

## CLEAN POWER AND *CHEVRON*: SCORING THE FIGHT FOR OBAMA'S CLIMATE CHANGE RULE

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### I. INTRODUCTION

When the Environmental Protection Agency (EPA) proposed the Clean Power Plan (CPP) in June 2014, the response was mixed. Proponents viewed it as a sensible and realistic means of reducing carbon dioxide (CO<sub>2</sub>) emissions produced by the energy sector.<sup>1</sup> Many, however, were skeptical. Opponents of the rule argued that it relied on a rarely used section of the Clean Air Act (CAA) to justify a radical expansion of EPA authority.<sup>2</sup> Several states and industry participants have challenged both the proposed and final rule,<sup>3</sup> and the Supreme Court of the United States recently took the unprecedented step of granting an immediate stay pending litigation.<sup>4</sup>

The stakes are high for the EPA and the Obama administration. Facing recalcitrant opposition from a Republican-controlled Congress, President Barack Obama promised executive action on climate change<sup>5</sup> and directed the EPA to limit CO<sub>2</sub> emissions from existing

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<sup>1</sup> See Tomas Carbonell & Megan Ceronky, *Section 111(d) and the Clean Power Plan: The Legal Foundation for Strong, Flexible, and Cost-Effective Carbon Pollution Standards for Existing Power Plants*, 44 ENVTL. L. REP. 11086, 11090–91 (2014).

<sup>2</sup> See Keith Goldberg, *States, Industry Groups Launch Clean Power Plan Legal Fight*, LAW360 (Oct. 23, 2015, 2:13 PM), <http://www.law360.com/articles/718094/states-coal-groups-launch-clean-power-plan-legal-fight> (according to West Virginia's Attorney General "[t]he Clean Power Plan is one of the most far-reaching energy regulations in this nation's history").

<sup>3</sup> See *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015); See also Alan Neuhauser, *Mess of Lawsuits Set to Challenge Clean Power Plan*, U.S. NEWS & WORLD REP. (Oct. 23, 2015, 11:20 AM), <http://www.usnews.com/news/articles/2015/10/23/mess-of-lawsuits-set-to-challenge-clean-power-plan>.

<sup>4</sup> See *Order in Pending Case*, WEST VIRGINIA V. E.P.A., 577 U.S. 15A773 (2016), [http://www.eenews.net/assets/2016/02/09/document\\_pm\\_03.pdf](http://www.eenews.net/assets/2016/02/09/document_pm_03.pdf) (last visited Jan. 3, 2017) (order granting stay).

<sup>5</sup> See John M. Broder & Richard W. Stevenson, *Speech Gives Climate Goals Center Stage*, N.Y. TIMES (Jan. 21, 2013), [http://www.nytimes.com/2013/01/22/us/politics/climate-change-prominent-in-obamas-inaugural-address.html?\\_r=0/](http://www.nytimes.com/2013/01/22/us/politics/climate-change-prominent-in-obamas-inaugural-address.html?_r=0/).

power plants.<sup>6</sup> Given the remaining uncertainties and ongoing denial of the scientific underpinnings of anthropogenic climate change, executive action has the potential to alter the debate on mitigation policies, forcing the opposition to challenge the extent of carbon reduction rather than the policy itself.<sup>7</sup> In addition, successful carbon mitigation policies bolster the United States' credibility on the international stage as it continues to assume a leadership role in transnational efforts to address global warming.<sup>8</sup> Indeed, many speculated whether the Supreme Court's decision to stay the rule would undermine the historic Paris Agreement on climate change.<sup>9</sup>

The CPP aims to reduce CO<sub>2</sub> emissions from existing power plants by thirty-two percent from their 2005 levels by 2030.<sup>10</sup> To achieve this goal, the CPP sets state-specific emissions standards tailored to each state's present energy mix.<sup>11</sup> The EPA calculated these standards to reflect the reductions that are achievable through the implementation of three "building blocks," each of which describes a particular method of reducing CO<sub>2</sub> emissions that the EPA has deemed feasible and cost-effective.<sup>12</sup> The building blocks provide for emissions reductions through increased efficiency, or heat rate improvements, (building block one) and the substitution of cleaner sources—natural gas and renewables such as wind and solar—for coal (building blocks two and three).<sup>13</sup> Each state is responsible for devising and implementing a plan for meeting the CPP's emissions standards, subject to EPA approval.<sup>14</sup> If states fail to submit a plan, the EPA is authorized to

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<sup>6</sup> See President Barack Obama, Remarks by the President in Announcing the Clean Power Plan (Aug. 3, 2015), <https://www.whitehouse.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan>.

<sup>7</sup> See *Charlie Rose: President Obama's Clean Power Plan with Gina McCarthy, Head of the Environmental Protection Agency* (PBS television broadcast Aug. 2, 2015), <http://www.charlierose.com/watch/60599780>.

<sup>8</sup> See *id.*

<sup>9</sup> See Robinson Meyer, *Did the Supreme Court Doom the Paris Climate Change Deal?*, THE ATLANTIC (Feb. 12, 2016), <http://www.theatlantic.com/technology/archive/2016/02/the-parts-of-obamas-climate-legacy-that-will-survive/462294/>. The Paris Agreement is a landmark deal that commits 195 nations to lowering CO<sub>2</sub> emissions levels. Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), <http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html>. International diplomats viewed the CPP as a crucial factor in the success of the negotiations. *Id.*

<sup>10</sup> See *Fact Sheet: Overview of the Clean Power Plan*, EPA, <http://www2.epa.gov/clean-powerplan/fact-sheet-overview-clean-power-plan> (last visited Apr. 26, 2016).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

substitute its own, which the states are obligated to implement.<sup>15</sup>

The CPP has broad implications for the energy sector. Due to the nature of greenhouse gasses (GHGs), meaningful emissions reductions cannot be achieved cost-effectively by measures implemented at each facility.<sup>16</sup> The EPA attempts to solve this problem by identifying reductions that are achievable across the entire energy grid, and not merely as a result of improvements to individual power plants. Consequently, building blocks two and three are emissions reduction measures that require actions “beyond the fenceline,” i.e. outside the physical boundaries of an affected power plant. In order to meet emissions rates set by the CPP, power plant owners and operators will be forced to reduce generation from coal-fired facilities and substitute generation from natural gas and renewable sources.<sup>17</sup> The EPA estimates that the rule will reduce coal-fired generation by nearly fifty percent from current levels.<sup>18</sup> Therefore, the CPP will restructure the nation’s energy supply, blurring the line between pollution reduction and energy regulation.

In addition to the CPP’s negative implications for the coal industry, the required emissions reductions are considerably more stringent for some states compared with others, depending on the extent of their reliance on coal-fired power.<sup>19</sup> For these reasons, the CPP has inspired vigorous opposition from states and industry participants. Twenty-seven states and “countless” industry participants are currently challenging the rule.<sup>20</sup> Opponents of the CPP consistently rely on two arguments.<sup>21</sup> First, they argue that a drafting

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<sup>15</sup> See 42 U.S.C. § 7411(d)(2) (2012). See also *id.*

<sup>16</sup> See Ann E. Carlson & Megan M Herzog, *Symposium: Text In Context: The Fate of Emergent Climate Regulation After UARG and EME Homer*, 39 HARV. ENVTL. L. REV. 23, 29 (2015).

<sup>17</sup> See Eric Anthony DeBellis, *In Defense of the Clean Power Plan: Why Greenhouse Gas Regulation Under Clean Air Act Section 111(d) Need Not, and Should Not, Stop at the Fenceline*, 42 ECOLOGY L.Q. 235, 254 (2015).

<sup>18</sup> See EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE 2–3, 3–24 (2015), <https://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf>.

<sup>19</sup> See generally EPA, GOAL COMPUTATION TECHNICAL SUPPORT DOCUMENT (2014), <http://www.epa.gov/sites/production/files/2014-06/documents/20140602tsd-goal-computation.pdf>.

<sup>20</sup> Robin Bravender et al., *The Fate of the Obama Administration’s Signature Climate Change Rule is in the Hands of the Courts*, E & E PUB., [http://www.eenews.net/interactive/clean\\_power\\_plan/fact\\_sheets/legal](http://www.eenews.net/interactive/clean_power_plan/fact_sheets/legal) (last updated Feb. 19, 2016).

<sup>21</sup> In addition, some opponents have argued that the CPP violates the 10th Amendment, a claim which has been described as “spurious.” See Patrick Parenteau, *The Clean Power Plan Will Survive: Part 2*, LAW360 (Sept. 29, 2015, 10:15 AM), <http://www.law360.com/articles/704048/the-clean-power-plan-will-survive-part-2>.

error—caused when two separate versions of § 111(d), one drafted by the House and one drafted by the Senate, were included in the 1990 amendments to the CAA—should be resolved to preclude regulation of CO<sub>2</sub> from existing power plants.<sup>22</sup> Second, opponents argue that the EPA lacks the authority to regulate beyond the fenceline.<sup>23</sup> Because the EPA relies on § 111(d) as the source of its authority for the CPP, the first argument creates a threshold issue that a reviewing court will likely be forced to resolve. The second argument is important because it encapsulates a powerful narrative that the EPA's critics have employed, which describes the CPP as a sweeping and unprecedented expansion of the agency's authority.<sup>24</sup> Taken together, both arguments raise issues of first impression and will likely comprise the heart of the legal challenge to the CPP.

Judicial review will hinge on the Supreme Court's application of the *Chevron* doctrine,<sup>25</sup> as both issues involve the EPA's interpretation of the CAA. Under *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, a court must defer to an agency's reasonable interpretation of a statute if Congress' intent is ambiguous.<sup>26</sup> With regard to the drafting error, opponents of the CPP argue that the version of § 111(d) drafted by the House should govern and that it unambiguously precludes the regulation of CO<sub>2</sub> from power plants,<sup>27</sup>

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Moreover, some opponents have focused on the EPA's § 111(b) rule, which is a statutory predicate of the CPP. See Patrick Parenteau, *The Clean Power Plan Will Survive Pt. 1*, LAW360 (Sept. 28, 2015, 11:37 AM), <http://www.law360.com/articles/704046/the-clean-power-plan-will-survive-part-1>. This Comment ignores these arguments.

<sup>22</sup> See Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review at 6, *Murray Energy Corp. v. EPA*, 136 S. Ct. 999 (2016) (No. 15A778) [hereinafter *Coal Industry Stay Application*]; Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 7–8, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773) [hereinafter *States' Stay Application*]; Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review at 11, *Basin Elec. Power Coop. v. EPA*, 136 S. Ct. 998 (2016) (No. 15A776) [hereinafter *Utilities' Stay Application*]; Final Opening Brief of Petitioner at 15, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (Nos. 14-1112, 14-1151) [hereinafter *Murray Energy Petitioner's Brief*]; Eric Groten, *Here Be Dragons: Legal Threats to EPA's Proposed Existing Source Performance Standards for Electric Generating Units*, 45 ENVTL. L. REP. 10116, 10120–21 (2015).

<sup>23</sup> See Application of Business Associations for Immediate Stay of Final Agency Action Pending Appellate Review at 10–11, 16–17, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773) [hereinafter *Business Associations' Stay Application*]; *States' Stay Application*, *supra* note 22, at 1–21; *Utilities' Stay Application*, *supra* note 22, at 11–12; Groten, *supra* note 22, at 10122.

<sup>24</sup> See, e.g., *States' Stay Application*, *supra* note 22, at 15.

<sup>25</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>26</sup> *Id.* at 842–43.

<sup>27</sup> See, e.g., *Murray Energy Petitioner's Brief*, *supra* note 22, at 15–16.

whereas the EPA argues that the House version is ambiguous, but can be reasonably interpreted so as not to conflict with the Senate version, which does not prohibit the CPP.<sup>28</sup> Consequently, a reviewing court will likely be forced to determine whether the House version is ambiguous under *Chevron* step one in order to resolve this issue. The fenceline issue involves the EPA's interpretation of the terms "best system of emission reduction" (BSER), which comprises the statutory basis for calculating the CPP's emissions standards.<sup>29</sup> Opponents challenge the EPA's interpretation as being overly expansive, whereas the EPA argues that outside the fenceline measures are authorized under the plain meaning of the term "system," as well as the legislative history and overall structure of the CAA.<sup>30</sup> Resolving this issue will implicate *Chevron* to some degree. Though the EPA argues that its interpretation is consistent with the plain meaning of the statute,<sup>31</sup> the Court could very well invoke *Chevron* step two, as "system" is not defined within the CAA, and "best system of emission reduction" lacks a clear meaning.<sup>32</sup> Alternatively, recent cases suggest the Court's willingness to apply an exception to *Chevron* deference, known as the major questions canon, when determining issues of "vast economic and political significance."<sup>33</sup> Those challenging the CPP argue that the EPA's interpretation of BSER is not entitled to deference due to the economic significance of the agency's attempt to restructure the energy sector.<sup>34</sup>

This Comment begins with a brief overview of the relevant portions of the CAA, as well as the *Chevron* doctrine and the major questions canon in Parts II and III, respectively. Part IV summarizes the arguments on both sides of these two crucial issues, assesses their strengths and weaknesses, and concludes that the CPP ought to survive them. In particular, the arguments in favor of reading § 111(d) to preclude the CPP are relatively weak, and under *Chevron*, a court should defer to the EPA's interpretation. Furthermore, interpreting §

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<sup>28</sup> Clean Power Plan, 80 Fed. Reg. 64712-15 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter *Final Rule*].

<sup>29</sup> 42 U.S.C. §§ 7411(a)1, (d)1 (2012); *Final Rule*, *supra* note 28, at 64723.

<sup>30</sup> *Final Rule*, *supra* note 28, at 64758-62

<sup>31</sup> *See id.* at 64758.

<sup>32</sup> *See* Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9, 13 (2015); Carlson & Herzog, *supra* note 16, at 29.

<sup>33</sup> *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014); *See also* *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

<sup>34</sup> *See Utilities' Stay Application*, *supra* note 22, at 11; *Business Associations' Stay Application*, *supra* note 23, at 10-11; *Coal Industry Stay Application*, *supra* note 22, at 3; *States' Stay Application*, *supra* note 22, at 15.

111(d) to allow regulations beyond the fenceline is reasonable under *Chevron* step two. Finally, the major questions canon should not be applied to invalidate the CPP. The rule lacks a convincing rationale and the Court has not defined the criteria for administering it. Moreover, recent cases in which the doctrine was applied are distinguishable from the context of the CPP.

## II. STATUTORY BACKGROUND

In order to implement the CPP, the EPA relies on its authority under § 111(d) of the CAA. Section 111 was originally conceived as part of a “three-legged” approach to regulating air pollutants emitted from stationary sources.<sup>35</sup> Accordingly, §§ 107-110 of the CAA address “criteria pollutants,” “the presence of which in the ambient air results from numerous or diverse mobile or stationary sources,” and which “may reasonably be anticipated to endanger public health or welfare.”<sup>36</sup> In addition, § 112 establishes national emissions standards for a list of designated “hazardous air pollutants” (HAPs) emitted from particular types of sources.<sup>37</sup> In light of these provisions, § 111 was originally conceived as a gap-filler that would cover emissions of non-criteria, non-HAP pollutants that the EPA determined caused or contributed to “air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>38</sup> In particular, § 111(b) addresses emissions from new sources, while § 111(d) covers existing sources.<sup>39</sup> Existing sources within a particular category are subject to § 111(d) only if new sources of the same category are already regulated under § 111(b).

Section 111(d) authorizes regulations on a state-wide level.<sup>40</sup> To accomplish this, the EPA establishes a “standard of performance for any existing source for any air pollutant.”<sup>41</sup> The Act defines a “standard of performance” as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated.”<sup>42</sup> Thus, to establish a standard of performance, the EPA identifies the

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<sup>35</sup> *Final Rule*, *supra* note 28, at 64700.

<sup>36</sup> 42 U.S.C. § 7408(a)(1) (2012).

<sup>37</sup> 42 U.S.C. § 7412 (2012).

<sup>38</sup> 42 U.S.C. § 7411(b)(1)(A) (2012); Robert R. Nordhaus & Avi Zevin, *Historical Perspectives on § 111(d) of the Clean Air Act*, 44 ENVTL. L. REP. 11095, 11097 (2014).

<sup>39</sup> § 7411.

<sup>40</sup> § 7411(d).

<sup>41</sup> § 7411(d)(1).

<sup>42</sup> § 7411(a)(1).

BSER for a given air pollutant and source category and the emission reduction that would result from the implementation of that system.<sup>43</sup> States are then required to develop a plan that would meet or exceed the emissions reductions achievable under the BSER.<sup>44</sup> Under § 111(d), states may choose the method of achieving emissions reductions, but if a state plan fails to provide for the implementation or enforcement of standards that meet EPA guidelines, the EPA has the authority to substitute its own plan.<sup>45</sup> Because fossil-fuel fired power plants are a listed source category and greenhouse gases are not defined as a criteria or hazardous pollutant,<sup>46</sup> the EPA is relying on § 111(d) for authority to implement the CPP, including the methods for emissions reduction suggested by the three building blocks.

### III. CHEVRON

In 1984, the Supreme Court issued its landmark ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*. At issue was the EPA's interpretation of the term "stationary source" in the context of one of the CAA's permitting requirements, which treated all of the pollution-emitting devices within a single industrial facility as though they were encased in a single "bubble."<sup>47</sup> Meanwhile, the respondents argued that each individual pollution-emitting source constituted a discrete stationary source so long as it emitted over 100 tons of a pollutant.<sup>48</sup> To resolve this dispute, the majority announced the following rule:

If the intent of Congress is clear. . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>49</sup>

Applying this framework, the majority noted that because the relevant provision of the CAA did not contain a definition of stationary source, the term's meaning was unclear.<sup>50</sup> Next, the majority assessed the legislative history of the provision and found that it, too, was

<sup>43</sup> See § 7411(a)(1), (d)(1); Carbonell & Ceronsky, *supra* note 1, at 11087–88.

<sup>44</sup> See 42 U.S.C. §§ 7411(a)(1), (d)(1).

<sup>45</sup> See *id.* § 7411(d)(2)(A); Carbonell & Ceronsky, *supra* note 1, at 11087–88.

<sup>46</sup> See §§ 7411(d)(1)(A)(i), 7412(b)(1); *National Ambient Air Quality Standards*, EPA (2016), <https://www.epa.gov/criteria-air-pollutants/naaqs-table>.

<sup>47</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

<sup>48</sup> See *id.* at 859.

<sup>49</sup> *Id.* at 842–43.

<sup>50</sup> See *id.* at 860.

unhelpful in clarifying the meaning of the term.<sup>51</sup> However, the majority did find that the legislative history clearly established the policy goals of the statute, and it upheld the EPA's interpretation because the agency had reasonably concluded that the plant-wide definition of stationary source was consistent with the intended policy.<sup>52</sup>

*Chevron's* two-step framework is now considered "foundational," as the "undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies."<sup>53</sup> *Chevron's* central holding has been interpreted to mean that when a legal challenge involves an administrative agency's interpretation of a statute, the reviewing court must determine whether Congress has unambiguously expressed its intent (step one).<sup>54</sup> If not, the court must defer to any interpretation that is reasonable in light of the statute, its history, and the canons of statutory construction (step two).<sup>55</sup> This approach resulted in a major transfer of interpretive authority to agencies.<sup>56</sup> Prior to *Chevron*, judicial interpretation was the default rule. Deference to administrative agencies required special justification, and the amount of deference was determined on a sliding scale.<sup>57</sup> Thus, *Chevron's* two-step framework was revolutionary—because once a reviewing court finds an ambiguity, it must automatically give maximum deference to the agency and accept any reasonable interpretation.<sup>58</sup>

The *Chevron* majority framed this rule in terms of an implicit

<sup>51</sup> See *id.* at 862.

<sup>52</sup> See *id.* at 863.

<sup>53</sup> Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006).

<sup>54</sup> *Chevron's* applicability may be limited according to certain "step zero" considerations, which are not discussed in this Comment. See *id.* at 207–22.

<sup>55</sup> *Chevron*, 467 U.S. at 845 (internal citations omitted) ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."). See also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992).

<sup>56</sup> See Merrill, *supra* note 55, at 977. The extent to which *Chevron* shifts the balance of interpretive authority away from courts is often limited in several ways. First, the application of step one has been described as "erratic" with some courts finding ambiguity far less often than others. See Case Comment, "How Clear Is Clear" In *Chevron's Step One?*, 118 HARV. L. REV. 1687, 1691–92 (2005). Second, the Supreme Court has limited the contexts in which *Chevron* applies at all. See Sunstein, *supra* note 53. This Comment discusses one of these limiting principles—the major questions canon.

<sup>57</sup> See Merrill, *supra* note 55, at 977.

<sup>58</sup> See *id.*



congressional delegation of authority to the executive. That is, *Chevron* relies on the assumption that by conferring authority to administer a statute to an agency, Congress implicitly delegates interpretive authority.<sup>59</sup> This rationale relies on a legal fiction, which assumes that a hypothetical reasonable legislator intended agencies rather than courts to resolve statutory ambiguities.<sup>60</sup> The majority's opinion in *Chevron* suggests two justifications for finding an implicit delegation. First, the majority notes that "the regulatory scheme is technical and complex" and suggests that Congress may have wanted agencies "with great expertise and charged with responsibility for administering the provision" to resolve any ambiguities.<sup>61</sup> Second, the majority notes that agency interpretations involve policy choices, which are more appropriately left to agencies because they, unlike the judiciary, are democratically accountable.<sup>62</sup>

The twin rationales for the *Chevron* framework inform the manner in which courts should apply the doctrine at step one. The task of determining whether a statute is ambiguous requires courts to apply, explicitly or implicitly, some standard of clarity.<sup>63</sup> In finding the appropriate standard, commentators have suggested that courts should be guided by the underlying justification for *Chevron* itself.<sup>64</sup> This makes sense, given that step one determines whether or not deference should apply. If the underlying justifications for deference are present, then a court should be more willing to find statutory ambiguity than it otherwise would be. Although courts may apply step one inconsistently in practice,<sup>65</sup> this Comment will assume that political accountability and agency expertise count in favor of finding ambiguity for the purposes of its analysis.

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<sup>59</sup> See *Chevron*, 467 U.S. at 844 ("[S]ometimes the legislative delegation to an agency . . . is implicit . . . . 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."); Merrill, *supra* note 55, at 995.

<sup>60</sup> See Sunstein, *supra* note 53, at 200; Abigail R. Moncreiff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 608–09 (2008). This has been referred to as the "delegation" theory of *Chevron*, which appears to be the prevailing theory of the case amongst the Justices on the Supreme Court. See Sunstein, *supra* note 53, at 198–99.

<sup>61</sup> *Chevron*, 467 U.S. at 865.

<sup>62</sup> See *id.* at 865–66; see also Sunstein, *supra* note 53, at 197.

<sup>63</sup> See Case Comment, *supra* note 56, at 1698.

<sup>64</sup> See *id.* at 1701–03.

<sup>65</sup> See *id.* at 1691–92.

*A. Chevron and the Major Questions Exception*

The implicit delegation rationale serves as the basis for the major questions canon, which has been invoked to invalidate agency interpretations that are analyzed under *Chevron*. Commentators view *FDA v. Brown & Williamson Tobacco Corp.* as the first mature expression of the doctrine.<sup>66</sup> At issue was the FDA's interpretation of the Federal Food, Drug, and Cosmetic Act (FDCA) to include tobacco products.<sup>67</sup> The majority rejected this interpretation, finding that it was inconsistent with the intent of Congress, as expressed via the FDCA's "overall regulatory scheme" and subsequent legislation involving tobacco.<sup>68</sup> More specifically, the majority found that the FDA's interpretation was not consistent with the term "safety" as it was used throughout the FDCA.<sup>69</sup> In addition, the majority determined that if tobacco products were subject to the FDCA, they would have to be banned according to the terms of the statute.<sup>70</sup> Yet, the majority reasoned, Congress "has foreclosed the removal of tobacco products from the market," insofar as it has "directly addressed the problem of tobacco and health through legislation on six occasions since 1965."<sup>71</sup> The majority interpreted these enactments as a ratification of the FDA's previous position that it lacked the jurisdiction to regulate tobacco,<sup>72</sup> and it concluded that Congress clearly intended to preclude the FDA from regulating tobacco products.<sup>73</sup>

*Brown & Williamson* is notable for the manner in which it deploys *Chevron* step one. At the outset, the majority indicated that it was invalidating the FDA's interpretation because it was inconsistent with the "unambiguously expressed intent of Congress."<sup>74</sup> This would seem to be a straightforward application of the first step; yet, towards the end of the opinion, the majority again addressed *Chevron*, this time discussing its applicability in general, noting that "in extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation."<sup>75</sup> To support this proposition the majority cited a passage from an essay authored by

<sup>66</sup> See Sunstein, *supra* note 53, at 240; Moncrieff, *supra* note 60, at 601.

<sup>67</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

<sup>68</sup> See *id.*

<sup>69</sup> See *id.* at 160.

<sup>70</sup> See *id.* at 137.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.* at 156.

<sup>73</sup> *Brown & Williamson*, 529 U.S. at 161.

<sup>74</sup> *Id.* at 125–26.

<sup>75</sup> *Id.* at 159.

Justice Breyer in 1986, a time when *Chevron*'s scope remained a topic of debate.<sup>76</sup> In that essay, then-Judge Breyer suggests the following: "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."<sup>77</sup> On this basis, the majority concluded: "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."<sup>78</sup>

Since *Brown & Williamson*, the Supreme Court has invoked the major questions canon on several occasions. Most recently, in *King v. Burwell*, the Court denied deference to the IRS' interpretation of the Affordable Care Act. That case involved an interpretation governing tax credits for individuals who purchased health care on a federal exchange, as opposed to an exchange established by one of the states.<sup>79</sup> Rather than apply *Chevron*, the majority held that because the tax credits involved "billions of dollars in spending each year" and affected "the price of health insurance for millions of people," the interpretive issue was a "question of deep economic and political significance."<sup>80</sup> Consequently, the majority concluded that it was "especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."<sup>81</sup>

In another recent case, *Utility Air Regulatory Group v. EPA (UARG)*, the majority stressed that the major questions canon was appropriate in the context of an expansion of agency authority that would have vast economic and political significance. In that case, the majority invalidated an EPA interpretation of the CAA's permitting requirements as applied to GHG emissions. The majority was concerned that forcing stationary sources to acquire permits on the basis of GHG emissions would result in an absurd expansion of the number of sources that would be subject to the program.<sup>82</sup> Specifically, it noted that under the EPA's interpretation, the agency could require permits for "the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide."<sup>83</sup>

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<sup>76</sup> See Sunstein, *supra* note 53, at 199.

<sup>77</sup> *Brown & Williamson*, 529 U.S. at 159.

<sup>78</sup> *Id.* at 160.

<sup>79</sup> *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

<sup>80</sup> *Id.* at 2489.

<sup>81</sup> *Id.*

<sup>82</sup> See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2428 (2014).

<sup>83</sup> *Id.* at 2444.

Consequently, citing *Brown & Williamson*, it concluded that the EPA's interpretation was unreasonable within the framework of *Chevron* step two because it would result in "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."<sup>84</sup>

Taken together, these cases illustrate several important features of the major questions canon. First, it appears to function as a broad exception to *Chevron*. In *Brown & Williamson*, the majority discussed the economic and political significance of the FDA's interpretation after it had concluded that the statute was unambiguous under *Chevron* step one.<sup>85</sup> In *UARG*, the majority invoked the major questions canon at step two, as a basis for concluding that the EPA's interpretation was unreasonable.<sup>86</sup> Finally, in *King*, the majority never embarks on a *Chevron* analysis and simply announces that the framework does not apply.<sup>87</sup> Consequently, the doctrine is not confined to any particular "step," but operates as a mechanism for denying deference on issues deemed sufficiently important.

But it is unclear why courts should assume interpretive authority over major questions. As several commentators have observed, the major questions canon lacks a persuasive justification in light of the two widely accepted justifications for *Chevron*—technical expertise and political accountability.<sup>88</sup> If, as *Chevron* suggests, courts should defer to agencies because they possess more technical expertise than judges and because policy decisions are best determined by politically accountable branches of government, then *Chevron* should apply to

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<sup>84</sup> *Id.*

<sup>85</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

<sup>86</sup> See *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 ("EPA's interpretation is also unreasonable because . . .").

<sup>87</sup> See *King*, 135 S. Ct. at 2488–89. There is debate as to whether the major questions canon should be interpreted as a discrete exception to *Chevron*. Some argue that *Brown & Williamson* should be interpreted as a *Chevron* step one case, with the implication being that "political and economic significance" is only relevant insofar as it suggests that Congress' intent is unambiguous. See Sunstein, *supra* note 53, at 247. Others interpret the major questions canon as a broad exception to *Chevron*. See Moncrieff, *supra* note 60, at 603. The difference may be more theoretical than practical. Under both analyses, an agency will not be entitled to deference when a reviewing court determines that a dispute involves a "major question," either because the statute is unambiguous or because *Chevron* does not apply. See Case Comment, *supra* note 55 (interpreting *Brown & Williamson* as a step one case and suggesting that courts adjust the standard of clarity at step one to deny deference to agencies when addressing a major question). In either case, the same fundamental problem of administering the doctrine remains, as there does not appear to be a metric for determining what constitutes a major question.

<sup>88</sup> See Sunstein, *supra* note 53, at 242–44; Moncrieff, *supra* note 60, at 606–16.

economically and politically significant issues as well. In *King*, the majority indicates that it is concerned with technical expertise, and its rationale for invoking the major questions canon is that the IRS is the wrong agency for determining health care policy.<sup>89</sup> But in *UARG*, the majority suggests a different rationale, which is that courts should assume interpretive authority when an agency attempts to enlarge its own jurisdiction.<sup>90</sup> But conceptualizing the major questions canon in terms of a rule against agency self-aggrandizement also lacks a compelling justification in light of *Chevron*. This is because agency interpretations that result in broader authority also involve technical expertise and political accountability. Thus, assuming that an agency's rulemaking was motivated purely out of a bad faith desire for increased power, it would still be subject to political forces that would force it to develop "compelling technical and political reasons for [its] decisions."<sup>91</sup>

Another problem with the major questions canon is that there is no criterion for administering the doctrine. In each major questions case, the Court simply relies on the phrase "economic and political significance" without explaining where the line is drawn. For instance, the *King* majority cites the fact that the ACA tax credits constituted "billions of dollars in spending" and affected "millions of people."<sup>92</sup> But what if it only involved millions in spending and affected thousands of people, would the major questions canon still apply? The Court leaves this question unanswered.<sup>93</sup> Moreover, the apparent source of the doctrine, Justice Breyer's essay, also fails to address the issue.<sup>94</sup> Breyer himself has indicated that he viewed "majorness" as one of several factors that would determine how much deference a court would apply.<sup>95</sup>

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<sup>89</sup> See *King*, 135 S. Ct. at 2489.

<sup>90</sup> See *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

<sup>91</sup> See Moncrieff, *supra* note 60, at 614 (arguing against a self-aggrandizing justification for the major questions canon).

<sup>92</sup> *King*, 135 S. Ct. at 2489.

<sup>93</sup> See Sunstein, *supra* note 53, at 243 (arguing that the major questions doctrine should not be applied as an exception to *Chevron* because there is no way to administer the distinction between interstitial and major questions and because agency expertise and political accountability are relevant to the resolution of major questions); Moncrieff, *supra* note 60, at 621 (noting that the major questions exception lacks "a workable rationale").

<sup>94</sup> See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–71 (1984).

<sup>95</sup> Moncrieff, *supra* note 60, at 611 n.72.

## IV. LEGAL CHALLENGES

This Comment addresses two arguments that are likely to figure prominently in the legal challenge against the CPP. First, a reviewing court will be forced to answer the threshold question of whether § 112 precludes regulation of existing sources under § 111(d). This will require judicial review of a longstanding drafting error, which will be an issue of first impression.<sup>96</sup> Second, recent decisions involving EPA interpretations of the CAA suggest that the “fenceline” issue will play a major role in a challenge before the Supreme Court, as at least four Justices have expressed concern over the breadth of EPA’s statutory authority to regulate air pollutants.<sup>97</sup> In addition, the EPA’s asserted authority to regulate beyond the fenceline constitutes the central premise of the CPP as well as an unprecedented expansion of regulatory power with respect to air pollution and GHG’s in particular. Consequently, the resolution of this issue will likely have a lasting impact on future EPA action under the CAA.

A. *The Drafting Error Argument*

In 1990, Congress amended the CAA and passed two different, potentially conflicting versions of § 111(d).<sup>98</sup> Prior to the 1990 amendments, § 111(d)(1) applied to “any air pollutant for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A).”<sup>99</sup> Consistent with § 111(d)’s role as a gap-filler for pollutants that were not covered by the criteria pollutant and HAP programs, this language was interpreted to exclude three categories of air pollutants: those for which air quality criteria have not been issued, those listed in § 108(a), and those listed in § 112(b)(1)(A).<sup>100</sup> In amending this provision in 1990, the Senate merely updated the cross-reference to reflect changes to § 112, substituting “§ 112” for “§ 112(b)(1)(A).”<sup>101</sup> Meanwhile the House version contains the language that currently appears in the U.S. Code:<sup>102</sup> “for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under [§

<sup>96</sup> See Nordhaus & Zevin, *supra* note 38, at 11095.

<sup>97</sup> See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>98</sup> See Nordhaus & Zevin, *supra* note 38, at 11098.

<sup>99</sup> Clean Air Amendments of 1970, Pub. L. No. 91-604, § 111(d)(1)(A), 81 Stat. 485, 1684 (1970).

<sup>100</sup> See Nordhaus & Zevin, *supra* note 38, at 11100.

<sup>101</sup> See *id.* at 11098.

<sup>102</sup> The Senate version is included in the Statutes at Large.

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108(a)] of this title *or emitted from a source category which is regulated under [§ 112] of this title.*"<sup>103</sup>

Opponents of the CPP argue that the House version precludes the EPA from regulating CO<sub>2</sub> emissions from power plants under § 111(d). On this view, the language of the House version is unambiguous, and by its plain meaning, § 111(d)(1) explicitly excludes pollutants regulated under § 108(a) as well as any air pollutant emitted from a source category regulated under § 112.<sup>104</sup> Opponents also argue that this interpretation is consistent with the 1990 amendments, which revised § 112 to authorize regulations according to source categories rather than pollutants.<sup>105</sup> As a result of this change, opponents contend that § 111(d)(1) was similarly amended to exclude § 112 source categories rather than pollutants, so as to avoid subjecting existing sources to simultaneous national and state-wide standards under §§ 112 and 111(d), respectively.<sup>106</sup> Because § 112 authorizes the Mercury and Air Toxics Standards, which apply to power plants, this reading of the House version would invalidate the CPP.<sup>107</sup>

In addition, proponents of this view argue that Congress never intended to pass the Senate version of § 111(d). In the absence of any legislative history clarifying the intended scope of the § 111(d) exception,<sup>108</sup> opponents of the CPP rely on the textual structure of the 1990 amendments. Accordingly, they note that the House version appears among several substantive changes to the Act, whereas the Senate version is included among a list of "clerical" changes under the heading "Conforming Amendments."<sup>109</sup> The Senate Legislative Drafting Manual stipulates that conforming amendments are "necessitated by the substantive amendments or provisions of the

<sup>103</sup> 42 U.S.C. § 7411(d)(1) (2012) (emphasis added).

<sup>104</sup> See *Murray Energy Petitioner's Brief*, *supra* note 22, at 15–18; Final Brief of the States of West Virginia, Alabama, Alaska, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, and Wyoming as Intervenor in Support of the Petitioner at 4, 6–12, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (Nos. 14-1112, 14-1151) [hereinafter *Murray Energy States' Brief*].

<sup>105</sup> See, e.g., *Coal Industry Stay Application*, *supra* note 22, at 13–15.

<sup>106</sup> See, e.g., *id.*

<sup>107</sup> See Nordhaus & Zevin, *supra* note 38, at 11098.

<sup>108</sup> See *id.* at 11103 ("[T]here is no obvious congressional purpose undergirding the dueling amendments. There are no floor statements or committee reports that directly answer the question of what Congress intended when amending § 111(d) in the 1990 CAA.").

<sup>109</sup> See *Murray Energy States' Brief*, *supra* note 104, at 7–8; *Murray Energy Petitioner's Brief*, *supra* note 22, at 30–31.

bill.”<sup>110</sup> Thus, the Senate version, which replaces “112(b)(1)(A)” with “112(b),”<sup>111</sup> corresponds with the need to update the cross-reference to § 112 in light of substantive amendments made to that section.<sup>112</sup> Yet, the House version also replaces this cross-reference, substituting “112(b)(1)(A)” with “or emitted from a source category which is regulated under section 112.”<sup>113</sup> In light of this conflict, opponents of the CPP argue that the Drafters intended to pass the House version because a conforming amendment would never be intended to qualify a substantive amendment.<sup>114</sup> Consequently, they argue that the Senate version was included in the final draft of the amendments by mistake and should not be given effect.<sup>115</sup>

Alternatively, opponents also argue that even if a court were to consider the Senate version, it should give effect to both provisions and interpret them to exclude—in addition to criteria pollutants—both any HAP emitted from any source and any air pollutant emitted from a source category regulated under § 112.<sup>116</sup> Opponents contend that principles of statutory construction require a court to give maximum effect to the language in each provision and that, therefore, this reading constitutes the only permissible interpretation of both provisions.<sup>117</sup> Moreover, proponents argue that because the 1990 amendments expanded the scope of § 112, this interpretation is consistent with the overall structure of the Act insofar as it narrows the gap covered by § 111(d).<sup>118</sup>

Unsurprisingly, the EPA rejects both of these arguments and takes

<sup>110</sup> United States Senate, Office of the Legislative Counsel, Legislative Drafting Manual § 126(b)(2)(A) (1997).

<sup>111</sup> Clean Air Act, Amendments, Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990); see *Murray Energy Petitioner's Brief*, *supra* note 22, at 30–31.

<sup>112</sup> See *Murray Energy States' Brief*, *supra* note 105, at 9.

<sup>113</sup> Clean Air Act, Amendments, Pub. L. No. 101-549, § 108, 104 Stat. 2399 (1990).

<sup>114</sup> See *Murray Energy Petitioner's Brief*, *supra* note 22, at 33. The entity responsible for preparing the U.S. Code, the House Office of the Law Revision Counsel, resolved this conflict by applying the amendments in the order in which they appear. See *id.* at 30–31 (noting that Congress and the House Office of the Law Revision Counsel have established a rule whereby an amendment will not be included in the U.S. Code if “a prior amendment in the same bill removes or alters the text that the subsequent amendment would amend”). Accordingly, because the cross-reference to § 112 had already been deleted by operation of the prior amendment containing the House version, the Senate version “could not be executed” and was not included in the U.S. Code. See *id.* (quoting the Office’s amendment note).

<sup>115</sup> See *Murray Energy States' Brief*, *supra* note 105, at 9–11.

<sup>116</sup> See *id.* at 14–15.

<sup>117</sup> See *id.* at 13.

<sup>118</sup> See Groten, *supra* note 22, at 10121 (noting that Congress completely rewrote § 112, adding a list of 188 HAPs to regulate).



the position that § 111(d) authorizes the regulation of CO<sub>2</sub> from power plants. Instead, the agency gives effect to both versions of the 1990 amendments, and construes them as having the same meaning within the context of the CPP.<sup>119</sup> Accordingly, the EPA argues that the Senate version is clear and unambiguous, and that its plain meaning excludes regulation of the pollutants listed in § 112.<sup>120</sup> With regard to the House version, the EPA argues that the language is ambiguous, and that in light of the CAA's history and structure, the only reasonable interpretation is that it excludes air pollutants listed in § 112 that are also emitted from source categories regulated under § 112.<sup>121</sup> On this reading, the § 111(d) exclusion does not preclude the CPP because CO<sub>2</sub> is not a HAP subject to § 112.<sup>122</sup>

Whereas opponents of the CPP assume that the House version's language is clear, the EPA's position suggests that it should be entitled to deference under *Chevron* step two.<sup>123</sup> To support this view, the EPA argues that the House version is susceptible to numerous interpretations.<sup>124</sup> To illustrate, recall that § 111(d)(1) provides as follows:

The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source for any air pollutant [clause 1] for which air quality criteria have not been issued or [clause 2] which is not included on a list published under [§ 108(a)] of this title or [clause 3] emitted from a source category which is regulated under [§ 112] of this title.<sup>125</sup>

Opponents of the CPP read the three clauses as simultaneous requirements, such that § 111(d) only applies to air pollutants that meet all three conditions. This reading imputes a conjunctive relationship between the three clauses, effectively replacing each “or” with an “and.” Yet, as the EPA and others have noted,<sup>126</sup> the disjunctive “or” that connects each clause supports a literal interpretation that allows the EPA to regulate any air pollutant when either air quality criteria have not been established for that pollutant, or the pollutant

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<sup>119</sup> See *Final Rule*, *supra* note 28, at 64715.

<sup>120</sup> See *id.* at 64712. This interpretation is not in dispute.

<sup>121</sup> See *id.* at 64714–15.

<sup>122</sup> See 42 U.S.C. § 7412 (2012).

<sup>123</sup> See *Final Rule*, *supra* note 28, at 64712.

<sup>124</sup> See *id.* at 64713.

<sup>125</sup> 42 U.S.C. § 7411(d)(1) (2012) (numbering added).

<sup>126</sup> See *Final Rule*, *supra* note 28, at 64713; Nordhaus & Zevin, *supra* note 38, at 11105.

is either not listed in § 108(a) or not emitted from a source category listed in § 112. On this reading, § 111(d) would authorize the EPA to regulate any air pollutant for which air quality criteria have not been issued, regardless of whether it is subject to regulation under § 112.<sup>127</sup>

The plain text of the House version also supports an interpretation that expressly *authorizes* the regulation of air pollutants that are emitted from a source category that is subject to § 112. Unlike the first two clauses, which are stated in the negative (“for which air quality criteria have *not* been issued . . . which is *not* on a list published under [§ 108(a)]”), the third clause is stated in the positive. Opponents of the CPP rely on an interpretation of the House version that implicitly repeats the negative from clause two, reading clause three as “*which is not* emitted from a source category which is regulated under § 112,” to conclude that § 111(d) prohibits rather than authorizes the regulation of pollutants emitted from § 112 source categories. But as the EPA points out, this interpretation relies on a presumption, not the plain text of the House version.<sup>128</sup>

Because the plain text of the House version supports multiple readings, the EPA argues that it is ambiguous.<sup>129</sup> Thus, in anticipation of *Chevron* step two, the EPA advances an interpretation that does not preclude the CPP, which the agency argues is reasonable in light of § 111(d)’s purpose as a gap-filler covering non-criteria, non-HAP pollutants. The EPA’s definition diverges from the plain text of the House version in the same manner as its opponents’ interpretation, construing the three clauses as conjunctives, and reading a negative “which is not” in to the third clause.<sup>130</sup> However, unlike its opponents, the EPA does not read the qualifying clause “emitted from a source category which is regulated under [§ 112]” as a broad exclusion of source categories listed under § 112 regardless of the pollutant subject to regulation under § 111(d).<sup>131</sup> Instead, the EPA argues that “regulated under [§ 112]” only refers to HAP emissions.<sup>132</sup> Therefore,

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<sup>127</sup> See *Final Rule*, *supra* note 28, at 64713. Because air quality criteria have not been issued for CO<sub>2</sub>, this interpretation would not preclude the CPP. See *id.* Nevertheless, the EPA rejects this interpretation as unreasonable because it would undermine § 111(d)’s historical purpose as a gap-filler by eliminating the relationship between § 111(d) and § 112 altogether. See *id.*

<sup>128</sup> See *Final Rule*, *supra* note 28, at 64713. The EPA also rejects this interpretation as unreasonable because it would allow for the regulation of HAPs that are already subject to § 112 regulations. See *id.*

<sup>129</sup> *Id.* at 64712–14.

<sup>130</sup> See *id.* at 64714.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

when “regulated under [§ 112]” modifies “source categories,”<sup>133</sup> it means that source categories listed under § 112 are excluded when the pollutant subject to § 111(d) regulation is also a HAP listed in § 112.<sup>134</sup> In this manner, the EPA reads the House version as a similar, but more narrow exclusion than the Senate version. Whereas the Senate version excludes pollutants that are listed under § 112, the EPA argues that the House version should be read to exclude § 112 pollutants emitted from § 112 source categories.<sup>135</sup>

The EPA argues that this reading is reasonable because it is consistent with the structure of the Act and Congress’s intent. First, the EPA notes that because “emitted from a source category which is regulated under [§ 112]” modifies “any air pollutant,” it makes more sense to interpret the clause as an exclusion of pollutants rather than source categories.<sup>136</sup> Second, the EPA argues that its interpretation is consistent with the structure of the CAA because it does not leave a regulatory gap for harmful pollutants that are not regulated under the criteria or HAP programs.<sup>137</sup> By contrast, the alternative interpretation adopted by the opponents of the CPP would prevent the EPA from regulating harmful non-criteria, non-HAP pollutants emitted from a source category that is subject to regulation under § 112.<sup>138</sup> But, the EPA argues, there is no evidence to suggest that Congress intended to narrow § 111(d) coverage when it passed the 1990 amendments.<sup>139</sup> Finally, because the EPA recognizes both versions of § 111(d), it argues that its interpretation of the House version is reasonable because it is consistent with the Senate version.<sup>140</sup>

#### B. *Resolving the Drafting Error Argument*

Ultimately, because the dispute involves an agency’s interpretation of a statute, the drafting error issue hinges on a court’s application of *Chevron*. If a reviewing court determines that Congress did not intend to pass the Senate amendment to § 111(d), it will still have to determine whether the House version is ambiguous, as the EPA argues. Otherwise, a court may determine that it must give effect to

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<sup>133</sup> 42 U.S.C. § 7411 (2012).

<sup>134</sup> See *Final Rule*, *supra* note 28, at 64713–14.

<sup>135</sup> See *id.* at 64714.

<sup>136</sup> See *id.* at 64715.

<sup>137</sup> See *id.*

<sup>138</sup> See Memorandum for the Federal Respondents in Opposition at 26, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (No. 15A773) (noting that § 112 lists 140 source categories).

<sup>139</sup> See *Final Rule*, *supra* note 28, at 64715.

<sup>140</sup> See *id.*

both versions.<sup>141</sup> In this event, opponents of the CPP argue that the Senate version should be ‘added’ to their interpretation of the House version to create a broader exclusion that combines the two provisions. On the other hand, the EPA argues that the two versions are consistent with one another. Consequently, to address each side’s arguments, a reviewing court will have to resolve the meaning of the House version regardless of whether it decides to give effect to the Senate version.

### 1. The House Amendment is Ambiguous

A reviewing court should find that the House version of § 111(d) is ambiguous. First, as the EPA points out, the most natural reading of the text does not make sense in light of the statute’s purpose as a gap-filler. Because the natural reading of the word “or” results in a series of disjunctive conditions, the text of the House amendment suggests that § 111(d) applies to any pollutant for which air quality criteria have not been established or which is either not listed in § 108(a) or not emitted from a source category listed in § 112. Yet this construction conflicts with the purpose of the exclusion, as both sides agree that § 111(d) was intended to cover the regulatory gaps between §§ 108 and 112 without overlapping with those programs.<sup>142</sup> If “or” is allowed to have its natural meaning, then the House version of § 111(d) would allow overlapping regulations of pollutants covered by § 108(a) (if either air quality criteria have not been established, or if the pollutant is not emitted by a § 112 source category), as well as pollutants emitted from a source category listed in § 112 (if either air quality criteria have not been established, or if the pollutant is not listed in § 108(a)).

In addition to finding textual evidence of ambiguity, a court should also analyze the step one issue in terms of institutional choice. In this regard, the court must consider whether it makes sense to assume that a rational legislator would have intended the EPA to have interpretive authority over the CAA. Of course, *Chevron* itself answers this question to some extent. As the Court recognized in that case, the EPA should be entitled to deference when interpreting a complex

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<sup>141</sup> See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014). A majority applied *Chevron* to a statute that contained two conflicting provisions, and three Justices concluded that in cases of direct conflict, *Chevron* does not apply. *Id.* To the extent that a court interprets the House and Senate amendments as being in direct conflict, *Scialabba* suggests that *Chevron* would apply to an interpretation that gives effect to both. *Id.* Nevertheless, as the EPA’s argument demonstrates, the two provisions are not necessarily in conflict, depending on how the House version is interpreted.

<sup>142</sup> See *Final Rule*, *supra* note 28, at 64715; *Murray Energy Petitioner’s Brief*, *supra* note 22, at 21–29.

statute within its area of expertise.<sup>143</sup> More specifically, the Court has already recognized the EPA as an “expert agency” with regard to the regulation of greenhouse gas emissions.<sup>144</sup> Moreover, although the EPA is an independent agency,<sup>145</sup> the CPP is clearly an example of executive branch policymaking, in that it was promulgated at the president’s request. Thus, the EPA’s attendant interpretations of the CAA reflect policy choices that were made by a politically accountable branch of government. On the bases of agency expertise and political accountability, a reviewing court’s standard of clarity should be relatively stringent, in favor of deference. Therefore, given the textual difficulties inherent in the House version of § 111(d), as well as the rationale for deference under *Chevron*, a reviewing court should conclude that § 111(d) is ambiguous and analyze the EPA’s interpretation under *Chevron* step two.

Alternatively, it is possible that a reviewing court will apply *Chevron* in a manner that recognizes the dueling amendments at the outset, rather than proceeding to analyze the House amendment for ambiguity first. In this case, the analysis at step one is more straightforward: the mere fact that the 1990 amendments included two potentially conflicting versions of the same statutory text is itself sufficient evidence that Congress failed to speak clearly on the issue. Thus, by giving effect to the Senate version, a reviewing court should recognize that the inconsistencies between the two versions create ambiguity.

This possibility presupposes a court’s willingness to recognize the Senate version, something to which the CPP’s opponents strenuously object.<sup>146</sup> But, it is settled law that when the two conflict, the Statutes at Large take precedence over the U.S. Code.<sup>147</sup> Moreover, opponents of the CPP have no basis for assuming that the Senate did not intend to pass their version of § 111(d) simply because it inserted the updated cross-reference as a conforming amendment following the House version.<sup>148</sup> Consequently, there is no reason why a court should ignore

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<sup>143</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

<sup>144</sup> *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011).

<sup>145</sup> Case Comment, *supra* note 56, at 1701 (noting Justice Kagan’s position that less deference should be accorded for independent agencies on the political accountability justification of the *Chevron* doctrine).

<sup>146</sup> *See discussion supra* notes 108–15.

<sup>147</sup> *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943)) (“[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent.”).

<sup>148</sup> *See Nordhaus & Zevin, supra* note 38, at 11100.

the Senate version.

2. The EPA's Interpretation of the House Amendment is Reasonable

Assuming a reviewing court gets to step two, it should find that the EPA's interpretation of the House amendment to § 111(d) is reasonable. First, the agency's reading is faithful to the exclusion's pre-1990 purpose. That is, unlike the competing interpretation, which would create a wholesale exclusion for specific source categories, it would limit § 111(d)'s applicability to non-criteria and non-HAP pollutants. Thus, the EPA's interpretation avoids creating a new regulatory gap with regard to non-criteria, non-HAP pollutants when they are emitted from source categories listed under § 112. Second, this reading reconciles the House and Senate versions and avoids creating a conflict within the statute. In this regard, the EPA's interpretation is consistent with the canons of statutory construction.<sup>149</sup>

Assuming a reviewing court agrees with this analysis, it will affirm the statutory predicate for the CAA, allowing the EPA to regulate CO<sub>2</sub> emissions from power plants under § 111(d). Nevertheless, having cleared this threshold issue, the rule faces a second compelling challenge—this time, against the scope of the EPA's statutory authority to regulate CO<sub>2</sub> emissions under § 111(d).

C. *The Fenceline Issue*

In order to implement building blocks two and three and regulate beyond the fenceline, the EPA relies on an interpretation of “standard of performance” that encompasses the entire energy grid, rather than each individual power-generating facility.<sup>150</sup> According to § 111(a), a standard of performance “reflects the degree of emission limitation achievable through the application of the best system of emission reduction.”<sup>151</sup> Because the Act does not define “system,” the EPA has adopted an interpretation based on the plain meaning of the term, defining it as “a set of things or parts forming a complex whole.”<sup>152</sup> Accordingly, the EPA defines “system of emission reduction” as “a set of measures that work together to reduce emissions.”<sup>153</sup>

<sup>149</sup> See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2217 (2014) (Sotomayor, J., dissenting) (internal citations omitted) (noting that the Court has a duty “to fit, if possible, all parts of a statute into a harmonious whole”).

<sup>150</sup> *Final Rule*, *supra* note 28, at 64762.

<sup>151</sup> 42 U.S.C. § 7411(a)(1) (2012).

<sup>152</sup> *Final Rule*, *supra* note 28, at 64762.

<sup>153</sup> *Id.*

In addition, under § 111(d)(1), a standard of performance applies for “any existing source.”<sup>154</sup> Section 111(a) defines an existing source as any existing “building, structure, facility, or installation which emits or may emit any air pollutant.”<sup>155</sup> For the purposes of the CPP, the EPA interprets “source” to include the owners and operators of any “building, structure, facility, or installation for which a standard of performance is applicable.”<sup>156</sup> Consequently, the EPA interprets a “system of emission reduction” as a series of measures that power plant owners and operators may implement to meet the emissions limits set by the CPP.<sup>157</sup>

The immediate consequence of the EPA’s interpretation of § 111 is that the CPP’s emissions standards are not limited by what is achievable through on-site improvements. As a result, the EPA’s calculation of achievable emissions reductions anticipates measures outside of the fenceline, such as investments in renewable energy and natural gas and purchases of emissions credits.<sup>158</sup> In fact, the EPA concedes that no pollution control technique or process can be installed at an existing coal-fired plant to achieve the CPP’s emissions standards.<sup>159</sup> Thus, the CPP will essentially force a reduction in fossil-fuel-fired power and transform the nation’s energy mix, reducing the amount of coal-fired power from forty-one percent of the nation’s energy supply to twenty-seven percent by 2030, with natural gas and renewables making up the difference.<sup>160</sup>

Opponents of the CPP argue that the EPA lacks the authority to regulate beyond the fenceline for two reasons. First, they argue that the language and structure of § 111 unambiguously precludes the EPA’s interpretation. Second, opponents argue that because of the scope of the mandated reductions in coal-fired power output, the CPP invokes a major question of vast “economic and political significance” without clear authorization from Congress.<sup>161</sup>

The first argument focuses on the EPA’s conflation of sources with their owners and operators. Section 111 defines the term “owner or operator” separately from “existing source” and “stationary

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<sup>154</sup> § 7411(d)(1).

<sup>155</sup> See §§ 7411(a)(3), (6).

<sup>156</sup> *Final Rule*, *supra* note 28, at 64762.

<sup>157</sup> See *id.*

<sup>158</sup> *Id.* at 64726.

<sup>159</sup> *Utilities’ Stay Application*, *supra* note 22, at 6.

<sup>160</sup> See *id.* at 7.

<sup>161</sup> *Business Associations’ Stay Application*, *supra* note 23, at 16–17.

source.”<sup>162</sup> Moreover, § 111(d) explicitly authorizes performance standards “for any existing source,” making no mention of a source’s owners or operators.<sup>163</sup> The Act further distinguishes between sources and their owners and operators in § 111(e), which provides that “it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.”<sup>164</sup> Thus, opponents of the CPP argue that the EPA’s interpretation conflicts with the unambiguous meaning of the statute because Congress intended to classify sources and their owners and operators separately, by providing those terms with distinct meanings and addressing each separately in various provisions of § 111.<sup>165</sup>

The second argument against the EPA’s attempts to regulate beyond the fenceline invokes the “major questions” canon. Challengers assert that the CPP constitutes a radical and unprecedented expansion of the EPA’s authority into an area where it lacks expertise, transforming the agency into an energy regulator intent on reconfiguring the nation’s energy supply.<sup>166</sup> Consequently, invoking *King* and *UARG*, they argue that the CPP involves a major question of economic and political significance, and that the EPA has acted without a clear Congressional mandate, thereby overstepping the bounds of its authority under § 111.<sup>167</sup>

For its part, the EPA maintains that Congress did speak clearly when it authorized the agency to determine the “best system of emission reduction” for existing sources.<sup>168</sup> According to the EPA, the expansive plain meaning of “system” encompasses the beyond-the-fenceline measures implicated in building blocks two and three.<sup>169</sup> Furthermore, the EPA maintains that its interpretation is reasonable because on-site improvements would either be too expensive or ineffective in curbing CO<sub>2</sub> emissions.<sup>170</sup> Finally, the EPA points out that power plants already rely on generation-shifting and other off-site

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<sup>162</sup> See 42 U.S.C. § 7411(a)(5) (2012) (defining “owner or operator” as “any person who owns, leases, operates, controls, or supervises a stationary source”).

<sup>163</sup> § 7411(d).

<sup>164</sup> § 7411(e).

<sup>165</sup> See, e.g., *Business Associations’ Stay Application*, *supra* note 23, at 9–11.

<sup>166</sup> See *id.* at 16–18.

<sup>167</sup> See *id.*

<sup>168</sup> See Memorandum for the Federal Respondents in Opposition, *supra* note 138, at 34.

<sup>169</sup> See *id.* at 35. The EPA adopts the dictionary definition of “system,” as a “set of connected things or parts forming a complex whole.” *Id.*

<sup>170</sup> See *id.* at 37–38.



measures to comply with existing CAA regulations that regulate beyond the fenceline.<sup>171</sup>

In addition, the EPA argues that it is reasonable to include owners and operators within the definition of “source” out of practical necessity. This is because pollution control strategies must always be carried out by a plant’s owner or operator, regardless of whether they occur within the boundaries of the physical plant.<sup>172</sup> Thus, the agency argues, just like any other pollution-control efforts, generation-shifting measures must be implemented by owners and operators of the affected source.

#### D. Resolving the Fenceline Issue

Once again, both of the arguments marshalled by challengers to the CPP against the EPA’s authority to regulate beyond the fenceline implicate the *Chevron* doctrine. The textual argument against conflating sources with their owners or operators implicitly relies on *Chevron* step one, because it asserts that the EPA’s interpretation is contrary to the unambiguous meaning of § 111. Similarly, by invoking the major questions canon and the EPA’s lack of expertise in energy regulation, opponents of the CPP seek to disqualify an interpretation of § 111 that would allow measures implemented outside of the physical boundaries of an affected power plant.<sup>173</sup> Curiously, unlike its response to the drafting error argument, the EPA does not explicitly argue that the relevant provisions of the Act are ambiguous.<sup>174</sup> This suggests that the EPA is staking its claim at *Chevron* step one and implicitly asserting that building blocks two and three are consistent with the unambiguous meaning of the Act. It is possible that a reviewing court will accept this view and resolve the fenceline issue at step one; however, the scope of “best system of emission reduction” has never been analyzed under *Chevron*.<sup>175</sup> It is not inconceivable that a

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<sup>171</sup> See *id.* at 40 (referring to the acid rain program implemented as part of the 1990 amendments to the CAA). The acid rain program contemplated generation-shifting and emissions credits trading. See also Legal Memorandum Accompanying Clean Power Plan for Certain Issues, 88–91; Memorandum for the Federal Respondents in Opposition, *supra* note 138, at 43 (referring to sulfur emissions standards promulgated under § 111(b), for which the EPA determined that the “best system” would take into account third-party off-site fuel cleaning).

<sup>172</sup> See Memorandum for the Federal Respondents in Opposition, *supra* note 138, at 44 (internal citations omitted) (arguing that “buildings, structures, facilities, and installations, obviously are incapable of taking such steps on their own”).

<sup>173</sup> See *Business Associations’ Stay Application*, *supra* note 23, at 16–17.

<sup>174</sup> See Memorandum for the Federal Respondents in Opposition, *supra* note 138, at 34–38.

<sup>175</sup> See Freeman, *supra* note 32, at 12.

court will find the term ambiguous and analyze the fenceline issue under *Chevron* step two.<sup>176</sup> If this were to happen, the EPA might still lose a legal challenge despite being able to demonstrate the reasonableness of its interpretations, if challengers can convince the court that building blocks two and three raise a “major question” of economic and political significance without clear Congressional authorization.

1. The Plain Meaning of “Best System of Emission Reduction” Permits Regulating Beyond the Fenceline

Within the context of § 111, the meaning of “best system” is less nebulous than it appears on its own. For instance, the Act provides that the EPA must evaluate the costs, non-air-pollution-related health and environmental impacts, and energy requirements of any proposed emissions standard to determine whether it is “best.”<sup>177</sup> Moreover, § 111(a)(1) stipulates that the “best system” must be “adequately demonstrated” and “achievable.”<sup>178</sup>

Within this framework, emissions reduction strategies such as generation-shifting and emissions credit trading make sense for a number of reasons. First, the CPP’s emissions targets meet the statutory criteria for “best.” Greater reliance on natural gas and renewables will not have a net negative impact on public health or the environment.<sup>179</sup> In addition, the EPA concluded that limiting the performance standard to what is achievable through on-site improvements would either be too costly or ineffective.<sup>180</sup> By regulating beyond the fenceline, the EPA aims to reduce the energy sector’s CO<sub>2</sub> emissions by sixteen percent, at a cost that does not exceed prior rules promulgated for power plants under the Act.<sup>181</sup> In addition, the EPA determined that there was sufficient unused natural gas and renewable generation capacity, such that generation-shifting

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<sup>176</sup> See *id.* at 13 (noting that a reviewing court might find “best system” ambiguous); Carlson & Herzog, *supra* note 16, at 35 (predicting that a reviewing court will analyze the fenceline issue at step two).

<sup>177</sup> See 42 U.S.C. § 7411(a)(1) (2012) (“[T]aking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.”).

<sup>178</sup> *Id.*

<sup>179</sup> See *Final Rule*, *supra* note 28, at 64721 (noting that the D.C. Circuit has interpreted “best” to mean that a rule must not do more harm than good in terms of public health and the environment); *id.* at 64751 (concluding that no combination of the building blocks will result in negative non-air health and environmental impacts).

<sup>180</sup> See *id.* at 64751.

<sup>181</sup> See Memorandum for the Federal Respondents in Opposition, *supra* note 138, at 39.

would not negatively impact the energy supply.<sup>182</sup> Second, the EPA found that the displacement of coal and other fossil fuels in favor of natural gas and renewables was “achievable” in light of the available capacity and prevailing trend towards greater reliance on natural gas and renewables within the industry.<sup>183</sup> Finally, the EPA concluded that building blocks two and three are “adequately demonstrated” because power plants currently have the capacity to invest in alternative fuel sources in order to reduce emissions,<sup>184</sup> if they do not do so already.<sup>185</sup> Thus, a court should find that the pollution-reduction measures anticipated by the three building blocks are authorized under the plain meaning of “best system of emission reduction,” as that term is used in § 111.

In addition, the conflation of sources with their owners and operators does not violate the meaning of § 111. Instead, the EPA has merely recognized the practical reality that inanimate “stationary sources”—as that term is defined in § 111(a)—are incapable of actually implementing *any* type of pollution control measure themselves, whether it be inside or outside the fenceline. Thus, although challengers are correct to note the manner in which the statute distinguishes “owners and operators” and “source,” their argument is ultimately specious; any emissions standard promulgated under § 111 necessarily relies on actions taken by source owners and operators for compliance. This is why § 111(e) holds owners and operators responsible for implementing the standards formulated under § 111(d).

## 2. Building Blocks Two and Three Are Reasonable in Light of Congressional Intent and Past Rulemaking

Assuming that a court finds the phrase “best system of emission reduction” ambiguous, it should affirm building blocks two and three because they are consistent with congressional intent and prior regulations under the Act. When Congress amended the CAA in 1977,

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<sup>182</sup> See *id.* at 38.

<sup>183</sup> See *id.* at 38–39.

<sup>184</sup> See *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973) (defining an “adequately demonstrated system” as one that can “reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way”); *Final Rule*, *supra* note 28, at 64746–47 (describing how power plant owners can invest in natural gas burning and renewable sources to offset CO<sub>2</sub> emissions from fossil-fuel burning sites).

<sup>185</sup> See Memorandum for the Federal Respondents in Opposition, *supra* note 138, at 40 (noting that some state programs already rely on generation shifting to reduce CO<sub>2</sub> emissions).

it explicitly recognized that regulations promulgated under § 111 would impact the energy sector.<sup>186</sup> This trend has continued, as the 1990 amendments added the HAPs provisions to the CAA, imposing emissions standards on both new and existing electric generating units.<sup>187</sup> Congress therefore anticipated that pollution reduction would affect energy production when it drafted the CAA.

Moreover, Congress has previously authorized beyond the fenceline measures within the CAA. To address acid rain, the 1990 amendments established a cap-and-trade program for sulfur dioxide emissions from fossil fuel-fired sources and encouraged substitution of renewable sources.<sup>188</sup> When it revised § 111(a)(1) in 1977, Congress specifically provided that the precursor to the phrase “best system of emission reduction”<sup>189</sup> should be broad enough to permit the EPA to require fuel treatment that was typically conducted offsite by third parties.<sup>190</sup> Although Congress updated § 111(a)(1) in 1990, it expanded the definition of “standards of performance.”<sup>191</sup> Consequently, it is reasonable to assume that Congress intends § 111(d) standards of performance to allow beyond the fenceline measures, including acts by third parties.

Finally, the Supreme Court has also acknowledged the reasonableness of certain beyond the fenceline measures in the air pollution context. In *E.P.A. v. EME Homer*, the Supreme Court recently affirmed the EPA’s interpretation of the Transport Rule—a provision of the CAA that regulates “downwind” emissions between states—

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<sup>186</sup> See *Sierra Club v. Costle*, 657 F.2d 298, 331 (D.C. Cir. 1981) (noting that the Senate and House Reports indicated that Congress was using “a long-term lens with a broad focus on . . . environmental and energy effects of different technological systems when it discussed section 111”). The focus on the energy impacts of pollution control was also apparent in the 1977 amendments to the criteria pollutant program, which shares the same federal-state implementation framework as § 111. See 42 U.S.C. § 7409(d)(2) (2012) (providing for the appointment of an “independent scientific review committee” to, *inter alia*, advise on the “energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards”).

<sup>187</sup> See 42 U.S.C. § 7412(b), (d)(2)-(3) (2012).

<sup>188</sup> See 42 U.S.C. § 7651(b) (2012).

<sup>189</sup> The 1977 amendments defined “standard of performance” in terms of a “technological system of continuous emission reduction.” See *Final Rule*, *supra* note 28, at 64765–66. The pre-1977 language (“best system of emission reduction”) was restored pursuant to the 1990 amendments. *Id.*

<sup>190</sup> See H.R. Rep. No. 95-294, at 188 (1977).

<sup>191</sup> See *Final Rule*, *supra* note 28, at 64701–02 (explaining the distinction between “technological system of continuous emission reduction” and “best system of emission reduction”).

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which provided for an emissions credit trading system.<sup>192</sup> Applying *Chevron*, a six-Justice majority found that the CAA's Transport Rule failed to specify how the EPA should divide responsibility for nonattainment of emissions standards in downwind states between multiple upwind polluters.<sup>193</sup> The majority deferred to the EPA's solution, which it found efficient and equitable, and therefore reasonable.<sup>194</sup>

In light of the history of the CAA and past rulemakings, a reviewing court should not find the EPA's interpretation of § 111 unreasonable merely because it calls for outside the fenceline measures or relies on the actions of third parties. Nevertheless, at this stage of the analysis, the reasonableness of the EPA's interpretation of "best system of emission reduction" remains an open question, as the major questions canon looms as a general exception to deference that can be invoked at step one or two.

### 3. The Fenceline Issue Does Not Raise a Major Question of Economic and Political Significance

Even if a court decides that it is reasonable to interpret § 111(d) as authorizing regulations that rely on actions taken outside the fenceline, it could still invalidate the CPP on the grounds that the extent of the mandated displacement of fossil fuel-fired power is sufficient to raise a "major question." However, the problem with any analysis of a potential "major question" is that no court has ever explained where the line is drawn, in terms of economic and political significance, between so-called "major questions" and reasonable interpretation. Yet if precedent is any guide, the CPP should not be considered a major question. In *Brown & Williamson*, the Court decided that a ban on all tobacco products was sufficiently "major."<sup>195</sup> The major question in *Burwell* involved billions of dollars and affected the health insurance policies of millions of Americans.<sup>196</sup> Finally, in *UARG*, the Court invoked the doctrine to invalidate an interpretation that would have brought millions of new sources under the Title V permitting program, placing a huge administrative burden on both the EPA and businesses that are not typically considered sources of air pollution.<sup>197</sup> The CPP is clearly distinguishable from each of these

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<sup>192</sup> See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1597 n.10 (2014).

<sup>193</sup> See *id.* at 1604.

<sup>194</sup> See *id.* at 1607.

<sup>195</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

<sup>196</sup> *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

<sup>197</sup> *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

situations. First, the Rule predominantly impacts a small sector of the U.S. economy, the coal industry. Unlike *Burwell*, other than reducing air pollution, the CPP will not make a noticeable difference in the lives of the vast majority of Americans.<sup>198</sup> Second, unlike *Brown & Williamson*, the regulation does not result in a total ban on any product or process; it simply incentivizes a reduction in coal power. Third, building blocks two and three really only apply to fossil-fuel fired power plants, a substantially smaller number of sources nationwide than was at issue in *UARG*.<sup>199</sup> Finally, it is likely that the energy sector would have responded to the CPP by substituting natural gas and renewables for fossil fuel sources even if those measures had not been suggested in building blocks two and three. This is because the mandated reductions in fossil-fuel-fired power are consistent with industry trends favoring increased reliance on natural gas and renewable energy,<sup>200</sup> and because displacement of fossil fuels represents the most cost-effective means of achieving reductions in CO<sub>2</sub>. Thus, it is difficult to conclude that the CPP represents a major disruption of the energy sector, as many challengers suggest.

Moreover, to the extent that CPP does meet the criteria for a “major question,” as the preceding analysis outlines, there is strong evidence that § 111(d) represents clear Congressional authorization for the offsite measures contemplated by the CPP. This is because the history of the Act, the legislative record, past rulemakings, and even past instances of deference to the EPA all point to the fact that the CAA, and § 111 in particular, authorizes beyond the fenceline measures, at least to some degree. In this respect, the situation is the complete opposite as that of *Brown & Williamson*, in which Congress had repeatedly acted under the assumption that the FDA could not regulate tobacco products.

Challengers’ arguments also fail with regard to the issue of agency expertise. The Court has repeatedly indicated that it views the EPA as

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<sup>198</sup> The EPA studied the possible consequences for energy availability, reliability, and price, and concluded that the CPP would not have a negative effect on consumers. See *Final Rule*, *supra* note 28, at 64663.

<sup>199</sup> See EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE 2–7 (2015), <http://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf> (indicating that there are only 1257 coal-fired power plants in service nationwide).

<sup>200</sup> See Memorandum for the Federal Respondents in Opposition, *supra* note 138, at 39 (noting that coal-fired electricity fell from fifty percent to thirty-nine percent of total energy production between 2004 and 2014, while over the same period the reliance on natural gas and renewables increased from eighteen percent to twenty-seven percent and nine percent to fourteen percent, respectively).

an expert agency with regard to the CAA and air pollution.<sup>201</sup> Although opponents of the CPP argue that the EPA is overstepping its authority and deputizing itself as an energy regulator, they fail to address the fact that Congress acknowledged the relationship between air pollution controls and the energy industry when it drafted other provisions of the CAA. Thus, the argument that the major questions canon should be invoked to deny deference to the EPA because it lacks sufficient expertise to administer the CPP is unpersuasive.

## V. CONCLUSION

No discussion of the imminent legal challenge to the CPP can afford to ignore the exigencies of the moment. When the final rule was published, many thought that the rule's fate would likely rest in the hands of Justice Kennedy, as the swing vote in a 5-4 decision.<sup>202</sup> Perhaps no one expected that the Court would grant a stay, much less that Justice Scalia would pass away within weeks of that unprecedented decision. At the time the stay was granted, headlines suggested that the CPP was in serious trouble,<sup>203</sup> although no one could say exactly why; the Court's stay order contained no reasoning, but simply indicated that the four "liberal" Justices had voted against it. Now, following Scalia's demise, there is a chance that the political obfuscation surrounding the nomination process will have the ironic effect of ensuring that the Court cannot strike the rule.<sup>204</sup> Right now, litigation is proceeding on an expedited schedule, and the United States Court of Appeals for the District of Columbia Circuit will hear the case in early June.<sup>205</sup> If Republicans prevent an Obama nominee from reaching the bench, there is a chance that an evenly divided Supreme Court will decide the challenge. Thus, there is a possibility that the same Republican obstructionism that bore the rule may ensure that it survives.

As for the actual legal analysis of the case, this Comment has

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<sup>201</sup> *Chevron* itself being an example of the Court's willingness to defer to the EPA's interpretations of the CAA. See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011) (identifying the EPA as an "expert agency" with regard to the administration of the CAA).

<sup>202</sup> See John Siciliano, *Justice Kennedy Will Decide the EPA Climate Plan's Fate*, WASH. EXAMINER (OCT. 30, 2015, 7:50 PM), <http://www.washingtonexaminer.com/justice-kennedy-will-decide-the-epa-climate-plans-fate/article/2575374>.

<sup>203</sup> See Coral Davenport, *Supreme Court's Blow to Emissions Efforts May Imperil Paris Climate Accord*, N.Y. TIMES (Feb. 10, 2016), <http://www.nytimes.com/2016/02/11/us/politics/carbon-emissions-paris-climate-accord.html>.

<sup>204</sup> See Robin Bravender, *Scalia's Death 'Puts All the Action' in D.C. Circuit*, E&E PUB. (Feb. 19, 2016), <http://www.eenews.net/stories/1060032665>.

<sup>205</sup> See *id.*

outlined two issues of first impression that constitute the bulk of challengers' arguments against the rule. As the preceding analysis suggests, the EPA can adduce persuasive arguments in its favor. Accordingly, the CPP should not be precluded by the House version of § 111(d), regardless of whether a court decides to give effect to the Senate version. In addition, § 111(d) should be interpreted to allow generation-shifting as well as other measures taken beyond the fenceline, as such measures are generally recognized by all three branches of government as viable, efficient means of reducing air pollution. Finally, the CPP does not warrant invalidation under the major questions canon because it is not sufficiently disruptive in light of precedent, because it is consistent with Congress' vision of the CAA, and because the EPA is the expert agency tasked with regulating air pollution pursuant to the Act. For these reasons, a reviewing court, namely the D.C. Circuit Court, should uphold the rule.