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NOTE

United States v. Wilson: Did Interstate General Substantially Affect Interstate Commerce?

Following the decision of the Supreme Court in *United States v. Lopez*,[1] commentators were quick to analyze its impact on federal law and the direction of the Court.[2] This scrutiny is not surprising given that *Lopez* marked the first occasion in nearly sixty years that the Court struck down a federal statute as beyond congressional power under the Commerce Clause.[3] Given that much of this century's important legislation—ranging from agricultural laws to the Civil Rights Acts—was passed under the constitutional authority of the Commerce Clause,[4] many observers believe that a number of these laws are now vulnerable to constitutional challenge.[5] One area of particular concern is environmental legislation.[6] Prior to *Lopez*, it was taken for granted that environmental legislation was well within Congress's commerce power.[7] Since *Lopez*, however, there is

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1. 514 U.S. 549 (1995). In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1988 & Supp. V 1993), as beyond the constitutional limits of Congress's commerce power. *See Lopez*, 514 U.S. at 551; *infra* notes 174-214 and accompanying text (discussing *Lopez*).

2. *See, e.g.*, Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34-45 (1995); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554 (1995).

3. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

4. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387 (1987).

5. *Compare* Stephen M. Johnson, United States v. Lopez*: A Misstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 69-74, 79-82 (1996) (enumerating justifications for the constitutionality of the Clean Water Act and the Endangered Species Act), *with* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 190 (1996) (calling for a return to pre-1937 Commerce Clause jurisprudence).

6. *See, e.g.*, Johnson, *supra* note 5, at 41-42 (speculating that *Lopez* "may have added another arrow to the quiver of ... opponents of federal [environmental] regulation"); Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 77 (1997) (discussing the possibility that *Lopez* will lead to a "fundamental rethinking" of the commerce power and its potential impact on the direct regulation of land use under federal environmental laws); Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 321 (1997).

7. *See* Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1307-09 (1997).

uncertainty about the limits of Congress's commerce power to pass regulations to protect the environment.[8] Seizing on this uncertainty, challenges are beginning to mount against environmental legislation such as the Clean Water Act ("the Act").[9] The Act's jurisdiction over wetlands may be particularly vulnerable after *Lopez* because, in many cases, implementation of the Act is based on somewhat attenuated connections to interstate commerce.[10]

Like many defendants charged with federal crimes and facing trial after *Lopez*, the defendants in *United States v. Wilson*[11] saw *Lopez* as an invitation to raise one more challenge to their convictions on appeal.[12] Specifically, the *Wilson* defendants argued that by adopting the "other waters" provision as part of a regulation defining the extent of jurisdiction of the section 404 permit program of the Act,[13] the U.S. Army Corps of Engineers (the "Corps") had exceeded the bounds of the Commerce Clause because the "other

8. In particular, absent a substantial connection to interstate commerce, it is not clear to what extent Congress may regulate private land use, traditionally an area of state concern. *See* Karkkainen, *supra* note 6, at 75-78; *see also* John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,408 (Aug. 1995) (singling out the Endangered Species Act and the Safe Drinking Water Act for possible vulnerability to constitutional challenge).

9. 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1998); *see infra* notes 88-94 and accompanying text (describing the functions of the Act).

10. *See* Johnson, *supra* note 5, at 66-67; Warner, *supra* note 6, at 343-55.

11. 133 F.3d 251 (4th Cir. 1997).

12. Since the *Lopez* decision, the Fourth Circuit has heard several Commerce Clause challenges to a variety of federal statutes. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997), *vacated, reh'g en banc granted* (Feb. 5, 1998) (upholding Title III of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994)); United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997) (upholding the Clean Water Act), *cert. denied*, 118 S. Ct. 1321 (1998); Hoffman v. Hunt, 126 F.3d 575 (4th Cir.) (upholding the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a)(1) (1994)), *cert. denied*, 118 S. Ct. 1838 (1997); United States v. Crump, 120 F.3d 462 (4th Cir. 1997) (upholding federal firearms statutes, 18 U.S.C. §§ 922(g), 924(c)(1) (1994)); United States v. Johnson, 114 F.3d 476 (4th Cir.) (upholding the Child Support Recovery Act, 18 U.S.C. § 228 (1994 & Supp. 1996)), *cert. denied*, 118 S. Ct. 258 (1997); United States v. Bailey, 112 F.3d 758 (4th Cir.) (upholding Title II of the Violence Against Women Act of 1994, 18 U.S.C. § 2261(a) (1994)), *cert. denied*, 118 S. Ct. 240 (1997); United States v. Wells, 98 F.3d 808 (4th Cir. 1996) (upholding federal firearms statute, 18 U.S.C.A. § 922(g) (West 1976 & Supp. 1998)); United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995) (upholding the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1) (1994)). The circuit courts of appeals decided over 35 cases presenting *Lopez* challenges in 1995 alone. *See The* Lopez *Watch*, ADMIN. & REG. L. NEWS, Winter 1996, at 4. By December 1995, approximately eight months after *Lopez*, the district and circuit courts had addressed over 80 Commerce Clause challenges to federal criminal statutes. *See* Andrew Weis, Note, *Commerce Clause in the Cross-Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1432 (1996).

13. 33 U.S.C. § 1344 (1994).

waters" provision does not require that the waters covered by the Act have a sufficient connection to interstate commerce.[14] Unlike many other defendants raising such Commerce Clause challenges, however, the defendants in *Wilson* were successful.[15]

This Note first describes the facts and holding of *United States v. Wilson* in the context of the relevant parts of the Act, including the § 404 permit program and the regulations promulgated thereunder.[16] A brief history of the commerce power is then recounted,[17] culminating in a lengthier discussion of *United States v. Lopez*.[18] The impact of *Lopez* in federal courts of appeals is summarized with respect to treatment of jurisdiction under the Act and the "other waters" provision.[19] The Note then analyzes how the current Supreme Court might address these jurisdictional issues in light of *Lopez*.[20] Finally, assuming that the "other waters" provision may be constitutionally problematic, changes to the provision are explored in addition to alternative bases for jurisdiction over wetlands such as those at issue in *Wilson*.[21]

Defendants James J. Wilson, Interstate General Company ("Interstate General"), and St. Charles Associates were convicted at trial on four felony counts of knowingly discharging fill material and excavated dirt into wetlands[22] on four parcels of land without a permit in violation of §§ 1311(a) and 1319(c)(2)(A) of the Act.[23]

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14. *See Wilson*, 133 F.3d at 255.

15. All such challenges raised in the Fourth Circuit were unsuccessful. *See supra* note 12 (listing the challenges).

16. *See infra* notes 22-136 and accompanying text.

17. *See infra* notes 137-73 and accompanying text.

18. *See infra* notes 174-214 and accompanying text.

19. *See infra* notes 215-64 and accompanying text.

20. *See infra* notes 265-342 and accompanying text.

21. *See infra* notes 343-66 and accompanying text.

22. The Corps defines wetlands as "areas that are inundated or saturated by surface or ground water at frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (1997). *See generally* Lawrence R. Liebesman, *The Section 404 Dredged and Fill Material Discharge Permit Program*, *in* THE CLEAN WATER ACT HANDBOOK 136, 138-41 (Parthenia B. Evans ed., 1994) (discussing wetlands delineation manuals); James J.S. Johnson & William L. Logan, III, *How an Uncodified Appropriations Act Has Partially Cured a Constitutional Problem About How Wetlands Are Defined for Federal Regulatory Purposes*, 13 TEMP. ENVTL. L. & TECH. J. 173 (1994) (discussing difficulties in defining wetlands); James J.S. Johnson et al., *Bogged Down Trying to Define Federal Wetlands*, 2 TEX. WESLEYAN L. REV. 481 (1996) (same). For a history of wetlands regulation, see Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction over Wetlands*, 69 N.D. L. REV. 873 (1993).

23. *See* 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1998); *Wilson*, 133 F.3d at 254.

Wilson was an experienced developer, having worked more than thirty years in the field.[24] He was the chief executive officer and chairman of the board of directors of Interstate General, a publicly traded land development company with assets of over $100 million.[25] Interstate General, in turn, was the general partner of St. Charles Associates, a limited partnership that owned the land at issue in *Wilson*.[26]

The charges related to excavation activities by the defendants in conjunction with the development of St. Charles, a planned community situated between the Potomac River and Chesapeake Bay in Charles County, Maryland.[27] At the time of the *Wilson* decision, St. Charles consisted of 4000 developed acres and 10,000 housing units inhabited by 33,000 residents.[28] At completion, it is expected to encompass 9100 acres with 80,000 residents.[29] The community was formed under the New Communities Act of 1968,[30] and the initial development was performed by a partnership between the United States Department of Housing and Urban Development ("HUD") and Interstate General.[31] As part of the agreement, seventy-five acres of wetlands near a swamp were to be preserved.[32] At issue were four parcels of land located more than ten miles from the Chesapeake Bay, more than six miles from the Potomac River, and hundreds of yards from the nearest creeks.[33] Additionally, these parcels were not pristine wilderness areas situated adjacent to already developed lots.[34]

The defendants attempted to make these parcels suitable for construction by digging ditches using a type of excavation known as "sidecasting"[35] to drain water from these parcels and dumping fill material on the land.[36] Both of these methods proved unsuccessful.[37]

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24. *See Wilson*, 133 F.3d at 254.
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. New Communities Act of 1968, Pub. L. No. 90-448, 82 Stat. 513 (repealed 1983). This statute's purpose was to "facilitat[e] the enlistment of private capital in new community development." *Id.* at 513.
31. *See Wilson*, 133 F.3d at 254.
32. *See id.*
33. *See id.* at 257.
34. *See id.* at 254.
35. Sidecasting is a process whereby a ditch is excavated and the removed soil is deposited next to the ditch. *See infra* note 60.
36. *See Wilson*, 133 F.3d at 254-55.
37. *See id.* at 255.

Engaging in these activities on wetlands required a permit pursuant to § 404 of the Act.[38] Defendants did not obtain the necessary permits and were consequently charged with criminal violations of the Act.[39]

At trial, the government introduced evidence that the parcels in question contained wetlands, including testimony and photographs of substantial standing water, reports of vegetation typical of hydrologic soils, and infrared aerial photographs displaying a pattern of streams under the vegetation.[40] Furthermore, maps of public record, such as the National Wetlands Inventory Map and topographical maps of Charles County and the State of Maryland, identified these parcels as containing wetlands.[41] The government also demonstrated that water from these areas flowed in a drainage pattern of ditches, creeks, and streams that ultimately emptied into the Potomac River.[42]

The government presented evidence that the defendants knew these lands were wetlands.[43] The very activities that formed the basis for prosecution in this case were attempts to drain the land to make construction possible.[44] Substantial fill was added in an attempt to raise the ground level of these parcels.[45] Because the ground was so wet, there were problems with the ground shifting and collapsing.[46] Bids for work on the property explicitly contained different prices for wet and dry work.[47] The government also presented testimony that despite the efforts to dry out the land, including the addition of hundreds of truckloads of stone, gravel, and other fill, wetland-loving plants continued to sprout through the fill.[48] Furthermore, a private consulting firm retained by the defendants concluded that the parcels contained wetlands and urged the defendants to seek permits from the Corps prior to developing the parcels.[49] Defendants also were warned by local zoning authorities about the potential presence of wetlands near the development.[50] Finally, even after the Corps issued

38. *See* 33 U.S.C. § 1344 (1994); *infra* notes 95-103 and accompanying text.
39. *See Wilson*, 133 F.3d at 254.
40. *See id.*
41. *See id.*
42. *See id.* at 254-55.
43. *See id.* at 255.
44. *See id.*
45. *See id.* Fill was added to three of the four parcels. Only ditches were dug on the fourth parcel. *See id.* at 254.
46. *See id.* at 255.
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*

an order to halt construction on one of the parcels, defendants continued to develop the other parcels without notifying the Corps or seeking a permit.[51]

In their defense, defendants argued that the Corps acted inconsistently and indecisively by taking action on only one parcel, despite the fact that the Corps knew of development on all four parcels.[52] The defendants also introduced an internal Corps memorandum stating that the Corps was unsure whether it had jurisdiction over the wetlands because the parcels might not be "waters of the United States" within the purview of the Act.[53] Defendants also argued that they had legally drained the parcels before adding the fill, and thus no violation of the Act had occurred.[54]

Nevertheless, the defendants were convicted of discharging fill material into a wetland without a permit—a violation of § 1311(a) of the Act.[55] Furthermore, defendants were found to have been aware that the parcels were wetlands, resulting in convictions of "knowing" violations of the Act,[56] which carry significantly more stringent penalties than mere negligent violations.[57] Wilson was sentenced to twenty-one months imprisonment with one year supervised release and fined one million dollars.[58] St. Charles Associates and Interstate General were together fined three million dollars and placed on five years probation.[59]

Defendants appealed to the Fourth Circuit on several grounds, including a challenge to the authority of § 328.3(a)(3) of the Act's

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51. *See id.*

52. *See id.*

53. *Id.* The Act prohibits discharges of pollutants into "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12) (1994). The Act defines "navigable waters" as "waters of the United States." *Id.* at § 1362(12). Exactly what Congress intended this latter term to encompass is an enigma, however. The Corps defines it in its regulations. *See* 33 C.F.R. § 328.3(c) (1997). *See infra* note 130 (quoting the regulation); *see also infra* notes 112-28 and accompanying text (explaining the dynamics of the Act and the jurisdictional regulations promulgated thereunder).

54. *See Wilson*, 133 F.3d at 255; *see also* Save Our Community v. U.S. EPA, 971 F.2d 1155, 1163-66 (5th Cir. 1992) (holding that the plain language of the Clean Water Act requires a § 404 permit only when there is a discharge, so drainage of wetlands in and of itself does not require a permit).

55. *See Wilson*, 133 F.3d at 254.

56. *See* 33 U.S.C. § 1319(c)(2) (1994) (providing for fines of up to $50,000 and imprisonment of up to three years); *Wilson*, 133 F.3d at 254-55. Another important issue raised in the *Wilson* opinion is the nature of mens rea required to constitute a "knowing" violation of the Act. *See infra* note 60.

57. *See* 33 U.S.C. § 1319(c)(1) (providing for fines of up to $25,000 and imprisonment of up to one year).

58. *See Wilson*, 133 F.3d at 254.

59. *See id.*

implementing regulations[60] (the " 'other waters' provision"), which the government argued extended jurisdiction of the Act to the four parcels in question.[61] Defendants argued that the definition of

60. *See* 33 C.F.R. § 328.3(a)(3) (1997). In addition to challenging the validity of the "other waters" provision, defendants challenged the district court's application of the Act to "wetlands that do not have a 'direct or indirect surface connection to other waters of the United States.' " *See Wilson*, 133 F.3d at 257-58; *infra* note 61. For a list of what "waters" are "waters of the United States," see *infra* note 130.

Defendants also challenged whether "sidecasting" actually constituted a violation of the Act. *See Wilson*, 133 F.3d at 258. Defendants argued that sidecasting in a wetland without introducing additional fill material did not constitute a violation of the Act since it is not a "discharge" under the meaning of § 1362(12) of the Act. *See id.* at 258-59. Judge Niemeyer agreed with the defendants' argument. *Id.* at 260. However, Judge Luttig concurred in the judgment only, and Judge Payne dissented from this view. *See id.* at 266 (Luttig, J., concurring); *id.* (Payne, J., concurring in part and dissenting in part). Thus, the Fourth Circuit's stance on this issue is not entirely clear. Incidental fallback from excavation activities has been held not to constitute the addition of fill material and hence not a "discharge" under the Act. *See* National Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (holding that incidental fallback is a "net withdrawal" and not an addition of material). For a contrary interpretation, see *Avoyelles Sportsman's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (holding that the redeposit of soil into wetlands is a "discharge" under § 1362(12) of the Act).

Furthermore, defendants challenged the district court's instructions to the jury regarding the mens rea necessary to constitute felony violations of the Act. *See Wilson*, 133 F.3d at 260-65. The Fourth Circuit unanimously found that the district court's jury instructions did not require the appropriate level of knowledge with respect to each element of the offense. *See id.* at 264-65. Among other things, the Fourth Circuit indicated that the prosecution must demonstrate that defendants knew both the physical characteristics of their property that made it a wetland and the required facts that connected the wetland to waters of the United States. *See id.* at 264. The level of mens rea necessary is an important issue, but is beyond the scope of this Note. For a more thorough discussion of this issue, see Christine L. Wettach, *Mens Rea and the "Heightened Criminal Liability" Imposed on Violators of the Clean Water Act*, 15 STAN. ENVTL. L.J. 377, 387-89 (1996) (discussing the knowing standard in the Clean Water Act). *See generally* Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 881-82 (1994) (discussing problems of intent in environmental crimes); R. Christopher Locke, *Environmental Crimes: The Absence of "Intent" and the Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311, 321-25 (1991) (discussing the less strict intent requirements in prosecuting environmental cases). For a survey of environmental crime, see generally Sandee Blabolil et al., *Environmental Crimes*, 34 AM. CRIM. L. REV. 491 (1997).

Finally, defendants also raised some issues regarding evidentiary rulings and sentencing, but these points were held to be moot in light of the Fourth Circuit's disposition of the other aspects of the appeal, a disposition requiring a new trial. *See Wilson*, 133 F.3d at 265-66.

61. *See Wilson*, 133 F.3d at 255. Jurisdiction also was founded on these wetlands being "adjacent wetlands" as defined by § 328.3(a)(7). *See id.* at 257. Defendants challenged this finding, as well as the corresponding jury instructions, on the grounds that the jury instructions indicated that jurisdiction would be proper despite the fact that no finding of a "direct or indirect surface connection" to other waters of the United States was required. *See Wilson*, 133 F.3d at 257-58. The Fourth Circuit's stance is not clear because, like the sidecasting issue, Judge Luttig concurred in the judgment only and Judge

"waters of the United States" set forth in § 328.3(a)(3) exceeded not only the bounds of the Act but also—based on the Supreme Court's recent holding in *United States v. Lopez*[62]—the Commerce Clause of the Constitution.[63]

In a majority opinion written by Judge Niemeyer, the Fourth Circuit agreed with defendants, holding that the Corps exceeded its congressional authorization in promulgating § 328.3(a)(3) because the regulation as it stood extended the jurisdiction of the Act beyond the scope of the commerce power.[64] Judge Payne joined this portion of the opinion,[65] but Judge Luttig did not, although it is likely that Judge Luttig agrees with Judge Niemeyer's analysis of the issue.[66]

Judge Niemeyer's opinion emphasized that the "other waters" provision premised the Corps's jurisdiction on a potential connection between the activities regulated and interstate commerce.[67] Judge Niemeyer stated that "[t]he regulation requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate waters."[68] He went on to state that if this regulation were a statute, "serious constitutional difficulties" would be present.[69] However, given that it was a mere regulation, Judge Niemeyer indicated that the court would not "lightly presume" that Congress, via the Act, had granted the Corps authority to assert its jurisdiction in such a "sweeping and constitutionally troubling manner."[70]

Payne dissented. *See id.* at 266 (Luttig, J., concurring); *id.* (Payne, J., concurring in part and dissenting in part).

62. 514 U.S. 549 (1995); *see infra* notes 174-214 and accompanying text (discussing *Lopez*).

63. *See* U.S. CONST. art. I, § 8, cl. 3; *Wilson*, 133 F.3d at 255.

64. *See Wilson*, 133 F.3d at 256-57.

65. *See id.* at 266 (Payne, J., concurring in part, dissenting in part).

66. *See id.* at 266 (Luttig, J., concurring in the judgment). Judge Luttig believed that *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997), *vacated, reh'g en banc granted* (Feb. 5, 1998), which upheld Title III of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994), against a Commerce Clause challenge, precluded Judge Niemeyer's analysis of the validity of the "other waters" provision. *See Wilson*, 133 F.3d at 266 (Luttig, J., concurring in the judgment). Judge Luttig dissented from the holding in *Brzonkala*, *see Brzonkala*, 132 F.3d at 974 (Luttig, J., dissenting), however, and thus appears to agree with the logic behind Judge Niemeyer's analysis on this score. *See Wilson*, 133 F.3d at 266 (Luttig, J., concurring in the judgment) (referring to Judge Niemeyer's opinion as "convincing"). In the final analysis, Judge Luttig's dissent in *Wilson* may be somewhat disingenuous. On February 5, 1998, the Fourth Circuit vacated the panel opinion in *Brzonkala* for an en banc hearing.

67. *See Wilson*, 133 F.3d at 256-57.

68. *Id.* at 257.

69. *Id.*

70. *Id.*

Accordingly, the court struck down the "other waters" provision as an expansion of jurisdiction by the Corps that exceeded the boundaries of congressional authorization under the Act.[71]

Notably, the constitutionality of the Act was never at issue in *Wilson*; the defendants only challenged the regulation and not the Act itself.[72] Furthermore, the majority opinion acknowledged that Congress's power over navigable waters was not questioned.[73] The court noted that Congress historically has been recognized as possessing the power to regulate navigable waters under the Commerce Clause.[74] The critical issue, therefore, was how much further the phrase "waters of the United States" extends beyond "navigable waters."[75] The majority acknowledged that the Supreme Court had stated that because Congress defined "navigable waters" as "waters of the United States," Congress's intent was to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[76] Consistent with this holding, the court admitted that it is "indisputable" that Congress has the power to regulate some non-navigable waters, but considered what the limits of this regulatory power are under *Lopez*.[77]

By way of dicta, Judge Niemeyer performed a brief analysis of what kinds of waters may be regulated consistent with *Lopez*.[78] First, he stated that discharge of pollutants into any waters that substantially affect interstate commerce can be regulated by Congress.[79] Second, Judge Niemeyer noted that it is appropriate for Congress to regulate discharges of pollutants into non-navigable waters in order to protect the use, or potential use, of navigable waters[80] under the theory that navigable waters are channels or instrumentalities of commerce that can be protected by regulation under the Commerce Clause according to *Lopez*.[81] Finally, he speculated that it may be proper for Congress to regulate the

71. *See id.*
72. *See id.* at 255-56.
73. *See id.* at 256.
74. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 22 (1824) ("It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, so far as navigation is concerned.... The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters.").
75. *See supra* note 53 (explaining the term "navigable waters").
76. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).
77. *See Wilson*, 133 F.3d at 256.
78. *See id.*
79. *See id.*
80. *See id.*
81. *See* United States v. Lopez, 514 U.S. 549, 558 (1995).

discharge of pollutants into waters that flow across state lines or flow into waters crossing state lines, regardless of whether or not the waters are actually navigable, due to the "interstate nature of such waters."[82] Judge Niemeyer was quick to point out, however, that such a broad assertion of jurisdiction may be questionable under the Supreme Court's recent Tenth Amendment jurisprudence.[83]

Another closely related issue raised on appeal was whether jurisdiction over the parcels in question was appropriate due to their status as "adjacent wetlands" as defined by § 328.3(a)(7) of the Act.[84] Defendants challenged the district court's instructions to the jury which stated that "adjacent wetlands" included "wetlands ... 'without a direct or indirect surface connection' with interstate waters."[85] Judge Niemeyer agreed with defendants, however, that the Fourth Circuit's stance on this issue is not clear because Judge Luttig concurred in the judgment only and did not address the merits of this holding.[86] Moreover, Judge Payne dissented on the grounds that the jury instructions were appropriate under earlier Supreme Court precedent.[87] Thus, the Fourth Circuit never fully resolved the adjacency issue in *Wilson*; rather, the core holding with respect to the Corps's jurisdiction under the § 404 permit program is the Fourth Circuit's rejection of the "other waters" provision.

To understand the *Wilson* defendants' Commerce Clause challenge, it is necessary to understand the mechanics of the statute at issue. The Act is a broad and complicated statute enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[88] The Act is comprehensive in scope, approaching its goal from a variety of directions, including providing for research;[89] developing pollution control programs;[90] establishing grants for waste treatment works;[91] setting water quality and

82. *Wilson*, 133 F.3d at 256.

83. The *Wilson* court pointed to *Printz v. United States*, 117 S. Ct. 2365 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Lopez*; and *New York v. United States*, 505 U.S. 144 (1992), to support this proposition. *See Wilson*, 133 F.3d at 256.

84. *See Wilson*, 133 F.3d at 257-58; 33 C.F.R. 328.3(a)(7) (1997).

85. *Wilson*, 133 F.3d at 257 (quoting the district court's jury instructions).

86. *See id.* at 266 (Luttig, J., concurring in the judgment).

87. *See id.*; *id.* at 266-68 (Payne, J., concurring in part and dissenting in part) (relying on *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)).

88. 33 U.S.C. § 1251 (1994); *see* Oliver A. Houck, *Clean Water Act and Related Programs*, *in* ENVIRONMENTAL LAW, at 241 (A.L.I.-A.B.A. Course of Study, Feb. 12, 1997), *available in* WESTLAW at SB52 ALI-ABA 241.

89. *See* 33 U.S.C. §§ 1254-1255.

90. *See id.* § 1256.

91. *See id.* §§ 1281-1299.

technology standards;[92] establishing permit programs;[93] and providing for enforcement of these standards and permits.[94]

One of the most important parts of the Act concerning wetlands protection is the § 404 permit program;[95] consequently, it is also one of the most controversial parts of the Act.[96] The § 404 permit program specifically requires permits in connection with the discharge of "dredged" or "fill" material into "navigable waters."[97] Congress delegated authority for administering the program to the Corps.[98] The Corps, in turn, promulgates regulations for administering the program.[99] The Corps's regulations define "dredged material" as "material that is excavated or dredged from

92. *See id.* §§ 1311-1318; *see also* Theodore L. Garrett, *Overview of the Clean Water Act, in* THE CLEAN WATER ACT HANDBOOK, *supra* note 22, at 1, 1-2 (giving an overview of water-quality based standards and technology based standards). In setting standards, the Clean Water Act also regulates liability for spills of toxic or hazardous substances. *See* 33 U.S.C. § 1321; *see also* Karen M. Wardzinski, *Oil and Hazardous Substance Spills, in* THE CLEAN WATER ACT HANDBOOK, *supra* note 22, at 183, 183-92 (providing an overview of issues related to hazardous spills).

93. *See* 33 U.S.C. §§ 1341-1345.

94. *See id.* § 1319. The Act also provides for citizen suits. *See id.* § 1365; *see generally* Karen M. McGaffey et al., *Enforcement, in* THE CLEAN WATER ACT HANDBOOK, *supra* note 22, at 195, 216-21 (providing a brief overview of citizen suits).

95. *See* 33 U.S.C. § 1344. For a comprehensive review of the jurisdiction, procedure, and liabilities under the program, see generally Liebesman, *supra* note 22. For a primer on wetlands regulation, see Mark A. Chertok, *Federal Regulation of Wetlands, in* ENVIRONMENTAL LITIGATION, at 859 (A.L.I.-A.B.A. Course of Study, June 23, 1997), *available in* WESTLAW at SB91 ALI-ABA 859. For a guide to the permit process, see Lawrence R. Liebesman & Philip T. Hundemann, *Regulatory Standards for Permits Under the Clean Water Act Section 404 Permit Program, in* THE NATURAL RESOURCES LAW MANUAL 3, 3-19 (Richard J. Fink ed., 1995).

96. *See* Houck, *supra* note 88, at 244. Houck argues that "Section 404 has been the most controversial provision in the Act and, the case could be made, of all environmental law. It pits the nation's most productive and threatened ecosystems against its most cherished notions of private property development . . . several thousand times per year." *Id.*

97. 33 U.S.C. § 1344(a). Section 1344(a) reads:

> (a) Discharge into navigable waters at specified disposal sites
>
> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

Id.

98. *See id.* § 1344(a), (d). The administration of permit programs may be further delegated to the states. *See id.* § 1344(h); 33 C.F.R. § 323.5 (1997); 40 C.F.R. §§ 124, 233 (1997).

99. *See* 33 C.F.R. § 323.

waters of the United States,"[100] and "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody."[101] Anyone engaging in these activities without a § 404 permit or in violation of the terms of a permit may be liable under § 1311(a) of the Act,[102] and violations of conditions or limitations set forth in the permit can be enjoined and punished by civil penalties.[103]

The *Wilson* defendants were convicted of violating § 1311,[104] which makes the discharge of "any pollutant by any person" unlawful, subject to several exceptions, including compliance with the § 404 permit program.[105] To understand what the prohibition covers, the list of definitions under § 1362 of the Act as well as several definitions adopted by the Corps must be examined. Section 1362 defines "discharge of a pollutant" to mean, in part, "any addition of any pollutant to navigable waters from any point source."[106] The definition for "pollutant" under § 1362 is broad and covers the fill dirt and gravel at issue in *Wilson*.[107] Similarly, "point source" is broadly defined to cover any identifiable, discrete point of discharge excluding agricultural run-off.[108] The problematic phrase is "navigable waters." The Act defines "navigable waters" as "waters of the United States" in § 1362(7).[109] The meaning of "waters of the

100. *Id.* § 323.2(c).

101. *Id.* § 323.2(e).

102. *See* 33 U.S.C. § 1311(a).

103. *See id.* § 1344(s).

104. *See Wilson*, 133 F.3d at 254. Because the jury found that the defendants had committed the violations knowingly, they also convicted the defendants for violating § 1319(c)(2)(A), which prescribes penalties for knowing violations of § 1311. *See id.* The Fourth Circuit reversed this finding, however, on appeal. *See id.* at 266.

105. 33 U.S.C. § 1311(a) ("Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.").

106. *Id.* § 1362(12).

107. *See* 33 U.S.C.A. § 1362(6) (West Supp. 1998) ("The term 'pollutant' means dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.").

108. The term "point source" means:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

Id. 33 U.S.C. § 1362(14) (1994).

109. *Id.* § 1362(7).

United States" is defined not by the Act itself but rather by a regulation of the Corps.[110] It is this regulation that defendants challenged as beyond the scope of the commerce power.[111]

The Corps originally had defined "waters of the United States" narrowly by limiting the definition to waters navigable in fact, that is, those waters that theoretically can be navigated.[112] However, environmental groups challenged the Corps's interpretation. In *National Resources Defense Council, Inc. v. Callaway*,[113] the District Court of the District of Columbia agreed with the plaintiffs, ordering the Corps to rescind its existing regulations and replace them with new ones asserting federal jurisdiction "to the maximum extent permissible under the Commerce Clause of the Constitution" as was intended by Congress.[114] The Corps responded in 1975 with new regulations recognizing a more expansive interpretation of "waters of the United States."[115] Congress considered narrowing this definition, but ultimately did not.[116]

Finally, in 1985, the Supreme Court approved the Corps's broader interpretation of the phrase "waters of the United States" in *United States v. Riverside Bayview Homes, Inc.*[117] In this case, Riverside Bayview Homes ("Riverside") was the owner of eighty acres of marshland in Michigan.[118] In 1976, Riverside began to add fill material to the property to make it suitable for a housing development.[119] The Corps believed this property was an "adjacent wetland" included in "waters of the United States" as defined in its 1975 regulations and filed suit to enjoin Riverside.[120] The district court agreed with the Corps and enjoined Riverside from filling its

110. *See* 33 C.F.R. § 328.3(a).

111. *See Wilson*, 133 F.3d at 255.

112. *See* Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,119 (1974) (defining "navigable waters of the United States" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce").

113. 392 F. Supp. 685 (D.D.C. 1975).

114. *Id.* at 686. It is not clear how the court came to this conclusion.

115. *See* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324-25 (1975).

116. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135-37 (1985) (analyzing the legislative history of the 1977 amendments to the Clean Water Act).

117. 474 U.S. 121 (1985).

118. *See id.* at 124.

119. *See id.*

120. *See id.* These are the regulations adopted in response to the *Callaway* decision. *See supra* notes 113-15 and accompanying text.

land without a permit.[121] Riverside appealed, and in 1980, the Sixth Circuit remanded with instructions to consider the effect of intervening amendments to the regulation made in 1977.[122] The district court again upheld the Corps's jurisdiction, and again Riverside appealed.[123] This time, the Sixth Circuit reversed.[124]

The Supreme Court, in turn, reversed the Sixth Circuit and upheld jurisdiction based on the language, history, and policy of the Act.[125] The Court held that Congress chose to give the Act broad coverage when it defined "navigable waters" as "waters of the United States," intending to regulate some waters that were not navigable in fact.[126] Furthermore, the Court found that the Corps's inclusion of adjacent wetlands in the definition of "waters of the United States" was not unreasonable given the broad scope of the Act and the inherent difficulties of precisely defining regulable waters, particularly when considering the interconnectivity of hydrological systems.[127] *Riverside* is the Court's latest word on the extent of jurisdiction under the Act; however, the Supreme Court's Commerce Clause jurisprudence has changed dramatically since then.[128]

The *Riverside* Court addressed only adjacent wetlands in its decision. The specific regulation with which the *Wilson* court took issue, however, is the more expansive "other waters" provision, which extends jurisdiction to isolated wetlands not necessarily located near any navigable waters.[129] The "other waters" provision defines "waters of the United States" to include: "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 could affect interstate or foreign commerce."[130]

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121. *See Riverside Bayview Homes*, 474 U.S. at 125.
122. *See id.*
123. *See id.*
124. *See* United States v. Riverside Bayview Homes, Inc., 729 F.2d 391 (6th Cir. 1984).
125. *See Riverside Bayview Homes*, 474 U.S. at 139.
126. *See id.* at 133.
127. *See id.* at 134-35.
128. *See infra* notes 171-214 and accompanying text.
129. *See Wilson*, 133 F.3d at 256-57.
130. 33 C.F.R. § 328.3(a)(3) (1997). Section 328.3(a)(1)-(7) in its entirety reads as follows:

The term *waters of the United States* means

(1) All waters which are currently used, or 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;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including

The Fourth Circuit in *Wilson* held that the "other waters" provision did not necessarily regulate an activity having a substantial effect on interstate commerce and did not require that the "waters" have any sort of nexus with navigable or interstate waters[131]—the implication being that the regulation did not fall within one of the categories of activities susceptible to regulation under the Commerce Clause as enumerated in *Lopez*.[132] The Fourth Circuit went on to suggest that if this regulation were a statute, it might be unconstitutional because it would have exceeded congressional authority under the Commerce Clause.[133] Acknowledging that the regulation was merely a regulation, however, the court said that absent a "clear indication to the contrary," it would not presume that Congress authorized the Corps to assert its jurisdiction via the "other waters" provision in such a constitutionally questionable manner.[134] The Fourth Circuit also stated, without further elaboration, that even as a matter of statutory construction, "waters of the United States" should be interpreted to mean waters that are at least interstate or closely related to navigable or interstate waters.[135] Accordingly, the Fourth Circuit held that the Corps exceeded its statutory authority under the Act when it promulgated § 328.3(a)(3).[136]

The United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several

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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 including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a)(1)-(7).

131. *See Wilson*, 133 F.3d at 257.

132. *See infra* notes 185-88 and accompanying text.

133. *See Wilson*, 133 F.3d at 257.

134. *Id.*

135. *See id.*

136. *See id.*

States, and with the Indian Tribes."[137] *Lopez* is the most recent statement on Commerce Clause jurisprudence by the Court. While the lasting significance of *Lopez* is not entirely clear, *Lopez* marks the first occasion in over sixty years that the Court has ruled a federal statute unconstitutional for exceeding Commerce Clause power.[138] To understand the defendants' *Lopez* challenge to the "other waters" provision, it is worth considering *Lopez* in relation to prior Commerce Clause jurisprudence.

The progenitor of Commerce Clause jurisprudence is Chief Justice Marshall's oft-cited opinion in *Gibbons v. Ogden*.[139] At issue in *Gibbons* was a New York statute granting an exclusive license to conduct steamship travel between New York and New Jersey.[140] New Jersey retaliated by allowing New Jersey citizens who were sued in New York under the statute to recover treble damages in New Jersey courts.[141] The Court struck down the New York statute, holding that it was preempted by an earlier federal statute.[142] Chief Justice Marshall, writing for a unanimous Court, defined the commerce power as plenary, using broad language: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power ... is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[143] In contrast to this sweeping statement, Chief Justice Marshall also recognized inherent limitations present in the language of the Commerce Clause: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one.... The enumeration presupposes something not enumerated; and that something, if we regard the language,... must be the exclusively internal commerce of a State."[144] In considering whether the commerce power extended to purely intrastate activities, Chief Justice Marshall stated that "[s]uch a power would be inconvenient, and is certainly unnecessary."[145] Thus, the *Gibbons* Court established a definition of the Commerce

137. U.S. CONST. art. I, § 8, cl. 3.

138. *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936), had been the last. *See* Julian Epstein, *Evolving Spheres of Federalism After* U.S. v. Lopez *and Other Cases*, 34 HARV. J. ON LEGIS. 525, 528 (1997).

139. 22 U.S. (9 Wheat.) 1 (1824).

140. *See id.* at 1-2.

141. *See id.* at 4-5.

142. *See id.* at 213-17.

143. *Id.* at 196.

144. *Id.* at 194-95.

145. *Id.* at 194.

Clause expansive in coverage yet limited by its own language.

Until the late nineteenth century, the Court remained relatively silent with respect to the dimensions of Congress's power under the Commerce Clause, in part because the controversy over slavery prevented consensus in exercising the power.[146] After the Civil War, Congress began to exercise its commerce power with new vigor. The passage of the Interstate Commerce Act[147] in 1887 and the Sherman Antitrust Act[148] in 1890 marked a "new era of federal regulation under the commerce power."[149] During the late 1800s and early 1900s, the Court made numerous attempts to divide activities into commercial and non-commercial categories according to formalistic distinctions[150] or to distinguish between an activity's "direct" and "indirect effects" on commerce.[151] While frequently overruling acts

146. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 194 (3rd ed. 1996). In fact, most decisions in the 1800s revolved around the "dormant" Commerce Clause, which concerned state legislation burdening interstate commerce as opposed to the limits of federal power. *See, e.g.*, Kidd v. Pearson, 128 U.S. 1 (1888) (upholding an Iowa statute prohibiting the manufacture of liquor). For a history of dormant Commerce Clause jurisprudence, see Sam Kalen, *Reawakening the Dormant Commerce Clause in Its First Century*, 13 U. DAYTON L. REV. 417 (1988).

147. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

148. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

149. United States v. Lopez, 514 U.S. 549, 554 (1995); *see also* Wickard v. Filburn, 317 U.S. 111, 121 (1942) (describing nineteenth century Commerce Clause jurisprudence); STONE ET AL., *supra* note 146, at 194-95 (briefly describing the commerce power during the post-Civil War era).

150. For example, the Court frequently separated mining, agriculture, and manufacturing from commerce in its analyses. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."); Hammer v. Dagenhart, 247 U.S. 251, 272 (1918) ("The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof."), *overruled by* United States v. Darby, 312 U.S. 100 (1941); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it.").

151. *See, e.g.*, *Carter Coal*, 298 U.S. at 309 (labeling the prohibited activities as "local controversies and evils affecting local work undertaken to accomplish that local result," and that any effect on commerce by such activities as "secondary and indirect"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) ("[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system."); *E.C. Knight*, 156 U.S. at 12 ("[A]lthough [manufacturing] may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly."). Note, however, that the Court's formalistic line-drawing did not always result in the invalidation of federal statutes. *See, e.g.*, United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922) (upholding antitrust laws as applied to striking coal miners); Stafford v. Wallace, 258 U.S. 495 (1922)

of Congress predicated on the Commerce Clause, the Court did find several narrow categories of subject matter to be appropriate objects of federal regulation under the commerce power, such as the instrumentalities of commerce[152] and certain prohibited items in the flow of commerce.[153]

This state of affairs continued until 1937, when the Court handed down its watershed decision in *NLRB v. Jones & Laughlin Steel Corp.*[154] In that case, the Court finally rejected earlier formalistic approaches and adopted a realistic approach toward the Commerce Clause. Upholding the National Labor Relations Act of 1935,[155] the Court dismissed the argument that the statute exceeded the congressional power, stating: "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum."[156] The Court continued: "We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience."[157] This shift from constructing substantive distinctions, often semantic in nature, to examining actual effects of an activity on interstate commerce marked a dramatic shift in the Court's thinking on the commerce power.[158]

On the heels of *Jones & Laughlin Steel*, the Court handed down a series of decisions upholding key New Deal legislation.[159] In *United States v. Darby*,[160] the Court upheld the Fair Labor Standards Act,[161]

(upholding the Packers and Stockyard Act of 1921); Swift & Co. v. United States, 196 U.S. 375 (1905) (upholding the regulation of stockyards under the Sherman Act).

152. *See, e.g.*, The Shreveport Rate Cases, 234 U.S. 342 (1914) (regulating intrastate railway rates).

153. *See, e.g.*, Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937) (addressing goods made by convicts); Hoke v. United States, 227 U.S. 308 (1913) (upholding the White Slave Act banning the transport of women across state lines for immoral purposes); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (addressing tainted eggs); Champion v. Ames, 188 U.S. 321 (1903) (addressing lottery tickets).

154. 301 U.S. 1 (1937); *see Lopez*, 514 U.S. at 555 (referring to *Jones & Laughlin Steel* as a "watershed case"); Epstein, *supra* note 4, at 1443 (calling *Jones & Laughlin Steel* "[t]he first major case to test the traditional analysis of the [C]ommerce [C]lause"); Regan, *supra* note 2, at 603 (calling *Jones & Laughlin Steel* "the first great case of the modern era of the Commerce Clause").

155. National Labor Relations Act (Wagner Act), ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151-169 (1994).

156. *Jones & Laughlin Steel*, 301 U.S. at 41.

157. *Id.* at 41-42.

158. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 333 (1997).

159. *See infra* notes 160-70 and accompanying text.

160. 312 U.S. 100 (1941).

161. Fair Labor Standards Act, ch. 676, 52 Stat. 1068 (1938) (codified as amended at

holding that Congress may regulate intrastate activities where those activities have a "substantial effect on interstate commerce."[162] In *Wickard v. Filburn*,[163] the Court upheld the Agricultural Adjustment Act of 1938,[164] again firmly rejecting prior semantic distinctions.[165] In order to stabilize wheat prices, the Agricultural Adjustment Act established limits on the amount of wheat a farmer could grow.[166] Roscoe Filburn exceeded his allotment and was penalized according to the terms of the statute.[167] A particularly noteworthy aspect of *Wickard* is that the statute was upheld as it applied to wheat that Filburn had grown for personal consumption in the form of feed for his poultry and livestock, flour for home use, and seed for future crops.[168] Rather than measure the impact of decreased demand due to Filburn's extra harvest, the Court chose to analyze the impact from an aggregate standpoint: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[169] Thus, even though a single instance

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29 U.S.C. §§ 201-219 (1994 & Supp. 1995)).

162. *Darby*, 312 U.S. at 119. Similar legislation regulating child labor had been struck down by the Court some 20 years earlier in *Hammer v. Dagenhart*, 247 U.S. 251 (1918). *Darby* expressly overruled *Dagenhart*. *See Darby*, 312 U.S. at 116-17.

163. 317 U.S. 111 (1942). While the *Lopez* Court referred to *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *United States v. Lopez*, 514 U.S. 549, 560 (1995), others have downplayed its significance. *See* Jim Chen, Filburn*'s Forgotten Footnote—of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 276-80 (1997) (describing the significance of the *Wickard* holding as more myth than history).

164. Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. §§ 1281-1393 (1994 & Supp. 1996)).

165. *See Wickard*, 317 U.S. at 124-25. In *Wickard*, the Court explained:

> Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it.... But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id.

166. *See id.* at 115.

167. *See id.* at 114-15.

168. *See id.* at 114.

169. *Id.* at 127-28. This same aggregation principle would later play a definitive role in determining whether or not a substantial effect on interstate commerce was present. *Compare* Perez v. United States, 402 U.S. 146, 154-55 (1971) (holding that extortionate credit transactions affect interstate commerce despite their intrastate character), *with*

may be insignificant, the Court chose to look at the cumulative effects of all individual instances. This precedent effectively lowered the standard to show that a regulated activity affected commerce.[170]

Following *Jones & Laughlin Steel*, *Darby*, and *Wickard*, the Court charted an expansive course in Commerce Clause jurisprudence,[171] yet it never explicitly rejected the idea that there are limits to congressional power under the Commerce Clause.[172] During this period the Court maintained a highly deferential attitude toward Congress's exercise of the commerce power.[173] Thus, the tenor of Commerce Clause jurisprudence preceding *Lopez* can be characterized as a lengthy period of expansiveness reflecting a reluctance to second-guess Congress. *Lopez* marked the first bump in the road to unabated federal power through the Commerce Clause.

In *Lopez*, the respondent, a twelfth-grade student at the time, was arrested for carrying a concealed handgun on school grounds.[174] Initially charged with a violation of state law, the respondent later was charged by federal agents[175] with violating the Gun-Free School Zones Act of 1990.[176] The statute made it a federal crime to possess a firearm within 1000 feet of school grounds.[177] After being convicted and sentenced to six months imprisonment by the district court, respondent appealed to the Fifth Circuit, arguing that the Gun-Free

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United States v. Lopez, 514 U.S. 549, 561 (1995) (determining that federal law prohibiting possession of a gun within 1000 feet of a school was not part of a larger economic regulatory scheme).

170. *See Lopez*, 514 U.S. at 600-01 (Thomas, J., concurring) (noting with disapproval the fact that trivial activities having insignificant effects on commerce can be regulated under the commerce power using the "aggregation principle").

171. Congress conspicuously exercised its Commerce Clause power when it passed civil rights legislation in the 1960s. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding a Commerce Clause challenge to Title II of the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (companion case).

172. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968) ("But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved."), *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976).

173. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."); *Heart of Atlanta Motel*, 379 U.S. at 258 (setting the standard as whether Congress had a rational basis for its determination that commerce was affected).

174. *See Lopez*, 514 U.S. at 551.

175. *See id.* The state law charge was dropped because of the imposition of federal charges. *See id.*

176. 18 U.S.C. § 922(q) (1988 & Supp. V 1993).

177. *See id.*; *id.* § 921(a)(25) (Supp. V 1993) (defining "school zone").

School Zones Act of 1990 exceeded Congress's power under the Commerce Clause.[178] The Fifth Circuit agreed[179] and the Supreme Court granted certiorari.[180]

In *Lopez*, the Court struck down the Gun-Free School Zones Act as unconstitutional because it was beyond the scope of congressional power under the Commerce Clause. Of the six separate opinions in *Lopez*, four adequately illuminate the differences in thought among the justices: the majority opinion written by Chief Justice Rehnquist;[181] two concurring opinions, one by Justice Kennedy[182] and a second by Justice Thomas;[183] and a dissenting opinion by Justice Breyer.[184]

Chief Justice Rehnquist started his opinion with a recounting of Commerce Clause jurisprudence from *Gibbons* to the present.[185] He then enumerated three broad categories of activity that are permissible objects of federal regulation. First, Congress may legislate with respect to the "use of the channels of interstate commerce."[186] Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce" even though the regulated activity is of an intrastate character.[187] Finally, Congress has the power to regulate activities that "substantially affect" interstate commerce.[188]

In applying this three-pronged analysis to the Gun-Free School Zones Act, Chief Justice Rehnquist quickly dispatched with the first

178. *See* United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

179. *See id.* at 1367-68.

180. *See* United States v. Lopez, 511 U.S. 1029 (1994) (granting certiorari).

181. *See* United States v. Lopez, 514 U.S. 549, 551 (1995). Justices O'Connor, Scalia, Kennedy, and Thomas joined the Chief Justice. *See id.*

182. *See id.* at 568 (Kennedy, J., concurring). Justice O'Connor joined Justice Kennedy in his concurrence. *See id.*

183. *See id.* at 584 (Thomas, J., concurring).

184. *See id.* at 615 (Breyer, J., dissenting). Justices Stevens, Souter, and Ginsburg joined Justice Breyer in his dissent. *See id.* Justices Stevens and Souter also filed separate dissents. *See Lopez*, 514 U.S. at 602 (Stevens, J., dissenting); *id.* at 603 (Souter, J., dissenting). Because both Justices joined Justice Breyer's dissent, their dissents will not be discussed separately.

185. *See id.* at 552-58.

186. *Id.* at 558.

187. *Id.*

188. *See id.* at 558-59. In the past, the Court had not been clear as to whether the regulated activity had to "affect" or "substantially affect" interstate commerce in order for Congress to act within the extent of the commerce power. *See id.* at 559. The majority set the standard as "substantially affects," finding this interpretation consistent with the "great weight" of the Court's case law. *Id.*

two categories and turned his focus to the third.[189] In determining that the statute did not regulate any activity "substantially affect[ing]" interstate commerce, the Chief Justice highlighted two factors: first, by its own terms the statute "has nothing to do with 'commerce' or any sort of economic enterprise" nor was it part of a larger economic regulatory scheme;[190] and second, the statute had no jurisdictional component that, on a case-by-case basis, would guarantee application of the law only under circumstances where interstate commerce was involved.[191]

Permeating Chief Justice Rehnquist's analysis is a concern more properly classified as one of federalism or of the Tenth Amendment rather than one relating to the nexus between the regulated activity and interstate commerce.[192] The Chief Justice voiced the Court's concern that the government's arguments made it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[193] This protective stance towards state sovereignty is consistent with the Court's recent federalism jurisprudence.[194]

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189. *See id.* at 559. In making its argument the government never argued that there was jurisdiction under the first two categories to enact § 922(q). *See* Brief for Petitioner at 8-11, *Lopez* (No. 93-1260); Adam Hirsh, United States v. Lopez*: A Commerce Clause Challenge*, Presentation at the University of Idaho College of Law (Feb. 3, 1996), *adapted in* 32 IDAHO L. REV. 505, 506 (1996).

190. *Lopez*, 514 U.S. at 561.

191. *See id.* (citing United States v. Bass, 404 U.S. 336 (1971)). A jurisdictional component is one that limits the reach of a federal statute, like § 922(q), to those activities that "have an explicit connection with or effect on interstate commerce." *Id.* at 562.

192. *See* Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 622-26 (1995) (discussing federalism in the *Lopez* opinion); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 129 (describing *Lopez* as an "act of interpretive fidelity"); Stephen M. McJohn, *The Impact of* United States v. Lopez*: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1 (1995) (arguing that the *Lopez* Court combined inherent limitations on the commerce power and external Tenth Amendment limitations on the commerce power to produce a heightened scrutiny of federal regulation of areas historically the province of the states).

193. *Lopez*, 514 U.S. at 654.

194. *See* Printz v. United States, 117 S. Ct. 2365 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); New York v. United States, 505 U.S. 144 (1992); *see also* Erwin Chemerinsky, *Formalism and Functionalism in Federal Analysis*, 13 GA. ST. U. L. REV. 959 (1997) (arguing for a functional as opposed to formalistic approach to federalism); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213, 2213 (1996) (discussing the Court's encroachment on the legislature); Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997) (discussing *Seminole Tribe*'s impact on federalism); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993)

Justice Kennedy's concurrence elaborated on this theme. He expressed reservations about the lack of political responsibility that inheres when the federal balance is upset, as is the case when the federal government regulates non-commercial activities traditionally under the domain of the states.[195] In the end, Justice Kennedy concluded that the statute was "an unconstitutional assertion of the commerce power."[196] He also noted, however, that "in this interdependent world of ours" any activity may ultimately have either a commercial origin or consequence.[197] Carrying this logic to its extreme, the commerce power becomes absolute, obliterating any meaningful distinctions between the state and federal governments—a scenario which, at some point, exceeds the commerce power. It is in this context, Justice Kennedy noted, that the question of state sovereignty is a useful inquiry to determine when Congress has exceeded the limits of the Commerce Clause.[198]

Although he joined the majority opinion in *Lopez*, Justice Kennedy qualified his concurrence with two important points. First, he noted that history has shown solely content-based distinctions to be imprecise and unworkable.[199] Second, he emphasized the importance of stability in Commerce Clause jurisprudence.[200] Given the vested interest the Court and the legal system have in stability, Justice Kennedy cautioned that the principle of stare decisis precludes an outright reversal of the expansive Commerce Clause jurisprudence witnessed during the past sixty years.[201] Summarizing, he stated: "Congress can regulate in the commercial sphere on the

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(discussing federalism and the *New York* case).

195. *See Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). The importance of political accountability is a recurring theme in recent Tenth Amendment jurisprudence. *See Printz*, 117 S. Ct. at 2378 ("The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known."); *New York*, 505 U.S. at 169 (noting that when the federal government compels regulation by the states, the state administrators may "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision"). The Court in *New York* further commented that "[a]ccountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate." *Id.*

196. *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

197. *Id.* (Kennedy, J., concurring).

198. *See id.* at 580 (Kennedy, J., concurring).

199. *See id.* at 574 (Kennedy, J., concurring); *supra* notes 146-70 and accompanying text (describing Commerce Clause jurisprudence from the late nineteenth century to the 1930s).

200. *See Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.").

201. *See id.* (Kennedy, J., concurring).

assumption that we have a single market and a unified purpose to build a stable national economy."[202]

Justice Thomas concurred with the majority opinion, yet characterized the "substantial effects" test by the majority as a broad, expansive test.[203] He went so far as to state that the test "lack[ed] . . . any grounding in the original understanding of the Constitution" and "grant[ed] Congress a police power over the Nation."[204] In fact, Justice Thomas indicated a preference for and a return to the formalistic distinctions that pervaded pre-New Deal Commerce Clause jurisprudence.[205] Unlike the majority or dissent, Justice Thomas indicated a readiness to revisit and overrule earlier Commerce Clause decisions, but also acknowledged that this might be a difficult task.[206] In the end, Justice Thomas welcomed a change in modern Commerce Clause jurisprudence.[207]

In striking contrast to Justice Thomas's call for a massive rollback of the commerce power, Justice Breyer argued in dissent that the Gun-Free School Zones Act was well within congressional power because it regulated an activity that had a significant effect on commerce, or at least that Congress had a rational basis for believing the statute regulated an activity having a significant effect on commerce.[208] Justice Breyer preferred a more deferential "rational basis" standard because the Constitution explicitly delegated the commerce power to Congress, and legislatures generally are in a better position to make empirical judgments with respect to the factual connection between the regulated activity and interstate

202. *Id.* (Kennedy, J., concurring).

203. *See id.* at 584-602 (Thomas, J., concurring).

204. *Id.* at 599-600 (Thomas, J., concurring).

205. *See id.* at 586 (Thomas, J., concurring) ("As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture.").

206. *See id.* at 601 n.8 (Thomas, J., concurring). Justice Thomas explained, "Although I might be willing to return to the original understanding, I recognize that many believe that it is too late ... to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean." *Id.*

207. *See id.* at 602 (Thomas, J., concurring) ("At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence."). Justice Thomas is not alone on this score. *See* Epstein, *supra* note 5, at 190 ("So what should be done? The most attractive possibility is to roll back the carpet to the original 1787 position.... [T]hat means to take all the decisions that are regarded as sacrosanct by everyone but Justice Thomas, and overrule them one and all, preferably with a single blow.").

208. *See id.* at 616-17 (Breyer, J., dissenting). Justice Breyer preferred the term "significant" to "substantial," but also indicated that it would make no difference in this case. *See id.* at 616 (Breyer, J., dissenting).

commerce.[209] Justice Breyer believed this standard to be met because education is "inextricably intertwined" with the economy.[210] The presence of guns in schools significantly affects the quality of education children receive, thereby affecting national productivity as a whole.[211] Furthermore, when deciding where to locate, businesses often factor in heavily the presence of an educated work force.[212] Finally, when determining how significant an activity's impact is on interstate commerce, the cumulative effect of all similar instances must be considered, not just individual occurrences in isolation.[213] On the basis of these arguments, Justice Breyer concluded that there was sufficient evidence for Congress to find a significant connection to interstate commerce to uphold the statute.[214]

In the wake of *Lopez*, many commentators predicted far-reaching consequences because a multitude of legislation had been passed pursuant to the Commerce Clause since 1937, including environmental legislation such as the Clean Water Act.[215] Not surprisingly, challenges have already surfaced in the lower courts.[216]

Just over two and one-half months prior to the *Wilson* decision, the Fourth Circuit decided *United States v. Hartsell*.[217] Because of *Hartsell*, it is unclear where the Fourth Circuit presently stands on the limits of constitutionally permissible jurisdiction under the Clean Water Act. The defendants in *Hartsell* owned and operated a

209. *See id.* at 616-17 (Breyer, J., dissenting).

210. *Id.* at 620 (Breyer, J., dissenting).

211. *See id.* (Breyer, J., dissenting).

212. *See id.* at 622 (Breyer, J., dissenting).

213. *See id.* at 616 (Breyer, J., dissenting).

214. *See id.* at 631 (Breyer, J., dissenting).

215. *See* Karkkainen, *supra* note 6, at 77 (describing federal environmental regulation as having "long been assumed to be a valid exercise of the Commerce power"); Warner, *supra* note 6, at 340-41 ("While it is true that some environmental laws have been based on authority arising from other Constitutional clauses, such as the Property Clause, most of the environmental enactments depend on an expansive reading of congressional commerce power.").

216. *See, e.g.*, National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (upholding § 9(a)(1) of the Endangered Species Act, 16 U.S.C. § 1538(a)(1) (1994)), *cert. denied*, 118 S. Ct. 2340 (1998); United States v. Olin, Corp., 107 F.3d 1506 (11th Cir. 1997) (reversing the district court and upholding the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 1995 & Supp. 1998)); United States v. Bramble, 103 F.3d 1475, 1480-82 (9th Cir. 1996) (upholding the Eagle Protection Act, 16 U.S.C. § 668 (1994)); United States v. Romano, 929 F. Supp. 502, 507-09 (D. Mass. 1996) (upholding the Lacey Act, 16 U.S.C. §§ 3371-3378 (1994), a federal wildlife protection statute), *rev'd on other grounds*, 137 F.3d 677 (1st Cir. 1998).

217. 127 F.3d 343 (4th Cir. 1997). The panel consisted of Circuit Judges Ervin and Motz, and District Court Judge Blake sitting by designation. *See id.*

wastewater treatment and oil reclamation business in Charlotte, North Carolina.[218] Defendants' operations involved accepting industrial wastewater and oil, processing the oil for reuse, and treating the wastewater prior to its discharge into a public sewer.[219] Defendants' discharges were carried via the sewer to the Irwin Creek Sewage Treatment Plant operated by the Charlotte-Mecklenberg Utility Department ("CMUD"). Water treated at this sewage plant was then discharged, flowing into the Irwin Creek and in turn flowing into the Catawba River, which crosses into South Carolina and finally empties into the Atlantic Ocean.[220] Pursuant to investigations by both the Federal Bureau of Investigation and CMUD, it was discovered that defendants were discharging excessive levels of toxic substances, including cadmium, chromium, copper, lead, nickel, and zinc, in violation of its pretreatment permits.[221] The illegal disposal methods employed by defendants involved intentionally bypassing treatment and monitoring devices.[222] As a result, pollutants were discharged directly into the sewer line, often under the cover of darkness.[223] Defendants were convicted of conspiracy and several counts of knowingly violating the relevant pretreatment standards, resulting in over $50,000 in fines and probation for the corporate defendant, and fines and fifty-one month sentences for the individual defendants.[224]

On appeal, defendants challenged the constitutionality of the Act based on the *Lopez* decision.[225] The Fourth Circuit found the argument to be without merit, holding that "Congress clearly intended to regulate pollutant discharge into sewer systems and other nonnavigable waters through the [Act], and that Congress has the constitutional authority to do so."[226] The court drew support from cases pre-dating *Lopez*, such as *Riverside Bayview Homes*.[227]

218. *See id.* at 346.
219. *See id.*
220. *See id.*
221. *See id.* at 346-47.
222. *See id.* at 347. Such "bypass" methods included discharging untreated wastewater directly into the sewer by means of a tank equipped with a special valve for rapid discharge and even directing employees to pump wastewater through the employees' toilet. *See id.*
223. *See id.*
224. *See id.*
225. *See id.* at 348. Defendants also raised a barrage of challenges ranging from violations of due process to erroneous rulings, all found to be without merit. *See id.* at 349-54.
226. *Id.*
227. *See id.* (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121

Furthermore, the Fourth Circuit rejected defendants' claim that *Lopez* rendered the Act unconstitutional, denying that "*Lopez* is a radical sea change which invalidates the decades of Commerce Clause analysis" and declared that the Act is "certainly a valid exercise of Congressional power."[228]

The only other circuit to have addressed the extent of the definition of "waters of the United States" prior to *Wilson* is the Eleventh Circuit in *United States v. Eidson*.[229] Similar to *Hartsell*, defendants were officers of an oil reclamation and industrial wastewater treatment business.[230] Defendants routinely engaged in illegal discharges of industrial wastewater, going to great lengths to conceal their activities from environmental regulators.[231] One evening, defendants were caught pumping a "sludge substance" containing a number of toxic pollutants directly into a storm sewer when a police officer chanced upon them.[232] The storm sewer emptied into an open drainage ditch which fed into a drainage canal.[233] This canal then flowed into a creek which in turn emptied into Tampa Bay.[234] Defendants were convicted of knowingly violating the Act.[235]

The challenge to the Act in *Eidson* differed somewhat from the challenges in *Hartsell* and *Wilson*. The *Eidson* defendants challenged not the Act itself, nor the specific wording of any regulations, but rather the finding that the specific drainage ditch in question was a "navigable water" within the meaning of § 1362(7).[236] The *Eidson*

(1985)).

228. *Id.* at 348 n.1 (citing United States v. Eidson, 108 F.3d 1336, 1341 (11th Cir. 1997)). The *Wilson* court never addressed *Hartsell* in its opinion—perhaps because the *Wilson* oral arguments were heard prior to the written opinion in *Hartsell*. *See Wilson*, 133 F.3d at 251; *Hartsell*, 127 F.3d at 343.

229. 108 F.3d 1336 (11th Cir.), *cert. denied*, 118 S. Ct. 248, *and cert. denied*, 118 S. Ct. 578 (1997).

230. *See id.* at 1340.

231. As in *Hartsell*, the violations in *Eidson* were egregious, including dumping industrial waste directly onto bushes and woods in an adjacent lot, keeping fraudulent inventory documents that recorded the illegal discharges as being stored in a fictitious "Tank 8," and importing truckloads of dirt to conceal soil contamination in anticipation of visits from inspectors. *See id.*

232. *See id.* at 1340.

233. *See id.* at 1342.

234. *See id.*

235. *See id.* at 1340. These are the same statutes under which the *Wilson* defendants were convicted. *See supra* note 23 and accompanying text. The *Eidson* defendants were also found guilty of three counts of mail fraud for falsely assuring their customers that they were disposing of the wastewater in compliance with all relevant environmental laws, regulations, and permits. *See Eidson*, 108 F.3d at 1340.

236. *See Eidson*, 108 F.3d at 1341.

court emphasized that "waters of the United States" was broadly defined and included waters that were not literally navigable.[237] Given this broad definition of "waters of the United States," the Eleventh Circuit had no problem determining that the ditch in question was a navigable water within the purview of § 1362(7), despite the fact that it was not navigable in fact, was man-made, and flowed only intermittently.[238]

Immediately after *Lopez*, the Supreme Court had a chance to address the constitutionality of the "other waters" provision at issue in *Wilson*, but declined to do so in *Cargill, Inc. v. United States*.[239] The facts leading up to this opportunity focus on the activities of the Leslie Salt Company ("Leslie Salt"), which was the owner of a tract of land near San Francisco, California. Leslie Salt used the property for the manufacture of salt until 1959.[240] This tract of land contained pits used to collect calcium chloride and shallow basins used for crystallizing the salt.[241] During most of the year, these pits and basins were dry, but during the winter and spring, they collected rainwater, forming temporary ponds.[242] In 1985, Leslie Salt began digging a feeder ditch and a siltation pond, discharging fill that affected the seasonally-ponded areas.[243]

In order to stop these activities, the Corps issued a cease and desist order pursuant to § 404 of the Act.[244] Leslie Salt filed suit challenging the Corps's jurisdiction over the temporary ponds and initially was successful in *Leslie Salt Co. v. United States* ("*Leslie Salt I*").[245] In *Leslie Salt I*, the district court found that the temporary ponds were not "waters of the United States" because, in part, they were not "other waters" under § 328.3(a)(3); they were man-made and dry much of the year.[246] On appeal in *Leslie Salt Co. v. United*

237. *See id.* at 1341 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985)). In *Eidson*, the Eleventh Circuit referred approvingly to an EPA regulation defining "waters of the United States" identically to § 328.3 at issue in *Wilson* as "[i]n accordance with this legislative intent." *Id.* However, the particular part of the regulation at issue in *Eidson* covered "tributaries to waters that 'may be susceptible to use in interstate or foreign commerce.' " *Id.* (quoting 40 C.F.R. § 230.3(s) (1997)). This part of the definition was not in controversy in *Wilson*. *See Wilson*, 133 F.3d at 257-58.

238. *See Eidson*, 108 F.3d at 1341-43.

239. 516 U.S. 955 (1995).

240. *See* Leslie Salt Co. v. United States ("*Leslie Salt IV*"), 55 F.3d 1388, 1390 (9th Cir. 1995), *cert. denied*, 516 U.S. 955 (1995).

241. *See id.*

242. *See id.* at 1391.

243. *See id.*

244. *See id.*

245. 700 F. Supp. 476 (N.D. Cal. 1989), *rev'd*, 896 F.2d 354 (9th Cir. 1990).

246. *See id.* at 485.

States ("*Leslie Salt II*"),[247] however, the Ninth Circuit held that these qualities did not exclude the ponds from the category of "other waters."[248] Furthermore, the Ninth Circuit held that the fact that the ponds might serve as a habitat for migratory birds or endangered species may provide a sufficient connection to interstate commerce under the so-called "migratory bird rule."[249] Accordingly, the Ninth Circuit reversed and remanded for a factual determination with respect to whether a sufficient connection to interstate commerce was present.[250] On remand, the district court in *Leslie Salt Co. v. United States* ("*Leslie Salt III*")[251] found a sufficient connection to interstate commerce because fifty-five species of migratory birds used the temporary ponds as a habitat.[252] Leslie Salt was accordingly assessed civil penalties and required to restore the property to its preexisting condition.[253]

Cargill, Inc., the successor corporation to Leslie Salt, raised the next appeal in *Leslie Salt Co. v. United States* ("*Leslie Salt IV*"),[254] arguing, among other issues, that the extent of jurisdiction under the Act as applied in the "migratory bird rule" exceeded the bounds of the Commerce Clause.[255] Because this issue had already been litigated in the Ninth Circuit in *Leslie Salt II*, the court held that the "law of the case" applied to this claim and that, consequently, Cargill would have to show that the *Leslie Salt II* holding was clearly erroneous.[256] The Ninth Circuit admitted that "[t]he migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason," but held that the *Leslie*

247. 896 F.2d 354, 359-60 (9th Cir. 1990).

248. *Id.* at 359-60.

249. *See id.* at 360. The migratory bird rule, found in the Discussion of Public Comments and Changes section of the Corps's final regulation, indicates that:

> [W]aters of the United States at 40 CFR 328.3(a)(3) also include the following 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.

Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (1986).

250. *Leslie Salt II*, 896 F.2d at 361.

251. 820 F. Supp. 478 (N.D. Cal. 1992), *aff'd in part*, 55 F.3d 1388 (1995).

252. *See Leslie Salt IV*, 55 F.3d 1388, 1392 (referring to *Leslie Salt III*).

253. *See id.*

254. 55 F.3d 1388 (9th Cir.), *cert. denied*, 516 U.S. 955 (1995).

255. *See id.* at 1395.

256. *See id.* at 1393, 1395.

Salt II holding was not "clearly erroneous" given the breadth of the Commerce Clause.[257]

The *Leslie Salt IV* decision was handed down about a month after *Lopez*, but the case was argued in 1994, prior to *Lopez*, and *Lopez* is not discussed anywhere in the opinion.[258] Cargill petitioned for certiorari which was denied in *Cargill, Inc. v. United States*.[259] In a rare, written dissent from a denial of certiorari, Justice Thomas, relying on *Lopez*, roundly condemned the "migratory bird rule" as well as the Corps regulations.[260] He specifically pointed out that the "other waters" provision of § 328.3(a)(3) did not premise jurisdiction on a substantial effect on interstate commerce, but rather required only that the activity "could affect" interstate commerce.[261] Justice Thomas also pointed out that the migratory bird rule parallels the uncertain "could affect" language of the "other waters" provision, extending jurisdiction to waters that could potentially serve as a habitat for migratory birds.[262] He believed that such an application of these regulations was improper because it is based on the erroneous assumption that "self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps's assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds."[263] Such an expansive interpretation, Justice Thomas believed, "stretches Congress's Commerce Clause powers beyond the breaking point."[264]

Lopez raises questions as to the constitutionality of the Act and the corresponding body of regulations promulgated thereunder. The *Wilson* case highlights the vulnerability of an important part of the Act—the § 404 permit program.[265] In light of *Wilson*, several questions remain. The first question is one explicitly avoided by the *Wilson* defendants, namely: Is there anything in the Act itself that is problematic given the limitation placed on the commerce power by

257. *Id.* at 1396.
258. *See id.* at 1388, 1395-96.
259. 516 U.S. 955 (1995).
260. *See id.* at 957-59 (Thomas, J., dissenting). Note that a denial of certiorari is not intended to express the Court's views as to either the validity of its jurisdiction or the merits of the case, but rather merely reflects the Court's "discretionary refusal" to review the lower court's decision. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.7, at 268 (7th ed. 1993).
261. *See id.* at 958 (Thomas, J., dissenting).
262. *See id.* (Thomas, J., dissenting).
263. *Id.* (Thomas, J., dissenting).
264. *Id.* (Thomas, J., dissenting).
265. *See* 33 U.S.C. § 1344 (1994).

Lopez?[266] If not, would the Supreme Court agree with the Fourth Circuit's assessment that the "other waters" provision of § 328.3(a) of the Corps's regulations exceeds the bounds of the Act and Constitution?[267] Finally, if the "other waters" provision is found to be an unconstitutional application of the Act by the Supreme Court, how might it be changed in order to comply with *Lopez* and what possible effects might such a change bring?[268]

The short answer to these questions seems to be that there is nothing unconstitutional in the Act itself. Moreover, even if the Supreme Court concludes that the "other waters" provision as it stands exceeds Congress's commerce power, a simple rewording of § 328.3(a)(3) would bring the regulation back within the limits of *Lopez*. The actual impact of such a change in the courts may be increased litigation regarding the scope of the reworded regulation.

The jurisdictional foundation for the § 404 permit program and the prohibition against "discharges of pollutants" is Congress's power to regulate "navigable waters."[269] The regulation of navigable waters has been a traditional object of the commerce power dating back to Justice Marshall's venerable *Gibbons* opinion.[270] As the *Wilson* court recognizes, the power to regulate waters navigable in fact is indisputable.[271] A question arises, however, when considering the significance of Congress's definition of "navigable waters" as "waters of the United States."[272] The Court has stated that the use of this definition of navigable waters reflects Congress's desire to extend the jurisdiction of the Act broadly.[273] Accordingly, the term " 'navigable' as used in the Act is of limited import," as the Act was intended to cover "at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[274] The Court's clear approval of this expansive interpretation in *Riverside Bayview Homes*, combined with the fact that six—if not eight—members of the *Lopez* Court seem unwilling to upset holdings such as *Riverside*

266. *See infra* notes 269-87 and accompanying text. The Fourth Circuit could not resist speculating on the issue in a cursory fashion. *See supra* notes 131-36 and accompanying text.

267. *See infra* notes 288-342 and accompanying text.

268. *See infra* notes 343-64 and accompanying text.

269. *See* 33 U.S.C. §§ 1311(a), 1344(a), 1362(12) (1994).

270. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 22 (1824).

271. *See Wilson*, 133 F.3d at 256.

272. 33 U.S.C. § 1362(7).

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

274. *Id.*

Bayview Homes,[275] make the regulation of non-navigable waters not problematic under current Commerce Clause jurisprudence. The *Wilson* defendants probably believed this to be the case as well.[276] While the *Wilson* court pointed out that there are limits to this reasoning and those limits are presently unclear,[277] the Fourth Circuit also has said that *Lopez* has not worked a "sea change" upon earlier Commerce Clause jurisprudence or the Act, which is still clearly viable today.[278] The Act itself provides no further guidance, as "waters of the United States" has no substantive meaning beyond, perhaps, that it must mean something different from "navigable waters." The Court determined in *Riverside Bayview Homes* that this difference is that "waters of the United States" is broader than just waters navigable in fact.[279]

In the context of the § 404 permit program, Congress leaves it to the Corps to supply the substance for the phrase "waters of the United States."[280] In its regulations, the Corps has provided a very detailed—but very broad—definition of what "waters of the United States" means in terms of the physical world.[281] The crux of any constitutional problems must, therefore, reside in this regulation, which was the point of attack for the *Wilson* defendants.[282] Section 328.3(a) of the Corps's regulations defines three primary types of

275. Justice Thomas is the only Justice who clearly favors reconsidering this century's Commerce Clause jurisprudence. *See supra* notes 203-07 and accompanying text. Obviously, as demonstrated by their dissent in *Lopez*, Justices Stevens, Souter, Ginsburg, and Breyer prefer expansive Commerce Clause jurisprudence with great deference to Congress on the issue. *See supra* notes 208-14 and accompanying text. Justices Kennedy and O'Connor, the key swing votes in *Lopez*, also seem unlikely to disturb a holding such as *Riverside Bayview Homes*. In their concurring opinion, they emphasized the importance of stare decisis and expressly affirmed earlier cases upholding a broad application of the commerce power. *See* United States v. Lopez, 514 U.S. 549, 573-74 (1995) (Kennedy, J., concurring). Chief Justice Rehnquist and Justice Scalia fall somewhere between the two concurring opinions. The majority opinion in *Lopez*, written by the Chief Justice and joined by Justice Scalia, implicitly approved of some prior, notably expansive, Commerce Clause decisions, such as *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), in outlining the proper objects of congressional regulation under the Commerce Clause. *See Lopez*, 514 U.S. at 558-59. Furthermore, the Chief Justice joined the majority in *Riverside Bayview Homes*, which was a unanimous decision. *See Riverside Bayview Homes*, 474 U.S. at 122.

276. Otherwise, presumably, they also would have challenged the Act itself.

277. *See Wilson*, 133 F.3d at 256.

278. *See* United States v. Hartsell, 127 F.3d 343, 348 n.1 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1321 (1998).

279. *See Riverside Bayview Homes*, 474 U.S. at 133.

280. *See* 33 U.S.C. § 1344(a), (d) (1994); 33 C.F.R. § 328 (1997).

281. *See* 33 C.F.R. § 328. This laundry list of applicable waters is provided in 33 C.F.R. § 328.3. *See supra* note 130 (listing applicable waters).

282. *See supra* notes 60-63 and accompanying text.

waters.[283] The first category is essentially waters "navigable in fact."[284] The second category encompasses waters, including wetlands, that span more than one state.[285] The third and most problematic category is the "other waters" provision, which covers intrastate bodies of water, the "use, degradation or destruction of which could affect interstate or foreign commerce."[286] It is this provision that gives the § 404 permit program the broad reach necessary to cover such "waters" as isolated wetlands. The very language of the "other waters" provision indicates that no actual connection to interstate commerce must exist, only a potential one. Thus, because the provision does not require an actual connection to interstate commerce, the Fourth Circuit held that § 328.3(a) could not survive a Commerce Clause challenge and thus was not authorized by the Act.[287]

The most important question the *Wilson* case raises is what the Supreme Court would do with the "other waters" provision. The uncertain state of Commerce Clause jurisprudence following *Lopez* makes it difficult to predict how the Court would rule on the issue presented in *Wilson*. When the separate opinions in *Lopez* are examined, however, some predictions can be made. Outcomes based on the extreme positions in *Lopez* are fairly easy to predict. Justice Thomas has already shown his inclination. In his vigorous dissent from the denial of certiorari in *Cargill*, he roundly condemned the "other waters" provision and especially its application in the migratory bird rule.[288] Justice Breyer's dissent basically favored the status quo: deference to Congress and a Commerce Clause with theoretical limits that Congress has never reached.[289] Thus, it is safe to assume that the dissenters in *Lopez* would uphold the "other

283. In addition to the three main categories of waters, § 328.3(a) includes tributaries of these waters, *see* 33 C.F.R. § 328.3(a)(5), wetlands adjacent to these waters, *see id.* § 328.3(a)(7), territorial seas, *see id.* § 328.3(a)(6), and impoundments of water that otherwise meet the definition of waters of the United States, *see id.* § 328.3(a)(4).

284. *See id.* § 328.3(a)(1).

285. *See id.* § 328.3(a)(2).

286. *Id.* § 328.3(a)(3).

287. *See Wilson*, 133 F.3d at 257.

288. *See* Cargill, Inc. v. United States, 516 U.S. 955, 956-59 (1995) (Thomas, J., dissenting).

289. *See* United States v. Lopez, 514 U.S. 549, 616-17, 624 (Breyer, J., dissenting); *see also supra* notes 208-14 and accompanying text (discussing Justice Breyer's dissent in *Lopez*). Justice Breyer believed that upholding § 922(q) would not eliminate the distinction between what is truly local and what is truly national, *see Lopez*, 514 U.S. at 624 (Breyer, J., dissenting), but Chief Justice Rehnquist pointed out that Justice Breyer is "unable to identify any activity that the States may regulate but Congress may not." *Id.* at 564.

waters" provision, possibly relying heavily on the "cumulative effect" principle Justice Breyer referred to in his dissent.[290] The tally at this point is likely to be four in favor of upholding the "other waters" provision and one clearly against.[291]

Predicting what the rest of the Court would do with the "other waters" provision is more difficult. It is therefore necessary to examine how the "other waters" provision may be analyzed under *Lopez*. *Lopez* outlines three major categories of activity that may be regulated by Congress pursuant to the Commerce Clause: (1) channels of interstate commerce; (2) instrumentalities or persons or things in interstate commerce; and (3) those activities that substantially affect interstate commerce.[292] While regulation of some waters that would qualify as "other waters" under § 328.3(a)(3) could be regulated under the first two categories, the "other waters" provision itself does not relate to the channels or instrumentalities of commerce per se. If we consider that it is the navigable waters themselves that are the channels or instrumentalities of interstate commerce—an assumption the *Wilson* court seemed willing to consider[293]—then the "other waters" provision does not appear to satisfy the first category because that category does not require that the regulated waters have any connection to navigable waters.[294] Also, it might be reasonable to consider water a "thing" in interstate commerce and, therefore, any waters that are interstate in nature or flow into interstate waters may satisfy this category.[295] Again, however, the "other waters" provision does not require that the regulated waters have any interstate qualities in this sense. Thus, the "other waters" provision does not appear to fit into the second category either. The only remaining option is to consider whether the "other waters" provision extends jurisdiction of the Act to cover activities that substantially affect interstate commerce.

The "substantially affects" category discussed in *Lopez* is

290. *See id.* at 616 (Breyer, J., dissenting).

291. The prediction is that Justice Breyer, along with Justices Stevens, Souter, and Ginsburg, who joined Justice Breyer's dissent in *Lopez*, would favor upholding the regulation. Justice Thomas likely would oppose upholding the regulation.

292. *See Lopez*, 514 U.S. at 558-59.

293. *See Wilson*, 133 F.3d at 256; *see also* Johnson, *supra* note 5, at 69 (considering this possibility).

294. *See supra* notes 123-36 and accompanying text.

295. The *Wilson* court implied that water may be a "thing" in interstate commerce when it expressed a possibility that Congress might be able to regulate waters that flow across state lines. *See Wilson*, 133 F.3d at 256. For further discussion of this possibility, see *infra* notes 361-64 and accompanying text.

particularly relevant because the "other waters" provision is drafted in terms of effects upon interstate commerce. To extend jurisdiction of the Act to a given body of water, the "other waters" provision requires only the mere possibility that the "use, degradation or destruction" of such a body of water could affect interstate commerce.[296] The provision provides three examples of such waters: (1) where interstate travelers could use waters for recreation or other purposes; (2) where fish or shellfish could be taken from waters and sold in interstate commerce; and (3) where waters could be used for industrial purposes by industries engaged in interstate commerce.[297] In addition, in the preamble to § 328 in the Federal Register, the Corps gives another example of what it believes to be included in the "other waters" provision: the migratory bird rule, which extends jurisdiction to waters that could be used by birds protected by migratory bird treaties or by migratory birds that cross state lines.[298]

The wording of the "other waters" provision alone might be enough to render it unconstitutional under *Lopez*. The majority opinion in *Lopez* went to some trouble to spell out the requirement that an activity must "substantially affect interstate commerce."[299] Therefore, a regulation that premises jurisdiction on a possible effect on interstate commerce seems to conflict directly with *Lopez*.[300] This is certainly the view of Justice Thomas, who believes that a "could affect" test does not require that an activity substantially affect interstate commerce.[301] This is also, of course, the view of the Fourth Circuit in *Wilson*.[302] However, eight members of the Supreme Court

296. 33 C.F.R. § 328.3(a)(3) (1997); *supra* note 130 (providing text of the "other waters" provision).

297. *See* 33 C.F.R. § 328.3(a)(3)(i), (ii), & (iii) (1997).

298. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (1986); *supra* note 249 (listing the migratory bird rule).

299. United States v. Lopez, 514 U.S. 549, 559 (1995).

300. *See id.* at 559 ("We conclude ... that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

301. *See* Cargill v. United States, 516 U.S. 955, 958 (1995) (Thomas, J., dissenting).

302. Whether the panel that heard *Hartsell* would come out the same way is not clear. It is significant to note that the *Hartsell* court did not address the other waters provision or any other Corps regulations, but only vaguely addressed a generalized challenge to the Act itself. *See* United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997).

Furthermore, the defendants in *Hartsell* committed far more egregious acts than those in *Wilson*, dumping toxic chemicals directly into a sewer which flowed eventually into navigable waters. *See Hartsell*, 127 F.3d at 346-47. In contrast, the *Wilson* defendants were trying to fill isolated wetlands with dirt in a manner that they claimed they thought to be in accordance with law. *See Wilson*, 133 F.3d at 254-55. Thus, in *Hartsell* the connection to navigable waters—and hence interstate commerce—was much more direct, and the actions by the defendants were clearly more directly harmful. *See Hartsell*, 127 F.3d at 346.

have yet to voice an opinion on the wording of the "other waters" provision.

To determine how the remainder of the Court would decide the issue, it is necessary to look beyond the statute's wording. In analyzing what activities have a substantial effect on commerce, the *Lopez* Court highlighted several factors as important. The first is whether the statute has a jurisdictional element that would enable a case-by-case inquiry as to whether interstate commerce was implicated.[303] The second is whether the activity is commercial in nature, including whether it is part of a larger economic regulatory scheme.[304] The third is whether federalism concerns are raised by the statute.[305]

In analyzing the "other waters" provision in light of these factors, it is worth considering whether the provision has a jurisdictional component. In fact, the entire "other waters" provision is a jurisdictional component. It premises jurisdiction on the condition that the use, degradation, or destruction of a body of water could affect interstate commerce.[306] The "other waters" provision goes so far as to provide concrete examples of this jurisdictional component in the context of recreation, fishing, and industry.[307] This alone clearly enables a case-by-case inquiry, but the "could affect" language takes us right back to the beginning. Depending on how the Court treats this language, the jurisdictional component may be found insufficient. If the jurisdictional component itself is premised on a potential, and not actual, effect on interstate commerce, then Congress has drafted a jurisdictional component that cannot withstand constitutional scrutiny due to the "other waters" provision.

Similar difficulties are encountered when considering whether the "other waters" provision extends jurisdiction to regulate activities that are commercial in character. Again, the "could affect" language implies that in any given instance there may be no relevant economic activity at issue. The nature of the activity regulated, however, must be examined in its entirety, not just individual instances.[308] A strong

303. *See Lopez*, 514 U.S. at 561-62.

304. *See id.* at 561.

305. *See id.* at 564-68 (discussing concerns of general federal police powers and state sovereignty).

306. *See* 33 C.F.R. § 328.3(a)(3) (1997).

307. *See id.*

308. Each Justice on the *Lopez* Court recognized this principle to some degree except Justice Thomas, who, despite joining the majority, took issue with the concept. *See Lopez*, 514 U.S. at 558; *id.* at 616 (Breyer, J., dissenting); *id.* at 600 (Thomas, J., concurring) ("The aggregation principle is clever, but has no stopping point.").

argument can be made that while the "other waters" provision does not require a substantial effect on interstate commerce in any particular instance, the aggregate of these instances will produce a substantial effect on interstate commerce.[309] If all isolated wetlands are filled and developed, the consequences for the environment may be substantial, and, given the importance of natural resources to the national economy, produce a subsequent substantial impact on interstate commerce.[310] This argument, however, is strikingly similar to the argument that the education of children, in the aggregate, is substantially related to the economic well-being of the nation, and this argument was rejected by the Court in *Lopez*.[311] The *Lopez* majority described the difference between *Wickard* and *Lopez*: Congress may not use a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," but where a "general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."[312]

The question then is whether, in the isolated wetland context,

309. The Court followed this principle in *Wickard*, which the majority in *Lopez* cited with tacit approval. *See id.* at 559-60 (citing Wickard v. Filburn, 317 U.S. 111 (1942)).

310. *See* Chertok, *supra* note 95, at 863 (listing functions that wetlands perform); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 38-39 (1993) (discussing the aggregate effect of destruction of wetlands); Karkkainen, *supra* note 6, at 62-63 (listing the functions wetlands perform); Warner, *supra* note 6, at 352-53 (making this argument specifically for migratory birds). Also, concepts such as biodiversity and ecosystems, which are based on the idea that the whole is larger than the sum of its parts and which focus on the value of the diversity and interconnectivity of living things, are gaining acceptance in environmental law. These ideas are particularly relevant to the Endangered Species Act ("ESA"), but they are also logically relevant to laws such as the § 404 permit program, which is integral in protecting unique habitats such as wetlands. In *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), the District of Columbia Circuit Court of Appeals relied on biodiversity in finding a connection between the destruction of an endangered species' habitat, the "taking" of an endangered species prohibited under § 9(a)(1) of the ESA, and interstate commerce. At issue in *National Association of Home Builders* was the habitat of the Delhi Sands Flower-Loving Fly. *See id.* at 1043. The evidence showed that there are less than 300 of these flies capable of breeding in the world, all located within an eight mile radius in Southern California. *See id.*; *id.* at 1060 (Sentelle, J., dissenting). To avoid violations of the ESA for interfering with the fly's habitat, San Bernardino County was forced to relocate a planned hospital at a cost to taxpayers of approximately $3.5 million. *See id.* at 1060 (Sentelle, J., dissenting). Despite the fly's limited range, the court determined that the loss of biodiversity itself would have a substantial impact on the ecosystem, which in turn has a substantial effect on interstate commerce. *See id.* at 1052-54. For an overview of biodiversity concepts in environmental law, see generally Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869 (1997), and Karkkainen, *supra* note 6.

311. *See Lopez*, 514 U.S. at 616, 618-25 (Breyer, J., dissenting).

312. *Id.* at 558 (citing Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)).

Congress is using a tenuous connection to interstate commerce to regulate private or state activities or whether Congress is regulating something substantially related to interstate commerce—even though in some instances the effect of an individual violation is of a de minimis character. The only guidepost is *Lopez*. While wetlands destruction presumably can have an enormous impact on commerce, can it reasonably be argued that the effect on commerce is any greater than that of education?[313] Perhaps the more appropriate question is whether the § 404 permit program more closely resembles the regulatory scheme controlling wheat prices in *Wickard* or the possession of a gun near a school? In some respects, regulation of wetlands seems to have a more indirect effect on commerce, similar to the effect of education on commerce, than the direct control of the market value of a nationally traded, fungible commodity such as wheat. On the other hand, underlying the controversy surrounding wetlands regulation clearly is an economic issue. Fortunes may be at stake in developing wetlands,[314] and, consequently, it is no surprise that sizable business entities are frequently the defendants in § 404 cases.[315] *Wilson* is a perfect example—he was an experienced and

313. Furthermore, the aggregation principle suffers logical shortcomings when considered from a Tenth Amendment perspective. Professor Epstein has argued that where the state interest outweighs the federal interest in one instance, it should still outweigh it when multiplied by a large number of cases. *See* Epstein, *supra* note 5, at 186. Yet aggregation is never employed in this fashion. It is only used on the federal side of the equation.

314. *See* Robert D. Sokolove & P. Robert Thompson, *From the Environment: The Future of Wetland Regulation Is Here*, 23 REAL EST. L.J. 78, 78 (1994) ("Wetlands regulations . . . have a profound impact on the economy of the entire nation, not merely one industry. Any business or industry involved with real estate or land is affected by this issue."); *see also* Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 697 (1989) ("Since wetlands often supply attractive sites for industrial, agricultural, and residential developments, wetland owners have strong economic incentives to replace wetlands with airports, port facilities, soybean fields, and shoreland housing."); David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 691 (1994) ("In general, environmental law is fought on the terrain of economics.").

315. For example, agribusiness giant Cargill, the petitioner in *Cargill, Inc. v. United States*, 516 U.S. 955 (1995), is the nation's largest privately-owned company, holding eight billion dollars in assets. *See Giant Cargill Resists Pressure to Go Public as it Pursues Growth*, WALL ST. J., Jan. 9, 1997, at A1; *see also* Riverside Bayview Homes, Inc. v. United States, 474 U.S. 121 (1985) (involving developer of subdivision); *Wilson*, 133 F.3d at 254 (noting that defendant Interstate General had over $100 million in assets); Hoffman Homes, Inc. v. U.S. EPA, 999 F.2d 256 (1993) (involving developer of subdivision). Accordingly, it generally is not the average homeowner installing a deck in his backyard who is pressing his case to the appellate level in federal court. But the average property owner has been caught in the crossfire. *United States v. Mills*, 817 F.

sophisticated developer who had ample warning that he might run into legal difficulties in developing the wetland parcels, yet he continued filling the parcels.[316] Although in the end Mr. Wilson was correct that the Corps had no jurisdiction over his parcels, it is difficult to explain why he would risk the violation in the absence of monetary gain.

After a point, the debate regarding what is and what is not economic in character begins to resemble pre-*Jones & Laughlin Steel* thinking on whether something has a direct or indirect effect on commerce.[317] Justice Kennedy seems to capture the unavoidable paradox in his concurring opinion in *Lopez*: "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence,"[318] yet "content-based boundaries used without more" are imprecise.[319] Nonetheless, the inquiry as to whether an activity is commercial in nature is once again relevant after *Lopez*.[320]

Because it is hard to draw the line strictly in terms of how substantial an effect is on interstate commerce, it is appropriate to examine whether the § 404 permit program intrudes on a traditional area of state sovereignty. The issue of federalism is a significant factor in both the *Lopez* majority opinion and Justice Kennedy's concurrence. Justice Kennedy actually hinges his entire decision on

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Supp. 1546 (N.D. Fla. 1993), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112 (1995), is an outrageous example of this problem. In *Mills*, a father and son purchased two lots of land and placed clean fill dirt on the property in an attempt to prepare the land for construction. *See id.* at 1548. The land did not appear to be what the average person would consider a wetland; it was a wooded lot without any standing water on it, and it did not appear to be a swamp, marsh, or bog. *See id.* For these actions, defendants, who represented themselves at trial, were sentenced to prison for 21 months. *See id.*

316. *See Wilson*, 133 F.3d at 255.

317. *See supra* notes 146-53 and accompanying text.

318. United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

319. *Id.* at 574 (Kennedy, J., concurring).

320. The Gun-Free School Zones Act, 18 U.S.C. § 922(q) (1988 & Supp. V 1993), was found unconstitutional in part because it had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561; *see also* Epstein, *supra* note 5, at 176 ("The earlier understanding was that any activity that had a substantial effect on commerce was within reach of the federal power: now it appears that it is only some class of activities that fall under that test, and that those have to be close to the commercial ...."); Johnson, *supra* note 5, at 48-49 (speculating that the Court may not defer to Congress when the regulated activity is not of a commercial character); Warner, *supra* note 6, at 341 (discussing the possibility that strict interpretation of *Lopez* may require that the regulated activity be economic in character).

this issue.[321] Whether the § 404 permit program intrudes on a traditional area of state sovereignty depends on how the program is characterized. In some respects, it amounts to mere land use regulation or zoning. In this case, it could be argued that zoning or land use is an area traditionally reserved to the states;[322] however, this particular argument has been rejected by the Supreme Court.[323] Additionally, the § 404 permit program has goals much broader in scope than zoning or land use regulation. The Act as a whole seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[324] and the § 404 permit program is an integral part of this bigger picture.[325] The Act's mandate and the scope of problems the Act was designed to remedy make zoning a poor analogy even if land regulation is involved. A better argument is that environmental legislation is sui generis and by its very nature has always been in the domain of the federal government.[326] Even though there was some state environmental regulation prior to this federal regime, the states' efforts reflected a laissez-faire attitude

321. *See Lopez*, 514 U.S. at 574-83 (Kennedy, J., concurring) (discussing the importance of the federal balance and how the Gun-Free School Zones Act upset this balance).

322. Or at least delegated to municipalities by the state. One of the major reasons the wetlands protection provisions of the Clean Water Act and the Endangered Species Act have attracted some public animosity is because they regulate land use by private individuals. *See* Johnson, *supra* note 5, at 59-60.

323. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 275-76 (1981). Two key issues for the *Hodel* Court in upholding provisions of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C.A § 1201-1328 (West 1986 & Supp. 1998)), were preventing a race to the bottom between states with respect to environmental laws and the fact that environmental hazards may affect more than one state. *See id.* at 281-82. For a discussion of these "race to the bottom" concerns with respect to environmental laws, see Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271 (1997); *see also* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1212-13 (1992) (arguing that proponents of the "race-to-the-bottom" theory should be required to "demonstrate the analytical validity of their arguments"); Joshua D. Sarnoff, *The Continuing Imperative (but Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 278-85 (1997) (commenting that "race-to-the-bottom" is an argument for federal environmental regulation).

324. 33 U.S.C. § 1251 (1994).

325. *See* Chertok, *supra* note 95, at 864 (noting that § 404 is the "primary basis" for federal wetland regulation).

326. Some commentators argue that the federal government is best-suited to deal with environmental issues. *See* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1244-53 (1995) (making the case for Federal involvement); Sarnoff, *supra* note 323, at 230-31.

towards the environment and were not comprehensive in scope.[327] Furthermore, after twenty-five years of extensive federal regulation of wetlands, it is hard to argue that the federal government is upsetting the traditional federal balance by intruding into traditional state sovereignty.[328] Thus, the Tenth Amendment concerns present in *Lopez* may not be an issue with the Act or the § 404 permit program.

Federalism may be the key issue in determining whether the Court would uphold the "other waters" provision. Given that the majority opinion in *Lopez* did not directly discuss federalism nearly as extensively Justice Kennedy's concurrence, Chief Justice Rehnquist and Justice Scalia, although expressing concerns about intrusions on state sovereignty, appear likely to focus on a specific activity's relation to interstate commerce in determining whether the commerce power has been exceeded.[329] Accordingly, they may be, after Justice Thomas, the justices most demanding in assessing the "other waters" provision's link to interstate commerce and, consequently, the least likely to find the provision constitutional under *Lopez*. Justices Kennedy and O'Connor, however, will be likely to uphold the provision if it is determined consistent with the federal system: federalism was the key to their votes in *Lopez*,[330] they find substantive definitions of commerce problematic, and they expressed an unwillingness to disturb prior Commerce Clause jurisprudence. Because four justices have already indicated a predisposition to uphold a regulation such as the "other waters" provision,[331] the addition of the votes of Justices Kennedy or O'Connor is enough to constitute a majority of the Court. A caveat must be reiterated, however: Even if regulating isolated wetlands is

327. Prior to the passage of the federal environmental law there was a substantial body of state law regulating activities that harm the environment, such as the common law doctrines of nuisance, trespass, negligence, as well as state conservation statutes protecting wildlife and other natural resources. *See* Dwyer, *supra* note 8, at 10,408; *see also* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144 (1995) (stating that the federal government became involved in environmental law only after states had failed to do so adequately).

328. *See* Dwyer, *supra* note 8, at 10,408. Moreover, most of the major federal environmental laws target industrial or commercial activity. *See* Johnson, *supra* note 5, at 65-66.

329. *See* United States v. Lopez, 514 U.S. 549, 558-68 (1995); *supra* notes 174-214 and accompanying text. Although, Chief Justice Rehnquist certainly was concerned about preserving the distinction between "what is truly national and what is truly local." *See Lopez*, 514 U.S. at 567-68.

330. *See id.* at 568-83 (Kennedy, J., concurring); *supra* notes 195-202 and accompanying text.

331. *See supra* notes 208-14 and accompanying text.

permissible for many of the reasons discussed above, the "other waters" provision is worded in a way that seems, on its face, to directly contradict language that five justices approved in *Lopez*.[332]

While the "other waters" provision seems to conflict with *Lopez*, the Court had a chance to address this issue in *Cargill*, but declined to do so.[333] The Court's decision to deny certiorari is illuminating because the facts in *Cargill* were favorable to a finding of no connection with interstate commerce. The "wetlands" at issue in *Cargill* and the *Leslie Salt* cases[334] were old salt pits that were completely dry much of the year.[335] Furthermore, in the *Leslie Salt* cases, the only reason wetland plants grew in the first place was because Leslie Salt was forced to plow the basins to avoid air pollution violations caused by the dust on the property;[336] prior to the plowing, the ground was too hard and saline to sustain any vegetation.[337] Finally, in remanding the case, the Ninth Circuit ordered the district court to consider jurisdiction under the migratory bird rule,[338] which is premised on the notion that migratory bird habitats may be regulated as part of interstate commerce, because " '[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds.' "[339] But as Justice Thomas noted, the record showed that the only people who came to the salt pits to observe the birds were the government's experts.[340] All things considered, it is

332. *Compare Lopez*, 514 U.S. at 559 (requiring that an activity "substantially affect" interstate commerce), *with* 33 C.F.R. § 328.3(a)(3) (1997) (premising jurisdiction on activities which "could affect" interstate commerce).

333. *See* Cargill, Inc. v. United States, 516 U.S. 955 (1995) (denying certiorari).

334. *See supra* notes 239-64 and accompanying text.

335. *See Leslie Salt I*, 700 F. Supp. 476, 480 (N.D. Cal. 1988).

336. *See id.*

337. *See id.*

338. *See Leslie Salt II*, 896 F.2d 354, 360 (9th Cir. 1990).

339. *Leslie Salt IV*, 55 F.3d 1388, 1395-96 (9th Cir. 1995) (quoting Hoffman Homes, Inc. v. U.S. EPA, 999 F.2d 256, 261 (7th Cir. 1993)). In addition to the Ninth and Seventh Circuits, the Tenth Circuit also has recognized the migratory bird rule. *See* Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984) (citing the presence of migratory birds as a factor in favor of finding jurisdiction prior to the rule's adoption in 1986). The Fourth Circuit, however, has refused to consider the rule because it is substantive as opposed to interpretive in nature and was published without heeding the notice and comment requirements in 5 U.S.C. § 553 (1994). *See* Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd per curiam*, 885 F.2d 866 (4th Cir. 1989). For a post-*Wilson* case upholding the migratory bird rule, see *Solid Waste Agency v. U.S. Army Corps of Engineers*, 998 F. Supp. 946 (N.D. Ill. 1998) (disagreeing with the reasoning of the Fourth Circuit in *Wilson*).

340. *See* Cargill, Inc. v. United States, 516 U.S. 955, 959 (1995) (Thomas, J., dissenting).

hard to imagine a more tenuous connection to interstate commerce, yet the Court passed on an opportunity to address both the "other waters" provision and the migratory bird rule.[341] This may, of course, be explained by factors other than the Court's stance towards the "other waters" provision. First, the Court may be waiting to see how the other courts of appeals rule on the issue.[342] Second, the denial of certiorari in *Cargill* occurred almost six months after the *Lopez* decision was handed down. Perhaps the Court was and is proceeding cautiously given the uproar *Lopez* has generated.

Even if the "other waters" provision is defective in light of *Lopez*, it is, quite possibly, merely an issue of semantics which can be easily remedied. If the phrase "could affect interstate . . . commerce" is replaced with "would substantially affect interstate . . . commerce," the "other waters" provision's problems under *Lopez* would be eliminated. The issue then transforms from the logical to the practical, shifting the focus from a problem of form to a problem of substance. The real effect of such a change would likely be massive litigation to determine whether each and every instance in which an isolated wetland is used, degraded, or destroyed has a substantial effect on interstate commerce. The *Eidson* case presents a scenario analogous to what the courts will likely confront. There defendants did not argue that the Act itself exceeded the limits of the Constitution, but rather that the specific waters in question were beyond the reach of the Act.[343] In *Eidson*, defendants argued that the storm drainage ditch into which they had dumped toxic chemicals

341. Significantly, the relationship between migratory birds and some types of economic activity has been well-documented. *See* Johnson, *supra* note 5, at 38-39 (noting the billions of dollars of commerce spent on migratory waterfowl). Furthermore, some commentators argue that looking at economic activity associated with migratory birds at particular isolated wetlands obscures the big picture. *See id.* Specifically, destruction of wetlands where, for example, no hunting takes place will create problems at wetlands where people do hunt. *See id.* at 37 (discussing the cumulative effect of destruction of wetlands); Warner, *supra* note 6, at 354-55 (same). This does not change the fact that this would be a most favorable case to discard the rule if the Court were so inclined.

342. *See supra* note 260 (discussing the significance of a denial of certiorari). However, the Court has been known to postpone granting certiorari on an issue until several lower courts are in conflict. *See* STERN ET AL., *supra* note 260, § 4.4. at 171. For example, in a rare opinion supporting a denial of certiorari, Justice Stevens cited a lack of conflict in the federal courts as a reason to deny certiorari. *See* McCray v. New York, 461 U.S. 961, 962 (1983). Moreover, Justice Brennan has indicated that there has been a long tradition of letting "tolerable conflicts" stand until more than two circuits have spoken on the subject. *See* William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983).

343. *See* United States v. Eidson, 108 F.3d 1336, 1341 (11th Cir. 1997).

was not a navigable water within the meaning of the Act.[344] The Eleventh Circuit then examined the physical and geographical qualities of the drainage ditch in question and determined that it was a navigable water under the Act.[345] In *Eidson*, this factual analysis of the ditch's status as a tributary was relatively simple.[346] A parallel analysis of whether an activity substantially affects interstate commerce will be far more complex.[347]

How much real change from current practices such a rewording of the "other waters" provision would yield will be in the hands of the Corps, which controls the permit process,[348] as well as the district courts, which must make the initial factual determination of what effects are and are not substantial. Because every piece of property and every wetland is different, it will take many decisions to shape the contours of what land falls under the jurisdiction of the Corps under the § 404 permit program. While there is no guarantee of significant change, the courts may hold that because the regulation was reworded, their interpretation must reflect some degree of change and, consequently, be more restrictive in upholding

344. *See id.*

345. *See id.* at 1342-43.

346. *See id.* at 1342.

347. This complexity results because the analysis of a body of water's status as a tributary involves a geographic inquiry. Essentially, does drainage ditch A flow into river B? Obviously, the inquiry can be more complex, but nothing on the order of magnitude of determining whether activities by humans or ducks substantially affect commerce, which may involve an endless number of variables.

348. *See* 33 U.S.C. § 1344(a)-(d) (1994). As would be expected, the Corps has recognized the threat *Wilson* poses to regulation of isolated wetlands. *See EPA, Army Corps of Engineers Guidance to Field Office on Isolated Waters Issues*, Daily Env't Rep. (BNA) No. 107, at E-5 (June 4, 1998), *available in* WESTLAW, BNA-ENV database [hereinafter *EPA/Army Corps Guidance*]. Accordingly, these agencies have recommended that, if at possible, jurisdiction over wetlands nationwide should be premised on provisions of 33 C.F.R. § 328.3(a) other than the "other waters" provision such as subsections (5) and (7), granting jurisdiction over tributaries of navigable waters and adjacent wetlands respectively. *See id.* In support of this strategy, the Corps and EPA cited a "more conclusive body of case law" supporting jurisdiction under these provisions, as well as, the relative ease of proving jurisdiction over such waters. *Id.* Under this directive, the "other waters" provision should reserved for waters that are truly isolated and intrastate in nature. *See id.* And in direct response to *Wilson*, the EPA and Corps instruct that the "other waters" provision should not be invoked as a basis for jurisdiction within the Fourth Circuit. *See id.* Rather, jurisdiction over isolated, intrastate water bodies, including wetlands, should be premised directly on the Act itself where "(1) either agency can establish an actual link between the water body and interstate or foreign commerce, and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce." *Id.* Thus, according to the EPA and the Corps, it is not clear how much actual practice will change as opposed to the legal arguments for extending jurisdiction.

jurisdiction in individual cases.[349]

Given the potential problems with the "other waters" provision, it is worth considering alternative avenues of jurisdiction over wetlands such as those at issue in *Wilson*. In addition to having a substantial effect on interstate commerce, an activity may be regulated in order to protect the channels of commerce.[350] Long recognized as falling under the commerce power, navigable waters could be considered channels of interstate commerce.[351] Thus, regulation of activities to protect navigable waters would be proper under *Lopez*. The *Wilson* court openly acknowledged this fact.[352] The Corps's regulations extend jurisdiction from this standpoint as well, defining waters of the United States to include: "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce"; "[t]ributaries of waters identified in [paragraphs (a)(1) through (a)(4)]"; and "[w]etlands adjacent to waters [in paragraphs (a)(1) through (a)(4)]."[353] The *Wilson* court, however, had difficulties with the district court's jury instructions, which did not require a "direct or indirect surface connection to interstate waters."[354] Furthermore, the court pointed out that the wetlands at issue were over six miles from the Potomac River, over ten miles from the Chesapeake Bay, and hundreds of yards from the nearest creeks, but it is not clear that the

349. The idea is that a change in language reflects a substantive change, not just a superficial one.

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

351. *See* Gibbons v. Ogden 22 U.S. (9 Wheat.) 1, 22 (1824) ("It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, *so far as navigation is concerned*. . . . The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters.").

352. *See Wilson*, 133 F.3d at 256.

353. 33 C.F.R. § 328.3(a) (1997). Paragraph (1) of § 328.3(a) describes what are waters essentially navigable in fact. Note that this provision extends jurisdiction upon potential use of the adjacent wetland, but this reading seems to differ qualitatively from the "other waters" provision; a body of water that is navigable in fact is still a channel of commerce whether used or not, whereas, at a certain level, anything could have a "commercial consequence" when examining an activity for a substantial effect on interstate commerce. *See Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). In fact, "navigable" describes a body of water that is capable of being navigated, but not necessarily navigated by vessels. Since *Lopez* permits regulation of not only the channel of commerce itself but also activities affecting a channel of commerce, the regulation of tributaries and adjacent wetlands also seems warranted under *Lopez*.

In response to *Wilson*, the Corps has recommended that jurisdiction be premised on the status of a water body as a tributary of or wetland adjacent to navigable waters rather than the "other waters" provision. *See EPA/Army Corps Guidance*, *supra* note 348, at E-5.

354. *Wilson*, 133 F.3d at 258.

waters were not in fact adjacent, only that the jury instruction was too expansive.[355] As Judge Payne demonstrated in his dissent, the court was perhaps a bit uncharitable in its analysis here.[356] Adjacent wetlands are one type of water that the Supreme Court has specifically held to be within the coverage of the Act and the Commerce Clause.[357] In addition, in upholding jurisdiction of the Act over adjacent waters, the Supreme Court emphasized the close hydrological relationship between navigable waters and the adjacent wetlands and did not focus on necessity of a surface connection.[358]

Another question is whether the wetlands could have been considered tributaries of a navigable water. The facts indicated that there was "a pattern of stream courses" under the vegetation. It is not clear exactly what constitutes a tributary, and neither the Act nor the Corps's regulations provide a definition.[359] The Corps, however, seems to view this as a viable alternative grounds for jurisdiction over isolated wetlands jurisdiction.[360]

Finally, *Lopez* approves of regulation of persons or things used in interstate commerce. In this case pollution and water could be considered things in interstate commerce; it could be argued that water is a commodity, in the general sense of the word, used in commerce and that pollution is an injurious byproduct of commerce. Even prior to *Jones & Laughlin Steel*, the Court had been willing to extend the commerce power to regulation of injurious articles in commerce.[361] Thus, where pollution is discharged into waters that eventually find their way into other states' waters or any navigable water, jurisdiction may be appropriate. The *Wilson* court recognized this possibility as well, but quickly cautioned that stretching this logic

355. *See id.* at 257-58.

356. *See id.* at 266-68 (Payne, J., concurring in part and dissenting in part).

357. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133-35 (1985).

358. *See id.*

359. *See* 33 U.S.C. § 1362 (1994); 33 C.F.R. § 328.3 (1997); *see also* United States v. Eidson, 108 F.3d 1336, 1341-42 (11th Cir. 1997) (noting the fact that the ditch was man-made and intermittent still did not affect its status as a tributary); Buttrey v. United States, 573 F. Supp. 283, 287-88 (E.D. La. 1983) (finding a bayou to be a river tributary). Federal courts have held that regulation of tributaries of navigable waters is appropriate under the Act. *See, e.g., Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997); United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1323-24 (6th Cir. 1974).

360. The Corps has expressed the view that extending jurisdiction over a water body as a tributary system to traditional navigable waters is preferable to employing the "other waters" provision in light of *Wilson*. *See EPA/Army Corps Guidance*, *supra* note 348, at E-5.

361. *See, e.g.*, Hoke v. United States, 227 U.S. 308 (1913); *cf.* Johnson, *supra* note 5, at 62-63 (discussing this in terms of protecting channels of commerce).

too far may implicate the Supreme Court's recent federalism concerns.[362] It seems that this category of permissible regulation suffers from the same dilemma facing the "substantially affects" category of regulation. One of the primary reasons for interpreting the jurisdiction of the Act broadly is that because water moves in hydrological cycles and in ecological terms, there is a high degree of interconnectivity.[363] Yet using these principles to extend jurisdiction leads to an obliteration of the limits of federal power under the Commerce Clause—a result with which a majority of the Supreme Court clearly is not comfortable.[364]

Wilson is an important decision for both Commerce Clause jurisprudence and environmental law since it marks one of the first meaningful ripples emanating from the *Lopez* decision.[365] Furthermore, the "other waters" provision struck down by the Fourth Circuit is crucial to the Corps's ability to regulate and protect wetlands—a matter of national interest. It is not clear how the Supreme Court will resolve an inevitable challenge to the "other waters" provision. With the Court's current composition, the key issue may be how environmental legislation is characterized in terms of the federal balance of power.

In any event, the "other waters" provision is still potentially problematic under *Lopez* even if what it seeks to regulate is a proper object of Congress's commerce power. If the "other waters" provision is rejected by the Court, and Congress still desires to regulate isolated wetlands, the Corps could easily bring the "other waters" provision into compliance with *Lopez* with a simple change in wording.[366] Moreover, many waters covered by the "other waters" provision could also be regulated under other, constitutionally-sound parts of § 328.3(a), but the Corps needs to assert jurisdiction on those grounds and the government must press these arguments in the federal courts.

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362. *See Wilson*, 133 F.3d at 256.

363. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133-35 (1985).

364. *See supra* notes 192-202 and accompanying text.

365. As opposed to all the fruitless litigation *Lopez* has spawned.

366. *See supra* notes 343-49 and accompanying text. While the Corps has publicly stated that it believes the *Wilson* case was wrongly decided, it has indicated that a change in the relevant jurisdictional regulations is on the horizon. *See EPA/Army Corps Guidance, supra* note 348, at E-5.


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