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ALCATEL

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A Judicial Threat to Clean Water

The Supreme Court's continuing debate over federal power reached a critical juncture on Tuesday. The justices heard arguments in a closely watched case from Illinois with potentially devastating consequences for environmental protection and, more broadly, Congress's traditional authority under the Constitution's Commerce Clause to address pressing issues of national concern.

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At issue was a decision by the Army Corps of Engineers to deny a permit to a group of local governments in Illinois that wanted to build a landfill at a site dotted with dozens of isolated ponds that serve as habitats for migratory birds. The local townships disputed the federal government's jurisdiction under the Clean Water Act, contending that Congress's authority to regulate interstate commerce does not extend to regulating isolated waters within one state in order to protect migratory birds.

That argument was properly rejected by a lower appellate court last year. The court noted that the cumulative effect on the economy of the "millions of people" who hunt, trap or observe migratory birds was such that the preservation of habitat protecting these birds was properly a matter of federal interest. Even if there were no effect on commerce from the destruction of a particular isolated habitat, the ruling said, "the aggregate effect is clear, and that is all the Commerce Clause requires."

Should the justices reject this "aggregate effects" analysis, it would call into question a slew of environmental laws, as well as civil rights statutes that rely on a broad definition of Congress's Commerce Clause authority — a point underscored in a thoughtful brief filed by an impressive coalition of civil rights and public interest groups. Those on the other side scoff that the reach of Congress's Commerce Clause power should not be defined by the migratory habits of birds. That obscures the point. What is being regulated here is waste disposal, an economic activity plainly within the scope of Congress's commerce power.

In the end, however, the court may not reach the constitutional issue, instead deciding the case on statutory grounds. A number of justices seemed inclined toward a ruling that would focus on language in the 1972 Clean Water Act giving the Army Corps authority over "navigable waters." From the tone of their comments, these judges could well decide that "navigable waters" do not include isolated ponds.

However, such a ruling would overturn a quarter-century of sound regulatory practice and judicial interpretation. It would also ignore wording elsewhere in the statute, as well as legislative history that demonstrates Congress's desire to broadly protect the nation's waters and wetlands, navigable or otherwise. Indeed, Congress debated — and rejected — a "navigability" requirement when it amended the Clean Water Act in 1977. A cramped reading of the statute or the Constitution in this case will be a major setback not only for the birds but for cleaner water everywhere.

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