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Comment

HOW AN ENVIRONMENTAL COMMERCE CLAUSE CHALLENGE PRESAGED THE DECISION OF CHIEF JUSTICE ROBERTS' IN NFIB V. SEBELIUS

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While legal pundits search high and low to discover why Chief Justice Roberts "jumped the shark" on the individual mandate in NFIB v. Sebelius, [1] the answer may lie in an overlooked 2003 case from the D.C. Circuit Court of Appeals.

In Rancho Viejo, LLC v. Norton, the Court addressed a Commerce Clause challenge to the Endangered Species Act. [2] A three-judge panel held that the federal government's prohibition on taking a protected toad--a noncommercial, intrastate species--was a valid regulation of interstate commerce because the taking would result from a commercial activity. [3] On petition for rehearing en banc, then-Judge Roberts expressed his opinion that the panel was wrong on its Commerce Clause analysis. [4] According to Judge Roberts:

> The panel's opinion in effect asks whether the challenged regulation substantially affects interstate commerce, rather than whether the activity being regulated does so. Thus, the panel sustains the application of the Act in this case because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental ***90** taking of arroyo toads can be said to be interstate commerce. [5]

The Rancho Viejo decision foreshadowed Justice Roberts' interpretation of the Affordable Care Act ("ACA") in NFIB v. Sebelius, a case that asked whether the individual mandate regulated activity (or inactivity) substantially affecting interstate commerce, or created such activity. [6]

In Rancho Viejo, Judge Roberts observed, "[t]he panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'" [7] Judge Roberts concluded the holding went too far, explaining, "Such an approach seems inconsistent with the Supreme Court's holdings in United States v. Lopez and United States v. Morrison," [8] wherein the Supreme Court held that federal legislation prohibiting the possession of firearms in school zones and violence against women was invalid under the commerce power. Citing the Fifth Circuit, Judge Roberts explained, "looking primarily beyond the regulated activity [[would] . . . effectually obliterate' the limiting purpose of the Commerce Clause." [9]

Based on this analysis, it should have been no surprise that Chief Justice Roberts would conclude that the individual mandate in the ACA had exceeded the constitutional limitation to regulate commerce. [10] As he explained in NFIB v. Sebelius, "[t]he Government's theory here would effectively override that [Commerce Clause] limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have ***91** them do." [11] Accordingly, "[s]uch a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'" [12]

It is Judge Roberts's final comment in Rancho Viejo that, in light of the NFIB v. Sebelius decision, gives pause. In urging the entire Court of Appeals to review the panel's faulty Commerce Clause analysis, he stated, "[s] uch review would . . . afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent." [13] That simple statement held far more meaning for Judge Roberts than it originally appeared. It was no passing remark; instead, it was a statement of Judge Roberts's strongly held judicial philosophy that courts should uphold federal legislation whenever possible. Chief Justice Roberts's recasting of the individual mandate penalty as a "tax" demonstrated that it is almost always possible to uphold federal legislation when the court is willing to rewrite the law. [14] Perhaps surprisingly, this is not the first time we have seen such an inclination from Chief Justice Roberts.

When Chief Justice Roberts was appointed in 2005, one of the first cases the new Court took up for review was Rapanos v. United States. [15] In that case, John Rapanos, represented by Pacific Legal Foundation, raised a Commerce Clause challenge to the Clean Water Act. [16] The Court did not address the Commerce Clause issue. Instead, the new Roberts Court avoided a constitutional conflict altogether by reinterpreting the Act and limiting federal jurisdiction that would otherwise exceed the commerce power. [17] The plurality opinion, authored by Justice Scalia and joined by Justices Thomas, Alito, and Roberts, was a clear compromise that showed the hand of the Chief Justice. Whereas the Clean Water Act prohibits unpermitted discharges into "navigable waters," defined in the Act only as "waters of the United States," the plurality parsed the word "waters" [18] in ***92** much the same way that Chief Justice Roberts parsed the word "tax" in NFIB v. Sebelius. Based on the Court's hyper-technical reading of that word, the plurality in Rapanos expanded the traditional meaning of "navigable waters," as highways of commerce, to include non-navigable tributaries to such waters. [19] This was a narrower reading of the Act than the government championed, and effectively allowed the plurality to rewrite the Act.

In a separate concurring opinion, Chief Justice Roberts chastised the Corps of Engineers and the Environmental Protection Agency for not adopting meaningful limits on agency authority under the Clean Water Act. [20] It is curious, however, that the Chief Justice put the entire onus of defining the scope of federal legislation on the enforcement agencies, rather than on Congress. Although this was the third time the Court had to address federal jurisdiction under the Clean Water Act, and Chief Justice Roberts acknowledged some ambiguity in the Act itself, [21] Justice Roberts did not urge Congress to clarify the statutory language despite a majority on the Court in disagreement on where the limits on agency authority should be drawn. Perhaps, in retrospect, this can be seen as an indication of Chief Justice Roberts's aversion to challenge congressional intent, as demonstrated for all to see in NFIB v. Sebelius.

Footnotes

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1 Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 132 S.Ct. 2566 (2012).

2 See Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003).

3 See id.

4 See Rancho Viejo, LLC, 334 F.3d at 1160 (Roberts, J., dissenting) (disputing denial of reh'g en banc).

5 Id.

6 Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 132 S.Ct. 2566, at 2587 (2012).

7 Rancho Viejo, LLC, 334 F.3d at 1160 (quoting U.S. Const. art. 1, § 8, cl. 3).

8 Id. (citing United States v. Lopez, 514 U.S. 549 (1995)); United States v. Morrison, 529 U.S. 598 (2000).

9 Rancho Viejo, LLC, 334 F.3d at 1160 (citing GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622, 634-35 (5th Cir. 2003)).

10 NFIB, 132 S.Ct. at 2591.

11 Id. at 2588.

12 Id. at 2591.

13 Rancho Viejo, LLC, 334 F.3d at 1160.

14 NFIB, 132 S.Ct. at 2600.

15 Rapanos v. United States, 547 U.S. 715 (2006).

16 Id.

17 See id. at 739.

18 Id. at 753.

19 Id.

20 Id. at 758.

21 Id.

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