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The Clean Water Act: What's Commerce Got to Do With It?

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I. Introduction

Few commentators doubt the value of clean, unadulterated waters teeming with varied and colorful aquatic life. The debate centers instead on more pragmatic concerns, that is, how to best accomplish the accepted imperative. Some maintain that the primary responsibility should fall on the federal government because of its insularity from regional economic and political pressures.[1] Others suggest that states should take the lead because of their familiarity with and ability to respond to local environmental concerns.[2] Both sides have valid points. The fundamental question, however, is not whether the states or Washington is better positioned to protect the environment, but which part of the federalist structure has authority to regulate in this area.

This inquiry is necessary because our republic rests upon purposeful divisions of power.[3] "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[4] For that reason, the federal government was granted a limited number of specific powers and the balance left to the states.[5]

This is not to say that the federal government is feckless. Within its apportioned sphere, the U.S. Congress has ample authority, including the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[6] This "Commerce Clause" was designed to forge the fragile new nation into an economic force by unifying foreign trade regulations and curbing factionalism within the country.[7] It proved well suited for that purpose.

In modern times, however, the U.S. Commerce Clause has been used to support a wide variety of criminal and social legislation having little relation to its text.[8] Indeed, by the close of the 20th century, the interstate commerce power

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1. *See, e.g.*, Victor B. Flatt, *A Dirty River Runs Through It (the Failure of Enforcement in the Clean Water Act)*, 25 B.C. Envtl. Aff. L. Rev. 1, 2-7 (1997).

2. *See, e.g.*, Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 Minn. L. Rev. 535, 535-37 (1997).

3. *See* Alden v. Maine, 527 U.S. 706, 713 (1999) ("Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document specifically recognizes the States as sovereign entities."); United States v. Lopez, 514 U.S. 549, 552 (1995) ("The powers delegated to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite.") (quoting The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal government.").

4. *Gregory*, 501 U.S. at 458.

5. *E.g.*, United States v. Reynard, 220 F. Supp. 2d 1142, 1171 (S.D. Cal. 2002) ("Every law enacted by Congress must be based on a power enumerated in the Constitution."). The U.S. Congress' powers are enumerated at Article I, Section 8 of the U.S. Constitution. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of national power." *Alden*, 527 U.S. at 14.

6. U.S. Const. art. I, §8, cl. 3.

7. *See infra* section entitled The Commerce Clause.

8. *See, e.g.*, Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 Ecology L.Q. 215, 235-36 (2000) ("Prior to 1936, there were significant limitations upon the power of the federal government to regulate commerce, but . . . the Court has [since] almost completely deferred to Congress in such matters."). New Deal programs ambitiously extended federal authority, and the judicial opinions sustaining those programs dismantled many of the traditional limitations to the same. *See, e.g.*, Richard A. Epstein, *The Proper Scope of the Commerce Clause*, 73 Va. L. Rev. 1387, 1400 (1987) ("The New Deal was not a reformation, but a sharp departure from previous case law . . . ."). Federal circuit and district courts have since upheld a wide range of congressional enactments. *See* United States v. Haney, 264 F.3d 1161 (10th Cir. 2001) (holding that the Commerce Clause supported a federal law proscribing the possession of a machine gun; United States v. Jimenez, 256 F.3d 330 (5th Cir. 2001) (holding that the Commerce Clause supported a federal arson statute as applied to the destruction of a home office); Gibbs v. Babbitt, 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000) (holding that Congress had the power to regulate the killing of a single endangered wolf); National Ass'n of Home Builders (NAHB) v. Babbitt, 130 F.3d 1041, 28 ELR 20403 (D.C. Cir. 1997) (holding that Congress could protect an intrastate fly species from incidental habitat damage caused by development of a county hospital); United States v. Pozsgai, 999 F.2d 719, 23 ELR 21012 (3d Cir. 1993) (holding that the defendants were liable for discharging fill material into isolated wetlands located on their property); Leslie Salt Co. v. United States, 896 F.2d 354, 20 ELR 20477 (9th Cir. 1990) (holding that the plaintiff could not fill shallow, excavated salt pits located on its property); United States v. Larkins, 852 F.2d 189, 18 ELR 21416 (6th Cir. 1988) (holding that the defendants could not fill sloughs and depressions that had collected rainwater); Utah v. Marsh, 740 F.2d 799, 14 ELR 20683 (10th Cir. 1984) (holding that the isolated, intrastate Utah Lake was subject to federal regulation); Goodwin v. Occupational Safety & Health Admin. Review Comm., 540 F.2d 1013 (9th Cir. 1976) ("In the case at bar the activity of clearing land for the purpose of growing grapes is an activity which, if performed under unsafe conditions, will adversely affect commerce."); Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985, 9 ELR 20426 (D. Haw. 1979) (holding that the federal government could require a state to protect the habitat of a nonmigratory, isolated bird from habitat destruction caused by wild goats); United States v. Bair, 488 F. Supp. 22, 9 ELR 20324 (D. Neb. 1979) (holding that the Commerce Clause authorized the federal government to criminalize hunting from aircraft).

had become so broad that many legal scholars suggested there were no longer limits to congressional authority.[9]

The U.S. Supreme Court reversed this trend in the 1995 case of *United States v. Lopez*,[10] which, for the first time in nearly 60 years, held that a federal enactment went beyond the power conveyed by the Commerce Clause.[11] The Court extended and clarified *Lopez* in *United States v. Morrison*[12] and seems prepared to scrutinize other federal enactments as well.[13] Whether these cases portend a fundamental change in Commerce Clause jurisprudence remains speculative but, at a minimum, the issue of enumerated powers is again more than an abstract discussion.

In that context, this Article examines the constitutional support for the Clean Water Act (CWA),[14] one of the older and better-known federal environmental statutes. The CWA, relatively modest in origin, has been steadily expanded by regulatory agencies so that it now applies to the discharge of various substances,[15] designated pollutants, into waters such as "intrastate lakes . . . [intermittent streams,] mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or . . . ponds, the use degradation or destruction of which *could affect* interstate commerce . . . ."[16] This Article argues that considerably more than a possible effect on interstate commerce is required to bring a particular instance of water pollution within congressional power.

Part II discusses the text of the Commerce Clause, including the meaning of "commerce among the several states" both before and after 1937. Part III briefly outlines the CWA and concludes by detailing two decisions that used little thought or critical analysis to uphold broad applications of the same. Part IV recounts *Lopez* and *Morrison*. Finally, Part V applies *Lopez* and *Morrison* to the CWA and its current regulatory interpretation.

II. The Commerce Clause

A. The Text

The text of the Commerce Clause is simple enough: Congress has the power to "regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."[17] The Framers regarded this power as one of the "third class" of powers, that is, "those which provide for the harmony and proper intercourse among the States."[18] In support of its inclusion in the U.S. Constitution, the Framers argued that the Commerce Clause would foster commercial and political harmony—realizing that a union in which the states spoke with solidarity on national trade issues would become a great economic force.[19] The Framers intended, therefore, to eliminate factions and prevent one state from laying duties, exacting fees or otherwise taking advantage of its location and internal attributes at the expense of other states.[20] They did not, however, believe it wise to grant the federal government plenary power over all things economic or of national concern,[21] and the Commerce Clause

9. *See* Holly Doremus, *Patching the Ark: Improving Legal Protection of Biodiversity*, 18 Ecology L.Q. 265, 294 (1991) ("As currently interpreted, the Commerce Power has a virtually unlimited sweep."); *see also* White, *supra* note 8, at 236 ("This expansive view of the Commerce Clause resulted from the belief that Congress had almost unlimited power to legislate based on the Commerce Clause."); Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 Duke Envtl. L. & Pol'y F. 321 (1997) ("Because courts have defined the commerce power quite broadly, since the 1930s, Congress has enjoyed some sixty years of essentially plenary legislative power.").

10. 514 U.S. 549, 552 (1995).

11. The Court held that the Gun-Free School Zones Act (School Zones Act) of 1990 was unconstitutional. *Id.* at 551.

12. 529 U.S. 598 (2000). The Court held that 42 U.S.C. §13981, which created a federal civil remedy for victims of gender-motivated violence, exceeded the interstate commerce power. *Id.* at 619.

13. *See* Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001); United States v. Jones, 529 U.S. 848 (2000). Although *SWANCC* and *Jones* were decided on statutory grounds, the Court clearly had concerns of constitutional dimensions. *See SWANCC*, 531 U.S. at 173, 31 ELR at 20384; *Jones*, 529 U.S. at 858.

14. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

15. *See id*. §1362(6), ELR Stat. FWPCA §502(6). The regulatory agencies have further expanded the definition of "pollutant," 40 C.F.R. §122.2 (1999), and one federal appellate court recently even held (over agency and state objections) that unaltered groundwater is a pollutant. Northern Plains Resource Council v. Fidelity Exploration & Dev. Co., 325 F.3d 1155, 33 ELR 20171 (9th Cir. 2003). The discharge of "dredged or fill material" without a permit is likewise unlawful. 33 U.S.C. §1344(a), ELR Stat. FWPCA §404(a).

16. 40 C.F.R. §122.2 (emphasis added). The CWA prohibits the discharge of pollution or fill into "navigable waters" without a permit. 33 U.S.C. §1311, ELR Stat. FWPCA §301. "Navigable waters" is defined as "the waters of the United States." *Id*. §1362(7), ELR Stat. FWPCA §502(7). The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have substantially expanded that definition. *See* 40 C.F.R. §122.2 (EPA); 33 C.F.R. §328.3(a)(3) (Corps).

17. U.S. Const. art. I, §8, cl. 3.

18. The Federalist No. 42, at 282 (James Madison) (Jacob E. Cooke ed., 1961). Included within the third class are, among others, the power to "coin money, regulate the value thereof, and of foreign coin; . . . to fix the standard of weights and measures; to establish a uniform rule of naturalization, and uniform laws of bankruptcy; . . . and to establish post offices and post roads." *Id.* at 282-83.

19. *See id.* No. 11, at 65-73 (Alexander Hamilton) ("Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system, superior to the control of all transatlantic force or influence, and able to dictate the terms of the connection between the old and the new world!"); *id.* No. 42, at 283 (James Madison) ("[W]ithout [the power to regulate commerce among the states,] the great and essential power of regulating foreign commerce, would have been incomplete, and ineffectual.").

20. *See id.* No. 7, at 38-41 (Alexander Hamilton) (arguing that a commercial union was necessary to prevent some states from forcing others to pay tributes); *id.* No. 42, at 283 (James Madison) ("A very material object of [power to regulate commerce among the states] was the relief of the States which import and export through other states, from the improper contributions levied on them by the latter."); *id.* No. 22, at 137 (Alexander Hamilton) ("The interfering and unneighbourly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others . . . .").

21. *See id*. No. 22, at 137 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* United States v. McCoy, 323 F.3d 1114, 1123 n.18 (9th Cir. Mar. 20, 2003) ("[S]imply because a type of antisocial conduct (which any state could validly proscribe) can fairly be described as a 'national' problem in the sense that many (or even all) states experience more instances of it than desirable or desired, [does not mean that] this of itself suffices to bring such conduct within the scope of Congress's Commerce Clause Power.") (quoting United States v. Bird, 124 F.3d 667, 678 n.13 (5th Cir. 1997)) (alterations in original); Peter A. Lauricella, *The Real "Contract With America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 Alb. L. Rev. 1377, 1403-05 (1997) (discussing the intent of the Framers and those who adopted the Constitution); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 Tex. L. Rev. 695, 705 (1996) ("The retention of local autonomy . . . was basic . . . ."); *id.* at 704 ("The founders all-but-exclusive concern was with exactions by some states from their neighbors.").

was thus composed with words carefully chosen to effect its purpose.[22]

The meaning of those words was thoroughly addressed in the landmark case of *Gibbons v. Ogden*.[23] The principal issue in *Gibbons* was whether Congress had the power to license ferries transporting passengers between ports in New Jersey and New York.[24] This question reached the Court when competing ferries began operating in the same waters, one under a federal license and the other pursuant to an exclusive New York license, and the federal licensee sued to enforce his monopoly rights.[25] In an opinion by Chief Justice Marshall, the Court held that the federal law was valid under the Commerce Clause and, therefore, the conflicting state law failed.[26]

Although *Gibbons* is sometimes selectively cited in support of a broad reading of interstate commerce power,[27] the opinion rests squarely upon the text of the Constitution.[28] That is, the Court focused on the words used to define the power conveyed and concluded that "the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."[29] Following this principle, the "power to regulate" is the power "to prescribe the rule by which commerce is to be governed."[30] And "commerce" "describes the commercial intercourse between nations, and parts of nations, in all its branches . . . ."[31] Finally, the phrase "among the several States" limits Congress' regulatory power to commercial intercourse that "concerns more States than one" and excludes from it "commerce, which is completely internal."[32] In other words, "[t]he enumeration [of powers] presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State."[33]

So defined, the Commerce Clause grants Congress the power to establish rules, subject to other constitutional limitations, for trade between the states, just as Congress may establish rules for trade with foreign nations and Native American tribes. This necessarily (and unremarkably) embraces the movement of persons and things interstate and thus the power to license ferries transporting passengers between New Jersey and New York.

B. Reinventing the Commerce Clause

The text-based interpretation of *Gibbons* guided the Court until 1936.[34] "[U]nder tremendous political pressure from President Franklin D. Roosevelt,"[35] however, the Court began to view federal power more broadly. This shift started with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[36] which upheld the National Labor Relations Act (NLRA) both facially and as applied to an intrastate steel producer.[37]

In sustaining the NLRA, the Court reasoned that the "close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry, although the industry when viewed separately is local."[38] The NLRA, according to the Court, satisfied this nexus because of the "close and intimate relation which a manufacturing industry has to interstate commerce."[39] In other words, Congress had the power

22. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113-25 (2001) (discussing the use of the term "commerce" in contemporary dictionaries, the Constitutional Convention, *The Federalist* papers and the ratification conventions and concluding that commerce was coterminous with "trade" and did not mean "any gainful activity").

23. 22 U.S. (9 Wheat.) 1 (1824).

24. *Id.* at 8-10 (Counsel for Appellee).

25. *Id.* at 3-10 (Counsel for Appellee).

26. *See id.* at 195-98.

27. *E.g.*, United States v. Lopez, 514 U.S. 549, 605 (1995) (Souter, J., dissenting); *id.* at 616 (Breyer, J., dissenting).

28. *See id.* at 594-97 (Thomas, J., concurring). In constitutional interpretive theory, there is a seemingly uncontroversial idea that words have natural, limited meanings that must control. The object in this method of interpretation is to limit the opportunity for judicial legislation by "defining what the text meant originally." *See* Lauricella, *supra* note 21, at 1383. Chief Justice Marshall followed this rule of construction. *See Gibbons*, 22 U.S. at 189 ("We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."); Epstein, *supra* note 8, at 1404 ("[Chief Justice Marshall's] attitude was that the Constitution should be construed in its natural sense."); Berger, *supra* note 21, at 701 ("Chief Justice Marshall, who had been a participant in the Virginia Ratification, stated that if a word 'was so understood . . . when the constitution was framed . . . [,] the convention must have used the word in that sense . . . .") (quoting *Gibbons*, 22 U.S. at 190) (alteration in original); *see also* Barnett, *supra* note 22, at 125 ("From the perspective of original intent, [*Gibbons*] is unremarkable.").

29. *Gibbons*, 22 U.S. at 188.

30. *Id.* at 196.

31. *Id.* at 190; *see also* Berger, *supra* note 21, at 702 ("Dr. Johnson's famous 1755 Dictionary defines 'commerce' as 'intercourse, exchange of on thing for another . . . ; trade; traffic.").

32. *Gibbons*, 22 U.S. at 194-95 ("The phrase [among] is not one which would probably have been selected to indicate the completely interior traffic of a State . . . ."); *see also* Berger, *supra* note 21, at 702 ("'Commerce among the States,' Chief Justice Marshall observed, 'must of necessity be commerce with the States.'") (quoting *Gibbons*, 22 U.S. at 196).

33. *Gibbons*, 22 U.S. at 195.

34. *See* Carter v. Carter Coal Co., 298 U.S. 238, 301 (1936) ("That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the Commerce Clause."); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) ("We are of the opinion that the attempt through the provisions of the code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power."); Hammer v. Dagenhart, 247 U.S. 251, 272 (1918) ("Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state."); Kidd v. Pearson, 128 U.S. 1, 20 (1888) ("No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce."); United States v. Dewitt, 19 U.S. 593 (1870) (holding that Congress could not proscribe all sales of naphtha and illuminating oils).

35. J. Blanding Holman IV, *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 143 (1995). President Franklin D. Roosevelt threatened to expand the Court and to "pack" it with New Deal Justices. *See id.* at 211 n.16. President Roosevelt formed this plan "in response to several Supreme Court decisions striking down major pieces of his New Deal legislation . . . ." Lauricella, *supra* note 21, at 1396.

36. 301 U.S. 1 (1937).

37. *Id*. at 30. The NLRA established collective bargaining rights and empowered a federal board to prevent "unfair labor practices." *Id.*

38. *Id*. at 38.

39. *Id.* at 43.

to regulate manufacturing in general and the steel industry in particular because of the connection between such industry and activities that were interstate in nature.[40]

Although *Jones & Laughlin* was a narrowly worded opinion,[41] its consequences went far beyond the facts of the case. The principle barrier to congressional regulation of intrastate activities was dismantled when manufacture became a part of commerce, not its successor.[42] Wasting little time, Congress enacted the Agricultural Adjustment Act (AAA) of 1938 the following year. The AAA purported to regulate the volume of wheat moving in interstate commerce but actually applied to all farmers, whether producing wheat for sale and transport or not.[43] Legal challenges quickly followed.

In *Wickard v. Filburn*,[44] the Court sustained the AAA both facially and as applied to an intrastate wheat grower.[45] The Court reasoned that its earlier limits on congressional power were outdated.[46] Properly interpreted, the Commerce Clause embraced any activity, even if it "be local and though it may not be regarded as commerce . . . if it exerts a substantial economic effect on interstate commerce, and this is irrespective of whether such effect is . . . 'direct' or 'indirect.'"[47] Applying this analysis to the AAA, the Court held that wheat production in general affected interstate commerce and, when aggregated, a single farmer growing wheat for personal consumption did the same because that farmer would otherwise buy more wheat on the open market.[48]

Wickard sustained federal regulation of an activity that just 50 years earlier the Court expressly reserved to the states.[49] Following *Wickard*, courts discovered that many local activities had some impact on interstate commerce[50] and, through these cases, a new formulation of the interstate commerce power developed: the challenged legislation was valid if Congress had "any rational basis" for finding that the regulated activity affected interstate commerce and "the means chosen were reasonable."[51] This view was firmly established when the CWA became law.

III. The CWA

A. The Statute and Agency Interpretations

Congress enacted the CWA in 1972 with the goal of eliminating water pollution in the nation by 1985.[52] To that end, the CWA targets the discharge of pollutants and "dredged or fill material" into "navigable waters,"[53] defined as "waters of the United States."[54] The U.S. Army Corps of Engineers (the Corps) regulates the discharge of dredged or fill mate-

40. *See id.* at 38-43.

41. *See id.* at 30 ("We think clear that the [NLRA] may be construed so as to operate within the sphere of constitutional authority."). The Court recited the provisions of the Act and concluded that only those activities affecting commerce "in such a close and intimate fashion" were within the authority of the board and that this determination could be made "as individual cases arise." *Id.* at 32.

42. *Cf.* United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it.").

43. *See generally* Holman, *supra* note 35, at 143-44 (discussing the background facts).

44. 317 U.S. 111 (1942).

45. *Id.* at 129.

46. *See id.* at 121-25.

47. *Id.* at 125.

48. *Id.* at 127.

49. *See* Kidd v. Pearson, 128 U.S. 1 (1888). In *Kidd*, the Court warned:

> If it be held that [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transaction in the future, it is impossible to deny that it would also include all the productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry . . . . Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago?

Id. at 20-21.

50. *See* cases cited *supra* note 8; Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that federal wage and hours laws were constitutional as applied to city employees); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 11 ELR 20569 (1981) (holding that the Surface Mining Control and Reclamation Act was facially constitutional); Perez v. United States, 402 U.S. 146 (1971) (holding that Congress has the power to criminalize intrastate extortionate credit practices). *But see* United States v. Wilson, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997) (concluding that the Corps' definition of "waters of the United States" appeared to "exceed congressional authority under the Commerce Clause"); Hoffman Homes, Inc. v. United States, 961 F.2d 1310, 22 ELR 21148 (7th Cir. 1992) (holding that regulation of a 0.8-acre wetland exceeded Congress' Commerce Clause power), *vacated*, 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993); Pierce v. King, 918 F. Supp. 932 (E.D. Cal. 1996) (holding that the Americans With Disabilities Act could not constitutionally extend to prison inmates), *vacated*, 528 U.S. 802 (1998); United States v. Olin Corp., 927 F. Supp. 1502, 26 ELR 21303 (S.D. Ala. 1996) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405 "represent[ed] an example of the kind of national police power rejected by *Lopez*"), *overruled*, 107 F.3d 1506 (11th Cir. 1997); Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996) (holding that the Freedom of Access to Clinic Entrances Act of 1994 exceeded the interstate commerce power), *rev'd*, 126 F.3d 575 (4th Cir. 1997); United States v. Mallory, 884 F. Supp. 496 (S.D. Fla. 1995) (holding that the federal "carjacking" statute was unconstitutional as applied); United States v. Trigg, 842 F. Supp. 450 (D. Kan. 1994) (holding that the School Zones Act was unconstitutional).

51. *E.g.*, *Hodel*, 452 U.S. at 276, 11 ELR at 20571-72. This test appears to have developed from a misreading of Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Stated in context, the *Heart of Atlanta* rule actually provides:

> The Act [does not] deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no "right" to select its guests as it sees fit, free from government regulation.

379 U.S. at 259. As is plain from the quoted text, the rule expressed a due process test, not a Commerce Clause test. Indeed, the Court in a thorough analysis examining whether the activity in question had a "substantial and harmful effect upon" interstate commerce had already held that "Congress may . . . prohibit racial discrimination by motels serving interstate travelers, however 'local' their operations may appear." *Id.* In short, the Court was addressing the second issue raised, not reexamining the first.

52. *E.g.*, FD&P Enters., Inc. v. Corps of Eng'rs, 239 F. Supp. 2d 509, 33 ELR 20140 (D.N.J. 2003). The stated purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a), ELR STAT. FWPCA §101(a).

53. 33 U.S.C. §1362(7), ELR STAT. FWPCA §502(7).

54. *Id.* §1311(a), ELR STAT. FWPCA §301(a).

rial and the U.S. Environmental Protection Agency (EPA) administers the remainder of the CWA.[55]

As discussed in the introduction, EPA and the Corps interpret "waters of the United States" to mean waters "the use, degradation, or destruction of which could affect interstate commerce."[56] This definition has been applied to navigable and non-navigable intrastate wetlands,[57] lakes,[58] streams[59] and creeks.[60] Until the Court intervened in 2001, the CWA also extended to isolated, intrastate, non-navigable waters based solely on the presence of migratory birds.[61] Violators are subject to civil and criminal penalties.[62]

B. Case Law

The CWA depends entirely on the Commerce Clause for support.[63] Surprisingly, the Court has reviewed few challenges to the Act and uniformly decided those cases on statutory grounds.[64] Constitutional decisions instead come from federal circuit and district courts, most of which have upheld broad applications of the same.[65]

For example, in *United States v. Pozsgai*,[66] the U.S. Court of Appeals for the Third Circuit examined an as-applied challenge to federal jurisdiction over a "forested wetland" (soil covered by trees and other vegetation with water at or near the surface) located within a 14-acre parcel of private land in Morrisville, Pennsylvania.[67] The wetland sat above the headwaters of a small, non-navigable stream that flowed along the eastern border of the property and, eventually, into the Pennsylvania Canal.[68] In the mid-19th century, barges carried coal along the Pennsylvania Canal to various markets, but no commerce currently traveled along the canal nor could ever pass on the stream.[69]

The Pozsgais argued that in filling their property, they had not substantially affected interstate commerce. The court disagreed. The panel reasoned that courts review Commerce Clause challenges under a "deferential standard" and "will uphold application of the law if there is a 'rational basis' for the congressional determination that the regulated activity 'affects interstate commerce,' and if the means chosen are reasonable."[70] Under that rubric, the court held that congressional regulation of water pollution, wherever it occurs, is "permissible under the Commerce Clause."[71]

The court further emphasized that "even assuming Congress' Commerce [Clause] Power is circumscribed by a 'substantiality' requirement," the court may consider "discharge by other property owners into wetlands above the headwaters within the same aquatic system as the Pozsgais . . . ."[72] The court did not reveal, however, whether other property owners in the same aquatic system had filled their wetlands. Nor did it explain how in filling their wetlands, the Pozsgais had substantially affected interstate commerce. Relying instead on the foregoing general statements, the court held that "application of the Corps'

55. *Id*. §1344, ELR STAT. FWPCA §404.

56. The full Agency definition of "waters of the United States" is:

> (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 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 . . . ;
> (6) The territorial seas; or
> (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); 40 C.F.R. §122.2.

Following Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001), the broadest aspects of this definition have been called into question. *See* Rice v. Harken Exploration Co., 250 F.2d 264, 31 ELR 20599 (5th Cir. 2001); *FD&P Enters.*, 239 F. Supp. 2d at 509, 33 ELR at 20140; United States v. RGM Corp., 222 F. Supp. 2d 780, 32 ELR 20817 (E.D. Va. 2002); United States v. Newdunn Assocs., 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002); United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002); *see also* Borden Ranch Partnership v. Corps of Eng'rs, 261 F.3d 810, 816, 32 ELR 20011, 20012 (9th Cir. 2001).

57. United States v. Pozsgai, 999 F.2d 719, 23 ELR 21012 (3d Cir. 1993) (holding that the CWA applied to "a forested wetland" that had "areas of standing water" and a "stream on the east boarder of the property").

58. Utah v. Marsh, 740 F.2d 799, 14 ELR 20683 (10th Cir. 1984) (holding the Commerce Clause extended the CWA to an intrastate lake that was not capable of bearing interstate navigation).

59. United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001) (holding that a small, intrastate stream was subject to the CWA because it was a tributary of a tributary to a river that could be used as a channel of interstate commerce).

60. Quivira Mining Co. v. EPA, 765 F.2d 126, 15 ELR 20530 (10th Cir. 1985) (holding that non-navigable creeks and arroyos affect interstate commerce because heavy rainfall might create a surface connection with interstate commerce).

61. The so-called migratory bird rule, 51 Fed. Reg. 41217 (1986), 53 Fed. Reg. 20765 (1988), which the Corps and EPA used to determine regulatory jurisdiction pursuant to the CWA, was invalidated in *SWANCC*. 531 U.S. at 174, 31 ELR at 20384-85.

62. 33 U.S.C. §1319(b)-(c), ELR STAT. FWPCA §309(b)-(c).

63. *See*, *e.g.*, Stanley A. Millan, *The Odd Couple: The High Court's Expansion of Environmental Standing in Waters but Contraction of Regulatory Jurisdiction Over Them*, 47 LOY. L. REV. 729, 745 (2001) ("The federal government's regulatory jurisdiction over navigable waters is based upon Article 1, Section 8, Clause 3 of the United States Constitution.").

64. *See SWANCC*, 531 U.S. 159, 31 ELR 20382 (holding that the migratory bird rule exceeded the intended scope of the CWA); United States v. Riverside Bayview Homes, Inc. 474 U.S. 121, 16 ELR 20086 (1985) (holding that the Corps regulation of waters adjacent to navigable waters was a permissible construction of the CWA).

65. *See, e.g.*, cases cited *supra* notes 57-60.

66. 999 F.2d 719, 23 ELR 21012 (3d Cir. 1993).

67. *Id.* at 734, 23 ELR at 21019-20.

68. *Id.* at 730, 23 ELR at 21017.

69. *See id*. at 730-33, 23 ELR at 21017-19.

70. *Id.* at 733, 23 ELR at 21019 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 11 ELR 20569 (1981)).

71. *Id.*

72. *Id.* at 734, 23 ELR at 21019-20.

wetlands regulation to the Pozsgais' discharge activities did not violate the Commerce Clause."[73]

The U.S. Court of Appeals for the Ninth Circuit used comparably little analytical effort in *Leslie Salt Co. v. United States*[74] to extend the CWA to excavated salt pits and manmade ditches. *Leslie Salt* involved 153 acres of undeveloped land near San Francisco Bay.[75] The property was originally pastureland but through private and public excavation on and near the property, the following ecological developments occurred:

> [T]idewater reached the edges of [the] property and caused the creation of some wetland features on the southern fringes. Migratory birds used [the excavated] pits as habitat during the winter and spring when they were flooded. In addition, an endangered species, the salt marsh harvest mouse, used the property as habitat.[76]

In 1985, Leslie Salt began to drain the land. The Corps asserted jurisdiction over most of the property pursuant to the CWA and ordered Leslie Salt to cease development efforts.[77] Leslie Salt challenged the order on statutory and constitutional grounds.[78] The district court found for the plaintiff on all counts and the Corps appealed.[79]

The Ninth Circuit panel first concluded that Congress intended to extend the CWA to artificial waters, including seasonal waters, created by third parties or the government and, therefore, how or why a particular water body came into existence was irrelevant to the Corps' jurisdiction.[80] Turning to Leslie Salt's constitutional challenge, the court held (without elaboration) that the "[c]ommerce [c]lause [p]ower, and thus the [CWA], is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."[81] The case was remanded for a determination of whether the property in fact provided such a habitat. The district court found that it did and that conclusion was affirmed on appeal.[82]

Pozsgai and *Leslie Salt* are analytically lazy opinions. *Pozsgai* simply assumed that filling a forested wetland on private property affected interstate commerce. *Leslie Salt* likewise had no evidence of anything interstate and commercial in nature, but the court nevertheless concluded that habitats for endangered species and migratory birds are ipso facto within the interstate commerce power. As is apparent from the following discussion, far more work is required to determine if the regulated activity is in fact "commerce among the several states."

IV. Substantive Analyses of the Commerce Clause

In light of the foregoing, *Lopez*[83] was rather unexpected. In *Lopez*, the Court reviewed a constitutional challenge to the Gun-Free School Zones Act (School Zones Act) of 1990,[84] which made possession of a gun within a "school zone" a federal crime.[85] The case arose when a high school senior in Texas was convicted under the statute. He appealed, and the Court—to the surprise of many—found the Act unconstitutional.[86]

The Court began by affirming two constitutional axioms: first, the federal government is one of enumerated and not general power.[87] Second, although the Commerce Clause is broad, it is not unlimited.[88] Accordingly, the Constitution requires a substantial connection between the regulated conduct and interstate commerce.[89] The Court found three categories of activity that satisfied the requisite nexus:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, ... Finally, Congress' commerce authority includes the power to regulate those . . . activities that substantially affect interstate commerce.[90]

The first category was said to embrace those "channels" through which people and goods moved interstate.[91] This allowed Congress to regulate, for example, the manufacture of products intended for transportation in interstate commerce and racial discrimination at motels catering to interstate travelers and advertising along interstate highways.[92] The second category extended congressional power to vehicles that actually travel across state lines—trains, cars, trucks, airplanes—and the operators of such vehicles.[93] The School Zones Act was not, however, a regulation of "the use of the channels of interstate commerce, nor [was] it an attempt to prohibit the interstate transportation of a commodity through the channels of interstate commerce; nor [was it a] regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce."[94] The first two categories were therefore of no support.

73. *Id.* "[T]his is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs, 531 U.S. 159, 173, 31 ELR 20382, 20384 (2001).
74. 896 F.2d 354, 20 ELR 20477 (9th Cir. 1990).
75. *Id.* at 355, 20 ELR at 20477-78.
76. *Id.* at 356, 20 ELR at 20477-78.
77. *Id.* at 356, 20 ELR at 20478.
78. *Id.*
79. *Id.* at 357, 20 ELR at 20478.
80. *Id.* at 358-59, 20 ELR at 20479.
81. *Id.* at 360, 20 ELR at 20480.
82. Leslie Salt Co. v. United States, 55 F.3d 1388, 25 ELR 21046 (9th Cir. 1995). The panel held:

> The migratory bird rule certainly tests the limits of Congress' commerce powers and, some would argue, the bounds of reason. In this case, there is no evidence of human contact with the seasonally ponded areas. The only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations. Nevertheless, given the broad sweep of the Commerce Clause, the holding in *Leslie Salt II* cannot be considered clearly erroneous on this ground.

Id. at 1396, 25 ELR at 21050 (internal footnote omitted).

83. 514 U.S. at 549.
84. 18 U.S.C. §922(q).
85. 514 U.S. at 551.
86. *Id.* at 551-52.
87. *See id.* at 552-58.
88. *Id.*
89. *Id.* at 558 ("Congress may not use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.") (quoting Maryland v. Wirtz, 392 U.S. 183, 197 (1968)).
90. *Id.* at 558-59 (citations omitted).
91. *See id.* at 558.
92. *See id.* (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255-56 (1964); United States v. Darby, 312 U.S. 100, 113-14 (1941)).
93. *See Lopez*, 514 U.S. at 558-59 (citations omitted).
94. *Id.* at 559.

As to the third category, the Court examined four considerations and held that possession of a gun within a school zone did not substantially affect interstate commerce. First, the Court reasoned that the School Zones Act was "a criminal statute that *by its terms* ha[d] nothing to do with any sort of economic enterprise, however broadly one might define those terms."[95] Second, the Act lacked a jurisdictional element "which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce."[96] Third, Congress made no findings in the legislative history "regarding the effects upon interstate commerce of gun possession in a school zone."[97] Finally, the Court rejected the arguments pressed by the government and the dissenting Justices to the effect that gun-related violence negatively impacted learning, which would, at least in the aggregate, impact interstate commerce.[98] To uphold such contentions would, the Court concluded, require piling "inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[99] It would thus become "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education . . . ."[100] Because the Court refused to eliminate the traditional distinctions "between what is truly national and what is truly local,"[101] the School Zones Act was unconstitutional.[102]

The Court followed *Lopez* five years later with *Morrison*.[103] In *Morrison*, the Court addressed a challenge to 42 U.S.C. §13981, which created a "federal civil remedy for the victims of gender-motivated violence" under the Violence Against Women Act (VAWA) of 1994.[104] The Court employed the analytical framework developed in *Lopez* and held that the civil suit provision was beyond congressional power.[105]

That the Court affirmed *Lopez*, a case some denounced as a "misstep,"[106] was significant in itself. But the Court also made three important contributions to the jurisprudence. First, the Court elevated *Lopez*'s largely ad hoc analytical framework to a set of mandatory interpretive principles.[107] It is now established that the interstate commerce power is limited to three categories of activity and analysis of federal action under the last category turns on the four determinative considerations discussed above.[108]

Second, although not adopting a "categorical rule against aggregating the effects of any non-economic activity," the Court recognized that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[109] The Court is unlikely to break 200 years of precedent.

Finally, the Court concluded:

> [T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. . . . Rather, "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[110]

That statement is a marked departure from the substantial deference to legislative findings, subject only to rational review, practiced for the preceding 60 years.[111]

V. *Lopez*, *Morrison*, and the CWA

Commentators and courts have sometimes twisted their arguments into knots in order to avoid applying the foregoing Commerce Clause pronouncements to new factual situations.[112] Nevertheless, *Lopez* and *Morrison* present the proper analytical model for evaluating all interstate commerce power issues, including the breadth of the CWA.

A. The Channels of Interstate Commerce

The channels of interstate commerce are the "modes of interstate or foreign commerce."[113] To the extent that navigable,[114] interstate waters are capable of facilitating the movement of persons and goods across state or national borders, those waters are within the first *Lopez* category.[115] Such waters are, in effect, highways carrying persons and goods interstate and "[o]ver interstate transportation, . . . the reg-

95. *Id.* at 561 (emphasis added).
96. *Id*.
97. *Id*. at 562.
98. *Id.* at 563-65.
99. *Id.* at 567.
100. *Id.* at 564.
101. *Id.* at 567.
102. *Id.* at 551.
103. 529 U.S. at 598.
104. *Id.* at 602.
105. *Id.* at 617-18.
106. *See, e.g.*, Stephen M. Johnson, United States v. Lopez: *A Misstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. L.J. 33 (1996).
107. *See, e.g.*, United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003).
108. *See Morrison*, 529 U.S. at 609.
109. *Id.* at 613.
110. *Id.* at 614.
111. *Compare id. with supra* notes 50, 51 and accompanying text; *see also* Gibbs v. Babbitt, 214 F.3d 483, 509, 30 ELR 20602, 20612 (4th Cir. 2000) (Luttig, J., dissenting).
112. *See generally* Glenn Reynolds & Brannon Denning, *Lower Court Readings of* Lopez*, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 Wis. L. Rev. 369 (discussing lower federal court interpretations of *Lopez*).
113. *Lopez*, 514 U.S. at 558-59; United States v. Ballinger, 312 F.3d 1264, 1269 (11th Cir. 2002).
114. Black's Law Dictionary 1050 (7th ed. 1999). ("[Navigable means c]apable of allowing vessels or vehicles to pass, and thereby usable for travel or commerce . . . .").
115. *See Lopez*, 514 U.S. at 558 ("Congress may regulate the use of the channels of interstate commerce."); Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) ("Ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states . . . subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states."); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); United States v. Deaton, No. 02-1442, 2003 U.S. App. LEXIS 11642, at *15, 33 ELR 20223 (4th Cir. 2003) ("The power of navigable waters is an aspect of the authority to regulate the channels of interstate commerce."); *Ballinger*, 312 F.3d at 1269; National Ass'n of Home Builders (NAHB) v. Babbitt, 130 F.3d 1041, 1058, 28 ELR 20403, 20410 (D.C. Cir. 1997) (Henderson, J., concurring) ("[Where] the object of the regulation was necessarily connected to movement of persons or things interstate, the regulation could therefore be characterized as regulation of the channels of commerce."); United States v. Miles, 122 F.3d 235, 245 (5th Cir. 1997).

ulatory power of Congress is ample . . . ."[116] Regulation of the use or misuse of those highways is squarely within federal power.[117]

In contrast, non-navigable waters and navigable but intrastate waters cannot carry people or products to another jurisdiction and, therefore, are not part of the channels through which interstate commerce passes.[118] It follows, however, that congressional intervention is justified when the discharge of a pollutant into a tributary of a highway of interstate commerce is shown under the relevant standard to interfere with the use of the same.[119] In this situation, the determinative act is not the discharge of pollutants into the tributary but the passage of those pollutants from the tributary to the channel of interstate commerce.[120] In other words, the tributary is regulable not because the tributary itself or the act of discharging a pollutant is within congressional power, but because the navigable water served by the tributary is a channel of interstate commerce.[121] So defined, the first category supports the protection of waters reasonably thought to be "waters of the United States," those waters to which the CWA by its terms applies.[122]

Recall that *Leslie Salt* took a broader view and found excavated salt pits to be within congressional power because they served as habitats for migratory birds and other protected animals.[123] Although *Leslie Salt* predates the *Lopez* framework, it has been similarly suggested that regulation of so-called critical habitat destruction implicates the channels of interstate commerce. One of the more notable expressions of this reasoning comes from Judge Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia Circuit.[124]

In response to a constitutional challenge to the Endangered Species Act's[125] "taking" provision, Judge Wald argued that although the first category "is commonly used to uphold regulation of interstate transport of persons or goods, it need not be so limited."[126] Instead, she maintained that the first category embraced incidental modification of critical habitat for two reasons:

> First, the prohibition against takings of an endangered species is necessary to enable the government to control the transportation of endangered species in interstate commerce. Second, the prohibition on takings of endangered animals falls under Congress' authority "to keep the channels of interstate commerce free from immoral and injurious uses."[127]

In support of her first point, Judge Wald reasoned that the prohibition against the taking of endangered animal habitat

116. Hammer v. Dagenhart, 247 U.S. 251, 272 (1918).

117. *See* cases cited *supra* note 115. This interpretation is consistent with the text of the CWA, which applies to the "waters of the United States," not any water "the use, degradation, or destruction of which would affect interstate commerce." *Compare* 33 U.S.C. §1362(7), ELR STAT. FWPCA §502(7) *with* 40 C.F.R. §122.2 (1999). And nothing in the legislative history to the CWA "signifies that Congress intended to exert anything more than its commerce power over navigation." Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs, 531 U.S. 159, 168 n.3, 31 ELR 20382, 20383 n.3 (2001).

118. *Cf. Morrison*, 529 U.S. at 609 (holding that providing a civil remedy for victims of gender-motivated violence was not within the channels of interstate commerce); *Lopez*, 514 U.S. at 559 (holding that possession of a gun within 1,000 feet of a school was not within the channels of interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) (holding that the Commerce Clause empowered Congress to prohibit racial discrimination at a motel catering to interstate travelers); United States v. Darby, 312 U.S. 100, 113 (1941) ("While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce.").

119. *See* cases cited *supra* notes 115, 118.

120. The physical act of discharging pollutants is purely intrastate in nature and not regulable under the first category. *Cf.* United States v. Ballinger, 312 F.3d 1264, 1269 (11th Cir. 2002) ("Arson . . . is an activity. Furthermore, it is a purely intrastate activity. Therefore, it is neither an instrumentality nor a channel of interstate commerce.").

121. In so extending the channels of interstate commerce, there must be evidence that an identifiable amount of impermissibly discharged pollutant has passed from the tributary to the channel of interstate commerce and now interferes with the use of the same. If this is not found, the regulation is not of the channels of interstate commerce. The presence of the navigable water becomes instead a pretext or convenient justification for the exercise of regulatory jurisdiction, not an essential element of the constitutional analysis. This conclusion is consistent with *SWANCC*'s interpretation of the CWA to require a "substantial nexus" between a non-navigable water and the navigable waters to which the CWA applies. *See* FD&P Enters., Inc. v. Corps of Eng'rs, 239 F. Supp. 2d 509, 33 ELR 20140 (D.N.J. 2003). The substantial nexus requirement is not satisfied merely by a showing of some (or a possible) hydrological connection. *See id.*

122. The U.S. Court of Appeals for the Fourth Circuit in United States v. Deaton, No. 02-1442, U.S. App. LEXIS 11642, 33 ELR 20223 (4th Cir. 2003), recently followed an analysis similar to that suggested here and held that non-navigable tributaries of navigable waters are within Congress' power to regulate the channels of interstate commerce. *See id.* at *18, 33 ELR at 20223. With this conclusion there can be little reasonable disagreement, except as to the court's misplaced use of *Wickard*'s aggregation principle, *id*. at *20, 33 ELR at 20223, which applies, if at all, only to economic activities analyzed under the third *Lopez* category. *See infra* section entitled Substantially Affects Interstate Commerce. This analytical hiccup notwithstanding, the court's initial conclusion rests on solid ground. The problem with *Deaton* is that having determined non-navigable tributaries of navigable waters are within congressional power, the court went on to hold that the EPA's exceedingly broad definition of "tributary," 33 C.F.R §328.3(a)(5), is entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 14 ELR 20507 (1984). *Deaton*, at *10-23, 33 ELR at 20223. It does not follow, however, that because non-navigable tributaries of navigable waters are regulable under the first *Lopez* category, any non-navigable watercourse at all connected to navigable water is similarly within congressional power, no matter how far removed in the hydrological cycle from the navigable water. This point is clarified by an examination of the facts in *Deaton*: the Corps sought jurisdiction over a nontidal wetland located on private property. Surface water from the property drains into a roadside ditch, which empties into a culvert and then into another ditch known as the John Adkins Prong of Perdue Creek. Perdue Creek flows into Beaverdam Creek, a tributary of the Wicomico River, a navigable water, which is in turn a tributary of the Chesapeake Bay. It is not clear from the opinion whether Beaverdam Creek is hydrologically connected to Perdue Creek through the latter's John Adkins Prong. Nevertheless, because of its possible and tortured connection to the Chesapeake Bay, regulation of a roadside ditch and by extension the wetland were found to be permissible regulatory interpretations of the CWA. Under a proper analysis, regulation of discharge into the Wicomico River or Beaverdam Creek is permissible under the first *Lopez* category. But the attenuated hydrological connection between the roadside ditch—and the wetland even more so—to a navigable water certainly presses (and probably exceeds) the outer limits of congressional power. For that reason, the agency regulation is not entitled to *Chevron* deference. *See SWANCC*, 539 U.S. at 172, 31 ELR at 20383.

123. *See supra* notes 74-82 and accompanying text.

124. *See* National Ass'n of Home Builders (NAHB) v. Babbitt, 130 F.3d 1041, 28 ELR 20403 (D.C. Cir. 1997).

125. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

126. *NAHB*, 130 F.3d at 1046, 28 ELR at 20405.

127. *Id*. (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)) (internal quotation marks omitted). Judge Wald failed to persuade either of her colleagues to join in this argument. *Id.* at 1057-58, 28 ELR at 20410-11 (Henderson, J., concurring); *id.* at 1062-63, 28 ELR at 20412 (Sentelle, J., dissenting).

is analogous to the prohibition against transfer and possession of machine guns,[128] which the Ninth Circuit sustained as a regulation of the channels of interstate commerce.[129] The Ninth Circuit held that "by regulating the market for machine guns, including regulating intrastate machine gun possession, Congress has effectively regulated the interstate trafficking in machine guns."[130] Applying this analysis, Judge Wald concluded that "the prohibition on 'taking' endangered species is properly classified as a first category regulation because one of the most effective ways to prevent traffic in endangered species is to secure the habitat of the species from predatory invasion and destruction."[131]

Unlike machine guns, however, migratory birds and all wild animals are *ferae naturae* and as such are incapable of ownership without possession.[132] Because wild migratory birds and endangered species are not and have never been owned, it is difficult to imagine how they could be a "commodity," which is "[a]n article of trade or commerce . . . [and] embraces only tangible goods, such as products or merchandise."[133] Machine guns (or the parts to assemble them), in contrast, are tangible goods and were necessarily in commerce at one time. The prohibition against possessing machine guns may thus plausibly be viewed as regulating "the use of the channels of interstate commerce, . . . [or] an attempt to prohibit the interstate transportation of a commodity through the channels of interstate commerce . . . ."[134] But until a wild animal is captured or killed, it cannot be a tangible good; until bought or sold, it is not in commerce. At that point, federal regulation of interstate transport (and possibly possession) may indeed be appropriate under the first category, but not before.[135]

In support of her second point, Judge Wald reasoned that Congress had the authority to rid the channels of interstate commerce of immoral or injurious uses and, therefore, could "prevent the taking of endangered species . . . where the pressures of interstate commerce place the existence of the species in peril."[136] There are three fundamental problems with this argument. First, the cases Judge Wald relied upon for authority—*Heart of Atlanta Motel v. United States*[137] and *United States v. Darby*[138]—sustained the statutes in question even though Congress legislated for moral reasons, *not because* the Commerce Clause necessarily embraces the regulation of immoral activities.[139] Second, the businesses regulated in *Heart of Atlanta* (a motel) and *Darby* (a manufacturing concern) were plainly economic in nature.[140] In contrast, the incidental destruction of critical habitat is never in itself economic.[141] Finally, *Heart of Atlanta* and *Darby* involved the regulation of persons or commodities in interstate trade or commerce.[142] As discussed above, however, wild animals freely alighting where they choose cannot be so considered.[143]

B. The Instrumentalities of Interstate Commerce

The second category allows Congress "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . ."[144] As discussed above, this category complements the first by extending congressional authority to the vehicles that actually move persons and commodities across state lines and the opera-

128. *Id.* at 1047, 28 ELR at 20405.

129. United States v. Rambo, 74 F.3d 948 (9th Cir. 1996).

130. *Id.* at 952.

131. *NAHB*, 130 F.3d at 1047, 28 ELR at 20405.

132. *See, e.g.*, Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284, 7 ELR Digest 20442 (1977) ("It is pure fantasy to talk of 'owning' wild fish, birds, or animals."); Missouri v. Holland, 252 U.S. 416, 434 (1920).

133. Black's Law Dictionary 267 (7th ed. 1999).

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

135. Judge Wald's argument would also transform any place where species stop or take refuge into a channel of interstate commerce. *Lopez* inveighs against regulations that have no identifiable stopping point, however. *See, e.g.*, *id*. at 564.

136. *NAHB*, 130 F.3d at 1048, 28 ELR at 20406.

137. 379 U.S. 241, 256 (1964).

138. 312 U.S. 100, 113 (1941).

139. *See Heart of Atlanta*, 379 U.S. at 257; *Darby*, 312 U.S. at 115.

140. *See Heart of Atlanta*, 379 U.S. at 243; *Darby*, 312 U.S. at 111; *infra* note 141. Judge Wald's reliance on *Heart of Atlanta* and *Darby* is misplaced. Renting rooms to interstate travelers is both commercial and interstate, and the federal government may reasonably declare that inn keepers cannot refuse to engage in this economic enterprise due to the race of certain patrons. So, too, prohibiting the employment of workers producing goods for interstate commerce at hours other than those set by Congress has an economic tie to the channels of interstate commerce not obvious in the incidental destruction of habit occupied by protected insects.

141. For example, incidental habitat destruction can be accomplished by feral goats, Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985, 9 ELR 20426 (D. Haw. 1979), the economic intentions of which are not readily apparent.

142. *See* National Ass'n of Home Builders (NAHB) v. Babbitt, 130 F.3d 1041, 1058, 28 ELR 20403, 20410 (D.C. Cir. 1997) (Henderson, J., concurring). In *Heart of Atlanta*, the offending motel was "readily accessible to interstate highways 75 and 85 . . . solicit[ed] patronage from outside the [state] through various national advertising media . . . maintain[ed] over 50 billboards and highway signs within the state . . . accept[ed] convention trade from outside [the state] and approximately 75% of its registered guests" lived outside of the state. 379 U.S. at 243. In *Darby*, the manufacturing concern acquired raw materials that were then manufactured into finished lumber "with the intent, when manufactured, to ship it in interstate commerce to customers outside of the state." 312 U.S. at 111.

143. *See supra* notes 131-34 and accompanying text; *see also NAHB*, 130 F.3d at 1063 n.1, 28 ELR at 20403 n.1 (Henderson, J., concurring). Judge J. Harvie Wilkinson III, Chief Judge of the Fourth Circuit, applied an equally result-oriented approach in Gibbs v. Babbitt, 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000), to uphold a U.S. Fish and Wildlife Service (FWS) regulation prohibiting the "taking" of endangered red wolves on private property. Unlike Judge Wald in *NAHB*, Judge Wilkinson in *Gibbs* found that restrictions on landowners' right to take wild animals on private property is "not a regulation of the channels of interstate commerce," nor a regulation of persons or things in interstate commerce. *Id*. at 491, 30 ELR at 20604. But a split panel held that under the third *Lopez* category, "[i]t was reasonable for Congress and the [FWS] to conclude" the regulation of a taking of endangered animals on private property is an economic activity, loosely defined, and substantially affects interstate commerce. *Id*. at 492, 30 ELR at 20604-05. The majority apparently felt compelled to this determination because invalidating the provision "would call into question the historic power of the federal government to preserve scare resources in one locality for the future benefit of all Americans." *Id*.; *see also id.* at 491, 497, 504, 506, 30 ELR at 20604, 20607, 20610, 20611. There is, of course, no power "to preserve scarce resources" stated in the Constitution and although the federal government may preserve natural resources an end, the means—or the power—to do so must spring from the Constitution or the action is invalid. As explained, *infra* section entitled Substantially Affects Interstate Commerce, an intrastate activity must be economic in nature and have a substantial affect on interstate commerce, at least in the aggregate, to fall within the third category of regulable conduct. The "taking" of a red wolf on private property does not satisfy that standard, and Judge Michael Luttig in his dissent to *Gibbs* appropriately took the majority to task for not faithfully applying *Lopez* and *Morrison*. *See id.* at 506-10 (Luttig, J., dissenting).

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

tors of such vehicles.[145] The CWA does not concern itself with such things, however. Like the School Zones Act, the CWA is not "a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce."[146] It would be pure fantasy to talk of water bodies and wetlands as vehicles moving people and goods across state lines and no one, so far, has suggested otherwise.

C. Substantially Affects Interstate Commerce

The third *Lopez* category examines whether a particular activity substantially affects interstate commerce.[147] This test would undoubtedly include waters considered channels of interstate commerce and the incidents of the same, but there is little reason to re-analyze what is already within the federal sphere. Accordingly, this section looks only to whether the "outer bounds" of congressional power[148] support the expansive regulatory interpretations of the CWA.

The first step in this inquiry is to "evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."[149] In *Lopez*, the Court examined the effect that possession of a gun within a school zone had on interstate commerce because the School Zones Act proscribed such conduct.[150] That is, *Lopez* looked to the "terms" of the statute to determine whether the School Zones Act regulated an economic activity and, ultimately, whether the Act was constitutional.[151] Likewise, because the statute at issue in *Morrison* created a federal civil remedy for victims of gender-motivated violence, the Court analyzed whether gender-motivated violence substantially affected interstate commerce.[152] Even the Court's more liberal applications of the "substantially affects" test depend on the conduct regulated to answer the threshold question of which activity to evaluate.[153]

To be sure, arguments in favor of a particular enactment often drift to activities associated with or somehow connected to the regulated activity. The extent of that drift factors into the fourth *Lopez* consideration—attenuation—but it is a mistake to begin the inquiry with anything other than the activity regulated. To do so presupposes, in effect, the outcome of the analysis. That is, if an economic activity connected to the regulated conduct is selected as the starting point, the economic nature question is rendered irrelevant—it has been improperly answered by reference to another activity. So, too, the steps required to find a substantial effect on interstate commerce are made to seem less attenuated than they would otherwise be because the distance between the regulated conduct and a substantial effect on interstate commerce has been artificially narrowed. To avoid these problems, that which the statute purports to do—what conduct is proscribed—must be where the analysis begins.[154]

The suggestion to deviate from this practice in the context of the CWA was presented to the Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[155] commonly abbreviated as *SWANCC*. In *SWANCC*, the Corps asserted jurisdiction over an intrastate, seasonal pond (with no apparent navigational aspects) based on the presence of migratory birds.[156] In arguing the constitutionality of the so-called migratory bird rule, however, the Corps focused not upon the presence of migratory birds but "upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature.'"[157] In response to Corps' use of an economic activity apart from but associated with the conduct regulated, the Court correctly observed that "this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[158] So it was.

The object or activity regulated "by the terms" of the CWA is, in essence, the discharge of pollutants or fill into water.[159] The CWA does not consider why a particular discharge occurred—a lone person who discharges 10 tons of waste or fill into the Mississippi River for no reason has violated the Act in the same way as a corporation that does so for financial gain.[160] Congress could, of course, have deter-

145. *Id.*; United States v. Ballinger, 312 F.3d 1264, 1269 (11th Cir. 2002); *Gibbs*, 214 F.3d at 491, 30 ELR at 20604.

146. *See Lopez*, 514 U.S. at 559.

147. *Id.*

148. *See Ballinger*, 312 F.3d at 1269-70; United States v. Rayborn, 138 F. Supp. 2d 1029, 1033 (W.D. Tenn. 2001) ("Congress's commerce power is fully extended when it reaches *commercial* activity that, in the aggregate, substantially affects interstate commerce."), *rev'd*, 312 F.3d 229 (6th Cir. 2002) (emphasis added).

149. Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs, 531 U.S. 159, 173, 31 ELR 20382, 20384 (2001).

150. *See Lopez*, 514 U.S. at 561.

151. *See id.*

152. *See* United States v. Morrison, 529 U.S. 598, 613 (2000).

153. Perez v. United States, 402 U.S. 146 (1971), which upheld the federal criminalization of extortionate credit practices, analyzed the class of activities proscribed by statute, that is, extortionate credit practices, to determine whether the requisite connection to interstate commerce was found. *See id.* at 154. And *Wickard*, "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, *Lopez*, 514 U.S. at 560, evaluated the affect wheat production—the conduct regulated—had on interstate commerce. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

154. *See, e.g., Lopez*, 514 U.S. at 561.

155. 531 U.S. 159, 31 ELR 20382 (2001).

156. *Id.* 173, 31 ELR at 20384.

157. *Id.*

158. *Id.*

159. 33 U.S.C. §1311(a), ELR STAT. FWPCA §301(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."); *id.* §1344, ELR STAT. FWPCA §404; *see also SWANCC*, 531 U.S. at 173, 31 ELR at 20384; *id.* at 193, 31 ELR at 20388 (Stevens, J., dissenting) (acknowledging that "the activity being regulated in this (and by the Corps' §404 regulations in general) is the discharge of fill material into water").

160. 33 U.S.C. §1311(a), ELR STAT. FWPCA §301(a); *id.* §1344, ELR STAT. FWPCA §404; *see also id.* §§1251-1387, ELR STAT. FWPCA §§101-607. In support of the regulatory interpretations of the CWA, it is sometimes argued that "the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons." *SWANCC*, 531 U.S. at 193, 30 ELR at 20388 (Stevens, J., dissenting). That may (or may not) be true, depending upon how broad a view of "economic reasons" one takes. If instances of filling wetlands or small ponds to level the ground for a home, intrastate businesses or residential developments are included as "economic reasons," the argument may be correct. But such activity involves zoning and planning issues, traditionally areas of state or local concern and thus removed from the province of the federal government. *See* Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 411 (1979); United Artist Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 402 (3d Cir. 2003); Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207, 1212, 31 ELR 20195, 20196 (10th Cir. 2000); Columbia Aggregates, Inc. v. Wharcom County, No. 96-34453, 1997 U.S. App. LEXIS 21049, at *3-4 (9th Cir. July 9, 1997); Sugarloaf Citizens Ass'n v. Montgomery County, No. 93-2475 (4th Cir. filed May 9, 1994); Fields v. Rockdale County, 785 F.2d 1558, 1561 (11th Cir. 1986). That axiom cannot be countered by the circular observation that EPA and the Corps consider wetlands, creeks, and ponds to be "waters of the United States," notwithstanding that such waters are neither navigable nor

mined either to regulate more narrowly or to direct, for instance, the manner in which plastics producers dispose of their byproducts or method of sludge removal for chemical plants. This would be the regulation of manufacturing, a practice upheld since *Jones & Laughlin* and firmly established in *Darby*.[161] But the CWA does not regulate manufacturing; it regulates the passage of pollutants and fill from point sources into water for the sake of having clean water. To be consistent with the terms of the statute, the constitutional analysis must also focus on the act of discharging some prohibited material into water.[162] In short, the precise conduct evaluated is necessarily the precise act regulated.[163]

Having identified the subject of the analysis, we apply the four "significant considerations" recognized in *Lopez* and *Morrison*. Stated again, those considerations are whether: (1) the activity in question is commercial in nature; (2) the law contains "an express jurisdictional element which limits its reach"; (3) there are "express congressional findings regarding the effects" of the activity on interstate commerce; and (4) the "link between [the regulated activity] and a substantial effect on interstate commerce is attenuated."[164]

As to the first consideration, the CWA by its terms does not regulate a commercial activity "however broadly one might define those terms."[165] Nor is it "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[166] Instead, the CWA, like the statutes at issue in *Lopez* and *Morrison*, regulates physical, noneconomic conduct most often occurring within the borders of a single state.[167] And like the School Zones Act and the VAWA, the CWA carries civil and criminal penalties for violations.[168] This poses an immediate problem for the agencies' interpretation of the CWA because "thus far in our Nation's history, [the Court has] upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[169]

interstate, unless we are prepared to grant the federal government plenary land use control through the Commerce Clause. All land use occurs, at some level, for "economic reasons." In any event, the CWA does not limit itself to violations committed for economic reasons, and the fundamental question here is not whether a commercial connection can be found but whether the conduct regulated is an economic activity. So far as the CWA is concerned, that question is answered in the negative.

161. *See supra* section entitled Reinventing the Commerce Clause; *see also supra* notes 139, 141.

162. *Cf.* United States v. Lopez, 514 U.S. 549, 561 (1995).

163. *See, e.g., id.* at 561. The *Gibbs* court took a different tact and became hopelessly lost in activities unrelated to the regulated conduct. To demonstrate the economic character of taking a single red wolf, the court relied on four activities associated with wolves. First, the court pointed to red wolf tourism, specifically, the "howling events—evenings of listening to wolf howls accompanied by educational programs." Gibbs v. Babbitt, 214 F.3d 483, 493-94, 30 ELR 20602, 20605 (4th Cir. 2000). The court found that people travel interstate to listen to wolves howling and spend money doing so. The problem with this analysis is that neither taking red wolves nor listening to red wolves is an economic activity. One must take yet another analytical leap and assume that there are economic activities connected to the people coming to howling events. The analysis is now a full three steps removed from the regulated conduct, much too far under *Lopez* and *Morrison*. *See supra* section entitled Substantive Analyses of the Commerce Clause. In any event, there may be economic activities connected to howling events (just as every gun possessed in the United States was manufactured and purchased—or the parts thereof—at one time), but that does not make the regulated conduct, that is, the act of taking a red wolf, an economic activity. Second, the court looked to the jobs created by scientific research of red wolves to fill the economic void. *Id*. at 494, 30 ELR at 20605. This reasoning fails because the FWS did not regulate the manner by which red wolves could be studied, much less how the hiring for such studies is done, just as in *Morrison* Congress had regulated violence against women, not the hiring and firing of women in the workplace. Third, the court pointed out the international market in fur pelts—notwithstanding the fact that such a market had not existed since the 18th century. *Id*. at 495, 30 ELR at 20606. This is a curious example. There is no doubt that Congress could regulate the international sale of wolf pelts, but that is terribly far removed from the FWS regulation. Congress can also regulate the international market in firearms; it cannot, however, regulate the possession of such firearms within a school zone. Finally, the markets for agricultural products and livestock provided the court with another tie to economic activities. The court concluded that red wolves impair (or may impair) the economic enterprises of farming and ranching and, therefore, Congress may rationally decide to balance the negative economic impact of preventing the taking of wolves against the possible future benefits of conserving wolves. *Id*. at 495-97. This reasoning is borrowed directly from the dissenting Justices' argument in *Lopez*: the possession of guns in school zones contributes to school violence; this disrupts education; the disruption of education has a negative impact on the economy. The negative economic consequences argument failed to carry the day in *Lopez* and it had no more merit in *Gibbs*. Such are the problems encountered when the search for an economic component goes beyond the conduct regulated.

164. *Morrison*, 529 U.S. at 611, 612.

165. *See Lopez*, 514 U.S. at 561; *cf. Gibbs*, 214 F.3d at 507, 30 ELR at 20611 (Luttig, J., dissenting). In *Lopez*, the Court used the terms "economic" and "commercial" interchangeably. United States v. McFarland, 311 F.3d 376, 396 (2002) (Garwood, J., dissenting). This Article also uses "economic" in the interstate commerce power context to mean "commercial."

166. *Lopez*, 514 U.S. at 560; *cf.* Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968). Regulation of economic activity with a de minimus impact on interstate commerce will be sustained if it "is an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulation," *Lopez*, 514 U.S. at 561, that is, "when the absence of such regulation would undercut a larger regulatory scheme affecting interstate commerce." United States v. Ballinger, 312 F.3d 1264, 1270 (11th Cir. 2002). The CWA is not a broad regulation of economic activity and, therefore, the de minimus rule is inapplicable. *Gibbs* failed to appreciate the distinction between regulations targeting interstate commerce and regulations that, although not directed at interstate economic activity, may have incidental economic effects. This confusion led the court to hold that the FWS "regulation is also sustainable as 'an essential part of a larger regulation of economic activity,'" 214 F.3d at 497, 30 ELR at 20607 (quoting *Lopez*, 514 U.S. at 561), because it was passed pursuant to the ESA, "a comprehensive and far-reaching piece of legislation that aims to conserve the health of our national environment." *Id*. This is a most unpersuasive analytical string. The ESA is not, nor has ever purported to be, a regulation of economic activity.

167. *See* 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

168. The discharge of fill or pollution into navigable waters without a §1342 or §1344 permit subjects the offender to criminal penalties. *See id.* §1319(a)-(c), ELR STAT. FWPCA §309(a)-(c).

169. *Morrison*, 529 U.S. at 613; *accord* United States v. Reynard, 220 F. Supp. 2d 1142, 1173 n.32 (S.D. Cal. 2002) ("It is clear that, where Congress passes a law under the third *Lopez* category[,] . . . the regulation in question must be economic in nature."). In *Lopez*, the Court held that the School Zones Act did not regulate economic activity. In reaching this conclusion, the Court reasoned that the Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise . . . ." *Lopez*, 514 U.S. at 561. Nor was the statute "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561. Thus, the statute could not "be sustained under [the] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate substantially affects interstate commerce." *Id.* The same is true of the CWA, which by its terms has nothing to do with commerce and is not part of a larger regulation of economic activity. It is of no moment that the application or nonapplication of the CWA in any given case might have economic consequences just as in *Morrison* it mattered little that application or nonapplication of the civil suit provision of the VAWA had economic consequence. *See* 529 U.S. at 610-16.

There may be, of course, economic activities connected to the polluter, just as there are economic activities connected to the perpetrator and victim of gender-motivated violence.[170] So, too, discharges might occur for economic reasons, just as the possession of a gun within a school zone occurred in *Lopez* for economic reasons.[171] Nevertheless, it remains that the activity regulated by the CWA—the act of discharging pollution or fill into water—like gun possession and violence against women is plainly noneconomic.

The noncommercial character of the CWA stands in contrast to, for instance, Title II of the Consumer Credit Protection Act[172] (criminalizing extortionate credit transactions), which the Court sustained in *Perez v. United States*.[173] In *Perez*, the defendant had loaned money to the owner of a local butcher shop and threatened physical harm if the principal was not repaid with interest set at increasingly unreasonable repayment rates.[174] The loan shark was prosecuted under the Act and found guilty. He challenged the conviction on constitutional grounds, and the case eventually reached the Court. The Court acknowledged the "substantial" constitutional question raised by the federal enactment but concluded that the Commerce Clause extended congressional power to a "class of activities"—extortionate credit practice—proscribed by the Act.[175]

Perez was, to be sure, an expansive interpretation of the Commerce Clause,[176] but at least the economic character of Title II of the Consumer Credit Protection Act was plain. One cannot engage in extortionate credit practices unless one is loaning money to others and collecting interest at usurious rates in return. That is a commercial activity. Not so with the CWA, as no commercial transaction need ever occur to be in violation of the Act. The CWA is instead like the statutes addressed in *Lopez* and *Morrison*: a broad regulation of noneconomic activity.

As to the second consideration, the CWA and accompanying regulations appear on the surface to contain a jurisdictional element. That is, the CWA applies to "navigable waters," defined as "waters of the United States,"[177] and EPA and the Corps limit their jurisdiction to waters "the use, degradation, or destruction of which could affect interstate or foreign commerce."[178] These are limitations without substance, however. There is always the possibility that a particular activity could affect interstate commerce and, therefore, regulatory power is unlimited if jurisdiction attaches on so little a showing.[179] An activity must *substantially* affect interstate commerce (not possibly affect interstate commerce) to be within the third *Lopez* category.[180] Thus, the purported jurisdictional element does nothing to "ensure, through case-by-case inquiry," that EPA and the Corps act within their constitutionally prescribed limits.[181]

As to the third consideration, the CWA contains no congressional findings regarding the substantial affect that polluting intrastate or non-navigable waters is alleged to have on interstate commerce.[182] Indeed, the legislative history of the CWA indicates nothing beyond Congress' intent to exercise its traditional commerce power over navigation.[183] A lack of cogent congressional findings proved problematic for federal statutes invoking the outer limits of the interstate commerce power before *Lopez*[184] and now certainly weighs against upholding broad regulatory interpretations of the CWA.[185]

170. *See Morrison*, 529 U.S. at 613. These are discussed *infra* at notes 187-91 and in the accompanying text.

171. Lopez possessed the gun within a school zone because an acquaintance asked him to transfer the weapon to a third person "who planned to use it in a gang war. Lopez was to receive $40 for his services." United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993). It is also entirely plausible that a gun might be possessed in a school zone for sale or for use in robbery or some other activity engaged in for financial gain.

172. 18 U.S.C. §§891-896.

173. 402 U.S. 146 (1971).

174. *Id.* at 148.

175. *Id.* at 154.

176. Justice Potter Stewart in his dissent to *Perez* lamented that

> under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of the facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.

Id. at 157 (Stewart, J., dissenting).

177. 33 U.S.C. §1362(7), ELR Stat. FWPCA §502(7).

178. 33 C.F.R. §328.3(a)(3).

179. *See* United States v. Larkins, 852 F.2d 189, 193, 18 ELR 21416, 21418 (6th Cir. 1988) (Merritt, J., concurring); *cf.* United States v. McCoy, 323 F.3d 1114, 1125-26 (9th Cir. Mar. 20, 2003) (holding that the jurisdiction limitation failed to achieve its purpose because it failed to limit the statute to activities that have the requisite effect on interstate commerce).

180. *E.g.*, *Lopez*, 514 U.S. at 559. No argument can be made that the test remains the "rational reason" evaluation applied in cases like *Pozsgai*. *See supra* section entitled Substantive Analyses of the Commerce Clause; *McCoy*, 323 F.3d at 1125-26; United States v. McFarland, 311 F.3d 376, 413 (5th Cir. 2002) (Higginbotham, J., dissenting) ("*Lopez* and *Morrison*, with the doctrine of substantiality, returned the courts to the field, to once again police the limits of congressional authority under the Commerce Clause."); Gibbs v. Babbitt, 214 F.3d 483, 509, 30 ELR 20602, 20612 (4th Cir. 2000) (Luttig, J. dissenting).

181. *Cf. Lopez*, 514 U.S. at 561; *McCoy*, 323 F.3d at 1125-26. In any event,

> [t]he Supreme Court's decisions in *Lopez* and *Morrison* . . . reject the view that a jurisdiction element, standing alone, serves to shield a statute from constitutional infirmaries under the Commerce Clause. At most . . . such an element "*may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce," or . . . it may lend support to this conclusion.

McCoy, 323 F.3d at 1125 (quoting *Morrison*, 529 U.S. at 612-13) (emphasis added).

182. *See* United States v. Wilson, 133 F.3d 251, 257, 28 ELR 20299, 20302 (4th Cir. 1997) (holding that there was no evidence Congress intended to extend federal jurisdiction to all waters "the use, degradation, or destruction of which could affect interstate or foreign commerce").

183. Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs, 531 U.S. 159, 168 n.3, 31 ELR 20382, 20383 n.3 (2001); *accord* United States v. RGM Corp., 222 F. Supp. 2d 780, 785, 32 ELR 20817, 20818-19 (E.D. Va. 2002).

184. *See* United States v. Mallory, 884 F. Supp. 496, 499 (S.D. Fla. 1995) (holding the federal "carjacking" statute unconstitutional as applied because there were no clear congressional findings that the activities substantially affected interstate commerce and the jurisdictional facts alleged in the indictment were insufficient); United States v. Trigg, 842 F. Supp. 450 (D. Kan. 1994) (holding that the absence of legislative evidence regarding the impact of the activity on commerce rendered the statute constitutionally defective).

185. In any event, congressional findings based upon attenuated or inferential reasoning are to be dismissed entirely. *Morrison*, 529 U.S. at 615. "The majority of the Supreme Court in *Lopez* and *Morrison* has left no doubt . . . that the interpretation of [the Commerce Clause] of the Constitution, no less than any other, must ultimately rest not with the political branches, but with the judiciary." *Gibbs*, 214 F.3d at 509, 30 ELR at 20612 (Luttig, J. dissenting).

As to the final consideration, any connection between the activity regulated through the CWA and interstate commerce depends on conduct far removed from the regulated action. Popular examples used to demonstrate a substantial effect on interstate commerce are manufacturing operations, because of the possibility that waste will be discharged into water in the course of business, and water-related tourism, which can attract interstate or international visitors.[186] In making such arguments, the analysis is instantly removed from the particular discharge. The relevant actions for Commerce Clause purposes become instead the financial dealings of the polluter or, even further displaced from the regulated conduct, the travel plans and cash outlays of random tourists.[187]

Reliance on conduct or activities such as recreational pursuits or the economic conduct of the actor to demonstrate a substantial effect on interstate commerce invokes precisely the type of loose connection to interstate commerce invalidated in *Lopez* and *Morrison*.[188] For example, *Lopez* rejected the government's assertion that violent crime (caused by possession of an object that surely traveled in interstate commerce) in schools affected interstate commerce because the cost of crime is substantial and reduced the effectiveness of education.[189] The argument has merit, but the Court refused to concern itself with attenuated connections.[190] Similarly, *Morrison* acknowledged that Congress found gender-motivated violence affected interstate commerce by deterring potential victims from engaging in education, employment, and commerce, thereby reducing national productivity.[191] Instead of considering the worth of those findings (and there is some) the Court dismissed them as based upon "a method of reasoning rejected as unworkable if we are to maintain the Constitution's enumeration of powers."[192]

No fewer leaps are required to find a connection between the broad, regulatory applications of the CWA and a substantial effect on interstate commerce. Taking the tourism example: a non-navigable or intrastate body of water or wetland is polluted or filled (presuming no state regulation); tourists may have visited that water for recreational purposes; if that water is polluted or filled, the tourists may not come; if tourists refuse to come, less money will be generated for the area; if the amount of revenue diverted or lost grows large enough, it could impact interstate commerce; if all similar or assumed instances are aggregated, the impact will become substantial.[193] The manufacturing example proceeds down a similar analytical line: again, a non-navigable or intrastate body of water or wetland is polluted or filled (presuming no state regulation); the polluter may have discharged the prohibited materials in connection with her business; she may derive a financial benefit by so disposing of waste; if enough polluters reap this benefit, there may be a discernible effect on commerce; through time and aggregation, that effect will presumably become both interstate and substantial.[194]

Given four steps from the regulated activity and certain inferences, any activity may be said to exert a substantial effect on interstate commerce. But Commerce Clause analysis is not an exercise in imagination where the object is to see what commercial connections the mind can conceive. The attenuated connections between the regulated activity and a substantial effect on interstate commerce recounted above do not pass constitutional muster.[195] After *Lopez* and *Morrison*, courts are directed not to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[196] The regulatory interpretations of the CWA unfortunately and improperly depend upon that unworkable method of reasoning.

Lastly, some attention must be given to the argument that courts are to examine the combined effect of all pollution and fill on interstate commerce. This suggestion, which is derived from *Wickard*'s aggregation principle, is flawed primarily because the activity regulated by the CWA is inherently noncommercial. No amount of aggregation will make it otherwise and, therefore, *Wickard*'s principle is inapplicable.[197] Noneconomic activity "by *itself*, [must] have economic consequences that *substantially affect* interstate commerce"[198] and, for that reason, filling an isolated wetland, as in *Pozsgai*, cannot be aggregated with similar presumed or hypothetical actions to find a substantial effect on interstate commerce.[199]

In any event, "aggregation" in this context means assuming that, given all possible instances, the activity substan-

186. *See SWANCC*, 531 U.S. at 193-94, 31 ELR at 20389 (Stevens, J., dissenting).

187. A third justification sometimes pressed is simply that the "power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce." *SWANCC*, 531 U.S. at 196, 31 ELR at 20389 (Stevens, J., dissenting). This argument, much like Judge Wald's similar analysis in *NAHB*, has no basis in the Constitution, case law, or American history and usually fails to find support.

188. *See Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. 612-13; *see also McCoy*, 323 F.3d at 1123-24. This is where the court in *Gibbs* found itself. *See supra* notes 142, 162.

189. *Lopez*, 514 U.S. at 563-64.

190. *Id.* at 567.

191. *Morrison*, 529 U.S. at 615.

192. *Id*.

193. This example is borrowed from Justice John Paul Stevens' dissent in *SWANCC*. Justice Stevens used bird watching as his tourism example because the isolated, intrastate ponds at issue were visited by migratory birds. *SWANCC*, 531 U.S. at 194-95, 30 ELR at 20389 (Stevens, J., dissenting).

194. This example is also borrowed from Justice Stevens' *SWANCC* dissent, although Justice Stevens did not recount the steps between the regulated activity and a substantial effect on interstate commerce. *See id.* at 194, 30 ELR at 20389 (Stevens, J., dissenting).

195. *See Lopez*, 514 U.S. at 567.

196. *Id.*

197. *Cf. Morrison*, 529 U.S. at 611 n.4 ("In every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character."); United States v. Ballinger, 312 F.3d 1264, 1270 (11th Cir. 2002) ("No aggregation of local effects is permissible to elevate a non-economic activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction."); United States v. Rayborn, 138 F. Supp. 2d 1029, 1033 (W.D. Tenn. 2001) ("Congress's commerce power is fully extended when it reaches *commercial* activity that, in the aggregate, substantially affects interstate commerce."), *rev'd*, 312 F.3d 229 (6th Cir. 2002) (emphasis added).

198. *Ballinger*, 312 F.3d at 1270 (emphasis in original).

199. This conclusion follows directly from *Lopez* and *Morrison*, which did not allow the combined impact of all instances of possessing a handgun within in a school zone for financial gain or all acts of violence against women to be used to find a substantial effect on interstate commerce. *See supra* section entitled Substantive Analyses of the Commerce Clause; *see also* United States v. McCoy, 323 F.3d 1114, 1123-24 (9th Cir. 2003).

tially affects interstate commerce.[200] The analysis rests on presumption and often sweeps in diverse and unrelated activities when the conduct actually regulated has no discernible impact on interstate commerce. This is the aggregation employed in *Pozsgai*. *Lopez* and *Morrison*, however, caution against logic with no identifiable stopping point, as the Court is unwilling to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states."[201] For that reason, Congress may not "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[202] Aggregation in the context of the CWA runs afoul of these principles.[203]

In sum, the activity regulated by the CWA is noneconomic, lacks both legislative findings and a relevant jurisdictional element, and the link between the act of discharging pollutants or fill into non-navigable or intrastate water and a substantial effect on interstate commerce is quite attenuated. The four determinative considerations announced in *Lopez* thus weigh against a broader application of the CWA than is constitutionally permissible under the first category.

V. Conclusion

The CWA is, to use an overused phrase, "watershed legislation" and unquestionably works to improve water quality in this country.[204] But the importance of the Act does not diminish the need to firmly affix its applications to one of Congress' enumerated powers. EPA and the Corps have gone too far in expanding their jurisdiction under the CWA. Recognizing the limitations of the interstate commerce power necessarily leaves some regulatory responsibility to the states. In the end, whether this is good or bad cannot control the constitutional analysis.[205]

200. *See Lopez*, 514 U.S. at 600 (Thomas, J., concurring). As one commentator noted, "a decision to mow my lawn once a month instead of once a week, when aggregated nationally, can be argued to 'substantially affect' the price of the gallon of gasoline necessary to power my lawnmower." Gavin R. Villareal, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After* United States v. Lopez, 76 TEX. L. REV. 1125, 1144 (1998). That observation, although humorously phrased, is quite accurate.

201. *See Lopez*, 514 U.S. at 567.

202. *See id.* at 558.

203. *Lopez* and *Morrison* actually call into question the continued validity aggregation as a permissible interpretive principle. In particular, the Court's enumeration of four "significant considerations" is form over substance if courts need only aggregate an activity with all similar ones across the country to find a substantial effect on interstate commerce. *Cf. Morrison*, 529 U.S. at 611-12 (listing the four factors); United States v. McFarland, 311 F.3d 376, 398-99 (5th Cir. 2002); *see also* (Garwood, J., dissenting) ("[I]f there are essentially no limits on the use of the aggregation principle to satisfy the 'substantiality' requirement, then that requirement becomes virtually meaningless and wholly incapable of performing the function it is designed to serve . . . .").

204. Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs, 531 U.S. 159, 175, 31 ELR 20382, 20385 (2001) (Stevens, J., dissenting).

205. In addition to the waters regulable through the Commerce Clause, the federal government retains plenary power over its own land and may legislate to protect the same, largely without restriction. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 6 ELR 20545 (1976) (holding that the federal government may prohibit the taking of wild burros and horses from federal land). And, if the goal is a national fiscal priority, the spending clause confers broad powers. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (holding that Congress could require states accepting federal money for highways to raise the minimum drinking age to 21 years of age). Finally, many states do and presumably will continue to vigorously regulate our interaction with nature. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 32 ELR 20627 (2002) (upholding an indefinite building moratorium imposed by a Californian-Nevada compact); Palazzolo v. Rhode Island, 121 S. Ct. 2448, 32 ELR 20516 (2001) (addressing a state law that denied the landowner the right to dredge and fill his wetlands); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 22 ELR 21104 (1992) (addressing a state law that denied the landowner the right to build any "permanent habitable structure" on his property); ASARCO, Inc. v. Washington Dep't of Ecology, No. 69406-1, 2002 Wash. LEXIS 183 (Wash. Mar. 21, 2002) (applying state regulation to a multimillion dollar cleanup site). There is, therefore, "little reason to fear that the horribles [predicted] will actually occur or that they would prove to be horrible." Berger, *supra* note 21, at 716 (quoting Lino Graglia, *Interpreting the Constitution: Posner and Bork*, 44 STAN. L. REV. 1019, 1034 (1992)).