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RAPANOS AND THE EBBING OF THE CONSTITUTIONAL "HIGH WATER" MARK FOR THE COMMERCE CLAUSE LIMITATION ON FEDERAL WETLANDS REGULATION

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Although much has already been written about the "murky waters" left in the wake of the Supreme Court's split pluralities and Justice Kennedy's singular but crucial concurrence in *Rapanos v. U.S.*, ___ U.S. ___, 126 S. Ct. 2208, 74 USLW 4365 (2006) (*Rapanos*), one part of that opinion has thus far escaped much review—the Court's discussion of the Commerce Clause and its potential limitations on federal regulation of "remote" wetlands. In fact, however, *Rapanos* marks the receding of a Commerce Clause-based limitation on federal wetlands regulation that seemed strong and viable just a few years ago in the Court's opinion in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). The hopes of advocates seeking to limit federal regulation of wetlands based upon Commerce Clause limitations ultimately floundered upon an unusual combination of an Ohio seasonal wheat farmer and two California marijuana users.

In *SWANCC*, the Court was faced with a seeming routine issue—could federal regulation of wetlands extent to a remote gravel pit that was unconnected to any other body of water? The United States defended this regulation by pointing out that migratory birds used the gravel pits, which had filled with water over the years, as convenient stopping off spots in their interstate migration. Moreover, the number of "birders" who travel to various states to see migratory birds generated over $1 billion in annual expenditures, according to the government. However, for a five-Justice majority of the *SWANCC* Court, these arguments about an uncertain aggregate affect upon interstate commerce raised a "significant constitutional question." 531 U.S. at 173. In order to avoid such a "significant" question, the Court instead invalidated the regulation (the so-called "Migratory Bird Rule") that allowed for federal regulation of those isolated water areas visited by migratory birds on statutory grounds.

In *Rapanos*, counsel for Mr. Rapanos came ready and armed with the Commerce Clause. Rapanos' brief argued that the government's "expansive" application of federal regulation to wetlands that were not navigable waters but merely "hydrogeologically connected" to such waters raised "significant Commerce Clause" issues because there was no showing by the government of "significant effects" upon interstate commerce. *Brief for Petitioners John A. Rapanos, et. al*, at pp. 22-23. Based upon the Court's prior ruling in *SWANCC*, supported by five members of the Court, one might have expected that the waves of Commerce Clause "concerns" would have again overwhelmed the regulatory scope that the federal government sought to uphold.

Instead, a strange fate befell the seemingly sturdy Commerce Clause argument before the Court. While Justice Scalia's plurality opinion found that a limitation of the Clean Water Act term "navigable waters" was required by the constitutional avoidance "canon" of statutory construction, in order to avoid possible Commerce Clause concerns, this was the opinion of only four members of the Court. 126 S. Ct. at 2224. Four other members of the Court joined Justice Stevens' dissent, which soundly rejected the potential Commerce Clause issue, noting that the wetlands at issue in the instance case played "key roles" in regulating the watershed and thereby impacting truly navigable waterways. 126 S. Ct. at 2261-62. This split left Justice Kennedy, who had previously joined the majority's analysis of Commerce Clause "concerns" in *SWANCC*. But, not this time.

Although Justice Kennedy joined in the judgment of the plurality opinion authored by Justice Scalia, the scope of his concurrence stopped there. After separately and vigorously rejecting the plurality's interpretation of the Clean Water Act as "inconsistent with the Act's text,

structure and purpose" (126 S. Ct. at 2246), Justice Kennedy then dismissed the canon of construction to "avoid" a constitutional problem by narrow statutory interpretation. Significantly, while Justice Kennedy "assumed" for purposes of argument that federal regulation of "remote" wetlands could raise a Commerce Clause issue, he at the same time noted facts that directly contradicted that assumption—the important and interstate effects of wetlands. Justice Kennedy specifically noted that a lack of wetlands to adequately filter the Mississippi River's nutrient rich runoff is impacting the Gulf of Mexico, where that runoff results in an oxygen-depleted "dead zone" itself the size of several states. 126 S. Ct. at 2246-47. Significantly, Justice Kennedy then cited the case of the Ohio farmer, *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard***,** an Ohio dairy farmer who also grew a crop of winter wheat challenged a wartime act regulating agricultural production on the grounds that such federal regulation exceeded permissible Commerce Clause limits. The Court, however, rejected this argument, noting that Congress' power to regulate commerce extended to "those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate ends . . . ." 317 U.S. at 124. By citing to *Wickard*, Justice Kennedy would seem to be signaling his willingness to build an impenetrable judicial levee restricting the raging argument of Commerce Clause limits to only the remotest of wetlands—the completely isolated wetlands of former gravel pits found in *SWANCC*.

Moreover, Justice Kennedy's concurring opinion also cited to a more recent Commerce Clause case involving two California marijuana users. Later in his concurrence, Justice Kennedy wrote that "in most cases" regulation of wetlands that possess a "significant nexus" to navigable waters will not raise serious constitutional difficulties. 126 U.S. at 2249. Indeed, Justice Kennedy stated that potential individual cases of troubling applications of the Commerce Clause did not require an "adoption of an interpretation that departs in all cases from the Act's text and structure," citing to *Gonzales v. Raich*, 545 U.S. 1 (2005).

A brief review of the *Gonzales* case underscores the implications of Justice Kennedy's citation. In *Gonzales*, two California women used marijuana for medical purposes; one using homegrown pot, the other woman purchasing her marijuana from "caregivers," as allowed by a California statute. The U.S. Attorney General attacked the California statute as conflicting with a comprehensive federal drug statute, but the primary defense was that the acts of these two women were beyond the federal government's Commerce Clause reach. Not so, held a majority of the Court. Rather, when a general federal statute bears a "substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." *Gonzales*, 545 U.S. at 17.

The implications of Justice Kennedy's citing of *Gonzalez* for any future Commerce Clause challenge to federal wetlands regulation are substantial. Even if Mr. Rapanos (or a subsequent developer) were to claim that the individual wetland he filled was insignificant to interstate commerce, such a claim would, for Justice Kennedy and four other members of the Court, be "irrelevant." As long as the Clean Water Act bears a general regulatory relationship to interstate commerce concerns (as it surely does), then an individual *de minimis* connection to interstate commerce does not prohibit federal regulation. This point was underscored by Justice Stevens, who in his dissenting opinion in *Rapanos* quoted then-Justice Rehnquist to the effect that the Clean Water Act was intended as a "total restructuring" and "complete rewriting" of existing water pollution laws. 126 S. Ct. at 2262. It was also Justice Stevens who authored the majority opinion in *Gonzales*, emphasizing in part that the federal statute in question had created a "comprehensive framework" for regulating drug usage, much of which inevitably did have an effect on interstate commerce. 545 U.S. at 24.

The high water mark of the Commerce Clause concerns about federal wetlands regulation was reached in *SWANCC*. After *Rapanos*, in which five Justices relied upon an broad line of Commerce Clause cases that expansively interpret that clause to allow federal regulation of individual wheat growers in Ohio and marijuana users in California, future Commerce Clause challenges to federal wetlands regulation are likely to fail.