

Constitutional Law Committee Newsletter

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MESSAGE FROM THE CHAIR

Robin Craig

One of the long-running themes of the Constitutional Law Committee has been that constitutional issues pervade the practice of environmental and natural resources law, and hence that practitioners need to be aware of those issues. It is unsurprising, therefore, that the featured contributors to this issue of the newsletter discuss constitutional issues arising in the newest and hottest environmental law issue—climate change. Nor, I suspect, are the two issues they discuss the only constitutional issues that will arise in the course of the country's grappling with this pervasive and multi-faceted problem.

In this issue, Jim May explores the contours of the political question doctrine as it has traditionally been employed and as it is now being used in climate change cases. As May notes, "federal courts have found that the seldom used 'political question doctrine' prevents them from entering the climate fray." He concludes that these courts are misapplying the doctrine in climate change cases based on common-law theories such as public nuisance.

Christopher Schroeder, in turn, looks at the effect of the Supreme Court's decision in *Massachusetts v. EPA* on the federal court doctrine of standing. Noting "that the majority and the dissent are disagreeing about some fairly large issues in standing law that ought to have implications for any lawsuit brought by the

beneficiaries of regulation," Schroeder nevertheless emphasizes that there are at least two ways of reading the Court's standing analysis and traces the use of the *Massachusetts v. EPA* decision in subsequent standing cases.

Climate change, almost certainly the most important environmental issue of the early 21st century, is perhaps also an appropriate topic with which to close out the 2007-2008 ABA administrative year. I would like to take this opportunity to thank my vice chairs for their service this year, and also to invite any readers who are interested in becoming more involved in next year's committee to e-mail me as soon as possible at rcraig@law.fsu.edu. Finally, thanks to all the readers of this newsletter for your continued participation as members of this committee.

CLIMATE CHANGE AND THE POLITICAL QUESTION DOCTRINE

James R. May

Climate change, as Chief Justice Roberts observes in his dissenting opinion in *Massachusetts v. EPA*, "may be a crisis, even the most pressing environmental problem of our time." *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (Roberts, J., dissenting) (internal quotations omitted). Who pays? Who knows? To date, Congress and the states have not enacted legislation to compensate states, landowners, and

**Constitutional Law
Committee Newsletter
Vol. 4, No. 3, July 2008
Norman A. Dupont, Editor**

In this issue:

Message from the Chair
Robin Kundis Craig 1

Climate Change and the Political
Question Doctrine
James R. May 1

Editor's Note
Norman A. Dupont 5

*Massachusetts v. EPA: A Big Deal for
Standing Law?*
Christopher H. Schroeder 5

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60654.



others for the consequences of climate change, including flooding, reduced property values, and increased health care expenses. Thus, common law—particularly public nuisance causes of action—may help distribute compliance costs equitably.

Public nuisance theory allows states and individuals to seek injunctive relief and/or money damages to abate activities that unreasonably interfere with a right common to the general public. Yet *state* public nuisance causes of action are often curtailed by limitations on liability and statutes of limitations, by requirements for individuals to show special damages, and by other obstacles.

On the other hand, *federal* common law for public nuisance has served as a meaningful cause of action for states and individuals to stop harmful activities and recover the costs of transboundary pollution. Public nuisance law involves an “unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B (1979). Public nuisance cases are generally brought by public entities, such as states as *parens patriae*, to protect state resources and the interests of a state’s citizens.

The theory is relatively straightforward. The linchpin of a federal public nuisance cause of action is establishing that the interference is “unreasonable” to public health or welfare. In the climate context, it is plausible to find that a defendant is a significant contributor to an unreasonable interference with a right common to the general public and allocate responsibility for equitable or legal relief.

Federal common law for public nuisance has a long and storied history of helping to fill the interstitial regulatory gaps left by diluted or dilatory federal legislative and executive responses. The more venerated cases include *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), *Missouri v. Illinois*, 200 U.S. 496 (1906) (water pollution), *New Jersey v. New York*, 284 U.S. 585 (1931) (solid waste), and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (air pollution). Although venerable in age, *Georgia v. Tennessee Copper Co.* received new life just last term in *Massachusetts v. EPA*, where the majority opinion cited it as an example of the “special

solicitation” afforded to states as sovereigns suing on behalf of their citizens. 127 S. Ct. at 1454.

Legal challenges of climate change seem a particularly cozy fit for federal common law. It is transboundary. Legislative enactments allowing for injunctive relief or money damages do not exist. A patchwork of state common law responses is untenable. Federal common law provides a means for addressing the impacts of climate change by offering the opportunity to establish compliance schedules to require the installation of technology that might be used to reduce emissions of greenhouse gases (GHGs), providing a basis for compensation for personal or property damage, and providing a means for paying the costs of monitoring, protecting, restoring, or providing substitutes for existing resources.

Unfortunately, however, at least two federal district courts have found that the seldom used “political question doctrine” prevents them from entering the climate fray in nuisance-based suits. This doctrine thwarts judicial review of issues textually or prudentially consigned to Congress, the president, or both. To coin a phrase, the doctrine applies to disable federal courts from reviewing matters on the theory that they “ought not enter [the] political thicket.” While the Constitution does not admit to a field of “political questions” beyond the reach of the federal judiciary, the Supreme Court concluded in *Baker v. Carr* that matters demonstrably committed to a coordinate branch of government, or otherwise imprudent for judicial service, are not justiciable. 369 U.S. 186 (1962). In deciding whether to apply the doctrine, courts must “analyze representative cases and . . . infer from them . . . analytical threads.” Such threads expose six “formulations” of cases that are not suitable for judicial identification, determination, or molding:

- (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of the kind clearly for nonjudicial discretion; or (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate

- branches of the government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Historically, the political question doctrine has proven one of “limited application.” Indeed, the Court applied the doctrine less than six times in more than two centuries, and only in limited contexts, including political apportionment and gerrymandering, impeachment, constitutional amendments, and treaty abrogation.

To this list now add climate change. Two federal district courts have recently declined to hear climate cases in the absence of an initial policy determination by the elected branches. First, in *Connecticut v. American Elec. Power Co., Inc.*, a collection of states and private conservation organizations sued the nation’s five largest emitters of carbon dioxide in the United States under federal common and state public nuisance law to redress the affects of climate change. 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal pending*, No. 05-5104-cv. The states claimed to have brought the suit for injunctive relief to address, *inter alia*, “irreparable harm” to the health, safety, and well-being of their 77 million citizens. Accordingly, plaintiffs asked the court to “cap” defendants’ emissions, develop a schedule for reducing defendants’ emissions on a percentage basis over time, assess and measure available alternative energy resources, and reconcile its relief with U.S. foreign and domestic policy.

The district court declined to hear the claim due to the political question doctrine. It concluded that it was impossible for it to make the “initial policy determination” “that must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim.” It observed that plaintiffs’ allegations were “extraordinary,” “patently political,” and “transcendently legislative,” and that that the mélange of environmental, economic, foreign policy, and national security implications of the case “present non-justiciable political questions that are consigned to the political branches, not the Judiciary.” Thus, it held that

the plaintiffs' lawsuit raised "non-justiciable political questions that are beyond the limits of this Court's jurisdiction."

Second, in *California v. General Motors Corp.* the trial court reached the same result as did the court in *Connecticut v. AEP*, 2007 WL 2726871 (N.D. Cal. 2007), appeal pending, No 07-16908. In *General Motors*, the State of California asked the court "to create a quotient or standard in order to quantify any potential damages that flow from Defendants' alleged act of contributing thirty percent of California's carbon dioxide emissions."

The district court in *General Motors* dismissed the action for the same reason as had the court in *AEP*, that is, due to lack of an initial policy determination by the elected branches. It determined it could not reach a ruling that is "principled, rational, and based upon reasoned distinctions" and that judicial review would be "inconsistent with the Framers' insistence that our system be one of checks and balances." Specifically, the court in *General Motors* ruled that the Clean Air Act's "comprehensive state and federal scheme to control air pollution in the United States," coupled with the Energy Policy and Conservation Act's "comprehensive response to the energy crisis of the 1970's," when "read in conjunction with the prevalence of the international and national debate, and the resulting policy actions and inactions . . . would require an initial policy determination of the type reserved for the political branches of government." Thus, the court concluded, it ought not "inject itself into the global warming thicket."

The trial court also found *Baker v. Carr*'s first and second formulations applied. First, it found climate change is textually committed to Congress, because "concerns raised by the political ramifications of a judicial decision on global warming in this case would sufficiently encroach upon interstate commerce, to cause the court to pause before delving into such areas so constitutionally committed to Congress." Second, it held that there is a lack of judicially discoverable or manageable standards by which to resolve the climate claims. It found a "legal framework" lacking, insofar as the court "is left without guidance in determining what is an unreasonable contribution to the sum of carbon

dioxide . . . or determining who should bear the costs . . ."

These decisions likely misapply the doctrine. The Constitution does not commit climate change to Congress or the executive. Federal common law provides ample and long-applied standards in cases involving disparate transboundary pollution. The elected branches have made initial policy determinations about climate change policies. Furthermore, there is good reason to question both the doctrine's jurisprudential bases and whether its framers meant it to be applied to federal common law in general, and climate cases in particular. Regardless, courts have rejected use of the doctrine to dismiss analogous claims for redress based on federal common law. The political question doctrine likely should not prevent courts from entering the climate change thicket. Indeed, both district court opinions are the subject of pending appeals to the Second and Ninth Circuit Court of Appeals respectively, and it is possible that the "political question" doctrine may be revisited by one or both of the appellate panels. The Second Circuit heard oral argument almost two years ago in the appeal of *Connecticut v. AEP*, and it would appear that a decision from that panel could come at any time.

That said, there is little doubt that federal common law is hardly the optimal option for addressing climate change. Climate change is a global issue with salient national impacts. Federal courts are probably not the premier forum for addressing what is arguably the world's most pressing problem. But until international law, Congress, the president, agencies, and the states, fully enter into the fray, common law is an essential tool. On the other hand, federal common law can also be unwieldy and amorphous. Yet without sufficient legislative tools, federal common law remedies remain a vital component of addressing the costs and consequences of climate change.

James R. May, *Professor of Law, Widener University*, is the *Constitutional Law Committee's vice chair for The Year in Review*. This article is a much abbreviated version of James R. May, *Climate, Constitutional Consignment, and the Political Question Doctrine*, 85 *DENV. U. L. REV.* 919 (2008).

EDITOR'S NOTE

Norman Dupont

As this issue was prepared for publication, the Supreme Court announced another 5-4 split on Article III standing in *Sprint Communications Co., L.P. v. APCC Services, Inc.*, ___ U.S. ___, 2008 WL 2484712, No. 07-552 (June 23, 2008). The factual setting in *Sprint* involves commercial transactions between “payphone” companies, their assignees, and the long-distance carrier and is dramatically different from the facts presented in *Massachusetts v. EPA*. But, the sharp battle between Justices Breyer, Stevens, Kennedy, Souter, and Ginsburg on one hand and the Chief Justice and Justices Scalia, Thomas, and Alito on the other, over Article III standing to sue continues to echo the sharp divisions that Professor Schroeder’s article so skillfully explores in a portion of the Court’s decision of last term in *Massachusetts v. EPA*, 549 U.S. ___, 127 S. Ct. 1438 (2007).

MASSACHUSETTS V. EPA: A BIG DEAL FOR STANDING LAW?

Christopher H. Schroeder

In 2003, the Environmental Protection Agency (EPA) rejected a petition filed by the state of Massachusetts and others asking the agency to regulate auto emissions of carbon dioxide (CO₂) because of CO₂’s role as the world’s major greenhouse gas (GHG). EPA claimed the Clean Air Act’s (CAA’s) jurisdiction did not extend to CO₂, and even if it did, EPA declined to regulate it for policy reasons.

In *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the Supreme Court rejected the CAA argument and ruled that EPA’s policy reasons were insufficient to justify denying the petition, remanding the petition to the agency for further consideration. As of this writing, no auto emissions have been regulated as a result of the decision, as EPA has yet to respond to the remand. Nonetheless, the opinion has already been enormously consequential by placing a Supreme Court imprimatur to the reality of climate change and thus to claims being made in numerous other proceedings, state and federal, calling for governments to take the climate change implications of their decisions into account. The influence of the Supreme Court’s affirming climate change and its ruling on the CAA will only grow over time.

Less certain is the impact of the other half of *Massachusetts v. EPA*. Before getting to the merits, the parties fought vigorously over whether any of the petitioners had standing to sue, and the Supreme Court split 5-4 on the issue, Justice Stevens writing for the Court and the Chief Justice writing for himself and Justices Scalia, Thomas, and Alito. Does the case present a relatively fact-specific disagreement unlikely to affect standing law generally, or do the opinions reflect a basic cleavage that may greatly affect the law of standing? As always, how the somewhat obscure entrails are read will depend upon how subsequent courts interpret them, but there is some profit in isolating the elements of the opinion where those future interpreters are likely to focus.



Constitutional Law
Committee Newsletter

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The Constitutional Law Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Norman Dupont at ndupont@rwglaw.com.

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Both Justice Stevens and the Chief Justice start out by agreeing on standing's "modern framework": in order to have standing to sue, "a petitioner must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Both are equally comfortable, furthermore, in reciting that the injury must be "particularized," and "actual or imminent." Beyond this agreement on standing law's boilerplate, however, their treatment of the injury, causation, and redressability requirements could not differ more. Causation and redressability often overlap, as they do to a certain extent here. In the interests of space, we will examine the differing treatment given to the injury and redressability components only.

As for injury, Massachusetts claims it will lose coastal lands—some of which Massachusetts itself owns—to rising sea levels caused by global warming. Justice Stevens recites language from a National Research Council report, unchallenged by EPA, that "global warming threatens (among other things) a precipitate rise in sea levels by the end of the century." Affidavits in the case state that climate change modeling suggests continuing land loss as sea levels rise between 20 and 70 centimeters by the year 2100. These facts seem sufficient to substantiate Massachusetts' "particularized injury in its capacity as a landowner" of low-lying coastal lands. What is more, the Court understood that "rising sea levels have already begun to swallow Massachusetts' coastal land." So the claim, in the majority's opinion, is far from speculative or uncertain. And the fact that the risks from climate change are "widely shared" does not defeat the conclusion that the Massachusetts' injury is particularized.

Justice Roberts takes issue with this analysis every step of the way. Initially, the Chief Justice seems to doubt that the phenomenon of global warming is even capable of producing particularized injury. He writes that the "very concept of global warming seems inconsistent with this particularized requirement. Global warming is a phenomenon 'harmful to humanity at large.'" Although this is the first point he makes, it seems largely to be a throwaway remark, because the Chief Justice goes on to speak of loss of land as if it were particularized.

Besides being a throwaway, the remark also seems wrong. While the Supreme Court has repeatedly said that a "generalized" injury cannot provide the basis for constitutional standing, it has also repeatedly said that once a petitioner has identified a concrete injury that he or she will suffer personally, the injury requirement has been satisfied, and it is immaterial whether enormous numbers of other people also are suffering injury. The doctrine against generalized injury is designed to weed out petitioners who are motivated to challenge government action, but who lack any other injury than those that can be associated with principled opposition, anger, annoyance, ideological commitments, and the like. Just as the standing restrictions sometimes mean that no one will be able to sue for a claimed law violation, sometimes the nature of the claimed violation means that an enormous number of people might be able to sue.

Putting aside this threshold objection to the particularity requirement, the Chief Justice goes on to find that Massachusetts' land loss fails to satisfy the standing requirements because its claim is too conjectural. Even though the affidavit noting that Massachusetts has already lost coastal land was unchallenged by the parties, Roberts finds it inadequate. In his view, it fails to support the only claim that matters for standing purposes, which is that Massachusetts has already lost land *because of* climate change. Noting that another affidavit acknowledges that subsidence unrelated to climate change is occurring along the coast, the claim that climate change has caused land loss is "pure conjecture."

Massachusetts' projections of future land loss fare no better under the Chief Justice's scrutiny. For him, accepting modeling of future harm as of 2100 sufficient to establish standing renders the requirement that an injury be "imminent" "utterly toothless." Besides, he continues, the models have an error band that exceeds the 70 centimeters elevation rise, so it is possible that no land loss would occur.

The majority and Chief Justice Robert's dissent in *Massachusetts v. EPA* approach the issue of redressability from equally divergent perspectives. Redressability presents an issue because even if ordering EPA to reconsider its decision to reject

Massachusetts' petition results in agency regulation of CO₂ emissions from new vehicles, Massachusetts' land loss could occur anyway. The entire transportation sector of the United States currently accounts for around 2 billion metric tons of global CO₂ emissions, and while that is an appreciable quantity, it is only 6 percent of the global total. Even substantial reductions in these emissions leave 94 percent of CO₂ emissions untouched, with an increasingly large share coming from countries outside the United States. (In 2006 or 2007, China overtook the United States as the world's leading emitter of CO₂, each contributing about one-fourth of the global total.) Under these circumstances, it is possible that EPA could regulate auto emissions to the fullest extent possible under the law and climate change would still cause land loss in Massachusetts.

For the dissent, the fact that reductions in auto emissions taken by themselves are unlikely to prevent Massachusetts' land loss prevents the state from establishing standing. In its view, in order for Massachusetts' injury to be redressed—in order for Massachusetts' land to be spared—other actors besides EPA as a regulator of automobiles must also join in efforts to reduce global GHGs. In such cases, where injury prevention depends upon the “unfettered choices made by independent actors not before the courts, a petitioner can only establish standing if he is able to present convincing evidence that these third parties will act in ways that will combine with the defendant's action to prevent the petitioner's injury. Aware of this problem, petitioners had submitted affidavits claiming that American decisions to reduce GHGs would act as a catalyst for other countries to follow suit, but these are dismissed by the Chief Justice as “conclusory” and “fanciful.”

Looking at the same set of affidavits and evidence, the majority has little difficulty with redressability. Policy makers are entitled to proceed one step at a time, and it is sufficient to satisfy redressability concerns that the actions the petitioners are claiming EPA is under a legal duty to take will “slow or reduce” Massachusetts' injury.

On redressability, both Stevens and Roberts seem to have valid points. In support of Justice Stevens, partly relieving the injury ought to count as redressing part of the injury. In this case, reducing land loss from 1,000 acres, say, to 800 acres obviously prevents the loss of the difference of 200. Likewise, pushing the date of loss from 2070 to 2080 prevents the loss of the use of the land for the decade in between. If either happens as a result of the court's decision, it would seem sufficient to demonstrate redressability. At the same time, the Chief Justice has a point in believing that there may well be scenarios under which reductions of emissions from American autos would fail to accomplish either slowing or reducing Massachusetts' injury. If, for example, current levels of GHG loading of the atmosphere are sufficient to reach a tipping point for the land-based ice masses of Greenland and Antarctica, sea levels could rise by as much as 20 feet, swamping Massachusetts' property—whether or not EPA acts to regulate auto emissions. This sort of “sudden tipping point” scenario is being actively debated by climate scientists.

Reading these two opinions side by side, it is hard to avoid the conclusion that Justice Stevens adopts a “forward-leaning” perspective on standing (to borrow a phrase from the instructions the White House reportedly gave its lawyers when it tasked them with finding legal justifications for strategies used in the war on terror), while the Chief Justice adopts a skeptical “show me” perspective. Justice Stevens provides one reason for his forward-leaning perspective at the outset of his standing discussion. “The parties' dispute,” he writes, “turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action.” To Justice Stevens, deciding the legal question that Massachusetts has raised does not seem at all like an unwarranted intrusion into the province of the elected branches to government; it seems like exactly the sort of business that the courts' conduct everyday, especially when the Congress has invited them to do so. The Chief Justice sees the case quite differently. For him, the case is but a stalking horse for a political dispute that Massachusetts and others are having with the Bush administration over the latter's approach to

climate change. In such circumstances, separation of powers concerns ought to make courts wary of being drawn into a political disagreement over issues of policy. This is particularly so when the petitioner is not a party about to be subjected to governmental regulation, but rather a third party claiming that someone else ought to be regulated. For those parties, standing is “substantially more difficult” to sustain.

It seems here that the majority and the dissent are disagreeing about some fairly large issues in standing law that ought to have implications for any lawsuit brought by the potential beneficiaries of regulation, to contest the lawfulness of government action or inaction when Congress has enacted a statutory right to sue. A line of Supreme Court decision with *Defenders of Wildlife v. Lujan*, 504 U.S. 555 (1992) at its head raises the standing threshold for such petitioners, regardless of whether Congress has enacted a right to sue or not. The Chief Justice’s dissent descends directly from the approach of Justice Scalia in *Lujan*. Justice Stevens’ opinion, in contrast, establishes a markedly different posture, understanding that the courts to have a distinct role in adjudicating legal disputes of this nature.

So far, then, the answer to the question initially posed must be that the opinions reflect a basic cleavage that may greatly affect the law of standing. But of course there is a kicker. Regardless of the number of petitioners, a case can go forward so long as one of the petitioners has standing. Consequently, standing decisions typically focus on a single party. When Justice Stevens begins his detailed discussion of the requirements of injury, causation, and redressability, focusing on Massachusetts, he starts with this prefatory sentence: “It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.” As a sovereign state, Massachusetts is entitled to “special solicitude.”

What are we to make of this? Is it the presence of a sovereign state as petitioner that explains why Justice Stevens is forward-leaning? Does the distinguishing of *Lujan* here intimate that without the presence of Massachusetts, the private parties would have failed to establish standing, as was the fate of the petitioners in

Lujan? There are two distinct answers to this question, depending upon whether our interest is in the internal development of doctrine or the external prediction of how future cases will be decided. As a matter of doctrinal consistency, the status of Massachusetts as a sovereign does not seem to do any explicit intellectual work once Justice Stevens begins his analysis of injury, causation, and redressability. None of the precedents cited by the majority turn on the presence of a state as petitioner. Indeed, none of the parties had attributed any significance to the sovereign status of one of the petitioners. Justice Stevens’ opening invocation of the nature of the claim and the existence of a statutory right to sue would seem to many quite sufficient to justify the approach the majority takes to its doctrinal analysis. On this view, the passages discussing Massachusetts’ sovereign status are throwaway passages for the majority.

The external view sees things differently. From the day the opinion came down, people have speculated that the “special solicitude” discussion is there to attract to Stevens’ opinion the vote of Justice Kennedy—the vote that would decide which of the two opinions formed the majority and which was written in dissent. Indeed, it was Justice Kennedy who raised the sovereign status issue directly in oral argument by referring to a case written by Justice Oliver Wendell Holmes, a case that appeared in none of the initial briefs submitted to the Court. If the sovereign-state emphasis is there to attract a fifth vote, then *Massachusetts v. EPA* is going to be an imperfect guide to future standing cases not involving sovereign states, simply because it will be hard to predict whether the forward-leaning five will stay together in the face of a private petitioner.

Already, some courts of appeals have dismissed the relevance of *Massachusetts v. EPA*’s to their case because the case before the appellate court lacked a state petitioner. A notable example is *Public Citizen v. NHTSA*, 489 F.3d 1279, 1294 n.2 (D.C. Cir. 2007). Similarly, the D.C. Circuit dismissed a standing claim by a foreign nation, *Canada, in Canadian Lumber Trade Alliance v. U.S.*, 517 F.3d 1319 (Fed. Cir. 2008). It remains to be seen whether *Massachusetts v. EPA* will be pigeon-holed as a

relatively narrow “sovereign-state” standing decision, or whether its forward-leaning posture toward standing will be applied to private petitioner cases as well.

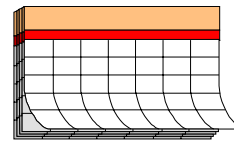
Public Citizen is itself notable as the latest in a series of D.C. Circuit cases requiring private petitioners alleging that an agency’s failure to regulate has increased their risk of suffering injury to submit proof of both a substantially increased risk of injury and a substantial probability of harm with that increase taken into account. Even had the court in *Public Citizen* decided that *Massachusetts v. EPA*’s discussion of injury, causation, and redressability had been germane, it is not at all clear the *Public Citizen* panel would have found much specifically of relevance in *Massachusetts v. EPA* with respect to the issues raised by the increased-risk decisions. That is because under the majority’s view, harm to Massachusetts was already occurring and would continue to occur with abatement of GHG emissions. So to the majority, this was not a case of increased risk at all, it was a case of presently occurring injury. However, the general forward-leaning posture of Justice Stevens opinion certainly would have had relevance, because the *Public Citizen* plaintiffs were also raising legal questions quite within the competence of the judiciary to decide and where the Congress had authorized them to sue.

The Chief Justice’s dissent, on the other hand, would have had doctrinal relevance to *Public Citizen*, had it been the majority. The dissent viewed the claim of present injury to be unproven, so for it the Massachusetts petition presented a case of claiming increased risk of future harm alone. With its skepticism toward computer modeling and projections of future harms, the dissent might well be interpreted as presenting a quite skeptical attitude toward standing based on projections of increased risk. But dissents are not majorities. Whatever the explanation for Justice Kennedy’s siding with the majority, the result is that *Massachusetts v. EPA* ends up having little to say about the particular problems presented by claims of standing based upon a claim not of immediate injury, but upon claims of an increased risk of a future injury.

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Global Climate Change and U.S. Law

Michael B. Gerrard, Editor

Because global climate change presents extraordinary challenges to the environment and the economy of United States as well as those of other nations, the debate about how to effectively implement more climate-friendly policies is sure to continue and amplify. The scientific case for strong action is becoming more compelling every month, and opinion polls show that the American public increasingly agrees. The law will play an important part in developing mechanisms to protect the climate, such as conserving energy, using renewable sources of energy, and implementing emission caps and trading programs.



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