

Nick Dranias

ndranias@ndlawpolicy.com

602-228-2582

- Senior Litigator, Government Accountability & Special Litigation Unit, Arizona Attorney General
- Policy Advisor and Research Fellow with the Heartland Institute
- Expert and Speaker's Bureau member with the Federalist Society
- Law and Civil Liberties Speaker for Students for Liberty
- Council of Scholars member with Compact for America Educational Foundation

Previously, Dranias served as President & Executive Director of Compact for America Educational Foundation where he led national efforts to organize the states to propose and ratify a federal Balanced Budget Amendment. Prior to that, Dranias was General Counsel, Policy Development Director and Constitutional Policy Director at the Goldwater Institute. Dranias led the Institute's successful challenge to Arizona's system of government campaign financing to the U.S. Supreme Court. Prior to that, Nick was an attorney with the Institute for Justice for three years and an attorney in private practice in Chicago for eight years, where he served as Young Lawyers Section co-editor of the Chicago Bar Association Record and earned the Oliver Wendell Holmes Award for his service.

Speaking in a personal capacity only. Bio for informational purposes only.

Core of the Clean Water Act

- 33 U.S.C. § 1311(a): “the discharge of any pollutant by any person shall be unlawful”
- 33 U.S.C. § 1362(12)(A), (B): “discharge of a pollutant[s]” means “any addition of any pollutant to navigable waters [or waters of the contiguous zone or the ocean] from any point source [other than a vessel or other floating craft”]

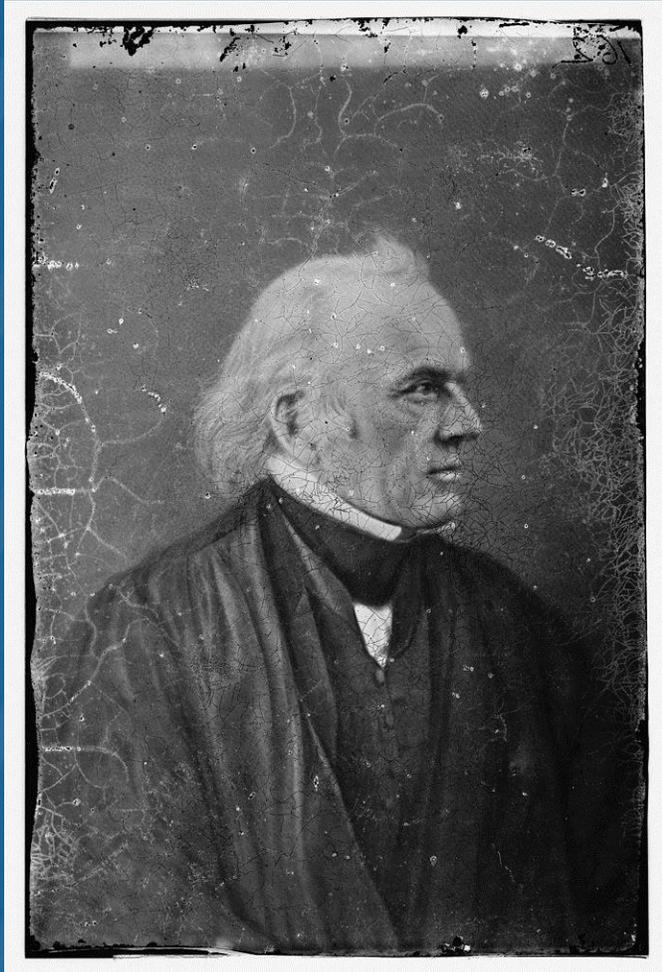
Centralized vs. Decentralized Regulation



Centralized vs. Decentralized Regulation

- **Statistical analysis indicates that a “race to the bottom” did not emerge during the Reagan presidency, when a significant push for regulatory decentralization occurred.** Daniel L. Millimet, *Assessing the Empirical Impact of Environmental Federalism*, 43 J. of Reg. Sci. 711, 712-33 (2003); John A. List, Shelby Gerking, *Regulatory Federalism and Environmental Protection in the United States*, 40 J. of Reg. Sci. 453, 454-71 (2000).
- **There is as much or more evidence for the improvement of environmental standards through decentralization as anything else.** Hilary Sigman, *Letting States Do the Dirty Work: State Responsibility for Federal Environmental Regulation*, LVI Nat’l Tax Journ. 107 (2003).

How Far Did the Ninth Circuit Go?



Maui vs. *Expressio Unius Est Exclusio Alterius*

33 U.S.C. § 1362(12)(A): “discharge of a pollutant[s]” means “any addition of any pollutant to navigable waters from any point source”

33 U.S.C. § 1362(14): a “point source” is a “conveyance” that is “discernible, confined, discrete”

No other conveyance is mentioned and groundwaters are *not* “discernible, confined, discrete.”



Where in the U.S. Constitution is the Power to Regulate Water?

- There is no federal police power;
- There is no navigable water clause;
- There is no EPA clause;
- There is no admiralty issue;

But there is...

- **The Commerce and Necessary and Proper Clauses.**

Can Congress Go This Far?

	U.S. v Lopez (1999) (carrying of handguns)	U.S. v. Morrison (2000) (violence against women)	Maui (CWA) (discharging of substances into deep wells)
No interstate jurisdictional element	√	√	?
No express economic purpose or link	√	√	√
Non-economic activity	√	√	√
Attenuated effect on interstate commerce	√	√	√
Criminal sanctions	√	√	√
Invades Traditional State Sovereignty	√	√	√

How Far Did Congress Go?

33 U.S.C. §§ 1251(b), (f), 1251(g), 1252(a), 1370(2):

Multiple statements of deference to “primary” role of states in regard to environmental regulation and water allocation, mandating cooperation from federal agencies, and disclaiming any implied intent to impair state jurisdiction over state waters.

No “clear and manifest” statement to override state jurisdiction and sovereignty.

- *Gonzalez v. Oregon*, 546 U.S. 243 (2006)
- *Wyeth v. Levine*, 555 U.S. 555 (2009)



The Correction is Coming... ?

- 4th Circuit joined 9th
- 5th and 7th Circuits disagree
- EPA rulemaking
- 4 friendlies in SCOTUS... but Kennedy?

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

