MASSACHUSETTS V. EPA: IS THE PROMISE OF REGULATION *MUCH ADO ABOUT NOTHING*? DECONSTRUCTING STATES SPECIAL SOLITUDE AGAINST AN EVOLVING JURISPRUDENCE

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For want of a nail the shoe was lost.
For want of a shoe the horse was lost.
For want of a horse the rider was lost.
For want of a rider the battle was lost.
For want of a battle the kingdom was lost.
And all for the want of a horseshoe nail.
For Want of A Nail [1]

I. INTRODUCTION

Shakespeare seldom failed his audiences, as they experienced the full range of human emotions acted out on stage. Whether it was fear, love, betrayal, desire, deceit or nothing (yes, even nothing), his fans were spell-bound. Shakespeare's sixteenth century play, *Much Ado About Nothing*,[2] offered themes of love, lust, and alleged infidelity. But his play suggested that the alleged infidelity was nothing more than a big fuss, or a big *ado,* over nothing. This theme of nothing, or *much ado about nothing*, also sets the stage for my audience

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1. BENJAMIN FRANKLIN, THE PREFACES, PROVERBS, AND POEMS OF BENJAMIN FRANKLIN: ORIGINALLY PRINTED IN POOR RICHARD'S ALMANACS FOR 1733-1758 275 (Paul Leicester Ford, ed., Putnam 1889). In *Massachusetts v. EPA*, Chief Justice Roberts relied on this proverb to highlight that focusing on small victories can result in big consequences, much like winning the battle but losing the war. 549 U.S. 497, 546(2007). Or, in the current case, perhaps the über goal of protecting the environment was lost because of Massachusetts' desire for a small victory. As Roberts stated, "[s]choolchildren know that a kingdom might be lost 'all for the want of a horseshoe nail,' but 'likely' redressability is a different matter." *Id.*

2. WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING (Cedric Watts ed., Woodsworth Editions Limited 2003).

here, the readers of this article. While drawn to the Supreme Court's lackluster illumination of the much sought after issue of global warming, I am prompted to respectfully ask what is the *much ado about Massachusetts v. EPA*[3] (hereinafter *Massachusetts*)? While the case was trumpeted as a landmark constitutional mandate in civilized society's decades long struggle with global warming,[4] the Court's opinion turned out to be nothing significant from an environmental pollution control perspective, a sentiment echoed by other scholars as well.[5] As I dissect *Massachusetts* through the lens of Justice Kennedy's swing vote[6] by analyzing the majority's approach to the threshold determination of state standing[7] and highlighting the shadows of new federalism in a routine administrative law decision,[8] I ponder whether the Court's opinion warrants

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3. 549 U.S. 497.

4. *See* Michael Hawthorne, *EPA Must Regulate Greenhouse Gases*, CHI. TRIB., Apr. 3, 2007, at 3. Global warming is the term given to the collective physical phenomena characterized by the increase in average temperature of the Earth's surface air and oceans, which began in the middle of the 20th century and is expected to continue unabated. For a scientific definition of global warming, see Intergovernmental Panel on Climate Change ("IPCC"), *Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1, 10 (Susan Soloman et al. eds., 2007), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf. Although the scientific community is divided in its assertion of a cause for this phenomenon, the consensus view is that the increase in atmospheric greenhouse gases due to human activity has caused most of the warming since the beginning of the industrial era. *Id.* at 10-12. Few doubts remain that the warming can be causally linked to natural causes alone. *Id.*

5. *See* Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA: *Breaking New Ground on Issues other than Global Warming*, 102 NW. U. L. REV. 1029, 1029-30 (2008).

6. Legal commentators widely view Justice Kennedy as the swing vote on the Supreme Court in the post O'Connor era. *See* Tony Mauro, *Kennedy Reshapes Abortion Conflict as He Refines 'Swing Vote' Role*, LEGAL TIMES, April 23, 2007, *available at* http://www.law.com/jsp/article.jsp?id =1177059874125. Justice Kennedy, the swing vote in *Massachusetts*, seemed sympathetic toward the state of Massachusetts, expressing particular interest in whether or not states have some sort of "special solicitude" or special standing. Robert V. Percival, Massachusetts v. EPA: *Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 131-34 (2008) (observing Justice Kennedy's accommodation of an orderly evolution of the modern regulatory state). If Kennedy accepts the argument that states have special standing in federal court, similar petitioners will likely be able to secure the necessary five votes, and the Court will proceed to the merits. *See* Michael Lufkin & Bradley Marten, *Supreme Court Greenhouse Gas Decision Extends Beyond the Tailpipe*, Envtl. News, Apr. 4, 2007, *available at* http://www.martenlaw.com/news/?20070404-greenhouse-gas-decision.

7. This article will discuss the quantum of injury the litigants in a petition must show in order to qualify for the applicable and relevant status required to bring a lawsuit against federal agencies.

8. *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008). Administrative rulemaking is the process by which state agencies governed by the executive branch adopt rules, following proper procedure, having the force of law. Mark Shepherd, Minn. House of Representatives, Administrative Rulemaking (2001), *available at* http://www.house.leg.state.mn.us/hrd/pubs/admrule.pdf. By delegating rulemaking authority to a federal agency, Congress is obligating the agency to make law. *Id.* "Agencies only have

much ado about debating its significance in the regulation of gases impacting our planet's global warming.

Review of the Environmental Protection Agency's ("EPA") actions post-*Massachusetts* indicates that the Court may not have been successful in putting the onus of regulating green house gases on the EPA within the meaning of the Clean Air Act ("CAA").[9] On the other hand, it is rather evident that the Court has ventured into a new arena of decision making while granting elevated status to individual states within the U.S. federal system. The majority opinion in *Massachusetts* was crafted around an analysis of the substantive question of whether the EPA has authority to regulate, and accordingly the obligation to make decisions regarding greenhouse gas emissions. By aligning itself with the scientific view that draws a causal link between man-made environmental pollution and global warming,[10] the Court found the EPA to have acted unlawfully by refusing to use its power of regulatory mechanism to combat the phenomenon. In arriving at its conclusion, however, the Court did not require any of the highly anticipated regulatory changes from the EPA. Rather, restricting its environmental regulation analysis within a narrow focus, the Court in *Massachusetts* examined states' expanded rights and concomitant obligations, an area I will expand on in this article.

The saga of *Massachusetts* began when the petitioners, comprising several states including Massachusetts, brought suit in the lower court, petitioning the EPA to regulate emissions of greenhouse gases ("GHG"),[11] under the 1963

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rulemaking authority to the extent that the legislature grants it." *Id.* The judicial branch, however, may "invalidate agency rules that exceed or conflict with the legislative delegation of rulemaking authority." *Id.*

9. *See* Peter S. Glaser & Douglas A. Henderson, Massachusetts v. EPA *Global Warming Decision: What Does It Mean?*, NAT. RESOURCES & ENV'T, Fall 2007, at 48, 49-50, *available at* http://www.troutmansanders.com/files/upload/GlaserReprint.pdf.pdf (observing that the nature, scope and timing of GHG reduction will depend more on Congress because EPA has no legal obligation to regulate GHG). The Clean Air Act is a collective term, applied to the panoply of legislative initiatives, given final form by means of applicable law imposed to combat environmental pollution. These laws are intended to reduce smog, pollutants, and noxious gases within the ambient surface-air of the earth. It is generally held that governmental adoption of these laws has helped improve the general well-being of human health on earth. For the full text of the Clean Air Act and accompanying Amendments, see EPA, Clean Air Act, *available at* http://www.epa.gov/air/caa/ (Dec. 19, 2008).

10. Massachusetts v. EPA, 549 U.S. 497, 508-09 (2007) (relying on the IPCC Scientific Assessment to determine that there is a causal link between human activity and global warming).

11. According to the National Energy Information Center, the term "greenhouse gases" (GHG) applies to "[m]any gases," some of which "occur in nature (water vapor, carbon dioxide, methane, and nitrous oxide), while others are exclusively human made (certain industrial gases)." Nat'l Energy Info. Ctr., Energy Info. Admin., Greenhouse Gases, Climate Change & Energy (May 2008), *available at* http://www.eia.doe.gov/bookshelf/brochures/greenhouse/Chapter1.htm. Although the Earth's weather and energy balance is maintained by a multitude of factors, including the sun and water cycles, scientific data indicates that the average temperature of the Earth would be considerably lower if all else is held equal and stable.

Clean Air Act.[12] The EPA argued that the CAA does not address global warming,[13] and thus the EPA does not have regulatory authority over greenhouse emissions.[14] Having lost in the lower court,[15] the petitioners were joined by religious groups, scientists, ski resorts, cities, businesses and former EPA officials, and an appeal was brought before the Supreme Court.[16] The EPA was joined by automakers, industry groups, and several other states.[17] From the petitioners' perspective, a favorable outcome would have been to obtain constitutional grants from the Justices, which would have effectively provided the EPA with an expanded obligation to pass emissions reducing regulations. However, the Court did not specifically mandate the EPA to adopt stringent vehicle emissions standards. Rather, the Court advised the EPA to reconsider its denial of the petition and provide rationale for the denial if the Agency chose to retain its original position.[18] While the plain meaning of the opinion clearly remands the case to the Agency to reconsider its denial of the petition, the outcome of the decision leaves the EPA free to decide not to regulate at all, as long as the Agency provides adequate justification for it.

Id. A recent assessment by the IPCC concluded that human activities impact significantly on the level of atmospheric GHG. *Id.*

By observing that, changes in atmospheric concentrations of greenhouse gases might have causal link to changes in energy balance of the climate system, IPCC concluded "[m]ost of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations." Intergovernmental Panel on Climate Change, *supra* note 4.

12. Massachusetts v. EPA, 415 F.3d 50, 53 (D.C. Cir. 2005)

> Congress first enacted the Clean Air Act (CAA) in 1963 with the purpose of reducing air pollution from stationary sources such as power plants and steel mills. The CAA sets emission standards for stationary sources while promoting public health and welfare of the United States population. [Ninety-five]million dollars over a three-year period financed state and local governments and air pollution control agencies, enabling them to conduct research and create control programs. Within the CAA, Congress also recognized the hazards of motor vehicle exhaust and mandated research, investigations, surveys, and experiments on interstate pollution from the use of high sulfur coal and oil.

Robyn Kenney, *Clean Air Act, United States*, *in* ENCYCLOPEDIA OF EARTH (Cutler J. Cleveland ed., 2009), *available at* http://www.eoearth.org/article/Clean_Air_Act,_United_States (last visited Mar. 23, 2009). However, the efficacies of the control programs created from this initiative are questionable from a mitigation perspective.

13. *EPA*, 415 F.3d at 54.

14. *See* Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52, 922, 52, 925–29 (Sept. 8, 2003) (showing EPA's observation that it lacked the statutory authority to regulate on the grounds that emissions are not "air pollutants" as that term is used in the CAA); *EPA*, 415 F.3d at 56 n.1.

15. *EPA*, 415 F.3d at 58-59.

16. Massachusetts v. EPA, 549 U.S. 497, 504-05 (2007).

17. *Id.*

18. *Id.* at 534-35.

Prior to the Supreme Court decision, *Massachusetts* was proclaimed to be the battle royal for environmental protection. Pitted on one side were the environmentalists, who had been anxiously seeking a win against what had clearly been viewed as the Bush Administration's anti-environmental policy. The environmentalists' opponents, however, did not support judicial encroachment upon federal agency decision making, nor were they in favor of regulating greenhouse gas emissions. Looking at the decision, in its true significance, it appears that *Massachusetts* may eventually retain only symbolic importance with respect to global warming. Especially, observing various actions set in motion by the EPA since the Court decided the case, I do not believe *Massachusetts* has binding authority to compel the EPA to make significant inroads in the fight against global warming. Reflecting upon the events preceding *Massachusetts,* it is clear that ultimately sustained federal agency inaction over the past decade paved the way for the evolution of the case in its current incarnation in the Supreme Court. I question, however, whether a significant environmental gain was made in the case. Considering the EPA's long drawn out consultation process and projecting a reasonable time line for any substantive environmental measure that may emanate from the *Massachusetts* decision,[19] I have no doubt that *Massachusetts* was a shallow victory for the environmental protection cause, which ultimately may boil down to *much ado about nothing*.

Once the dust settles on the environmental issues within *Massachusetts*' findings, it will be easier to uncover the constitutional development of the opinion along three predominant threads. First, the long term significance of

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19. Consider the words of Robert J. Meyers, Principal Deputy Assistant Administrator, EPA:

> As you are aware, the Energy Independence and Security Act of 2007 (EISA) was signed into law on December 19 of last year. That law revised the renewable fuels provisions in section 211(o) of the Clean Air Act. It also affected the Department of Transportation's (DOT) authority for setting Corporate Average Fuel Efficiency (CAFE) standards, including providing for consultation with the Department of Energy and EPA. Given the passage of EISA, and consistent with the Executive Order and the consultation provision in EISA, EPA is analyzing how to proceed on the issues before us on the remand, as well as how to proceed on any rulemaking that would regulate or substantially and predictably affect emissions of greenhouse gases from vehicles and engines.
>
> As a result, at this time, the Agency does not have a specific timeline for responding to the remand. However, let me assure you that developing an overall strategy for addressing the serious challenge of global climate change is a priority for the Agency, and we are taking very seriously our responsibility to develop an effective, comprehensive strategy.

Letter from Robert J. Meyers, Principal Deputy Assistant Adm'r, EPA, to David Bookbinder, Sierra Club (Feb. 27, 2008), *available at* http://www.sierraclub.org/environmentallaw/lawsuits/docs/EPA_Response_Letter.pdf.

Massachusetts must be reviewed against a newer constitutional illumination of state standing and how such standing may impact the judicial review of federal agency rulemaking authority.[20] The *Massachusetts* Court's newer framework for state standing is enshrined within special solicitude, an enduring principle of states' special rights, awakened from more than a century of hibernation. While the legal community is abuzz with the prospect of the Supreme Court adopting a new rule in *Massachusetts*, I trace the origin of the states' special standing to sue federal agencies to a panoply of precedent cases. While reviewing the genesis of special solicitude will provide a better understanding of the Roberts Court's newer foray into American constitutional jurisprudence, it will also provide a much needed glimpse into the evolving new constitutional federalism rights bestowed upon states. In my analysis, I will be aided by an understanding of how Justice Kennedy's view of federalism[21] melds into a seamless legal doctrine within Justice Stevens' pragmatism,[22] while placing the states under firmer footing within the American federal system than what has been the case in the past.[23] An interesting aspect of studying the evolution of special solicitude is to deconstruct the Court's creative approach in granting a new dimension into state standing, while staying within the framework of the conventional *Lujan* analysis.[24] More specifically, it is fascinating to witness how the Court

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20. *See* Watts & Wildermuth, *supra* note 5, at 1030.

21. Justice Kennedy's view of federalism is enshrined within the dual threads of his innate conservatism and his romantic idealism of the judiciary's place within the broader American republic as the insurer of justice, liberty and equality for all concerned. It is that drive for equality which shapes his view of the states' role within the grandeur federal republic, which in turn shapes his belief in the state's obligation to protect its inhabitants from injurious impact of a defective regulatory framework. For additional commentary on Justice Kennedy's federalism, see Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709, 729-35 (2006).

22. Justice Stevens' pragmatism is couched within his ability to navigate through the maze of facts, details and relevance, no matter how complicated the enquiry. In sharp contrast to some of his colleagues on the bench, it has been difficult to pinpoint his judicial bent to a specific brand of judicial adjudication process, nor is it easy to predict the outcome of his decision making in various cases. Although recent years have witnessed a distinct flavor of liberalism and an expansive view of constitutional interpretation in Justice Stevens' jurisprudential philosophy, this is borne out of his half century's understanding of how judicial process can best apply for the cause of human betterment. *Id.* at 714-15.

23. *Massachusetts* has transcended as an environmental case, as it evolved as a ground-breaking opinion on states' rights within the American federal system. By expanding the frontier of states' obligations and accompanying rights that flow from the Constitution, *Massachusetts* will go down in the history of constitutional jurisprudence as the opinion which expanded and solidified states' role within the federal republic.

24. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) was a United States Supreme Court case in which the court held that a group of wildlife conservation and other environmental organizations lacked standing to challenge regulations jointly issued by the U.S. Secretaries of the Interior and Commerce, regarding the geographic area to which a particular

incorporates every required element of the traditional *Lujan* framework, that of injury in fact, causation and redressability, while relaxing the threshold quanta for each and granting an elevated status to the states in the process.

A second substantive issue of doctrinal importance, which I shall bring to light in this article, is the more liberal Article III standing limitations[25] the Court has embarked upon, not only by relaxing the Constitution's Article III requirements, but also by maintaining consistency with its earlier rulings. My inquiry revolves around how the Court deconstructed findings of Article III standing under the doctrine of non-availability of particularized injury, while expanding its interpretation of Article III standing overall. I do not view the Court's ruling in *Massachusetts* as an isolated decision. Rather, I see it as a continuation of the Court's view originated in *Gonzales v. Oregon*,[26] framed in *Hamdan v. Rumsfeld,*[27] and perhaps further solidified in *Massachusetts*. Although tasked with resolving an impasse between the states' right to sue federal agencies and Congress' power to control federal jurisdiction, the Court has again retained the enduring principle of Article III,[28] while embracing an old framework. Delving into the archives of constitutional rulemaking and the history of Article III, I find the two-tiered structure of Article III[29] has undergone multiple refinements over the past decades. Yet, the Court shows fidelity to the textual interpretations of "cases and controversies," which springs anew within a reincarnated *Lujan* framework, only to be memorialized in *Massachusetts*.

I draw attention to the third significant development of this case, which reveals the Court's inclination to administrative law rulemaking. Until recently, administrative law has mostly been the exclusive jurisdiction of the District of

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section of the Endangered Species Act of 1973 applied. *See id.* at 557-58, 578; *see generally* Watts & Wildermuth, *supra* note 5.

25. *See infra* Section IV.

26. 546 U.S. 243 (2006).

27. 548 U.S. 557 (2006). For an understanding of the evolution of the Article III jurisprudence, see Saby Ghoshray, Hamdan's *Illumination of Article III Jurisprudence in the Wake of the War on Terror*, 53 WAYNE L. REV. 991 (2007).

28. I share the view that the indeterminate texts of Article III are "nestled between the critical junctions of two bedrock principles of the Constitution, the separation of powers and the judicial authority to interpret valid laws," thereby providing new meaning to the fixed immutable lines concerning Congress' power to curtail federal jurisdiction. *Id.* at 992. "These texts, which form Article III, have gone through various interpretations since the early days of the Framing period." *Id.*; *see also* Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. LAW. REV. 444 (1989) (challenging the traditional view of Congress' plenary authority over federal court jurisdiction); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990) (concurring in and discussing Akhil Reed Amar's argument that despite a strong claim for Article III limits on congressional control, Congress still may deprive all federal courts of jurisdiction over cases within the federal judicial power).

29. *See generally* Meltzer, *supra* note 28.

Columbia Circuit Federal Court.[30] But confronted with a climate change question with a much broader implication in *Massachusetts*, the Court responded with a restrictive finding. However, the extent of the curvature of this narrow verdict seems to have become illuminated by multiple strands of constitutional significances. Using its Article III standing interpretation, while expanding states' special standing, the Court justified the challenge of federal agency inaction[31]. Couched within a routine administrative law type verdict, *Massachusetts'* longstanding impact could potentially extend beyond rulemaking review, as the dormant states' power surfaces to announce the emergence of a new federalism doctrine within the Roberts' Court.

Massachusetts presents a rich concoction of constitutional interpretations along various areas of the constitutional landscape. The impact could be realized, reviewed and pondered for years to come. First, a litany of cases is currently trickling through various lower and federal court systems, challenging the authority of the EPA as the states become more empowered to make decisions on behalf of their citizens. Based on individual context, each of these lawsuits could be decided in any number of ways, depending on *Massachusetts* interpretation by the judges and lawyers. However, *Massachusetts* has opened a window of opportunity for these litigants, offering a fresh new look at an old problem. Second, given how *Massachusetts* was decided, opening a new vista of opportunities for states to challenge federal agency decisions, may not come from the proverbial left field. For example, we may see a lawsuit in the horizon, bringing a petition for rulemaking against the Securities Exchange Commission ("SEC"), on grounds of alleged inaction causing financial injury to a state. I shall, however, restrict my current analysis to the three issues discussed above.

With this objective in mind, Part II of this article examines the environmental impact of the decision in *Massachusetts vs. EPA* within the existing regulatory framework and observes that this decision is more of a constitutional jurisprudence analysis than an environmental litigation. Accordingly, Part III illuminates the constitutional landscape of states' special solicitude, a newer states' rights paradigm, crafted out of precedent cases and

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30. Massachusetts v. EPA, 415 F.3d 50, 53 (D.C. Cir. 2005) (*EPA*). The U.S. Court of Appeals for the Federal Circuit enjoys nationwide jurisdiction in specialized cases, such as those involving patent laws arising from the district courts, and jurisdiction over appeals from the Court of International Trade, U.S. Court of Federal Claims, U.S. Court of Veteran Appeals, International Trade Commission, Board of Contracts, Patent and Trademark Office, and Merit Systems Protection Board. Office of Career & Prof'l Dev., Am. Univ. Wash. Coll. of Law, Judicial Clerkships: Federal Court Clerkships (2009), http://www.wcl.american.edu/career/clerkships/federalclerkships.cfm. As a result, the core corpus of cases the U.S. Court of Appeals for the Federal Circuit deals with are routine administrative law cases, where the court rules over the procedural details regarding agency activities, in accordance with settled laws. *EPA*, 415 F.3d at 53.

31. *See EPA*, 549 U.S. at 516-26.

constitutional interpretation of Article III jurisprudence. The framework discussed in Part III will then lead to an explanation of the interpretations and assumptions utilized in developing the newer and expansive framework of Article III requirements in Part IV. In Part V, I will discuss how the holdings in *Massachusetts* are in line with an evolving liberal jurisprudence and structured along the lines of a dynamic constitutionalism. I intend to show how the relaxed requirement framework of Article III jurisprudence is consistent with the evolving shared power paradigm of the Constitution. Finally, in Part VI, I conclude by revisiting my initial enquiry, whether *Massachusetts* is indeed *much ado about nothing.*

II. ENVIRONMENTAL CASE: *MUCH ADO ABOUT NOTHING*?

The debate regarding whether the EPA has statutory authority over the regulation of GHG began in 1998.[32] One year later, the original petition against the EPA was brought by several organizations seeking to prove that the federal agency's position contradicts the straight forward text of the CAA.[33] The EPA accepted its statutory authority for reduction of GHG under

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32. *See* Memorandum from Jonathan Z. Cannon, Gen. Counsel, EPA, to Carol M. Browner, Adm'r, EPA 1 (Apr. 10, 1998), *available at* http://www.law.umaryland.edu/environment/casebook/documents/EPACO2memo1.pdf. The history of the EPA's legal wrangling related to the agency's authority can be traced back to 1998, as the agency is on record implicitly admitting its role in environmental regulation of GHG. In April 1998, then-EPA General Counsel Jonathan Cannon issued a memorandum declaring that carbon dioxide meets the Clean Air Act's definition of "air pollutant." *Id.* at 2. Observing, however, that the EPA made no determination to exercise its authority to regulate greenhouse gases under the Act even though the EPA knew that it could move forward with regulation if it wanted to – or if it thought such a move were politically viable. *See id.* at 4. However, the EPA's denial of rulemaking continued and formalized further in 2003. The administrators for the EPA determined in 2003, that the EPA lacked authority under the Clean Air Act to regulate carbon dioxide and other greenhouse gases (GHG) and, that even if the EPA did have such authority, the EPA declined to regulate carbon dioxide and other GHG. *See* Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003) (indicating EPA's observation that it lacked the statutory authority to regulate on the grounds that emissions are not "air pollutants" as that term is used in the CAA). This led to the decision by the U.S. Court of Appeals for the District of Columbia Circuit on September 13, 2005, to uphold the decision of the EPA, although the reasoning among the appellate judges for coming to the majority conclusion was sharply at odds, which ultimately found its way into the Supreme Court. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005.

33. *See* Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. at 52,925–29. Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1) (2000), requires the administrator of the Environmental Protection Agency ("EPA") to set emission standards for "any air pollutant" from motor vehicles or motor vehicle engines "which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." The Clean Air Act is one of a basket of legislations relating to the reduction of smog from the environment, which strives to reduce air pollution in general. The Clean Air Act has become a weapon for states, federal agencies and environmental organizations either to enforce

the CAA, identifying a meticulous approach to detail and clarity; however, it was more abrupt and incoherent in its ultimate decision to deny the petition.[34] Fast forward ten years, the EPA's rulemaking authority under the CAA, or its inaction with regards to environmental protection, is back on our radar.[35] At a superficial level, the Court's mandate in *Massachusetts* seems encouraging to environmentalists. However, a careful scrutiny of the holding suggests that the Court simply ordered the EPA to think again. The opinion neither enforces nor binds the EPA to regulate GHGGHG. Thus, *Massachusetts* will neither provide much sought after relief from greenhouse gas emissions, nor will the decision help facilitate reversal of the effects of global warming. My position will be clear, as I chronicle below the substantive steps the EPA has taken since *Massachusetts* was decided.

When the Supreme Court, in a 5-4 majority ruling in April 2007, decided against the EPA's refusal to regulate the emission of carbon dioxide and other greenhouse gases, it did not require the Agency to reverse its previously held position.[36] Neither did the Court mandate the EPA to regulate the emissions so as to prevent global warming.[37] It merely required the Agency to provide

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clean air standards or to shift responsibilities, not to mention becoming the central tenet in legal maneuvers ranging from arguments presented in various courts in the United States.

34. On August 28, 2003, the EPA denied petition to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. at 52, 933. Although the EPA very methodically and diligently listed effects on climate and welfare, and explicitly defined the term air pollutant with comprehensive breadth and scope, it ultimately decided against regulating emissions. *Id.* at 52, 924-933. The petition was filed by the International Center for Technology Assessment and a number of other organizations. *Id.* at 52, 922. The Agency denied the petition to regulate greenhouse gas emissions from motor vehicles for two primary reasons: 1) Congress has not granted EPA authority under the Clean Air Act to regulate CO2 and other greenhouse gases for climate change purposes, and 2) "EPA believes that setting GHG emission standards for motor vehicles is not appropriate at this time." *Id.* at 52, 925.

35. The *Massachusetts* case revolves around the intricacies related to the EPA's rulemaking authority under the CAA, a topic first confronted about two decades back, which provides a contextual background of the regulatory inaction, or defective oversight, the federal agency has been accused of in various parlances.

36. Massachusetts v. EPA, 549 U.S. 497, 534-35 (2007). Citing *Chevron v. NRDC*, 467 U. S. 837, 843-44 (1984), Justice Stevens observed:

> We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding. We hold only that EPA must ground its reasons for action or inaction in the statute.

Id. (citation omitted).

37. *Id.* at 534. The majority held in *Massachusetts* that the EPA must provide reasoned justification for its denial. In not doing so the agency's rationale was therefore "arbitrary, capricious, . . . or otherwise not in accordance with law." *Id.* (citing 42 U.S.C. § 7607(d)(9)(A)). The Court neither mandated the EPA to regulate greenhouse gases, nor suggested imposition of

sufficient rationale for the position it advocates.[38] Thus, the ruling obligated the Agency to demonstrate that its choice complies with the requirements of the Clean Air Act, while holding: "[W]e need not and do not reach the question whether on remand the EPA must make an endangerment finding . . . . We hold only that EPA must ground its reasons for action or inaction in the statute."[39] Environmental activists,[40] legislators,[41] and the Bush Administration,[42] each interpreted the decision as a mandate to begin cracking down on carbon dioxide emissions. This interpretation, however, is not supported as a requirement under the CAA, which is consonant with the majority's narrow decision. Proof of this position is provided by the very

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any regulatory mechanism, apparently withholding judgment as to whether EPA should regulate greenhouse gases. *Id.* at 534-35.

38. Justice Stevens noted, "EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change." *Id.* at 534.

39. *Id.* at 534-35.

40. I refer to the initial euphoria environmental activists and various non-governmental organizations experienced, anticipating significant regulatory changes in environmental laws. As the dust settled, revealing the true significance of the case, environmentalists grew less ecstatic, as there was no sign of regulatory changes, even after two years elapsed since the case was initially decided. This prompted various environmental groups to file a mandamus petition with the United States Court of Appeals for the District of Columbia Circuit in April 2008, asking the court to order an endangerment finding within sixty days based on the EPA's continued inaction post the Supreme Court's decision in *Massachusetts*. *See* Warming Law: Changing the Climate in the Courts, Massachusetts v. EPA*, Ignored: One Year Later, Back to Court We Go…,* (April 2, 2008), http://warminglaw.typepad.com/my_weblog/2008/04/massachusetts-v.html.

41. After the Supreme Court ruling in *Massachusetts*, U.S. Senator John Kerry commented, "[i]t's an historic moment when the Supreme Court has to step in to protect the environment from the Bush Administration. Now that the White House must go back and take a fresh look at regulating greenhouse gas emissions from automobiles, they must take the challenge seriously." Press Release, Senator John Kerry, John Kerry on *Massachusetts vs. EPA* Supreme Court Verdict (Apr. 2, 2007), *available at* http://kerry.senate.gov/cfm/record.cfm?id=271741). However, the holding in *Massachusetts* does not rule that the Clean Air Act obligates the EPA to regulate the emissions of carbon dioxide and other greenhouse gases from cars. Rather, it leaves the decision to regulate or not to regulate open, so long as, any decision the EPA makes is based on sound and scientifically based rationale. *Massachusetts*, 549 U.S. at 532-35.

42. During his presidency, President George W. Bush did not make significant efforts to mandate the EPA to regulate greenhouse gas, despite making promises to "require all power plants to meet clean air standards in order to reduce emissions of sulfur dioxide, nitrogen oxide, mercury and carbon dioxide within a reasonable period of time" on the campaign trail before his first election. Eric Pianin & Amy Goldstein, *Bush Shifts Stance On Emissions Cuts*, WASH. POST, Mar. 14, 2001, at A1. *Massachusetts* being decided in the Supreme Court indicates that the President did not even attempt to influence the EPA to make inroads into what automatically should befall upon the federal agency's purview, despite publicly declaring his intentions to do so. In response to the ruling in *Massachusetts* that carbon dioxide is a pollutant under the Clean Air Act, President Bush publicly directed his Administration to complete the work before the end of 2008. Administration of George W. Bush, *President's Remarks on Fuel Economy and Alternative Fuel Standards*, 43 WEEKLY COMP. PRES. DOC. 630, 630 (May 14, 2007), *available at* http://www.gpoaccess.gov/wcomp/v43no20.html.

entity which stands to become most impacted by the opinion in *Massachusetts*. This becomes more apparent, as I purview the procedural steps the EPA has taken during 2008.

The EPA's denial of Massachusetts' petition to regulate GHG emissions from motor vehicles under CAA was predicated on grounds that CAA did not authorize regulation of GHG.[43] Prompted by Massachusetts, the EPA released an advance notice of proposed rulemaking ("ANPR") in July 2008, elaborately detailing the consultation process the EPA has to go through prior to any definitive findings related to the regulation of GHG under the CAA.[44] This ANPR must be understood within the context of the Agency's prior rulemaking inertia as well as the Court's mandate within an administrative law paradigm.[45] Devoid of substantive regulatory change, this ANPR is simply a response to the Court's mandate in *Massachusetts*, as the EPA understood the urgency to move forward in order to comply with the Court's mandate.[46]

A review of the ANPR response reveals that the EPA's consultative process involves a necessary endangerment determination prior to rulemaking.[47] Clearly, this intermediate step would stymie the implementation of swift regulatory measures, as it is bound to get comingled with the various regulatory requirements under Section 202 (a) of the CAA must identify its rulemaking requirements, which is specifically mandated by *Massachusetts,*[48] while carefully isolating the endangerment provisions that are in conflict with Section 202(a)'s regulatory requirements.[49] Spawned by litigants' challenges, emanating from the *Massachusetts* decision, the EPA has received numerous petitions for rulemaking for various mobile sources of pollution.[50] Each one of these cases must be meticulously identified and isolated for further action, while distinguishing between different rule-making obligations. The cumbersome complexity of such a regulatory response requirement will indeed degenerate into a bureaucratic drag, making substantive environmental control measures rather difficult to achieve. Considering the litany of comments the

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43. *Massachusetts*, 549 U.S. at 511.

44. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (proposed July 30, 2008).

45. *See* Watts & Wildermuth, *supra* note 5 (explaining that the Court's decision in *Massachusetts* simply requires the EPA to "reconsider its denial of a petition to regulate the emissions of four pollutants associates with climate change" and to offer an explanation of its decision). *See generally* Gillian E. Metzger, *supra* note 8.

46. Watts & Wildermuth, *supra* note 5 at 1029 n.5.

47. *See* Regulating Greenhouse Gas Emissions, *supra* note 44.

48. *Id.*

49. I refer generally to the framework that judges operate while determining the scope, context and of the relevant regulation from the context of its fidelity to the applicable law guiding such regulation.

50. Environmental groups have both urged EPA to regulate air pollutants to curb global warming while filing petitions. For a list of lawsuits, see Sierra Club, Sierra Club Lawsuits (2008), http://www.sierraclub.org/environmentallaw/lawsuits/.

EPA received in the aftermath of the Supreme Court decision, it is prudent to assume that it will take many more months, and emissions of millions of metric tons of GHG into the atmosphere, before the EPA can furnish substantive regulatory guidelines.

Clearly, the current framework of environmental regulation is a cornucopia of shortcomings and redundancies inherited from a broader overture of the CAA. Therefore, the EPA's rulemaking within the framework of the CAA will require a determination regarding every type of pollutant, all of which may fall within the regulatory jurisdiction of the EPA.[51] In the absence of specificity, it is quite possible that the EPA's obligation to regulate carbon dioxide from motor vehicles may become applicable to a wide range of scenarios where public health or welfare is threatened. This will inevitably facilitate an increase in regulations, encompassing a broader spectrum beyond motor vehicles, with immeasurable economic consequences for society's recent response in the significantly lengthy ANPR highlights the layered and bureaucratic procedural steps the EPA intends to take prior to engaging in definitive rulemaking to redress the environmental concerns highlighted in *Massachusetts*.

If the cautious and carefully calibrated response of the EPA post-*Massachusetts* is any indication of substantive changes in regulations to come, the fight for environmental regulation may be far from over. While the Pandora's Box for GHG emissions restrictions may have just been opened, the full scope of its content is yet to be reviewed for any clarity and directional lead towards environmental protection. Under the broader tenants of the CAA, if and once carbon-dioxide or, for that matter, any of the GHG, are to be regulated for motor vehicles, the scope and context related to the control of other non-stationary as well as stationary sources must be reviewed.[52] Thus,

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51. According to the D.C. Circuit Court of Appeals, the EPA has a "clear statutory obligation to set emission standards for each listed [hazardous air pollutant]" under Section 112(b) of the Clean Air Act. National Lime Ass'n v. EPA, 233 F.3d 625, 634 (D.C.Cir. 2000). On the other hand, *Massachusetts* mandates the EPA to engage in endangerment determination prior to providing a rulemaking determination on greenhouse gases. Massachusetts v. EPA, 549 U.S. 497, 532-33 (2007). That means, for any greenhouse gas, the decision to regulate or not must be preceded by the EPA making a threshold determination of endangerment. This invites complex jurisdictional quandaries as well as overlapping obligatory constraints under the dual application of *Massachusetts* and section 112 (b) of the CAA.

52. Regulation of emissions requires identification of the source that emits the gas in question. Conventional sources of emissions include motor vehicles, although there could be any number of moving and static sources, which may be responsible for emission of prohibited gas. Due to the broader mandate of *Massachusetts*, in the absence of a specific regulatory mandate, a wide range of sources could come under the purview of the prohibitive framework. Making the threshold determination of endangerment, followed by the decision to regulate or not regulate, may require both a huge undertaking as well as a severe resource drain, resulting in economic pressure. *See generally* Regulating Greenhouse Gas Emissions, *supra* note 44 (observing the complexity of implementation of various aspects of the CAA, involving distinction between stationary and non-stationary sources). Several commentators followed suit with the EPA's ANPR, echoing various compelling reasons for EPA's not publishing an endangerment finding.

the unintended consequences of overtly broader regulatory guidelines of *Massachusetts* may come back to haunt us as *a much ado about nothing* from an environmental perspective.

The Supreme Court's decision in *Massachusetts* neither sets a deadline for the EPA nor places any objective requirement on the EPA to undertake any specific or particularized course of action to be implemented within some defined regulatory parameters. This prompts me to revert to my original supposition that, when it comes to combating global warming, the holding in *Massachusetts* is simply *much ado about nothing*. Although the substantive discovery of *Massachusetts* is not predicated on any reformulation or expanded abstraction of environmental law, the significance of the case must be derived from a rich assortment of constitutional adjudication. While it has ceased to become an environmental protection case,[53] *Massachusetts* opens the door for substantive investigation into several constitutional issues. While I seek to establish that point in the succeeding sections of this article, I will begin by particularly focusing on the following: 1) did the EPA abdicate its responsibility under the CAA to regulate all greenhouse gases and 2) does a state have standing to invoke the EPA or federal jurisdiction under Article III?

As the Court's opinion leaves the EPA free to decide not to regulate as long as it justifies its position adequately, the response to the first part of my query is clear. While the environmental community and the media have billed *Massachusetts* as a blockbuster global warming case, the EPA's response thus far tells a different story. This begs the question as to where the true significance of the case lies, as the opinion of the Court is formulated through a complex web of state standing analysis and the applicable standard of review for agency denials of petitions for rulemaking. On a larger scale, the case could become a trailblazer in signaling for an evolving relationship between federalism and administrative law,[54] in which an expansive contour of administrative law is used to address federalism concerns by not encroaching into, or reducing, Congress' regulatory authority.[55]

See Competitive Enterprise Comments on the ANPR, November 25, 2008, *available at* http://cei.org/cei_files/fm/active/0/Marlo%20Lewis,%20ANPR%20Comment%2011-2508.pdf.

53. The constitutional significance of *Massachusetts* is seen in observing that, although initially touted as an environmental case, its true importance may lie elsewhere. As I shall highlight in the succeeding sections of this article, the decision in *Massachusetts* provides a more expanded constitutional guidance related to states' sovereign rights within the federal system of the United States. By drawing support from precedent cases, the majority has put state standing as an Article III litigant in a firmer footing than before.

54. *See generally* Metzger, *supra* note 8.

55. *See supra* note 8.

III. DECONSTRUCTING QUASI-SOVEREIGNTY WHILE DEVELOPING A NEW PARADIGM FOR STATES' STANDING

To get a sense of the special power bestowed upon the states, it is essential to understand the doctrinal framework of special standing developed by the majority. The right to sue federal agencies requires special standing,[56] and the *Massachusetts* Court granted this special standing by crafting a newer constitutional paradigm forged of precedent cases and constitutional grants.[57] The Court established Massachusetts' special position and interest[58] by connecting the special position explicitly with the Agency's regulatory authority under the federal rules in contention here.[59] Although we are yet to fully evaluate the scope and extent of this emerging paradigm, it is of vital importance to arrive at a reasonable understanding. Against an evolving legal firmament, where multiple states have filed lawsuits against the EPA for various injury determinations, a full evaluation of a broader and more expansive quasi-sovereign power implied by the Justices in *Massachusetts* is very essential.

Tracing the history of constitutional jurisprudence over a century, the Court in *Massachusetts* defined special solicitude by proceeding along three distinct threads. As noted by various scholars, the predominant architects of *Massachusetts* are two precedent cases.[60] First, bringing to life a century old decision in *Georgia v. Tennessee Copper Company* (hereinafter *Georgia*),[61] the Court introduced the concept of a quasi-sovereign states' interest.[62] Second, examining the injury to Massachusetts' coastline from GHG emissions within the 3-prong test framework developed in *Lujan*,[63] the Court established a partial standing requirement.[64] Third, by establishing that a state depends on Congress' efficient enactment of appropriate legislative measures, the Court embarked upon completing the standing argument.

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56. *See infra* Section V.

57. *See* Gonzales v. Oregon, 546 U.S. 243 (2006) (representing the expanded meaning of constitutional grants regarding special state standing).

58. *See infra* Section V; *See also* Massachusetts v. EPA, 549 U.S. 497, 519-20 (2007) (noting that "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives[,]" but that Massachusetts retained "quasi-sovereign interests" which it was entitled to protect).

59. Justice Stevens argued that in lieu of forgoing some sovereignty by joining the federal union of the United States, the states inherited a measure of protection from Congress. *See id.* at 518-20. Congress in turn, has instructed the EPA to protect the states' citizens from environmental harms. *Id.* at 519-20. The EPA's failure to do should elicit a remedy for the state in question. *See id.* at 521.

60. *See* Watts & Wildermuth, *supra* note 5, at 1030-31.

61. 206 U.S. 230 (1907).

62. *Massachusetts*, 549 U.S. at 518-19.

63. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

64. *See infra* Section V.

In *Massachusetts*, the majority argued for providing the states with an adequate protection mechanism and they arrived at a definitive ruling by noting that Congress creates federal agencies via legislative mandate that implicitly ensures protection of the states' interests.[65] However, the Court's reliance on *Georgia* to establish Massachusetts' standing is quite puzzling. The most germane enquiry is whether *Georgia* contains similar constitutional elements as *Massachusetts*. Using *Georgia* as its foundation, the Court developed a hybrid approach to establish *locus standi* for Massachusetts to sue federal agencies. The Court supported this by following Justice Oliver Wendell Holmes' observation in *Georgia:*

> The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity 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.[66]

After establishing the concept of quasi-sovereignty, the *Massachusetts* Court further established that "[j]ust as Georgia's 'independent interest . . . in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today."[67]

Since *Georgia*'s elements may not be fully compatible with the facts and circumstances in *Massachusetts*, why did the Court choose to discuss those elements? I believe the Court recognized the challenges in establishing both a position and interest, necessary elements for crafting the standing framework for Massachusetts and similarly situated states to sue.[68] By introducing the concept of quasi-sovereignty,[69] the Court pre-empts this challenge by relaxing the stringent requirement of full functionality for both elements.[70] Afterwards, it became easier to compare Massachusetts' interests to the quasi-sovereign interest of Georgia articulated by the *Georgia* Court.[71] Once the full functionalities are relaxed, application of all three distinct elements of *Lujan* becomes much easier, which I examine next.

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65. I refer to the general framework by which Congress, either via statute or direct mandate to the federal agencies, ensures the protection of state's interest.

66. *Massachusetts*, 549 U.S. at 518-19 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907)).

67. *Id.* at 519.

68. *Id.* at 518.

69. *Id.* at 518-20.

70. *Id.*

71. *Id.* at 520, n.17 (explaining why *Georgia* is relevant to the *Massachusetts* standing analysis).

How does the quasi-sovereign interest articulated in *Georgia* facilitate the required standing in *Massachusetts*? Furthermore, it would be interesting to identify how all three elements of the *Lujan* framework can be applied to the facts and circumstances found in *Massachusetts*. The concept of state standing is neither unique to constitutional jurisprudence nor is it an extra-judicial concept. Stepping away from its genesis in *Georgia*, I will focus on *Alfred L. Snapp and Son, Inc. v. Puerto Rico ex rel. Barez* (hereinafter *Snapp*),[72] in which constitutional adjudication required determining whether Puerto Rico had standing to sue Virginia's apple growers on behalf of its citizens. Puerto Rico argued in favor of its standing by pointing out that the migrant workers within Virginia's territory were being "discriminated against . . . in favor of foreign laborers," thereby violating applicable federal law.[73] As pointed out in discussions illuminating precedent cases that helped formulate *Massachusetts*, the Court ruled in favor of Puerto Rico and established three categories of state sovereignty: 1) proprietary interests; 2) quasi-sovereign interests; and 3) sovereign interests, in furtherance of its standing analysis.[74] These particularized classes of sovereignty created in *Snapp* expand into a broader framework for evaluating *Massachusetts*. Therefore, *Snapp* provided yet another backdrop in which to place the evolving paradigm of state standing by understanding an expanded gamut of possibilities from which to carve out a similar scenario for Massachusetts. Especially, reviewing all three categories of

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72. 458 U.S. 592 (1982).

73. *Id.* at 608-09. The *Massachusetts* Court invoked *Snapp* as precedent to support the legal premise on which *Massachusetts* was decided. *Massachusetts*, 549 U.S. at 519. The support for the legal doctrine on which the *Massachusetts* decision is based comes from the understanding that, to protect the well-being of its citizens, a state can invoke *parens patriae* action if the state can articulate a quasi-sovereign interest that is inherently and distinctly separate from the interest of the private parties. *Snapp*, 458 U.S. at 601-608. The Court in *Snapp* explicitly notes that articulation of such interests has not been framed either via an "exhaustive formal definition" or by means of a "definitive list of qualifying interests." *Id.* at 607. However, certain characteristics of such interests are to be extracted from substantive evidence via case-by-case development. *Id.* This involves cases where the state's quasi-sovereign interest may be identified through physical or economic well-being of its residents or by ensuring that the state is not being unduly discriminated against via denial of its rights "within the federal system." *Id.* In the *Snapp* framework, the Court emphasized that, sovereignty interests of a state do not flow through showing the injury and loss of well-being of a definitive proportion of its populace, rather it may emanate from either direct or indirect injury to an undefined yet substantive proportion of its population. *Id.* Once such injury is established, the state can invoke its inherent sovereign lawmaking powers to sue under *parens patriae*, or the guardian of its citizens. *Id.* This understanding led the Court to observe that Puerto Rico had *parens patriae* standing because it was "similarly situated to a State," as "[i]t has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State." *Id.* at 608 n.15. To enable the state to faithfully execute the *parens patriae* doctrine, Congress enacted various federal legislations, violation(s) of which bestows the state right under *parens patriae* to sue the relevant federal administrative agencies for redress of such injuries.

74. *Snapp*, 458 U.S. at 601-02; *see also* Watts & Wildermuth, *supra* note 5, at 1031.

sovereignty provides the necessary illumination to draw an inference regarding the specific rights and obligations enshrined in the quasi-sovereign interests.[75]

The Court in *Massachusetts* never precisely defined quasi-sovereign interests, despite providing some general guidance.[76] As observed in various companion cases and discussed at length in legal commentaries, these state interests could range from the health and well being of its citizens, such as in a public interest lawsuit for polluting across the boundary of another sovereign, to ensuring that the residents of the state "are not excluded from the benefits that are to flow from participation in the federal system."[77] The framework of *Snapp* would therefore indicate that suits based on quasi-sovereign interests can be easily distinguished from private citizen's suits.[78] Therefore, the framework of *Snapp* empowers us with a succinctly different threshold requirement, which in turn bestows upon states like Massachusetts its *parens patriae* rights under quasi-sovereignty, enabling them to sue a federal administrative agency for denial of a rulemaking petition.

The complexity and difficulty in meeting the threshold requirement under the current framework stems from the difficulty of applying the *Lujan* factors. Where the petitioner in *Lujan* was a private individual, the primary litigant in *Massachusetts* was a sovereign state. My contention here is that the *Massachusetts* Court recognized the three step test of *Lujan* as a good baseline from which a qualitative determination of the scope and context of all three *Lujan* elements could be made in evaluating the Article III justiciability of *Massachusetts*. The Court rightly held that the quantum requirements for injury, causation and redressability may be tempered by noting the difference between a state and a private individual. A private individual must go through a higher threshold in each of *Lujan's* three steps, while the thresholds can be lowered for the state because the state is insulated with an added layer of procedural right protection that flows from its *parens patriae* obligation. Thus, the *Massachusetts* Court held that the panoply of precedent cases did not mandate the state to fully satisfy the *Lujan* requirements.[79] On the contrary, precedent cases are

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75. In its attempt to provide a definitive roadmap for identifying specific causes of *parens patriae* action, the Supreme Court in *Snapp* identified three specific categories of state sovereignty, one of which is applicable to the determination in *Massachusetts*. *Snapp*, 458 U.S. at 601-02.

76. *See Massachusetts*, 549 U.S. at 518-19.

77. *Snapp*, 458 U.S. at 608; *see* Thomas W. Merrill, 30 COLUM. J. ENVTL. L. 293, 303, 303 n.44 (2005) (citing North Dakota v. Minnesota, 263 U.S. 365 (1923); Wyoming v. Colorado, 259 U.S. 419 (1922); Kansas v. Colorado, 206 U.S. 46 (1907); Missouri v. Illinois, 180 U.S. 208 (1901)). *See also* Watts & Wildermuth, *supra* note 5 at 1032.

78. The Court applies the framework of *Snapp* while holding the quasi-sovereignty of the state as separate and distinguishable from full sovereignty, and thus arguing that the standing requirement of quasi-sovereignty will differ from that of the other kind of sovereignty.

79. Massachusetts v. EPA, 549 U.S. 497, 517-20 (2007). The Court in *Massachusetts* was acutely aware of the difficulty the state of Massachusetts may face in fully meeting the thresholds in each of the three procedural steps of *Lujan*. Thus, in his majority opinion Justice

consistent with the pattern that, by bringing suit based on quasi-sovereign interests, a state may be able to get by with a lower quantum in meeting the threshold for all three elements of *Lujan*.[80]

The apparently perplexing legal reasoning of *Massachusetts*, therefore, must be examined through the lens of a set of overlapping rationales. First, the doctrinal paradigm developed in *Georgia* makes it difficult to satisfy Article III's standing requirement solely based on an assertion of quasi-sovereign interest. Second, Article III's prudential restrictions of "cases and controversies" make it difficult to invoke states' standing without finding actual controversy. While the majority in *Massachusetts* introduced the concept of "quasi-sovereignty" by borrowing from *Georgia*, it circumvented the controversy restriction by invoking *Lujan*. Legal commentators have observed that, "either by showing that the state itself has suffered some injury in fact from the challenged action or by suing in a representational capacity and showing that the state's citizens have suffered some injury in fact from the challenged action."[81]

For the purpose of this discussion, I will not engage in a detailed explanation of the proprietary interest and sovereign interest applications of the framework developed in *Snapp*.[82] However, the preliminary hurdle the *Massachusetts* Court had to overcome was to carefully construct Massachusetts' interests at stake in that particular case.

The Chief Justice's interpretation of Article III's requirements for state standing was very different than what the majority applied in granting Massachusetts special standing as a litigant. Chief Justice Roberts did not see a constitutional basis for relaxing the Article III requirements to grant Massachusetts the requisite standing to bring a lawsuit against the EPA,[83] nor was he in agreement with the majority's articulation of a separate and

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Stevens succinctly articulated how the quantum of threshold can be lowered noting, "[h]owever, a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests,'—here, the right to challenge agency action unlawfully withheld,' can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 517-18 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 572, n.7 (1992).

80. *Lujan*, 504 U.S. at 560-61.

81. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 305 (2005); Watts & Wildermuth, *supra* note 5, at 1033.

82. *Snapp*, 458 U.S. at 601-02.

83. *Massachusetts*, 549 U.S. at 536-37 (Roberts, C.J., dissenting). The Chief Justice noted, "[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. The general judicial review provision cited by the Court, 42 U. S. C. §7607(b)(1), affords States no special rights or status." *Id.*

distinguishable standing requirement delineated along the basis of private and public litigants.[84]

Massachusetts' ability to overcome the aforementioned hurdle is inalienably dependent upon two interlinked deterministic paradigms. Therefore, to assert a relevant argument, first, the applicable standing for the states must be determined. This should be followed by forging a valid litigant standing under Article III to obtain the necessary rights to sue a federal agency. In my view, the Court's hybrid opinion is a prudential result of Justice Stevens' effort in securing the crucial swing vote to elicit the majority opinion.[85] By embracing the familiar *Lujan* opinion, in which Justice Kennedy concurred, Justice Stevens obtained the launch pad necessary to propel this evolving states' right out of constitutional quandary into a manageable legal paradigm.[86] Thus, by first demonstrating that Massachusetts' standing satisfied the *Lujan* requirements, Justice Stevens gave an enduring constitutional life to the famous three-prong test.[87] Secondly, Justice Stevens noted that a state

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84. According to Chief Justice Roberts, "[n]or does the case law cited by the Court provide any support for the notion that Article III somehow implicitly treats public and private litigants differently." *Id.* at 537.

85. Constitutional adjudication in the Supreme Court is a deterministic process. Often times a particular outcome is arrived at via an adversarial process, in which the Justice writing the majority opinion expands the paradigm of his doctrinal framework wide enough to accommodate the strongly held view of a particular Justice in attempt to elicit his vote in favor. In the current Supreme Court, the Justices in majority of most important cases vote along a very predictable and ideological line. Thus, it was important to secure the vote of Justice Kennedy, who has become the central point in most of the recent decisions with his ability to cast the "deciding swing" vote. Perhaps, the somewhat convoluted approach the majority took in *Massachusetts*, while inviting both dissent from the minority and invoking debate about the doctrinal complexity, was a result of invoking *Lujan*'s 3-prong test as the baseline determinant for adjudication. Indeed, *Lujan* will go down in the history of constitutional jurisprudence as a landmark case penned by Justice Kennedy. *See generally* Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 Wayne L. Rev. 983 (2008) (describing the Roberts' Court's proclivities over the last 3 years).

86. Constitutional quandary comes from the observation that, the holding in *Lujan* involves a three-prong test, each of which contains restrictive covenants with a sufficiently higher threshold the litigant must overcome in order to obtain justiciability under Article III. This higher threshold is overcome in *Massachusetts* only by lowering the threshold via inserting an additional constitutional element, that of a procedural right. *Massachusetts,* 549 U.S. at 517-20.

87. The three steps articulated in *Lujan* are 1) identifying the injury, 2) determining the causal link between the injured party and the source of injury and 3) showing that reversal of action sought by the injured litigant will provide redressability from the onset of injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). All of these elements have a significantly high threshold. For example, the injury must be specifically applicable to the litigant in a concrete and deterministic way, the size and scope of such injury being more excessive than merely substantive. In addition, the injury must be imminent and not distant or implicit. The causation factor must be clearly established beyond a reasonable doubt, such that it must be clearly traced from the source of injury to the injured litigant. Thirdly, there must be clear and convincing rationale based on which it can be properly concluded that sought action will redress the cause

asserting quasi-sovereign interests must demonstrate standing in federal court either based on its own injury or based on its residents' injury.[88] Therefore, by putting the inhabitants of the state and the state itself within a basket, Justice Stevens melded the interest element within a continuous spectrum of standing framework carved out of *Lujan*.[89]

What is the significance of *Lujan* in *Massachusetts*? The majority's craftsmanship reveals a granular aspect of states' special interest. The judicial craftsmanship is revealed by implementing the *Lujan* analysis, enabling the Court to authenticate a less restrictive framework than was employed in the past.[90] This more lenient variant of the *Lujan* framework has relaxed the stringent requirements of three-element test.[91] Moreover, this attenuation of the individual injury components produced a more inclusive definition of the Article III standing requirement, an area I shall explore in the next section. Before entering into a discussion on Article III, I must delve into the *Lujan* injury analysis to examine how the opinions of Justices Stevens and Kennedy fare against Chief Justice Roberts' dissent.

The *Massachusetts* Court recognized that a small and remote injury does have standing for the purpose of federal rulemaking.[92] Retrenchment of the Court's position from a higher quantum of injury requirement might be perceived as a drastic step. However, the step is a necessary requirement for the formulation of *Massachusetts*' special solicitude guidelines.[93] Empowered with an attenuated threshold of *Lujan*, the Court positioned itself to illuminate the contours of this special solicitude in *Massachusetts*. Although relatively common in American jurisprudence, special solicitude has appeared infrequently in constitutional adjudication. Prior to *Massachusetts*, the Court found disparate applications of this principle in discrete time intervals to uphold certain civil

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of injury. *Id.* It has been established that all of these elements have been relaxed in scope and applicability in *Massachusetts*, in order to accord an Article III finding of standing.

88. *Massachusetts*, 549 U.S. at 518-19. I draw attention to the private/public distinction discussed in the framework of standing. The issue becomes murkier when the Court is asked to determine what sovereignty rights are applicable when injury is alleged to have occurred to a private entity residing within the geographical confines of a state. Some could argue that private litigants, for the purpose of standing analysis, may not enjoy the same quasi-sovereignty the states enjoy and thus must overcome a distinctively higher threshold in order to be able to sue federal agencies. On the other hand, it can be argued that, by virtue of being within the confines of a state, quasi-sovereign rights might flow into these private litigants. The Court articulated in *Massachusetts*, drawing from precedent cases, that the entities within a state can be protected from injury if it can be proven that the entity, private or public, depends on the state for its protection by virtue of the state's *parens patriae* obligation. *Id.* at 519.

89. *Id.* I refer to the state as the protector of its own interest as well as the interests of entities within its confinement, thus placing a set of various interests within a basket of interests that needs of protection.

90. *See supra* note 79.

91. *Id.*

92. *Massachusetts*, 549 U.S. at 521-24.

93. *Id.* at 516-20.

liberties and to protect the rights of veterans, sailors, and the disabled. Therefore, it was a sharp departure from the Court's previous positions when the *Massachusetts* Court applied special solicitude in the context of a federal agency defendant's refusal to regulate. However, the seeds of such a ground-breaking decision were sown in Justice Souter's dissenting opinion in a more recent case decided by the Court in 2000, *United States v. Morrison*.[94] Justice Souter noted in *Morrison*, "[t]he majority's special solicitude for 'areas of traditional state regulation' is thus founded not on the text of the Constitution but on what has been termed the '*spirit* of the tenth Amendment.'"[95] Although Justice Kennedy joined with the majority of the Court in *Morrison*, where it held that the civil remedy provision of the Violence Against Women Act was unconstitutional mainly because of its reservation of unenumerated rights to the state under the Tenth Amendment,[96] the reasoning there gives us insight as to how he was persuaded to join the majority in *Massachusetts*.

Taking a retrospective side-glance into the evolution of constitutional jurisprudence in this arena, the theory of special solicitude was embraced by Justice Scalia in his scorching dissent in *Lawyer v. Department of Justice*[97] where he noted that:

> [O]ne would think that the special solicitude we have shown for preservation of the State's apportionment authority would cause the court to demand clearer credentials on the part of those who purport to speak for the legislature.98

It can be seen, therefore, that the phrase has appeared in the context of states' rights well before its emergence in *Massachusetts*.[99] Although in a completely different context, special solicitude was invoked again in 2006. While addressing Justice Stevens' jurisprudence, several commentators have noted that the Justice embraced special solicitude for the states and federal judges, while commenting on his professed enthusiasm for advancing federal issues

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94. 529 U.S. 598, 628 (2000)(Souter, J., dissenting).

95. *Id.* at 648 n.18 (internal citations omitted) (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 585 (1985)(O'Connor J., dissenting)).

96. *Id.* at 600, 617-19 (majority opinion). The Tenth Amendment clarifies the Constitution's principle of Federalism, explaining that powers not granted to the Federal government and not prohibited to the states are then afforded to the states and the citizens. U.S. Const. amend. X.

97. 521 U.S. 567, 586 (1997) (Scalia, J., dissenting).

98. *Id.*

99. I refer in general to the panoply of precedent cases, starting from *Georgia v. Tennessee Copper Company* through *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, that gave rise to a rich constitutional landscape describing a broader spectrum of sovereignty, each type of sovereignty connected with diverging sets of procedural obligations to obtain rights to sue. *See also supra* note 78.

among the states' supreme courts and federal courts before granting certiorari by the U.S. Supreme Court.[100]

As I conclude this section, I observe, special solicitude was never used for standing cases involving a state as plaintiff. Rather, it was invoked in determining states' sovereign standing in cases where a state either sought immunity from lawsuits or argued for federal statutory preemption as a defense. *Massachusetts* metamorphosized special solicitude by granting states the right to interfere with federal regulation under certain circumstances. Finally, special solicitude can be summed up in describing a set of rights residing within a continuous spectrum of the Constitution where it unfolds in a range of diversified rights, from states' rights to interfere with federal regulation under certain circumstances, to states' rights to protect its quasi-sovereignty, to the interest of its inhabitants, or to compel the federal agencies to pass relevant laws, among others.

IV. ENVIRONMENTAL LITIGATION SHAPING ARTICLE III JURISPRUDENCE: RELAXING THE STANDARD OR NATURAL EVOLUTION?

Residing at the fulcrum of the decision making process, Article III jurisprudence evolves in *Massachusetts*, leaving two sets of Justices at opposite ends of the spectrum. Interpreting from a textual context, Chief Justice Roberts highlights Article III's restriction limiting adjudication only to "cases and controversies."[101] He further attempts to foreclose any possibility that the narrow scope of "controversy" will morph into an evolving concept by emphasizing the necessary requirement mandated in *Lujan*.[102] The Chief Justice espouses a stricter version of Article III and uses that to declare that the State of Massachusetts has no standing: "Relaxing 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."[103] If we were to limit ourselves to Chief Justice Roberts' interpretation of Article III, the plaintiff could not reach the required status to sue the EPA because, as he notes further, "[n]othing about a State's ability to sue in that capacity dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III."[104] Thus, according to the Chief Justice, despite having its coastline

100. *See* Watts & Wildermuth, *supra* note 5, at 1034-35.

101. Invoking the language of Daimler Chrysler Corp. v. Cuno, 547 U. S. 332, 341, 342 (2006), in *Massachusetts*, the Chief Justice observed in his dissent that the Article III power of the federal judiciary is limited to "cases" and "controversies" thus prohibiting imposition of judicial interpretation when the dispute brought by litigants does not involve a proper case or controversy. *Massachusetts*, 549 U.S. at 536 (Roberts, C.J., dissenting).

102. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

103. *Massachusetts*, 549 U.S. at 536 (Roberts, C.J., dissenting).

104. *Id.* at 538.

severely impacted by proven drivers of global warming, Massachusetts' injury does not give rise to its designated special standing.[105] Furthermore, Chief Justice Roberts ignores the reference to *Georgia,* indicating that the case merits no precedence in terms of Article III standing, while observing that the nature and magnitude of the injury sustained by Massachusetts did not elevate to the level of special consideration.[106]

In sharp contrast, Justices in the majority approach *Massachusetts*' standing determination with an evolving view of Article III. First, staying within the textualist interpretation of Article III, the majority made the determination predicated upon finding "controversies."[107] The majority satisfies the "controversy" requirement of Article III by relying on Justice Kennedy's observation in *Lujan* that, in situations where controversy may not be apparent, Congress can trigger "controversy" by defining relevant injury to the affected entity and subsequently establishing a causal link.[108] Second, the majority introduces procedural rights as a necessary element to trigger attenuation of the threshold requirements in *Lujan's* traditional three-pronged test of standing, giving a new meaning to the standing paradigm.[109] Third, the *Massachusetts* Court introduces *Georgia*'s private-public distinction in standing as a reference point to understand a wider variety of sovereign rights from which to develop the special sovereign right they have designed here.[110]

Justice Stevens observed, quoting *Lujan*, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[111] This is where Justices Stevens and Kennedy sharply differ from the Chief Justice. While Chief Justice Roberts does not find any controversy with regards to Massachusetts' claim of injury from global warming, the majority leaves the door open for showing an existence of injury for the explicit purpose of Article III standing. In the majority's opinion, even if there is not a consensus for finding injury, the states can implicitly claim injury by invoking a congressional mandate.

The obvious question is under what circumstances Congress provides states with special standing? As argued, most notably by Chief Justice Roberts, and echoed in *Lujan*, finding of injury with all its concomitant elements is a necessary condition for Article III standing. In *Massachusetts,* however, the majority converted the element of necessity into a sufficient condition by adding an additional criterion of procedural right. Thus, a special standing for

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105. *Id.* at 541-42, 547.
106. *Id.* at 537, 541-42.
107. *Id.* at 516-18 (majority opinion).
108. *Id.* at 516.
109. *Massachusetts*, 549 U.S. at 516-18.
110. *Id.* at 518-19.
111. *Id.* at 516 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

the states cannot flow from the traditional framework of *Lujan*; rather it requires the accompaniment of a procedural right for the special standing to emanate from a relaxed set of injury parameters. In the traditional sense, standing under Article III requires the injury to be "concrete and particularized, . . . actual or imminent."[112] The injury must be connected via a causal link to the source of regulatory rulemaking failure, which is to be followed by a showing of redressability.[113] Under *Massachusetts*, the elements of imminency and redressability can be eliminated if it can be proven that a procedural right emerged from the failure of federal agencies in promulgating rules, having been duly delegated by the Congress.[114]

The third element I would like to explore is the Court's attempt to revive a century old case, *Georgia v. Tennessee Copper Company,* to establish a spectrum of scenarios under which state standing becomes more pronounced.[115] The original case sets some of the ground rules under which various levels of sovereignties could obtain standing, while distinguishing between the

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112. *Id.* at 517.

113. *Id.* at 517-18.

114. *Id.*

115. In *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907), the concept of *quasi*-sovereignty was adopted as legitimate state standing within the federal union of states, such that a state is granted standing to bring lawsuit for injury against the federal agencies. In this case, the state of Georgia, on behalf of its citizens, sued two companies that operated copper smelters in Tennessee near the Georgia border. *Id.* at 236-37. Justice Holmes noted that a public nuisance had been created because the "sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within [several counties in Georgia] . . . ." *Id.* at 238-39. While the defendants argued that they had recently constructed new facilities, and as such the scope of the problem was reduced, the Court decided in favor of Georgia. *Id.* at 239. The Court gave the companies a reasonable time to build more emission control equipment, but held that if the said equipment did not reduce emissions sufficient enough to protect plant life in Georgia, the State could ask the court for an injunction to shut down the smelters. *Id.* Thus, by advancing a nuisance doctrine, the Court in Georgia established a legal paradigm for state standing, which after one hundred years later has evolved into a new test of federalism for states. The difficulty of context arises from the understanding that this case was not originally intended to determine justiciability under Article III requirements, as clearly articulated by Chief Justice Roberts' dissent in *Massachusetts*: "In contrast to the present case, there was no question in *Tennessee Copper* about Article III injury. There was certainly no suggestion that the State could show standing where the private parties could not; there was no dispute, after all, that the private landowners had 'an action at law'". *Massachusetts*, 549 U.S. at 538 (Roberts, C.J., dissenting) *(*quoting *Georgia*, 206 U.S. at 238-39). The Chief Justice, invoking other companion cases already discussed in my analysis here, went on to observe: "Far from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a 'quasi-sovereign interest' '*apart* from the interests of particular private parties.'" *Id.* (quoting Alfred L. Snapp and Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982). "The Court, in effect, takes what has always been regarded as a *necessary* condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a *sufficient* showing for purposes of Article III." *Id.* at 538. The *Massachusetts* Court did not intend, for *Georgia* to be used as a support for Article III standing, rather the majority brought back the century old case to provide a broader gamut of state sovereignty.

hierarchical requirements of full sovereignty and quasi-sovereignty.[116] Although *Georgia* relays a detailed articulation of different threshold standards to be used for private and public litigants,[117] *Massachusetts*' use of this case seems only to conceptualize the entity definition for a quasi-sovereign state.[118] Unlike *Georgia*, the *Massachusetts* Court does not delineate between private and public, but rather characterizes the entire gamut of entities within a state's physical boundary to construct quasi-sovereignty from the perspective of protecting the interests of those entities.

From the analysis thus far, it is clear how the injury analysis in *Lujan* paved the way for establishing Article III standing of the states.[119] The Court's findings may signal a new line of enumerated rights principles, as it implicitly observes that procedural rights have more fundamental characteristics than the elements of injury crafted in *Lujan*. Against this backdrop, the standing analysis would yield that special standing can flow from a combination of procedural rights and a subset of injury elements.

Massachusetts not only represents the Court's embrace of the environmentalist worldview but also how that environmental worldview helps shape Article III jurisprudence. As I elect to disengage from Chief Justice Roberts' scientific view of global warming, I find his observation of the Article III standing requirement quite significant.[120] The Chief Justice carefully separates the disparate elements of the causal chain of injury from the lack of regulatory rulemaking and demands particularized proof of each.[121] His analysis directly contradicts the environmental presumption of impending disaster and its consequences.[122] In sharp contrast, Justice Stevens joined with

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116. *Georgia*, 206 U.S. 237-239.

117. *Id.*

118. The majority in *Massachusetts* took resort to the explanation given in *Georgia* v. *Tennessee Copper Co*, while delineating the standing requirements for a suit between private citizens with those of a state. The Court emphasized that the State was entitled to a higher quantum of relief, while the private litigant may have to make do with a lower quantum, which emanates from the State's *quasi*-sovereign rights. *Massachusetts*, 549 U.S. at 518-21.

119. *Lujan* discusses Article III standing, clearly articulating the requirements of actual and imminent injury, chains of causation and the distinct possibility of redress. *See supra* note 88.

120. The Chief Justice's dissent centers around three themes. First, he questions the scope and context of *Georgia v. Tennessee Copper* in establishing state standing under Article III jurisprudence. Second, he vehemently disagrees with the constitutional implication of diluting the *Lujan* standard to establish state standing, as has been the case in *Massachusetts*. Thirdly, the Chief Justice does not see the connection between *parens patriae* and special standing of the state as granted to the litigant in the case. *See Massachusetts*, 549 U.S. at 537-42 (Roberts, C.J., dissenting).

121. *Id.* at 543-46.

122. Referring to the *Lujan* standard applied in *Massachusetts*, Chief Justice Roberts observed that, the majority's injury analysis is flawed in various respects. First, the majority failed to show the injury is imminent as required in *Lujan*, however, erroneously applied *Lujan*, by inserting claims of procedural rights. Second, *Lujan*'s chain of causation was not established

Justice Kennedy to structure a contrary opinion that neither expands the powers of Congress nor imposes hard mandates on the EPA, resulting in granting the EPA boundless discretion. Concomitantly rather, the Justices joined together to further expand the scope of Article III's standing for the states, which will continue to illuminate the constitutional space for decades to come.

V. LOOKING THROUGH THE PRISM OF EVOLVING CONSTITUTIONAL JURISPRUDENCE

A. Trends in Constitutional Jurisprudence

Thus far I have established that *Massachusetts* is not just a global warming case, but rather a case borne out of a conflicting confluence of political and regulatory developments, decided ultimately along narrow regulatory findings. Despite the commentators and legal theorists highlighting the global warming aspect and climate control dimension, *Massachusetts* has expanded constitutional trajectory for Article III standing and states sovereignty in more ways than any incremental impact it may produce in environmental regulation years from now. I have already explained in detail the link between Article III jurisprudence and special standing of the state. However, nestled beneath this special standing, reside a number of significantly distinct constitutional elements that require further illumination. First, there is a grant of elevated rights for the states, which unmistakably signals the emergence of a new federalism in constitutional adjudication. Second, within the Court's explicit mandate for the states' position to sue federal agencies, I see the undercurrent of deeply seated suspicion towards executive rulemaking. Third, although it opened up newer jurisprudential vistas while taking perceptible detours from the traditional deference doctrine and developed a newer power paradigm, *Massachusetts* is merely a guidepost along the Court's evolutionary jurisprudence. In the following paragraphs, I will identify these emerging threads in finer detail.

B. Massachusetts Resides Within a Continuous Spectrum of Constitutional Rule-making

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in *Massachusetts*, while the majority relaxed the Article III standards through a faulty constitutional adjudication of special standing. *Id.* at 541-45.

Massachusetts reveals a sharp departure from the Court's *Chevron* deference[123] in startling contrast with precedent. Penned by Justice Stevens,[124] *Chevron* revolves around the majority's endorsement of political considerations in lawfully influencing federal agency policy decisions. Written by the very same Justice, *Massachusetts* presents a sharp departure from having political considerations influence policy decisions. Along the same trend, *Massachusetts* rejects *Skidmore* deference,[125] the traditional index for rulemaking, which, because it premises decision making on expert opinion, constitutional adjudication gives precedence and primacy to experts' opinions over conventional wisdom. *Massachusetts* discounted both of these older case laws and drifted towards a more objective framework based on injury determination of the petitioner to place federal administrative agencies into unfamiliar footings. Superficially, the deference doctrine applied in *Massachusetts* may look very different. *Massachusetts* however, was decided along a more familiar continuum of shared power paradigm overriding executive judgment, while straddling a slightly different contour. While both *Chevron* and *Skidmore* were decided based on executive override of expert judgment, *Massachusetts* followed the trajectory of overriding executive decision making in favor of expert judgment.[126] This is clearly seen in the reverential treatment shown toward the expert commentaries and findings regarding global warming.

Where do these cases stand in the spectrum of Supreme Court cases that melds executive decision making with expert judgments to influence the Court's decisions? I trace the genesis of the sentiment in *Massachusetts* within *Gonzales v. Oregon*, where the Court observed:

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123. As a doctrine of Administrative Law, *Chevron* deference sprang into life by the Supreme Court's opinion in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* deference states that, when a statute becomes ambiguous for implementation and falls within the subject matter jurisdiction of a federal agency, official interpretation of the statute by the said agency, if reasonable, is the prevailing law on the subject. *Id.* at 842-44. This practice of allowing the agency to interpret applicable law is known as "*Chevron* deference."

124. *Id.* at 839.

125. "*Skidmore* deference" is based on the 1944 decision in *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). *Skidmore* implies that the weight to be accorded to an administrative interpretation in a particular case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

126. In *Massachusetts*, the Court changes its trajectory of overriding executive decision making in favor of expert judgment, by overriding the decision made by the executives of federal agencies, in favor of expert opinion. This can be seen by noting that, the Court gave reverence do the opinions of the experts, in finding causal links between global warming and emission of greenhouse gases. *See Massachusetts*, 549 U.S. at 521-23.

> The Government, in the end, maintains that the prescription requirement delegates to a single executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it. [127]

This rejection of the Attorney General's determination that, it is not a legitimate medical practice under the federal Controlled Substance Act ("CSA")[128] for a physician to prescribe a controlled substance to patients lawfully committing suicide under Oregon's assisted suicide statute[129] is a huge step in the Court's illumination of states' rights. Superficially, *Gonzales*, like *Massachusetts*, presents a conflict of two competing spheres of influence, one emanating from states sovereign right to implement laws regulating behavior of its citizens within its own borders and the other revolving around federal jurisdiction of federal statutes within the said state's border. Oregon argued that the Attorney General's interpretation of the CSA erroneously invalidated state law, which reflected the democratic choice of the people of Oregon in the medical arena.[130] On the other hand, the Attorney General argued that Oregon's decision to permit physicians to distribute controlled substances for physician-assisted suicide, under its Death with Dignity Act[131] was not consistent with federal law.[132]

The Court's departure from reliance on executive decision making power signals, perhaps, a sentiment that goes far beyond expert override of executive power. In my view, this staunch opposition to executive rulemaking is not an isolated illumination of the shared power paradigm, as I have discussed elsewhere. Drawing upon its earlier findings within the recent illumination of diverse arenas constitutional law, I find the roots of these sentiments clearly coming from the Court's refusal to continue executive excesses, as in its decisions related to terrorism cases.[133] Although the *Gonzales* case is less connected with scientific judgment as was the *Massachusetts* case, connecting the two within a contour *Gonzales* to *Massachusetts* is not difficult if seen

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127. Gonzales v. Oregon, 546 U.S. 243, 275 (2006).

128. 21 U.S.C. § 801 et seq. (2006). The CSA was enacted into law via the Comprehensive Drug Abuse Prevention and Control Act of 1970. More about the Act can be viewed at http://www.usdoj.gov/dea/pubs/csa.html.

129. *Id.*

130. *Gonzales*, 546 U.S. at 251-52, 254.

131. OR. REV. STAT. §§ 127.800-127.995 (1997), *available at* http://oregon.gov/DHS/ph/pas/ors.shtml. According to the statute, an adult resident from Oregon that has been deemed terminally ill by a physician may request a lethal prescription from their physician to end their life. *Id.* § 127.805. The request must be in writing, and initiated by the terminally ill Oregonian. *Id.* § 127.810. Also, the terminally ill person must have 6 months or less to live. *Id.* § 127.800.

132. *Gonzales*, 546 U.S. at 254.

133. *See* Saby Ghoshray, *Untangling the Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 ST. THOMAS L. REV. 249, 278-79 (2006).

through the evolutionary lens of a contrarian viewpoint within constitutional jurisprudence.[134] This contour can be further solidified into a continuum if I incorporate the findings of the *Hamdan* Court which challenges president's authority to establish military tribunals while expanding Article III jurisprudence and further illuminating the shared power paradigm.[135]

The Court's strong resistance to insulate expert decision making from political interference becomes visible in *Massachusetts* as seen through the difference, asserted by Justice Stevens, between agency denial of a rule-making petition and agency decision for inaction on enforcement.[136] On the other hand, a finding of such granularity in a federal agency's administration was summarily rejected by Justice Scalia, who found no valid distinction within what he characterized as a "straightforward administrative-law case."[137] Justice Scalia, on the grounds that, in that case, the EPA enjoys broad discretion in rulemaking, attempted to bolster his position by finding both a lack of standing and the application of an improper injury doctrine.[138] The majority, following Justice Kennedy's *Lujan* concurrence, sharply combated Justice Scalia's view that a litigant's right of standing may flow from unlawfully held agency action which may have caused injury to such litigant.[139]

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134. For an exploration of the emergence of this contrarian viewpoint, see Ghoshray, *supra* note 21, at 729-35; *see also* Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post*-Roper, 45 J. CATH. LEGAL STUD. 561 (2006).

135. *See supra* note 27.

136. Justice Stevens observed:

> There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is "extremely limited" and "highly deferential."

Massachusetts v. EPA, 549 U.S. 497, 527-28 (2007) (citations omitted).

137. Justice Scalia had a contrarian viewpoint than that offered in the majority opinion by Justice Stevens:

> 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 issue at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.

Id. at 560. (Scalia, J., dissenting).

138. *Id.*

139. *Id.* at 517-18.

By melding disparate constitutional doctrines into a single doctrine of state's special standing, the majority signaled a paradigm shift towards a more reasoned judgment on federal agency rule-making. This willingness to end a federal administrative agency's arbitrariness in rule-making indicates the judiciary's deep-rooted rejection of any form of federal absolutism.[140] Justice Stevens' strong conviction in *Massachusetts* is but a reflection of the strong discontent with presidential absolutism, an area I have also explored elsewhere.[141] Within these series of rebukes to the Administration, however, I see a strong undercurrent of the judiciary's sincere effort to undo the damages of an administration characterized by executive excesses.[142]

Finally, does the opinion in *Massachusetts* give us any indication as to the majority's shift towards an evolving jurisprudence of dynamic constitutionalism? Although several Justices feel strongly about states' rights and standing within the firmament of the American federation, is there a trend within the judiciary to view states' rights as seen through the continuum drawn between *Gonzales* and *Massachusetts*?

C. Massachusetts' Success in Linking Lujan's Test with Inherited Procedural Rights

Now that I have deconstructed the *Massachusetts* Court's framework of states' special standing, it is time to examine whether a new line of constitutional adjudication is emerging to allocate more rights to the individual states. Earlier, I described how *Lujan's* framework was relaxed in *Massachusetts* to develop special standing for the states. Here, I extend the discussion further from an evolutionary constitutionalism point of view to better understand how *Lujan's* three pronged test was linked with the procedural rights to develop the paradigm of states' special solitude. I see special solicitude of states as an evolving concept, which resides within a continuous spectrum of states' rights, rather than being a single strand of right. This bundle of quasi-sovereignty rights was constructed by the amalgamation of a discreet set of rights. These individual rights emanate from various sources,[143] such as: 1) directly flowing from precedent cases; 2) generating from the failure of regulatory obligatory agencies; and 3) developing from the dark crevices of

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140. Here I refer to executive excesses in general. For a discussion of executive excesses, see Ghoshray, *supra* note 134.

141. *See generally* Saby Ghoshray, *Illuminating the Shadows of Constitutional Space While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L.J. 295 (2008).

142. *See* Ghoshray, *supra* note 134.

143. For a discussion on how some fundamental rights can originate via an evolving understanding of existing issues, see generally Saby Ghoshray, *Expansion of Family Rights While Searching for the Meaning of Life, Individuality and Self*, 48 SANTA CLARA L. REV. 959 (2008).

constitutional curvature that encapsulates shared the powered paradigm which is shared by Congress and the President.[144]

The opinion in *Massachusetts* was arrived at by lowering the threshold to bring in a paradigm shift in states' standing. This loosening of standard for states' standing was done by inserting a procedural right within the original *Lujan* framework. As a result, a more relaxed threshold for standing evolves within the meaning of responsibilities delegated to the federal agencies. Thus, while the agencies inherit a roving authority for rulemaking from Congress, its obligation to states enhances accordingly. In the context of environmental regulation, the authority to regulate GHG precipitates into a more expansive mandate towards regulating motor vehicles, utilities and industrial facilities. Although the decision in *Massachusetts* may not be significant enough to reverse global warming, its far reaching impact may herald a new era of state sponsored litigation. Traditionally, the states' standing is a threshold issue, for which the litigants face a demanding enquiry related to the size, scope and origin of the injury. *Massachusetts* overcame the stringent requirement of *Lujan* by introducing a discounted *Lujan* via granting the states a special ability, not explicitly identified before but abstracted from the nuisance law,[145] articulated in *Georgia.*

Although constitutional jurisprudence related to states' rights began more than a century ago in *Georgia*, it got a newer life-form in *Lujan*, found a more interpretative constitutional gloss in *Gonzales,* and ultimately found a deeper conviction in *Massachusetts*. Each incremental journey has not been in linear steps toward formulating new constitutional paradigm, but developed by straddling a more non-linear contour during each lap of this constitutional trajectory. In relaxing the stringent framework for states' standing, the jurisprudence required evolution. In this jurisprudential evolution of the constitutional landscape, often times, few areas of constitutional contours get illuminated which leaves dark crevices along the constitutional curvature.[146] More often than not, this requires illumination at a later stage, via incremental abstraction of a future case, as happened in *Massachusetts*.

For example, *Lujan* established Article III standing by identifying three prosecutable steps that litigants must overcome:[147] The injury must be 1) actual or imminent, concrete and particularized; 2) fairly traceable to the action of the regulatory agency in question; and 3) redressed by a favorable decision.

144. *See* Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165 (2009).

145. *See supra* note 108.

146. The term constitutional curvature gives a curved space analogy to highlight the complexity of constitutional interpretation in applying the two-century old Constitution to some particularized real life problems. This concept is borrowed from quantum physics, originally by Professor Laurence Tribe, to emphasize the need for constitutional jurisprudence to embrace post-modernity. *See supra* note 145.

147. *See supra* note 88.

Whether the federal courts should intervene or, whether the given question is worthy of federal administrative action, is to be determined by identifying whether *Massachusetts* injury is real or linked by a casual chain from the litigants and whether it is redressable in future. The question comes down to a determination of the immediacy and quantum of the injury, caused by the adverse impact of increasing GHG in the environment, suffered by citizens of Massachusetts. In reality, the alleged injury is too remote and too distant which is in sharp departure from *Lujan's* actual and imminent, particularized and concrete requirement.[148] Could *Massachusetts* really overcome the stringent structural standing requirements of *Lujan*? Not really, unless, of course, the Court imports a sublime yet, profound version of the standing enquiry to evaluate the standing requirement.

In *Massachusetts*, the Court has reshaped the standing enquiry of *Lujan* as it introduced a "relaxation loophole" in the elements of the causation and redressability.[149] *Massachusetts* invoked *Lujan* to postulate under what scenarios normal standards for states' standing could be relaxed. For example, Congress can define injuries "and articulate chains of causation that will give rise to a case or controversies where none existed before."[150] So the question then is how does Congress do that? Justice Stevens' observed that,[151] the relaxation of standards is achieved by vesting upon the states a procedural right of litigation, which flow through by the failure of regulatory obligations of the federal agencies. In this context, a federal agency is tasked with a specific procedural framework within which the agency is obligated develop rules to regulate issues related to citizens' everyday life. If the agency is unable to develop such rules, the default scenario would prompt the agency to provide justification for not being able to oversee the regulation sought.

Understanding the agency obligation in providing relief in the form of rulemaking or rule enforcing will help in understanding the development of states' standing. *Massachusetts* holds that, by entering into the Union, sovereign states part with some of the inherent rights of original sovereignty. As a reward for giving up this sovereignty, a reciprocal procedural right automatically flows to that state. This right is the very benefit the state must enjoy from the reciprocal protection of the Union. The right is defaulted to the federal government, or the federal agency acting as a delegate, to protect the state from harm or injury that the state cannot protect itself from. I view this as an exchange mechanism. It is premised on the understanding that the Union must marshal its available resources when the state is in peril or in need of redress for a specific tractable injury being imposed upon it. To efficiently

148. Massachusetts v. EPA, 549 U.S. 497, 544-45 (2007) (Roberts, C.J., dissenting).

149. *Id.* at 546-547.

150. *Id.* at 516 (majority opinion)(quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

151. *Id.* at 517-18.

implement such an exchange mechanism, the Congress, through its power of legislative prerogative, has instructed the various federal agencies to be vigilant and active in rule-making.

If an agency is found to be ill-equipped or ill-prepared to act towards redressing injury, the state can assert its right of due protection, by invoking its procedural right to make the relevant agency liable. This is how the state's standing flows. It does not flow directly through the three elements advocated in *Lujan*. According to *Massachusetts*, it flows by relaxing these structural parameters and inserting the procedural right while straddling a very important paradigm of shared by Congress and the President.[152]

This uncertainty and loose-coupling of diverging standards does indeed provide constitutional quandary. Where cases and controversies emerge, it becomes a different task to ascertain when it is the Congress' responsibility or the federal agencies' task to provide relief from injury. This complex manifestation of power is somewhat similar to the shared power paradigm between the Congress and the President, where the President's power expands and contracts with the fluctuating power of the Congress.[153] The emerging view of states power, however, does not embrace the shared power paradigm, as it is predicated on states enjoying a heighted standing. On the other hand, the special solicitude of the states can be seen as an attenuated *Lujan* framework, where the thresholds of all the traditional *Lujan* elements have been lowered. This has been done by introducing a vested procedural right, without relaxing congressional authority, but increasing the federal agencies' roving authority. Thus, the special standing for the state can be seen as another attempt at irradiating the opaqueness of the constitutional curvature[154] by forming a loosely coupled standing framework via forging several precedent cases. This framework gets solidified in *Massachusetts* while springing open the door to more expansive states' rights in applicable scenarios. This array of states' rights can indeed present interesting challenges to the judiciary, while states claim injury under various scenarios. For example, is it possible that, the State of New York could bring a lawsuit against the Securities Exchange Commission ("SEC") in the federal court claiming injury caused by the federal agency's negligence in properly supervising regulations in the financial market? A reading of *Massachusetts* may just give the State a shot at the SEC.

VI. CONCLUSION

152. *See* Ghoshray, *supra* note 142.

153. Here I refer to the shared power paradigm of the Constitution, in which the Congress and the President enjoy concurrent power, such that, the intensity of the Presidential power is conditional upon Congressional authority vested on the issue. *See generally id.*

154. *See supra* note 145.

What did the Supreme Court really hold in *Massachusetts vs. EPA*? Was it an environmental regulation case or does the true significance of the case come from a constitutional illumination of Article III jurisprudence? In my article, I have presented responses to these questions. The majority in *Massachusetts* did not hold the EPA responsible for regulating emissions of greenhouse gases. Rather, the Court observed that EPA must respond to a state's constitutionally grounded request for rule-making in either agreement or denial. However, the agency must provide justified rationale for such ruling. The significance of *Massachusetts* may, therefore, not be fully evaluated by looking through the lens of an environmental paradigm shift. Rather, it has to be appreciated because of the significant constitutional grounds raised in the case.

First, *Massachusetts* provided a new constitutional gloss on states' special solicitude. The Court did not create a new bundle of rights. Instead, it brought an enhanced illumination of existing rights of states, by uncovering some forgotten cases buried in darker crevices of constitutional landscape. The majority in *Massachusetts* empowered the states with special rights of standing under Article III, by expanding federalism, while placing states' *parens patriae* obligation under a more expanded basket of rights. This special standing flows from a combination of procedural rights emanated from a federal agency's failure to engage in rule-making and relaxed threshold requirements of injury analysis.

Second, the newer injury analysis for Article III standing was borne out of the traditional *Lujan* framework, tempered by an elevated state responsibility to protect its inhabitants, ultimately finding firmer footing on the incremental constitutional grants of precedent cases. Despite the dissents by four of the justices, including the Chief Justice, the Article III relaxation was crafted in a constitutionally sound manner, by creating a baseline from the precedent, followed by the enhancement from creation of procedural rights. This layered framework of relaxation was not an attenuation of standards, but rather a constitutional necessity in light of a broader and better understanding of principled rule-making.

Third, the importance of *Massachusetts* stems from a new vista the Court ventured into as the doctrinal development in the case paved way for a renewed awareness into states' rights within the constitutional jurisprudence. The Court, in providing a new interpretative guideline to evaluate agency action, raised the obligation threshold for agency action, while empowering the states with an elevated set of rights. This paradigmatic shift in the state-federal relationship will indeed provide a newer constitutional gloss in states' federalism rights.

Finally, I began my exploration by borrowing from Shakespeare, in enquiring whether *Massachusetts vs. EPA* is *much ado about nothing*. Here, at the end of my journey, I am convinced that the Court's narrow decision did not advance the anti-global warming agenda significantly enough. On the other

hand, an apparently routine environmental law case took on a new life as one of constitutional interpretation along multiple threads, which is much more than intended. At the end, *Massachusetts* was indeed, not, *much ado about nothing*.