

Litigating to Regulate: *Massachusetts v. Environmental Protection Agency*

Andrew P. Morriss*

I. Introduction

By a 5-4 vote in *Massachusetts v. Environmental Protection Agency*,¹ the Supreme Court took yet another significant step away from the Framers' vision of the judiciary and toward a politicized Supreme Court sitting as a super-legislature and super-regulator. The Court substituted its judgment for that of the politically accountable branches of the federal government. By dramatically loosening the rules of standing, the Court invited those unhappy with the federal government's failure to regulate in a particular manner in any substantive area to use the federal courts to force federal agencies to regulate. In short, the Court encouraged interest groups to seek to obtain from the courts what they could not from agencies or Congress. The Court rolled out the welcome mat for state governments unhappy with a federal agency's decision, creating from whole cloth a new rule of standing that allows states to gain a hearing in federal court with only the thinnest of allegations of harm. In doing so, the Court undermined the legal rules of standing. The majority also supported its decision with a one-sided and unsophisticated account of the scientific evidence for the petitioners' claims concerning climate change, needlessly inserting the courts into a scientific dispute that, as the majority's opinion demonstrated, they are woefully unprepared to handle.

Unfortunately *Massachusetts v. EPA* is but one piece of a broader trend toward regulation through litigation. A wide range of interest

*Andrew P. Morriss is H. Ross and Helen Workman Professor of Law and Business and Professor, Institute for Government and Public Affairs, University of Illinois. Jonathan H. Adler, Benjamin D. Cramer, and Roger E. Meiners for comments on an earlier draft. All errors remain, of course, my responsibility.

¹127 S. Ct. 1438 (2007).

groups, including state politicians, private interest groups, and federal regulators, is increasingly using the courts as a vehicle to impose regulatory measures the interest groups cannot obtain from legislatures and agencies.² The usual regulatory process has many flaws, but it at least incorporates a measure of political accountability. By shifting key aspects of regulatory decision-making to the courts, these interest groups are finding ways to deflect responsibility for the costs imposed by the regulatory state. By doing so in a way that provides only a means to increase regulatory agencies' activity and jurisdiction, the courts' acquiescence in regulation by litigation further erodes the constraints on regulators, giving them (and interest groups that favor increased regulation) a second chance on those occasions when they lose in the political process.

II. The Decision

The substantive dispute at the heart of *Massachusetts v. EPA* was straightforward. Section 202(a)(1) of the Clean Air Act requires that the administrator of the Environmental Protection Agency (EPA) "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."³ In October 1999, a group of nineteen organizations ranging from Greenpeace USA to the Network for Environmental and Economic Responsibility of the United Church of Christ filed a petition with EPA, requesting that the agency initiate rulemaking to regulate greenhouse gas emissions from new motor vehicles under that section. Before formulating the response required by law, EPA sought and received extensive public comment on the petition and obtained a report on the science of climate change from the National Research Council of the National

²See Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Regulation by Litigation* (Yale University Press, forthcoming 2008); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 *Harv. Env. L. Rev.* 179 (2005); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Regulation by Litigation: The EPA's Regulation of Heavy Duty Diesel Engines*, 56 *Admin. L. Rev.* 403 (2004); *Regulation Through Litigation* (W. Kip Viscusi, ed. 2002).

³42 U.S.C. § 7521(a)(1).

Massachusetts v. Environmental Protection Agency

Academy of Sciences.⁴ After considering the matter, the agency decided in 2003 against issuing a rule, concluding that it lacked statutory authority to do so.⁵ In addition, EPA determined that even if it had authority to regulate mobile source emissions of greenhouse gases, rulemaking on motor vehicle greenhouse gas emissions alone would be imprudent because it would fragment government policy toward emissions and impede negotiations with other countries over a global approach to climate change.

The interest groups, now joined by twelve states⁶ and local and territorial governments,⁷ appealed EPA's decision to the D.C. Circuit. The three judge panel in that court produced three opinions, two of which supported upholding EPA's decision (albeit on different grounds) and one of which favored overturning the agency decision not to regulate motor vehicle greenhouse gas emissions as arbitrary and capricious.⁸ Most of the unsuccessful petitioners then sought review of the decision in the Supreme Court. A variety of interest groups and ten states⁹ supported EPA's position on one ground or another before the Supreme Court (including the Cato Institute).

The case presented two questions for the Supreme Court. First, did any of the organizations, states, or local governments complaining about EPA's failure to regulate have standing to seek review of the agency's decision in the courts? Standing is a component of Article III's limitation of the federal courts' jurisdiction to "Cases" and "Controversies."¹⁰ Standing's requirement that a petitioner seeking to overturn an agency action must demonstrate that the agency's action "injures him in a concrete and personal way"¹¹ was a difficult hurdle to overcome for those who simply objected to an agency's

⁴National Research Council, *Climate Change: An Analysis of Some Key Questions* (2001).

⁵Control of Emissions from New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52922 (Sept. 8, 2003).

⁶California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

⁷The District of Columbia, American Samoa, New York City, and Baltimore.

⁸Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), rev'd 127 S. Ct. 1438 (2007).

⁹Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah.

¹⁰U.S. Const., Art. III.

¹¹Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).

