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AT WHAT COSTS? ENVIRONMENTAL REGULATIONS AND COST-BENEFIT ANALYSIS IN *MICHIGAN V. EPA*

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I. INTRODUCTION

By some estimates, the Clean Air Act[1] (CAA) has provided $22 trillion in health savings and benefits to the general public.[2]

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1. 42 U.S.C. §§ 7401–7671q (2016).

2. Alan H. Lockwood, *How the Clean Air Act Has Saved $22 Trillion in*

However, in *Michigan v. EPA*,[3] the Supreme Court struck down hazardous air pollution (HAP) regulations in the CAA because the U.S. Environmental Protection Agency (EPA) failed to consider costs early enough in the rule making process.[4] These regulations had been held up in legal challenges and bureaucratic politics for over 20 years.[5] Given the enormous benefit of fully implementing the CAA, why did the Court limit the EPA's ability to enforce the law?

No matter its rationale, the Court's holding has led to diverse reactions across the legal and political community.[6] Environmentalists have downplayed the significance of the Court's holding, while conservatives interpreted the decision as lending evidence to support their rejection of President Obama's environmental agenda.[7] Meanwhile, industry experts have

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Health-Care Costs, THE ATLANTIC (Sept. 26, 2015, 2:37 PM), www.theatlantic.com/health/archive/2012/09/how-the-clean-air-act-has-saved-22-trillion-in-health-care-costs/262071/; *see also* U.S. ENVTL. PROT. AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (2011), www2.epa.gov/sites/production/files/2015-07/documents/fullreport_rev_a.pdf. The overall net benefit estimate ranged from $1 trillion to $35 trillion dollars. *Id.* Total costs of compliance for the Act was $65 billion. *Id.* The EPA described the steps taken in its analysis as: "1. air pollutant emissions modeling; 2. compliance cost estimation; 3. ambient air quality modeling; 4. health and environmental effects estimation; 5. economic valuation of these effects; and, 6. results aggregation and uncertainty characterization." *Id.*

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

4. *Id.* at 2708.

5. *See* New Jersey v. EPA, 517 F.3d 574, 579–80 (D.C. Cir. 2008) (describing the history of HAP regulation of coal and oil power plants); CRAIG COLLINS, TOXIC LOOPHOLES, 46–47 (2010) (detailing changes to the HAP regulations under George W. Bush's Clear Skies Initiative); *see also Michigan v. EPA*, 135 S. Ct. at 2705–06 (explaining regulatory and legal actions taken between 1998 and 2014 regarding HAP regulations).

6. *See* Jonathan H. Adler, *Supreme Court Smacks EPA for Ignoring Costs, but Mercury Rule Likely to Persevere*, WASH. POST (June 30, 2015), www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/30/supreme-court-smacks-epa-for-ignoring-costs-but-mercury-rule-likely-to-persevere (questioning precedential value of decision); *see also* Rebecca Leber, *Antonin Scalia Compared a Lifesaving EPA Regulation to a Ferrari*, THE NEW REPUBLIC (June 29, 2015), www.newrepublic.com/article/122198/antonin-scalia-compared-lifesaving-epa-regulation-ferrari (criticizing the decision and featuring a humorous picture of Justice Scalia driving a Ferrari in response to Justice Scalia's analogy in the case).

7. *See* Mindy Goldstein, *Michigan v. EPA: Does It Mean More Than Mercury?*, EMORY L. (July 10, 2015), http://law.emory.edu/news-center/releases/2015/07/Michigan-v-EPA-does-it-mean-more-than-mercury.html (questioning the significance of the *Michigan* holding); Sanjay Narayan, *Michigan v. EPA: Are Mercury Protections Worthwhile? We Know the Answer*, SIERRA CLUB (June 30, 2015), www.sierraclub.org/planet/2015/06/michigan-v-epa-are-mercury-protections-worthwhile-we-know-answer (pointing out the narrowness of the holding, while also criticizing the notion that the EPA should have to consider costs in regulations); *Michigan v. EPA: Cost and Benefits Matter*, SENATE REPUBLICAN POL'Y COMMITTEE (July 9, 2015), www.rpc.senate.gov/policy-papers/michigan-v-epa-costs-and-benefits-matter

reported that most power plants instituted measures to meet these regulations even as they were challenged by industry groups in the courts.[8]

From a legal perspective, *Michigan v EPA* is the latest addition to an evolving body of case law interpreting the CAA.[9] The Supreme Court has addressed cost-benefit issue when interpreting environmental statutes and regulations no fewer than three times over the past four decades.[10] However, in *Michigan v. EPA*, the Court made a questionable break from a longstanding principle giving deference to a federal agency's reasonable interpretation of ambiguous statutory language.[11] This break

(presenting *Michigan v. EPA* holding as evidence to reject President Obama's environmental agenda); *see also* Andrew M. Grossman, *Does EPA's Supreme Court Loss Doom Obama's Climate Agenda?*, CATO INST. (June 29, 2015, 1:04 PM), www.cato.org/blog/does-epas-supreme-court-loss-doom-obamas-climate-agenda (declaring Obama environmental plans illegal); Sam Hananel, *Appeals Court Leaves EPA Mercury Pollution Rule in Effect*, ABC NEWS (Dec. 15, 2015, 12:43 PM), http://abcnews.go.com/Politics/wireStory/appeals-court-leaves-epa-mercury-rule-effect-35774185 (reporting that Court of Appeals for the District of Columbia Circuit ruled that the HAPs rule remain in effect while the EPA recalculates costs and benefits).

8. Eric Wolff, *Supreme Court's Eventual MATS Ruling Will Be (Mostly) Moot*, SNL FIN. (May 14, 2015, 8:30 AM), www.snl.com/InteractiveX/Article.aspx?cdid=A-32620730-13109; *see also* Brief of Emission Control Companies as Amici Curiae in Support of Respondents and in Support of Affirmance at 19–20, Michigan v. EPA, 135 S. Ct. 2699 (2015) (No. 14-46) (asserting that of the 271 Gigawatts (GW) of coal-fired power generation in the U.S. 36% will not bear direct costs for mercury compliance, 24% have already complied with the rules through state regulations or consent decrees, and the remaining 40% are in the process of complying); Mark Drajem, *Obama May Win by Losing in Quirk of Supreme Court EPA Review*, BLOOMBERG (June 24, 2015, 5:13 PM), www.bloomberg.com/news/articles/2015-06-24/obama-may-win-by-losing-in-quirk-of-supreme-court-epa-review (speculating that most coal plants retired because of HAP regulations will remain retired).

9. *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2437 (2014) (addressing whether CAA regulation of car greenhouse gas emissions triggered CAA permitting requirements); EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1599 (2014) (upholding the EPA's interpretation of the "Good Neighbor Provisions" in the CAA); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462–63 (2001) (addressing whether the EPA had to consider costs when revising National Ambient Air Quality Standards (NAAQS)); Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (affirming the EPA's plant-wide definition of CAA term "stationary source").

10. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. at 2709–10 (addressing cost considerations in HAP regulation for coal and oil power plants); *EME Homer City Generation, L.P.*, 134 S. Ct at 1610 (holding that Good Neighbor Provision does not require the EPA to disregard implementation costs); *see also Whitman*, 531 U.S. at 486 (finding that the EPA cannot consider implementation costs in setting NAAQS); Union Elec. Co. v. EPA, 427 U.S. 246, 256 (1976) (holding that the EPA cannot consider economic feasibility in reviewing State Implementation Plans (SIP) for NAAQS).

11. *See, e.g.*, *Chevron*, 467 U.S. at 842–44 (1984) (laying down the Supreme Court's accepted framework for addressing statutory construction questions);

could have significant implications for President Obama's Clean Power Plan.[12]

This comment first gives an overview of the CAA and the Clear Air Act Amendments of 1990[13] (1990 CAA Amendments). It discusses both the structure of the CAA, and the legislative history of the 1990 CAA Amendments including some of the law's policy and political goals. Turning to the judicial interpretation of the CAA, this comment will present a legal history of the particular section of the CAA at issue in *Michigan v. EPA*.[14]

The Analysis section critiques the Supreme Court's decision in *Michigan v. EPA*. The decision misapprehended statutory context and misapplied relevant case law. Additionally, the Court utilized a novel application of the *Chenery* doctrine, an important administrative law principle named after the landmark 1943 case *SEC v. Chenery Corp.*[15] concerning how government agencies justify their actions, in order to exclude a cost-benefit analysis from judicial review.[16] The Analysis section will also discuss the possible impacts of the *Michigan v. EPA* decision on the Clean Power Plan.

The Proposal section proposes litigation goals that Clean Power Plan defenders should pursue in light of the *Michigan v. EPA* decision. First, Clean Power Plan defenders must invest in the major questions argument.[17] Second, defenders of the Clean Power Plan need to focus on existing energy market conditions. Third, Clean Power Plan defenders need to define and explain benefits and co-benefits of the Clean Power Plan thoroughly to the

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King v. Burwell, 135 S. Ct. 2480, 2489 (2014) (affirming *Chevron* two step framework); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (holding same).

12. *See, e.g.*, Eric Groten, *Here Be Dragons: Legal Threats to EPA's Proposed Existing Source Performance Standards for Electric Generating Units*, 45 ENVTL. L. REP. 10116, 10117 (2015) (examining generally the statutory problems with the Clean Power Plan existing immediately before the *Michigan v. EPA* decision); *see also* Ann E. Carlson & Megan M. Herzog, *Symposium: Text in Context: The Fate of Emergency Climate Regulation after UARG and EME Homer*, 39 HARV. ENVTL. L. REV. 23, 24 (2015) (suggesting the Court will decide the Clean Power Plan's fate according to either a *UARG* or *EME Homer City* framework).

13. Clean Act Air Amendments of 1990, Pub. L. No. 101–549, 104 Stat. 2399 (1990).

14. 42 U.S.C. § 7412(n) (2016); *Michigan v. EPA*, 135 S. Ct. at 2705.

15. SEC v. Chenery Corp., 318 U.S. 80 (1943)

16. *See id.* at 87 (1943) (stating, "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see also Michigan v. EPA*, 134 S. Ct. at 2710 (applying *Chenery* doctrine).

17. *See Brown & Williamson Tobacco Corp.*, 529 U.S at 159-60 (holding that Congress does not delegate to federal agencies the power to settle major political or economic questions); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 484-485 (2016) (describing the major questions doctrine).

Court. The *Michigan v. EPA* decision shows that a fraction of the Court is skeptical of the EPA's attempts to use existing provisions in the CAA to address climate change concerns. If advocates for the Clean Power Plan focus on the concerns raised in *Michigan v. EPA*, they may be able to defend the Clean Power Plan successfully.

II. BACKGROUND: A HISTORY OF THE CAA AND THE STATUTE AT ISSUE IN MICHIGAN V. EPA

Throughout the history of the CAA, the law has adjusted to regulatory challenges and demands by the public for stricter pollution controls.[18] Since the CAA was first enacted in 1970, Congress has substantially amended the law on two occasions.[19] To develop an informed understanding of the CAA as it stands today, it is first necessary to understand the historical difficulties in implementing effective pollution controls faced by Congress and the President.

A. Structure and Policy of the Clean Air Act 1970–1990

The 1970 CAA emerged from a variety of federal policies and laws designed to control air pollution.[20] The federal government tried to incentivize states to create air pollution control measures through grants during the 1950s and 1960s.[21] In 1967, Congress passed the Air Quality Act[22] which required states to establish air quality standards for metropolitan regions or else face federally mandated standards.[23] However, this legislation was ultimately unsuccessful.[24] By 1970, no state had established air quality standards, and in response Congress created the original CAA.[25]

18. *See* GARY C. BRYNER, BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990, 81–115 (1993) (considering environmental problems that lead to reform of the CAA); *see also* The Honorable Henry A. Waxman, *Overview and Critique: An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1733–43 (1991) (focusing specifically on the problems leading to the 1990 CAA Amendments).

19. *See* BRYNER, *supra* note 18, at 79–100 (exploring changes to the CAA).

20. BRYNER, *supra* note 18, at 81.

21. *Id.*

22. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

23. BRYNER, *supra* note 18, at 81. The Air Quality Act also contained provisions to increase research in air pollution prevention and assist states in developing air pollution control plans. *See* ROY S. BELDEN, CLEAN AIR ACT, 6 (2d ed. 2011) (listing Air Quality Act provisions).

24. BRYNER, *supra* note 18, at 81.

25. *See id.* (discussing Air Quality Act); *see also* BELDEN, *supra* note 23, at 6 (analyzing the advantages and drawbacks of The Air Quality Act of 1967).

The 1970 CAA included a variety of measures to address air pollution from stationary and moving sources.[26] Two major provisions of the CAA mandated national ambient air quality standards (NAAQS) on category pollutants for specific geographical regions and for new stationary pollution sources.[27] The CAA allowed states to develop state implementation plans (SIP) to meet these air quality standards.[28] Congress also mandated emissions standards based on the best available emissions controls for each specific industry.[29] Additionally, the CAA gave the EPA discretion to regulate HAPs based on the Agency's understanding of public health risks.[30] The CAA established causes of action for the EPA or private citizens to challenge dangerous polluters in court as well.[31]

The 1970 CAA contained many provisions governing "moving sources of pollution," a term which primarily referred to cars and automobile emissions.[32] Specifically, the EPA required the auto industry to reduce emissions of carbon monoxide, hydrocarbons, and nitrogen oxide by 90% for new vehicle models.[33] Additionally, cars had to maintain their emissions levels for 5 years or 50,000 miles.[34] The government levied a $10,000 fine for removing vehicle emission control devices.[35]

Many of the more ambitious programs in the 1970 CAA proved to be difficult to implement in practice, resulting in the 1977 CAA Amendments.[36] In 1977, the auto industry threatened to shut down production of 1978 model cars because they faced a penalty of $10,000 for each non-compliant car.[37] Additionally many areas in the country fail to meet the 1970 CAA's NAAQS provisions.[38] In response to these challenges, the 1977 CAA Amendments largely extended the deadlines for NAAQS and vehicle emissions compliance.[39]

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26. *See* BELDEN, *supra* note 23, at 6–7 (discussing the 1970 CAA).

27. *Id.*

28. BRYNER, *supra* note 18, at 83.

29. BELDEN, *supra* note 23, at 7.

30. *See id.* (discussing HAP regulations); *see also* BRYNER, *supra* note 18, at 125–26 (mentioning early HAP regulations in the CAA).

31. BRYNER, *supra* note 18, at 84.

32. *Id.* at 83–84.

33. *See id.* at 83 (detailing air quality regulations for vehicles). For nitrogen oxides this reduction was from 1971 model years, while for carbon monoxide and hydrocarbons it was from 1970 model years. *Id.*

34. *Id.* at 84.

35. *Id.*

36. BELDEN, *supra* note 23, at 7 (describing the lack of progress in achieving the goals of the 1970 CAA). Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

37. BRYNER, *supra* note 18, at 85.

38. BELDEN, *supra* note 23, at 7.

39. BRYNER, *supra* note 18, at 85.

During the 1980s, President Ronald Reagan changed how government agencies create regulations, which resulted in delayed implementation of many CAA provisions.[40] Government regulations had to meet cost-benefit analyses, and the President established an appeals process through the Task Force on Regulatory Relief to resolve interagency conflicts.[41] This intricate appeals process resulted in regulatory morass and a failure to address many pressing environmental problems through rule making and enforcement.[42] In 1983, for example, the EPA introduced rules to curb acid rain.[43] Member of Reagan's administration ridiculed the program as overly expensive.[44] Because of the complicated regulatory oversight structure, the rules went nowhere.[45]

Congressional frustration with inaction at the EPA sparked unsuccessful efforts to amend the CAA throughout the 1980s.[46] During the decade, the House considered various measures which would become part of the 1990 CAA Amendments.[47] Ultimately, the measures failed either in committee, or before a floor vote.[48] In the Senate in 1988, George Mitchell managed to pass a bill similar to the 1990 CAA Amendments out of the Environment and Public Works Committee.[49] The measure died before a floor vote during contentious negotiations between the United Mine Workers and environmentalists.[50] While the 1980s saw stymied efforts at environmental legislation, various measures were percolating in Congress to address major environmental problems in the nation.[51]

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40. *Id.* at 86–91, 173-74. *See also id.* at 176 (describing stalled rulemaking for a 25 percent recycling goal in December 1990 even though President George H.W. Bush supported the goal in the 1988 presidential campaign).

41. *See* OFFICE OF MANAGEMENT AND BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (1997), www.whitehouse.gov/omb/inforeg_chap1 (examining changes in the Executive Office under President Reagan). The Office of Management and Budget (OMB) could effectively stall rulemaking if it found proposed regulations incompatible with administration goals. BRYNER, *supra* note 18, at 173.

42. *Id.* at 29–32, 174-76.

43. *Id.* at 117.

44. *Id.* (detailing story where the new EPA administrator William Ruckelshaus tried to develop acid rain regulations only to be ridiculed by OMB Director David Stockman).

45. *Id.*

46. Waxman, *supra* note 18, at 1723–34.

47. *Id.*

48. *Id.* at 1728–29 (analyzing acid rain and hazardous air pollutants controls introduced in the House).

49. BRYNER, *supra* note 18, at 92.

50. *Id.*

51. *Id.* at 91–93 (explaining congressional gridlock in the late 1980s).

B. The 1990 CAA Amendments

After the 1988 presidential elections, many important leaders in Washington, including President George H.W. Bush and Senator George Mitchell, wanted to amend the CAA.[52] Congress unsuccessfully tried to reform the struggling law for much of the previous decade, while strong environmental challenges faced the nation.[53] Together, these forces combined to spark comprehensive changes in the way the nation handled air pollution.[54]

Motivation for some of the 1990 CAA Amendments came from increasingly difficult environmental problems in the United States and abroad.[55] Polluters were required to report their emissions levels starting in the late 1980s.[56] The results disturbed the general public, as it showed many businesses released substantial amounts of chemicals that cause acid rain and ozone depletion.[57] Public consciousness of ozone depletion rose throughout the 1980s, culminating in the Montreal Protocol, an international agreement regulating emissions of ozone depleting chemicals.[58] Around the same time, two man-made disasters — the Bhopal chemical explosion and the Exxon Valdez ship wreck — increased public awareness of chemical hazards.[59] By the start of the 1988 Congressional term, the public was ready for Congress to pass major environmental legislation.[60]

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52. *See id.* at 94. (describing election of CAA supporter President George H.W. Bush and Senator George Mitchell).

53. Waxman, *supra* note 18, at 1723–34 (noting especially the effect of the Bhopal accident).

54. *See* BRYNER, *supra* note 18, at 165–84 (considering the significance of the 1990 CAA Amendments).

55. *See id.* at 62 (discussing Superfund legislation).

56. *Id.*

57. *Id.* (showing that businesses released about 2.7 billion pounds of pollutants leading to between 300 and 1500 annual cancer fatalities).

58. *Id.* at 74.

59. *See* Waxman, *supra* note 18, at 1729 (detailing the Bhopal accident). The Bhopal accident occurred when a storage tank at an industrial facility in Bhopal, India released 60,000 pounds of methyl isocyanate killing over 2,500 people and leaving 100,000 with permanent disabilities. *Id.* The accident "resulted from operating errors, design flaws, maintenance failures, training deficiencies and economy measures that endangered safety." Stuart Diamond, *The Bhopal Disaster: How It Happened*, N.Y. TIMES, Jan. 28, 1985, www.nytimes.com/1985/01/28/world/the-bhopal-disaster-how-it-happened.html ?pagewanted=all. A few years later, the Exxon Valdez oil tanker spilled over 270,000 barrels of oil into Prince William Sound, Alaska after it ran aground. *See* Philip Sahecoff, *Largest U.S. Tanker Spill Spews 270,000 Barrels of Oil Off Alaska*, N.Y. TIMES, Mar. 25, 1988, www.nytimes.com/learn ing/general/onthisday/big/0324.html (describing the effects of the Exxon Valdez oil spill); s*ee also* Waxman, *supra* note 18, at 1729, 1735 (discussing the Exxon Valdez oil spill).

60. *See* BRYNER, *supra* note 18, at 92–94 (describing events leading to the CAA).

Along with these environmental challenges, two important political changes sparked the effort to reform the CAA.[61] First, in the 1988 presidential campaign, Republican presidential candidate George H.W. Bush needed to distance himself from the then unpopular Republican President Reagan.[62] Bush focused on reforming the CAA as a way to present himself as a different kind of Republican.[63] Once Bush was president, he sought to make good on his reform promise, and so he introduced a bill to reform the CAA.[64] While Congress did not ultimately adopt the legislation, the bill added credibility to the issue and established a benchmark in negotiations between Republicans and Democrats.[65]

Second, a change in Senate leadership removed a barrier to the 1990 CAA Amendments.[66] In 1998, George Mitchell replaced Robert Byrd as majority leader in the Senate.[67] Byrd was a major barrier to passing environmental legislation in the past.[68] He represented West Virginia, a state with a large coal mining industry, and wanted to protect jobs in his state.[69] Senator Mitchell, on the other hand, was a strong environmentalist who previously worked on CAA reforms.[70]

The 1990 CAA Amendments were the product of intense negotiations and compromise in Congress.[71] First, Congressmen John Dingell and Henry Waxman came together on a framework to pass CAA legislation out of the House.[72] This was an important

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61. *See id.* at 93–110 (recounting the 1988 Presidential election and the resignation of Robert Byrd from Senate Democratic leadership).

62. *Id.* at 94.

63. *Id. See also* Videotape: The Clean Air Act of 1990 Featuring Robert Grady, Roger Porter, and Alan K. Simpson, C-SPAN (Apr. 4, 2014), www.c-span.org/video/?318654-3/clean-air-act-1990 [hereinafter *Videotape discussion*] (featuring discussion of George H.W. Bush campaign speech on environmental issues in Boston, Massachusetts).

64. BRYNER, *supra* note 18, at 94–97.

65. *Id.* at 97–100 (listing several points in the legislative process where President Bush threatened a veto of legislation that went over the total costs of his bill); *see also* Waxman, *supra* note 18, at 1736–39 (discussing veto threats).

66. *See* BRYNER, *supra* note 18, at 94 (detailing George Mitchell's assent to Senate leadership).

67. *Id.*

68. *Id.*; Waxman, *supra* note 18, at 1727.

69. BRYNER, *supra* note 18, at 105.

70. *Id.* at 80 (Senator Mitchell had a long standing commitment to the legislation, dating from his service as chairman of the Senate Committee on Environment and Public Work's Subcommittee on Environmental Protection in 1987–1988).

71. *See id.* 91–115 (explaining the compromises that lead to the 1990 CAA).

72. Waxman, *supra* note 18, at 1737 (including a story of detailed negotiations between Waxman and Chairman John Dingell (D-Mich.) that became the framework for 1990 CAA Amendments). Congressman Dingell represented a district near Detroit, Michigan. *Id.* In the past, he was a barrier to passing CAA reform because he was resistant to new controls on auto emissions and felt the auto industry had done enough to protect the

step since many thought the House would have been less likely to pass legislation than the Senate.[73] In the Senate, George Mitchell arranged months of late night negotiations in his office involving the President's staff and Senate Republicans to come up with a bill.[74] After reaching an agreement on a bill, Senator Mitchell warded off an attempt by Senator Byrd to defeat political support for the bill.[75] Senator Byrd introduced an amendment to include bloated unemployment benefits for coal miners laid off because of the bill.[76] This amendment was likely to destroy political support for the bill, but the Senate voted it down by one vote.[77] The Senate then passed its own CAA legislation.[78] The two bills were different in many ways, and therefore were subjected to a conference committee that produced the final version of the 1990 CAA Amendments.[79]

What emerged from the conference committee was a series of changes to the CAA designed to meet complex new environmental challenges.[80] The 1990 CAA Amendments added new classifications to the NAAQS along with stricter deadlines for emissions reductions and broader stationary source coverage.[81] They also required reductions in hydrocarbon and nitrogen oxide emissions from cars by 35% and 60%, respectively.[82] New cars were required to maintain these emissions standards for 10 years or 100,000 miles.[83] Additionally, the legislation established a cap and trade program for sulfur dioxide emissions and implemented ozone protection controls among other measures.[84]

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environment. *See* BRYNER, *supra* note 18, at 80 (detailing Congressman's Dingell's control of the Energy and Commerce Committee).

73. Waxman, *supra* note 18, at 1737 (recounting predictions of a combative and drawn out negotiation processes that did not come to fruition).

74. BRYNER, *supra* note 18, at 101–03; *see also Videotape discussion*, *supra* note 63 (including a discussion of negotiations between Republicans and Senate Democrats).

75. BRYNER, *supra* note 18, at 105–06.

76. *Id.*

77. *Id.*

78. *Id.*

79. Waxman, *supra* note 18, at 1739 (detailing the conference committee process); BRYNER, *supra* note 18, at 109–15.

80. *See* BRYNER, *supra* note 18, at 123–27 (providing an overview of 1990 CAA Amendments).

81. BELDEN, *supra* note 23, at 8 (explaining the process in the legislation for incrementally increasing attainment for NAAQS provisions).

82. BRYNER, *supra* note 18, at 125.

83. *Id.*

84. BRYNER, *supra* note 18, at 124. The acid rain control provisions first reduced sulfur dioxide and nitrogen oxide emissions then established emissions allowances that conform to the cap. *Id.* In terms of ozone protection, the law included a program similar to the Montreal Protocol except with an accelerated schedule. *Id.* BELDEN, *supra* note 23, at 8–9. The law also increased penalties for violators and expanded citizen lawsuit provisions. BRYNER, *supra* note 18, at 124.

In regards to HAPs, the EPA had formerly been reluctant to regulate HAPs according to public health standards, primarily for cost reasons.[85] Between 1970 and 1990, the EPA codified only seven HAP regulations in total.[86] The new law listed 189 HAPs and required the EPA to promulgate Maximum Achievable Control Technology (MACT) standards mandating polluters install equipment to curb emissions.[87] Congress required the EPA to conduct a risk assessments to determine if more emissions reductions were necessary to ensure an "ample margin of safety" for HAP emissions.[88] The specific subsection of the CAA at issue in *Michigan v. EPA* — 42 U.S.C. § 7412(n) — was part of the Title III HAP reduction legislation.[89]

C. A Legal History of HAP Regulations for Coal and Oil Power Plants at Issue in Michigan v. EPA

There is a unique legislative history to 42 U.S.C. § 7412(n) that emerged out of the conference committee for the 1990 CAA Amendments. The statute's plan text requires the EPA to study the adverse health effects from HAP emissions for coal and oil power plants.[90] Then, the statue provides that: "[t]he Administrator shall regulate electric utility steam generating units [coal and oil power plants] under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study."[91]

As the official legislative history of the 1990 CAA Amendments shows, there was some uncertainty concerning the application of HAP emission reductions to coal and oil power plants.[92] For six substances, the EPA found that regulating coal and oil power plants would not result in any public health benefit, but for others the Agency was less certain.[93] The Senate passed a version of the law without any separate HAP regulation for coal and oil power plants, while the House version included the language present in § 7412(n).[94] The conference committee

85. BRYNER, *supra* note 18, at 117.

86. U.S. ENVTL. PROT. AGENCY, THE CLEAN AIR ACT IN A NUTSHELL: HOW IT WORKS (2013), www2.epa.gov/sites/production/files/2015-05/documents/caa_nutshell.pdf.

87. 42 U.S.C. § 112(d) (2016); BRYNER, *supra* note 18, at 125–26.

88. BRYNER, *supra* note 18, at 124.

89. *Michigan v. EPA*, 135 S. Ct. at 2705.

90. 42 U.S.C. § 7412(n)(1)(A) (2016).

91. *Id.*

92. Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1990, 1414–16 (1993), http://babel.hathitrust.org/cgi/pt?id=uc1.$b561714;view=1up;seq=1436 [hereinafter *Legislative History*].

93. *Id.* at 1416. The substances were arsenic, beryllium, cadmium, hexavalent chromium, formaldehyde, and radionuclides. *Id.*

94. White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1264

adopted the House's language to compensate for the uncertainty involved in regulating HAPs from coal and oil power plants.[95] Thus, the EPA could regulate "only if warranted by the scientific evidence."[96] This ensured that the EPA would not issue duplicative regulations on coal and oil power plants.[97]

In 1998, the EPA found that it was necessary and appropriate to regulate HAP emissions from coal and oil power plants.[98] However, President George W. Bush reversed this finding in 2003 as part of his Clear Skies Initiative.[99] The plan removed coal and oil power plants from the list of HAP regulated sources and implemented a cap-and-trade scheme for Mercury emissions instead.[100] However, in *New Jersey v. EPA*, the United States Court of Appeals for the District of Columbia Circuit ordered the EPA to issue HAP regulations despite to the Clean Skies Initiative. [101] That court held that the EPA failed to follow the statutory procedure for de-listing a source of pollution.[102]

The EPA in 2012 restarted the rule making process for regulating HAPs from coal and oil power plants.[103] The Agency found that the regulations were appropriate because of risks to public health and the environment and necessary because the CAA's other provisions did not eliminate the risks.[104] Additionally, the EPA argued that "costs should not be considered when deciding whether power plants should be regulated."[105] The Court in *Michigan v. EPA* reviewed the EPA's rationale for regulating HAPs from fossil fuel fired power plants.[106]

D. The Court's Reasoning in Michigan v. EPA

The Court utilized statutory context and previous case law to support its conclusion that the EPA's statutory construction was

(Kavanaugh, J. dissenting) (D.C. Cir. 2014).

95. *Legislative History*, *supra* note 92, at 1416.

96. *Id.* ("Under the conference agreement adopting the approach that the House included in its bill, these and other scientific issues will be examined, and regulations will be imposed only if warranted by the scientific evidence").

97. *Id.*

98. *New Jersey v. EPA*, 517 F.3d at 579 (recalling the results of the HAP study including the dangers from methylmercury in fish).

99. COLLINS, *supra* note 5, at 46–47.

100. *New Jersey v. EPA*, 517 F.3d at 579–80. Some suggest that the Clear Skies Initiative was meant to placate the utility lobby which donated $4 million to President George W. Bush's first election campaign. *See* COLLINS, *supra* note 5, at 45 (suggesting a possible link between President Bush's environmental policy and his campaign contributors).

101. *New Jersey v. EPA*, 517 F.3d at 583.

102. *Id.*

103. *Michigan v. EPA*, 135 S. Ct. at 2705.

104. *Id.*

105. *Id.* (quotations omitted).

106. *Id.*

unreasonable.[107] Other parts of § 7412(n) direct the EPA to conduct a study that considers costs of available technology to reduce mercury emissions from other sources.[108] According to the Court, since the statute directs the EPA to consider costs in that study, the EPA should also consider costs in its decision to regulate coal and oil power plants.[109] The EPA cited *Whitman v. American Trucking Ass'ns*[110] in support of its reading of § 7412(n).[111] While *Whitman* declined to require the EPA to consider costs in ambiguous sections of the CAA, the Court in *Michigan v. EPA* limited this holding.[112] *Whitman* only stood for the idea that the EPA should not read-in cost considerations when the statute directs the EPA to regulate based on factors excluding costs.[113] Thus, the statute in *Michigan v. EPA* was too dissimilar for the Court to extend its holding in *Whitman*.[114]

The Court also makes some interesting analogies to highlight what it sees as logical flaws in the EPA's reasoning.[115] The EPA justified its decision to not consider costs when initially deciding whether HAP regulations were appropriate and necessary by claiming it could consider costs when setting emissions standards.[116] The Court quipped back that by the EPA's logic, someone could find it appropriate to buy a Ferrari without considering costs, because he plans to think about costs when considering extra features.[117] The analogy shows the Court's skepticism of any statutory construction that does not include a cost-benefit analysis at the earliest point possible.[118]

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107. *Id.* at 2707–11.

108. *Id.* at 2708 (describing 42 U.S.C. § 7412(n)(1)(A)).

109. *Id.*

110. *Whitman*, 531 U.S. at 457.

111. *Michigan v. EPA*, 135 S. Ct. at 2709 (analyzing *Whitman*).

112. *Whitman*, 531 U.S. at 467 (citing *Union Elec. Co.* and General Motors Corp. v. United States, 496 U.S. 530 (1990) in support of its holding); *Michigan v. EPA* 135 S. Ct. at 2707.

113. *Michigan v. EPA*, 135 S. Ct. at 2709.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The Court included another analogy in this section drawing from the Fourth Amendment. *Id.* The Court discussed that just because the Fourth Amendment requires searches to be "reasonable" and warrants to be "supported by probable cause" does not mean warrants can be unreasonable. *Id.* Just because 42 U.S.C. § 7412(n)(1) excludes costs while 42 U.S.C. § 7412(n)(2) includes cost considerations does not mean the Court can read out costs from 42 U.S.C. § 7412(n)(1). *Id.*

118. *Id.*

III. ANALYSIS: *MICHIGAN V. EPA* IS BAD PRECEDENT ON MANY DIFFERENT LEVELS

While coal and oil power plants took measures to comply with HAP regulations, industry groups and states challenged the same rules in the courts.[119] The groups sustained their attack in the United States Court of Appeals for the District of Columbia Circuit,[120] and on appeal to the Supreme Court.[121] In striking down the regulations, the Court misapprehended the larger statutory context and misapplied precedent governing *Chevron* deference cases.[122] Additionally, the opinion used the *Chenery* doctrine, a well-known administrative law principle, to limit the Court's judicial review.[123] This application distorts the policy considerations underlying the doctrine.[124] Nevertheless, *Michigan v. EPA* is Supreme Court precedent and could have substantial impacts on the Obama Administration's Clean Power Plan.[125]

A. Problems with the Court's Michigan v. EPA Decision

Michigan v. EPA ignores many important parts of the regulatory system for HAP emissions established by § 7412.[126] It also never discussed the body of relevant case law which ignored or downplayed cost consideration arguments as well.[127] The trend

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119. *See generally* Wolff, *supra* note 8 (detailing industry compliance with HAP regulations); *see also Michigan v. EPA*, 135 S. Ct. at 2706 (listing the industry's challenge at the Supreme Court to HAP regulations); *White Stallion Energy Ctr., LLC* 748 F.3d at 1233 (discussing the industry's challenge at the appellate level).

120. *White Stallion Energy Ctr., LLC* 748 F.3d at 1233 (challenging the regulations at the United States Court of Appeals for the District of Columbia Circuit).

121. *Michigan v. EPA*, 135 S. Ct. at 2706 (challenging the regulations at the Supreme Court).

122. *Michigan v. EPA*, 135 S. Ct. at 2707–11 (reviewing statutory context and the *Whitman* precedent).

123. *Id.* at 2710–11.

124. *See* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 992–1005 (2007) (analyzing how *Chenery* promotes the non-delegation values of democratic accountability, non-arbitrary rule of law, and judicial manageability).

125. *See* Carlson & Herzog, *supra* note 12, at 28–35 (framing the ultimate fate of the Clean Power Plan as a question of whether the Court follows its *Util. Air Regulatory Group* or *EME Homer* ruling).

126. *See* 42 U.S.C. § 7412(d) (2016) (describing the different ways to categorize sources of pollution after the EPA decides the sources need regulation).

127. *See Whitman*, 531 U.S. at 467–68 (refusing to find implicit cost consideration in a CAA statute that did not explicitly direct the EPA to consider costs); *Union Elec. Co.*, 427 U.S. at 256 (declining to find that economic considerations were implicit in the CAA's NAAQS programs). *But cf. EME Homer City Generation, L.P.*, 134 S. Ct. at 1606–07 (allowing the EPA to

in *Chevron* cases is to give deference to a federal agency's interpretation of statutes under the agency's exclusive control.[128] However, *Michigan v. EPA* seems meddlesome in comparison to other *Chevron* doctrine decisions.

1. The EPA Considered Costs at Other Points in the Rule Making Process

The majority in *Michigan v. EPA* misapprehended § 7412's larger statutory context, especially the ways in which the EPA considered costs in devising HAP regulations.[129] According to the statutory scheme, a stationary source subject to HAP regulations must meet the MACT standard for its category.[130] This standard is the average HAP emissions level for the best performing 12% of pollution sources in the category.[131] The EPA has the discretion to set beyond the floor standards that are more stringent than typical MACT standards, but must consider costs in making that decision.[132]

For the dissent in *Michigan v. EPA*, this scheme provides costs controls in at least two ways.[133] First, the EPA sets the MACT standards at the level of the best performing market actors.[134] Since these market actors were able to perform without incurring excessive costs, it makes sense to conclude that other market actors could also do so.[135] Both groups operate in the similar market conditions, have a similar customer population,

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tailor ambiguous sections of the CAA's "Good Neighbor Provision" to avoid imposing excessive costs on polluters); *see also Chevron*, 467 U.S. at 851–54 (detailing legislative history of CAA permit program as allowing the EPA to balance economic and environmental interests).

128. *See EME Homer City Generation, L.P.*, 134 S. Ct. 1603–04 (giving *Chevron* deference to the EPA's interpretation of a "Good Neighbor Provision" statute that included cost considerations in setting emission reduction goals for upwind states); *Whitman*, 531 U.S. at 468–70 (affirming the EPA's interpretation of NAAQS to exclude cost considerations); *see also Chevron*, 467 U.S. at 845 (allowing deference to the EPA's "bubble concept" based on the statutory definition of "stationary source").

129. *See Michigan v. EPA*, 135 S. Ct. at 2715–20 (Kagen, J. dissenting) (listing the EPA's cost considerations throughout the regulatory process).

130. 42 U.S.C. § 7412(d)(1)(A) (2016).

131. 42 U.S.C. § 7412(d)(3)(A) (2016). The EPA can set MACT standards for source categories with less than 30 sources at the average achieved by the best performing 5 sources as well. *Id.*; 42 U.S.C. § 7412(d)(3)(B) (2016).

132. 42 U.S.C. § 7412(d)(2) (2016); *see also Michigan v. EPA*, 135 S. Ct. at 2715 (Kagen, J. dissenting) (detailing the regulatory process for HAP emissions under 42 U.S.C. § 7412(d)).

133. *Michigan v. EPA*, 135 S. Ct. at 2719–20 (Kagen, J. dissenting).

134. *Id.* at 2719 (arguing that since the MACT standards are set at the best performing 12% of industry, there must be cost considerations in the standards because that is how businesses make decisions).

135. *Id.*

and face similar challenges in controlling air pollution.[136] Second, § 7412(d) gives the EPA wide discretion in establishing categories and sub-categories for different polluters.[137] These subcategories define the MACT standards themselves, and allow the EPA to consider specific characteristics in the power market.[138] The EPA can then define the MACT standards in ways that account for industry compliance costs.[139]

Indeed, the EPA exercised its discretion in multiple ways to consider costs.[140] The Agency separated coal and oil plants into discrete categories and further divided these sources based on the processes the plants use to make energy.[141] The EPA then proceeded to allow power plants to comply with the regulations based on either input or output standards.[142] It also extended the bubble concept, where the EPA aggregates emissions from all sources of pollution at a site in determining compliance, to include the regulation of power plants.[143] These are just some of the cost considerations included in the rule.[144] Rebutting the majority's Ferrari analogy, the dissent reframed the cost issue in terms more favorable to its reading of the overall context:

> A better analogy might be to a car owner who decides without first checking prices that it is "appropriate and necessary" to replace her worn-out brake-pads, aware from prior experience that she has ample time to comparison-shop and bring that purchase within her budget. Faced with a serious hazard and an available remedy, EPA moved forward like that sensible car owner, with a promise that it would, and well-ground confidence that it could, take costs into account down the line.[145]

Given the many accommodations the EPA made for the coal and oil utility industry, it is hard to fault the dissent for finding the ruling making process to be more than solicitous to the industry's costs.

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136. *Id.*

137. *Id.* at 2720.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (noting that the plants were divided into plants burning high-rank coal, plants burning low-rank virgin coal, plants that run on integrate gasification, liquid oil units, and solid oil units).

142. *Id.*

143. *Id.*

144. *Id.* 2720–21. These system included accommodation for plants primarily burning natural gas but that sometimes burn oil. *Id.* Sources with construction, permitting, or labor challenges were given extra time to meet HAP regulations too. *Id.*

145. *Id.* at 2725.

2. Michigan v. EPA Fails to Give Deference to the EPA's Statutory Interpretation, Contrary to the Prevailing Trend in Chevron Cases

The Court reviewed the EPA's decision to regulate HAPs from fossil fuel power plants under the *Chevron* framework.[146] Under *Chevron*, the Court gives deference to a federal agency's interpretation of an ambiguous statute that it exclusively administers if the interpretation is reasonable.[147] For the majority in *Michigan v. EPA*, it was unreasonable to exclude costs considerations when deciding to regulate.[148] Excluding costs opens the door for regulations where the costs far outweigh the benefits, in the majority's opinion.[149]

In both pre- and post-*Chevron* cases, the Court has rejected arguments that would revoke the EPA's statutory construction for economic feasibility reasons.[150] For example, in *Union Elec. Co. v. EPA*, a power plant challenged Missouri's SIP on the grounds that the plan was technologically and economically infeasible.[151] Reviewing the criteria the CAA directed the EPA to consider, the Court concluded that the EPA should not consider economic feasibility in reviewing a state plan.[152] The Court came to a similar conclusion in *Whitman*[153] with Justice Scalia, the author of *Michigan v. EPA*'s majority opinion. The challengers in *Whitman* argued the terms "requisite" and "adequate margin" in the statutes directing the EPA to regulate ambient air quality standards allowed the Agency to consider implementation costs.[154] While the *Michigan v. EPA* court tried to limit *Whitman*'s ruling, the *Whitman* court found it implausible that a few words in the NAAQS statutes allowed for cost considerations.[155]

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146. *Michigan v. EPA*, 135 S. Ct. at 2707.

147. *Chevron*, 467 U.S. at 840. *Chevron* was concerned with the EPA regulation that adopted a plant-wide definition of the term "new or modified major stationary source" for permitting purposes. *Id.* This allowed polluters to install new equipment so long as the installation did not increase the total emissions from the plant. *Id.* The Court found that "stationary source" was ambiguous in the CAA and upheld the EPA's definition as a reasonable construction of the statute. *Id.* at 845 (holding that Congress did have any specific intention on the applicability of the bubble concept).

148. *Michigan v. EPA*, 135 S. Ct. at 2707.

149. *Id.*

150. *See Union Elec. Co.*, 427 U.S. at 488 (holding that the EPA need not consider costs in its NAAQS program); *see also Whitman*, 531 U.S. at 469 (rejecting an argument that Congress included implementation cost considerations when directing the EPA to set ambient air quality standards "requisite to protect the public health").

151. *Union Elec. Co.*, 427 U.S. at 256.

152. *Id.* at 488.

153. *Whitman*, 531 U.S. at 471.

154. *Id.* at 468.

155. *Id.* at 469; *Michigan v. EPA*, 135 S. Ct. at 2709.

The *Chevron* framework has limits that do not fit well with the statute at issue in *Michigan v. EPA*.[156] *FDA v. Brown & Williamson Tobacco Corp.* sets out the major questions exception to *Chevron* deference.[157] Congress presumptively delegates authority to government agencies when it writes ambiguous statutes.[158] However, it is unlikely that Congress would delegate authority to a government agency to regulate a significant part of the economy or resolve an important political question.[159] Congress traditionally addresses major questions through lawmaking.[160] Additionally, one usually must strain statutory interpretation tools to find answer to major questions in existing legislation.[161] The Court does not believe that Congress would delegate enormous power through cryptic statutory language.[162] Therefore, if a government agency uses a vague statute to solve a major question, the agency must find explicit statutory authority for its action.[163]

Utility Air Regulatory Group v. EPA is perhaps the most relevant application of the major questions doctrine to a CAA issue.[164] *Utility Air Regulatory Group* addressed the question of whether the authority to regulate greenhouse gases (GHG) as an air pollutant extended to the CAA's Prevention of Significant Deterioration (PSD) program.[165] PSD essentially prevents stationary sources from ruining an area's NAAQS attainment by requiring stationary sources to install best available control technology.[166] The proposed regulations could potentially cover thousands of sources not contemplated under the 1990 CAA Amendments.[167] Additionally, the sources were everyday

156. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60; MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (holding that Congress did not delegate to the FCC the power to make telephone company rate filings voluntary through the statutory term "modify"); *see also Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (applying *Brown & Williamson* to strike down the EPA's attempt to regulate GHG under its PSD and Title V permitting).

157. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60 (holding that the FDA did not have statutory grounds to regulate cigarettes under the Food, Drug, and Cosmetic Act).

158. *Id.*

159. *Id.* at 160.

160. *Id.*

161. *See id.* (expressing skepticism that Congress could delegate power to FDA through a cryptic statutory construction).

162. *See Whitman*, 531 U.S. at 468 (analogizing that Congress does not hide elephants in mouse holes).

163. *Brown & Williamson Tobacco Corp*, 529 U.S. at 160.

164. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

165. *Id.* at 2434.

166. *Id.* at 2435.

167. *Id.* at 2444; *see also* BRYNER, *supra* note 18, at 123–28 (providing an overview of the major parts of the Act and demonstrating no attention given to GHG emissions).

businesses, like hotels or small retailers, which the EPA never regulated in the past.[168] To adjust to these inequities, the EPA limited its authority to stationary sources that emit over 100,000 tons of CO_2 a year.[169] Even though the EPA tailored its rule to only cover major CO_2 polluters, the Court struck down the law.[170] They found that because the EPA's rule covered such a large portion of the economy, its underlying statutory construction must be unreasonable.[171]

Unlike the permitting requirements at issue in *Utility Air Regulatory Group*, § 7412(n) clearly anticipates HAP regulation of coal and oil power plants.[172] A close reading of the statute and the legislative history proves this point.[173] Additionally, the HAP regulations at issue in *Michigan v. EPA* would not substantially change the relationship between the EPA and the utility industry.[174] EPA closely regulates coal and oil power plants under other CAA provisions.[175] HAP regulations are more similar to the regulations the *Utility Air Regulatory Group* Court did uphold.[176] There, the Court allowed the EPA to regulate GHG emissions for sources already covered by the PSD program.[177] The EPA already regulates coal and oil power plants like these already regulated sources at issue in *Utility Air Regulatory Group*.[178] In light of the

168. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2436.

169. *Id.* at 2437.

170. *Id.* at 2444.

171. *Id.*

172. 42 U.S.C. § 7412(n)(1) (2016); *see also Michigan v. EPA*, 135 S. Ct. at 2709, 2714 (showing that both the majority and dissent in *Michigan v. EPA* agree that the EPA should consider costs at some point when promulgating HAP regulations); *New Jersey*, 517 F.3d at 582 (implying that Congress meant to regulate HAPs under § 7412(n)(1)).

173. *See* 42 U.S.C. § 7412(n)(1) (2016) (showing that HAP regulations of coal and oil power plants was authorized under the specific subparagraph of the statute and not the section); *see also Legislative History*, *supra* note 92, at 1415 (detailing that Congress subjected coal and oil power plants to extensive regulations under the CAA acid rain provisions).

174. *See* Wolff, *supra* note 8 (proving that the coal and oil industry has already complied with the HAP regulations at issue in *Michigan v. EPA*); *see also* Emission Control Companies as *Amici Curiae*, *supra* note 8, at 19–20 (listing the proportion of the coal industry that complied with HAP regulations).

175. *See Legislative History*, *supra* note 92, at 1415 (detailing CAA acid rain controls); *see also* Wolff, *supra* note 8 (asserting industry compliance with HAP regulations).

176. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2449 (characterizing GHG emissions controls for "anyway" sources as properly extending the EPA's jurisdiction over already-regulated companies).

177. *Id.*

178. *Id.; see also* BRYNER, *supra* note 18, at 126–27, 146–47 (describing acid rain controls and a cap-and-trade system to limit sulfur dioxide, a chemical contributing to acid rain); *Legislative History*, *supra* note 92, at 1416–17 (recording the Congressional debate concerning HAP regulations for coal and oil power plants).

Utility Air Regulatory Group holding, the HAP rules were not a drastic expansion of the EPA's authority.[179]

The *Michigan v. EPA* decision may be a reaction to the *EME Homer City Generation* holding.[180] The late Justice Scalia wrote a scathing dissent in that case criticizing the majority for allowing the EPA to consider costs in implementing the CAA's Good Neighbor Provisions.[181] He characterized the regulations as an "undemocratic revision of the Clean Air Act," and claimed the EPA manufactured a statutory ambiguity to include cost-benefit analysis in its regulations.[182] Furthermore, the dissent in *EME Homer City Generation* described *Whitman* as demanding a textual commitment to consider costs to allow the EPA to consider costs in regulations.[183] In *Michigan v. EPA*, *Whitman*'s textual commitment rule morphed into a toothless principle allowing the EPA to consider costs where there is no language mandating cost considerations at all.[184] Given the contradictory positions Justice Scalia took in *EME Homer City Generation, L.P.* and *Michigan v. EPA*, it is certainly plausible to consider the later decision as a reaction to the former.[185] It seems Justice Scalia is saying if the EPA wants to consider costs, then that is what they will get.[186] Along with these reasons, the *Michigan* v. *EPA* opinion contains a novel application of a well-known administrative law principle — the *Chenery* doctrine.[187]

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179. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2448.

180. *EME Homer City Generation, L.P.*, 134 S. Ct. at 1607 (allowing the EPA to consider costs in issuing Transport Rule to comply with CAA "Good Neighbor" provisions).

181. *Id.* at 1611 (Scalia, J. dissenting). The Good Neighbor Provisions require upwind states to modify their SIP to account for pollution blown through the air into downwind states. *Id.* at 1595.

182. *Id.*

183. *Id.* at 1616.

184. *Michigan v. EPA*, 135 S. Ct. at 2709.

185. *EME Homer City Generation, L.P.*, 134 S. Ct. at 1616; *Michigan v. EPA*, 135 S. Ct. at 2709. It is helpful to look at Justice Scalia's characterizations of the *American Trucking* holding one after another to see that his views truly are contradictory in these cases. "*American Trucking* thus demanded a textual commitment of authority to the EPA to consider costs." *EME Homer City Generation, L.P.*, 134 S. Ct. at 1616 (Scalia, J. dissenting). "*American Trucking* thus establishes the modest principle that where the [CAA] expressly directs EPA to regulate on the basis of a factor that . . . does not include costs, the Act normally should not be read as . . . allowing the Agency to consider costs." *Michigan v. EPA*, 135 S. Ct. at 2709. *American Trucking* cannot both demand textual authority to allow the EPA to consider costs, and at the same time, permit the EPA to consider such costs without specific textual authority. The holdings contradict each other.

186. *Compare EME Homer City Generation, L.P.*, 134 S. Ct. at 1616 (Scalia, J. dissenting) (holding that *American Trucking* demands textual authority to consider costs) *with Michigan v. EPA*, 135 S. Ct. at 2709 (mandating that the EPA consider costs).

187. *See Michigan v. EPA*, 135 S. Ct. at 2710 (applying *Chenery* doctrine).

B. Michigan v. EPA Uses a Worrisome Application of the Chenery Doctrine

The Court in *Michigan v. EPA* used the *Chenery* doctrine to exclude from judicial review the points in the EPA's rule where the Agency considered costs.[188] This doctrine states that reviewing courts must judge agency decisions only on the reasons the agency gave in their initial decision.[189] Courts cannot allow post hoc rationalizations of agency decisions.[190] The Court held that it would violate *Chenery* to evaluate the cost considerations the EPA made after deciding to regulate HAPs from coal and oil power plants.[191] This application of the *Chenery* doctrine distorts the doctrine's policies and unreasonably limits judicial review.

1. Chenery Defined

Chenery involved a reorganization of a utility company under the Public Utility Holding Company Act of 1935.[192] Respondents were managers of the old corporation who purchased preferred stock in order to maintain control of the company.[193] The law required the SEC to approve the merger, and it found respondents violated their duty as fiduciaries by purchasing new company stock.[194] The respondents could not participate in the merger without paying a penalty.[195] The *Chenery* Court's review of the SEC's case citations showed that respondents had no fiduciary duty.[196] While the SEC advocated other reasons to penalize respondent's purchases, the Court was unwilling to address these arguments.[197] "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[198]

Since the decision, the *Chenery* doctrine has become a pervasive principle of administrative law.[199] The Supreme Court

188. *Id.* at 2710. The dissent goes on to express skepticism about whether the EPA's post determination costs consideration are enough to ensure cost effective regulation. *Id.* at 2711.

189. *Chenery*, 318 U.S. at 81–87

190. *Id.*

191. *Michigan v. EPA*, 135 S. Ct. at 2710.

192. *Chenery*, 318 U.S. at 81–87.

193. *Id.* at 84–85.

194. *Id.* at 85.

195. *Id.*

196. *Id.* at 88–89.

197. *Id.* at 90–93.

198. *Id.* at 88.

199. *See* Bryan C. Bond, Note, *Taking It on the Chenery: Should the Principles of Chenery I Apply in Social Security Disability Cases?* 86 NOTRE DAME L. REV. 2157, 2158–61 (2011) (explaining the ubiquitous nature of

cited the principle on many different occasions since 1942.[200] Appellate courts have used the doctrine in a variety of administrative settings as well.[201] When the government justifies an administrative action on grounds not advanced at the administrative level, courts typically use *Chenery* to bar these post hoc rationalizations.[202]

There are limits to the *Chenery* doctrine, however. First, in a 1945 follow-up case also captioned as *SEC v. Chenery Corp.*[203] (*Chenery II*), the Court clarified that the *Chenery* doctrine only applies to determinations that Congress delegated to an agency's exclusive jurisdiction.[204] Second, the doctrine does not apply when an agency's action is compelled by statute or case law.[205] Applying the doctrine in that scenario produces a formality where the Court remands a case solely for the agency to re-draft its opinion using the correct rationale.[206]

2. The Court's Use of Chenery Distorts the Doctrine's Policy Benefits and Unreasonably Limits Judicial Review

One reason to question the *Michigan v. EPA* majority's application of the *Chenery* doctrine is that the EPA's HAP regulations may not change in response to the decision. The Court

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Chenery in administrative law).

200. *See, e.g.*, Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (noting that the National Highway Traffic Safety Administration could not raise new reasons for declining a mandatory airbag standard that the Administration did not raise at the administrative level); Bond, *supra* note 199, at 2158–61 (detailing many applications of the *Chenery* doctrine).

201. Parker v. Astrue, 597 F.3d 920, 922 (7th Cir. 2010) (applying *Chenery* to exclude argument Social Security Administration's (SSA) lawyer made on appeal that were not included at the administrative level); Moab v. Gonzales, 500 F.3d 656, 659–60 (7th Cir. 2007) (utilizing *Chenery* to limit judicial review of Bureau of Immigration Appeals (BIA) denial of asylum application to the grounds BIA advanced in its decision).

202. *See Parker*, 597 F.3d at 922 (excluding SAA argument on appellate review); *State Farm*, 463 U.S. at 43 (rejecting newly raised reasons for declining mandatory airbag standard); *see also* Bond, *supra* note 199, at 2158–61 (describing *Chenery* doctrine).

203. SEC v. Chenery Corp., 332 U.S. 194 (1947).

204. *Id.* at 196 (1947) (limiting *Chenery* to decisions "which an administrative agency alone is authorized to make"); *see also* Stack, *supra* note 124, at 965–67 (describing the *Chenery* doctrine's limits).

205. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 544–45 (finding that *Chenery* was irrelevant to review of a utility contract to purchase power because under case law the contracts are presumed just and reasonable); *see also* Stack, *supra* note 124, at 966 (discussing times when applying *Chenery* may be inappropriate); Judge Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 210 (1969) (claiming that courts should not invoke *Chenery* when its application is a mere formality).

206. Stack, *supra* note 124, at 966; Friendly, *supra* note 205, at 210.

of Appeals for the District of Columbia ruled that the HAPs rules remain in effect while the EPA conducts a more detailed cost-benefit analysis.[207] Many people do not expect the Court's *Michigan v. EPA* ruling to affect the ultimate fate of the HAPs rule.[208] Courts should not invoke *Chenery* when the final result of administrative actions are not in dispute.[209] Since it is likely that HAP regulations will meet the Court's standards, the Court erred in invoking *Chenery* to limit its judicial review.[210] Beyond this, there are additional reasons to question the Court's application of the *Chenery* doctrine.

The *Chenery* doctrine supports many policy considerations.[211] *Chenery* promotes democratic accountability because it prevents government agencies from changing their justifications for regulatory decisions.[212] Congress, the President, and the public must know exactly why the agency is taking action in order to debate the action accordingly.[213] The doctrine also promotes a non-arbitrary rule of law because the government agency must make well-reasoned decisions or else face reversal by the courts.[214] Finally, *Chenery* aids judicial management by narrowing the issues for courts to decide when reviewing agency actions similar to the way trial objections preserve legal issues on appeals.[215]

The *Michigan v. EPA* decision, in contrast, does not promote these policy goals. The EPA's final agency action did not prevent the public from understanding its position on HAP regulations.[216] While the final agency action is long and dense, it contains a detailed overview of the statutory authority supporting the EPA's

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207. Hananel, *supra* note 7.

208. *See* Phillip A. Wallach, *Michigan v. EPA: Competing Conceptions of Deference Due to Administrative Agencies*, BROOKING INST. (Oct. 23, 2015, 2:37 PM), www.brookings.edu/blogs/fixgov/posts/2015/06/29-michigan-v-epa-administrative-deference-wallach (questioning the practical effect of the *Michigan v. EPA* decision); *see also* Brad Plumer, *The Supreme Court Throws a Wrench in the EPA's Crackdown on Mercury Pollution*, VOX (Oct. 23, 2015, 2:38 PM), www.vox.com/2015/6/29/8861167/supreme-court-EPA-ruling-mercury-coal (predicting that the HAP regulations in *Michigan v. EPA* ultimately will remain in force).

209. *See* Friendly, *supra* note 195, at 210 (explaining that it is inappropriate to invoke *Chenery* when the legitimacy of a final agency action is not in question).

210. *See* Wallach, *supra* note 198 (questioning the effect of the *Michigan v. EPA* decision on HAP regulation of coal and oil power plants).

211. Stack, *supra* note 124, at 991–1000.

212. *Id.* at 991–96.

213. *Id.*

214. *Id.* at 996–98.

215. *Id.* at 998–1000.

216. *See* National Emission Standards for Hazardous Air Pollutants From Coal and Oil Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9304, 9311–67 (Feb. 16, 2012) (codified at 40 C.F.R. Pts. 60, 63) [hereinafter *HAPs Regulations*]. (detailing statutory authority for HAP regulations of coal and oil power plants).

decision.[217] A motivated Congressman or interested public citizen could understand the EPA's position through reading the final action document. The public could hold the Agency accountable for its action by voting against the Agency's ultimate boss, the President. The EPA's action was comprehensive and transparent, which gives the public what it needs to hold the Agency accountable through the democratic process.

The *Michigan v. EPA* court chose to focus only on selected portions of the EPA's final rule.[218] Their decision seems arbitrary given that the EPA did exactly what the Court wanted the Agency to do in order to provide reasonable statutory interpretation.[219] The Agency issued a cost-benefit analysis that showed the HAP regulations were cost efficient.[220] *Chenery* supports non-arbitrary rule of law because when agencies give reasons for decisions they limit agency discretion to the scope of those reasons.[221] If the Court does not support an outcome within the scope of the reasons provided by the Agency, the non-arbitrary benefit of the *Chenery* doctrine falls apart.[222] The Court must affirm when agencies act within the scope of a given rationale for a decision.[223] That did not occur in the *Michigan v. EPA* case.

Finally, by refusing to address an adequate ground for affirmance, the Court in *Michigan v. EPA* marginalized another benefit of *Chenery*: judicial manageability.[224] Agencies cannot know if the Court will evaluate all asserted grounds for a decision after *Michigan v. EPA*.[225] The *Michigan v. EPA* court ignored the Agency's rationale that satisfied the Court's demands.[226] Thus, the EPA could not preserve their cost consideration argument in the same way a party in litigation preserves a legal argument at trial. To continue the trial analogy, the EPA asserted its objection by including cost considerations, but the Court used the *Chenery*

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217. *Id.*

218. *Michigan v. EPA*, 135 S. Ct. at 2706.

219. *HAPs Regulations*, *supra* note 216, at 9306.

220. *Id.* at 9327.

221. Stack, *supra* note 88, at 997.

222. *See HAPs Regulations*, *supra* note 216, at 9306 (explaining required cost-benefit analysis that accompanied HAP regulation for coal and oil power plants).

223. *See* Stack, *supra* note 88, at 997 (describing the non-arbitrary rule of law benefit of the *Chenery* doctrine).

224. *See HAPs Regulations*, *supra* note 216, at 9306 (addressing costs and benefits of HAPs regulations).

225. *See Michigan v. EPA*, 135 S. Ct. at 2717–18 (Kagen, J. dissenting) (criticizing the majority for focusing single mindedly on only one part of the regulatory process).

226. *HAPs Regulations*, *supra* note 216, at 9327 (detailing costs and benefits of HAP regulations).

doctrine to ignore the objection.[227] This undermines the judicial management policy in the *Chenery* doctrine.

Chenery is also an important part of *Chevron* deference.[228] Implicit in *Chevron* deference is the idea that administrative agencies consider all possible statutory interpretations before deciding which to follow. *Chenery* ensures that government agencies thoroughly analyze unclear statutes before taking action.[229] Administrative agencies cannot advance new reasons during judicial review supporting their statutory construction.[230] *Chenery* mandates that courts only consider arguments advanced at the administrative level.[231]

The Court's application of *Chenery* in *Michigan v. EPA* distorts these principles because the EPA did work through the problems in § 7412(n).[232] The EPA's final ruling responded to over 900,000 public comments and explained its statutory authority numerous times.[233] Specifically, the ruling stated that the EPA would not consider costs in initially deciding whether to regulate because there was no clear congressional mandate for cost considerations.[234] This was a reasonable argument to make against a statutory interpretation including cost considerations because it repeated the Court's holding in *Whitman*.[235] If the point of *Chenery* in a *Chevron* case is to ensure that the government agency works through the problems presented by the statute, then the EPA surely succeeded After all, what else could the Agency have done to satisfy the Court?

The dissent in *Michigan v. EPA* accused the majority of unreasonably staring fixedly at only one part of the EPA's rule.[236] Given the majority's application of the *Chenery* doctrine, the criticism that the majority unreasonably limited its judicial review is apt.[237] The *Michigan v. EPA* majority's reasoning promoted none of the policies and principles underlying the *Chenery* doctrine.[238] The majority also ignored many instances where the EPA considered costs in setting its regulations.[239] The Court refused to

227. *See id.* (explaining cost considerations in HAP regulations); *see also Michigan v. EPA*, 135 S. Ct. at 2710 (invoking the *Chenery* doctrine to ignore agency cost considerations).

228. Stack, *supra* note 124, at 1004–06.

229. *Id.* at 1005.

230. *Chenery*, 318 U.S. at 88.

231. *Id.*

232. *See generally HAPs Regulations*, *supra* 216, (reviewing the EPA's decision in exhaustive detail).

233. *Id.* at 9310.

234. *Id.* at 9327.

235. *See Whitman*, 531 U.S. at 468 (holding that the EPA must have a clear statutory directive to consider costs in CAA rule making).

236. *Michigan v. EPA*, 135 S. Ct. at 2718 (Kagen, J. dissenting).

237. *Id.* at 2710

238. *Supra* Part III.B.

239. *HAPs Regulations*, *supra* 216, at 9305.

analyze the EPA's decision in its entirety, and used the *Chenery* doctrine to justify this failure.[240]

In addition to this questionable application of the *Chenery* doctrine, *Michigan v. EPA* hinged upon the Court's interpretation of a CAA statute.[241] It could therefore effect the outcome of legal challenges to the Clean Power Plan — the EPA's regulation of carbon emissions from power plants under another CAA statute.[242]

C. Michigan v. EPA Could Have Substantial Effects on the Clean Power Plan

The Clean Power Plan is a central part of the Obama Administration's environmental policy.[243] Under the new rules, states generally must choose from a variety of options to meet GHG emissions goals on a statewide basis.[244] The EPA issued its final rules for the plan on October 23, 2015, and twenty-four states immediately challenged the plan.[245] These states question the Clean Power Plan's legality on constitutional and statutory grounds.[246] The Clean Power Plan has serious statutory problems because the House and Senate passed different versions of the statute the EPA relied on in drafting the regulations.[247] These

240. *Michigan v. EPA*, 135 S. Ct. at 2710.

241. *See id.* at 2705 (summarizing the legislative history of § 7412(n)).

242. Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64710 (Oct. 23, 2015) (to be codified at 40 C.F.R. Pt. 60) [hereinafter *Clean Power Plan Regulations*].

243. EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 6 (2013), www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf, (noting that GHG emissions from the power sector account for 1/3 of total emissions); *see also Clean Power Plan Regulations*, *supra* note 242, at 64665 (characterizing the rules as a major part of President Obama's Climate Action Plan).

244. Mario Loyola, *Federal Coercion and the EPA's Clean Power Plan*, THE ATLANTIC (Oct. 24, 2015, 6:05 PM), www.theatlantic.com/politics/archive/2015/05/federal-coercion-and-the-epas-clean-power-plan/393389/ (explaining the Clean Power Plan); *Clean Power Plan Regulations*, *supra* note 242, at 64665.

245. *Clean Power Plan Regulations*, *supra* note 242, at 64462; Petition for Review at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Oct. 23, 2015), www.ago.wv.gov/pressroom/2015/Documents/File-stamped%20petition%2015-1363%20%28M0108546xCECC6%29-c1.pdf (broadly outlining challenges to the Clean Power Plan).

246. Petition for Review, *supra* note 245, at 2.

247. *Clean Power Plan Regulations*, *supra* note 242, at 64712 (analyzing two versions of 42 U.S.C. § 7411(d) passed with the 1990 CAA Amendments); *see also* Anthony Adragna & Andrew Childers, *Clean Power Plan Implication Unclear After Supreme Court Denies Agency Deference*, BLOOMBERG, June 30, 2015, www.bna.com/clean-power-plan-n17179928897/ (addressing the conflicting versions of 42 U.S.C. § 7411(d)).

states may use the *Michigan* decision as part of its strategy to overturn the Clean Power Plan on major question grounds.[248]

1. The Clean Power Plan

The Clean Power Plan is the EPA's and President Obama's strategy to reduce GHG emissions from coal and oil power plants.[249] First, the EPA establishes aggregate GHG emissions targets from power plants for each state.[250] The regulations contain various ways that states can meet these emissions limits.[251] States can reduce GHG emissions from existing fossil fuel burning power plants, convert coal power plants to natural gas power plants, or implement beyond-the-fence-line programs to reduce GHG emissions overall.[252] For example, assume the EPA mandates that a state must not emit more than 10 units of GHGs, and a state currently emits 12 units of GHGs. The state can then: (1) control GHG emissions from fossil fuel power plants by 2 units; (2) convert the equivalent of 2 units of coal power plants to cleaner burning natural gas power plants; (3) replace 2 units of fossil fuel emissions with zero emissions sources like wind power; or (4) reduce electricity consumption by 2 GHG units.[253] The rules give states the choice to either submit their own plans or have the EPA design a plan for them.[254] In this way, the Clean Power Plan mirrors the federalist system the CAA utilizes to meet NAAQS standards.[255] In a companion rule making proceeding, EPA established emissions standards for new fossil fuel power plants.[256] These standards set emissions limits for any fossil fuel

248. Petition for Review, *supra* note 245, at 2. (asserting challenges to the Clean Power Plan on constitutional and statutory grounds).

249. THE PRESIDENT'S CLIMATE ACTION PLAN, *supra* note 243, at 6; *Clean Power Plan Regulations*, *supra* note 242, at 64665.

250. *Clean Power Plan Regulations*, *supra* note 242, at 64663 (reviewing GHG emissions standards for fossil fuel burning power plants and rate-based and mass-based emissions goals for states).

251. *Id*. at 64666. The three choices for state plans include increasing energy efficiency at existing power plants, power capacity from lower-emitting natural gas plants, or capacity from renewable sources. *Id*. States can also develop cap-and-trade systems individually or combined with other states to meet their state plan goals. *Id*. at 64663; *see also* Loyola, *supra* note 244 (listing Clean Power Plan compliance options).

252. *Clean Power Plan Regulations*, *supra* note 242, at 64665-67. These programs involve increasing demand-side energy efficiency. *Id*.

253. *See id*. at 64666 (explaining compliance options). This hypothetical explains compliance options from a mass based emissions perspective. *Id*. at 64663.

254. *Id*. at 64666-67; *see also* Patrick Parenteau, *The Clean Power Plan Will Survive: Part 2*, LAW360 (Sept. 29, 2015 10:15 AM), www.law360.com/articles/704048/the-clean-power-plan-will-survive-part-2?article_related_content=1 (detailing the Clean Power Plan's structure).

255. Parenteau, *supra* note 254.

256. Standard of Performance for Greenhouse Gas Emissions From New,

fired power plants a utility builds in the future.[257]

The EPA claimed statutory authority to issue the Clean Power Plan under 42 U.S.C. § 7411(d).[258] The statute requires the EPA to establish regulations for any pollutant not controlled by NAAQS standards or that is not regulated under the § 7412 HAP standards. [259] Essentially, the EPA construes 42 U.S.C. § 7411 as providing a safety valve for regulating pollutants otherwise not covered by the NAAQS or HAP programs.[260] In *Massachusetts v. EPA*, the Court established that the term "any pollutant" under the CAA includes GHG emissions.[261] This decision triggered a requirement to regulate GHGs under § 7411.[262]

However, the 1990 CAA Amendments and previous versions of the CAA did not directly envision regulations for GHG emissions.[263] There are no specific titles in the legislation addressing climate change.[264] While one can read § 7411(d) to cover GHG emissions, the EPA did not historically use the section to regulate substantial parts of the economy.[265] Parts of the Clean Power Plan envision changes in state laws too. [266] In light of these

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Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510, 64512 (Oct. 23, 2015) [hereinafter *New Source Greenhouse Gas Standards*]

257. *Id.*

258. *Clean Power Plan Regulations*, *supra* note 242, at 64710.

259. 42 U.S.C. § 7411(d)(1) (2016).

260. *Clean Power Plan Regulations*, *supra* note 242, at 64715 (examining its statutory construction as comprehensive relative to HAP and NAAQS provisions); Patrick Parenteau, *The Clean Power Plan Will Survive: Part 1*, LAW360 (Sept. 28, 2015, 11:37 AM), www.law360.com/articles/704046/the-clean-power-plan-will-survive-part-1?article_related_content=1 (noting the relationship between § 7411, HAP regulations and the NAAQS program).

261. Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (finding that GHG fit within the CAA's definition of "air pollutant").

262. *Clean Power Plan Regulations*, *supra* note 242, at 64664 (explaining purpose of the rule as reducing GHG emissions from fossil fuel-fired power plants).

263. *Massachusetts v. EPA*, 549 U.S. at 529 (citing the EPA's previous views that the CAA did not address GHG emissions). *See generally* Clean Air Amendments of 1990, *supra* note 13.

264. BRYNER, *supra* note 18, at 123–28 (listing the major sections of the 1990 CAA Amendments).

265. Groten, *supra* note 12, at 10117 (detailing the four other occasions the EPA invoked § 7411(d) to regulate air pollution).

266. *Clean Power Plan Regulations*, *supra* note 242, at 64664, 64712–15 (explaining the House and Senate versions of § 7411(d) and different interpretations of each amendment). The House version proscribes regulation for any air pollutant not covered by the NAAQS program or an air pollutant emitted from *a source* covered under § 7412. *Id.* at 64713 (emphasis added). One argument is that since the law covers power plants under § 7412, this exempts them from § 7411(d) regulation. Groten, *supra* note 12, at 10119–22. This comment does not address this argument because the argument is secondary to the overall *Chevron* deference question. *See* Parenteau, *supra* note 260 (explaining that ambiguous statutes trigger *Chevron* deference). The conflicting versions of § 7411(d) mean that the statute is ambiguous. *Id.*; *Clean*

issues, many states bristled at the idea of the EPA forcing them to regulate GHG emissions from fossil fuel power plants.[267] These states are pursuing legal action to strike down the Clean Power Plan, and it's likely that the Supreme Court will decide the case.[268]

2. Michigan v. EPA Shows the Supreme Court's Lack of Deference to the EPA's Decisions

To understand how Clean Power Plan challengers might use *Michigan v. EPA*, one must remember the distinction between within-the-fence-line and beyond-the-fence-line regulations.[269] Within-the-fence-line regulations refers to regulating a power plants' GHG emissions through equipment and controls inside the power plant.[270] It is the first compliance option for the hypothetical state discussed above. Beyond-the-fence-line regulations are measures like building renewable sources of electricity or installing energy efficient controls for consumers that limit a state's GHG emissions.[271] These are the third and fourth options for the hypothetical state. The CAA traditionally addressed within-the-fence-line regulations.[272] This departure from within-the-fence-line regulations may lead to a major questions doctrine challenge.

Beyond-the-fence-line regulations are similar to the rules at issue *FDA v. Brown & Williamson Tobacco Corp.*[273] Fossil fuel

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Power Plan Regulations, *supra* note 242, at 64714. The real issue facing the Court then will be whether to give *Chevron* deference to the EPA in light of the ambiguities in § 7411(d). Parenteau, *supra* note 260.

267. Valerie Volcovici & Lawrence Hurley, *U.S. States, Business Groups Challenge Obama's Carbon Rules in Court*, REUTERS, Oct. 23, 2015, www.reuters.com/article/us-usa-climatechange-lawsuit-idUSKCN0SH1JH20151023.

268. *Id.*; Parenteau, *supra* note 260. Justice Scalia's death may change the outcome of the Clean Power Plan. Robin Bravender, *Scalia's death 'puts all the action' in D.C. Circuit*, E & E PUBLISHING, LLC, Feb. 19, 2016, www.eenews.net/stories/1060032665. If there are not nine justices on the Supreme Court when it rules on the Clean Power Plan, it is possible that the D.C. Circuit Court of Appeal's decision will govern the outcome of the case. *Id.*

269. *See Clean Power Plan Regulations*, *supra* note 242, at 64665 (listing examples of beyond the fence-line regulations); Loyola, *supra* note 244 (noting the uniqueness of beyond the fence-line regulations in the EPA's history).

270. *See* Loyola, *supra* note 244 (describing difference between within-the-fence-line and outside-the-fence-line regulations).

271. *Id.*

272. *See* Scott. C. Oostdyk, *A Constitutional Challenge to EPA's 'Clean Power Plan'*, LAW360 (Oct. 27, 2015, 1:05 PM), www.law360.com/articles/590762/a-constitutional-challenge-to-epa-s-clean-power-plan (detailing the one time in the EPA's history where the Agency tried to regulate beyond-the-fence-line); *see also* Parenteau, *supra* note 254 (noting the uniqueness of beyond-the-fence-line regulations but concluding that the regulations are willful state choices to meet federal goals).

273. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–61.

power generation accounts for a substantial part of the nation's energy portfolio.[274] The utility industry as a whole is larger than the tobacco industry and both are pervasive parts of the U.S. economy.[275] The FDA in *Brown & Williamson Tobacco Corp.* used a similar avoidance strategy like the EPA used with the Clean Power Plan to limit their power.[276] In *Brown & Williamson Tobacco Corp.*, the FDA only required package disclosures on cigarettes even when their statutory interpretation suggested they could ban cigarettes outright.[277] The Clean Power Plan employs a similar avoidance strategy utilizing cooperative federalism to let states design GHG emissions reduction plans.[278] However, the EPA's interpretation of the statutory language implies that the Agency could implement emissions controls directly on fossil fuel power plants.[279] By self-limiting their authority, both agencies imply that Congress really did not intend the agencies' power to extend as far as the agencies claim.[280]

The Court's holding in *Utility Air Regulatory Group* may preview the eventual fate of most of the Clean Power Plan.[281] Both the Clean Power Plan and the regulations in *Utility Air Regulatory Group* are outgrowths of the *Massachusetts v.* EPA decision.[282] The two cases are similar in that they both involve the EPA using regulatory strategies that are novel compared to the Agency's

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274. *See* U.S. ENERGY INFO. ADMIN., FREQUENTLY ASKED QUESTIONS: WHAT IS U.S. ELECTRICITY GENERATION BY ENERGY SOURCES? (Apr. 1, 2016), www.eia.gov/tools/faqs/faq.cfm?id=427&t=3 (showing that coal accounted for 39% of total U.S. electricity generation in 2014, while petroleum accounted for 1%).

275. *See* U.S. DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, GDP BY INDUSTRY, (Sept. 5, 2016), www.bea.gov/industry /gdpbyind_data.htm (listing the value of the utility industry in 2014 at approximately $291 billion, while the value of the food and tobacco manufacturing sector was around $235 billion).

276. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 136–40 (showing that FDA's statutory construction implied that the Agency should ban cigarettes, but the Agency decided against a ban because of fear of health effects of withdrawal symptoms).

277. *Id.*

278. *See Clean Power Plan Regulations*, *supra* note 242, at 64663 (describing latitude states have in meeting Clean Power Plan emissions requirements).

279. *Id.*

280. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 136–40 (limiting regulations over cigarettes); *see also Clean Power Plan Regulations*, *supra* note 243, at 64663 (reviewing system of cooperative federalism to meet GHG emissions reduction targets).

281. *See Util. Air Regulation Grp.*, 134 S. Ct. at 2444 (rejecting PSD permitting requirements for GHG emissions on major questions grounds).

282. *See Clean Power Plan Regulations*, *supra* note 242, at 64664 (characterizing the Clean Power Plan as an effort to regulate carbon emissions from fossil fuel power plants); *see also Util. Air Regulatory Grp.*, 134 S. Ct. at 2436 (linking *Massachusetts* decision and subsequent efforts to regulate GHG emissions).

traditional actions.[283] This is especially true for beyond-the-fence-line regulations in the Clean Power Plan.[284] Because of its expansive nature, the Court may characterize the Clean Power Plan as the EPA usurping regulatory authority from Congress over an important political question.[285] This would essentially mirror *Utility Air Regulatory Group*'s main holding.[286]

What about within-the-fence-line regulations aimed at reducing GHG emissions from new or modified fossil fuel power plants? This action is more in line with the EPA's traditional regulatory actions. It may be the point where *Michigan v. EPA* could most effect the outcome of a Clean Power Plan challenge. The within-the-fence-line emissions limits depend on fossil fuel burning power plants implementing carbon capture and sequestration (CCS) and supercritical pulverized coal (SCPC) technologies.[287] There is a great deal of uncertainty surrounding CCS technology particularly because the power industry has not adopted the technology on a large scale.[288] Installing CCS technology is expensive for power companies as well.[289] If the Court feels that the EPA has not been solicitous enough to the power industry's compliance costs, it may turn to *Michigan v. EPA* to knock out this final part of the Clean Power Plan.

There are some signs the EPA is adjusting to the Court's holding in *Michigan v. EPA*.[290] Both final agency actions establishing the Clean Power Plan and emission controls for new fossil fuel plants include cost considerations.[291] The rulings show adjustment and responses to public comments concerning

283. *See* Oostdyk, *supra* note 272 (describing the one other time in the EPA's history when the Agency attempted beyond-the-fence-line regulations); Parenteau, *supra* note 244 (noting uniqueness of beyond-the-fence-line regulations but disagreeing that these regulations violate the *Brown & Williamson Tobacco Co.* holding); *see also* BRYNER, *supra* note 18, at 123-28 (reviewing the structure of the 1990 CAA Amendments).

284. *See* Groten, *supra* note 12, at 10124-25 (analyzing the link between *Util. Air Regulatory Group* and beyond-the-fence-line regulations).

285. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

286. *See id.* (striking down PSD permitting requirements for GHG emissions).

287. *New Source Greenhouse Gas Standards*, *supra* note 256, at 64512.

288. *See* Kevin Bullis, *The Cost of Limiting Climate Change Could Double Without Carbon Capture Technology*, MIT TECH. REV. (Oct. 27, 2015, 4:10 PM), www.technologyreview.com/news/526646/the-cost-of-limiting-climate-change-could-double-without-carbon-capture-technology/ (explaining importance of CCS technology for addressing climate change but emphasizing the lack of scale in industry's use of the technology).

289. *New Source Greenhouse Gas Standards*, *supra* note 256, at 64512–13 (implying that CCS technology implicates costs concerns).

290. *See id.* (detailing compliance costs).

291. *See id.* (projecting compliance costs for regulations of new or modified fossil fuel fired power plants); *Clean Power Plan Regulations*, *supra* note 202, at 64679 (projecting total compliance costs for the Clean Power Plan at $2.5 billion).

implementation costs.[292] For example, the EPA enlarged emissions limits for new fossil fuel burning power plants to address a commenter's concerns about implementation costs.[293] In the Clean Power Plan ruling, the EPA highlights many times that its partnership with states allows for flexibility in implementing emissions goals.[294] Given *Michigan v. EPA*'s holding, the EPA may have revised its regulations in an effort to accommodate the Court's current thinking on regulatory costs.

Additionally, *Michigan v. EPA* still leaves open questions concerning so-called "co-benefits."[295] These co-benefits in *Michigan v. EPA* came from reductions in $PM^{2.5}$ as opposed to directly from HAP emissions, although science suggests a direct link between HAPs and $PM^{2.5}$.[296] The Court in *Michigan v. EPA* focused on the relatively modest accounting of direct benefits compared to the larger amount of co-benefits.[297] This characterization seems to question whether a regulatory scheme is reasonable if its benefits do not result directly enough from the scheme.[298] The Court's problem with co-benefits echoes many conservative criticisms regarding air pollution standards.[299] The Clean Power Plan's benefits do not rest on co-benefits to the extent HAP regulations did in *Michigan v. EPA*.[300] It does include some co-benefits and world-wide benefits from GHG emissions reduction as opposed to benefits arising exclusively from the U.S.[301] *Michigan v. EPA*'s majority expressed hesitation at wading into the weeds too much

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292. *See New Source Greenhouse Gas Standards*, *supra* note 256, at 64512–13 (noting that the EPA increased GHG emissions limits for new fossil fuel power plants because of many commenters' cost concerns); *see also Clean Power Plan Regulations*, *supra* note 243, at 64665 (detailing cost concerns built into the Clean Power Plan).

293. *New Source Greenhouse Gas Standards*, *supra* note 256, at 64512–13.

294. *Clean Power Plan Regulations*, *supra* note 242, at 64664–66.

295. *Michigan v. EPA*, 135 S. Ct. at 2705–06, 2711.

296. *HAPs Regulations*, *supra* note 216, at 9305; *see also* W. VA. DEP'T OF ENVTL. PROT., HAZARDOUS AIR POLLUTANTS (HAPS) LIST (2016), www.dep.wv.gov/daq/Air%20Toxics/Pages/HazardousAirPollutants%28HAPs%29List.aspx (listing many HAPs as VOCs as well); William M. Hodan & William R. Barnard, *Evaluating the Contribution of PM2.5 Precursor Gases and Re-entrained Road Emissions to Mobile Source PM2.5 Particulate Matter Emissions*, www3.epa.gov/ttnchie1/conference/ei13/mobile/hodan.pdf (describing the effects of VOCs on HAPs ambient air pollution).

297. *Michigan v. EPA*, 135 S. Ct. at 2708.

298. *Id.*

299. *See* C Boyden Gray, *EPA's Use of Co-Benefits*, THE FEDERALIST SOCIETY (Sept. 24, 2015), www.fed-soc.org/publications/detail/epas-use-of-co-benefits (hypothesizing that the EPA may be double counting emissions reductions across programs).

300. *Compare Clean Power Plan Regulations*, *supra* note 242, at 64679 (showing direct benefits of $2.8 billion) *with HAPs Regulations*, *supra* note 216, at 9305 (showing direct benefits of $4 to $6 million).

301. *See Clean Power Plan Regulations*, *supra* note 242, at 64679 (featuring co-benefits from global emissions reduction and reductions in other pollutants from limiting GHGs).

in defining costs and benefits.[302] This may signal that the Court will not give much traction to a direct challenge to the Clean Power Plan on co-benefit grounds. Nevertheless, the co-benefits question is another part of the *Michigan v. EPA* decision the Court may consider in ruling on the Clean Power Plan.

No matter the legal outcome, the Clean Power Plan will impact *Michigan v. EPA*'s precedential value. As the final rule shows, the new regulations impose both expensive compliance costs and have the potential for large societal benefits.[303] The Court will likely revisit the reasoning of the *Michigan v. EPA* decision when confronted with these challenges to the Clean Power Plan. How much weight the Court gives the decision will have a significant impact on the Clean Power Plan's fate. If the Court expands its *Michigan v. EPA* holding, the Clean Power Plan may be in serious legal trouble. However, if the Court limits *Michigan v. EPA* to its facts, this may signal that the Clean Power Plan will survive its legal challenges.

IV. PROPOSAL: LITIGATION STRATEGIES IN DEFENDING THE CLEAN POWER PLAN

With the many problems in the majority's reasoning, *Michigan v. EPA* seems to simply stand for the proposition that regulations must be cost effective in order to be reasonable.[304] That idea may have merits as a policy of supporting efficient government.[305] As a legal principle in interpreting the CAA, the position seems fairly inappropriate. However, *Michigan v. EPA* is binding precedent that will continue to affect environmental and

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302. *Michigan v. EPA*, 135 S. Ct. at 2711.

303. *See Clean Power Plan Regulations*, *supra* note 242, at 64679 (listing direct benefits at $2.8 billion in 2020 and total compliance costs at $2.5 billion).

304. *See Michigan v. EPA*, 135 S. Ct. at 2709 (implying that regulatory decisions are only reasonable when the benefits outweigh the costs).

305. *See generally* ALAN RANDALL, *Benefit-Cost Considerations Should be Decisive When There is Nothing More Important at Stake*, *in* ECONOMICS, ETHICS, AND ENVIRONMENTAL POLICY CONTESTED CHOICES, 53, 54–55 (Daniel W. Bromly & Jouni Paavola eds., 2002) (discussing the normative goals that cost-benefit analysis supports); *see also* Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1138–43 (positing that cost-benefit analysis can be a means for political leaders to exercise oversight over agency decision making); Stephen Clowney, *Environmental Ethics and Cost-Benefit Analysis*, 18 FORDHAM ENVTL. L. REV. 105, 109 (advocating that cost-benefit analysis promotes thoughtful deliberation and improves environmental group standing in public discussions); Cass R. Sunstein, *Cost Benefit Analysis and the Environment* 4 (U. Chi. Law & Econ. Working Paper No. 227, Oct. 2004) (claiming that even partial adoption of cost-benefit analysis could dramatically change government agency regulation).

administrative law for years to come.[306] The government and other Clean Power Plan defenders must address *Michigan v. EPA* in order to successfully vindicate the Clean Power Plan. How should the Clean Power Plan defenders adjust their litigation strategy to accommodate the Court's *Michigan v. EPA* decision?

Michigan v. EPA should highlight for the Solicitor General, the EPA lawyers, and others defending the Clean Power Plan the Court's focus on the major questions doctrine in CAA cases. While *Michigan v. EPA* is not a case directly addressing GHG emissions, it shows the Court is hesitant to grant the EPA broad powers under the CAA to fight climate change.[307] If the Court shows skepticism to the EPA regulations dealing with HAPs, Clean Power Plan defenders can be sure that the Court views the Plan with skepticism as well.[308] Clean Power Plan defenders should be aware that they face serious challenges in showing that the Plan does not violate the major questions doctrine.[309] From these realizations, there are ways that defenders of the Clean Power Plan can adjust their litigation strategy to downplay the Plan's impact on the energy market. This strategy can defeat a major questions challenge, which is the most difficult obstacle the defenders face in litigating the case.

Specifically, Clean Power Plan supporters should set three goals for their litigation strategy in light of the *Michigan v. EPA* decision. First, they must invest in the major questions challenge. Second, the defenders must focus on existing energy market conditions to show that the Clean Power Plan does not change major trends in the industry. Third, the Court must understand the meaning and scope of the Clean Power Plan's benefits. While these goals do not form a complete litigation strategy, they are three areas where the *Michigan v. EPA* decision can most inform a defense of the Clean Power Plan.

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306. *See* Cass R. Sunstein, *Thanks, Justice Scalia, for the Cost-Benefit State*, BLOOMBERG (July 7, 2015, 9:00 AM), www.bloombergview.com/articles/2015-07-07/thanks-justice-scalia-for-the-cost-benefit-state (praising the *Michigan* decision for bringing more cost-benefit analysis to government regulation); *but cf.* Andrew M. Grossmam, *Michigan v. EPA: A Mandate for Agencies to Consider Costs*, 2014–2015 CATO SUP. CT. REV. 281, 302 (2015) (questioning whether the Court will overturn many other government regulations on the same grounds as they did in *Michigan v. EPA*).

307. *See Michigan v. EPA*, 135 S. Ct. at 2708 (noting that *Chevron* deference does not extend to statutory gerrymandering); *see also Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (striking down CAA Title V and PSD permitting requirements that would apply to millions of small sources).

308. *See Michigan v. EPA*, 135 S. Ct. at 2708 (express skepticism that regulations that are not cost efficient can ever be reasonable under *Chevron*).

309. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 (outlining the major questions doctrine).

A. Invest in the Major Questions Doctrine

Constitutional arguments against the Clean Power Plan are likely to fail.[310] Clean Power Plan challengers initially raised the Fifth Amendment takings clause and the anti-commandeering principles as reasons for rejecting the plan.[311] Generally, the Clean Power Plan is not a regulatory taking because it would not render coal or oil power plants completely useless to the plant owners.[312] Because the Clean Power Plan leaves open many productive uses for coal and oil power plants, it meets the *Penn Station* factors that govern regulatory takings.[313] The Clean Power Plan also does not commandeer state legislative authority because the Plan includes a federal option for non-participating states.[314] This option is a legitimate exercise of federal power, and therefore does not violate the anti-commandeering principle.[315] The major questions doctrine, then, is likely to be the strongest challenge to the Clean Power Plan.

While in *Michigan v. EPA* the government had the advantage of addressing a narrow question, this may not be the case for the Clean Power Plan defenders.[316] The Court's order in *Michigan v. EPA* to grant certiorari addressed the narrow question of whether it was reasonable for the EPA to disregard costs in initially deciding to regulate coal and oil power plants under § 7412(n).[317] The initial documents from the Clean Power Plan challengers do not give much hope for a narrow certiorari ruling as the

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310. *See EPA's Proposed 111(d) Rule For Existing Power Plants: Legal and Cost Issues Hearing Before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce*, 114th Cong. (2015) (statement of Richard L. Revesz, Lawrence King Professor of Law, New York University School of Law) (criticizing constitutional challenges to the Clean Power Plan). *But cf. id.* (statement of Laurence H. Tribe, Carl M. Loeb Professor of Constitutional Law, Harvard Law School) (outlining constitutional challenges to the Clean Power Plan). The statement that constitutional arguments against the Clean Power Plan are likely to fail is the author's opinion supported by the subsequent analysis.

311. Petition for Review, *supra* note 245, at 2.

312. *See New Source Greenhouse Gas Standards*, *supra* note 256, at 64512 (noting that many coal and oil power companies plan to comply with the Clean Power Plan).

313. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978) (highlighting that regulatory takings are almost always valid unless the regulatory action renders property completely unproductive).

314. *See* Parenteau, *supra* note 254 (detailing federal plan option for states).

315. *See New York v. U.S.*, 505 U.S. 144, 166 (1992) (recounting Congress' power to create laws under many different parts of the constitution).

316. Writ of Certiorari, Michigan v. EPA, 135 S. Ct. 702 (2014) (No. 14-26) (limiting question for the Court to whether the EPA unreasonably refused to consider costs in regulating HAPs from coal and oil power plants).

317. *Id.*

challengers are raising both statutory and constitutional arguments.[318]

Some prior D.C. Circuit case law suggests that the Court could narrow the issues in this case on appeal.[319] Other parties raised the anti-commandeering argument to challenge parts of the CAA, but the D.C. Circuit completely rejected the argument.[320] This suggests that it is possible that the Supreme Court would not consider the anti-commandeering question since this argument does not have enough traction to move past the lower court. It would ultimately be up to the Supreme Court, however, to define the issues on appeal when deciding whether to grant certiorari. There is no guarantee that the Court will narrow the issues on appeal. Since Clean Power Plan defenders do not know the scope of any challenge, they need to prioritize their efforts in defending the Plan.

The major questions doctrine requires Clean Power Plan challengers to develop a complex record. A baseline issue in any major questions challenge is the current character of the industry the government seeks to regulate.[321] Clean Power Plan defenders then must develop a record to support their view of the energy market as it currently exists.[322] Developing this record will require that Clean Power Plan defenders introduce factual evidence detailing the conditions of the energy industry in the United States.[323] The defenders also must show that the Clean Power Plan will have a minimum impact on the industry once implemented.[324] Prioritizing issues and arguments is a fundamental part of litigation.[325] In this case, it is clear that the major questions doctrine will be an important part of the Clean

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318. *See* Petition for Review at 2, *supra* note 245, (raising both statutory and constitutional challenges to the Clean Power Plan).

319. *See* Texas v. EPA, 726 F.3d 180, 196–97 (D.C. Cir. 2013) (rejecting a challenge to a PSD program for vehicle GHG emissions because the EPA can administer the program itself without violating the anti-commandeering principle).

320. *Id.*

321. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 (holding that the major questions doctrine challenges agency actions when those actions transform a substantial part of the national economy).

322. *See* Jonas Monast and David Hoppock, *Designing CO_2 Performance Standards for a Transitioning Electricity Sector*, 44 ENVTL. L. REP. NEWS & ANALYSIS 11068, 11069–11072 (Dec. 2014) (characterizing the energy market as increasing dependence on natural gas while decreasing dependence on coal).

323. *Id.*

324. *Id.* at 11069–74 (showing market trends moving away from coal electricity generation).

325. *See generally Managing Litigation Checklist*, PRACTICAL LAW (Feb. 15, 2015), www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_corporate_counselcleseminar/Materials/1p_3_managing_litigation.authcheckdam.pdf (describing issue assessment as an important part of pre-litigation strategy).

Power Plan litigation.[326] The Plan's defenders then need to devote substantial time to developing the factual record in order to support their opposition to the major questions challenge.

Constitutional challenges to the Clean Power Plan are contrary to prevailing Supreme Court precedent.[327] The major questions challenge to the Clean Power Plan seems viable and defending the Plan from the challenge will require a detailed case record.[328] Therefore, a fundamental part of the Clean Power Plan defense litigation strategy should be to invest time in the major questions challenge. This decision directs resources and energy toward the most difficult challenge the Clean Power Plan must overcome to win the Court's approval.[329]

B. Focus on Existing Energy Market Conditions

Once Clean Power Plan defenders develop the record to give an accurate view of the energy industry, they must minimize the Plan's impact on industry. Specifically, the defenders need to make convincing arguments that the Clean Power Plan is not an attack on the coal industry. The general trend in the energy market is toward greater dependence on natural gas.[330] Advancements in extracting shale gas in the United States made natural gas the cheapest form of energy, regardless of the Clean Power Plan.[331] This is an important point that the Court must understand.

Coal companies are likely to highlight compliance costs and market factors in challenging the Clean Power Plan.[332] Indeed,

326. Parenteau, *supra* note 260 (predicting that the Clean Power Plan will survive but analyzing the major questions issue as a difficult challenge to the Plan); *but c.f.* Oostdyk, *supra* note 272 (questioning whether Clean Power Plan beyond-the-fenceline regulations can survive a major questions challenge).

327. *See New York v. U.S.*, 505 U.S. at 160 (holding that federal actions do not violate the anti-commandeering principle if the federal government administers the regulatory program); *see also Penn Cent. Transp. Co.*, 438 U.S. at 124–25 (showing that regulatory actions are not takings if there remains some productive use for the regulated property); *see also Texas*, 726 F.3d at 196–97 (rejecting anti-commandeering argument in a CAA case).

328. *See* Oostdyk, *supra* note 272 (supporting major questions challenge to the Clean Power Plan); *see also* Monast and Hoppock, *supra* note 322, at 11068–72 (detailing prevailing trends in the energy market).

329. *See* Oostdyk, *supra* note 272 (predicting failure of the Clean Power Plan on major questions grounds).

330. *See* Monast and Hoppock, *supra* note 322, at 11068–70 (reporting on the decline in power production from coal and increase in power production from natural gas).

331. *Id.*

332. *See* Missouri River Energy Services, *Environmental Protection Agency Clean Power Plan Threatens MRES Resources, Consumers and Reliability* (Mar., 2015), www.mrenergy.com/uploads/files/2015_EPA_Clean_Power_Plan_Fact_Sheet.doc (reporting that the Clean Power Plan may wipe out the power company); *see also* Mario Parker, *Obama's Clean Power Plan Seen Wiping Out High-Cost Coal*, BLOOMBERG (Oct. 27, 2015, 11:28 PM),

coal power plants are closing around the country, and coal fired electricity is losing market share.[333] The fact that the electricity market will likely see little growth in demand in the near future compounds these competitive pressures.[334] Coal companies, somewhat validly, see environmental regulations as a burdensome forced investment.[335] Many coal companies believe the regulations force either substantial investment in equipment upgrades without guarantees of high profits or shutting down altogether.[336] The onerous regulatory costs combine with low market growth to create uncertainty in the coal companies' long-term viability.[337]

Michigan v. EPA shows that the Court has sympathy towards coal industry compliance costs.[338] The Court's holding in the case mandates that the EPA consider compliance costs for regulated industries.[339] This mandate does not have a foundation in CAA case law and goes against the prevailing trend in CAA cases.[340] It would also provide extra protection to coal companies against future costly regulations.[341] *Michigan v. EPA*'s oral arguments shows that at least one of the conservative justices — Justice Alito — was sympathetic to industry costs.[342] Justice Alito seemed to believe that § 7412(n)'s legislative history implied that Congress

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www.bloomberg.com/news/articles/2015-08-03/obama-s-clean-power-plans-will-kill-high-cost-coal-producers (detailing the Clean Power Plan's effect on the high cost coal industry).

333. *See* Monast and Hoppock, *supra* note 322, at 11068-69 (addressing coal plant closures around the country but projecting that closures will decline in the future).

334. *Id.* at 11072.

335. *See id.* at 11077 (describing how end use efficiency can prevent burdensome investments in emissions control technologies).

336. *See* Missouri River Energy Services, *supra* note 332 (warning of stranded investments in coal power plants); *see also* Monast and Hoppock, *supra* note 322, at 11072 (predicting future coal plant closures).

337. *See* Missouri River Energy Services, *supra* note 332 (claiming the Clean Power Plan could lead to "death by a thousand cuts" for power companies with coal generators); *see also* Monast and Hoppock, *supra* note 322, at 11072 (detailing the competitive pressures from regulatory costs on the coal industry).

338. *See Michigan v. EPA*, 135 S. Ct. at 2707 (claiming that no regulation is appropriate if compliance costs outweigh health benefits).

339. *Id.* at 2708.

340. *See Whitman*, 531 U.S. at 468 (holding that challengers must show a statutory command for the EPA to consider costs in order to defeat regulations where the EPA did not consider costs); *see also Union Elec. Co.*, 427 U.S. at 256 (rejecting a claim that the EPA must consider economic feasibility in approving a SIP).

341. *See Michigan v. EPA*, 135 S. Ct. at 2707 (finding that regulations are invalid if compliance costs outweigh benefits). If the Court's holding in *Michigan v. EPA* is a legal principle, then it would protect industry from non-cost efficient regulations. *Id.*

342. *See* Transcript of Oral Argument at 46–47, Michigan v. EPA, 135 S. Ct. 2699 (2015) (No. 14-46) (Justice Alito claiming that Congress treated power plants separate in § 7412(n) to accommodate for their compliance costs).

intended to separate coal and oil power plants from the other HAP sources.[343] Chief Justice Roberts also characterized the disparity between direct benefits and compliance costs as a "red flag" during oral arguments.[344] He implied that in some situations cost considerations can defeat regulatory action regardless of the statutory language at issue.[345] Taken together, these remarks show that the Court's conservative justices are hesitant to impose large costs on the coal industry without clear statutory authority.[346]

In this environment of solicitous attention toward compliance costs, Clean Power Plan defenders need to minimize the impact of the Plan on coal companies. They also need to maximize the impact of general market trends on the coal industry. For example, natural gas generation is the least costly form of new electricity generation when leveling costs.[347] This competitive pressure on coal exists outside of the Clean Power Plan.[348] New coal generation was unlikely in the future without the Clean Power Plan for simple economic reasons.[349] Additionally, futures markets project low price increases for raw natural gas.[350] Even if natural gas prices were to rise, they would have to almost double in price to make new coal generation competitive with natural gas.[351] These forces exist outside of the Clean Power Plan.[352] Essentially, fracking is destroying the coal industry, not the Clean Power Plan or the EPA.[353] The Court must understand this for the Clean Power Plan to prevail.

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343. *Id.*

344. *See id.* at 62–64 (Chief Justice Roberts suggesting that the disproportionate relationship between direct and co-benefits raises legitimacy issues in HAP regulations).

345. *Id.* Chief Justice Roberts also connects this point with a suggestion that the EPA may have used HAP regulations in order to impose stricter requirements for $PM^{2.5}$ then the Agency could otherwise. *Id.* at 64.

346. *Id.* at 46–47, 62–64.

347. *See* Monast and Hoppock, *supra* note 322, at 11071 (showing total system levelized costs for natural gas generation at $67.1 per Megawatt Hour (MWh) while coal generation stands at $100.1 MWh).

348. *Id.* The figures come from the U.S. Energy Information Administration's 2013 Annual Energy Outlook Report. *Id.*; U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2013 WITH PROJECTIONS TO 2040 (Apr., 2013), www.eia.gov/forecasts/aeo/p df/0383%282013%29.pdf.

349. *See* Monast and Hoppock, *supra* note 322, at 11070 (explaining that increase in cheap natural gas limits future demand for coal).

350. *See id.* at 11071 (projecting level natural gas prices despite the possibility for price shocks in regional areas).

351. *See id.* (noting that natural gas prices would have to almost double for natural gas to achieve a levelized cost of new generation per MWh with coal).

352. *Id.*

353. *See id.* (attributing the drop in natural gas prices to shale extraction); *see also New Source Greenhouse Gas Standards*, *supra* note 256, at 64512 (detailing decreased demand for coal production in electricity sector).

There are also ways that the Clean Power Plan may help the coal industry. Investing in energy efficiency is one strategy states can choose to comply with the Clean Power Plan.[354] While increased energy efficiency lowers overall demand for electricity, it also lowers demand for new electricity generation.[355] This reduces reliance on natural gas and allows power companies to invest capital in their existing power generation fleet which includes coal power plants.[356] Stabilizing electricity demand also incentivizes state utilities to maintain their current mix of power generation systems.[357] This mix includes coal power generation.[358]

Energy efficiency investments are then in coal companies' interests because they stabilize the energy market overall.[359] Some states are exploring energy efficiency as a compliance strategy for the Clean Power Plan.[360] Making this point clear to the Court is important because it refutes a threshold question in a major questions challenge.[361] If a government action parallels an already existing change in an industry, that action cannot be subject to a major questions challenge.[362] A threshold issue in the major questions challenge is that the government action causes a major change in a given industry.[363] If there is no government action catalyzing a change in industry, logically there is no major questions challenge.[364]

C. Define Co-Benefits

Additionally, Clean Power Plan defenders must address the co-benefits issue raised in *Michigan v. EPA*.[365] *Michigan v. EPA*'s

354. *See Clean Power Plan Regulations*, *supra* note 242, at 64665 (including energy efficiency programs as a compliance strategy for the Clean Power Plan).

355. Monast and Hoppock, *supra* note 322, at 11077.

356. *Id.*

357. *Id.*

358. *See* U.S. ENERGY INFO. ADMIN., *supra* note 274 (listing coal as accounting for 39% of total energy generation in the U.S. in 2013).

359. *See* Monast and Hoppock, *supra* note 322, at 11077 (noting the benefits of energy efficiency actors within the energy market).

360. *See* Rebecca Stanfield, *Illinois's Climate plan can also be its plan for economic growth*, SWITCHBOARD NAT. RESOURCE DEF. COUNCIL STAFF BLOG (Sept. 22, 2014), http://switchboard.nrdc.org/blogs/rstanfield/illinoiss_climate_solutions_ca.html (advocating that Illinois use mostly energy efficiency strategies to comply with the Clean Power Plan).

361. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 (defining major questions challenge as when an agency's action dramatically changes a regulated industry).

362. *Id.*

363. *Id.*

364. *Id.*

365. *See Michigan v. EPA*, 135 S. Ct. at 2711 (addressing the co-benefits question).

holding shows the importance of the co-benefits issue.[366] If regulations must be cost efficient in order to be reasonable, what qualifies as a benefit is a salient issue.[367] Each side in litigation will debate the regulation's benefits under this principle to see if the regulation is in fact efficient. This is reason enough for Clean Power Plan defenders to devote resource in their litigation strategy to defining and explaining benefits and co-benefits to the Court. The oral arguments from *Michigan v. EPA* also reveal a mistake in the government's responses to co-benefits questions that the Clean Power Plan litigants should avoid repeating.[368]

In particular, Justice Roberts asked the Solicitor General to explain why there were a disparate proportion of direct benefits from mercury regulation to co-benefits.[369] The Solicitor General responded that the EPA did in fact list the other direct benefits from the regulations.[370] Those benefits, however, were too difficult to quantify, so the EPA did not attempt to quantify the benefits.[371] This answer did not address the Chief Justice's fundamental concern, and may have fueled the majority's skepticism of the HAP regulations.[372] If these listed benefits are difficult to quantify, then it seems more likely that the benefits do not exist making the regulation appear less reasonable. This was both a logical fallacy, since the quantifiable nature of benefits does not determine whether the benefits exist, and ignores the connection between HAPs and $PM^{2.5}$.[373] The Solicitor General missed an opportunity to show that the direct benefits of HAP regulations are actually more substantial than the $4-6 million figure cited in the majority's opinion. This point may have rendered the *Michigan v. EPA* Court's opinion moot. If in fact HAP regulations were cost effective, there would be no point in the Court's decision.[374]

The Clean Power Plan's cost-benefit analysis includes many other potential pitfalls like the one the Solicitor General encountered above.[375] First, the direct climate benefits in the analysis are "global" climate benefits.[376] This means that it

366. *Id.*

367. *See id.* at 2707 (showing skepticism to regulations that do not pass a cost-benefit analysis).

368. *See* Transcript of Oral Argument, *supra* note 342, at 64 (featuring Solicitor General's response to a question about co-benefits).

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*; *see also Michigan v. EPA*, 135 S. Ct. at 2707 (expressing skepticism that regulations with small direct benefits could be reasonable).

373. *See* Hodan and Bernard, *supra* note 296 (explaining the connection between HAPs and $PM^{2.5}$).

374. *See Michigan v. EPA*, 135 S. Ct. at 2707 (questioning whether inefficient regulations are appropriate).

375. *See Clean Power Plan Regulations*, *supra* note 242, at 64679–82 (outlining costs and benefits of the Clean Power Plan).

376. *Id.* at 64681.

accounts for climate benefits in other countries, which the Court may find suspicious.[377] However, there are certainly benefits in mitigating climate change that would affect the United States, and the government should take care to explain these benefits to the Court.[378] Second, the Clean Power Plan cost-benefit analysis includes co-benefits from reduction in $PM^{2.5}$ and ozone emissions.[379] The government needs to defend these benefits. This includes explaining why $PM^{2.5}$ is not more properly addressed in other CAA statutes and explaining that $PM^{2.5}$ reduction produces health benefits no matter the source.[380] Third, Clean Power Plan benefits grow almost exponentially in the analysis.[381] For example, in one model climate benefits increase from $3.3 billion in 2020 to $20 billion in 2030.[382] The government must advocate for a longer view of cost-benefit analysis because with time the Clean Power Plan benefits far outweigh the costs.[383]

This comprehensive view of Clean Power Plan benefits will help defenders analogize the case with the *Massachusetts v. EPA* decision. In *Massachusetts v. EPA*, the state appellants were able to impress upon the Court the severity of refusing to address climate change.[384] The opinion notes rising sea levels and other adverse weather effects as specific harms facing states without federal intervention under the CAA.[385] However, *Utility Air Regulatory Group* and *Michigan v. EPA* emphasize the burden CAA regulations could have on market actors.[386] By explaining Clean Power Plan benefits thoroughly, its defenders can introduce

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377. *Id.*

378. *See id.* at 64679–82 (detailing climate and health benefits); *see also* U.S. ENVTL. PROT. AGENCY, FACT SHEET: CLEAN POWER PLAN BENEFITS (2014), www.epa.gov/sites/production/files/2014-05/documents/20140602fs-benefits.pdf (asserting that the Clean Power Plan could prevent up to 6,400 premature deaths and 150,000 asthma attacks in children).

379. *See Clean Power Plan Regulations*, *supra* note 242, at 64680 (listing benefits from $PM^{2.5}$ and ozone reduction).

380. *See* Transcript of Oral Argument, *supra* note 342, at 63 (Chief Justice Roberts questioning why the EPA can claim benefits from $PM^{2.5}$ when $PM^{2.5}$ is regulated under other CAA provisions); *see also* World Health Organization, *Health Effects of Particulate Matter* 6 (2013), www.euro.who.int/__data/assets/pdf_file/006/189051/Health-effects-of-particulate-matter-final-Eng.pdf (explaining the effect $PM^{2.5}$ has on people with pre-existing heart conditions and the elderly).

381. *See Clean Power Plan Regulations*, *supra* note 242, at 64679–82 (showing large increases in Clean Power Plan benefits over time).

382. *Id.* at 64681.

383. *Id.*

384. *See Massachusetts v. EPA*, 549 U.S. at 521 (describing the risks of rising sea levels and water scarcity from climate change).

385. *Id.*

386. *See Util. Air Regulatory Grp.*, 134 S. Ct. 2444 (nothing that the EPA's actions would extend its regulatory authority to many small businesses); *see also Michigan v. EPA*, 135 S. Ct. 2708 (implying that regulatory actions that do not consider costs are unreasonable).

the same scenarios where the US does nothing about climate change that motivated the *Massachusetts v. EPA* court. Without the Clean Power Plan, it will be difficult for the US to meet its climate change goals under the 2015 Paris Agreements and thereby maintain the international credibility of the Paris Agreements.[387] The same disasters that motivated the Court to find carbon an air pollutant under the CAA in *Massachusetts v. EPA* are possible without the Clean Power Plan.[388] This shift in focus may persuade a majority of the Court to return to the concerns about GHG emissions that motivated the *Massachusetts v. EPA* decision.

V. CONCLUSION

The *Michigan v. EPA* decision presents many challenges and opportunities. With its misapprehension of case law and statutory context, the Court's reasoning in the decision is suspect.[389] The Court also employed a novel application of the *Chenery* doctrine to limit the scope of its judicial review.[390] This application distorts the benefits of the *Chenery* doctrine in the non-delegation framework.[391] Finally, *Michigan v. EPA* could have a substantial impact on the fate of the Clean Power Plan.[392] Clean Power Plan

387. *See* Eric Anthony DeBellis, *In Defense of the Clean Power Plan: Why Greenhouse Gas Regulations Under Clean Air Act Section 111(D) Need Not, and Should Not, Stop at the Fenceline*, 42 ECOLOGY L.Q. 235, 260 (2015) (explaining that striking down the Clean Power Plan would prevent the US from meeting the 2015 Paris Agreement); Ben Adler, *Will One of These Clowns Destroy the Paris Climate Deal?*, MOTHER JONES (Dec. 18, 2015, 6:00 AM), www.motherjones.com/environment/2015/12/republicans-paris-climate-change-deal-cop21 (predicting that any domestic reversal of the Clean Power Plan could kill the Paris Agreement). *But cf.* Fiona Harvey and Suzanne Goldenberg, *US Clean Power Plan Setback 'Will Not Affect Paris Climate Change Deal*, THE GUARDIAN (Feb. 10, 2016 12:27 PM), www.theguardian.com/environment/2016/feb/10/us-clean-power-plan-setback-will-not-affect-paris-climate-change-deal (reporting that European nations and the United States remained faithful to the Paris Agreement despite Supreme Court stay of the Clean Power Plan). The Paris Agreement depends on nations setting voluntary emissions reductions goals, and US leadership in reductions is critical to maintain the Agreement's international credibility. Jorge E. Vinuales, *The Paris Climate Agreement: An Initial Examination* 5 (Cambridge Ctr. for Env't, Energy, and Nat. Res., Working Paper No. 6, December 15, 2015).

388. *Massachusetts v. EPA*, 549 U.S. at 521.

389. *See* discussion *supra* Part III. A (explaining problems with the *Michigan v. EPA* decision).

390. *See* discussion *supra* Part III. B (criticizing the Court's application of the *Chenery* doctrine in *Michigan v. EPA*).

391. *Id.*

392. *See* discussion *supra* Part III. C (predicting the effect of the *Michigan v. EPA* decision on the Clean Power Plan).

challengers could use the decision alongside other statutory attacks on the EPA's plan to reduce GHG emissions.[393]

In anticipation of future Clean Power Plan litigation, the *Michigan v. EPA* decision reveals three goals Clean Power Plan defenders should set for themselves.[394] First, the defenders must invest in the major questions doctrine.[395] Second, Clean Power Plan defenders need to focus on existing energy market conditions.[396] Third, the defenders need to define the Plan's cost and benefits.[397] While these goals do not form a comprehensive litigation strategy, they are important lessons that Clean Power Plan defenders need to take from the *Michigan v. EPA* case.[398] These goals will help defend the Clean Power Plan from a major questions challenge.[399]

While *Michigan v. EPA* does not address GHG emissions, the case fits well within a family of cases defining the scope of the CAA and GHG regulations.[400] These cases sometimes give deference to the EPA in regulating GHG emissions, while other times limit the Agency's authority.[401] If Clean Power Plan defenders can see the flaws in the *Michigan v. EPA* decision and understand the case's implication for their litigation strategy, they are more likely to succeed in their task.[402] Ignoring the case will increase the likelihood that the Clean Power Plan will fail. *Michigan v. EPA* represents a unique data point in the Court's thinking concerning the scope of the CAA.[403] Hopefully, environmental advocates will adjust to the Court's decision and use it to further their efforts to tailor CAA provisions to fight climate change.

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393. *Id.*

394. *See* discussion *supra* Part IV. (describing potential litigation strategies for Clean Power Plan defenders).

395. *Supra* discussion Part IV. A.

396. *Supra* discussion Part IV. B.

397. *Supra* discussion Part IV. C.

398. *Supra* discussion Part IV.

399. *Id.*

400. *See Massachusetts v. EPA*, 549 U.S. at 532 (finding that GHGs fit under the CAA definition of air pollutant); *see also Util. Air Regulatory Grp.*, 134 S. Ct. at 2444–50 (denying the EPA authority to regulate GHG emissions under Title V and PSD programs generally but allowing the EPA to regulate GHG emissions from sources already coved under Title V and the PSD program); *see also EME Homer City Generation, L.P.*, 134 S. Ct. at 1606–07 (allowing the EPA to consider costs in implementing the CAA's Good Neighbor Provision).

401. *Compare Massachusetts v. EPA*, 549 U.S. at 532 (holding that GHGs are an air pollutant under the CAA), *with Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (limiting the EPA's authority to regulate GHG emissions under Title V and the PSD program).

402. *See* discussion *supra* Part IV.

403. *See* discussion *supra* Part III. A.