

Massachusetts v. EPA: From Politics to Expertise

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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's 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 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*, *Hamdan v. Rumsfeld* 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

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¹ 127 S. Ct. 1438 (2007).

House or political appointees in the agencies.² Expertise-forcing is in tension with one leading rationale of the *Chevron* doctrine,³ 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.⁴

Part I describes the problem of politicized expertise. Part II 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 shows that it has retreated from the *Chevron* worldview just described, as well as from the idea, most prominent in *FDA v. Brown & Williamson*, 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 III 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

² 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.

³ See *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

⁴ 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. See *Calvert Cliffs’ Coordinating Comm., Inc. v. United States Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971); see also *Sierra Club v. Morton*, 514 F.2d 856, 873-74 (D.C. Cir. 1975) (citing the “action-forcing” elements of NEPA to justify potential judicial oversight of agency inaction); *Scientists’ Inst. for Pub. Information, Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. 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. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring statement) (noting that judges must ensure that agencies exercise their expertise rationally); see also *Consumer Fed’n of Am. v. Fed. Power Comm’n*, 515 F.2d 347 (D.C. 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. See Richard J. Lazarus, Professor, Georgetown University Law Center, Remarks at the Environmental Law Panel, Harvard Law School Worldwide Alumni Congress (June 13, 2007).

Court seems to adopt a kind of anti-circumvention 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 be *State Farm* 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.⁵ 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 decisionmaking 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.⁶

I. The Problem: Political Interference with Agency Expertise

Every administration exerts some degree of political influence over agency decisionmaking. 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.⁷ Yet 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

⁵ 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 *Mass. v. EPA*, 127 S. Ct. at 1471.

⁶ 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*, G.W.U. L. REV. (forthcoming). 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*, G.W.U. L. REV. (forthcoming).

⁷ 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)

of air pollution rather than accept major revisions demanded by the White House.⁸ 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.”⁹ 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 warranted.¹⁰ 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.¹¹ 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.”¹²

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

⁸ See Jeremy Symons, *How Bush and Co. Obscure the Science*, WASH. POST, July 13, 2003, at B04; Andrew C. Revkin & Katharine Q. Seelye, *Report by E.P.A. Leaves out Data on Climate Change*, N.Y. TIMES, June 19, 2003, at A1.

⁹ Environmental Protection Agency, ISSUE PAPER: WHITE HOUSE EDITS TO CLIMATE CHANGE SECTION OF EPA’S REPORT ON THE ENVIRONMENT (April 29, 2003), *published in* UNION OF CONCERNED SCIENTISTS, SCIENTIFIC INTEGRITY IN POLICYMAKING 34-38 (March 2004).

¹⁰ See Andrew C. Revkin, *Bush Aide Edited Climate Reports*, N.Y. TIMES, June 8, 2005, at A2. 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*, N.Y. TIMES, June 15, 2005, at A1.

¹¹ As the decision in *MA v. EPA* was pending, the non-profit 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. See TAREK MAASSARANI, GOVERNMENT ACCOUNTABILITY PROJECT, REDACTING THE SCIENCE OF CLIMATE CHANGE: AN INVESTIGATE AND SYNTHESIS REPORT (March 2007), *available at*: <http://www.whistleblower.org/doc/2007/Final%203.28%20Redacting%20Climate%20Science%20Report.pdf>.

¹² See Andrew C. Revkin, *Climate Expert Says NASA Tried to Silence Him*, N.Y. TIMES, January 29, 2006, at 1-6.

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 Fish and Wildlife Service to refrain “for non-scientific reasons...from making ... findings that are protective of [endangered] species.”¹³ Numerous other books and articles likewise have alleged an unprecedented degree of politicization of agency expertise under the George W. Bush administration.¹⁴ 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.

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 in the Office of Management and Budget had in 2003 published a draft peer review Bulletin that was widely criticized as an effort to politicize agency science.¹⁵ 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 industry.¹⁶ Perhaps slightly less visible, but well known to Washington insiders, the President twice tried to nominate Susan Dudley to be Director

¹³ See UNION OF CONCERNED SCIENTISTS, U.S. FISH AND WILDLIFE SURVEY SUMMARY 1 (February 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 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.

¹⁴ See e.g., Rena Steinzor and Wendy Wagner, eds., *RESCUING SCIENCE FROM POLITICS* (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." See President's Science Policy Questioned; Scientists Worry That any Politics Will Compromise Their Credibility," *The Washington Post*, February 19, 2004, page A2.

¹⁵ See “Proposed Bulletin on Peer Review and Information Quality,” 68 Fed. Reg. 54023, September 15, 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

of the Office of Information and Regulatory Affairs in the Office of Management and Budget.¹⁷

E.O. 13422 were more pointed, calling it an executive power grab, and expressing concern that its purpose is to enable White House political staff to override agency scientists and experts.²¹ 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, the general picture of which they are a part had clearly taken shape, and concerns about politicization were in the air.

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.²² 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 was preparing to release its fourth assessment report, which would state the scientific consensus on the warming trend, and outline the potential risks of unmitigated greenhouse gas emissions more forcefully than ever before.²³

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

²¹ See Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, January 30, 2007, at A1. In an email 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." See Posting of Peter Strauss, Professor, Columbia Law School, to [Listserv email address] (on file with authors).

²² 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 *Mass. v. EPA* decision (4/1/2004 – 3/31/2007), compared with only 1,125 hits for the three years before that (4/1/2001 – 3/31/2004).

²³ 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 <http://www.ipcc.ch/about/about.htm> ("The role of the IPCC is to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation. The IPCC does not carry out research nor does it monitor climate related data or other relevant parameters. It bases its assessment mainly on peer reviewed and published scientific/technical literature."). All three working groups of the IPCC have issued their sections for the Fourth Assessment Report, titled "Climate Change 2007." See <http://www.ipcc.ch/about/about.htm> (follow the three Working Group hyperlinks to get the separate contributions to the report).

major power plants and the automobile industry seeking injunctive relief or damages for their contributions to the harms caused by global warming.²⁴ In response to a listing petition by environmental groups, the US 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.²⁵ 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—well-founded or not—that the administration was trying to suppress and manipulate agency science.

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 Counsel²⁶ had reversed course from two previous General Counsels in deciding that carbon dioxide and other greenhouse gases were not “pollutants” regulable under the Act.²⁷ 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 section CAA section 209, which authorizes California, alone among the states, to independently establish emissions standards under certain conditions, subject to waiver by the EPA. If CO₂ 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.²⁸

Based in part on its determination that CO₂ 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 Section 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.”²⁹ In the petition denial, EPA cited its legal opinion that greenhouse gases are not pollutants, and

²⁴ See *California v. General Motors*, No. 3:06CV05755 (N.D. Cal. filed Sept. 20, 2006); *Connecticut v. American Electric Power*, 406 F.Supp.2d 265 (S.D.N.Y. 2005).

²⁵ See *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 (proposed Jan. 9, 2007).

²⁶ EPA’s Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act, Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator (Aug. 28, 2003).

²⁷ Prior General Counsels had consistently deemed greenhouse gases to be pollutants, but nevertheless declined to regulate them.

²⁸ See *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. CV F 04-6663 (E.D. Cal. Jan. 16, 2007) (staying proceedings pending the outcome in *MA v. EPA*);

²⁹ 42 U.S.C. §7521(a)(1) (2000).

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 section 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 section 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 economies.”³⁰ 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.³¹ 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,³² which emphasized uncertainty while downplaying many statements of certainty or near-certainty that cut against EPA’s position.³³

The agency thus declined to make the threshold judgment necessary to trigger regulation of vehicle emissions under section 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,³⁴ and that “the CAA provision authorizing regulation of motor vehicle emissions does not impose a mandatory duty on the Administrator to exercise her judgment.”³⁵ 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.”³⁶ 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 greenhouse gases cause or contribute to climate change.”³⁷

Although EPA had cited a number of policy reasons for declining to regulate, its claims about lingering and pervasive scientific uncertainty were a lynchpin of the petition

³⁰ Control of Emissions from New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003).

³¹ *See id.*

³² *See* NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (2001), available at <http://www.nap.edu/html/climatechange/>.

³³ 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. *See* Brief of Amici Curiae Climate Scientists David Battisti et al. in Support of Petitioner, *Mass. v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-112) at 3 (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 . . .”).

³⁴ Control of Emissions from New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. at 52,929.

³⁵ *Id.*

³⁶ 42 U.S.C. §7521(a)(1) (2000).

³⁷ *Mass. v. EPA*, 127 S. Ct. at 1463 (emphasis added).

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.

II. 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.

On this view, the cross-cutting political constraints had forced EPA to indefinitely put off a decision, making no first-order judgment at all. That course of action had the collateral benefit of leaving in place the non-regulatory status quo, thus satisfying the White House’s major concern. And although deciding not to decide guaranteed objections from scientists and environmentalists, at least it was 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 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,³⁸ 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.³⁹ The majority’s basic problem, then, was to liberate the EPA from these cross-cutting and paralyzing political

³⁸ The petition denial suggests as much, noting that the motor vehicle fleet is one of “many sources” of GHG emissions and a “sensible regulatory scheme would require that all significant sources of emissions be considered.” 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.

³⁹ The Court’s decision merely to grant certiorari in *MA v. EPA* 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 U.S. 727 (1972), to find a successful certiorari petition by environmentalists, and, of course, the petitioners lost the case. For statistics on the rate at which environmental petitioners have been granted cert and the lower rate at which they have won in that posture, see RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* --- (2005).

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*⁴⁰ and *Akins*,⁴¹ and backs away from Justice Scalia's plurality opinion in *Lujan*,⁴² which sought to tighten the injury-in-fact test. (Of course, one can explain the standing holding by saying simply that the five majority Justices have a broader view of standing than the four dissenters, though this would be tautological.)

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 (perhaps) similarly-situated private parties to disable strong “presidential administration”⁴³ of line agencies, even agencies that are not legally independent.⁴⁴ 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 cabinining 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 non-scientific 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,

⁴⁰ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

⁴¹ *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998).

⁴² *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁴³ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); see also Laurence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

⁴⁴ 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.

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 cases⁴⁸ and the Commerce Clause⁴⁹ 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. Although this approach was not practically available to the states at the time EPA made its decision, when Republicans controlled Congress, the Democrats had won both Houses a month before the Supreme Court heard oral argument in *MA v. EPA*. 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.⁵⁰ On this view, the Clean Air Act itself supported their 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’ power to create statutory rights is ultimately limited by Article III requirements. In *Lujan*, Justice Kennedy’s concurrence parted ways with Justice Scalia’s plurality opinion by suggesting that statutes might

⁴⁸ See, e.g., *Seminole Tribe v. Fla.*, 517 U.S. 44, (1996) 183 (Souter, J., 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).

⁴⁹ See, e.g., *United States v. Morrison*, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) (criticizing the revival of “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 U.S. 549, 604 (1995) (Souter, J., dissenting) (valorizing deference to “rationally based legislative judgments ‘[as] a paradigm of judicial restraint.’ In 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).

⁵⁰ State and local officials, not environmental groups, were responsible for pressing for national air regulation. See CHRISTOPHER J. BAILEY, *CONGRESS AND AIR POLLUTION* 109 (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. *Id.* at 104-05).

create injuries, and articulate chains of causation, which would be adequate for Article III purposes, providing the injury is sufficiently concrete,⁵¹ 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.⁵² 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.⁵³ 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 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 towards a different model of standing, this more generous version of the *Lujan* plurality’s approach may have a large effect on cases where litigants 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 line-up 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

⁵¹ 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*. Thus, although Congress can create a right of action and articulate chains of causation, the would-be litigant must still prove that his injury is sufficiently concrete.

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

⁵³ See generally Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

for states because they are special, for statutory rights generally, or even through the generous application of the *Lujan* plurality's framework—increases the scope for judges to oversee the legality of executive action.⁵⁴ This runs directly 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.⁵⁵ 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 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 and career staff at EPA. 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 towards an older model of administrative law that emphasizes the tension between democratic politics 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 Clean Air Act, section 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.”⁵⁶ At a minimum, EPA argued, the definition of “pollutant” 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 under the Energy Policy 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,

⁵⁴ Although the Court declined to extend this expansive view of standing to private taxpayers this term, see *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007), the case can be distinguished from *MA v. EPA* because it is not brought under a statutory grant of authority.

⁵⁵ 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.”)

⁵⁶ 42 U.S.C. §7602(g) (2000).

such as the system of National Ambient Air Quality Standards, 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 world-wide sources not under their control.

Similar arguments had carried the day in *Brown & Williamson*, 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 ,”⁵⁷ 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 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.⁵⁸

Most important of all was an interpretive canon emphasized (though arguably not invented) by the Court in *Brown & Williamson*⁵⁹: 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 medical marijuana.⁶⁰

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 nondelegation 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

⁵⁷ 21 U.S.C. §321(g)(1) (2000).

⁵⁸ See *Brown & Williamson*, 529 U.S. at 146-56.

⁵⁹ See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228-31 (1994).

⁶⁰ 546 U.S. 243, 259 (2006) (“The CSA 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.”)

agency's view. The interpretive techniques of *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.⁶¹ 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 Food, Drug and Cosmetic Act; at a minimum it would have been authorized to do so. For another thing there was a great deal of post-enactment legislation in *Brown & Williamson* indicating that Congress did not intend to ban tobacco products; such "post-enactment legislative history" did not exist in *MA v. EPA*.⁶²

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?⁶³ What's the problem, the Court said in a brisk paragraph, if EPA must regulate motor vehicle mileage standards to control emissions? There might be conflict with the Department of Transportation, "but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."⁶⁴ 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 [Section 202(a)] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that

⁶¹ See Transcript of Oral Argument at 17-18, *Mass. v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120). Given the lack of attention to the authority issue at oral argument, it is particularly striking that four Justices dissented on the issue.

⁶² See *Brown & Williamson*, 529 U.S. at 161-92 (Breyer, J., 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.

⁶³ *Mass. v. EPA*, 127 S. Ct. 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.").

⁶⁴ *Id.* at 1461.

without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete.”⁶⁵

Is *MA v. EPA* consistent with *Brown & Williamson*?⁶⁶ 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 Sections 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 hard to deny, on any view of what counts as plain meaning, that nicotine plainly is an “article (other than food) intended to affect the structure or any function of the human body.” Yet 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

first-order judgment about whether greenhouse 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 Clean 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 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: the two cases 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 Clean Air Act 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 *over-reach* whereas *MA v. EPA* involved a case of putative agency *under-reach*. 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.⁶⁸

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 provisions 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

⁶⁸ Of course under-reach can be converted into over-reach 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 been challenged, would a reviewing court have determined that it overreached, and sent the matter to Congress for a clearer expression of authority?

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 Section 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?"⁶⁹

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*⁷⁰ 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 force at least, to denial of petitions for rulemaking. On the one hand, the basic logic of *Heckler v. Chaney*—that agencies have limited budgets and limited time, so must be given discretion to set priorities and allocates 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.⁷¹ 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.⁷²

⁶⁹ Robert Mankoff, *Businessman Talking into Telephone Cartoon*, *NEW YORKER*, May 3, 1993, at ---.

⁷⁰ 470 U.S. 821 (1985).

⁷¹ Eric Biber, *Two Sides of the Same Coin: Judicial Review Under APA Sections 706(1) and 706(2)* (forthcoming, 2007) at 11-19 (discussing importance of resource allocation rationale in administrative law).

⁷² Circuit courts have sometimes provided remedies against delaying agencies. See *Public Citizen Health Research Group v. Chao*, 314 F.3d 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 Int'l Chemical Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (imposing a deadline on OSHA for completion of a cadmium rulemaking); *American Horse Protection Assn. v. Lyng*, 812 F.2d 1, 7-8 (1987) (reversing district court's grant of

In *Southern Utah Wilderness Alliance*,⁷³ decided in 2004, Justice Scalia wrote for the Court that “a claim [to compel agency action unlawfully withheld under section 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.”⁷⁴ The Court declined to require the Bureau of Land Management to regulate environmentally damaging off-road vehicle 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.”⁷⁵ 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 the merits of the relevant statutes, the agency is failing to do something it is legally obliged to do.⁷⁶

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.⁷⁷ In the specific context of section 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 section 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.⁷⁸

summary judgment to Secretary of Agriculture in animal advocates’ action against the Secretary’s refusal to institute rulemaking proceedings in light of inadequacy of regulations to prevent neglect of show horses).

⁷³ 542 U.S. 55 (2004).

⁷⁴ *Id.* at 64.

⁷⁵ *Id.* at 65 (citing 43 U.S.C. § 1782(c) (2000)).

⁷⁶ In *SUWA*, the relevant statutory provision required the Bureau of Land Management to “manage [lands under its jurisdiction] so as not to impair suitability for preservation of wilderness” and “in accordance with a land use plan.” 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. *Id.* at 65-72.

⁷⁷ See Biber, *supra* note at 24-25 (explaining why it may be appropriate to treat decisions not to issue rules differently from decisions not to enforce).

⁷⁸ 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

To understand the significance of these holdings, we must begin with some general points about decision making.⁷⁹ 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; 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.⁸⁰ 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 non-decision. 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.⁸¹ Both the cost of delay and the benefits of waiting are affected by the stakes of the decision. When stakes are high (as when a non-decision might lead to 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 incentives must also be considered. 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 politically fraught, such 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

agency defending the view that other issues are more important at the moment than addressing climate change.

⁷⁹ 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.

⁸⁰ See generally Avinash Dixit and Robert S. Pindyck, *INVESTMENT UNDER UNCERTAINTY* (Princeton 1994).

⁸¹ 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).

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 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 others.

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.⁸² Because of how the status quo was set, deciding not to make the first-order decision in *MA v. EPA* (i.e., declining to decide whether the statutory endangerment test is met) appeased the White House by leaving greenhouse gases unregulated, and had the major 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 Anti-Circumvention 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 meta-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 decisionmaking. Conversely, in such an environment, cabining second-order decisionmaking is an indirect means of ensuring that expert judgments — regardless of how they come out — are at least made. This cabining of the discretion to decide not to decide is, in our view, the heart of expertise-forcing.⁸³ Unbounded discretion to decide not to decide circumvents, and thus threatens to fatally undermine, the complex statutory

⁸² See *Mass. v. EPA*, 127 S. Ct. at 1473 n.1 (Scalia, J., dissenting).

⁸³ Cf. *In re Int'l Chemical Workers' Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (“[T]he benefits of agency expertise and creation of a record will not be realized if the agency never takes action.”).

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 to decide not to decide by holding that EPA must make its metadecision by reference to the same constrained set of statutory factors – scientific and technical considerations – that constrain the first-order judgment required by Section 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.⁸⁴

But this is not obviously correct, at all. Why exactly do the statutory factors that constrain the making of a judgment also constrain the meta-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 Section 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 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.⁸⁵

The majority does not respond clearly to this important point. Justice Stevens' 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

⁸⁴ *Mass. v. EPA*, 127 S. Ct. at 1462-63 (emphasis added).

⁸⁵ *Id.* at 1473 (Scalia, J., dissenting) (citation omitted) (emphases in original).

to form a scientific judgment”⁸⁶ – 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 decision and the metadecision.⁸⁷ But as we have seen, where the status quo is non-regulatory, 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 title; 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 anti-circumvention principle is a necessary corollary to the majority’s expertise-enforcing project. Suppose that EPA could, on policy grounds, perpetually decide not to decide, thereby declining indefinitely to make the first-order judgment contemplated by section 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 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 just is no circumvention in the first place; deciding not to decide is something the EPA has statutory authority to do. Of course, Justice Scalia might agree that this discretion cannot be bound

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 not to make such judgments, ever; 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 upon a strong anti-circumvention principle, while Justices Scalia and Thomas, the Court's most committed textualists, dissent on largely textualist grounds.

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 non-decision 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.⁸⁹

Chief among these pre-*Chevron* cases, and decided just a year before *Chevron*, is *MVMA v. State Farm*,⁹⁰ 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.

circumvention principles. See, e.g., *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859 (1982).

⁸⁹ We do not wish to overstate how much "older" this tradition is than the *Chevron* 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 co-exist; 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, *Presidential Administration*, *supra* note_ at (for notion that most models of administrative law persist in some form.)

⁹⁰ 463 U.S. 29 (1983). See also Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

The *Benzene*⁹¹ case 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 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 effort by the Court to pull back on the reins of an overzealous agency, which it saw as responding to the pro-labor political priorities of the Carter administration. On this view, the Court sees its role as ensuring that politically motivated agencies do not over-reach, just as the Court in *State Farm* was concerned that politics not produce regulatory under-reach.

MA v. EPA harkens 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 v. AEC*,⁹² 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."⁹³

Finally, there are two important Clean Air Act cases that embody the expertise-forcing view that we see revived in *MA v. EPA*. In *NRDC v. Train*,⁹⁴ the D.C. Circuit required EPA to list lead as a criteria pollutant under section 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..."⁹⁵ The Court rejected the agency's view that it could

⁹¹ *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

⁹² *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

⁹³ *Id.* at 114-15. 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, e.g., Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *Scherr v. Volpe*, 466 F.2d 1027, 1033 (7th Cir. 1972).

⁹⁴ 545 F.2d 320 (2nd Cir.1976)

⁹⁵ *Id.* at 322.

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, and lead to 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.”⁹⁶

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 Leventhal’s “statement” in support of the D.C. Circuit’s decision in *Ethyl Corp. v. EPA*,⁹⁷ 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.⁹⁸

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:⁹⁹

“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

⁹⁶ *Id.* at 328.

⁹⁷ 541 F.2d 1,68-69 (D.C. Cir. 1976). This was not a concurrence but a “statement.”

⁹⁸ *Id.* at 13 (majority opinion).

⁹⁹ *Id.* at 66-68 (Bazelon, C.J., concurring). This exchange was part of a longstanding 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.” See 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).

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.”¹⁰⁰

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—all but Kennedy—of the *MA v. EPA* majority 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 most assuredly did not represent unwanted political interference. In *Brown & Williamson*, as we have argued, the Court endorsed a different kind of political accountability by demanding that Congress speak clearly if it wished to authorize the FDA to regulate tobacco. The Court in *MA v. EPA* rejects *both* kinds of political accountability in one fell swoop: the Court declined to send the matter to Congress by deferring to the agency's view that it lacks regulatory authority, and also refused to defer to the agency's claim of boundless discretion to decide not to decide.

III. 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 decisionmaking 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 towards increasing suspicion, on the part of many of the

¹⁰⁰ *Id.* at 68-69 (Leventhal, J., concurring statement).

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;¹⁰¹ 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 v. Oregon*,¹⁰² the Court rejected the Attorney General’s determination that it was not “legitimate medical practice” under the federal Controlled Substances Act for a physician to prescribe controlled substances to patient’s 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 Health and Human Services, Justice Kennedy’s majority opinion explains, rather than the Department of Justice; the Attorney General is authorized under the Controlled Substances Act 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*¹⁰³) because discretion to make such judgments was not delegated to him by Congress, it fails to garner even *Skidmore* deference¹⁰⁴ because it lacks 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

¹⁰¹ See *supra* notes --- and accompanying text.

¹⁰² 126 S.Ct. 904 (2006)

¹⁰³ 519 U.S. 452 (1997).

¹⁰⁴ See *United States v. Mead Corp.*, 533 U.S. 218; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

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 v. Rumsfeld*¹⁰⁵ 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. Justice 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--what the Court refers to as "an integrated system of military courts and review procedures."¹⁰⁶ 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 had failed to articulate a reason, or place anything in the record, to show why that is so.¹⁰⁷

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 Clean Air Act, 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 over-reaching 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 under-reach rather than over-reach, 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

¹⁰⁵ 126 S.Ct. 2749 (2006).

¹⁰⁶ *Id.* at 2770 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)).

¹⁰⁷ *Id.* 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.").

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 domestic laws."¹⁰⁸ 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.¹⁰⁹

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*.¹¹⁰ 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 implicit responses to the worry that agencies must have discretion to allocate resources on cost-benefit grounds, as they do with respect to non-enforce

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 section 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 non-regulatory 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?

Of course the case does not answer all questions. Crucial to the holding is the point that Section 202(a) excludes non-informational factors from the agency’s meta-decisionmaking 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 metadecisions. 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 first choice 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

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.

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 decisionmaking, and may be able to control political distortions at that stage as well.¹¹²

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. It is even conceivable, though unlikely, that such a renewed non-decision 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.¹¹³ 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. 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 anti-circumvention principle, are plausible but 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

¹¹² There have been extended disputes over the usefulness of hard look review and its 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.

¹¹³ Especially as the *only* basis for nondecision, without the benefit of covering fire from other political factors in a multifactor opinion.

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 first choice is to make no decision either way, but that its second choice is to 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. 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 will have 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 keeps alive California’s legal claim that it is entitled to regulate tailpipe emissions of carbon dioxide under section 209(b) of the Act. That section confers on California a special authority to go beyond federally established emissions standards, and 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 Air Resources Board to set standards for CO₂ for new vehicles and to

implement the regulations over a phase-in period. After promulgating the regulations, the Board was promptly sued by the automobile industry, which argued, first, that EPA lacks the authority to regulate Greenhouse gases under the CAA (i.e., that California enjoys no “special status” under section 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 *Energy Policy Conservation Act*, which reserves the right to establish fuel efficiency standards to the National Highway Transportation Safety Administration (NHTSA) within the Department of Transportation; this latter point turns on an argument that there is no way to regulate CO₂ emissions without tightening fuel efficiency standards.

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 section 202(a) could live compatibly together with DOT regulation of fuel efficiency. This language may well supply a hint about the Court’s view of the preemption argument. Although California must still secure EPA approval in the form of a waiver before implementing the standards (an application the agency left pending until the ruling in *MA v. EPA*), the Court’s decision has added political, if not legal, pressure on the agency to grant it. Among other things, EPA may feel constrained to cite only scientific and technocratic reasons should it choose to refuse the waiver. On this, the thinking goes, although neither California’s regulations nor the waiver criteria were directly at issue in *MA v. EPA*, the agency can probably take a hint. This would, in all likelihood, make it harder, though not impossible, for EPA to deny the waiver.¹¹⁴ Of course, California still faces the preemption challenge even if it receives a waiver from EPA, but at least in the short term, the Court’s decision in *MA v. EPA* strengthened California’s position.

All this has larger implications for global warming regulation generally than might appear at first glance. If California’s emissions standards survive judicial review, they will go into effect not only in California but in the eleven states that have adopted them under the “identity” requirement in CAA section 209. This means that the auto industry will be facing, for the first time, multi-state regulation of greenhouse gases even if the federal government ultimately takes no action either to regulate these emissions via EPA implementation of section 202(a)(1), or to increase fuel efficiency standards via

¹¹⁴ Section 209 establishes certain criteria that California must satisfy to obtain the waiver, including that the state show it faces “compelling and extraordinary” circumstances that justify its setting higher tailpipe emissions standards than DOT sets nationally. See 42 U.S.C. §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.

NHTSA regulation of CAFE standards pursuant to ECPA. In all events (and ironically even if they lose this point in the preemption argument), the practical result is that the auto manufacturers will, in all likelihood, need to increase fuel efficiency in order to achieve compliance with the state standards. More broadly, this forces the transportation sector to shoulder at least some of the burden of achieving GHG reductions nationwide, regardless of what Congress chooses to do i.e., even if Congress wishes to spare the transportation sector and target other sectors, such as electric utilities, especially hard. 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 is that the Court’s grant of standing breathes 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 seek relief for defendant contributions to the harms caused by global warming.¹¹⁵ Although the outcomes in these cases are by no means sure (not only because of threshold justiciability issues but also because of the difficulty of proving causation) it is certainly helpful that the Court granted standing in *MA v. EPA*. The majority’s “three strands” approach to standing provides lower courts ample flexibility to grant standing in these cases when they otherwise might have declined to do so under *Lujan*. At the same time, a potentially larger implication of the Court’s opinion in *MA v. EPA* for the pending nuisance cases is that the courts will find that the Clean Air Act preempts common law nuisance claims.¹¹⁶

A third implication is somewhat more technical. If EPA makes the first-order finding of endangerment necessary to trigger regulation under section 202(a)(1), the fact that greenhouse gases are now “pollutants” under the Act may mean that EPA will need to regulate them under other provisions of the Act, including the “prevention of significant deterioration” and “new source review” programs, which target stationary sources. This is because these programs define “regulated pollutant” as “any pollutant subject to regulation under the Act.”¹¹⁷ To be sure, an endangerment determination alone under section 202(a) would not be sufficient to trigger such regulation under other programs; a pollutant must be the focus of a promulgated NAAQS or emission standard that restricts emissions in order to be considered a “regulated NSR pollutant” for example. But the promulgation of tailpipe standards for CO₂ could trigger CO₂ into

¹¹⁵ See *Conn. v. Am. Elec. Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005). The suit was filed by eight states including California and New York, as well as New York City and three land trust against the five largest carbon dioxide emitters in the United States. See also *Cal. v. Gen. Motors*, No. 3:06CV05755 (N.D. Cal. filed Sept. 20, 2006) filed by the state of California against six manufactures of motor vehicles for contributing to global warming. The New York suit seeks injunctive relief while the California suit seeks damages.

¹¹⁶ See *Milwaukee II*.

¹¹⁷ See 42 USC 7475(a)(4) (2000) (“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”); 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”)

being a PSD/NSR pollutant automatically, even if EPA has not set a *de minimis* threshold.¹¹⁸ This is a debatable issue, and lawsuits are likely on the way, but if NSR is indeed triggered by a tailpipe standard, *MA v. EPA* could be the last straw for industry, which has long viewed the PSD/NSR rules as so cumbersome as to be unmanageable; it could lead to a wholesale revision by Congress of these aspects of the Act.

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 its New Source Performance Standards program, something for which it is under attack in pending litigation.¹¹⁹ This is all to say that the full implications of the Court's decision for implementation of the CAA are still unknown, but they are potentially far-reaching.

MA v. EPA will have repercussions for implementation of other environmental statutes as well. A number of lawsuits have been filed in recent years against the federal government under the National Environmental Policy Act (NEPA), and against state governments (and sometimes private parties) under "mini-NEPAs" passed by the states demanding that defendants consider GHG impacts as part of the environmental impact disclosure process. 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.¹²⁰ 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.

More broadly, the decision in *MA v. EPA* has shifted the momentum in the political and legal struggle aimed at forcing the administration to respond to the global warming problem with measures that go beyond voluntarism.¹²¹ Within the organized environmental community, and the pro-regulatory states that are 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 enormous symbolic value. From the perspective of the groups seeking federal action,

¹¹⁸ 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). I thank Peter Wyckoff, Senior Counsel at Pillsbury, Winthrop, Shaw, Pittman, for pointing this prospect out in an exchange. See Email from Peter Wyckoff to Jody Freeman (July 11, 2007) (on file with Supreme Court Review).

¹¹⁹ 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 Clean Air Act, a position that the Supreme Court has now overruled. See *Coke Oven Env'tl. Task Force v. EPA*, No. 06-1131 (D.C. Cir. filed Apr. 7, 2006).

¹²⁰ See *Ctr. for Biological Diversity v. NHTSA*, No. 06-71891 (9th Cir. filed Apr. 12, 2006) (suit challenging challenging 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*, L.A. TIMES, Apr. 13, 2007, at B3 (describing 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).

¹²¹ See J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. Penn. L. Rev. 1499, 1517-18 n.54 (2007).

it communicates to the public something on the order of: *Even the Supreme Court thinks something must be done*. Perhaps surprisingly, the decision also adds fuel to the legislative fire in Congress. Since the Democratic takeover in 2006, numerous climate change bills have been proposed, building on earlier proposals in the 109th Congress that went nowhere. Yet *MA v. EPA* has not quelled this legislative activity by sending the matter back to EPA, 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 emissions is necessary because the problem is so serious, and because GHG regulation affects virtually every aspect of the economy. In this sense, one might argue, *MA v. EPA* has a democracy-forcing aspect because it helped, by airing out the issues, to expose to public view the limitations of the Clean Air Act.¹²²

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, in part 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 this problem 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 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.¹²³ 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 wish to nudge it in the other direction.

¹²² Among other limitations, the Clean Air Act's major tool for setting air pollution standards—the NAAQS process—is unsuitable for GHG emissions. States cannot ensure compliance with "national standards" for CO₂ and other greenhouse gases.

¹²³ 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 e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 405-06 (D.C. 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 e.g.*, *Portland Audubon Soc'y v. Env'tl. Species Comm.*, 984 F.2d 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).

After *MA v. EPA* was decided, new accusations emerged about attempts by the Bush administration to manipulate “expert” decisions by public health agencies.¹²⁴ Dr. Richard H. Carmona, the former Surgeon General, who served from 2002-2006, 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 are 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 ones.”¹²⁵ Two things are striking about this episode, regardless of whether it is true. 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,¹²⁶ 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.

¹²⁴ Gardiner Harris, *Surgeon General Sees 4-Year Term as Compromised*, N.Y. TIMES, July 11, 2007, at A1. Former EPA Administrator Christine Todd Whitman has also recently admitted that she resigned because she refused to sign off on a rule about the Clean Air Act’s new source review, 40 C.F.R. 52.21(cc) (2005), that was being pushed by Vice President Cheney. See Jo Becker & Barton Gelman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1. 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 F.3d 880, 887 (D.C. 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. We decline to adopt such a world-view.”)

¹²⁵ Harris, *supra* note XXX.

¹²⁶ See generally Daryl Levinson & Richard H. Pildes, *Separation of Parties, not Powers*, 119 HARV. L. REV. 2311 (2006).