THE MIGRATORY BIRD RULE AND CONSTITUTIONAL AVOIDANCE IN *SOLID WASTE AGENCY*: THE COURT DUCKS A CHALLENGE TO THE FEDERAL COMMERCE POWER

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INTRODUCTION

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[1] the United States Supreme Court held that the Army Corps of Engineers' ("Corps")[2] "Migratory Bird Rule"[3] was an unconstitutional extension of the authority Congress granted to the Corps. This decision has been praised by developers because it limits federal regulatory authority over isolated waters and wetlands,[4] and condemned by environmentalists as "a potentially devastating decision for our efforts to preserve water quality and protect migratory birds."[5]

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1. 531 U.S. 159 (2001).

2. Both the Environmental Protection Agency (EPA) and the Corps use the Migratory Bird Rule, but only the Corps implements the Section 404 permit program. *See infra* note 7. Although the EPA had some involvement in the history of this case, all of the court decisions focus on the Corps' authority, without discussing the EPA. This Casenote similarly limits discussion to the question of the Corps' authority in implementing Section 404.

3. This rule provides "[The] EPA has clarified that waters of the United States at 40 C.F.R. 328.3(a)(3) (2001) also include the following waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines . . . ."

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)

4. Charles Lane, *Agency Wins Fight over Waste Dumping; High Court Curbs Federal Authority*, WASH. POST, Jan. 10, 2001, at A4.

5. *Id.* (quoting Derb Carter, Southern Environmental Law Center, Chapel Hill, N.C.).

The decision is also remarkable, however, for what it failed to address. The Court did *not* determine whether, in light of its recent Commerce Clause decisions,[6] Congress has the power to *grant* the Corps the authority embodied in the Migratory Bird Rule.

In 1986, the Corps claimed regulatory jurisdiction over isolated waters throughout the United States that harbor and provide habitat for migratory birds through what became known as the "Migratory Bird Rule."[7] The next year, the Corps used that rule as the basis for denying Solid Waste Agency of Northern Cook County (SWANCC) a permit to discharge fill into isolated waters and wetlands.[8] SWANCC brought suit challenging the Corps' authority, and the United States District Court for the Northern District of Illinois granted the Corps' motion for summary judgment.[9] The United States Court of Appeals for the Seventh Circuit[10] affirmed, holding that the Corps reasonably[11] exercised its authority under "Section 404(a)"[12] of the Clean Water Act (CWA)[13] in promulgating the Migratory Bird Rule, and that Congress did not exceed its power under the Commerce Clause in granting the Corps the authority to promulgate the rule.

The Supreme Court, however, concluded that the Migratory Bird Rule was inconsistent with Congress' intent.[14] The Court declined to defer to the Corps' interpretation of

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6. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

7. 51 Fed. Reg. at 41,206, 41,217; *see infra* note 127 (explaining meaning of "migratory birds").

8. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 849 (7th Cir. 1999).

9. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 998 F. Supp. 946 (N.D. Ill. 1998).

10. *Solid Waste Agency*, 191 F.3d at 853.

11. This decision applied the standard of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The *Chevron* doctrine holds that where a statute is ambiguous, the courts should defer to the administrative interpretation promulgated by the agency charged with implementing that statute, so long as the agency's interpretation is reasonable. *Id.* at 843.

12. 33 U.S.C. § 1344(a) (2000). Despite residing at § 1344 of the United States Code, the permit provision is commonly referred to by its original legislative designation, "Section 404" of the Federal Water Pollution Control Act.

13. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (1994 & Supp. V 1999). This statute is more commonly known as the Clean Water Act.

14. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171–72 (2001).

Section 404(a), citing its "prudential desire not to needlessly reach constitutional issues and [its] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[15] In effect, the Court viewed the Corps' interpretation as exceeding the limits of Congress' power under the Commerce Clause. The Court examined the legislative history of Section 404 and, finding no clear statement[16] that Congress intended the extension of authority that the Corps had claimed,[17] opted to "read the statute as written to avoid the significant constitutional and federalism questions raised by [the Corps'] interpretation" of Section 404(a).[18]

Had the Court taken a different approach and reached the question of whether Congress exceeded its commerce power in authorizing the Corps to promulgate the Migratory Bird Rule, the Court would have had to apply the standard developed in its recent Commerce Clause cases.[19] This test restricts Congress' power to legislate under the Commerce Clause by stipulating that activity properly regulated by Congress must have a "substantial effect" on interstate commerce[20] and be economic in nature.[21]

The Court avoided this constitutional inquiry in *Solid Waste Agency* by narrowly construing Section 404(a) to find Congress did not authorize the Corps' claim of jurisdiction. By avoiding the constitutional question, however, the opinion leaves the status of federal environmental statutes unclear in light of the distinction between economic and noneconomic

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15. *Id.* at 172–73.

16. *Id.* at 172. The Court observed: "Where an administrative interpretation invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.*

17. *Id.* at 174.

18. *Id.*

19. United States v. Lopez, 514 U.S. 549, 558–560, 566–68 (1995); United States v. Morrison, 529 U.S. 598, 613–14 (2000); *see infra* Part I.

20. *Lopez*, 514 U.S. at 559.

21. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561. The standard may impose a further requirement that Commerce Clause legislation not infringe on "areas of traditional state" concern. *Morrison*, 529 U.S. at 615–16; *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). This requirement clearly interests Justices Kennedy and O'Connor, whose concurring votes completed the majority in *Lopez*, 514 U.S. at 580, and who joined the majority in *Morrison*, 529 U.S. 598. Chief Justice Rehnquist's comments on this aspect of the test are limited, however, suggesting that he does not view it as an essential component of the Commerce Clause analysis. *Lopez*, 514 U.S. at 567–68; *see infra* Part I.

activity in the Court's Commerce Clause jurisprudence. This ambiguity results from Chief Justice Rehnquist's failure to explain the meaning behind his observations that the Migratory Bird Rule "invoke[d] the outer limits of Congress' power"[22] and that the Corps' interpretation of the CWA raised "significant constitutional and federalism questions."

One possible interpretation of these comments is that the Chief Justice perceives *all* federal environmental protection statutes as pressing the limits of Congress' commerce power. This view would fall in line with the rigid distinction between regulation of economic and noneconomic activity under the Commerce Clause that Rehnquist first articulated in *United States v. Lopez*.[23] Moreover, Rehnquist expressed a similar view when concurring in the earlier decision of *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*[24] Alternatively, the Chief Justice's quarrel may have been limited to the unique circumstance presented by the case: the extension of the federal commerce power over navigable waters to isolated ponds.[25] Given the Court's recent decisions regarding the limits of Congress' commerce power, the more extreme perspective seems more likely.

The view that *all* environmental protection statutes press the limits of Congress' commerce power was likely the crux of the significant constitutional and federalism questions that the Migratory Bird Rule raised. Articulating that perspective would have departed from precedent[26] and jeopardized numerous bedrock federal environmental statutes,[27] and thus may have cost the Chief Justice the votes of some members of the majority. Whether the current Supreme Court, so often narrowly divided over Congress' legislative authority,[28] contains five members willing to extend the current Commerce Clause test to such an extreme is uncertain.

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22. *Solid Waste Agency*, 531 U.S. at 172.

23. 514 U.S. 549; *see infra* Part I.

24. 452 U.S. 264, 311 (1981). See *infra* Part III.B.

25. *See infra* Part II.

26. *See Hodel*, 452 U.S. at 277–82.

27. *E.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (2000).

28. *See* United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine 527 U.S. 706 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995). All were five to four decisions.

That uncertainty may explain the Court's avoidance of the Commerce Clause question in *Solid Waste Agency*. Had the Court attempted to apply the recent Commerce Clause test to the Migratory Bird Rule, some Justices in the majority might have acknowledged the impropriety of that test in a case such as this, in which the regulated activity (destruction of waters that provide habitat for migratory birds) less clearly appears economic in nature than a traditional economic activity such as wheat production.[29] Environmental statutes nonetheless address important federal interests—namely the conservation and protection of our nation's shared natural resources—that implicate interstate commerce, whether directly or indirectly. Moreover, those interests are particularly suited to federal, rather than state, regulation.[30]

Given these considerations, a narrow interpretation of the Court's recent test is inappropriate for evaluating the validity of federal environmental legislation under the Commerce Clause because it focuses on one rigid inquiry: whether or not the regulated activity, in isolation, is economic in nature. In reviewing environmental statutes, the Court should look not to the isolated activity being regulated (e.g., discharging fill into a water or wetland) but instead to the purpose of that activity (e.g., discharging fill into a wetland to prepare for construction) and to the larger objective of the statute (e.g., protection of habitat for an interstate resource of national interest: migratory birds). By taking a broader view of environmental statutes, the Court should recognize that they aim to protect interstate natural resources, that our economy depends on those natural resources, and that consequently environmental regulation is an appropriate exercise of the federal commerce power.

In Part I of this Casenote, I provide a brief summary of the evolution of the Supreme Court's modern Commerce Clause jurisprudence, with particular emphasis on the two decisions in which the Court articulated its recent Commerce Clause test: *United States v. Lopez*[31] and *United States v. Morrison*.[32] In Part II, I review the Corps' authority to enforce Section 404(a)

29. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

30. *See, e.g., Hodel*, 452 U.S. at 282 ("The prevention of... destructive interstate competition is a traditional role for congressional action.").

31. 514 U.S. 549.

32. 529 U.S. 598.

of the CWA and discuss the background of the *Solid Waste Agency* case and the Supreme Court's decision. In Part III, I confront the constitutional question avoided by the Court and examine the Court's motivation for avoiding that question. This analysis shows that the Court's decision was likely driven by the difficulty of applying the recent Commerce Clause standard to the review of federal environmental statutes, and the reluctance of some members of the majority to depart from established precedent sustaining environmental legislation under the Commerce Clause. In Part IV, I suggest that in reviewing federal environmental legislation directed at activity that is "intermediate" (between economic and noneconomic) in nature, the Supreme Court should not limit itself to a narrow economic/noneconomic analysis. Instead, the Court should take into account the broad economic purpose of the activity being regulated and acknowledge the national interest in protection of natural resources.

I. MODERN COMMERCE CLAUSE JURISPRUDENCE

The Commerce Clause of the federal Constitution states that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."[33] In *Gibbons v. Ogden*,[34] the Supreme Court established that the federal government has the power under the Commerce Clause to regulate interstate commerce, including navigation. [35] The contours of Congress' Commerce Clause power emerged during the course of the next century.[36] The Court struggled to

33. U.S. CONST. art. I, § 8, cl. 3.

34. 22 U.S. (9 Wheat.) 1 (1824).

35. This discussion concerns only the "positive" Commerce Clause. However, in the years following *Lopez*, the Court has decided six cases involving the "dormant" or "negative" Commerce Clause. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Hunt-Wesson, Inc. v. Franchise Tax Bd., 528 U.S. 458 (2000); S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997); Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997); Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). Analysis of the Court's current treatment of dormant Commerce Clause questions is beyond the scope of this Casenote.

36. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (holding that the Commerce Clause does not reach intrastate transactions that do not directly affect interstate commerce.); Stafford v. Wallace, 258 U.S. 495, 516 (1922) (holding that Congress has the power to regulate intrastate transactions that are incident to the "current" of interstate commerce and that "promote the flow of [interstate] commerce."); Champion v. Ames, 188

determine the scope of Congress' control over *intra*state activities that affected interstate commerce, first identifying particular classes of activities as beyond Congress' power,[37] then interpreting Congress' power as extending only to activities having *direct* effects on interstate commerce.[38] Later, the Court interpreted that power to encompass regulation of activities having a "close and substantial relation" to interstate commerce,[39] and activities having *economic* effects on interstate commerce.[40] The Court also allowed consideration of the aggregate effects of intrastate activities on interstate

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U.S. 321, 354 (1903) (holding that Congress may prohibit the transport of lottery tickets across state lines because "lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states."); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it."); *see also* Wickard v. Filburn, 317 U.S. 111, 121–25 (1942) (describing the development of Commerce Clause jurisprudence).

37. *E.g.*, *E.C. Knight*, 156 U.S. at 12 (holding that manufacturing is outside the scope of commerce.).

38. *E.g.*, *A.L.A. Schechter Poultry*, 295 U.S. at 548 (holding that wages and hours of intrastate poultry handlers do not directly affect interstate commerce.).

39. *E.g.*, Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (holding that Congress has the power to prohibit racial discrimination by restaurants that serve food "a substantial portion of which has moved in interstate commerce."); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding that Congress has the power to prohibit discrimination in public accommodations that "might have a substantial and harmful effect" on interstate commerce."); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (holding that Congress' power to regulate interstate commerce "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of [that] power."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.") (citing *Schechter Poultry*, 295 U.S. at 544); The Shreveport Rate Cases (Houston E. & W. Tex. Ry. Co. v. United States), 234 U.S. 342, 351 (1914) (holding that Congress' authority over interstate carriers "embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security . . . efficiency . . . [and] conditions" of interstate commerce.).

40. *E.g.*, *Wickard*, 317 U.S. at 125 ("[E]ven if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

commerce.[41] Defining those limits continues to present the Court with a formidable challenge.

In applying these various tests, the Supreme Court showed great deference to Congress' determination that certain activities affected interstate commerce. From 1937 until 1995, the Court did not invalidate a single federal statute for exceeding Congress' commerce power.[42] The Court's posture of deference to legislative judgment was such that Congress only needed to show a rational basis for concluding that a regulated activity had substantial effects on interstate commerce.[43] In recent years, however, the Court has focused more intently on defining the appropriate bounds of Congress' commerce power. With its 1995 decision in *United States v. Lopez*,[44] the Court began to issue decisions that "made it clear that the judiciary will enforce strict limits on Congress' power" under the Commerce Clause.[45] The following sections briefly review the two most significant recent Commerce Clause decisions, *United States v. Lopez*[46] and *United States v. Morrison*.[47]

A. *The* Lopez *Decision*

United States v. Lopez was the first case since 1937 in which the Supreme Court refused to tolerate an expansive interpretation of the federal commerce power.[48] In *Lopez*, a student was convicted in the United States District Court for the Western District of Texas for possession of a firearm on school premises[49] in violation of the Gun-Free School Zones Act of 1990 (GFSZA).[50] The GFSZA "made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a

41. *Id.* (allowing federal regulation of wheat production where an individual farmer's contribution "taken together with that of many others similarly situated, is far from trivial").

42. Erwin Chemerinsky, *Forecasting the Future of Federalism*, 37 TRIAL 18, 18 (2001).

43. *See, e.g.*, Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 280 (1981).

44. 514 U.S. 549 (1995). This case is discussed more fully *infra* at Part I.

45. Chemerinsky, *supra* note 42, at 18.

46. 514 U.S. 549.

47. 529 U.S. 598 (2000).

48. 514 U.S. at 567.

49. *Id.* at 551–52.

50. 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V).

school zone.'"[51] The Court of Appeals for the Fifth Circuit reversed Lopez's conviction, holding that the GFSZA was an improper exercise of Congress' power to legislate under the Commerce Clause.[52] The Supreme Court affirmed the judgment of the court of appeals, holding the GFSZA unconstitutional.[53]

The *Lopez* Court refused to apply the "great deference to congressional action" shown in prior cases.[54] Writing for the majority in the five to four decision,[55] Chief Justice Rehnquist attempted to define the "outer limits" of the federal commerce power by identifying "three broad categories of activity that Congress may regulate under [that] power."[56] These categories include (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "activities having a substantial relation to interstate commerce."[57] The Court determined that neither of the first two categories applied to the statute at issue in *Lopez* and therefore analyzed whether the GFSZA addressed activity that fell into the third category.[58] The Court indicated that it would sustain legislation regulating *economic* activity that, either alone or in aggregate, *substantially affects interstate commerce*.[59] Holding that the GFSZA regulated activity that was in no way economic, the Court determined that such activity could not substantially affect interstate commerce.[60] The opinion implied, however, that the Court might sustain regulations directed at activities

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51. *Lopez*, 514 U.S. at 551.

52. *Id.* at 552.

53. *Id.*

54. *Id.* at 567; *see, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264 (1981); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

55. The Chief Justice was joined by Justices Scalia, Thomas, Kennedy, and O'Connor. *Lopez*, 514 U.S. at 550. Justice Kennedy filed a concurring opinion, discussed *infra*, in which Justice O'Connor joined. *Id.* at 568. Justice Thomas also filed a concurring opinion, advocating a narrower interpretation of the commerce power. *Id.* at 584. Justices Stevens, Souter, and Breyer filed dissenting opinions. *Id.* at 602–03, 615. Justices Stevens, Souter, and Ginsburg joined in Justice Breyer's opinion.

56. *Id.* at 557–58.

57. *Id.* at 558–59.

58. *Id.* at 559.

59. *Id.* at 560. This is true even for regulation of intrastate economic activity, if that activity, in aggregate, substantially affects interstate commerce. *Id.*; *see also* Wickard v. Filburn, 317 U.S. 111, 128 (1942).

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

that "arise out of or are connected with a commercial transaction," but are not themselves "economic" in nature, if those activities have a substantial aggregate effect on interstate commerce.[61] The Court also allowed for the possibility that regulation of wholly intrastate activity might survive Commerce Clause scrutiny if the statute in question were "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated."[62] In such cases, the Court indicated that Congress could regulate activity that "in aggregate" substantially affects interstate commerce.[63] Additionally, the Court noted that "express congressional findings regarding the effects [of the regulated activity] upon interstate commerce" would aid the substantial effects inquiry.[64] Congress had not made such findings in passing the GFSZA.[65]

The government argued that the possession of guns in school zones substantially affects interstate commerce by resulting in violent crime.[66] Such crime, the government contended, affects the national economy by imposing significant monetary costs on society and by making people less willing to "travel to areas within the country that are perceived to be unsafe."[67] The government further contended that the possession of guns in schools degrades the educational process, resulting in a less productive citizenry and detracting from "the economic well-being" of the United States.[68] The Court

61. *See id.* at 561.

62. *Id.*

63. *Id.* With respect to the statute at issue in the case, the Court commented that the GFSZA was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," and therefore could not be sustained "under [the Court's] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.*

64. *Id.* at 562. The Court also commented that the argument that the regulated activity bears sufficient relation to interstate commerce would be aided by a "jurisdictional element which would ensure . . . that the [activity] in question affects interstate commerce." *Id.* at 561. As an example of such a jurisdictional element, the Court referred to a statute which expressly required an "additional nexus to interstate commerce." *Id.* at 562.

65. *Id.*

66. *Id.* at 563–64.

67. *Id.* at 564.

68. *Id.*

concluded that if it were to accept this argument, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate."[69]

In a concurring opinion, Justice Kennedy, joined by Justice O'Connor, called the Court's holding "necessary though limited."[70] Justice Kennedy reviewed the history of Commerce Clause legislation and the Court's modern posture of deference to Congressional determinations in this area.[71] He discussed the uncertainty regarding the Court's role in maintaining the federalism prescribed by the Constitution[72] and "emphasized the importance of stability in Commerce Clause doctrine." [73] Justice Kennedy wrote,

> the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.[74]

He concluded that although "Congress does have substantial discretion and control over the federal balance," the judiciary must have the capacity to intervene where Congress has upset that balance.[75]

With respect to the GFSZA, Justice Kennedy observed that "[t]he statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required."[76] He noted that the people and activities regulated by the GFSZA were not commercial in character and that the statute contained no "evident" connection to commerce.[77] While acknowledging that "in a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence," Justice

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69. *Id.*
70. *Id.* at 568 (Kennedy, J., concurring).
71. *Id.* at 569–74 (Kennedy, J., concurring).
72. *Id.* at 575–80 (Kennedy, J., concurring).
73. John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 ENV. L. REP. 10,408, 10,424 (1995).
74. *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).
75. *Id.* at 577–78 (Kennedy, J., concurring).
76. *Id.* at 580 (Kennedy, J., concurring).
77. *Id.* (Kennedy, J. concurring).

Kennedy stated that when Congress attempts to reach those extremes under the commerce power, "at the least [the Court] must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."[78]

These comments suggest that Justices Kennedy and O'Connor do not wholly accept the Chief Justice's conception of Commerce Clause authority predicated on a rigid distinction between economic and noneconomic activity. In acknowledging the difficulty in making that distinction, and noting that the GFSZA lacked any "evident" connection to commerce, they nevertheless seem inclined to defer to Congress' judgment, at least where a deliberate judgment is "evident." Furthermore, Justices Kennedy and O'Connor appear particularly concerned with protecting state sovereign authority with respect to "area[s] of traditional state concern."[79] Thus, Justices Kennedy and O'Connor may support federal regulation of activity not clearly economic in nature if Congress provides a clear commerce-based rationale for enacting the legislation. Had Congress made explicit findings regarding the importance of the GFSZA to interstate commerce to justify the infringement on state sovereign authority, Justices Kennedy and O'Connor might have voted to sustain the statute, resulting in a different outcome.

In reaching its decision in *Lopez*, the Court revived an old standard for the review of federal legislation promulgated under Congress' commerce power. The Court had required activity regulated under the Commerce Clause to have a "substantial economic effect on interstate commerce" in the past.[80] In the context of the Court's posture of deference to Congress over the last half-century, however, the decision broke new ground. The opinions made clear that with respect to the third *Lopez* category of activity, at least three Justices—Scalia, Thomas, and the Chief Justice—will only sustain Commerce Clause legislation that regulates purely economic activity. Although some possibility remains that the Court will sustain legislation merely arising out of or connected to a

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

79. *Id.* at 580–81. Although Chief Justice Rehnquist seemed to acknowledge this concern at the end of his opinion, the "distinction between what is truly national and what is truly local" did not enter into his analysis of the constitutionality of the GFSZA. *Id.* at 567–68.

80. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

commercial transaction,[81] the significance of that caveat is unclear in light of the Court's decision in *United States v. Morrison*,[82] discussed below.

B. The Morrison *Decision*

Five years after *Lopez*, the Court applied its new test for Commerce Clause legislation in *United States v. Morrison*.[83] In that decision, the Court struck down a damages provision of the Violence Against Women Act (VAWA)[84] because the activity regulated—gender-motivated violent crime—was not "economic in nature."[85] The provision created a federal cause of action by which victims of such crime could sue their attackers for damages.[86] In *Morrison*, a university student who had been sexually assaulted by fellow students sued her attackers under the statute.[87] The United States intervened to defend the constitutionality of the VAWA's damages provision.[88] Again writing for the majority,[89] Chief Justice Rehnquist reiterated the three *Lopez* categories that Congress may regulate under the Commerce Clause.[90] The Court then analyzed whether the regulated activity fit into the third category by asking whether it "substantially affect[ed] interstate commerce."[91] Although the Court stopped short of a "categorical rule against aggregating the effects of any noneconomic activity in order to

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81. *Lopez*, 514 U.S. at 561.
82. 529 U.S. 598 (2000).
83. *Id.*
84. 42 U.S.C. § 13981 (1994).
85. *Morrison*, 529 U.S. at 609, 613.
86. 42 U.S.C. § 13981.
87. 529 U.S. at 604.
88. *Id.*
89. The Chief Justice was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Thomas filed a concurring opinion, again advocating a narrower interpretation of the commerce power. *Id.* at 627. Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined. *Id.* at 628. Justice Breyer filed a dissenting opinion in which Justice Stevens joined, and in which Justices Souter and Ginsburg joined as to part I-A. *Id.* at 655.
90. *Id.* at 609. Again, the *Lopez* categories included (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "activities having a substantial relation to interstate commerce." United States v. Lopez, 514 U.S. 549, 558–59 (1995).
91. *Morrison*, 529 U.S. at 609. The petitioners in the case did not contend that either of the first two *Lopez* categories would apply to the statute at issue in the case, and the Court agreed. *Id.*

decide these cases," it noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[92] The opinion thus strongly intimated that substantial aggregate effects on interstate commerce will not provide a viable basis for regulation of noneconomic activity under the Commerce Clause.

The Court also registered its "concern . . . expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." [93] Chief Justice Rehnquist may have included this comment to appease Justices Kennedy and O'Connor—the concurring Justices in *Lopez*—who did not write separately in *Morrison*. Justices Kennedy and O'Connor may have refrained from writing separately because the Chief Justice devoted more attention to the concern they raised in *Lopez* that legislation enacted under the commerce power should not "obliterate the Constitution's distinction between national and local authority."[94] The Court's strong emphasis on the relationship between the attenuated nature of the effects in this case and the encroachment on state authority may explain why Justices Kennedy and O'Connor joined the majority in *Morrison* after writing separately in *Lopez*. Accordingly, *Morrison* should not be read to suggest that those Justices have accepted Chief Justice Rehnquist's distinction between economic and noneconomic activity as the test for Commerce Clause authority.

In enacting the VAWA, Congress made extensive findings regarding the effects of gender-motivated violence on interstate commerce.[95] In this respect, the VAWA differed from the GFSZA at issue in *Lopez*. Although the *Lopez* Court had suggested that such findings might support the validity of Commerce Clause legislation,[96] it rejected Congress' findings in *Morrison*, noting that "[w]hether particular operations affect interstate commerce sufficiently to come under the

92. *Id.* at 613.

93. *Id.* at 615.

94. *Id.* (Congress' reasoning with respect to the effects of gender-motivated crime on interstate commerce "will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other *areas of traditional state regulation*." (emphasis added)).

95. *Id.* at 614.

96. 514 U.S.at 562.

constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[97] The Court deemed Congress' findings in *Morrison* insufficient because although they demonstrated an effect on interstate commerce, they relied on "a method of reasoning that we have already rejected as unworkable."[98] Although the Court did not clearly explain what made Congress' method "unworkable," the Court's concern seemed to stem from the "attenuated" nature of the but-for causal chain described by the legislative findings.[99]

Together, *Morrison* and *Lopez* indicate that to satisfy at least three of the Justices,[100] legislation enacted under Congress' commerce power must regulate *economic* activity that substantially affects interstate commerce. The opinions also indicate that even where federal legislation arguably "substantially affects" interstate commerce, the majority will not sustain legislation that impermissibly intrudes upon areas of traditional state concern. The Court seems more likely to allow such an intrusion if Congress has made express findings regarding the connection between the regulated activity and interstate commerce. If the connection is "attenuated," however, the Court will not sustain the legislation unless the findings contain jurisdictional limitations that restrain further expansion of Congress' power.

This framework raises serious questions about the place of environmental protection statutes in the Court's Commerce Clause jurisprudence.[101] Congress' authority to enact many environmental statutes derives from its commerce power.[102]

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97. *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557, n.2 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964)).

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

99. *Id.*

100. Justices Scalia and Thomas joined in Chief Justice Rehnquist's opinions for the majority in *Lopez* and *Morrison*.

101. Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 340–42 (1997).

102. *See, e.g.*, Federal Hazardous Substances Act, 15 U.S.C. §§ 1261–1278 (2000); Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2000); Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2000); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1421h (2000); Endangered Species Act of 1973, 16 U.S.C. §§1531–1544 (2000); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2000); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000); Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26 (2000); Noise Control Act, 42 U.S.C. §§ 4901–4918 (2000); Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§

Some environmental statutes contain jurisdictional provisions that expressly limit their scope to activities affecting interstate commerce, [103] and for these statutes, the distinction between economic and noneconomic activity may be less important to a Commerce Clause inquiry than the question of what qualifies as "affecting" interstate commerce. Other environmental statutes contain congressional findings[104] "that describe the impact of environmental degradation on interstate commerce."[105] Finally, a few environmental statutes contain neither express jurisdictional limitations nor congressional findings concerning the relationship of the regulated activity to interstate commerce.[106]

After *Lopez*, one scholar suggested that while congressional findings concerning effects on interstate commerce do not bind courts, such findings would be "highly persuasive" in a Commerce Clause analysis, such that "[i]ncidental regulation of noncommercial activities under those

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6901–6992k (2000); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2000); Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101–5127 (2000).

103. *See, e.g.*, Federal Hazardous Substances Act, 15 U.S.C. § 1263 (prohibiting certain acts with respect to hazardous substances in interstate commerce); Toxic Substances Control Act, 15 U.S.C. §§ 2602(3)–(4), 2603(a) (establishing testing requirements for chemicals distributed in interstate commerce); Migratory Bird Treaty Act, 16 U.S.C. § 705 (regulating interstate transportation of migratory birds); Federal Water Pollution Control Act, 33 U.S.C. §§ 1342(a), 1362(7), 1362(12) (requiring permits for discharges of pollutants to waters of the United States); Noise Control Act, 42 U.S.C. §§ 4902(7), 4909(a) (prohibiting acts with respect to products distributed in interstate commerce); Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901–7942 (2000); Hazardous Materials Transportation Act, 49 U.S.C. § 5102(1) (defining reach of the Act to cover interstate commerce and activities that affect interstate commerce); *see also* John P. Dwyer, *supra* note 73, at 10,426–28 & n.75.

104. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2601(a)(3) (effective regulation of interstate commerce in toxic chemicals requires federal regulation of intrastate commerce in toxic chemicals); Marine Mammal Protection Act, 16 U.S.C. § 1361(5) (marine mammals and marine mammal products move in interstate commerce or affect marine ecosystems important to other animals or animal products that move in interstate commerce); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201(c), (g), (j) (congressional findings describing the impacts of coal mining on interstate commerce); Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7901 (regulation of interstate commerce requires federal regulation of environmental impacts of uranium mill tailings); *see also* Dwyer, *supra* note 73, at 10,427 & nn.76, 78.

105. Dwyer, *supra* note 73, at 10,427.

106. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544; Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26; *see also* Dwyer, *supra* note 73, at 10,427–428 & n.80.

statutes should survive constitutional challenge."[107] The Court's dismissal of the VAWA's congressional findings in *Morrison*, however, leaves the accuracy of this assertion in doubt. After *Morrison*, environmental statutes enacted under the commerce power without express jurisdictional limitations arguably face constitutional attack, even if they contain congressional findings describing the relationship of the regulated activity to interstate commerce. Moreover, environmental statutes that do contain jurisdictional limitations still may face constitutional review, as the meaning of "substantially affecting interstate commerce" remains uncertain after the Court's rejection of "attenuated" connections to interstate commerce in *Lopez* and *Morrison*.

Environmental legislation may address activities with more direct effects on interstate commerce than the activities at issue in *Lopez* and *Morrison*. At the same time, activities regulated under environmental statutes may not fit a traditional concept of "economic." *Solid Waste Agency*[108] presented the Court with an opportunity to consider the place of environmental legislation in the larger scheme of Commerce Clause jurisprudence.

II. THE *SOLID WASTE AGENCY* DECISION

Solid Waste Agency reached the Supreme Court after the Court's decisions in *Lopez* and *Morrison*. If the Court had reached the constitutional question of Congress' power to grant the Corps authority over isolated waters, the Court likely would have applied the Commerce Clause test it developed in those cases. The Court, however, concluded that the Corps' interpretation of Section 404(a) embodied in the Migratory Bird Rule did not comport with Congress' intent. By deciding the case on this narrower basis, the Court avoided reaching the constitutional question that *Solid Waste Agency* presented.

107. Dwyer, *supra* note 73, at 10,427.
108. 531 U.S. 159 (2001).

A. *Authority of the Army Corps of Engineers under the Clean Water Act Section 404(a) Program*

Solid Waste Agency involved the authority of the Corps to regulate isolated waters and wetlands under its Section 404(a) permitting authority. Section 404(a) of the CWA authorizes the Corps to require a permit for the discharge of fill[109] into "navigable waters."[110] The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."[111] The Corps' regulations further define "waters of the United States" to include "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."[112]

In *United States v. Riverside Bayview Homes*, the Court deferred to the Corps' judgment in interpreting the statutory definition of "waters of the United States."[113] There, a developer had placed fill material in wetlands adjacent to a lake in Michigan in preparation for construction of a housing development.[114] The Corps had asserted jurisdiction over the wetlands because they were adjacent to a navigable waterway.[115] The Court applied the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council* in its review of the Corps' interpretation of its Section 404(a) authority.[116] The *Chevron* Court held that if a statute is ambiguous, courts should defer to the administrative interpretation promulgated by the agency responsible for implementing that statute, so long as the agency's interpretation is reasonable.[117] The

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109. "Fill" refers to earth, stone, or other solid material "for building up the level of an area of ground." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (1994).

110. 33 U.S.C. § 1344(a) (2000). "The Secretary [of the Army] may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.*

111. 33 U.S.C. § 1362(7).

112. 33 C.F.R. § 328.3(a)(3) (2001); *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).

113. 474 U.S. 121.

114. *Id.* at 124.

115. *Id.* at 123.

116. 467 U.S. 837 (1984).

117. *Id.* at 843. Where a statute is clear, however, "the analysis ends with the court's application of the plain meaning." Solid Waste Agency v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 851 (7th Cir. 1999) (citing *Chevron*, 467 U.S. at 842).

Riverside Bayview Homes Court found that the "breadth of congressional concern for protection of water quality and aquatic ecosystems" supported the reasonableness of the Corps' conclusion that adjacent wetlands are inseparably linked to the waters of the United States.[118] The legislative history of the 1977 amendments to the CWA,[119] and "Congress' unequivocal acquiescence to, and approval of, the Corps' regulations" further supported the Court's conclusion.[120] The Court thus recognized that under *Chevron*, the Corps has a proper role in interpreting Section 404(a).

In keeping with the administrative role that the Court recognized in *Riverside Bayview Homes*, the Corps also has explained that the term "waters of the United States" includes waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties" or "which are or would be used as habitat by other migratory birds which cross state lines."[121] The Supreme Court's *Solid Waste Agency* decision focused on this regulatory interpretation of "waters of the United States," known as the "Migratory Bird Rule."[122]

B. Background: SWANCC Challenges the Corps' Denial of a Section 404(a) Permit

Solid Waste Agency concerned a parcel of land on which SWANCC[123] proposed to develop a disposal site for nonhazardous waste.[124] A sand and gravel mine operated on the site from the 1930s until the 1950s, but after it was abandoned, the site naturally developed into an early successional woodland[125] containing over two hundred

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118. 474 U.S. at 133.

119. *Id.* at 135–38. The Court observed that both houses of Congress specifically considered the scope of the Corps' authority, and in the end retained the definition of "waters of the United States" in the existing CWA. *Id.*

120. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001) (citing *Riverside Bayview Homes*, 474 U.S. at 135–39).

121. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

122. 531 U.S. at 164.

123. SWANCC (the Solid Waste Agency of Northern Cook County) "is a consortium of 23 suburban Chicago cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste." *Id.* at 162–63.

124. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 847–48 (7th Cir. 1999).

125. "Succession" is the process by which an "ecological community" of plants and animals moves from one stage to another over time, such as the gradual transformation from an open field to a dense forest. An "early

permanent and seasonal ponds.[126] The plant and wildlife species living at the site included over one hundred species of birds, many migratory.[127]

In 1987, the Corps asserted jurisdiction over the isolated, intrastate wetlands and waters at the proposed disposal site because the "aquatic areas of the site 'are or could be used as habitat by migratory birds which cross states lines.'"[128] SWANCC's proposed project involved "the filling of approximately 17.6 acres of semi-aquatic property."[129] Because the Corps claimed jurisdiction over the wetlands and waters at the site, SWANCC twice applied for a "Section 404(a) permit" allowing it to place fill in the wetlands.[130] The Corps denied the permit applications.[131]

SWANCC brought an action challenging the Corps' jurisdiction on several grounds.[132] Most importantly, SWANCC challenged both the Corps' authority to require a permit as beyond its authority under Section 404(a) and Congress' authority under the Commerce Clause to grant such expansive regulatory jurisdiction.[133] The district court judge granted summary judgment for the defendants, holding that "the commerce clause authorizes the federal government to regulate isolated intrastate waters that provide a habitat for migratory birds" and that "the migratory bird rule [is] a valid application of the Clean Water Act."[134]

The United States Court of Appeals for the Seventh Circuit affirmed the lower court's judgment. The court of appeals

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successional woodland" is therefore a community in which trees and other "woody" plants have begun to live alongside smaller, non-woody plants in a fairly open environment. At this stage, the trees are not yet large enough to shade the majority of the area. *See, e.g.*, JANINE M. BENYUS, THE FIELD GUIDE TO WILDLIFE HABITATS OF THE EASTERN UNITED STATES 202, 213–15 (1989).

126. *Solid Waste Agency*, 191 F.3d at 848.

127. *Id.* at 848. Migratory birds live in different regions during the summer and winter. Because the geographic areas they occupy (their "ranges") may span national boundaries, they are the subject of Migratory Bird Treaties. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2000).

128. *Id.* at 849 (quoting a November 16, 1987 letter from the Corps to SWANCC); Solid Waste Agency v. U.S. Army Corps of Eng'rs, 998 F. Supp. 946, 949 (N.D. Ill. 1998).

129. *Solid Waste Agency*, 191 F.3d at 848.

130. *Solid Waste Agency*, 998 F. Supp. at 948–49.

131. *Id.* at 949.

132. *Id.* at 949.

133. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 165–66 (2001).

134. *Solid Waste Agency*, 998 F. Supp. at 952, 955.

applied the Supreme Court's *Lopez* test for Congress' authority under the Commerce Clause and asked "whether the destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce."[135] After reviewing the significant annual expenditures of Americans who hunt, trap, and observe migratory birds,[136] and noting that wetland destruction had reduced the populations of many migratory bird species and thereby impeded the ability of people to engage in these activities,[137] the court determined that such habitat destruction "'substantially affects' interstate commerce" through its effects on bird populations.[138] Accordingly, the court concluded that the use of habitat by migratory birds was a viable basis for the assertion of Congress' commerce power over isolated waters.[139]

The court of appeals also considered whether the Corps' assertion of jurisdiction comported with Congress' intent. For this question, the court applied the reasonableness standard[140] articulated by the Supreme Court in *Chevron*.[141] Noting that Congress' power under the Commerce Clause is broad enough to encompass regulation of waters based on the presence of migratory birds, the court affirmed, holding that "it was reasonable for the Corps to interpret the Act as authorizing [the Migratory Bird Rule]."[142]

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135. *Solid Waste Agency*, 191 F.3d at 850 (citing Wickard v. Filburn, 317 U.S. 111 (1942) and United States v. Lopez, 514 U.S. 549, 558 (1995)). The Seventh Circuit decision in *Solid Waste Agency* preceded the Supreme Court's decision in *United States. v. Morrison*, 529 U.S. 598 (2000).

136. "[A]pproximately 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, and . . . about 11 percent of them traveled across state lines to do so. . . . Another 17.7 million people spent time observing birds in states other than their states of residence . . . ." *Solid Waste Agency*, 191 F.3d at 850 (citing U.S. FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR & BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1996 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 25, 45 (1997)).

137. *Solid Waste Agency*, 191 F.3d. at 850.

138. *Id.* at 850. The court also explained that concern that the Migratory Bird Rule "erodes the 'distinction between what is truly national and what is truly local,'" *id.* (quoting *Lopez*, 514 U.S. at 567–68), was misplaced. "[That] argument works only if . . . the protection of migratory bird habitat is a matter of local concern only . . . [and] is refuted by the numerous international treaties and conventions designed to protect migratory birds." *Id.* at 850–51.

139. *Id.* at 853.

140. *Id.* at 851.

141. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

142. *Solid Waste Agency*, 191 F.3d at 853.

C. The Supreme Court Decision

The Supreme Court granted certiorari and reversed the court of appeals decision. The Court considered "whether the provisions of § 404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause."[143] Although both parties had preserved and thoroughly briefed the issue, [144] the Court did not reach the second question.[145] Instead, the Court narrowly construed the Section 404(a) to invalidate the rule as an improper interpretation of Congress' grant of authority to the Corps. The Court could have invalidated the rule by analyzing the case under its recent test for Commerce Clause authority and determining that the discharge of fill into isolated waters inhabited by migratory birds does not constitute economic activity. Such an outcome would, of course, have depended on a majority's willingness to apply the test to strike down the Migratory Bird Rule.[146] Therefore, the Court's decision to avoid the Commerce Clause question is significant. Analysis of the Court's decision in light of recent precedent suggests the possibility that the decision not to reach the Commerce Clause question in the case reflected the discomfort of some members of the majority in *Lopez* and *Morrison*[147] with applying the recent test to federal environmental legislation.

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143. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001).

144. Brief for the Petitioner *Solid Waste Agency*, 531 U.S. 159, No. 99-1178; 2000 WL 1041190, at **36–48 (U.S. July 27, 2000); Reply Brief for the Petitioner, *Solid Waste Agency*, 531 U.S. 159, No. 99-1178, 2000 WL 1532361, at **1–20 (U.S. Oct. 13, 2000); Brief for the Federal Respondents, *Solid Waste Agency*, 531 U.S. 159, No. 99-1178, 2000 WL 1369439, at **36–49 (U.S. Sep. 20, 2000).

145. The petitioner presented two objections: (1) that the Corps' interpretation was not valid, and (2) that the Corps' *interpretation* of the statutory grant of authority was valid, but that Congress' grant of authority was unconstitutional. Only the latter implicates Congress' authority under the Commerce Clause. Brief for the Petitioner, *Solid Waste Agency*, 531 U.S. 159, No. 99-1178. 2000 WL 1041190, at **13–48.

146. Justices O'Connor, Scalia, Kennedy, and Thomas joined in Chief Justice Rehnquist's majority opinion.

147. Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist. *See* United States v. Lopez, 514 U.S. 549 (1995) and United States v.Morrison, 529 U.S. 598 (2000).

In *Solid Waste Agency*, the Supreme Court invoked the doctrine of constitutional avoidance,[148] which requires that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[149] This approach to constitutional problems "reflects the prudential concern that constitutional issues not be needlessly confronted, [and] recognizes that Congress . . . is bound by and swears an oath to uphold the Constitution."[150] The Court's application of the doctrine of constitutional avoidance in *Solid Waste Agency* suggests that a majority of the Court could not clearly resolve the constitutional question presented.

The Court decided *Solid Waste Agency* by focusing on Congress' grant of jurisdiction over "navigable waters"[151] to the Corps and considering whether this jurisdictional grant included authority over the type of waters at issue in the case.[152] In its analysis, the Court examined the legislative history of Section 404[153] and its amendments, as well as the congressional response to the Corps' implementing regulations.[154] The Court determined that the term "navigable waters" was central to Congress' jurisdictional grant of Section 404(a) authority, and that the Corps' authority under that term does not extend to waters (or wetlands) that are not, at a minimum, *adjacent to* navigable waters.[155]

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148. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop, 440 U.S. 490, 499–501 (1979) and Justice Marshall's opinion in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804)). The modern incarnation of the doctrine can be traced to *Ashwander v. Tennessee Valley Authority*, in which Justice Brandeis set out seven principles of constitutional avoidance, including the preference for deciding cases on non-constitutional grounds. 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

149. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (quoting *DeBartolo*, 485 U.S. at 575).

150. *DeBartolo*, 485 U.S. at 575.

151. 33 U.S.C. § 1344(a) (2000).

152. *Solid Waste Agency*, 531 U.S. at 167, 171–172.

153. The Court considered not only the legislative history of Section 404(a), but the history of other provisions of Section 404 as well. *Solid Waste Agency*, 531 U.S. at 169–171 (discussing Congress' inclusion of 33 U.S.C. § 404(g) in the statute).

154. *Solid Waste Agency*, 531 U.S. at 166–72.

155. *Id.* at 167–168.

In reaching this conclusion, the Court distinguished *United States v. Riverside Bayview Homes*,[156] in which the Court followed *Chevron* and deferred to the agency's reasonable interpretation of Section 404(a).[157] In *Solid Waste Agency*, by contrast, the Court determined that the respondents had provided no persuasive evidence that Congress had acquiesced to the Corps' "claim of jurisdiction over nonnavigable, isolated, intrastate waters."[158] Noting the difference between giving a statutory phrase "limited effect," as it had in *Riverside Bayview Homes*,[159] and "no effect whatever," the Court refused to "[read] the term 'navigable waters' out of the statute."[160] According to the Court, the Corps' extension of its jurisdiction to encompass isolated waters would have rendered the statute's reference to "navigable waters" meaningless and therefore ran contrary to Congress' intent.[161] The Court therefore held that isolated waters fall outside of Congress' grant of Section 404(a) jurisdiction to the Corps, even if such waters provide habitat for migratory birds.[162]

Although the Court chose not to defer to the Corps' interpretation of the Migratory Bird Rule, the posture of *Solid Waste Agency* resembled cases such as *Riverside Bayview Homes*,[163] in which the Court applied *Chevron* deference.[164] For example, Congress charged the Corps with implementing Section 404(a), and the Migratory Bird Rule represented an administrative interpretation of that statute. Moreover, historical interpretations of the terms "navigable waters" and "waters of the United States" arguably render Section 404(a)'s scope ambiguous.[165] Given that *Solid Waste Agency* involved these *Chevron* factors, the Court could have decided that *Chevron* required deference to the Corps' interpretation of the

156. 474 U.S. 121 (1985).

157. *Id.* at 131.

158. 531 U.S. at 171.

159. 474 U.S. at 133 ("Although the Act prohibits discharges into 'navigable waters' the Act's definition of 'navigable waters' as 'the waters of the United States' [including waters that are not navigable in fact] makes it clear that the term 'navigable' as used in the Act is of limited import." (citations omitted)).

160. *Solid Waste Agency*, 531 U.S. at 172.

161. *See id.*

162. *Id.* at 171–72.

163. 474 U.S. at 131.

164. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

165. See discussion *supra*, Part II.A.

statute—so long as that interpretation was reasonable. If the Court had applied *Chevron* deference and reviewed the Corps' promulgation of the Migratory Bird Rule under a reasonableness standard, the rule may have withstood the Court's scrutiny. Instead, the Court held that Congress clearly did not intend to extend the Corps' jurisdiction to isolated waters, regardless of the presence of migratory birds.[166] Because the Court found the scope of Section 404(a) clear, it declined to extend *Chevron* deference to the Migratory Bird Rule.[167]

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, argued that the legislative history of Section 404 supported the Corps' broad interpretation of its authority,[168] and that the Court should have extended *Chevron* deference to the Corps' interpretation of Section 404(a), as it did in *Riverside Bayview Homes*.[169] He observed that the Court's refusal to do so was "unfaithful to both *Riverside Bayview [Homes]* and *Chevron*. For it is the majority's reading, not the [Corps'], that does violence to the scheme Congress chose to put into place."[170]

By deciding *Solid Waste Agency* on the basis of the Corps' interpretation of Section 404(a), the Court avoided reaching the constitutional question of whether the Commerce Clause gives Congress the authority to grant the Corps jurisdiction over isolated waters based on the presence of migratory birds. The Court's avoidance of this question also perpetuated the uncertainty[171] surrounding the future of environmental protection statutes in light of *Lopez* and *Morrison*. Although *Solid Waste Agency* left such statutes constitutionally intact for the moment, Chief Justice Rehnquist's observations regarding the scope of Congress' authority under Section 404(a)[172] suggest

166. *Solid Waste Agency*, 531 U.S. 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." (citation omitted)).

167. *Id.* at 172.

168. *Id.* at 183–190 (Stevens, J., dissenting).

169. *Id.* at 191 (Stevens, J., dissenting).

170. *Id.*

171. Warner, *supra* note 101, at 340–42.

172. 531 U.S. at 172–73 (suggesting that the Corps' interpretation of Section 404(a) "invokes the outer limits of Congress' power," "push[es] the limit of congressional authority," "permit[s] federal encroachment upon a traditional state power" and "'raise[s] serious constitutional problems'" (citations omitted)).

that he views environmental legislation predicated on the Commerce Clause as constitutionally suspect.

III. THE QUESTION THE SUPREME COURT AVOIDED IN *SOLID WASTE AGENCY*

By deciding that the interpretation of Section 404(a) embodied in the Migratory Bird Rule was inconsistent with Congress' intent, the Court avoided the question whether, consistent with the Commerce Clause, Congress could have granted the Corps jurisdiction over isolated waters that provide habitat for migratory birds.[173] Arguably, in the aggregate, the discharge of fill into waters inhabited by migratory birds, like the home-growing of wheat in *Wickard v. Filburn*,[174] substantially affects interstate commerce.[175] In *Lopez* and *Morrison*, however, the Court qualified the "aggregate effects test" by emphasizing the distinction between economic and noneconomic activity and underlining the attenuated nature of the regulated activities' effects on interstate commerce.[176] Under this standard, the constitutionality of environmental statutes would depend not on the aggregate effects on interstate commerce of the activities they regulate, but rather on the economic (or noneconomic) nature of those activities. Had it applied its recent Commerce Clause test to resolve the Commerce Clause question in *Solid Waste Agency*, the Court might have concluded that the discharge of fill into waters inhabited by migratory birds does not constitute economic activity and therefore falls outside Congress' commerce power.

By narrowly construing Section 404(a) to strike down the Migratory Bird Rule, the Court also avoided applying its recent Commerce Clause test to federal environmental statutes generally. [177] If the Court had concluded that the activity

173. *Id.* at 162.

174. Wickard v. Filburn, 317 U.S. 111, 128 (1942).

175. *See Solid Waste Agency*, 531 U.S. at 194 (Stevens, J., dissenting) ("[N]o one disputes that the discharge of fill into 'isolated' waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations.").

176. See *supra* Part I.

177. Interestingly, in its brief the Petitioner had noted that "[t]he vast scheme of federal environmental regulation would . . . be essentially untouched by a decision in this case invalidating asserted federal authority over completely isolated interstate [sic] waters used by migratory birds." Brief for Petitioner, *Solid Waste Agency*, 531 U.S. 159, No. 99-1178, 2000 WL 1041190, at *50 (U.S. July 27, 2000).

regulated by Section 404(a) lay beyond the scope of the commerce power because that isolated activity was not economic in nature, the decision would have announced that the Court's recent Commerce Clause test applies wholesale—and narrowly—to federal environmental statutes. Accordingly, such a decision would have placed in question Congress' authority to pass other environmental legislation predicated on the commerce power,[178] because like Section 404(a), such statutes regulate activities that, when viewed in isolation, might not be "economic" in nature.[179] For example, one section of the Endangered Species Act prohibits, among other acts, the "taking" of endangered or threatened species.[180] Congress has defined "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."[181] Admittedly, the act of harassing or killing an animal might not in itself be economic activity. Similarly, the discharge of air pollutants—subject to Congressional regulation under the Clean Air Act[182]—in isolation may not be economic activity.

The term "noneconomic" incompletely describes the activities regulated by environmental protection statutes, however, because people often undertake such activities for clearly economic reasons.[183] As such, these activities are more "economic in nature" than the activities at issue in *Lopez* and *Morrison*. Because the Court did not perform this analysis, the proper resolution of the question of whether environmental statutes regulate economic activity remains unclear.

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178. Such challenges have been made in the past. *See, e.g.*, Gibbs v. Babbitt, 214 F.3d 483, 497 (4th Cir. 2000) (holding that the Endangered Species Act's prohibition on "taking" endangered animals did not violate the Commerce Clause); United States v. Olin Corp., 107 F.3d 1506, 1510–11 (11th Cir. 1997) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 did not violate the Commerce Clause as applied to on-site disposal by a chemical manufacturer); United States v. Bramble, 103 F.3d 1475, 1480–82 (9th Cir. 1997) (upholding the constitutionality of the Eagle Protection Act, 16 U.S.C. § 668 (2000), under the Commerce Clause).

179. See *infra* Part IV.

180. 16 U.S.C. § 1538(a).

181. 16 U.S.C. § 1532(19).

182. 42 U.S.C. §§ 7401–7671q(2000).

183. *Cf.* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 193 (2001) (Stevens, J., dissenting) (noting that "unlike the class of activities Congress was attempting to regulate in *United States v. Morrison* ('[g]ender motivated crimes') and [*United States v.*] *Lopez* (possession of guns near school property), the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons" (citations omitted)).

The Court also left unresolved the larger question of whether the economic/noneconomic distinction in the recent Commerce Clause test applies to environmental legislation at all. This question exists because important precedent weighs in favor of the constitutionality of Congress' use of its commerce power to enact statutes that protect the environment. By avoiding the Commerce Clause question in *Solid Waste Agency*, the majority eschewed consideration of this precedent. Nonetheless, in his majority opinion, Chief Justice Rehnquist made particular observations that hint at his views concerning the proper fate of environmental statutes after *Lopez*. Closer consideration of prior case law, the Chief Justice's observations, and the views of the concurring justices in *Lopez* offers additional insight into the underlying reasons for the Court's failure to resolve the questions about the relationship between the *Lopez* test and federal environmental legislation.

A. Hodel v. Virginia Surface Mining and Reclamation Association: *Precedent Upholding Congress' Power to Enact Environmental Legislation*

The Supreme Court has, in the past, considered and upheld Congress' power to enact environmental protection statutes under the Commerce Clause. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*,[184] the Court reviewed the constitutionality of the Surface Mining Control and Reclamation Act of 1977 ("Surface Mining Act").[185] Congress enacted the Surface Mining Act to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."[186] The act faced challenge on several constitutional grounds, including Congress' authority to enact it under the commerce power.[187]

Hodel predated *Lopez* by more than a decade, and the Court applied the rational basis standard of review then

184. 452 U.S. 264 (1981).

185. 30 U.S.C. § 1201 (2000).

186. *Hodel*, 452 U.S. at 268 (quoting 30 U.S.C. § 1202(a)).

187. The act was also challenged on the basis of the Tenth Amendment, *id.* at 284, the Just Compensation Clause of the Fifth Amendment, *id.* at 293, and the Due Process Clause of the Fifth Amendment, *id* at 298. The Court upheld the act on all four grounds. *Id.* at 305.

applicable to Commerce Clause legislation.[188] Observing that Congress had made "express findings, set out in the Act itself, about the effects of surface coal mining on interstate commerce,"[189] and noting that the legislative record provided "ample support" for those findings,[190] the Court determined that Congress had a "rational basis for concluding that surface coal mining has substantial effects on interstate commerce."[191] Accordingly, the Court held that enacting the Surface Mining Act did not exceed Congress' commerce power.

The *Hodel* Court commented on the scope of Congress' Commerce Clause authority. The Court reiterated that Congress may regulate purely intrastate activity that affects interstate commerce when "combined with like conduct by others similarly situated."[192] The Court also recognized that Congress' traditional role in preventing "destructive interstate competition" justified nationwide surface mining and reclamation standards.[193] Finally, the Court noted its agreement with lower federal courts "that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."[194] Thus, the *Hodel*

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188. *Id.* at 280–82.

189. *Id.* at 277. The Court quoted the Surface Mining Act:

> [M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

Id. at 277 (quoting 30 U.S.C. § 1201(c)).

190. *Id.* at 277.

191. *Id.* at 280.

192. *Id.* at 277 (quoting Fry v. United States, 421 U.S. 542, 547 (1975)).

193. *Id.* at 281–82. Congress expressly stated in the Surface Mining Act: "[S]urface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders." *Id.* (quoting 30 U.S.C. §1201(g)).

194. *Id.* at 282 & n.21 (listing lower court decisions that upheld congressional regulation of such activities under the Commerce Clause).

Court held that the scope of Congress' commerce power extended to intrastate activities such as surface mining that in aggregate affect interstate commerce, especially where those activities may adversely affect the environment in more than one state.

The Court's recent distinction between economic and noneconomic activity appears to have replaced the *Hodel* Court's rational basis standard for review of Commerce Clause legislation. Nonetheless, *Hodel*'s important pronouncements concerning the propriety of Congress' enactment of environmental protection statutes, particularly regarding the aggregate effects of intrastate activities on interstate commerce and the need to prevent interstate competition from undermining states' efforts to protect the environment, remain valid. Although the Court's composition has changed considerably since *Hodel*,[195] these observations may continue to find favor with a majority of the Court's current members, particularly in light of the principle of *stare decisis*.[196] More than four members of the Court may share the view that *Hodel*'s precedent strongly favors sustaining Congress' authority to enact environmental legislation under the commerce power. Accordingly, an attempt to overrule *Hodel* in its entirety might not capture a majority of the Court.

B. "Significant Constitutional Questions" and Chief Justice Rehnquist's Perspective

In *Solid Waste Agency* the Court asserted that the Corps' interpretation of Section 404(a) would raise "significant constitutional and federalism questions," and that a narrow reading of the statute was therefore necessary to avoid those questions.[197] The Court never directly identified these

195. Only current Justice Stevens and then-Justice Rehnquist were on the Court in 1981 when *Hodel* was decided. *See* http://www.supremecourtus.gov.

196. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("[T]he doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" (citations omitted)).

197. 531 U.S. at 174. The Court observed, "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Id.* at 173 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

"significant constitutional and federalism questions," but they likely involved the aforementioned uncertainty regarding (1) whether the recent Commerce Clause test, complete with its narrow distinction between economic and noneconomic activity, should apply to environmental statutes, and (2) the proper characterization of activity regulated by environmental statutes as economic or noneconomic. As the Chief Justice suggested, the Court's prudential concern with unnecessarily deciding constitutional questions may have driven the *Solid Waste Agency* decision.[198] The Court's recent pronouncements concerning its role in the review of Commerce Clause legislation,[199] however, suggest that Chief Justice Rehnquist—and the current majority—welcome opportunities to limit the scope of Congress' commerce power. Given that posture, the use of the doctrine of constitutional avoidance in this case suggests that the members of the majority did not agree on the proper resolution of the "significant constitutional and federalism questions" that *Solid Waste Agency* raised.

The Court's treatment of the Migratory Bird Rule in light of *Chevron* belies Chief Justice Rehnquist's view of the place of environmental statutes in the Court's Commerce Clause jurisprudence. The Court emphasized that even if it had agreed with the respondents that Section 404(a) was ambiguous, it would not have extended *Chevron* deference to the administrative interpretation of Section 404(a) embodied in the Migratory Bird Rule.[200] The Court observed, "Where an administrative interpretation of a statute invokes *the outer limits of Congress' power*, we expect a clear indication that

198. 531 U.S. at 172.

199. United States v. Morrison, 529 U.S. 598, 608 (2000) ("*Lopez* emphasized . . . that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."); United States v. Lopez, 514 U.S. 549, 557 n.2 (1995) (citing Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."); *Lopez*, 514 U.S. at 567 ("[W]e decline here to proceed any further" in expanding the Court's deference to congressional action.); *Lopez,* 514 U.S. at 557 n.2 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring) ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.")

200. *Solid Waste Agency*, 531 U.S. at 172.

Congress intended that result."[201] Because the Court could find "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit,"[202] it chose to "read the statute as written to avoid the significant constitutional and federalism questions raised by [the Corps'] interpretation."[203]

The Court's characterization—more specifically, Chief Justice Rehnquist's characterization—of the Migratory Bird Rule as pressing "the outer limits of Congress' power" likely formed the core of the "serious constitutional and federalism questions" at issue in the case. Nonetheless, that characterization is itself ambiguous. Chief Justice Rehnquist did not explain whether he believes that all environmental protection statutes lie at (or beyond) the limit of Congress' Commerce Clause authority or whether he merely objected to the extension of authority sought in *Solid Waste Agency*, specifically the inclusion of "abandoned sand and gravel pit[s]" within the scope of Congress' historical commerce-related authority over "navigable waters."

The Chief Justice's separate opinion in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*[204] suggests that he adheres to the former perspective. Although he concurred in the *Hodel* judgment on the basis of *stare decisis*, then-Justice Rehnquist wrote, "there can be no doubt that Congress in regulating surface mining *has stretched its authority to the 'nth degree.*'"[205] This observation suggests that Justice Rehnquist objected to Congress' regulation of the activity controlled by the Surface Mining Control and Reclamation Act of 1977.[206] The Chief Justice likely harbors similar objections to Congress' assertion of jurisdiction over other activities regulated by environmental statutes. Such a view would explain his generalized pronouncement that the Corps' interpretation of Section 404(a) "invoke[d] the outer limits of Congress' power."

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201. *Id.* at 172 (citing *Edward J. DeBartolo Corp.*, 485 U.S. at 575) (emphasis added).

202. *Id.* at 174.

203. *Id.*

204. 452 U.S. 264, 307–312 (1981) (Rehnquist, J., concurring).

205. *Id.* at 311 (Rehnquist, J., concurring) ("Though there can be no doubt that Congress in regulating surface mining has stretched its authority to the 'nth degree,' our prior precedents compel me to agree with the Court's conclusion [that the Surface Mining Act did not violate the Commerce Clause].") (emphasis added).

206. 30 U.S.C. §§ 1201–1328 (2000).

If Chief Justice Rehnquist believes that current environmental protection statutes stretch Congress' commerce power, this view renders uncertain the future of environmental statutes predicated on the Commerce Clause—including such bedrock laws as the Endangered Species Act,[207] Clean Air Act,[208] and the Comprehensive Environmental Response, Compensation and Liability Act.[209] If the Court's composition shifts only slightly, the Chief Justice could secure the necessary majority to overturn these and other environmental statutes. For the moment, however, the majority appears to include members who hesitate to apply the recent Commerce Clause test to federal environmental statutes in light of existing precedent.

C. Hodel *Suggests that the Migratory Bird Rule Should Have Survived Review under* Lopez

In his dissenting opinion in *Solid Waste Agency*, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, argued that the Court should adhere to *Hodel* in concluding that Congress had the power under the Commerce Clause to grant the Corps authority over isolated waters as interpreted in the Migratory Bird Rule. Even under the *Lopez* test, Justice Stevens cited *Hodel* for the principle that the substantial effects inquiry should focus on the aggregate effect on interstate commerce of a class of activities.[210] Justice Stevens explained, "the discharge of fill into 'isolated' waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations."[211] Because migratory birds have "intrinsic value"[212] as "'protectors of our forests and our crops' and as 'a food supply,'"[213] and because "literally millions

207. 16 U.S.C. §§ 1531–1544 (2000).

208. 42 U.S.C. §§ 7401–7671q (2000).

209. 42 U.S.C. §§ 9601–9675.

210. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 193 (Stevens, J., dissenting). In support of this principle, Justice Stevens also cited *Perez v. United States*, 402 U.S. 146 (1971), and *Wickard v. Filburn*, 317 U.S. 111 (1942). *Id.*

211. *Solid Waste Agency*, 531 U.S. at 194 (Stevens, J., dissenting).

212. *Id.* (Stevens, J., dissenting) (citing Missouri v. Holland, 252 U.S. 416, 435 (1920)).

213. *Id.* (Stevens, J. dissenting) (quoting *Holland*, 252 U.S. at 435).

of people" engage in birdwatching and hunting,[214] Justice Stevens concluded, "[t]he causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds is not 'attenuated'; it is direct and concrete."[215]

Justice Stevens addressed the Court's distinction between economic and noneconomic activity by noting that the "discharge of fill material into water"[216] regulated by Section 404(a) is usually "undertaken for economic reasons."[217] Finally, Justice Stevens commented that "the protection of migratory birds is a . . . *national* problem."[218] He pointed to *Hodel* for the rationale that federal regulation is "essential" to prevent interstate competition from undermining environmental standards.[219]

Clearly, Justice Stevens views *Hodel* as retaining precedential value in the realm of Commerce Clause jurisprudence. Moreover, even under the test the Court developed in *Lopez*, according to Stevens' reasoning the Migratory Bird Rule was a valid exercise of the federal commerce power because the activity regulated substantially affects interstate commerce. Although some members of the majority may share his views, they avoided expressing their positions by joining in Chief Justice Rehnquist's opinion holding that the Corps' Migratory Bird Rule ran contrary to Congress' intent.

Justice Kennedy's concurring opinion in *Lopez* suggests that he and Justice O'Connor represented the vulnerable votes in *Solid Waste Agency*. Justice Kennedy's "plea for stability in Commerce Clause doctrine"[220] indicates a strong respect for precedent. In the context of *Solid Waste Agency*, that concern

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214. *Id.* at 195 (Stevens, J., dissenting). Justice Stevens cited studies showing that 5.3 million Americans spent a total of $638 million hunting migratory birds in 1984, and that more than one hundred million Americans spent nearly $14.8 billion in 1980 to watch and photograph fish and wildlife. *Id.* at n.17 (citing U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION 54, OTA-O-206 (Mar. 1984)) [hereinafter WETLANDS].

215. *Id.* at 195 (Stevens, J., dissenting) (citing United States v. Morrison, 529 U.S. 598, 612 (2000), for the term "attenuated").

216. *Solid Waste Agency*, 531 U.S. at 193 (Stevens, J., dissenting).

217. *Id.* (Stevens, J., dissenting) (citations omitted).

218. *Id.* at 195 (citation omitted) (Stevens, J., dissenting).

219. *Id.* at 196 (Stevens, J., dissenting).

220. Dwyer, *supra* note 173, at 10,429.

for *stare decisis* may support retaining *Hodel* as the standard for review of federal environmental statutes. Adhering to *Hodel*, however, would not have achieved Chief Justice Rehnquist's desired outcome. Like *Lopez* and *Morrison*, *Solid Waste Agency* was a five-to-four decision. The loss of even one justice from the majority might have resulted in a narrow holding that the activity regulated by Section 404(a) and the Migratory Bird Rule was sufficiently economic in nature to pass muster under the Court's recent Commerce Clause test.[221] Such a holding would have resulted in broader implications by establishing post-*Lopez* precedent upholding a federal environmental statute under the Commerce Clause—an outcome not likely favored by the Chief Justice.

IV. THE CONSTITUTIONALITY OF FEDERAL ENVIRONMENTAL STATUTES

In light of the Supreme Court's current interest in limiting the scope of the federal commerce power, the Court's avoidance of the Commerce Clause question in *Solid Waste Agency* is remarkable. For the moment, the Court avoided deciding how *Lopez* and *Morrison* will affect the review of federal environmental legislation. Presumably, the Court will eventually reach this question—and when it does, the Court should defer to existing Commerce Clause precedent by acknowledging the broad economic nature of the activities environmental statutes regulate.

Federal environmental statutes regulate activities that occupy an intermediate position on the scale of economic and noneconomic activity, such as the taking of endangered species and the discharge of air pollutants. Although people may engage in such activities for economic purposes, in a narrow sense these activities might not be strictly "economic" when viewed in isolation. Their "aggregate effects" on interstate commerce also may be more attenuated than the effects of activities such as growing wheat for private consumption,[222] which Congress may regulate under the federal commerce power.[223] Moreover, unlike in *Wickard*, where Congress sought

221. *Solid Waste Agency*, 531 U.S. at 193–95 (Stevens, J., dissenting).
222. *See* Wickard v. Filburn, 317 U.S. 111 (1942).
223. *Id.* at 128–29.

to regulate the national wheat market,[224] most environmental statutes do not focus on a particular national market.

Although in a narrow sense the activities regulated by environmental statutes might not be economic in nature, those activities arguably have more substantial and direct economic effects on interstate commerce than the regulated activities at issue in *Lopez* and *Morrison*. As Justice Stevens noted in his dissent, "unlike the class of activities Congress was attempting to regulate in [*Morrison*] ('[g]ender-motivated crimes') and *Lopez* (possession of guns near school property), the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons."[225] Similarly, hazardous materials are most often handled in the course of business operations.[226] Endangered species protection generates billions of dollars annually in tourism related to wildlife-watching,[227] and creates jobs in scientific research.[228] Millions of Americans "regularly participate in birdwatching and hunting" and annually spend millions of dollars on those activities.[229] Air and water pollution directly affect human health and cost the economy thousands of dollars each year.[230] Moreover, such pollution can cross state lines and affect the citizens of other states.[231]

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224. *Id.* at 115.

225. *Solid Waste Agency*, 531 U.S. at 193 (Stevens, J., dissenting) (citations omitted; parentheticals in original).

226. For example, most of the sites listed by the EPA as part of the Superfund program are associated with commercial or industrial facilities. *See* EPA Superfund website, http://www.epa.gov/superfund/sites (last visited Feb. 28, 2003).

227. *E.g.*, Gibbs v. Babbitt, 214 F.3d 483, 493, 496 (4th Cir. 2000) (describing "howling events," in which tourists listen to wolf howls and attend educational programs).

228. *Id.* at 494.

229. *Solid Waste Agency*, 531 U.S. at 195 & n.17 (Stevens, J., dissenting) (citing WETLANDS, *supra* note 214).

230. *See, e.g.*, EPA's Clear Skies website (claiming "[i]n 2010, early reductions in fine particle and ozone levels under Clear Skies would result in 6,400 fewer premature deaths and $44 billion in annual health and visibility benefits nationwide each year") *available at* http://www.epa.gov/air/clearskies/benefits/html (last visited Mar. 1, 2003); *see also* Ontario Medical Ass'n, *The Illness Costs of Air Pollution in Ontario: A Summary of Finding*, available at http://www.oma.org/phealth/icap.htm (June 2000); *see generally* UNEP Collaborating Centre on Energy and Environment, *AirImpacts.org: The Health and Economic Effects of Air Pollution*, available at http://www.airimpacts.org.

231. *E.g.*, U.S. Environmental Protection Agency, National Air Quality, 2001 Status and Trends: Acid Rain, *at* http://www.epa.gov/air/aqtrnd01/acidrain. html.

The Court's modern Commerce Clause cases suggest a spectrum of activities ranging from those for which congressional regulation is proper[232] to those for which it is not.[233] Activities regulated by federal environmental statutes seem to fall between these extremes, and therefore whether the Court would consider them economic in nature is uncertain. Because these activities occupy an intermediate position on the spectrum of economic activity, the Court's consideration of the constitutionality of Congress' enactment of environmental legislation under the commerce power should account for more than the economic nature of the isolated activity being regulated. The Court should adopt a broad view of the activities regulated by environmental statutes and acknowledge the essential economic purpose of those activities.

The Court has not definitively announced whether the economic/noneconomic analysis must focus on the narrow activity described in a statute (e.g., discharging fill into waters and wetlands) or whether the analysis may consider the broader economic implications of the activity (e.g., filling waters and wetlands for the purpose of building a waste disposal facility). Accordingly, the option of adopting the broader approach remains available to the Court. Moreover, the Court could fit this approach into its current scheme, as *Lopez* left open the possibility that Congress may regulate intrastate activity that in the aggregate substantially affects interstate commerce, if such regulation "is part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[234] Federal environmental statutes represent such a regulatory scheme, and their importance derives from the national interest in management of our natural resources—resources that have clear economic significance.[235]

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232. *E.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Congress' regulation of restaurant service); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Congress' regulation of the operation of public accommodations); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding Congress' regulation of wheat production).

233. *E.g.*, United States v. Morrison, 529 U.S. 598 (2000) (rejecting Congress' regulation of gender-motivated violent crime); United States v. Lopez, 514 U.S. 549 (1995) (rejecting Congress' regulation of handgun possession in school zones).

234. *Lopez*, 514 U.S. at 561. See *supra* Part I.A.

235. For example, the significant roles of clean water, clean air, timber, hardrock and other minerals, oil and gas, fisheries, and wildlife in our national

Nonetheless, such a national interest will inevitably conflict with certain state interests, implicating the particular concerns of Justices Kennedy and O'Connor.

In *Lopez*, Justices Kennedy and O'Connor clearly expressed their primary interest in assuring that federal legislation not "intrude on an area of traditional state concern."[236] In future review of environmental statutes, these Justices will likely insist that the Court consider this factor in its analysis. In *Solid Waste Agency*, after reaching its decision that the Migratory Bird Rule constituted an impermissible interpretation of Section 404(a), the majority commented that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[237] This statement and the Court's concern with the absence of a "clear statement" of Congress' intent for Section 404(a) to reach gravel pits suggest the extent to which the Court considered the appropriate scope of Congress' power—despite the Court's avoidance of the Commerce Clause question. Because of its importance to Justices Kennedy and O'Connor, the question of federal infringement on state authority will likely remain a significant component of the Court's Commerce Clause analysis, even if the Court adopts a broad approach to the economic/noneconomic inquiry.

The notion that federal usurpation of state regulatory authority in the "traditional" area of land and water use impermissibly intrudes on state sovereignty ignores the importance of the federal regulatory scheme for the protection of an interstate resource such as migratory birds. In the absence of federal regulation, each state could devise its own program to protect migratory bird habitat or other resources—or implement none at all. Such a fragmented approach would render each state vulnerable to the whims of any state that

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economy are indisputable. *See generally*, CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992).

236. *Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

237. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (quoting Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.")).

shared its resources. The tragedy of the commons[238] would operate on a grand scale, because states could maximize their own short-term benefits without absorbing the costs imposed on other states.[239]

Although local land-use decisions fall within the traditional province of state and local governments,[240] those decisions must come secondary to the objectives of the federal regulatory scheme. Management and conservation of interstate resources such as migratory birds fall within traditional areas of federal concern.[241] The two regulatory areas (interstate resource management and local land-use control) represent two different layers of governmental decision-making. Because the federal government represents the people of all the states, local decisions may not frustrate the federal scheme. The Court should consider the importance of the federal interest in protecting the environment across all states when assessing the validity of federal environmental regulation.

CONCLUSION

In *Solid Waste Agency*, the Court avoided reaching the question of whether the Migratory Bird Rule was an impermissible exercise of Congress' commerce power and instead struck down the rule as exceeding the scope of the authority Congress intended to grant to the Corps. The Court asserted that the Corps' interpretation of Section 404(a) raised "significant constitutional and federalism questions."[242] Although the Court failed to articulate the nature of those questions, they likely involved (1) whether the recent Commerce Clause test, complete with its narrow distinction between economic and noneconomic activity, should apply to environmental statutes, and (2) whether the various activities regulated by environmental statutes are properly characterized

238. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243–48 (Dec. 13, 1968).

239. *Solid Waste Agency*, 531 U.S. at 195 (Stevens, J., dissenting); Hodel v. Va. Surface Mining and Reclamation Ass'n., 452 U.S. 264, 282 (1981).

240. *Solid Waste Agency*, 531 U.S. 159, 174 (citing *Hess*, 513 U.S. at 44)("[R]egulation of land use [is] a function traditionally performed by local governments.").

241. *See* Missouri v. Holland, 252 U.S. 416, 435 (1920).

242. *Solid Waste Agency*, 531 U.S. at 173.

as economic or noneconomic. Given the current Court's eagerness to restrict the scope of the federal commerce power, the Court's avoidance of the Commerce Clause question in this case suggests that the majority did not agree on the proper resolution of the constitutional questions that the case presented, in light of established precedent.

Chief Justice Rehnquist commented on the scope of Congress' authority in his concurring opinion in *Hodel*.[243] Given that earlier opinion, his statement that the Migratory Bird Rule "invokes the outer limits of Congress' power"[244] suggests that he believes the proper economic/noneconomic analysis should focus solely on the narrow activity regulated by federal legislation. Moreover, his comments suggest that he views all environmental statutes as pressing the limits of Congress' commerce power. By contrast, the holding of *Hodel* represents important precedent upholding federal environmental legislation under the Commerce Clause.

Two members of the majority in *Solid Waste Agency*—Justices Kennedy and O'Connor—failed to wholly accept Chief Justice Rehnquist's Commerce Clause test as articulated in *Lopez*. In his *Lopez* concurrence, Justice Kennedy, joined by Justice O'Connor, emphasized the importance of stability in the Court's Commerce Clause jurisprudence. This view suggests that Justices Kennedy and O'Connor would oppose the Chief Justice's efforts to depart from *Hodel* in the review of environmental statutes under the Commerce Clause. These divergent views regarding the appropriate analysis for review of Congress' authority to enact environmental statutes may have formed the basis of the disagreement among the majority justices. Both *Lopez* and *Morrison* were five-to-four decisions; the majority cannot afford to lose a single vote. Rather than reach the constitutional question that *Solid Waste Agency* presented and risk an outcome he disfavored, Chief Justice Rehnquist invoked the doctrine of constitutional avoidance and secured a majority of justices willing to decide the case by narrowly construing Section 404(a).

By applying the avoidance doctrine and electing to decide the case on the basis of statutory construction, the Court accomplished two things. First, the Court limited federal

243. *Hodel*, 452 U.S. at 277–82.

244. *Solid Waste Agency*, 531 U.S. at 172 (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

authority by narrowly construing a statute when normally it would have deferred to the Corps' administrative discretion.[245] Second, the Court avoided confronting the difficulty of the *Lopez* test as applied to federal environmental statutes, thereby momentarily preserving those laws. Ducking the constitutional issue enabled Chief Justice Rehnquist to strike down the Migratory Bird Rule because he retained the votes of Justices Kennedy and O'Connor, who seem particularly concerned with the stability of the Court's Commerce Clause jurisprudence, but nonetheless favor strict limitations on Congress' commerce power. The decision left for another day the "difficult constitutional questions" regarding the future of federal environmental statutes after *Lopez* and *Morrison*.

The Supreme Court will eventually decide whether the recent Commerce Clause test applies wholesale to review of federal environmental statutes and whether to adopt a narrow or broad approach to the economic/noneconomic inquiry. Federal environmental protection statutes regulate activities that fall into an intermediate zone on the spectrum of economic and noneconomic activity. When reviewing the constitutionality of such legislation, the Court should look beyond the mere regulated activity and consider the broad economic purpose of that activity. Adopting this approach will enable the Court to consider the important national interests at stake in environmental regulation. Moreover, this broad view of the activities regulated by environmental statutes comports with the Commerce Clause scheme the Court developed in *Lopez* and *Morrison*, while remaining faithful to the important Commerce Clause precedent embodied in *Hodel*.

The Court will likely continue to consider whether a federal statute infringes on an area of traditional state concern in its analysis, even if it adopts a broad view of the economic/noneconomic inquiry. That factor should not hinder federal environmental legislation, however, as natural resource protection implicates national concerns that necessarily extend across state lines.

Congress should be restrained in its assertion of the commerce power, as the improper exercise of that power may upset the balance between federal and state authority

245. *See* United States v. Riverside Bayview Homes, 474 U.S. 121, 131 (1985) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

contemplated by our federalist system of government. The Supreme Court must similarly be circumspect in its review of Congress' exercise of the commerce power. The Court should hesitate to dismantle important federal regulatory schemes on the basis of an unduly narrow distinction between economic and noneconomic activity. Like all of the interpretive devices used by the Court over the years in its effort to define the scope of the Commerce Clause, the economic/noneconomic distinction is a judicially-created concept. While the distinction is an acceptable interpretive tool, it should not be construed so narrowly as to undermine its utility. Instead, the Court should recognize the need for flexibility in the application of the economic/noneconomic distinction so as to preserve federal regulatory authority in areas properly, and necessarily, controlled by the federal government.