Litigating to Regulate: *Massachusetts v. Environmental Protection Agency*

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I. Introduction

By a 5-4 vote in *Massachusetts v. Environmental Protection Agency*,[1] the Supreme Court took yet another significant step away from the Framers' vision of the judiciary and toward a politicized Supreme Court sitting as a super-legislature and super-regulator. The Court substituted its judgment for that of the politically accountable branches of the federal government. By dramatically loosening the rules of standing, the Court invited those unhappy with the federal government's failure to regulate in a particular manner in any substantive area to use the federal courts to force federal agencies to regulate. In short, the Court encouraged interest groups to seek to obtain from the courts what they could not from agencies or Congress. The Court rolled out the welcome mat for state governments unhappy with a federal agency's decision, creating from whole cloth a new rule of standing that allows states to gain a hearing in federal court with only the thinnest of allegations of harm. In doing so, the Court undermined the legal rules of standing. The majority also supported its decision with a one-sided and unsophisticated account of the scientific evidence for the petitioners' claims concerning climate change, needlessly inserting the courts into a scientific dispute that, as the majority's opinion demonstrated, they are woefully unprepared to handle.

Unfortunately *Massachusetts v. EPA* is but one piece of a broader trend toward regulation through litigation. A wide range of interest

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[1]127 S. Ct. 1438 (2007).

groups, including state politicians, private interest groups, and federal regulators, is increasingly using the courts as a vehicle to impose regulatory measures the interest groups cannot obtain from legislatures and agencies.[2] The usual regulatory process has many flaws, but it at least incorporates a measure of political accountability. By shifting key aspects of regulatory decision-making to the courts, these interest groups are finding ways to deflect responsibility for the costs imposed by the regulatory state. By doing so in a way that provides only a means to increase regulatory agencies' activity and jurisdiction, the courts' acquiescence in regulation by litigation further erodes the constraints on regulators, giving them (and interest groups that favor increased regulation) a second chance on those occasions when they lose in the political process.

II. The Decision

The substantive dispute at the heart of *Massachusetts v. EPA* was straightforward. Section 202(a)(1) of the Clean Air Act requires 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.''[3] In October 1999, a group of nineteen organizations ranging from Greenpeace USA to the Network for Environmental and Economic Responsibility of the United Church of Christ filed a petition with EPA, requesting that the agency initiate rulemaking to regulate greenhouse gas emissions from new motor vehicles under that section. Before formulating the response required by law, EPA sought and received extensive public comment on the petition and obtained a report on the science of climate change from the National Research Council of the National

[2]See Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, Regulation by Litigation (Yale University Press, forthcoming 2008); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, Choosing How to Regulate, 29 Harv. Env. L. Rev. 179 (2005); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, Regulation by Litigation: The EPA's Regulation of Heavy Duty Diesel Engines, 56 Admin. L. Rev. 403 (2004); Regulation Through Litigation (W. Kip Viscusi, ed. 2002).

[3]42 U.S.C. § 7521(a)(1).

Academy of Sciences.[4] After considering the matter, the agency decided in 2003 against issuing a rule, concluding that it lacked statutory authority to do so.[5] In addition, EPA determined that even if it had authority to regulate mobile source emissions of greenhouse gases, rulemaking on motor vehicle greenhouse gas emissions alone would be imprudent because it would fragment government policy toward emissions and impede negotiations with other countries over a global approach to climate change.

The interest groups, now joined by twelve states[6] and local and territorial governments,[7] appealed EPA's decision to the D.C. Circuit. The three judge panel in that court produced three opinions, two of which supported upholding EPA's decision (albeit on different grounds) and one of which favored overturning the agency decision not to regulate motor vehicle greenhouse gas emissions as arbitrary and capricious.[8] Most of the unsuccessful petitioners then sought review of the decision in the Supreme Court. A variety of interest groups and ten states[9] supported EPA's position on one ground or another before the Supreme Court (including the Cato Institute).

The case presented two questions for the Supreme Court. First, did any of the organizations, states, or local governments complaining about EPA's failure to regulate have standing to seek review of the agency's decision in the courts? Standing is a component of Article III's limitation of the federal courts' jurisdiction to ''Cases'' and ''Controversies.''[10] Standing's requirement that a petitioner seeking to overturn an agency action must demonstrate that the agency's action ''injures him in a concrete and personal way''[11] was a difficult hurdle to overcome for those who simply objected to an agency's

[4]National Research Council, Climate Change: An Analysis of Some Key Questions (2001).

[5]Control of Emissions from New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52922 (Sept. 8, 2003).

[6]California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

[7]The District of Columbia, American Samoa, New York City, and Baltimore.

[8]Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), rev'd 127 S. Ct. 1438 (2007).

[9]Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah.

[10]U.S. Const., Art. III.

[11]Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

policy choices. And because global climate change is by definition a *global* phenomenon, standing posed a serious obstacle to the petitioners. Indeed, one of the opinions in the D.C. Circuit had rejected their claim on precisely this ground. To reach the merits of the case, the Supreme Court had to find that at least one of the petitioners who objected to EPA's decision had standing to object to EPA's refusal to regulate. Second, if at least one of the petitioners did have standing, there was a serious question about whether the Court should disturb the agency's decision not to regulate. Under the Supreme Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council*,[12] federal courts are to defer to an agency's reasonable interpretation of an ambiguous statute absent a clear congressional intent. In other words, if an agency interprets a statute in a reasonable way, the courts should not substitute their own construction for that of the agency. The petitioners were on firmer ground here than they were on standing. However, as a plausible decision could have upheld the agency's decision not to regulate, they were by no means assured of success even if they prevailed on the standing issue, if the Court applied *Chevron*.[13]

The Court divided 5-4 on both questions. The majority (Justices Breyer, Ginsburg, Kennedy, Souter, and Stevens), in an opinion by Justice Stevens, found in favor of the petitioners on both the standing issue (by holding that Massachusetts, at least, had standing) and the merits.[14] In dissent, Chief Justice Roberts, joined by the remaining three (Justices Alito, Scalia, and Thomas), rejected Massachusetts's claims on standing grounds. In a second dissenting opinion, joined in by the same four, Justice Scalia examined and rejected the petitioners' claims on the merits.

[12] 467 U.S. 837 (1984).

[13] The courts' application of *Chevron* has been uneven from the start. See Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984 (1991); Orin S. Kerr, Shedding Light on Chevron: An Empirical Study on the Chevron Doctrine in the U.S. Courts of Appeals, 15 Yale J. on Reg. 1 (1998); Christopher H. Schroeder & Robert L. Glicksman, Chevron, State Farm, and EPA in the Courts of Appeals During the 1990s, 31 Envtl. L. Rep. 10376 (2001). Amici, including the Cato Institute, also offered non-*Chevron*-based arguments that supported the decision not to regulate.

[14] One of the ironies of the case is that Justice Stevens is the author of the *Chevron* opinion. Deference to agencies apparently only matters to him when he agrees with the results.

III. The Majority

Justice Stevens opened the majority opinion with a remarkably one-sided summary of the scientific evidence on climate change. From the first sentences—''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.''[15]—through the remainder of the opinion, a reader who was not acquainted with the debate over climate change would be hard pressed to realize that there is considerable disagreement over virtually every aspect of the issue.[16] And a reader of Justice Stevens's opinion could be forgiven for not knowing that there was debate over how to best approach climate change within the political branches. Stevens's summary of congressional and presidential attention to climate change issues barely mentioned the unanimous Senate resolution opposing the Kyoto Protocol from 1997.[17]

Stevens's selective account had a purpose. The petitioners' standing problem stemmed from the requirement, as articulated in the 1992 decision in *Lujan v. Defenders of Wildlife*, that a litigant must show a ''concrete and particularized'' injury that is ''actual or imminent,'' that the injury is ''fairly traceable'' to the defendant, and that a favorable decision will redress the injury.[18] If climate change was less than certain, it would hamper the standing claim by making it hard to show an ''actual or imminent'' injury. By avoiding any of the uncertainties about the petitioners' claims concerning climate change, Stevens strengthened their claim to have standing.

The problem was not solved by assuming a resolution to the scientific debate, however. A global change in climate over decades,

[15] Massachusetts v. EPA, 127 S. Ct. 1438, 1446 (2007).

[16] See, e.g., Robert M. Carter, C. R. de Freitas, Indur M. Goklany, David Holland & Richard S. Lindzen, Climate Change: Climate Science and the Stern Review, 8 World Economics 161 (April–June 2007); Fraser Institute, Independent Summary for Policymakers: IPCC Fourth Assessment Report (2007).

[17] S. Res. 98, 105th Cong., 1st Sess. (1997). Even accepting the petitioners' scientific claims, Stevens's opinion is still inaccurate scientifically. See Jonathan H. Adler, Justice Stevens' Scientific Mistake, The Volokh Conspiracy (April 4, 2007), available at http://www.volokh.com/posts/1175698890.shtml (visited August 13, 2007). No doubt Stevens would have found standing even if he had not made this error, but the lack of scientific literacy in the opinion underscores the problematic nature of relying on courts to evaluate such claims.

[18] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

caused by emissions of greenhouse gases from sources spanning the globe is difficult to characterize as a ''particularized injury'' that is ''fairly traceable'' to EPA's failure to regulate one source of emissions in the United States.[19] Stevens solved this piece of the standing problem with a clever move, one so clever none of the parties or amici had discussed it in their briefs.[20] He reached back to a 1907 case, *Georgia v. Tennessee Copper Co.*,[21] which involved a common law nuisance suit by the state of Georgia against a polluter in Tennessee. The decision in that case recognized Georgia's interest in protecting its citizens from the ill-effects of air pollution caused in Tennessee. Massachusetts's case was stronger than Georgia's, Justice Stevens concluded, because Massachusetts owned considerable coastal property it alleged was threatened by rising sea levels as a result of climate change. If Georgia could complain about the smelter in Tennessee harming Georgia's citizens' property, Stevens reasoned, surely Massachusetts could complain about EPA's failure to prevent greenhouse gas emissions from mobile sources from causing sea levels to rise and land owned by the state to flood. Stevens's interpretation of *Tennessee Copper* is wrong—the case has nothing to do with standing and Stevens's attempted analogy falls flat.

The final standing issue was whether the remedy sought by Massachusetts and the other states—regulation of mobile source greenhouse gas emissions—would ''redress'' the injury. In other words, if EPA regulated mobile source greenhouse gas emissions, what would happen? Would regulating mobile source emissions of greenhouse gases prevent the harms alleged by Massachusetts? Only if the state could show that EPA regulation would reduce the harm it suffered would the state have standing under *Lujan v. Defenders of Wildlife*. As U.S. mobile source emissions constitute less than a

[19] The Cato amicus brief argued that the ''particularized injury'' claimed by Massachusetts (the flooding of state coastal property) was not in ''imminent'' danger, as the flooding would not occur until far in the future. Relying on distant harms to make the alleged harm particular had the effect of eviscerating the imminent portion of the test. See Brief of the Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Support of Respondents, 2006 WL 3043962, at *9–*12 (2006).

[20] Jonathan H. Adler, Warming Up to Climate Change Litigation, 93 Va. L. Rev. In Brief 61, 63 (2007).

[21] 206 U.S. 230 (1907).

third of total U.S. greenhouse gas emissions, which in turn constitute only a fraction of world emissions,[22] reducing emissions by American mobile sources would not seem likely to solve Massachusetts' problem since it would affect at most only six percent of total CO_2 emissions if *all* emissions from mobile sources ended, which no one claims would happen. Justice Stevens then simply concluded: ''[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.''[23] That any potential regulation would have such a small impact did not bother Stevens. For example, he concluded that even if China and India increased their emissions of greenhouse gases (as seems likely they will), reducing U.S. mobile source emissions would ''slow the pace of global emissions increases.''[24] He therefore declared that Massachusetts had standing. Unpacking Stevens's chain of reasoning reveals that the case held that a rise in sea level of a few inches over a century was sufficient to satisfy the requirement, effectively eliminating any substantive content in the standing analysis.

Stevens accorded Massachusetts ''special solicitude'' in his analysis of standing.[25] This weakening of standing rules for state governments is something new. The most limited government proponents can hope for from this case is that these new, looser rules are restricted to state governments and that there will be a return to more rigorous standing analysis for private parties. But even limited to state governments, the looser standing rules are problematic because the loosening benefits are almost entirely available only to those demanding additional regulation. Those who object to expanding a regulation for other than a purely philosophical reason could already challenge an agency's action because the harm caused by the regulatory expansion would suffice for standing. But the looser standard for standing is a benefit for those objecting to the absence of a regulation because it allows a state (and perhaps others) that can make a minimally plausible claim that a regulation would mitigate a harm to its interests to challenge the decision not to regulate.

[22] Massachusetts v. EPA, 127 S. Ct. 1438, 1468–69 (2007) (Roberts, C.J., dissenting).

[23] *Id.* at 1457–58.

[24] *Id.* at 1458.

[25] *Id.* at 1454–55.

Having found standing, Justice Stevens had little trouble finding that EPA was required to act. EPA had determined that CO_2 was not within the statutory definition of ''air pollutant'' and so it lacked authority to regulate under the statute. Even if it had had such authority, however, the agency had determined that it *should* not act, because doing so would likely impede reducing greenhouse gas emissions globally by hindering U.S. negotiations with other countries' over their emissions and by fragmenting the domestic approach to the issue.[26]

As it had on the standing issue, EPA appeared to be on firm ground here for two reasons. First, greenhouse gas emissions make a poor fit with the Clean Air Act's regulatory approach and history. The Act was adopted to address what were primarily local air pollution problems[27] and expanded in 1990 to deal more extensively with transboundary air pollution questions such as acid rain.[28] Nowhere in the legislative history of the Act is there any evidence that the statute was intended by Congress to address global air pollution issues like climate change. Further, Congress had repeatedly addressed climate change, both by authorizing and funding studies, by encouraging ''non-regulatory'' measures to address greenhouse gas emissions, and by the Senate's unanimous expression of disapproval of the Kyoto Accord in 1997.[29] In all the various resolutions, appropriations riders, and statutes on climate change issues passed by Congress over the years, there has never been any indication that anyone in Congress, for or against regulation of greenhouse gas emissions, thought that the Clean Air Act already authorized EPA to regulate those emissions. However, Justice Stevens rejected EPA's (and the Cato Institute's) argument that this history suggested that EPA was correctly interpreting Congress's intentions on its authority with respect to those substances. ''That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it

[26] Control of Emissions from New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52922, 52931 (Sept. 8, 2003).

[27] Adler, *supra* note 20, at 67.

[28] See Gary C. Bryner, Blue Skies, Green Politics: The Clean Air Act of 1990 and Its Implementation (1995).

[29] That history is well summarized in the Cato Institute's amicus brief, in which I participated. See Brief of the Cato Institute, *supra* note 19, at *17–*24.

amended [the relevant section] in 1970 and 1977.''[30] Even if the Court thought that the statute was ambiguous on this point, however, under *Chevron* the courts are to defer to reasonable agency interpretations of an agency's organic statutes.

Apart from its impact in this case, Justice Stevens' action essentially limited an important recent Supreme Court precedent to its facts, eliminating a key constraint on regulatory agencies. In *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,[31] the Supreme Court had rejected the FDA's unilateral effort to assert regulatory authority over cigarettes despite nearly a century of congressional refusal to grant the agency such authority.[32] (The four dissenters in that case were joined in *Massachusetts v. EPA* by Justice Kennedy, who had disagreed with them in the earlier case, making clear Kennedy's pivotal role on the court.)[33]

Justice O'Connor wrote the majority opinion in *Brown & Williamson* and the parallels and distinctions from Justice Stevens's opinion in *Massachusetts v. EPA* are instructive. Like Stevens, O'Connor noted that there was a significant problem for which a regulatory solution was proposed. After examining the history of the regulatory statute in question, however, she concluded that Congress had precluded the agency from acting, in part because Congress had repeatedly

[30] Massachusetts v. EPA, 127 S. Ct. 1438, 1460 (2007). It seems likely that if Congress thought anything about greenhouse gases in either 1970 or 1977, it probably thought that they might be a good idea as the dominant climate change theory of the 1970s was that the earth was cooling rather than warming. See, e.g., The Cooling World, Newsweek (April 28, 1975) at 64 available at http://www.resiliencetv.fr/uploads/newsweek_coolingworld.pdf (''The central fact is that after three quarters of a century of extraordinarily mild conditions, the earth's climate seems to be cooling down. Meteorologists disagree about the cause and extent of the cooling trend, as well as over its specific impact on local weather conditions. But they are almost unanimous in the view that the trend will reduce agricultural productivity for the rest of the century.'').

[31] 529 U.S. 120 (2000).

[32] For a detailed discussion of tobacco and regulation by litigation, see, Morriss, Yandle & Dorchak, Regulation by Litigation, *supra* note 2, at Chapter 7; Bruce Yandle, Joseph A. Rotondi, Andrew P. Morriss & Andrew Dorchak, Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation, Univ. of Illinois Law and Economics Research Paper No. LE07-021 (2007).

[33] See Jonathan H. Adler, Massachusetts v. EPA Heats Up Climate Policy No Less than Administrative Law: A Comment on Profs. Watts and Wildermuth, Case Research Paper Series in Legal Studies Working Paper 07-20 (2007).

declined to provide the agency with the authority it now asserted. An important reason for O'Connor's conclusion was that if the FDA did have authority over tobacco under the Food, Drug and Cosmetic Act, it would have no choice but to ban tobacco products since they could not be considered ''safe'' under the statute.[34] Since Congress regularly enacted legislation that showed it accepted the legal sale of cigarettes, O'Connor interpreted this legislative history as precluding the FDA's broad reinterpretation of its statutory authority.

Justice Stevens found that this reasoning did not apply to greenhouse gas emissions and the Clean Air Act for two reasons. First, he suggested that the key to *Brown & Williamson* was that regulation by the FDA would have led to a ban of tobacco. Since EPA action in this case ''would only *regulate* emissions'' rather than ban vehicles, the earlier case did not apply.[35] Second, in the case of tobacco, the FDA had for decades explicitly denied it had authority over tobacco. Here, EPA had never formally addressed the issue of its authority over greenhouse gases but EPA's general counsel had previously claimed authority to regulate.[36] This assertion is particularly pernicious, because agencies rarely have an incentive to make ''consistent and repeated'' disclaimers of authority. In the case of tobacco, it was only the tobacco industry's extraordinary political clout that prompted such disclaimers. Stevens's reasoning thus protects only powerful political interests able to cajole or coerce an agency into disclaiming jurisdiction.

Worse, granting legal significance to self-serving statements by agency counsel about expansive authority undercuts political accountability. The public choice literature has long explained that agency staff have strong incentives to pursue their agency's mission, ranging from the personal (expanding their agency's jurisdiction enhances their own careers) to the publicly-minded (staff who want to further their agency's mission to help the public but are likely to experience ''tunnel vision'' and thus focus narrowly on the importance of their mission to the exclusion of the government's broader goals).[37] In short, principal-agent problems are rampant in the relationship between agency staff and elected officials, even within an

[34] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 134–39 (2000).

[35] 127 S. Ct. at 1461.

[36] *Id.*

[37] See William A. Niskanen, Bureaucracy and Representative Government (1971).

administration. In this context, relying on staff statements concerning broadening agency authority creates a one-way ratchet for expanding agency regulatory authority.

Justice Stevens concluded with a touch of false modesty. On remand, EPA need not regulate greenhouse gases, it need merely ''ground its reasons for action or inaction in the statute.''[38] But Stevens actually left EPA with almost no room to avoid a decision to regulate mobile source greenhouse gas emissions, not just those to which Section 202 applied, for the logic of Stevens's analysis extends beyond that section. As Professor Adler noted earlier this year:

> Without any further action by Congress, the regulation of greenhouse gas emissions from new motor vehicles under Section 202 is a near absolute certainty, as is the regulation of industrial and utility emissions under Section 111. Litigation to force the listing of carbon dioxide as a criteria air pollutant, and requiring the establishment of a National Ambient Air Quality Standard, such as those that exist for ozone, particulates and other ambient pollutants, will not be far behind. At this point, if not before, Congress will be compelled to act.[39]

IV. The Roberts Dissent

Chief Justice Roberts authored a dissenting opinion contesting the majority's standing analysis, joined by Justices Alito, Scalia, and Thomas. Roberts noted the scale of the change in the rules of standing made by the majority. He also established that the majority's reliance on *Georgia v. Tennessee Copper Co.* was not consistent with prior treatment of that case or the opinion's facts. Rather than easing standing rules for states, Roberts explained, *Tennessee Copper* raised ''an additional hurdle for a state litigant: the articulation of a 'quasi-sovereign interest' '*apart* from the interests of particular private parties.'''[40] As Roberts noted, the irrelevance of *Tennessee Copper* to the question presented in this case—prior to the majority's reinterpretation of it—is evidenced by the petitioners' failure to cite the case before the Supreme Court or D.C. Circuit and its absence from the

[38] Massachusetts v. EPA, 127 S. Ct. 1438, 1463 (2007).

[39] Adler, *supra* note 20, at 71.

[40] 127 S. Ct. at 1465 (Roberts, C.J., dissenting) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982) (emphasis added)).

briefs of the many amici and the three opinions below. The chief justice noted the irony in the majority's reformulation of standing, a doctrine whose purpose is in part to ensure that the issues are vigorously contested by parties with a real stake in the outcome, based on an interpretation of *Tennessee Copper* that was never briefed or argued by the parties.

Applying the ''traditional'' standing test, the chief justice argued Massachusetts's allegations of loss of coastal land to rising seas was not sufficient to satisfy the ''particularized injury'' portion of the test for at least three reasons. First, ''[t]he very concept of global warming seems inconsistent with this particularization requirement'' and ''the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world.''[41] Second, the claim that Massachusetts is losing coastal land is based solely on a statement that rising sea levels have already occurred, without any supporting detail. Third, the declarations of experts on which the state relied also include evidence that Massachusetts's coast is gradually sinking anyway, an alternative explanation for any loss that might have occurred or be threatened that is not distinguished from the alleged loss from rising sea levels. The result is ''pure conjecture.''[42] All the state had to offer in addition to these conjectures were computer models with substantial error margins and timelines that placed much of the harm over the course of a century. None of this would have been sufficient under *Lujan v. Defenders of Wildlife.*

Further, the state's claim should have failed because of a lack of connection between the remedy sought (regulation of mobile source emissions) and the harm alleged (rising sea levels). Not only do domestic mobile source emissions constitute only four percent of global greenhouse gas emissions (six percent of CO2 emissions), but the regulations sought would apply only to new vehicles, reaching maximum effect only as the fleet of vehicles turned over. Any reductions would initially come from only a small proportion of mobile sources, and hence from a fraction of the four percent of total greenhouse gas emissions. ''In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners

[41] *Id.* at 1467.

[42] *Id.*

describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury-the loss of Massachusetts coastal land-the connection is far too speculative to establish causation.''[43]

Finally, the chief justice noted that eighty percent of greenhouse gas emissions come from outside the United States and developments in other countries are likely to have the major impact on overall greenhouse gas levels irrespective of U.S. controls. The majority had waved this problem away, essentially saying that any reduction in greenhouse gas emissions would mitigate the problem. Roberts was unwilling to do so, contending that Massachusetts should have been required to show that regulation by EPA would be likely to protect it from the loss of coastal land. Unfortunately for Massachusetts, he continued, there was an ''evident mismatch between the source of their alleged injury-catastrophic global warming-and the narrow subject matter of the Clean Air Act provision at issue in this suit. The mismatch suggests that petitioners' true goal for this litigation may be more symbolic than anything else. The constitutional role of the courts, however, is to decide concrete cases-not to serve as a convenient forum for policy debates.''[44]

Despite its failure to garner five votes, the chief justice's dissent is chiefly valuable as an example of how the traditional standing doctrine would have applied to the facts of this case. The contrast between its analysis and the more elastic standing test applied in the majority opinion make clear the substantial differences in the doctrine of standing that occurred as a result of *Massachusetts v. EPA.*

V. The Scalia Dissent

Justice Scalia joined the chief justice's dissent on standing but authored his own (joined by the other three dissenters as well) to address the merits of the claim. Here the dispute turned on the words ''in his judgment'' in Section 202(a)(1) of the Clean Air Act, which mandates that the EPA 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

[43] *Id.* at 1469.

[44] *Id.* at 1470.

which may reasonably be anticipated to endanger public health or welfare.'' The majority focused on the public health and welfare language, arguing that the administrator could consider only such matters in making a decision about whether to regulate or not. Scalia saw the decision as two phase: The administrator first has to decide *whether* to make a decision about regulating a pollutant. Once he decides to do so, then he makes a regulatory decision on the basis of ''public health and welfare.'' In the first phase, the administrator may consider other factors, such as the impact on foreign policy and on other departments. Even under the majority's analysis, Scalia argued that EPA was justified in finding that the scientific uncertainty was too great to allow it to act now, pointing to extensive material in the record suggesting that such uncertainty existed.

Scalia also contested the majority's interpretation of the term ''air pollutant'' in the Clean Air Act. ''Air pollutant'' is defined as ''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.''[45] Engaging in a close grammatical analysis of the statute's text, Scalia argued that this is a two part definition. To be an air pollutant, a substance must be ''an air pollutant agent or combination of such agents.'' The words after ''including'' do not define things that are air pollutants, they simply illustrate things that may be air pollutants if those things are also air pollutant agents. EPA had read the definition of ''air pollutant'' in this way and Justice Scalia argued that the agency's view deserved deference as a plausible interpretation of the statute under the *Chevron* doctrine.[46]

Justice Scalia's legal analysis of EPA's statutory position is the type of careful textual analysis that is too often lacking in regulatory matters. However, as Professor Adler has pointed out, EPA did not refuse to make a judgment about the dangers of climate change but instead made a judgment that it would not regulate.[47] Since that judgment was not based on the standard in Section 202, once the Court had decided that greenhouse gases were included under Section 202 EPA was left vulnerable to a complaint that it had not

[45] 42 U.S.C. § 7602(g).

[46] Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[47] Adler, *supra* note 20, at 71.

followed the statute. Why did EPA not make the more prudent declaration that it was refusing to make a judgment on climate change's risks? We can only speculate, but two explanations are plausible. First, the decision was made in 2003, during the run up to the 2004 election between President George W. Bush and Sen. John Kerry. One of the Democrats' more pointed attacks on the Bush Administration was that it was ''anti-environment.'' A refusal by EPA to affirm the gospel of climate change would have reinforced this attack. If political considerations played any role in setting EPA's strategy, they likely were seen as supporting a nuanced decision that paid homage to climate change fears while avoiding regulation. Second, to the extent that the decision was driven by EPA's analysis, it seems likely that the agency's staff would have been concerned with both pushing the agency toward regulation and preserving the agency's powers. From their position, a disclaimer based on prudential grounds would have been preferable to a ''we don't know'' position as it would have allowed a later administration to make a different decision by claiming circumstances had changed rather than reversing a legal position. If the agency lost the lawsuit, as it surely anticipated it might, it would find itself in the position of having to regulate. Finding itself ordered to regulate was an outcome that it is difficult to imagine the agency staff finding unpleasant. Thus both the administration's and the agency's interests were served by the approach EPA took, even though it undercut the chances of the decision being upheld.

VI. Standing and Separation of Powers

For the Supreme Court, ''[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.''[48] Separation of powers does not *accidentally* make it harder to address serious problems, it *intentionally* makes it harder for the government to act in all cases *including* when there are serious problems that a group thinks need to be addressed. The point of deliberately making it harder for the government to act was to check abuse of power; the price of checking abuse of power was

[48] Buckley v. Valeo, 424 U.S. 1, 124 (1976).

that it became harder for the government to act even when there was not an abuse.

Standing is a crucial part of the separation of powers because it both protects the judiciary from being brought into disputes where it has no role and protects the political branches from the judiciary by limiting when the judiciary might interfere with decisions by the political branches. The requirement of standing derives from Article III's limitation of federal-court jurisdiction to ''Cases'' and ''Controversies,'' which restricts ''the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.''[49] There are other important limits as well (e.g., the requirement that a matter appealed to the courts be a final agency action), but standing's role is critical to restricting the courts to their proper sphere.

Massachusetts v. EPA opens the door to many more suits by interest groups, and by states in particular, dissatisfied with the outcome of the political process. It opens a one way door toward expanding the role of the federal government. Any individual or state actually injured by a regulatory action already met the *Lujan v. Defenders of Wildlife* test. The only beneficiaries of this decision are those who object to government decisions *not* to regulate. The unequal nature of the relaxation of the standing rules undermines the independence of the political branches from the judiciary.

It is easy to understand why the Sierra Club or Greenpeace would want EPA to regulate more; lobbying for more regulations is what such groups do. It is less obvious why state governments would want more federal regulation. The answer lies in the incentives created by the Clean Air Act.

VII. The Politics of the Clean Air Act

The Clean Air Act's structure plays a key role in the politics behind the state efforts to push EPA to regulate mobile source emissions of greenhouse gases. Two features are important. First, with respect to the criteria pollutants, the federal government determines the overall levels of air pollution acceptable and selects the pollution control technologies required to be used by various industries. Once the EPA has set these standards, states get to figure out how to

[49] Flast v. Cohen, 392 U.S. 83, 95 (1968).

meet them and implement specific restrictions on stationary sources within their borders through state implementation plans (SIPs). SIPs are massive technical documents for which the operative unit of measurement is ''filing cabinets.''[50] Many states' SIPs lack indices; most portions of a SIP are incomprehensible to the non-specialist. The result is that the key details of air pollution control—how the burden of reducing pollution is allocated among sources—are opaque to the general public. Federal regulation thus creates valuable rights to be distributed by state environmental agencies through their SIPs. Of course, requiring regulation of greenhouse gas emissions from mobile sources under Section 202 would not by itself trigger the listing of those gases as criteria pollutants. As noted earlier, however, the Court's decision leaves little room for EPA to avoid such a listing and the victorious interest groups certainly see this decision as the first step in a broader assault on greenhouse gas emissions under existing provisions of the Clean Air Act.[51]

Further, EPA bases its analysis of states' compliance with the national standards using computer models of emissions.[52] The models contain important assumptions about the environment and about government regulation, assumptions that do not always match reality. In a conflict between model and reality, the model trumps—what matters from a state's point of view is what EPA *says* the state's emission levels are.[53] An important goal of the litigation in

[50] See Andrew P. Morriss, The Politics of the Clean Air Act in Political Environmentalism 263 (Terry L. Anderson, ed. 2000).

[51] See, e.g., EarthJustice, Press Release: High Court Rules Clean Air Act Gives EPA Authority to Fight Global Warming (April 2, 2007) (''To combat this most urgent environmental crisis, strong and comprehensive U.S. action is crucial. EPA must use its existing Clean Air Act authority to require control of greenhouse gas emissions—by motor vehicles (the subject of this case) as well as by other sources like power plants. The Act has successfully cut emissions of many pollutants, and it can do the same for greenhouse gases.'').

[52] See Morriss, Yandle & Dorchak, Diesel, *supra* note 2, at 412–21 (discussing modeling issues).

[53] On greenhouse gases there will be many important assumptions necessary to make the models work. In particular, the relationship between greenhouse gas emissions and mobile sources is different than the relationship between many other pollutants and mobile sources. For example, many pollutants (e.g. particulates) are the result of incomplete combustion. Pollution sources can become cleaner with respect to these by increasing the efficiency of combustion or by preventing the pollutants from leaving the combustion system (as through the catalytic converters on U.S. automobiles). Greenhouse gases, however, are the product of combustion.

Massachusetts v. EPA was to gain states the ability to regulate greenhouse gases independently. To the extent they are able to do so before EPA acts—and everyone agrees that EPA will move slowly to implement the decision in this case and even more slowly to extend its regulatory reach to greenhouse gases in other areas—these states will establish ''facts on the ground'' that EPA will likely have to recognize in its modeling.

Second, the statute distinguishes between stationary and mobile sources in important ways. While state and federal governments share responsibility for regulating emissions from both, the federal government has most of the authority in the area of mobile sources. The federal government has the authority to mandate what technology auto and truck makers use to reduce pollution. States have only three means of affecting these: they can institute inspection and maintenance (''I&M'') programs that ensure engines and exhaust systems are operating properly, restrict the use of mobile sources (i.e. tell people they can't drive as much), and require cars sold in their states to meet the California emissions standards rather than the federal standards.[54] The first two of these options are extremely unpopular. When EPA convinced Ohio to adopt an I&M program, it provoked a political backlash that led the state government to pay for the inspection costs rather than charging car owners as it had done.[55] Driving restrictions are a complete non-starter politically.

Not only are there relatively few ways to reduce their emission without replacing the internal combustion engine (and even alternatives like electric vehicles still produce greenhouse gas emissions at the powerplants that charge them), but the most important technology for reducing greenhouse gas emissions from an internal combustion engine is improving fuel efficiency. As fuel efficiency increases, however, the cost of operating a vehicle falls and so actual use may increase, reducing the net reduction in greenhouse gas emissions.

One additional option to control mobile source emissions is to regulate fuel formulation, something EPA, the states, and even some local governments are already doing. See Andrew P. Morriss & Nathaniel Stewart, Market Fragmenting Regulation: Why Gasoline Costs So Much (And Why It's Going to Cost More), 72 Brook. L. Rev. 939, 1021–35 (2007). We may already be reaching the limits of emissions gains possible through this means, however, and the costs of increasing the complexity of fuel formulation to consumers are starting to be recognized.

[54]California's emission control legislation predated the federal limits and so it was permitted to continue to have a separate set of standards. In 1990, the federal statute was amended to permit other states to adopt the California standards.

[55]Todd A. Stewart, E-Check: A Dirty Word in Ohio's Clean Air Debate—Ohio's Battle Over Automobile Emissions Testing, 29 Cap. U.L. Rev. 265 (2001); Tieran Lewis,

The result is that states can do little to affect their mobile source emissions. Once EPA's computer model analyzes both the stationary and mobile source emissions and makes a prediction of the pollution levels due to mobile sources, any reductions needed to meet the federally mandated ambient air quality standards are left to the states to discover.

For understanding *Massachusetts v. EPA,* the key points are that mobile sources are major sources of greenhouse gas emissions and that the politically feasible set of regulatory measures that can limit their emissions available to states is vanishingly small. What states interested in reducing greenhouse gas emissions need, therefore, is for EPA to impose a technological solution on greenhouse gas emissions on car and truck manufacturers and to give states plenty of credit in EPA's mobile source emission model for that technology (irrespective of whether the technology actually reduces emissions.)[56] States that want to address climate change need this because they have few other means of addressing mobile source emissions of greenhouse gases. The decision in this case moved them considerably closer to that goal.

VIII. The Politics of Climate Change and the Courts

The roster of states participating on both sides of *Massachusetts v. EPA* tells a great deal about the politics of climate change regulation. Joining Massachusetts in demanding that EPA address mobile source emissions of greenhouse gases were eleven states and the District of Columbia; opposing were ten states. Using federal Energy Information Administration data,[57] I calculated the ratio of fossil fuel energy production (coal, natural gas, and petroleum) in each jurisdiction to its total energy use. The ratio is evidence of a state's economic interest in continuing hydrocarbon energy use; a low (high) ratio suggests that a state would benefit (lose) economically relative to other states if greenhouse gas emissions were regulated,

Governor's E-Check Veto Concerns Some Residents, Daily Kent Stater (July 17, 2007) (elimination of fees).

[56] See Morriss, Yandle & Dorchak, Diesel, *supra* note 2, at 480–81 (discussing mobile source model problems in dealing with ozone levels and nitrogen oxide emissions).

[57] Energy Information Administration, Table S1—Energy Consumption Estimates by Source and End-Use Sector, 2004, available at http://www.eia.doe.gov/emeu/states/sep_sum/plain_html/sum_btu_1.html (last visited August 12, 2007).

since its energy sector would suffer a comparative advantage (disadvantage).

Of the states demanding that EPA regulate, all but one are at or below the median ratio of hydrocarbon energy use to total energy use and six are among the ten with the lowest ratios. New Mexico, the one exception, has a governor running for the Democratic nomination for president, a campaign in which demonstrating one's environmental credentials is important. Of the ten states opposing regulation, eight are above the median ratio; only Idaho and South Dakota are below it. If we examine the percentage of energy states produce from non-nuclear, non-hydrocarbon sources, we find a similar pattern. Eleven U.S. states produced ten percent or more of their energy from such sources in 2004 (thirty-three produced five percent or less). Of those eleven, five supported Massachusetts (California, Washington, Oregon, Maine, Vermont) and only two (Idaho and South Dakota) supported EPA.[58]

IX. Consequences for the Future

That states have different economic interests is true with respect to many dimensions of federal policy—and the potential for conflict over such differences was a concern of the Founders in their design of the Constitution. The Supreme Court was not the forum the Founders anticipated would resolve those differences; the political branches were. By weakening standing rules, the Court's decision in *Massachusetts v. EPA* threw the door wide open for states dissatisfied with the outcome of the political process to seek redress in the courts.

Whether or not the federal government should be regulating mobile source (or any other) emissions of greenhouse gases is fundamentally a political question. Unlike many of the air pollution issues of the past, regulating greenhouse gases would insert EPA into virtually every aspect of human activity. Indeed, it is hard to conceive of an economic activity that does not result in at least the production of greenhouse gases, whether from transportation of products and

[58] A similar division of interests among states existed in the federal nuisance suit (since dismissed) by primarily Northeastern states over power plant greenhouse gas emissions. The plaintiff states sued primarily utilities in the Midwest and South, not in their own states. See Connecticut et al. v. American Electric Power Co. et al., No. 04-cv-05569, 2005 WL 2249748 (S.D.N.Y. Sept. 15, 2005).

raw materials for manufacturing or air travel and electricity use for service industries. Climate change is thus the Holy Grail for those seeking to expand state authority over the economy as it justifies regulating everything.[59]

Perhaps most alarmingly, Justice Stevens's analysis essentially reduces to an assertion that the regulatory state must be able to respond to what he sees as a crisis of the magnitude of climate change because *somebody* needs to do *something*. Nowhere in Justice Stevens's opinion is there any sense that he believes that Congress can only act when it has been allocated the power to do so by the Constitution or that an agency's mandate might not include addressing a problem not known at the time the agency's authority was established. The reader is left with the impression that Justice Stevens cannot imagine that no one has the authority to address a problem if the problem is large enough.

Of course, it would be the height of folly to rely on Congress or a regulatory agency for the protection of liberty. That is why we have the separation of powers, among other features of the national government. But the political process does offer some protection from government over-reaching in circumstances like these. Regulating greenhouse gas emissions is likely to be extremely costly because of their ubiquity in economic activity.[60] In a debate over the costs and benefits of such regulations, it seems likely that imposing those costs on the American public generally would be the preference, intensely felt, of a minority of Americans, while the majority would be resistant to bearing the economic impact of action without greater assurance that other nations would also address the issue or that waiting for technological improvements would not substantially lower the costs. If that debate occurred in Congress, there would be an opportunity for those who see global warming as a crisis requiring immediate action and for those who think differently to make their respective cases. A vigorous debate over everything from the underlying science to the most cost-effective regulatory approaches would

[59] Politicians can benefit as well, since the threat of regulation alone is often remarkably lucrative. See Fred S. McChesney, Money for Nothing: Politicians, Rent Extraction, and Political Extortion (1997).

[60] See House of Lords, Select Committee on Economic Affairs, The Economics of Climate Change, vol. I, HL Paper 12-I (2005) (reviewing economic issues surrounding climate change).

ensue. The result might not be less regulation, indeed it could be more,[61] but the prospect of being held accountable at the polls for either refusing to act or imposing unnecessary costs would give individual members of Congress a reason to consider their actions carefully. While far from perfect, the political process would force the choices into the public eye.

Both directly (by giving EPA little choice but to enter the greenhouse gas regulation arena) and indirectly (by making it easier for states and interest groups to push the regulatory state to expand through the relaxation of the requirements for standing), *Massachusetts v. EPA* is a major step away from limited government. As a result of this shift to a world where regulatory policy is determined by and through litigation, economic freedoms are likely to become increasingly scarce.

[61] See David Schoenbrod, Remarks to the National Resource Defense Council, 20 Cardozo L. Rev. 767 (1999).