Interpreting "Appropriate and Necessary" Reasonably under the Clean Air Act: *Michigan v. Environmental Protection Agency*

INTRODUCTION

Under the administrative law principle of *Chevron* deference, if the language of a statute is ambiguous, a court must defer to the agency's interpretation of that language if the agency's interpretation is reasonable.[1] In *Michigan v. Environmental Protection Agency*, the U.S. Supreme Court evaluated an Environmental Protection Agency (EPA) decision to ignore costs when deciding whether regulation of power plants under the Clean Air Act (CAA) is "appropriate and necessary."[2] The majority opinion, written by Justice Scalia, held that EPA must consider cost, including the cost of compliance.[3] Justice Kagan, writing for the dissent, argued that EPA acted reasonably in initially determining whether regulation was appropriate based on other factors such as potential harms and technological feasibility, because the agency necessarily evaluates cost during later phases of the regulatory process.[4]

In Part I, this In Brief surveys the legal background for power plant regulation and for *Chevron* deference. Then, Part II analyzes the case history and the Court's reasoning in interpreting the appropriate-and-necessary language. Finally, Part III explores the potential implications of the Court's decision for future cases and agency decisions. The Court in *Michigan* leaves *Chevron* deference relatively intact, but the Court's reasoning nevertheless may reduce judicial deference to agency interpretation by broadening the scope of what courts have historically deemed unreasonable.

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1. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–44 (1984).
2. Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015).
3. *Id*.
4. *Id*. at 2717 (Kagan, J., dissenting).

I. LEGAL BACKGROUND

A. Power Plant Regulation under the Clean Air Act

Under the CAA, EPA's Hazardous Air Pollutants Program regulates stationary source emissions.[5] This program distinguishes between major sources, which emit more than ten tons of a single pollutant or more than twenty-five tons of a combination of pollutants in a single year, and area sources, which do not meet this threshold.[6] The CAA requires that EPA regulate all major sources and regulate area sources if they threaten "adverse effects to human health or the environment."[7] EPA promulgates floor standards, which are minimum emission standards calibrated to levels already achieved by the best-performing 12 percent of sources within a category or subcategory of regulated sources, for all sources it regulates.[8] EPA may also choose to impose more stringent emission regulations, known as beyond-the-floor standards, for which the CAA expressly requires the agency to consider costs in justifying the heightened standard.[9]

In CAA section 7412(n)(1)(A) ("the appropriate-and-necessary standard"), Congress gave EPA statutory authority to regulate power plants only if the agency found regulation to be appropriate and necessary based on the results of a study of "the hazards to public health reasonably anticipated" as a result of power plant emissions.[10] EPA concluded power plants should be subject to regulation in the same manner as other stationary sources because of the impact to public health, reasoning that costs need not be considered in making that initial conclusion.[11]

EPA estimated that regulating all power plants would carry costs of approximately $9.6 billion per year.[12] However, EPA also estimated that regulation would have ancillary health and environmental benefits, like reduction of particulate matter and sulfur dioxide emissions, resulting in $37 to 90 billion in quantifiable savings and 11,000 fewer premature deaths annually.[13] Nevertheless, EPA conceded that these comparative costs and benefits did not influence its finding that regulating power plants was appropriate and necessary because the agency was not considering costs.[14]

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5. *Id.* at 2704 (majority opinion).
6. *Id.* at 2705.
7. 42 U.S.C. § 7412(c)(3) (2012).
8. § 7412(d)(3).
9. § 7412(d)(2).
10. *See* § 7412(n)(1)(A).
11. *Michigan*, 135 S. Ct. at 2705.
12. *Id*. at 2705–06.
13. *Id.* at 2721 (Kagan, J., dissenting).
14. Brief for the Federal Respondents at 14, *Michigan*, 135 S. Ct. 2699 (Nos. 14–46, 14–47, 14–49), 2015 WL 797454, at *14.

B. Chevron *Deference*

An important consideration in administrative law is how courts treat agency interpretations of ambiguous statutes that mandate agency action. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that a court should defer to an agency interpretation of such a statute unless the court deems it unreasonable.[15] This principle came to be known as *Chevron* deference.[16] *Chevron* deference relies on the idea that Congress intended agencies to resolve any ambiguities left in a statute, and should possess "whatever degree of discretion the ambiguity allows."[17]

Under *Chevron*, courts employ a two-part test to determine whether to defer to an agency's interpretation.[18] In Step One, a court determines whether there is a statutory ambiguity that renders an agency interpretation eligible for deference, and whether there is any previous congressional guidance on the issue that may govern.[19] In Step Two, a court evaluates whether the agency's interpretation is reasonable.[20] After *United States v. Mead Corp.*, an agency is eligible for *Chevron* deference under Step One if Congress had delegated to that agency the authority to issue such interpretations with the force of law.[21] This In Brief addresses the emboldening of the judiciary to declare an agency interpretation unreasonable under Step Two of the *Chevron* test, rather than the standard for eligibility under Step One of the test. Provided an agency uses proper procedures for issuing interpretations, the *Mead* holding does not impact the reasonableness standard under Step Two of *Chevron*.[22]

Courts find agency interpretations presumptively valid as long as the interpretations are not "arbitrary and capricious."[23] This means that agencies must rationalize their decisions in "technocratic, statutory, or scientifically driven terms, not political terms."[24] Further, courts are required to show

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15. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984).

16. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226 (2001) ("[C]lassification rulings, like Customs regulations, deserve *Chevron* deference.").

17. *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting Smiley v. Citibank, 517 U.S. 735, 741 (1996)).

18. *Chevron,* 467 U.S. at 842–43.

19. *Id.*

20. *Id.* at 843.

21. *Mead*, 533 U.S. at 226–27 (2001) (holding that the United States Customs Service was not entitled to *Chevron* deference under Step One because Congress had not delegated that authority to the agency).

22. *See id*. at 229 ("[A] reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.") (citations omitted).

23. *See, e.g.*, Sierra Club v. EPA, 353 F.3d 976, 978 (D.C. Cir. 2004) (citing Nat. Res. Def. Council v. EPA, 194 F.3d 130, 136 (D.C. Cir. 1999)).

24. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983)).

particular deference "where the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise."[25] Some courts and academics have argued the arbitrary-and-capricious standard is distinct from the *Chevron* reasonableness standard in that the former tests whether an agency has given a reasoned explanation for its interpretation, while the latter tests whether the interpretation is consistent with the statute.[26] The Court in *Michigan* follows more recent judicial opinions, collapsing the two tests and maintaining that a reasonable interpretation under *Chevron* is one whose claim of consistency is supported with reasoned explanation.[27]

Courts generally consider an agency's interpretation to be reasonable, provided the interpretation is consistent with plain meaning, legislative intent, and legislative history of the regulation.[28] In cases such as *National R.R. Passenger Corp. v. Boston & Maine Corp.* and *K Mart Corp. v. Cartier, Inc.*, the Court deferred to agency interpretations that were consistent with the statute's plain meaning.[29] In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, the Court established that an agency is "bound" by Congress's "ultimate purposes" and by the means Congress has deemed appropriate for the pursuit of those purposes.[30]

II. CASE SUMMARY

A. Setting the Stage for Deference

The CAA requires that EPA assess the hazards that power plant emissions pose to public health.[31] Under the appropriate-and-necessary standard, EPA can regulate power plants only if EPA construes such regulation to be appropriate and necessary.[32] Step Two of *Chevron* deference grants EPA authority to interpret this language, and whether it encompasses cost, provided

25. Troy Corp. v. Browner, 120 F.3d 277, 283 (D.C. Cir. 1997).

26. Watts, *supra* note 24, at 8 n.15 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1001 n.4 (2005)).

27. *See* Michigan v. EPA, 135 S. Ct. 2699, 2708 (2015) ("EPA identifies a handful of reasons to interpret § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate. We find those reasons unpersuasive."); *see also* Nat'l Ass'n of Regulatory Util. Comm'rs. v. Interstate Commerce Comm'n, 41 F.3d 721, 726 (D.C. Cir. 1994) ("[T]he inquiry at the second step of *Chevron* overlaps analytically with a court's task under the Administrative Procedure Act in determining whether agency action is arbitrary and capricious (unreasonable).") (citations omitted).

28. *See* Kristine Cordier Karnezis, Annotation, *Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court*, 3 A.L.R. Fed. 2d 25 § 2 (2005).

29. *See* Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417–18 (1992) (holding that deference was due because the agency's interpretation did not conflict with the "plain language" of the statute); *see also* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291–92 (1988) (holding that when a statute is silent or ambiguous regarding a specific issue, a court must defer to an agency's interpretation unless it conflicts with the "plain meaning" of the statute and finding the agency regulation a reasonable interpretation of an ambiguous provision).

30. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 n.4 (1994).

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

32. *Id.* at 2701.

the agency interpretation is reasonable.[33] EPA found regulation of power plants to be appropriate because the emissions posed risks to public health and the environment, and it found regulation to be necessary because these risks were not eliminated by other provisions of the CAA.[34]

EPA did not consider costs as part of its initial decision to regulate power plants since the agency did not interpret the appropriate-and-necessary standard to require this.[35] Twenty-three states sought review of EPA's interpretation, and the D.C. Circuit heard the eventual appeal.[36] In defending its position, EPA argued that if Congress wanted the agency to consider cost then the statute would have included express language to that effect.[37]

The D.C. Circuit found EPA's reasoning "permissible," noting that petitioners could not identify a case where a court required EPA to consider costs when the CAA did not explicitly instruct it to do so.[38] The D.C. Circuit also noted that the CAA explicitly requires EPA to consider costs in other regulatory activities such as setting beyond-the-floor standards, but the CAA made no mention of costs in the appropriate-and-necessary standard.[39] The Supreme Court granted certiorari to review the D.C. Circuit's findings.[40]

B. Interpreting "Appropriate and Necessary"

In *Michigan*, the Supreme Court held it was unreasonable for EPA to disregard cost in its initial decision to regulate power plants because it would not be rational to impose substantial economic cost in return for a few health or environmental benefits.[41] According to the Court, because "*any* disadvantage could be termed a cost," without analyzing the costs up front, EPA could not know whether regulation truly produced a net benefit.[42] The majority held EPA overstepped its authority, asserting that *Chevron* exists to allow agencies to choose among competing reasonable interpretations of a statute, not to "license interpretive gerrymanders under which an agency keeps parts of [the] statutory context it likes while throwing away parts it does not."[43]

The dissent argued that EPA need not analyze costs in its initial decision because the agency would be able to do so later as part of its ongoing

33. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

34. *Michigan*, 135 S. Ct. at 2701.

35. *Id*. at 2701, 2705.

36. *Id.* at 2706.

37. White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1236–37 (D.C. Cir. 2014), *rev'd sub nom.* Michigan v. EPA, 135 S. Ct. 2699 (2015).

38. *Id*. at 1238.

39. *Id.* at 1238–39.

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

41. *Id*. at 2707.

42. *Id.* (emphasis added).

43. *Id*. at 2708.

regulatory program.[44] However, EPA admitted it considered costs irrelevant in making its interpretation, so the majority did not consider the agency's future intentions to be germane to the Court's assessment.[45] A court may uphold agency action only on the basis on which the agency took that action, and here EPA took action on a basis that excluded cost considerations.[46] Moreover, the majority held that even if EPA intended to defer cost considerations to later phases of rulemaking, EPA's interpretation would still be unreasonable because the agency could not guarantee that it would be able to balance costs and benefits at that later phase without having considered them up front.[47]

Justice Thomas, in his concurring opinion, added that agencies such as EPA are not "interpreting" statutory ambiguities so much as they are engaging in "formulation of policy."[48] Justice Thomas argued that agency policy making disguised as statutory interpretation conflicts with Article I of the U.S. Constitution because it amounts to a body other than Congress exercising legislative power.[49] If judges are precluded from choosing what they believe to be the best interpretation of the statute, the agency effectively becomes "the authoritative interpreter . . . of [ambiguous] statutes."[50]

Ultimately, the Court held that EPA must consider cost in determining whether regulation is appropriate and necessary but did not require the agency to perform a formal cost-benefit analysis that would assign each cost and benefit a monetary value.[51] The Court construed the appropriate-and-necessary standard to require only that EPA account for cost in some fashion in making its initial decision to regulate power plants.[52]

III. ANALYSIS

A. Maintaining the Appearance of Deference

To maintain *Chevron* deference while overturning EPA's conclusion that costs need not be considered when deciding whether to regulate power plants,

44. *Id.* at 2710.

45. *Id.*

46. *See* Secs. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

47. *Michigan*, 135 S. Ct. at 2709 ("Cost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at *this* stage. . . . By EPA's logic, someone could decide whether it is 'appropriate' to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system.") (emphasis in original).

48. *Id*. at 2712–13 (Thomas, J., concurring) (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984)).

49. *Id*. at 2713; *see* U.S. Const. art. I, § 1.

50. *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005)).

51. *Id*. at 2711 (majority opinion).

52. *Id*.

the Court had to find EPA's interpretation unreasonable.[53] While the Supreme Court reversed a lower court decision upholding EPA's decision not to consider cost in making regulatory determinations, the Court's reasoning still leaves the principle of *Chevron* deference intact.[54] The Court considered EPA eligible for statutory deference under Step One of the *Chevron* test, but ultimately concluded in Step Two that the agency interpreted the appropriate-and-necessary standard unreasonably when it deemed cost irrelevant.[55] This leaves the door open for agencies to continue interpreting statutory ambiguities, as long as the courts deem such interpretations to be reasonable.[56]

B. Expanding the Application of "Unreasonable"

The Court in *Michigan*, in finding EPA's interpretation unreasonable under Step Two of the *Chevron* test, may also have expanded the authority of the judiciary to deem an agency interpretation unreasonable.[57] In a departure from its historic assessment of reasonableness, the Court prioritized whether the agency "fai[led] to consider an important aspect of the problem" over whether the agency contradicted plain language or legislative intent.[58] While *Chevron*'s limits on agency power have traditionally been "extremely permissive,"[59] these limits seem somewhat more restrictive after *Michigan* because the Court's determination of what was an "important aspect of the problem" superseded EPA's interpretation.[60]

The majority's rejection of the argument that EPA takes costs into account at multiple stages in setting power plant emissions limits also suggests that the Court's standard for reasonableness analysis is now higher than the arbitrary-and-capricious standard.[61] The dissent found it plausible that EPA structured its regulatory evaluation around anticipated harms and technological feasibility, and that the agency would incorporate cost evaluations in later assessment stages and before setting any emissions limits.[62] While the dissent argued that EPA's determination of its process was based on data and its technical

53. *See Chevron*, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency.") (emphasis added).

54. *Michigan*, 135 S. Ct. at 2712.

55. *Id.* at 2706–07.

56. *See id*. at 2707 ("EPA strayed far beyond those bounds [of reasonable interpretation] when it read § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.").

57. *Id*. at 2712 (Thomas, J., concurring) ("[*Chevron* deference] wrests from Courts the ultimate interpretative authority . . . .").

58. *Id.* at 2707 (majority opinion) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)).

59. *Id.* at 2713 (Thomas, J., concurring).

60. *See id.* at 2707 (majority opinion) (quoting *State Farm*, 463 U.S. at 43).

61. *See Michigan*, 135 S. Ct. at 2717–18 (Kagan, J., dissenting) ("The interpretive task is thus at odds with the majority's insistence on staring fixedly 'at *this* stage.'") (emphasis in original) (citing majority opinion).

62. *Id*. at 2722.

expertise, and therefore sufficient to be upheld under the arbitrary-and-capricious standard, such an evaluation was not enough to compel the majority to deem EPA's interpretation reasonable.[63]

C. Looking Forward

The Court in *Michigan* may have made a step toward reestablishing the judiciary as the true "authoritative interpreter" of statutory ambiguities.[64] While the holding serves as an important check on regulatory authority, it does raise concerns as to whether the judiciary will give adequate weight to agencies' technical or subject-matter expertise in future assessments of reasonableness in statutory interpretation.[65] The majority in this case did not defer to EPA's regulatory expertise in determining whether to assess costs, and did not consider that the agency might have known it would more effectively assess cost impacts further along in the regulatory process.[66] It remains to be seen whether this holding is the beginning of a trend away from courts considering an agency's subject-matter expertise when evaluating the reasonableness of that agency's statutory interpretation.

CONCLUSION

The Court's holding that EPA must consider costs in its initial appropriate-and-necessary determination for power plants may reduce future judicial deference to agency interpretation. Although the *Michigan* holding maintained *Chevron* deference in principle, the Court's declaration that EPA's construal of the CAA was unreasonable strengthened the position of the judiciary regarding its evaluation of reasonableness in statutory interpretation. Under *Chevron*, courts have always retained the final say on the merits of an agency interpretation by their assessment of reasonableness. However, the *Michigan* decision bolsters the ability of courts to assess such interpretations

63. *Id*. at 2707 (majority opinion); *see id.* at 2716–18 (Kagan, J., dissenting); *see also* Int'l Fabricare Inst. v. EPA, 972 F.2d 384, 389 ("The rationale for deference is particularly strong when the EPA is evaluating scientific data within its technical expertise").

64. *See Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005)).

65. *See id*. at 2718 (Kagan, J., dissenting) ("EPA's experience and expertise in that arena—and courts' lack of those attributes—demand that judicial review proceed with caution and care.").

66. *See id*. at 2714 ("The Environmental Protection Agency placed emissions limits on coal and oil power plants following a lengthy regulatory process during which the Agency carefully considered costs. . . . Despite that exhaustive consideration of costs, the Court strikes down EPA's rule . . . .").

according to a more stringent standard of reasonableness that does not necessarily defer to agencies' technical and subject-matter expertise.

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