From Prohibition to Mandate: The Problem of Cost in Environmental Regulation

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INTRODUCTION

Cost consideration during the promulgation of environmental regulation rulings should be neither prohibited nor required without a direct Congressional mandate. Flexibility in environmental rulings would allow the Environmental Protection Agency (EPA) to bring a fresh approach to each new rule without shackling it to one blanket interpretation for cost consideration.

Absent express Congressional mandates, federal agencies possess moderate rulemaking flexibility.[1] This administrative latitude can swing for or against agencies.[2] In the context of environmental regulation, environmentalists and the energy industry regularly disagree over whether cost considerations are reasonably read into otherwise silent statutes and administrative rules promulgated by the EPA.[3] The Supreme Court's interpretation of cost consideration through various analyses of environmental regulations has evolved beginning with *Whitman v. American Trucking Association*, which held that cost consideration is prohibited during the setting of the National Ambient Air Quality Standards (NAAQS).[4] Later, *Environmental Protection Agency v. EME Homer City Generation* held that cost consideration was allowed through the "Transport Rule" at the discretion of the EPA.[5] Most recently, its holding in *Michigan v. Environmental Protection Agency* essentially created a mandate requiring the EPA to consider cost when regulating hazardous air

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[1] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[2] *See, e.g.*, EPA v. EME Homer City Generation, 572 U.S. 489, 519-20 (2014); Michigan v. EPA, 135 S. Ct. 2699, 2706-07 (2015).

[3] *See, e.g.*, Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 464-65 (2001); *EME Homer City Generation,* 572 U.S. at 504-05; *Michigan*, 135 S. Ct. at 2706.

[4] *Am. Trucking Ass'n*, 531 U.S. at 471.

[5] *EME Homer City Generation*, 572 U.S. at 519.

pollutants from factories.[6] These shifts from prohibition to mandate lean on *Chevron* deference[7]—along with other interpretive methods such as *expressio unius*—to reach vastly different outcomes when it comes to cost consideration. These varying outcomes muddle environmental regulations and lead to an opaque rulemaking process when the EPA attempts to promulgate rules based on environmental regulations.[8]

Cost consideration in environmental regulation sparks an important debate because industries, in general, must use cost to determine how active to be in the regulation of their emissions or discharges.[9] The general consensus is that if cost is considered during the rulemaking process, the rule will ultimately be more industry-friendly and less protective of the environment.[10] Justice Stephen Breyer succinctly explains the reasoning behind pro-cost consideration, saying it is necessary "in order to better achieve regulatory goals" by taking into account a proposed regulation's adverse effects.[11] Justice Breyer's reference to taking adverse effects into account is indicative of his support of cost consideration.[12] In the event cost is not considered, environmental regulations are focused predominately on reaching a goal that is typically health-based.[13] Because compliance can be required without taking into account adverse effects on the industry or its capacity to meet the requirements without going out of business, health-based regulations are tougher on industries against which regulations can be enforced.[14]

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[6] *Michigan*, 135 S. Ct. at 2706-07.

[7] When applying *Chevron* deference, courts defer to reasonable agency interpretation of statutes in the event Congress has not directly addressed the issue at hand. Chevron U.S.A, Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984). For a more in-depth analysis of *Chevron* deference, see Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010).

[8] *See* Rachel Kenigsberg, Note, *Convenient Textualism: Justice Scalia's Legacy in Environmental Law*, 17 VT. J. ENVTL. L. 418, 440-41 (2016); Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards and Cost Benefit Analysis*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10674, 10677 (2016).

[9] Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulation*, 54 ADMIN. L. REV. 1237, 1247 (2002).

[10] Livermore & Revesz, *supra* note 8, at 10674.

[11] *Cf.*, *Am. Trucking Ass'n*, 531 U.S. at 490 (Breyer, J. concurring).

[12] Pierce, *supra* note 9, at 1247-48.

[13] Amy Sinden, *A "Cost-Benefit State"? Reports of its Birth Have Been Greatly Exaggerated*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10933, 10937 (2016).

[14] Livermore & Revesz, *supra* note 8, at 10675.

This Note analyzes the evolution of the Court's dissimilar holdings in *American Trucking*, *EME Homer City Generation*, and *Michigan*. It argues that the deferential approach reached in *EME Homer City Generation* adheres best to the *Chevron* deference standard. Part I provides background on why cost consideration is an important issue and how certain approaches to cost consideration create specific problems within environmental regulation. Part II breaks down each of the three approaches, including a look at how various courts have followed the approaches, the benefits that each approach provides, and how each uses the *Chevron* standard to justify its conclusion. Part III proposes that the deferential approach, regardless of the inclusion of cost consideration, is the approach that best utilizes the *Chevron* standard and carries out the intent of environmental regulations most efficiently.

I. COST CONSIDERATION BACKGROUND

Cost consideration comes in many forms, from open-ended balancing to the much stricter cost-benefit analysis.[15] An open-ended balancing approach allows the EPA to consider many factors, including cost.[16] This type of analysis provides the EPA with greater flexibility to consider cost with no prerequisite weight against other factors defined by Congress, or factors that are relevant to that specific pollutant.[17] Another commonly used approach for cost consideration is a feasibility analysis.[18] This approach examines the economic and technological feasibility of compliance, by weighing the costs the industry must undertake against its financial capacity.[19] The feasibility approach, however, ignores the social benefits that arise from environmental regulation.[20] Finally, the last prominent cost consideration approach is cost-benefit analysis.[21] Although cost-benefit analysis is not regularly used in environmental regulation, it has its fair

[15] Sinden, *supra* note 13, at 10935-40.
[16] *Id.* at 10939.
[17] *Id.*
[18] *Id.* at 10937.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 10935.

share of proponents.[22] While cost-benefit analysis can have multiple meanings, the basic principle is to compare positives and negatives to reach a fair outcome.[23] In the context of environmental regulation, the benefits of regulation on health and the environment are weighed against the industry's cost in reaching the benefits.[24]

Cost consideration, specifically cost-benefit analysis, may be seen as anti-protectionist and environmentalists have often avoided discussions on the topic in regulatory groups.[25] Some argue that since cost-benefit analysis is here to stay post-*Michigan v. EPA,* half of the major players in the environmental regulation game are left on the sideline.[26] The Obama Administration's acceptance of cost-benefit analysis, as well as the recession in 2008, has caused some environmentalist groups to more fully embrace the approach, but some still negatively view cost-benefit analysis and argue for a health-based approach.[27] Also, cost is not specifically limited to the monetary value of the regulated industry's ability to comply with the rule.[28] The agency is given the power to determine all costs facing the regulated industry within reason.[29] Although cost of compliance is the most important factor to be weighed when cost consideration is allowable, the agency must still determine what other non-monetary costs the industry may face.[30]

Two problems arise when cost is not considered in setting emissions standards: (1) the stopping-point problem and (2) the inadequacy paradox.[31] The stopping-point problem addresses eradicating a public health risk caused by pollution by requiring the elimination of all emissions when cost cannot be considered.[32]

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[22] *Id.* at 10933-35.

[23] *Id.* at 10935-36.

[24] *See id.* at 10936.

[25] Michael A. Livermore & Richard L. Revesz, *Retaking Rationality Two Years Later*, 48 HOUS. L. REV. 1, 8 (2011).

[26] Cass R. Sunstein, *Thanks, Justice Scalia, for the Cost-Benefit State*, BLOOMBERG VIEW (July 7, 2015, 9:00 AM), https://www.bloomberg.com/opinion/articles/2015-07-07/thanks-justice-scalia-for-the-cost-benefit-state (last visited Apr. 15, 2019).

[27] Livermore & Revesz, *supra* note 5, at 26-27.

[28] *See Michigan*, 135 S. Ct. at 2711 (2015).

[29] *Id.*

[30] *Id.*

[31] Livermore & Revesz, *supra* note 8, at 10674.

[32] *Id.*

Because of the stopping-point problem, the EPA could theoretically set emission standards at zero.[33]

The second problem when cost is not considered is the inadequacy paradox, which arose after *American Trucking,* where the EPA set less stringent ambient air quality standards despite the prohibition against considering costs.[34] The first explanation for the inadequacy paradox is a bias toward overly weak health-based standards in order to avoid ancillary effects, where regulating one pollutant affects the emissions of another, since health-based standards do not take the ancillary effects into account like cost considerations would.[35] The second explanation for the inadequacy paradox is that the EPA is skeptical about setting standards that are too stringent, which may impose excessive costs on emitters without taking the impact of those costs into consideration.[36]

According to a series of executive orders, the EPA is required to use a cost-benefit analysis during rulemaking if the statute does not clearly state the factors to be taken into consideration when setting the rules or if the statute does not limit the extent that cost can be taken into account.[37] Ultimately, if a statute does not legally prohibit an agency from applying a cost-benefit analysis, then a cost-benefit analysis must be undertaken during the rulemaking process to determine whether the benefits of the rule outweigh the costs imposed on the industry.[38] This requirement of a cost-benefit analysis in light of no other legally binding approach was established by Executive Order 13563 by President Barack Obama's administration.[39] When cost must be considered, the Office of Information and Regulatory Affairs (OIRA)—a branch of the Office of Management and Budget (OMB)—reviews agencies' work to determine whether cost is being considered in their rulemaking

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[33] *Id.*

[34] *Id.*

[35] *Id.* at 10678-79.

[36] Livermore & Revesz, *supra* note 8, at 10679.

[37] Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 HARV. ENVTL. L. REV. 87, 99 (2016).

[38] *See, e.g.*, *id.*; Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1846 (2013).

[39] Sunstein, *supra* note 3838, at 1845-46.

and whether the cost-benefit analyses undertaken by the agency is satisfactory.[40]

As mentioned earlier, in the event cost is not considered in environmental regulation, the main alternative is the health-based standard.[41] Following this approach, the EPA sets standards based entirely on the consideration of human health effects or environmental impact with no consideration of cost.[42] The goal in health-based standards is to eliminate a public health risk or, if that is impossible, to reduce the risk to an acceptable level.[43] The health-based standard fails to weigh risks with rivaling social priorities (e.g. costs) against health advancements, which differ entirely from the cost-benefit standard.[44] It also differs from a feasibility analysis because it is not beholden to the regulated industry's capacity to meet the regulation without going out of business.[45]

II. THE SUPREME COURT ADDRESSES COST CONSIDERATION

The Supreme Court has used three approaches when deciding if cost should be considered when the EPA promulgates rules for the Clean Air Act. The first is the prohibition approach from *American Trucking* where the EPA is prohibited from considering costs.[46] The second is the deferential approach from *EME Homer City Generation* where the EPA is given the flexibility to decide whether cost should be considered.[47] Finally, the third approach is the cost consideration mandate from *Michigan* where the EPA is required to consider costs as a factor.[48]

Each conclusion was justified using the *Chevron* analysis.[49] The deferential approach, however, best follows the *Chevron* analysis and provides the EPA with the greatest amount

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[40] *Id.* at 1845-46.
[41] Sinden, *supra* note 13, at 10937.
[42] *Id.*
[43] Livermore & Revesz, *supra* note 8, at 10675.
[44] *Id.*
[45] *Id.*
[46] *See Am. Trucking Ass'n.*, 531 U.S. at 471 (2001).
[47] *See EME Homer City Generation*, 572 U.S. at 518-24 (2014).
[48] *See Michigan*, 135 S. Ct. at 2711 (2015).
[49] *See*, *e.g. id.* at 2706-07; *Am. Trucking Ass'n*, 531 U.S. at 579; *EME Homer City Generation*, 572 U.S. at 513.

of flexibility when deciding the unique question of whether cost should be considered when promulgating rules under the Act. Unlike the other two approaches, being deferential to the EPA allows the agency to be flexible and approach each rulemaking based on the unique challenges each situation presents.

A. The Prohibition Approach

In *American Trucking*, the Supreme Court prohibited the EPA from considering costs when setting National Ambient Air Quality Standards (NAAQS) for state compliance with the Clean Air Act (CAA).[50] The NAAQS requirement is set out in § 109(b) of the CAA, which establishes primary standards necessary for protecting public health and secondary standards for safeguarding public welfare.[51] No other considerations are provided in the statute outside the public health and welfare thresholds.[52] The statute does, however, allow for an adequate margin of safety when setting the standards.[53]

Justice Antonin Scalia explained in his majority opinion in *American Trucking* that the use of "public health" and "public welfare" were clear enough to preclude the EPA from considering cost when setting NAAQS.[54] The focus of the analysis in *American Trucking* is on the plain meaning of the primary standard's requisite consideration—public health.[55] Justice Scalia used the plain meaning of "health" to determine that such a meaning prohibits cost considerations, holding that cost cannot be considered when determining "the health of the community."[56] Using the *expressio unius* interpretive canon, Justice Scalia reasoned that Congress meant to preclude cost considerations because other environmental statutes unambiguously require the consideration of cost and § 109(b) of the CAA does not express this requirement.[57] This approach is clearly contrary to the method currently enforced by the administrative agency, where a

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[50] *Am. Trucking Ass'n*, 531 U.S. at 471.

[51] Clean Air Act § 109(b), 42 U.S.C. § 7409 (West, Westlaw through Pub. L. 115-281).

[52] *Id.*

[53] *Id.*

[54] *Am. Trucking Ass'n*, 531 U.S. at 465-66.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 466-67.

cost-benefit analysis must be considered in light of no other legally binding consideration.[58]

Justice Scalia's holding in *American Trucking* created a health-based standard in § 109(b).[59] As mentioned above, the focus of § 109(b) as a health-based standard becomes the elimination of a public health risk with no consideration of any other factors—either economic or technological.[60] This leads to the stopping point problem and the inadequacy paradox mentioned in the introduction.[61] As a result of the stopping point problem, the EPA must set NAAQS without being able to weigh many of the factors that it would otherwise find beneficial in making such a determination, forcing the EPA to analyze only one side of a multifaceted issue.[62] Logically, the EPA should be able to set NAAQS in a way that would completely eliminate the health risks at issue, but instead, the EPA opts to settle for something less than full elimination of the health risk.[63] The impression is that it is weighing other factors, but is unable to report those factors under the *American Trucking* holding, which creates a gap between the EPA's decision-making process and the final rule.[64] The D.C. Circuit Court of Appeals acknowledged the stopping-point issue with the health-based standard in *American Trucking* and held § 109(b) unconstitutional for lack of guidance.[65] Ultimately, the Supreme Court reversed the D.C. Circuit's holding, opting instead for the prohibition approach.[66]

This decision is viewed as a victory for environmentalists seeking protective regulation despite its imposition of undue costs on the regulated industry.[67] It bars the EPA from taking into account any factors that it might otherwise use to set the threshold for pollutants at a level above zero.[68] Without these factors, the industry could be regulated out of business while

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[58] Sunstein, s*upra* note 38, at 1846.

[59] WILLIAM H. RODGERS, JR. & ELIZABETH BURLESON, RODGERS ENVIRONMENTAL LAW, 2D. § 6:3, *Legal Confirmation of the Public Health Goals,* Westlaw (database updated November 2018).

[60] Sinden, *supra* note 13, at 10937.

[61] Livermore & Revesz, *supra* note 8, at 10674.

[62] *Id.* at 10675.

[63] *Id.* at 10677.

[64] *Id.* at 10677.

[65] *Id.* at 10677.

[66] Livermore & Revesz, *supra* note 8, at 10677.

[67] *Id.* at 10674.

[68] *Id.* at 10677.

trying to achieve compliance with such low thresholds set at the discretion of the EPA.

An example of the *American Trucking* health-based environmental regulation can be observed in *Association of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control District*.[69] In *Irritated Residents*, the San Joaquin Valley Unified Air Pollution Control District ("the district") sought compliance with a regulation requiring air contaminants from agriculture to be reduced through the enactment of a permit process where facilities had to choose from a variety of mitigation options to reduce contaminants.[70] This reduction was meant to help improve an area's ambient air quality that had not yet reached NAAQS attainment.[71] The residents challenged the process because it failed to take health effects into account during the analysis of the issue.[72]

Unlike the statute in *American Trucking*, the regulation in *Irritated Residents* allows for cost consideration in the rulemaking process.[73] The court sided with the residents, stating that under their interpretation of *American Trucking,* the true goal of the CAA—including the NAAQS—is public welfare.[74] Because the process at issue here was meant to help satisfy the NAAQS, health effects must be considered using a health-effects assessment in light of the CAA's primary goal of public welfare under *American Trucking*.[75] Despite the requisite consideration of costs, lack of an assessment of health benefits controlled in *Irritated Citizens* because the court viewed *American Trucking*'s holding as clearly indicative of a health-based standard where public health rises above all other considerations.[76] This case exemplifies the power of a health-based standard, under which the court overruled a reasoned decision by the rulemaking body of this district because it did not put enough emphasis on health impact—despite its consideration of cost.[77]

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[69] *See* Ass'n of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control Dist., 168 Cal. App. 4th 535, 547 (Cal. Ct. App. 2008).

[70] *Id.* at 541-42.

[71] *Id.* at 547.

[72] *Id.* at 542.

[73] *Id.* at 544.

[74] *See Ass'n of Irritated Residents*, 168 Cal. App. 4th at 547.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 557.

However, after *American Trucking,* NAAQS are actually set with less stringency than they would have been if cost had been considered.[78] This is known as the inadequacy paradox.[79] For fear of excessive costs on regulated industries or lack of consideration of the possible ancillary benefits, the EPA has promulgated less stringent NAAQS than it otherwise would if cost consideration were evaluated as a factor during the rulemaking process.[80] The EPA appears to be worried that promulgating stringent NAAQS to entirely eliminate the health risks of pollutants—which would be justified after *American Trucking*—would have enormous economic impact on regulated industries.[81] These factors are yet another illustration of instances in which the EPA seemingly takes cost into consideration without officially reporting it, further contributing to the opacity of the EPA's decision-making process while setting NAAQS.[82]

The Supreme Court could have upheld the D.C. Circuit's decision to strike the statute due to its ambiguity, allowing a reformed statute that would better address the issue of NAAQS standards.[83] Additionally, the Supreme Court could have better used *Chevron* to defer to the EPA's expertise on factors that should be examined when setting NAAQS to avoid the stopping-point problem and fill in the gaps made by the EPA weighing factors unofficially.[84] The EPA could institute a much more transparent process leading to more sound results if it had the ability to officially weigh factors other than health effects, contrary to the holding in *American Trucking*.[85]

Ultimately, the Supreme Court's prohibition of cost consideration is under-inclusive considering the many unique and various issues the EPA must balance during environmental regulation. By prohibiting cost considerations, the Supreme Court created a more ambiguous decision-making process that does not allow the EPA to be as transparent as it otherwise could be.

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[78] Livermore & Revesz, *supra* note 8, at 10674.
[79] *Id.*
[80] *Id.* at 10678-79.
[81] *Id.* at 10679.
[82] *Id.*
[83] Livermore & Revesz, *supra* note 8, at 10677.
[84] *See id.*
[85] *See id.*

B. The Deferential Approach

The Supreme Court took a different approach from *American Trucking* in *EME Homer City Generation*, decided thirteen years after *American Trucking*.[86] In *EME Homer City Generation*, Justice Ruth Bader Ginsberg allowed the EPA's cost consideration approach despite a lack of specific guidance from the controlling statute.[87] In *EME Homer City Generation*, the Court faced the issue of interstate air pollution that caused downwind states to be in violation of their NAAQS attainment requirements due to upwind states' activities.[88] As discussed in *EME Homer Generation*, without Congress stepping in to control interstate air pollution with the "Good Neighbor Provision," upwind states are able to free ride off of the natural movement of air pollution to downwind states, allowing them to reach NAAQS attainment with less effort and costs compared to downwind states.[89] The Good Neighbor Provision requires states to set standards for meeting NAAQS requirements through State Implementation Plans (SIPs) which should prohibit activity that significantly contributes to nonattainment in a downwind state or interferes with the maintenance of any rule promulgated by the EPA.[90] From the Good Neighbor Provision, the EPA promulgated the Transport Rule which, among other factors, requires cost consideration in determining the reduction of emissions in an upwind state that significantly contributes to a downwind state's NAAQS nonattainment.[91]

Unlike *American Trucking*, the majority in *EME Homer City Generation* relied on *Chevron* deference to uphold the Transport Rule's cost consideration—despite the Good Neighbor Rule's ambivalence toward the EPA's mandated considerations when approving a SIP.[92] The Court held that the Transport Rule's cost considerations were not arbitrary or capricious in this instance because it was an efficient and equitable solution to the

[86] *See EME Homer City Generation*, 572 U.S. at 518-24.
[87] *Id.* at 519-20.
[88] *Id.* at 495-96.
[89] *Id.*
[90] 42 U.S.C. § 7410.
[91] *EME Homer City Generation*, 572 U.S. at 495.
[92] *Id.* at 519-20.

problem.[93] Ultimately, the Court deferred to the EPA's expertise during the rulemaking process to fill in the gap Congress left in an ambiguous statute.[94]

Similar to *American Trucking*, *EME Homer City Generation* is an example of the Supreme Court reversing the D.C. Circuit's decision.[95] However, unlike *American Trucking*, the Court in *EME Homer City Generation* recognized the ambiguity of the Good Neighbor Provision and gave deference to the EPA instead of viewing that ambiguity as prohibiting the EPA from exercising deference in its interpretation of the statute.[96] In contrast to the decision in *American Trucking*, the Supreme Court allowed the EPA to use its expertise to decide how to best analyze factors that include cost, in absence of specific, unambiguous language from Congress in the CAA.[97] As Justice Ginsburg writes in *EME Homer City Generation*, "[u]sing costs in the Transport Rule calculus . . . makes good sense."[98] Using such a deferential approach in this instance permitted the EPA to come to an efficient and equitable solution to the allocation problem that arises from the Good Neighbor Provision, rather than forcing the EPA to act in a specific manner that would go against the Court's decision in *Chevron*.[99]

Another example of the Court's deference to the EPA's expertise can be seen in the holding of *Entergy Corp. v. Riverkeeper Inc*.[100] In *Entergy*, the Court tackled the issue of whether it was permissible for the EPA to use and consider a cost-benefit analysis when setting rules for power plants using water intake pipes to draw water from outside sources and cool their facilities, ultimately aimed at decreasing the deaths of

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[93] *Id.* at 519.

[94] *Id.* at 519-20.

[95] *Id*. at 524.

[96] *Id.* at 519-20.

[97] *Compare EME Homer City Generation*, 572 U.S. at 489 (holding that the EPA's decision to consider cost in interpreting the Transport Rule and Good Neighbor Provision are reasonable interpretations of the statute and satisfy *Chevron*), *with* Am. Trucking Ass'n, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (holding that the text in § 109(b) bars the EPA from considering costs when setting NAAQS), *and* Whitman v. Am. Trucking Ass'n., 531 U.S. 457, 471 (2001) (agreeing with the D.C. Circuit that the text of § 109(b) unambiguously bars the EPA from considering costs in the NAAQS-setting process).

[98] *EME Homer City Generation,* 572 U.S. at 519.

[99] *Id.* at 519-20.

[100] Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 226 (2009).

billions of aquatic organisms per year caused by being trapped against the cooling screens (impingement) or being sucked into the cooling system (entrainment).[101] The Clean Water Act (CWA) mandates that the EPA establish standards requiring "the location, design, construction, and capacity of water intake structures reflect the best technology available for minimizing adverse environmental impact."[102] In response to the CWA, the EPA used a cost-benefit analysis to determine whether power plants whose water intake flow is more than 50 million gallons of water per day—at least 25 percent of which is used for cooling—meet performance standards (known as the Phase II rules) by lowering the impingement and entrainment caused by their water intake pipes.[103] Requiring such facilities to transition to closed-cycle cooling systems would have significantly reduced impingement and entrainment.[104] However, after all factors between the available alternatives were considered, the use of remedial technology to meet performance standards survived the cost-benefit analysis while the transition to closed-cycle cooling systems did not.[105]

The *Entergy* Court, through the words of Justice Scalia, held that the Phase II rules were a permissible interpretation of an ambiguous statute by satisfying a *Chevron* analysis.[106] Although the Phase II rules—promulgated after the completion of a cost-benefit analysis—were not the only approach available to the EPA or the most reasonable as determined by the courts, they were at least permissible.[107]

Perhaps most interesting is Justice Scalia's remarks distinguishing *Entergy* from *American Trucking*.[108] In the majority opinion, Justice Scalia differentiates *American Trucking*'s holding—which would seemingly control the Court in *Entergy* because the statutes at issue were similarly vague—by relying on the statutory context of the CAA.[109] The CAA as a whole was given more weight by the Court in *American Trucking*,

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[101] *Id.* at 212-15.
[102] 33 U.S.C.A. § 1326(b) (West, Westlaw through Pub. L. 116-8).
[103] *Entergy*, 556 U.S. at 215.
[104] *Id.* at 215-16.
[105] *Id.*
[106] *Id.* at 217-18.
[107] *Id.* at 218.
[108] *See Entergy*, 556 U.S. at 223.
[109] *Id.*

where it justified the prohibition of cost consideration, while the Court in *Entergy* upheld the EPA's cost-benefit analysis by considering, though ultimately ignoring, other provisions of the CWA.[110] Justice Scalia acknowledges the fallacy in his holding by recognizing that similar statutory standards applicable to point sources—like the power plants at issue in *Entergy*—expressly authorize cost-benefit analyses, while the standard at issue in *Entergy* does not.[111] As the dissent argues, the inference that could be drawn from this statutory silence is an intent to forbid a cost-benefit analysis, which would put this case on all fours with the holding in *American Trucking*.[112] However, Justice Scalia avoids this interpretation by claiming the inferences one can draw from the above statutory silence is implausible when put into context with the other sections of the CWA.[113] The discrepancy left behind by the two holdings provides strong evidence that one of the two decisions is less effective than the other. In light of *Chevron* deference, the holding in *American Trucking* should look more like the holding in *Entergy* in order to provide consistency between the two and to provide deference to the EPA's expertise in rulemaking.

The deferential approach is the best tactic the Supreme Court can take toward EPA's environmental regulation. By deferring to the EPA's expertise, the Supreme Court allows for consideration of the various issues the EPA faces when rulemaking and, as time persists, allows for the shifting of public opinion toward environmental regulation. With all things considered, the deferential approach allows for flexibility, where not deferring to the EPA would be too extreme and final.

C. The Mandate Approach

Opposite from the prohibition approach, yet just as restrictive, is the mandate approach the Supreme Court took in *Michigan v. EPA* only one year after *EME Homer City Generation*.[114] Under the mandate approach, the Supreme Court required the EPA to consider costs in some capacity when it

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[110] *Id.* at 222-23.
[111] *Id.* at 212-13, 220-22.
[112] *Id.* at 222-23.
[113] *See Entergy*, 556 U.S. at 222-23.
[114] *See Michigan*, 135 S. Ct. at 2711 (2015).

interpreted an ambiguous section of the CAA.[115] Through this approach, the Court essentially barred the EPA from ignoring cost in favor of a health-based approach.[116]

In *Michigan v. EPA*, the Court decided the agency acted inappropriately when it ignored costs entirely in determining whether emissions of hazardous air pollutants (HAPs) from power plants should be regulated under the CAA.[117] The statute in dispute only requires EPA action if it finds regulation is "appropriate and necessary."[118] To determine whether regulating the emission of HAPs is "appropriate and necessary," the EPA must complete a study as outlined in the statute and act only after considering the results of the study.[119] Once the EPA determines that power plants can be regulated under the CAA, the EPA divides the sources into categories and subcategories in accordance with the statute.[120] Next, the EPA sets minimum emissions regulations for each category and subcategory, also known as floor standards.[121] The EPA has the authority to set even stricter standards, known as "beyond-the-floor standards," but cost consideration is required by the statute when the agency formulates stricter guidelines.[122]

The issue in *Michigan* arose after the EPA deemed the regulation of coal and oil-fired power plants as "appropriate and necessary," but the floor standards that followed failed to account for the significant increase in costs to power plants that would result from these standards.[123] The EPA later acknowledged that cost could have been considered due to the ambiguity of the statute, but the regime chose to emphasize the regulatory benefits to public health and the environment instead.[124]

The Court was ultimately unconvinced by the EPA's interpretation of the statute and held that disregarding cost was

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[115] *Id.* at 2707, 2711.

[116] *Id.*

[117] *Id.* at 2704-06, 2712.

[118] 42 U.S.C.A. § 7412(n)(1)(A) (West, Westlaw through Pub. L. No. 115-281); *Michigan* 135 S. Ct. at 2704.

[119] 42 U.S.C.A. § 7412(n)(1)(A); *Michigan*, 135 S. Ct. at 2705.

[120] 42 U.S.C.A. § 7412(c)(1); *Michigan*, 135 S. Ct. at 2705.

[121] 42 U.S.C.A. § 7412(d)(3); *Michigan*, 135 S. Ct. at 2705.

[122] *See* 42 U.S.C.A. § 7412(d)(2); *Michigan*, 135 S. Ct. at 2705.

[123] *Michigan*, 135 S. Ct. at 2705.

[124] *Id.* at 2706.

inappropriate.[125] Justice Scalia relied on evidence of approximately $10 billion annually incurred by the power industry—an overwhelming cost that would be irrational to ignore when setting industry standards.[126] The Court also used statutory context to bolster its holding.[127] Other sections of the statute require the EPA to consider cost when setting standards.[128] These aforementioned sections were used as additional proof of Congress's intent for cost to be considered when determining industry standards, even absent express legislative mandate.[129]

Although the statutory foundation in *American Trucking* and *Michigan v. EPA* is substantially similar, Justice Scalia's *Michigan v. EPA* holding almost entirely departs from his majority opinion in *American Trucking*, in what appears to be an effort to require agencies to consider costs when creating standards.[130] Because *Michigan v. EPA* is the most recent opinion on cost consideration in environmental regulation, the case's holding has led some to declare the U.S. a "cost-benefit state."[131] The result is that all regulation from federal agencies must face the rigors of a cost-benefit analysis when certain congressional language is used.[132] Although the Court allowed the EPA's cost consideration in both *EME Homer City Generation* and *Entergy*, *Michigan v. EPA* is the first instance in which the Court required an agency to consider cost against their wishes.[133]

Some scholars have interpreted the ruling in *Michigan v. EPA* to put to rest any semblance of a presumption against cost that remained from *EME Homer City* and *Entergy*.[134] They consider *Michigan v. EPA* as casting *EME Homer City* and *Entergy*'s deferential decisions as unreasonable in the light of *Michigan v. EPA*'s clear mandate of cost consideration.[135]

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[125] *Id.* at 2707-08.
[126] *Id.* at 2706-07.
[127] *Id.* at 2708.
[128] *Michigan*, 135 S. Ct. at 2708.
[129] *Id.*
[130] Kenigsberg, *supra* note 8.
[131] Sunstein, *supra* note 24.
[132] *Id.*
[133] Sinden, *supra* note 13, at 10933-34.
[134] Andrew M. Grossman, *Michigan v. EPA: A Mandate for Agencies to Consider Costs*, 2015 CATO SUP. CT. REV. 281, 294 (2015).
[135] *Id.*

Further, those who maintain this view argue that *Michigan v. EPA* narrows *American Trucking*'s holding to instances where the CAA lists factors excluding cost, thus employing *expressio unius*.[136] These ideas give *Michigan v. EPA* great authority by silently overruling *EME Homer City* and *Entergy* and narrowing *American Trucking* in favor of cost consideration when dealing with ambiguous statutes.[137]

Proof of the confusion can be seen in *Kentucky Coal Association, Inc. v. Tennessee Valley Authority*.[138] In that case, members of a regulated industry tried to use *Michigan v. EPA* as a bludgeon by requiring that the cheapest monetary outcome of a cost-benefit analysis be the ultimate choice made by the agency in the decision-making process.[139] The Tennessee Valley Authority (TVA), a public power company serving the Southeastern region of the United States, was asked by the EPA to reduce emissions from one of its coal-fired power plants in Kentucky.[140] To accomplish this, the TVA had to decide between retrofitting the plant with new pollution controls or change the fuel source from coal to natural gas.[141] After completing an environmental analysis, TVA decided to alter the fuel source—much to the ire of the Kentucky Coal Association.[142]

Retrofitting the plant with new pollution controls was the more cost-effective decision.[143] The Kentucky Coal Association argued that the retrofitting plan was required under *Michigan v. EPA* because it was cheaper than switching to natural gas, and because TVA was violating the Supreme Court's mandate by proceeding with the change.[144] The Sixth Circuit Court of Appeals disagreed, reminding the Kentucky Coal Association that "cost effective" is not necessarily what is cheapest in terms of dollars and cents.[145] Harms to human health and the environment are also "cost effective" considerations agencies look at when

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[136] *Id.*
[137] *See id.* at 294, 310-11.
[138] *See* Kentucky Coal Ass'n, Inc. v. Tennessee Valley Authority, 804 F.3d 799, 802-03 (6th Cir. 2015).
[139] *Id.*
[140] *Id.* at 801.
[141] *Id.*
[142] *Id.*
[143] *Tennessee Valley Authority*, 804 F.3d at 802.
[144] *Id.*
[145] *Id.* at 802-03.

proceeding with a certain decision.[146] Since TVA took into consideration all of the costs—from monetary to health-related and environmental costs—it was justified in adopting the more environmentally friendly natural gas changeover.[147]

Kentucky Coal Association clearly misunderstood Justice Scalia's opinion in *Michigan v. EPA* requiring cost considerations. With the finality of cases like *Michigan v. EPA*, it is easier for individuals to misinterpret the holding and try to apply it in less than ideal ways, as was evident in *Kentucky Coal Association*. However, if the Supreme Court deferred to the EPA in *Michigan v. EPA*, situations like this would not develop because there would be no requirement that agencies consider costs. Like the prohibition approach, the Supreme Court's mandate of cost consideration is too final for environmental regulation. Requiring cost consideration causes confusion and does not take into account the various situations that the EPA faces when approaching environmental regulation.

III. THE DEFERENTIAL APPROACH IS THE TRUEST TO *CHEVRON*

Chevron requires deference to the rulemaking agency when Congress is silent or ambiguous in its statutory construction, so long as the agency's rules are based on a permissible interpretation of the statute.[148] Both the prohibition and mandate approaches remove that deference from the EPA despite each facing a seemingly ambiguous statute.[149] *State Farm* requires reasonableness as the threshold standard in the agency rule.[150] Reasonableness is established when the rule is neither arbitrary nor capricious.[151] The Court should not foreclose the option of cost consideration or require costs be considered in the light of full, reasoned decisions by the EPA. The Court, therefore, should lean more heavily on the deferential approach and determine if the EPA has acted reasonably based on the evidence

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[146] *Id.* at 802.

[147] *Id.* at 803.

[148] *Chevron, U.S.A., Inc.*, 467 U.S. at 842-43 (1984).

[149] *See Am. Trucking Ass'n.*, 531 U.S. at 487-88 (Stevens, J., concurring); *Michigan*, 135 S. Ct. at 2705-07 (2015).

[150] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 54-55 (1983).

[151] *Id.* at 41-43.

and circumstances, without the finality that *American Trucking* and *Michigan* provide. Under this approach, instead of forcing the EPA to accept a rule indefinitely, the rulemaking undergoes an analysis and decision-making process. This results in a more just outcome for both environmentalists and industry participants, while keeping in line with the spirit of *Chevron* deference.

The holdings in *American Trucking* and *Michigan v. EPA*, which create a prohibition and a mandate, respectively, muddle statutes that are seemingly similar, but ultimately reach different outcomes.[152] Justice Scalia famously wrote in his majority in *American Trucking* that Congress does not "hide elephants in mouseholes."[153] However, the Court places an elephant directly into a mousehole in *Michigan v. EPA* by mandating cost consideration in an ambiguous statute.[154] By relying more consistently on *Chevron* deference, the Court could avoid this dilemma entirely by deciding whether the agency's decision was arbitrary or capricious, dodging unreasonable limitations on the EPA. This approach emphasizes the agency's expertise, allows for regulations to match societal norms as different administrators are ushered in and out, and simplifies statutes.

Deferring to the EPA in this manner has the added benefit of being able to adjust to changing public opinion as the EPA evolves. With Supreme Court decisions like *American Trucking* and *Michigan v. EPA*, the cost consideration stance will not change unless the statute at issue is repealed or replaced, or the Supreme Court issues a new ruling. By deferring to the EPA, the Supreme Court gives the EPA autonomy to change its rules based on the evolving administrations. This approach is more flexible and allows changes to rules with much less effort than would be required under *American Trucking* and *Michigan v. EPA*.

Cost consideration prohibitions and mandates leave no room for attention to the economic state of the regulated industry at the time of the regulation. For example, a cost consideration prohibition during an economic downturn would likely lead to health-based standards that would be more rigorous than an industry could handle and would lead to negative externalities

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[152] Kenigsberg, *supra* note 8 at 441.
[153] *Am. Trucking Ass'n*, 531 U.S. at 468 (2001).
[154] *Michigan*, 135 S. Ct. at 2711.

not intended by the agency. Additionally, while cleaning up the environment, an agency may inadvertently cause business closures, job losses, and increase its prices for whatever products the industry is producing at the time. If this scenario occurs while the economy is struggling, it would be avoidable if the EPA could consider cost during its rulemaking process. On the other hand, a cost consideration mandate during an economic upturn could be manipulated by industry if environmentalist groups refuse to take part in discussions, as they often do.[155] In this case, the regulated industry's efforts could place greater weight on the cost of regulation without greater consideration of the industry's capacity for more protective regulation during times of economic success. The EPA's decision not to take cost into consideration in this instance would arguably be justified because the industry could afford to have greater regulation enforced upon it to achieve more robust health-based protections.

Another issue facing a cost consideration prohibition, or a cost consideration mandate, is the state of public health and the environmental status at the time of regulation. Much like the economic analysis above, a deferential approach allows the EPA to put more weight on necessary factors that depend on the state of public health and the environment as a result of the regulated industry's pollution at the time of regulation.[156]

In the event a cost consideration prohibition is in place, as was seen in *American Trucking*, the EPA has wide-reaching authority to regulate a particular business to the brink of extinction if the environment or public health so require it. Under a deferential approach, the EPA could recognize the necessity for significant environmental regulation, while still exercising discretion in implementing rules that do not require an industry to suffer too greatly as a result of promulgated rules. Furthermore, a deferential standard permits the EPA to openly include cost in its analysis as opposed to the analyses completed after *American Trucking,* where it seems as if the EPA included cost as part of its rulemaking but was barred from reporting it.[157] Again, this would make the EPA's rulemaking process more transparent, which would be beneficial to both the regulated

[155] Livermore & Revesz, *supra* note 25, at 27.
[156] Livermore & Revesz, *supra* note 8, at 10677.
[157] *Id.* at 10677.

industry and the public at large. Another issue arises if the EPA continues to struggle with the "inadequacy paradox" as a result of the prohibition.[158] If the "inadequacy paradox" continues, the EPA will be less likely to regulate to the appropriate level for fear that it is imposing burdensome costs on the regulated industry.[159]

In contrast, if a cost consideration mandate is in place, the EPA has limited authority to regulate in the face of a widespread public health or environmental degradation issue caused by pollution from the regulated industry.[160] Here, the EPA must regulate only to the extent that it does not overpower the industry, despite taking the necessary steps to control pollution for the betterment of public health and the environment. If the EPA's expertise is deferred to, it will have greater flexibility to put the appropriate weight on cost, while maintaining the autonomy to do what is necessary to reign in the polluting industry and protect public health and the environment.

Under a deferential standard, like those employed in *EME Homer City Generation* and *Entergy*, the EPA could put more weight on necessary factors by taking into consideration the social climate toward environmental regulation, economic status of the country or industry at the time of rulemaking, and the need for over- or under-protective regulation in light of the state of public well-being and the environment at the time of regulation.

CONCLUSION

Courts should continue to follow the deferential approach used in *EME Homer City Generation* and *Entergy* to decide if cost can be considered in environmental rulemaking. Prohibiting or mandating cost consideration does not do service to the intent of Congress's environmental regulation and needlessly causes problems that otherwise would not exist. Environmentalist groups and regulated industries would be much better served if the EPA's expertise was deferred to instead of being limited to one approach. Finally, members of the public would have a better opportunity to learn how their health and surrounding

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[158] *Id.* at 10677-79.

[159] *Id.*

[160] *Id.* at 10674, 10676-77.

environment are affected by the EPA's regulations, which would concurrently be more appropriately designed and tailored for the public's needs and for the benefit of their wellness and the environment.