MASSACHUSETTS V. EPA: A STRATEGIC AND JURISDICTIONAL RECIPE FOR STATE ATTORNEYS GENERAL IN THE CONTEXT OF EMISSION ACCELERATED GLOBAL WARMING SOLUTIONS

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Yon Cassius has a lean and hungry look;

He thinks too much. Such men are dangerous.

Julius Caesar[1]

I. INTRODUCTION

State attorneys general have risen in prominence in recent years.[2] A large part of the rise in the prominence of attorneys general has been in their ability to join together to successfully address particularly complex and involved litigation. Although the attention focused on attorneys general treats their cooperative efforts as a new development,[3] the reality is that attorneys general have a long history of working cooperatively.[4] The most well known of these multi-state efforts is the Tobacco Master Settlement Agreement, which resulted in a multibillion dollar settlement that pays each of the participating states millions of dollars per year.[5] This success has led to attorneys general joining together in other areas as well, including antitrust, consumer protection, and environmental issues. Testing the limits of the legal reach of attorneys general on behalf of their citizens fits the states' roles as "laboratories of democracy."[6] This approach is not without its detractors, who argue that

1. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, ll. 194–95 (Arthur Humphreys, ed., Clarendon Press 1984).

2. *See* Richard Blumenthal, *The Role of State Attorneys General*, 33 CONN. L. REV. 1207, 1207 (2001) (referring to "the golden age of attorneys general").

3. *See* Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998 (2001).

4. NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES app. L, at 412 (Lynne M. Ross ed., 1990).

5. *See* Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 162–66 (2d Cir. 2005) (providing a good summary of the background regarding the Tobacco MSA); A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 241–46 (3d Cir. 2001).

6. Landell v. Sorrell, 406 F.3d 159, 178 (2d Cir. 2005).

it is unconstitutional,[7] abused by the attorneys general,[8] and has negative effects on the legal system.[9] Even with its detractors, the success of these efforts cannot be doubted.[10] In light of these successes and a growing perception that the federal government is refusing to address global warming, states and their attorneys general are increasingly being looked to in order to provide leadership and direction on this issue.[11]

The recent decision in *Massachusetts v. EPA*[12] serves as fitting example of the benefits that attorneys general from the various states can have within litigation. *Massachusetts* was immediately noteworthy upon its release for two primary points of law. First, it was hailed as judicial acknowledgement of the human impact on global warming, which meant that government could no longer avoid its consideration with respect to environmental policy.[13] The second noteworthy impact of the decision was the *Massachusetts* analysis of the issue of standing.[14] But this article will examine a third, and seemingly overlooked, tactical approach that *Massachusetts* has raised—namely that state attorneys general[15] may be among the most agile litigants and policymakers within this

7. Lynch, *supra* note 3, at 2016–17. Lynch relies on the Compact Clause, Article 1, Section 10, as interpreted in *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 469 (1978), to make his argument that multistate litigation may be unconstitutional. *Id.* The dynamic nature of the alliances between attorneys general, meaning they are in constant flux, seems to undercut most of Mr. Lynch's relevant arguments.

8. Senator McCain was quoted as saying: "Who do these people think they are?" in reference to the state attorneys general in multistate litigation. *Id.* at 1998 (citing David J. Morrow, *Transporting Lawsuits Across State Lines*, N.Y. TIMES, Nov. 9, 1997, §3, at 1).

9. *Id.* at 1998–99 (referring to a comment made by Alabama Attorney General William Pryor, Jr. in a speech made at the Reagan Forum on November 14, 2000). It is worth noting that Attorney General Pryor's successor has participated in a number of National Association of Attorneys General (NAAG) multistate groups, most notably, Ameriquest (Mortgages) and MySpace (Internet) to name a few.

10. Of course, how "success" is measured has been questioned. Within the context of the tobacco litigation for example, critics have lauded the monetary amounts but criticized the connection of the payment amounts under the agreement with tobacco sales. *See* Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 187–88 (2000).

11. *See* Robert B. McKinstry, Jr. et al., *Federal Climate Change Legislation as if the States Matter* 1 (Widener Law School Legal Studies Research Paper Series No. 08-04, 2007), *available at* http://ssrn.com/abstract=1031552.

12. 127 S. Ct. 1438 (2007).

13. *See* Linda Greenhouse, *Justices Say E.P.A. Has Power to Act on Harmful Gases*, N.Y. TIMES, April 3, 2007, at A1.

14. *Massachusetts*, 127 S. Ct. at 1452–58; *see also infra* Part IV.

15. Interestingly this case had, as Amici, state attorneys general supporting both Massachusetts and the EPA. Supporting Massachusetts were California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *Id.* at 1446 n.2. Supporting the EPA's position were Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah. *Id.* at 1446 n.5.

area to promote dynamic alternatives.[16] This article will provide an overview of the global warming issue and previous efforts to address it, an analysis of the *Massachusetts* decision, an overview of the role of the state attorney general, attempts by attorneys general to address climate change through litigation,[17] and recommendations for attorneys general as they continue to address these issues.[18]

II. AN ABRIDGED HISTORY OF GLOBAL WARMING

A. The Greenhouse Effect

Although there is debate with regard to the significance of human impact on warming,[19] there is little debate as to the effects of increasing temperatures on polar ice caps and climate change. It should be noted that the "greenhouse effect" is a natural phenomenon, without which the planet would be significantly colder and life as we know it would not be possible.[20] In other words, a little warming is good, but a lot could be troubling. Scientists currently believe that the release of carbon dioxide (CO_2) into the atmosphere is one of the primary causes of global warming and that this warming is being accelerated by human activity releasing greater amounts of CO_2 into the atmosphere.[21] In recognizing the impact of increased CO_2 emissions, scientists have identified two pri-

16. California is widely recognized as a trendsetter in the area of automobile emissions. California led the nation in establishing motor vehicle emission control requirements and it was determined that there were potential benefits for the nation in allowing California to continue to experiment and innovate in the field of emissions control. *See* Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1109–10 (D.C. Cir. 1979); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. N.Y. State Dep't of Envtl. Conservation, 17 F.3d 521, 525 (2d Cir. 1994).

17. For example, the Sierra Club has adopted a policy of opposing proposed coal fired power plant. Sierra Club, Environmental Law Program: Stopping the Coal Rush, http://www.sierraclub.org/environmentallaw/coal/ (last visited Apr. 6, 2008). For a list of successfully opposed coal plants, see Sierra Club, Environmental Law Program, Coal Victories Across the Nation, http://www.sierraclub.org/environmentallaw/coal/victories.asp (last visited Apr. 6, 2008). Interestingly, this litigious drive is not limited to fossil fuel or traditional power generation, but also encompasses the renewable energy sector. Brit T. Brown & Benjamin A. Escobar, *Wind Power: Generating Electricity and Lawsuits*, 28 ENERGY L.J. 489, 489 (2007).

18. This is also relevant because in 2000, the United States was the top greenhouse gas emitting country in the world, followed closely by China, the European Union, Russia, and India. KEVIN A. BAUMERT ET AL., NAVIGATING THE NUMBERS: GREENHOUSE GAS DATA AND INTERNATIONAL CLIMATE POLICY 12 fig.2.1 (2005).

19. *See, e.g.*, BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (Cambridge Univ. Press 2001); NAT'L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 17 (2001) [hereinafter CLIMATE CHANGE SCIENCE]. For example, although carbon dioxide levels increased steadily during the twentieth century, global temperatures decreased between 1946 and 1975. CLIMATE CHANGE SCIENCE, *supra* at 16. Considering this and other data, the National Research Council concluded that "there is considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases." *Id.* at 1.

20. EPA, Global Warming: Climate, http://yosemite.epa.gov/oar/globalwarming.nsf/content/climate.html (last visited Apr. 6, 2008).

21. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

mary contributors of human-caused CO_2 emissions—motor vehicle emissions and electricity generation.[22] Paramount among these concerns is the increase observed in average temperatures in the United States, which have increased "between .74 and 5 degrees Fahrenheit since 1900."[23] The prediction is for temperatures to continue to increase by as much as five degrees by the year 2100.[24]

B. Global Warming Is Not a New Concept

Global warming as a concept has been around since at least 1865[25] as a scientific theory.[26] The greenhouse effect,[27] which contributes to global warming, makes the earth habitable; without it, we would likely not exist.[28] Human activity[29] was first theorized as a contributing cause of contemporary global warming in 1938.[30] According to the measurements of ice cores, concentrations of atmospheric CO_2 have increased from 290 ppm (parts per million) in 1750 (the start of the Industrial Revolution) to 350 ppm today.[31] These measurements are taken from an

22. *Id.*; Massachusetts v. EPA, 127 S. Ct. 1438, 1457 (2007).

23. *Connecticut*, 406 F. Supp. 2d at 268.

24. *Id.*

25. The discovery of the "greenhouse effect" is credited to French mathematician and physicist Joseph Fourier in 1824. *See* Svante Arrhenius, *On the Influence of Carbonic Acid upon the Temperature of the Ground*, 41 LONDON, EDINBURGH & DUBLIN PHIL. MAG. & J. SCI. 237 (1896) (citing JOSEPH FOURIER, HEAT A MODE OF MOTION 405 (London 2d ed., 1865)), *available at* http://www.globalwarmingart.com/images/1/18/Arrhenius.pdf.

26. SPENCER R. WEART, THE DISCOVERY OF GLOBAL WARMING 2–4 (2003) (citing John Tyndall, *On Radiation Through the Earth's Atmosphere*, 25 PHIL. MAG. 204–05 (1863)).

27. A very early experiment by Horace de Benedict Saussure in 1760 demonstrated the greenhouse effect through the use of "heliothermometer," which was simply panes of glass covering a thermometer, which showed that their use increased the temperature on the thermometer. JAMES RODGER FLEMING, HISTORICAL PERSPECTIVES ON CLIMATE CHANGE 61 (1998). Fourier cited Saussure in his efforts. *Id.*

28. Hervé Le Treut et al., *Historical Overview of Climate Change Science*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 115 (Susan Soloman et al. eds., 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter1.pdf.

29. Acceptance of the impact of human activity is not universal. S. FRED SINGER & DENNIS T. AVERY, UNSTOPPABLE GLOBAL WARMING: EVERY 1,500 YEARS 10–11 (2007) (suggesting that global warming is due to natural climate cycles and not due to CO_2 emissions).

30. WEART, *supra* note 26, at 2 (citing G. S. Callendar, *The Artificial Production of Carbon Dioxide and Its Influence on Climate*, 64 Q. J. ROYAL METEROLOGICAL SOC'Y 223–40, (1938)).

31. *Id.* at 202–06; *see also* U.S. Department of Commerce, National Oceanic & Atmospheric Administration, Trends in Atmospheric Carbon Dioxide—Mauna Loa, http://www.esrl.noaa.gov/gmd/ccgg/trends/ (last visited Apr. 6, 2008). When looking at this rise, it is important to consider that the CO_2 increase represents an increase of approximately 78%, but the worldwide population increased from 1750 to present from about 700 million people to approximately 6.5 *billion* people—an increase of more than 900%.

ice core that acts as a record of the past 650,000 years.[32] CO_2 is considered the most dominant of the greenhouse gases (GHG) in Earth's current atmosphere.[33] There are other GHGs, such as methane,[34] nitrous oxide,[35] and hydroflourocarbons[36] that are more potent than CO_2 when they are in equal concentrations because they have the potential to trap more energy.[37] But none of those gases are currently as concentrated in the atmosphere as CO_2.[38] The concern with these types of emissions is that they tend to stay within the atmosphere for decades, or longer, creating a cumulative effect, and they circulate throughout the atmosphere reaching the far corners of the globe.[39] This is the antithesis of other airborne pollutants, which are primarily shortlived and local in effect.[40] This difference was at the core of the EPA's arguments for why it could not regulate vehicle emissions.[41]

C. Congress Addresses Human-Accelerated Global Warming

Although the concept of global warming has been around for more than 150 years,[42] it has only been actively studied since approximately 1959.[43] Around that time, the United States Weather Bureau began measuring atmospheric levels of CO_2 at an observatory in Mauna Loa,

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32. AL GORE, AN INCONVENIENT TRUTH 66 (2006). Scientists drill through Antarctic ice sheets and extract cores. This enables scientists to examine the ice and extract air samples from the time period when that portion of the ice was frozen, which can then be analyzed. This analysis yields an estimate of carbon dioxide levels. *Id.* at 60–67.

33. AM. BAR ASS'N, GLOBAL CLIMATE CHANGE AND U.S. LAW 5 (Michael B. Gerrard ed., 2007) [hereinafter GLOBAL CLIMATE CHANGE AND U.S. LAW].

34. *Id.* Methane has a global warming potential (GWP) of twenty-three, which means that it is twenty-three times more potent than CO_2.

35. *Id.* GWP of 296.

36. *Id.* GWP that ranges from 120 to 12,000. *Id.* Additionally, there are perflourocarbons (GWP 5700 to 11,900) and sulfur hexafluoride (GWP 22,200). *Id.; see also* U.S. ENERGY INFO. ADMIN., EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 2004, at 12 (2005), *available at* http://tonto.eia.doe.gov/FTPROOT/environment/057304.pdf.

37. GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 33, at 5.

38. *Id.*

39. *Id.* at 5–6.

40. *Id.*

41. Massachusetts v. EPA, 127 S. Ct. 1438, 1450–51 (2007). The EPA reasoned that the Clean Air Act was designed to target local air pollutants rather than those with a world wide circulation and presence. *Id.*

42. Arrhenius pointed to the work of mid-nineteenth century scientists like John Tyndall in his discussion of absorption of rays from the earth by gases in the air. Arrhenius, *supra* note 25, at 239. Tyndall's experiments with absorption of heat by various molecules led him to conclude that the earth's surface would be "held in the iron grip of frost" without the presence of such molecules in the atmosphere. Tyndall Centre for Climate Change Research, John Tyndall, FRS, DCL, LLD, http://www.tyndall.ac.uk/general/history/john_tyndall_biography.shtml (last visited Apr. 7, 2008).

43. Pioneers in the study of the effects of GHGs are Roger Revelle and Charles David Keeling, who conducted many of the initial measurements at Mauna Loa. GORE, *supra* note 32, at 30. Interestingly, Congress first called on federal agencies to cooperate with efforts to reduce air pollution around the same time. Act of Sept. 22, 1959, Pub. L. No. 86-365, 73 Stat. 646 (1959).

Hawaii.[44] Atmospheric study of CO_2 levels did not attract serious attention from the federal government until the late 1970s.[45] In 1978, Congress directed the President to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications."[46] President Carter sought the answer from the National Academy of Sciences.[47] The Academy's National Research Council responded by noting that if CO_2 continued to increase, significant climate change would result.[48] Finally, the Council noted that "[a] wait-and-see policy may mean [that we have waited] until it is too late."[49]

Almost ten years passed before Congress again addressed this issue by enacting the Global Climate Protection Act of 1987.[50] Within this Act, the EPA was required to propose to Congress a "coordinated national policy on global climate change."[51] Almost simultaneously, the Intergovernmental Panel on Climate Change, which was organized under the United Nations, published a report on the topic.[52] This report reached the conclusion that the effect of GHGs from human activities are contributing to a warming of the Earth's surface.[53]

D. Coordinating Emission Standards Worldwide

These conclusions were reached again in 1992, when President George H. W. Bush signed the United Nations Framework Convention on Climate Change, which was ratified unanimously by the Senate.[54] This treaty contained a pledge that the signatory nations would aim to reduce their GHGs to 1990 levels by the year 2000.[55] A key part of this

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44. GORE, *supra* note 32, at 38.

45. National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978).

46. *Id.* § 3, at 601.

47. JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT 2–3 (2004).

48. CLIMATE RESEARCH BOARD, NAT'L RESEARCH COUNCIL, CARBON DIOXIDE AND CLIMATE: A SCIENTIFIC ASSESSMENT viii (1979).

49. *Id.*

50. 15 U.S.C. § 2901 n. (2000).

51. Massachusetts v. EPA, 127 S. Ct. 1438, 1448 (2007) (quoting 15 U.S.C. § 2901 n. § 1103(b) (2000)).

52. *Id.*

53. *Id.* (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC SCIENTIFIC ASSESSMENT xi (John T. Houghton et al. eds., 1991).

54. GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 33, at 17; *Massachusetts*, 127 S. Ct. at 1448. This occurred in Rio De Janiero at the United Nations Conference on Environment and Development. GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 33, at 17.

55. *Id.* at 62.

agreement was the establishment of the Conference of the Parties (COP), which meets annually to implement the goals of the agreement.[56]

In 1997, the COP met in Kyoto, Japan, with the United States, led by Vice President Al Gore, actively participating.[57] The commonly known Kyoto Protocol made a sweeping change in the underlying agreement by making the original emissions pledges binding.[58] The primary criticism of the Kyoto Protocol, which called for mandatory target reductions in GHGs, was that it did not apply to developing nations such as China and India.[59] This criticism placed the Clinton administration in a difficult position as one of the primary architects of the agreement because the Senate unanimously passed a resolution opposing the Kyoto Protocol.[60] Specifically, the resolution directed that the United States could not enter into any agreement limiting GHGs unless the agreement applied equally to developing nations.[61] A sufficient number of nations have ratified the Kyoto Protocol for it to enter into force, with the United States and Australia being the only major industrialized countries who are not parties.[62] It is against this comprehensive backdrop that state attorneys general must work.

III. THE ROAD TO *MASSACHUSETTS V. EPA*

A. Authority Found . . .

The United States continues to monitor GHGs and President George W. Bush has sought voluntary reductions in GHG emissions.[63] This voluntary policy has also led to a change in interpretation at the EPA of its authority to regulate GHGs under the Clean Air Act.[64] General Counsel for the EPA under President Clinton had reached the conclusion that the EPA had the authority to regulate GHGs under the Clean Air Act.[65] Several groups asked the EPA to accept this authority through a petition asking the EPA to regulate GHG emissions from motor vehicles.[66]

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56. *Id.* at 18.
57. *See id.*
58. *Id.*
59. *Massachusetts*, 127 S. Ct. at 1449.
60. *Id.*; *see also* GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 33, at 19.
61. GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 33, at 19.
62. *Id.*
63. *Id.*
64. *Id.* at 20.
65. *Id.* The opinion was drafted by the EPA's General Counsel, Jonathon Z. Cannon in 1998. *Massachusetts*, 127 S. Ct. at 1449. Cannon's successor reached the same conclusion when asked by a congressional committee two weeks after the rulemaking petition was filed. *Id.*
66. *Id.*; *see also* GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 33, at 20.

B. And Lost

In response, the EPA opened a comment period with regard to the rulemaking petition.[67] More than 50,000 comments were received by the EPA.[68] While the comment period was open, the White House sought another report from the National Research Council (NRC).[69] The NRC's report reached almost the identical conclusion as the IPCC's report reached when it convened in the early 1990s.[70] The EPA denied the rulemaking petition[71] and found that the Clean Air Act did not grant the EPA the ability to regulate emission of GHGs[72] and that even with the authority to regulate, it would be unwise to do so at the time.[73]

C. A Cause for Concern?

Two events have brought emissions concerns vis-à-vis energy to the forefront for virtually every American. The first was an energy crisis, which caused rolling blackouts throughout California beginning in the summer of 2000 and ending in 2001.[74] The second was the effect of Hurricanes Katrina[75] and Rita on oil production, distribution, and refining. Each of these events affected millions, as energy prices spiked in California and across the nation. Idaho was not immune from these price increases and after Hurricane Katrina saw itself with the second highest gas prices in the continental United States.[76] Idaho is particularly vulnerable to oil price volatility because a single pipeline serves the

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67. Control of Emissions from New and In-Use Highway Vehicles and Engines, 66 Fed. Reg. 7486–87 (Jan. 23, 2001).

68. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 59,924 (Sept. 8, 2003).

69. CLIMATE CHANGE SCIENCE, *supra* note 19, at vii.

70. *Id.* at vii–viii; *see also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC SCIENTIFIC ASSESSMENT (John T. Houghton et al. eds., 1991).

71. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,922.

72. *Id.* at 52,925–52,929; Memorandum from EPA General Counsel Robert Falricans to EPA Administrator, EPA's Authority to Improve Mandatory Controls to Address Global Climate Change Under the Clean Air Act (Aug. 28, 2003).

73. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929–52,931; *see also* Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

74. *See* Pub. Util. Comm'n of Cal. v. Fed. Energy Regulatory Comm'n, 462 F.3d 1027, 1040–43 (9th Cir. 2006).

75. Massachusetts v. EPA, 127 S. Ct. 1438, 1456 n.18 (noting that one of the affidavits in support of the Commonwealth's position presciently predicted the impact of Hurricane Katrina on New Orleans).

76. J. Robb & Marty Trillhaase, *Fair Treatment Makes Good Politics*, POST REG. (Idaho Falls, Idaho), Oct. 28, 2005, at A6.

southern part of the state.[77] Added to the impact of these events is a growing concern with regard to global warming or climate variability. The most pressing area of concern is the significance of human activity with respect to the acceleration of global warming.

D. Dominoes

Taken at face value, the impact of human-accelerated global warming appears to have a domino effect on a number of natural resource issues. For example, one of the predicted outcomes of global warming is that hurricanes, typhoons, and tornadoes will become more frequent and intense.[78] Weather extremes are not simply limited to storm events, but will also result in a pattern of broken weather norms through factors such as extreme summer heat.[79]

Dominoes continue to tumble when warming theory is applied to ecosystems. For example, California, like many western states, enjoys the benefits of hydropower, which relies on snow pack, reservoirs, and a series of dams to generate year round electricity.[80] Precipitation falls mostly in the winter and early spring, which means that the mountain snow pack forms part of the storage system and its gradual melt through spring and summer help to balance the system to meet year round demand, particularly in the dry summer.[81] As temperatures increase, more rain falls, which means snow pack decreases and the limited snow pack melts more quickly; this requires the reservoirs to draw down more quickly to hold the additional water, which results in less water in the summer when the demand is greatest.[82] A tumbling of the

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77. OFFICE OF THE ATTORNEY GEN., STATE OF IDAHO, REPORT ON POST HURRICANE KATRINA GASOLINE PRICES IN IDAHO 3 (2006).

78. *Massachusetts*, 127 S. Ct. at 1456 n.18; *see also* GORE, *supra* note 32, at 80–95.

79. GORE, *supra* note 32, at 73 (noting that 2005 was the hottest year on record); *id.* at 76–77 (showing a map of new record-high temperatures in the United States in 2005).

80. *See* CAL. CLIMATE ACTION TEAM, CAL. ENVTL. PROT. AGENCY, CLIMATE ACTION TEAM REPORT TO GOVERNOR SCHWARZENEGGER AND THE LEGISLATURE 35–36 (2006), *available at* http://www.climatechange.ca.gov/climate_action_team/reports/2006-04-03_FINAL_CAT_REPORT.pdf.

81. Noah Knowles & Daniel R. Cayan, *Potential Effects of Global Warming on the Sacramento/San Joaquin Watershed and the San Francisco Estuary*, 29 GEOPHYSICAL RES. LETTERS 38, 38 (2002).

82. *Id.*

dominoes outlined above is believed to be one of the causes[83] of the California Energy Crisis of 2001.[84]

E. Frustrations Peak

The EPA rulemaking began as an effort by nineteen private organizations[85] that filed the original petition on October 20, 1999.[86] Specifically, the petitioners asked the EPA to regulate motor vehicle emissions containing GHGs pursuant to section 202 of the Clean Air Act.[87] Following the EPA's denial of the petition to regulate these emissions, the petitioners were joined by state and local governments in a review of the EPA's order.[88] At the outset, the Court of Appeals for the District of Columbia noted that it had exclusive jurisdiction over nationally applicable regulations,[89] while the district courts would have jurisdiction over the citizen suits seeking to compel the EPA to act with regard to nondiscretionary acts.[90] The court concluded that the remedy petitioners were seeking was a regulation that would be national in scope and, therefore, section 7607(b)(1) was the appropriate paragraph under which to invoke jurisdiction.[91]

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83. Another cause was an interruption in the supply of natural gas to generators in southern California due to an explosion at an El Paso pipeline. And yet another of the causes is attributed to be a lack of creation of new power-generating facilities in light of a skyrocketing demand. *See* Shi-Ling Hsu, *Reducing Emissions From the Electricity Generating Industry: Can We Finally Do It?*, 14 TUL. ENVTL. L.J. 427, 455 n.134 (2001). The San Francisco Chronicle also has a chronology of the events, which can be found online at *Energy Crisis Overview: How We Got Here*, SFGATE, May 8, 2001, http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2001/05/08/lookhow.DTL.

84. *See* Robert Mayer, *Deregulation Unlikely to Cause Energy Problems Like California's, Officials Say*, DAILY TEXAN, Feb. 6, 2001, *available at* http://media.www.dailytexanonline.com/media/storage/paper410/news/2001/02/06/News/Deregulation.Unlikely.To.Cause.Energy.Problems.Like.Californias.Officials.Say-698302.shtml.

85. 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 of 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. Massachusetts v. EPA, 127 S. Ct. 1438, 1449 n.15 (2007).

86. *Id.* at 1449.

87. *Id.*

88. Massachusetts v. EPA, 415 F.3d 50, 51–52 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007); *see also* 42 U.S.C. § 7607(b)(1) (2000) (setting forth the procedure for a petition for judicial review).

89. *Massachusetts*, 415 F.3d at 53 (citing 42 U.S.C. § 7607(b)(1) (2000)).

90. *Id.* (citing 42 U.S.C. § 7604(a)(2) (2000)).

91. *Id.* at 53–54.

IV. STANDING IN SOLICITUDE

A. Standing by Another Name?

As anticipated, Article III standing was a threshold question before the D.C. Circuit as well.[92] Proof of standing requires the showing of three essential elements.[93] First, one must allege an invasion of a legal interest that is concrete and particular.[94] This particularity has been explained as requiring that the alleged injury affect the plaintiff in a "personal and individual way."[95] Second, there must be a traceable causal connection between the injury complained of and the conduct of the defendant.[96] Finally, standing requires that the injury is likely be addressed by a favorable decision from the court.[97] The burden on proving standing rests with the party invoking the court's jurisdiction.[98]

Additionally, the D.C. Circuit requires that the petitioner meet the same burden as a plaintiff moving for summary judgment to establish standing;[99] in other words, the elements must be supported by affidavit or other evidence.[100] The court in *Massachusetts* proceeded with the merits because it determined that there was sufficient overlap in the case between the statutory standing and merits inquiries.[101] In sum, the court determined that is was a "first of its kind" case and in following the statutory standing cases, assumed that the EPA had the statutory authority to regulate GHGs.[102]

After proceeding to the merits, the D.C. Circuit Court reached the opposite conclusion the United States Supreme Court reached. Namely, the court found that it had a duty to "uphold agency conclusions based on policy judgments" "when an agency must resolve issues 'on the frontiers of scientific knowledge.' "[103] The court's use of the phrase "frontiers of scientific knowledge" is particularly interesting because in essence the court noted there is not enough current knowledge about the issue to

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92. *Id.* at 54; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750–51 (1984).

93. *Lujan*, 504 U.S. at 560.

94. *Id.*; *Allen*, 468 U.S. at 756; Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740 n.16 (1972).

95. *Lujan*, 504 U.S. at 560 n.1.

96. *Id.* at 560; Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976).

97. *Lujan*, 504 U.S. at 560.

98. *Id.*; FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990); *Warth*, 422 U.S. at 508.

99. Sierra Club v. EPA, 292 F.3d 895, 899 (D.C. Cir. 2002).

100. *Id.* (quoting *Lujan*, 504 U.S. at 561).

101. Massachusetts v. EPA, 415 F.3d 50, 56 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

102. *Id.*

103. *Id.* at 58 (quoting Envtl. Def. Fund v. EPA, 598 F.2d 62, 82 (D.C. Cir. 1978)).

require the EPA to regulate.[104] However, the court was unwilling to find that the harm was not specific enough[105] and instead stretched to intertwine the merits and standing.[106] After reviewing the order of the EPA, the court determined "that the EPA Administrator properly exercised his discretion under [section] 202(a)(1) in denying the petition for rulemaking."[107]

B. Not Wrong, Just Different

The United States Supreme Court granted certiorari in *Massachusetts v. EPA*.[108] Interestingly, the Supreme Court considered the circuit court's determination of the standing question and reached the same conclusion with regard to proceeding to the merits of the case; however, it did so for altogether different reasons.[109] The only similarity between the two analyses was that both courts stressed the special position and interest of Massachusetts.[110] The Court noted: "It is of considerable relevance that the party seeking review here is a sovereign state and not, as was in *Lujan*, a private individual."[111] This statement, not unexpectedly, has been construed by some commentators to mean that absent intervention by the states, the original petition brought by nineteen private organizations would have been subject to more stringent standing requirements.[112]

C. The Unique Position of a State

The Supreme Court has recognized that states are not considered normal litigants for purposes of federal jurisdiction.[113] The Court in *Massachusetts* noted that states have "an interest . . . in all the earth

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104. *Id.*

105. *Id.* at 54–55. More interesting, Judge Sentelle wrote that the petitioners did not demonstrate the element of injury sufficient to establish standing under Article III, but then concurred in the judgment. *Id.* at 59 (Sentelle, J., concurring).

106. *Id.* at 55–56. Judge Randolph found that it was permissible to proceed because the standing and merits inquiries overlapped. *Id.*

107. *Id.* at 58.

108. 126 S. Ct. 2960 (2006).

109. Massachusetts v. EPA, 127 S. Ct. 1438, 1451–59 (2007).

110. *Id.* at 1454.

111. *Id.*

112. *E.g.*, Michael Sugar, Note, *Massachusetts v. Environmental Protection Agency*, 31 HARV. ENVTL. L. REV. 531, 542 (2007) ("[T]his creates a two-tiered standing framework, with a top tier for state attorneys general bringing actions and the second, lower tier for private plaintiffs and other groups that have no state backing."); *see also* Korsinsky v. EPA, 192 Fed. App'x. 71 (2d Cir. 2006) (holding that global warming and CO_2 emissions may cause future harm deemed too speculative to establish standing for a private plaintiff).

113. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

and air within its domain."[114] Although the language used by the Court is sweeping, this interest can be reasonably quantified as the public interest, under which a state attorney general can generally bring suit.[115] State sovereignty underlies both the public's interest in the earth and land, as well as the attorney general's duty to defend a state's natural resources.[116] Some have stretched this interest to calling the state attorney general "the [p]eople's lawyer."[117] But it is clear that the Court is considering the attorney general, through his representation of the state, to be representative of far more than just the citizens of the state.[118] Rather, a state's interests additionally encompasses certain elements—so-called quasi-sovereign interests[119]—that are separate and apart from any rights possessed by individual citizens with standing and, at least in *Massachusetts*, are dispositive for standing purposes.[120]

D. Unchallenged Injury and Causation

Interestingly, the Court accepted the affidavits submitted on behalf of the Commonwealth of Massachusetts without question.[121] Based upon this lack of contest, the Court found that global sea levels had risen between ten and twenty centimeters over the course of the twentieth century.[122] The Court then identified an injury based on the belief of a Massachusetts official that a "significant fraction of coastal property" will be permanently or temporarily lost.[123]

Two things are peculiar in this context. First, it seems odd that the Court is willing to recognize an injury that will occur "over the course of the next century."[124] Assuming the sea will encroach as predicted over the course of the next century, it seems fairly tenuous that the court is then able to link the rising seas to the decision of the EPA to regulate or not regulate automobile emissions.[125] But again, the Court found itself in a tight spot. Considering that the EPA was defending its position based

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114. *Massachusetts*, 127 S. Ct. at 1454 (quoting *Georgia*, 206 U.S. at 237).

115. *See, e.g.*, Bill Aleshire, Note, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187, 190–91 (2000).

116. This defense of state natural resources by the state attorneys general can be summed up as such: "I speak for the trees, for the trees have no tongues." DR. SEUSS, THE LORAX (1971).

117. Don LeDuc, *Michigan Administrative Law, October Term*, 1994–95, 13 T.M. COOLEY L. REV. 341, 371 (1996).

118. *See Massachusetts*, 127 S. Ct. at 1454.

119. *Id.* (citing *Georgia*, 206 U.S. at 237).

120. *Id.* at 1453–54 (citing *Georgia*, 206 U.S. at 237).

121. *Id.* at 1456. It seems odd that these affidavits would be before the Court in an unchallenged posture since a major portion of EPA's defense was "the uncertainty surrounding various features of climate change." *Id.* at 1463; *see also* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52, 922, 52,930–52,931 (2003).

122. *Massachusetts*, 127 S. Ct. at 1456.

123. *Id.*

124. *Id.*

125. *See id.* at 1456–57.

on the uncertainty surrounding climate change,[126] it was anathema that Massachusetts' affidavits regarding the impacts of climate change went unchallenged.[127] The EPA never challenged Massachusetts' claim that automobile emissions were causally linked to rising seas, which were slowly stealing the beaches of Massachusetts.[128] Thus, the Court had no alternative but to accept the claim.

The Court also recognized the limited scope of any impact that EPA regulation may have.[129] The Court acknowledged that any regulation would only impact approximately 6% of worldwide emissions.[130] Incrementally, however, the Court felt that this regulation would be worthwhile.[131] The Court acknowledged that small steps were better than no steps[132] and that state attorneys general were particularly well suited to pursue them by asking the EPA to regulate in the limited arena of automobile emissions.[133]

E. A Practical Result

In light of the seeming latitude[134] that the Supreme Court granted with respect to the states' ability to bring suit through their status as *quasi-sovereigns*, it would appear that this decision marks a significant departure from conventional standing requirements.[135] But reviewing the history of this case, as well as tangential case law,[136] the result was likely quite predictable. Attorneys general have long been recognized as possessing the power to bring suit to advocate against wrongs perpetrated on their citizens, particularly ones in which the harms would go

126. *Id.* at 1463.

127. *Id.* at 1456.

128. *Id.* at 1456–58.

129. *Id.* at 1457–58.

130. *Id.* at 1457.

131. *Id.* at 1457–58; *see also* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (holding that reforms may be made "one step at a time.").

132. *Id.* ("That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.").

133. This is the distinction between protecting citizens from federal application as opposed to seeking vindication of a right that has been granted by the government, in this case the right to have emissions regulated by the EPA. *Id.* at 1455 n.17.

134. *Id.* at 1466 (Roberts, C.J., dissenting). Chief Justice Roberts notes: "It is ironic that the Court today adopts a new theory of Article III standing for States without the benefit of briefing or argument on the point." *Id.*; *see also id.* at 1466 n.1.

135. *Id.* at 1453–54 (majority opinion).

136. *See, e.g.*, Kentucky *ex rel.* Hancock v. Ruckelshaus, 362 F. Supp. 360, 369 (W.D. Ky. 1973) (finding that, although preempted, the state attorney general had the right to bring suit on behalf of the people).

unaddressed.[137] Reviewing the posture of the parties and the lens through which the majority viewed the case, one could distill the outcome to one of "judicial common sense"[138] or "pragmatism."[139] One could read even further and surmise that the decision marked an appropriate check against agency power. To a limited degree, it also appears that the Court was also mildly influenced by external events.[140]

Although the Court does not state its reliance on common sense or that its decision is judicially pragmatic, it is clear that the states within *Massachusetts* were confronted with a "Hobson's Choice."[141] The states, pursuant to the Clean Air Act, had to look to the EPA for protection and were not seeking to enact their own regulation. This meant that the states were not seeking to avoid application of the Clean Air Act,[142] but rather were asserting their rights under the act.[143] The EPA had recently reversed itself and declared that it did not have the authority to regulate auto emissions.[144] This left the states in the odd situation in which they had no choice but to sue the EPA over its determination that it lacked the authority to promulgate rules.[145] Connecticut Attorney General Blumenthal recognized the frustration of this situation in 2005: "States often fill a gap where the federal government refuses to act."[146]

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137. *E.g.*, Iowa v. Scott & Fetzer Co., No. 81-362-E, 1982 WL 1874, at *4 (S.D. Iowa July 8, 1982); *see also* Tennessee *ex rel.* Leech v. Highland Mem'l Cemetary, Inc., 489 F. Supp. 65, 68 (E.D. Tenn. 1980) (upholding constitutionality of 15 U.S.C. § 15(c)).

138. State v. Santistevan, 143 Idaho 527, 529, 148 P.3d 1273, 1275 (Ct. App. 2006).

139. State v. Lynch, 796 P.2d 1150, 1158 (Okla. 1990).

140. *Massachusetts*, 127 S. Ct. at 1456 n.18 (noting that the MacCracken affidavit predicted ("eerily prescient") the devasting effect of Hurricane Katrina over a year in advance).

141. State v. Smith, 144 Idaho 482, ___, 163 P.3d 1194, 1200 n.4 (2007). ("A 'Hobson's Choice' is defined as 'an apparent freedom to take or reject something offered when in fact no such freedom exists; an apparent freedom of choice when there is no real alternative.' " (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1076 (Philip Babcock Gove ed., 1993))).

142. *See generally* Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923) (holding that a state cannot institute judicial proceedings on behalf of its citizens to protect them from federal statutes).

143. *See generally* Nebraska v. Wyoming, 515 U.S. 1, 22 (1995) (recognizing that a state is deemed to represent all its citizens and is presumed to speak in its citizens' best interests).

144. *See* GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 33, at 20; *supra* Part III.A–B.

145. *See generally Massachusetts*, 127 S. Ct. 1438.

146. Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335, 341 (2005) (comments of Richard Blumenthal, Attorney General of Connecticut). Attorney General Blumenthal continued, "The federal government has said it has no authority to act and that Congress has rejected efforts to cover this, given that CO2 is not an ambient air problem . . . ." *Id.* Attorney General Blumenthal's frustration was echoed by Maine Attorney General Stephen Rowe, who stated "I'm outraged by the federal government's refusal to list CO2 as a pollutant. In the state of Maine, we're at the end of the nation's tailpipe for pollutants." *Id.* at 342 (comments of Stephen Rowe, Attorney General of Maine).

F. For Foreseeable Reasons . . .

The Court was placed in an equally difficult position[147] with regard to the case before it. The *Massachusetts* decision could also be foreseen from an earlier case involving states and a request for regulation by the EPA. In *West Virginia v. EPA*,[148] two states, along with several businesses and regulatory entities, petitioned for review of the EPA's development of nitrogen oxide emission limits.[149] The D.C. Circuit Court addressed the standing issue and noted that the states were specifically prohibited from bringing the suit as *parens patriae* against the federal government.[150] The distinction is significant because a state attorney general acting to protect the citizens from the application or enforcement of federal statutes would be prohibited,[151] but the attorney general acting as the state to assert its right to federal government regulation is permitted.[152] The court found the states had standing, not through any analysis, but with the simple distinction that they were not suing as *parens patriae*; rather, "the states are suing as states."[153] The court did not use either "special solicitude" or "quasi-sovereign" to justify the special circumstances that a state may enjoy by virtue of statehood but simply stated as if it were an inescapable legal conclusion.

G. Quasi-Sovereigns

Comparing *West Virginia* with the outcome reached in *Massachusetts*, it seems clear that both courts are headed in the same direction but with different terminology.[154] The Court in *Massachusetts* went far-

147. Interestingly, the D.C. Circuit Court acknowledged the difficult position it found itself in when reviewing its options, which included (1) a special master, (2) a remand to the EPA, or (3) addressing the merits. Massachusetts v. EPA, 415 F.3d 50, 55–56 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

148. 362 F.3d 861 (D.C. Cir. 2004).

149. *Id.* at 864.

150. *Id.* at 868 (citing Md. People's Counsel v. Fed. Energy Regulatory Comm'n, 760 F.2d 318, 320 (D.C. Cir. 1985)). It is worth noting that none of these cases attribute standing to the attorney general's capacity to bring suit as *parens patriae*, but instead permit suit based on the theory of sovereignty or *quasi*-sovereignty. *Massachusetts*, 127 S. Ct. at 1455 n.17; *see also* Georgia v. Pa. R.R. Co., 324 U.S. 439, 447 (1945) (Court also making this distinction).

151. Massachusetts v. Mellon, 262 U.S. 447, 484–85 (1923).

152. Massachusetts v. EPA, 127 S. Ct. 1438, 1455 n.17 (2007).

153. West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004).

154. Professor Stevenson made note of this point as well, observing that at oral argument, Justice Kennedy asked whether Massachustts had "some special standing as a state." Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 5 n.18 (2007) (citing Transcript of Oral Argument at 14, *Massachusetts*, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 3431932. The response pointed the Court to *West Virginia*, but then the discussion drifted into another area. *Id.*

ther than that of the circuit court in *West Virginia* and found that the injury claimed was visited upon Massachusetts' quasi-sovereign interest in the coastal property that it owns.[155] As the majority opinion put it, the state "has alleged a particularized injury in its capacity as a landowner"[156] and was simply attempting "to assert its rights under the [Clean Air] Act."[157] Viewed from this perspective, the standing analysis in *Massachusetts* serves chiefly to remove any doubt that the limitation on suit against the federal government when a state sues in *parens patriae* capacity does not exist when the state sues to vindicate a quasi-sovereign interest.

H. Special Solicitude

The *Massachusetts* Court also referred to the need to give "special solicitude"[158] to protecting the state's quasi-sovereign interests under the "procedural right [under the Clean Air Act] to challenge the rejection of its rulemaking petition as arbitrary and capricious."[159] In light of the subsequent analysis, which applied the traditional injury-causation-redressability standing test, it is difficult to know the extent to which "special solicitude" played a pivotal role in the justiciability question. The use of the term, however, has sparked substantial discussion about the effect that the case will have on attorneys general. This discussion warrants an intensive look at the position of state attorneys general.

V. THE UNIQUE POSITION OF THE STATE ATTORNEY GENERAL

A. A Quick History

The position of attorney general is rooted in mid-thirteenth century England,[160] when King Edward II appointed William Langley in 1315.[161] The earliest attorneys general were labeled "the chief representative of the crown in the courts."[162] As the King's lawyer, the attorney certainly had to abide by the King's rule, but the office had an inherent independ-

155. *Massachusetts*, 127 S. Ct. at 1456 n.19. The Court goes on to list the beaches, parks, reservations, wildlife sanctuaries, and sporting and recreational facilities that the State owns, operates, and maintains. *Id.*

156. *Id.* at 1456.

157. *Id.* at 1455 n.17.

158. *Id.* at 1455.

159. *Id.* at 1444.

160. NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 4, at 3.

161. David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective On Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 142 (2002).

162. Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 268 n.4 (5th Cir. 1976) (quoting 6 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 457–61 (2d ed. 1971)).

ence given the breadth and volume of the issues he had to address.[163] Out of this independence, a responsibility for the public interest developed such that by the mid-eighteenth century this responsibility was an intrinsic duty of the attorney general.[164] This broadening of duties expanded as the office crossed the Atlantic and established itself within the colonies, which later became the states.[165] As states were added to the union, attorneys general were often part of the core territorial governments prior to statehood.[166] At statehood, many states incorporated the office into their constitution, while a few inserted the office by statute.[167]

B. Autonomy of the Attorney General

The broad discretion and independence of attorneys general survives to this day. In the vast majority of states, the attorney general is an independently elected officer.[168] This election by the people accords the attorney general with a degree of autonomy that can be difficult to quantify.[169] At a minimum, courts have found that the attorney general has a right to exercise "conscientious official discretion to enter into those legal matters deemed by him to involve the public interest, even

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163. *Id.* at 268.

164. Lynch, *supra* note 3, at 2002 n.12 (citing 12 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 305 & n.6 (1938)).

165. *See Shevin*, 526 F.2d at 268. The office was not limited to England either. For example, in Pennsylvania the attorney general position was created in 1643 "as an office within government of the area known as New Sweden." Pennsylvania Attorney General, History of the Office of Attorney General, http://www.attorneygeneral.gov/theoffice.aspx?id=170 (last visited Apr. 8, 2008). This position was filled by appointment by the King of Sweden. *Id.* William Penn continued the office after his arrival, and it has been in existence to the present. *Id.*

166. Idaho, for example, had a federally appointed attorney general, then one provided for by the territorial legislature, and finally one included within the executive branch of the Idaho Constitution. IDAHO STATE HISTORICAL SOC'Y, ORIGINAL SLATE OF TERRITORIAL OFFICERS, REFERENCE SERIES NO. 370 (1966); Act of Jan. 22, 1885, § 1, 1885 Idaho Sess. Laws 31, 31–32 (1885); IDAHO CONST. art. IV, § 1.

167. Forty-four states and Puerto Rico provide for the office of attorney general within their constitutions. NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 4, at 337–38.

168. Forty-three states elect their attorneys general. Idaho is one of them. In five, the attorney general is appointed by the Governor. The Attorney General of Maine is appointed by the legislature, while in Tennessee, the attorney general is appointed by the Tennessee Supreme Court. Washington D.C. also has an attorney general who is appointed by the Mayor.

169. One area of uncertainty is who holds the final say within state litigation. For example, in *Feeney v. Commonwealth*, the court found that the attorney general possessed the ultimate authority over litigation. 366 N.E.2d 1262, 1266–67 (Mass. 1977). But in *People ex rel. Deukmejian v. Brown*, the court found that the governor possessed the ultimate authority. 624 P.2d 1206, 1209 (Cal. 1981).

though not expressly authorized by statute."[170] This discretion often has evolved from a natural progression of the office's creation in a state constitution,[171] with a caveat that duties may be provided for by law,[172] but necessarily includes those duties that existed with the office's creation under the English common law.[173] In sum, the duties of the attorney general, with regard to the public interest, involve those duties the attorney general sees fit to exercise in the absence of a statutory limitation of those duties.[174]

In simplest terms, as the chief legal officer of the state, the attorney general has the power to initiate any legal proceedings necessary to protect the interests of the state.[175] Although the Supreme Court did not discuss the public interest duty of the state attorneys general, it is clear that the states' representation of the public interest weighed heavily on the minds of the majority.[176] This broad reading of the public interest may be a signal that attorneys general will seize upon to advance the interests of their citizens and spur[177] the federal government[178] and

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170. State *ex rel.* Shevin v. Yarborough, 257 So. 2d 891, 895 (Fla. 1972) (Ervin, J., concurring).

171. *See supra* note 167.

172. For example, the Idaho Constitution provides for the office of attorney general in Article IV, § 1 with the duties to be prescribed by law:

> The executive department shall consist of a governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general and superintendent of public instruction, each of whom shall hold his office for four years beginning on the first Monday in January next after his election, commencing with those elected in the year 1946, except as otherwise provided in this Constitution. The officers of the executive department shall, during their terms of office, reside within the state. Their official office shall be located in the county where the seat of government is located, there they shall keep the public records, books and papers. They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law, provided that the state controller shall not perform any post-audit functions.

IDAHO CONST. art. IV, § 1.

173. "The Attorney General inherited many powers and duties from the King's Counsellor at Common Law . . . ." *Yarborough*, 257 So. 2d at 893; *see also* Illinois v. Bristol-Myers Co., 470 F.2d 1276, 1278 (D.C. Cir. 1972); D'Amico v. Bd. of Med. Exam'rs, 520 P.2d 10, 20 (Cal. 1974); State *ex rel.* Patterson v. Warren, 180 So. 2d 293, 299 (Miss. 1965); State *ex rel.* Carmichael v. Jones, 41 So. 2d 280, 284 (Ala. 1949). *See generally* John Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1 (1955).

174. *See, e.g.*, Mobil Oil Corp. v. Kelley, 353 F. Supp. 582, 586 (S.D. Ala. 1973), *aff'd*, 493 F.2d 784 (5th Cir. 1973); *In re* Intervention of the Attorney General, 40 N.W.2d 124, 126 (Mich. 1949); Appeal of Margiotti, 75 A.2d 465, 466 (Pa. 1950), *repudiated on other grounds* by Commonwealth v. Schab, 383 A.2d 819 (Pa. 1978); State *ex rel.* Davis v. Love, 126 So. 374, 376–77 (Fla. 1930).

175. *See, e.g.*, *Carmichael*, 41 So.2d 280; Morley v. Berg, 226 S.W.2d 559, 566 (Ark. 1950); *D'Amico*, 520 P.2d at 20; Gandy v. Reserve Life Ins. Co., 279 So. 2d 648, 649 (Miss. 1973); Bonniwell v. Flanders, 62 N.W.2d 25, 28 (N.D. 1953); Agey v. Am. Liberty Pipe Line Co., 172 S.W.2d 972, 974 (Tex. 1943).

176. Massachusetts v. EPA, 127 S. Ct. 1438, 1454–59 (2007).

177. *Id.* at 1464 (Roberts, C.J., dissenting) ("Apparently dissatisfied with the pace of progress on this issue in the elected branches . . . .").

businesses into action more quickly.[179] At a minimum, the Supreme Court appears to have invited states to pressure agencies to regulate in a number of settings.[180]

C. A Cautious Approach

It would be easy to assume that attorneys general would seize this invitation, but there are a number of factors that must be weighed by each attorney general. At least one attorney general acknowledged that there is an increasing ability for attorneys general to interject themselves into issues of national importance due to a perceived abdication of power by the federal government.[181] But this does not mean that attorneys general will view this as a mandate to engage the federal government in litigation.[182] Attorneys general are usually confronted with significant demands on their limited resources, which can quickly become overtaxed when confronted with the demands of complex multistate litigation such as the *Massachusetts* case.[183]

D. A Rush to the Courthouse?

At least one commentator seems to think that the creation of a "special solicitude"[184] category of standing will result in fifty state attorneys general joining the EPA Administrator as regulators.[185] Additionally, he concludes that the creation of the "special solicitude" rule will completely alter the landscape of the office of state attorneys general

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178. Professor Dru Stevenson makes the point that now the prerogative to regulate now rests not with a single administrator of the EPA, but with the Administrator and fifty-plus attorneys general. Stevenson, *supra* note 154, at 63–64, 69. This will in turn likely create more regulation and may even alter the relatively predictable trajectory of rulemaking. *Id.*

179. *Id.* at 64.

180. *Id.* at 63.

181. *See* Symposium, *supra* note 146, at 338 (comments of Richard Blumenthal, Attorney General of Connecticut).

182. As noted earlier, attorneys general were not united in *Massachusetts*. They appeared in support of the EPA as well as Massachusetts. *See* NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 4.

183. Maine Attorney General Steven Rowe discussed his non-joinder in a 2005 Symposium, noting (1) that the case was resource intensive and that he had only seven attorneys in his air resource division who were already involved in other suits, (2) that his first priority as Attorney General is defensive litigation and enforcement of state environmental laws, and (3) that he foresaw large out-of-pocket costs for the State. Symposium, *supra* note 146, at 342–43 (comments of Stephen Rowe, Attorney General of Maine). In sum, all of the above issues must be addressed before Rowe felt he could consider Maine being a plaintiff in an interstate suit. *See id.*

184. Massachusetts v. EPA, 127 S. Ct. 1438, 1466–68 (2007).

185. Stevenson, *supra* note 154, at 68.

from candidate selection to cooperation and competition with their counterparts.[186] These predictions appear premature at best. As illustrated below, although some attorneys general appear willing to probe the bounds of "special solicitude,"[187] subsequent decisions have thus far not recognized a relaxed standing rule where states assert quasi-sovereign interests. Aside from likely judicial reluctance to re-fashion standing principles without more definitive guidance from the Supreme Court, it is hardly clear that a large proportion of the attorneys general either will desire or will have the opportunity to argue for expanded Article III standing. Several recent cases lend credence to the proposition that *Massachusetts* will not serve to open the federal courthouse door to broad-based environmental degradation claims by states.

VI. SOLICITUDE CHECKED

A. Connecticut Challenges Electricity Generation Emissions

While *Massachusetts* was pending, the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin brought suit against a number of electric utilities under a public nuisance theory to abate global warming in *Connecticut v. American Electric Power Co.*[188] Although the state attorneys general advanced a legal theory that was simple in its application, namely public nuisance law, the court quickly identified the issue as far more complex.[189] The state attorneys general likened their case to one in which garbage was dumped into the ocean polluting state beaches[190] and another where noxious gases were released that threatened forests, orchards, and crops.[191] The court resisted the simplification of the issues posed and instead assessed the ramifications of the relief requested by the state attorneys general.[192]

In sum, the state attorneys general were asking the court to assume the duties of Congress, the President, and even the EPA; that is, to develop a cap on emissions, a schedule for implementation, balance

186. *Id.* at 74.

187. *See* Symposium, *supra* note 146, at 341–42 (comments of Richard Blumenthal, Attorney General of Connecticut) (discussing global warming, public nuisance law, and the general federal refusal to act within the area).

188. 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

189. *Id.* at 272.

190. *Id.* at 272 n.9 (citing New Jersey v. New York City, 283 U.S. 473, 476–77 (1931)).

191. *Id.* (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 236 (1907)).

192. *Id.* at 272.

these determinations with the global climate change negotiations, and make several other determinations.[193] The other dilemma posed to the court was that the plaintiff states were placing a miniscule piece of a global puzzle in front of the court for a determination.[194] The complaint alleged that the defendants produced 10% of all CO_2 emissions within the United States.[195] This 10% needs to be applied to the backdrop of global CO_2 emissions, of which 22% of the worldwide contributions are attributable to the United States.[196] Assuming that these numbers are accurate, this means that the state attorneys general sought to have the court impose limits and standards on those responsible for 2.2% of the emissions worldwide[197] without any means of limitation on the other 97.8%. Quantifying the injury in this manner makes it virtually impossible for the court to either trace the causation of any injury suffered by the states[198] or to provide a remedy because only a trace factor is before it.

The court predictably viewed this as a non-justiciable political question, which should be resolved through the political branches as opposed to the judiciary.[199] In light of the *Massachusetts* decision, it would have been interesting to see if the outcome of this case would have been different had the EPA created CO_2 emission standards that the companies in *Connecticut* were not meeting. This case is useful as an example of just how difficult it is to address the intertwined issues of global climate change and its causes.

B. Illinois Heads Out of State

In *People ex rel. Madigan v. PSI Energy Inc.*, the Attorney General of Illinois attempted to similarly regulate the emissions of a power plant located in Indiana by filing suit in an Illinois state court.[200] Interest-

193. *Id.* at 272–73.

194. *Id.* at 273.

195. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 297 (2005) (citing *Connecticut*, 406 F. Supp. 2d at 268).

196. *See* ENERGY INFO. ADMIN., EMISSIONS OF GREENHOUSE GASES IN THE U.S. 2006, at 6 (2007), *available at* http://www.eia.doe.gov/oiaf/1605/ggrpt/pdf/0573(2006).pdf. Adding to the difficulty, CO_2 makes up approximately 82% of global GHG emissions, and the case did not address the other GHGs, many of which are far more destructive than CO_2. *See supra* notes 34–36 and accompanying text.

197. Merrill, *supra* note 195, at 297. Although Merrill's calculations result in an estimate of 2.5% of worldwide emissions, that estimate is based upon a 2004 measurement of 25% for the United States' world contribution. *See id.* at 297 n.22. The 2.2% result stated in this article is based upon a 2006 measurement of 22%. *See* ENERGY INFO. ADMIN., *supra* note 196, at 6.

198. *Id.*

199. *Connecticut*, 406 F. Supp. 2d at 274.

200. 847 N.E.2d 514 (Ill. App. Ct. 2006), *appeal denied*, 852 N.E.2d 248 (2006).

ingly, standing was not discussed in this decision, most likely because the case was brought in state court by the state attorney general against a business from which two plume inversions had crossed the border from Indiana to Illinois.[201]

At least for argument's sake, the Illinois Attorney General could direct the court to two distinct plumes that caused citizens of Illinois direct harm.[202] But the court did consider preemption based on both an apparent conflict between the Illinois Environmental Protection Act[203] and the Clean Air Act.[204] Not surprisingly, the court found the Illinois Attorney General's suit was preempted by the Clean Air Act through a favorable comparison to the Clean Water Act based on the acts' similar structures.[205] Although the Clean Air Act permits states and the EPA to make enactments to limit emissions, restrict pollution through technology, and institute other control measures,[206] the caveat is that states are limited to such measures only within their borders.[207]

Interestingly, Illinois likely would have been successful if it had approached this suit differently. Section 7604 of the Clean Air Act permits a state to file suit in federal court against an out-of-state source, or even another state, to address Clean Air Act violations.[208] Instead, Illinois chose to file suit in its own state court, thereby giving PSI Energy a viable preemption defense, particularly in light of the likelihood that PSI would face multiple and conflicting regulations if both Indiana and Illinois were permitted oversight.[209] Added to the multiplicity of regulation was a heightened risk of confrontation between Illinois and Indiana and what could be interpreted as a move by Illinois to propel itself as the regional regulator of out-of-state sources.[210] Weaving *Madigan* into the fabric of *Massachusetts* and *Connecticut*, it seems that the courts are far more receptive to assisting the attorneys general to assert the rights of their states as opposed to becoming regulators.

C. California Takes on the Automakers

A further example of state attorneys general seeking to become regulators occurred in *California v. General Motors Corp.*,[211] when the

201. *Id.* at 515–16.

202. *Id.* at 516. "Shortly after the July 21 plume reached Mt. Carmel, numerous residents complained of burning eyes, scratchy throats, and coughing caused by the thick haze covering their town." *Id.*

203. 415 ILL. COMP. STAT. ANN. 5/1 to /7.5 (West 2004 & Supp. 2007).

204. *Madigan*, 847 N.E. 2d at 516; *see also* Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000 & Supp. 2005).

205. *Id.* at 516–17 (citing Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000 & Supp. 2005)).

206. 42 U.S.C. §§ 7410, 7413(a)(2) (2000).

207. *Id.* § 7410(a)(2)(D).

208. *Madigan*, 847 N.E.2d at 517.

209. *Id.*

210. *Id.* at 517 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496–97 (1987)).

211. No. CO6-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

Attorney General of California sued the automobile manufacturers[212] under two public nuisance theories—one under federal common law and the other under California law.[213] This suit, on its face, appears similar to the case presented in *Connecticut*, with the difference being that California sued all of the automobile manufacturers as opposed to six power plants responsible for a minute amount of emissions.[214] The automakers responded with a motion to dismiss, arguing that California was seeking "to create a new global warming tort that has no legitimate origins in federal or state law."[215]

The Attorney General of California relied on an expansive reading of *Massachusetts* to support its theory that it was permitted to pursue an "interstate global warming damages tort claim."[216] The court, however, returned to the limited holding in *Massachusetts* for instruction and noted that *Massachusetts* simply confirmed a state's right to challenge a federal agency's decision.[217] The court reasoned in great detail along themes similar to those relied upon by the court in *Connecticut*, noting the comprehensive nature of regulation within both the Environmental Policy and Conservation Act and the Clean Air Act.[218] Specifically, the court noted that there are threshold policy questions that must be answered before a court could even begin to make the appropriate judicial determinations.[219] In sum, *Connecticut*, *California*, and *Madigan* may be ahead of the curve with regard to the significant national policy decisions that remain to be made.

D. A Ray of Light?

In spite of the seemingly sweeping pronouncement with regard to standing in *Massachusetts*, courts have not given state attorneys general a free pass with regard to the threshold determinations confronting global warming lawsuits. But another decision may provide further direction. In *Pakootas v. Teck Cominco Metals, Ltd.*, the Washington Attorney General joined a suit against Teck Cominco Metals, Ltd., a Ca-

212. Defendants included General Motors Corp., Toyota, Ford Motor Co., Honda Motor Co., Daimler Chrysler Corp., and Nissan. *Id.* at *1.

213. *Id.* at *2.

214. *Id.*; Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

215. *California*, 2007 WL 272687, at *2.

216. *Id.* at *12.

217. *Id.*

218. *Id.* at *8–10.

219. *Id.*

nadian mining company under CERCLA,[220] to enforce an EPA order regarding a slag pile located within the United States.[221]

Teck operated a lead-zinc smelter in British Columbia, Canada.[222] Teck disposed of the wastes from this smelter into the Columbia River,[223] which originates in Canada and runs through Washington, forming the border between Oregon and Washington while winding its way to the Pacific Ocean. Although the waste originated in Canada, it was carried downstream and deposited in slower moving water areas, such as Lake Roosevelt.[224] Teck argued that CERCLA could not be applied to it because such application would be extra-territorial, meaning CERCLA could not be applied outside the borders of the United States.[225]

The court focused on where the waste was located and determined that the location, within the United States, was a "facility" as that term is defined by CERCLA.[226] The definition of facility was critically important in this case because its determination served as the tipping point for determining whether CERCLA was being applied extra-territorially.[227] Notably, facilities are generally defined as only requiring a showing that a hazardous substance was placed or somehow located there.[228] Even though the hazardous materials had originated in Canada, which is outside the borders of the United States, the fact that it had migrated downstream into the United States brought it under the jurisdiction of CERCLA.[229]

E. Looking to the Future

Although *Pakootas* differs from the other cases within this article because it deals with CERCLA as opposed to emissions under the Clean Air Act, it is applicable to the issue of CO_2 emissions. The *Pakootas* distinction regarding origination as opposed to either downstream or downwind migration of the pollutants could have far reaching ramifica-

220. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2000).

221. 452 F.3d 1066, 1068–70 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 858 (2008).

222. *Id.* at 1069.

223. *Id.*

224. *Id.* at 1070. Lake Roosevelt is the lake located behind Grand Coulee Dam. Bureau of Reclamation, United States Department of the Interior, Columbia Basin Project Washington, http://www.usbr.gov/dataweb/html/columbia.html (last visited Apr. 8, 2008). Started in 1933 as a Public Works Project under President Franklin D. Roosevelt's administration, the dam is the largest concrete structure in the United States and the third largest hydroelectric facility in the world. *Id.* Lake Roosevelt contains nine million acre feet of water. *Id.*

225. *Pakootas*, 452 F.3d at 1073–74.

226. *Id.* at 1074.

227. *Id.*

228. 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1360 (9th Cir. 1990) (citing 42 U.S.C. § 9601(9) (2000)).

229. *Pakootas*, 452 F.3d at 1082.

tions as state attorneys general continue to look for solutions to climate change.[230] At the outset of this article, one of the primary concerns regarding CO_2 is that it is a global emission with a relatively long life as opposed to other airborne pollutants. This means that there may be an opportunity to bring an action against power plants located in China or India, for example, to compel them to have enforceable standards from which they currently enjoy an exemption.

VII. A FEW RECOMMENDATIONS FOR ATTORNEYS GENERAL

State attorneys general have demonstrated a willingness to address this difficult issue, but their success has not matched their passion. Guidance can be gleaned from the attempts by attorneys general to litigate solutions to global warming. First, attorneys general must recognize that they are at their strongest when they form groups that address significant pieces of the puzzle. Second, attorneys general need to be able to identify both the harm to their state and the cause of the harm with some degree of specificity. Third, attorneys general should resist the temptation to drive change within global warming law through novel legal theories. Finally, attorneys general should look for opportunities to improve upon their ability to build consensus by looking outside their ranks for partners.

A. Big Picture Solutions Instead of Regional Factions

A theme that resonates through the cases addressing emissions and climate change is the global impact of such matters. This theme is particularly applicable to attorneys general as they consider how to best address the issue. Attorneys general should be leery of positioning themselves as a lone voice[231] or as part of a regional enclave addressing a tiny sliver[232] of the problem. Instead, attorneys general should use the Tobacco Master Settlement as an example and harness the presence and expertise that can be brought to bear when thirty or more attorneys general from across the United States are aligned with a common

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230. But the Pakootas decision also carries a debate over the political overtones of agency action or inaction, as seen in the EPA's decision in 2006 to rescind a cleanup order that was issued in 1999 against Teck Cominco. Kevin Graman, *Supreme Court Sides with Colvilles; Tribe Can Pursue Case Against Teck Cominco*, SPOKESMAN REVIEW, Jan. 8, 2008, at A1, *available at* http://www.spokesmanreview.com/breaking/story.asp?ID=13062.

231. People *ex rel.* Madigan v. PSI Energy Inc., 847 N.E.2d 514, 515–16 (Ill. App. Ct. 2006) (where the Illinois Attorney General alone sued an owner of an out-of-state coal-fire and electric power generating plant and sought to enjoin its plume emissions).

232. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 273 (S.D.N.Y. 2005) (noting the significant policy determinations that must be made, particularly whether the societal costs of emission reduction should be "borne by just a segment of the electricity-generating industry" and their consumers).

goal.[233] In order to properly address the reach of emissions as they impact climate change, big-picture solutions should be pursued.

B. Connect the Dots

The Supreme Court noted in *Massachusetts* that the affidavits showed a causal connection between automobile emissions and rising seas.[234] Moreover, the Court identified that even though automobile emissions account for just 6% of the global emissions, if automobile emissions were the only contributors then the United States would still be the third highest emitter of CO_2 worldwide.[235] In other words, the affidavits linking harm with causation were the lynchpin of *Massachusetts* because it provided the Court with a sufficient basis upon which to causally connect the dots.[236]

Given the breadth of global warming and its impacts, attorneys general sometimes struggle with causal linkage in these types of cases, with the courts noting the difficulty in assessing the harm leads to an uncertain remedy.[237] Adding to this difficulty is that the efforts of the attorneys general have far reaching implications on our way of life. For example, attorneys general bringing suit against the automotive industry or the electrical generation industry requires a significant balancing of efforts to reduce greenhouse gas emissions with the attendant social utility of electricity and automobiles.[238] Based on both the far reaching linkage of CO_2 emissions worldwide and the societal need for consumables the produce CO_2, this balancing test is critically important.[239] Ad-

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233. *See* Grand River Enters., Ltd. v. Pryor, 425 F.3d 158, 162 (2d Cir. 2005) (noting that forty-six states, along with the District of Columbia and five United States territories, entered into the Tobacco Master Settlement Agreement).

234. Massachusetts v. EPA, 127 S. Ct. 1438, 1457–58 (2007).

235. *Id.* at 1457.

236. An interesting case to watch with regard to causation involves an Alaskan coastal town, Kivalina, that is slowly eroding into the sea. Current predictions estimate that the town could be underwater within ten years. In response, the City of Kivalina has sued Exxon Mobil, eight other oil companies, fourteen power companies and a coal company. The suit has been filed primarily as a federal common law public nuisance action and also alleges a conspiracy theory among the corporate actors. Felicity Barringer, *Flooded Village Files Suit, Citing Corporate Link to Climate Change*, N.Y. TIMES, Feb. 27, 2008, at A16.

237. *See, e.g.*, *Connecticut*, 406 F. Supp. 2d at 272 ("Plaintiffs ask this Court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage."); California v. Gen. Motors Corp., No. CO6-05755, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) ("Such an exercise would require the Court to create a quotient or standard in order to quantify any potential damages that flow from Defendants' alleged act of contributing thirty percent of California's carbon dioxide emissions.").

238. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 847 (1984).

239. As an example, wind powered electricity generation has no CO_2 emissions, but it has generated significant litigation. For an excellent overview of this topic, see Brown & Escobar, *supra* note 17, at 489. This puts the balancing aspect in perspective for state attorneys general to weigh prior to bringing suit—as in what are the impacts on the citizens of my state as well as neighboring states? This is yet another reason state attorneys general should resist small picture solutions.

dressing these issues also impacts the attorneys general's ability to form the necessary groups because these actions may impact different states and their interests in vastly different ways.

C. Pursue Orthodox Litigation

As discussed above, attorneys general are at their strongest when they form broad groups addressing well-established harms and do so in an orthodox manner. For example, in *Massachusetts* attorneys general were successful when challenging agency action, in other words, asserting their rights and dissatisfaction with federal inaction.[240] State attorneys general were also successful when they aligned with the EPA, as demonstrated in the *Pakootas* case, and sought enforcement of an order that directly affected their state.[241] In *Texas v. United States*,[242] the Fifth Circuit Court of Appeals found that the state attorney general had standing to challenge a Department of Interior decision, which would have forced the state to participate in a process that it was challenging as invalid.[243] Although the court did not cite *Massachusetts v. EPA*, its reasoning was identical—namely that Texas' suit was the only meaningful opportunity for the state to challenge the Interior's determination.[244]

Finally, this point was most recently reinforced in *New Jersey v. EPA*.[245] New Jersey and fourteen other states challenged an EPA decision to de-list coal- and oil-fired electric utility steam generating units (EGUs) from the list of regulated sources under section 112 of the Clean Air Act.[246] The D.C. Circuit upheld the states' challenge to the delisting by employing a straightforward statutory analysis,[247] again reinforcing the point that states are most effective when they work together[248] within the pre-existing judicial framework.

Attorneys general should also make sure that they are advancing the strongest legal arguments available on behalf of their citizens. One of the benefits of litigating as the attorney general is that it carries with it an inherent degree of credibility based upon the stature of the office. Additionally, courts generally grant an attorney general's legal opinion

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240. *See* 127 S. Ct. at 1438.

241. Pakootas v. Tech Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006).

242. 497 F.3d 491 (5th Cir. 2007).

243. *Id.* at 497–98.

244. *Id.*

245. 517 F.3d 574 (D.C. Cir. 2008).

246. *Id.* at ___.

247. *Id.* at ___.

248. It is worth noting that a significant number of states again supported the EPA action. *Id.* at ___. This means that there is likely still significant work to be done to generate any semblance of a working group like that seen in *Grand River Enterprises*.

some degree of persuasiveness.[249] Based on this deference, attorneys general should jealously guard the respect given their offices by only advancing the most legally sound arguments and suits.

Massachusetts clarifies that states will generally have standing when they are challenging federal agency action or inaction, which is in stark contrast to the difficulty states will face when they seek to insert themselves or the courts as the regulating entity. The sum of this line of reasoning is that state attorneys general enjoy their strongest legal position asserting their rights within the system,[250] as opposed to challenging it.

D. Look for Advantageous Partners

As demonstrated in *Pakootas*, at times the federal government can be a powerful ally.[251] State attorneys general have formed a strong working relationship with the Federal Trade Commission, which has increased the visibility and effectiveness of both entities.[252] Additionally, state attorneys general should look for opportunities to work with the regulating agencies to maximize the effect of their efforts.[253] The *Massachusetts* case provides a good example of how state attorneys general can craft appropriate public private partnerships to both identify and advance the public's interest.

A significant hurdle for state attorneys general when forming partnerships can be the political overtones associated with such partnerships. As indicated previously, attorneys general are elected in forty-three states and such elections necessarily carry with them the political ramifications of party affiliation.[254] *Massachusetts* is an example of how

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249. State *ex rel.* Adams v. Cadwalader, 174 A.2d 786, 787 (Md. 1961); Van Riper v. Jenkins, 45 A.2d 844, 845 (N.J. 1946).

250. Another excellent example of attorney general working within the system is illustrated in *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, in which a group of ten states and the District of Columbia successfully challenged NHTSA's rule setting Corporate Average Fuel Efficiency (CAFÉ) standards for light trucks. 508 F.3d 508 (9th Cir. 2007).

251. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006).

252. David J. Morrow, *Transporting Lawsuits Across State Lines*, N.Y. TIMES, Nov. 9, 1997, §3, at 1 (noting that state attorneys general have worked together so well that the F.T.C. has cross-deputized many of them).

253. An example is seen in *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, where Vermont enacted emissions regulations with respect to greenhouse gases that were challenged as preempted. 508 F. Supp. 2d 295 (D. Vt. 2007). The Court relied on *Massachusetts* to show that EPCA and the CAA overlapped, but were not in conflict and then went on to find that Vermont's emissions regulations were not preempted insofar as they relied on California's emission standards but with the caveat that if California's application for waiver were denied, then Vermont's would be preempted. *Id.* at 308–09. This case is currently pending on appeal in the Second Circuit. Environmental Law Institute, Safeguarding the Laws that Protect the Environment, http://www.endangeredlaws.org/case_green mountain.htm (last visited Apr. 8, 2008).

254. There are thirty-one attorneys general who list their party affiliation as Democrat (thirty-two including the District of Columbia) and nineteen Republican. *See* National

party affiliation can shape the affiliations that are forged in bringing suit.[255] At this time, it appears that much of the litigation with regard to global warming is being brought forth by a single party, which may inadvertently obfuscate the legitimate intentions and legal arguments of attorneys general. But many attorneys general have shown a willingness to put aside their differences to advance causes within the public's interest.[256] Although the political overtones are always present within an attorney general's work, most have shown a willingness to put them aside when the public interest requires it.

This means that attorneys general have the ability to rapidly band together to address significant issues, but they also have the ability to work with others in public private partnerships, as well as state-federal partnerships. An approach state attorneys general should consider involves bringing the regulating agencies to the table to identify steps that can be taken on the state and federal levels to address emissions and climate change. Attorneys general can equally reach out to the energy sector to identify technologies, measured steps, and quantifiable benchmarks to effectively address emissions and energy within the existing framework.

VIII. CONCLUSION

Following the decision in *Massachusetts*, President Bush issued an executive order calling for cooperation among the agencies to protect the environment with respect to GHG emissions from motor vehicles.[257] To date, the EPA has not enacted a rule addressing CO_2 emissions but thinks that the issue was addressed in the Energy Independence and Security Act of 2007.[258] This act also includes two requirements that the EPA likely perceives will address the emissions issue; the first increases the renewable fuel standards to thirty-six billion gallons and the second

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Association of Attorneys General, The Attorneys General, http://www.naag.org/attorneys_general.php (last visited Apr. 8, 2008).

255. For example, the suit was brought by predominately Democratic attorneys general, and the EPA's position was supported by predominantly Republican attorneys general. Massachusetts v. EPA, 127 S. Ct. 1438, 1446 n.2, 1447 n.5 (2007); National Association of Attorneys General, *supra* note 254.

256. Again, the Tobacco Master Settlement Agreement is a good example as it involves forty-six states. Grand River Enter. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 162 (2d Cir. 2005). Another is the recent agreement between MySpace and the Attorneys General, which included forty-nine state attorneys general. Anne Barnard, *MySpace Agrees to Lead Fight to Stop Sex Predators*, N.Y. TIMES, Jan. 15, 2008, at B3.

257. Exec. Order No. 13,432, 72 Fed. Reg. 27,717 (May 14, 2007).

258. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified in scattered sections of 42 and 49 U.S.C.).

implements aggressive CAFÉ standards for cars and light trucks.[259] At this point, even in light of the *Massachusetts v. EPA* decision,[260] it appears that state attorneys general are faced with the prospect of continuing litigation regarding EPA's responsibilities with regard to automobile emissions.[261]

Attorneys general enjoy a unique position, both within our government and within the legal system. With that unique position attends significant responsibility for the attorney general as they represent the state, the public interest, and virtually everything in between. This responsibility includes a duty to not rush to the courthouse to solve every wrong as a legal Lone Ranger,[262] but necessarily includes a duty to work within our governmental systems and with one another. As attorneys general continue to address global warming's impact on their states and other pressing problems, it is incumbent upon them to form strong coalitions addressing significant segments of the problem through orthodox causally connected litigation, and involving groups beyond just the ranks of attorneys general. Proceeding in this manner should lead to enhanced "special solicitude" for both states and their attorneys general as they continue to address climate change.

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259. *Id.* Additionally, the EPA denied California's request for a Clean Air Act waiver under its authority to seek a waiver based upon its special status. This will likely have a ripple effect as Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington have also adopted California's standard and the governors of Arizona, Colorado, Florida, and Utah have indicated that they were planning to adopt California's standards. John M. Broder & Felicity Barringer, *EPA Says 17 States Can't Set Greenhouse Gas Rules for Cars*, N.Y. TIMES, Dec. 20, 2007, at A1. On January 2, 2008, California, along with fifteen other states, filed suit against the EPA. Felicity Barringer, *California Sues EPA Over Denial of Waiver*, N.Y. TIMES, Jan. 3, 2008, at A14. This case may prove to be of even greater significance in the context of state based emissions solutions than the *Massachusetts* case based on the alignment of states and the interests involved.

260. Recently, the same coalition filed a new petition in the D.C. Circuit Court demanding that the EPA either regulate or demonstrate why regulation is unnecessary. Felicity Barringer, *Group Seeks EPA Rules on Emissions from Vehicles*, N.Y. TIMES, Apr. 3, 2008, at A16.

261. *See* Barringer, *supra* note 259.

262. The Lone Ranger was a popular radio show created by George Trendle and Fran Striker. It debuted in 1933, and the last new episode appeared in 1954. It was also a television show. Interestingly, the Lone Ranger lived by a creed with began, "I believe . . ." and included: "In being prepared physically, mentally, and morally to fight when necessarily for that which is right."