

Clean water is symbol of the power of the people

Founding fathers could not foresee today's problems

By Andrew Koppelman and David Dana

In 1789, the founding fathers decided that Americans would have to drink contaminated water, that New Orleans would have to keep them out of rivers and streams. They provide habitat for aquatic animals and plants. They

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In disaster, is added uncertainty and "additional work for all concerned parties." There will be plenty of new work for lawyers and scientists, who will now fight over the existence, or lack thereof, of a "significant nexus" in any particular case.

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intended Congress to have unlimited power. Justice Scalia had suggested that broad wetlands regulation might be unconstitutional. It is a stretch to say that the Commerce power includes the ability to protect wetlands that have no direct connection to any river that is used by interstate shipping. But there are two reasons why courts have been drawn to such expansive readings: First, terms that they could not foresee. Wetlands protection is one of them. The most pertinent such attempt. It is much easier, politically, for members of Congress who share Scalia's ideology to simply acquiesce in the judicial gutting of a federal environmental statute than for them to take the responsibility for repealing that statute on their own.

And not only the Clean Water Act, as important as that statute is, but the mining industry and other big businesses have been waging a battle against the federal Endangered Species Act, urging the federal courts to invalidate the federal protection of endangered species as beyond the scope of Congress' commerce power. So far, the lower federal courts have rejected these challenges, but in the next year or two, many believe the Supreme Court will agree to review the constitutionality of the Endangered Species Act, and the disagreement about what constitutes real problems — and real solutions. Scalia evidently thinks the Clean Water Act is cumbersome and inefficient, and he complains about the "burden of federal regulation." He is entitled to his own opinion. But it is not clear why his opinion should count for more than that of Congress.

It appears that what is really driving the court these days is a hostility to federal power, at least federal power that might burden owners and business owners. A determination to cut that power back now dominates the Republican party, and so the party leaders appoint judges who share that hostility. That was not the view of the framers, who had had plenty of cutting off those powers would be insane. An example of that hostility is that the federal government now exercises authority to print paper money, and the framers of the Constitution does not authorize that. The Constitution, however, empowers the court to strike down federal laws as exceeding Congress' powers. The court, following a jurisprudence that seeks to enforce the intentions of the framers of the Constitution, emphasized that the framers never



Michael Macora / The Chronicle 2005

The Flooding caused by Hurricane Katrina occurred because over the years thousands of acres of wetlands, a natural levee system, had been destroyed by uncontrolled development

posed to any such power. But time has proven them wrong, and a judicial decision taking away that power would bring about the worst economic catastrophe in American history. The self-styled "originalists" on the court, such as Scalia, have maintained a delicate silence about these implications of their approach.

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Of course, Congress isn't required to protect the waterways. It's always free to repeal the Clean Water Act, in whole or in part. But Congress is very unlikely to repeal the law, because most Americans like having clean drinking water, they like waterways that can support fish that can be safely eaten and in which they and their children can safely swim, and they aren't happy about Katrina, so instead, rightly-wing judges get appointed to do what elected officials dare not attempt. It is much easier, politically, for members of Congress who share Scalia's ideology to simply acquiesce in the judicial gutting of a federal environmental statute than for them to take the responsibility for repealing that statute on their own.

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