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SWANCC's Clear Statement: A Delimitation of Congress's Commerce Clause Authority to Regulate Water Pollution

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NOTE

SWANCC's Clear Statement: A Delimitation of Congress's Commerce Clause Authority to Regulate Water Pollution

Matthew B. Baumgartner

TABLE OF CONTENTS

INTRODUCTION 2138
I. THE NAVIGABLE WATERS DOCTRINE AS A CHANNELS-OF-COMMERCE POWER 2145
II. CONGRESS'S AUTHORITY TO REGULATE WATER POLLUTION UNDER THE CHANNELS-OF-COMMERCE POWER IS WELL-SETTLED AND BROAD IN SCOPE 2149
A. *Toward a Hydrological Connection Test* 2150
B. *Restrictive Interpretations of the Navigation Power Unduly Restrict Federal Jurisdiction over Channels of Commerce* 2153
III. STRUCTURAL FEDERALISM CONCERNS IN THE WATER POLLUTION CONTROL ARENA 2156
A. *Water Pollution Regulations Are Properly Considered Environmental Laws as Distinct from Land Use Regulations* 2158
B. *The First Principles of Interstate Commerce Clause Jurisprudence Support Federal Regulation of Water Pollution* 2161
IV. ECONOMIC OR NONECONOMIC: POTENTIAL REGULATION OF WATER POLLUTION UNDER THE SUBSTANTIAL EFFECTS DOCTRINE WOULD SATISFY THE *LOPEZ* STANDARD 2162
A. *Wetland Protections Regulate Economic Activity* 2165
B. *Upholding Federal Wetland Regulations Does Not Require Attenuated Reasoning* 2170
CONCLUSION 2171

INTRODUCTION

Perhaps the most controversial aspect of federal water pollution law is wetland regulation.[1] Wetlands are typically marshy or swampy areas with hydrologic soils and vegetation. Their ecological value is widely recognized,[2] but wetlands often stand in the way of lucrative commercial development projects.[3] Thus, the battle over the validity of federal wetland regulation is a classic fight between environmentalists and industry.[4] The wetlands controversy is also paradigmatic of the perpetual struggle to define the constitutional limits to federal regulation.

The country's main water pollution control law, the Clean Water Act (CWA), purports to regulate all "navigable waters,"[5] which it defines as "waters of the United States."[6] Although wetlands are not themselves navigable, section 404 of the CWA requires obtaining a federal permit from the Army Corps of Engineers ("the Corps") before discharging "dredged or fill material"[7] into wetlands. The permit requirement applies to individual property owners and commercial developers alike,[8] and is therefore a significant

1. *See* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1243 (1995) (noting that section 404 is the center of the federal wetlands regulation controversy because its scope has been in dispute since the CWA was enacted in 1972).

2. *See* Elaine Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?* 46 AM. U. L. REV. 931, 955-56 (1997) (noting that wetlands promote biodiversity as well as play an important role in flood control, preventing $30.9 billion in flood damage annually); *see also* Houck & Rolland, *supra* note 1, at 1243-50.

3. *See* Houck & Rolland, *supra* note 1, at 1243 (noting that federal wetland regulation "pits America's most biologically-productive and most rapidly-diminishing ecosystems against rights of private ownership and property development"). A well-publicized case involving a commercial developer's challenge to CWA-based wetland permit requirements is *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Wilson was developing a large-scale project in Charles County, Maryland, when he was indicted for, and eventually convicted of, illegally filling over fifty acres of protected wetlands without obtaining the required permit from the Army Corps of Engineers. *Id.* at 254. Wilson appealed his conviction to the Fourth Circuit, and won on Commerce Clause grounds. *Id.* at 257.

4. *See* Houck & Rolland, *supra* note 1, at 1243 (describing the federal regulation of wetlands as a "tough, nasty business") (quoting *Efforts to Combat Marine Pollution Not Keeping Pace with Growth, State Group Told*, 18 Env't Rep. (BNA) 1934, 1934-35 (Dec. 18. 1987) (quoting Jim Ross, Director of Oregon Department of Land Conservation and Development)).

5. 33 U.S.C. § 1344(a) (2000).

6. *Id.* § 1362(7).

7. *Id.* § 1344.

8. *See* Jonathan H. Adler, *Wetlands, Waterfowl and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 26 (1999); Houck & Rolland, *supra* note 1, at 1252.

impediment to development projects that involve wetlands.[9] In addition, critics have always maintained that Congress's regulatory power does not extend to isolated wetlands because they are not navigable.[10]

The Federal Government's constitutional authority to regulate water pollution arises from the Interstate Commerce Clause.[11] Historically, Congress's power over waters was tied to the national need to regulate navigation as an aspect of commerce.[12] This authority has come to be known as the "navigable waters doctrine" and was expanded by Congress early on to serve environmental goals.[13] In fact, Congress's authority under the doctrine to regulate pollution of navigable-in-fact waters — waters that are actually navigable, as distinguished from "navigable waters," which has become a term of art — has been well-settled for more than a century.[14] However, the extent to which the federal government can constitutionally regulate waters that are not navigable-in-fact has never been clear, and is controversial to this day.

9. *See* Jonathan Adler, *Swamp Rules: The End of Federal Wetland Regulation?*, 22 REG., Summer 1999, at 11, 14, *available at* http://www.cato.org/pubs/regulation/regv22n2/swamprules.pdf ("To developers and property rights activists, Section 404 imposes a repressive burden that often disenfranchises small land owners."); *see also*, Fed. Reg. 38,650, 38,659 (July 27, 1995) (discussing the reduction in the "regulatory burden" that would be achieved through an alternative permitting program for non-commercial single-family home renovation projects, as opposed to the usual section 404 wetlands permit). Even more daunting than the burdens imposed by the section 404 permit requirement itself are the potential consequences of non-compliance. In *United States v. Wilson*, for example, developer James Wilson failed to procure the necessary permits before filling over fifty acres of wetlands, which resulted in a jury conviction, a 21-month jail term, and several million dollars in fines. 133 F.3d 251, 254 (4th Cir. 1997).

10. *See e.g.*, Adler, *supra* note 8, at 36 (arguing that the federal interest in protecting wetlands arises from the need to keep navigable waterways navigable and thus does not implicate isolated wetlands).

11. The Interstate Commerce Clause endows the Congress of the United States with the authority to make laws to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3.

12. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824) ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation.... The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it."); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1866).

13. For example, the Rivers and Harbors Act of 1899, codified as amended at 33 U.S.C. § 401 (2000), mandated that no person may deposit refuse in navigable waters or their tributaries unless a federal permit was obtained. *See* Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11042, 11043-45 (2002), *available at* http://www.elr.info/articles/vol32/32.11042.cfm (discussing the early navigable waters doctrine and the Rivers and Harbors Act of 1899); Roderick E. Walston, *The Federal Commerce and Navigation Powers: Solid Waste Agency of Northern Cook County's Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699, 723-24 (2002) (same).

14. *See* Walston, *supra* note 13, at 722-23.

Proponents of federalism in this area have always maintained that regulation of intrastate wetlands should be left to the states as part of the traditional state authority over land use.[15] Such federalism concerns, of course, emerged as a driving force in the Supreme Court's Commerce Clause jurisprudence in the mid-1990s. The Court's opinions in *United States v. Lopez*[16] and *United States v. Morrison*,[17] striking down Commerce Clause-based federal regulation of criminal activity, only increased the calls for scaling back the most controversial wetland measures.[18]

Any Commerce Clause-based regulation must now be evaluated through the lens of the *Lopez* Commerce Clause framework.[19] In *Lopez*, the Court denied federal jurisdiction to criminally prosecute Alfonso Lopez for violating the Gun-Free School Zones Act (GFSZA) on the ground that the law was not within Congress's power to regulate interstate commerce. In so holding, the Court stated that it was refusing to extend the federal commerce power any further than it had been extended in the previous half-century.[20] The *Lopez* Court appraised the Court's previous Commerce Clause cases, and concluded that three broad categories of activity are recognized as within Congress's regulatory authority.[21] First, the Court recognized Congress's plenary authority to regulate the use of channels of commerce.[22] Second, Congress is empowered to regulate the instrumentalities of commerce, identified as persons or things in interstate commerce.[23] Third, *Lopez* recognized Congress's authority to regulate activities that substantially affect interstate commerce.[24] Two of these categories are potential sources of water pollution laws. Congress may legislate to protect the channels of commerce, including "navigable waters."[25] Congress may further regulate

15. *See, e.g.*, Adler, *supra* note 8, at 36.

16. 514 U.S. 549 (1995).

17. 529 U.S. 598 (2000).

18. *See* Adler, *supra* note 8, at 42 (arguing that "[w]etland federalism is likely to provide sounder policy and more effective environmental protection than the current approach.").

19. *See Morrison*, 529 U.S. at 609 ("*Lopez* . . . provides the proper framework for conducting the required analysis.").

20. *Lopez*, 514 U.S. at 567-68 (acknowledging the broad language of past Commerce Clause opinions, but declining to "proceed any further").

21. *Id.* at 558-59.

22. *Id.* at 558.

23. *Id.*

24. *Id.* at 558-59 ("Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.") (citations omitted).

25. *See, e.g.*, United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

activities that pollute waters where those activities substantially affect interstate commerce.[26]

The navigable waters doctrine was traditionally a subset of the channels-of-commerce power and dates back to Chief Justice Marshall's opinion in *Gibbons v. Ogden*.[27] However, until the Supreme Court considered the issue in 2000,[28] it was widely thought that the navigation power allowed Congress to regulate waters that substantially affected commerce.[29] In fact, then-Justice Rehnquist wrote for the Court in *Kaiser Aetna v. United States* that "congressional authority over the waters of this Nation does not depend on a stream's 'navigability.'"[30] Rehnquist went on to write that the federal navigation power — or even the presence of water — is irrelevant in determining whether the regulated activities are "susceptible of congressional regulation under the Commerce Clause," since the only relevant inquiry is the effect on interstate commerce.[31] This language illustrates that federal water regulation fell into what the *Lopez* Court subsequently termed the "substantial effects" category, rather than the "channels of commerce" category.[32]

After *Kaiser Aetna*, and an important case from the U.S. District Court for the District of Columbia holding that the Corps must define "navigable waters" broadly to include as many waters as possible under the Commerce Clause,[33] the Corps promulgated CWA-based

26. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979).

27. 22 U.S. (9 Wheat.) 1, 189-90 (1824); *see also Kaiser Aetna*, 444 U.S. at 170-80 (1979); United States v. Grand River Dam Auth., 363 U.S. 229 (1960); United States v. Twin City Power Co., 350 U.S. 222 (1955); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

28. *See infra* notes 38-47 and accompanying text.

29. *See, e.g.*, Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985) (holding that Congress intended the CWA to cover, as much as possible, all waters of the United States); Deltona Corp. v. United States, 657 F.2d 1184, 1186 (Ct. Cl. 1981) (same).

30. *Kaiser Aetna*, 444 U.S. at 173-74. This case involved a challenge to the application of the federal "navigable servitude" to a marina that was formerly, before dredging, a "pond" on private property. *Id.* The holding of the case was that although the Corps has the authority to regulate a navigable marina in the interests of interstate commerce, forcing the owners of the private marina to open it up to the public amounted to a compensable taking. *Id.* at 178.

31. *Id.* at 173-74.

32. *Kaiser Aetna* preceded *Lopez* by nearly two decades, and went unmentioned by the *Lopez* Court in its appraisal of past Commerce Clause cases. *Kaiser Aetna* made clear, however, that "[t]he cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are . . . best understood when viewed in terms of more traditional Commerce Clause analysis [*i.e.*, whether the regulated "activities 'affect' interstate commerce"] than by reference to whether the stream in fact is capable of supporting navigation. . . ." *Id.* at 174.

33. Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975). In the water pollution context, the substantial effects doctrine reaches bodies of water not

regulations over waters based on their effect on interstate commerce.[34] Thus, the judicial willingness to consider the navigable waters doctrine as coextensive with the substantial effects power, rather than the channels-of-commerce power, paved the way for expansive federal regulations under the CWA.[35] The agencies soon asserted, and the courts upheld, jurisdiction over intrastate, isolated wetlands, even when situated completely on private property — all based on a substantial effect on interstate commerce.[36]

Despite the seemingly limitless expansion of federal jurisdiction in this area, the term "navigable waters" remained the operative statutory language. Although the language seemed like something of a holdover from a bygone era,[37] it surprisingly became the centerpiece of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*.[38] *SWANCC* involved a challenge to the "Migratory Bird Rule"

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reachable under the channels-of-commerce power, because of the latter's reliance on the concept of navigability.

34. The Corps has issued regulations defining "waters of the United States" to include:

(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 . . . ;

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

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

(6) The territorial seas;

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

33 C.F.R. § 328.3(a) (2004).

35. *See* Adler, *supra* note 8, at 25-26 (discussing the Corps' efforts to expand its jurisdiction over waters that were not navigable-in-fact following *Callaway*).

36. *See* United States v. TGR Corp., 171 F.3d 762, 764-65 (2d Cir. 1999); United States v. Eidson, 108 F.3d 1336, 1341-42 (11th Cir. 1997); Leslie Salt Co. v. United States, 55 F.3d 1388, 1394-95 (9th Cir. 1995), *cert. denied*, Cargill, Inc. v. United States, 516 U.S. 955 (1995); Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993); Quivira Mining Co. v. EPA, 765 F.2d 126, 129-30 (10th Cir. 1985); United States v. Texas Pipeline Co., 611 F.2d 345, 347 (10th Cir. 1979); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325 (6th Cir. 1974); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1185-86 (D. Ariz. 1975).

37. *See Ashland Oil*, 504 F.2d at 1323 (noting that the conference bill of the CWA defines the term "navigable waters" broadly for water quality purposes: "It means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." (quoting 118 CONG. REC. 33756 (1972) (Statement of Rep. Dingell))).

38. 531 U.S. 159 (2001).

(MBR),[39] which served as the basis for federal jurisdiction over abandoned gravel pits that had filled with water[40] and were used by migrating birds in their interstate travels.[41] The municipal consortium challenging the federal permit requirement argued that Congress could not require a section 404 permit because there were no "navigable waters" involved.[42] The consortium also claimed that federal regulatory jurisdiction over intrastate wetlands was not within Congress's Commerce Clause powers.[43] The Corps countered that the CWA's legislative history and broad definition of "navigable waters" as "waters of the United States" — along with the Court's past expansive reading of the navigable waters doctrine — indeed permitted regulation of any water that substantially affected commerce. Here, the substantial effect was the several million dollars spent annually by hunters and bird watchers on migrating birds, who necessarily use water pits as they migrate.[44]

The Court never reached the validity of the Corps' argument, however. In deciding *SWANCC*, the same 5-4 majority that decided *Lopez* construed the CWA narrowly to find that Congress had not expressed a "clear intent" to apply section 404 to isolated, intrastate waters based only on a substantial effect on interstate commerce.[45] For

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39. The MBR was the Corps' attempt to "clarify" the scope of its jurisdiction under the regulation at issue in *Wilson*, which covered wetlands and other waters that "could affect interstate or foreign commerce." *See SWANCC*, 531 U.S. at 163-64 (citing 33 C.F.R. § 328(a)(3)). The MBR states that the section 404(a) permit requirement extends to *intra*state waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,217 (Nov. 13, 1986).

40. The waters at issue in *SWANCC* were not wetlands, but were alleged by the government to nonetheless be "waters of the United States." *SWANCC*, 531 U.S. at 164. For purposes of the Commerce Clause analysis, there is no meaningful difference between *SWANCC*'s isolated ponds and isolated, intrastate wetlands.

41. *Id.* at 164-65, 173.

42. *Id.* at 165-66.

43. *Id.*

44. *Id.* at 173.

45. *See* Jaimie Y. Tanabe, *The Commerce Clause Pendulum: Will Federal Environmental Law Survive in the Post-*SWANCC *Epoch of "New Federalism"?*, 31 ENVTL. L. 1051, 1067-68 (2001); *see also id.* at 1060 n.75 ("Chief Justice Rehnquist authored the majority decision [in *Lopez*] joined by Justices Scalia and Thomas. Justices Kennedy and O'Connor concurred in the decision. The dissenting Justices were Souter, Breyer, Stevens, and Ginsburg. This is the same five-to-four split as in the *SWANCC* decision.") (citing *Lopez*, 514 U.S. at 567-68 and *SWANCC*, 531 U.S. at 159).

the Court to even reach the issue of whether the agency's interpretation was constitutionally valid required a clear statement from Congress that the agency was permitted to promulgate regulations that "would result in a significant impingement of the States' traditional and primary power over land and water use."[46] To avoid these "significant constitutional and federalism questions," the Court held that section 404's jurisdiction was limited to "navigable waters," a term that must be interpreted to exclude waters that merely affect commerce, and are neither navigable-in-fact waters, nor connected to any such waters.[47]

A slew of challenges have been brought to CWA-based wetland regulations in the wake of *SWANCC*, with varying results in the lower courts.[48] The courts are split as to whether the effect of *SWANCC* was to limit CWA jurisdiction to only those wetlands that are directly adjacent to navigable-in-fact waters, or to allow federal regulation of wetlands where there is any hydrological connection to "navigable waters." Because *SWANCC* itself did not undertake a constitutional analysis, these post-*SWANCC* cases mostly interpret the CWA, and what *SWANCC* said about its terms.

This Note explains the constitutional framework of federal water pollution regulation, and uses post-*SWANCC* cases for illustration and support in that endeavor. Part I argues that *SWANCC*'s avoidance of the difficult constitutional issue through the use of the clear statement rule revives the navigable waters doctrine as a channels-of-commerce power. One important implication of this argument is that any regulation, like the MBR, that invokes substantial effects-based reasoning is not valid under the CWA.[49] Part II argues that because the channels-of-commerce power is both well-settled and broad in scope, the federal government can regulate any body of water that is hydrologically connected to a navigable-in-fact waterway. Part III addresses the structural federalism concerns underlying *Lopez*, arguing that the hydrological connection test advocated for in Part II

46. *SWANCC*, 531 U.S. at 174.

47. *Id.*

48. *See* Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003); United States v. Krilich, 303 F.3d 784 (7th Cir. 2002); Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002); Headwaters v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001).

49. As noted, the CWA is limited to "navigable waters," which it defines as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2000). This Note argues that because the CWA was meant as a broad exertion of Congress's commerce power, the statute extends as far as the relevant constitutional doctrine allows. *See infra* Section II.B. What the relevant constitutional doctrine is, is a separate question. The principal argument of this Note is that *SWANCC* has interpreted the relevant constitutional doctrine to be the channels-of-commerce power rather than the substantial effects power.

does not offend principles of federalism. Part IV applies the *Lopez* substantial effects analysis to potential federal regulation of isolated, intrastate wetlands, concluding that such regulation is valid because the filling of wetlands is typically an integral aspect of economic activity.

I. THE NAVIGABLE WATERS DOCTRINE AS A CHANNELS-OF-COMMERCE POWER

SWANCC's narrow construction of the CWA, and its term "navigable waters," necessarily precludes federal jurisdiction on the basis of a substantial effect on commerce, thereby reviving the navigable waters doctrine as a channels-of-commerce power. The narrow statutory construction employed in *SWANCC* stemmed from the Court's desire to avoid a controversial constitutional analysis that it viewed as "needless" in light of a statutory holding that raised no significant constitutional questions.[50] "This concern is heightened," the Court wrote, "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[51] The Court then alluded to the substantial effects arguments that *might* justify the MBR, noting that it "would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."[52] However, the Court refused to undertake this substantial effects analysis on the ground that an assertion of such a far-reaching constitutional authority went well beyond the statutory authority conferred by the term "navigable waters."[53] The Court indicated that the navigable waters doctrine is distinct from the substantial effects prong of Congress's commerce power by noting that inclusion of the term "navigable waters" in the CWA indicated that Congress intended for jurisdiction to at least be related to navigable-in-fact waters.[54] Thus, the Court made clear that the statutory term "navigable waters" indicates an exercise of the channels-of-commerce power, and not the more controversial substantial effects power.

50. *SWANCC*, 531 U.S. at 172-73 (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

51. *Id.* at 173 (citing United States v. Bass, 404 U.S. 336, 349 (1971)).

52. *Id.*

53. *Id.* (noting that the substantial effects rationale underlying the MBR is "a far cry, indeed, from 'navigable waters' and 'waters of the United States' to which the statute by its terms extends").

54. *Id.* at 172 ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.").

Even though *SWANCC* avoided the issue of how *Lopez* affects federal constitutional authority to protect the environment, the same strictures of federalism that guided the *Lopez* decision also guided the Court's statute-based holding in *SWANCC*. Indeed, it was through the use of a now familiar, but still controversial,[55] canon of statutory construction known as the "clear statement rule"[56] that the even more controversial constitutional analysis was avoided. The precise principle of statutory construction relied on by the *SWANCC* Court is that agencies will not be permitted to construe statutes in such a way that raises serious constitutional doubts.[57] For the Court to consider the constitutionality of questionable agency action, a clear statement that Congress intended such action is required.[58] Professor Cass Sunstein has noted that this canon of statutory construction goes "well beyond" the uncontroversial notion that agencies cannot construe statutes in such a way that makes them unconstitutional.[59] Rather, all that is necessary in order for the reviewing court to invoke constitutional avoidance is that the constitutional issue must be "serious and substantial," and that the statute be fairly capable of an interpretation contrary to that offered by the agency.[60] Because of the presence of the term "navigable waters" in section 404, the Court concluded that an alternative interpretation of the navigable waters doctrine as a channels-of-commerce power is just as plausible, and avoids the thorny federalism questions raised by the substantial effects

55. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (asserting that the modern clear statement rule is more controversial than the traditional rule that prohibited agencies from construing a statute so as to make it unconstitutional).

56. Professor William Eskridge describes the Rehnquist Court's use of canons of statutory construction such as clear statement rules as "a self-conscious effort to provide a subconstitutional way to enforce 'underenforced' constitutional norms," specifically structural constitutional norms such as nondelegation and federalism. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 286-87 (1994). These structural concerns are, Eskridge argues, almost never enforced through constitutional invalidation of federal statutes. *Id.*

57. *See* Sunstein, *supra* note 55, at 331.

58. *Id.*

59. *Id.*

60. Sunstein concludes that this principle trumps the normal rule of deference to the agency interpretation, as announced in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Sunstein, *supra* note 55, at 331. "*Chevron* deference" is the doctrinal rule that where statutory language is ambiguous, reasonable agency interpretations will be upheld. Indeed, the dissent in *SWANCC* argued for *Chevron* deference. *SWANCC*, 531 U.S. at 191 (Stevens, J., dissenting). The majority, however, "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject[ed] the request for administrative deference." *Id.* at 174. This Note takes no position on this particular criticism, except to argue that in light of *SWANCC*'s preference for a narrow construction of the CWA, a precise analysis of the statutory language is now required for an accurate assessment of current federal jurisdiction to regulate water pollution.

rationale offered by the Corps in defense of the MBR.[61] The navigable waters doctrine — interpreted as a channels-of-commerce power — does not raise such serious constitutional questions; otherwise the Court could not have relied on that term in avoiding the difficult constitutional issue.

The relevant scholarship and policymaking has largely overlooked the Court's use of this canon, and what it means for the current scope of federal jurisdiction to regulate water pollution.[62] For instance, the Clinton administration issued a guidance memorandum interpreting *SWANCC* on the narrowest possible grounds, as invalidating the MBR, but not CWA jurisdiction based on other ways in which isolated waters could affect interstate commerce.[63] The memorandum urged regulators to consult legal counsel where there may be alternate "connections with interstate commerce [which] might support the

61. Sunstein sees this canon as protecting a background rule of federalism. Sunstein, *supra* note 55, at 331 ("The constitutional source of this principle is the evident constitutional commitment to a federal structure, a commitment that may not be compromised without a congressional decision to do so — an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress.").

62. A recent Note argues that the legislative history of the CWA, as relied upon in *SWANCC*, indicates that the CWA "sounds in the federal 'power over navigation,' not in the general commerce power to regulate intrastate activities that substantially affect interstate commerce." Jennifer DeButts Cantrell, Note, *For the Birds: The Statutory Limits of the Army Corps of Engineers' Authority Over Intrastate Waters After* SWANCC, 77 S. CAL. L. REV. 1353, 1375 (2004). Cantrell's Note distinguishes between the navigation power and Congress's general commerce power, whereas this Note argues that the navigation power is properly considered a form of the commerce power. The two notes reach the same conclusion, however: that *any* substantial effects-based regulation is not supported by the CWA, as interpreted in *SWANCC*. *Id.* at 1375-76. Other literature addressing the statutory basis for federal jurisdiction after *SWANCC* also focuses on the legislative history of the CWA. On one end of the spectrum, Albrecht and Nickelsburg argue that in the absence of a clear expression of Congressional intent to regulate waters other than navigable-in-fact waters and their immediately adjacent wetlands, there is no federal jurisdiction under section 404 to regulate tributaries based on a hydrological connection or any other "new jurisdictional test." Albrecht & Nickelsburg, *supra* note 13, at 11056-57. Lance Wood, an environmental lawyer for the Army Corps of Engineers, has responded specifically to the Albrecht and Nickelsburg article with an alternative reading of the legislative history of the CWA that supports uniform CWA jurisdiction over tributaries of navigable-in-fact waters. *See* Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Nonnavigable Tributaries of the Traditional Navigable Waters and to their Adjacent Wetlands*, 34 ENVTL. L. REP. 10187 (2004), *available at* http://www.elr.info/articles/vol34/34.10187.pdf.

63. Memorandum from Gary S. Guzy, General Counsel U.S. Environmental Protection Agency, and Robert M. Andersen, Chief Counsel U.S. Army Corps of Engineers, to a Distribution List of EPA Administrators, Corps Commanders et al., Subject: Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters (Jan. 19, 2001), *at* http://www.saj.usace.army.mil/permit/documents/swancc.pdf [hereinafter *Guzy Memo*]. The memorandum specifically noted that "[w]aters covered solely by subsection (a)(3) that could affect interstate commerce *solely* by virtue of their use as habitat by migratory birds are no longer considered 'waters of the United States.'" *Id.* at 4. "Waters covered solely by subsection (a)(3)" refers to waters that are not otherwise covered by section 328.3, making (a)(3) the catch-all subsection for regulatory jurisdiction. *See supra* note 39.

assertion of CWA jurisdiction over 'nonnavigable, isolated, intrastate waters under subsection (a)(3).'"[64]

Environmental advocacy groups have also urged a narrow reading of *SWANCC* on the ground that the Court only specifically invalidated the MBR.[65] This interpretation would allow for CWA jurisdiction over wetlands that are used, for example, to irrigate crops that are transported and sold in interstate commerce.[66]

These arguments are flawed because they ignore the *SWANCC* Court's reasoning that the CWA does not authorize federal jurisdiction over waters based on a constitutionally questionable rationale. As noted above, the Court not only invalidated federal jurisdiction based on the MBR, it refused to undertake a *Lopez* substantial effects analysis because the Court concluded that the CWA term "navigable waters" does not support a constitutionally questionable substantial effects-based regulation. The Court's narrow method of statutory construction means that had the regulation at issue asserted *any* substantial effects rationale — migratory birds, crops sold in interstate commerce, etc. — the outcome would have been the same. Thus, neither the Clinton administration guidance nor the environmental groups' position is valid under the reasoning of *SWANCC*, which cabins federal jurisdiction under the CWA in Congress's power to regulate the channels of interstate commerce.[67]

SWANCC's use of the clear statement rule in refusing to consider a substantial effects-based regulation under the CWA means that the statute is an exercise of Congress's authority over channels of commerce. As a channels-of-commerce power, the navigable waters doctrine requires some connection to navigable-in-fact waters. This authority does not extend to waters which substantially affect interstate commerce. Thus, any assertion of jurisdiction over waters

64. *Guzy Memo*, *supra* note 63, at 4.

65. *See, e.g.*, Press Release, Natural Resources Defense Council, Bush Administration Plans to Limit Scope of Clean Water Act (July 11, 2003), *available at* http://www.nrdc.org/media/pressreleases/030203.asp (last visited Oct. 24, 2004); Sierra Club,, *Supreme Court Removes Wetlands Protection*, CLEAN WATER & WETLANDS NEWS (Jan. 9, 2001), *at* http://www.sierraclub.org/wetlands/news/jan9_01.asp (last visited Oct. 24, 2004) (asserting that *SWANCC* only invalidated CWA jurisdiction where the Migratory Bird Rule is the sole basis for regulation).

66. The Corps asserted — along with the MBR — in 1986, that the "waters of the United States" include those waters that are "[u]sed to irrigate crops sold in interstate commerce." 51 Fed. Reg. 41, 206, 41,217 (Nov. 13, 1986).

67. This is true despite a strong argument that such *Lopez* category three jurisdiction actually better serves the purpose of the statute and intent of the enacting Congress. *See, e.g.*, *NRDC v. Callaway*, 392 F. Supp. at 686 (holding the Corps' pre-1975 regulations asserting jurisdiction over only those waters subject to the ebb and flow of the tide to be unreasonably narrow on the grounds that Congress intended to regulate as many waters as possible under the Commerce Clause for purposes of controlling water pollution).

that are not somehow connected to navigable-in-fact waters is not valid under the statute.

II. CONGRESS'S AUTHORITY TO REGULATE WATER POLLUTION UNDER THE CHANNELS-OF-COMMERCE POWER IS WELL-SETTLED AND BROAD IN SCOPE

This Part clarifies the extent of the navigable waters doctrine as a channels-of-commerce power, something the Fourth Circuit has acknowledged has never been "entirely clear."[68] Indeed, over what waters the CWA currently permits federal regulations is a debated issue among the lower courts in the wake of *SWANCC*. Most post-*SWANCC* decisions have upheld federal jurisdiction over wetlands that are hydrologically connected to a navigable-in-fact body of water.[69] Section II.A argues that the hydrological connection test identified by this line of cases is a proper delimitation of Congress's authority over channels of commerce. This rationale is supported by the *Lopez* Court's recognition of the broad reach of Congress's powers to not only regulate channels of commerce, but also to protect them from external sources of harm.[70] A minority of courts has interpreted the *SWANCC* decision broadly, to require that any regulated body of water must have a "significant nexus"[71] with, or be directly adjacent to, a navigable waterway.[72] Section II.B argues that

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

69. Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003); Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002); United States v. Krilich, 303 F.3d 784, 791 (7th Cir. 2002) (upholding lower court's determination that "the precise holding of SWANCC was not so broad" as to "remove from the Corps' regulatory authority all waters that are not adjacent to bodies of open water"); Headwaters v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001); *see generally* Lawrence R. Liebesman, *Judicial, Administrative, and Congressional Responses to* SWANCC, 33 ENVTL L. REP. 10899 (2003), *available at* http://www.elr.info/articles/vol33/33.10899.cfm (discussing post-*SWANCC* cases).

70. *See Lopez*, 514 U.S. at 558. *Deaton* issued an especially strong acknowledgement of *Lopez*'s affirmation of the channels-of-commerce power by rejecting an argument that this power restricts Congress to preventing only physical obstructions to navigability. The court held that Congress's authority to regulate the navigable waters is no less extensive than its power over any other channel of commerce. *Deaton*, 332 F.3d at 707 ("[T]here is no reason to believe Congress has less power over navigable waters than over other interstate channels such as highways, which may be regulated to prevent their 'immoral and injurious use.'" (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917))).

71. The term "significant nexus" was used by the *SWANCC* Court in distinguishing waters at issue in the present case from the adjacent wetlands at issue in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). *SWANCC*, 531 U.S. at 167.

72. *In re* Needham, 354 F.3d 340, 345-46 (5th Cir. 2003); Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001); FD&P Enters., Inc. v. United States Army Corps of Eng'rs, 239 F. Supp. 2d 509 (D.N.J. 2003); *see generally* Liebesman, *supra* note 69, at 10903-04 (discussing post-*SWANCC* cases).

this line of cases unduly limits federal jurisdiction to regulate the channels of commerce.[73]

A. *Toward a Hydrological Connection Test*

Congress's power over the channels of commerce is broad enough to support federal jurisdiction over wetlands that are hydrologically connected to navigable-in-fact waters. The channels-of-commerce power is plenary and is given great deference by the Court[74] because it does not raise the important federalism concerns that regulation of an intrastate activity affecting commerce does.[75] Rather, the navigable waters doctrine assumes that navigable waters are tied to national interests — and, presumably, a legitimate exercise of federal power — while nonnavigable waters are tied to local interests and are not the proper subject for federal regulation.[76] In addition to being well-settled, Congress's authority to regulate the channels of commerce is extensive. *Lopez* reaffirmed the broad scope of this power by quoting from *Caminetti v. United States*, which upheld the Mann Act barring the transport of "any woman or girl" in interstate channels for an "immoral purpose."[77] The Act was within congressional authority, even though the defendant's conduct — transporting a woman across state lines to "be and become his mistress and concubine"[78] — was entirely noncommercial. Thus, Congress's authority to regulate the channels of interstate commerce is also quite broad in scope, properly barring the "injurious uses" of the nation's channels of commerce.[79]

In 1976 the Sixth Circuit Court of Appeals applied this rationale in upholding federal jurisdiction over nonnavigable tributaries in *United*

73. *See, e.g., Deaton*, 332 F.3d at 706-07 (holding that this view of the channels-of-commerce power is too narrow in light of Supreme Court decisions recognizing Congressional authority to legislate to prevent the injurious use of navigable waters, including the entry of pollutants from nonnavigable tributaries). The question all these post-*SWANCC* cases address is whether the asserted connection to navigable waters supports Clean Water Act jurisdiction. This Note contends that because the CWA is an exercise of Congress's navigation power — which is itself a channels-of-commerce power — these cases can be viewed as constitutional cases. Thus, when discussing CWA jurisdiction, this Note is simultaneously discussing the extent of the Congress's power over waters as channels of commerce.

74. *See Lopez*, 514 U.S. at 558 ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.") (citations omitted).

75. *See* Walston, *supra* note 13, at 740-41.

76. *Id.*

77. *Lopez*, 514 U.S. at 558 (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)); *see also Caminetti*, 242 U.S. at 485.

78. *Caminetti*, 242 U.S. at 483.

79. *Lopez*, 514 U.S. at 558.

States v. Ashland Oil and Transportation Co.[80] The court noted that water pollution is a "direct threat to navigation — the first interstate commerce system in this country's history and still a very important one.... It would, of course, make a mockery of those powers if [Congress's] authority to control pollution was limited to the bed of the navigable stream itself."[81] The court went on to warn that in the absence of federal control, the tributaries could then be used "as open sewers" carrying waste into the navigable waters and completely undermining the federal regulations.[82] This rationale is the basis for federal regulation of waters that are not themselves navigable, but are hydrologically connected to navigable waters, and is still just as valid in the wake of *SWANCC* as it was when the *Ashland Oil* court issued its holding.

In *Headwaters v. Talent Irrigation District*,[83] the first significant post-*SWANCC* CWA case, the Ninth Circuit held that even a tenuous hydrological connection was sufficient to support federal jurisdiction.[84] Noting that this holding was necessary to preserve the central goal of the CWA, which *SWANCC* left intact, the *Headwaters* court reasoned that "[t]he [CWA] is concerned with the pollution of tributaries as well as with the pollution of navigable streams, and 'it is incontestable that substantial pollution of one not only may but very probably will affect the other.'"[85]

The Fourth Circuit followed suit in *United States v. Deaton*,[86] finding even intermittent and very distant hydrological connections to be sufficient to support CWA jurisdiction. The *Deaton* court specifically held that the channels-of-commerce power permits Congress to legislate to prevent the injurious use of navigable waters, as it did in enacting the CWA.[87] Thus, the court upheld federal jurisdiction over wetlands adjacent to a nonnavigable artificial ditch that flows into the navigable Wicomico River, because there is

80. 504 F.2d 1317 (6th Cir. 1974).

81. *Id.* at 1325-26.

82. *Id.* at 1326 ("The navigable part of the river could become a mere conduit for upstream waste.").

83. 243 F.3d 526 (9th Cir. 2001).

84. *Id.* at 534.

85. *Id.* (quoting *Ashland Oil*, 504 F.2d at 1329).

86. 332 F.3d 698 (4th Cir. 2003).

87. *Id.* at 707 ("For example, Congress may outlaw the use of navigable waters as dumping grounds for fill material. The power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters.").

a "hydrologic connection between the Deaton wetlands and navigable waters."[88]

More recently, in *Treacy v. Newdunn Associates*,[89] the Fourth Circuit found wetlands[90] situated on private land, and separated by an interstate highway from a traditionally navigable river, to be within CWA jurisdiction.[91] The court found that the wetlands were historically connected to the Stony Run River, but following the construction of a highway, the connection was more attenuated, through intermittent surface waters over 2.4 miles of streams and manmade ditches.[92] In support of its holding that the wetlands were within the meaning of "navigable waters,"[93] the court noted that *SWANCC* acknowledged that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands '*inseparably* bound up with the "waters" of the United States.'"[94] Accordingly, *SWANCC* merely held that "the Corps's attempted exercise of jurisdiction over isolated ponds that had

88. *Id.* at 703. Of all the post-*SWANNC* cases, the *Deaton* opinion comes closest to supporting this Note's assertion that *SWANCC* effectively categorized the navigation power as a channels-of-commerce power rather than as a substantial effects power. *Id.* at 709 ("*SWANCC*, of course, emphasizes that the CWA is based on Congress's power over navigable waters, suggesting that covered nonnavigable waters are those with some connection to navigable ones."). The *Deaton* court also held, as this Note asserts, that this power is plenary and extends as far as necessary to prevent the injurious uses of channels of commerce, including entry of pollution into navigable waters. *Id.* at 707. However, the *Deaton* court did not indicate in its opinion that it gave any consideration to the method of statutory construction employed in *SWANCC*. The *Deaton* opinion is bolstered by this Note's assertion that the *SWANCC* Court must, because it relied on this as a constitutionally "safe" statutory construction, consider the navigable waters doctrine to be uncontroversial, even when invoked to regulate nonnavigable waters. *See supra* Section I.B. This is not to argue that there is no federalism concern when the navigable waters doctrine is invoked. Indeed, that doctrine assumes that some waters will be within the power of the states to regulate. *See* Walston, *supra* note 13, at 740-41. Part III *infra* considers the structural federalism concerns in the context of federal water pollution regulations under the channels-of-commerce power.

89. 344 F.3d 407 (4th Cir. 2003).

90. Newdunn Associates bought 43 acres of land, 38 of which were wetlands within the Corps' CWA regulations. *Id.* at 409-10 (quoting 33 C.F.R. § 328.3(b) (2002)). The Corps' regulations define "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* at 409 (quoting 33 C.F.R. § 328.3(b) (2002)).

91. *Id.* at 415.

92. *Id.* at 410.

93. *Id.* at 415 ("We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States — based as it is on the Corps' and the EPA's technical expertise — is unreasonable." (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985))).

94. *Id.* (quoting *SWANCC*, 531 U.S. at 167).

no hydrologic connection whatsoever to navigable waters could not stand."[95]

The Fourth Circuit's interpretation is correct because, as demonstrated by past navigable waters cases,[96] and even under *SWANCC*, the federal navigation power is extensive enough to support measures that seek to prevent pollution from entering navigable waters, whether directly or via a hydrological connection. The Fourth Circuit has thus adopted the proper standard, permitting the Corps to exert its jurisdiction over "any branch of a tributary system that eventually flows into a navigable body of water."[97] To limit the navigable waters doctrine any further would unduly restrict Congress's well-settled authority to legislate against the injurious uses of the channels of interstate commerce.[98]

B. *Restrictive Interpretations of the Navigation Power Unduly Restrict Federal Jurisdiction over Channels of Commerce*

A few courts have issued more limited holdings that improperly restrict federal regulation.[99] In *Rice v. Harken Exploration Co.*,[100] an Oil Pollution Act (OPA)[101] case, the Fifth Circuit determined that *SWANCC* precluded federal jurisdiction over any water that is not "actually navigable or is adjacent to an open body of navigable water."[102] The court thus removed from the reach of federal regulators groundwater and a nonnavigable creek into which pollutants seeped, even though the pollutants from each found their way into the navigable Canadian River.[103]

More recently, the Fifth Circuit declared that neither CWA nor OPA jurisdiction is conferred by a hydrological connection, holding instead that a nonnavigable body of water is jurisdictional only if it flows "directly into" a navigable waterway.[104] The court reiterated its definition of adjacency first announced in *Rice*, that "there must be a

95. *Id.*

96. *See, e.g.*, *Riverside Bayview*, 474 U.S. 121; United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

97. *Deaton*, 332 F.3d at 711.

98. *See Lopez*, 514 U.S. at 558; *see also Deaton*, 332 F.3d at 707.

99. *See* Liebesman, *supra* note 69, at 10899.

100. 250 F.3d 264 (5th Cir. 2001).

101. The OPA contains the term, "navigable waters," prompting the plaintiffs to argue, and the court to conclude, that Congress intended for the term to have the same meaning as under the CWA. *Id.* at 270.

102. *Id.*

103. *Id.* at 265.

104. *In re* Needham, 354 F.3d 340, 345-47 (5th Cir. 2003).

close, direct and proximate link."[105] In the same vein as the Fifth Circuit cases, a New Jersey District Court held in *FD&P Enterprises, Inc. v. United States Army Corps of Engineers*[106] that CWA jurisdiction, and thus the federal navigation power, had shifted away from a "hydrological connection" test and toward a "significant nexus" test.[107]

Both principle and precedent inveigh against such restrictive interpretations, however. First, the rationale employed by these courts unduly limits the federal navigation power as a *Lopez* category one power. One need look no further than *Lopez* itself for support of *Ashland Oil*'s and *Newdunn*'s necessary-and-proper reasoning as it relates specifically to the federal power over channels of commerce. The *Lopez* Court noted the long-settled rule that this power includes the authority "to keep the channels of interstate commerce free from immoral or injurious uses."[108] This has long included the regulation of nonnavigable waters from which pollution can flow into navigable waters.[109]

The CWA invokes the full extent of this constitutional principle.[110] The Supreme Court recognized in *United States v. Riverside Bayview Homes, Inc.*[111] that the statute extends to nonnavigable waters in order to keep the navigable waters free from pollution outlawed by federal regulations.[112] The Court specifically sanctioned the Corps' argument for jurisdiction over hydrologically connected wetlands because they are "inseparably bound up with the 'waters' of the United States."[113] In turn, *SWANCC* specifically endorsed *Riverside Bayview*'s

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105. *Id.* at 346 n.9 (quoting *Rice*, 250 F.3d at 272) (quotation marks omitted).

106. 239 F. Supp. 2d 509 (D.N.J. 2003).

107. *Id.* at 516. The *FD&P Enterprises* court interpreted *SWANCC* to require more than a "mere hydrological connection" to support jurisdiction based on the federal navigation power, thus limiting the navigation power to immediately adjacent wetlands. *Id.*

108. *Lopez*, 514 U.S. at 558.

109. *See Deaton*, 332 F.3d at 707 ("The power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters.") (citing United States v. Grand River Dam Auth., 363 U.S. 229, 232 (1960); Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525-26 (1941); United States v. Rio Grande Dam Irrigation Co., 174 U.S. 690, 708-09 (1899)).

110. *See* H.R. REP. No. 92-911, at 131 (1972); H.R. REP. No. 92-1465, at 144 (1972) (both reports indicating that the House committee fully intended that the term "navigable waters" be given the broadest possible constitutional interpretation); *see also Deaton*, 332 F.3d at 707 ("Indeed, the principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act.") (citing *Ashland Oil*, 504 F.2d at 1325-29).

111. 474 U.S. 121 (1985).

112. *Id.* at 133.

113. *Id.* at 134.

reasoning, alluding to the "significant nexus" between the wetlands and open water only to indicate what led the *Riverside Bayview* Court to uphold federal jurisdiction *in that case*.[114] As *SWANCC* merely refused to undertake a substantial effects analysis,[115] there was no indication in that case that the Court intended the navigable waters doctrine to itself be recast as a more limited power.

The *FD&P Enterprises* court's interpretation of the "significant nexus" language in *SWANCC*, as evidence that a "mere hydrological connection"[116] to a navigable water is not enough to establish federal jurisdiction, is therefore inconsistent with precedent as well as the well-settled federal power to keep pollution out of navigable waters. Likewise, the Fifth Circuit's adjacency rationale unduly limits federal jurisdiction to the facts of *Riverside Bayview*, completely ignoring that Court's view of wetlands as inseparably bound up with waters of the United States.

Both the adjacency and significant nexus tests are also less manageable than the hydrological connection test.[117] It is unclear what a significant connection is — one that is obvious to the naked eye, or one through which vast amounts of pollution can enter federal waters. Either new jurisdictional test would require judicial assessment of an area that is within the expertise of the Corps and EPA, with little, if any, predictability. Thus, if federal regulations do constitutionally extend to those waters that are connected to navigable waters — which has been settled law since *Riverside Bayview* — then *any* hydrological connection should suffice as far as the courts are concerned.[118]

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114. *SWANCC*, 531 U.S. at 167 ("Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'"); *see* Wood, *supra* note 62, at 10202 (arguing that it would be "completely illogical" to permit federal CWA jurisdiction to adjacent wetlands into order to implement the CWA's goal of protecting water quality but not to allow such jurisdiction over nonnavigable tributaries, "which have far greater importance to the quality of the navigable waters than adjacent wetlands do").

115. *See supra* Section I.A.

116. *FD&P Enters.*, 239 F. Supp. 2d at 516.

117. *See Wood*, *supra* note 62, at 10188 ("For example, it is unclear what water bodies the Fifth Circuit's *Needham* panel would consider to be 'adjacent' to navigable-in-fact water bodies, etc.").

118. *Deaton* held that if Congress has the authority to regulate nonnavigable waters as part of its power over channels of commerce, it also has the authority to delegate it to the Corps, provided Congress provides an "intelligible principle" — in this case, the goal of the CWA itself: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" — upon which the Corps can base its regulatory decisions. *Deaton*, 332 F.3d at 707 (4th Cir. 2003) (quoting Clean Water Act, 33 U.S.C. § 1251(a) (2000)); see *id.* ("This use of delegated authority is well within Congress's traditional power over navigable waters."). Thus, under the *Chevron* rule of deference, courts should defer to the Corps' reasonable regulatory decisions in this area. *See id.* at 709-10.

In addition to being both judicially manageable and consistent with Congress's well-settled authority to regulate what actually enters the channels of commerce, the hydrological connection standard is actually quite a moderate use of the channels-of-commerce power. In a notable post-*Lopez* channels-of-commerce case, *National Association of Home Builders v. Babbitt*,[119] the D.C. Circuit held that the Endangered Species Act's prohibition against the "taking" of an endangered species — the Delhi Sands Flower-Loving Fly — was a valid exercise of Congress's channels-of-commerce authority.[120] The court reasoned that for the taking clause to be preserved, it must be extended to prevent "interstate actors" — in that case construction materials and builders moving across state lines — from destroying the endangered fly's habitat through their use of the channels of commerce in building a hospital.[121]

By comparison, the case for federal regulation of hydrologically connected waters is a much easier one to make under the channels-of-commerce power. This is because navigable waters are themselves channels of commerce over which there is clear federal jurisdiction. Thus, the extension of *Lopez* category one powers to cover hydrologically connected waters that the Supreme Court has found to be "inseparably bound up"[122] with navigable waters, which actually are channels of commerce, is quite moderate in light of existing post-*Lopez* case law in this area.[123]

III. Structural Federalism Concerns in the Water Pollution Control Arena

This Part argues that the hydrological connection test comports with principles of federalism that have underscored the Supreme Court's recent Commerce Clause jurisprudence.[124] The need for

119. 130 F.3d 1041 (D.C. Cir. 1997).

120. *Id.* at 1048-49.

121. *Id.* at 1048. The court's holding that Congress has the authority to regulate the channels of interstate commerce so as to prevent the taking of an endangered species has been criticized for its slippery-slope reasoning. *See* Calvert G. Chipchase, *The Clean Water Act: What's Commerce Got to Do With It?*, 33 ENVTL L. REP. 10775, 10783 n.135 (2003), *available at* http://www.elr.info/articles/vol33/33.10775.cfm (last visited Mar. 15, 2005) ("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."). This Note reserves comment on that ground.

122. *See SWANCC*, 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134).

123. As noted, the *Deaton* court also considered the "waters of the United States" to be channels of commerce, over which Congress enjoys plenary policymaking authority. *See Deaton*, 332 F.3d at 707-08.

124. Justice Kennedy's concurrence in *Lopez*, along with the Court's other recent Commerce Clause decision in *United States v. Morrison*, 529 U.S. 598 (2000), emphasized the importance of limiting principles in Commerce Clause jurisprudence so as to avoid a federal

limiting federal powers is not a new notion; Justice Cardozo once wrote that the judicial inquiry is to distinguish "what is national and what is local in the activities of commerce."[125] Thus, one job of the judiciary in Commerce Clause cases is to protect what is properly the job of the states from federal intrusion.[126] Moreover, the *SWANCC* Court's use of the clear statement rule to protect this structural federalism concern[127] mandates that any complete analysis of the constitutional scope of federal powers to regulate water pollution consider the limitations imposed by that concern. As noted, the navigable waters doctrine historically respects this important concern.[128] This Part, however, goes beyond the historical rationale and asserts that federal regulation of water pollution under the expansive navigable waters doctrine argued for here does not "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[129]

Two considerations are paramount to the structural federalism analysis. First, the most prevalent concern in the modern jurisprudence is that some areas of regulation must be left solely up to the states to regulate.[130] The second consideration is whether water

general police power. *See Morrison* 529 U.S. at 615-17; *Lopez*, 514 U.S. 549, 578-80 (1995) (Kennedy, J., concurring); *see also* United States v. Ho, 311 F.3d 589, 604 (5th Cir. 2002) (citing the need for limiting principles in valid Commerce Clause-based regulation in upholding federal asbestos abatement requirements).

125. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935).

126. *See Lopez*, 514 U.S. at 556-57 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

127. *SWANCC*, 531 U.S. at 174; *see also* ESKRIDGE, *supra* note 56 (noting the Court's use of clear statement rules to protect underserved constitutional principles such as federalism).

128. *See supra* notes 75-76 and accompanying text (arguing that the navigable waters doctrine assumes that navigable waters implicate important national concerns, whereas nonnavigable waters do not).

129. *Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37).

130. *See Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."). Indeed, it seems at times that the Court asserts states' rights as a matter of such importance without regard to the regulation or policy at issue that one is hard pressed to decipher in what types of cases the Court considers federal authority proper within the constitutional structure. Professor Daniel Halberstam states:

> The current majority has sought to revive some limitation on federal powers in an effort to protect the states' role in the federal system. But . . . the Court refuses to appeal systematically to any generalized principle of making the federal system work as a productive whole. Instead, the Court frequently seems preoccupied with protecting state autonomy as an end in itself. In other words, the Court generally relies less on a vision of the legitimate role of the states within the overall system of democratic federal governance than on appeals to what the states did or did not "surrender" upon joining the Union.

Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 795 (2004). Despite the unpredictability, this Note argues that water pollution authority is a proper federal undertaking.

pollution is an aspect of interstate commerce that states cannot effectively manage without federal policy. Section III.A argues that water pollution regulations are an essential part of national environmental policy, which the Supreme Court has deemed distinct from the traditional state power over land use. Section III.B argues that states cannot regulate pollution of navigable waters without disturbing the policies of neighboring states, thus making it a proper use of Congress's Commerce Clause authority to impose national water pollution control standards.

A. *Water Pollution Regulations Are Properly Considered Environmental Laws as Distinct from Land Use Regulations*

The main federalism concern in both *Lopez* and *SWANCC* is that traditional areas of state control must not be encroached upon by federal regulation.[131] In *Lopez*, that concern was the basis for the nullification of the Gun-Free School Zones Act, and in *SWANCC*, it was the basis for the Court's narrow construction of the CWA. In this way, *SWANCC* echoed what critics of federal wetland enforcement have long argued: that federal water pollution laws encroach on land use requirements, "perhaps the quintessential state activity."[132] However, the Supreme Court has distinguished the two as separate types of laws.

The argument that environmental protection measures are land use requirements has been addressed and squarely rejected by the Supreme Court in *California Coastal Commission v. Granite Rock Co.*[133] Central to the Court's analysis was whether a California environmental law amounted to an illegitimate land use regulation on

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131. *See SWANCC*, 531 U.S. at 174 (refusing to undertake the substantial effects analysis in light of existing federalism concerns because Congress had not indicated a clear intent for such expansive regulations as the MBR); *Lopez*, 514 U.S. at 564 (rejecting an argument for the constitutionality of the Gun-Free School Zones Act on the ground that such reasoning would, if accepted, establish a general police power of the sort only enjoyed by the states).

132. *See* Adler, *supra* note 8, at 36 (quoting Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 768 n.30 (1982)). Although the *SWANCC* Court did note the land use concern, it specifically left open the question whether federal water pollution regulations amount to an unconstitutional breach of Commerce Clause authority. *See SWANCC*, 531 U.S. at 173-74. In contrast, the Court has held that despite the implications for land use, regulating the environmental harms resulting from surface mining is constitutional because of the substantial effect on interstate commerce. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281 (1981).

133. 480 U.S. 572 (1987). In this case, a mining company sought relief from a state environmental compliance requirement on federal land on the grounds that the law was tantamount to a state land use regulation on federal land. *Id.* at 576-77. The mining company argued that *only* federal environmental laws should apply on federal land, and that states have no right to apply their environmental laws, which the company characterized as land use regulations, on federal property. *Id.* at 580.

federal property. The Court held that the California law is an environmental regulation that does *not* determine the basic uses of the federal land.[134] The Court distinguished between land use and environmental regulations on the ground that "[l]and use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."[135] Drawing such a distinction is not necessarily obvious, as the "line between environmental regulation and land use planning will not always be bright."[136] The Court, however, deferred to Congress's indication of "its understanding of land use planning and environmental regulation as distinct activities."[137]

The Court's recognition of environmental laws as distinct from land use laws — even where there is some overlap between the two — alleviates the concern underlying *Lopez* and *Morrison* about federal infringement of states' rights.[138] Thus, the Court should, by its own rationale, be far less concerned about opening the flood gates to myriad federal police powers by upholding federal water regulations than, for example, by upholding federal criminal statutes.

The *SWANCC* Court carefully avoided this analysis, however. In employing the clear statement rule, the Court indicated only that the substantial effects-based jurisdiction argued for by the Corps would raise the difficult constitutional question of encroachment into the area of land use, not that the substantial effects analysis would invariably preclude federal jurisdiction on that ground.[139] The Court

134. *Id.* at 586-87.

135. *Id.* at 587.

136. *Id.*

137. *Id.* The dissent in *SWANCC* cited *California Coastal* for support of federal environmental laws. *SWANCC*, 531 U.S. at 191 (Stevens, J., dissenting). The dissent was specifically refuting the majority's suggestion that the Corps' interpretation of the statute encroached upon the traditional state power over land use, concluding that "[t]he CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power." *Id.* However, settling this dispute between the majority and dissent was not relevant to the outcome in *SWANCC* since the Court needed only to identify — not resolve — a serious constitutional concern in order to avoid the analysis. *See supra* Part I (discussing the *SWANCC* Court's use of the clear statement rule as a canon of statutory construction).

138. *But see* Peter Arey Gilbert, Note, *The Migratory Bird Rule after* Lopez: *Questioning the Value of State Sovereignty in the Context of Wetland Regulation*, 39 WM. & MARY L. REV. 1695, 1727 (1998) (arguing that all of CWA § 404 regulates land use, a traditional state function). Gilbert goes on to conclude, however, that the MBR does not undermine important federalism concerns, primarily because states cannot effectively manage wetland protection due to pressure to deregulate, thus creating a "race to the bottom." *See id.* at 1735.

139. *SWANCC*, 531 U.S. at 173-74. This particular method of constitutional avoidance is controversial precisely because it does not permit agency interpretations that may in fact be

specifically declined to evaluate whether or not federal jurisdiction over isolated wetlands would amount to an unconstitutional encroachment upon the traditional state power over land use.[140] In fact, such federal jurisdiction would not, in light of *California Coastal*, be a federal land use regulation.

Moreover, denying federal jurisdiction under the federalism rationale would require characterizing wetlands as "lands" rather than "waters." But as the dissent in *SWANCC* pointed out, the Court has already spoken on that issue, holding in no uncertain terms in *Riverside Bayview* that wetlands are "waters of the United States."[141] Thus, denying federal jurisdiction over hydrologically connected wetlands on the basis of a federal usurpation of the state power to regulate land use would be contrary to both *California Coastal* and *Riverside Bayview*.[142]

In addition to the precedent that should guide the constitutional analysis, the *approach* to federalism taken by the *California Coastal* Court is illuminating for its focus on broad sectors of social regulation, specifically environmental policy and land use policy. The Court did not seek to draw a line within these broad sectors demarcating the point at which federal jurisdiction ends and state authority begins. Such an approach is often advocated in the context of water pollution control,[143] but always misses the point. Federalism concerns have not typically sought to determine which bodies of water only the states get to regulate and which the federal authorities get to regulate. Rather, the federalism concern is primarily about whether there is federal encroachment into an entire area that has been traditionally left to the states, such as crime, education or family law.[144] The long history of federal control over the nation's navigable waters[145] illustrates that this is not such an area of law.

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constitutional. Under this canon, interpretations that merely raise significant constitutional questions and are not clearly intended by Congress are prohibited. *See* Sunstein, *supra* note 55, at 331.

140. *SWANCC*, 531 U.S. at 174.

141. *Id.* at 184, 191 (Stevens, J., dissenting) (citing *Riverside Bayview*, 474 U.S. at 123).

142. One may conjecture that perhaps the *SWANCC* Court's method of constitutional avoidance was utilized in protection of the Court's federalism concerns because the substantial effects analysis would not actually limit federal jurisdiction in light of *Riverside Bayview* and *California Coastal*. *See generally* Halberstam, *supra* note 130, at 795 (arguing that the Court seems to be "preoccupied" with asserting state autonomy as an end in itself).

143. *See, e.g.*, Adler, *supra* note 8, at 36; Albrecht & Nickelsburg, *supra* note 13, at 11058 ("Regulating drainage ditches, ephemeral waters and wetlands that are not immediately adjacent to navigable waters will extend the federal government into 'the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" (quoting *SWANCC*, 531 U.S. at 174)).

144. *See Lopez*, 514 U.S. at 564.

145. *See supra* Part I.

B. *The First Principles of Interstate Commerce Clause Jurisprudence Support Federal Regulation of Water Pollution*

Limiting federal authority to navigable-in-fact waters and their directly adjacent wetlands would undermine the rationale behind the Interstate Commerce Clause itself. The "first principles" of federal regulation of interstate commerce endorse the notion that federal control should extend to areas where the states may interfere with each other's efforts.[146] Indeed, *Lopez* cited language in *Gibbons* indicating that *only* internal commerce which "does not extend to or affect other States" is beyond the reach of federal powers over commerce.[147] The long standing rationale for federal water pollution control is based on this very principle of "subsidiarity," which dictates that federal control is necessary where the states cannot effectively regulate themselves.[148] In fact, the transboundary nature of water pollution poses the identical problem that gave rise to the need for an exclusive federal power over interstate commerce in the first place. Water pollution can be transferred from one state to another, because states often share the same river, lake or other hydrological connection with other states' waters.[149] Thus, even states with strong water pollution control standards would suffer from water pollution because of weak standards in neighboring states.

Prior to the enactment of a federal water pollution statute, the problem of ineffective state control led to the very "animosity and discord" between states that Hamilton intended national standards to prevent.[150] In 1906, a water pollution dispute led to litigation between the States of Missouri and Illinois. In *Missouri v. Illinois*,[151] Missouri charged that Illinois's dumping of Chicago's sewage flowed via Illinois waters into the Mississippi River, causing a nuisance for the residents of St. Louis — notably, an increased incidence of typhoid.[152] When Chicago began dumping its sewage into a canal and down the Mississippi, its incidence of typhoid fell sharply from more than eighty

146. *See Lopez*, 514 U.S. at 552. Hamilton famously wrote in *Federalist No. 22* that a central goal of the Interstate Commerce Clause was to tame the "interfering and unneighborly regulations of some States [which] if not restrained by a national control" would become increasingly "serious sources of animosity and discord." THE FEDERALIST NO. 22, at 144-45 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kelser ed., 1999).

147. *Lopez*, 514 U.S. at 553 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824)).

148. *See, e.g.*, Wood, *supra* note 62, at 10193.

149. *Id.* at 10194.

150. THE FEDERALIST, *supra* note 146, at 144-45.

151. 200 U.S. 496 (1906).

152. *Id.* at 524.

cases per 100,000 to fewer than ten per 100,000.[153] Thus, Illinois effectively sent Missouri its typhoid problem via transboundary water pollution.

Despite the demonstrated inability of states to regulate water pollution so as not to interfere with each other, a noted "environmental federalist," Jonathan Adler, has argued that states can more effectively regulate wetlands than the federal government.[154] Even Adler, however, acknowledges that the constitutional limits to federal authority would not prevent regulation of activities that result in the pollution of a navigable waterway.[155]

Because of the transboundary nature of water pollution, it affects more than one state.[156] As *Missouri v. Illinois* illustrates, water pollution is a classic element of commerce between states that frequently cannot be managed effectively without national controls.[157] Thus, the original subsidiarity rationale for federal power over commerce justifies federal regulation in this area. Finally, the hydrological connection test — because a navigable-in-fact waterway must be involved — ensures that federal water pollution law is not expanded beyond a point which the subsidiarity rationale can support.

IV. ECONOMIC OR NONECONOMIC: POTENTIAL REGULATION OF WATER POLLUTION UNDER THE SUBSTANTIAL EFFECTS DOCTRINE WOULD SATISFY THE *LOPEZ* STANDARD

Lopez revived the historic federalism tenets of Commerce Clause jurisprudence, and cast doubt over the constitutional foundation of environmental laws.[158] Nevertheless, this Part argues that potential federal regulation of isolated, intrastate wetlands would satisfy the

153. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW SCIENCE AND POLICY 78 (4th ed., 2003).

154. Adler, *supra* note 8, at 41-54. Adler makes both policy and legal arguments against expansive federal wetland controls. He appears to be limiting his argument that states can more effectively regulate wetlands to the policy arena; he argues against substantial effects-based federal regulations on legal grounds. *See id.* This Note addresses the substantial effects arguments in the context of potential regulation of isolated wetlands in Part IV.

155. *Id.* at 36-37. Adler later argues, however, that applying a *Lopez* substantial effects analysis to wetlands might "free up" from federal regulation not only isolated, intrastate wetlands, but also hydrologically connected wetlands. *Id.* at 40. However, this latter argument ignores Congress's authority to regulate connected wetlands pursuant to its channels-of-commerce powers.

156. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824), *quoted in* United States v. Lopez, 514 U.S. 549, 552 (1995).

157. *Missouri v. Illinois*, 202 U.S. at 524; *see also* THE FEDERALIST, *supra* note 146, at 144-45.

158. *See* Tanabe, *supra* note 45, at 1060-61 n.75.

Lopez substantial effects analysis.[159] Four factors make up the analysis: whether the activity being regulated is economic; whether the law at issue contains a "jurisdictional element" that courts can use on a case-by-case basis to determine the effect on interstate commerce; the presence of Congressional findings should the effect on interstate commerce not be "visible to the naked eye"; and, finally, the degree of attenuation between the actual regulated activity and the effect on interstate commerce.[160]

The economic/noneconomic distinction seems to be the only "make-or-break" element,[161] and the primary basis for the outcomes of *Lopez*[162] and *Morrison*.[163] Section IV.A argues that wetland regulation almost always involves economic activity. Whether the reasoning employed in determining the regulated activity's connection to interstate commerce is "attenuated" is also an important element because it seeks to limit the activities within the federal government's reach to those that are truly part of interstate commerce, thus denying the federal government a general police power, a role reserved for the states.[164] Section IV.B argues that making the link between the economic activity affecting wetlands and interstate commerce does not require attenuated reasoning. Congressional findings[165] and the

159. It is worth noting that some commentators have argued that in the area of water regulation, the traditional navigable waters doctrine is the only proper constitutional limit to federal regulatory authority over the nation's waters. *See, e.g.*, Chipchase, *supra* note 121; Albrecht *supra* note 13. This is a problematic argument, though, because it would in effect limit Congress's authority to regulate water pollution more severely than *Lopez* and *Morrison* limit the federal commerce power generally. Specifically, by limiting Congress's powers in this area to the navigation power, no matter how permissive that power is, the limitation would undermine Congress's ability to regulate activities that substantially affect interstate commerce *and* involve nonnavigable waters.

160. *Lopez*, 514 U.S. at 559-565.

161. *See* Halberstam, *supra* note 130, at 796-97. Halberstam argues that *Lopez* created a new formal approach to delimiting Congress's Commerce Clause authority that cabins the authority in three areas: "1) the channels of interstate commerce, 2) the instrumentalities of interstate commerce, and 3) *"'economic' activities... [that] must 'substantially affect interstate commerce.'"* *Id.* at 796 (emphasis added). Thus Halberstam, for one, views the substantial effects category as strictly limited to economic activities.

162. *Lopez*, 514 U.S. at 549.

163. *Morrison*, 529 U.S. at 610-11 (discussing the importance of the economic nature of the activity regulated by federal law).

164. *Lopez*, 514 U.S. at 549.

165. The *Morrison* Court, in striking down the Violence Against Women Act, reviewed extensive Congressional findings regarding the aggregate effects of violence against women on interstate commerce, but nonetheless denied federal jurisdiction to prosecute under the Act. *Morrison*, 529 U.S. at 617. There are myriad ways in which isolated wetlands affect interstate commerce, including use by migratory birds. It has been argued that the migratory bird "community," including bird aficionados who travel across state lines for observation purposes, as well as the scientific community that observes migration patterns, affects interstate commerce because of the total value of the industry surrounding the birds. *See* Tanya M. White & Patrick R. Douglas, *Postponing the Inevitable: The Supreme Court Avoids Deciding Whether the Migratory Bird Rule Passes Commerce Clause Muster*, 9 MO.

presence of a jurisdictional element[166] are not dispositive elements, and thus are not the focus of this analysis.

It is worthwhile here to reiterate that as far as the Supreme Court is concerned, Congress has not yet passed any legislation regulating water pollution that should be analyzed under this framework.[167] Thus, the following analysis determines the proper constitutional limits to potential federal water pollution regulation over non-hydrologically connected waters.[168] The emphasis of any such new legislation will undoubtedly be on the regulation of isolated wetlands.[169]

ENVTL. L. & POL'Y REV. 9, 20 (2001). However, one prominent criticism of the Migratory Bird Rule (MBR) is that, even assuming a statutory basis for it, it would in effect make every body of land or water in the country subject to a federal regulation since migrating birds can potentially alight anywhere. Thus, relying on migrating birds does not satisfy the requirements of *Lopez* and *Morrison* that there be some limit to federal jurisdiction. *See* Adler, *supra* note 8, at 28-30 (discussing the inadequacies of the MBR). Other valuable functions affecting interstate commerce include flood control, the preservation of surface and ground water quality, and preservation of water supply. These impacts, while clearly valuable, also do not, by themselves, make the case for federal jurisdiction. *Id.* at 33-34 (asserting that the value of wetlands is not relevant to the constitutionality of federal regulation of them). Rather, as discussed *infra,* the activity that pollutes wetlands is inherently commercial and hence is the sounder basis for federal controls. Under the *Lopez/Morrison* framework, it is only if the regulated activity is "economic" that the myriad impacts on interstate commerce matter. *See* Halberstam, *supra* note 130, at 795.

166. The *Lopez* Court identified the usefulness of a jurisdictional element in a statute that "might limit its reach to a discrete set of [regulated intrastate activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. The term "navigable waters" in the current CWA could be characterized as a jurisdictional element, *see* Chipchase, *supra* note 121, at 10786, but this Note has asserted a different and more traditional use of that term. Moreover, the substantial effects analysis, of which a jurisdictional element is part, is only needed to regulate waters that are beyond the scope of the navigation power. Still, though, no appeals court has struck down federal legislation for the lack of a jurisdictional element, and nothing in *Lopez* or *Morrison* indicates that this it is a required element in the legislation. *See, e.g.*, GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622, 640 (5th Cir. 2003) (interpreting the ESA's take provision to apply only to instances where there is a connection to interstate commerce). For example, the *Ho* court found that the Environmental Protection Agency (EPA) did not limit the scope of the asbestos workplace standard by means of any kind of jurisdictional element, but declared this deficiency not detrimental to the statute. United States v. Ho, 311 F.3d 589, 603 n.13 (5th Cir. 2002).

167. *See supra* Part I discussing the *SWANCC* Court's holding that the CWA does not invoke the constitutionally questionable substantial effects power in regulating "navigable waters," and "waters of the United States."

168. This assumes, of course, that this Note's analysis to this point is right, and that the CWA does not currently reach isolated, intrastate wetlands. However, until *SWANCC*, it was widely accepted that the CWA did authorize regulation of such wetlands. *See infra* notes 29-37 and accompanying text. Thus, much pre-*SWANCC* commentary and regulatory effort has focused on the constitutionality of isolated wetland regulation and is referred to in this Part.

169. *See, e.g.,* S. 473, 108th Cong. § 4 (2003) (asserting federal jurisdiction over isolated wetlands); H.R. 962, 108th Cong. § 4 (2003) (same).

A. *Wetland Protections Regulate Economic Activity*

Within the substantial effects analysis, the most significant consideration regarding Congress's power to invoke the aggregation principle to regulate wholly intrastate activities is whether the regulated activity is economic, or commercial, in nature.[170] As *SWANCC* noted, almost any application of such legislation could only be upheld under the aggregation principle,[171] which permits federal laws to reach minor individual instances of conduct based on the aggregate effect of like instances on interstate commerce, thus meeting the substantial effects test.[172] For a court to consider the aggregate effects of the regulated activity on interstate commerce, that activity almost certainly must be economic in nature.[173]

The Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*[174] upheld federal water and land quality protection measures because the regulated activity was economic in nature. *Hodel* involved a Commerce Clause challenge to the Surface Mining Control and Reclamation Act. The Act was designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations,"[175] and specifically required that the mining land and affected water be restored to its natural condition.[176]

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170. *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

171. Because Congress can regulate only activities that *substantially* affect interstate commerce, the relatively minor effects of individual instances of activities would be beyond federal reach if not for the Court's acceptance of Congress's ability to regulate individual instances of activity that in the aggregate substantially affect interstate commerce. This is the basis of federal regulation first upheld in *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). The Supreme Court recently affirmed *Wickard*'s aggregation principle. Gonzales v. Raich, No. 03-1454, 2005 U.S. Lexis 4656, at *29-*35.

172. *See Lopez*, 514 U.S. at 561 (holding that because the GFSZA did not regulate economic activity, it could not be upheld under the aggregation principle). The aggregation principle has been recently applied by the Fifth Circuit, in *United States v. Ho*, 311 F.3d 589 (5th Cir. 2002), in upholding the Clean Air Act's federal asbestos removal performance requirements, as well as both the Fifth and D.C. Circuits in upholding challenges to the Endangered Species Act's take provision. *GDF Realty*, 326 F.3d 622 (5th Cir. 2003); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003).

173. *Morrison*, 529 U.S. at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide [*Morrison*], thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity *only* where the activity is economic in nature.") (emphasis added). The economic activity requirement is not a widely-accepted hard-and-fast rule, however. The Fifth Circuit considers it an open question whether the Supreme Court allows regulation of noneconomic intrastate activity under the aggregation principle. *See Ho*, 311 F.3d at 600.

174. 452 U.S. 264 (1981).

175. *Hodel*, 452 U.S. at 268 (citing 30 U.S.C. § 1202(a) (1976 ed., Supp. III)).

176. This included the restoration of land to its approximate original contour, segregation and preservation of topsoil, and minimization of disturbance to the hydrologic

The Supreme Court rejected the Commerce Clause challenge and the claim that the Act regulated land use, an activity traditionally left to the states.[177] The Court's rationale was that Congress may clearly regulate the conditions under which goods are shipped where the local activity of producing the goods affects interstate commerce.[178] The limited judicial scrutiny applied in *Hodel* indicated that Congress had nearly plenary power to enact environmental laws, irrespective of whether the laws infringed on traditional state functions.[179]

Although *Lopez* provides a more structured framework for evaluating the constitutionality of substantial effects-based regulations, it does not require more than rational basis scrutiny and does not preclude consideration of past Commerce Clause cases, including *Hodel*.[180] The *Lopez* Court specifically cited *Hodel* as an example of a case that upheld regulation of "intrastate economic activity."[181] Despite the *Lopez* Court's characterization of *Hodel* as a case of pure economic regulation, *Hodel* involved more than this. *Hodel* held that Congress has the power under the Commerce Clause to legislate to protect land and water resources from the effects of a particular economic activity — surface mining. Thus, even in *Lopez* there is a hint that the Court considers environmental regulations to be an aspect of the regulation of economic activities.[182]

Water pollution almost always results from activity similarly commercial to surface mining, namely: chemical dumping, development of housing structures, shopping malls, parking lots, even

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balance. *Id.* at 269. The federal role under the Act was predominant over the role of the states, which merely issued permits that complied with requirements set by the Secretary of the Interior. There was also federal enforcement. *Id.* at 270-71.

177. *Hodel*, 452 U.S. at 270; *see also*, Adler *supra* note 8, at 36 (asserting that "regulation of land use is perhaps the quintessentially state activity" (quoting Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 768 n.30 (1982))).

178. *Hodel*, 452 U.S. at 281.

179. *Id.* at 276 (applying a rational basis test). Despite the sweeping holding, Rehnquist's concurrence in *Hodel* articulated a limit to Commerce Clause powers. *Id.* at 311 (Rehnquist, J., concurring). In addressing the expansion of Commerce Clause powers, Rehnquist expressed uncertainty as to whether the "substantial effects" test had been restated as simply an "effects" test. *Id.* at 312 (Rehnquist, J., concurring). He nonetheless accepted the government's argument as rational, even though, in his view, "there can be no doubt that Congress in regulating surface mining has stretched its authority to the 'nth degree.'" *Id.* at 311.

180. *Lopez*, 514 U.S. at 559 (citing *Hodel* with approval); *Raich*, No. 03-1454, 2005 U.S. Lexis 4656, at *38 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.") (citing *Lopez*, 514 U.S. at 557, and *Hodel*, 452 U.S. at 276-80).

181. *Id.*

182. The *Lopez* Court did not discuss the environmental aspects of *Hodel*, only describing the case as upholding regulation of "interstate coal mining." *Lopez*, 514 U.S. at 559.

sports stadiums.[183] Like the *Hodel* regulations, the CWA's permit requirement almost always applies to commercial projects. However, as it is currently written, the CWA prevents the discharge of pollutants into wetlands associated with any activity and for any reason.[184] Thus, one difference between water pollution regulations and the environmental performance requirements in *Hodel* is that the latter *only* restricted the discharge of pollutants resulting from surface mining activities, which are plainly economic in nature.[185] Current CWA-based water pollution regulations apply, at least superficially, to economic *and* noneconomic activity, the latter of which *Lopez* and *Morrison* inveigh against regulating.

This feature of the CWA has inspired criticisms focusing on the alleged noneconomic nature of wetland regulation.[186] Adler, for instance, noted that the filling of wetlands is not "inherently economic or commercial in nature," pointing to such examples as expanding one's home,[187] or even walking or riding a bicycle through a wetland.[188]

183. *See* Bueschen, *supra* note 2, at 951.

184. The CWA's permit requirement does not distinguish between economic and noneconomic activities; it simply says "the Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters." 31 U.S.C. § 1344(a).

185. *See Lopez*, 514 U.S. at 559 (citing *Hodel* as an example of a case upholding regulation of intrastate economic activity that substantially affects interstate commerce). Interestingly, the law in *Hodel* was valid even though the regulations involved had obvious land use implications. *See Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring, despite the possible infringement on state autonomy in the area of land use regulation).

186. *See, e.g.*, Adler, *supra* note 8, at 34; Chipchase, *supra* note 121, at 10785-86.

187. Adler, *supra* note 8, at 34-35 ("Many wetland permits concern nothing more than a family's effort to expand its home."). Construction or expansion of single family homes is subject to a "general" or "nationwide" permit, which, unlike a typical section 404 permit applied for by commercial developers, "requires minimal effort on the part of the applicant." 60 Fed. Reg. 38,650, 38,653 (July 27, 1995). This nationwide permit program is designed to simply allow such small-scale wetlands activities as expanding one's home, while freeing up agency resources to focus on commercial activities that more substantially impact wetlands. *Id.* at 38,650. Thus, the permit requirement for single family homes, like the hypothetical federal regulation of walking through a wetland, *may* be considered so minimal as not to disturb the efficacy of the wetland regulatory scheme. *See infra* notes 194-195 and accompanying text.

Because of the small scale of single family home expansion, whether or not this is a commercial activity within the scope of substantial effects-based regulation is not central to this Note's argument that regulation of isolated wetlands is valid because of the focus on commercial activity. Indeed, this single family home facet, minimal as it is, of the section 404 permit program could be struck down without affecting the constitutionality of the bulk of the program, which is the focus of this Note. Thus, this Note does not attempt to characterize the expansion of one's home as either economic or noneconomic activity.

188. Adler, *supra* note 8, at 35 ("Moreover, the Corps has asserted that it could regulate 'walking, bicycling, or driving a vehicle through a wetland,' if it so chose, because such activities could result in the 'discharge of dredged material.' Clearly, regulatory authority of this scope extends far beyond the regulation of purely commercial activity, and is therefore constitutionally suspect."). There is in fact no record of a section 404 permit issuance for conducting any of these activities. In the very regulations Adler cites for his assertion that

Further, the argument goes, it is not the wetland's "value" in either an economic or ecological sense that makes regulating it constitutional. It is the "connection to interstate commerce,"[189] which is just as non-existent in the case of backyard wetlands as in the case of guns in school zones.[190]

As an initial matter, the insignificance of the noneconomic impacts on wetlands means that the CWA could simply be limited to economic activity without losing much, if any, protective force.[191] Second, notwithstanding the remote possibility of federal regulation of walking through wetlands on a Sunday afternoon stroll, filling wetlands is far more economic than the criminal activities at issue in *Lopez* and *Morrison*. Filling wetlands with fill material and other pollutants is typically done by commercial actors for a commercial profit.[192]

Post-*Lopez* cases have recognized, just as *Hodel* did, that where economic activity produces environmental harms, the environmental regulation constitutes an inseparable part of the regulation of the economic activity.[193] Moreover, these cases have addressed and rejected arguments emphasizing the mere theoretical possibility that minor noncommercial activity, such as walking through a protected wetland, can violate the regulation and hence prove the noneconomic nature of the regulated activity.[194] Such illustrations do not undermine the efficacy of a complex set of regulations designed primarily to regulate commercial activity so as to minimize the environmental consequences of it.[195] Thus, launching a constitutional attack on water

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the Corps could regulate these activities, the Corps indicated that "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland would have de minimis effects except in extraordinary situations, and the agencies do not intend to devote scarce resources to regulating such typically innocuous activities." 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). Moreover, it is far from clear that such authority would be "constitutionally suspect." The Court recently affirmed that when "a general statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, No. 03-1454, 2005 U.S. Lexis 4656, at *30 (citing *Lopez*, 514 U.S. at 558, and Maryland v. Wirtz, 392 U.S. 183, 196 n. 27 (1968)).

189. Adler, *supra* note 8, at 37.

190. *Id.* ("An isolated wetland's value, ecological or otherwise, in and of itself, cannot form the basis of federal jurisdiction any more than the value of well-educated school children can provide the basis for federal regulation of guns in schools.").

191. *See, e.g.*, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (noting the minimal impacts of noneconomic activities on wetlands).

192. *See, e.g.*, *Wilson*, 133 F.3d at 254.

193. *See GDF Realty*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo*, 323 F.3d 1062 (D.C. Cir. 2003); United States v. Ho, 311 F.3d 589 (5th Cir. 2002).

194. *See Rancho Viejo*, 323 F.3d at 1077 ("Hence, because much activity regulated by the ESA does bear a substantial relation to commerce, it may well be that the hiker hypothetical proffered by the plaintiff is 'of no consequence' to the statute's constitutionality.") (citations omitted).

195. *See* Hodel v. Indiana, 452 U.S. 314, 329 n.17 (1981) ("A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single

pollution regulations based on unrealistic illustrations is not a critique that will influence the developing jurisprudence. Wetland protection regulations focus on commercial activity and should be sustained for that reason.

An example of sustaining environmental regulations on the basis of their focus on economic activity is the Fifth Circuit's recent decision in *United States v. Ho*.[196] The *Ho* court deemed asbestos removal to be "very much a commercial activity" in today's economy because of its connection to commercial purposes such as building renovation or demolition for land use.[197] Wetland regulations are substantially the same as asbestos removal safeguards in this regard: they both regulate activity that is a necessary precursor to commercial development.[198]

In *Lopez* and *Morrison*, the issue was clear: gun possession and gender- motivated violence were "in no sense" economic activities.[199] The same can hardly be said of wetlands regulation. Indeed, one is hard pressed to imagine the need for such regulations without the presence of a large, national commercial development market, and other significant economic activities.[200] However, the economic nature of wetland regulation also illustrates that should the Court reverse course and demand the kind of precision in each and every regulation that avoids even theoretical misuses of the commerce power, the CWA and its regulations could — if extended to isolated wetlands — be re-written to reach only economic activity without losing any force.

facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies [the Commerce Clause] test."). As noted, the single family home expansion permit requirement poses a more difficult question, but one that is not central to this Note's argument that isolated wetlands legislation could be validly enacted because of the focus on commercial activity. *See supra* note 187.

196. 311 F.3d 589 (2000).

197. *Ho*, 311 F.3d at 602.

198. Both the *Ho* court and the *Nat'l Assn of Home Builders* court framed the respective regulations as applying primarily to economic activities rather than environmental protection. The D.C. Circuit took notice of this fact in *Rancho Viejo*. The *Rancho Viejo* court also rejected a Commerce Clause challenge to the ESA's take provision because the court considered the regulated activity to be the construction of a commercial housing development rather than the destruction of an endangered species. 323 F.3d at 1077-78.

199. *Morrison*, 529 U.S. at 610-11 (quoting *Lopez*, 514 U.S. at 573-74).

200. While this Note has focused on commercial development, that is certainly not the only type of commercial activity that poses a threat to water quality. *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), was a CWA enforcement case in which Eidson, whose business was cleaning underground gasoline tanks for gas and service stations, simply dumped untreated petroleum waste into nonnavigable tributaries of Florida's Tampa Bay, which then killed untold numbers of fish. Eidson was clearly a commercial actor attempting to gain a competitive advantage in his market by avoiding a cost of doing his type of business. Such economic activity has long been held to be within reach of the Commerce Clause. *See Lopez*, 514 U.S. at 559-60 (discussing the Court's approval of regulations on a wide variety of economic activity).

B. *Upholding Federal Wetland Regulations Does Not Require Attenuated Reasoning*

The substantial effects analysis does not permit attenuated reasoning in demonstrating a connection between the regulated activity and interstate commerce.[201] The purpose this element serves is to disallow limitless arguments that could justify federal control of nearly any activity. Because wetland destruction is typically a consequence of commercial development projects, this element of the *Lopez* analysis does not appear to stifle regulation of isolated wetlands.[202] As long as the activity that pollutes or degrades the wetland is commercial, the imagination need not strain itself in order to conclude that a federal permitting requirement is part of a larger economic scheme relating to industrial or commercial uses of water resources.

For instance, the *Ho* court found, "most importantly," that the relationship between asbestos removal and interstate commerce was "direct and apparent."[203] The court found rational Congress's recognition of a national asbestos market and Ho's activities' injuries to it.[204] Specifically, Ho gained a commercial advantage on licensed asbestos abatement companies by ignoring the cost-imposing federal standards.[205] Moreover, the court noted that "the presence of a national market in the regulated activity also serves as a limiting principle"[206] in the sense that activities unrelated to a national commercial market would not be reached under the regulations.

While it could be argued, just as Adler has in the case of wetland regulations,[207] that the asbestos requirements at issue in *Ho* are too far removed from interstate commerce because of the potential that a private home owner would have to comply when expanding his or her house,[208] the presence of a national market and the directly intertwined nature of the regulations with what is usually commercial activity was enough to uphold the federal regulations, just as these

201. *Lopez*, 514 U.S. at 564 (holding that the government's reasoning demonstrating a link between interstate commerce and gun possession in a school zone was too tenuous).

202. *See GDF Realty*, 326 F.3d at 640 (holding that the "ESA is an economic regulatory scheme").

203. *Ho*, 311 F.3d at 603.

204. *Id.*

205. *Id.*

206. *Id.* at 604 & n.15 (citing Perez v. United States, 402 U.S. 146, 154-57 (1971) (national market for commercial credit), and Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (national market for wheat)).

207. *See supra* notes 187-190 and accompanying text.

208. *See* Adler, *supra* note 8, at 34-35 (discussing the possibility of needing a federal permit to expand one's home if situated on a wetland).

elements are enough to justify federal wetland pollution control measures.

CONCLUSION

Many have argued that *SWANCC* substantially restricted previously expansive federal jurisdiction under the Commerce Clause. In fact, *SWANCC* was not such a case. Rather, *SWANCC*'s impact will, taken with *Lopez*, be to contribute to a more structured constitutional framework of water pollution laws, and the analysis employed by courts charged with reviewing them. Specifically, *SWANCC*'s use of the clear statement rule indicates the soundness of the navigable waters doctrine as a constitutional principle. Taken with *Lopez*'s affirmation of Congress's plenary power over the channels of commerce, the navigation power supports jurisdiction over any wetland that is hydrologically connected to a navigable body of water. *SWANCC*'s use of the clear statement rule to avoid a substantial effects analysis of wetland regulation also indicates that Congress has not yet exercised its substantial effects authority in this area. Thus, isolated, intrastate wetlands are beyond the reach of federal jurisdiction under the CWA as it is currently written. However, because wetland protections typically regulate economic activity, Congress can through a clear use of its substantial effects power properly enact legislation aimed at protecting isolated, intrastate wetlands.

Although some may prefer no federal regulation over isolated wetlands as a matter of policy, the Constitution is more permissive, especially in light of the *lack* of a competing traditional state function.[209] Water pollution control has developed into an important national concern, and it will only become more critical to the nation's welfare as time passes and water resources become ever scarcer. A federal water protection regime can, on a sound constitutional basis, seek to protect the nation's waters from commercial pollution.

209. There is a relevant and meaningful policy argument about whether wetland protection policy is best made and implemented by the states or federal agencies. *See* Adler, *supra* note 8, at 40-54 (arguing for a policy of "wetland federalism" because of the superior effectiveness of state regulation of wetlands). It is important, however, to maintain the distinction between what is within federal constitutional reach, and whether federal control is preferable to state control as a matter of policy.