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Questioning the Use of Structure To Interpret Statutory Intent: A Critique of *Utility Air Regulatory Group v. EPA*

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In late 2009 and early 2010, the Environmental Protection Agency promulgated a series of final agency actions that operate together to regulate greenhouse gas (GHG) emissions under the Clean Air Act (CAA). Under some CAA programs, sources of pollution are required to obtain permits based on the volume of pollutants they emit.[1] GHGs, however, are emitted at much greater volumes than conventional air pollutants.[2] Together, these facts led to a problem: regulating GHG emissions at the levels apparently required by the CAA would have increased the number of permitted sources at least a hundredfold.[3] The EPA responded to this problem with the "Tailoring Rule," which adjusted the statutory permitting thresholds set out in the CAA.[4]

In *Utility Air Regulatory Group v. Environmental Protection Agency*, the Supreme Court struck down the EPA's regulatory solution. Nonetheless, *UARG* is a significant victory for the EPA—both because the Court recognized the Agency's authority to regulate GHGs in the first place, and because it ultimately allowed the EPA to regulate ninety-seven percent[5] of the GHG

1. *See* 42 U.S.C. § 7475 (2012) (requiring permits under the CAA prevention of significant deterioration (PSD) program for "major emitting facilities"); 42 U.S.C. § 7479 (2012) (defining "major emitting facilities" as certain types of sources that have potential to emit over 100 tons per year of "any air pollutant," and mandating that all other stationary sources are subject to PSD permitting if they have potential to emit over 250 tons per year of "any air pollutant"); 42 U.S.C. §§ 7602(j), 7661(2)(B), 7661a(a) (2012) (requiring Title V operating permits for stationary sources that have potential to emit at least 100 tons per year of "any air pollutant").

2. Util. Air Regulatory Grp. v. EPA, No. 12-1146, slip op. at 5 (U.S. June 23, 2014) [hereinafter *UARG*].

3. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31557 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51-52, 70-71) [hereinafter Tailoring Rule] ("Our best estimate at present is that permitting authorities would need to process almost 82,000 permit applications per year, compared to, at most, 800 in the current PSD program.").

4. *Id.* at 31514.

5. *See UARG*, slip op. at 9-10 (recognizing that, under the Tailoring Rule, EPA would regulate 83% of stationary source greenhouse gas emissions, and in EPA's view only 3% of those

emissions the Agency had proposed to control under the EPA's Tailoring Rule. To obtain this result, however, the Court took an approach that has some troubling implications. In *UARG*, the Court held that GHG emissions cannot trigger certain permitting requirements because GHGs are not properly considered "air pollutants" in the context of some CAA programs. The Court's analysis focused on congressional intent, even though Congress itself did not expressly contemplate GHG regulation when it passed the CAA. In trying to determine what Congress intended in an unanticipated factual setting, the Court created an interpretive precedent that is not meaningfully constrained. This Essay analyzes that precedent and its implications. First, I discuss the meaning of the term "air pollutant," as used in the CAA and as interpreted by the EPA and the Court's previous jurisprudence.[6] Next, I critique the Court's use of *FDA v. Brown & Williamson Tobacco Corp.* to justify its reinterpretation of "air pollutant" in *UARG*.[7] Finally, I argue that in imposing this reinterpretation on the EPA, the Court overstepped the boundaries of its role.

I. STATUTORY AND REGULATORY BACKGROUND

The CAA does not expressly list GHGs as pollutants. In fact, in *Massachusetts v. EPA*, the Supreme Court recognized that the CAA's drafters "might not have appreciated the possibility that burning fossil fuels could lead to global warming."[8] The CAA drafters did, however, recognize that without regulatory flexibility of the kind necessary to subsume GHGs under the term "air pollutant," changing circumstances "would soon render the Clean Air Act obsolete."[9] In *Massachusetts v. EPA*, the Court concluded that the CAA should be interpreted with this need for flexibility in mind.[10] Accordingly, the Court read the statutory definition of the term "air pollutant" broadly, and held that EPA has CAA authority to regulate GHG emissions.[11]

GHGs were regulated as CAA pollutants for the first time on January 2, 2011, when the EPA first required controls of GHG emissions from motor vehicles.[12] In the EPA's view, this regulation triggered additional requirements

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emissions are brought into the regulatory regime solely due to their greenhouse gas emissions).

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

7. 529 U.S. 120 (2000).

8. *Massachusetts*, 549 U.S. at 532.

9. *Id.* at 532.

10. *Id.*

11. *Id.* at 528-29.

12. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324 (May 7, 2010) (to be codified at 49 C.F.R. pt. 531, 533, 536-38) [hereinafter Tailpipe Rule] (regulating GHGs). The Tailpipe

under the Prevention of Significant Deterioration (PSD) and Title V permitting provisions. Under the PSD provisions, for example, sources must obtain permits if they emit "any air pollutant" in specified amounts.[13] For more than three decades, the EPA has consistently interpreted the term "any air pollutant," as used in the PSD setting, to mean "any air pollutant *regulated under the Clean Air Act*."[14] Therefore, if the Agency chose to regulate GHG emissions under any part of the CAA—a choice within its authority, according to *Massachusetts v. EPA*—it would be forced to impose PSD and Title V permitting requirements on thousands of historically unregulated sources, even though a relative handful of these sources account for the lion's share of total GHG emissions.[15]

The EPA recognized that implementing PSD and Title V permit requirements for all of the sources meeting the statutory thresholds would "overwhelm[ ] the resources of permitting authorities, and severely impair[ ] the functioning of the program[ ]."[16] As a result, it promulgated the Tailoring Rule, which established a process to phase in the permitting requirements over a period of time, focusing initially on the largest GHG emitters.[17] The EPA set an initial regulatory threshold of 75,000 or 100,000 tons per year of GHGs, a significant increase over the relevant statutory thresholds of 100 or 250 tons per year.[18]

In *UARG*, the Supreme Court rejected the Tailoring Rule and disposed of the triggering problem differently. The Court held that EPA's long-standing interpretation of the scope of its PSD permitting authority was incorrect. Congress, the Court found, did not intend for PSD or Title V permitting requirements to come into play whenever the Agency regulated a substance under *any* CAA program. Instead, the term "air pollutant" was intended by Congress to have different meanings in different CAA settings.[19] In light of the Court's holding, PSD and Title V permitting requirements cannot currently be triggered, in the first instance, by GHG emissions,[20] but if a source is already required to acquire either a PSD or a Title V permit by virtue of its emissions of

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Rule entered into effect on January 2, 2011, the beginning of the 2012 automotive model year. *See id.* at 25324; Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17004, 17007 (Apr. 2, 2010)

13. 42 U.S.C. § 7479(1) (2012).

14. *See* 43 Fed. Reg. 26388, 26403 (June 19, 1978) (emphasis added).

15. Util. Air Regulatory Grp. v. EPA, No. 12-1146, slip op. at 5 (U.S. June 23, 2014).

16. 75 Fed. Reg. 31514 (June 3, 2010).

17. *See id.* at 31523-25, 31586-88.

18. *Id.* at 31523.

19. *UARG*, slip op. at 16-24.

20. *Id.* at 19-20.

another pollutant or pollutants, those permits must now account for GHG emissions.[21]

II. THE SUPREME COURT SHOULD NOT HAVE RELIED ON *BROWN & WILLIAMSON* IN ANALYZING EPA'S REGULATORY SCHEME

The Court relied on *Brown & Williamson*[22] to justify this adventure in statutory reinterpretation. The threshold question in that case was the "appropriate framework for analyzing" the Food and Drug Administration's (FDA) decision to regulate tobacco as a drug under the Food, Drug and Cosmetic Act (FDCA).[23] The FDCA defines "drug" to include "articles (other than food) intended to affect the structure or any function of the body,"[24] a broad definition which seems to include tobacco.[25] The Court nonetheless held that the FDA lacked authority to regulate tobacco as a "drug" under the FDCA.[26] The Court's decision rested, in part, on Congress's decades-long history of regulating tobacco through other legislative acts—as the Court portrayed it, "an unbroken series of congressional enactments that made sense only if adopted 'against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.'"[27]

In rejecting the Agency's interpretation of the term "air pollutant" in the context of CAA permitting programs, the Court twice cited *Brown & Williamson* for the proposition that a statute must be read in the context of "the overall statutory scheme."[28] The Court found that EPA's interpretation of the CAA, insofar as it would require PSD and Title V permits based solely on GHG emissions, would be incompatible with Congress's statutory scheme in enacting the CAA.[29]

Yet the unique factual context of *Brown & Williamson*, which enabled the Court's bold statutory reinterpretation in that case, was totally absent in

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21. *Id.* at 27.

22. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

23. *Id.* at 132.

24. 21 U.S.C. § 321(g)(1)(C) (2012).

25. *Brown & Williamson*, 529 U.S. at 164 (Breyer, J., dissenting).

26. *Id.* at 161.

27. Massachusetts v. EPA, 549 U.S. 497, 531 (2007) (quoting *Brown & Williamson*, 529 U.S. at 144). It is notable that it was not exactly legislative history that the Court relied on in *Brown & Williamson* but rather legislation passed *after* the relevant statutory language had been promulgated.

28. Util. Air Regulatory Grp. v. EPA, No. 12-1146, slip op. at 15 (U.S. June 23, 2014) (quoting *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks omitted)).

29. *Id.* at 18.

UARG. In crafting an interpretation of the FDCA that defeated a plain reading of the statute's language, the Court in *Brown & Williamson* was able to rely on unusually extensive and consistent subsequent legislation. No such resource was available in *UARG*.

III. THE COURT WAS WRONG TO REPLACE EPA'S STATUTORY INTERPRETATION WITH ITS OWN

In reviewing the Tailoring Rule, the *UARG* Court had four options: (1) force EPA to follow the CAA's unworkable numerical limits, thereby putting pressure on Congress to amend the framework it created; (2) recognize administrative authority to adjust explicit numerical limits consistent with the Agency's interpretation of congressional intent; (3) review the statutory framework and other indicia of congressional intent and, if appropriate, invalidate EPA's approach without establishing a single path forward, leaving it to EPA to propose an alternative; or (4) conclusively interpret the statute, foreclosing other potential Agency interpretations. The Court reviewed EPA's statutory interpretations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[30] which established a framework that typically defers to agency interpretations in the face of ambiguity.[31] In spite of this deferential framework, however, the Court took the fourth option—the approach that maximizes the role of the Court and minimizes the role of the Agency.[32] I question whether that was the correct approach.

First of all, in striking down the Tailoring Rule, the Court stated that the EPA violated the separation of powers by revising the CAA's statutory terms.[33] This must mean that the unworkable consequences of incorporating GHGs into the CAA are for Congress to solve. After all, it is no more satisfying from a separation-of-powers perspective to have courts, rather than agencies, determine how to overcome practical difficulties resulting from a statute's plain language. From this standpoint, the fundamental issue is not that the agency tried to fix a statutory problem; it is that Congress either could not, or would not, fix that problem itself. But under this analysis, the Court should have approached the absurd results of GHG regulation by forcing EPA to follow the CAA's unworkable numerical limits.[34]

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30. Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837 (1984).

31. *UARG*, slip op. at 10, 16.

32. *Id*. at 16-24.

33. *Id*. at 23.

34. It is somewhat surprising that Scalia did not advance this approach. *See generally* American Broadcasting Cos., Inc. v. Aereo, Inc., No. 13-461, slip op. at 13 (U.S. June 25, 2014) (Scalia, J., dissenting) ("Hence, the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave Congress the

Nonetheless, the Court seemed to conclude that the absurd results flowing from regulation based on the statutory language were analogous to statutory ambiguity, and that some interpretation was therefore appropriate. The question thus became one of Congressional intent and who should determine that intent.[35] What gave the Court the right to substitute its judgment for that of the EPA?[36]

There are two substantive reasons why we should be wary of the Court's move. First, it is unclear what justifies the particular interpretation the Court chose. The Court had multiple options. For example, Justice Breyer argued that narrowing the meaning of "major emitting facility" was the most sensible approach, given that it did less violence to the statutory structure.[37] Justice Scalia disagreed, and argued that EPA must instead interpret the term "any air pollutant" to "denote less than the full range of pollutants covered by the Act-wide definition."[38] There may be still other options that the Agency and the Justices have not explored. Under *Chevron*, where statutory ambiguity exists, the Court's role is to strike down impermissible statutory interpretations advanced by agencies, not to interpret congressional intent itself. In *Brown & Williamson*, the Court could at least rely on unusually extensive legislative history in departing from this well-established rule.[39] But in *UARG* such a history was missing. Instead, the Court somewhat arbitrarily selected an interpretation of its own.

Second, even assuming the Court had some principle behind its interpretation, it is far from clear that the Court's interpretation should win out in this case. Determining Congressional intent in a particular factual setting is not a question of pure legal analysis. It is a question of applying law to facts, and one for which understanding the nuances of how an industry functions is particularly important.[40]An agency's greater awareness of the technical details

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task of deciding whether the Copyright Act needs an upgrade. . '[I]t is not our job to apply laws that have not yet been written.'" (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U. S. 417, 456 (1984))).

35. Such ambiguity is sometimes resolved through examining legislative history, but the legislative history is silent with respect to the scope of EPA's regulatory authority over climate change. *See generally* Massachusetts v. E.P.A., 549 U.S. 497, 531 (2007).

36. In this situation the absurd results flowing from regulation based on the statutory language are analogous to statutory ambiguity of a kind that results in agency deference under a traditional *Chevron* analysis. In both cases, some interpretation of Congressional intent is required.

37. *UARG*, slip op. at 7-11 (Breyer, J., dissenting).

38. *UARG*, slip op. at 24 n. 8.

39. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143-56 (2000).

40. *See, e.g.*, Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) ("When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of

of a regulation and its consequences ensures that the agency, as compared to the Court, is in a superior position to understand the implications of a statutory interpretation in a particular regulatory setting. This greater awareness supports the view that the agency should make a determination of legislative intent in the first instance.[41]

In *UARG* the Court chastised the EPA for promulgating a rule that would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization,"[42] but nonetheless proceeded to enact an interpretation with similarly dramatic implications of its own accord and without clear doctrinal benchmarks. The outcome of *UARG* may be favorable from the EPA's perspective, but the Court's analysis could lead to difficulties in the future. The Court should not put itself in the position of interpreting what law Congress would have passed if it had considered global warming. By doing so in *UARG*, the Court expanded its authority in a way that is inconsistent with the system of checks and balances established by the Constitution.

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judicial review of the agency's policy determinations is limited."); Marsh v. Or. Nat. Resources Council, 490 U.S. 360, 377 (1989) (deferring to agency discretion where analysis requires technical expertise); Ctr. for Biological Diversity v. EPA, 749 F.3d 1079, 1087-88 (D.C. Cir. 2014) (citing to "[d]ecades of decisions" standing for the principle that agencies are given particular deference in areas requiring technical expertise).

41. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 ("[I]t is for agencies, not courts, to fill statutory gaps.").

42. *UARG*, slip op. at 19.