Judicial Perspectives on Climate Change and the Constitution

KAMERON T. WRIGHT*

TABLE OF CONTENTS

I. INTRODUCTION

This Comment converges at the intersection of Constitutional Law and Climate Law. It seeks to explore six various jurisprudential perspectives and juridical decision-making models in their application to the modern threat of climate change. Based in some part on Professor Christopher

* © 2021 Kameron T. Wright. J.D. Candidate 2021, University of San Diego School of Law. 2013 B.S., United States Naval Academy. The author gratefully appreciates the contributions of the staff and editors of the *San Diego Journal of Climate & Energy Law*, as well as the mentorship and encouragement of Professor Roy L. Brooks, University of San Diego School of Law.

Stone's seminal work *Should Trees Have Standing?* and Professor Roy Brooks' book *Structures of Judicial Decision Making from Legal Formalism to Critical Theory*, I attempt to provide insight and new lenses by which the legal scholar may view the legal debate on climate change.

I first digest, through six judicial perspectives, a rather important climate law Supreme Court case that first broke the mold of traditional "standing" doctrine. The underlying values and crucial subtext of the various "Justices" are spoken into and through their perspectives in a quasi-judicial voice. I then critique these perspectives to challenge their implications and consequences. And last, I comment on a recent Ninth Circuit case directly on point that illustrates the conflict and tension between structural Constitutional doctrine and judicial desire for a living Document for an evolving world environment. We begin in 2007.

II. *MASSACHUSETTS V. ENVIRONMENTAL PROTECTION AGENCY*

A. Traditional Perspectives

A group of private organizations petitioned the Environmental Protection Agency (EPA)[1] to begin regulating the emissions of four greenhouse gases, including carbon dioxide, under § 202(a)(1) of the Clean Air Act.[2] The petition was based on respected scientific opinions that a well-documented rise in global temperatures and attendant climatological and environmental changes have resulted from a significant increase in the atmospheric concentration of greenhouse gases.[3]

The EPA ultimately denied the petition, reasoning that (1) the Clean Air Act does not authorize it to issue mandatory regulations to address global climate change, and (2) even if the agency had the authority to set greenhouse gas emission standards, it would have been "unwise to do so at that time," because a causal link between greenhouse gases and the increase in global surface air temperatures was not "unequivocally established."[4]

---

1. Massachusetts v. EPA, 549 U.S. 497 (2007).
2. 42 U.S.C. § 7521(a)(1) ("The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator's] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.").
3. *Massachusetts*, 549 U.S. at 505, 510; *see* 42 U.S.C. § 7602(g) (defining "air pollutant" to include "any air pollution agent . . ., including any physical, chemical . . . substance . . . emitted into . . . the ambient air").
4. *Massachusetts*, 549 U.S. at 511–13.

Petitioners were later joined by Massachusetts and other state and local governments and sought review in the D.C. Circuit.[5] A majority of the D.C. Circuit panel agreed that the EPA Administrator properly exercised his discretion in denying the rulemaking petition.[6] But the circuit court's reasoning was a three-way tie. One judge concluded that the Administrator's exercise of discretion was proper without addressing the question of standing.[7] Another found that standing was lacking but concurred on the merits that the Administrator was within his discretion.[8] A third judge dissented, finding that standing was proper and that the EPA administrator had failed to operate within his discretion.[9] Based on the concurrence, the court denied review of the petition.[10]

On appeal, the Supreme Court of the United States ruled on two issues. First, the Court held that petitioners have standing to challenge the EPA's denial of their rulemaking petition.[11] To demonstrate standing, a litigant must show that it has suffered: (1) a concrete and particularized injury that is either actual or imminent, (2) that the injury is fairly traceable to the defendant, and (3) that a favorable decision will likely redress that injury.[12]

The Court further elaborated that Congress can "accord[] a procedural right to protect [the] concrete interests" of citizens to vitiate standing by statute.[13] The Court distinguished the special position of Massachusetts as a sovereign, and noted that States have sovereign prerogatives over the territory allegedly affected.[14] Furthermore, the exercise of the police power

---

5. *Id*. at 514; see 42 U.S.C. § 7607(b)(1), which specifies review of the EPA Administrator's discretion is within the purview of the United States Court of Appeals for the District of Columbia Circuit.

6. *Massachusetts*, 549 U.S. at 514.

7. *Id.*

8. *Id.* at 514–15.

9. *Id.* at 515–16; *Massachusetts v. EPA*, 415 F.3d 50, 65 (D.C. Cir. 2005) (Tatel, J., dissenting) (reasoning that the petitioners adequately supported the conclusion that the EPA's failure to curb greenhouse gas emissions contributed to the sea level changes that threatened Massachusetts' coastal property and that a redress requiring a reduction in emissions would delay the adverse impacts of global warming), *rev'd* 549 U.S. 497 (2007).

10. *Massachusetts*, 549 U.S. at 514.

11. *Id*. at 517.

12. *Id*.; *See* U.S. CONST. art. III, § 2 (delineating the actual cases and controversies requirement); *see also Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992).

13. *Massachusetts*, 549 U.S. at 517 (citing *Lujan*, 504 U.S. at 572, n.7).

14. *Massachusetts*, 549 U.S. at 518 (distinguishing from *Lujan*, 504 U.S. at 560 where a private individual brought the claim, explaining it was of "considerable relevance" the party seeking review was a sovereign State); *id.* at 518–19 (holding that Massachusetts has an independent, sovereign interest in the preservation of its territory, supporting federal

to force reductions in greenhouse gas emissions was now lodged in the Federal Government, and the States must have a means of redress.[15]

Because Congress has ordered the EPA to protect Massachusetts by prescribing applicable emissions standards,[16] and has given Massachusetts "a concomitant procedural right" to challenge the rejection of its rulemaking petition as "arbitrary and capricious,"[17] the majority held that the petitioners' submissions have satisfied "the most demanding standards of the adversarial process."[18] The EPA's "steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent,'"[19] and there is a "substantial likelihood that the judicial relief requested" will prompt the EPA to take steps to reduce that risk.[20]

Justice Stevens, writing for the majority, stated, "The harms associated with climate change are serious and well recognized."[21] "That these changes are widely shared does not minimize Massachusetts' interest in the outcome of this litigation."[22] "Given [the] EPA's failure to dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming, its refusal to regulate such emissions, at a minimum, 'contributes' to Massachusetts' injuries."[23] "While regulating motor-vehicle emissions may not by itself reverse global warming, it does not follow that the Court lacks jurisdiction to decide whether [the] EPA has a duty to take steps to *slow* or *reduce* it."[24]

---

jurisdiction) ("In that capacity [as a quasi-sovereign] 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." (quoting *Georgia v. Tenn. Copper Co*., 206 U.S. 230, 237 (1907))).

15. *Massachusetts*, 549 U.S. at 519 (holding "[t]hat Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.").

16. *Id*. at 519–20; 42 U.S.C. § 7521(a)(1).

17. *Massachusetts*, 549 U.S. at 520; 42 U.S.C. § 7607(b)(1).

18. *Massachusetts*, 549 U.S. at 521.

19. *Id*. at 521; *Lujan*, 504 U.S. at 560.

20. *Massachusetts*, 549 U.S. at 521; *see also* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 63–68 (1978) (holding that Congress constitutionally limited liability of nuclear power plants to protect that private sector during development based on the remote possibility that the ceiling of liability would be reached in a single accident; relief remained available to parties, thus the law was not unconstitutional).

21. *Massachusetts*, 549 U.S. at 521.

22. *Id*. at 522; *see, e.g.*, FEC v. Akins, 524 U.S. 11, 24–25 (1998).

23. *Massachusetts*, 549 U.S. at 499, 524; *Massachusetts*, 415 F.3d at 66 (Tatel, J., dissenting) ("[The] EPA would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming").

24. *Massachusetts*, 549 U.S. at 525; *see* Larson v. Valente, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a

The Court held that the petitioners in this case had standing to challenge the denial of their rulemaking petition with the EPA.[25]

Second, the Court held that the EPA has statutory authority to regulate greenhouse gases and the agency should not abdicate its mandate to regulate. The Court noted the difference between an agency refusing to enforce a rule versus refusing to make a rule.[26] The Court found that the EPA rejected the rulemaking petition based on impermissible considerations and its actions were therefore "arbitrary, capricious, or otherwise not in accordance with law,"[27] demanding that on remand, the EPA must "ground its reasons for action or inaction in the statute."[28]

In response to the EPA's desire to postpone policy-making on greenhouse gases, the majority demanded that the agency take action, one way or the other: "[The] EPA's alternative basis for its decision—that even if it has statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text."[29] "The statutory question is whether sufficient information exists for it to make an endangerment finding, and to that end the EPA has refused to comply with a clear statutory command."[30] On the question of the EPA's

---

favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury").

25. *Massachusetts*, 549 U.S. at 526.

26. *Id*. at 527. *See infra* note 56.

27. 42 U.S.C. § 7607(d)(9) (2007).

28. *Massachusetts*, 549 U.S. at 534–35. *See also id.* at 500 (the Court elaborates "[b]ecause greenhouse gases fit well within the Act's capacious definition of 'air pollutant,' [the] EPA has statutory authority to regulate emission of such gases from new motor vehicles. That definition – which includes 'any air pollution agent . . ., including any physical, chemical, . . . substance . . . emitted into . . . the ambient air . . .' [the Clean Air Act] embraces all airborne compounds of whatever stripe. Moreover, carbon dioxide and other greenhouse gases are undoubtedly 'physical [and] chemical . . . substance[s].'").

29. *Id*. at 532. *See id.* at 501 ("While the statute conditions EPA action 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.'" (citing § 7601(a)(1)).

30. *Id.* at 533–34 (explaining that "[u]nder the Act's clear terms, [the] EPA can avoid promulgating regulations only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. It has refused to do so, offering instead a laundry list of reasons not to regulate, including the existence of voluntary Executive Branch programs providing a response to global warming and impairment of the President's ability to negotiate with developing nations to reduce emissions. These policy judgments have nothing to do with whether greenhouse gas emissions contribute to climate change and do not amount to a reasoned justification for declining to form a

failing to fulfill its mandate, the Court held that "[t]he EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore . . . not in accordance with the law."[31]

The ruling of the D.C. Circuit was reversed and remanded.

1. Judicial Positivism

The POSITIVIST JUSTICE, dissenting:

The Positivist school of thought concurs whole-heartedly with the dissent of the Chief Justice.[32] Evaluation within our current system of rules, both statutory and those derived from case law, are of the utmost importance and the Court should avoid any deviation from traditional canons of established textualist interpretation. The majority in *Massachusetts* deviates sharply from clearly established justiciability doctrine precedent and blurs the lines in our separation of powers. A positivist would vehemently dissent.

Global warming is not a problem that "has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who consider the regulatory, legislative, and treaty-based means of addressing global climate change."[33] Petitioners seek to use the judiciary as the vehicle for instituting change that they consider to occur too slowly within "the functions of Congress and the Chief Executive."[34] The proper role of the Court, which the majority now unabashedly rejects, is to adjudicate justiciable cases and controversies that have proper constitutional standing.[35] Petitioners failed to assert: (1) a particularized injury (2) fairly traceable to the defendant's allegedly unlawful conduct that is (3) likely to be addressed by the requested relief.[36]

A particularized injury must be actual or imminent (not conjectural),[37] real and immediate,[38] and certainly impending.[39] Based on the evidence

---

scientific judgment. Nor can [the] EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. If the scientific uncertainty is so profound that it precludes [the] EPA from making a reasoned judgment, it must say so." *Id.* at 501.).

31. *Id.* at 534 (citing 42 U.S.C. § 7607(d)(9)(A) (2007)).
32. *Id*. at 535 (Roberts, C.J. dissenting, joined by Scalia, Thomas, and Alito, JJ.).
33. *Id*. at 535 (Roberts, C.J., dissenting).
34. *See id*.; *See also Lujan*, 504 U.S. at 576. *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 130–37 (N.Y. Crown Forum, 2019).
35. *But see Lujan*, 504 U.S. at 560.
36. Allen v. Wright, 468 U.S. 737, 751 (1984).
37. *Lujan*, 504 U.S. at 560.
38. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).
39. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990).

in the record, the alleged injury was not particularized.[40] Apart from the issue of Massachusetts, as a State claiming a particularized injury, the scientific data provided details nothing remotely conclusive.[41] Petitioners claim that Massachusetts will lose "significant state-owned coastal land[s]" *over the next 100 years*.[42] Furthermore, the model used in that calculation hypothesizes a 20 to 70 cm rise in sea levels, with a maximum observed error of 70 cm.[43] How the majority concludes that a calculation with an inherent error equal to its maximum value satisfies the definition of imminence "taxes the credulity of the credulous."[44]

The same conclusion can be reached for causation and redressability, which are conventionally addressed together. The fair traceability to the defendant's alleged misconduct and validity of proposed relief are significantly lacking. Can we really surmise that the EPA's refusal to regulate greenhouse gas emissions is *the* predominant cause of Massachusetts' "injury"? The problem of global warming is far too complex to even suggest that conclusion.[45] Beyond the difficulties associated with explaining causal links, the challenge demonstrating that the EPA's regulation would redress the injury is insurmountable.[46] According to the petitioner's own declarations, the proposed emissions standard regulations *might* reduce global emissions a "*fraction of 4 percent.'*"[47] The majority's conclusion that these causal links and redressability are sufficient to satisfy the elements of standing is as speculative as it is meritless.

---

40. *Massachusetts*, 549 U.S. at 541–42 (Roberts, C.J., dissenting) ("The very concept of global warming seems inconsistent with this particularization requirement. Global warming is a phenomenon 'harmful to humanity at large,' the redress petitioners seek is focused no more on them than on the public generally–it is literally to change the atmosphere around the world." (quoting Massachusetts v. E.P.A. 415 F.3d 50, 60 (C.A.D.C. 2005) (Sentelle, J., dissenting in part and concurring in judgment))).

41. *Id.* at 538–39 (Roberts, C.J., dissenting) ("[A] State asserting quasi-sovereign interests as parens patriae must still show that its citizens satisfy Article III. . . . [O]ur cases cast significant doubt on a State's standing to assert quasi-sovereign interest—as opposed to direct injury—against the Federal Government." (rejecting the doctrine of parens patriae as a substitute for concrete injury and the majority's reliance on *Tennessee Copper Co*.)). *See* cases cited *supra* notes 14, 15.

42. *Massachusetts*, 549 U.S. at 542 (emphasis added).

43. *Id*.

44. Maryland v. King, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting).

45. *Massachusetts*, 549 U.S. at 541 (Roberts, C.J., dissenting).

46. *Id*. at 542–43. *See also* Transcript of Oral Argument at 4–16, 30–38, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120).

47. *Massachusetts*, 549 U.S. at 544 (Roberts, C.J., dissenting) (emphasis added).

To its credit, the Court's "special solitude" for Massachusetts limits the extent to which this new standard of relaxed standing can be expanded in the future.[48] Nonetheless, a positivist cannot abide by the Court's flagrant disregard of precedent and the limited role that the judiciary has in our democratic society. The Court is now untethered from the text of the Constitution and abandons the doctrine of *stare decisis*.[49] Finding no basis for standing, the positivist need not comment on the Court's policy-dictation to the EPA, but the Pragmatist does so eloquently in the dissenting part of the following opinion.

Today, the Court functions as a bench of politicians, not as judges. The positivist dissents.

2. Judicial Pragmatism

The PRAGMATIST JUSTICE, concurring in part and dissenting in part:

Pragmatism compels writing separately from the majority and the Positivist because although agreeing with the Court's finding on standing, the Pragmatist cannot abide by the forced policymaking on the EPA. On that inquiry, Pragmatism agrees with Positivism, finding the majority violates the separation of powers doctrine.

First, a Pragmatist would hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition. This case "suffers from none of the defects" that would preclude it from being a justiciable Article

---

48. *Id*. at 548. *See, e.g.*, 42 U.S.C. § 7477 (establishing that "[the Federal Government] shall, and a State may, take such measures, including . . . seeking injunctive relief, as necessary to [enforce the Clean Air Act]"); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (establishing that private plaintiffs have standing to seek injunctive relief and civil damages for Clean Water Act violations); Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 970–71 (9th Cir. 2003) (establishing standing for citizens to allege procedural violations of the National Environmental Policy Act's notice and comment requirements and the Endangered Species Act's consultation and biological-assessment requirements); *but see* Wash. Envtl. Council v. Bellon, 741 F.3d 1075, 1078 (9th Cir. 2014) (Smith, J., concurring) (in denying rehearing en banc, rejected the dissenting view that "[holding] that non-state entities categorically lack standing to use the Clean Air Act to compel state action on global warming—disregards Supreme Court precedent, makes bad law for our circuit, and harms the public"; refusing to expand the reasoning of *Massachusetts* to allow for suits by private, non-state entities; and holding "[*Massachusetts*] does nothing to restrict environmental litigation beyond those limitations already established by the Supreme Court. And the opinion leaves open the many doors that previously existed under our case law for governmental entities and private parties to litigate with respect to injuries resulting from global climate change."); *infra* notes 136–51 and accompanying texts.

49. *See* U.S. CONST. art III, § 2; *see, e.g.*, Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992); Allen v. Wright, 468 U.S. 737, 751 (1984); City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); Whitmore v. Arkansas, 495 U.S. 149, 158 (1990). *See also* GORSUCH, *supra* note 34, at 121–25.

III "controvers[y]."[50] To demonstrate standing, a litigant must show that it has suffered a concrete and particularized injury, that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favorable decision will likely redress that injury.[51]

The Pragmatist would agree that where Congress has "accord[ed] a procedural right to protect [the] concrete interests" of citizens and Massachusetts has sovereign prerogatives over the territory affected, the exercise of police power to force reductions in greenhouse gas emissions, now lodged in the Federal Government, provides a means of redress.[52] It is clear that Congress intended to provide a cause of action rooted in environmental protection policy, and a Pragmatist justice would no more than vindicate this normative value.

Therefore, the Pragmatist would also agree that Massachusetts has a procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious, that the EPA's refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both actual and imminent, (to the extent necessary to vitiate standing) that refusal to regulate such emissions contributes to Massachusetts' injuries, and that there is a "substantial likelihood that the judicial relief requested" will prompt the EPA to take steps to reduce that risk.[53] This is merely *policy-discovery*; it is well established as an unarticulated norm that we should endeavor to protect the environment and sometimes that means that new rules and regulations must be made. When they are not made, clear public policy dictates that a procedure be available to redress the failure of an agency to perform as required by law.[54]

---

50. *Massachusetts*, 549 U.S. at 498; *see, e.g.*, Luther v. Borden, 48 U.S. 1 (1849).

51. *Massachusetts*, 549 U.S. at 517; *see Lujan*, 504 U.S. at 560–61.

52. *Massachusetts*, 549 U.S. at 519 (concluding that Massachusetts has an independent, sovereign interest in the preservation of its territory, supporting federal jurisdiction); *id.* ("Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."); *see Lujan*, 504 U.S. at 573.

53. *Massachusetts*, 549 U.S. at 521 (citing *Duke Power Co*., 438 U.S. at 79); *Id*. at 519–21; 42 U.S.C. § 7521(a)(1); 42 U.S.C. § 7607(b)(1). *Lujan*, 504 U.S. at 560; *Massachusetts*, 415 F.3d at 65 (Tatel, J., dissenting) ("[The] EPA would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming.").

54. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540 ("[A]ny person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency. . . [or] to compel the Secretary to apply . . . the prohibitions set forth in or authorized pursuant to . . . this Act with respect

This conclusion is based on reasoned elaboration from existing arrangements, and only goes so far as policy-discovery, merely expanding the doctrine of standing to an evolving modern problem. This allows for vindication of the articulated (or arguably unarticulated) norm that climate change efforts need to be addressed and challenged in the courts where the Executive fails to follow Congress's command.[55] The Pragmatist would therefore concur in the judgment on this first question on standing.

Where Pragmatism departs from the majority, however, is on the difference between an agency not enforcing a rule versus refusing to make a rule.[56] That is not for the Court to decide as a matter of policy; Congress sets the limit of Administrative discretion and the President oversees its execution. Today, the Court engages in *policy-making* not delegated to nor constitutionally within its purview; Courts generally do not tell agencies *how* to obey statutes. A Pragmatist would therefore write separately to dissent on the merits.

First, the Court in *Massachusetts* deviates from its own mandate as a neutral arbiter of Congressional and Executive policy. Under the President's direction, the EPA is entrusted by Congress with creating and enforcing rules and regulations related to the reduction of air pollutants that endanger public health or welfare.[57] The statute is void of permissible (or impermissible) reasons for which the EPA may defer judgment on a rulemaking petition.[58] There is no legitimacy behind the Court's policy-making directives issued by the majority. The EPA gave reasons enough for not wanting to decide on Massachusetts' petition.[59]

---

to taking of any resident endangered species or threatened species . . . [or] against the Secretary *where there is alleged a failure* of the Secretary *to perform any act or duty* . . . .") (emphasis added).

55. *See infra* note 88; *see also* Transcript of Oral Argument at 4, Massachusetts v. EPA, 549 U.S. 497 (No. 05-1120) (petitioners conceding that the Court need not decide the merits of climate change in order to find standing).

56. *Compare Massachusetts*, 549 U.S. at 527 ("There are key difference between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. . . . Refusals to promulgate rules are thus susceptible to judicial review, though such a review is extremely limited and highly deferential.") (internal quotations omitted); *with id.* at 550 (Scalia, J., dissenting) ("Where does the [Clean Air Act] say that the EPA Administrator is required to come to a decision on this question whenever a rulemaking petition is filed? The Court points to no such provision *because none exists*.") (emphasis added).

57. 42 U.S.C. § 7521; *see also* Transcript of Oral Argument at 41–46, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120).

58. *Massachusetts*, 549 U.S. at 552 (Scalia, J., dissenting) ("[T]he statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment—the permissible reasons for deciding not to grapple with the issue at the present time.").

59. *Id.* ("The reasons EPA gave are surely considerations executive agencies *regularly* take into account . . . when deciding whether to consider entering a new field: the impact such entry would have on the Executive Branch programs and on foreign policy."); *id.* at

Some, though not all, Pragmatists cannot agree with the conclusion that the EPA rejected the rulemaking petition based on impermissible considerations.[60] The Administration provided justification for its inaction, namely that it could not with any certainty postulate that the proposed regulations would have the desired effect of curbing climate change.[61] Pragmatist jurists in particular favor yielding to the experts and trust the EPA in their determinations within their purview. If Congress wants to "force an agency's hand," it knows how to do so.[62]

Second, the Court's reliance on the Clean Air Act is misguided. The policy considerations behind the Clean Air Act had nothing to do with climate change and everything to do with breathable air and the reduction of fluorocarbons and other airborne toxins.[63] Nothing in the history of the Clean Air Act pontificates on the need to curb the presumptuous causes of global warming.[64]

The role of the EPA is to issue regulations as it sees fit in accordance with the directives from Congress. It is not the role of the Court to legislate based on policy considerations on matters delegated by the Legislature to the Executive.[65] Although the Pragmatist is no stranger to validation of policies, articulated or not, some would still firmly believe that today's ruling goes too far. "Legislatures create policy, courts create law."[66] Whether a

---

531–32 ("EPA finally argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job that Congress has assigned to [the Department of Transportation]."); *id.* at 533 ("EPA said . . . that regulating greenhouse gases might impair the President's ability to negotiate with 'key developing nations' to reduce emissions.") (citing Control of Emissions From New Highway Vehicles and Engines, 68. Fed. Reg. 52, 931–32 (Sept. 8, 2003) (to be codified at 40 C.F.R. pt. 86)).

60. *See id*. at 534–35, 550–52.

61. *Id*. at 553–55 (Scalia, J., dissenting) (citing Control of Emissions From New Highway Vehicles and Engines, 68. Fed. Reg. 52,930 (Sept. 8, 2003) (to be codified at 40 C.F.R. pt. 86)).

62. *Id*. at 550; *see, e.g.*, Brock v. Pierce County, 476 U.S. 253 (1986).

63. *Massachusetts*, 549 U.S. at 556–59; *see also* Transcript of Oral Argument at 42–48, 51–52, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120).

64. *See* 42 U.S.C. § 7604(f)(3); *see also* 42 U.S.C. *supra* note 2, §§ 7521, 7571, 7582, 7602, 7619.

65. *Massachusetts*, 549 U.S at 560 (Scalia, J., dissenting) ("This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us, but to an executive agency").

66. ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 140 n.35 (2nd ed. 2005) (citing Neil Duxbury, *Faith in*

proposed rule is within the EPA's purview limited by Congress may be justiciable as a matter of statutory interpretation. However, whether the EPA should be forced to adjudicate proposed rules before they are ripe is a question of policymaking and deference should therefore be given to the agency.[67] "Th[e] Court has no business substituting its own desired outcome for the reasoned judgment of a responsible agency."[68] The Executive's role is to "take Care that the Laws be faithfully executed."[69] As Justice Scalia noted in *Lujan v. Defenders of Wildlife*, "[The Court should] not enable the courts, with the permission of Congress, to 'assume a position of authority over the governmental acts of another co-equal [branch of government].' And [] become 'virtually continuing monitors of the wisdom and soundness of Executive action.'"[70] The separation of powers doctrine forbids what the majority commands.

Pragmatists believe that a fair process is granted by our answer to the standing question, thus concurring in that judgment alone because we have evolved the law and given recourse through a procedural remedy that was previously foreclosed. But pragmatism generally counsels against the Court's indifference to the policy determinations of an executive agency. Duly delegated the authority to adjudicate policy questions, the Executive is now second-guessed by the Court for want of a particularly desired result.

Pragmatists would dissent as to that conclusion.

Reason: The Process Tradition in American Jurisprudence, 15 CARDOZO LAW REV. 601, 661 (1993).

67. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–44 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. . . . If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.") (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

68. *Massachusetts*, 549 U.S. at 560 (Scalia, J., dissenting).

69. U.S. CONST. art. 2, § 3.

70. Lujan v. Def. of Wildlife, 504 U.S. 555, 577 (1992) (first quoting Massachusetts v. Mellon, 262 U.S. 447, 486 (1923); then quoting Allen v. Wright, 468 U.S. 737, 759 (1984)); s*ee also* GORSUCH, *supra* note 34, at 61–69.

3. Judicial Nominalism

The NOMINALIST JUSTICE, concurring:

Looking only towards what he/she "feels" is the right result, the Nominalist looks only to one's internal understanding of right and wrong. When action is imperative, legalistic doctrines should not stand in the way of judicial will. The Legislature provided a means to an end and the Executive wishes to abdicate its duty and authority to see it through. The judiciary need not address the rule or precedent established here; the only matter of any import is that the Court do right by the parties involved in the present case, which makes the task before the bench an easy one. Although capable of going either way, let us assume the Nominalist would concur completely with the majority and side with the environment, as legal realists typically have done.

Nominalists are cynical and skeptical of all the rules and established law cited by more traditionalist jurists.[71] Positivism and Pragmatism prefer the lethargic crutches of outmoded legal doctrines instead of the speed of their own legs. American constitutional jurisprudence on the requirements of standing is as outdated as it is inflexible. The Nominalist sees no reason to continue to apply some antiquated principle like standing when the right answer is clear. The majority believes the scientific data presented and the Nominalist is free to adopt or reject those factual assertions. But why Justice Stevens bothers to cloak his true colors in some half-baked attempt to rationalize his reasoning about a State's prerogatives and privileges is beyond the Nominalist's comprehension; the Nominalist wishes that Justice Stevens would simply concede that all jurists, including himself, reason first with their emotion every time. Every judge is a nominalist at heart. The country needs to cut greenhouse gas emissions and if that means abandoning some ancient doctrine, "so be it."

The Nominalist would rule that Massachusetts *or* any other litigant joining the petition has legal standing to challenge the EPA. If the Court fails to find standing in this case, it will have to find it in another case, unless it desires to abdicate its power to the same extent the EPA has attempted to do here. The EPA had a job to do, and the Court should do it for them as it sees fit. Furthermore, a Nominalist may forewarn the EPA

71. BROOKS, *supra* note 66, at 102, 175 (commenting on legal realists' fact-skepticism and rule-skepticism and tendency to favor consequentialist approaches in judicial decision-making. The nominalist judges purely from the "gut" and seeks to find the "best result" only for the case *sub judice*).

that any failure to regulate in the future will warrant further judicial review and if the Court must micromanage the nuances of that agency to ensure the best result in each case then that is what the Court should be prepared to do.

As observed above, Judicial Nominalists have the philosophical temperaments of legal realists. Nominalists reject the need for consistency in the law and arguably the "rule of law" in the conventional sense ceases to exist. Although doubtful of most universal facts and truths,[72] the facts presented here (and the summary detailed by the Asymmetrical theorist below) make the case for protecting the climate clear. There is the possibility the facts about climate change are wrong and the Nominalist's concerns are entirely meritless. But it is surely better for judges to act when no action is needed than risk the consequences of a failure to act when the call of duty is imperative. Even if judicial action proved to be ineffectual, the result is immaterial because justice demands the Court not sit idle when confronted with an opportunity for progress.

The very prospect that a failure to judicially act on climate change could doom our species compels the Nominalist to concur.

B. Critical Theorist Perspectives

In contrast to the three main traditional perspectives of judicial decision making, the critical theories require changing the datum and viewpoint of legal analysis. The crux of critical theory is critically assessing the existing rule through the lens of the "outsider." In short, the critical theorist will first deconstruct the existing rule or arrangement, and then reconstruct a remedy, based on the perspective of the "outsider." In the case discussed here, the *environment*, or some entity thereof, is the representative outsider. Each theorist will define the insider and outsider differently, and in so doing, effect the reconstruction of their perspective. The remedy must then pass through four epistemology tests to evaluate its validity and sufficiency in answering the outsider's source of subordination.[73]

---

72. *See id.* at 174–83 ("[L]egal realism displays the predominant intellectual temperament of judicial nominalism . . . . [however] [j]udicial nominalism's normativity—its commitment to the best results in particular cases—is problematic."). *But see* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

73. BROOKS, *supra* note 66, at 243–55 (discussing the criticalist "way of knowing," the truths and "hypertruths" each seeks to validate, and defining the rational/empirical, standpoint, postmodern, and positionality epistemologies).

1. Judicial Symmetry

The SYMMETRICAL JUSTICE, concurring

The Symmetrical theorist would start with the existing rule: the issue here is about standing, whether a party possess the legal prerequisites that allow its claims to be recognized and adjudicated by our courts. Standing is what makes a suit a "case or controversy."[74] Standing is vital; it is the foundation upon which a party asserts its desire for relief.[75] Without standing, there is no recourse in the courts of law and equity. In the Symmetrical theorist's view, we must level this procedural playing field with a *neutrally-minded* rule. Symmetricalists first determine if an existing arrangement (rule or law) is insider or outsider conscious. In this regard, if a law is not neutral, then the disfavored party is subordinated by the law. Symmetricalists will then seek to remedy subordination with a facially neutral law.[76]

An important assumption necessary for critical analysis, first requires acceptance that Mother Earth is an outsider subordinated by the law and by human history. Our entire legal system and notions of property law have deprived the entity that bore our existence from what is rightfully hers and has served our human race's advancement at her subordination. Her silence can no longer be condoned as assent to her own destruction. She must be given an equal voice. But, the Judiciary should not force an Executive agency to act nor can judges micromanage interpretation of various

74. Sierra Club v. Morton, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting) ("The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."). *But see* Muskrat v. United States, 219 U.S. 346 (1911); Allen v. Wright, 468 U.S. 737, 750–52 (1984).

75. CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY AND THE ENVIRONMENT, 35 (Oxford, Oxford Univ. Press 3d ed. 2010) (2002) ("Standing, broadly understood, is the authority of someone to initiate an action.").

76. BROOKS, *supra* note 66, at 261–62 ("Applying the symmetrical equality model, the judge finds subordination if the matter under consideration is insider- or outsider-consciousness . . . . Having found subordination, the judge then prescribes a facially neutral law to redress the identified subordination.") (footnote omitted); *see also* Roy L. Brooks, "Rehabilitative Reparations for the Judicial Process," 58 N.Y.U. ANN. SURV. AM. L. 475, 481–83 (2003).

statutes, congressional directives, and agency regulations.[77] And, it will not always be the case where a State as noble as Massachusetts has the fortitude to effectuate litigation that gives the judicial branch the footing it requires to issue a remedy. Our current concept of standing is antiquated and archaic in scope. The narrow framework of standing must be reconstructed to accommodate that which cannot pursue protection through litigation on its own behalf. The Court must, therefore, expand the foundation of our idea of who, or what, has standing to bring a claim.[78]

Consequently, the Symmetrical justice would differ from his colleagues in the majority on the preliminary question of standing in that a symmetrical theorist would be convinced that the injury in fact applies equally to any human on Earth as it applies to Massachusetts. Courts should not limit the standing of private individuals, nor the environment itself in seeking redress from the judiciary. It may seem preposterous to grant inanimate objects the legal right to sue, but yet we give credence to the legal fiction of corporations.[79] Courts allow every sect of minority person to have an identifiable perspective.[80] Courts allow for the advocacy of children with or without their consent. Furthermore, courts appoint guardians for representation where they are due.

The Symmetrical theorist would hold that the government and petitioners jointly appoint a guardian to be approved by this Court to represent Mother Earth, who may file claims and seek injunctive, declaratory, or monetary relief on her behalf, but who is simultaneously immune from suit as a matter of law.[81]

Similarly, the government is represented offensively by the Department of Justice under the guidance of the Attorney General, and defensively by the Solicitor General. Courts have long held that criminal defendants be

---

77. *See supra* notes 50–70 and accompanying text.

78. STONE, *supra* note 75, at 10–11, 49–70 (discussing the development of the "many fronts of standing" in environmental law).

79. *See Sierra Club*, 405 U.S. at 742 (Douglas, J., dissenting) (discussing the rights of corporations in America); Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) (the Marshall Court issuing a landmark decision solidifying the rights of private corporations in America over a century earlier); *see also* United States v. Deveaux, 9 U.S. 61, 86 (1809); JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 373–80 (New York: Riverhead Books) (2018).

80. *See* Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience-RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1278–93 (1999).

81. STONE, *supra* note 75, at 8–10 (discussing how "friends" of the environment can fulfill a plethora of duties that guardians generally perform, let alone provide legal representation); *see also* STONE, *supra*, text accompanying note 49 (noting how a single appointed guardian remedy would avoid the difficulty and complications of multiple jurisdictions granting guardians for a single entity).

appointed counsel and we provide the same through a compulsory process.[82] Minors and those adjudicated legally incompetent are appointed guardians to make decisions they are legally incapable of making.[83] Corporations have general counsel.[84] Even the deceased and their eternal estates are represented by executors.[85] It is no stretch of the legal imagination to grant legal standing to Earth via an appointed legal guardian, who may seek redress of wrongs on her behalf.[86]

This holding would grant no more legal rights to the environment than those already endowed upon humans. It merely levels the playing field and is insider-outsider neutral in that regard. Finding that remedy satisfactory, the Symmetrical theorist would need not address the inner workings of the EPA's decision-making since this solution of equal standing is enough to create an equal process.

This rule survives empirical and *rational* epistemology—the logical truth. Logically, if a defect in the law caused a lack of standing to challenge a failure to regulate, then granting that standing is an appropriate remedy. The environment, and future generations of humanity,[87] collectively, would have a voice in a court of law where one did not exist before. This neatly circumvents the Positivist's concerns over particularized injury, as it appoints a single guardian to protect the interests of a collective injury, while minimizing the potential for vexatious litigation.

This rule passes muster under *standpoint* epistemology—the truth of the outsider. The representative outsider, in this case the climate at large and her inheritors, the future generations of unborn humans, the Amazon rainforest, and the birds of the air and the beasts of the field are all given a legal right that they did not have before. If trees, the representative outsiders, could speak, they would desire the legal standing to challenge EPA regulations that fail to curb greenhouse gas emissions and slow global warming. In

82. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Anders v. California, 386 U.S. 738 (1967).

83. *See, e.g.*, *In re* Gault, 387 U.S. 1 (1967).

84. *See generally* Santa Clara County v. S. Pac. R.R., 118 U.S. 394 (1886); *see also* CORMAC CULLINAN, WILD LAW: A MANIFESTO FOR EARTH JUSTICE 64–66 (Green Books 2d ed. 2011) (2002) (criticizing the legally fictitious creature called a corporation for having "too many rights" and "few responsibilities").

85. *See generally* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 1986).

86. STONE, *supra* note 75, at 62–68 (first proposing the idea of guardianship for the environment).

87. *See* STONE, *supra* note 75, at 103–14 (discussing standing for future generations).

particular, the representative outsiders benefit from this holding in that their interests in the EPA's regulations under the Clean Air Act are now voiced.

This last point demonstrates the limitations of a symmetrical holding under *postmodern* epistemology, of which it fails to satisfy. Postmodern epistemology validates the truth of every intersectionality of outsider. The unrepresentative outsider is of course every fish of the sea and every lake and river that does not or cannot benefit from a new greenhouse gas regulation issued by the EPA under the Clean Air Act. The Symmeticalist's remedy of guardianship-standing does nothing to better the plight of those species or sectors of the environment that suffer at the hands of toxic waste contamination, poisoned ground-waters, or landfills. Even at its maximum employment, this new rule is too narrow in its grant of a neutral procedural remedy that it fails to vindicate the interests of those ecosystems that would not benefit from a Clean Air Act regulation. These injuries may be addressed in future litigation. For now, the Symmetrical justice might justify his holding by focusing on the parties directly affected by climate change and the injuries within the power of the EPA under the statute at issue here to amend.[88] The Symmetrical theorist would accept the compromise of leaving other environmental injuries by a failure to regulate under some other statute for some other day.

Under *positionality* epistemology, the analysis goes beyond the mere truths of other epistemologies and considers only what are "permanent truths" or "hypertruths." The greatest hypertruth furthered by the Symmetricalist would recognize that we are all part of the human race and this great organism that is our planet. We must actively protect the planet if we are to survive. Providing an advocate for a Living Being silenced for thousands of years guarantees a new, fair process of living in symbiosis with our Mother Earth. Of course, this hypertruth stands in stark contrast to the values of industry, capitalism, and society's economic progress. But, balancing the two competing hyper truths in light of the existential question compels the only conclusion: our planet must win.

Accordingly, the Symmetrical justice would concur in the judgment.

2. Judicial Asymmetry

The ASYMMETRICAL JUSTICE, concurring

---

88. *See* Transcript of Oral Argument at 8–9, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120) (conceding to Justice Kennedy that the Court need not decide the merits of climate change in order to find standing); *see also id.* at 4 ("We are not asking the Court to pass judgment on the science of climate change or to order EPA to set emission standards. We simply want EPA to visit the rulemaking petition based upon permissible considerations.") (Petitioner's counsel opening statement).

Rather than seeking an insider-outsider neutral solution, the Asymmetrical theorist wants to counterbalance the scales: as the majority notes, "the unusual importance of the underlying issue persuaded us to grant the writ."[89] "If carbon dioxide continues to increase, the study groups 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."[90] We simply cannot wait. An Asymmetrical theorist must concur only in the judgment, but for reasoning much more critical of the existing law than her colleagues.

The Asymmetrical theorist would agree with the Symmetrical theorist that the court should address the existing structure of the law but would see the severity of the subordination issue with greater clarity. Asymmetricalists will find an existing arrangement subordinates outsiders if it adversely affects outsiders by either unconscious bias or insider privilege.[91] "Insiderism" need not be intended by a law or rule; it can merely be an effect of unconscious bias.[92] To the Asymmetricalist then, the relevant outsider norms are the appropriate lens through which to perceive the subordination question.[93] In the presence of outsider subordination, the Asymmetricalist will fashion a remedy that grants preference to the outsiders to counter-balance the historical subordination.[94] Affirmative action is an example of Asymmetricalist doctrine. The denial of the environment—Mother Earth—equal standing in a court of law exudes insiderism and cannot be corrected by merely granting equal rights. A non-sentient being, such as our planet, can never be considered an equal in the man-made creation that is the practice of law.[95] No court could ever give Mother Earth the equality she deserves. After all, "there is no greater inequality than the equal treatment of unequals."[96]

---

89. *Massachusetts*, 549 U.S. at 506.

90. *Id*. at 508 n.11. *But see* Transcript of Oral Argument, *supra* note 88.

91. BROOKS, *supra* note 66, at 239 ("Subordination, or anti-objectivism, is established . . . if a law or institutional practice negatively impacts outsiders and, . . . enhances or maintains insider privilege."); *see also id*. at 262.

92. BROOKS, *supra* note 66, at 240.

93. BROOKS, *supra* note 66, at 262; *see also id*. at 246 ("those who have experienced discrimination speak with a special voice to which we should listen").

94. BROOKS, *supra* note 66, at 261–64; *see* RUTH BADER GINSBURG ET AL., MY OWN WORDS 245 (2016) ("I do not suggest that the Court should never step ahead of the political branches in pursuit of a constitutional precept.").

95. *See* CULLINAN, *supra* note 84, at 21, 55–61 (noting the dangers of humanity's self-delusion that the "idea of law" justifies ignorance of Earth's law).

96. Dennis v. United States, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting).

But the issue here is not just one of standing, because giving trees the right to sue does nothing if men do not take up the law in the environment's defense. Trees should not have to rely on the continued subordination or selective representation that would come from being granted a legal right. That which hath born us is not subservient to rights humans grant; the creation does not give the creator rights. Earth has had natural rights since before the dawn of the human race. We have just failed to recognize them in our indomitable exercise of self-serving dominion.

"The harms associated with climate change are serious and well recognized."[97] There has long been tension between environmentalists looking to mitigate the consequences of economic development and the more aggressive proponents of government-initiated climate change adaptation policy.[98] The effect of greenhouse gas emissions on global temperature rise and the disparate effects on sea levels are only the tip of the iceberg in terms of the devastating environmental impacts due to anthropological causes.[99] Based on the cause and effect relationship between emissions regulations (or lack thereof) and injury to the climate as a whole,[100] the Asymmetrical theorist would find the Court uniquely positioned to greatly influence the course of environmental propensities in our society. An Asymmetricalist would not shy away from the opportunity to correct (even overcorrect) the subordination.

Asymmetrical theorists would like to concur with Symmetrical's proposed holding, but he does not go far enough. Guardians can be bought; they can be slovenly and lethargic and ineffective. First, an Asymmetricalist would hold that any public or private entity has standing to petition the EPA. As the positivist notes in his dissent, the majority's reliance on Massachusetts' sovereignty is foolish at best.[101] The private organizations that make up

---

97. *Massachusetts*, 549 U.S. at 521; J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENV'T. L. REV. 363, 379–81 (2010) (explaining that climate change symptoms are well captured and consequences forecast).

98. Ruhl, *supra* note 97, at 366–76, 378 (forecasting ten structural trends that are expected in environmental law as the field reacts to adaptation modes and policy pressures).

99. Ruhl, *supra* note 97, at 379 nn.38–39 (citing numerous sources and volumes of research to show conclusively, among other determinations, that "air pollution control will accelerate warming in the coming decades," and a positive feedback loop of lost plant life and melting tundra further increases production of net greenhouse gases).

100. James E. Parker-Flynn, *The Intersection of Mitigation and Adaptation in Climate Law and Policy*, 38 ENVIRONS ENV'T. L. & POL'Y J. 1, 2 (2014); *see also id.* at nn.1–12.

101. *See Massachusetts*, 549 U.S. at 518–19. *But see id.* at 538–39 (Roberts, C.J., dissenting) (rejecting the majority's reliance on the state's established authority over resources within its borders as an impetus to expand its alleged susceptibility to injury, including a rising sea level that impedes the use of its own land).

the vast bulk of the petitioners here are equally injured and seek an equal remedy and should therefore have equal standing.

Second, the Asymmetrical justice would not limit these suits to the Clean Air Act. She would grant standing for any claim for any failure to regulate under existing or future statutes related to environmental protection, not just for the statute addressed in this case. The urgency of this existential problem demands this kind of action, and again, we have the opportunity to reach all intersectionalites of the environment, and thus all outsiders to this existing arrangement.

Thirdly, she would hold, as a matter of law, that the EPA is directed and obligated to use its authority to regulate emissions and slow the pace of climate change, in all suits and petitions against it, excepting only a narrowly tailored compelling state interest to do otherwise.[102] The EPA would no longer have discretion over instituting new regulations; it would be mandated to do so. In any instance when a petition desires a new greenhouse gas cutting ordinance, the EPA will approve it. The only redress for an affected entity is to seek review in the D.C. Circuit per the Clean Air Act and ultimately by appeal to the Court. A compelling interest is of the most exacting constitutional standard.[103] Here, the Asymmetrical justice demands that a refusal to regulate must satisfy strict scrutiny. Henceforth, an Asymmetrical justice would dictate the default rule is that new climate saving regulations will be granted when they are requested. Combined with the newly granted standing addressed above,[104] this holding would bring about drastic and much needed social change and will end the subordination of the environment.

To be clear: she does not believe this mandate comes from any congressional statute nor is justified through legislative history. Of course, the Clean Air Act may have started movement in the right direction, but for the wrong reasons. Those statutes, in the end, were self-serving to the human race, whereas the Asymmetricalist's ruling is based on redressing Earth's injury from humans since the Industrial Revolution. The Asymmetrical

102. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1973) (finding a compelling interest and a law narrowly tailored to that end is a judicial standard of strict scrutiny); *see also* Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

103. Corso v. Fischer, 983 F. Supp. 2d 320, 333 (S.D.N.Y. Oct. 23, 2013) ("Strict scrutiny is usually the 'death knell' for the challenged regulation") (citing Falwell v. Miller, 203 F. Supp. 2d 624, 631 (W.D. Va. 2002); Mood for a Day, Inc. v. Salt Lake City, 953 F. Supp. 1252, 1262 n.12 (D. Utah 1995)).

104. *See supra* notes 74–88 and accompanying text.

theorist purely relies on the norms expected by the environment if it could speak for itself, and she merely grants the responsibility for addressing those concerns to the agency in our government most apt to fulfill them. "The lawn tells me it wants water by certain dryness of the blades of soil. . . . We make decisions on behalf of, and in the purported interest of, other every day; these 'others' are often creatures whose wants are far less verifiable, and even far more metaphysical in conception, than the wants of rivers, trees, and land."[105] The Asymmetricalist would agree that the Earth is communicating the symptoms of its injury to us by its reactions to increased atmospheric carbon dioxide, the induced effects of climate change and global warming. Make no mistake, this is an action of corrective policy and is in effect environmental affirmative action. The situation calls for a transformation of the lens through which we view the law.[106] The Court must create a shield for Mother Earth out of the sword that has been used to enslave her lands, waters, and resources for centuries.[107]

The context of this ruling necessitates that she defines the affected groups. The symmetrical justice properly described the subordinated outsiders as Mother Earth and all her children who suffer from a failure to regulate greenhouse gases. The insiders, therefore, are the establishment and the government, which in themselves are merely representatives of the interests of corporations, the industrialists, the titans of business and our capitalist society at large.[108] Their interests are ones of economy, in plain contrast to the environment's interest of survival. The rule the Asymmetrical justice crafts today will vindicate the norms of the outsider-environment; to what expense on behalf of the insider-establishment is of no consequence to the Asymmetrical theorist.

---

105. Sierra Club v. Morton, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting); STONE, *supra* note 75, at 11 (Professor Stone asserting that natural objects in the environment can in fact speak for themselves).

106. *Sierra Club*, 405 U.S. at 745 (Douglas, J., dissenting) (understanding the symptoms of injury provides judges the norms through which to perceive the subordination).

107. Thomas Berry, *Forward* to CULLINAN, *supra* note 84, at 19 ("This legal foundation . . . exalted the property-owning citizen beyond anything known previously in the history of political establishments. The difficulty is not exactly with the rights granted to humans; the difficulty is that no rights and no protections were granted to any non-human mode of being.").

108. *See* CULLINAN, *supra* note 84, at 26–31; *see also* BERRY, *Forward* to CULLINAN, *supra* note 84, at 19 ("From its beginning the American Constitution was clearly a document framed for the advancement of the human with no significant reference to any other power in heaven or Earth. In the Bill of Rights, added as the first ten amendments, a detailed listing of the rights of individual persons was given. Humans had finally become self-validating, both as individuals and as a political community. This self-validation was invented and sustained by the union of the commercial-entrepreneurial powers with the legal-judicial powers to sustain the assault on the natural world.").

This holding is entirely rational from the climate's perspective. If given the ability to craft its own remedy for its injury, the environment would certainly agree with an Asymmetricalist.[109] Where at least one sentient human, one of Earth's own, has the conscience to litigate on her behalf, a petition may at least be heard and by default a rule granted unless a compelling interest justifies otherwise. The standard of strict scrutiny serves to affirm the interests of the petitioners in the absence of a truly extraordinary (compelling) government interest.[110]

The representative climate would readily accept this remedy and therefore this holding passes standpoint and postmodern epistemologies. Mother Earth would welcome an EPA more attuned to meeting her needs on a consistent basis at the expense of the insiders who devised a system effectuating her continued subordination. This holding also neatly corrects the limitations of the Symmetrical justice's holding and applies to all intersectionalities of the environment, because I have broadened the scope of applicable statutes. Some may think that by satisfying the norms of the non-representative member of the environment, the standpoint epistemology is no longer satisfied. An Asymmetrical theorist would remain unpersuaded that conflict requires her attention; given this set of circumstances and the breadth of this holding, Asymmetrical theorists care more about saving the fish as well as the birds than to debate whether the latter would consider the former to have equal injury.

Like the symmetrical holding, under positionality this holding acknowledges and furthers the hypertruth of good stewardship of our planet. Despite the relativity of truths between and amongst our race, the ultimate truth is undeniable: without a home, the rest of our endeavors are forfeit to our

109. *Sierra Club*, 405 U.S. at 743 (Douglas, J., dissenting); *See* STONE, *supra* note 75, at 11.

110. STONE, *supra* note 75, at 17–22 (suggesting an effort should be made to afford non-human life representative and procedural rights and notes that Congress has done so in legislation such as the National Environmental Policy Act. He also notes, however, that this and similar statutory measures generally limit the federal government's footprint but does nothing to alter the conduct of private corporations.).

ignorance. We must have an environment in which a civilization is capable of existing.[111] "A wait-and-see policy may mean waiting until it is too late."[112]

The majority could have and should have done more. The Asymmetrical jurist can only concur in the judgment of the majority, but not the majority's reasoning.

3. Judicial Hybridism

The HYBRIDIST JUSTICE, concurring

The Hybrid critical theorist would agree with both Symmetrical and Asymmetrical colleagues to some extent.[113] While the Symmetrical holding refused to address the decision-making of the EPA and resolved only the question of standing, the Asymmetrical ruling would instigate incalculable amounts of litigation[114] and creates too exacting a standard for the EPA to exercise its discretion. Where one party, say polar bears, loses a suit, and another party, sea lions, attempts to sue on the same facts and law, endless and vexatious litigation can occur. Courts will likely operate under "compulsory joinder" rules in order to eliminate these complications. Hybridists do not see a need to be as drastic as Asymmetricalists in their reconstructions. They seek only to *neutralize* insider power, not vanquish it.

Hybridists would concur with the Symmetrical holding on guardianship and would add a requirement that the EPA provide a decision on a petition, justifying all rejections with a *substantial* government interest within 180 days of its filing. Hybridists would also agree with the second Asymmetrical holding, regarding the broadening of the case at hand to include all environmental regulations, not just those under the Clean Air Act. The proposed test of strict scrutiny, however, requiring a *compelling* interest is rarely if ever, satisfied,[115] whereas the Hybridist compromise of a proposed

---

111. *See* CULLINAN, *supra* note 84, at 157–66; *see also id.* at 138–45 (arguing for "transformation in law and governance" and articulates a new philosophy of law call "Earth jurisprudence." This includes rethinking the most basic of concepts such as property law.); *see also id.* at 7–10 (focusing on an "earth-centric perspective of law and regulation.").

112. *Massachusetts*, 549 U.S. at 508, note 11 (citing Climate Research Board, Carbon Dioxide and Climate: A Scientific Assessment vii, viii (1979)).

113. *See* BROOKS, *supra* note 66, at 264, 265 (Hybridists follow the deconstruction (question of subordination) of Asymmetricalists but follow the reconstruction (proposed remedy) of Symmetricalists. Hybrid prefers rules that find the golden mean and neutralize insider power while not committing reciprocal subordination.)

114. STONE, *supra* note 75, at 68 (noting under a scheme like Asymmetrical's the "potential collateral effects of litigation," like *res judicata* could be maladaptive to progress.); *see* STONE, *supra* note 75.

115. *See* Parker-Flynn, *supra* note 100; *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1302–06 (2007) (Regarding strict scrutiny as effectively a categorical bar, noting despite "Gerald Gunther's much-quoted remark that strict scrutiny is 'strict' in theory and fatal in fact,' the Supreme Court has sometimes suggested that strict

standard of intermediate scrutiny is more reasonable and does not unduly prejudice against insiders.[116]

The Hybridist would likely echo the Symmetricalist's analysis of guardianship holding under the critical epistemologies and will not repeat them here. Only note that a Hybridist would support this measure because it attempts to find a mean between the human-insider and non-human-outsider. Similarly, the Hybridist would concur the Asymmetricalist's analyses of the broadening of applicable statutes and will not rehash that analysis. What follows is only an application of critical epistemologies to the third Hybridist holding, the mitigating of strict scrutiny to intermediate scrutiny.

The intermediate scrutiny holding passes rational and empirical epistemology. The default ruling of the EPA will still be in favor of a new environmental-friendly regulation and a substantial interest must otherwise overrule the regulation and its benefits. Relative to the Asymmetricalist's compelling interest standard, and although disfavored, the hybridist intermediate standard still provides a reasonable means of protecting the environment without overburdening the insider interests. This, in the Hybridist' view, allows for societal, industrial, and technological advancement while still providing adequate redress to the environment.

This holding over intermediate scrutiny would not pass under standpoint or postmodern epistemologies. Arguably, if the climate could speak, it would desire most to regulate itself altogether without interference from its most-sentient species. As such, under any rule where humans have the final say over the impact to the whole planet, the best interests of the environment are furthered by the most minimal interaction possible.[117] We are forever beyond that remedy. Many Hybridists would remain not confident that a proper balance can be struck as a matter of law that will truly vindicate

---

scrutiny will permit infringements of preferred rights only to avert rare, catastrophic harms.").

116. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (explaining that intermediate scrutiny only requires a substantial government interest and the law must be "not more extensive than necessary to serve that interest.") (quoting *id*. at 566 (majority opinion)); *see also* Plyler v. Doe, 457 U.S. 202 (1982).

117. Paola Villavicencio Calzadilla & Louis J. Kotzé, *Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia*, 7:3 TRANSNAT'L ENV'T L., 397, 398 (2018) ("In the anthropocentric ethic, humans consider themselves the dominant and most important life form; non-human lives are important only insofar as they are useful for maintaining the position of humans at the top of the social hierarchy.").

the norms of the environment. But, in any event, neutralizing the power of the industrial establishment is a suitable compromise.

Positionality is validated by the third part of the holding, however. In the balancing of hypertruths, the hybridist holding validates the immediate need to protect the environment while not completely disavowing the interests of humanity. But in the end, this holding still upholds the great overarching value in our jurisprudence in this case: the promotion of one earth, one planet, and one world.[118]

C. Commentary

The current political climate (pun intended) in 2020 is littered with discussions of green energy and the need to curb the causes and effects of climate change. This Comment was first written to explore the juridical methods and judicial techniques of traditionalist and criticalist philosophies as applied to environmental law and the Court's perspective on the issue of global warming in *Massachusetts*.

The majority's opinion, written by Justice Stevens, holds for the first time that a State has standing to petition the EPA for a regulation that could remedy an injury to that sovereign's shores. Some view this reach of judicial power as the Court injecting itself into the political arena. Justice Stevens furthermore holds the EPA responsible for fulfilling its congressional mandate by forcing regulation of greenhouse gases. Those who accuse the Court of activism would say this is a "political question"[119] left to the other two branches of government.

The traditionalists confine their rulings to existing structures of law. Justice Positivism sides with Chief Justice Roberts and refuses to recognize the claim against the EPA for lack of standing by Massachusetts, relying on the precedent and existing rules regarding constitutional standing

---

118. *See* CULLINAN, *supra* note 84, at 122–30; *see also id.* at 128 ("Accepting the premises of Earth jurisprudence has fundamental implications for the study of jurisprudence, law and governance. Currently we learn about jurisprudence and law in law libraries and lecture theaters from which nature is meticulously excluded. From an Earth-centered perspective, this means that we are devising our legal philosophies and laws without reference to the 'primary texts' (i.e., nature) and seeking answers in libraries that do not contain those answers.").

119. Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

requirements. Justice Pragmatism finds no qualms with assenting to the majority's finding of standing as a policy-discovery measure but refuses to violate the separation of powers doctrine by mandating how an executive agency chooses to regulate. Justice Nominalism applies his own standard of wisdom and calls this an easy case based on his own gut-feelings on the necessity of combatting climate change.

The Criticalist justices break the structure and restrictions of conventional statutory and precedent-bound methods of interpretation.[120] Justice Symmetrical adopts Professor Stone's concept of guardianship as an acceptable means of providing equal standing. Justice Asymmetrical prefers granting standing to any entity capable of providing guardianship, expands the scope of applicable statutes, and counterbalances the scales by creating an exacting standard for insiders to overcome should they desire to challenge a new regulation. Justice Hybrid splits the difference, favoring Asymmetrical's deconstruction and Symmetrical's reconstruction by neutralizing insider power with an intermediate scrutiny standard for insiders, while preventing vexatious litigation via appointed guardianship.

It seems, therefore, that Justice Hybrid best supports diversity and inclusion.[121] While Asymmetrical validates outsider norms the most, the remedy is too extreme and arguably unworkable for a modern society. The only standard beyond strict scrutiny is an absolute standard. Hybrid, on the other hand, provides a means of redress that covers all intersectionalities of outsiders, provides for equal access to the process, and still succeeds to include a way that the human-insider can effectuate economic and industrial progress.

Throughout the development of critical theory, on numerous occasions the criticalist perspectives eventually became governing law.[122] Although

120. *See* BROOKS, *supra* note 66, at 211–25, 308 (explaining central to Critical Theory is the tenant of anti-objectivism. Anti-objectivism, as a basic assumption, presumes that the existing legal framework, created by privileged insiders, is inherently biased, either consciously or unconsciously. Criticalists rely on anti-objectivism as the foundation for reasoning that seeks to validate outsider norms and perspectives in an imperfect and historically subordinating structure of existing law. Without subordination, there is no critical process to undergo.).

121. *See* GINSBURG, *supra* note 94, at 268–76 (discussing the "value of diversity".).

122. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (dawn of the Civil Rights Era); Lau v. Nichols, 414 U.S. 563 (1974) (promoting associated statutes that were enacted in the years following *Brown*); United States v. Virginia, 518 U.S. 515 (1996) (allowing equal educational opportunities for women); Roe v. Wade, 410 U.S. 113 (1973) (vindicating feminist norms and women's right to elect pregnancy termination).

primarily enacted through statutes after landmark cases, this trend demonstrates society's progressive desire to recognize shifting values and norms towards outsider perspectives. The present case is no different.

Professor Stone's seminal work cited *passim* was published in 1972. Professor Nash and Fr. Berry published works on the Rights of Earth in 1989 and 2001, respectively. Cullinan's Wild Law cited *passim* was published in 2003. In the mid-2000s, the Community Environmental Legal Defense Fund assisted in drafting the Rights of Nature approved by a town council, the first instance of recognized Rights of Nature in law. In September 2008, the people of Ecuador voted in a referendum to amend the Constitution of Ecuador, creating the first constitution recognizing the rights of Mother Earth.[123] In April of 2010, the Bolivian people proclaimed a Universal Declaration of the Rights of Mother Earth and codified it into law in 2012.[124]

In 2011, the first lawsuit over the Rights of Nature was adjudicated in Ecuador. The named plaintiff was a river that defended itself from a project that would affect its health. In 2014, New Zealand's Parliament recognized that a former park of 2000 square kilometers had "legal recognition in its own right."[125] In 2017, Columbia recognized similar rights in a river. In 2017, Mexico City amended its constitution and the city of Lafayette, CO, enacted the first Climate Bill of Rights, both codifying the legal rights of nature.[126] On October 17, 2019, The Democratic Party of Florida adopted the Rights of Nature into its party platform.[127]

---

123. *See* República del Ecuador Constitucion de 2008 January 31, 2011, tit. II, ch. 7, art. 71–74; Calzadilla & Kotzé, *supra* note 117, at 398–99.

124. Calzadilla & Kotzé, *supra* note 117, at 397, 399–404, 406–07. *Id*. at 400 ("[W]hile there seems to be no easy answer to such profound contradictions and complexities that overshadow the idealistic promise and potential of juridically innovative ways to safeguard Earth system integrity, the rights of nature debate and its practical manifestation in legal systems such as that of Bolivia provide considerable opportunities to begin with a much needed re-imagination of law and its ability to protect nature."). *See John Vidal, Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth,* THE GUARDIAN (Apr. 10, 2011), https://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights [https://perma.cc/KS59-LYWF]; *Timeline of Articles on the Rights of Nature*, GLOB. ALL. FOR RIGHTS OF NATURE, https://therightsofnature.org/timeline/ [https://perma.cc/H5LA-FT7Q]; CULLINAN, *supra* note 84, at 183–91.

125. Calzadilla & Kotzé, *supra* note 117, at 398–99 nn.11, 12; Whanganui River Deed of Settlement Between the Crown and Whanganui Iwi, https://www.govt.nz/assets/Documents/OTS/Whanganui-Iwi/Whanganui-Iwi-Whanganui-River-Deed-of-Settlement-Summary-5-Aug-014.pdf [https://perma.cc/T6FN-QXNM] (last visited Oct. 27, 2019).

126. *See Timeline of Articles on the Rights of Nature*, GLOB. ALL. FOR RIGHTS OF NATURE, https://therightsofnature.org/timeline/ [https://perma.cc/H5LA-FT7Q].

127. MEDIA STATEMENT: FLORIDA DEMOCRATS ADOPT RIGHTS OF NATURE IN PARTY PLATFORM (OCT. 15, 2019), https://celdf.org/2019/10/media-statement-florida-democrats-adopt-rights-of-nature-in-party-platform/ [https://perma.cc/6T6T-2LBY].

We are all inhabitants of our Mother Earth. We are all included as beneficiaries in the solution to global warming. Every race, creed, and nationality benefits from the sustainment of our planet and preservation of biodiversity and global temperature.[128] Under any of the Criticalist holdings, minority groups, the underprivileged, underrepresented minorities which have been subordinated by the corporate-elite backed legal system have a mode of redress on behalf of their planet. Industries and corporations driving for profits who manipulate the system can no longer avoid the piercing cries of the indigent and the young, nor the Earth that they have ravaged for its resources. Every intersectionality of life on Earth, human, animal, plant, ecosystem, and climate included, is given a voice.

In all reality, I think courts would be reluctant to further this line of judicial decision-making. The justification of the process here, the means to the end, opens the proverbial door to an unbounded, unrestricted potential for future "cases and controversies" not previously sustainable. Broadening the definition of standing to the degree the Criticalist's advocate may create an impetus to recognize other collective, amorphous associations that cannot satisfy the traditional requirements of injury, causation, and redressability. The result may include far-reaching implications and expansive judicial power to adjudicate more than a case or controversy. Let us consider the possible extremes of such a holding.[129]

If the environment is considered an outsider and a compilation of inanimate objects is now given the legal effect of standing, why then should we not give voices to groups whose injuries in more conventional claims are just as attenuated and imprecise? For instance, the millennial generation has mounting student loan debt. The current, collective college loan debt

128. *See generally* United Nations Framework Convention on Climate Change, *Conference of the Parties for 2012*, U.N. Doc. FCCC/CP/2012/8/Add.1 (Feb. 28, 2013), https://unfccc.int/sites/default/files/resource/docs/2012/cop18/eng/08a01.pdf [https://perma.cc/L5JZ-4J2X]; *see also* United Nations Framework Convention on Climate Change, *Conference of the Parties for 2013*, U.N. Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2013), https://unfccc.int/sites/default/files/resource/docs/2013/cop19/eng/10a01.pdf [https://perma.cc/LJ7D-QJVB].

129. *See* Calzadilla and Kotzé, *supra* note 117, at 424 (stating "The key challenge in this respect would be to reconcile as far as possible such radical worldviews with the prevailing, more conventional Western, often Eurocentric and predominantly anthropocentric, visions of law that form the basis of most legal systems the world over. We would need to open ourselves as lawyers, politicians and academics, among many other role players, to these alternative, potentially progressive, and possibly more effective juridical framings that focus on preserving Earth system integrity.").

tops $1.5 trillion spread over some 40 million Americans.[130] In most cases, predatory lending led to the legalized leveraging of college debt on the generationally-backed value that college education is a right and everyone should secure a loan for financing. But now the value of the individual degree has decreased due to the increase in supply. College graduates are having a harder time finding jobs that will pay commensurate with their education. Many millennials have tight cash flow, will work well into retirement years to pay back loans, and may scrap together just enough savings to live on. There has been a call for a debt jubilee.

If a court were so activist as to recognize a new judicial power to protect the environment, it may be equally as likely to invalidate loan contracts (even on a more traditional contract excuse such as unconscionability) and void all student debts for an entire generation of student-outsiders who were subordinated by the laws that protect lenders and universities. While some would hail such a decision, the second and third order effects are too immense to measure. The lost capital in the banking industry would undoubtedly cripple some financial institutions. That debt is still an asset on the balance sheets of banks, on which investors rely for the preservation of capital. In order to mitigate future risks, banks would force disclosure from all future loan applicants as to the status of the applicant's prior student loans. Interest rates would increase due to the need to hedge against more risky loans in the future and to make up for losses, and so on. A ruling such as this would be possible under a Criticalist theory looking to vindicate millennial generational norms, where "collective standing" could be justified on the same grounds that gave the environment standing, because "particularized, imminent injuries" fall under a now broadened scope of interpretation.

Another, arguably larger example is the insolvency of Social Security. Under the process condoned by the Criticalists, an activist court could effectively invalidate social security. Congress has already had to raise the retirement age. What is stopping a court from simply striking down social security mandatory payments in order to reprieve the nation's balance sheet? Social security and other entitlements make up 52% of the national budget and the total unfunded debt liabilities by governments in the United States is $25 trillion.[131] Without infringing on the debt or interest owed foreign powers or bond holders, the Court could simply provide for a nullification of social security obligations. The elderly will no longer be

130. Fed. Res. Bank of N.Y., *Research and Statistics Group*, Q2 Q. REP. ON HOUSEHOLD DEBT AND CREDIT (2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q2.pdf [https://perma.cc/NSY5-6R7Z].

131. CHRISTOPHER CHANTRILL, U.S. GOVERNMENT SPENDING (Oct. 10, 2020), https://www.usgovernmentspending.com/federal deficit [https://perma.cc/B6QQ-P69U].

paid, but the young will have greater cash flow and half the US national debt will evaporate.

In the evolving financial nature of the country, a Court could consider the young and unborn future generations as outsiders, unfairly born and raised into a pay-as-you-go system of debt that they never consented to. If an entity as amorphous as the climate can articulate standing, why not the collective unborn, future generations? If the Court finds standing in such an instance and finds it simply untenable and unconscionable to allow the past generations to burden the future generations with shouldered debt, the Court could, in theory, wipe it out. Such a finding, possible with broadened applications of constitutional standing, are within the scope of Criticalist corrective remedies.

In the case of *Massachusetts*, the second and third order effects of over-regulating industrial and economic sectors could have drastic implications for the human standard of living. Transitioning off fossil fuels for power and transportation before we have sustainable alternative sources of energy will undoubtedly have adverse and nation-threatening effects on commerce and society's stability. Whether considering the loan forgiveness, judicially mandated entitlement reform, or judicial fiat on greenhouse gas emissions, the Court would effectively assert all the authority reserved to the Legislature and Executive. Even under Justice Symmetrical's moderate holding requiring a guardian, judicial review would become a process for unprecedented policy-making beyond the scope of the judicial function.[132] Disregard of constitutional and statutory limitations in a radical attempt to effect change through unbridled re-interpretation is a dangerous and powerful precedent, and many believe this type of reasoning can only lead to judicial usurpation and tyranny.[133]

---

132. THE FEDERALIST NO. 78 (Alexander Hamilton) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

133. *Id.* ("[The judiciary] can never attack with success either of the other two [branches] . . . though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered . . . so long as the judiciary remains truly distinct from both the [L]egislature and the Executive. . . . '[T]here is no

Having considered the extremes and by re-orienting the problem in the frame of judicial construction, prudence dictates the People remain sovereign through the democratic process and put the pressure on their elected legislature to act in accordance with their will. A Climate Protection Act or Climate Change Prevention Act is not beyond the scope of the legislature to enact. Moreover, as noted in the introduction, Congress has the authority to statutorily provide a cause of action against an agency to redress injuries. Where Congress provides a remedy and recognizes an injury, courts would be more likely to find a case or controversy.[134]

The key to balancing any issue is moderation, which is what environmentalists have arguably called for over the past half-century. But they also (validly) point out that the longer we wait to moderate, the harder the moderation must be to effectuate a meaningful correction. And the question remains, *who* decides when and how to balance the scales. There is the possibility that even despite a Congressional mandate, a stalwart agency or court may refuse to recognize a cognizable injury to the environment. But, I have great faith in the moderate pace of change that our system permits.

However, I must concede that there is one great counter-argument to the two extreme hypothetical examples posed above: the question in the case *sub judice* is an existential one, beyond the concept of property, the reach of statutes, and the structure of the Constitution. We are talking about *survival*. The seemingly inescapable gravity that threatens the continued existence of our society and species compels action. Humanity cannot wait; without the human race there is no need for human law. Perhaps, as the scholars cited *passim* suggest, the time has come to abandon traditional doctrines like constitutional standing. Perhaps, we should rethink the very structure of our jurisprudence.[135] The case below illustrates.

---

liberty, if the power of judging be not separated from the legislative and executive powers.' . . . [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments[.]"). *See also*, Antonin Scalia, *"Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, A MATTER OF INTERPRETATION 39, 42 (Princeton Univ. Press 1997); GINSBURG, *supra* note 94, at 229–30.

134. *See* Massachusetts v. EPA, Oral Arguments, *supra* note 46, at 40:14-41:5 (Respondent responding to Chief Justice Roberts's question regarding whether a statute conferring a cause of action can necessarily vitiate standing saying: "Congress could make findings with respect to causation or other issues that this Court would have to give deference to and seriously consider, but [the Chief Justice is] right. It would not override the requirements of Article III.").

135. *See* CULLINAN, *supra* note 84, at 170 ("If we are to halt and reverse the process of degrading Earth we must completely revise how we govern ourselves. . . . [W]e must reject the misperception that humans are separate from Earth."); *see also id.* at 177 ("'[T]he environment' cannot be adequately dealt with simply by creating a new category of environmental law. Ultimately, all law must be based upon and reflect Earth jurisprudence, as must all institutional structures of our societies.").

III. *JULIANA V. UNITED STATES*[136]

In 2018, several plaintiffs, many of them teenagers and young adults concerned about climate change, filed a lawsuit in federal court against the United States government.[137] The plaintiffs sought injunctive relief from to compel the federal government to curb CO_2 emissions.[138] The district court concluded, "the plaintiffs had standing to sue, raised justiciable questions, and stated a claim for infringement of a Fifth Amendment due process right to a 'climate system capable of sustaining human life.'"[139] Despite a voluminous record,[140] the Ninth Circuit reversed, 2 to 1.[141]

Writing for the majority, Circuit Judge Hurwitz conceded the first two prongs of standing, causation and injury, but ruled the plaintiffs failed to allege redressability: they failed to show how a favorable judicial ruling

136. Juliana v. United States, 947 F.3d 1159, 1165–66 (9th Cir. 2020).

137. *See id.*

138. *Id.* at 1166 ("The operative complaint accuses the government of continuing to "permit, authorize, and subsidize" fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs. Some plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. The complaint asserts violations of: (1) the plaintiffs' substantive rights under the Due Process Clause of the Fifth Amendment; (2) the plaintiffs' rights under the Fifth Amendment to equal protection of the law; (3) the plaintiffs' rights under the Ninth Amendment; and (4) the public trust doctrine. The plaintiffs seek declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]." (alteration original)).

139. *Id*.

140. *Id.* at 1166 ("The plaintiffs have compiled an extensive record . . . [that] leaves little basis for denying that climate change is occurring at an increasingly rapid pace. . . . [S]ince the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years. . . . Today, it is over 410 parts per million and climbing. . . . Copious expert evidence establishes that this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked. Temperatures . . . may rise more than 6 degrees Celsius by the end of the century. . . . This extreme heat is melting polar ice caps and may cause sea levels to rise 15 to 30 feet by 2100. The problem is approaching 'the point of no return. . . .' [T]he federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions. As early as 1965, the Johnson Administration cautioned that fossil fuel emissions threatened significant changes to climate, global temperatures, sea levels, and other stratospheric properties. In 1983, an Environmental Protection Agency ("EPA") report projected an increase of 2 degrees Celsius by 2040, warning that a 'wait and see' carbon emissions policy was extremely risky. . . . Nonetheless, by 2014, U.S. fossil fuel emissions had climbed. . . from 1965. This growth shows no signs of abating. . . . [T]he country is now expanding oil and gas extraction four times faster than any other nation.").

141. *Id*. at 1175.

would actually lead to reduced CO_2 emissions and beneficial environmental impact.[142] The majority further stated such an incursion on policy-determinations would violate the separation of powers doctrine, noting the democratic branches are the appropriate vehicles for policy change.[143]

However, District Judge Staton, sitting by designation, dissented.[144] Judge Staton's opinion rejected the confines of standing and instead embraced a new principle: "Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction."[145] Judge Staton expounds on this "perpetuity principle." Although the question here is *existential*, she does not limit its reach to solely environmental matters.[146] Specifically

---

142. *Id*. at 1170 ("The crux of the plaintiffs' requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress . . . an order simply enjoining those activities will not, according to their own experts' opinions, suffice to stop catastrophic climate change or even ameliorate their injuries. The plaintiffs' experts opine that the federal government's leases and subsidies have contributed to global carbon emissions. But they do not show that even the total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth. . . . Rather, the record shows that many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources.").

143. *Id*. at 1172. "[T]his kind of plan will demand action not only by the Executive, but also by Congress. Absent court intervention, the political branches might conclude . . . that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate change than the plaintiffs believe is necessary. 'But we cannot substitute our own assessment for the Executive's [or Legislature's] predictive judgments on such matters . . .'" (alterations original, citations omitted).

144. *Id*. at 1175 (Staton, District Judge, dissenting).

145. *Id*. at 1175–76 ("[P]laintiffs' claims adhere to a judicially administrable standard. And considering plaintiffs seek no less than to forestall the Nation's demise, even a partial and temporary reprieve would constitute meaningful redress. Such relief, much like the desegregation orders and statewide prison injunctions the Supreme Court has sanctioned, would vindicate plaintiffs' constitutional rights without exceeding the Judiciary's province."); s*ee id*. at 1182 ("[P]laintiffs have a constitutional right to be free from irreversible and catastrophic climate change.") (comparing due process rights annunciated in Brown v. Board and Furman v. Georgia).

146. *Id*. at 1179 ("This perpetuity principle does not amount to "a right to live in a contaminant-free, healthy environment." . . . be sure, the stakes can be quite high in environmental disputes, as pollution causes tens of thousands of premature deaths each year, not to mention disability and diminished quality of life. Many abhor living in a polluted environment, and some pay with their lives. But mine-run environmental concerns "involve a host of policy choices that must be made by . . . elected representatives, rather than by federal judges interpreting the basic charter of government[.]" . . . The perpetuity principle is not an environmental right at all, and it does not task the courts with determining the optimal level of environmental regulation; rather, it prohibits only the willful dissolution of the Republic.") (internal citations omitted).

disagreeing with the majority on the third prong of the standing requirements, Judge Staton relies on *Massachusetts v. EPA* to find that the redressability element is satisfied, as "some" reduction of CO_2 is a quantifiable redress.[147] But, in deriving a Due Process right for the individual to live in a non-cataclysmic climate, Judge Staton neatly side-steps the "special solicitude" the State of Massachusetts enjoyed, expanding *Massachusetts* even further than Justice Stevens had imagined.[148] Besides, standing doctrine, like other justiciability doctrines, is often used solely for courts to decide which cases they want to hear and which issues they would rather refrain from addressing. Judge Staton criticized the majority's rigid adherence to the separation of powers, calling the doctrine "deference-to-a-fault" when "yielding" to the political branches will "walk the Nation over a cliff."[149] What *Brown* was for segregation, this case could have been for climate change.[150]

At a minimum, Judge Staton is a far-flung Pragmatist, believing that "faithful application of our history and precedents reveals that a failure to [confront and reconcile the tension between separation of powers and judicial review] leads to the wrong result."[151] But, unless the words of her opinion cloak a subtext of environmentalism that goes undetected, she is not employing any critical environmental perspectives. Although her deconstruction follows that of the Asymmetrical critical theorist, she does not offer a reconstructive remedy so radical as to embody a true critical theorist; she does not offer any analysis on the perspective of the environment

147. *Id*. at 1182 ("[A] non-negligible reduction in emissions—there, by regulating vehicles emissions—satisfie[s] the redressability requirement of Article III[.]").

148. *Id*. at 1183 nn.8, 9; *see id.* at 1187 ("[W]e need not definitively determine that standard today. Rather, we need conclude only that plaintiffs have submitted sufficient evidence to create a genuine dispute as to whether such an amount can possibly be determined as a matter of scientific fact.")

149. *Id.* at 1184 ("[T]he doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when . . . it requires that we instruct the other branches as to the constitutional limitations on their power. Indeed, sometimes 'the [judicial and governance] roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, . . . orders the alteration of an institutional organization or procedure that causes the harm.'" (citation omitted)).

150. *Id.* at 1188–89; *see id*. at 1191 ("And while all would now readily agree that the 91 years between the Emancipation Proclamation and the decision in Brown v. Board was too long, determining when a court must step in to protect fundamental rights is not an exact science.").

151. *See id.* at 1184 (illustrating that pragmatists are consequentialists and often concerned primarily about the results of their decisions.).

as an outsider. At the extreme, the good Judge may be a Nominalist at heart in that she is most concerned with the enforcement of her own values and feelings as to what is "right."

IV. CONCLUSION

The dissent's conclusion is rooted in legal realism and is ironically and particularly unnerving. Judge Staton's reasoning is more expansive of judicial power than a critical theorist in that it is not limited solely to the environmental issue. It lays the groundwork for the hypotheticals I posed above: if the Court can dream up a Due Process right under the Fifth Amendment to live in a climate-change-free environment, what new rights-to-be-created would exceed the newfound scope of judicial power? Furthermore, if the Court can re-legislate for Congress and compel the Executive to act in accordance with judicial decree to the extent the *Juliana* dissent proposes, there is some merit to the proposition that our democratic elections would become empty ceremonies. Some may pontificate that the sole purpose of future elections may be only to impeach unelected judges.

Then again, throughout human history, the times have presented decision points that demand employment of that exclusive quality of our human race: Leadership. Perhaps the need to stop climate change is such a moment. Perhaps leaders are sometimes found in black robes.