Running Aground on the (Shoal) Waters of the United States: The Supreme Court Invalidates the Migratory Bird Rule

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Running Aground on the (Shoal) “Waters of the United States”: The Supreme Court Invalidates the Migratory Bird Rule

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers

I. INTRODUCTION

For the better part of the last fifty years, the Commerce Clause provided a safe harbor for congressional legislation. Finding a connection between a regulated activity and interstate commerce meant smooth sailing through the federal courts. Moreover, failure to find such a connection was not fatal, as the courts often provided one. Congress took advantage of these fair seas and passed a host of legislation regulating commercial, social, and criminal activities. Among these statutes was the Federal Water Pollution Control Act of 1972, popularly known as the Clean Water Act ("CWA"). Like many statutes based on the Commerce Clause, the constitutionality of the CWA was tested and upheld.

However, the legislative landscape began to change with the Supreme Court’s decision in United States v. Lopez. For the first time in nearly sixty years, an act of Congress was invalidated as exceeding the authority granted to Congress by the Commerce Clause. As courts applied the stricter standard announced in Lopez, some regulations began to founder under the newly-heightened scrutiny. Among the regulations that struggled in these rough waters was 33 C.F.R. § 328.3, the United States Army Corps of Engineers’s ("Corps’s") definition of "waters of the United States." In United States v. Wilson, the Fourth Circuit held that 33 C.F.R. § 328.3 exceeded the statutory authority of the CWA in order to avoid raising constitutional questions. Against this background, the Supreme Court granted certiorari in Solid Waste Agency of Northern Cook

2. U.S. CONST. art. I, § 8, cl. 3.
3. See infra notes 98-101 and accompanying text.
7. 133 F.3d 251 (4th Cir. 1997).
8. Id. at 257.
County v. United States Army Corps of Engineers, a case considering whether a series of rain-filled gravel mines qualified as "waters of the United States" under the CWA and the Corps's Migratory Bird Rule.

II. FACTS AND HOLDING

The Solid Waste Agency of Northern Cook County ("SWANCC") was formed by twenty-three suburban Chicago cities and villages to locate and develop a disposal site for nonhazardous baled waste. The Chicago Gravel Company informed SWANCC of the availability of a 533-acre parcel bordering Cook and Kane counties in Illinois. This site had been used for gravel and sand mining for three decades, but it was closed around 1960. The abandoned site developed into a "successional stage forest," and the excavation trenches evolved into a group of permanent and seasonal ponds of varying size and depth. SWANCC bought the site for disposal of solid nonhazardous baled waste.

SWANCC filed for permits, as required by local law, with Cook County and the State of Illinois. In March of 1986, SWANCC contacted the Corps to determine if § 404(a) of the CWA required that SWANCC obtain a federal dredge and fill permit prior to filling some of the permanent and seasonal ponds. The Corps concluded that it lacked jurisdiction because the site did not contain wetlands or areas that supported vegetation adapted for life in saturated soil conditions. However, members of the Illinois Nature Preserves Commission observed a number of migratory bird species at the site. Upon receiving notice of these observations, the Corps reconsidered its conclusion that it lacked jurisdiction. Subsequently, the Corps asserted jurisdiction over the site pursuant to subpart (b) of the Migratory Bird Rule.

10. Id. at 162.
11. Id. at 162-63.
12. Id. at 163.
13. Id.
14. Id.
15. Id.
16. Id.
19. Id. at 164.
20. Id.
21. Id.
22. Id. In 1986, the Corps attempted to define and clarify the reach of its jurisdiction under § 404(a) of the Clean Water Act ("CWA"). The Corps stated its
The Corps discerned that people had observed approximately 121 species of migratory birds at the site. Based on this finding, on November 16, 1987, the Corps determined that seasonally-ponded areas of the site qualified as waters of the United States. The Corps made this determination because “(1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird [sic] which cross state lines.”

While permits were pending, SWANCC made proposals to decrease the displacement of migratory birds at the disposal site. SWANCC acquired approval from all necessary local and state agencies. By 1993, SWANCC secured “a special use planned development permit from the Cook County Board of Appeals, a landfill development permit from the Illinois Environmental Protection Agency, and approval from the Illinois Department of Conservation.” However, the Corps refused to issue a § 404(a) permit. The Corps found that SWANCC’s proposal was not the least environmentally damaging alternative, that it posed an unacceptable risk to the local drinking water supply, and that the project would have an unmitigated impact on area-sensitive species.

SWANCC filed suit in the United States District Court for the Northern District of Illinois challenging both the jurisdiction of the Corps and the merits of its denial of the § 404(a) permit. The district court granted the Corps’s motion

jurisdiction 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.


23. Id.
24. Id.
25. Id. at 164-65 (quoting U.S. Army Corps of Eng’rs, Chicago Dist., Dep’t of Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab. No. 1, p. 6) (correction in original).
26. Id. at 165.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
for summary judgment on the jurisdictional issue.\textsuperscript{32} SWANCC dropped its challenge to the permit denial and appealed the jurisdictional issue to the United States Court of Appeals for the Seventh Circuit.\textsuperscript{33} On appeal, SWANCC attacked the Corps’s use of the Migratory Bird Rule to assert jurisdiction.\textsuperscript{34} SWANCC argued that the Corps “exceeded [its] statutory authority in interpreting the CWA to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds and, in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction.”\textsuperscript{35}

The court of appeals first considered the constitutional question—whether Congress lacked authority under the Commerce Clause—and held that the “cumulative impact” doctrine gave Congress the authority to regulate such waters.\textsuperscript{36} The court found that the destruction of the natural habitats of migratory birds had a substantial aggregate effect on interstate commerce because “each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds.”\textsuperscript{37} The court then turned to the regulatory issue, holding that “the CWA reached as many waters as the Commerce Clause allows.”\textsuperscript{38} As a result of holding that the Migratory Bird Rule was permissible under the Commerce Clause, the court also held that the Migratory Bird Rule was a reasonable interpretation of the CWA.\textsuperscript{39}

The United States Supreme Court granted certiorari and reversed.\textsuperscript{40} In a five-to-four decision,\textsuperscript{41} the Court held that, as applied to SWANCC’s balefill site, the Migratory Bird Rule exceeded the authority granted to the Corps under § 404(a) of the CWA.\textsuperscript{42} The Court stated that the Corps’s application of its regulations raised serious constitutional questions.\textsuperscript{43} However, because the Court could not find a clear indication from Congress that it intended § 404(a) of the CWA to reach abandoned sand and gravel pits, the Court read the statute “to avoid the

\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 165-66.
\textsuperscript{36} Id. at 166. The cumulative impact doctrine states that a single activity that has no discernable effect on interstate commerce may be regulated if the aggregate effect of the activity has a substantial impact on interstate commerce. Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Chief Justice Rehnquist delivered the opinion of the Court. Id. at 161. He was joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Id. Justice Stevens filed a dissenting opinion that was joined by Justices Souter, Ginsburg, and Breyer. Id.
\textsuperscript{42} Id. at 174.
\textsuperscript{43} Id.
significant constitutional and federalism questions raised by [the Corps's] interpretation." Thus, the Court avoided the Commerce Clause issue.45

III. LEGAL BACKGROUND

A. The Development of the Migratory Bird Rule

In the late 1960s and early 1970s, water pollution became a major national concern.46 Congress, in an attempt to address these concerns, passed the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."47 The CWA, in § 404(a), gives the Corps the authority to grant permits "for the discharge of dredged or fill material into the navigable waters."48 Section 404(a) also gives the Corps, in conjunction with the Environmental Protection Agency ("EPA"), the ability to establish guidelines to specify the criteria under which a permit may be granted.49 The CWA defined the term "navigable waters" to mean "waters of the United States."50 However, the CWA did not define "waters of the United States." Faced with this ambiguous definition, the Corps initially construed the CWA to apply only to waters that were actually navigable.51 This definition proved overly restrictive, and, in 1975, the Corps redefined "waters of the United States" to include navigable waters, non-navigable interstate waters and their tributaries, intrastate waters whose use or destruction could affect interstate commerce, and wetlands adjacent to waters of the United States.52

The Corps's definition of "waters of the United States" faced constitutional challenge in United States v. Riverside Bayview Homes, Inc.53 In Riverside Bayview, the Corps sought to enjoin a property developer from placing fill material

44. Id.
45. See id.
52. 33 C.F.R. § 328.3(a) (2000).
on "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan." The district court granted an injunction, and the developer appealed to the Sixth Circuit. The Sixth Circuit reversed and held that the land was not subject to the Corps's jurisdiction because it was not subject to flooding by the adjacent navigable water "at a frequency sufficient to support the growth of aquatic vegetation."

The Supreme Court granted certiorari and reversed. The Court determined that the Corps's action did not amount to a taking under the Fifth Amendment, and that its decision to include adjacent wetlands in its definition of "waters of the United States" was reasonable. The Court declared that "[t]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." Because wetlands may drain into adjacent waters and serve to filter and purify those waters, the Court could not "say that the Corps' conclusion . . . [was] unreasonable." Nevertheless, the Court specifically did not address the question whether § 404(a) or the Commerce Clause would allow the Corps to assert jurisdiction over isolated wetlands.

In 1986, the Corps adopted what has become known as the Migratory Bird Rule, which asserted jurisdiction over wetlands not adjacent to navigable waters. The rule extended the Corps's jurisdiction to the following waters: (1) those used as habitat by birds protected by migratory bird treaties; (2) those used by other migratory birds that cross state lines; (3) those used by endangered species; and (4) those used to irrigate crops sold in interstate commerce. Prior to the Supreme Court's landmark decision in Lopez, the validity of the Migratory

54. Id. at 124.
55. Id. at 125.
56. Id.
57. Id.
58. Id. at 129.
59. Id. at 133.
60. Id.
61. Id. at 134.
Bird Rule was considered by the Fourth,\textsuperscript{66} Seventh,\textsuperscript{67} and Ninth Circuits.\textsuperscript{68} The Fourth Circuit invalidated the rule because it was not passed in compliance with notice and comment rulemaking under the Administrative Procedures Act.\textsuperscript{69} However, both the Seventh Circuit in Hoffman Homes, Inc. \textit{v. EPA},\textsuperscript{70} and the Ninth Circuit in \textit{Leslie Salt Co. \textit{v. United States}}\textsuperscript{71} held that the jurisdiction of the Corps could reach local waters because of use of the waters by migratory birds.\textsuperscript{72} These decisions were based, in part, on an expansive reading of the Commerce Clause.\textsuperscript{73} Nevertheless, recent trends in Commerce Clause jurisprudence suggest that future Supreme Court decisions may give the Commerce Clause a more restrictive reading.\textsuperscript{74}

\textit{B. The Commerce Clause from Gibbons to Morrison}

The constitutional basis for the CWA, and other federal environmental laws, was Congress’s power to regulate interstate commerce.\textsuperscript{75} The Commerce Clause grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”\textsuperscript{76} Although the Clause has limits, for more than half a century, it has been interpreted to grant Congress near-plenary power.\textsuperscript{77} However, since the Supreme Court’s decision in \textit{Lopez}, there has been “speculation as to the continued viability of a host of federal regulatory schemes.”\textsuperscript{78}

\begin{itemize}
\item[67.] Hoffman Homes, Inc. \textit{v. EPA}, 999 F.2d 256, 260-63 (7th Cir. 1993).
\item[70.] 999 F.2d 256 (7th Cir. 1993).
\item[71.] 896 F.2d 354 (9th Cir. 1990), \textit{cert. denied}, 498 U.S. 1126 (1991).
\item[72.] Hoffman Homes, 999 F.2d at 260-61; Leslie Salt, 896 F.2d at 360.
\item[73.] Hoffman Homes, 999 F.2d at 263 (Manion, J., concurring); Leslie Salt, 896 F.2d at 360-61.
\item[76.] U.S. CONST. art. I, § 8, cl. 2.
\item[77.] See \textit{infra} notes 102-03 and accompanying text.
\item[78.] Linehan, \textit{supra} note 62, at 366.
\end{itemize}
The Supreme Court first addressed the scope of the Commerce Clause in *Gibbons v. Ogden.* The Court, writing for Chief Justice Marshall, stated that all the powers set forth in Article I of the United States Constitution are complete in themselves and may be exercised to their utmost extent. The Court cautioned, however, that this power is limited by the express terms of Article I. Congress cannot regulate non-commercial activities or commerce only affecting one state. Under *Gibbons,* it was not enough for an activity to affect commerce; Congress could only regulate those activities which can be properly termed 'commerce.'

After *Gibbons,* the Court did not have many opportunities to rule on the scope of the commerce power, and it was not until 1870 that the Court invalidated a federal law for exceeding Congress's Commerce Clause authority. Eventually, the Court determined that some intrastate activities affected interstate commerce to such an extent that federal regulation was justified. This belief reached its peak during the New Deal era in the landmark case of *NLRB v. Jones & Laughlin Steel Corp.*, in which the Court upheld the National Labor Relations Act. The Court held that, when industries organize themselves on a national scale, "making their relation to interstate commerce the dominant factor in their activities," they open up their industrial labor relations to congressional regulation. Rather than ask whether the regulated activity was commerce, the Court focused on whether the activity substantially affected commercial activity. Because Jones & Laughlin was a large national steel producer with thousands of employees, one could argue that labor strife there could affect interstate commerce. Nevertheless, *Jones & Laughlin* effectively "marked the end of the Court's restraint on congressional assertion of power under [the Commerce Clause]."

Following *Jones & Laughlin,* the Court found that Congress's power under the Commerce Clause was nearly limitless. This point was driven home in

79. 22 U.S. (9 Wheat) 1 (1824).
80. Id. at 196.
81. Id. at 196-97.
82. Adler, supra note 46, at 8.
83. Linehan, supra note 62, at 372.
84. Adler, supra note 46, at 8 (citing United States v. Dewitt, 76 U.S. (9 Wall.) 41, 42-45 (1870)).
85. Warner, supra note 74, at 327.
86. 301 U.S. 1 (1937).
87. Id. at 30.
88. Id. at 41.
89. Id. at 37.
90. Adler, supra note 46, at 9.
91. Adler, supra note 46, at 9.
Wickard v. Filburn,92 in which the Court upheld the conviction of a farmer for growing wheat for personal consumption.93 Although the Court recognized that the farmer’s growing wheat for his family had little, if any, effect on interstate commerce, it reasoned that, if thousands of other farmers also grew wheat for their families, there could be a substantial impact on commerce.94 The Court stated that a purely local and non-commercial activity could “whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”95

The Wickard decision made it clear that the Commerce Clause, despite its textual language, did not limit Congress’s regulatory powers to interstate commerce.96 Although the Court has continued to “nominally review” congressional regulations of commerce, it effectively “rubber stamped” congressional acts that could affect commerce.97 For example, the Court upheld civil rights laws,98 criminal statutes,99 environmental regulations,100 and minimum wage laws as applicable to state government employees101 as regulations of interstate commerce. The Court held that it should “defer to a congressional finding that a regulated activity affects interstate commerce.”102 This highly deferential review led one federal judge to make a lighthearted suggestion that it would be appropriate to rename the Commerce Clause the “Hey, you can do whatever you feel like Clause.”103

93. Id. at 128-29.
94. Id. at 127-28.
95. Id. at 125.
96. Linehan, supra note 62, at 378.
97. Linehan, supra note 62, at 379.
98. Katzenbach v. McClung, 379 U.S. 294, 295-305 (1964) (upholding the Civil Rights Act of 1964 as applied to a local barbeque restaurant despite the fact that there was no evidence that the restaurant served interstate travelers); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250-62 (1964) (upholding the Civil Rights Act of 1964 as applied to a local motel adjacent to an interstate highway).
99. Perez v. United States, 402 U.S. 146, 150-57 (1971) (upholding a federal conviction for extortion under the Federal Consumer Credit Protection Act, despite the fact there was no evidence that the defendant’s conduct had any interstate commerce effects).
100. Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 303-05 (1981) (upholding the Surface Mining Control and Reclamation Act despite the argument that it regulates land use, which is a local matter).
102. Hodel, 452 U.S. at 275.
103. Alex Kozinski, Introduction to Volume Nineteen, 19 HARV. J.L. & PUB. POL’Y 1, 5 (1995) (Judge Kozinski has served on the United States Court of Appeals for the
The Court drastically altered its course in *Lopez*, a 1995 case striking down the Gun Free School Zones Act. 104 *Lopez* marked the first time in more than fifty years that the Court struck down a federal regulation because it exceeded Congress's powers under the Commerce Clause. 105 Chief Justice Rehnquist authored the majority opinion and stressed that "the constitution creates a Federal Government of enumerated powers." 106 The Court delineated three categories of activities that could be regulated under the Commerce Clause. 107 First, Congress can regulate the use of the channels of interstate commerce. 108 Second, Congress can protect the instrumentalities of interstate commerce from all "threats," even those coming from purely intrastate activities. 109 Third and finally, Congress can regulate activities that have a substantial relationship to interstate commerce. 110 According to the Court, mere possession of a gun in a school zone failed to meet any of these tests. 111 The Court refused to consider the aggregate effect of guns in school zones because it determined that gun possession was not a commercial activity. 112

After *Lopez*, several circuit courts addressed how the decision applied to environmental regulations. In *Wilson*, the Fourth Circuit questioned the constitutionality of the Corps's definition of "waters of the United States" found in 33 C.F.R. § 328.3(a)(3). 113 Because the regulation covered waters that "could affect interstate or foreign commerce," the Fourth Circuit concluded that the

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107. *Id.* at 558.
108. *Id.*
109. *Id.*
110. *Id.* at 558-59.
111. *Id.* at 567.
112. *Id.*
113. United States v. Wilson, 133 F.3d 251, 257-59 (4th Cir. 1997). The regulation defines waters of the United States as including: "[a]ll other 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." 33 C.F.R. § 328.3(a)(3) (1993). This regulation was initially adopted in 1975 to expand the Corps's jurisdiction to waters that were not actually navigable and was clarified in 1986 by the Migratory Bird Rule. The Fourth Circuit did not consider the application of the Migratory Bird Rule because it previously had held that the Migratory Bird Rule was invalid because it was implemented without using notice and comment rulemaking as required by the Administrative Procedures Act. See *Tabb Lakes, Ltd. v. United States*, No. 89-2905, 1989 WL 106990, at *2 (4th Cir. Sept. 19, 1989).
regulation probably did not meet the *Lopez* test, as it required neither a substantial effect on commerce nor a nexus with navigable (or even interstate) waters.\(^\text{114}\) Noting that the definition was contained in an agency regulation rather than a statute, the Fourth Circuit avoided the constitutional issue by invalidating the regulation as exceeding its congressional authorization under the CWA.\(^\text{115}\) Wildlife protection laws, however, have fared better after *Lopez*.\(^\text{116}\) In *United States v. Bramble*,\(^\text{117}\) the Ninth Circuit upheld the Eagle Protection Act under the Commerce Clause.\(^\text{118}\) The Ninth Circuit reasoned that both possession of and commerce in eagle parts have substantial effects on interstate commerce because they threaten the eagle with extinction.\(^\text{119}\) In *National Ass’n of Home Builders v. Babbitt*,\(^\text{120}\) the D.C. Circuit upheld the Endangered Species Act’s ("ESA’s") prohibition against the taking of endangered species as applied to the Delhi Sands Flower-Loving Fly.\(^\text{121}\) The D.C. Circuit held that the provision against taking was justified "as a necessary aid to the prohibitions in the ESA on transporting and selling endangered species in interstate commerce."\(^\text{122}\) The D.C. Circuit cited *Bramble* and stated that the risk of extinction substantially affects interstate commerce.\(^\text{123}\)

As lower courts struggled to apply *Lopez*, it became apparent that the Court had left several questions unanswered about how to apply its analysis.\(^\text{124}\) The *Lopez* Court noted that Congress had not provided any findings concerning a link

\(\text{114. } \text{Wilson, 133 F.3d at 257.} \)

\(\text{115. } \text{Id. The Supreme Court took an identical approach in *Solid Waste*. See infra notes 155-64 and accompanying text.} \)

\(\text{116. } \text{See *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996). The Author mentions federal wildlife protection laws because their relationship to interstate commerce is similar to that of the Migratory Bird Rule. Wildlife protection laws preserve the possibility ‘of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species.’ *Palila v. Haw. Dep’t of Land & Natural Res.*, 471 F. Supp. 985, 995 (D. Haw. 1979), aff’d, 639 F.2d 495 (9th Cir. 1981).} \)

\(\text{117. } \text{103 F.3d 1475 (9th Cir. 1996).} \)

\(\text{118. } \text{Id. at 1481.} \)

\(\text{119. } \text{Id. ‘Extinction . . . would . . . foreclos[e] any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material.’} \text{Id.} \)

\(\text{120. } \text{130 F.3d 1041 (1997), cert. denied, 524 U.S. 937 (1998).} \)

\(\text{121. } \text{Id. at 1043.} \)

\(\text{122. } \text{Id. at 1046-47.} \)

\(\text{123. } \text{Id. at 1054.} \)

\(\text{124. } \text{Gerhardt, *supra* note 75, at 10980.} \)
between guns in school zones and interstate commerce.\textsuperscript{125} The absence of a jurisdictional element "which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce" also troubled the Court.\textsuperscript{126} Would the Court defer to congressional findings in subsequent decisions? Would a jurisdictional element allow future legislation to pass constitutional muster? The Court addressed these questions in \textit{United States v. Morrison}.\textsuperscript{127}

In \textit{Morrison}, the Court concluded that Congress lacked the constitutional authority to enact the civil remedy section of the Violence Against Women Act, 42 U.S.C. § 13981.\textsuperscript{128} Although the Violence Against Women Act, like the Gun Free School Zones Act, did not contain a jurisdictional element,\textsuperscript{129} the Court indicated that the presence of a jurisdictional element merely would "lend support to the argument that § 13981 is sufficiently tied to interstate commerce."\textsuperscript{130} However, unlike the Gun Free School Zones Act, the Violence Against Women Act was "supported by numerous findings."\textsuperscript{131} Despite these findings, the Court struck down the Act, stating "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."\textsuperscript{132}

In \textit{Morrison}, the Court sent a strong signal that "even under our modern expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."\textsuperscript{133} It reemphasized that Commerce Clause regulations must focus on commerce—"thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."\textsuperscript{134} While not overruling Commerce Clause precedent, the Rehnquist Court highlighted the limiting language in these decisions and refused to extend them to "effects on interstate commerce so indirect and remote."\textsuperscript{135} This retreat from the strong cumulative effects test essential to \textit{Wickard} and its progeny has caused great speculation and concern in environmental law, "the field in which Congress arguably most frequently resorts

\textsuperscript{126} Id. at 561.
\textsuperscript{127} 529 U.S. 598 (2000).
\textsuperscript{128} Id. at 602.
\textsuperscript{129} Id. at 613.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 614.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 608.
\textsuperscript{134} Id. at 613.
\textsuperscript{135} Id. at 608 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1936)).
to the Commerce Clause Power.”136 It is against this backdrop that the Supreme Court granted certiorari in a case challenging the constitutionality of the Migratory Bird Rule.

IV. INSTANT DECISION

In Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, the Supreme Court held that 33 C.F.R. § 328.3(a)(3), as applied to SWANCC’s balefill site pursuant to the Migratory Bird Rule, exceeded the statutory authority granted to the Corps under § 404(a) of the CWA.137 The Court reached this conclusion, in part, because of the serious constitutional questions that would be raised by the application of the CWA to an “abandoned sand and gravel pit.”138 The Court feared that “[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.”139

First, the Court noted that this was not the first time it had considered the scope of § 404(a).140 The Court held in Riverside Bayview that the Corps could assert jurisdiction over wetlands that abutted navigable waters because Congress intended to regulate some waters that would not be considered navigable under the ordinary definition of the term.141 The Solid Waste Court pointed out that the holding was based on Congress’s approval of the Corps’s regulations interpreting the CWA to cover such wetlands, and the belief that Congress’s concern for water quality and protection of aquatic ecosystems indicated the intent to reach waters that were adjacent to waters of the United States.142 The Court then emphasized that the Riverside Bayview Court did not consider whether the Corps could regulate the discharge of fill material into wetlands that are not adjacent to navigable waters.143

Next, the Court looked at the Corps’s original interpretation of the CWA.144 In 1974, the Corps defined the term navigable waters and emphasized that the

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136. Gerhardt, supra note 75, at 10980.
138. Id.
139. Id.
140. Id. at 167.
141. Id.
142. Id.
143. Id.
144. Id. at 168.
water body's capability for use for transportation or commerce is the key factor.\textsuperscript{145} While this definition was inconsistent with the Corps's position, the Corps did not argue that it mistook Congress's intent in 1974.\textsuperscript{146} Instead, the Corps argued that Congress implicitly approved of the Corps's more expansive 1977 definition of navigable waters.\textsuperscript{147} Congress had the opportunity to overrule the Corps's 1977 interpretation through legislation but failed to do so.\textsuperscript{148} The Court dismissed this argument stating that "'[f]ailed legislative proposals are a 'particularly dangerous ground on which to rest an interpretation of a prior statute.'"\textsuperscript{149} Moreover, the failure of the 1977 House Bill could not have shown Congress's agreement with the Migratory Bird Rule, which was not adopted until 1986.\textsuperscript{150} Further, the Court noted that the Corps could not point to any evidence "that the House bill was proposed in response to the Corps's claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction."\textsuperscript{151}

Next, the Court addressed the Corps's argument that the term "other . . . waters" in § 404(g) incorporated the Corps's 1977 regulations.\textsuperscript{152} Section 404(g) does not define "other . . . waters," and the Court found that it is possible Congress only wanted to include waters adjacent to navigable waters.\textsuperscript{153} Regardless, the Court held there was no need to determine the meaning of § 404(g) conclusively and stated that it was enough to point out that § 404(g) did not conclusively determine the definition of "waters" elsewhere in the Act.\textsuperscript{154}

Finally, the Court considered the possibility that "Congress did not address the precise question of § 404(a)'s scope with regard to nonnavigable, isolated, intrastate waters, and that, therefore, [the Court] should give deference to the 'Migratory Bird Rule.'"\textsuperscript{155} Although the Court found § 404(a) was clear, the Court asserted that \textit{Chevron} deference\textsuperscript{156} would not be appropriate.\textsuperscript{157} The Court

\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 169.
\textsuperscript{149} Id. at 169-70 (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994)).
\textsuperscript{150} Id. at 170.
\textsuperscript{151} Id. at 171.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 172.
\textsuperscript{156} In \textit{Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837 (1984), the Court laid out a framework for dealing with an agency's interpretation of a statute that it administers. If Congress has spoken to the precise question, then the intent of Congress is applied. \textit{Id.} at 842. However, if the statute is silent or ambiguous, then
found that the Migratory Bird Rule permitted federal encroachment on a traditional state power and stretched the limits of Congress’s Commerce Clause powers. Therefore, the rule raised “significant constitutional questions.” When an administrative interpretation of a statute raises significant constitutional questions, the Court requires a clear indication that Congress intended to reach that result. This requirement is based on the Court’s desire to avoid unnecessarily deciding constitutional questions. The Court found “nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit.” Therefore, it read the statute to avoid the constitutional questions raised by the Migratory Bird Rule and rejected the Corps’s request for Chevron deference.

the court should ask whether the agency’s answer “is based on a permissible construction of the statute.” Id. at 843. This policy of deference has been the source of much debate both among scholars and among the courts. Much of the discussion has concerned the continued validity of the doctrine. Solid Waste has implications in this debate and, at the time of this writing, has been cited several times for the position that, where the agency’s construction would raise constitutional questions, the court should construe the statute to avoid such questions. See Nehme v. Immigration & Naturalization Serv., 252 F.3d 415, 422 (5th Cir. 2001); John v. United States, 247 F.3d 1032, 1040 (9th Cir. 2001) (Tallman, J., concurring); John, 247 F.3d at 1045-47 (Kozinski, J., dissenting); Time Warner Entm’t Co. v. FCC, 240 F.3d 1126, 1131 (D.C. Cir. 2001); Collette v. St. Luke’s Roosevelt Hosp., 132 F. Supp. 2d 256, 266 n.7 (S.D.N.Y. 2001); Davis v. United States, 50 Fed. Cl. 192, 205 (2001). This Note focuses on the environmental law and commerce clause implications of the Solid Waste decision and, for the purpose of brevity, does not discuss the Chevron implications. For debate on the continued validity of Chevron, see generally David A. Brennen, Treasury Regulations and Judicial Deference in the Post-Chevron Era, 13 GA. ST. U. L. REV. 387 (1997); Thomas J. Byrne, The Continuing Confusion Over Chevron: Can the Nondelegation Doctrine Provide a (Partial) Solution?, 30 SUFFOLK U. L. REV. 715 (1997); Patricia G. Chapman, Has the Chevron Doctrine Run Out of Gas? Senza Ripieni Use of Chevron Deference or the Rule of Lenity, 19 MISS. C. L. REV. 115 (1998); David M. Hasen, The Ambiguous Basis of Judicial Deference to Administrative Rules, 17 YALE J. ON REG. 327 (2000); Gregory E. Maggs, Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia, 132 CONN. L. REV. 399 (1996); Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351 (1994).

158. Id. at 173.
159. Id.
160. Id. at 174.
161. Id. at 172.
162. Id.
163. Id. at 174.
164. Id.
The dissent viewed the majority opinion as an “unfortunate step that needlessly weakens our principal safeguard against toxic water.” It first considered Riverside Bayview and argued that:

[o]ur broad finding in Riverside Bayview . . . applies equally to the 410-acre parcel at issue here. Moreover, once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute’s protection to those waters or wetlands that happen to lie near a navigable stream.

The dissent then examined the history of federal water regulations and contended that, although the initial goal of such regulations was to promote commerce and transportation, during the mid-twentieth century, this goal gave way to concerns about environmental degradation. This shift reached its peak with the passage of the CWA in 1972. The CWA was the first truly comprehensive water pollution law. The dissent argued that § 404(a) was principally a pollution control measure. Although Congress retained the jurisdictional term “navigable waters,” it “broadened the definition of that term to encompass all ‘waters of the United States.’” Thus, the dissent argued, the Court’s focus on commerce and navigation ignored the fact that “Congress intend[ed] that its assertion of federal jurisdiction be given the ‘broadest possible constitutional interpretation.’” Congress used the term “navigable waters” as “shorthand for ‘waters over which federal authority may properly be asserted.’”

Next, the dissent addressed the majority’s holding that the Corps initially construed its jurisdiction under § 404(a) to be limited to “navigable waters.” The dissent noted that the reactions of Congress, the EPA, and the courts quickly convinced the Corps that the “statute required it ‘to protect water quality to the full

165. Justice Stevens filed a dissenting opinion that was joined by Justices Souter, Ginsburg, and Breyer. Id. at 161 (Stevens, J., dissenting).
166. Id. at 175 (Stevens, J., dissenting).
167. Id. at 176 (Stevens, J., dissenting).
168. Id. at 178 (Stevens, J., dissenting).
169. Id. at 179 (Stevens, J., dissenting).
170. Id. (Stevens, J., dissenting).
171. Id. (Stevens, J., dissenting).
172. Id. at 180 (Stevens, J., dissenting).
173. Id. at 181 (Stevens, J., dissenting) (quoting S. CONF. REP. NO. 92-1236, at 144 (1972)).
174. Id. at 182 (Stevens, J., dissenting).
175. Id. at 183 (Stevens, J., dissenting).
extant of the [C]ommerce [C]lause.”176 This led to the expanded regulations that were upheld in Riverside Bayview.177 According to the 1977 version of these regulations, the Corps’s jurisdiction extended to “isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters . . . of the United States, the degradation or destruction of which could effect interstate commerce.”178 These trends were recognized by members of Congress, and, in 1977, bills were proposed that would have limited the scope of the Corps’s jurisdiction.179 The dissent argued that the failure of these bills constituted congressional endorsement of the expanded regulations.180 “Congress’ rejection of the House’s efforts in 1977 to cut back on the Corps’ 1975 assertion of jurisdiction clearly indicates congressional acquiescence in that assertion.”181 The dissent asserted that the majority reached its contrary conclusions through “selective reading.”182 “[I]t is particularly ironic for the Court to raise the specter of federalism while construing a statute that makes explicit efforts to foster local control over water regulation.”183

Concluding that the Corps’s interpretation was reasonable and, therefore, entitled to deference under Chevron, the dissent turned to the question whether, under the Commerce Clause, Congress had the power to regulate the balefill site.184 The dissent considered the three categories expressed in Lopez and argued that this case concerned an activity that substantially affects interstate commerce.185 It pointed out that, so long as an aggregated class of similar activities substantially affected interstate commerce, an individual activity need not actually affect commerce.186

The dissent argued that “the discharge of fill material into the Nation’s waters is almost always undertaken for economic reasons.”187 And such discharge, in the aggregate, adversely will impact the populations of migratory birds, 188 and that “[t]he causal connection between the filling of wetlands and the decline of

176. Id. (Stevens, J., dissenting).
177. Id. at 184 (Stevens, J., dissenting).
179. Solid Waste, 531 U.S. at 185 (Stevens, J., dissenting).
180. Id. at 186 (Stevens, J., dissenting).
181. Id. (Stevens, J., dissenting).
182. Id. at 191 (Stevens, J., dissenting).
183. Id. at 192 (Stevens, J., dissenting).
184. Id. (Stevens, J., dissenting).
185. Id. at 192-93 (Stevens, J., dissenting).
186. Id. at 193 (Stevens, J., dissenting).
187. Id. (Stevens, J., dissenting).
188. Id. at 194 (Stevens, J., dissenting).
commercial activities associated with migratory birds . . . is direct and concrete." The power to regulate commerce includes the ability to protect natural resources, and migratory birds are such a resource. Next, the dissent noted that, in Missouri v. Holland, the protection of migratory birds was held to be a national interest that only could be accomplished by national action. The dissent concluded that there was no merit to the petitioner's Commerce Clause argument.

V. COMMENT

In Solid Waste, the Supreme Court held that the Migratory Bird Rule was an unreasonable interpretation of the CWA. The Court did not decide whether the Corps's assertion of jurisdiction was permissible under the Commerce Clause. However, the Court's discussion about the "serious constitutional questions" presented by the case appears consistent with the recent Lopez and Morrison decisions. The opinion leaves some unanswered questions concerning the scope of the CWA and the decision's place in Commerce Clause jurisprudence.

A. What is Left of the Migratory Bird Rule?

Although the Court struck down the Migratory Bird Rule, it did so as specifically applied to the petitioner's balefill site. However, the opinion implies that any assertion of jurisdiction over isolated waters and wetlands solely because of the presence of migratory birds would raise similar constitutional questions. Perhaps in anticipation of the Court's interpretation, the Corps asserted, in its brief, that the regulated activity was a municipal landfill that is of a commercial nature. However, the Court stated that this argument was a "far cry" from the purpose of the CWA. It is unlikely that the Court would allow federal regulation of isolated wetlands solely because of the presence of migratory birds.

189. Id. at 195 (Stevens, J., dissenting) (citations omitted).
190. Id. (Stevens, J., dissenting).
192. Solid Waste, 531 U.S. at 195 (Stevens, J., dissenting); see Holland, 252 U.S. at 433.
193. Solid Waste, 531 U.S. at 197 (Stevens, J., dissenting).
194. Id. at 174.
195. Id. at 174.
196. Id.
197. Id. at 173.
198. Id.
The Migratory Bird Rule protected four types of isolated wetlands: (1) those that provide a habitat for migratory birds protected by treaty; (2) those that provide a habitat for migratory birds that cross state lines; (3) those that provide a habitat for endangered species; and (4) those that are used to irrigate crops for sale in interstate commerce.\textsuperscript{199} The \textit{Solid Waste} opinion certainly eliminates the protection of the first two categories. As endangered species have an interstate commerce connection similar to that of migratory birds (i.e., revenue-generating recreational activities associated with the animals), the opinion, by implication, covers the third category, as well. However, the fourth category of wetlands, those that are used to irrigate crops that are sold in interstate commerce, may survive the opinion.

It is unclear how the Court would react to the regulation of isolated wetlands if those wetlands were used for the irrigation of crops to be sold in interstate commerce. The Court emphasized that the word “navigable” is in the statute for a reason, and it could not adopt an approach that would give the term no effect.\textsuperscript{200} However, the irrigation of crops provides a closer and more tangible connection to interstate commerce than is presented by the presence of migratory birds. The Court emphasized that it was not setting the limits or defining the exact meaning of the definition of “other waters” in § 404(a).\textsuperscript{201} Nevertheless, the Court expressed great reluctance to extend the holding in \textit{Riverside Bayview} to non-adjacent wetlands.\textsuperscript{202} Given the Court’s desire to protect the “States’ traditional and primary power over land and water use,”\textsuperscript{203} it likely would be reluctant to extend § 404(a) to isolated wetlands. However, considering the five-to-four split, it is possible that a case presenting a stronger constitutional argument might sway one justice.

\textbf{B. Impact on the Environmental Protection Agency’s National Pollution Discharge Elimination System Permit Program}

Under the CWA, the EPA is authorized to regulate and issue permits for the discharge of pollution from a “point source” into a “water of the United States.”\textsuperscript{204} The EPA has defined waters of the United States very broadly.\textsuperscript{205} Although \textit{Solid

\begin{itemize}
\item \textsuperscript{199} Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).
\item \textsuperscript{200} \textit{Solid Waste}, 531 U.S. at 172.
\item \textsuperscript{201} \textit{Id.} at 171.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.} at 174.
\item \textsuperscript{204} 33 U.S.C. § 1342 (1994).
\item \textsuperscript{205} 40 C.F.R. § 122.2 (2001). All of the following are defined as “waters of the United States”:
\end{itemize}
Waste dealt specifically with the Corps’s definition, it may have implications for the EPA’s definition, as well. A January 19, 2001, EPA-Corps of Engineers memorandum discussing the decision expressed the opinion that it applied with equal force to National Pollution Discharge Elimination System (“NPDES”) permitting.\textsuperscript{206}

The EPA’s definition, for the most part, appears to be well within the limits set by Solid Waste and Riverside Bayview, and, thus, would not present major constitutional questions. Both the Second Circuit and the Ninth Circuit have upheld the EPA’s definition.\textsuperscript{207} However, subpart (c) of the definition extends to “other waters . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.”\textsuperscript{208} This portion of the definition mirrors the Corps’s definition of waters of the United States that the Fourth Circuit questioned in Wilson.\textsuperscript{209} The Ninth Circuit, in Headwaters, Inc. v. Talent

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(b) All interstate waters, including interstate “wetlands;”
(c) All other 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 would affect or could affect interstate or foreign commerce including any such waters:
   (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
   (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
   (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
(d) All impoundments of waters otherwise defined as waters of the United States under this definition;
(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
(f) The territorial sea; and
(g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.


\textsuperscript{206} Environmental Law Decision Notes, 2001-JUN ARMY LAW. 37, 41. The memorandum expressed both the Environmental Protection Agency’s and the Corps’s opinions that Solid Waste is “a limited decision having minimal impact on their ‘broad’ jurisdictional authority under the CWA.” Id.

\textsuperscript{207} Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526, 533-34 (9th Cir. 2001); United States v. TGR Corp., 171 F.3d 762, 765 (2d Cir 1999).

\textsuperscript{208} 40 C.F.R. § 122.2 (2001).

\textsuperscript{209} See supra note 113 and accompanying text.
Irrigation District,\textsuperscript{210} upheld subpart (c) of the EPA’s definition and distinguished Solid Waste because the irrigation canals at issue in Headwaters were not “isolated waters” because they leaked into natural streams and lakes.\textsuperscript{211} To the extent that subpart (c) of the EPA’s definition of waters of the United States reaches isolated waters with no hydrological connection to navigable waters, courts likely will follow Solid Waste and Wilson in order to strike down the assertion of NPDES authority. To the extent a hydrological connection can be established, courts will be free to follow Headwaters and Riverside Bayview, and to allow the EPA to enforce its NPDES permit authority.

C. What About Riverside Bayview?

The Court in Solid Waste endorsed the central holding of Riverside Bayview that the Corps can exercise jurisdiction over wetlands that are adjacent to “waters of the United States.” The rain-filled mines in Solid Waste were neither adjacent nor connected to “waters of the United States,” while the wetlands of Riverside Bayview were adjacent. This gave the Court the ability to distinguish the cases. Although Solid Waste is faithful to the literal language of Riverside Bayview, it represents a retreat from the expansive position taken by the Riverside Bayview Court.

The different approaches can be seen in the dicta of the courts. While Riverside Bayview emphasized that “the Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ . . . is of limited import,”\textsuperscript{212} Solid Waste stressed that it “is one thing to give a word limited effect and quite another to give it no effect.”\textsuperscript{213} A more substantial difference between the cases is their approach to the 1977 legislative debates concerning the Corps’s assertion of jurisdiction over wetlands. While the Solid Waste Court refused to accept Congress’s failure to act as an endorsement of the Corps’s interpretation, the Riverside Bayview Court held that “Congress acquiesced in the administrative construction.”\textsuperscript{214} Finally, while the Solid Waste Court declined to apply Chevron deference, the Riverside Bayview followed a traditional Chevron analysis.\textsuperscript{215}

As discussed, although Solid Waste and Riverside Bayview reached consistent and reconcilable conclusions, the respective Courts used very different

\begin{itemize}
  \item \textsuperscript{210} 243 F.3d 526 (9th Cir. 2001).
  \item \textsuperscript{211} Id. at 533.
  \item \textsuperscript{212} United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).
  \item \textsuperscript{213} Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172 (2001).
  \item \textsuperscript{214} Riverside Bayview, 474 U.S. at 136.
  \item \textsuperscript{215} Id. at 131.
\end{itemize}
approaches. Their consistency is more a product of their starting points than their analysis.\textsuperscript{216} However, given the Court's reluctance to reverse its prior decisions,\textsuperscript{217} it is unlikely the Court will overrule Riverside Bayview anytime in the near future. Instead, the Court likely will draw a sharp line between adjacent and non-adjacent waters using Riverside Bayview to affirm regulations dealing with adjacent waters and Solid Waste to strike down regulations dealing with non-adjacent waters.\textsuperscript{218}

D. Commerce Clause Issues

Solid Waste is also significant because of the role it plays in the Rehnquist Court's Commerce Clause jurisprudence. The Court avoided the Commerce Clause out of its "prudential desire not to needlessly reach constitutional issues."\textsuperscript{219} While doing so, it commented on the absence of "a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit."\textsuperscript{220} This begs the question whether Congress could amend § 404(a) to state that the Corps can assert jurisdiction over isolated wetlands pursuant to the terms of the Migratory Bird Rule.

The dissent likely would have no problem with this.\textsuperscript{221} This faction of the Court makes clear its belief that the Migratory Bird Rule would pass constitutional muster as an "activit[y] that 'substantially affect[s]' interstate commerce" under the third prong of Lopez.\textsuperscript{222} However, in doing so, these Justices rely on the Perez, Hodel, and Wickard cases decided prior to the Court's retreat from the cumulative effects test in Lopez. They also note that the intrinsic value of migratory birds was

\textsuperscript{216} Riverside Bayview was an appeal from a restrictive decision holding that the Corps could not assert jurisdiction over an adjacent wetland if it was not flooded by adjacent waters at a sufficient frequency. \textit{Id.} at 125. Solid Waste was an appeal from an expansive decision holding that the Corps could assert jurisdiction over isolated waters solely because of the presence of migratory birds. Solid Waste, 531 U.S. at 166.


\textsuperscript{218} Lower courts have had some difficulty drawing this line and have expressed different views of Solid Waste's precedential authority. \textit{Compare} United States v. Krilich, 152 F. Supp. 2d 983, 988 (N.D. Ill. 2001) ("SWANCC does indicate, though, that wetlands likely need to have a substantial connection to interstate commerce or a connection to navigable waters (in the traditional sense) in order to be waters of the United States that fall within the CWA term navigable waters."). \textit{With} United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 849 (D. Md. 2001) ("The SWANCC case was a narrow holding dealing with the Migratory Bird Rule and 33 CFR § 328(3)(a)(3).")

\textsuperscript{219} Solid Waste, 531 U.S. at 172.

\textsuperscript{220} \textit{Id.} at 174.

\textsuperscript{221} \textit{Id.} at 197 (Stevens, J., dissenting).

\textsuperscript{222} \textit{Id.} at 193 (Stevens, J., dissenting).
recognized in Holland.223 The reliance on Holland may be misplaced as Holland dealt with the treaty power and never discussed whether Congress could protect migratory birds under the Commerce Clause.224 However, Holland was decided well before the Court adopted the cumulative effects test in Jones & Laughlin, and an expansive reading of the cumulative effects test could support its holding.225

While the majority did not definitively rule on whether Congress could enact a Migratory Bird Rule, it likely would not approve of such legislation. The majority emphasized that, although the Commerce Clause is broad, it is limited, and, pursuant to the third prong of Lopez, there must be an activity that substantially affects interstate commerce.226 However, the Migratory Bird Rule does not identify clearly a commercial object or activity “that, in the aggregate, substantially affects interstate commerce.”227 Further, the majority expressed concern that asserting jurisdiction over isolated wetlands under the Migratory Bird Rule “would result in a significant impingement of the States’ traditional and primary power over land and water use.”228 One of the Justices in the majority already has indicated that he had doubts about whether there was a “sufficient nexus with interstate commerce” to support the Migratory Bird Rule.229

A statute protecting the habitat of migratory birds might be upheld if it is passed as a wildlife protection measure. Even after Lopez, wildlife protection acts have been upheld by circuit courts as valid regulations of interstate commerce.230 After Morrison, which focused on the economic nature of the activity being regulated, there was some question whether wildlife protection acts would survive constitutional challenge.231 However, the Court recently passed on the opportunity to consider the constitutionality of the Endangered Species Act by denying certiorari in Gibbs v. Norton.232 This action may indicate that the Court is, for the

223. Id. at 194 (Stevens, J., dissenting).
225. Solid Waste, 531 U.S. at 173.
226. Id.
227. Id. at 174.
229. See supra notes 116-123 and accompanying text.
230. Gibbs v. Babbitt, 214 F.3d 483, 507 (4th Cir. 2000) (Luttig, J., dissenting) (arguing that the killing of all red wolves living on private property in North Carolina would not constitute economic activity as required in Morrison, and, therefore, the majority’s use of aggregation was impermissible), cert. denied, Gibbs v. Norton, 121 S. Ct. 1081 (2001).
moment, no longer interested in further restraining the federal power over the environment. However, it also may be an indication that the Court intends to defer to long-standing statutes while striking down administrative interpretations of those statutes.

The Court’s decision not to rule on the Commerce Clause issue has provided some relief for civil rights activists concerned that the case might further undermine the cumulative effects test. More than ten civil rights groups filed an amicus brief. Although the groups acknowledged that the case did not directly involve civil rights, if the Court further retreated from the cumulative effects test and the aggregation theory, the decision could “cast a pall” on civil rights laws and hate crime legislation. These concerns are still prevalent because, although the Court did not reach the Commerce Clause question, its recognition of the serious and significant constitutional problems of the Corps’s argument emphasizes the vitality of the Lopez approach. As mentioned earlier, the Court is not likely to turn away from long-standing precedents, such as Katzenbach v. McClung and Heart of Atlanta Motel v. United States, which are not in danger of being overturned. However, more recent legislation that pushes at the edges of the Commerce Clause may be at risk.

32. Id. The Supreme Court has held that the “denial of a writ of certiorari imports no expression of opinion upon the merits of the case.” United States v. Carver, 260 U.S. 482, 490 (1923) (opinion by Justice Holmes); accord Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 366 n. 1 (1973); Brown v. Allen, 344 U.S. 443, 489-97 (1953). A “variety of considerations underlie denials of the writ,” Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950) (opinion by Justice Frankfurter), making it difficult to give denials of certiorari any precedential value. It is noteworthy, however, that if the Court desired to extend Solid Waste’s holding to the Endangered Species Act, Gibb would have provided the opportunity to do so.


234. Id.

235. Id.

236. Id.


239. The Supreme Court has shown reluctance to overturn cases and laws that are longstanding and have become part of the “national culture.” See Dickerson v. United States, 530 U.S. 428, 443 (2000) (“Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.”); Mitchell v. United States, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (“[T]he no-adverse-inference rule has found ‘wide acceptance in the legal culture’ . . . which is adequate reason not to overrule these cases, a course I in no way propose.”). Solid Waste followed this general approach when it struck down the Corps’s 1986 Migratory Bird
VI. CONCLUSION

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Supreme Court considered whether the Army Corps of Engineers could assert federal jurisdiction over an abandoned strip mine that, over the years, had become a series of ponds. A sharply divided Court held that, when Congress passed § 404(a) of the CWA, it did not intend the Corps’s jurisdiction to stretch that far. By deciding the case as a matter of statutory interpretation, the Court avoided the highly sensitive Commerce Clause issue. However, the dissenting opinion and the dicta in the majority opinion indicate that the Court is split on this issue, as well. The majority’s dicta indicate that the Court is committed to the narrower Commerce Clause interpretation established in *Lopez* and reaffirmed in *Morrison*. Moreover, the majority has provided a new argument for those seeking to restrict the reach of federal regulations: “Attorneys can argue either that a statute is unconstitutional as exceeding the scope of Congress’s commerce power or that the court should construe the law as inapplicable so as to avoid constitutional issues.”240 The Rehnquist Court has indicated its commitment to *Lopez*. One thing is certain: rough waters lay ahead for Commerce Clause regulations.

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