

2008

## A New Era of Green Regulation: EPA Must Regulate Climate Altering Gases Emitted from Motor Vehicles. *Massachusetts v. Environmental Protection Agency*

Brett Maland

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Brett Maland, *A New Era of Green Regulation: EPA Must Regulate Climate Altering Gases Emitted from Motor Vehicles. Massachusetts v. Environmental Protection Agency*, 15 Mo. Env'tl. L. & Pol'y Rev. 369 (2008)

Available at: <https://scholarship.law.missouri.edu/jesl/vol15/iss2/5>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# A NEW ERA OF GREEN REGULATION: EPA MUST REGULATE CLIMATE ALTERING GASES EMITTED FROM MOTOR VEHICLES

*Massachusetts v. Environmental Protection Agency*<sup>1</sup>

## I. INTRODUCTION

In 1978, President Carter signed the National Climate Program Act in order to “understand and respond to natural and man-induced climate processes and their implications.”<sup>2</sup> In the decades that followed, the link between human activity, increased levels of greenhouse gases, and global warming was established with ever greater certainty.<sup>3</sup> During the 1990’s, the international community became involved, most notably through the United Nations. In 1992, the United States agreed to a nonbinding effort of 154 nations to reduce emissions of greenhouse gases, which includes carbon dioxide,<sup>4</sup> a gas which is emitted whenever gasoline or any other fossil fuel ignites. A second international meeting led to a smaller group of countries agreeing to mandatory cuts.<sup>5</sup> However, the United States declined to join the group.<sup>6</sup>

Dissatisfied with the federal inaction, Massachusetts and a group of other states, local governments, and private organizations decided to prompt the executive branch to act through the power of the judiciary.<sup>7</sup> The litigants attacked the Environmental Protection Agency’s [*hereinafter* EPA] lack of rules relating to a federal statute.<sup>8</sup> That statute required the EPA to regulate climate altering emissions from motor vehicles.<sup>9</sup> The Court ultimately found in favor of Massachusetts in a decision that

---

<sup>1</sup> 127 S.Ct. 1438 (2007).

<sup>2</sup> *Id.* at 1448.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1449.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1451.

<sup>8</sup> *Id.* at 1449.

<sup>9</sup> 42 U.S.C. § 7521(a)(1) (2000).

extends standing to a widespread grievance, and has extensive economic implications, both of which make this an extraordinary case.

## II. FACTS AND HOLDING

A respectable portion of the scientific community claims greenhouse gases such as carbon dioxide operate in the atmosphere to cause a greenhouse effect which in turn causes global warming.<sup>10</sup> The theory of a greenhouse effect has been supported empirically by a recent rise in global temperatures coinciding with a rise in atmospheric carbon dioxide.<sup>11</sup> The concern with rising global temperatures is that, among other numerous negative impacts, it will cause Arctic and Antarctic ice sheets to melt, leading to rising sea levels that damage valuable coast lines.<sup>12</sup>

Carbon dioxide levels in the Earth's atmosphere are at the highest levels in the past 420,000 years.<sup>13</sup> This started to become a concern in the 1970s when President Carter requested the National Research Council to investigate the potential threat of increasing levels of carbon dioxide.<sup>14</sup> The Council's investigation found no reason to doubt that increasing levels of carbon dioxide will cause climate change.<sup>15</sup> As Congress directed the EPA and Secretary of State to propose solutions, the international concern regarding the greenhouse effect grew.<sup>16</sup> A United

---

<sup>10</sup> *Mass. v. Env'tl. Prot. Agency*, 127 S.Ct. 1438 (2007). Carbon dioxide is not the only species of greenhouse gases. However, it is the most relevant species of greenhouse gases and the remainder of this paper will thus focus on carbon dioxide. *Id.*

<sup>11</sup> *Mass. v. Env'tl. Prot. Agency*, 415 F.3d 50, 56 (D.C. Circuit 2005). Carbon dioxide operates analogously to a glass roof on a greenhouse. *Id.* Similar to the glass roof on a greenhouse, carbon dioxide allows solar radiation to pass through the atmosphere to heat the Earth (while also absorbing some of that heat itself), but then insulates the Earth by obstructing heat loss to outer-space. *Id.* As carbon dioxide and other greenhouse gases increase in the Earth's atmosphere, the atmospheric insulation becomes thicker which causes it to trap more heat on the Earth and in the atmosphere as opposed to releasing some of it to space. *Id.*

<sup>12</sup> *Mass.*, 127 S.Ct. at 1456.

<sup>13</sup> *Id.* at 1447.

<sup>14</sup> *Id.* at 1448.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Nations agency named the Intergovernmental Panel on Climate Change concluded in 1990 that increasing levels of carbon dioxide from human activity will increase the average temperature on the Earth.<sup>17</sup> Five years later, the IPCC issued a second report supporting the conclusion of the earlier report and that of the National Research Council, calling the human impact on global warming “discernable.”<sup>18</sup>

Despite the scientific consensus, the EPA elected not to issue any rule regulating greenhouse gases from motor vehicles.<sup>19</sup> Massachusetts, along with a group of other states, local governments and private interest groups, challenged the EPA’s inaction.<sup>20</sup> Massachusetts argued that the EPA failed in fulfill its duty under § 7521 (a)(1) of the Clean Air Act when the agency declined to regulate greenhouse gas emissions, namely carbon dioxide, from motor vehicles.<sup>21</sup> The relevant section of the Clean Air Act directs the EPA Administrator to regulate climate altering emissions from motor vehicles.<sup>22</sup> Massachusetts contended that the link between greenhouse gases emitted from motor vehicles and a danger to public health and welfare is well established among the scientific community and by not regulating emissions of such gases, the EPA is acting in violation of a Congressional mandate to prescribe regulating standards.<sup>23</sup>

The EPA, alongside a group of trade organizations and another group of states, claimed Massachusetts lacked standing and further argued in support of the discretion exhibited by the EPA.<sup>24</sup> The complaint was taken directly to the Court of Appeals, which asserted jurisdiction since the challenge against the EPA’s rulemaking was national in scope.<sup>25</sup> The Court of Appeals for the District of Columbia Circuit declined to rule on

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1449.

<sup>19</sup> *Id.* at 1438.

<sup>20</sup> *Id.* at 1446.

<sup>21</sup> *Id.* at 1446-47.

<sup>22</sup> 42 U.S.C. § 7521(a)(1) (2000).

<sup>23</sup> *Mass.*, 127 S.Ct. at 1446.

<sup>24</sup> *Id.* at 1446-47.

<sup>25</sup> *Mass. v. Env'tl. Prot. Agency*, 415 F.3d 50, 53-54 (D.C. Cir. 2005).

standing, but agreed that the EPA properly exercised its discretion and dismissed the complaint on the merits.<sup>26</sup>

Under a three judge panel, the Court of Appeals reasoned that the EPA administrator was empowered to “use judgment,” which allowed the EPA to consider not only scientific data, but also policy implications relating to the decision.<sup>27</sup> Furthermore, because it may be that regulating vehicle emissions may not be practical since the link between greenhouse gases and global warming was not “unequivocally established” by the National Research Council, the EPA was within the bounds of reason in deciding not to regulate.<sup>28</sup> The court also found holes in the scientific data, pointing to the fact that, although global temperatures have increased alongside carbon dioxide levels since the industrial revolution, such a correlation has not always been the case, thereby highlighting some uncertainty regarding carbon dioxide’s impact on global warming.<sup>29</sup>

The United States Supreme Court granted certiorari to what Massachusetts claims is the “most pressing environmental challenge of our time.”<sup>30</sup> In a five-four split, the majority held that Massachusetts had standing under Article III of the United States Constitution<sup>31</sup> because

---

<sup>26</sup> *Id.* at 56, 58.

<sup>27</sup> *Id.* at 58. Each judge filed a separate opinion; a judgment, a concurring opinion and one dissent. *Id.* at 58, 61. The concurring judge decided the case on Article III constitutional standing, agreeing that the court should vindicate the EPA, but on the grounds that the petitioners could not show injury sufficient for adjudication. *Id.* at 58.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 57.

<sup>30</sup> *Mass. v. Envtl. Prot. Agency*, 127 S.Ct. 1438, 1446 (2007)

<sup>31</sup> *Id.* at 1441-44. Massachusetts made a sufficient showing of injury. *Id.* at 1444. It is important to note that the issue regarding standing is strongly linked to the ultimate issue of whether the EPA is authorized to decline regulating carbon dioxide emissions. *Mass. v. Envtl. Prot. Agency*, 415 F.3d 50, 56 (D.C. Cir. 2005). At the heart of the controversy is the “uncertainty” in the causal link between increases in carbon dioxide and increases in average global temperatures. If that link is sufficiently uncertain, then the petitioners cannot show sufficient injury. If the petitioners cannot show sufficient injury, then they either lack standing or, the EPA is justified in its decision making because it would be reasonable for the EPA to decline regulating a chemical that might not cause any harm. On the other hand, if the injury is sufficiently certain to cause injury, then the petitioners would have standing and the EPA would be less justified in its election not to regulate a chemical that *will* cause injury. If the injury is sufficiently certain, then the question for

Massachusetts sufficiently demonstrated the requirements of judicial standing and that Congress directed the EPA to regulate carbon dioxide emissions from motor vehicles unless the EPA determined that carbon dioxide emitted from motor vehicles did not contribute to climate change.<sup>32</sup>

## II. LEGAL BACKGROUND

Through the Clean Air Act and its amendments, Congress provided that “the [EPA] Administrator shall . . . [set] 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 . . . .”<sup>33</sup> The Act further defines public welfare to include the impact on weather and climate.<sup>34</sup> Considerable debate has risen regarding the EPA’s inaction regarding greenhouse gases. Much of the debate hinges upon two main issues: (A) whether Massachusetts or any other entity can question the EPA’s inaction on such matters; and (B) whether the EPA has the discretion to refrain from regulating greenhouse gases from vehicle emissions.

### A. Constitutional Standing

Article III of the United States Constitution limits the Court’s jurisdiction to cases and controversies.<sup>35</sup> These important words relegate the Court’s power to issues found in an adversarial context.<sup>36</sup> The adversarial context, central to American jurisprudence, pits opposing sides against each other, thereby motivating the deepest search for truth.<sup>37</sup> To ensure that the adversarial context is met, each party must have a

---

the court is whether the EPA is authorized to make considerations beyond the scope of science, such as practicality and policy considerations.

<sup>32</sup> *Mass.*, 127 S.Ct. at 1462.

<sup>33</sup> 42 U.S.C. § 7521(a)(1) (2000).

<sup>34</sup> 42 U.S.C. § 7602(h) (2000).

<sup>35</sup> U.S. CONST. art. III, § 2.

<sup>36</sup> *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

<sup>37</sup> *Baker v. Carr*, 369 U.S. 186, 204 (1962).

legitimate stake in the outcome,<sup>38</sup> which can be established by showing injury, causation and redressability.<sup>39</sup>

Before jumping into the elements of standing, it is important to note that the Court recognizes special significance regarding a procedural right to judicial review when that right is imbedded in a statute. In *Lujan*, the Court acknowledged that a procedural right to a judicial hearing relaxes the requirements for immediacy and redressability.<sup>40</sup> This is relevant for injuries that occur in the future caused by government inaction. For example, a litigant living near a proposed dam site could challenge the government's failure to undertake an environmental impact statement, even before the construction occurred.<sup>41</sup> It is possible that the environmental impact statement will not remedy the litigant's plight, but if Congress afforded the litigant a procedural right to judicial review, then that litigant may achieve standing, even without showing an injury or that redressability is certain.<sup>42</sup> Thus, a litigant with a procedural right to judicial review will have standing even if some uncertainty exists as to whether a court imposed remedy will adequately redress the plaintiff's future loss.<sup>43</sup>

### 1. Injury

The plaintiff's injury must be concrete and particularized.<sup>44</sup> However, the injury does not need to be measured by objective economics, but instead can be damage to the "aesthetic and environmental well-being" of a national forest.<sup>45</sup> If the injury has not already occurred, then it must at least be imminent.<sup>46</sup>

---

<sup>38</sup> *Id.*

<sup>39</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>40</sup> *Id.* at 572 n. 7.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

<sup>45</sup> *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

<sup>46</sup> *Lujan*, 504 U.S. at 560. The limitation on immanency is defined by the concreteness. *Id.* In *Lujan*, the court decided the plaintiffs did not demonstrate adequate injury since

While the harm must be particularized, that does not mean the harm must be limited only to the plaintiffs.<sup>47</sup> The Supreme Court asserted jurisdiction in *U.S. v. SCRAP* because the plaintiff group, as well as other citizens who enjoy the national forests and other natural habitats would be harmed by an increase in litter if the United States government operated in a way that indirectly discouraged recycling.<sup>48</sup> The Supreme Court reasoned that denying “standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread Government actions would be questioned by nobody.”<sup>49</sup> On the other hand, the Court refused to find standing in *Flast v. Cohen* when the litigant suffered a “generalized grievance about the conduct of government” in a suit regarding tax appropriations.<sup>50</sup> Despite the taxpayer distinction, a fine line separates the holding advanced in *SCRAP* with the separation of powers doctrine which disallows standing for generalized grievances developed in *Flast v. Cohen*.

Although a limit exists to how widespread the injury can be, this limitation does not preclude a State from achieving judicial standing.<sup>51</sup> A State’s interest can be twofold; as the proprietor of State organizations or as a representative of all its citizens.<sup>52</sup> However, the injury must occur to one or both of those interests.<sup>53</sup> The State cannot sue as a nominal plaintiff.<sup>54</sup> If a few specific citizens are the true plaintiffs, then the court will not have jurisdiction over a plaintiff State’s claim.<sup>55</sup> The Court forces those specific citizens to advance the claim themselves, not the government.<sup>56</sup>

---

there was only the possibility that the plaintiffs would ever use allegedly damaged land.  
*Id.* at 562-63.

<sup>47</sup> *U.S. v. SCRAP*, 412 U.S. 669, 687 (1973).

<sup>48</sup> *Id.* at 688.

<sup>49</sup> *Id.*

<sup>50</sup> *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

<sup>51</sup> *State of Ga. v. Pa. R. Co.*, 324 U.S. 439, 449-50 (1945).

<sup>52</sup> *Id.* at 450.

<sup>53</sup> *Id.* at 451-52.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 452.



## 2. Causation and Redressability

The conduct sought to be remedied must cause the injury the plaintiffs allege.<sup>57</sup> If instead, the injury is caused by a party not before the court, then the element of causation cannot be satisfied.<sup>58</sup> When the plaintiff sues over government inaction, it is important as to whether the plaintiff is "an object of the [inaction] at issue."<sup>59</sup> When the plaintiff is the object of the inaction, then causation is generally obvious.<sup>60</sup> However, if the government inaction instead focuses on a third party, then causation becomes much more complex.<sup>61</sup> In the latter case, the plaintiff has a heavy burden of proving that the requested relief will provide the plaintiff with a remedy.

The standard for showing that the relief requested will provide the sought after remedy is "substantial likelihood."<sup>62</sup> Therefore, the requested relief does not need to be certain to bring relief, but there must be a high probability that a favorable judgment will provide relief.<sup>63</sup> This is not to say that full relief must occur in one fell swoop.<sup>64</sup> Instead, the relief can occur in stages, where partial relief occurs initially, and additional relief occurs in the future.<sup>65</sup>

## B. Authority to Regulate (or not to Regulate)

Generally, agencies receive broad discretion when deciding whether to regulate.<sup>66</sup> However, the broad discretion applies only when the statute is ambiguous.<sup>67</sup> If the action or inaction by the agency is arbitrary and capricious, then the court must overrule the agency's

---

<sup>57</sup> *Lujan*, 504 U.S. at 560.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 561.

<sup>60</sup> *Id.* at 561-62.

<sup>61</sup> *Id.* at 562.

<sup>62</sup> *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 79 (1978).

<sup>63</sup> *Id.*

<sup>64</sup> *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

<sup>65</sup> *Id.*

<sup>66</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

<sup>67</sup> *Id.*

decision.<sup>68</sup> When the issue before the court is an agency's inaction, and more specifically its refusal to generate regulations, the standard of review is "extremely limited" and "highly deferential."<sup>69</sup> Thus, an agency's inaction will be given a high degree of discretion providing that inaction is not arbitrary and capricious.

Some objects defy regulation if those things have a unique history and ubiquitous presence and the statute suspected of authorizing the regulation is not explicit.<sup>70</sup> In *Brown & Williamson Tobacco Corp.*, the Supreme Court held that tobacco products were not "drugs" or "devices" according to the Food, Drug and Cosmetic Act, which prevented the Food and Drug Administration from regulating cigarettes, among other tobacco products.<sup>71</sup> The Food, Drug and Cosmetic Act "requires the [Food and Drug Administration] to prevent the marketing of any drug or device where the 'potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit.'"<sup>72</sup> Thus, if cigarettes were in fact "drugs" or "devices", then the Food and Drug Administration would be forced to issue a complete ban on cigarettes, since cigarettes do not have any "possibility of therapeutic benefit" to compensate for their health hazard.<sup>73</sup> The court decided that if Congress wanted to ban cigarettes completely, it would have done so explicitly since cigarettes are not typically thought to be in the category of illicit drugs, and because such a ban would have sweeping economic effects as it would instantly wipe out an enormous and resilient industry in the United States.<sup>74</sup>

In most cases, a statute gives some discretion to the agency that Congress empowers. Section 7521(a)(1) of the Clean Air Act authorizes the EPA to consider the public health or welfare in determining whether or not a substance is an air pollutant.<sup>75</sup> Welfare can include, among other

---

<sup>68</sup> *Id.* at 844.

<sup>69</sup> *Nat'l Customs Brokers & Forwarders Ass'n. of Am., Inc. v. U.S.*, 883 F.2d 93, 96 (D.C. Cir. 1989).

<sup>70</sup> *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 136 (2000).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 134.

<sup>73</sup> *Id.* at 134-35.

<sup>74</sup> *Id.* at 135-36.

<sup>75</sup> 42 U.S.C. § 7521(a)(1) (2000).

things, the impact on the weather and climate.<sup>76</sup> The discretion, however, does not extend beyond the text of the statute.<sup>77</sup> More specifically, the EPA is not authorized to consider broad economic impacts of its regulations without a textual provision to the effect.<sup>78</sup>

Based on the relevant section of the Clean Air Act,<sup>79</sup> the EPA concluded in 1998 that it had the authority to regulate carbon dioxide emissions from motor vehicles.<sup>80</sup> The EPA reiterated its decision regarding its authority again in 1999.<sup>81</sup> However, in 2003, the EPA decided that it lacked the authority to regulate carbon dioxide emissions from motor vehicles.<sup>82</sup>

### III. INSTANT DECISION

Massachusetts challenged the EPA's inaction. Justice Stevens, joined by four members of the Supreme Court, ruled in favor of Massachusetts and the accompanying petitioners.<sup>83</sup> The majority held: (1) that Massachusetts did have standing to petition for review of the EPA's decision to decline regulation of greenhouse gas emissions from motor vehicles; (2) that the EPA did have the authority to regulate greenhouse gas emissions, and furthermore; (3) that the Clean Air Act required the EPA to regulate greenhouse gas emissions of greenhouse gases cause climate change.<sup>84</sup> In dissent, three Justices sided with Chief Justice Roberts that Massachusetts could not demonstrate standing, thereby removing the Court's jurisdiction.<sup>85</sup> Furthermore, the dissent countered, this time through Justice Scalia, that even if the petitioners did

---

<sup>76</sup> 42 U.S.C. § 7602(h) (2000).

<sup>77</sup> *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

<sup>78</sup> *Id.*

<sup>79</sup> 42 U.S.C. § 7521(a)(1) (2000).

<sup>80</sup> *Mass. v. Env'tl. Prot. Agency*, 127 S.Ct. 1438, 1449 (2007).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1450.

<sup>83</sup> *Id.* at 1438.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1464.

have standing, the EPA was within its bounds of discretion to refuse to regulate greenhouse gases from motor vehicles.<sup>86</sup>

### A. Standing

The majority began by discussing the relaxed standing requirements that are applicable when a litigant has a statutorily provided procedural right to petition for a rulemaking review.<sup>87</sup> Since § 7607(b)(1) of the Clean Air Act provided such a right, the court reasoned that Congress provided special significance to judicial review so that the litigant needed only show that “some possibility” exists that the requested relief will remedy the litigant’s injury.<sup>88</sup> The Court also asserted that because at least one litigant is a state,<sup>89</sup> it has a quasi-sovereign interest in the property owned by the state.<sup>90</sup> This quasi-sovereign interest is independent from the rights of its citizens.<sup>91</sup> Therefore, the Court viewed the litigation as Massachusetts asserting its own rights under the Clean Air Act, not the rights of its citizens.<sup>92</sup> The majority did not explicitly argue that being a state relaxes the articles of standing, but instead only pointed out the fact that the plaintiff’s status as a state “is of considerable relevance” due to the quasi-sovereign interest.<sup>93</sup>

The Court next turned to the three requirements of standing: injury, causation and redressability.<sup>94</sup> Justice Stephens based the injury in the strong scientific consensus that predicts a rise in sea level resulting

---

<sup>86</sup> *Id.* at 1471, 1478.

<sup>87</sup> *Id.* at 1453.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1454. Other states may also qualify but, the court chose to focus on Massachusetts since only one litigant needs to demonstrate standing. *Id.* at 1453.

<sup>90</sup> *Id.* at 1454-55. Although the states are not completely sovereign, they do retain some rights over the federal government relating to their territory. *Id.* at 1454.

<sup>91</sup> *Id.* at 1454.

<sup>92</sup> *Id.* at 1455, n. 17 (stating that Massachusetts “seeks to assert *its* rights under the Act.”) (emphasis added)

<sup>93</sup> *Id.* at 1454. Nevertheless, the majority does spend a good deal of effort distinguishing the rights of a state from the rights of an individual litigant, and, furthermore, the dissent accuses the majority of relaxing the standing requirements for a state, which the dissent views as contrary to established precedent. *Id.* at 1454-55, 1464.

<sup>94</sup> *Id.* at 1452.

from global warming.<sup>95</sup> The Court argued the rise in sea level, which has already risen between ten and twenty centimeters over the 20<sup>th</sup> century, will destroy some of the state's coastal property through permanent inundation or intermittent storm surges.<sup>96</sup> This injury, Justice Stephens stated, is both concrete and particularized to coastal land.<sup>97</sup> While the Court acknowledged that the injury is widespread, the Court reasoned that denying review on that ground would mean that governmental inaction which causes the most widespread harm could be "questioned by nobody."<sup>98</sup>

The Court found causation to be straightforward since the EPA does not dispute whether greenhouse gases emitted from motor vehicles contribute to global warming.<sup>99</sup> Even though the contribution from motor vehicles in the United States is only a small fraction of the worldwide greenhouse gas emissions, focusing on that small fraction is still a step in the right direction in the majority's opinion.<sup>100</sup> In fact, the Court pointed out that a tentative first step is often best because it allows for subsequent iterations to hone in on the best possible solution.<sup>101</sup> And, the Court continued, this first step is not as small as the dissent insinuated, since the American transportation sector alone would rank third behind only the entire European Union and China for total greenhouse gas emissions.<sup>102</sup> Even though the objects of the inaction were third parties (motor vehicles) and not the defendant, the majority believed the causation element was strong enough to overcome the heavy burden established in *Lujan*.<sup>103</sup>

---

<sup>95</sup> *Id.* at 1455-56.

<sup>96</sup> *Id.* at 1456.

<sup>97</sup> *Id.* The state's coastal interest includes "approximately 53 coastal state parks, beaches, reservations and wildlife sanctuaries" in addition to "sporting and recreational facilities." *Id.* n. 19.

<sup>98</sup> *Id.* at 1458 n. 24 (quoting *U.S. v. Students Challenging Reg. Agency Procedures*, 412 U.S. 669, 688 (D.C. Cir. 1973)).

<sup>99</sup> *Id.* at 1457.

<sup>100</sup> *Id.* The majority points out that 6% of the global greenhouse gases come from automobiles in the United States, so regulating this fraction will still bring about a meaningful contribution. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

The majority rounded out the standing elements by reasoning that the redressability element was also met.<sup>104</sup> The Court admitted that the requested relief will not reverse global warming by itself, but it will slow global warming which partly remedies the litigant's claim.<sup>105</sup> Of course, the EPA cannot directly control China and India, where emissions are rapidly increasing, but the majority shows that the EPA can dampen the impact of this real threat.<sup>106</sup>

### B. Dissent: Standing

Four justices dissented on the issue of standing arguing the problem of global warming is for policymakers, not the judiciary.<sup>107</sup> The dissent argued that the standing requirements were improperly relaxed in this case because the specific procedure for filing a rule making petition provided by Congress in no way relaxes the standing requirements.<sup>108</sup> The dissent further disagreed with the Court's loosening of the standing requirements for a state, arguing that if the litigant is a state, the standing requirements are actually tightened rather than relaxed.<sup>109</sup>

As to the elements of standing, (injury, causation and redressability), the dissent believed the plaintiffs came up short on all three requirements.<sup>110</sup> Because the injury of global warming affects all of society, the dissent argued that the injury is not sufficiently particularized,

---

<sup>104</sup> *Id.* at 1458. (Much of this analysis collapses into the causation element. The causation and redressability analysis are similar because if in fact the injury is caused by the EPA's inaction, then forcing the EPA to act will redress the injury).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1463-64.

<sup>108</sup> *Id.* at 1464.

<sup>109</sup> (106) *Id.* at 1464-65. Writing for the dissent, the Chief Justice accuses the majority of misinterpreting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). *Id.* at 1465. The dissent claims that standing was not an issue in that case, which instead dealt with the difference in remedies afforded to a quasi-sovereign litigant as opposed to a private individual. *Id.* In fact, the dissent continues, if a plaintiff is a state, it is required to clear an additional hurdle – it must show a quasi-sovereign interest in addition to the interest of its citizens. *Id.* Thus, the Chief Justice states, the Court's finding of standing based off of only a quasi-sovereign interest is flawed. *Id.* at 1465-66.

<sup>110</sup> *Id.* at 1467-69.

even if the injury is loss of coastal land.<sup>111</sup> The dissent argued that the loss of state land should not qualify as an injury to a state asserting quasi-sovereign status because if a state's land is at issue, then private individuals would surely own similarly situated land that would also be affected, making it the duty of the private individuals to file an action with the court, not the state at the expense of all taxpaying citizens.<sup>112</sup> The dissent further found the injury too hypothetical to qualify as actual or imminent.<sup>113</sup> While the dissent acknowledged that an actual injury could occur since global sea levels have risen ten to twenty centimeters during the 20<sup>th</sup> century, the dissent was nevertheless unimpressed that the plaintiffs did not elaborate by showing resulting damage.<sup>114</sup> The dissent also pointed out that the injury is hardly imminent since the predicted rise over the 21<sup>st</sup> century of twenty to seventy centimeters is coupled with a maximum margin of error of up to seventy centimeters.<sup>115</sup> Thus, it would not be outside of statistical expectations if sea level actually fell by fifty centimeters.

The dissent's issue with causation was that global warming is simply too complex of a phenomenon<sup>116</sup> to attribute a significant amount of causation to the greenhouse gases emitted from American motor vehicles.<sup>117</sup> The defendant EPA, the dissent suggested, can only regulate a fraction of the four percent of the total global greenhouse gas emissions.<sup>118</sup> Due to the complexity of global warming, the dissent argued that the

---

<sup>111</sup> *Id.* at 1467.

<sup>112</sup> (109) *Id.* at 1466.

<sup>113</sup> *Id.* at 1467.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1467-68.

<sup>116</sup> *Id.* at 1468. The impact is complex because it is difficult to predict the quantity of greenhouse gas emissions, or how much the oceans and vegetation will absorb, or how to quantify the greenhouse mechanism, how to account for things like cloud cover among many other complexities. *Id.* at 1469.

<sup>117</sup> *Id.* at 1468.

<sup>118</sup> *Id.* Since the Clean Air Act only gives the EPA the authority to regulate new motor vehicles and since motor vehicles in the United States contribute to only 4 percent of global greenhouse gases, the causation of American motor vehicles is small. *Id.*

impact of the EPA's inaction has an indeterminate effect on the alleged injury which prevents standing.<sup>119</sup>

The dissent further stated that the problem cannot be redressed by the EPA since eighty percent of greenhouse gas emissions occur outside the United States.<sup>120</sup> The dissent did not buy the argument that other countries will follow the lead of the United States on this issue regardless of the economic impact of decreasing global gas emissions.<sup>121</sup> The dissent did not agree that the injury was related to what can be remedied in the instant action.<sup>122</sup>

### C. Merits

For the merits of the EPA's argument, the court applied a highly deferential standard that is even more limited than typical agency review since the review involves a failure to act rather than an actual act.<sup>123</sup> Still, the Court had little trouble deciding that the text of the Clean Air Act authorizes the EPA to regulate emissions from motor vehicles because greenhouse gas emissions are air pollutants according to § 7602(g) of the Clean Air Act.<sup>124</sup> Therefore, the EPA has the statutory authority to regulate these emissions since the plain language of § 7521(a)(1) directs the EPA to regulate air pollutants from motor vehicles.<sup>125</sup>

Despite the language of the statute, the EPA relied on *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.* in claiming it was not Congress' intent to allow the EPA to regulate greenhouse gas emissions from motor vehicles.<sup>126</sup> This argument suggests that, just as the Food, Drug and Cosmetic Act, which applied to "drugs" and "devices,"

---

<sup>119</sup> *Id.* The dissent recognizes that the standards have been stretched in the past, namely in *U.S. v. Student Challenging Regulatory Procedures (SCRAP)*, 412 U.S. 669 (1973), but argues this case was a mishap of judicial restraint. *Id.* at 1470-71.

<sup>120</sup> *Id.* at 1469.

<sup>121</sup> *Id.* at 1469-70.

<sup>122</sup> *Id.* at 1470.

<sup>123</sup> *Id.* at 1459.

<sup>124</sup> *Id.* at 1459-60.

<sup>125</sup> *Id.* at 1459-61. The EPA did not produce any legislative history that says otherwise.

*Id.*

<sup>126</sup> *Id.* at 1461.



could not be read so broadly to apply to a common item with a unique history such as cigarettes, so too the Clean Air Act applying to air pollutants cannot be read so broadly as to cover common agents such as carbon dioxide emitted from motor vehicles, which also have a unique history in the United States.<sup>127</sup> But the majority distinguished the instant case because applying the Food, Drug and Cosmetic Act to tobacco would ban cigarettes completely, and if Congress had intended its statute to have such a sweeping effect, it surely would have said so in no uncertain terms. In *Massachusetts* on the other hand, applying the Clean Air Act to motor vehicles emissions would not ban automobiles or even automobile emissions, so there is nothing counterintuitive about applying the act to motor vehicles emissions.<sup>128</sup>

The Court pointed out another distinguishing characteristic related to statements made by the EPA as opposed to the Food and Drug Administration.<sup>129</sup> After the Clean Air Act, the EPA publicly asserted jurisdiction over greenhouse gas emissions from motor vehicles. If Congress disagreed, it could have modified the statute. However, before *Brown & Williamson Tobacco Corp.*, the Food and Drug Administration consistently stated that it did not have authority over tobacco products, so Congress had no impetus for modifying the Food, Drug and Cosmetic Act if Congress agreed.<sup>130</sup> Overall, the Court suggested the language of § 7521(a)(1) of the Clean Air Act is meant to provide the EPA with some flexibility for changed circumstances and scientific advances, not to shirk responsibility all together.<sup>131</sup>

The final point the Court discussed is the EPA's assertion that even if it does have the authority to regulate greenhouse gas emissions, it can refuse to promulgate rules at its discretion.<sup>132</sup> The Court rejected this basis because the statutory text bound that discretion to whether

---

<sup>127</sup> *Id.* at 1450 at 1450, 61.

<sup>128</sup> *Id.* at 1461.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* The majority also did not believe that there was any problem with the EPA having overlapping jurisdiction with the Department of Transportation, which is responsible for regulating mileage standards on vehicles. *Id.* at 1462.

<sup>131</sup> *Id.* at 1462.

<sup>132</sup> *Id.*

greenhouse gases contribute to global warming.<sup>133</sup> In other words, the EPA has the discretion to refuse to regulate, but only if the EPA found that greenhouse gases emitted from motor vehicles do not facilitate global warming.<sup>134</sup> The majority did not see the relevance in the EPA's argument that regulation would take away a bargaining chip for the President in negotiating international greenhouse gas reduction agreements.<sup>135</sup> The Court reasoned that this diplomatic consideration was irrelevant because it was not tied to the statutory text, and thus beyond the legislatively authorized discretion.<sup>136</sup>

According to the Court, the uncertainty regarding specific aspects of global warming was also found to be insufficient justification for EPA inaction.<sup>137</sup> If the EPA decided that greenhouse gases did not contribute to global warming, then the EPA would be justified in refusing to regulate.<sup>138</sup> However, the EPA agrees that greenhouse gases contribute to global warming.<sup>139</sup> The Court interpreted the Clean Air Act to authorize discretion only as to whether or not greenhouse gases contribute to global warming, not the significance of various features or the degree of impact.<sup>140</sup>

Thus, the Court effectively ruled that greenhouse gases, including carbon dioxide, are air pollutants under § 7521 of the Clean Air Act.<sup>141</sup> The only way that carbon dioxide would not be considered an air pollutant under this section is if the EPA determined that carbon dioxide and the other greenhouse gases did not contribute to global warming.<sup>142</sup> However, the EPA has already conceded this fact, and a retraction would be contrary to the scientific consensus.

---

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1462-63.

<sup>135</sup> *Id.* at 1463.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1457.

<sup>140</sup> *Id.* at 1463.

<sup>141</sup> *See Mass.*, 127 S. Ct. 1438.

<sup>142</sup> *Id.*

## IV. COMMENT

The bold ruling of *Massachusetts* recognizes standing for what might be the most generalized grievance ever to receive the support of a Supreme Court majority. A grievance not just felt across the United States as in *SCRAP*, but across the entire globe.<sup>143</sup> The Court was justified in extending standing to the plaintiff states based on the precedent in *SCRAP* and the rationale that the Court must be empowered to hear cases of widespread grievances or else the most sweeping abuses by the political branches could be questioned by no one.<sup>144</sup> Implicit in the Court's decision to extend standing is the notion that the political branches do not always operate effectively in the context of environmental regulation, and especially, as in this case, when the circumstances require immediate action to realize long term benefits.

After hearing *Massachusetts*, the Court decided that greenhouse gases, including carbon dioxide, are air pollutants under § 7521 of the Clean Air Act (assuming the greenhouse gases contribute to global warming, which the Court left up to the EPA to decide), and thus, must be regulated when released from new motor vehicles.<sup>145</sup> The decision forces the EPA to get serious about global warming, most likely beyond the motor vehicle sector, making the economic ramifications of the case even more significant. Regulation in the motor vehicle context has some

---

<sup>143</sup> *Id.*; U.S. v. *SCRAP*, 412 U.S. 669 (1973). Although the majority intentionally focused the ruling on property which will be affected by rising sea levels, it is clear that everybody will be affected by significant climate change. For example, even though Iowa does not have any coastline, the agriculture industry would certainly be impacted, which probably explains why Iowa's Attorney General joined in *Conn. v. Am. Elec.*, a public nuisance claim, where the plaintiffs sued a group of electric utilities for spewing carbon dioxide into the atmosphere. *Conn. v. Am. Elec.*, 406 F.Supp.2d 265, 267-68 (S.D. N.Y. 2005). In *Conn. v. Am. Elec.*, the plaintiffs claim failed because it was a political question. *Id.* at 274. This case is distinct from *Massachusetts* because the plaintiffs asked the Court to act directly upon the source of greenhouse gas emissions, using common law as opposed to disputing a statutorily created mandate with the executive branch. *Id.*

<sup>144</sup> *Mass.*, 127 S. Ct. at 1458 n. 24. Although the majority only cites to *SCRAP* in a footnote, the dissent discusses it as if it is a significant implied basis for the majority's decision. *See id.* at 1470-71.

<sup>145</sup> *Mass.*, 127 S. Ct. 1438.

positive economic impacts which will offset some of the costs commonly associated with regulation.

Thus, *Massachusetts* is significant in two respects. The case is legally significant because of the extension of standing and the fact that the merits of this case will extend to other sectors of U.S. industry. The case is economically significant because the EPA must now regulate what may be the most widespread byproduct of industrialization, carbon dioxide.<sup>146</sup>

## A. Legal Analysis

### 1. Standing for a Widespread Injury

Chief Justice Roberts and Justice Scalia are longtime critics of granting standing for generalized grievances, and believe this sort of policy should be left to the political branches.<sup>147</sup> Since an injury such as global warming affects so many people, the best venue for a remedy is at the ballot box they urge, not the courts.<sup>148</sup> While it is true that global warming will impact everybody, the court stayed within the bounds of

---

<sup>146</sup> It is important to understand that carbon dioxide is not like traditional pollutants, which is what makes the regulation of carbon dioxide so extraordinary. Instead, it along with water, is the chief byproduct of combustion. See RICHARD M. FELDER & RONALD W. ROUSSEAU, *ELEMENTARY PRINCIPLES OF CHEMICAL PROCESSES*, 141-42 (John Wiley & Sons 1986). Fossil fuels such as gasoline produce a fixed amount of energy during combustion. *Id.* at 619 (stating the amount of energy produced by combustion of n-octane or gasoline). Since fossil fuels such as gasoline also have a fixed chemical structure with a fixed amount of carbon atoms, the amount of carbon dioxide produced in combustion cannot be appreciably altered. See *id.* at 142. In other words, decreasing carbon dioxide emissions is not like removing lead and sulfur from gasoline emissions, impurities which can be removed to some extent, because combustion produces a fixed amount of carbon dioxide. The only way to decrease carbon dioxide emissions from fossil fuel combustion is to decrease consumption of fossil fuels. Thus, any regulation by the EPA will be targeted at an eventual decrease in combustion of gasoline. When considering that fossil fuels have powered economic growth since the dawn of industrialization, the impact of moving away from fossil fuels is truly extraordinary.

<sup>147</sup> See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (April 1993); Antonin Scalia, *The Doctrine of Standing as an essential element of the separation of powers*, 17 SUFFOLK U. L. REV. 881, 894-95 (1983).

<sup>148</sup> *Id.*

standing by focusing on the particularized and concrete injury to coastal property.<sup>149</sup> Global warming may be bad for everybody, but it is of particular concern to those states and individuals owning title to coastal property. This disparity of interests suggests that the ballot box may not adequately redress the damage resulting from climate change.<sup>150</sup> For example, voters living at sea level in Manhattan might care more about melting Arctic and Antarctic ice sheets than voters in Montana.

Furthermore, strict adherence to the rule dismissing generalized grievances overestimates the value of decentralized knowledge in environmental decisions,<sup>151</sup> and ignores the possibility that political officials may be reluctant to make immediate sacrifices to maintain the climate.<sup>152</sup> After all, mitigating the effects of global warming will be expensive.<sup>153</sup> The elected branches might suffer from myopia since asking constituents to bear short-term costs for intangible long-term benefits is not always the best way to curry favor with fickle voters.

The long term benefits are intangible due to the uncertainty regarding the impact of global warming,<sup>154</sup> which encourages politicians to shy away from greenhouse gas regulation. The uncertainty is no longer about whether carbon dioxide emissions will have negative repercussions, but how severe those repercussions will be. For example, it is somewhat

---

<sup>149</sup> *Mass.*, 127 S. Ct. 1438.

<sup>150</sup> With the relaxed requirements on immediacy justified by the procedural right to judicial review, the future injury is a sufficient injury because the science says the damage caused by greenhouse gases will eventually result.

<sup>151</sup> Decentralized knowledge generally refers to the efficient operation of the market where value is determined by the people or the free market. In this case, the market is the democratic process.

<sup>152</sup> In addition to the reason discussed, the strict adherence of Scalia and Roberts might lose practicality in a democracy with many issues. Voters whose injury is not that significant might ignore the injury and vote according to other issues.

<sup>153</sup> See *infra* IV.B for a discussion on the economic impact of greenhouse gas regulation.

<sup>154</sup> *Mass.*, 127 S. Ct. at 1467 (Roberts, J. dissenting). In dissent, Roberts points out that the majority does not elaborate on the impact of rising sea levels other than to say it will cause a loss of land. *Id.* A loss of land clearly has some cost, but how much cost and when that cost will come into play is far from certain. Furthermore, the maximum statistical error of the majority's prediction for rising sea levels is 70 centimeters over through 2100. *Id.* at 1468. If this maximum error occurs in the negative, then there will be no sea level rise at all because the expected rise is 20 to 70 centimeters through the end of this century. *Id.*

uncertain whether the rising temperatures will raise the sea level thirty centimeters by 2100 or sixty centimeters by that year.<sup>155</sup> The amount of money spent on reversing global warming should obviously consider the severity of the repercussions, but unfortunately, that severity is unknown. At least partly due to this economic uncertainty, Congress passed the buck to the executive branch, providing the EPA with authority to regulate emissions that contribute to global warming, but also providing the EPA with some discretion.<sup>156</sup> The uncertainty also explains why the EPA resisted regulation while simultaneously asserting authority to regulate greenhouse gas emissions.<sup>157</sup> The political branches must account to the voters of today, not the voters in fifty years and, apparently for the elected branches, the political tradeoff between short-term costs and long-term benefits is an issue that is easier to dodge than to face, at least until now.<sup>158</sup>

In addition to demonstrating sufficient injury, Massachusetts also satisfied the causation and redressability requirements of standing. It is true that greenhouse gases are not only emitted from motor vehicles within the United States, but that does not mean that greenhouse gases from motor vehicles do not cause some injury by accelerating the effect of global warming. Furthermore, decelerating the impact of global warming provides some redress for Massachusetts and the other injured states, even if it is only one small piece of the problem.

---

<sup>155</sup> *Id.* at 1467-68.

<sup>156</sup> See 42 U.S.C. § 7521(a)(1) (2000).

<sup>157</sup> *Mass.*, 127 S. Ct. at 1449. Consider that the Court may have been motivated to decide the case partly because of President Bush's failure to recognize the impact human activity has on global warming until 2003. See Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L. L. 3 (2007).

<sup>158</sup> Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1130 n.42 (1977) on the propensity of the elected branches for dodging:

On the congressional proclivity for ducking difficult decisions, see 122 Cong. Rec. 31,622 (1976) (statement by Rep. Flowers) ("Congress pass [[es] myriad laws and ... invest[s] ... agencies with ... vast power to make rules and regulations, and then ... stand[s] back and say[s] when ... constituents are aggrieved or oppressed by various rules and regulations, 'Hey, it's not me. We didn't mean that.' ")

Such factors and influences explain why the Court asserted jurisdiction and subsequently ignored the executive branch's interpretation of the Clean Air Act. Unlike the other branches, the Court can do the right thing, even when it is unpopular.<sup>159</sup> Under this view, the Court is justified to hear a case involving "the most pressing environmental challenge of our time"<sup>160</sup> because the decision conforms to precedent on standing and because the ballot box might not be effective in redressing Massachusetts' injuries.

The decision does not allow the Court to develop policy as the dissent suggests, but instead the decision allows the judicial branch to pressure the executive branch to develop policy, based on the perceived intent of the legislative branch. The policy making comes from the development of regulations, not the Court's order to regulate. The Court only provided an avenue of relief because the democratic outlets were unresponsive to the difficult decision relating to global warming.<sup>161</sup>

## 2. Future Extension of Ruling to Electric Utilities

The constitutional question of standing would be even stronger when regarding emissions from electric power plants. Whereas as all of the motor vehicles in the United States contribute about two billion metric tons of greenhouse gases each year, the electric companies generate almost two and a half billion metric tons annually.<sup>162</sup> This means more pollution coming from a smaller, and thus, more manageable group to

---

<sup>159</sup> Eli Salzberger, Paul Fenn, *Judicial Independence: Some Evidence From The English Court Of Appeal*, 42 J.L. & ECON. 831, 832 (Oct. 1999)

<sup>160</sup> *Mass.*, 127 S. Ct. at 1446.

<sup>161</sup> Lisa Schultz Bressman, *Deference and Democracy*, GEO. WASH. L. REV. (June 2007). The judicial reach in *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120 (2000), *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) and *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) were all responses to a perceived dysfunction in the political branches. See *id.*

<sup>162</sup> EPA website using 2005 numbers, <http://www.epa.gov/climatechange/emissions/usgginventory.html> (last visited Nov. 13, 2007). The Supreme Court cited the MacCracken affidavit which stated 1.7 billion metric tons were emitted from U.S. automobiles in 1999. *Mass.*, 127 S. Ct. at 1457.

regulate.<sup>163</sup> Furthermore, the redressability is already proven. Nuclear, hydroelectric, wind and solar are all proven alternatives that contribute an inappreciable quantity of carbon dioxide,<sup>164</sup> while alternatives to motor vehicle combustion engines, such as electric and hydrogen powered cars, are not used extensively. Already twenty five percent of the nation's power comes from power plants that do not use fossil fuels, while only two percent of the transportation sector has moved to technologies that do not emit greenhouse gases.<sup>165</sup> This is not to say that cutting carbon dioxide emissions would be less costly with power plants than with motor vehicles. However, with a major electric company advocating carbon dioxide restrictions on electric generating plants,<sup>166</sup> changes must be economically feasible.

With standing established under *Massachusetts*, a state could now sue the EPA for neglecting to control carbon dioxide emissions from electric companies. Massachusetts would still be precluded from bringing an action directly against the electric companies under the doctrine of political question,<sup>167</sup> but the case against the EPA is all but explicitly decided if Massachusetts wielded litigation to compel the EPA to develop emissions criteria for carbon dioxide.

The Court recognized carbon dioxide as an air pollutant under § 7521, and the doctrine of *pari materia* requires carbon dioxide to be considered an air pollutant in other sections of the Clean Air Act as

---

<sup>163</sup> Even though the Court only acted upon one defendant, the EPA will still have to impose restrictions on a huge number of entities and individuals. Whereas with action against electric companies, the restrictions would be on group that is orders of magnitude smaller.

<sup>164</sup> Nuclear, hydroelectric, wind and solar power do not come from fossil fuels, and do not consist of any chemical reaction that releases carbon dioxide.

<sup>165</sup> John Donnelly, *High Court to Hear Case on Auto Pollution: Mass., other States Challenge EPA*, BOSTON GLOBE, Nov. 29, 2006.

<sup>166</sup> Duke Energy, the third largest generator of coal produced electricity, favors regulation of carbon dioxide emissions. Testimony Before Subcomm. on Energy and Air Quality Energy and Commerce Committee, 110<sup>th</sup> Cong. (2007) (testimony of James E. Rogers, Chairman, President and CEO Duke Energy Corp.).

<sup>167</sup> In *Am. Elec.*, Connecticut, a state situated similarly to Massachusetts, charged a slew of electric companies with a public nuisance. *Conn. v. Am. Elec.*, 406 F.Supp.2d 265 (S.D. N.Y. 2005). However, the Court rejected the claim as a public question and *Mass.* does not change that ruling.



well.<sup>168</sup> This ruling extends past motor vehicles because, not surprisingly, many other areas of the Clean Air Act also regulate air pollutants.<sup>169</sup> For example, § 7408(a) requires the EPA to establish criteria for climate changing air pollutants emitted from stationary sources, which include electric plants.<sup>170</sup> Massachusetts or a similarly situated state could compel the EPA to regulate electric plants under the ruling in *Massachusetts*.<sup>171</sup>

### B. Economic Impact of Greenhouse Gas Regulation

Contrary to what is implied by the dissent, the Court did not develop policy. The EPA will still make the policy regarding carbon dioxide emissions from motor vehicles. The only requirement from the court is that the EPA has to come up with some policy. But the extent of the regulation is wide open, so the EPA could implement modest restrictions, aggressive restrictions, or anything in between. Even the most aggressive timeline for a policy would not take effect for at least a few years, to provide car manufacturers a reasonable amount of time to align resources and planning. Thus, the next administration will have the most significant responsibility in enforcing emissions criteria.

In response to *Massachusetts*, the EPA will, in some measure, mandate decreased fuel consumption to limit carbon dioxide emissions.<sup>172</sup> The EPA could act cautiously, setting limits that impact only the most egregious example of, say sport utility vehicles, while creating exemptions for commercial hauling vehicles. People wishing to own large sport utility vehicles could still do so, providing they have the means to afford more

---

<sup>168</sup> Brief of Washington Legal Foundation as Amici Curiae Supporting Respondent at 11-12, *Mass.*, 127 S. Ct. 1438 (No. 05-1120), 2006 WL 3043964 (arguing that carbon dioxide should not be considered an air pollutant for motor vehicles because it would follow that carbon dioxide would also be an air pollutant when emitted from coal fired power plants. Since the Court found that carbon dioxide is an air pollutant when emitted from motor vehicles, it will probably extend the application of carbon dioxide).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 14.

<sup>172</sup> Carbon dioxide is a direct byproduct of fossil fuel combustion, not an impurity like lead or sulfur. See *supra*, n. 146. Thus, for the EPA to achieve decreased carbon emissions, the EPA will need to mandate a decrease in fuel consumption.

efficient engines, probably utilizing a non-conventional technology.<sup>173</sup> As a result, oil prices would drop considerably, making energy more efficient for business so that a tangible value could be realized. For example, if motor vehicles averaged forty miles per gallon, oil costs would drop about \$20 a barrel or about twenty-five percent at today's prices.<sup>174</sup> This reduction would benefit consumers (at least those who do not mind giving up sport utility vehicles) and business at the social cost of sacrificing large sport utility vehicles for Chevrolet Cobalts and Honda Civics.<sup>175</sup>

Additionally, pundits Thomas Friedman and Fareed Zakaria, along with a host of others, identify another secondary economic benefit from a decreased reliance on oil.<sup>176</sup> This argument considers that the total cost of oil runs far deeper than what consumers see at gas stations. In addition to the price a consumer pays at the pump, he also pays taxes to the federal government, which spends a significant portion of that revenue protecting the supply of oil by military means.<sup>177</sup> Given that so much oil money goes to oppressive regimes that are often hostile to the United States and that the nature of these regimes is that they are likely to promote terrorism or unrest, American citizens essentially finance multiple sides of economically unproductive conflicts.<sup>178</sup> If the United States did not rely so heavily on a steady supply of oil, then tax money spent on policing the most volatile regions of the world could be remitted back to the taxpayer or at least invested into a more value adding endeavor.<sup>179</sup>

---

<sup>173</sup> Modest moves like this might actually help the President's ability to negotiate international deals as it shows the United States is willing to do its part.

<sup>174</sup> Fareed Zakaria, *Mile by Mile, Into the Oil Trap*, THE WASHINGTON POST (August 23, 2005)

<sup>175</sup> With current technologies, these vehicles get over 30 miles to the gallon according to the respective manufacturers. Chevrolet, <http://www.chevrolet.com/fueleconomy> (last visited Nov. 14, 2007); Honda, <http://automobiles.honda.com/civic-hybrid> (last visited Nov. 14, 2007).

<sup>176</sup> Thomas Friedman, *The Power of Green*, N.Y. TIMES, April 15, 2007; Fareed Zakaria, *How to Escape the Oil Trap*, NEWSWEEK, Aug. 29, 2005; Fareed Zakaria, *The Real Story of Pricey Oil*, NEWSWEEK, May 22, 2006).

<sup>177</sup> Thomas Friedman, *The Power of Green*, N.Y. TIMES, April 15, 2007.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Another way to look at this is to consider the U.S.'s altruistic goal of spreading democracy. *Id.* Increasing oil prices are inversely correlated with curtailing freedom and

The argument for reducing carbon dioxide emissions by decreasing reliance on oil has an appealing ring to it. However, there are people, unconditionally faithful to laissez faire capitalism, who fret over the stifling effects of regulation. By eliminating choice, the theory goes, markets will not operate efficiently, and thus forego some opportunity when compared against the free market.<sup>180</sup> This argument should be the starting presumption in any economic analysis, because in almost all instances, it is true. But in this specific instance, it seems reasonable that the freedom to drive large vehicles is outweighed by the benefit of lower energy costs for commercial use and the possibility of decreased military spending. It is true that such regulation might negatively expose the American vehicle industry, which seems to have a competitive advantage in manufacturing sport utility vehicles, the very vehicles that will be affected the most by carbon dioxide emissions regulation. But even considering the negative economic repercussions, there is sufficient argument on both sides to make either position tenable. Tipping the scale then, is the added bonus of benefiting the environment by delaying, or even reversing global warming.

When carbon dioxide regulations extend beyond motor vehicles and hit the electric companies,<sup>181</sup> the economic picture is less rosy. The costs of phasing out existing coal fired electric plants in favor of nuclear, wind, solar, hydroelectric, etc., will be significant. Carbon dioxide from coal fired electric plants could also be stored under-ground or broken down in some other way, but it will still be associated with increased capital investment and operating costs. Either way, people will pay for the regulation as taxpayers or consumers.<sup>182</sup> Of course, the cost is probably

---

democracy in oil producing states. *Id.* Thus, one way to expand democracy is to decrease the price of oil by driving demand down.

<sup>180</sup> Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 592 (1980) (citing ADAM SMITH, WEALTH OF NATIONS (1776)).

<sup>181</sup> Duke Energy, the third largest generator of coal produced electricity, favors regulation of carbon dioxide emissions. *Subcomm. on Energy and Air Quality Energy and Commerce Comm.*, 110<sup>th</sup> Cong. (2007) (testimony of James E. Rogers, Chairman, President and CEO Duke Energy Corp.). This suggests that regulation is imminent.

<sup>182</sup> *Testimony Before the Committee on Environment and Public Works*, 107<sup>th</sup> Cong. (2001) (testimony of Dale Heydlauff Senior Vice President of Environmental Affairs with American Electric Power Co. on behalf of The Edison Electric Institute). Heydlauff

worth the benefit of stable climate, but everybody will have to pay for the higher energy costs in some form. And with electricity, the economy will not receive secondary benefits as with a decreased reliance on oil.

Those who promote the regulation of electric utilities will surely point to the jobs created from regulation, but that is not the same thing as economic value.<sup>183</sup> Jobs might be created, but the vast majority of those jobs will not generate value and the cost of generating these jobs will be more than offset by corresponding job losses as different sectors of the economy cease to be profitable due to increased energy costs. Nevertheless, the judiciary may again be the forum for pressuring the executive branch to act since this decision is even more painful than the decision to regulate motor vehicle emissions for greenhouse gases.

## V. CONCLUSION

By recognizing standing in *Massachusetts*, the Court demonstrated dissatisfaction with the political branches. The dissatisfaction will likely extend beyond motor vehicles to other emitters of greenhouse gases, namely the electric companies. Since the Court's decision only obligates the EPA to develop the policy, the Court avoids encroaching upon the realm of the elected branches by developing the policy itself.

Of course, any policy the EPA develops will have some impact on the economy. Modest regulations on carbon dioxide emissions from motor vehicles represent the low-hanging fruit on the greenhouse gas list because of the secondary economic benefits of increasing fuel efficiency of motor vehicles. The next step that will almost certainly result from the ruling in *Massachusetts*, regulating electric power plants, will not be so easy on the economy. Consumers will incur a cost for decreasing carbon dioxide emissions while only maintaining the environmental status quo as a benefit, a benefit which is much less tangible than money in a bank

---

and American Electric Power disfavor regulation and point to the strong market based reductions of other air pollutants. *See id.*

<sup>183</sup> Senator Clinton estimates her proposal to address global warming will create five million new jobs through 2020. *See* [cnn.com](http://www.cnn.com), <http://www.cnn.com/2007/POLITICS/11/06/clinton.energy.ap> (last visited November 13, 2007). However, this part is just political puffing, and Senator Clinton does face the underlying issue of cost by stating her plan will cost \$150 billion over ten years. *Id.*

account. Despite the economic consequences of the *Massachusetts* ruling rippling through other sectors of the economy, the Court acted appropriately by following precedent and forcing the executive branch to recognize the scientific consensus regarding global warming.

BRETT MALAND