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Special Solicitude for State Standing: Massachusetts v. EPA

Dru Stevenson

Articles

Special Solicitude for State Standing: *Massachusetts v. EPA*

Dru Stevenson*

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* Associate Professor of Law, South Texas College of Law. I would like to thank my colleague Adam Gershowitz for helpful input and suggestions, and Jay Clendenin for helpful research assistance. Special thanks to Professor Jonathan Masur at the University of Chicago Law School for reviewing the draft and offering insightful comments and proposed revisions. Finally, I am indebted to Eric Prock, Frank Pyle, and the terrific editorial team at the *Penn State Law Review*, whose careful review and suggested changes greatly improved this article. The author was an Assistant Attorney General for the State of Connecticut in 2002-03, when the litigation that led to the *Massachusetts v. EPA* decision was in its nascent stages, and had some involvement with research on the legal issues in the case.

I. Introduction

The United States Supreme Court issued its first decision pertaining to global warming on April 2, 2007, in the landmark case *Massachusetts v. EPA*.[1] The Court held that the federal Environmental Protection Agency (EPA) had a statutory duty to promulgate regulations for emissions of carbon dioxide and other greenhouse gases that seem to contribute to worldwide climate change, or at least to furnish a more satisfying reason for failing to do so than the EPA previously offered.[2] The threshold issue in the case was whether the plaintiffs had standing to bring the action in the first place.[3]

After deciding the threshold issue in the affirmative, the Court went

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

2. *Id.* at 1462-63. The majority states that under the Clean Air Act, the EPA must regulate carbon dioxide emissions if it makes a finding of endangerment. *Id.* at 1462. Since the EPA's purported reasons for not regulating emissions were unrelated to the question of whether emissions contribute to climate change, the EPA had not conformed to the CAA. *Id.*

3. *Id.* at 1446 (noting at the outset that before the Court could reach the merits—that is, to answer questions of whether the EPA had statutory authority to regulate greenhouse gas emissions and whether the EPA could decline to do so within its statutory discretion—it had to pass on the question of whether the plaintiff had Article III standing). After a lengthy introduction about the global warming controversy, and the meandering procedural history of the case, the Court finally commences its discussion of the threshold standing question. *Id.* at 1452. After moving through the standard boilerplate of traditional quotes about standing, the majority offers its bottom line, general rule: "a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Id.* at 1453 (citation omitted). It then relies on its previous decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) for the notion that a court may relax the immediacy and redressibility requirements for Article III standing where some statutory right to sue exists for certain types of harms, as with citizen suits for Clean Air Act violations. Massachusetts v. EPA, 127 S. Ct. at 1453. Most significantly the Court then states that the standing prerequisites should be *further* relaxed if the plaintiff is a state, given the tradeoffs that sovereign states make in joining the Union. *Id.* at 1454.

on to reject the EPA's contentions (inconsistent with the agency's previous positions on the matter[4]) that it lacked statutory authority to regulate greenhouse gases from automobiles and that it was free to abstain from regulating even if it did have such authority.[5] A consortium of states,[6] government entities,[7] and activist groups[8] comprised each side of the litigation, and garlands of amici briefs came from the regulated industries,[9] specialized advocacy groups, and policy celebrities ranging

4. *See* Massachusetts v. EPA, 127 S. Ct. at 1449 ("In 1998, Jonathan Z. Cannon, then EPA's General Counsel, prepared a legal opinion concluding that 'CO2 emissions are within the scope of EPA's authority to regulate,' even as he recognized that EPA had so far declined to exercise that authority.") (citing Memorandum to Carol M. Browner, Administrator (Apr. 10, 1998) ("Canon memorandum")); *see also id.* at 1461 ("Prior to the order that provoked this litigation, EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it *had* such authority.") (emphasis in original) (citing the Cannon memorandum).

5. *See id.* at 1459 (saying that the Court has "little trouble concluding" that § 202(a)(1) of the Clean Air Act authorizes the EPA to regulate greenhouse gases).

6. *See id.* at 1446 n.2 (noting that California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington banded together on the plaintiff's side). Siding with the EPA were Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah. *Id.* at 1447 n.5. It should be noted that six additional states, Arizona, Delaware, Iowa, Maryland, Minnesota, and Wisconsin, filed briefs as amici curiae in support of the petitioner states.

7. *See id.* at 1446 n.3. Besides the EPA's involvement as the defendant in the case, the District of Columbia, American Samoa, New York City, and Baltimore joined on the plaintiff's side. *Id.* No such entities joined on the defendants' side. It is not clear if the special solicitude for state standing that the Court sets forth in this opinion also applies to municipalities and territories.

8. *See id.* at 1446-67 nn.4 & 6. On the plaintiffs' side were the Center for Biological Diversity, the Center for Food Safety, the Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, the National Environmental Trust, the Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group. *Id.* at 1446 n.4. Siding with the EPA as litigants were the Alliance of Automobile Manufacturers, the National Automobile Dealers Association, the Engine Manufacturers Association, The Truck Manufacturers Association, the CO2 Litigation Group, and the Utility Air Regulatory Group. *Id.* at 1447 n.6.

9. *See* Brief of William J. Baumol et al. as Amici Curiae in Support of Respondents, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3043972, supporting numerous local (state and municipal level) automobile dealers' associations; Brief of Amicus Curiae William H. Taft, IV in Support of Respondents, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3095444, funded by the Automotive Trade Policy Council; Amicus Curiae Jerome B. Carr, Ph.D. to File a Brief in Support of the Respondents, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2817216; Brief for Entergy Corporation As Amicus Curiae in Support of Petitioners, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2540802; *see also* Brief For Respondents Alliance of Automobile Manufacturers et al., Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3023028.

from Madeline Albright[10] to Robert Bork.[11] An interestingly pragmatic brief, contrary-to-interest, came from the Entergy Corporation,[12] pleading for some sensible regulations now instead of sudden, drastic regulations at some uncertain point in the future.[13]

The ruling is truly a landmark decision in environmental law, especially in the highly controversial area of mitigating climate change through legal mechanisms.[14] The case presents a host of implications for the role of the EPA in worldwide protection of the environment, the proper occasions for the federal judiciary to intervene in highly debated public policy matters, and even for divining the current political composition of the Supreme Court.[15] Perhaps the most far-reaching

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10. *See* Brief for Amicus Curiae Madeleine K. Albright in Support of Petitioners, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2570988.

11. *See* Brief of Amici Curiae Robert H. Bork et al. in Support of Respondent United States Environmental Protection Agency, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3101954.

12. Brief for Entergy Corporation As Amici Curiae in Support of Petitioners, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2540802. Entergy urges the Court to find that greenhouse gas emissions are "air pollutants" under the CAA, and therefore should be regulated. *Id.* at *28. It goes on to say that government regulation is an economic method to employ in solving the climate change dilemma. *Id.*

13. *See id.* at *1-4.

14. Brief of Amici Curiae Robert H. Bork et al., *supra* note 11, at *3-4. In his summary of what the plaintiffs in the case are attempting to do, Bork says that the suit is, in effect, merely an attempt to employ the Court to implement global environmental policies. *Id.* at *9. He notes that the original petition from 1999 states that the plaintiffs more or less admit to using the courts as a tool (i.e. legal mechanism) in order to reduce the effects of global warming. *Id.* at *3.

15. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1446-51 (2007). Bork discusses the case in light of United States policy and the United Nations. *See* Brief of Amici Curiae Robert H. Bork et al., *supra* note 11. He argues that the question at hand (i.e. whether or not to regulate greenhouse gas emissions from cars) is solely a political one, one that should be left to the "political branches." *Id.* at *3-4. The decision on whether to regulate should not be contravened by the courts, especially in light of the fact that global warming necessarily implicates many nations and governments and cannot be addressed by the United States alone. *Id.* at *4. This seems to be a practical argument (in addition to the Constitutional implications), in that Bork is advocating against allowing plaintiffs to turn the Court into a policymaker. Doing so would likely be inefficient since the Court does not have the same political tools at its disposal (i.e. power to negotiate treaties). Since the United States Congress and the President have both been active in formulating policies to address global warming, he says that the issue is clearly a political one and should not be addressed through the courts (this was also a basis that the EPA relied on in denying the petition for rulemaking). *Id.* at *4-10. Aside from U.S. policy, he says that the debate in the United Nations illustrate the global nature of the issue of global warming and the fact that the United States alone cannot solve the problem. *Id.* at *6-9. Therefore, he advocates against allowing plaintiffs to circumvent the policy arguments by going straight through the courts in order to effectuate their own policy. *Id.* at *9-10. This also involves economic considerations (i.e. whether it is more efficient for each individual country to address global warming through its own courts, or if the problem is better addressed through a collective body where all parties agree to a common

implications, however, are for administrative law more generally: the question of standing for challenging inaction by an administrative agency.[16]

The Court adopted what appears to be a new rule, or at least a rule that it had never before made explicit: the states have "special solicitude" to obtain standing to sue federal agencies.[17] As Justice Roberts observes in his (overly anxious) dissent, the "special solicitude" rule for state standing appears to be unprecedented in the Supreme Court's history, and is even mysteriously absent from the gaggle of briefs (by parties and amici) filed in the case.[18] Roberts' tone is excessively

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approach).

16. *See* Massachusetts v. EPA, 127 S. Ct. at 1471 (Roberts, J., dissenting) (warning that the relaxed standing requirements permit the Court to enter the political arena where a plaintiff state seeks force agency action). Of course, every case about standing is open to the charge of being results-driven, and this case is no exception. To the extent that one subscribes to the view that standing is nothing but a smokescreen for the court to get the result it wants (that is, based on the merits), neither this case nor any other standing case could have any control or etiological effect on future cases. Yet earlier Supreme Court decisions on standing have had an undeniable effect on lower courts, regardless of whether the Supreme Court was playing a game in the original ruling. For example, Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) had an instant impact on standing cases in federal courts. *See, e.g.*, Friends of the Earth, Inc. v. Gaston Copper Recycling Corp,, 204 F.3d 149, 162-63 (4th Cir. 2000) (overruling a lower court's denial of standing in light of *Laidlaw*); Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1149-50 (9th Cir. 2000) (applying the new *Laidlaw* rule to grant standing). For more discussion, *see* ROGER W. FINDLEY, DANIEL A. FARBER, AND JODY FREEMAN, ENVIRONMENTAL LAW 114-15 (6th ed. 2003).

17. *See* Massachusetts v. EPA, 127 S. Ct. at 1454-55 ("Given that procedural right [to bring citizen suits to compel enforcement of the Clean Air Act] and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."). The majority explains why states are entitled to relaxed standing requirements, saying that because states forfeit certain rights when entering the union (such as treaty power, the right to invade other states, and federal preemption) they are entitled to special solicitude in standing analysis. *Id.* at 1454. In response to the dissent's accusation that the majority has created a new standing doctrine, the Court relies on a secondary source's interpretation of its standing jurisprudence to support its conclusion that a state has standing to sue a federal agency in order to force it to regulate. *Id.* at 1455. Its interpretation of "parens patriae" cases leads the majority to decide that states have so called special solicitude. Thus, the majority concludes that Massachusetts has met "the most demanding standards of the adversarial process." *Id.* The majority even says that the judicial review provision in the CAA gives states the right to challenge agency action as arbitrary and capricious. *Id.* at 1454.

18. *See id.* at 1464 (Roberts, J., dissenting) ("Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such 'special solicitude' is conspicuously absent from the Court's opinion. . . .").

Although no one invoked the phrase "special solicitude" in the briefs or at oral argument, Roberts fails to mention (as does the majority, for that matter), that there *was* a passing discussion at oral argument about the notion that states should have automatic or "special" standing, at least when there is a preemption problem looming. *See* Transcript of Oral Argument, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006

apocalyptic about the consequences of this novel move by the majority, but he seems correct that it is a new direction for the Court. This essay focuses on the new "special solicitude" rule, its implications for the office of state Attorney General, and its interrelation with the Court's willingness to compel a federal agency to regulate against its will.

The majority, represented by Justice Stevens, based this special solicitude rule mostly on three concerns, each a component of the states' dependence on the federal government to protect and provide for the members of the Union.[19] First, individual states lack recourse against other states for pollution (or other externalized harms) that they foist upon their neighbors.[20] "Massachusetts cannot invade Rhode Island[21] to force reductions in greenhouse gas emissions," the Court quips.[22] The states must appeal to the federal government—either courts or agencies—to resolve problems of interstate externalities. Moreover, the Constitution bars individual states from negotiating their own treaties with foreign nations, such as China and India,[23] the two main contributors of greenhouse gases besides the United States.[24] This is

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WL 3431932 (Nov. 29, 2006). Justice Kennedy first brought it up, asking the Massachusetts Attorney General, "[d]o you have some special standing as a state. . . ?" *Id.* at *14. Seizing the thought, Mr. Milkey tried to point the Court to West Virginia v. EPA, 362 F.3d 861, 868 (2004), where the D.C. Circuit apparently granted standing on this basis. *Id.* at *15. The conversation then shifted to a discussion of the Massachusetts coastline, and then Justice Scalia's concern that this would be another *S.C.R.A.P.* case (that is, of marginal precedential value). Justice Ginsburg interrupted the discussion and asked if this was a claim of discreet standing for sovereign states confronted by preemption problems. *Id.* at *16-17. Mr. Milkey hastily agreed. *Id.* Justice Scalia then stated the issue nicely: "I don't understand that. You have standing whenever a Federal law preempts state action? You can complain about the implementation of that law because it has preempted your state action? Is that the basis of standing you're alleging?" *Id.* at *17. Mr. Milkey responded by pointing to the amici brief filed by Arizona and several other states, which cited a few circuit court cases supporting that notion; then the discussion turned back to the Clean Air Act itself. *Id.* The oral arguments and the cases alluded to therein are the subject of Section II.C., *infra.*

19. *See Massachusetts v. EPA,* 127 S. Ct. at 1454 (These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." (citation omitted)).

20. *Id.*

21. Rhode Island was actually a co-plaintiff with Massachusetts in this case. Their juxtaposition is the only reason to suggest a conflict between the two.

22. *Id.*

23. Brief of Amici Curiae Robert H. Bork et al., *supra* note 11, at *9 (noting that China, India, and South Korea are not bound by the reductions required by the Kyoto Protocol).

24. Massachusetts v. EPA, 127 S. Ct. at 1449 (discussing the history surrounding legislation and international efforts addressing global warming, and noting that the U.S. opted not to sign on to the Kyoto Protocol because the two other greatest polluters were

probably an allusion to the Kyoto Protocol, a treaty the federal government repudiated, which would have been the primary instrument of international law for addressing manmade climate change. The relatively free ride given to China and India under the Protocol was the main justification for its lack of federal endorsement.[25]

Third, Justice Stevens notes that the states cannot even enact their own internal regulations to control the problem within their borders because of preemption problems.[26] Once Congress steps into an area, states may be unable to issue their own regulations, even to fill in gaps in the existing federal regulatory regime (such as the lack of federal standards for carbon dioxide emission).[27] This may be an ominous hint about the prospects of some of the pending litigation about CO_2 emissions,[28] cases that have not yet reached the Court. In fact, several states have recently enacted their own regulations,[29] which the automobile industry has challenged,[30] and Justice Stevens may have been

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not required to reduce their pollution levels).

25. *See id.* Justice Stevens states rather clearly:

> UNFCCC signatories met in Kyoto, Japan, and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because those targets did not apply to developing and heavily polluting nations such as China and India, the Senate unanimously passed a resolution expressing its sense that the United States should not enter into the Kyoto Protocol.

Id. For more discussion, *see* Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877 (2006).

26. *See* Massachusetts v. EPA, 127 S. Ct. at 1454 ("... in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.").

27. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (describing "field preemption," the doctrine that states where federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it").

28. *See, e.g.*, People v. Gen. Motors Corp. et al., No. 06-05755, complaint filed (N.D. Cal. Sept. 20, 2006); Connecticut v. Am. Elec. Power Co., Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *see also* Benjamin P. Harper, Note, *Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns*, 40 GA. L. REV. 661 (2006); Hari Osofsky, *The Geography of Climate Change Litigation: Implications For Transnational Regulatory Governance*, 83 WASH. U. L. REV. 1789 (2005).

29. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 43018.5 (West Supp. 2005); 310 MASS. CODE REGS. 7.29(5)(a)(5) (2004); N.H. REV. STAT. ANN. § 125-O:3 (2005); OR. REV. STAT. § 469.503 (2003); Suffolk County, N.Y., Laws ch. 235, §235-3; *see also* Regional Greenhouse Gas Initiative, http://www.rggi.org; California, Washington, and Oregon have agreed to explore a similar proposal, *see* Press Release, Cal. Envtl. Prot. Agency, West Coast States Strengthen Joint Climate Protection Strategy (Nov. 18, 2004), http://www.calepa.ca.gov/PressRoom/Releases/2004/WC_Climate.pdf.

30. *See, e.g.*, Central Valley Chrysler-Jeep, Inc. v. Witherspoon, No. CV F 04-6663 AWI LJO, 2007 WL 135688, (E.D. Cal. Jan. 16, 2007); *see* examples cited in Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877 (2006). Of course, California has special status to avoid preemption under the Clean Air Act where other states do not. *See* 42 U.S.C. § 7416 (1990).

signaling that the Supreme Court will find these regulations preempted, at least in some circumstances.

For these three reasons, therefore, the majority concludes that the states deserve special treatment or leniency in actions to compel federal agencies to protect their well-being.[31] The states voluntarily joined the Union, Stevens observes, and surrendered the rights they would otherwise have had in each of these three domains (threatening force against contiguous neighbors, consummating treaties with other countries, and even passing their own laws and regulations) in order to participate in the greater Nation.[32] Without these powers, the states are somewhat helpless and vulnerable, unless the federal government affords commensurate protections in return.[33] In a sense, it is a matter of symmetry. Rights and privileges that the states yield or concede to the federal government create a duty for the federal government to stand in the states' shoes, and even to act at their behest.[34] The mechanism for preserving this symmetry is in the grant of standing to sue. Nationwide democratic elections for Washington officeholders are not enough.[35]

As the dissent makes clear, the Court stands divided on this issue and the split is nearly even. Four Justices (predictably, Roberts, Alito, Scalia, and Thomas)[36] were completely opposed to the idea of giving the states standing. A change of one swing vote, or a replacement of one Justice from the majority, could lead to a reversal in future cases, or at least a narrowing of the rule. For example, a future court could distinguish this case on the grounds that it pertains exclusively to regulations under the Clean Air Act, which already mandates intense state participation in the creation of State Implementation Plans (SIPs) to meet the National Ambient Air Quality Standards (NAAQS) for certain air pollutants.[37] If another case involves a regulatory regime that

31. Massachusetts v. EPA, 127 S. Ct. at 1454.

32. *See id.*

33. *See id.* The majority says that since the listed "sovereign prerogatives" vest solely in the federal government, Congress has ordered the EPA to regulate emissions in order to protect the states. *Id.* The opinion does not, however, cite any law that provides states with a different threshold for standing.

34. *See id.* at 1455 ("With that in mind, it is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'")

35. *But see id.* at 1471 (Roberts, J., dissenting) (saying that the Court's holding transgresses on the "proper . . . role of the courts in a democratic society").

36. *See id.* at 1463.

37. 42 U.S.C. § 7410(a)(1) (2000). The connection between the plaintiff's special entitlement to standing in this case due to its special participatory role under the Clean Air Act was alluded to during oral arguments before the Supreme Court. *See* Transcript of Oral Argument, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3431932 (Nov. 29, 2006).

generally excludes state involvement, it might furnish a basis for distinguishing *Massachusetts v. EPA* and narrowing its applicability.[38]

Rather than argue the merits of the new "special solicitude" rule, this article embraces it and attempts to anticipate some of its direct and indirect effects. The idea of state standing to sue is separate from the partisan positions on global warming. In fact, previous cases have had Scalia and Thomas insisting on special deference for states (unrelated to standing), with Stevens et al. decrying their "special solicitude" for states in a dissent.[39]

In practice, *Massachusetts v. EPA* really creates special solicitude for state Attorneys General (AG's), not simply for states. In this case, each state involved in the litigation, nearly half the states in the Union, participated vicariously through its Attorney General.[40] Each AG chose sides and made the decision to litigate independently of other government officials, such as the governors.[41] Relaxed standing requirements for states mean fewer hurdles for policy-oriented litigation by the state AG's. Each AG will have more incentive to devote resources to such endeavors, now that the costs are lower and the chances of success are greater.[42]

Even before this case, the role of the AG was evolving from Counsel for the Executive Brach into the People's Lawyer;[43] now it is

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38. The first case to cite *Massachusetts v. EPA*, remarkably, cited it for the proposition that judicial review of EPA actions is very limited and highly deferential; this is, of course, the very court that was reversed in the *Massachusetts v. EPA* case. *See* Defenders of Wildlife v. Gutierrez, 484 F.Supp.2d 44, 2007 U.S. Dist. LEXIS 25161, at *13 (D.D.C. Apr. 5, 2007). Of course, any ruling that allows standing for new plaintiffs could arguably expend judicial power, because more plaintiffs can file cases and more judicial review will occur. Even if future courts disagree with the specific result in *Massachusetts v. EPA*, the decision provides courts with more opportunities to review and scrutinize agency decisions in other regulatory fields.

39. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 648 (2000).

40. *See supra* note 6 and states listed therein.

41. *See generally* Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721 (1997); Erin L. Penn, *Perdue v. Baker: Who Has the Ultimate Power Over Litigation on Behalf of the State of Georgia—The Governor or the Attorney General?*, 21 GA. ST. U. L. REV. 751 (2005) (discussing a controversial redistricting appeal, where a newly-elected governor asked the state AG to withdraw the suit initiated by his predecessor (from the other political party), and the AG refused). More recently, the model of the divided executive branch (as seen on the state level) has emerged as a proposal for limited Presidential powers as well. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2246 (2006).

42. *See generally* Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335 (2005); Hon. Richard Blumenthal, *The Role of State Attorneys General*, 33 CONN. L. REV. 1207 (2001); Symposium, *State Attorney General Litigation: Regulation through Litigation and the Separation of Powers: Roundtable*, 31 SETON HALL L. REV. 617 (2001).

43. *See* Justin G. Davids, *State Attorneys General and the Client-Attorney*

much more so. In forty-three states, the Attorney General is an elected position,[44] on the general ballot along with the governor and legislators. With the special solicitude rule, the state Attorney General position takes on more significance for national public policy concerns, as the citizenry realizes that its choice of candidate can affect what litigation ensues and which side its state will take.

It seems likely that national policy concerns will become a campaign issue in the elections[45] for state AG's, given the greater ease by which the AG can bring actions against federal agencies to compel regulation of certain areas. The elections themselves will have higher stakes as a result, and will attract more media coverage, more policy debate, and probably more campaign spending given the farther reach of the office.[46]

Relationship: Establishing the Power to Sue State Officers, 38 COLUM. J.L. & SOC. PROBS. 365, 366 (2005) ("[Colorado Attorney General] Salazar's position: As the people's lawyer he had the authority to bring a suit to determine the constitutionality of the redistricting plan."); Bill Aleshire, Note, *The Texas Attorney General: Attorney Or General?*, 20 REV. LITIG. 187, 190-91 (2000) ("This claim is based on the notion that the Attorney General is 'the people's lawyer,' possessing the duty and authority to represent the 'public interest' client instead of any other state government client. Such a role can place the Attorney General in a watchdog position. . . ."); Don LeDuc, *Michigan Administrative Law, October Term, 1994-95*, 13 T.M. COOLEY L. REV. 341, 371 (1996) (describing Michigan AG as the "People's lawyer" instead of the governor's counsel).

44. *See, e.g.*, National Association of Attorneys General, The Attorneys General, http://www.naag.org/naag/about_naag.phpt (stating that:

> The Attorney General is popularly elected in 43 states, as well as in Guam, and is appointed by the governor in five states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming) and in the four jurisdictions of American Samoa, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. In Maine, the Attorney General is selected by secret ballot of the legislature and in Tennessee, by the state Supreme Court. In the District of Columbia, the Mayor appoints the Attorney General whose powers and duties are similar to those of the Attorneys General of the states and jurisdictions.).

See also William P. Marshall, *supra* note 41, at 2448; Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs To Allege Reliance As An Essential Element*, 43 HARV. J. ON LEGIS. 1, 36 n.266 (2006); Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage And Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 546 (2006).

45. For an example of how global warming has become a campaign issue, *see* Steven Milloy, *Love Fest on the Hill*, WASH. TIMES, March 25, 2007, at B01, (". . . Mrs. Boxer doesn't want legislation this year, preferring instead to have global warming as a campaign issue in 2008.").

46. It seems to me that the conflation of policymaking and litigation, regardless of its possible benefits and rewards, introduces a disproportionate degree of moral luck into the individual AG's prospects. Some of this national-level litigation will be very successful and produce pleasant results that everyone appreciates, but in other cases, unintended consequences could leave the voters sour on the whole venture. The ultimate effects and outcome are largely outside the control of the individual AG. For example, compelling a federal agency to promulgate rules could yield bad/undesirable rules that are worse than no rules at all, or could result in rules that the agency refuses to enforce, at least for the

This shift in the nature of the Attorney General's role should also affect the type of candidates who run for the position. Those with more opinions on national policy issues (and perhaps with national-level aspirations) will be more attracted to the office.[47] Those who can better articulate their positions on these matters will have more appeal to voters, and at least one of the candidates is likely to make some prospective litigation an issue in the campaign, forcing both sides to address it. This will necessarily have a screening effect on the type of

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time being. *See also* Bernard Williams, *Persons, Character, and Morality*, reprinted in MORAL LUCK 1-120 (1981); *see also* CLAUDIA CARD, THE UNNATURAL LOTTERY: CHARACTER AND MORAL LUCK 32 (1996).

47. To some extent, this new focus on the role of the AG shifts the potential personal reward of the office from one of achievement to one of accomplishment. Achievements are remarkable things to which we attain, like titles and positions. Accomplishments are the remarkable things we actually do, the ways with which we operate as individual agents of change. The traditional role of the state AG was more of an achievement; the public service involved could be somewhat pedantic as far as litigation goes, and the office was typically a stepping-stone to a Senate seat or the Governor's mansion. With the special solicitude rule, however, each AG has the potential to be an agent of change on the national level, to *accomplish* things instead of *achieving* them.

For a brief discussion of this distinction made by philosophers from Aristotle (*Metaphysics)* through Vendler and Kenny, *see* Daniel W. Graham, *States and Performances: Aristotle's Test,* 30 PHIL. Q. 117, 118-19 (1980). Graham focuses most of his discussion, however, on Aristotle's Greek syntax and the subsequent commentaries, rather than the implications for evaluating the careers of public officials. *Id.* at 118-21. Philosopher Zeno Vendler himself makes much of the different semantic traits of "accomplishment" verbal statements, versus "achievement" verbs. The former use more continuous-past-action verbs, for example, than the former. *See* Zeno Vendler, *Verbs and Times,* 66 PHIL. REV. 143, 145-48 (1957). Unsurprisingly, some sociologists see the distinction as a product of societal changes that affect the criteria for the development of self-esteem. *See, e.g.,* David D. Franks and Joseph Marolla, *Efficacious Action and Social Approval as Interacting Dimensions of Self-Esteem: A Tentative Formulation Through Construct Validation*, 39 SOCIOMETRY 324, 338-39 (1976). Vendler notes in a digression that one odd semantic difference between accomplishments and achievements in speech is that the former are actions where the helping verb "can" is added or removed without much change in meaning, while achievement-related verbs are drastically affected by the presence of "can" or "could." *See* Vendler, 66 PHIL. REV. at 148-49, whose example is the semantic equivalency of "I can believe that," with "I believe that."

Of course, "achievement" and "accomplishment" are sometimes used interchangeably, especially in cases where precise definitions of these terms are of less significance. *See, e.g.,* Thomas A. Wright & Douglas G. Bonett, *The Contribution of Burnout to Work Performance,* 18 J. ORG. BEHAV. 491, 494 (1997) ("The third burnout dimension, diminished personal accomplishment, denotes a decline in one's personal feelings of competence and successful work achievement.") (citation omitted); *see also* Roslyn Arlin Mickelson, *Why Does Jane Read and Write So Well? The Anomaly of Women's Achievement*, 62 SOC. OF EDUC. 47 (1989) (discussing the puzzle of exemplary female academic performance where rewards for such accomplishments or achievements are hindered by sexism in society); Richard A. Guzzo, *Types of Rewards, Cognitions, and Work Motivation*, 4 ACAD. MGMT. REV. 75 (1979); Wagner A. Kamakura & Thomas P. Novak, *Value-System Segmentation: Exploring the Meaning of LOV [List of Values],* 19 J. CONSUMER RES. 119, 120-21 (1992) (defining the internal value of "achievement" as being comprised of social recognition as well as a feeling of "accomplishment").

person who fills these positions, as well as the expectations of his or her constituents. This is not necessarily bad; one could see it as another democratic outlet, a new source of democratic accountability for unelected officials in federal agencies. On the other hand, the higher stakes will also attract more lobbyists to the state Attorneys General for lobbying activities that would previously have been concentrated in Washington.

Another indirect effect of the special solicitude rule is the increase in both cooperation and competition between state Attorneys General.[48] At present, the AG's like to build consortiums to litigate on their side of an issue,[49] partly as a way of pooling resources, and partly for the increased credibility that comes from greater numbers and greater geographical diversity on the same side of a case.[50] As state-led cases become more prevalent (the logical outcome of relaxed standing requirements), a state Attorney General will need to cooperate and collaborate more with his or her counterparts from other states than ever before; litigation teamwork with other AG's thus becomes part of the job description. At the same time, within these consortiums or alliances there are tussles over which state will take the lead position in a high-profile case.[51] Such publicity is important for elected officials. In *Massachusetts v. EPA*, the decision was strategic: everyone knew that the "injury-in-fact" requirement for standing under Article III would be the lynchpin of the case. Massachusetts' comparatively long coastline and the state government's ownership of significant stretches of beach[52]

48. For an excellent discussion of the cooperative alliances between the AGs in multistate litigation, *see* Jason Lynch, Comment, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation,* 101 COLUM. L. REV. 1998 (2001).

49. *See id.* at 2003-08.

50. *See id.* (describing these effects for multistate antitrust and consumer protection cases, as well as the tobacco litigation).

51. *See id.* at 2004 (noting that so far, the states appear to be "so closely coordinated that those participating in the case will usually choose one or two lead states and cede to them primary responsibility for negotiating with the defendant on behalf of all the states involved."). Regardless of the outward appearance of a unified front and a designated leader, from the perspective of someone working inside an AG office at the phase when the global warming cases were still under contemplation, this writer can attest that internal discussions about who gets to lead can be animated.

52. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1456 (2007).

> These rising seas have already begun to swallow Massachusetts' coastal land. Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.

made for a more colorable argument of injury or prospective loss from rising sea levels.[53] This may also explain Alaska's otherwise striking membership in the opposing consortium, if the defendants recruited the state with the longest coastline of all to offset this point. If a particular case is likely to be popular with citizens from several states, there can be a race to be the first state to file suit to lock in the state's name in the case caption before others join.

The special solicitude rule is also likely to diminish the role of activist groups, like the National Resource Defense Council (NRDC) or Sierra Club, for litigation against federal agencies. Such groups now have an inferior position, at least regarding standing, compared to the state Attorneys General. Constituents who want policy changes would naturally prefer a representative who has a magic token for standing, so those who previously backed private nonprofit activist groups are more likely to look to the Attorneys General for this purpose.[54] The declining litigation role for activist groups will probably lead to an internal organizational shift toward other activities, like education, publicity, and lobbying. Of course, the *Massachusetts v. EPA* case began with special interest groups who petitioned the EPA for rulemaking under the Clean Air Act, so in a sense they initiated the case.[55] That was before the "special solicitude" rule came into play, however.

The replacement of the private activist groups with the state AG's

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Id. (internal citations and quotation marks omitted).

53. *See id.* n.19.

> For example, the [Massachusetts Department of Conservation and Recreation] owns, operates and maintains approximately 53 coastal state parks, beaches, reservations, and wildlife sanctuaries. [It] also owns, operates and maintains sporting and recreational facilities in coastal areas, including numerous pools, skating rinks, playgrounds, playing fields, former coastal fortifications, public stages, museums, bike trails, tennis courts, boathouses and boat ramps and landings. Associated with these coastal properties and facilities is a significant amount of infrastructure, which the Commonwealth also owns, operates and maintains, including roads, parkways, storm-water pump stations, piers, sea wall revetments and dams.

Id. (citations omitted).

54. *See, e.g.*, Korsinsky v. EPA, 192 Fed. Appx. 71 (2nd Cir. Aug. 10, 2006) ("Korsinsky's primary claim, that global warming and carbon dioxide emissions may cause him a future injury, is too speculative to establish standing.") (citation omitted).

55. *See Massachusetts v. EPA*, 127 S. Ct. at 1449 n.15. Nineteen activist groups commenced the litigation with a rulemaking petition under the Clean Air Act. *See id.* These groups were Alliance for Sustainable Communities; Applied Power Technologies, Inc.; Bio Fuels America; The California Solar Energy Industries Assn.; Clements Environmental Corp.; Environmental Advocates; Environmental and Energy Study Institute; Friends of the Earth; Full Circle Energy Project, Inc.; The Green Party of Rhode Island; Greenpeace USA; International Center for Technology Assessment; Network for Environmental and Economic Responsibility of the United Church of Christ; New Jersey Environmental Watch; New Mexico Solar Energy Assn.; Oregon Environmental Council; Public Citizen; Solar Energy Industries Assn.; The SUN DAY Campaign. *Id.*

could alter the nature of the litigation, as the AG's have a broader range of constituents to appease—including large numbers of moderates who prefer less radical policy changes, or demands for reform, than the stereotypical member of an activist group like the NRDC. Even so, offsetting the tempered demands are the greater litigation resources and sophistication of the AG's office (multiplied as consortiums of states band together), which bears upon strategic decisions about the case, as the plaintiffs can commit to a longer term of involvement.

The corollary holding in *Massachusetts v. EPA* was that the states could attack federal inaction and compel agencies to regulate.[56] This is a significant additional enhancement of states' rights in light of the special solicitude rule on standing. Together, the holdings provide states standing to force the hand of the federal government, at least in promulgating regulations.[57] The Court, however, drew a bright line between agency enforcement and rulemaking.[58] Agencies retain much more discretion about enforcement—whether to enforce, when to enforce, remedies to seek, etc.[59] The Court does not mention its recent *Town of Castle Rock v. Gonzales* decision,[60] but the pattern is consistent. Agencies have less discretion about promulgating rules than they do about enforcing them.[61] Presumably, the states would find themselves less successful in future attempts to force agencies to increase enforcement of rules that are already in place.

For purposes of greenhouse gas emissions this means, in theory, that the agency could thwart the plaintiff's victory in *Massachusetts v. EPA* by refusing to enforce whatever regulations it makes.[62] This is another

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56. *Id.* at 1454 (saying that states have a right to challenge agency inaction as arbitrary and capricious, in effect compelling them to regulate).

57. *Id.*

58. *Id.* at 1459 (stating that courts provide a lot of discretion to the agencies in deciding whether to bring an enforcement action, and such decision is usually not subject to judicial review). However, the majority says that the amount of discretion afforded to a denial of a petition for rulemaking is more rigorous. *Id.* The Court says that the CAA allows the Court to reverse such a denial if it is arbitrary and capricious. *Id.*

59. *Id.*

60. Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005). In this case, the Supreme Court held that state law did not give a woman the right to force the police to enforce a restraining order against her husband. *Id.* at 765-66. The case deals heavily with issues of due process and property interests, however the issue is very similar to that in *Massachusetts v. EPA*. Both cases address whether a plaintiff can force a government entity to do a certain action. Where in *Massachusetts v. EPA* the Court held that the state could compel the EPA to engage in *rulemaking*, the Court in *Castle Rock* held that the plaintiff could not force the police to *enforce* a restraining order. *See Castle Rock,* 545 U.S. at 765.

61. *See* Massachusetts v. EPA, 127 S. Ct. at 1458.

62. *See id.* at 1463.

> We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions

reason the dissenting opinions seem overstated. Drastic changes are not imminent: even apart from the lengthy process of making the Court-required rules, the EPA may not do much to enforce them until there is a change in the Administration (that is, the Presidency).[63]

This does not make the holding meaningless. There is a chronic problem of path dependence[64] for agency rulemaking.[65] It is much easier to tweak existing regulations, or to step up enforcement, than it is to promulgate new rules from scratch. Once a basic regulatory framework for greenhouse gas emissions is in place, it will become much easier for future Administrations to ratchet up the rules or to intensify the EPA's enforcement efforts.[66] There is significant value, therefore, in forcing an agency to create rules where none exists.

The Court's distinction between rulemaking and enforcement[67]

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in the event that it makes such a finding. We hold only that EPA must ground its reasons for action or inaction in the statute.

Id. (citation omitted).

63. *See id.* at 1459.

> [Agency] discretion is at its height when the agency decides not to bring an enforcement action. Therefore, in *Heckler v. Chaney*, . . . we held that an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review. Some debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking.

Id. (citation omitted).

64. For a general introduction to the concept of path dependence in law and economics, *see* S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, And History*, 11 J.L. ECON. & ORG. 205 (1995).

65. *See* Luca Enriques & Matteo Gatti, *The Uneasy Case For Top-Down Corporate Law Harmonization In The European Union*, 27 U. PA. J. INT'L ECON. L. 939, 954-55 (2006); Paul Teske, *Wither the States? Comments on the Daca Federal-State Framework*, 4 J. TELECOMM. & HIGH TECH. L. 365, 369 (2006); A.C. Pritchard, *The SEC at 70: Time For Retirement?* 80 NOTRE DAME L. REV. 1073, 1086-87 (2005); Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 DUKE L.J. 913, 928 (2005); Gail Charnley & E. Donald Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, 32 ENVTL. L. REP. 10363, 10365 (2002) ("Environmental health regulation is path-dependent: actions taken now affect the nature of actions taken later."); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1334 n.458 (1995) ("One wonders in light of the history of securities regulation how much the heavily substantive approach of contemporary environmental law owes to path dependence concerning the choices of original legal strategies rather than to deliberative choice.").

66. *See, e.g.*, Milloy, *supra* note 45 at B01; *see also* Kim Chipman, *Some Desert Bush on Global Warming*, PITT. POST-GAZETTE, April 30, 2006, at A11.

> The shift has given fresh hope to lawmakers such as Sens. John McCain, an Arizona Republican, and Joseph Lieberman, a Connecticut Democrat, who are co-sponsors of legislation to limit carbon emissions. Mr. McCain is expected to push for another Senate vote on the measure this year and says he's prepared to make climate change a campaign issue if he runs for president in 2008.

Chipman, *Some Desert Bush on Global Warming* at A11.

67. *See Massachusetts*, 127 S. Ct. at 1459.

> There are key differences between a denial of a petition for rulemaking and an

makes sense, even apart from the venerable line of cases the Court cites. It is easier to find a statutory mandate or duty for the former; the latter must, by necessity, be more discretionary. Rulemaking is much more costly and lengthy due to the APA notice-and-comment requirements and the "hard look" doctrine, which has the effect of inducing agencies to beef up the "record" in a case with a dizzying array of internal memoranda, minutes of meetings, and detailed scientific studies.[68] Agencies are loath to sink scarce resources into new rulemaking, especially in controversial areas. The rulemaking process, being more tedious and less flexible than enforcement, is therefore less responsive to genuine crises or public outcry for government action.[69] If either agency activity needs a push from the courts, it would be rulemaking rather than enforcement.

The prospect of states having more freedom (or legal power) to compel federal regulation could force Congress to be clearer in future enactments about when the agency has a duty to regulate, and when it is a matter of agency discretion. Currently, the "enabling statutes," those pieces of legislation that delegate authority to an agency to make and enforce rules that execute the will of Congress, are woefully ambiguous and inconsistent about when agencies *can* regulate and when they *must* regulate. *Massachusetts v. EPA* arguably allows and invites states to settle that question for the agency in many settings. If Congress previously intended that very ambiguity to delegate discretion to the agency in this regard, the Court has now re-delegated at least some of that discretion to the states instead. Split delegations of power between the states and a federal agency are not new, as the Clean Air Act did that from the beginning. Before, however, the delegation did not come in the form of an option that states could exercise, and this appears to be the case now. This new "option-exercise delegation" may compel Congress

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> agency's decision not to initiate an enforcement action. . . . In contrast to nonenforcement decisions, agency refusals to initiate rulemaking are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.

Id. (internal citations and quotation marks omitted).

68. *See* Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied* 417 U.S. 921 (1974) ("[The] agency, particularly when its decisions can literally mean survival of persons or property, has a continuing duty to take a 'hard look' at the problems involved in its regulatory task, and that includes an obligation to comment on matters identified as potentially significant by the court order. . . ."). For a discussion of the costs for agencies in promulgating rules subject to judicial scrutiny, *see* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations,* 120 HARV. L. REV. 528 (2006).

69. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 99-110 (2d ed. 2001).

to change the way it drafts enabling statutes.

Giving fifty more political entities a say in whether new regulations are necessary would logically lead to more regulations overall. The Court did not give states a right to forestall or veto federal regulations; the option-delegation pertains only to the commencement of rulemaking, not to force repeal. More regulation is not always a bad thing, although each new regulation invariably presents some additional compliance costs for the regulated industry. Offsetting the increased compliance costs are the reductions in uncertainty in the regulated market. Reduced uncertainty fosters investment and can bolster share prices, even if net revenues are lower due to greater compliance costs. This was the thrust of Entergy Corp.'s argument in its amicus brief.[70] Breaking ranks with the rest of the regulated industry, Entergy argued that the lingering uncertainty about future regulations and liability, which could be sudden and drastic if the EPA does nothing until there is some climate-related catastrophe, seemed more burdensome to the business than complying with whatever regulations the EPA is likely to promulgate if it starts now.[71] In addition, new regulations can act as a restraint on an enforcement agency, in that it sets predictable limits within which the agency must conduct its enforcement.[72] Rulemaking diverts some agency resources to the process of proposing and implementing the rules. These resources might otherwise have gone toward monitoring and enforcement of previous regulations that also burden the relevant industry.

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70. *See* Brief for Entergy Corp., *supra* note 12, at *3-4.

71. *See id.* at *3:

> The energy needs of the United States are expected to double over the next 50 years, and Entergy and its fellow industry members need to plan—and act—now for the strategic capital investments—viewed on a 25-year horizon—that will be necessary to meet this increased demand. Entergy seeks certainty with respect to the regulatory regime it must operate under, and does not believe that EPA's current position on CO2 regulation will stand the test of time.

72. *See id.* (Entergy expressed grave concern about the prospect of being subject to some type of post-Kyoto international regime that would provide few procedural safeguards and protections for individual parties.) Again, this seems remarkably insightful and prescient for a member of the regulated industry—to look past immediate compliance costs and see that things could be worse in the absence of American legal restraints and safeguards. *See id.* at *4.

> Finally, Entergy is far less sanguine than EPA about the prospect of this nation's air-quality decisions being decided by the international community. Entergy prefers the considerable safeguards of the CAA rulemaking process, which provides for participation by interested parties sensitive to this nation's needs and fosters (through judicial review under the Administrative Procedures Act) decisions grounded in sound scientific debate. The international debate offers no comparable guarantees, and therefore none of the security of the American rulemaking process.

See id.

Finally, the potential for overlapping jurisdiction and regulations can dilute the impact of each agency's actions. For example, in the present case, the Court mentions the overlap with the Department of Transportation's rules about automobile efficiency. The EPA argued that this would make their prospective regulations somewhat redundant. This redundancy, however, should allay some of the fears of the regulated industry because it softens the real-world impact of what the agency can do.

This essay explores these points further. Part II will briefly summarize the arguments raised about "special solicitude" for state standing by the Court's majority and by Roberts' dissent and will attempt to situate this new rule in its historical context, looking for the origin of the "special solicitude" phraseology in earlier decisions of the Court. The heart of this article, however, is in Part III, which will focus mostly on the implications of the special solicitude rule for each state's Attorney General, as well as the indirect effects on special-interest activist groups like the NRDC. Also included will be some speculation about ways future courts may narrow or distinguish the special solicitude rule of *Massachusetts v. EPA*. Part IV turns to the subject of compelled rulemaking for federal agencies, again summarizing the majority and dissenting opinions on this issue, and highlighting the distinction between rulemaking and enforcement in this regard. Part IV also explores some of the likely consequences if compelled regulation becomes more commonplace. Part V offers a brief summary and concluding remarks.

Before proceeding, it seems appropriate to offer some disclaimers and disclosures. While this article does respond primarily to one new decision by the Supreme Court, it is not a "case note" in the traditional sense. I do not advocate a position about the merits of the Court's holding or rationale, or offer normative prescriptions for how future courts should apply the case. More importantly, this article does not take a strong position on the controversy surrounding global warming or whether the EPA should regulate greenhouse gases. The numerous, well-written briefs in the case exhaustively present the best arguments on each side of the issues, supplemented by insightful comments from both the majority and the dissenters in *Massachusetts v. EPA,* and the carefully crafted opinions of the lower court. To reiterate the policy arguments pertaining to climate change would seem unnecessarily redundant. Rather, the approach taken here, as in my other writings, focuses on the etiological aspects of law, the point where law translates into actual decisions or choices by the affected citizens, state actors, and judges. Readers committed to an ontological or normative approach to legal academics may find this approach bothersome, but the discussion

of consequences resulting from the Court's decision should provide useful information even for readers whose primary goal is to stake out a position. Etiological considerations overlap partially with utilitarianism, so the discussion that follows may suggest a utilitarian bent. The purpose here is not to say whether the outcome of the case was correct, or if the dissenters "should have won" instead, but rather to look at what prompted the Court to craft the new rule contained in the case and what repercussions might follow, whether directly or indirectly.

II. Special Solicitude for States: Background

One of the pivotal lines in the Court's opinion in *Massachusetts v. EPA* is the sentence where it pronounces a new rule for state standing to sue federal agencies: "Given that procedural right[73] and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to *special solicitude* in our standing analysis."[74] Chief Justice Roberts decries this innovation in his dissent, stating flatly that "[r]elaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such 'special solicitude' is conspicuously absent from the Court's opinion."[75]

Roberts is mostly right about the Court's opinion. The majority bases its stance on the states' dependence on the federal government to protect them from out-of-state nuisances,[76] Congress' mandate to the agency to protect the welfare of the states,[77] and the statutory provision for citizen suits against the EPA.[78] Its citations to previous legal authority are quite thin. The majority and dissent tussle over the applicability of *Georgia v. Tennessee Copper Co.*,[79] which seems to pertain to a different problem or element of state standing than the one in *Massachusetts v. EPA*, and over a number of cases cited by the dissent about the federal government's freedom to impose itself upon the states in certain matters.[80] The majority mentions one relatively recent case,

73. That is, the general statutory right for citizen suits under the Clean Air Act. *See* 42 U.S.C. § 7521(b)(1) (2000).

74. Massachusetts v. EPA, 127 S. Ct. 1438, 1454-55 (2007) (emphasis added).

75. *Id.* at 1464.

76. *Id.* at 1454.

77. *See id.*

78. *See id.*

79. *See* Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); *see also* Massachusetts v. EPA, 127 S. Ct. at 1454-55, 1464-65.

80. *See, e.g.*, Massachusetts v. EPA, 127 S. Ct. at 1455 n. 17 and 1464-66 (citing Massachusetts v. Mellon, 262 U.S. 447 (1923) and Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982)).

Nebraska v. Wyoming,[81] for the proposition that states have standing to bring cross-claims against the federal government to vindicate "'*quasi-sovereign*' interests which are 'independent of and behind the titles of its citizens, in all the earth and air within its domain[.]'"[82]

The cases that each side discusses, however, do not mention the phrase "special solicitude" at all. The phrase is likely to become shorthand for the new rule for standing this case creates (or at least clarifies). The question remains, therefore, where the Court found this particular verbiage. This section explores the historical origin of the phrase itself.

Professor Peter Tiersma has recently proposed that the increasing textualization of case law or precedents in the American legal system gives priority to specific phrases and verbiage that subsequent courts (and lawyers) quote constantly.[83] "American judges seem to be looking for 'sound bites' that encapsulate some or all of the holding of a case," he observes.[84] "Judges . . . seem increasingly happy to provide those judicial sound bites."[85] One such "sound bite" is the incantation "special solicitude," which functions as an invitation for states to seek redress in the courts against recalcitrant federal agencies. Textualization of precedents in the American legal system has reached a level where it is meaningful and informative to trace the etymological lineage of a special phrase that becomes shorthand for a new legal rule.

A. Case-Based Etymology

The phrase "special solicitude" is relatively common in American jurisprudence, and it appears relatively frequently in Supreme Court decisions. Even so, never before *Massachusetts v. EPA* has the Court used this jargon for state standing. Apart from questions of standing or of states' rights, the Court has mentioned its "special solicitude" for veterans,[86] sailors,[87] the disabled,[88] pro se litigants,[89] the protection of

81. *See* Nebraska v. Wyoming, 515 U.S. 1 (1995).

82. Massachusetts v. EPA, 127 S. Ct. at 1455 n.17 (quoting *Tenn. Copper*, 206 U.S. at 237) (emphasis in original).

83. *See* Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1257-1262 (2007).

84. *Id.* at 1260.

85. *Id.*

86. *See, e.g.*, Spicer v. Smith, 288 U.S. 430, 435 (1933) (While declining to find that pension payments under the World War Veterans' Act were entitled to a priority against a bank's insolvency, the Court says that "war risk" pension laws "evince special solicitude for the protection of veterans who by reason of mental incompetency are unable to protect themselves."); People ex rel. Nelson v. Stony Island State Sav. Bank, 192 N.E. 682, 684 (Ill. 1934) ("special solicitude for the protection of veterans who by reason of mental incompetency are unable to protect themselves"); *In re* Bagnall's Guardianship,

29 N.W.2d 597, 603 (Iowa 1947) (Veterans' pension laws like many to be found in pension laws, "disclose a purpose to safeguard to beneficiaries the appropriations and payments made for their benefit . . . and evince special solicitude for the protection of veterans who by reason of mental incompetency are unable to protect themselves."); Reichert v. Berlin State Bank of Marne, Mich., 251 N.W. 340, 341 (Mich. 1933) (Veterans' pension laws like many to be found in pension laws, "disclose a purpose to safeguard to beneficiaries the appropriations and payments made for their benefit . . . and evince special solicitude for the protection of veterans who by reason of mental incompetency are unable to protect themselves."); Sharkey v. United States, 17 Cl. Ct. 643, 649 (Cl. Ct. 1989) ("The United States Government, in view of the tenuous basis of the legality of the conflict in Vietnam, undertook a special solicitude toward those involved in the Vietnam conflict and created a fiduciary obligation toward such servicepersons therein involved[.]").

87. *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990) (holding that there is a cause of action for wrongful death of a seaman under general maritime law, the Court noted that "admiralty courts have always shown a special solicitude for the welfare of seamen and their families"); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 626-27 (1978) (noting that maritime law has "always shown 'a special solicitude for the welfare of those men who [undertake] to venture upon hazardous and unpredictable sea voyages'") (citation omitted); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 386-87 (1970) (holding that a cause of action exists under maritime law for death caused by a violation of maritime duty, based in part on the principle of affording seamen special solicitude, which differs from the common law).

88. *See, e.g.*, Jacobsen v. U.S. Postal Service, 812 F.2d 1151, 1153 (9th Cir. 1987) ("The special solicitude shown by Congress for the blind has been so long, so constant, and so pointed that it must be seen as manifesting a congressional conviction that the federal government has, in the words of yet another statute, 'special federal responsibilities' to the blind."); Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 198 (5th Cir. 1984) ("The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude[,]" in part because they lack power in the political process and their condition is "immutable") (citation omitted).

89. *See, e.g.*, Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 475 (2d Cir. 2006) (according "special solicitude" to a pro se litigant's submissions to the Court to interpret them as stating the "strongest arguments that they suggest."); Girard v. Donald W. Wyatt Det. Facility Inc., 50 Fed. Appx. 5, 7 (1st Cir. 2002) (noting that the court affords special solicitude to pro se litigants, but it does not forgive disregard of procedural rules); Ruotolo v. IRS, 28 F.3d 6, 8 (2d Cir. 1994) ("Recognizing that the Ruotolos were acting *pro se*, the district court should have afforded them special solicitude before granting the IRS's motion for summary judgment."); Caldwell v. Amend, 30 F.3d 1199, 1201 (9th Cir. 1994) (discussing the "prison mailbox rule" which affords incarcerated pro se litigants special solicitude by deeming a motion "filed" upon placing it in the prison mailbox, rather than upon receipt by the court clerk); Trammell v. Coombe, No. 97-2622, 1999 U.S. App. LEXIS 34073, at *5 (2d Cir. Dec. 23, 1999) ("It is well settled that the courts afford *pro se* litigants 'special solicitude' when they are faced with motions for summary judgment. The failure of a district court to apprise *pro se* litigants of the consequences of failing to respond to a motion for summary judgment is ordinarily grounds for reversal.") (citations omitted); Coronado v. LeFevre, No. 98-2792, 1999 U.S. App. LEXIS 8213, at *6 (2d Cir. Apr. 23, 1999) ("Keeping in mind both our requirement that dismissal for failure to prosecute be used in only 'extreme' cases and the special solicitude courts should extend to *pro se* plaintiffs in this area, we conclude that the dismissal of Coronado's case was error."); Int'l Bus. Prop. v. ITT Sheraton Corp., No. 94-55427, 1995 U.S. App. LEXIS 24542, at *8 (9th Cir. Aug. 9, 1995) (affirming trial court's dismissal of pro se plaintiff's suit because of discovery sanctions, this court notes

certain civil liberties,[90] and ironically, plaintiffs injured by a regulatory change by an administrative agency, as opposed to a refusal to regulate in the first place.[91] The first five of these categories comprise the vast majority of reported cases where the phrase occurs.

As for the issue of states' rights or standing, it seems the immediate precedent for the phrase, ironically, comes from the dissenting opinion in a previous case, *United States v. Morrison*,[92] where Justices Souter, Stevens, Ginsburg, and Breyer (all in the majority in *Massachusetts v. EPA*) criticized their more "federalist" colleagues on the majority for going overboard on the states' behalf.[93] Justice Souter complained disparagingly: "The majority's special solicitude for 'areas of traditional state regulation' . . . is thus founded not on the text of the Constitution but on what has been termed the '*spirit* of the Tenth Amendment.'"[94] In *Morrison,* the Court (which included only one of the Justices, Kennedy, who subsequently joined the majority in *Massachusetts v. EPA*) held that the civil remedy provision of the Violence Against Women Act[95] was unconstitutional, due in part to the reservation of unenumerated rights to the states under the Tenth Amendment.[96] The case did not concern standing, but rather the constitutionality of giving private parties (victims

"[w]e recognize that pro se litigants are granted special solicitude with regard to court-ordered sanctions"); Adams v. Nankervis, No. 89-35511, 1990 U.S. App. LEXIS 7653, at *4 (9th Cir. May 10, 1990) ("We recognize that pro se litigants, especially prisoners, must be given special solicitude."). *But see* Barrett v. Lombardi, 239 F.3d 23, 28 (1st Cir. 2001) (pro se litigant is denied special solicitude because he is, himself, a lawyer).

90. *See, e.g.*, N.Y. Times Co. v. Jascalevich, 439 U.S. 1331, 1333 (1978) ("[T]his Court has shown a special solicitude for applicants who seek stays of actions threatening a significant impairment of First Amendment interests."); Branzburg v. Hayes, 408 U.S. 665, 734 (1972) (Stewart, P., dissenting) ("[W]e have shown a special solicitude towards the 'indispensable liberties' protected by the First Amendment.") (citations omitted); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 568 (1972) (noting that although "the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only"); Commonwealth v. Butler, 328 A.2d 851, 856 n.10 (Pa. 1974) ("The Supreme Court of the United States has regularly shown a special solicitude for interests touching on the defense of criminal cases and imprisonment.") (citations omitted); Times-Picayune Publ'g Corp. v. Schulingkamp, 419 U.S. 1301, 1307 (1974) ("The Court also has shown a special solicitude for preserving fairness in a criminal trial.").

91. *See* Vigil v. Rhoades, 746 F.Supp. 1471, 1482 (D.N.M. 1990) ("Finally, this Court's conclusion . . . is bolstered by the special solicitude the Supreme Court has prescribed in those situations in which an agency decision amounts to a change of course: Revocation of an extant regulation is substantially different than a failure to act.") (emphasis in original).

92. *See* United States v. Morrison, 529 U.S. 598 (2000).

93. *See id.* at 649 n.18.

94. *Id.* (citation omitted) (emphasis in original).

95. *See* 42 U.S.C. § 13981 (2000).

96. *See Morrison*, 529 U.S. at 627.

of gender-based violence) a federal civil remedy against state actors.[97]

As this is the most recent case[98] prior to *Massachusetts v. EPA* where members of the Court used the phrase to refer to judicial deference to states' rights, it seems that the irony may have been intentional. Perhaps the majority, which (minus Justice Kennedy) had comprised the dissenters in *Morrison*, wanted to highlight the inconsistency of the self-proclaimed advocates of states' rights (such as Scalia and Thomas) in flipping on the federalism issue once it concerned an environmental problem instead. The alternative is that the real inconsistency is on the part of the *Massachusetts v. EPA* majority, which criticized the idea of giving "special solicitude" to states in the earlier decision. It is possible that the five Justices were incognizant of the Court's most recent use of the phrase, but this seems unlikely given its relative uncommonness in this setting and the fact that they themselves were the ones who last used it.[99] More plausibly, the majority intended it as a subtle jab at the dissenters.

Supporting the theory that "special solicitude" was a loaded term or jab is the fact that the next antecedent case before *Morrison* to employ the phrase was *Lawyer v. Department of Justice,*[100] where Justice Scalia penned a characteristically scathing dissent against the Court's endorsement of a Florida redistricting arrangement that a federal judge had mandated. He contended that "one would think that the special

97. Prior to *Massachusetts v. EPA,* academic commentators had observed "special solicitude" by the Rehnquist Court (the commentators' words, not the Court's) in areas other than standing to sue. *See, e.g.,* Preeta D. Bansal, *The Supreme Court's Federalism Revival and Reinvigorating the "Federalism Deal,"* 21 ST. JOHN'S J. LEGAL COMMENT. 447, 450 (2007).

> The Supreme Court's federalism revival was marked by heightened solicitude to states in four areas of constitutional doctrine: Congress's powers under the Commerce Clause, Congress's powers to enact legislation pursuant to Section Five of the Fourteenth Amendment, state sovereign immunity under the Eleventh Amendment, and "reserved" powers under the Tenth Amendment.

Id.

98. This section focuses on court precedents as a way of exploring case-based etymology for technical legal terminology (i.e., "special solicitude for states"). There is widespread use of the phrase in the legal academic literature, especially after *Morrison* (literally hundreds of passing references, but mostly incidental to quotes from the dissent in *Morrison*, or citations to one journal article from 2001 that used the phrase in its title. Evan H. Caminker, *Judicial Solicitude For States Dignity,* 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001)). To the extent that the "source" for Justice Stevens' use of the phrase in *Massachusetts v. EPA* may lie in academic commentary rather than the Court's own opinions, the most likely culprit would be the "2006 Fordham Law Review Symposium on the Jurisprudence of Justice Stevens," in which contributing panelist-writers used the phrase repeatedly. *See infra* Section II.B for more discussion.

99. As mentioned above, the phrase is reasonably commonplace in contexts far removed from states' rights or standing, but noticeably rare in this situation.

100. *See* Lawyer v. Dep't of Justice, 521 U.S. 567 (1997).

solicitude we have shown for preservation of the States' apportionment authority would cause the court to demand clearer credentials on the part of those who purport to speak for the legislature."[101] He ends this sentence with a footnote[102] that is particularly relevant to the standing issue in *Massachusetts v. EPA*:

> The Court is of the view that participation by Florida's legislative branches was beside the point, and that the attorney general alone could propose a redistricting plan and settle this lawsuit without participation by the legislature. . . . I know of no support for this proposition, and the Court provides none.[103]

The phrase "special solicitude," therefore, had appeared in reference to states' rights even before *Morrison*, and may have furnished the idea for the other justices (in the majority in *Lawyer*) to use it to characterize and criticize the states'-rights position in the subsequent *Morrison* case. It is also interesting that Justice Scalia used the phrase "special solicitude" in a sentence where he then contrasted the "will of the state" with that of its Attorney General.[104] The majority, in a statement that seems to have foreshadowed *Massachusetts v. EPA*, described the AG's special role in the litigation: "[T]here is no reason to suppose that the State's attorney general lacked authority to propose a plan as an incident of his authority to represent the State in the litigation."[105] In response to Scalia's statement excerpted above, the majority added in a footnote, "We disagree on this question of state law only insofar as the dissent views this implicit authority to limit the broad discretion possessed by the attorney general of Florida in representing the State in litigation."[106]

Going back further in the Court's history, the next case[107] before

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101. *Id.* at 586 (Scalia, J., dissenting).

102. *Id.* at 587 n.3 586 (Scalia, J., dissenting).

103. *Id.* at 586 (Scalia, J., dissenting) (internal citations omitted).

104. *See id.* at 586.

105. *Id.* at 577. It is important to note, however, that the Florida State Constitution explicitly provided for the Attorney General to have this role in reapportionment or redistricting litigation: "Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment." FLA. CONST. art. III, § 16(c) (1970).

106. *Lawyer v. Dep't of Justice*, 521 U.S. at 578 n. 4 (citation omitted).

107. There is one intervening case where the Court mentioned Congress' "considerable solicitude for state law" in the "savings" provisions of the Federal Railroad Safety Act. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 665 (1993) (Justice White wrote this part of the opinion on behalf of a unanimous Court). I have relegated this instance to a footnote because it is not a case where the Court is talking about "solicitude" as a principle of jurisprudence or as a factor federal judges should consider, but rather makes a passing comment on Congress' explicit legislative decision to eschew preemption in certain delineated circumstances.

Lawyer that employed the "special solicitude" phrase for states was seventeen years earlier. *Andrus v. Utah*[108] addressed the Secretary of Interior's authority (and full discretion) to refuse state applications to trade federal grazing land for school-grant land, designated as such as part of the state's entry into the Union.[109] The key phrase again appears as a slogan for dissenters, as Justice Powell complained that the relevant statute (the Taylor Grazing Act of 1934)[110] had shown "special solicitude for the States by directing the Secretary [of the Interior] to . . . cooperate fully with the State to that end."[111]

An even earlier case that also mentions the phrase in a dissenting opinion seems more relevant to the reasoning of the Court in *Massachusetts v. EPA*. In *Pfizer, Inc. v. Government of India,*[112] the Court gave standing to foreign governments (India et al.) to sue American companies under domestic antitrust laws and seek treble damages.[113] The Court relied in part on previous decisions allowing state governments to sue as the victims of antitrust violations.[114] Justice Powell argued that there was no reason to extend the same "solicitude" to foreign nations that Congress had given to the states, at least under the Court's interpretations.[115] "The solicitude that we assume Congress has for the welfare of each of the United States, especially when the subject matter of legislation largely has been removed from the competence of the States and has been entrusted to the United States, cannot be assumed with respect to foreign nations."[116] Justice Stevens uses this same point as one of his three reasons for the new "special solicitude" rule for standing in *Massachusetts v. EPA*, that is, that the states have voluntarily forfeited their right to legislate in certain areas when they joined the Union and therefore depend on the federal agencies for protection. Stevens did not cite the *Pfizer* decision, of course, but it seems that one *could* cite it for this general idea. Justice Roberts is therefore only partly correct in his assertion that the Court's move was unprecedented. *Pfizer,* and the cases it cites, do pertain to standing for government entities, but not standing under Article III; the question is whether they are

108. Andrus v. Utah, 446 U.S. 500 (1980).

109. *See id.*

110. 43 U.S.C § 315 *et seq.* (1980).

111. *See Andrus*, 446 U.S. at 531 (Powell, J. dissenting). Interestingly, Justice Stevens wrote the majority opinion in this case, as he did in *Massachusetts v. EPA.* He is the only Justice who was on the Court for both cases.

112. Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978).

113. *See id.* at 320. More precisely, the Court held that held that foreign nations, if otherwise entitled to sue in American courts, would also be entitled to sue for treble damages under the antitrust laws, at least to the same extent as any other plaintiff. *See id.*

114. *See, e.g.,* Georgia v. Evans, 316 U.S. 159 (1942).

115. *See Pfizer*, 434 U.S. at 331 (Powell, J. dissenting).

116. *Id.*

appropriate plaintiffs under a particular statute.

Twelve years before *Pfizer*, the Court, in *United States v. Yazell*,[117] mentioned a principle or rule of "solicitude" for states in the context of federal preemption. The litigation in this case was essentially a debt collection action by a federal agency against the wife of a bankrupt borrower in rural Texas and the decision appears to be partially result-driven.[118] It is an interesting case because the relevant state law, the rule of "coverture," (making married women immune to contract liability) was no longer in force by the time the case reached the Supreme Court.[119] Siding with Ms. Yazell, the Court (through Justice Fortas) distinguished this case from other types of preemption cases, and explained that the federal agency was bound by the laws of the state at the time it entered the contract to make a disaster-relief loan to the defendant:

> We do not here consider the question of the constitutional power of the Congress to override state law in these circumstances by direct legislation or by appropriate authorization to an administrative agency coupled with suitable implementing action by the agency. We decide only that this Court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here. Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements.[120]

Despite his careful choice of words, Fortas cites none of the "precedents of this Court" for the rule of "solicitude for state interests"; his footnotes for the distinguished types of preemption cases are to precedents where the Court sided with the federal government. This is not a case about standing, of course, which distinguishes it from *Massachusetts v. EPA* on a fundamental level. Nevertheless, it does stand for the abstract proposition of deferring to the will of the states in areas where there is a gap in federal regulations and legislation, as there was in this case, even if the states' interest runs counter to the stated policy of a federal agency. In that sense, *Yazell* does foreshadow *Massachusetts v. EPA*.[121]

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117. *See* United States v. Yazell, 382 U.S. 341 (1966).

118. *See id.* at 342-45.

119. *See id.* at 343.

120. *Id.* at 352 (internal citations omitted).

121. For other cases where a court includes the "solicitude" phrase in a quote from *Yazell*, *see* Sitton v. United States, 413 F.2d 1386, 1388 (5th Cir 1969) *and* Novak v. Gen. Elec. Corp., 282 F. Supp. 1010, 1017 (E.D. Pa. 1967) (both standing for the principle that federal courts should avoid fashioning a "federal rule" to fill a gap in

Justice Fortas' allusion to Supreme Court "precedents" for his rule is particularly significant because there are none in the 130 years preceding his words. This might explain his otherwise strange omission of citations. Prior to *Yazell,* there is a period of several generations without a single instance where the Supreme Court uses the phrase (or anything like it) to refer to federal judicial deference to states.[122] Similarly, there are no federal circuit court cases prior to *Yazell* that use this phrase in relation to states' prerogatives, standing, or rights.

The only previous federal decision to mention "special solicitude" for states, albeit pertaining to federal court jurisdiction instead of standing, is *Briggs v. French,*[123] an 1835 case that addressed a dispute over land title between private parties in different states.[124] The passing nature of the reference, and the inapposite issue that confronted the Court in that case, seem to put it outside the etymological lineage of the "special solicitude" rule in *Massachusetts v. EPA.*

B. Commentary-Based Etymology

The previous section focused on Court precedents as a way of exploring case-based etymology for the specific verbiage or technical jargon in question (i.e., "special solicitude for states"). It is possible, of course, that academic commentators' use of the phrase could have influenced Justice Stevens' word choice, even though he mentions none.

For what it may be worth, academic commentators used the phrase only twice in the years preceding *Yazell,*[125] and only four times in the twelve years between *Yazell* and *Pfizer,*[126] but nowhere in the context of

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federal legislation or regulation where there is an applicable state rule operating in the case).

122. There is also a passing reference to "solicitude" for "freedom of trade among the states" in Justice Black's dissent in H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 549-50 (1949) (Black, J. dissenting) (case concerning state denial of license for milk processing plant owned by out-of-state corporation; the majority held that it violated the commerce clause).

123. *See* Briggs v. French, 4 F. Cas. 117 (1835).

124. *See id.* at 119.

125. *See* Note, *Property Subject to the Federal Tax Lien,* 77 HARV. L. REV. 1485, 1490 (1964) ("The *Meyer* opinion is thus noteworthy for its demonstration of solicitude toward state exemption policy and its willingness to draw federal policy therefrom even at the risk of sacrificing uniformity in tax collection procedures.") (citation omitted); Note, *The Supreme Court: 1958 Term,* 73 HARV. L. REV. 84, 152 (1959) ("Against the application of federal substantive law in *Tungus*, Mr. Justice Stewart argued that Congress, in enacting the Death on the High Seas Act, had exhibited a solicitude for the preservation of state law in this area.") (discussing The Tungus v. Skovgaard, 358 U.S. 588 (1959), which does not use the term "solicitude").

126. *See* Note, *Developments in the Law—Zoning,* 91 HARV. L. REV. 1427, 1610 (1978) ("In recent years, the Court has evinced increasing solicitude for an independent sphere of state responsibility."); Note, *Developments in the Law—Section 1983 and*

standing for states to bring suit. In the years since *Morrison,* however, there have been literally hundreds of passing references. Most of these are incidental to quotes from the dissent in *Morrison*[127] or the other cases discussed in the previous section. There are also numerous footnote citations to one journal article from 2001, which used the phrase in its title.[128] If the "source" for Justice Stevens' use of the phrase in *Massachusetts* were academic commentary rather than the Court's own opinions, the most likely culprit would be the "2006 Fordham Law Review Symposium on the Jurisprudence of Justice Stevens," in which contributing panelist-writers used the phrase repeatedly,[129] and with which Justice Stevens would presumably have been familiar.

Of the innumerable articles that discuss the Court's "special solicitude" for states, it appears that none use the phrase in connection with standing for states as plaintiffs. Instead, most discuss state sovereignty issues, that is, state immunity to lawsuits,[130] or freedom from

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Federalism, 90 HARV. L. REV. 1133, 1135 (1977) ("the decisions of the Supreme Court have evidenced increasing solicitude for the interests and prerogatives of the states"); Note, *The Supreme Court: 1975 Term,* 90 HARV. L. REV. 1, 62-63 (1976) (mentioning "the Court's increasing solicitude for the role of states in a federal system," based on its previous term decision in National League of Cities v. Usery, 426 U.S. 833 (1976)); Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism,* 89 HARV. L. REV. 1871 (1976) (examining "the trend toward increasing solicitude for state interests which culminated in the [1976 Supreme Court] *Usery* decision."). There is also one from 1979: Comment, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power,* 128 U. PA. L. REV. 402, 416-18 (1979) (discussing the lack of "special solicitude" for states in the Court's analysis of federal block grant spending by state governors).

127. *See, e.g.,* Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power,* 79 S. CAL. L. REV. 1327, 1354 (2006) (quoting United States v. Morrison, 529 U.S. 598 (2000)).

128. *See* Caminker, *supra* note 98.

129. *See* Thomas H. Lee, *Countermajoritarian Federalism,* 74 FORDHAM L. REV. 2123, 2129 (2006) ("Justice Stevens's special solicitude for the state (and federal) judges in the trenches is also evident in his oft-professed enthusiasm for percolation of federal issues among state supreme courts and federal circuit courts before the Supreme Court grants certiorari."); Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism,* 74 FORDHAM L. REV. 2133, 2134-35 (2006) ("The much-noted tension between the Rehnquist Court's professed solicitude for states in its Commerce Clause and Tenth and Eleventh Amendment cases and its constriction of state authority in its preemption cases provides one illustration of the normative difficulties."); David J. Barron, *Fighting Federalism With Federalism: If It's Not Just A Battle Between Federalists And Nationalists, What Is It?,* 74 FORDHAM L. REV. 2081, 2117 (2006)

> (But taken as a whole, it does not seem controversial to assert that the body of work produced by the Federalism Five has a clearly conservative cast while the Dissenting Four's does not. That is particularly true when one compares the areas in which the Federalism Five's usual solicitude for state decision making gives way with the areas in which the Dissenting Four's usual embrace of federal power weakens.).

130. *See* Caminker, *supra* note 98 (discussing solicitude for states' "dignity" as a rationale for overturning federal rights of action against states, that is, tort liability for

federal statutory preemption or federal review of state laws or actions.[131] In a sense, these issues represent the mirror image of the standing issue in *Massachusetts v. EPA,* which implicated the immunity of the federal government against suits by states, and, more importantly, the rights of states to interfere with federal regulation under certain circumstances. As with the line of cases using the phrase "special solicitude" pertaining to states' rights, the usage by academic commentators also completely omits the issue of standing. Perhaps the widespread use of the phrase in academic commentary influenced the terminology chosen by Justice Stevens, as a verbal allusion or echo, but his application of the phrase is conceptually distinct from its use in scholarly publications.

C. *Oral Arguments and Briefs*

The previous sections focused on the technical terminology adopted by the Court for its new standing rule—"special solicitude"—and explored its origin. The most likely candidate is the *Morrison* dissent, but in no case was this phrase used for state standing to sue. The remaining question, therefore, is the origin of the *idea* that the Court decided to associate with this phrase in *Massachusetts v. EPA.*

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state governments under federal law); Richard H. Seamon, *Damages For Unconstitutional Affirmative Action: An Analysis Of The Monetary Claims In Hopwood v. Texas,* 71 TEMP. L. REV. 839, 885 (1998) (discussing a hierarchy of federal solicitude, first for the states, second for state officials, and least for private parties).

131. *See, e.g.,* Timothy Zick, *Federalism Past, Federalism Future: A Constitutional Law Symposium: Active Sovereignty,* 21 ST. JOHN'S J. LEGAL COMMENT. 541 (2007); Peter J. Smith, *The Marshall Court and the Originalist's Dilemma,* 90 MINN. L. REV. 612, 662 (2006) ("[I]n general the Justices of the federalism majority cited narrow language in Marshall Court decisions that suggest solicitude for state autonomy. Conversely, the dissenters cited the more nationalistic implications of *Gibbons* and other Marshall Court decisions."); *See* Hollis, *supra* note 127, at 1354 (quoting *Morrison*); Michael S. Greve and Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment,* 14 SUP. CT. ECON. REV. 43, 57 (2006) ("In particular, and perhaps contrary to perceptions of the Court's increased solicitude for 'states' rights,' the Rehnquist Court does *not* appear to have become more hostile to federal preemption, at least not by a measure of case outcomes.") (emphasis in original); Margaret H. Lemos, *The Commerce Power And Criminal Punishment: Presumption Of Constitutionality Or Presumption Of Innocence?,* 84 TEX. L. REV. 1203, 1251 (2006) ("In the rare instances in which states oppose new federal enactments or desire a repeal of existing prohibitions, any solicitude for the states likely will be overcome by federal legislators' own powerful incentives to take a tough-on-crime stance."); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures,* 44 VILL. L. REV. 1 (1999) (discussing the need for more solicitude of state court procedures); Michael W. McConnell, *The Supreme Court, 1996 Term: Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores,* 111 HARV. L. REV. 153, 163 (1997) ("The opinion was unsurprising in its treatment of the federalism issue, following the recent trend toward significantly greater solicitude for the autonomy and authority of the states in the federal system.").

There was a passing discussion at oral argument about the notion that states should have automatic or "special" standing, at least when there is an issue of federal preemption preventing states from regulating themselves.[132] Justice Kennedy first brought it up:

> JUSTICE KENNEDY: No, no. I'm asking whether you have some special standing—
>
> MR. MILKEY: Yes—
>
> JUSTICE KENNEDY: —as a State and, if so, what's the authority for that?[133]

This seems to be the origin of the phrase "special standing," at least for states, because it does not occur in the briefs. Seizing the thought, Mr. Milkey tried to point the Court to *West Virginia v. EPA*,[134] where the D.C. Circuit apparently granted standing on this basis:

> MR. MILKEY: Your Honor, first of all, I do think we have special standing. For example, here it's uncontested that greenhouse gases are going to make ozone problems worse, which makes it harder for us to comply with our existing Clean Air Act responsibilities.
>
> And the—in the West Virginia case, which is a D.C. Circuit case, the Court found that that itself provided an independent source of standing. In terms of Supreme Court cases, the—it's been—for 200 years, this Court has recognized loss of state sovereign property as a traditional—[135]

The conversation then shifted to a discussion of the Massachusetts coastline, and then Justice Scalia's concern that this would be another *S.C.R.A.P.*[136] case, with little useful precedential value. Justice Ginsburg then interrupted this discussion, interjecting a request for clarification about the special standing:

> JUSTICE GINSBURG: Mr. Milkey, does it make a difference that you're not representing a group of law students, but a number of States who are claiming that they are disarmed from regulating and that the regulatory responsibility has been given to the Federal

132. *See* Transcript of Oral Argument, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3431932 (Nov. 29, 2006).

133. *Id.* at *14.

134. *See* West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004).

135. Transcript of Oral Argument at *14-15, Massachusetts v. EPA, 127 S. Ct. 1438 (No. 05-1120).

136. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687-88 (1973).

> Government and the Federal Government isn't exercising it? I thought you had a discrete claim based on the sovereignty of States and their inability to regulate dependent on the law Congress passed that gives that authority to the EPA. I thought that was—
>
> MR. MILKEY: Your Honor, you are correct that we are saying that provides us also an independent source of our standing.[137]

Milkey's statement seems explicit enough. Justice Scalia then stated the issue nicely:

> JUSTICE SCALIA: I don't understand that. You have standing whenever a Federal law preempts state action? You can complain about the implementation of that law because it has preempted your state action? Is that the basis of standing you're alleging?
>
> MR. MILKEY: In short, Your Honor—
>
> JUSTICE SCALIA: Do you know any case that has ever held that?
>
> MR. MILKEY: Your Honor, I would cite you to the amicus brief of the State of Arizona et al., which cites several cases, albeit not in this Court, that stand for that principle.[138]

Then the discussion turned back to the Clean Air Act itself.[139] The point did not resurface during oral argument. The *West Virginia v. EPA* case, mentioned at oral argument, is interesting because it came from the same court that ruled against the petitioners in *Massachusetts v. EPA*.[140] Neither the majority nor the dissenters cite the case in *Massachusetts v. EPA*, even though it would appear to be highly relevant. In the *West Virginia v. EPA* case, two states and several business and energy policy entities petitioned for review of EPA requirements compelling states to revise state implementation plans (SIPs) under the Clean Air Act, so as to reduce nitrogen oxide (NOx) emissions.[141] The rules (which followed protracted litigation already[142]) established emission limits for major NOx sources.[143] The EPA contended that West Virginia and Illinois

137. *See* Transcript of Oral Argument at *16-17, Massachusetts v. EPA, 127 S. Ct. 1438 (No. 05-1120).
138. *Id.* at *17.
139. *See id.*
140. *See* West Virginia v. EPA, 362 F.3d 861 (D.C. Cir. 2004).
141. *Id.* at 864-65.
142. Appalachian Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001) ("*Appalachian I*"); Appalachian Power Co. v. EPA, 251 F.3d 1026 (D.C. Cir. 2001) ("*Appalachian II*").
143. West Virginia v. EPA, 362 F.3d at 864-65.

lacked standing to challenge its regulatory action.[144] The court disagreed, holding that the states should have standing because of the way that the regulatory framework effectively tied their hands:

> Here, the states are suing as states. The NOx SIP Call directs each state to revise its SIP in accordance with EPA's NOx emissions budget for the state. The lower the emissions budget, the more difficult and onerous is the states' task of devising an adequate SIP. Thus, lower growth factors leading to lower emissions budgets causes injury to the states as states. EPA's own brief belies its argument, as it states that "under the NOx SIP Call, states have the option of participating in [a] cap and trade program or obtaining the reductions through other mechanisms." This injury is sufficient to confer standing.[145]

The case is distinguishable from *Massachusetts v. EPA* on several grounds: this involves proactive command-and-control regulation by the EPA, rather than a refusal to regulate; and the harm here is not from increased pollution, but from the unfair, disproportionate compliance burden placed on certain states instead of others. Even so, one could argue, as Attorney General Milkey did, that the case involves a federal regulatory encroachment on state sovereignty, albeit a permissible encroachment, but that this impingement of the state's right to make laws automatically creates a harm sufficient to generate standing. The D.C. Circuit Court cites no authority for this position except *City of Olmstead Falls v. FAA*,[146] which was a case about a proposed airport runway creating actual physical harm to the neighboring community, not about a local government being unable to regulate freely within its own jurisdiction.[147]

The "Arizona Brief" mentioned during the oral arguments[148] in *Massachusetts v. EPA* does focus on standing, but devotes almost all of its pages to the traditional elements (namely injury in fact and redressibility). Only on the last pages does it mention, almost in passing, the possibility that states should have standing whenever they have a

144. *See id.* at 868.

145. *Id.*

146. *See* City of Olmsted Falls v. FAA, 292 F.3d 261 (D.C. Cir. 2002).

147. *See id.* at 268.

> Olmsted Falls may bring this petition if it alleges harm to itself as city qua city. Taking a generous reading of the petitioner's materials, we find that Olmsted Falls has alleged harm to its own economic interests based on the environmental impacts of the approved project. Although it is a close question, we conclude that the City has standing to bring this action.

Id.

148. *See* Transcript of Oral Argument at *17, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3431932 (Nov. 29, 2006).

colorable claim of preemption.[149] It seems almost to be an afterthought, and it would not have received mention at oral arguments unless Justices Kennedy and Ginsburg had specifically asked for cases on this specific point. The "Arizona Brief," in turn, mentions four circuit court cases that seem to stand for the proposition that states have standing based on any infringement of state sovereignty.[150]

The first case mentioned[151] is an older case, *Florida v. Weinberger*.[152] In this case, the Secretary of the United States Department of Health, Education and Welfare had regulated "what sort of a state licensing board for nursing home administrators will qualify for the Medicaid program."[153] Florida challenged the regulation, disputing the Department's statutory authority to pass such regulations[154] and complaining that the regulations would preempt Florida's own internal regulation of its nursing home administrators.[155] The Fifth Circuit held:

> It seems clear that, considerations of ripeness and sovereign immunity aside, the State of Florida has standing, arising from its clear interest both in the manner in which the Medicaid program is administered vis-a-vis its citizens and in being spared the reconstitution of its statutory program, to litigate the merits of this case. . . . We hold that Florida has standing.[156]

It is interesting, however, that unlike the discussion during the oral arguments in *Massachusetts v. EPA* (and in the majority opinion itself), this case explicitly finds state standing apart from "sovereignty immunity" concerns.[157] Nevertheless, the bases the court uses instead, concern for its citizens' welfare and preemption of its own state statutes,

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149. *See* Brief of the States of Arizona, Iowa, Maryland, Minnesota, and Wisconsin, As Amici Curiae in Support of Petitioners at *22-23, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2563380.

150. *Id.* at *21.

151. *See id.* at *22.

152. *See* Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974).

153. *Id.* at 490.

154. *See id.* at 491.

155. *See id.* at 490-91.

156. *Id.* at 494.

157. *Id.* Admittedly, it is rather unclear whether the court is talking about Florida's sovereign immunity or the federal government's. In the immediate context, the court is discussing Florida's standing and whether it has a redressible injury, but the closing line of the opinion uses the phrase apparently in reference to an argument that the federal agency raised instead.

> The Secretary perfunctorily advances sovereign immunity. To this contention a sufficient answer is that the complaint contains the classic allegations of action beyond the minister's delegated powers and that these, should plaintiffs prevail on the merits, must perforce be established since his regulations are challenged on no other ground.

Id. at 496.

seem to be the very items included in the notion of "sovereignty" thirty-three years later in *Massachusetts v. EPA*. The *Weinberger* case may also be distinguishable because its vintage made it excessively dependent on the then-recent *United States v. Students Challenging Regulatory Agency Procedures [SCRAP]* case,[158] which the Supreme Court now treats as largely discredited.[159]

The second case discussed in the Arizona Brief[160] was a more recent case, *Alaska v. United States Department of Transportation*,[161] in which twenty-seven states challenged orders of the Department of Transportation (DOT) concerning advertising by airlines.[162] The states claimed that the federal agency had failed to follow the rigors of notice-and-comment procedures required by the Administrative Procedures Act (APA).[163] The DOT disputed the states' standing to challenge its action, claiming there was no cognizable injury. The states based their "injury" on the prospective preemption that would occur, an encroachment (admittedly legal if done according to the APA's strictures) on state sovereignty,[164] which is closer to the concepts raised in *Massachusetts v. EPA*. Interestingly, in this case the federal agency contended that the state Attorneys General were mistaken about the preemption, arguing that the relevant state statutes were such that they would skirt preemption.[165] The court seemed irritated by this argument, stating: "In effect, DOT asks us to dismiss the States' claims on jurisdictional grounds because of some speculative possibility that the various Attorneys General do not understand state law. This we emphatically decline to do."[166] It is interesting to see this early hint of deference to state AG's in determining preemption questions, over the objections of the federal agency, as furnishing the basis for standing. Even so, the Supreme Court did not cite *Alaska v. U.S. Department of Transportation* in the *Massachusetts v. EPA* opinion.

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158. *See id.* at 494-96 (Even the court in *Weinberger* expressed skepticism about *United States v. Students Challenging Regulatory Agency Procedures [SCRAP]*, 412 U.S. 669 (1973).). "If these be thought gossamer distinctions, we can only rejoin that SCRAP's ingenious law students have caused us to be translated to ethereal realms, where we must function as best we are able." *Id.* at 495.

159. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1471 (U.S. 2007) (Roberts, J. dissenting).

160. *See* Brief of the States of Arizona, Iowa, Maryland, Minnesota, And Wisconsin, As Amici Curiae in Support of Petitioners at *23, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2563380.

161. *See* Alaska v. United States Dep't of Transp., 868 F.2d 441 (D.C. Cir. 1989).

162. *See id.*

163. *See id.* at 443.

164. *See id.*

165. *See id.*

166. *Id.*

The Arizona Brief also mentioned, as part of a closing string cite,[167] *Ohio ex rel. Celebrezze v. U.S. Department of Transportation*.[168] In this case, Ohio had sought declaratory judgment that federal regulation, which by its terms preempted a state statute dealing with transportation of nuclear material through the state, was procedurally and substantively invalid.[169] The district court dismissed the case for lack of standing.[170] The Sixth Circuit reversed, concluding that Ohio had standing: "Ohio has standing to challenge the Department's regulation and undertake to vindicate its own law."[171] The court uses the language of the "zone of interest" test,[172] but its underlying concern of preemption and state sovereignty seems paramount.[173]

The final case on this subject mentioned by the Arizona Brief[174] was *Conference of State Bank Supervisors v. Conover*,[175] but this case seems less useful because the court addressed the standing question only in passing, relegated to a footnote.[176] The court did conclude, however, that state government officials had standing to challenge regulations that preempted inconsistent state law.[177]

For whatever reason, the Supreme Court chose not to cite any of these cases, instead leaving the impression that it was taking a maverick position. The cases seem relevant, however, in understanding historical background and parameters of the states' special standing to sue federal

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167. *See* Brief of the States of Arizona, Iowa, Maryland, Minnesota, And Wisconsin, As Amici Curiae in Support of Petitioners at *23, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2563380.

168. Ohio ex rel. Celebrezze v. United States Dep't of Transp., 766 F.2d 228 (6th Cir. 1985).

169. *See id.* at 230-31.

170. *See id.* at 231.

> The court finds that the State of Ohio's contention is not sufficient to establish the necessary case in controversy required by Article III of the United States Constitution. The injury which the plaintiff has envisioned is not an immediate or threatened injury which would provide the requisite jurisdiction to this court.

Id.

171. *Id.* at 233.

172. *See id.*

173. *See id.* at 232-33:

> This Court concludes that since Ohio is litigating the constitutionality of its own statute, duly enacted by the Ohio General Assembly, Ohio has a sufficient stake in the outcome of this litigation to give it standing to seek judicial review of the rule making action of the U.S. Department of Transportation and its Materials Transportation Bureau.

174. *See* Brief of the States of Arizona, Iowa, Maryland, Minnesota, And Wisconsin, As Amici Curiae in Support of Petitioners at *23, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2563380.

175. *See* Conference of State Bank Supervisors v. Conover, 710 F.2d 878 (D.C. Cir. 1983).

176. *See id.* at 880 n.3.

177. *See id.*

agencies, especially where preemption issues are afoot.

D. The Chevron Man

It is worth mentioning, in closing this section, that Justice Stevens did something similar in a previous watershed case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council.*[178] *Chevron* also focused on the EPA's interpretation of its authority under the Clean Air Act, specifically the "bubble rule" for "stationary sources."[179] Neither the parties involved nor the Justices on the Court at the time viewed the case as a landmark decision about judicial deference to government entities or organs. Instead, it appeared at first to be an obscure case about technical regulatory terms.[180] While previous Supreme Court jurisprudence on agency interpretations of law had relied upon a balancing of many factors, Justice Stevens introduced a bit of a legal revolution with his two-part test that came to be known as the Chevron Doctrine, a doctrine which made *Chevron* one of the most-cited cases of all time.[181] As Thomas Merrill explains,

> The most striking aspect of the briefs is the absence of any direct antecedent for the two passages for which *Chevron* is most famous, namely the "two-step" approach to review questions of law, and the justification of deference to agencies in terms of the their relationship to the President. Justice Stevens apparently came up with these innovations on his own.[182]

The paragraph above could just as well have described *Massachusetts v. EPA*. As in the new *Massachusetts v. EPA* decision, where Justice Stevens also "packaged" a new proposition with ramifications far beyond the controversy of the case at bar,[183] his innovation in *Chevron* did not draw upon the briefs in the case or the lower court decision.[184] In fact, Stevens himself insisted at the time and thereafter that *Chevron* was merely a "restatement of existing law,"[185]

178. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

179. *See id.*

180. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark,* in ADMINISTRATIVE LAW STORIES 399-428 (Peter L. Strauss, ed. 2006).

181. *See id.*

182. Merrill, *surpa* note 180 at 415.

183. *See id.* at 400 ("What was new was the way Justice John Paul Stevens creatively packaged this proposition in his opinion for a unanimous but short-handed Court of six Justices.")

184. *See id.* at 413 (noting that the merits briefs focused entirely on the EPA's deregulation program under President Reagan and the statutory framework of the Clean Air Act amendments).

185. *Id.* at 420.

which is uncanny considering its far-reaching impact on administrative law and the fact that it became his most famous opinion.[186] Parallels between *Chevron* and *Massachusetts v. EPA* abound;[187] perhaps it is the hallmark of Stevens' jurisprudence to create a major new rule *ex nihilo* in an otherwise straightforward case. It is possible, of course, to interpret the lack of precedent for the "special solicitude" verbiage as indicative of how seriously (or lightly) the Court takes it as a doctrinal matter. Even so, Justice Stevens has a history of writing landmark decisions about judicial review of agency activities, packaged in new or unexpected ways. It is not out of character for him to coin a phrase that becomes an important doctrine in administrative law.

III. The Special Solicitude for the State Attorneys General

By creating a special standing rule for states, as a practical matter *Massachusetts v. EPA* granted standing for state Attorneys General (AG's).[188] Any state litigating against a federal agency would do so through its Attorney General, so the most immediate effect of the case, from an etiological standpoint, is for this group. In most cases, an individual AG makes the decision to litigate as well as which side to take, independent of other government officials such as the governors.[189] State AG's must confront formidable costs when contemplating major

186. *See id.*

187. Both involved the Clean Air Act as the relevant statutory provision, both were cases about the EPA's interpretation of that statute and a Republican President's attempt to reduce environmental regulation, both were authored by the same Justice, both stand for the more abstract notion of judicial deference (either to the agency or to the states), and both reversed a decision by the D.C. Circuit. Interestingly, *Chevron* began as a narrowly divided decision—four to three in the first conference vote—but later turned out to be unanimous. *See id.* at 415.

188. For an important discussion of standing for state AG's to bring lawsuits related to global warming, albeit in the context of nuisance actions against private parties rather than petitions against the EPA itself, *see* Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part II*, 30 COLUM. J. ENVTL. L. 351, 351-62 (2005). Thomas Merrill makes the following observation, highly relevant to the *Massachusetts v. EPA* case and the present discussion about its consequences:

> At no time during this history was it suggested that there was something inappropriate about federal courts hearing public nuisance suits brought by State Attorneys General challenging transboundary pollution. Indeed, at no time during this history was any suggestion made that State Attorneys General would have to satisfy standing limitations applicable to private litigants in order to bring such an action.

Id. at 354-55.

189. *See generally* McGinley, *supra* note 41 (discussing the conflicts between the West Virginia AG and other state officials in certain litigation matters); Penn, *supra* note 41 (discussing the Georgia AG's refusal to heed the governor).

litigation,[190] and competing priorities regarding their other legal duties within the state.[191] Standing is one additional obstacle that every AG must consider before commencing an action. Relaxing the standing requirements for states means that there will be one less hurdle—a significant hurdle that itself could otherwise consume costly litigation resources—for policy-oriented litigation by the state AG's. Now that the costs are lower and the chances of success are greater,[192] proceeding to litigation will be a rational decision for AG's more frequently.

A. The Evolving Role of the Attorneys General

The office of Attorney General began in medieval England as the King's legal barrister;[193] by the sixteenth or seventeenth century, it had evolved into an official position that encompassed all the sovereign's legal matters.[194] This political institution was imported to America from its founding; every state has an Attorney General, as does the federal government. Some states, like Delaware, had an Attorney General from their inception.[195] Other states created the post later, such as Connecticut, which did not have an Attorney General until 1898.[196] Pennsylvania had an Attorney General from the time it was a Swedish Colony (starting in 1643), before the arrival of William Penn.[197] The

190. *See, e.g.*, Symposium, *The Role of State Attorneys General in National Environmental Policy*, *supra* note 42 at 339-40 (discussing the various litigation costs that prevent some smaller states from getting involved in multistate litigation).

191. *See id.*

192. *See id.*

193. "The modern office of attorney general originated with Edward II's appointment of William Langley to the position in 1315." David Villar Patton, *The Queen, The Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective On Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 142 (2000). Other reports mention the position decades earlier, in the thirteenth century. *See, e.g.*, Nebraska Attorney General's Office Organization, History of the Attorney General's Office, http://www.ago.state.ne.us/content/history.html (last visited July 9, 2007), and Delaware's Attorney General, History of the Attorney General, http://attorneygeneral.delaware.gov/office/history.shtml (last visited July 9, 2007).

194. *See* Lynch, *supra* note 48, at 2002.

195. *See* Delaware's Attorney General, Past Attorney Generals, http://attorneygeneral.delaware.gov/office/past_generals.shtml (last visited July 9, 2007). Georgia has a similar history. *See* Office of the Attorney General of Georgia, History of the Office, http://www.state.ga.us/ago/history.html (last visited July 9, 2007).

196. *See* State of Connecticut Attorney General's Office, History of Connecticut Attorney General's Office, http://www.ct.gov/ag/cwp/view.asp?a=2132&q=295136 (last visited July 9, 2007).

197. *See* Pennsylvania Attorney General, History of the Office of the Attorney General, http://www.attorneygeneral.gov/theoffice.aspx?id=170 (last visited July 9, 2007). Similarly, South Carolina had an Attorney General from 1698. *See* South Carolina Attorney General, Founder's Day Speech, http://www.scattorneygeneral.org/office/history.php (last visited July 9, 2007).

traditional role of the AG was to represent the Executive of the state.

In recent decades, the role of the AG has evolved from Counsel for the Executive Branch into the People's Lawyer, and today it is much more so.[198] In forty-three states, the Attorney General is an elected position,[199] on the general ballot along with the governor and legislators. The role of state AG's in multistate litigation has evolved in recent decades, beginning mostly with cooperative efforts to enforce antitrust and other consumer protection laws against large, national corporations.[200] Promulgation of uniform litigation guidelines by the National Association of Attorneys General facilitated more cooperation between individual AG's in suing large corporations (who might have easily fended off lawsuits from small-state AG's otherwise),[201] and certainly the advent of fax machines and email enabled parties to join as plaintiffs from geographically distant locations.[202] Multistate litigation, which began in earnest in the 1980's, focused primarily on civil suits against large businesses, not against the federal government.[203]

There is, however, a common element between multistate consumer protection enforcement and litigation against the federal agencies: regulatory abandonment by the relevant federal agency. During the Reagan era, the Justice Department and the FTC withdrew from enforcing antitrust regulations, leaving a void that the state AG's felt compelled to fill.[204] Similarly, the EPA's refusal to regulate greenhouse gases, a position adopted under the George W. Bush administration in contrast to the agency's earlier position, invited the litigation that led to *Massachusetts v. EPA*. In general, one manifestation of a presidential policy of deregulation is agency inaction on the enforcement and

198. *See* Davids, *supra* note 43 at 366; *see also* State of Connecticut Attorney General's Office, http://www.ct.gov/ag/site/default.asp (last visited July 9, 2007) (where the introduction by Attorney General Richard Blumenthal begins, "Welcome. As the public's lawyer, I am here to defend state laws, protect consumers, and ensure our children and seniors are safe from abuse and neglect.")

199. *See, e.g.,* National Association of Attorneys General website, http://www.naag.org/naag/about_naag.php (last visited July 9, 2007), which states:

> The Attorney General is popularly elected in 43 states, as well as in Guam, and is appointed by the governor in five states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming) and in the four jurisdictions of American Samoa, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. In Maine, the Attorney General is selected by secret ballot of the legislature and in Tennessee, by the state Supreme Court. In the District of Columbia, the Mayor appoints the Attorney General, whose powers and duties are similar to those of the Attorneys General of the union's states and jurisdictions.

200. *See* Lynch, *supra* note 48, at 2003-07.

201. *See id.* at 2003-04.

202. *See id.* at 2006.

203. *See id.* at 2005-08.

204. *See id.* at 2005.

rulemaking fronts. Ironically, the unintended consequence of this policy is an increase in litigation activity by the state AG's in the very same area, which can prove just as daunting to the regulated industry as routine oversight by a federal agency.[205]

B. From Multistate Enforcement to a New Federalism

The multistate litigation of the 1980's and 90's had national significance, but mostly in the private sector: large, national corporations would reach settlements that might require adjustments of their business practices in all fifty States.[206] With the special solicitude rule, the state Attorney General position takes on more significance for national public policy concerns, as the cases turn to the national government as a target instead of national corporations.

In a sense, the election of AG's thus allows voters an alternative method of influencing national policy, by electing candidates for the state AG position who are committed to litigating against the federal government, and are committed to taking a particular side on the issues of the day. Given the greater ease by which the AG can bring actions against federal agencies to compel regulation, prospective litigation can become a significant campaign issue in the elections.[207] This raises the stakes in these elections, thereby attracting more media coverage, more policy debate, and most likely more campaign spending given the increasingly national scope of the office. It turns the traditional federalism debate on its head: rather than focusing on the national government's interference with internal state matters, the new issue is one of state interference with national governance.

An additional irony of this situation is that the increased recourse to the federal courts (another way of stating the rule of special solicitude for standing), the unelected and arguably least-democratic branch of

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205. *See* comments by Richard Blumenthal, Attorney General of Connecticut, in Symposium, *The Role of State Attorneys General in National Environmental Policy,* 30 COLUM. J. ENVTL. L. 335, 338 (2005):

> There are remarkable and really unique opportunities for Attorneys General as litigators, public interest lawyers, and in part it is increasing because of the astonishing abdication of power and its abandonment by the federal government. Much of what Attorneys General do today with the federal government's failure to meet its responsibilities has provided wonderful opportunities and obligations for Attorneys General that have never and should never have existed before.

206. *See* Lynch, *supra* note 48, at 2006-09.

207. *See,* Steven Milloy, *Love Fest on the Hill,* WASH. TIMES, March 25, 2007 at B01 (For an example of how global warming has become a campaign issue: "Mrs. Boxer doesn't want legislation this year, preferring instead to have global warming as a campaign issue in 2008.").

government, could actually have a democratizing effect. Citizens have the option of electing individuals to pursue litigation to change national regulatory policy on their behalf. The nationalization of the office adds a complex layer to the existing division of executive power in the states between the governor and the AG.

While having a divided executive creates inefficiency, it provides for more checks and balances.[208] Professor William Marshall recently explained the democratic benefits of the divided executive:

> First, as its architects intended, the divided executive model disperses power and checks executive branch excess. Second, under the divided executive, the Office of the Attorney General is, or can be, appropriately independent of gubernatorial control. Neither ethical constraints nor structural concerns, properly understood, demand that the Attorney General exclusively represent the Governor's interests. Third, by insulating the Attorney General's legal authority from gubernatorial control, the divided executive protects against executive branch overreaching by dedicating an executive officer to uphold the rule of law. Additionally, as the example of intrabranch litigation suggests, attorney general independence promotes fuller decision-making before governmental action by assuring consideration of a wider range of concerns than if the Governor acted alone. Fourth, the divided executive can be constructed to accommodate a variety of interests. A state, for example, may protect the right of an attorney general to exercise independent legal judgment against the Governor's position in a particular matter while still requiring the Attorney General to advance the interests of the Governor when her disagreement is based on pure policy or upon any other factor deemed to fit best within the final authority of the Governor. In this way, the Governor's prerogatives can be accommodated as well.[209]

Marshall was proposing that the federal executive (i.e., the current Presidency) could benefit from a similar division of power.[210] A division, it seems, has now taken place in another form. The special solicitude takes some power from the President and confers it on fifty state AG's rather than the federal AG, which is what Marshall had in mind.[211]

C. *Self-Selection and Screening Effects*

The nationalization of the state Attorney General's role that results

208. *See* Marshall, *supra* note 41, at 2267-68.
209. *Id.* (citations omitted).
210. *See id.*
211. *See id.*

from the special solicitude rule is likely to affect the type of candidates who run for the position, attracting more individuals who are passionate about national policy issues, and who have national-level aspirations. The success of candidates will depend upon their ability to articulate clear policy positions about prospective areas of federal litigation more than in previous eras, although other factors like party affiliation and personal charisma will obviously continue to influence voters as well. This new component of the candidate's electoral appeal, however, can attract those who might otherwise have sought other political offices, and can influence which candidates each political party within that state chooses to run on its ticket.

Similarly, lobbyist efforts focused on these national policy issues will have a new target at the state AG's office, where the decisions about whether to litigate and which side to take are likely to occur. The AG's other national role, litigating over preemption issues, exacerbates this effect. Recent empirical research indicates that litigation over federal preemption of state regulation ends at the Supreme Court.[212] Congress does not change the relevant statutes after the Supreme Court has defined the parameters of the preemption.[213] The litigation over regulatory preemption, an immensely important issue for the regulated parties and activist groups, determines the ultimate outcome, and lobbying Congress for a legislative change in the preemption area is either fruitless or does not occur.[214] Moreover, the Supreme Court's decisions about preemption, which tend to be final, tend to come out for and against preemption in equal numbers.[215] The odds of winning on final appeal, therefore, are about 50%, and the cases may be frighteningly close. Using backward induction, therefore, the state AG's decisions about litigating a preemption question are of more interest to lobbyists, once Congress passes the initial enactment, than lobbying in Washington. This issue works in tandem with the new special solicitude rule to make the state AG's more of a magnet for lobbying pressures, and hence more inherently political.

The increasingly nationalized role of the state AG, caused by the special solicitude rule, also alters an aspect of the office that is deeper than merely the addition of national policy issues to the traditional slate of state matters. The new special solicitude rule empowers the state AG's to be agents of change more frequently because they will have

212. *See* Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions,* 120 HARV. L. REV. 1604 (2007).

213. *See id.* at 1614-19.

214. *See id.* at 1620-22.

215. *See id.* at 1612-13.

standing to innovate and bring new legal challenges in more cases. Special solicitude also permits a state AG to effect change, or at least contribute significantly to it, on a more grandiose scale. The traditional Attorney General was more of an officeholder, dutifully discharging legal tasks much the same as any other attorney in that position would have done.[216] The new AG is an agent of change.[217]

Being an agent of change highlights the interesting distinction between "achievement" and "accomplishment" in public service (and in any other prestigious position, for that matter).[218] Achievements are remarkable things to which we attain, like titles and positions. Accomplishments are the remarkable things we actually do, the ways in which we operate as individual agents of change.[219] Where there is a high office whose duties or tasks are largely constant and foreordained, a person attaining to the position has made an achievement. To distinguish oneself from the crowd and to rise above one's peers is perhaps the most common object of ambition or aspiration for those seeking advancement in their careers.[220] This is achievement, advancement in the midst of

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216. *See* Norman I. Silber, *Nonprofit Interjurisdictionality*, 80 CHI.-KENT L. REV. 613, 619-23 (2005), for a review of the duties of state attorneys general in the arena of nonprofit organization law. Silber says of the traditional role of state attorneys general:

> The historical assignment to attorneys general of the responsibility for protecting assets belonging to the public (parens patriae) typically empowers them to investigate operations and prosecute wrongdoing on behalf of the public. Most attorneys general also have the authority to stand in the shoes of injured parties and to sue on their behalf when doing so is in the public interest.

Id. at 620 (citations omitted).

217. *Cf.* Ben A. Rich, *The Politics of Pain: Rhetoric or Reform?*, 8 DEPAUL J. HEALTH CARE L. 519, 546-47 (2005) (suggesting that the Model Policy set out by the Federation of State Medical Licensing Boards that establishes guidelines for pain management will create an opportunity for state attorneys general to become "agents of change."). Rich says that the 2004 Model Policy invokes the state attorney general "as a potential agent of change in the regulatory law and policy of pain management." *Id.* at 546. He also says:

> The political reality, of course, is that no state attorney general is likely to be held accountable by voters for not vigorously seeking to overcome state legal and regulatory barriers to pain management, advance care planning, or quality end-of-life care. Consequently, the role of the attorney general in breaking down these well-known and long-standing barriers will be highly idiosyncratic, depending on the personal perspective and motivation of the office holder.

Id. at 547-48.

218. Of course, many writers use the terms interchangeably, but here they provide the necessary words to express an important distinction.

219. *See* Graham, *supra* note 47, at 118-19.

220. *See* James McConvill, *Executive Compensation and Corporate Governance: Rising Above the "Pay-for-Performance" Principle*, 43 AM. BUS. L.J. 413, 422-23 (2006) (discussing the failure of the idea that money is the sole motivating factor behind an executive's level of professional performance). McConvill analyzes what really motivates a person to "climb the corporate ladder," and cites to Martin Seligman's book *Authentic Happiness* for the proposition that "[a] career entails a deeper personal

competition. Being the Attorney General was once an achievement.

Merely obtaining a coveted position, however, is different from being a true agent of change. Even performing competently in some high office is distinguishable from producing something new or changing the way things are. [221] For example, former Secretary of State Madeline Albright claims in her memoirs[222] that one of her greatest "accomplishments" was being the first female Secretary of State.[223] This seems to be a misnomer: attaining to a high office is more properly an achievement than an accomplishment.[224] Admittedly, she reached a higher political office than any other woman in American history,[225] and in this sense, her achievement was a milestone. Albright speculates that future generations of young women can now have higher expectations, and possess greater opportunities for their careers, thanks to her.[226]

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investment in work. You mark your achievement through money, but also through achievement. Each promotion brings you higher prestige and more power . . . as well as a raise. . . ." *Id.* at 422. The more seniority an employee has, he argues, the more money becomes less of an incentive and other factors become the main motivators. *See id.* at 422-23.

221. *See* Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 54-85 (2000) (chronicling "instances of administrative regulators advancing broad-based interests at the expense of concentrated, mobilized interests," such as the EPA deciding to more strictly regulate ozone and particulate matter). *Id.* at 54. Corley surveys examples of administrative decisionmakers achieving different goals, often in the face of stringent opposition from Congress.

222. *See* MADELINE ALBRIGHT, MADAM SECRETARY (2003).

223. *Id.* at xi-xii, 510-11. Actually, she cites few if any other accomplishments besides this, apart from the handful of international crises that came and went under her watch, as they do under every Secretary of State.

224. It would be one thing if she claimed to have saved the world from nuclear war, as Adlai Stevenson arguably did, or from economic collapse, as Alan Greenspan and Warren Buffett possibly did when they contained the domino effect of the Long Term Capital debacle in 1997. In Albright's case, she simply handled or managed crises that arose. The conclusion was typically frustration rather than triumph, as with the Rwandan Genocide and the rather inexplicable emergence of Al Qaeda as a quasi-superpower. The only triumph seems to be her claimed contribution to the feminist cause—and this was "accomplished," in part, by the unfortunately stereotyped road of marrying the right man, for which Albright is almost apologetic. *See id.* at 37-38. Albright's "achievement" (being appointed by Clinton) also resulted in large part from her political activity.

225. As Secretary of State, perhaps the only positions better would be President or Vice-President. Of course, one could reasonably contend that being a Supreme Court Justice is every bit as significant, and two women have attained this office. For whatever reason, Albright does not focus on the achievements of other women who were her contemporaries, except for passing references.

226. *See id.* at 510-11. Albright writes:

> But the encounters that mean the most to me are with women of various ages who recognize the real me and come up to say thank you. I especially treasure the young women who say that my example has inspired them to raise their sights so that they now feel that serving as secretary of state or in even higher office is a realistic goal.

Id.

Perhaps this is true, as the next President went a step further and appointed the first African-American Secretary of State, followed by the first African-American female Secretary of State. Yet Albright's classification of her appointment as an "accomplishment" that paved the way for these successors requires an element of "but for" causation: but for her success in climbing the political ladder so high, future women could not have done so. This is not merely speculative; it is highly debatable. Does she really mean that other women would have to try harder, or be more credentialed and qualified, to attain high positions if not for her ascendance to the office?

The point here is not to criticize Madeline Albright (I have praised her in print elsewhere),[227] but to clarify the changed office of the state Attorney General. Her case presents a nice illustration of the underlying change under consideration here. Albright's claimed "accomplishment" was actually the decisional act of another, the President who appointed her. His decision probably included a consideration of her stellar credentials and experience, but she herself was not the agent performing the act that constituted the "accomplishment." Once in the position, she may have seen herself as an influential person, but she does not claim to have accomplished any great feats in execution of her responsibilities. Her purported accomplishment was getting the job in the first place despite the historical discrimination against her gender.[228] Yet this "accomplishment" was the deed of another person, and this seems like a contradiction. She may have achieved something great, but she did not "accomplish" the feat in question. Achievement, in this sense,[229]

227. Dru Stevenson, *Book Review: Madam Secretary*, 12 WM. & MARY J. WOMEN & L. 467 (2006) (reviewing MADELINE ALBRIGHT, MADAM SECRETARY (2003)).

228. In fairness, at least one psychological researcher, however, has found a pattern of difference between genders in how they perceive their own "achievements," with women (at least in American culture) focusing more on the process of their strivings and men focusing more on their personal impact. *See* Joseph Veroff, *Process vs. Impact in Men's and Women's Achievement Motivation,* 1 PSYCHOL. WOMEN Q. 283 (1977). I understand Professor Veroff's use of "impact" to be roughly analogous to my use of the word "accomplishment" as opposed to "achievement."

229. While I focus here partly on agency, linguist Patrick Caudal uses "achievement" versus "accomplishment" to distinguish semantic concepts related to temporality; that is, "whether an event should be considered as an *accomplishment* (i.e., a non-atomic event, possessing internal subevents) or an *achievement* (i.e., an atomic event, lacking any internal subevent)." Patrick Caudal, *Achievements vs. Accomplishments: A Computational Treatment of Atomicity, Incrementality, and Perhaps of Event Structure,* Conférence TALN 1999, at 9 (1999), http://www.atala.org/doc/actes_taln/AC_0127.pdf (emphasis in original) (last accesed Aug 1, 2007). I agree with his distinction, and our use of the dichotomy overlaps to the extent that "achievements" in obtaining public offices occur at a precise point in time (date of inauguration, date of appointment or confirmation, etc.). "Accomplishments," on the other hand, bespeak an incremental process or ordeal, a feat toward which the actor works.

depends on the decisions of others; accomplishment is what the subject herself does.

Achievement can depend on merit,[230] of course, and meritocracy seems just and fair when compared to alternatives like simony and nepotism. Innate talent, credentials, resources, and cooperation from others are factors related to both achievement and accomplishment.[231] Accomplishments are different from achievements because the former can create merit, while the latter acknowledges it.[232]

The traditional role of the state AG stands for achievement. The public service involved could be somewhat pedantic as far as litigation goes, and the office was typically a stepping-stone to becoming a Senator or Governor.[233] With the special solicitude rule, however, each AG has

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230. *See* Seymour Martin Lipset, *Affirmative Action and the American Creed*, 16 WILSON Q., Winter 1992, at 52, 54 ("The market calls for meritocracy and the rejection of nepotism and other forms of favoritism. Hiring the best qualified person whether he or she be black or white, Jewish or Gentile, native or foreign born, is the best way to maximize economic returns.").

231. *Cf.* R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1030-46 (2001) (arguing that class-based school admissions do not violate meritocratic principles, as there are "resource disparities" that influence a person's performance in school but are not the fault of that person; rewarding an economically disadvantaged person is not anti-meritocratic); Tuneen E. Chisholm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 706 (1999) (writing that white Americans have an unfair advantage over African Americans, therefore "a true meritocracy cannot be achieved unless everyone starts with a clean slate or, at least, a fair allocation of the basic resources that ensure full citizenship.") (citation omitted).

232. The distinction between achievement and accomplishment being advanced here is reflected in the disparate treatments of moral luck in philosophical literature. Claudia Card, for example, focuses much more on the random luck involved in our innate abilities, opportunities for obtaining marketable credentials, etc. *See generally* CLAUDIA CARD, THE UNNATURAL LOTTERY: CHARACTER AND MORAL LUCK (1996). Others, such as Richard Posner and Bernard Williams, focus more on luck as an aspect of the consequences of our decisions or actions. *See* Williams, *supra* note 46; Milner v. Apfel, 148 F.3d 812, 814-15 (7th Cir. 1998) (Posner, J.); United States v. Martinez, 16 F.3d 202, 206 (7th Cir. 1994) (Posner, J.) (most legal commentary focuses on the former). *See also* United States v. Smith, 27 F.3d 649, 667 (D.C. Cir. 1994) (Sentelle, J., dissenting); Michael S. Moore, *Four Reflections On Law And Morality,* 48 WM. & MARY L. REV. 1523, 1557 n.95 (2007); Nir Eyal, *Egalitarian Justice And Innocent Choice*, 2 J. ETHICS & SOC. PHIL. 1 (2007); Mark A. Geistfeld, *The Doctrinal Unity Of Alternative Liability And Market-Share Liability,* 155 U. PA. L. REV. 447, 450 (2006).

233. *See* Marshall, *supra* note 41, at 2253 (2006)

> (In states where the Governor and the Attorney General are independently elected, the two officers may come from different political parties with diametrically opposed partisan agendas. . . . Add to this the political reality that the Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor's office and the blueprint for confrontation and conflict is manifest.)

(citation omitted). *See also* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 23 (1993)

the potential to be an agent of change on the national level, to *accomplish* things instead of *achieving* them. *Massachusetts v. EPA* is itself a striking example of this phenomenon, besides being the catalyst for more of the same. The distinction between achievement and accomplishment also helps illustrate the difference in screening effects for those seeking the office. Civil servants seeking a high position as an end in itself may find themselves replaced by those seeking a position that offers a unique opportunity to effect frequent and large-scale change, a position with special solicitude from the Supreme Court for this purpose.

D. Cooperation and Competition

The special solicitude rule also alters the job of the state AG by increasing both the cooperation and competition between them and their counterparts in other states.[234] In the last two decades, the AG's have started to build consortiums to litigate one side of an issue.[235] This allows pooling of resources, which is necessary for smaller states, as well as increased credibility that comes from greater numbers and greater geographical diversity on the same side of a case.[236] One logical outcome of relaxed standing requirements is an increase in state-led suits. The increase in such suits will require state Attorneys General to cooperate and collaborate more with their counterparts from other states.

At least one commentator[237] has suggested that this scenario could present Constitutional problems, especially under the "Compact Clause,"[238] which forbids states from making agreements or compacts with other states without the consent of Congress.[239] Litigation against

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> (The risk that an attorney general will compromise professionalism and bend to political pressure in rendering opinions and carrying out law enforcement responsibilities is greater with a popularly elected and politically ambitious attorney general who has gubernatorial aspirations. History teaches that many of them do. Elective attorneys general are more likely to regard the office as a political stepping stone.)

(citations omitted).

234. *See* Lynch, *supra* note 48, at 2003-08 (discussing at length the cooperative alliances between the AGs in multistate litigation).

235. *See id.* at 2004-08.

236. *See id.* (describing these effects for multistate antitrust and consumer protection cases, as well as the tobacco litigation).

237. *See id.* at 2016-17.

238. *See* U.S. CONST. art. I, § 10, cl. 3.

239. *See* Lynch, *supra* note 48, at 2016-17; *see also* Virginia v. Maryland, 540 U.S. 56, 63 (2003) (mentioning the constitutionality of the Black-Jenkins Award under the Compact Clause); New York v. Hill, 528 U.S. 110, 111 (2000) (addressing the Interstate Agreement on Detainers); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999) ("Under the Compact Clause, States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity.") (internal citation omitted) (emphasis in original).

these multistate coalitions yields few favorable outcomes,[240] although there are no significant cases focusing on litigation consortiums. The Supreme Court had the opportunity to address the issue in *Massachusetts v. EPA,* but carefully sidestepped it by focusing explicitly on one state, Massachusetts, and ignoring the claims of the others.[241] Compact Clause analysis involves two critical inquiries: whether Congress approved the agreement (which it usually does),[242] and whether the interstate agreement increases the political power of the states enough to infringe upon the federal structure.[243] Both of these present some potentially cumbersome concerns for cases, like *Massachusetts v. EPA*, that may arise in the future. In *Massachusetts v. EPA*, Congress authorized the suits against the EPA under the Clean Air Act, but not necessarily the banding together of states in groups as parties in such litigation.[244] Perhaps the informality of the agreement allowed it to escape the Court's attention,[245] but maybe no one raised it in the appeal.

More troubling is the traditional rule that interstate compacts are permissible where they pose no threat to the federal structure or federal power. In *United States Steel Corp. v. Multistate Tax Commission,*[246] the Court found that there was no such infringement because the Tax Commission increased state power over private corporations and

240. *See, e.g.,* United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (finding no constitutional infirmity with the Multistate Tax Commission); Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985) (finding no violation of Compact Clause in Massachusetts and Connecticut statutes offering reciprocity to other New England states for regulation of bank holding companies); Int'l Union of Operating Eng'rs, Local 542 v. Del. River Joint Toll Bridge Comm'n, 311 F.3d 273 (2002) (finding no violation of Compact Clause by Toll Bridge Commission).

241. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1453-54 (2007).

242. *See* Lynch, *supra* note 48, at 2018; *Coll. Sav. Bank*, 527 U.S. at 686.

243. *United States Steel Corp.*, 434 U.S. at 456; *see also* Lynch, *supra* note 48, at 2016-17.

244. It might be possible to infer Congressional acquiescence for multistate litigation groups under the Clean Air Act from Section 176(A)(a) of the 1990 amendments, addressing interstate spillovers of nitrogen oxides, and the EPA's creation of the Ozone Transport Assessment Group (OTAG), which became the subject of litigation in the celebrated case *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001). For purposes of satisfying the Compact Clause, Congressional approval of an agreement can come via administrative agencies and regulations, such as the EPA's OTAG project. *See, e.g.,* Milk Indus. Found. v. Glickman, 967 F.Supp. 564, 566 (D.D.C. 1997), *aff'd* 132 F.3d 1467 (D.C. Cir. 1998) (statute giving Secretary of Agriculture authority to implement regional dairy compact only upon his finding of "compelling public interest" in compact region did not constitute unconstitutional delegation of legislative authority to consent to interstate compacts; compact had already been conditionally accepted by Congress).

245. If true, this seems to contradict the Court's previous holding that the nature or form of the agreement is not the issue, but rather its effect on the federal government. *United States Steel Corp.*, 434 U.S. at 470.

246. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

taxpayers, but not the federal government.[247] The special solicitude rule gives states standing to sue the federal government, which they are likely to do in groups; this could implicate the Compact Clause in a way that has not arisen before. Even so, the Court in *Massachusetts v. EPA* ignored the issue, and it is therefore unclear whether this represents tacit approval for purposes of precedent, or merely an issue the parties missed in their briefs.[248]

Interstate litigation alliances also create some level of competition between state AG's over which one will take the lead position in a high-profile case.[249] In *Massachusetts v. EPA*, the decision was serendipitous: the "injury-in-fact" requirement for standing under Article III was crucial to the case, and Massachusetts' comparatively long coastline and the state government's ownership of significant stretches of beach[250] made for a more colorable argument of injury or prospective loss from rising sea levels.[251] This aspect may explain Alaska's otherwise striking

247. *See id.* at 472-73.

248. *See generally* Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application Of State Law To Compact Clause Entities*, 23 YALE L. & POL'Y REV. 163 (2005) (for more recent discussion of problems with Compact Clause jurisprudence).

249. *See* Lynch, *supra* note 48, at 2004 (noting that so far, the states' AG's offices appear to be "so closely coordinated that those participating in the case will usually choose one or two lead states and cede to them primary responsibility for negotiating with the defendant on behalf of all the states involved"). Regardless of the outward appearance of a unified front and a designated leader, from the perspective of someone working inside an AG office at the phase when the global warming cases were still under contemplation, this writer can attest that internal discussions about who gets to lead can be animated.

250. Massachusetts v. EPA, 127 S. Ct. 1438, 1456 (2007)

> (These rising seas have already begun to swallow Massachusetts' coastal land. Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century. If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.)

(internal citations and quotation marks omitted). Of course, California, another plaintiff in the case, has a longer coastline than Massachusetts, but California has a special exemption from some of the preemption scope of the Clean Air Act. Given that the majority in *Massachusetts v. EPA* relied on federal preemption as a major justification for creating the special solicitude rule, using California as the primary plaintiff for standing purposes would have undermined this rationale.

251. *See id.* n. 19

> (For example, the [Massachusetts Department of Conservation and Recreation] owns, operates, and maintains approximately 53 coastal state parks, beaches, reservations, and wildlife sanctuaries. [It] also owns, operates and maintains sporting and recreational facilities in coastal areas, including numerous pools, skating rinks, playgrounds, playing fields, former coastal fortifications, public stages, museums, bike trails, tennis courts, boathouses, and boat ramps and landings. Associated with these coastal properties and facilities is a significant

membership in the opposing consortium, as mentioned before: the defendants may have recruited the state with the longest coastline of all to offset this point. If a particular case is likely to be popular with citizens from several states, there can be a race to be the first state to file suit in order to lock in the state's name in the case caption before others join.[252]

E. Are Activist Groups Left Out?

Activist groups, such as the National Resource Defense Council (NRDC) or Sierra Club, may find that they have a diminished role for litigation against federal agencies in light of the special solicitude rule. Of course, the *Massachusetts v. EPA* case began with special interest groups who petitioned the EPA for rulemaking under the Clean Air Act, so in a sense they initiated the case.[253] That was before the "special solicitude" rule came into play, however. Another possible manifestation of the same phenomenon would be an increase in litigation partnerships between activist groups and state AG's offices, as these special interest groups turn to the AG's to help their case get standing in federal court.

Activist groups now have an inferior position, at least regarding standing, compared to the state Attorneys General. Citizens desiring policy changes will prefer legal advocacy by a representative with a magic token for standing and are more likely to look to the Attorneys General for this purpose.[254] The declining litigation role for activist groups may lead to an internal organizational shift toward other activities, like education, publicity, and lobbying. The replacement of

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amount of infrastructure, which the Commonwealth also owns, operates, and maintains, including roads, parkways, stormwater pump stations, piers, sea wall revetments, and dams.)

(citations omitted).

252. *See* Stephen M. Axinn, *Developments In Mergers and Acquisitions,* 58 ANTITRUST L.J. 403, 417 (1989) (discussing prosecutorial rivalry between states in antitrust enforcement).

253. *See Massachusetts v. EPA,* 127 S. Ct. at 1449, n. 15. Nineteen activist groups commenced the litigation with a rulemaking petition under the Clean Air Act. These groups were Alliance for Sustainable Communities; Applied Power Technologies, Inc.; Bio Fuels America; The California Solar Energy Industries Assn.; Clements Environmental Corp.; Environmental Advocates; Environmental and Energy Study Institute; Friends of the Earth; Full Circle Energy Project, Inc.; The Green Party of Rhode Island; Greenpeace USA; International Center for Technology Assessment; Network for Environmental and Economic Responsibility of the United Church of Christ; New Jersey Environmental Watch; New Mexico Solar Energy Assn.; Oregon Environmental Council; Public Citizen; Solar Energy Industries Assn.; The SUN DAY Campaign. *Id.*

254. For a possible example, *see* Korsinsky v. EPA, 192 Fed.Appx. 71 (2d Cir. 2006) ("Korsinsky's primary claim, that global warming and carbon dioxide emissions may cause him a future injury, is too speculative to establish standing.").

the private activist group with the state AG's could alter the nature of the litigation. Attorneys General have many competing duties, and a broad range of constituents (the electorate in their state) to appease.[255] More importantly, state AG's are likely to litigate together with other states, as they have been doing for several years, in order to pool resources, specialize various litigation tasks, and obtain economies of scale and greater credibility.[256] In contrast, the NRDC and Sierra Club historically litigated environmental cases alone. Greater resources on the part of the plaintiffs permit greater undertakings. At the same time, many of the decisions that litigants must make along the way, especially pertaining to strategy, venue selection, specific demands, and settlement negotiations, must occur collectively when the states are litigating together, and this must affect the nature of the litigation.

IV. States Compelling Federal Agencies to Regulate

Massachusetts v. EPA also held that the states could attack federal inaction and compel agencies to regulate.[257] Combined with the special solicitude rule on standing, this part of the holding could have far-reaching implications for the enhancement of state power. Essentially, states now have special standing to force the hand of the federal government, at least in promulgating regulations.[258] In this regard, the Court emphasized that there is a significant difference between enforcement and rulemaking by agencies; the former is less susceptible to compulsion than the latter.[259] Agencies retain much more discretion about enforcement—whether to enforce, when to enforce, remedies to seek, etc.[260] Agencies have less discretion, however, about promulgating

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255. *See* comments by Stephen Rowe, Attorney General of Maine, in Symposium, *The Role of State Attorneys General in National Environmental Policy,* 30 COLUM. J. ENVTL. L. 335, 342-43 (2005)

> (So why didn't I join this effort? There were several reasons, basically logistical. We saw it as being resource intensive. It's an interstate suit—we're plaintiffs so once we pull the trigger, there's work to be done. We have 7 lawyers in our air resource division, and we're involved with these other suits: against EPA for failure to list CO2; we're also defending a lot of suits on the state level. The first priority is defensive litigation. The second priority is to lend support to our essential services. Another priority is the enforcement of state environmental laws. And then we can be plaintiffs in interstate suits. We saw large out of pocket expenses.).

256. *See* Lynch, *supra* note 48, at 2008.

257. *See Massachusetts v. EPA*, 127 S. Ct. at 1454 (saying that states have a right to challenge agency inaction as arbitrary and capricious, in effect compelling them to regulate).

258. *See id.*

259. *See id.* at 1459.

260. *See id.* In *Town of Castle Rock. v. Gonzales*, 545 U.S. 748 (2005), the Court upheld agency discretion in enforcement decisions, albeit in a completely different

rules than they do about enforcing them, at least in the aftermath of this case.[261]

A. The Majority's Analysis

The EPA argued alternatively that it *could not*, and *would not* regulate greenhouse gases under the Clean Air Act.[262] The first argument was less defensible in this particular case, but would have been invincible if true. Without statutory authority to regulate, no party (or court) could possibly require the agency to do so; it would simply be illegal. The Court held that in this case the EPA clearly *could* regulate because Congress delegated that authority to the agency.[263] This holding, however, is completely dependent on this statute and these facts. This part of the *Massachusetts v. EPA* decision has the least relevance for future cases. In other cases where federal agencies *can* show that they lack authority to regulate, that would still be a winning argument.

The contrary is true with respect to the EPA's second argument. It significantly changes the rules of the game for future litigation. The EPA argued that discretion of authority to regulate something necessarily implies discretion not to regulate as well.[264] The majority did not adopt this symmetry-based approach.[265]

Instead, the majority focused on the word "judgment" in the enabling statute,[266] which it interpreted in light of the standard word "shall" that accompanies it.[267] The word "judgment" thus becomes the primary "regulatory variable"[268] in this case, the word whose ambiguity is both the conduit and the boundary of Congress' delegation of authority. "Put another way, the use of the word 'judgment' is not a

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context—fending off Section 1983 liability for an "act of omission," rather than challenging standing to challenge purposeful agency silence.

261. *Massachusetts v. EPA*, 127 S. Ct. at 1459.

262. *See id.* at 1460-62.

263. *See id.* at 1462.

264. *See id.*

265. *See id.* at 1463.

266. *See id.* at 1462

> (The alternative basis for EPA's decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U.S.C. § 7521(a)(1), that judgment must relate to whether an air pollutant "causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare. . . .")

(citations omitted).

267. *See id.*

268. *See* William N. Eskridge, Jr. & Judith N. Levi, *On Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103 (1995); Dru Stevenson, *To Whom Is The Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 167 (2003).

roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits."[269] The EPA apparently argued that "shall" was the keyword of delegation in the text, and that the word "judgment" was a modifier that limited the force of "shall."[270] The Court, in contrast, treated "judgment" as the regulatory variable with "shall" as the modifier limiting the agency's judgment.[271]

This is very significant.[272] "Shall" and "judgment" (a.k.a. "discretion") are ubiquitous in the landscape of agency enabling statutes.[273] For the Court to hold that "shall" is the limiter and

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

270. *See id.*

271. *See id.*

272. It seems to me that Justice Stevens is espousing the exact same view he held in his dissenting opinion in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), except that here he writes for the majority. Nowhere does *Massachusetts v. EPA* cite or acknowledge the holding in *Young*, which deferred to an agency refusal to regulate, even though *Massachusetts v. EPA* seems to be overturning *Young*.

273. The word "shall" generates endless confusion, as it contains so much semantic ambiguity. Sometimes the confusion centers on whether "shall" means "must" or "may," that is, whether it is permissive or mandatory (the same issue presented in *Massachusetts v. EPA*). *See* In re Trusteeship of First Minneapolis Trust Co., 277 N.W. 899, 902 (Minn. 1938) ("Provisions which are mandatory in form are often held to be directory, and those which are directory in form are often held to be mandatory because such words as 'may,' 'shall,' 'must,' and 'will' are often used without discrimination. All of them are elastic and frequently treated as interchangeable.") (citations omitted). The UNIFORM STATUTE AND RULE CONSTRUCTION ACT (1995) devotes Section 4 to this problem, and posits that "'Shall' and 'must' express a duty, obligation, requirement, or condition precedent." Uniform Stat. & Rule Constr. Act § 4(a). "May," by contrast, "confers a power, authority, privilege, or right." *Id.* § 4(b). This would seem to settle the question in *Massachusetts v. EPA* in favor of the majority, and against Scalia's dissent. The official Comment to this section, however, muddies the water with this attempted clarification: "The context of a statute or rule may indicate that a "shall" or "must" is directory and not mandatory." *Id.* In Doe v. Statewide Grievance Comm., 694 A.2d 1218 (Conn. 1997), the Connecticut Supreme Court held that "shall" was merely "directory" and not "mandatory." *See also* Lomelo v. Mayo, 204 So.2d 550, 552 (Fla. Dist. Ct. App. 1967) (holding that when "shall" appeared twice in the same sentence, it was mandatory the first time and permissive or directory the second time); Keenan v. Young, 195 N.E.2d 382, 385 (Ohio Ct. App. 1963) ("The word 'shall' may be construed as meaning permissive or directory (equivalent to 'may') to carry out the legislative intent and in cases where no right or benefit to anyone depends upon it being taken in the imperative."). *See also* Ian K. Peterson, *When "May" Means "Shall": The Case for Mandatory Liquidated Damages Under the Federal Wiretap Act*, 35 STETSON L. REV. 1051 (2006) (arguing that "may" means "shall" and that "shall" is mandatory); Hope Caldwell, *Difference Between "Shall" and "May" Saves Liquor License*, 3 LAWYERS J. 1 (Sept. 21, 2001); Michele M. Asprey, *Shall Must Go*, 3 SCRIBES J. LEGAL WRITING 79 (1992) (arguing that "shall" should never be used in legal writing because of its tendency to generate confusion); Reed Dickerson, *Choosing Between Shall and Must in Legal Drafting*, 1 SCRIBES J. LEGAL WRITING 144, 144-45 (1990) ("That convention is to use the modal *shall* to denote a flat-out command, the breach of which risks legal discipline, and to use *must* to denote merely a condition precedent to legal effectiveness.") (emphasis in original).

"judgment" is the modifier, it means that not only the EPA, but also other agencies, will face an ongoing mandate to promulgate rules. The agencies' discretion to regulate is *not* discretion to abstain.[274] The problem here is not the typical conundrum of statutory interpretation, ambiguity in the words, or the choice between plain vernacular meaning and technical usage. Instead, the question is which word modifies the other. This may seem like an arcane word game, but it directly implicates the nature and scope of judicial review in future cases,[275] *Chevron* deference,[276] and even federalism. The decrease in agency discretion here means more power for states to challenge agency refusals to regulate.

B. Scalia's Dissent

In his dissent,[277] Justice Scalia was characteristically incredulous. "The question thus arises: Does anything *require* the Administrator to make a 'judgment' whenever a petition for rulemaking is filed?"[278] He

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As if this were not confusing enough, "shall" is also used in a future temporal sense, somewhat interchangeably with "will," but there is controversy over whether one or the other of these words is supposed to imply more "force" when used with different tenses of verbs. *See* Gertrude Block, *Differentiating "Shall" and "Will,"* 23 PA. LAW. 68 (2001) (Historically, shall, in the first persons singular and plural (that is, following I or we), would indicate simple futurity. "However, shall, when used in the second and third persons singular and plural (you, he/she and they), would now [after the 17th century] be 'determinative' (that is, would mean 'must.')" Will meant the exact opposite.); Howard Darmstadter, *Shall? Will? Who Makes the Rules?* 7 BUS. L. TODAY 8, 10 (1998), *available at* http://www.abanet.org/buslaw/blt/7-5legal.html:

> (The Oxford English Dictionary and Fowler's Modern English Usage (third edition) are of the view that in British English, shall in the second and third person (you, he, she, it, they) expresses the speaker's determination or insistence while will expresses mere futurity. In the first person (I, we), it's the reverse, with shall expressing the simple future and will indicating determination. . . . If you try to persuade a court that we shall is more emphatic than we will, you are likely to lose.).

274. In some ways, the asymmetrical position of the agencies after *Massachusetts v. EPA* is analogous to the mandatory voting laws in the American colonies (and some foreign states today), where citizens could incur criminal penalties for failing to vote. In that situation, freedom to vote does not necessarily imply freedom *not* to vote. This stands in contrast, for example, to Free Speech concepts, where compelled speech would certainly not be considered "free."

275. If a matter is in the purview of agency discretion, then the standard of review is abuse of discretion, i.e., whether the decision is "arbitrary and capricious." This is the most deferential standard of review, and the agency merely needs to articulate that it had some reason, however tenuous, for its decision. If a decision is not a matter of agency discretion, then the reviewing court can apply a "substantial evidence" test, or even something stricter.

276. *See infra* Section IV.C.

277. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1471-78 (2007).

278. *Id.* at 1472 (emphasis in original).

alleges that the majority cites no statutory authority,[279] which is only partly true. The majority dutifully cited and dissected the relevant statute,[280] as explained above. Scalia is correct, however, that these paragraphs in the majority's opinion lack citations to other cases. Yet apart from one case about a statute that explicitly required rulemaking,[281] Scalia seems guilty of the same offense. He lacks cases for his opinion as well, but for a passing reference to *Chevron*.[282]

Scalia sarcastically characterizes the majority's decision as "invent[ing] a multiple-choice question that the EPA Administrator must answer when a petition for rulemaking is filed."[283] His a-b-c packaging of the majority's requirements of agencies, however, provides readers and future generations of jurisprudes with a clearer statement than we might otherwise have gleaned from the majority's opinion. Scalia reduces it to a tidy, memorable three-part test, probably aiding his opponents unwittingly. Thus, we have the three-part *Massachusetts v. EPA* test:

> 1. Did the agency conclude that the relevant statute *could* include the fact scenario giving rise to the litigation? If yes, the agency *must* make rules.
>
> 2. If not (to question 1), then the agency *may* refrain from rulemaking.
>
> 3. If the agency cannot answer the first question, it must provide a detailed justification for being unable to decide, i.e., strong evidence of overwhelming uncertainty.[284]

Like the majority, Scalia also focuses on the word "judgment,"

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279. *See id.* ("Without citation of the statute or any other authority, the Court says yes. Why is that so? When Congress wishes to make private action force an agency's hand, it knows how to do so.").

280. *See id.* at 1462.

281. *See id* at 1472 (citing Brock v. Pierce County, 476 U.S. 253, 254-55 (1986) (discussing the Comprehensive Employment and Training Act (CETA), 92 Stat. 1926, 29 U.S.C. § 816(b) (1976 ed., Supp. V))).

282. *See id.* at 1473-74

> (The Court nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). As the Administrator acted within the law in declining to make a "judgment" for the policy reasons above set forth, I would uphold the decision to deny the rulemaking petition on that ground alone.).

283. Massachusetts v. EPA, 127 S. Ct. at 1472.

284. *See id.* (I paraphrase here to make the three-part test more general in applicability.).

setting it off in quotation marks for emphasis.[285] He begins, however, assuming *arguendo* that "the Administrator's discretion is not entirely unbounded—that if he has no reasonable basis for deferring judgment he must grasp the nettle at once."[286] This is a long way of restating the "shall" concept, except he uses some double negatives and substitutes "must" instead of the statutory term "shall." In his view, however, "judgment" is a temporal prerequisite to "must [regulate]."[287] In that sense, "judgment" qualifies or limits "shall." As he thinks *Chevron* deference applies to "judgment," rather than to "must" or "shall," a court would almost never reach the latter and decide to compel an agency to regulate. Instead, under his scheme, courts will defer almost automatically to the agency's "judgment," as long as there is some scintilla of support for it.

Scalia is correct that the majority seems to have gone beyond the traditional "hard look" doctrine, which used an "abuse of discretion" or "arbitrary and capricious" standard of review.[288] The "hard look" doctrine usually imposes a burden of production on agencies,[289] and sometimes a burden of persuasion.[290] The holding in *Massachusetts v. EPA* apparently imposes at least a burden of persuasion, if not a burden of proof, in cases where the agency balks at regulating.[291] For better or worse, Scalia's characterization in this regard seems accurate: the Court is using stricter scrutiny than it usually would in "hard look" cases. The more searching review of the agency's position seems to be an unavoidable consequence of interpreting words like "judgment" and "discretion" as the primary regulatory variables, which "shall" or "must" merely cabins in. All of these are stock terminology in the enabling statutes by which Congress delegates rulemaking tasks to the agencies.

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285. *See id.*

286. *Id.*

287. *See id.* at 1472-73.

288. *See* AMAN & MAYTON, *supra* note 69 at 523 n.71 ("The legal language to which a substantive or a procedural hard look is tied usually remains the 'arbitrary and capricious' clause of the Administrative Procedure Act (APA)."); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983).

289. AMAN & MAYTON, *supra* note 69, at 527-29.

290. *See id.* at 521; *see also State Farm,* 463 U.S. at 51-52.

291. Elsewhere in the decision, however, the Court says that it is still "highly deferential" to the agency in refusal-to-regulate cases:

> They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is "extremely limited" and "highly deferential."

Massachusetts v. EPA, 127 S. Ct. at 1459. *See also* AMAN & MAYTON, *supra* note 69, at 536 (citing earlier circuit court decisions for the notion that agencies receive "high end" judicial deference for refusals to regulate).

Scalia has always been a champion of the Chevron Doctrine,[292] which would seem to make him pro-agency (he espouses judicial deference to the agencies). Yet this case illustrates another principle of Scalian jurisprudence: a bias against more numerous regulations as a general matter. This is a question of sheer regulatory quantity, not quality (like the burdensomeness of the regulations, etc.). He seems to suggest that courts should leave agencies alone if they are refraining from rulemaking. Moreover, the promulgation of regulations generates text (words) that Scalia can attack as being outside their more obvious common meanings, under the first part of *Chevron* analysis. In contrast, his application of *Chevron* to the word "judgment" means there will be almost nothing to criticize about a refusal to regulate, as long as the agency offers *some* reasonable basis for its inaction.[293] In sum, Scalia's use of *Chevron* and his choice of "judgment" as the word to which its analysis would apply shows (or would require if applied) a bias toward fewer regulations from a numerical or quantitative standpoint.

C. Chevron Analysis

The two previous sections alluded to the Chevron Doctrine, which is a centerpiece of administrative law. Both the majority and dissent (Scalia) in *Massachusetts v. EPA* cite *Chevron*, and the same Justice (Stevens) authored the majority opinions in both of these key cases.[294] *Massachusetts v. EPA* joins the large corpus of jurisprudence on *Chevron*. It also purports to resolve some unsettled aspects of the Chevron Doctrine itself.[295] Exactly what *Massachusetts v. EPA* does to *Chevron*, however, could be the subject of differing opinions.

Chevron itself has come to stand for the proposition that courts should defer to administrative agencies' interpretation of their enabling statutes, in any instance where the governing statute itself is ambiguous or unclear.[296] The Chevron Doctrine usually appears as a two-part test: first, whether the statute is clear and unambiguous, and second, if ambiguous, then whether the agency's interpretation is "reasonable."[297] The threshold for reasonableness is low; the agency typically wins if the

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292. *See* Merrill, *supra* note 180.

293. Apparently, even contending that the agency is overworked or that it is waiting to see what will happen in the next presidential election would suffice as a rationale for deferring "judgment."

294. *See* discussion *supra* Section II.D.

295. *See Massachusetts v. EPA*, 127 S. Ct. at 1459 ("Some debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking.").

296. *See* Merrill, *supra* note 180, at 400-01.

297. *See id.*

court reaches the second step of the test.[298] The number of Chevron Doctrine cases that conclude at the first step, with a finding that the statute is clear, suggests that many of the cases are outcome-driven. When the court divides over step one of Chevron Doctrine analysis, it occasions dictionary-dueling by the Justices.[299] One side (usually Scalia) argues that the meaning is explicit and unambiguous, while the others find a range of possible definitions for the word in their dictionaries.

The majority in *Massachusetts v. EPA* applies *Chevron* in two ways. First, it states that *Chevron* mandates profound judicial deference to agency decisions about whether to bring enforcement actions.[300] The Court marks this as the "height" or maximum of *Chevron* deference.[301] Second, the Court also disparages Justice Scalia's dissent in a footnote,[302]

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298. *See, e.g.*, Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986) (deferring to the Secretary of Health and Human Services regarding the regulation of the food toxin aflatoxin); NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112 (1987) (discussing the agency's understanding of whether it could approve certain labor dispute settlements); *but see* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (ruling against the agency on step two); Dole v. United Steelworkers of Am., 494 U.S. 26 (1990) (ruling against the Department of Labor on *Chevron* step two analysis).

299. *See, e.g.*, MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 225-28 (1994) (majority and dissent engaged in argument about which dictionary should be used to determine the correct interpretation of "modify"); Am. Textile Mfrs. Inst. Inc. v. Donavan (the Cotton Dust case), 452 U.S. 490 (1981) (dictionary definition of "feasible" forms basis for court's holding); *see also* Am. Mining Cong. v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) (dictionaries consulted to discern the proper meaning of "disposal"); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 552 (1992) ("Justice Scalia himself slavishly relies on dictionaries to interpret statutes. . . ."); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (explaining Justice Scalia's use of dictionaries within his overall interpretive framework). The trend is decidedly toward increasing use:

> [I]n the six Terms between 1987 and 1992, the Court never cited dictionaries *fewer* than fifteen times, with a high point of thirty-two references during the 1992 Term. Dictionary definitions appeared in twenty-eight percent of the 107 Supreme Court cases decided by published opinion in the 1992 Term—a fourteen-fold increase over the 1981 Term. The trend toward increased dictionary use has been pervasive: the Court has referred to twenty-seven different dictionaries since 1988 in cases involving not only statutes, but also constitutional provisions and administrative codes.

Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438-39 (1994) (emphasis in original) (citations omitted). *See also* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 298-99 (1999).

300. *Massachusetts v. EPA*, 127 S.Ct at 1459 ("The scope of our review of the merits of the statutory issues is narrow. As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.").

301. *See id.* ("That discretion is at its height when the agency decides not to bring an enforcement action.").

302. *See id.* at 1460 n.26

> (In dissent, JUSTICE SCALIA maintains that because greenhouse gases permeate the world's atmosphere rather than a limited area near the earth's surface, EPA's exclusion of greenhouse gases from the category of air pollution

saying that both the phrases "ambient air" and "air pollution agent" are perfectly clear (Chevron step one, which normally ends the analysis), and even if the phrases were ambiguous, the Court says they could not possibly mean what the EPA says they mean (Chevron step two analysis).[303] This second *Chevron* maneuver is historically typical. The first, however, seems to cut new ground, designating specific scenarios that would mark the upper and lower boundaries of *Chevron* deference. One way to read *Massachusetts v. EPA*, then, is to say that it requires high deference for agency enforcement decisions and low deference for decisions about whether to make rules. This is very significant in light of the circumstances of the case, as well as the special solicitude holding of state standing. Not only do states have a lower standing threshold, but they can more readily force agencies to promulgate regulations.

The classic examples of the Chevron Doctrine are cases where the agency takes a single statutory term and expands or elaborates upon it in its promulgated regulations[304] (the original case was about the definition of "stationary source" under the Clean Air Act)—clearly a matter of agency interpretations of ambiguous statutory verbiage. *Massachusetts v. EPA* explicitly extends the doctrine's reach to agency decisions about whether to regulate and whether to enforce, which are less directly matters of agencies interpreting statutes and more simply a choice of whether to act at all. In this sense, *Massachusetts v. EPA* may expand the range of the Chevron Doctrine, even while it sets upper and lower limits to it in this new arena.

It is also possible to read the Court's holding as simply focused on its application to the verbiage "shall [promulgate/regulate]." In other words, we could characterize the majority as applying *Chevron* step one ambiguity analysis to "shall [regulate]," at least by implication, which nearly forces the conclusion that the statute is clear and the agency's

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> "agent[s]" is entitled to deference under Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).... EPA's distinction, however, finds no support in the text of the statute, which uses the phrase "the ambient air" without distinguishing between atmospheric layers. Moreover, it is a plainly unreasonable reading of a sweeping statutory provision designed to capture "*any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air."... JUSTICE SCALIA does not (and cannot) explain why Congress would define "air pollutant" so carefully and so broadly, yet confer on EPA the authority to narrow that definition whenever expedient by asserting that a particular substance is not an "agent." At any rate, no party to this dispute contests that greenhouse gases both "enter the ambient air" and tend to warm the atmosphere. They are therefore unquestionably "agents" of air pollution.)

(emphasis in original) (citations omitted).

303. *See id.* at 1462.

304. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (discussing the INS interpretation of the words "fear," "threatened," etc.).

duties unavoidable. We could similarly characterize Scalia's opinion as applying *Chevron* step two analysis to this phase instead, and finding the agency's interpretation of "shall" (as permissive) to be reasonable. Under this reading, Scalia is applying *Chevron* step one analysis (ambiguity assessment) to "judgment,"[305] but step two analysis (the reasonableness assessment) to "shall," "agent," and "air pollutant."[306] The majority seems to do the reverse, at least by implication.

D. Rulemaking vs. Enforcement

The Court moves on after its passing reference to *Chevron* and focuses instead on the inherent differences between agency "nonenforcement"[307] and refusals to regulate, and proceeds to analyze this distinction even beyond the *Chevron* two-step analysis. The majority offers four key differences, explaining that refusals to regulate are: 1) less frequent than refusals to enforce existing regulations;[308] 2) more "apt to involve legal as opposed to factual analysis;"[309] 3) "subject to special formalities;"[310] and 4) responses to petitions for

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305. *See Massachusetts v. EPA*, 127 S. Ct. at 1473: "EPA's interpretation of the discretion conferred by the statutory reference to 'its judgment' is not only reasonable, it is the most natural reading of the text. The Court nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under *Chevron*. . . ." (citation omitted).

306. *See id* at 1472-77. Justice Scalia also singles out the word "including" for *Chevron* ambiguity assessment (that is, *Chevron* step two), but only in passing: "Once again, in the face of textual ambiguity, the Court's application of *Chevron* deference to EPA's interpretation of the word 'including' is nowhere to be found. Evidently, the Court defers only to those reasonable interpretations that it favors." *Id.* at 1476. This is mostly a corollary of his treatment of "air pollutants;" as he explains in a footnote:

> Not only is EPA's interpretation reasonable, it is far more plausible than the Court's alternative. As the Court correctly points out, "all airborne compounds of whatever stripe," *ante,* at [1460], would qualify as "physical, chemical, . . . substances or matter which [are] emitted into or otherwise enter the ambient air." It follows that *everything* airborne, from Frisbees to flatulence, qualifies as an "air pollutant." This reading of the statute defies common sense.

Id. at 1476 n.2 (emphasis in original) (citation omitted).

307. *See id.* at 1459.

308. *See id.* Apparently, the significance of this fact is that the uncommonness of refusals to regulate make it more feasible for courts to scrutinize the agency's decision, whereas scrutiny of every instance of nonenforcement would require day-to-day oversight and meddling by the courts in the agency's internal affairs.

309. *Id.* Judicial review has its primary functionality in settling questions of law and is least useful (and least justifiable) for second-guessing determinations of fact by the agency or by lower courts—assuming one believes there is a real-world distinction between questions of law and fact.

310. *Id.* The Court cites 5 U.S.C. § 555(e) for this proposition. Here is the relevant provision:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in

rulemaking, which carry their own procedural right for the petitioner.[311] Instead of citing its own precedent, the Court cites[312] the D.C. Circuit's decision in *American Horse Protection Association. Inc. v. Lyng*,[313] which made the distinction to allow itself review of an agency refusal to regulate despite the Court's nearly absolute deference requirement (for nonenforcement decisions) in *Heckler v. Chaney*.[314] The Court officially adopts this position of the D.C. Circuit, finding a distinction between rulemaking and enforcement.[315] The Court previously noted in *Heckler* that it did not yet have an opportunity to consider whether an agency could refuse to regulate, but hinted that it would find that the agency lacked discretion for such abstention: "Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'"[316] *Massachusetts v. EPA* afforded the opportunity that was missing in *Heckler v. Chaney*.

The reasons quoted from the *American Horse Protection* case were directly related to the circuit court's need to work around *Heckler v. Chaney*. There are even stronger policy rationales that would support the distinction, but they were not readily available in a quotable form like the litany in *American Horse Protection*. For instance, it is easier to find a statutory mandate or duty for rulemaking.[317] Enforcement by necessity must be more a matter of discretion.[318] Rulemaking is much more

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connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

5 U.S.C. § 555(e) (2000). This seems to be a small error in the opinion, at least as it appears on Westlaw; the Court should have cited 5 U.S.C § 553(e), not § 555(e), because the former is the one that actually gives the right to petition for rulemaking: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e) (2000). § 555(e) merely requires agencies to offer "grounds" for denial in writing. In any case, the Court connects it with greater judicial review apparently because the "formalities" implies procedural due process considerations, etc.

311. *See* Massachusetts v. EPA, 127 S. Ct at 1459. The third and fourth reasons seem a bit redundant, or at least closely related.

312. *See id.*

313. Am. Horse Protection Assn. Inc. v. Lyng, 812 F.2d 1 (D.C. Cir. 1987).

314. Heckler v. Chaney 470 U.S. 821 (1985).

315. *See Massachusetts v. EPA*, 127 S. Ct at 1459.

316. *Heckler*, 470 U.S. at 833 n.4.

317. *See id.* (where the Court writes, "[n]or do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," indicating that abdication of statutory responsibilities was a genuine concern, even if the facts in *Heckler* did not rise to this level, as refusals to regulate might do).

318. Actually, the D.C. Circuit made this point at length in *American Horse*

lengthy, and costly for the agencies. The APA notice-and-comment requirements[319] and the "hard look" doctrine[320] have the combined effect of inducing agencies to beef up the "record" in a case with a dizzying array of internal memoranda, minutes of meetings, and detailed scientific studies.[321] Agencies are resistant to investing resources into new rulemaking, especially in controversial areas. The rulemaking process, being more tedious and less flexible than enforcement, is therefore less responsive to genuine crises or public outcry for government action.[322] It is foreseeable that agencies would need prodding from the courts for rulemaking more than they would for enforcement.

There is also a frequent phenomenon of path dependence[323] for agency rulemaking,[324] and this fact bolsters the idea for pushing agencies to regulate. Where no regulations exist, inertia weighs against change. It can seem overwhelming to the agency to strike out into a completely new area, so it may be much easier to tweak existing regulations, or to step up enforcement, than to promulgate new rules from scratch. Once a basic regulatory framework is in place, it tends to follow a trajectory whose next steps are predictable. It will be much easier for future Administrations to ratchet up the rules or to intensify the agency's enforcement efforts. There is significant value, therefore, in forcing an

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Protection, but in a less "quotable" way, discussing the analogy made in *Heckler v. Chaney* to prosecutorial discretion. *See Am. Horse Protection*, 812 F.2d at 4.

319. *See* Administrative Procedure Act, 5 U.S.C. § 553 (2000); AMAN & MAYTON, *supra* note 69, at 527.

320. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-53 (D.C. Cir. 1970).

321. For a discussion of the costs for agencies in promulgating rules subject to judicial scrutiny, *see* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and the Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006).

322. *See* AMAN & MAYTON, *supra* note 69, at 99-110.

323. *See* S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, And History*, 11 J. L. ECON. & ORG. 205 (1995) (for a general introduction to the concept of path dependence in law and economics).

324. *See* Luca Enriques & Matteo Gatti, *The Uneasy Case For Top-Down Corporate Law Harmonization In The European Union*, 27 U. PA. J. INT'L ECON. L. 939, 954 (2006); Paul Teske, *Wither the States? Comments on the Daca Federal-State Framework*, 4 J. TELECOMM. & HIGH TECH. L. 365, 369 (2006); A.C. Pritchard, *The SEC at 70: Time For Retirement?* 80 NOTRE DAME L. REV. 1073, 1087 (2005); Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 Duke L.J. 913, 928 (2005); Gail Charnley & E. Donald Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, 32 ENVTL. L. REP. 10, 363, 365 (2002) ("Environmental health regulation is path-dependent: actions taken now affect the nature of actions taken later."); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1334 n.458 (1995) ("One wonders in light of the history of securities regulation how much the heavily substantive approach of contemporary environmental law owes to path dependence concerning the choices of original legal strategies rather than to deliberative choice.").

agency to create rules where none exists.[325]

E. More Standing, More Litigation, More Regulation

Enabling statutes have historically been ambiguous and inconsistent about when agencies *can* regulate and when they *must* regulate. It is noteworthy that the Supreme Court was aware of the unresolved issue in 1985 when it decided *Heckler v. Chaney*, but had its first opportunity to settle the question in 2007. *Massachusetts v. EPA* tacitly invites states to push agencies to regulate in a variety of settings. Perhaps Congress previously intended to delegate discretion to the agencies about whether to regulate, but *Massachusetts v. EPA* instructs otherwise; the enabling statutes thus function as a mandate.[326] Even so, in practical terms an agency can still shirk its statutory duty, at its discretion, until a petition for rulemaking triggers judicial review of the agency's inaction. The Court has thus shifted some of the regulatory discretion to the states by providing an express route for them to trigger rulemaking by the federal agencies. The delegation comes in the form of an option that states can exercise: they can decide whether to sue, even if the agency cannot legally decide to refrain from regulating. This new "option-exercise delegation" may compel Congress to change the way it drafts enabling statutes.[327]

Giving fifty state AG's a say in whether new regulations are necessary would logically lead to more regulations overall. The option-delegation result of *Massachusetts v. EPA* pertains only to the commencement of rulemaking, not to force repeal. More regulation is not always a bad thing,[328] although each new regulation invariably presents some additional compliance costs for the regulated industry.

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325. *See* FRANK KNIGHT, RISK, UNCERTAINTY, AND PROFIT 361 (1921):

> The real problem with bureaucracies is not that they are rash, but the opposite. When not actually rotten with dishonesty and corruption they universally show a tendency to "play safe" and become hopelessly conservative. The great danger to be feared from a political control of economic life under ordinary conditions is not a reckless dissipation of the social resources as much as the arrest of progress and the vegetation of life.

326. *See* Matthew C. Stephenson, *Legislative Allocation Of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006), demonstrating that Congress delegates more discretion to the courts when they want more stability over time, and are less concerned about inter-issue consistency. Congress does this by providing statutorily for more occasions of judicial discretion and by its decisions about how much ambiguity to include in the statute.

327. *See generally id.* (suggesting that Congress' intent in delegating discretion varies depending on how much stability Congress thinks is desirable in a particular area).

328. *See* Tiersma, *supra* note 83, at 1262 ("A final manifestation of the increasingly textual nature of case law is a growing, almost insatiable, demand for more precedent."). The following subsections expound upon this notion in more detail.

1. Knightian Uncertainty and Beneficial Overregulation

The special solicitude rule, combined with the agencies' diminished discretion to refrain from rulemaking, introduce countervailing effects for uncertainty in the regulatory arena. If the decision about whether to regulate was previously the prerogative of one Administrator, now there are fifty individual AG's who share that prerogative. If the future decisions of one individual are relatively inscrutable, then that uncertainty has seemingly multiplied, as any one of them could bring an action to trigger rulemaking in a new area. On the other hand, once the initial rulemaking occurs, it usually follows a predictable trajectory. If the regulated industry perceives rulemaking to be inevitable at some point in the future, but subject to a wide range of possible tracks, then it reduces uncertainty significantly to get the initial regulatory phase out of the way. This was the thrust of Entergy Corporation's argument in its amicus brief.[329] Entergy argued that the lingering uncertainty about future regulations and liability, which could be sudden and drastic if the EPA does nothing until there is some climate-related catastrophe, seemed more burdensome to the business than complying with whatever regulations the EPA is likely to promulgate if it starts now.[330]

This point provides a nice illustration of a phenomenon that has mostly eluded academic attention[331] up to this point: the decreased uncertainty resulting from more regulation can provide a benefit that offsets—or even outweighs—the greater compliance costs that those regulations impose on the regulated industry. Increased compliance costs may lower net revenues (mistakenly called "profits" in common parlance), but greater uncertainty can lower investment or share prices, independent of the company's earnings statement.

Economist Frank Knight famously articulated the difference

329. Brief for Entergy Corporation As Amici Curiae in Support of Petitioners, at *3-4, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2540802.

330. *See id.* at *3:

> The energy needs of the United States are expected to double over the next 50 years, and Entergy and its fellow industry members need to plan—and act—now for the strategic capital investments—viewed on a 25-year horizon—that will be necessary to meet this increased demand. Entergy seeks certainty with respect to the regulatory regime it must operate under, and does not believe that EPA's current position on CO2 regulation will stand the test of time.

331. Professor Jonathan Masur has a forthcoming article in the *Vanderbilt Law Review* that discusses how excessive judicial deference to agencies can give the agency too much discretion and can trigger an overreaction by Congress, both of which have a chilling effect on the regulated industry because of the increased uncertainty about the regulatory regime. *See generally* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, ___ VAND. L. REV. ___ (forthcoming 2007), *available at* http://ssrn.com/abstract=940458.

between risk and uncertainty in his classic text *Risk, Uncertainty, and Profit.* Risk pertains to possibilities whose odds are knowable, at least from an actuarial standpoint, while uncertainty pertains to possibilities whose odds are unknown, or where the possible outcomes themselves are a matter of speculation.[332] Knight's primary interest was entrepreneurship and compensation for business leaders.[333] At the same time that he differentiated between risk and uncertainty, he distinguished true "profits" (windfall rewards resulting from luck or a rare stroke of genius[334]) from net revenues (what most people call "profit"), the latter being largely compensation for the entrepreneur's time, skills, assumed risks, and deferred interest.[335]

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332. *See* KNIGHT, *supra* note 325. To summarize, risk involves multiple possible outcomes of a scenario, where the odds of each outcome are fairly clear and quantified. An example would be a bet (or lottery or raffle) where the chances of winning are one in fifty; or, for that matter, the *Reader's Digest* Sweepstakes, which typically has odds on the order of one in two hundred million. Uncertainty, in contrast, involves either unknown or unknowable possible outcomes. Knightian uncertainty may involve a finite set of reasonable possibilities where it is impossible to ascertain beforehand which is more likely, or how much more likely. Of course, uncertainty could refer to an infinite range of outcomes or possibilities as well. *See also* Johan Deprez, Note, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings*, 34 LOY. L.A. L. REV. 1221, 1237-46 (2001); Claire A. Hill, *How Investors React to Political Risk*, 8 DUKE J. COMP. & INT'L L. 283, 297-309 (1998) (discussing investor skittishness in response to any signs of political turmoil); *see generally* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Sanctions*, 70 VA. L. REV. 965 (1984) (arguing generally that uncertainty over-deters and under-deters the wrong people, respectively); Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information About Whether Acts Are Subject to Sanctions*, 6 J. L. ECON. & ORG. 93 (1990).

333. *See* John McKinney, *Frank H. Knight on Uncertainty and Rational Action*, 43 S. ECON. J. 1438, 1443-44 (1977).

334. *See generally* KNIGHT, *supra* note 325 at 333. At the same time, he notes that the boundary between genius and luck is blurry.

> The receipt of profit in a particular case may be argued to be the result of superior judgment. But it is the judgment of judgment, especially one's own judgment, and in an individual case there is no way of telling good judgment from good luck, and a succession of cases sufficient to evaluate the judgment or determine its probable value transforms the profit into a wage.

Id. at 311, 337.

335. *See id.* at 310-11 (this is also a recurring theme throughout his book).

> If it is necessary to distinguish between profit and wages, it is just as vital to contrast profit with payment for risk-taking in any ordinary sense of the terms. An insurer, in so far as his business is reduced to a science, takes no risk; the risk in the individual case of the insured is obliterated on being thrown in with the multitude of cases of the insurer. And it is immaterial whether the cases are a homogenous group of similars or whether each is objectively in a class by itself, if the true probability can be ascertained. The "risk" which gives rise to profit is an uncertainty which cannot be evaluated, connected with a situation such that there is no possibility of grouping on any objective basis whatever. . . . The only "risk" which leads to a profit is a unique uncertainty

Former Federal Reserve Board Chairman Alan Greenspan says that reducing Knightian uncertainty in the overall marketplace was one of his primary objectives as manager of the American economy, as such uncertainty causes both high inflation rates and stock market crashes.[336] The presence of too much Knightian uncertainty can have profound effects on economic development, as it stifles investment[337] and generates unnecessary losses.[338] People are intuitively averse to uncertainty, even more than they are averse to risk.[339] They will steer their resources away from it when possible. The possibility of sudden, radical moves by any governmental branch introduces genuine uncertainty into many facets of society.[340] Frank Knight called uncertainty the "essential evil" of modern progressive states.[341] This creates a paradox where the sole causative agent of true profits, uncertainty, also causes overall losses taken together, and entrepreneurs, as a group, lose far more often, and to a far greater degree, than they win.[342]

Knight made a few other observations that are particularly relevant to *Massachusetts v. EPA* and the discussion here. First, he explains that a modern society can manage uncertainty in two basic ways. One approach is to distribute the risk as widely as possible, so that everyone

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> resulting from an exercise of ultimate responsibility which in its very nature cannot be insured nor capitalized nor salaried. Profit arises out of the inherent, absolute unpredictability of things, out of the sheer brute fact that the results of human activity cannot be anticipated and then only insofar as even a probability calculation in regard to them is impossible and meaningless.

Id.

336. *See* Alan Greenspan, *Innovation and Issues in Monetary Policy: the Last Fifteen Years,* 94 AM. ECON. REV. 33, 37-40 (2004).

337. *See generally* Takao Asano, *Portfolio Inertia Under Ambiguity,* 52 MATHEMATICAL SOC. SCI. 223-225 (2006); Joshua Aizenman and Namcy Marion, *Volatility and Investment: Interprting Evidence from Developing Countries,* 66 ECONOMICA 157 (1999) (showing that in developing countries, private investment decreases when there is more uncertainty, at the same time that public spending tends to increase); Ricardo J. Caballero & Arvind Krishnamurthy, *Flight to Quality and Collective Risk,* MIT DEPARTMENT OF ECONOMICS WORKING PAPER NO. 06-07 (Mar. 15, 2006), *available at* http://ssrn.com/abstract=891856.

338. *See, e.g.,* Jürgen Eichberger, David Kelsey, and Burkhard Schipper, *Ambiguity and Social Interaction,* (Mar. 30, 2007), *available at* http://ssrn.com/abstract=464242.

339. *See, e.g.,* Daniel Ellsberg, *Risk, Ambiguity, and the Savage Axioms,* 75 Q. J. ECON. 643 (1961) (the article whose conclusions came to be known as Ellsberg's Paradox); Paolo Ghirardato & Massimo Marinacci, *Risk, Ambiguity, and the Separation of Utility and Beliefs,* CALTECH SOC. SCI., WORKING PAPER NO. 1085 (Feb. 2001), *available at* http://ssrn.com/abstract=260578; Asano, *supra* note 337 (for an example of the distinction between Ellsberg's subjective ambiguity and true Knightian uncertainty).

340. *See generally* Paul Slovic, *Perceived Risk, Trust, and Democracy, reprinted in* THE PERCEPTION OF RISK 316-326 (Paul Slovic, ed. 2000).

341. KNIGHT, *supra* note 325, at 347.

342. *See id.* at 364-65.

bears a share of the net losses. The other is the American free-enterprise approach of concentrating all of it on certain individuals (entrepreneurial executives), who volunteer to bear the brunt of the uncertainty in exchange for the small chance of windfall profits.[343] The latter approach, whereby the entrepreneur internalizes all the uncertainty costs (costs of mistakes), seems to increase social welfare for everyone else, as the rest of society obtains the benefit of resources being allocated for efficient production, without the costs of uncertainty, which the businessman bears alone.[344]

The reverse effect occurs when we vest too much discretion or responsibility in individual government agents, because the costs of mistakes fall upon everyone. Higher discretion for a state actor, then, is the distributive approach to uncertainty, because the individual official will not bear the costs personally, but rather they fall on everyone in the purview of the official's decision. Frank Knight's insight implies that vesting full discretion in individual state actors is inherently anti-free-market because for him, the essence of free-market capitalism is the concentration of mistake costs on individual entrepreneurs, simultaneous with the redistribution of the benefits of their productivity. In the Preface to the 1948 edition of his book, Knight states: "In political terms, the problem of stabilization is to accomplish the result of a government of law, for, apart from political objections, too much discretion in the hands of administrators will defeat the end of [consumer] confidence."[345] In other words, he explicitly links the collapse of markets to excessive rulemaking discretion in the hands of an individual agency director.[346] Once rules are in place, however, agency personnel become extremely predictable, greatly reducing the systemic uncertainty.[347]

As Entergy Corporation anticipated in its rather maverick brief,[348] the Supreme Court's decision in *Massachusetts v. EPA* reduces uncertainty by forcing the promulgation of rules that will set the trajectory for regulations in the decades to come. The regulated industry will face some new burdens in the form of compliance costs, but the

343. *See id.* at 347-49, 370.

344. *See id.* at 278 ("It is unquestionable that the entrepreneur's activities effect an enormous saving to society, vastly increasing the efficiency of economic production.").

345. *Id.* at xlv.

346. Knight also sees the election of officials, whose abilities and judgment are somewhat unknown, as another source of uncertainty. *See id.* at 288.

347. *See id.* at 361.

348. Brief for Entergy Corporation As Amici Curiae in Support of Petitioners, at *1-4, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2540802. Entergy opens its memorandum admitting: "This case makes for strange bedfellows." *Id.* at *1.

same businesses are more likely to attract passive investors now that regulatory uncertainty is lower.[349] As stated above,[350] reduced uncertainty encourages investment and therefore increases the companies' share prices, even if the company must cope with some new compliance costs. Arguably, share price is more important to the regulated industry in the long term than present net revenues.[351] Any executive whose compensation includes a hefty bounty of stock options has a personal incentive to focus more on share value than on current earnings minus operating costs. Our legal system imposes a fiduciary duty on managers to put the interests of passive investors ahead of their own,[352] so the managers of the regulated industry seem to have a legal obligation to consider the uncertainty-reducing benefits of regulations. This, however, would require looking at the long term as opposed to immediate earnings, which is relatively rare.[353] In any case, the Court's distinction between agency discretion in rulemaking and discretion in enforcement makes sense from an economic standpoint, because the former plays havoc with system-wide uncertainty while the latter does not. The Court's holding in *Massachusetts v. EPA* on agency refusals to regulate thus reduces uncertainty and can boost share values of the regulated industry. In addition, the special solicitude rule spreads the discretion about rulemaking from one Administrator across fifty AG's, as discussed above.

2. To Whom Is the Law Addressed?

Commentators usually focus on how new regulations will constrain the regulated industry, as if legal rules control only the citizenry and not the government itself. Nevertheless, regulations also act as a restraint on an enforcement agency, in part by setting predictable limits within which the agency must conduct its enforcement.[354]

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349. Knight's discussion focused almost entirely on the motivations of entrepreneurs, i.e., what would possess businessmen to take the gambles that they do in the face of so much evidence that they are likely to fail. He does not really address the issue of share prices or passive investors at all, or the investors' clear aversion to uncertainty.

350. *See supra* notes 329-47.

351. This is not to say that net earnings are not a significant component of current share value, but rather that they are not the sole component; market uncertainty is also a vital ingredient in trading prices for stocks, as discussed above.

352. *See* Meinhard v. Salmon, 164 N.E. 545 (1928).

353. Some recent economic literature has called for agencies to do the same. *See, e.g.*, John Stranlund & Yakov Ben-Haim, *Price-Based vs. Quantity-Based Environmental Regulation Under Knightian Uncertainty: An Info-Gap Robust Satisficing Perspective*, UNIV. OF MASS. AMHERST RES. ECON. WORKING PAPER NO. 2006-1 (July 2006), *available at* http://ssrn.com/abstract=920463.

354. Frank Knight observed alternatively that discretion in the hands of a sole administrator generated excessive uncertainty, *see* KNIGHT, *supra* note 325, at xlv, but

In addition, rulemaking activity diverts agency resources away from enforcement, to the process of proposing and implementing the rules.[355] Those concerned about the cost-benefit analysis of regulations should offset the compliance costs not only by the enhanced share values, but also by the fact that other costs related to agency enforcement actions must necessarily decrease at the same time.

3. Does Regulatory Overlap Dilute the Regulatory Burden?

The Court in the *Massachusetts v. EPA* case mentioned the overlap with the Department of Transportation's (DOT) rules about automobile efficiency.[356] The EPA contended that this overlap would make its prospective regulations redundant and could yield contradictory results.[357] These are two separate problems, of course. The point about regulatory redundancy is a concern that the EPA will waste valuable time and resources promulgating emissions rules and bringing enforcement actions, only to find that the DOT is already doing the same thing. The second point is the concern that the EPA and the DOT could, in theory, promulgate contradictory rules or adopt contradictory strategies for enforcement. The Court viewed the overlap as harmless because the

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also that bureaucrats are excessively cautious and tend to follow established rules and protocol slavishly, *see id.* at 361. Entergy Corp. expressed grave concern about the prospect of being subject to some type of post-Kyoto international regime that would provide few procedural safeguards and protections for individual parties. It is unusual for a member of the regulated industry to look past immediate compliance costs and see that things could be worse in the absence of American legal restraints and safeguards. *See* Brief for Entergy Corporation As Amici Curiae in Support of Petitioners, at *4, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2540802.:

> Finally, Entergy is far less sanguine than EPA about the prospect of this nation's air-quality decisions being decided by the international community. Entergy prefers the considerable safeguards of the CAA rulemaking process, which provides for participation by interested parties sensitive to this nation's needs and fosters (through judicial review under the Administrative Procedures Act) decisions grounded in sound scientific debate. The international debate offers no comparable guarantees, and therefore none of the security of the American rulemaking process.

I have argued elsewhere that legal rules bind state actors directly and the public by implication only, following in the tradition of writers like Hans Kelsen and other positivists. *See generally* Dru Stevenson, *To Whom Is The Law Addressed?, supra* note 268.

355. The Entergy Brief hints at this as well; it hopes the EPA will produce something that will bind the agency in the future and give the regulated industry the opportunity to plan around it.

356. *See Massachusetts v. EPA*, 127 S. Ct. at 1451, 1462.

357. *See id.* at 1451 ("But because Congress has already created detailed mandatory fuel economy standards subject to Department of Transportation (DOT) administration, the agency concluded that EPA regulation would either conflict with those standards or be superfluous.").

agencies can easily collaborate and avoid cancelling each other out.[358]

Jacob Gersen has argued that overlapping jurisdiction can create a healthy competition between agencies that provides Congress with useful information about which agency merits more delegated authority in the future.[359] This is similar to a point made long ago by Herbert Simon, that jurisdictional conflicts can bring to light the most significant unsettled policy issues for the highest authority (in regulatory cases, either Congress or the courts) to examine and resolve.[360] Gersen's view lends support to the Court's decision in *Massachusetts v. EPA*, which left the possibility of overlapping jurisdiction open, although the Court seemed to assume the agencies would collaborate rather than compete.

While the EPA was concerned about redundancy and contradictory results in the *Massachusetts v. EPA* case, regulated industries probably worry instead that overlapping jurisdiction between agencies would simply increase or compound the regulatory burdens (compliance costs). The logic would run along the lines that two regulatory regimes must be twice as bad (burdensome) as one. Each could impose its own rules, and each presents its own probability of bringing enforcement actions.

It is rational for the regulated industry to prefer less regulation instead of more, but there may be some hidden advantages for the regulated industry that flow from overlapping jurisdiction. First, the potential for overlapping jurisdiction and regulations can dilute the impact of each agency's actions. For example, instead of competing and encroaching on each other's territory, each agency may steer clear of the other agency's regulatory sphere in order to avoid unpleasant conflicts between directors, or the contradictory actions that the EPA feared with greenhouse gas regulations. This leaves a regulatory gap somewhere in the middle between the two agencies, areas left unregulated or unenforced by both agencies involved. The EPA's refusal to regulate greenhouse gases, which led to the *Massachusetts v. EPA* litigation in the first place, is a clear example of this phenomenon,[361] where one agency refuses to act because it fears encroaching on another agency's "turf," leaving a huge regulatory gap (no regulation of greenhouse gas emissions

358. *See id.* at 1462 ("The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.").

359. *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law,* 2006 SUP. CT. REV. 201 (2007), *available at* http://ssrn.com/abstract_id=981765. Gersen's main thesis is that courts should defer to agency interpretations about the extent of overlap in their jurisdiction with other agencies, because overlap eventually brings agencies more in line with Congress' intent. *See id.*

360. *See* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 195 (4th ed. 1997).

361. *See* Massachusetts v. EPA, 127 S. Ct at 1462 ("But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities.").

at all).[362] The same phenomenon can occur in more subtle forms, however, leaving discreet regulatory gaps that the regulated industry can exploit to its advantage. Even after the EPA and the DOT promulgate their regulations, the same collision-avoidance principle can create gaps in their enforcement activities.[363]

Similarly, agencies may approach jurisdictional overlap as an opportunity for shirking and conserving resources. If an agency feels that its resources are limited (as most do), it would be tempting to leave certain areas of time-consuming rulemaking and costly enforcement activities to the "other" agency that shares jurisdiction over the area. When both agencies do this (avoid an area in hopes that the other will tackle it), more regulatory gaps appear, which again benefit the regulated industry by alleviating compliance costs (where neither agency promulgates rules) or limiting their probability of sanctions for noncompliance (where neither agency brings enforcement actions).

In addition, even where both agencies do regulate simultaneously, there should be a diminishing marginal value for the additional regulations and enforcement actions. This is similar to the EPA's concern about wasting its time on duplicative work. Suppose, for example, that the DOT issues stricter mileage regulations for the automobile industry (which would reduce overall carbon dioxide gas emissions) before the EPA can issue its rules for greenhouse gas emissions. From the industry's standpoint, it may already be in compliance—or at least partially compliant—with the EPA's rules, due to the previous DOT requirements.[364] The marginal cost of the EPA's

362. Professor Gersen mentions the possibility of agency shirking when there is overlapping jurisdiction, and seems to blame this on Congress rewarding the competing agencies based on results instead of effort. *See* Gersen, *supra* note 359, at 207-16.

363. While Gersen seems to assume that agencies aggressively seek to expand their own jurisdiction (an assumption that underlies his argument that agencies engage in healthy competition when assigned overlapping jurisdiction by Congress), Frank Knight asserted that bureaucracies are cautious and overly conservative, not aggressive, rash, or competitive. Knight explains:

> Another interesting misconception in regard to the public official should be pointed out before we leave this topic. It is common and natural to assume that a hired manager, dealing with resources which belong to others, will be less careful in their use than the owner. The view shows little insight into human nature and does not square with observed facts. The real trouble with bureaucracies is not that they are rash, but the opposite. When not actually rotten with dishonesty and corruption they universally show a tendency to "play safe" and become hopelessly conservative. The great danger to be feared from a political control of economic life under ordinary conditions is not a reckless dissipation of the social resources so much as the arrest of progress and the vegetation of life.

KNIGHT, *supra* note 325, at 361.

364. In *Massachusetts v. EPA*, the EPA contended that their regulatory activities of carbon dioxide emissions could be entirely redundant if the DOT also regulated car

additional regulations, therefore, is substantially lower than if the EPA had issued its regulations in isolation.[365]

As another example of the diminishing marginal cost of additional regulations, suppose that a previously unregulated firm (perhaps in an area of new technology) suddenly becomes the object of new DOT regulations. Besides the explicit changes in manufacturing processes required by the regulations, the firm will face new internal overhead costs, such as the creation of a "compliance office" with staff to collect the necessary data for reporting to the agency, *ex ante* legal counsel about the regulatory parameters and potential sanctions, etc. Once this overhead is in place, the addition of more regulations from a parallel agency would impose far fewer costs because there is already a compliance unit for handling reporting, monitoring, and so on.

Even where the overlapping agencies collaborate and coordinate their efforts, which the Court in *Massachusetts v. EPA* assumes they will do,[366] the resulting regulatory burden is likely to be no greater than it would be if a single agency took responsibility. If the agencies do coordinate their activities, we can assume they would divide the tasks between them, assigning specific parts of the rulemaking and enforcement regime to one side or the other. Rather than having both promulgate overlapping rules or both bring enforcement actions, coordination is most likely to ensure that only one of the agencies does each task. This is not to say that collaboration will actually occur, as the Court hopes; agencies often avoid interacting with each other.[367] To the extent that they do collaborate, however, due to division of labor the regulatory burden is likely to be the equivalent of a single-agency regime rather than doubled.

From the standpoint of Knightian uncertainty described in Section IV.E.1.,[368] regulatory overlap can also dilute the potential costs for the

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emissions via mileage requirements. This is an argument at the extreme, however, because there is a continuum of possible overlap between the two sets of regulations. It seems just as likely that they would be only partially redundant. If so, this would mean that the EPA's regulations have some value (perhaps a necessary tweaking of the pre-existing DOT regulations), but for the regulated industry, the additional cost is incremental as well.

365. An important caveat to this idea is the "knee of the curve" problem as described in Chemical Manufacturers Ass'n v. EPA, 870 F.2d 177, 204-05 (1989), where the costs of reducing pollution decreased with each incremental step, until a certain threshold where the costs skyrocketed (the knee of the curve). This can happen because the technology is largely unavailable for guaranteeing complete elimination of certain pollutants.

366. *See* Massachusetts v. EPA, 127 S. Ct at 1462.

367. Mutual avoidance, of course, creates the types of regulatory gaps (either in enforcement or rulemaking) that I have already discussed.

368. *See generally* KNIGHT, *supra* note 325.

regulated industry by making discretion less concentrated in a single Administrator.[369] A single agency possessing full authority can make more drastic mistakes than an agency working in tandem—or in competition—with other agencies. Concentration of power increases uncertainty about future rulemaking and enforcement activities. Where agencies share jurisdiction, change is likely to occur more slowly, providing more predictability for the regulated industry.

Herbert Simon suggests that jurisdictional ambiguity encourages adjudicators to focus on expediency or results in that case rather than the proper allocation of authority.[370] The *Massachusetts v. EPA* case seems to illustrate this principle, in a sense: the majority expressed more concern about the global issue than about leaving the decision to the designated authority on air regulation. Overall, this jurisprudential phenomenon would seem to benefit regulated industries, because it implies that courts are more likely to take note of cost-benefit analysis of regulatory actions in cases where agency jurisdiction overlaps. Cost-benefit analysis usually works to the industry's advantage in litigation, because it allows their compliance costs to be a factor in the court's decision where otherwise the court might have ignored them. To the extent that Simon's principle works and courts respond to overlapping jurisdiction by focusing more on the results or costs involved, the industry receives an advantage in litigation.

A completely separate issue concerning the prospect of more regulations is that they are likely to preempt state laws, as many federal regulations do. Preemption may deter some state AG's from using their new privileges under the special solicitude rule if the state would prefer to have its own regulations instead of federal rules that do not take account of local needs. On the other hand, there are many instances where state laws encounter preemption problems even where the agency is silent, because the area is clearly within the agency's domain (this was the crux of the problem in *Massachusetts v. EPA*). In addition, depending on the individual AG's political affiliation and position toward controversial state laws, triggering federal rulemaking may be a tool for the state AG to eliminate state laws that are out of favor with the AG's party or constituents.

V. Conclusion

The Supreme Court created a new standing rule in *Massachusetts v. EPA*. This "special solicitude" rule gives states a favored status when

369. *See id.* at xlv (Preface to Fourth Edition); *see also supra* note 354 and comments therein.

370. *See* SIMON, *supra* note 360 at 194-95.

bringing suits against federal administrative agencies. The most direct and immediate beneficiaries of the special solicitude rule are the state Attorneys General, through whom the states litigate. Given the unfettered discretion and independence that AG's have in deciding when to litigate and which position to adopt, the special solicitude rule transforms their offices into positions of national importance. The altered status of the state AG also changes the stakes in their local elections, the type of candidates who are likely to run and win, and the degree of cooperation and competition with their counterparts elsewhere.[371]

In the landscape of public-interest litigation, the special solicitude rule creates a type of zero sum game for the public's choice of legal representatives. By conferring special litigation status on the state AG's, the Court diminished the litigation role of private activist groups by comparison. While activist groups may still participate in the cases along with the states, the lead party in a case would preferably be a state (via its AG), because the state is better able to cross the hurdles of the standing requirements.

Massachusetts v. EPA augments the special solicitude rule by redrawing the boundaries of judicial deference and agency discretion. In seeming contrast to earlier precedents, the Court held that agencies have substantially less discretion regarding their refusal to regulate than they do about when and how to enforce regulations. This distinction further tips the scales toward the states, who not only have assurances of standing, but also have an invitation to compel federal agencies to regulate new areas where they have been previously silent.[372] This new

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371. After the *Massachusetts* case, another court took a step further augmenting the role of a state Attorney General as part of the post-Katrina litigation against federal agencies (primarily the Army Corps of Engineers). On August 24, 2007, New Orleans-based U.S. District Judge Stanwood Duval appointed state Attorney General Charles Foti Jr. to bring suit on behalf of thousands of still-unrepresented flood victims who were at risk of missing their deadline to file claims. *See, e.g.,* Susan Finch, *Judge Appoints Foti to File Suit: Case to Cover Litigants without Attorneys,* The Times-Picayune (Aug. 25, 2007), available at the following: http://www.nola.com/news/t-p/metro/index.ssf?/base/news-23/1188024886183440.xml&coll=1. Subsequently, the Fifth Circuit voided the decision of the district judge in a succinct unpublished opinion: http://www.ca5.uscourts.gov/opinions/unpub/07/07-30762%200.wpd.pdf. The court gave no explanation except that the district court lacked authority to assign claimants to the AG as their designated counsel; no mention was made of the authority of the AG himself.

372. As this article was going to print, the Fifth Circuit issued its opinion in *Texas v. United States*, __ F.3d __, 2007 WL 2340781 (5th Cir. 2007), granting

superior position for compelling rulemaking should lead to an increase in the quantity or number of federal regulations. Increased regulation raises compliance costs for the regulated industry, but can also benefit the affected parties by increasing their share values, as there is less regulatory uncertainty. In addition, regulations impose some constraints on the agencies themselves, by setting boundaries for enforcement and by diverting agency resources away from enforcement to promulgate more regulations. Further, the inevitable administrative overlap that results from more rulemaking can dilute the burdens of the new rules on the regulated industry. These factors—enhanced share values and diluted enforcement effects—should be considerations in the cost-benefit analysis of the EPA's forthcoming regulations on greenhouse gas emissions.

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the state of Texas (via the office of its Attorney General, of course) standing to sue the Secretary of the Interior to stop an administrative proceeding regarding an Indian casino application before the Secretary had issued a final decision. Although the decision nowhere cites *Massachusetts v. EPA,* it seems to follow that case's approach of special solicitude for states, at least regarding standing to sue the federal government. The majority opinion in *Texas v. U.S.* seems to rely heavily on Eleventh Amendment arguments that state sovereignty creates unique circumstances where courts could find an injury-in-fact that would not apply to private parties (or tribes, for that matter). The "injury in fact" that the state alleged was more intangible and speculative than the harm alleged in *Massachusetts*: Texas contended that the Secretary of Interior's haven-of-last-resort approach for the tribes weakened the state's bargaining position with Indian tribes and subjected the state to an unnecessary, protracted administrative proceeding. Unlike *Massachusetts,* this case did not involve an agency refusal to promulgate rules, but rather a state trying to *prevent* an agency from promulgating rules.

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