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MASSACHUSETTS V. EPA: THE INCONVENIENT TRUTH ABOUT PRECEDENT

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EVERY so often, the Supreme Court renders a decision that is difficult to separate from the politics of the day—not that Justices consciously promote a political party or purpose, but sometimes political inclinations insinuate themselves into the Justices’ thinking in a way that colors their approach and tilts toward one outcome. It happens less often and less boldly than is often supposed. But it does happen.

This Term’s decision in *Massachusetts v. Environmental Protection Agency*¹ (“*Mass. v. EPA*”) is just such a decision. In their eagerness to promote government action to address global warming, the Justices stretch, twist, and torture administrative law doctrines to avoid the inconvenient truth that this is not a matter on which judges have any real role to play.

Wasting no time in signaling the politics of this decision, Justice John Paul Stevens, writing for the Court, begins his opinion with a jeremiad on global warming. The very first sentences are:

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide

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¹ 127 S. Ct. 1438 (2007).

in the atmosphere. Respected scientists believe the two trends are related.²

Instead of legal issues, Justice Stevens starts with a mini-lesson on greenhouse gases as a cause of global warming. By the end of the first paragraph, readers understand that—no matter what obstacles stand in the way—this decision is going to command the Bush Administration’s environmental decisionmakers to do what a Gore Administration’s more eco-friendly administrators surely would have done: take steps to order automobile makers to cut back on the emissions that “[r]espected scientists”³ connect to global warming. The rest, as they say, is mere detail.

Unfortunately for administrative law, quite a few legal obstacles did stand in the way. Watching the Stevens opinion go around, over, and through these doctrines is both entertaining and depressing. This essay gives only a quick tour of the carnage.

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The case began when a coalition of groups interested in energy, technology, and environmental issues petitioned the Environmental Protection Agency (“EPA”) to institute a rulemaking proceeding under Section 202 of the Clean Air Act to regulate automobile emissions, including carbon dioxide, that constitute greenhouse gases contributing to the scourge of global warming. EPA asked for and received extensive public comment, but ultimately declined to institute the proceeding both because it deemed the requested action outside the scope of its statutory authority and because it saw the issue as part of a larger problem better addressed—and being addressed—by other governmental agents. The petitioners, joined by a dozen state governments and a few local governments, sought review in the United States Court of Appeals for the District of Columbia Circuit and, after losing there, in the Supreme Court.

The first legal hurdle to a happy outcome for our intrepid litigators was standing. Standing law has hardly been a highlight of the Court’s jurisprudence, either with respect to statutory standing requirements or with its amalgam of constitutional and prudential

² *Id.* at 1446.

³ *Id.*

standing requirements. The Court managed to confuse standing law with its decision in *Association of Data Processing Service Organizations v. Camp*,⁴ where it misread the Administrative Procedure Act. *Data Processing* conflated one provision granting standing to litigants with legal rights in dispute and another provision separately recognizing the standing of litigants authorized by statute to seek review of agency action, in effect, as “private attorneys general.”⁵ The result was a mish-mash of considerations respecting the nature of the injury suffered and the litigant’s relation to a statutory “zone of interests.”⁶ Courts have spent thirty-five years trying to straighten out statutory standing law since then.

The Court’s exposition of the constitutional prerequisite of a “case or controversy” has occasionally been problematic as well. That phrase, according to past decisions, embodies requirements that litigants have a personal stake in the outcome of the case (an injury in fact), that the challenged action caused the harm alleged, and that resolution of the litigation can redress the alleged harm. As a prudential matter, the Court has endeavored to avoid making decisions on matters where the other political branches are given primacy and there is little or no legal basis for fashioning judgments on the issues at stake. Sometimes this has led the Court to deny standing where questions are essentially political; sometimes the Court has simply declared the matter nonjusticiable. The Court’s problems on the constitutional-prudential side of standing have been less at the level of theory than of practice, with its application of these tests less than uniformly consistent.

Justice Stevens’s opinion in *Mass. v. EPA* mangles parts of the statutory requirement, the constitutional requirement, and the prudential considerations that have been encrusted onto the Court’s other—especially its constitutional—standing doctrines. Start with the constitutional requirement of an injury in fact. As prior cases articulated the test, the injury had to be “concrete and particularized,” “distinct and palpable,” “actual or imminent,” “not conjectural or hypothetical,” not remote or speculative. An injury to the planet as a whole cannot give rise to standing—there is nothing distinct and palpable about that, so far as any given plaintiff is

⁴ 397 U.S. 150 (1970)

⁵ *Id.* at 154.

⁶ *Id.* at 156.

concerned. Nor is it within the use of ordinary language to describe the injury expected from global warming as actual or imminent. Chief Justice Roberts's careful description of the evidence supporting the sole example of actual or imminent harm asserted by the petitioners is a devastating rebuke to the Court on this score.

To be fair, the Court's decision in *United States v. Students Challenging Regulatory Agency Procedures*⁷ is hard to reconcile with any of the quoted formulations of the injury-in-fact test. The name of the petitioning group in *SCRAP* gives a clear signal of its distance from anyone having a direct and concrete connection to the challenged regulation. The *SCRAP* decision seems to treat standing as an open door, satisfied by creative pleading of the thinnest sort. But subsequent decisions in *Simon v. Eastern Kentucky Welfare Rights Organization*⁸ and *Lujan v. Defenders of Wildlife*⁹ brought the test back from its high-water mark of flexibility. Until this case, *Mass. v. EPA* presents as broad a claim as conceivable, involving harm that is remote, debatable, and—if one gets past those problems—ubiquitous.

The Court, however, gave special weight to the fact that petitioners in the case included states such as Massachusetts. It is not entirely clear how this changes standing analysis. States can, indeed, sue as *parens patriae*, asserting the claims of their citizens, but even so the citizens must have injuries that meet the constitutional requisites for standing.

Justice Stevens seems less focused on that aspect of state standing than on the fact that the state itself has suffered (or imminently will suffer) an injury, in this case the erosion of state-owned land due to rising sea levels caused by global warming. Asserting its own interest as landowner, not an interest in governing within its own sphere of sovereignty, would not seem to call for "special solicitude" for state standing. Yet, again, the injury asserted does not become more concrete, more distinctive, or more imminent simply because a state is asserting it.

Moreover, the truth—which even the dissenters were too decorous to mention—is that states are less likely than private litigants to assert concrete interests in litigation. State attorneys general are

⁷ 412 U.S. 669 (1973).

⁸ 426 U.S. 26 (1976).

⁹ 504 U.S. 555 (1992).

political figures with political agendas and political aspirations. Their litigation decisions often reflect their political interests, most of all when the litigation involves not an individual criminal suspect but a fundamental challenge to the federal government's environmental policy. It should come as no surprise that eleven of the twelve attorneys general suing in *Mass. v. EPA* were Democrats while the administration whose policies they challenged was Republican. Far from treating the states' participation as presumptively establishing standing, the Court should have seen the states' filing more as presumptive evidence that this was a political fight over national policy, just the sort of issue that traditionally would have been regarded as a political question.

In addition to showing special solicitude for state interests here, Justice Stevens's opinion shows special solicitude for Justice Anthony Kennedy, the Court's new swing-man, quoting consistently from his concurring opinion in *Lujan* rather than from the majority.¹⁰ That also allowed Justice Stevens to downplay the redressability and causation requirements for constitutional standing. As Judge Raymond Randolph rightly noted in the D.C. Circuit's decision, considerations relevant to redressability and causation come up again in the arguments on the merits of the petition.¹¹ But by the time Justice Stevens's opinion is done with those as elements of standing, they are not much more than imperceptible speed bumps on the open road to court.

The Court's treatment of the statutory standing issue also leaves much to be desired. Accuracy, for one thing. The Court notes that litigants who are granted standing by law in order to protect procedural rights do not need to meet the same redressability and causality standards as others. Justice Stevens's opinion then points to a special provision in the Clean Air Act giving such a procedural right.¹²

Unfortunately, that provision, codified at 42 U.S.C. § 7607(b)(1), provides no procedural right at all, and certainly none that could be claimed to have been violated in the EPA's decision not to insti-

¹⁰ See, e.g., *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

¹¹ *Massachusetts v. EPA*, 415 F.3d 50, 54–55 (D.C. Cir. 2005).

¹² *Massachusetts*, 127 S. Ct. at 1453.

tute a rulemaking proceeding.¹³ The provision instead simply states which court litigants must go to if they wish to challenge certain EPA decisions. Section 7607(b)(1) does not grant a right to review, much less any right that was at issue in the disposition of the rulemaking petition. The right of review comes instead from the Administrative Procedure Act's general provision for judicial review of agency action—a provision conditioned on standing either through the existence of a direct legal right or through another law's grant of an entitlement to contest a particular decision.

The statutory standing question, thus, comes back full circle. The special grant of standing to bring the challenge in *Mass. v. EPA* comes from the Court, not the Congress.

* * *

The Court did no better on reviewability. The question here is not *who* can ask for review, but *what* can courts properly be asked to review.

Decisions to initiate a prosecution or a rulemaking—or not to start them—generally are not reviewed by courts. They are regarded as discretionary matters that turn on a set of considerations too “polycentric” (to use Lon Fuller’s phrase) to be subject to judicial review. Politicians and administrators balance a large number of overlapping interests and concerns, but courts and judges can effectively deal only with relatively discrete controversies that can be resolved by application of set principles. If there are too many interrelated moving parts, the matter is one of “feel” rather than principle. Those are matters typically committed to the discretion of decisionmakers other than the courts.

The question whether a prosecution was rightly initiated or whether a rulemaking was properly begun is subordinated to narrower, principled inquiries respecting the validity of the charges pressed or the legality of the rule adopted. Questions respecting prosecutions not initiated and rulemaking proceedings not begun

¹³ 42 U.S.C. § 7607(b)(1) (2000) (providing, in pertinent part, that “[a] petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final actions taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia”)

are generally regarded as beyond judicial ken absent an unequivocal legal command removing administrative discretion.

The *Mass. v. EPA* majority took a different tack. The Court starts with a statutory provision that says the Administrator of the EPA shall prescribe “standards applicable to the emission of any air pollutant from any class or classes of new motor vehicle or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”¹⁴ The words “in his judgment”¹⁵ sound a whole lot like a commitment of the matter to the Administrator’s discretion.

The provision contains limitations on what the Administrator can do—for example, he cannot sustain regulations of an air pollutant unless the air pollution associated with it is reasonably connected to a likelihood of harm to public health. But there is no action-forcing command in the provision, nothing that requires the Administrator to judge that a given pollutant produced by a new motor vehicle must be regulated as a danger to public health or welfare. In the absence of such a legislative command, there is nothing obvious for courts to review. Somehow the *Mass. v. EPA* majority missed that. Maybe they were watching the movie rather than reading the book.

* * *

Having passed the threshold hurdles to review, the Court had one more obstacle to get by en route to saving the planet: *Chevron* deference. Under the rule laid down in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,¹⁶ courts defer to reasonable administrative judgments where the law’s breadth, ambiguity, and structure suggest that administrators, not judges, are supposed to give more concrete meaning to legislated terms.

While courts’ later application of *Chevron*’s deference rule has enough twists and turns for a slalom run, its initial exposition is worth repeating:

¹⁴ 127 S. Ct. at 1447.

¹⁵ *Id.*

¹⁶ 467 U.S. 837 (1984).

Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by an agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.¹⁷

Those words were written twenty-three years before *Mass. v. EPA* in another case challenging a decision of the EPA implementing its interpretation of the Clean Air Act. They were written for the Court by Justice Stevens. And they are diametrically opposed to what Justice Stevens and the Court do in *Mass. v. EPA*.

Far from accepting the agency's construction of the statute, Justice Stevens and his colleagues put on the mantle of climatologists-in-chief, second-guessing every consideration that supports the positions taken by the EPA and the current administration. The EPA's decision not to proceed with the requested rulemaking rested first on its own view of the reach of regulatory authority granted to it in an area that has been subject to vigorous public debate and repeated legislative initiatives. Secondly, the agency decision was rooted in a policy judgment of exactly the sort that the *Chevron* Stevens said properly rests in political, not judicial, hands.

Reasonable people can differ on the question of EPA's authority to regulate carbon dioxide and other greenhouse gases because they contribute to global warming. Congress repeatedly considered

¹⁷ Id. at 865–66.

what actions should be taken by what government body and passed legislation (signed into law) specifically focused on that issue, assigning responsibility to particular government agents for particular tasks concerning global warming and regulation of greenhouse gases. Those steps certainly are consistent with EPA's conclusion that the general language respecting air pollutants in the Clean Air Act was not understood by Congress as giving EPA authority in this arena. Justice Antonin Scalia, in his dissent, explains carefully why the EPA's interpretation should be seen not merely as reasonable but as right.

If the question before the Court in *Mass. v. EPA* was whether the Clean Air Act should be read as precluding EPA from ever regulating any greenhouse gas, there might have been some warrant for the majority to engage in its statutory exegesis. Although the majority's analysis is a bit of a stretch in spots, the Court's opinion presents a plausible alternative construction of the law. The question, however, was whether EPA's refusal to regulate carbon dioxide emissions from new automobiles as a cause of global warming was a permissible action under the law. In that context, any possible question of the agency's authority should have been credited as a reasonable basis for a decision not to go forward now.

More obviously, the other set of reasons advanced by EPA easily should have put an end to the case. The most stunning move in the Court's opinion is the seemingly effortless leap from its decision on authority to a conclusion that, because EPA *may* regulate, it *must* and must do so *now*.

Any level of deference to administrative decisionmaking should suffice to uphold EPA's decision not to endeavor to affect global warming by regulating carbon dioxide emissions from new automobiles at a time when there are considerable questions about what contribution those emissions make to global warming, what policies are best pursued on a global scale, and what effect an EPA initiative at this point would have on other government efforts. The majority opinion in *Mass. v. EPA* reads like a faculty discussion paper or political position paper, intended only for a like-minded crowd. There is no sense of real openness to the EPA's analysis—questioning the clarity of global warming science or the immediate need to do anything and everything possible to combat it (even at

the risk of impairing efforts at a better solution) is received by the majority as an obvious departure from common sense.

It is one thing to say that on balance the Justices would have preferred a different set of policy judgments, would have given more credit to certain considerations and less to others, or in other particulars would themselves have exercised the decisionmaker's discretion in very different ways. It is something altogether different to declare that no reasonable person could have accepted the arguments or reached the conclusion that the EPA did. Both in tone and substance, Justice Stevens's *Mass. v. EPA* opinion looks like his *Chevron* opinion turned inside out.

While the appearance of doing something out of keeping with the broad fabric of the law for one case and one set of interests only is never a good thing, that is the best possible legacy for *Mass. v. EPA*. With luck, the Court's decision will not be the opening salvo in a wholesale rewriting of administrative law doctrine but, instead, will remain an isolated relic of the heady days after Al Gore's Academy Award, when anything seemed possible and global warming was simply a category of its own.

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