IDEAS & TRENDS; For the Chief Justice, a Dissent and a Line in the Sand

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WHEN the Supreme Court ordered the Bush administration last week to take global warming seriously, the headlines the decision generated were well deserved. This was a major ruling, likely to help shape an important policy debate.

It may be heresy, then, to suggest that the court's directive to the Environmental Protection Agency was not necessarily the most important part of the decision.

Well after the debate over climate change moves to other forums -- as it promptly did in the days following the decision -- the case is likely to be remembered for two other reasons.

One is how the 5-to-4 majority widened access to the federal courts, reinvigorating the doctrine of environmental standing by giving a surprising new twist to the court's long-running debate over states' rights. The other is how vigorously Chief Justice John G. Roberts Jr. expressed his displeasure at that development. His 15-page dissenting opinion, his first of the term, served as a declaration of his deepest jurisprudential beliefs and highest priorities. It thus offered the most revealing portrait in the 18-month history of the Roberts court of the new chief justice at work.

In interviews and public appearances, Chief Justice Roberts has set a new standard for visibility, and the portrait of the chief justice as an avatar of a new era of consensus on a divided court has gained considerable currency in articles and even books.

This case was a rude reminder that his careful self-presentation comes with a price. He is no more likely than any other justice to yield on what he regards as a matter of principle. But the raised expectation of consensus magnifies a defeat like this one: his consensus project lost as well.

That Chief Justice Roberts cast a dissenting vote in Massachusetts v. Environmental Protection Agency was no great surprise. He had advocated a narrow view of standing, particularly in environmental cases, since his days as a lawyer in the Reagan administration.

Fourteen years ago, as a lawyer in private practice, he published an article in The Duke Law Journal praising a 1992 opinion by Justice Antonin Scalia that cut back sharply on the ability of environmental groups to challenge government policies in federal court. (Dissenting from that decision, Lujan v. Defenders of Wildlife, Justices Harry A. Blackmun and Sandra Day O'Connor declared that they could not "join the court on what amounts to a slash-and-burn expedition through the law of environmental standing.")

A relaxed doctrine of standing, the future chief justice warned in his 1993 article, "would

transform the courts into ombudsmen of the administrative bureaucracy, a role for which they are ill-suited both institutionally and as a matter of democratic theory." And in his dissenting opinion last week, he quoted from the Scalia opinion in arguing that "the redress of grievances of the sort at issue here 'is the function of Congress and the chief executive,' not the federal courts."

Massachusetts should not have been permitted to proceed with its lawsuit against the federal agency, the chief justice argued, because it met none of the three essential ingredients for standing: an actual injury; proof that the injury was due to something the defendant did or failed to do; and proof that the injury would be redressed if the defendant did as the plaintiff asked.

In the majority opinion, Justice John Paul Stevens found five votes for the conclusion that Massachusetts not only met all three tests but was also entitled to special deference for its claim to standing because of its status as a sovereign state. Invoking no modern precedent -- because there was none -- to support this new theory of states' rights, Justice Stevens deftly turned the court's federalism revolution, which he has long opposed, on its head and provoked an objection from the chief justice. States have "no special rights or status" when it comes to standing, Chief Justice Roberts said.

It was his vehemence rather than his dissenting vote that was the surprise. This was no dry document written by a law clerk. The chief justice was spending capital and speaking in his own voice. The opinion was reminiscent of many by his mentor, William H. Rehnquist, for whom he clerked. Standing was a big issue back then, and Associate Justice Rehnquist dissented from decisions that interpreted the doctrine generously. One was a case called United States v. Students Challenging Regulatory Agency Procedures, or SCRAP.

Five law students sued the Interstate Commerce Commission for approving a railroad rate increase that they said would cause them "economic, recreational and aesthetic harm" by leading to air pollution and environmental degradation. That claim was sufficient to establish injury for the purposes of standing, the majority said. Justice Rehnquist joined a dissenting opinion that warned that "we are well on our way to permitting citizens at large to litigate any decisions of the government which fall in an area of interest to them and with which they disagree."

Justice Scalia's decision in the 1992 Defenders of Wildlife case had seemingly brought SCRAP to an end. But now, according to Chief Justice Roberts, SCRAP is back. "Today's decision is SCRAP for a new generation," he said mournfully near the end of his dissent.

So is it fair to conclude that in this case, Chief Justice Roberts is Rehnquist redux? Not quite.

In 1976, four years into the Rehnquist tenure, Professor David L. Shapiro of Harvard Law School wrote a famous article that boiled the justice's philosophy down to three premises: (1) in a case between the individual and the government, the government wins;

(2) in a case between state and federal authority, the states win; and (3) when there is a question about whether a federal court has jurisdiction to decide a case (like whether the plaintiff had standing), the question should be resolved against jurisdiction (or against standing).

Those observations held up remarkably well during Justice Rehnquist's tenure. But last week's case placed the second and third propositions in irreconcilable conflict: the state could win only if it had standing.

Never having faced such a case, William Rehnquist did not have to choose between principles. For Chief Justice Roberts, limiting standing was more important than deference to the states, a choice rich with implications as the Roberts court continues to reveal itself.