Reading the Clean Air Act After Brown & Williamson

Michael Herz

Benjamin N. Cardozo School of Law, herz@yu.edu

Follow this and additional works at: https://larc.cardozo.yu.edu/faculty-articles

Part of the Law Commons

Recommended Citation

Available at: https://larc.cardozo.yu.edu/faculty-articles/355

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact christine.george@yu.edu, carissa.vogel@yu.edu.
Reading the Clean Air Act After Brown & Williamson

by Michael Herz

I. Introduction

Smoking is not considered an environmental issue. Congress has kept the U.S. Environmental Protection Agency (EPA) out of the tobacco regulation game by excluding tobacco from coverage under the statute otherwise most appropriate for that use, the Toxic Substances Control Act, and EPA's halting steps toward regulation of secondhand smoke have hit a judicial roadblock. Nonetheless, tobacco lurks on the fringes of environmental law and policy—not least because, as the single most significant threat to public health, it provides a benchmark against which environmental risks are often measured (usually by those arguing against regulating those risks). Now federal tobacco regulation has led to a judicial decision of potentially great significance for environmental lawyers: Food & Drug Administration v. Brown & Williamson Tobacco Corp. Though not an "environmental case" as such, Brown & Williamson holds important lessons for environmental law and litigation.

After a brief description of the opinions in the case, I will comment on two aspects of the decision of particular importance to environmental lawyers: the Court's handling of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. and its reliance on post-enactment developments in interpreting a statute.

II. The Court's Decision in Brown & Williamson

The Federal Food, Drug, and Cosmetic Act (FFDCA) authorizes the Food and Drug Administration (FDA) to regulate "drugs" and "devices." Throughout almost its entire history, the FDA took the position that tobacco cigarettes were neither a drug nor a device and that it lacked authority to regulate them. In 1996, it flipped. Asserting that nicotine is a "drug," it issued regulations prohibiting the sale of cigarettes to minors and regulating other activities that were likely to promote or facilitate smoking among minors. The regulations were challenged by tobacco manufacturers, retailers, and advertisers on the ground that the statute simply does not extend to tobacco products. The U.S. District Court for the Middle District of North Carolina upheld the regulations; the U.S. Court of Appeals for the Fourth Circuit reversed; and the U.S. Supreme Court affirmed, concluding that the FFDCA does not grant the FDA jurisdiction over these products.

In an opinion by Justice O'Connor, the five-Judge majority (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) concluded that Congress had precluded FDA regulation of tobacco. Although acknowledging that the agency's position rested on a plausible reading of the actual text of the statute, the majority emphasized the importance of context in statutory interpretation and examined the statute as a whole and the overall legislative scheme. It made two basic points. First, as it read the statute, if the FDA had jurisdiction over tobacco, it would have no choice but to ban tobacco products, but Congress had expressly precluded such a step. Therefore, tobacco products "simply do not fit" within the FFDCA scheme and the agency's reading of the statute was nonsensical. Second,
the Court emphasized Congress' actions, and inaction, regarding the regulation of tobacco since 1965—a period long after the passage of the FFDCA. It noted Congress' repeated consideration and rejection of bills that would have given the FDA jurisdiction over tobacco, its "specific intent" in six pieces of legislation directly addressing tobacco, and the fact that all such legislation was enacted against the background of and in reliance on the FDA's assertion that it could not regulate tobacco. According to the majority, this added up to more than "simple inaction by Congress that purportedly represents it acquiescence in an agency's position"; rather, through actual legislation, Congress had "effectively ratified the FDA's previous position." 14

Finally, the majority turned to Chevron. As the first two sections of the opinion presaged, it declined to defer to the agency's interpretation, staying squarely in Chevron's step one. It had two complementary reasons for doing so. First, for the reasons summarized above, it thought the statute was clear and dispositive. Second, the Court was unwilling to treat whatever ambiguity there might be (and it was unwilling to admit there was much) as an implicit delegation given the nature of the issue. It deemed it unlikely that Congress would have delegated such a momentous, politically charged, and consequential decision to the FDA, at least not without a clearer and more direct statement. 15 Relying on an idea generally associated with Justice Breyer, and citing an article by him, 16 the Court noted that whether Congress has delegated decisionmaking authority to an agency turns in part on the nature and importance of the issue; the more significant the issue, the less likely that Congress has handed it to an agency.

Writing for the four dissenters—Justices Stevens, Souter, Ginsburg, and Breyer—Justice Breyer took the opposite tack on each of the three parts of the majority's opinion. He briefly made the point that the language and purpose of the FFDCA supported the FDA's assertion of jurisdiction. 17 This is hard to quarrel with, and the majority had not done so. Justice Breyer then turned to the majority's reasons for ignoring the natural reading of the statute. First, he offered a reading of the statute under which the FDA could regulate tobacco without banning it, thereby avoiding the majority's conundrum that the only permissible regulatory action was in fact impermissible. 18 Second, he expressed grave doubts about relying on later congressional inaction or enactments to understand existing statutes. Emphasizing that Congress had never directly come to grips with the question of FDA authority, he observed that after the FDA had asserted jurisdiction Congress considered but failed to enact legislation to deny it such authority. Thus the legislative record was, in Breyer's slightly peculiar phrase, "critically ambivalent." 19 Finally, Justice Breyer argued that changes in available information—both as to the activities of the tobacco companies and as to scientific understanding—along with a policy change accompanying a change of presidential administration, amply justified the FDA's shift in position. 20

Justice Breyer cited Chevron, but only in passing, and his arguments rest much more on the FFDCA itself than on a pitch for deference. At times he uses the language and concepts of Chevron step two, asserting that the FDA's interpretation was not "unreasonable" and emphasizing the policymaking freedom and democratic accountability of the agency. 21 But much of the opinion is devoted to refuting the majority's interpretation of the Act directly and concluding that, correctly interpreted, the FFDCA itself grants the FDA the asserted authority. And Justice Breyer seems almost intentionally to eschew the "step one" and "step two" language and dichotomy. If one were to impose that vocabulary onto the opinion, one would say that Justice Breyer concluded: (a) that this was a Chevron step one case because the statute gives the FDA authority to regulate tobacco, and (b) that the statute is at most ambiguous and therefore, under step two, the Court had to defer to the agency's reasonable interpretation. 22 But that is not what Justice Breyer himself says.

III. Understanding Brown & Williamson

The opinions in Brown & Williamson invite two sorts of obvious criticisms. The first is that the Court ignored Chevron and failed appropriately to defer to the FDA. 23 For example, support FDA's conclusion that, given the overwhelming evidence that the nicotine in tobacco products is intended to be used to sustain addiction and as a sedative, stimulant, and appetite suppressant, tobacco products are drug-delivery devices within the meaning of the FDCA. At the very least, FDA's conclusion is based on "a permissible construction" of the Act. Ibid.


14. Id. at 1306-14.
15. Id. at 1314-15.
16. Id. (citing Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363 (1986)).
17. Id. at 1316-19 (Breyer, J., dissenting).
18. Id. at 1322-26.
19. Id. at 1326.
20. Id. at 1328-30.
21. Id. at 1320-21, 1328-31.
22. This was the approach taken by the government. In its reply brief, for example, the FDA asserted:

The relevant indicia of congressional intent . . . do not come close to establishing that Congress "directly addressed the precise question at issue" and "unambiguously expressed [its] intent" that tobacco products fall outside the reach of the FDCA. 467 U.S. at 843. To the contrary, the text, legislative history, and administrative interpretation of the Act strongly
writing in a previous issue of the *Environmental Law Reporter*, Jim O'Reilly entitled his Article about the decision "Chevron Goes Up in Smoke" and asserted that the Court "distort[ed] the Chevron standard." 24 And, before the Fourth Circuit or the Supreme Court had ruled, Cass Sunstein wrote a nuanced defense of the FDA's regulation that emphasized *Chevron* and the role of agencies in refining and updating congressional enactments. 25 My own view is that the Court's *Chevron* analysis was basically correct and consistent with its own past practice. Right or wrong, both the majority and the dissenting opinions have important lessons for the future application of *Chevron*, which I explore in Part III.A.

The second predictable criticism of the Brown & Williamson opinions concerns the methodology of statutory interpretation. In this era of struggle between "textualists" and "intentionalists," it is striking that the Court's more conservative members—including, without a separate concurrence, Justice Scalia—joined an opinion that virtually ignores the text of the provision at issue. The Court instead rests on a "clear" congressional "intent" that is "expressed in the FFDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FFDCA," 28 but, awkwardly, not in the directly applicable text itself. At the same time, the more liberal members of the Court, including the two leading proponents of a reliance on legislative history, Justices Stevens and Breyer, 27 here sound like Scalian formalists, both in style and substance, adumbrating that "a legislative atmosphere is not a law, unless it is embodied in a statutory word or phrase." 29

Whatever the merits of one interpretative approach over the other, there has been some convenient trading of methodologies here, which I explore in Part III.B. Beyond that, the Court's reliance on post-enactment developments has direct relevance to at least one critical environmental issue that is now being litigated: the question whether EPA must consider costs in setting national ambient air quality standards (NAAQS). I turn to that issue in Part IV.

A. The Application and Scope of Chevron in and After Brown & Williamson

At the time it was decided, and in the ensuing years, *Chevron* was seen as a blow to environmental groups. The specific regulation upheld by the Court—applying the "bubble policy" to new source review requirements in nonattainment areas—had been a Reagan Administration initiative, reversing the ostensibly more environmentally protective position that had been taken by the Carter Administration. More broadly and importantly, the message of strong judicial deference to agency decisions that the *Chevron* decision contained, or that the lower courts later discovered in it, was threatening to environmental groups. In the eyes of environmentalists, the deferential stance would lead to the loss of hard-won congressional gains because the federal judiciary consisting primarily of Democratic appointees would yield to Republican agency preferences rather than interpreting and enforcing largely Democratic statutes themselves.

I was an attorney with the Environmental Defense Fund in the mid-1980s, and I recall more than one worried strategy discussion among lawyers for environmental groups working on briefs that actually supported a particular agency decision. There was real concern that any reliance on *Chevron* might help win the battle but would ultimately lead to losing the war. It seemed clear to us that, because the agency was the usual opponent, the environmentally preferable approach was to downplay *Chevron* in order to preserve a strong judicial role in overseeing agency decisionmaking and enforcing congressional decisions. And surely the first generation of *Chevron* articles—in which conservatives embraced and liberals attacked the decision—can be suspected of being motivated (at least a little, if only subconsciously) by the authors' substantive preference for the outcomes they expected from the judiciary as opposed to those they expected from agencies.

How times have changed. With a federal judiciary at least until recently dominated by Reagan and Bush appointees, a Republican Congress, and a Democratic administration, the constellation of players and forces has completely shifted. Now a strong reading of *Chevron* means greater agency autonomy, which means more vigorous regulation. As a result, the endorsements and attacks on strong deference are coming from opposite quarters. 29

1. The Supreme Court's *Chevron* Analysis in Brown & Williamson

This realignment was nowhere more clear than leading up to, and in the wake of, the tobacco case. As in *Chevron* itself, though in a more consequential and visible setting, the tobacco case arose because a federal agency had abandoned a prior policy and adopted a new reading of its statute. This time, however, the new reading delighted activists and dismayed the regulated community, as it promised significant new regulatory burdens rather than increasing the flexibility of existing ones. Citing *Chevron*, but not in fact deferring to the agency, the Court held that the agency's action was inconsistent with the statute. As a result, some have celebrated the decision for its antiregulatory effects. One lawyer for the prevailing side has written that "[t]obacco companies are not the only beneficiaries of the decision," which "also promises relief to other victims of over-zealous agency regulation whose statutory challenges too often founder on

---


26. 120 S. Ct. at 1297.


28. 120 S. Ct. at 1331.

29. As this is written, the November 2000 election has yet to occur; it could, of course, again realign the players.
That assessment should be modified slightly. Brown & Williamson promises relief to those affected by over-zealous agency action—whether it be regulation or deregulation—where “over-zealous” is defined as “inconsistent with the relevant statute.” But in asserting meaningful judicial oversight, Brown & Williamson is not new. Rather, while inconsistent with much of the received wisdom about Chevron, the Court’s approach is consistent with a proper reading of that decision.

Certainly Brown & Williamson is consistent with the Supreme Court’s actual practice, which has been consistently nondeferential. Professor Thomas Merrill has confirmed this general impression: the Supreme Court has not been more deferential to agency interpretations since Chevron was decided than it was before. Sometimes the Court cites Chevron but does not defer, as in Brown & Williamson; other times it does not even cite Chevron.

The Court’s apparent failure to follow its own teachings can give rise to two responses: either we can shake our heads about the Court’s lack of self-restraint, or we can wonder whether we have misunderstood the supposedly neglected teachings. I would suggest that the latter is the case. The Court’s actual practice, while no doubt inconsistent in its specifics and from time to time in error, overall reflects the appropriate understanding of Chevron. In Brown & Williamson, all nine Justices were trying to determine the better reading of the statute. That was not self-evident. Statutory meaning is never self-evident in a case that makes it all the way to the Supreme Court. (And what better proof, or definition, of “ambiguity” can there be than a 5-4 division among Supreme Court Justices?) But not one of the Justices seemed to think that such “ambiguity” triggered step two of Chevron and required deference to the agency. Rather, both the majority and the dissent grappled with text, purpose, history, common sense, and legal context—in Chevron’s terms, “the traditional tools of statutory construction”—to reach a conclusion as to the statute’s meaning.

To be more precise, all nine Justices were trying to determine the statutory boundaries on agency action. Five Justices thought that the FFDCA precluded FDA regulation of tobacco; that is a Chevron step-one inquiry. The four dissenters concluded that the statute allowed but did not require FDA regulation of tobacco. That is also a step-one inquiry. The case illustrates the simple proposition that in any case of administrative action under statutory limits, a court must determine the boundaries of agency authority. “Congress may have given an agency lots of room or almost none, but the boundaries are by definition set by Congress and hence for judicial identification.”

Consider in this regard Justice Breyer’s discussion of the FDA’s flip-flop as to its authority to regulate tobacco. Majority and dissent correctly agree that an agency’s reversal does not defeat or dilute Chevron deference. But Justice Breyer attacks the majority for nonetheless holding the FDA to its initial interpretation, despite what he argues are more than ample reasons for the flip-flop. Just as the majority had cited Justice Breyer’s article against him, so here Justice Breyer invokes Chief Justice Rehnquist’s well-known separate opinion in the air bags case. In that opinion, then-Justice Rehnquist had defended shifts in agency policies that followed on the arrival of new presidential administrations: “As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.” But Justice Breyer is not exactly hoisting the majority on its own petard here. It is a complete response to Justice Breyer to italicize the opening qualifier: as long as the agency remains within the bounds established by Congress. Whether the agency has done so is always, and by definition, a judicial, step-one inquiry. The Brown & Williamson majority concluded that the agency had overstepped those bounds.

Whether the majority was correct in that conclusion, I do not know. But at the level of methodology, there was nothing striking or untoward about the opinion. Indeed, viewing Brown & Williamson in Chevron terms, there was no significant disagreement; the majority and the dissent adopted essentially the same methodology, they just disagreed about what the statute meant.

2. The Scope of Chevron After Brown & Williamson

So where does that leave us with regard to Chevron’s scope?


35. See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1313 (2000) (“Certainly, an agency’s initial interpretation of a statute that it is charged with administering is not ‘carved in stone.’”) (quoting Chevron, 467 U.S. at 863, 14 ELR at 20514); id. at 1328 (Breyer, J., dissenting) (“[T]he FDA’s change of positions does not make a significant legal difference.”). Chevron itself, of course, involved a new and contradictory agency position that merited “Chevron deference.”

Three central, recurrent, and related issues arise with regard to the scope of step one. First, does mere ambiguity or uncertainty as to statutory meaning trigger step two? Second, if so, how compelling must a particular interpretation be to keep a court from deferring? Must Congress really have addressed "the precise question at issue," or might a court conclude that Congress came close enough for government work? How clear is clear? Is it enough that a court feels confident that it has identified the "better" of two or more plausible readings, or must it be convinced that there is only one plausible interpretation? Third, what materials should a court examine in making that determination? Should it examine only "the plain language of the statute," or should it consider other sources of statutory meaning, such as legislative history, purpose, or policy, as it did in *Chevron* itself? Brown & Williamson helps answer these questions.

First, the Court confirms that ambiguity itself can be an implicit delegation of decisionmaking authority to the agency triggering step two. This approach is mistaken, I think, but I am not the Supreme Court.

Second, it has little directly to say on the "how clear is clear" question, which is by its nature frustratingly hard to pin down. There is no metric for quantifying statutory clarity and no mechanism for policing judicial assertions that a disputed text is "clear." Judges tend to be, or at least pretend to, pretty confident in their conclusions. Hence the not-so-rare-as-one-might-think phenomenon of all judges in a case agreeing that a statute is clear but disagreeing as to what it clearly means. For what it is worth, two conflicting hints can be found in the majority opinion. On the one hand, it at least purports to set the bar of clarity rather high. It expressed little doubt and was confident that it had found the "clear intent" of Congress. On the other hand, the statute undeniably was ambiguous, given the conflict between text and context, but the majority stayed in step one notwithstanding.

Much more importantly, the majority emphasized a second variable besides the clarity, or lack thereof, of the statute: an inquiry into "the nature of the question presented." In some cases, apparently, a particular level of ambiguity will trigger step two, and in some cases it will not. Whether it does so depends on whether it makes sense to presume that Congress has indeed handed over the decisionmaking authority to the agency. "[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." The Court's language and approach suggest that it will not defer under *Chevron* on major, politically salient issues, even if the statutory language is unclear. Put differently, *Chevron* deference hinges on a policymaking delegation, and while the requisite delegation can sometimes be found simply through Congress' use of vague language, such an implicit delegation will be found only for minor, interstitial questions.

Finally, with regard to the materials to be consulted within step one, it is notable that all nine Justices operated within a very broad step one, in which they looked well beyond the language, plain or otherwise, of the provision at issue. As in *Chevron* itself, the "traditional tools of statutory interpretation" were broadly understood. In *Chevron*, the Court deferred only when those tools proved fruitless; in Brown & Williamson it did not need to defer because those tools provided a satisfactorily firm answer. I consider just what those tools were in the next section. For present purposes, the point is simply that they go far beyond the language of the text. The step-one mansion has many rooms.

### B. Acquiescence, Ratification, and Post-Enactment Legislative History

The striking feature of the majority’s opinion is its reliance on legislative developments that came after passage of the directly applicable statute. The individual Justices in the Brown & Williamson majority are usually wary about relying on legislative history generally, and post-enactment legislative history in particular, and have shied away from the idea of legislative acquiescence or ratification of judicial or administrative interpretations.

What effect should actions taken by a legislator or a legislature after a statute is enacted have on our understanding of that statute? Two polar positions are easily identified. At one extreme, legislative action or inaction subsequent to enactment simply has no bearing whatsoever on the statute’s meaning; at the other, interpreters must be continually alert to current legislative understandings or preferences. Courts tend to fall between these poles in practice, although closer to the first.

In part, the magnetic pull of these poles depends on exactly what kind of evidence of post-enactment legislative understanding is at issue. Statements by an individual legislator, or even a committee, about the meaning of a past enactment are almost always rejected out-of-hand and are generally seen as the weakest sort of indication of legislative in-

---

37. *Chevron*, 467 U.S. at 842, 14 ELR at 20508.
38. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520-21 (predicting that *Chevron* battles would turn on the question of "how clear is clear").

> Of course I can—as can any judge—always determine which of the parties has the better interpretation of a statute, but as I understand and appreciate *Chevron*, it imposes a discipline on judges to stop and ask ourselves this question: if we, as counselor for the petitioner or general counsel of the agency, had been asked to write an opinion letter on the applicability of the statute to the facts, what would it have looked like—would we have told our client it was a relatively close question?
40. See, e.g., National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) ("If the agency interpretation is not in conflict with the plain language of the statute, deference is due.").
41. *Chevron*, 467 U.S. at 851-54, 862-64, 14 ELR at 20511, 20513-14.
43. Id. at 1315.
tent. Thus, in Environmental Defense Fund v. City of Chicago, which held that the Resource Conservation and Recovery Act’s household waste exemption does not apply to ash from waste-to-energy incinerators, the plaintiffs relied on letters from an individual U.S. representative and six U.S. senators to the EPA Administrator. Appearing more than three years after the relevant provision had been enacted (and, suspiciously and surely not coincidentally, on the same day), the letters set out their authors’ view that Congress had not exempted ash from subtitle C regulation. While agreeing with this reading of the statute, the court of appeals dismissed the letters as simply irrelevant: “post-enactment statements, such as we have here, bear no necessary relationship to the forces at work at the time of enactment, the preferences of the enacting legislator and his or her constituency, and the impact of pressure groups.”47 This disdain for post-enactment legislative history is typical.48

It is important to see why this is the standard approach. The essential concern with post-enactment legislative history of this sort is its reliability. There is almost no reason to trust, and every reason to be suspicious of, the individual member of Congress who says “this is what we meant five years ago.” Given the passage of time, the incentive for strategic deception of others and of oneself, the absence of any check on or consequences from what is said, the possibility of individual changes of mind, and the fact that no one is listening, individual statements made after the fact are useless at best as indicators of the prevailing understanding or purpose at the time of enactment.

Courts have been less quick to dismiss another sort of post-enactment legislative history: the failure of Congress to amend a statute that has been given a particular judicial or administrative interpretation. Courts not infrequently take congressional inaction as approval of a prevailing interpretation. The best-known example of this approach is Flood v. Kuhn, in which the Supreme Court stood by its long-standing, though peculiar, reading of the antitrust laws to exempt professional baseball. But the Court has been completely inconsistent with regard to this approach; relying on it heavily in some cases, rejecting it in others.50

There are two sorts of objections to relying on Congress’ failure to amend a statute as an indication of the correctness of the prevailing interpretation. One concern is, again, reliability. As many have pointed out, legislative inaction can have all sorts of explanations other than approval of the status quo, including ignorance, the press of other business, disagreement as to what should replace the prevailing error, confusion over what the status quo is, filibuster or other minority procedural maneuver, fear of a presidential veto, or all manner of political calculations.51 The other objection is quite different; it attacks not the accuracy of the inference of congressional approval but its relevance. Under traditional understandings, legislation survives its enacting coalition; a later Congress can alter a predecessor’s action only by amending it; courts look to the “legislative intent” of the enacting legislature. Justice Scalia has made this point with some force in an opinion for the Court:

“Only time will tell,” [the dissent] says, “whether the Court... has correctly interpreted the will of Congress.” The implication is that today’s holding will be proved wrong if Congress amends the law to conform with [the interpretation advanced by the] dissent. We think not. The “will of Congress” we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment. Otherwise, we would speak not of “interpreting” the law but of “intuiting” or “predicting” it. Our role is to say what the law, as hitherto enacted, is; not to forecast what the law, as amended, will be.52

On this theory, the views of later Congresses—the inactive ones—are simply irrelevant to the meaning of the statute. Congress cannot acquiesce in or ratify an interpretation by leaving it alone; the only constitutionally relevant action it can take is to make laws, pursuant to the constitutionally prescribed procedures. Even if a court were utterly confident that the current Congress concurred in a judicial or administrative reading of a statute, that fact would be irrelevant to the correct interpretation of the statute. Congressional silence, like the legislative veto, is not a constitutionally given by one Congress (or a Committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.” Public Employees’ Ret. Sys. v. Betts, 492 U.S. 158, 168 (1989).

50. An inconsistency it acknowledged in one of the most striking examples of a refusal to accept the legislative ratification argument, Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) (5-4) (holding that Securities and Exchange Act §10(b) does not create a private right of action against those who aided and abetted stock fraud). In rejecting an interpretation that had prevailed for 60 years, the Courtposix-positive any reliance on legislative inaction as support for that interpretation. However, it did observe that “[i]t is true that our cases have not been consistent in rejecting arguments such as these.” Id. at 187.
of overall legal context, and a willingness to abandon text. Yet it is the dissent that relies on text and formalistically insists that the only relevant act a legislature can take is to enact or amend a statute directly—in Justice Breyer's phrase, "a legislative atmosphere is not a law, unless it is embodied in a statutory word or phrase." 56

Complaints about methodological inconsistencies on the part of individual Justices are common, they are easy to make, and they are often well-founded. But they do not get you very far. On the one hand, of course Supreme Court Justices, like everyone (and like lawyers more than most), are not perfectly consistent. It's so obvious a point as almost not to be interesting. On the other hand, it is easily and often overstated. The opinions in Brown & Williamson are not quite the about-face that they may seem to be. The majority insists that this was not a run-of-the-mill legislative acquiescence case. 57 It felt compelled to portray this as an unusual situation, unlike the myriad cases in which Congress has done nothing in the face of an accepted interpretation. The majority's point was that the long-standing interpretation had been woven into the fabric of the law; Congress had not simply left it alone, it had relied on it, legislated around it, and developed an overall regulatory scheme that depended on it. If this description is accurate (the dissenter were unconvinced), it makes the strongest case for relying on later congressional action to inform one's understanding of an earlier statute—not just acquiescence, nor even just reenactment, but, in the Court's words, "effective ratification." Taken at face value, the majority addresses the concerns of both reliability and relevance discussed above.

As one with no particular familiarity with food and drug law, I cannot speak to the validity of the majority's reading of the particular laws in question. But I found its argument a plausible interpretation of what Congress had done. More important, it was not only a coherent but a welcome approach at the methodological level.

Similarly, the dissent does not wholly retreat into narrow formalism, rejecting any examination of post-reenactment events and overall context. To a significant extent, it meets the majority on its own terms, contesting that the specific conclusions it draws from the specific congressional actions over the years. Moreover, it accepts a sort of dy-

53. See Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) (rejecting legislative acquiescence argument because "Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President" and "Congressional inaction cannot amend a duly enacted statute"); cf. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 13 ELR 20663 (1983) (striking down legislative veto because it was a type of "legislation" that did not result from constitutionally prescribed procedures).

54. United States v. Cerecedo Hermanos y Compania, 209 U.S. 337, 339 (1908). See also Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

55. One professor has labeled this the most fundamental issue about statutory interpretation. Should interpreters regard a statutory enactment as fixed in time, not giving weight to events after passage, or should they take statutory language as an evolving part of the whole body of the law, considering various post-reenactment events as affecting how the language should be understood? KENT GREENAWALT, STATUTORY INTERPRETATION: 20 QUESTIONS 227 (1999).

56. 120 S. Ct. at 1331 (Breyer, J., dissenting). Cj. In re Sinclair, 870 F.2d 1340, 1342-44 (7th Cir. 1989) (Easterbrook, J.) ("An opinion poll revealing the wishes of Congress would not translate to legal rules. Desires become rules only after clearing procedural hurdles . . . .") (Justice Breyer also invokes Justice Scalia's not-even-in-a-footnote line. 120 S. Ct. at 1326; see supra note 44.

57. As if seeking to limit the damage, the Court was at pains to stress just how unusual the sort of legislative action on which it relied was: "We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching this conclusion. Indeed, this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency's position." 120 S. Ct. at 1312.
dynamic statutory meaning by endorsing the FDA's change of position.

Notwithstanding the perfect conservative/liberal array of majority and dissenting Justices, then, Brown & Williamson is not really an occasion for head-shaking about politicized, result-oriented jurisprudence on the Supreme Court. Neither group simply abandoned its usual interpretive principles outright. However, the majority opinion is a significant step toward a dynamic understanding of statutes, and it countenances a fairly broad inquiry into sources of statutory meaning beyond the particular text of the provision at issue. So one can be sure that future litigants will latch on to the relatively open-ended approach taken by the majority and the relatively conservative approach taken by the dissent.

IV. Brown & Williamson and American Trucking

Brown & Williamson will have an immediate application of importance to environmental lawyers. Many of the methodological lessons are applicable in the most significant environmental case of the current Supreme Court term, American Trucking Ass'n. 58

The Court granted two separate certiorari petitions arising out of the D.C. Circuit's decision setting aside EPA's new NAAQS for ozone and particulates. 59 In one, Browner v. American Trucking Ass'n, EPA challenges the D.C. Circuit's ruling that Clean Air Act (CAA) §109, at least as interpreted by the agency, is an unconstitutional delegation of legislative authority. Though not directly relevant to that issue, Brown & Williamson suggests that the Court will not find an unconstitutional delegation. In the other case, American Trucking Ass'n v. Browner, industry groups are challenging the D.C. Circuit's ruling that EPA cannot consider costs or economic effects when setting a NAAQS. On that issue, Brown & Williamson argues in favor of affirming the court of appeals.

61. 42 U.S.C. §7409(b)(1), ELR STAT. CAA §109(b)(1); see also id. §7408(a)(2), ELR STAT. CAA §108(a)(2) (describing air quality criteria).
62. Two standard examples are "the benzene case," Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 10 ELR 20489 (1980) (upholding statutory directive that agency establish standards that are "reasonably necessary and appropriate to provide safe or healthful employment or places of employment"), and the World War II
expect Congress itself to resolve. Thus, the Court is willing to presume that Congress has not delegated to the agency basic, fundamental issues, and it will work to find the answers to those issues in the statute. And, of course, if it finds such answers, then the statute easily survives a nondelegation challenge. Finally, all of this suggests that the Court will be dubious about the D.C. Circuit's notion that the agency can solve any nondelegation problem by tying its own hands.

These indicators of the Court's take on American Trucking are not much more than tea leaves. Nonetheless, they suggest that the Court will reject the lower court's nondelegation ruling.

B. Reading the CAA

1. Congressional Ratification

Since its enactment in 1970, CAA §109 has been consistently understood by EPA and the courts to preclude consideration of costs in setting a primary NAAQS. When it promulgated the original set of six NAAQS in 1971, EPA made clear its understanding that the CAA "does not permit any factors other than health to be taken into account in setting the primary standards." It has never questioned or retracted from that understanding of the statute. That interpretation is now 30 years old—not quite as long-standing as the interpretation the FDA had abandoned in Brown & Williamson, but an impressive run nonetheless. The D.C. Circuit adopted the same interpretation in 1980 in Lead Industries Ass'n v. U.S. Environmental Protection Agency, and reaffirmed it on several occasions before doing so again in American Trucking itself.

Before the Supreme Court, both EPA and certain of its amici have invoked Brown & Williamson and argued that Congress has "effectively ratified" this interpretation. The argument is a compelling one. As in Brown & Williamson, there is more here than mere acquiescence through inaction, though there is certainly that. Congress considered and rejected legislation that would have altered the prevailing interpretation; it amended CAA §109 in other respects but left the relevant language untouched. Perhaps most important, it has repeatedly addressed the role of costs and feasibility in the NAAQS regime through statutory amendments. It has made a clear and considered decision to do so through provisions concerning implementation and attainment of the NAAQS rather than by modifying the process or standards for establishing the NAAQS themselves. As in Brown & Williamson, Congress has accepted EPA's interpretation and legislated "against the backdrop of the [EPA's and the D.C. Circuit's] consistent and repeated statements it lacked authority" to consider costs, addressing the costs issue elsewhere in the statute, and thus "effectively ratifying" the prevailing interpretation.

2. Chevron and Gridlock

The foregoing should indicate that I do not think Chevron will be much of an issue in American Trucking. Just as in Brown & Williamson, the costs issue will likely be resolved within step one, with, at the most, a passing statement that even if the statute were less clear, the agency's interpretation is a reasonable one.

The setting and posture of American Trucking, however, do shed some light on concerns about Chevron that were voiced after Brown & Williamson came down. Writing in these pages, Professor James O'Reilly expressed concern that Brown & Williamson creates a "cigarette corollary" to Chevron that verges on "anti-deference." The cigarette corollary would deny deference where, over a period of years, neither Congress nor the relevant agency has acted. On this reading of Brown & Williamson, Congress' very inaction, in the face of the agency's failure to assert jurisdiction, becomes a ratification of the absence of jurisdiction and precludes later assertions of authority, overwhelming ordinary principles of deference. O'Reilly fears that future EPA regulation will be hamstrung by the cigarette corollary, because the environmental arena has seen a similar pattern of congressional inaction coupled with occasional passage of relevant legislation against a particular administrative backdrop.

The American Trucking case is a strong counterexample to his concern, reminding us that in many instances, the agency has acted. In those cases, congressional dithering, gridlock, and legislating around the edges may cement rather than foreclose an expansive interpretation.

This is precisely the fear of a group of five U.S. senators who have filed an amicus brief in American Trucking. They object that

65. 647 F.2d 1130, 10 ELR 20643 (D.C. Cir. 1980). See id. at 1148, 10 ELR at 20651 ("[T]he statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109.").
68. Brown & Williamson, 120 S. Ct. at 1306.
69. Id. at 1313.
70. O'Reilly, supra note 24, at 10574.
to the Executive branch. No longer would Congress be able to serve as a check on Executive power. Rather, the Executive could readily act to extend the outer bounds of its authority and if, for whatever reason, Congress did not affirmatively act to check that excess, the Judiciary would construe that inability as acquiescence. 72

Discounting the senators’ personal stake and their lawyer’s rhetorical excess, one can see why the senators might be uneasy. For one of the many unusual things about the tobacco case was that the Agency’s historical interpretation had been self-abnegating. In general, agencies are prone to read their powers broadly, not narrowly. That is bureaucratic, if not human, nature. For those most suspicious of government bureaucracies, EPA may even head the list of ambitious overreachers. Professor Todd Zywicki, lamenting “[t]he relentless ‘mission creep’ of the EPA,” has written:

Bureaucrats seek larger budgets and greater power for themselves. In order to sustain large payrolls and expansive powers, the EPA must actually be doing something. An EPA that simply oversaw the implementation of common law and market remedies would be a humble and limited EPA. On the other hand, an EPA that relentlessly seeks to expand its authority and is engaged in an ongoing review of existing and potential technologies, reconsidering and rewriting existing regulations in light of changing technology and market conditions, is a much more powerful and lucrative agency. 73

Zywicki’s analysis is not uncommon, has roots at least as deep as The Federalist, and resonates with much real-world experience. I do not think that EPA’s performance can be explained solely in terms of a lust for power. 74 But there is enough truth to this notion to suggest that Professor O’Reilly’s concerns may be overstated. Agencies do tend to read their mandates broadly. Overall, the ratchet effect at work in Brown & Williamson is, I think, more likely to operate in favor of agency authority than against it.

Two caveats are in order, however. First, many agencies, including EPA, read their mandates broadly but do so very slowly. It can take an awfully long time for EPA to produce a set of regulations. Where the agency has failed to do anything during a time of congressional dithering or legislating around the edges, then Brown & Williamson could have the antiregulatory consequences described by Professor O’Reilly. Secondly, the Brown & Williamson approach will work in favor of agency authority only if applied even-handedly with regard to the regulatory initiatives at issue. If the five-Justice majority has a different approach in cases where an agency has long asserted that it does have a regulatory power, then too Brown & Williamson will have the antiregulatory consequences O’Reilly fears.

3. Dynamic Interpretation

Not long after the November 1994 elections, when the Contract With America was still a potent political document and a revolution seemed to be occurring in Washington, Professor John Nagle wrote a review of the leading academic defense of “dynamic statutory interpretation,” Professor William Eskridge’s book of that title. 75 Nagle argued against the dynamic approach. Using the Contract With America as a jumping-off point, he suggested that a court truly committed to Eskridge’s approach should “update” existing statutes in light of the clear, though unenacted, preferences of the 104th Congress. Notwithstanding his substantial agreement with much of the Republican regulatory agenda, 76 Nagle argued that for a court actually to do so would be illegitimate. His example was chosen to give the generally liberal supporters of dynamic interpretation pause. American Trucking takes this question out of the law reviews and into the courtroom.

The industry petitioners and their amici argue that the CAA as of 1970 incorporated cost-benefit analysis. Like many, I find this argument hard to take seriously. 77 The language and history of the Act are consistent with the tenor of the times: clean air at any cost; human health has no price tag. To be sure, the intervening 30 years have seen a marked shift in environmental policy (though not the fundamental transformation that exponents of cost-benefit analysis would like; witness the failure of recent regulatory reform efforts). The pure health-based approach seems anachronistic. But, of course, Congress has never amended CAA §109 to reflect this shift.

Now, believers in dynamic interpretation might contend that CAA §109 should be read consistently with currently prevailing regulatory principles. But to say that CAA §109 is a naive anachronism is one thing; to say that therefore it should be updated by the courts, rather than amended by Congress, is a rather bold legislisludential step. Doing so would be a much greater step away from statutory formalism than is the “effective ratification” approach of Brown & Williamson. It would be a surprise to see the Court’s conser-

72. Id. at 24.


74. Neither does Zywicki, in fact. He also observes that many at EPA are drawn to their jobs by a sense of mission and a personal commitment to environmental protection. For Zywicki, this only compounds the problem. “[T]rue believers” are especially prevalent in environmental regulatory agencies. Because they personally need not consider the costs of such regulations, and are isolated from the need to consider the trade-off between environmental purity and other social goals, such as economic development, those passionately committed to the environmentalist cause will find ample room to indulge their personal preferences for environmental purity.


76. Id. at 2249.

77. This is not the place for a full exposition of the argument in favor of the long-standing understanding of the Act. One good statement of the position is in the Federal Register preamble to the challenged rulemaking itself. See U.S. EPA, National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38652, 38683-88 (July 18, 1997); see also McGarity, supra note 60, at 22-28.
vatives willing to indulge in such a dynamic reading. Nonetheless, it is pretty amazing that they are being urged to do so by none other than Sen. Orrin Hatch (R-Utah), not usually known as a fierce advocate of judicial activism. Here is an excerpt from Senator Hatch's amicus brief in American Trucking:

The [CAA] must be construed in pari materia with later-enacted regulatory reform statutes that direct agencies to favor cost-effective regulatory decisions and to mitigate unwarranted regulatory burdens where possible. See Vermont Agency, 120 S. Ct. at 1870 n.17. The Unfunded Mandates Reform Act ("UMRA") requires EPA, like all agencies, to select the most cost-effective regulatory alternative (or, alternatively, to explain why a cost-effective option was not chosen). Pub. L. No. 104-4, §205, 109 Stat. 64, 66 (1995) (codified at 2 U.S.C. §1535). The Small Business Regulatory Enforcement Fairness Act ("SBREFA") compels agencies to consider and minimize the "significant economic impact" of regulations on "small entities." Pub. L. No. 104-121, §241(b)(5), 110 Stat. 847, 864 (1996) (codified at 5 U.S.C. §604(a)(5)). EPA is correct that UMRA and SBREFA do not override the mandates of an agency's organic statute, see 2 U.S.C. §1535(b)(2); 5 U.S.C. §604(a)(5), but, absent clear inconsistency, the Act should not be interpreted to defeat Congress's clear directive in favor of cost-effective regulation. This is a bolder request than the Court is likely to accept, particularly since the milder forms of dynamism (ratification and the reenactment doctrine) cut the other way in this case. Even were the Court to be tempted, it is a hard argument to make here given the failure of across-the-board regulatory reform proposals. Of course, the Court might still rule against EPA, pretending that the statute had always allowed or required EPA to take costs into account, but doing so really would be pretending.

V. Conclusion

It is not always easy to tell what cases will continue to loom large through the years. Chevron itself is a reminder. Though it came to be the dominant case of administrative law and continues to outdistance all others for the "most-cited" prize, when it was decided it went largely unnoticed. And many decisions seemed momentous at the time and then sunk beneath the waves. But Brown & Williamson likely will have important repercussions in many areas, not least of them environmental law. Its specific and immediate application to the American Trucking Ass'n case suggests that the Court will reverse the D.C. Circuit's nondelegation ruling and uphold its long-standing interpretation of the CAA as precluding consideration of costs in setting the NAAQS. The more general repercussions will be salutary—a turn away from a too-strong reading of Chevron's deference requirement, and toward a broader, contextual approach in statutory interpretation.

78. Interestingly, on the merits Justice Breyer would clearly be in the conservative camp on this issue. That is, he deems pure health-based standard setting, without regard to costs, as silly policy. His book, Breaking the Vicious Circle, is an attack on excessive, noncost-justified efforts to eliminate tiny risks. See Stephen G. Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation (1993). Thus, American Trucking will present a stark choice for Breyer between the interpretive methodology he adopted in his Brown & Williamson dissent and the regulatory methodology he has argued for in his nonjudicial writings. Were he to read CAA §109 to mandate EPA compliance with the themes of Breaking the Vicious Circle, it is a safe bet that fellow Justices who disagree will be quoting the Brown & Williamson dissent back at him—particularly the line about a "legislative mood" not being a law.
