

THE OPINION ASSIGNMENT POWER, JUSTICE SCALIA’S
UN-BECOMING, AND *UARG*’S UNANTICIPATED
CLOUD OVER THE CLEAN AIR ACT

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INTRODUCTION

By the time the Supreme Court handed down its opinion in *Utility Air Regulatory Group v. EPA* (“*UARG*”),¹ on June 23, 2014, the conventional wisdom about the most likely outcome was well settled. The Court would issue a split decision.² The Justices would reject the U.S. Environmental Protection Agency’s (“EPA”) view that greenhouse gases (“GHGs”) emitted by a new stationary source could render the source a “major source,” thereby triggering application of the Best Available Control Technology (“BACT”) requirement of the Clean Air Act’s³ Prevention of Significant Deterioration (“PSD”) program⁴ to any air pollutant emitted by that source.⁵ But the Court would then go on to agree with EPA that if a stationary source emitted non-GHG pollutants in sufficient quantities to trigger the BACT requirement, BACT would then apply to all air pollutants emitted, including GHGs.⁶ In short, GHGs do not trigger BACT in the first instance, but, once otherwise triggered, BACT applies to GHGs.

It was also conventional wisdom that even such a “split” ruling would constitute a major win for EPA.⁷ First, BACT would still apply to almost all GHG emissions emitted by major sources because most major stationary sources of GHGs are also major sources of other air pollutants. That is why Justice Scalia in announcing the opinion for the Court from the bench expressly declared that “EPA is getting almost everything it wanted in this case.”⁸ In addition, the Court’s overturning of the GHG BACT trigger would render

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¹ 134 S. Ct. 2427 (2014).

² See Jody Freeman, *Symposium: Soft Landings and Strategic Choices*, SCOTUSBLOG (Feb. 5, 2014), <http://perma.cc/9UXT-X7KE>.

³ 42 U.S.C. §§ 7401–7671q (2012).

⁴ *Id.* §§ 7470–7492.

⁵ See Freeman, *supra* note 2.

⁶ See *id.*

⁷ See, e.g., David Doniger, *What Will the Supreme Court’s Latest Climate-Change Case Mean?*, SWITCHBOARD (May 18, 2014), <http://perma.cc/K7S9-PPB6>.

⁸ Adam Liptak, *Justices Uphold Emission Limits on Big Industry*, N.Y. TIMES (June 23, 2014), <http://perma.cc/3FS-NCH3>.

wholly unnecessary the notorious Tailoring Rule,⁹ which had been legally problematic from the outset and had bolstered “lawless[ness]” claims directed against the President.¹⁰ Finally, it was also widely anticipated that nothing the *UARG* Court would say would likely undermine EPA’s authority to regulate GHGs from new and existing major stationary sources under section 111 of the Act.¹¹ EPA’s section 111 authority is an order of magnitude more important in its potential reach than PSD and BACT, as underscored by EPA’s proposed rulemaking applicable to existing stationary sources not reached by the PSD program.¹²

So, herein lies *UARG*’s central dilemma. The Court issued just the “split” decision that Court watchers anticipated.¹³ And the Court did not question that EPA possesses authority to regulate GHG emissions under section 111.¹⁴ But then the Court’s opinion departed sharply from the expected script, and with very different longer-term implications than those forecasted and more in keeping with industry’s wish list. The celebratory language of *Massachusetts v. EPA*,¹⁵ in which the Court endorsed a sweeping view of EPA authority and indeed responsibility to address “the most pressing environmental challenge of our lifetime,”¹⁶ was replaced in *UARG* by some skepticism of future Agency efforts to use its authority in innovative ways, including some of the very ways that the Agency is currently contemplating under section 111.¹⁷

Most of the immediate news reports missed the gap between the formal ruling and the opinion language. Consistent with Justice Scalia’s characterization of an EPA win in announcing the opinion, the dominant media message was that EPA had won big.¹⁸ EPA reportedly similarly characterized the ruling as a “win for our efforts.”¹⁹ What is the possible explanation for the surprising discrepancy between the formal ruling and the opinion’s longer-term ramifications? The answer is simple. What Court watchers, including this author, failed to anticipate is that Justice Scalia would be in the majority and that Chief Jus-

⁹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

¹⁰ See Marlo Lewis, *The Environmental Protection Agency’s Breathtakingly Lawless Attempt to Regulate Greenhouse Gases*, FORBES (Feb. 25, 2014), <http://perma.cc/C99Y-NAPB>.

¹¹ 42 U.S.C. § 7411(d) (2012); see Doniger, *supra* note 7.

¹² Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014) [hereinafter Clean Power Plan Proposed Rule]; see also EPA Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 13–20 (2014), <http://perma.cc/475H-5L3H>.

¹³ See *UARG*, 134 S. Ct. 2427, 2442, 2448 (2014). For a more detailed description of the case, 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).

¹⁴ See *UARG*, 134 S. Ct. at 2441 n.5.

¹⁵ 549 U.S. 497 (2007).

¹⁶ *Id.* at 505 (quoting Petition for Writ of Certiorari at 22, *Massachusetts v. EPA*, 549 U.S. 497 (No. 05-1120)) (internal quotation marks omitted).

¹⁷ See generally Clean Power Plan Proposed Rule, 79 Fed. Reg. 34,830.

¹⁸ See, e.g., Lyle Denniston, *Opinion Analysis: EPA Mostly Wins, but with Criticism*, SCOTUS-BLOG (June 23, 2014), <http://perma.cc/975L-VMK4>.

¹⁹ Liptak, *supra* note 8.

tice Roberts would in turn assign him the responsibility of authoring the Court's opinion.

The end result was a Court opinion that is significant in several unanticipated ways. First, it underscores the importance of which Justice receives the assignment to draft the "opinion of the Court" in any given case. Second, it suggests the emergence in recent years of a far more strategic Justice Scalia than before—willing to hedge his views in order to secure opinion assignments and thereby, as in *UARG*, promote policy outcomes he favors. Finally, the *UARG* opinion decreases the precedential force of *Massachusetts v. EPA* and will require EPA to marshal new arguments and invoke other precedent to sustain the Agency's most ambitious plans to use the Clean Air Act to control GHG emissions. Each of these points is elaborated upon below.

I. THE POWER OF THE OPINION ASSIGNMENT

As the senior Justice in the majority, the Chief Justice assigned Justice Scalia the *UARG* opinion. It is an open secret that it can make a big difference which Justice receives the opinion assignment. For instance, a few Terms ago, in *American Electric Power Co. v. Connecticut* ("AEP"),²⁰ the Justices unanimously agreed that the federal Clean Air Act displaced a federal common law of nuisance action brought by environmental organizations against the country's largest power plants.²¹ Because the vote was unanimous, the Chief Justice could have assigned the opinion to anyone on the bench. He chose Justice Ginsburg, and the resulting opinion, while necessarily ruling that the Clean Air Act displaced any such common law action, expansively reaffirmed environmental plaintiffs' prior win in *Massachusetts v. EPA*, and generously stressed the sweep of EPA's authority under the Clean Air Act, including section 111.²² Justice Ginsburg took full advantage of her authority in crafting the opinion.

Nor is there anything remotely aberrational about an opinion author's doing so. Both former Chief Justice Rehnquist and Justice Thurgood Marshall, in cases arising under the National Environmental Policy Act ("NEPA"),²³ proved extremely able (albeit to very different policy ends) in using their authorship of the Court's opinion to further objectives entirely supplemental to the Court's formal judgment.²⁴ Chief Justice Rehnquist repeatedly found ways to include opinion language designed to limit NEPA's future reach, while Justice Marshall did the exact opposite.²⁵ The authoring Justice's ultimate responsibility is to

²⁰ 131 S. Ct. 2527 (2011).

²¹ *Id.* at 2532.

²² *See id.* at 2532, 2537–38.

²³ 42 U.S.C. §§ 4321–4370h (2012).

²⁴ *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1573–85 (2012).

²⁵ *Id.*

draft an opinion that a majority of the Justices will join.²⁶ And, as both Chief Justice Rehnquist and Justice Marshall demonstrated, there are invariably many possible analytical pathways available within those basic bounds, ranging from those that are very broad in their reasoning to those that are very narrow.²⁷

To be sure, in theory, any one individual Justice could always condition his or her vote on the opinion author's following only one precisely-drawn path. The initial votes at conference are necessarily tentative until an actual opinion has been produced and the five Justices necessary for a majority have formally agreed to "join" it.²⁸ A lot of bargaining over precise wording can result during the drafting process, especially when the majority has only five votes.²⁹ Yet, even with that essential caveat, basic concerns of comity, collegiality, and desired reciprocity in future cases (when the roles are reversed) naturally limit the degree of fine-tuning and tone-setting on which potentially joining Justices are likely to insist.³⁰

So, what are the factors that influence the decision of the Chief Justice, or whoever is the senior Justice in the majority in a specific case, in making the opinion assignment? The most significant limitation is also the most obvious: only those in the majority are eligible.³¹ In choosing which Justice in the majority should be assigned the opinion, the senior Justice is likely to take into account a variety of factors, some designed to influence substance and others more directed to the Court's own institutional interests. For instance, in a case in which the Court is sharply divided, there might be a premium on assigning the opinion to a Justice who is most able to craft an opinion that walks the tightrope necessary to retain the majority.³² In other instances, the senior Justice might want to assign the opinion to a Justice who she believes is most likely to follow an approach, whether broad or narrow, that is most in keeping with the senior Justice's own take.³³

On the other hand, there may also be largely institutional reasons to assign the opinion to one particular Justice in the majority. Equity is one such reason, rooted in the basic institutional feature that each Justice has the same number of votes: one. The reigning practice is that all Justices author roughly the same

²⁶ See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 264–65 (Alfred A. Knopf 2001) (1987); DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 267 (10th ed. 2014).

²⁷ Compare Lazarus, *supra* note 24, at 1575, with *id.* at 1580.

²⁸ See O'BRIEN, *supra* note 26, at 265–66.

²⁹ See REHNQUIST, *supra* note 26, at 264–65.

³⁰ See O'BRIEN, *supra* note 26, at 286–88; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1191 (1992).

³¹ See O'BRIEN, *supra* note 26, at 268–69. There have been claims that both Chief Justices Warren and Burger engaged in tactical voting, by voting contrary to their actual views, so as to ensure they remained the senior Justice in the majority in order to retain the corresponding power of the opinion assignment. See G. Edward White, *Earl Warren: A Public Life*, in *INSIDE THE SUPREME COURT* 706, 708–11 (Susan Low Bloch et al. eds., 2d ed. 2008); Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action*, in *INSIDE THE SUPREME COURT*, *supra*, at 715, 722–23.

³² See O'BRIEN, *supra* note 26, at 274–75.

³³ See Sue Davis, *Power on the Court: Chief Justice Rehnquist's Opinion Assignments*, in *INSIDE THE SUPREME COURT*, *supra* note 31, at 723, 725–26.

number of opinions for the Court each Term, with those senior often receiving slightly more than those junior, but truly only slightly. For instance, five Justices authored seven opinions for the Court and four authored eight during October Term 2013.³⁴ Indeed, the basic practice of rough numerical equity is so well established that it allows Court watchers to gain significant insight into the Court's strictly private deliberations. One can determine with surprising accuracy, after an opinion is announced, whether a different Justice likely received the initial opinion assignment and lost his majority during deliberations. And, when only a few opinions are left to be decided in a Term or from a particular argument session, one can predict fairly accurately which Justice is the likely author of those remaining opinions. The practice even has an informal name: reading Supreme Court "tea leaves."³⁵

Finally, there may also be important symbolic, institutional reasons other than equity to assign a particular Justice the opinion. For some especially high profile opinions, it may seem more appropriate to have the Chief Justice write the opinion, such as Chief Justice Warren Burger in *United States v. Nixon*³⁶ or Chief Justice Earl Warren in *Brown v. Board of Education*.³⁷ In other instances, a particular Justice's own background and history might seem to have influenced the opinion assignment, such as Justice Ginsburg's authorship of the Court opinion in *United States v. Virginia*,³⁸ striking down the Virginia Military Institute's policy of denying admission to female applicants. For similar reasons, a senior Justice may decide to assign what the public might view as a "conservative" result to a Justice considered a "liberal" or a "liberal" result to a "conservative," in an effort to make the point that the Court's rulings do not in fact fall along such ideological or partisan labels nearly as often as assumed by the general public.³⁹

In *UARG*, the Chief Justice did not have many choices for the opinion assignment. There were only three Justices who joined all aspects of the majority opinion: the Chief Justice and Justices Scalia and Kennedy.⁴⁰ The number of

³⁴ *Stat Pack for October Term 2013*, SCOTUSBLOG 2 (July 3, 2014), <http://perma.cc/A8PK-2LPW>.

³⁵ See Linda Greenhouse, *Supreme Court: Of Meaty Tea Leaves and Other Bafflements*, N.Y. TIMES (Mar. 12, 1985), <http://perma.cc/A27P-C3KH>.

³⁶ 418 U.S. 683 (1974).

³⁷ 347 U.S. 483 (1954).

³⁸ 518 U.S. 515 (1996).

³⁹ See O'BRIEN, *supra* note 26, at 275.

⁴⁰ *UARG*, 134 S. Ct. 2427, 2432 (2014). Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented from the majority view that GHG emissions from a stationary source could not trigger the PSD program, and Justices Thomas and Alito dissented from the majority view that BACT, once triggered, applied to all regulated pollutants emitted by a major stationary source, including GHGs. See *id.* at 2449, 2455 (Breyer, J., concurring in part and dissenting in part); *id.* (Alito, J., concurring in part and dissenting in part). A caveat, however, is necessary here because we cannot know for sure that the final vote was the same as the vote at conference, which is the vote that serves as the basis for the opinion assignment. Had any other Justices initially agreed to the majority's split view of the PSD program's applicability, they too would have been eligible for the opinion assignment. There is no way of knowing for sure whether there were others originally in that majority who later shifted their views.

Justices available for the opinion assignment in *UARG* was therefore far lower than in most cases. The average number of Justices in the majority in cases decided on the merits has been 7.4, 7.4, and 8 during the past three Terms (October Terms 2011, 2012, and 2013).⁴¹ The Chief Justice has been the senior Justice in the majority in an overwhelming percentage of the Court's cases; he was in the majority in 92%, 86%, and 92% of the time during the past three Terms.⁴² Even in those relatively few instances when the Court is most sharply divided, with a five to four vote, there are still typically five Justices in the majority eligible for the opinion assignment. *UARG* is the more unusual instance in which the "majority" view depended on cobbling together the votes of Chief Justice Roberts and Justices Scalia and Kennedy with parts of two separate opinions by other Justices that were wholly opposed to each other.

The limited number of eligible opinion writers in *UARG* therefore partly explains why the Chief Justice picked Justice Scalia for the opinion assignment. But not fully. Why not himself? Or Justice Kennedy? Probably for a combination of reasons. First, the normal number of opinion assignments per Justice is one per two-week argument session, with the possibility of one two-opinion session for a few Justices. Both the Chief Justice and Justice Kennedy were already writing two opinions in cases that had been argued the month before and therefore the Chief Justice was likely reticent to have either himself or Justice Kennedy write twice the very next month. If so, writing *UARG* might have precluded their writing an opinion for the Court in a different, high-profile case argued that same session, and for each Justice, preferring to write the opinion in the other case, that would have been a problem.⁴³ Because, moreover, the

⁴¹ *Stat Pack for October Term 2011*, SCOTUSBLOG 12 (June 30, 2012), <http://perma.cc/42J2-KSN7>; *Stat Pack for October Term 2012*, SCOTUSBLOG 12 (June 27, 2013), <http://perma.cc/GCH4-Q8YQ>; *Stat Pack for October Term 2013*, *supra* note 34, at 17.

⁴² *Stat Pack for October Term 2011*, *supra* note 41, at 13; *Stat Pack for October Term 2012*, *supra* note 41, at 13; *Stat Pack for October Term 2013*, *supra* note 34, at 19.

⁴³ For the Chief Justice, the case was *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), in which the Court held that defendants in private securities fraud actions can defeat a plaintiff's ability to rely on a fraud-on-the-market presumption by introducing evidence at the class certification stage that the alleged misrepresentation did not in fact affect the market price of the securities, *id.* at 2417. The Chief Justice had little choice but to author the opinion in that extremely high profile case. The majority ruled against the investors but stopped short, contrary to the predictions of many, of a sweeping ruling overruling a major Court precedent that had established the fraud-on-the-market presumption theory. *See id.* at 2407–13; *The Supreme Court, 2013 Term—Leading Cases*, 128 HARV. L. REV. 291, 300 (2014). Only the Chief Justice and Justices Kennedy and Kagan did not write separately, and the Chief Justice's majority required the votes of Justices Ginsburg, Breyer, and Sotomayor, who also together joined a separate concurring opinion authored by Justice Ginsburg. *Halliburton*, 134 S. Ct. at 2404–05. Justices Scalia, Thomas, and Alito concurred in the judgment only. *Id.* at 2417 (Thomas, J., concurring in the judgment). The decision to step back from the expected more conservative ruling in favor of a narrow ruling that declined to overrule Court precedent has become a signature of the Chief Justice's tenure on the Court. For Justice Kennedy, the priority opinion-writing assignment for that same argument session was plainly *Hall v. Florida*, 134 S. Ct. 1986 (2014), rather than *UARG*. In *Hall*, Justice Kennedy was the senior Justice for a five-Justice majority, and the question presented in *Hall* arose directly out of a prior Court ruling, *Atkins v. Virginia*, 536 U.S. 304 (2002), in which Justice Kennedy had written the opinion for the Court. The Court's ruling in *Atkins* was that the Eighth and Fourteenth Amendments barred the execution of intellectually-disabled persons. *Hall*, 134 S.

Chief Justice and Justice Kennedy were the senior Justices in the majority in both those other cases, each could be confident of being able to secure the opinion assignment. They literally had the authority to assign the opinion to themselves.

Even then, a case based on numerical equity could have been made against Justice Scalia. At the time the opinion assignments were being made for the February argument session in which *UARG* was heard, Justice Scalia was the only Justice who had written two opinions in two prior argument sessions, and one opinion in each of the other two sessions, for a total of six Court opinions.⁴⁴ For that reason, it would normally have been well within bounds for the Chief Justice to “zero” Justice Scalia out for February, meaning no opinion assignments for that session. Instead, all three Justices (the Chief, Scalia, and Kennedy) received no opinion assignments for cases argued during the subsequent March sitting, in effort to promote numerical equity.⁴⁵ Why then did the Chief Justice decide to choose Justice Scalia in February for *UARG*? It could have partly been for the wholly institutional reason that the Chief Justice did not want to double himself up for February, and he preferred to write *Halliburton Co. v. Erica P. John Fund, Inc.*⁴⁶ But it also could have been for the more strategic reason that he preferred to assign the opinion to someone who, like the Chief Justice, had dissented from *Massachusetts v. EPA*, and therefore was more likely to craft an opinion narrowing that ruling, than to Justice Kennedy, who had been in the *Massachusetts* majority, and therefore would be far less likely to do so.⁴⁷

The choice of Justice Scalia was certainly not benign. Justice Scalia has hardly been shy about expressing his skepticism of broad assertions of regulatory authority in support of environmental protection. He has been highly critical of federal environmental regulators.⁴⁸ He wrote just such a dissenting opinion in the other Clean Air Act case decided last Term, *EPA v. EME Homer City Generation, L.P.*,⁴⁹ severely chastising the Agency so much that he was subsequently compelled to amend a significant portion of his dissent that mischaracterized EPA's past practices and arguments.⁵⁰ Now writing for the Court

Ct. at 1990 (citing *Atkins*, 536 U.S. at 321). *Hall* raised the further question whether the State of Florida could constitutionally refuse to consider any person with an IQ score above 70 as intellectually disabled. *Id.* Justice Kennedy was the “swing Justice” in both cases and, as the senior Justice in *Hall*, he was clearly going to assign *Hall* to himself, which is precisely what he did.

⁴⁴ *Stat Pack for October Term 2013*, *supra* note 34, at 2.

⁴⁵ *Id.*

⁴⁶ 134 S. Ct. 2398 (2014).

⁴⁷ See *Massachusetts v. EPA*, 549 U.S. 497, 549 (2007).

⁴⁸ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 720 (2006) (“The burden of federal regulation on those who would deposit fill material in locations denominated ‘waters of the United States’ is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot The average applicant for an individual permit spends 788 days and \$271,596 in completing the process” (citations omitted)).

⁴⁹ 134 S. Ct. 1584 (2014).

⁵⁰ Jonathan H. Adler, *Homer Nods in EPA v. EME Homer City Generation – UPDATED*, VOLOKH CONSPIRACY (Apr. 29, 2014), <http://perma.cc/FA9U-GP6Z>.

in *UARG*, Justice Scalia chose a tone no less condemning, at one point dubbing EPA's actions "outrageous."⁵¹

In all events, the even more interesting inquiry, addressed next, concerns how and why Justice Scalia voted at conference in a way that allowed himself to be eligible for the opinion assignment at all.

II. UN-BECOMING JUSTICE SCALIA

Justice Scalia's vote at conference, which made him eligible for the opinion assignment, is curious. The compromise position that Justice Scalia endorsed by being in the majority was exceedingly un-Scalia-like: GHGs could not be "air pollutants" for purposes of the PSD BACT trigger, but could be for BACT coverage.⁵² Justice Scalia is more of an all or nothing kind of Justice than the compromising type, and he has been well known to sharply criticize his conservative colleagues when they have engaged in such seemingly pragmatic line-drawing, which he has condemned as "faux judicial restraint."⁵³ But, oddly, in *UARG*, Justice Scalia did just that and found himself the target of a Scalia-like critique by Justice Alito, who ridiculed the hypocrisy of the distinction that permitted the Court's split-the-difference ruling.⁵⁴

There was also little reason to anticipate that Justice Scalia would view the merits in *UARG* differently from Justice Alito and Justice Thomas. Like Justices Thomas and Alito, he dissented in *Massachusetts v. EPA*.⁵⁵ Justice Scalia also displayed little patience for EPA's position during the *UARG* oral argument and appeared open to excluding GHGs entirely from the PSD program.⁵⁶

Perhaps Justice Scalia faced a dilemma in *UARG*. As the most senior Justice after the Chief Justice, Justice Scalia would have voted at conference immediately after the Chief Justice. By then, given the Chief Justice's vote in favor of a split decision, Justice Scalia would have known that a majority was going to vote in favor of EPA at least on the issue of whether BACT applied to GHG emissions from stationary sources otherwise subject to BACT. If he joined Justices Alito and Thomas in voting against any application of PSD to GHG emissions, either a Justice who was in the *Massachusetts* majority would most likely get the *UARG* opinion assignment, as had happened in *AEP*,⁵⁷ or the Chief Justice would, who could not be counted on to author an aggressive opinion that challenged *Massachusetts*. Only if Justice Scalia decided to hedge on his practice of preferring all-or-nothing propositions and buy into the compromise position, could he receive the opinion assignment and have an opportunity

⁵¹ *UARG*, 134 S. Ct. 2427, 2444 (2014).

⁵² *Id.* at 2449.

⁵³ See Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449, 498 n.7 (2007); *Roper v. Simmons*, 543 U.S. 551, 627 n.9 (2005).

⁵⁴ See *UARG*, 134 S. Ct. at 2456 (Alito, J., concurring in part and dissenting in part).

⁵⁵ *Massachusetts v. EPA*, 549 U.S. 497, 549 (2007).

⁵⁶ See Transcript of Oral Argument at 42–43, 46, *UARG*, 134 S. Ct. 2427 (No. 12-1146).

⁵⁷ See *supra* text accompanying notes 20–22.

to do the opposite of what Justice Ginsburg had achieved in *AEP* when she reaffirmed *Massachusetts*. He could then craft an opinion that eroded *Massachusetts*.

The notion that Justices at times join or write opinions that do not entirely reflect their own personal views may seem like an anathema, but it must happen all the time. Justices must frequently join final opinions even though they do not agree with every word or nuance, in order to assist the Court in achieving an “opinion of the Court” needed for legal clarity.⁵⁸ Or to project an image of unanimity on a legal issue over which the country is sharply divided with the hope of de-escalating the controversy.⁵⁹ And, that can clearly be a good thing.

But whether good or bad, or whether there is a difference between the initial and final vote, it is just not a “Scalia thing.” Justice Scalia’s signature since joining the Court has been his strongly held, rule- (as opposed to standard-) like views and his strict adherence to them even when their application leads to policy outcomes that one can safely assume are not ones that he would personally applaud.⁶⁰ Indeed, his unbending commitment in the face of such policy tensions bolstered the force and credibility of his point of view. One could forcefully tout, as Justice Scalia himself has often done, his view that the First Amendment barred prosecution of someone for burning the American flag.⁶¹ One could cite to his unqualified commitment to the text of the Sixth Amendment’s Confrontation Clause even when doing so led to the overturning of convictions of criminal defendants accused of heinous offenses.⁶² Or his refusal to join the part of an opinion citing to legislative history even if the cite supports his reading of the statute.⁶³ Even environmental groups and tort plaintiffs (and this author as their counsel) have benefitted from Justice Scalia’s insistence that the plain meaning of the statutory text or settled principles of the common law trump what others might fairly characterize as a more pragmatic, if not downright politically conservative policy outcome in a particular case.⁶⁴

But that is precisely why *UARG* suggests the possible emergence of a different Justice Scalia. Unlike Justice Blackmun, who former *New York Times* reporter Linda Greenhouse argued in her book, *Becoming Justice Blackmun*, found his judicial voice over time,⁶⁵ Justice Scalia may be doing the opposite; he may well be “un-becoming.” To further his policy preferences, he may be

⁵⁸ See Ginsburg, *supra* note 30, at 1191.

⁵⁹ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁶⁰ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

⁶¹ See *United States v. Eichman*, 496 U.S. 310, 317–18 (1990); see also JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 232 (2009).

⁶² See *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004); cf. *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting).

⁶³ See, e.g., *Conroy v. Ansikoff*, 507 U.S. 511, 518 (1992) (Scalia, J., concurring in the judgment).

⁶⁴ See, e.g., *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 141 (2003); *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 339 (1994).

⁶⁵ See generally LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (1st ed. 2006).

losing what has made his voice on the Court especially distinctive and effective.

III. A CLOUD OVER THE CLEAN AIR ACT

However Justice Scalia ended up with the opinion assignment in *UARG*, he clearly took full advantage of that opportunity. He cut back on the force of *Massachusetts v. EPA*, adopting positions wholly antithetical to the Court's reasoning in that case. And, even in ruling in favor of EPA's authority to regulate GHG emissions under the Clean Air Act, his opinion reached unnecessarily beyond the questions directly presented to cast some doubt on the full reach of the Agency's authority in its actual exercise.

UARG retreats from *Massachusetts* in two significant respects. First, in *Massachusetts*, the Court held, over Justice Scalia's dissent, that the plain meaning of the term "air pollutant" throughout the Clean Air Act ("when used in this chapter") extended to GHGs.⁶⁶ The Court said the "statutory text forecloses" their exclusion and the "statute is unambiguous."⁶⁷ The Court announced one uniform definition of air pollutant for the entire statute. *AEP* was written in keeping with the same basic assumption.⁶⁸ But in writing for the Court in *UARG*, Justice Scalia announced the potentially significant limiting notion that because the Court in *Massachusetts* dealt only with motor vehicle emissions of GHGs, the Court had not necessarily decided that GHGs were air pollutants for any other parts of the law besides auto emissions, and accordingly not for the PSD program and the BACT trigger.⁶⁹ According to Justice Scalia's opinion for the Court, the very same plain meaning that foreclosed exclusion of GHGs in *Massachusetts* did not preclude EPA or a reviewing court from excluding GHGs where they could not "sensibly be encompassed with the particular regulatory program."⁷⁰ In short, the plain text can be effectively trumped by the Agency's or, as in this case, just the Court's view of what constitutes "sensible policy." Such a willingness by Justice Scalia to allow judicial assessment of "sensible policy" to override congressional intent, herein as expressed by the plain meaning of "used in this chapter"⁷¹ is to say the least, very un-Scalia like.⁷²

Justice Scalia's opinion for the Court cut back on *Massachusetts* in yet another significant way. In *Massachusetts*, those in industry and at EPA defend-

⁶⁶ 42 U.S.C. § 7602(g) (2012); *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

⁶⁷ *Massachusetts*, 549 U.S. at 528–29.

⁶⁸ See *AEP*, 131 S. Ct. 2527, 2537 (2011).

⁶⁹ See *UARG*, 134 S. Ct. 2427, 2441 (2014).

⁷⁰ *Id.*

⁷¹ 42 U.S.C. § 7602 (emphasis added).

⁷² Cf. John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 71 n.411 (2014) (commenting on how Justice Scalia's majority opinion in *UARG* "undermines Congress's power to use uniform language to express uniform policy" and how "the Court disregarded Congress's choice to adopt a single definition of what 'air pollutant' means '[w]hen used in [the Clean Air Act]'" (brackets in original)).

ing the Agency's then-position that GHGs were not "air pollutants" within the meaning of the Clean Air Act relied heavily on the Supreme Court's prior ruling in *FDA v. Brown & Williamson Tobacco Corp.*,⁷³ in which the Court held that tobacco fell outside FDA's jurisdiction in the absence of clearer congressional intent that Congress had intended to confer the FDA jurisdiction over an "industry constituting a significant portion of the American economy."⁷⁴ The Court in *Massachusetts*, however, flatly rejected the analogy and the relevance of the *Brown & Williamson* ruling to the Clean Air Act and EPA, concluding that any reliance on that ruling was "misplaced."⁷⁵ Yet, writing in *UARG* for the Court, Justice Scalia resurrected the central relevance of *Brown & Williamson* to the legal analysis of the application of the Clean Air Act to GHGs, thrice quoting from it, to make the point that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."⁷⁶

Finally, while upholding that EPA possesses authority to apply BACT to GHG emissions, the *UARG* Court's opinion gratuitously reached out to state that "there are important limitations on BACT that may work to mitigate petitioners' concerns about 'unbounded' regulatory authority."⁷⁷ Relying on a few lower court decisions and snippets from EPA guidance documents, the Court catalogued some of the limits. EPA could not require a "fundamental redesign" of a facility.⁷⁸ Nor could EPA reduce a facility's emissions by imposing energy efficiency limits on a facility's use of electricity.⁷⁹ The latter limitation is especially foreboding because EPA has long taken potential energy efficiency gains into account in calculating emissions limits based on technology-based standards like BACT.⁸⁰ Indeed, as the Court itself acknowledged, EPA has made "compulsory improvements in energy efficiency . . . the 'foundation' of greenhouse-gas BACT."⁸¹ Such energy efficiency gains are also a major element of EPA's currently proposed rulemaking to regulate GHG emissions from major existing electricity generating units ("EGUs") pursuant to section 111(d): energy-efficiency improvements within the EGUs themselves, offloading of production to other EGUs that are more energy efficient, and reductions in consumer demand for electricity as a result of consumer adoption of energy conservation measures.⁸²

⁷³ 529 U.S. 120 (2000).

⁷⁴ *Id.* at 161, 159.

⁷⁵ *Massachusetts v. EPA*, 549 U.S. 497, 530–31 (2007).

⁷⁶ *UARG*, 134 S. Ct. 2427, 2441, 2443–44 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159).

⁷⁷ *Id.* at 2448.

⁷⁸ *Id.*

⁷⁹ *Id.* (citing EPA, EPA-457/B-11-00, PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES 24 (2011)).

⁸⁰ *See, e.g., Alaska v. EPA*, 540 U.S. 461, 475 & n.6 (2006) (describing instance of lower emissions resulting from improved combustion technology).

⁸¹ *UARG*, 134 S. Ct. at 2447.

⁸² *See Clean Power Plan Proposed Rule*, 79 Fed. Reg. at 34,836.

Underscoring the significance of all of these “important limitations” on EPA’s exercise of its authority, Justices Ginsburg, Breyer, Sotomayor, and Kagan refused to join the part of Justice Scalia’s opinion that proposed them. Although all four Justices supplied Justice Scalia with the votes necessary for the majority ruling that BACT applies to GHGs, they then declined to give him the votes necessary for a majority endorsing the limitations, no doubt in an effort to persuade him to abandon that discussion.⁸³ Justice Scalia was nonetheless able to secure “opinion of the Court” status for this limiting language because of a highly unusual vote by Justices Thomas and Alito. Although disagreeing with his view (and the majority ruling) that BACT applies to GHG emissions, they dropped a footnote saying that if BACT did apply, then they supported Justice Scalia’s limitations: “While I do not think that BACT applies at all to ‘anyway sources,’ if it is to apply, the limitations suggested in Part II–B–1 might lessen the inconsistencies highlighted in Part II of this opinion, and on that understanding I join Part II–B–1.”⁸⁴

Justices Alito and Thomas literally are having it both ways: BACT does not apply, but if it does, here are the limitations that would restrict its application. The propriety of such a highly unusual conditional vote is assumed, without discussion. The extraordinary nature of the vote, however, underscores everyone’s awareness on the bench of the potential significance of the “important limitations” on EPA’s authority being proffered by Justice Scalia.

CONCLUSION

As expected, *UARG* constitutes a split decision, but one that nonetheless can be fairly characterized as endorsing EPA’s general authority to regulate GHG emissions pursuant to both the Clean Air Act’s PSD provisions and section 111. Yet, those who celebrate EPA’s ambitious plans to exercise that authority would be mistaken to ignore the extent to which language within *UARG* raises questions concerning the full reach of Agency authority in its actual implementation. In particular, the Court’s opinion will likely fuel arguments that EPA is limited in its authority in two potentially significant ways, both of which are contemplated by EPA in its current proposal to regulate GHG emissions from major existing power plants pursuant to section 111(d).⁸⁵ The first is to reduce GHG emissions by prompting states to adopt policies that shift supply of electricity to alternative sources of electric power with lower GHG emissions than coal-fired power plants.⁸⁶ And the second is to reduce power-plant GHG emissions to promote greater energy efficiency by consumers of electricity and thereby lessen the demand for electricity.⁸⁷

⁸³ See *UARG*, 134 S. Ct. at 2432; *id.* at 2455 (Breyer, J., concurring in part and dissenting in part).

⁸⁴ *Id.* at 2458 n.3 (Alito, J., concurring in part and dissenting in part).

⁸⁵ See Clean Power Plan Proposed Rule, 79 Fed. Reg. 34,830.

⁸⁶ *Id.* at 34,851 (describing building blocks two and three).

⁸⁷ *Id.* (describing building block four).

To be sure, the *UARG* opinion in no manner clearly denies that EPA possesses such authority. And, because only the PSD program was at issue in *UARG* and not the scope of EPA's authority under section 111(d), the case can be readily distinguished in any subsequent challenges to EPA's exercise of section 111(d) authority. But by reducing the precedential reach of *Massachusetts v. EPA*, and by resurrecting the relevance of *Brown & Williamson* to the application of the Clean Air Act to regulate GHG emissions, the Court has no less clearly raised new challenges for those preparing to defend EPA's actions. Whether done deliberately, the Court has made an already challenging defense even more challenging still.

Finally, wholly apart from its possible import for EPA's future exercise of Clean Air Act authority to address climate change, *UARG* also underscores what a difference it can make who receives the opinion assignment in a given case. Justice Scalia's opinion for the *UARG* Court was very different from what an opinion written either by the Chief Justice or Justice Kennedy would have been, even though in support of the same judgment. The surprising nature of Justice Scalia's vote in *UARG*, agreeing to the kind of middle-ground position he normally condemns, also raises the question whether he shaped his initial vote at conference in an effort to exercise maximum influence on the opinion's content. No more than speculation is possible, but if true, it would suggest a significant erosion of the Justice's commitment to core jurisprudential principles that have long defined his truly distinctive voice on the Court for the past twenty-eight years.

