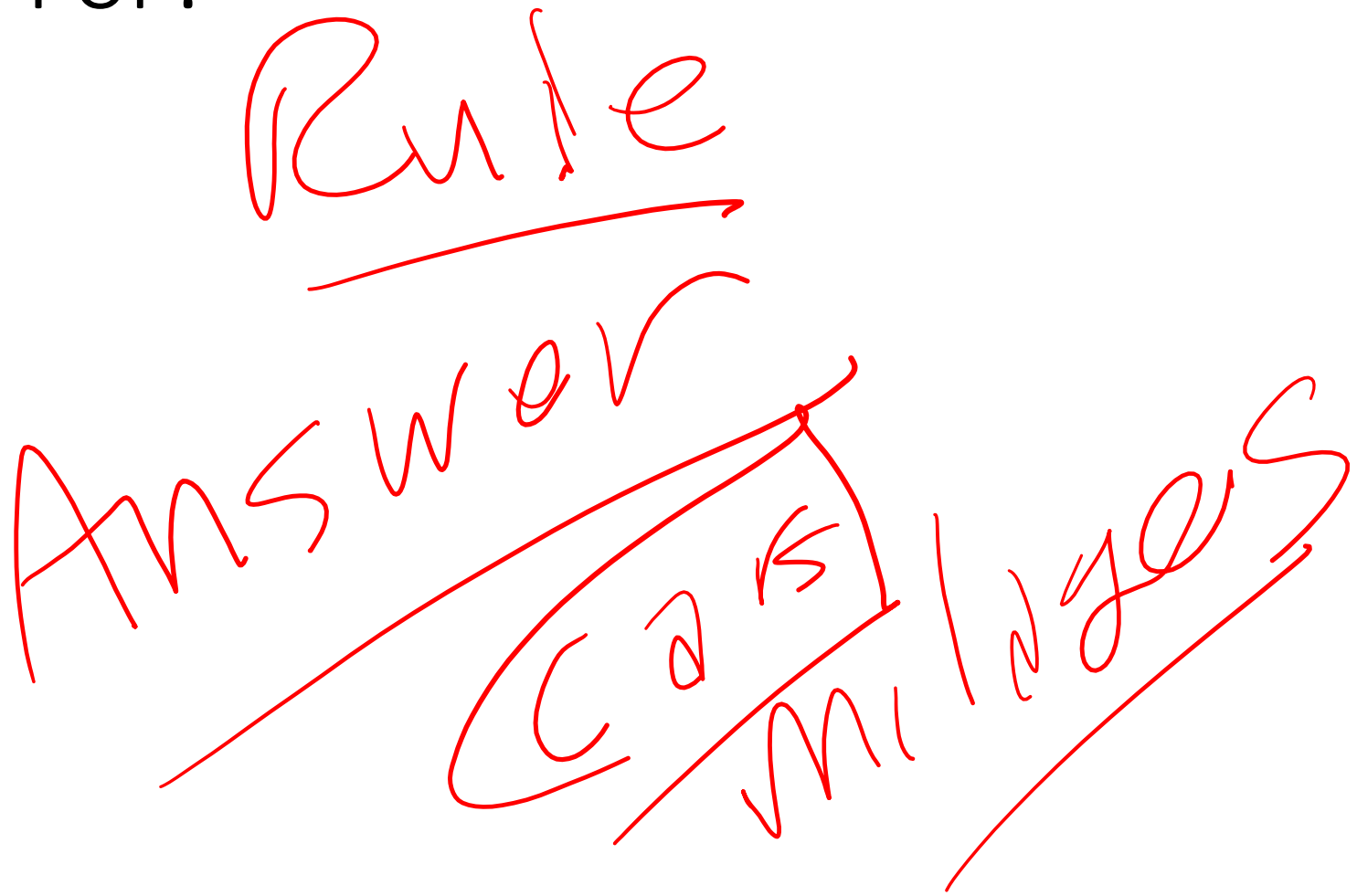
Massachusetts v. E.P.A., 127 S.Ct. 1438 (2007)

Review of Standing and Interpretation of the CAA

Brief Review of Standing

Key Question- What are the Petitioners Asking For?



What did *Lujan* Require for Standing in a Procedural Rights Case?

- There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.
- Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Does Petitioner have to Prove EPA Would Issue a Rule if its Prevails?

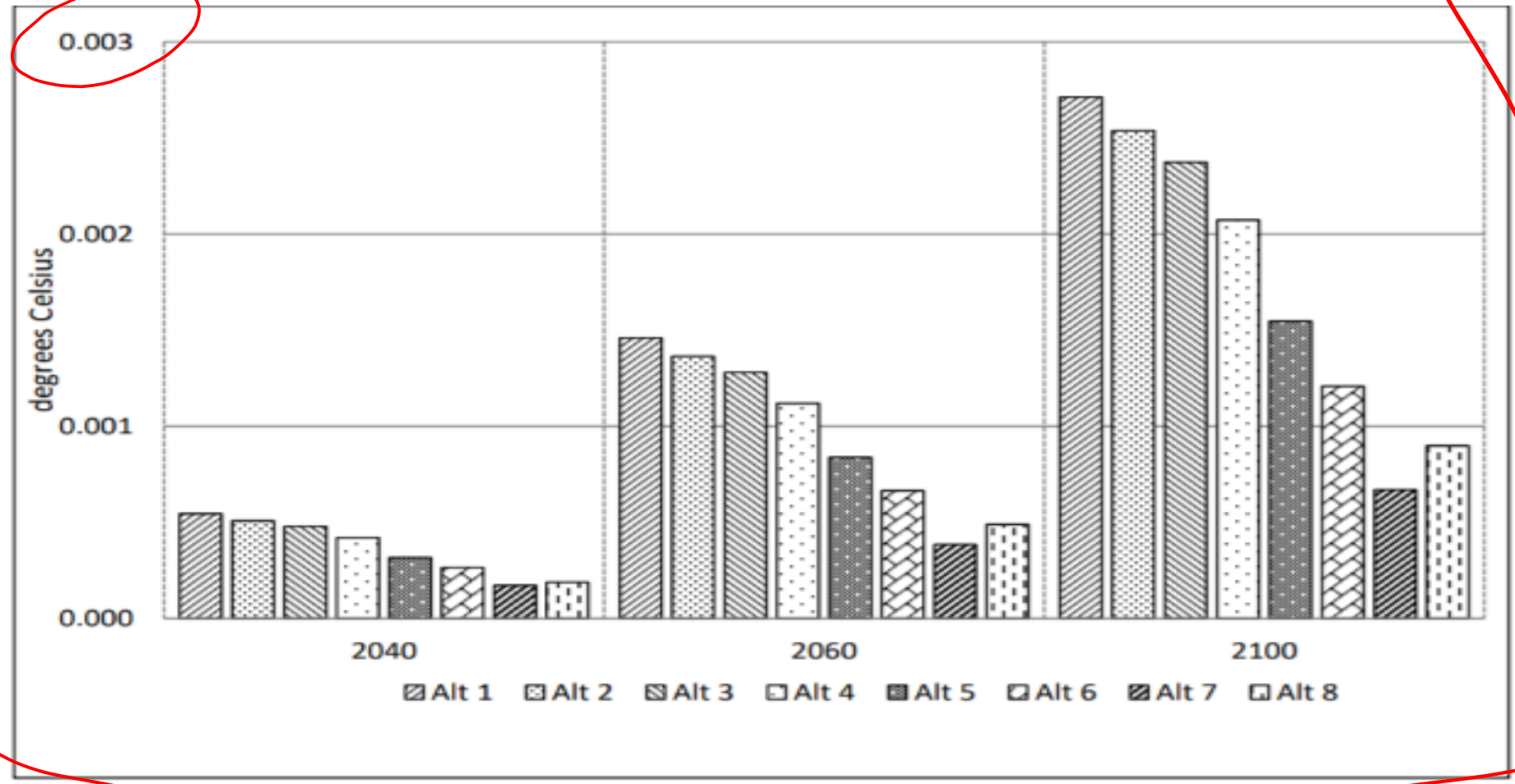
- "A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result"
  - *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F. 3d 89, 94-95 (CADC 2002) (*Mass v. EPA*)

Does Massachusetts Have Special Standing Rights?

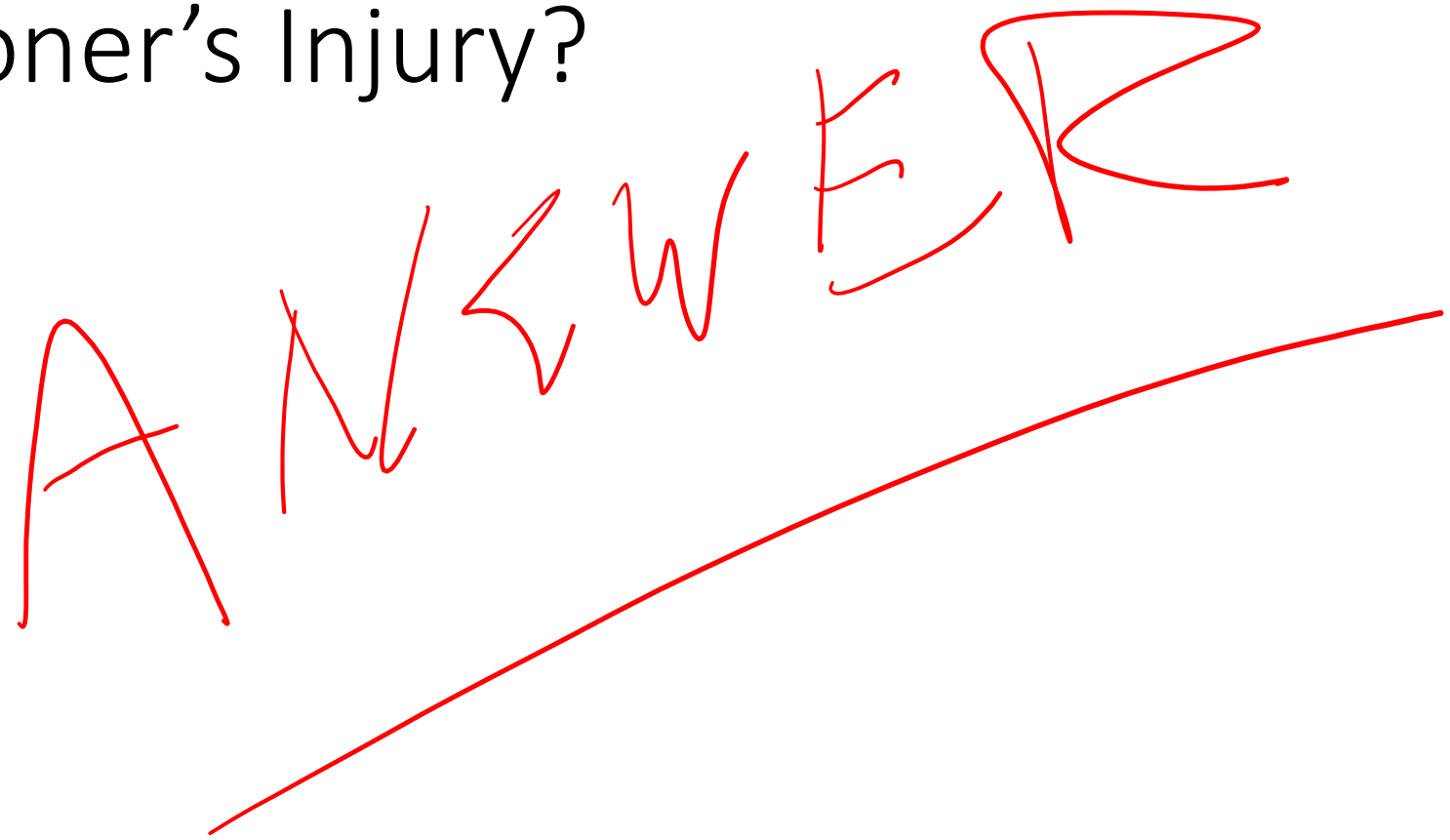
- Stevens starts the standing analysis with this quote:
  - "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."
  - *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237 (1907)
- No one cited this case in the briefs or the lower court litigation.

The Redressability Problem: The Effect of Reducing CAFE on Projected 3.5C Warming by 2100

Figure S-5. Increase in Global Mean Surface Temperature Compared with the No Action Alternative



What is Actually Required to Redress Petitioner's Injury?



The Majority: The Standing Facts for Massachusetts

- In sum -- at least according to petitioners' uncontested affidavits -- the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek.
- We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition.

Standing - The Dissent

Does the Dissent Deny Climate Change?

- Global warming may be a "crisis," even "the most pressing environmental problem of our time. Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it.

Is it Being Ignored by the Government?

- It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.

What is the Heart of the Dissent's Concerns?

- Before determining whether petitioners can meet this familiar [standing] test, however, the Court changes the rules. It asserts that "States are not normal litigants for the purposes of invoking federal jurisdiction," and that given "Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."

The *Tennessee Copper* Case

- [*Tennessee Copper* involved pollution drifting across the state line and damaging farms in Georgia. Georgia filed suit on behalf of the its landowners.]
- In contrast to the present case, there was no question in *Tennessee Copper* about Article III injury. . . . There was certainly no suggestion that the State could show standing where the private parties could not; there was no dispute, after all, that the private landowners had "an action at law."

What about State Owned Land as Supporting Its Special Status?

- What is more, the Court's reasoning falters on its own terms. The Court asserts that Massachusetts is entitled to "special solicitude" due to its "quasi-sovereign interests," but then applies our Article III standing test to the asserted injury of the State's loss of coastal property.
- In the context of *parens patriae* standing, however, we have characterized state ownership of land as a "nonsovereign interes[t]" because a State "is likely to have the same interests as other similarly situated proprietors."

The State as *Parens Patria* versus the Federal Government

- As a general rule, we have held that while a State might assert a quasi-sovereign right as parens patriae "for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them." *Massachusetts v. Mellon*, 262 U. S. 447, 485-486 (1923)

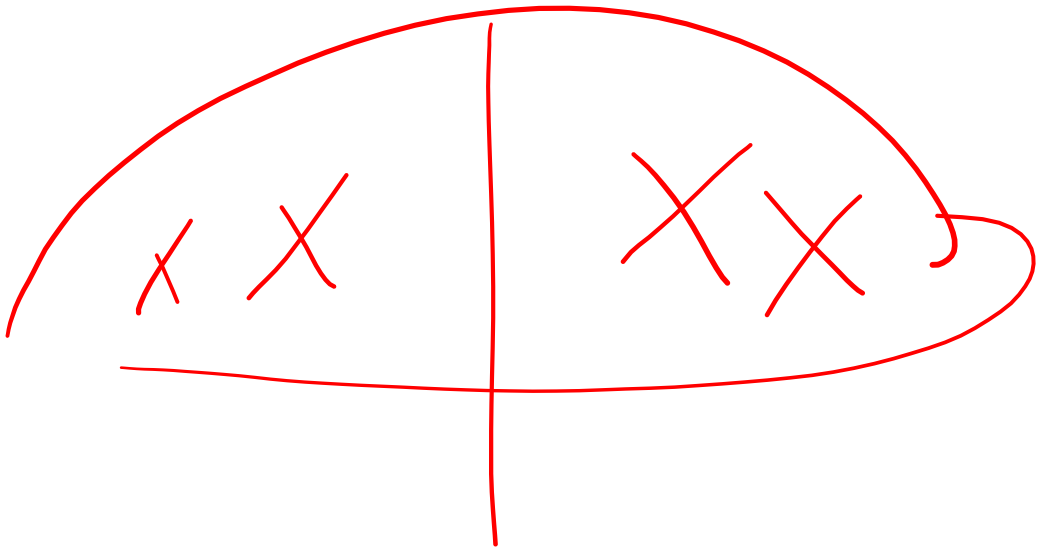
The Majority's Reliance on *Tennessee Copper*

- All of this presumably explains why petitioners never cited Tennessee Copper in their briefs before this Court or the D. C. Circuit. It presumably explains why not one of the legion of amici supporting petitioners ever cited the case. And it presumably explains why not one of the three judges writing below ever cited the case either. Given that one purpose of the standing requirement is " `to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination,' 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.

Is the Dissent Asking the Wrong Question?

- The injury the Court looks to is the asserted loss of land. …But even if regulation does reduce emissions -- to some indeterminate degree, given events elsewhere in the world -- the Court never explains why that makes it likely that the injury in fact -- the loss of land -- will be redressed.
- Schoolchildren know that a kingdom might be lost "all for the want of a horseshoe nail," but "likely" redressability is a different matter. The realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts coastal land.

Does the CAA Allow Regulation of GHGs?



What were EPA's Two Findings When it Answered the Rulemaking Petition?

- (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change, see id., at 52925-52929; and
- (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.

- The EPA had previously said it had the authority to regulate GHGs. By denying it had the authority, it gave the court a pure legal question to answer – could the CAA cover GHGs?

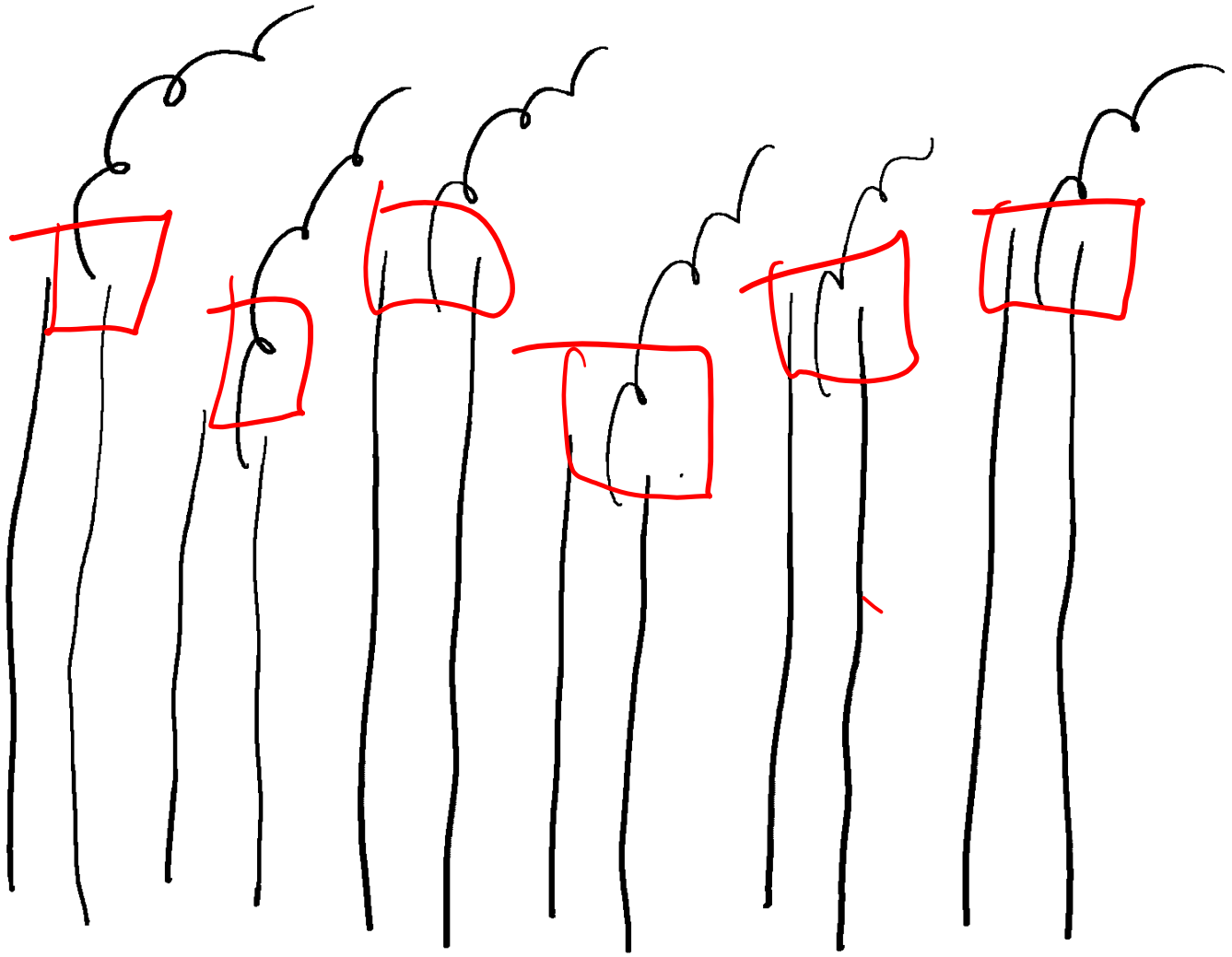
What does the Clean Air Act §7521(a)(1) require the EPA to issue regulations on?

- [35] "The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, [key to the dissent] or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare ...
- [36] The Act defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air." §7602(g).
- "Welfare" is also defined broadly: among other things, it includes "effects on ... weather ... and climate." §7602(h).

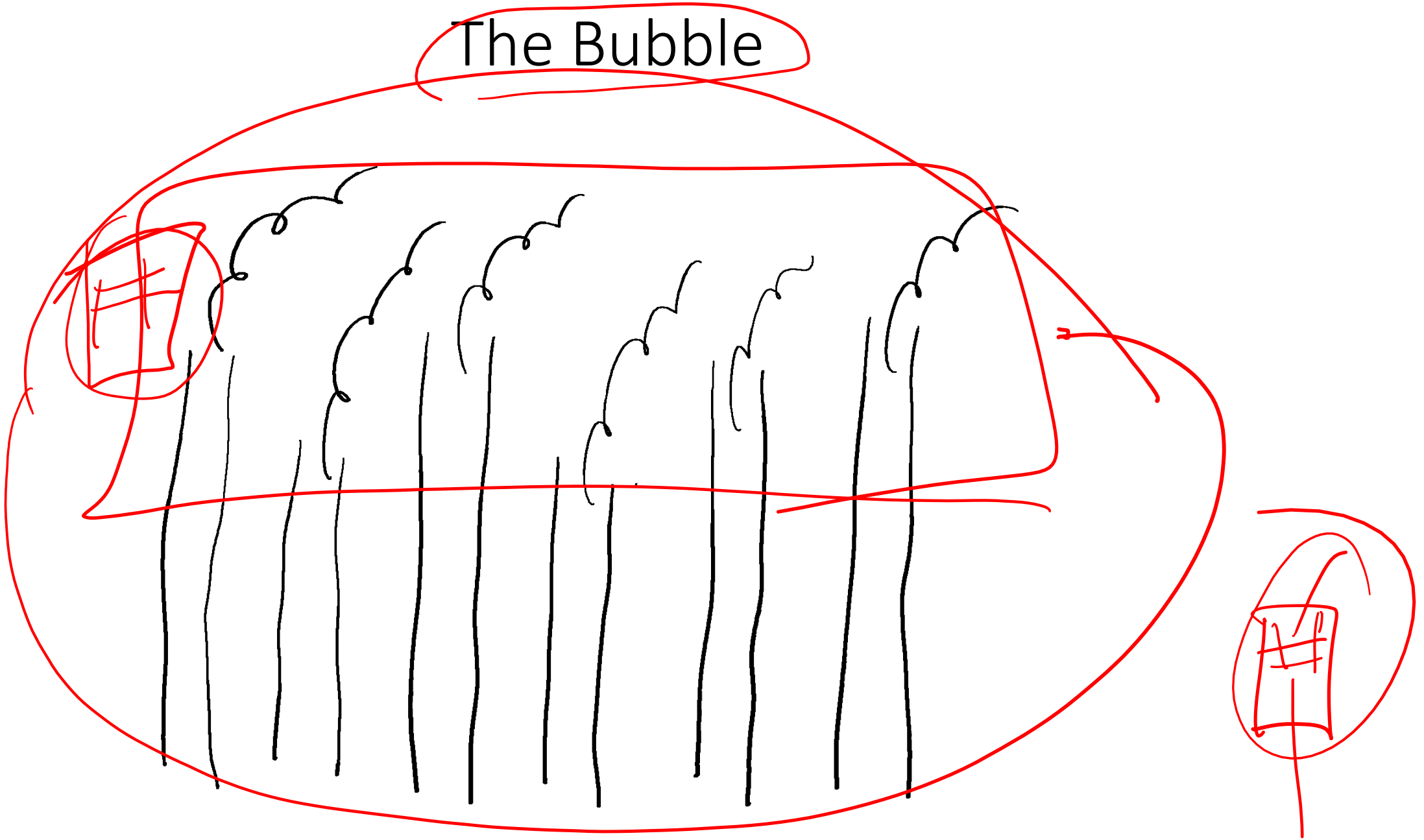
Is the Statute Unambiguous?

- This Court uses the rule from the *Chevron* case to decide what the CAA means for GHGs.
  - Question for the *West Virginia v. EPA* case: Will the Court abandon Chevron and redo the analysis with the major questions test?
- The question in *Chevron* was how should the EPA monitor air pollution emissions in large industrial facilities with many sources of air pollution?

Individual Source Monitoring



The Bubble



The EPA Rule in *Chevron*

- The EPA promulgated a rule that regulates the facility as a whole - measuring the air pollution as if the faculty is in a bubble.
- Environmental groups sue, arguing that the EPA should require pollution from each source to be measured.
- The Clean Air Act does not give specific direction on this question.
- How should the Court decide whether the rule is allowed under the CAA?
  - The court could read the statute on its own and decide the best approach, effectively making the regulatory policy decision.
  - The court could defer to the agency.
- (This is not a new problem (*Skidmore* and *Hearst* are from the 1940s), but this is the first case to articulate a test for deciding which path to take.)

Chevron - Step One

- Does the statute clearly prohibit or clearly allow the rule?
- The Court decides this question using traditional tools of statutory construction, e.g., text, structure, statutory purposes & findings, legislative history.
  - No deference to the agency at this stage.
- If clearly prohibits the rule, then the court is done.
- If it clearly allows the rule and no other rule, the court is done.
- If it is ambiguous – it allows many rules but it does not give clear guidance on the best rule – then the court goes to Step Two.

Chevron Deference - Step Two

- If statute is ambiguous, or if Congress left gaps for the agency to fill, *Chevron* assumes that this means Congress is leaving the policy choice of rules to the agency.
- The agency's interpretation of the statute has to be reasonable.
  - This might be questioned based on the cost of compliance.
- The agency is entitled to deference if its interpretation is reasonable.
  - The agency's interpretation need not be the best or the one preferred by the court.
- Conservative critics of regulation hate *Chevron*, at least until they get control of the EPA.
- Environmentalists, as in the *Chevron* case itself, argue against deference when the EPA uses it to weaken or not make regulations.

Chevron Step 1 – Brown and Williamson Variation

- Even if the statute is clear, is it really what Congress meant?
  - The Food, Drug, and Cosmetics Act says anything that is sold to affect the structure and function of the body is a drug.
  - Under the plain language, tobacco would be a drug under the FDCA.
  - Drugs can only be licensed for interstate sale if they are safe and effective as labeled for use.
  - If tobacco is a drug, it would have to be banned under the statute.
  - Congress clearly did not want to ban tobacco, so the FDCA does not mean that the words say.
- This became the Major Questions Doctrine by the decision in the OSHA Vaccine Case.

Chevron Step 1 Applied in This Case

- [36] The Act defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air." §7602(g).
- "Welfare" is also defined broadly: among other things, it includes "effects on ... weather ... and climate." §7602(h).
- Broadly read, farts could be pollution and people mobile sources.
- As with tobacco and the FDCA, did Congress intend the CAA to be broad enough to encompass GHGs?
- The Majority looks at the legislative history of the CAA and other Congressional actions related to global warming and climate change to determine Congressional intent.

What was the National Climate Program Act of 1978?

- In 1978, Congress enacted the National Climate Program Act, 92 Stat. 601, which required the President to establish a program to "...assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications..."
- What does this tell us about concerns with greenhouse gasses (GHG) – is it just something Al Gore thought up?

What did the National Academy of Sciences Tell President Carter?

- "If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible... . A wait-and-see policy may mean waiting until it is too late."

What did the Global Climate Protection Act of 1987 require the EPA to do?

- Finding that "manmade pollution -- the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere -- may be producing a long-term and substantial increase in the average temperature on Earth," §1102(1), 101 Stat. 1408, Congress directed EPA to propose to Congress a "coordinated national policy on global climate change...Congress emphasized that "ongoing pollution and deforestation may be contributing now to an irreversible process" and that "[n]ecessary actions must be identified and implemented in time to protect the climate."
- Who was president in 1987? Is this really a liberal plot?

The First Global Warming Treaty

- The Kyoto Protocol was the first pure climate treaty.
- President Clinton wanted the US to participate.
- Before the conference, the Senate passed this sense of the Senate resolution, voting 95-0:
  - Declares that the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997 or thereafter which would: (1) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex 1 Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period; or (2) result in serious harm to the U.S. economy.
- No senator would vote for a treaty that imposed stricter requirements on the US than on developing countries. (China and India)

Is this like Chevron or Brown and Williamson?

How does the EPA argue that CO2 is not covered?

What was the EPA Evidence of Congressional Intent?

- [48] In concluding that it lacked statutory authority over greenhouse gases, EPA observed that Congress "was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990," yet it declined to adopt a proposed amendment establishing binding emissions limitations. Id., at 52926. Congress instead chose to authorize further investigation into climate change.

Was there Other Specific legislation on Global Atmospheric Issues?

- EPA further reasoned that Congress' "specially tailored solutions to global atmospheric issues," 68 Fed. Reg. 52926 -- in particular, its 1990 enactment of a comprehensive scheme to regulate pollutants that depleted the ozone layer -- counseled against reading the general authorization of §202(a)(1) to confer regulatory authority over greenhouse gases.
  - Does a specific ozone statute mean all pollutants now need specific statutes?

Had Congress considered and rejected CO2 Regulation?

- [50] EPA reasoned that climate change had its own "political history": Congress designed the original Clean Air Act to address local air pollutants rather than a substance that "is fairly consistent in its concentration throughout the world's atmosphere," declined in 1990 to enact proposed amendments to force EPA to set carbon dioxide emission standards for motor vehicles, ibid. and addressed global climate change in other legislation, 68 Fed. Reg. 52927.
- [This is a powerful argument and returns to cause problems once the EPA has promulgated a GHG rule.]

Administrative Policy Rationale for the EPA Position

- What did EPA want from Congress before regulating green house gasses?
- Is there a regulatory conflicts problem with the EPA regulating gasoline mileage, which is also regulated by the DOT?
- Would an EPA rule make it harder to negotiate a treaty on global warming?
  - How could motor vehicle regulations conflict with the goal of a comprehensive approach to global warming?
  - Why would such regulations weaken the president's ability to persuade developing countries to lower their emissions?

How does the Majority Distinguish *Brown and Williamson*?

- Would the EPA have to ban CO2, as the court thought it would have to do with tobacco?
- Does the Clean Air Act include cost-benefit analysis, unlike the FDCA?
- Are there other laws and agencies dealing with CO2 that would have conflicting goals, as there are for tobacco?
  - What is DOT regulating that affects CO2?
  - Does this conflict?

The Majority's Analysis of the Statute

- The Clean Air Act's sweeping definition of "air pollutant" includes "any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air ... ." §7602(g). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical ... substance[s] which [are] emitted into ... the ambient air." The statute is unambiguous.

The Majority's Rejection of the Brown and Williamson Arguments.

- While the Congresses that drafted §202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. ... Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.

CAFE.

The Majority's Holding

- In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore "arbitrary, capricious, . . . or otherwise not in accordance with law." 42 U. S. C. §7607(d)(9)(A). We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding.
- [The court is not forcing the EPA to regulate GHGs, only allowing it to. This makes it easier for a future court to unwind Mass v. EPA on standing without having to address the CAA.]

Scalia's Dissent

- Scalia assumes, as with B&W, that CO2 technically fits into the statute, as tobacco fit into the FDCA.
- In B&W the agency wanted to regulate, thus the question was whether it had authority to do so.
- In this case, the agency does not want to regulate, so the question is whether it can decline to regulate.

What does “In His Judgment” (EPA Secretary) Mean?

- “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U. S. C. §7521(a)(1)
  - This is triggered once it is determined that something can be an air pollutant.
- Scalia believes that the Majority is forcing the EPA to regulate GHGs.

Does the Majority Require an Endangerment Finding?

- The Court, however, with no basis in text or precedent, rejects all of EPA's stated "policy judgments" as not "amount[ing] to a reasoned justification," ante, at 31, effectively narrowing the universe of potential reasonable bases to a single one:
- Judgment can be delayed only if the Administrator concludes that "the scientific uncertainty is [too] profound." Ibid. The Administrator is precluded from concluding for other reasons "that it would . . . be better not to regulate at this time." Ibid.

The Majority's Rejection of the Policy Reasons in the Rejection

- The Court dismisses this analysis as "rest[ing] on reasoning divorced from the statutory text." Ante, at 30. "While the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' . . . that judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare

Is Scalia Correct?

- The Majority says that it is not requiring an endangerment finding in the holding.
- Scalia is correct that this appears to conflict with the language rejecting the policy reasons in the response to the petition for rulemaking.
- Under this reasoning, Scalia dissents, seeing this an unreasonable intrusion of the court into a political question.

What does Mass v. EPA Really Say?

- Can the rejection of the reasons in the petition be reconciled with retaining the secretary's discretion to determine whether to regulate an air pollutant?
- Obama issued an endangerment finding, so this did not become an issue on remand.
  - The intent was to prod Congress into passing a climate bill.
- Trump did not withdraw the endangerment finding for fear of empowering the state climate cases.

The Structure of Air Pollution Regulation under the CAA (ignored in this case)

- The CAA regulates the local health effects of air pollution
- EPA establishes standards for acceptable levels of given pollutants and the states establish state implementation plans (SIPS) to reach those levels in thousands of local regions call attainment or non-attainment areas.
- Regulation is done at the local level, with different standards for emissions based on local conditions.
- That is why ozone required special legislation, as did acid rain.
- Do GHGs fit in this model?