

No Time Like the Present: The Eighteenth Century Judicial Power Meets the Twenty-First Century Problem in *Massachusetts v. EPA*

Jamison E. Colburn

At oral argument in November in *Massachusetts et al. v. EPA*, No. 05-1120, the Supreme Court showed its cards to at least the following extent: there are many ways for it to conclude that our federal judiciary can play virtually *no* productive role in attacking the global problem of climate change. The justices were prepared (albeit, in at least one case, with bad information), armed with questions that predicated the Court's precedents to the issues at hand. But several of the justices seemed utterly confounded by the nature of the claims being heard. Long ago, Hamilton argued in *The Federalist* No. 78 that their inability to apply force or will—leaving the courts with only their “judgment”—would make the judiciary the “least dangerous branch.” He did not foresee how scientific questions could eventually so dominate American public life as to render the rule of law essentially irrelevant to, for example, the biggest environmental problem confronting humanity in the twenty-first century. He did not foresee, that is, the danger of the judicial power rendering itself impotent and trapped within its own trumped up structure.

As everyone knows, science and the scientific process are quite different from lawyering and the legal process. Scientists accept findings and draw conclusions only when evidence supports them to a high probability, *i.e.*, high enough so that the phenomenon is very unlikely a function of chance. Lawyers, on the other hand, usually start out knowing their conclusions and gathering evidence and arguments to support them. Of course, judges know this and usually are appropriately skeptical of the claims made by partisans. The problem is that partisans are the only ones *making* claims in court—leading judges to view the whole world as partisan. While our adversarial legal process is often applauded as a search for truth, the reality can be quite different and *Massachusetts v. EPA* shows how.

Justice Scalia's chortling error at oral argument confusing the troposphere with the stratosphere quickly sent columnists, bloggers, and listserves aflutter. But consider the following exchange between the justices and the Massachusetts Assistant Attorney General arguing the case over the nature of the petitioners' injury:

MR. MILKEY: Your Honor, I think if someone is losing property because of this problem, then that person would have standing, but we're nowhere near a de minimis threshold here. We have shown we own property, 200 miles of coastline which we're losing, and we think the standing is straightforward.

JUSTICE SCALIA: No, I'm not sure—I think our opinions have even said it, but certainly commentators have often said it, that really the far margin of our standing cases has been, you know, the famous [*SCRAP*] case, in which the allegation was that the added pollution from municipal incineration of municipal waste which would—which couldn't be transported by rail for burial because the ICC rates were too high, that added pollution interfered with the students' . . . hiking in the

George Washington Forest along the Blue Ridge. That seems to me a much more immediate kind of damage; yet that's been referred to as really the far margin of our standing cases. You're talking not about their being affected by ambient air but being affected by a stratospheric effect which then has another consequence that you allege.

MR. MILKEY: Your Honor, once these are emitted the laws of physics take over, so our harm is imminent in the sense that lighting a fuse on a bomb is imminent harm. It may take—

JUSTICE GINSBURG: Mr. Milkey, does it make a difference that you're not representing a group of law students, but a number of States who are claiming that they are disarmed from regulating and that the regulatory responsibility has been given to the Federal Government and the Federal Government isn't exercising it? I thought you had a discrete claim based on the sovereignty of States and their inability to regulate dependent on the law Congress passed that gives that authority to the EPA. I thought that was—

MR. MILKEY: Your Honor, you are correct that we are saying that provides us also an independent source of our standing.

JUSTICE SCALIA: I don't understand that. You have standing whenever a Federal law preempts State action? You can complain about the implementation of that law because it has preempted your State action? Is that the basis of standing you're alleging?

Put aside the fact that this may be the rare instance Justice Scalia rejects a state's plea that its sovereignty has been insulted. Justice Ginsburg's question was obviously deft and strategic: she was trying to make the claim out to be one to which the swing votes—Justices Souter and Kennedy—might pay more heed. Really, though, does the fourteenth-century concept of “sovereignty” (a concept Justice Ginsburg herself has expressed misgivings about over the years) bring the necessary clarity and form to the claims advanced by petitioners? Can it be used to embody the (counterintuitive) immediacy of climate change and transform what is an otherwise formless and illimitable—global—threat into something “concrete” and “particularized”? Lujan v. Defenders of Wildlife, 504 U.S. 555, 574 & n.8 (1992). If so, it is only because our federal judiciary has imprisoned itself within an outmoded view of its constitutional role, tailored neither to the present nor to the past—but rather to an *imagined* past where Americans elevated vague and uncertain constitutional principles over necessity.

Questions Presented

Both questions presented in the case are statutory: whether EPA has authority under Clean Air Act § 202(a)(1) to regulate greenhouse gases as “air pollutants” and whether EPA validly declined to do so with a published finding mentioning considerations other than those listed in that section of the statute. Insults to states' sovereignty are a little beside the point, though. Congress gave “any person” the right to

sue EPA and level such allegations under Section 304. Massachusetts is only in court in this case because it meets general definitions of “person” in Section 302(e) and/or the Administrative Procedure Act. Besides, there may be twelve states suing EPA—but there were also ten states backing EPA.

The real issue is that Section 202(a)(1) only authorizes EPA to regulate “mobile sources,” and, by all accounts, that would only translate into a small overall reduction in greenhouse gas emissions globally. If every last car in America stopped emitting carbon dioxide and oxides of nitrogen tomorrow (which won’t happen), there is absolutely no proof that it would even move the needle on climate change. Thus, the Solicitor General’s office has argued that the states cannot prove “redressability” in the case, at least not to the Court’s standards for Article III standing. And, under existing doctrine, the relief sought and the constitutional requirements surrounding the “case or controversy” language in Article III probably combine to sever Massachusetts’ case from the rest of what might flow from its victory here.

Harm to All is Harm to None?

Of course, petitioners and everyone else knows that *Massachusetts v. EPA* is part of a war, not the war itself. Reversing *this* White House’s course on greenhouse gases could quite possibly catalyze real international collaboration, with real potential for progress. The global *empire* that is the United States—something as unknown to the framers as would be global climate change—is steered in infinitesimally small increments like those at issue in *Massachusetts v. EPA*. Moreover, modern programmatic statutes like the Clean Air Act, being of a staggering breadth, complexity, and scientific contingency, are legal structures simply unknown to those who created the “judicial Power” of Article III. They and the executive branch they govern have become behemoths of which judges are now wary. Chevron certainly awaits Massachusetts if it is “lucky” enough to get the Court to the merits of its claim.

But the very dirty (and not so little) secret is that a victory in *Massachusetts v. EPA* could be extremely useful in stage *two* of the petitioners’ war plan. The holding would help show EPA actually believes greenhouse gases *are* an air pollution problem and could be used to push EPA to regulate them through other parts of the Act, perhaps even as “criteria pollutants” under Sections 108 and 109. *See, e.g., Natural Resources Defense Council, Inc. v. Train*, 545 F.3d 320 (2d Cir. 1976). I doubt Justice Scalia was kept out of the loop on that secret, but even supposing that he was, I know of no constitutional principle that justifies denying judicial relief because it might *reveal* truth. No one seriously argues anymore that climate change is not in progress, that it can be addressed by any single measure, nor that the executive branch lacks any authority to regulate greenhouse gas emissions as such. But don’t be surprised if that is the picture the Court says it sees in *Massachusetts et al. v. EPA*, No. 05-1120. And if that is the best our Supreme Court has, it deserves to be used as but a tool in a public relations war. After all, the petitioners won more than they probably ever bargained for the minute the Court granted review in this case: that shined a spotlight on this problem in the otherwise darkened room of the United States’ response to climate change.