



Back To the Sovereign States!

[By James Kilpatrick]

“It is of considerable relevance,” wrote Justice John Paul Stevens, “that the party seeking review here is a sovereign state and not a private individual.”

The Supreme Court’s most senior member was writing for the majority on April 2 in the case of *Massachusetts v. Environmental Protection Agency*. He was invoking a doctrine as old as the Republic — a doctrine embedded in the Constitution’s tenth Amendment. The states may not have much of their original sovereignty left, but even their residual “quasi-sovereign” powers gained the court’s respect.

From every real-life point of view, the majority’s hortatory opinion will accomplish little. Notably, it provoked the first full-scale dissenting opinion by Chief Justice John Roberts since he joined the court. It contributed to Justice Anthony Kennedy’s growing reputation as the court’s decider in 5-4 cases. Most usefully, if briefly, the court’s action focused public attention on the growing problem of global warming.

The facts are not greatly in dispute. In this case the facts are diluted by significant conjecture. For the most part we’re talking law. Federal law delegates power to the EPA to regulate greenhouse gas emissions from new motor vehicles. The EPA has declined to exercise that power. Justice Stevens and his colleagues insist upon action. Their majority opinion asserts:

“EPA’s decision — that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time — rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA’s authority on the formation of a ‘judgment,’ the use of the word ‘judgment’ ... is not a roving license to ignore the statutory text. If

EPA makes a finding of endangerment, the Clean Air Act *requires* the agency to regulate emissions of the pollutants from new motor vehicles.

“EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. For example, EPA said that a number of voluntary executive branch programs already provide an effective response to the threat of global warming, and that curtailing motor-vehicle emissions would reflect ‘an inefficient, piecemeal approach’ to the climate change issue.

“Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.”

Stevens concluded his long majority opinion by scolding the administration for failing to offer a reasoned explanation for its refusal to act. This was “arbitrary, capricious, and otherwise not in accordance with law.”

Chief Justice Roberts, in response, lectured his most senior colleague on the merits of judicial restraint. Roberts did not exactly scoff at old doctrines of “state sovereignty” or “quasi-sovereignty.” Even so, he concluded that in the case at hand, Massachusetts has no sovereign rights — or even quasi-sovereign rights — the EPA is bound to respect. That theory “has no basis in our jurisprudence.” The state has neither

the duty nor the power to enforce the rights of its citizens in relation to the federal government. Goodnight from Appomattox.

Under well-established precedent, Massachusetts must demonstrate “injury in fact” that could be redressed by court order. Where is the injury? “It is pure conjecture.” The concept of *global* warming seems inconsistent with the idea of particularized relief based upon the emissions of late-model cars in Massachusetts. What of the projected inundation of coastal land? Under established principles of tort law, a threatened injury must be “certainly impending.” To accept a series of compounded estimates, said Roberts, “renders requirements of imminence and immediacy utterly toothless.”

It was a splendid breaking of lances between Stevens and Roberts, but it settled nothing. On remand, the EPA presumably will explain patiently that an effective response to global warming remains to be devised. Meanwhile, old-fashioned states-rightsers may express their thanks to Justice Stevens. On April 2 he gave them one brief shining moment to recall their Camelot.

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