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### **ESSAY**

#### THE SIGNIFICANCE OF MASSACHUSETTS V. EPA

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Last month, the Supreme Court handed down its decision in *Massachusetts v. Environmental Protection Agency* (“*Mass. v. EPA*”),<sup>1</sup> its first case dealing with climate change. The decision was an enormous, if narrow, victory for environmentalists: it legitimized their concerns about global warming and their claims that the administration was not doing what it should to address it. Whether the decision was a great victory for the environment remains to be seen, but it will affect the policy debate for years to come.

I should make clear that I had a dog in this fight. In 1998, as EPA General Counsel in the Clinton administration, I wrote a legal opinion on the question of EPA’s authority to regulate emissions of carbon dioxide (“CO<sub>2</sub>”) and other greenhouse gases under the Clean Air Act (“CAA” or “Act”), one of three issues decided in *Mass. v. EPA*. Generally, the Act authorizes EPA to regulate a substance if it is an “air pollutant” and if the Administrator finds that emissions of it endanger public health or welfare. I concluded that CO<sub>2</sub> and other greenhouse gases qualified as air pollutants

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<sup>1</sup> 127 S. Ct. 1438 (2007).

when emitted into the air and were regulable upon a finding by EPA that they met the endangerment standard.<sup>2</sup>

In 1999, relying on this legal opinion, a coalition of groups filed a rulemaking petition with EPA asking the Agency to regulate greenhouse gas emissions from new motor vehicles under Title II of the Act. In 2003, while that petition was still pending, a new EPA General Counsel reversed the opinion, concluding that the Agency did *not* have the authority to regulate greenhouse gas emissions for their effect on climate change. Soon after that, EPA denied the rulemaking petition on the grounds (1) that the Agency lacked the necessary regulatory authority and (2) that, even if it had the authority, regulating greenhouse gas emissions from motor vehicles would not be “effective or appropriate . . . at this time.”<sup>3</sup> On this latter point, the Agency invoked a range of considerations, including scientific uncertainty, the comparative advantages of the administration’s “comprehensive approach” to climate change, and the adverse effect of unilateral regulation on convincing developing countries to control emissions.<sup>4</sup>

This decision was upheld by a divided panel of the D.C. Circuit.<sup>5</sup> And then, somewhat surprisingly, as there was no conflict among the circuits and the case presented a serious question of whether petitioners had standing, the Supreme Court granted review. Last month, Justice Stevens delivered the opinion of the Court, speaking for a bare majority that included Justices Kennedy, Souter, Ginsburg, and Breyer. The Court concluded that at least one of the environmental petitioners, the state of Massachusetts, had standing. On the merits, it held that EPA had the statutory authority to regulate CO<sub>2</sub> and other greenhouse gases and that, in declining to regulate, the Agency had failed to meet its statutory obligations. Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined in a pair of dissenting opinions, one on standing authored by Chief Justice Roberts<sup>6</sup> and one on the merits authored by Justice Scalia.<sup>7</sup>

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<sup>2</sup> Memorandum from Jonathan Z. Cannon, General Counsel, EPA (Apr. 10, 1998), available at <http://www.virginalawreview.org/inbrief/2007/05/21/cannon-memorandum.pdf>.

<sup>3</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,929–31 (Sept. 8, 2003).

<sup>4</sup> Id. at 52,930–31.

<sup>5</sup> Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005).

<sup>6</sup> Massachusetts, 127 S. Ct. at 1463 (Roberts, C.J., dissenting).

What are we to make of this decision? In early commentary, Richard Lazarus called it “a breathtaking result for [the] greens” and “[s]tunning.”<sup>8</sup> The holding defines a major new area of responsibility for EPA and requires the Agency to review this and other requests for regulation of greenhouse gas emissions under limits set by the Court. The Court’s opinion also reflects sympathy with environmentalist beliefs and values to an extent rarely, if ever, seen in the Court’s environmental cases. This cultural or symbolic significance of *Mass. v. EPA* is, for me, its most remarkable feature, and it is to that aspect of the decision that I now turn.

What do I mean by “environmentalist beliefs and values”? People calling themselves environmentalists believe a lot of different things, but there are some common threads. Environmentalists share a sense of urgency: they believe that the environment is seriously threatened and requires attention now. They also subscribe to the ecological model—the idea that nature is fragile and interdependent, so that environmental disturbances are likely to have harmful consequences and those consequences can be distant in place and time. In the absence of conclusive evidence of harmful effects, environmentalists are inclined to presume such effects.

Environmentalism is associated with certain values—values that emphasize acting collectively for the common good and fitting harmoniously into the natural and social environment. Environmentalists generally favor regulation to prevent or correct the widespread harms they see in the world.

This environmentalist worldview has implications for law. It assumes serious secondary effects or externalities from environmental disturbances, even though those effects may be uncertain or difficult to measure, and thus supports measures to control those externalities. Supreme Court Justices who have shown sympathy for this worldview (for example, Justices Stevens, Souter, Ginsburg, Breyer, and sometimes Kennedy) tend to favor liberal access to the courts, a broad scope of federal regulatory power, and generous interpretations of environmental regulatory authority. Justices who have resisted environmentalist tenets (for example, Chief Justice Roberts and Justices Scalia, Thomas, Alito, and sometimes Kennedy) have contrary tendencies on these issues. Against the

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<sup>7</sup> Id. at 1471 (Scalia, J., dissenting).

<sup>8</sup> Richard Lazarus, A Breathtaking Result for Greens, *Env'l. F.*, May–June 2007.

claims of environmentalists, this latter group places judicial restraint, limited federal power, and narrow constructions of regulatory authority. I do not suggest that these Justices are anti-environment; they do not wish the environment harm. Their resistance to environmentalism is influenced, I believe, by concerns about the consequences of the environmentalist vision for individual autonomy and economic freedom.

These opposing views are manifest in *Mass. v. EPA*. The Court's opinion begins, in striking fashion, with this assertion: “[r]espected scientists” believe that the rise in global temperatures is related to a significant increase in carbon dioxide concentrations in the atmosphere.<sup>9</sup> This assertion establishes the factual premise for much of the rest of the opinion. The Court then quotes environmental petitioners' claim that global warming is “the most pressing environmental challenge of our time.”<sup>10</sup> The prominent placement of the quote so early in the opinion leaves little doubt that the Court agrees with it. And the rest of the opinion reinforces that implication. If we assume that the Court uses the first page of an opinion to tell us what is most important about the case, the most important thing in this case is that anthropogenic climate change is real and very serious.

In their dissents, both Chief Justice Roberts and Justice Scalia note the Court's sense of urgency. They do not say that the Court is alarmist. Their point instead is that the Court's assessment of the risks, whatever they are, should have no influence on its decision. Even if climate change were a “crisis,” indeed “the most pressing environmental challenge of our time,” responding to it is the job of the politically accountable branches, not the courts.<sup>11</sup> Thus against the force of environmental urgency, the dissenters would place the barrier of institutional restraint. The outcome here, of course, would be no regulation.

We can trace the influence of these competing views more specifically in the Justices' positions on the three issues decided by the

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<sup>9</sup> *Massachusetts*, 127 S. Ct. at 1446.

<sup>10</sup> *Id.*

<sup>11</sup> See *New York v. United States*, 505 U.S. 144, 187 (1992) (opining that the “crisis of the day” should not weaken our resistance to “the temptation to concentrate power . . . as an expedient solution to [such] ‘cris[es]’”).

Court: standing, the scope of EPA's regulatory authority, and the appropriateness of EPA's decision not to regulate.

The standing inquiry focuses on the nature of the injury necessary for the exercise of federal judicial power under Article III, using a three-part test: injury, causation, and redressability.<sup>12</sup> The injury must be concrete, particularized and actual or imminent, it must be causally related to the legal violation complained of, and the relief requested must be capable of redressing it. There are several things going on in Justice Stevens's standing analysis, including special solicitude for Massachusetts' standing as a sovereign State, but I want to focus here on the Court's assessment of Massachusetts' standing under the standard three-part test.

Massachusetts' argument for standing was based on a claim of systemic injury. Its success depended on (1) the Court's readiness to assume injury from human disturbance of the earth's climate system, which is a vast and complex system; and (2) the Court's willingness to accept as significant climate effects that could not easily be quantified and might even be quite small within the context of the system as a whole. In short, standing depended on a view of the facts consistent with the ecological model. And that was the view the Court embraced.

Justice Stevens fashions an extended chain of causation, which looks something like the following: Domestic motor vehicles emit greenhouse gases. Increased world greenhouse gas emissions have led to a heightened greenhouse effect, which has led to a global temperature rise, which has led to sea level rise, which has led to loss of Massachusetts' coastline. EPA's failure to regulate greenhouse gas emissions from automobiles contributes to this loss. A correction of that failure will moderate the loss. Hence injury, causation, and redressability were all satisfied.

It does not matter to Justice Stevens that the causal chain is lengthy and complex or that specific impacts are relatively small or difficult to measure. His analysis implicitly accepts the notion that systemic injuries are just as real and just as serious—indeed more serious—than the discrete injuries that have traditionally supported standing.

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<sup>12</sup> *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Chief Justice Roberts' dissent argues that the Court uses "the dire nature of global warming itself as a bootstrap for finding causation and redressability."<sup>13</sup> His main focus is deconstructing the Court's causation story. Domestic automobile emissions are a minuscule part of global greenhouse gas emissions, he states. The linkage between those emissions and Massachusetts' coastal loss is fraught with complexity, "far too speculative to establish causation."<sup>14</sup> And far too speculative to make it likely that Massachusetts' specific loss will be redressed by any auto emission standards EPA might impose.

Chief Justice Roberts insists that he is not debating the scientific case for global climate change or doubting its seriousness. He is simply taking Article III standing requirements seriously to keep courts out of policy and to maintain the tripartite allocation of power. But by separating the several elements of the causal chain and demanding particularized proof of each, his analysis necessarily rejects the environmentalists' presumptions of fragility, radiating harm, and serious consequence.

Another environmental case in modern standing jurisprudence, *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"), accepted a comparably broad systemic notion of injury and causation.<sup>15</sup> There the alleged injury to environmental plaintiffs was the disturbance in their use of local forests and streams that would be caused by the impact of reduced recycling brought about by a nationwide railroad freight rate increase on recyclable commodities. Chief Justice Roberts calls the Court's decision in *Mass. v. EPA* "SCRAP for a new generation";<sup>16</sup> he does not mean this as a compliment. Decided in 1973, in the first flush of the environmental movement, *SCRAP* seemed a ringing endorsement of the ecological model as applied to standing. It was marginalized, but not quite overruled, in subsequent environmental standing decisions authored by Justice Scalia. Although arguably limited to cases in which petitioners are states, *Mass. v. EPA* represents the Court's fresh embrace of the environmentalist worldview in its Article III jurisprudence.

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<sup>13</sup> *Massachusetts*, 127 S. Ct. at 1468 (Roberts, C.J., dissenting).

<sup>14</sup> *Id.* at 1469.

<sup>15</sup> 412 U.S. 669 (1973).

<sup>16</sup> *Massachusetts*, 127 S. Ct. at 1471 (Roberts, C.J., dissenting).

We see a similar pattern on the merits, where the Court addressed EPA's authority to regulate greenhouse gas emissions and its determination not to regulate at this time. Both issues turn on the degree of discretion the Court is willing to grant the agency. The Justices' different views on that question are framed by their sense of urgency about climate change and their concept of the role that urgency should play in the Court's deliberations.

The Court's opinion seems to leave EPA little room in dealing with climate change. First, it holds that greenhouse gas emissions clearly fall within the statute's definition of "air pollutant." The statute defines "air pollutant" with astounding breadth as "any air pollution agent . . . including any physical, chemical [or] biological . . . substance or matter which is emitted into or otherwise enters the ambient air."<sup>17</sup> Based on a plain reading of the text, the Court concludes that the statute "embraces all airborne compounds of whatever stripe."<sup>18</sup> It rationalizes the statute's broad reach with the observation that without sufficient flexibility, new problems, such as climate change, would render the statute obsolete and inadequate.

Second, the Court limits EPA's latitude to postpone regulation. The statute, it concludes, requires EPA to determine either that CO<sub>2</sub> emissions from automobiles pose a danger or that they do not, or that the scientific uncertainty is so profound that it cannot reach a reasoned decision on climate change. The Court finds that EPA did neither here. The "laundry list" of reasons the Agency offered for not regulating are not to the point.

The Court does not require that EPA find endangerment. But its opening assertion that greenhouse gases are causing climate change signals its view that the science supports an endangerment finding. The Court barely disguises its frustration with an Agency that has refused to address what the Court views as a serious risk, doing so in the face of a statutory provision that mandates—the language is "shall"—regulation of emissions that are found to "endanger."

It is this frustration, born of the Court's sense of urgency, that is the ultimate target of Justice Scalia's dissent on the merits. Scalia finds sufficient ambiguity in the definition of "air pollutant" to

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<sup>17</sup> 42 U.S.C. § 7602(g) (2000).

<sup>18</sup> *Massachusetts*, 127 S. Ct. at 1460.

warrant deference to the agency's interpretation. The text, he argues, can fairly be read to require that any "air pollutant" must also be an "air pollution agent" and that greenhouse gas emissions are not agents of "air pollution" because they exert their effect throughout the atmosphere rather than near the earth. Scalia divides the affected resource (air) into discrete units (air at ground level and air in the upper atmosphere) as a way of limiting regulatory authority—an interpretive approach he has applied to similar effect in other environmental cases.<sup>19</sup> Scalia also concludes that nothing in the statute's language requires the administrator to make a judgment about endangerment or limits what EPA may consider in deciding to defer making a judgment. The factors EPA cited in deciding that it would not be wise to grant the petition at this time are reasonable and proper and therefore the denial should be upheld.<sup>20</sup>

Justice Scalia ends his dissent with a coda that captures the tension between environmentalism and institutional restraint that is the organizing theme of the entire case:

The Court's alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. 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. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.<sup>21</sup>

With pronouncements of this sort, however, it is important to keep in mind that, as a statistical matter, the Justices' willingness to grant deference to agency interpretations relates significantly to the interpretation's ideological content.<sup>22</sup> Arguments about separation of powers and the proper role of the courts may be deployed

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<sup>19</sup> See, e.g., *Rapanos v. United States*, 126 S. Ct. 2208, 2220–25 (2006).

<sup>20</sup> *Massachusetts*, 127 S. Ct. at 1475–77 (Scalia, J., dissenting).

<sup>21</sup> *Id.* at 1477–78.

<sup>22</sup> Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823, 825–26 (2006) (concluding that conservative Justices are significantly more likely to validate agency interpretations whose ideological content is conservative, and liberal Justices are significantly more likely to validate interpretations with liberal ideological content).

selectively in service of the Justices' value preferences, including those that influence their responses to environmentalists' claims. The recent case of *Rapanos v. United States*<sup>23</sup> provides a counterpoint to *Mass. v. EPA* in this regard. In *Rapanos*, Justice Stevens emphasized the limited role of the courts in arguing for deference to the Corps of Engineers' expansive interpretation of its regulatory authority under the Clean Water Act; Justice Scalia asserted the Court's prerogatives in enforcing an interpretation limiting regulatory scope.

The Court in *Mass. v. EPA* remanded the matter for further consideration by the Agency, but it neither dictated a particular outcome nor set a deadline for a new decision. On May 14, President Bush publicly directed the Agency to implement the decision by developing regulations to reduce greenhouse gas emissions from automobiles and improve fuel efficiency.<sup>24</sup> Although his direction appears to remove the possibility of another decision not to set automobile emissions standards, the President did not specify what the regulations would require or address whether the Agency should also regulate greenhouse gas emissions under other CAA authorities, such as standards for new stationary sources or national air quality standards.

Even if this or a future EPA were to use all the tools potentially available to it under the CAA for regulating greenhouse gas emissions, it is not clear to what extent an effective national climate change program could be assembled from existing authorities. Moreover, the existing statute does not provide for the international arrangements that will be necessary to deal with greenhouse gas emissions at the global scale. Further action by Congress and the President will be necessary to achieve a comprehensive climate change policy.

This brings me again to the broader cultural or symbolic significance of the decision. The Court has accepted—indeed has seemed to internalize—the beliefs, assumptions, and values that animate the environmentalists' views on climate change. It has legitimized the environmentalists' concerns against the efforts of the administration to discredit and put them aside. The decision provides a

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<sup>23</sup> 126 S. Ct. 2208.

<sup>24</sup> Bush Calls for Cuts in Vehicle Emissions: Agencies Ordered to Draft New Rules, Wash. Post, May 15, 2007, at D1.

rallying point for climate change advocates and a touchstone for the public on climate change. I am not suggesting this is *Brown v. Board of Education* for the environment, but it may be as close as we will come.

There remain the dissenters' claims that the Court has exceeded its institutional bounds and stepped into a policy role for which it is unsuited. Commentators will disagree on whether the Court got it right in this case, but I do not think the decision can fairly be called unbridled. The Court did what courts do—it marshaled the facts, it applied precedent, and it interpreted statutory text. As it noted, "the proper construction of a congressional statute [is] a question eminently suited to resolution in a federal court," and the CAA specifically authorizes this type of judicial challenge.<sup>25</sup> The Court stopped at least one step short of dictating policy.

The Court did show its colors, however, and its colors were green. At this moment, that is the remarkable thing.

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<sup>25</sup> *Massachusetts*, 127 S. Ct. at 1453.