COMPETITIVE ENTERPRISE INSTITUTE

OnPOINT

July 28, 2015 **No. 204**

EPA's Clean Power Plan Overreach

Agency Does Not Merit *Chevron* Deference to Implement Burdensome Rule

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On June 2, 2014, the U.S. Environmental Protection Agency (EPA) proposed the Clean Power Plan, President Obama's marquee climate change initiative. In the proposal, the EPA took the unusual step of preemptively seeking *Chevron* deference from federal courts, even though the Clean Power Plan will not undergo judicial review until after the final rule is published in the *Federal Register* later this summer. *Chevron* deference is a famous and oft-employed administrative law principle that federal courts should defer to reasonable agency construction of the statutes they are charged with administering, in reference to a seminal 1984 Supreme Court ruling, *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*[1] As this analysis demonstrates, the agency's request for judicial deference lacks merit.

The first section of this paper explains the legal reasoning behind *Chevron* deference, as well as subsequent refinements of the doctrine in Article III courts. The second section discusses the Clean Power Plan's unprecedented scope and the EPA's capacious interpretation of Clean Air Act Section 111(d), which allegedly authorizes the rule. The third section argues that the Clean Power Plan contravenes every direct and indirect foundation for *Chevron* deference. The last section briefly investigates how federal courts are likely to review the Clean Power Plan, without resorting to the *Chevron* framework, and concludes that the EPA's interpretation is unlikely to survive such a "fair" reading.

The Basics of *Chevron* Deference: Steps Zero, One, and Two. In *Chevron v. NRDC*, the Supreme Court established a widely used two-step analytical framework for courts to review agency interpretations of their own statutes. At step 1, the reviewing court asks "whether Congress has directly spoken to the precise question at issue." At this point, "if the intent of Congress is clear, that is the end of the matter," because courts "must give effect to the unambiguously expressed intent of Congress." However, if "the statute is silent or ambiguous with respect to the specific issue," the court moves on to *Chevron* step 2, whereupon "the question ... is whether the agency's answer is based on a permissible construction of the statute."[2]

The fundamental basis for *Chevron* deference is a grant of lawmaking power from Congress to a federal agency, and the agency's use of that authority. Usually, a statutory delegation of congressional authority is obvious and therefore uncontroversial. And where Congress does not expressly legislate a grant of policymaking power, but nonetheless intended to do so, the courts may infer such a delegation from the statute.[3]

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However, "in extraordinary cases…there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[4] In these rare controversies, the court must consider contextual factors beyond the immediate text of the statute, to determine whether *Chevron* deference is appropriate.[5] This analysis is known as *Chevron* step zero.[6] The Clean Power Plan is just such an extraordinary case. Because the EPA's Clean Power Plan rulemaking lacks every foundation for *Chevron* deference, judicial respect should be denied.[7]

The Foundations of *Chevron* Deference. The *Chevron* ruling offers three justifications of unequal importance for deferring to agency interpretations of their own enabling statutes.

The Supreme Court anchored *Chevron* deference on the agency's exercise of lawmaking power pursuant to a delegation of congressional legislative authority. Regulatory agencies are creations of Congress, and they issue rules with the force of law only when Congress grants them the power to do so. The Court reasoned that a congressional delegation of power—either explicit[8] or implicit[9]—includes an inherent authority to "fill gaps" in the statutory scheme by resolving textual ambiguities.[10]

From a legal perspective, a delegation of legislative authority is the sine qua non of *Chevron* deference. However, the Supreme Court also put forth two practical justifications. First, the Court explained that agencies possess expertise within their subject matter that renders them better informed to parse imprecise terms in their enabling statutes.[11] Second, the court reasoned that executive branch agencies enjoy greater political accountability, by virtue of their connection to a popularly elected President, than do unelected judges.[12]

Since *Chevron* was decided, federal courts have established a body of jurisprudence that modifies the doctrine. Three such rulings are germane to this analysis.

1) In *INS v. Cardoza-Fonseca*, the Supreme Court held that an agency's inconsistent interpretations, if unexplained, undermine the deference an agency would otherwise warrant. [13]
2) The D.C. Circuit Court of Appeals, which has jurisdiction for judicial review of the Clean Power Plan,[14] applies the doctrine of constitutional avoidance[15] to render *Chevron* deference inappropriate when the agency's proffered interpretation of the statute raises "constitutional difficulties."[16]
3) The Supreme Court recently ruled in *King v. Burwell*[17] that there exists a strong presumption against according *Chevron* deference to an agency's statutory interpretation that would expand agency control over issues of "deep economic and political significance" without an express congressional mandate.

The Alleged Statutory Authorization for EPA's Clean Power Plan. Later this summer, the EPA will promulgate the Clean Power Plan, President Obama's signature climate change mitigation policy.[18] This unprecedented regulation would control greenhouse gas emissions from the entire electricity sector, rather than on a source-by-source basis, as the agency has done in the past. The Clean Power Plan's broad scope is based on a novel and expansive reading of the Clean Air Act—an interpretation that is founded in part on the agency receiving *Chevron* deference from Article III Courts.

The EPA's rulemaking for the Clean Power Plan is allegedly authorized by Clean Air Act Section 111(d).[19] Major media outlets have described this provision as "obscure," and the description is apt.[20]

In fact, §111(d) is a catch-all. The foundational regulatory regime established by the Clean Air Act is the National Ambient Air Quality Standards (NAAQS) program,[21] which addresses six "criteria" pollutants: ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide, and lead. As defined by the statute, NAAQS criteria pollutants endanger public health and welfare, and are emitted from "numerous and diverse sources."[22] The Act's other major air quality program for stationary sources targets Hazardous Air Pollutants (HAPs) from industrial categories.[23] HAPs are emissions that are "carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic."[24] The objective of §111(d) is to regulate emissions from stationary sources that are neither HAPs nor NAAQS criteria pollutants. Simply put, §111(d) is defined primarily by what it is not.

Greenhouse gases are a poor fit for the §111(d) program as it has long been interpreted by the EPA. Emissions subject to §111(d) are known as "designated pollutants." Existing stationary sources subject to the provision are known as "designated facilities." In §111(d)-implementing regulations promulgated in 1975, the EPA described designated pollutants as "highly localized"[25] and "not emitted from numerous and diverse sources."[26] Greenhouse gases, by contrast, are emitted from virtually all acts of energy use and ubiquitous in the atmosphere.[27]

The obscure nature of §111(d) is reflected by its limited history. Since the Clean Air Act was enacted in 1970, the EPA has employed §111(d) to regulate four highly localized pollutants—sulfuric acid mist, fluoride emissions, total reduced sulfur, and landfill gases—from five uncommon industries—pulp mills, solid waste landfills, and acid, fertilizer, and aluminum manufacturing.[28] Within these discrete and insular industrial source categories, the EPA long has interpreted §111(d) such that "states may establish less stringent emission standards on a case-by-case basis."[29] Accordingly, the implementing rules predict that "in most if not all cases, the result is likely to be substantial variation in the degree of control required for particular sources rather than identical standards for all sources."[30]

The provision had never been controversial, until now. Many EPA approvals of state plans to meet §111(d) requirements were promulgated as direct final rules, which the agency only uses when it is confident the matter no party will object. The length of the §111(d) approvals averages only two pages in the *Federal Register*.[31]

The Clean Power Plan represents a stark departure from the EPA's past practice under §111(d). Instead of regulating categories of designated facilities on a source-by-source basis, the Clean Power Plan would regulate the entire electricity generating sector. In one fell swoop, the rule would extend the EPA's authority beyond individual stationary sources—where the agency historically drew the line—to the electric system as a whole, including generation, transmission, distribution, and consumption.[32]

The EPA has been remarkably open about the rule's broad scope. The proposal explains that the Clean Power Plan is "a set of measures that impacts affected electricity generating units as a group."[33] [Emphasis added] And in a legal memorandum published concomitantly with the proposed rule, the agency explains that the regulation "rel[ies] on the interconnected nature of the [electricity] grid to achieve, on a nationwide basis, the important objective of significant amounts of CO2 reductions from fossil-fired electricity generating units."[34]

Top EPA political appointees have been candid about how the Clean Power Plan's epochal purpose is to reduce greenhouse gas emissions by "transitioning" all electricity generation to a "carbon conscious economy."[35]

In February testimony before Congress, EPA Administrator Gina McCarthy said of Clean Power Plan compliance costs: "I consider these to be investments in clean economies and job growth."[36] And in a recent appearance on HBO's "Real Time with Bill Maher," she said that the rule "is about following the transition in the energy world now. … It's the future.[37] McCarthy summarized the Clean Power Plan's grand purpose in an April speech at Columbia University:

> Our role is to look at the transition that is happening in the energy world, and instead of running against the tide, let's put some wind in those sails! Let's put a marker down about what investments should happen if we can all agree that a low carbon future is essential to pursue. … America is already bullish on clean energy and the low carbon economy. That is my argument. That is what money and investments are telling me. And EPA simply wants to send the right signal.[38]

In light of the Clean Power Plan's wide berth and transformative goals, as avowed by the agency, Federal Energy Regulatory Commission (FERC) Commissioner Phillip Moeller stated the obvious when he told Congress that "EPA is creating national electricity policy"[39] with this rulemaking.

It is no exaggeration to state that the EPA's novel reading of the Clean Air Act gives the agency unlimited authority to regulate. Section 111(d) requires the agency to set "standards of performance," defined as the "application of the best system of emission reduction." In its proposed Clean Power Plan, the EPA expands its interpretation of "system" to "encompass virtually any 'set of things' that reduce emissions."[40] By the agency's frank admission, there is "virtually" no limitation on what could be subject to regulation under §111(d)! This new and far-reaching statutory construction is a far cry from authorizing the regulation of a few obscure industries on a source-by-source basis, which is how the agency interpreted this provision for over four decades.

Likely due to the tenuousness of its interpretation, the EPA took the highly unusual step of repeatedly citing its supposed right to *Chevron* deference at the proposal stage of the rulemaking.[41] The proposal claims, "EPA is justified in adopting this interpretation under the second step of the *Chevron* framework,"[42] and an accompanying legal memorandum elaborates on the agency's appeal for deference to its "reasonable construction."[43]

EPA's Clean Power Plan Does Not Merit *Chevron* Deference. The EPA's Clean Power Plan contravenes every principle undergirding *Chevron* deference. For starters, the agency enjoys no delegation of congressional authority to remake the retail electricity market. Nor does the rule enjoy any semblance of electoral accountability, as President Obama was conspicuously silent on climate change during his 2012 reelection campaign. Also, the agency lacks expertise in overseeing the nation's electric grid. Finally, the Clean Power Plan runs afoul of three corollaries to the doctrine of *Chevron* deference.

1) EPA Lacks Congressional Delegation to Make National Electricity Policy. Congress passed the Federal Power Act in 1935 in direct response to issues raised by the then-ongoing electrification of America. The Act recognizes that the federal government's jurisdiction shall "extend only to those matters which are not subject to regulation by the States,"[44] and thereby codified the New Deal philosophy that electric utilities are local institutions that should be locally controlled, as articulated by Montana Democratic Senator Burton Wheeler, one of the statute's chief sponsors.[45]

To this end, the Act establishes a "bright line" between state and federal regulation.[46] Congress expressly intended for the federal government to have jurisdiction over interstate sales of wholesale electricity, while "States retain exclusive authority to regulate the retail market."[47] The Act explicitly delegates the authority to regulate interstate markets to the Federal Energy Regulatory Commission (FERC) and withholds from the federal government authority to regulate retail electricity markets within the individual states.

The Clean Power Plan would upend Congress's carefully planned regulatory regime for the electric industry. It would erase the "bright line" between state and federal jurisdiction in the electricity market as established by the Federal Power Act, and subject both parties to EPA authority.

For example, the Federal Power Act allows states to choose which energy sources to use and whether and how to regulate consumption by end-use consumers, shielded from FERC interference. Under the Clean Power Plan, these determinations would be incorporated into a sector-wide emissions reduction plan, known as a "state implementation plan," over which the EPA would hold a veto. According to FERC Commissioner Tony Clark:

> To the degree that you put [Clean Power Plan compliance policies] in a plan and it gets a seal of approval from the EPA, that then becomes a federally enforceable plan. So what happens then is the administrator of EPA is really in charge of state energy policy. … It simply gives Washington so much authority over the decisions that have traditionally been made by state public utility commissions, legislators and governors.[48]

The Clean Power Plan similarly usurps FERC's authority. For example, most utilities participate in multi-state grids known as regional transmission organizations.[49] Under the Federal Power Act, these wholesale interstate markets are regulated by FERC, guided by the principle of economic efficiency and reasonableness.[50] The Clean Power Plan asserts the EPA's authority to reorganize these markets, under the guiding principle of reducing carbon

emissions from sources such as coal—regardless of the costs. More generally, the Clean Power Plan would crowd out FERC's authority to set national policy for wholesale markets.

Notwithstanding the Federal Power Act's explicit delineation of power between FERC and state governments, the EPA claims an implicit Clean Air Act delegation to regulate practically the entire electricity market. The agency's position cannot withstand scrutiny. The rule would infringe on the states' oversight of retail electricity markets, despite Congress's unambiguous withholding of a delegation of such authority to the federal government. It also would hand to the EPA responsibilities that were plainly granted to FERC. The bottom line is that the EPA is attempting to exercise powers that Congress either delegated to other federal agencies or reserved for the states. As the Ninth Circuit Court of Appeals recently explained, "It is difficult to imagine that Congress left [Executive Branch agencies] free to compete with each other and grab whatever authority they like."[51]

The EPA lacks a congressional delegation commensurate with the authority the agency claims under the Clean Power Plan. And when federal agencies issue rules without a grant of power from Congress, Article III courts must deny *Chevron* deference.[52]

2) EPA Lacks Expertise. No office within the EPA has a mandate to study electricity markets. For example, the mission of the agency's Office of Research and Development is to pursue "environmental health research."[53] This makes perfect sense, insofar as Congress intended for the EPA to be an environmental regulator, not an energy regulator.

As noted, Congress housed expertise for system-wide regulation of the electric industry in the Federal Energy Regulatory Commission. And by expressly withholding a delegation of authority to the federal government over retail electricity markets, Congress incentivized the states to develop their own expertise. Indeed, all 50 States operate energy-specific regulatory bodies, usually known as Public Utilities Commissions.

Article III courts routinely deny *Chevron* deference in instances where an agency is plainly short on subject matter expertise.[54] Because the agency cannot claim expertise in regulating the entire electricity industry as an interconnected whole, as the Clean Power Plan and agency officials purport to do, the EPA's interpretation of its authority pursuant to Clean Air Act §111(d) is not entitled to deference.

3) The Clean Power Plan Lacks Political Accountability. The EPA also lacks the other ancillary qualification for deference: political accountability. For all intents and purposes, the rule was hidden from voters, due to President Obama's conspicuous silence on global warming policy during his 2012 reelection campaign. Consider the following headlines:

- *San Francisco Chronicle*: "Obama, Romney Quiet on Climate." [55]
- *Guardian*: "U.S. Presidential Debates: Abortion, Climate Change, and other Missing Issues."[56]
- Associated Press: "Guns, Climate, Gays Missing in Presidential Race." [57]

Over the course of three debates—spanning some 50,000 words—neither climate change nor global warming was mentioned by President Obama, Mitt Romney, or a moderator.[58] And when energy policy was addressed, the President tried to outflank Romney on the right. During the second debate, the President portrayed himself as a stauncher supporter of fossil fuels—including coal—than his Republican challenger.[59]

To be sure, the President's decision to duck climate change during his reelection was excellent politics. Polls indicate that American voters give low priority to global warming.[60] Nonetheless, Obama's blatant avoidance of the issue undercuts any claim that the Clean Power Plan enjoys a measure of electoral accountability.

While an Article III Courts has yet to justify a denial of *Chevron* deference due to electoral illegitimacy, federal courts often cite political accountability as a reason for affirming judicial respect for agency interpretations of their enabling statutes.[61] If electoral legitimacy can support the case for *Chevron* deference, it follows that President Obama's utter failure to subject this hugely consequential policy to voter scrutiny in any meaningful way militates heavily against the EPA's request for *Chevron* deference.

4) EPA's Clean Power Plan Triggers Three Disqualifiers for Chevron Deference. Since the *Chevron* ruling, federal courts have refined the circumstances where deference is appropriate. In that regard, the Clean Power Plan triggers three disqualifiers.

Under the interpretive logic established in the recent Supreme Court ruling, *King v. Burwell*, the EPA does not merit the deference it seeks. In *King v. Burwell*, the Supreme Court denied *Chevron* deference to the IRS because its interpretation would have expanded agency authority into areas of "deep economic and political significance" without an explicit directive from Congress.[62] The same reasoning applies to the Clean Power Plan. On the one hand, the rule has the potential to be the most expensive regulation ever imposed on the electricity industry, costing between $41 and $73 billion per year as proposed.[63] On the other, it directly infringes on prerogatives long held exclusively by the states, so the rule clearly raises profound political questions.[64] As noted, the EPA lacks a congressional delegation of authority—either express or implicit—to regulate such matters. In sum, the Clean Power Plan has profound economic and political implications and lacks a clear statutory basis.

In a similar vein, the D.C. Circuit Court, which would conduct judicial review of the Clean Power Plan, does not accord deference to agency interpretation that create "constitutional difficulties."[65] The Clean Power Plan does that, as it necessarily raises 10th Amendment concerns due to the gross expansion of federal authority into important regulatory affairs reserved to the states.[66] Liberal legal icon Laurence Tribe, for example, is on record saying final promulgation of the rule as proposed would be akin to "burning the Constitution."[67]

Finally, courts accord much less deference to an agency's interpretations of a statute that conflict with the agency's previous interpretations of that same statute, if the change in course is left unexplained.[68] The EPA's current interpretation of Clean Air Act §111(d) is an example of such an unexplained departure. The agency first interpreted the provision in

November 1975, when it promulgated implementing rules that remain in effect today.[69] That 40-year-old interpretation is dramatically narrower than the one on which the EPA relies to justify the Clean Power Plan. In 1975, the agency confined itself to regulating within source categories or subcategories, on a plant-by-plant basis.[70] In its proposed Clean Power Plan, the EPA abandons this approach—without acknowledging it—and instead expands its own authority over an aggregation of all the source categories that comprise the electricity generating industry. The agency's inconsistent interpretation, if left unexplained in the final rule,[71] bars the agency from receiving *Chevron* deference from federal courts.[72]

How will federal courts review the Clean Power Plan? A reading without deference is described variously as a "plain"[73] or "fair"[74] interpretation.[75] Such an approach is a function of both the statutory text and its context. In order to discern congressional intent, the court will employ the traditional tools of statutory construction,[76] but it will also look for contextual clues, including the legislative history, statutory structure, and purpose.[77]

As the EPA has conceded, the legislative history of §111(d) is virtually non-existent. In the 1975 implementing regulations, the agency noted that, "neither the conference report nor subsequent debates include any discussion of section 111(d) as finally enacted."[78]

The EPA argues that the structure of the Clean Air Act plainly supports the regulation of greenhouse gases under §111(d).[79] This claim is dubious. As this analysis shows, the Clean Air Act's structure indicates that greenhouse gases, which are emitted from diverse mobile and stationary sources, fit more logically under the National Ambient Air Quality Standards program than under Clean Air Act §111(d).[80] The EPA is simply wrong to suggest that the structure of the Clean Air Act clearly authorizes it to use §111(d) to extend jurisdiction over the entire electricity industry. And even if greenhouse gases were appropriately subject to §111(d), the Act's structure makes obvious that this obscure provision is an impermissible basis for regulation of the entire electricity industry.

The EPA argues that the Clean Air Act's purpose—to mitigate pollution—justifies the agency's broad reading of §111(d).[81] This is true, and, when all is said and done, it is the only reasoning on which the agency can viably defend its interpretation in the course of a reviewing court's plain or fair construction of the statute. Nonetheless, a generalized purpose makes for a wobbly foundation on which to support a near-unlimited expansion of EPA authority absent a direct statutory directive. As the D.C. Circuit Court of Appeals—which likely will review the Clean Power Plan—has warned:

> Although EPA argues that the statute should be liberally construed to effect the purpose of a statute, its own proposed removal of virtually any constraints on the discretion of the administrator would hardly serve that purpose.[82]

Conclusion. In the proposed Clean Power Plan, the EPA preemptively claimed *Chevron* deference. As the analysis above demonstrates, the EPA's interpretation of Clean Air Act §111(d) does not merit *Chevron* deference, because it lacks every justification for judicial respect. With the Clean Power Plan, the agency asserts unlimited authority to regulate the electric industry without a congressional delegation of authority, expertise, or an electoral

mandate. Moreover, the EPA's expansive interpretation of the Clean Air Act triggers three disqualifiers for *Chevron* deference that have been established by federal courts. Moreover, without the benefit of *Chevron* deference, the agency's statutory construction is unlikely to survive judicial review.

Notes

[1] 467 US 837 (1984).
[2] Ibid. at 842-843.
[3] *U.S. v. Mead Corp*, 533 U.S. 218, at 229.
[4] *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, at 159 (2000).
[5] Such extra-textual factors include "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given over a long period of time…" *Barnhart v. Wilson*, 535 U.S. 212 at 222 (2002).
[6] Cass Sunstein, *Chevron Step Zero*, John M. Olin Law & Economics Working Paper No. 249, University of Chicago Law School, May 2005, http://www.law.uchicago.edu/files/files/249-crs-chevron.pdf.
[7] In practice, the reasoning that underlies a denial of *Chevron* at step zero also could render the interpretation unlawful at *Chevron* step 1 or unreasonable at *Chevron* step 2. In *FDA v. Brown & Williamson Tobacco Corp*, the Supreme Court determined that Congress explicitly denied a delegation of lawmaking authority to the Food and Drug Administration; therefore, the Court ruled against the agency at *Chevron* step 1 (*FDA v. Brown & Williamson* at 160-161. In *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, the Supreme Court determined at *Chevron* step 2 that the Federal Communications Commission's statutory interpretation was unreasonable because the agency did not have a congressional delegation for the authority it claimed. As such, the EPA's request for deference for its interpretation of the Clean Air Act could be denied for the same reasons at *Chevron* steps zero, 1, and 2.
[8] An explicit grant of legislative authority occurs when Congress expressly directs an agency to issue regulations with the force of law.
[9] In *U.S. v. Mead Corp*, 533 U.S. 218 (2001), the Supreme Court explained that an inferable delegation "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice and comment rulemaking, or by some other indication of comparable congressional intent." At 226-227
[10] Ibid. at 844, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."
[11] Ibid. at 865. "Judges are not experts in the field…"
[12] Ibid. at 865-966. "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."
[13] 480 U.S. 421 (1987), at 447 n. 30 "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."
[14] 42 U.S.C. §7607 establishes that judicial review of regulations like the Clean Power Plan, which are promulgated pursuant to §7411(d), may be sought only in the U.S. Court of Appeals for the District of Columbia.
[15] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council* 485 U.S. 568 (1988) at 575.
[16] *Chamber of Commerce v. FED. ELECTIONS COM'N*, 69 F. 3d 600, at 605 (D.C. Cir. 1995). Also, see *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C.Cir.1994). *Akins v. FEC*, 101 F.3d 731, 740 (D.C.Cir.1996) (en banc), vacated on other grounds, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998). *University of Great Falls v. NLRB*, 278 F. 3d 1335, at 1340-1341 (D.C. Cir. 2002). The Fifth Circuit also has adopted this reasoning. *Neinast v. Texas*, 217 F. 3d 275, at 281-282.
[17] *King v.* Burwell, __ U.S. __, No. 14-114, 2015 WL 2473448 (June 25, 2015).
[18] The rule, as proposed, accounts for 55 to 71 percent of the emissions reductions to be achieved by President Obama's Climate Action Plan, which is the centerpiece of the administration's global commitment to reduce emissions in advance of United Nations Framework Convention on Climate Change negotiations for a

successor treaty to the Kyoto Protocol this winter in Paris. Center for Climate and Energy Solutions, "Achieving the United States' Intended Nationally Determined Contribution," June 2015, http://www.c2es.org/docUploads/achieving-us-indc.pdf.

[19] 42 U.S.C. 7411(d).

[20] Leon G. Billings, "The Obscure 1970 Compromise that Made Obama's Climate Rules Possible," *Politico*, June 2, 2014, http://www.politico.com/magazine/story/2014/06/the-obscure-1970-compromise-that-made-obamas-climate-rules-possible-107351.html?ml=m_t1_2h#.VZvWFkbsSUn. Coral Davenport, "Brothers Battle Climate Change on Two Fronts," *New York Times*, May 10, 2014, http://www.nytimes.com/2014/05/11/us/brothers-work-different-angles-in-taking-on-climate-change.html?_r=2.

[21] 42 U.S.C. §§7408-7410.

[22] 42 U.S.C. §108(a)(1)(B).

[23] 42 U.S.C. §7412.

[24] 42 U.S.C. §7412(b)(2).

[25] 40 FR 53342.

[26] 40 FR 53340.

[27] Marlo Lewis, "Would EPA's Defeat in Clean Power Plan Case 'Overthrow' the 'Structure' of the Clean Air Act?" GlobalWarming.org, April 20, 2015, http://www.globalwarming.org/2015/04/20/would-epas-defeat-in-clean-power-plan-case-overthrow-the-structure-of-the-clean-air-act/. Greenhouse gases, due to their ubiquity, are a poor fit for the NAAQS program. The EPA would have to set a greenhouse gas NAAQS below current levels, which would render the entire U.S. subject to draconian NAAQS nonattainment controls. William Yeatman, "Green Missive Moves up Economic Doomsday Clock to Three Minutes until Midnight," Global Warming.org, January 25, 2015, http://www.globalwarming.org/2015/01/25/green-missive-moves-up-economic-doomsday-clock-to-three-minutes-until-midnight/. Justice Antonin Scalia arguably foreclosed the possibility of a greenhouse gas NAAQS in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2013). Peter Glazer, "Supreme Court Observations: Don't buy the Spin, EPA Lost the Utility Air Regulatory Group v. EPA Case," *The Legal Pulse*, Washington Legal Foundation, http://wlflegalpulse.com/2014/06/26/supreme-court-observations-dont-buy-the-spin-epa-lost-utility-air-regulatory-group-v-epa-case/.

[28] Yeatman, "Deep Background into EPA's Impending Climate Plan for Exiting Power Plants," GlobalWarming.org, May 23, 2014, http://www.globalwarming.org/2014/05/23/primary-document-dump-fridays-deep-background-into-epas-impending-climate-plan-for-existing-power-plants/.

[29] 39 FR 36102. For an example of a §111(d) variance, see 46 FR 55974 (November 13, 1981), in which EPA granted a variance to Virginia for a sulfuric acid plant.

[30] 40 FR 53343.

[31] Yeatman, "Every EPA Review of State 111(d) Submissions," GlobalWarming.org, May 30, 2014, http://www.globalwarming.org/2014/05/30/primary-document-dump-fridays-every-epa-review-of-state-111d-submissions/.

[32] The Clean Power Plan sets state-specific greenhouse gas emissions targets based on four "building blocks": (1) increased energy efficiency at coal-fired power plants, (2) operating combined cycle natural gas plants 70 percent of the time, (3) increased usage of renewable and non-emitting sources of electricity, and (4) increased energy efficiency by the end user. Of these four, only the first is a source-specific measure of the kind the agency has implemented pursuant to Clean Air Act §111(d). The remaining three measures go beyond the fence line of the emissions source (the power plant). These systematic, sector-wide controls are unprecedented. The EPA claims that the Clean Power Plan affords states flexibility in implementation options, but it has yet to actually identify any such options. Yeatman, "EPA OAR Chief again Belies Clean Power Plan 'Flexibility,'" GlobalWarming.org, April 16, 2015, http://www.globalwarming.org/2015/04/16/epa-oar-chief-janet-mccabe-again-belies-clean-power-plan-flexibility/. There is no way to comply with the Clean Power Plan without comprehensive regulation of the electricity sector. And any state plan to implement the Clean Power Plan would have to receive EPA approval. See proposed Clean Power Plan, section VIII (79 FR 34830).

[33] 79 FR 34892.

[34] Environmental Protection Agency, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, June 2, 2014, p. 47.

[35] Yeatman, "EPA Administrator McCarthy: A 'Carbon Conscious Economy' Is Inevitable, and EPA Will Make Sure It Happens," GlobalWarming.org, April 29, 2015,

http://www.globalwarming.org/2015/04/29/epa-administrator-mccarthy-a-carbon-conscious-economy-is-inevitable-and-epa-will-make-sure-it-happens/.

[36] Yeatman, "Lies and Other Lowlights from EPA Administrator McCarthy's Testimonies on FY 2016 Budget," GlobalWarming.org, February 27, 2015, http://www.globalwarming.org/2015/02/27/lies-and-other-lowlights-from-epa-administrator-mccarthys-testimonies-before-the-house-this-week-on-fy-2016-budget/.

[37] "Real Time with Bill Maher," June 27, 2015 (transcript prepared by author), http://www.hbo.com/real-time-with-bill-maher.

[38] Yeatman, "EPA Administrator McCarthy: A 'Carbon Conscious Economy' Is Inevitable."

[39] Written Testimony of FERC Commissioner Philip D. Moeller before the Committee on Energy and Commerce Subcommittee on Energy and Power, U.S. House of Representatives, "FERC Perspective: Questions Concerning EPA's Proposed Clean Power Plan and other Grid Reliability Challenges," July 29, 2014, p. 1, http://docs.house.gov/meetings/IF/IF03/20140729/102558/HHRG-113-IF03-Wstate-MoellerP-20140729.pdf.

[40] EPA, Legal Memorandum, p. 51.

[41] Since 1994, the EPA has proposed 9,039 regulations in the *Federal Register*. During that time, 42 proposed regulations, of 9,039, claimed *Chevron* deference. Tellingly, these 42 proposed regulations comprise virtually all of the most controversial and far-reaching rulemakings during that period, including all of President Obama's significant climate rules—the Carbon Pollution Standards, the two rounds of Corporate Average Fuel Economy standards for greenhouse gases, the "Tailoring Rule," and New Source Review standards for greenhouse gases. The short list also includes the administration's controversial Waters of the U.S. rule, the Mercury and Air Toxics Standards, and the agency's proposed rejection of Texas's New Source Review program for minor sources. During the George W. Bush administration, the EPA claimed *Chevron* deference in such major proposed rulemakings as an overhaul of the New Source Review program, a reinterpretation of the term "solid waste" in the Resource Conservation and Recycling Act, and a National Ambient Air Quality Standard for ozone. During the Clinton Administration, the EPA claimed *Chevron* deference for proposed rules including an overhaul of the New Source Review program, the second phase of the Acid Rain trading program, and regulatory regime for lead-based paint. All data taken from searches of the *Federal Register* at the Government Printing Office's database, FDSys, http://www.gpo.gov/fdsys.

[42] 79 *Federal Register* 34886.

[43] EPA, Legal Memorandum , p. 54.

[44] 16 U.S.C. §824(a).

[45] Hon. Richard D. Cudahy and William D. Henderson, "From Insull to Enron: Corporate Re-Regulation after the Rise and Fall of Two Energy Icons," *Energy Law Journal*, Vol. 26, pp. 35, 77 (2005).

[46] *Northern States Power Company v. FERC*, 176 F. 3d 1090 (8th Cir. 1999), at 1096.

[47] *Electric Power Supply Association v. FERC*, WL___ (D.C. Cir. May 23, 2014).

[48] Comments included in a letter to the editor of the Fargo-Moorhead Forum, "Reining in EPA Vital to North Dakota, by U.S. Rep. Kevin Cramer, June 30, 2015, http://www.inforum.com/letters/3776295-letter-reining-epa-vital-nd.

[49] For example, 14 states—Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin, and parts of Arkansas, Kentucky, Missouri, Montana, and Texas—participate in the Midcontinent Independent Service Operator (MISO) grid. Another 13 states—Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Tennessee Virginia, and West Virginia—plus the District of Columbia participate in the PJM connection. For an overview of all multistate RTOs, see http://www.ferc.gov/market-oversight/mkt-electric/overview.asp.

[50] Federal Energy Regulatory Commission staff report, *Energy Primer: A Handbook of Energy Market Basics*, July 2012, Chapter 3 http://www.ferc.gov/market-oversight/guide/energy-primer.pdf

[51] *Niggar v. Holder*, 689 F. 3d 1077 at 1082 (9th Cir. 2012).

[52] *Sac and Fox Nation, et al., v. Norton*, 240 F. 3d 1250 (10th Cir. 2001) at 1265. *London v. Fieldale Farms Corp.*, 410 F. 3d 1295 (11th Cir. 2005) at 1304. *Kelley v. EPA*, 25 F. 3d 1088 (D.C. Cir. 1994) at 1091. *Passamaquoddy Tribe v. State of Maine*, 75 F. 3d 784 (1st Cir. 1996) at 794. *Denis v. U.S.*, 633 F. 3d 201 (3rd Cir. 2011) at 208.

[53] EPA, "About the Office of Research and Development," http://www2.epa.gov/aboutepa/about-office-research-and-development-ord.

[54] *Zivkovic v. U.S., 724* F. 3d 894 (7th Cir. 2013) at 899-900. *Francis v. Reno*, 269 F. 3d 162 (3rd Cir. 2001) at 168. *King v. Burwell*.

[55] David Baker, "Obama, Romney Quiet on Climate," *San Francisco Chronicle*, October 3, 2012.

[56] Matt Williams, "US Presidential Debates: Abortion, Climate Change, and other Missing Issues," *Guardian*, October 23, 2012, http://www.theguardian.com/world/2012/oct/23/presidential-debates-missing-issues.
[57] Charles Babignton, "Guns, Climate, Gays Missing in Presidential Race," Associated Press, October 2, 2012, http://news.yahoo.com/guns-climate-gays-missing-presidential-race-072646278--election.html.
[58] Tim Dickinson, "Don't Ask, Don't Tell: 11 Big Questions that Were MIA at the Presidential Debates," Rolling Stone, October 24, 2012, http://www.rollingstone.com/politics/news/dont-ask-dont-tell-11-big-questions-that-were-mia-at-the-presidential-debates-20121024#ixzz3h7UbRCT4.
[59] Yeatman, "On Energy Policy, Debate Obama Bears No Resemblance to Real-Life Obama," GlobalWarming.org, October 17, 2012, http://www.globalwarming.org/2012/10/17/on-energy-policy-debate-obama-bears-no-resemblance-to-real-life-obama/.
[60] Rebecca Rifkin, "Climate Change Not a Top Worry in U.S.," Gallup, March 12, 2014, http://www.gallup.com/poll/167843/climate-change-not-top-worry.aspx.
[61] *Rehabilitation Ass'n of Va. v. Kozlowski*, 42 F. 3d 1444 (4th Cir. 1994) at 1471. *National Fisheries Institute, Inc. v. Mosbacher*, 732 F. Supp. 210 (D.D.C. 1990), at 226-227. *Microcomputer Technology Institute v. Riley*, 139 F. 3d 1044 (5th Cir. 1998) at 1051. *IlioUlaokalani Coalition v. Rumsfeld*, 464 F. 3d 1083 (9th Cir. 2006) at 1111. *Hernandez-Patino v. INS*, 831 F. 2d 750 (7th Cir. 1987). *FLORIDA MANUF. HOUSING ASS'N v. Cisneros*, 53 F. 3d 1565 (11th Cir. 1995) at 1571.
[62] *King v. Burwell*.
[63] David Harrison and Anne E. Smith, Potential Energy Impacts of the EPA Proposed Clean Power Plan, NERA Economic Consulting, October 2014, http://www.globalwarming.org/wp-content/uploads/2014/10/NERA_ACCCE-CPP-Report_Final-Oct-16-20141.pdf.
[64] Yeatman, "EPA's Illegitimate Climate Plan," *OnPoint* No. 196, Competitive Enterprise Institute, July 28, 2014, http://cei.org/sites/default/files/Yeatman%20-%20EPAs%20Illegitimate%20Climate%20Rule_0.pdf
[65] For a list of cases applying this principle, see note 16.
[66] Yeatman, "Investigating the Constitutionality of EPA's Clean Power Plan," White Paper, April 13, 2015, http://www.globalwarming.org/2015/04/20/would-epas-defeat-in-clean-power-plan-case-overthrow-the-structure-of-the-clean-air-act/. David B. Rivkin, Mark DeLaquil, and Andrew Grossman, "Does EPA's Clean Power Plan Proposal Violate States' Sovereign Rights?" *Engage*, Vol. 16, No. 1, July 15, 2015, http://www.fed-soc.org/publications/detail/does-epas-clean-power-plan-proposal-violate-the-states-sovereign-rights.
[67] Erica Martinson, "Laurence Tribe, Obama's Legal Mentor, Attacks EPA Power Plant Rule," *Politico*, March 20, 2015, http://www.politico.com/story/2015/03/epa-power-plant-rule-laurence-tribe-116258.html.
[68] See note 13 and accompanying text. Circuit courts often cite an agency's inconsistent interpretation as a reason for denying *Chevron* deference. See *Credit Union Insurance Corp., v. U.S.*, 86 F. 3d 1326 (4th Cir. 1996) at 1332; *CeCe v. Holder*, 733 F. 3d 662 (7th Cir. 2012), at 676-677; *Succar v. Ashcroft*, 394 F. 3d 8 (1st Cir. 2005) at 36; and *Natural Resources Defense Council v. U.S. EPA*, 526 F. 3d 591 (9th Cir. 2009) at 606-607.
[69] 40 *Federal Register* 53340.
[70] The EPA's plant-by-plant approach may also be inferred from the agency according states the right to issue variances for individual source categories. Ibid at 53343-53344.
[71] The proposed Clean Power Plan and its supporting legal documentation make no reference to the EPA's original interpretation of Clean Air Act §111(d). In fact, the agency misleadingly cites the 1975 implementing regulations in an attempt to buttress its current expansive interpretation. In the 1975 implementing regulations, the agency stressed that it would exercise flexibility by subcategorizing industrial categories. In the proposed Clean Power Plan, the EPA references this language to support the premise that the agency may aggregate the entire electricity sector into a regulated entity (79 FR 34891). Simply put, the agency does not just ignore its previous interpretation; it has *reinterpreted it to mean the opposite*, and used this incorrect interpretation to support the Clean Power Plan.
[72] Yeatman, "EPA's Clean Power Plan Defies Its Own Regulation," GlobalWarming.org, November 3, 2014, http://www.globalwarming.org/2014/11/03/epas-clean-power-plan-defies-its-own-regulation/.
[73] *King v. Burwell*.
[74] *Decker v. EPA*, 133 S. Ct. 1326, 1342 (2013).
[75] In practice, there is no difference between a court's statutory reading performed independent of the *Chevron* analytical framework, and such a reading performed at *Chevron* step 1. Both are textual analyses executed without deference to the agency's interpretation.
[76] Ruggero J. Aldisert, *The Judicial Process, Text, Materials, and Cases*, second edition, pp. 193-312 (1996).

[77] The essential Supreme Court case on a contextual interpretation of an agency's construction of its enabling statute is *FDS v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000).
[78] 40 *Federal Register* 53342.
[79] EPA, Legal Memorandum, p. 55.
[80] Marlo Lewis, "Would EPA's Defeat in Clean Power Plan Case 'Overthrow' the 'Structure' of the Clean Air Act?"
[81] EPA, Legal Memorandum, p. 56.
[82] *American Chemistry Council v. Johnson*, 406 F. 3d 738, at 743 (D.C. Cir. 2005).