Law and the Public's Health

WHEN PUBLIC HEALTH MEETS MARKET FORCES: RAPANOS V U.S. ARMY CORPS OF ENGINEERS

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In June 2006, the United States Supreme Court decided *Rapanos v U.S. Army Corps of Engineers*,¹ and in his dissent, Justice John Paul Stevens perhaps best summed up its significance:

the narrow question . . . is whether wetland adjacent to tributaries of traditionally navigable waters are waters of the United States and thus subject to [Army Corps of Engineers] jurisdiction. [But the] broader question is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised. . .¹

Leading news accounts of the decision reported that *Rapanos* “came close to rolling back one of the country’s fundamental environmental laws.”² A four-Justice plurality would have overturned longstanding rules governing the regulation of wetlands. Justice Kennedy’s more limited concurrence prevented this result, but while the “fractured decision” is “likely to preserve vigorous federal enforcement of . . . the Clean Water Act, [it] is also likely to lead to new regulatory battles, increased litigation by property owners and a push for new legislation.”²

Rapanos sheds light on the extent to which the current Supreme Court, so often characterized as conservative, in fact may be poised to make a fundamental and radical shift—at least where agency regulation of market conduct affecting the environment is concerned—away from its own longstanding policy regarding the degree of judicial deference accorded federal agencies charged with the interpretation and enforcement of public welfare laws, especially laws whose interpretation and enforcement rest on complex matters of technical and scientific judgment. Such a jurisprudential shift would have widespread and profound implications for a broad array of federal environmental and public safety laws that together comprise the foundation of public health.

This installment of *Law and the Public's Health* analyzes this important decision and its implications for public health policy and practice.

THE CASE

Justice Scalia’s plurality opinion traced the long lead-up to the decision: The dispute began in 1989 when real estate developer John Rapanos “backfilled wetlands on a parcel of land . . . that he owned and sought to develop.”³ The nearest body of navigable water was between 11 and 20 miles away, but the U.S. Army Corps of Engineers (Corps) determined that the wetlands were “waters of the United States” and thus subject to its jurisdiction. The Corps then mounted both civil and criminal enforcement actions against Rapanos for failing to comply with federal permit requirements.

Characterizing the Corps as an “enlightened despot,”³ Justice Scalia described the process by which the Corps determines, under the Clean Water Act of 1972,⁴ whether to approve or deny an application to engage in conduct on lands and waters under its controls. The Corps’ process involves a formal review of an application, based on numerous relevant factors: “conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, and considerations of property ownership and, in general, the needs and welfare of the people.”⁵ For simply “backfilling his own wet fields” without adhering to the permit process (i.e., without seeking permission from the Corps), Rapanos was subjected to both civil fines and prison.⁶

Rapanos’ legal troubles stemmed from the fact that the Corps had classified his wetlands as part of the navigable water system of the United States and thus subject to federal jurisdiction under the Clean Water Act. The purpose of the Act is to “restore and maintain” the “integrity of the nation’s waters.”⁷ The Act recognizes the parallel policy powers of state governments over the quality and integrity of the water supply⁸ and thus, in its pollution control provisions, focuses on “navigable waters” defined as “the waters of the United States including the territorial seas.”⁹ Over the nearly 35-year time span since the law’s passage, the Corps had come to interpret the term “navigable waters” broadly, even when such waters, as in John Rapanos’ case, lacked a continuous surface connection to such waterways.

It was the power of the federal agency to broaden

the concept of “navigable waters” that lay at the heart of the plurality’s decision. Justice Scalia framed the Corps’ actions as an expansion of jurisdiction to reach “virtually any parcel of land containing a channel or conduit—whether manmade or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow.”⁹ In Justice Scalia’s view, the federal agencies had construed the terms of the law to give them the power to reach private development of wetlands that did not continuously connect to waterways. That this expanded interpretation of the term “waters of the United States” jurisdiction rested on extensive scientific evidence regarding the “downstream” reach of pollutants and had stood undisturbed by Congress for thirty years was beside the point in the plurality’s view. What mattered was whether the terms of the statute permitted such an interpretation.

Justice Scalia reviewed the evolution of Corps’ interpretation of its jurisdiction under the Act. Following a restrained initial approach to enforcement, the Corps ultimately had adopted a reading of the law that gave the term waters of the United States” a meaning coextensive with the fullest extent of Congress’ Constitutional powers to regulate interstate and foreign commerce pursuant to the Commerce Clause, the Constitutional grant of Congress’ lawmaking powers on which the Clean Water Act rests. The Corps’ interpretation ultimately reached beyond traditional interstate navigable waters to encompass all interstate and intrastate waters and bodies of land such as “wetlands, mudflats, sandflats, prairie potholes, and other land masses, the use, degradation or destruction of which could affect interstate and foreign commerce.”⁹ In 2003 the Corps proposed rules that would have narrowed the scope of this jurisdiction, but no final rules ever were promulgated. (Much attention has been paid to the political pressure that has been brought to bear on regulatory agencies in recent years to force them to limit their scientific and enforcement activities. See: Michaels D, Monforton C. Manufacturing uncertainty: contested science and the protection of the public’s health and environment [cited 2006 Jul 25]. *Am J Public Health* 2005;95(Suppl 1):S39-48. Available from: URL: <http://www.defendingscience.org/upload/Michaels-Monforton.pdf>. See also: Specter M. Political science: the Bush administration’s war on the laboratory. *The New Yorker* 2006 Mar 13:58-70. The timing between John Rapanos’ journey through the federal judicial system and the preliminary attempt to limit the reach of the Corps’ jurisdiction may be less than completely coincidental. The Court is, of course, acutely aware of the political and policy significance

of both the environment in which it decides cases, as well as the impact of its decisions on politics, economics, and society.)

In an earlier era, the Court might have deferred to the Corps’ interpretation, particularly since no subsequent act of Congress had ever refuted the reach of its rules. Since the New Deal, the Court has interpreted Congress’ Commerce Clause powers broadly, recognizing the extent to which these powers give lawmakers the power to reach even intrastate and individual activities and conduct if such activities and conduct are viewed as potentially affecting commerce among the states. Indeed, during the 2005 term, the Court used this jurisprudential approach to uphold the constitutionality of the Controlled Substances Act in the face of a challenge to Congress’ Constitutional authority to limit state powers to regulate medical practice and outlaw the individual use of medical marijuana not grown for resale.¹⁰

In sum, where Congress uses its Commerce Clause powers to act for the public welfare, modern jurisprudence has come to give lawmakers and the enforcement agencies charged by Congress with interpreting and applying the law a wide berth. It is this settled approach to Commerce Clause cases and the application of broad judicial deference—particularly where the legal interpretation in question rests on extensive scientific findings—that made the plurality decision in *Rapanos* so remarkable. Rather than following this approach, Justice Scalia chose to simply set aside the interpretation as unsubstantiated by the terms of the statute. Employing his signature rapier approach to words, Justice Scalia characterized the Corp’s regulations as “beyond parody,”¹¹ allowing the Corps to take a “Land is Water” approach to water protection.¹¹ What makes the plurality decision in *Rapanos* so striking is not simply that the Court set aside a longstanding agency interpretation of a public welfare law, but that it did so in the context of a decades-old law whose enforcement is so technical and turns on an extensive weighing of scientific evidence.

Had Justice Kennedy not separately concurred, the plurality vote may well have been a majority and the definition of “navigable waters” would have been overturned. Instead, Justice Kennedy, who refused to support such a sweeping step, concurred with a more narrowly drawn opinion that sent the case back to the lower courts, not for dismissal, but for a new evidentiary hearing on the question that he saw as central to the Corps’ powers, namely, whether Rapanos’ wetlands in fact had a significant nexus to navigable waters. In other words, although Justice Kennedy concurred that the penalties against Rapanos were improper, the

basis for his decision was not that the Corps lacked the statutory power to intervene in discontinuous wetland situations, but that the factual record did not support the intervention in this case and required further development.

In his dissent, Justice Stevens, writing for himself and Justices Souter, Ginsberg, and Breyer, stated that the Corps' interpretation was owed the classic deference shown to federal agencies acting under broad grants of legislative powers to protect the public welfare. This deference, embodied in the landmark decision *Chevron U.S.A. Inc. v Natural Resources Defense Council*,¹² has been a mainstay of Supreme Court jurisprudence for a generation and, in the dissent's view, remains the standard by which courts should review the legality of federal agency conduct. This deference is particularly apt, in the view of the dissent, when the agency conduct that lies at the heart of a dispute involves a complex and highly technical and scientifically based statute, whose regulatory requirements themselves rest on extensive evidence.

IMPLICATIONS FOR PUBLIC HEALTH PRACTICE AND POLICY

Judicial decisions are important not only for their content but for the precedent they set in terms of judicial approach to complex policy problems. Viewed in this light, the significance of the *Rapanos* decision has as much to do with the approach taken by the Court as the future reach of the Clean Water Act. The Scalia plurality, joined by Justice Kennedy, signaled a willingness to use the judicial power over the meaning of law to set aside longstanding, evidence-based agency standards related to environmental law, in favor of an alternative theory of Congressional purpose and intent. In the Scalia plurality's case, four votes existed to strike down the standard as a matter of law, without further evidentiary consideration. It is this willingness to intervene so completely in the agency enforcement process that made their decision a radical one. Justice Kennedy, on the other hand, was willing to take the momentous step of overturning the rule, only if the agency could not demonstrate a significant nexus between the conduct in question and the harm to be averted. In essence, Justice Kennedy was willing to give the agency a chance to show the importance of its intervention—a more cautionary approach to be sure that did not involve a wholesale overturning of a standard, but one that nonetheless places a high burden of proof on regulators.

What does this all mean for state health policy and practice? First, the potential for a lessening of federal enforcement efforts brings into sharper relief the importance of the parallel system of state clean water laws on which the Clean Water Act rests. State environmental laws are part of the bedrock of national public health protection, a fact that is easier to forget when an active federal presence is in place. The legal landscape of federal environmental laws under the current Court serves to remind us of the importance of the state legal system on which the nation is founded.

A second observation is that this case concerns the jurisprudential approach taken to the interpretation of federal laws by federal courts. State laws are construed by state courts, each of which has its own jurisprudential approach. Many state courts may continue to be heavily deferential to agencies charged with the interpretation and enforcement of laws that rest on science and evidence. At the same time, American society as a whole is in the throes of one of the most market-oriented eras, with a parallel eclipsing of the concepts of social contract and shared community risk. Thus, state and local public health agencies should perhaps see the sentiments expressed by the *Rapanos* plurality as one that could yet come to rest in their own judicial systems, if they have not already done so.

A final noteworthy point has to do with the role of science in judicial review of law. One likes to think of jurisprudence as bounded by and resting upon evidence. In fact, evidence does lie at the heart of law and the search for the meaning of law. At the same time, all the evidence in the world may fail to dissuade a court of the propriety of a legal interpretation, particularly in an era in which science is under constant challenge. There are times when courts act purely because of the meaning of the law itself, and in these situations, the evidence simply does not carry the day. This type of intervention is typically the case when individual rights and liberties are at stake, but less so when the balance is between law and markets. That the *Rapanos* plurality had no hesitation dismissing the science of downstream pollutants because it simply could not accept the notion that non-contiguous wetlands fell within the meaning of "waters" is an apt illustration of the power of courts to alter the balance between market interests and the public health, just as it can alter the balance between governments and individuals.

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