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The Supreme Court's New Federalism: The Authority of the U.S. Army Corps of Engineers Does Not Extend Over Isolated Intrastate Wetlands Under the Migratory Bird Rule

PAUL EDWARD SVENSSON*

Part I

Introduction

The U.S. Supreme Court heard arguments on October 31, 2000 regarding the Seventh Circuit Court of Appeal's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,¹ a case involving the jurisdictional reach of the Federal Water Pollution Control Act of 1972 (CWA).² The issue before the Court was whether the U.S. Army Corps of Engineers (Corps) can assert jurisdiction over isolated intrastate waters solely because those waters potentially or actually serve as a habitat for migratory birds.³ The first question the Court was required to address was whether the Migratory Bird Rule, as promulgated by the Corps, exceeded the authority delegated to the Corps by Congress under the CWA.⁴ If the statutory construction of the CWA by the Corps was permissible,⁵ the Court would have had to determine whether Congress exceeded its authority under

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1. 191 F.3d 845 (7th Cir. 1999) [hereinafter *Solid Waste III*] *aff'g* 998 F. Supp. 946 (N.D. Ill. 1998) [hereinafter *Solid Waste I*], *cert. granted*, 529 U.S. 1129, (2000) and *rev'd* 531 U.S. 159 (2001) [hereinafter *Solid Waste III*].

2. Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2000).

3. *Solid Waste III*, 531 U.S. at 163; *see also* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,217 (Nov. 13, 1986). The Migratory Bird Rule characterizes the Corps' assertion of jurisdiction over waters that are actually or potentially used as habitat by migratory birds. *Id.*

4. *Solid Waste III*, 531 U.S. at 166.

5. 33 U.S.C. § 1362(7) (2000). The plain language of the statute limits the Corps' jurisdiction to "navigable waters," which are defined as "waters of the United States." *Id.*

the Commerce Clause of the U.S. Constitution⁶ in enacting the CWA. The ruling by the Court was initially expected to define the extent of the statutory term "waters of the United States," and the constitutional limits of federal land use regulation under the authority of the Commerce Clause.⁷

On January 9, 2001, in *Solid Waste III*,⁸ the Court answered the first question in the negative. In making its decision, the Court considered the plain meaning of the CWA and its interpretation of congressional intent, but did not reach the constitutional question regarding the limits on congressional power.⁹

Part II of this comment offers a brief historical perspective of the Court's review of legislative applications of commerce power by Congress, an overview of the sections of the CWA applicable to the *Solid Waste III* case, and an overview of the recent split in circuit court decisions relative to the principle issues under study. Part III discusses the facts, holding and analysis of the lower courts in *Solid Waste I* and *Solid Waste II*. Part IV contains a critical analysis of the Court's decision in *Solid Waste II*. Part V presents an inferential analysis of the constitutional questions raised vis-à-vis limits on congressional powers not addressed by the Court. Part VI discusses federal land use regulation using conditional federal spending. Part VII discusses the implications of the *Solid Waste III* decision on the application of federal environmental legislation. In particular, the regulation of state and local land use issues which have no discernible impact on interstate commerce will be considered, and the conclusion drawn that the prospects for maintaining environmental integrity need not be limited by this decision.

Part II

Supreme Court Review of Commerce Clause Use by Congress

The Framers of the Constitution, seeking to develop a form of government markedly different from the British monarchy, designed a system of state and federal governments with distinct

6. U.S. CONST. art. I § 8, cl. 3. (giving Congress the power to "regulate commerce with foreign Nations, and among the several States . . .").

7. See *Solid Waste III*, 531 U.S. 159.

8. *Id.*

9. *Id.* at 168.

powers in order to provide a degree of independence for the states.¹⁰ James Madison explained,

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.¹¹

Consistent with Madison's perspective, the Court in 1819 held that the federal government was established as one with a defined list of enumerated powers under the Constitution.¹² The Court took the concept of separation of powers one step further when it added that the actions of the Congress were subject to judicial review.¹³ Included in the enumerated powers of the national government is the power "to regulate commerce . . . among the states."¹⁴ The extent of this commerce power, or more specifically the concept of what constitutes commerce, was argued from the outset.¹⁵

By 1824, the meaning of the term commerce was broadly determined by the Court to involve "the commercial intercourse between nations, and parts of nations, in all its branches, [as] regulated by proscribing rules for carrying on that intercourse."¹⁶ In *Gibbons v. Ogden*,¹⁷ the Court rejected the idea of limiting the scope of commerce to the "buying and selling, or the interchange of commodities" and excluding "navigation."¹⁸ Congressional power over economic matters with interstate consequences was considered exclusive in its operation and could be exercised to its fullest

10. THE FEDERALIST No. 45, at 135-38 (James Madison) (Roy P. Fairfield ed., 1981).

11. *Id.* at 137.

12. *McCullough v. Maryland*, 17 U.S. 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers.").

13. *Id.* at 423.

14. U.S. CONST. art. I, § 8, cl. 3.

15. See generally *Gibbons v. Ogden*, 22 U.S. 1 (1824).

16. *Id.* at 189-90.

17. 22 U.S. 1 (1824).

18. *Id.* at 189.

extent.¹⁹ However, the Court carefully distinguished that Congress was only empowered to control "commerce . . . 'among the several states,'"²⁰ and that any commerce that was thoroughly internal to a state remained reserved for the state to control.²¹ The Court also reaffirmed the principle expressed in *McCullough* that any enactment made by Congress "under the pretext of executing its powers" must be invalidated as inconsistent with the intent of the constitution.²²

The dramatic shift of the country from an agricultural to an industrial based society was instrumental in influencing the Court to find that certain commercial activities, though purely intrastate in origin, had a sufficient effect on other states so as to justify federal regulation.²³ In 1914, in *Houston & Texas Railway v. United States*,²⁴ the Court held that the Congress had the power to proscribe railroad shipping rates where the intrastate commercial activity had a direct effect on interstate commerce.²⁵ The most dramatic extension of the use of this "Effects Doctrine" occurred in 1942 with the Court's opinion in *Wickard v. Filburn*.²⁶ In *Wickard*, the Court upheld the penalty provision of the 1938 Agricultural Adjustment Act when a farmer had grown more wheat on his farm, albeit for personal use, than permitted under the federal scheme.²⁷ The Court opined that although the impact of this individual farmer's activity was confined within the state and minimal, it would be nonetheless significant in its cumulative effect.²⁸ The Court reasoned that the production of home grown wheat would lead a farmer to purchase less wheat on the open market thus having a potential impact on the market price.²⁹ Significantly, if other farmers followed this example, the consequence in the aggregate would have a substantial economic effect on interstate commerce.³⁰

19. *Id.* at 197.

20. *Id.* (quoting U.S. CONST. art. I, §8, cl. 3).

21. *Id.* at 194-95 (citing U.S. CONST. art. I, § 8, cl. 3).

22. *Id.* at 198; see also *McCullough v. Maryland*, 17 U.S. 316 ,422 (1819).

23. See generally *Houston & Texas Ry. v. United States*, 234 U.S. 342 (1914) (*The Shreveport Rate Case*).

24. 234 U.S. 342 (1914).

25. *Id.* at 355.

26. 317 U.S. 111 (1942).

27. *Id.* at 117.

28. *Id.* at 127-28.

29. *Id.* at 128.

30. *Id.* at 127-28.

The Court subsequently upheld Congress' use of the commerce power to enact legislation to prohibit racial discrimination in restaurants,³¹ regulate hours and wages of state workers,³² and the regulation of the use of private land to ensure environmental integrity.³³ In *Hodel v. Virginia Surface Mining & Reclamation Association*,³⁴ the Supreme Court emphasized that it concurred with "the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one state."³⁵

The Court abruptly redirected its course in 1995. For the first time in over fifty years, the Court decided that Congress had overreached its authority, and was attempting to regulate a matter that had been traditionally left to the states.

In *United States v. Lopez*,³⁶ the Court cited an absence of congressional findings which would demonstrate that gun possession in a school yard had a substantial effect on interstate commerce as determinative of its holding that the statute was not within the Commerce Clause authority of the Congress.³⁷ Justice Souter chastised the majority for refusing to apply the rational basis test that the Court had applied for over fifty years.³⁸ To the contrary, the majority expressed an adherence to the substantial effects test,³⁹ yet criticized the "level of generality" that could make any activity look commercial.⁴⁰

31. *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding that Congress had a rational basis for determining that racial discrimination in a restaurant would substantially effect interstate commerce because the restaurant purchased out-of-state goods, and interstate travel may be restricted if travelers were unsure about obtaining food service).

32. *Maryland v. Wirtz*, 392 U.S. 183 (1968) (reasoning that since the state operated hospital and school supplies were purchased out-of-state, the working conditions of the state employees could be regulated because any labor discord could effect interstate commerce).

33. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (finding a rational basis for requiring the mining company to restore the land to its prior condition after mining operations were ended where the coal was an interstate commodity).

34. 452 U.S. 264 (1981).

35. *Id.* at 282.

36. 514 U.S. 549 (1995).

37. *Id.* at 560.

38. *Id.* at 604 (Souter, J., dissenting).

39. *Id.* at 566.

40. *Id.* at 565.

The *Lopez* Court identified three categories of activity that Congress could legitimately regulate under its commerce power.⁴¹ First, "Congress may regulate the use of the channels of interstate commerce."⁴² Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may only come from intrastate activities."⁴³ Third, congressional commerce power extends to "those activities having a substantial relation to interstate commerce."⁴⁴

In *United States v. Morrison*,⁴⁵ the Court advocated, and clarified, the analytical framework that the *Lopez* Court utilized to conduct its analysis of the constitutionality of the congressional enactment in question.⁴⁶ This methodology involves the determination whether: (1) the intrastate activity is an economic endeavor and "substantially affects" interstate commerce;⁴⁷ (2) the statute is designed and enforced to influence or proscribe the rules of the economic activity;⁴⁸ (3) the legislative history includes congressional findings regarding the effect of the activity upon interstate commerce;⁴⁹ and (4) there is a reasonable nexus between the activity and the substantial effect on commerce.⁵⁰

In *Morrison*, a victim of a gender-based crime had sought a federal remedy under the Violence Against Women Act.⁵¹ The Court applied the analytical framework and "reject[ed] the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."⁵² The Court held that: (1) the violent act was not an economic activity;⁵³ (2) the statute contained no jurisdictional element establishing that the federal cause of action is in

41. *Id.* at 558.

42. *Lopez*, 514 U.S. at 558 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)).

43. *Id.* (citing *The Shreveport Rate Case*, 234 U.S. 342 (1914)).

44. *Id.* at 558-59 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

45. 529 U.S. 598 (2000).

46. *Id.* at 609.

47. *Id.* at 610.

48. *Id.* at 611.

49. *Id.* at 612.

50. *Id.* at 611-12.

51. *See* Violent Crime Control & Law Enforcement Act, 42 U.S.C. § 13981 (1994).

52. *Morrison*, 529 U.S. at 617.

53. *Id.* at 618 (explaining that regardless of whether violence had an economic effect in the aggregate violence was, in itself, not an economic activity).

pursuance of Congress' power to regulate interstate commerce;⁵⁴ (3) the congressional findings were not sufficient, by themselves, "to sustain the constitutionality of the statute,"⁵⁵ and (4) the statute did not regulate an activity with a sufficient nexus to interstate commerce.⁵⁶

The majority in *Morrison* reasoned that it was returning to its traditional roots, as expressed in *Gibbons*, by basing its decision on the need to maintain a separation of powers between federal and state governments.⁵⁷ In contrast to the finding in *Lopez*, the *Morrison* Court opined that the detailed congressional findings reflected so much of an "aggregate effect" that application of the commerce power would involve the risk of unbounded federal involvement into areas traditionally reserved for the states.⁵⁸ The decisive issue, however, was neither the effect on the principle of separation of powers nor the substantial effect of an activity on interstate commerce.⁵⁹ In *Morrison*, the "substantial effect" test had been supplanted by a "new criterion of review."⁶⁰ The principle focus of the Court would now be on the economic nature of the intrastate activity,⁶¹ albeit characterized as recapturing the original mission of the Court to distinguish between local and national activities.⁶²

54. *Id.* at 611-12 (asserting that Congress established the "remedy over a wider, and more purely intrastate, body of violent crime.").

55. *Id.* at 614-15 (the congressional findings relative to the substantial interstate effect of violent crimes against women were substantially weakened in the view of the Court because the aggregate "but-for" effect it created would substantially impact "employment, production, transit or consumption" to such an extent that it would justify regulation of all criminal or family law matters that are traditionally areas of state regulation).

56. *Id.* at 612 (asserting that "the link between gun possession and substantial effect on interstate commerce was attenuated.").

57. *Id.* at 616 n.7 (reasoning that the *Gibbons* principle of a distinct separation of federal and state authority would be undermined).

58. *Morrison*, 529 U.S. at 614-15.

59. *See id.* at 627 (Thomas, J., concurring) (asserting that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases.").

60. *Id.* at 637.

61. *See id.* at 639 (Breyer, J., dissenting) (insisting that the majority would exclude from possible consideration any activity, even if had commercial affects, "when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of [its] general police power.").

62. *See id.* at 617-18 ("In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted.").

Justice Breyer forewarned that reviving “the distinction between commercial and non-commercial conduct,” first rejected in *Wickard*, “can only be seen as a step toward recapturing the prior mistakes.”⁶³ He criticized the majority for its myopia in concluding that the *Gibbons* Court’s theory of limiting governmental activities based on the enumerated powers of the Constitution meant that “some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power.”⁶⁴

The findings of both the *Lopez* and *Morrison* Courts were also consistent with the theory expressed by Justice Marshall in *McCullough* that some “ends” are inappropriate for national control, albeit for different reasons. Justice Marshall had interpreted the Necessary and Proper Clause⁶⁵ to mean that Congress may not legislate beyond its authority through the pretextual use of an enumerated power.⁶⁶ The Court in *Morrison*, on the other hand, reasoned that the statute under review must be designed to regulate an appropriate economic activity in order to be constitutional.⁶⁷

The Clean Water Act

Congress enacted the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s water.”⁶⁸ The CWA forbids the discharge of fill materials into “navigable waters”⁶⁹ without a Section 404(a) permit from the Corps.⁷⁰ “Navigable waters” are broadly defined in the statute as “waters of the United States.”⁷¹

63. *Id.* at 643.

64. *Morrison*, 529 U.S. at 639.

65. U.S. CONST. art. I, § 8, cl. 18.

66. *McCullough v. Maryland*, 17 U.S. 316, 423 (1819).

67. *Morrison*, 529 U.S. at 614 (“Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” (quoting *United States v. Lopez*, 529 U.S. 549, 557 (2000) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 311 (1981))).

68. 33 U.S.C. § 1251 (2001).

69. 33 U.S.C. § 1362(7) (2001).

70. 33 U.S.C. § 1344(a) (2001) (granting the Corps authority to issue Section 404 permits “for the discharge of dredged or fill material into the navigable waters”).

71. Definitions of Waters of the United States, 33 C.F.R. § 328.3(a)(3) (1998) (defining the term “waters of the United States” to include “waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.”).

The Corps is responsible for reviewing the permit applications for compliance with guidelines promulgated by the Environmental Protection Agency (EPA), and grants the permit unless it is contrary to the public interest.⁷² To fall within the scope of the regulatory program the activity must involve the discharge of fill material, defined as the addition of "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody,"⁷³ into the "waters of the United States."

Neither the statute nor the implementing regulations directly address whether isolated wetlands are included or excluded from application of the CWA. Wetlands are recognized as providing "significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species."⁷⁴ For a wetland to be protected under the plain language of the CWA, it would have to qualify as a "navigable water." The CWA provides no further definition of the waters to which the Corps' jurisdiction extends;⁷⁵ however, as indicated, the regulations define "navigable waters" as "waters of the United States" which does include wetlands.

In 1986, the Corps asserted that Section 404 extended to intrastate waters:

- a. which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. which are or would be used as habitat by other migratory birds which cross state lines; or
- c. which are or would be used as habitat for endangered species; or
- d. used to irrigate crops sold in interstate commerce.⁷⁶

72. General Policies for Evaluating Permit Applications, 33 C.F.R. § 320.4(a)(1) (1998). Public interest review evaluates the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest, and consideration of the impact of the proposed activity on wetlands. *Id.*

73. Permits for Discharges of Dredged or Fill Material Into Waters of the United States, 33 C.F.R. § 323.2(e) (1998) ("[T]he term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the [CWA].").

74. 33 C.F.R. § 320.4(b)(2)(i) (1998).

75. See, e.g., *Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting).

76. Army Corps of Engineers, Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,217 (Nov. 13, 1986).

Under this Migratory Bird Rule, the Corps had previously asserted its jurisdiction based on the use of the isolated wetlands as a habitat by the migratory birds.⁷⁷ In *Solid Waste II*, the Seventh Circuit agreed.⁷⁸ In contrast, the Fourth Circuit in *United States v. Wilson*⁷⁹ rejected this reasoning and held that, "waters of the United States" are restricted to those waters that are navigable, and if not navigable, those which are "interstate or closely connected to navigable or interstate waters."⁸⁰ The *Wilson* court accordingly declined to review "the extent and limits of congressional power to regulate non-navigable waters" as being beyond the scope of legislative authority.⁸¹

In *Solid Waste III*, the Supreme Court granted *certiorari* to resolve the discrepancy between the two circuits.⁸² It was not the first time that the Court had been asked to interpret Section 404, although the Court had not previously been asked to answer the question whether the Corps had authority to regulate discharges of fill material into wetlands that were not adjacent to bodies of open water.⁸³ In *United States v. Riverside Bayview Homes*,⁸⁴ the Court upheld the application of the CWA to an intrastate wetland adjacent to a navigable intrastate lake.⁸⁵ In *Riverside Bayview Homes*, the Court reasoned that the wetlands directly impacted the quality of the lake water by serving as a natural filtration system.⁸⁶ In doing so, the Court acknowledged the ambiguity of the CWA legislative history and policies underlying its statutory grant

77. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395-96 (9th Cir. 1995) [hereinafter *Leslie Salt III*], *cert. denied sub nom. Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (upholding decision that isolated intrastate wetlands used or potentially used as a habitat by migratory birds are subject to the CWA).

78. *Solid Waste II*, 191 F.3d 845, 853 (7th Cir. 1999).

79. 133 F.3d 251 (4th Cir. 1997).

80. *Id.* at 257 (opining that, "as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least . . . closely related to navigable or interstate waters.").

81. *Id.* at 256.

82. *Solid Waste III*, 531 U.S. at 165-66.

83. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-32 n.8 (1985) (indicating specifically that the Court was "not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.").

84. 474 U.S. 121 (1985).

85. *Id.* at 134.

86. *Id.* at 133-34 n.9 (clarifying that the Court did not hold that "every adjacent wetland is of great importance to the environment of adjoining bodies of water," but that, in itself, did not limit the role of the Corps in evaluating the request and deciding to either issue or deny a permit).

of authority, but nonetheless opined that the extrinsic factors supported the reasonableness of the Corps' inclusion of adjacent waters as "waters of the United States."⁸⁷ The Court noted congressional approval of the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters.⁸⁸ As indicated, the Court expressly reserved judgment on the application of the CWA to an isolated intrastate wetland,⁸⁹ but it did conclude that "the language, policies and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill materials into wetlands adjacent to the 'waters of the United States.'"⁹⁰

Thus, even though the Court's reasoning in *Riverside Bayview Homes* was limited to wetlands "adjacent" to navigable waters, the expressed acceptance of the Corps' statutory construction provided an indication of disagreement with the opinion of the *Wilson* court.⁹¹ This decision did not guarantee that the Corps' jurisdiction over all "waters of the United States" should extend to isolated, intrastate wetlands.

The Split in Circuit Court Decisions and Their Relevance to the Review of *Solid Waste III* by the Supreme Court

Since 1992, three circuit courts, in conflicting decisions, have addressed the issue of isolated, intrastate wetlands.⁹²

87. *Id.* at 131.

88. *Id.* at 135-37 (congressional interest in protection of aquatic ecosystems reflected its intent to include wetlands as "waters of the United States.").

89. *Id.* at 131-32 n.8 (declining to "address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.").

90. *Riverside Bayview Homes*, 474 U.S. at 139.

91. See *United States v. Wilson*, 133 F.3d 251, 256-57 (stating that non-navigable waters were beyond the scope of legislative authority unless they were "closely related" to navigable waters which the court left undefined).

92. See *Leslie Salt III*, 55 F.3d 1388, 1396 (9th Cir. 1995) (upholding decision that isolated intrastate wetlands used or potentially used as a habitat by migratory birds are subject to the CWA); see also *Hoffman Homes v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256, 261 (7th Cir. 1993) [hereinafter *Hoffman Homes II*] (overruling decision in *Hoffman I* that isolated wetlands were not subject to the CWA, and holding that the potential use of the area by migratory birds was sufficient to establish the requisite nexus between a wetland and interstate commerce). But see *Wilson*, 133 F.3d at 257 (concluding that the regulation promulgated by the Corps, 33 C.F.R. § 328.3(a)(3), impermissibly expands the statutory phrase "waters of the United States" beyond its reasonable limit).

In *Hoffman Homes I*, the Seventh Circuit held that the application of the CWA was unreasonable and invalid.⁹³ Based on a review of the statute's plain language and legislative history, the court reasoned that since there was no discussion of isolated wetlands, it was not reasonable to apply the CWA in the matter before the court.⁹⁴ The court further opined that since isolated wetlands have no connection to any other body of water, they did not further the purpose of the CWA to restore or maintain the integrity of the Nation's waters.⁹⁵ Finally, the court rejected the argument that the potential use of the wetlands by migratory birds provided a sufficient connection with interstate commerce where there was no evidence as to how filling the wetlands area in question would affect some human economic activity associated with the area.⁹⁶ The opinion of the court as to the constitutionality of the statute borrows heavily from Chief Justice Rehnquist's concurring opinion in *Virginia Mining*.⁹⁷ In finding the statute invalid, the court asserted that "some activities may be so private and local in nature that they simply may not be in commerce."⁹⁸

In *Hoffman Homes II*, the Seventh Circuit retracted both its statutory and constitutional holdings and accepted an interpretation of the regulation allowing migratory birds as the nexus between a wetland and interstate commerce.⁹⁹ The court explained that it was reasonable for the agency to interpret the regulation as extending its jurisdiction to waters where the connection with interstate commerce was "potential rather than actual, minimal rather than substantial."¹⁰⁰ The court reasoned that the potential use of waters by migratory birds was sufficient to invoke Commerce Clause jurisdiction because "[t]hroughout North America, millions of people annually spend more than a billion dollars on

93. *Hoffman Homes, Inc. v. United States Environmental Protection Agency*, 961 F.2d 1310, 1316 (7th Cir. 1992) [hereinafter *Hoffman Homes I*].

94. *Id.* at 1316.

95. *Id.*

96. *Id.* at 1321.

97. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) (absent the requisite nexus between interstate commerce and the geographical area, the court opined that "it is clear that there is no rationale basis" to establish a regulation).

98. *Id.* at 310; see also *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (majority opinion by Chief Justice Rehnquist) (stating that Congressional action must distinguish "between what is truly national and what is truly local").

99. See *Hoffman Homes II*, 999 F.2d 256, 261 (7th Cir. 1993).

100. *Id.*

hunting, trapping, and observing migratory birds.”¹⁰¹ The court nevertheless ruled in favor of the developer because the EPA had not presented sufficient evidence that the water was a suitable or potential habitat for migratory birds because the only source of water was rainfall, and it was wet only part of the year.¹⁰² The court concluded that “[a]fter April showers, not every temporary wet spot necessarily becomes subject to governmental action.”¹⁰³

In *Leslie Salt II*,¹⁰⁴ the Ninth Circuit reached a different conclusion, determining that the potential presence of migratory birds in a seasonal wetland area created as a by-product of industrial land use provided a sufficient connection to interstate commerce to allow the Corps to apply the CWA.¹⁰⁵ The manufacturer subsequently stipulated to a restoration plan and a fine, thereby preserving the successor owner’s right to appeal whether the fines were mandatory.¹⁰⁶

Cargill, the successor in interest to Leslie Salt Company, sought review by the Supreme Court of the circuit court’s ruling in *Leslie Salt II* that supported the Corps’ interpretation of the CWA as extending jurisdiction to habitat used by migratory birds.¹⁰⁷ The application to the Court for certiorari was denied.¹⁰⁸ However, Justice Thomas’ dissent is relevant to a consideration of the constitutional questions not considered by the Court in *Solid Waste III*.¹⁰⁹

In *Cargill*, the question raised on certiorari was whether “the . . . Corps, under the [CWA], can constitutionally assert jurisdiction over private property based solely on the actual or potential presence of migratory birds that cross state lines.”¹¹⁰ In his dissent to the majority’s refusal to grant certiorari, Justice Thomas asserted that “there was no showing that petitioner’s land use

101. *Id.*

102. *Id.* at 262

103. *Id.*

104. 896 F.2d 354 (9th Cir. 1990) remanded for determination of which property is subject to jurisdiction under CWA, *Leslie Salt I*, 820 F. Supp. 478 (N.D. Cal. 1992).

105. *Id.* at 359-60 (noting that the CWA violation occurred as a result of the effort by the manufacturer to cure an air pollution citation by plowing over abandoned salt basins which created an environment for vegetation and migratory birds during the wet seasons).

106. *Leslie Salt III*, 55 F.3d 1388, 1392 (9th Cir. 1995) cert. denied sub nom. *Cargill, Inc. v. United States*, 516 U.S. 955 (1995).

107. See *Cargill*, 516 U.S. at 955.

108. *Id.*

109. See *id.* (Thomas, J., dissenting).

110. *Id.* at 955-56 (Thomas, J., dissenting).

would have any effect on interstate commerce" because it was not "usable in interstate commerce,"¹¹¹ and the Corps does not have "carte blanche authority to regulate every property that migratory birds use or could use as habitat."¹¹² He proffered that "[t]his case raises serious and important constitutional questions about the limits of federal land use regulation in the name of the [CWA] that provide a compelling reason to grant certiorari in this case."¹¹³ Justice Thomas distinguished the reasoning applied in *Hoffman Homes II* from the present case by indicating that he "did not challenge Congress' power to preserve migratory birds and their habitat through legitimate means."¹¹⁴ Such regulation, however, requires the presence of an economic activity that must "substantially affect interstate commerce."¹¹⁵ The only documented activity at the site was the seasonal visits of the migratory birds leading Thomas to conclude there was no economic activity affecting interstate commerce.¹¹⁶

Wilson was decided by the Fourth Circuit shortly after the *Lopez* decision was reached, and its effect is reflected in the circuit court's reasoning. In *Wilson*, the Fourth Circuit suggested that defining "'waters of the United States' to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase . . . beyond its definitional limit."¹¹⁷ The majority opined, in dicta, that extending the application of the CWA to waters other than those adjacent to navigable waters was "substantially beyond the regulations that had been approved in *Riverside Bayview Homes*,"¹¹⁸ and exceeded the constitutional basis for the CWA.¹¹⁹

Writing separately, Judge Luttig declined to accept this part of the majority statement.¹²⁰ Judge Luttig distinguished the majority's opinion that the regulation cannot exceed the limits imposed by the Supreme Court in *Riverside Bayview Homes* from its

111. *Id.* at 959 (Thomas, J., dissenting).

112. *Id.* (Thomas, J., dissenting).

113. *Cargill*, 516 U.S. at 959. (Thomas, J., dissenting).

114. *Id.* (Thomas, J., dissenting).

115. *Id.* (Thomas, J., dissenting) (opining that the assertion of jurisdiction by the Corps was untenable given the Courts rejection of the economic basis for jurisdiction in *Lopez*).

116. *See id.* at 956 (Thomas, J., dissenting).

117. *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

118. *Id.* at 258.

119. *Id.*

120. *See id.* at 266 (Luttig, J., concurring) (finding majority interpretation of the Commerce Clause too expansive).

decision in *Brzonkala v. Virginia Polytechnic & State University*.¹²¹ In *Brzonkala*, the Fourth Circuit interpreted the decision of the Supreme Court in *Lopez*, restricting the application of federal regulation to activities which substantially affect interstate commerce, to be limited in scope, and inapplicable to the extension of regulatory authority proposed by the Violence Against Women Act.¹²²

The Fourth Circuit's majority opinion in *Wilson* was consistent, albeit for different reasons, with its decision in *Tabb Lakes Ltd. v. United States*.¹²³ That decision affirmed the holding in the lower court, where the district judge reasoned that the Corps did not have regulatory jurisdiction under the CWA over all wetlands, but only over the "waters of the United States" because the Corps had promulgated the Migratory Bird Rule without following the notice and comment requirements of the Administrative Procedure Act.¹²⁴ The district court declined to decide, but did opine, that the potential use of the property as a migratory bird habitat was sufficient to establish the necessary nexus to interstate commerce.¹²⁵

In *Wilson*, however, the Fourth Circuit did not conclusively address whether a connection between interstate commerce and the wetland was facilitated by the presence of migratory birds. Instead, the court presumed that Congress could regulate "the discharge of pollutants into non-navigable waters to the extent necessary to protect the use or potential use of navigable waters."¹²⁶ The court, considering the impact of *Lopez*, opined that the reach of federal jurisdiction would be limited, but that the "potential use" of the wetlands in interstate commerce would not be sufficient to justify federal regulation.¹²⁷

In contrast, the Fourth Circuit took an alternate route in *Gibbs v. Babbitt*¹²⁸ where it held that "Congress may constitutionally address the problem of protecting endangered species"¹²⁹ by

121. 132 F.3d 949 (4th Cir. 1997), *reh'g en banc*, *opinion vacated*, and *on reh'g en banc* 169 F.3d 820 (4th Cir. 1999), and *aff'd sub nom.* *United States v. Morrison*, 529 U.S. 598 (1999).

122. *Id.*

123. 885 F.2d 866 (4th Cir. 1989) *aff'g* 715 F. Supp. 726 (E.D. Va. 1988).

124. *Tabb Lakes*, 715 F. Supp. at 727.

125. *Id.* at 728.

126. *United States v. Wilson*, 133 F.3d 251, 256 (4th Cir. 1997).

127. *Id.*

128. 214 F.3d 483 (4th Cir. 2000).

129. *Id.* at 506.

asserting jurisdiction, under the Commerce Clause, to enact a regulation that limits the taking of red wolves on private land.¹³⁰ The majority reasoned that the protection of the red wolf was integral to ongoing scientific study, tourism and potential trade value.¹³¹ The court concluded that these factors, together with an historical congressional interest in protecting endangered species satisfied the requirement of demonstrating a substantial impact on interstate commerce, and thus established a rational basis to exercise jurisdiction under current Commerce Clause jurisprudence.¹³² The court did not, however, require clearly demonstrable findings to support its conclusions, and was not persuaded by arguments relying on efforts to minimize the impact of taking a single red wolf,¹³³ or asserting the state's police powers to regulate local land use.¹³⁴ Instead, the court distinguished the statutes held invalid in *Lopez* and *Morrison* based on the long-standing history of federal efforts to preserve scarce resources, whereas the interests sought to be protected in *Lopez* and *Morrison* have never become a permanent feature of the national political agenda.¹³⁵

The dissent argued that killing all of the red wolves residing on private property would not reach the level of economic activity held by the Court in *Morrison* or *Lopez* required to be of concern to the Commerce Clause,¹³⁶ "if it could be said to constitute an economic activity at all."¹³⁷ Similarly to his opinion in *Wilson*,¹³⁸ Judge Luttig criticized the majority in *Gibbs* for taking an overly expansive view of the Commerce Clause, stating that the majority was reasoning in error that "[t]he political, not the judicial, process is the appropriate arena for the resolution of this particular dispute."¹³⁹ Judge Luttig emphasized that the "Court in *Lopez* and *Morrison* has left no doubt" that the interpretation of the Commerce Clause rests "with the judiciary," and in this case the court should have followed the precedent set forth by the majority decisions in *Morrison* and *Lopez*.¹⁴⁰

130. *Id.* at 486.

131. *Id.* at 494-95.

132. *Id.* at 497.

133. *Id.* at 497-98.

134. *See Gibbs*, 214 F.3d at 499-500.

135. *See id.* at 500.

136. *Id.* at 507 (Luttig, J., dissenting).

137. *Id.* (Luttig, J., dissenting).

138. *United States v. Wilson*, 133 F.3d 251, 261 (4th Cir. 1997).

139. *Gibbs*, 214 F.3d at 509 (Luttig, J., dissenting).

140. *Id.* (Luttig, J., dissenting).

Part III

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers—the Lower Court Decisions

The issues which arose from the attempt of the Solid Waste Agency of Northern Cook County (SWANCC) to create a multi-county landfill on an area utilized as a habitat by migratory birds were two-fold:

1. Whether the Corps, consistent with the CWA and the Commerce Clause, may assert jurisdiction over isolated, intrastate wetlands based on the actual or potential use of those waters by migratory birds;¹⁴¹
2. Whether the Corps may reasonably interpret the CWA to extend to isolated, intrastate wetlands based on their actual or potential use as a habitat for migratory birds.¹⁴²

This case concerned the future of a 533-acre parcel of land that SWANCC intended to partially use for a non-hazardous waste landfill.¹⁴³ The area was used as a gravel-mining pit approximately fifty years ago, leaving behind a maze of trenches and surface depressions.¹⁴⁴ The land has evolved into a woodland including over 170 species of plants, 200 seasonal and permanent ponds, and is populated by a variety of small animals and over 100 species of birds.¹⁴⁵ The site is the seasonal home to many migratory birds; in particular it contains the "second largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests as of 1993."¹⁴⁶ The plans required 17.6 acres of ponds and small lakes to be filled as part of the site development,¹⁴⁷ and SWANCC had agreed to certain mitigation efforts while obtaining all required state and local permits and approvals.¹⁴⁸

The action arose when the Corps asserted jurisdiction over fifty-five acres of the land, which were deemed navigable waters

141. *Solid Waste II*, 191 F.3d 845, 847 (7th Cir. 1999).

142. *Id.*

143. *Id.*

144. *Solid Waste I*, 998 F. Supp. 946, 948 (N.D. Ill. 1998).

145. *See Solid Waste II*, 191 F.3d at 848.

146. *Id.*

147. *Id.*

148. *See* Petitioner's Brief, at 5, *Solid Waste I*, 998 F. Supp. 946 (N.D. Ill. 1998).

under the CWA,¹⁴⁹ and denied the petitioner a permit to develop the property.¹⁵⁰ The Corps had initially determined that the property did not meet the statutory definition of "waters of the United States," and did not fall within the Corps' regulatory jurisdiction when SWANCC first inquired whether a Section 404(a) permit was required to fill in certain seasonal and permanent ponds.¹⁵¹ The Corps apparently changed its position when informed by the Illinois Nature Preserves Commission that migratory birds had been observed on the property, thus making the use of the site subject to the CWA.¹⁵²

The district court granted summary judgment to the Corps on the jurisdictional issue, holding that "the Commerce Clause authorizes the federal government to regulate isolated intrastate waters that provide a habitat for migratory birds even if the particular birds on the site do not substantially affect interstate commerce."¹⁵³ The court reasoned that if, as a factual matter, an intrastate waterway is a habitat, then it is subject to jurisdiction under the CWA.¹⁵⁴ The court stated that "migratory birds have long been a proper subject for federal Commerce Clause regulation," and the power to protect the habitats in which they live is a reasonable corollary of this political interest.¹⁵⁵ The court elaborated on its concerns with the cumulative effect of its decision, opining that "[w]hile the destruction of a single habitat is unlikely to effect the viability of migratory bird populations, the destruction of numerous such habitats may, in the aggregate, have a substantial effect on their livelihood."¹⁵⁶ With regard to the statutory interpretation, the district court decided that the plain language of the CWA revealed the congressional intent to protect wildlife,¹⁵⁷

149. See *Solid Waste II*, 191 F.3d at 847; see also 33 U.S.C. § 1362(7) (2001).

150. See *Solid Waste I*, 998 F. Supp. at 948; see also 33 U.S.C. § 1344 (2000).

151. See *Solid Waste I*, 998 F. Supp. at 948 (stating that the Corps initially determined that the site contained no wetlands nor supported any vegetation typically adapted for life in saturated soil conditions); see also 33 C.F.R. § 328.3(b).

152. *Solid Waste I*, 998 F. Supp. at 948-49; see also 33 C.F.R. § 328.3(a)(3).

153. *Solid Waste I*, 998 F. Supp. at 952.

154. *Id.*

155. *Id.*; see also *Gibbs v. Babbit*, 214 F.3d 483, 497 (4th Cir. 2000).

156. *Solid Waste I*, 998 F. Supp. at 952; see also *Hoffman Homes II*, 999 F.2d 256, 261 (7th Cir. 1993) (observing that the cumulative loss of habitat has impacted the potential ability of people to observe, trap and hunt many species of birds due to the dramatic reduction in their populations).

157. See *Solid Waste I*, 998 F. Supp. at 954 (noting that the the statute's purposes were to "restore and maintain . . . biological integrity . . .," and achieve "the protection and propagation of . . . wildlife," and that the statute authorized the agency to promulgate regulations to achieve these purposes).

and it was reasonable for the Corps to extend the definition of "waters of the United States" to include any waters used by migratory birds.¹⁵⁸

On appeal, the Seventh Circuit addressed the constitutional question whether Congress had the authority to regulate isolated, intrastate waters under the cumulative impact doctrine.¹⁵⁹ The court stressed that "*Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine."¹⁶⁰ The question before the court, therefore, was whether the destruction of the natural habitats of migratory birds in the aggregate substantially affects interstate commerce.¹⁶¹ If so, the Corps would have a legitimate constitutional basis to assert jurisdiction over the isolated activity in question under the CWA. The circuit court held that the destruction of the habitats did in fact have an aggregate effect on interstate commerce.¹⁶² The court asserted that jurisdiction over isolated, intrastate waters based on their actual use as a habitat by migratory birds is a permissible exercise of Congress' authority under the Commerce Clause to regulate activities that substantially affect interstate commerce.¹⁶³ The court also concluded that the Corps acted reasonably in interpreting that the CWA applied to isolated, intrastate wetlands based on their actual use by migratory birds.¹⁶⁴ The court reasoned that the land was an actual habitat for migratory birds and that large economic expenditures are incurred throughout the country relating to the observing, trapping and hunting of these myriad species, but did not require that these activities be actually taking place at the site.¹⁶⁵ The court clearly stated that it must be an "actual habitat," and this fact was established in this case.¹⁶⁶ The court discounted the ar-

158. *Id.* at 954-55.

159. *Solid Waste II*, 191 F.3d 845, 850 (7th Cir. 1990) (stating that the "cumulative impact" doctrine considers the scope of the Commerce Clause to include regulation of local activity which when taken alone does not have a substantial economic effect on interstate commerce, but which may have such an effect when considered in light of its cumulative effect).

160. *Id.*

161. *Id.*

162. "[T]he destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially effects' interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires."

163. *Id.* at 850-51.

164. *Id.*

165. *Solid Waste II*, 191 F.3d at 853.

166. *Id.*

gument that this ruling would blur the lines of what is national and what is truly local, indicating that the presence of federal treaties and statutes reflects the historical national concern over the issue.¹⁶⁷

As to the statutory issue, the circuit court determined that the statute itself defined the jurisdictional reach of the CWA. The court reviewed the plain language of the statute and affirmed the decision of the district court that the intent of Congress to preserve wildlife as well as water quality is evident from a plain language reading of the statute.¹⁶⁸ The court also indicated that "it is well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows."¹⁶⁹ Petitioner had argued that the finding in *Wilson* precluded this; however, the circuit court distinguished the case at bar based on (1) the actual use of the land by the migratory birds, and (2) that the use of the land in the manner proposed would have an immediate effect on the migratory birds and interstate commerce.¹⁷⁰

Part IV

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers—the Supreme Court Decision

As previously indicated, when the Court accepted this case it was asked to decide whether the provisions of the CWA could extend to isolated, intrastate wetlands and, if so, whether Congress could delegate such authority under the Commerce Clause. The Court answered the first question in the negative and concluded that it need not reach the constitutional question regarding the limits on congressional power.¹⁷¹

The majority argued that this approach was consistent with its historically "prudential desire not to needlessly reach constitutional issues and [its] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."¹⁷² The Federalist philosophy of the Court is predominately reflected in its emphasis that the

167. See *id.* at 851.

168. *Id.* at 852.

169. *Id.* at 851.

170. *Id.* at 851-52.

171. *Solid Waste III*, 531 U.S. 159, 172 (2001).

172. *Id.* at 172-73.

decision prevented "a significant impingement of the States' traditional and primary power over land and water use."¹⁷³ The Court was also clear as to its perspective on the constitutional question stating that it has interpreted the CWA "to avoid the significant constitutional and federalism questions raised"¹⁷⁴ by the Corps' interpretation, and found no congressional intent to the contrary.¹⁷⁵ The dissent criticized the majority for invalidating the Migratory Bird Rule and redrawing the "jurisdictional line,"¹⁷⁶ but did acknowledge that "the *ecological* connection between the wetlands and the nearby waters had played a central role" in the Court's decision in *Riverside Bayview Homes*, implicitly acknowledging that this connection was not present in *Solid Waste III*.¹⁷⁷

The majority argument focused on the absence of support for the Migratory Bird Rule in either the plain language of the CWA,¹⁷⁸ or the legislative history of congressional activity.¹⁷⁹ The majority refused to extend jurisdiction of the CWA beyond the extent of the finding in *Riverside Bayview Homes* that required a "significant nexus between the wetlands and the 'navigable waters.'"¹⁸⁰ The dissent, to the contrary, argued that Congress had approved the Corps' understanding of its jurisdiction when it enacted the 1976 Amendments to the CWA,¹⁸¹ and that the Court should give deference to the regulatory interpretation of the Corps vis-a-vis its Migratory Bird Rule.¹⁸² Justice Stevens argued that the Court's finding in *Riverside Bayview Homes* reflected a congressional crossing of "the legal watershed" from navigable waters to marshes and inland lakes, and that "there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream."¹⁸³

The majority acknowledged that the Corps expanded the definition of "navigable waters" in 1977 when it issued regulations that broadly defined "waters of the United States" to include "iso-

173. *Id.* at 174.

174. *Id.*

175. *Id.*

176. *Id.* at 176 (Stevens, J., dissenting).

177. *Solid Waste III*, 531 U.S. at 176 n.2 (Stevens, J., dissenting) (emphasis in original).

178. *See id.* at 167.

179. *See id.* at 168 n.3.

180. *Id.* at 167; *see also* *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-32 n.8 (1985).

181. *See Solid Waste III*, 531 U.S. at 177 (Stevens, J., dissenting).

182. *Id.* at 176 (Stevens, J., dissenting).

183. *Id.* (Stevens, J., dissenting).

lated wetlands,"¹⁸⁴ but refused to infer congressional acquiescence based on a failure to pass legislation to overturn the 1977 regulations.¹⁸⁵ The dissent admitted that it is also "chary of attributing significance to Congress' failure to act,"¹⁸⁶ but assumed that the failure to act reflects a reasonableness of the agency construction and justifies acquiescence.¹⁸⁷ The dissent concurs that the majority is persuaded that Congress intended to regulate wetlands adjacent to navigable waters, but maintained that such a position infers the acceptance of a broader definition of "waters of the United States" as reflected in the Court's decision in *Riverside Bayview Homes*.¹⁸⁸ The dissent concluded that the Court was wrong in not following its own precedent set in *Riverside Bayview Homes*.¹⁸⁹

The majority found no indication of Congressional intent to support the proposed jurisdiction.¹⁹⁰ Absent a clear indication of congressional intent, the majority insisted that the Court must interpret the statute in a manner that would avoid raising "serious constitutional problems."¹⁹¹ Had the Court agreed with the statutory construction proposed by the Corps and the dissent, the constitutional question of whether the CWA falls within Congress' power to regulate intrastate activities under the Commerce Clause would have required resolution.

The majority stated that in order to reach a decision on the "significant constitutional questions. . . [they] would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."¹⁹² The majority was critical of the Corps for asserting that the landfill is "of plainly commercial

184. *Id.* at 160; *see also* 33 C.F.R. § 323.2(a)(5) (1978).

185. *Id.* at 170.

186. *Id.* at 186 (Stevens, J., dissenting).

187. *Solid Waste III*, 531 U.S. at 186 (Stevens, J., dissenting).

188. *See* *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985).

189. *Solid Waste III*, 531 U.S. at 187.

190. *Id.* at 172; *see also* *The Daniel Ball*, 77 U.S. 557, 563 (1870) (stating that navigable waters refers to waters that are "navigable in fact" and that are "susceptible of being used, in their ordinary condition, as highways for commerce"); *see also* *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940) (indicating that the phrase "navigable waters" covers waters that are navigable in fact and those that could be made navigable with improvements).

191. *Solid Waste III*, 531 U.S. at 173; *see also* *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1998) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

192. *Solid Waste III*, 531 U.S. at 173.

value" since the circuit court had rendered its decision after considering the argument that the use of the land as a habitat by the migratory birds was the interstate economic activity at issue.¹⁹³ The majority went no further than to deny "administrative deference."¹⁹⁴ However, the dissent indicated that it was within the "class of activities" that should be considered in an "affects" analysis.¹⁹⁵

Part V

An Inferential Analysis of the Supreme Court Decision in *Solid Waste III*: Does the Activity in These Isolated Intrastate Wetlands Meet the Requirements of the "Substantial Affect" Doctrine as Currently Interpreted by the Court?

The proposition put forth by Justice Stevens in his dissent in *Solid Waste III* that judicial review involving the Commerce Clause should analyze the "class of activities" involved, echoes the Court's decision in *Perez v. United States*.¹⁹⁶ The Court has more recently limited the permissible reach of the Commerce Clause, rejecting efforts to regulate areas deemed within the realm of traditional state authority.¹⁹⁷

Chief Justice Rehnquist¹⁹⁸ and Justice Thomas,¹⁹⁹ in particular, have made their pro-federalism stance clear on issues similar to those present in the *Solid Waste III* case.²⁰⁰ As Justice Thomas indicated, "I do not challenge Congress' power to preserve migra-

193. *Id.* at 173-74.

194. *Id.* at 174.

195. *Id.* at 192-93 (Stevens, J., dissenting).

196. 402 U.S. 146 (1971) (noting that it is the class of regulated activities to be considered in an "affects" Commerce Clause analysis); see *Solid Waste III*, 531 U.S. at 193 (Stevens, J., dissenting).

197. *Compare* *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (noting that just because Congress concludes that an activity substantially affects commerce does not sustain its regulation under the Commerce Clause); and *United States v. Morrison*, 529 U.S. at 616 n.6 (2000) (noting that the but-for causal chain implied in a substantial affects analysis must have its limits in justifying the regulation of activities under the Commerce Clause).

198. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981).

199. See, e.g., *Cargill v. United States*, 516 U.S. 955, 959 (1995) (Thomas, J., dissenting).

200. See *United States v. Morrison*, 529 U.S. 598, 615 (2000) ("the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded."); see also *Lopez*, 514 U.S. at 564.

tory birds and their habitat through legitimate means. However, that . . . does not give the Corps *carte blanche* authority to regulate every property that migratory birds use or could use as a habitat.”²⁰¹ The issue of concern for Justice Thomas is whether the application of the CWA under the Commerce Clause meets the then-current constitutional test of whether the activity to be regulated “substantially affects” interstate commerce.²⁰²

In *Lopez* and *Morrison*, the Court has recognized three broad categories of activity that Congress can regulate under the Commerce Clause: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) commercial activities that substantially affect interstate commerce.²⁰³ The isolated intrastate wetlands at issue in *Solid Waste III* must meet the requirements under the third category of activity if their regulation by Congress or its agency is to be found constitutional under the Commerce Clause.

The Court has historically interpreted channels of interstate commerce to include waters that are navigable in fact,²⁰⁴ or adjacent and directly impacting navigable waters.²⁰⁵ In *Cargill*, Justice Thomas suggested a broader interpretation when he opined that the “other waters” regulatory provision²⁰⁶ requires only that the activity “*could* [have an] affect” on interstate commerce.²⁰⁷ He reasoned that the use of the waters as a potential habitat by migratory birds could extend the Corps’ regulatory jurisdiction to those waters,²⁰⁸ but did not extend this analogy so as to include the waters themselves as channels of interstate commerce. Despite his apparent willingness to extend the Corps’ jurisdiction, Justice Thomas was unwilling to base it solely on the flight path of the birds.²⁰⁹ This argument is consistent with past decisions of

201. *Cargill*, 516 U.S. at 959 (Thomas, J., dissenting) (emphasis in original).

202. *See id.*

203. *See Lopez*, 514 U.S. at 558-59; *see also Morrison*, 529 U.S. at 609.

204. *See generally* *Kaiser Aetna v. United States*, 444 U.S. 164, 171-74 (1979) (citing, *inter alia*, *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940)) (finding isolated ponds and ditches cannot constitute navigable waters within this Court’s Commerce Clause jurisprudence).

205. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

206. *See* 33 C.F.R. § 328.3(a)(3).

207. *Cargill v. United States*, 516 U.S. 955, 958 (1995) (Thomas, J., dissenting) (emphasis in original).

208. *Id.*

209. *Id.* (arguing that the flight of the birds does not create a sufficient interstate nexus).

the Court that held that wild birds are *ferae naturae*,²¹⁰ and not "instrumentalities of commerce."²¹¹

The Court in *Kaiser Aetna* reasoned that traditional Commerce Clause analysis should be used to determine whether a particular regulation is appropriately enforced under the commerce power.²¹² That case, as here, involved the third category of activity as further defined by *Lopez* and *Morrison*.

According to the circuit court in *Solid Waste II*, the activity passed the "substantial affect" test as expressed in *Lopez*.²¹³ Had the majority extended the statutory jurisdiction of the Corps, the question before the Court would have been whether the activity continued to pass that test after *Morrison*.²¹⁴ The "substantial affects" test, as established in *Lopez* and as modified in *Morrison*, requires: (1) the intrastate activity to be economic in nature²¹⁵ and substantially affect interstate commerce;²¹⁶ (2) the statute is designed and enforced to influence or proscribe the rules of the economic activity;²¹⁷ (3) the legislative history includes congressional findings reasonably related to the effect of the activity on interstate commerce;²¹⁸ and (4) there is a reasonable nexus between the activity and the interstate commerce.²¹⁹

In *Solid Waste II*, the activity under review was the potential or actual use of the site as a habitat by migratory birds, and the interstate commerce was the hunting, trapping and observation of the migratory birds.²²⁰ The facts in the case at hand suggest: (1) the site evolved as the by-product of industrial land use, and was not a natural habitat; (2) there was no showing that humans ever went onto the property to hunt, trap or observe the migratory

210. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977) (finding that until captured, the birds belong to no one).

211. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

212. *Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979).

213. *Solid Waste II*, 191 F.3d 845, 850 (7th Cir. 1990); see also *Lopez*, 514 U.S. at 564.

214. See *Solid Waste II*, 191 F.3d at 845.

215. *United States v. Morrison*, 529 U.S. 598, 613 (2000); see also *Lopez*, 514 U.S. at 564.

216. *Morrison*, 529 U.S. at 610; see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring) (stating that the activity cannot be so local and private in nature that it cannot be commercial); see also *Cargill v. United States*, 516 U.S. 955, 959 (1995) (Thomas, J., dissenting) (arguing that the land must be usable in interstate commerce).

217. *Morrison*, 529 U.S. at 611-12.

218. *Id.* at 612.

219. *Id.* at 615 (an aggregate effect is too attenuated).

220. See *Solid Waste II*, 191 F.3d 845, 850 (7th Cir. 1990).

birds; and (3) other than the presence of the migratory birds, there was no showing that the land would have any effect on interstate commerce.²²¹ The record reflects that the petitioner may have put forth a mitigation plan as part of the local review process, but this was not at issue in the circuit court review.²²²

Justice Thomas has asserted that the “point of *Lopez* was to explain that the activity on the land to be regulated must substantially affect interstate commerce before Congress can regulate it pursuant to its Commerce Clause power.”²²³ The Court has since extended this requirement to mandate that the intrastate activity was of an independent economic nature prior to its considered effect on interstate commerce.²²⁴

In light of these facts, the use of the site as a habitat by the migratory birds cannot be viewed as an economic activity,²²⁵ and the circuit court did not attempt to distinguish it as such.²²⁶ Instead, the circuit court considered the vast amount of expenditures made on a national basis relative to hunting, trapping and the observation of migratory birds, and specifically referred to the presence of these activities in neighboring states.²²⁷

Upholding the circuit court’s conclusion that the filling of isolated wetlands could have a substantial effect on commerce is unlikely in light of the higher standard imposed under *Morrison*.²²⁸ The Court, however, found similar reasoning in *Morrison* as insufficient, by itself, to establish the necessary nexus with interstate commerce that was not so broad as to allow the federal government to regulate everything in the path of the migratory birds in the name of protecting interstate commerce.²²⁹ Under the theory put forth by the Corps, there would conceivably be no logical stopping point to the extent of the Corps’ jurisdiction.²³⁰ The current Supreme Court has certainly refused to agree with this reading of governmental authority, asserting that “we always have rejected

221. *Id.* at 848-49.

222. *Id.* at 851.

223. *Cargill v. United States*, 516 U.S. 955,959 (1995).

224. *See Morrison*, 529 U.S. at 615.

225. *See Gibbs v. Babbitt*, 214 F.3d 483, 507 (4th Cir. 2000) (Luttig, J., dissenting) (arguing that the activity must be economic in nature or at least present a plausible case of future economic character and impact).

226. *See Solid Waste II*, 191 F.3d at 850.

227. *Id.* at 850.

228. *See Morrison*, 529 U.S. at 619 n.8.

229. *See id.* at 615.

230. *See Nat’l Ass’n Home Builders v. Babbitt*, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting), *cert. denied*, 524 U.S. 937 (1998).

readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power' that traditionally belongs to the state."²³¹

In the absence of economic activity, any enactment by Congress claiming to be within the scope the Commerce Clause would presumably be deemed an invalid exercise of federal authority since "[e]very law enacted by Congress must be based on one or more powers enumerated in the Constitution."²³²

Part VI

Federal Conditional Spending: An Alternative Approach

The *Lopez* Court removed non-economic local activities, whatever their effect on interstate commerce, from the scope of federal regulatory power and indirectly made "discussion of federal conditional spending meaningful once again."²³³ The Spending Doctrine²³⁴ allows Congress to use conditional offers of federal funds to circumvent these restrictions.²³⁵ In *South Dakota v. Dole*,²³⁶ the majority held that Congress has the authority to impose conditions on the receipt of funds, even to attain objectives it might not be able to attain directly.²³⁷ The dissent asserted that there must be a rational, or substantial relationship, between the funding and the funding condition.²³⁸ The spending program must be reasonably adapted to the attainment of an end that will justify the expenditure.²³⁹

231. *Morrison*, 529 U.S. at 618-19 (quoting *United States v. Lopez*, 514 U.S. 549, 584-5 (1995) (Thomas, J. concurring)); see also *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982) (recognizing that "a state's power to regulate the use of water . . . for the purpose of protecting the health of its citizens . . . is at the core of its police power.").

232. *Morrison*, 529 U.S. at 607.

233. See Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911, 1919 (1995) (discussing the authority of Congress to achieve otherwise impermissible regulation of the states through conditional spending).

234. U.S. CONST. art. I, § 8, cl. 1 (granting Congress the power to "provide for the common Defense and general Welfare of the United States.").

235. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that otherwise allocable federal funds could be withheld from states that did not comply with national drinking age).

236. *Id.*

237. *Id.* at 208-09.

238. *Id.* at 213-15 (O'Connor, J., dissenting).

239. *Id.* (O'Connor, J., dissenting).

The Resource Conservation & Recovery Act as a Viable Example of Conditional Federal Spending in the Area of Environmental Legislation

The objectives of the Resource Conservation & Recovery Act (RCRA) are to: "assist in developing and encouraging methods for the disposal of solid waste that are environmentally sound . . . accomplished through Federal technical and financial assistance to States . . . for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry."²⁴⁰ Under RCRA, the EPA has the authority to approve a state plan for the disposal of solid waste, and to allow state substitution of the regulatory process if certain guidelines are met.²⁴¹ To construct a municipal solid waste landfill on a wetlands area, an owner must demonstrate that: (1) a practicable alternative to the use of the wetland area is unavailable;²⁴² (2) the construction or operation of the landfill will not cause or contribute to violations of any applicable state water quality standards, jeopardize the continued existence of endangered species or critical habitats, or violate any requirement for the protection of a marine sanctuary;²⁴³ (3) the landfill will not cause or contribute to significant degradation of wetlands;²⁴⁴ and (4) proactive or mitigating steps have been taken to prevent or minimize wetland impact.²⁴⁵ These RCRA wetlands provisions mirror the EPA's section 404 guidelines concerning wetlands under the CWA.²⁴⁶

In *Resource Investments Inc. v. United States Army Corps of Engineers*,²⁴⁷ the Ninth Circuit considered whether section 404 of the CWA authorized the Corps to require the owner to obtain a NPDES permit prior to constructing a municipal solid waste landfill on a wetlands site.²⁴⁸ The company sought to construct and operate a municipal solid waste landfill on a 320-acre site that

240. 42 U.S.C. § 6941 (2001).

241. *Id.* § 6947 (2001).

242. Criteria for Municipal Solid waste Landfills – Wetlands, 40 C.F.R. § 258.12(a)(1) (2001).

243. *Id.* § 258.12(a)(2) (2001).

244. *Id.* § 258.12(a)(3) (2001).

245. *Id.* § 258.12(a)(4) (2001).

246. See Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material – Restrictions on Discharge, 40 C.F.R. § 230.10 (2001).

247. 151 F.3d 1162 (9th Cir. 1998).

248. *Id.* at 1163; see also 33 U.S.C. § 1342 (2001). Section 402 of the CWA prohibits the discharge of pollutants into navigable waters without a permit issued by the EPA under the National Pollution Discharge Elimination System (NPDES).

required clearing, filling and grading of approximately 21.6 acres of the site's 70 acres of wetlands.²⁴⁹ Their application for a permit under section 404 of the CWA was denied because they failed to demonstrate the unavailability of practicable alternatives for waste disposal that were less environmentally damaging.²⁵⁰ The district court affirmed on the ground that the "Corps' decision was not arbitrary, capricious, contrary to law, or an abuse of discretion."²⁵¹ The company appealed, and contended that the authority to regulate solid waste landfills was vested with the EPA and not the Corps.²⁵² The Ninth Circuit held that the EPA under RCRA, and not the CWA, exclusively regulates the construction of a municipal solid waste landfill on a wetland site.²⁵³

The EPA can look to this resolution in light of the potential ramifications of the decision in *Solid Waste III*, to consider what additional wetland determinations can be made by the states under RCRA. The decision by the Ninth Circuit assigned responsibility to the EPA to make these wetland determinations based on the breadth of its solid waste responsibilities under RCRA, and precludes further conflict in the circuit between two agencies that both currently have statutory authority to make wetlands determinations.²⁵⁴ The court reasoned that the site, design and construction of a solid waste landfill on a wetlands area was specifically regulated under RCRA by the EPA, or, alternatively, through a state with an EPA approved solid waste permit program.²⁵⁵

RCRA survives the decision expected in *Solid Waste III* because it does not rely on the Commerce Clause for its authority. RCRA is representative of the type of federal conditional spending legislation "designed to foster cooperation among Federal, State, and local governments and private industry"²⁵⁶ that can be successful in the post-*Solid Waste III* era. Otherwise, states that decide not to participate under RCRA will no longer be subject to federal regulation over those isolated, intrastate wetlands with no demonstrable interstate economic value.

249. *Resource Investments*, 151 F.3d at 1164.

250. *Id.* at 1165.

251. *Id.*

252. *Id.*

253. *Id.* at 1169.

254. *Id.* at 1168-69.

255. *Resource Investments*, 151 F.3d at 1168-69.

256. 42 U.S.C. § 6941 (1984).

Part VII

Conclusion

The immediate effect of the *Solid Waste III* decision is two-fold. First of all, any effort to impose the authority of the CWA can only extend to navigable waters and adjacent wetlands.²⁵⁷ As a corollary, only a state possesses the authority to regulate land and water use in isolated, intrastate wetlands.²⁵⁸

Second, the language used by Congress in environmental legislation must be sufficiently specific, or alternatively, there must be another source of the clear intent of Congress to support regulatory interpretations.²⁵⁹ Otherwise, the courts will have the discretion to strike down an environmental rule based on a finding that the regulatory body exceeded its authority.

A third criterion is seen in the hypothetical judicial review of the circuit court's "substantial effects" analysis. When considered in light of *Lopez*, *Morrison* and the dicta expressed in *Solid Waste III*, environmental activities that are otherwise within the province of the state's traditional authority may be subject to federal regulation, under a commerce clause theory, only if there is a demonstrable and sufficient economic activity that affects interstate commerce.²⁶⁰

Finally, federal spending legislation presents state legislatures with the need to evaluate a complex set of incentives and disincentives regarding whether they should participate in the voluntary program. Compliance with federal guidelines will bring added resources to the state in terms of funding, but comes at the expense of potential restrictions on residential and business development. Alternatively, maintenance of open space improves the quality of residential life, enhances property value, and facilitates the protection of a diverse, independent ecosystem. The general population must provide a clear direction to its elected officials through the political process to ensure that their wishes regarding environmental protection are known, and that legislators do not rely solely on the input of special interest groups.

State governments may then effectively exercise their traditional authority over the health and safety of its citizens, and ini-

257. *Solid Waste III*, 531 U.S. 159, 174 (2001).

258. *See id.*

259. *See id.* at 173-74.

260. *See* United States v. Morrison, 529 U.S. 598, 615 (2000); *see also* *Solid Waste III*, 531 U.S. at 193; *see also* United States v. Lopez, 514 U.S. 549, 564 (1995).

tiate environmental legislation to protect areas no longer protected under federal legislation. States could theoretically seek to balance the interests of its diverse economic and environmental interests. Such state action would be consistent with the federalist philosophy underpinning the Supreme Court's decision. The risk, however, is a return to the environmental negligence and lack of legislative supervision that led to the application of federal laws in the first place. The presumption that developers and businesses will misuse the environment in the absence of protective federal or state legislation may or may not be valid; however, the states cannot permit themselves the luxury of procrastination in this regard.