Michigan, et al. v. Environmental Protection Agency, et al.: A Step Back From Federal Agency Deference

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Reporting

Statement of Facts:

In *Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015) the Supreme Court ruled that the Environmental Protection Agency ("EPA" or "the Agency") impermissibly interpreted the Clean Air Act ("CAA") by not considering costs in its determination that power plant regulations were appropriate and necessary.[1] The broad purpose of the Clean Air Act is to monitor air pollution created by "stationary" (ex: refineries and factories) and "moving" (ex: cars) sources through regulatory programs.[2] The heart of the case stems from 1990 Amendments to the Clean Air Act ("the amendments").[3] In the amendments, Congress added programs such as the National Emissions Standards for Hazardous Air Pollutants Program ("Hazardous Air Pollutants Program" or "program"), which separated stationary pollution producers into two categories called, "major" and "area" sources.[4] The factor that distinguished the two categories was the amount of pollution the source created.[5] Under the CAA, the EPA had to regulate all major sources, while area sources did not require regulation unless they posed a health risk to humans or the environment.[6] For each category or subcategory, the EPA was required to create "floor standards" also known as minimum emission regulations.[7] In addition, under certain circumstances the EPA could impose "beyond-the-floor" standards, which were stricter emission

[1]Michigan v. E.P.A., 135 S. Ct. 2699, 2701 (2015).
[2]*Id.* at 2704.
[3]*Id.*
[4]*Id.* at 2704-05.
[5]*Id.* CAA dictated that a major source is one that emits more than 10 tons of a one type of pollutant or more than 25 tons of total pollutants per year.
[6]Michigan v. E.P.A., 135 S. Ct. at 2705.
[7]*Id.*

regulations, in such cases the CAA expressly requires the EPA to consider cost before it subjected the sources to the stricter regulations.[8]

The amendments of 1990 did not treat power plants the same as other stationary sources because Congress added an additional procedure to determine if the Hazardous Air Pollutants Program applied to them.[9] First, the additional procedure required the EPA to conduct a study on ". . . hazards to public health reasonably anticipated to occur as a result of emissions" from power plants after the potential regulations of the program were put in place.[10] Second, if based on the findings of the study the EPA felt that regulation was "appropriate and necessary," it was to regulate power plants using the standards set forth under the program.[11]

In 2000, the EPA completed the study and determined based on the findings that regulation was "appropriate and necessary" for oil and coal fed power plants.[12] The EPA felt regulation was "appropriate" because the study showed that the air pollutants from power plant emissions would detrimentally affect human health and the environment.[13] Likewise, regulation was "necessary" because any other procedure under the CAA besides regulation would not correct the problems caused by plant emissions.[14] In its decision to regulate, the EPA explained that it determined that cost should not be taken into consideration when deciding if regulation under the Hazardous Air Pollutants Program was applicable to power plants.[15]

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Michigan v. E.P.A., 135 S. Ct. at 2705.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

In addition to the hazardous effects study mandated by Congress, the EPA also released "Regulatory Impact Analysis" to comply with an executive order.[16] The impact analysis estimated that the regulations would cost power plant operators approximately $9.6 billion per year, while the benefits that the EPA could accurately estimate were under $6 million per year.[17] At the time the EPA released the Impact Analysis, it cautioned that it could not accurately predict what the benefits of the regulations would be, but stressed that the regulations would have "ancillary benefits" which were estimated between $37 billion and $90 billion annually.[18] However, the EPA admitted that the "ancillary benefits" did not affect its determination that power plant regulation under the Hazardous Air Pollutant Program was appropriate and necessary.[19]

Procedural History:

Shortly after the EPA released its decision, that regulation of power plants was appropriate and necessary; numerous petitioners including multiple non-profit organizations and 23 states challenged the rule.[20] Specifically, the petitioners challenged the EPA's determination that cost considerations were irrelevant in determining whether power plant regulation was necessary and appropriate.[21] Ultimately, the Court of Appeals for the D.C. Circuit upheld the EPA's decision.[22] Shortly thereafter, the Supreme Court granted certiorari.[23]

Issue:

[16]Michigan v. E.P.A., 135 S. Ct. at 2705-06.
[17]*Id*. at 2706.
[18]*Id*.
[19]*Id*.
[20]*Id*.
[21]Michigan v. E.P.A., 135 S. Ct. at 2706.
[22]*Id.*
[23]*Id.*

The Supreme Court granted certiorari to determine whether the EPA correctly interpreted the Clean Air Act, which allows the Agency to regulate power plants under the Hazardous Air Pollutants Program if it determines such regulations are "appropriate and necessary" when the Agency chose to ignore cost when reaching its decision to regulate power plants.[24]

Holding:

In a five to four decision written by Justice Scalia, the Court held that the EPA utilized an unreasonable interpretation of the CAA when it decided to ignore cost in its determination of whether to regulate power plants.[25] Furthermore, it held that the EPA must consider cost in its determination of regulation when it is "appropriate and necessary;" however, it is up to the Agency to determine how cost fits into its determination.[26]

Rationale:

The Majority's rationale can be broken down into three major parts: (1) an examination of the state of applicable federal administrative law, (2) a discussion of the phrase "appropriate and necessary," and (3) dismantling the EPA's counter-arguments.[27]

Justice Scalia starts by discussing the law that governs federal administrations, specifically their statutory interpretation authority.[28] First, he states that federal administrative agencies must act with "reasoned decisionmaking" which means that agency decisions are judged based on whether they are reasonable.[29] Second, he states, "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that

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[24]*Id*. at 2704.
[25]*Id*. at 2712.
[26]*Id*. at 2711.
[27]Michigan v. E.P.A., 135 S. Ct. at 2701.
[28]*Id.* at 2706.
[29]Michigan v. E.P.A., 135 S. Ct. 2699, 2706, (2015) (*citing* Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 374, (1998)).

result must be logical and rational."[30] Lastly, Scalia concluded that, ". . . agency action is lawful only if it rests "on a consideration of the relevant factors."[31]

Next, the Court examined the EPA's decision under the "*Chevron* Deference" standard, which is the bright line test courts use to determine if an agency's interpretation is acceptable.[32] The *Chevron* deference required the court to accept an agency's reasonable interpretation of an ambiguity in a statute that the agency administers.[33] However, even under this deferential standard, an agency "must operate within the bounds of reasonable interpretation."[34] The Majority applied *Chevron* and held that the EPA wandered outside the limits of reasonable interpretation when it decided that costs were not relevant to their decision.[35]

After the *Chevron* analysis, the Majority discussed the phrase "appropriate and necessary" and held that while the phrase was ambiguous, an examination of the context of the phrase mandated some attention to cost.[36] The Majority opined that the EPA's interpretation of "appropriate and necessary;" which allowed them ignore cost considerations was not only inappropriate, but was irrational when it subjected power plant operators to billions of dollars in economic harm.[37]It was inappropriate because federal administrative law precedent showed that it is a time-tested practice of agency regulation to consider cost, as "consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the

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[30]*Id.*
[31]Michigan v. E.P.A., 135 S. Ct. 2699, 2706, (2015) (*citing* Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 103 S. Ct. 2856 (1983)).
[32]*Id.* at 2706-07.
[33]Michigan v. E.P.A., 135 S. Ct. 2699, 2706-07, (2015) (*citing*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, (1984)).
[34]Michigan v. E.P.A., 135 S. Ct. at 2706-07.
[35]*Id.* at 2707.
[36]*Id.*
[37]*Id.*

advantages and the disadvantages of agency decisions."[38] Using the backdrop of precedent the Court concluded that the EPA's decision to interpret "appropriate and necessary" as a grant to ignore cost was unreasonable.[39]

Next, the Justice Scalia provided a statutory context argument as reaffirmation that cost is relevant.[40] In the CAA amendment of 1990, Congress required the EPA to conduct surveys and to use them to determine if regulation was appropriate and necessary. Within those studies, cost concerns were accounted for, and as such, there was no solid ground for EPA to stand on and claim cost was not a concern of Congress.[41]

Justice Scalia next turned his attention to dismantling each of the EPA's arguments as to why cost should be irrelevant in its initial decision.[42] First, the EPA attempted to use statutory construction, to argue that the specific instruction to examine cost in other sections versus its absence in the power plant process shows a legislative intent to exclude cost from the initial determination.[43] The majority disagreed and explained it is unreasonable to infer that the express relevance of cost in one section automatically means its absence in another section renders it irrelevant.[44] Second, the EPA cited to a case in which the Supreme Court sided with the EPA interpretation of the CAA when it held that the EPA did not have to consider cost in narrow situations where the Act expressly instructs it to rely on a specific factor for regulation.[45] Justice Scalia differentiated the two cases by reiterating that "appropriate and necessary" required the

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[38]*Id.*
[39]*Id.* at 2707-08.
[40]Michigan v. E.P.A., 135 S. Ct. at 2708.
[41]*Id.*
[42]*Id.*
[43]*Id.* at 2708-09.
[44]*Id.* at 2709.
[45]Michigan v. E.P.A., 135 S. Ct. 2699, 2709, (2015) (*citing* Whitman v. American Trucking Assns., Inc., 121 S. Ct. 903, (2001)).

Agency to look at all relevant factors, and cost was clearly a relevant factor.[46] Third, the EPA pointed to the mechanics of the regulation process, claiming that just because cost did not enter into its initial "appropriate and necessary" determination it did not mean that cost would never be considered.[47] Rather the EPA argued that cost would become important later in determining "how much" regulation needed to occur.[48] Once again, Justice Scalia disarmed the argument by restating that regulation only can occur if "appropriate and necessary" which as the court painstaking showed included an examination of costs; so although costs may be vitally important at a later stage, its later relevant does not render it irrelevant at the beginning.[49] Lastly, the EPA argued that the CAA as a whole made costs irrelevant to the initial decision to regulate all other sources besides power plants.[50] The Court pointed out that even though that is true, the CAA narrowly defined the standards the EPA had to use in the regulation of other sources while it clearly intended to treat power plants differently based on the separate and broad standard of "appropriate and necessary" that the EPA had to use.[51]

To conclude the Court restates its ultimate holding that it was unreasonable for the EPA to interpret the CAA in a way that ignores cost when considering power plant regulations.[52] Further, the majority made it clear, it was not ruling on how the Agency must consider costs only that it had to consider them.[53] Finally, Scalia addressed the idea of ancillary benefits that the

[46]Michigan v. E.P.A., 135 S. Ct. at 2709.
[47] *Id.* at 2709.
[48]*Id.*
[49] *Id.*
[50] *Id.* at 2709-10.
[51] *Id.* at 2710.
[52] Michigan v. E.P.A., 135 S. Ct. at 2711.
[53] *Id.*

EPA alluded to throughout their arguments by saying the Court had can only affirm an agency's action based what it actually did, and not what it might do.[54]

Concurrence / Dissent:

Justice Thomas filed a very short concurrence in which he agreed with the holding of the majority, but was highly concerned with the Agency's request for deference. In Justice Thomas' opinion, the deference requested by the EPA raised, a constitutional question.[55] According to Justice Thomas, if the Court allowed federal agencies to operate with an absolute deference to interpret ambiguous statutes they are charged with administering, they are essentially allowing an impermissible delegation of legislative authority that conflicts with the vesting clause of article 1 of the Constitution. Const. Art. 1 Section 1.[56] What scared Justice Thomas most was not that the EPA over stepped its boundaries but rather, that it felt entitled to ask for the deference based on past precedent.[57]

Justice Kagan along with Justices, Ginsburg, Breyer, and Sotomayor dissented from the majority and upheld the actions of the EPA.[58] The dissent made three main arguments: (1) the EPA did not ignore costs, but rather looked at costs throughout the entire process and knew that once it deemed regulations necessary and appropriate it would have to consider costs again, (2) the EPA was unable to accurately estimate costs at the beginning of the process so it acted reasonably in its decision to wait on determining them, and (3) the regulatory process that the EPA used in this situation is no different than the one it used many times prior in dealing with emissions and hazardous air pollutants.[59] After providing great depth and analysis into each of

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[54] *Id.*
[55] *Id* at. 2712 (Thomas, J., Concurring).
[56] *Id.*at 2713.
[57] Michigan v. E.P.A., 135 S. Ct. at 2713 (Thomas, J., Concurring).
[58] *Id.* at 2714 (Kagan, J., Dissenting).
[59] *Id.* at 2714-15.

these arguments, the dissent made it clear that the reason its position differed from the majority is that theirs is founded upon, "an understanding of the full regulatory process relating to power plants."[60] The dissent concluded that after stepping back and looking at the entire regulatory process, it was clear that the EPA acted reasonably in its determination to consider costs after it determined the appropriateness and necessity of regulations.[61]

Next, the dissent proceeded to provide an in-depth analysis of the steps the EPA took after its initial "appropriate and necessary" determination, in order to show that the Agency's decision to defer cost considerations until a later point was not only reasonable, but also logical.[62] In the third section of the dissent, Justice Kagan attacked the arguments of the majority arguing that all of their arguments were flawed because they were based on an incorrect view of the regulatory process. Essentially Justice Scalia's analysis was too narrow because he chose to examine only one isolated part of the regulatory process rather than looking at the entire scheme.[63] The dissent concluded by stating that the majority's overly narrow holding in the case essentially crippled the EPA by removing its congressionally granted flexibility to examine both costs and benefits in the regulatory process.[64]

History:

The main issue in *Michigan v. EPA* is whether the EPA permissibly interpreted the Clean Air Act when it determined that it is appropriate and necessary to regulate power plant emissions without considering costs.[65] While *Michigan v. EPA* was a landmark case for the Supreme Court, it was not a case of first impression as the Court previously determined the standard of review

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[60] *Id.* at 2718.
[61] *Id.*
[62] *Id.* at 2718-725.
[63] Michigan v. E.P.A., 135 S. Ct. at 2724 (Kagan, J., Dissenting).
[64] *Id.* at 2726.
[65] Michigan v. E.P.A., 135 S. Ct. 2699 (2015).

used to examine an agency's interpretation of a statute entrusted to them by Congress to administer in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*.[66] In addition, the Court also ruled on the EPA's responsibility to consider cost prior to implementing regulations in the Clean Air Act in *Whitman v. Am. Trucking Associations*.[67]

The most important case in relation to *Michigan v. EPA* was *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, which the Supreme Court decided in 1984.[68] The issue in *Chevron* stems from the Clean Air Act Amendments of 1977 ("Amendments"), in which Congress imposed additional requirements on States that failed to meet the national air quality standards established by the EPA at an earlier time (theses states are known as "nonattainment states").[69] The Amendments required nonattainment States to establish permit programs that would expose the construction of new, or the modification of existing, "stationary sources," to much stricter EPA regulations.[70] Under the Amendments, the EPA changed the definition of "stationary sources" to allow States to use a plantwide view rather than examining each pollutant-causing source individually for the purpose of regulation.[71] This idea is referred to as the "Bubble Concept".[72] The implementation of the Bubble Concept resulted in litigation and forced the Supreme Court to decide whether the EPA's interpretation of "stationary source" (an ambiguous term used by Congress in the original CAA) was permissible when it determined that

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[66] Chevron, U.S.A., Inc. v. Natural Resource Def. Council, Inc., 467 U.S. 837 (1984).
[67] Whitman v. Am. Trucking Associations, 531 U.S. 457 (2001).
[68] *Chevron*, 467 U.S. 837 (1984).
[69] *Id.* at 840.
[70] *Id.*
[71] *Id.*
[72] *Id.* Under the Bubble Concept, multiple pollution creating devices located in the same power plant or industrial complex are treated as one source for the purpose of regulation, and, therefore, plants may modify or install new components without being subject to the harsher regulations if change does not increase the plant emissions as a whole.

States could view all "pollution-emitting devices in the same industrial grouping" as though they were contained in a single "bubble."[73]

While the narrow issue in this case deals with the EPA's decision to change the definition of "stationary sources," Justice Stevens, author of the opinion, used the case as a broader platform to discuss how courts should review an agency's interpretation of a statute that Congress entrusted to them to administer.[74] The Court found that any review of an agency's interpretation regarding an ambiguous or silent issue in a statute requires the Court to answer two questions: first, the Court must ask, whether Congress has specifically addressed the issue at hand.[75] If the answer is yes, then the agency must abide by the express intent of Congress.[76] If Congress has not addressed the issue then the Court asks whether the agency's interpretation of the ambiguity in the statute is an allowable construction of the statute.[77] The wording of the second question is important, the question is not, what construction the Court deems correct, (an analysis applicable when there is no alleged agency interpretation) but rather, was the agency's construction permissible.[78] In addition, statutes can provide for an express delegation of authority to an agency for a specific purpose if it is clear that Congress intentionally left a term ambiguous or intentionally left a gap for the agency to fill.[79] Such instances should receive extreme deference unless the agency's actions are clearly "arbitrary, capricious, or manifestly contrary to the statute."[80] Lastly, if the agency's construction of a particular statute occurs because of an

[73] *Id.*
[74] *Chevron*, 467 U.S. at 842-45.
[75] *Id.* at 843.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Chevron*, 467 U.S. at 843-44.
[80] *Id.* at 844.

attempt to balance conflicting policies within the statute the Court should not question the agency's interpretation unless it is painfully clear that it conflicts with Congress' intent.[81]

In answering, whether the Court already addressed the issue presented by the case, Justice Stevens agreed with the Court of Appeals that the CAA did not provide Congress' intent regarding the use of the Bubble Concept to determine what a "stationary source" is.[82] The Court's rationale lay in the legislative history of the CAA, which from its inception in the 1950s to the Amendments of 1977 made no mention of the applicability of the Bubble Concept to stationary sources.[83] Next, Justice Stevens examined the legislative history of the Amendments of 1977, which does not mention the Bubble Concept but does provide an explanation as to the purpose of the Amendments.[84] Specifically, the purpose of the permit program within the Amendments of 1977 was to strike a balance between environmental concerns and the economic desire not to impede development.[85] Consequently, the Court concluded Congress did not specifically address the issue of applying the Bubble Concept in the determination of stationary sources.[86]

Having held that Congress did not specifically address the issue at hand, the Court proceeded to the second question in its analysis; whether the EPA's interpretation was an allowable under the statute and concluded that it was permissible for the agency to interpret

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[81] *Chevron*, 467 U.S. at 845 (*citing* United States v. Shimer, 367 U.S. 374 (1961)).
[82] *Id.* at 845.
[83] *Id.* at 845-51.
[84] *Id.* at 851.
[85] *Chevron*, 467 U.S. at 851-53. Both the House Committee Report and the Senate Committee Report attest to this purpose. The House Committee Report stated that the economic interest involved was one of "two main purposes" of this particular section of the CAA. Meanwhile, the Senate Committee Report advocated for a case-by-case review of all new or modified major sources so as to still allow development while still reaching the proscribed air quality standards.
[86] *Id.* at 853.

"source" as having a plantwide meaning.[87] Justice Stevens utilized the legislative history and the text of the CAA in his opinion.[88] The legislative history showed that a discussion of the definition of "source" occurred in at least three formal proceedings and resulted in three slightly different definitions.[89] The Court opined that the fluctuation in the definition was evidence that Congress intended "source" to be a flexible term, thus allowing EPA some leeway in determining its meaning.[90] Next, the Court examined specific language of the statute in sections of the CAA offered by the parties as proof of Congress' intended definition of "source," all of which the Court rejected.[91] In fact, the Court found the arguments to be unpersuasive stating, "To the extent, any congressional "intent" can be discerned from this language . . . [it] was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act."[92]

Overall, based on the legislative history of the CAA, the legislative purpose of the Amendments of 1977, and the plain language of the statute, the Court held in *Chevron* that the EPA's decision to interpret "stationary sources" as having a plantwide application was a reasonable interpretation of the statute they were charged with administering by Congress and thus permissible. [93] Furthermore, the case created the *Chevron* deference, which has been consistently used to guide the Court in cases involving challenges to governmental agency statutory interpretations.

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[87] *Id.* at 866.
[88] *Id.* at 853-66.
[89] *Id.* at 853.
[90] *Id.*
[91] *Chevron*, 467 U.S. at 859-861.
[92] *Id.* at 862.
[93] *Id.* at 866.

The next relevant case to a discussion of *Michigan v. EPA* is *Whitman v. American Trucking Association*.[94] The dispute in *Whitman* originated from CAA Section 109(a), which required that the EPA set forth national ambient air quality standards ("NAAQS") for various air pollutants.[95] Section 109(b) mandates that the EPA set primary air quality standards to ". . . protect the public health with an adequate margin of safety."[96] In 1997, an adjustment occurred to the NAAQS governing particulate matter and the ozone, which prompted numerous private entities and states to challenge the new standards.[97] These cases asked the Court to examine several large issues including whether the EPA may consider cost in setting NAAQS when the controlling section of the CAA does not expressly grant them the authority to do so.[98]

Addressing the first issue, the Supreme Court agreed with the majority of the decisions in the District of Columbia Circuit Court, which on numerous occasions considered the relationship between EPA regulations for NAAQS and cost implementation.[99] When confronted by this question, the District of Columbia Circuit Court consistently adhered to the rule set forth in *Lead Industries Assn., Inc. v. EPA*, which held that "economic considerations [may] play no part in the promulgation of ambient air quality standards under Section 109 of the CAA."[100] Furthermore, as numerous sections of the CAA explicitly authorized cost consideration, the Court will not find in ambiguous sections of the CAA an implied authority to consider costs.[101] Therefore, to prove that cost of implementation is relevant to regulation, a party must show "a textual commitment of

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[94] Whitman v. Am. Trucking Associations, 531 U.S. 457 (2001).
[95] *Id.* at 462.
[96] *Whitman*, 531 U.S. at 465 (citing 42 U.S.C. § 7409(b)(1) amended Aug. 7, 1977). After the EPA sets these standards, they are required to be reviewed at 5-year intervals by an "Administrator" and adjusted as that individual deems appropriate.
[97] *Whitman*, 531 U.S. at 463.
[98] *Id.* at 462.
[99] *Id.* at 464-65.
[100] *Id.* at 464.
[101] *Whitman*, 531 U.S. at 467 (*referencing* Union Elec. Co. v. EPA, 427 U.S. 246 (1976); cf. General Motors Corp. v. United States, 496 U.S. 530, 538 (1990)).

authority to the EPA to consider costs in setting NAAQS . . .”[102] Lastly, the “textual commitment” to allow cost consideration must be clear, because “Congress does not change statutes in fundamental ways by using vague terms or hidden provisions.”[103]

Delivering the opinion of the Court, Justice Scalia separately dismantled each of the respondent’s arguments advocating for cost consideration. First, the respondents claimed that vague language of Section 109(b), such as “adequate margin,” allowed interpretation to include costs.[104] Justice Scalia quickly dismissed this argument by looking at the plain language of the CAA and Section 109(b) and stated that the Court found it “implausible” that Congress intended the vague language in Section 109(b) to control whether costs should be considered.[105] Essentially, the “textual commitment” was not clear enough to elicit the respondents’ desired conclusion.[106]

Furthermore, the Majority concluded that the respondent’s next two arguments failed based on this concept.[107] Cost, Justice Scalia opined, is simply too important and would have such a drastic effect on the effectiveness of the statute, that Congress would have explicitly included it in the text if it wanted cost considered.[108]

Lastly, the respondents pointed to places in the CAA where cost is explicitly required and argued that these sections are illogical unless cost is also a relevant factor in setting NAAQS.[109] The Majority rejected this argument by placing the sections of the CAA relied upon by the

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[102] *Whitman*, 531 U.S. at 468.
[103] *Whitman*, 531 U.S. at 468 (*quoting* MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 231 (1994)).
[104] *Whitman*, 531. U.S. at 468.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 469.
[108] *Id.* This would essentially nullify the purpose of the statute. The purpose of this particular section of the CAA was set NAAQS at levels “requisite to protect the public health.” Allowing cost considerations had the potential to neutralize the direct health benefits desired in creating the NAAQS.
[109] *Whitman,* 531 U.S. *at* 470.

respondents in their proper statutory and historic context.[110] While under the CAA it is the EPA's responsibility to create NAAQS, it is the responsibility of the States to be the "primary implementers" of the NAAQS.[111] It is up to the States to determine which sources and how these sources will meet the NAAQS.[112] The Court concluded that the sections of the CAA that required the EPA to collect cost data to aid States during their implementation of the regulations were a completely separate (and reasonable) step in the process from the EPA's directive to establish the regulations.[113]

Ultimately, Justice Scalia explained, "text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA."[114]

Analysis:

Michigan v. E.P.A. was a landmark case for the Supreme Court, and its holding will have far-reaching effects on federal administrative and energy law for years to come. That the case was decided by a vote of 5 to 4 speaks volumes of the strength of the Majority's argument. Two core consequences resulted from the Court's decision to strike down the EPA's interpretation of ambiguous language within a statute that the agency is charged with administering. First, the decision crippled the EPA's ability to regulate power plant under the CAA. Second, the Court's holding appeared to be a step away from the long-standing precedent of the *Chevron* deference, which would affect not only the EPA, but also all federal agencies charged by Congress with administering particular statutes.

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[110] *Id.* at 470-71.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 471.
[114] *Id.*

The Majority's decision that the EPA must consider costs when deciding whether to regulate power plants cripples the EPA's entire regulatory process under the CAA. The CAA mandated that the EPA only regulate power plants if they found it to be "necessary and appropriate," and the agency, after conducting multiple Congressionally mandated studies (which weighed the costs and benefits), felt regulation was in fact "necessary and appropriate."[115] Justice Scalia disagreed and opined that imposing billions of dollars of economic costs on power plant operators without considering costs was not only inappropriate, it was illogical.[116] If this were the end of the EPA's regulatory process, it would undoubtedly be inappropriate to expose power plant operators to that type of economic burden; however, that is simply not the case. The "necessary and appropriate" analysis is only the first step in an extended process, as Justice Kagan pointed out in the dissent.[117]

By focusing almost all of their decision on the concept of "necessary and appropriate," the Court adopts what appears to be a far too narrow stance on the issue. It is important to recognize, that as the EPA argued and Justice Kagan wisely acknowledged, the EPA considered costs during the multiple additional steps that make up the regulation process. Most importantly, they explicitly considered cost when determining the level of regulation to impose and expressly promised that "costs of controls will be examined as a part of developing the regulation."[118] Forcing the EPA to consider cost in the first step of the process is akin to putting the wagon before the horse.[119] If the EPA did examine costs and they were found to be substantial, does that make regulation any less "necessary and appropriate," when the main purpose of the Clean Air

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[115] Michigan v. E.P.A., 135 S. Ct. at 2705.
[116] *Id.* at 2707.
[117] *Id.* at 2714 (Kagan, J., Dissenting).
[118] *Id.* at 2725.
[119] *Id* at 2724.

Act is to monitor air quality and protect the public from hazardous emissions?[120] Undoubtedly, cost is relevant in the regulatory process, but holding that the EPA must consider it in the first step seems to subvert the overall intent of the CAA by placing too much emphasis on cost at an inappropriate place in the decision-making process.

The most startling aspect of the Court's opinion is not Justice Scalia's holding, but rather, the methodology he used to justify it. Justice Scalia made it clear that when an agency's interpretation of a statute it is in charge of administering is challenged, the *Chevron* deference is the test.[121] As detailed above, *Chevron* dictates that the Court ask: (1) if Congress has addressed the issue involved in the case, and (2) if Congress has not addressed the issue, whether the agency's interpretation of the ambiguity in the statute was a permissible one.[122] Congress did not state what it meant by "necessary and appropriate" in the statute. Therefore, the Majority proceeded to examine the permissibility of the EPA's interpretation and held it was strayed beyond the acceptable boundaries of the statute.[123]

Essentially, Justice Scalia relied on the language in *Chevron* that required an agency's interpretation to be reasonable and held it was unreasonable to view "necessary and appropriate" as allowing enormous economic burdens without initially considering cost.[124] While this rationale was logical, Justice Scalia appeared to ignore an important aspect of *Chevron*. The Court's role is to examine whether the Agency's interpretation was permissible, not whether the Agency chose the best interpretation or the interpretation that the Court would choose.[125] It is arguable that the EPA acted reasonably in its decision to interpret "necessary and appropriate" as

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[120] *Id.* at 2705.
[121] Michigan v. E.P.A., 135 S. Ct. at 2706-7.
[122] *Id.* at 2706-07, (*citing* Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc., 104 S. Ct. 2778 (1984)).
[123] *Id.* at 2707.
[124] *Id.*
[125] *Chevron*, 467 U.S. at 843.

not including cost considerations. The Agency was aware that costs became vitally important after determining whether regulations were the correct course of action. This made it reasonable for them to defer considering costs until later. Why consider the same thing two separate times, especially when deferring on cost allowed for a more accurate assessment later? Furthermore, the EPA's actions appear to be even more reasonable based on the Agency's past conduct. As Justice Kagan illustrated, the EPA applied the same basic framework for regulation on all other hazardous emission sources under other portions of the CAA without being challenged for nearly two decades.[126]

The narrow purpose of *Michigan v. E.P.A.* was for the Court to resolve whether the EPA permissibly interpreted the Clear Air Act in its decision to regulate power plants. In holding that the EPA acted impermissibly in its interpretation of "necessary and appropriate," the Court appears to have laid the foundation for more confusion rather than clarity. First, the EPA now has to reexamine the entire regulatory process for hazardous emissions, a process it has utilized for years. Second, and more significantly, this decision appears to challenge the permissible interpretation analysis of *Chevron*, which could affect the manner in which all federal agencies operate. Or as Justice Kagan perfectly states, *Michigan v. E.P.A.* blatantly challenges, "Congress's allocation of authority between the Agency and the courts."[127]

[126] Michigan v. E.P.A., 135 S. Ct. at 2714-15 (Kagan, J., dissenting).
[127] *Id.* at 2715.