SPEAK NOW OR FOREVER BE OVERRULED: DEFERRING TO POLITICAL "JUDGMENT" IN EPA RULEMAKINGS

Matthew R. Bowles[*]

INTRODUCTION

"Jobs, jobs, jobs" are a top concern during economic hard times.[1] Politicians often respond with proposals to reduce unemployment, including deregulation of areas that might hinder growth.[2] The usual suspects include environmental rules,[3] and sometimes public sentiment inspires leaders to shift their positions on important policies.

In September 2011, President Obama changed a policy of his administration when he ordered the Environmental Protection Agency ("EPA") to abandon[4] a discretionary revision of the national ambient air quality standard ("NAAQS") for ozone, a rulemaking that the agency had initiated at the start of his administration.[5] President Obama justified the decision as "reducing regulatory burdens" on the economy and avoiding duplicative rulemakings.[6] The current Clean Air Act ("CAA") regulation is due for mandatory review in 2013, which would have rendered any discretionary revision in 2011 obsolete.[7] Accordingly, the EPA withdrew its proposed rule.[8]

---

[*] George Mason University School of Law, J.D. Candidate, May 2013; Editor-in-Chief, GEORGE MASON LAW REVIEW, 2012-2013; University of North Carolina at Chapel Hill, B.A., Journalism and Political Science, May 2007. I would like to thank Sarah Collins, Philip Lynch, David Schnare, Chelsea Sizemore, and Wesley Weeks for their thoughtful suggestions on this Comment and my family for always encouraging my curiosity of the world. Any errors are my own.

[1] *See* Nate Silver, *Jobs, Jobs, Jobs Versus the S-Word*, FIVETHIRTYEIGHT BLOG (Sept. 9, 2011, 2:30 AM), http://fivethirtyeight.blogs.nytimes.com/2011/09/09/jobs-jobs-jobs-versus-the-s-word; Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP (July 30, 2012), http://www.gallup.com/poll/156347/Americans-Next-President-Prioritize-Jobs-Corruption.aspx.

[2] *See, e.g.*, Memorandum from House Majority Leader Eric Cantor to House Republicans, Re: Upcoming Jobs Agenda (Aug. 29, 2011) (on file with George Mason Law Review).

[3] *See id.*

[4] *See* Press Release, The White House, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards.

[5] National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (proposed Jan. 19, 2010) (to be codified at 40 C.F.R. pts. 50 & 58).

[6] Press Release, The White House, *supra* note 4.

[7] *See id.*

Like most efforts to manage the regulatory state, this event raises familiar questions about administrative governance. What does agency discretion really entail? May the President influence agency policymaking? And if he does, how should a reviewing court respond? This Comment addresses these issues specifically as they pertain to the EPA.

Important to this analysis are two recent Supreme Court cases, which reflect different theories about the role of presidential politics in agency rulemakings. The first theory holds that science, not politics, should drive agency decision making.[9] Arguably, the Court applied this "expertise-forcing" standard of review in *Massachusetts v. EPA*[10] when it held that the plain text of the CAA and relevant scientific data required the EPA to regulate greenhouse gases.[11] According to the Court, the agency could not refuse to regulate based on other considerations, namely, its concerns that issuing a new rule would interfere with the President's other policy initiatives.

The alternative theory, embodied in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[12] and *FCC v. Fox Television Stations, Inc.*,[13] permits political control of agency decision making. Particularly in *Fox*, the Court indicated that an agency may consider political factors when setting policy as long as these factors are reasonable and disclosed to the public.[14]

This Comment argues that the political control model should apply to EPA rulemakings. Unlike the expertise model, this approach accords with major doctrines of administrative law, democratic principles, and the agency's executive design. When reviewing an agency's policy decision, courts usually defer to the agency's judgment so long as it was reasonable and authorized by statute.[15] This deferential standard of review should extend to actions involving presidential influence, a factor as relevant to EPA policymaking as scientific evidence. Agency decision making involves value tradeoffs that cannot be made on the basis of science alone.[16] To conform to democratic principles, these decisions should be made by elected officials, and allowing the President to participate in these decisions promotes public accountability and imbues the regulations with greater legitimacy.[17]

---

8 *See* Press Release, U.S. Envtl. Prot. Agency, Statement by EPA Administrator Lisa P. Jackson on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/E41FBC47E7FF4F13852578FF00552BF8.

9 *See* Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54 (explaining the expertise theory).

10 549 U.S. 497 (2007).

11 *Id.* at 534; Freeman & Vermeule, *supra* note 9, at 54.

12 467 U.S. 837 (1984).

13 129 S. Ct. 1800 (2009).

14 *See id.* at 1812-13; *id.* at 1816 (Scalia, J.) (plurality opinion).

15 *See infra* Part III.C.

16 *See infra* Part III.A.

17 *See infra* Part III.B.

Thus, courts should defer to the EPA's discretion to weigh political factors,[18] such as a presidential directive to terminate a regulation,[19] so long as the governing statute does not expressly forbid them. Under this Comment's "political deference" rule, the reviewing court should accept the agency's decision if it is: (1) not expressly barred by statute, (2) rationally related to the regulation, (3) rationally related to the public interest, (4) substantially supported by the President, and (5) adequately disclosed to the public.[20] Giving credit to political factors will encourage the EPA to speak out with the real reasons for its policy decisions. This rule also would promote political accountability, as the agency's decisions would be tied to the President and the public they affect.

This Comment proceeds in five parts. Part I provides background on the EPA, air quality standards, and the rulemaking process. Part II discusses judicial review standards and explains the expertise model of governance, including two Supreme Court cases that reflect this theory: *Whitman v. American Trucking Associations*[21] and *Massachusetts v. EPA*. From this precedent, Part III criticizes the expertise model as inapposite to the normative value judgments associated with policymaking. Instead, the case law, democratic governance, and pure pragmatism support an alternative framework of political deference. Part III outlines a five-factor test for this approach. In Part IV, this Comment argues that the judiciary should strive to exercise deference toward EPA rulemakings that involve the President. In particular, Part IV examines statutory and structural justifications for this approach. Finally, Part V provides a representative application of the political deference rule, analyzing the 2011 withdrawal of the ozone NAAQS.

---

18 "Political factors" are value-laden considerations. Unlike scientific facts, political factors are normative. *See* Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1274 (2004) ("Science describes; it does not prescribe. . . . Science seeks to supply verifiable descriptions of—and explanations and inferences about—what is, rather than imposing judgments about what *should be*."). In the context of this Comment, political factors are value judgments (or influence) that come from the people or the political branches of government.

19 *See supra* notes 4-7 and accompanying text.

20 For a description of the rule, see *infra* Part III.D. This Comment concedes that political deference may not be appropriate for every type of review or for every environmental rulemaking (e.g., when the governing statute expressly forbids its use). It is most applicable to cases of arbitrary and capricious review.

21 531 U.S. 457 (2001).

I. EPA RULEMAKING: A PRIMER

Though EPA rulemaking is incredibly complex,[22] a basic understanding is useful for analyzing agency decision making and judicial review. This Part briefly explains the agency's role as a national promulgator of environmental rules and describes the rulemaking process. It also summarizes particular sections of the CAA.

A. *The Environmental Protection Agency*

President Nixon formed the EPA in 1970 to consolidate several federal environmental agencies into one.[23] Rather than drafting legislation, both houses of Congress simply approved the President's executive order, known as the Reorganization Plan No. 3 of 1970.[24] This event made the EPA an anomaly within the administrative world. A bastion of independent scientists, the EPA differs from other technical agencies because it is closely aligned with the nation's top political leader, the President.

Charged with implementing various federal environmental statutes, the EPA promulgates most rules through informal rulemaking, the notice-and-comment process of the Administrative Procedure Act ("APA").[25] Informal rulemakings are triggered by statutory deadline, internal investigation, or petitions from the public.[26] They proceed in three main steps: public notice of the proposed rulemaking, receipt and analysis of comments from interested parties, and promulgation of a final rule.[27] During this process, EPA staff and outside experts analyze different facts and policy concerns relevant to the regulatory matter at issue.[28] Before finalizing major rules, the EPA must submit the proposed versions to the Office of Management and

---

22 *See generally* THE CLEAN AIR ACT HANDBOOK (Julie R. Domike & Alec C. Zacaroli eds., 3d ed. 2011) (a detailed, 739-page treatise devoted exclusively to the CAA regulatory regime).

23 Reorganization Plan No. 3 of 1970, 5 U.S.C. app. § 1, at 643-44 (2006).

24 *See id.* at 643; *The Guardian: Origins of the EPA*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/aboutepa/history/publications/print/origins.html (last updated Aug. 31, 2012).

25 *See* 5 U.S.C. § 553; 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.1, at 557-58 (5th ed. 2010) ("This notice and comment procedure for issuing legislative rules with substantive impact is usually referred to as informal rulemaking[,] . . . [t]he most important and most interesting procedure . . . .").

26 Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP. PROBS., Autumn 1991, at 57, 70.

27 5 U.S.C. § 553; McGarity, *supra* note 26, at 58.

28 "One high-level staff employee at EPA, who had been in six different agencies over a nine-year period, commented that EPA has the most systematic process for issuing major rules that he had ever seen." McGarity, *supra* note 26, at 70 n.37 (citing Interview with John M. Campbell, Deputy Assistant Adm'r for Policy, Planning, and Evaluation, U.S. Envtl. Prot. Agency, (June 29, 1984)).

Budget ("OMB") for interagency review.[29] The OMB ensures that agencies comply with Executive Orders 12,866 and 13,563,[30] which require agencies to analyze the costs and benefits of major rules and consider alternatives to traditional regulation.[31]

The EPA is led by one person, the presidentially appointed EPA Administrator.[32] Through the rulemaking process, the Administrator consults with various advisors and evaluates certain factors to make the agency's final decision.[33] Some factors, like scientific data, are quantitative and easily susceptible to empiricism.[34] Others, like economic costs, are calculable but less empirical. A third group of factors are qualitative or value-laden—and thus often political in nature. As this Comment discusses, the appropriateness of a factor usually depends on the governing statute.[35]

In the end, the Administrator considers the relevant factors and either promulgates a final rule or decides not to issue one.[36] For defending the legality of promulgated rules, the most important part is the general statement of basis and purpose.[37] Federal courts of appeals may review EPA rules and reverse any action deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[38] Statements that lack a complete record comprise "the most frequent basis for judicial reversal of

---

29 *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011), *aff'g* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). This process has evolved significantly since the EPA was founded; the agency is now subject to greater scrutiny by the President's closest officers. *See* McGarity, *supra* note 26, at 58.

30 Exec. Order No. 12,866, 58 Fed. Reg. at 51,737 ("Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues . . . . To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations."); Exec. Order No. 13,563, 76 Fed. Reg. at 3821.

31 Exec. Order No. 12,866, 58 Fed. Reg. at 51,735.

32 *See* McGarity, *supra* note 26, at 61-65.

33 *Id.* at 61; Alfred A. Marcus, *EPA's Organizational Structure*, LAW & CONTEMP. PROBS., Autumn 1991, at 5, 40 ("[T]he creation of a single administrator of EPA has given this individual substantial discretionary powers to mold agency direction . . . . The power of the EPA administrator is much greater than the power of commissioners in comparable agencies such as NRC or FTC.").

34 *See* SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA 9 (1995).

35 *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 46 (2009) (discussing how some statutes explicitly restrict what factors an agency may consider).

36 An agency may withdraw a proposed rule. *See, e.g.*, Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment, 69 Fed. Reg. 13,805 (Mar. 24, 2004) ("[n]otice of withdrawal of proposed rulemaking" stating "[w]e have decided to terminate the rulemaking for the administrative rewrite of headlighting requirements, due to other regulatory priorities and limited agency resources").

37 *See* 5 U.S.C. § 553(c) (2006).

38 *Compare* 5 U.S.C. § 706(2)(A) (arbitrary and capricious review under the Administrative Procedure Act) *with* 42 U.S.C. § 7607(d)(9)(A) (2006) (arbitrary and capricious review under the CAA).

agency rules."[39] Thus, to withstand this review, the EPA should adequately explain all factual, legal, and other reasons for any rule it promulgates.

B. *The Clean Air Act*

A popular fount of regulations and related litigation, the CAA is an ideal statute for analysis.[40] Signed into law in 1970, the statute entrusts the EPA with "responsibilities for protecting and improving the nation's air quality and the stratospheric ozone layer."[41] This Part discusses provisions of the CAA and related rules like the NAAQS.

The CAA includes six different titles, which govern the federal system for regulating air pollution.[42] Perhaps most important is Title I, which provides for the prevention and control of air pollution from stationary sources like factories.[43]

The Title I regulatory scheme consists of two distinct processes.[44] In the first stage, the EPA sets national air quality goals known as NAAQS for criteria pollutants, or common outdoor air pollutants.[45] Currently, the EPA lists only six criteria pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide.[46] NAAQS primary standards protect human health, whereas secondary standards ensure public welfare in things like soils and crops.[47] The CAA mandates a review of each standard every five years, but the EPA has discretion to conduct reviews more frequently.[48]

---

39 *See* PIERCE, *supra* note 25, § 7.4, at 593.

40 *See* Michael R. Barr, *Introduction to the Clean Air Act: History, Perspective, and Direction for the Future*, *in* THE CLEAN AIR ACT HANDBOOK, *supra* note 22, at 9; William F. Pedersen, *Rulemaking and Judicial Review Under the Clean Air Act*, *in* THE CLEAN AIR ACT HANDBOOK, *supra* note 22, at 699-707.

41 *See Clean Air Act*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/air/caa (last updated Feb. 17, 2012).

42 *See* 42 U.S.C. §§ 7401-515 (Title I—Programs and Activities); *id.* §§ 7521-90 (Title II—Emission Standards for Moving Sources); *id.* §§ 7601-27 (Title III—General Provisions); *id.* §§ 7651-51o (Title IV—Acid Deposition Control); *id.* §§ 7661-61f (Title V—Permits); *id.* §§ 7671-71q (Title VI—Stratospheric Ozone Protection).

43 *See id.* § 7401.

44 *See* Richard E. Ayres & Jessica L. Olson, *Setting National Ambient Air Quality Standards*, *in* THE CLEAN AIR ACT HANDBOOK, *supra* note 22, at 13.

45 42 U.S.C. §§ 7408-09.

46 40 C.F.R. pt. 50 (2010); *National Ambient Air Quality Standards (NAAQS)*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/air/criteria.html (last updated July 16, 2012).

47 *See* 42 U.S.C. § 7409. In practice, primary and secondary standards are almost indistinguishable. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 46.

48 42 U.S.C. § 7409(d)(1).

The EPA formulates NAAQS through a lengthy rulemaking process.[49] The agency first develops a criteria document for each pollutant based on scientific findings.[50] An external group of advisers known as the Clean Air Scientific Advisory Committee (the "Scientific Committee") reviews this data.[51] For each primary and secondary NAAQS, the EPA proposes a maximum concentration level in parts per million ("ppm"), which the public can comment on before the rule is finalized.[52] For example, in 2008, after performing a mandatory review of the criteria data and consulting with the Scientific Committee, the EPA revised the primary NAAQS for 8-hour ozone to 0.075 ppm, down from the 1997 level of 0.080 ppm.[53]

After the EPA issues a standard, the states create and implement plans to achieve the NAAQS. Each state submits its plan to the EPA for approval, which can make revisions if the proposed plan would not adequately implement the national standard.[54] Because this process takes several years, the EPA's rulemaking pipeline usually includes some NAAQS matter at any given time.

II. ADMINISTRATIVE GOVERNANCE BY THE COURTS AND EXPERTS

Agency actions such as the NAAQS are subject to review by the courts. In fact, soon after the EPA finalized the new ozone NAAQS in 2008, environmental organizations and some states petitioned the D.C. Circuit for review, arguing that the agency had arbitrarily rejected the recommendations of the Scientific Committee.[55] The Scientific Committee had proposed an NAAQS between 0.060 and 0.070 ppm, but the EPA set the standard at 0.075 ppm.[56]

This Part explains the judicial doctrines that govern cases such as these. It begins with an overview of the *Chevron* doctrine, which promotes

---

49 *See id.* §§ 7409(a)-(b), 7410(a)(2).

50 *Id.* § 7408(a).

51 *Id.* § 7409(d).

52 *Id.* § 7409(a)(1)(B); *see also supra* Part I.A (describing the notice-and-comment process).

53 *See* National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,483 (Mar. 27, 2008) (to be codified at 40 C.F.R. pts. 50 & 58) (final rule which states, "[a]fter carefully taking the above comments and considerations into account, and fully considering the scientific and policy views of the CASAC, the Administrator has decided to revise the level of the primary 8-hour O3 standard to 0.075 ppm").

54 42 U.S.C. § 7410(a)(1). State implementation plans are complex. For a basic overview, see Alec C. Zacaroli, *Meeting Ambient Air Standards: Development of the State Implementation Plans*, *in* THE CLEAN AIR ACT HANDBOOK, *supra* note 22, at 47.

55 *See* General Docket, Mississippi v. EPA, No. 08-1200 (D.C. Cir. May 23, 2008) (consolidating cases brought by numerous public interest groups concerning the NAAQS).

56 *See* National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. at 16,482 ("In making a final judgment about the level of the O3 standard, the Administrator notes that the level of 0.075 ppm is above the range recommended by the CASAC (i.e., 0.070 to 0.060 ppm).").

deference for agency interpretations of ambiguous statutes, and "arbitrary and capricious" review, the standard applied to agency policymaking decisions. This Part also describes two competing approaches to administrative governance—the expertise model and the political-control model—and their implications on judicial review. Finally, this Part explains two Supreme Court cases, *Whitman v. American Trucking Associations* and *Massachusetts v. EPA*, which seemingly support the expertise approach.

A. *Judicial Review of Agency Action*

Because of the availability of judicial review,[57] federal agencies must defend the legality of their rules in court.[58] Although a little muddled, the case law generally supports giving deference to agencies that act within their statutory authority.[59]

1. Constitutional Framework and *Chevron* Deference

The United States Constitution vests "[a]ll legislative powers . . . in [the] Congress of the United States"[60] and all executive power in the President.[61] A classic approach to separation of powers would leave administrative agencies, which exercise both powers, without a home.[62] Nevertheless, the Supreme Court has consistently recognized the constitutionality of the administrative state, affirming countless delegations of legislative authority.[63]

---

57 Since the nation's founding, the federal judiciary has had power to review actions by the two political branches. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803); *see also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 6 (2010) ("Many framers, Federalists and even some Republicans, expected the undemocratically selected Court, at least on occasion, to strike down statutes it believed were in conflict with the Constitution."). The so-called fourth branch, the administrative state, is also subject to judicial review. 5 U.S.C. § 702 (2006).

58 Marianne Koral Smythe, *Judicial Review of Rule Rescissions*, 84 COLUM. L. REV. 1928, 1928 (1984) ("Congress' extensive delegation of regulatory authority to federal agencies over the last fifty years has frequently placed upon the federal judiciary the complex task of adjudicating the legality of regulatory conduct.").

59 *See infra* Part III.C.

60 U.S. CONST. art. I, § 1.

61 *Id.* art. II, § 1. The President must also "take Care that the Laws be faithfully executed." *Id.* art. II, § 3.

62 *See* PIERCE, *supra* note 25, § 2.1, at 43. Many agencies also exercise quasi-judicial powers. *See id.* § 2.3, at 48.

63 "Except for two 1935 cases, the Court has never enforced its frequently announced prohibition on congressional delegation of legislative power [to administrative agencies]." *Id.* § 2.6, at 99. In *Panama Refining Co. v. Ryan*, the Supreme Court invalidated a section of the National Industrial Recovery Act ("NIRA") because it provided only general statements of policy, such as "to conserve natural re-

To survive scrutiny under the nondelegation doctrine, a challenged agency must simply show that Congress supplied an "intelligible principle" to guide its action.[64] Congress can delegate "interstitial policymaking" to agencies so long as it defines the substantive standards.[65] In short, Congress makes the laws but entrusts agencies with policy development and implementation.

With this backdrop, the *Chevron* case gave courts an essential tool for reviewing agencies' legal determinations.[66] *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[67]

The *Chevron* Court established a two-step process for analyzing administrative interpretations of statutes.[68] A reviewing court first examines whether the statute is clear; if so, the agency must follow "the unambiguously expressed intent of Congress."[69] A second step is required if the statute is ambiguous or silent: the court must consider the agency's interpretation and defer to the agency's decision if it is a permissible construction of the statute.[70]

However, *Chevron* deference does not apply to agency interpretations of statutory provisions where the "agency has *not* been delegated responsi-

---

sources," which left all major policy determinations to the executive branch. 293 U.S. 388, 417-18, 430 (1935). Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court overturned an NIRA provision giving broad power to the President to establish detailed codes over all major industries. 295 U.S. 495, 550 (1935).

64 Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (alteration in original) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928))).

65 PIERCE, *supra* note 25, § 2.6, at 99-100.

66 *Chevron* provided perhaps "[t]he most famous doctrine in all of administrative law." Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1044 (2011).

67 United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (explaining when *Chevron* deference applies).

68 Few have explained this analytical process more succinctly than Justice John Paul Stevens:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc, 467 U.S. 837, 842-43 (1984) (footnotes omitted).

69 *Id.* at 843.

70 *Id.* at 844.

bility to define."[71] In those cases, *Skidmore* deference governs. In *Skidmore v. Swift & Co.*,[72] the Supreme Court held that an agency's guidelines for interpreting a statute were persuasive but not binding on the trial court.[73] Unlike a regulation, informal guidelines do not have the force of law.[74] *Skidmore* deference is thus less empowering for agencies than *Chevron*. It affords only persuasive value, which is basically meaningless since courts are already apt to accept the most persuasive reading of a statute.[75]

2. Arbitrary and Capricious Review

Agency authority is further limited by the judiciary's power of arbitrary and capricious review, which Congress codified in the APA.[76] This standard applies to acts of agency discretion and requires agencies to adequately explain the reasons for their decisions.[77]

The Supreme Court clarified the meaning of arbitrary and capricious review in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[78] "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency."[79] In other words, a reviewing court focuses on the agency's decision-making process (i.e., whether the decision was well-reasoned) rather than the particular policy outcome.[80]

A slightly different matter occurs when an agency shifts positions on an existing policy. Courts usually presume that a long-standing agency policy is valid;[81] thus, a change in the status quo raises suspicions of *ultra vires*

---

71 Michael P. Healy, *Reconciling* Chevron, Mead, *and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 9 (2011). One example is when an agency opines about an issue but does not promulgate a legislative rule. *See id.*

72 323 U.S. 134 (1944).

73 *Id.* at 139.

74 *See* Healy, *supra* note 71, at 19.

75 *See id.* at 9-10, 10 n.61. "The text employs the common expression of *Skidmore* deference, even though that expression is a misnomer. A more accurate expression would be *Skidmore* guidance or *Skidmore* persuasion." *Id.* at 46 n.281.

76 5 U.S.C. § 706(2)(A) (2006) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

77 *See* Watts, *supra* note 35, at 14.

78 401 U.S. 402 (1971).

79 *Id.* at 416 (citations omitted).

80 *See* Healy, *supra* note 71, at 11.

81 The doctrine of presumptive validity assumes that an agency's existing policy is the one most consistent with congressional intent for the regulatory program. *See* Smythe, *supra* note 58, at 1943.

conduct.[82] In *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co*.,[83] the Supreme Court overturned the National Highway Traffic Safety Administration ("NHTSA") decision to rescind an airbag and seatbelt regulation, holding that the agency failed to consider mandatory factors such as the statute's highway safety objective.[84]

State Farm gave courts a framework for heightened arbitrary and capricious review: "[an] agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[85] Under this formulation of arbitrary and capricious review, agencies have discretion to make policy, but that discretion is greatly constrained by judicial review.

B. *Agency Self-Control: Expertise and Hard Look Review*

State Farm's "hard look" review reinforces a governance model that puts agency professionals in charge of policymaking.[86] This theory of expert administration rose to prominence during the New Deal.[87] According to one of its leading advocates, "[w]ith the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation."[88] Proponents of this model argue that experts, if insulated from politics, "could ascertain and implement an objective public interest; administration could become a science."[89]

Under *State Farm*, "courts take a hard look at whether the agencies themselves have taken a hard look at the range of evidence, arguments, and alternatives relevant to an issue, and have made and explained a reasoned

---

82 BLACK'S LAW DICTIONARY 1559 (8th ed. 2004) (defining "ultra vires" as "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law").

83 463 U.S. 29 (1983).

84 *Id.* at 46-48. The original rule required car manufacturers to equip new automobiles with passive safety restraints. *Id.* at 36-37. Under a new administration, the NHTSA regarded airbags as effective safety devices, but did not consider requiring them in lieu of detachable seatbelts, which the agency deemed faulty. *Id.* at 48. According to the Court, this was not a "logical response" given the statutory mandate to ensure traffic safety. *Id.*

85 *Id.* at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

86 *See* 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 9.26 (3d ed. 2010) ("Without using the term, the Supreme Court used the hard look approach in *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.* That opinion has become the most authoritative expression of the hard look approach." (footnote omitted)).

87 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001). The New Deal era witnessed broad acceptance of the expertise model, though earlier thinkers also promoted the theory. *See generally* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 201, 209-10 (1887) (promoting the separation of "politics" and "administration").

88 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938).

89 *See* Kagan, *supra* note 87, at 2261 (describing arguments made by the self-control theorists).

policy choice based on these considerations."[90] This review focuses on errors of process. It generally holds that political concerns cannot justify an agency's action.[91] For this reason, hard look review is sometimes called "expertise-forcing" because it seeks to insulate the administrative state "from outside political pressures, even or especially pressures emanating from the White House or political appointees in the agencies."[92]

1. *Massachusetts v. EPA*

Arguably, the Supreme Court applied a standard of hard look review in two cases involving EPA rulemakings: *Massachusetts* and *American Trucking*. In *Massachusetts*, the Court held the EPA's denial of a petition requesting regulation of four greenhouse gases was arbitrary and capricious.[93] This 2007 case asked whether the CAA provided authority for the regulation.[94] The Court answered this question affirmatively, holding that the statutory term "air pollutant" is capacious enough to include carbon dioxide as long as the agency determines that the gas endangers public health.[95]

More important for administrative law was the second question, regarding the agency's reasons for not regulating.[96] According to the *Massachusetts* majority, the EPA "offered no reasoned explanation for its refusal" to regulate.[97] The Court's analysis focused on the statutory term "judgment" and the manner by which the EPA makes an endangerment finding.[98] According to the majority, the Administrator's judgment must be based on scientific evidence about the gas's effects on public health or welfare.[99] In other words, if EPA scientists make an endangerment finding, then the agency *must* regulate the pollutant.[100]

The EPA had listed several justifications for denying the rulemaking petition, including concerns about interfering with President Bush's international negotiations on climate change, the purported effectiveness of existing voluntary programs, and the agency's desire to avoid "'an inefficient,

---

90 *Id.* at 2380.

91 Magill & Vermeule, *supra* note 66, at 1053.

92 Freeman & Vermeule, *supra* note 9, at 52.

93 Massachusetts v. EPA, 549 U.S. 497, 534 (2007). Several states and organizations had petitioned the EPA to study the environmental impact of automobile emissions like carbon dioxide. *Id.* at 505.

94 *Id.* at 528.

95 *Id.* at 528-29.

96 *Id.* at 532-33.

97 *Id.* at 534.

98 *Id.* at 532-33 (citing 42 U.S.C. § 7521(a)(1) (2006)).

99 *Massachusetts*, 549 U.S. at 532-33.

100 *See id.* at 533.

piecemeal approach'" to the climate change.[101] But the Court rejected these policy reasons as "divorced from the statutory text."[102]

2. *Whitman v. American Trucking Associations*

About six years earlier, the *American Trucking* Court issued a similar opinion explaining EPA decision making as an expertise matter. While *American Trucking* did not discuss the legitimacy of political influence, the decision nevertheless likened NAAQS rulemakings to the sanitized process of laboratory science, where outside variables are excluded.

In *American Trucking*, several industry groups and states sought review of the 1997 ozone and particulate matter NAAQS, arguing that the EPA failed to consider the costs of implementing these standards.[103] The Supreme Court rejected their claim, holding that the CAA "unambiguously bars cost considerations from the NAAQS-setting process."[104] Because the term "cost" is used elsewhere in the statute, the Court inferred that Congress would have been more explicit if it intended costs to factor into such rulemakings.[105] For example, at the state-level implementation phase, state agencies consider costs because they must account for each polluter's ability to comply with the NAAQS through "reasonably available control technology."[106] However, the Court concluded these factors are impermissible during the initial step of establishing the national standard.[107]

Together, *Massachusetts* and *American Trucking* reflect the idea that EPA decision making should be confined to scientific facts, as determined by the agency's experts.[108] These cases suggest that other considerations such as economic costs or presidential policy coordination are not valid in agency rulemakings.

---

101 *Id.* (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003)).

102 *Id.* at 501.

103 *Id.* at 465.

104 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 471 (2001) (discussing 42 U.S.C. § 7409(b)(1) (2006)).

105 *Id.* at 469-70.

106 *See* 42 U.S.C. § 7502(c)(1).

107 *Am. Trucking*, 531 U.S. at 471.

108 *Cf.* Freeman & Vermeule, *supra* note 9, at 52 ("[T]he majority's solution in *MA v. EPA* was a kind of *expertise-forcing* . . . .").

III. MAKING SENSE OF POLICYMAKING: A DOCTRINE OF POLITICAL DEFERENCE

The major shortcoming of cases like *Massachusetts* and *American Trucking* is their failure to appreciate the normative nature of policymaking. Hard look review and the expertise model hold that policymaking should operate in a science-only vacuum—ignoring the reality that regulatory decision making is a series of multifaceted value judgments. Moreover, by insulating these decisions from the political branches, these theories stand at odds with other administrative law doctrines and basic elements of representative democracy. Lower courts and the public deserve a more balanced approach for reviewing agency decisions that accounts for political control.

This Part consists of four sections. First, this Part argues that policymaking is the process of choosing a policy from competing options. An agency cannot make decisions based on scientific facts alone—its decisions also involve value judgments. Second, to fulfill democratic principles, policymaking should be linked to elected officials and thus the people they govern. Third, the case law supports giving significant deference to regulatory policy decisions, including politically influenced matters. Finally, this Part proposes a standard of review for courts to use when reviewing politically influenced rulemakings. The political deference rule offers a structured test for determining when political considerations are proper. In permitting agencies to consider all relevant factors allowed by statute, the rule empowers agencies to better align their policymaking with the public will.

A. *Policymaking Inherently Involves Value Judgments*

At its core, policymaking involves value judgments. Science, though informative, cannot *make* these policy decisions.[109] Rather, the rulemaking process considers many variables and ultimately leads to a policy based on the decision maker's best judgment.

By definition, any decision involves consideration of at least two options, which require tradeoffs.[110] Those who contend that these regulatory decisions should be based exclusively on science misunderstand the policymaking process.[111] Returning to the example previously discussed, the

---

109 *See* John S. Applegate, *A Beginning and Not an End in Itself: The Role of Risk Assessment in Environmental Decision-Making*, 63 U. CIN. L. REV. 1643, 1666-67 (1995).

110 Some decisions may consider more than two factors, but each decision considers at least two. *See* BLACK'S LAW DICTIONARY 436 (8th ed. 2004) (defining "decision" as "[a] judicial or agency determination after consideration of the facts and the law"). *Tips on Decision Making*, HARVARD BUS. REVIEW, http://hbr.org/web/management-tip/tips-on-decision-making (last visited Nov. 21, 2012) ("Every important decision inevitably involves a trade-off.").

111 *See* Magill & Vermeule, *supra* note 66, at 1054.

EPA must designate a specific level for each NAAQS—the agency must choose 0.075 ppm or some other number to be the national standard for ozone.[112] The Scientific Committee makes the first policy decision by proposing a minimum number and a maximum number to narrow the Administrator's options for the NAAQS. This involves a value judgment—a decision to propose a low-end of 0.060 ppm instead of zero. Even though 0.000 ppm may be the safest level of ozone to protect human health, it is also impractical and not socially optimal, so regulators propose a number greater than zero.[113] To make this decision, the Scientific Committee likely considers policy tradeoffs associated with each increase or decrease in the standard. The EPA Administrator makes a similar value judgment when she selects a specific number from the Scientific Committee's proposed range, or when she deviates from it altogether.

According to its own employees, the EPA evaluates a variety of factors to make these value judgments.[114] During the risk assessment phase of rulemaking, EPA employees examine only the science.[115] But factors excluded from this initial step are integral to the second phase. Risk management is "'an agency decision-making process that entails consideration of political, social, economic, and engineering information.'"[116] The EPA considers these factors alongside scientific "'information to develop, analyze, and compare regulatory options and to select the appropriate regulatory response to a potential chronic health hazard.'"[117] The product is environmental policy.

This observation stands at odds with the Supreme Court's holding in *American Trucking*. There, the Court held that the EPA may not consider economic costs in its promulgation of NAAQS standards.[118] Of course, the Court was mainly enforcing a statute that allows state implementation plans, but not national standards, to factor in costs.[119] Nevertheless, the case highlights a logical flaw. The statute's regulatory scheme demands the impossible—that policymaking be descriptive, not normative. Even if the EPA may not overtly consider costs in NAAQS (e.g., may not examine economic

---

112 *See supra* notes 53-56.

113 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 494 (2001) (Breyer, J., concurring) ("The statute, by its express terms, does not compel the elimination of *all* risk; and it grants the Administrator sufficient flexibility to avoid setting ambient air quality standards ruinous to industry.").

114 *See* McGarity, *supra* note 26, at 59 n.6, 61 (discussing the EPA decision-making process, as surmised through interviews with more than 50 EPA officials).

115 *See* Coglianese & Marchant, *supra* note 18, at 1275.

116 *Id.* at 1276 (quoting NAT'L RESEARCH COUNCIL, NAT'L ACAD. OF SCI., RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 19 (1983) [hereinafter NAS/NRC RED BOOK]).

117 *Id.* (quoting NAS/NRC RED BOOK, *supra* note 116, at 19).

118 *Am. Trucking*, 531 U.S. at 468-71.

119 *See id.* at 470; *id.* at 490 (Breyer, J., concurring) (explaining that "the legislative history shows that Congress intended the statute to be 'technology forcing'" by having the national standard set lofty goals).

reports about a rule's potential impact on industry), the agency implicitly considers these principles when setting the standard. It is not as though the Administrator simply throws a dart at a plot of numbers to set the standard. Talk about arbitrary! Nor does she plug the descriptive data into a calculator, which then produces the magic number. Rather, the Administrator considers the tradeoffs associated with each concentration level and makes an informed decision.

The Court's decision in *Massachusetts*, though expertise-forcing, was more acknowledging of this normative aspect of policymaking.[120] The majority opined that a "scientific uncertainty . . . so profound that it precludes the EPA from making a reasoned judgment" could justify the EPA's refusal to regulate, indicating that the agency may be able to consider policy factors in its decision makings.[121] According to this coda, future EPA decisions tinged with presidential influence might be affirmed if those decisions adequately disclose the scientific uncertainties. Perhaps the EPA in *Massachusetts* merely failed to make this requisite showing.[122] But suppose that a future EPA, embroiled in a mandatory rulemaking, is faced with inconclusive data from its decade-long research. Instead of promulgating a rule, the newly elected President directs the EPA Administrator to terminate the rulemaking. Maybe he fears that issuing a regulation, simply to issue one, would unduly burden industry or that further research into the scientific uncertainties would waste precious agency resources. This is exactly the kind of value judgments involved in policymaking, and it seems reasonable to permit the President and EPA Administrator to coordinate a resolution. Since all policymaking involves balancing tradeoffs, it is unclear why the *Massachusetts* Court would be willing to grant deference in situations involving scientific uncertainty but would withhold it in other cases.

Isolating variables is appropriate in laboratories, where the primary aim is to develop scientific knowledge.[123] But regulatory decision making involves nonscientific judgments about social values and leads to enforceable action.[124] Whether maintaining the status quo or creating a new policy, an agency's decision impacts lives, livelihoods, and industry. It is unrea-

---

120 *See* Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1043-44 (2008) (discussing the relationship between scientific determinations and policy determinations when reviewing agency decisions).

121 *See* Massachusetts v. EPA, 549 U.S. 497, 534 (2007); Watts & Wildermuth, *supra* note 120, at 1044 n.90.

122 *See* Watts & Wildermuth, *supra* note 120, at 1042-43 (discussing the Court's finding that the underlying statute "tightly constrained the EPA's discretion to defer" making a judgment).

123 *See* JASANOFF, *supra* note 34, at 9 ("Science, as conventionally understood, is primarily concerned with getting the facts 'right'—at least to the extent permitted by the existing research paradigm or tradition.").

124 *See id.* at 9, 79 (describing how the law seeks accurate facts but is also concerned with fairness and efficiency, and explaining "the right of administrative agencies to determine for themselves whether evidence related to risk [is] substantial enough to support restrictive action").

sonable to expect regulators to ignore these factors, and it is naïve to exclude them from the administrative record.[125]

Thus, judicial review should conform to this reality and allow administrative agencies to consider normative factors, such as political influence or policy tradeoffs, instead of trying to confine policymaking to a science-only vacuum.[126]

B. *Policymakers Should Be Politically Accountable*

Allowing federal agencies to make major policy decisions presents a major dilemma for democratic governance. As then Professor Elena Kagan noted, "[e]ffective administration requires delegations that provide significant discretion to agency officials; these broad delegations, however, raise serious concerns about accountability because agency officials are not elected."[127] In contrast to the expertise approach discussed in Part II.B, a model based on political control could allay concerns that an unelected bureaucracy is making important policy decisions with the potential to affect vast areas of society.[128] This model links the government to the governed and elucidates policy choices for the public by channeling them through elected officials.[129]

In a representative government, the people decide which values will rule.[130] As noted, agencies also make value judgments. Although well-equipped to gather and evaluate scientific information, agencies have less expertise for deciding which values should govern.[131] If anyone is to ensure that these decisions accord with the public will, it should be one of the elected branches—the President or Congress. In contrast, "[t]he judiciary, being the least democratically accountable of the three branches, . . . [is] the least competent, from an institutional standpoint, to resolve these questions

---

125 Justice Breyer has described "rational regulation" as the consideration of all factors not expressly precluded by the statute. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 490 (2001) (Breyer, J., concurring).

126 *Cf. id.* ("[O]ther things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation."). *But see id.* (noting that in *American Trucking*, the "legislative history, along with the statute's structure, indicates that § 109's language reflects a congressional decision not to delegate to the agency the legal authority to consider economic costs of compliance.").

127 Kagan, *supra* note 87, at 2331.

128 *Id.* at 2263 (considering "the propriety of giving unelected administrators, potentially acting on the basis of personal views, interests, and relationships, the task of making these contestable choices").

129 *See id.* at 2331-32 (defending the "presidential model" of administration).

130 Politics has been described as "the authoritative allocation of values." *See generally* DAVID EASTON, THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICS (1953). Collectively, people make choices about competing options and values. These decisions are political.

131 *See* Magill & Vermeule, *supra* note 66, at 1054 ("[S]cientists have no legal expertise and no political warrant to strike tradeoffs or choose between competing values.").

of social value and to second-guess the executive decision-making process."[132]

Some contend that the legislature, not some other actor, should make society's big value judgments; after all, the Constitution empowers the legislature as the primary lawmaker.[133] The *Massachusetts* Court relied on this premise in holding that Congress had already resolved the policy decision to regulate greenhouse gases when it passed the CAA instructing the EPA to control "'any air pollutant from [new motor vehicles] . . . [that] may reasonably be anticipated to endanger public health or welfare.'"[134] The problem with this holding is that Congress did not actually make a value judgment—it simply punted the decision to the agency. The statute requires the EPA to determine whether a particular gas endangers "public health or welfare" (a rather amorphous concept), and it explicitly leaves this determination to "[t]he Administrator['s] . . . judgment."[135] While there is a general notion of "public health," this language affords significant discretion for deciding what it means in particular situations and at what level the harmful gas should be regulated.[136] Contrary to the Court's opinion, when Congress decides to have administrative rules based on ambiguous principles, it delegates the task of assessing policy tradeoffs to the agency.

Moreover, although Congress could provide ongoing political oversight of these decisions, the President is better suited for this role.[137] For one thing, Congress fulfills its primary role when it enacts the agency's governing statute. Constitutionally, the responsibility for executing this law, or overseeing its implementation, rests with the President.[138] Presidential control also offers unique benefits of "cost-effectiveness, consistency, and rational priority-setting."[139] As a unitary decision maker, the President can "impos[e] . . . a coherent regulatory philosophy across a range of fields to produce novel regulatory (or for that matter, deregulatory) policies."[140]

---

132 Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1171 (2010).

133 *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

134 Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (quoting 42 U.S.C. § 7521(a)(1) (2006)).

135 42 U.S.C. § 7521(a)(1); *see also infra* Part IV.A.

136 *See supra* Part III.B.

137 *See* Kagan, *supra* note 87, at 2332 ("Modern attributes of the relationship between the President and the public make these claims stronger than ever before. . . . [P]residential control of administration at the least possesses advantages over any alternative control device in advancing the[] core democratic values [of responsiveness and transparency].").

138 U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

139 Kagan, *supra* note 87, at 2339.

140 *Id.* at 2341.

Congress, with its many and diverse perspectives, is neither efficient nor decisive in these regards.[141]

Just as importantly, the President is the only actor tied to the nation's political pulse.[142] The agency heads responsible for implementing national policy are not subject to elections, and few people know or care who these leaders are.[143] So how can the public hold them accountable? They look to the President—he is responsible for effective, and ineffective, administration.[144] Alexander Hamilton's vision of a vigorous presidency has been fulfilled in modern practice: the President energizes the bureaucracy with the public's values.[145]

Administrative governance and judicial review should reflect these democratic principles instead of isolating rulemakings from the political branches of government. One problem with the expertise model and hard look review is that agencies present their decision making in purely technocratic terms.[146] This process disguises essentially political decisions as products of the scientific method.[147] Labeling political concerns as such and giving them a place in judicial review "would help to take some of the pressure off science" and shed light on what really drives rulemakings.[148] In turn, this practice would promote better political accountability. "[B]y requiring agencies to explain their decisions in a transparent manner, political actors and their constituents gain access to information about agency action and can monitor agencies."[149]

Under this approach, courts could still hold agencies accountable to their governing statutes by requiring them to "openly and transparently dis-

---

141 *Cf. id.* at 2256-59 (describing the difficulties of congressional oversight).

142 "[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests." *Id.* at 2335.

143 *See* Dana Milibank, Op-Ed, *Throw Out the President's Cabinet*, WASH. POST (Apr. 19, 2012), http://www.washingtonpost.com/opinions/its-time-to-toss-the-presidents-cabinet/2012/04/19/gIQA59P4TT_story.html.

144 As one former solicitor general explained, "[t]he lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it." CHARLES FRIED, ORDER AND LAW 153 (1991).

145 THE FEDERALIST NO. 70, at 421-22 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws . . . . A feeble Executive implies a feeble execution of the government. . . . That unity is conducive to energy will not be disputed.").

146 Magill & Vermeule, *supra* note 66, at 1053 ("[P]olicy choices are disguised as technocratic determinations of fact and causation.").

147 *Id.*; *see also* Watts, *supra* note 35, at 23-29 (describing several examples where agencies considered non-technical policy factors, including one where the EPA lowered the reporting threshold for certain toxic chemicals in response to Vice President Gore's directive to do so).

148 *See* Watts, *supra* note 35, at 41.

149 *Id.* at 42.

close" any political influence.[150] But by promoting greater deference, courts would allay concerns about judicial overreach.[151]

C. *Administrative Law Gives Deference to Political Decisions*

These virtues of political control would mean little without a legal foundation. As this Part explains, the case law supports a highly deferential standard of review of agency policymaking and recognizes the legitimacy of political influence in that process.

1. On Matters of Policy, Courts Defer to Agencies

Major pillars of administrative law, including the *Chevron* doctrine and arbitrary and capricious review, favor policymaking by agencies over policy revision by the courts.[152] These doctrines govern different actions—*Chevron* applies to statutory interpretations, whereas arbitrary and capricious review applies to discretionary decisions—but both actions involve policy decisions and receive deference merely by satisfying a reasonableness test.[153] This gives agencies great discretion to make policy within their statutory bounds.

---

150 *Id.* at 44-45 (emphasis omitted) ("Agencies themselves would face the burden of sufficiently indicating the reasons for their actions in regulatory documents. This rule . . . serves to ensure that agencies disclose all of the evidence and reasoning on which they wish to rely in defending their decisions.").

151 The American political system has long feared unelected rule, especially by federal judges. *See, e.g.*, BRUTUS No. XV (March 20, 1788), *available at* http://www.constitution.org/afp/brutus15.htm (criticizing the federal Constitution as giving the independent judiciary "a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven"). This concern exists for judicial reviews of environmental regulations. *See* Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 81 (2002) (discussing a study that showed that courts' reversals of the EPA increased by 32 percent after *Chevron*). Professors Joseph Smith and Emerson Tiller explain that some "judges strategically select reversal instruments so as to protect decisions that advance their policy goals." *Id.* Thus, in some cases, the least accountable branch rejects policies made by the more politically beholden and technically qualified EPA.

152 *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (discussing the *Chevron* doctrine); Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (discussing the limits of arbitrary and capricious review); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 479 (2002) ("*Chevron* deference is grounded in a congressional intent to delegate primary interpretive authority to the agency.").

153 *See* Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 180 (John F. Duffy & Michael Herz eds., 2005) ("*Chevron* step two directs courts to defer to 'reasonable' agency interpretations of ambiguous statutory

According to the *Chevron* doctrine, if a statute is unclear, the agency charged with administering the statute is entitled to interpret its text.[154] The *Chevron* Court found that the statute's ambiguous language "enlarge[d] . . . the scope of the agency's power" and gave "broad discretion" to the EPA to fill in the policy gaps.[155] This statutory silence also provided discrete signals from Congress, telling courts to defer to such decisions, if they are based on reasonable interpretation.[156] *United States v. Mead Corp.*[157] reaffirmed this high level of deference, holding that "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority" "to make rules carrying the force of law."[158]

Similarly, under the arbitrary and capricious standard in *Overton Park*, a reviewing court should overturn an agency's policy decision only if the facts show that the agency abused its statutory discretion.[159] Even the Court in *State Farm* took a deferential tone, noting that "[t]he scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency."[160]

These cases illustrate a preference for deference to agency policymaking. When a court must review an action for proper process, it defers judgment on decisions about the policy itself and leaves those matters to the agency's discretion.[161]

---

provisions. Such 'interpretations' constitute policy decisions of the sort to which the arbitrary and capricious test also applies.").

154 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc, 467 U.S. 837, 844 (1984).

155 *Id.* at 862 ("To the extent any congressional 'intent' can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.").

156 Watts, *supra* note 35, at 37-38.

157 533 U.S. 218 (2001).

158 *See id.* at 226-27, 229. This authority also includes notice-and-comment rulemakings. *See id.* at 227.

159 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (explaining the test for arbitrariness as "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").

160 Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

161 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc, 467 U.S. 837, 844 (1984); *Overton Park*, 401 U.S. at 416; *see also* Healy, *supra* note 71, at 11 ("The Court's articulation of [arbitrary and capricious review] reflects ambivalence toward substantive review.").

2. This Deference Extends to Politically Influenced Decisions

The law also recognizes that agencies do not exercise this discretion in isolation.[162] As the *Chevron* Court acknowledged, policymaking involves political actors such as the President, whose participation is perfectly acceptable:

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[163]

Thus, in its "deepest roots," *Chevron* rejects the expertise-forcing approach in favor of a model of political deference.[164] President Reagan had ordered a review of all regulatory programs, and subsequently the EPA determined that a single definition of "stationary source" was more prudent than the prior administration's dual definition.[165] The *Chevron* Court premised its deference on the agency's comparative advantages in expertise and political accountability.[166] The EPA is entitled to make policy judgments both because of its scientific expertise and its connection to the President, who provides political legitimacy for the agency's decisions.[167] The judiciary, which lacks both traits, should generally defer to these decisions.

Arbitrary and capricious review cases also reflect this principle. In *FCC v. Fox Television Stations, Inc.*, the Supreme Court gave significant deference[168] to a new policy of the Federal Communications Commission ("FCC") that made the television broadcast of a single fleeting expletive actionable as indecent conduct.[169] Under prior policy, the FCC punished broadcasters only when performers made multiple profane remarks during a

---

162 *See, e.g.*, Kagan, *supra* note 87, at 2376 (arguing that the *Chevron* Court gave deference to the EPA because its "regulation exhibited clear signs of presidential influence").

163 *Chevron*, 467 U.S. at 865-66.

164 Kagan, *supra* note 87, at 2373, 2376; *see also* Watts, *supra* note 35, at 13 ("[M]ajor doctrines, such as *Chevron* deference, . . . seem to embrace the newer political control model." (footnote omitted)).

165 *See Chevron*, 467 U.S. at 857-58.

166 *See id.* at 865-66.

167 Kagan, *supra* note 87, at 2373 (describing "agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public").

168 See *Fox I*, 129 S. Ct. 1800, 1812-13 (2009). Addressing a separate question in *Fox II*, the Supreme Court held that the FCC order violated the Due Process Clause of the Fifth Amendment because the agency failed to give the broadcaster fair notice of its change in policy. *See generally* FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307, 2320 (2012).

169 A fleeting expletive is a single, isolated utterance of a profanity, as compared to multiple or repeated uses of the word. *See Fox I*, 129 S. Ct. at 1809.

broadcast.[170] The *Fox* Court said the policy shift was permissible because the FCC publicly acknowledged the change and justified its decision as reasonable.[171] The FCC said that it changed the policy to improve its anti-profanity enforcement efforts in light of technological advances, which allowed "broadcasters to bleep out offending words."[172] The Court held that it was not the judiciary's place to determine which policy was better.[173] As long as the new policy was reasonable, courts should defer judgment.

Importantly, the Court upheld the FCC's action even though it had been significantly influenced by congressional pressure.[174] As Justice Antonin Scalia noted, "[i]f the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress made clear its wishes for stricter enforcement."[175] Thus, *Fox* recognizes the legitimacy of regulatory change based partly on political factors.[176]

Similarly, in *Sierra Club v. Costle*,[177] the D.C. Circuit examined whether communications between the President, his advisers, and the EPA had tainted the agency's rulemaking.[178] In affirming the EPA's regulation, the D.C. Circuit recognized the need for the President "to monitor the consistency of executive agency regulations with Administration policy."[179] For accountability purposes, the *Costle* court favored presidential involvement over an administrative state that was politically insulated, even though the former approach might lead the EPA to adopt policies that sometimes differ from its experts' recommendations.[180] As one scholar has explained, this case "quite clearly embraces the political control model by expressing the view that informal rulemaking is a politically influenced process, not a technocratic process that must mimic the sanitized process used in a courthouse."[181]

---

170 *Id.* at 1806-07.

171 *Id.* at 1812-13.

172 *Id.* at 1813.

173 *Id.* at 1811.

174 *See id.* at 1815-16 (Scalia, J.) (plurality opinion) (describing how the FCC's new policy "was spurred by significant political pressure from Congress").

175 *See Fox I*, 129 S. Ct. at 1816.

176 *See id.* Even though a majority did not sign onto Justice Scalia's opinion in its entirety, the Court nevertheless affirmed the FCC's policy *despite* the presence of political influence.

177 657 F.2d 298 (D.C. Cir. 1981).

178 *Id.* at 386-91. The D.C. Circuit also considered whether congressional pressure was improper. *Id.* at 409.

179 *Id.* at 405.

180 *See id.* at 405-06 .

181 *See* Watts, *supra* note 35, at 39 (emphasis omitted). The D.C. Circuit held that political influence is not appropriate for some agency matters, such as adjudications. *See Costle*, 657 F.2d at 400 ("Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among 'conflicting private claims to a valuable privilege,' the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte

As these two cases illustrate, courts are not beholden to the hard look standard of *State Farm*. Both the *Chevron* doctrine and the arbitrary and capricious review of *Fox* and *Costle* support judicial deference when agencies exercise their statutory discretion in politically coordinated ways. Still, as discussed next, courts need a practical way to account for these factors in their reviews of rulemakings.

D. *The Political Deference Rule*

Discussions about the role of politics in agency rulemakings are familiar to legal academia. Professor Kathryn Watts has proposed one model by which courts can credit political influence under the arbitrary and capricious standard.[182] This Comment argues more generally that courts should defer to an agency's political decision in rulemakings whenever the statute permits it.[183] Moreover, this Comment provides its own five-factor framework for adjudicating these questions, offering more structure than rational basis review.[184] The political deference rule offers judicial deference for agencies' considerations of political factors that are (1) not expressly barred by statute, (2) appropriate in source, (3) related to the rulemaking, (4) related to the public good, and (5) disclosed to the public.[185]

---

contacts is of more questionable utility." (footnotes omitted) (quoting Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959)).

182 *See generally* Watts, *supra* note 35.

183 This suggested rule would apply to *Chevron* deference and arbitrary and capricious review, even though *Chevron* itself accounts for political influence in statutory interpretations. This Comment elucidates that process by providing a structured framework for arbitrary and capricious review of agency rulemakings. Political influence is not proper in agency adjudications.

184 Rational basis review requires only that the reason for regulating be rationally related to the regulation. Some courts consider this doctrine perfectly applicable to administrative law. *See* 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 5:30, at 117-18 (3d ed. 2010). For example, in *Dunlop v. Bachowski*, "the Court permitted review of an agency's reasons for refusing to act in order to insure that the agency had a rational basis consistent with a statutory purpose." *Id.* (discussing *Dunlop*, 421 U.S. 560 (1975)). However, other courts apply the standard only to constitutional reviews of congressional acts. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 n.9 (1983) ("The Department of Transportation suggests that the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.").

185 Professor Watts formulates the analysis differently and asks three separate questions: (1) "what types of political influences should count as legitimate factors," (2) "who stands as a potential source of legitimate political influence," and (3) "what specific types of rulemaking decisions might most appropriately be influenced by political factors?" *See* Watts, *supra* note 35, at 45.

1. The Governing Statute

A first principle of administrative law is that agency action must conform to its authorizing statute.[186] The major judicial doctrines confirm that agencies are agents of Congress. In particular, *Chevron* step one conveys the primacy of Congress: "[i]f the intent of Congress is clear, that is the end of the matter."[187] Under *Skidmore*, agencies lack authority to make binding determinations when deciding matters outside their statutory delegations.[188] Likewise, when a court applies arbitrary and capricious review, it first looks at the "small range of choices" set by the statute; any agency decision outside that range is unlawful and not entitled to deference.[189]

Thus, any review of agency action should begin with the governing statute. If the statute explicitly "foreclose[s] a certain factor, such as economic or political factors, . . . then the agency plainly should not be allowed to rely upon that factor in justifying its decision."[190] Beyond these express requirements, however, agencies should enjoy great discretion to consider any factors logically relevant to their decisions.[191]

Statutory silence, therefore, is the prerequisite for receiving political deference.[192] If the statutory silence requirement is met, a court may apply the rule and examine whether the agency's political considerations were reasonable.

2. The Source of the Politics

The next prong considers the agency's relationship to the elected branches. An agency's classification as executive or independent helps determine the source of legitimate influence.[193] Most executive agencies are led by one person, usually a member of the President's cabinet.[194] The President also can remove executive agency leaders at will.[195] These designs give the President significant authority over these agencies. Thus, Con-

---

186 This is perhaps *the* first principle of administrative law. *See supra* Part II.A.

187 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc, 467 U.S. 837, 842 (1984).

188 Skidmore v. Swift & Co., 323 U.S. 134, 135-37, 139 (1944).

189 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971).

190 *See* Watts, *supra* note 35, at 46 (emphasis omitted).

191 *Id.* at 52.

192 *Id.* at 46.

193 *Cf.* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 607-11 (2010) (describing "structural features that distinguish [independent agencies] from executive-branch agencies").

194 PIERCE, *supra* note 25, § 2.5, at 76.

195 Bressman & Thompson, *supra* note 193, at 610.

gress's decision to delegate authority to an executive agency implies *presidential* control.[196]

Independent agencies may deserve different treatment because of their insulation from the President. "The characteristic that most sharply distinguishes independent agencies is the existence of a statutory limit on the President's power to remove the head (or members) of an agency."[197] For example, the Federal Energy Regulatory Commission ("FERC") is a five-person commission whose members hale from different political parties and are removable only for cause.[198] Because of these restrictions, presidential control is less intended and less practical, suggesting that independent agencies are less entitled to political deference. Alternatively, independent agencies like the FERC are beholden to Congress through its funding and oversight powers, so it is possible that the legislature—if anyone—is the appropriate source of their political control, as the decision in *Fox* suggests.[199]

The key requirement is electoral accountability. Suppose an agency justified a regulation on the basis of a public opinion poll showing approval for its action, but the agency received no direction from either political branch. Although the poll reflects popular opinion, this factor has not been channeled through the political system. Thus, under the political deference rule, relying on this factor would not be legitimate. The influence must come from an elected official so if public opinion changes or if the policy fails, the people can hold the decision maker accountable.

3. The Significance of the Politics to the Rulemaking

In evaluating the significance of a political consideration, courts should examine the factor's relationship to the regulation. The factor should

---

196 Kagan, *supra* note 87, at 2251. ("[A] statutory delegation to an executive agency official—although not to an independent agency head—usually should be read as allowing the President to assert directive authority . . . over the exercise of the delegated discretion.").

197 PIERCE, *supra* note 25, § 2.5, at 76; *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935) (holding that, for an independent commissioner of the Federal Trade Commission, "no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute").

198 42 U.S.C. § 7171(b)(1) (2006).

199 *See Fox I*, 129 S. Ct. 1800, 1815 (2009) (Scalia, J.) (plurality opinion) ("The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction."). *But see id.* at 1829 (Breyer, J., dissenting) ("Federal Communications Commissioners have fixed terms of office; they are not directly responsible to the voters; and they enjoy an independence expressly designed to insulate them, to a degree, from 'the exercise of political oversight.'" (quoting Freytag v. Commissioner, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part and concurring in judgment))).

rationally relate to the regulation.[200] Unlike the public opinion poll example, if the President were to issue a statement directly addressing a rulemaking, that event would carry great weight. His statement narrowly targets the program at issue and is attached to a politically accountable office. In contrast, if the agency simply said that "the President made us do it," that would be an example of arbitrary decision making.[201] Agencies must still explain the reasons for their decisions under the political deference rule. Giving credit to this kind of general statement would be improper because it leaves the President's discretion unfettered and fails to provide any reason for the agency action.[202]

4. Public Interest

Moreover, courts should attempt to discern the factor's social quality—whether the political action relates to the public interest. This requirement is meant to weed out political cronyism and guard against agency capture. Suppose the President told an agency to relax a financial regulation to help a few bankers who had supported him during a recent election.[203] A reviewing court should find this factor illegitimate because it "seeks to serve a private interest but not any broader conception of the public good."[204] Harder cases, of course, will involve searching for more evidence of illegitimate political motive.

Some might criticize this test as forcing judges to perform a role beyond their competency.[205] Yet arbitrary and capricious review already requires courts to examine the reasonableness of discretionary actions,[206] a task that involves balancing various social interests.[207] The public interest

---

200 *See id.* at 1811 (majority opinion); *id.* at 1815-16 (Scalia, J.) (plurality opinion).

201 *See* Watts, *supra* note 35, at 55 (citing Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 21 (2001)).

202 *See id.*

203 *Cf. id.* at 54 (describing a similar hypothetical in which "the FDA justified its decision by boldly stating: 'The President directed us to rescind the preemption regulations in order to reward the trial lawyers, who provided significant campaign support to the President'").

204 *See id.* at 54-55.

205 *See* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 189 (1990) (explaining how some argue that "by ignoring politics the courts are able to escape the difficult problems of assessment and balancing that might be thrust on them were the veil lifted; and similarly, by requiring that agencies express the reasons and findings for their actions in nonpolitical terms, perhaps the agencies are somehow forced to eschew political decision making").

206 *See* Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (explaining how a court must look for "'rational connection between the facts'" an agency considered and the decision it made (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))).

207 In these tests, what qualifies as reasonable depends on public values. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985).

test requires courts to "deliberat[e] in order to identify and implement the public values that should control the controversy."[208]

5. Adequate Disclosure

The final requirement for political deference is that the influence be adequately disclosed.[209] An agency typically explains its reasoning in the rule's statement of basis and purpose, and courts look to these documents when reviewing rules for errors.[210] But this practice is unlikely to fulfill the purpose of the political deference rule. As Professor Jodi Short explains, "[a]lthough *Federal Register* publication would make political reasons publicly available as a formal matter, as a practical matter it would mean that those reasons never reach the vast majority of citizens."[211] A better approach would require the political actor, in addition to the agency, to disclose its interactions through a means more likely to reach the public or media. A presidential press release is one example of adequate disclosure. Such statements are easily accessible and frequently discussed in the media, so they are more likely to reach the public than might a lone sentence in the Federal Register.

The important thing is for agencies to actually disclose their political considerations, something which they rarely do in current practice.[212] This failure to disclose may have been what sealed the agency's fate in *State Farm*.[213] The NHTSA's rule rescission was influenced by presidential politics, with President Reagan fulfilling his campaign promise to provide greater oversight of the regulatory state.[214] However, because President Reagan's role was not disclosed in the record, the Court could not even consider its reasonableness. For consideration in arbitrary and capricious review, a factor must be disclosed in the rulemaking or explicitly listed in the statute.[215] Arguably, if the NHTSA had explained this factor, the Court

---

208 *See id.*

209 Professor Nina Mendelson argues that "an ex ante disclosure regime is superior to proposals that judges be more receptive to political reasons in reviewing a particular agency action." *See* Mendelson, *supra* note 132, at 1127. This Comment follows Professor Watts's approach by incorporating the disclosure requirement into the judicial review standard. *See* Watts, *supra* note 35, at 57-73.

210 *See supra* Part I.A.

211 Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1848 (2012).

212 *See* Mendelson, *supra* note 132, at 1127.

213 This is one possible explanation. To be clear, the *State Farm* majority's "focus on the evidence and facts before the agency (and its silence on the issue of politics) likely was not meant to signal the Court's affirma[nce] . . . [of an] embrace of politics." *See* Watts, *supra* note 35, at 19.

214 *See* Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

215 *See* PIERCE, *supra* note 25, § 7.4, at 596 ("Courts today permit agencies to defend the validity of a rule only by reference to materials in the record of the rulemaking.").

may have been more receptive to its change in policy.[216] Based on this reading, even the hard look standard of *State Farm* might permit an agency to consider presidential influence when that factor is disclosed in the record.

The political deference rule, therefore, encourages adequate disclosure by providing judicial affirmation to agencies that comply with the rule's five requirements. If this rule were applied more routinely, agencies would not fear having their decisions struck down. In turn, disclosure would promote better accountability as agencies make known the reasons for their value judgments.

IV. GIVING POLITICAL DEFERENCE TO THE EPA

The question remains whether this model applies to environmental rulemakings. This Part argues that political deference is both permissible and appropriate for EPA rulemakings. Instead of barring political deference, the CAA provides areas of silence through which the EPA may legitimately consider extrastatutory factors, like presidential influence. Sections of the CAA that authorize rulemakings center on the term "judgment" of the Administrator.[217] This Part first challenges the *Massachusetts* majority's interpretation of this term and argues that "judgment" confers broad discretion on the Administrator. Second, this Part explains how the origin and structure of the EPA support a role for presidential influence in environmental rulemaking.

A. *The "Judgment of the Administrator" Deserves Deference*

Because agencies cannot act without congressional approval, the EPA must base its actions in a relevant statute.[218] The rulemakings in *Massachusetts*,[219] *American Trucking*,[220] and the 2011 NAAQS withdrawal[221] were

---

216 *See* Kagan, *supra* note 87, at 2382 ("But if presidential policy is to count as an affirmative reason to sustain administrative action, in the way Justice Rehnquist suggested, then the relevant actors should have to disclose publicly and in advance the contribution of this policy to the action—in the same way and for the same reasons that they must disclose the other bases for an administrative decision to receive judicial credit."). *But see* Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 310-11 (2004) (explaining how the majority opinion in *State Farm* "deem[ed] the politics of the rescission simply irrelevant" and instead focused exclusively on "the substantive and factual underpinnings of the agency's conclusion").

217 *See* 42 U.S.C. §§ 7409(b)(1), 7521(a)(1) (2006).

218 *See supra* Part III.D.1.

219 42 U.S.C. § 7521(a)(1) ("The Administrator shall . . . regulat[e] . . . in his judgment . . . .").

220 *Id.* § 7409(b)(1) (describing how NAAQS are determined "in the judgment of the Administrator").

221 *Id.* (requiring "judgment of the Administrator").

empowered by the same statutory phrase, "judgment of the Administrator."[222] Used throughout the CAA, this phrase recognizes the Administrator—not the President or some committee—as the EPA's final decision maker.[223] Although the Administrator's "judgment" seems restrained by the holding in *Massachusetts*, a textual analysis of the statute shows that it actually confers great discretion on the agency.

1. The *Massachusetts* Majority Incorrectly Interpreted the Term "Judgment"

As discussed in Part III.A, the *Massachusetts* decision contains indirect support for the political deference rule, noting that politically directed decisions might be legitimate if based on scientific uncertainty. Regardless of this issue, however, *Massachusetts* should not bind future EPA rulemakings because that Court incorrectly interpreted Section 202(a) of the CAA.[224]

Justice John Paul Stevens in his majority opinion and Justice Scalia in his dissent applied the *Chevron* test, but they reached different conclusions regarding the term "judgment."[225] The majority stopped at *Chevron* step one, holding that the EPA's discretion to regulate greenhouse gases is constrained by "congressional design."[226] According to the majority, the agency could not refuse to regulate based on its concerns that a new EPA rule would negate the President's ongoing policy initiatives.[227]

Interestingly, the Court made this ruling while opining that the EPA Administrator may refuse to regulate based on other grounds, such as con-

---

222 *Massachusetts* used a close variant of this phrase: "in his judgment," referring to the Administrator. *See supra* note 219 and accompanying text.

223 *See, e.g.*, 42 U.S.C. § 7411(h)(1) ("judgment of the Administrator" regarding the promulgation of new stationary source rules); *id.* § 7424(b)(1) ("judgment of the Administrator" regarding approval of state implementation plans).

224 42 U.S.C. § 7521(a)(1) provides that:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his *judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

Id. § 7521(a)(1) (emphasis added).

225 *See* Massachusetts v. EPA, 549 U.S. 497, 549 (2007) (Scalia, J., dissenting) ("As the [majority] recognizes, the statute 'condition[s] the exercise of EPA's authority on its formation of a "judgment."'" (second alteration in original) (quoting *id.* at 532 (majority opinion))).

226 *Id.* at 532-33 (majority opinion) ("[T]hat judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" (second and third alterations in original) (quoting 42 U.S.C. § 7521(a)(1))).

227 *See id.* at 533-34.

siderations about agency resources or internal policy priorities.[228] But if the CAA demands that EPA rulemakings be science-driven, then why can the agency refuse to act simply because it faces budgetary constraints or favors one program over another? Moreover, if these factors are permissible under arbitrary and capricious review, then why are presidential considerations not also permissible? By not answering these questions, the Court failed to distinguish relevant factors from the supposedly irrelevant factors. It also found statutory clarity where such was lacking.[229] The CAA discusses neither administrative factors, which the Court found permissible, nor political factors, which it found impermissible.[230]

Instead of stopping at step one, the Court should have completed the *Chevron* test and considered alternative interpretations of the text.[231] As the *Chevron* Court recognized, "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[232] Under this doctrine, statutory silence presents an opening for the agency to consider reasonable factors not explicitly precluded,[233] and because there is no text barring political considerations, the *Massachusetts* Court should have proceeded to *Chevron* step two.[234]

Justice Scalia took this approach and examined the EPA's statutory interpretation, finding clear support for giving deference to presidential influence: "The reasons 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."[235] Because the term "judgment" contemplates a balancing of these factors, the EPA was entitled to deference.[236]

---

228 *See id.* at 527, 533.

229 *See id.* at 552-53 (Scalia, J., dissenting) ("[The majority] nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under *Chevron*." (citation omitted)).

230 *See* 42 U.S.C. § 7521(a)(1) (2006).

231 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc, 467 U.S. 837, 843 (1984) ("[I]f the statute is *silent* or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (emphasis added)).

232 *Id.* at 844.

233 *See Massachusetts*, 549 U.S. at 552 (Scalia, J., dissenting) ("[T]he various 'policy' rationales that the [majority] criticizes are not 'divorced from the statutory text,' except in the sense that the statutory text is *silent*, as texts are often silent about permissible reasons for the exercise of agency discretion." (emphasis added) (citations omitted)).

234 *See* 42 U.S.C. § 7521(a)(1) (containing no language expressly defining how the Administrator must form a "judgment" about air quality).

235 *See Massachusetts*, 549 U.S. at 552-53 (Scalia, J., dissenting) (emphasis omitted).

236 *See id.* (describing the interpretation promoted by the EPA as "the most natural reading of the text").

In the case underlying *Massachusetts*, the D.C. Circuit also employed a "full *Chevron*" analysis.[237] Relying on prior precedent, the court determined that the CAA "does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence."[238] The court held that the EPA's concerns about the uniformity of national environmental regulations were equally important to the judgment-making process.[239] Thus, because the EPA's refusal to regulate was consistent with the statute, it deserved deference.[240]

Against the long-standing precedent of *Chevron*, the *Massachusetts* majority substituted its own interpretation of the CAA for the agency's reasonable construction of the statute. The Supreme Court failed to recognize the statute's ambiguity and offered a meaningless distinction. Instead, the Court should have deferred to the EPA's reasonable decision involving political factors.

2. Within the CAA, "Judgment" Confers Broad Discretion on the EPA

The term "judgment" also governs Title I rulemakings like the 2011 ozone NAAQS revision.[241] At first blush, this term confers broad discretion on the agency. As commonly understood, a "judgment" is a decision formed after analyzing multiple factors.[242] Assuming no textual limitations, it seems reasonable that an Administrator's evaluation would include all factors relevant to the regulation.

Context supports this interpretation. Section 109 of the CAA provides:

> National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.[243]

---

237 *See* Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007) (examining all the "'policy' considerations that . . . warranted regulatory forbearance at this time" and holding that the EPA's decision not to regulate was reasonable and entitled to deference).

238 *Id.* (citing Ethyl Corp. v. EPA, 541 F.2d 1, 20 (D.C. Cir. 1976)).

239 *Id.*

240 *Id.*

241 42 U.S.C. § 7409(b)(1) (2006).

242 *See, e.g.*, NEW OXFORD AMERICAN DICTIONARY 942 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010) (defining "judgment" as "the ability to make considered decisions or come to sensible conclusions . . . [or] an opinion or conclusion [by such process]"). Other, court-focused understandings of "judgment" would not directly apply to the phrase "judgment of the Administrator" because the Administrator is not a judge and informal EPA rulemakings are not adjudicatory. *See, e.g.*, *id.* (defining "judgment" also as "a decision of a court or judge").

243 42 U.S.C. § 7409(b)(1).

In other words, the Administrator's judgment must be based on air quality data as determined by the latest science.[244] The Scientific Committee analyzes this information "and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate."[245] Importantly, the term "recommend" shows that the Scientific Committee's role is advisory.[246] The final decision remains in the hands of the Administrator. She must make the "judgment" about whether and how to regulate. Additionally, like the CAA provision analyzed in *Massachusetts*, the text here does not bar consideration of political factors.

Throughout the CAA, the term "judgment" is contrasted with other phrases like "Administrator shall," which denote a statutory command.[247] For example, Section 167 governs the enforcement of air quality plans: "The Administrator shall, and a State may, take such measures . . . as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part."[248] Whereas "may" conveys the discretionary rights of states, the term "shall" explicitly imposes an enforcement obligation on the Administrator.[249] In contrast, the phrase "judgment of the Administrator" does not suggest a mandate. Rather, it reflects the discretionary nature of the action.

The relative frequency of these two phrases within the Act also signifies their different meanings. In the entire CAA, the "judgment" phrase is used only 29 times,[250] while the phrase "Administrator shall" appears hundreds of times.[251] The CAA's relatively sparing use of "judgment" suggests that Congress reserved the term for specific instances when it wanted to grant the Administrator greater discretion. The rule of law disfavors unfettered discretion, and Congress's more frequent use of the term "shall" indi-

---

244 *Id.* § 7408(a)(2).

245 *Id.* § 7409(d)(2)(b).

246 *See id.*; *see also id.* § 7409(d)(2)(C)(i)-(iv) ("Such committee shall also . . . advise the Administrator . . . .").

247 Wherever "shall" is used to describe an action, the delegate *must* do that thing. Anderson v. Yungkau, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'the language of command.'" (quoting Escoe v. Zerbst, 295 U.S. 490, 493 (1935))); s*ee also* BLACK'S LAW DICTIONARY 1407 (8th ed. 2004) (defining "shall" as "[h]as a duty to; more broadly, is required to").

248 42 U.S.C. § 7477.

249 *Cf. Anderson*, 329 U.S. at 485 ("[W]hen the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory.").

250 This count includes variants of the phrase "judgment of the Administrator" such as "Administrator's judgment," and "his judgment"—which the Act uses interchangeably.

251 *See* 42 U.S.C. §§ 7401-7671q. Compared to the Act's sparing use of "judgment of the Administrator," Section 112 of the CAA alone contains 113 iterations of the phrase "Administrator shall." *See id.* § 7412 (describing the Administrator's mandatory obligations over hazardous air pollutants).

cates it was trying to restrict the agency's authority in most other situations.[252]

Both in plain meaning and in context, the phrase "judgment of the Administrator" conveys broad discretion on the EPA Administrator. Because the statutory text is silent as to what factors the Administrator may actually consider, reviewing courts should give greater deference to her policy judgments.

B. *The EPA's Design Reflects a Role for Presidential Influence*

The EPA's organizational structure and history reveal that presidential influence is appropriate for the Administrator's judgment-making process.

Unlike most federal agencies, the EPA was not established by a single enabling act—Congress simply ratified an executive order.[253] President Nixon formed the EPA to enable more uniform execution of the nation's environmental laws.[254] To accomplish that end, Reorganization Plan No. 3 transferred to the EPA certain powers previously held by executive agencies like the Federal Water Quality Administration, Agricultural Research Service, and National Air Pollution Control Administration.[255] Previously, cabinet-level departments had managed these programs, giving the President significant authority over their policymaking.[256] Even though the reorganization afforded some independence for EPA regulators, the plan nevertheless sought a more coordinated policymaking process managed by the President's Council on Environmental Quality.[257] As President Nixon explained, "the Council focuses on what our broad policies in the environmental field should be; the EPA would focus on setting and enforcing pollution control standards. The two are not competing, but complementary."[258]

---

252 This commanding language helps supply the "intelligible principle" of Congress. *See supra* note 64.

253 *Compare* 47 U.S.C. § 151 (2006) ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . there is created a commission to be known as the 'Federal Communications Commission' . . . .") *with* Reorganization Plan No. 3 of 1970, 5 U.S.C. app. § 1, at 643 (2006) ("Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, July 9, 1970 . . . . There is hereby established the Environmental Protection Agency . . . .").

254 *See* 5 U.S.C. app. at 644-45 (Message of the President) ("In organizational terms, this require[d] pulling together into one agency a variety of research, monitoring, standard-setting and enforcement activities now scattered through several departments and agencies.").

255 *Id.*

256 The three departments were Interior, Agriculture, and Health, Education, and Welfare, respectively. *Id.*

257 *See id.*

258 *Id.* at 646; *see also id.* ("[T]aken together, they should give us, for the first time, the means to mount an effectively coordinated campaign against environmental degradation in all of its many forms.").

Thus, from its beginning, the EPA was a policymaking arm of the President's administration.

Even today, the President remains closely aligned with the agency, treating the EPA Administrator as a cabinet-level officer.[259] Also, like the presidency itself, the EPA is a unitary organization: the Administrator makes the final decisions. In contrast, policymaking by an independent commission usually requires majority approval.[260] Coupled with the fact that the EPA Administrator is removable at will, these distinctions give the President unparalleled authority over the agency's affairs.[261]

Given its close ties to the executive branch, it seems reasonable for the EPA to consider presidential direction, as one factor, in its decision makings. This holds true even for NAAQS rulemakings. While it spoke against the consideration of implementation costs in *American Trucking*, the Supreme Court did not address the legitimacy of other decisional factors such as political influence, internal budgetary concerns, or other policy considerations.[262]

The Court should revisit its holding to address these factors and provide clarity about the statutory bounds of EPA rulemaking. If it did, the Court would find legislative and functional support for the EPA's political coordination. For example, the CAA's declaration of purpose states that "[a] primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention."[263] The statute also charges the Administrator with developing uniform pollution rules among the states and federal agencies.[264] Not only should the Administrator's "judgment" be well-reasoned and informed by science, it should also consider coordinating policy among various political entities. Arguably, these considerations could be apolitical, but the more appropriate approach involves—or at least is accountable to—the President. This legitimizes the EPA's policy decisions in the American democratic system by tying those to the nationally elected executive.

The EPA was formed as a consolidated entity to execute the nation's environmental laws, with the President and EPA Administrator working together to direct the agency's policymaking. Moreover, the CAA and

---

259 *See The Executive Branch*, WHITEHOUSE.GOV, http://whitehouse.gov/our-government/executive-branch (last visited Nov. 21, 2012) ("Fifteen executive departments—each led by an appointed member of the President's Cabinet—carry out the day-to-day administration of the federal government. They are joined in this by other executive agencies such as the CIA and Environmental Protection Agency, the heads of which are not part of the Cabinet, but who are under the full authority of the President.").

260 *See* Bressman & Thompson, *supra* note 193, at 610.

261 *See id.* at 610 n.49 (describing the EPA as executive because "the administrator of that agency is fully removable by the President").

262 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468-71 (2001).

263 42 U.S.C. § 7401(c) (2006).

264 *Id.* § 7402(a)-(b).

American Trucking seem to condone this activity. Judicial review should therefore recognize a place for presidential influence in EPA rulemakings.

V. EXAMINING POLITICAL DEFERENCE IN PRACTICE

This Comment provides a way for courts to exercise political deference effectively and consistently. In short, courts should defer to the EPA's political considerations when they are not barred by statute, appropriate in source, relevant to the rulemaking, related to the public interest, and disclosed to the public.[265] As a practical example, this Part applies the political deference rule to the 2011 ozone NAAQS withdrawal.

On September 2, 2011, President Obama directed EPA Administrator Lisa Jackson to withdraw a proposed revision of the ozone NAAQS.[266] The Obama Administration had initiated the discretionary review in 2010[267] to accord the ozone standard with the Scientific Committee's findings, which the EPA had rejected during the Bush Administration.[268] Pending this review, the D.C. Circuit held in abeyance some cases challenging the Bush-era standard.[269] However, the EPA terminated the regulatory review soon after President Obama's September 2011 announcement.[270] This Comment examines whether that agency decision deserves political deference.[271] Recall that the rule analyzes five factors: (1) statutory silence, (2) source of political influence, (3) relation to the rulemaking, (4) relation to the public good, and (5) public disclosure.

The initial requirement of statutory silence is arguably satisfied by Part IV.A.[272] Neither the term "judgment of the Administrator" nor the context of the CAA restrict the EPA from considering political factors.

The next prong examines political source. President Obama conveyed the political influence and explained the decision himself:

---

265 *See supra* Part III.D.

266 Press Release, The White House, *supra* note 4.

267 *See* National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (proposed Jan. 19, 2010) (to be codified at 40 C.F.R. pts. 50 & 58).

268 *See supra* note 56 and accompanying text.

269 *See* Unopposed Motion to Vacate the Briefing Schedule and Hold These Consolidated Cases in Abeyance, Mississippi v. EPA, No. 08-1200 (D.C. Cir. Mar. 10, 2009).

270 *See* Press Release, U.S. Envtl. Prot. Agency, *supra* note 8.

271 The D.C. Circuit will address the merits of the Bush-era cases, which reopened after the EPA's 2011 withdrawal of the revised NAAQS. *See* EPA's Revised Motion to Govern Further Proceedings, Mississippi v. EPA, No. 08-1200 (D.C. Cir. Sept. 12, 2011) (describing EPA's decision not to oppose reinstating the briefing schedule).

272 Micro-level costs may be barred by *American Trucking*, but the CAA's statutory silence permits consideration of big-picture political factors like the desire to avoid regulatory duplication. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 490 (2001) (Breyer, J., concurring).

> I have continued to underscore the importance of reducing regulatory burdens and regulatory uncertainty, particularly as our economy continues to recover. With that in mind, and after careful consideration, I have requested that Administrator Jackson withdraw the draft Ozone National Ambient Air Quality Standards at this time. Work is already underway to update a 2006 review of the science that will result in the reconsideration of the ozone standard in 2013. Ultimately, I did not support asking state and local governments to begin implementing a new standard that will soon be reconsidered.[273]

The OMB's instructions to EPA Administrator Jackson were similar, though they focused more on the discretionary nature of the rulemaking: "finalizing a new standard now is not mandatory and could produce needless uncertainty."[274]

Additionally, the President is the appropriate source of influence for the EPA. As discussed, the President formed the unitary agency, and its Administrator is removable at will. The EPA is an executive agency.

The President and the agency also adequately disclosed these factors. President Obama issued a press release and made direct statements to the media. This message reached the public and sufficiently tied the agency's policy decision to the President. Moreover, the agency's approach reflects the practice of previous administrations. For example, in a formal letter to the Mine Safety and Health Administration, then Chief of Staff Andrew Card announced President Bush's decision to terminate a rulemaking about chemical exposures.[275] The agency subsequently disclosed this factor in its formal withdrawal of the rule.[276] Less transparent actions have not always prevailed in court.[277]

The harder questions involve matters of substance. First is the factor's relationship to the regulation. Recall, the statute requires the EPA to promulgate NAAQS based on the Administrator's "judgment."[278] For Administrator Jackson, the political consideration was President Obama's advice to terminate the NAAQS review. This factor directly addressed the NAAQS rulemaking. Suppose, instead, the EPA had based its withdrawal decision on a past executive order outlining general goals for governmental reform.[279] If this were the factor at issue, the judicial review might turn out differently, as perhaps happened in *Massachusetts*.[280] Judges should be hesi-

---

273 Press Release, The White House, *supra* note 4.

274 *See* Letter from OIRA Adm'r Cass R. Sunstein to EPA Adm'r Lisa Jackson (Sept. 2, 2011) (on file with George Mason Law Review).

275 Air Quality, Chemical Substances, and Respiratory Protection Standards, 69 Fed. Reg. 67,681, 67,686 (Nov. 19, 2004) (withdrawing proposed rule).

276 *See id.* (explaining the withdrawal as part of the administration's "priority-setting").

277 *See* Smythe, *supra* note 58, at 1933-35 (explaining the outcome of *State Farm* as NHTSA's failure to explain its abandonment of the safety-restraint rule).

278 *See supra* Part IV.A.

279 *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) ("Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.").

280 *See* Watts, *supra* note 35, at 55.

tant to give deference to narrow agency actions based on broad political initiatives because those statements may not reflect the President's attitude about the specific policy. Because public accountability is at the heart of political deference, giving deference to such sweeping language would undermine the rule.[281] A degree of specificity is required. President Obama's announcement satisfies this element because it narrowly targeted the NAAQS under review. He is thus on the hook for this policy choice.

Additionally, the court should confirm that the decision is within the public interest. One explanation for the NAAQS withdrawal was the Obama Administration's efforts to curb excessive regulation during a period of high unemployment.[282] Also, given the impending mandatory review, there was no pressing need for the 2011 revision. Both justifications seem rationally related to the setting of a national environmental standard. As discussed, all policymaking involves value judgments, and environmental policymaking in particular requires risk management. Determining which risks are acceptable depends on the needs and tolerances of society, which likely include considerations of economic growth and the job market.[283] Balancing these interests against the need for a revised environmental standard, President Obama came down on the side of the former, deciding that a discretionary review would be too burdensome at this time.[284] The rulemaking permitted this balancing of tradeoffs, which includes consideration of the nation's changing needs. Moreover, it was prudent to forgo this discretionary review given that the ozone NAAQS was already due for mandatory review and agency resources are scarce. President Obama's explanation likely satisfies the test.

Therefore, the EPA's decision to withdraw the rule should receive deference under the proposed standard of review.

---

281 One aim of political deference is to tie the agency action to a politically accountable office, which helps connect the action with the public will. *See supra* Part IV.D. Perhaps the political factor in *Massachusetts* was not sufficiently specific. The EPA declined to regulate on the basis of presidential climate-change negotiations, not on the basis of a direct statement about the rulemaking petition. *See* Massachusetts v. EPA, 549 U.S. 497, 533 (2007).

282 *See supra* note 273 and accompanying text.

283 *See supra* Part III.A. *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 494 (2001) (Breyer, J., concurring) ("The [CAA] . . . grants the Administrator sufficient flexibility to avoid setting ambient air quality standards ruinous to industry.").

284 Alternatively, this could have been a strategic calculation by President Obama to make his administration appear more business-friendly while not actually changing current environmental policy. In the short term, President Obama's decision likely had a negligible effect on reducing the nation's regulatory burden—despite his ambitious prediction. As Professor Rena Steinzor noted, "even had [Administrator] Jackson been allowed to promulgate the more stringent standard, implementation efforts—and therefore the expenditure of private sector compliance costs—would not have gotten underway for several more years." Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 258 (2012). Because of the lengthy state-level planning process, the proposed NAAQS would not have been fully implemented until 2031; thus, the threat it posed to the nascent economic recovery of 2011 was arguably indirect and minimal. *Id.* at 258 n.255.

FINAL THOUGHTS

Environmental regulation is essential to our modern way of life. These policies protect human health and the natural world, and they should be informed by the best scientific evidence. But even though scientific research tells us that the earth is warming and that human activity is a contributing factor,[285] science alone cannot tell us what to do about these problems. The solutions require making informed decisions—judgments—about the future of society, major decisions that will impact everything from what kind of cars we will drive to how we interact with other nations.[286]

When regulatory policymaking demands these types of value judgments, it should be responsive to changes in circumstances and the public will. Presidential coordination achieves this effectively and with legitimacy. This is not to say that society should look to the President as its savior. No one should desire that.[287] Even our persistent focus on "job creation" may be unsuited for the political system.[288] But whether desirable or not, the President *is* the nation's chief executive. If the public is to effect change in the administrative state, that change must come through him or her.

Judicial review should promote this form of governance instead of scuttling it. When an agency reveals political considerations that are not precluded by statute, a reviewing court should not dismiss the action as

---

285 *E.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf ("Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level."); *id.* at 37 ("Changes in the atmospheric concentrations of GHGs and aerosols, land cover and solar radiation alter the energy balance of the climate system and are drivers of climate change. . . . Global atmospheric concentrations of CO2, CH4 and N2O have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values determined from ice cores spanning many thousands of years . . . .").

286 In this author's humble opinion, Congress should do this job—it should evaluate all factors and develop a comprehensive policy for addressing climate change.

287 *See* GENE HEALY, THE CULT OF THE PRESIDENCY 298 (2008) ("Skepticism toward power is our constitutional birthright, and it teaches us that in politics, wherever there's a promise, there's an unspoken threat. We *know*, though we sometimes choose to forget, that when a presidential candidate promises to save the world and solve all our problems—it's not going to be free."). This author largely agrees with Gene Healy's criticism of contemporary America, which expects far too much from its President and allows that one person to exert excessive authority over the national agenda and everyday life. Yet it remains true that, under the constitutional system, the President—rather than some detached, unelected experts—is the rightful executive of federal policies enacted by Congress. It is both naïve and inappropriate to try to remove the President from executive agency policymaking.

288 *See Does the President Actually Influence the Economy?*, MARKETPLACE (Mar. 7, 2012), http://www.marketplace.org/topics/economy/freakonomics-radio/does-president-actually-influence-economy (radio host Kai Ryssdal's interview of economics writer Stephen Dubner, who argues that "the [P]resident's ability to actually change the shape and direction and velocity of the macroeconomy is extremely limited").

unlawful. Rather, the court should apply a standard of review like the one proposed here, especially when reviewing EPA rules. Under the CAA, science remains the foundation of EPA rulemakings, but the Administrator's authority also includes discretion to consider presidential influence. This Comment's political deference rule would encourage rational regulation that accounts for all relevant factors and would enhance the legitimacy of such regulations.[289] And in providing political deference, courts would defer more to democracy's decision makers—the people.

289 "Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends . . . upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall." Sierra Club v. Costle, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (footnote omitted).