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MASSACHUSETTS v EPA: FROM
POLITICS TO EXPERTISE

I. INTRODUCTION

On one view, *Massachusetts v EPA*¹ was a rather narrow administrative law decision. A 5–4 majority of the Supreme Court held that the Environmental Protection Agency (EPA) had failed to justify adequately its denial of a petition for rulemaking filed by a coalition of states and private plaintiffs. This sort of case is the routine fare of the District of Columbia Circuit, rather than the stuff of which headlines are made. Yet *MA v EPA* garnered massive public and professional attention.

Much of this attention resulted, of course, from the substantive question at issue in the rulemaking petition: whether EPA has authority to regulate, and (under certain conditions) must decide whether to regulate, greenhouse gas emissions from tailpipes in the United States' new automobile fleet. This was a case about global warming, the newspapers said, and the immediate symbolism of the case was that the Court had nudged the federal government into

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¹ 127 S Ct 1438 (2007).

action on the most consequential regulatory question of the day.

From a broader perspective, however, we will argue that the regulatory controversies surrounding global warming illustrate a larger theme: the Court majority's increasing worries about the politicization of administrative expertise, particularly under the Bush administration. On this view, *MA v EPA* is best understood not so much as an environmental law case, not primarily anyway; rather it is a companion case to *Gonzales v Oregon*,² *Hamdan v Rumsfeld*,³ and other episodes in which Justice Stevens and Justice Kennedy have joined forces to override executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics.

If the problem is the politicization of expertise, the majority's solution in *MA v EPA* was a kind of *expertise-forcing*, or so we will claim. Expertise-forcing is the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House or political appointees in the agencies.⁴ Expertise-forcing is in tension with one leading rationale of the *Chevron* doctrine,⁵ a rationale that emphasizes the executive's democratic accountability and that sees nothing wrong with politically inflected presidential administration of executive-branch agencies. Whereas the *Chevron* worldview sees democratic politics and expertise as complementary, expertise-forcing has its roots in an older vision of administrative law, one in which politics and expertise are fundamentally antagonistic.⁶

² 546 US 243 (2006).

³ 126 S Ct 2749 (2006).

⁴ From here on, we will use "White House" to include political appointees in the agencies; nothing in our thesis depends upon whether political pressures that distort agencies' expert judgments emanate from officials in the Executive Office of the President, or instead from appointees who take their cues from the White House.

⁵ *Chevron USA, Inc. v Natural Resources Defense Council, Inc.*, 467 US 837 (1984).

⁶ There is an older tradition of environmental law cases in the D.C. Circuit in which Judge Skelly Wright evinces frustration with executive "footdragging" in the implementation of statutory requirements. *Calvert Cliffs' Coordinating Committee, Inc. v United States Atomic Energy Commission*, 449 F2d 1109 (DC Cir 1971). See also *Sierra Club v Morton*, 514 F2d 856, 873-74 (DC Cir 1975) (citing the "action-forcing" elements of NEPA to justify potential judicial oversight of agency inaction); *Scientists' Institute for Public Information, Inc. v Atomic Energy Commission*, 481 F2d 1079, 1092 (DC Cir 1973) (requiring an environmental impact statement from the Atomic Energy Commission and claiming that "we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'"). Judge Leventhal wrote opinions in some notable cases adhering to this tradition as well.

Part II describes the problem of politicized expertise. Part III explains how the Court in *MA v EPA* embraced expertise-forcing as the solution to that problem in its two holdings on the merits. First, the Court's interpretation of the Clean Air Act (CAA) shows that it has retreated from the *Chevron* worldview just described, as well as from the idea, most prominent in *FDA v Brown & Williamson*,⁷ that statutes should be interpreted in light of a "nondelegation canon"—meaning that courts should force Congress to speak clearly if it intends to delegate regulatory authority over major political and economic questions. In *MA v EPA*, the Court did the opposite of what it did in *Brown & Williamson*: it interpreted statutory ambiguity to find that the agency already possessed the requisite legal authority to regulate in an important area, and declined to call on Congress for a fresh statement. This divergence is put in its best light by understanding the Court's project in *MA v EPA* as one of expertise-forcing. Second, the Court's careful scrutiny and close cabining of the EPA's discretion to decline to regulate by "deciding not to decide" is also best understood as a component of the Court's expertise-forcing project.

Part IV considers the implications of the expertise-forcing approach adopted by the Court, in both legal and political terms. Aside from its immediate impact on pending litigation and proposed legislation related to climate change, the case has longer-term doctrinal implications, particularly for an agency's traditionally capacious flexibility to defer discretionary decisions—"to decide not to decide." In constraining EPA's discretion and subjecting the agency's deferral of a decision to hard look review, the Court seems to adopt a kind of anticircumvention principle: agencies cannot perpetually defer the threshold decisions necessary to trigger regulation if doing so would undermine the main purposes of the statute. Before *MA v EPA*, it was unclear whether discretionary decisions not to promulgate regulations were even reviewable, let alone subject to "hard look" review. In this regard, *MA v EPA* could

See, for example, *Ethyl Corp. v EPA*, 541 F2d 1, 68 (DC Cir 1976) (Leventhal concurring) (noting that judges must ensure that agencies exercise their expertise rationally). See also *Consumer Federation of America v Federal Power Commission*, 515 F2d 347 (DC Cir 1975) (finding that the Federal Power Commission had neglected its rate-control responsibilities, pursuing instead a deregulatory agenda). Justice Stevens could be seen, according to Professor Richard J. Lazarus, as the new Skelly Wright. Richard J. Lazarus (remarks at the Environmental Law Panel, Harvard Law School Worldwide Alumni Congress, June 2007).

⁷ 529 US 120 (2000).

be *State Farm*⁸ for a new generation: just as *State Farm* held de-regulatory decisions reviewable, in order to allow a judicial hard look at a decision that allegedly injected politics into an expert judgment, so too *MA v EPA* held the denial of a petition requesting regulation to be reviewable, and for similar reasons.⁹ Alternatively, the Court's expertise-forcing enterprise may be limited, either because *MA v EPA* is a unique decision about global warming or because expertise-forcing, which necessarily relies on judicial predictions about political events, is an unpredictable business.

In a broader perspective, *MA v EPA* can be seen, along with *Gonzales* and *Hamdan*, as one in a series of rebukes to the administration, an expression of the Court's growing concern about potential executive overreaching. Viewed in this light, political interference with agency decision making is a species of a larger problem. Our main suggestion for administrative law, then, is that *MA v EPA* is part of a trend in which the Court has at least temporarily become disenchanted with executive power and the idea of political accountability and is now concerned to protect administrative expertise from political intrusion.¹⁰

II. THE PROBLEM: POLITICAL INTERFERENCE WITH AGENCY EXPERTISE

Every administration exerts some degree of political influence over agency decision making. After all, it is the prerogative of the democratically elected chief executive to shape agency policy within the bounds of often vague and incomplete statutes. And some administrations are more aggressive in this regard than others.¹¹ Yet

⁸ *Motor Vehicles Manufacturers' Association v State Farm Mutual Automobile Insurance Co.*, 463 US 29 (1983).

⁹ The Chief Justice, dissenting on the Court's standing holding, suggested that *MA v EPA* was *SCRAP* for a new generation, which may also be true. See *MA v EPA*, 127 S Ct at 1471 (Roberts dissenting).

¹⁰ For a broadly compatible account of recent cases, not focused on *MA v EPA*, see Peter L. Strauss, *The Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo Wash L Rev 696 (2007). For an argument that the Court has at least occasionally been suspicious of presidential interference with agency expertise throughout the post-*Chevron* era, see Lisa Schultz Bressman, *Deference and Democracy*, 75 Geo Wash L Rev 761 (2007).

¹¹ See Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2247 (2001) (showing that President Clinton expanded upon President Reagan's initial attempts at exerting more presidential control over administration). For a contrary view about whether this is a desirable development, see Peter L. Strauss, *Presidential Rulemaking*, 72 Chi Kent L Rev 965, 984 (1997).

the accounts circulating about the Bush administration as *MA v EPA* moved through the courts were of a different scope and scale than in the past: the administration had been altering scientific reports, silencing its own experts, and suppressing scientific information that was politically inconvenient. And this was being done so systematically, critics said, as to leave no doubt that it was authorized by the White House.

Most relevant to *MA v EPA*, there were suggestions of widespread tampering by the Bush administration with the global warming data reported by numerous federal agencies, including EPA. In September 2002, under Administrator Christine Whitman, EPA staff chose to delete a section on global warming from an annual report on the state of air pollution rather than accept major revisions demanded by the White House.¹² White House officials, it was said, had objected to the discussion of scientific research in the report indicating a significant rise in global temperatures and linking the rise to human activity, and referring to a National Academy of Sciences Report that the White House had earlier endorsed. White House officials replaced these sections with reference to a study funded by the American Petroleum Institute that questioned climate change science. After considering its options, EPA staff concluded in an internal memorandum that the edited section “no longer accurately represents the scientific consensus on climate change” and dropped it entirely. To publish the changes, the memorandum speculated, would expose the agency to “severe criticism from the science and environmental communities for poorly representing the science.”¹³ Episodes such as this apparently created significant tension between career agency staff and political appointees.

During 2002 and 2003, Philip Cooney, the Chief of Staff to President Bush’s Council on Environmental Quality (and a former lobbyist for the American Petroleum Institute with no scientific training), rewrote or altered reports by federal agencies on various aspects of climate change, with the effect of introducing greater doubt and uncertainty into these reports than the science war-

¹² See Jeremy Symons, *How Bush and Co. Obscure the Science*, Wash Post B04 (July 13, 2003); Andrew C. Revkin and Katharine Q. Seelye, *Report by E.P.A. Leaves Out Data on Climate Change*, NY Times A1 (June 19, 2003).

¹³ Environmental Protection Agency, *Issue Paper: White House Edits to Climate Change Section of EPA’s Report on the Environment* (Apr 29, 2003), in Union of Concerned Scientists, *Scientific Integrity in Policymaking* 34–38 (March 2004).

ranted.¹⁴ Scores of scientists in agencies such as the National Oceanic and Atmospheric Administration (NOAA) and EPA reported being pressured to delete references to climate change and global warming from official documents, including their communications with Congress.¹⁵ James Hansen, the top climate scientist at the National Aeronautics and Space Administration (NASA), reported that the administration had tried to stop him from publicly calling for prompt reductions in greenhouse gases linked to global warming, and that officials from NASA headquarters had ordered the agency's public affairs staff to review his upcoming lectures, web postings, and interviews out of concern for "coordination."¹⁶

While we express no view as to their accuracy, it is clear that accusations of political interference with expert agency decisions were being made frequently during this time, and attracted significant media attention. Reports of such manipulation were not limited to climate change but extended to scientific judgments concerning environmental, health, and safety regulation more generally. A report by the Union of Concerned Scientists alleges a wide variety of examples of administration interference with the science produced by federal agencies, including an attempt to bar a Department of Agriculture employee from discussing his findings about antibiotic-resistant bacteria in the air around hog farms, and directives made by political appointees to botanists, biologists, and ecologists in the U.S. Fish and Wildlife Service (USFWS) to refrain "for non-scientific reasons . . . from making . . . findings that are protective of [endangered] species."¹⁷ Numerous other books and articles like-

¹⁴ See Andrew C. Revkin, *Bush Aide Edited Climate Reports*, NY Times A2 (June 8, 2005). Following these revelations, Mr. Cooney resigned and was hired three days later by Exxon Mobil. See Andrew C. Revkin, *Former Bush Aide Who Edited Reports Is Hired by Exxon*, NY Times A1 (June 15, 2005).

¹⁵ As the decision in *MA v EPA* was pending, the nonprofit Government Accountability Project (the self-declared "nation's leading whistleblower organization") released a report detailing numerous instances of administration interference with expert scientists in numerous agencies. Tarek Maassarani, *Redacting the Science of Climate Change: An Investigative and Synthesis Report* (Government Accountability Project 2007), online at <http://www.whistleblower.org/doc/2007/Final%203.28%20Redacting%20Climate%20Science%20Report.pdf>.

¹⁶ Andrew C. Revkin, *Climate Expert Says NASA Tried to Silence Him*, NY Times 1-6 (Jan 29, 2006).

¹⁷ Union of Concerned Scientists, *U.S. Fish and Wildlife Survey Summary 1* (Feb 2005) ("One in five agency scientists revealed they have been 'directed to inappropriately exclude or alter technical information from a USFWS scientific document,' such as a biological opinion."). Accusations of political interference of this kind have arisen before—Reagan administration officials were reported to have pressured FWS staff to alter their findings

wise have alleged an unprecedented degree of politicization of agency expertise under the George W. Bush administration.¹⁸ We are not concerned with the merits of these claims; our point is simply that these accusations were well known, and certainly no secret to the Supreme Court Justices.¹⁹

The administration had taken other steps that fueled similar concerns about political interference with agency decisions generally, and manipulation of agency science in particular. For example, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) had in 2003 published a draft peer review bulletin that was widely criticized as an effort to politicize agency science.²⁰ The proposal required agencies to rigorously peer review all “significant regulatory information” intended for public dissemination, and for “especially significant regulatory information” follow a strict process of “formal, independent, external peer review” prescribed by OIRA. The proposal barred agency scientists, or any scientist funded by the agency (no matter how indirectly), from participating in the peer review process, with no such bar applying to industry scientists—even where the scientific information under review was produced by the regulated

regarding the status of the spotted owl, and the Bush I administration was found to have improperly interfered in an adjudicative decision by the Endangered Species Act Committee over whether to exempt western forests from the requirements of the Act. But in the past such shenanigans were considered exceptions to the rule.

¹⁸ See, for example, Rena Steinzor and Wendy Wagner, eds, *Rescuing Science from Politics* (Cambridge, 2007). In 2004, twenty Nobel Prize winners released a statement criticizing the administration’s handling of scientific information, saying in part, “When scientific knowledge has been found to be in conflict with its political goals, the administration has often manipulated the process through which science enters into its decisions. This has been done by placing people who are professionally unqualified or who have clear conflicts of interest in official posts and on scientific advisory committees; by disbanding existing advisory committees; by censoring and suppressing reports by the government’s own scientists; and by simply not seeking independent scientific advice.” Guy Gugliotta and Rick Weiss, *President’s Science Policy Questioned; Scientists Worry That Any Politics Will Compromise Their Credibility*, Wash Post § 856(a)(2) (Feb 19, 2004).

¹⁹ See, for example, Brief of Former EPA Administrators Carol M. Browner et al as Amici Curiae in Support of Petitioners, *MA v EPA*, No 05-1120, *3 (filed Aug 31, 2006) (available on Westlaw at 2006 WL 2569575) (charging that the EPA “subordinate[d] science-based regulatory decisionmaking to non-statutory policy considerations”).

²⁰ Office of Management and Budget, Proposed Bulletin on Peer Review and Information Quality, 68 Fed Reg 54023-02 (2003). The proposal was roundly criticized by the American Public Health Association, the Association of American Medical Colleges, and the Federation of American Societies for Experimental Biology, among other leading scientific organizations. See letter from Dr. George C. Benjamin, Executive Director of the APHA, to Dr. Margo Schwab, OIRA (Dec 11, 2003); letter from Dr. Jordan J. Cohen, President of the AAMC, and Dr. Robert J. Wells, President of the FASEB, to Dr. Margo Schwab, OIRA (Dec 4, 2003).

industry.²¹ Perhaps slightly less visible, but well known to Washington insiders, the President twice tried to nominate Susan Dudley to be Director of the Office of Information and Regulatory Affairs in the Office of Management and Budget.²² The Dudley nomination was widely perceived not only as a White House effort to exert more centralized political control over agency staff²³ but also as an effort to rein in environmental, health, and safety agencies, which tend to support their rulemakings with public health and other scientific data. Democrats in the Senate had blocked the confirmation out of concern that science-driven regulatory policy would be subordinated to political ideology.²⁴ This was fueled to some extent by historical allegations that OIRA interfered with agency science in its effort to cut back on regulation,²⁵ and by Dudley's own background and public statements—she had worked since 1998

²¹ See 68 Fed Reg at 54023-02 (cited in note 20). OMB drafted the bulletin pursuant to the Information Quality Act, in which Congress directed OMB to develop guidelines to ensure the “quality, objectivity, utility, and integrity of information” distributed by federal agencies. Information Quality Act, Pub L No 106-554, § 515(a), 114 Stat 2763, 2763A-153 (1995), codified in 44 USC § 3516 (2000). After widespread criticism of the proposed bulletin, including a workshop on the bulletin at the National Academy of Sciences attended by several hundred people, OMB issued a revised draft bulletin on Apr 28, 2004. See Office of Management and Budget, Revised Information Quality Bulletin on Peer Review, 69 Fed Reg 23230-02 (2004). OMB adopted this revised proposal as its final bulletin. Office of Management and Budget, Final Information Quality Bulletin for Peer Review, 70 Fed Reg 2664-02 (2005). The final bulletin explicitly permitted government employees to serve as peer reviewers, as long as they “comply with applicable Federal ethics requirements” and as long as they did not contribute to the information being reviewed. The bulletin also permits outside scientists who receive funding from a federal agency to review that agency's work, as long as the funding they receive is based on “investigator-initiated, competitive, peer-reviewed proposals.” Id at 2675.

²² Since the Reagan administration, OIRA has overseen agency rulemaking on behalf of the White House. During recent Republican administrations it has been accused of using cost-benefit analysis as a one-way ratchet to discourage what in its view is overzealous and insufficiently justified regulation by proregulatory agency staff. See Nicholas Bagley and Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum L Rev 1260, 1263–70 (2006) (detailing OIRA's use of cost-benefit analysis).

²³ For an argument that this perception of OIRA's as a centralizing force is inaccurate and that it has primarily played an antiregulatory role in the administrative state, see id at 1264.

²⁴ See Rebecca Adams, *Groups Mobilize Effort to Block Regulatory Czar*, CQ Weekly (Oct 27, 2006).

²⁵ OIRA has in the past been accused of politicizing agency science in addition to exerting a deregulatory effect through the use of cost-benefit analysis. See, for example, Lisa Heinzerling and Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration: Part II*, 34 Envir L Rep, 10485, 10490–91 (2004). On the politicization of science in regulatory policy, see Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 Envir L 1083 (2007). See generally Wendy E. Wagner, *The “Bad Science” Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 L & Contemp Probs 63 (2003).

at the Mercatus Center, an antiregulation thinktank that the *Wall Street Journal* once called “[t]he most important thinktank you’ve never heard of.”²⁶ (The President finally made her a recess appointment on April 4, 2007.)

In addition, in early 2007, after the Court had heard oral argument in *MA v EPA*, but while the decision was still pending, the President signed Executive Order 13422 (EO 13422). The new Executive Order amends Executive Order 12866 (which requires agencies to do a cost-benefit analysis for “major” rules) by mandating that each agency establish a “regulatory policy office,” run by a political appointee, to supervise the development of agency rules and guidance documents. Executive Order 13422 also instructs that agencies must identify “a specific market failure” to justify regulating,²⁷ and requires staff to submit not only proposed rules but proposed guidance documents—which had not previously been subject to OMB scrutiny under Executive Order 12866—to OMB for review.

The Congressional Research Service, an arm of the Library of Congress that provides nonpartisan research to members of Congress, summarized the impact of the new executive order this way: “The changes made by this executive order represent a clear expansion of presidential authority over rulemaking agencies. In that regard, E.O. 13422 can be viewed as part of a broader statement of presidential authority presented throughout the Bush Administration.”²⁸ Scholars and members of Congress opposed to EO 13422 were more pointed, calling it an executive power grab, and expressing concern that its purpose is to enable White House political

²⁶ Mercatus is funded primarily by industry, especially the Koch family, an oil and gas company from Kansas that donates heavily to Republican causes. Democrats cited a variety of positions Dudley has taken on regulatory issues as worrisome, pointing to her arguments that the EPA should value the lives of older people less than the lives of younger people when doing cost-benefit analyses and that the benefits as well as the costs of ozone pollution should be taken into account when setting new ozone standards. See Judy Pasternak, *Bush Backed Shunned Nominees: His Three Choices for Jobs Dealing with the Environment Were Previously Blocked as Pro-Industry*, LA Times A1 (Apr 1, 2007).

²⁷ Exec Order 13422, 72 Fed Reg 2703 (2007) (“Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.”).

²⁸ Curtis W. Copeland, *Changes to the OMB Regulatory Review Process by Executive Order 13422 14* (Congressional Research Service, Feb 2007), online at <http://www.fas.org/sgp/crs/misc/RL33862.pdf>.

staff to override agency scientists and experts.²⁹ Whatever its ultimate impact, and regardless of its merits, the new executive order added to a growing sense that the administration was interested in greater control over agencies, in particular those that imposed expensive regulations in the name of public health and safety. This only intensified concern about the potential for politicization of expertise. Even if the Supreme Court Justices were unaware of the particulars of either the President's efforts to appoint Dudley, or the new executive order, by the time *MA v EPA* reached the Court the general picture of which they are a part, including allegations of interference with climate-related science, had clearly taken shape, and concerns about politicization were widely known.³⁰

Against this backdrop, a scientific consensus that had solidified over the last decade was gelling in the public's mind: global temperatures were in fact rising and contributing, among other things, to elevated sea levels and more intense hurricanes, and the rising temperatures were linked to human activity, specifically, the emissions of greenhouse gases from the burning of fossil fuels. In the few years before *MA v EPA* reached the Supreme Court, the rate of publication of articles on global warming in major U.S. newspapers and journals had increased dramatically.³¹ Scientists both within and outside government were becoming more vocal in calling for a policy response, including federal regulation of greenhouse gas emissions. Indeed, as the Court considered *MA v EPA*, the Intergovernmental Panel on Climate Change (IPCC) was preparing to release its fourth assessment report, which would state the scientific consensus on the warming trend and outline the potential

²⁹ See Robert Pear, *Bush Directive Increases Sway on Regulation*, NY Times A1 (Jan 30, 2007). In an e-mail to the administrative law list about the new Executive Order, Professor Peter Strauss wrote: "The important thing about the new Regulatory Policy Officer provision is that it is to be a PRESIDENTIAL appointee—that is, one the President can fire and replace without having to get senatorial confirmation. This remarkably tightens White House control over agency business . . . what this does—in the week House and Senate have shown some signs of cleaning out the stables—is further to arm the political potentials of White House controls." Posting of Peter Strauss, Professor, Columbia Law School, to adminlaw@chicagokent.kentlaw.edu.

³⁰ See, for example, Juliet Eilperin, *U.S. Pressure Weakens G-8 Climate Plan; Global-Warming Science Assailed*, Wash Post A1 (June 17, 2005).

³¹ A simple Lexis-Nexis search of the keywords "climate change" or "global warming" in major U.S. newspapers' headlines returned 2,189 hits for the three years prior to the *MA v EPA* decision (Apr 1, 2004 through March 31, 2007), compared with only 1,125 hits for the three years before that (Apr 1, 2001 through March 31, 2004).

risks of unmitigated greenhouse gas emissions more forcefully than ever before.³²

At the same time, states and environmentalists, frustrated with EPA's refusal to regulate greenhouse gases at the federal level, had launched public nuisance suits against major power plants and the automobile industry seeking injunctive relief or damages for their contributions to the harms caused by global warming.³³ In response to a listing petition by environmental groups, the U.S. Fish and Wildlife Service, after much delay, agreed in late 2006 to determine whether to list the polar bear as "threatened" under the Endangered Species Act because of loss of habitat due in part to melting arctic sea ice caused by global warming.³⁴ And Al Gore's movie, *An Inconvenient Truth*, hit theaters nationwide.

This was the political, cultural, and legal context in which the Supreme Court decided *MA v EPA*. Whatever their personal views, it would have been impossible for the Justices not to know of the growing scientific consensus on climate change, or to be unaware of accusations that the administration was trying to suppress and manipulate agency science.³⁵

The EPA actions that prompted the litigation in *MA v EPA* arguably fit the pattern of political interference described above, or at least plausibly raised suspicions. First, the agency's General Counsel³⁶ had reversed course from two previous General Counsels

³² The "Summary for Policymakers" of the fourth IPCC report was published in February 2007, so its major findings were well known and publicized prior to the Court's decision in *MA v EPA*. The IPCC was established in 1988 by the World Meteorological Organization and the United Nations Environment Programme. See Intergovernmental Panel on Climate Change, *About IPCC*, online at <http://www.ipcc.ch/about/index.htm> ("The [IPCC's] role is to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic literature produced worldwide relevant to the understanding of the risk of human-induced climate change, its observed and projected impacts and options for adaptation and mitigation. IPCC reports should be neutral with respect to policy, although they need to deal objectively with policy relevant to scientific, technical and socio economic factors. They should be of high scientific and technical standards, and aim to reflect a range of views, expertise and wide geographical coverage."). All three working groups of the IPCC have issued their sections for the Fourth Assessment Report, titled "Climate Change 2007." See *id.* (providing three Working Group hyperlinks for separate contributions to the report).

³³ See *California v General Motors*, 2007 WL 2726871 (ND Cal); *Connecticut v American Electric Power*, 406 F Supp 2d 265 (SDNY 2005).

³⁴ Department of the Interior, Endangered and Threatened Wildlife and Plants; 12-Month Petition Finding and Proposed Rule to List the Polar Bear (*Ursus Maritimus*) as Threatened Throughout Its Range, 72 Fed Reg 1064 (Jan 9, 2007).

³⁵ See note 19 and accompanying text.

³⁶ Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Hor-

in deciding that carbon dioxide and other greenhouse gases were not “pollutants” regulable under the Act.³⁷ This determination had implications beyond the matter of EPA’s own discretion to regulate greenhouse gases, which added to its political import: if upheld, it would effectively derail California’s attempt to regulate tailpipe emissions under CAA § 209, which authorizes California, alone among the states, to independently establish emissions standards under certain conditions, subject to waiver by the EPA. If carbon dioxide were not a pollutant in the first place, as EPA claimed, the state would have no authority to regulate it under the auspices of the Act, and its tailpipe emissions regulations, which ten other states had adopted pending the waiver grant by EPA, would be invalid.³⁸

Based in part on its determination that carbon dioxide and other greenhouse gases were not pollutants, the agency in 2003 denied a rulemaking petition filed by the International Center for Technology Assessment and other parties seeking regulation under § 202(a)(1) of the CAA. This section provides that the Administrator of EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant” from any class of motor vehicles “which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”³⁹ In the petition denial, EPA cited its legal opinion that greenhouse gases are not pollutants, and then explained that even if they were, the agency would decline to regulate them. This was because EPA “disagreed with the regulatory approach urged by the petitioners [via § 202]” and preferred a different policy approach for several reasons, including that “the science of climate change is extraordinarily complex and still evolving,” that regulation under § 202 would be an inefficient and piecemeal approach to the climate change issue, and that unilateral EPA regulation could “weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their econo-

inko, EPA Acting Administrator, *EPA’s Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act* (Aug 28, 2003).

³⁷ Prior general counsels had consistently deemed greenhouse gases to be pollutants, but nevertheless declined to regulate them.

³⁸ See *Central Valley Chrysler-Jeep, Inc. v Witherspoon*, 2007 WL 135688 (ED Cal) (staying proceedings pending the outcome in *MA v EPA*). California ultimately prevailed in this case, *Central Valley Chrysler-Jeep, Inc. v Goldstene*, No CV F 04-6663 (ED Cal, Dec 11, 2007), but was afterward denied a waiver by the EPA, letter from Stephen L. Johnson, Administrator, U.S. Environmental Protection Administration, to Arnold Schwarzenegger, Governor, State of California (Dec 19, 2007). See also note 130 and accompanying text.

³⁹ 42 USC § 7521(a)(1) (2000).

mies.”⁴⁰ The denial referred to the President’s “comprehensive” global climate change policy, which consisted of encouraging voluntary reductions of greenhouse gases and promoting technology development, along with further scientific research to reduce remaining uncertainties.⁴¹ In support of its conclusion that the science was too uncertain to warrant regulation, the agency relied on selective and somewhat misleading excerpts from a 2001 report by the National Research Council,⁴² which emphasized uncertainty while downplaying many statements of certainty or near-certainty that cut against EPA’s position.⁴³

The agency thus declined to make the threshold judgment necessary to trigger regulation of vehicle emissions under § 202. Indeed, in its petition denial EPA emphasized that the exercise of the statutory authority to regulate greenhouse gases turns on a judgment to be made by the Administrator, that the “requisite endangerment finding” has not been made,⁴⁴ and that “the CAA provision authorizing regulation of motor vehicle emissions does not impose a mandatory duty on the Administrator to exercise her judgment.”⁴⁵ EPA simply exercised its discretion not to assess whether greenhouse gases “cause or contribute to, air pollution which may reasonably be anticipated to endanger public welfare.”⁴⁶ It decided not to decide. As we will detail below, the Court recognized this and explicitly framed its holding in the same way: EPA, the Court held, “has offered no reasoned explanation *for its refusal to decide* whether

⁴⁰ Environmental Protection Agency, Control of Emissions from New Highway Vehicles and Engines, 68 Fed Reg 52922, 52931 (Sept 8, 2003).

⁴¹ Id.

⁴² National Research Council, *Climate Change Science: An Analysis of Some Key Questions* (2001), online at <http://www.nap.edu/html/climatechange/>.

⁴³ Notably, critics pointed out, the agency omitted the opening line of the report, which reads: “Greenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise.” Id at 1. Brief of Amici Curiae Climate Scientists David Battisti et al in Support of Petitioner, *MA v EPA*, No 05-1120, *3 (filed May 15, 2006) (pointing out EPA’s mishandling of NAS Report and disregard of weight of evidence: “EPA and the appeals court stated that they considered the NAS/NRC report *Climate Change Science* to be the scientific authority for the decision to deny the petition to regulate. We feel an obligation to inform this Court that they misunderstood or misrepresented the science contained in the report [and] to correct the public record as to what Climate Change Science and subsequent NAS reports say about climate change . . .”).

⁴⁴ 68 Fed Reg at 52929 (cited in note 40).

⁴⁵ Id.

⁴⁶ 42 USC § 7521(a)(1) (2000).

greenhouse gases cause or contribute to climate change.”⁴⁷

Although EPA had cited a number of policy reasons for declining to regulate, its claims about lingering and pervasive scientific uncertainty were a linchpin of the petition denial. Given the charged context in which EPA arrived at this position, it was not surprising that questions arose about whether the petition denial was in fact the product of expertise—a decision supported by the scientific evidence—or whether it was an instance of politics overriding scientific judgment.

III. THE SOLUTION: EXPERTISE-FORCING

On this picture, EPA found itself in an exceedingly uncomfortable position—pressed on the one hand by an administration that opposed regulating greenhouse gases, and on the other by experts, both within and outside the agency, who believed global warming required a regulatory response. Making the statutory judgment that greenhouse gas emissions “cause, or contribute to, air pollution that may reasonably be anticipated to endanger public health or welfare” would trigger a statutory obligation to regulate new vehicle emissions in some manner, might trigger regulation of stationary sources under the Act, and would keep alive California’s bid to independently regulate tailpipe emissions. That course of action would infuriate the White House, which had taken the position that more study was needed and that unilateral domestic regulation of greenhouse gases was both premature and undesirable. At the same time, a statutory judgment that greenhouse gases did not endanger health and welfare would outrage many scientists, environmentalists, and other constituencies important to the agency, damaging the agency’s scientific credibility.

As a result, the cross-cutting political constraints had forced EPA to indefinitely put off a decision, making no first-order judgment at all, or so one might reasonably conclude. That course of action had the collateral benefit of leaving in place the nonregulatory status quo, thus satisfying the White House’s major concern. Deciding not to decide guaranteed objections from scientists and environmentalists, but it was at least less damaging to EPA than a substantive first-order judgment that greenhouse gases have no adverse public health and welfare effects—a judgment that would be hard

⁴⁷ *MA v EPA*, 127 S Ct at 1463 (emphasis added).

to make with a straight face, given the burgeoning scientific consensus. And although EPA could in theory agree with the scientific consensus on warming and find that greenhouse gases have adverse public health and welfare effects, *and nevertheless* conclude that it is not “sensible” to regulate emissions from new motor vehicles,⁴⁸ that conclusion could be very difficult to defend—at least more difficult than declining to make the threshold judgment in the first place.

On this account, the majority’s worry in *MA v EPA* was that politics had disabled the EPA’s expert judgment about the crucial regulatory questions.⁴⁹ The majority’s basic problem, then, was to liberate the EPA from these cross-cutting and paralyzing political pressures, both enabling it to bring expertise to bear on the regulatory problems and prodding it to do so. How could this be accomplished?

The solution was two-fold. In the first place, the majority took a flexible and capacious view of standing law, allowing states and (perhaps) private landowners to trigger vigorous judicial review of executive action. The Court’s standing holding was of course necessary to proceed to the merits. In one sense, it represents nothing very new—the Court’s holding only reinforces its return to more liberalized standing in cases like *Laidlaw*⁵⁰ and *Akins*,⁵¹ and backs away from Justice Scalia’s opinion in *Lujan*,⁵² which sought to tighten the injury-in-fact test.

Yet on our account, the practical effect of granting standing in *MA v EPA* may be somewhat different than in these other cases. On the facts of *MA v EPA*, capacious standing affects the allocation of authority *within* the executive branch, allowing states and (per-

⁴⁸ The petition denial suggests as much, noting that the motor vehicle fleet is one of “many sources” of greenhouse gas emissions and a “sensible regulatory scheme would require that all significant sources of emissions be considered.” 68 Fed Reg at 52931. For this and other policy reasons, EPA concluded that it would decline to regulate motor vehicle emissions even if it had the authority to do so.

⁴⁹ The Court’s decision merely to grant certiorari in *MA v EPA* (and in *Environmental Defense v Duke Energy*, 127 S Ct 1423 (2007), another environmental case decided the same day) was striking on its own—only rarely have environmental plaintiffs been granted certiorari as petitioners. One needs to go back thirty-five years to *Sierra Club v Morton*, 405 US 727 (1972), to find a successful certiorari petition by environmentalists granted over the opposition of the government. And, of course, the petitioners lost that case on the merits. We thank Richard Lazarus for making this point.

⁵⁰ *Friends of the Earth, Inc. v Laidlaw Environmental Services (TOC), Inc.*, 528 US 167 (2000).

⁵¹ *Federal Election Commission v Akins*, 524 US 11 (1998).

⁵² *Lujan v Defenders of Wildlife*, 504 US 555 (1992).

haps) similarly situated private parties to disable strong “presidential administration”⁵³ of line agencies, even agencies that are not legally independent.⁵⁴ In affording the states standing, the Court signaled its dissatisfaction with the political accountability on which strong presidential administration relies for its legitimacy. At a minimum, allowing access to judicial review was a necessary first step in the Court’s expertise-forcing project.

In the second place, the majority’s holdings on the merits made it extremely difficult for the agency to maintain its posture of refusing to make a first-order decision. By interpreting the relevant statutory provisions with no deference to the EPA’s disclaimer of authority, and by narrowly cabining the grounds on which EPA might decline to make a first-order statutory judgment one way or another, the Court makes it virtually unavoidable for EPA to make such a judgment, with a consequent pressure to regulate if its judgment is that greenhouse gas emissions from new tailpipes can reasonably be anticipated to contribute to the endangerment of public health and welfare. At a minimum, the Court significantly raises the costs to the agency of declining to regulate. And by ruling out as impermissible all nonscientific considerations, the Court makes it much more difficult for the President to dictate the outcome on other policy grounds. The Court’s two merits holdings are thus best understood as components of its expertise-forcing project.

Below, we examine each major aspect of the Court’s decision in *MA v EPA*—its holdings on standing, statutory authority, and administrative discretion to “decide not to decide.” After some brief remarks on standing, we make two principal claims: first, that the Court’s refusal to grant *Chevron* deference to EPA’s view of its statutory authority, especially in light of the *Brown & Williamson*⁵⁵ precedent, suggests that for the current Court insulating expertise from politics is a greater imperative than forcing democratic accountability, and, second, that narrowing the permissible grounds on which an agency can make a second-order decision to defer a discretionary first-order decision—something the Court has never

⁵³ Kagan, 114 Harv L Rev 2245 (cited in note 11). See also Lawrence Lessig and Cass Sunstein, *The President and the Administration*, 94 Colum L Rev 1 (1994).

⁵⁴ When we refer to “presidential control” we include the political appointees within the agency who likely reflect the administration’s policy priorities; when we refer to “line” agencies, we refer to career staff.

⁵⁵ *FDA v Brown & Williamson Tobacco Corp.*, 529 US 120 (2000).

done before—represents an effort to guard against politically motivated agency circumvention of broad statutory purposes.

A. STANDING

We begin with a short summary of the Court’s standing analysis. Our main interest is in what the Court held on the merits; the precise grounds on which the Court found standing, and the relationship between the standing analysis in *MA v EPA* and in earlier decisions, are not critical for our thesis. All that matters, for our purposes, is that the Court allowed the suit to proceed in order to resolve it on the merits on expertise-forcing grounds.

The Court’s analysis had at least three strands. First, and receiving most of the attention, was the Court’s suggestion that federal standing law embodies some form of “special solicitude” for states that bring lawsuits as plaintiffs to vindicate their sovereign interests. Second was a brief but pregnant suggestion, based on a significant concurrence by Justice Kennedy in *Lujan v Defenders of Wildlife*,⁵⁶ that statutes can create “procedural rights,” the vindication of which does not require “meeting all the normal standards for redressability and immediacy.”⁵⁷ Third—and distinct from the “special solicitude” holding—was an ordinary standing analysis that focused on Massachusetts qua large landowner rather than qua sovereign, which found that Massachusetts’s own coastal property was threatened by rising sea levels traceable to the effects of greenhouse gases.

It seems obvious that the first two strands of this analysis were, at least in part, a by-product of intra-Court coalition building. To garner a crucial fifth vote, Justice Stevens needed to write an opinion that Justice Kennedy, the Court’s likely swing voter, would

⁵⁶ 504 US 555 (1992). Justice Kennedy’s *Lujan* concurrence referred to Congress’s power to create legal rights of action for which there is no analogue in the common law:

We must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court’s opinion to suggest a contrary view.

Lujan, 504 US at 580 (Kennedy concurring).

⁵⁷ *MA v EPA*, 127 S Ct at 1453, quoting *Lujan*, 504 US at 572 n 7. The majority opinion in *MA v EPA* refers more narrowly than did Justice Kennedy’s *Lujan* concurrence to Congress’s ability to create “procedural rights” to challenge agency action; it is for such rights that the normal requirements of immediacy and redressability do not apply.

join. The idea that states as sovereigns enjoy special judicial solicitude resonates with Justice Kennedy's views about constitutional federalism—both judicial protection for tacit principles of state sovereign immunity, and judicial enforcement of limited federal authority, especially under the Commerce Clause. And emphasizing Congress's role in creating procedural rights, as Justice Stevens's opinion does, elevates Justice Kennedy's *Lujan* concurrence into binding law.

It is hardly clear, however, that a special law of standing for states is consistent with the prior views of Justice Souter, who—in opinions joined by Justice Stevens—emphasized in both the sovereign immunity cases⁵⁸ and the Commerce Clause⁵⁹ cases that there are “political safeguards of federalism.” Presumably, if those political safeguards are robust, states need no special solicitude in Article III litigation. Indeed, perhaps states should be especially disfavored as plaintiffs because they have substitute political remedies. In the case of greenhouse gas regulation, surely the states can spur legislative oversight of a recalcitrant EPA by enlisting sympathetic members of their congressional delegations to hold hearings or otherwise make life difficult for the agency. As a general matter, states surely have more opportunities to hold agencies accountable than do most private parties, and the availability of these remedies could militate against granting them standing.

On the other hand, we might understand the states in *MA v EPA* as claiming that they had *already* used the national political process, and won.⁶⁰ On this view, the CAA itself supported their

⁵⁸ See, for example, *Seminole Tribe v Florida*, 517 US 44, 183 (1996) (Souter dissenting) (describing how the “plain statement rule, which ‘assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision,’ is particularly appropriate in light of our primary reliance on ‘the effectiveness of the federal political process in preserving the States’ interests”) (citations omitted).

⁵⁹ See, for example, *United States v Morrison*, 529 US 598, 647 (2000) (Souter dissenting) (criticizing the revival of the “state spheres of action” consideration in Commerce Clause analysis: “The defect, in essence, is the majority’s rejection of the Founders’ considered judgment that politics, not judicial review, should mediate between state and national interests”); *United States v Lopez*, 514 US 549, 604 (1995) (Souter dissenting) (valorizing deference to “rationally based legislative judgments ‘[as] a paradigm of judicial restraint,’” because “[i]n judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress’s political accountability in dealing with matters open to a wide range of possible choices”) (citation omitted).

⁶⁰ State and local officials, not environmental groups, were responsible for pressing for national air regulation. See Christopher J. Bailey, *Congress and Air Pollution* 104–5, 109

position, and they were merely turning to the courts to enforce their political victory. Our suggestion is just that, whatever the merits of the “political safeguards” argument for limited state standing, it appears that the majority Justices who might have subscribed to that position at least temporarily set it aside and accepted a possible inconsistency with their broader federalism jurisprudence in order to obtain Justice Kennedy’s indispensable fifth vote.

The second thread in the majority’s standing analysis, the idea that Congress can by statute create procedural rights whose vindication is an adequate basis for standing, is more deeply threatening to the views of standing held by the four Justices in dissent, especially Justice Scalia, who believes that Congress’s power to create statutory rights is ultimately limited by Article III requirements. In *Lujan*, Justice Kennedy’s concurrence parted ways with Justice Scalia’s opinion by suggesting that statutes might create injuries and articulate chains of causation, which would be adequate for Article III purposes, providing the injury is sufficiently concrete,⁶¹ even if those injuries were not “injuries in fact” in some independent sense. And a majority of the Court, in *FEC v Akins*, had adopted a similar view in the setting of informational injuries.⁶² By reviving Justice Kennedy’s concurrence, the *MA v EPA* majority extends the analysis of *Akins* to a new setting, and pushes the Court further toward a model of standing in which the relevant question is whether there is a legal right to sue, a right created by statutes or other sources of law.⁶³ It is not surprising, then, that Chief Justice Roberts’s dissent on the standing issue argued that under the restrictive *Lujan* framework, the state’s injuries should be

(Manchester, 1998) (citing the role of groups of local officials, including the U.S. Conference of Mayors, the American Municipal Association, and the National Association of Counties, which felt pressure from voters to act but lacked resources to act themselves and remained concerned about disadvantages to their jurisdictions caused by a race to the bottom).

⁶¹ Justice Kennedy’s concurrence does seem to require that a litigant show he has suffered whatever injury Congress has defined in a *concrete and personal way*. See *Lujan*, 504 US at 581 (Kennedy concurring) (requiring that the congressionally defined injury be “concrete”).

⁶² 524 US 11 (1998) (holding that FECA creates a right of action for voters to challenge an FEC decision not to undertake an enforcement action, and that petitioners met the prudential standing test that allows Congress to create standing beyond common law rights of action, as well as the Article III test for injury, having suffered a concrete injury by being denied information that they sought).

⁶³ See generally Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 Mich L Rev 163 (1992).

counted as highly speculative, depending upon long and uncertain causal chains, themselves incorporating uncertain predictions about the behavior of other nations and actors. In this way, Chief Justice Roberts emphasized (perhaps unintentionally) that *MA v EPA* seems in part to undercut the *Lujan* framework substantially.

The third prong of the majority's standing analysis, which is independent of the "special solicitude" afforded to states, argues entirely *within* the *Lujan* framework that the state's injuries as a landowner were sufficiently concrete and were redressable by the requested relief, in the simple sense that obtaining relief might make things better for the state and could not make things any worse. Here, *MA v EPA* clearly pulls against Justice Scalia's narrow interpretation of injury and redressability in *Lujan*. Even putting aside the Court's ambiguous gesture toward a different model of standing, this more generous version of the *Lujan* approach may have a large effect on cases where litigants, who are potential beneficiaries of the regulation, attempt to persuade judges to order or encourage administrative regulation of third parties—a common feature of environmental cases, and precisely the situation in *MA v EPA*.

The multiple bases for standing identified in the Court's opinion produce a great deal of uncertainty. It is not clear which if any components of the Court's standing analysis will generalize beyond this case. There is reason to think that "special solicitude" in particular will be limited and short-lived, its invention made necessary by the unique facts and judicial lineup in *MA v EPA*. Yet it is open to a future Court—and to lower courts in the interim—to emphasize any one of the Court's standing rationales, especially the third and most ordinary strand. To the extent that it can be separated from "special solicitude," the revival of the *Lujan* concurrence may make standing easier to achieve in future cases.

For our purposes, however, the differences among these three rationales are interesting but tangential. Common to all is that an expansive view of standing—whether for states because they are special, for statutory rights generally, or even through the generous application of the *Lujan* framework—increases the scope for judges to oversee the legality of executive action.⁶⁴ This runs directly

⁶⁴ Although the Court declined to extend this expansive view of standing to private taxpayers this term, see *Hein v Freedom from Religion Foundation, Inc.*, 127 S Ct 2553, 2559

counter to the earlier trend of narrowed standing; restricting judicial oversight of executive action is an explicit purpose of the *Lujan* framework, according to Justice Scalia, its author.⁶⁵ The Court in *MA v EPA* must obviously grant standing in order to assess whether the EPA, in denying the petition to regulate, acted lawfully. Yet standing here has a more specific effect as well: instead of using standing to engage in judicial oversight of an undifferentiated executive (the kind of oversight that Justice Scalia wished to prevent in *Lujan*), the Court can be understood, in the particular circumstances of the case, as granting standing in order to review the allocation of authority *within* the executive, specifically between the White House and its political appointees in the agency, on the one hand, and career staff at EPA on the other. On a view that emphasizes the democratic accountability of the executive as a source of legitimacy, this approach is hard to justify or even understand; pressure from the White House to exercise discretionary authority in one way or another is a good, not a bad, and shows that the system of presidential administration is functioning properly. As we will explain below, however, the Court has seemingly turned away from this benign view of presidential administration toward an older model of administrative law that emphasizes the tension between democratic politics—and in particular presidential political control over line agencies—and technocratic expertise.

B. STATUTORY AUTHORITY

We now turn to the first merits question in *MA v EPA*: whether EPA has statutory authority to regulate greenhouse gases as “pollutants.” The relevant provision of the CAA, § 302(g), defines air pollutants as “any air pollution agent or combination of such agents, including any . . . physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air.”⁶⁶ At a minimum, EPA argued, the definition of “pollutant”

(2007), the case can be distinguished from *MA v EPA* because it was not brought under a statutory grant of authority.

⁶⁵ See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U L Rev 991, 991 (1983) (“My thesis is that the judicial doctrine of standing is a crucial and inseparable element of [the separation of powers], whose disregard will inevitably produce—as it has in the past few decades—an overjudicialization of the processes of self-governance.”).

⁶⁶ 42 USC § 7602(g) (2000).

contains sufficient ambiguity that the Court should defer to EPA's reasonable reading that it lacks such authority. The Court rejected EPA's definitional argument, emphasizing the literal breadth of the definition and holding that greenhouse gases were clearly covered. Justice Scalia's dissent, joined by three other Justices, focused in part on this issue, arguing that the definition was at least ambiguous.

EPA also argued, more broadly, that the overall statutory scheme, the history of congressional action in this and related areas, and possible conflicts between EPA regulation of new vehicle emissions under the CAA and the regulation of fuel efficiency by the Department of Transportation (DOT) under the Energy Policy and Conservation Act, all suggested that the EPA lacked authority or could reasonably interpret the statutes in that fashion, even if the immediately relevant statutory sections at first glance seemed clear. As for the statutory scheme, EPA emphasized that several of its most prominent features, such as the system of National Ambient Air Quality Standards (NAAQS), seemed implicitly geared to coping with localized pollutants rather than greenhouse gases, which have the same incremental effect on global warming regardless of the location in which they are emitted. The NAAQS system does not seem workable for greenhouse gases in part because states could never ensure compliance with federally established concentration limits; those gases are emitted from many worldwide sources not under their control.

Similar arguments had carried the day in *Brown & Williamson*,⁶⁷ in which the Court held that the FDA lacked authority to regulate nicotine as a drug under a similarly broad statutory definition. The Food, Drug and Cosmetic Act (FDCA) defined a "drug" as "articles (other than food) intended to affect the structure or any function of the body,"⁶⁸ and, at least facially, nicotine surely met that definition. The *Brown & Williamson* majority overrode this clear text, however, through a grab-bag of interpretive techniques, including an appeal to the specific or counterfactually reconstructed intentions of the enacting Congress of 1938 (whose median member probably did not intend to ban tobacco or authorize an agency to do so, or at least would not have so intended if asked

⁶⁷ 529 US 120 (2000).

⁶⁸ 21 USC § 321(g)(1) (2000).

the question), and a claim that later “tobacco-specific” labeling legislation was inconsistent with regulatory prohibition of tobacco, and thus should be understood as an implied partial repeal of the broad statutory definition of “drug.” Finally, the FDA had made many representations that it lacked the relevant authority, before changing its view during the Clinton administration, and many bills designed to give the FDA express regulatory authority had died in Congress.⁶⁹

Most important of all was an interpretive canon emphasized (though arguably not invented) by the Court in *Brown & Williamson*:⁷⁰ statutes should not be construed to give agencies authority over questions of great “economic and political” significance unless Congress has spoken clearly. Given the strong argument that Congress had spoken clearly in the FDCA, this “major questions” canon was widely thought to be quite powerful; perhaps it meant that Congress had to speak not only clearly but also specifically in order to confer authority on agencies. Other cases had implicitly followed a similar approach. In *Gonzales v Oregon*, for example, the Court had interpreted federal laws regulating controlled substances to deny the Attorney General the authority to regulate the prescription of controlled substances to patients lawfully committing suicide under Oregon’s assisted suicide statute.⁷¹

In *MA v EPA*, however, it is plausible to think that EPA was in a far stronger position than either the FDA or the Attorney General had been in their cases. In *Brown & Williamson*, the nondelégation canon for major questions pulled against *Chevron* deference; the FDA would not win if the relevant statutes were ambiguous, but only if they clearly conferred the authority the agency claimed. In *MA v EPA*, however, *Chevron* and the major questions canon pulled in the same direction. The agency could lose only if the Court found that the relevant statutes clearly mandated rejecting the agency’s view. The interpretive techniques of

⁶⁹ See *Brown & Williamson*, 529 US at 146–56.

⁷⁰ See, for example, *MCI Telecommunications Corp. v AT&T Co.*, 512 US 218, 228–31 (1994).

⁷¹ 546 US 243, 259 (2006) (“The [Controlled Substances Act] gives the Attorney General limited powers, to be exercised in specific ways. . . . Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA. Rather, he can promulgate rules relating only to ‘registration’ and ‘control,’ and ‘for the efficient execution of his functions’ under the statute.”).

Brown & Williamson, in other words, needed only to generate sufficient ambiguity for the EPA to win under *Chevron*. Doubtless for these reasons, the Solicitor General's brief devoted a great deal of space and emphasis to the *Brown & Williamson* arguments.

Surprisingly, however, there was little discussion of either the definitional question generally, or *Brown & Williamson* in particular, at oral argument. When petitioners' counsel began his argument on the definition of "pollutant," he was shut down by the Justices in a way that strongly suggested that the issue would pose no difficulty for the Court, and would likely come out his way.⁷² And although the Justices obviously disagreed in the end about the definition of "pollutant," neither the majority opinion nor Justice Scalia's dissent said much about *Brown & Williamson*. Perhaps this was because all concerned thought the two cases could be easily distinguished. For one thing, the remedial implications of granting the FDA authority to regulate tobacco in *Brown & Williamson* were potentially far more serious than granting the EPA statutory authority to regulate greenhouse gases in *MA v EPA*—the FDA arguably would have had to ban tobacco under the terms of the FDCA; at a minimum it would have been authorized to do so.⁷³ For another thing there was a great deal of postenactment legislation in *Brown & Williamson* indicating that Congress did not intend to ban tobacco products; such "postenactment legislative history" did not exist in *MA v EPA*.⁷⁴

Whether for these or other reasons, the majority dispensed with the issue of statutory authority with celerity. What did it matter, the Court said in a footnote, whether Congress had dealt with the only other nonlocalized emission problem, stratospheric ozone, in a separate statutory section?⁷⁵ What's the problem, the Court said in a

⁷² See Transcript of Oral Argument, *MA v EPA*, No 05-1120, *17-18 (Nov 29, 2006). Given the lack of attention to the authority issue at oral argument, it is particularly striking that four Justices dissented on the issue.

⁷³ See *Brown & Williamson*, 529 US at 161-92 (Breyer dissenting). By contrast, in *MA v EPA*, the result of finding agency authority was not so dire. Section 202(a) gives EPA considerable discretion to tailor the timing and stringency of tailpipe emissions regulation of the new vehicle fleet, including allowing for considerations of economic and technological feasibility.

⁷⁴ *MA v EPA*, 127 S Ct at 1461-62.

⁷⁵ Id at 1461 n 29 ("We are moreover puzzled by EPA's roundabout argument that because later Congresses chose to address stratospheric ozone pollution in a specific legislative provision, it somehow follows that greenhouse gases cannot be air pollutants within the meaning of the Clean Air Act.").

brisk paragraph, if EPA must regulate motor vehicle mileage standards to control emissions? There might be conflict with the DOT, “but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”⁷⁶ After all, EPA is charged with protecting public health and welfare, whereas DOT is charged with promoting fuel economy. Finally, as to the specific or imaginatively reconstructed intentions of the enacting Congress—a prominent argument for limiting agency authority in *Brown & Williamson*—Justice Stevens wrote that “[w]hile the Congresses that drafted [§ 202(a)] 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 CAA obsolete.”⁷⁷

Is *MA v EPA* consistent with *Brown & Williamson*?⁷⁸ Viewed from one angle the answer is no, from another yes. The argument that they are inconsistent runs as follows. Under the conventional understanding of *Brown & Williamson*, the major questions canon means that if an agency is to exercise jurisdiction over a major question, Congress must confer that jurisdiction clearly. Surely the regulation of greenhouse gases is an economic and political issue of major significance; if *Brown & Williamson* were followed, the Solicitor General argued, the Court could find statutory authority to regulate greenhouse gas emissions only by finding the relevant statutes entirely clear.

In *MA v EPA*, the arguments against agency authority seem, at least arguably, as strong as the equivalent arguments in *Brown & Williamson*. Setting to the side Justice Scalia’s objections for the moment, there is a decent (though not ironclad) argument that the immediately relevant text of §§ 202(a) and 302(g) was clear. But of course the immediate text in *Brown & Williamson* was in this sense also quite clear, arguably even more so than in *MA v EPA*. It is

⁷⁶ Id at 1461.

⁷⁷ Id at 1462.

⁷⁸ Justice Scalia in dissent said not a word about *Brown & Williamson*. Perhaps his vote with the majority in that case was inconsistent with his textualist jurisprudence, which generally disparages drawing inferences about implicit congressional intentions, especially from rejected bills and the like. On the other hand, Justice Scalia may have thought, very simply, that any *Brown & Williamson*-style discussion of the broader statutory scheme and its history was unnecessary, given his argument that the immediate text of the provisions at issue was facially ambiguous.

hard to deny, on any view of what counts as plain meaning, that nicotine plainly fits within the definition, “articles (other than food) intended to affect the structure or any function of the body.” No Justice in *Brown & Williamson* suggested that the immediately relevant texts were ambiguous, and there is no opinion in *Brown & Williamson* closely analogous to the Scalia dissent in *MA v EPA*.

The guiding assumption of *Brown & Williamson* is that what counts as clear for purposes of *Chevron* cannot be judged solely in light of the statutory sections immediately at hand; rather it must be judged in light of the whole statutory scheme and other statutes. And the arguments from the overall statutory scheme that the Solicitor General emphasized in *MA v EPA* were at least as strong as in *Brown & Williamson*. What is striking is just that the *MA v EPA* majority seems to afford much less weight to those arguments than did the *Brown & Williamson* majority. In this sense, where *Brown & Williamson* denied an agency authority because Congress had not clearly granted it, *Massachusetts v EPA* thrusts authority upon the agency, even though Congress had not clearly granted it.

The possible inconsistency goes deeper, however. The major questions canon has been explained as a nondelegation canon, one that aims to prod Congress, rather than agencies, into shouldering political responsibility for large policy choices.⁷⁹ In *MA v EPA*, by contrast, the consequence of not affording *Chevron* deference to EPA on the major questions surrounding greenhouse gases was precisely the opposite: Congress need take no further action, because EPA already (the Court ruled) has the authority to make a first-order judgment about whether greenhouses gases should be regulated. *MA v EPA* is in this sense an anti-nondelegation case, one that extends agency authority over a controversial regulatory domain in the face of the agency’s own disavowals, where the overall statutory landscape did not clearly grant authority, and where Congress had not expressed a recent and clearly focused judgment on the relevant questions.

How, if at all, can the two cases be made legally consistent? The simplest argument is that in *MA v EPA*, unlike in *Brown & Williamson*, the relevant sections of the Clear Air Act were sufficiently clear to override even the combined effect of *Chevron* and the major-questions canon. If statutes are clear, there can be no inconsistency

⁷⁹ See Cass R. Sunstein, *Chevron Step Zero*, 92 Va L Rev 187 (2006); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Supreme Court Review 223 (2000).

with the statutory default rules, whatever they are; it is just that the default presumptions have been overcome. Now suppose, on the other hand, that one does not think the relevant statutes entirely clear about EPA's authority. There is still a sense in which the two cases are perfectly consistent: they both suggest that no *Chevron* deference will be afforded to agencies on interpretive questions of major economic and political significance, whether the agency is attempting to expand its jurisdiction (*Brown & Williamson*) or to exclude from its jurisdiction a politically touchy subject (*MA v EPA*). On this view, even if the CAA did not clearly give EPA authority to regulate greenhouse gases, still the Court took that to be the better reading of the statutes, all things considered; here the effect of the major-questions canon is to eliminate the *Chevron* default that would ordinarily entitle the agency to win unless the statute clearly runs against the agency's view.

There are other differences as well, which could explain the two outcomes. The most obvious is that *Brown & Williamson*, like *Gonzales*, involved an instance of putative agency *overreach*, whereas *MA v EPA* involved a case of putative agency *underreach*. Whereas the FDA had always said it *lacked* authority to regulate tobacco prior to changing its mind in the Clinton administration, the EPA had always said it *possessed* the authority to regulate greenhouse gases until changing *its* mind in the George W. Bush administration. Perhaps the Court reserves the nondelegation approach—in the sense of forcing Congress to clarify its intent to grant regulatory authority—for the former situation, and resorts to expertise-forcing in the latter; we return to this possibility shortly.⁸⁰

In our view, however, the most convincing reconstruction is simply that the *MA v EPA* majority seems to be engaged in a different enterprise than the *Brown & Williamson* majority. Whereas the latter was pursuing a nondelegation approach, one that required a clear statement from Congress in order to bring major issues within the scope of the agency's jurisdiction, the former does not seem interested in getting a clear statement, from a current Congress, about the bounds of EPA's authority. Consider that the statutory provi-

⁸⁰ Of course underreach can be converted into overreach simply by an agency choosing to act where it has not before, as occurred with the FDA in *Brown & Williamson*. The analogous question in this setting would be: if EPA had chosen to regulate greenhouse gases under Section 202(a), and had been challenged, would a reviewing court have determined that it overreached, and sent the matter to Congress for a clearer expression of authority?

sions that (the Court argued) clearly gave EPA authority over greenhouse gas emissions were enacted in the 1960s and 1970s, before greenhouse gases and global warming moved to the top of scientific and public agendas. A nondelegation approach would prod Congress to reconsider the subject, today, in explicit terms. *MA v EPA* shows no interest in that project.

If a nondelegation approach does not explain *MA v EPA*, then what is the majority's enterprise? Our basic suggestion is that the enterprise is not at all to force politically accountable policy choices, either by Congress or (least of all) the president. Rather, the enterprise is expertise-forcing: the majority's enterprise is to clear away legal obstacles and political pressures in order to encourage or force EPA to make an expert first-order judgment about greenhouse gases, a judgment constrained by the statutory factors of health and welfare set out in § 202(a). To explain this claim, we must set it in its legal context: the Court's holding that EPA had supplied no valid reason for deciding not to make a first-order judgment at all.

C. DECIDING NOT TO DECIDE: "HOW ABOUT NEVER? IS NEVER GOOD FOR YOU?"⁸¹

We now turn to the Court's holding on the second merits question. Here the issue was whether EPA had discretion to defer making the threshold finding necessary to trigger regulation for the variety of policy reasons it offered—whether EPA could simply decide not to decide. No prior Supreme Court case had raised precisely this question about the extent of an agency's discretionary rulemaking authority.

On what grounds may an administrative agency reject a petition for rulemaking? On what grounds, if any, may a reviewing court overturn that decision? Is a rejection of a rulemaking petition reviewable at all? Before *MA v EPA*, the law on these questions was surprisingly unclear, especially at the level of the Supreme Court. *Heckler v Chaney*⁸² had announced a limited presumption of unreviewability, at least for enforcement discretion; it was thus clear that agencies had broad discretion, unless statutes clearly dictated otherwise, to decide whether or not to initiate enforcement proceedings. It was not so clear whether the same discretion extended, with equal

⁸¹ Robert Mankoff, *Businessman Talking into Telephone Cartoon*, *New Yorker* (May 3, 1993).

⁸² 470 US 821 (1985).

force at least, to denials of petitions for rulemaking. On the one hand, the basic logic of *Heckler v Chaney*—that agencies have limited budgets and limited time, and so must be given discretion to set priorities and allocate resources—carries over to the rulemaking setting; rulemaking proceedings are not on average any less costly or time consuming than enforcement proceedings, and may often be more so.⁸³ Thus the Court has seemed reluctant to compel agency action when agencies with discretionary grants of authority prefer not to act, except in very narrow circumstances, such as when Congress has prescribed a specific legal duty the agency refuses to undertake, or when the agency has unreasonably delayed legally required action that it has initiated but failed to complete.⁸⁴

In *Norton v Southern Utah Wilderness Alliance*,⁸⁵ decided in 2004, Justice Scalia wrote for the Court that “a claim [to compel agency action unlawfully withheld under § 706(1) of the APA] can proceed only where a plaintiff asserts that an agency failed to take a discrete action that it is required to take.”⁸⁶ The Court declined to require the Bureau of Land Management (BLM) to regulate environmentally damaging off-road vehicle (ORV) use on public lands eligible for wilderness designation, even though the agency had a statutory obligation to manage the lands “so as not to impair their suitability for preservation as wilderness.”⁸⁷ That managerial mandate required nothing so specific as regulating off-road vehicles. *SUWA* did not actually involve the denial of a petition for rulemaking, and the decision does not announce or confirm a presumption of “unreviewability” for anything. But it does indicate that the relevant question for courts reviewing agency inaction is just whether, on

⁸³ Eric Biber, *Two Sides of the Same Coin: Judicial Review under APA Sections 706(1) and 706(2)* 11–19 (Vill Envir LJ article, forthcoming spring 2008) (discussing the importance of the resource allocation rationale in administrative law).

⁸⁴ Circuit courts have sometimes provided remedies against delaying agencies. See *Public Citizen Health Research Group v Chao*, 314 F3d 143, 146 (3d Cir 2002) (finding unreasonable delay in OSHA’s development of hexavalent chromium rules and ordering the parties to set a timetable for the rulemaking through mediation or else have one set by the court); *In re International Chemical Workers Union*, 958 F2d 1144, 1150 (DC Cir 1992) (imposing a deadline on OSHA for completion of a cadmium rulemaking); *American Horse Protection Association v Lyng*, 812 F2d 1, 7–8 (1987) (reversing the district court’s grant of summary judgment to the Secretary of Agriculture in an animal advocates’ action against the secretary’s refusal to institute rulemaking proceedings in light of the inadequacy of regulations to prevent neglect of show horses).

⁸⁵ 542 US 55 (2004) (“*SUWA*”).

⁸⁶ *Id.* at 64.

⁸⁷ *Id.* at 65, citing 43 USC § 1782(c) (2000).

the merits of the relevant statutes, the agency is failing to do something it is legally obliged to do.⁸⁸

MA v EPA establishes that agency denials of rulemaking petitions are in fact reviewable, and that an agency may decline to make rules only on the basis of factors the statute makes relevant.⁸⁹ In the specific context of § 202, the Court determined that the relevant statutory factors are whether the air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.” These factors are scientific and causal; they do not include broader considerations of foreign affairs and public policy. Further, if EPA does make a threshold finding of endangerment, it has no choice but to regulate motor vehicle emissions, although within the terms of § 202(a) itself it would have considerable latitude to determine the timing and content of the ensuing regulation. In addition, the Court’s holding presumably leaves EPA some residual discretion to “decide not to decide”; that is, to again decline to make the endangerment judgment. However, this residual discretion is highly constrained: such decisions must be “reasoned judgments” reviewable under the arbitrary and capricious standard. Crucially, *the same statutory factors that govern the agency’s decision about whether or not a pollutant meets the endangerment standard also govern its decision about whether or not to make that judgment in the first place.* That is, roughly speaking, EPA may decline to make a statutory judgment only on technocratic and scientific grounds, not political ones.⁹⁰

To understand the significance of these holdings, we must begin

⁸⁸ In *SUWA*, the relevant statutory provision required the Bureau of Land Management to “manage [lands under its jurisdiction] so as not to impair the suitability of such areas for preservation as wilderness” and “in accordance with a land use plan.” *SUWA*, 542 US at 59, citing 43 USC § 1782(c). The plaintiffs argued that the agency violated this duty by failing to protect public lands from environmental damage caused by ORVs. The Court unanimously held, per Justice Scalia, that this failure was not remediable under the APA. BLM had a general nonimpairment mandate but discretion to decide how to achieve it, and there was no specific discrete mandate to ban or regulate ORVs. *SUWA*, 542 US at 65–72.

⁸⁹ See Biber, *Two Sides of the Same Coin: Judicial Review under APA Sections 706(1) and 706(2)* at 24–25 (cited in note 83) (explaining why it may be appropriate to treat decisions not to issue rules differently from decisions not to enforce).

⁹⁰ Arguably, the Court still leaves room for the agency to cite considerations such as time and resource constraints, or other priorities, as reasons why it declines to regulate, but even if that might be helpful to the agency in some contexts, that is unlikely to leave the EPA much flexibility here. It is hard to imagine the agency defending the view that other issues are more important at the moment than addressing climate change.

with some general points about decision making.⁹¹ Why might an agency decide not to decide, and why might courts worry about such second-order decisions? Begin by imagining an agency that only considers social welfare, not its own political position. There are a number of reasons such well-motivated agencies might wish to defer decisions: they believe they will make a better decision later, after collecting more information; they have more important things to do with limited resources; or, most generally, because the agency believes that the “option value” of postponing a decision—the value of making it later and not now—is greater than the net benefit of deciding now, even with appropriate discounting of future value.

A major source of option value is that more information will often be available in the future, enabling a better decision.⁹² Under some circumstances this will surely be normatively desirable. On the other hand, making a slightly worse-informed decision now can be better than waiting if there are opportunity costs or interim losses from a nondecision. In theory, holding other factors constant, agencies should postpone their decisions just until the costs of further delay exceed the expected gain in new information.⁹³ Of course, both the cost of delay and the benefits of waiting are affected by the stakes of the decision, in terms of the magnitude and probability of the risks involved. When stakes are high (as when a nondecision might lead to significant irreversible negative consequences), the cost of delaying a decision could be substantial. At the same time, high stakes raise the cost of an erroneous decision as well, and thus increase the benefit of collecting more information. Depending on which risk is perceived to be greater—the potentially irreversible costs of deciding too soon versus the potentially irreversible costs of delaying too long—it can be sensible to wait for additional or better information.

So far we have imagined well-motivated agencies deciding whether to decide on the basis of social welfare. However, political

⁹¹ As we have said, the EPA here effectively declined to regulate greenhouse gases, but the actual choice it made—and the choice it had to defend to the Court—was not to make the threshold endangerment finding at all.

⁹² See generally Avinash Dixit and Robert S. Pindyck, *Investment Under Uncertainty* (Princeton, 1994).

⁹³ We bracket the problem that “[t]o maximize subject to the constraint of information costs one would have to know the expected value of information, but this is not in general possible.” Jon Elster, *Introduction*, in *Rational Choice* 1, 25 (1986).

incentives may also come into play. The private costs to the agency of deciding now might exceed the social costs, if the agency's decision will cause it to be punished by the White House, or excoriated by scientists, or targeted by regulated constituencies. In this revised calculus, from the agency's standpoint, it should decide not to decide when the expected private costs of making a decision now, either way, are greater than the private benefits.

Some issues are so politically fraught, however, that no matter how an agency decides (in a first-order sense), a large constituency will be angered; indeed, this is our picture of EPA's position with respect to greenhouse gases. The agency may be loath to make a first-order expert judgment because it fears that the judgment will have to be made in some particular direction, a direction that will produce further problems or demand politically hazardous regulatory action. Or the agency may realize that a judgment in any direction will result in political punishment.

In our view, the Court's holding on the second merits issue can best be understood in just these terms: it rested on the worry that EPA decided not to decide because of a divergence between political costs to the agency and social costs. On this account, the majority believed that EPA was postponing the statutory judgment not because of the social benefits of waiting for more information, or as a result of a careful calibration by the agency of the costs and benefits of further delay given its resource constraints in light of other pressing priorities, or for other valid reasons. Indeed, it would be implausible to attribute to the agency the desire to defer regulation in order to gather more information; EPA's alternative legal position was that it lacked authority to regulate and could not revisit the issue. Rather, EPA was postponing its decision in order to duck cross-cutting political pressures from the White House and business-friendly interest groups, on the one hand, and from green interest groups, scientists, and many states, on the other.

It is important for this account that an agency decision not to decide is not neutral; it leaves the regulatory status quo ante in place.⁹⁴ Because of how the status quo was set, deciding not to make the first-order decision in *MA v EPA* (that is, declining to decide whether the statutory endangerment test is met) appeased the White House by leaving greenhouse gases unregulated, and had the major

⁹⁴ See *MA v EPA*, 127 S Ct at 1473 n 1 (Scalia dissenting).

advantage (from EPA's perspective) of not forcing EPA to make implausible scientific and technical claims that would have incurred widespread condemnation from climate scientists, environmentalists, and the public at large. Better to lapse into passivity, on this view, than to be seen actively cooperating with an effort to politicize science. To be sure, even to decide not to decide required EPA to write an opinion that overstated the uncertainty of the climate science, and thus caused it to be condemned by expert scientists, environmentalists, and other informed observers. However, EPA's nondecision did not require a substantive claim that greenhouse gases have no adverse health and welfare effects; plausibly, it thus produced a lesser backlash than a first-order judgment against regulation would have.

D. THE ANTICIRCUMVENTION PRINCIPLE

On this account, the majority's basic response was to narrow the bases on which EPA could decide not to decide. By excluding the most obviously political factors, such as a concern that regulation might interfere with the administration's foreign policy objectives, the majority forced EPA to defend its second-order decision solely by reference to narrower technocratic factors, above all the value of waiting for further information. If second-order agency discretion to postpone the exercise of technocratic first-order judgment is open-ended, then in a highly politicized environment, decisions not to decide will—at least if sustained indefinitely—undermine the enterprise of technocratic decision making. Conversely, in such an environment, cabinining second-order decision making is an indirect means of ensuring that expert judgments—regardless of how they come out—are at least made. This cabinining of the discretion to decide not to decide is, in our view, the heart of expertise-forcing.⁹⁵ Unbounded discretion to decide not to decide circumvents, and thus threatens to fatally undermine, the complex statutory scheme; if agencies can eternally make no decision, the expert judgment contemplated by § 202(a) will never take place.

As previously mentioned, the majority cabined EPA's discretion

⁹⁵ Compare *In re International Chemical Workers' Union*, 958 F2d 1144, 1149 (DC Cir 1992) (“[T]he benefits of agency expertise and creation of a record will not be realized if the agency never takes action.”).

to decide not to decide by holding that EPA must make its second-order decision by reference to the same constrained set of statutory factors—scientific and technical considerations—that constrain the first-order judgment required by § 202(a). As the majority said:

[EPA] has offered a laundry list of reasons not to regulate [centering on other executive branch programs, the President’s foreign-policy stance, and the reactions of other nations]. Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident that they have nothing to do with whether greenhouse gas emissions contribute to climate change. *Still less do they amount to a reasoned justification for declining to form a scientific judgment. . . .* If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. . . . In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change.⁹⁶

Now, this is not obviously correct at all. Why exactly do the statutory factors that constrain the making of a judgment also constrain the second-order decision not to make such a judgment in the first place? Justice Scalia, in dissent, excoriated the majority for collapsing these two very different questions, arguing that under § 202(a) and the larger statutory scheme, the statutory factors that constrain the EPA’s first-order judgments do not at all constrain its second-order judgments to decide not to make a first-order judgment. If that is so, then under *SUWA*, not to mention *Chevron*, there is no clear statutory command that the EPA’s inaction has violated—not even in the limited sense that the EPA’s nondecision has taken statutorily irrelevant factors into account. As Justice Scalia put it:

When the Administrator *makes* a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” But the statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment—the permissible reasons for deciding not to grapple with the

⁹⁶ *MA v EPA*, 127 S Ct at 1462–63 (emphasis added).

issue at the present time. . . . [T]he statutory text is silent, as texts are often silent about permissible reasons for the exercise of agency discretion. The reasons the EPA gave are surely considerations executive agencies *regularly* take into account (and *ought* to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy.⁹⁷

The majority does not respond clearly to this important point. Justice Stevens's exposition tends to collapse the two different levels of judgment into one another, often skipping back and forth in the same sentence. There is a conclusory assertion that EPA's nonscientific "policy judgments" do not "amount to a reasoned justification for declining to form a scientific judgment"⁹⁸—but why not? There is also something of a suggestion that EPA did not label its decision as a nondecision of the sort Scalia refers to, but rather as a decision not to regulate. It is true that EPA used some unfortunate language, quoted by the Court, blurring the distinction between the first- and second-order decisions.⁹⁹ But as we have seen, where the status quo is nonregulatory, a decision not to decide is also a decision not to regulate; in this sense EPA stated things accurately. In any event the thrust of EPA's approach was quite clear, regardless of the label; it seems uncharitable to conclude that the Court's disposition of the case really rests on this sort of gotcha.

The more charitable reconstruction of the majority's argument is that *courts should interpret statutes so as not to allow circumvention of a statute's main provisions*. This anticircumvention principle is a necessary corollary to the majority's expertise-forcing project. Suppose that EPA could, on policy grounds, perpetually decide not to decide, thereby declining indefinitely to make the first-order judgment contemplated by § 202(a). (In a famous *New Yorker* cartoon, a man is pictured holding a phone and staring at a calendar; the caption says, "How about never? Is never good for you?") Such a situation might well be taken to undermine the purposes of the statutory scheme, perhaps irreparably. In the Court's view, the basic purpose of § 202(a), and of the broader statutory scheme in which it is nested, is to ensure that EPA applies

⁹⁷ Id at 1473 (Scalia dissenting) (citation omitted) (emphases in original).

⁹⁸ Id at 1463 (majority opinion).

⁹⁹ Id.

its expertise to make judgments about the health and welfare effects of pollutants. Fulfilling this mission necessarily requires the agency to assess scientific information on an ongoing basis, to estimate risks in the context of degrees of uncertainty, and to calibrate when and to what extent to regulate exposure to harmful substances. It is hard to see how that purpose could be fulfilled if EPA also enjoys unbounded discretion to perpetually duck the relevant questions for whatever reasons it chooses.

Of course what counts as a circumvention is itself a legal question. On Justice Scalia's view, if the relevant statutes do not clearly (or at all) constrain EPA's discretion to decide not to decide, there is simply no circumvention in the first place; deciding not to decide is something the EPA has statutory authority to do. Justice Scalia would presumably agree that this discretion cannot be boundless. The agency could not decline to make a threshold judgment under § 202(a), because, say, the agency thinks it will disproportionately benefit Democratic voters who live in urban areas. But Justice Scalia and the other dissenting Justices would give the EPA much greater latitude than the majority to consider a broader range of factors at the second-order decision stage, including presidential priorities, the agency's preference for alternative regulatory and nonregulatory strategies, remaining scientific uncertainties, and the potential implications for foreign policy, all of which the agency cited to support its petition denial.

In our view, what best explains the difference between this view and the majority's implicit approach is that strong anticircumvention principles are best understood as a form of interpretive purposivism.¹⁰⁰ On the majority's account of the statutory purposes, it would seem absurd for the statute to require strong, and tightly constrained, first-order judgment about pollution's effects on health and welfare while conferring unbounded discretion on EPA to decide never to make such judgments; from a purposivist perspective, the latter discretion looks like a kind of loophole. This account fits the lineup of the decision: Justices Stevens and Breyer, the Court's most committed purposivists, implicitly rely

¹⁰⁰ This is a familiar theme in the debate over textualism and purposivism, or "form" and "substance," in the interpretation of the tax code; where taxpayers comply with the literal terms of the code but circumvent its intent or purposes in a manner that reduces their tax burdens, purposivist courts will invoke anticircumvention principles. See, for example, *Helvering v Gregory*, 69 F2d 809 (2d Cir 1934), *aff'd*, 293 US 465 (1935); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U Chi L Rev 859 (1982).

upon a strong anticircumvention principle, while Justices Scalia and Thomas, the Court's most committed textualists, dissent on a textualist ground—that the statute's text itself places no constraints on the agency's discretion to decide not to decide.

Another reading, compatible with though different from the anticircumvention idea, is that the majority was implicitly invoking a kind of prophylactic principle, one intended to bar bad-faith decisions not to decide by EPA.¹⁰¹ Suppose that agencies do, in theory, have discretion to decide not to decide on the basis of the sorts of factors Justice Scalia emphasized. Suppose also, however, that the majority saw EPA as using those legitimate factors to cover up ideological disagreement with the statute's basic policy choices and feared that the subterfuge could not be smoked out through ordinary arbitrary and capricious review. On this reading, rather than invoking an anticircumvention principle, the Court constrained the agency's initial decision-making discretion in order to ensure EPA would not use legitimate factors in bad faith. It is hard to rule this idea in, or out, on the basis of the Court's limited discussion; both the prophylactic principle and the anticircumvention principle can plausibly be read into the opinion. But some such principle there must be, if the opinion is to make sense.

In making these points, we are assuming a certain picture of the relationship between politics and expertise: politics is a threat to expertise rather than its complement. One might, of course, have a different picture. Perhaps agency judgments should be, above all, politically accountable; perhaps "political pressure from the White House" is just accountability to the Chief Executive. The majority never spells out its view of this relationship, nor does it explicitly discuss circumstances under which it believes it would consider it normatively desirable for agencies not to decide. Yet we think our account of the dangers of nondecision plausibly explains the Court's approach in *MA v EPA*. This approach harkens back to an older, pre-*Chevron* vision of administrative law in which independence and expertise are seen as opposed to, rather than defined by, political accountability, and in which political influence over agencies by the White House is seen as a problem rather than a solution.¹⁰²

¹⁰¹ Thanks to David Strauss for advancing the idea in this paragraph.

¹⁰² We do not wish to overstate how much "older" this tradition is than the *Chevron*

Chief among these pre-*Chevron* cases, and decided just a year before *Chevron*, is *Motor Vehicles Manufacturers' Association v State Farm Mutual Automobile Insurance Co.*,¹⁰³ the famous administrative law case in which the Court used “hard look review” to invalidate the National Highway Traffic Safety Administration’s (NHTSA) repeal of the passive restraint rule. In scrutinizing the agency’s proffered explanations, and in finding them insufficient as a rationale for repeal, the majority implicitly rejected the agency’s real motivation. In fact, NHTSA was simply responding to a shift in administration priorities: between the rule’s promulgation and its repeal, Ronald Reagan had been elected on a deregulatory agenda. (Indeed, the dissent explicitly acknowledges this rationale, and treats it as sufficient to justify the agency’s turnabout.) *State Farm* is expertise-forcing in the sense that the Court expects the agency to make discretionary policy decisions that can be justified by the relevant statutory factors, and not politics. The inference is that political influence is a source of danger rather than of accountability. The Court’s role is to ensure that political interference does not undermine the agency’s pursuit of its statutory duty, in this case to enhance automobile safety.

Industrial Union Department, AFL-CIO v American Petroleum Institute (the “Benzene” case)¹⁰⁴ can be viewed in this light as well. In *Benzene*, the Supreme Court invalidated a rigorous workplace exposure standard, finding both that the Occupational Safety and Health Administration (OSHA) had misinterpreted its statutory authority, and that the agency’s reasoning in support of the stricter benzene exposure standard was not supported by substantial evidence. In interpreting the Occupational Safety and Health Act, a plurality of the Court effectively read into the statute a requirement that the agency make a threshold finding of “significant risk” before it could set a safety standard for toxics, although Congress had not explicitly required this. The case can be understood as an

tradition that we believe superseded it. Indeed, *State Farm*, which we cite as a plausible example of expertise-forcing, was roughly contemporaneous with *Chevron*. These different “models” of administrative law usually coexist; what changes is emphasis. Our point is simply that the era of hard look gave way to the era of *Chevron* deference, not that the tradition of expertise-forcing ever disappeared entirely. See Kagan, 114 Harv L Rev at 2245 (cited in note 11) (suggesting that most models of administrative law persist in some form).

¹⁰³ 463 US 29 (1983). See also Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v Chaney*, 52 U Chi L Rev 653 (1985).

¹⁰⁴ 448 US 607 (1980).

effort by the Court to pull back on the reins of an overzealous agency, which perhaps it saw as responding to the prolabor political priorities of the Carter administration. On this view, the Court sees its role as ensuring that politically motivated agencies do not overreach, just as the Court in *State Farm* was concerned that politics not produce regulatory underreach.¹⁰⁵

MA v EPA hearkens back, as well, to a number of action-forcing decisions authored primarily by Judge Skelly Wright in the D.C. Circuit concerning the implementation of the National Environmental Policy Act (NEPA). In *Calvert Cliffs' Coordinating Committee, Inc. v United States Atomic Energy Commission*,¹⁰⁶ the best known of these cases, the court held that the commission's rules governing consideration of environmental issues were insufficient. The statutory language required disclosure of environmental impacts "to the fullest extent possible." But this language, wrote Judge Skelly Wright,

does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." . . . They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.¹⁰⁷

¹⁰⁵ Of course, the *Benzene* case may alternatively be viewed as an instance of judicial *interference* with agency expertise if one believes that the agency was trying to use the best available science to comply with statutory commands. After all, the Supreme Court essentially insisted that the agency produce scientific evidence ("substantial evidence") to support the claim that benzene was sufficiently dangerous at levels below ten-parts-per-million to justify the stricter one-part-per-million standard, something the agency claimed it could not do given the available epidemiological data and the limitations on doing human exposure studies. We thank Lisa Heinzerling for pointing out this alternative reading.

¹⁰⁶ 449 F2d 1109 (DC Cir 1971).

¹⁰⁷ Id at 1114–15. It was the courts' responsibility to oversee the implementation of new environmental legislation:

[I]t remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: [NEPA]. We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.

Id at 1111. Other circuits followed the lead set by Skelly Wright in the D.C. Circuit by enforcing agency compliance with NEPA. See, for example, *Davis v Coleman*, 521 F2d

Finally, there are two important CAA cases that embody the expertise-forcing view that we see revived in *MA v EPA*. In *NRDC v Train*,¹⁰⁸ the D.C. Circuit required EPA to list lead as a criteria pollutant under § 108 of the Act (the first step toward setting a national air quality standard), despite the agency's claim that it had near-absolute discretion not to do so. Section 108 requires the administrator to list each air pollutant that "in his judgment has an adverse effect on public health and welfare . . . the presence of which in the ambient air results from numerous sources; and . . . for which he plans to issue air quality criteria."¹⁰⁹ The Court rejected the agency's view that it could simply decline to issue air quality criteria, and therefore never trigger the obligation to set a standard. Acceding to this interpretation would render the mandatory language in the section "mere surplusage," said the Court. Once the first two conditions are met, the agency must list the pollutant. Although there may be political reasons why the agency is reluctant to list lead (notably, it would trigger a NAAQS for lead, which would mean high compliance costs for fuel producers), the Court sees its role as forcing the agency to act in conformance with the purpose of the statute: "The structure of the Clean Air Act . . . its legislative history, and the judicial gloss placed upon the Act leave no room for an interpretation which makes the issuance of air quality standards for lead under section 108 discretionary. The Congress sought to eliminate, not perpetuate, opportunity for administrative footdragging."¹¹⁰

It goes too far to say that all of these cases are specifically concerned with expertise-forcing as a rebuke to "strong presidential administration," though some of them are. More generally, in this line of cases, the courts force expertise as a way to check a number of bureaucratic pathologies, including vulnerability to interest group pressure or institutional resistance to a new statutory mission. Yet it is fair to say that in all of these decisions, the reviewing court performs an expertise-forcing role: courts must ensure that agencies make rational decisions based on relevant statutory factors. This view is perhaps best articulated in Judge

661 (9th Cir 1975); *Save Our Ten Acres v Kreger*, 472 F2d 463, 467 (5th Cir 1973); *Scherr v Volpe*, 466 F2d 1027, 1033 (7th Cir 1972).

¹⁰⁸ 545 F2d 320 (2d Cir 1976).

¹⁰⁹ *Id* at 322.

¹¹⁰ *Id* at 328.

Leventhal's "statement" in support of the D.C. Circuit's decision in *Ethyl Corp. v EPA*,¹¹¹ which upheld EPA's controversial regulation of lead emissions from motor vehicles. In *Ethyl Corp.*, the relevant provision authorized EPA to regulate emissions that "will endanger" the public health or welfare, and the court deferred to the agency's interpretation that this authorized regulation where the agency found a "significant risk" of harm. Noting that the CAA is "precautionary" and that the agency must operate at the frontiers of scientific knowledge, the court held that the statute does not require proof of actual harm.¹¹²

In his statement, Judge Leventhal sought to counter the views of Chief Judge Bazelon, who had also concurred in the decision but for very different reasons—because he believed courts were ill-equipped to review the substantive rationality of technical agency decisions:¹¹³

Taking [Judge Bazelon's] opinion in its fair implication, as a signal to judges to abstain from any substantive review, it is my view that while giving up is the easier course, it is not legitimately open to us at present. . . . In the case of agency decision-making the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises its delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory. . . . The substantive review of administrative action is modest, but it cannot be carried out in a vacuum of understanding. Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably. Once the presumption of regularity in agency action is challenged . . . the agency's record and reasoning has to be looked at. . . . Restraint, yes, abdication, no.¹¹⁴

¹¹¹ 541 F2d 1, 68–69 (DC Cir 1976). This was not a concurrence but a "statement."

¹¹² Id at 13 (majority opinion).

¹¹³ Id at 66–68 (Bazelon concurring). This exchange was part of a long-standing debate between the two judges about the extent to which courts were capable of, and obligated to, "engage in meaningful review of the substantive rationality of agency decisions raising complex scientific and technological issues." Samuel Estricher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 Colum L Rev 894, 906 (1980). Leventhal explained his approach, with special reference to environmental cases, in Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U Pa L Rev 509 (1974).

¹¹⁴ *Ethyl Corp.*, 541 F2d at 68–69 (Leventhal concurring statement).

The implicit suspicion of politics that we detect in the majority opinion in *MA v EPA* fits within this older understanding of the court's role. And it stands in notable contrast to the more sanguine view of politics represented by both *Chevron* (also authored by Justice Stevens) and *Brown & Williamson* (in which four of the five members of the *MA v EPA* majority—all but Kennedy—dissented). In *Chevron*, the majority endorsed the notion that political considerations could lawfully influence agency policy decisions (in that case deciding whether the term “stationary source” included multiple units operating under a fictional bubble even if the approach arguably led to more lenient enforcement of air regulation). That EPA changed its mind about this definition over the years was a sign of political responsiveness to a democratically accountable executive; it did not represent unwanted political interference. In *MA v EPA*, however, the Court rejected this kind of political accountability, refusing to defer to the agency's claim of discretion to decide not to decide.

IV. TRENDS AND IMPLICATIONS

A. REALISM AND GLOBAL WARMING

The simplest approach to *MA v EPA* is to say that it is really just a global warming case, produced by a confluence of political and regulatory circumstances that may or may not generalize to other areas. Most of the Justices voted on the most basic ideological lines (on this account): left-of-center Justices voted to make EPA do something about global warming, right-of-center Justices voted to the contrary, and as usual Justice Kennedy was the median and decisive voter. The left-of-center Justices won because they happened to obtain, or were tactically clever enough to obtain, Justice Kennedy's support in the context of global warming; but each policy area is a new battle.

Even as realism, this account is too crude, in part because it focuses too closely on the immediate case and not enough on the context of the Court's decision making in recent years. We mean to offer a larger view of this context, in which *MA v EPA* is part and parcel of a larger trend toward increasing suspicion, on the part of many of the Justices, that the Bush administration has politicized administrative and professional expertise in a number of domains—not just global warming. If those trends either affect

or reflect Justice Kennedy's thinking, that makes them all the more important, given the Court's current configuration.

In any event, we also wish to put *MA v EPA* in the best possible light from an internal legal point of view. The Court did not, of course, write an opinion explicitly limited to global warming; it wrote an opinion in general administrative law terms, and the lower courts will have to deal with the opinion on those terms. The expertise-forcing approach we have imputed to the Court helps to make sense of some otherwise puzzling features of the opinion, such as the implicit assumption that the statutorily relevant factors constrain both the EPA's first-order judgments and its second-order decisions to decide. Absent an expertise-forcing rationale, the Court's opinion is vulnerable to Justice Scalia's criticisms on this score;¹¹⁵ with the expertise-forcing rationale, the opinion makes a great deal of sense. From an internal legal point of view, whether such a rationale crossed Justice Stevens's mind, or Justice Kennedy's, is irrelevant; what matters is that it helps fit *MA v EPA* into the larger fabric of administrative law in an intelligible way. Others are free to analyze *MA v EPA* from the external standpoint of ideology, or legal realism, but that is not our main interest here.

B. PUTTING *MA v EPA* IN CONTEXT

We see the Court's decision in *MA v EPA* as of a piece with other cases, decided in the last few terms, which similarly involve executive override of expert judgments by professionals or agencies. For example, in *Gonzales*, the Court rejected the Attorney General's determination that it was not "legitimate medical practice" under the federal Controlled Substances Act (CSA) for a physician to prescribe controlled substances to patients lawfully committing suicide under Oregon's assisted suicide statute—a ruling that would leave prescribing physicians vulnerable to criminal prosecution. Although the case was strongly inflected with federalism concerns, the majority's rationale also turned on the Attorney General's lack of expertise to make determinations about standards of medical care. Congress assigned such expert medical judgments to the Department of Health and Human Services (HHS), Justice Kennedy's majority opinion explains, rather than

¹¹⁵ See notes 97–98 and accompanying text.

the Department of Justice; the Attorney General is authorized under the CSA only to prevent “illicit drug dealing and trafficking as conventionally understood.” The Attorney General’s interpretive rule thus not only failed to attract *Chevron* deference (owed to agency interpretations of their own ambiguous regulations under the Court’s ruling in *Auer v Robbins*¹¹⁶) because discretion to make such judgments was not delegated to him by Congress; it failed to garner even *Skidmore* deference¹¹⁷ because it lacked the traditional indicia of expertise. On this point, Justice Kennedy noted that the Attorney General brought neither experience nor expertise to bear in making his interpretive ruling—he failed, for example, to consult expert agencies such as HHS. Although *Gonzales* is less centrally concerned with scientific judgments than *MA v EPA*, the majority opinion is tinged with underlying suspicion about politically motivated executive usurpation of judgments normally left to experts.

This concern appears even in seemingly unrelated terrorism cases that have reached the Court in recent years. The principal issues in *Hamdan* were the President’s authority to establish military tribunals and Congress’s power to limit federal court jurisdiction, neither of which raised the questions of scientific or medical judgment at issue in *MA v EPA* or *Gonzales*. Yet this decision too can be seen through the “politics versus expertise” lens. Justices Stevens and Kennedy again teamed up to rein in executive assertions of authority that appear to disregard established professional or bureaucratic practices and procedures. The Court held that the President’s military commissions violate the Uniform Code of Military Justice (UCMJ)—what the Court refers to as “an integrated system of military courts and review procedures.”¹¹⁸ Invocations of political exigency alone cannot justify departing from the long-established rules and procedures that normally govern courts-martial, wrote Justice Stevens for the majority. Such departures may be permissible where the normal procedures are shown to be “impracticable,” the Court allowed, but the President

¹¹⁶ 519 US 452 (1997).

¹¹⁷ See *United States v Mead Corp.*, 533 US 218; *Skidmore v Swift & Co.*, 323 US 134 (1944).

¹¹⁸ *Id.* at 2770, quoting *Schlesinger v Councilman*, 420 US 738, 758 (1975).

had failed to articulate a reason, or place anything in the record, to show why that is so.¹¹⁹

We do not mean to suggest that the outcomes in *Gonzales* and *Hamdan* can be entirely explained, or ought to be primarily viewed, in terms of the Court's desire to insulate expert decision making from political interference. Other concerns—federalism in *Gonzales*, say, or separation of powers and due process in *Hamdan*—may better account for the outcomes. Still, these cases are all to a greater or lesser extent inflected with a worry about executive willingness to cast aside expertise and professional methodologies and procedures in the name of political expedience. The EPA's determination that greenhouse gases are not air pollutants, and that even if they were, the agency would decline to regulate them under the CAA, can be seen as a species of the same problem.

At the same time, and more broadly, *MA v EPA* can be seen as one in a series of rebukes to the Bush administration's generous vision of executive power. In the cases discussed above, crucial Justices such as Kennedy and Stevens perceived overreaching by the administration. On this view—whether right or wrong—the administration implausibly asserted in *Hamdan* the power to establish military tribunals that would try enemy combatants without standard court-martial procedures; in *Gonzales*, it implausibly claimed that the power to regulate controlled substances conferred an implicit power to establish medical practice standards, with the effect of criminalizing otherwise legal assisted suicide. In *MA v EPA*, the alleged agency failing was underreach rather than overreach, but the same Justices may have seen the same unbounded vision of executive power at work in the form of political interference with agency expertise.

The Court's rebuke of the administration is perhaps most evident in a passage toward the end of the *MA v EPA* decision, where the majority went out of its way to chastise EPA's invocation of foreign policy considerations, among other reasons, for refusing to regulate greenhouse gas emissions. As Justice Stevens wrote, "In particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute

¹¹⁹ *Hamdan*, 126 S Ct at 2792 ("The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present.").

domestic laws.”¹²⁰ This passage bites hard on a line cast in an amicus brief, filed on behalf of former Secretary of State Madeleine Albright, which aimed to raise the Court’s ire about the potential for just such executive overreach by warning that the foreign affairs rationale could be used more generally as an executive trump card.¹²¹

C. HARD LOOK REVIEW OF RULEMAKING DENIALS: STATE FARM FOR A NEW GENERATION

On the view we attribute to the *MA v EPA* majority, courts have a role to play not only through ex post judicial review of agency decisions, but also through expertise-forcing when agencies are deciding not to decide because of political pressures. If agencies refuse to exercise their first-order expertise, in any direction, because issues are politically too controversial, or because they fear that an expert judgment would point in the direction of politically costly action—a plausible description of what occurred when EPA considered whether to regulate greenhouse gases—courts can review the reasons agencies give for postponing their first-order decisions in order to flush out these socially harmful motivations. Where agencies have no valid reason for further delay, courts will indirectly force them to make the first-order expert judgment they have been avoiding.

MA v EPA seems to adopt this perspective when it makes two important findings. The first is that *rulemaking denials are reviewable*.¹²² The Court distinguished rulemaking denials from decisions not to enforce on the grounds that the former are less frequent and more likely to involve issues of law rather than fact—both

¹²⁰ *MA v EPA*, 127 S Ct at 1458.

¹²¹ Brief for Amicus Curiae Madeleine K. Albright in Support of Petitioners, *MA v EPA*, No 05-1120, *16–19 (filed Aug 31, 2006) (available on Westlaw at 2006 WL 2570988). The amicus brief argued that the administration’s reliance on the foreign policy rationale for declining to regulate, if generalized beyond this context, could lead to a significant expansion of executive power. Since so many domestic regulatory issues now overlap with foreign policy questions, the Court should be wary of approving of a foreign affairs “trump” over domestic statutory obligations. See also Mark Moller, *Blame Bush for Massachusetts v. EPA?* (SCOTUSblog, Apr 3, 2007), online at http://www.scotusblog.com/movabletype/archives/2007/04/blame_bush_for.html (remarking that the Court seems increasingly distrustful of executive claims of inherent authority to ignore Congress in domestic affairs).

¹²² 127 S Ct at 1459 (adopting the language from a D.C. Circuit case, the Court confirmed that “[r]efusals to promulgate rules are thus susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential’”).

implicit responses to the worry that agencies must have discretion to allocate resources on cost-benefit grounds, as they do with respect to nonenforcement. Consistently with *SUWA*, the Court focused on whether the relevant statutory provisions were best understood to allow EPA to do what it did. This doctrinal development is far more adventurous, and potentially consequential, than anything the Court did in its standing analysis. The result is that a category of agency decision making that once enjoyed all the benefits of “inaction” is treated as if it were “action” and subjected to review.¹²³

The second crucial point is that *agency decisions not to decide are (presumptively) subject to “hard look” review*. At least absent a clear statutory command to the contrary, the reviewing court will require the agency to offer a nonarbitrary reason for the decision not to decide. One type of arbitrariness is legal error: agencies must consider only those factors made relevant by the particular statute at hand. In other words, hard look review applies *both* to the agency’s decision about whether to make a threshold determination in the first place, *and* to the agency’s decision about whether the threshold has been crossed. When making both the first-order judgment under § 202 and the second-order decision about whether to decide, EPA may not consider extraneous non-statutory factors such as foreign policy, or its preference for other regulatory or nonregulatory approaches that might fit better with the President’s priorities. Rather, the agency is to focus primarily on information, scientific uncertainty, and the costs and benefits of acquiring further information. Does the state of the science enable the EPA to make a rational judgment now, in either direction, about the health and welfare effects of a given pollutant? What are the costs of deciding not to decide, as against the informational advantages that would arise from postponing the first-order judgment until the science is solidified?

¹²³ Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 NYU L Rev 1657 (2004). Bressman argues for a revision to the nonreviewability doctrine applied to agency inaction cases because “an agency is susceptible to corrosive influences when it refuses to act, just as when it decides to act. These influences may produce administrative decisionmaking that is arbitrary from a democratic perspective, no matter how rational or accountable it may be from a political standpoint.” *Id.* at 1661. Presidential control, Bressman argues, may be inadequate to prevent arbitrariness: “The President exercises control in a manner that is too corrupting and sporadic to reduce the potential for faction. Like Congress, he may pressure agencies to depart from broad statutory purposes in favor of personal priorities.” *Id.* at 1690.

Of course the case does not answer all questions. Crucial to the holding is the point that § 202(a) excludes nonscientific and non-technical factors from the agency's initial decision-making calculus. Some statutes can plausibly be read to share that feature; others presumably cannot. All organic statutes are different; in some settings statutes will be read to give agencies more or less discretion to decide not to decide. The main contribution of the decision, however, is to clarify that there is nothing magic about such initial decisions. They are reviewable on the ordinary terms of administrative law. Properly understood, *MA v EPA* is not—as the Chief Justice noted disdainfully in his dissent—*SCRAP* for a new generation; it is *State Farm* for a new generation.

D. THE LIMITS OF EXPERTISE-FORCING

Expertise-forcing is never a complete solution to the problem of political interference, just a first step. It is always possible that the same political distortions that cause the agency to avoid a decision will also cause it to skew the first-order decision that the court forces it to make. But for various reasons, an agency whose preference might be to duck an issue altogether might also want to exercise its expert judgment accurately, or at least in an unbiased fashion, on issues that it is forced to confront.

For one thing, agency officials might be sufficiently concerned for the agency's reputation as an expert that it will not openly distort its first-order opinions, incurring mockery and outrage from scientific and technocratic experts, even if the agency would be quite happy to avoid making a first-order judgment altogether. A person who is willing to refrain from pointing out that the emperor is wearing no clothes may balk at saying out loud that the clothes exist. For another thing, if the agency realizes that any first-order judgment it makes will alienate some constituency or other—either the White House or environmental constituencies will be outraged, whatever the agency does—then it may decide to let the scientific chips fall where they may, on the principle that one might as well be honest if dishonesty will not pay. Finally, of course, judicial review can also take a hard look at the reasons the agency gives for its first-order decision making, and may be able to control political distortions at that stage as well.¹²⁴

¹²⁴ There have been extended disputes over the usefulness of hard look review and its

It is also true that the Court in *MA v EPA* did not quite force a first-order judgment, although it went a long way in that direction. It remains notionally possible for EPA on remand to say that the scientific uncertainty is indeed “so profound” that it cannot sensibly make the statutory judgment, one way or another, and so must still wait. And the door is at least arguably still open, however narrowly, for the EPA to say that resource constraints and other priorities weigh in favor of nondecision. That is, even while ruling out a host of considerations as irrelevant to the decision not to decide, the Court left open the possibility that the agency might still decline to decide because of resource constraints, or other policy priorities, or reasons *other than* those forbidden political or policy judgments that are extraneous to the statutory factors. It is even conceivable, though unlikely, that such a renewed nondecision might be upheld after another round of arbitrary and capricious review. If that second round of judicial review works well, then there should be nothing troubling about this scenario; it means that EPA does indeed have valid reasons to continue postponing its first-order judgment. At a minimum, in this scenario *MA v EPA* would have achieved its expertise-forcing aims at the second decision-making level, even if not at the first; although the EPA would not have been forced to make an expert first-order decision, it would have been constrained to make its second-order decision not to decide on expert or technocratic grounds, rather than political ones.

We may further conjecture—although there is no direct evidence for this in the opinion—that Justice Stevens, Justice Kennedy, and perhaps others in the majority are implicitly betting that EPA will not be able to say, with a straight face, that the scientific uncertainty is indeed “so profound” that no present judgment is possible.¹²⁵ Given the scientific consensus, solidifying daily, that anthropogenic global warming is not only a real phenomenon but due in significant part to human-controlled emissions of greenhouse gases, the residual uncertainties are diminishing rapidly.

associated procedural requirements. Compare William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 Yale L J 38 (1975) (claiming that more demanding procedures enhance the flow of information and promote democratic values), with Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 Duke L J 1385 (1992) (detailing the difficulties of “ossification” in the rulemaking process). We are bracketing these debates.

¹²⁵ Especially as the *only* basis for nondecision, without the benefit of covering fire from other political factors in a multifactor opinion.

EPA will, on this conjecture, be unable to maintain that the level of uncertainty is still so high as to disable any first-order judgment at all. If this is so, then a kind of politics—EPA’s concern for its scientific reputation, and for the reaction of experts who will condemn an EPA claim that black is white—will enforce the majority’s attempt to prod EPA to make an expert judgment independent of politics.

The expertise-forcing logic that ultimately underpins *MA v EPA*, and the corollary anticircumvention principle, are plausible but, we concede, not obviously correct. It is not at all clear that even absent the Court’s ruling, EPA would or could indefinitely postpone the making of a statutory judgment; perhaps it would embark on that course anyway, precisely for political reasons. If a Democratic president were to come to power in 2008, or a Republican president more concerned about global warming, the political calculus would shift. Indeed, it may already have shifted with the election of a Democratic Congress in 2006; legislators have considerable power to prod agencies in desired directions, even where there is a president of the other party in office—in this case, a weakened president. Perhaps the Court took an incomplete view of the political landscape, and a broader view would have shown that there is no problem, or that the problem will soon be cured. Given the currently swelling consensus that global warming is a serious problem, it is hard to imagine that the EPA could really have postponed a first-order judgment indefinitely.

These points can be taken further, to suggest that the Court’s expertise-forcing approach may have been affirmatively perverse. As we have noted, the logic of expertise-forcing supposes that the agency’s initial preference is to make no decision either way, but that, if forced to decide, it will exercise its expert judgment on the merits, or at least that the prospect of a second round of *ex post* judicial review can provide the agency with sufficient incentive to make its first-order judgment in a rationally defensible fashion. This is only one possibility; another is that the political pressure from the White House is sufficiently great, and the incentives provided by the prospect of judicial review sufficiently weak, that an agency that can no longer refuse to decide will just decide in a slanted way. To the extent that the majority is worried about the politicization of EPA’s scientific and technocratic judgments under the Bush administration, perhaps the Court should

be encouraging the EPA to decide not to make a judgment until that administration has left office, at least if the Court believes that the politicization will be reduced in the next administration.

All this just shows, however, that expertise-forcing is an approach that rests on uncertain judicial judgments about the likely course of politics, and about the likely costs and benefits of alternative approaches.¹²⁶ But this is not a unique problem for expertise-forcing; other strategies of judicial review also rest on uncertain predictions. The question is under what conditions might expertise-forcing amount to a useful strategy for courts worried about the politicization of administrative expertise. Where agencies are postponing a first-order judgment in order to deflect political pressure, from the executive or elsewhere, but would render an unbiased first-order judgment if forced to do so, courts committed to a certain vision of the centrality of expertise in the administrative state can prod agencies into revealing their true expert judgments. It is plausible, although by no means clear, that *MA v EPA* presented such conditions. Whether or not it did, the expertise-forcing rationale puts the majority's opinion in its best light, providing answers to the otherwise troubling legal points raised in Justice Scalia's dissent.

E. IMPLICATIONS FOR CLIMATE CHANGE REGULATION

Whether or not *MA v EPA* is the new *State Farm*, and regardless of whether the Court's expertise-forcing project has staying power, the decision has a number of important short-term implications for environmental law and policy, particularly as it relates to climate change. First, the Court's holding that EPA has authority to regulate greenhouse gases under the CAA kept alive California's legal claim that it is entitled to regulate tailpipe emissions of carbon dioxide under § 209(b) of the Act, which confers on California a special authority to go beyond federally established emissions standards, and § 177, which allows other states to adopt California's standards so long as they are "identical." In 2003, the California legislature passed AB 1493, which requires the state's

¹²⁶ For concerns that *MA v EPA*'s expertise-forcing approach has proven ineffective so far, and the suggestion that state regulation is a useful alternative to politicized EPA decision making, see David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization* (George Washington forthcoming article on file with authors).

Air Resources Board (ARB) to set standards for greenhouse gas emissions from new vehicles, and to implement the regulations over a phase-in period. After promulgating the regulations, the ARB was promptly sued by the automobile industry, which argued, first, that EPA lacked the authority to regulate greenhouse gases under the CAA (that is, that California enjoys no “special status” under § 209 to regulate a substance the Act does not cover). Second, the industry argued that, in any event, California’s tailpipe regulations are preempted by the EPCA,¹²⁷ which reserves the right to establish fuel efficiency standards to the Department of Transportation; this latter point turns on an argument that there is no way to regulate carbon dioxide emissions without tightening fuel efficiency standards. When *MA v EPA* was decided, litigation challenging California’s legal authority to set tailpipe standards was pending in both Vermont and California.¹²⁸

The decision in *MA v EPA* that greenhouse gases meet the definition of “pollutant” and are thus regulable under the Act eliminated the auto industry’s first argument above. The Court also lent some help to California on the second argument by suggesting that any ensuing EPA regulation of new vehicle emissions under § 202(a) could live compatibly with DOT regulation of fuel efficiency. This language was thought at the time to supply a hint to the district courts in Vermont and California about the Court’s view of the preemption argument. Although it is hard to know how strong a role the Supreme Court’s language on preemption played, the states certainly briefed the issue, and the district court judgments both cited it in their decisions in favor of California on the preemption challenge.¹²⁹ Also, at the time *MA v EPA* was handed down, California was still hoping to secure EPA approval for its tailpipe regulations in the form of an EPA waiver under § 209 of the CAA (an application the agency had left pending until the Court decided *MA v EPA*). Such a waiver was necessary, quite apart from prevailing on the preemption challenges, before any of the states could implement the California standards. Although EPA ultimately

¹²⁷ Energy Policy and Conservation Act, Pub L No 94-163 § 301, 89 Stat 871 (1975), amending 15 USC § 1901 et seq (2000).

¹²⁸ See *Central Valley Chrysler-Jeep, Inc. v Witherspoon*, 2007 WL 135688 (ED Cal); *Green Mountain Chrysler Plymouth Dodge Jeep v Crombie*, 508 F Supp 2d 295 (D Vt 2007).

¹²⁹ See *Central Valley Chrysler-Jeep, Inc. v Goldstene*, 2007 WL 4372878 (ED Cal); *Green Mountain*, 508 F Supp 2d at 351.

decided against granting the waiver,¹³⁰ the decision in *MA v EPA* seemed at the time to add political, if not legal, pressure on the agency to grant it, thus fueling the states' momentum.

MA v EPA has larger implications for global warming regulation generally than might appear at first glance. First, if California's emissions standards survive appellate review, and if the state succeeds in its appeal of EPA's waiver denial (an uphill battle in the final year of the Bush II administration, but arguably less difficult to imagine in a new administration), the standards will go into effect not only in California but in the twelve other states that have adopted them under the "identity" requirement in CAA § 177.¹³¹ This means that the auto industry will be facing, for the first time, multistate regulation of greenhouse gases even if the federal government ultimately takes no action either to regulate these emissions directly via EPA implementation of § 202(a)(1), or to further increase fuel efficiency standards via NHTSA regulation of CAFE (corporate average fuel economy) standards pursuant to the EPCA. The practical result is that the auto manufacturers will, in all likelihood, need to increase fuel efficiency or take other steps in order to achieve compliance with the California standards. More broadly, this would force the transportation sector to shoulder at least some of the burden of achieving greenhouse gas reductions nationwide, regardless of whether Congress wishes in new climate legislation to spare the transportation sector and burden other sectors, such

¹³⁰ Section 209 establishes certain criteria that California must satisfy to obtain the waiver, including that the state show that it faces "compelling and extraordinary" circumstances that justify its setting higher tailpipe emissions standards than EPA sets nationally. See 42 USC § 7543(b)(1)(B) (2000). These criteria have not proved an obstacle to past waivers, which California has routinely been granted, because the substances being regulated under these waivers were localized pollutants that contribute to California's severe ozone problem, one that has historically been unmatched anywhere in the nation as a result of California's concentration of automobiles and its unique topography. Although the statute places the burden on those opposing the waiver, meeting the same standard when carbon dioxide is the "pollutant" being regulated is somewhat more complicated. California must show that it is in "compelling and extraordinary circumstances" when it comes to the impacts of global warming. On one view, California clearly faces unique challenges: given its long coastline and its significant dependence on mountain snowmelt for water, global warming could do more damage to California than other states. On another view, many states will suffer as a result of global warming, and California's situation is not any more compelling or extraordinary than, say, Florida's. EPA rejected California's arguments in the waiver denial. See letter from Stephen L. Johnson, Dec 19, 2007, cited in note 18.

¹³¹ The Pew Charitable Trusts, *U.S. State and Regional Action on Global Warming* (Dec 6, 2007), online at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Fact_Sheets/Global_warming/state%20actions.pdf.

as electric utilities, to a greater extent. Had *MA v EPA* come out the other way on the definition of “pollutant,” this would have been much harder to achieve.

A second major implication of *MA v EPA* was that the Court’s grant of standing breathed life into other global warming lawsuits pending around the country, including two federal common law public nuisance suits brought by a coalition of states against, in one suit, the major power plants, and in another, the automobile industry. Both suits sought relief for the defendants’ contributions to the harms caused by global warming.¹³² The plaintiffs in these cases ultimately failed because of threshold justiciability issues,¹³³ but at the time, the majority’s “three strands” approach to standing seemed to provide lower courts ample flexibility to grant standing when they otherwise might have declined to do so under *Lujan*.¹³⁴ In the wake of these decisions, which reveal a judicial reluctance to entertain nuisance suits of this kind, a potentially larger implication of the Court’s opinion in *MA v EPA* for any future nuisance cases is that the courts will find that the CAA preempts common law nuisance claims.¹³⁵

A third implication is somewhat more technical, and relates to the ability of EPA to use the existing CAA to regulate greenhouse gases quite broadly, even if Congress passes no new climate legislation. If EPA makes the first-order finding of endangerment necessary to trigger regulation under § 202(a)(1) (the mobile source provision at issue in the case) the fact that greenhouse gases are now “pollutants” under the Act may mean that EPA must regulate them under provisions of the Act designed to target stationary sources as well, including the “new source review” (NSR) program, which requires new or “modified” stationary sources to meet stringent technology-based permit limits. NSR defines “regulated pol-

¹³² See *Connecticut v American Electric Power Co.*, 406 F Supp 2d 265 (SDNY 2005). The suit was filed by eight states, including California and New York, as well as New York City and three land trusts, against the five largest carbon dioxide emitters in the United States. *California v General Motors*, 2007 WL 2726871 (ND Cal), was filed by the state of California against six manufacturers of motor vehicles for contributing to global warming. The New York suit seeks injunctive relief while the California suit seeks damages.

¹³³ See *American Electric*, 406 F Supp 2d at 274; *General Motors*, 2007 WL at *16.

¹³⁴ See note 52.

¹³⁵ See *City of Milwaukee v Illinois*, 451 US 304 (1981). We thank Lisa Heinzerling for this point.

lutant” as “any pollutant subject to regulation under the Act.”¹³⁶ The question is, what would make greenhouse gases “regulated pollutants”? An endangerment determination alone would not be sufficient to trigger regulation under NSR because a pollutant must be the focus of a *promulgated* national ambient air quality or emission standard in order to be considered a “regulated NSR pollutant.” But a promulgation of tailpipe standards for carbon dioxide following an endangerment finding under § 202(a)—a rulemaking EPA promised to undertake in the wake of *MA v EPA*¹³⁷—could trigger carbon dioxide into being an NSR regulated pollutant automatically, even if EPA has not set a *de minimis* threshold.¹³⁸

In addition to this, in the wake of *MA v EPA*, EPA has lost its principal explanation for why it has not set standards for greenhouse gases in yet another CAA program known as the New Source Performance Standards program, something for which it is under attack in pending litigation.¹³⁹ This is all to say that the full implications of the Court’s decision for the potential use of the CAA as an instrument for regulating greenhouse gas emissions are still unknown, but they are potentially far-reaching.

Fourth, *MA v EPA* will have repercussions for the implementation

¹³⁶ Regarding NSR for stationary sources governed by the “Prevention of Significant Deterioration” provisions of the Act, see 42 USC § 7475(a)(4) (2000) (providing that “the proposed facility is subject to the best available control technology for each pollutant *subject to regulation* under this Act emitted from, or which results from, such facility”) (emphasis added); 40 CFR § 52.21(b)(50) (2006) (“Regulated NSR pollutant, for purposes of this section, means the following: (i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the Administrator . . . (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act; (iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or (iv) Any pollutant that otherwise is subject to regulation under the Act . . .”).

¹³⁷ EPA announced in its December 2007 priority list that it planned to issue a notice of proposed rulemaking regarding automobile greenhouse gas emissions by the end of 2007 and issue a final rule by October 2008. Environmental Protection Agency, Statement of Priorities, 72 Fed Reg 69922-01, 69934 (Dec 10, 2007). As of April 2008, EPA still had not published the proposed rule.

¹³⁸ See 40 CFR 52.21(b)(23)(ii) (2006) (defining significance as a “rate of emissions that would equal or exceed” a set list of emissions rates for different pollutants). We thank Peter Wyckoff, Senior Counsel at Pillsbury Winthrop Shaw Pittman, for pointing this prospect out in an exchange. See e-mail from Peter Wyckoff to Jody Freeman (July 11, 2007).

¹³⁹ In a case pending before the D.C. Circuit, a coalition of states, cities, and environmental groups have challenged EPA’s 2006 New Source Performance Standards for utility and industrial power plants for failing to establish a standard for greenhouse gases. EPA had declined to do so on the basis that it had no authority under the CAA, a position that the Supreme Court in *MA v EPA* has now overruled. See *Coke Oven Environmental Task Force v EPA*, No 06-1131 (DC Cir, filed Apr 7, 2006).

of *other* environmental statutes as well, including the National Environmental Policy Act (NEPA)¹⁴⁰ and the Endangered Species Act (ESA).¹⁴¹ For example, a number of lawsuits have been filed in recent years alleging federal agency violations of NEPA's environmental impact disclosure requirements because of a failure to consider greenhouse gas impacts for proposed federal projects.¹⁴² And similar lawsuits have been filed against states, and sometimes private parties, under state environmental disclosure and mitigation statutes.¹⁴³ Although the Court's decision in *MA v EPA* does not engage the NEPA issue, the finding that greenhouse gases are "pollutants" adds weight to the argument that their environmental impact must be disclosed. This will greatly complicate and presumably slow NEPA compliance because, as yet, there are no established protocols for how to assess the environmental impacts of greenhouse gases, which may be emitted (or reduced) depending on the nature of the proposed development project.

Moreover, as J. B. Ruhl has argued, after *MA v EPA*, it is possible to claim that "it is incumbent on *all* federal regulatory agencies to assess how global climate change is to be integrated into their respective regulatory programs."¹⁴⁴ There are a variety of ways in which the provisions of the ESA could be used to reduce greenhouse gas emissions. For example, § 7's "jeopardy" consultation provision requires federal agencies to consult with either the Fish and Wildlife Service or the National Marine Fisheries Service (the two agencies with responsibility to implement the ESA) in order to ensure that

¹⁴⁰ 42 USC § 4321 et seq (2000).

¹⁴¹ 16 USC § 1531 et seq (2000).

¹⁴² See, for example, *Center for Biological Diversity v National Highway Traffic Safety Administration*, 2007 WL 3378240 (9th Cir) (holding that the National Highway Traffic Safety Administration's failure to take climate change effects into account when promulgating fuel economy standards for light trucks and SUVs violates NEPA impact disclosure requirement).

¹⁴³ See *Center for Biological Diversity v National Highway Traffic Safety Administration*, No 06-71891 (9th Cir, filed Apr 12, 2006) (challenging the failure to consider impacts of 2006 CAFE standards on global warming under NEPA). See also Tim Reiterman, *State Sues San Bernardino County to Nullify Its Blueprint for Growth*, LA Times B3 (Apr 13, 2007) (describing a recent case by California Attorney General Jerry Brown against San Bernardino County for failing to comply with the California Environmental Quality Act in its General Plan).

¹⁴⁴ See J. B. Ruhl, *Climate Change and the Endangered Species Act, Building Bridges to the No-Analog Future* 30 (Boston University Law Review article forthcoming spring 2008) ("Like the EPA after *Massachusetts v EPA*, the [Fish and Wildlife Service] surely will find itself effectively barred from taking the position that climate change is not occurring or, if it is occurring, that it has no anthropogenic causal component.").

actions they authorize, fund, or carry out do not “jeopardize” the continued existence of listed species or “adversely modify” their critical habitat.¹⁴⁵ Presumably, § 7 could be used by the Services to leverage greenhouse gas reductions from the consulting agencies as a condition of the “no jeopardy” findings necessary for the projects to go forward.¹⁴⁶ ESA § 9, which requires public and private persons to ensure they do not “take” endangered species (broadly defined by regulation to include both direct harm and indirect harm via habitat modification), could be used to impose greenhouse gas reductions on private parties as well. Whether or not the services choose to exercise their discretion and use the ESA this way,¹⁴⁷ and whether or not citizen suits will seek to force them to do so, remains to be seen.¹⁴⁸ But in the wake of *MA v EPA*, these agencies, like the EPA, will be under increasing pressure to mitigate global climate change through the findings and decisions they make regarding species endangerment and conservation.¹⁴⁹

More broadly, the decision in *MA v EPA* helped to shift the momentum in the political and legal struggle to force the incumbent administration to respond to the global warming problem with measures that go beyond voluntarism.¹⁵⁰ Within the organized environmental community, and among the proregulatory states seeking federal action, the case is considered to be a huge victory, even though the “victory” amounted to sending the threshold endangerment decision back to EPA. At a political level, the case has

¹⁴⁵ 16 USC § 1536(a)(2) (2000).

¹⁴⁶ Now that the FWS have announced their intent to list the polar bear as threatened because of global warming, this possibility is all the more real. See note 34.

¹⁴⁷ See Ruhl, *Climate Change and the Endangered Species Act* (cited in note 144) (proposing that the ESA should not be used to regulate greenhouse gas emissions, but instead should focus on establishing protective measures for species that have a chance of surviving the climate change transition and establishing a viable population in the future climate regime).

Unlike where the Clean Air Act takes the EPA, however, accepting that human-induced climate change is occurring does not lead inevitably to particular administrative duties or findings under the ESA. No provision of the ESA addresses pollutants, emissions, or climate in any specific regulatory sense. Rather, the statute operates on fairly holistic levels, requiring the FWS to consider what constitutes endangerment, take, jeopardy, and recovery of species.

Id at 30.

¹⁴⁸ See id (noting that some environmental groups have announced their intention to use litigation under the ESA to seek protection of climate-threatened species).

¹⁴⁹ Id.

¹⁵⁰ See J. DeShazo and Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U Pa L Rev 1499, 1517–18 n 54 (2007).

enormous symbolic value. From the perspective of the groups demanding federal regulation, it communicated to the public something on the order of: *even the Supreme Court thinks something must be done*.

The decision also added fuel to the legislative fire in Congress. Numerous climate-change bills were proposed in the 110th Congress after the Democratic takeover in 2006, building on earlier proposals in the 109th Congress that went nowhere. Even if passage must await a new administration, all of this activity has helped to build momentum and political support for federal climate legislation sooner rather than later. Interestingly, the Court's remand to EPA did not quell this legislative activity, as our expertise-forcing perspective might predict. Instead, the decision seems only to have added to a sense of urgency that a federal law to cut greenhouse gas emissions is necessary because the problem of climate change is so serious, and because the CAA, as currently written, is a less-than-ideal vehicle for addressing it. In this sense, one might argue, *MA v EPA* has a democracy-forcing aspect because, by airing out the issues, it reinforced the need for a comprehensive new legislative approach.¹⁵¹

V. CONCLUSION

For all of these reasons, *MA v EPA* is a highly consequential environmental law case. And it is indisputably a major political event. But it is also, in our view, an important administrative law case, not primarily because of the standing holding but above all because of the Court's willingness to restrict and carefully scrutinize agency discretion to "decide not to decide." If our expertise-forcing theory is right, the Court is concerned at the moment to insulate expert agencies from political influence. This is not, on our account, because the Court believes that expert decisions should be completely separated from politics or because the Court naively views presidential influence as something new that must be nipped in the bud. Neither is the case. All administrations exert political pressure on their executive agencies, and many have been accused of "interference," something we suspect the Court knows well. In our

¹⁵¹ Among other limitations, the CAA's major tool for setting air pollution standards—the NAAQS process—is unsuitable for greenhouse gas emissions. States cannot ensure compliance with "national standards" for carbon dioxide and other greenhouse gases.

view—and we expect this is the Court’s view—it is inevitable that political considerations will come into play in executive agencies headed by political appointees who are accountable to the President.¹⁵² Our suggestion is simply that the pendulum may have swung too far, at least in the view of the majority Justices, in the direction of strong presidential administration, and that they wished to nudge it in the other direction.

After *MA v EPA* was decided, new accusations emerged about attempts by the Bush administration to manipulate “expert” decisions by public health agencies.¹⁵³ Dr. Richard H. Carmona, the former Surgeon General, who served from 2002 to 2006, claimed that he was told “not to speak or issue reports about stem cells, emergency contraception, sex education, or prison, mental and global health issues,” that his speeches and reports were altered by political appointees without his consent, and that “on issue after issue the administration made decisions about important public health issues based solely on political considerations, not scientific

¹⁵² Courts have never tried, for example, to ban ex parte communications among executive branch officials, or between agency officials and the White House, in the context of rulemaking. See, for example, *Sierra Club v Costle*, 657 F2d 298, 405–06 (DC Cir 1981) (“The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. . . . The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.”). Such ex parte contacts are only unlawful when an agency is engaged in an on-the-record adjudication. See, for example, *Portland Audubon Society v Environmental Species Committee*, 984 F2d 1534, 1537 (9th Cir 1993) (finding that the President is an “interested party” within the meaning of section 557(d) of the APA for purposes of formal adjudications).

¹⁵³ Gardiner Harris, *Surgeon General Sees 4-Year Term as Compromised*, NY Times A1 (July 11, 2007). Former EPA Administrator Christine Todd Whitman has also recently admitted that she resigned because she refused to sign off on a rule about the CAA’s New Source Review program, 40 CFR § 52.21(c) (2005), that was being pushed by Vice President Cheney, see Jo Becker and Barton Gelman, *Leaving No Tracks*, Wash Post A1 (June 27, 2007). The rule was later struck down by the D.C. Circuit, which used particularly harsh language in doing so. See *New York v EPA*, 443 F3d 880, 887 (DC Cir 2006) (criticizing the EPA, stating that “[o]nly in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use,” and “declin[ing] to adopt such a world-view”).

ones.”¹⁵⁴ Two things are striking about this episode. First, it was accompanied by statements by two other former Surgeon Generals from two prior administrations (one Democratic and one Republican) who also claimed to have weathered political interference, though to a lesser degree, which reveals that the problem is to some extent endemic. Second, the occasion for these statements was a hearing before the House Oversight and Government Reform Committee, which suggests that political remedies are in fact available when political interference with agency expertise goes too far. Perhaps a judicial response to strong presidential administration is unnecessary because the legislative branch can fend for itself. To be sure, this can be more difficult when the presidency and the Congress are both in the hands of the same party,¹⁵⁵ as was the case during the events that led to *MA v EPA*. But such dominance rarely lasts long. Given this is the case, the Court may soon retreat from its current project and return to a *Chevron* worldview premised on strong presidential administration. For now though, the Court seems to have rediscovered an old problem, and returned to an older judicial role.

¹⁵⁴ Harris, NY Times A1 (cited in note 153).

¹⁵⁵ See generally Daryl Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2311 (2006).