SWANCC won't put environmentalism in the tank

By SAM KAZMAN

Worried that the Supreme Court's recent invalidation of wetlands regulations opens the door to environmental disaster? If so, you may find reassurance, oddly enough, in the dissenting opinion in that case.

The Court's January 9th ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* has been attacked for supposedly subordinating national environmental needs to a cramped interpretation of the Constitution's Commerce Clause. In reality, until a few years ago that clause had been stretched to the point of meaninglessness, and *SWANCC* continues its badly needed resurrection. But for those whose main concern is environmental quality rather than constitutional propriety, it is *the dissent* that, oddly enough, may contain a key for achieving both objectives.

The substantive importance of environmental regulation is a major theme of the dissent, and it closes with the contention that migratory bird habitats are a "textbook example" of a subject needing federal regulation. The benefits of destroying a particular habitat with a landfill are "disproportionately local" while its environmental costs "are widely dispersed." We have, in short, a prime case of "externalities," where the effects of an action on outside parties supposedly make the actor unlikely to accurately weigh its costs and benefits. The result, in the dissent's words, makes "federal regulation both appropriate and necessary."

Commentary

But like the Commerce Clause, the externality argument can be stretched too far; after all, most actions by people or states have effects on outsiders. The real problem is when outsiders are *harmed*, and this is a problem to which the *SWANCC* majority wasn't oblivious. Its ruling covers only *isolated* wetlands, and leaves wetlands connected to navigable waters under Army Corps jurisdiction. Interstate water pollution remains subject to federal regulation.

The dissent's focus on migratory birds goes beyond this core problem. Migratory bird habitat involves not a negative externality but a positive one—a benefit that one state's wetlands produce for other states. But even here, the case for federal regulation isn't all that cut-and-dried. Some of these external benefits may not be all that external. The petitioner, remember, was not a single isolated town, but a consortium of 23 municipalities. Its members might not bear all the environmental consequences of the landfill, but they'd certainly bear some. Consider the billions of dollars that, as pointed out by the dissent, are spent annually on birdwatching. If the loss of this one gravel pit were going to result in less spending by birdwatchers nationwide, then at least some of that loss in income would likely be experienced by the consortium's members.

At the same time, if the benefits of having the landfill were local, then how reliably would those benefits be assessed by a national regulatory agency? The Army Corps focused only on the landfill's environmental costs, giving minimal if any weight to its benefits.

Ironically, the one scholarly analysis cited by the dissent on externalities *actually presents a powerful case against federal environmental regulation*. This is a 1992 analysis by NYU Law Professor Richard L. Revesz entitled "*Rehabilitating Interstate Competition: Rethinking The 'Race-To-The-Bottom' Rationale For Federal Environmental Regulation,"* 67 N.Y.U.L. Rev. 1210. The Revesz article supports the dissent's point about externalities, *but it also concludes most federal environmental regulatory programs are wrong-headed*. They're aimed at preventing an interstate "race to the bottom," in which states compete for polluting industries by dropping their own environmental safeguards. But this "race to the bottom" notion, according to Prof. Revesz, is simply incorrect: "Contrary to prevailing assumptions, competition among states for industry should not be expected to lead to a race that decreases social welfare... ." To the contrary, it is socially beneficial, while federal environmental regulation aimed at countering it "is likely to produce results that are undesirable."

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What's even more ironic is that this article has helped stimulate a growing reexamination of state versus federal environmental regulation. A host of analyses of topics ranging from environmental audits to clean air to brownfields demonstrate that state environmental regulators have far outpaced their federal counterparts in effectiveness. Their advantage lies in their flexibility, in their proximity to the problems at issue, and in their willingness to not rely exclusively on punishment. In the words of New York Law School Professor David Schoenbrod, formerly a senior attorney for the Natural Resources Defense Council, the federal environmental regulatory structure has become "opaque, arcane, elliptical, repetitive, and evasive."

At first blush, the promise of non-federal approaches to environmental problems seems to have little direct bearing on the issue of Commerce Clause limits. The curious fact remains, however, that a key piece of scholarship on this approach ended up being cited not by the majority in *SWANCC*, but by the dissent. Only time will tell whether this is a meaningless coincidence, an intriguing bit of irony, or a sign of things to come.

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