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The Rise (And Fall?) Of Fundamentalist Federalism

ARE COMPANIES COMING CLEAN IN SEC FILINGS?
IS CREATING MARKETS IN HUMAN LIVES MORAL?



**COVER
STORY**

Fundamentalist Federalism

In the Supreme Court, parties and justices alike are couching in “federalism” terms issues that until recently were treated as mere questions of statutory interpretation. The circuit courts likewise continue to entertain a range of federalism and constitutional theories that strike at the heart of environmental law. Seeking a return to a pre-New Deal theory of government, these “fundamentalist federalists” have gained some beachheads but are being turned back — for now

JAY AUSTIN and SCOTT SCHANG

2004 may go down as the year that “judicial activist” became a prime-time epithet. With high-profile court decisions on gay marriage and the Pledge of Allegiance set amid ongoing battles between the White House and the Senate over judicial nominees — and now a presidential election where a number of Supreme Court seats are likely at stake — the term has been tossed around in public more than any time since the heyday of the Warren Court.

Of course, lawyers know there is both more and less to charges of judicial activism than meets the eye. More, because even decisions that betray an ideological bent rarely come from a single unfettered judge, but from other people’s invention of legal theories, factual opportunities exploited by litigants, and subtle interactions within appellate panels. Less, because activism often is in the eye of the beholder, and because judges over time often do stick to their principles — even if it’s possible to disagree with those principles. Further, lawyers understand better than most that there are valid spheres of judicial action, where the legislature has inadvertently or purposefully left a law’s implementation to the courts, or where equity demands a remedy.

This last point has proven particularly important in federal environmental law, which for over three decades has found an essential backstop in the federal courts. As far back as 1975, Justice Thurgood Marshall praised the “vaguely worded” National Environmental Policy Act for giving judges room to create a “common law” that has been “the source of NEPA’s success.” Far from activist, those early decisions created a consistent body of NEPA procedure that even-

tually was codified into regulations. Many other environmental statutes have routinely benefited from judicial review and interpretation.

Lately, though, judicial innovation has taken a more dramatic form. This can be most clearly seen in the wake of the Supreme Court rulings in *U.S. v. Lopez* (1995) and *U.S. v. Morrison* (2000), involving the federal Gun-Free School Zones Act and Violence Against Women Act. These decisions limited federal power under the Commerce Clause for the first time in sixty years, and sparked a wave of similar challenges to environmental statutes. Those challenges were bolstered by the Court’s delphic decision in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* (2001), which raised new questions about the Clean Water Act’s constitutional underpinnings that are still reverberating. Meanwhile lower court opinions, such as the Fourth Circuit’s in *Bragg v. West Virginia Department of Environmental Protection* (2001), have applied the Court’s expanded view of sovereign immunity to bar most citizen suits against state agencies under the Surface Mining Control and Reclamation Act.

What separates these cases, their recent progeny, and similar lines of argument from most prior environmental litigation is a profoundly different view of the Constitution that challenges the basic premises of federal regulation and the established balance of power between federal and state governments. At stake are both Congress’s power to legislate on environmental issues, and the ability of federal executive agencies and courts to implement, adjudicate, and enforce the laws.

It is no accident that these opinions and arguments come at a time when some legal

theorists and political activists have been advocating that the proven system of cooperative environmental federalism be replaced with a devolution of federal authority to the states, or even the simple abolition of most regulation. With persistence and determination, the Federalist Society promotes, and ideology-driven law firms like the Pacific Legal Foundation actively litigate, a “fundamentalist” version of federalism that calls for a pre-1937 reading of the Commerce Clause, near-absolute state sovereign immunity, and, overall, a limited scope of both federal and state regulatory authority. While this fundamentalist federalism has had only modest success in the environmental sphere, it has already changed the shape of the debate at the highest levels.

This past term, the Supreme Court heard eight environmental cases, fully 10 percent of its docket — each of which, as IN THE COURTS columnist Richard Lazarus noted in these pages, had been won below by environmental plaintiffs. The Court’s actual decisions were a mixed bag, but taken together they show the increasing tendency of parties and justices alike to couch in “federalism” terms issues that until quite recently were treated as mere questions of statutory interpretation. The circuit courts likewise continue to entertain a range of federalism and constitutional theories that strike at the heart of environmental law, and that feature prominently in dissents by conservative judges. And as fundamentalist federalism gets more play in courtrooms, it has given rise to concern about not just the outcomes of specific cases, but also the beliefs of recent and future nominees to the federal bench.

Federalism did not dominate any of the Supreme Court’s environmental decisions this term, but its presence was palpable. As has been happening in other areas of law, constitutional and quasi-constitutional arguments now turn up in the most mundane discussions of federal environmental statutes. Once little more than an afterthought

for a “kitchen sink” brief, they are becoming almost de rigueur for those hoping to draw the Court’s attention to environmental cases or to garner certain justices’ votes.

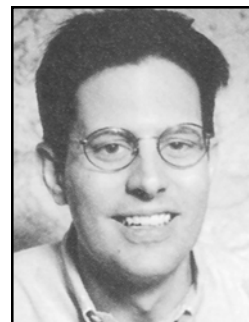
In *Alaska Department of Environmental Conservation v. EPA*, the Court upheld the Environmental Protection Agency’s authority to override a Best Available Control Technology decision issued by the state of Alaska under the Clean Air Act. *Alaska* hinged on statutory language that authorizes EPA to “take such measures . . . as necessary to prevent the construction” of facilities that fail to meet the act’s requirements, and on whether this language is outweighed by states’ express authority to “determine” BACT on a case-by-case basis. In the first 5-4 vote of the term, the Court said that EPA can step in where the state fails to provide a “reasoned justification” for its decision.

The dissenters — Justices Kennedy, Scalia, Thomas, and Chief Justice Rehnquist — both questioned the majority’s reading of the act and charged it with ignoring “principles that preserve the integrity of states in our federal system.” In a now-standard federalist move, they called for a “clear statement rule” that would require Congress to be unambiguous when it grants oversight authority to EPA. Hinting darkly at lurking constitutional concerns, they even cited the Court’s recent Tenth and Eleventh Amendment cases to the effect that states are “coequal sovereigns entitled to the same dignity and respect” as the federal government. In so doing, they went well beyond the arguments raised by Alaska and the 10 states that joined it as amici, all of which were based on statutory and policy grounds.

To be sure, cooperative federalism is at the core of the CAA and many other environmental statutes. But there is a significant difference between the constitutional canons that come into play when Congress preempts state law or abrogates state sovereign immunity, and the parsing of a statute designed to share power that unquestionably flows from the federal level in the first place. If the dire oppression predicted by the *Alaska* dissent ever did come to pass, the states could respond by simply abandoning their delegated

The protests are coming not from the states, but from economic interests, legal theorists, and political activists pushing an anti-regulatory agenda through the courts

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programs, an outcome no one is seriously suggesting. Notably, an even larger number of states sided with EPA and against their sister states, arguing for federal oversight under what they, like the Court majority, viewed as an unremarkable reading of the act. Yet only the vote of Justice O'Connor, who is decidedly not a fundamentalist, kept the CAA from being radically redefined.

The justices' preoccupation with federalism also added an unexpected twist to *Engine Manufacturers Association v. South Coast Air Quality Management District*, a CAA pre-emption case. At issue was whether SCAQMD rules that required public and private fleet operators to purchase low-emission vehicles were pre-empted by Section 209 of the act, which prohibits states and localities from adopting their own emission "standards." The parties thoroughly briefed this statutory matter, which the Court eventually resolved in favor of pre-emption. But to the clear surprise of counsel, oral argument was dominated by spontaneous questions about whether the act could bar even the portion of the rules dealing with government agencies' vehicle purchases — since at least some justices appear to view procurement as a purely internal state function. Indeed, the 8-1 majority opinion remanded this issue, which has allowed SCAQMD to hang onto a fair portion of its rules for the time being.

Naturally, the Court's fondness for viewing the world through federalism-tinted glasses has not been lost on other environmental litigants. *South Florida Water Management District v. Miccosukee Tribe of Indians* raised a definitional question of whether pumping polluted water from one side of a levee into clean water on the other side constitutes a "discharge of a pollutant" under the Clean Water Act. This fairly straightforward issue was clouded by the fact that the pumping was being done by a state water management district, prompting the district and some state amici to argue that requiring a National Pollutant Discharge Elimination System permit would impermissibly "alter the federal-state balance." The force of that claim again was blunted when even more states weighed in on behalf of the federal permit requirement,

and when the solicitor general opposed it. This time all the justices resisted the temptation to address the federalism question that had been dangled in front of them, and all but Justice Scalia voted to remand for additional fact-finding.

While fundamentalist federalism has been a subtext of the Supreme Court's environmental cases, in the lower courts it is front and center. With judges both taking the Supreme Court's cues and anticipating its interest in future cases, federalism issues play a role in many high-profile environmental suits. Perhaps the most contentious Clean Air topic is New Source Review, which requires existing plants to install state-of-the-art pollution controls when they upgrade and increase emissions. The NSR debate pits certain states against others and against the federal government, as downwind states claim that EPA is failing in its duty to protect their citizens from pollution transported from upwind states. Similarly, one of the largest forest management topics, the fate of the four-year-old Roadless Rule, promises to put the respective roles of the federal and state governments under the microscope, with the Bush administration proposing to relax federal protections and grant governors significant say over

The Court's fondness for viewing the world through federalism-tinted glasses has not been lost on other litigants

the regulation and management of federal lands.

But the most significant environmental federalism issue continues to be the reach of federal power under the Endangered Species Act and the Clean Water Act. After almost ten years of post-*Lopez* Commerce Clause litigation, only these two statutes appear to be in any real jeopardy. The ESA battle may be in its last stages, as a dissenting group of Fifth Circuit judges have declared themselves the last keepers of the faith in restraining federal power over endangered species. The Fifth is also the only circuit to have significantly restricted federal jurisdiction over wetlands and water pollution following the *Solid Waste Agency of Northern Cook County* decision. In both instances, fundamentalist

Of Pot, Porn, Machine Guns — And Mold Beetles

Court watchers asked to name the most conservative circuit court and the most frequently overturned circuit court might automatically respond “the Fifth and the Ninth,” but in recent months they would have gotten it backwards. In a series of ironic twists, the Ninth Circuit, often labeled the most liberal and the most likely to attract Supreme Court review, appears determined to show that it too can strike down what it sees as congressional overreaching, having invalidated several federal criminal statutes. Meanwhile, the traditionally conservative Fifth Circuit had an 0-6 record in Supreme Court cases last term, and also made the “liberal” move of upholding the Endangered Species Act against constitutional challenge. Because the Ninth’s rationale for striking down federal statutes arguably is in tension with the Fifth’s rationale for upholding the ESA, these courts’ seeming role reversal may graduate from a court watchers’ pastime to an important issue for environmental practitioners.

Two of the Ninth Circuit’s most liberal voices, Judges Stephen Reinhardt and Harry Pregerson, sparked that court’s trend of invalidating federal statutes on Commerce Clause grounds. In *United States v. McCoy*, Judge Reinhardt took a page from the fundamentalist federalist’s playbook (see main article) and found that the U.S. government had no authority to prosecute a mother who posed for sexually explicit pictures with her young daughter, but who had no intention to sell or distribute the photos.

While the government claimed that the prosecution was predicated upon use of film and a camera that had traveled in interstate commerce, Judge Reinhardt would have none of it. The court conceded that there is an interstate market in child pornography, but ruled that the regulated activity was the actual picture-taking, which in this case was clearly non-economic and unrelated to the interstate market. It disagreed with an earlier Third Circuit opinion, *U.S. v. Rodia*, that upheld the same federal provision by applying the so-called aggregation principle — the notion, derived from *Wickard v. Filburn*, that all instances of this activity taken together would substantially affect interstate commerce. Instead, the *McCoy* court pointed to the Supreme Court decisions in *Lopez* and *Morrison* as making clear that the aggregation principle was inapplicable to non-economic activity.

Subsequent Ninth Circuit panels have used the *McCoy* rationale to invalidate federal criminal statutes as applied to homemade machine

guns (*United States v. Stewart*) and marijuana grown for purely intrastate medicinal use (*Raich v. Ashcroft*). Thus, as pointed out by Dan Schweitzer, Supreme Court counsel for the National Association of Attorneys General, the Ninth has “learned to stop worrying and love” the Rehnquist Court’s new federalist tendencies.

While Ninth Circuit judges have applied Court precedent largely to overturn statutes favored by social conservatives, the circuit’s approach may have the consequence, intended or not, of undercutting the constitutional support for the ESA or other environmental statutes, at least as applied in certain cases. At first blush, the Ninth’s position against aggregation arguably conflicts with the Fifth Circuit majority opinion in *GDF Realty*, which relied on the aggregation principle to uphold ESA protection of mold beetles and other putative “cave bugs” against a Commerce Clause challenge. Indeed, the petitioners in *GDF* have cited *McCoy* and its disagreement with the Third Circuit to claim a general level of “confusion” over the aggregation principle that merits Supreme Court intervention, arguing that “other courts of appeals have differed on . . . whether non-economic activity can be aggregated.”

But the conflict between the circuits is more one of appearance than reality. The Fifth’s analysis differs from the Ninth’s by looking at the ESA as a larger regulatory scheme that is inherently economic in nature, something the Ninth said could not be done with the federal pornography provision. By finding that the ESA’s larger scheme protects endangered species with their “esthetic, ecological, educational, historical, recreational, and scientific value,” the Fifth relied upon a different line of cases to find that the activity is in fact economic and, therefore, that aggregation is appropriate.

Despite this potential to reconcile the two circuits’ results, it is true that case law on how to analyze non-criminal regulatory activity under *Lopez* and *Morrison* is still in the developing stages, with many opinions and few clear answers. Given that these two circuits’ reversal rates defied conventional wisdom last term (the Ninth’s was a middling 72 percent, while the Fifth’s hit 100 percent), it would be difficult to predict which circuit would prevail if the Supreme Court decides there is an actual conflict. The Court has granted certiorari in the Ninth’s medical marijuana case, but has yet to decide whether to hear *GDF Realty*. Court watchers and environmental lawyers should both stay tuned. — *Scott Schang*

federalism is at the center of the controversy.

As with many environmental laws, the link between the Commerce Clause and the Endangered Species Act is a tacit one. Congress drafted the ESA in the early 1970s, a high-water mark of federal jurisdiction, and did not appear to feel a need to expressly state its constitutional basis. Twenty years later, the *Lopez* and *Morrison* opinions established a stricter definition of interstate commerce and gave new, and apparently retroactive, weight to congressional findings about a statute's nexus to commerce. That may have made some sense in those cases, which dealt with the expansion of federal authority into areas — handgun possession and legal remedies for domestic violence or rape — typically occupied by state criminal law. Indeed, almost all the Commerce Clause cases now working their way to the Supreme Court similarly involve criminal matters: gun possession, controlled substances, and child pornography (see sidebar, page 31).

But the logic and language of *Lopez* and *Morrison* are ill-suited to address topics such as species and ecosystem protection, which both challenge traditional economic valuation and largely lack a comprehensive state-law counterpart. For jurists who strongly believe in the federalist principles embodied by these opinions, they provide bright, inflexible lines of analysis which the ESA fails to satisfy; while those who focus more on the act's ecological purposes and national scope have labored to articulate the nexus that Congress did not know it would need to provide. By its silence to date, the Supreme Court so far has sided with the latter group of judges.

Three courts of appeals — the D.C., Fourth, and Fifth Circuits — have rejected challenges to the ESA's provisions against the "take" of a listed species, with the Ninth Circuit suggesting it would do the same. These circuits held that the Commerce Clause empowers Congress to protect even species that are found only within a single state and have minimal commercial value. But though the outcomes have been uniform, the rationales the courts used to uphold the act's farthest reaches have been diverse, with each opinion provoking at least one dissent. Indeed,

the two most recent decisions took conflicting approaches in deciding just why the statute remains constitutional, while the reasoning put forth by dissenting judges has been steady, if quite narrow.

The main sticking point is identifying what constitutes the "regulated activity" to be analyzed for Commerce Clause purposes. Is Congress regulating the take of species — such as the killing of arroyo toads in California? Or is it regulating the activity that would result in the take — the 202-acre housing development slated for the toads' habitat? Courts such as the D.C. Circuit in *Rancho Viejo v. Norton* chose to focus on the economic motives behind the taking of the endangered species. Instead of examining whether the Commerce Clause reaches incidental takes of the arroyo toad, the court asked whether it allows federal regulation of a massive housing development with interstate ties.

Clearly, it is not hard to find a significant nexus to interstate commerce when the question is framed in this way.

Dissenting judges David Sentelle and John Roberts, as well as Judge Michael Luttig of the Fourth Circuit, have roundly criticized this approach as being based on inaccurate readings of the controlling Supreme Court precedent. They argue, with at least some analytical force, that under *Lopez* and *Morrison* the actual taking of the protected species must itself have a significant connection with interstate commerce. They maintain that looking to the reason

for the take, rather than the take itself, removes any meaningful restraint on Congress's power and renders the Commerce Clause all-encompassing.

One practical problem for the dissenters' fundamentalist federalist approach is that as many as half of all threatened and endangered species may be found within a single state; they are being regulated precisely because they have been reduced to small numbers in just a few places. Extinction of species can be a national problem with obvious commercial impacts, yet the very characteristics that make individual species endangered may also make them intrastate and non-commercial. But *Lopez* and *Morrison* fundamentalists see no way around this dilemma,

Constitutional arguments are becoming almost de rigueur to attract the Court's attention or garner votes

Judges' Party Affiliations Predict Outcome Of NEPA Cases

In 1997, Professor Richard Revesz published an article in the *Virginia Law Review* claiming that judicial ideology “significantly influences” the outcome of environmental cases in the D.C. Circuit. The results of Revesz’s study, though vigorously disputed by then-Chief Judge Harry Edwards, support what many environmental practitioners have long believed, that it is possible to predict the chance of success in certain cases by the party affiliation of the presiding judges. This view of judicial decision-making is rather starkly borne out by a new ELI study of decisions in NEPA cases. The forthcoming report, written by ELI attorneys and John Carter of the Judicial Accountability Project, suggests that the political leanings of judges may be the most decisive factor in determining the outcome of NEPA cases.



Brad Klein

The National Environmental Policy Act was passed in December 1969 and is often referred to as the “backbone” of federal environmental law. It requires federal agencies to document and consider the environmental impacts of certain projects before they are carried out. Over the years, ELI has reported on, analyzed, and conducted groundbreaking research on NEPA case law as it has evolved. To take the pulse of NEPA on its 35th birthday, ELI researchers reviewed 325 NEPA cases brought in

federal district and circuit courts from January 21, 2001, the first full day of the George W. Bush (“Bush II”) administration, through June 30, 2004. The results are dramatic, and in some instances disturbing.

Although the overall success rates for NEPA plaintiffs today — 44 percent in the district courts and 32 percent in the circuit courts — are roughly comparable to historical baselines, the voting patterns of “Democratic” judges (using the party of the nominating president as a proxy for the judges’ own affiliations) are quite different from those of Republican appointees. In the district courts, the study found that a plaintiff with pro-environmental goals had more than twice the chance of success before a Democratic-appointed judge (59 percent) than before a Republican appointee (28 percent).

In contrast, plaintiffs with pro-development or industry goals were successful only 14 percent of the time before Democratic appointees, but 58 percent of the time — more than four times as often — before Republicans. Moreover, in the 23 cases that have been decided so far by Bush II district court appointees, environmental plaintiffs successfully advanced NEPA claims in only four instances. Although it’s still too early to draw definitive conclusions, this initial 17 percent success rate is well below the

average for all Republican appointees, and less than half of the historical and current baseline rates.

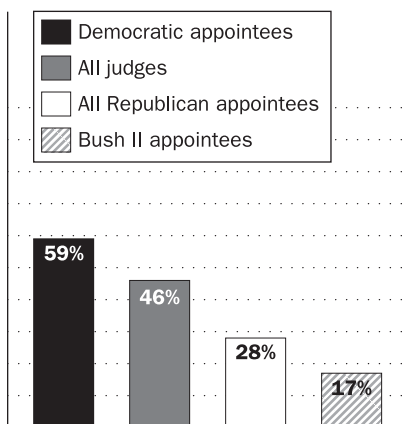
Similar results were observed in the circuit courts. Over the period from 2001 through June 2004, environmental NEPA plaintiffs enjoyed a 52 percent chance of success before panels composed of two Democratic and one Republican appointee, and a remarkable 75 percent success rate when all three judges were Democratic appointees. But if those plaintiffs were unlucky enough to draw three Republican-appointed jurists, they may as well have packed it in and gone home: their chance of success was one in nine.

These results, though based on just three-and-a-half years of data, mirror Revesz’s findings and more recent conclusions by Professor Cass Sunstein that, at least in certain kinds of cases, there is a correlation between ideology and judicial decisionmaking. Further research is needed to build on this growing body of academic work, particularly in contexts that impose greater legal or structural constraints on judges. Given these striking preliminary results and the fact that NEPA law stems largely from judicial precedent, this study does suggest that parties whose interests are affected by NEPA litigation should be particularly attuned to the political leanings of judges before whom they practice.

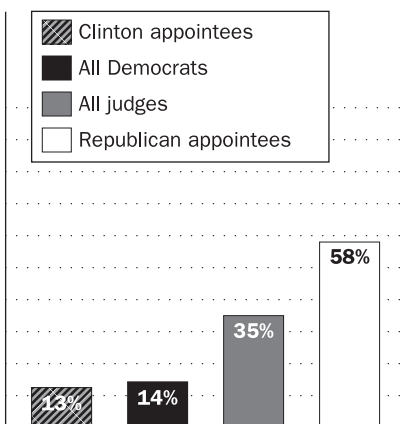
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NEPA Success Rates in U.S. District Court, Jan. 2001–June 2004 (%)

“Pro-Environment” Plaintiffs

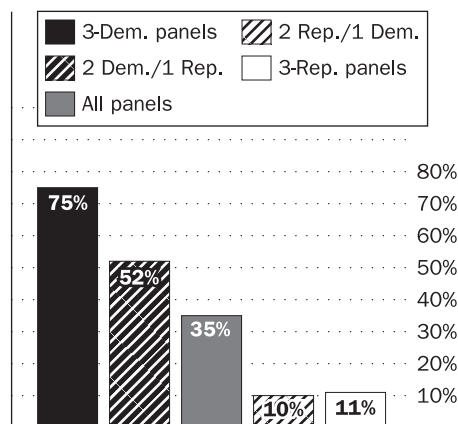


“Pro-Development” Plaintiffs



NEPA Success Rates in U.S. Courts of Appeal, Jan. 2001–June 2004 (%)

“Pro-Environment” Plaintiffs





and insist that Congress is simply without power over the “uncharismatic mini-fauna” that are often carefully chosen for ESA test cases.

In what might be viewed as hoisting the fundamentalists on their own petard, a panel of Fifth Circuit judges recently agreed to limit their analysis to the actual take, yet nonetheless upheld the ESA. In *GDF Realty Investments v. Norton*, developers wanted to site a Wal-Mart on a plot of land that housed a group of underground arthropods, arguably of little or no current economic value, that are found only in one Texas county. The Fifth Circuit panel said that the taking of these species — derided by plaintiffs as “cave bugs” — was the regulated activity that was required to have a sufficient nexus to interstate commerce. In conducting its analysis, however, the panel looked at the cumulative impacts of all takes of all endangered species, regardless of their location. By invoking this so-called aggregation principle, it found that all species takes do in fact have a sufficient effect on interstate commerce to validate federal jurisdiction under the ESA’s take prohibition.

When the Fifth Circuit en banc declined to review the panel decision, six judges mounted a rear-guard defense. Led by Judge Edith Jones and joined by, among others, the recess-appointed Charles Pickering, these dissenters applauded the panel for taking the fundamentalist approach and focusing on the take of the species. But they strongly protested application of the aggregation principle to what they continue to view as non-commercial activity, arguing that this is impermissible under *Lopez* and *Morrison*. Their dissenting opinion seems calculated to raise the Supreme Court’s federalism antennae, as does plaintiffs’ portrayal of the ESA as the “federalization of land use issues traditionally reserved to the states and their localities.”

The chances that the Court will grant certiorari in *GDF Realty* appear slim. The justices already refused a petition in *Rancho Viejo* with full knowledge of the differing approaches taken by the D.C. and Fifth circuits, though likely without the benefit of Judge Jones’s en banc dissent, which was issued just two days prior. If the Court fails to hear the case, that

dissent may well be the last hurrah for the fundamentalist view that the federal government cannot protect intrastate, non-commercial endangered species due to Commerce Clause limitations. Future constitutional challenges to the ESA would most likely abandon the federalism angle under the Commerce Clause and swing to the Fifth Amendment’s Takings Clause — the *GDF Realty* plaintiffs have already filed a \$60 million takings suit in the Court of Federal Claims.

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Meanwhile, in numerous skirmishes at the margins of the Clean Water Act, the fundamentalists have gained a beachhead, but appear to be stalled. In 2001, the Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* that part of the Corps’ Migratory Bird Rule was unsupported by the CWA. The Court also noted in dictum that “significant constitutional and federalism questions” might be raised when federal jurisdiction purports to extend to waters that are neither navigable nor adjacent or tributary to navigable waters. This set off significant litigation over whether SWANCC merely addressed a narrow instance — the “abandoned gravel pits” at issue in that case — or whether it more severely restricted CWA jurisdiction.

Ruling less than four months after *SWANCC* was decided, the Fifth Circuit in *Rice v. Harken Exploration* held that the Oil Pollution Act could only protect waters that are “actually navigable” or adjacent to such waters. Over the intervening three-and-a-half years, however, the Fourth, Sixth, Seventh, and Ninth Circuits all have adopted narrower readings of SWANCC, and repeatedly upheld broad CWA jurisdiction over all manner of waterbodies. None of these circuits has found a single instance of a completely isolated waterbody, like the gravel pit in SWANCC, that escaped federal jurisdiction. If the waters or wetlands at issue flow into navigable waters, are adjacent to them, or have a “significant nexus” to them, these circuits hold — usually relying on the Supreme Court’s earlier decision in *U.S. v. Riverside Bayview Homes*

— that the federal government retains authority to regulate them.

One might think that the Fifth Circuit could be persuaded by its fellow circuits; after all, if the goal is to protect navigable waters, how effective can one be if one cannot regulate the waters that flow into them? But late last year, the circuit reiterated its idiosyncratic reading of *SWANCC*. In *In re Needham*, again in an opinion written by Judge Edith Jones, the court went to significant lengths to reaffirm *Rice v. Harken* and to transplant its Oil Pollution Act holding directly into the Clean Water Act context. Oddly, the panel upheld federal jurisdiction on the facts of the case before it, but at the same time advanced a limited view of CWA jurisdiction in general, making a detailed legal argument that is superfluous and arguably dicta. But at least in the Fifth Circuit, EPA and the Corps of Engineers are being told to float their boats elsewhere unless they are in a water that is navigable-in-fact or one directly adjacent.

The *Needham* court failed to discuss the rationales adopted by circuits that take a narrower reading of *SWANCC*, and instead simply repeated its fundamentalist view. The all-important D.C. Circuit perhaps could have benefited from such a discussion, as it may eventually have to weigh in on the issue when considering a suit that opposes revisions to EPA's Spill Prevention Control and Countermeasure Rule. In *American Petroleum Institute v. Leavitt*, currently in the D.C. District Court, plaintiffs are asking for a ruling that isolated waters, intermittent streams, remote tributaries, and ephemeral streams are beyond federal jurisdiction as a matter of both statutory interpretation and constitutional law.

It remains to be seen whether *API* will bolster the Fifth Circuit's attempt to manufacture a post-*SWANCC* circuit split or help swamp it. But the *API* plaintiffs are also in the challenging position of arguing in the same circuit that upheld the reach of the Commerce Clause in *Rancho Viejo*. To distinguish *Rancho Viejo* and the other ESA cases, they are making an explicitly federalist argument that Congress's power over endangered species is more encompassing than its power over wetlands and remote waters because the states have less of

a history in regulating endangered species. This argument echoes dicta in the *SWANCC* opinion emphasizing the states' "traditional and primary power over land and water use." But it also requires plaintiffs to assert that the states' water quality protection efforts are somehow more "traditional" than, say, their authority over fish and wildlife — an exceedingly fine line to draw. Moreover, it ignores that many states favor concurrent federal jurisdiction in both areas, again raising the question of exactly whom fundamentalist federalism is really trying to protect.

If the Rehnquist Court's Commerce Clause revolution has been reduced to a "more-local-than-thou" squabble voiced only by oil producers and real estate developers, it may have lost its steam, at least where environmental law is concerned. Fundamentalists are still trying to provoke the Court with claims that the ESA and CWA amount to "federalization of land use issues" and a "deep intrusion into the ordinary lives of landowners." But most jurists and states, and many regulated parties, still see these statutes as a relatively common-sense solution to modern environmental

problems. As Justice Stevens wrote in his *SWANCC* dissent: "The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power." Never truly addressed by the *SWANCC* majority, this paradigm continues to be followed in all but one circuit. Whether the D.C. Circuit follows suit may ultimately depend upon the federalist leanings of the judges who hear the *API* case.

Indeed, the emergence of fundamentalist federalism among sitting judges has resonated in the halls of the Senate, sparking heated battles over judicial nominees' federalist credentials and how they may color their view of environmental cases. Senate Democrats have filibustered circuit court nominees such as William Myers, the former Interior Department solicitor who once likened federal management of public lands to "the tyrannical actions of King George." Myers also filed an amicus brief

A subtext of the Supreme Court's cases, in the lower courts fundamentalist federalism is front and center

in SWANCC urging the Supreme Court to reach the Commerce Clause issue that even the Rehnquist majority seemed eager to avoid; and his view of citizen suits was summed up in an article stating that “environmentalists are mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety, and welfare.” Environmental groups seized upon these instances as evidence that Myers would be an anti-environmental activist judge, and led a fight to keep him off the bench. The filibuster of Myers’s nomination is thought to be the first time that environmental issues have played a decisive role in the judicial selection process, with many mainstream organizations, such as the National Wildlife Federation, taking their first-ever stance on a nominee.

Similarly raising the hackles of environmental groups are several nominees who have been architects of the larger federalist movement, first as practicing lawyers and now as sitting judges. These include Jeffrey Sutton, who successfully argued several state sovereign immunity cases in the Supreme Court before being appointed to the Sixth Circuit; his frequent client, former Alabama Attorney General William Pryor, who was recess-appointed to the Eleventh Circuit; and Federalist Society stalwart Paul Cassell, now a judge in the District of Utah. Judge Sutton has already penned one dissent suggesting that he brought a narrow interpretation of the Commerce Clause with him to the bench, while Judge Cassell — like a number of the Bush administration’s appointees — has proven notably unsympathetic to NEPA plaintiffs (see sidebar, page 33).

The debate about “environmental federalism” at all stages of the judicial process highlights a disconnect between, on the one hand, modern understandings of the relation between humans and nature and the workings of ecosystems, and on the other, classical (and neoclassical) views of how the Constitution divides power between federal and state governments. As modern environmental law transcended police powers and tort law to become its own discipline, grounding cooperative federalism in the Constitution’s text was not thought to be particularly problematic. Legislators and judges both relied upon post-1937 readings of the Commerce Clause, Property Clause, and

Spending Clause to address pollution that respects no boundaries, or to curb the impact of development that destroys habitat without accounting for the national effects of species loss.

Since 1995, however, the penchant of some to read the Commerce Clause narrowly and to see any exercise of federal authority within state borders as inherently suspect has put on the defensive environmental laws that even arguably touch upon land use, such as the Clean Water Act and the Endangered Species Act. These fundamentalist federalists try to create a sense of outrage at the federal government’s “meddling” with individual landowners, just as environmentalists can provoke anger at the extinction of thousands of native species with value yet unknown. The hard part is finding the right balance between emotion, science, law, and tradition to create a workable, dual system of environmental regulation.

There is a need for serious, continuing public dialogue about the proper balance of power between the federal and state governments in implementing environmental protections. History shows that this federal-state relationship has no setpoint, but instead ebbs and flows as the issues and times demand. Now that a concerted effort to advance fundamentalist federalist principles in the courts has to some degree succeeded, the very language and argument of federal environmental cases reflect an ongoing dispute over these principles’ validity. We would all benefit from a more public debate of the appropriate roles of activism at the bar and within the judiciary in overseeing the environmental federalism created, but not always fully defined, by the elected branches.

So far, most courts have opted to continue deferring to the balance jointly established by Congress and state legislatures, and to uphold our system of cooperative federalism that for almost 35 years has supported federal jurisdiction concurrent with state jurisdiction. Tellingly, the cries protesting this system by and large are not coming from the states themselves, but from economic interests, legal theorists, and political activists who have undertaken a concerted effort to advance an anti-regulatory agenda through the courts. As the composition of the federal judiciary continues to shift, time will tell whether their fundamentalist ideology will reach critical mass and significantly reorder federal environmental law, or whether it is simply a burst of “judicial activism,” destined to become a footnote in legal textbooks. •