

## MASSACHUSETTS V. EPA HEATS UP CLIMATE POLICY NO LESS THAN ADMINISTRATIVE LAW: A COMMENT ON PROFESSORS WATTS AND WILDERMUTH

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*Massachusetts v. EPA*<sup>1</sup> is easily the Supreme Court's most important environmental law decision in well over a decade. By a vote of 5–4, the Supreme Court set the Environmental Protection Agency (EPA) on a course to regulate greenhouse gas emissions and potentially remade much of administrative law.<sup>2</sup> While the Supreme Court has been reluctant to authorize broad federal regulatory authority in other areas, the *Massachusetts* majority readily unearthed expansive yet untapped authority to control emissions of the most ubiquitous byproduct of modern industry. It is no wonder environmental advocates greeted the decision with cheer.

In their essay, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*,<sup>3</sup> Professors Kathryn A. Watts and Amy J. Wildermuth have presented a thoughtful analysis of the Supreme Court's handiwork in *Massachusetts v. EPA*. They are correct that the decision potentially paves new ground in administrative law, particularly with regard to state standing. The Court's approach to review of agency decisions to decline rulemaking petitions is also potentially significant, but less groundbreaking than Watts and Wildermuth suggest. In the context of climate change policy, their assessment of the Court's decision is farthest from the mark, however, for the *Massachusetts* majority did everything it could,

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

<sup>2</sup> For one account of how broadly *Massachusetts v. EPA* may have altered administrative law doctrine, see Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 73 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf> (link). For this author's view, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 61 (2007), <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf> (link).

<sup>3</sup> Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. COLLOQUY 1 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/17> (link).

given the posture of the case, to ensure federal regulation of greenhouse gases from motor vehicles and other emission sources. It is true, as a technical matter, that “the Court’s opinion did not order the EPA to regulate with respect to climate change.”<sup>4</sup> Yet there should be little doubt that the Court’s judgment in the case gives the Agency little option but to regulate, and not just emissions from new motor vehicles. Unless the relevant provisions of the Clean Air Act are revised by Congress in new climate change legislation, *Massachusetts v. EPA* will mean greenhouse gas emission limits on industrial facilities and the likely regulation of carbon dioxide as a criteria air pollutant.<sup>5</sup>

### I. STANDING FOR STATES

Professors Watts and Wildermuth are certainly correct to say the *Massachusetts* majority’s treatment of standing was “unusual.”<sup>6</sup> For starters, the Court applied the traditional elements of standing in a most undemanding fashion. Not only did the Court find a “rather small and remote injury” to be sufficient to satisfy the injury element,<sup>7</sup> it further concluded that Section 307 of the Clean Air Act accords plaintiffs a “procedural right” justifying a relaxation of “the normal standards for redressability and immediacy.”<sup>8</sup> As a consequence, the familiar requirements explicated in *Lujan v. Defenders of Wildlife*<sup>9</sup> may well present a less daunting challenge to future litigants in regulatory matters, particularly those concerning dispersed environmental harms. Even more surprising, however, was the Court’s newfound solicitude to the standing of state litigants, based upon authority and a line of reasoning not presented in any of the parties’ or *amici* briefs before the Court.

The Court proclaimed that state standing claims are “entitled to special solicitude” in federal court.<sup>10</sup> The Court reached this conclusion by arguing that a century-old case, *Georgia v. Tennessee Copper*,<sup>11</sup> demonstrated that states are not ordinary litigants for the purposes of invoking the jurisdiction of federal courts.<sup>12</sup> In that case, a downwind state, Georgia, sought judicial relief from upwind pollution under the federal common law of interstate

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<sup>4</sup> *Id.* at 1.

<sup>5</sup> “Criteria air pollutants” are those air pollutants for which the EPA is required to establish National Ambient Air Quality Standards under Section 109 of the Clean Air Act. 42 U.S.C. § 7409 (link); *see also* EPA, *What Are the Six Common Air Pollutants?* (2007), available at <http://epa.gov/air/urbanair/> (link) (referring to those pollutants for which the EPA sets NAAQS as “criteria pollutants”). This is discussed in further detail *infra* notes 42–50, and accompanying text.

<sup>6</sup> Watts & Wildermuth, *supra* note 3, at 2.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Massachusetts v. EPA*, 127 S.Ct. 1438, 1453 (2007) (internal quotations omitted).

<sup>9</sup> 504 U.S. 555 (1992) (link).

<sup>10</sup> *Massachusetts*, 127 S.Ct. at 1455.

<sup>11</sup> 206 U.S. 230 (1907) (link).

<sup>12</sup> *Massachusetts*, 127 S.Ct. at 1454.

nuisance. The Supreme Court, in an opinion by Justice Holmes, found that Georgia could seek equitable relief that was potentially unavailable to private litigants, but this hardly establishes that states should receive “special solicitude” when seeking standing to challenge agency action (or inaction) under a regulatory statute. As Chief Justice Roberts’ dissent amply demonstrates, *Georgia* had little if anything to do with Article III standing.<sup>13</sup> The Court’s finding here is also a bit ironic, as the statute at issue in *Massachusetts v. EPA*, the Clean Air Act, almost surely preempts the sort of action brought by Georgia in *Georgia*.<sup>14</sup>

The applicability of *Georgia* to *Massachusetts* is anything but obvious. While the *Massachusetts* majority could have grounded their newfound approach to state standing in the framework provided by prior court decisions, such as *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*,<sup>15</sup> it did not. As Professors Watts and Wildermuth show, but do not stress, the Court’s ultimate treatment of Massachusetts’ state interests is a bit confused.<sup>16</sup> As Professors Watts and Wildermuth further note, the Court could have chosen to rest state standing upon other state sovereign interests, such as a state’s interest in preventing the potential federal preemption of its own laws.<sup>17</sup> Yet the Court did not do so. Where Professors Watts and Wildermuth would like to argue that the Court’s reasoning supports state standing when federal action threatens to preempt state law, the reasoning of the Court could cut the other way, insofar as it articulates a theoretical framework for federal-state relations that justifies federal preeminence in climate change policy. Specifically, the Court stressed that states surrendered certain “sovereign prerogatives” to the federal government, including the ability to take

<sup>13</sup> See *Id.* at 1465 (Roberts, C.J., dissenting).

<sup>14</sup> See 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.”). Under the relevant analysis, if greenhouse gases are subject to regulation as air pollutants under the Clean Air Act, then claims that greenhouse gas emissions constitute or contribute to an interstate nuisance under the federal common law are almost surely preempted.

<sup>15</sup> 458 U.S. 592 (1982) (link).

<sup>16</sup> Watts & Wildermuth, *supra* note 3, at 8 (noting “confusion” about the Court’s approach to state standing).

<sup>17</sup> Professor Wildermuth served as Counsel of Record for an amicus curiae brief in *Massachusetts v. EPA* submitted on behalf of several states. See Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120), available at <http://www.communityrights.org/PDFs/MassBriefs/Mass%20v%20EPA--Amici%20States.pdf> (link). For a critique of these alternative arguments for state standing, see Brief of The Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Support of Respondents at 14–17, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120), available at [http://www.cato.org/pubs/legalbriefs/ma\\_v\\_epa\\_10-24-06.pdf](http://www.cato.org/pubs/legalbriefs/ma_v_epa_10-24-06.pdf) (link).

direct action to control interstate air pollution.<sup>18</sup> If such prerogatives “are now lodged in the Federal Government,”<sup>19</sup> states have less basis to complain if federal air pollution regulation preempts state actions.

The implications of the Court’s newfound solicitude for state standing are far from clear. Insofar as the Court was motivated by a concern for state “dignity,” as indicated by the majority’s reliance upon *Alden v. Maine*,<sup>20</sup> it may be short-lived, as Justice Kennedy is the only member of the *Massachusetts* majority who has shown much concern for such interests. Alternatively, the Court could be signaling a “special solicitude” for state efforts to drive public policy through the courts—a form of state-driven “regulation by litigation”<sup>21</sup>—as has been attempted by quite a few state attorneys general in recent years.<sup>22</sup> Another possibility is that the decision will simply be used to dilute the standards for standing more generally, and not simply for states. As already noted, the Court’s application of *Lujan* was anything but rigorous and certainly suggests a particular solicitude—“special” or not—for citizen suit plaintiffs challenging agency action, at least where they seek to redress broadly dispersed environmental harms.

## II. REVIEW OF RULEMAKING PETITION DENIALS

Another important question in *Massachusetts v. EPA* was what standard of review would be applied to the EPA’s denial of a rulemaking petition. The Court’s resolution of this question would be important even if for no other reason than it had never explicitly answered it before. The *Massachusetts* majority did not create a new standard, however.<sup>23</sup> Rather, it explicitly adopted the deferential standard articulated in 1987 by the U.S.

<sup>18</sup> *Massachusetts*, 127 S.Ct. at 1454 (“When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.”).

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

<sup>20</sup> *Id.* (citing *Alden v. Maine*, 527 U.S. 706, 715 (1999) (link), for the proposition that “in the federal system, the States ‘are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty’”).

<sup>21</sup> See generally REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002) (documenting examples of the use of litigation to regulate economic activity); see also Andrew P. Morriss et al., *Choosing How To Regulate*, 29 HARV. ENVTL. L. REV. 179, 203–10 (2005) (link) (discussing choice of regulation by litigation in contrast to other regulatory strategies).

<sup>22</sup> The litigation campaign against cigarette companies that eventually led to the “Master Settlement Agreement” is the most infamous example of state attorney general “regulation by litigation.” State attorneys general have also filed suits against gun manufacturers, paint companies, and other corporations alleged to have committed wrongs against the public. Not all have viewed this as a positive development. See, e.g., Hans Bader, Competitive Enter. Inst., *The Nation’s Top Ten Worst State Attorneys General* (2007), available at <http://www.cei.org/pdf/5719.pdf> (link) (criticizing use of litigation as a regulatory tactic by state attorneys general).

<sup>23</sup> Cf. Watts & Wildermuth, *supra* note 3, at 2 (stating “the Court’s decision breaks new ground” with regard to judicial review of agency refusals to initiate rulemakings).

Court of Appeals for the D.C. Circuit in *American Horse Protection Association v. Lyng*<sup>24</sup> and followed by the D.C. Circuit ever since.

In *American Horse Protection Association*, the D.C. Circuit held that agency denials of a petition for rulemaking were subject to judicial review, unlike an agency's refusal to initiate an enforcement action.<sup>25</sup> An agency's formal denial of a rulemaking petition, like an actual enforcement action (but unlike a failure to initiate enforcement) provides a focal point for judicial scrutiny. Under *American Horse Protection Association* judicial review should be limited and quite deferential.<sup>26</sup> But here, as elsewhere, deference does not mean abdication.<sup>27</sup> In *American Horse Protection Association* the D.C. Circuit remanded the Secretary of Agriculture's refusal to initiate rulemaking on the grounds that his proffered reasons were insufficient. Thus, adoption of this deferential standard of review does not preclude judicial invalidation of agency denials of rulemaking petitions.

Unlike Professors Watts and Wildermuth, I do not find the *Massachusetts* majority's review of the EPA's action to be particularly searching or severe—let alone “meticulous and probing.”<sup>28</sup> Nor is it at odds with the D.C. Circuit standard embraced by the Supreme Court. The *Massachusetts* majority did not scrutinize or second-guess the EPA's articulated reasons for refusing to regulate so much as it held that the EPA's reasons were impermissible under the Clean Air Act. The Court did not conclude that the EPA was wrong in asserting that new vehicle emission standards were impractical or inefficient, or that a rulemaking could conflict with efforts to forge international action on climate change. Such rationales, according to the Court, simply could not justify a refusal to regulate because they were divorced from the relevant statutory text.<sup>29</sup> Had the Agency simply declined to rule on the petition, citing resource constraints and other agency priorities, the outcome may well have been different.

The Court's approach was wholly consistent with the standard of review set forth in *American Horse Protection Association*. While the D.C. Circuit held that denials of rulemaking petitions should only be overturned

<sup>24</sup> 812 F.2d 1 (D.C. Cir. 1987).

<sup>25</sup> *Id.* at 4 (“[R]efusals to institute rulemaking proceedings are distinguishable from other sorts of nonenforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.”).

<sup>26</sup> *Id.* at 7; see also *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989) (review of petition denials should be “extremely limited” and “highly deferential”).

<sup>27</sup> *Cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in judgment) (link) (“deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ”).

<sup>28</sup> Watts & Wildermuth, *supra* note 3, at 12.

<sup>29</sup> *Massachusetts v. EPA*, 127 S.Ct. 1438, 1462 (2007) (EPA's decision to deny the rulemaking petition was based upon “reasoning divorced from the statutory text”).

“in the rarest and most compelling of circumstances,” it specifically identified an agency’s failure to abide by the explicit terms of the relevant authorizing statute as the sort of error that a reviewing court should correct.<sup>30</sup> This standard of review requires that the reviewing court consider and interpret the relevant statutory language so as to determine whether the agency acted in a lawful fashion. Because Congress specified that the EPA is required to regulate emissions that the Administrator concludes “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,”<sup>31</sup> the Agency’s other rationales for not regulating were irrelevant. This was particularly true given the EPA’s own admission in the petition denial that the statutory threshold for regulation had effectively been met.<sup>32</sup>

In adopting and faithfully applying the D.C. Circuit’s *American Horse Protection Association* test for the review of agency denial of rulemaking petitions the Court helped clarify this area of the law, but it did not depart from established precedent, and should not have been “surprising.”<sup>33</sup> *Massachusetts* did not involve an agency decision to defer ruling on a petition, but a petition denial. Nor did it require the Court to carefully examine the evidence behind the EPA’s arguments. In short, the Court broke no new ground here.<sup>34</sup> Rather, it paved over a well-worn path.

### III. FUTURE GREENHOUSE GAS REGULATION

Whatever impact *Massachusetts v. EPA* has on administrative law, one thing is certain: Barring congressional intervention, this decision will cause the EPA to regulate the emission of greenhouse gases from new motor vehicles, as well as from other sources. As a technical matter, the Court remanded the matter back to the Agency for further proceedings, given the EPA’s failure to offer a “reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change.”<sup>35</sup> As a practical matter, however, the EPA has already made this determination, so the adoption of new vehicle emission standards is only a matter of time. In this regard, I disagree with Professors Watts and Wildermuth that “in acting on the rulemaking petition, the EPA plainly had not determined whether greenhouse gases contribute to global warming.”<sup>36</sup>

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<sup>30</sup> *Am. Horse Prot. Ass’n*, 812 F.2d at 5 (internal quotations omitted).

<sup>31</sup> 42 U.S.C. § 7521(a)(1) (link).

<sup>32</sup> See *infra* notes 39–40, and accompanying text.

<sup>33</sup> Watts & Wildermuth, *supra* note 3, at 12 (finding “the level of scrutiny that the Court applied” to the EPA’s rulemaking petition denial “surprising”).

<sup>34</sup> Professors Watts and Wildermuth, on the other hand, believe that the Court’s opinion “breaks new ground” and constitutes a “ramped up review of rulemaking denials.” *Id.* at 2, 11.

<sup>35</sup> *Massachusetts v. EPA*, 127 S.Ct. 1438, 1463 (2007).

<sup>36</sup> Watts & Wildermuth, *supra* note 3, at 14.

Section 202 of the Clean Air Act provides that the EPA “shall” set emission standards for new vehicles for “any air pollutant” the Administrator concludes causes or contributes to air pollution “which may reasonably be anticipated to endanger public health or welfare.”<sup>37</sup> Once it is established that greenhouse gases are air pollutants for the purpose of this provision, the EPA has little choice to regulate unless it is prepared to argue that the accumulation of greenhouse gases in the atmosphere cannot “reasonably be anticipated to endanger public health or welfare.” Were the EPA operating on a clean slate, it is *perhaps* conceivable that the Agency could deny that anthropogenic greenhouse gases will have such effects, and that such a conclusion would withstand legal challenge.<sup>38</sup> But, at this point, the EPA is *not* operating on a clean slate and so the Agency’s obligation to regulate under Section 202 should be a foregone conclusion.

The EPA’s own prior statements and actions are simply incompatible with a determination that greenhouse gases do not contribute to air pollution that can be reasonably anticipated to threaten public health and welfare. In fact, in denying the petition to regulate greenhouse gases under Section 202, the EPA endorsed President Bush’s statement that the federal government “must address” climate change and suggested that one reason not to regulate greenhouse gas emissions from new motor vehicles was because the Bush Administration had already undertaken other policies to “reduce the risk” of global climate change.<sup>39</sup> The EPA did not deny that greenhouse gases contributed to climate change, or even suggest that anthropogenic emissions could not be anticipated to affect health or welfare. Rather, it argued that the nature of the problem called for a “different policy approach” than that sought by the petitioners.<sup>40</sup> Whatever the merits of the EPA’s *policy* argument that adopting new vehicle emission standards would constitute “an inefficient, piecemeal approach” to the problem of climate change, Congress did not delegate the EPA the discretion to make such policy judgments under Section 202.

Once the EPA makes the required endangerment finding under Section 202, it will be child’s play to force greenhouse gas emission regulation un-

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<sup>37</sup> Section 202(a)(1) of the Clean Air Act provides, in relevant part:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1).

<sup>38</sup> I stress the word “perhaps” here because this would be a difficult position for the EPA to assert and sustain against legal challenge, despite the substantial deference that reviewing courts show to agencies’ scientific assessments.

<sup>39</sup> 68 Fed. Reg. 52,925 (link).

<sup>40</sup> 68 Fed. Reg. 52,929 (link). This apparent inconsistency in the 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 *Massachusetts*, 127 S.Ct. at 1458.

der other Clean Air Act provisions. Section 111 of the Act requires the Agency to set emission performance standards for stationary sources that “cause[] or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>41</sup> If greenhouse gases satisfy the requirements of Section 202, they almost surely satisfy Section 111 as well. Section 111 only requires the adoption of emission standards when a given classification of pollution sources contributes “significantly” to the air pollution in question, so insignificant sources of emission would remain unregulated. Larger sources, however, such as coal-burning power plants and some industrial facilities would not be so lucky.

The next provisions that could be triggered are more interesting, and perhaps a bit more troubling. Under Section 108 of the Act, the EPA Administrator is required to create a list of criteria air pollutants that includes “each air pollutant, emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” that is emitted into the ambient air by “numerous or diverse mobile or stationary sources.”<sup>42</sup> This endangerment standard is practically indistinguishable from that in Section 202; a pollutant that satisfies one almost surely satisfies the other.

The only potential distinction in Section 108 is additional language providing that the pollutant in question must be one for which the EPA Administrator “plans to issue air quality criteria under this section,” but there is little reason to believe that the EPA could refuse to regulate greenhouse gases on this basis. In fact, this argument was flatly rejected by the U.S. Court of Appeals for the Second Circuit over thirty years ago in *Natural Resources Defense Council v. Train*.<sup>43</sup> In *Train*, the EPA argued that it could opt not to include lead as a criteria air pollutant because it did not plan to issue air quality criteria on lead and there were more cost-effective means of controlling lead emissions. The Second Circuit found the former argument wholly unpersuasive and the latter argument irrelevant given the text of the Act.<sup>44</sup> Unless *NRDC v. Train* was wrongly decided, the rationale would apply equally to carbon dioxide.

Once a pollutant is listed, the EPA must develop a criteria document and, under Section 109, establish National Ambient Air Quality Standards (NAAQS) for the pollutant.<sup>45</sup> Once the NAAQS are in place, Section 110 requires states to submit State Implementation Plans (SIPs) to ensure that all metropolitan areas will meet the standards.<sup>46</sup> Here is where the real implementation difficulties would begin, as the SIP process was designed for

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<sup>41</sup> 42 U.S.C. § 7411 (link).

<sup>42</sup> 42 U.S.C. § 7408 (link).

<sup>43</sup> 545 F.2d 320, 325–26 (2d Cir. 1976).

<sup>44</sup> *Id.*

<sup>45</sup> 42 U.S.C. § 7409 (link).

<sup>46</sup> 42 U.S.C. § 7410 (link).



controlling localized, ambient pollution problems, not protecting the global atmosphere.<sup>47</sup>

The EPA might wish to argue that the NAAQS regulatory regime is fundamentally ill-suited to greenhouse gas control. The Agency would have a point—albeit one rejected by the *Massachusetts* majority. The meaningful measure of greenhouse gas pollution levels is their concentration in the global atmosphere, not the locally ambient air. There is nothing any given jurisdiction can do to comply with a NAAQS for carbon dioxide unless emissions are controlled worldwide. No SIP could possibly meet a greenhouse gas NAAQS set in accordance with the Act's requirements. Nonetheless, the *Massachusetts* majority explicitly rejected the idea that recognizing greenhouse gases as pollutants under the CAA would produce any unintuitive or illogical results,<sup>48</sup> so this argument is foreclosed. At best, state failure to submit acceptable plans would eventually lead to the adoption of a Federal Implementation Plan under Section 179,<sup>49</sup> likely after years of litigation.<sup>50</sup>

In sum, not only does the Court's *Massachusetts* decision effectively obligate the EPA to regulate emissions of greenhouse gases from new motor vehicles, if applied consistently it will also require the EPA to regulate greenhouse gases from other sources as well. The resulting regulations may have practical difficulties and inefficiencies, but this will not relieve the EPA of its regulatory burden. The *Massachusetts* majority concluded the Clean Air Act's requirements are unambiguous, and the agency must now comply.

#### IV. FINAL THOUGHTS

As a practical matter it will take years for the EPA to comply with the Court's judgment,<sup>51</sup> and years more for additional litigation to force the EPA's hand. In the meantime, climate policy will not stand still. Domesti-

<sup>47</sup> See generally Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 101 (2007) (link) (discussing the limits of local emission control policies to address global climate change and the need for a national, if not global, emission control strategy).

<sup>48</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459–60 (2007).

<sup>49</sup> 42 U.S.C. § 7509 (link).

<sup>50</sup> See Posting of Jonathan Wiener to The University of Chicago Law School Faculty Blog, [http://uchicagolaw.typepad.com/faculty/2007/04/climate\\_policy\\_.html](http://uchicagolaw.typepad.com/faculty/2007/04/climate_policy_.html) (Apr. 3, 2007) (link) (describing a scenario in which the FIP requirement of Section 179 is triggered).

<sup>51</sup> On May 14, 2007, President George W. Bush instructed the Administrator of the Environmental Protection Agency to coordinate with the heads of other relevant federal agencies and develop regulations responsive to the Supreme Court's decision in *Massachusetts v. EPA* that would be finalized "by the end of 2008." See Press Release, The White House, President Bush Discusses CAFE and Alternative Fuel Standards (May 14, 2007), available at <http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html> (link); see also Exec. Order No. 13,432, 72 Fed. Reg. 27,717 (May 16, 2007), available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-2462.pdf> (link).

cally, state and local governments will continue to experiment with climate-related policies of various sorts.<sup>52</sup> California hopes to obtain a waiver from the EPA allowing it to adopt vehicle emission standards of its own, and other states have announced a desire to follow suit.<sup>53</sup> Foreign nations and international organizations will simultaneously develop emission targets and cooperative agreements. As this is being written, the President is proposing a new climate policy approach for the fifteen nations with the greatest greenhouse gas emissions,<sup>54</sup> and the U.S. House of Representatives is considering a bill that could become the first federal statute to explicitly require the regulation of greenhouse gases as such.<sup>55</sup> Should either of these or other climate proposals become law, the EPA may be relieved of regulating greenhouse gases under Section 202 and other provisions of the Act. Nonetheless, it would be a mistake to diminish the importance of *Massachusetts v. EPA* in forcing the EPA's hand.

It is also worth considering that, as things now stand, *Massachusetts v. EPA* effectively forces the adoption of climate change policies that were not the product of legislative deliberation and a policy dialogue on the costs and benefits of various climate policy strategies. Rather, the regulation to be spawned by *Massachusetts v. EPA* is the consequence of a judicial construction of decades-old legislative language clearly and unequivocally designed to address a wholly different set of environmental concerns. If this is the way climate policy is to be made, there are ample reasons to be less than sanguine about the ultimate results.

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<sup>52</sup> See, e.g., BARRY G. RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY (2004) (detailing state-level climate change policies); see also Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 282 (2003) (link) (noting that many states "have quietly begun to fill the void in leadership that some believe exists at the national level").

<sup>53</sup> See Letter from Catherine Witherspoon, Executive Officer, Cal. Air Res. Bd., to Stephen L. Johnson, Adm'r, EPA (Dec. 21, 2005), available at <http://www.arb.ca.gov/cc/docs/waiver.pdf> (link).

<sup>54</sup> Sheryl Gay Stolberg, *Bush Proposes Goals on Greenhouse Gas Emissions*, N.Y. TIMES, June 1, 2007, at A1 (link).

<sup>55</sup> See, e.g., Zachary Coilie, *Dems Drafting Bill that Could Derail State Warming Law*, S.F. CHRON., June 5, 2007, at A-1 (link); H. Josef Hebert, *Bill Would Block States on Auto Rules*, BOSTON GLOBE, June 4, 2007 (link).