Closing Statement

Standing Up for State Standing, but Waiting for the Other Shoe

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April 2 was a banner day for environmental plaintiffs in the Supreme Court. A 5–4 majority overrode EPA's denial of their petition asking the agency to regulate carbon dioxide emissions from new motor vehicles under the Clean Air Act because they contribute to global warming and sea level rise. Justice Stephens's opinion upheld petitioners' standing to sue and rejected EPA's claim that CO_2 is not an "air pollutant" under Section 202 of the statute. The Court held that the agency must decide whether or not CO_2 emissions "may reasonably be anticipated to endanger public health or welfare," leaving little discretion to decline to regulate. The majority's holding that "a small incremental step" can be a sufficient remedy to satisfy the standing requirement of redressability of the injury is especially important. In dealing with today's environmental problems, government often needs to respond in phases while more conclusive scientific evidence of injury and impact emerges.

On the standing point, the majority in *Massachusetts v. EPA* borrowed a leaf from the book of the states' rights wing of the Court — most of whom dissented — and stressed the "special solicitude" for the interests of the commonwealth as an owner of coastal property and a sovereign unable to protect its own interests without action by the federal government. Whether the interest of Massachusetts qua state was essential to upholding standing or whether a private party like a landholding citizen or conservation organization would also be able to sue is a remaining issue raised by Chief Justice Roberts's vigorous dissent.

The chief justice's objection to finding standing to sue was not unexpected. His writing before joining the court supported Justice Scalia's view that broad citizen standing offends the separation of powers by allowing mere citizens to bring to court issues that more properly belong in legislative bodies. More surprising was his emphatic dismissal of the significance of motor vehicle emissions of CO_2 in his analysis of the elements of injury, causation, and redressability as requirements of standing to sue. Referring to the "bit-part domestic new motor vehicles greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon," the chief justice concluded that "the petitioners' true goal for this litigation may be more symbolic than anything else."

Is the contribution of U.S. motor vehicles to global warming only symbolic? Although the opinions cite the figure of 4 percent of global greenhouse gas emissions (6 percent of CO_2 emissions), it bears emphasis that U.S. emissions from the transportation sector in 2004 constituted 32 percent of our total, a share second only to utilities, at 38 percent. The U.S. vehicle fleet's overall fuel economy largely determines the level of CO_2 emissions from the transportation sector and has not improved over the past 20 years.

This situation resulted from a serious public policy blunder. In 1975, Congress relieved "light trucks," supposedly driven mostly by farmers and construction crews, from more rigorous pollution and fuel economy standards. Since then, low mileage trucks and sport utility vehicles have come to dominate the market and have caused fuel economy improvement to stall, increasing U.S. dependence on costly oil imported from mostly unstable or unfriendly countries. The profitability of the U.S. motor vehicle industry also came to depend on sales of these vehicles, a fact which has made it practically impossible for either political party to press for tighter standards.

Justice Stephens's opinion notes that the Department of Transportation administers motor vehicle mileage standards and that EPA and DOT should be able to "both administer their obligations and yet avoid inconsistency." Accomplishing this happy harmony is part of the job of the White House Office of Management and Budget.

The legal authorities for action by both agencies make the cost of regulation a factor in setting the standards. Under normal circumstances, an analysis of regulatory costs, though factually complex, is relatively straightforward. However, the two largest U.S. motor vehicle manufacturers, General Motors and Ford, have logged billions of dollars in losses in recent years and are carrying huge employee benefit costs not borne by their overseas competitors. This problem is never mentioned in the Supreme Court opinions. But it is the elephant in the room and the reason why sooner or later Congress will have to address the question of standards for the industry whether or not the Clean Air Act empowers or requires EPA and the Executive Branch to forge ahead on their own.