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10th Annual Mid-South Agricultural and Environmental Law Conference

Environmental Law & Agriculture Industry Before the United States Supreme Court

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What is going on at One First Street?

- Press: This is a deeply conservative, pro-business Court with a solid 6-Justice majority intent on remaking the law the way the Federalist Society would like it to be.

NPPC & AFBF v. Ross (2023):

GORSUCH, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III, IV–A, and V, in which THOMAS, SOTOMAYOR, KAGAN, and BARRETT, JJ., joined, an opinion with respect to Parts IV–B and IV–D, in which THOMAS and BARRETT, JJ., joined, and an opinion with respect to Part IV–C, in which THOMAS, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part, in which KAGAN, J., joined. BARRETT, J., filed an opinion concurring in part. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which ALITO, KAVANAUGH, and JACKSON, JJ., joined. KAVANAUGH, J., filed an opinion concurring in part and dissenting in part.

What is going on at One First Street?

Andy Warhol Foundation v. Goldsmith (2023):

SOTOMAYOR, J., delivered opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, BARRETT, and JACKSON, JJ., joined. GORSUCH, J., filed concurring opinion, in which JACKSON, J., joined. KAGAN, J., filed dissenting opinion, in which ROBERTS, C. J., joined

Kagan, J., footnote in dissent: The majority opinion is trained on this dissent in a way majority opinions seldom are. Maybe that makes the majority opinion self-refuting? After all, a dissent with "no theory" and "[n]o reason" is not one usually thought to merit pages of commentary and fistfuls of comeback footnotes. In any event, I'll not attempt to rebut point for point the majority's varied accusations …. I'll just make two suggestions about reading what follows. First, when you see that my description of a precedent differs from the majority's, go take a look at the decision. Second, when you come across an argument that you recall the majority took issue with, go back to its response and ask yourself about the ratio of reasoning to ipse dixit. With those two recommendations, I'll take my chances on readers' good judgment.

What is going on at One First Street?

Sackett v. EPA

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. KAGAN, J., filed an opinion concurring in the judgment, in which SOTOMAYOR and JACKSON, JJ., joined. KAVANAUGH, J., filed an opinion concurring in the judgment, in which SOTOMAYOR, KAGAN, and JACKSON, JJ., joined.

What is going on at One First Street

- Scalia vacancy, Merrick Garland nomination, Gorsuch confirmation; Barrett confirmation immediately prior to 2020 election.
- Court expansion proposals.
- Ethics attacks, calls for stronger ethics code, recusal standards.
- *Dobbs* leak and inconclusive investigation.
  - Reason for the delayed opinions this Term?
- Kavanaugh: Court should take more cases.

NPPC v. Ross—the California Prop 12 case

- Dormant Commerce Clause challenge to Prop 12, which prohibits sale of pork in California unless it comes from a sow housed a specified way (24 sq ft, stand up/turn around, no breeding stalls post-weaning).
- Citizen initiative: purports to prevent animal cruelty and human disease.
- 99% pork consumed in California imported; 13% of U.S. pork market.
- Half Nation's sows are in Iowa, N. Carolina, Illinois, Minnesota, Missouri.
- Massive cost: new barns, smaller herds, greater sow mortality.
- Costs inhere in every cut of pork, wherever sold

Prop 12, cont'd

12(b)(6) dismissal affirmed 5-4. Unanimous: no extraterritoriality head of dormant Commerce Clause. *Baldwin*, *Brown-Foreman*, *Healy* recast as discrimination cases.

Gorsuch, Thomas: CC is about discrimination; *Pike v. Bruce Church* involved discriminatory intent. Would severely cabin *Pike*.

Gorsuch, Thomas, Barrett: Under *Pike* balancing of effect on commerce against benefits, courts not capable of balancing State's moral justifications against harm to commerce; incommensurable, non-justiciable.

Kagan, Sotomayor: Recognize *Pike* balancing; reject incommensurability; but plaintiffs did not adequately allege Prop 12 had a substantial impact on interstate commerce.

Roberts, Alito, Kavanaugh, Jackson (dissent), Barrett (conc.): Plaintiffs alleged substantial effect on interstate commerce. Dissenters would have remanded for *Pike* balancing.

Kavanaugh dissent: parade of horribles, not what Framers intended.

Sackett v. EPA: Wetlands, WOTUS

- WOTUS because "Priest Lake, Idaho, is a navigable water → A non-navigable creek connects to Priest Lake → The non-navigable creek is connected to a non-navigable, man-made ditch → The nonnavigable, man-made ditch is connected to wetlands → These wetlands, though separated from the Sacketts' lot by a thirty-foot-wide paved road, are 'similarly situated' to wetlands alleged to exist on the Sacketts' lot → These wetlands on the Sacketts' property, aggregated with the wetlands across the street, bear a 'significant nexus' to Priest Lake."
- *Riverside Bayview*, *SWANCC*, *Rapanos*, *Sackett I*, *Hawkes*
- 2015, 2020, 2023 WOTUS Rules

Sackett v. EPA

- Unanimously rejects "significant nexus" test. Alito majority's reasoning:
- "The CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it."
- No clear statement in CWA of intent to override traditional state authority over land and water use—quite the contrary
- Rule of lenity: narrow reading to scope of criminal statue.
- Instead: "we conclude that the Rapanos plurality was correct": the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes."

Sackett v. EPA

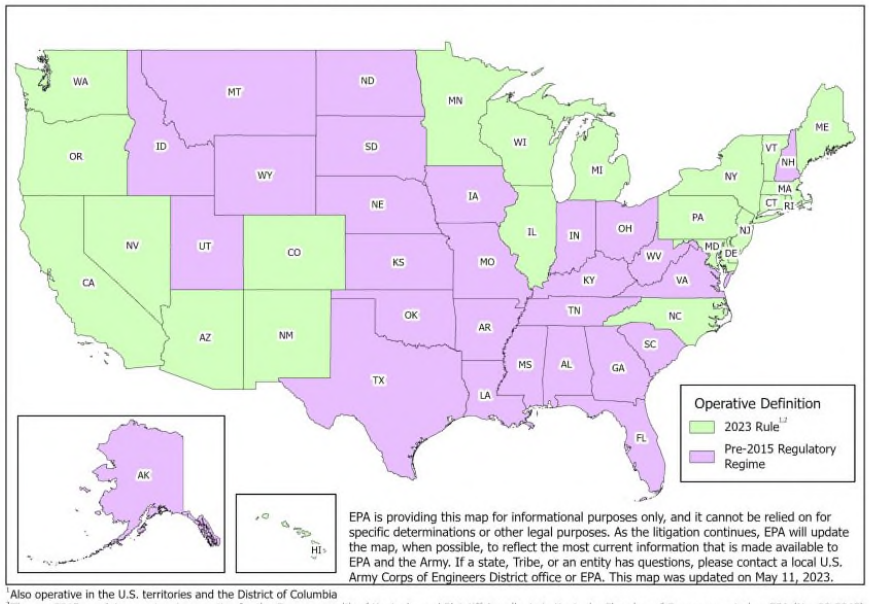
- Majority: "Wetlands must qualify as 'waters of the United States' in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA," "making it difficult to determine where the 'water' ends and the 'wetland' begins."

- "Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."

- Kavanaugh concurrence would interpret "adjacent" to mean "nearby" instead. E.g., wetland the other side of a berm from a river would be a wetland under Kavanaugh test (and under "significant nexus") but not under majority test.

WOTUS May 30, 2023

Operative Definition of "Waters of the United States"



EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, EPA will update the map, when possible, to reflect the most current information that is made available to EPA and the Army. If a state, Tribe, or an entity has questions, please contact a local U.S. Army Corps of Engineers District office or EPA. This map was updated on May 11, 2023.

[1]Also operative in the U.S. territories and the District of Columbia

[2]The pre-2015 regulatory regime is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).

Judicial review of agency action; Chevron deference

- Kagan: "We are all textualists now." Plain statutory language.
- *Weyerhaeuser v. FWS*: dusky gopher frog unoccupied critical habitat
- *National Association of Manufacturers v. Dep't of Defense*: jurisdiction to challenge WOTUS rule.

APA review of regulations; Chevron deference

- Cabining agency discretion: clear statements/non-delegation
- Major questions doctrine:
  - Before agency can decide major questions of vast economic, social or political significance, "the Act [must] plainly authoriz[e]" the agency's action. *NFIB v. Dep't of Labor* (2022)
  - *W. Va. v. EPA* (2022): EPA Clean Power Plan cannot regulate CO2/GHG emissions from existing power plants under CWA 111(d) by forcing shift to clean energy sources through carbon emission caps
  - *UARG v. EPA* (2014): MQD involved when EPA CAA findings would "require permits for construction and modification of tens of thousands, and operation of millions, of small sources nationwide."

The end of Chevron?

- Supreme Court has not relied on *Chevron* deference to uphold agency action since 2016.
- *Loper Bright v. Sec'y of Commerce:* cert. granted on this question:

> "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute n ambiguity requiring deference to the agency."

Agriculture related Takings

- *Cedar Point Nursery v. Hassid* (2021): California regulation required agricultural employer to allow union organizers onto property 3 hours per day, 120 days per year. Held: that was a per se physical taking requiring compensation.
- *Horne v. U.S. Dep't of Agriculture* (2015): Raisin marketing order requires producers some years to set aside part of their crop for the government, which may or may not sell the crop and return some of the proceeds to grower. Held: reserve requirement was a per se physical taking. That grower chose to participate in raisin market, knowing of the reserve requirement, is no defense.

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