

States, Courts, and Nature: State Attorneys General and Environmental Litigation

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On April 2, 2007 the U. S. Supreme Court ruled in favor of Massachusetts and eleven other states who had sued the Environmental Protection Agency in an effort to force the agency to regulate carbon dioxide emissions, a main cause of global climate change.¹ The Court, while not requiring agency action, urged the EPA to reconsider its prior decision not to regulate the gas under the Clean Air Act and explicitly gave it the authority to do so. Editorials around the nation in the week that followed hailed the ruling as one of the most important environmental decisions in recent memory. “It would be hard to overestimate the importance” of the ruling, said the *New York Times*; the decision provided a “needed rebuke” to the Bush Administration for its failure to act on the issue of climate change, charged the *Milwaukee Journal Sentinel*; the decision would “stoke an already simmering debate in Congress about the urgency of climate-change legislation,” the *St. Louis Post-Dispatch* predicted.²

Six weeks after the Supreme Court’s ruling, the Bush Administration announced that it would begin a regulatory process to increase the fuel economy of the nation’s automobiles. In making the announcement, EPA administrator Steven Johnson accepted the Court’s decision and highlighted what he said would be “the first regulatory step” to control greenhouse gas emissions from new vehicles, a process that could take up until the end of 2008.³ Democratic leaders, environmental groups, and many of the nation’s leading news media were less than impressed with the Bush Administration’s response to the Court’s ruling. In the wake of the decision, many expected immediate action from the administration and hoped for a stronger set of policies.

¹ *Massachusetts et. al. v. Environmental Protection Agency* 127 S. Ct. 1438 (2007).

² “The Court Rules on Warming,” *New York Times*, April 3, 2007; Franzen, “A needed rebuke,” *Milwaukee Journal Sentinel*, April 7, 2007: 10; Grant Slater, “The climate on climate change is changing: New warnings in report, new ruling by the court,” *St. Louis Post-Dispatch*, April 8, 2007: B1.

³ Jim Rutenberg and Edmund Andrews, “Bush Calls for Work for Higher Fuel Efficiency,” *New York Times*, May 15, 2007.

Despite the administration's rather anemic policy response, the case of *Massachusetts v. EPA* is notable and important for a number of reasons. It still has the potential to trigger federal action on climate change, and it may influence the fate of other climate change cases currently in the courts as well as state laws regulating vehicle emissions.⁴ Moreover, it appears to be part of a larger trend in which state attorneys general are acting through the courts to reshape national environmental policy. The climate change case is but one example; in recent years, states have worked cooperatively to sue the federal government over its mercury pollution rules, pesticides policies, and the nation's air pollution law. State attorneys general have also targeted private parties, charging major utility companies and the big six automakers for contributing to climate change-related problems in their states. This controversial practice, dubbed by its critics as "legislation through litigation," is the focus of this paper.

State attorneys general have not limited themselves to the environmental field, having also taken the initiative in the areas of consumer protection and anti-trust litigation. The states' suit against tobacco companies in the mid-1990s is perhaps the best known of these cases, as it led to a large cash settlement for participating states and is often credited with encouraging the use of such lawsuits. The Supreme Court's decision in *Massachusetts v. EPA* seems likely to have a similar effect, due in part to the Court's rather liberal interpretation of the standing doctrine. In answering the question of whether the plaintiffs had a right to sue in federal courts, Justice Stevens exalted the status of states as litigants: "The states are not normal litigants for the purposes of invoking federal jurisdiction," Stevens wrote for the majority. In granting states a "special position and interest" as sovereign entities, the Supreme Court may have opened the

⁴ In 2005, California requested a waiver from the EPA so it could impose its own vehicle emissions regulations but was rebuffed when the agency said it did not have the authority to act on the request. The Supreme Court in *MA v. EPA* disagreed with the EPA's interpretation, prompting California Governor Arnold Schwarzenegger to threaten to sue the agency if it did not act on the state's request in a timely manner. See Janet Wilson, "State May Sue EPA Over Clean Air Law," *Los Angeles Times*, April 26, 2007: B3.

door to further multi-state environmental litigation by giving states relatively easy access to the courts. In fact, some critics of the decision voiced their greatest concerns over the Court's liberal interpretation of standing. The *Wall Street Journal's* editorial, for example, claimed that "Standing is one of the few self-restraints on the power of the federal courts, and it is a far too frequent habit of the current Supreme Court to view its own power as unlimited. By diluting the standards for standing, the High Court creates a highway by which judges can speed past the political branches and play an ever larger role in American public life."⁵

Some observers would welcome this development, arguing that state attorneys general are using the courts to vigorously enforce federal law and tackle important public problems in the absence of federal implementation and initiative. But the critics are just as vocal, charging that state attorneys general are inappropriately using the judiciary to change the law.⁶ They worry not only about policy consequences but about procedural issues—namely, that the litigation usurps more democratic policy-making processes. At times, the rhetoric is overwrought and hyperbolic, as when one critic claimed that "the free market and the cause of human liberty cannot survive much more of this litigation madness."⁷ Such rhetoric has fueled recent efforts to oust activist attorneys general in state elections and to enact policy reforms designed to temper their litigation efforts.

While the debate over state environmental litigation heats up in the wake of the Supreme Court's landmark decision, scholarly knowledge about the topic remains sparse. This paper is part of a larger research project designed to fill gaps in the scholarly and policy literature in this area. The project will examine all state environmental litigation against private parties and the

⁵ "Jolly Green Justices," *Wall Street Journal*, April 3, 2007: A14.

⁶ Jeff Birnbaum, presentation at "The New Business of Government-Sponsored Litigation: State Attorney General and Big City Lawsuits," The Federalist Society for Law and Public Policy Studies, June 22, 1999. Accessed at <http://www.fed-soc.org/Publications/Transcripts/stateaglitigation.htm> (March 14, 2007).

⁷ Honorable William Pryor, *ibid.*

federal government from 1970 to the present. The goal is to present a comprehensive picture of state environmental litigation during the last thirty-seven years, from the start of the modern environmental era through the era of New Federalism to the present day. This will include analyses of who is litigating, for what purposes, under what laws, and to what effect. A second component of the project consists of interview data, media analysis, and an examination of government documents to understand and evaluate the policy consequences of state environmental litigation, particularly multi-state, high profile cases. Does litigation influence the policies of the federal government and the practices of national and multi-national corporations? On the whole, is it a useful tool or counterproductive?

My goals in this paper are more modest. I begin the paper by summarizing existing research on state attorneys general and state-based litigation to provide a context for the larger project. In general, scholars have found that states are becoming more active litigators and that cooperation among the states is growing. The explanations for these trends typically focus on the organizational capacity of state attorneys general offices and on political developments that have led to an expansion of state responsibility for federal regulatory enforcement. After illustrating and explaining the rise of state environmental litigation, I begin an analysis of state environmental litigation by distinguishing four types of cases that suggest different motivations for the lawsuits. In the concluding section of the paper, I return to a discussion of the landmark climate change case, *Massachusetts v. EPA*, to consider its history, policy relevance, and political significance.

The Rise of State Litigation

Popular debates about state-based litigation suggest that state attorneys general are litigating at the national level more frequently and vigorously. Scholarly research has examined

this question empirically by looking at states' participation as litigators and amicus curiae before the Supreme Court. While participation has varied over the decades, the general trend has been upward; Richard Kearney and Reginald Sheehan, for example, document a tripling of state appearances before the Supreme Court in the thirty-year time period they study. Numbers range from a low of twenty cases in 1955 where states were a direct party before the Court to a high of one hundred and forty cases in 1988. Overall, states are second only to the federal government in terms of numbers of appearances before the Supreme Court.⁸ A similar prominence is evident when looking at state participation as amicus curiae before the Court. In the 1982 Court term, for example, states accounted for the largest proportion of amici of any organization, even though their numbers were small compared to other types of groups.⁹

Research suggests that states are also cooperating more often than in the past. In other words, both state and *multi*-state litigation is increasing. Multi-state litigation can take two general forms. In the first instance, state attorneys general pursue a similar cause of action concurrently against the same private party. Many of these have been in the area of consumer protection, on issues ranging from fraudulent advertising to the sale of defective products.¹⁰ In the 1990s, for example, states reached settlements with a variety of large corporations, including Sears Roebuck, Bausch and Lomb, and the forest company Louisiana Pacific.¹¹ Typically, state attorneys general coordinate and cooperate with one another on such cases, "sharing with each

⁸ Richard C. Kearney and Reginald S. Sheehan, "Supreme Court Decision-Making: The Impact of Court Composition on State and Local Government Litigation," *Journal of Politics*, 54 (1992): 1008-25.

⁹ Gregory A. Caldeira and John R. Wright, "Amici Curiae before the Supreme Court: Who Participates, When, and How Much?," *The Journal of Politics* 52 (3), 1990: 794. Since 1982, states filed amicus briefs in 18% of the orally argued cases before the Supreme Court and participated even more frequently at earlier stages in the process. See Eric N. Waltenberg and Bill Swinford, "The Supreme Court as a Policy Arena: The Strategies and Tactics of State Attorneys General," *Policy Studies Journal* 27 (2), 1999: 250.

¹⁰ In a recent study, Colin Provost found the number of out-of-court consumer protection settlements had grown four-fold in the 1990s. Colin Provost, "The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits," *Political Research Quarterly* 59 (4), 2006: 609-619.

¹¹ David J. Morrow, "Transporting Lawsuits Across State Lines," *New York Times*, November 9, 1997: 1.

other legal theories, discovery materials, court filings, litigation expenses and even staff.”¹²

According to state attorney general Tom Miller of Iowa, states are more powerful when they band together: “What we've found is that by coming together, the dynamics of the cases change. When a corporation discovered it had to face thirty states, instead of one, it suddenly became much more serious about dealing with the issue.”¹³ While these cases are filed individually in state courts, they can have national consequences when a corporation is forced to change its general business practices as a result of multiple lawsuits.

In the environmental field, multi-state litigation more typically consists of states joining together in a single lawsuit aimed at the federal government or private parties. This kind of cooperation (for all types of cases) at the Supreme Court level has become more common in recent decades. The number of joint amicus filings before the Supreme Court went up sharply during the 1980s, and so-called “mass participation” cases involving twenty or more states also increased dramatically.¹⁴ A review of interstate cooperation by Ann O’M. Bowman revealed that the average state participated in a multi-state legal action on twenty-five occasions from 1992 to 1999. In addition, multi-state lawsuits increased over this time period overall.¹⁵

In short, the popular perception that states and state attorneys general are becoming more active litigators at the national level and are cooperating more frequently appears to be borne out by the evidence.¹⁶ The next question is why this is so.

¹² Jason Lynch, “Federalism, Separation of Power, and the Role of State Attorney General in Multistate Litigation,” *Columbia Law Review*, December 2001: 2004.

¹³ Quoted in Morrow, 1.

¹⁴ Cornell Clayton, “Law, Politics and the New Federalism: State Attorneys General as National Policymakers,” *The Review of Politics* 5 (3), 1994: 548. See also Waltenberg and Swinford 1999.

¹⁵ Ann O’M. Bowman, “Horizontal Federalism: Exploring Interstate Interactions,” *Journal of Public Administration Research and Theory* 14 (4), 2004: 540-41. States varied in their participation rates, with states like Colorado, South Carolina, and New Hampshire scoring relatively low (with nine instances of multi-state legal action each) and California, Massachusetts, New York and others scoring high (with thirty-nine cases each).

¹⁶ As I will point out later, however, the evidence is largely limited to the Supreme Court level.

Explaining the Rise of State Litigation

Two sets of explanations are often provided for the rise in state litigation. The first considers organizational and entrepreneurial reasons, such as the professionalization and politicization of state attorneys general offices. The second set of factors highlights structural factors, such as devolutionary trends that have increased states' regulatory responsibilities. Taken together, the literature suggests that states have not only become more capable litigators, but they also have more opportunities and incentives to litigate around national issues.

Organizational and Entrepreneurial Explanations

States are usually represented in their lawsuits by the office of the attorney general, in effect the state's law firm when it comes to state and federal litigation. The office of the state attorney general occupies a unique position in state politics and its distinctive features make it a particularly fertile institution for political and policy entrepreneurship. First, the powers of the state attorneys general, outlined in both state constitutions and state statutes, are characteristically broad. As Jason Lynch points out, state attorneys general are often directed in expansive terms to simply "perform duties 'prescribed by the law.'"¹⁷ These duties include relatively non-discretionary duties such as defending the state's legal interests and providing legal advice to lawmakers. But they also allow a more discretionary, pro-active role for state attorneys general who can litigate in pursuit of the state's public interest.

Importantly, the state attorneys general are able to independently define what constitutes the state's public interest. This is because state attorneys general are elected in almost all states, separately from the office of the governor, and are not subject to oversight by the state

¹⁷ Lynch 2001, 2002.

executive.¹⁸ State legislatures, on the other hand, have greater oversight capabilities as they can redefine the duties of the office through statutory or constitutional change. Legislators also control the purse strings and can presumably de-fund the office if they disagree with the attorney general's agenda. In practice, however, such supervisory and punitive actions are relatively rare, leaving attorneys general with a good deal of political autonomy.¹⁹

The U.S. Congress and federal agencies have enhanced state attorneys general power in recent years as they have become increasingly important partners in enforcing federal law. Joseph Zimmerman notes that Congress has authorized attorneys general to “exercise concurrent enforcement authority with federal departments and agencies in regulatory fields long considered to be exclusive provinces of the national government.”²⁰ One example is when the Federal Trade Commission granted state attorneys general the right to pursue several types of cases in federal courts, such as telemarketing fraud, home equity loan fraud, and credit reporting abuses.²¹

Popular commentary suggests that many state attorneys general are using their relatively newfound power to litigate high profile cases with the intent of winning reelection or running for higher political office. While little direct evidence exists to test this assumption, data collected by Colin Provost suggests that the office of the state attorney general has become a popular springboard for individuals with larger political ambitions. He found that “of the 166 attorneys general who served at least two years between 1980-1999, more than 70 ran for a governorship or a U.S. Senate seat.”²² Another twenty ran for or were appointed for a position at the state

¹⁸ State attorneys general are elected in 43 states. In five states they are appointed by the governor (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming); in Maine, the state legislature selects an attorney general by secret ballot; and in Tennessee, the state Supreme Court appoints the attorney general. See Clayton 1994.

¹⁹ Lynch 2001; Provost 2006.

²⁰ Joseph F. Zimmerman, “Interstate Cooperation: The Roles of the State Attorneys General,” *Publius: The Journal of Federalism* 28 (1), 1998: 74.

²¹ Morrow 1997, 1.

²² Colin Provost, “State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism,” *Publius: The Journal of Federalism* 33 (2), 2003: 40.

level. It is reasonable to assume that attorneys general with big political aspirations will be more aggressive in using litigation to shape public policy. Again, indirect evidence supports this claim. Provost finds that attorneys general are more likely to join a multi-state consumer protection case if they are in a state with a liberal-leaning electorate where consumer groups are well organized.²³ In other words, the electorate's ideology and level of organization correlates with state attorneys general activism. Issues that are popular with the public, such as environmental or consumer protection, but which have been relatively neglected by the political branches of the government might be particularly attractive targets for litigation. And in the case of multi-state lawsuits, attorneys general can often claim credit for victories even if they have contributed little to the overall litigation effort.²⁴

While incentives are important in explaining individual and group behavior, we must also consider the available resources for acting on these incentives. In the case of state attorneys general, resources have been increasing. The typical office of the state attorney general has grown from a relatively small, provincial outfit to a much larger, more professionalized, and better funded operation. In 1989, for example, the mean number of attorneys in state offices had grown to 148 (from 19 in 1950) and the median office budget was \$3.3 million compared to \$170,000 in 1950.²⁵ In fact, the budgets of the state attorneys general offices outpaced the

²³ Provost 2003. Bowman (2004, 543) also finds that states with more liberal policies are more likely to cooperate with other states on litigation. On the flip side, state attorneys general often refrain from joining multi-state lawsuits when large commercial interests in their state would be harmed by the lawsuit. For example, in the Microsoft anti-trust case, Washington state (home to Microsoft Corporation) declined to sign on to the lawsuit, as did several states who were home to Microsoft's allies. Similarly, tobacco-growing states such as Kentucky and Tennessee did not join Mississippi's lawsuit against the tobacco industry. (Forty-six states eventually joined the "Master Settlement Agreement" resulting from the litigation). See Jacob Weisberg, "Microsuits: Why State Attorneys General Are Suddenly Suing Everybody," *Slate*, May 22, 1998 at <http://slate.msn.com/StrangeBedfellow/98-05-22/StrangeBedfellow.asp> (accessed July 9, 2007) and Martha A. Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics* (Washington, DC: CQ Press, 2002).

²⁴ Morrow (1997) notes that then New York Attorney General Dennis C. Vacco referred to consumer fraud settlements with Compaq Computer Corporation and Telebrands Corporation in a 1996 public report, despite the fact that New York was not a lead negotiator in either case.

²⁵ Waltenberg and Swinford 1999, 245.

growth of general government spending in every state in the 1980s.²⁶ The typical office of the state attorney general, in other words, has become more capable of initiating and joining large, complex legal cases. At the same time, many offices are still individually outgunned by large corporations and the federal government who have considerably more resources, making interstate cooperation an attractive option.²⁷

Attorneys general have been helped in their individual and group efforts by the National Association of Attorneys General (NAAG), an umbrella organization formed in 1907 to facilitate interaction among state attorneys general and to increase their collective performance. NAAG serves as a vehicle for state cooperation and capacity-building, using its standing committees on the environment, consumer protection, anti-trust law, civil rights, insurance regulation and others to provide information to state attorneys general offices, develop common policy positions, and coordinate legal activity. According to Clayton, NAAG has consciously developed a more proactive stance in recent years, “aiming at the use of state laws and law enforcement policies to create national regulatory standards” and to challenge federal preemption of state law.²⁸ The institutional development of NAAG has no doubt contributed to the rise in state and multi-state litigation.

Structural Explanations

To fully understand the rise in state-based litigation, we must also consider historical political developments that have enhanced the role of states in federal regulatory policy generally and environmental policy in particular. In the environmental field, the federal government consolidated its power in the 1970s by enacting a variety of natural resource and pollution laws that often preempted state action. However, these statutes typically require a good deal of

²⁶ Clayton 1994.

²⁷ Morrow 1997; Lynch 2001.

²⁸ Clayton 1994, 540.

intergovernmental cooperation in the implementation and enforcement stages of the policy process. States that have received approval from the Environmental Protection Agency are therefore responsible for many of the day-to-day administrative and enforcement duties associated with implementation of federal environmental law. In fact, by 1998 states were running 757 federal environmental programs, almost double the number from earlier in the decade and amounting to about three-quarters of all programs.²⁹ As these numbers suggest, states have greatly increased their capacity for implementing and enforcing environmental regulations, thereby facilitating the decentralization of environmental policy. Moreover, many states appear far more committed to environmental protection than in previous eras. Federal statutes typically allow states to go beyond national standards and the majority of states have done so, with some states like California leading the nation in areas like clean air policy.³⁰

In addition to the already substantial role for states in environmental policy implementation, larger devolutionary trends in the 1980s enhanced states' responsibilities in many policy arenas. The Reagan Administration successfully devolved powers to the states in its effort to shrink the size and responsibilities of the federal government. Congress too transferred many responsibilities to the states, due in part to the presence of a large federal deficit which dampened Congress' ability and willingness to enact new federal programs and fully fund existing ones. According to Eric Waltenberg and Bill Swinford, interest groups "followed suit,

²⁹ Barry Rabe, "Power to the States: The Promises and Pitfalls of Decentralization," in Norman J. Vig and Michael E. Kraft, *Environmental Policy: New Directions for the Twenty-First Century* (Washington, D.C.: CQ Press, 2006): 36. See also Denise Scheberle, "The Evolving Mix of Environmental Federalism and Intergovernmental Relationships," *Publius: The Journal of Federalism* 25 (1), 2005: 72.

³⁰ See, for example, Dewitt John, *Civic Environmentalism: Alternatives to Regulation in States and Communities* (Washington, DC: CQ Press, 1994) and Matthew Potoski, "Clean Air Federalism: Do States Race to the Bottom?" *Public Administration Review* 61 (3), 2001: 335-342.

shifting their focus to the state capitals as well.”³¹ In short, the states began to fill a vacuum left by the regulatory withdrawal and retrenchment of the federal government.

This regulatory void, as suggested, grew especially large during the Reagan Administration, when several federal agencies were de-funded in an effort to decrease the private sector’s regulatory burden. Consider, for example, that the Reagan administration cut the size of the Federal Trade Commission in half. (The number of consumer fraud cases subsequently decreased by more than half of previous levels.)³² More generally, regulatory agencies lacked sufficient capacity to maintain previous levels of, and aggressiveness toward, regulatory enforcement. According to Clayton, however, public demand for regulation and oversight did not diminish, encouraging the states to take matters into their own hands: “Faced with public pressure to fill the void left by federal withdrawal, states were forced to become more aggressive in their own enforcement of federal laws or alternatively to establish their own tougher regulatory statutes and standards.”³³

Proponents of state-based litigation frequently cite this explanation and justification for state-based litigation—namely, that it properly fills a regulatory void left by the federal government. Richard Blumenthal, the attorney general of Connecticut and lead attorney in a multi-state lawsuit against major utility companies put it this way: “There are remarkable and really unique opportunities for Attorneys General as litigators, public interest lawyers, and in part it [state-based litigation] is increasing because of the astonishing abdication of power and its abandonment by the federal government. Much of what attorneys general do today with the federal government’s failure to meet its responsibilities has provided wonderful opportunities

³¹ Eric Waltenberg and Bill Swinford, “The Supreme Court as a Policy Arena: The Strategies and Tactics of State Attorneys General,” *Policy Studies Journal* 27 (2), 1999: 246.

³² See Lynch 2001 and Morrow 1997.

³³ Clayton 1994, 532-33.

and obligations for attorneys general that have never and should never have existed before.³⁴ Similarly, former New York State Attorney General Elliot Spitzer argued for activist state attorneys general by asserting that they “can—not only can, but must—step forward into a void to ensure that the rule of law is enforced...”³⁵ But others suggest a more cooperative relationship between federal agencies and states attorneys general, implying that some federal authorities welcome the states’ efforts to enforce federal law. A Federal Trade Commission employee, for example, claimed that “The states have become our most valuable law enforcement partners. Sometimes we follow them on certain issues and then they follow us on others. Given our smaller resources, we all have to find ways to be more productive.”³⁶

If state attorneys general were using the federal courts to simply enforce existing federal law, however, their activities might prove relatively uncontroversial. But proponents and critics alike suggest that at times, states go beyond simple enforcement to urge a broader application of the law and to strengthen or even change existing law. Martha Derthick, in her analysis of the tobacco litigation of the mid-1990s, refers to this type of litigation as “extralegislative policymaking.”³⁷ She notes that the 1998 Master Settlement Agreement between the states and the tobacco companies, which effectively ended the tobacco litigation, represented an entirely new regulatory regime. In addition to reimbursing the states for Medicare costs, the Master Settlement banned several types of tobacco advertising, merchandising, and sponsorship. More importantly, it restricted the ability of the tobacco industry to organize and lobby against the Master Settlement and against state and local efforts to regulate the promotion and sale of

³⁴ Presentation of Richard Blumenthal, “The Role of State Attorneys General in National Environmental Policy: Welcome and Global Warming Panel, Part I,” *Columbia Journal of Environmental Law*, 30 (335): 2005.

³⁵ *Ibid.*

³⁶ Quoted in Morrow 1997, 1.

³⁷ Derthick 2002, 4.

tobacco products.³⁸ Derthick argues that policymaking through litigation is problematic for democracy, especially when lawyers are negotiating the terms of settlement: “Typical as a way of concluding lawsuits, negotiations between the contending parties do not feature public deliberation, as legislation normally does in a democracy...”³⁹

The extent to which state attorneys general engage in proactive, legislative-type activities (compared to more straightforward law enforcement) is unknown. Moreover, we do not know if they are always successful in reshaping the law. Assuming, though, that the charge is at least partially true, it raises a series of well-known critiques about the role of the judiciary in a democracy. Like Derthick, many critics argue that the courts should not be involved in making political decisions and essentially treading on the legislature’s turf. As William Pryor, Attorney General of Alabama and a critic of state attorneys general activism, charged, “The aim of this litigation is to shift the awesome powers of legislative bodies—commercial regulation, taxation, appropriation, and the power to change law—to the Judicial branch of government.”⁴⁰

In response to defenders who claim that states (and courts) are simply filling regulatory gaps, critics suggest that these gaps are areas where democratically-elected bodies have consciously chosen not to act, perhaps because scientific or political consensus has not been achieved, or because other equally valid but conflicting goals are privileged. In such cases, state litigation may serve a “counter-majoritarian” purpose; in cases where a single, powerful state successfully triggers policy changes with broad, national consequences, a minority may be

³⁸ Ibid, 3-4.

³⁹ Ibid, 5.

⁴⁰ William Pryor, “The New Business of Government-Sponsored Litigation: State Attorneys General and Big City Lawsuits,” Conference of The Federalist Society for Law and Public Policy Studies, June 22, 1999. Accessed at <http://www.fed-soc.org/Publications/Transcripts/stateaglitigation.htm> (March 14, 2007).

unfairly imposing its will on the majority. In short, state litigation may usurp *federal* power by imposing some states' preferences on other states and on the national government.

Another set of critiques focuses on the motivations of state attorneys general and the types of cases they choose to litigate. State-based litigation might be counter-productive to the extent that it is driven by political actors who have an incentive to litigate high-profile, media-friendly cases. These cases may advance valid public purposes, but they might equally serve political purposes more than public ones. Put differently, the cases might generate publicity and raise the popularity of state attorneys general, but do little to improve public policy. This concern is particularly acute in the wake of the tobacco litigation of the 1990s, the settlement of which brought large sums of money into state coffers. Critics fear that such lawsuits are primarily a way for states to improve their fiscal situation by reaching into the deep pockets of large industries. Interestingly, conservatives are not the only ones to voice this concern. In an article in the liberal on-line magazine *Slate*, Jacob Weisberg charges that multi-state legal actions like the anti-trust case against Microsoft are “almost *pure* politics. They generally reflect the ambitions of state elected officials rather than the claims of sound public policy.”⁴¹

On a more positive note, state litigation might be a useful tool for clarifying and enforcing federal environmental law, for filling in the “gaps” in regulation, and for asserting state autonomy and authority in an intergovernmental regulatory environment. It might serve important public purposes by forcing action on pressing environmental problems that are not being addressed in Congress because of gridlock and special interest lobbying. In short, the litigation may reflect a broader public interest in solving environmental problems that are being neglected, for one reason or another, by other institutions.

⁴¹ Jacob Weisberg, “Microsuits,” *Slate*, May 23, 1998 at <http://www.slate.com/id/2315/> (accessed July 9, 2007).

The popular debate over state attorney general litigation is important but limited because it lacks a strong empirical basis for judging its impact on policy and politics. The academic literature also fails to provide a useful assessment of the policy consequences of state-based litigation. As suggested above, scholarly treatments have frequently focused on documenting a rise in state-based litigation and explaining the sources of it. Even here, however, there are significant gaps in the literature. First, most of the studies examine state activity at the Supreme Court level rather than in all the federal courts. Second, the scholarship to date rarely examines substantive policy areas to understand the nature and content of this litigation, thus limiting our understanding of how state litigation shapes the policy process and policy outcomes. As Clayton admits, researchers need to look at the content and nature of state cases “to understand the changing political character of state litigation and its implications for control of public policy.”⁴² In other words, an evaluation of state-based litigation can only be made after a careful consideration of what kinds of cases are being litigated, for what purposes, and to what effect. The next section offers a categorization of state environmental cases that is intended to help us understand the states’ varying motivations for bringing these lawsuits to the federal courts.

The Purposes and Goals of State-based Environmental Litigation

It is reasonable to assume that state-based environmental litigation serves multiple goals, both policy-oriented and political in nature. These goals can be discerned in part from examining the cases themselves; the following analysis is based on a preliminary review of approximately 350 cases brought by the states between 1970 and 2007. I offer four distinct types of state environmental cases, each of which suggest different motivations for the lawsuits and imply a different set of cost-benefit calculations for the states.

⁴² Clayton 1994, 549

Enforcing Federal and State Regulations

First, states litigate to clarify vague federal statutes and to enforce existing state and federal environmental regulations at the state level. This includes fairly straightforward cases where states are seeking to recover their enforcement costs. Many of these cases target private corporations such as oil and mining companies whose waste and discharges have been the subject of state clean-up efforts. In the late 1980s, for example, the state of Arizona sued Allied-Signal Corporation and other defendants to recover the costs associated with cleaning up a toxic waste site in the city of Phoenix.⁴³ The state was attempting to enforce the federal Superfund law which is designed to ensure that those responsible for producing and disposing of toxic materials bear the cost of cleanup and remediation. In the early 1980s, the state of Illinois also assumed the role of legal enforcer, using the citizen suit provision of the federal Clean Air Act to sue Celotex Corporation for violations of both the federal clean air law and the state's clean air implementation plan.⁴⁴ In this case, the U.S. Environmental Protection Agency supported the state's position, suggesting that at times states and federal agencies cooperate with one another on these cases.

States and the federal government are less likely to collaborate when states try to compel federal agencies to follow state environmental law. When states are successful, these cases can reshape state-federal relations as they impose state environmental standards (many of which are more stringent than the federal governments') on federal agencies. In a 1989 lawsuit brought by the state of Colorado, for example, the state attempted to compel the U.S. Army to abide by state hazardous waste laws and regulations in their role as operator of the Rocky Mountain Arsenal (a

⁴³ *State of Arizona v. Motorola, et. al.*, 774 F. Supp. 566, 1991.

⁴⁴ *State of Illinois v. Celotex Corporation*, 516 F. Supp. 716, 1981.

federal hazardous waste and Superfund site).⁴⁵ The judge ruled in favor of Colorado in this instance, defending the state's interest in rather eloquent terms: "Sites like the Arsenal," Judge Carrigan of the U.S. District Court of Colorado wrote, "must be considered in the long range perspective of generations yet unborn and centuries still far over time's horizon. Indeed...it is the people of Colorado who ultimately must pay either the price of cleanup, or the price of not cleaning up this, the worst hazardous and toxic waste site in America. It is not inappropriate that the present and future victims of this poison legacy, left in their midst by the Army and Shell [oil corporation], should have a meaningful voice in its cleanup."⁴⁶

In enforcement cases such as these, states have an incentive to externalize the cost of environmental regulations by forcing federal agencies and private industries to bear the costs of environmental clean-up and conform to strict state laws. When states target private industries in this manner, they are acting in opposition to "race-to-the-bottom" theories which suggest that sub-national jurisdictions will refrain from imposing costs on industries and firms for fear that they will lose business to competing jurisdictions. According to the theory, states are in competition with each other to provide a "business friendly" environment and encourage new, out-of-state investment while retaining existing state industries. But lawsuits such as the *Arizona* and *Illinois* cases referred to above suggest holes in "race-to-the-bottom" theories. Here, states acted in a way that could be construed as hostile to business, a sign perhaps that some states face "upward" pressures to strengthen environmental regulatory enforcement. This might be particularly true when the state can shift the cost of enforcement to the private sector or the federal government. Under these circumstances, citizens receive environmental amenities without being asked to bear an additional tax burden.

⁴⁵ *State of Colorado v. U.S. Department of Army*, 707 F. Supp. 1562. Interestingly, in this case the U.S. EPA was an ally of the state against the U.S. Army, illustrating the danger of treating the federal government as a unitary actor.

⁴⁶ *Ibid.*

The environmental impacts of these cases are typically confined to a local or regional area. A particular toxic waste site, for example, may be subject to a quicker clean-up process or additional environmental regulations as a result of a successful lawsuit. But these cases are unlikely to have a widespread (e.g. a national) environmental impact. From a legal standpoint, they could set important precedent by giving states the right to subject federal agencies and private parties to stricter state environmental standards. However, they are unlikely to change policy on a national scale.

Limiting the Scope of Federal Standards

While many state environmental cases encourage greater regulatory enforcement, some cases seek to limit the scope of—or request exemptions from—federal environmental standards. These cases are designed to shield local and state authority from federal interference. For example, the state of Alaska successfully sued the Department of Interior in the late 1970s to exempt their wolf kill program from the requirements of the National Environmental Policy Act. In a more recent case, Maine joined forces with the fishing industry and the Chamber of Commerce to challenge the U.S. Fish and Wildlife’s listing of the Gulf of Maine Atlantic Salmon as a “distinct population segment” under the Endangered Species Act.⁴⁷ Such a designation would require the state to do more to preserve the species and prevent its extinction, putting further limits on the already-restrictive Maine fishing industry. In this case, the court deferred to the Fish and Wildlife agency and the state lost its case.

The goals of Alaska and Maine in these cases were to protect home industries, traditional uses of natural resources, and state political autonomy. The states, presumably, have an incentive to support local industries and preserve local jobs in the face of federal efforts that might threaten these. Even if the state has a relatively low chance of winning the lawsuit (given the tendency of

⁴⁷ *State of Maine v. Norton*, 257 F. Supp. 2d 357, 2003.

the federal government to prevail in its lawsuits more often than not), the state and state attorneys general can advocate for the industry and workers, perhaps gaining valuable political support in the process.

These cases fit more neatly into theories of federalism that stress states' dependence on and deference toward local industries. The idea here is that the power of local industries is greater at the sub-national level, where they typically wield substantial economic clout and enjoy close ties to state legislatures and state agencies.⁴⁸ Overall, however, such cases comprise a small fraction of the over 300 environmental cases coded thus far, suggesting that state litigation is not used primarily to defend local industries.⁴⁹

The environmental impact of these cases, like the ones above, is likely to be contained to the local or state level. Because states are essentially looking for waivers from federal laws, these lawsuits are unlikely to have broad, national consequences. However, if other states use legal victories in such cases to press for similar exemptions in their states, their impact might reach beyond state borders.

Inter-state Disputes and "NIMBYISM"

Some state environmental lawsuits reflect a desire on the part of the plaintiff state to prevent their neighbors from exacerbating environmental problems within the state's borders. For example, the states of Connecticut and New Jersey unsuccessfully sued the Environmental Protection Agency and the state of New York in 1981 over an interstate pollution dispute. In this case, the EPA had approved a revision to New York's Clean Air Act implementation plan,

⁴⁸ For an exploration of the agenda biases of local governments, see Matthew Crenson, *The Un-Politics of Air Pollution: A Study of Non-Decision Making in the Cities* (Baltimore, MD: John Hopkins Press, 1971).

⁴⁹ The data analysis is preliminary, so I do not cite exact numbers here.

allowing a utility company to perform a one-year “test burn” that Connecticut and New Jersey claimed would endanger their air quality and impede economic growth in the region.⁵⁰

A related set of inter-state disputes involve conflicts over the use of natural resources that cross state boundaries. In a recent case of this type, Alabama and Florida sued the Army Corps of Engineers and the state of Georgia on the grounds that the Corps had not released enough water from a Georgia dam, thereby threatening endangered mussels downstream in their states.⁵¹ In this and other cases like it, it is difficult to determine whether Alabama and Florida are motivated by a genuine concern about the fate of the endangered mussels, or by a desire to capture a greater share of the water resources for other purposes (e.g. recreation, fishing, etc). In other words, states might use environmental laws as a means for protecting other, non-environmental state interests.

Finally, some states sue out of a desire to prevent unwanted pollution-generating facilities or waste from entering their states. These are classic “NIMBY” (Not-In-My-Backyard) cases, such as when Maryland sued to prevent a sewage treatment plant from being built in the state in the late 1970s, and when Illinois tried to prevent the importation of used uranium from nuclear power plants in the early 1980s.⁵²

States have a clear incentive to litigate these kinds of cases. The “culprit” is typically an out-of-state entity (e.g. another state, a government agency, or an out-of-state corporation) and therefore the lawsuit poses none of the dilemmas associated with suing an in-state corporation. In other words, this may be a way for states to get more environmental protection for their citizens while imposing costs on outsiders. As suggested already, states also might use environmental

⁵⁰ *State of Connecticut v. Environmental Protection Agency*, 656 F.2d 902, 1981.

⁵¹ *State of Alabama v. Army Corps of Engineers*, 424 F.3d 1117, 2005.

⁵² *State of Maryland ex. rel. Burch v. Costle*, 452 F. Supp. 1154, 1978; *State of Illinois v. General Electric Company*, 683 F.2d 206, 1982.

laws to achieve other, non-environmental ends for their states. Such lawsuits can serve important political goals as well, given that they appeal to local citizens' interest in defending their rights vis-à-vis other states and the federal government.

These cases may have a region-wide environmental impact given that the problems they seek to address cross state boundaries. From a policy and political standpoint, the cases could also shift relations between the states. If successful, one state may be able to impose its preferences on, change the regulations within, and/or shape the behavior of another state or the agencies and corporations within it.

Strengthening and Expanding Federal Law

The final set of cases has received the most public attention and stirred the greatest scholarly and popular debate. In these cases, states appear to use litigation to strengthen and expand environmental regulations on a broad scale. Typically, the cases involve high-profile issues with potentially far-reaching regional or national consequences, thus attracting multiple state litigants. Many target government agencies such as the Environmental Protection Agency. As Denise Scheberle remarks, "Many states have found themselves in an unusual position—suing the EPA to make the agency more aggressive in enforcing its own regulations or imposing new regulations."⁵³ Other lawsuits target private industries, but unlike the cases referred to above, these lawsuits tend to name multiple industries and firms whose operations reach across state boundaries.

The number of such cases seems to have increased in recent years, although the practice dates back to at least the 1980s when Northeastern states sponsored a series of lawsuits aimed at remedying the problem of acid rain. States in the Northeast have long complained about

⁵³ Denise Scheberle, "The Evolving Matrix of Environmental Federalism and Intergovernmental Relationships," *Publius: The Journal of Federalism*, 35 (1), 2005: 77.

pollution from coal-fired plants in the Midwest and Southeast that drifts to the Northeast and causes acid precipitation, endangering lakes, wildlife, forests, and historic buildings. Starting in the mid-1980s, various coalitions of states attempted to force the Environmental Protection Agency to reduce the pollutants that cause acid rain. In one case, they asked the agency to revise national air-quality standards to address the problem, standards absent in federal statutes at that time.⁵⁴ More recently, states have targeted coal-fired power plants for their contributions to the Northeast's smog and acid rain problems. In 1999, for example, Connecticut filed suit in five states against sixteen power plants, claiming violations of the federal Clean Air Act.⁵⁵

While the acid rain cases might appear to be chiefly inter-state disputes, the original litigation was undoubtedly aimed at changing federal laws and regulations. As noted above, the 1972 Clean Air Act did not specifically address the problem of acid rain, and as the problem grew more visible and acute in the 1980s, Northeastern states attempted to amend the law through litigation.⁵⁶ Several states were explicit about their desire to see Congress revise the Clean Air Act and appeared to be dissatisfied with being forced to use the courts in the absence of Congressional action.⁵⁷ Recent cases aimed at private utility companies and the Tennessee Valley Authority (which runs eleven coal-fired power plants) look more like simple cases of regulatory enforcement, but even here, the impact of the cases could be quite broad. For example, in the aforementioned Connecticut case, suits were filed in five different states and could have effected the operations of multiple power companies across the country.

⁵⁴ Philip Shabecoff, "6 States in Northeast to Sue U.S. Over Acid Rain," *New York Times*, April 14, 1987: B2.

⁵⁵ Paul Zielbauer, "Connecticut to Sue Coal-Fired power Plants in Five States," *New York Times*, November 18, 1999: B14.

⁵⁶ The 1990 Amendments to the Clean Air Act contained provisions designed to address the problem of acid rain. Specifically, it established a target reduction of 10 million tons of sulfur dioxide and 2 million tons of nitrogen oxide by 2000. Whether and to what degree the lawsuits contributed to these policy changes is an open question, one that my larger research project will eventually address.

⁵⁷ See "Acid Rain Lawsuit Rejected by Court," *New York Times*, September 19, 1986: D16.

Notably, the states' acid rain suits in the 1980s targeted the Reagan Administration's Environmental Protection Agency, infamous for its hostile stance toward environmental regulation and its sympathy for regulated industries. This lends credence to the idea that states sue agencies when the federal government retreats from the environmental policy arena. During the "greener" Clinton Administration, however, the Northeastern states continued to litigate the issue of acid rain. But in these cases, they targeted power companies rather than the EPA and even cooperated with the agency in a number of lawsuits.⁵⁸ Today, the states are targeting both the EPA and private industry around a number of issues, revealing a frustration with the Bush Administration and a willingness to go after both public and private parties.

These cases, like the first set, appear to negate "race-to-the-bottom" theories. Since states are attempting to toughen federal environmental standards, they are in effect raising the minimum standards by which they must abide. However, plaintiff states tend to be "early adopters"—they have already enacted state regulations that exceed federal ones. For example, many of the lead states in the climate change cases—California, Maine, Massachusetts, New York, New Jersey, and others—have already passed some form of a state climate change (or alternative energy) law. Therefore, it might be more accurate to characterize these lawsuits as attempts to level the playing field by forcing the federal government to establish nation-wide minimum standards. Moreover, given the large disparities in the amount of carbon dioxide emitted by each state, states with relatively low carbon emissions will be interested in establishing national regulations.⁵⁹ As Frank O'Donnell, director of the environmental group

⁵⁸ Jennifer Lee, "3 Northeast States Win Verdict Against a Utility," *New York Times*, August 8, 2003: A10.

⁵⁹ The Associated Press analyzed state-by-state emissions since 1993, and reported both aggregate state emissions and per capita emissions. The states with the highest per capita emissions include Wyoming, North Dakota, and Alaska while those with the highest overall emissions are Texas, California, and Pennsylvania. States like Maine, Connecticut, and Vermont, all plaintiffs in *Massachusetts v. EPA*, have little impact on national emissions compared to Texas, Illinois, Ohio and other states on the opposing side of the case.

Clean Air Watch, said about state-by-state disparities in carbon emissions, “Some states are benefiting from both cheap electricity [from coal-fire plants] while polluting the planet and make the rest of us suffer the consequences of global warming. I don’t think that’s fair at all.”⁶⁰

Lawsuits designed to regulate carbon emissions on a national scale may be an attempt by these relatively low emitting states to force high emitting states to carry their fair share of the regulatory burden.

As suggested, these lawsuits also serve important political purposes. State attorneys general in particular may embrace these lawsuits because the litigation enhances their visibility and reputation. Former New York Attorney General Elliot Spitzer, for example, built his political career on his reputation for initiating and otherwise playing an important role in high-profile lawsuits against the federal government and major U.S. corporations. The financial incentives for states to bring these suits also cannot be dismissed, although they are rather weak in environmental lawsuits (in comparison to consumer protection and anti-trust suits, for example). Most of the high-profile, multi-state environmental lawsuits seek specific policy changes or ask for injunctions on the polluting activity rather than monetary rewards. One exception is the case of *California v. General Motors Corporation* where California Attorney General Bill Lockyer has sued car manufactures for their contributions to climate change and seeks monetary damages to reimburse the state.⁶¹

State attorneys general are further encouraged to take on these lawsuits by environmental organizations and public interest lawyers. According to Richard Blumenthal, attorney general of Connecticut, the cases often originate with non-profit groups or activist lawyers: “Very often it

⁶⁰ Quoted in Seth Borenstein, “Texas, Wyoming Lead in Emissions,” *USA Today*, February 6, 2007. On-line at http://www.usatoday.com/weather/climate/globalwarming/2007-06-02-emissions_N.htm?POE=click-refer (accessed July 14, 2007).

⁶¹ *California ex. rel. Bill Lockyer v. General Motors Corporation*, No. 06-05755 (N. D. Cal., September 30, 2006).

[state environmental litigation] begins with some informal contacts, private sector and public interest lawyers coming to attorneys general. We often receive a variety of ideas, some good some bad. We evaluate them and try to see whether they can be successful.”⁶² For environmental organizations, the alliance with state attorneys general can be a great benefit, most obviously because of the substantial legal resources offered by state attorneys general offices. These resources are not only monetary but include the legal expertise and experience of state attorneys general and their associates.⁶³

Climate Change Litigation

The most prominent and innovative multi-state environmental lawsuits today take aim at the problem of climate change. The conventional wisdom is that the United States has failed to take serious action to decrease its carbon emissions, a position that predates the Bush Administration.⁶⁴ However, states and localities have been acting in the absence of federal initiative, considering and enacting a variety of policy proposals to reduce state greenhouse gas emissions and develop alternative sources of energy.⁶⁵ In 2003, for example, New York’s Governor Pataki invited Northeastern governors to join him in a Regional Greenhouse Gas Initiative (RGGI) where states would agree to a mandatory cap-and-trade program for the

⁶² Presentation of Richard Blumenthal, “The Role of State Attorneys General in National Environmental Policy: Welcome and Global Warming Panel, Part I,” *Columbia Journal of Environmental Law*, 30 (335): 2005.

⁶³ My research will investigate whether state attorneys general enjoy relatively positive public images compared with other litigants; if so, then advocacy groups have an additional reason to cooperate with state attorneys general. Research by Michael W. McCann and William Haltom suggests that tobacco litigation initiated by (or which features prominently) state attorneys general tends to get more positive and less negative coverage compared to cases initiated by private citizens and their lawyers. Coverage of the latter emphasizes potential monetary awards and is tainted by an anti-litigation bias that has become more dominant in recent years. See Michael W. McCann and William Haltom, *Distorting the Law: Politics, Media, and the Litigation Crises* (Chicago: University of Chicago Press, 2004), Chapter 7.

⁶⁴ While President Bill Clinton signed the Kyoto Protocol to the United Nations Framework Convention on Climate Change, he did not submit it to the Senate for ratification, apparently anticipating that it would not pass a hostile Congress.

⁶⁵ See Rabe 2006.

region's power plant emissions.⁶⁶ California, meanwhile, recently passed the Global Warming Solutions Act of 2006 which caps the state's greenhouse gas emissions at 1990 levels by the year 2020.

Prior to and alongside these legislative and executive efforts, states' attorneys general have launched several climate change lawsuits in an apparent effort to expand their influence beyond state borders and force federal action on the issue. The most well-known of these was recently decided by the Supreme Court in *Massachusetts v. EPA*. The origins of the case date back to 1999 when nineteen organizations, including environmental organizations and renewable energy trade associations, petitioned the Environmental Protection Agency, asking it to regulate greenhouse gas emissions under Section 202 of the federal Clean Air Act (CAA).⁶⁷ A year earlier, the agency's general counsel had concluded that carbon dioxide qualifies as a pollutant under the CAA and could theoretically be regulated by the agency.⁶⁸ In 1999, however, a new general counsel announced that the EPA had no plans to do so, apparently succumbing to congressional opposition at the time.⁶⁹

In early 2003, state attorneys general from seven states (New York, Connecticut, Maine, Massachusetts, New Jersey, Rhode Island, and Washington) entered the dispute by urging then EPA Administrator Christine Todd Whitman to set national ambient air standards for carbon

⁶⁶ "Governor Calls on Northeast States to Fight Climate Change," April 25, 2003 at http://www.state.ny.us/governor/press/year03/april25_2_03.htm (accessed March 24, 2005)

⁶⁷ Section 202 directs the EPA to set emissions standards for "any air pollutant" from new motor vehicles which contributes to air pollution "which may reasonably be anticipated to endanger public health or welfare." The statute leaves it up to the "judgment" of the EPA Administrator to determine whether the pollutant qualifies as a harmful air pollutant. 42 U.S.C. 7521 (a) (1).

⁶⁸ Jonathan Cannon, "EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources," Memo to Carol Browner, EPA Administrator, April 10, 1998. Available at <http://www.law.umaryland.edu/environment/casebook/documents/EPACO2memo1.pdf> (accessed July 12, 2007). The memo noted, however, that this determination is only a first step. To regulate CO₂, the EPA would have to find that it posed a harm to human health, welfare, and the environment, for example.

⁶⁹ Robert Meltz, "Climate Change Litigation: A Growing Phenomenon," CRS Report to Congress, Congressional Research Service, May 18, 2007: 3.

dioxide.⁷⁰ In June the same year, Connecticut, Maine, and Massachusetts filed the first climate change lawsuit, claiming that the EPA had a mandatory duty to regulate carbon dioxide. But the EPA, responding to the legal challenges, formally rejected their predecessor's position and concluded that the agency did not have the statutory authority to regulate CO₂ and other greenhouse gases.⁷¹

This decision prompted twelve state attorneys general to file suit in the D.C. Circuit Court of Appeals along with several co-plaintiffs, including three U.S. cities, two U.S. territories, and several environmental groups. (Ten states joined the EPA on the defendant's side to support the agency's passive regulatory stance).⁷² The case challenged the EPA's refusal to regulate carbon emissions from new motor vehicles (thereby restricting the case to mobile sources of greenhouse gases). But the Bush Administration was apparently unmoved by the states' legal challenge, reiterating its previous statement that the EPA lacked the proper authority and that the president would not reconsider his decision to forego the regulation of carbon dioxide emissions.⁷³

In 2005, the D.C. Circuit Court rejected the state's lawsuit in a split decision by the three judge panel,⁷⁴ prompting the plaintiffs to appeal to the Supreme Court. Some observers considered it a victory that the Court even accepted the petition for review. As Legislative Attorney Robert Meltz wrote later, "It was somewhat surprising that the Supreme Court agreed to review the D.C. Circuit decision," given the fact that there was no disagreement among the

⁷⁰ Scheberle, 78.

⁷¹ Robert Fabricant, "EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act," Memo to Marianne Horinko, EPA Acting Administrator, August 28, 2003.

⁷² The plaintiff states were California, Connecticut, Illinois, Massachusetts, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. Opposing them were Alaska, Idaho, Kansas, Missouri, North Dakota, Nebraska, Ohio, South Dakota, Texas, and Utah. Notably, the plaintiff states are largely "blue" states while the defending states are almost all "red" states.

⁷³ Scheberle, 79.

⁷⁴ 415 F.3d 50 (D.C. Cir. 2005).

circuit courts and that grants of certiorari over the opposition of the United States (as happened in this case) are rare.⁷⁵ Justice Steven’s rationale for accepting the case, as expressed in his majority opinion in *Massachusetts v. EPA*, should be further cause for celebration by climate change activists. The Court issued the writ in part, he claims, because of the “unusual importance of the underlying issue.”⁷⁶

At a minimum, then, the case has lent some legitimacy and prominence to the problem of climate change given that the Supreme Court has recognized the problem and its scientific basis.⁷⁷ As Daniel Farber, a law professor at the University of California at Berkeley said when the Court agreed to hear the case, “If the Supreme Court just says climate change is real, even if they don’t do anything else, that would be significant.”⁷⁸ The Court went beyond this, however, by confirming that climate change is already causing environmental damage in the United States. The majority, in granting Massachusetts standing, acknowledged that the state had lost shoreline from a climate-change induced rise in sea level. The proximity of the threat became a basis for determining that Massachusetts had suffered a particularized and concrete “injury in fact,” one of the criteria for conferring standing.⁷⁹

The novel standing argument developed in the case (much of the majority opinion is devoted to this issue) may have the largest and most lasting impact on future climate change litigation and state environmental lawsuits more generally. Justice Stevens found that the state of Massachusetts, in asserting its injury, had a “special position and interest” because it was a

⁷⁵ Meltz, 7.

⁷⁶ *Massachusetts et. al. v. Environmental Protection Agency* 127 C. Ct. 1438.

⁷⁷ A first look at the editorials in the nation’s major newspapers suggests that the case was widely and almost universally welcomed by the new media (with a few exceptions, such as the *Wall Street Journal*).

⁷⁸ Quoted in Laura Fitzpatrick, “The Jury on Global Warming,” SeedMagazine.com, August 3, 2006 at <http://www.seedmagazine.com> (accessed April 3, 2007).

⁷⁹ The defense had argued that the plaintiffs could not get past the standing hurdle because their injury was not sufficiently tangible and imminent. Moreover, they claimed that a favorable decision for the plaintiffs (e.g. where the EPA starts to regulate carbon emissions from cars) would not mitigate their alleged injuries, since auto emissions constituted just 6% of global greenhouse gas emissions.

sovereign state and not a private entity. States are “not normal litigants for the purposes of invoking federal jurisdiction,” said the Court.⁸⁰ They have certain sovereign prerogatives which allow them to sue as “parens patriae” to protect the public and promote state governmental interests. The Court’s articulation of a special status for state litigants is likely to affect state cases now pending in federal courts and may encourage state attorneys general to launch additional suits aimed at shaping federal environmental policy. Quite simply, attorneys general can be reasonably assured that the courts will remain open to their lawsuits. In addition, environmental groups are likely to increase their efforts to woo state attorneys general. Because the Court exalted the status of the state litigants, while leaving doubt as to whether the environmental groups could have achieved standing on their own, environmental organizations can reduce uncertainty by cooperating with state attorneys general in such lawsuits.⁸¹

The Court’s favorable standing ruling may benefit state and environmental litigants in another manner. After the Court described the special status of states, it addressed the second prong of the standing test, that of causation. To establish standing, plaintiffs must show that their injury can be fairly traceable to the actions of the defendant. The Environmental Protection Agency conceded that carbon dioxide emissions contribute to global climate change, but asserted that the global contribution from U.S. automobiles was so small that any reduction achieved through litigation would be negligent. The Court rejected this argument: “Its [the EPA’s] argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would

⁸⁰ *Massachusetts et. al. v. Environmental Protection Agency* 127 S. Ct. at 1454.

⁸¹ Environmental plaintiffs would only need to convince one state attorney general to join them, as *MA v. EPA* suggests that just one plaintiff needs to prove standing for the case to go forward. The Court’s generous interpretation of standing is particularly significant given its tendency in recent years to restrict standing for environmental plaintiffs. See Lettie McSpadden, “Environmental Policy in the Courts” in *Environmental Policy*, edited by Norman J. Vig and Michael E. Kraft., 4th ed. (Washington, D.C.: CQ Press, 2000).

doom most challenges to regulatory action.”⁸² Rather than doom such challenges, the Court has increased their chances for success.

The substantive ruling of the court—namely, that the Environmental Protection Agency has the authority to regulate CO₂ from automobiles and must revisit its decision not to regulate it—is also significant. Several editorials in the wake of the decision suggested it would put added pressure on the EPA, the Bush Administration, and Congress to take more aggressive action to fight climate change. As noted at the outset of the paper, the Bush Administration did respond to the decision, albeit rather halfheartedly. As for the EPA, it will be under increased scrutiny in the shadow of the decision, but the agency’s regulatory review process could take years. And climate change was already on the Congressional agenda soon after the Democrats won control in 2006, making it difficult to gauge the ruling’s independent (or additional) influence on Congressional action. To find the most immediate (and perhaps significant) consequence of the ruling, we must shift our attention back to the states and their unilateral efforts to fight climate change.

In 2004, the state of California asked the EPA for a waiver from federal Clean Air Act allowing it to regulate carbon emissions from motor vehicles.⁸³ The agency dragged its heels, citing the same argument it made in *Massachusetts v. EPA*, namely that it did not have the authority to regulate global greenhouse gas emissions. In the wake of the Supreme Court decision, however, this argument is defunct. A month after the ruling, California Governor Arnold Schwarzenegger threatened to sue the agency for failing to respond to the state’s request in a timely manner, suggesting that the Court’s ruling had cleared away any remaining legal

⁸² 127 S. Ct. 1438.

⁸³ This is not novel; as one newspaper article notes, California has requested forty waivers from the CAA since 1977 and has received the “vast majority of them.” David Wood, “States Vie with U.S. on Emissions Rules,” *Christian Science Monitor*, May 29, 2007: 2.

hurdles.⁸⁴ Because eleven other states have adopted California's tailpipe emissions law, a favorable ruling on California's waiver request would effectively force automobile manufacturers to increase the fuel efficiency of their fleets. It would also be a victory for states rights, given that it would confer authority on states to set vehicle emissions standards, which historically has been the prerogative of the federal government.

The potential fallout from the *Massachusetts v. EPA* case thus raises long-standing, thorny questions about states' rights and federal preemption that, in this context, have reversed the usual liberal-conservative split on these issues. Conservatives are complaining that states are determining national policy and encroaching on federal power. As Jason Lynch notes, this is somewhat ironic given that these critics in the past have been much more worried about the possibility of *federal* intrusion on state power.⁸⁵ Their underlying concern, however, is that state litigation of this kind (and the shift in federal-state relations that results) promotes *more* regulation than would otherwise be the case. Regulatory advocates, of course, welcome such a shift, claiming that the public's interest has been stymied by a hostile administration, partisan gridlock, and special interest politics in Washington. State attorneys general, argues New Hampshire Attorney General Peter Heed, are "one of the few progressive forces left today" and their lawsuits are "essential to a well-functioning society."⁸⁶

Conclusion

State-based environmental litigation has the potential to trigger federal action on new and emerging environmental problems and to change the way private industries do business. One can look to the tobacco litigation and settlement of the 1990s to understand how these lawsuits can

⁸⁴ Tom Chorneau, "Governor Says 'Clock Ticking' on EPA Action to Curb Emissions," *San Francisco Chronicle*, April 26, 2007: B1.

⁸⁵ Lynch, 2000.

⁸⁶ Presentation of Peter Heed, "The Role of State Attorneys General in National Environmental Law Policy: Groundwater Pollution Panel," *Columbia Journal of Environmental Law*, 30 (403): 2005.

shape the politics and policy around a public issue. The recent victory of a dozen states in a lawsuit challenging the Bush Administration's climate change policy suggests that states and state attorneys general are flexing their muscles and undertaking bold initiatives designed to challenge national regulatory policy.

Despite the apparent growth of high-profile state lawsuits, the academic, legal, and policy communities currently lack a comprehensive overview of state-based environmental litigation and an understanding of its impact on government policy and private industry behavior. Specifically, too little is known about the history of state environmental litigation, its goals, and whether and how it has changed over the years. More importantly, few efforts have been made to understand when, why, and how this litigation influences environmental policy and practices. This paper represents a first effort at filling this gap and is part of a larger research project designed to examine and analyze all state environmental litigation filed in federal courts from 1970 to the present.

State environmental litigation has already created a backlash among critics, and some have responded to the lawsuits by directing campaign money to state attorneys general races and by recommending policy changes that might temper state attorneys general activism.⁸⁷ Meanwhile, proponents will likely be emboldened by recent court victories and may step up their activism. In short, the debate over state environmental litigation is likely to continue; it is time for scholars to contribute to this discussion by examining and understanding the policy consequences of state environmental litigation.

⁸⁷ See, for example, transcripts from "The New Business of Government-Sponsored Litigation: State Attorney General and Big City Lawsuits," The Federalist Society for Law and Public Policy Studies, June 22, 1999. Accessed at <http://www.fed-soc.org/Publications/Transcripts/stateaglitigation.htm> (March 14, 2007).