the Cross and Tiller studies are both consistent with the phenomenon of collegiality.

In explaining my view of collegiality I start with three observations drawn from many years of working and talking with my colleagues on the D.C. Circuit. First, judges on my court who are convinced that the law requires a certain result in a case do not decline to take a position simply to avoid registering a dissent. Second, judges who are in the majority and convinced that the law requires a certain result do not moderate their views because they fear that a dissent will somehow draw attention to flaws in the majority opinion. Finally, the judges on a panel usually agree on the correct result in a case. And when there is initially no clear view as to what the judgment should be in a particular case, we normally work hard in our deliberations to find the correct result.[186]

Are you more persuaded by the explanation that judges vote strategically and ideologically or by Judge Edwards's response that the statistical findings demonstrate collegiality and compromise? Is there any empirical test that might distinguish Judge Edwards's theory of collegiality on one hand and the ideological and strategic-voting theories offered by Revesz and Cross and Tiller on the other?

VI. APPLICATIONS

A. DEFERENCE TO AGENCY DECISION-MAKING

Perhaps the most crucial and contested issue that arises with respect to agency decision-making is the degree of deference owed by courts to agency interpretations of enabling statutes. Two approaches have been offered: the ''*Chevron* standard'' and the ''*Skidmore* standard.'' As you read the following two cases, consider the extent to which public choice theory provides support for one standard over the other and the extent to which public choice insights inform, or should inform, the Supreme Court's decision.

Chevron U.S.A. Inc. v. Natural Resources Defense Council[187]

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. is one of the most important Supreme Court cases of recent decades. *Chevron* arose in response to new regulations established by the EPA interpreting the Clean Air Act. The specific issue in *Chevron* was review of the decision by the EPA to amend its earlier regulatory definition of a ''stationary source'' of air pollution, which had defined each individual source of pollution in a plant (e.g., each smokestack) as a ''stationary source,'' to instead allow a state to treat the entire plant as a ''stationary source.'' The new regulation produced a figurative ''bubble'' over the entire plant.

186. *Id.* at 1358–59 (footnote omitted).

187. 467 U.S. 837 (1984).

As a result, an existing plant that contained several pollution-emitting devices could install or modify one piece of equipment without meeting the permit conditions if the alteration would not increase the total emissions from the plant. The Court held that the change in the definition was permissible. Justice Stevens, writing for a unanimous Supreme Court, wrote:

> 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.
>
> ''The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'' If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[188]

After concluding that the regulation was not inconsistent with the statutory language or legislative history of the Clean Air Act, the Court also specifically noted that it would not second guess the policy conclusions of the EPA:

> The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the ''bubble concept,'' but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.
>
> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex,

188. *Id.* at 842–44 (citation and footnotes omitted).

the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an 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.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ''Our Constitution vests such responsibilities in the political branches.''

We hold that the EPA's definition of the term ''source'' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.[189]

United States v. Mead Corp.[190]

In *United States v. Mead Corp.*, the Supreme Court was confronted with the question of the scope of *Chevron*. The issue in *Mead* was whether a tariff classification ruling by the United States Customs Service should be afforded *Chevron* deference. Justice Souter, writing for the *Mead* majority, concluded that under the facts as presented in *Mead*, *Chevron*

189. *Id.* at 864–66 (citation and footnotes omitted).

190. 533 U.S. 218 (2001).

deference would not apply. Instead, the Court applied the doctrine of *Skidmore v. Swift & Co.*,[191] that ''the ruling is eligible to claim respect according to its persuasiveness.''[192] The Court drew the distinction as follows:

> We granted certiorari in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference 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. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.
>
> When Congress has ''explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,'' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. ''[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' '' and ''[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . .'' The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other. Justice Jackson summed things up in *Skidmore* v. *Swift & Co.*:
>
> > ''The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

191. 323 U.S. 134 (1944).

192. *Mead*, 533 U.S. at 221.

> earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.''[193]

The Court concluded:

> Underlying the position we take here, like the position expressed by Justice Scalia in dissent, is a choice about the best way to deal with an inescapable feature of the body of congressional legislation authorizing administrative action. That feature is the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress. Implementation of a statute may occur in formal adjudication or the choice to defend against judicial challenge; it may occur in a central board or office or in dozens of enforcement agencies dotted across the country; its institutional lawmaking may be confined to the resolution of minute detail or extend to legislative rulemaking on matters intentionally left by Congress to be worked out at the agency level.
>
> Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.[194]

Writing in dissent, Justice Scalia argued that *Skidmore* deference to agency action was, among other things, inconsistent with the purposes of permitting delegation in the first place, namely to allow Congress to rely on agency expertise in crafting regulations. Moreover, by treating different types of agency actions differently, the Court's rule provides administrative agencies with incentives to try to strategically manipulate their rulemaking procedures so as to fit their rules into the preferred category. He wrote:

> Another practical effect of today's opinion will be an artificially induced increase in informal rulemaking. Buy stock in the GPO. Since informal rulemaking and formal adjudication are the only more-or-

193. *Id.* at 226–28 (citations and footnotes omitted).

194. *Id.* at 235–37 (footnotes omitted).

less safe harbors from the storm that the Court has unleashed; and since formal adjudication is not an option but must be mandated by statute or constitutional command; informal rulemaking—which the Court was once careful to make voluntary unless required by statute—will now become a virtual necessity. As I have described, the Court's safe harbor requires not merely that the agency have been given rulemaking authority, but also that the agency have *employed* rulemaking as the means of resolving the statutory ambiguity. (It is hard to understand why that should be so. Surely the mere *conferral* of rulemaking authority demonstrates—if one accepts the Court's logic—a congressional intent to allow the agency to resolve ambiguities. And given that intent, what difference does it make that the agency chooses instead to use another perfectly permissible means for that purpose?) Moreover, the majority's approach will have a perverse effect on the rules that do emerge, given the principle (which the Court leaves untouched today) that judges must defer to reasonable agency interpretations of their own regulations. Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.

Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion. As *Chevron* itself held, the Environmental Protection Agency can interpret ''stationary source'' to mean a single smokestack, can later replace that interpretation with the ''bubble concept'' embracing an entire plant, and if that proves undesirable can return again to the original interpretation. For the indeterminately large number of statutes taken out of *Chevron* by today's decision, however, ambiguity (and hence flexibility) will cease with the first judicial resolution. *Skidmore* deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, *leave* the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed. It will be bad enough when this ossification occurs as a result of judicial determination (under today's new principles) that there is no affirmative indication of congressional intent to ''delegate''; but it will be positively bizarre when it occurs simply because of an agency's failure to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts.

One might respond that such ossification would not result if the agency were simply to readopt its interpretation, after a court reviewing it under *Skidmore* had rejected it, by repromulgating it through one of the *Chevron*-eligible procedural formats approved by the Court

today. Approving this procedure would be a landmark abdication of judicial power. It is worlds apart from *Chevron* proper, where the court does not *purport* to give the statute a judicial interpretation—except in identifying the scope of the statutory ambiguity, as to which the court's judgment is final and irreversible. (Under *Chevron* proper, when the agency's authoritative interpretation comes within the scope of that ambiguity—and the court therefore approves it—the agency will not be ''overruling'' the court's decision when it later decides that a different interpretation (still within the scope of the ambiguity) is preferable.) By contrast, under this view, the reviewing court will not be holding the agency's authoritative interpretation within the scope of the ambiguity; but will be holding that the agency has not used the ''delegation-conferring'' procedures, and that the court must therefore *interpret the statute on its own*—but subject to reversal if and when the agency uses the proper procedures.

. . . I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency. . . . There is, in short, no way to avoid the ossification of federal law that today's opinion sets in motion. What a court says is the law after according *Skidmore* deference will be the law forever, beyond the power of the agency to change even through rulemaking.

And finally, the majority's approach compounds the confusion it creates by breathing new life into the anachronism of *Skidmore*, which sets forth a sliding scale of deference owed an agency's interpretation of a statute that is dependent ''upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control''; in this way, the appropriate measure of deference will be accorded the ''body of experience and informed judgment'' that such interpretations often embody. Justice Jackson's eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.

It was possible to live with the indeterminacy of *Skidmore* deference in earlier times. But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime (all except rulemaking, formal (and informal?) adjudication, and whatever else might now and

then be included within today's intentionally vague formulation of affirmative congressional intent to ''delegate'') is irresponsible.[195]

DISCUSSION QUESTIONS

1. From a public choice perspective, as a general rule, which form of deference, *Chevron* or *Skidmore*, makes the most sense? Does the Court in *Chevron* assume that when Congress delegates it does so based on the traditional model of delegation, rather than the strategic models of delegation suggested by some public choice theorists? In determining the deference owed to an agency interpretation, should it matter why Congress delegates?

2. The Court writes in *Chevron* that the reasons for Congress's decision to delegate rulemaking authority is unknown: Congress might have done so to make use of EPA's expertise, Congress might have done so without considering the policy question resolved by EPA and called into question in *Chevron*, or Congress might have done so after failing to resolve offsetting interest-group pressures and so the interests ''on each side decided to take their chances with the scheme devised by the agency,'' a sort of regulatory ''lottery.''[196] More importantly, the Court argues that the reason why Congress chose to delegate is irrelevant: ''For judicial purposes, it matters not which of these things occurred.'' Do you agree with that conclusion? If you think that the reasons for the delegation should matter, do you also think that judges are capable of determining such motivations? Assuming that Courts can distinguish delegations for ''good'' reasons (such as reliance on agency expertise) from ''bad'' reasons (as a result of interest-group capture or to play the ''delegation lottery'') should the degree of judicial deference to agency decision-making turn on the quality of the reasons for the delegation? Why or why not? If Congress delegates in order to avoid blame for enacting controversial policies, as some public choice theorists argue, should this have any implications for the appropriate degree of deference owed to an agency? Should judges try to prevent Congress from delegating in order to avoid political accountability? If not, should judges try to articulate rules that heighten agency accountability?

3. Prior to becoming a Judge (and later Justice), Justice Scalia edited the journal *Regulation*, a public choice-influenced academic journal that studies regulation and the regulatory process, suggesting at least some formal familiarity with public choice scholarship. As this chapter discusses, before joining the judiciary, Justice Breyer also had considerable scholarly familiarity with regulation and public choice scholarship. Yet as illustrated in *Mead*—where Breyer joined the majority opinion while Scalia, writing alone, dissented—these Justices disagree on fundamental questions of judicial deference to agency decision-making. To what extent, if at all, does their disagreement arise from differences in their understanding of the regulatory process and the ability of the judiciary to improve it? Can either of their views be said to be more compatible with the insights of public choice theory? Do either of their views tend to confirm Merrill's hypothesis about the influence of public choice theory on judicial doctrine?

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195. *Id.* at 246–50 (Scalia, J., dissenting) (citations omitted).

196. For an analysis of delegation as a form of ''regulatory lottery'' favored by interest groups and Congress when Congress is unable to strike a political coalition, see Aranson, Gellhorn & Robinson, *supra* note 156.

4. Justice Scalia argues that the *Skidmore* doctrine provides agencies with an incentive to ''rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.'' Scalia's concern implicitly assumes that agencies act strategically in the manner and timing of issuance of regulations. Is this statement consistent with public interest theories of delegation? Public choice theories? If agencies do act strategically in the issuance of regulations, should that affect whether, or the degree to which, judicial deference should be granted?

5. Which of the various agency delegation theories is most consistent with *Mead*? Do you agree with Elhauge that the combined *Chevron*/*Mead* regime promotes enactable preferences by allowing rules to develop consistently with the best available proxy for contemporary (but not necessarily contemporaneous) congressional intent[197]? Why or why not? Do you agree that it is an appropriate normative benchmark? Why or why not?

B. DEFERENCE TO AGENCY SELF INTEREST

One area in which public choice insights have influenced governmental regulation involves judicial deference to agency decision-making in contexts that implicate agency self interest, a situation that arises in various settings.[198] For instance, some cases directly involve an agency's financial self interest, such as the interpretation of a contract entered into between an agency and a private party or the interpretation of a statute that may affect the agency's contractual obligations. Sometimes an agency competes with private parties in the marketplace, and again the interpretation of relevant statutes potentially affects the agency's competitive position.

A more interesting and far-reaching situation, however, is whether *Chevron* deference is owed to an agency's interpretation of its jurisdiction, even before reaching the substance of its regulation. As a matter of public choice theory, the analysis turns on whether agencies are thought to seek expansion or autonomy and independence. As you read the cases presented, consider which of the theories of agency incentives by Niskanen, Wilson, or others, best explains the agencies' decisions whether to assert jurisdiction. Consider also the normative question as to whether public choice theory suggests a need for a different degree of deference depending on whether an agency is seeking to expand or to contract its regulatory jurisdiction.

We present two cases: *FDA v. Brown & Williamson Tobacco Corp.*[199] and *Massachusetts v. EPA*.[200]

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197. *See supra* chapter 5, section II.B.3.

198. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self–Interest*, 13 CORNELL J.L. & PUB. POL'Y 203 (2004); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences* (George Mason Univ. Law & Econ., Research Paper No. 08–46, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1213149.

199. 529 U.S. 120 (2000).

200. 549 U.S. 497 (2007).

FDA v. Browne Williamson Tobacco Corp.[201]

Brown & Williamson addressed the question of whether the FDA had the authority to regulate tobacco and, specifically, to regulate cigarettes and smokeless tobacco as ''devices'' that deliver nicotine to the body. The FDA asserted the authority to do so, a position that the United States Supreme Court ultimately rejected.

Under the Food and Drug Act, the FDA must ensure that any product regulated by it must be ''safe'' and ''effective'' for its intended use. Thus, the Act generally requires the FDA to prevent the marketing of any drug or device where the potential for inflicting death or physical injury is not offset by the potential therapeutic benefit. In its rulemaking proceeding, the FDA determined that '' 'tobacco products are unsafe,' 'dangerous,' and 'cause great pain and suffering from illness.' ''[202] It further found that the consumption of tobacco products presents '' 'extraordinary health risks,' and that 'tobacco use is the single leading cause of preventable death in the United States.' ''[203]

Writing for the Court in *FDA v. Brown & Williamson Tobacco Corp.*, Justice O'Connor determined that given FDA's statutory mandate and its factual findings respecting cigarettes and smokeless tobacco products, if those products were classified as ''devices'' under the statute, the ''FDA would be required to remove them from the market.''[204] However, she noted, Congress has made clear its intent that tobacco products not be removed from the market and, in fact, had enacted several pieces of legislation since 1965 related to the problem of tobacco and health, legislation that was predicated on the assumption that tobacco products would remain legal. Justice O'Connor wrote:

> In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years. At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The ''classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'' This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. ''[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it [has] not been expressly amended.''
>
> Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health. . . .

201. 529 U.S. 120 (2000).

202. *Id.* at 134.

203. *Id.*

204. *Id.* at 135.

> In adopting each statute, Congress has acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA [''Food Drug and Cosmetics Act''] to regulate tobacco absent claims of therapeutic benefit by the manufacturer. In fact, on several occasions over this period, and after the health consequences of tobacco use and nicotine's pharmacological effects had become well known, Congress considered and rejected bills that would have granted the FDA such jurisdiction. Under these circumstances, it is evident that Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA.[205]

Justice O'Connor further observed that until this case, the FDA consistently and expressly disavowed jurisdiction to regulate tobacco. In fact, Congress's actions over time made clear ''Congress' intent to preclude *any* administrative agency from exercising significant policymaking authority on the subject of smoking and health.''[206] For instance, when the Federal Trade Commission at one point moved to regulate cigarette labeling and advertising, ''Congress enacted a statute reserving exclusive control over both subjects to itself.''[207] The Court notes:

> Taken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products. We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching this conclusion. Indeed, this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency's position. To the contrary, Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco. In doing so, Congress has been aware of tobacco's health hazards and its pharmacological effects. It has also enacted this legislation against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction under the FDCA to regulate tobacco products as customarily marketed. Further, Congress has persistently acted to preclude a meaningful role for *any* administrative agency in making policy on the subject of tobacco and health. Moreover, the substance of Congress' regulatory scheme is, in an important respect, incompatible with FDA jurisdiction. Although the supervision of product labeling to protect consumer health is a substantial component of the FDA's regulation of drugs and devices, the FCLAA [''Federal Cigarette Labeling and Advertising Act''] and the CSTHEA [''Comprehensive Smokeless Tobacco Health Education Act

205. *Id.* at 143–44 (citations omitted).

206. *Id.* at 149.

207. *Id.*

of 1986''] explicitly prohibit any federal agency from imposing any health-related labeling requirements on cigarettes or smokeless tobacco products.

Under these circumstances, it is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco.[208]

In addition to criticizing the FDA for this sudden reversal of position, the Court questioned whether Congress would have delegated to the FDA the authority to regulate or even to ban tobacco. The Court concluded that it was highly implausible that Congress would have impliedly delegated such a far-reaching authority to the FDA, especially in such a cryptic manner:

Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no ''reasonable assurance of safety,'' it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

. . . .

[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of ''safety'' as it is used throughout the Act—a concept central to the FDCA's regulatory scheme—but also ignore the plain implication of Congress' subsequent tobacco-specific legisla-

208. *Id.* at 155–56 (citations omitted).

tion. It is therefore clear, based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.

By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless, no matter how ''important, conspicuous, and controversial'' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And '' '[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.' ''[209]

Massachusetts v. EPA[210]

A few years later in *Massachusetts v. EPA* the Supreme Court revisited the question of an agency's authority to determine its jurisdiction, but in the context of an agency's *refusal* to assert jurisdiction. The case arose when Massachusetts and several other states sued the EPA, requesting that it be ordered to regulate certain ''greenhouse gases,'' including carbon dioxide, that were alleged to cause global climate change that harmed the party states. Section 202(a)(1) of the Clean Air Act requires that the EPA ''shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator's] judgment causes[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.''[211] The EPA refused to regulate on the basis that is was not authorized to do so under the Clean Air Act and that even if it had such power, it was a reasonable exercise of its discretion to refuse action in light of what it viewed as the uncertainty of climate change science as well as the practical difficulties associated with various proposed regulatory solutions.

Writing for the majority of the *Massachusetts* Court, Justice Stevens held that EPA did have authority to regulate under the statute and that its refusal to do so was not based on specific findings about the lack of scientific evidence. The Court opened by noting the high importance of the issue:

> A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.

209. *Id.* at 159–61 (citations omitted).

210. 549 U.S. 497 (2007).

211. 42 U.S.C. § 7521(a)(1) (2006).

> For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a ''greenhouse gas.''
>
> Calling global warming ''the most pressing environmental challenge of our time,'' a group of States, local governments, and private organizations, alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.[212]

Justice Stevens first determined that the Commonwealth of Massachusetts had standing to present the challenge in its sovereign capacity and as owner of coastal property allegedly subject to erosion as a consequence of global warming. The Court also noted that it was taking the case despite reservations more generally about whether specific plaintiffs had standing because of the ''unusual importance of the underlying issue. . . .''[213] The Court noted the immense international debate on the issue and ongoing efforts to address the issue through legislative and international action. The majority opinion continued:

> Congress . . . addressed the issue in 1987, when it enacted the Global Climate Protection Act. Finding that ''manmade pollution—the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere—may be producing a long-term and substantial increase in the average temperature on Earth,'' Congress directed EPA to propose to Congress a ''coordinated national policy on global climate change,'' and ordered the Secretary of State to work ''through the channels of multilateral diplomacy'' and coordinate diplomatic efforts to combat global warming. Congress emphasized that ''ongoing pollution and deforestation may be contributing now to an irreversible process'' and that ''[n]ecessary actions must be identified and implemented in time to protect the climate.''
>
> Meanwhile, the scientific understanding of climate change progressed. In 1990, the Intergovernmental Panel on Climate Change (IPCC), a multinational scientific body organized under the auspices of the United Nations, published its first comprehensive report on the topic. Drawing on expert opinions from across the globe, the IPCC concluded that ''emissions resulting from human activities are substantially increasing the atmospheric concentrations of . . . greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface.''

212. Massachusetts v. EPA, 549 U.S. 497, 504–05 (2007) (footnotes omitted).

213. *Id.* at 506.

Responding to the IPCC report, the United Nations convened the ''Earth Summit'' in 1992 in Rio de Janeiro. The first President Bush attended and signed the United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding agreement among 154 nations to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of ''prevent[ing] dangerous anthropogenic [*i.e.*, human-induced] interference with the [Earth's] climate system.'' The Senate unanimously ratified the treaty.

Some five years later—after the IPCC issued a second comprehensive report in 1995 concluding that ''[t]he balance of evidence suggests there is a discernible human influence on global climate''—the UNFCCC signatories met in Kyoto, Japan, and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because those targets did not apply to developing and heavily polluting nations such as China and India, the Senate unanimously passed a resolution expressing its sense that the United States should not enter into the Kyoto Protocol. President Clinton did not submit the protocol to the Senate for ratification.[214]

After disposing of several questions involving standing, the Court turned to the merits of the case:

On the merits, the first question is whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a ''judgment'' that such emissions contribute to climate change. We have little trouble concluding that it does. In relevant part, § 202(a)(1) provides that EPA ''shall by regulation prescribe . . . 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 [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an ''air pollutant'' within the meaning of the provision.

The statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of ''air pollutant'' includes ''*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . . .'' On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ''any.'' Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt ''physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.'' The statute is unambiguous.

Rather than relying on statutory text, EPA invokes post-enactment congressional actions and deliberations it views as tantamount

214. *Id.* at 508–09 (citations and footnotes omitted).

to a congressional command to refrain from regulating greenhouse gas emissions. Even if such post-enactment legislative history could shed light on the meaning of an otherwise-unambiguous statute, EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it amended § 202(a)(1) in 1970 and 1977. And unlike EPA, we have no difficulty reconciling Congress' various efforts to promote interagency collaboration and research to better understand climate change with the agency's pre-existing mandate to regulate ''any air pollutant'' that may endanger the public welfare. Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.[215]

The Court then addressed the apparent inconsistency with *FDA v. Brown & Williamson Tobacco Corp.*:

EPA's reliance on *Brown & Williamson Tobacco Corp.*, is ... misplaced. In holding that tobacco products are not ''drugs'' or ''devices'' subject to Food and Drug Administration (FDA) regulation pursuant to the Food, Drug and Cosmetic Act (FDCA), we found critical at least two considerations that have no counterpart in this case.

First, we thought it unlikely that Congress meant to ban tobacco products, which the FDCA would have required had such products been classified as ''drugs'' or ''devices.'' Here, in contrast, EPA jurisdiction would lead to no such extreme measures. EPA would only *regulate* emissions, and even then, it would have to delay any action ''to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance.'' However much a ban on tobacco products clashed with the ''common sense'' intuition that Congress never meant to remove those products from circulation, there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter.

Second, in *Brown & Williamson* we pointed to an unbroken series of congressional enactments that made sense only if adopted ''against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.'' We can point to no such enactments here: EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles. Even if it had, Congress could not have acted against a regulatory ''backdrop'' of disclaimers of regulatory authority. Prior to the order that provoked this litigation, EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it *had* such authority. There is no reason,

215. *Id.* at 528–30 (citations and footnotes omitted).

much less a compelling reason, to accept EPA's invitation to read ambiguity into a clear statute.

EPA finally argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT. But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's ''health'' and ''welfare,'' a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence. Because greenhouse gases fit well within the Clean Air Act's capacious definition of ''air pollutant,'' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.[216]

The EPA further argued that even if it had legal authority to regulate greenhouse gases, it was a reasonable exercise of its discretion to decline to act. The Court rejected this claim, writing:

Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty—which, contrary to Justice Scalia's apparent belief, is in fact all that it said—is irrelevant. The statutory question is whether sufficient information exists to make an endangerment finding.

In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore ''arbitrary, capricious, . . . or otherwise not in accordance with law.'' We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. We hold only that EPA must ground its reasons for action or inaction in the statute.[217]

216. *Id.* at 530–32 (citations omitted).

217. *Id.* at 534–35 (citations omitted).

In one of two dissenting opinions in the case, Justice Scalia argued that nothing in the statute compels the EPA Administrator to determine whether a given substance creates a public health risk, only that the EPA must act if such a judgment is made. Thus, Scalia maintained, the EPA Administrator has discretion whether to make any such judgment in the first place, especially given the contentious nature of the underlying scientific claims about global climate change and the difficulties of identifying a workable regulatory solution to the problem. Scalia explained:

> The provision of law at the heart of this case is § 202(a)(1) of the Clean Air Act (CAA), which provides that the Administrator of the Environmental Protection Agency (EPA) ''shall by regulation prescribe . . . 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.'' As the Court recognizes, the statute ''condition[s] the exercise of EPA's authority on its formation of a 'judgment.' '' There is no dispute that the Administrator has made no such judgment in this case.
>
> The question thus arises: Does anything *require* the Administrator to make a ''judgment'' whenever a petition for rulemaking is filed? Without citation of the statute or any other authority, the Court says yes. Why is that so? When Congress wishes to make private action force an agency's hand, it knows how to do so. Where does the CAA say that the EPA Administrator is required to come to a decision on this question whenever a rulemaking petition is filed? The Court points to no such provision because none exists.[218]

Scalia continues, ''I am willing to assume, for the sake of argument, that the Administrator's discretion in this regard is not entirely unbounded—that if he has no reasonable basis for deferring judgment he must grasp the nettle at once.''[219] But, he continued:

> The Court dismisses this analysis as ''rest[ing] on reasoning divorced from the statutory text.'' ''While the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' . . . that 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.' '' True but irrelevant. When the Administrator *makes* a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that ''cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' But the statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment—the permissible reasons for deciding not to grapple with the issue at the present time. Thus, the various

218. *Id.* at 549–50 (Scalia, J., dissenting) (citations omitted).

219. *Id.* at 550.

> ''policy'' rationales that the Court 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. 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. There is no basis in law for the Court's imposed limitation.
>
> EPA's interpretation of the discretion conferred by the statutory reference to ''its judgment'' is not only reasonable, it is the most natural reading of the text. The Court nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc*. As the Administrator acted within the law in declining to make a ''judgment'' for the policy reasons above set forth, I would uphold the decision to deny the rulemaking petition on that ground alone.[220]

On remand to the EPA, the EPA issued a Notice of Proposed Rulemaking that solicited comments on the possible health effects of greenhouse gases but refused to make any conclusions or findings on the issue.[221] The Notice was prefaced with the following statement by the EPA Administrator:

> EPA's analyses leading up to this ANPR [''Advance Notice of Proposed Rulemaking''] have increasingly raised questions of such importance that the scope of the agency's task has continued to expand. For instance, it has become clear that if EPA were to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, then regulation of smaller stationary sources that also emit GHGs [greenhouse gases]—such as apartment buildings, large homes, schools, and hospitals—could also be triggered. One point is clear: the potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.
>
> This ANPR reflects the complexity and magnitude of the question of whether and how greenhouse gases could be effectively controlled under the Clean Air Act. This document summarizes much of EPA's work and lays out concerns raised by other federal agencies during their review of this work. EPA is publishing this notice today because it is impossible to simultaneously address all the agencies' issues and respond to our legal obligations in a timely manner.
>
> I believe the ANPR demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct

220. *Id.* at 552–53 (citations omitted).

221. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008).

> health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations. These rules would largely preempt or overlay existing programs that help control greenhouse gas emissions and would be relatively ineffective at reducing greenhouse gas concentrations given the potentially damaging effect on jobs and the U.S. economy.[222]

The Notice was followed by a Proposed Rule, issued after the intervening change in presidential administrations. The new Proposed Rule differed significantly from the previous Notice. It stated:

> Today the Administrator is proposing to find that greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations. Concentrations of greenhouse gases are at unprecedented levels compared to the recent and distant past. These high atmospheric levels are the unambiguous result of human emissions, and are very likely the cause of the observed increase in average temperatures and other climatic changes. The effects of the climate change observed to date and projected to occur in the future—including but not limited to the increased likelihood of more frequent and intense heat waves, more wildfires, degraded air quality, more heavy downpours and flooding, increased drought, greater sea level rise, more intense storms, harm to water resources, harm to agriculture, and harm to wildlife and ecosystems—are effects on public health and welfare within the meaning of the Clean Air Act. In light of the likelihood that greenhouse gases cause these effects, and the magnitude of the effects that are occurring and are very likely to occur in the future, the Administrator proposes to find that atmospheric concentrations of greenhouse gases endanger public health and welfare within the meaning of Section 202(a) of the Clean Air Act.[223]

The Administrator also proposed to find that the emissions of some greenhouse gases from motor vehicles contribute to the overall mix of greenhouse gases in the atmosphere: ''Thus, she proposes to find that the emissions of these substances from new motor vehicles and new motor vehicle engines are contributing to air pollution which is endangering the public health and welfare. . . .''[224]

DISCUSSION QUESTIONS

1. In *FDA v. Brown & Williamson Tobacco Corp.*, the FDA asserted jurisdiction to regulate that the Court subsequently said that it lacked. In *Massachusetts v. EPA*, the EPA refused to assert jurisdiction that there was

222. *Id.* at 44,354–55.

223. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,886 (proposed Apr. 24, 2009).

224. *Id.*

strong reason to believe it possessed. Moreover, on remand to the EPA, the Administrator still refused to assert jurisdiction. Do any of the models discussed in this chapter provide a consistent explanation for the decisions of the agencies in these cases?

2. In *Brown & Williamson* the extreme public importance of the issue and the dramatic consequences that would flow from a ruling led the Court to infer that Congress did not intend for the FDA to regulate tobacco. In *Massachusetts v. EPA*, the Court noted the extreme importance of the issue and suggested that this might indicate Congress's intent to have the EPA regulate greenhouse gas emissions. Can the two cases—and the premises upon which the opinions rest—be reconciled? What does public choice and other theories of delegation say about whether Congress generally does or does not intend to delegate on extremely important and controversial issues?

3. In *Massachusetts v. EPA*, Justice Scalia argues that if Congress wanted EPA to regulate greenhouse gases, it could simply mandate that the Administrator make a judgment as required by the statute or alternatively simply order EPA to regulate. Scalia suggests that given the high-profile nature of the issue, Congress's failure to take such steps suggests that Congress did not intend for the EPA to regulate greenhouse gases. Do any of the models discussed in this chapter explain why the EPA Administrator refused to make this judgment? Or why Congress did not order EPA to make that judgment?

4. On remand, the EPA Administrator originally expressed the opinion that regulation of greenhouse gases is an issue that should be left to Congress and not undertaken by the EPA. Why do you believe that he expressed that view? Why might Congress be willing to allow the EPA to issue regulations on this issue rather than undertake to enact legislation as requested by the EPA Administrator?

5. Is it relevant to the determination of whether Congress intended EPA to act that the Senate specifically refused to ratify the Kyoto Treaty? Why or why not?

6. In *Brown & Williamson*, Justice O'Connor noted that on an issue as important and high-profile as the possible banning of tobacco, it would be illogical to assume that Congress would permit an agency to act without a clear expression of congressional intent. In *Massachusetts v. EPA*, in contrast, Justice Stevens stressed the public and economic importance of the issue and that when the Clean Air Act was enacted, given the scientific knowledge of the time, Congress could not have anticipated that greenhouse gases (such as carbon dioxide) might later be considered a pollutant. Justice Stevens further reasoned that when Congress delegates, it does so broadly in order to allow agencies to react to changing conditions. Based on the models discussed in this chapter, which of the underlying assumptions—those expressed by Justice O'Connor or by Justice Stevens—concerning congressional behavior is more plausible?

7. To what extent can the decisions in these cases be explained by the models of ideological judging discussed in this chapter? Keep this question in mind as you read the ''attitudinal model'' of judicial behavior in chapter 7.

8. In *Whitman v. American Trucking Associations, Inc.*,[225] the Supreme Court addressed a nondelegation challenge to certain rules issued by the EPA

225. 531 U.S. 457 (2001).

under the Clean Air Act. Under the Act, the Administrator of the EPA is required to set national ambient air quality standards (NAAQS) for each air pollutant for which ''air quality criteria'' have been issued. Once NAAQS have been promulgated, the Administrator must review the standard and the criteria on which it is based every five years. In 1997, EPA revised the NAAQS for particulate matter and ozone. The American Trucking Associations challenged the EPA action on the ground that the delegation of this authority to the EPA was made without an ''intelligible principle'' and therefore was an improper delegation under the Supreme Court's precedent in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

Several states joined the American Trucking Association (the ''ATA'') in challenging the rules. In *Massachusetts v. EPA*, the named plaintiff and several other states joined in bringing the action to try to force the EPA to regulate greenhouse gases (several other states filed an *amicus* brief supporting the EPA). In *American Trucking*, Michigan, Ohio, and West Virginia opposed the EPA's regulation. In *Massachusetts*, the states bringing the action included California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. Those who filed *amicus* briefs opposing the action in *Massachusetts* included Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah. Does public choice help to provide an explanation of the various states' positions in these two cases?

Professor Todd Zywicki has offered the following hypothesis: Environmental regulation can be very costly. States that adopt stricter environmental regulations such as regulation of greenhouse gases, whether for practical or ideological reasons, thereby create a competitive disadvantage for in state businesses.[226] Other states, notably rural states with low population densities, will be less concerned about issues of ambient air quality and greenhouse gases and will thus oppose strict environmental regulations for economic or ideological reasons. Producers of raw materials (such as coal) or other products (such as automobiles or auto parts) that are likely to be adversely affected by such regulations were they to be promulgated also will oppose stricter regulation.

On this account, states that unilaterally enact strict environmental regulations will support federal action that enables them to export the cost of their regulations onto states with different policy preferences, which Zywicki calls ''political externalities.'' Does this breakdown of state economic interests provide the basis for a persuasive account of the lineup of states in *Massachusetts* and *American Trucking*? If so, does Zywicki's thesis provide any normative insight with respect to the nondelegation doctrine and the allocation of decision-making authority among Congress, agencies, and the courts? Which body is in the best position to respond to the inevitable distributional consequences of any proposed regulation? Why?

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226. *See* Zywicki, *supra* note 115; Jason Scott Johnston, *Climate Change Hysteria and the Supreme Court: The Economic Impact of Global Warming on the U.S. and the Misguided Regulation of Greenhouse Gas Emissions Under the Clean Air Act* (Univ. of Pa. Law Sch. Inst. for Law & Econ., Research Paper No. 08–04, 2008), *available at* http://ssrn.com/abstract=1098476; Henry N. Butler & Todd J. Zywicki, *Expansion of Liability Under Public Nuisance*, 20 S. CT. ECON. REV. (forthcoming 2011).

In *American Trucking*, Justice Breyer wrote a concurring opinion upholding the delegation. Breyer reasoned that the statute affords the EPA Administrator wide latitude to update the requirements of the Clean Air Act and to weigh those standards that '' 'protect the public health' with 'an adequate margin of safety' '' against other values such as economic effects and feasibility.[227] Can those tradeoffs be resolved as a matter of ''technical expertise''? Does the EPA's technical expertise include assessing the economic effects of its regulatory policies? Breyer also argues that given the substantial effect of ambient air quality standards on ''States, cities, industries, and their suppliers and customers, Congress will hear from those whom compliance deadlines affect adversely, and Congress can consider whether legislative change is warranted.'' Should this ''fire alarm'' theory of delegation, meaning that in the event of a significant and unintended result, affected parties will notify Congress, be relevant to the question of whether a court should uphold a delegation? Why or why not?

227. 531 U.S. at 494.