

LSU Journal of Energy Law and Resources

Volume 4 | Issue 2
Spring 2016

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Repository Citation

Nick Kunkel, *Changing Climate and Changing Doctrine: How Greenhouse Gases Have Polluted the EPA's Clean Air Act Authority and How to Clean it up*, 4 LSU J. of Energy L. & Resources (2016)
Available at: <http://digitalcommons.law.lsu.edu/jelr/vol4/iss2/13>

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Changing Climate and Changing Doctrine: How Greenhouse Gases Have Polluted the EPA's Clean Air Act Authority and How to Clean it up

INTRODUCTION

Discussion of climate change—or global warming, or whatever other headline-grabbing brand-name it has most recently been given—seems almost omnipresent in recent years. The pervasiveness of the issue is not without good reason: According to a recent report issued by the American Association for the Advancement of Science, overwhelming evidence substantiates not only the occurrence of human-caused climate change, but that the that the levels of greenhouse gases (GHGs) currently in the atmosphere and being emitted are *already* having calamitous effects—including the increased spread of infectious diseases and escalated incidence and magnitude of droughts, floods, heat waves, and severe storms.¹ It is no wonder, then, that in the past several years the Obama Administration and the Environmental Protection Agency (EPA or “the Agency”) made a number of forceful efforts to combat these alarming realities.²

The EPA's role in fighting climate change, however, is still in its relative infancy. Although the Clean Air Act (CAA or “the Act”)³—the statute from which the EPA gathers its authority to regulate air pollution—was enacted in 1963, it was not until far more recently that the Agency viewed the Act as a vehicle for dealing with the issue of climate change. Specifically, it was the Supreme Court's landmark 2007 decision in *Massachusetts v. EPA*⁴ that opened—and shoved the EPA through—the door for climate change regulation under the CAA. *Massachusetts*, which centered on interpretation of the CAA term “any air pollutant,”⁵ is a consequential decision not merely because it allows for more aggressive EPA action in response to climate change, but also because it raises a wide range of difficult interpretive questions regarding the EPA's regulatory authority under the statute.

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1. *What We Know: The Reality, Risks, and Response to Climate Change*, AM. ASS'N FOR THE ADVANCEMENT OF SCI. (2014).

2. See, e.g., Barack Obama, *Presidential Memorandum – Power Sector Carbon Pollution Standards*, THE WHITE HOUSE (June, 25, 2013); <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards> [<https://perma.cc/424Y-E9VD>].

3. See generally Clean Air Act, 42 U.S.C. §§ 7401–7671 (2012).

4. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

5. See Clean Air Act, 42 U.S.C. § 7521(a)(1).

In particular, the *Massachusetts* Court's treatment of the term "any air pollutant," when coupled with the circumstances surrounding the most recent amendments to the CAA and the significant need for timely climate change regulation, leaves the extent of the EPA's CAA authority largely uncertain. This uncertainty has manifested in the form of two recently decided and seemingly inapposite Supreme Court cases: *EPA v. EME Homer City Generation, L.P.*⁶ and *Utility Air Regulatory Group v. EPA.*⁷ In both of these cases, the Court assessed EPA constructions of the CAA under the familiar framework of *Chevron U.S.A. Inc. v. NRDC*,⁸ appearing to produce equitable results in each instance. Nevertheless, the Court's opinions in each case differed drastically as to the level of deference afforded to the EPA in interpreting ambiguities in the CAA. Perhaps equally important, the Court likewise diverged as to the analytical process it followed in each respective case.

Notably, in *EME Homer*, the Court emphasized a particularly text-heavy, deferential mode of analysis, whereas, in *Utility Air*, the majority drew on a number of non-textual factors in applying a comparatively less deferential analytical process. Due to the nature of these holdings and their fragile interrelation with both climate change and the EPA's CAA authority, resolution of their apparent conflict is imperative to the Agency's continued ability to regulate effectively under the Act. Given the pressing importance of acting immediately to combat climate change, the EPA's ability to efficiently and effectively carry out the CAA's statutory mandates is perhaps now greater than ever.

This comment recommends that courts differentiate *EME Homer* and *Utility Air* on the basis of their application to GHG-based rules versus non-GHG-based rules. Their holdings should be applied accordingly in resolving future challenges to EPA—CAA rules. Specifically, due to the relationship between the nature of the GHG-based rule at issue in *Utility Air*, the poor fit between the CAA's text and GHG regulations in general, and the particular non-textual factors guiding the Court's decision in *Utility Air*, a similar process should be applied in adjudicating other challenges to GHG-based rules. Reciprocally, the exceedingly complex nature of many CAA provisions and the Court's corresponding deferential, text-based review of the challenge in *EME Homer* dictate that its holding be followed in reviewing non-GHG-based rules.

Part I of this comment gives a background of the aforementioned issues, detailing the effect that *Massachusetts* had on the EPA's CAA authority, exploring the relationship between *Massachusetts* and the

6. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

7. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

8. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

disparate Supreme Court guidance that followed, and explaining the importance of resolving this conflict. Part II examines the holdings in *EME Homer* and *Utility Air* more closely. More specifically, this section explains the legal principles forming the backdrop of the Court's analyses and details the Court's holding in each case. Part III focuses on the precise interplay between these two conflicting holdings and discusses their significance in the regulatory landscape. The discussion aims to accomplish that goal by illustrating the impact of the Court's disparate reasoning and assessing the role of important administrative law-based policy concerns, and how they guided the Court's selection of seemingly incongruent analytical processes. Finally, Part IV argues that distinguishing *Utility Air* and *EME Homer* on the basis of their applicability to GHG-based rules and explains why doing so alleviates many of the related policy concerns.

I. BACKGROUND

A. Massachusetts Opens the Door for CAA-Based Climate Change Regulation

The EPA, tasked with protecting human health and the environment,⁹ gathers much of its rulemaking authority from the CAA.¹⁰ However, following the landmark Supreme Court decision in *Massachusetts v. EPA*, the precise extent of this authority has been left in a state of growing uncertainty. In *Massachusetts*, the Court held that the CAA “authorize[d] EPA to regulate greenhouse gas emissions from new motor vehicles” if the Agency “form[ed] a ‘judgment’ that such emissions contribute to climate change.”¹¹

More specifically, *Massachusetts* centered on the issue of whether the EPA had authority under the CAA to regulate the emission of GHGs—namely, carbon dioxide—from automobiles.¹² This question, in turn, hinged on whether the EPA's interpretation of the CAA language “any air pollutant” as not including carbon dioxide was a permissible construction of that term. The EPA argued that, despite the CAA's sweepingly broad definition of “any air pollutant,” carbon dioxide fell outside the statute's scope on the basis of a number of non-textual factors. Chief among these was the EPA's belief that, due to a lack of information regarding the issue when the CAA was most

9. *Our Mission and What We Do*, ENVTL. PROT. AGENCY (Sept. 29, 2015), <http://www2.epa.gov/aboutepa/our-mission-and-what-we-do> [https://perma.cc/42ZQ-BUAY].

10. *See generally* Clean Air Act, 42 U.S.C. §§ 7401–7671 (2012).

11. *Massachusetts*, 549 U.S. at 528. *See also* Clean Air Act, 42 U.S.C. § 7521 (2012).

12. *Massachusetts*, 549 U.S. at 504.

recently amended, Congress did not intend for climate change inducing substances to be considered “air pollutants” within the meaning of the Act.¹³ The EPA further listed the political history of climate change, the sizeable expansion of authority that would result if it construed “any air pollutant” to include carbon dioxide, and the general difficulty in implementing a regulatory scheme dealing with climate change inducing agents as additional reasons for its statutory construction.¹⁴ The EPA urged reliance on these non-textual considerations with citation to *FDA v. Brown & Williamson Tobacco Corp.*¹⁵ In particular, the EPA relied on *Brown & Williamson* for the notion that where an issue—here, the regulation of carbon dioxide under the CAA—holds vast political or economic significance, Congress would not have conferred to an agency authority over that issue without clear and precise instruction.¹⁶

While the D.C. Circuit agreed with the EPA’s argument and weighed extratextual policy factors heavily in its decision to uphold the Agency’s statutory construction,¹⁷ the Supreme Court did not follow suit, instead concluding simply that “[t]he statutory text forecloses EPA’s reading.”¹⁸ As for the non-textual arguments advanced by the EPA, the Court found “no reason, much less a compelling reason, to accept EPA’s invitation to read ambiguity into a clear statute.”¹⁹ Ultimately, the Court held that, should the EPA form a judgment that carbon dioxide emissions from automobiles contribute to climate change, it would be the required to regulate them under the CAA.²⁰

13. *See id.* at 512–13.

14. *Id.*

15. *Id.* at 512 (“EPA stated it was urged on this view . . . by this Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.*”) (internal quotation omitted). *See also* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

16. *Massachusetts*, 549 U.S. at 512 (“In essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it.”).

17. *Id.* at 514 (“Judge Randolph [of the D.C. Circuit] concluded that the [EPA’s] exercise of judgment need not be based solely on scientific evidence, but also may be informed by the sort of policy judgments that motivate congressional action.”). *See Massachusetts v. EPA*, 415 F.3d 50, 58 (D.C. Cir. 2005).

18. *Massachusetts*, 549 U.S. at 528.

19. *Id.* at 531.

20. *Id.* at 528–32.

B. Massachusetts' Implications for EPA's CAA Authority

Upon subsequently forming such a judgment,²¹ the EPA issued several expansive CAA-based rules in the following years.²² Despite seemingly acting in accordance with express judicial authorization, the EPA was met with a wave of litigation challenging its authority to issue many of these rules. The problem the EPA faced stems from the fact that in 1990, when the CAA was most recently amended, Congress did not plan for the Act, as it was written at the time, to serve as a mechanism for dealing with the then newly emerging issue of climate change, nor to operate as a conduit for effecting the regulation of GHG emissions.²³

The Court alluded to this in *Massachusetts*, but reassured the parties that

[w]hile the Congresses that drafted [the CAA] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they *did* understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete . . . [and that] the language of [CAA] § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.²⁴

Although the Court was correct in its assertion that the provision at issue allowed for flexibility, this is decidedly *not* the case for the entirety of the CAA. As a result, where *Massachusetts'* holding that “any air pollutant” unambiguously encompasses GHGs intersects with *inflexible* portions of the CAA, the EPA is effectively tasked with carving out square-peg regulations and fitting them into the round holes of the CAA framework.

21. 74 Fed. Reg. 66523, 66537 (Dec. 15, 2009) [hereinafter Endangerment Finding].

22. See e.g., 76 Fed. Reg. 48208-01 (Aug. 8, 2011) (establishing framework for determination of emission reductions required of upwind states) [hereinafter “Transport Rule”]; 75 Fed. Reg. 17004 (April 2, 2010) (setting out that a regulation on motor vehicle greenhouse gas emissions would trigger application of permitting requirements to all stationary sources with the potential to emit greenhouse gases in excess of 100 tons per year) [hereinafter “Triggering Rule”]; 75 Fed. Reg. 25324 (May 7, 2010) (setting forth final rule imposing greenhouse gas emission standards for motor vehicles) [hereinafter Tailpipe Rule].

23. See 68 Fed. Reg. 52,922-02 (Sept. 8, 2003) (denying public petition for regulation of GHG emissions under the CAA and explaining that “[o]nly the research and development provision of the CAA—section 103—specifically mentions CO₂, and the legislative history of that section indicates that Congress was focused on seeking a sound scientific basis on which to make *future* decisions on global climate change, not regulation under the CAA as it was being amended”) (emphasis added).

24. *Massachusetts*, 549 U.S. at 532 (emphasis added).

The EPA noted this difficulty in its 2008 Advanced Notice of Rulemaking, explaining its opinion that the CAA is “an outdated law . . . ill-suited for the task of regulating global greenhouse gases.”²⁵ Specifically, the EPA warned that, under the framework of the CAA, the regulation of GHG emissions from motor vehicles would likely trigger the mandatory application of other more stringent regulations to stationary sources that emit GHGs—unintentionally “result[ing] in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.”²⁶ Despite these concerns, the EPA ultimately followed the Court’s directive and issued a rule regulating GHG emissions from motor vehicles (Tailpipe Rule).²⁷

Consistent with its earlier warnings, the EPA also provided a final determination that the Tailpipe Rule would mandatorily trigger massive regulations of GHG emissions from stationary sources.²⁸ The reason for that determination lay in the CAA mandate that stationary sources with the potential to emit threshold levels of “any air pollutant”—a term which, according to the *Massachusetts* Court, includes GHGs—be subject to permitting requirements and emissions limitations for “each pollutant subject to regulation” under the Act.²⁹ Therefore, the regulation of GHG emissions under the Tailpipe Rule, according to the EPA, triggered application of these permitting requirements to all stationary sources with the potential to emit GHGs in amounts above statutory thresholds.³⁰

Though theoretically no different than other instances in which regulation of a new pollutant triggered CAA permitting requirements, application of these provisions to GHGs presented a major functional problem: Despite being subject to the same statutorily mandated thresholds, GHGs tend to be emitted in quantities “orders of magnitude greater” than the pollutants in consideration of which these thresholds

25. 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) [hereinafter Advanced Notice].

26. *Id.*

27. *See* Tailpipe Rule, *supra* note 22.

28. *See id.* Albeit somewhat unusual given its name, the Triggering Rule did not actually trigger the application of these permitting programs. Rather, the Triggering Rule simply represents the EPA’s final and official determination that the Tailpipe Rule automatically and mandatorily brought GHGs within these programs’ regulatory scope.

29. Clean Air Act, 42 U.S.C. §§ 7407, 7410, 7475, 7479 (2012).

30. Triggering Rule, *supra* note 22. In *Massachusetts*, the Court merely stated that the EPA was compelled to regulate GHG emissions from new motor vehicles if it formed a judgment that such emissions contributed to climate change. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). That is, it was the actual *issuance* of such a regulation which triggered application of the stationary source permitting schemes to sources emitting GHGs. In this regard, the Tailpipe Rule technically produced this effect; the Triggering Rule itself simply represented the EPA’s final and official determination of this fact.

were established.³¹ The EPA warned that issuing GHG regulations in spite of this problem would place immense burdens on industry, causing programs designed to apply to “a relatively small number of large industrial sources” to affect an enormous number of smaller commercial and even residential, sources.³² According to the EPA, this would leave the programs both unadministrable and “unrecognizable to the Congress that designed” them.³³ The EPA thus set out to mitigate these problems, issuing a rule which sought to “tailor” these regulations to GHGs by implementing, *inter alia*, a “phase-in” approach to their application.³⁴

Despite the EPA’s concern and attempts to address the problems underlying these regulatory programs, a number of parties filed petitions challenging the EPA’s authority to pass these rules shortly thereafter.³⁵ These challenges soon began to resemble a laundry list.³⁶

The Court’s conspicuous inconsistency in its resolution of two of these challenges in particular highlights the current uncertainty regarding the Agency’s rulemaking authority under the CAA: While in *EPA v. EME Homer*, the Court employed a methodology that emphasized strict textual construction of the CAA provision at issue,³⁷ it instead weighed a number of non-textual considerations in applying what appeared to be an overall “reasonableness” inquiry in *Utility Air Regulatory Group v. EPA*.³⁸ In fact,

31. Advanced Notice, *supra* note 25, at 44,498–99.

32. *Id.*

33. 75 Fed. Reg. 31,514, 31,555, 31,562 (June 3, 2010) [hereinafter Tailoring Rule]. The EPA quantified this broad expansion, estimating that the number of sources subject to the regulations would increase “from the current 280 sources per year to almost 82,000 sources.”

34. *Id.* at 31,523–25. This approach allowed for the regulations to take effect gradually, allowing temporary exemptions of varying lengths for certain sources, and reserved the possibility that the EPA may allow permanent exemptions in some instances. Additionally, the EPA noted that it would undergo additional rulemaking to “take further action to address [problems regarding] small sources.”

35. See Coalition for Responsible Regulation, et al. v. EPA, 684 F.3d 102 (D.C. Cir. 2012). Many of these petitions were filed just days after the promulgation of the rules they challenged.

36. Lee Logan, *States Novel Suit Over ESPS Settlement Faces Procedural Challenges*, INSIDE EPA WEEKLY REPORT, Aug. 8, 2014, (detailing several suits in which the EPA’s authority under the CAA has been challenged). See, e.g., *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (challenging the EPA’s authority to issue a rule creating national standards for emissions from power plants); *EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (challenging the EPA’s authority to pass Transport Rule).

37. See *EME Homer*, 134 S. Ct. at 1601, for one of many examples of such methodology (“The *practical* difficulties cited by the Court of Appeals do not justify departure from the Act’s *plain text*”) (emphasis added).

38. See *Utility Air*, 134 S. Ct. at 2444, for an example of one of these “other” considerations (noting the “economic and political significance” of the regulation in determining whether an EPA interpretation of the CAA deserved deference).

EME Homer had explicitly rejected many of the bases for the Court's decision in *Utility Air*. Because of the acuteness of this conflict and its relationship to the urgent need to combat climate change through CAA-based regulation, it must be resolved with the utmost judicial care.

The weightiness of the impact that this conflict holds the potential to produce owes itself to the inherent complexity of both the CAA and the issue of climate change in general,³⁹ as such complexities tend to increase the likelihood of statutory ambiguity.⁴⁰ Moreover, the CAA is complex both in a technical, scientific sense⁴¹ and in a structural sense.⁴² Because these aspects of the CAA promote ambiguity with respect to the EPA's regulatory authority under the Act, the extent of the EPA's authority is inextricably linked to—and tremendously impacted by—the level of judicial deference given to the agency's interpretations of ambiguous provisions.⁴³ The inherent relationship between agency authority and

39. See Advanced Notice, *supra* note 25, at 44,365 (explaining that determining “how to regulate GHG emissions [under the CAA] while considering . . . the Nation's energy and economic security . . . is enormously difficult,” and explaining that doing so would require “an enormously elaborate, complex, burdensome, and expensive regulatory regime”).

40. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2089, n.89 (1990) (“Statutory terms [often] offer ambiguous guidance to agencies that must establish regulations in complex areas” and emphasizing that these complexities oftentimes create scenarios where “a statutory term is ambiguous with regard to the particular problem [it was designed to prevent]”); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) (explaining the increased need to “reconcil[e] conflicting policies” where statutes are complex and technical).

41. See Advanced Notice, *supra* note 25 at 44,366 (explaining that many CAA provisions require “interpretation of statutory terms and the application of technical or scientific data and judgment”). See also, *Chevron*, 467 U.S. at 2793 (noting that the CAA's “regulatory scheme is technical and complex”); *EME Homer*, 134 S. Ct. at 1595–1597 (detailing difficulty in construing particular CAA provisions and noting that “EPA conducted complex modeling” in an effort to resolve the issue).

42. See Sunstein, *supra* note 40 (noting that one of the “characteristic problems in modern regulation” is the fact that “[o]ften the regulatory process is confounded by the difficulty of coordinating numerous statutes with one another”). Cf. *supra* Part I.B (detailing a portion of the CAA's framework); Triggering Rule, *supra* note 22 (explaining that regulating emissions under certain CAA provisions triggers mandatory application of additional regulations under other portions of the Act); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (discussing the interplay of these “triggering” provisions). These aspects of the Act's complex nature and their relation to underlying concerns regarding administrative law and climate change are discussed, *infra*, in further detail.

43. See generally *Negusie v. Holder*, 555 U.S. 511, 529 (2009) (Stevens, J., concurring in part and dissenting in part) (noting that “the singularly judicial role of marking the boundaries of agency choice . . . did not die with [Chevron],” and that the presence of statutory ambiguity does “not [mean] that courts should cease to mark the bounds of delegated agency choice”) (internal citation omitted).

judicial deference underlines the importance of resolving the aforementioned jurisprudential tension with particular care. Such a resolution—whether beneficial or detrimental—will directly impact both the present *and* the future of the EPA’s ability to regulate effectively under the CAA. And given the importance of the underlying objective at stake—combating climate change—the EPA’s ability to regulate is perhaps more important now than ever.

II. RECENT SUPREME COURT DECISIONS AND THEIR RELATIONSHIP TO AGENCY LAW PRINCIPLES

A. *The Legal Backdrop*

To understand the significance of the conflict between *EME Homer* and *Utility Air* in relation to the future of the EPA’s regulatory authority, it is first necessary to understand its significance in relation to the underlying administrative doctrines in play.

Chevron U.S.A., Inc. v. NRDC, a seminal case in administrative law, established the two-step framework courts use to review an agency’s construction of a statute it administers.⁴⁴ *Chevron* sets out a two-step process for adjudicating challenges to agency rules.⁴⁵ First, the reviewing court must determine whether the particular statutory provision is, in fact, ambiguous.⁴⁶ If the court determines that the text of the statute gives a clear answer to the precise question at issue, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁴⁷ If instead the court finds that the provision is silent or ambiguous with respect to that issue, the court must then determine “whether the agency’s answer is based on a permissible construction of the statute.”⁴⁸ So long as the agency’s interpretation represents a permissible construction of the statute, it is given dispositive effect.⁴⁹ At *Chevron*’s core is the notion that “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”⁵⁰ Accordingly, an agency’s “view governs if it is a *reasonable* interpretation of the statute—not necessarily

44. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). The impact of *Chevron* in the administrative arena is vast and ever present. See Sunstein, *supra* note 40 (explaining the importance and notoriety of *Chevron*, reckoning that “*Chevron* is this generation’s *Erie*”).

45. *Chevron*, 467 U.S. at 842.

46. *Id.*

47. *Id.* at 842–43.

48. *Id.* at 843.

49. *Id.*

50. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.”⁵¹ Despite its ubiquity in the realm of administrative law, however, the precise doctrine established in *Chevron* remains hotly debated.⁵²

First, with respect to the very analytical procedure called for by *Chevron*, some legal scholars have argued that the separation of its central inquiry—whether an agency’s statutory construction is entitled to deference—into two discrete steps is both artificial and ill-advised. In particular, administrative law scholars Matthew Stephenson and Adrian Vermule take the position that *Chevron*’s “two-step structure causes material confusion among commentators and courts, with harmful consequences for administrative law doctrine.”⁵³ In the view of Stephenson and Vermule, “[r]ather than trying to breathe life into each of *Chevron*’s two steps, judges, scholars, and teachers of administrative law should jettison the two-step framework and acknowledge that *Chevron* calls for a single inquiry into the reasonableness of the agency’s statutory interpretation.”⁵⁴

Second, there is scholarly disagreement as to *Chevron*’s exact scope and the precise level of deference to which an agency’s interpretation is entitled when that interpretation involves a “major question.”⁵⁵ This so-

51. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (first emphasis added).

52. See, e.g. Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 229 n.116 (1994) (quipping “[t]he loss of forests necessary to make the paper to print all of the articles written on the proper standard of review in interpreting statutes following [*Chevron*] might well have justified requiring the Supreme Court to issue an environmental impact statement along with the opinion”).

53. Matthew C. Stephenson & Adrian Vermule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598 (2009).

54. *Id.*

55. See Doug Williams, *A Harder “Hard Case”*, 57 ST. LOUIS U. L.J. 931, 944–946 (2013) (detailing scholarly disagreements over the so-called “major questions exception” to *Chevron*). See also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006) (coining the phrase “major questions exception”). Some scholars are of the opinion that the major questions doctrine triggers a complete inapplicability of *Chevron*—that is, it answers the question asked at “*Chevron* step zero”—while others hold that it simply influences the inquiry at step one of *Chevron*. Compare, e.g., Abigail R. Moncrieff, *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 (2008) (examining the exception as applicable at “step zero”), with Sunstein, *supra*, at 248 (“*MCI* and *Brown & Williamson*, [the cases giving rise to the exception] . . . are best read as Step One cases”). For the purposes of this comment, it is of no matter where, within *Chevron*’s framework, the major questions exception comes into play. Ironically, in the iteration of the exception relevant to this comment, the Court cites *Brown & Williamson* in its assessment of *Chevron*’s second step. See *Utility Air*, 134 S. Ct. at 2444.

called “major questions” exception to *Chevron* emanates from *FDA v. Brown & Williamson Tobacco Corp.*⁵⁶ In *Brown & Williamson*, the Court explained that its “inquiry into whether Congress has directly spoken to the precise question at issue”—that is, its determination of whether the statute at issue is ambiguous—“is shaped, at least in some measure, by the nature of the question presented.”⁵⁷ The Court reasoned that “Congress could not have intended to delegate a decision of [considerable] economic and political significance to an agency [ambiguously],” relying for support on the facts that the agency interpretation at issue was “[c]ontrary to its [prior] representations to Congress” and that Congress had created a separate scheme effecting the same nature of regulations at issue.⁵⁸ Especially given the fact that some scholars argue that the major questions exception was rejected by the Court in *Massachusetts*,⁵⁹ these principles hold particular importance with regard to the matter at hand.

Indeed, the debate surrounding the separation of *Chevron*’s inquiry into two distinct steps and the debatable vitality of the major questions exception are each matters on which the Court has recently given disparate holdings. In *Utility Air* and *EME Homer*, the Court seemed to employ contrasting levels of distinction between *Chevron*’s two steps. Additionally, while the Court employed a black-letter form of *Chevron* in *EME Homer*—prioritizing strict statutory construction and demonstrating a reluctance to consider non-textual factors—it utilized a “looser” form of *Chevron* in *Utility Air*, seemingly breathing new life into *Brown & Williamson*’s major questions exception by emphasizing many of the very same non-textual factors it rejected in *EME Homer*. The dichotomy between the Court’s more traditional *Chevron* analysis and its modified “*Chevron*-lite” becomes readily apparent upon a detailed reading of these two opinions.

56. See generally, *Brown & Williamson*, *supra* note 15.

57. *Id.* at 160.

58. *Id.* at 159.

59. See, e.g. Moncrieff, *supra* note 55, at 594 (“In *Massachusetts v. EPA* . . . the Court dealt a fatal blow to a fledgling, though controversial, doctrine: the “major questions” exception to *Chevron* deference”).

B. Dueling Chevron Standards in *EME Homer* and *Utility Air*

In both *EME Homer* and *Utility Air*, the Court specified unequivocally that *Chevron* was the doctrinal framework guiding its analysis.⁶⁰ These nods to *Chevron* make the Court's seeming inconsistencies in its application not only puzzling, but all the more important. A detailed reading of these decisions reveals important analytical wrinkles and inconsistencies that bear directly on the future of the EPA's CAA authority.

1. Traditional Chevron in *EME Homer*

EPA v. EME Homer City Generation involved a challenge to the EPA's authority to issue the Transport Rule, the Agency's latest attempt to delineate the scope of the CAA's "Good Neighbor Provision."⁶¹ The Good Neighbor Provision requires each state to submit to the EPA a State Implementation Plan (SIP), which must contain "adequate provisions" to eliminate emissions that "contribute significantly" to nonattainment of EPA pollution standards in any other state.⁶² If, upon review, the EPA finds a particular State's SIP inadequate, the Agency will then issue the state a Federal Implementation Plan (FIP), which the state is thereafter bound to follow.⁶³ Under the Transport Rule, emissions by upwind states are deemed to "contribute significantly" to downwind nonattainment to the extent that the upwind state's exported pollution (1) produces one percent or more of the threshold pollution level in a downwind state, and (2) can be eliminated cost-effectively, as determined by the EPA.⁶⁴ The issue in *EME Homer* was whether the EPA had reasonably concluded that it was not required to quantify a state's regulatory obligations under the Transport Rule before issuing the state a FIP, and whether the Agency's consideration of cost was reasonable in defining what emissions "contribute significantly" to downwind nonattainment.⁶⁵

60. See *Utility Air*, 134 S. Ct. at 2439 ("We review EPA's interpretations of the Clean Air Act using the standard set forth in *Chevron*"); *EME Homer*, 134 S. Ct. at 1604 (noting that "*Chevron* . . . is the path making decision and it bears a notable resemblance to the case [at hand]") (internal citation omitted).

61. *EME Homer*, 134 S. Ct. at 1593.

62. Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i) (2012). See also *EME Homer*, 134 S. Ct. at 1593–95 (explaining in detail these CAA provisions). More specifically, the aforementioned "pollution in any other state" refers to emissions which "contribute significantly" to nonattainment in downwind states.

63. Clean Air Act, 42 U.S.C. § 7410(c)(1).

64. Transport Rule, *supra* note 22.

65. *EME Homer*, 134 S. Ct. at 1598–99.

The D.C. Circuit held that the rule exceeded the EPA's statutory authority on both of these grounds.⁶⁶ As to the first issue, the court based its conclusion largely on the impracticability of applying the Transport Rule as written. The court argued that under the rule, "a State's only chance to avoid a FIP is to make a successful stab in the dark," and held that these difficulties created an implicit statutory exception to the plain text of the Good Neighbor Provision.⁶⁷ In the D.C. Circuit's view, the Good Neighbor Provision required that the EPA must first "define[] or quantif[y] a State's good neighbor obligation" and then give "the State . . . a reasonable time to implement that requirement with respect to sources within the State" before the Agency was permitted to issue the State a FIP.⁶⁸ Further, finding also that the EPA's consideration of costs in setting states' "Good Neighbor" obligations was unreasonable, the D.C. Circuit opined that the Good Neighbor Provision required "[d]istributi[on of] those obligations in a manner proportional to [each state's] contributions."⁶⁹ Ultimately, however, the Supreme Court disagreed with both of these holdings.⁷⁰

On the former issue, the Court concluded simply that "the text of the statute supports EPA's position[.]"⁷¹ emphasizing the definitive language of the CAA provision at issue.⁷² Overturning the judgment of the D.C. Circuit on this basis, the Court explained that "[h]owever sensible (or not) the Court of Appeals' position, a reviewing court's 'task is to *apply* the text [of the statute], *not to improve upon it*."⁷³ The Court reiterated that "[t]he practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text."⁷⁴ The Court also explicitly rejected the argument that the Transport Rule was unreasonable because it did not comport with prior EPA decisions to quantify States' regulatory obligations before issuing FIPs, explaining that, "[w]hatever pattern the Agency followed in its [past rules], EPA retained discretion to alter its course."⁷⁵

On the second issue, the Court likewise upheld the EPA's interpretation of the Good Neighbor Provision as permitting consideration of costs in defining what amounts of emissions "contributed significantly"

66. *EME Homer, L.P. v. EPA*, 696 F.3d 7, 37 (D.C. Cir. 2012).

67. *Id.* at 37.

68. *Id.* at 31.

69. *Id.* at 21–22. It is worth reiterating that the D.C. Circuit's construction of the Good Neighbor Provision indeed differed significantly from that provided by the EPA in the Transport Rule.

70. *EME Homer*, 134 S. Ct. at 1600, 1603.

71. *Id.* at 1600.

72. *Id.* (quoting Clean Air Act, 42 U.S.C. § 7410(a)(2)).

73. *Id.* at 1600–01 (quoting *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989)) (emphasis added).

74. *Id.* at 1601.

75. *EME Homer*, 134 S. Ct. at 1601–02.

to downwind nonattainment, stressing that an agency's interpretation of ambiguous statutory language is entitled to deference as long as it is reasonable, regardless of whether it is the particular construction a reviewing court might find *most* reasonable.⁷⁶ The Court cautioned that “[w]hen ‘Congress has not directly addressed the precise [interpretive] question at issue,’ . . . a reviewing court cannot ‘simply impose its own construction o[f] the statute.’”⁷⁷ Elucidating this warning, the Court pointed to the fundamental imprecision of addressing such a scientifically and technically complex issue as an indication that the “EPA must have leeway in fulfilling its statutory mandate.”⁷⁸

Undeniably, the Court's analysis in *EME Homer* followed the *Chevron* framework unwaveringly. The Court explicitly observed *Chevron*'s two-step process, drawing a clear distinction between the questions of whether the statute was ambiguous and whether the EPA's interpretation of the ambiguity was reasonable.⁷⁹ Furthermore, at each of *Chevron*'s two steps, the Court addressed the precise considerations associated with traditional *Chevron* analysis.⁸⁰ First among these, the Court applied a strict and straightforward textual analysis of the contested

76. *Id.* at 1603 (emphasizing the similarity of the issue at hand to that considered in *Chevron*). *See also Entergy*, 556 U.S. at 218 (“[An agency’s] ‘view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts”).

77. *Id.* at 1603 (quoting *Chevron*, 467 U.S. at 843).

78. *Id.* at 1609. The Court made particular note of the complex modeling the EPA conducted prior to formulating the Transport Rule. *Id.* at 1596. The Court explained that, “[b]ecause ‘a full understanding of the force of the statutory policy . . . depend[s] upon more than ordinary knowledge’ of the situation,” courts should be hesitant to overturn an agency’s decision in such an circumstance. *Id.* at 1603 (quoting *U.S. v. Shimer*, 367 U.S. 374, 382 (1961)).

79. *See id.* at 1593 (“Satisfied that the Good Neighbor Provision does not *command* the Court of Appeals’ cost-blind construction,” i.e., satisfied that the statute *is* ambiguous (*Chevron*’s first step), “and that EPA reasonably interpreted the provision,” i.e., the EPA’s interpretation was reasonable (*Chevron*’s second step), “we reverse the D.C. Circuit’s judgment”) (emphasis added). As to the question of whether the EPA was required to give quantitative guidance before issuing FIPs, the Court decided the issue at *Chevron*’s first step. *Id.* at 1601 (“[T]he statute speaks without reservation”). Conversely, in determining whether the EPA was permitted to consider costs in formulating regulatory requirements under the Good Neighbor Provision, the Court decided the issue at *Chevron*’s second step. *See id.* at 1606 (“Persuaded that the Good Neighbor Provision does not dictate [a] particular allocation of emissions . . . we must next decide whether the allocation method chosen by EPA is a permissible construction of the statute.”) (internal quotation omitted).

80. *See* Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 N.D. L. REV. 1971, 1972 (2007) (“Descriptive statistics reveal that textualism and legislative intent are most common.”).

provision, noting throughout its opinion that the plain text of the statute supported the EPA's interpretation,⁸¹ and that the statutory language took precedence over any practical concerns⁸² or alternative readings advanced by the circuit court.⁸³ Next, the Court assessed Congress's intent in drafting the statute. The Court reasoned that, "[h]ad Congress intended [to require the EPA to give additional time before issuing a FIP], Congress, we take it, would have included a similar direction in that section,"⁸⁴ and "[b]y altering the schedule Congress provided by SIPs and FIPs, the D.C. Circuit . . . allowed a delay Congress did not order and placed an . . . obligation on EPA [which] Congress did not impose."⁸⁵ Taken together, these analyses reflect *Chevron's* core premise: "that it is for agencies, not courts, to fill statutory gaps."⁸⁶

2. Modified-Chevron, in *Utility Air*

In stark contrast to the Court's decision in *EME Homer*, the *Utility Air* majority strayed from *Chevron's* beaten path. There, as in *EME Homer*, the Court explicitly noted that it was applying *Chevron* in reaching its decision.⁸⁷ However, aside from this ostensible doctrinal nod, the Court's reasoning in *Utility Air* was largely devoid of typical *Chevron* inquiries, seeming instead to favor a different analytical method.

Utility Air involved challenges to the EPA's authority to issue several GHG-related rules Under the CAA,⁸⁸ specifically, the Triggering Rule⁸⁹ and the Tailoring Rule.⁹⁰ The dispute presented two distinct issues: namely, whether the EPA permissibly determined (1) "that a source may be subject to the [CAA's] PSD and Title V permitting requirements on the

81. *EME Homer*, 134 S. Ct. at 1600.

82. *Id.* at 1601.

83. *Id.* at 1600, 1603.

84. *Id.* at 1601.

85. *Id.*

86. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* 545 U.S. 967, 982 (2005). *See also* Sunstein, *supra* note 55, at 190 ("[*Chevron's*] grant of [interpretive authority to agencies] seemed to depend on a distinctive account of legal interpretation, one that sees resolution of statutory ambiguity as involving judgments of principle and policy and insists that the executive, not the courts, should make those judgments").

87. *See Utility Air*, 134 S. Ct. at 2439 ("We review EPA's interpretations of the Clean Air Act using the standard set forth in *Chevron*.").

88. *Id.* at 2438.

89. *See* Triggering Rule, *supra* note 22 (representing the EPA's final judgment that the regulation of GHG emissions from motor vehicles would trigger the application of PSD and Title V permitting requirements to stationary sources with the potential to emit threshold levels of GHGs).

90. *See* Tailoring Rule, *supra* note 33 (modifying and delaying the effects of the permitting programs to sources which emitted GHGs).

sole basis of the source's potential to emit greenhouse gases [above relevant statutory thresholds],” and (2) “that a source already subject to the [permitting] program because of its emission of conventional pollutants (an ‘anyway’ source) may be required [under the program] to limit its greenhouse-gas emissions.”⁹¹

The first of these two challenges focused on the EPA's interpretation of the language “any air pollutant” in relation to CAA provisions requiring stationary sources with the potential to emit threshold levels of “any air pollutant” to comply with certain permitting requirements.⁹² Under the EPA's interpretation of this language, GHGs fell within the purview of “any air pollutant” once they became regulated under the CAA via the Tailpipe Rule.⁹³ In turn, stationary sources would become subject to the PSD and Title V permitting programs on the basis of their potential to emit GHGs above the statutory threshold and, additionally, all the programs' requirements would become applicable to GHG emissions.⁹⁴ The D.C. Circuit upheld those rules, finding the EPA's interpretation of the CAA provisions at issue to be “compelled by the statute.”⁹⁵ The Supreme Court

91. *Utility Air*, 134 S. Ct. at 2438. These issues identified by the Court represent two separate questions each of which arose primarily out of the challenge to the Triggering Rule. The Court's consideration of the Tailoring Rule, because it served essentially as an addendum of sorts to Triggering Rule, was subsumed by the former of the two questions. *See id.* at 2444–45. Additionally, in analyzing the first question presented, although the Court individually addressed the permissibility of the Tailoring Rule, the analysis therein is not relevant to the discussion at hand. In quickly (and correctly) disposing of the rule, the Court wasted no words pointing out that “[i]t is hard to imagine a statutory term less ambiguous than the precise numerical thresholds [at issue],” and that, by replacing specifically enumerated amounts of 100 and 250 tons with *100,000 tons*, the EPA clearly “went well beyond the bounds of its statutory authority.” *Id.* at 2445 (internal quotation omitted).

92. *See id.* at 2439. This language appears in two separate CAA permitting programs. The first program, contained in the Act's Prevention of Significant Deterioration (PSD) provisions, applies to new stationary sources. Clean Air Act, *supra* note 2, at §§ 7475(a)(1), 7479(2)(C) (making it unlawful to *construct or modify* a “major emitting facility” in “any area to which [the PSD program] applies” without a permit) (emphasis added). This provision applies to new sources with the potential to emit 250 tons per year of “any air pollutant” (i.e., to “major emitting facilit[ies]). *Id.* § 7479(1) (defining “major emitting facility”). The second program, set out in Title V of the CAA, requires existing stationary sources with the potential to emit 100 tons per year of “any air pollutant” to obtain permits as well. *Id.* §§ 7661a(a) (making it unlawful to *operate* any “major source” without a permit), 7661(2)(B) (defining “major source”). All relevant analytical distinctions between these programs is noted in this comment.

93. *Utility Air*, 134 S. Ct. at 2437. *See also* Tailpipe Rule, *supra* note 22.

94. *See* Triggering Rule, *supra* note 22.

95. *Id.* *See* Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 133–34 (2012) (the D.C. Circuit's decision).

disagreed,⁹⁶ but despite its acknowledgment that *Chevron* controlled its inquiry, it reached this conclusion based on reasoning which departed from *Chevron*'s recommended course of "employing traditional tools of statutory construction."⁹⁷ In fact, the Court based its decision in *Utility Air* almost exclusively on *non-textual* factors, implicating issues regarding *Massachusetts* and the major questions exception to *Chevron*.

The Court's citation to *Brown & Williamson* is crucial in understanding the precise nature of this logical pattern.⁹⁸ Most notably, the Court employed language directly from *Brown & Williamson* to accentuate its proposition that

[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," [courts] generally greet its announcement with a measure of skepticism. [Courts] expect Congress to speak clearly if it wishes to assign an agency decisions of vast "economic and political significance."⁹⁹

The doctrinal principles espoused in this passage are important for two reasons. First, they essentially embody the major questions exception exactly as it was understood prior to *Massachusetts*—and exactly as the Court rejected it in that holding. The *Utility Air* Court seemingly endorsed *Brown & Williamson*'s modified approach to *Chevron* by emphasizing the notion that agency interpretations are subject to enhanced scrutiny when they potentially implicate profound real-world impacts. Second, these precepts effectively authorize the Court to appraise certain non-textual factors the consideration of which *Chevron* does not traditionally contemplate. Accordingly, the considerations that most strongly influenced the outcome of *Utility Air* emanated largely from beyond the text of the CAA—and represent many of the same factors that the EPA urged the Court to consider in *Massachusetts*.

First among these non-textual factors was the nature of the EPA's "earlier and later pronouncements" interpreting the phrase "air pollutant."

96. *Utility Air*, 134 S. Ct. at 2439.

97. *Chevron*, 467 U.S. at 843 n.9.

98. *See Utility Air*, 134 S. Ct. at 2441, 2443–44.

99. *Id.* at 2444 (quoting *Brown & Williamson*, *supra* note 15, at 159) (internal citation omitted) (emphasis added). The *Brown & Williamson* language quoted by the Court is particularly notable for its striking similarity to comments made by the EPA and others regarding the Triggering Rule. *See, e.g.* Advanced Notice, *supra* note 25, at 44,355 (the EPA warning that the Triggering Rule "would have a profound effect on virtually every sector of the economy and touch every household in [America]"); *id.* at 44,360 (Council on Environmental Quality expressing concern that the Triggering Rule would affect "a vast range of community and business activity").

The Court emphasized that in past pronouncements the EPA had restricted its interpretation of the term “any air pollutant” to any *regulated* air pollutant—a definition more narrow than the CAA-wide definition that *Massachusetts* specifically held incorporated GHGs.¹⁰⁰ Although this particular construction of the term would still include GHGs, the Court reasoned that, because the EPA had previously narrowed its interpretation of “any air pollutant” to fit its desired regulatory effect, it could do so again, chiding the Agency in its statement that “[i]t takes some cheek for EPA to insist that it cannot possibly give ‘air pollutant’” a more narrow meaning “in the PSD and Title V contexts when it has been doing precisely that for decades.”¹⁰¹ The Court pointed to various instances where prior EPA interpretations of the language “any air pollutant” had limited construction of the term to fit the Agency’s regulatory goals.¹⁰² The Court’s emphasis of this point both comports with and serves to highlight the proposition for which the Court cited *Brown & Williamson*: that courts must examine more closely agency interpretations that hold potentially vast political and economic significance.

Furthermore, the *Utility Air* Court gave considerable weight to the real-world difficulties that would result from upholding the Triggering Rule as a reasonable construction of the CAA. Confirming the impact this impracticability had on its decision, the Court opined, “[T]he fact that EPA’s greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it.”¹⁰³ Among these demands, the Court noted that the EPA’s rule would result in an increase of the regulation’s annual administrative costs from \$77 million to over \$22.5 billion and force an enormous number of newly covered sources to comply with permitting requirements, placing significant “procedural burdens on

100. *Utility Air*, 134 S. Ct. at 2439–40.

101. *Id.* at 2440.

102. *Id.* The alternative interpretations listed by the Court construed “any air pollutant” to mean “air pollutants for which EPA has promulgated new source performance standards,” 36 Fed. Reg. 24,877 (1971), “pollutants for which the area is designated nonattainment,” 45 Fed. Reg. 52,745 (1980), “regulated pollutants,” 62 Fed. Reg. 54,941 (1997), and “visibility-impairing air pollutants,” 62 Fed. Reg. 54,941 (1997).

103. *Utility Air*, 134 S. Ct. at 2444. The Court seems to suggest that certain methods could potentially alleviate some of these procedural concerns, specifically lamenting the fact that it had not been “given [specific details] about the ability of other possible ‘streamlining’ techniques by EPA—such as ‘general’ or ‘electronic’ permitting—to reduce the administrability problems identified [by the Court].” *Id.* at 2444 n.7.

the permitting authority and EPA.”¹⁰⁴ Moreover, despite “constitut[ing] an ‘unprecedented expansion in EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land,’” the Court felt that the Triggering Rule would nevertheless “be ‘relatively ineffective at reducing greenhouse gas concentrations.’”¹⁰⁵ Providing further support for its invalidation of the Triggering Rule, many of the Court’s precise concerns were echoed in comments from numerous executive branch agencies, including, *inter alia*, the Departments of Agriculture, Commerce, Transportation, and Energy.¹⁰⁶

These bases for the Court’s conclusion fall directly in line with *Brown & Williamson*. Because the “EPA’s interpretation . . . would bring about an enormous and transformative expansion in EPA’s regulatory authority without *clear* congressional authorization,” the Court found that “it would be patently unreasonable . . . for EPA to insist on seizing [such] power.”¹⁰⁷ Yet ambiguous provisions where Congress has given no clear direction are precisely the gaps that *Chevron does* call on agencies to fill. This jurisprudential paradox makes evident the Court’s apparent departure from traditional *Chevron* analysis on *Utility Air*’s first issue.

Turning to “whether EPA’s decision to require BACT [best available control technology]¹⁰⁸ for greenhouse gases emitted by sources otherwise subject to PSD review” [wa]s . . . a permissible interpretation of the statute,¹⁰⁹ the Court did not change its analytical process. In fact, on this second issue, the Court weighed factors essentially identical to those compelling its judgment on the first issue.

First among these considerations, the Court cited the regulation’s consistency with the earlier and later EPA pronouncements as grounds for

104. *Id.* These numbers represent the aggregate costs under the PSD program (increasing from \$12 million to over \$1.5 billion) and under Title V (increasing from \$62 million to \$21 billion).

105. *Id.* at 2436.

106. *Id.* at 2436 n.2. These other government bodies included the Council of Economic Advisers, the Office of Science and Technology Policy, the Council on Environmental Quality, and the Small Business Administration.

107. *Id.*

108. BACT is “an emission limitation based on the maximum degree of reduction” that is “achievable . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques.” Clean Air Act, 42 U.S.C. § 7479(3). BACT is determined “on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.” *Id.*

109. *Utility Air*, 134 S. Ct. at 2448. To clarify, at issue was the EPA’s determination that sources that would *already* be subject to the PSD permitting program based on their emissions of conventional pollutants (i.e., sources subject to the program based on their emission of pollutants *other* than GHGs) would be required to comply with BACT standards for GHGs.

upholding the rule, twice making note of the Agency's prior determinations regarding BACT requirements for anyway sources. Dismissing the petitioners' concerns that the regulation risked paving the way for the EPA to seize unbounded regulatory authority, the Court highlighted the fact that the "EPA ha[d] long interpreted BACT as required only for pollutants that the source itself emits."¹¹⁰ Second, the Court emphasized that "[t]here [was] no indication . . . that EPA ha[d] [previously] interpreted [the relevant statute] to mean anything other than what it says."¹¹¹

Also consistent with its adjudication of the first issue, the *Utility Air* Court stressed the practical effects of the EPA's statutory construction. Specifically, the Court pointed out that the EPA had published a guidance document that clearly addressed and assuaged many—if not all—of the practical concerns cited by the petitioners as evidence that the EPA's judgment on the issue was unreasonable.¹¹² The Court explained that the document plainly recommended less burdensome considerations than those petitioners argued were impermissible.¹¹³ Moreover, according to the Court, "the record before us does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases."¹¹⁴ On those grounds, the Court concluded that the EPA's decision to require BACT for GHGs was reasonable.¹¹⁵

Upon careful examination of the majority opinion in *Utility Air*, the Court's departure from *Chevron's* analytical framework becomes readily apparent. Whether intentionally or not, the Court not only divorced its

110. *Id.*

111. *Id.*

112. *Id.* For example, petitioners argued "that EPA may never require BACT for greenhouse gases" because "applying it to greenhouse gases will make it more about regulating energy use, which will enable regulators to control every aspect of a facility's operation and design, right down to the light bulbs in the factory cafeteria." *Id.* at 2447 (internal quotations omitted). Speaking directly on this issue, the EPA explained "that BACT analysis should consider options *other than* energy efficiency," and "BACT should not require every conceivable change that could result in minor improvements in energy efficiency, such as the aforementioned light bulbs." *Id.* at 2448 (internal quotations omitted). According to the Court, the EPA's guidance evinced the "long . . . held [notion] that BACT cannot be used to order a fundamental redesign of [a] facility." *Id.* (citation omitted).

113. *Id.* ("The guidance document explains that permitting authorities should consider whether a proposed regulatory burden outweighs any reduction in emissions to be achieved").

114. *Utility Air*, 134 S. Ct. at 2439.

115. *Id.* at 2438 ("Even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to convince us that EPA's interpretation is unreasonable.")

reasoning from the plain meaning of the statutory language at issue¹¹⁶—the foremost consideration at step one of *Chevron*—but in fact seemed to forego *Chevron*'s two-step framework altogether. Despite the Court's nominal indications that it was transitioning from *Chevron*'s first step to its second,¹¹⁷ no bona fide distinction exists between its analyses at either part.¹¹⁸ Perhaps as a result of the commingling of *Chevron*'s two steps, the Court, in lieu of direct inquiry into the actual meaning of the statutory language, instead focused most pointedly on the likely effects of the EPA's interpretation, the impracticability of the rule's implementation, and the relationship between the statutory construction at issue and prior EPA interpretations of similar provisions. As a result, the Court's analysis essentially collapsed into a single-step, totality-of-the-circumstances inquiry into the regulation's general reasonableness. The relationship between this methodology and that employed by the Court in *EME Homer* holds vast importance for the future of the EPA's regulatory authority under the CAA.

116. See *id.* at 2449 n.2 (explaining that GHGs “are indisputably a ‘pollutant subject to regulation,’”—a category of substances narrower than the category “any air pollutant” with respect to which the Court found the EPA's GHG-inclusive construction unreasonable) (emphasis added).

117. See *id.* at 2442 (“Having determined that EPA was mistaken in thinking the Act compelled [its] interpretation of the PSD and Title V triggers, we next consider the Agency's alternative position that its interpretation was justified as an exercise of its discretion to adopt a reasonable construction of the statute”) (internal quotations omitted); *id.* at 2448 (“Even if the text were not so clear, applying BACT to greenhouse gases is not so disastrously unworkable . . . as to convince us that EPA's interpretation is unreasonable.”).

118. Compare *id.* at 2438–42 (considering, at *Chevron*'s first step: the EPA's prior interpretations of the term “any air pollutant;” the particularly “elaborate, burdensome” nature of the permitting scheme that would result from the Triggering Rule; the “incompatib[ility of] inclusion [of GHGs] with th[e] programs' regulatory structure;” and the fact that “greenhouse gases[] are emitted in such vast quantities that their inclusion [in the permitting programs] would radically transform those programs and render them unworkable as written”) with *id.* at 2442–46 (considering, at *Chevron*'s second step: the EPA's prior determinations “that applying the PSD and Title V permitting requirements would be inconsistent with . . . the Act's structure and design;” the “incompatib[ility of the rule] with the substance of Congress' regulatory scheme;” the imposition of “a complicated, resource-intensive, time-consuming . . . process suitable for hundreds of larger sources” on “tens of thousands of smaller sources;” and the extension of rules which “cannot rationally be extended beyond a relative handful of large sources capable of shouldering heavy substantive and procedural burdens” to these thousands of smaller sources).

III. THE CONFLICT IN THE COURT'S CLEAN AIR ACT DOCTRINE

Even a quick skim of the Court's opinions in *EME Homer* and *Utility Air* makes evident, at the very least, their sweeping theoretical divergence. This discord is of particular import, as it serves to illustrate the significance that traditional policy concerns underlying administrative law doctrine hold in the context of climate change regulation. But the conflict between the Court's textual and non-textual analyses does not merely implicate a theoretical debate devoid of any real-world impacts; the difference in the methodologies applied in the two cases directly impacted their outcome.

A. *The Effect of the Conflict on the Outcome of EME Homer and Utility Air*

To understand the extent of the impact that these distinct methodologies hold for the future of the EPA's CAA authority, it is first necessary to understand the tremendous impact these differences have already had. Comparative analysis of *EME Homer* and *Utility Air* makes readily apparent the far-reaching influence of their inconsistencies.

1. *EME Homer, Under an Overall Reasonableness Standard*

In *EME Homer*, the Court adhered fairly strictly to the traditional *Chevron* approach and, as a result, ultimately upheld the EPA's Transport Rule as a permissible construction of the CAA.¹¹⁹ But what if the Court had followed a line of reasoning more similar to that employed in *Utility Air*? What if the Court, instead of assessing the Transport Rule under *Chevron*'s two discrete steps, had collapsed its analysis into a single inquiry of the overall reasonableness of the EPA's statutory construction? And, what if the Court in *EME Homer* had gone beyond the considerations traditionally associated with *Chevron* analysis and instead emphasized the same non-textual factors that guided its decision in *Utility Air*?

Simply put, application of *Utility Air*'s methodology would have produced the opposite result. In fact, nearly *all* of the reasoning that formed the basis of the Court's decision in *EME Homer* fails under the standards set forth in *Utility Air*.

First, in the line of logic weighing most heavily on the Court's determination that the EPA was not required to give states quantitative instruction or a subsequent implementation period before issuing FIPs, the Court rebuffed the D.C. Circuit's conclusion that the potential ineffectiveness

119. See *supra* text accompanying notes 80–86 (pointing out that the Court broke its analysis into two discrete steps and addressed the major *Chevron* considerations explicitly).

and impracticability of the Transport Rule compelled an alternative interpretation of the statute.¹²⁰ In contrast, the *Utility Air* majority specifically cited similar practical difficulties pertaining to the EPA's Triggering Rule as compelling evidence that the EPA *should have* tailored its interpretation.¹²¹ In fact, *Utility Air* seems to go so far as to imply that, in the presence of such difficulties, an agency may sometimes be *required* to stray from the plain meaning of statutory text in order for its interpretation to be considered "reasonable"¹²²—a direct contradiction of the holding in *EME Homer*.¹²³ Had this reasoning been applied in *EME Homer*, it is clear that the Court would have found that the Transport Rule represented an unreasonable interpretation of the CAA's Good Neighbor Provision.¹²⁴ Accordingly, the Court would also have likely favored a statutory construction more in keeping with that set out by the D.C. Circuit, as that interpretation accounted for and sought to alleviate problems with the Transport Rule's functional applicability.¹²⁵

120. See *EME Homer*, 134 S. Ct. at 1601 ("The practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text"); *id.* (rejecting the lower court's supposedly more functional construction of the statute because "[h]owever sensible (or not) the Court of Appeals' position, a reviewing court's task is to apply the text [of the statute], not to improve upon it").

121. See, e.g., *Utility Air*, 134 S. Ct. at 2442 (giving reasons the EPA ought to have "use[d] 'air pollutant' to denote . . . only those [substances] that may sensibly be encompassed within the particular regulatory program").

122. See *id.* at 2439–40 (explaining that, despite the fact that "the Act-wide definition [of air pollutant] includes greenhouse gases," in the PSD and Title V context, non-GHG inclusive "interpretations [a]re appropriate[because i]t is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of [substances such as GHGs]"); *id.* at 2440 (placing in the category of "appropriate," more narrow constructions of "any air pollutant," even "[t]hrough these limitations are nowhere to be found in the Act-wide definition"). This implication is even more obvious given the fact that the Court held the EPA's construction of "any air pollutant" unreasonable specifically on the grounds that its inclusion of GHGs would "render [the permitting programs] unworkable as written." *Id.* at 2442.

123. Cf. *id.*; *EME Homer*, 134 S. Ct. at 1601 ("The practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text.").

124. *Utility Air*, 134 S. Ct. at 2444 ("The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good enough reason for rejecting it.").

125. In the D.C. Circuit's view, "once EPA defines or quantifies a State's good neighbor obligation, the State must have a reasonable time to implement that requirement [before being issued a FIP]." See *EME HCG Circuit Court Decision*, *supra* note 80, at 31. According to the circuit court, accepting the EPA's interpretation of the Good Neighbor Provision would mean that "a State's only chance to avoid FIPs is to make a successful stab in the dark." *Id.* at 36. Cf. *Utility Air*, 134 S. Ct. at 2442 (reasoning that the EPA should have "interpret[ed] 'any air pollutant' in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities *that enable them to be sensibly regulated* at the statutory thresholds, and to exclude . . . pollutants[] like greenhouse gases") (emphasis added).

In further support of its decision on *EME Homer*'s first issue, the Court rejected petitioners' argument that the EPA's failure to harmonize the Tailoring Rule with its prior interpretations of the Good Neighbor Provision made it unreasonable.¹²⁶ In contrast, the *Utility Air* Court pointed to inconsistency with prior statutory constructions as a major indicator that the EPA's most recent interpretation was unreasonable.¹²⁷ Significantly, the past EPA judgments at issue in *EME Homer* were of the same nature as those in *Utility Air*, construing more narrowly a particular CAA provision in order to mitigate difficulties in implementing and enforcing the related.¹²⁸ This direct parallel makes it quite likely that *Utility Air*'s rationale would have led the *EME Homer* Court to conclude that the Transport Rule constituted an unreasonable interpretation on the basis of its incongruity with past EPA constructions.

Finally, with regard to the issue of cost consideration under the Good Neighbor Provision, application of *Utility Air*'s reasoning would likely have led to a contrary result once again. Here, comparative analysis illustrates the functional difference between applying *Chevron* as two discrete steps and applying it as a collapsed single-step reasonableness inquiry. Explicitly differentiating *Chevron*'s two steps, the *EME Homer* majority first found the Good Neighbor Provision ambiguous, at step one, as to the allocation of responsibility amongst multiple upwind States contributing significantly to nonattainment in a single downwind State;¹²⁹ then, at step two, the Court held that considering costs—or, as the EPA characterized it: “in terms of the language, ‘contribute significantly,’ . . . constru[ing] that term to include a component of difficulty of

126. *EME Homer*, 134 S. Ct. at 1601–02 (“Whatever pattern the Agency followed in its [prior rules], EPA retained discretion to alter its course.”). Specifically, respondents had noted that, in regard to similar rules calling for a reduction of pollution by upwind States, the EPA had allowed a grace period subsequent to quantification of the States’ regulatory obligations during which the States had an opportunity to formulate adequate SIPs. *See id.* (citing Tr. Of Oral Arg. 37–39, 42–43, 45–46).

127. *Utility Air*, 134 S. Ct. at 2440 (“It takes some cheek for EPA to insist that it cannot possibly give ‘air pollutant’ a [non-GHG-inclusive] meaning in the PSD and Title V contexts when it has been doing precisely so for decades.”).

128. In *EME Homer*, the past judgments construed more narrowly the Good Neighbor Provision, for the purpose of lessening the practical difficulties faced by states in being required to propose a SIP without any quantitative guidance. *See supra* note 141 and accompanying text. In *Utility Air*, the past judgments more narrowly construed the term “any air pollutant” for the purpose of lessening the practical difficulty of subjecting the innumerable sources of less harmful emissions to “an elaborate, burdensome permitting process” not designed to apply to such sources. *See Utility Air*, 134 S. Ct. at 2439–40.

129. *EME Homer*, 134 S. Ct. at 1604.

achievement,” with cost being that component¹³⁰—was a reasonable method of allocating this responsibility.¹³¹

Although framing its disagreement with this holding in terms different than a one-step vs. two-step *Chevron* issue, Justice Scalia’s dissent expressed articulately the manner in which *EME Homer*’s outcome might differ under a single-step analysis. As Justice Scalia wrote:

[T]he statute does not focus on whether the upwind state has “achieved [compliance] significantly”; it asks whether the State has “contributed significantly” to downwind pollution. The provision addresses the physical effects of physical causes, and it is only the *magnitude* of the relationship sufficient to trigger regulation that admits of some vagueness. Stated differently, the statute is ambiguous as to *how much* of a contribution to downwind pollution is “significant,” but it is not at all ambiguous as to whether factors unrelated to the *amounts of pollutants* that make up a contribution affect the analysis.¹³²

As the dissent suggests, under a two-step *Chevron* analysis, the unfortunate potential arises for a court’s consideration of the first step to become divorced from its consideration of the second step.¹³³ Conversely, this concern is somewhat alleviated under a single-step inquiry because, by this method, the agency’s construction is considered specifically *in relation to* the ambiguous language at issue. The dissent, seemingly acknowledging this sentiment, gives an eloquent explanation of its significance to the matter at hand:

Just as “[i]t does not matter whether the word ‘yellow’ is ambiguous when the agency has interpreted it to mean ‘purple,’”

130. Tr. Of Oral Arg. 9. In support of this interpretation, petitioners’ explained that “in common parlance, we might say that dunking a basketball is a more *significant* achievement for somebody who is 5 feet 10 than for somebody who is 6 feet 10.” *Id.* (emphasis added).

131. *Id.* at 1606–07.

132. *Id.* at 1611 (Scalia, J., dissenting) (final two emphases in original).

133. It should be emphasized that the *Chevron* Court did specify that the first step in this methodology is, in fact, to inquire as to the presence of ambiguity with respect to “*the precise question at issue.*” *Chevron*, 467 U.S. at 842 (emphasis added). Accordingly, the risk that the logic applied at each of *Chevron*’s two steps may become divorced is perhaps best categorized as an issue resulting from the *misapplication* of *Chevron*, rather than from the doctrine itself or from its own dichotomy or non-dichotomy between its two steps. However, as evidenced here, the separation of *Chevron*’s inquiry into two discreet steps does give rise to the significant potential for reviewing judges—whether inadvertently or subconsciously, or by deliberate legal sleight-of-hand—to obfuscate the relationship between the appropriate considerations to be assessed at each step.

it does not matter whether the phrase “amounts which . . . contribute significantly [to downwind NAAQS nonattainment]” is ambiguous when EPA has interpreted it to mean “amounts which are inexpensive to eliminate.”¹³⁴

The problem lies in the fact, lost in the dichotomy between *Chevron*’s two steps, that even if the term “contribute significantly” is ambiguous, it might *not* be ambiguous as to its exclusion of cost-consideration.¹³⁵ Though the effect of this particular conflict between *EME Homer* and *Utility Air* is less determinative of the issue’s outcome, it is nevertheless indicative of the divergent analyses’ potential to produce antithetical results.

As this doctrinal inversion evidences, *Utility Air* did not differ from *EME Homer* in a merely hypothetical or theoretical sense, nor did the differences in its rationale bear simply minor or ancillary effects when applied in lieu of those relied upon in *EME Homer*. Rather, these differences effected a distinct, tangible difference in the cases’ outcomes.

2. *Utility Air Under Traditional Chevron Analysis*

Application of *EME Homer*’s methodology to the circumstances at issue in *Utility Air* would likewise bear directly on the case’s outcome. As with the hypothetical in Part III.A.i., nearly all of the reasoning underlying the Court’s decision in *Utility Air* fails when judged under the standards set forth in *EME Homer*.

In finding the EPA’s GHG-inclusive construction of the term “any air pollutant” unreasonable as applied to the CAA’s PSD and Title V permitting programs, the Court placed significant emphasis on several lines of reasoning. First, and undoubtedly most prominent among these, the Court repeatedly stressed the undesirable consequences and implausibility of implementing the Triggering Rule as confirmation of the

134. *EME Homer*, 134 S. Ct. at 1612 (quoting *U.S. v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1847, n.1 (2012) (Scalia, J., concurring in part and concurring in judgment)).

135. *See id.* (“It would be extraordinary for . . . use of the single word ‘significantly,’ to transmogrify a statute that assigns responsibility on the basis of the amounts of pollutants emitted into a statute authorizing EPA to reduce interstate pollution in the manner that it believes most efficient.”).

rule's unreasonableness.¹³⁶ This rationale stands in stark contrast to *EME Homer*'s markedly stricter adherence to traditional textual construction. In *EME Homer*, the Court explained that "[t]he practical difficulties [in a rule's application] do not justify departure from the Act's plain text."¹³⁷ With respect to the rules at issue in *Utility Air*, not only does the CAA's plain text ("any air pollutant"), support the EPA's GHG-inclusive construction, but the Court itself has previously held that the Act-wide definition of "any air pollutant" includes GHGs.¹³⁸ Owing, then, to the fact that *EME Homer* held textual support for the EPA's position to be dispositive at *Chevron*'s first step,¹³⁹ it follows that, under *EME Homer*, the Triggering Rule would have likewise been upheld.

Next, the second major basis for the Court's decision in *Utility Air* was the failure of the Triggering Rule to comport with the EPA's past interpretations of the relevant provision.¹⁴⁰ According to the Court, "[i]t takes some cheek for EPA to insist that it cannot possibly give 'air pollutant' a [more narrow meaning] in the PSD and Title V contexts when it has been doing precisely that for decades."¹⁴¹ Again, *EME Homer* explicitly rejected this logic, as the Court, there, explicitly dismissed an

136. See, e.g., *Utility Air*, 134 S. Ct. at 2443 ("The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it."); *id.* (describing "the calamitous consequences" of the EPA's interpretation); *id.* at 2436 ("[The Rule] would . . . touch every household in the land, yet still be relatively ineffective at reducing greenhouse gas concentrations") (internal quotation omitted). Further examples of this reasoning abound.

137. *EME Homer*, 134 S. Ct. at 1601–02.

138. See *Utility Air*, 134 S. Ct. at 2439; *Massachusetts*, 549 U.S. at 528–29. Although the Act-wide definition of "any air pollutant" at issue in *Massachusetts* is not the precise instance of the term at issue in *Utility Air*, the fact that the Court found that "[t]he statute is unambiguous," *id.*, as to the inclusion of GHGs in the Act-wide definition of the term is strong, if not dispositive evidence that the plain text of the Act supports the EPA's position. In fact, the Court, in *Utility Air*, more or less acknowledges as much, explaining that GHGs are "indisputably [included in the category of] 'pollutant[s] subject to regulation.'" *Utility Air*, 134 S. Ct. at 2449 n.9. Ironically, despite holding the EPA's interpretation of "any air pollutant" unreasonable due to its inclusion of GHGs, the Court places GHGs "indisputably" into an even narrower category. Indeed, making the textual argument that GHGs are a pollutant subject to regulation is difficult without first conceding that they are, in fact, a pollutant in the first place. These interpretive inconsistencies are further evidence of the fact that the *Utility Air* Court divorced its logic from *Chevron* and traditional textual analysis in favor of a more comprehensive set of considerations.

139. *EME Homer*, 134 S. Ct. at 1600 ("the text of the statute supports EPA's position").

140. See *supra* notes 108–111 and accompanying text.

141. *Utility Air*, 134 S. Ct. at 2440.

identical argument.¹⁴² Under *EME Homer*, the EPA's past constructions of "any air pollutant" as not including GHGs would not preclude its subsequent GHG-inclusive interpretation of the term, nor would these past alternative constructions lend weight to the argument that the Triggering Rule was an impermissible construction of the CAA.¹⁴³

Finally, the *Utility Air* Court repeatedly emphasized that, in the context of the PSD and Title V permitting programs, construing the term "any air pollutant" to include GHGs was "incompatible . . . with those programs' regulatory structure."¹⁴⁴ Analogously, in the appellate court decision ultimately overturned in *EME Homer*, the D.C. Circuit reasoned that the SIP/FIP provisions of the CAA "establishe[d] a partnership between EPA and the states," by which "EPA sets the standards, but the States bear primary responsibility for attaining, maintaining, and enforcing these standards."¹⁴⁵ The circuit court held that the EPA's Transport Rule was "incompatible with . . . the structure of the Clean Air Act" because, by failing to give states quantitative guidance or a reasonable opportunity to propose an adequate SIP, it effectively usurped the regulatory autonomy reserved for the states, thereby violating this so-called "partnership."¹⁴⁶ The D.C. Circuit's argument that the Transport Rule was an impermissible interpretation of the CAA on the grounds that it was incompatible with the Act's structure was ultimately *rejected* by the Court in its reversal of the D.C. Circuit—despite the fact that this reasoning is essentially identical to the Supreme Court's own reasoning in *Utility Air*.¹⁴⁷ Yet again, this analytical difference is emblematic of the substantial likelihood that

142. *EME Homer*, 134 S. Ct. at 1601–02 ("Whatever pattern the Agency followed in its [past rules], EPA retained discretion to alter its course.").

143. *Id.* at 1602 (explaining that because the EPA was "[e]ndeavoring to satisfy the D.C. Circuit's directive [in a prior case] . . . [the Court] cannot condemn EPA's decision" on the present matter). Ironically, this is yet another line of logic conflicting directly with *Utility Air*. There, the Court reasoned that its own prior determination that the term "any air pollutant" included GHGs *did not* lend support to the reasonableness of the EPA's similar construction of the term. *Utility Air*, 134 S. Ct. at 2439 (noting that "[i]n *Massachusetts*, the Court held that the Act-wide definition [of 'air pollutant'] includes greenhouse gases," but still reaching an ultimate conclusion that the EPA's GHG-inclusive construction was unreasonable).

144. *Id.* at 2442. *See also, e.g., id.* at 2443 ("[W]e think it beyond reasonable debate that [the Triggering Rule] would be incompatible with the substance of Congress' regulatory scheme").

145. *EME Homer*, 696 F.3d at 29–30.

146. *Id.* at 33.

147. *See EME Homer*, 134 S. Ct. at 1600–1601 (acknowledging the circuit court's argument, but still finding that "nothing in the statute places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations").

application of *EME Homer*'s reasoning would have led the Court to a different decision in *Utility Air*.

In short, the Triggering Rule would have been exceedingly unlikely to be deemed an impermissible construction of the CAA had it been assessed under *EME Homer*. This dissimilarity in outcome results from the Court's underlying willingness to consider the totality of the circumstances with which it was faced in *Utility Air*, and its reciprocal observance of black-letter *Chevron* analysis in *EME Homer*. This doctrinal cause-and-effect relationship is equally evident in the previous assessment of the Triggering Rule.¹⁴⁸

IV. RECONCILING THE COURT'S CONFLICTING DOCTRINE

The inconsistency and uncertainty in judicial review created by the Supreme Court's contradictory holdings is problematic in and of itself, as it leaves the validity of any particular rule up to the EPA's best guess.¹⁴⁹ The greater problem, however, lies in the resulting demand placed on the EPA to draft regulations with primary consideration not of the intent of Congress, but of what it believes courts will uphold.¹⁵⁰ Furthermore, both the highly complex, technical nature of the CAA and the increasing impetus for climate change regulation exacerbate the negative consequences potentiated by this uncertainty. While the CAA's complexity amplifies the need for judicial

148. See Part III.A.2.

149. See William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan*, 96 GEO. L.J. 1038, 1157 (2008) (noting that "the Supreme Court itself is not settled as to what is the correct approach to agency statutory interpretations," and that "whatever approach the Court says it is following, the Justices will tend to be ad hoc in their actual practice").

150. See Reeves & Logan, *EPA Takes Steps to Shore up Legal Basis for Power Plant GHG Rule*, INSIDE EPA WEEKLY REPORT (June 6, 2014) (explaining that recently, the EPA has focused in large part on "insulating [its] proposed rules from fundamental legal attack" by giving "alternative definition[s] in an effort to have at least one upheld by federal courts"); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 76-79 (2000) ("[T]he sort of careful deliberation and drafting that legislators might use to guide judicial interpretation will be wasted on an administrative agency. The agency will tend to choose among reasonable interpretive options based on political considerations and policy concerns rather than anything in Congress' statute.").

review¹⁵¹ by expanding the range of possible interpretations of ambiguities,¹⁵² it simultaneously increases the importance of technical and scientific expertise in their interpretation, paradoxically encouraging heightened deference to the EPA.¹⁵³ That these effects are at competition with one another is axiomatic: Greater need for deference to agency interpretations undoubtedly enhances the risk that agencies might overstep the bounds of their authority, which, in turn, increases the importance of the reviewing court's role in keeping agency authority in check.¹⁵⁴ Accordingly, in addressing the problem created by the Court's current doctrinal conflict, any potential solution will only be beneficial to the extent that it strikes a balance between these countervailing interests.

But how can such a balance be struck? Would it not be prudent to simply choose one of the Court's two methodologies and "stick to it?" Answering these questions requires a closer look at the two aforementioned competing interests as they relate to the Court's analyses in *EME Homer* and *Utility Air*, respectively.

151. See Sunstein, *supra* note 40, at 2088 ("Often the regulatory process is confounded by the difficulty of coordinating numerous statutes with one another").

152. See Stevenson & Vermule, *supra* note 53, at 601 ("statutory language . . . will suggest to the reviewing court both a 'best' interpretation of the statute . . . and a range of interpretations that are sufficiently plausible that the court would view them as reasonable, though not ideal"). The pair goes on to list a number of factors that influence the size and scope of this range—or, as they put it, "the amount the court would permit the agency to deviate from the court's ideal reading—including the language of the statute at issue and the court's confidence in the agency's expertise, among others. *Id.* at 601 n.19 ("The size of the zone need not be fixed by the statute itself; the amount of interpretive latitude the court gives the agency—the amount the court would permit the agency to deviate from the court's ideal reading—may depend in part on other factors, such as the court's confidence in the agency's expertise, its sympathy for the agency's policy goals, or its assessment of the importance of the interpretive issue.")

153. See Sunstein, *supra* note 40, at 2095 ("[D]eference [i]s appropriate [where] the agency's competence [i]s highly relevant"). *Cf. id.* at 2085 (1990) ("[T]he text and background of the [Administrative Procedure Act] suggest a firm belief in the need for judicial checks on administration, particularly with respect to the interpretation of law"); *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994) ("[B]road deference [to agency's statutory interpretations] is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns") (internal quotations omitted).

154. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State After Chevron*, 89 COLUM. L. REV. 452, 487-88 (describing "the Court's long struggle to reconcile the growth of agencies with the Constitution" as having been "far more complex" than anticipated") (1989).

A. *The Problem with Picking “One or the Other”*

First, *EME Homer*'s pointed focus on the need for agencies to fill statutory gaps is made clear by the Court's by-the-book adherence to *Chevron*, its emphasis on strict statutory construction, and its common-sense approach to determining congressional intent.¹⁵⁵ The Court specifically stressed that, “[b]ecause a full understanding of the force of the statutory policy . . . depend[s] upon more than ordinary knowledge of the situation, the administering agency's [reasonable] construction is to be accorded controlling weight.”¹⁵⁶ Corresponding to the considerable importance it placed on the need for agency expertise in statutory interpretation, the Court's opinion in *EME Homer* afforded reciprocally little consideration to the need to “police” the EPA or keep its authority in check.¹⁵⁷

In contrast, the need to keep the EPA's authority in check was precisely the interest that the Court's opinion in *Utility Air* weighed most heavily; the Court's citation to *Brown & Williamson* clearly signals this priority. As discussed *supra*, the *Utility Air* majority supported its determination that the EPA had unreasonably construed the CAA by repeatedly noting that the Triggering Rule would greatly expand the Agency's regulatory authority.¹⁵⁸ In fact, *Utility Air* placed so much emphasis on the need to keep the EPA's power in check that it essentially required that the EPA divorce its interpretation from the plain meaning of the statutory language. And, as in *EME Homer*, the Court's strident protection of one particular interest in *Utility*

155. See generally Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2300 (2006) (“Congress would prefer agencies rather than courts to have binding authority to resolve residual [statutory] ambiguities”).

156. *EME Homer*, 134 S. Ct. at 1603 (internal quotations omitted).

157. *Id.* at 1601 (“The practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text”). One of these “difficulties cited by the Court of Appeals[,]” *id.*, was the concern that, by way of the Transport Rule, the EPA was usurping a considerable amount of the regulatory autonomy typically reserved for the States under the relevant portions of the CAA. *EME HCG Circuit Court Decision*, *supra* note 66, at 29–30.

158. See *supra*, notes 103–107 and accompanying text (detailing the enormous effect the Triggering Rule would have on the EPA's regulatory authority). See also, e.g., *Utility Air*, 134 S. Ct. at 2442 (“[A]pplying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design. In the Tailoring Rule, the EPA described the calamitous consequences of interpreting the Act in that way”); *id.* at 2443 (explaining that, where it previously regulated about 800 sources under the PSD program and 15,000 under Title V, the rule would result in expansion of the number of sources over which the EPA had regulatory authority to 82,000 and 6.1 million, respectively). The Court further noted that the increase in the Agency's authority was so great that it would “necessitate[] as much as a 1,000-fold increase in the permitting-thresholds set forth in the statute.” *Id.*

Air dictated a corresponding de-emphasis on furtherance of the other. Particularly, in placing strong priority on its role in preventing agency overreach, the *Utility Air* majority discounted the importance of the role of agency experts—or, as the Court described them in *EME Homer*: those holding “a full understanding of the statutory policy . . . [and] more than ordinary knowledge of the situation”¹⁵⁹—in interpreting ambiguities in technically complex statutes.¹⁶⁰

Having established the particular interests underlying the holdings in *Utility Air* and *EME Homer*, determining whether either of these holdings’ respective methodology should be “chosen” as the predominant adjudicative strategy moving forward becomes simple. It is no coincidence that *Utility Air*, in deemphasizing the importance of deference to agency expertise, cited to *Brown & Williamson* in support for its employment of an overarching reasonableness test.¹⁶¹ The Court’s choice to look beyond the text of the statute reflects the policy concerns at the heart of *Brown & Williamson*: Where an agency interpretation holds potentially vast political or economic consequences—or, in other words, where the courts’ role in policing agencies is most important—courts should apply a more comprehensive test to assess whether the agency’s interpretation is reasonable.

It seems fairly safe to conclude that the Court’s quasi totality-of-the-circumstances analysis in *Utility Air* did, in fact, produce the right result. Notably, the Court’s invalidation of the Triggering Rule prevented burdensome permitting requirements “finely crafted for thousands, not millions, of sources” from being thrust upon approximately 6.1 million sources.¹⁶² It additionally/further precluded the swell of administrative costs from around \$74 million to over \$22 billion¹⁶³ and averted “decade-long delays in issuing permits” which would have caused “construction projects to grind to a halt nationwide.”¹⁶⁴

However, the likely consequences of the EPA’s Triggering Rule were both easily quantifiable and patently extreme. This certainty of impact played the crucial role of mitigating the usual risks associated with brushing aside the need for expert resolution of statutory ambiguities.

159. *EME Homer*, 134 S. Ct. at 1603 (internal quotation omitted).

160. *See Utility Air*, 134 S. Ct. at 2439–40 (explaining the Court’s *own view* as to how the EPA *should have* construed the CAA provision at issue); *id.* at 2442 (emphasizing that “there is no insuperable textual barrier to EPA’s interpreting ‘any air pollutant’ [more narrowly]” at what was purportedly the *first* step of *Chevron* analysis).

161. *See supra*, Part II.B.2 (detailing the wide range of factors guiding the Court’s assessment of the Triggering Rule).

162. *Utility Air*, 134 S. Ct. at 2443–44.

163. *Id.* at 2442–43.

164. *Id.* at 2443.

Applying the *Utility Air* methodology in assessing a highly technical and complex issue not characterized by such glaringly dire consequences would effectively give the reviewing court nearly as much authority as the agency to interpret the statute¹⁶⁵ despite the obvious disparity in the technical expertise possessed by the two bodies.¹⁶⁶ The comparative analysis of the Transport Rule under *Utility Air*'s reasoning, discussed *supra*, illustrates this problem quite clearly.¹⁶⁷ The risk—inherent in across-the-board application of *Utility Air*—of giving courts such broad discretion in this context raises concerns not only due to courts' general lack of knowledge on scientific and technical issues, but also because it essentially removes any concrete framework by which courts are bound in answering questions that are often intrinsically political in nature.¹⁶⁸ Simply put, applying *Utility Air* to every challenge to CAA-based rules would allow courts to effectively usurp authority reserved for agencies on account of their expertise. Furthermore, doing so would unreasonably bog down the regulatory process by forcing agencies to tailor their rules to the sensibilities of courts rather than congressional intent.¹⁶⁹

Similarly, the value the Court placed on the broad discretion of agency expertise in *EME Homer* seems to have led to an agreeable result. The *EME Homer* Court—essentially tasked with choosing between the EPA's and the

165. *Cf. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (“[A reviewing court’s] task is to apply the text [of the statute] not to improve upon it”).

166. *See* David J. Barron & Elena Kagan, CHEVRON’S NONDELEGATION DOCTRINE, 2001 S. CT. REV. 201, 203–05 (explaining that deference to agencies is especially important “in light of the many and fluctuating considerations, usually best known to the agency itself”); *Thomas Jefferson Univ. v. Shalada*, *supra* note 153, at 512 (“[B]road deference [to agency’s statutory interpretations] is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns”) (internal quotations omitted).

167. *See supra*, Part III.A.1.

168. *See* *Molot*, *supra* note 155 (“[A]genc[ies] will tend to choose among reasonable interpretive options based on political considerations and policy concerns”). *Cf. Goldsmith & Manning*, *supra* note 172 (explaining that agencies are better suited to make these political and policy related determinations because “Congress would prefer agencies rather than courts to have binding authority to resolve residual [statutory] ambiguities,” and that “the best explanation for this is that executive branch officials are endowed with presumptive constitutional authority . . . to complete an ambiguous statutory scheme *unless Congress specifies otherwise*”) (emphasis added).

169. At least some members of the Court have alluded to this notion, emphasizing “the different institutional competencies of agencies and courts” and noting that “agencies [not courts] are experts at statutory implementation.” *Neguse*, *supra* note 43, at 530 (Stevens, J., concurring in part and dissenting in part).

D.C. Circuit's interpretations of a CAA ambiguity—did not overlook the fact that the provision at issue was highly scientifically complex in determining which interpretation should control.¹⁷⁰ The Court pointed out that the linkages in the data “with which EPA had to contend [in making its determination] number[ed] in the thousands,”¹⁷¹ that the “EPA conducted complex modeling to establish the combined effect the upwind reductions projected at each cost threshold would have on air quality in downwind States.”¹⁷² Furthermore, even given the extensive lengths to which the EPA went in deciding how to frame its rule, the Court acknowledged that “a degree of imprecision is inevitable in tackling the problem of interstate air pollution.”¹⁷³ Recognizing this scientific complexity, the *EME Homer* Court ultimately concluded that the “EPA must have leeway in fulfilling its statutory mandate” and therefore upheld the Transport Rule.¹⁷⁴

In this sense, the Transport Rule provides a pristine example of why agencies are generally far better equipped than courts to interpret the statutes they are tasked with enforcing—the very reason that granting deference to agency interpretations on complex matters is often prudent. However, in giving considerable leeway to the EPA, the *EME Homer* Court placed little emphasis on the importance of its role in preventing agencies from asserting excessive authority. Viewing the Triggering Rule through the lens of *EME Homer*'s reasoning displays conspicuously the risks associated with this omission.¹⁷⁵ Indeed, it is not difficult to conclude that *EME Homer*'s reliance on the plain meaning of statutory text and rejection of other, extratextual considerations such as the “practical difficulties” of implementing the Triggering Rule could lead to particularly adverse consequences if applied in a *Utility Air*-like circumstance where the most prominent indications of a regulation's unreasonableness are the actual effects of that statutory construction.¹⁷⁶

170. See *supra*, Part II.B.1 (detailing the particular challenges at issue in *EME Homer*).

171. *EME Homer*, 134 S. Ct. at 1594.

172. *Id.* at 1596.

173. *Id.* at 1609.

174. *Id.*

175. See *supra*, Part III.A.2 (reasoning that the Triggering Rule would likely have been upheld under an *EME Homer* analysis).

176. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) (warning that the uncertainty in “[t]he present [agency law doctrine] contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law that a fusion of lawmaking and law-exposition is especially dangerous to our liberties”); Jerry L. Mashaw, *Greed, Chaos, and Governance*, 152–153 (1997) (warning against giving overly broad deference to agency interpretations and explaining, “If congressional statutes were truly specific with respect to the actions that administrators were to take, presidential politics would be a mere beauty contest”).

The necessary conclusion, then, is that neither *EME Homer* nor *Utility Air* should govern every challenge to the EPA's CAA authority. The likelihood of drastically negative consequences under either methodology renders both unsavory as universal solutions. Nevertheless, the pertinent lesson here lies in the fact that each of these competing doctrines *do* produce seemingly beneficial results in particular circumstances. Only by accurately identifying these circumstances can a workable solution to the doctrinal conflict be obtained.

Clearly, application of *EME Homer's* logic to legal circumstances such as those presented in *Utility Air* produces far-from-ideal results. But what *were* the precise legal circumstances that colored the Court's decision in *Utility Air*? What particular aspects of the EPA's Triggering Rule would allow it to pass muster under the plain meaning of the CAA despite the near-catastrophic effects that would result? Better yet, what aspects of the CAA provision would allow a rule to produce such consequences despite clearly fitting the plain meaning of its language to produce such dire consequences? Answering these questions will illuminate an effective solution to the doctrinal conflict at hand.

A. The GHG vs. Non-GHG Distinction

Luckily, in light of the preceding analysis of the CAA, CAA jurisprudence, and related administrative law policy concerns, these answers are not so difficult to find. Simply put, the efficacy of the *EME Homer* and *Utility Air's* competing rationales in the circumstances in which they were applied—and the sheer disaster risked by their application in the alternative circumstances—stems from the fact that *Utility Air's* Triggering Rule implicated one ingredient that *EME Homer* and the Transport Rule lacked: greenhouse gases.

In 1990, when Congress passed the most recent revision of the CAA, legislators did not plan for the Act, as written, to serve as a vehicle for regulating GHG emissions or combatting climate change.¹⁷⁷ As such, the fit of the statutory language to GHG regulations can be imprecise. In particular,

177. See 68 Fed. Reg. 52922-02 (Sept. 8, 2003) (“Only the research and development provision of the CAA—section 103—specifically mentions CO₂, and the legislative history of that section indicates that Congress was focused on seeking a sound scientific basis on which to make *future* decisions on global climate change, not regulation under the CAA as it was being amended.”) (emphasis added); Advanced Notice, *supra* note 25, at 44,355 (setting out the EPA's opinion that the CAA is “an outdated law . . . [which] is ill-suited for the task of regulating global greenhouse gases”).

problems arise in applying the CAA's numerous "triggering" provisions,¹⁷⁸ which go into effect according to specific, statutorily-determined, numerical emissions thresholds. Because these thresholds were established in consideration of "conventional pollutants" that tend to be emitted in quantities "orders of magnitude" less than GHGs,¹⁷⁹ the resulting disparity leaves many portions of the CAA entirely unworkable when applied to GHGs.¹⁸⁰

The true complication arises, however, from the fact that many provisions in the CAA, by the plain meaning of their language, *can* reasonably be construed to apply to GHGs.¹⁸¹ The fact that Congress, in drafting the CAA's particular language and setting its quantitative thresholds, did not anticipate the extension of that language or those thresholds to apply to GHGs is precisely the reason that *EME Homer's* logic cannot be applied in situations analogous to those at issue in *Utility Air*. Strict application of *Chevron's* two-step test would allow for a rule like the Triggering Rule slip through the doctrine's adjudicative cracks. Essentially, the nature of the CAA makes it so that, sometimes, the *only* way to prevent a potentially harmful GHG-centric rule from being upheld is to take into consideration factors beyond the mere words and numbers set forth in the CAA.¹⁸²

The essence of the problem at hand lies in the fact that *Chevron's* traditional two-step form is not built to deal with statutory language rendered

178. See, e.g., Clean Air Act, 42 U.S.C. §§ 7475(a)(1), 7479(2)(C) (2012) (requiring a permit for new sources with the potential to emit 250 tons per year of "any air pollutant"); *Id.* at § 7475(a)(4) (requiring new sources subject to the PSD permitting program to comply with BACT "for each pollutant subject to regulation [under the Act]"). Essentially, two triggers come into play here: First, should the EPA issue a report classifying a new substance as an "air pollutant," that classification would trigger the application of the PSD permitting program to sources with the potential to emit 250 tons per year of that pollutant; second, should the EPA issue a regulation of a new substance, that regulation would trigger every source subject to the PSD program to be subject to mandatory compliance with BACT.

179. Advanced Notice, *supra* note 25, at 44,498–99.

180. See Sunstein, *supra* note 40, at 2090 ("[R]egulation often runs into difficulty because of the complex systemic effects of regulatory controls. Statutes interact in surprising ways with markets, other statutes, and other problems. Unanticipated consequences are common").

181. See, e.g., Clean Air Act, 42 U.S.C. §§ 7475(a)(1) (making subject to regulation sources with the potential to emit 250 tons of "any air pollutant"). This issue—and this particular provision—served as the basis for *Utility Air*.

182. See Sunstein, *supra* note 40, at 2087–89 (explaining that "*Chevron* is best understood and defended . . . [as] involv[ing] extratextual considerations of various kinds, including how a statute is best or most sensibly implemented," because "[s]ometimes regulation is made more difficult because of the pervasive problem of changed circumstances," and "Congress is unable to amend every statute to account for those who must apply the statute"); *Id.* at 2089 ("Congress cannot possibly foresee all of the problems to be dealt with under broad statutory terms").

problematic due to changing circumstances.¹⁸³ This shortcoming explains why *EME Homer* yields less-than-ideal results when applied to GHG-related rules. Instead, considerations beyond those associated with a strict *Chevron* analysis become crucial in this context, as courts are capable of responding more quickly and fluidly to changing circumstances than legislators.¹⁸⁴

Furthermore, as beneficial as the *Utility Air* approach may be in helping to prevent the promulgation of textually supported but potentially harmful rules, it is equally beneficial in the opposite sense. Oftentimes, the same changes in circumstance that necessitate regulation can, themselves, cause that very “regulation [to] fail[] because of the excessive rigidity of statutory commands.”¹⁸⁵ When reviewing such regulations, consideration of factors beyond mere statutory text can produce more favorable results. Administrative law scholar Cass Sunstein lists the CAA’s “best available technology” provisions as a prime example of how a statute’s textual rigidity can make effective regulation difficult in light of changing circumstances.¹⁸⁶ In fact, one of these very provisions—the BACT requirement—took center stage in *Utility Air*, where the Court upheld the EPA’s rule specifically on the basis of its likely real-world effects/non-textual factors.¹⁸⁷

By their very nature, the problems created by GHG regulation under the CAA can be solved only by applying *Utility Air*’s extratextual, totality of the circumstances approach. However, this necessity does not lessen the risks associated with applying *Utility Air* outside of the context of GHG regulation. Because the root of the problem with the Court’s conflicting holdings is centered specifically on the regulation of GHGs, the solution to the quandary of how to resolve this conflict should likewise be a particularized one centered on the regulation of GHGs. Although *Utility Air* is exceptionally useful in this specific context, the distinct need for

183. *See Id.* at 2089 (explaining that, when facing such a problem, “tak[ing] changed circumstances into consideration[] seems to be a valuable if partial corrective”).

184. *See id.* at 2088 (“the common law process has a significant advantage over legislation in its capacity to respond to changing conditions and mores”). *Cf. Cross, supra* note 81, at 2001 (explaining that, although it is not at all uncommon for the Court to use non-traditional methods of statutory interpretation, “[i]t is impossible to determine, though whether this pluralism is sincere (using the best methods for each case) or strategic (using the methods that conform to the Justice’s ideologically preferred outcome”).

185. Sunstein, *supra* note 40, at 2089.

186. *Id.* at 2089 n.87.

187. *Utility Air*, 134 S. Ct. at 2448–49 (explaining that the EPA’s interpretation of the BACT provision “is not so disastrously unworkable . . . as to convince us that EPA’s interpretation is unreasonable” because “the record before [the Court] does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases”).

expert-driven statutory interpretation remains—particularly in light of the CAA’s technically complex nature and the science underlying its provisions. Accordingly, *Utility Air* should be followed in reviewing GHG-related rules, while *EME Homer* should control with regard non-GHG rules. This solution serves to concurrently maximize the requisite deference to the EPA’s interpretations of the CAA and the flexibility necessary to deal with the paramount need for GHG regulation under a law whose language makes it exceedingly difficult to do so. At the same time, this strategy minimizes both the danger of giving courts too much authority to impose their own statutory constructions and the risk of allowing agencies to unreasonably expand their own authority.

CONCLUSION

Climate change, being of pressing importance, demands immediate attention. The suggestions set forth in this comment serve to enhance the EPA’s ability to provide timely and effective countermeasures, while simultaneously mitigating the risks associated with other particular courses of action. Short of amending the CAA, the competing interests underlying administrative law as a whole—deferring to agency expertise while preserving the judiciary’s authority to check agency—make finding a *complete* solution to the issue considered in this comment implausible. Nevertheless, applying the methodology advanced in *Utility Air* to the adjudication of GHG-related rules, and retaining that of *EME Homer* for the review of non-GHG rules, comes substantially close to doing so. Here, both competing administrative law interests and the importance of doctrine that allows for effective climate change regulation are given maximum priority. Indeed, tackling this issue will take the cooperation of many—and this doctrinal compromise is a firm step in the right direction.

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* J.D., 2016, Paul M. Hebert Law Center, Louisiana State University. First and foremost, I would like to thank Professor Michael Coenen for his help and guidance in navigating the complex field of administrative law. I also owe a great deal of gratitude to my fellow Journal members for their patience and assistance throughout this process.