

ANTI-REGULATORY SKEWING AND POLITICAL CHOICE IN *UARG*

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INTRODUCTION

In *Utility Air Regulatory Group v. EPA* (“*UARG*”),¹ discerning an authoritative result is a challenge. Nevertheless, the most important opinion that garnered two different Court majorities—the opinion by Justice Scalia—provides a new interpretation of the reach of the Clean Air Act (“CAA”),² rejects longstanding regulatory approaches of the U.S. Environmental Protection Agency (“EPA”) to the Prevention of Significant Deterioration (“PSD”) program under the CAA, and castigates EPA for overreaching. Two major precedents that had found broad EPA power to regulate greenhouse gases (“GHGs”) under the CAA—*Massachusetts v. EPA*³ and *American Electric Power Co. v. Connecticut* (“*AEP*”)⁴—have been undercut. The *UARG* majority that limits EPA’s power even reaches out to offer unnecessary views on several CAA terms central to upcoming climate regulatory actions.⁵

But any Supreme Court decision’s effects flow from both its methodology and its substantive implications. And when a high-stakes decision is penned by Justice Scalia, the Court’s most outspoken champion of textualism and critic of judicial policymaking, that decision offers a testing ground: when the result really mattered, did the Justices hold true to those interpretive methods and demonstrate their claimed virtues?

After briefly reviewing the *UARG* decision, this Essay offers a concise survey of several interpretive approaches championed by Justice Scalia and sometimes other Justices, also identifying the claimed virtues animating those

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¹ 134 S. Ct. 2427 (2014).

² 42 U.S.C. §§ 7401–7671q (2012).

³ 549 U.S. 497 (2007).

⁴ 131 S. Ct. 2527 (2011).

⁵ Justice Scalia was joined in full by Chief Justice Roberts and Justice Kennedy. *UARG*, 134 S. Ct. at 2432. Justice Alito and Justice Thomas joined Parts I, II.A, and II.B.1 (rejecting EPA’s interpretation that sources’ GHG emissions could trigger the PSD program); Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, joined Part II.B.2 (upholding the application of PSD permitting requirements to “anyway” sources’ emissions of GHGs). *Id.*

methodologies. These interpretive frames—including textualism, dislike of multi-factored tests, the *Chevron* deference framework, and near abandonment of the delegation doctrine—all ostensibly shun judge-empowering frameworks and the linked latitude for judicial policymaking. All reflect dislike of indeterminacy and especially “totality of the circumstances” tests. Judicial neutrality and predictability are the claimed aspiration. According to these frames, judges should not adopt approaches that empower them to “do what they think is good,”⁶ or “imbue authoritative texts with their own policy preferences.”⁷

This Essay finds, however, that the *UARG* majority that limited EPA’s regulatory power over GHGs violates most of these aspirations. Splenetic castigation of EPA seems to substitute for analytical clarity and rigorous grappling with statutory language, policy implications, and context. Judicial cherry picking of EPA statements leaves the odd impression that EPA itself opposed the Tailoring Rule.⁸ *UARG*’s majority discussion limiting EPA power is laden with judicial policy preferences unlinked to the CAA or the challenges of climate change regulation. This majority’s unnecessary comments about the CAA and EPA power all cut in the direction of less regulation of GHGs, perhaps planting the seeds for regulatory reversals in a new administration or in court. This sort of strategic stage-setting may in reality be common among judges and Justices, but is far from the restrained neutrality claimed as the great virtues of textualism, rule-dominated and precedent-respecting approaches to judging, and judicial minimalism.

I. *UARG*’S LIMITATION OF EPA AUTHORITY

Because this symposium’s introduction provides regulatory context and a summary of the *UARG* decision,⁹ this Part merely sets the stage for the analysis that follows.

In the Tailoring Rule, EPA juggled several competing constraints and imperatives.¹⁰ First, fealty to precedent constrained EPA. In *Massachusetts* and *AEP*, the Supreme Court had given the CAA’s terms “air pollutant” and “any air pollutant” an expansive meaning that encompassed GHG emissions.¹¹ While *AEP* did not state that EPA had the power to regulate GHG emissions under the PSD program, its discussion of section 111 regulation of categories of stationary sources left that as the logical inference.¹² Second, EPA hewed to its long-standing view rooted in CAA language that once an air pollutant is “subject to

⁶ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 9–10 (2012).

⁷ *Id.* at xxviii–xxix.

⁸ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) [hereinafter Tailoring Rule].

⁹ For a more detailed description of the decision, see generally Cecilia Segal, *Climate Regulation Under the Clean Air Act in the Wake of Utility Air Regulatory Group v. EPA: Introduction*, 39 HARV. ENVTL. L. REV. 1 (2015).

¹⁰ See Tailoring Rule, 75 Fed. Reg. at 35,516–18.

¹¹ *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007); *AEP*, 131 S. Ct. 2527, 2537 (2011).

¹² See *AEP*, 131 S. Ct. at 2537–38.

regulation,” then new or modified major emitting facilities are subject to the PSD program if they exceed specified tonnage thresholds.¹³ Third, the statute’s explicit tonnage levels triggering PSD applicability (100 or 250 tons of annual emissions),¹⁴ meant that a complete exclusion of smaller GHG emitters from the program would be vulnerable to judicial rejection. The best support for such an exclusion would require overt reference to the somewhat inverted enactment history of the PSD program, where Congress added the program to the statute following citizen litigation and a court order that prompted its creation by EPA.¹⁵ That history reveals a general antidegradation goal, with the tonnage limits correlating to a modest number of large stationary pollution sources.¹⁶ However, to privilege history and intent over text was risky. Fifth, EPA wanted to avoid imposing burdensome permitting obligations on many thousands of otherwise small emitters and federal or state regulators due to a massively expanded PSD program.¹⁷ Lastly, EPA was hemmed in by ever more certain science about the reality of climate change and resulting harms and risk.¹⁸

EPA therefore proposed and finalized its Tailoring Rule, initially regulating GHGs from only large stationary sources. EPA first required PSD permitting for sources already subject to PSD permitting—“anyway” sources—and that had the potential to emit 75,000 or more annual tons of GHG carbon equivalents.¹⁹ Sources emitting 100,000 tons of GHGs would subsequently be brought under the PSD program based solely on their GHG emissions;²⁰ this would reach only an additional three percent of GHG emissions over those emitted by “anyway” sources. EPA justified the tailoring approach as a matter of “administrative necessity” and one that would avoid “absurd results” in the form of huge implementation burdens for little net pollution reduction.²¹ EPA also relied on the Court’s standing analysis statement in *Massachusetts* that agencies need not solve regulatory challenges in “one fell regulatory swoop.”²² Refashioning this language as articulating a “one-step-at-a-time doctrine,” EPA argued for latitude to take partial steps and be a steward of limited public and

¹³ See, e.g., Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980).

¹⁴ 42 U.S.C. § 7479(1) (2012).

¹⁵ Tailoring Rule, 75 Fed. Reg. at 31,550–51; Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling Versus Site-Shifting*, 74 IOWA L. REV. 1, 10–15 (1988–89). See also Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 106–10 (2009) (discussing the PSD program’s history in critique of purposivist interpretation).

¹⁶ Tailoring Rule, 75 Fed. Reg. at 31,555.

¹⁷ *Id.* at 31,533.

¹⁸ See *id.* at 31,519 (summarizing the Endangerment Finding); Transcript of Oral Argument at 62, *UARG*, 134 S. Ct. 2427 (2014) (No. 12-1146). See also ROBERT GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW & POLICY ch. XII, sec. A (7th ed. forthcoming 2015) (reviewing recent climate science).

¹⁹ Tailoring Rule, 75 Fed. Reg. at 31,523.

²⁰ *Id.* at 31,523–24.

²¹ *Id.* at 31,541–44.

²² *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007).

private resources.²³ EPA stated that decisions about any possible additional PSD GHG regulation had to await further study, assessment of the first phase of GHG permitting, and additional public comment and regulatory proceedings.²⁴ EPA indicated it might never require permits for such sources.²⁵ It also would consider variants on “general permits” or other regulatory “streamlining” strategies.²⁶

Justice Scalia announced the judgment of the Supreme Court, but two different sets of Justices created majority outcomes for different parts of the opinion. Parts I, II.A, and II.B.1 are a blistering rejection of EPA’s regulation of sources due only to their GHG emissions. This Essay generally refers to this majority portion as the “no GHGs-alone PSD authority” or “the majority limiting EPA power.” It rejected both EPA’s view that it *had* to regulate sources emitting GHGs under the PSD program and, in the alternative, that it *could* do so under a discretionary judgment.²⁷ Justice Scalia’s opinion in Part II.B.2 garnered a different majority, concluding that “anyway” sources already subject to PSD permitting requirements could be required to control their GHG emissions.²⁸ Justices Breyer and Alito each wrote separate opinions concurring and dissenting in part.²⁹

II. JUDICIAL REVIEW OF POLITICAL JUDGMENTS AND THE NEUTRALITY ASPIRATION

In rejecting EPA’s claim of authority to reach sources due solely to their GHG emissions, Justice Scalia’s opinion relied on a familiar array of interpretive techniques. These techniques reflect a dislike of interpretative approaches and judicial review frameworks characterized as unduly manipulable, indeterminate, and likely to enable judges to pursue their own policy preferences. After reviewing these methodologies and their rationales, many but not all linked to textualism, this Essay analyzes whether the *UARG* majority limiting EPA power actually applies these approaches and demonstrates their animating virtues.

Justice Scalia’s extensive writings about textualism have several oft-stated strains, many of which are now called the “new textualism.”³⁰ According to

²³ Tailoring Rule at 31,544–45.

²⁴ *Id.* at 31,522.

²⁵ *Id.* at 31,522 n.11, 31,525.

²⁶ *Id.* at 31,524–26, 31,586–88.

²⁷ *UARG*, 134 S. Ct. 2427, 2442 (2014).

²⁸ *Id.* at 2449. Justice Scalia lost Justices Thomas and Alito, but picked up the additional support of Justices Ginsburg, Breyer, Sotomayor, and Kagan.

²⁹ *Id.* at 2449 (Breyer, J., concurring in part and dissenting in part); *id.* at 2455 (Alito, J., concurring in part and dissenting in part).

³⁰ For materials introducing and critiquing the new textualism, see WILLIAM ESKRIDGE JR. ET AL., STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTE 349–445 (2014) (especially relevant are pages 366–70). For citation of foundational scholarship, see *id.* at 367 n.5.

textualist principles, judges should rely on statutory text and interpret it according to its reasonable, objective meaning.³¹ Judges should never rely on legislative history because, unlike the actual statute, it is not subject to presentment and made law.³² Legislators' statements about a proposed law may also stray from the law's actual content.³³ Often such statements are drafted by staff and never actually spoken.³⁴ And since law is a sequential, collective process and Congress institutionally complex, no one legislator can speak for Congress and the president anyway.³⁵ Of particular importance, textualists shun legislative history due to its manipulability; to them, choosing which legislative history materials to use is like arriving at a party and picking out one's friends in the crowd.³⁶ Similarly, "intentionalism" and "purposivism" are rejected because, under such approaches, judges can privilege a single or unascertainable intent or expand on a judicially preferred purpose, even though laws seldom have a single intent, embrace limited means to ends, and reflect compromises.³⁷ However, as in *UARG*, Justice Scalia and other "new textualists" do consider structure and statutory context and, with some frequency, make intra- and inter-statutory linguistic comparisons, a practice some scholars have called "holistic" textualism.³⁸ New textualists also rely on canons of construction.

Other interpretive preferences share similar motivations, but are not linked directly to textualism. Justice Scalia's heated rhetoric about the infirmities of *United States v. Mead Corp.*³⁹ also faults interpretive doctrines that offer uncertainty instead of a crisp analytical framework.⁴⁰ *Mead* held that *Chevron* deference is generally, but not always, triggered by an agency's use of the notice-and-comment process or more formal process where Congress authorized the

³¹ SCALIA & GARNER, *supra* note 6, at xxviii–xxix.

³² ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–34 (1997). For critiques of new textualism and its effects, especially for environmental law, see Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565, 574–76, 580–605 (2005); Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1290 (1996).

³³ Hertz, *supra* note 15, at 98.

³⁴ See SCALIA, *supra* note 32, at 34.

³⁵ See generally Kenneth A. Schepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

³⁶ SCALIA, *supra* note 32, at 36 (attributing this phrase to Judge Harold Leventhal).

³⁷ See David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 118–22 (2013) (discussing such critiques of purposivism).

³⁸ This author has criticized such "holistic textualism" and interstatutory and intrastatutory cross-referencing on theoretical grounds and due to sloppy judicial application in William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 238–39 (2000). Adrian Vermeule questions the discretion-constraining claims underlying "holistic textualism" in ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 202–05 (2006).

³⁹ 533 U.S. 218 (2001).

⁴⁰ See generally Antonin Scalia, Assoc. Justice of the U.S. Supreme Court, *Remarks by the Honorable Antonin Scalia for the 25th Anniversary of Chevron v. NRDC*, in 66 ADMIN. L. REV. 243 (2014) [hereinafter *Remarks by Scalia*] (discussing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Mead*, 533 U.S. 218).

agency to regulate with the “force of law.”⁴¹ Justice Scalia stated that *Mead* returns deference frameworks to the “case-by-case, statute-by-statute mode of analysis that preceded . . . *Chevron*, with all the harmful side effects that generally attend that mode of analysis.”⁴² Now judges are “utterly confused” and “befuddled” by the “emerging mess” that has left judges and advocates to work with “th’ol’ totality of the circumstances test,” which, in Justice Scalia’s view, “is of course no test at all.”⁴³

Relatedly, in writing for the Court in *City of Arlington v. FCC*,⁴⁴ Justice Scalia explained why judicial review of agency law interpretations involving so-called “jurisdictional” questions must be reviewed under the usual *Chevron* framework that has long provided a “stable background rule.”⁴⁵ Requiring a more searching form of review for jurisdictional questions, Justice Scalia said, would result in the antithesis of “reasoned decisionmaking” because advocates and judges could “reframe” any question as jurisdictional, “sifting the entrails of vast statutory schemes to divine” whether the disputed interpretation is jurisdictional.⁴⁶

Justice Scalia similarly criticizes balancing tests due to their discretion-freeing attributes. In his view, the essence of law is a “law of rules;” if judges must juggle multiple factors, then outcomes become unpredictable.⁴⁷ Instead, he praises law and, it appears, lawmaking by judges, legislatures, and agencies, as best when clear, predictable, and constraining.⁴⁸ He views as dichotomous the “general rule of law” and “personal discretion to do justice.”⁴⁹ More “discretion-conferring approaches” risk arbitrariness, undercutting “equality of treatment” that is itself an element of people’s “sense of justice.”⁵⁰ Furthermore, discretion-conferring approaches render lower courts’ work more difficult due to the loss of “predictability.”⁵¹ Greater legal clarity and respect for precedent, especially “firm rule[s] of decision,” create a “check upon arbitrary judges.”⁵²

In *Whitman v. American Trucking Ass’ns*,⁵³ again writing for the Court, Justice Scalia rejected a reinvigorated nondelegation doctrine. The Court stated it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or apply-

⁴¹ *Mead*, 533 U.S. at 226–27.

⁴² Remarks by Scalia, *supra* note 40, at 244.

⁴³ *Id.* at 247, 249, 251.

⁴⁴ 133 S. Ct. 1863 (2013).

⁴⁵ *Id.* at 1868–71.

⁴⁶ *Id.* at 1870, 1871.

⁴⁷ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178, 1187 (1989) (describing why a rule-based approach is superior “to a discretion-conferring approach to judicial law making”).

⁴⁸ *Id.* at 1178–80.

⁴⁹ *Id.* at 1177, 1179.

⁵⁰ *Id.* at 1178, 1182.

⁵¹ *Id.* at 1179.

⁵² *Id.* at 1180.

⁵³ 531 U.S. 457 (2001).

ing the law.”⁵⁴ Empowering judges to draw such a line would itself be too indeterminate.

In his confirmation testimony and subsequent opinions, Chief Justice Roberts has similarly talked about the need for judicial modesty. Courts should not reach out to decide more than necessary, especially if doing so would displace choices of the political branches.⁵⁵ Whether the Chief Justice or Justice Scalia and others sharing their views actually observe their own claimed methodologies and exercise apolitical judicial forbearance remain the subject of ongoing analysis and debate.

Hence, a crosscutting virtue—indeed, the common claimed virtue—of these interpretive methodologies and frameworks is an embrace of clear rules that reduces latitude for judges to champion their own policy preferences. The next part examines the *UARG* majority limiting EPA authority for its consistency with these methodologies and their supposed virtues.

III. ANTI-REGULATORY SCALE TIPPING IN *UARG*

A simple text-based reading of the CAA’s PSD provisions, informed by the Supreme Court’s broad definition of “air pollutant” as including GHGs in *Massachusetts* and *AEP*, could have led to an easy outcome upholding EPA’s PSD Tailoring Rule. Indeed, if applying the statute based purely on text, the Court might have even required more regulation. Unless the Court embraced agency latitude to preserve agency resources—a policy presumption often embraced by much of the Court—the CAA’s text quite directly called for EPA to regulate *all* stationary sources emitting GHGs at levels in excess of the statutory tonnage minima.⁵⁶ After all, GHGs were now “subject to regulation” under the CAA following the regulation of GHG emissions from motor vehicles.⁵⁷ EPA’s inclusion of GHGs, although not criteria pollutants, within the PSD program once they became “subject to regulation” was consistent with a longstanding EPA interpretation.⁵⁸ Moreover, *Chevron*’s deference framework

⁵⁴ *Id.* at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

⁵⁵ For discussion of this minimalism claim, see Damien Schiff, *Nothing New Under the Sun: The Minimalism of Chief Justice Roberts and the Supreme Court’s Recent Environmental Law Jurisprudence*, 15 MO. ENVTL. L. & POL’Y REV. 1, 5–8 (2007).

⁵⁶ Justice Scalia has applauded denying citizens standing to challenge agency failures to act. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 897 (1983) (stating that “lots of once-heralded programs ought to get lost or misdirected,” and “the ability to lose or misdirect laws can be said to be one of the prime engines of social change”). In *Heckler v. Chaney*, 470 U.S. 821 (1985), *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Court created hurdles for judicial challenges to agency forbearance and inaction.

⁵⁷ Tailoring Rule, 75 Fed. Reg. at 31,521–22; Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010); see also Segal, *supra* note 9, at 2.

⁵⁸ See Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380, 26,382 (June 19, 1978).

is especially applicable in the setting of the Tailoring Rule.⁵⁹ *Chevron* also involved a new law interpretation under the CAA affecting thousands of stationary pollution sources across the country, yet despite the huge importance of the new “bubble” strategy, EPA’s approach was upheld under the now prevailing statutory interpretation deference framework. Nor did Congress in 1990 limit EPA’s broad authority over major stationary sources under the CAA.⁶⁰ Hence, if the Court’s textualists and minimalists were true to their claimed methodologies and animating virtues, they either could have required EPA to regulate more comprehensively, could have shown deference to EPA, or, even if uncomfortable with EPA’s “tailored” tonnage triggers, could have upheld EPA’s regulation due to EPA’s plans to consider bringing additional smaller sources into the PSD program in the future.

Instead, the no GHGs-alone PSD authority majority undercuts the Court’s two major climate regulation precedents. It also relies on a superficial form of textualism, limiting the CAA’s reach and EPA’s power based largely on an unexplicated contextual read and a major law-rewriting construction founded on inferences from PSD permitting procedures. A broadened form of the *FDA v. Brown & Williamson Tobacco Corp.* (“*Brown & Williamson*”)⁶¹ anti-regulatory canon further tips the scale.⁶² Much of this majority discussion reflects a technique that is textualist due to what it shuns: the Court does not examine legislative history or statutory purposes as stated in the CAA’s text, let alone other indicators of purpose. Policy impacts of the Agency’s or Court’s outcomes are not assessed for congruence with the CAA’s goals.

The Court gives scant attention to the Tailoring Rule’s explanation of policy implications and programmatic consistency,⁶³ but not because the Court is focused only on text. Instead, this majority starts with extensive quoting of views of departments, agencies, and EPA from an infamous backpedalling in climate policy during the Bush Administration despite the Supreme Court’s ruling in *Massachusetts*.⁶⁴ However, neither this language nor the earlier decision to stall GHG regulation was reaffirmed in the Obama Administration EPA’s Tailoring Rule. The Court then backs away from its expansive rulings in *Massachusetts* and *AEP* that GHGs are included within the CAA’s definition of “air pollutant.” This *UARG* majority now calls “obviously untenable” the view that

⁵⁹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863, 866 (1984).

⁶⁰ Brief for the Federal Respondents at 27–29, 32–33, *UARG*, 134 S. Ct. 2427 (2014) (No. 12-1146) (making a legislative ratification argument due to 1990 amendments to the PSD program).

⁶¹ 529 U.S. 120 (2000).

⁶² *UARG*, 134 S. Ct. at 2439–46.

⁶³ See Brief for the Federal Respondents, *supra* note 60, at 21–29 (distilling EPA’s argument for the Tailoring Rule and offering history of the PSD program).

⁶⁴ Juliet Eilperin & R. Jeffrey Smith, *EPA Won’t Act on Emissions This Year: Instead of New Rules, More Comments Sought*, WASH. POST (July 11, 2008), <http://perma.cc/DF5Z-VAKU>. A congressional investigation and report followed. MAJORITY STAFF OF THE HOUSE SELECT COMM. ON ENERGY INDEPENDENCE AND GLOBAL WARMING, 110TH CONGRESS, INVESTIGATION OF THE BUSH ADMINISTRATION’S RESPONSE TO *Massachusetts v. EPA*: HOW BIG OIL PERSUADED THE BUSH ADMINISTRATION TO ABANDON PROPOSED REGULATIONS FOR GLOBAL WARMING POLLUTION (2008).

the “Act-wide definition of ‘air pollutant’” also applies to the “any air pollutant” language triggering PSD regulation of “major emitters.”⁶⁵

This conclusion is based in substantial part on a context-based argument rooted in cross-section comparisons. The Court asserts that because EPA has regulated fewer than all air pollutants under other provisions of the CAA, it similarly could have carved GHGs out of the PSD program.⁶⁶ These other provisions, however, are far more directed at particular affected sources, problems, or pollutants in quite distinct settings. Maybe EPA could find statutory play to regulate all air pollutants under these provisions, but the Court provides zero elucidation of this major claim. And even if true, why would such Agency interpretive differences under different provisions and perhaps administrations, to address different problems, not deserve deference? The Court does not analyze the language, context, and legislative, regulatory or judicial history surrounding these provisions and regulations.⁶⁷ It merely cites the statutory and regulatory sections and the Federal Register.⁶⁸

In a particularly odd move, the Court seems to find especially significant not EPA’s consistent practices, the Federal Register preamble regarding this regulation, past PSD actions, or the Solicitor General’s and EPA’s Supreme Court positions in this case, but a single 1993 memorandum by a deputy director of the Office of Air Quality Planning and Standards.⁶⁹ The Court says it is “plain as day” that EPA could exclude GHGs; it takes “some cheek” for EPA to claim the contrary.⁷⁰ How this is “plain as day” is left unexplained, as is the legal theory behind the citation to this individual’s memorandum.⁷¹

The discussion that follows provides the real answer: the Court’s statutory interpretation is driven by inferences from regulatory burdens. The Court says there is no “insuperable textual barrier” to EPA regulating “sensibly,” with EPA power to “exclude those atypical pollutants that, like [GHGs]” are emitted “in such vast quantities that their inclusion would radically transform those programs and render them unworkable *as written*.”⁷² As further analyzed below, footnote 6 offers several limiting constructions that it does not mandate, but also “do[es] not foreclose.”⁷³ This discussion gives huge weight to the

⁶⁵ *UARG*, 134 S. Ct. at 2439–40.

⁶⁶ *Id.* at 2440. This majority asserts that EPA has elected to limit air pollutants regulated under section 111, under nonattainment new source permitting, in monitoring requirements, and in visibility protecting provisions.

⁶⁷ See *supra* note 38 for sources discussing risks of “holistic textualism.”

⁶⁸ *UARG*, 134 S. Ct. at 2440.

⁶⁹ *Id.* (citing Memorandum from Lydia N. Wegman, Deputy Dir., Office of Air Quality Planning and Standards, EPA, to Air Division Dir., Regions I–X, EPA 4–5 (Apr. 26, 1993)).

⁷⁰ *Id.*

⁷¹ Even if this memorandum were a guidance document, it could not be given law-like impact; such documents cannot bind the agency or others. See *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1046–47 (D.C. Cir. 1987). Moreover, even if this old memorandum were unusually authoritative, agencies always have the ability to change their views if they confront the old views and explain their new approach with a reasonable rationale. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–17 (2009).

⁷² *UARG*, 134 S. Ct. at 2442 (emphasis added).

⁷³ *Id.* at 2442 n.6.

Court's views of "sensible regulation," but says nary a word about the CAA's actually stated and manifested policy purposes, including the CAA's mention of "climate" among its "welfare" concerns.⁷⁴ Concern with the aggregate climate impacts of many smaller sources goes virtually unmentioned, yet climate change is the quintessential "one percent" problem that, due to the ubiquity of GHG emissions and contributing sources, likely will require regulation of many small sources.⁷⁵ This *UARG* majority fails to hold in balance the clean air and economic growth goals that Congress, EPA, and the Court have long said must be weighed under the CAA.⁷⁶

In concluding in Part II.A.2 that EPA also lacks discretionary authority to regulate PSD sources due only to their GHG emissions, the actual textual analysis is thin and conclusory.⁷⁷ After citing cases calling for contextual analysis, this majority again finds implicit in substantial implementation burdens that the PSD program could not possibly encompass regulation of sources due only to their GHG emissions.⁷⁸

This majority closes with reliance on *Brown & Williamson*.⁷⁹ The Court calls the Tailoring Rule an "enormous and transformative expansion in EPA's" power to regulate "'a significant portion of the American economy,'" yet "without clear congressional authorization."⁸⁰ This majority calls it a claim of "extravagant statutory power over the national economy" that is "patently unreasonable—not to say outrageous."⁸¹ EPA is characterized as "seizing expansive power that it admits the statute is not designed to grant."⁸² This whole discussion is odd since EPA actually declined to exercise such vast power, instead offering the Tailoring Rule's high tonnage limits and incremental regulation. The opinion makes only passing reference to how EPA discussed reducing permitting burdens and possibly not regulating down to the statute's tonnage levels.⁸³

EPA's "tailoring" to regulate initially at far higher thresholds is held foreclosed by the statute's 100/250-ton triggers, again with Court language of casti-

⁷⁴ 42 U.S.C. §7602(h) (2012).

⁷⁵ Kevin M. Stack & Michael P. Vandenbergh, *The One Percent Problem*, 111 COLUM. L. REV. 1385, 1388–90, 1402–18 (2011).

⁷⁶ Tailoring Rule, 75 Fed. Reg. at 31,555 (discussing these "two purposes" with citation to supporting legislative materials and cases). *Chevron* discussed these competing goals at greatest length. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863, 866 (1984) (discussing CAA goals of clean air and economic growth); see also *AEP*, 131 S. Ct. 2527, 2539 (2011) (discussing CAA's "competing interests" of "environmental benefit[s]," "energy needs," and avoidance of "economic disruption"); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 464–71 (2001) (contrasting provision focused on health and others requiring analysis of costs and economic impacts).

⁷⁷ *UARG*, 134 S. Ct. at 2442–44.

⁷⁸ See, e.g., *id.* at 2440.

⁷⁹ *Id.* at 2442–44 (citing *Brown & Williamson*, 529 U.S. 120 (2000)).

⁸⁰ *Id.* at 2442, 2444 (quoting *Brown & Williamson*, 529 U.S. at 159).

⁸¹ *Id.* at 2444.

⁸² *Id.*

⁸³ *Id.* at 2444 n.7.

gation, but this time for EPA's "rewriting" of the law.⁸⁴ However, GHG emissions controls are largely preserved when, maintaining the focus on avoiding undue regulatory burdens and expansion of authority, another Court majority supports Justice Scalia's opinion that EPA can regulate "anyway" sources due to their GHG emissions where such sources already fall within the PSD permitting program.⁸⁵

Looked at in its overall methodology and logic, the no GHGs-alone PSD authority majority opinion suffers from an extreme form of the indeterminacy and preference-laden decisionmaking often condemned by those same Justices. Judicial precedents are limited with virtually no effort to distinguish them, the key statutory text is basically rewritten due to a summary, contextual reference to other provisions and their implications, and cross-referenced provisions are not analyzed for their own histories and intra- and inter-textual nuances. Selective and somewhat misleading quotations and omissions of agency statements are used like the proverbial friend picked out of a crowd—the antithesis of the neutral objective interpretive technique for textualists—and those selectively chosen or omitted materials are used to trump or perhaps prove the falsity or unjustifiable nature of EPA's current positions. EPA's reasons for tailoring its coverage are misleadingly excerpted to imply that EPA views the Tailoring Rule as irrationally and unduly burdensome. Much of this majority is hence neither rigorously true to the text nor minimalist. It reaches out to preclude or comment on actions and assertions of power that EPA has not yet exercised.

Apart from one footnote, this Court majority offers little explanation for why the majority's partial carveout of GHGs from the statute is a more justifiable (although unacknowledged) rewriting of the statute than either EPA's tailoring approach or rationales offered by Justice Breyer, mostly in support of EPA. As Justice Breyer notes, the Court majority seems to be making an "absurd results" claim to rewrite the statute to exclude GHGs from PSD regulation even though they are an "air pollutant," but the majority actually avoids language of absurdity; instead, textual inferences drawn from implementation burdens are claimed to compel the GHG exclusion.⁸⁶ That the Court majority is rewriting the statute is never conceded apart from possibly the one declination to interpret the law "as written" because it would render the resulting program "unworkable."⁸⁷ Although the Court's majority sections are driven mainly by policy impacts and what they imply about the PSD program's reach, the Court devotes little attention to EPA's proffered policy rationales and impacts. Yet such examination of purposes, policy impacts, and statutory and regulatory implications of interpretive choices in a technical and complex statutory setting is where, as the Court has long acknowledged, agencies have the greatest compar-

⁸⁴ *Id.* at 2445–46.

⁸⁵ *Id.* at 2437.

⁸⁶ *Id.* at 2451 (Breyer, J., concurring in part and dissenting in part).

⁸⁷ *Id.* at 2442 (majority opinion). This language could be tweaking EPA for offering a statutory interpretation that must be wrong because it would render the program "unworkable," or it might be a concession that this majority is going beyond the text alone.

ative institutional advantage over courts.⁸⁸ The *Brown & Williamson* canon plays an important role, yet by its terms can cut only in an anti-regulatory direction and requires policy-laden judgments about its applicability.⁸⁹ Little of the “rule of law as a law of rules” is evident in these opinion portions.⁹⁰

Moreover, had the majority utilized pragmatic statutory interpretation techniques examining enactment history and other indicators of legislative intent and purpose, perhaps the statutory numbers could have been interpreted as proxies for large size.⁹¹ As Justice Breyer notes, the question should be which rewriting is better in light of the statute’s overall purposes, much as absurdity-based rewritings are supposed to deviate minimally from the law.⁹² Instead, the majority limiting EPA power considers only its own policy concerns with implementation burdens and huge agency power, but those policy concerns lack any direct statutory affirmation. Plus, this majority fails to assess these judicial policy concerns against other express statutory policies and purposes.

Here, as in other settings, new textualism’s limited data points for analysis have a freeing effect; the Justices are unconstrained by the need to reconcile a larger number of indicators of reasonable statutory meaning.⁹³ Text is analyzed with reference to other texts for possible contextual inferences, but without investigation of what those other texts can bear in the way of alternative meanings or their own “vertical” regulatory history.⁹⁴ Such holistic or structural textualism can, as confirmed here, be comprised of inch-deep analysis that may err and also unsettle the law surrounding the other referenced provisions.⁹⁵ The *UARG* majority limiting EPA’s power only glancingly looks at text, downplays

⁸⁸ *Chevron* itself rests on this comparative greater institutional competence of agencies, as well as a theory of greater political accountability. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); see Herz, *supra* note 15, at 91–92, 99.

⁸⁹ Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 Nw. U. L. REV. 1239, 1327 (2002); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2605–07 (2006).

⁹⁰ See Scalia, *supra* note 47.

⁹¹ EPA argued this. Tailoring Rule, 75 Fed. Reg. at 31,555.

⁹² See generally Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006) (analyzing absurdity doctrine and debates among textualists over its use). In the Tailoring Rule preamble, EPA discussed “absurd results” precedents. Tailoring Rule, 75 Fed. Reg. at 31,542–43.

⁹³ See Buzbee, *supra* note 38, at 238–39 (using the limited data point metaphor); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 373 (1994) (describing textualism’s “limited palette” as leaving more to the imagination of a textualist interpreter). See also William D. Popkin, *An Internal Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1148–50 (1992) (questioning the drawing of inferences based on comparisons of usage within a statute).

⁹⁴ Buzbee, *supra* note 38, at 190 & n.61.

⁹⁵ See e.g., T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hospitals, Inc. v. Casey, and *Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 697 (1992) (critiquing the “horizontal” textual comparison move as incoherent); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 341–66 (1995) (explaining structural textualism and discussing its pros and cons); Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 618–21 (2005) (suggesting that Justice Scalia’s “strong presumption of textual coherence across whole statutes” or even across a whole statutory code may lead to coherent but “fundamentally mistaken analysis”).

the political branches' views about statutory purpose and policy impacts of regulatory choices, and relies on free-floating judicial policy views about "sensible regulation."⁹⁶ Especially when combined with the anti-regulatory *Brown & Williamson* canon, such ostensibly text-rooted analysis creates broad judicial power to exercise the very sorts of policy-laden judicial discretion claimed to be antithetical to textualists, minimalists, and others criticizing judicially manipulable modes of analysis.

IV. CLIMATE REGULATION IN THE WAKE OF *UARG*

Since the Court upheld regulating "anyway" sources, *UARG*'s immediate substantive impacts on GHG emissions are modest. The case's climate effects are more likely to flow from its CAA constructions and its numerous strategic hints and suggestions. Collectively, they work as a one-way anti-regulatory ratchet, without exception suggesting less encompassing or rigorous regulation. The net effect is to signal, if not permit, a future EPA to back off of GHG regulation, and to sow the seeds for attacks on EPA GHG regulations in the pipeline.

While the Court's recasting of its expansive *Massachusetts* and *AEP* decisions raises more questions than it resolves, *UARG* reduces the CAA's reach. The Court states that *Massachusetts* "does not strip EPA of authority to exclude [GHGs] . . . under other parts of the Act"⁹⁷ Relatedly, *UARG*'s footnote 5, stating that "no party in [*AEP*] argued [section 111] was ill suited to accommodating [GHGs],"⁹⁸ could be read to suggest that *AEP*'s section 111 discussion was mere dicta. However, *AEP*'s holding that power plants could not be subject to federal common law suits was due to the reach of section 111.⁹⁹ Opponents of current proposed section 111 GHG regulations—high visibility proposals that during 2014 ignited a firestorm of criticism—have a new toehold to reexamine EPA's power under section 111.¹⁰⁰

Another possible anti-regulatory authority expansion concerns agency authority to decline action based on *de minimis* impacts. Two early footnotes question "how much" of a regulated pollutant a source must emit before requiring control of emissions to levels consistent with Best Available Control

⁹⁶ *UARG*, 134 S. Ct. 2427, 2441–42 (2014) (stating EPA has power to regulate only those airborne pollutants that "may sensibly be encompassed" under a regulatory program and be "sensibly regulated at the statutory thresholds").

⁹⁷ *Id.* at 2441.

⁹⁸ *Id.* at 2441 n.5.

⁹⁹ *See id.* at 2441 & n.5.

¹⁰⁰ *See generally* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014). This proposed regulation under Clean Air Act section 111(d) and linked earlier proposals triggered both support and congressional attempts to strip EPA of such power. *Compare* Press Release: NRDC Experts: EPA Carbon Pollution Limits for New Power Plants Workable, Popular and Would Address Climate Change, Natural Res. Def. Council (Feb. 6, 2014), <http://perma.cc/MGE3-R29P>, with Protecting Jobs, Families, and the Economy from EPA Overreach Act, S. 2414, 113th Cong. (2014) (attempting to amend the CAA to prohibit the regulation of CO₂ emissions).

Technology (“BACT”), and this majority section closes by mentioning agency power (agreed to by EPA) to disregard *de minimis* risks.¹⁰¹ The later majority section upholding EPA’s regulation of “anyway” sources again brings up EPA latitude to exclude *de minimis* risks, even stating that 75,000 tons a year does not “necessarily exceed[] a true *de minimis* level.”¹⁰² Whether regarding GHGs or other areas of environmental or risk regulation, implicit agency power to broadly define and exclude *de minimis* risks in the future has been strengthened.

Although Justice Alito favored limiting PSD regulation to what he calls “conventional pollutants” that do not include GHGs, he could not garner majority support. Footnote 6 of the Scalia majority limiting EPA power, however, states that limiting PSD regulation to criteria pollutants or pollutants with “localized effects” is “not foreclosed” to EPA or other reviewing courts.¹⁰³ Hence, a majority has now tentatively declared these additional deregulatory options open to EPA.

The majority limiting EPA power does not just apply *Brown & Williamson*, where the Court rejected an agency claim of huge regulatory power over the economy despite strong statutory indicators to the contrary. The *UARG* majority limiting EPA power says “plac[ing] plainly excessive demands on limited governmental resources is alone a good reason for rejecting” such claimed authority, and after citing *Brown & Williamson*, continues in the same vein, stating that “requir[ing] permits for” many thousands or millions of sources is just the sort of regulatory expansion “we have been reluctant to read into an ambiguous statutory text.”¹⁰⁴ But the majority identifies no ambiguity; EPA’s claim of power is called “patently unreasonable” and “outrageous,”¹⁰⁵ while the Court’s contrary read is “plain as day.”¹⁰⁶ On the other hand, the actual textual basis for the majority’s rejection of EPA power is merely an inference drawn from implementation burdens; the CAA lacks the abundant signals of contrary congressional intent highlighted in *Brown & Williamson* to explain why *Chevron* deference was inapplicable. Nevertheless, *UARG*’s arguably confused but expansive application of *Brown & Williamson* will now be used to buttress claims in battles over climate regulation and other fields that large regulatory burdens justify power-limiting statutory constructions. Supporters of government power, in contrast, will highlight the much more limited trigger for this canon in *Brown & Williamson* and quote *UARG*’s emphatic language that the statute compelled a contrary conclusion; *UARG*’s context does not support a new free-floating canon against broad agency power. Nonetheless, *UARG* arguably strengthens this most overtly anti-regulatory and non-positivist statutory interpretation canon.

¹⁰¹ *UARG*, 134 S. Ct. at 2435 & n.1, 2437 & n.3.

¹⁰² *Id.* at 2449.

¹⁰³ *Id.* at 2442 n.6.

¹⁰⁴ *Id.* at 2444.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2440.

Finally, the Court includes an odd and lengthy discussion of how BACT works or “may” work, “assuming without deciding” that it might be used to force “improvements in energy efficiency,” but nonetheless proceeding to describe apparently permissible and disputable forms of BACT regulation.¹⁰⁷ The Court majority relies mainly on lower court opinions, briefs, and EPA guidance documents for authority, yet none constituted authoritative EPA views, let alone actions or views ripe for Supreme Court assessment.¹⁰⁸ This discussion is indisputably dicta on an issue not squarely presented by the case. But another anti-regulatory cue is evident.

CONCLUSION

Despite *UARG*'s limited direct impacts on the tonnage of GHGs subject to regulation, the majority opinion limiting EPA power is laden with anti-regulatory moves and cues. Previous Supreme Court climate change precedents have been undercut. Although authored by a Justice who professes disdain for indeterminate law and rejects judges' pursuit of their own policy preferences, many of those pitfalls are evident in *UARG*. Indeed, even rigorous textual analysis is absent. Instead of displaying policy-neutral judging that is respectful of the political branches' choices, anti-regulatory leanings, and one-sided cues for future limitations of EPA power are littered throughout the opinion. Little is settled by the case, but the stage for future policy changes and attacks on GHG regulation is set.

¹⁰⁷ *Id.* at 2448–49.

¹⁰⁸ *See id.*

