This essay examines three US Supreme Court opinions (Massachusetts et al. v. Environmental Protection Agency et al. (2007); Environmental Protection Agency et al. v. EME Homer City Generation, L.P., et al. (2014); and Utility Air Regulatory Group v. Environmental Protection Agency et al. (2014)) through a lens of constitutive rhetoric. Focus on a nation’s highest court (e.g., US Supreme Court) draws attention to one of the most significant stages upon which environmental debates occur and are resolved, as well as to the consequential communication shared from that stage that may have been shaped by or that may filter down to citizens participating in the public sphere. Ultimately, the opinions of the courts, at all levels within a nation/state, are one site in a larger body of environmental communication where the divide between scholarship and practice must be bridged. Through close textual analysis of the opinions drawing from pentadic criticism, this study draws attention to the language of the opinions, especially their introductions, and the potential of that language, via an interpellated audience, to constitute the future of air quality protection efforts in the US (and perhaps beyond its borders).
Introduction

While participants at the 2015 COCE will, no doubt, make compelling arguments about divides within environmental communication that need to be bridged in order to integrate scholarship and practice, this essay focuses on the divide between citizen participation and environmental law. Attention on this divide expands our understanding of many of the environmental conflicts and controversies of our time. In particular, attention on a nation’s highest court (e.g., US Supreme Court) draws attention to one of the most significant stages upon which environmental debates occur and are resolved, as well as to the consequential communication shared from that stage that may have been shaped by or that may filter down to citizens participating in the public sphere. Ultimately, the opinions of the courts, at all levels within a nation/state, are one site in a larger body of environmental communication where the divide between scholarship and practice must be bridged.

The opinions of the US Supreme Court (Court) not only offer interpretations of US legislative policy (e.g., Clean Air Act) and directives on administrative (e.g., the Environmental Protection Agency) action, but are also a source of influence on the public’s perception of or response to environmental issues – a source that, in the case of the US, has not received the same scholarly attention as the communication coming from the White House or the US Congress. The language choices of a justice/judge constructing an opinion after a case has been decided impact audiences as far reaching as future courts (through the setting of precedent), legislatures and parliaments (who will craft or modify laws, policies, and institutions), lawyers and advocates (who will come before the courts), and/or a nation’s citizens (who are bound by the laws or opinions and act/are acted upon by their language).

This essay examines three Court opinions (Massachusetts et al. v. Environmental Protection Agency et al. (2007); Environmental Protection Agency et al. v. EME Homer City Generation, L.P., et al. (2014); and Utility Air Regulatory Group v. Environmental Protection Agency et al. (2014)) through a lens of constitutive rhetoric. The three opinions have much in common. Each involves the Environmental Protection Agency (EPA) and its enforcement of the Clean Air Act (CAA) through various statutes within the CAA. Each offers opinions (and/or dissents which are not included here) written by varying justices that together represent diverse (i.e., contradictory and/or conflicting) perspectives that extend beyond the Court to political parties, interest groups, and citizens. Each deals with air pollution or greenhouse gases and the complex challenges in finding or confirming the (legal) solutions to these issues. Through close textual analysis of the opinions drawing from pentadic criticism, this study draws attention to the language of the opinions and the potential of that language, via an interpellated audience, to constitute the future of air quality protection efforts in the US (and perhaps beyond its borders).

Three Opinions: A Context

The first of the three opinions is Massachusetts v. EPA (Massachusetts). In a 5-4 decision, the Court sided with a number of states and cities that sued the EPA over its failure to use the CAA as justification to regulate greenhouse gases from new motor vehicles (i.e., cars, trucks) – gasses associated with human-induced climate change. The opinion is significant not only for its affirmation of that obligation, but the acknowledgement of standing given to Massachusetts and other plaintiffs. The opinion was written by Justice John Paul Stevens. The second opinion is EPA v. EME Homer City Generation (Homer City). In a 6-2 decision, the Court addressed the EPA’s enforcement of national ambient air quality standards (NAAQS), which the Congress directed the EPA to establish through the CAA. The standards (through a Good Neighbor Provision of the CAA) are applied to each state, and the factories or powerplants within that state that emit pollutants, and focus on how that state’s emissions of pollutants may impact the air quality of a neighboring state that is up wind. Justice Ruth
Bader Ginsburg authored this majority opinion. The third opinion is Utility Air Regulatory Group v. EPA (Utility Air). In a mixed decision with varying justices agreeing with or dissenting from parts of the opinion, the Court determined that the EPA is limited in its ability to apply greenhouse-gas emission standards to stationary factories and powerplants. In particular, the EPA cannot tailor the language of the CAA to address the differences in scale between the kinds of air pollution the CAA originally recognized and the kinds of polluting gases that contribute to climate change. Therefore, a slightly smaller – but still significant – number of those stationary sources can be regulated for these emissions if they are already subject to regulation under historic definitions of air pollution. Justice Antonin Scalia authored this majority opinion.

The significance of these opinions, at least in the context of the environmental communication, environmental law, and the public sphere, is informed by the work of Giovinazzo (2006) who focuses his attention on CAA language. He describes the “symbolic language” of the CAA, language that is at the heart of all three opinions. Though not directly addressing constitutive rhetoric, he does note that the language of the CAA constitutes a near-impossible situation for the EPA – creating clean air for purpose of human health often regardless of the costs to the pollution sources for doing so. While critics of the CAA have asked Congress to clarify its language and the Court to interpret the existing language through a sensible framework, Giovinazzo argues that the strength of the CAA language is that it makes that sensible framework a little less “sensible.” Specifically, Giovinazzo indirectly explains the benefits of the constitutive rhetoric developed by Congress within the CAA; that being symbolic language that provides the EPA options to address air quality at the date of the CAA’s writing and into the future as the science and policy options/solutions develop on air quality concerns.

Turning to the law, several scholars have contributed to our understanding of legal opinions as examples of environmental communication, including some writing about Massachusetts (e.g., Ghoshray, 2010; Kimbrell, 2007; Smelser, 2007; Tschida, 2012). Ghoshray (2010) argues that Massachusetts was “nothing significant from an environmental pollution control perspective” (p. 448). He may be correct. It did not bring a revolutionary change in our efforts to slow climate change. However, both he and Smelser (2007) draw attention to how the Court constituted standing in the case to allow petitioners the potential to sue the EPA. This constituting of standing can make a meaningful difference moving forward on air pollution and climate change concerns, even while influencing the laws around standing in positive or negative ways. Alternatively, Tschida (2012) focuses his attention on the construction of “certainty” in the opinion. Certainty is a construct not just associated with the debate over climate change and its causes, but also with the symbolic language in the law, the policies formulated to address environmental problems, and in the use of legal precedent to connect Massachusetts to other opinions.

Justice’s Opinions as Constitutive Rhetoric

The study of legal communication involving environmental concerns could not be more important to our current situation. While the reasons for this are many, we outline one argument, based in the study of communication, which guides this essay. Several scholars, most notably White (1985a), argue that the law is a branch of rhetorical studies; that the rhetoric of the law establishes, maintains, and transforms our communities; and from this, we can conclude, that the law is a constitutive rhetoric (see Asen, 2010; Freeman, 1991; Holmes, 1991; Klinger, 1994; Makau, 1984; Mills, 2014; Prosise and Smith, 2011; Schneyer, 1993; White 1895b). Shifting attention, as White (1985a) does, from contemporary explorations of the law based in the rules of institutions and/or the bureaucracies of government allows scholars to explore the law in ways more closely aligned with Aristotle and Plato. Specifically, the trend has been to view the law through a more scientific lens, focusing more on procedures for determining an opinion than on how the opinion is created or what the opinion creates
(see Klinger, 1994; Makau, 1984; Prosise and Smith, 2011). In particular, the move toward the science of judicial opinions has had the effect of removing much of the attention from the communication itself that is central to the courtroom and, as Klinger (1984) contends, leaves the practice of law distanced from those it is applied to and/or serves. The contemporary trend White rebels against has stripped citizens of a portion of their agency as problem solvers. On a related note, Bäckstrand (2003) makes a comparable argument about the role of science in contexts such as public discussions of climate change. She argues that a “participatory paradigm” in policymaking is butting heads with beliefs and practices that have recently favored technical expertise. As such, both the law and science, in ways relevant to this essay, are being asked to modify their technical language and the control of their technical spheres in favor of a more democratic model.

Because of his desire to swing the pendulum of legal studies back toward the rhetorical, White (1985a) suggests the rhetoric of the law can be more nuanced than studies of persuasive argument structure while also avoiding the scientific explanation of how an opinion was reached. He is interested in how oral arguments and/or opinions, much like literary works, constitute and transform the character of individuals (e.g., a judge, a lawyer, the citizenry/jury), communities, and the culture. He notes that this influence is two-way (see Prosise and Smith, 2011). Put differently, White declares the creativity of legal argument, much like the creativity of the literary arts, is about making meaning with others (e.g., lawyers, other judges, citizens) through language (see Besel, 2012). To capitalize on this meaning making, one needs to understand the work of rhetor (i.e., lawyers and judges). White (1985a) maintains, an effective rhetor employs the language of her/his audience, changes the voice or the authority from which they speak to be appealing to that audience, and is mindful of the character (e.g., ethos and/or rhetorical status) which s/e is developing for self or for others. The objective is not just arguing about the proper decision of a case, nor specifying the language that should frame that case, but about creating a community of rhetors one is a part of in that moment – rhetors addressing the issue at hand. White contends that these objectives may be the subject of analysis and criticism. Since our focus in this essay is on a particular element of the legal environment (i.e., Court opinions), it is appropriate to note:

The judicial opinion, often thought to be the paradigmatic form of legal expression, might be far more accurately and richly understood if it were seen not as a bureaucratic expression of ends-means rationality but as a statement by an individual mind or a group of individual minds exercising their responsibility to decide a case as well as they can and to determine what it shall mean in the language of the culture. (White, 1985a, p. 41)

From the opinion, in White’s estimation, a justice must work with the language s/he has been given by the legislature, by previous courts, and/or by the culture (e.g., current events). White refers to this as the inherited language. A justice may use that language, creatively, in ways that affect the desired change or outcome (i.e., the art of the text). Finally, s/he may establish or interpellate the rhetorical community, defining her/his own character or those of other agents/actors in the deliberative environment (p. 45-6). Prosise and Smith (2001) further this notion by explain that the Supreme Court “has the political legitimacy to settle the rules of the game and have it accepted by the nation” (p. 606). This highlights the potential that can arise for a situation to play out in a specific manner due to the structure through which it proceeded and those who had the ability to influence it along the way.

White’s (1985a) contention about the constitutive nature of rhetoric has another component that expands its potential to influence the culture within which it exists and has implications for this essay. Returning to his claim that the most important concern about an opinion may not be its “message” (i.e., the decision), he adds that the importance may be in the “performance” (p. 117). An opinion creates openings for issues to be explored, understood, and debated not just within the courtroom, but also
within a community. In creating these openings, the opinion creates opportunities for building community with and between audiences. Moreover, White asserts that his ideas about the law’s constitutive nature are not simply about the decision and about what is best or worst for a community or the right/wrong interpretation of statute; instead, he reminds us, “The judge is always a person deciding a case the story of which can be characterized in a rich range of ways; and he (or she) is always responsible both for his choice of that characterization and for his decision [italic intentional]” (p. 123). A study of judicial opinions draws attention to the constitution of the justice’s character, but to the constitution of the responsibilities of the justice to the opinion (i.e., the law, the community, etc.).

The desire to solve problems through rhetoric that expands citizen agency is not a concern unique to rhetoric of the law scholars. Goodnight (2012) and Sovacool (2008) argue that through deliberative rhetoric, citizens produce and examine social knowledge in order to persuade others and find solutions to common problems. There are three spheres where this occurs – the personal, public, and technical. The personal is associated with casual conversation with friends and family. The technical encompasses the jargon and communication style of a particular field and its experts, be it science or the law. It is the middle ground, the public sphere, where informal language and common understandings of issues is expressed in policymaking and community action. Sovacool is among a host of scholars arguing that experts need to modify the jargon of their technical sphere to reach a public audience and have their technical knowledge enter the public sphere where citizen participation can occur. Those involved in the environmental sciences, Sovacool contends, have been particularly poor at doing this. The same argument may apply to policymakers in the context of their rulings and opinions (Killingsworth and Palmer, 1992). Additionally, Asen (2010) argues that rhetoric is fundamentally integrated into public policy, functioning as a crucial determinant in how both policymakers and citizens interpret a given issue. He asserts that public policy is a “mediation of rhetorical and material forces” (p. 124). In other words, rhetoric becomes of great importance as a constitutive force because it draws attention to the issues of authorship, temporality, and polysemy that arise with the rhetoric. Justices, like policymakers, try to shape and manipulate the material forces using specific rhetoric in the opinions they create. The rhetoric is not stagnant, it continues to shift and transform over time as views and material needs change. This materiality gives opinions or policies a way of evaluating, propagating, and enforcing preferred social norms as it garners material consequences.

Within any act of communication, recognition of the power found in the rhetorical status of the communicator is important (e.g., Hariman, 1986; Logue & Miller, 1995). When examining the rhetoric of the Court opinions, this is certainly the case. Status is recognition and identity conferred by others (e.g., citizens, the media, or colleagues). It is not equal to ethos (i.e., an internal aspect of the communicator’s character), thought the two are often referenced jointly; it is instead a judgment of character made by an audience or observer (see Schneyer, 1993). It is not simply a factor of the position one holds, though one’s position may create opportunities for the establishment of status, as is the case with the justices. It is an evaluation and determination of others’ (legal) standing or place in society. It is dependent upon one’s peers or audiences and their cooperation with or acknowledgment of a particular status in the communicator. In an exchange, a justice may work to establish or reinforce their status as opinion-giver in the eyes of other justices, legislators, members of the public, etc. They do so, in part, to legitimate themselves and opinions they offer and, therefore, the relationship of those opinions to other points of view within the culture. Ultimately, the status of the rhetor may have much to do with the acceptance of the message (if the status alone is not the message).

Finally, Feteris (2008) notes that in composing an opinion justices choose language that will constitute their decision as being self-evident, giving the impression that the justice simply applied the
law or policy to the facts of the case. In constituting the expression of an opinion in this particular fashion, the justice conceals other opinions that were possible or reasonable, giving preferential treatment to their decision as the only logical choice. To secure confidence in the opinion on the part of an audience – perhaps the legal community, legislators, or citizens, the justice will be careful to articulate the manner in which their application of the law or policy is faithful to legislator intent. This burden of proof may be one more thing that a justice must constitute. Obviously, there are times when a tension will exist between an understanding of intent and an understanding of what is just and sensible. Feteris adds, as audiences, our attention may be directed toward the interplay of legislator intent, a justice’s burden of proof, and the justice’s rhetorical practices in an opinion – practices that may serve the justice’s interests as well as that of the law (See also Bessel, 2012; Prosise & Smith, 2001).

Three Opinions: An Analysis

No one method exists for identifying the constitutive rhetoric of a text, for it is not a method but an explanation of message construction or content and that message’s function. Therefore, our essay relies on pentadic criticism for its ease of use and its ability to recognize the dramatic constructs of a rhetorical work (Burke, 1966, 1969). The pentad is fitting because of Burke’s statement that language use constitutes action and that action is located in our psychological position – a position created by the very language we use. Dramatism is based on the idea that humans express this constitution much like the elements of a play. The dramatic constructs within the opinions reflect the Court’s constitution of the larger situation or issue – its “drama” – and, therefore, are the basis from which we choose to explain how an audience is interpellated through the constructs of the Court.

Through a close reading of the three opinions, we were able to identify a significant number of pentads, and their related ratios, operating within each opinion. While a single sentence may contain each of the five elements of the pentad, this application of the pentad was too focused and gave us the minutia but lost the big picture. Likewise, an entire opinion could be identified by a single pentad, but this caused the loss of depth to what the justices constitute in each complex opinion and its various sections and sub-sections. Therefore, our analysis strikes a middle ground. Our pentads may reflect a single paragraph of text or several paragraphs, perhaps even a section or sub-section of the opinion. As the close readers of the opinions, we argue that this balance best reflects the constitutions within the opinion while creating opportunities to differentiate the constitutions created in each opinion. Finally, because the introduction and early sections of each opinion best represent the nature of the case before the Court, our attention for this essay focuses on content from these portions of each opinion. This choice is consistent with Schneyer (1993) argument:

Exploring certain parts of a judicial opinion seems to yield consistently gratifying insights. The words at the beginning of the opinion, for example, often give insight into the judge’s attitude towards the entire enterprise of making a decision. Anyone who reads any part of an opinion will almost invariably read the first few words, giving the judge her best opportunity to say the most crucial things about the case. (p. 124)

The first opinion is the Massachusetts. To characterize the whole opinion, and the pentadic pattern that appears across it, our attention was immediately drawn to Stephens’ construction of scene. According to Burke (1966, 1969), significant attention on scene suggests a philosophical focus of the rhetor on materialism, the belief that matter is the fundamental substance in nature and that all occurrences in nature can be linked or traced back to material conditions. This standard interpretation of a rhetor’s focus on scene makes sense here. Stephens constitutes the material existence of
anthropogenic climate change and legitimizes the reliability (i.e., material existence) of the science that support that is used to do so.

Specifically, in the introduction to the opinion and early in Section II Stephens points to the impact carbon dioxide is having as it is released into the atmosphere (scene). He notes that this impact has been argued by the agent “respected scientists” (p. 1) and that those scientists want us to accept (purpose) that carbon dioxide “is therefore a species – the most important species – of a ‘greenhouse gas’” (p. 1). Stephens does not need to constitute the legitimacy of this science on his own just based on the claims of a scientific community he apparently trusts but that others, potentially, may not. In Section I of the opinion, he also describes a scene where Congress (agent) and the White House paid attention to, and seemingly trusted and accepted, this science as well. He points to 1978; the year Congress enacted the National Climate Program Act that required the White House to create a program that would help the US and the world understand and respond to anthropogenic climate change. He cites a conclusion of that program:

If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible. . . . A wait-and-see policy may mean waiting until it is too late. (p. 4)

Additionally, he points to 1987; the year Congress directed the EPA to return to Congress with a plan to address climate change on a global scale. This was done based on a Congress that accepted “manmade pollution—the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere—may be producing a long-term and substantial increase in the average temperature on Earth” (p. 4). Finally, in Section II, his attention is on the EPA (as an extension of the White House) as agent. He identifies the EPA’s effort to gather public comment on the relationship of anthropogenic greenhouse gases and climate change. Within this scene, with more than 50,000 public comment responses and the comment period not yet closed, the nonpartisan National Research Council, chartered by an act of Congress in 1916, issued a report that stated “[g]reenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise” (p. 7).

While Stephens has established and legitimated the material existence of climate change and its anthropogenic causes, this is not the only scene-based constitution worthy of recognize in the opinion. Stephens argues the actions of Congress and the EPA/White House place both bodies on the hook as pre-Massachusetts acknowledgers of the science of the climate change problem(s). Specifically, in Section I he outlines a scene in which the agent, Congress, enacted the CAA. This scene includes the measurements of which Congress was aware of carbon dioxide in the atmosphere going back to 1959 and how those measurements have been compared to “the 420,000-year-old ice record” (p. 3); to show the amounts of carbon dioxide have increased and continue to grow. This scene, with its agent and the act, lead to the purpose the Congress had in enacting the CAA and from which Stephens uses to set his own scene, within the opinion, of government responsibility for addressing the anthropogenic climate change problem. That congressional purpose, the CAA, Stephens cites is:

The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare… (p. 2-3)

Stephens adds his own clarification to this purpose, drawing from pieces of the CAA,
The Act defines “air pollutant” to include “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” [citation] “Welfare” is also defined broadly: among other things, it includes “effects on . . . weather . . . and climate.” (p. 3)

With the purpose of the CAA as a response to a changing atmospheric scene, Stephens moves toward viewing the inclusion of greenhouse gases in the overarching spirit of the CAA as well within Congressional intent. Having established that anthropogenic pollution includes carbon dioxide, and in recognizing that Congress passed the Global Climate Protection Act in 1987, Stephens argues (using a citation from the Global Climate Protection Act), “Congress emphasized that ‘ongoing pollution and deforestation may be contributing now to an irreversible process’ and that ‘[n]ecessary actions must be identified and implemented in time to protect the climate.’” (p. 5).

Of course, if Stephens is setting his own scene for the opinion by describing the historic scene in which government understanding of climate change as developed, he is not going to limit himself to what Congress has acknowledged or done, he is going to include the White House/EPA. He does this by connecting the EPA’s request for comments to the actions that followed. Again, before the close of the period for these comments, as Stephens notes within the opinion, the White House asked the National Research Council for “‘assistance in identifying the areas in the science of climate change where there are the greatest certainties and uncertainties’ from the National Research Council, asking for a response ‘as soon as possible’” (p. 7). He later chastises the White House, noting that a request with this urgency is nonsensical if the White House is going to claim before this Court, that is has neither the authority nor the will to address carbon dioxide via the CAA.

As a matter of legal concern, the question before the Court in Massachusetts was not whether or not anthropogenic climate change exists as a result of carbon dioxide emissions. The question was the EPA’s obligation to regulate emissions from passenger automobiles. However, from a constitutive framework based in the pentad, it is clear that Justice Stephens takes on the climate question in ways that overshadow the legal question. In doing so, from these scenes based in the science of climate change and the reading of Congress’ or the EPA/White House’s purposes for acting, Stephens constitutes the government’s MvEPA obligation to act on the regulation of carbon dioxide emissions from automobiles. Later sections of the opinion further constitute this obligation, as the opinion is now known for doing. This is done in the creative constitution of standing and/or in the interpretation of statute, both of which previous authors have addressed and are not central to the issues this essay takes on for the COCE conference. Ultimately, while there is much more to the MvEPA opinion than these paragraphs reflect, neither this essay nor our conference presentation affords us the space to develop additional constitutions. Therefore, our attention now turns to the second opinion.

In the second opinion, Justice Ginsburg, like Justice Stephens before her, devotes significant attention is on the scene. However, whereas Massachusetts established the material conditions of climate change and the acknowledgement of these material conditions by Congress and the EPA, therefore leading to the material conditions of the CAA as applied to EPA action and recognized in statute, the use of scene in Homer City is different. Unlike Justice Stephens, a significant difference is that Ginsburg does not need to constitute or establish the reality of the environmental problem before connecting it to policy action. Her concern, as we note below, is between the scene and the agency the agents adopt within that scene.

In the introduction, Ginsburg begins to establish a scene that, in significant ways, carries her into the ruling to follow. In this, there is a similarity to Massachusetts. She notes, “Left unregulated, the emitting or upwind State reaps the benefits of the economic activity causing the pollution without bearing all the costs.” She adds, “Conversely, downwind States to which the pollution travels are
unable to achieve clean air because of the influx of out-of-state pollution they lack authority to control” (p. 1). Therefore, air pollution traveling across state lines may adversely affect the receiver of the pollution more than the producer. Ginsburg elaborates in section I-A wherein air pollution is the agent and its indifference to state boundaries is the act:

Air pollution is transient, headless of state boundaries. Pollutants generated by upwind sources are often transported by air currents, sometimes over hundreds of miles, to downwind States. As the pollution travels out of state, upwind States are relieved of the associated costs. Those costs are borne instead by the downwind States, whose ability to achieve and maintain satisfactory air quality is hampered by the steady stream of infiltrating pollution. (p. 2-3)

This scene establishes the basis for why the EPA acted as it did, or wants to act, and why Homer City Generation, L.P., - a source of pollutants - wants to challenge that action. This scene is, in itself, not being challenged. It is the EPA regulation of the scene that is central here. Ginsburg does not need to prove the existence of pollution crossing boundaries to convince her audience that action, whatever form it takes, is warranted. She only needs to address the agency afforded the EPA by Congress, which she does when she declares:

Congress included a Good Neighbor Provision in the Clean Air Act (Act or CAA). That provision, in its current phrasing, instructs States to prohibit in-state sources “from emitting any air pollutant in amounts which will . . . contribute significantly” to downwind States’ “nonattainment . . . , or interfere with maintenance,” of any EPA-promulgated national air quality standard. (p. 2)

Ginsburg’s treatment of the EPA is favorable and respectful. They are doing the best they can with a difficult situation. If anything, an agent being negatively cast would have to be the wind.

Ginsburg further addresses the EPA as the agent charged with finding a policy solution to this pollution problem. EPA acted by adopting an interpretation of the Good Neighbor Provision of the CAA that they called Cross-State Air Pollution Rule, or the “Transport Rule” – their purpose. This is something, they contend, that is within their agency as specified by Congress in the CAA’s Good Neighbor Provision. Whether or not the Transport Rule is within the language or spirit of the CAA is the question before the Court. Ginsburg’s specific development of the scene the EPA is operating within for this interpretation captures our attention. Ginsburg writes:

The rule calls for consideration of costs, among other factors, when determining the emission reductions an upwind State must make to improve air quality in polluted downwind areas. The Court of Appeals for the D. C. Circuit vacated the rule in its entirety. It held, 2 to 1, that the Good Neighbor Provision requires EPA to consider only each upwind State’s physically proportionate responsibility for each downwind State’s air quality problem. That reading is demanded, according to the D. C. Circuit, so that no State will be required to decrease its emissions by more than its ratable share of downwind-state pollution. (p. 2)

This characterization establishes the based in interpretation of the CAA and its Good Neighbor Provision, wherein one state should be a good neighbor to other states and manage its air pollution so that it does not create a burden for a neighboring state.

The court’s choice here is whether to reverse the D.C. Circuit decision (the purpose of the Court hearing Homer City). That choice is informed by precedent (the Court’s agency) in similar cases where a government agency had to interpret and operationalization statute. In addressing itself as the opinion-granting agent, the Court concludes “the Good Neighbor Provision does not command the Court of Appeals’ cost-blind construction, and that EPA reasonably interpreted the provision” in operationalizing
the Transport Rule (p. 2). Ginsburg and the Court reach this conclusion in a way that is vilifies the wind and the pollution it carries while respecting the EPA’s difficulty in taking corrective action. In Section I-A, she asserts:

First, identifying the upwind origin of downwind air pollution is no easy endeavor. …Further complicating the problem, pollutants do not emerge from the smokestacks of an upwind State and uniformly migrate downwind. …Finally, upwind pollutants that find their way downwind are not left unaltered by the journey. Rather, as the gases emitted by upwind polluters are carried downwind, they are transformed, through various chemical processes, into altogether different pollutants. (p. 3)

Unlike the Massachusetts opinion, Homer City is not, indirectly, trying to answer a question that is not its legal question. The Court focuses on the scene here, and does so to constitute the material conditions of the wind-pollution relationship and the challenges this relationship creates for the EPA. Further, the Court recognizes that the Good Neighbor Provision, while an act of Congress tied to the CAA, it is also the scene and the agency in which the EPA must act. It is therefore the fundamental substance that can be linked to the material condition of the Transport Rule the EPA created to address the problem of the wind. Ginsburg’s materialism constitutes a favorable impression of the EPA given its difficult challenges of regulating pollution, or getting states to regulate pollution, crossing state boundaries.

The final opinion is Utility Air. It is unique for the attention Justice Scalia places on the agent-act, agent-agency, and agent-scene ratios. The attention given to agent is associated with idealism, which focuses on the kind of person/entity operating within the drama being told (Burke, 1966, 1969). What we also noticed is how the construction of the opinion differs from the others in two meaningful ways. First, the length of the introduction is the shortest of the three – two sentences. Second, the constitution of the agents as the dominant element carried through the opinion in ways that required attention to a larger portion of the opinion. Both of these present challenges to the claim noted by Schneyer (1993) earlier in this essay.

What immediately drew our attention is the opposition that is created between the EPA and the Court as agents. One could argue that both agents find their agency in the CAA, so attention is then directed to the act and scene for these agents. Scalia writes:

Acting pursuant to the Clean Air Act,… [citation] …the Environmental Protection Agency recently set standards for emissions of “greenhouse gases” (substances it believes contribute to “global climate change”) from new motor vehicles. We must decide whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases. (p. 1)

The words “it” and “believes” were striking aspects of the character Scalia constitutes in the opinion. Scalia potentially suggests that the EPA as an “it” stands alone – it is in the minority in its belief. Alternatively, Scalia suggests that the “belief” is based in some flawed or uncertain data, that it lacks conviction or certainty. Scalia’s publicly-expressed doubts about climate change heighten our interpretation. Whatever the intent, Scalia appears dismissive the EPA. Alternatively, he constitutes the Court as empowered noting, “we must decide,” which, as the writer of the opinion, in some ways means “I” am expressing my decision.

In Section I-A, addressing the background specific to the stationary source (e.g. factories, powerplants) permitting, Scalia briefly sets a scene describing what the CAA regulates and identifies the question before the Court – the scene in which it will issue its opinion. He creates another opposition, this time between the EPA and states that have “primary responsibility for implementing” the
national ambient air quality standards (NAAQS) for stationary sources of pollution (p. 2-3). Over several paragraphs, Scalia describes elaborate, one might say onerous, measures that stationary sources, as agents, must engage in to meet permitting requirements. While stationary sources must follow arduous and exhausting rules (or agency) to meet permitting requirements (their purpose), and their partners, the states, must make designations about how these stationary sources meet NAAQS, the EPA is simply charged with “formulating” the standards. This constitutes a power balance tipping away from the EPA while characterizing the stationary sources as victim/citizen in meeting those burdens.

In Section I-B, Scalia returns to the opposition between the Court and the EPA and does so in connection to Massachusetts (an opinion on which he was in the dissent), writing:

In 2007, the Court held that Title II of the Act “authorize[d] EPA to regulate greenhouse gas emissions from new motor vehicles” if the Agency “form[ed] a ‘judgment’ that such emissions contribute to climate change.” [citation] In response to that decision, EPA embarked on a course of regulation resulting in “the single largest expansion in the scope of the [Act] in its history.” [citation] (p. 4)

The potential to read disapproval, if not scorn, in his language is obvious. “If” the EPA formed a judgement, which, given his dissent, he would have preferred they did not. Additionally, he seemingly identifies the scope of the expansion being outside his preferences as well. This attention on the agent, at a micro-level, constitutes part of the scene, at a macro-level, within this section of the opinion. After this seeming disapproval, Scalia tempers his critique with an extended and generally positive treatment of the agent-scene ratio inspired or guided by brief references to agent-act and agent-purpose. He constitutes an EPA that was struggling to determine an appropriate and effective way to address the greenhouse gases created by stationary sources and doing so with input from others. He acknowledges that the EPA recognized the limitations of their solution, the Transport Rule, and its operationalization within the existing language of the CAA (see Giovinazzo, 2006).

Conclusion

Several important implications and/or conclusions of this approach to studying legal rhetoric are apparent. First, looking across related opinions draws attention to an area of environmental communication that has not received the attention it deserves. Our analysis for this COCE conference, while not groundbreaking in its approach or its discoveries, does suggest the fruitfulness of this manner of examination. Viewing the law (as written or as applied) as a constitutive rhetoric, particularly where the environment is concerned, opens the door to alternative understandings of conflicts and controversies that range from policy development and application to public participation and advocacy. More scholarship should be focused on that the law, or its agents, rhetorically constitute in its practice. In particular, we found the pentad useful in looking at the dramatic form in which an opinion can be crafted to make the decision seem self-evident.

Second, attention is drawn to the persuasive potential of these environmental/legal constitutions. The rhetoric that justices and judges create has consequences for agents (citizens, industries, advocates, legislators, agencies such as the EPA, etc.) involved in environmental communication and for the environmental conflicts and controversies, the scene, affecting those agents or to which those agents speak when doing their work. Our effort in this essay drew attention to the status of the justices, not just as justices speaking to legal issues, but also as people speaking to the reality of climate change, the value of science, or the definition of pollution. Our effort reveals a Court and particular justices that are highly concerned with status and using that status as leverage (e.g., over other justices, over lower Courts, over the White House or an agency of it like the EPA) to reach a legal, if not a political and/or cultural, purpose or objective.
Opinions like Massachusetts and Utility Air, when juxtaposed, expose the efforts of the Court to offer material for the questions that circulate in the public sphere – questions about climate change, pollution, or science. In particular, we see Justice Stephens address, in significant detail, a question not before the Court – a question that is not even about the law. This is followed by an opinion that could move beyond comparable, extraneous questions and alter the scene. Finally, the extraneous question can return to the Court, showing it is not immune to the personal conclusions (i.e., the politics, values, readings of the public culture) of the justices.
References


Environmental Protection Agency v. EME Homer City Generation, L.P., 12-1182 (Supreme Court of the United States April 29, 2014).


Massachusetts v. Environmental Protection Agency, 06-1120 (Supreme Court of the United States April 2, 2007).


