

Go With the Flow

When it dips into the Clean Water Act, the Roberts Court should step lightly.

BY TIMOTHY J. DOWLING

A single theme dominated the testimony of Chief Justice John Roberts Jr. during his confirmation hearings: judicial humility.

Time and again, he insisted that “humility should characterize the judicial function.” From his opening statement to his swearing-in ceremony, the chief justice emphasized that he has no platform and prefers to be known as a “modest judge” committed to the rule of law.

The Court’s newest member, Justice Samuel Alito Jr., likewise is described by those who know him best as a cautious judge without an agenda whose fundamental allegiance is to the law itself.

On Feb. 21 the Supreme Court will hear oral argument in two monumental Clean Water Act cases that provide an early test of the Court’s commitment to judicial humility and the rule of law: *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*. The argument will be the first for Alito, and the rulings will set the tone for the newly constituted Roberts Court.

The Court will consider whether the federal Clean Water Act protects not only navigable lakes and rivers but also the nonnavigable tributaries that flow into them, as well as wetlands adjacent to those tributaries. The questions presented are whether intrastate nonnavigable tributaries and their adjacent wetlands are “waters of the United States” within the meaning of the act and whether this reading is consistent with the Constitution’s commerce clause.

HUGE STAKES

The stakes are extraordinary. The phrase “waters of the United States” is the key jurisdictional term in the act that governs federal controls for the discharge of sewage, toxic chemicals, fill material, and all other pollutants. The vast majority of our rivers, streams, and other tributaries are nonnavigable. In the continental United States, more than 40 percent of all fed-

eral pollution-control permits govern discharges into nonnavigable headwaters.

Protection of these tributaries is, of course, essential to the water quality of the larger lakes and rivers downstream. But they also are important in their own right, with most of our drinking-water intake valves located in headwaters. If these smaller rivers and streams are not “waters of the United States,” polluters discharging into them could ignore their federal discharge permit limits with impunity.

Wetlands protection also is critically important. Wetlands serve as giant sponges to absorb huge amounts of floodwaters that would otherwise destroy lives and property. They also act as nature’s kidneys by filtering out toxic pollutants from farm and urban runoff before those chemicals reach our lakes, rivers, and bays.

John Rapanos illegally filled 54 acres of wetlands adjacent to tributary systems that feed into Lake Huron. He ordered his consultant to destroy any evidence of the wetlands, and fired him when he refused. Rapanos also repeatedly ignored government orders to stop his unlawful filling. In his defense, Rapanos argues that nonnavigable tributaries and their adjacent wetlands are not waters of the United States and thus are not covered by the Clean Water Act.

June Carabell contends that the act does not protect wetlands separated from adjacent waters by an earthen berm, notwithstanding the impact these wetlands have downstream when water seeps through or overtops the berm. Carabell would like to destroy such wetlands in southeast Michigan to build 130 condominiums a short distance from Lake St. Clair, a natural asset of great commercial value because of its outstanding boating, fishing, and swimming. The wetlands are one of the last remaining large forested wetland parcels in the area.

TEXT AND HISTORY

These cases will test the Supreme Court’s commitment to judicial humility in at least four ways.

First, at his hearings the chief justice stressed that judicial modesty requires fealty to the text, structure, and history of statutes. Such fidelity strongly favors federal protection of non-navigable tributaries and their adjacent wetlands.

The 1972 Clean Water Act expanded the reach of statutory protections for our waters from “navigable waters” to include all “waters of the United States,” an expansion clearly at odds with limiting the act’s scope to navigability. The plain meaning of “waters of the United States” embraces waters regardless of their navigability. This reading is fully consonant with the act’s purpose of restoring the “chemical, physical, and biological integrity of the Nation’s waters.”

Structure and context confirm this construction. For example, Section 404(g) of the act authorizes states to assume responsibility for the federal program governing discharges of fill material, but it prohibits them from assuming jurisdiction over actually navigable waters. If the act as a whole does not apply to nonnavigable waters, this provision would be a meaningless nullity.

Historically, federal law has protected tributaries for more than 100 years. The Rivers and Harbors Act of 1899 prohibited the discharge of refuse into tributaries if the garbage could be washed into navigable waters. Congress expanded these protections in the 1972 act because prior controls had proved, in the words of the Senate report, “inadequate in every vital respect.” As the solicitor general argues, Rapanos’ reading of the act would render federal law narrower than a century’s worth of federal protections, based on statutory language designed to expand those protections.

RESPECT FOR OTHERS

Second, judicial humility requires respect for precedent and the views of other judges. As the chief justice put it, “Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.”

Precedent overwhelmingly favors continued protection of nonnavigable tributaries. In *International Paper Co. v. Ouellette* (1987), the Court concluded that the act establishes “an all-encompassing program of water pollution regulation” that protects “virtually all bodies of water.” And in *United States v. Riverside Bayview Homes Inc.* (1985), the Court unanimously ruled that the Army Corps of Engineers may regulate wetlands adjacent to waters so long as the class as a whole has “significant effects on water quality and the aquatic ecosystem.”

Appellate judges across the jurisprudential spectrum have upheld these federal protections. For example, in *United States v. Deaton* (2003), Judges J. Michael Luttig, J. Harvie Wilkinson III, and M. Blane Michael of the U.S. Court of Appeals for the 4th Circuit rejected a challenge to the protection of a small tributary whose waters eventually reach the Chesapeake Bay. Although Rapanos argues the Supreme Court should read the act narrowly to avoid raising issues under the commerce clause, the *Deaton* court saw no need for such a narrow statutory interpretation because the statutory and constitutional analyses overwhelmingly support continued federal protection.

Third, the chief justice observed that his mentor, the late 2nd Circuit Judge Henry Friendly, had the “essential humility” to

appreciate that, as a judge, he should give appropriate deference to agency expertise.

The federal protections at issue are the long-standing product of intense deliberation and scientific analysis by two expert agencies, the Army Corps of Engineers and the Environmental Protection Agency. Deference to this technical expertise was the focal point of an amicus brief filed by four former EPA administrators, including William Reilly, a Republican who spearheaded the federal commitment to “no net loss” of wetlands.

Rapanos argues that the act does not protect man-made tributaries like the large ditches adjacent to some of the wetlands he destroyed. But many natural tributaries have been channelized and rerouted, and the Corps and the EPA reasonably determined that the act protects all tributaries of navigable waters.

The relative ecological importance of a particular tributary or wetland is considered in the process of granting permits for development. Although developer amici portray the permit program as regulation run amok, the Corps grants more than 99 percent of applications to fill wetlands.

LISTENING TO THE STATES

Finally, Chief Justice Roberts emphasized the importance of stability in the law: “Given my view of the role of a judge, which focuses on appropriate modesty and humility, the notion of dramatic departures is not one that I would hold out much hope for.”

It is difficult to imagine a more dramatic departure from environmental law than that requested in these cases. The protections at issue have been on the books for 30 years. They make up the vast bulk of federal jurisdiction under the act. And they are essential to the continued protection of lives, property, and commercial resources.

Developer amici cast the cases as an important test of federalism, but the states cannot do the job alone. Economic pressures often prevent upstream states from protecting tributaries and adjacent wetlands that are essential to flood control and water quality in downstream states. As the Court observed in *Hodel v. Virginia Surface Mining & Reclamation Association* (1981), “Prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause.”

That is why 33 states, as well as many other state and local government groups, have filed amicus briefs in support of continued federal protection. Unlike the federal restrictions on assisted suicide recently struck down in *Gonzales v. Oregon* (2006), the states recognize that continued federal protections for tributaries and adjacent wetlands are essential to complementary state protections.

The biblical book of Proverbs instructs that with humility comes wisdom. *Rapanos* and *Carabell* offer the Roberts Court an early opportunity to embrace such wisdom.

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