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Michigan v. EPA and the Erosion of Chevron Deference

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I. INTRODUCTION

The deference that courts grant agency statutory interpretation has long been a source of tension between the three branches of government. Within that tension lies vital issues concerning political accountability, technical expertise, and the methods courts use to deal with a massive modern administrative state that was unimaginable at the time that the Constitution was drafted. When it was decided in 1984, *Chevron U.S.A. v. Natural Resources Defense Council*[1] sought to alleviate that tension, leaving broad interpretative authority to executive agencies, so long as their interpretations did not conflict with congressional intent and were reasonable.[2]

Just over three decades later, there are signs that *Chevron* is buckling. In *Michigan v. EPA*,[3] decided in the summer of 2015, the Supreme Court struck down a major regulation that set standards for emissions of mercury and other pollutants from power plants, on the grounds that the Environmental Protection Agency (EPA) had unreasonably interpreted the Clean Air Act (CAA or the Act).[4] This holding represents a significant departure from the traditional application of *Chevron*, and a sign that the Court may be moving away from a deferential standard of review of agency statutory interpretation.

This note analyzes *Michigan* and where it fits within the ever-evolving framework of the Court's application of *Chevron*, and how the case could contribute to a continuing decline in the doctrine's importance and applicability. Part II provides background information on the *Chevron* doctrine, and how the Court has historically deferred to agency statutory interpretation. Part III examines the facts of *Michigan* and the approaches that the Justices took on their reasoning, and Part IV analyzes these approaches and explains how *Michigan* fits into an ongoing trend away from *Chevron*'s highly deferential standard. Finally, Part V explores the possible implications of the holding in *Michigan*, and how this decision could affect the regulatory process—and challenges to it—in years to come.

II. BACKGROUND: THE *CHEVRON* DOCTRINE

Chevron is a cornerstone in administrative jurisprudence.[5] It is the most cited

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1. 467 U.S. 837 (1984) [hereinafter *Chevron*].
2. *Id.* at 842-43.
3. 135 S. Ct. 2699 (2015).
4. *Id.* at 2707.
5. Peter M. Shane & Christopher J. Walker, *Chevron at 30: Looking Back and Looking Forward: Foreword*, 83 FORDHAM L. REV. 475, 475 (2014).

administrative law case (and the third most cited case overall) in American legal history.[6] While the rules and application of a *Chevron* analysis may appear somewhat convoluted, the issue of deference to agency statutory interpretation strikes directly at critical separation of powers issues. A *Chevron* case necessarily asks: how must the executive branch, through its administrative agencies, interpret unclear congressional directives? How much leeway does the legislative branch intend to delegate to the executive branch—and how much can it? And when can the judicial branch step in and offer its own interpretation to overrule what the executive branch has done?

Chevron sought to answer these questions by giving broad deference to the executive branch. The case concerned the EPA's interpretation of a provision of the CAA[7] requiring states that fail to meet certain emissions standards to establish a permitting program for "new or modified stationary sources" of air pollution.[8] The EPA adopted a rule permitting states to treat entire industrial plants as a "stationary source," rather than treating each pollution-emitting device within a plant as its own "stationary source": an approach that it called the "single bubble" concept.[9] Environmental groups challenged the EPA rule, claiming that while the CAA left the definition of a "stationary source" ambiguous, the definition adopted by the EPA was inappropriate given the CAA's obvious intent to improve air quality.[10]

The Supreme Court disagreed. It held that the EPA's interpretation of the CAA was permissible because it was a reasonable resolution of ambiguous statutory language.[11] The Court deferred to the EPA, which it saw as better equipped than the judiciary to deal with the complexities of environmental policy, to determine how best to interpret the statute, noting that "the regulatory scheme is technical and complex,"[12] and that the EPA's "interpretation represents a reasonable accommodation of manifestly competing interests and is entitled deference."[13] The Court held that when agencies go through the proper notice and comment process outlined in the Administrative Procedure Act, they are entitled to deference so long as their interpretations are "permissible constructions of the statute."[14]

Central to *Chevron*'s holding is the idea that agencies have greater technical expertise than the courts to interpret statutory language concerning their particular fields, and that when it comes to important policy questions, agencies, which are politically accountable, should be given deference:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for

6. *Id.*
7. 42 U.S.C. § 7502(b)(6) (1977).
8. *Chevron*, 467 U.S. 837, 840 (1984).
9. *Id.*; *see also* 46 Fed. Reg. 50766 (1981).
10. *Chevron*, 467 U.S. at 841.
11. *Id.* at 865.
12. *Id.*
13. *Id.*
14. *Id.* at 843.

> assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'[15]

This holding has had major repercussions throughout administrative law, giving a broad grant of interpretive power to executive agencies, often at the expense of the judiciary's power to "say what the law is"[16] through the process of judicial review. According to one prominent administrative law scholar, "*Chevron* might well be seen not only as a kind of counter-*Marbury*, but even more fundamentally as the administrative state's very own *McCulloch v. Maryland,* permitting agencies to do as they wish so long as there is a reasonable connection between their choices and congressional instructions."[17] The case's central holding has also been seen as a powerful counterweight against judicial overreach into the realm of policy making, by requiring judges to refrain from interfering with validly promulgated regulations.[18]

In order to put *Chevron* into effect, the Court has developed a two-step process. At Step One, courts must ask whether or not the statute is ambiguous on the matter.[19] If so, the court moves on to Step Two, and determines whether or not the agency's interpretation is a reasonable one.[20] This is where the deferential nature of the *Chevron* standard kicks in—a court will only invalidate an agency's interpretation of a statute if that interpretation runs manifestly contrary to the statute's goals.[21] This is a high bar for plaintiffs challenging an agency to clear, and one that they rarely do.[22]

There is another "step" to *Chevron*: the so-called *Chevron* Step Zero. This step is "the initial inquiry into whether the *Chevron* framework even applies."[23] Because of the deferential nature of *Chevron*, this question can be a critical one. A 2008 study found that at the Supreme Court, actions granted *Chevron* deference were upheld 76.2% of the time, compared with 66% of the time when reviewed de novo.[24] For these reasons, a court's decision to accept or not to accept the argument that a given

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15. *Id.* at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

16. Marbury v. Madison, 5 U.S. 137, 177 (1803); *see also* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

17. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV 187, 190 (2006).

18. Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2063 ("Once Chevron is understood as a constitutional responsibility of the judiciary to avoid policymaking power, it makes little sense to limit deference only to those interpretations issued with the force of law. The judiciary is exercising policy power whenever it supplants an administrative interpretation, regardless of the formality of that interpretation or its supposed 'force.'").

19. *Chevron*, 467 U.S. at 842-43.

20. *Id.*

21. Kennecott Utah Copper Corp. v. U.S. Dept. of Interior, 88 F.3d 1191, 1206 (D.C. Cir. 1996).

22. Dan Farber, *Justice Scalia and Environmental Law*, LEGAL PLANET, http://legal-planet.org/2016/02/15/justice-scalia-and-environmental-law/ (noting that there have only been three occasions—*Michigan* being one of them—upon which the Court has determined that an agency's interpretation of an ambiguous statute was unreasonable).

23. Sunstein, *supra* note 17, at 191.

24. William Eskridge, Jr. & Lauren Baer, *The Continuum of Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L. J. 187. 1083, 1100. It should be noted that these numbers do not differentiate between cases in which the Court decided the question at step or step two, but includes all cases in which the Court applied the *Chevron* framework.

action is entitled to *Chevron* deference could be dispositive in its determination of whether or not that action is legal.[25]

Michigan, however, is the rare example of a court invalidating a government agency's statutory interpretation at *Chevron* Step Two, or effectively deciding that though the statutory language in question was indeed ambiguous, the agency's interpretation of that language was so manifestly contrary to congressional intent that it was not a "permissible construction of the statute."[26] In arriving at this conclusion, the court erred. It did not give the agency the high level of deference required by *Chevron*. This case, and others which have limited the applicability and importance of *Chevron* deference, are part of an ongoing trend away from judicial deference for agency interpretation of statutory ambiguity, which could have serious consequences in agency actions.

III. THE CASE: *MICHIGAN V. EPA*

A. The EPA's Regulation

The process that culminated in the *Michigan* holding began in the 1990's, when the EPA became concerned that the regulatory framework it had used to limit hazardous emissions from stationary coal-fired power plants had failed.[27] Under the CAA, these power plants are treated differently, for regulatory purposes, from other polluters, and are subject to looser restrictions on emissions.[28] When Congress amended the CAA in 1990, it included section 7412, which permitted the EPA to bring these plants within the fold of other emitters, if, after conducting a study of the power plants' effect on public health, it "finds such new regulation is appropriate and necessary."[29]

The EPA undertook that study, and released its findings in 2000.[30] It determined that the new regulations were "appropriate" because power plant emissions posed a serious threat to human health and the environment, and "necessary" because neither existing regulations, nor other provisions of the Act, eliminated that threat.[31] Key, for the purposes of this case, was the EPA's treatment of costs to be borne by private industry as a result of the new regulations.[32] The agency decided that "costs should not be considered" at the outset when deciding whether or not it was appropriate and necessary to include power plants in its more rigorous regulatory framework under the CAA.[33]

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25. *See* Sunstein, *supra* note 17, at 191. Recent cases have raised the bar that Step Zero presents in a *Chevron* analysis. *See infra* Part V.

26. *Chevron*, 467 U.S. 837, 843 (1984).

27. Michigan v. EPA, 135 S. Ct. 2699, 2705 (2015).

28. 42 U.S.C. § 7412(b) (Supp. II 1990).

29. *Id.* § 7412(n)(1)(A) (Supp. II 1990).

30. *Michigan*, 135 S. Ct at 2705.

31. 65 Fed. Reg. 79825, 79826 (2000).

32. *Michigan*, 135 S. Ct. at 2706.

33. 77 Fed. Reg. 9304, 9326 (2012) (to be codified at 40 C.F.R. pts. 60, 63). *See also* 77 Fed. Reg. at 9327 (2012) (reiterating the EPA position that costs do not have to be read into the definition of the word "appropriate"); 76 Fed. Reg. 24976, 24981 (2011).

In compliance with an Executive Order,[34] the EPA conducted a cost-benefit analysis of the new regulations and determined that the regulations would impose a cost of about $9.6 billion a year on power plant operators, with direct tangible benefits of $4 to $6 million a year.[35] The agency also estimated that ancillary effects of the regulation would yield annual benefits of between $37 billion and $90 billion, as fewer people became sick from pollutants and spent more time at work and less time at hospitals.[36] It also found that the new regulation would annually prevent about 11,000 premature deaths, 130,000 cases of asthma, and 540,000 days of lost work.[37] After an extensive period of notice and comment, during which the EPA reviewed over 900,000 public comments,[38] the agency issued a new regulation, known as Mercury and Air Toxic Standards ("MATS"), which took effect in 2011.[39]

MATS established federal standards to limit emissions from coal and oil-fired power plants with a capacity of twenty-five megawatts or greater, which were originally excluded from the CAA, to meet certain floor standards within four years.[40] Designed to drive cleaner technology, MATS set market-based standards, which would be established by averaging the emissions standards of the top twelve percent of the plants that had reduced emissions the most.[41]

B. The Arguments and the Court's Decision

Twenty-three states, including Michigan, challenged these new rules in court, arguing that the EPA unreasonably interpreted the Act when it created these new regulations.[42] They claimed that in deciding not to consider cost, the EPA violated section 7412 when it failed to take into account what would be "appropriate and necessary."[43] These cases were consolidated and heard in *Michigan*.[44]

At trial, the EPA argued that since section 7412 was silent on the matter of costs, while other provisions of the Act mention it, Congress could not have meant that the agency would be required to consider costs in its decision to regulate.[45] The EPA claimed that agencies were actually prohibited from considering costs when not explicitly instructed to.[46] The EPA also argued that even if it were required to

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34. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993), requiring all regulations with an annual economic effect of at least $100 million to undergo a cost-benefit analysis.

35. *Michigan*, 135 S. Ct. at 2705-06.

36. *Id.*; *see EPA Fact Sheet: Mercury and Air Toxic Standards for Power Plants*, (Dec. 16, 2011) http://www3.epa.gov/mats/pdfs/20111221MATSsummaryfs.pdf.

37. 77 Fed. Reg. 9304, 9428-29 (2012). The EPA also estimated that by 2016, the standards would have prevented 2,800 cases of chronic bronchitis, 4,700 heart attacks, 5,700 hospital and emergency room visits, 6,300 cases of acute bronchitis, 140,000 cases of respiratory symptoms, and 3.2 million days when people must restrict their activities. *See EPA Fact Sheet*, *supra* note 36.

38. *EPA Fact Sheet*, *supra* note 36.

39. 76 Fed. Reg. 80727 (2011).

40. *EPA Fact Sheet*, *supra* note 36.

41. 65 Fed. Reg. 79825, 79830 (2000). The Supreme Court approved of a similar EPA scheme designed to stimulate technological advancement in the term before Michigan was decided. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

42. Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015).

43. *Id.* at 2706-07.

44. *See id.* at 2706

45. *Id.* at 2709.

46. *Id.*

consider costs, it did so in the manner in which it conducted its regulatory process, and at all points after the initial decision to regulate, when, before conducting further research, it would have no way of knowing what the cost of regulation would be.[47]

The Court, by a vote of five to four, did not accept this argument.[48] After conducting a *Chevron* analysis, it held that the EPA acted unreasonably by failing to consider cost when it found new regulation appropriate and necessary.[49] While the Court found that the statutory language of section 7412 was indeed ambiguous,[50] it held that the EPA "strayed far beyond [the] bounds" of reasonability when it read the statute to mean that "it could ignore cost when deciding whether to regulate power plants."[51]

The key question that the Court wrestled with is one of timing. The majority and dissent agreed that had the EPA *completely* disregarded the cost of regulation, this would have been unreasonable, and would have therefore failed to survive a *Chevron* analysis.[52] Where the majority and the dissent's analyses diverge is in their understandings of *when* in the regulatory process that consideration of cost must occur.

1. The Majority: The Term "Appropriate" Requires a Consideration of Cost in the Decision to Regulate

In the majority opinion, Justice Scalia[53] argued that, given the statute's language, "the phrase 'appropriate and necessary' requires some consideration of costs."[54] When the agency decided to initiate a regulatory process without considering costs, it ran afoul of congressional intent.[55] For him, the plain meaning of "appropriate," set against standard administrative operating procedure, must include costs, because "[o]ne would not say that it is rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[56] He also cited section 7412's requirement that the EPA take costs into account at other points in the regulatory process as evidence that the agency must be required to do the same in the initial decision to regulate.[57]

That the EPA *did* consider those costs down the line is not enough in Scalia's reading. He rejected the argument that the EPA's consideration of costs at other

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47. *Id.*
48. *Id.* at 2707.
49. *Id.*
50. *Id.* at 2706-07.
51. *Id.* at 2707
52. *Id.* at 2714.
53. There is some degree of irony in Justice Scalia's role in the continuing erosion of *Chevron*, as he has long been an advocate of its broad application. In *INS v. Cardoza-Fonseca*, 408 U.S. 421, 453 (1987), he wrote a concurrence, in which he criticized the court's opinion—written by Justice Stevens, the author of *Chevron*—for limiting the doctrine's scope. *See also* United States v. Mead Corp., 533 U.S. 218, 239 (2001) (applying *Chevron* deference to a broader range of agency actions); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE. L. J. 511 (1989) (defending the constitutionality and policy merits of *Chevron*.)
54. *Michigan*, 135 S. Ct. at 2707.
55. *Id.* at 2708.
56. *Id.* at 2707.
57. *Id.* at 2708.

points during the regulatory process was enough to be "appropriate," citing *SEC v. Chenery Corp.*,[58] which held that "a court may uphold agency action only on the grounds that the agency invoked when it took the action."[59] Since the EPA explicitly acknowledged that it did not consider costs in its decision to regulate, that decision cannot be considered "appropriate." Whether or not the EPA considered cost at other stages of the regulatory process is irrelevant, if it fails to embark on the process properly. "What it said is that cost is irrelevant to the decision to regulate," Scalia wrote, "That is enough to decide these cases."[60]

2. The Dissent: Cost Considerations Throughout the Regulatory Process Meet the "Appropriate" Requirement in the CAA

Justice Kagan found this approach far too narrow and unrealistic. While she agreed with the court that, had the EPA completely ignored costs in its regulatory decision, that would have been unreasonable,[61] she found that the agency's overall consideration of costs was enough to satisfy the standard set by *Chevron*.[62] Kagan argued that the majority looked far too fixedly at the determination made at the outset of the regulatory process, calling it "a peculiarly blinkered way for a court to assess the lawfulness of an agency's rulemaking."[63] She instead focused on the regulatory framework in its entirety, and found that the EPA did indeed consider costs at all relevant times.[64] She concluded that the EPA did not analyze cost at the outset because such an exercise would have been impossible.[65] Without having conducted the study required of it by the CAA, the EPA would have no way of knowing what the cost would be.[66] Rather, the EPA did consider cost at all relevant phases of the regulatory process, testing what benchmark emission targets for power plants would be realistically achievable and what floor standards would be acceptable "with cost considerations baked right in."[67] The EPA bore out these considerations in its cost benefit analysis, which found that the benefits of regulation would dramatically exceed the costs.[68] This, for Kagan, was more than enough for the EPA to survive a *Chevron* analysis:

> The Agency acted well within its authority in declining to consider costs at the opening bell of the regulatory process given that it would do so in every round thereafter . . . [the] EPA reasonably found that it was "appropriate" to decline to analyze costs at a single stage of a regulatory proceeding otherwise imbued with

58. 318 U.S. 80 (1943).
59. *Michigan*, 132 S. Ct. at 2708 (quoting SEC v. Chenery Corp., 318 U.S. 80 (1943)).
60. *Id.* at 2710.
61. *Id.* at 2714.
62. *See* Judulang v. Holder, 132 S. Ct. 476, 478 (2011). Writing for a unanimous court, Justice Kagan argued that "[c]ost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy," in a decision invalidating agency action. *Id.*
63. *Michigan*, 135 S. Ct. at 2714.
64. *Id.* at 2718.
65. *Id.* at 2715.
66. *Id.*
67. *Id.* at 2719.
68. *Id.* at 2721.

cost concerns.[69]

Kagan also rejected Scalia's reliance on *Chenery*.[70] She argued that while the agency did indeed acknowledge that it did not consider costs in its determination that regulation would be needed, the regulation it promulgated explicitly stated that costs would be examined as a part of developing a final regulation, and that the EPA would find the least costly solution available to set its new standards.[71] For Kagan, it was comfortably within *Chevron*'s boundaries of reasonability for the EPA to "[consider] costs all over the regulatory process, except in its threshold finding—when it could not have measured them accurately anyway."[72]

The difference between the two justices' approaches can be encapsulated in a colorful metaphor that they both employed. Scalia likened the EPA's failure to consider costs at the outset, and then considering costs later, to someone who "[decides] it is 'appropriate' to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system."[73] Kagan instead compared the EPA to a driver who finds it "appropriate and necessary," before looking at prices, to buy new brake pads, and then undertakes investigations to determine exactly what brake-pads will best serve her purposes and fit within her budget.[74] This core disagreement over the agency's authority to decide when and how to consider costs is the key difference between the majority and the dissent in *Michigan*.

3. Thomas's Concurrence: Chevron Deference May be Unconstitutional.

In a concurrence, Justice Thomas issued a broadside attack against the very idea of *Chevron* deference, and claimed that such deference "raises serious separation-of-powers issues."[75] For Thomas, when agencies are given broad authority to interpret broad statutes, they are effectively legislating, in violation of Article I of the Constitution, which vests "[all] legislative Powers" in Congress.[76] Thomas also sees deference to agency action as a violation of Article III, and the power of the judiciary to "say what the law is,"[77] writing that "*Chevron* deference . . . [forces judges] to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction."[78] He derided the willingness with which courts seem to abdicate this authority to the executive branch, and wrote that "we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency 'interpretations' of federal statutes."[79]

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69. *Id.* at 2715.
70. *Id.* at 2726.
71. *Id.*
72. *Id.*
73. *Id.* at 2709.
74. *Id.* at 2725.
75. *Id.* at 2712.
76. *Id.* at 2713 (quoting U.S. CONST. art. I., §1).
77. *Id.* at 2712 (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).
78. *Id.* at 2713 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand C Internet Servs., 545 U.S. 967, 1983 (2005)).
79. *Id.* at 2713 (Thomas, J., concurring).

IV. ANALYSIS

The majority's reasoning in *Michigan* suffered from a number of defects, which led it to a holding incompatible with settled administrative law. Specifically, the majority misread a consideration of cost into the word "appropriate," ignored case law giving agencies wide latitude in their determination of when and how to use costs in their regulations, and disregarded the EPA's valid evidence that the agency did consider cost at all relevant stages. For these reasons, the Court did not apply traditional *Chevron* deference, indicating a possible move away from that standard in future cases.

A. The Court was Wrong to Read a Consideration of Cost into the Word "Appropriate" in the CAA

The Court's reading of "cost" into the word "appropriate" here is forced. The plain language meaning of the adjective "appropriate," according to Merriam-Webster's, is "right or suited for some purpose or situation."[80] Applied to facts of *Michigan*, on its own, this understanding of the word "appropriate" would not seem to demand a consideration of cost in the decision to regulate. The EPA could conceivably determine that a regulation is "right or suited for some purpose or situation"—and consider the effects of that regulation, in terms of cost, after finding it to be appropriate.

Scalia acknowledged that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost,"[81] but argued that in an administrative context, where cost is central to reasonable regulation, costs must be read into the phrase in the CAA.[82] He also pointed to the statutory context of the CAA, which requires the EPA to undertake several studies, one of which, taken after the decision to regulate is made, would determine "the health and environmental effects of such emissions, . . . and the costs of such technologies."[83] Since this study requires a consideration of costs, Scalia reasoned, cost must be read into the original inquiry as well. "This directive to [the] EPA to study cost," he wrote, "is a further indication of the relevance of cost to the decision to regulate."[84]

What Scalia failed to recognize in his discussion of the emissions study required by section 7412, is that such studies must necessarily be undertaken *only after* the decision to regulate has been made—that is, according to the majority's reasoning, after the critical moment of cost consideration has already passed.[85] His reading of cost into the phrase "appropriate and necessary" presents the EPA with a catch-22. On the one hand, it must consider costs in its determination that regulation is appropriate. On the other hand, it has no idea what the costs of a particular regulation will be until conducting its study. It seems highly unlikely that in drafting section 7412, Congress intended to put the EPA in such a bind. It seems more unlikely still

80. *Appropriate Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/appropriate (last visited Nov. 6, 2015).

81. *Michigan*, 135 S. Ct. at 2707.

82. *Id.* at 2707-08.

83. *Id.* at 2708 (quoting 42 U.S.C. § 7412(n)(1)(B) (Supp. II 1990)).

84. *Id.*

85. *Id.*

that an interpretation that avoids this bind should be found to be "unreasonable" under a *Chevron* analysis.

It is also worth noting that the statutory language of the CAA could be interpreted in another way that avoids this problem. Since the second study that the statute called for (to monitor the effect of emissions) does specifically mention a consideration of costs, while the original inquiry only requires that the EPA find regulation "appropriate and necessary," this would seem to suggest that Congress was well aware of its authority to require the EPA to consider costs at certain points in the regulatory process, and specifically declined to do so at the outset.[86] Scalia rejected this argument, and claimed that "[i]t 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."[87] However, read in this context, where one potentially permissible reading of a statute creates serious practical problems that seem to run contrary to congressional intent, and another construction avoids those problems, the latter would certainly seem to be a "permissible construction of the statute" as *Chevron* requires.[88]

Reading costs into the word "appropriate" here is also inconsistent with established administrative procedure. Under a scheme established by Executive Order, agencies are required to conduct cost-benefit analyses for regulations that will have an annual effect of $100 million or more, and explain why the planned regulation is better than any identified alternatives.[89] This means that the EPA was always going to be required to consider costs, and to justify its regulation.[90] Given this fact, it was incorrect for the Court to determine that the EPA acted unreasonably when it determined that it was not required to consider costs at the outset of its decision to regulate. The EPA reasonably determined that, because it would have to consider costs throughout the process, and justify its costs through a cost-benefit analysis, it would be redundant and wasteful to consider costs in that threshold decision. For these reasons, the Court was wrong to read a consideration of cost into the phrase "appropriate and necessary" in section 7412 when conducting its *Chevron* analysis in *Michigan*.[91]

B. The Court's Reading of Cost into the Term "Appropriate" is Not Supported by Case Law

As Scalia and Kagan acknowledged, cost is an integral part of the regulatory

86. *Id.* at 2709

87. *Id.*

88. *See* Shane, *supra* note 5, at 475.

89. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

90. *Id.*

91. There is also an internal inconsistency in the court's reasoning: it reads "costs" broadly, to encompass all possible detrimental effects of regulation, while refusing to consider the health benefits of regulation while weighing those costs. *See* Dan Farber, *"Necessary and Appropriate"* LEGAL PLANET (Nov. 30, 2015), http://legal-planet.org/2015/11/30/necessary-and-appropriate/ ("The Court said . . . that ignoring costs in making a decision violates common sense. The Court also insisted that 'cost' has to be defined broadly, to include all harmful impacts of a decision. Excluding important health benefits from consideration seems equally in violation of common sense—all the more so in a statute whose primary purpose is protection of public health.").

process, and an issue that administrative agencies frequently grapple with.[92] In *Michigan*, the court misapplied the standard of deference that agencies traditionally enjoy when determining how to read "costs" into their regulations, as the following cases demonstrate.

In *Entergy Corp. v. Riverkeeper, Inc*.,[93] the Court reviewed the EPA's decision to conduct a cost-benefit analysis when it regulated thermal emissions from large power plants.[94] There, the EPA was directed by the Clean Water Act to base its regulation on the "best technology available" in order to "minimiz[e] adverse environmental impact."[95] The holding in *Entergy* suggests that when agency action is reviewed under *Chevron*, agencies have some discretion in resolving ambiguity concerning costs.[96]

The Court also permitted the EPA to exercise discretion in its determination of how to deal with costs in *EPA v. EME Homer City Generation, L.P.*[97] In that case, the EPA established an emission budget standard, which was designed to protect states downwind from major polluters from bearing the full burden of emissions, and to require some degree of accountability on the part of the states where the polluters were located.[98] To encourage such accountability, the EPA established a cost-sharing plan, which prohibited states from exceeding a certain "emission 'budget,'" and imposing a federally established implementation plan if they did so.[99] The EPA implemented this rule based on the so-called "Good Neighbor Provision" of the CAA, which requires states to prohibit local pollution sources from "emitting any air pollutant in amounts which will . . . contribute significantly" to other states' inability to meet EPA air quality standards.[100] Though that provision is silent on the question of costs, the Court, after conducting a *Chevron* analysis, upheld the EPA's use of imposed costs as a tool to ensure compliance.[101] The Court held that the "EPA's cost-effective allocation of emission reductions among upwind States . . . is a permissible, workable, and equitable interpretation of the Good Neighbor Provision."[102]

In *Michigan*, the Court ignored the holdings in *Entergy* and *Homer City*. In those cases, the Court gave the EPA considerable latitude in determining how and when costs should considered, and considerable deference in its interpretation of an ambiguous statute. In *Michigan*, on the other hand, the Court did not grant the EPA such deference, and instead held the EPA to a novel standard not consistent with established *Chevron* analysis.

One case in which the EPA was not given latitude to deal with costs (and one which was a source of argument between the justices in *Michigan*) is *Whitman v. American Trucking Ass'n*.[103] In that case, which also dealt with the EPA's

92. *Michigan*, 135 S. Ct. at 2714.
93. 556 U.S. 208 (2009).
94. *Id.* at 224.
95. *Id.* at 220.
96. *Id.* at 226.
97. 134 S. Ct. 1584 (2014).
98. *Id.* at 1596.
99. *Id.* at 1597.
100. *Id.* at 1593.
101. *Id.* at 1610
102. *Id.*
103. 531 US 457 (2001).

construction of language in the CAA, the Court held that the agency *could not* read cost into its directive to set air quality standards at "levels requisite to protect the public health."[104]

Scalia distinguished the statutory language in the two cases, pointing out that "'[a]ppropriate and necessary' is a far more comprehensive criterion than 'requisite to protect public health.'"[105] Present in *Michigan* and absent in *American Trucking*, for Scalia, is a consideration of cost in the natural reading of the statutory language in question—*American Trucking* was therefore not controlling:

> *American Trucking* . . . stands for the modest principle that where the [CAA] expressly directs [the 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. That principle has no application here.[106]

But these directives are not as distinguishable as Scalia suggests. Both are set against the same "backdrop of administrative practice" that Scalia claims forces cost considerations into the word "appropriate" in section 7412.[107] Scalia does not explain why the fact that "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate"[108] makes it unreasonable to ignore cost considerations in *Michigan*, but did not prevent a holding in *American Trucking* which forbids the EPA from considering costs when not explicitly instructed to do The Court was wrong to set aside *American Trucking*'s holding prohibiting a consideration of costs, while also ignoring *Entergy* and *Homer City*'s rulings that agencies had broad discretion on when and how to consider costs in the regulatory process.

C. The EPA did Consider Costs in its Decision to Regulate

Even if one reads cost consideration into the word "appropriate," the Court was wrong to find that the EPA "ignored" costs in its finding that "regulation [was] appropriate and necessary"[109]—the grounds on which the Court claims the EPA fails *Chevron*.

The EPA claimed at trial that even though it determined that "costs should not be considered"[110] in deciding whether or not power plants should be brought under MATS regulation, the actions that it took in its initial regulation demonstrate that it did not "ignore" costs in its decision to regulate, and therefore did not unreasonably interpret the CAA. The majority rejected this argument, noting that the Court will not uphold agency action on grounds different from those the agency presented.[111] But, as Kagan pointed out in her dissent, "equally, a court may not strike down

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104. Michigan v. EPA, 135 S. Ct. 2699, 2709 (2015), (quoting Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 472 (2001)).
105. *Id.*
106. *Id.*
107. *Id.* at 2708
108. *Id.* at 2707.
109. *Id.*
110. *Id.* at 2705.
111. *Id. at* 2711.

agency action without considering the reasons the agency gave."[112] The record is filled with evidence of the EPA considering cost in its decision to regulate, and in what form its regulation would take.[113] While the agency did conclude that "costs should not be considered" in its decision to bring power plants under MATS regulation, it acknowledged, at that early stage, that it would consider costs at all relevant points.[114] From the outset, the EPA stated that "the effectiveness and costs of controls will be examined along with the level(s) of control that may be technically feasible."[115] It also announced that it would commit itself to finding "lower cost solutions."[116] In its final rules, the EPA showed the steps it had undertaken, from the decision to regulate onward, and concluded that it has made its standards "cost-efficient."[117] This persistent and rigorous attention to cost in the EPA's regulatory process, including the actions it took when determining that regulation was "appropriate and necessary," show that the agency did not ignore the impact its rules would have on power plant operators, but rather considered them whenever it could. Therefore, even if the Court correctly read cost into the word "appropriate" in section 7412, the EPA showed that it did indeed consider costs in its decision to regulate, and therefore should not have seen its regulation overturned.

V. *MICHIGAN'S* MILIEU: OTHER EROSIONS OF *CHEVRON*

Michigan is not an isolated incident. Rather, it is a part of a trend towards rolling back *Chevron* deference which is evident in numerous recent decisions in which the Court has decided not to apply *Chevron* at all—in effect widening the gap of *Chevron* Step Zero.

Four days before deciding *Michigan*, the Court issued its opinion in another administrative case with a much higher profile. In *King v. Burwell*,[118] plaintiffs challenged the manner in which the IRS interpreted the Affordable Care Act's creation of government-run healthcare exchanges.[119] Many assumed that the decision would turn on a *Chevron* analysis, as this was a case concerning a government agency's interpretation of a statute.[120]

To the surprise of many, the Court held that *Chevron* was inapplicable, and decided the case based on the plain language of the statute.[121] It did so on two

112. *Id.* at 2726 (Kagan, J., dissenting).

113. National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. 9326 (Feb. 16, 2012) (codified at 40 C.F.R. § 63).

114. *Michigan*, 135 S. Ct. at 2725 (Kagan, J., dissenting).

115. Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79825 (Dec. 20, 2000).); *See also Michigan*, at 2725 (Kagan, J., dissenting).

116. *Michigan*, 135 S. Ct. at 2725 (Kagan, J., dissenting).

117. National Emission Standards for Hazardous Air Pollutants, 40 C.F.R. § 63 (2012); *see also Michigan*, 135 S. Ct. at 2726 (Kagan, J., dissenting).

118. 135 S. Ct. 2480 (2015).

119. Affordable Choices of Health Benefit Plans, 42 U.S.C. §§18031, 18041 (2010).

120. *See* Jeffrey Toobin, *Did John Roberts Tip His Hand?* NEW YORKER (Mar. 4, 2015), http://www.newyorker.com/news/daily-comment/did-john-roberts-tip-his-hand; Sarah Kliff, *Chevron Deference: The Legal Principle That Could Save Obamacare*, VOX (June 20, 2015), http://www.vox.com/2015/6/20/8815097/king-v-burwell-chevron-deference.

121. *King*, 135 S. Ct. at 2488-89.

separate grounds. First, the Court claimed that the question at bar fell into an exception to *Chevron* created by *FDA v. Brown & Williamson Tobacco Corp.,*[122] in which the Court held that in extraordinary circumstances of deep "economic and political significance," in which Congress is unlikely to have made an implicit delegation of power, *Chevron* would not apply.[123] Second, the Court determined that even if Congress had delegated this important task to an agency, it is highly unlikely that it would have done so to the IRS, "which has no expertise in crafting health insurance policy of this sort."[124]

Chief Justice Roberts, who wrote the majority opinion in *King*, has advocated for a narrower application of judicial deference than the broad standard granted in *Chevron*. In a dissent in *City of Arlington v. FCC*,[125] Roberts called for limiting *Chevron* deference to those cases in which it appears clear that Congress had intended to delegate the authority to resolve a particular statutory ambiguity to an agency. "[B]efore a court may grant such deference," he wrote, "it must decide on its own whether Congress—the branch vested with lawmaking authority under the Constitution—has delegated to the agency lawmaking power over the ambiguity at issue."[126] In *King*, Roberts appears to have injected this threshold step into the *Chevron* analysis, holding that the doctrine would not apply when it seemed as though Congress had not intended to grant the IRS authority to resolve ambiguities in healthcare policy. Legal analysts have seen this decision not to apply *Chevron* as a "striking and significant departure from the normal rule of statutory interpretation,"[127] and "[offering] opponents of agency action a new arrow for their legal quivers."[128]

Gonzales v. Oregon[129] shows another exception that has recently been carved out of *Chevron*. In that case, the Attorney General's office challenged an Oregon statute allowing for physician assisted suicide by claiming that the Controlled Substances Act of 1970 prohibited the distribution of the drugs used in the process.[130] Specifically, the Attorney General claimed that the statutory requirement that the drugs be used for a "legitimate medical practice" precluded their use for suicide.[131] Despite the fact that the case turned on an agency's interpretation of ambiguous statutory language, the Court refused to apply *Chevron*, stating that "*Chevron* . . . is warranted only 'when it appears that Congress delegated authority to the agency

122. 529 U.S. 120 (2000).

123. *King*, 135 S. Ct. at 2488 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

124. *Id.*

125. 133 St. Ct. 1863, 1877 (2013) (Kennedy & Alito, JJ., dissenting).

126. *Id.* at 1880.

127. Jody Freeman, *The Chevron Sidestep: Professor Freeman on King v. Burwell*, HARV. U. ENVTL. L. PROGRAM (Oct. 25, 2015, 8:57 PM), http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/.

128. Jonathan H. Adler, *Could King v. Burwell spell bad news for the EPA*?, THE VOLOKH CONSPIRACY (Oct. 25, 2015, 9:03 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/03/could-king-v-burwell-spell-bad-news-for-the-epa/.

129. 546 U.S. 243 (2006).

130. *Id.* at 248-49.

131. *Id.* at 253.

generally to make rules carrying the force of law.'"[132] It instead applied a standard known as *Skidmore* deference which directs a court to "follow an agency's rule only to the extent that it is persuasive,"[133] a much lower standard than *Chevron*'s level of deference.

These cases point to a dramatic widening of Step Zero, with the potential to swallow the *Chevron* doctrine entirely. "The Court [has] limited Chevron's application by restricting the types of agency interpretations entitled to deference and by narrowing the implied-delegation rationale," one scholar has noted. "Indeed, the debate about Chevron today is whether to apply it at all, rather than how to apply it."[134]

While *Michigan* is not a *Chevron* Step Zero case, the way that the Court applied *Chevron* indicates increasing skepticism with the *Chevron* doctrine itself. In effect, the *Michigan* Court acknowledged ambiguity in the CAA and then proceeded as though there was none.[135] The Court applied a strict textual analysis, focusing narrowly on the application of the single word "appropriate" in the CAA, to arrive at a conclusion that invalidated an agency action which, under established *Chevron* jurisprudence, ought to have survived. This lack of deference represents a deviation from settled administrative law, and is part of a growing trend towards limiting the applicability and effect of *Chevron*, with potentially serious consequences for administrative agency action.

VI. CONCLUSION

Michigan will make it much more difficult for agencies to defend their statutory interpretations, or to know what sort of statutory interpretations will be accepted by the court. After this holding, the EPA, and other regulatory agencies, will be forced to meet a much higher standard in order to survive judicial scrutiny. One commenter has noted that "[r]egulatory actors should find *Michigan* discomfiting; the decision suggests that agencies' freedom to interpret congressional statutes is more constrained than they might previously have thought—at least when it comes to considerations of cost."[136] After *Michigan*, Bob Sussman, a former EPA official, noted that the significance of the case "lies not in the precise statutory provision addressed by the Court, but in the unusually aggressive approach of the majority in scrutinizing and then rejecting EPA's legal and policy choices under a complex

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132. *Id.* at 255 (quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

133. Gonzalez*,* 546 U.S. at 269; *see* Skidmore v. Swift & Co., 323 U.S. 134 (1944). The question of when to apply *Chevron* or *Skidmore*, has long been a point of contention between the courts, though decisions are typically granted more deference under the Chevron regime. *See generally* Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447 (2013).

134. Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 185 (2012).

135. Michigan v. EPA, 135 S. Ct. 2699, 2706-07 (2015) ("We review this interpretation under the standard set out in *Chevron*. *Chevron* directs the courts to accept a reasonable resolution of an ambiguity in a statute that the agency administers.") (internal citation omitted).

136. Jonathan R. Nash, *Michigan v. EPA and the future of Chevron deference*, THE HILL (July 16, 2015 6:30 AM), http://thehill.com/blogs/pundits-blog/the-judiciary/248040-michigan-v-epa-and-the-future-of-chevron-deference.

regulatory scheme."[137]

This assessment appears to be playing out. The EPA recently issued regulations under its new Clean Power Plan (CPP), which is designed to limit carbon emissions and combat climate change.[138] These regulations rely on statutory interpretations of the Clean Air Act and were developed with the understanding that agency interpretations would be afforded a high level of deference.[139] Several states have already begun the process of challenging these regulations in court.[140] On February 9, 2016, the Court took an uncommon step when it granted a stay in the implementation of the CPP pending the legal challenge brought by these states.[141] The states seeking the stay argued that "*Michigan v. EPA* starkly illustrates the need for a stay in this case," to avoid another scenario in which industry is forced to comply with a rule that is eventually struck down.[142] In an interview with the New York Times, Jody Freeman, a Harvard law professor and former environmental counsel to the Obama administration, described this order as "a stunning development," and one that "certainly indicates a high degree of initial judicial skepticism from five justices on the court."[143] The EPA has described the order as "extraordinary and unprecedented."[144] The Court's decision to stay the implementation of the CPP before a legal challenge can be brought indicates that it is continuing to move away from judicial deference to agency actions in the post-*Michigan* landscape. After *Michigan*, the extent to which courts will be expected to defer to agency statutory interpretations is not clear.

Whether this trend will continue, or just how far it will go, will depend on the composition of a changing court. The vacancy on the Court created by the death of Justice Scalia on February 13, 2016, makes the murky and difficult subject of

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137. Bob Sussman, *What the* Michigan v. EPA *SCOTUS ruling means for the President's Clean Power Plan*, BROOKINGS (July 17, 2015), http://www.brookings.edu/blogs/planetpolicy/posts/2015/07/17-michigan-epa-clean-power-sussman.

138. Coral Davenport & Gardiner Harris, *Obama to Unveil Tougher Environmental Plan With His Legacy in Mind*, N.Y. TIMES (Aug. 2, 2015), http://www.nytimes.com/2015/08/02/us/obama-to-unveil-tougher-climate-plan-with-his-legacy-in-mind.html?_r=0.

139. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 57492 (proposed Sep. 25, 2014) (to be codified at 40 C.F.R. pt. 60); 7 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 64543 (proposed Oct. 30, 2014) (to be codified at 40 C.F.R. pt. 60); Carbon Emissions Guidelines for Existing Stationary Sources: EGUs in Indian Country and U.S. Territories; Multi-Jurisdictional Partnerships, 79 Fed. Reg. 65481 (proposed on Nov. 4, 2014) (to be codified at 40 C.F.R. pt. 60); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 79 Fed. Reg. 67406 (proposed Nov. 14, 2014) (to be codified at 40 C.F.R. pt. 60).

140. Ellen M. Gilmer, *Clean Power Plan: Opponents push to block rule while defenders prep for battle*, ENERGYWIRE (Oct. 26, 2015), http://www.eenews.net/stories/1060026891.

141. Order to Stay Implementation of Final Agency Action, West Virginia v. EPA, No. 15A773, 2016 WL 502947, at *1.

142. Application for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, West Virginia v. EPA, No. 15A773 2016 WL 502946 at *1 (citations omitted).

143. Adam Liptak, Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emmissions*, N.Y. TIMES, (Feb. 9, 2016), http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html?_r=0.

144. *Id.*

predicting where the Court is moving ever murkier and more difficult.[145] Without Scalia, the Court is, broadly speaking, effectively split on whether or not *Chevron* ought to be applied broadly. The next Supreme Court justice could be a swing vote on whether the doctrine remains intact or not. It is true that, despite challenges over the last thirty years, *Chevron* has proved durable. Today, the highly charged tensions the Court sought to resolve are flaring up with greater intensity, with the potential to overwhelm *Chevron*. Admittedly, it is very difficult to predict the direction the court is heading, especially in the thorny, complicated, and politically volatile world of administrative law. However, *Michigan* and cases like it strongly suggest that the Court is scaling back *Chevron*, and moving away from a deferential standard of review for agency statutory interpretation.

145. *See* Anne Pluta, *Obama Will Have a Tough Time Rallying Support to Replace Scalia*, FIVETHIRTYEIGHT (Feb. 23, 2016), http://fivethirtyeight.com/features/obama-will-have-a-tough-time-rallying-support-to-replace-scalia/.