CONVENIENT TEXTUALISM: JUSTICE SCALIA'S LEGACY IN ENVIRONMENTAL LAW

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"No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency."– Justice Scalia[2]

INTRODUCTION

Justice Antonin Scalia's sudden passing on February 13th, 2016, has ignited a political debate over his replacement. However, few in the legal world will contest the staggering influence Justice Scalia wielded over the Court's approach to statutory interpretation.[3] Throughout his three decades on the Court, he has consistently and persuasively promoted textualism as

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2. Massachusetts v. EPA, 549 U.S. 497, 560 (2007) (Scalia, J., dissenting).

3. *See, e.g.*, Noah Feldman, *Scalia's 'Classic' Textualism Will Be His Legacy*, BLOOMBERG VIEW (Feb. 17, 2016), http://www.bloombergview.com/articles/2016-02-17/scalia-s-classic-textualism-will-be-his-legacy [https://perma.cc/HQ98-9V6G].

the best method of statutory interpretation.[4] He believed that in most cases, a decision should be made based on the plain meaning of the text as derived from the ordinary definitions of the individual words and the overall structure of the language.[5] This led Justice Scalia to frequently criticize other Justices for looking beyond the text itself to find meaning, such as relying on legislative history to determine congressional intent.[6] Many scholars view Justice Scalia's appointment to the Supreme Court in 1986 as key to the rise in the use of textualism in the judicial system.[7] The statistics back them up, as the Supreme Court "cited dictionaries four times as often in 2010 compared to 1985."[8]

Justice Scalia verbally committed to following the text of a statute "even if [he] think[s] some other approach might 'accor[d] with good policy'" in a given case.[9] Nevertheless, he did not always follow a textualist approach when actually deciding cases. Specifically when writing opinions in environmental cases, Justice Scalia became increasingly willing to rely on legislative history, economic principles, and other non-text factors. Overall, in environmental law cases, Justice Scalia seemed to progressively abandon his textualist ideals in order to reach outcomes he found preferable.

This paper is organized into five sections, including this introduction. Part I gives a brief overview of the general principles of textualism and then discusses Justice Scalia's use of textualism while on the Supreme Court. Part II discusses Justice Scalia's jurisprudence in environmental cases from 1990 to 2000. During this time, Justice Scalia seemed more willing to maintain his textualist principles in environmental cases. Part III of this paper discusses Justice Scalia's jurisprudence in environmental cases from 2001 to the end of his career. It demonstrates that Justice Scalia increasingly abandoned textualism when handling environmental matters. This paper concludes by arguing that Justice Scalia's real aim became

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4. Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 401 (1994).

5. *Id.*

6. *E.g.*, Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting); Blanchard v. Bergeron, 489 U.S. 87, 97–98 (1989) (Scalia, J., concurring); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (describing "the quest for the 'genuine' legislative intent" as "a wild-goose chase").

7. *E.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 94 (1995).

8. John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 498 (2014).

9. Burrage v. United States, 134 S. Ct. 881, 892 (2014).

limiting environmental regulation, instead of actually following his own textualist principles.

I. BACKGROUND

A. Textualism Overview

Textualism is the principle that judges should make decisions based on the actual text of the Constitution or a given statute.[10] It is based on the idea that judges "must seek and abide by the public meaning of the enacted text, [as] understood in context," and should "choose the letter of the statutory text over its spirit."[11] Textualists believe that this approach is the only way to guarantee the preservation of democratic principles and the separation of powers, because only the exact words of a statute are voted on by Congress and signed by the president.[12] A judge that goes beyond the given words is seen by strict textualists as, at best, "disrespecti[ng] the legislative process by relying upon unenacted legislative intentions or purposes to alter the meaning of a duly enacted text,"[13] and, at worse, as attempting to seize legislative power.[14]

Pure textualists abhor a judge's use of legislative history and legislative purpose when making judicial decisions. Textualists argue that legislative history should not be used because "it subverts the requirements of bicameralism and presentment through which Congress must express its intent." [15] Judge Easterbrook has argued that it "would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some evidence about the law, [if] the real source of legal rules is the mental processes of legislators."[16] Furthermore, a statute is generally passed after extensive compromise. Accordingly, a committee report or a sponsor's statement does not represent the view of Congress as a whole, but instead just the view of the given legislator or group of

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10. Manning, *supra* note 7, at 420.
11. *Id.*
12. Paul Killebrew, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1897 (2007).
13. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006).
14. Eskridge, *supra* note 7, at 648.
15. Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1972 (2005).
16. In re Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989).

legislators.[17] Thus, textualists argue that legislative history generally should not be used when deciding a case.

Textualists are also against basing a decision on the purpose of a statute. Legislation is based on elaborate, and often chaotic, compromises in which hundreds of lawmakers vote on legislation "for complicated reasons that may have little or nothing to do with the content of the legislation itself."[18] This process makes it doubtful that Congress as whole could have a singular intention for passing a statute.[19] Furthermore, these compromises often purposefully leave some issues unresolved, so the Court should be "especially cautious about reading statutes to reflect an underlying consensus on policy goals that extend beyond the statutes' terms."[20] Hence, textualists believe in following the letter of the text over the uncertain spirit of the law.[21]

B. Scalia's Textualism

Throughout Justice Scalia's time on the Court, he repeatedly emphasized the superiority of textualism over other approaches to statutory interpretation.[22] Within one year of his confirmation, Justice Scalia made clear that he saw his task as a Justice as "giv[ing] a fair and reasonable meaning to the text of the United States Code," instead of trying "to enter the minds of the Members of Congress."[23] This language expresses Justice Scalia's stated belief that "[j]udges interpret laws rather than reconstruct legislators' intentions,"[24] or worse, attempt to implement their own policy choices.[25]

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17. Manning, *supra* note 7, at 675 ("[T]extualist judges argue that a 535-member legislature has no 'genuine' collective intent with respect to matters left ambiguous by the statute itself.").

18. Killebrew, *supra* note 12, at 1906.

19. *Id.*

20. *Id.* at 1908 (citing Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983)).

21. Manning, *supra* note 7, at 420.

22. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia J., concurring) ("We are governed by laws, not by the intentions of legislators."); *Blanchard*, 489 U.S. at 98–100 (discussing how committee reports and floor statements can be manipulated); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.").

23. Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1987) (Scalia, J., concurring in part and dissenting in part).

24. INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring).

25. *Massachusetts*, 549 U.S. at 560.

Justice Scalia also viewed textualism as a way of getting politics and personal beliefs out of judicial decisions.[26] A judge's job is "not to determine what seems like good policy at the present time, but to ascertain the meaning of the text."[27] In fact, Justice Scalia often concurred in cases just so he could disagree with the majority's use of legislative history.[28] For example, in *Jett v. Dallas Independent School District*, he "join[ed] Parts I and IV of the Court's opinion, and Part III except insofar as it relies upon legislative history."[29] Again, in *Octane Fitness*, Justice Scalia concurred just to note that he disagreed with footnotes one through three, which discussed how the legislative history supported the majority's holding.[30] These concurrences demonstrate how strongly Justice Scalia believed in following textualism because he has repeatedly spent the time to write his own opinions just so he was not agreeing to support non-textualist arguments. Overall, Justice Scalia believed that deciding cases "begins and ends with what the text says and fairly implies."[31]

II. JUSTICE SCALIA'S OPINIONS BETWEEN 1990–2000

In 2000, Justice Scalia was given the lowest score on environmental protection of all the then-Justices, based on his votes in environmental law cases.[32] Even then, many legal scholars saw him as apathetic, or even hostile, to environmental concerns.[33] However, the following section demonstrates that during this period, Justice Scalia seemed both more willing to occasionally side with the environmental interest, and more likely to rely upon his textualist principles when siding against the environmental interest. The following cases demonstrate how Justice Scalia attempted to

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26. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16–17 (2012).

27. George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303 (1990).

28. *E.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738 (1989) (Scalia, J., concurring); *Blanchard*, 489 U.S. at 97; Zedner v. United States, 547 U.S. 489, 509–10 (2006) (Scalia concurs because "[he] believes the only language that constitutes 'a Law' . . . is the text of the enacted statute"); Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1752–53 n.1–3 (2014) (Scalia does not write a separate concurrence but does not join the majority opinion with regard to three footnotes that discuss legislative history).

29. *Jett*, 491 U.S. at 738.

30. *Octane Fitness*, 134 S. Ct. at 1752–53.

31. SCALIA & GARNER, *supra* note 26, at 375.

32. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 727 (2000).

33. Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 19 PACE ENVTL. L. REV. 619, 629 (2002) [hereinafter *Thirty Years of Environmental Protection*].

maintain his textualist principles even when handling environmental law cases during this period.

A. Majority in City of Chicago v. Environmental Defense Fund

In *City of Chicago v. Environmental Defense Fund ("EDF")*, the Supreme Court assessed whether Chicago was violating the Resource Conservation and Recovery Act ("RCRA").[34] RCRA grants EPA the power to regulate both hazardous waste, under Subtitle C, and non-hazardous waste, under Subtitle D.[35] The requirements within Subtitle C are much more rigorous and require EPA to regulate the management of hazardous waste from creation to disposal.[36] In 1980, EPA defined hazardous waste to exclude household waste, facilities used to incinerate household waste, and ash produced by the process of incinerating household waste.[37] In 1984, Congress passed the "Clarification of Household Waste Exclusion," which, *inter alia*, stated that a "resource recovery facility . . . shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of [Subtitle C] regulation."[38] This amendment was largely seen as Congress trying to ratify EPA's definition of hazardous waste.[39]

EDF sued the City of Chicago for allegedly violating RCRA by allowing the disposal of ash from resource recovery incinerators, which burned household waste in landfills not licensed to accept hazardous waste.[40] The City of Chicago argued that this was allowed since household waste disposal was specifically exempted from RCRA in the Clarification of Household Waste Exclusion.[41] However, Justice Scalia, writing for the majority, held that RCRA does not exempt this type of ash and thus it must be regulated as a hazardous waste under RCRA.[42]

In coming to this decision, Justice Scalia relied solely on the text of the statute. Specifically he looked at section 3001(i), which exempts a facility "that treats, stores, disposes of, or manages hazardous waste."[43] Justice Scalia determined that the absence of the word "generating" in this section

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34. Chicago v. Envtl. Def. Fund (EDF), 511 U.S. 328 (1994).
35. *Id.* at 331–32.
36. 42 U.S.C. §§ 6921–6934 (2012).
37. § 6921(i).
38. *EDF*, 511 U.S. at 333–34 (citing 42 U.S.C. § 6921(i)).
39. Diarmuid F. O'Scannlain, *Current Trends in Judicial Review of Environmental Agency Action*, 27 ENVTL. L. 1, 8 (1997).
40. *EDF*, 511 U.S. at 330.
41. *Id.* at 335.
42. *Id.* at 334–35.
43. 40 C.F.R. pt. 261.

meant that RCRA only excluded the waste these facilities receive, not the waste that these facilities produce.[44] Thus, the text of this exception does not cover ash produced by resource recovery facilities. Overall, Justice Scalia held that the "carefully constructed text of section 3001(i)" made clear that a "resource recovery facility's management activities are excluded from Subtitle C regulation, [while] its generation of toxic ash is not."[45]

Justice Scalia confirmed his interpretation by comparing section 3001(i) to the Superfund Amendments and Reauthorization Act of 1986.[46] In that amendment, the Court specifically included the generation of hazardous or liquid wastes in its list of exempted activities.[47] Textualists "generally presume[] that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." [48] Thus, Justice Scalia used the Superfund Amendment to demonstrate that Congress specifically chose not to include the generation of waste when passing the Clarification of Household Waste Exclusion.

Furthermore, in coming to this decision, Justice Scalia chose to reject both legislative history and legislative purpose arguments. The City of Chicago argued that the RCRA Amendment, "Clarification of Household Waste Exclusion," indicated that Congress intended to codify the EPA rule exempting such ash from the definition of hazardous waste.[49] However, Justice Scalia rejected this argument by looking at the specific text of the amendment. He argued that this purpose argument was irrelevant because the plain meaning of the statute "clearly does not contain any exclusion for the ash itself."[50] The City of Chicago also pointed to a Senate Committee Report that made clear that the exception was supposed to cover "[a]ll waste management activities of such a facility, including the generation . . . of waste." [51] Scalia rejected this argument by arguing that the statute "is the [only] authoritative expression of the law, and the statute prominently omits reference to generation."[52] He simply did not believe the Court should rely

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44. *EDF*, 511 U.S. at 336–37.
45. *Id.* at 337.
46. *Id.* at 337–38.
47. Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, § 124(b), 100 Stat. 1689 ("[O]wner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, *generating*, transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning [of Subtitle C].") (emphasis added).
48. Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the "Petty Offense" Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89, 115 (2013) (citing Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (internal citations omitted)).
49. O'Scannlain, *supra* note 40, at 8.
50. *EDF*, 511 U.S. at 334.
51. S. REP NO. 98–284, at 61 (1983).
52. *EDF*, 511 U.S. at 337.

"upon a single word in a committee report that did not result in legislation."[53] The legislative history and purpose arguments were irrelevant because the plain meaning of the text clearly did not create an exemption for this type of ash.[54]

City of Chicago demonstrates Justice Scalia following his textualist principles even though it resulted in a major victory for the environmentalists.[55] In this case, he made his decision by analyzing the actual text of the statute and by comparing its language to other similar statutes. He also explicitly rejected the usage of legislative history and legislative purpose in arguing his position. Thus, this case is a striking example of Justice Scalia adhering to his textualist principles and demonstrates how early on in Justice Scalia's judicial career he was willing to follow these principles even if it meant an environmental victory.[56]

B. Dissent in PUD No. 1 v. Washington Department of Ecology

In *PUD No. 1 of Jefferson County*, the Supreme Court assessed whether a state could impose additional requirements to obtain a permit under the Clean Water Act ("CWA").[57] In this case, the State of Washington added a minimum stream flow requirement as part of the necessary certifications for building a hydroelectric power plant under the CWA.[58] The Supreme Court held that a state could, pursuant to § 401 of the CWA, condition certification of a project with a minimum stream flow requirement.[59] Justice Scalia signed on to Justice Thomas' dissent in this case.

The dissent based most of its argument on two portions of CWA section 401. First, section 401(a)(1) mandates that

> [a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting

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53. *Id.*

54. *Id.* ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently omits reference to generation.").

55. *See* Richard J. Lazarus & Claudia M. Newman, City of Chicago v. Environmental Defense Fund*: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 2–3, 19 (1995) (discussing Scalia's use of textualism in the case, which led to a victory for Environmental Defense Fund and ruled the "municipal waste combustion" was not exempt under RCRA); *Thirty Years of Environmental Protection Law*, *supra* note 33, at 63.

56. Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565, 598 (2005).

57. PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 703 (1994)

58. *Id.*

59. *Id.* at 723.

> agency a certification from the State in which the discharge originates . . . that any such discharge will comply with . . . applicable provisions of [the CWA].[60]

Second, section 401(d) of the CWA allows a state to place conditions on the permit including "effluent limitations and other limitations, and monitoring requirements" that may be necessary to ensure compliance with various provisions of the CWA and with "any other appropriate requirement of State law."[61] The dissenters argued that these two statutes must be read in harmony.[62] They believed that since section 401(a)(1) was limited to pollutants, section 401(d) should be similarly read to be limited to state laws related to discharges of pollutants. This led to the dissenters arguing, "a State may impose . . . only those conditions that are related to discharges."[63] Thus, Justices Scalia and Thomas would have ruled against Washington's mandatory stream flow requirement because it was unrelated to pollutant discharge.[64]

Interpreting the text in relation to other sections of a statute is a common statutory technique used by textualists.[65] However, the dissenters gave another reason for their opinion based on the majority's lack of "consideration to the fact that its interpretation of section 401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act."[66] This argument seems to have led Justice Stevens to concur simply to chide the dissent for hypocritically departing from the plain meaning of the text.[67] He stated that he found it surprising that textualist judges would go beyond the statutory text when "[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require."[68] His argument seems to suggest that Justices Thomas and Scalia allowed their own opinions on federalism to trump the apparent plain meaning of the CWA.[69]

Furthermore, Justice Scalia typically started with a "presumption against federal preemption of state law" in all settings, which can only be

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60. 33 U.S.C. § 1341(a)(1) (2012).
61. *Id.* § 1341(d).
62. *PUD No. 1*, 511 U.S. at 727 (Thomas, J., dissenting).
63. *Id.* at 728.
64. *Id.* at 724.
65. *See, e.g.*, Karkkainen, *supra* note 4, at 407–08 (discussing how Justice Scalia believes statutory terms must be understood in context).
66. *PUD No. 1*, 511 U.S. at 724.
67. *Id.* at 723 (Stevens, J., concurring).
68. *Id.*
69. *Id.*

overcome by a clear statement in the given statute.[70] For instance, in *American Insurance Association v. Garamendi*, Justice Scalia joined the dissent to argue that the Court incorrectly held that a California law designed to help California Holocaust survivors collect on unpaid insurance claims from German insurance companies was preempted by federal law.[71] Justice Scalia felt that "[c]ourts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws."[72] Justice Scalia's argument in this case—that the federal law preempts the state law—is thus somewhat unusual for him. However, this argument is not necessarily contradictory to Justice Scalia's judicial philosophy, because a clear statement in the text on preemption can overturn his previously stated starting presumption.

It is impossible to know whether the actual text or the federal-state balancing issue was the deciding factor for Justice Scalia. It does seem like the dissenters were skeptical of the regulation from the start since they wrote that "FERC must balance the Nation's power needs together with the need for energy conservation, irrigation, flood control, fish and wildlife protection, and recreation," while the "State environmental agencies, by contrast, need only consider parochial environmental interests."[73] This demeaning language indicates an inherent initial bias against this type of environmental regulation.[74] However, a large portion of their argument seems to be based on the actual text of the CWA. Overall, this case indicates that Justice Scalia, despite possible prejudice against strong environmental protection, still largely adhered to textualism in deciding environmental law cases.

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70. SCALIA & GARNER, *supra* note 26, at 290–94 ("A federal statute is presumed to supplement rather than displace state law."); *see also* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 554 (2013) (reviewing ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (discussing the Court's "presumption against federal preemption of state law" during Justice Scalia's tenure); Gregory v. Ashcroft, 501 U.S. 452, 461–64 (1991) (requiring courts to be "absolutely certain that Congress intended" the Federal Age Discrimination in Employment Act to displace state law before applying preemption).

71. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 430 (2003) (Scalia, J., dissenting).

72. *Id.* at 443.

73. *PUD No. 1*, 511 U.S. at 735 (Thomas, J., dissenting).

74. *See* 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, 1256 (1996) (discussing Justice Thomas's "palpable pro-development bias" when deciding on a FERC permit decision).

C. Majority in Babbit v. Sweet Home

Sweet Home represents another case in which Justice Scalia tried to use textualism to explain his argument but appears to have been actually swayed by background policy rationales. In this case, the Supreme Court looked at whether the Department of Interior ("DOI") had authority under the Endangered Species Act ("ESA") to prohibit logging activities in the natural habitat of two endangered species.[75] The ESA makes it illegal for any person to "take" an endangered or threatened species.[76] The ESA defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[77] DOI promulgated a rule further defining harm to include "significant habitat modification or degradation where it actually kills or injures wildlife."[78] Thus, whether the DOI had the authority to restrict the timber harvest depended on if the Court upheld its interpretation of "harm."

The majority held that "harm" was ambiguous and thus the agency was given *Chevron* deference to make a reasonable interpretation.[79] The Court further found that defining "harm," as including "significant habitat modification or degradation that actually kills or injures wildlife" was reasonable.[80] Thus, the Court upheld EPA's regulation. Justice Scalia dissented from this opinion.

Justice Scalia began his dissent by arguing that the majority's ruling "imposes unfairness to the point of financial ruin."[81] This opening, "which is entirely unsupported in the record,"[82] indicates that Justice Scalia disagreed with the decision to protect an endangered species over the economic interest of the timber industry. This value judgment goes against how Justice Scalia defined the function of the Court in *Burrage*. Specifically, he argued in that case that the "the role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might 'accor[d] with good policy.'"[83] According to Justice Scalia's own words, his judgment that the government should protect financial interest

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75. Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or., 515 U.S. 687 (1995). The two species in question are the red-cockaded woodpecker and the spotted owl. *Id.* at 696.

76. 16 U.S.C. § 1538(a)(1)(B) (2012).

77. *Id.* § 1532(19).

78. 50 C.F.R. § 17.3 (2012).

79. *Sweet Home*, 515 U.S. at 708.

80. *Id.*

81. *Id.* at 714 (Scalia, J., dissenting).

82. Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249, 296 (2003).

83. Burrage v. United States, 134 S. Ct. 881, 892 (2014).

over the interest of endangered species should not play any role in his decision-making.

After this introduction, Justice Scalia goes on to explain why harm does not include habitat modification or degradation using traditional textualist approaches. He used multiple dictionaries to explain how the phrase "to take" when referring to wild animals, "means to reduce those animals, by killing or capturing, to human control."[84] He explained how the ESA's definition of take expands the word slightly but just to make clear that the statute covers "not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process."[85] Furthermore, he argued that the word "harm" must be read in light of the other nine words in the definition,[86] which all deal with "affirmative conduct intentionally directed against a particular animal or animals."[87] Prohibiting habitat destruction does not fall within the category of direct conduct. *Noscitur a sociis*, the principle of defining a word in a list based on its shared attributes with the other words on the list, is a common technique of textualism.[88] Thus, these arguments seem to fit within Justice Scalia's typical textualist approach.

However, these textualist arguments are not the only rationale Justice Scalia relied upon in his opinion. He also argued that "no legislature could reasonably be thought to have intended" activities like farming and road building to be subject to strict liability penalties under the ESA.[89] However, he did not cite any evidence for this proposition. Conversely, in past decisions the Court has stated that Congress's intention when passing the ESA was to "halt and reverse the trend toward species extinction—whatever the cost."[90] This indicates that it would be reasonable to believe that Congress intended these activities to be covered by the ESA. Furthermore, Justice Scalia's attempt to "enter the minds of Members of Congress," when he said that a legislator passing this bill could not have intended this result, shows him using a statutory technique he has previously vehemently opposed.[91] He also seems to be making a value judgment on what the government should do to protect endangered species. Justice Scalia has repeatedly and adamantly written against judges deciding

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84. *Sweet Home*, 515 U.S. at 718–19.
85. *Id.* at 718.
86. The other words defining "to take" are "to harass . . . pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).
87. *Sweet Home*, 515 U.S. at 720.
88. United States v. Burke, 504 U.S. 229, 243 (1992) (Scalia, J., concurring).
89. *Sweet Home*, 515 U.S. at 721.
90. TVA. v. Hill, 437 U.S. 153, 184 (1978).
91. *Union Gas Co.*, 491 U.S. at 30.

cases based on judicial policy judgments.[92] This suggests that Justice Scalia is willing to rely on both legislative intent and economic arguments when he thinks it strengthens his argument.

Overall, this opinion is an example of Justice Scalia relying on both textualist arguments and his own policy judgments. He refers to the statutory text, structure, legislative intent, and economic principles in determining whether FWS reasonably construed the term "harm" in the ESA. However, he seems to be more influenced by the economic implications of the majority's ruling than the actual text of the statute. His view against "excessive government regulation" is starting to trump his stated textualist judicial principles.[93] Overall, Justice Scalia seems to have been greatly influenced by his own economic and policy ideas, but still relies heavily on the actual text in making his arguments.

III. JUSTICE SCALIA'S OPINIONS BETWEEN 2001–2016

In the new century, Justice Scalia has increasingly expressed his disdain towards the very concept of environmental regulation. In one opinion, he referred to greenhouse gases ("GHGs") as the substances that "[EPA] believes contribute to 'global climate change,'" suggesting that this is merely EPA's belief instead of an actual phenomenon.[94] In another opinion, he described the U.S. Army Corps of Engineers as "an enlightened despot" that tried to stretch the phrase "waters of the United States" "beyond parody."[95] This disdain has led him to relax his textualist principles when deciding environmental law cases. The following opinions demonstrate how Justice Scalia started to more selectively use textualist canons and instead rely more heavily on legislative purpose and history when writing opinions in environmental law cases. His desire for less strenuous environmental regulations seemed to overcome his interpretive principles.

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92. *See* SCALIA & GARNER, *supra* note 26, at 29 ("In the interpretation of legislation, we aspire to be 'a nation of laws, not of men.' This means (1) giving effect to the text that lawmakers have adopted and that the people are entitled to rely on, and (2) giving *no* effect to lawmakers' unenacted desires."); Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) ("A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.").

93. Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 590–92 (1998).

94. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2434 (2014).

95. Rapanos v. United States, 547 U.S. 715, 721, 734 (2006).

A. *Majority in* Entergy Corp. v. Riverkeeper, Inc.

The issue in *Entergy* was whether EPA could permit power plants to abstain from using the most environmentally safe "cooling water intake structures" on the grounds that the costs of these structures greatly exceeded their environmental benefits.[96] The relevant statutory language of the CWA requires that point sources use "the best technology available for minimizing adverse environmental impact" when deciding the "location, design, construction, and capacity of cooling water intake structures."[97] EPA chose to perform cost-benefit analyses when determining the best available technology ("BAT").[98] Justice Scalia, writing for the majority, upheld this use of cost-benefit analyses.[99]

In his opinion, Justice Scalia argued that BAT could mean either the technology that produces the "greatest reduction in adverse environmental impacts at a cost that can be reasonably borne by the industry," or the technology that "produces a good at the lowest per-unit cost, even if it produces a lesser quantity of that good than other available technologies."[100] Justice Scalia continued by arguing that this ambiguity means that EPA should be given deference to determine the meaning of BAT.[101]

Justice Scalia's argument seems to distort several key textualist counter arguments. The definition of BAT seems to turn on the word "minimize." The Merriam-Webster Dictionary defines "minimize" as "'to reduce or keep to a minimum'" and defines "minimum" as "'the least quantity assignable, admissible, or possible.'"[102] Taken together, "minimize" means to reduce or keep to the least quantity admissible or possible. However, Justice Scalia does not follow this definition, but instead proposed a new definition for minimize.[103] He argued that Congress' use of the modifier "drastic" in front of "minimize" in another part of the CWA demonstrates that "minimize" is not used in its full sense.[104] He asserted that if minimize really meant to reduce "to the smallest amount possible," then putting drastic before minimize would be superfluous.[105] According to Scalia,

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96. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 212–13 (2009).
97. *Id.* at 213 (citing 33 U.S.C § 1326).
98. *Id.* at 217–18.
99. *Id.* at 226.
100. *Id.* at 218.
101. *Id.* at 220–26.
102. Weston M. Cole, Entergy Corp. v. Riverkeeper, Inc.*: Cost Considerations and the Best Technology Available for Cooling Water Intake Systems*, 14 SUSTAINABLE DEV. L.J. 48, 59–60 (2011).
103. *Entergy Corp.*, 556 U.S. at 218.
104. *Id.* at 218–19.
105. *Id.*

because minimize cannot be defined as "the smallest amount possible" in that section of the CWA, it cannot mean "the smallest amount possible" in the disputed section of the CWA.[106]

After making this elaborate argument that statutes should be read uniformly, he ignored the fact that other provisions of the CWA explicitly mandate that EPA compare costs and benefits when defining the "best" technology that industry must adopt.[107] Adopting Justice Scalia's interpretive method, the absence in section 1326(b) of any reference to cost would seem to signal that Congress wanted cost to be considered in other parts of the CWA but not in this section. It seems disingenuous to define "minimize" by reference to the rest of the CWA, while ignoring other sections of the CWA that explicitly mandate the use of cost-benefit analyses. Justice Scalia used the rule against surplusage where it helped him, but rejected that canon when it was harmful to his ultimate policy goal.

Later on, Justice Scalia resorted to rhetoric by arguing that a cost-benefit analysis is necessary because otherwise EPA would have to require "industry [to] spend[] billions to save one more fish."[108] This exaggerated example appears to be based on Justice Scalia's personal opinion of how much value Congress should have put on clean water and healthy ecosystems. Overall, Justice Scalia seems to be willing to pick and choose when he follows certain textualist canons in order to reach his economic goals.

B. Dissent in EPA v. EME Homer

In 2014, the Court reviewed EPA's Transport Rule, which required cost-effective allocation of emission reductions among upwind states to improve air quality in polluted downwind areas under the Good Neighbor Provision of the Clean Air Act ("CAA").[109] The CAA requires EPA to set National Ambient Air Quality Standards ("NAAQS") at levels "requisite to protect the public health."[110] States have to create a State Implementation Plan ("SIP"), which is a federally enforceable plan for reducing in-state emissions to those levels.[111] The CAA recognizes that pollutants cross state lines and thus contains the Good Neighbor Provision, which requires states'

106. *Id.*
107. *Id.* at 241–42 (Stevens J., dissenting).
108. *Id.* at 226.
109. EPA v. EME Homer City Generation, 134 S. Ct. 1584, 1610 (2014).
110. *Id.* at 1594.
111. *Id.*

SIPs to prohibit in-state sources "from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other State."[112] To make this manageable for the states, "EPA employed a 'two-step approach' to determine when upwind States 'contribute[d] significantly to nonattainment.'"[113] In step one, EPA excluded any upwind states that contributed less than one percent of the NAAQS emission to any downwind state.[114] In step two, EPA created a cost-effective allocation of emission reduction among the remaining upwind states.[115] Thus, EPA allocates pollution reduction based on cost-effectiveness rather than on the state's contribution to downwind nonattainment.

A majority of the court upheld this regulation under *Chevron* deference.[116] The majority determined that the Good Neighbor Provision did not specify how responsibility for a downwind state's excess pollution should be allocated among contributing upwind states and that EPA reasonably filled in that gap.[117] Justice Scalia dissented from this opinion. He argued that the plain text of the CAA only allows EPA to consider pollution contribution when deciding reduction amounts.[118] Since the text is clear, *Chevron* deference should not be given and cost effectiveness should not be considered. Justice Scalia argued that if this proportionality approach is unworkable then the Good Neighbor Provision is simply inoperative.[119]

After making this textualist argument, Justice Scalia went on to argue that the "statute's history demonstrates that 'significantly' is not code for 'feel free to consider compliance costs.'"[120] Specifically, he explained that "the previous version of the Good Neighbor Provision required each State to prohibit emissions that would prevent attainment or maintenance by any other state of any [NAAQS]."[121] This was later changed to only require states to prevent air pollutants that "contribute significantly to nonattainment."[122] Justice Scalia argued that this change demonstrates that "significant" simply means, "to eliminate any implication that the polluting State had to be a but-for rather than merely a contributing cause of the downwind nonattainment or maintenance problem."[123] Thus, Justice

112. *Id.* at 1593 (citing 42 U.S.C § 7410(a)(2)(D)(i)).
113. *Id.* at 1596.
114. *Id.*
115. *Id.*
116. *Id.* at 1593.
117. *Id.* at 1603.
118. *Id.* at 1610 (Scalia, J., dissenting).
119. *Id.* at 1613.
120. *Id.* at 1612.
121. *Id.*
122. *Id.*
123. *Id.*

Scalia relied on the legislative history of the statute to explain why "significant" does not allow EPA to consider cost. In making this argument, Scalia had to guess why the word significantly was added to the statute. Scalia has made very clear "the quest for the 'genuine' legislative intent is probably a wild-goose chase."[124] Despite this belief, Justice Scalia went on a wild-goose chase to defend his definition of "significant" in this opinion.

At first glance, Justice Scalia's position may seem to be positive for environmentalists because he appeared to advocate that EPA should regulate without considering the cost. However, in reality this would likely lead to no regulation at all. The majority argued that the proportional-reduction approach that Justice Scalia advocated for "appears to work neither mathematically nor in practical application."[125] Justice Scalia refuted this claim but also stated that if his interpretation is actually unworkable the "statute would [simply] be inoperative."[126] Thus, Justice Scalia's opinion would have, at best, delayed EPA's ability to regulate air pollution under the Good Neighbor Provision and would, at worst, make it impossible for EPA to ever regulate under this provision.

Overall, Justice Scalia's dissent in *EME Homer* demonstrates his willingness to explore legislative history in environmental cases. His decision to deviate from a textualist approach seems to be based on his personal objections to the regulation. Justice Scalia was explicitly critical of EPA's motive and states, "this is not the first time EPA has sought to convert the Clean Air Act into a mandate for cost-effective regulation."[127] This argument was used to bolster his claim that "too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress.[128] However, Justice Scalia incorrectly remembered EPA's past arguments, because in *Whitman*, EPA actually argued the exact opposite of what Justice Scalia's dissent claimed.[129] The error indicates that in Justice Scalia's rush to prove that EPA has nefarious intentions, he failed to cite-check his own opinion. Justice Scalia seemed more concerned with criticizing EPA than with the actual legal argument he was making. This uncharacteristic mistake suggests that Justice Scalia has an inherent bias against EPA and the environmental regulations it promulgates.

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124. Scalia, *supra* note 6, at 517.
125. *EME Homer*, 134 S. Ct. at 1605.
126. *Id.* at 1613 (Scalia, J., dissenting).
127. Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 603–06 (2014) [hereinafter *Supreme Court Opinions*].
128. *EME Homer*, 134 S. Ct. at 1610 (Scalia, J., dissenting).
129. *Supreme Court Opinions*, *supra* note 131, at 604–05.

C. Majority in Utility Air Regulatory Group v. EPA

The Supreme Court limited the issue in *Utility Air Regulatory Group* ("*UARG*") to "whether EPA permissibly determined that its regulation of GHG emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit GHGs."[130] In deciding this question, the Court first had to understand the complicated legislative and judicial framework surrounding the CAA. In 2007, the Supreme Court held that GHGs were within the definition of "any air pollution," which meant that EPA had the authority to regulate GHGs from new motor vehicles if the agency found that GHGs "may reasonably be anticipated to endanger public health or welfare."[131] In 2009, EPA made this endangerment determination, leading it to promulgate a regulation for GHGs emitted from new motor vehicles, known as the Tailpipe Rule.[132] EPA argued that this Tailpipe Rule caused GHGs to become a pollutant "subject to regulation" which trigged the Prevention of Significant Deterioration ("PSD") and Title V permitting requirements in the CAA.[133] The PSD permit requires all major emitting facilities, defined "as any stationary source with the potential to emit 250 tons per year of 'any air pollutant' (or 100 tons per year for certain types of sources)," to implement the "best available control technology" for "each pollutant subject to regulation under [the CAA]."[134] Title V requires a "comprehensive operating permit" for stationary source with the "potential to emit 100 tons per year of 'any air pollutant.'"[135]

These triggering requirements created a problem for EPA because GHGs are emitted at a much greater level than other applicable pollutants, such as sulfur dioxide. Applying the regulation to those quantities of GHGs would require EPA to regulate small entities, such as schools and churches, which would place overwhelming costs on both those entities and EPA itself.[136] EPA's solution to this problem was to promulgate the Tailoring Rule, a three-step approach to focus permitting efforts on the worst GHG emitters.[137] First, EPA would only require permits from sources that would

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130. *Util. Air Regulatory Grp.*, 134 S. Ct.at 2438.

131. *Massachusetts*, 549 U.S. at 528–30 (citing 42 U.S.C. § 7521(a)(1)).

132. Laura King, *Changing Climate, Unchanging Act, Improvising Agency, Enabling Court: The Story of* Coalition for Responsible Regulation v. EPA, 37 HARV. ENVTL. L. REV. 267, 270–73 (2013).

133. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2447.

134. *Id.* at 2435 (citing 42 U.S.C.A. §§ 7475(a)(4), 7479(1)).

135. *Id.* at 2431, 2436 ("Title V of the Act makes it unlawful to operate any 'major source,' wherever located, without a permit. A 'major source' is a stationary source with the potential to emit 100 tons per year of 'any air pollutant.'") (internal citations omitted).

136. *Id.* at 2446.

137. *Id.* at 2437–38.

need permits for other air pollutants anyway ("anyway sources").[138] Second, EPA would require permits for other sources capable of emitting at least 100,000 tons per year of CO2-equivalent GHG emissions ("carbon dioxide only sources").[139] Third, EPA said it would consider whether to further reduce the permitting thresholds, established in the second step.[140]

Justice Scalia, writing for the majority, upheld step one but rejected steps two and three of this approach.[141] In effect, the regulation could still be applied to GHG emissions from sources that were already being regulated for other air pollutants, but not to sources that would only be regulated based on their GHG emissions. This holding had very little impact on the rule itself since EPA is still able to regulate eighty-three percent of all GHG emissions emitted from stationary sources, compared with the eighty-six percent it could have under EPA's original interpretation.[142] Justice Scalia asserted that this decision gave EPA "almost everything it wanted in this case."[143] While *UARG* may have had a limited impact on EPA's rule, it does illuminate Justice Scalia's inconsistent decision-making in environmental law cases.

Justice Scalia's decision to vote with the majority was unexpected. Given his rhetoric in *Massachusetts v. EPA*,[144] it was surprising that he did not sign on to Justice Alito's opinion denouncing the use of the CAA to regulate GHGs at all. Some scholars have suggested that Justice Scalia, who votes after the Chief Justice, voted with the majority after he realized that EPA would win a majority on the issue of whether BACT applied to GHG emissions from stationary sources already subject to regulation for other pollutants.[145] Justice Scalia may have chosen to vote this way in order to try to write the opinion in a way that would erode the pro-environmentalist decision in *Massachusetts v. EPA*.[146] This is exactly what

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138. *Id.* at 2437.
139. *Id.*
140. *Id.* at 2437–38.
141. *Id.* at 2449.
142. *Id.* at 2448–49.
143. Adam Liptak, *Justices Uphold Emission Limits on Big Industry*, N.Y. TIMES (June 23, 2014), http://www.nytimes.com/2014/06/24/us/justices-with-limits-let-epa-curb-power-plant-gases.html [https://perma.cc/L42C-XK3E].
144. *Massachusetts*, 549 U.S. at 560 (Scalia, J., dissenting) ("[T]he term air pollution as used in the regulatory provisions cannot be interpreted to encompass global climate change. Once again, the Court utterly fails to explain why this interpretation is incorrect, let alone so unreasonable as to be unworthy of *Chevron* deference." (internal citations omitted)).
145. Richard J. Lazarus, *The Opinion Assignment Power, Justice Scalia's Un-Becoming, and* UARG*'s Unanticipated Cloud over the Clean Air Act*, 39 HARV. ENVTL. L. REV. 37, 44–46 (2015) [hereinafter *The Opinion Assignment Power*].
146. *See id.* at 39. (explaining how Justice Ginsburg used her authoring power to "expansively reaffirm[] environmental plaintiffs' prior win in *Massachusetts v. EPA*" when writing a unanimous opinion in *American Electric Power Co. v. Connecticut*).

Justice Scalia did with this opinion. In *Massachusetts v. EPA*, the Court made clear that the term "any air pollutant" in the CAA covered GHGs.[147] However, in *UARG*, Justice Scalia stated that the Court only decided that GHGs are within the definition of "air pollutants" in CAA for motor vehicle emissions,[148] deftly narrowing where the term "any air pollutant" must include GHG emissions.[149]

After determining that this phrase is ambiguous in the PSD and Title V permitting sections, Justice Scalia held that EPA's interpretation of "any air pollutant" was unreasonable using a *Chevron* Step-Two analysis.[150] Justice Scalia argued that EPA's interpretation is "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[151] The idea of requiring a "clear statutory authorization" for an agency to act seems contrary to the long-standing principle of *Chevron* deference.[152] The Supreme Court has previously made clear that agencies cannot alter the fundamental details of a regulatory scheme based on vague statutory terms because, as Justice Scalia famously said, Congress does not "hide elephants in mouseholes."[153] For instance, in *Whitman*, Justice Scalia examined section 109(b)(1) of the CAA, which instructs EPA to set standards, "which . . . are requisite to protect the public health" with "an adequate margin of safety," and found that the phrases "adequate margin" and "requisite" did not authorize EPA to consider cost when setting safety standards.[154] This argument is based on the idea that Congress would not have hidden an elephant (cost consideration) within a mouse hole (the phrases "adequate margin" and "requisite").[155]

However, in *UARG*, Justice Scalia seems to be arguing that an agency cannot interpret a broad term to include anything that has a "vast 'economic and political significance.'"[156] Unlike in *Whitman*, the phrase at issue in this

147. *Massachusetts*, 549 U.S. at 528–29.
148. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2431.
149. *Id.*; *The Opinion Assignment Power*, *supra* note 150, at 46.
150. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442–46.
151. *Id.* at 2444.
152. Christine Kexel Chabot, *Selling* Chevron, 67 ADMIN. L. REV. 481, 506 (2015). This case differs from *Brown-Williamson*, because in that case the Court ruled under *Chevron* Step-One that Congress had not delegated to FDA the power to regulate tobacco products, but this case was decided in *Chevron* Step-Two. *See* Amanda C. Leiter, Utility Air Regulatory Group v. EPA*: A Shot Across the Bow of the Administrative State*, 10 DUKE J. CONST. L. & PUB. POL'Y 59, 79 (2014) (Scalia and other justices refused to grant straight deference as is normally the standard for the *Chevron* two-step analysis).
153. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).
154. *Id.* at 464 (citing 42 U.S.C. § 7409(b)(1)).
155. *Id.* at 464, 468.
156. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

case is broad by definition and, on its face, covers the contested interpretation.[157] However, Justice Scalia found a reason to narrow the application of "any air pollutant" to not cover anything with "vast 'economic and political significance.'" Following his previous analogy, Justice Scalia seems to have suggested that Congress could not have meant to hide an elephant (regulation of GHG emissions) in a zoo (the phrase "any air pollutant"). However, this decision to essentially narrow an agency's powers, because the Court believes that Congress misguidedly granted it too broadly, goes against Justice Scalia's traditional judicial philosophy. In fact, Justice Scalia has repeatedly made clear that if "Congress has made a mistake" with the language of a statute, it is Congress, not the Court, that has to correct it.[158]

Overall, Justice Scalia's opinion in *UARG* shows the length that he is willing to go in order to narrow previous environmental victories in the Court. It also demonstrates that he is willing to limit what falls within *Chevron* deference if it helps him get the result he wants to reach in an environmental case. More specifically, Justice Scalia gave himself the power to "correct" Congress' overly broad delegation of power to an agency.

D. Majority in Michigan v. EPA

The most recent environmental case decided by the Supreme Court, *Michigan v. EPA*, represents Justice Scalia's clearest departure from textualism. This case dealt with whether EPA had to consider cost when deciding to regulate hazardous air pollutants emitted by electric utilities.[159] CAA section 7412 requires EPA to determine whether it is "appropriate and necessary," to regulate hazardous air pollutants from power plants.[160] Based on several studies, EPA concluded that it was appropriate and necessary to regulate coal- and oil-fired plants.[161] EPA did not consider the cost of

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157. *See Massachusetts*, 549 U.S. at 528–29 (holding that "any air pollutant" unambiguously includes GHG emissions).

158. Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring); *see also* King v. Burwell, 135 S. Ct. 2480, 2504 (2015) (Scalia, J., dissenting) ("This Court, however, has no free-floating power 'to rescue Congress from its drafting errors.'").

159. Michigan v. EPA, 135 S. Ct. 2699, 2704 (2015).

160. *Id.* at 2704–05

161. *Id.* EPA determined that regulating was "'appropriate' because (1) power plants' emissions of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce these emissions. It found regulation 'necessary' because the imposition of the Act's other requirements did not eliminate these risks." *Id.* at 2705.

regulation during this first stage, but did consider cost at the second stage, when determining the actual emission standard.[162]

Justice Scalia, writing for the majority, held that EPA acted unreasonably by not considering cost in the first stage.[163] Justice Scalia came to this conclusion by applying the *Chevron* doctrine.[164] Under *Chevron* step-one, the Court looks to whether the text of the statute, in this case the word "appropriate," is ambiguous.[165] In most cases, Justice Scalia started his analysis of a word by turning to dictionaries.[166] However, in this case, Justice Scalia stated, "one does not need to open up a dictionary" in order to determine the meaning of "appropriate."[167] Instead, he simply asserted that the word appropriate is a "classic broad and all-encompassing term."[168]

It was quite uncommon for Justice Scalia to find that a statute is ambiguous under the *Chevron* framework.[169] Textualism is based on the idea that there is a specific meaning to every word of a statute. Thus, it is unusual for textualists, like Justice Scalia, to find the "requisite ambiguity in the statutory text necessary to bring the *Chevron* principle into play."[170] In fact, Justice Scalia himself stated that it is "relatively rare that *Chevron* will require [him] to accept an interpretation which, though reasonable, [he] would not personally adopt."[171] Thus, it was atypical for Justice Scalia to find a statute ambiguous and even more unusual for him to determine that so quickly and without analyzing any dictionary definitions.

After breezing by *Chevron* step one, Justice Scalia focused on step two, which is whether EPA's interpretation was reasonable.[172] He argued that "appropriate" must require at least some attention to cost in the present context.[173] He does not cite anything to support this assertion, but instead argued that it would not be rational "to impose billions of dollars in

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162. *Id.* at 2714–15 (Kagan, J., dissenting).
163. *Id.* at 2711–12.
164. *Id.* at 2706–07.
165. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
166. *See* Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 87 (2010) (showing that Justice Scalia cited a dictionary as a source in forty opinions from 2000 to 2010); *see, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225–26 (1994) (citing several dictionaries in his *Chevron* analysis); Johnson v. United States, 529 U.S. 694, 715–16 (2000) (Scalia J., dissenting) (citing dictionaries to define "revoke").
167. *Michigan*, 135 S. Ct. at 2707.
168. *Id.*
169. *See* Karkkainen, *supra* note 4, at 460 (explaining how Justice Scalia's record shows that he is not very likely to find ambiguity under *Chevron*).
170. *Id.*
171. Scalia, *supra* note 6, at 521.
172. *Michigan*, 135 S. Ct. at 2707.
173. *Id.*

economic costs in return for a few dollars in health or environmental benefits." [174] Justice Scalia simply disagreed with EPA's regulatory decision. This type of decision-making directly contravenes his stated position that "no matter how important the underlying policy issues at stake, the Court has no business substituting its own desired outcomes for the reasoned judgment of the responsible agency."[175] It seems quite at odds with both textualism and *Chevron* jurisprudence to hold that "appropriate" is ambiguous but still requires EPA to consider cost.[176]

Justice Scalia went on to concede "there are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost."[177] However, he argued that in this particular situation, "[a]gencies have long treated cost as a "centrally relevant factor when deciding whether to regulate."[178] This argument seems counter to Scalia's traditional approach in two ways. First, Justice Scalia has repeatedly found that agencies can change their minds in how they interpret their own regulations.[179] This regularly happens because priorities and approaches drastically change with different administrations. Thus, it seems atypical for Justice Scalia to use the fact that an agency has considered cost important in the past as a reason it must consider cost in the present.

Second, this idea is inconsistent with Scalia's majority opinion in *Whitman*. In that case, Scalia made clear that Congress must make a textual commitment for cost consideration to be mandatory.[180] Justice Scalia indirectly admitted to a lack of textual commitment in *Michigan* by deciding this case on the second step of *Chevron* because that means the statute was ambiguous about cost. Thus, Justice Scalia ironically finds that Congress hid an elephant (cost consideration) in a mouse hole (the word "appropriate").[181] Furthermore, the language at issue in *Michigan* is very similar to the language at issue in *Whitman*. It seems disingenuous to argue that EPA cannot consider cost when setting NAAQS "requisite to protect

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174. *Id.*

175. *Massachusetts*, 549 U.S. at 560.

176. Andrew M. Grossman, Michigan v. EPA*: A Mandate for Agencies to Consider Costs*, 2015 CATO SUP. CT. REV., 281, 284 (2015).

177. *Michigan*, 135 S. Ct. at 2707.

178. *Id.*

179. *See, e.g.*, Auer v. Robbins, 519 U.S. 452 (1997) (giving deference when the Secretary of Labor interpreted his own regulations); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 295 (2009) (Scalia, J., concurring). However, in recent years Justice Scalia has argued that an agency should not get deference when it changes its interpretation. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring).

180. *Whitman*, 531 U.S. at 468.

181. *See id.* at 468 ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

public health," but that EPA must consider cost when deciding if it is "appropriate and necessary" to regulate after considering the results of public health studies. In both provisions, Congress was explicitly concerned with the health impacts of air pollution and makes no mention of considering cost. It is unreasonable to simultaneously argue that one standard requires EPA to consider cost while the other bans the consideration of cost.

In general, Justice Scalia sharply departed from his regular textualist practices and his own past jurisprudence in *Michigan v. EPA*. Instead of using dictionaries and the actual text, he relied on context and his own economic principles and political ideas. Justice Scalia ended his career on the Court seemingly more concerned with ensuring that environmental regulations are not overly burdensome than with following his textualist ideals.

CONCLUSION

In death, Justice Scalia has been described as one of the "most influential jurists in American history,"[182] in part for the textualist principles he brought to the Court.[183] Justice Kagan believes that "[h]is views on interpreting texts have changed the way [the Court] think[s] and talk[s] about the law."[184] There really is no disputing the influence his strong presence and quick wit had on both statutory interpretation and the law generally. However, Justice Scalia did not always apply the textualist principles that he so strongly advocated for during his three decades on the Court.

Over time, Justice Scalia increasingly shifted away from textualism in environmental law cases. He instead began to rely on both legislative intent and economic arguments. For instance, in *Entergy*, he highlighted the absurdity of spending a "billion to save one more fish" as a rationale for finding the word "minimize" ambiguous. Again, in his opinion in *Michigan*, Justice Scalia used financial rationales to argue that "appropriate" requires EPA to consider cost. These cases demonstrate how Justice Scalia started to use his own beliefs about the worth of environmental statutes to decide cases. Instead of defining the words of the

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182. Dean Martha Minow, *Antonin Scalia '60 (1936-2016)*, HARV. L. TODAY (Feb. 20, 2016), https://today.law.harvard.edu/antonin-scalia-60-1936-2016 [https://perma.cc/3MWE-F8H4].

183. *See e.g.*, Feldman, *supra* note 3.

184. Robert Barnes, *How the Other Justices Remember Antonin Scalia*, WASH. POST (Feb 14, 2016), https://www.washingtonpost.com/politics/courts_law/how-the-other-justices-remember-antonin-scalia/2016/02/14/30a53ae4-d34b-11e5-9823-02b905009f99_story.html [https://perma.cc/N4V9-P8U6].

statute to determine how an agency can act, Justice Scalia began by selecting his own desired outcome, and then defining the disputed statutory terms to dictate that outcome.

Justice Scalia's desire to limit environmental regulation became more apparent in his rhetoric as well. He often seemed incredulous of the goals of environmental regulations, and indignant about their financial implications. Justice Scalia became more concerned about the policy implications of "overly burdensome" environmental regulation than about evenhandedly applying his strict textualism to statutory interpretation of environmental statutes. By the end of his career, Justice Scalia appeared to be more focused on outcomes than statutory principles in environmental cases, in violation of his own famous maxim that "[n]o matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency."[185]

185. *Massachusetts*, 549 U.S. at 560.