Last week, conflicting federal court decisions regarding the Patient Protection and Affordable Care Act, commonly known as the ACA or "Obamacare," set the nation abuzz.

In *Halbig v. Burwell*, the D.C. Circuit Court of Appeals struck down an Internal Revenue Service (IRS) regulation providing federal subsidies to low-income taxpayers who purchase health insurance through a state-run or federally run insurance exchange. The D.C. Circuit held that the subsidy regulation violated the plain language of the ACA, which, according to the court, authorizes subsidies only to taxpayers who purchase insurance through an "exchange established by [a] State"—not a federal exchange (a *Chevron* Step I ruling, for those who are familiar with administrative law). A few hours after the D.C. Circuit issued its opinion, the Fourth Circuit Court of Appeals upheld the subsidies in a conflicting decision, *King v. Burwell*. The Fourth Circuit found that the ACA language was ambiguous about whether it authorized tax credits in federally run exchanges, and the court considered the IRS regulation to be a reasonable interpretation of ambiguous statutory text (a *Chevron* Step II ruling).

The federal government now seeks *en banc* review of the *Halbig* decision before all eleven D.C. Circuit judges. Challengers or the federal government ultimately could petition for U.S. Supreme Court review of the issue. Environmental lawyers and others interested in federal climate change regulations are watching closely to see whether the Supreme Court elects to wade into the debate to resolve the conflict between the circuits.

You may be wondering, **what does the healthcare fight have to do with climate regulation?** The key connection is **statutory construction**—the principles courts use to interpret statutes. Just as interpretation of the ACA was the focus of *Halbig* and *King*, interpretation of the Clean Air Act has been the focus of some of the most important federal climate change cases, including *Massachusetts v. EPA* and *Utility Air Regulatory Group v. EPA*.

In any statutory construction case, the court's ultimate goal is determining what Congress intended when it enacted the statute. In some cases, it is clear that Congress has spoken directly to a particular issue. In other cases, a statute may be ambiguous or silent about an issue, thus granting the implementing agency authority to address the open question through regulations. In such cases, a court will defer to the expert agency's interpretation as long as it is reasonable.

Because the ACA subsidy question involves statutory construction, it has generated significant discussion in the environmental law community—including here on LegalPlanet (*see* Ann's post on how *Utility Air* may support the government's position on ACA subsidies).

Various commentators have debated the cross-implications of climate change caselaw and ACA subsidy litigation.

On Friday, Notre Dame Law Professor John Nagle added his perspective to the ongoing discourse. Professor Nagle posted an opinion piece on CNN.com arguing that the Obama Administration's legal argument in defense of the ACA subsidies directly contradicts the legal theory underpinning federal climate change mitigation programs. Professor Nagle maintains that a legal strategy focusing on "what Congress apparently intended rather than on the law's actual provisions" "would save the subsidies that underpin the Affordable Care Act, but . . . would doom the administration's approach to climate change." According to Professor Nagle, to tackle the problem of climate change,

> [President Obama] turned to the Clean Air Act, which Congress enacted in 1970 to reduce the clouds of air pollution that plagued so many American cities at the time. The intent of the Congress that passed the Clean Air Act was to empower the Environmental Protection Agency to regulate emissions of substances that make people sick when they breathe them.
>
> That Congress did not even think about climate change, and the pollutants that Congress did contemplate are fundamentally different from greenhouse gases that occur naturally in the atmosphere, are not toxic when breathed even at the elevated levels that now exist in the atmosphere, and that cause harm indirectly by facilitating the greenhouse effect that has begun to change the world's climates. **If we were to follow [the White House's] advice and evaluate the intent of Congress, then the Clean Air Act would not apply to climate change**.

Professor Nagle cites the Supreme Court's 2007 decision in the landmark climate change case *Massachusetts v. EPA* to support his argument, suggesting that the Court looked at the language literally rather than attempt to understand Congressional intent by examining the context of the Clean Air Act as a whole:

> [T]he high court held the clear text of the Clean Air Act encompassed all sorts of air pollutants, not just those that were in the mind of Congress when it enacted the law. That . . . understanding of the Clean Air Act forms the legal foundation for the EPA's ongoing regulation of greenhouse gas emitters and of Obama's

> Climate Action Plan.

I respectfully disagree with Professor Nagle's interpretations of the Clean Air Act and *Massachusetts*. **As *Massachusetts* recognized, the Clean Air Act as a whole demonstrates Congress' deliberate foresight and intent to regulate dangerous pollutants such as greenhouse gases, even if the enacting Congresses did not expressly anticipate climate change.**

First and foremost, the Clean Air Act's definition of "air pollutant" is capacious, encompassing "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . ." (§ 7602(g)). As the Supreme Court stated in *Massachusetts*, this "sweeping statutory provision," which Congress "define[d] . . . so carefully and so broadly," (n. 26) "embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any'" (at 529).

The Supreme Court rightly acknowledged Congress' intent to craft a motor vehicle emission standard program–Clean Air Act section 202(a)(1)–that extends to situations Congress did not anticipate (at 531):

> **While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete.** The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.

Thus, *Massachusetts* is in harmony with the Obama Administration's legal defense of the ACA subsidies. The Congresses enacting the Clean Air Act intended for the Act to apply broadly and adapt to changing science and air pollution concerns. This conclusion is evident whether one examines, to use Nagle's words, "what Congress apparently intended" or "the law's actual provisions." Nonetheless, I propose that there is no workable distinction between Congress' intent and a law's plain language. As stated above, the overall goal of statutory construction is determining what Congress intended. The literal statutory text plays a fundamental role in this investigation, as *Massachusetts* demonstrates. Review of statutory text cannot be wholly divorced from a court's broader inquiry into Congressional

intent. Just as Ann noted in her post last week, quoting *Utility Air* and *FDA v. Brown & Williamson Tobacco Corp.*, it is a "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"

Other sections of the Clean Air Act bolster the conclusion that Congress intended for the Act to regulate beyond, "emissions of substances that make people sick when they breathe them," to use Nagle's words. For instance, the Clean Air Act includes a program dedicated to regulating ozone-depleting substances. Like greenhouse gases, ozone-depleting substances are non-toxic and only cause problems once they're up in the atmosphere, where chemical reactions lead to destruction of the stratospheric ozone layer that protects the earth from the sun's harmful UV rays. Before Congress adopted a specialized program for ozone-depleting substances, EPA used standard Clean Air Act programs, such as the Prevention of Significant Deterioration (PSD) permitting program, to regulate them. As EPA argued in its *Utility Air* brief (p. 33, citations omitted),

> Congress has never embraced the distinction . . . between local and well-mixed atmospheric pollutants . . . . Before the 1990 amendments, the EPA regulated certain well-mixed gases that deplete the ozone layer, and thus these were subject to the PSD program's requirements. In the [1990 Clean Air Act Amendments], **Congress overhauled the restrictions on those ozone-depleting substances without enacting any similar exemption, on the evident understanding that those well-mixed gases were proper subjects of PSD regulation.** The same is true of greenhouse gases.

In sum, Congress not only intended for the regulatory scope of the Clean Air Act to extend beyond substances with localized health effects but also ratified such regulation through the 1990 Clean Air Act Amendments. Although challengers in *Utility Air* tried to persuade the Supreme Court that the PSD program was designed only for localized pollutants that cause exposure-related harms, as Nagle now seems to argue, such arguments failed to persuade the Supreme Court. The Supreme Court found that the PSD program's emission control requirements were perfectly workable and suitable in the context of greenhouse gases (*see* pp. 27-28).

Clean Air Act § 115 offers yet another example of the Act's sweeping statutory provisions. Section 115 authorizes EPA to require states to revise their pollution control plans (state implementation plans, or SIPs) to prevent or eliminate U.S. emissions that cause

environmental problems in other countries. Section 115 broadly extends to "any air pollutant or pollutants emitted in the United States [that] cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country . . . ." Like many other Clean Air Act provisions, section 115 has a deliberately broad scope and is manifestly designed for future international pollution crises that Congress could not then name.

It is simply not the case that the Obama Administration must choose between a statutory construction theory that supports climate change regulations and a statutory construction theory that supports the ACA subsidies. A thoughtful inquiry into Congress' intent, as the Court conducted in *Massachusetts*, must conclude that the Clean Air Act is deliberately designed with the breadth and flexibility necessary to manage pollution challenges that Congress did not expressly anticipate in 1970, including climate change.