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### *ESSAY*

#### WARMING UP TO CLIMATE CHANGE LITIGATION

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THERE was never any doubt that *Massachusetts v. Environmental Protection Agency*<sup>1</sup> (“*Mass. v. EPA*”) would be a closely watched and hotly contested case. Nor was there much question that Justice Anthony Kennedy would provide the pivotal swing vote. On many of the issues before the Court, the remaining justices were sure to be evenly divided. Justice Kennedy has shown an uncanny ability to find himself in the majority in close cases—environmental cases in particular<sup>2</sup>—and this would be no exception.

The surprise in *Mass. v. EPA* is the facility and ease with which the Court dispatched opposing arguments and redefined prior precedents. Not content to widen doctrines on the margins, Justice Stevens’s majority opinion blazed a new path through the law of standing and unearthed newfound regulatory authority for the EPA. Under the Court’s new interpretation, the Clean Air Act (“CAA” or “the Act”) provides EPA with roving authority, if not

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

<sup>2</sup> See Richard J. Lazarus, Restoring What’s Environmental About Environmental Law in the Supreme Court, 47 UCLA L. Rev. 703, 712–15 (2000) (noting that Justice Kennedy was in the majority in environmental cases more than any other justice).

responsibility, to regulate any substance capable of causing or contributing to environmental harm in the atmosphere.

The federal government did much to facilitate this course. At least since Clinton EPA General Counsel Jonathan Cannon first suggested EPA's preexisting regulatory authority could reach greenhouse gases,<sup>3</sup> various agencies laid the groundwork for the eventual regulation of greenhouse gases. Even during the second Bush Administration, EPA has been anything but a reluctant regulator, and as such the present administration was not the most compelling advocate for its own cause.

Now that EPA has authority to regulate greenhouse gases, regulatory controls on motor vehicles (as well as on other sources of greenhouse gases, including utilities and industrial facilities) are sure to follow. In time, however, *Mass. v. EPA* may come to stand for more than the simple proposition that Congress delegated authority to regulate greenhouse gases under the CAA. It may herald in a new era of state-sponsored litigation, environmental standing, and statutory interpretation—and yet still do little to cool down a warming planet.

#### GEORGIA ON MY MIND

Whether the Commonwealth of Massachusetts, or any other petitioner, had standing to challenge EPA's failure to regulate greenhouse gases was a threshold issue for the Court. The question of standing had divided three ways a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit,<sup>4</sup> and was heavily briefed by the parties and amici. Although many assumed the Court would focus on the specific claims of standing put forward by Massachusetts, few expected the Court to announce a new rule for state standing in lawsuits brought against the federal government.

Justice Stevens's majority opinion announced that “[s]tates are not normal litigants for the purposes of invoking federal

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<sup>3</sup> Memorandum from Jonathan Z. Cannon, General Counsel, EPA, to Carol M. Browner, Administrator, EPA (April 10, 1998), available at <http://www.virginialawreview.org/inbrief/2007/05/21/cannon-memorandum.pdf>.

<sup>4</sup> *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

jurisdiction.”<sup>5</sup> Where private litigants would continue to face the demanding standing inquiry outlined in *Lujan v. Defenders of Wildlife*,<sup>6</sup> states would receive “special solicitude” and have less difficulty invoking the jurisdiction of federal courts.<sup>7</sup> Such a special standard had not been identified before, so the majority had to reach back—way back—for authority to support its position, ultimately seizing upon *Georgia v. Tennessee Copper Company*, a century-old case in which the state of Georgia brought suit against a polluting factory across the border in Tennessee in federal court under the federal common law of nuisance.<sup>8</sup>

Although the Commonwealth of Massachusetts argued that it had “special standing” as a state, *Georgia v. Tennessee Copper* was nowhere to be found in Massachusetts’ briefs. Neither, for that matter, was it cited by any of the parties or amici in their briefs, nor was it considered by any of the opinions below. State amici Arizona, et al., argued that states had unique interests worthy of consideration in the standing inquiry, but still did not mention *Georgia*. The simplest explanation for *Georgia*’s conspicuous absence from the briefing is that the decision does not support the proposition for which it was cited.

Justice Kennedy referenced the *Georgia* opinion as Massachusetts’ “best case” supporting standing during oral argument,<sup>9</sup> but his reasons for doing so are not entirely clear. *Georgia v. Tennessee Copper* involved Georgia’s effort to obtain an injunction against upwind polluters across the Tennessee state border. Justice Holmes held for the Court that Georgia could obtain equitable relief—unavailable to private parties—because of the state’s “quasi-sovereign” interest in its territory. Yet it is one thing to hold that one state cannot foul the air of its neighbor. It is quite another to maintain that a state’s ability to vindicate such a claim on behalf of its citizens gives rise to a “special solicitude” when a state sues in federal court to invoke the regulatory apparatus of administrative agencies. As Chief Justice Roberts

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<sup>5</sup> *Massachusetts*, 127 S. Ct. at 1454.

<sup>6</sup> 504 U.S. 555 (1992).

<sup>7</sup> *Massachusetts*, 127 S. Ct. at 1455.

<sup>8</sup> 206 U.S. 230 (1907).

<sup>9</sup> Transcript of Oral Argument at 15, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120).

noted in dissent, Congress knew how to show a “special solicitude” for state interests under the CAA, as it did in Section 126<sup>10</sup> when it explicitly authorized state petitions seeking greater protection from upwind pollution sources.<sup>11</sup> Yet nothing in the Act, or administrative practice, suggests the sort of “special solicitude” the Court found here.

Somewhat ironically, the underlying claim in *Georgia v. Tennessee Copper*, a claim of interstate nuisance under federal common law, is almost certainly preempted by the statute under which Massachusetts sought relief. The Supreme Court has long held that comprehensive environmental regulatory schemes preempt claims that interstate pollution constitutes a nuisance under federal common law.<sup>12</sup> Were the facts of *Georgia v. Tennessee Copper* to arise today, the state of Georgia would be unable to pursue its specific claim in federal court. Moreover, with the *Mass. v. EPA* Court holding that the Clean Air Act applies to greenhouse gases, nuisance claims relating to global warming are most likely preempted as well.

#### WHAT’S LEFT STANDING OF STANDING?

The *Mass. v. EPA* court was not simply “solicitous” of states. It weakened the traditional requirements for Article III standing as well. Under *Lujan v. Defenders of Wildlife*, standing requires that the plaintiff have suffered an “injury in fact” that is “actual or imminent” and “concrete and particularized.” The injury must be “fairly traceable” to the conduct complained of, and it must be likely that “the injury will be redressed by a favorable decision.”<sup>13</sup>

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<sup>10</sup> See 42 U.S.C. § 7426 (2000).

<sup>11</sup> *Massachusetts*, 127 S. Ct. at 1465 (Roberts, C.J., dissenting) (citing 42 U.S.C. § 7426(b) (2000)).

<sup>12</sup> See *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding that the Clean Water Act preempts interstate nuisance claims for water pollution under federal common law); see also Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 *Ala. L. Rev.* 717, 768–69 n.476 (2004) (“Although the Supreme Court has not directly addressed the question of whether the federal Clean Air Act preempts federal common law in disputes over transboundary air pollution, it is widely assumed to do so, particularly in light of the Clean Air Act Amendments of 1990, which created a comprehensive federal permit scheme similar to that established by the Clean Water Act.”)

<sup>13</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

The Court purported to adhere to this “most demanding” standard in evaluating Massachusetts’ claims, while actually interpreting *Lujan*’s requirements in a most forgiving way, particularly with regard to causation and redressability.

An initial difficulty for petitioners’ standing claim is the undifferentiated nature of climate change. Global climate change, by definition, affects the global climate. As such, injuries predicated on global warming would seem to constitute the archetypal “generalized grievance” common to all members of the public; and as such, it is unfit for judicial resolution. The question is not whether climate change is real, or whether human activities have contributed and will contribute to a warming of the atmosphere, but rather whether global changes that affect all citizens of the United States—indeed all citizens of the world—are sufficiently concrete and particularized to satisfy Article III’s requirements. That climate change is an urgent concern matters not at all in the standing analysis, for the question is one of whether *federal courts* should intervene, not whether a given question is worthy of federal action. As traditionally understood, Article III standing required (in Justice Kennedy’s words) that petitioners demonstrate “that the action injures [them] in a concrete and personal way.”<sup>14</sup>

Massachusetts’ injury—or at least the only injury considered by the majority—is its claim of present and future sea level rise exacerbated by human contributions to the greenhouse effect.<sup>15</sup> While some portion of sea level rise is due to natural phenomena, the petitioners submitted affidavits detailing estimates and projections of future increases in sea level over the next several decades that would be due, in part, to human emissions of greenhouse gases. Yet insofar as petitioners’ standing claim was

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<sup>14</sup> Id. at 581 (Kennedy, J., concurring).

<sup>15</sup> Here it is worth noting that the majority opinion misquotes the relevant affidavits so as to overstate the contribution of global warming to sea level rise. The majority asserts that “global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming.” Yet the affidavit cited for this proposition is more circumspect, merely stating that warming-induced melting of glaciers and thermal expansion of the oceans “were the major contributions” to the estimated sea level rise of ten to twenty centimeters over the past century. See MacCracken Decl. ¶5(c), Jt. App. at 225, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120).

dependent at all on such future projections, such as potential losses of coast “by 2100,”<sup>16</sup> the injuries alleged are too remote and distant in time to satisfy the traditional requirement that an alleged injury be “actual or imminent.” Under the law before this case, a *future* injury would not do.

Although there is no question that (again, in Justice Kennedy’s words repeated in *Mass. v. EPA*), “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,”<sup>17</sup> Congress did no such thing here. Section 307(b) of the CAA is a jurisdictional provision; it does not create a new cause of action.<sup>18</sup> Nor did it meet the requirement, restated by the majority, that “Congress . . . at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”<sup>19</sup>

To cover this analytical hole, the majority relies upon language from *Lujan* noting the “normal standards for redressability and immediacy” are relaxed when a statute vests a litigant with a “procedural right.”<sup>20</sup> This is the rationale for recognizing environmental litigants’ standing to enforce other laws that impose only procedural obligations on regulatory agencies, such as the National Environmental Policy Act. But the CAA provision has nothing to do with Massachusetts’ claims in this case, as it does not establish equivalent procedural rights, at least not as such terms have been defined to date. Rather, Massachusetts claimed substantive injury, for which it sought substantive relief.

If the majority stretched the standing inquiry at the margins to accommodate the petitioners’ claim of injury, it rent *Lujan*’s fabric in considering causation and redressability. Under *Mass. v. EPA*, *any* contribution of *any* size to a cognizable injury is sufficient for causation, and *any* step, no matter how small, is sufficient to provide the necessary redress. While citing the requirement that a

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<sup>16</sup> *Massachusetts*, 127 S. Ct. at 1456 n.20 (discussing “possible” effects of sea level rise over the next century).

<sup>17</sup> *Id.* at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

<sup>18</sup> See 42 U.S.C. § 7607(b)(1) (2000).

<sup>19</sup> *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

<sup>20</sup> *Lujan*, 504 U.S. at 560–61.

favorable decision must “relieve a *discrete injury*” to the plaintiff,<sup>21</sup> the majority holds that any government action that, all else equal, reduces (or at least retards the growth of) global emissions of greenhouse gases by any amount will suffice. After all, Justice Stevens explained, “a reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”<sup>22</sup> Yet given the rate of growth in greenhouse gas emissions worldwide, irrespective of what happens in the United States, this is anything but a self-evident proposition.

#### I DO NOT THINK IT MEANS WHAT YOU THINK IT MEANS

The *Mass. v. EPA* majority determined that the CAA provides “unambiguous” authority for EPA to regulate the most ubiquitous byproduct of modern industrial civilization, even though Congress never once recognized or ratified such an intent in explicit terms.<sup>23</sup> No matter. The majority held that such ratification is unnecessary, even were it to produce potentially incongruous results (a consequence the majority denies), because the Act’s “broad language” was designed to ensure sufficient “flexibility” so as to ensure the CAA would not become obsolete.<sup>24</sup> Congressional revision of the Act is unnecessary so long as the language can be read so as to ensure federal authority to act, even if in unforeseen (and perhaps even undesirable) ways.

The claim that the CAA confers regulatory authority upon EPA to regulate greenhouse gases has a superficial plausibility. After all, the majority notes, “air pollution” is defined in capacious terms by the Act.<sup>25</sup> Yet individual provisions of complex statutory provisions should not be read in isolation, certainly not when the potential implications are vast. Rather, they must be read in context, as part of a statutory whole.

The relevant statutory provisions were enacted and revised to control local and regional air pollution, such as soot and smog. Where Congress sought to authorize the regulation of

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<sup>21</sup> *Massachusetts*, 127 S. Ct. at 1458 (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1460.

<sup>24</sup> *Id.* at 1462.

<sup>25</sup> See *id.* at 1460 (noting the CAA’s “sweeping definition of ‘air pollutant’”).

transboundary or atmospheric pollutants as such (for example, ozone depleting substances or precursors to acid rain), it adopted additional, specialized provisions for this purpose. As the CAA is read in *Mass. v. EPA*, however, such action was wholly unnecessary, for the general air pollution provisions already granted EPA ample authority to address all matter of substances that are emitted into the air. Indeed, such an interpretation is not merely plausible, according to the Court, but required.

The history of air pollution control belies such an interpretation of the Act. From the late 1970s to the present, Congress repeatedly considered climate change legislation, and consistently refused to authorize regulatory controls on greenhouse gas emissions. Beginning with the National Climate Program Act of 1978, Congress sought to develop a “national climate policy,” yet never delegated regulatory authority over greenhouse gases, as such, to EPA. To the contrary, Congress encouraged the adoption of “nonregulatory” approaches to climate change concerns. Indeed, Congress explicitly considered the adoption of vehicle emission controls when debating the 1990 CAA amendments. A provision to require such controls was approved by the Senate Committee on Environment and Public Works, but was stricken before final passage of the bill due to heated opposition.

Not only did Congress never explicitly authorize EPA to regulate greenhouse gas emissions from automobiles or any other source, it explicitly denied EPA such authority when unilateral agency action seemed a possibility. When the Clinton EPA suggested it had the authority to regulate greenhouse gas emissions despite the absence of explicit authority, Congress responded with appropriations riders explicitly barring the expenditure of any EPA funds on developing or implementing such rules. Only when control of EPA returned to Republican hands, and the threat of unilateral administrative action on climate change dissipated, did Congress relent in this course.

The majority dismissed these and other actions by Congress as nothing more than “postenactment legislative history.”<sup>26</sup> Yet what the Court faced here were not post hoc explanations of legislative

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<sup>26</sup> *Id.*



intent or efforts to spin ambiguous statutory language. Rather, it is an unbroken chain of Congressional *action* predicated on a common understanding of what Congress itself had wrought. The issue is not what members of Congress said to justify their actions, but what Congress as a whole actually did.

Though denied by the majority, *Mass. v. EPA* has much in common with *FDA v. Brown & Williamson Tobacco Corp.*,<sup>27</sup> a decision which is now likely confined to its facts. In *Brown & Williamson* the Court invalidated the Food and Drug Administration's ("FDA") effort to extend its regulatory authority to tobacco products. There, the Court found sufficient reason to hesitate before presuming that Congress had authorized an administrative agency to assert previously unrecognized "jurisdiction to regulate an industry constituting a significant portion of the American economy."<sup>28</sup> If anything, *Mass. v. EPA* is an even more "extraordinary case[],"<sup>29</sup> for a consequence of the Court's holding in *Mass. v. EPA* will be regulation of much of the American economy, not merely of a single industry.

If EPA has the authority—indeed, the presumptive obligation—to regulate greenhouse gas emissions from new motor vehicles under Section 202 of the Act, it has no less an obligation to regulate emissions from industrial sources under Section 111 and to require the promulgation of State Implementation Plans to meet a National Ambient Air Quality Standard under Sections 108, 109 and 110. The endangerment standard triggering regulation under each set of provisions is the same.<sup>30</sup> Given the clear irrationality—if not impossibility—of regulating atmospheric greenhouse gas concentrations like localized concentrations of urban smog, this would seem no less of an improbable result than the federal ban on cigarettes the Court feared would result from FDA tobacco regulation. If this does not satisfy the Court's standard for a "counterintuitive" result, there is not likely to be anything else that ever will.

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<sup>27</sup> 529 U.S. 120 (2000).

<sup>28</sup> *Id.* at 159.

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

<sup>30</sup> Compare 42 U.S.C. § 7521(a)(1) (2000) with 42 U.S.C. § 7411(b)(1)(A) (2000) and 42 U.S.C. § 7408(a)(1)(A) (2000).

It is one thing to accept Congress's explicit decisions to engage in broad delegations of quasi-legislative authority to administrative agencies, as the Court has done time and again over the past sixty years. It is quite another to conjure a delegation of awesome regulatory authority from statutory provisions that were never intended to be used for this purpose. Regulatory tools are delegated to agencies with specific language for particular purposes. Once granted, these tools are not free-ranging objects to be wielded as agencies, courts, or private litigants would like. Yet that is precisely the interpretation *Mass. v. EPA* gives to the CAA. Given the significance of climate change and Congress's repeated attention to climate change policy over the past thirty years, it defies common sense that Congress would have granted to EPA the authority to regulate greenhouse gases with nary a peep as to such intent. And even if one were to conclude that a delegation of authority is possible, it is a stretch to argue that the CAA's language is so unambiguous as to preclude a contrary conclusion from the agency itself.<sup>31</sup>

#### SLEEPING IN THE BED EPA MADE

If one ignores the problems plaguing petitioners' claims of standing, and accepts the Court's discovery of EPA's latent power over emissions of carbon dioxide and other greenhouse gases, it is easy to conclude that EPA's effort to explain its decision not to regulate was inadequate. Assuming it had the authority to regulate greenhouse gases, EPA announced it would decline to do so, because such action was unwise at this time. The Agency cited various reasons, including the fact that the Bush Administration had already undertaken other policies to "reduce the risk" of global climate change.<sup>32</sup> Yet as the *Mass. v. EPA* majority noted,

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<sup>31</sup> While EPA previously concluded that it had the latent authority to regulate greenhouse gases under the CAA, it was not until the Bush Administration's petition denial that EPA reached such a conclusion after going through a notice-and-comment rulemaking. Thus, if either interpretation of the Act was due *Chevron* deference, it would have been EPA's later conclusion that it lacked regulatory authority to control emissions of greenhouse gases.

<sup>32</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,925 (Sept. 8, 2003).

the reasons proffered by the agency failed to conform to the requirements of the CAA.

In denying the petition, EPA endorsed the President's statement that the federal government "must address" climate change, but suggested the nature of the problem recommended a "different policy approach" than that sought by the petitioners.<sup>33</sup> EPA argued, plausibly, that it does not "make sense" to regulate greenhouse gas emissions from motor vehicles, because this would constitute "an inefficient, piecemeal approach" to the issue.<sup>34</sup> Few climate policy experts believe such regulations would constitute a particularly effective or efficient means of reducing greenhouse gas emissions. Yet the policy judgment to regulate such emissions—if they contribute to pollution that "may reasonably be anticipated to endanger public health or welfare"—had already been made by Congress.<sup>35</sup>

The endangerment standard established by CAA Section 202 is generally precautionary in nature. If EPA concludes air pollution "may reasonably be anticipated to endanger public health or welfare," it is required to regulate. That is the import of the word "shall" in the statute.<sup>36</sup> EPA could have refused to make a judgment. As a legal matter, EPA might also have been able to conclude that greenhouse gas emissions do not, in the judgment of the Administrator, contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare" (though this would have been a difficult proposition to maintain given EPA's and other federal agencies' prior and contemporary pronouncements on the subject). What EPA could not do, however, is precisely what it did: acknowledge the threat posed by greenhouse gases, but refuse to regulate on other grounds.

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<sup>33</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,929–52,931 (Sept. 8, 2003). This apparent inconsistency in EPA's arguments was not lost on the majority, which "attach[ed] considerable significance" to Agency statements that global warming is a problem that must be addressed. See 127 S. Ct. at 1458.

<sup>34</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,931 (Sept. 8, 2003).

<sup>35</sup> See 42 U.S.C. § 7521(a)(1) (2000).

<sup>36</sup> See *id.*

Justice Scalia's dissent sought to vindicate the Agency's authority to set its own priorities, particularly when refusing to act. Justice Scalia is no doubt correct that if EPA had simply deferred to make any judgment about whether greenhouse gas emissions contribute to climate change that could harm public health or welfare, that decision would be entitled to great deference. The majority opinion also endorses a quite deferential standard of review of such matters. Yet that is not what EPA did. In denying the petition, EPA did not refuse to make a judgment about the risks posed by climate change. Instead, it refused to regulate. Although the result—no regulation of greenhouse gas emissions under CAA Section 202—is the same, the decisions are quite distinct, as Justice Scalia himself notes in his dissent.<sup>37</sup> If EPA sought not to regulate, it should have refused to make a judgment about the risks posed by climate change, rather than second guess the precautionary policy judgment made Congress when enacting the CAA. Given EPA's many statements about the risks of climate change, a refusal to make an endangerment finding under Section 202 would have been vulnerable to court challenge, but less so than the course EPA actually took.

#### CLIMATE POLICY 2.0

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

Although a Supreme Court majority has concluded that the CAA applies to greenhouse gases, few (if any) seriously contend that the Act's provisions are well suited to the problem of climate change. Even if one assumes the United States should take

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<sup>37</sup> *Massachusetts*, 127 S. Ct. at 1472 n.1 (Scalia, J., dissenting).

unilateral action—in the absence of cooperative efforts by the other users of the atmosphere, which is the world’s greatest common pool resource—applying the CAA’s specific requirements to greenhouse gases makes little sense. As even further regulatory pressure is brought to bear on American industry by states eager to jump aboard the climate policy bandwagon, new federal regulation is sure to arise. And this, perhaps, was the point. Massachusetts and others engaged in strategic litigation to create leverage for a new generation of environmental controls. Yet once the smoke clears, and new climate policies are in place, the legal consequences of *Mass. v. EPA* will remain.

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