

Justice Scalia's Regrettably Irrelevant Decision in *Rapanos v. United States*

While many would argue that Justice Scalia's opinion would be a disaster for wetlands policy, this author claims just the opposite. He argues that Justice Kennedy's case-by-case significant nexus test will result in greater centralization, whereas Justice Scalia's opinion would invite more state initiative and experimentation.

BY MARK MOLLER

For dedicated wetlands activists, the U.S. Supreme Court's recent decision in *Rapanos v. United States*¹ will come as something of a relief. The case challenged the scope of federal control over local "wetlands." The government didn't get everything it wanted—that is, judicial affirmance of its assertion of near plenary discretion over any land within U.S. borders that is sometimes wet. But, courtesy of concurrences by Justice Anthony Kennedy and Chief Justice John Roberts, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers can salvage a very large amount of power over national wetland policy.

The ultimate question, of course, is whether this outcome is a good thing. Readers of this publication no doubt think it is, on balance. I hold a contrarian view, informed as much by concern about the environmental impact of centralized bureaucratic control over wetland policy as by the rule of law values that federal policy flouts.

Below, I briefly summarize highlights of the *Rapanos* decision—particularly the concurrences of Kennedy and Roberts; discuss the import of the concurrence for the scope of the decision; and, then, offer a short contrarian assessment the concurrence's policy consequences.

RAPANOS V. UNITED STATES

Ever since the Court's 1984 holding in *United States v. Riverside Bayview Homes, Inc.*,² the Corps has labored to stretch its jurisdiction over wetlands as widely as possible. In *Rapanos*, EPA premised its enforcement proceeding on a "hydrological connection" between navigable water and the land over which it sought jurisdiction. The "hydrological connection" test, formulated by some field offices of the Corps, postulates that federal authority extends to any channel through which water flows into navigable water—whether the channel is on the surface or in the ground, supports intermittent or steady flows, carries molecules, or floods.

Based on this test, the federal government brought criminal charges against one John Rapanos, a Michigan commercial developer who dumped sand and dirt onto three parcels of his

land in preparation for a real estate development project. He was threatened with jail time (up to sixty-three months in prison) because the sand "backfilled" intermittently saturated bits of land on his property and because of the hypothetical threat that some of that sand might be carried by rainwater through old run-off drains and, after a journey through culverts, creeks, and ditches, end up in the Kawkawlin River, a navigable body of water ten to twenty miles away by various measures.

In ensuing appeal to the Supreme Court, the justices split five to four: Justices Scalia, Thomas, Roberts, Alito, and Kennedy rejected some or all of the government's arguments. Justices Breyer, Ginsburg, Souter, and Stevens would have accepted those arguments. However, simple head counting conceals fractures in the majority that, when all is said and done, limit the decision's real-world impact.

SCALIA'S PLURALITY DECISION

Relying on constitutional concerns about the Clean Water Act's scope, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, rejected the government's expansive reading of the statute. The government, he said, envisions that the Corps would "function as a de facto regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board." That interpretation, said Scalia, "stretches the outer limits of Congress's commerce power," raising difficult constitutional questions.

In these circumstances, according to Scalia, the U.S. Congress must make a "clear and manifest" statement of its intent to authorize federal power of such scope. Accordingly, Scalia would read "the waters of the United States" to authorize federal regulatory power over permanent, standing, or continuously flowing bodies of water "forming geographic features" such as "streams[,] . . . oceans, rivers, [and] lakes," but not over channels through which water flows "intermittently or ephemerally," such as channels that provide on-and-off rainfall drainage.

Scalia's opinion imposes fewer restraints on EPA than a quick read might suggest. Scalia notes that the Agency's authority over statutory "point sources" (that is, discrete points of discharge) may continue unabated, so long as the Agency can prove the discharge flows into waters under federal control—an inquiry, says Scalia, that mimics the "hydrological connection" test. In other words,

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Scalia converts the “hydrological connection” test from a test that defines regulated “waters” to a test for *causation* of pollution in regulated waters. Yet he doesn’t answer how “direct” or “proximate” an intermittent discharge must be to federally regulated waters before it may fall within the federal purview or whether “upstream channels” that carry upstream flows themselves constitute point sources—leaving these line-drawing problems for later litigation.

In the end, Scalia’s opinion would leave states with: exclusive control over isolated, non-navigable, intrastate ponds and water-saturated areas that do not “drain” into other bodies of water; exclusive control over “diffuse” intermittent flows that are not discharged through an upstream point source; and concurrent control, to an as yet undefined degree, over downstream intermittent flows emanating from point sources when discharge affects the water quality or integrity of standing, continually flowing tributaries of navigable water.

KENNEDY AND ROBERTS OPEN THE SPIGOT ON FEDERAL POWER

The Chief Justice’s and Justice Kennedy’s concurring opinions, however, clip the reach of Scalia’s opinion. Kennedy acknowledges that some applications of the CWA may raise constitutional problems but contends that the Act is constitutionally unproblematic so long as it is read to require a “significant nexus” between wetlands and traditionally navigable waters. Kennedy provides little concrete guidance to lower courts concerning how to apply the “significant nexus” test. He specifies only that the significant nexus test is satisfied if a waterway “either alone or in combination with similarly situated lands in the region, affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’” in a fashion that is not “speculative” or insignificant. Unlike Justice Scalia, he suggests that the geographic and temporal nature of the water flow—surface or ground, continually running or intermittent—is irrelevant to the scope of federal authority. The significance of a water flow’s cumulative impact on the ecological integrity of “navigable water” is all that matters. Within these broad parameters, Kennedy leaves elaboration to lower courts acting on a case-by-case basis. As for Chief Justice Roberts, he invites EPA to engage in formal notice-and-comment rulemaking about the scope of federal power over wetlands by suggesting that if it engages in such rulemaking, it would deserve “generous” leeway in the lines it draws. Both concurrences may, in practice, carve more room for agency discretion than Justice Scalia’s. As I will discuss in the concluding section, this is, in fact, a bad thing.

To see why we should be uneasy about these concurrences, let’s start by examining the effect of the concurrences in greater

detail. They narrow the decision in two ways. First, Kennedy’s confusing “significant nexus” test is likely to generate an enormous number of splits in the federal circuit courts. And while EPA has a general policy of abiding by the first circuit opinion to resolve a question, it sometimes avoids appealing adverse decisions in district courts in order to preserve its policy discretion. Finally, the Supreme Court can be expected to take on average, at most, one appeal related to the CWA per year. Thus, it could be a decade or more before the federal judiciary manages to impose any actual restraint on EPA or the Corps under the significant nexus test.

Second, even assuming the significant nexus test may, in theory, coalesce into a set of restraints on federal regulatory power, Chief Justice Roberts would give the agencies broad power to *change* those restraints. In *Rapanos*, Scalia suggests that the Court

retains the power to authoritatively interpret the scope of an agency’s jurisdiction when an ambiguous statute raises difficult constitutional questions about the boundary between federal and state power—even under a detailed and extensive regulatory program such as the CWA. Put simply, where federalism concerns loom, *courts alone* must define the legal limit on federal authority under the statute and must resolve doubts *against* constitutionally questionable interpretations. Roberts, however, seems to take a broader, and rather radical, view of federal authority: If the agency deliberates about its constitutional and statutory

authority, imposes “some” limit on its authority, and does so in the context of public notice-and-comment procedures or formal adjudication, Roberts would give the agency “generous” deference, even if EPA draws more expansive lines around its authority than those that Scalia’s plurality opinion draws. In effect, Roberts would give the agency the authority to “cure” constitutional problems with the scope of the act by unilaterally imposing and abiding its own limits on its authority.

Kennedy also extends his own distinctive offer of deference to the executive. He says that “through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.” In effect, Kennedy suggests that case-specific applications of a regulation meeting these conditions need not be assessed on a case-by-case basis under the “significant nexus” test, even if some such

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applications are constitutionally overbroad. In such cases, the agency would deserve the ordinary deference accorded when agencies interpret their own regulations.

KENNEDY AND ROBERTS: WETLANDS' OVERAPPRECIATED "FRIENDS"
Thanks to Kennedy and Roberts, *Rapanos* imposes only slight limits on the outer boundaries of federal wetlands regulation. That's a cause for concern, not celebration, because both decisions push environmental policy further in the direction of centralized, command-and-control solutions run out of Washington.

I won't belabor arguments for environmental federalism made at length by others elsewhere. As Professor Jonathan Adler has explained,³ environmental policy benefits from decentralization, for at least two reasons: First, sound environmental practice differs from region to region, in light of differences in local ecology, local development, and, ultimately, local politics. For example, the ecological consequences of destroying an intermittent stream in an arid Western state with low population density may differ from the consequences of destroying a similar stream in hyper-developed Florida, a state with a tropical ecology. As a result, Adler says, "state and local governments often have a comparative advantage in addressing most environmental concerns. . . . The federal government may well enjoy a comparative advantage in the funding and support of scientific research, but this does not necessarily extend to policy choice and design."

Second, decentralization facilitates experimentation. Rather than a one-size-fits-all policy, we get the benefit of seeing how, and why, different approaches succeed or fail. As Professor Robert Percival suggests, "Some of the most innovative environmental protection legislation has been the product of state initiatives, including California's Proposition 65, New Jersey's Environmental Cleanup and Responsibility Act, and Michigan's Environmental Protection Act."⁴ Environmental policy would benefit from more such state-level experiments, while retaining a role for the federal government to address environmental problems with a truly interstate—cross-border—dimension that states are incapable of addressing themselves.

Unfortunately, Kennedy's and Robert's concurrences push environmental policy in the opposite direction—toward centralization and ossified top-down command, away from state initiative. The chilling effect of the concurrences is a simple calculus. Kennedy's case-by-case "significant nexus" test creates uncertainty about where federal power over wetlands ends and state power begins. That uncertainty is only exacerbated by the offer of "generous" deference that Kennedy and Roberts extend to agencies when they offer their own definition of federal power. Deference creates uncertainty for *state* regulators because it gives federal agencies leeway to change their rules unilaterally from administration to administration. Since Kennedy and Roberts would extend categorical deference to new regulations that are constitutionally overinclusive to some degree, regulators may reach into local environmental problems in different, difficult to predict ways in each new administration. Uncertainty about the scope of a state's sovereignty over local environmental policy, in

turn, chills state initiative because state regulators are less sure that they can capture all the rewards of their efforts.

At the same time, Kennedy's concurrence would extend deference only to federal rules that set national standards capable of "consistent" application. His "consistency" requirement not only affects federal jurisdiction—that is, regulatory power—but also federal policy *judgments*, since he makes the ecological significance of particular wetlands the touchstone for federal control over them. By specifying that federal regulators must define ecological significance "consistently," Kennedy creates perverse incentives for federal environmental *policy* to become more rigid and less geographically flexible.

Scalia's opinion, by contrast, does a better job of creating a clear policy space for states for two reasons. First, Scalia sets forth a relatively well-defined sphere of core federal regulatory interest—the water quality and integrity of continuously flowing surface tributaries of traditionally navigable water. Second, he reduces uncertainty by forcing agencies to abide by a judicially defined boundary on their statutory authority until Congress changes that boundary. Because Congress moves less quickly than agencies, Scalia ensures that the policy sphere left to states is less changeable, inviting more state initiative. And to the extent that sphere is changed, it will be changed by a body—Congress—in which states and localities are represented, rather than by the plebiscitary executive branch. Scalia, in the end, creates greater opportunity for policy flexibility, experimentation, and ecology-specific approaches to wetland regulation than either Kennedy or, ultimately, the Chief Justice.

Alas, Scalia's opinion is doomed to irrelevance. It has been roundly scorned by environmental activists—his opinion is "disdainful" of good (read "federal") environmental policy, says Professor Richard Lazarus.⁵ Moreover, when a majority splits 4 to 1, the narrower concurring opinion is the binding rule of decision. That means that Kennedy's case-deciding amorphous approach and Roberts' offer of generous deference to the jurisdictional boundaries concocted by self-interested federal regulators will govern going forward. Ossification of federal wetlands policy, to its detriment, is the inevitable, lamentable result. ■

NOTES

¹ 126 S. Ct. 2208 (2006).

² 474 U.S. 121 (1984).

³ Jonathan Adler, "The Fable of Federal Environmental Litigation: Reconsidering the Federal Role in Environmental Regulation," *Case Western Reserve Law Review* 55 (2004): 93.

⁴ Robert V. Percival, "Environmental Federalism: Historical Roots and Contemporary Models," *Maryland Law Review* 54 (1995): 1172-73.

⁵ "Discussion Board: Rapanos and Carabell," Scotusblog (June 19, 2006), at http://www.scotusblog.com/movabletype/archives/2006/06/discussion_boar_1.html (comments of Richard Lazarus).