Massachusetts v. Environmental Protection Agency, Exploring the Merits of Greenhouse Gas Regulation

Elise Korican
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By Elise Korican*

I. INTRODUCTION

Under Section 202(a) of the Clean Air Act, the Administrator of
the Environmental Protection Agency “shall by regulation
prescribe...standards applicable to the emission of any air pollutant
from any class or classes of new motor vehicles...which in his
judgment cause, or contribute to, air pollution which may reasonably
be anticipated to endanger public health or welfare.”1 Do greenhouse
gases such as carbon dioxide qualify as “air pollutants” under Section
202 of the Clean Air Act? If so, is the EPA obligated to regulate
such pollutants, and to what extent may the Court review the EPA’s
denial of a rulemaking petition requesting such regulation?

In 1999, a rulemaking petition was filed with the EPA to request
regulation of greenhouse gases emitted from new motor vehicles.2
The EPA denied the petition in 2003, finding among other things that

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Beach, Robert C. Maxson, for his leadership, friendship, and words of wisdom that
will forever resonate.

2. International Center for Technology Assessment, et al., Petition for
Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas
Emissions from New Motor Vehicles under Section 202 of the Clean Air Act, Oct.
it did not have the authority to set emission standards for greenhouse gases under the Clean Air Act.\(^3\) The petitioners were then joined by Massachusetts and other state and local governments and sought review by the D.C. Circuit in *Massachusetts v. EPA*.\(^4\) Two of the three judges on the panel agreed that the EPA Administrator correctly exercised his discretion in denying the rulemaking petition, though each of the judges wrote separately, agreeing and disagreeing on distinctly different grounds.\(^5\)

*Massachusetts v. EPA* was then appealed to the Supreme Court with three primary issues: 1) whether the petitioners have standing to challenge the EPA’s denial of their rulemaking petition; 2) whether, and to what extent, the Court can review the merits of the agency’s refusal to initiate enforcement proceedings; and 3) whether the EPA does have the authority to regulate greenhouse gas emissions under the Clean Air Act and the circumstances under which the EPA may decline to do so.\(^6\) In a 5-4 decision, the Supreme Court held: 1) that petitioners do have standing to challenge their rulemaking petition denial; 2) that while judicial review of agency refusal to initiate enforcement proceedings is generally strictly limited, an instance of denial of rulemaking is subject to review; and 3) the EPA must regulate greenhouse gas emissions if a finding of endangerment is made, otherwise decisions not to regulate must be for lack of an endangerment finding or express notation of profound scientific uncertainty preventing the ability to implement effective regulation.\(^7\)

The purpose of this case note is to explore the Supreme Court’s decision in *Massachusetts v. EPA*. Part II provides the historical background of global warming, related legislation, the enactment of the Clean Air Act and later amendments, as well as relevant case holdings as to judicial review of agency decisions and

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5. See *Massachusetts v. EPA*, 415 F.3d 50.
7. *Id.* at 1458-63.
implementation of the Clean Air Act. Part III sets out the operative facts of the Massachusetts v. EPA case beginning with the initial rulemaking petition, through the decision of the district court of appeals, and describes the facts as presented to the Supreme Court. Part IV outlines the Court’s majority and dissenting opinions. Part V examines the legal impact, and broader societal impact of the Court’s decision. Finally, Part VI concludes this case note.

II. HISTORICAL BACKGROUND

Global warming is the rise in near-surface air and water temperatures on Earth in recent decades. The Intergovernmental Panel on Climate Change (IPCC) concluded, “Most of the observed increase in globally averaged temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations.” Global warming is caused by pollutants, namely carbon dioxide, collecting in the earth’s atmosphere causing the heat from the sun to be trapped which, in turn, raises Earth’s air and water temperatures. The Natural Resources Defense Council names automobiles the second largest culprit in the creation of nearly 1.5 billion tons of carbon dioxide annually. According to the National Oceanic and Atmospheric Administration, global surface temperatures have increased about 0.6

8. See infra pages 431-40.
11. See infra page 467-73.
12. See infra page 473-75.
16. Id. Coal-burning power plants are the largest source of carbon dioxide pollution in the United States, with 2.5 billion tons produced annually. Id.
degrees Celsius since the late nineteenth century and about 0.4 degrees Celsius over the past twenty five years.\textsuperscript{17} The effects of global warming are already apparent in the severe wildfires that have occurred in many states recently, as well as in floods, droughts and extreme heat waves throughout the world.\textsuperscript{18}

If left to run its course, scientists predict a number of consequences are likely to occur based on a continuation of the current trends. Melting glaciers, rising sea levels, warmer sea temperatures, increased pest infestation and disrupted natural habitats are among those predicted to have broad reaching catastrophic effects.\textsuperscript{19}

In 1970 Congress passed the Clean Air Act which addressed rising pollution levels in the air.\textsuperscript{20} This act was later amended in

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\begin{itemize}
\item \textsuperscript{17} National Climatic Data Center: United States Department of Commerce, \textit{Global Warming: Frequently Asked Questions}, Q 2 http://lwf.ncdc.noaa.gov/oa/climate/globalwarming.html#Q2 (last visited Jan. 27, 2008). Although local temperatures fluctuate naturally, over the past fifty years the average global temperature has increased at the fastest rate in recorded history. \textit{Id.} Experts think the trend is accelerating; the 10 hottest years on record have all occurred since 1990. \textit{Id.}
\item \textsuperscript{18} Natural Resources Defense Council, \textit{Global Warming Basics: What it is, how it's caused, and what needs to be done to stop it}, http://www.nrdc.org/global Warming/f101.asp (last visited Jan. 27, 2008). Global warming is already causing damage in many parts of the United States. In 2002, Colorado, Arizona and Oregon endured their worst wildfire seasons ever. \textit{Id.} The same year, drought created severe dust storms in Montana, Colorado and Kansas, and floods caused hundreds of millions of dollars in damage in Texas, Montana and North Dakota. \textit{Id.} Since the early 1950s, snow accumulation has declined 60 percent and winter seasons have shortened in some areas of the Cascade Range in Oregon and Washington. \textit{Id.} Of course, the impacts of global warming are not limited to the United States. \textit{Id.} In 2003, extreme heat waves caused more than 20,000 deaths in Europe and more than 1,500 deaths in India. \textit{Id.} In what scientists regard as an alarming harbinger of events to come, the area of the Arctic's perennial polar ice cap is declining at the rate of 9 percent per decade. \textit{Id.}
\item \textsuperscript{19} \textit{Id.} Melting glaciers, early snowmelt and severe droughts will cause more dramatic water shortages in the American West. \textit{Id.} Rising sea levels will lead to coastal flooding on the Eastern seaboard, in Florida, and in other areas, such as the Gulf of Mexico. \textit{Id.} Warmer sea surface temperatures will fuel more intense hurricanes in the southeastern Atlantic and Gulf coasts. \textit{Id.} Forests, farms and cities will face troublesome new pests and more mosquito-borne diseases. \textit{Id.} Disruption of habitats such as coral reefs and alpine meadows could drive many plant and animal species to extinction. \textit{Id.}
\item \textsuperscript{20} Clean Air Act §§ 101-618(g), 42 U.S. C. §§ 7401-7671g (2000).
\end{itemize}
1974, 1977, and 1990 and gave the EPA Administrator the authority to define air pollutants and acceptable concentrations of such pollutants, and review state plans to regulate pollutant sources.\textsuperscript{21} Title II of the CAA authorizes the EPA to regulate harmful pollutants from new motor vehicles.\textsuperscript{22} In 1970, Congress added Section 302(h) of the Clean Air Act, asserting that “[a]ll language referring to effects on welfare includes...effects on...weather...and climate.”\textsuperscript{23}

Under the 1970 Clean Air Act, “air pollutant” is defined as “including any physical, chemical, biological, [or] radioactive ... substance or matter which is emitted into or otherwise enters the ambient air.”\textsuperscript{24} The pressing issue, which led to the case of \textit{Massachusetts v. EPA}, is the crucial question of whether greenhouse gases are considered “air pollutants” under the Clean Air Act.

In 1977, the D.C. Circuit, in \textit{Ethyl Corp. v. EPA}, addressed the interpretation of the language in Section 211(c)(1)(A) of the Clean Air Act (CAA).\textsuperscript{25} In the case, Ethyl, a manufacturer of lead additives and refiner of gasoline, argued the EPA must find proof of actual harm in order to regulate gasoline additives, namely lead.\textsuperscript{26} The court in \textit{Ethyl Corp.}, interpreted the CAA in a manner which provided the EPA Administrator authority to act when a pollutant “will endanger” the public health or welfare.\textsuperscript{27} In its discussion, the court noted that Congress had removed from Section 211 of the CAA specific language which used to include a “findings requirement” standard to be used by the EPA Administrator when acting under the “will endanger” standard.\textsuperscript{28} The “will endanger” standard was found by the court, sitting en banc, to be preventative in nature.\textsuperscript{29} The

\begin{enumerate}
\item \textit{Id.}
\item Clean Air Act § 202, 42 U.S.C. § 7521.
\item Clean Air Act § 302(h), 42 U.S.C. § 7602(h).
\item \textit{See} Clean Air Act § 302(g), 42 U.S.C. § 7602(g).
\item Ethyl Corp. v. EPA, 541 F.2d 1, 7 (D.C. Cir. 1976).
\item \textit{Id.} at 13 (agreeing with the EPA Administrator that “will endanger” should be interpreted to mean “presents a significant risk of harm”).
\item \textit{Id.} Note that the word “will” is used, meaning “about to” or “expected to” happen, not necessarily already happened.
\item \textit{Id.} at 14-15.
\item \textit{Id.} at 17. The court basically found that the language allowed for the Administrator to act before danger occurred rather than restricting action to after danger had already occurred.
\end{enumerate}
court’s interpretation of the “will endanger” language in Section 211 of the CAA upheld the EPA’s preventative regulation requiring annual reductions in the lead content of leaded gasoline. This was an important ruling that broadened the EPA Administrator’s power to regulate pollutants since it allowed for regulation absent actual harm. Specifically, the court held the Clean Air Act “and common sense... demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.”

The court’s ruling in *Ethyl Corp. v. EPA* led to specific 1977 amendments to the CAA. Namely, Congress amended Section 202(a)(1) of the Clean Air Act, altering it from “air pollution which endangers the public health” to “air pollution which may reasonably be anticipated to endanger public health.” The main purpose of the 1977 Amendments was to aid states in achieving their goals, as many failed to meet the standards first set by the Clean Air Act.

A year later, in 1978, the D.C. Circuit dealt with the issue of statutory uncertainty and the use of policy considerations to “gap-fill” where an agency administrator is unable to use the plain language of a statute for decision making direction. In *Environmental Defense Fund v. EPA*, petitioners challenged EPA regulations prohibiting discharge of a toxic substance, polychlorinated biphenyls (PCBs), into the nation’s waterways. The petitioners argued principally that the EPA had inadequate scientific knowledge of the PCBs at issue (less chlorinated PCB mixtures) and therefore lacked an adequate basis for regulation.

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30. See id. at 1.
33. Robyn Kenney, Clean Air Act, United States, Encyclopedia of Earth (Oct. 4, 2006), http://www.eoearth.org/article/Clean_Air_Act_United_States (last visited December 21, 2007). One major revision brought by the 1977 amendments tightens pollution control for newly built sources and brings older plants under the Clean Air Act’s regulations. *Id.* The 1977 amendments instituted the New Source Review (NSR), which requires companies to obtain permits before modifying equipment. *Id.*
35. *Id.* at 79. Most scientific studies in existence were of highly chlorinated PCBs. *Id.* However, during the 1970’s public concern for the harmful nature of these chemicals encouraged a shift to less chlorinated PCBs. *Id.* This shift occurred rapidly, causing a gap in scientific knowledge. *Id.* Petitioners also argued
Among other counter-arguments, the EPA cited *Ethyl Corp. v. EPA* for the notion that action does not need to be delayed in order to wait for actual causal links to be established between the toxins and harm to health or the environment.\(^{36}\) In ruling on the petitioners’ challenge, the D.C. Circuit Court of Appeals affirmed its use of the substantial evidence standard in reviewing scientific rulemaking.\(^{37}\) It was noted, in the court’s opinion, that there is a clear distinction between factual determinations and policy decisions at the administrative level.\(^{38}\) The court held that where the agency has insufficient information to make an informed factual decision, policy considerations must guide the agency’s rulemaking and the court will uphold these policy judgments.\(^{39}\)

More than a decade after the *Environmental Defense Fund* case was heard, the D.C. Circuit ruled, in *Natural Resources Defense Council, Inc. v. EPA*, on a challenge to the EPA’s decision to abandon amendments to vinyl chloride emission standards set under Section 112 of the Clean Air Act.\(^{40}\) Section 112 of the Clean Air Act provides the EPA Administrator with authority to define air pollutants and "set an emission standard...at the level which in his judgment provides an ample margin of safety to protect the public health."\(^{41}\) The Natural Resources Defense Council (NRDC) argued the Administrator was required under Section 112 of the Clean Air

the EPA’s authority, under the 1972 Act, to ban the discharge of PCB’s into waterways is preempted by the Toxic Substances Control Act passed by Congress to phase out PCB’s over a two and a half year period. Congress enacted the Toxic Substances Control Act in 1976, under 15 U.S.C. §§ 2601-2629, which included a specific section addressing PCBs, Section 6(e). The court held there was no congressional intent that the TSCA preempt EPA’s authority and that, so long as there was a finding of risk to health or environment, regulation was proper. *Id.* at 76.

36. *Id.* at 79. The EPA was arguing for use of the “will endanger” standard upheld in *Ethyl Corp.* and wanted to be able to act to prevent harm before it occurred.

37. *Id.* at 82.

38. *Id.*

39. *Id.* This is meant to stand for the proposition that, when the decisions involve agency discretionary decisions “on the frontiers of scientific knowledge,” policy considerations may play a role. *Id.*


41. *Id.* at 1148.
Act to make emissions decisions based on health-related factors, thus the unknown health risks posed by carcinogenic agents of vinyl chloride required the Administrator to prohibit all emissions. The EPA had concluded that it had two options based on its authority under Section 112 of the Clean Air Act: 1) require a complete prohibition of such emissions, or 2) set emission standards such that they are the "lowest level achievable by use of the best available control technology." The EPA found that the first alternative posed an unreasonable cost in that it would require closure of an entire industry and therefore chose to act under the second option. The court reviewed the EPA's actions to determine whether they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court found that Congress' wording in the statute, providing that the Administrator act to allow for an "ample margin of safety," does not affect the Administrator's authority to act in the face of uncertainty. Further, the court said the language on its face clearly did not mean free of all risk, but substantially safe from risk. The court explained that if they were to find the Administrator must ban all emissions when uncertainty exists, the court would ultimately be removing all of the Administrator's discretion. In fact, the discretion granted to the Administrator by the statute is used most ideally in the very case of uncertainty. However, the court did find that Section 112 of the Clean Air Act required that the Administrator's discretion be used in

42. Id. at 1147.
43. Id. at 1148.
44. Id. This is because vinyl chloride "is a gaseous synthetic chemical used in the manufacture of plastics." Id. Thus, complete prohibition of this emission would require the plastics industry itself to be shut down.
45. Id. at 1152; Clean Air Act section 307, 42 U.S.C. § 7607(d)(9)(A) (1982). This is known as Chevron deference.
46. Natural Resources Defense Council, 824 F.2d at 1152. The NRDC took the position that the "ample margin of safety" standard meant the Administrator had no discretion in the face of uncertainty. Id. The court said the statute nowhere defines ample margin of safety and that acting in a situation of uncertainty does not contradict Congress' intent. Id.
47. Id.
48. Id.
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a manner that relates to public health and safety.\footnote{Id. at 1164-65. This seems to be the standard applied by the Supreme Court in \textit{Massachusetts v. EPA} as, in both instances, the court requires strict adherence to the authorizing statute's wording when the agency makes discretionary decisions.} In the case of \textit{NRDC v. EPA}, the Administrator made the decision as to the regulation of vinyl chloride on a determination of industry cost and technological feasibility rather than public health and safety, thus the Administrator's discretion was not properly exercised.\footnote{Natural Resources Defense Council, 824 F.2d at 1165.}

The most recent amendments to the CAA in 1990 addressed the latest issues and threats to the environment of the United States "in order to improve air quality by imposing restrictions on the release of hazardous pollutants into the atmosphere."\footnote{Energy Information Administration, \textit{Clean Air Act Amendments of 1990}, \url{http://www.eia.doe.gov/oil-gas/natural_gas/analysis_publications/ngmajorleg/clnairact.html} (last visited January 21, 2008).} The 1990 Amendments imposed greater restrictions on power plant emissions allowances, identified twenty-two cities having excessive levels of ozone and carbon monoxide and required the owners of commercial fleet vehicles to begin purchasing clean-fuel vehicles.\footnote{Id. The impact of the 1990 amendments was significant. Since natural gas is a relatively clean-burning fuel, it became an attractive energy source for industries seeking to lower their emissions. \textit{Id.} Most electric utilities met the legal threshold by fuel-switching to low-sulfur coal or by increasing the use of gas at existing units. \textit{Id.} The legislation, proposed by President Bush was designed to address three major issues: acid rain, urban air pollution, and toxic air emissions.}

The legislation, proposed by President Bush was designed to address three major issues: acid rain, urban air pollution, and toxic air emissions.\footnote{Overview: The Clean Air Act Amendments of 1990, The U.S. Environmental Protection Agency, \url{http://www.epa.gov/oar/CAA/overview.txt} (last visited March 3, 2008). Clearly compliance with the Act was still an issue even thirteen years after the 1977 amendments. According to the Encyclopedia of Earth: [The] Clean Air Act of 1990 introduces a permit program for large sources that release pollutants into the air. The permit includes information on which pollutants are being released, how much may be released, and steps the source's owner or operator are taking to reduce the pollution. This permit system simplifies and clarifies business' obligations for reducing air pollution. The 1990 Clean Air Act includes other provisions to reduce interstate air pollution, and covers pollution that originates in Mexico and...}
It was not until 1998 that the question of whether carbon dioxide should be classified as an air pollutant was addressed. In what has become known as the Cannon Memorandum, the former EPA General Counsel, Jonathon Cannon, found that carbon dioxide ($CO_2$) is in fact an air pollutant under Section 302(g) of the Clean Air Act.\(^{54}\)

The memorandum specified, however, that in order for the EPA to be required to regulate this air pollutant, there must be a finding of endangerment to public health or welfare.\(^{55}\)

Canada that is transported into the United States as well as pollution that originates in the United States and affects Canada and Mexico. The EPA’s enforcement powers broadened with the new amendment; the EPA is now authorized to fine violators and increase penalties for violations of the Act...

The 1990 amendment also addresses acid rain pollution by creating a market-based system as a means to reduce sulfur dioxide emissions from power plants. There are two phases; Phase I targets the highest emission producing plants, which were expected to achieve reductions by 1995, and Phase II, which began in 2000, affects smaller plants and calls for stricter reductions from Phase I sources. Companies are allowed to either bank their allowances or trade them with other companies.


54. Memorandum from Jonathan Z. Cannon to Carol M. Browner, Administrator, on EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources, pg 2 (April 10, 1998). The opinion written by Cannon was done so at the request of Congressman DeLay and was meant to determine whether the EPA had the authority to control the pollution requirements for four pollutants: nitrogen oxide, sulfur dioxide, carbon dioxide, and mercury. These questions arose with regard to restructuring of the utility industry and electric power utilization. Then current General Counsel, Gary Guzy, reiterated this view before a Congressional hearing in October 1999. Testimony of Gary S. Guzy before a Joint Hearing of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs of the Committee on Government Reform and the Subcommittee on Energy and Environment of the Committee on Science, U.S. House of Representatives (October 6, 1999).

55. Memorandum from Jonathan Z. Cannon to Carol M. Browner, Administrator, on EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources, 4 (April 10, 1998). Interestingly, both Guzy and Cannon stressed that EPA "has made no determination to date to exercise [its] authority" to regulate greenhouse gases under the Act. *Id.* Yet both clearly believe that EPA could move forward with regulation if it wanted to – or if it thought such a move were politically viable.
In *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, respondents, tobacco manufacturers and retailers, argued the FDA had not properly exercised its authority under the Food, Drug, and Cosmetic Act (FDCA) in deciding to regulate tobacco products. Respondents argued that broad congressional grant of authority on the face of an act, and an agency’s abuse of such broad authority to regulate an area of political and economic sensitivity. The FDCA grants the FDA authority to regulate “drugs” and “devices”, two categories in which the FDA argued tobacco products neatly fit. The United States Supreme Court turned to the plain language of the statute to determine Congress’ intent and held there was no intent to allow the FDA to regulate tobacco. The court reasoned that to allow the FDA to regulate tobacco would allow a ban on tobacco under the FDCA which would be in clear conflict with Congress’ intent to keep tobacco on the market.

**III. FACTS**

57. *Id.*
58. *Id.* at 142. Once again the court is examining the face of the authorizing statute, a practice of many courts, and eventually a concept which leads to the Supreme Court’s ruling in the present case. In considering Congress’ intent, the court in *Brown & Williamson* says: “Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA’s jurisdiction.” *Id.; see also infra* note 59 (explaining the steps made to arrive at this conclusion). Further, the court explains that, when looking at “tobacco-specific legislation” passed by Congress in the last 35 years, there have been six separate pieces of legislation enacted since 1965 addressing the problem of tobacco use and its effect on health. *Id.* at 143. All of these pieces of legislation require, among other things, warning labels on packaging, prohibit certain advertising, and report research findings on the addictive nature of tobacco. *Id.* at 143-44; *see infra* note 127 (citing in full the legislation which conflicted with a finding that the FDA should regulate tobacco).
59. *Brown & Williamson*, 529 U.S. at 142-43. The court made this conclusion because clearly tobacco would not be safe for the public health under FDA standards. Thus, by default, if the FDA were given the authority to regulate tobacco, the FDA would be required to ban it in order to fulfill its obligation to protect public health. This is because, under the FDCA, any product regulated by the FDA must be safe for intended use, except those products which are banned. *Id.*
On October 20, 1999, several organizations, including the International Center for Technology Assessment (ICTA), petitioned the EPA to regulate certain greenhouse gas emissions from new motor vehicles and engines. The petitioners cited various sources, including Title II of the Clean Air Act, beginning with Section 202(a)(1), as evidence of authority granted to the EPA Administrator to regulate pollution emissions from new motor vehicles. In 2003, in response to the rulemaking petition and after a notice and comment period, the EPA General Counsel, Robert Fabricant, removed the Cannon Memorandum and stated that carbon dioxide and other greenhouse gases cannot be considered air pollutants for any contribution they may make to global climate change. In denying the rulemaking petition, Fabricant cited Brown & Williamson Tobacco Corp., relating the broad grant of authority


61. See supra note 1 and accompanying text.

62. The EPA received almost 50,000 comments from the public on the petition. See 68 Fed. Reg. at 52,924. This could be construed as strong evidence of the widespread public concern over global warming.

63. Robert E. Fabricant, Memorandum, EPA’s Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act (Aug. 28, 2003), available at http://www.connellfoley.com/hselaw/pdf/Fabricantmemo.pdf (hereinafter Fabricant Memorandum). Fabricant stated that Cannon’s findings no longer represented the views of the EPA’s General Counsel. Id. Fabricant explained that “[a]lthough the Act specifically authorizes information development and ‘non-regulatory’ measures related to global climate change, there is no indication that Congress intended EPA to regulate in this particular area.” Id. He also relies on the Supreme Court’s decision in the Brown & Williamson case (see discussion infra notes 56-59 and accompanying text) as evidence the EPA was “urged on this view” that the agency cannot rely on broad grants of power to regulate large industries in the economy. 68 Fed. Reg. 52,926. Interestingly, the two prior memoranda (Cannon’s memo as well as Guzy’s) were both issued while President Clinton was in office. Fabricant was appointed by President Bush, whose environmental policy was much more controversial than that of President Clinton. The Bush Administration took multiple initiatives to encourage control of climate change. Such initiatives included efforts to promote fuel cell and hybrid vehicles and a move toward developing hydrogen fuel as opposed to gasoline for permanent use in vehicles. See Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003).
given the EPA by the CAA to the similarly broad authority given the FDA by the FDCA. Fabricant noted that greenhouse gases (GHGs) are a similarly politically sensitive area of the regulation, the regulation of which must be substantiated by Congress’ intent to designate such authority. Fabricant found there was no such intent on the part of Congress and relied on the fact that in 1990, amendments to the CAA which would place GHGs under the EPA’s strict control were rejected. Further, the EPA argued Congress had addressed global climate change in other legislation and that to regulate greenhouse gases would have an even greater economic effect than would regulating tobacco in Brown & Williamson. The EPA concluded that such GHGs did not fall under the CAA’s definition of air pollution. The denial of the rulemaking petition also claimed regulation of GHGs would conflict with the Department of Transportation’s authority to set mileage standards for new motor vehicles under the Energy Policy Conservation Act.

Lastly, in denying the rulemaking petition, the EPA argued that even if Congress had granted the EPA the authority to regulate GHGs from new motor vehicles, action under section 202(a)(1) is not

64. See Fabricant Memorandum.

65. Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. at 52,928. In other words, when the issue is of such political and social sensitivity and relevance, an agency cannot just find implied power to regulate such issue but must find that congress actually intended the agency to regulate it.

66. See 68 Fed. Reg. at 52,928-29. The EPA relied on the fact that Congress “was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990” thus declining to adopt a proposed amendment, establishing that the EPA’s authority to regulate greenhouse gas emissions was a clear sign of intent not to delegate such authority. 68 Fed. Reg. at 52,926. The EPA stood for the proposition that Congress never intended the agency to regulate concentrations of pollutants that are consistent throughout the world, but intended only for the EPA to regulate local pollutants. 68 Fed. Reg. at 52,927.

67. 68 Fed. Reg. at 52, 928. The EPA’s ultimate conclusion was that Congress would have needed to specifically grant the EPA authority to regulate greenhouse gases for such statutory authority to exist.

68. 68 Fed. Reg. at 52, 928.

69. Id. The EPA explained its reasoning by noting that the only way to curtail vehicular greenhouse emissions is to regulate fuel economy, which would conflict with the Department of Transportation’s authority. 68 Fed. Reg. at 52,929.
mandatory, thus refusing to act is fully justified.\textsuperscript{70} The EPA cited the wording in Section 202 of the Clean Air Act, which states that it is at the discretion of the Administrator to make a finding of endangerment, thus declining to implement rulemaking is fully justified, especially given the scientific uncertainty as to the effects of GHGs on public health and welfare.\textsuperscript{71} The agency did recognize that the concentration levels of greenhouse gases have dramatically increased as a result of manmade emissions and that accompanying increases in air temperature have occurred, but denied the existence of proof of a clear causal link between the two.\textsuperscript{72} The EPA used this uncertainty as further support for its denial of the rulemaking petition.\textsuperscript{73} Finally, the EPA argued regulation of motor-vehicle emissions would be a “piecemeal approach” to climate change and would conflict with any “comprehensive program” developed by the executive branch to address the problem.\textsuperscript{74}

Upon denial of the rulemaking petition twelve states, three cities, and several major environmental groups, along with the original petitioners, filed a lawsuit with the United States Court of Appeals for the District of Columbia Circuit, pursuant to Section 307 of the Clean Air Act.\textsuperscript{75} The case was heard by a three-judge panel that

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  \item \textsuperscript{70} 68 Fed. Reg. at 52,929.
  \item \textsuperscript{71} \textit{Id.} The EPA offered various policy arguments in support of the denial of rulemaking petition. Namely, the EPA argued regulation of GHGs would be ineffective and would result in “an inefficient, piecemeal approach to addressing the climate change issue.” 68 Fed. Reg. at 52,930. EPA also claimed regulations of GHGs under Section 202 would involve foreign policy issues and likely conflict with voluntary emission reduction plans already in effect. 68 Fed. Reg. at 52,929.
  \item \textsuperscript{72} 68 Fed. Reg. at 52,930.
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} 68 Fed. Reg. at 52,931, 52932.
  \item \textsuperscript{75} Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005). Section 307(b) of the Clean Air Act states:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under
ruled against petitioners in a split decision. Judge Raymond Randolph found for the EPA, concluding the agency correctly cited policy reasons for declining to engage in rulemaking. Judge Randolph determined the Administrator’s exercise of “judgment” as to whether a pollutant could “reasonably be anticipated to endanger public health or welfare” could be based on scientific uncertainty as well as other policy factors, including the concern that unilateral regulation of U.S. motor-vehicle emissions could weaken efforts to reduce greenhouse gas emissions from other countries. Judge David Sentelle concluded that petitioners had failed to “demonstrat[e] the element of injury necessary to establish standing under Article III” in that they did not allege “particularized injuries” to themselves. Sentelle joined Randolph’s judgment on the merits in finding for the EPA. Judge David Tatel dissented, arguing Massachusetts’s harm was particularized because the state was losing acres of coastline due to rising waters as a result of global warming, and that EPA’s reasons for refusing to regulate were incoherent and did not form a basis for the agency’s decision. This fractured decision gave no guidance for future challenges to global warming.

section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.

Clean Air Act § 307(a), 42 U.S.C. §7607(a).
76. Massachusetts v. EPA, 415 F.3d at 58.
78. Massachusetts v. EPA, 415 F.3d at 58. In ruling in this manner, Judge Randolph gave the EPA the ability to avoid making an endangerment determination as required by the Clean Air Act. He did so by improper reliance on Ethyl Corp. See infra note 140.
79. Massachusetts v. EPA, 415 F.3d at 59-60 (Sentelle, J., dissenting).
80. Id. at 60-61 (Sentelle, J., dissenting).
81. Id. at 64-66, 67-82 (Tatel, J., dissenting). Judge Tatel gave multiple reasons for agreeing with the petitioners that the CAA explicitly gives the EPA authority to regulate greenhouse gas emissions. See id. at 61-62 (Tatel, J., dissenting). Primarily Tatel argued for a strict, plain language reading of the CAA which did, according to him, provide the EPA with authority to regulate “any air pollutant.” See id. at 67 (Tatel, J., dissenting) (arguing that based on the plain language of the statute, the EPA is authorized, in its judgment, to regulate greenhouse gas emissions from new motor vehicles). Judge Tatel also opined that
After a rehearing en banc was denied, Massachusetts filed a petition for a writ of certiorari with the United States Supreme Court on March 2, 2006 and, on June 26, 2006, certiorari was granted.82 One of the EPA’s primary arguments was that uncertainty surrounding various features of climate change justified the EPA’s denial of the rulemaking petition to regulate greenhouse gases.83 The three relevant issues raised in the case were: 1) Do Massachusetts and the other petitioners have legal standing to bring the lawsuit?;84 2) Are greenhouse gases “air pollutants” under section 202 of the federal Clean Air Act?;85 and 3) In refusing to regulate greenhouse gases under Section 202, may the EPA consider factors other than public health and welfare?86

In a forty-page opinion, including two dissents, the Supreme Court held in favor of the petitioners in a close, five to four split.87 Justice Stevens, writing for the majority, found Massachusetts did have standing to sue and that the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions from new motor vehicles in the event the Administrator forms a “judgment” that such emissions contribute to climate change.88 Further, Stevens found the EPA can

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scientific uncertainty is not addressed in the CAA as a reason for deciding not to issue regulations under the statute. See id. at 77-78 (Tatel, J., dissenting).

In another surprising similarity to the eventual majority opinion in the Supreme Court, Judge Tatel also argued that not only was scientific uncertainty absent from the list of considerations permissible for the Administrator in deciding whether to regulate, but the one consideration, endangerment to public health and welfare, that is in the statute was not even considered by the EPA. See id. at 77 (Tatel, J., dissenting). Judge Tatel’s remaining arguments are all surprisingly similar to those made in the majority opinion in the present case in the Supreme Court.

Judge Tatel also criticized the EPA’s reliance on Brown & Williamson and congressional inaction as misplaced. Id. at 71 (Tatel, J., dissenting). He explained that because the EPA has already extensively been regulating the energy and transportation industries under the CAA, the EPA’s regulation of greenhouse gas emissions would be accepted under the CAA. Id. (Tatel, J., dissenting).

84. Massachusetts, 127 S.Ct. at 1452-53.
85. Id. at 1459.
86. Id. at 1462.
87. Id. at 1464.
88. See Id. at 1452-1458.
avoid taking regulatory action with respect to greenhouse gas emissions from new motor vehicles only if the agency determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.  

IV. SUMMARY AND ANALYSIS OF THE COURT'S OPINION

A. Justice Steven's Majority Opinion

Justice Stevens begins with an emphatic opening, explaining there is "well-documented" history as to the rise of global temperatures and the coinciding build-up of carbon dioxide. He is quick to point out this theory is supported by "respected scientists" and proceeds to detail the effects of carbon dioxide on the atmosphere by trapping heat. Justice Stevens notes the petitioners' concerns that global warming is "the most pressing environmental challenge" of this era and outlines the two issues at hand in this case: "whether the EPA has the statutory authority to regulate greenhouse gases from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the authorizing statute."

Justice Stevens points to the relevant aspects of the Clean Air Act by citing Section 202(a)(1), 42 U.S.C. § 7521(a)(1), and pointing out that the Act defines "air pollutant" broadly under § 7602(g) as well as "welfare" under § 7602(h). When these provisions were enacted,
knowledge of climate change and its causes were largely unknown though increasing carbon dioxide levels, Stevens says, were duly noted. He describes the increasing awareness of the effects of carbon dioxide in the 1970's as evidenced by congressional actions like the enactment of the National Climate Program Act and requests by President Carter for National Research Council investigation of the subject. In the 1980's Congress continued to take action by enacting the Global Climate Protection Act requesting that the EPA propose a national, integrated program to combat deforestation and other likely effects of climate change after learning that "manmade pollution...may be producing a long-term and substantial increase in the average temperature on Earth." Finally, Stevens notes, in 1990

94. Massachetts, 127 S.Ct. at 1447.
95. Id. at 1448. The NRC's response to President Carter's request was that increasing carbon dioxide levels will result in substantial climate changes and "a wait-and-see policy may mean waiting until its too late." Id. (quoting the Climate Research Board, Carbon Dioxide and Climate: A Scientific Assessment, p. vii (1979)).
96. Id. at 1448 (quoting The Global Climate Protection Act of 1987 § 1102(1)). In the Global Climate Protection Act of 1987, Congress acknowledged that while the effects of global warming/climate change may not be "fully manifest" until the next century, deforestation and pollution may be contributing to the irreversible process. The Global Climate Protection Act of 1987 § 1102(3). The key goals of the Act were to increase global understanding, cooperation, and development of technologies aimed to combat the greenhouse effect. § 1103(a). Under the Act, the President was responsible for "developing and proposing to Congress a coordinated national policy on global climate change." § 1103(b). The EPA and the Secretary of State were ordered by the Act to jointly submit to Congress a report on the current scientific understanding of the greenhouse effect and its consequences, and assessment of United States efforts to gain international cooperation in limiting global climate change, and provide a description of the strategy by which the US intends to gain further international cooperation. § 1104.

It seems that, by this Act, Congress clearly involved the EPA in this issue on an international level, which, to some degree, trumps the EPA's argument that international affairs issues absolve the agency from having to regulate greenhouse gas emissions. See 68 Fed. Reg. 52,931-32 (EPA's policy arguments as to why it would be inappropriate to engage in such regulation at this time).

If, as long ago as 1980, Congress turned to the EPA to combat deforestation and air pollution which contributed to global warming, it seems very likely
the Intergovernmental Panel on Climate Change (IPCC) published a report on the topic, affirming that the effect of manmade emissions is in fact global warming which results in warming of the Earth’s surface. This IPCC report, Stevens explains, led to an agreement among 154 nations to reduce carbon dioxide and other greenhouse gases. Within five years the IPCC was unequivocally confirming its 1990 report.

After concluding his brief historical background on the understanding of global warming and resulting executive branch actions, Justice Stevens gets to the petitioner’s arguments: mainly that substantial evidence shows that greenhouse gas emissions lead to climate change which has led to record warm temperatures which will likely lead to serious effects on human health and the environment. The petitioners cited the Cannon Memorandum’s finding that carbon dioxide emission is within the EPA’s authority to regulate as evidence the EPA itself has admitted having such authority. Justice Stevens summarizes the history of petitioners’ request for rulemaking which concluded in 2003 with the denial of the rulemaking petition. He makes note that before the close of the comment period on the rulemaking petition the White House sought assistance in clarifying uncertainties in the realm of climate change from the National Research Council which resulted in a 2001 report confirming that “greenhouse gases are accumulating...as a result of Congress would turn to the EPA presently to continue to regulate, or begin to regulate in a different manner, greenhouse gas emissions.

97. Massachusetts, 127 S.Ct. at 1448.
98. Id. This occurred at the United Nations “Earth Summit” in 1992 in Rio De Janeiro. Twenty years after the first global environment conference, the UN sought to help Governments rethink economic development and find ways to halt the destruction of irreplaceable natural resources and pollution of the planet. The Earth Summit was the planning, education and negotiations among all Member States of the United Nations, leading to the adoption of Agenda 21, a wide-ranging blueprint for action to achieve sustainable development worldwide.
99. Id. at 1449.
100. Id.
101. Id. As discussed supra, the Cannon Memorandum was withdrawn in 2003 during response to the rulemaking petition by the EPA former General Counsel. See supra note 63.
human activities...” and emphasizing that “temperatures are, in fact, rising.”103 A summary of the D.C. Circuit court’s ruling on the matter and denial of the petitioner’s claim follows.104

In the first section of analysis, Justice Stevens determines the issue of standing, one this case note will mention as relevant summary of the case but not discuss in great detail. Article III of the United States Constitution requires all cases brought in federal court meet the cases and controversies requirement.105 In other words, federal courts may not decide hypothetical issues but must wait until injured parties bring cases to their courts.106 Justice Stevens, in a lengthy discussion addressing the various claims the EPA asserted against petitioner’s standing, concludes that Massachusetts does in fact have standing to bring their claim in federal court.107 He explains that Massachusetts, having a majority of its borders on the sea, has a particular injury in that the state has a sovereign interest in protecting its land from rising sea levels caused by global warming resulting from greenhouse gas emissions.108 Importantly, Justice Stevens notes that petitioners were granted statutory authorization under 42 U.S.C. § 7607(b)(1) to bring suit to assert their rights under the Clean Air Act “without meeting all of the normal requirements of redressability and immediacy” though actual injury must have been

103. *Massachusetts*, 127 S.Ct. at 1450 (quoting Climate Change: An Analysis of Some Key Questions (NRC Report), 1 (2001)). It is important to note that, although this definitely shows there is increasing awareness and concern for global warming and emissions causing global warming, it does not necessarily have anything to do with the EPA nor is it evidence the EPA is supposed to regulate such emissions. The NRC report was cited by both Judge Tatel in his dissenting opinion in the D.C. Circuit Court opinion on this case as well as here, in the majority opinion of the Supreme Court ruling. *See Massachusetts v. EPA*, 415 F.3d at 77 (Tatel, J., dissenting).
105. *See* U.S. CONST. art. III. There are three requirements to establish standing: 1) injury in fact; 2) causation; and 3) redressability.
106. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Parties bringing suit in federal court must have suffered an actual injury as a result of the challenged act, the injury must be “fairly traceable” to the act, and court must be able to give a decision that would provide relief to the party. *Id.* at 559-60.
108. *Id.* at 1454.
suffered. He notes that when a state enters the union it surrenders certain sovereign prerogatives to the Federal Government, such that the state cannot enter into treaties with foreign countries or invade other states to force reductions in greenhouse gas emissions. Thus, Congress has “ordered EPA to protect Massachusetts (among others) by prescribing standards” for the limitation of pollutants from new motor vehicles deemed to effect the public health and welfare. Justice Stevens finds that, given “Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in [the Court’s] standing analysis.” Stevens concludes that Massachusetts had suffered concrete harm, there is a causal connection between the harm and the emission of greenhouse gases, and that reducing the rate of increase in greenhouse gas emissions would slow the harmful progress of climate change.

In the fifth section of his opinion, Justice Stevens delves into the merits of the case, the focus of this case note. He begins by defining the Court’s scope of review as narrow and says that Chevron deference must be given to the agency’s actions. Most importantly, agency discretion is at its height when the agency

109. Id. at 1453. Under 42 U.S.C. § 7607(b)(1) “A petition for review of action of the Administrator in promulgating any ... standard under section 7521 of this title ... or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.”
110. Id. at 1454.
111. Id.
112. Id.
113. Id. at 1455-57. The court determined actual injury was suffered as a result of global warming’s effect on natural ecosystems. Id. Since the court has previously held that only one of the petitioners needs to have standing to permit the case to be considered for review, a finding that Massachusetts has standing allows the case to proceed on the merits. Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47 (2006).
114. Massachusetts, 127 S.Ct. at 1459. According to the Court in Chevron v. NRDC, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. Chevron U.S.A Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-845 (1984). Courts are to defer to agency interpretations where the statute is silent or ambiguous with respect to the specific issue and look only for evidence the agency acted in an arbitrary or capricious manner. Chevron, 467 U.S. at 842-843.
decides not to bring an enforcement action. Justice Stevens quickly notes that there is a distinct difference here between denying a petition for rulemaking where parties have a procedural right to bring and refuse to bring enforcement actions. Since the Clean Air Act specifically permits review of the EPA’s denial of rulemaking petitions under Section 307 of the Clean Air Act, Stevens is permitted to review and reverse the EPA’s actions using the arbitrary and capricious standard discussed previously. With this standard of review in mind, Justice Stevens begins his resolution of the questions which have arisen in the case.

1. Does section 202(a)(1) of the Clean Air Act authorize the EPA to regulate greenhouse gas emission from new motor vehicles in the event that it forms a “judgment” that such emissions contribute to climate change?

115. Massachusetts, 127 S.Ct. at 1459. The Court, in Overton Park v. Volpe, allowed judicial review of an agency discretionary decision, and required the agency to explain how it considered the two factors it had to satisfy to grant funds for highway construction that went through a city park. Citizens to Pres. Overton Park, Inc. v. Volpe, 357 F.Supp. 846 (D. Tenn. 1973). The agency was required to offer reasons for its decision consistent with these factors.

However, in Heckler v. Chaney, the court refused to allow judicial review of an agency decision by the FDA to not enforce food and drug law requirements before states could legally use drugs for lethal injections. Heckler v. Chaney, 470 U.S. 821 (1985). The agency non-enforcement decision was within the agency’s exclusive discretion, and there was no law to apply (there were no factors the agency was required by law to consider in making its decision as there were in Overton). Id. The court in Heckler ruled that because enforcement decisions usually require a high level of agency coordination and expertise and because there is inherently a lack of danger the agency is exercising coercive power by refusing to act, that substantial deference was owed to such decisions. Id. at 831-32. The Court in Massachusetts v. EPA found a distinct difference between the refusal to enforce a rule in Heckler and the EPA’s denial of the rulemaking petitions in Massachusetts. Further, the Court relied on the Clean Air Act itself for the notion that review of such a decision by the Court was warranted. See Clean Air Act § 307(b), 42 U.S.C. § 7607(b); see also supra note 75.

116. Massachusetts, 127 S.Ct. at 1459.

117. Id.; see supra note 114 and accompanying text (discussing the Chevron deference standard and use of the standard).

118. Massachusetts, 127 S.Ct. at 1459.
Justice Stevens unequivocally answers this question in the affirmative, finding that the express wording of Section 202 grants authority to the EPA to regulate greenhouse gas emissions from new motor vehicles. The EPA’s counter argument to this remains rooted in the belief that Congress did not intend for the EPA to regulate emissions affecting climate change. Thus, under this reasoning, carbon dioxide as an emission that affects climate change does not qualify under the statute as an “air pollutant.” Justice Stevens quashes this argument by emphasizing the statute’s repeated use of the word “any” when describing the air pollutants the EPA is authorized to regulate. Stevens interprets Congress’ intent as broad and meaning that the EPA must regulate “all airborne compounds” and that the statute is “unambiguous” on this point. In a related discussion, Stevens nullifies the EPA’s argument that post-enactment legislative history shows Congress meant to curtail

119. Id.

120. Id. at 1460. This argument on the EPA’s part is lacking, and finds its basis mostly in the EPA’s point that post enactment legislative history indicates contrary Congressional intent. As indicated by the Court, post enactment legislative history is a weak argument for the intent of Congress in enacting the statute.

121. Id.

122. Clean Air Act § 302(g), 42 U.S.C. § 7602(g); Massachusetts, 127 S. Ct. at 1456. Stevens argues for looking to the plain meaning of the statute. In his view, under the plain meaning there is no ambiguity, thus the EPA did not need to interpret the statute. It was clear: the EPA had authority to regulate greenhouse gases because the statute chose, by plain language, to define its terms broadly. This is one main argument opposing Justice Scalia’s dissent which argues for Chevron deference and criticizes Steven’s improper analysis of the EPA’s decision not to initiate rulemaking. See also infra notes 133-34 and accompanying text (containing the portion of Steven’s opinion which addresses the relevance of what he views to be the broad language of section 202(a)). This argument by Stevens, that because the plain language of the statute was unambiguous the EPA was not entitled to interpret it, is extremely important to the face of judicial review of agency decisions. The Court found that no interpretation was permissible because the agency was bound to the plain language due to their inability to produce information to indicate contrary Congressional intent. Id. It seems that such proof would require some interpretation on the part of the agency anyway. Instead the decision by the court may suggest a two part method for the agency to pursue: first, identifying the plain language of the statute and second, determining whether contrary Congressional intent existed. The EPA failed to clearly explain any contrary intent by Congress, thus under this reasoning by the Court the EPA cannot prevail. See infra note 128 and accompanying text.
the agency’s power to regulate greenhouse gases by pointing out that even if this was the case, the EPA failed to correctly identify any such history. He further emphasizes that Congress’ efforts to promote research and interagency collaboration “do not conflict with any thoughtful regulatory effort; they complement it.”

Justice Stevens then outlines two reasons why the EPA’s reliance on *Brown & Williamson Tobacco Corp.* was incorrect. First, where the FDA would have banned tobacco, the EPA in the present case could only regulate greenhouse gas emissions. Further, in *Brown & Williamson* Congress had no intent to ban tobacco products whereas there is no such argument in the present case as to Congress’ intent not to curtail harmful emissions leading to global warming. Second, Stevens explains, in *Brown & Williamson* there were congressional enactments that would directly conflict with anything but a finding that the FDA did not have the authority to regulate tobacco. Here, there are no conflicting congressional enactments that would make EPA regulation of greenhouse gas emissions from

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125. *Id.* at 1461.

126. *Id.* On the contrary, Congress’ various actions show they in fact wish to do that very thing: curtail greenhouse gas emissions.

127. *Id.* In *Brown & Williamson* the court explained:

Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco and human health. Those statutes, among other things, require that health warnings appear on all packaging and in all print and outdoor advertisements, prohibit the advertisement of tobacco products through any medium of electronic communication subject to regulation by the Federal Communications Commission, require the Secretary of HHS to report every three years to Congress on the research findings concerning the addictive property of tobacco, and make States’ receipt of certain federal block grants contingent on their making in unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18.

*Brown & Williamson*, 529 U.S. at 143-44 (citations omitted). It would clearly be counterintuitive to then ban tobacco when there are six specific statutes regulating tobacco.
new motor vehicles nonsensical. The EPA even affirmed that it had such authority in 1998.

Next, Justice Stevens diminishes the EPA’s argument that regulation of greenhouse gas emissions from new motor vehicles would conflict with the Department of Transportation’s duties to set mileage standards. He emphasizes that the EPA’s duty to protect the public’s “health” and “welfare” is an environmental duty separate from the Department of Transportation altogether. There is no reason to believe the two agencies cannot both carry out their duties while avoiding inconsistency.

Justice Stevens notes that while Congress did not have all knowledge of global warming and climate change when it adopted Section 202(a)(1) of the Clean Air Act, it assumed flexibility would be necessary which is why they chose the broad language used. He concludes this section of analysis by emphasizing that, because greenhouse gases fit well within the Clean Air Act’s broad definition of “air pollutant,” the EPA does have the necessary statutory authority to regulate such emissions from new motor vehicles.

128. Massachusetts, 127 S.Ct. at 1461.
129. Id.
131. Massachusetts, 127 S.Ct. at 1462 (quoting Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1)).
132. Id. This may be a stretch. Perhaps the rule should be that the EPA cannot regulate in a manner which would directly conflict with the Department of Transportation’s (DOT) regulations. Hypothetically, the EPA should not be allowed to do things like set mileage standards, a role for the DOT, but must instead find a means of regulating greenhouse gas emissions from new motor vehicles in some manner which would not directly conflict with the DOT’s methods.
133. Id. As Section 202(a)(1) states:

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, 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.

2. The EPA’s “Even-if” Argument

In the seventh section of his opinion, Justice Stevens addresses the EPA’s argument that even if statutory authority does give the agency the right to regulate greenhouse gas emissions from new motor vehicles, it would be unwise to do so at this time. Stevens points out that although the statute does authorize the Administrator to exercise “judgment,” that judgment is to be exercised with respect to an air pollutant’s possible harm to health and welfare of the public, not just a discretionary exercise of judgment for any reason. The exercise of judgment, Stevens explains, is to turn on a finding of endangerment. A finding of endangerment would require the EPA to regulate the dangerous emissions from new motor vehicles. Stevens clarifies that, under this rationale, the only way for the EPA to avoid regulating such emission would be to find that greenhouse gases do not contribute to climate change, or provide “some

134. *Massachusetts*, 127 S.Ct. at 1462. In Justice Steven’s opinion he clearly views Congress’ use of broad terminology to be an attempt to allow for regulatory flexibility and provide the agency with the ability to respond to changing circumstances that would likely arise as technology progressed over the coming decades. This is likely a valid interpretation of Congress’ choice of terminology and would very well lead to the conclusion Stevens has come to: that greenhouse gases were meant to be included in the definition of “air pollutant” as it became evident through scientific advancements that such gases were becoming a threat to the public health and welfare. Does this evaluation of Congress’ intent necessarily eliminate the possibility that Congress intended otherwise, as Scalia suggests in his dissent? See infra section C. While Justice Stevens may be correct that broad wording was used under Section 202(a) of the CAA to allow other, then unknown pollutants to qualify for regulation under the statute, it may have been a stretch to assume that such an allowance was intended to be made for greenhouse gases specifically.

135. *Id.*

136. *Id.* As the court in *Natural Resources Defense Council* noted, where a statute authorizes an agency Administrator to exercise their own discretion under the mandates of the statute, that discretion, whether express or implied, must be used to satisfy the statutory standard, not avoid the statutory standard. See *Natural Res. Def. Council*, 824 F.2d at 1164-65. See also supra note 49 and accompanying text (emphasizing this standard in *Natural Resources Defense Council* and *Massachusetts v. EPA* in the final Supreme Court ruling).


138. *Id.*
reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”'

Justice Stevens vehemently discredits the EPA’s “laundry list” of policy reasons given not to regulate, as having to do with whether greenhouse gas emissions do or do not contribute to climate change endangering public health and welfare. In particular, the EPA argued that regulation of greenhouse gases would conflict with the President’s goals in negotiating with foreign nations on the matter.

139. Massachusetts, 127 S.Ct. at 1462.
140. Id. Judge Randolph, writing for the majority in D.C. Circuit Court opinion, cited Ethyl Corp. for the proposition that policy considerations are permissible in deciding rulemaking petitions where an assessment of risk exists. See Massachusetts, 415 F.3d at 58. Judge Randolph explained:
The EPA Administrator's analysis, although it did not mention Ethyl, is entirely consistent with the case. In addition to the scientific uncertainty about the causal effects of greenhouse gases on the future climate of the earth, the Administrator relied upon many "policy" considerations that, in his judgment, warranted regulatory forbearance at this time.
Id. (quoting 68 Fed.Reg. at 52,929). Justice Stevens, writing for the majority in the present case heard by the Supreme Court, clearly ruled policy considerations were not part of the plain language of the CAA as factors the Administrator was permitted and required to consider in making a decision whether to permit a rulemaking petition. Though Justice Stevens refrains from delving into the inadequacies of reliance on Ethyl Corp. for the notion that such policy considerations are permissible, but it would seem, on its face, that the holding in Ethyl Corp. is in fact a valid argument to sustain policy considerations.

In Ethyl Corp. the court permitted policy considerations because the policy considerations went to the issue of whether the statutory standard of endangerment was met. The EPA’s policy considerations in the present case, however, were not related to a finding of endangerment. The policy considerations made by the EPA Administrator were primarily related to effectiveness of foreign policy and potential conflicts between the Department of Transportation and the EPA. Thus, a clear difference exists between applying Ethyl Corp. to all situations of agency risk assessment and allowing policy considerations to always gap-fill statutory ambiguity as a factor in agency discretionary decisions where factors are not explicitly provided. Merely allowing policy considerations to help agencies determine whether statutory requirements have or have not been met before issuing new rules and regulations seems to be the proper application of Ethyl Corp.

141. 68 Fed.Reg. at 52932. The Constitution does allocate certain matters of foreign affairs to Congress and others to the Executive branch. U.S. CONST. art. I, 8; art. II, §§ 2-3. The courts generally agree the President plays the most prominent role in conducting foreign relations, though this role is not without limit. See First
Stevens points out the EPA has previously been given authority in areas where the President also has authority yet the EPA is not required to consult with the state department in formulating its policies and rules.142

Justice Stevens also disregards the EPA’s claim that uncertainty surrounding climate change justifies inaction by the agency.143 If sufficient information does not in fact exist to make an endangerment finding, Stevens explains, the EPA must state this as its reason for declining to engage in rulemaking.144 In other words, the EPA cannot just decline to regulate greenhouse gases solely because of some uncertainty surrounding the issue because this is not in line with the statutory context of the EPA’s duties.145

Stevens concludes by finding the EPA’s decision arbitrary and capricious because no reasons were offered as to whether greenhouse gases contribute to climate change endangering the health and welfare of the public.146 Since policy concerns are not part of the Clean Air Act’s language, these are not considered valid reasons for

\footnotesize{Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972); see also United States v. Curtis-Wright Export Corporation, 299 U.S. 304, 319 (1936).}

142. Massachusetts, 127 S.Ct. at 1463.

143. Id. See supra notes 25-31 and accompanying text (discussion of Ethyl Corp.); see infra notes 145-46 (discussion of scientific uncertainty), infra notes 172-73 and accompanying text (discussing uncertainty as a grounds for which EPA could exercise its discretion not to regulate greenhouse gas emissions).

144. Massachusetts, 127 S.Ct. at 1463.

145. Id. Justice Scalia, in his dissent, makes a wholly separate argument that seems to stand on all fours, when compared to the present argument by Justice Stevens. Scalia notes the NRC report relied on by the EPA as evidence of scientific ambiguity and argues the EPA, in referencing the NRC report extensively, did explicitly state that scientific ambiguity exists. See Massachusetts, 127 S.Ct. at 1475; see also infra note 184 and accompanying text (discussing this argument regarding the NRC report language as specifically referencing scientific uncertainty, but also noting that Judge Tatel, in his dissent in the D.C. Circuit opinion, stood for the proposition that the NRC report contained adequate scientific knowledge to determine whether endangerment exists).

146. Massachusetts, 127 S.Ct. at 1463. Justice Scalia takes a clearly opposite view with regard to the validity of the EPA’s reasoning, stating “The reasons the EPA gave are surely considerations executive agencies regularly take into account (and ought to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy.” Id. at 1473 (Scalia, J. dissenting).}
the EPA’s denial of the rulemaking petition. With these findings, Justice Stevens reverses the Court of Appeal’s judgment in favor of the EPA and remands the case.

B. Chief Justice Roberts’ Dissenting Opinion

Chief Justice Roberts begins his dissent, joined by Justice’s Scalia, Thomas, and Alito, with an admission that global warming may be a “crisis” but emphasizes it is being handled by policymakers in the Executive and Legislative branches. He rejects the petitioners’ broad-ranging injury claim as non-justiciable based on a narrow statute. He views the issues here as ones which the Executive branch must address, not the federal courts.

Chief Justice Roberts’ dissent continues on to address primarily the issue of standing, for which this case note will give a summary but refrain from in-depth analysis.

First, Chief Justice Roberts criticizes the majority’s finding that Massachusetts has standing because he believes the three-part standing test as outlined in Article III of the Constitution has not been met. Specifically, Roberts says Massachusetts and other petitioners have failed to show particularized injury because the loss of coastal land and other injuries resulting from global warming now and in the future will be widespread, not particularized.

Roberts then criticizes the affidavits submitted by Massachusetts attesting to the particularized injury claimed. Roberts says the affidavits fail to establish the sort of “actual” injury the Court

147. Massachusetts, 127 S.Ct. at 1463. It would seem most would argue that policy considerations should always be considered whenever any branch of the government, or administrative agency for that matter, attempts to regulate the actions of individuals, corporations, or other entities.
148. Id. at 1463.
149. Id. at 1463-64 (Roberts, C.J., dissenting).
150. Id. at 1464 (Roberts, C.J., dissenting).
151. Id. (Roberts, C.J., dissenting).
152. Id. at 1467 (Roberts, C.J., dissenting). This seems to imply that no one can ever challenge any agency action relating to global warming. The case of FEC v. Akins, cited by the majority, yet not discussed by Chief Justice Roberts, stood for the very proposition that concrete harm, even though it is widely spread, is enough to satisfy the standing requirements of Article III.
153. Id. (Roberts, C.J., dissenting).
described in detail because the statements were "conclusory" and brought up other reasons, such as "land subsidence," to explain the rising sea levels in Massachusetts and consequent loss of land.\textsuperscript{154} Roberts also thinks the alleged harm was stretched over too long of a span of time to satisfy the requirement of alleged future harm.\textsuperscript{155} He says the declaration that "global warming will cause sea level to rise by 20-70 centimeters \textit{by the year 2100}" is an insufficient span of time and merely a guess at that.\textsuperscript{156} He cites \textit{Whitmore v. Arkansas}, for the proposition that "[a] threatened injury must be \textit{certainly impending} to constitute injury in fact."\textsuperscript{157}

Chief Justice Roberts also believes the causation element of Article III standing requirements was not met. He thinks that petitioners failed to establish that EPA's inaction caused the alleged injuries, since greenhouse gases from new motor vehicles are just one small fraction of the contributing factors in causing global warming.\textsuperscript{158}

As to the final element of standing, redressability, the Chief Justice found the petitioners failed to meet this requirement as well.\textsuperscript{159} He explained that any fractional reduction in greenhouse gas emissions that may result from EPA regulation of such emissions from new motor vehicles would be completely offset by developing nations' emissions.\textsuperscript{160} He criticizes the majority for accepting the petitioners argument that developing nations are more likely to "follow suit," in a sense, if the United States began implementing regulations on greenhouse gas emissions.\textsuperscript{161} He says the Court has

\footnotesize{\begin{quote}
154. \textit{Id.} at 1467 (Roberts, C.J., dissenting) (quoting Petitioners' Standing Appendix in No. 03-1361, etc. (CADC), p. 196, 197 (Stdg. App.)).
155. \textit{Id.} at 1467-68 (Roberts, C.J., dissenting).
156. \textit{Id.} at 1467 (Roberts, C.J., dissenting).
158. \textit{Id.} (Roberts, C.J., dissenting). Roberts explained that "In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners' alleged injury – the loss of Massachusetts coastal land – the connection is far to speculative. \textit{Id.} at 1469. (Roberts, C.J., dissenting).
159. \textit{Id.} at 1469 (Roberts, C.J., dissenting).
\end{quote}
previously held that “a party must present facts supporting an assertion that the actor will proceed in such a manner.”\textsuperscript{162}

Chief Justice Roberts concludes his dissent by criticizing the petitioners’ motives and accusing them of using the judicial court system as a means for carrying out its “policy debates.”\textsuperscript{163}

\textbf{C. Justice Scalia’s Dissenting Opinion}

Justice Scalia joins the Chief Justice’s dissent in full but discusses his dissent on the merits, leaving the standing argument out of his opinion.\textsuperscript{164} Scalia’s first argument is that Section 202(a)(1) of the Clean Air Act allows the EPA administrator to exercise his judgment in deciding whether or not to regulate greenhouse gas emissions from new motor vehicles.\textsuperscript{165} He concedes that the statute “condition[s] the exercise of EPA’s authority on its formation of a ‘judgment’” but questions whether the Administrator is required to make a “judgment” whenever a petition for rulemaking is filed.\textsuperscript{166} Justice Scalia claims that if Congress had intended to require such judgment it would have chosen different wording in the statute.\textsuperscript{167} When Congress wants to force an agency to do something it uses terms such as “shall.”\textsuperscript{168} Scalia claims that since nowhere in the Clean Air Act does not require the EPA to make a firm decision whenever a rulemaking petition is filed, the EPA did not act incorrectly in failing to explain a judgment on the issue.\textsuperscript{169}

Justice Scalia then discredits Justice Stevens’ outline of the three ways in which the Administrator can supposedly exercise his

\begin{itemize}
  \item \textsuperscript{162} \textit{Id}. at 1470 (Roberts, C.J., dissenting).
  \item \textsuperscript{163} \textit{Id}. at 1471 (Roberts, C.J., dissenting).
  \item \textsuperscript{164} \textit{Id}. (Scalia, J. dissenting).
  \item \textsuperscript{165} \textit{Id}. at 1471-72 (Scalia, J. dissenting).
  \item \textsuperscript{166} \textit{Id}. at 1472 (Scalia, J. dissenting) (quoting \textit{Massachusetts}, 127 S.Ct. at 1462).
  \item \textsuperscript{167} \textit{Id}. at 1472 (Scalia, J. dissenting).
  \item \textsuperscript{168} \textit{Id}. (Scalia, J. dissenting) (quoting \textit{Comprehensive Employment and Training Act} 29 U.S.C. § 816(b) which states “provide[d] that the Secretary of Labor shall issue a final determination as to the misuse of CETA funds by a grant recipient within 120 days after receiving a complaint alleging misuse”).
  \item \textsuperscript{169} \textit{Id}. (Scalia, J. dissenting).
\end{itemize}
judgment, as an invented “multiple-choice question.” Scalia argues that even if the Majority is correct and the Administrator must have a basis for rejecting a rulemaking petition, the majority construes this too narrowly. He explains that under the majority’s rationale the Administrator’s judgment can be delayed “only” if he concludes that scientific uncertainty is too profound to make an endangerment finding, which would be too narrow an interpretation of the statute. In Scalia’s view, the Administrator should be able to avoid a rulemaking petition for other reasons besides just profound scientific uncertainty and that such other reasons were given by the EPA in this case. He then emphasizes the main points the EPA gave for refusing to regulate greenhouse gas emissions from new motor vehicles, including that the President had laid out a comprehensive plan and that establishing greenhouse gas emission standards for new motor vehicles would be an inappropriate approach to addressing climate change. The EPA argued “a sensible regulatory scheme would require that all significant sources and sinks of [greenhouse gas] emissions be considered in deciding how best to achieve any needed emission reductions” and that EPA regulation could weaken the United States’ efforts to persuade developing countries to reduce greenhouse gas emissions.

170. Id. (Scalia, J. dissenting). Stevens explained the Administrator must exercise his judgment in one of three ways:
(a) by concluding that the pollutant does cause, or contribute to, air pollution that endangers public welfare...(b) by concluding that the pollutant does not cause or contribute to, air pollution that endangers public welfare...or (c) by ‘provid[ing] some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether’ greenhouse gases endanger public welfare.

171. Id. (Scalia, J. dissenting).
172. Id. (Scalia, J. dissenting).
173. Id. (Scalia, J. dissenting).
174. Id. at 1472-73 (Scalia, J. dissenting).
175. Id. at 1473 (Scalia, J. dissenting) (quoting 68 Fed. Reg. at 52929-31).

The EPA also tried to argue that any potential benefit that would be derived from EPA regulation of greenhouse gases would be lost to other nations which disregarded their greenhouse gas emissions. Id. These arguments are those which Justice Stevens refers to as the EPA’s “policy” rationales. Id. at 1463.
Justice Scalia criticizes the majority for dismissing the EPA’s rationale because it was “divorced from the statutory text.”176 He agrees with the majority’s reasoning, but argues instead that the statute does not address situations in which the Administrator seeks to defer making a judgment. Thus the statutory text according to Scalia is silent and so it logically follows that the EPA’s arguments are not divorced from it.177 In Scalia’s opinion, the EPA took into account the typical considerations (including policy issues) an agency would evaluate in determining whether to regulate a new area.178 On this point, he believes the majority imposed a limitation which lacked any established basis.179 Scalia concludes this section of his opinion by pointing to the Majority’s finding, that the EPA’s decision did not deserve Chevron deference, as groundless.180 Justice Scalia proposes that, for the reasons set forth, the agency properly declined to make a judgment and validly denied the rulemaking petition.181

In the alternative, Justice Scalia explains that the same conclusion he has come to could likewise be made based “on the Court’s own terms.”182 He points to the majority’s argument that the EPA could have shirked its duties by making a finding of scientific uncertainty, but only where such a finding is explicitly stated.183 In support of the EPA, Scalia says the agency has done exactly that in relying on the 2001 report by the National Resource Council. The report first warns that current estimates as to future effects of global warming “should be regarded as tentative and subject to future adjustments” and that “the understanding of the relationships between weather/climate and human health is in its infancy and therefore the health consequences

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176. Id. at 1473 (Scalia, J. dissenting) (quoting Massachusetts, 127 S. Ct. at 1462). The majority’s argument was that the EPA can make a judgment but that judgment must be in relation to agency’s duty to protect the health and welfare of the people. Id.
177. Id. (Scalia, J. dissenting).
178. Id. (Scalia, J. dissenting). This is precisely what many people would argue, that an agency should consider policy issues always.
179. Id. (Scalia, J. dissenting).
180. Id. (Scalia, J. dissenting).
181. Id. at 1473-74 (Scalia, J. dissenting).
182. Id. at 1474 (Scalia, J. dissenting).
183. Id. (Scalia, J. dissenting).
of climate change are poorly understood."\textsuperscript{184} Besides outlining the NRC’s points in depth as to the uncertainty surrounding climate change, Scalia “simply cannot conceive of what else the Court would like the EPA to say.”\textsuperscript{185}

In the second section of his dissent, Justice Scalia disagrees with Justice Steven’s statement that the Clean Air Act gives the EPA authority to regulate greenhouse gas emissions because of the broad definition of “air pollutant.”\textsuperscript{186} While he agrees that carbon

\textsuperscript{184} Id. at 1474-75 (Scalia, J. dissenting) (quoting National Research Council, Climate Change Science: An Analysis of Some Key Questions, pp 1, 20). The EPA made extensive use of the findings in the NRC’s report, and included a detailed analysis of the NRC report in its decision not to regulate greenhouse gas emissions from new motor vehicles as requested by the petition. \textit{See} 68 Fed. Reg. 52930. Judge Tatel explicitly argues in his dissent in the circuit court opinion of this case that the NRC report provides the EPA with adequate scientific information to determine whether global warming resulting from greenhouse gases does endanger the public health or welfare. \textit{See Massachusetts,} 415 F.3d at 77. It is surprising that two completely opposing sides can use the same report to support their opinion. Where Tatel argued for the petitioners that the EPA should be required to regulate greenhouse gases, Justice Scalia argues the EPA should not be held to possess such authority and that the EPA did explicitly state that insufficient scientific authority exists; therefore, an endangerment finding cannot be made. How can the same report containing the same information be used to support two such opposing views? Judge Tatel viewed the NRC report as providing enough information to make the so-called “endangerment finding,” while the majority in the Supreme Court opinion argued simply that the EPA had failed altogether to make a decision as to endangerment and failed to explicitly establish that there was sufficient uncertainty to do so, and Scalia argues the language in the NRC report does just that – provides sufficient information to establish that scientific uncertainty exists. The use of the NRC report by the EPA was to establish not the scientific understanding of global warming but to established the very opposite: uncertainty. While Tatel’s dissent is arguably the closest the circuit court got to what eventually became the Supreme Court majority’s opinion on the case, the majority was obviously not satisfied with the EPA’s use of the report to express scientific uncertainty as Justice Scalia suggests.

\textsuperscript{185} \textit{Massachusetts,} 127 S.Ct. at 1475 (Scalia, J. dissenting).

\textsuperscript{186} Id. (Scalia, J. dissenting) (quoting § 202(a)(1)). In a related footnote to this portion of Scalia’s opinion, he points to the majority’s conclusion that “air pollution” includes “all airborne compounds of whatever stripe.” \textit{Id.} at 1476 n.2 (quoting \textit{id.} at 1460). From this Scalia reasons the majority’s supposedly overbroad interpretation would include “everything airborne, from Frisbees to flatulence, qualifies as an ‘air pollutant’.” \textit{Id.} at 1476. Apparently, subsequent research confirmed this is the first time the term “flatulence” has made it into a U.S. Supreme Court opinion. Timothy J. Dowling & Jennifer Bradley, \textit{Global
dioxide is clearly included in the definition of “air pollutant,” Scalia argues the point that, under section 302(g) of the Clean Air Act, the definition of “air pollutant” contains two parts, under one of which greenhouse gases do not qualify. As Scalia views the situation, an “air pollutant” must not only be “physical, chemical,...substance[s] or matter which [are] emitted into or otherwise enter[r] the ambient air” under the second half of the definition, but also an “air pollution agent or combination of such agents” under the first half. He emphasizes petitioners’ argument that the use of the word “including” joining the first phrase to the second means that anything following the word “must necessarily be a subset of whatever precedes it.” By citing the petitioners’ example, Scalia illustrates that the portion of the definition preceding the word “including” acts to limit the second half of the definition. Thus, an air pollutant can be “any physical, chemical,...substance or matter which is emitted into or otherwise enters the ambient air,” but it must also be an “air pollution agent or combination of such agents.”

The question then becomes: are greenhouse gases agents of air pollution? In furthering his argument for the application of Chevron deference to the EPA’s decision, Justice Scalia points out that the term “air pollution” is not defined by the Clean Air Act, thus the EPA

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Warming in the Supreme Court: What Does Massachusetts v. EPA Mean For You (and Planet Earth)?, 59.8 ENVTL. LAW 3, 5 (August 2007).

187. Massachusetts, 127 S.Ct. at 1475 (Scalia, J. dissenting) (quoting § 7602(g)).

188. Id. (Scalia, J. dissenting) (quoting 42 U.S.C. § 7602(g)). Section 302(g) of the Clean Air Act, defining “air pollutant” reads in full:

The term “air pollutant” means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term “air pollutant” is used.

Clean Air Act § 302(g), 42 U.S.C. § 7602(g).

189. Massachusetts, 127 S.Ct. at 1475 (Scalia, J. dissenting) (quoting § 7602(g)).

190. Id. at 1476 (Scalia, J. dissenting).

191. Clean Air Act § 302(g), 42 U.S.C. § 7602(g).
interpreted the ambiguous term. Scalia explains that because the petition for rulemaking called for regulation in order to “reduce the risk of global climate change,” the EPA had to determine whether the greenhouse gases responsible for global climate change are in fact “air pollution.” He defers to the EPA’s argument on this point, that the problems associated with greenhouse gases are atmospheric, in the upper atmosphere, not the ground level, or near surface, pollution traditionally termed “air pollution.” Scalia then proceeds to then define both “air” and “pollute” to further establish his support of the EPA’s theory that the term “air pollution” under the Clean Air Act includes only those substances polluting the air near ground level.

192. *Massachusetts*, 127 S.Ct. at 1477 (Scalia, J. dissenting). Since *Chevron* deference is shown when the agency interprets an ambiguous term, as previously established, it follows from Scalia’s argument, that *Chevron* deference should be applied in the present case. Under this rationale, Justice Scalia must prove the EPA interpreted the term in a manner that is a “permissible construction of the statute.” *Chevron*, 467 U.S. at 843.


194. 68 Fed. Reg. at 52,926-27. In fact, Scalia is under the impression the “upper reaches of the atmosphere” is not “air” in the traditional sense. *Massachusetts*, 127 S.Ct. at 1477 (Scalia, J. dissenting).

195. *Massachusetts*, 127 S.Ct. at 1477 (Scalia, J. dissenting). To define “air” and “pollute,” Justice Scalia turns to a 1949 version of Webster’s Dictionary. According to Webster’s, “pollute” means “[t]o make or render impure or unclean.” The first three definitions of “air” are: 1) “[t]he invisible, odorless, and tasteless mixture of gases which surrounds the earth”; 2) “[t]he body of the earth’s atmosphere; esp. the part of it near the earth, as distinguished from the upper rarefied part”; 3) “[a] portion of air or of the air considered with respect to physical characteristics or as affecting the senses.” WEBSTER’S NEW INTERNATIONAL DICTIONARY 1910 (2d ed. 1949). Thus, Scalia concludes that since greenhouse gases are affecting the upper atmosphere, as opposed to the near earth atmosphere, such gases are not included in the definition of “air” as used by the Clean Air Act so the EPA is not required to regulate them.

Critics of Scalia’s dissent wrote that the word “air,” as currently understood (not as defined by a decades-old dictionary), is not simply limited to the ground-level portions of the atmosphere. Dowling, 59.8 ENVTL. L. at 5. The critics reference the lengthy subchapter of the Clean Air Act “designed to preserve the stratospheric ozone layer from pollutants that degrade the protective shield.” *Id.* Most notably, greenhouse gases do not just collect and exist in the upper atmosphere, but collect at equal concentrations throughout the atmosphere from upper to lower. *Id.* Thus, even if Scalia’s argument that “air pollution” refers to
In his concluding paragraphs, Justice Scalia chastises the Court for failing to explain why “air pollution” should encompass global climate change, apparently viewing the dictionary definitions of the two words to be evidence of the intent of the drafters of the Clean Air Act. He seems appalled that Justice Stevens determined Chevron deference was not applicable after failing to clarify this important point. Scalia views this case as “straightforward administrative-law” regardless of the importance of action in the face of global warming. He emphasizes, in his closing line, the importance of upholding “the reasoned judgment of [a] responsible agency.”

V. IMPACT OF THE COURT’S DECISION

A. Legal Impact

While Massachusetts v. EPA answered a number of important questions, including issues of standing and interpretation of the Clean Air Act, one of the most important for future litigation was the Court’s criticism of the agency’s decision making process. In holding that the EPA could not rely on any other factors besides public health and welfare in determining whether to deny the rulemaking petition, the court laid down strict guidelines for future agencies. It is now clear that agencies are not, in fact, able to take ground-level air pollution, this would still include a relevant portion of greenhouse gases.

With regard to Scalia’s dismissal of the term “pollutant” as not including harm to the upper atmosphere and ozone layer, critics quickly point out that Section 103 of the Clean Air Act expressly refers to carbon dioxide as an “air pollutant.” Further, The Clean Air Act requires regulation of pollutants which lead not to impurities in the air but to acid rain which affects the lakes, thus the EPA is not restricted to regulating only those pollutants that affect the breathable air. Further, the Clean Air Act requires the EPA to regulate vehicular pollutant that “endanger public health and welfare,” and “welfare” is defined as including effects on both weather and climate. id. (quoting Clean Air Act § 202, 42 U.S.C. § 7521); see supra note 23 and accompanying text (citing the language within the Clean Air Act defining “welfare”).

196. Massachusetts, 127 S.Ct. at 1477 (Scalia, J. dissenting).
197. Id. (Scalia, J. dissenting).
198. Id. at 1477-78 (Scalia, J. dissenting).
199. Id. at 1478 (Scalia, J. dissenting).
200. Massachusetts, 127 S.Ct. at 1463.
into account policy concerns or international issues in making decisions whether or not to carry out their duties unless the statute granting them such authority explicitly provides for such considerations or such considerations are used to make the finding required by statute. Agencies are to look to their authorizing statutes, and only these statutes, in making regulatory decisions when called upon by a rulemaking petition. This severely limits agencies and may prevent agencies from considering the broader impact of their decisions for lack of ability to review policy considerations.

With regard to administrative agency discretion and authority, it could be argued that this case strips agencies of some level of decision making power and vests it back in Congress. This case clearly places strict emphasis on Congress’ terminology in statutes granting authority or otherwise instructing agencies to act. The agency’s power or authority to deny a rulemaking petition no longer rests solely on the agency administrator’s interpretation of the issue at hand, but now must fall within the guidelines and parameters of the language in the authorizing statute. A decision based on anything else would be considered, as a result of Massachusetts v. EPA, to be arbitrary and capricious. Thus, an agency administrator is bound to regulate unless it can be determined otherwise under only the terminology of the authorizing statute.

The Court held that not only are agency decisions to decline rulemaking judicially reviewable but they are subject to review under the arbitrary and capricious standard. While this standard is generally one which gives a great deal of deference to the agency, the manner in which it was applied here led to the agency being held to a higher standard. The EPA’s discretionary decision was criticized as not conforming to the strict wording of the Clean Air Act. Where an agency decision would historically been given a great deal of lenience in favor of restraining judicial control of agency decisions, the standard seems to have been applied here using a much stricter interpretation.

Two programs for setting greenhouse gas emissions standards are sure to be affected by the Supreme Court’s ruling in Massachusetts v. EPA. The New Source Performance Standards program administered by the EPA, and the Prevention of Significant Deterioration program,

201. Id. at 1459.
administered by the states subject to EPA supervision, both apply to new and modified sources and require such sources to install advanced pollution-control technology.\textsuperscript{202} If the EPA does in fact makes an endangerment finding, regulations would be triggered under both programs. Prior to litigation of Massachusetts v. EPA, environmental interest groups had sought EPA greenhouse gas regulation under the New Source Performance Standards program, and were denied their rulemaking petition by the EPA.\textsuperscript{203} The appeal of this denial was stayed due to the case of Massachusetts v. EPA, which will now likely be renewed in light of the Supreme Court’s decision in this case.\textsuperscript{204}

Importantly, The Supreme Court’s decision in Massachusetts v. EPA, will affect a number of cases currently filed, seeking to hold various industries responsible for regulating their greenhouse gas emissions.\textsuperscript{205} Since the Court has ruled the EPA does have authority to regulate greenhouse gas emissions under the Clean Air Act, “a serious question arises as to whether federal common law nuisance claims based on [greenhouse gas] emissions are not preempted.’’\textsuperscript{206} Also, in a number of cases energy and chemical companies were sued under state and federal common law theories in federal court in Mississippi for their greenhouse gas emissions alleged contribution to the intensity of Hurricane Katrina.\textsuperscript{207} With the Court’s decision in Massachusetts v. EPA, questions will arise in these cases as to the application of Mississippi common law to out-of-state greenhouse gas emissions.

The Court’s denial of the EPA’s foreign policy argument will likely have a significant effect on certain pending cases. In Central

\begin{footnotes}
\item[202] Peter S. Glaser & Douglas A. Henderson, Massachusetts v. EPA Global Warming Decision: What Does It Mean?, 22.2 NAT. RESOURCES & ENV’T 48, 49 (Fall 2007). This advanced pollution-control technology is referred to as Best Demonstrated Technology and Best Available Control Technology under the two separate programs. Both are determined by considering the feasibility of possibly technology which does not have to be commercially common in the industry but does have to be practical and available. \textit{Id}.
\item[203] \textit{Id.} at 49-50.
\item[204] \textit{Id.} at 50.
\item[206] Glasser, 22.2 NAT. RESOURCES & ENV’T at 50.
\item[207] \textit{Id}.
\end{footnotes}
Valley Chrysler-Jeep v. Witherspoon, automobile manufacturers argued against implementation of California law limiting greenhouse gas emissions from automobiles registered in the state. Notably, the auto manufacturers argued state regulation of this sort is preempted because it conflicts with federal foreign policy as well as the Clean Air Act and the Energy Policy and Conservation Act. The EPA refused to grant a preemption waiver under Section 209 of the Clean Air Act, at which point Judge Ishii disregarded the claim that the CAA acts to preempt state law on the matter. The case was placed on hold pending the outcome of Massachusetts v. EPA. Since the Court in Massachusetts v. EPA indicated clearly that the EPA is not to make foreign policy considerations in determining whether it should regulate greenhouse gas emissions itself, it is likely the court will find in Witherspoon that the same analysis should apply and foreign relations considerations should not be accounted for in reviewing California’s regulations.

Clearly, the Court’s ruling in Massachusetts v. EPA was viewed as a strong “win” for environmentalists. The Clean Air Act, on the other hand, benefited in a less obvious way. The Act has now been clearly cited by the Supreme Court as the standard upon which the EPA should base its decision-making.

B. Broad Impact

The societal impact of the Court’s ruling in Massachusetts v. EPA is currently in debate. The decision leaves little to work with in determining future regulation of harmful substances not within the natural or ordinary definitions of existing statutes since the decision merely remands the case for reconsideration by the EPA. Certainly, the ruling that greenhouse gases are “air pollutants” under Section 202 of the Clean Air Act will lead to regulation of such gases from motor vehicles which will begin to reduce global warming and, hopefully, slow climate change. Although the decision does theoretically leave the option open to the EPA to decline to regulate greenhouse gases if the EPA finds that such pollutants do not meet

209. Id.
210. Id. at 1173-75.
the endangerment finding required, it is unlikely that such a decision would be made by the EPA, given current public policy and movements against global warming.

Perhaps the Court’s ruling will encourage Congress to take a more aggressive role in implementing laws to limit greenhouse gas emissions and other causes of global warming. One commentator expressed the notion that while Massachusetts v. EPA may “set the direction in the near term, in the end it will remain up to Congress to decide the nature, scope, and timing of a [greenhouse gas] regulatory program.”

While the decision is still the EPA’s so long as they abide by the direction of the court, it is almost certain the EPA will grant the rulemaking petition since the Court has left the agency virtually no choice in the matter. However, the EPA is free to choose how and to what extreme they wish to implement greenhouse gas emission standards so long as such regulations are within their statutory authority. This uncertainty as to how the EPA will ultimately choose to carry out this regulatory scheme has already led the automotive industry to increase fuel efficiencies out of fear of future stringent EPA regulations. Though the impact of the decision ultimately rests within the EPA’s authority under Title II of the Clean Air Act in regulation of motor vehicles, the way the court has pronounced its ruling leaves the same conclusions to be made as to the EPA’s authority to regulate greenhouse gas emissions under the much broader Title I of the Act. Thus, this fear of future EPA regulation

211. Glaser, supra note 202 at 49.

212. It would be exceedingly difficult for the EPA to find that greenhouse gas emissions are not dangerous to the public health or welfare after the Court went to great lengths to explain the harmful effects greenhouse gases are having on the environment, and therefore the public health and welfare.

213. This is evident in the increasing number of advertising campaigns by vehicle manufacturers touting the greater fuel economy of their vehicles. However, some may argue this was spurred by consumer desire to counter the skyrocketing prices at the fuel pump, not automobile manufactures’ fear of impending EPA greenhouse gas emission standards.

214. While the original petition to the EPA sought only regulation of greenhouse gas emissions from new motor-vehicles under Title II of the Clean Air Act, the Court’s ruling only applies to that Title. Under Title I, however, stationary and area sources are regulated by much the same wording as Title II. However, the EPA would not be required under this Court’s ruling to apply the same standards to
may similarly be spurring other industries to begin research and implementation of new technologies which will reduce their greenhouse gas emissions as well.

Arguably, vesting the EPA with the authority to regulate carbon dioxide could mean much more than just tighter emissions standards for automobiles because of the broad terminology of Title I and the court’s manner of ruling in this case. In an earlier 1994 case against the EPA brought by the American Lung Association, the court ruled the EPA was obligated to review existing air quality standards for particulate matter and would be required to consider a new standard.215 The EPA obligingly proposed to tighten air quality standards for ozone and particulate matter. The proposed rules, the largest, costliest, and most controversial in EPA history, were promulgated in November 1996.216 The subsequent Congress was unable to reverse the rule and they were only later invalidated by a federal court. Critics voice a very real concern that similar broad reaching regulations will be proposed by the EPA now that it has been granted authority to wrestle with carbon dioxide emissions as a result of Massachusetts v. EPA.217

While most environmentalists view the Court’s ruling in Massachusetts v. EPA as a victory, businesses are already concocting methods for avoiding lost profits and spreading the costs of any new regulation schemes amongst themselves. As one strategic law firm wrote in a memo preparing its corporate clients for likely EPA emissions regulations, “[i]f a business changes its operations to reduce its impact on the climate, it can often sell the ‘credit’ for those changes to another business that is not so climate neutral.”218 This

stationary and area sources. It necessarily follows that, because the EPA has authority to regulate greenhouse gases under Title II, it also has authority to regulate the same under Title I.

216. Jonathan H. Adler, Regulating Greenhouse Gases: Will EPA Take a Dive, Competitive Enterprise Institute, Jan. 13, 2000, http://www.cei.org/gencon/004/01707.cfm (last visited Jan. 21, 2008) (analyzing the potential issues presented by the appeal of the rulemaking petition denial if the EPA were to be ordered to regulate greenhouse gas emissions)
217. Id.
218. David G. Mandelbaum, Environmental and Energy and Project Finance Memo: What’s All This About Climate Change Means For Domestic Businesses
theory could essentially lead to an evening out of emissions rather than a reduction of emissions overall.

Some are even concerned that regulation of greenhouse gas emissions from motor vehicles will result in smaller, lighter cars which are, arguably, less safe than those already on the road. Along this line of reasoning, arguments are being made that dramatic increases in the federal fuel economy standards would increase the already high death toll resulting from car accidents as a result of “downsized” cars.  

VI. CONCLUSION

While the Supreme Court’s decision in Massachusetts v. EPA does not directly issue regulation of greenhouse gas emissions nor does it expressly order the EPA to do so, it is clear that the Supreme Court intends this to be the case. At the agency level, the Supreme Court’s decision strips administrative agencies of the right to make policy and international considerations in its discretionary decisions. The language of authorizing statutes is strictly upheld by the Court as the agency’s sole means for determining the parameters within which it can exercise its discretion. A review of an agency decision for arbitrary and capricious conduct now entails a stricter scrutiny of the agency’s method for decision making and analysis of the factors used when the decision involves a denial of a petition for rulemaking. In this way, the Court set a precedent that there is a distinct difference in review of an agency’s refusal to enforce a rule or regulation and an agency’s refusal to initiate rulemaking. This is likely due to the fact that a refusal to enact rules may directly conflict with duties and responsibilities Congress has expressly directed the agency to carry


219. Jonathan H. Adler, The Coming Greenhouse Power Grab, WASH. TIMES, Dec. 27, 1999 (discussing the potential impact of the case just after the petition for rulemaking was filed with EPA for regulation of greenhouse gases). This is an interesting twist on the issue as most scholars and analysts are concerned with the legal impact of the case or business impact as a result of increasingly strict emission standards. It is also notable that before petitioners even reached the D.C. Circuit court with their appeal, journalists were already in a frenzy of concern over what could potentially happen if the EPA were to regulate vehicle emissions.
out, whereas enforcement of a rule involves an agency’s interpretation of their own regulation as well as the conduct of the violating party, a more technical analysis.

The Supreme Court made expressly clear that a denial of a petition for rulemaking by an agency in its discretionary capacity must strictly adhere to the statutory language governing its authority. Where an agency administrator may, in his discretion, refuse to regulate a matter, such refusal must fall clearly within the confines of the statute. As the Court found in the instant case, the EPA Administrator was permitted, in his discretion, to refuse to regulate under the Clean Air Act only if the Administrator found that he was being asked to regulate that which would not “endanger” the public health or welfare, and any uncertainty as to this finding need be explicitly conveyed in the refusal to promulgate rules.

Congress has made clear through the Clean Air Act that the EPA is charged with the duty of regulating pollution that may endanger the health or welfare of the public. The Court in this case has ruled that “air pollution,” as it is used in the Clean Air Act, includes greenhouse gas emissions which, as proved by respected scientists through detailed reports, are causing global warming and climate change. Thus, barring an explicit finding by the EPA that climate change does not pose potential harm to the health or welfare of the public, the EPA must regulate such emissions from new motor-vehicles, as addressed by petitioners in their request for rulemaking under Title II of the Clean Air Act.

Though the ramifications of the Supreme Court’s holding in *Massachusetts v. EPA* are not yet known, many are speculating about what the future may hold as a result of the case. Primarily, the effect the holding will likely have on auto-makers is at the forefront of the debate and may include tighter fuel efficiency standards perhaps resulting in smaller, less safe vehicles. Other industries are concerned, given the similarity between the Title I and Title II language of the Clean Air Act and that the EPA could clearly regulate under Title II, similar regulation may begin as to stationary sources under Title I. Businesses are frantically searching for ideas to assist them in spreading what could be a very large regulatory cost among other industry members.