

TO EMIT IS HUMAN; TO REGULATE, DIVINE: STATUTORY INTERPRETATION OF THE CLEAN AIR ACT IN *MASSACHUSETTS V. ENVIRONMENTAL PROTECTION AGENCY*, 127 S. CT. 1438 (2007)

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I. INTRODUCTION**

Plato once wrote, “[s]o it is with *air*: there is the brightest variety which we call [space and heaven], the muddiest which we call mist and darkness, and other kinds for which we have no name”¹ Since Plato’s time, air has become even more mysterious as changes in the Earth’s atmosphere have begun to impact the global climate and public health and welfare. As global temperatures rise, so too do questions regarding the future of our planet.

*Massachusetts v. Environmental Protection Agency*² is the quintessential case regarding the future of air pollution regulation and prevention of continued environmental harm. As global warming is one of the most pressing issues of our time, the courts are stepping in and taking control of a difficult and complex situation. In this case, the United States Supreme Court holds the Environmental Protection Agency (hereinafter “EPA”) can no longer refuse to issue a classification regarding carbon dioxide and other greenhouse gases because such substances clearly fit into the definition of an air pollutant under the Clean Air Act (hereinafter “CAA”)³ The Court leaves it to the EPA to make a ruling whether such greenhouse gases are harmful, and if so, the EPA has a statutory duty to regulate. If the EPA finds such gases non-harmful to the public health and welfare, it can avoid regulation of such emissions from new motor vehicles. Regardless, the EPA can no longer refuse to act, unless

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** Developments following the U.S. Supreme Court’s decision in *Massachusetts*, including any subsequent EPA proposals for rules to implement the decision, are beyond the scope of this Casenote.

1. PLATO, *TIMAEUS* 83, available at [http://en.wikipedia.org/wiki/Air_\(classical_element\)](http://en.wikipedia.org/wiki/Air_(classical_element)) (last visited Feb. 17, 2009).

2. *Massachusetts v. Env’tl. Prot. Agency*, 127 S. Ct. 1438 (2007) (hereinafter *Massachusetts*).

3. See *infra* Section III and note 29.

it can support its inaction in the language of the CAA, which it has never previously done.⁴

Massachusetts is important because by stimulating EPA action, the Court takes an active measure to further the environmental cause. If carbon dioxide and other greenhouse gases do require regulation, such regulations will have an effect on new vehicle emission standards, the motor-vehicle industry and future of design, and would likely stimulate other governments throughout the world to adopt similar measures to combat the harmful repercussions from carbon dioxide and similar greenhouse gases. If these gases are not harmful pollutants by EPA standards, no regulation is required. This could have serious repercussions in that carbon dioxide, currently the most prevalent type of greenhouse gas, would not be subject to regulation and therefore increased concentrations would likely result in the atmosphere. If other governments follow this lead, global warming is likely to increase at an ever-growing rate.

This Casenote will argue carbon dioxide and nitrous oxide emissions do fall into the CAA's definition of an air pollutant, while deference should be given to the EPA finding that methane and hydrofluorocarbons do not constitute air pollutants. Section II of this Casenote sets forth the background regarding global warming, the history and present version of the CAA, as well as the EPA's authority to regulate thereunder. Section III explains the facts and explores the majority and dissenting opinions of *Massachusetts*. Section IV describes the appropriate statutory interpretation methodology in order to better determine whether there is ambiguity within the CAA, and then applies the reasoning of the majority and dissent to that model. By exploring the text of the CAA, the statutory interpretation arguments of the Court and dissenters, and the repercussions of each outcome, it will be possible to determine the fairness and appropriateness of the Court's decision, and whether this decision puts the federal government on a path toward regulating greenhouse gases.

II. BACKGROUND

The controversy surrounding global warming is incredibly prevalent in our society, yet questions exist regarding the science and effective regulation of this phenomenon. The background section will begin with the histories of the dispute and science of global warming, and end with an explanation of the current statutory scheme regarding environmental pollutants.

4. *Massachusetts*, 127 S. Ct. at 1444.

A. Origins of the Dispute

Beginning with the discovery of a gradual increase in global temperatures, scientists debated the major cause of this global warming.⁵ Generally, the scientific community accepts human activity as the predominant cause of the correlating increase in greenhouse gas emissions and the increasing temperatures, although there are still skeptics of global warming and its impact on the Earth, arguing no unequivocal evidence establishes a causal link between greenhouse gas emissions and global warming.⁶ However, the overwhelming majority of scientific evidence shows that the increase in global temperatures has coincided with the rise of greenhouse gas concentrations in the atmosphere.⁷

The most prevalent of all the greenhouse gases is carbon dioxide.⁸ In the past, the United States Environmental Protection Agency (hereinafter “EPA”), although authorized by statute to regulate harmful air pollution emissions from new motor vehicles, declined to rule specifically on whether carbon dioxide, and other common greenhouse gases emitted from motor vehicles, qualify as dangerous air pollutants within the definition of the CAA.⁹ By declining to rule on the status of such greenhouse gases, the EPA successfully avoided regulating such emissions. The EPA supported its decision to abstain from ruling in policy arguments.¹⁰

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5. See Steven G. Davidson, *Regulation of Emission of Greenhouse Gases and Hazardous Air Pollutants from Motor Vehicles*, 1 PITT. J. ENVTL. PUB. HEALTHL. 1, 2 (2006). Many scientific experts attribute climate change to the burning of fossil fuels and other human activities, while there is a vocal minority of the scientific community saying the increased temperatures result from a natural cycle.
 6. Jay M. Zitter, *Construction and Application of § 202(a)(1) of Clean Air Act (42 U.S.C.A. § 7521(a)(1)) Allowing for Promulgation of Standards Applicable to Emission of Air Pollutants from New Motor Vehicles or Engines, Which Cause, or Contribute to, Air Pollution, Which May Reasonably be Anticipated to Endanger Public Health or Welfare*, 13 A.L.R. FED. 2d 703 (2006).
 7. Daniel Baylson, Casenote, *Commonwealth of Massachusetts v. EPA: Passing the Buck on Regulation of Greenhouse Gas Emissions*, 17 VILL. ENVTL. L.J. 411, 412 (2006).
 8. Joshua Steinberg, Casenote, *The Bone-Chilling Effects of Global Warming and the EPA's Cold-Shoulder Response to Pleas for Help, a Case Note on Massachusetts v. EPA*, 415 F.3D 50 (D.C. Cir. 2005), 26 TEMP. J. SCI. TECH. & ENVTL. L. 169, 174 (2007).
 9. *Massachusetts*, 127 S. Ct. at 1450.
 10. *Id.* (arguing against EPA regulatory authority over new motor vehicle greenhouse gas emissions due to Congress' further investigation into climate change and specially tailored solutions to global atmospheric issues, and the great economic and political repercussions that would stem from regulating such emissions).

B. The History of Global Warming

Global warming describes the phenomenon of the increase in global climate temperatures.¹¹ Despite common perception, global warming is not a new phenomenon and its scientific roots can be traced back as early as the mid-19th century.¹² Although temperature elevations can be attributed to a number of causes, mostly the increased presence of greenhouse gases with the Earth's atmosphere causes global warming.¹³ A certain amount of greenhouse gases occur naturally in our atmosphere, while additional amounts result from human activity.¹⁴ A wide array of human activity leads to greenhouse gas emissions, including the burning of fossil fuels, natural gas, and coal, as well as certain types of chemical reactions.¹⁵

While scientists began to examine the link between human activity and the increase in temperatures as early as 1938, the debate regarding human activity and actual contribution to global warming still continues today.¹⁶ However, the Intergovernmental Panel on Climate Change¹⁷ recently stated “[m]ost of the observed increase in globally averaged temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations,” and also “*very likely* that it is not due to known natural causes alone.”¹⁸ When released, carbon dioxide acts as an insulator and traps solar energy in the atmosphere, preventing the escape of heat.¹⁹ Carbon dioxide, the most common of all the greenhouse gases, acts like the ceiling of a greenhouse to capture and retain heat.²⁰ Scientists predict

11. Steinberg, *supra* note 8, at 174.

12. Dominick J. Graziano, *Global Warming: An Introduction to the State of the Science and a Survey of Some Legal Responses*, 79 FLA. B. J. 34 (2005).

13. Steinberg, *supra* note 8, at 174.

14. *Id.*

15. *Id.* The manufacture of cement is one example of a chemical reaction which creates greenhouse gases.

16. Graziano, *supra* note 12, at 34–35.

17. The Intergovernmental Panel on Climate Change was established in 1988 in recognition of the problem of potential global climate change. The role of the IPCC is to assess the scientific, technical, and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts, and options for adaptation and mitigation. The IPCC does not conduct research, nor does it monitor climate related data, but bases its assessments mainly on peer-reviewed and published scientific and technical literature. Intergovernmental Panel on Climate Change, About Us, *available at* <http://www.ipcc.ch/about/about.htm> (last visited Feb. 17, 2009).

18. IPCC, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 10 (Feb. 5, 2007) *available at* <http://www.ipcc.ch/SPM2feb07.pdf>. (stating “very likely” equates to greater than 90% probability). *Id.* at 4 n.6.

19. *Massachusetts v. Envtl. Prot. Agency*, 127 S. Ct. 1438, 1446 (2007).

20. *Id.* at 1446.

global warming will cause loss of arctic ice, rising sea levels, and the loss of plant and animal life with effects becoming more pronounced and destructive over time.²¹

C. The History of the Clean Air Act

The original CAA came into effect in December 1963, and allowed federal agencies to expand research efforts, make grants to air pollution control agencies at the state level, and intervene directly to diminish interstate pollution in certain specified circumstances.²²

Congress passed the Clean Air Act Amendments of 1970 as a response to the threats to human health from air pollution.²³ Although these amendments worked to join the states and federal government as partners in establishing programs to deal with the problem of air pollution, the Act continued to depend upon states as the primary force to regulate such issues.²⁴ Primarily, the 1970 Amendments required the EPA to promulgate national ambient air-quality standards (hereinafter “NAAQS”).²⁵

A second set of amendments came in 1977, whereby Congress codified a program intended to prevent potential air-quality deterioration in areas where pollutant levels were lower than the NAAQS.²⁶

Congress enacted the CAA’s most recent amendments in 1990, aiming to curb major threats to national health and environmental safety by specifically addressing acid rain, urban air pollution and toxic air emissions.²⁷ With these amendments Congress gave the EPA Administrator the authority to regulate standards applicable to the emission of any air pollutant from any class of motor vehicles.²⁸

21. Graziano, *supra* note 12, at 35.

22. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 63–64 (1975).

23. *Id.* at 64.

24. *Id.* at 64–65.

25. Philip White Jr., *Clean Air Act—Supreme Court Cases*, 7 A.L.R. FED. 2d 357 (2005) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 846 n.15 (1984). “Primary standards were defined as those whose attainment and maintenance were necessary to protect the public health, and secondary standards were intended to specify a level of air quality that would protect the public welfare.”).

26. *Id.* at 848–49.

27. See United States Environmental Protection Agency, Overview, The Clean Air Act Amendments of 1990, available at <https://www.epa.gov/oar/caa/overview.txt> (last visited Feb. 17, 2009).

28. See Clean Air Act, 42 U.S.C.A. § 7521(a)(1) (West 2007).

D. The Current Clean Air Act and EPA Authority

The Clean Air Act states, “The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”²⁹ The CAA defines air pollutant to include “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”³⁰

This section of the CAA gives the EPA the general authority over motor vehicle emissions as they apply to the contribution of pollutants into the atmosphere.³¹ This provision dictates that the EPA Administrator is required to regulate air pollutant emissions from motor vehicles, which “*in his judgment*” cause or contribute to air pollution and therefore impact public health and welfare.³² Courts have ruled in order to regulate under the CAA, the Administrator had to find an emission constitutes an air pollutant, and such pollutant must be “likely to cause or contribute to air pollution which endangers the public health or welfare.”³³ There is room for interpretation and discretion in this statute, because all emissions are not necessarily air pollutants, and air pollutants, in general, do not necessarily lead to adverse impacts on the health and welfare of the public.³⁴

III. EXPOSITION OF *MASSACHUSETTS v. EPA*

In *Massachusetts*, the Supreme Court held the EPA must make a ruling as to whether the carbon dioxide and other greenhouse gases constitute air pollutants. If so, the CAA requires the EPA to regulate emissions of such gases from new motor vehicles. If not, the EPA can avoid regulation of such emissions. Regardless of its findings, the EPA can no longer refuse to make a determination. This section will review the facts and procedural history of *Massachusetts*, followed by analyses of the majority and dissenting opinions.

29. *Id.*

30. 42 U.S.C.A. § 7602(g) (West 2007).

31. Zitter, *supra* note 6.

32. *Id.*

33. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 15 (D.C. Cir. 1976).

34. Zitter, *supra* note 6.

A. Facts and Procedural Posture

In 1999, in response to the growing climate change and predicted adverse effects on human health and environment, a group of 19 private organizations³⁵ filed a rulemaking petition with the EPA.³⁶ In the petition they asked the EPA to use its powers under § 202 of the CAA to regulate emissions of four greenhouse gases³⁷ from new motor vehicles.³⁸

Fifteen months after the submission of the petition, the EPA took action requesting public comment on the issues raised in the petition, particularly regarding “any scientific, technical, legal, economic or other aspect of these issues that may be relevant to [the] EPA’s consideration of this petition.”³⁹ In 2003, the EPA denied the rulemaking petition, justifying its conclusion by stating the CAA does not authorize the EPA to issue mandatory regulations regarding global climate change, and even if it did, regulating such emissions would be unwise.⁴⁰

In response to the EPA’s decision, a group of States,⁴¹ local governments,⁴² and private organizations⁴³ sought review of EPA’s inaction.⁴⁴ The United States Court of Appeals for the District of Columbia Circuit denied their petition for review, holding the EPA Administrator had discretion under

35. *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1449 n.15 (2007). The organizations include Alliance for Sustainable Communities, Applied Power Technologies, Inc., Bio Fuels America, the California Solar Energy Industries Ass'n., Clements Environmental Corp., Environmental Advocates, Environmental and Energy Study Institute; Friends of the Earth, Full Circle Energy Project, Inc., the Green Party of Rhode Island, Greenpeace USA, International Center for Technology Assessment, Network for Environmental and Economic Responsibility for the United Church of Christ, New Jersey Environmental Watch, New Mexico Solar Energy Ass'n., Oregon Environmental Council, Public Citizen, Solar Energy Industries Ass'n., The SUN DAY Campaign.

36. *Id.* at 1449.

37. *Id.* The four greenhouse gases are carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.

38. *Id.*

39. *Id.* (citing 66 Fed. Reg. 7486, 7487 (2007)).

40. *Massachusetts*, 127 S. Ct. at 1450.

41. *Id.* at 1446 n.2. The states include California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

42. *Id.* at 1446 n.3. The local governments are District of Columbia, American Samoa, New York City, and Baltimore.

43. *Id.* at 1446 n.4. The private organizations included are Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group.

44. *Id.* at 1451.

the CAA to deny the rulemaking petition, and properly executed that discretion.⁴⁵

Petitioners filed for *certiorari* to the Supreme Court, arguing the EPA had abandoned its responsibility to regulate the emissions of four greenhouse gases, including carbon dioxide.⁴⁶ The petitioners asked the Supreme Court to determine whether the EPA has the authority to regulate greenhouse gas emissions from new motor vehicles, and if so, whether the EPA's stated reasons for declining to do so are consistent with the CAA.⁴⁷ The Court granted *certiorari*.⁴⁸

B. The Majority Opinion

In order to rightfully hear the issues within the case, the Court first had to determine whether the petitioners had standing under Article III of the Constitution to challenge the EPA's denial of their rulemaking petition.⁴⁹ The Supreme Court uses a three-part test to determine whether a litigant has standing to bring forth a claim. A litigant must show a particularized and concrete injury that is actual or imminent, the injury must have been caused by and be fairly traceable to the defendant, and there must be a likelihood that the injury can be redressed by a favorable court decision.⁵⁰ There, the Court found that although the climate-change risks are widely shared, it does not minimize Massachusetts' interest in the outcome of the litigation, since rising seas have already begun to swallow Massachusetts' coastal land.⁵¹ As Massachusetts owns a considerable portion of the state's coastal property, it has a particularized injury in its capacity as a landowner that is both actual and imminent.⁵² Moreover, the EPA does not dispute the connection between greenhouse gases and global warming, and so its refusal to regulate such emissions contributes to Massachusetts' injuries.⁵³ Lastly, although regulating

45. *Id.* See also *Mass. v. EPA*, 415 F.3d 50, 58 (2005). All three judges in the Court of Appeals wrote separate opinions. The Court declined to state whether the EPA did have statutory authority to regulate greenhouse gas emissions from new motor vehicles. Assuming the EPA did have such power to regulate, the Court held the EPA properly declined to exercise such authority based on policy judgments and denied the petition for review.

46. *Massachusetts*, 127 S. Ct. at 1446.

47. *Id.*

48. *Id.* at 1447.

49. *Id.* at 1452.

50. *Id.* 1453 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

51. *Id.* at 1456.

52. *Id.* at 1455.

53. *Id.* at 1457. However, the EPA does perhaps dispute the connection between greenhouse gases and a rise in sea level.

new automobile emissions in the United States will not alone reverse global warming, deciding whether EPA has a duty to slow such damage was within the Court's discretion as a possible remedy for Massachusetts.⁵⁴ According to the majority, the injury, causation, and redressability requirements of standing were all satisfied in this case.

Additionally, the Court found greenhouse gases are air pollutants within the definition of the CAA, giving the EPA the statutory authority to regulate such emissions from new motor vehicles.⁵⁵ The Clean Air Act's definition of air pollutant includes any "air pollution agent or combination of such agents, including any physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air"⁵⁶ Since the definition embraces all airborne compounds, any emission from a vehicle, according to the majority, fits into that definition.⁵⁷ As these vehicle emissions constitute air pollutants under the definition of the Act, the EPA has the authority to regulate such emissions.⁵⁸

Lastly, the Court held the EPA must justify its reasoning to decline to take action regarding regulation of new vehicle emissions of greenhouse gases within the statutory language of the CAA.⁵⁹ The congressional design of the Act allows the EPA to "avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation⁶⁰ as to why it cannot or will not exercise its discretion to determine whether they do."⁶¹ Therefore, unless the EPA can justify inaction within the Act, it is required to investigate the extent of damage stemming from such greenhouse gases, and act accordingly based on its findings.⁶²

54. *Id.* at 1458.

55. *Id.* at 1462.

56. *Id.* at 1459 (citing 42 U.S.C.A. § 7602(g) (West 2007)).

57. *Massachusetts*, 127 S. Ct. at 1460.

58. *Id.* at 1462.

59. *Id.* at 1463.

60. *Id.* at 1462. A reasonable explanation must be rooted in "whether an air pollutant causes, or contributes to, air pollution which may reasonably be anticipated to endanger the public health or welfare." According to the majority, the judgment of the Administrator must be defined by the statutory limits of the Act.

61. *Id.*

62. *Id.* at 1463.

C. The Dissenting Opinions

1. Chief Justice Roberts' Dissent Regarding Standing⁶³

The Chief Justice found that the merits of the case could not be heard because petitioners failed on the standing issue.⁶⁴ To begin with, he found the concept of global warming inconsistent with the imminence and particularization requirements of standing.⁶⁵ The Chief Justice supported this conclusion by stating global warming exists on a century-long continuum and as a result, substantial repercussions of global warming would not become entirely apparent in the near future.⁶⁶ The particularization requirement of injury was also not satisfied in this case because global warming is a phenomenon harmful to society at large, and the redress sought is a change in the atmosphere around the world, and not specific to petitioners.⁶⁷ The actual element of injury was also lacking because there can be no actual injury when the only supporting evidence of such injury is scientific conjecture and broad allegations of sea level increases.⁶⁸

Additionally, the Chief Justice found further problems with the causation and redressability elements of standing.⁶⁹ Since the petitioners were unable to trace their alleged injuries back to the emissions that might be limited by the EPA, and can only show future regulation of new motor vehicle standards might reduce only a fraction of global emissions, they could not establish the necessary causation of the injury as well as a possibility of redress in the event EPA decides to regulate new motor vehicle emissions.⁷⁰

2. Justice Scalia's Dissent Regarding Statutory Interpretation

Justice Scalia dissented on the merits. He began his analysis saying nothing in the CAA language requires the EPA Administrator to make a judgment when a petition for rulemaking is filed.⁷¹ The majority never cited

63. Although the standing issue of *Massachusetts* is a compelling legal issue, the primary focus of this casenote remains the statutory interpretation and regulatory impact of the Court's decision regarding the Clean Air Act.

64. *Id.* at 1464 (Roberts, C.J., dissenting).

65. *Id.* at 1467–68 (Roberts, C.J., dissenting).

66. *Id.* at 1468 (Roberts, C.J., dissenting).

67. *Id.* at 1467 (Roberts, C.J., dissenting).

68. *Id.* (Roberts, C.J., dissenting).

69. *Id.* at 1468 (Roberts, C.J., dissenting).

70. *Id.* at 1469 (Roberts, C.J., dissenting).

71. *Id.* at 1472 (Scalia, J., dissenting).

to a statute or other authority for its reasoning, as there is no such authority.⁷² If the intent of Congress was to require the Administrator to act, it had the opportunity to explicitly state as much in the CAA.⁷³ The Act states the Administrator must only give some reasonable explanation for its inaction to determine whether greenhouse gases endanger public welfare.⁷⁴ The EPA had done so, by stating various policy concerns as its basis for abstention.⁷⁵

The EPA rooted its inaction in two theories. First, EPA regulation would interfere with the President's comprehensive plan addressing climate change.⁷⁶ The President's long-term approach involves incentives and technological developments which would effectively reduce the scientific uncertainties regarding global temperature increases.⁷⁷ If the EPA steps in and begins to regulate in this area, it would result in an inefficient, piecemeal approach impeding the climate plan of the President.⁷⁸ Second, an EPA determination on greenhouse gases would weaken efforts to persuade developing foreign countries to reduce their greenhouse gas emissions.⁷⁹ As the President is the ultimate authority in foreign affairs, it is his duty to address foreign policy issues.⁸⁰ The EPA's reasons relating to Executive Branch programs and foreign policy were not separate from the statutory text of the CAA since policy rationales are often in the forefront when deciding whether to enter into a new field.⁸¹ The Administrator, in giving these reasons, acted within his broad discretion in declining to make a judgment in this case.⁸²

Next, Justice Scalia moved to the science of global warming as grounds for avoiding a determination as to the harm of greenhouse gas emissions.⁸³ The majority allowed the EPA to waive a judgment regarding whether greenhouse gases endanger the public welfare if it feels the science concerning climate change is too uncertain.⁸⁴ However, the EPA said exactly this based

72. *Id.* (Scalia, J., dissenting).

73. *Id.* (Scalia, J., dissenting).

74. *Id.* (Scalia, J., dissenting).

75. *Id.* (Scalia, J., dissenting).

76. *Id.* at 1472–73 (Scalia, J., dissenting).

77. *Id.* at 1473 (Scalia, J., dissenting).

78. *Id.* (Scalia, J., dissenting).

79. *Id.* (Scalia, J., dissenting).

80. *Id.* (Scalia, J., dissenting).

81. *Id.* (Scalia, J., dissenting).

82. *Id.* at 1474 (Scalia, J., dissenting).

83. *Id.* (Scalia, J., dissenting). *See also* Steinberg, *supra* note 8, at 181.

84. *Massachusetts*, 127 S. Ct. at 1474 (Scalia, J., dissenting).

on a National Research Council report.⁸⁵ Reducing the uncertainty of global warming can only be accomplished through major advances in the understanding of factors determining the concentration of greenhouse gases and the sensitivity of the Earth's climate.⁸⁶ Until that uncertainty has been resolved, the EPA has the discretion to abstain from ruling on the harmfulness of such greenhouse gases.

Lastly, Justice Scalia addressed the statutory interpretation of "air pollutant."⁸⁷ The majority claimed the CAA allows the EPA to regulate greenhouse gas emissions if it finds such emissions contribute to global warming.⁸⁸ Justice Scalia said to reach that conclusion the majority mistakenly assumed a greenhouse gas is necessarily an air pollutant.⁸⁹ However, in order to be an air pollutant, and subject to such regulation under the Act's definition, the substance must be "physical [or] chemical," "emitted into . . . the ambient air," and "an air pollution agent or combination of such agents."⁹⁰ Although greenhouse gases obviously are physical or chemical substances emitted into the ambient air, the EPA's interpretation is that they are not necessarily an "air pollution agent."⁹¹

The term "air pollution" is not defined by the CAA.⁹² The EPA regards air pollution in terms of impurities in the ambient air at ground level or near the surface or the earth, while carbon dioxide and other greenhouse gases are found higher up in the atmosphere and inconsistent with the EPA's view of air pollutant.⁹³ Justice Scalia found the dictionary established the reasonableness of this view since it defines pollute as "[t]o make or render impure or unclean," and defines the air as "the part of [the earth's atmosphere] near the earth."⁹⁴ Justice Scalia stated this is a reasonable interpretation of the CAA, and

85. *Id.* (Scalia, J., dissenting). The National Research Council Report states, "[b]ecause of the large and still uncertain level of natural variability inherent in the climate . . . a [causal] linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes . . . cannot be unequivocally established." *Id.* The report goes on to state, "[t]he understanding of the relationships between weather/climate and human health is in its infancy and therefore the health consequences of climate change are poorly understood." *Id.* at 1475.

86. *Id.* (Scalia, J., dissenting) (citing 68 Fed. Reg. 52930 (Sept. 8, 2003)).

87. *Id.* at 1475 (Scalia, J., dissenting).

88. *Id.* (Scalia, J., dissenting).

89. *Id.* (Scalia, J., dissenting).

90. *Id.* (Scalia, J., dissenting).

91. *Id.* (Scalia, J., dissenting).

92. *Id.* at 1477 (Scalia, J., dissenting) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

93. *Id.* (Scalia, J., dissenting).

94. *Id.* (Scalia, J., dissenting) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1910 (2d ed. 1949)).

therefore, the EPA deserves deference in their view.⁹⁵ The EPA concluded that the CAA authorizes regulation of an air pollutant causing or contributing to air pollution, but carbon dioxide and other greenhouse gases allegedly contributing to climate change are beyond the scope of the CAA's authorization to regulate.⁹⁶

Justice Scalia concluded his dissent by stating that although global temperature changes may be an important policy issue, the Court should not impose its own interpretations when the EPA has made reasoned judgments which deserve deference.⁹⁷

IV. ANALYSIS

This portion of the Casenote describes the appropriate method of statutory interpretation to better determine whether there is ambiguity within the CAA, and then applies the reasoning of the majority and dissent to that model. It explores the text of the CAA, the statutory interpretation arguments of the Court and dissenters, and the repercussions of each outcome, to it determine the fairness and appropriateness of the Court's decision, and whether this decision puts the federal government on a path toward regulating greenhouse gases.

A. The Controversy

The provision of the CAA in controversy states, “[t]he [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁹⁸ The CAA defines air pollutant to include “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”⁹⁹

The CAA requires a substance to be an “air pollution agent” to be within the definition of air pollutant and encompassed by the statute. However, the

95. *Massachusetts*, 127 S. Ct. at 1476 (Scalia, J., dissenting). See *Chevron*, 467 U.S. at 843 (holding if a statute is ambiguous to a certain issue, deference should be given to an agency's interpretation of the issue, so long as that interpretation is reasonable).

96. *Id.* at 1477 (Scalia, J., dissenting).

97. *Id.* at 1478 (Scalia, J., dissenting).

98. 42 U.S.C.A. § 7521(a)(1) (West 2007).

99. 42 U.S.C.A. § 7602(g) (West 2007) (emphasis added).

statute does not expressly define “air pollution agent.” While the majority implicitly assumes any “physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air” necessarily constitutes an “air pollution agent,”¹⁰⁰ the dissent finds ambiguity in the meaning of “air pollution agent,” and accepts the EPA’s determination that carbon dioxide and other greenhouse gases are not “air pollution agents,” and therefore, outside its regulatory scope.¹⁰¹

B. Statutory Interpretation to Determine Ambiguity

If Congress has clearly addressed the particular issue, the court, as well as an agency must follow the unambiguously expressed intent of Congress.¹⁰² However, if the legislature has not directly spoken to the precise question at issue, the court cannot impose its own interpretation, but must defer to the agency’s interpretation of the statute in question.¹⁰³ The Court often utilizes tools of statutory construction to determine whether provisions of a statute are ambiguous.

First, the Court often begins statutory interpretation with the cardinal rule of statutory construction: the primary goal of statutory construction is to ascertain and give effect to the intent of the legislature at the time of enactment.¹⁰⁴ To do this, the Court must carefully review the text of the rule, as textual support carries the greatest argumentative weight.¹⁰⁵ Intent is best evidenced by the clear and unambiguous language of the statute and the plain meaning of the words.¹⁰⁶ If the words of the statute indicate a clear intent by Congress, the analysis may stop at that point, as the act is not ambiguous.¹⁰⁷ However, if there is no express statement by Congress regarding the provision, the court must continue its statutory interpretation analysis to determine whether ambiguity exists.

Next, if the plain language of the statute does not expressly show Congress’ intent, the Court can apply textual canons to determine whether the legislature has addressed the issue.¹⁰⁸ Here, the Court often considers the text

100. *Massachusetts*, 127 S. Ct. at 1447.

101. *Id.* at 1464 (Scalia, J., dissenting).

102. *Chevron*, 467 U.S. at 842–43.

103. *Id.* at 843.

104. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990).

105. *Id.*

106. *Id.*

107. *Chevron*, 467 U.S. at 842.

108. See Eskridge & Frickey, *supra* note 104, at 325.

in light of the entire act as a whole.¹⁰⁹ Following that step, the Court looks outside the text of the statute and employs the use of extrinsic sources, such as legislative history, to determine if Congress has spoken to the precise issue.¹¹⁰

Lastly, if after using the tools of statutory construction the court determines the statute is silent or ambiguous regarding a Congressional direction of the issue, the court must give deference to an agency's interpretation.¹¹¹ An agency's interpretation is given considerable weight, and will be followed so long as it is supported by any rational basis.¹¹²

C. The Justification of the Majority

Although the Court comes to the correct conclusion regarding the EPA's authority to regulate carbon dioxide and nitrous oxide emissions from new motor vehicles, its reasoning falls short, particularly regarding the regulation of methane and hydrofluorocarbons. The majority skips several important analytical steps in reaching its decision. The Court should have addressed more fully the statutory interpretation of the CAA and its capacious definition of "air pollutant." In doing so, the Court also would have found while the CAA is not ambiguous as to the classification of carbon dioxide, perhaps there is room for interpretation regarding the remaining two greenhouse gases: methane and hydrofluorocarbons.

The Court quickly finds the CAA authorizes the EPA to regulate carbon dioxide and other greenhouse gas emissions as they are clearly "air pollutants" within the definition of the Act.¹¹³ The majority finds no ambiguity in the text of the statute and reads the CAA's definition of "air pollutant" to encompass any physical or chemical substance which is emitted or enters the air.¹¹⁴ This is the end of the Court's statutory interpretation of the Act.

Accordingly, the Court should have examined the language of the CAA more closely. Although the majority correctly states an "air pollutant" is a substance that must be physical or chemical in nature and emitted or released in the air, they fail to recognize that the substance must also be an "air pollution agent." As the CAA does not define this key phrase, further exploration of Congress' intent is required. Using textual canons to further

109. Nicholle Winters, *Carbon Dioxide: A Pollutant in the Air, But Is the EPA Correct That It Is Not an "Air Pollutant"?*, 104 COLUM. L. REV. 1996, 2005 (2004).

110. See Eskridge & Frickey, *supra* note 104, at 356.

111. *Chevron*, 467 U.S. at 843-44.

112. *Id.* at 844.

113. *Massachusetts v. Envtl. Prot. Agency*, 127 S. Ct. 1438, 1459 (2007).

114. *Id.* at 1460.

explore the intent of the legislature, the Court would have found several factors supporting its holding regarding carbon dioxide and nitrous oxide.

First and foremost, Congress listed carbon dioxide and nitrous oxide as air pollutants in another section of the CAA.¹¹⁵ This section of the CAA mandates a research plan directing “[i]mprovements . . . for preventing or reducing multiple air pollutants, including nitrogen oxides . . . and carbon dioxide.”¹¹⁶ When examining the CAA as a whole, there is overwhelming evidence the legislature’s intent was to classify carbon dioxide and nitrous oxide as “air pollutants,” and therefore authorize the EPA to make a determination whether such gases are harmful.¹¹⁷ If the EPA does find such harm exists, they must regulate. However, this section of the statute does not extend to methane or hydrofluorocarbons. Since they are not expressly mentioned in the list of air pollutants in this section of the CAA, it would be difficult to extend Congress’ intent to cover those gases as well.

This provision is neither addressed by the majority nor the dissent. However, respondents, in their appellate brief, contend this provision, within the 1990 Amendments to the CAA, regards “nonregulatory” strategies for controlling air pollution.¹¹⁸ Moreover, respondents argue this section “expressly provides that nothing in the subsection ‘shall be construed to authorize the imposition on any person of air pollution control requirements.’”¹¹⁹ However, § 7403(g)(1) is not being used to argue the EPA is required to regulate carbon dioxide, but only that Congress views carbon dioxide and nitrous oxide as air pollutants within the view of the CAA. This finding eliminates any ambiguity in the text of the CAA, as Congress has spoken directly to the issue, and the intent of Congress should be followed over any agency interpretation of the statute.

Another factor supporting the inclusion of all four greenhouse gases as air pollutants can be found in the purposes section of the statute. This section can often give insight into the background regarding the enactment of the statute and give some indications of legislative history and intent. The CAA’s purposes include, “protect[ing] and enhanc[ing] the quality of the Nation’s air resources so as to promote the public health and welfare.”¹²⁰ This evidence of Congress’ intent to include all potentially harmful greenhouse gases in the

115. 42 U.S.C.A. § 7403(g)(1) (West 2007).

116. *Id.*

117. *See* Winters, *supra* note 109, at 2004.

118. Brief for Respondents Alliance of Automobile Manufacturers, Engine Manufacturers Ass’n, National Automobile Dealers Ass’n, Truck Manufacturers Ass’n at 40, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3023028.

119. *Id.*

120. 42 U.S.C.A. § 7401(b)(1) (West 2007). *See also* Winters, *supra* note 109, at 2005.

CAA's definition of air pollutant, so that any gas which may be deemed harmful could be subject to regulation by the EPA. Since the four greenhouse gases in question could be detrimental to the public health and welfare, Congress possibly intended those to be classified as air pollutants. Using this basis, all four greenhouse gases would be encompassed by the CAA.

D. The Persuasiveness of the Dissent

Justice Scalia's dissent on the merits contains persuasive legal theory, and is partially justified in accepted principles of administrative law. The dissent correctly gives deference to the EPA interpretation that methane and hydrofluorocarbons are not encompassed by the CAA, as the statute is ambiguous regarding those greenhouse gases. However, that deference should not extend to carbon dioxide and nitrous oxide.

The dissent finds the CAA ambiguous. The statute requires a substance to be an "air pollution agent" to be encompassed by the CAA and subject to regulation, but does not define that key phrase. Since there is no express directive by Congress regarding the meaning of "air pollution agent," Justice Scalia finds ambiguity within the text of the Act and finds the EPA interpretation to be a reasonable agency interpretation and worthy of *Chevron*¹²¹ deference.¹²² However, the dissent does not address Congress' wording in other portions of the CAA. Since the legislature classified "carbon dioxide" and "nitrogen oxides" as "air pollutants" in § 7403(g)(1) of the CAA,¹²³ the statute is not ambiguous as to those gases. Since Congress did not list methane or hydrofluorocarbons in that provision, the CAA is ambiguous regarding those gases since it is not clear whether such gases are "air pollution agents."

The EPA's construction of the statute does not include any of the four greenhouse gases within the definition of "air pollutant." The EPA uses the dictionary to find the plain meaning of the language and determines an "air pollutant" is something that renders the air at ground level impure or unclean.¹²⁴ As carbon dioxide and other greenhouse gases are found higher than ground level, the EPA finds they do not fall within the plain meaning of the language. With this conclusion, an EPA finding of harm regarding these

121. 467 U.S. 837 (1984) (holding if a statute is ambiguous to a certain issue, deference should be given to an agency's interpretation of the issue, so long as that interpretation is reasonable).

122. *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1476 (2007) (Scalia, J., dissenting).

123. 42 U.S.C.A. § 7403(g)(1) (West 2007).

124. *Massachusetts*, 127 S. Ct. at 1477 (Scalia, J., dissenting).

gases and ultimate regulation is outside its scope of authority given by the CAA.¹²⁵

Justice Scalia's main contention is that deference should be given to an administrative agency's interpretation of an ambiguous statute, so long as that interpretation is reasonable.¹²⁶ He then points to the dictionary to support the EPA's conclusions as reasonable. However, when looking at the totality of the circumstances, the EPA's interpretation regarding carbon dioxide and nitrous oxide should not be followed, as the CAA is not ambiguous regarding those greenhouse gases. Congress has explicitly stated its intentions in other portions of the CAA by recognizing carbon dioxide and nitrous oxide as an air pollutant, and that clear expression must be followed.

However, there is no other provision in the CAA naming methane and hydrofluorocarbons as air pollutants. As other indications of Congressional intent regarding the classification of those gases are not overwhelmingly clear, the CAA is ambiguous as to whether those gases are "air pollution agents," and deference to the EPA's findings should be given since its reasoning is supported by a rational basis. Although there is some indication in the CAA's purposes section the EPA's construction is unreasonable, it is not so strong as to overcome the high standard of deference to be given to an agency's interpretation.

E. Implications

This holding represents a major shift in the role of the federal judiciary regarding global climate change. Historically, efforts to reduce greenhouse gas emissions and other climate-changing pollutants were voluntary.¹²⁷ However, with this decision, the Court has begun to step in and put the pressure on federal administrative agencies. The EPA has lost some of its broad discretion regarding regulatory authority, and can no longer ground inaction in policy considerations, but must instead ground its inaction within the language of the CAA.

This decision is a victory for the petitioners and environmental activists. Although the Court did not require the EPA to regulate greenhouse gas emissions from new motor vehicles, it will no longer allow the EPA to merely defer judgment and pass the regulatory buck to states. The EPA must now address carbon dioxide and greenhouse gases, and in the event the Agency finds such substances are harmful, it must regulate.

125. *Id.* at 1475 (Scalia, J., dissenting).

126. *Id.* at 1478 (Scalia, J., dissenting).

127. Baylson, *supra* note 7, at 431.

If the EPA does regulate, the decision will be known as the first to address the seriousness and potential future harm of global warming.¹²⁸ Such a finding would not only have an impact on automobile manufacturers, but also may set an example to foreign countries to step in and begin to take action, to begin to solve this problem on a global scale. If the EPA does not regulate, global warming will continue to go unregulated by the federal government, and it will continue to be the responsibility of states to determine and implement their own emission standards.

V. CONCLUSION

In *Massachusetts*, both the majority's holding and the dissent were partially correct and incorrect. Although the majority's statutory interpretation analysis fell somewhat short, its conclusion that carbon dioxide and nitrous oxide were "air pollutants" under the CAA was proper. Since Congress expressly stated those greenhouse gases were "air pollutants" in another portion of the statute, there is no ambiguity regarding the intent of Congress in the language of the CAA. Since the statute is not ambiguous, Congress' intent must be followed and the EPA is authorized to make a finding regarding these two gases, and eventually regulate carbon dioxide and nitrous oxide emissions from new motor vehicles if deemed harmful. By stimulating EPA action regarding carbon dioxide and nitrous oxide, the Court takes an active measure to further the environmental cause. Regulations will have an effect on new vehicle emission standards, the motor-vehicle industry and future of design, and would likely stimulate other governments throughout the world to adopt similar measures to combat the harmful repercussions from carbon dioxide and similar greenhouse gases.

However, the CAA does not classify methane or hydrofluorocarbons as "air pollutants" in any other provision of the statute. Since a gas must be an "air pollution agent" to fall within the "air pollutant" definition of the CAA, and the Act does not define "air pollution agent," the statute is ambiguous. Therefore, the dissent was correct in finding deference should be given to the EPA's determination methane and hydrofluorocarbons do not fall within the CAA's definition of "air pollutant," since the EPA's conclusion is reasonable. As a result, these gases are subject to regulation and therefore increased concentrations would likely result in the atmosphere. If other governments follow this lead, global warming is likely to increase at an ever-growing rate, compounding changes in the earth's climate.

128. *Id.*

The emission of carbon dioxide and other greenhouse gases is impossible to prevent in today's world. However, since global warming is becoming increasingly problematic, and continues to remain unaddressed globally as well as domestically, it is appropriate for the federal government to take action. Although federal agencies are closer and in a better position to regulate such issues, they have been abstaining from this responsibility for a variety of reasons. If agencies continue to refuse to exercise their regulatory authority, it will be time for the federal courts to step in and begin to take control before the situation becomes irreversible.