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# Postponing the Inevitable: The Supreme Court Avoids Deciding Whether the Migratory Bird Rule Passes Commerce Clause Muster. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers

Tanya M. White

Patrick R. Douglas

## CASENOTE

# POSPTPONING THE INEVITABLE: THE SUPREME COURT AVOIDS DECIDING WHETHER THE MIGRATORY BIRD RULE PASSES COMMERCE CLAUSE MUSTER

*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[1]

## I. INTRODUCTION

The Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[2](hereinafter referred to as "SWANCC") held that the "navigable waters" language in the Clean Water Act,[3] which was defined as the "waters of the United States,"[4] could not be applied to isolated intrastate wetlands based on the presence of migratory birds alone.[5] In so holding, the Court avoided facing the question of whether the "Migratory Bird Rule" can survive a commerce clause challenge. The Court, although it did not decide in this case, will inevitably face that decision. Although traditionally supportive of upholding statutes passed pursuant to the commerce clause, the Court has recently narrowed the scope of Congress' power under the commerce clause in *United States v. Lopez*.[6] The authors of this casenote assert that the court should uphold the Migratory Bird Rule under the commerce clause because it is consistent with the Court's decision in *Lopez* and because, to hold otherwise, would jeopardize the validity of nearly all environmental regulations that are based on the commerce clause.

## II. FACTS AND HOLDING

The Solid Waste Agency of Northern Cook County ("SWANCC") is comprised of 23 municipalities which joined together as a municipal corporation in order to locate and develop a non-hazardous waste disposal site.[7] SWANCC located such a site located in Cook and Kane Counties, Illinois, and purchased it.[8] The site consisted of 533 acres of which SWANCC hoped to use 410 acres as a "balefill".[9]

Prior to SWANCC's purchase of the 533-acre parcel, the land had been a working strip mine, which operated until around 1960.[10] After the strip mine closed, nearly half of the land[11] became classified as a successful early stage forest – it was vegetated by around 170 species of plants, about 200 permanent and seasonal ponds developed where there were once gravel pits, and it became home to numerous species of small animals.[12] And, most importantly for the subject of this Note, a number of species of birds, including endangered migratory species that depend on water for survival, could be observed at the site breeding, nesting or feeding.[13]

Before SWANCC could open the "balefill", it had to fill in approximately 17.6 acres of small lakes and ponds with forested area.[14] In order to do so, SWANCC had to comply with § 404 of the Clean Water Act (CWA), which requires a permit from the Chief of Engineers, as acting under the Secretary of the Army, before being allowed to discharge fill materials into "the navigable waters" as defined in the CWA and by the Environmental Protection Agency

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[1] 121 S. Ct. 675 (2001).
[2] *Id.*
[3] 33 U.S.C. § 1344(a) (1994).
[4] *Id.* § 1362(7).
[5] *SWANCC*, 121 S. Ct., at 684.
[6] 514 U.S. 549 (1995).
[7] *SWANCC*, 121 S. Ct., at 678.
[8] *Id.*
[9] *Id.* A "balefill" is defined in the case as "a landfill where the waste is baled before it is dumped." *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 848 (7th Cir. 1999).
[10] *SWANCC*, 121 S. Ct., at 678.
[11] *Id.* Of the 533-acres which comprised the parcel, 298 of them were classified as part of the successful early stage forest. *Id.*
[12] *Id.* These ponds ranged in size from less than one-tenth of an acre to several acres in size. Their depths also varied. *Id.*
[13] *Id.*
[14] *Id.*

(EPA).[15] In March 1986, unsure about whether it fell under the jurisdiction of the Corps and, thus subject to the statute, SWANCC inquired with the Corps to determine if part of a 276-acre site was considered "wetlands" under the CWA, thereby subjecting it to regulation under § 404.[16] The Corps decided that the site was not considered "wetlands."[17] Then, in February 1987, SWANCC asked the Corps if another parcel of land, this time 414-acres, included wetlands and was, again, told no by the Corps.[18]

However, with regard to the second, larger site, although it initially ruled that it was not subject to § 404 regulation, the Corps changed its mind and subjected it to regulation after the Illinois State Preserves Commission, an Illinois state agency, reported that several migratory bird species had been spotted on the land.[19] The Corps, after learning of the observation, changed its mind and notified SWANCC in a letter dated November 16, 1987, that it would be subject to regulation under the CWA's § 404 because they "are or could be used as habitat by migratory birds which cross state lines".[20] Under the Migratory Bird Rule, the Corps claimed jurisdiction to regulate isolated, intrastate waters in two instances: if the water is or would be the habitat of birds protected by Migratory Bird Treaties or if the water is or would be used as a habitat by migratory birds which cross over state lines.[21]

Pursuant to the new determination by the Corps that SWANCC must apply for a CWA § 404 permit, SWANCC submitted an application to fill the ponds which was denied by the Corps because they found the site to be a habitat for migratory birds.[22] SWANCC then submitted a second § 404 permit application that was also denied.[23] After the second denial, SWANCC sued the Army Corps of Engineers arguing that the migratory bird rule was an incorrect basis for the Corps to have jurisdiction.[24] SWANCC also challenged the denial of its § 404(a) permit on the merits.[25] The Northern District of Illinois entered summary judgment in favor of the Corps on the issue of jurisdiction, after which SWANCC abandoned its challenge to the merits of its § 404(a) permit denial.

SWANCC then appealed to the Seventh Circuit Court of Appeals.[26] SWANCC assailed the Corps' use of the Migratory Bird Rule as a basis for jurisdiction over the Cook County site by arguing that the Corps exceeded their statutory authority in interpreting the CWA to apply intrastate, nonnavigable, isolated waters based solely on the presence of migratory birds.[27] SWANCC also argued that Congress lacked the power under the Commerce Clause to grant the Corps regulatory jurisdiction over the site.[28]

Turning to the constitutional question first, the Seventh Circuit Court of Appeals held that Congress possessed the authority to regulate such intrastate waters based upon the cumulative impact doctrine.[29] Under this doctrine, even if an activity, taken in isolation, has no effect on interstate commerce, it may still be subject to regulation if the aggregate effect of the activity substantially affects interstate commerce.[30] The court reasoned that aggregate effect of the destruction of the habitat of migratory birds has a substantial effect upon interstate commerce because each year millions of Americans cross state lines to hunt and observe migratory birds and spend upwards of one billion dollars to do so.[31] The court further

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[15] *Id.* 33 U.S.C. § 1362(7) defines "navigable waters" as "the waters of the United States, including the territorial seas." "Navigable waters" are further defined by the Environmental Protection Agency (EPA) and the Army Corps of Engineers as including, "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (2001).

[16] *SWANCC*, 121 S. Ct., at 678.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 678-79. This decision to gain control over SWANCC's land by the Corps is based on the definition of "waters of the United States" in 33 C.F.R. § 328.3(a)(3) which has been thought to include all waters regardless of their relation to interstate commerce which: 1) are or would be the habitat of birds protected by the Migratory Bird Treaties or 2) are or would be habitats for migratory birds which cross state lines. *SWANCC*, 121 S. Ct., at 678.

[21] *SWANCC*, 121 S. Ct., at 678. *See* 33 C.F.R. § 328.3(a)(3) (2001).

[22] *SWANCC*, 121 S. Ct., at 679.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

determined that the CWA reaches all the waters the Commerce Clause allows, and the Migratory Bird Rule was a reasonable interpretation of the CWA.[32]

The Supreme Court granted certiorari,[33] and reversed the decision of the Seventh Circuit. The Supreme Court held that the "navigable waters" language in § 404(a) of the CWA,[34] defined as the "waters of the United States,"[35] could not be applied to SWANCC's site because 33 C.F.R. § 328.3(a)(3) (1999),[36] as applied to SWANCC's site through the Migratory Bird Rule, [37] exceeds the authority granted to the Corps under § 404(a) of the CWA.[38]

## III. LEGAL BACKGROUND

In order to fully understand the Court's ruling in the instant case, one must consider the history of environmental regulation, specifically the Migratory Bird Rule, and the use of the Commerce Clause to justify such regulations; the history of the Commerce Clause, before and after the 1995 Supreme Court decision in *United States v. Lopez*; and the post-*Lopez* history of litigation regarding the Migratory Bird Rule.

### *A. The Clean Water Act's Section 404 and the Migratory Bird Rule*

Congress, in 1972, enacted the Clean Water Act (CWA).[39] Because part of the goal of the Clean Water Act is to restore wetlands, section 404 requires that, before anyone can dredge or fill wetlands, they must obtain a permit from the U.S. Army Corps of Engineers.[40] Instead of referring to wetlands, however, the CWA refers more broadly to "navigable waters" which is defined in the CWA as "waters of the United States."[41] Although initially the Corps confined its exercise of authority to waters that were "navigable" in the traditional sense, it broadened its jurisdiction in a number of ways – including a 1986 exercise of jurisdiction based on the Commerce Clause.[42] The Corps exerted power through what is now called the Migratory Bird Rule under the commerce clause by regulating 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."[43] Thus, although prior to the Migratory Bird Rule the Corps could not have jurisdiction over waters that were not either connected to or adjacent to interstate waters, this rule allows potential jurisdiction over not only isolated, but completely intrastate, bodies of water if migratory birds are present.[44]

### *B. History of the Commerce Clause*

The Migratory Bird Rule is based on the fact that Article I of the Constitution vests in Congress the power to regulate commerce with other nations and among the states.[45] Congress's power to regulate interstate commerce, although narrowly interpreted at first, became seemingly unlimited and U.S. courts began to uphold any congressional regulation regardless of any direct effect on interstate commerce.[46]

The Court first recognized the power of Congress to regulate commerce under Article I in *Gibbons v. Ogden* in 1824.[47] *Gibbons* held that, as between a New York statute that granted an exclusive right to provide steamboat travel

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[32] *Id.* at 679-80.
[33] 529 U.S. 1129 (2000).
[34] 33 U.S.C. § 1344(a).
[35] 33 U.S.C. § 1362(7).
[36] *See supra* n. 20.
[37] 51 Fed.Reg. 41217 (1986).
[38] *SWANCC*, 121 S. Ct., at 675.
[39] Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended by the Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977), at 33 U.S.C. §§ 1251-1387 (1988).
[40] Federal Water Pollution Control Act § 404(a), 33 U.S.C. § 1344.
[41] Federal Water Pollution Control Act §§ 404(a) and 502(7), 33 U.S.C. § 1344.
[42] Peter Arey Gilbert, *The Migratory Bird Rule After Lopez: Questioning the Value of State Sovereignty in the Context of Wetland Regulation*, 39 Wm. & Mary L. Rev. 1695 (May, 1998) citing Stephen M. Johnson, *Federal regulation of Isolated Wetlands*, 23 Envtl. L. 1, 2-3 (1993).
[43] Gilbert, *supra* n. 42 quoting 51 Fed. Reg. 41206, 41207 (1986).
[44] Gilbert, *supra* n. 42 citing 33 C.F.R. § 328.3a(3) (1991).
[45] U.S. Const. art. I, § 8[3]. It reads in part that Congress has the power, "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*
[46] Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisdiction and the Limites of Federal Wetland Regulation*, 29 Envtl. L. 1, 7 (Spring 1999).
[47] *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194-95 (1824).

between New York and New Jersey and a federal statute licensing all ships involved in trade, the federal statute was superior.[48] The Court found that in the interest of preserving the channels of interstate commerce the New York statute, which restricted such commerce, should be struck down.[49] In the *Gibbons* decision, Justice Marshall made clear that Congress's Commerce Clause powers should not extend to health, quarantine or inspection laws, nor would the power permit regulation of non-commercial activities and purely intrastate activities.[50]

After *Gibbons*, the Court continued to narrowly interpret Congress's power under the Commerce Clause and, in fact, did not decide many Commerce Clause cases.[51] Around the turn of the century, however, the Court began to expand the scope of Congress's Commerce Clause power as it upheld everything from Congress's ability to regulate purely intrastate railroads to its ability to control labor strikes.[52] However, the primary shift in allowing Congress greater power to regulate activity came in *NLRB v. Jones & Laughlin Steel Corp.*[53], where the Court held that even if activities occur only intrastate, they can be regulated if they have a "close and substantial relation to interstate activities that their control is essential or appropriate to protect that commerce from burdens and obstructions."[54] The Court, in *Jones & Laughlin* reasoned that because the strikes might halt production and thus cause people in other states not to receive the steel produced by Jones & Laughlin, it should uphold Congress's power to regulate such strikes.[55]

After *Jones & Laughlin* in 1937, the Court basically granted Congress the absolute power to regulate anything they wanted – the Court no longer required solid or substantial proof that the area regulated impacted interstate commerce.[56] For example, in *Wickard v. Filburn*, the Court upheld a farmer's prosecution because, although he had only violated a federal agricultural quota by growing wheat on his farm to feed his family which had little if any impact on interstate commerce.[57] The Court based its holding on the "aggregate effects test" which says that even though the defendant was only growing wheat to feed his family and that did not affect interstate commerce, if every farmer nationwide decided to do the same interstate commerce would be affected.[58]

### *C. Lopez and its Aftermath*

The Court's seemingly endless grant of Commerce Clause power to Congress came to a halt in 1995 in *United States v. Lopez*[59] when the court, for the first time in almost 60 years, invalidated a federal statute because it exceeded Congress's power to regulate interstate commerce.[60] The issue in *Lopez* was whether the Gun-Free School Zones Act of 1990 (GFSZA),[61] which prohibited anyone from knowingly possessing a firearm within 1,000 feet of a school, exceeded Congress's ability to regulate commerce. The court said it did.[62] The defendant, Alfonso Lopez, Jr., a San Antonio, Texas, high school student, was arrested and convicted in a Texas court under the GFSZA even though there was a similar Texas state statute which prohibited gun possession on school property.[63] Lopez's conviction was overturned by the Fifth Circuit[64] – a decision that the Supreme Court affirmed.[65]

In *Lopez*, Chief Justice Rehnquist recognized Congress's Commerce Clause power was not boundless – and, in fact, should be limited where it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[66] He based his reasoning on a strict interpretation of the traditional three-

[48] *Id.* at 196.
[49] *Id.*
[50] *Id.* at 203.
[51] *See* Adler, *supra* n. 46 at 8.
[52] *Id.* at 9.
[53] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).
[54] *Id.*
[55] *Id.*
[56] *See* Adler, *supra* n. 31 at 6.
[57] *Willard v. Filburn*, 317 U.S. 111, 128 (1942).
[58] *Id.*
[59] *United States v. Lopez*, 514 U.S. 549 (1995).
[60] *See* Adler, *supra* n. 46 at 10.
[61] 18 U.S.C. § 922(q)(1)(A) (Supp. 1998).
[62] *Lopez*, 514 U.S. at 551.
[63] *Id.* (citing Tex. Penal Code Ann. § 46.03(a)(1)(1994)).
[64] Lopez v. United States, 2 F.3d 1342 (5th Cir. 1993).
[65] *Lopez*, 514 U.S. at 551.
[66] *Id.*

part test used by the Court – which allows Congress to regulate the "channels of interstate commerce", the activities that "substantially affect" interstate commerce and the instrumentalities of interstate commerce.[67]

In determining whether the possession of guns around school zones was a proper area for Congress to regulate, the court considered the three tests – and determined that this activity could not be considered economic activity in and of itself nor could it be considered an instrument of interstate commerce.[68] Thus, the Court decided that they would have to determine whether possessing a gun in a school zone "substantially affected" interstate commerce, consequently determining that it did not.[69] Chief Justice Rehnquist said the question of whether an activity substantially impacted interstate commerce was a question of degree that should be based on a factual inquiry.[70] In *Lopez*, the court found because the government could not produce concrete facts and evidence that the possession of guns in school zones substantial impacted interstate commerce, it did not substantially affect interstate commerce.[71] Chief Justice Rehnquist noted that the critical deciding factor was that the balance of federal-state power would be disturbed if the court had upheld Lopez's conviction, asking specifically whether the regulation dealt with a traditionally state interest – here, police power.[72]

### *D. The Migratory Bird Rule – As Interpreted by Various Circuits*

Several circuits, before and after *Lopez*, have addressed both the regulation of isolated wetlands and whether the migratory bird rule survives a commerce challenge and each arrived at different results.

The Ninth Circuit, after twice considering the facts and district court decisions involving *Leslie Salt Co. v. United States*[73], ultimately held that the Army Corps of Engineers had jurisdiction over the land in question under the commerce clause and the CWA based on the presence of migratory birds.[74] The case involved a dispute about a 153-acre undeveloped parcel of land that was originally owned by Leslie Salt and later acquired by Cargill.[75] The parcel contained ponds that were once shallow, watertight basins created by Leslie Salt's manufacturers who operated a salt manufacturing facility.[76] These ponds, though not present year round, supported aquatic life until the EPA forced Leslie Salt, in 1983, to plow the area.[77] Because of the plowing, the area turned into a wetlands-like environment that fostered migratory birds and other animals and plants.[78] When Leslie Salt decided to drain the land, the Army Corps of Engineers stepped in and tried to stop them, claiming that draining the land would harm migratory birds and, thus, the land was subject to the Corps jurisdiction under the CWA.[79] The Ninth Circuit, on the first appeal, remanded the case based on its holding that there could be a sufficient connection between a migratory bird habitat and interstate commerce to establish the Corps' jurisdiction under the Commerce Clause.[80] On hearing Leslie Salt's second appeal, the Ninth Circuit, once again upheld the Migratory Bird Rule.[81] In his dissent in *Cargill, Inc. v. United States*[82], Justice Thomas argued that the Ninth Circuit's decision to allow the Corps to exercise jurisdiction in this case based on the Migratory Bird Rule in *Leslie Salt* was even less related to commerce than the possession of guns in school zones which the Court, in *Lopez* held was not within Congress's commerce clause powers.[83]

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[67] *Id.* at 558-59.
[68] *Id.* at 599, 601.
[69] *Id.* at 566.
[70] *Id.* at 562-63 and 566.
[71] *Id.* at 562-63, 567.
[72] *Id.*
[73] *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *rev'd* 700 F. Supp. 476 (N.D. Cal. 1989), *cert. denied*, 498 U.S. 1126 (1991), *aff'd*, 55 F.3d 1388 (9th Cir.), *cert. denied* sub nom. *Cargill, Inc. v. United States*, 516 U.S. 955 (1995).
[74] Marni A. Gelb, *Leslie Salt Co. v. United States: Have Migratory Birds Carried the Commerce Clause Across the Borders of Reason*, 8 Vill. Envtl. L.J. 291, 304-5 (1997).
[75] *Id.* at 302-3.
[76] *Id.*
[77] *Id.* at 304.
[78] *Id.*
[79] *Id.*
[80] *Leslie Salt Co.*, 896 F.2d at 361.
[81] *Leslie Salt Co.*, 55 F.3d at 1397.
[82] *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). This is Justice Thomas' dissent to the petition for a writ of certiorari for the Ninth Circuit's opinion in *Leslie Salt Co. v. United States*, 55 F.3d 1388. The case is called *Cargill, Inc. v. United States* because the Ninth Circuit's decision was appealed, in this case, not by Leslie Salt, but by Cargill, Inc. the subsequent owners of the property.
[83] *Id.* at 957-58.

In *Hoffman Homes v. Administrator, United States Envtl. Protection Agency*,[84] the Seventh Circuit, in 1993, held in favor of the Army Corps of Engineers in recognizing the existence of their jurisdiction based on the presence of migratory birds under the Commerce Clause.[85] In *Hoffman Homes I*, the Corps investigated a developer, who owned forty-three acres of land which were to be developed into a housing subdivision, after an employee of the Corps observed construction on the site.[86] The case, on appeal from an EPA decision in favor of Corps, was decided in favor of the developer in *Hoffman Homes I* because the court reasoned that the potential to support migratory birds as a habitat was insufficient to establish jurisdiction.[87] In *Hoffman Homes II*, the Seventh Circuit vacated its decision in *Hoffman Homes I* and, upon an unsuccessful attempt at arbitrating the case, held that where an area could, but does not necessarily actually, affect interstate commerce, jurisdiction based on the commerce clause was still proper.[88] So, although the court upheld the use of the commerce clause to establish jurisdiction of wetlands based on the presence of migratory birds, the court concluded that the suitability of Hoffman Homes' land was not supported by evidence.[89]

In 1997, the Fourth Circuit, in *United States v. Wilson*[90], held that the Army Corps of Engineers exceeded its jurisdiction in determining that the wetlands located on the Defendant's land were "waters of the United States" and, thus, able to fall under its authority.[91] In *Wilson*, the Fourth Circuit struck down the conviction of defendants, James Wilson, the Interstate General Company and St. Charles Associates, for knowingly discharging fill material into wetlands without a permit and violating § 404 of the CWA.[92] The Fourth Circuit, in *Wilson*, rejected the argument by the Corps that it had authority to regulate intrastate waters based on the presence of migratory birds and said the Corps lacked authority to regulate the wetlands because they were not navigable and completely intrastate.[93] It is significant to note that the court, in *Wilson*, suggested that the migratory bird rule was unconstitutional, yet they did not specifically discuss the application of the rule to the circumstances of the case because migratory birds were not found to make a habitat out of the defendant's land.[94]

In *United States v. Hallmark Construction*,[95] a 1998 case, the District Court for the Northern District of Illinois held in favor of the EPA (and thus upheld the Corps jurisdiction) on Hallmark Construction's summary judgment motion and also upon a trial in *Hallmark II*.[96] Hallmark Construction had bought land from Swift Research Farms to develop a subdivision.[97] The land included a five-acre area that naturally retained water and which was classified as a "seasonally flooded farmed wetland" by a civil engineering firm hired by Hallmark Construction to inspect the land.[98] The Seventh Circuit, in *Hallmark I*, held that *Lopez* had not done away with the Seventh Circuit's holding in *Hoffman Homes II*.[99] However, in *Hallmark II*, the Seventh Circuit found that, although *Lopez* did not abolish Commerce Clause jurisdiction over wetlands based on the presence of migratory birds, the facts of this case indicated that the Corps lacked jurisdiction because the government never proved that migratory birds used the five acres as a habitat.[100]

## IV. INSTANT DECISION

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Corps primarily argued that Congress intended that the "navigable waters" language of § 404(a) reach nonnavigable, isolated, intrastate waters and that Congress approved of Corps regulations that extended its jurisdiction to cover such waters. The Supreme

[84] *Hoffman Homes, Inc. v. EPA* ("Hoffman Homes I"), 961 F.2d 1310 (7th Cir. 1992), *aff'd on other grounds, Hoffman Homes, Inc. v. EPA* ("Hoffman Homes II"), 999 F.2d 256 (7th Cir. 1993).
[85] *Hoffman Homes I*, 961 F.2d at 1131.
[86] *Id.*
[87] *Id.*
[88] *Hoffman Homes II*, 999 F.2d at 259, 260-61.
[89] *Id.* at 262. "The migratory birds are better judges than are we, the ALJ or CJO. Having avoided Area A, the migratory birds have thus spoken and submitted their own evidence. We see no need to argue with them." *Id.*
[90] 133 F.3d 251 (4th Cir. 1997).
[91] *Id.* at 259.
[92] *Id.* at 254.
[93] *Id.* at 257.
[94] *Id.*
[95] *United States v. Hallmark* ("Hallmark I"), 14 F. Supp. 2d 1069 (denying defendants motion for summary judgment), final opinion rendered in *United States v. Hallmark* ("Hallmark II"), 30 F. Supp. 2d 1033 (N.D. Ill. 1998).
[96] *Id.*
[97] *Hallmark I*, 14 F. Supp. 2d at 1071.
[98] *Id.*
[99] *Id.*
[100] *Hallmark II*, 30 F. Supp. 2d at 1042.

Court held that the "navigable waters" language in § 404(a) of the CWA,[101] defined as the "waters of the United States,"[102] could not be applied to SWANCC's site because 33 C.F.R. § 328.3(a)(3) (1999),[103] as applied to SWANCC's site through the Migratory Bird Rule, [104] exceeds the authority granted to the Corps under § 404(a) of the CWA.[105]

In reaching this holding, the Court first turned to prior interpretations of § 404(a) of the CWA.[106] The Court cited *United States v. Riverside Bayview Homes, Inc.*,[107] in which it held that the Corps had jurisdiction over wetlands that were adjacent to a navigable waterway.[108] The Court noted that even though it found that Congress intended to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of the term,"[109] the "significant nexus" between the wetlands and the "navigable waters" at issue in *Riverside Bayview Homes* formed the basis for that particular reading of the CWA.[110] The Court further noted that it expressed no opinion in *Riverside Bayview Homes* as to whether the Corps could regulate wetlands not adjacent to "navigable waters."[111]

The Court next noted that the Corps' original interpretation of the CWA, promulgated in 1974, emphasized that "it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor."[112] The Court then turned to the Corps' argument that Congress recognized and approved a broader definition of "navigable waters" that includes nonnavigable, isolated waters by failing to pass legislation to overturn the Corps' 1977 regulations, which defined "waters of the United States to include "isolated wetlands and lakes...and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which would affect interstate commerce."[113] The Corps pointed to failed House Bill H.R. 3199 that would have narrowed the definition of "navigable waters" from the regulations promulgated by the Corps in 1977 as evidence that Congress favored the definition espoused by the Corps' 1977 regulations.[114] In response to this argument, the Court found that failed legislative proposals were an unreliable ground upon which to rest interpretations of prior statutes, and that subsequent legislative history was far less authoritative than contemporaneous evidence.[115] Thus, the Court concluded, the Corps failed to show that Congress acquiesced to the broader definition of "navigable waters" set forth in the Corps' 1977 regulations.[116]

The Corps next argued that § 404(g)(1) of the CWA authorizes jurisdiction over isolated, nonnavigable wetlands.[117] Section 404(g)(1) of the CWA allows a state to petition the EPA for permission to administer its own permit program for discharge of fill material into "the navigable waters (other than those waters which are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce...) within its jurisdiction."[118] The Corps argued that the extension of jurisdiction in § 404(g)(1) to waters other than traditional "navigable waters" is evidence that Congress accepted a broad definition of "navigable waters" that included nonnavigable, isolated, intrastate waters.[119] The Court found that § 404(g)(1) does not conclusively determine the construction to be placed on the term "waters" as it appears in other places in the act.[120]

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[101] 33 U.S.C. § 1344(a) (1994).
[102] 33 U.S.C. § 1362(7) (1994).
[103] *See supra* n. 20.
[104] 51 Fed.Reg. 41217 (1986).
[105] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 684 (2001).
[106] *Id.* at 681.
[107] 474 U.S. 121 (1985).
[108] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 680.
[109] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).
[110] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 680.
[111] *Id.*
[112] *Id. See* 33 C.F.R. § 209.260(e)(1) (1974).
[113] *Id. See* 33 C.F.R. § 232.3(a)(5) (1978).
[114] *Id.* at 681. *See* 123 Cong. Rec. 10420, 10434 (1977) (H.R. 3199, if passed, would have defined "navigable waters" as "all waters which are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.")
[115] *Id.* at 681-82. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Hagen v. Utah*, 510 U.S. 399, 420 (1994).
[116] *Id.* at 682.
[117] *Id.* at 681.
[118] 33 U.S.C. § 1344(g)(1)
[119] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 681.
[120] *Id.* at 682.

In light of these arguments, the Court concluded that the Migratory Bird Rule could not serve as a basis for holding that nonnavigable, isolated, intrastate waters fall under § 404(a)'s definition of "navigable waters."[121] The Court reasoned that such a holding would render the term "navigable" in § 404(a) of the CWA a nullity.[122] The Court further found that Congress' definition of "navigable waters" as the "waters of the United States"[123] cannot be a basis for reading the term "navigable waters" out of the statute.[124] Thus, the Court concluded, the plain meaning of the term "navigable" as used in § 404(a), simply shows that Congress, in enacting the CWA, intended to exert jurisdiction over waters that were navigable in fact or could reasonably be made so.[125]

The Corps next argued that at the least, Congress did not address the question of the scope of § 404(a) and the Court should give deference to the Corps' interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[126] In response to this argument, the Court found that when an administrative regulation invokes the outer limits of the power of Congress, a clear expression must be present that Congress intended that result.[127] The Court indicated that this premise stems from the desire not to reach constitutional issues needlessly and from the assumption that Congress does not lightly authorize agencies to interpret a statute to reach the outer boundaries of Congress' power and that this concern is heightened when an administrative interpretation permits federal encroachment upon a traditionally state power.[128] The Court, therefore reasoned that where a construction of a statute would raise serious constitutional problems, the Court should then construe the statute to avoid such problems unless such a construction is clearly against the intent of Congress.[129]

The Court then indicated, in light of its decision in *United States v. Lopez*,[130] that the application of the Migratory Bird Rule by the Corps in this instance raises significant constitutional questions.[131] The Court found that allowing the Corps to assert jurisdiction over the waters in question would result in a significant impingement of the States' power over water and land use.[132] The Court pointed out that there is no clear statement from Congress that it intended § 404(a) to reach the types of waters involved in the instant case.[133] Thus, the Court concluded that § 404(a) is clear in that the term "navigable waters" as applied through the Migratory Bird Rule cannot apply to the waters in question, and even if the term were ambiguous, the Court declined to extend *Chevron* deference in order to avoid the serious constitutional problems raised by the construction of § 404(a) urged by the Corps.[134]

Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer.[135] The dissent argued that the majority based its opinion on two untenable premises: (1) that when Congress passed the CWA in 1972, it only intended to exert its commerce power over "navigation" and (2) that Congress, in the 1972 CWA, drew the Corps' jurisdiction at this particular line.[136] The dissent began by asserting that early federal water regulations focused primarily on promoting water transportation and commerce.[137] However, the dissent asserted, during the middle of the 20th century, federal water regulation began to focus more on protecting against environmental degradation.[138] The dissent argued that the CWA of 1972 was primarily directed at pollution control, whereas its earlier antecedents focused primarily on the maintenance of navigation.[139] Thus, the dissent argued, because the primary purpose of the act was to prevent pollution, it was necessary to expand the act's jurisdictional scope, and although Congress carried over the traditional jurisdictional term "navigable

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[121] *Id.*
[122] *Id.*
[123] *See* 33 U.S.C. § 1362(7).
[124] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 682.
[125] *Id.* at 683.
[126] 467 U.S. 837 (1984).
[127] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 683. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).
[128] *Id. See United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").
[129] *Id.*
[130] 514 U.S. 549 (1995).
[131] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 683-84.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 683.
[135] *Id.* at 684.
[136] *Id.* at 685.
[137] *Id.*
[138] *Id.* at 686.
[139] *Id.* at 687.

waters," it broadened the definition of the term to encompass all "waters of the United States."[140] The dissent supported this argument by pointing to a Conference Report explaining that the definition of "navigable waters" as "waters of the United States" in § 502(7) was intended to "be given the broadest possible constitutional interpretation."[141] Thus, the dissent argued that while the majority claims that this construction reads the term "navigable" out of the statute, this was already accomplished by Congress by deleting the word from the definition in § 502(7).[142] The dissent also supported this argument by pointing out that the history of federal water pollution regulation indicates that Congress' use of the term "navigable waters" in the 1972 CWA simply continued a long history of usage of the term in prior enactments.[143] Therefore, the dissent argued, the term "navigable waters" operates "as a shorthand for 'waters over which federal authority may properly be asserted.'"[144]

The dissent also argued that Congress approved of and endorsed a definition of "navigable waters" to include nonnavigable, isolated, intrastate waters.[145] The dissent pointed out that the definition of "waters of the United States," found in 33 C.F.R. § 328.3(a)(3),[146] promulgated by the Corps in 1977, spawned a bill in the House to narrow that definition.[147] The dissent stated that because the bill was defeated in the Senate after extensive debate, Congress was fully aware of the Corps' understanding of its jurisdiction and the failure to pass the bill indicated Congressional approval over the Corps' assertion of jurisdiction.[148] In further support of this argument, the dissent also pointed to the fact that portions of the 1977 revisions to the CWA exempted certain classes of waters from federal control.[149] The dissent argued that the exemption of these waters from federal control is evidence that the 1977 Congress recognized that "isolated" waters not covered by the exceptions would fall under the ambit of the CWA.[150]

The dissent next argued that § 404(g) of the CWA uses language that suggests that Congress accepted that the act covered more than waters "navigable" in the traditional sense.[151] Section 404(g)(1) of the CWA allows a state to petition the EPA for permission to administer its own permit program for discharge of fill material into "the navigable waters (other than those waters which are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce) within its jurisdiction.[152] The dissent argued that the legislative history of this provision evidences Congress' desire to extend federal jurisdiction beyond waters "navigable" in the traditional sense.[153] The dissent responded to the majority's finding that § 404(g) did not conclusively determine the construction of the term 'waters' used elsewhere in the act by relying on the Court's finding in *Riverside Bayview Homes* that the provisions of § 404 should be read in pari materia.[154]

The dissent also argued that the Corps' definition of "navigable waters" in 33 C.F.R. §328.3(a)(3) and the Migratory Bird Rule was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[155] The dissent first pointed out that, in *Riverside Bayview Homes*, it clearly held that the agency's construction of the statute that it was to enforce was entitled to *Chevron* deference.[156] The dissent further supported its argument for deference by stating that the Corps' interpretation of the statute does not encroach upon any traditional state power over land use, because, the dissent argues, environmental regulation is distinguishable from traditional land use planning.[157] The dissent also bolstered this argument by arguing that § 404(g) explicitly attempts to foster State control over water regulation by allowing states to develop their own discharge permit programs.[158] Thus, the dissent argued that there exist no federalism

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[140] *Id.*
[141] *Id. See* S. Conf. Rep. No. 92-1236, 144 (1972), reprinted in 1 Leg. Hist. 327
[142] *Id.* at 688.
[143] *Id.*
[144] *Id.*
[145] *Id.* at 690.
[146] *See supra* note 15.
[147] *See supra* note 114 and accompanying text.
[148] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 690.
[149] *Id. See* 33 U.S.C. § 1344(f) (1994).
[150] *Id.*
[151] *Id.* at 691.
[152] *Id.* at 684. *See supra* note 113.
[153] *Id.* at 683-84.
[154] *Id.* at 693.
[155] *Id. See* 467 U.S. 837 (1984).
[156] *Id.*
[157] *Id.*
[158] *Id.*

concerns as the Corps' interpretation does not encroach upon traditional state power, and it is therefore entitled to administrative deference.[159]

Though the majority construed the statute to avoid answering the question of whether Congress has power under the commerce clause to regulate isolated, intrastate waters that serve as a habitat for migratory birds, the dissent commented on this subject and answers the question in the affirmative.[160] The dissent first set forth the three broad categories of activity that Congress may regulate under the commerce clause as set out in *Lopez*.[161] These include regulation of the "channels" and "instrumentalities" of interstate commerce, and activities that "substantially affect" interstate commerce.[162] The dissent argued that the Migratory Bird Rule is properly analyzed under the "substantially affects" category.[163] Drawing on the "aggregation principle," set down in *Wickard v. Filburn*,[164] that if a class of activity, in the aggregate, substantially affects interstate commerce, it is properly the subject of federal regulation, the dissent concluded that destruction of the habitat of migratory birds, in the aggregate, substantially affects interstate commerce.[165]

The dissent argued that the power to regulate interstate commerce necessarily includes the power to regulate and preserve the natural resources that generate such commerce.[166] The dissent pointed out that, in terms of § 404 of the CWA, the discharge of fill material into the nation's waters nearly always is undertaken for commercial reasons. The dissent further argued that it is undisputed that discharge of fill material into isolated, intrastate waters serving as habitat for migratory birds will adversely affect migratory bird populations, and in light of the host of commercial activities generated by migratory bird populations, adverse effects on such populations would undoubtedly "substantially affect" interstate commerce.[167] The dissent attempted to distinguish *Lopez* and *United States v. Morrison*[168] by arguing that the causal connection between filling of wetlands and commercial activities associated with migratory birds is direct and substantial, and not attenuated.[169]

The dissent further supported its argument that regulation under § 404 of the CWA and the Migratory Bird Rule is appropriate under the commerce clause because the Migratory Bird Rule does not blur the distinction between activities that are "national" and "local" in nature, as that concern was espoused in *Morrison*.[170] Here, the dissent argued that the destruction of the habitat of migratory birds often involves a benefit that is disproportionately local, such as the landfill in question, and the costs, such as fewer migratory birds and a decrease in commerce derived therefrom, are disproportionately national and dispersed on other States.[171] The dissent argued that in such situations, federal regulation of the activity is necessary and proper.[172] Therefore, the dissent reasoned, if the commerce clause allows Congress to regulate activities that may have environmental effects on other states, it also allows Congress to regulate individual activity that has the same effect taken in the aggregate.[173]

## V. COMMENT

The Supreme Court, although it avoided addressing the constitutional implications by holding that the "navigable waters" as defined as "waters of the United States" through the Migratory Bird Rule cannot grant the Corps jurisdiction over isolate, intrastate ponds, still did not address whether the Migratory Bird Rule, itself, can withstand a challenge on commerce clause grounds. Thus, the question still remains as to whether the Migratory Bird Rule could withstand a commerce clause challenge. The authors of this casenote submit that the Supreme Court should have held, consistent with *Lopez*, that the Migratory Bird Rule justified the Army Corps of Engineers' jurisdiction over SWANCC in this case because: first, although maintaining the habitats of migratory birds is a non-commercial activity, the Army Corps of Engineers, unlike the government in *Lopez*, was able to provide concrete examples of the how destruction of the habitat

[159] *Id.*
[160] *Id.* at 693-694.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] 317 U.S. 111 (1942).
[165] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 694.
[166] *Id.* at 695
[167] *Id.* at 694-95.
[168] 529 U.S. 598 (2000) (Striking down the Violence Against Women Act ("VAWA")).
[169] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. at 695.
[170] *Id.*; *see* also *United States v. Morrison*, 529 U.S. at 617-18.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 696.

for migratory birds would affect commerce; second, unlike the regulation of gun possession in *Lopez* which clearly falls under the state's police power, environmental regulation has not traditionally been an area of state regulation and there exist no comparable state laws to deal with the problem, as are present in *Lopez*; and third, realistically, the Court is not likely to determine that the regulation of wetlands falls outside the Commerce Clause because it would lead to an unbelievable backlog of appeals.

The first argument is that, although this activity is intrastate and non-commercial on its facts, the Army Corps of Engineers provided sufficient evidence that there is a substantial impact on interstate commerce based on an aggregate of the activity surrounding the migratory bird "industry." Clearly, one cannot argue that maintaining a habitat for migratory birds is an inherently commercial activity. However, the Supreme Court should, like the Seventh Circuit did, have based its holding on the fact that under the aggregate test in *Wickard v. Filburn*,[174] the destruction of migratory bird habitats nationwide would have a substantial affect on interstate commerce.[175] The Seventh Circuit, in the text of its decision in *SWANCC*, cited numerous findings regarding the amount of money spent by Americans on activities involving migratory birds.[176] The Seventh Circuit's conclusion was that, from the statistical data presented, it was obvious that Congress had an interest in protecting such wetlands through regulation because there was a good deal of economic activity related to migratory birds.[177] Additionally, within the facts of the decision, the Seventh Circuit detailed the actual birds that reside in the area sought to be filled in and dredged by SWANCC.[178] Thus, also under the Fourth Circuit's holding in *United States v. Wilson*[179], the inclusion of specific facts indicating the use of the wetlands in question as a bona fide habitat for migratory birds fulfill that court's requirement that the use of the land be proven to affect migratory birds, not just that it have the potential to affect migratory birds.[180] The Supreme Court, instead of upholding the Seventh Circuit's detailed analysis of why the Migratory Bird Rule satisfies commerce clause requirements, found simply that "navigable waters" cannot be held to include, under the definition of "waters of the United States", isolated, intrastate ponds based alone on the presence of migratory birds. The Court's decision to ignore the constitutional implications will no doubt create confusion in the several circuits as they struggle to decide whether the migratory bird can sustain a challenge based on commerce clause grounds.

The authors of this casenote contend that the Migratory Bird Rule should survive such a challenge. Such a holding would be consistent with the court's decision in *Lopez* because *Lopez* differs from *SWANCC* because, in *Lopez*, the Supreme Court criticized Congress for its failure to include specific findings on how the possession of a gun in a school zone affected interstate commerce.[181] Nowhere in the *Lopez* decision were there any findings of fact similar to what was offered in *SWANCC*.[182] Thus, the mere existence of findings in the Seventh Circuit's decision in *SWANCC* should be enough for the Supreme Court to establish the fact that an economic impact – and even an interstate one – is what is at stake in the case. Additionally, the fact that the government in *Lopez* failed to include substantiating evidence of the impact of guns near school zones on interstate commerce also shows that the court failed to establish real proof that the particular Texas school was adversely affected by the presence of guns. The Seventh Circuit, in *SWANCC*, established that the presence of migratory birds substantially impacted interstate commerce, isolated wetlands, in and of themselves, impact commerce in that they heighten biological diversity and support both populations of migratory birds and of

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[174] Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

[175] *Solid Waste Agency of Northern Cook County*, 121 S.Ct. 675 and *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850.

[176] *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850 citing Hoffman Homes, Inc., 999 F.2d at 261. "We observed in *Hoffman Homes, Inc. v. EPA*...that 'throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds.'" *Id. SWANCC* also cited a study which said that approximately 3.1 million Americans spent $1.3 billion in 1996 to hunt migratory and 11 percent of them traveled across state lines to hunt. *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850 citing Fish and Wildlife Service, U.S. Dep't of the Interior and Bureau of the Census, U.S. Dep't of Commerce, 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 25 (November 1997). Additionally, the Seventh Circuit, in its decision, noted that some 17.7 million Americans traveled to other states to observe the migratory birds, 14.3 million of those individuals traveled specifically to see the migratory birds and 9.5 million Americans traveled to observe shorebirds. *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850 citing Fish and Wildlife Service, U.S. Dep't of the Interior and Bureau of the Census, U.S. Dep't of Commerce, 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 45 (November 1997).

[177] *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850.

[178] *Id.* at 848. See also supra note....

[179] *United States v. Wilson*, 133 F.3d at 251.

[180] *Solid Waste Agency of Northern Cook County*, 191 F.3d at 851.

[181] *Lopez*, 514 U.S. at 559 – 562.

[182] *Id.*: See infra note 3, p. 2.

endangered species.[183] This finding by the Seventh Circuit, in the record before the Supreme Court, should have been enough to sustain the Migratory Bird Rule's validity against a commerce clause challenge.

Another strength of the *SWANCC*'s case, unlike *Lopez*, is that this case deals with a commercial industry which, through the presence of migratory birds on its wetlands, is being subject to the Corps jurisdiction and regulation. That is, because *SWANCC* deals with the activities of a corporation which are broader in scope and certainly not limited to personal use since the land is being developed as a waste disposal facility, there is a commercial impact in this case, which was not present in *Lopez* and partially helped the court to justify its holding.[184]

The second argument is that unlike Congress's attempt to regulate gun possession near schools in *Lopez*, which clearly falls under the state's police power and was, in fact, covered under a Texas statute, environmental regulation has not traditionally been an area of state regulation and there exist no comparable state laws to deal with the problem. Additionally, although in *Lopez* the Court said that because the "Guns Free School Zones" Act contained no jurisdictional element to link firearm possession to interstate commerce,[185] the Clean Water Act does contain such a provision because the goal of the CWA is to "maintain the chemical, physical, and biological integrity of the Nation's waters...(and) provide ... for the protection and propagation of fish, shellfish and wildlife..."[186] Thus, because the CWA specifically points to the goal of the migratory bird rule's use in establishing the Corps' jurisdiction, it satisfies the requirement in *Lopez* that there be a link between the act being regulated and interstate commerce.

In *Lopez*, the Court noted the fact that determining the breadth and use of criminal laws, especially with respect to police powers, was traditionally a state function – and, in fact, until recently there had not existed a federal criminal body of law.[187] The Supreme Court, in *Lopez*, stressed the fact that the commerce clause had almost eliminated any vestiges of federalism still alive in modern America.[188]

Although *Lopez* was partially decided based on substantial federalism concerns, any such fears in the instant case are unfounded because the regulation of migratory birds has predominantly been a federal responsibility. The Seventh Circuit said that based on the number of international treaties and long upheld case law recognizing the national, and even international, nature of migratory birds, regulating the nation's waters has not been an area of traditional local control.[189] Using *Lopez*'s focus on functional federalism, which is especially apparent in Justice Kennedy's concurring opinion, the regulation of this wetlands area based on the presence of migratory birds is a legitimate use of Congress's Commerce Clause power because the effects of the destruction of that wetland have effects outside the state – thus, affecting more land than that owned by the landowner.[190] Additionally, since the 1970s when substantial federal environmental legislation including the Clean Water and Clean Air Acts was enacted, the federal government has had control over nearly all environmental regulation nationwide with the only state authority being what is delegated under the federal statutes. In fact, some argue that using the Migratory Bird Rule to regulate isolated wetlands, even if regulating wetlands is traditionally a state function, passes *Lopez* because of the potential costs which would be borne by other states if the wetlands were not regulated.[191]

Third, because of the congressional, environmental and social repercussions which would likely result if the Court began overturning environmental legislation for violating the Commerce Clause, realistically and practically the Court will probably not do so. Even in the wake of the Court's decision in *Lopez* not to uphold the GFSZA under the commerce

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[183] Elaine Bueschen. "Do Isolated Wetlands Substantially Affect Interstate Commerce?." 46 Am. U. L. Rev. 931. 959 (February. 1997).

[184] Christopher N. Challis. *Standing Alone in Murky Waters: Evaluating the Fourth Circuit's Solitary Stance on Federal Wetlands Regulation.* 34 Wake Forest L. Rev. 1179. 1201 (Winter 1999). "However. a strong argument can be make that the activity of corporations such as ... Solid Waste ... qualify as economic or commercial in nature. As this is the more likely scenario a court will encounter. it is reasonable to conclude that such wide-scale land clearing will satisfy the first requirement of the Lopez analysis." *Id.*

[185] *Lopez*. 514 U.S. at 561.

[186] Edward Alburo Morrissey. *The Jurisdiction of the Clean Water Act over Isolated Wetlands: The Migratory Bird Rule*. 22 J.Legis. 137. 142 (1996) citing 33 U.S.C. 1251(a)(1988).

[187] *Lopez*, at 567-68.

[188] *Id.*

[189] 191 F.3d at 851 (citing Convention for the Protection of Migratory Birds and Birds in Danger of Extinction. and Their Environment. U.S. – Japan. 25 U.S.T. 331. T.I.A.S. No. 7990 (1972); Convention for the Protection of Migratory Birds and Game Mammals. U.S. – Mex.. 50 Stat 1311. T.S. No. 912 (1936); Convention for the Protection of Migratory Birds. U.S. – Gr. Brit.. 39 Stat. 1702. T.S. No. 628 (1916); *North Dakota v. United States*. 460 U.S. 300. 309. 103 S.Ct. 1095. 75 L.Ed.2d 77 (1983); and *Missouri v. Holland*. 252 U.S. 416. 40 S.Ct. 382. 64 L.Ed. 641 (1920)).

[190] Peter Arey Gilbert. *The Migratory Bird Rule After Lopez: Questioning the Value of State Sovereignty in the Context of Wetland Regulation*. 39 Wm. & Mary L. Rev. 1695. 1740 (1998). "Sustaining the MBR does not undermine. in any meaningful way. any of the contemplated benefits of state sovereignty. The MBR does not frustrate the constitutionally mandated federal-state balance in that it does not open the door to limitless federal regulation. Whatever its merits. judicially imposed deference to state sovereignty should extend only so far as the reasons that justify state sovereignty as a principle." *Id.*

[191] *Id.* at 1739.

clause, the Court would likely think twice before using *Lopez* to overturn the Migratory Bird Rule and remove isolated wetlands from the jurisdiction of the Army Corps of Engineers. If the Court were to find the Migratory Bird Rule beyond the scope of the commerce clause powers granted to Congress, the Court would realistically have to deal with an influx of cases because of the breadth and variety of environmental regulation not based directly on commercial activity.

Other practical concerns also counsel against striking down the Migratory Bird Rule based on commerce clause grounds. By holding that the Migratory Bird Rule does pass commerce clause muster, the Court could pave the way for increased use of weaker bases for regulation of isolated wetlands. Recently, the Seventh Circuit held in *United States v. Dierckman* that the "Swampbuster" provisions of the Food Security Act, under which a farmer who converts wetlands on his property can lose any Department of Agriculture ("USDA") benefits were based on Congress' spending power, rather than the commerce clause.[192] Such regulations place a coercive "choice" on farmers because the vast majority of farmers in America today receive some form of USDA benefits, and they must either submit to federal wetlands regulation or "choose" to convert wetlands on their property and lose all USDA benefits.[193] In light of the nearly unbridled power wielded by Congress under the spending power, the Seventh Circuit's decision in *Dierckman* approves a coercive scheme of indirect regulation of intrastate wetlands.[194]

In contrast, the regulation under § 404 of the CWA is a more responsible regulation in that it is based on more constitutionally tenable grounds under the commerce clause and current commerce clause jurisprudence. Regulation under § 404 is more direct and does not place such a coercive choice on owners of wetlands. If the Court were find that the Migratory Bird Rule cannot survive a commerce clause challenge, the door would stand open for other circuits to follow the Seventh Circuit's lead and endorse more questionable bases for intrastate wetland regulation.

An alternative to overturning cases for violations of the commerce clause based on the Migratory Bird Rule that one scholar suggests would be to amend the CWA to overtly subject isolated wetlands to jurisdiction based on the presence of migratory birds.[195] The scholar reasons that, by applying a broader interpretation of the CWA's jurisdictional provision, the EPA and the Corps can work to protect and increase the population of wildlife directly through the CWA.[196]

Realistically, although the Federal District Courts have occasionally struck down statutes based on *Lopez* in the last five years, none of these decisions have been upheld by any one of the Courts of Appeal.[197] Courts have upheld many of these because, in the wake of *Lopez*, the government (and its agencies) are much more likely to include many findings of fact which directly relate the presence of migratory birds to the body of water in question and to interstate commerce.[198] Because most environmental statutes overtly contain a connection to interstate commerce within their texts, when faced with a case involving a commerce clause challenge to the Migratory Bird Rule when the wetlands area in question is not a purely intrastate, isolated pond, the court should uphold such jurisdiction based on the commerce clause since holding otherwise could potentially derail nearly all environmental statutes. .[199]

## VI. CONCLUSION

The Supreme Court's holding in this case merely postpones the Court's inevitable decision as to whether the Migratory Bird Rule passes commerce clause muster. The Court should hold that it does because it is consistent with the Court's decision in *Lopez* and because, to hold otherwise, would jeopardize the validity of nearly all environmental regulations that are based on the commerce clause. While it remains uncertain whether the Supreme Court would sustain the Migratory Bird Rule on commerce clause grounds, what is certain is that it will face that exact question at point in the future and, when it does, for the sake of the future of federal environmental regulations, it must uphold the rule.

TANYA M. WHITE
PATRICK R. DOUGLAS

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[192] *See United States v. Dierckman*, 201 F.3d 915 (7th Cir. 2000).

[193] *See* Rebecca Fink, *"We're From the Government and We're Here To Help." Farmer and Ranchers' Reliance on Voluntary Governmental Programs May Open the Door to Governmental Control of Private Property Through the Expanding Scope of Wetlands Regulation*, 30 Tex. Tech. L. Rev. 1157, 1158 (1999).

[194] *See* Patrick R. Douglas, *Conservation or Coercion: Federal Regulation of Intrastate Wetlands Under the Swampbuster Provisions of the Food Security Act*, 8 Mo. Envtl. L. & Policy Rev. 59 (2001).

[195] Morrissey, 22 J. Legis. 137, 143 (1996).

[196] *Id.*

[197] Antony Barone Kolenc, *Commerce Clause Challenges After United States v. Lopez*, 50 Fla. L. Rev. 867, 931 (December, 1998).

[198] Bueschen, 46 Am. U. L. Rev. at 960.

[199] Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 Duke Envtl. L. Pol'y F. 321, 365 (Spring 1997).