

Investor's Business Daily, August 16, 2005 pA12

The Toad Less Traveled. (ISSUES & INSIGHTS)(EDITORIALS)(Editorial)

Full Text: COPYRIGHT 2005 Investor's Business Daily, Inc.

Judiciary: Strange as it may seem, the confirmation of Supreme Court nominee John Roberts may hinge on the property rights of a frog as greenies line up to oppose his nomination.

In the *Kelo v. New London* case, the U.S. Supreme Court ruled the property of Susette Kelo could be seized and sold to developers because the revenue needs of the community trumped the property rights granted by the Fifth Amendment of the U.S. Constitution.

If her land had been home to an endangered species, however, rather than just an ordinary American citizen, the developers lusting for it likely would have been forced to look elsewhere.

Yet she still would have lost the effective use of her property, which, under the Endangered Species Act (ESA), would have been magically transformed from "home" to "habitat."

As a consequence of the act, endangered flies have blocked freeway construction, spawning salmon have brought down dams, and suckerfish in Oregon have threatened the livelihoods of hundreds of farmers.

Which brings us to the Southwestern arroyo toad and John Roberts.

The greenies and their anti-growth allies are upset that in his minority opinion in *Rancho Viejo v. Norton*, he argued that a three-judge panel of the D.C. Court of Appeals erred in dismissing a California developer's suit against the ESA.

He did so on the grounds that the interstate commerce clause did not apply because "the hapless toad, for reasons of its own, lives its entire life in California."

Environmentalists claim Roberts is a shill for big business who would plunder the Earth with his rulings.

Glenn Sugameli of Earthjustice, formerly the Sierra Club Legal Defense Fund, which has filed nearly 50 suits since the 1990s under the ESA to block development, says Roberts' views on amphibian rights as expressed in the California case "does raise serious questions" about how he might view "the constitutionality of important protections under the ESA."

Friends of the Earth has gone on record with claims that a "recent case dealing with the ESA raises troubling concerns about Roberts' commitment to upholding Congress' constitutional right to pass laws that protect our air, land, and water."

Judging from the reaction of environmental champion Ted Kennedy one would have thought Roberts had just run over Kermit in a Hummer.

Teddy warned of the "sweeping implications" of Roberts' alleged attack on the Commerce Clause which, according to Kennedy, threatens "Social Security, Medicare, the minimum wage" as well as the arroyo toad.

But Roberts' dissent was not an attack on the Constitution, only an opinion on the jurisdiction of the court in a single case.

And Roberts is not a mindless pawn of big business, having represented the Lake Tahoe Regional Planning Agency in 2002, persuading the U.S. Supreme Court to uphold a moratorium on developing the lake's shoreline.

The ESA has been more effective in eroding our rights than in protecting species and has proven dangerous as well.

In Riverside, California, the ESA prevented private landowners from clearing firebreaks on their land, lest they disturb the habitat of the Stephen's kangaroo rat -- an animal that is so similar to the nonprotected regular kangaroo rat that biologists often can't tell the two apart unless they autopsy one of the critters.

In the ensuing fires, many of the landowners' homes burned -- as did much of the habitat the ESA was supposed to protect.

Clearly the ESA gives the feds and environmentalists enormous sway over our property and property rights, which in view of the Kelo decision, are as endangered as the St. Andrews Beach mouse or the Madla Cave Meshweaver spider.

Roberts' confirmation hearings might be a good time to debate whether the Constitution gives rats more rights than people and give a few senators the chance to clear the frog in their throats.