

Justice Gorsuch Faces Case Where Neither Choice Entirely Satisfactory

Before joining the Supreme Court, Neil Gorsuch made clear that he, like the justice he replaced, Antonin Scalia, believes in strict adherence to statutory text. According to Gorsuch, a judge's personal policy preferences should play no role in statutory interpretation. And, going even further than Scalia, nominee Gorsuch admonished that judicial deference to agency construction of ambiguous statutory language under *Chevron v. Natural Resources Defense Council* amounts to an unconstitutional violation of separation of powers. An environmental case now pending before the Court on petition for a writ of certiorari, however, may well put Justice Gorsuch's stated commitment to statutory text to the test.

At issue in the petition pending before the Court in *New York v. EPA* is the validity of the agency's so-called Water Transfer Rule, which provides that a movement from one navigable waterbody to an entirely distinct waterbody does not amount to an "addition of any pollutant to navigable waters" requiring a Clean Water Act Section 402 permit. Under this reading, EPA readily acknowledges, a person can discharge highly polluted water from one water body into a highly pristine separate water body without the need for a Section 402 permit.

EPA statutory grounding for the validity of the WTR is the Clean Water Act's phrasing of the definition of "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters." EPA contends that the term "navigable waters" in this context treats all navigable waters in the nation as a "unitary" concept such that conveyances of pollutants from one navigable waterbody to another do not "add" pollutants to navigable waters overall. The pollutants are merely redistributed within the nation's navigable waters.

A case that may well provide a test of the strength of the jurist's stated convictions

The origins of EPA's unitary waters theory can be found in an amicus brief filed by the solicitor general in the Supreme Court's *South Florida Water Management District vs. Miccosukee Tribe of Indians*, decided in 2004. Relying on the notion that the Clean Water Act treated navigable waters as a unitary concept, the amicus brief argued for the first time that point sources that transfer water from one navigable waterbody to another distinct navigable waterbody do not require Section 402 permits even though the "point source . . . might be described as the 'cause-in-fact' of the release of pollutants into navigable waters."

The reason for the solicitor general's surprising filing at the time was clear. The federal government was concerned that a different rule might subject to Clean Water Act permitting requirements the routine transfers of water by federal agencies such as the Bureau of Reclamation or the U.S. Army Corps of Engineers between distinct bodies of navigable water. In this respect, the primary institutional motivation behind the interpretation appeared to derive from the concerns of those agencies rather than from EPA.

Both during the *Miccosukee* oral argument and in the opinion she wrote for the Court in the case, Justice Sandra Day O'Connor left little doubt of her skepticism of the validity of the solicitor general's view. At oral argument, she described it as "an extreme position" that needed "a fall-back position," generating courtroom laughter. And in the opinion she went to great lengths to explain the many ways that such an interpretation could not be squared with the structure and operation of the Clean Water Act. The opinion emphasized in particular how the unitary waters theory conflicted with



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those parts of the statute that seek to protect "individual waterbodies as well as 'waters of the United States' as a whole." The Court, however, declined ultimately to decide the issue because it had not been raised in or decided by the lower courts.

Notwithstanding the *Miccosukee* Court's clear skepticism, EPA subsequently embraced the solicitor general's unitary waters theory in a rulemaking that established the WTR, which exempts from Clean Water Act Section 402 permit requirements transfers of water (even if polluted) between distinct waterbodies. And, relying very heavily on *Chevron* deference, two federal courts of appeals have rejected challenges to EPA's rule that argued that the rule cannot be squared with the act's plain meaning and clear focus on individual waterbodies.

The state of New York's pending petition in *New York v. EPA* asks the Supreme Court to review the issue. Should Gorsuch adhere to his view of both the conclusive role of statutory text and the impropriety of *Chevron* deference in judicial review of agency interpretation, there is good reason to expect he would support the WTR's challengers on the merits. Yet, hailing from Colorado, where such water transfers are routine, the justice's personal policy preferences are likely sympathetic to EPA's contrary position.

How Justice Gorsuch votes on New York's petition may well provide an early test of the strength of the justice's stated convictions.