

perform that role effectively. The Court's holding — that internal inconsistencies do not always render agency action arbitrary and capricious — facilitates a productive deliberative process within agencies. Had the Court held otherwise, the decision could have stifled debates among agency officials. Either agency officials would hesitate to disagree with one another in the first place or they would express disagreement informally.⁷⁴ The former would hamper the agency's ability to make wise decisions (undermining the expertise rationale for deference to agency interpretations), and the latter would minimize agency transparency (mitigating the democracy/accountability rationale for deference). While *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*⁷⁵ made this point on a large scale — accepting shifts in policy views over time so long as they were based upon a “reasoned analysis”⁷⁶ — allowing an agency to be inconsistent as it develops a policy is also important.⁷⁷

By reinforcing agencies' policymaking function and then enhancing agencies' ability to perform that function effectively, *Home Builders* strengthened agencies' position as important interpretive institutions within the regulatory state. The Court's decision reaffirms that *Chevron* is not merely narrowly applicable to statutory ambiguity but, rather, is a basic statement that statutory conflicts without clear solutions present policy, not legal, problems and that agencies are the appropriate institutions to address them.

3. *Limits on Agency Discretion.* — The Bush White House is famous (or infamous) for reshaping the nation's environmental regulations: it has eased pollution regulations for coal-fired power plants;¹ it has sought to undercut smog and soot regulations with the Orwellian-titled “Clear Skies Initiative”;² it has allowed the energy industry to determine environmental policy;³ and it has pressured the Environmental Protection Agency (EPA) to remove global warming from its

⁷⁴ Cf. FED. R. CIV. P. 26(b)(3) (shielding attorney work product from discovery); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (explaining that without the work product doctrine, “much of what is now put down in writing would remain unwritten” and “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial”).

⁷⁵ 463 U.S. 29 (1983).

⁷⁶ *Id.* at 42.

⁷⁷ On the value of accepting some agency inconsistency, see generally Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 588–89 (1985).

¹ Michael Janofsky, *Inspector General Says E.P.A. Rule Aids Polluters*, N.Y. TIMES, Oct. 1, 2004, at A12.

² Editorial, *Clear Skies, R.I.P.*, N.Y. TIMES, Mar. 7, 2005, at A16.

³ See Christopher Drew & Richard A. Oppel, Jr., *How Power Lobby Won Battle of Pollution Control at E.P.A.*, N.Y. TIMES, Mar. 6, 2004, at A1 (describing Vice President Cheney's role in changing environmental policy into a pro-energy industry policy).

annual pollution report.⁴ In a rebuke to the White House's ideological approach to environmental policy, the Supreme Court held last Term in *Massachusetts v. EPA*⁵ that greenhouse gases fall within the meaning of "air pollutant" under section 202(a)(1) of the Clean Air Act⁶ (CAA), that the EPA's rejection of a rulemaking petition was based on impermissible considerations, and that states had standing to challenge the EPA's inaction. 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.

The existence of life on Earth requires certain gases in the atmosphere that trap solar energy and heat, acting like a natural greenhouse and creating habitable temperatures.⁷ When these greenhouse gases are artificially introduced into the atmosphere, they intensify the greenhouse effect.⁸ The resultant global warming has the potential, among other things, to increase flash floods in the Appalachians, diminish the water supply from the Great Lakes, and create rising sea levels and storm surges on coastlines.⁹ In 1999, a group of nineteen private organizations petitioned the EPA to use its authority under section 202 of the CAA to regulate greenhouse gas emissions from new motor vehicles.¹⁰ In 2003, after a comment period, the EPA denied the rulemaking petition.¹¹ The EPA argued that it lacked statutory authority to regulate greenhouse gases such as carbon dioxide.¹² As a

⁴ Andrew C. Revkin, *With White House Approval, E.P.A. Pollution Report Omits Global Warming Section*, N.Y. TIMES, Sept. 15, 2002, at 30.

⁵ 127 S. Ct. 1438 (2007).

⁶ 42 U.S.C. § 7521(a)(1) (2000). The Clean Air Act provides in relevant part: "The Administrator 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." *Id.*

⁷ PEW CENTER ON GLOBAL CLIMATE CHANGE, THE GREENHOUSE EFFECT, http://www.pewclimate.org/global-warming-basics/facts_and_figures/climate_science_basics/ghe.cfm (last visited Oct. 6, 2007).

⁸ *Id.*

⁹ See *Massachusetts v. EPA*, 415 F.3d 50, 61 (D.C. Cir. 2005) (Tatel, J., dissenting).

¹⁰ *Massachusetts v. EPA*, 127 S. Ct. at 1449 & n.15.

¹¹ *Id.* at 1450.

¹² The EPA argued that greenhouse gases did not fit under the CAA definition of "air pollutants" for three reasons: first, Congress had rejected the opportunity to regulate such gases when considering the CAA; second, Congress designed the statute to address local air pollutants rather than substances present in the earth's atmosphere; and third, EPA regulation would conflict with Department of Transportation jurisdiction over fuel economy standards. *Id.* at 1450–51. Notably, however, the EPA's General Counsel wrote a legal opinion in 1988 concluding that carbon dioxide emissions *were* within the EPA's regulatory authority. *Id.* at 1449.

fallback position, the EPA contended that regulation was unwise because a causal link between the greenhouse effect and global warming “[could] not be unequivocally established,”¹³ because regulation conflicted with the President’s “comprehensive approach” to global warming, and because regulation might impede the President’s ability to negotiate with developing countries on emissions reduction.¹⁴

Together with several states and local governments, the petitioners sought review in the United States Court of Appeals for the District of Columbia Circuit.¹⁵ A divided panel denied the petition for review.¹⁶ Announcing the judgment of the court, Judge Randolph assumed *arguendo* that the EPA had authority to regulate greenhouse gases, but found the EPA Administrator within his discretion not to initiate rulemaking because he had relied on policy considerations.¹⁷ Judge Sentelle concurred in the judgment but dissented in part, concluding that the petitioners did not have standing to sue because their injury was not “particularized . . . in a personal and individual way.”¹⁸ Judge Tatel dissented. After finding that Massachusetts had standing given the “loss of land within its sovereign boundaries”¹⁹ due to rising sea levels, Judge Tatel read the CAA as unambiguously granting authority to regulate emissions²⁰ and found the EPA Administrator’s policy reasons for refusing to regulate to be impermissible.²¹

The Supreme Court reversed and remanded. In an opinion by Justice Stevens,²² the Court held that Massachusetts had standing to challenge the EPA’s refusal to regulate, that the CAA gave the EPA authority to regulate motor vehicle emissions, and that the EPA’s justifications for refusing to regulate were inconsistent with the statutory requirement.²³ Turning first to standing, the majority found that Congress had established a procedural right to challenge unlawfully withheld actions²⁴ and that the litigant could therefore “assert that right without meeting all the normal standards for redressability and

¹³ *Id.* at 1451 (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930 (Sept. 8, 2003)).

¹⁴ *Id.*

¹⁵ *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005).

¹⁶ *Id.* at 53, 58–59.

¹⁷ *Id.* at 56, 58. Judge Randolph believed the issue of standing overlapped with the merits. *Id.* at 55–56.

¹⁸ *Id.* at 59–60 (Sentelle, J., dissenting in part and concurring in the judgment) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)) (internal quotation marks omitted).

¹⁹ *Id.* at 65 (Tatel, J., dissenting).

²⁰ *Id.* at 67–73.

²¹ *Id.* at 73–75.

²² Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg, and Breyer.

²³ *Massachusetts v. EPA*, 127 S. Ct. at 1458, 1459, 1462–63.

²⁴ *Id.* at 1453.

immediacy.”²⁵ The Court then held that states have a quasi-sovereign interest distinct from proprietary, landowning,²⁶ or *parens patriae*²⁷ interests.²⁸ This quasi-sovereign interest in “preserv[ing] its sovereign territory” was reinforced by the state’s surrender of “sovereign prerogatives” to the federal government when it entered the Union and by the “concomitant” congressionally established procedural right.²⁹ Together, that right and interest “entitled [the state] to special solicitude in [the Court’s] standing analysis.”³⁰ Applying the tripartite injury-causation-redress test set forth in *Lujan v. Defenders of Wildlife*,³¹ the majority held that Massachusetts had standing: injury occurred because “rising seas have already begun to swallow [its] coastal land”;³² causation was recognized because the EPA never disputed that greenhouse gas emissions cause global warming;³³ and redress was possible because regulating motor vehicle emissions would “slow or reduce” global warming.³⁴

The majority then announced that an agency refusal to promulgate rules is subject to judicial review.³⁵ Ratifying the D.C. Circuit’s opinion in *American Horse Protection Ass’n v. Lyng*,³⁶ the Court distinguished between an agency decision not to bring enforcement actions, which is generally unreviewable,³⁷ and a refusal to initiate rulemaking, which often involves legal analysis, public explanations, and proce-

²⁵ *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)) (internal quotation mark omitted).

²⁶ This quasi-sovereign interest is “independent of and behind the titles of its citizens, in all the earth and air within its domain.” *Id.* at 1454 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

²⁷ Under *parens patriae* standing doctrine, the state is granted standing to represent the interests of its citizens. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 289–90 (5th ed. 2003).

²⁸ See *Massachusetts v. EPA*, 127 S. Ct. at 1454–55; see also *id.* at 1455 n.17 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 484–85 (1923) (implying that the Court can adjudicate a state’s “rights of person or property,” “rights of dominion over physical domain,” and “quasi-sovereign rights actually invaded or threatened,” but cannot adjudicate “abstract questions of political power, of sovereignty, of government”)).

²⁹ *Id.* at 1454.

³⁰ *Id.* at 1454–55. The Court did not explain how this “special solicitude” factored into its analysis.

³¹ See 504 U.S. 555, 560–61 (1992) (requiring that plaintiffs have suffered a “concrete and particularized” injury that is either “actual or imminent,” that the injury be caused by the defendant, and that a judicial decision will redress the injury).

³² *Massachusetts v. EPA*, 127 S. Ct. at 1456.

³³ *Id.* at 1457. The Court rejected the EPA’s argument that the effect of greenhouse gas emissions on global warming was “insignificant,” noting that incremental steps can be meaningful. *Id.* at 1457–58.

³⁴ *Id.* at 1458 (emphasis omitted).

³⁵ *Id.* at 1459.

³⁶ 812 F.2d 1, 4 (D.C. Cir. 1987).

³⁷ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

dural rights of petitioners.³⁸ The Court also noted that the CAA explicitly allows judicial review of refusals to regulate.³⁹

On the merits, the Court first held that section 202(a)(1) of the CAA authorizes the EPA to regulate greenhouse gases.⁴⁰ The statute was facially unambiguous, referring to “any air pollution agent” and “any physical, chemical . . . substance or matter which is emitted into . . . the ambient air,”⁴¹ and the broad language demonstrated Congress’s desire for a flexible statutory rule.⁴² The Court then held that the EPA’s fallback argument — that it would be unwise to regulate greenhouse gases — was statutorily impermissible.⁴³ The statute required the Administrator’s “judgment” only to determine whether an air pollutant “cause[s], or contribute[s]” to air pollution affecting public health and welfare.⁴⁴ Thus, the EPA could avoid action only if it found no causal link or if it explained why it could not or would not determine whether a causal link existed.⁴⁵

Chief Justice Roberts dissented.⁴⁶ He began by attacking the Court’s “special solicitude” for states, arguing that neither the Constitution nor the CAA established different standing requirements for public and private litigants.⁴⁷ He then distinguished traditional *parens patriae* standing, which requires states to demonstrate injury-causation-redress for both its citizens and its own quasi-sovereign interest,⁴⁸ from the Court’s approach, which he dubbed “a new doctrine of state standing.”⁴⁹ The Chief Justice then argued that the litigants failed each of *Lujan*’s prongs,⁵⁰ concluding that the petitioners’ goals were symbolic and should have been left to the political arena.⁵¹

³⁸ *Massachusetts v. EPA*, 127 S. Ct. at 1459; see also *Lyng*, 812 F.2d at 3–4.

³⁹ *Massachusetts v. EPA*, 127 S. Ct. at 1459 (citing 42 U.S.C. § 7607(b)(1) (2000)).

⁴⁰ *Id.*

⁴¹ *Id.* at 1460 (quoting 42 U.S.C. § 7602(g) (2000)).

⁴² *Id.* at 1462. The Court also criticized the EPA’s use of post-enactment legislative history. *Id.* at 1460. Additionally, it distinguished *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000): first, the Court thought Congress would not have intended the FDA to *ban* tobacco products, but Congress reasonably could have wanted the EPA to *regulate* greenhouse gases; and second, Congress acted against the backdrop of the FDA’s repeated denials of authority over tobacco, whereas the EPA had declared authority over greenhouse gases in 1998. Finally, the Court found that overlap in Department of Transportation and EPA authority was not inconsistent. *Id.* at 1461–62.

⁴³ *Id.* at 1462.

⁴⁴ *Id.* (alterations in original) (quoting 42 U.S.C. § 7521(a)(1) (2000)).

⁴⁵ *Id.*

⁴⁶ The Chief Justice was joined by Justices Scalia, Thomas, and Alito.

⁴⁷ *Massachusetts v. EPA*, 127 S. Ct. at 1464–65 (Roberts, C.J., dissenting).

⁴⁸ *Id.* at 1465–66.

⁴⁹ *Id.* at 1471.

⁵⁰ *Id.* at 1466–71.

⁵¹ *Id.* at 1464, 1471.

Justice Scalia also dissented.⁵² Focusing on the merits, he argued that the CAA does not require the EPA Administrator to make a “judgment” whenever a petition for rulemaking is filed.⁵³ Rather, the EPA Administrator could *defer* a judgment.⁵⁴ Justice Scalia then commented that the Court had ignored the EPA’s references to uncertainty in climate change science,⁵⁵ and he took issue with the majority’s interpretation of the EPA’s statutory authority, particularly the phrase “air pollutant.” In the statutory text — “any air pollution agent . . . including any physical, chemical . . . substance” — the word “including” was intended as a limitation on “air pollution agent,” not as an illustration of potential “air pollution agent[s].”⁵⁶ Applying *Chevron*,⁵⁷ Justice Scalia found the definition of “air pollution” ambiguous, the EPA’s interpretation reasonable, and deference appropriate.⁵⁸

Massachusetts v. EPA is certainly significant because the Court entered the public debate on global warming and because the Court’s identification of a source of state standing outside proprietary interests or *parens patriae* has the potential to empower the states to compel federal regulation. But focusing on these particular holdings may miss the broader significance of the case: *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. Since the early 1980s, the presidential control model has dominated debates on discretion, accountability, and judicial review. However, recent decisions — some involving highly charged political issues — have looked suspiciously upon expansive presidential control arguments and ultimately rejected them. On the spectrum between broad presidential power and multiple avenues of administrative accountability,⁵⁹ *Massachusetts v. EPA* marks another step away from the political conception of administration founded in the values of the incumbent administration, and toward a more neutral, judicially-enforced administrative state.

In the 1980s and 1990s, commentators on the left and right converged on presidential power over agencies as a mechanism for admin-

⁵² Justice Scalia was joined by Chief Justice Roberts and Justices Thomas and Alito.

⁵³ *Massachusetts v. EPA*, 127 S. Ct. at 1472 (Scalia, J., dissenting).

⁵⁴ *Id.* at 1473.

⁵⁵ *Id.* at 1474–75.

⁵⁶ *Id.* at 1475–76.

⁵⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁵⁸ *Massachusetts v. EPA*, 127 S. Ct. at 1476–77.

⁵⁹ See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI-KENT L. REV. 987 (1997); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2337 n.347 (2001).

istrative accountability⁶⁰ and effective regulation.⁶¹ Presidents Reagan and Clinton so expanded presidential power over the regulatory state that then-Professor Elena Kagan declared in 2001, “[w]e live today in an era of presidential administration.”⁶² Under this model, judicial involvement threatened effective and accountable administration, and so in a series of cases the Supreme Court at once reduced its own oversight and expanded agency discretion: *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel*⁶³ prevented judges from adding procedures to agency decisionmaking,⁶⁴ *Chevron* announced deference to agencies’ reasonable interpretations of ambiguous statutes,⁶⁵ and *Lujan*, expressing a fear of ideological plaintiffs, restricted standing to those who could meet injury-in-fact, causation, and redressability requirements.⁶⁶

But despite the general acceptance of presidential control theory and its corollary of judicial deference, in recent years the Supreme Court has looked with suspicion on politically motivated administration, and it has taken a few unmistakable steps that signal executive authority is not unbounded and will be held externally accountable. The clear divide between the majority and dissent in *FDA v. Brown & Williamson*⁶⁷ illustrates the Court’s steps toward a greater oversight role. President Clinton had decided to allow the FDA to declare nicotine an addictive drug in an effort to fight youth smoking.⁶⁸ Channeling presidential control theory, Justice Breyer’s dissent argued that the President and Vice President are the “only” officials the entire nation elects and that they would thus be held “politically accountable” for

⁶⁰ The President is the most democratically accountable official because he is elected by the entire nation and is thus accountable to it. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1676–77 (2004); Farina, *supra* note 59, at 990–91; see generally Kagan, *supra* note 59, at 2272–2319.

⁶¹ See Kagan, *supra* note 59, at 2339–46.

⁶² *Id.* at 2246.

⁶³ 435 U.S. 519 (1978).

⁶⁴ *Id.*

⁶⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see also Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL’Y 227, 230 (1998); cf. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968). Other examples abound. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that agency inaction in enforcement is immune from judicial review); *Allen v. Wright*, 468 U.S. 737, 760 (1984) (expressing concern that a broad standing doctrine would allow judges to become “continuing monitors of the wisdom and soundness of Executive action” (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972))).

⁶⁷ 529 U.S. 120 (2000) (holding that tobacco was not a “drug” the FDA could regulate under the federal Food, Drug, and Cosmetic Act).

⁶⁸ See Philip J. Hilts, *Clinton to Seek New Restrictions on Young Smokers*, N.Y. TIMES, Aug. 10, 1995, at A1.

the FDA's decision.⁶⁹ The majority rejected this argument, noting that "regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate . . . must always be grounded in a valid grant of authority from Congress."⁷⁰ A year later, in *United States v. Mead Corp.*,⁷¹ the Court placed significant limits on *Chevron* deference, resurrecting the less-deferential *Skidmore*⁷² standard and further narrowing agency discretion. Notably, the *Mead* Court explicitly rebuffed the presidential or political control approach when it rejected Justice Scalia's suggestion that *Chevron* apply to all "authoritative" interpretations — those approved by the highest political officials.⁷³ Finally, last year in *Gonzales v. Oregon*,⁷⁴ another case with strong political overtones, the Court censured the Attorney General for acting "without consulting . . . anyone outside his Department,"⁷⁵ and stated that his position would "effect a radical shift of authority."⁷⁶ Instead of deferring to the executive branch, the Court balanced the "agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws."⁷⁷ In each case, the Court expanded its review beyond the deference expected in the *Chevron* era.

Read in the context of these decisions, *Massachusetts v. EPA* is another strike against the presidential control model and in favor of heightened external accountability. Consider the standing issue, for example: Standing doctrines have been linked to executive power theories via the separation of powers. In a 1983 article, then-Judge Scalia argued that expansive standing doctrines infringe on the President's power and make courts an equal branch "in the formulation of public policy."⁷⁸ A decade later, in *Lujan*, the Court adopted Justice Scalia's position: the judiciary should not supervise administrative actions, and it should not adopt expansive standing doctrines to facilitate review because such review would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to

⁶⁹ *Brown & Williamson*, 529 U.S. at 190 (Breyer, J., dissenting).

⁷⁰ *Id.* at 161 (majority opinion) (citation omitted).

⁷¹ 533 U.S. 218, 226–27 (2001) (holding that agency interpretations only get *Chevron* deference if Congress has delegated the authority to make rules carrying the force of law and if the interpretation in question was promulgated under that authority).

⁷² *Skidmore v. Swift*, 323 U.S. 134 (1944).

⁷³ *Mead*, 533 U.S. at 238 n.19; see also *id.* at 257 (Scalia, J., dissenting).

⁷⁴ 126 S. Ct. 904 (2006) (holding that the Controlled Substances Act did not allow the Attorney General to prohibit doctors from prescribing drugs for physician-assisted suicide).

⁷⁵ *Id.* at 913.

⁷⁶ *Id.* at 925.

⁷⁷ *Id.* at 914.

⁷⁸ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 893 (1983).

‘take Care that the Laws be faithfully executed.’”⁷⁹ *Massachusetts v. EPA* marks a shift away from this position, recognizing that *the Court* should ensure that the law is executed properly. The *Massachusetts v. EPA* Court announced that the dispute “turn[ed] on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.”⁸⁰ Such language more closely resembles *Marbury*’s judicial supremacy, that it is the province of the judiciary to “say what the law is,”⁸¹ than *Chevron*’s deferential acquiescence, that “federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do.”⁸² Indeed, formally recognizing that persons with procedural rights need not meet the stringent requirements of *Lujan* and explicitly identifying the quasi-sovereign interests of states both amount to significant expansions of standing doctrine. In Justice Scalia’s zero-sum separation of powers analysis, this expansion of the judicial role necessarily requires a curtailment of executive power and discretion.

Moreover, the Court’s method of expanding *state* standing challenges presidential accountability theory, identifying states, rather than the President, as an appropriate locus of accountability. Under the presidential control theory, the president’s national constituency, responsiveness, and transparency⁸³ imply that federal administrators should be held accountable via political channels, particularly for hot-button issues like global warming.⁸⁴ However, because some of the traditional “sovereign prerogatives” of states — to negotiate treaties, to compel other states by invasion or force, or in some cases to regulate in-state — have been transferred to the federal administrative state, the states have a “stake in protecting [their] quasi-sovereign interests.”⁸⁵ Thus, although many scholars have identified accountability arising from other branches of government⁸⁶ or from the citizen-

⁷⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3). Whether the Take Care Clause is actually relevant to standing is unclear. Professor Cass Sunstein argues that the Take Care Clause is “irrelevant” because the courts would only be reviewing illegal actions, thus creating no constitutional problem. Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 213 (1992).

⁸⁰ *Massachusetts v. EPA*, 127 S. Ct. at 1453.

⁸¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁸² *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). Indeed, *Chevron* has been called the “counter-*Marbury*.” Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006).

⁸³ See Kagan, *supra* note 59, at 2331–39.

⁸⁴ Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190–91 (2000) (Breyer, J., dissenting).

⁸⁵ *Massachusetts v. EPA*, 127 S. Ct. at 1454.

⁸⁶ See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

ry,⁸⁷ the Court drew on accountability derived from federalism, a retreat from the simplicity of the presidential accountability model.⁸⁸

Additionally, the Court's decision to review the EPA's refusal to initiate rulemaking represents another rejection of expansive executive power theories. In *Heckler v. Chaney*,⁸⁹ the Court held that an agency's refusal to undertake enforcement actions was unreviewable because it "involve[d] a complicated balancing of a number of factors," did not involve "coercive power over an individual's liberty or property rights," and was akin to a prosecutorial decision that implicated the Take Care Clause.⁹⁰ In its merits brief, the EPA argued that *Chaney* created a "deferential standard" that was "equally applicable" to a refusal to initiate rulemaking.⁹¹ But the Court refused to interpret *Chaney*'s unreviewability doctrine as counseling deference to an agency refusal to initiate rulemaking.⁹² Rather, it ratified the D.C. Circuit's decision in *Lyng*,⁹³ which found such cases to be reviewable. Notably, neither Chief Justice Roberts nor Justice Scalia mentioned *Chaney*, *Lyng*, or the majority's treatment of the standard of review for refusals to initiate rulemaking proceedings.

The Court most explicitly showed its distrust of political influence on the merits. In holding that the EPA could not "ignore the statutory text,"⁹⁴ the Court noted that "[t]o the extent that this constrains agency discretion to pursue other priorities of the Administrator or the Presi-

⁸⁷ See Jaffe, *supra* note 66; Sunstein, *supra* note 79, at 183–92; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1443–44 (1988); see generally *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 615–17 (2d Cir. 1965).

⁸⁸ Justice Kennedy in particular may have been sympathetic to expanding state-based accountability, given his argument in *United States v. Lopez*, 514 U.S. 549, 575–76 (1995), that federal and state governments can prevent tyranny by checking each other's power. The shift away from presidential accountability may also help explain Justice Kennedy's opinion for the Court in *Gonzales v. Oregon*, in which the Court noted that Congress did not have the "far-reaching intent to alter the federal-state balance" by granting total interpretive authority to "a single Executive officer." 126 S. Ct. 904, 925 (2006).

⁸⁹ 470 U.S. 821 (1985).

⁹⁰ *Id.* at 831–32. See Bressman, *supra* note 60, at 1678 (arguing that *Chaney* can be explained by the presidential control model).

⁹¹ Brief for the Federal Respondent at 37–38, *Massachusetts v. EPA*, 127 S. Ct. 1438 (No. 05–11120), 2006 WL 3043970.

⁹² The Court's decision is supported by *Chaney* itself: the *Chaney* Court recognized that agency decisions denying jurisdiction or "abdicat[ing] . . . statutory responsibilities" might not be within the discretion of the agency. *Chaney*, 470 U.S. at 833 n.4. Still, the *Chaney* Court refused to decide whether such situations were reviewable. *Id.*

⁹³ 812 F.2d 1, 4 (D.C. Cir. 1987) (noting that agency refusals to initiate rulemaking were "less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation"). The EPA also sought to characterize *Lyng* as suggesting extreme deference to refusals to initiate rulemaking proceedings. See Brief for the Federal Respondent, *supra* note 91, at 38 n.15.

⁹⁴ *Massachusetts v. EPA*, 127 S. Ct. at 1462.

dent, this is the congressional design.”⁹⁵ Reserving its most forceful language to criticize one factor on the EPA’s “laundry list” of impermissible reasons not to regulate, the Court declared that “while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.”⁹⁶ In the context of the Bush White House’s well-known ideologically driven approach to environmental policy,⁹⁷ such statements amount to a significant reprimand of political influence over administrative decisions.

Although *Massachusetts v. EPA* takes noteworthy steps away from a political conception of the administrative state, grounded in executive primacy, it is too early to tell whether these steps constitute a sea change in the administrative law akin to the one begun in the 1980s. The Supreme Court today is deeply divided, and in many of the most controversial cases, eight Justices’ votes predictably fall along political lines,⁹⁸ canceling each other out. In this 5–4 Court, cases such as *Massachusetts v. EPA* often turn on the views of Justice Kennedy, meaning any predictions as to the larger significance or “direction” of the Court are at the mercy of a single Justice. Given the political overtones of the case, including its reference to Hurricane Katrina,⁹⁹ the Court may not have intended to further a trend of active judicial review, but rather simply to force a reluctant administration to act on a pressing problem whose solution had achieved widespread consensus.

Still, when coupled with the decisions in *Brown & Williamson*, *Mead*, and *Gonzales v. Oregon*, *Massachusetts v. EPA* highlights an emerging trend of heightened judicial oversight of executive agency actions. Suspicious of politically motivated administrative interpretation, the Court seems to believe that the administrative state is not merely an arm of the President, but rather that it still has some characteristics of a “fourth branch”¹⁰⁰ of government.

H. Sherman Act

Minimum Resale Price Maintenance. — For nearly a century, it was per se unlawful under the Sherman Act¹ for a manufacturer and its distributors or retailers to agree on minimum resale prices for the

⁹⁵ *Id.*

⁹⁶ *Id.* at 1462–63.

⁹⁷ See *supra* notes 1–4.

⁹⁸ For example, the *Brown & Williamson* dissenters were in the *Massachusetts v. EPA* majority. See also Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

⁹⁹ *Massachusetts v. EPA*, 127 S. Ct. at 1456 n.18.

¹⁰⁰ *FTC v. Ruberoid*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

¹ 15 U.S.C. §§ 1–7 (2000 & Supp. IV 2004).