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## Michigan v. EPA: Money Matters When Deciding Whether to Regulate Power Plants

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*MICHIGAN V. EPA*: MONEY MATTERS WHEN DECIDING  
WHETHER TO REGULATE POWER PLANTS

I. INTRODUCTION

Administrative agencies play an essential role as one of the Federal government’s core regulatory instruments.<sup>1</sup> Congress delegates its regulatory authority to administrative agencies with varying degrees of purpose and power.<sup>2</sup> Because of their broad authority to “exercise legislative, executive and judicial powers[,]” administrative agency decisions are often challenged by entities subject to their regulations.<sup>3</sup> Despite challenges from such entities, however, the Supreme Court of the United States has traditionally granted deference to administrative agencies’ interpretations of ambiguous statutory language.<sup>4</sup>

This Note addresses one such challenge.<sup>5</sup> In *Michigan v. EPA*,<sup>6</sup> state and industrial entities challenged the Environmental Protection Agency’s (EPA or Agency) refusal to consider cost in determining whether to regulate power plants.<sup>7</sup> Through the Clean Air Act (CAA), “Congress directed the Agency to perform a study of the hazards” that power plant emissions posed to public health.<sup>8</sup> Based

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1. See Michael Uhlmann, *A Note on Administrative Agencies*, THE HERITAGE GUIDE TO THE CONSTITUTION, <http://www.heritage.org/constitution#!/articles/2/essays/101/a-note-on-administrative-agencies> (last visited Jan. 11, 2016) (discussing general history of administrative agencies).

2. See *id.* (discussing administrative agencies’ function).

3. See *id.* (discussing challenges to regulatory authority). See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984) (challenging EPA’s regulation to treat all pollution-emitting devices similarly); *Michigan v. EPA*, 135 S. Ct. 2699, 2705-06 (2015) (challenging EPA’s “appropriate and necessary” regulation of power plants); *City of Arlington v. Fed. Commc’ns Comm’n*, 133 S. Ct. 1863, 1863 (2013) (challenging FCC ruling under Telecommunications Act).

4. See generally *Chevron*, 467 U.S. at 844 (establishing principle of judicial deference to administrative agencies’ interpretations and constructions of statutes); *Michigan*, 135 S. Ct. at 2706-07 (reviewing EPA’s “necessary and appropriate” regulation of power plants under *Chevron*’s deference standard); *Arlington*, 133 S. Ct. at 1868 (applying *Chevron* deference standard in reviewing FCC ruling under Telecommunications Act).

5. For a discussion of the general topic of this Note, see *infra* notes 6-18 and accompanying text.

6. 135 S. Ct. 2699 (2015).

7. *Id.* at 2706 (stating Petitioners’ central challenge to EPA’s decision to regulate power plants).

8. See *id.* at 2705 (internal quotations omitted) (discussing CAA guidelines of EPA study).

on that study, the EPA found that the regulation of power plants was both “appropriate and necessary.”<sup>9</sup> In June 2015, the Supreme Court of the United States overturned the judgment of the Court of Appeals for the D.C. Circuit, thereby, striking down the regulation.<sup>10</sup> In striking down the regulation, the Supreme Court of the United States held that the EPA’s statutory interpretation of the CAA “to mean that cost is irrelevant to the initial decision to regulate power plants” was unreasonable.<sup>11</sup> The Supreme Court of the United States ruled that the EPA “must consider cost . . . before deciding whether regulation is appropriate and necessary.”<sup>12</sup>

This Note analyzes the Supreme Court of the United States’ decision in *Michigan*.<sup>13</sup> Part II of this Note provides the factual basis of the dispute and describes the circumstances that led to the dispute.<sup>14</sup> Part III provides the statutory framework of the Clean Air Act and provides a brief overview of relevant case law.<sup>15</sup> Part IV presents the Supreme Court of the United States’ analysis in reaching its conclusion that the EPA unreasonably interpreted the Clean Air Act to mean that cost is irrelevant to the initial decision to regulate power plants.<sup>16</sup> Part V analyzes the Supreme Court of the United States’ decision to invalidate as unreasonable the EPA’s interpretation of the CAA’s “appropriate and necessary” clause.<sup>17</sup> Finally, Part VI, discusses the possible impact of the Supreme Court of the United States’ ruling on future EPA decisions to regulate industries and entities.<sup>18</sup>

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9. *See id.* at 2705-06 (establishing findings of EPA study).

10. *See id.* at 2711-12 (stating Supreme Court holding).

11. *See Michigan*, 135 S. Ct. at 2711-12 (holding EPA’s finding of “appropriate and necessary” regulation unreasonable).

12. *See id.* at 2711 (explaining rationale of holding).

13. *See generally id.* at 2699 (determining EPA’s statutory interpretation to be unreasonable).

14. For a further discussion of the factual background of *Michigan*, see *infra* notes 19-44 and accompanying text.

15. For a further discussion of the legal background of *Michigan*, see *infra* notes 45-82 and accompanying text.

16. For a further discussion of the narrative analysis of the Supreme Court of the United States’ decision in *Michigan*, see *infra* notes 83-149 and accompanying text.

17. For a further discussion of the critical analysis of the Supreme Court of the United States’ decision in *Michigan*, see *infra* notes 150-197 and accompanying text.

18. For a further discussion of the impact of the Supreme Court of the United States’ decision in *Michigan*, see *infra* notes 198-208 and accompanying text.



## II. FACTS

In *Michigan*, state and industry entities challenged the EPA's refusal to consider cost in determining whether to regulate power plants.<sup>19</sup> The CAA grants the EPA authority to regulate power plants.<sup>20</sup> Specifically, the CAA "establishes a series of regulatory programs to control air pollution from stationary sources (such as refineries and factories) and moving sources (such as cars and airplanes)."<sup>21</sup> One such regulatory program, the National Emissions Standards for Hazardous Air Pollutants Program, is at issue in this litigation.<sup>22</sup>

The Hazardous Air Pollutants Program (Program) regulates stationary sources based on their emissions categorization as either a "major source" or an "area source."<sup>23</sup> Specifically, the Program defines a "major source" as any stationary "source that emits more than 10 tons of a single pollutant or more than 25 tons of a combination of pollutants per year."<sup>24</sup> The Program defines an "area source" as any stationary source whose emissions levels do not surpass the emissions levels of a major source.<sup>25</sup> The "EPA is required to regulate all major sources under the program."<sup>26</sup> The EPA, however, is "required to regulate an area source under the program [only] if it presents a threat of adverse effects to human health or the environment . . . warranting regulation."<sup>27</sup>

Under the CAA Amendments of 1990, Congress established separate regulatory requirements for "fossil-fuel-fired power plants."<sup>28</sup> In order to determine whether to regulate power plants,

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19. *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (stating Petitioners' central challenge to EPA's decision to regulate power plants). Petitioners included twenty-three states and various industrial and environmental entities. *Id.*

20. *See* Clean Air Act, 42 U.S.C. §§ 7401-7431 (2012) (noting source of EPA's regulatory power over power plants).

21. *See Michigan*, 135 S. Ct. at 2704 (discussing regulatory purpose of CAA).

22. *Id.* (discussing hazardous-air-pollutants program). This program was established by the 1990 Amendments to the Clean Air Act. *Id.*

23. *See id.* at 2704-05 (explaining Program's method for regulating stationary sources); *see also* 42 U.S.C. § 7412(a)(1) (defining regulation of stationary sources).

24. *See Michigan*, 135 S. Ct. at 2705 (citing 42 U.S.C. § 7412(a)(1)) (defining "major source" categorization).

25. *See id.* (citing 42 U.S.C. § 7412(a)(2)) (defining "area source" categorization).

26. *See id.* (discussing EPA regulatory requirements under CAA).

27. *See id.* (internal quotation marks omitted) (citing 42 U.S.C. § 7412(c)(1)-(3)) (describing EPA required regulation of "area source" under CAA).

28. *See id.* (explaining regulatory program applicable to oil and coal fired power plants). The CAA classifies fossil-fuel-fired power plants as "electric utility steam generating units, but [the Court and this Note] will simply call them power

“Congress directed the [EPA] to perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous air pollutants] after imposition of the requirements . . . .”<sup>29</sup> Section 7412(n)(1) of the CAA required the EPA to regulate power plants if it found that “regulation is appropriate and necessary after considering the results of the study . . . .”<sup>30</sup>

In 1998, the EPA completed the study mandated by Section 7412(n)(1) of the CAA and ultimately concluded that the regulation of fossil-fuel-fired power plants was both “appropriate and necessary.”<sup>31</sup> The Agency found regulation “appropriate because (1) power plants’ emissions of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce these emissions.”<sup>32</sup> The Agency found regulation “necessary because the imposition of the Act’s other requirements did not eliminate these risks.”<sup>33</sup> Most importantly, the EPA “concluded that costs should not be considered when deciding whether power plants should be regulated” under Section 7412 of the CAA.<sup>34</sup>

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plants.” *Id.* The parties agreed that the intended effect of these regulatory requirements was to “reduc[e] power plants’ emissions of hazardous air pollutants, although the extent of the reduction was unclear.” *Id.*

29. *See Michigan*, 135 S. Ct. at 2705 (internal quotation marks omitted) (discussing whether and how to regulate power plants); *see also* 42 U.S.C. § 7412(n)(1)(A) (emphasizing purpose of EPA’s mandated study).

30. *See Michigan*, 135 S. Ct. at 2705 (quoting 42 U.S.C. § 7412(n)(1)(A)) (requiring regulation where EPA deems “appropriate and necessary”). The Court assumed as correct the EPA’s interpretation of this statutory language to mean that power plants should be made subject to regulation on the same terms as other major and area sources of hazardous air pollutants. *See id.* The regulatory process for major and area sources generally requires the EPA to: (1) “divide sources covered by the program into categories and subcategories[.]” (2) “promulgate certain minimum emission regulations, known as floor standards . . . to reflect the emissions limitations already achieved by the best-performing 12% of sources within the category or subcategory[.]” and (3) “impose [where necessary] more stringent emission regulations, known as beyond-the-floor standards.” *Id.* The EPA *must* consider cost under the third stage of the regulatory process. *Id.*

31. *See id.* (discussing findings of EPA study).

32. *See id.* (citing National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. 9304, 9363 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63)) (explaining why EPA found regulation of power plants “appropriate”).

33. *See id.* (citing National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. at 9363) (explaining why EPA found regulation of power plants “necessary”).

34. *See id.* (quoting National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. at 9363) (internal quotation marks omitted) (discussing EPA’s post-study findings).



On May 3, 2011, the EPA issued a final rule, promulgating its regulation of power plants.<sup>35</sup> Alongside the regulation, the EPA provided a “Regulatory Impact Analysis” (Analysis).<sup>36</sup> The Analysis estimated that the EPA’s regulation, if enacted, would impose an annual compliance cost equivalent to nearly \$9.6 billion on power plants.<sup>37</sup> Additionally, the Analysis projected that the regulation’s “benefits of reducing power plants’ emissions of hazardous air pollutants[,]” although not fully quantifiable, range from four to six million dollars annually.<sup>38</sup> The Agency provided, however, that if the regulation’s “ancillary effects” are taken into account, the “quantifiable benefits” of its regulation could reach thirty-seven to ninety billion dollars annually.<sup>39</sup> The Agency nevertheless claimed that its “appropriate-and-necessary finding did not rest on these ancillary effects . . . .”<sup>40</sup>

Petitioners filed a lawsuit, which challenged the EPA’s “refusal to consider cost” when it determined that the regulation of power plants was “appropriate and necessary.”<sup>41</sup> Subsequently, the Court of Appeals for the D.C. Circuit upheld the EPA’s decision not to consider cost in making its determination to regulate power plants.<sup>42</sup> The Supreme Court of the United States, however, reversed the judgment of the Court of Appeals for the D.C. Circuit, holding that the EPA interpreted Section 7412 of the CAA “unreasonably when it deemed cost irrelevant to the [initial] decision to regulate power plants.”<sup>43</sup> The Court ultimately held that the EPA “must consider cost-including, most importantly, [the] cost of com-

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35. See National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. at 9363 (containing full version of EPA’s final rule).

36. See *Michigan*, 135 S. Ct. at 2705 (discussing EPA’s Regulatory Impact Analysis). In its briefs, the “EPA conceded[ed] that the Regulatory Impact Analysis ‘played no role’ in its appropriate-and-necessary finding.” *Id.* at 2706 (quoting EPA’s Br. 14).

37. See *id.* at 2705-06 (discussing estimated cost of compliance with EPA regulation to power plants).

38. See *id.* at 2706 (discussing estimated benefits of regulation to environment). The Court points out that, in comparison, “the costs to power plants were thus between 1,600 and 2,400 times as great as the quantifiable benefits of reduced emissions of hazardous air pollutants.” *Id.*

39. See *id.* (discussing Regulatory Impact Analysis’s estimations of regulation’s costs and benefits). The Agency cited “cutting power plants’ emissions of particulate matter and sulfur dioxide” as “ancillary effects” of the regulation. *Id.*

40. See *id.* (highlighting EPA’s claim that ancillary benefits “‘played no role’ in its appropriate-and-necessary finding”).

41. See *Michigan*, 135 S. Ct. at 2706 (stating basis of Petitioner’s claim).

42. See *id.* (stating holding of Court of Appeals for D.C. Circuit that upheld EPA’s decision not to consider cost).

43. See *id.* at 2711-12 (announcing holding of Supreme Court of United States).

pliance-before deciding whether regulation is appropriate and necessary.”<sup>44</sup>

## II. BACKGROUND

The CAA embodies the primary federal law providing for the regulation of air emissions.<sup>45</sup> The CAA is primarily administered by the EPA and, like any federal statute enforced by an administrative agency, the EPA is accorded broad deference in interpreting and implementing the CAA.<sup>46</sup> The extent of deference granted to administrative agencies is not without constraint however.<sup>47</sup>

### A. The Clean Air Act

In 1970, Congress enacted the CAA in an effort to prevent and control air pollution.<sup>48</sup> The primary purpose of the CAA is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare . . . .”<sup>49</sup> The CAA seeks to accomplish its mission by encouraging “reasonable Federal, State and local governmental actions . . . for [air] pollution prevention.”<sup>50</sup> The CAA establishes regulatory programs aimed at controlling air pollution from both “stationary sources” and “moving sources.”<sup>51</sup> In 1990, Congress enacted amendments to the CAA “to provide for [the] attainment and maintenance of health protective national ambient air quality standards.”<sup>52</sup>

### B. Deference Accorded to Administrative Agencies

Congress grants administrative agencies broad deference in their interpretation of statutes and construction of statutory

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44. *See id.* at 2711 (holding EPA must consider cost in making its “appropriate and necessary” determination to regulate power plants).

45. For a discussion of the CAA, see *infra* notes 48-52 and accompanying text.

46. For a discussion of the broad deference accorded to administrative agencies, see *infra* notes 53-64 and accompanying text.

47. For a discussion of the limitations imposed on the deference accorded to administrative agencies, see *infra* notes 65-82 and accompanying text.

48. *See* Clean Air Act, 42 U.S.C. § 7401 (1990) (stating Congressional findings and declaration of purpose of CAA).

49. *See* § 7401(b) (declaring purpose of CAA).

50. *See* § 7401(c) (asserting air pollution prevention as main objective of CAA).

51. *See Michigan*, 135 S. Ct. at 2704 (explaining CAA’s regulatory scheme). Under the CAA, “stationary sources” include “refineries and factories” while “moving sources” include “cars and airplanes.” *Id.*

52. Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (providing Congress’s reason for amending CAA).

schemes.<sup>53</sup> Thus, courts evaluate an administrative agency's interpretation of ambiguous statutory language within a deferential framework.<sup>54</sup> In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>55</sup> the Supreme Court of the United States considered whether an EPA regulation's construction of the term "stationary source" constituted a "reasonable construction" of the statutory term under the CAA.<sup>56</sup> The EPA regulation at issue "allow[ed] a State to adopt a plant wide definition of the term 'stationary source'" for purposes of the CAA in an effort to achieve greater compliance with the EPA's national air quality standards.<sup>57</sup> The Court held that the EPA's construction of the term "stationary source" was a "permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth."<sup>58</sup> In reaching its decision, the Court emphasized the importance of upholding the "principle of deference to administrative interpretations."<sup>59</sup>

*Chevron* established the deferential framework with which courts evaluate an administrative agency's interpretation of statutes.<sup>60</sup> Specifically, "*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers."<sup>61</sup> In *Chevron*, the Court provided that "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions[:]"

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53. See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (establishing principle of judicial deference to administrative agencies' interpretations and constructions of statutes); *Michigan*, 135 S. Ct. at 2706-07 (reviewing EPA's "necessary and appropriate" regulation of power plants under *Chevron* deference standard); *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (applying *Chevron* deference standard in reviewing FCC ruling under Telecommunications Act).

54. For a further discussion of case law in which courts apply the *Chevron* deference standard to administrative agencies' statutory interpretations, see *supra* note 53 and accompanying text.

55. 467 U.S. 837 (1984).

56. See *id.* at 840 (explaining central issue of case). The EPA's regulation applied to States classified as "nonattainment" States that "had not achieved the national air quality standards" established by the [EPA]." *Id.* at 840.

57. *Id.* (explaining purpose of EPA's regulation). The EPA's regulation effectively "allow[ed] States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble'." *Id.* at 837.

58. *Id.* at 866 (stating Supreme Court's holding).

59. *Id.* at 844 (explaining Court's long-held deference to executive and administrative agencies' statutory interpretations).

60. See *Chevron*, 467 U.S. at 844 (relying on "principle of deference" to administrative statutory interpretations).

61. *Michigan*, 135 S. Ct. at 2707 (citing *Chevron* precedent of deferential framework).



First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>62</sup>

Under the *Chevron* deference standard, an ambiguity in a statute implicitly authorizes an administrative agency to provide a reasonable interpretation of the ambiguous statutory language.<sup>63</sup> The *Chevron* court recognized the broad regulatory authority that Congress delegated to administrative agencies and acknowledged that courts should accord deference to administrative agencies' interpretations of ambiguous statutes, particularly because administrative agencies are entrusted by Congress to administer them.<sup>64</sup>

### C. Limitations on the Deference Accorded to Administrative Agencies

Despite *Chevron's* broad deferential standard, however, administrative agencies are not accorded unlimited discretion in administering statutes and interpreting ambiguous statutory provisions.<sup>65</sup> In *Utility Air Regulatory Group v. EPA*,<sup>66</sup> the Supreme Court of the United States considered "whether it was permissible for [the] EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the [CAA] for stationary sources that emit greenhouse gases."<sup>67</sup>

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62. *Chevron*, 467 U.S. at 842-43 (footnote omitted) (providing test Court relies on to review agencies' statutory construction and interpretation).

63. *See id.* at 843-44 (discussing agency's implicit authority to resolve statutory ambiguities).

64. *See id.* at 844 (recognizing "principle of deference" that must be accorded to agency interpretations of statutory schemes).

65. For a discussion of the limited discretion provided to agencies, see *supra* notes 53-64 and accompanying text.

66. 134 S. Ct. 2427 (2014).

67. *See id.* at 2434 (discussing central challenge to EPA's standards). In issuing these standards, the EPA cited its findings that "greenhouse-gas emissions from new motor vehicles contribute to elevated atmospheric concentrations of green-



The CAA's act-wide definition of "air pollutant" included greenhouse gases and the CAA "authorize[d] [the] EPA to regulate greenhouse gas emissions" emitted by motor vehicles.<sup>68</sup> The EPA interpreted the CAA's act-wide definition of "air pollutant" to encompass not only greenhouse gases emitted by motor vehicles but also greenhouse gases emitted by stationary sources, and accordingly determined that the Agency is compelled to regulate stationary sources that emit greenhouse gases since, under the CAA, "air pollutants" automatically triggered the relevant regulations.<sup>69</sup> The Court evaluated the EPA's interpretation of the CAA using the deferential standard established under *Chevron*.<sup>70</sup> The Court ultimately ruled that the Agency improperly extended the act-wide definition of "air pollutant" to greenhouse gases emitted by stationary sources because it misapplied the term within the "overall statutory scheme."<sup>71</sup> The Court, therefore, held that the applicability of permitting requirements to motor vehicle greenhouse gas emissions does not implicitly validate the applicability of such permitting requirements to stationary source greenhouse gas emissions.<sup>72</sup> According to the Court, the EPA's statutory interpretation of the CAA was "impermissible" because the Agency had essentially tailored the legislation to its own "bureaucratic policy goals by rewriting unambiguous statutory terms."<sup>73</sup> In reaching its decision, the Court emphasized that "[e]ven under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation."<sup>74</sup>

The Court further delineated a limitation on administrative agencies' authority to reasonably interpret ambiguous statutory pro-

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house gases, which endanger public health and welfare by fostering global 'climate change'." *Id.* at 2437 (citation omitted).

68. *See id.* at 2436-40 (citation omitted) (explaining CAA provisions triggering greenhouse gas regulations). "In 2007, the Court held that Title II of the [CAA] '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.'" *Id.* at 2436 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007)).

69. *See id.* at 2439-40 (discussing EPA's interpretation of CAA's act-wide definition of "air pollutant").

70. *See id.* at 2439 (citing *Chevron*, 467 U.S. at 842-43) (providing Court's standard of review under *Chevron*).

71. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2439-42 (citation omitted) (providing explanation of regulation triggers).

72. *See id.* at 2442 (stating Court's overall finding with respect to regulation triggers).

73. *See id.* at 2445 (rejecting EPA's interpretation of statute's triggering provisions).

74. *See id.* at 2442 (citing *Arlington*, 133 S. Ct. at 1868) (internal quotation marks omitted) (providing case law in support of Court's holding).

visions by providing that an express statutory authority to consider cost is required in order for an agency to consider cost in setting regulations.<sup>75</sup> In *Whitman v. American Trucking Ass'ns*,<sup>76</sup> the Supreme Court of the United States evaluated whether the EPA Administrator “may consider the costs of implementation in setting national ambient air quality standards (NAAQS) under [Section] 109” of the CAA.<sup>77</sup> The relevant provision of the CAA directed the EPA to “set primary ambient air quality standards . . . ‘requisite to protect the public health’ with ‘an adequate margin of safety’.”<sup>78</sup> The EPA interpreted this provision of the CAA to mean that the Agency may consider implementation costs in setting NAAQS.<sup>79</sup> The Court, however, refused to find an “implicit . . . authorization to consider costs that has elsewhere, and so often, been expressly granted.”<sup>80</sup> Essentially, the Court held that there must be a clear “textual commitment of authority” that allows “the EPA to consider costs in setting NAAQS” standards.<sup>81</sup> Absent some “clear” or explicit statutory authority, the EPA is precluded from considering costs in enacting regulations.<sup>82</sup>

#### IV. NARRATIVE ANALYSIS

In *Michigan*, the Supreme Court of the United States’ decision focused solely on whether it was reasonable for the EPA to ignore costs when concluding that the regulation of power plants was “appropriate and necessary.”<sup>83</sup> The Court’s analysis began by discuss-

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75. For a discussion of this limitation, see *infra* notes 76-82 and accompanying text.

76. 531 U.S. 457 (2001).

77. *See id.* at 462 (stating issues on appeal).

78. *Id.* at 465 (citation omitted) (quoting language of Section 109(b)(1) of CAA that provides NAAQS regulatory guidelines).

79. *See id.* at 463 (discussing EPA’s interpretation of CAA provision).

80. *See id.* at 467 (citations omitted) (providing Court’s conclusion with respect to EPA’s statutory interpretation of CAA provision).

81. *See Whitman*, 531 U.S. at 468 (quoting Court’s conclusion regarding proper statutory interpretation of CAA provision).

82. *See id.* (emphasizing importance of “clear” textual authority to consider cost).

83. *See Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015) (internal quotation marks omitted) (providing overall issue before Supreme Court of United States). Although the Court of Appeals for the D.C. Circuit addressed a number of claims relating to the EPA’s final rule, the only issue on appeal to the Supreme Court of the United States was the reasonableness of the EPA’s decision to regulate power plants. *See White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1234-58 (D.C. Cir. 2014).



ing relevant case law.<sup>84</sup> The Court noted that *Chevron* provides the applicable standard of review of the EPA's interpretation of the CAA.<sup>85</sup> Next, the Court presented the underlying rationale of its ruling that the EPA's interpretation of the CAA was unreasonable.<sup>86</sup> Finally, the Court discussed the arguments offered by the EPA to justify its interpretation of the CAA and refuted each argument in turn before announcing its decision.<sup>87</sup>

#### A. Majority's Ruling that the EPA Unreasonably Ignored Cost

As an initial matter, the Court reiterated the reasoning behind the EPA's decision not to consider cost in determining whether the regulation of power plants was "appropriate and necessary".<sup>88</sup> The EPA's refusal to consider cost rested on its interpretation of Section 7412 of the CAA.<sup>89</sup> Section 7412 of the CAA "directs the Agency to regulate power plants if it finds such regulation is appropriate and necessary."<sup>90</sup> The Court emphasized that although the Agency "could have interpreted this provision to mean that cost is relevant to the decision to [regulate] power plants[,] . . . it chose to read the statute to mean that cost makes no difference to the initial decision to regulate."<sup>91</sup> The Court found that the EPA, by choosing to interpret Section 7412 of the CAA to mean that cost is irrelevant to the initial decision to regulate, "strayed far beyond" the "bounds of reasonable interpretation."<sup>92</sup>

The Court regarded the EPA's refusal to consider cost as an excessive and unreasonable use of its administrative discretion.<sup>93</sup>

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84. See *Michigan*, 135 S. Ct. at 2706-07 (reviewing applicable case law). Part II of the opinion encompasses this section. *Id.*

85. See *id.* (announcing standard of review under *Chevron*). For a discussion of the *Chevron* deference standard, see *supra* notes 53-64 and accompanying text.

86. See *Michigan*, 135 S. Ct. at 2707-08 (discussing rationale that led to Court's decision). Part II(A) of the opinion encompasses this section. *Id.*

87. See *id.* at 2708-10 (discussing and rejecting EPA's arguments put forth to justify its refusal to consider cost). Part II(B) of the opinion encompasses this section. *Id.*

88. See *id.* at 2706-07 (reinforcing basis of EPA's decision).

89. *Id.* at 2706 (reciting Agency's statutory authority). Specifically, the EPA relied upon Section 7412(n)(1)(A) of the CAA. *Id.*

90. *Id.* (internal quotation marks omitted) (providing CAA's directive to EPA for regulating power plants).

91. *Michigan*, 135 S. Ct. at 2706 (emphasis omitted) (citations omitted) (noting Agency's equal opportunity to interpret statute to encompass cost as relevant factor).

92. *Id.* at 2707 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014)) (finding EPA's decision unwarranted).

93. For a discussion of the Court's reasoning of why it found the EPA's decision excessive and unreasonable, see *infra* notes 83-137 and accompanying text.

The Court provided three reasons to justify its finding of administrative abuse of discretion.<sup>94</sup> First, “[r]ead naturally . . . the phrase ‘appropriate and necessary’ requires at least some attention to cost.”<sup>95</sup> The Court presumed that “[o]ne would not say that it is even rational, never mind ‘appropriate[ ]’[,] to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”<sup>96</sup> The Court criticized the EPA’s interpretation because it effectively allows the Agency to disregard any type of cost, including health or environmental costs.<sup>97</sup> Thus, under the EPA’s interpretation, a regulation whose incidental health or environmental costs exceed its benefits would nevertheless be deemed appropriate.<sup>98</sup> The Court, however, reasoned that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.”<sup>99</sup>

Second, agencies have traditionally “treated cost as a centrally relevant factor when deciding whether to regulate.”<sup>100</sup> According to the Court, “[agencies’] [c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”<sup>101</sup> The Court thus found that “[a]gainst the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether ‘regulation is appropriate and necessary’ as an invitation to ignore cost.”<sup>102</sup> By interpreting the “appropriate and necessary” provision to mean that cost is irrelevant to regulation, the EPA conveniently

94. See *Michigan*, 135 S. Ct. at 2707-08 (discussing unreasonableness of Agency’s interpretation of CAA).

95. *Id.* at 2707 (explaining that natural reading of “appropriate and necessary” standard necessarily imports attention to cost).

96. *Id.* (explaining irrationality of EPA’s interpretation of “appropriate and necessary” standard based on common sense).

97. *Id.* (providing further criticism of EPA’s interpretation). The Court noted that “cost includes more than the expense of complying with regulations; any disadvantage could be termed a cost.” *Id.* (internal quotation marks omitted).

98. *Id.* (demonstrating unreasonableness of EPA’s interpretation by applying Agency’s underlying rationale to different type of cost). “The Government concede[d] [in oral argument] that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would *still* deem regulation appropriate.” *Id.* (emphasis in original) (citation omitted).

99. *Michigan*, 135 S. Ct. at 2707 (highlighting irrationality of deeming regulation whose social harm significantly outweighs social good as “appropriate”).

100. *Id.* (citing traditional administrative practice of considering cost as relevant factor in regulation).

101. *Id.* (emphasis omitted) (explaining relevance of cost to regulation).

102. *Id.* at 2708 (finding EPA’s interpretation of “appropriate and necessary” provision as statutory “invitation to ignore cost” unreasonable).



regarded the CAA's directive as an "invitation to ignore cost" in contravention to established administrative practice.<sup>103</sup>

Third, "[s]tatutory context reinforces the relevance of cost."<sup>104</sup> Under Section 7412(n)(1) of the CAA, subparagraph (A) requires the "EPA to [conduct a] study [of] the hazards to public health posed by power plants and to determine whether regulation is appropriate and necessary."<sup>105</sup> Meanwhile, subparagraphs (B) and (C) require the EPA to conduct two additional studies, one of which requires a study of mercury emissions from power plants with specific considerations of the "health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies."<sup>106</sup> The Court established that although subparagraph (A) provides the "appropriate and necessary" standard with no explicit mention of cost, subparagraphs (B) and (C) explicitly mention cost and, thereby, implicitly extend the relevance of cost to the regulation of power plants under subparagraph (A).<sup>107</sup> The statutory context of the "appropriate and necessary" provision further indicates, accordingly, that Congress intended cost to be a relevant consideration in the decision to regulate power plants.<sup>108</sup>

The Court noted that the EPA, in an attempt to "minimize this express reference to cost," argued that Section 7412(n)(1)(A) of the CAA "requires it to consider only the study mandated by that provision, [and] not the separate mercury study, before deciding whether to regulate power plants."<sup>109</sup> Yet, in adopting its final rule, the EPA "insisted that the provisions concerning all three studies provide[d] a framework for [its] determination of whether to regulate [power plants]."<sup>110</sup> In doing so, the EPA effectively conceded

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103. *See id.* (criticizing Agency's decision as nonconforming to administrative practice).

104. *Michigan*, 135 S. Ct. at 2708 (providing third reason underlying Court's finding of EPA's statutory interpretation as unreasonable).

105. *Id.* (citing section of CAA requiring EPA's study of power plants).

106. *Id.* (emphasis omitted) (citing Section 7412(n)(1)(B) of CAA requiring EPA's study of health and environmental effects of mercury emissions).

107. *See id.* (indicating how express mention of cost in related subparagraphs establishes implicit relevance of cost to subparagraph providing "appropriate and necessary" standard).

108. *See id.* (explaining how statutory directive to consider cost in other related studies further indicates relevance of cost to regulation).

109. *Michigan*, 135 S. Ct. at 2708 (discussing EPA's argument concerning statute's express mention of cost).

110. *Id.* (internal quotation marks omitted) (citing National Emission Standards for Hazardous Air Pollutants, 76 Fed. Reg. 24976, 24987 (May 3, 2011) (to be codified at 40 C.F.R. pts. 60, 63)) (referencing three studies as framework for Agency's determination regarding whether to regulate power plants).

that it interpreted the “scope of the appropriate and necessary finding in the context of all three studies.”<sup>111</sup> The Court undermined this argument by highlighting the Agency’s failure to explain how subparagraph (B)’s express mention of “environmental effects . . . and . . . costs” provided “direct evidence” of Congress’s concern with environmental effects rather than with costs.<sup>112</sup> The Court stressed that “*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.”<sup>113</sup> In the Court’s view, the EPA’s interpretation of the “appropriate and necessary” provision as not encompassing cost amounted to a selective statutory interpretation serving administrative convenience rather than a reasonable statutory interpretation.<sup>114</sup>

#### B. Refuting the EPA’s Interpretation of the “Appropriate and Necessary” Clause

The EPA provided several reasons to justify its interpretation of Section 7412(n)(1)(A) of the CAA, which establishes the “appropriate and necessary” standard, to mean that cost is irrelevant to the initial decision to regulate power plants, all of which the Supreme Court of the United States refuted, finding them entirely unpersuasive.<sup>115</sup> First, the EPA argued that “other parts of the Clean Air Act expressly mention cost” while Section 7412(n)(1)(A) does not.<sup>116</sup> The Court rebutted this argument by indicating that it is “unreasonable to infer that, by expressly making cost relevant to other decisions, the [CAA] implicitly makes cost irrelevant to the appropriateness of regulating power plants.”<sup>117</sup> To analogize the flaw in the Agency’s logic, the Court compared it to the fact that while other sections of the CAA expressly mention “environmental

111. *Id.* (emphasis omitted) (affirming three studies as underlying basis of Agency’s “appropriate and necessary” finding).

112. *Id.* (emphasizing inconsistencies in Agency’s argument).

113. *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) (criticizing Agency’s interpretation of statutory context as administrative convenience rather than “reasonable interpretation[ ]” of statute). For a discussion of *Chevron*, see *supra* notes 53-64 and accompanying text.

114. See *Michigan*, 135 S. Ct. at 2708 (distinguishing between permissible and impermissible agencies’ interpretations of statutes under *Chevron*).

115. See *id.* (providing EPA’s arguments to justify its interpretation of Section 7412(n)(1)(A) as disregarding cost). The Court discussed these arguments and countered them in Part B of the opinion. See *id.* at 2708-10.

116. *Id.* at 2708-09 (discussing first argument EPA made to justify its statutory interpretation).

117. *Id.* at 2709 (rebutting first argument EPA made finding it unreasonable).



effects,” Section 7412(n)(1)(A) does not and, yet, “that did not stop EPA from deeming environmental effects relevant to the appropriateness of regulating power plants.”<sup>118</sup>

Second, the EPA sought support from the decision reached by the Supreme Court of the United States in *Whitman*.<sup>119</sup> *Whitman* established the principle that “where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the Agency to consider cost anyway.”<sup>120</sup> The Court, however, rejected the applicability of *Whitman* to this case, reasoning that the “appropriate and necessary” standard established under *Michigan* is a “far more comprehensive criterion” than the “ requisite to protect the public health” standard established under *Whitman*.<sup>121</sup> According to the Court, the term “appropriate and necessary . . . read fairly and in context . . . plainly subsumes consideration of cost.”<sup>122</sup>

Third, the EPA argued that “it need not consider cost when first deciding *whether* to regulate power plants because it can consider cost later when deciding *how much* to regulate them.”<sup>123</sup> The Court refuted this argument by emphasizing that the question before it was the meaning of the “appropriate and necessary standard that governs the initial decision to regulate” and not its implication on subsequent regulation.<sup>124</sup> The Court reasoned that “[c]ost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at this stage.”<sup>125</sup> Again, the Court reiterated that the statutory context of

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118. *Id.* (analogizing EPA’s flawed logic by comparing relevance of other statutory provisions not expressly mentioned but relied upon in EPA’s “appropriate and necessary” finding).

119. *See Michigan*, 135 S. Ct. at 2709 (discussing second argument EPA offered to justify its statutory interpretation). For a discussion of *Whitman*, see *supra* notes 76-82 and accompanying text.

120. *Michigan*, 135 S. Ct. at 2709 (providing precedent set in *Whitman*).

121. *See id.* (finding standard set in *Whitman* inapplicable). *Whitman*’s standard was broadly defined, while *Michigan*’s “appropriate and necessary” standard was narrowly defined to implicitly include cost as relevant factor. *Id.*

122. *Id.* (establishing statutory context of “appropriate and necessary” standard “plainly” includes cost as relevant factor).

123. *Id.* (emphasis in original) (discussing third argument EPA made to justify its statutory interpretation).

124. *See id.* (internal quotation marks omitted) (restating central issue before Court to rebut EPA’s third argument).

125. *Michigan*, 135 S. Ct. at 2709 (emphasis omitted) (explaining that cost’s relevance to later regulatory stages does not eliminate its relevance to initial regulatory stages).



the “appropriate and necessary” standard reinforces its expansive nature to logically encompass cost.<sup>126</sup>

Fourth, the EPA argued that the “Clean Air Act makes cost irrelevant to the initial decision to regulate sources other than power plants.”<sup>127</sup> The Agency, therefore, claimed that “it is reasonable to interpret [Section] 7412(n)(1)(A) in a way that harmonizes the program’s treatment of power plants with its treatment of other sources.”<sup>128</sup> The Court rejected this argument, holding that this “line of reasoning overlooks the whole point of having a separate provision about power plants: treating power plants *differently* from other stationary sources.”<sup>129</sup> According to the Court, Congress drafted a separate provision for the regulation of power plants precisely to emphasize its intent to treat power plants differently by subjecting them to an expansive standard of regulation that encompasses multiple factors.<sup>130</sup>

Lastly, the EPA argued that “Congress treated power plants differently from other sources because of uncertainty about whether regulation of power plants would still be needed after the application of the rest of the Act’s requirements.”<sup>131</sup> The Court acknowledged that this is “undoubtedly *one* of the reasons Congress treated power plants differently[.]”<sup>132</sup> The Court noted, however, that “if uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains necessary, not whether regulation is appropriate *and* necessary.”<sup>133</sup> Moreover, the Court cited to the EPA’s assertion that it made the “appropriate and necessary” finding in light of all three studies required under Section 7412(n)(1)(A), one of which expressly reflected a consider-

126. *See id.* (emphasizing significance of “appropriate and necessary” standard’s statutory context in order to buttress importance of considerations of cost).

127. *Id.* at 2709-10 (discussing fourth argument EPA makes to justify its statutory interpretation).

128. *Id.* at 2710 (internal quotation marks omitted) (clarifying EPA’s argument).

129. *Id.* (emphasis in original) (rejecting EPA’s argument by emphasizing significance of separate statutory provision for regulation of power plants).

130. *See Michigan*, 135 S. Ct. 2710 (discussing congressional intent behind separate statutory provision for regulation of power plants).

131. *Id.* (discussing final argument EPA made to justify its statutory interpretation).

132. *Id.* (agreeing partially with EPA’s reasoning underlying Congress’s separate statutory provision for power plant regulation).

133. *Id.* (emphasis in original) (internal quotation marks omitted) (rebutting EPA’s explanation for separate statutory provision establishing standard for regulation of power plants).



ation of cost, to bolster the meaning of the “appropriate and necessary” standard.<sup>134</sup>

Based upon its analysis and reasoning, the Supreme Court of the United States found the EPA’s interpretation of the “appropriate and necessary” standard established under Section 7412(n)(1)(A) of the CAA to be unreasonable.<sup>135</sup> The Court held that the EPA “interpreted [Section] 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants.”<sup>136</sup> The Court, therefore, ruled that the Agency “must consider cost-including, most importantly, cost of compliance-before deciding whether regulation [of power plants] is appropriate and necessary.”<sup>137</sup>

Justice Thomas agreed with the result reached by the Court, but wrote a separate concurring opinion.<sup>138</sup> Justice Thomas’s concurring opinion focused on the potentially unconstitutional deference afforded to agencies under *Chevron*.<sup>139</sup> According to Justice Thomas, the *Chevron* deference granted to agencies in interpreting federal statutes raises serious constitutional questions and, thus, warrants greater judicial scrutiny.<sup>140</sup>

### C. Dissent’s Finding that the EPA Reasonably Accounted for Cost

Justice Kagan, joined by Justice Ginsburg, Justice Breyer and Justice Sotomayor, dissented.<sup>141</sup> The dissent concluded that the “EPA, in regulating power plants’ emissions of hazardous air pollutants, accounted for costs in a reasonable way.”<sup>142</sup> The dissent reached its conclusion by explaining that simply declining to con-

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134. *See id.* (citing EPA’s admitted significance of all three studies required under Section 7412(n)(1) to its “appropriate and necessary” inquiry).

135. *See Michigan*, 135 S. Ct. at 2711-12 (discussing Court’s holding). For a discussion of the Court’s analysis and reasoning, see *supra* notes 83-134 and accompanying text.

136. *Id.* at 2712 (announcing holding of Supreme Court of United States).

137. *Id.* at 2711 (explaining that cost of compliance must be considered in deciding whether to regulate power plants).

138. *See id.* at 2712-14 (Thomas, J., concurring) (warning of potential constitutional danger in granting administrative agencies excessive deference under *Chevron*).

139. *See id.* at 2712-13 (explaining basis of perceived constitutional danger). For a discussion of *Chevron*, see *supra* notes 53-64 and accompanying text.

140. *See Michigan*, 135 S. Ct. at 2712-14 (discussing constitutional danger and suggesting need for greater scrutiny of agencies’ statutory interpretations).

141. *See id.* at 2714-26 (Kagan, J., dissenting) (providing dissenting opinion).

142. *Id.* at 2718 (stating dissent’s overall conclusion that EPA reasonably accounted for costs in reaching its ultimate decision to regulate power plants).

sider cost at the initial stages of regulation does not mean that the “Agency gave cost no thought at all[,]” as the majority asserted.<sup>143</sup> The dissent refuted the majority’s finding by explaining that the Agency “did not explicitly analyze costs at the very first stage of the regulatory process” precisely because it recognized that later stages of the regulatory process would necessarily ensure the “cost-effectiveness” of the regulation.<sup>144</sup>

The dissent further pointed out that the “EPA could not have accurately assessed costs” at the initial stages of the regulatory process.<sup>145</sup> Indeed, the regulatory process requires the “appropriate and necessary” finding to precede the Agency’s determination of emissions standards, “[a]nd until [the] EPA knows what standards it will establish, it cannot know what costs they will impose.”<sup>146</sup> Moreover, the dissent emphasized the Agency’s authority to decline to consider cost at the initial stage of the regulatory process.<sup>147</sup> Applying the *Chevron* deference standard, the dissent reiterated that “when Congress does not say how to take costs into account, agencies have broad discretion to make that judgment.”<sup>148</sup> The Court must, therefore, defer to the Agency’s reasonable interpretation of an ambiguity in the CAA, according to the dissent’s opinion.<sup>149</sup>

## V. CRITICAL ANALYSIS

The Court in *Michigan* held that the EPA unreasonably interpreted the “appropriate and necessary” clause in determining whether to regulate power plants and based its finding on both statutory analysis and relevant case law.<sup>150</sup> Section A discusses the Court’s disagreement on which stage of the regulatory process cost

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143. *See id.* at 2714-15 (emphasis omitted) (explaining that alternative analysis refutes majority’s conclusion that EPA failed to consider cost entirely).

144. *See id.* at 2714 (discussing why dissent found EPA’s decision not to consider cost at initial stages of regulation reasonable).

145. *See Michigan*, 135 S. Ct. at 2723 (Kagan, J. dissenting) (highlighting why costs could not have been accurately determined during early stages of regulation).

146. *See id.* (noting order of regulatory stages inhibits EPA from providing accurate cost estimates).

147. *See id.* at 2714-15 (discussing dissent’s rationale).

148. *See id.* at 2726 (explaining *Chevron*’s deferential framework requires Court to defer to Agency’s reasonable interpretation of statutory ambiguity).

149. *Id.* (reiterating importance of judicial deference to Congressional grant of legislative authority to agencies).

150. For a discussion of the Court’s analysis and findings, see *supra* notes 83-137 and accompanying text.



becomes a relevant factor.<sup>151</sup> Section B discusses the Court's disagreement on the extent of deference that should be accorded to the Agency's interpretation of the statutory ambiguity.<sup>152</sup> Section C discusses the Court's adherence to the principle of deference in light of existing case law.<sup>153</sup> Lastly, section D addresses the Constitutional danger of according broad deference to administrative agencies' statutory interpretations.<sup>154</sup>

#### A. Stage of the Regulatory Process in Which Cost Becomes a Relevant Factor

The central question before the Supreme Court of the United States in *Michigan* was whether the EPA reasonably interpreted the "appropriate and necessary" clause in determining whether to regulate power plants.<sup>155</sup> The majority held that the EPA unreasonably interpreted the statute's "appropriate and necessary" provision to mean that cost is irrelevant to the initial decision to regulate power plants.<sup>156</sup> In reaching its ruling, the majority considered (1) administrative agencies' traditional practice of treating "cost as a centrally relevant factor when deciding whether to regulate[.]" (2) a natural and logical reading of the "appropriate and necessary" clause, and (3) statutory context, which, together, "reinforc[e] the relevance of cost" to the decision to regulate.<sup>157</sup> Conversely, the dissent held that the EPA reasonably interpreted the statute's "appropriate and necessary" provision to mean that cost is irrelevant to the initial decision to regulate power plants.<sup>158</sup> To support its conclusion, the dissent emphasized that the EPA's "appropriate and necessary"

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151. For a discussion of the Court's disagreement on this point, see *infra* notes 155-173 and accompanying text.

152. For a discussion of the Court's disagreement on this point, see *infra* notes 174-178 and accompanying text.

153. For a discussion of the Court's adherence to the principle of deference, see *infra* notes 179-188 and accompanying text.

154. For a discussion of the Constitutional danger of according agencies broad deference, see *infra* notes 189-197 and accompanying text.

155. See *Michigan*, 135 S. Ct. at 2704 (stating case's central issue). The "appropriate and necessary" provision is found in Section 7412(n)(1)(A) of the CAA, which directs the EPA to regulate power plants if it finds regulation "appropriate and necessary." Clean Air Act, 42 U.S.C. § 7412(n)(1)(A) (1970) (amended 1977 and 1990).

156. See *Michigan*, 135 S. Ct. at 2711 (providing majority's holding).

157. See *id.* at 2707-09 (discussing rationale behind majority's holding). For a complete discussion of the Court's analysis and reasoning, see *supra* notes 83-149 and accompanying text.

158. See *Michigan*, 135 S. Ct. at 2715 (Kagan, J., dissenting) (providing dissent's conclusion that EPA reasonably declined to consider cost at initial stage of regulation).

finding represents only the first stage in the regulatory process and that later stages of the regulatory process will necessarily ensure the “cost-effectiveness” of the regulation.<sup>159</sup> The central disagreement between the majority and dissent, therefore, rests on determining which stage of the regulatory process must cost constitute a relevant consideration in the regulation of power plants.<sup>160</sup>

The regulatory stage at which cost becomes a relevant consideration is, however, a distinction without a difference.<sup>161</sup> Cost undoubtedly represents an important factor in regulation generally.<sup>162</sup> Cost, however, should not always trump all other considerations, especially when human health and environmental protection are at stake.<sup>163</sup> The majority found that the “Agency gave cost no thought *at all*” in making its initial “appropriate and necessary” finding.<sup>164</sup> Contrary to the majority’s finding that the EPA failed to consider costs altogether, the EPA reasonably accounted for costs because, as the dissent points out, the Agency’s initial “appropriate and necessary” finding was predicated on its knowledge and experience that later regulatory stages would inevitably ensure the “cost-effectiveness” of the regulation.<sup>165</sup>

Indeed, the EPA’s Regulatory Impact Analysis provided that when the regulation’s “ancillary benefits” are taken into account, the estimated “quantifiable benefits” of the regulation increase from thirty-seven to ninety billion dollars annually.<sup>166</sup> While the EPA acknowledged that the regulation’s “ancillary benefits . . . played no role in its appropriate-and-necessary finding[,]” these “ancillary benefits” nevertheless provide a strong indication of the

159. *See id.* at 2714-15 (explaining EPA’s decision not to consider cost in initial stage of regulation proper given that cost will be considered in virtually all subsequent stages of regulation).

160. For a discussion of the majority and dissent’s central points of disagreement, see *supra* notes 155-159 and accompanying text.

161. For a discussion of why the regulatory stage at which cost becomes relevant is a distinction without a difference, see *infra* notes 162-173 and accompanying text.

162. *See generally Michigan*, 135 S. Ct. at 2707-08 (discussing significance of cost to regulation).

163. *See id.* at 2726 (Kagan, J., dissenting) (suggesting majority’s decision deprives EPA of using its regulatory authority to “save many, many lives”).

164. *See id.* at 2706 (majority opinion) (emphasis in original) (finding Agency completely disregarded cost because it “considered cost irrelevant to its initial decision to regulate”).

165. *See id.* at 2714 (Kagan, J., dissenting) (finding EPA’s deferral of considering cost during initial regulatory stage reasonable because later regulatory stages would necessarily encompass considerations of cost).

166. *See id.* at 2705-06 (majority opinion) (discussing estimated impact of regulation’s “ancillary benefits” provided in EPA’s Regulatory Impact Analysis).



potential “cost-effectiveness” of the regulation.<sup>167</sup> Although the regulation’s initial costs substantially outweigh its quantifiable benefits, the regulation’s long-term benefits may substantially outweigh its costs by an even greater margin.<sup>168</sup> The Regulatory Impact Analysis estimates that the regulation’s initial cost of compliance to power plants is 9.6 billion dollars annually while the quantifiable benefits of reduced emissions are four to six million annually.<sup>169</sup> Taking the regulation’s ancillary benefits into account, however, substantially increases the regulation’s estimated quantifiable benefits ranging from thirty-seven to ninety billion dollars annually.<sup>170</sup> The Court’s disagreement as to which regulatory stage determines the relevance of cost is, therefore, overshadowed by the potential economic significance of the regulation as a whole.<sup>171</sup> Instead of evaluating the EPA’s decision in light of the potential benefits of implementing the regulation, the Court appeared highly dismissive of the Agency’s Regulatory Impact Analysis altogether, finding that the “Agency gave cost no thought at all.”<sup>172</sup> This is simply not the case, however, because the Agency’s Regulatory Impact Analysis indeed considered the long-run costs and provided significant evidence that the regulation’s ancillary benefits substantially outweigh the regulation’s initial costs.<sup>173</sup>

## B. Extent of Deference Accorded to Administrative Agencies

The Court’s disagreement additionally rests on the extent of deference that should be afforded to the EPA and administrative agencies generally under *Chevron*.<sup>174</sup> The majority found that the EPA “strayed far beyond” the “bounds of reasonable interpretation” when it declined to consider cost in deciding whether to regulate

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167. See *Michigan*, 135 S. Ct. at 2706 (discussing impact of regulation’s “ancillary benefits”).

168. See *id.* at 2705-06 (explaining regulation’s monetary impact).

169. See *id.* at 2705-06 (discussing estimated annual costs and benefits of EPA’s regulation).

170. See *id.* (discussing estimated ancillary benefits of implementing EPA’s regulation). Ancillary benefits include “cutting power plants’ emissions of particulate matter and sulfur dioxide[,]” which are “substances that are not covered by the hazardous-air-pollutants program.” *Id.* at 2706.

171. For a discussion of the economic significance of the regulation as a whole, see *supra* note 166-170 and accompanying text.

172. See *Michigan*, 135 S. Ct. at 2706 (emphasis omitted) (concluding that EPA failed to consider cost entirely in reaching its initial decision to regulate).

173. For a discussion of the findings of the Regulatory Impact Analysis, see *supra* notes 166-172 and accompanying text.

174. For a discussion of *Chevron* deference, see *supra* notes 53-64 and accompanying text.

power plants.<sup>175</sup> The dissent, on the other hand, found that Congress grants the EPA broad authority and that the EPA “exercised that authority reasonably and responsibly” when it declined to consider cost in the initial stage of the regulatory process.<sup>176</sup> The majority defines the scope of the Agency’s discretion conservatively, whereas, the dissent defines the scope of the Agency’s discretion liberally.<sup>177</sup> Nevertheless, the dissent’s liberal interpretation of agency discretion is more in accordance with how the Court has traditionally evaluated issues of statutory ambiguity.<sup>178</sup>

### C. Adhering to the Principle of Deference

The Court’s decision in *Michigan* appears internally inconsistent with its prior decisions.<sup>179</sup> The Court, in *Chevron*, established the principle of deference to administrative agencies’ statutory interpretations.<sup>180</sup> Based on this principle of deference, the Court has been reluctant to strike down an agency’s interpretation of a statutory ambiguity.<sup>181</sup> In *Michigan*, however, the Court strayed from its long-standing principle of deference by finding the EPA’s interpretation of the CAA unreasonable despite the EPA’s judgment that regulation is “appropriate and necessary” based on its specialized knowledge and experience.<sup>182</sup>

Rather than accord the EPA deference in its finding that the regulation of power plants is “appropriate and necessary,” the Court engaged in a close scrutiny of the Agency’s underlying rationale.<sup>183</sup> While the Court stresses that the Agency gave cost “no

175. See *Michigan*, 135 S. Ct. at 2707 (citing *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2443 (2014)) (finding EPA exceeded its interpretive authority).

176. See *id.* at 2726 (Kagan, J., dissenting) (arguing EPA acted “reasonably and responsibly” within its interpretive authority in regulating power plants).

177. For a discussion of the Court’s disagreement with respect to the EPA’s authority, see *supra* notes 174-176 and accompanying text.

178. For a discussion of the Court’s deference to administrative agencies, see *supra* notes 53-64 and accompanying text.

179. For a discussion of how this decision is internally inconsistent, see *infra* notes 179-188 and accompanying text.

180. For a discussion of *Chevron*, see *supra* notes 53-64 and accompanying text.

181. See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (establishing principle of judicial deference to administrative agencies’ interpretations and constructions of statutes); *Michigan*, 135 S. Ct. at 2706-07 (reviewing EPA’s “necessary and appropriate” regulation of power plants under *Chevron* deference standard); *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (applying *Chevron* deference standard in reviewing FCC ruling under Telecommunications Act).

182. See *Michigan*, 135 S. Ct. 2699, 2711-12 (holding EPA’s interpretation unreasonable).

183. See *id.* at 2706-12 (discussing Court’s analysis and rejecting all of EPA’s arguments).



thought at all” in its initial decision to regulate, the EPA explained that its decision not to consider cost “when first deciding whether to regulate” was predicated on the fact that cost will inevitably become relevant “when deciding how much to regulate.”<sup>184</sup> As the dissent points out, “[c]osts matter in regulation. But when Congress does not say how to take costs into account, agencies have broad discretion to make that judgment.”<sup>185</sup> The Agency’s judgment and its ultimate decision to decline considerations of cost in the initial stage of the regulatory process should have been granted deference by the Court.<sup>186</sup> The statutory provision that authorizes the EPA to regulate stationary sources, including power plants, does not explicitly state during which stage of the regulatory process cost must be considered or that cost should be a consideration in regulating power plants at all.<sup>187</sup> Without a clear or explicit Congressional directive to consider cost, the Agency exercised its discretion and interpreted the statutory ambiguity by deferring considerations of cost to later stages of the regulatory process, and that interpretation should have been accorded deference by the Court.<sup>188</sup>

#### D. The Constitutional Danger of According Administrative Agencies Broad Deference

The concurring opinion focused entirely on the constitutional ramifications of *Chevron*.<sup>189</sup> Justice Clarence Thomas’s opinion warns of the “potentially unconstitutional delegations” of authority granted under the *Chevron* deference standard and urges for greater judicial scrutiny of agency “interpretations” of federal stat-

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184. *See id.* at 2706-09 (explaining discrepancy between Court’s rationale and EPA’s argument).

185. *See id.* at 2726 (Kagan, J., dissenting) (explaining that Congress grants agencies broad powers and judiciary should honor that by granting agencies deference).

186. *See id.* at 2726 (providing importance of granting agencies broad discretion to make regulatory judgments).

187. *See* Clean Air Act, 42 U.S.C. § 7412(n)(1)(A) (providing “appropriate and necessary” standard without mention of cost considerations).

188. *See Michigan*, 135 S. Ct. at 2717 (Kagan, J., dissenting) (explaining reasonableness of Agency’s determination). The dissent emphasized that “the Agency, when making its ‘appropriate and necessary’ finding, did not decline to consider costs as part of the regulatory process. Rather, it declined to consider costs at a single stage of that process, knowing that they would come in later on.” *Id.*

189. *See id.* at 2712-14 (Thomas, J., concurring) (providing concurring opinion). For a discussion of *Chevron* deference, see *supra* notes 53-64 and accompanying notes.



utes.<sup>190</sup> According to Justice Thomas, “agencies interpreting ambiguous statutes [ ] are not engaged in acts of interpretation at all” but rather in the “formulation of policy.”<sup>191</sup> He explains that “[S]tatutory ambiguity thus becomes an implicit delegation of rule-making authority” which is then used to “fill in gaps based on policy judgments[.]”<sup>192</sup>

The observation that agencies are engaging in the “formulation of policy” illuminates the impact that agency decisions and regulations make on policymaking.<sup>193</sup> That observation, however, equally supports both the majority’s opinion and the dissent’s opinion.<sup>194</sup> The majority can thus argue that by striking the Agency’s regulation for not initially considering cost, it is discouraging agency decisions that fail to properly consider cost and, thereby, encouraging more cost-effective regulations.<sup>195</sup> The dissent can likewise argue that by favoring the Agency’s regulation despite its initial reluctance to consider cost, it is encouraging agency decisions that succeed to holistically consider cost, and, thereby, discourage more cost-centric regulations.<sup>196</sup> Either way, Justice Thomas’s concurrence provides no additional guidance for administrative agencies in implementing future regulations.<sup>197</sup>

## VI. IMPACT

The Court’s decision in *Michigan* is likely to have a meaningful impact on the EPA’s regulatory power.<sup>198</sup> The Court’s ruling that the Agency “must consider cost,” including the “cost of compliance,” when deciding whether regulation is “appropriate and neces-

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190. See *Michigan*, 135 S. Ct. at 2713-14 (Thomas, J., concurring) (internal quotation marks omitted) (explaining constitutional danger of *Chevron* deference).

191. *Id.* at 2712-13 (internal quotation marks omitted) (discussing effect of agencies’ interpretive authority on policy making).

192. *Id.* at 2713 (explaining powerful effect of agency authority on policy making).

193. For a discussion of how agencies are engaged in the “formulation of policy,” see *supra* notes 189-192 and accompanying text.

194. For a discussion of how the concurring opinion equally supports both the majority’s holding and the dissent’s conclusion, see *infra* notes 195-197 and accompanying text.

195. For a discussion of the majority opinion and reasoning, see *supra* notes 83-137 and accompanying text.

196. For a discussion of the dissenting opinion and reasoning, see *supra* notes 141-149 and accompanying text.

197. For a further discussion of the concurring opinion, see *supra* notes 138-140 and accompanying text.

198. See *Michigan*, 135 S. Ct. at 2726 (Kagan, J., dissenting) (explaining that Court’s decision intrudes on agencies’ regulatory power and broad discretion).



sary” under the CAA effectively imposes a restraint upon the EPA’s regulatory power.<sup>199</sup> The *Michigan* Court suggests that the EPA will not be capable of making its regulatory decisions based upon its comprehensive analysis and judgment without giving the costs associated with its regulatory decisions any consideration.<sup>200</sup> Instead, the EPA must consider the cost-effectiveness of a regulation, even at the initial stages of the regulatory process, before passing a regulation.<sup>201</sup>

Beyond the EPA, this decision suggests that agencies must generally make cost-effective decisions when exercising their regulatory power.<sup>202</sup> This decision’s applicability may affect other federal agencies, particularly because this is a binding Supreme Court of the United States precedent applicable to all federal agencies.<sup>203</sup> Furthermore, the decision is advantageous to industries and entities subject to agency regulations because it affords them the assurance that agency regulations must be cost-effective at the outset to be upheld as reasonable.<sup>204</sup>

Despite the fact that agencies have traditionally been granted deference, the Supreme Court of the United States in *Michigan* undoubtedly diminished the extent of deference granted to administrative agencies.<sup>205</sup> Rather than defer to the specialized knowledge and experience of agencies in their respective regulatory field, the Court retracted agencies’ regulatory power.<sup>206</sup> The Court essentially reminded the EPA that regulatory decisions cannot be based on entirely ideal environmental goals, but rather, they must be practical and economically justified.<sup>207</sup> Ultimately, the Supreme Court of the United States upholds the broad deference granted to administrative agencies, but limits the extent of its deference to rea-

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199. *See id.* at 2711 (majority opinion) (holding EPA must consider cost in regulating power plants).

200. *See id.* at 2726 (Kagan, J., dissenting) (explaining majority’s decision denies agencies power to use its broad discretion).

201. For a further discussion of the Court’s analysis and rationale, see *supra* notes 83-137 and accompanying text.

202. *See Michigan*, 135 S. Ct. at 2711 (providing Court’s rationale that cost must be considered in deciding whether to regulate power plants).

203. *See generally id.* at 2712 (providing Supreme Court of United States found that cost must be considered in determining whether to regulate).

204. For a further discussion of the Court’s analysis and rationale, see *supra* notes 83-137 and accompanying text.

205. For a further discussion of the principle of deference, see *supra* notes 53-64 and accompanying text.

206. *See Michigan*, 135 S. Ct. at 2726 (Kagan, J., dissenting) (explaining disappointment with majority’s lack of deference to agency expertise and judgment).

207. For a further discussion of the Court’s analysis and holding, see *supra* notes 83-137 and accompanying text.

sonable regulations that necessarily embrace considerations of cost.<sup>208</sup>

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208. For a further discussion of the Court's analysis and holding, see *supra* notes 83-137 and accompanying text.

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