# Essay

## Mandating Unfunded Mandates? Agency Discretion in Rulemaking After *Massachusetts v. EPA*

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### *Introduction*

Traditionally, government agencies have been able to consider policy concerns such as lack of funding and resources when deciding whether to issue rules. Agencies could therefore decide not to promulgate rules for unfunded mandates. In *Massachusetts v. EPA*,[1] the Supreme Court reversed the Environmental Protection Agency's ("EPA") denial of a rulemaking petition, rejecting EPA's policy reasons for not regulating greenhouse gas emissions. EPA, however, did not include lack of funding as one of its justifications for declining to regulate greenhouse gas emissions. The Court's decision thus raises the question of whether it would consider lack of funding a sufficient reason for failing to regulate.

This Essay argues that there remain circumstances under which EPA could refuse to regulate greenhouse gas emissions, justifying its decision on lack of funding.[2] The Essay concludes that lack of funding is still a valid reason for deciding not to regulate. Even in the wake of

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* J.D., 2008, The George Washington University Law School. I would like to thank Notes Editor Elisa Kantor and Articles Editor William Wetmore for their helpful editorial comments and the editors and staff of *The George Washington Law Review* for their hard work.

1 Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

2 Although this Essay argues that EPA, under certain circumstances, can refuse to regu-

*Massachusetts v. EPA*, agencies can still refuse to promulgate rules because a mandate is unfunded.

## *I. Significant Legal Background*

Over the last few decades, the Supreme Court and other courts have appeared very willing to defer to the decisions of administrative agencies. The courts have appeared particularly willing to defer to agency inaction in the form of decisions not to initiate enforcement actions and decisions not to issue rules. This Section discusses this area of the law, including the latest developments in *Massachusetts v. EPA*.

### *A. Agency Discretion in Initiating Enforcement Actions*

Deference to agency inaction is greatest when an agency decides not to bring an enforcement action. The Supreme Court made this clear in *Heckler v. Chaney*,[3] holding that an agency's decision not to initiate enforcement proceedings is presumptively unreviewable.[4] One of the main reasons for this presumption of unreviewability is that a decision to bring an enforcement action requires an agency to balance several factors, including the allocation of scarce agency resources.[5] Thus, agencies are granted great discretion in part because a mandate might be unfunded or underfunded.

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late greenhouse gas emissions from new vehicles, this Essay does not make a normative argument that EPA should refuse to regulate greenhouse gas emissions.

3 Heckler v. Chaney, 470 U.S. 821 (1985).

4 *Id.* at 837–38.

5 *Id.* at 831–32. The Court explained the reasons agency decisions to refuse enforcement are generally unsuitable for judicial review:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, *whether the agency has enough resources to undertake the action at all*. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

*Id.* (emphasis added); *see also* Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987) (discussing three features of nonenforcement decisions that support the presumption of unreviewability); 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.7, at 1272 (4th ed. 2002).

In *Chaney*, the Court did discuss one situation in which the presumption of unreviewability could be rebutted: "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[6] Even this ability to rebut the presumption of unreviewability, however, is in serious doubt after the Court's 2005 decision in *Town of Castle Rock v. Gonzales*.[7] In *Castle Rock*, when faced with such a statute,[8] the Court "held that the statute must be interpreted to confer enforcement discretion on the agency."[9]

The Supreme Court reaffirmed the extreme deference to agency decisions not to initiate enforcement proceedings in *Massachusetts v. EPA*, explaining that "an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review."[10] The Court also repeated the reasons for deferring to agencies, explaining: "As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when the agency decides not to bring an enforcement action."[11]

*Chaney* and *Castle Rock* can be seen as part of a larger movement in the Supreme Court's jurisprudence to grant greater deference to administrative agencies. This movement is perhaps exemplified best by the Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[12] which established that a court must defer to an agency's reasonable interpretation of an ambiguous statute.[13] The Court, however, still had not answered the question of whether agency denials of rulemaking petitions are reviewable. In

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6 *Chaney*, 470 U.S. at 833; *see also* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.7, at 354 (4th ed. Supp. 2007) ("[In *Chaney*, t]he Court stated in dicta . . . that the presumption of unreviewability can be rebutted by a statute that couples the language of command with a justiciable standard.").

7 Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005).

8 "The statute at issue in *Castle Rock* compelled an agency to take an enforcement action when it had 'probable cause' to believe that the statute has been violated and the evidence clearly supported a probable cause finding . . . ." PIERCE, *supra* note 6, § 17.7, at 355.

9 *Id.*; *see also Castle Rock*, 545 U.S. at 761–62.

10 Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (citing *Chaney*, 470 U.S. 821).

11 *Id.* (citations omitted).

12 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984) (deferring to an agency's reasonable interpretation of ambiguous statutes).

13 *Id.*; *see also* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 525, 539–49 (1978) (preventing courts from requiring agencies to use additional procedures beyond those required by agency rules, statutes, and the Constitution); Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 902 (2007).

fact, in *Chaney*, the Court explicitly stated that it did not need to reach that issue.[14]

### *B. Agency Discretion in Rulemaking*

Agencies generally have considerable discretion to refuse to promulgate rules—either by denying a rulemaking petition or by refusing to issue a rule at the end of a rulemaking procedure—for a variety of reasons, including policy determinations on how to allocate scarce resources. Refusing to promulgate a rule because it is unfunded or underfunded presumably would fall within this discretion.

#### *1. Agency Refusal to Initiate a Rulemaking*

The first way an agency can refuse to issue a rule is by denying a petition to institute a rulemaking proceeding.[15] Before *Massachusetts v. EPA*, the Supreme Court had not dealt with the issue of whether agency denials of rulemaking petitions are reviewable. The United States Court of Appeals for the District of Columbia Circuit, however, dealt with this issue in *American Horse Protection Association, Inc. v. Lyng*.[16] In that case, the U.S. Secretary of Agriculture refused to institute rulemaking proceedings in response to a petition to outlaw "the practice of deliberately injuring show horses to improve their performance in the ring."[17] In rejecting the Secretary's explanation for refusing to institute rulemaking proceedings,[18] the D.C. Circuit discussed the differences between agency refusals to institute enforcement proceedings and refusals to institute rulemaking proceedings.[19] The court found that "refusals to institute rulemaking proceedings are distinguishable from other sorts of nonenforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation."[20] For these reasons, the court found that the Supreme

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14 *See* Heckler v. Chaney, 470 U.S. 821, 825 n.2 (1985) ("[T]his case . . . does not involve the question of agency discretion not to invoke rulemaking proceedings.").

15 The Administrative Procedure Act requires an agency to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e) (2006). When a petition is denied, the agency must give "a brief statement of the grounds for denial." *Id.* § 555(e).

16 Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1 (D.C. Cir. 1987).

17 *Id.* at 1.

18 *See id.* at 5–7 (finding that the agency's conclusory statement "that the most effective method of enforcing the Act is to continue the current regulations" was "insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking").

19 *Id.* at 3–4.

20 *Id.* at 4.

Court's holding in *Chaney* does not apply to refusals to institute rulemaking proceedings.[21] The court thus found that agency denials of rulemaking petitions are reviewable.[22]

Nevertheless, agencies still have a significant amount of discretion when denying rulemaking petitions. Under the Administrative Procedure Act, a court reviewing an agency's decision to deny a rulemaking petition must determine whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[23] The level of judicial review that a court applies to such a decision is "extremely narrow."[24] As Professor Richard Pierce explains in his Administrative Law treatise:

> A petition for rulemaking asks an agency, in effect, to devote a significant proportion of its scarce resources to a particular way of addressing a particular problem. An agency can have any number of plausible reasons for declining to take this action, and courts are poorly positioned to evaluate the reasons most frequently given by agencies. These include an agency's decision that it can better address the problem through adjudication given its present level of understanding of the problem, *or that the problem is not sufficiently important to justify allocation of significant scarce resources given the nature of the many other problems the agency is attempting to address*. A court rarely has enough information to second guess agency decisions premised on this type of reasoning. . . . It has little ability to determine the resources available to the agency or to determine whether the other problems to which the agency has chosen to devote its scarce resources are more or less important than the problem raised in the petition.[25]

For these reasons, courts engage in an extremely narrow scope of review. In particular, courts grant agencies an especially high degree of deference where an agency's decision not to institute a rulemaking is based on "'pragmatic considerations' that are 'ill-suited to judicial resolution,' e.g., resource allocation considerations."[26]

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21 *Id.*

22 *Id.*

23 5 U.S.C. § 706(2)(A) (2006); *see also Am. Horse Prot. Ass'n*, 812 F.2d at 4.

24 WWHT v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981); 1 PIERCE, *supra* note 5, § 6.10, at 390.

25 1 PIERCE, *supra* note 5, § 6.10, at 390 (emphasis added).

26 *Id.* at 393 (quoting Prof'l Pilots Fed'n v. FAA, 118 F.3d 758, 763 (D.C. Cir. 1997)).

Agencies thus are allowed a great deal of discretion when denying rulemaking petitions. Although such decisions are reviewable by courts, judges are unlikely to overturn an agency's decision, especially where the agency considers factors such as funding and scarce resources.

### 2. *Agency Refusal to Issue a Rule at the End of a Rulemaking Process*

The other way an agency can refuse to issue a rule is by declining to issue a rule at the end of a rulemaking process. For example, in *Consumer Federation of America v. Consumer Product Safety Commission*,[27] the D.C. Circuit ruled that the Consumer Product Safety Commission did not act in an arbitrary or capricious manner when it terminated a rulemaking proceeding by deciding not to pursue a ban on the sale of adult-size all-terrain vehicles for use by children.[28] Although the court declined to grant as much deference to the agency as it would have in the context of a denial of a petition to initiate a rulemaking, the court decided that the proper standard of review in this situation, "while not extreme, is very substantial."[29] Then-Judge Ruth Bader Ginsburg explained that an agency's selection of means for pursuing policy goals "implicate the allocation of scarce administrative resources; they involve forecasts about the consequences of proposed regulatory actions and other matters the agency ordinarily is best equipped to judge."[30] As Professor Pierce explains:

> The high degree of deference accorded agency decisions of this type is attributable to a combination of factors: (1) there are potentially an infinite number of different rules that represent an arguably appropriate response to a problem within an agency's jurisdictional responsibilities; (2) agencies can rationally respond to a problem through means other than issuance of a rule, e.g., through increased enforcement and adjudication; (3) courts are poorly positioned to second guess agency choices among potential alternative rules or between rules and other potential ways of addressing a problem; and (4) even mandatory statutory language rarely is so

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27 Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n, 990 F.2d 1298 (D.C. Cir. 1993).

28 *Id.* at 1299, 1308.

29 *Id.* at 1305 (internal quotation marks omitted); 1 PIERCE, *supra* note 5, § 6.10, at 390.

30 *Consumer Fed'n of Am.*, 990 F.2d at 1305 (citing Heckler v. Chaney, 470 U.S. 821, 831–32 (1985)).

> clear and detailed that it can be interpreted to require an agency to respond to a problem in a specific manner.[31]

As a result, courts also grant a considerable amount of deference to an agency decision not to issue a rule at the end of a rulemaking proceeding.

Courts, following the lead of the Supreme Court, have traditionally granted agencies a high level of discretion when deciding not to act, either by deciding not to initiate enforcement proceedings, deciding not to initiate a rulemaking proceeding, or deciding not to issue a rule at the end of a rulemaking proceeding. Although courts afford each decision a somewhat different level of deference, a common theme that runs throughout is that a court is very likely to affirm an agency's exercise of discretion where its decision involves practical considerations such as lack of funding and the allocation of scarce resources.

### *C.* Massachusetts v. EPA *and Its Impact on Agency Refusals to Initiate a Rulemaking*

In April 2007, the Supreme Court decided *Massachusetts v. EPA*,[32] which dealt with a denial by EPA of a petition to institute a rulemaking proceeding. In particular, the case dealt with a petition filed under the Clean Air Act.[33] Section 202(a)(1) of the Clean Air Act provides:

> The [EPA] 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 vehicles engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[34]

In 1999, a group of private organizations filed a rulemaking petition asking EPA to regulate greenhouse gas emissions from new motor vehicles under § 202.[35] In 2001, EPA requested public comments on the issues raised in the petition.[36] In 2003, EPA denied the rulemaking petition, justifying its decision with the reasons "(1) that

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31 1 PIERCE, *supra* note 5, § 6.10, at 390–91.

32 Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

33 *See id.* at 1449.

34 42 U.S.C. § 7521(a)(1) (2000).

35 *Massachusetts*, 127 S. Ct. at 1449.

36 *Id.*

. . . the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change . . . and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time."[37]

### *1. Agency Refusal to Initiate a Rulemaking*

Before beginning its review of EPA's decision on the merits, the Court decided whether an agency's denial of a rulemaking petition is reviewable. The Supreme Court affirmed the D.C. Circuit's opinion in *American Horse Protection Association*,[38] holding that "[r]efusals to promulgate rules are . . . susceptible to judicial review, though such review is extremely limited and highly deferential."[39]

### *2.* Massachusetts v. EPA *on the Merits*

In the Court's discussion of the merits of the case, the Court had no trouble dispensing with EPA's first reason for denying the rulemaking petition: that "the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change."[40] The majority easily found that the statute was unambiguous and that it conferred on EPA the jurisdiction "to regulate greenhouse gas emissions from new motor vehicles in the event that [EPA] forms a 'judgment' that such emissions contribute to climate change."[41]

The Court then turned to EPA's other reason for denying the rulemaking petition: "that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time."[42] The majority found that "the statute does condition the exercise of EPA's authority on its formation of a 'judgment.'"[43] But "[i]f EPA makes a finding of endangerment, the Clean Air Act requires

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37 *Id.* at 1450 (citations omitted).

38 *See supra* notes 16–22 and accompanying text.

39 *Massachusetts*, 127 S. Ct. at 1459 (internal quotation marks omitted) ("We therefore 'may reverse any such action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 42 U.S.C. § 7607(d)(9))); *see also* Michael Sugar, Massachusetts v. Environmental Protection Agency, 31 HARV. ENVTL. L. REV. 531, 540 (2007) (discussing how the Court in *Massachusetts v. EPA* "sidestepped *Heckler*" and determined that decisions not to regulate are "sufficiently different from enforcement actions to be reviewable").

40 *Massachusetts*, 127 S. Ct. at 1450, 1459–62.

41 *Id.* at 1459.

42 *Id.* at 1450, 1462–63.

43 *Id.* at 1462.

the agency to regulate emissions of the deleterious pollutant from new motor vehicles."[44]

EPA, in deciding not to regulate greenhouse gas emissions, had offered several policy justifications for its decision:

> that a number of voluntary executive branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions, and that curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue."[45]

The majority summarily rejected all of these policy justifications, stating that "they have nothing to do with whether greenhouse gas emissions contribute to climate change," and "[s]till less do they amount to a reasoned justification for declining to form a scientific judgment."[46] The Court also stated that EPA cannot avoid performing its obligation under the Clean Air Act by noting the scientific uncertainty surrounding climate change. "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."[47]

The majority opinion appears to foreclose the possibility of refusing to regulate greenhouse gas emissions based on policy considerations (e.g., funding considerations). As Justice Scalia stated in his dissenting opinion, the majority "rejects all of EPA's stated policy judgments as not amount[ing] to a reasoned justification, . . . effectively narrowing the universe of potential reasonable bases to a single one: Judgment can be delayed *only* if the Administrator concludes that the scientific uncertainty is [too] profound."[48] At first glance, the Court's opinion seems to foreclose the possibility of refusing to regulate based on policy reasons.[49]

The question thus arises whether the fact that a mandate is unfunded (or underfunded) is justification enough for an agency to refuse to promulgate a rule, despite the clear authority to do so in the wake of *Massachusetts v. EPA*. In other words, can courts order agen-

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44 *Id.*

45 *Id.* at 1462–63 (internal citations omitted).

46 *Id.* at 1463.

47 *Id.*

48 *Id.* at 1472 (Scalia, J., dissenting) (alterations in original) (internal quotation marks omitted).

49 *See id.*

cies to regulate areas for which the statutory authority is there but the funding is not?

## *II. Analysis*

### *A. EPA's Discretion Under the Clean Air Act After* Massachusetts v. EPA

Under the Clean Air Act, before the Court's decision in *Massachusetts v. EPA*, there were two obvious instances in which EPA could conceivably consider policy judgments. First, EPA could make a policy decision whether to exercise its discretion to determine whether greenhouse gases endanger public welfare. The Court, however, rejected EPA's reasons for refusing to make such a determination.[50] The other instance in which EPA could conceivably take into account policy considerations is if it decides that greenhouse gases endanger public welfare. EPA could then decide whether to promulgate a rule. The text of the Clean Air Act and the Court's opinion, however, also seem to foreclose the exercise of discretion in this case.

At first glance, therefore, in the wake of *Massachusetts v. EPA*, it appears that agencies can no longer refuse to promulgate a rule merely because a mandate is unfunded, at least in the case of "unambiguous" statutes like the Clean Air Act. This would represent a marked shift in the level of the Court's deference to administrative agencies in denying rulemaking petitions, or even in the level of deference to administrative agency decisions more generally. Commentators have already begun to discuss the case's importance for deference to administrative agencies.[51] As one commentator noted, "*Massachusetts v. EPA* may be part of an emerging shift away from the expansive deference of the *Chevron* era and toward greater judicial oversight of administrative action."[52]

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50 *See id.* at 1462–63 (majority opinion) ("The statutory question is whether sufficient information exists to make an endangerment finding.").

51 *See, e.g.*, Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 803 (2007) (arguing that *Massachusetts v. EPA* exhibits a "principle of withholding deference when an agency acts undemocratically"); *Leading Cases: Federal Statutes and Regulations: Review of Administrative Action: Limits on Agency Discretion:* Massachusetts v. EPA, 121 HARV. L. REV. 415, 416 (2007) [hereinafter *Leading Cases*].

> Although the debate over global warming and the Court's clarification of state standing doctrine will surely generate both controversy and scholarship, the lasting legacy of *Massachusetts v. EPA* may be its furtherance of the Court's recent retreat from providing expansive judicial deference toward presidential control over the administrative branch.

*Id.*

52 *Leading Cases*, *supra* note 51, at 420.

This reading of the case certainly has strong support. This interpretation is a relatively straightforward reading of *Massachusetts v. EPA*, because, as the majority explained:

> Under the clear terms of the Clean Air Act, EPA can avoid taking further action *only* if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design*.[53]

The majority appears perfectly willing to curtail agency discretion.

Nevertheless, there are reasons to think the Court would still defer to EPA if it based its reasoning on policy justifications such as lack of funding and allocation of scarce resources. First, EPA did not include such reasons as one of its stated reasons either in its denial of the rulemaking petition or in its argument before the Supreme Court.[54] Thus, the Court did not have a reason to determine whether it would defer to EPA in such an instance. Considering the Court's traditional deference to agency decisions based on cost and funding considerations,[55] it is not unreasonable to think the outcome might have been different if EPA had relied on such considerations in denying the rulemaking petition. This is true despite the majority's strong language limiting the circumstances under which EPA can avoid regulating greenhouse gas emissions.[56] The majority itself stated that "[a]s we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."[57]

Moreover, that the Supreme Court overturned EPA's denial of the rulemaking petition does not mean EPA is foreclosed from denying the petition on other grounds. Under *SEC v. Chenery Corp.*,[58] an agency can take an action on remand identical to the action reversed by the court if the agency can provide a different and legally permissible basis for the action.[59] On remand, EPA could therefore deny the rulemaking petition on the grounds that the agency does not wish to

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53 *Massachusetts*, 127 S. Ct. at 1462 (emphasis added) (citation omitted).

54 *See id.* at 1462–63.

55 *See supra* Parts I.A–B.

56 *Massachusetts*, 127 S. Ct. at 1462.

57 *Id.* at 1459.

58 SEC v. Chenery Corp., 332 U.S. 194 (1947).

59 *Id.* at 199–201.

devote its scarce resources to regulating greenhouse gas emissions from new vehicles, and the Court could uphold such a decision on the newly stated grounds.

Perhaps more importantly, the majority left itself an escape hatch at the very end of its opinion. The majority stated, "[w]e 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*."[60] The Court did not elaborate on this statement, but it seems to imply that even if EPA makes a "judgment" that greenhouse gas emissions from new vehicles may endanger public health or welfare, EPA will still have discretion to decide what, if anything, to do about such emissions. Seen in the broader context of the Supreme Court's deference jurisprudence, it appears that EPA could still decide not to regulate greenhouse gas emissions if it bases its decision on considerations of funding and scarce-resource allocation. The fact that regulating greenhouse gas emissions might be an unfunded mandate presumably would permit EPA to decide not to regulate the emissions.

This conclusion is bolstered by § 202(a)(2) of the Clean Air Act, which provides that "[a]ny regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, *giving appropriate consideration to the cost of compliance within such period*."[61] The majority in *Massachusetts v. EPA* specifically relied on this section of the Clean Air Act in determining that EPA has the authority to regulate greenhouse gas emissions from new vehicles; the Court reasoned that allowing EPA to regulate would not lead to any drastic measures because the agency "would have to delay any action 'to permit the development and application of the requisite technology.'"[62] EPA thus appears to have discretion under both the Clean Air Act and under Supreme Court precedent to delay regulation of greenhouse gas emissions. Because of the Court's deference to agency decisions based on allocation of scarce resources, EPA could likely delay regulation indefinitely, again permitting EPA to refuse to regulate.

Despite the arguments that *Massachusetts v. EPA* represents a "retreat from providing expansive judicial deference toward presiden-

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60 *Massachusetts*, 127 S. Ct. at 1463 (emphasis added).

61 42 U.S.C. § 7521(a)(2) (2000) (emphasis added).

62 *Massachusetts*, 127 S. Ct. at 1461 (quoting 42 U.S.C. § 7521(a)(2)).

tial control over the administrative branch,"[63] there are compelling reasons to think that EPA can still take into account whether a mandate is unfunded in deciding whether to regulate greenhouse gas emissions. It might be able to decide not to make a "judgment" as to whether greenhouse gas emissions endanger public health and welfare. Even if EPA cannot refuse to make this decision, it can delay indefinitely any action.

### *B. Agency Discretion Regarding Unfunded Mandates*

If, in the face of a strong rebuke from the Supreme Court, EPA can still take into account whether a mandate is unfunded in determining whether to issue a rule, then other agencies certainly can take such considerations into account. This is consistent with Supreme Court precedent, which has granted great deference to agency decisions not to issue rules (either by denying a rulemaking petition or by refusing to issue a rule at the end of a rulemaking process), especially where such decisions are based on pragmatic considerations such as resource allocation considerations.[64] Despite an agency's clear authority to promulgate a rule in the wake of *Massachusetts v. EPA*, an agency is still free to refuse to promulgate a rule if it justifies its decision on the fact that a mandate is unfunded.

## *III. Conclusion*

In *Massachusetts v. EPA*, the Supreme Court held that the Clean Air Act requires EPA to determine whether greenhouse gas emissions from new vehicles contribute to global warming. In addition, the Court held that if EPA makes such a determination, it must regulate such emissions. Despite the unambiguous Clean Air Act and the Court's opinion, however, this Essay points to circumstances in which EPA can refuse to issue a rule to regulate greenhouse gas emissions. This is consistent with the Court's extreme deference to agency "discretion to choose how best to marshal its limited resources."[65] Even in the wake of *Massachusetts v. EPA*, EPA and other agencies can refuse to promulgate a rule based on the justification that a mandate is unfunded or underfunded.

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63 *Leading Cases*, *supra* note 51, at 416.

64 *See supra* Part I.B; *see also* 1 PIERCE, *supra* note 5, § 6.10, at 393 (discussing the greater amount of deference granted to an agency's decision not to institute a rulemaking proceeding where the decision is based on considerations such as resource allocation).

65 *Massachusetts*, 127 S. Ct. at 1459.