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MASSACHUSETTS v. EPA: THE CAUSES AND EFFECTS OF CREATING COMPREHENSIVE CLIMATE CHANGE REGULATIONS

Colin H. Cassedy*

INTRODUCTION

In November 2007, the United Nations Secretary General described climate change as “the defining challenge of our age.”1 Those comments came shortly after the United Nations Intergovernmental Panel on Climate Change (“IPCC”) released its latest report urging the nations of the world to immediately reduce greenhouse gases (“GHGs”) in order “to avert a global climate disaster, which could leave island nations submerged and abandoned, reduce African crop yields by 50 percent, and cause a 5 percent decrease in global gross domestic product.”2 As the debate in the United States over global warming and its effects continues to grow and influence domestic politics, the international community has taken significant steps towards mitigating the damage with international instruments such as the Kyoto Protocol.3 Despite progress on the international stage towards reducing greenhouse gases, domestic governmental progress toward GHG reduction in the United States has been sluggish at best. Because the United States government has consistently refused to ratify the Kyoto Protocol the treaty has no binding internal effect and the United States is not required to abide by its terms. Although many Americans agree that ratifying the Kyoto Protocol would have been a significant and beneficial first step for the United States, some scholars argue that much more drastic measures are needed to curb the problems posed by global warming.4 Specifically, they argue that vital to the reduction of GHG emissions is the adoption of a comprehensive federal government scheme and a coordinated international plan that includes all major industrialized nations,

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2 Id.


including the United States.\footnote{Id.}

Individual state efforts to take climate change action at a regional level have successfully forced the United States federal government into taking the first steps towards creating mandatory GHG emissions reduction legislation. The reluctance of the United States federal government to address global climate change provoked the state of Massachusetts, along with several other states, to sue the federal Environmental Protection Agency ("EPA"). The basis of the suit was to challenge the EPA’s persistent refusal to regulate greenhouse gas emissions under their statutory authority found in the Clean Air Act ("CAA").\footnote{See Massachusetts v. Environmental Protection Agency, 127 S. Ct. 1438, 1446 (2007).} Many states have recognized the need for such regulation and out of frustration with waiting for the federal government to act, several states have decided to pass their own regulations placing limits on greenhouse gas emissions.\footnote{Regional Greenhouse Gas Initiative, http://www.rggi.org/about.htm (last visited Apr. 22, 2008).} State regulation is a significant first step, but global climate change and the need to reduce GHGs are also international problems that require not only a unified domestic approach, but also a global approach in order to have any significant impact. In that spirit, the Bush Administration has recently taken steps that are directly attributable to the United States Supreme Court’s landmark decision in Massachusetts v. EPA.

In Massachusetts v. EPA, several states recognized the growing need for universal regulation of GHG emissions and decided to challenge the EPA’s refusal to regulate GHG emissions. The Supreme Court held that states may sue a federal agency for failure to regulate emissions of greenhouse gases.\footnote{Massachusetts, 127 S. Ct. at 1446.} The importance of the decision and its impact on various industries throughout the United States, and the world at large, cannot be overstated. The Wall Street Journal declared the Court’s decision a possible “turning point in the national debate over climate change.”\footnote{Jess Bravin, Court Rulings Could Hit Utilities, Auto Makers, WALL ST. J., Apr. 3, 2007, at A1.} The Wall Street Journal characterized this decision as “the latest sign that greenhouse gases are about to affect U.S. industry and the economy in a big way.”\footnote{Jeffrey Ball & Mike Spector, Industries Showing Uncertainty Over Ruling’s Impact, WALL ST. J., Apr. 3, 2007, at A10.} The Court’s decision in Massachusetts v. EPA has validated the rights of states to act as a check on the federal government, ultimately strengthening the United States’ federal system of government by ensuring accountability at the federal level.

This note first examines and analyzes the Supreme Court’s decision in Massachusetts v. EPA. Section II analyzes state regulatory responses to the Supreme Court’s decision in Massachusetts v. EPA and section III analyzes the federal responses. Section IV provides a brief overview of the United States’
approach to climate change regulation. Section V examines the recent trends and activities in the effort to create an international climate change policy. Finally, this note concludes that since it is no longer debatable that man’s energy activities contribute to global climate change, it is the United States’ responsibility to take the lead and demonstrate to the rest of the world that a coordinated and meaningful international climate change treaty that includes all major industrialized nations is attainable.

I. MASSACHUSETTS V. EPA

The Supreme Court’s decision in Massachusetts v. EPA originated with a 2003 EPA decision in which the agency specifically declined to regulate greenhouse gas emissions from motor vehicles. The EPA relied on several different arguments for its refusal to regulate GHGs, including foreign policy concerns and the agency’s lack of statutory authority under the CAA. In addition, the EPA explained that “establishing GHG emission standards for U.S. motor vehicles at this time would require EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies,” which, in turn “would result in an inefficient, piecemeal approach to addressing the climate change issue.” In essence, the EPA was trying to put their decision on hold in order to allow the President’s plan and the current initiatives a chance to be effective. The EPA concludes its decision by specifically supporting the President’s “global climate change policy” which “sets the U.S. on a path to slow the growth of GHG emissions and, as the science justifies, to stop and then reverse the growth.” However, the EPA fails to acknowledge its potential role in the President’s plan and on September 8, 2003, the EPA issued its decision refusing to promulgate rules that regulate motor vehicle GHG emissions. Massachusetts et al. appealed the EPA’s decision and two of the three judges on the panel in the United States Court of Appeals for the District of Columbia Circuit agreed, “that the EPA

12 Id. at 52925 (asserting that “[t]he international nature of global climate change also has implications for foreign policy, which the President directs. In view of EPA’s lack of CAA regulatory authority to address global climate change, DOT’s authority to regulate fuel economy, the President’s policy, and the potential foreign policy implications, EPA declines the petitioners’ request to regulate GHG emissions from motor vehicles.”).
13 Id. at 52931.
14 Id. at 52933 (explaining that the president’s policy "supports vital global climate change research and lays the groundwork for future action by investing in science, technology, and institutions” and it “emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change.").
15 Id. at 52933.
Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rule making.”\textsuperscript{16} The petitioners then appealed to the United States Supreme Court and the Court granted certiorari.

The United States Supreme Court’s decision in \textit{Massachusetts v. EPA} in April 2007 is one of the most significant developments in the power of states to force the hand of federal government agencies to promulgate and implement environmental regulations. Petitioners in \textit{Massachusetts v. EPA} specifically wanted the EPA to regulate by setting limits on the emission of GHGs, much like the limits found in international treaties such as the Kyoto Protocol. \textit{Massachusetts v. EPA} has been referred to as “a landmark decision in environmental law”\textsuperscript{17} because it demonstrates the increasing and still-emerging role that American states play in the creation and implementation of international environmental law. Specifically, \textit{Massachusetts v. EPA} will potentially result in the strengthening of the United States’ environmental regulation position on the international stage because it affirms the rights of states to create regulations based on international environmental standards and goals that the federal government has consistently refused to accept and implement. The newly affirmed power of the states is known as the “special solicitude for states”, which the Court explains in \textit{Massachusetts v. EPA} when addressing the threshold issue of state standing.\textsuperscript{18}

\textit{Massachusetts}, along with several other states, brought suit against the EPA to force the agency to regulate GHG emissions from motor vehicles. The Court in \textit{Massachusetts v. EPA} addressed three specific issues: (1) whether the petitioners have standing to bring their claims under Article III of the United States Constitution; (2) “whether the EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles”\textsuperscript{19}; (3) if the EPA has the statutory authority to do so, “whether [the EPA’s] stated reasons for refusing to do so are consistent with the statute.”\textsuperscript{20} The legislation specifically in question was Section 202(a)(1) of the CAA, which the EPA claimed did not give the agency authority to regulate GHG emissions from motor vehicles because they did not fall under the definition of “pollutants”.\textsuperscript{21}

\textsuperscript{16} \textit{Massachusetts v. EPA}, 415 F.3d 50, 58 (2005).
\textsuperscript{17} Dru Stevenson, \textit{Special Solicitude for State Standing: Massachusetts v. EPA}, 112 \textit{Penn St. L. Rev.} 1, 4 (2007) (asserting that \textit{Massachusetts v. EPA} “presents a host of implications for the role of the EPA in worldwide protection of the environment, the proper occasions for the federal judiciary to intervene in highly debated public policy matters, and even for divining the current political composition of the Supreme Court” and most importantly “the question of standing for challenging inaction by an administrative agency.”).
\textsuperscript{18} See \textit{id}.
\textsuperscript{19} \textit{Massachusetts}, 127 S. Ct. 1438 at 1446.
\textsuperscript{20} \textit{Id}.
\textsuperscript{21} 42 U.S.C. § 7521(a)(1) provides in part: “The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable
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In Massachusetts v. EPA, the EPA relied on two of the same arguments as it did in its 2003 agency decision to defend its refusal to regulate GHG emissions. First, the EPA argued that it did not have the statutory authority to regulate because the emitted gases are not “pollutants” under the CAA. In the alternative, the EPA argued that such a decision is a foreign policy matter, which should be handled solely by the President. Finally, the EPA argued that Massachusetts and the other states that brought suit did not have standing because they had not suffered a particularized injury and there is no effective remedy available. However, when the Court announced its holding on April 2, 2007 in a 5-4 decision, it refused to accept the EPA’s three arguments. Rather, the Court held that such gases are “pollutants” and that the CAA gives the EPA broad discretion to regulate such gases. However, the Court did not mandate any specific type of regulation be employed. It stated simply but bluntly that the EPA could no longer rely on its former arguments for the agency’s failure to regulate these gases.

The Court’s majority opinion, delivered by Justice Stevens, acknowledges at the outset the link between a rise in global temperatures and “a significant increase in the concentration of carbon dioxide in the atmosphere.” In analyzing the CAA, the Court notes that the definition of “air pollutant” is broad and includes “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive... substance or matter which is emitted into or otherwise enters the ambient air.” The Court summarizes the history of the CAA and emphasizes that Congress’ passage of the CAA came before the global causes and effects of climate change were well understood. The Court was willing to interpret the statutory language broadly because the dangers that the Act was designed to protect against were not fully known by Congress at the time. The Court essentially describes why it believes reducing GHGs that contribute to climate change is a compelling cause and what our federal government has and has not done to lessen its effects.

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...”).

22 Massachusetts, 127 S. Ct. 1438 at 1450.
23 Id. at 1451.
24 Id. at 1453.
25 Id. at 1443.
26 See Massachusetts, 127 S. Ct. 1438.
27 Id. at 1446.
28 42 U.S.C. § 7602(g).
29 Massachusetts, 127 S. Ct. at 1447.
A. Standing

The Court’s rule on standing empowers the states to take independent action to control GHG emissions. One of the EPA’s defenses was that Massachusetts, as well as the other plaintiff-states, did not have standing because they had not suffered a concrete, particularized injury and there was no available remedy. The Court concluded that the “EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent’” and that there is a remedy available because there is “a ‘substantial likelihood that the judicial relief requested’ will prompt EPA to take steps to reduce that risk.” The Court notes “that States are not normal litigants for the purposes of invoking federal jurisdiction” and continues to cite a 1907 Supreme Court decision in which Justice Holmes explained that “...the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

The Court relies upon an historical analysis to articulate a new rule for state standing. The Court explains that when a state enters the Union, it must give up a certain amount of its sovereignty. As a result of the state giving up some of its sovereignty, the federal government has a duty to protect those rights and act on behalf of the interest of the states. Since the states surrender some of their sovereign rights to the federal government, the Court concludes that “Massachusetts’ stake in protecting its quasi-sovereign interests” entitles it “to special solicitude in our standing analysis.”

The Court’s majority opinion relies on three arguments for supporting the new special solicitude standing rule. First, states only have the authority to regulate the events that occur inside their territorial borders. As a result, states that receive pollution from other states do not have the power to force the other state to limit its pollution. For instance, “Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions.” Instead, “[t]he states must appeal to the federal government—either court or agencies—to resolve

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30 Id. at 1453.
32 Id. at 1454 citing Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907).
33 Id. at 1454.
34 Stevenson, supra note 17, at 8.
35 Massachusetts, 127 S. Ct. 1438 at 1454.
36 See Massachusetts, 127 S. Ct. 1438; see also Stevenson, supra note 17, at 6.
37 Id.
38 Massachusetts, 127 S. Ct. 1438 at 1454.
problems of interstate externalities." The Court reasons that states must be given special status, as opposed to individuals, because states have given a portion of their sovereignty to the federal government and must have a mechanism by which to enforce their rights if the federal government refuses to do so. Second, the Court holds that a state has no ability to engage in foreign relations. Third, the Court finds that a state may face preemption if it attempts to regulate in an area where the federal government has power to regulate. In the Court's own words, a state "cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted." Some scholars have convincingly argued that this is an indirect reference to the Kyoto Protocol. It is possible that the majority, led by Justice Stevens, is expressing their disapproval of the U.S. refusal to sign the Kyoto Protocol. Although the special solicitude rule is the current law, it is unclear whether the Court will choose to apply this rule the next time a state attempts to force a federal agency to promulgate rules. The standing rule certainly does not discourage states from exercising power when thought necessary because the federal government refuses to do so.

B. "Pollutants"

The next issue addressed by the majority is whether the EPA has statutory authority under the CAA to regulate emissions from new motor vehicles. The EPA argued that it did not have the authority to regulate emissions from new motor vehicles because such emissions did not constitute an "air pollutant" under the CAA. The Court rejected this argument, holding that "[o]n its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any'... .The statute is unambiguous." The Court emphasized that the EPA did not rely on the statutory text, but rather legislative intent for its position. The Court dismissed that rationale as well, stating that the "EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat

39 Stevenson, supra note 17, at 6.
40 See Massachusetts, 127 S. Ct. 1438 at 1454. See also Stevenson, 112 PENN ST. L. REV. at 6.
41 Massachusetts, 127 S. Ct. at 1454. See also Stevenson, 112 Penn St. L. Rev. at 6.
42 Id.
43 Stevenson, supra note 17, at 6. (arguing "[t]his is probably an allusion to the Kyoto Protocol, a treaty the federal government repudiated, which would have been the primary instrument of international law for addressing manmade climate change. The relatively free ride given to China and India under the Protocol was the main justification for its lack of federal endorsement.").
44 Massachusetts, 127 S. Ct. at 1460.
45 Id.
greenhouse gases as air pollutants.\textsuperscript{46}

The EPA's alternative argument was that even if it did have statutory authority to regulate GHG emissions, it determined in its "judgment", according to the statute, that it should not exercise that authority.\textsuperscript{47} The Court here announced that the EPA's alternative argument "rests on reasoning divorced from the statutory text" because the "judgment" the EPA is granted by the statute requires the agency to regulate when an air pollutant " 'causes, or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."\textsuperscript{48} Clearly, the Court feels that GHG emissions from motor vehicles contribute to air pollution and therefore must be regulated. The Court criticized the EPA's argument saying, "the use of the word 'judgment' is not a roving license to ignore the statutory text" but is instead "a direction to exercise discretion within defined statutory limits."\textsuperscript{49} The Court reasons that the EPA's failure to regulate is not justified and is incompatible with the statute. The Court bluntly says the EPA's reasons "have nothing to do with whether greenhouse gas emissions contribute to climate change."\textsuperscript{50} The Court stopped short of requiring the EPA to regulate emissions, but its holding is a clear indication that the EPA must come up with a different justification should it continue to refuse to regulate motor vehicle GHG emissions.

C. The Dissenting Opinions

Not all members of the Court agreed with the majority's standing holding. Four of the Justices, including Chief Justice Roberts, disagreed with granting petitioners standing in this matter. In Chief Justice Roberts' dissent, in which Justice Scalia, Justice Thomas, and Justice Alito join, he asserts that "[r]elaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such "special solicitude" is conspicuously absent from the Court's opinion."\textsuperscript{51} Focusing on this lack of case law in the majority's opinion, Chief Justice Roberts continues to explain in his dissent that "the Court has to go back a full century in an attempt to justify its novel standing rule, but even there it comes up short" because Georgia v. Tennessee Copper Co. dealt "solely with available remedies" and "had nothing to do with Article III standing."\textsuperscript{52} Justice Roberts summarizes his dissent by asserting, "[t]his Court's jurisprudence

\textsuperscript{46} Id.
\textsuperscript{47} Id. at 1462.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 1464.
\textsuperscript{52} Id. at 1465.
simply recognizes that redress of grievances of the sort at issue here ‘is the function of Congress and the Chief Executive,’ not the federal courts.”

To establish standing, according to the Court’s jurisprudence in Chief Justice Roberts’ opinion, the “petitioners bear the burden of alleging an injury that is fairly traceable to the Environmental Protection Agency’s failure to promulgate new motor vehicle greenhouse gas emission standards, and that is likely to be redressed by the prospective issuance of such standards.” Since the petitioners did not meet this burden, in Chief Justice Roberts’ opinion, he felt compelled to dissent from the majority’s opinion. He did not think that the petitioners were able to prove a particular injury because “[g]lobal warming is a phenomenon ‘harmful to humanity at large’ and the redress petitioners seek is focused no more on them than on the public generally – it is literally to change the atmosphere around the world.” Chief Justice Roberts also believes that the majority “ignores the complexities of global warming” and disregarded the requirement of particularized injury and used “the dire nature of global warming itself as a bootstrap for finding causation and redressability.”

Justice Scalia also filed his own separate dissent, in which Chief Justice Roberts, Justice Thomas, and Justice Alito joined. Justice Scalia acknowledged that he “would hold that this Court has no jurisdiction to decide this case because petitioners lack standing.” However, Justice Scalia puts aside that issue because the majority decided otherwise, and he continues to argue his dissent on the merits. He does not agree with the majority’s interpretation of “air pollution” because “regulating the build up of CO₂ and other greenhouse gases in the upper reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is polluting the air.” The essence of Justice Scalia’s dissent is best summarized in the concluding paragraph of his dissent when he explains:

The Court’s alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the

53 Id. at 1464.
54 Id.
55 Id. at 1467.
56 Id. at 1468.
57 Id. at 1471.
58 Id. at 1477.
reasoned judgment of the responsible agency.\textsuperscript{59}

As Justice Scalia sees it, the EPA has broad discretion to regulate under the CAA and absent some egregious error, Justice Scalia does not believe the Court should interfere with the EPA’s discretion. Scalia explains that the majority, “with no basis in text or precedent, rejects all of EPA’s stated ‘policy judgments’ as not ‘amoun[ting] to a reasoned justification,’” effectively narrowing the universe of potential reasonable bases to a single one: Judgment can be delayed \textit{only} if the Administrator concludes that “the scientific uncertainty is [too] profound.”\textsuperscript{60} However, the Court did not require the EPA to regulate emissions, it simply held that the EPA’s stated reasons for doing so were not consistent with the statute. This does not amount to the Court interfering with an executive agency’s discretion because the agency can still refuse to regulate GHG emissions, so long as its refusal to do so is consistent with the CAA.

II. STATE RESPONSES TO MASSACHUSETTS V. EPA

Refusing to wait for the federal government to implement regulations limiting GHG emissions, California decided to take action on its own at the state level. In 2002, California was the first state to pass a law that required auto manufacturers to reduce GHG emissions.\textsuperscript{61} Two years later, in 2004, California issued specific regulations detailing how the auto manufacturers were supposed to meet the reduction requirements.\textsuperscript{62} Five other states followed California’s lead and passed the same or similar laws.\textsuperscript{63} Initially, it seemed as though California had successfully implemented stricter GHG emission standards than the federal government would ever agree to abide by in international treaties. However, in order for California to implement stricter regulations than the federal government follows under the CAA, California must receive a waiver from the EPA.\textsuperscript{64} California applied for a waiver from the EPA on December 21, 2005, under section 209(b) of the CAA.\textsuperscript{65} California argued a waiver was

\textsuperscript{59} Id. at 1477-78.
\textsuperscript{60} Id. at 1472.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} 42 U.S.C.A. § 7543 (issuing a general prohibition against states adopting their own standards for controlling emissions from new motor vehicles, but allowing a waiver “to any State which has adopted standards...for the control of emissions from new motor vehicle engines...if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards”).
\textsuperscript{65} 72 FR 21260-01, California State Motor Vehicle Pollution Control Standards; Request for
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necessary because of the “compelling and extraordinary conditions” associated with GHG emissions and the lack of strict federal standards.  

In December 2007, the EPA denied California’s waiver application because the Administrator determined that California does not have “compelling and extraordinary conditions” since it is affected by climate change to the same extent as the other states in our country.  

California’s governor, Arnold Schwarzenegger, referred to the EPA decision to deny the waiver as “unconscionable” when he announced California’s decision to sue the EPA.  

The EPA attempted to justify its denial of California’s waiver by stating that there was no need for it because a federal fuel-economy regulation would be “more efficient” at reducing GHG emissions.  

However, the California Air Resources Board has calculated that if the EPA were to grant the waiver and allow California’s regulations to go forward, carbon dioxide would be reduced in 2016 by 17.2 million metric tons, “more than double the 7.7 million metric tons that would be eliminated under the new federal fuel-economy standard.”  

In addition, the total reduction from 2009 through 2016 would be triple that of the federal regulation.  

The implications of the EPA’s refusal to grant a waiver are wide-ranging. In effect, when the EPA denied California’s waiver, it invalidated all other state GHG emission standards that were grounded on California’s regulations.  

The EPA’s decision to refuse to grant a waiver is also noteworthy because the decision is a departure from decades of precedent of granting California such waivers.  

After all, a waiver to do more than is allowed under federal regulation does not contravene federal statutes or regulatory goals. Congress had previously recognized that granting California a waiver to implement stricter standards allowed the state to serve “as a proving ground for new technology that would later be introduced nationwide pursuant to federal


Id. at § (b)(1)(B) (waiver can be denied if the EPA Administrator determines that “such State does not need such State standards to meet compelling and extraordinary conditions”).  


Id.  

Id.  

Id.  

Id.  

Id.  

Id.  

Id.  

Id.  

Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F.Supp.2d 295, 344 (D.Vt. 2007) (stating unequivocally that “[t]here is no dispute that if California fails to receive a waiver from EPA for its standards, then Vermont’s GHG standards are invalid.”).  

Id. at 344-345 (explaining that “Congress has allowed California to avoid preemption” in the past “because it was persuaded that California had uniquely severe air pollution problems and a burgeoning number and concentration of automobiles” and because Congress “determined that there were potential benefits for the nation in allowing California to continue to experiment and innovate in the field of emissions control”).
In fact, the EPA has “issued waivers to California in virtually all of California’s applications. . .and has never denied California an emissions waiver in its entirety.”\textsuperscript{75} The court also recognized that “actions by sub-national governments have indeed led to nationally significant emissions reduction for criteria pollutants” and “[t]here is no reason to believe that this approach would not also prove effective for GHG emissions abatement.”\textsuperscript{76}

California has separately filed a public nuisance suit under both federal common law and California state law against six major motor vehicle manufacturers in the United States.\textsuperscript{77} California was seeking damages for the harm caused by the motor vehicle manufacturers in the form of GHG emissions from their automobiles.\textsuperscript{78} The automobiles emit approximately 289 million metric tons of GHGs in the United States, which “constitutes approximately nine percent of human-generated carbon dioxide emissions in the United States and over thirty percent in California.”\textsuperscript{79} In the suit, California alleged the harm from climate change has caused “an increase in the winter average temperatures. . .a reduction in the snow pack which serves as thirty-five percent of the State’s water. . .increased risk of flooding within the state. . .increased erosion along California’s 1,075 miles of coastline. . .and increases in the risk and intensity of wildfires, among others.”\textsuperscript{80}

Although the case seemed like an opportunity for the courts to step in and solidify California’s role as a pioneer in implementing mandatory climate change regulation at the regional level, the court never reached the merits of the case, holding that the public nuisance claim under federal common law was a non-justiciable political question.\textsuperscript{81} The court held it was “precluded from exercising supplemental jurisdiction over Plaintiff’s state law nuisance claim” and therefore that claim was dismissed without prejudice.\textsuperscript{82} Although California’s attempt to recover damages by way of a public nuisance suit was unsuccessful, it is yet another significant step at the regional level in the battle to reduce GHG emissions.

\textsuperscript{74} Id. at 345.
\textsuperscript{75} Id. at 348-349.
\textsuperscript{76} Id. at 394.
\textsuperscript{78} Id. at 596.
\textsuperscript{79} Id.
\textsuperscript{81} Id. at 16.
\textsuperscript{82} Id.
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III. FEDERAL RESPONSES TO MASSACHUSETTS V. EPA

Massachusetts v. EPA is a landmark case because the Court validated the right of a state to challenge a federal agency’s judgment. The majority opinion paves the way for states to challenge decisions by other federal agencies and potentially impact numerous areas of law. Specifically, Massachusetts v. EPA can be credited with altering the foreign policy of the United States regarding global climate change. The change in policy began with an Executive Order soon after the Court’s decision and its most recent manifestation is the United States’ participation in an international forum in Bali, Indonesia to discuss a successor treaty to the Kyoto Protocol.

In direct response to Massachusetts v. EPA, President George W. Bush issued Executive Order 13432, which states the policy of the United States.83

It is the policy of the United States to ensure the coordinated and effective exercise of the authorities of the President and the heads of the Department of Transportation, the Department of Energy, and the Environmental Protection Agency to protect the environment with respect to greenhouse gas emissions from motor vehicles...in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth.84

Following that executive order, the EPA Administrator, Stephen Johnson acknowledged at a press briefing that “the U.S. Supreme Court decided in Massachusetts versus EPA that the Clean Air Act provided the EPA with the statutory authority to regulate greenhouse gas emissions from new vehicles if I determine in my judgment whether such emissions endanger public health and welfare under the Clean Air Act.”85 The Administrator, in the same set of remarks, acknowledged that the first steps towards EPA regulation had been taken, and he also supported the Bush administration’s efforts to date.86 Administrator Johnson explained that he believed that the United States is already making significant progress in reducing GHG emissions, arguing “U.S.

84 Id.
86 Id. (stating that “Since 2001, EPA and the entire administration have invested more than $37 billion to study climate change science, promote energy-efficient and carbon-dioxide-reducing technologies, and fund tax incentive programs...” which amounts to “more money than any other country in the world has spent to address this global climate change”).

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greenhouse gas intensity declined by 1.9 percent in 2003, declined by 2.4 percent in 2004, and 2.4 percent again in 2005. Put another way, from 2004 to 2005, the U.S. economy has increased by 3.2 percent, while greenhouse gas emissions increased by 0.8 percent. In other words, there has been no reduction in GHG emissions. Rather, there has been an increase, which further demonstrates the need for a federal comprehensive scheme and a coordinated international plan to reduce GHG emissions.

In a potentially productive first step, several members of Congress agreed to address the issue of implementing mandatory caps on carbon emissions. The three most prominent sponsors of the bill are Senators John McCain, Barack Obama, and Joe Lieberman, a Republican, Democrat, and Independent respectively. The wide political spectrum of support gained by this bill seems to suggest it has a legitimate chance of becoming law. The bill requires “mandatory caps on greenhouse emissions by power plants, industry, and oil refineries” and requires the release of GHGs “to return to 2004 levels by 2012 and to 1990 levels by 2020.” To accomplish the stated goals of the bill, “businesses could buy emissions ‘credits’ from other companies that have exceeded their reduction targets and could use other methods to avoid the most costly cutbacks, according to a draft of the bill.” In an effort to compromise, the Chairman of the Energy and Natural Resources Committee is offering a “more modest” bill that allows GHG emissions to increase until 2030. While it is unclear which bill, if any will pass, the encouraging aspect is that Congress seems to be grasping the urgency and severity of the problem.

IV. THE U.S. APPROACH TO INTERNATIONAL CLIMATE CHANGE REGULATION

The United States first responded to the problem of climate change in 1978 when Congress passed the National Climate Program Act (“NCPA”). Prior to this time, climate change was not perceived by scientists as a serious threat, but rather “meteorologists explained that weather patterns always did vary modestly, in cycles lasting a few decades or centuries” and scientists even

87 Id.
89 Id.
90 Id.
91 Id.
92 Id.
speculated that there could be beneficial effects for the farm industry.\textsuperscript{94} However, as more scientists began to study the possible problems, it became clear that the government should be involved in discovering the specific problems associated with GHG emissions, and more importantly, possible solutions.\textsuperscript{95} As a result, the NCPA created a system “to study the causes and effects of climate change.”\textsuperscript{96} In addition, President Carter directed the National Research Council, a “nonprofit institution that provides science, technology and health policy advice under a congressional charter signed by President Abraham Lincoln”\textsuperscript{97} to study the implications of climate change.\textsuperscript{98} Nine years later, Congress amended the NCPA and implemented the Global Climate Protection Act of 1987, which created the National Climate Program to study the effects of man-made GHG emissions and how to reduce their impact domestically and more importantly, internationally.\textsuperscript{99} Three years later, Congress passed the Global Change Research Act, “which called for an annual report to Congress, research into energy efficiency and the climate change implications of urban and suburban development practices, and discussions with other nations on ways to coordinate climate change research.”\textsuperscript{100}

In 1990, the IPCC released its first complete report on climate change and concluded that man-made emissions are contributing to a warmer Earth.\textsuperscript{101} Based on this conclusion, in 1992 the United Nations held the Earth Summit in Rio de Janeiro, at which President George H.W. Bush, along with 154 other nations, decided to support the United Nations Framework Convention on Climate Change (“UNFCCC”).\textsuperscript{102} The United States Senate ratified the UNFCCC and it took effect in 1994.\textsuperscript{103} The UNFCCC’s stated objective is the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”\textsuperscript{104} While the UNFCC “does not set specific targets for each signatory

\textsuperscript{94} Spencer R. Weart, \textit{The Discovery of Global Warming} 1-2 (2003).
\textsuperscript{95} See Visick, \textit{supra} note 93.
\textsuperscript{96} Id.
\textsuperscript{97} The National Research Council, \url{http://sites.nationalacademies.org/nrc/index.htm}.
\textsuperscript{98} See \textit{Massachusetts}, 127 S.Ct. at 1448 (noting that “If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible...A wait-and-see policy may mean waiting until it is too late.”).
\textsuperscript{99} Visick, \textit{supra} note 93.
\textsuperscript{100} Id.
\textsuperscript{101} See \textit{Climate Change: The IPCC Scientific Assessment}, at xi (John Theodore Houghton, G.J. Jenkins, J.J. Ephraums, eds., 1990) (explaining that “emissions resulting from human activities are substantially increasing the atmospheric concentrations of...greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth’s surface.”).
\textsuperscript{102} Visick, \textit{supra} note 93.
\textsuperscript{103} Id.
\textsuperscript{104} United Nations Framework Convention on Climate Change art. 2, May 9, 1992, \textit{available at}
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to meet. . .it does set the broad goal of returning greenhouse gas emissions to 1990 levels," and urges developed countries to take the lead in stopping and reversing the effects of climate change.\textsuperscript{105} After the UNFCCC, the IPCC released its second complete report in 1995 and concluded that "[t]he balance of evidence suggests there is a discernable human influence on global climate."\textsuperscript{106} Following the IPCC's second similar conclusion, UNFCC members met in Japan in 1997 and created the Kyoto Protocol, "which stipulates specific targets for greenhouse gas emissions reductions from signatories to the UNFCCC."\textsuperscript{107} Notably, the Kyoto Protocol requires only developed countries to reduce GHG emissions.\textsuperscript{108} This continues the earlier Rio Declaration's position that the "right to develop" on the party developing countries outweighs the obligation not to cause environmental harm.\textsuperscript{109} Although President Bill Clinton signed the Kyoto Protocol in 1998, he never presented it to the Senate for ratification and therefore the United States is not bound by its terms.\textsuperscript{110} At the very minimum, by signing the treaty, the United States has agreed not to act inconsistently with the stated aims and objectives of the treaty.

The Senate explained the position of the United States when it passed a unanimous resolution explaining that because developing countries were not subject to Kyoto emission limitations, the United States should not enter it.\textsuperscript{111} In addition, President George W. Bush has not supported the Kyoto Protocol on the grounds that developing countries are not required to reduce GHG emissions, even though they are "major emitters".\textsuperscript{112} This is a legitimate concern but ought not to impede climate change efforts by the states or the federal government. In a letter from President George W. Bush to several Senators, Mr. Bush explained that he opposes the Kyoto Protocol because "it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy."\textsuperscript{113} Mr. Bush continues in the letter to explain that the Senate's 95-0 vote on the Kyoto Protocol demonstrates "that there is a clear consensus that the

\begin{itemize}
\item \textsuperscript{105} Visick, \textit{supra} note 93, at 251.
\item \textsuperscript{107} Visick, \textit{supra} note 93.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} James E. Hickey, Jr., \textit{Environmental Protection and Energy Development, in ENERGY LAW AND POLICY FOR THE 21ST CENTURY} 5-28 (2000).
\item \textsuperscript{110} Visick, \textit{supra} note 93, at 251.
\item \textsuperscript{111} See S. Res. 98, 105\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (July 25, 1997).
\item \textsuperscript{113} George W. Bush, \textit{Test of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts} (March 13, 2001) \textit{available at} http://www.whitehouse.gov/news/releases/2001/03/20010314.html.
\end{itemize}
Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns.\textsuperscript{114} Instead, the President advocates a "balanced national energy policy" that includes requiring power plants to reduce GHG emissions by "phasing in reductions over a reasonable period of time, providing regulatory certainty, and offering market-based incentives to help industry."\textsuperscript{115} President Bush also wrote in the letter that he does "not believe, however, that the government should impose on power plants mandatory emissions reductions for carbon dioxide" because it "is not a 'pollutant' under the Clean Air Act."\textsuperscript{116} It remains to be seen whether President Bush now believes in imposing mandatory emissions reductions on various industries given the Supreme Court's holding that carbon dioxide is indeed a pollutant under the CAA. It seems as though this finding could give President Bush the political opportunity to advocate for and ultimately implement some type of coherent and comprehensive federal legislation mandating GHG emissions reductions. While Congress has not yet produced a viable piece of legislation addressing the issue, President Bush has signaled to the international community that the United States is serious about confronting the problems associated with global climate change.

On both the domestic and international fronts, the world has taken steps to mitigate the effects of GHGs and their contribution to climate change. However, the scientists who comprise the United Nations Intergovernmental Panel on Climate Change agree that the efforts to date, both domestically and internationally, have been insufficient.\textsuperscript{117} The Intergovernmental Panel on Climate Change is composed of over two thousand scientists whose main "role is to assess on a comprehensive, objective, open and transparent basis the latest scientific, technical and socio-economic literature produced worldwide relevant to the understanding of the risk of human-induced climate change, its observed and projected impacts and options for adaptation and mitigation."\textsuperscript{118} Indeed, the scientists on this panel were awarded the Nobel Peace Prize in October 2007, and recently agreed that the world must "reverse the growth of greenhouse gas emissions by 2015 to prevent serious climate disruptions."\textsuperscript{119} Although the efforts to address the problems associated with rising GHG emissions by various countries and institutions have been mostly unsuccessful and inadequate, all of the parties involved share the common goal of protecting our planet.

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{118} Intergovernmental Panel on Climate Change Mandate, available at http://www.ipcc.ch/about/index.htm.
\textsuperscript{119} Rosenthal, \textit{supra} note 117.
Despite a common goal, some scholars argue that commonality is precisely why there has been minimal success with the initiatives to date. In essence, although there may be a shared common good, "there is seldom a common interest in paying for that good. Each member of the group wants other members to pay the costs of providing it because, by definition, each member will benefit from the good regardless of whether or not he or she pays for it." The problems associated with acting on behalf of a common good, such as the ever-present threat of free riders, may explain why the efforts to date have been inadequate to address the problem. As a result, any proposed solution in the future must ensure that each nation bears its fair portion of the burden. Much of the debate will focus on what amounts to a fair portion, but there is no reason why an agreement cannot be reached.

V. INTERNATIONAL CLIMATE CHANGE REGULATION INITIATIVES

Massachusetts v. EPA led to a direct change in the United States’ approach to global climate change. The change in policy began with an Executive Order soon after the Supreme Court’s decision and its most recent manifestation is the United States’ participation in an international forum in Bali, Indonesia to discuss a successor treaty to the Kyoto Protocol. In December 2007, the signatory countries of the Kyoto Protocol, including the United States, came together again in an attempt to reach a more meaningful and effective solution to the problems associated with the emission of GHGs that directly result in global climate change. Representatives from 187 countries met in Bali, Indonesia and agreed to participate in discussions over the next two years in an attempt to form a new treaty aimed at reducing GHG emissions.

The resulting agreement, the Bali Action Plan, has as its stated objective, "[r]esponding to the finding of the Fourth Assessment Report of the Intergovernmental Panel on Climate Change that warming of the climate system is unequivocal, and that delay in reducing emissions significantly constrains opportunities to achieve lower stabilization levels and increases the risk of more severe climate change impacts." The discussions surrounding the Bali Action Plan focused in large part on the most recent report from the IPCC, released in

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120 Paul G. Harris, Collective Action on Climate Change: The Logic of Regime Failure, 47 NAT. RESOURCES J. 195, 201 (2007).
121 Id.
123 Fuller, supra note 122.
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November 2007, just weeks before the meeting in Bali.\textsuperscript{125} The report states that climate change is “unequivocal” and the United Nations Secretary General urged the two biggest polluters in the world, the United States and China, to play a central role in reducing the effects of GHG emissions.\textsuperscript{126} China’s contribution to GHG emissions is mostly attributable to exports, which account for twenty three percent of all Chinese GHG emissions, six percent of which is directly attributable to exports going to the United States.\textsuperscript{127} The IPCC’s most recent report is actually based on three earlier reports, which when analyzed simultaneously, paint an outlook so grim that “[o]nly urgent, global action will do.”\textsuperscript{128} According to the report, the dangers are widespread and potentially affect the entire planet ranging from water shortages in Africa, increased risk of coastal flooding for cities around the world, species loss, hotter summers, and colder winters.\textsuperscript{129}

The Bali Action Plan, does not have any binding effect, but does state that “‘deep cuts in global emissions will be required’”\textsuperscript{130} and offers a schedule to negotiate a modified treaty based on the Kyoto Protocol.\textsuperscript{131} Although the United States has agreed to participate in the discussions over the next two years, the same concerns that have kept the United States from signing the Kyoto Protocol, specifically the concern that China and India must agree to limit their emissions, remain at the forefront of concern by United States officials. One United States official stated, “[t]he negotiations must proceed on the view that the problem of climate change cannot be adequately addressed through commitments for emissions cuts by developed countries alone. Major developing economies must likewise act.”\textsuperscript{132} Rapidly industrializing countries such as India and China have insisted that their priority must be to remove their country from poverty before agreeing to any mandatory reductions in GHG emissions.\textsuperscript{133} These countries often assert that the United States was not subject to such regulations while it was going through its industrial revolution and therefore countries like China and India should not be forced to reduce GHG emissions at the risk of further increasing poverty. However, the problem with this argument is that the current condition of our planet is much different than it was when the United States was undergoing its industrialization. It is an

\textsuperscript{125} See Fuller, supra note 122.
\textsuperscript{128} Associated Press, supra note 126.
\textsuperscript{129} Id.
\textsuperscript{130} Fuller, supra note 122.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
undeniable fact that to solve the problems associated with climate change, the major emitters of GHGs must play an active and central role in reductions. Without their efforts, any initiative is doomed to produce the same inadequate solutions that are found in the Kyoto Protocol. The conference in Bali concluded on an emotional note “after a last-minute standoff in the public plenary at the end of a day of high emotions, with the co-organizer of the conference, Yvo de Boer, fleeing the podium at one point as he held back tears.” Clearly the parties involved in these negotiations recognize the importance of arriving at a new pact that will pick up where the Kyoto Protocol leaves off when it expires in 2012. One of the main reasons necessitating a new treaty that easily picks up where Kyoto left off is to maintain the stability and promote the growth of carbon markets.

### A. Carbon Markets

An integral part of the Kyoto Protocol was the provision that set up a “complex market for companies to trade permits to pollute.” The idea was to “harness market forces to solve global warming.” Since the Kyoto Protocol sets GHG emission level restrictions for each signatory country, each country must then decide which companies within its borders to restrict in order to meet its emission caps. “After a government sets an emissions limit for a company, it gives that company just enough permits to cover it. Companies that reduce emissions below their caps can sell excess credits to companies that don’t have enough.” The trading in these permits has been in effect since 2005 and was a thirty billion dollar industry in 2007. This “cap-and-trade” system has promise. The main challenge is that the world’s two largest polluters, the United States and China, are not bound by caps and therefore two major players are left out of the “cap-and-trade” system. Future agreements must develop a cap-and-trade system that includes the United States and China simply because of their immense contributions to GHG emissions. The current system has

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134 Id.
136 Id.
137 Id.
138 Id.
139 Id.
140 Id.
141 Id.
142 Id.
143 Id. (stating that “The U.S. and China together account for about 40% of emissions of carbon dioxide from fossil-fuel combustion, which scientists say is the most common source of man-made greenhouse-gas emissions…” and that amount “…dwarfs the 28% share from the countries that did
produced some positive environmental effects. However, the progress has been much slower than originally envisioned by Kyoto's creators. In fact, “Japan’s emissions are rising, Canada has backed away from its target, and the EU says it will meet its goal only if member nations get tougher. Scientists say far bigger cuts than those called for in the treaty are needed. But global energy use is expected to rise by 50% by 2030.”

Part of the problem is that industries and companies located in countries that are bound by caps have found ways to meet cap requirements without actually reducing the consumption of fossil fuels. A United Nations official, who helped create the carbon market, acknowledged that “markets work as markets will do, to find the lowest-cost alternative” meaning that if it is cheaper for a company to meet its cap requirements using technology, but not by reducing the consumption of fossil fuels, it will do so. Frequently technology allows a company to reduce emissions and meet its cap requirements in a more economically efficient way than by switching to alternative fuels. One such way is by purchasing emissions permits from developing countries engaged in projects that reduce carbon, which actually generates permits under the terms of the Kyoto treaty. Permit-generating projects have sprung up throughout the world and importantly, “projects targeting more potent gases generate more credits than projects targeting carbon dioxide” which “accounts for 77% of all man-made greenhouse gas-emissions. . .but. . .is also the weakest” GHG. By doing this, companies can avoid reducing their own emissions and simply pay a fee for their GHG emissions in the form of purchasing permits. Advocates of the permit trading system argue that because companies have to purchase permits to maintain their current emissions levels, the price of consumer goods will ultimately reflect the harm caused to the planet by their production. If companies are forced to buy permits, they will ultimately pass that expense on to the consumer in the form of higher prices.

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144 Id.
145 Id.
146 Id.
147 Id.
148 Id. (noting that “Installing machinery on a refrigerant plant to incinerate HFC-23 is cheap…generating one carbon credit through an HFC-23 project typically costs less than $1. Generating a credit from a renewable-energy project – erecting a wind turbine or solar panel – can cost $5 to $10” according to the World Bank).
149 Id. (in fact.).
150 Id.
151 Id.
152 Chevalier, supra note 127.
153 Id.
goods manufactured by companies that do not have to purchase carbon credits, thus providing an incentive for all companies to lower GHG emissions.\(^\text{154}\)

**CONCLUSION**

As a direct result of the United States Supreme Court’s decision in *Massachusetts v. EPA*, the federal Executive Branch has taken a new and different policy stance on reducing the emission of GHGs. Directly after *Massachusetts v. EPA*, President Bush signed an Executive Order officially altering his administration’s policy regarding GHG emissions. In addition, with a new pact, the United States agreed, during the Bali conference, to try to accomplish what the Kyoto Protocol was not able to do.\(^\text{155}\) The Bali agreement marks a change in position from the Bush administration’s prior position that the 1992 UNFCCC was adequate to address all the problems associated with climate change. Domestically, Congress is debating several bills that would impose mandatory caps on carbon emissions. However, there are still no binding agreements on the United States or economically developing countries such as India and China, and therefore only time will tell whether these countries will be able to reach an agreement over the next two years to solve the deficiencies of the Kyoto Protocol. What is certain is that the countries need somehow to reach a universally accepted international agreement that provides for meaningful mandatory caps on emissions. The science is no longer debatable that man’s energy activities contribute to global climate change. The IPCC has published its warnings. It is now up to the rest of the world to listen and take action. The United States is in a unique position to lead the march toward a practical and effective solution.

\(^{154}\) *Id.*

\(^{155}\) Fuller, *supra* note 122.