A basic insight of positive political theory is that the existence of veto points makes it possible for an agenda setter to substantially influence political outcomes. Essentially, an outcome is viable so long as it satisfies a basic condition: it must be closer than the status quoto to the optimum outcome for at least one gate keeper. Changing the status quo shifts the feasible set of outcomes. This has seemingly paradoxical implications for environmental law.

Congress has been more or less deadlocked over environmental legislation for the past twenty years. There are a lot of veto points: multiple committees in both houses of Congress, congressional leadership with control over the floor agenda, the Senate's filibuster rule, and the President's veto power. What this means is that no other outcome is preferred by all of the gate keepers to the status quo. Thus, new legislation is impossible.

But that can change if the status quo changes. Consider the example of climate change. At present, the key gate keeper is the 60th senator. That senator may well prefer a status quo of zero regulation to a cap-and-trade scheme. But the status quo is no longer zero regulation. It now consists of considerable state regulation. Even more significantly, if the Obama Administrations follows the Supreme Court's invitation, the status quo will become regulation under the Clean Air Act.

From this perspective, there is an ironic advantage to the potential flaws of the Clean Air Act as a way of regulating greenhouse gases. Suppose, for example, that the Clean Air Act promised rigorous reductions of greenhouse gases. Even if the resulting regulatory costs were very high, environmentalists in Congress might block new legislation.

Thus, if the goal is to prod Congress into passing climate legislation, it would be ideal if the Clean Air Act imposes major costs on industry (thus encouraging industry to seek another solution) but is not *too* effective in reducing emissions quickly (giving environmentalists an incentive to come to the table).

Of course, another industry option is to litigate any Clean Air Act regulations rather than supporting new legislation. *Massachusetts v. EPA* makes it unlikely that an endangerment finding would be overturned, but there might be a hope of overturning or at least delaying later regulatory stages. The *Chevron* doctrine increases the prospect that regulations would ultimately survive judicial review. Still, at the very least, industry can hope for delay.

Thus, the true status quo would not be immediate regulation under the air pollution statute but some increased prospect of burdensome regulation a couple of years down the road. Nevertheless, even this shift in the status quo may make new legislation more palatable to the 60th senator, especially since there would also be delays in implementing any new regulations (so the delay factor is really a wash to some extent).

Perhaps this is a roundabout way of stating the obvious: regulating greenhouse gases under the Clean Air Act would make it easier to get a cap-and-trade scheme through Congress. The most interesting point is that, from the point of view of prompting legislation, an inefficient (Pareto inferior) status quo is preferable, snce all parties then have something to gain from new legislation.

Thus, if you think the Clean Air Act is a really bad way to address climate change and that we need new legislation, that may be a very good — if paradoxical — reason to urge the EPA to start down the road to regulate under the Clean Air Act.