

3-1-2006

Federal Wetland Jurisdiction and the Power To Regulate Commerce: Searching for the Nexus in Gerke Excavating

Joshua L. Lee

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Commercial Law Commons](#), and the [Environmental Law Commons](#)

Recommended Citation

Joshua L. Lee, *Federal Wetland Jurisdiction and the Power To Regulate Commerce: Searching for the Nexus in Gerke Excavating*, 2006 BYU L. Rev. 263 (2006).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2006/iss1/6>

This Note is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Federal Wetland Jurisdiction and the Power To Regulate Commerce: Searching for the Nexus in *Gerke Excavating*

I. INTRODUCTION

Courts reviewing the constitutionality of federal wetland regulation have an elephant in the living room. While congressional regulation of intrastate wetlands may be indispensable to the preservation of our nation's environmental well-being, the basis for such power is a very complicated issue. Courts have upheld such regulations as a valid exercise of Congress's Commerce Clause power¹ but have failed to conduct a thorough examination of the constitutionality of these regulations in light of more recent Commerce Clause decisions.² The Supreme Court has generally declined to confront the issue,³ though it may in two cases for which it has granted certiorari in the 2005–2006 term: *Carabell v. United States Army Corps of Engineers*⁴ and *United States v. Rapanos*.⁵

In *United States v. Gerke Excavating, Inc.*,⁶ Judge Posner of the Seventh Circuit wrote a strikingly brief opinion that is exemplary of the heuristic reasoning courts use in reviewing the validity of federal wetland

1. See John C. Eastman, *A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*, 2004 CATO SUP. CT. REV. 469.

2. The three major Commerce Clause cases most recently decided by the Supreme Court are *Gonzales v. Raich*, 125 S. Ct. 2195 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995).

3. See *United States v. Rapanos*, 376 F.3d 629, 635 (6th Cir. 2004) (“Unfortunately, the two leading Supreme Court cases on the reach of the CWA have done little to clear the muddied waters of CWA jurisdiction.”); Eastman, *supra* note 1; Raymond Takashi Swenson, *Continuing Chaos at the Corps: The Turbulent State of Clean Water Act Jurisdiction*, 47 ADVOC. 15, 16 (2004). The last Supreme Court case to scrutinize federal wetland regulation did not confront the more difficult issue of whether the Constitution authorizes federal regulation of intrastate wetlands with some hydrological connection to waters that are navigable-in-fact. The case involved the narrower issue of the “migratory bird rule,” which was a regulation promulgated by the United States Army Corps of Engineers that asserted federal jurisdiction over *isolated*, intrastate wetlands solely on the basis of occasional occupation by migratory birds. See *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); see also discussion *infra* Part II.B.3.

4. 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005).

5. 376 F.3d 629, *cert. granted*, 126 S. Ct. 414 (2005).

6. 412 F.3d 804 (7th Cir. 2005).

regulation. In this case, the Seventh Circuit upheld the constitutionality of the Federal Clean Water Act⁷ as applied to intrastate wetlands with a very tenuous connection to any navigable interstate waters.⁸

This Note argues that in upholding the Clean Water Act, the court in *Gerke* arrived at the correct holding, albeit with an inadequate analysis. More specifically, this Note argues that under *Gonzales*, *Morrison*, and *Lopez*,⁹ federal wetland regulation does not cleanly fit into any of the Commerce Clause's three delineated categories of permissible regulation—channels of commerce, instrumentalities or things in commerce, or activities that substantially affect interstate commerce¹⁰—and, therefore, cannot be upheld solely on the basis of the commerce power. Instead, federal wetland regulation can survive modern Commerce Clause scrutiny only under an alternative, or “at least more nuanced,” conception of the commerce power that incorporates the Necessary and Proper Clause. Justice Scalia enunciated such a conception of the commerce power in his concurrence to the Court's most recent Commerce Clause decision, *Gonzales v. Raich*.¹¹

This more nuanced conception of the commerce power recognizes that federal regulation of intrastate wetlands is not legitimate with the Commerce Clause as its only basis. As previously stated, wetland regulation does not fit into the three categories of activities or things that Congress may regulate under the Commerce Clause. However, the enabling power of the Necessary and Proper Clause allows Congress to regulate intrastate wetlands as an essential component of the broader federal regulation of interstate waters. Justice Scalia's conception of the interplay between the Necessary and Proper Clause and the Commerce Clause suggests that Congress could regulate noneconomic activity that substantially affects interstate commerce where that noneconomic activity falls within a broader regulatory scheme of economic activity.¹² This Note proposes that, by analogy, the Necessary and Proper Clause

7. Federal Water Pollution Control (Clean Water) Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1387 (2000)).

8. See discussion *infra* Parts III, IV.A.

9. *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005); *United States v. Morrison*, 529 U.S. 598, 608–09 (2000); *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); see discussion *infra* Part II.A.6.

10. *Lopez*, 514 U.S. at 58–59.

11. *Gonzales*, 125 S. Ct. at 2215 (Scalia, J., concurring); see discussion *infra* Part IV.B.

12. *Gonzales*, 125 S. Ct. at 2215 (Scalia, J., concurring).

empowers Congress to regulate intrastate wetlands as part of its broader scheme of regulating interstate waters as channels of commerce.

Part II of this Note first examines the development of Commerce Clause jurisprudence, giving a detailed explanation of where it stands today and a brief survey of how it got there. Part II briefly explains what wetlands are and the history of their regulation. Part III summarizes the facts and the holding of the principal case, *United States v. Gerke Excavating, Inc.* Part IV highlights the analysis missed by the principal case and how federal wetland regulation could be legitimately justified under Justice Scalia's conception of the Commerce Clause as it relates to the Necessary and Proper Clause. Part V gives a brief conclusion.

II. BACKGROUND

A. *The Commerce Clause*

This Section will briefly survey the history of the Commerce Clause beginning from the first major Supreme Court cases, as this history is an integral part of how the Court currently interprets the scope of this provision.

1. *The Marshall period*

That the United States government is one of limited and enumerated powers is a firmly rooted principle of American constitutional law.¹³ Among Congress's constitutional grants of authority is the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁴ The first major exercise of federal

13. See U.S. CONST. art. I, § 8; *Morrison*, 529 U.S. at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); *Lopez*, 514 U.S. at 551 (characterizing the concept of enumerated powers as "first principles" of the Constitution); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 33 (1824) ("[T]he constitution of the United States is one of limited and expressly delegated powers, which can only be exercised as granted, or in the cases enumerated."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 389 (2005).

14. U.S. CONST. art. I, § 8, cl. 3; see also, *Gonzalez*, 125 S. Ct. at 2205 ("The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation."); GERALD GUNTHER, *CONSTITUTIONAL LAW* 93 (12th ed. 1991) (explaining that the commerce power was "designed to promote a national market and curb Balkanization of the economy").

commerce power came without controversy in 1787 when Congress passed the Interstate Commerce Act.¹⁵ After the 1787 Act, nearly thirty years passed before the Supreme Court first construed Congress's commerce power¹⁶ in *Gibbons v. Ogden*.¹⁷ Chief Justice Marshall's seminal opinion established that this power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."¹⁸ Despite this broad characterization, Marshall made clear that the power "may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated."¹⁹ Significantly, *Gibbons* established that the Commerce Clause grants Congress the authority to regulate channels of commerce.²⁰

Despite Marshall's vigorous characterization of federal power to regulate channels of commerce, he later refused to strike down a Delaware statute that authorized the construction of a dam that obstructed a navigable creek.²¹ Marshall suggested that federal authority over navigable waters is not absolute in the sense that a state could incidentally regulate commerce so long as the regulation was not repugnant to the commerce power.²² Although this opinion focused on

15. 24 Stat. 379; see *Wickard v. Filburn*, 317 U.S. 111, 121 (1942).

16. See *Lopez*, 514 U.S. at 553; PAUL R. BENSON, JR., *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970*, at 9 (1970).

17. 22 U.S. (9 Wheat.) 1.

18. *Id.* at 196.

19. *Id.* at 194-95. Chief Justice Marshall also stated, "It is not intended to say that these words comprehend that commerce, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id.* at 194.

20. *Id.* at 197 ("The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'" (quoting U.S. CONST. art. I, § 8)). Similarly, the concurring opinion stated, "When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence." *Id.* at 229 (Johnson, J., concurring).

21. *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). The state statute was sustained "even though the dam obstructed navigation of the creek by a vessel sailing under a federal coasting license identical to that held by *Gibbons*." BENSON, *supra* note 16, at 25. Chief Justice Marshall stated,

It cannot be urged that the power to regulate commerce can interfere with the rights of the states over the property within their boundaries. While the waters of the United States belong to the whole people of the nation, this creek continued subject to the power of the state in whose territory it rises.

Black-Bird Creek, 27 U.S. (2 Pet.) at 249.

22. *Black-Bird Creek*, 27 U.S. (2 Pet.) at 251-52.

the “dormant” Commerce Clause²³ rather than on Congress’s affirmative commerce power, it casts some doubt on any interpretation of *Gibbons* as a *carte blanche* to Congress regarding its regulatory power over channels of commerce.

2. *The post-Marshall antebellum period*

Most early Commerce Clause disputes after *Gibbons* focused not on the limits of federal commerce power but rather on the validity of “discriminatory state legislation”—legislation that restricts or burdens interstate commerce, against the backdrop of this broad national power.²⁴ Between 1837 and 1852, under the direction of Chief Justice Taney, “[t]he Court . . . fell into what may best be described as a state of confusion regarding . . . the commerce power.”²⁵ Following this so-called “state of confusion” and focus on the *nature* of the commerce power, the Court’s attention turned to the *subjects* of that power.²⁶ In *Cooley v. Board of Wardens*, the Court established a compromise that gave to Congress exclusive authority to regulate commerce as to subjects of a national concern and to states the limited authority to regulate local matters, even if they had an effect on interstate commerce.²⁷ But during

23. Essentially, the “dormant” commerce power is the idea that the Commerce Clause itself imposes a restriction on the states’ power to regulate commerce, giving the federal government virtually exclusive jurisdiction. Professor Sunstein explains, “The Commerce Clause is both an authorization to Congress and, more controversially, a self-executing prohibition on certain state actions burdening interstate commerce.” Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1705 (1984). Exactly what the scope of the “dormant” Commerce Clause is and what role it should play has been the subject of an ongoing and controversial debate since the days of Chief Justice Marshall. See, e.g., Julian N. Eule, *Laying the Dormant Commerce Clause To Rest*, 91 YALE L.J. 425 (1982).

24. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005); *United States v. Lopez*, 514 U.S. 549, 553 (1995); *Wickard v. Filburn*, 317 U.S. 111, 121 (1942); Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 DUKE ENVTL. L. & POL’Y F. 321, 326 (1997); J. Blanding Holman, IV, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 142 (1995).

25. BENSON, *supra* note 16, at 26 (referring to cases such as *Thurlow v. Commonwealth (The License Cases)*, 46 U.S. (5 How.) 504 (1847), where “the justices were badly divided in their reasoning, and six of them wrote nine different opinions”).

26. BENSON, *supra* note 16, at 27. “[W]hen the nature of a power like this is spoken of . . . it must be intended to refer to the *subjects* of that power, and to say they are of such a nature as to require exclusive legislation by Congress.” *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (emphasis added).

27. *Cooley*, 53 U.S. (12 How.) at 319; see also BENSON, *supra* note 16, at 35.

most of the second half of the nineteenth century, the Court had scant occasion to examine the *scope* of Congress's commerce power.²⁸

3. Reconstruction and a dramatic shift

In the decades leading up to the turn of the century, laissez-faire economics had gradually prompted another shift in jurisprudence that caused the Court to impose stifling limits on commerce power. To achieve this end, the Court often applied formalistic distinctions²⁹ such as distinguishing commerce from manufacturing,³⁰ or direct effects from indirect effects on interstate commerce.³¹ Then, in 1937, the Supreme Court suddenly withdrew from its activist role in reviewing congressional authority.³² This marked the beginning of a long period during which the commerce power grew into a powerful legislative force with firm approbation from the Court.³³

28. See Matthew L. Pirmot, Note, *United States v. Wilson: Did Interstate General Substantially Affect Interstate Commerce?*, 77 N.C. L. REV. 361, 377 (1998) ("Until the late nineteenth century, the Court remained relatively silent with respect to the dimensions of Congress's power under the Commerce Clause, in part because the controversy over slavery prevented consensus in exercising the power.").

29. DONALD L. DOERNBERG, *SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE* 160–61 (2005); Logan Everett Sawyer, III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to International Shoe*, 10 GEO. MASON L. REV. 59, 64 (2001) ("Clear examples of formal jurisprudence are *Lochner*-era Commerce Clause cases."). The principle behind the decisions of this period has been described as the concept of "dual federalism," whereby the federal government and the states were seen as coequal sovereigns with mutually exclusive powers that could not overlap, the Tenth Amendment representing an affirmative limit on the power of Congress. BENSON, *supra* note 16, at 59–60; DOERNBERG, *supra* at 160.

30. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936); *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) ("Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."); *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895).

31. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Adair v. United States*, 208 U.S. 161, 178 (1908) (requiring "some real or substantial relation to or connection" to commerce).

32. See BENSON, *supra* note 16, at 73–75. This change is generally thought to have been precipitated in part by President Franklin D. Roosevelt who, in anticipating problems with New Deal legislation, proposed a "court-packing plan," whereby he could appoint six new justices to the Court. *Id.*; see also Holman, *supra* note 24, at 142–43; David W. Scopp, *Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court's Web of Confusion Traps More Than the Fly*, 39 U.S.F. L. REV. 789, 790 (2005).

33. See DOERNBERG, *supra* note 29, at 163; Adler, *supra* note 13, at 390 ("For most of the latter half of the twentieth century, the notion that there were justiciable limits on the scope of Congress's Commerce Clause power was a dead letter."); Sylvia Law, *Families and Federalism*, 44 WASH. U. J.L. & POL'Y 175, 227 (2000) ("From 1937 until 1995, the Court never struck down an act of Congress for exceeding its powers under the Commerce Clause."); Michael P. Van Alstine, *The*

4. *The New Deal*

This expansion of commerce power began with abandonment of the formalistic distinctions the Court had previously applied to limit congressional commerce power.³⁴ The Court revealed its new policy of judicial deference in three major cases: *NLRB v. Jones & Laughlin Steel Co.*,³⁵ *United States v. Darby*,³⁶ and *Wickard v. Filburn*.³⁷ Significantly, *Jones & Laughlin Steel* established that Congress has the power to regulate intrastate activities that “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.”³⁸ In *Jones & Laughlin Steel*, the Court “departed from the distinction between ‘direct’ and ‘indirect’ effects”³⁹ and held that although a steel company’s conduct might only affect interstate labor relations “indirect[ly] or remote[ly],” the industry as a whole would certainly have a significant enough impact on interstate commerce to bring the conduct within the purview of congressional authority.⁴⁰ This holding formed the

Costs of Legal Change, 49 UCLA L. REV. 789, 807 n.88 (2002) (“For a prolonged period (from the end of the *Lochner* era until quite recently), the possibility of substantive limits on Congress’s Commerce Clause power was viewed as little more than theoretical.”).

For contemporary views of pre-1995 limitations on the Commerce Clause, see *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas, J., concurring) (“When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words.”); GUNTHER, *supra* note 14, at 93 (“After nearly 200 years of government under the Constitution, there are very few judicially enforced checks on the commerce power.”); BERNARD SCHWARTZ, *CONSTITUTIONAL LAW: A TEXTBOOK* 122 (2d ed. 1979) (“A question that naturally arises, to one familiar with the recent decisions, is that of what constitutional limitations, if any, still remain upon the commerce power.”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 297 (2d ed. 1988) (“The Supreme Court has in recent years largely abandoned any effort to articulate and enforce *internal* limits on congressional power—limits inherent in the grants of power themselves.”); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387 (1987) (“[T]oo much water has passed over the dam for there to be a candid judicial reexamination of the Commerce Clause that looks only to first principles.”).

34. See *supra* notes 29–31 and accompanying text.

35. 301 U.S. 1 (1937).

36. 312 U.S. 100 (1941).

37. 317 U.S. 111 (1941).

38. 301 U.S. at 37.

39. *United States v. Lopez*, 514 U.S. 549, 555 (1995) (citing *Jones & Laughlin Steel*, 301 U.S. at 36–38).

40. *Jones & Laughlin Steel*, 301 U.S. at 41–43. The Court stated,

We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities

basis of what is now known as the “substantial effects” test.⁴¹ Though *Jones & Laughlin Steel* opened the floodgates for broad federal commerce power, the Court expressed an important caveat that Rehnquist-era Supreme Court Justices would later emphasize:

[T]he scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.⁴²

Following *Jones & Laughlin Steel*, the Court in *United States v. Darby* “recognized the power of Congress . . . to declare that an entire class of activities affects commerce.”⁴³ This principle would allow Congress to regulate local activities as long as they exerted an effect on interstate commerce when viewed as a class, and it also formed the basis for the expansive rule articulated in *Wickard v. Filburn*.⁴⁴

Wickard, decided the same year as *Darby*, set out a holding that has been referred to as the “high water mark” in federal commerce power.⁴⁵ This case involved a wheat farmer who argued that certain amendments⁴⁶ to the Agricultural Adjustment Act of 1938⁴⁷ were unconstitutional as applied to him because the Act extended federal authority to regulate wheat that was grown entirely for the purposes of

do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern.

Id. at 41.

41. *Lopez*, 514 U.S. at 558–59. Essentially, the “substantial effects” test puts an activity within the scope of Commerce Clause regulation if that activity exerts a substantial effect on interstate commerce. For further explanation, see *infra* Part II.A.6.b.

42. 301 U.S. at 37, cited in *Gonzales v. Raich*, 125 S. Ct. 2195, 2216 (Scalia, J., concurring); *United States v. Morrison*, 529 U.S. 598, 608 (2000); *Lopez*, 514 U.S. at 557; *id.* at 585 (Thomas, J., concurring); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 309 (1981). Similar to this language in *Jones & Laughlin Steel*, Justice Cardozo had previously noted that “[t]here is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

43. *Maryland v. Wirtz*, 392 U.S. 183, 192 (1968) (citing *United States v. Darby*, 312 U.S. 100, 120–21 (1941)).

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

45. DOERNBERG, *supra* note 29, at 162; see also *Lopez*, 514 U.S. at 560 (characterizing *Wickard* as “the most far reaching example of Commerce Clause authority over intrastate activity”).

46. 55 Stat. 203.

47. 52 Stat. 31 (current version at 7 U.S.C. §§ 1281–1521 (2000)).

his own consumption.⁴⁸ In upholding the Act, the Court introduced what has been called the “aggregation principle,”⁴⁹ which allows Congress to regulate a class of activities that have little or no effect on interstate commerce individually, but which exert a substantial effect on commerce in the aggregate.⁵⁰ After *Wickard*, the Court allowed Congress to expand federal control into areas such as civil rights,⁵¹ criminal law,⁵² and environmental law.⁵³

In just 200 years, the scope of the Commerce Clause had evolved from Chief Justice Marshall’s healthy ox, to a caged little pet, to a monstrous and uncontrollable beast. This set the stage for a surprising return to judicial scrutiny of Commerce Clause legislation in *United States v. Lopez*.⁵⁴ This evolution also set a precarious stage for the Court’s wrestle with the principle of dual sovereignty.

5. Federalism

Despite the Court’s refusal to impose internal limits on the commerce power (in other words, limits inherent within the Commerce Clause),⁵⁵ it eventually found external limits: namely, the Tenth Amendment. In *National League of Cities v. Usery*, decided in 1976,⁵⁶ the Court held that “the Tenth Amendment acted as a substantive limit on the commerce power.”⁵⁷ This holding imposed an external restriction on

48. *Wickard*, 317 U.S. at 118.

49. *Lopez*, 514 U.S. at 600 (Thomas, J., concurring); Scopp, *supra* note 32, at 798.

50. *Wickard*, 317 U.S. at 127–28 (“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”); *see also* Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since Lopez: A Survey*, 32 CAP. U. L. REV. 671, 679–80 (2004); Pirnot, *supra* note 28, at 379–80; Warner, *supra* note 24, at 328–29.

51. For cases upholding Title II of the Civil Rights Act of 1964 under the commerce power, *see Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). For cases upholding congressional prohibition of discrimination in public transportation under the commerce power, *see Boynton v. Virginia*, 364 U.S. 454 (1960); *Henderson v. United States*, 339 U.S. 816 (1950); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Mitchell v. United States*, 313 U.S. 80 (1941).

52. *See Perez v. United States*, 402 U.S. 146 (1971).

53. *See discussion infra* Part II.B.

54. 514 U.S. 549 (1995); *see infra* Part II.A.6.

55. *See TRIBE*, *supra* note 33, at 297.

56. 426 U.S. 833 (1976).

57. Warner, *supra* note 24, at 331. In *National League of Cities*, the Court affirmed that “an express declaration of this limitation [on the commerce power] is found in the Tenth Amendment.” 426 U.S. at 842.

congressional commerce power based on the principle of dual sovereignty—a principle external to the Commerce Clause itself. The Court proved to be somewhat schizophrenic regarding this external limit on the commerce power when, in *Garcia v. San Antonio Metropolitan Transit Authority*,⁵⁸ it overruled *National League of Cities* not long after it was decided. In 1992, the Court returned to enforcing external, state-sovereignty limits on the commerce power but did not expressly overrule *Garcia*.⁵⁹ While it is uncertain how much weight federalism still carries in the Commerce Clause arena, it certainly has not been forgotten.⁶⁰

6. 1995–present: *Lopez*, *Morrison*, and *Gonzales*

a. Facts and background. The Court's abstinence from enforcing internal limits and ambivalence in enforcing external limits created a state such that its 1995 decision in *United States v. Lopez*⁶¹ shocked the legal community.⁶² For the first time in more than half a century,⁶³ the

58. 469 U.S. 528, 531, 556 (1985) (stating that “the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action”). *National League of Cities*, itself, overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), a relatively recent precedent. See *Nat'l League of Cities*, 426 U.S. at 853–54.

59. *New York v. United States*, 505 U.S. 144, 149 (1992). Justice O'Connor based the limitation on the “spirit of the Tenth Amendment.” *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting). In *New York*, the Court explained this so-called “spirit” of the Tenth Amendment:

The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment *confirms* that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

505 U.S. at 156–57 (emphasis added).

60. See *United States v. Lopez*, 514 U.S. 549, 568–84 (1995) (Kennedy, J., concurring) (arguing that the Gun-Free School Zones Act should be struck down on considerations of federalism rather than on any inherent limits on the commerce power). For a thorough discussion of the ongoing debate as to whether the Tenth Amendment is a substantive limit on federal power, or merely a truism, see John R. Vile, *Truism, Tautology or Vital Principle?: The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445 (1996).

61. 514 U.S. 549 (1995).

62. See, e.g., Cary B. Davis, *The Commerce Clause: Border Crossing + Church Burning = Interstate Commerce (A Formula for Federalizing Common Law State Crimes)*: *United States v. Ballinger*, 57 FLA. L. REV. 975, 976–77 (2005); Eastman, *supra* note 1, at 471; E. Thomas Sullivan, *Judicial Sovereignty: The Legacy of the Rehnquist Court*, 20 CONST. COMMENT. 171 (2003) (reviewing JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002)); Paul Tzur, Comment, *I Know Economic Activity When I See Economic Activity: An Operational Overhaul of the Measure by Which Federal Criminal Conduct Is Deemed “Economic,”* 94 J. CRIM. L. & CRIMINOLOGY 1105, 1105–06 (2004).

63. See Holman, *supra* note 24, at 139; Warner, *supra* note 24, at 323.

Court declared that Congress had exceeded its power to legislate under the Commerce Clause by enacting the Gun-Free School Zones Act.⁶⁴ Some commentators questioned the shelf-life of *Lopez*,⁶⁵ but, five years later in *United States v. Morrison*,⁶⁶ the Court again declared that a statute overreached Congress's commerce power and affirmed its willingness to enforce limits on that power. However, a more recent decision, *Gonzales v. Raich*,⁶⁷ casts doubt on the viability of the *Lopez* and *Morrison* decisions, leaving this area of law in a state of uncertainty.⁶⁸

At issue in *Lopez* was section 922(q) of the Gun-Free School Zones Act of 1990,⁶⁹ which subjected to federal criminal prosecution "any individual [who] knowingly . . . possess[ed] a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."⁷⁰ The Court found that the Act exceeded Congress's authority to regulate commerce because it was "a criminal statute that by its terms [had] nothing to do with 'commerce' or any sort of economic enterprise."⁷¹

In *Morrison*, the challenged legislation was a provision of the Violence Against Women Act of 1994, which gave victims of gender-motivated violence a civil remedy in federal court.⁷² The Court found the statute beyond the purview of the Commerce Clause because "[t]he

64. Pub. L. No. 101-647, 104 Stat. 4844 (1990) (formerly codified at 18 U.S.C. § 921-22).

65. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 141 (1995) ("[T]he impact of the [*Lopez*] decision on broader questions of federal power will be limited."); Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 693 (1996) ("As a practical matter, *Lopez* has deprived Congress of very little power.").

66. 529 U.S. 598 (2000); see also Lilly Santaniello, *Commerce Clause Challenges to the Endangered Species Act's Regulation of Intrastate Species on Private Land*, 10 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 39, 43 (2003).

67. 125 S. Ct. 2195 (2005).

68. See Craig M. Bradley, *What Ever Happened to Federalism?*, 41 TRIAL 52 (2005) ("[T]he Court strangled in its infancy the so-called federalism revolution that began a mere 10 years ago."); Pamela A. MacLean, *In Focus: Circuit Court Review: Circuits Split on Wetlands Control*, NAT'L L.J., Aug. 15, 2005, at S1. Doubts cast by *Gonzales* are accentuated by the fact that it was a six-to-three decision, whereas *Lopez* and *Morrison* were more sharply divided five-to-four decisions. A fact that further weakens the precedent value of *Lopez* and *Morrison* is that two of the three justices in favor of declaring the Controlled Substances Act (in *Gonzales*) as beyond the purview of the commerce power, will no longer be on the Court when future Commerce Clause cases are decided.

69. 18 U.S.C. § 922(q)(1)(A) (1994), *invalidated by* *United States v. Lopez*, 514 U.S. 549 (1995), *amended by* Pub. L. No. 104-208, 110 Stat. 3009, 3009-369 to 3009-370 (1996).

70. 18 U.S.C. § 922(q)(1)(A) (1994).

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

72. 42 U.S.C. § 13981 (1994), *invalidated by* *United States v. Morrison*, 529 U.S. 598 (2000).

regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”⁷³

Finally, in *Gonzales v. Raich*, the Court addressed a challenge to the Controlled Substances Act, which imposed federal criminal penalties on anyone caught in the unauthorized manufacturing, dispensing, distributing, or possessing of a controlled substance.⁷⁴ Contrary to what may have been expected after *Lopez* and *Morrison*, the Court rejected the constitutional challenges to the Act.⁷⁵ The Court stated that “case law firmly establishes Congress’s power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”⁷⁶

While these three cases present a doctrine that can be difficult to apply consistently,⁷⁷ the doctrine itself can be summarized with some clarity. As a preliminary matter, in each of the three cases the Court explained that the activities subject to congressional regulation under the Commerce Clause fall into three categories: (1) channels of interstate commerce; (2) instrumentalities, persons, or things in interstate commerce; and (3) activities that substantially affect or have a substantial relation to interstate commerce.⁷⁸ Facts and circumstances before the Court in each case afforded it an opportunity to examine only the third and most controversial category: the “substantial effects test.”⁷⁹

b. The substantial effects test. The Court emphasized four factors to examine in determining whether an activity could be regulated under this third category.⁸⁰ First, the Court emphasized that for an activity to

73. *Morrison*, 529 U.S. at 618.

74. 21 U.S.C. §§ 841(a)(1), 844(a) (2000).

75. *Gonzales v. Raich*, 125 S. Ct. 2195, 2215 (2005).

76. *Id.* at 2205.

77. Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 616 (2001).

78. *Gonzales*, 125 S. Ct. at 2205; *Morrison*, 529 U.S. at 608–09; *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

79. *Gonzales*, 125 S. Ct. at 2205; *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 559.

80. *Gonzales*, 125 S. Ct. at 2205–15; *Morrison*, 529 U.S. at 609–16; *Lopez*, 514 U.S. at 559–68. Regarding the “substantial effects” test, Justice Scalia’s concurring opinion in *Gonzalez* noted that “the power . . . cannot come from the Commerce Clause alone. . . . Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.” *Gonzales*, 125 S. Ct. at 2216 (Scalia, J., concurring) (citations omitted); *see also id.*

“substantially affect” interstate commerce, the activity should be economic in nature.⁸¹ The Court made a broad declaration that “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”⁸² In an attempt to refine this test, the *Gonzales* majority defined “economic” as “the production, distribution, and consumption of commodities.”⁸³ Applying the aggregation principle articulated in *Wickard*,⁸⁴ the *Gonzales* majority stated that in the case of inherently economic activity, the Court “need not determine whether [the] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”⁸⁵ However, while the fact that

at 2221 (O’Connor, J., dissenting) (citing her prior dissenting opinion in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585–86 (1985)); *id.* at 2230–31 (Thomas, J., dissenting).

In *Gonzales*, the majority began its opinion by stating that “[t]he question presented in this case is whether the [Necessary and Proper Clause] includes the power to prohibit the local cultivation and use of marijuana in compliance with California law,” but did not explicitly address the matter further. *Id.* at 2198–99. Justice Scalia argued that this fact rendered the majority’s “substantial effects” category “*incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce.” *Id.* at 2216 (Scalia, J., concurring). Justice O’Connor did not explicitly discuss how this affected her analysis, and Justice Thomas suggested a resurrection of Chief Justice Marshall’s view of what is necessary and proper: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Id.* at 2230–31 (Thomas, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819)). The implications of the Necessary and Proper Clause on the commerce power are discussed in detail in Part IV.B.

81. *Lopez*, 514 U.S. at 559–61 (holding that because the Gun Free School Zones Act regulated noneconomic activity, it could not be subject to *Wickard*’s aggregation principle); *see also Gonzales*, 125 S. Ct. at 2205–06, 2211 (upholding the Controlled Substances Act because “[l]ike the farmer in *Wickard*, respondents [were] cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market . . . the activities regulated by the CSA are quintessentially economic”); *Morrison*, 529 U.S. at 610–11, 613 (striking the civil remedy provision of the Violence Against Women Act because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity”).

82. *Lopez*, 514 U.S. at 560; *see also Gonzales*, 125 S. Ct. at 2210; *id.* at 2216 (Scalia, J., concurring); *Morrison*, 529 U.S. at 610.

83. *Gonzales*, 125 S. Ct. at 2211 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). Justice O’Connor described the majority’s explanation as a “breathhtaking” definition that “threatens to sweep all of productive human activity into federal regulatory reach.” *Id.* at 2224 (O’Connor, J., dissenting).

84. *See supra* notes 44–50 and accompanying text.

85. *Gonzales*, 125 S. Ct. at 2208 (citations omitted). It bears emphasis that in determining whether an activity substantially affects interstate commerce, the aggregation principle is only applicable to *economic* activities. *See Lopez*, 514 U.S. at 560–61; Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 35 (1999).

an activity is economic is sufficient under the test, it apparently is not necessary that it be an economic activity if the *effect* of the activity is economic in nature: “[E]ven if [the] 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.”⁸⁶

A point mentioned by the *Gonzales* majority, and heavily emphasized by Justice Scalia in his concurring opinion, is that an activity need not be economic in nature if it is “merely one of many ‘essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’”⁸⁷ This means that regulation of a noneconomic activity can be sustained under the substantial effects test if it is a necessary component in a larger scheme of economic regulation.⁸⁸

To summarize, in order for federal legislation to pass muster as a valid exercise of the commerce power under the substantial effects test, it must regulate an activity that: (1) is economic in nature, (2) has a significant economic impact on interstate commerce, *or* (3) is regulated as an “essential” component of an overall scheme of economic regulation that is itself valid.

In determining whether the legislation is valid, the Court considers three other factors. First, the Court looks for a “jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce.”⁸⁹ Essentially, this is a technical aspect of legislation that limits the triggering of federal jurisdiction to circumstances that involve interstate commerce. For example, committing federal securities fraud requires the use of a “manipulative or deceptive device” that is employed using “any means or instrumentality of *interstate commerce* or of the [U.S.] *mails*, or of any facility of any *national securities exchange*.”⁹⁰ The presence of a jurisdictional element

86. *Gonzales*, 125 S. Ct. at 2205–06 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

87. *Id.* at 2210, 2211 (quoting *Lopez*, 514 U.S. at 561); *id.* at 2217–20 (Scalia, J., concurring).

88. An illustration of this principle can be found in *Gonzales*, where Justice Scalia stated that “the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme. . . . Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market ‘could be undercut’ if those activities were excepted from its general scheme of regulation.” *Id.* at 2210, 2220 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561).

89. *Lopez*, 514 U.S. at 561–62; *see also Morrison*, 529 U.S. at 613.

90. Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78(j) (2000) (emphasis added).

is not dispositive under the substantial effects test but is, rather, one factor to consider. This factor weighed into the invalidation of the legislation in *Lopez* and *Morrison*,⁹¹ but the *Gonzales* majority did not mention it.

The third factor addressed by the Court is whether the regulation in question is supported by legislative findings of fact “regarding [the] effect [of the regulated activity] on interstate commerce.”⁹² The Court looks for direct evidence in the legislative history that the activity being regulated actually affects interstate commerce. As with the jurisdictional element, findings of fact are part of the analysis, but not necessary for the Court to uphold legislation.⁹³

Finally, the Court considers whether the activity’s connection to commerce is so tenuous that the Court “would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states.”⁹⁴ This factor examines the length and integrity of the causal chain between the regulated activity and the purported effects on interstate commerce. A weak connection weighs against the validity of the legislation.

To summarize, for legislation to be a valid exercise of the commerce power under the substantial effects test, it must have some connection to economic activity. If the economic connection can be established, other factors a court may consider include whether the legislation has a jurisdictional element, the existence and contents of congressional findings of fact, and the significance of the connection between the regulated activity and interstate commerce. While *Lopez*, *Morrison*, and

91. See *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561–63.

92. *Lopez*, 514 U.S. at 562; see also *Morrison*, 529 U.S. at 612, 614.

93. *Gonzales*, 125 S. Ct. at 2208 (“While congressional findings are certainly helpful . . . particularly when the connection to commerce is not self-evident . . . the absence of particularized findings does not call into question Congress’ authority to legislate.”); *Lopez*, 514 U.S. at 1631–32. In *Morrison*, the Court invalidated the statute at issue despite voluminous findings indicating that the regulated activity actually had a significant effect on interstate commerce, stating that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.” 529 U.S. at 614.

94. *Lopez*, 514 U.S. at 567. The example of attenuated reasoning cited by the Court was that “(1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce.” *Id.* at 565 (citing *id.* at 623 (Breyer, J., dissenting)); see also *Morrison*, 529 U.S. at 615–16 (“The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce.”).

Gonzales have articulated a fairly straightforward doctrine, the cases have not left a predictable guide for application of the doctrine.⁹⁵ Despite the difficulty in applying this doctrine, this Note concludes that the substantial effects test, at least without the support of the Necessary and Proper Clause, cannot sustain Congress's assertion of federal wetland jurisdiction.⁹⁶ This conclusion incorporates this principle as analogized from Justice Scalia's concurring opinion in *Gonzales*.

c. Justice Scalia's concurrence in Gonzales. While Justice Scalia agreed with the Court's holding in *Gonzales*, he had a slightly different, or "at least more nuanced," conception of why the holding was right.⁹⁷ In addition to the power "[t]o regulate Commerce,"⁹⁸ the Constitution vests Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."⁹⁹ This power is found in the Necessary and Proper Clause.

Justice Scalia found the legislation at issue to be within Congress's power by virtue of the interplay between the commerce power and the necessary and proper power.¹⁰⁰ He stated that the Necessary and Proper Clause allows Congress to regulate, with its commerce power, intrastate noneconomic activities that are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activit[ies] were regulated."¹⁰¹ Justice Scalia

95. See *Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (describing the test as a "rootless and malleable standard"); Alex Kreit, Comment, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787, 1825 (2003) ("[T]he current 'substantial effects' doctrine makes a clear analysis difficult.").

96. See discussion *infra* Part IV.

97. *Gonzales*, 125 S. Ct. at 2215 (Scalia, J., concurring).

98. U.S. CONST. art. I, § 8, cl. 3.

99. *Id.* art. I, § 8, cl. 18.

100. In *Lopez*, Justice Thomas also recognized the synergy created by the interplay of the two clauses, but characterized the utility of this interplay as being very limited. *United States v. Lopez*, 514 U.S. 549, 588 (1995) (Thomas, J., concurring) ("After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6.").

101. *Gonzales*, 125 S. Ct. at 2217 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561). The *Gonzales* majority articulated a similar principle but did not explicitly tie it to the Necessary and Proper Clause. See *id.* at 2205–15. This principle was also recognized by the Fourth Circuit in *United States v. Deaton*, though the court did not explicitly invoke the Necessary and Proper Clause to achieve its result. 332 F.3d 698, 707 (4th Cir. 2003) ("The power over navigable waters also

explained that this principle “referred to those cases permitting the regulation of intrastate activities ‘which in a substantial way interfere with or obstruct the exercise of the granted power.’”¹⁰² For example, in *Gonzales* Justice Scalia agreed with the majority that Congress could prohibit intrastate marijuana possession. However, Justice Scalia argued that congressional power to regulate intrastate marijuana possession arose not by virtue of the commerce power alone, but because the regulation was essential to the success of the overall federal scheme regulating controlled substances.¹⁰³ Justice Scalia further explained that for a court reviewing this kind of legislation, “[t]he relevant question is simply whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.”¹⁰⁴ This Note will explain how federal wetland regulation can be properly sustained under this application of the Necessary and Proper Clause to the Commerce Clause.¹⁰⁵

B. Federal Wetlands Regulation

Before discussing the Commerce Clause as applied to federal wetland regulations, this Section will explain what wetlands are, briefly summarize the legislation that has affected wetlands, and discuss the current legislation that makes wetland regulation controversial.

1. The meaning of “wetland”

Wetlands elicit very different images from different people. Some see wetlands as sacred ground, as places of hallowed sanctuary. Henry David Thoreau, the “patron saint of swamps,”¹⁰⁶ wrote, “If there were Druids whose temples were the oak groves, my temple is the swamp.”¹⁰⁷

carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters.”).

102. *Gonzales*, 125 S. Ct. at 2217 (Scalia, J., concurring) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

103. *Id.* at 2219 (“That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation.”).

104. *Id.* at 2217 (citing *United States v. Darby*, 312 U.S. 100, 121 (1941)).

105. See discussion *infra* Part IV.

106. RODNEY JAMES GIBLETT, *POSTMODERN WETLANDS: CULTURE, HISTORY, ECOLOGY* 229 (1996).

107. William L. Howarth, *Imagined Territory: The Writing of Wetlands*, 30 *NEW LITERARY HIST.* 509, 527 (1999). For some entertaining and romantic views on wetlands, see GIBLETT, *supra* note 106; BARBARA HURD, *STIRRING THE MUD: ON SWAMPS, BOGS, AND HUMAN IMAGINATION* (2001).

Others may see wetlands as “places of darkness, disease and death, horror and the uncanny, melancholy and the monstrous,”¹⁰⁸ nothing more than “a hideaway for scoundrels, debtors, enchanted women . . . runaway slaves, and hermits.”¹⁰⁹ This apprehensive view of wetlands is dramatically reflected in Chief Justice Marshall’s statement about a creek: “It is one of those sluggish reptile streams, that do not run but creep, and which, wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes.”¹¹⁰ Personal views aside, wetlands are a vital component of our natural environment and ecosystems.¹¹¹

So just what is a wetland? It has been said that “[a] wetland is whatever a competent expert says it is,”¹¹² and that “the definition of wetlands [is] more a matter of politics than science,”¹¹³ which, for the purposes of this Note, it is. The agency charged with enforcing wetland regulations, the Army Corps of Engineers (“the Corps”), has defined wetlands as follows:

The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.¹¹⁴

108. GIBLETT, *supra* note 106, at xi.

109. HURD, *supra* note 107, at 46.

110. *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829).

111. Wetlands serve many functions: some wetlands store flood waters, some help to control erosion, and they all generally provide a unique habitat for certain plants and animals. Further, some recharge underground aquifers, some help remove pollutants from water, and they also provide many different types of recreation. *See United States v. Byrd*, 609 F.2d 1204, 1210–11 (7th Cir. 1979); 42 Fed. Reg. 37,128 (July 19, 1977); COMMITTEE ON MITIGATING WETLAND LOSSES ET AL., COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 27–34 (2001); PAUL D. CYLINDER, ET AL., WETLANDS REGULATION 2 (1995); S.M. HASLAM, UNDERSTANDING WETLANDS: FEN, BOG AND MARSH 22–41 (2003); JON KUSLER & TERESA OPHEIM, OUR NATIONAL WETLAND HERITAGE: A PROTECTION GUIDE 1–10 (2d ed. 1996); WILLIAM M. LEWIS, JR., WETLANDS EXPLAINED: WETLAND SCIENCE, POLICY, AND POLITICS IN AMERICA 41–64 (2001); Lee Evan Caplin, *Is Congress Protecting Our Water? The Controversy over Section 404, Federal Water Pollution Control Act Amendments of 1972*, 31 U. MIAMI L. REV. 445, 455–56 (1977); Holman, *supra* note 24, at 205–06; Stephen M. Johnson, *United States v. Lopez: A Missstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 71–73 (1996).

112. HASLAM, *supra* note 111, at 1.

113. LEWIS, *supra* note 111, at 26.

114. 33 C.F.R. § 328.3(8)(b) (2005).

263] *Federal Wetland Jurisdiction in Gerke Excavating*2. *Federal wetland legislation, historically*

Although humans have devised a number of ingenious ways to abuse and destroy the environment, the primary damage to wetlands has come directly from draining, filling, and converting wetlands to dry land¹¹⁵—euphemistically referred to as “reclamation.”¹¹⁶ Early American colonists quickly began draining wetlands with “small hand-dug ditches,” and this progressed during the country’s period of Westward expansion.¹¹⁷ In 1850 Congress passed the Swamp Land Act,¹¹⁸ which allowed the states to “reclaim the swamp and overflowed lands therein.”¹¹⁹ The federal government’s anti-wetland policy reached its high-water mark in the early 20th century when it, “in essence, provided free engineering services to farmers to drain wetlands” and “shared the cost of drainage projects.”¹²⁰ But eventually, the growing body of information on wetlands prompted a change in policy. The shift began in 1934 when Congress passed the Migratory Bird Hunting Stamp Act,¹²¹ which imposed a cost on hunting waterfowl and allocated some of the proceeds for acquiring wetlands to be set aside as “Waterfowl Production Areas.”¹²²

Before the colonists’ “reclamation” began, wetlands comprised about 225 million acres of United States territory.¹²³ Researchers currently estimate that total wetland acreage has been reduced by about fifty

115. J. Gardiner, *Pressures on Wetlands*, in WETLAND MANAGEMENT 47, 50–53 (R.A. Falconer & P. Goodwin eds., 1994).

116. See P.B. Williams, *From Reclamation to Restoration—Changing Perspectives in Wetland Management*, in WETLAND MANAGEMENT, *supra* note 115, at 1–3 (“It is perhaps in pursuit of an overriding rationalization that the advocates of resource exploitation succeeded in popularizing their activities as ‘reclaiming’ rather than ‘claiming,’ implying that all wetlands were formerly dry lands and that mankind was merely correcting nature’s mistake.”).

117. THOMAS E. DAHL & GREGORY J. ALLORD, NATIONAL WATER SUMMARY ON WETLAND RESOURCES, U.S. GEOLOGICAL SURVEY, HISTORY OF WETLANDS IN THE CONTERMINOUS UNITED STATES, <http://water.usgs.gov/nwsum/WSP2425/history.html> (last visited Feb. 1, 2006).

118. *Id.* The first Swamp Land Act was passed in 1849 and only applied to Louisiana. In 1850, the Swamp Land Act was made applicable to twelve other states. *Id.*

119. Act of Sept. 28, 1850, ch. 84, 9 Stat. 519.

120. DAHL & ALLORD, *supra* note 117.

121. Migratory Bird Hunting Stamp (Duck Stamp) Act, ch. 71, 48 Stat. 452 (1934) (codified at 16 U.S.C. §§ 718a–718j (2000)).

122. 16 U.S.C. § 718d(c).

123. KUSLER & OPHEIM, *supra* note 111, at 1; NATURAL RES. CONSERVATION SERV., U.S. DEP’T OF AGRIC., RCA ISSUE BRIEF #4, WETLANDS VALUES AND TRENDS (Nov. 1995), <http://www.nrcs.usda.gov/technical/land/pubs/ib4text.html#losses>.

percent.¹²⁴ The enormous loss of wetlands eventually prompted further reaction from the federal government to regulate in this area.¹²⁵ In 1972 Congress enacted the landmark Clean Water Act (“CWA”), which had the stated purpose to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹²⁶ Congress enacted this legislation pursuant to its power under the Commerce Clause.¹²⁷ This Act was a reflection of the public’s growing concern for wetlands. Wetlands eventually gained a very high priority on political agendas. The Bush (Sr.) and Clinton Administrations adopted and endorsed a national policy known as “no net loss,”¹²⁸ which refers to the idea that “wetlands lost in one location can be replaced by wetlands created at another location.”¹²⁹ Federal environmental protection generally has grown over the years such that currently it “arguably represents the most expansive assertion of federal authority.”¹³⁰

3. *The controversy*

Wetland regulations, specifically section 404 of the CWA,¹³¹ have created a controversy as to how far the federal government can extend its authority over non-navigable waters through the Commerce Clause. Commerce Clause jurisdiction over waters that are navigable-in-fact is

124. COMMITTEE ON MITIGATING WETLAND LOSSES, ET AL., *supra* note 107, at 1; WETLANDS VALUES AND TRENDS, *supra* note 123; *see also* United States v. Gerke Excavating, Inc., 412 F.3d 804, 806 (7th Cir. 2005) (“There are believed to be more than 100 million acres of wetlands in the lower 48 states.” (citation omitted)).

125. *See* KUSLER & OPHEIM, *supra* note 111, at 1–4. Notably, the federal government was not actively involved in any kind environmental protection before the late 1960s when it began enacting a number of environmental statutes. *See* Adler, *supra* note 13, at 381–82 (“[M]ost environmental concerns were addressed at the state and local level, if they were addressed at all.”). The latter half of the twentieth century witnessed a complete turnaround in United States environmental policy; “[b]etween the 1850s and 1970s, the federal government was intent on eliminating wetlands. Since then, it has been equally intent on preserving them.” LEWIS, *supra* note 111, at 3–4.

126. Federal Water Pollution Control (Clean Water) Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1387 (2000)).

127. *See* Adler, *supra* note 13, at 404 (“[W]hen the various environmental statutes were adopted, the underlying assumption was that the Commerce Clause ‘grants virtually carte blanche authority to Congress to legislate for environmental protection.’” (quoting Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 148 (2001))).

128. *See* KUSLER & OPHEIM, *supra* note 111, at 3–4.

129. LEWIS, *supra* note 111, at 16. For a sharp criticism of the inadequacy of the “no net loss” policy, *see id.* at 16–17.

130. *See* Adler, *supra* note 13, at 387.

131. CWA § 404, 33 U.S.C. § 1344 (2000).

uncontroversial and was established nearly two-hundred years ago.¹³² Section 404 of the CWA, which “prohibits the discharge of dredge or fill materials into ‘navigable waters’ without a permit,”¹³³ has raised the controversy as to how far federal jurisdiction extends to waters that are not navigable-in-fact.

“Navigable waters,” as used in the statute, is a term of art. What, exactly, constitutes these “navigable waters” over which Congress and the Army Corps of Engineers (“the Corps”)¹³⁴ claims jurisdiction is the center of the CWA’s controversy. The CWA cryptically defines “navigable waters” as “waters of the United States, including the territorial seas.”¹³⁵ Pursuant to administrative authority, the Corps enacted regulations defining “waters of the United States” to include “[w]etlands adjacent to” other waters listed in the section.¹³⁶ It further defines “adjacent” as “bordering, contiguous, or neighboring.”¹³⁷ Federal jurisdiction over directly adjacent wetlands was upheld by a unanimous Supreme Court in *United States v. Riverside Bayview Homes*,¹³⁸ but this was a decade before the Court’s return to a critical review of federal commerce power.

The Corps also enacted what became known as the “migratory bird rule,” which extended federal jurisdiction into intrastate waters that could “be used as habitat by birds protected by Migratory Bird Treaties . . . [or] by other migratory birds which cross state lines.”¹³⁹ The “migratory bird rule” effectively authorized federal regulation over non-navigable intrastate wetlands, including man-made ponds that certain birds happened to land in occasionally.¹⁴⁰

By the time the Court reviewed the “migratory bird rule” in *Solid Waste Agency of Northern Cook County v. United States Army Corps of*

132. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824); Matthew B. Baumgartner, Note, *SWANCC’s Clear Statement: A Delimitation of Congress’s Commerce Clause Authority To Regulate Water Pollution*, 103 MICH. L. REV. 2137, 2141 (2005).

133. Holman, *supra* note 24, at 165.

134. The Army Corps of Engineers is the federal agency charged with enforcing section 404 of the CWA. CWA § 404, 33 U.S.C. § 1344; see also Johnson, *supra* note 111, at 68.

135. CWA § 502(7), 33 U.S.C. § 1362(7).

136. 33 C.F.R. § 328.3(a)(1)–(7) (2005).

137. *Id.* § 328.3(c).

138. 474 U.S. 121, 139 (1985).

139. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (formerly codified at 33 C.F.R. § 328.3(a)(3) (1999)).

140. See *id.*

Engineers (“SWANCC”),¹⁴¹ Congress’s commerce power had been cast in a new light under the *Lopez* and *Morrison* decisions. In fact, the *SWANCC* opinion, like the *Lopez* and *Morrison* opinions, was delivered by Chief Justice Rehnquist with an identical five-to-four division.¹⁴² In *SWANCC*, the Court held that the “migratory bird rule” was not authorized by the CWA, suggesting that the provision went beyond the power granted by the Commerce Clause.¹⁴³ Although decided on a statutory basis, the *SWANCC* holding can be characterized as a constitutional ruling because, as explained by Judge Posner,

The arguments are interchangeable, since the only reason . . . to doubt the validity of the regulation is the principle that the meaning of a statute or a regulation can be stretched where that is necessary to avoid its being held unconstitutional. The idea here would be that the Corps of Engineers would prefer a bobtailed regulation to none if that is the choice forced on it by the Constitution.¹⁴⁴

The *SWANCC* Court suggested that in order for federal jurisdiction to exist over wetlands, there should be a “significant nexus between the wetlands and ‘navigable waters.’”¹⁴⁵ But because the Court did not draw a very bright line, it fostered a division among the lower courts as to where that line should be drawn on the continuum that ranges from wetlands directly adjacent to navigable waters, to wetlands with a much more distant or tenuous physical connection to navigable waters.¹⁴⁶ Most jurisdictions have given *SWANCC* a narrow reading that restricts

141. 531 U.S. 159 (2001).

142. In all three cases, Chief Justice Rehnquist was joined by Justices Scalia, Kennedy, O’Connor, and Thomas while Justices Stevens, Souter, Ginsburg and Breyer wrote or joined in dissenting opinions. *Gonzales v. Raich*, 125 S. Ct. 2195, 2195 (2005); *United States v. Morrison*, 529 U.S. 598, 598 (2000); *United States v. Lopez*, 514 U.S. 549, 549 (1995).

143. *SWANCC*, 531 U.S. at 174 (“We thus read the [CWA] as [not authorizing the ‘migratory bird rule’] to avoid the significant constitutional and federalism questions raised by [the Corps’] interpretation.”).

144. *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 806 (7th Cir. 2005); *see also SWANCC*, 531 U.S. at 173 (“[W]here 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.”).

145. *SWANCC*, 531 U.S. at 167; *see also Carabell v. U.S. Army Corps of Eng’rs*, 391 F.3d 704, 710 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005); *In re Needham*, 354 F.3d 340, 347 (5th Cir. 2003).

146. *See United States v. Adam Bros. Farming, Inc.*, 369 F. Supp. 2d 1180, 1183–84 (C.D. Cal. 2004); Adler, *supra* note 13, at 419; Maclean, *supra* note 68, at S1.

263] *Federal Wetland Jurisdiction in Gerke Excavating*

only federal regulation over *isolated* intrastate wetlands.¹⁴⁷ However, some courts, including the Fifth Circuit Court of Appeals, have interpreted the *SWANCC* opinion more broadly.¹⁴⁸

To summarize the state of the law at the time *Gerke Excavating* was decided, there are two main points. First, Commerce Clause jurisprudence had evolved to a point where regulation had to fall within at least one of three categories in order to be constitutionally valid: (1) channels of commerce; (2) instrumentalities, persons or things in commerce; or (3) activities that substantially affect commerce. Second, the extent of federal jurisdiction over wetlands had been called into question after the *Lopez* decision. The Court's *SWANCC* opinion resolved the issue of the "migratory bird rule," but left one very important question unanswered—specifically, just how substantial of a connection between regulated wetlands and interstate navigable waters is required for the federal government to sustain that regulation under the commerce power.

III. *UNITED STATES V. GERKE EXCAVATING, INC.*

Following prior Seventh Circuit interpretation,¹⁴⁹ the *Gerke* court permitted the federal government to assert jurisdiction over wetlands with a very tenuous connection to any navigable waters—wetlands "drained by a ditch that runs into a nonnavigable creek that runs into [a] nonnavigable . . . [r]iver, which in turn runs into [a navigable river]." ¹⁵⁰ *Gerke Excavating* had "dumped dredged stumps, and roots, plus sand-

147. See, e.g., *Gerke*, 412 F.3d 804; *Carabell*, 391 F.3d 704; *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (2005); *United States v. Reuth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

148. See *In re Needham*, 354 F.3d 340, 345–46 (5th Cir. 2003) ("The CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters."); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *FD&P Enters. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 516 (D.N.J. 2003) ("[A] 'significant nexus' must constitute more than a mere 'hydrological connection.'"); *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002). For a more thorough discussion of the varying interpretations of the CWA, see Marjorie A. Shields, Annotation, *What Are "Navigable Waters" Subject to Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251 et seq.)*, 160 A.L.R. FED. 585 (2000).

149. *Reuth Dev. Co.*, 335 F.3d 598. In *Reuth*, the Seventh Circuit upheld federal jurisdiction over wetlands "adjacent to an unnamed tributary to Dyer Ditch, which flows north to Hart Ditch, which flows north to the Little Calumet River, which is a navigable water of the United States." *Id.* at 600.

150. *Gerke*, 412 F.3d at 805.

based fill” into wetland portions of a 5.8 acre tract. Because Gerke did not first obtain a permit from the Corps, its actions violated the CWA.¹⁵¹ Gerke argued that the Corps’ assertion of jurisdiction over the wetlands in question “exceed[ed] the authority granted the Corps of Engineers by the Clean Water Act,” or, in the alternative, that “if the regulation [was] within the congressional grant of authority, then it exceed[ed] the authority that the Commerce Clause . . . grants Congress.”¹⁵² The case was analyzed in light of its inherent constitutional argument because, as explained before, the statutory and constitutional arguments “are interchangeable.”¹⁵³

The court began its analysis with a brief discussion of the language of the regulation in question. As explained above,¹⁵⁴ the Corps enacted regulations extending federal jurisdiction over “wetlands adjacent to” any other waters covered in the regulation.¹⁵⁵ The court acknowledged the difficulty of applying the term “adjacent” to wetlands connected to a navigable river through a series of tributaries,¹⁵⁶ but went no further because Gerke did “not argue that the regulation is inapplicable to this case.”¹⁵⁷ The court indirectly analyzed the meaning of “adjacent” in the remainder of its opinion but did not focus on how the meaning of the word fit into the constitutional analysis.

The court next discussed the “navigable waters doctrine,”¹⁵⁸ which permits Congress to regulate “waterways used to transport people and goods in interstate or foreign commerce”¹⁵⁹ and was established nearly two-hundred years ago in *Gibbons v. Ogden*.¹⁶⁰ It pointed out that wetlands “supply some of the water in navigable waterways,” and

151. *Id.*

152. *Id.* at 806.

153. *See supra* note 144 and accompanying text.

154. *See supra* notes 136–138 and accompanying text.

155. 33 C.F.R. § 328.3(a)(7) (2005).

156. *Gerke*, 412 F.3d at 805. The court explained as follows:

The Lemonweir River is thus a tributary of a navigable river, but are the wetlands “adjacent” to the Lemonweir? They are connected to it in the sense that water from the wetlands flows into the river, but they might be thought “adjacent” not to the river but merely to the ditch, and a ditch is not what one would ordinarily understand as a “tributary.” The Wisconsin River, because it flows into the Mississippi, is connected to the Gulf of Mexico, but it would be odd to describe it as “adjacent” to the gulf.

Id.

157. *Id.*

158. *See Baumgartner, supra* note 132, at 2145–49.

159. *Gerke*, 412 F.3d at 806.

160. *See supra* notes 17–20 and accompanying text.

although “filling in a 5.8 acre tract . . . is not going to have a measurable effect . . . Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect.”¹⁶¹ The court never explicitly stated which of the three categories of permissible regulation this fell into, but appeared to be applying the substantial effects test because the primary cases it cited for its above proposition were cases applying the substantial effects test.¹⁶² *Gerke* did cite two cases “with specific reference to the regulation of navigable waters,” one of which was explicitly applying a channels of commerce analysis.¹⁶³ However, the court gave these two cases no special emphasis and appeared to be citing them merely for their support of the idea that Congress can regulate “an entire class of acts if the class affects commerce.”¹⁶⁴

The court stated that part of this power to regulate an entire class of activities includes the authority to “forbid the pollution of navigable waters even if the pollution has no effect on navigability.”¹⁶⁵ Further drawing on this principle, the court quickly concluded that Congress can regulate wetlands “if water from the wetlands enters a stream that flows into the navigable waterway,” and it matters not “[w]hether the wetlands are 100 miles from a navigable waterway or 6 feet.”¹⁶⁶ The court’s conclusion included a very brief reply to the argument that so much of the United States is wetlands, and allowing federal jurisdiction would lead to frequent encroachment upon state power and necessarily violate principles of federalism. The court responded by stating that the argument “is two-edged” because the more wetlands that exist, the more impact they will have on interstate navigable waters.¹⁶⁷

To summarize, the court began with the proposition that Congress can regulate channels of commerce, including navigable waters. The court then cited the principle drawn from the substantial effects test, which is that even when an activity taken alone is outside the reach of the commerce power, the federal government can regulate that activity if it

161. *Gerke*, 412 F.3d at 806 (citing, inter alia, *Gonzales v. Raich*, 125 S. Ct. 2195, 2205–07 (2005); *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942); *United States v. Hicks*, 106 F.3d 187, 188–90 (7th Cir. 1997); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997)).

162. *Id.*

163. *Id.* at 806–07 (citing, inter alia, *United States v. Deaton*, 332 F.3d 698, 706–07 (4th Cir. 2003); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–26 (1941)).

164. *Id.* at 806.

165. *Id.* at 807 (“In fact navigability is a red herring from the standpoint of constitutionality.”).

166. *Id.*

167. *Id.*

falls within a larger class of activities that falls within the commerce power. The court connected these two principles and held that the Corps could assert jurisdiction over wetlands as part of its overall regulation of navigable interstate waters, but the court did not explain exactly how or why these two principles could work together. Part IV will explain in more detail why this analysis was inadequate.

IV. ANALYSIS

Although the *Gerke* court arrived at the correct holding, it did so using an abbreviated application of the substantial effects test as applied to channels of commerce. This Part first explains why the court's reasoning is difficult to reconcile with the Supreme Court's Commerce Clause jurisprudence. It then shows how the Necessary and Proper Clause can augment the reach of the Commerce Clause—as gleaned from Justice Scalia's concurring opinion in *Gonzales*—to properly include wetlands such as those in *Gerke*.

A. *The Gerke Opinion*

This Section argues that the analysis in *Gerke* was inadequate for two main reasons. First, the opinion does not address the fact that the plain language of the CWA and the Commerce Clause does not support federal jurisdiction over wetlands with only a tenuous connection to waters that are navigable-in-fact. Second, the opinion incorrectly applies the substantial effects test to the facts at bar, failing to consider the elements of the test as articulated by the Supreme Court.¹⁶⁸

1. *The plain language of the CWA and the Commerce Clause*

In illustrating why the Commerce Clause alone could not support federal jurisdiction over the wetlands in *Gerke*, this Note's analysis begins with an examination of why the plain language of the CWA and the Commerce Clause do not support such jurisdiction. The United States Constitution gives Congress the power “[t]o regulate *Commerce*.”¹⁶⁹ One modern definition of “Commerce” is “[t]he exchange of goods, productions, or property of any kind; especially, exchange on a large

168. See discussion *supra* Part II.A.6.b.

169. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

scale, as between states or nations; extended trade.”¹⁷⁰ Justice Thomas summarized what the Framers’ definition might have been as “selling, buying, and bartering, as well as transporting for these purposes.”¹⁷¹

The common thread running between these definitions is that “commerce” involves *transactions* or some sort of activity directly related to those transactions. Arguably, it is a stretch, albeit a small one, to extend this power to *actual* channels of commerce such as rivers and roads. Case law has firmly extended commerce jurisdiction over channels of commerce,¹⁷² but the language of the Constitution must be stretched appreciably to expand that jurisdiction to include *tributaries* of those channels. The plain language of the Commerce Clause must be stretched even further in applying the commerce power to “wetlands [that] are drained by a ditch that runs into a nonnavigable creek that runs into [a] nonnavigable . . . [r]iver, which in turn runs into [a] navigable river.”¹⁷³ Filling wetlands without a permit—which the CWA forbids—is not inherently economic, and its relation to actual channels of commerce is no more direct than its connection to economic activity.

Because the CWA applies to “[w]etlands adjacent to [navigable waters],”¹⁷⁴ the specific inquiry becomes: How far can one stretch the meaning of “adjacent,” and “commerce” along with it? The Fifth Circuit articulated a narrow conception of “adjacent,” stating that “both the regulatory and plain meaning of ‘adjacent’ mandate a significant measure of proximity. Therefore, including all ‘tributaries’ as ‘navigable waters’ would . . . extend the OPA¹⁷⁵ beyond the limits set forth in

170. FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 536 (1963).

171. United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring); see also Calvin H. Johnson, *The Panda’s Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 6 (2004) (eschewing dictionary documents in favor of “samples” taken from early usage: “In the constitutional debates, ‘regulation of commerce’ was most importantly a cover of words for the program of nationalizing the state ‘imposts’ or taxes on imports.”).

172. *Gerke*, 412 F.3d at 807; *SWANCC*, 531 U.S. 159, 181 (2001) (Stevens, J., dissenting) (“By 1972, Congress’ Commerce Clause power over ‘navigation’ had long since been established.” (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824))).

173. *Gerke*, 412 F.3d at 806.

174. 33 C.F.R. § 328.3(a)(1)–(7) (2005).

175. OPA is the Oil Pollution Act and, for purposes of federal jurisdiction, is “co-extensive with the definition found in the Clean Water Act.” *In re Needham*, 354 F.3d 340, 344 (5th Cir. 2003).

SWANCC.”¹⁷⁶ The *Gerke* conception of “adjacent” includes, essentially, wetlands that drain into tributaries of tributaries of navigable waters.¹⁷⁷ This interpretation requires a significant stretch of the meanings of both “commerce” and “adjacent.” Not only does it run contrary to the plain language of the CWA and the Commerce Clause, but it also fails to address the Supreme Court’s suggestion in *SWANCC* that a “‘significant nexus’ between the wetlands and ‘navigable waters’” exist before the Corps can assert jurisdiction over those wetlands.¹⁷⁸ The opinion glosses over the weakness of the connection between the wetlands filled in *Gerke* and the navigable-in-fact waters to which those wetlands are connected, selectively citing precedent from other circuits that supports the conclusion.¹⁷⁹

2. Substantial effects test incorrectly applied to the CWA

The next major flaw in the Seventh Circuit’s analysis is the poorly supported¹⁸⁰ and ambiguous¹⁸¹ application of the substantial effects test to the CWA.¹⁸² In *SWANCC*, the Court stated that nothing in “the legislative history [of the CWA] . . . signifies that Congress intended to exert anything more than its commerce power over navigation.”¹⁸³ In other words, Congress was using its authority here to regulate channels of commerce, not to regulate activities that substantially affect

176. *Id.* at 347 n.12. See *supra* note 145 and accompanying text.

177. *Gerke*, 412 F.3d at 805. Other circuits have adopted this broad view of “adjacent.” See *United States v. Rapanos*, 339 F.3d 447, 450–53 (6th Cir. 2003), *cert. granted*, 126 S. Ct. 414 (2005); *United States v. Deaton*, 332 F.3d 698, 704–12 (4th Cir. 2003).

178. See *supra* note 145 and accompanying text.

179. *Gerke*, 412 F.3d at 807 (citing *Rapanos*, 339 F.3d at 450–53; *Deaton*, 332 F.3d at 704–12).

180. See *SWANCC*, 531 U.S. 159, 173 (2001) (declining to analyze the “migratory bird rule” under the substantial effects test); Baumgartner, *supra* note 132, at 2145 (“*SWANCC*’s narrow construction of the CWA, and its term ‘navigable waters,’ necessarily precludes federal jurisdiction on the basis of a substantial effect on commerce.”); see also *infra* note 185 and accompanying text.

181. The application of the substantial effects test in *Gerke* is not explicit but is manifest in the court’s statement that “[t]he sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect.” *Gerke*, 412 F.3d at 806 (citations omitted). In addition, the two Supreme Court cases to which the Seventh Circuit cites support the above proposition, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942), are cases that focus on the substantial effects test and have nothing to do with channels of commerce or navigable water.

182. See *supra* notes 161–163 and accompanying text.

183. *SWANCC*, 531 U.S. at 168 n.3 (emphasis added).

commerce. *SWANCC* further explained that the CWA's reference to *navigable* waters

was of "limited import" [However, t]he 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.¹⁸⁴

The fact that the CWA claims jurisdiction over *navigable* waters suggests that the CWA's Commerce Clause jurisdiction is tied to channels of commerce, rather than to activities that substantially affect commerce.¹⁸⁵ This interpretation makes sense particularly in light of the substantial effects doctrine articulated in *Lopez*, *Morrison*, and *Gonzales*.¹⁸⁶

3. Elements of the substantial effects test not properly considered

Even assuming that the substantial effects test can be correctly applied to channels of commerce, the Seventh Circuit's application is flawed because it does not adequately address considerations that the Supreme Court has incorporated into the test. First, the very authority that the court cites (at the Supreme Court level) describes Congress's power not as the authority to regulate *any* activity that substantially affects interstate commerce, but as the authority to regulate *economic* activities that have a substantial effect on interstate commerce.¹⁸⁷

Beyond the court's failure to even consider this factor, it is difficult to argue that filling wetlands is "economic activity."¹⁸⁸ Granted, filling

184. *Id.* at 172.

185. *See* *United States v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003) ("*SWANCC*, of course, emphasized that the CWA is based on Congress's power over navigable waters.>").

186. *See* discussion *supra* Part II.A.6.b.

187. *See* *Gonzales v. Raich*, 125 S. Ct. 2195, 2211 (2005) (holding that Congress can prohibit intrastate marijuana cultivation under the CSA because "[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic"); *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942); *see also* *United States v. Lopez*, 514 U.S. 549, 560 (1995) ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved *economic* activity in a way that the possession of a gun in a school zone does not." (emphasis added)).

188. *See* *Deaton*, 332 F.3d at 706 (upholding the CWA as applied to wetlands because, in part, "Congress's power over the channels of interstate commerce, unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature"); Adler, *supra* note 10, at 35 ("The filling of intrastate, isolated wetlands . . . is not inherently economic or commercial in nature."). *But see* *SWANCC*, 531 U.S. at 193

wetlands may be in preparation of economic activity such as operating a commercial structure to be built on the land that is being filled. Alternatively, filling wetlands may be considered economic in that a landowner pays an excavating company to do the filling. But the activity itself is not inherently economic.

Importantly, however, the same analogies that would justify classifying wetland “reclamation” as economic would have sufficed for gun possession in *Lopez*.¹⁸⁹ Guns are articles of commerce that can be bought and sold. Yet the Supreme Court found that the statute prohibiting the possession of guns in a school zone “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”¹⁹⁰ In other words, possessing guns, like filling wetlands, is an activity that is not inherently economic.

Second, the court fails to take into account or even acknowledge the fact that the Corps’ regulation of “adjacent” wetlands lacks a jurisdictional element¹⁹¹ that “might limit its reach to a discrete set of [waters] that additionally have an explicit connection with or effect on interstate commerce.”¹⁹² In fact, the Corps’ regulation extending jurisdiction to “adjacent” wetlands broadens federal reach outside of its clear jurisdiction over navigable interstate waters. Although the Supreme Court did not address the jurisdictional element in its most recent commerce analysis in *Gonzales*, “such a jurisdictional element would lend support to the argument that [the regulation] is sufficiently tied to interstate commerce.”¹⁹³

Third, the court does not inquire into congressional or administrative findings of fact detailing the effects of filling “wetlands [that] are drained by a ditch that runs into a nonnavigable creek that runs into [a] nonnavigable . . . [r]iver, which in turn runs into [a navigable river].”¹⁹⁴

(“[T]he discharge of fill material into the Nation’s waters is almost always undertaken for economic reasons.”).

189. 514 U.S. at 549.

190. *Id.* at 561.

191. *See supra* notes 89–91 and accompanying text.

192. *United States v. Morrison*, 529 U.S. 598, 611–12 (2000) (quoting *Lopez*, 514 U.S. at 562). The basic provisions of the Corps’ interpretation of “navigable waters” include very explicit jurisdictional elements. *See* 33 C.F.R. § 328.3(a)(1)–(3) (2005). However, the restrictive language in those provisions is significantly broadened by provisions that expand jurisdiction to tributaries and adjacent wetlands. *Id.* § 328.3(a)(5), (7).

193. *Morrison*, 529 U.S. at 598.

194. *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 806 (7th Cir. 2005).

Not only is there no explanation of the absence of any factual findings, but there is also no discussion of possible ways in which Congress could have even *rationaly concluded*¹⁹⁵ that such filling affects interstate commerce. In other words, the Seventh Circuit did not even apply the minimum standard of scrutiny as to this element.

Finally, even assuming that filling wetlands constitutes “economic” activity that can be regulated so long as it exerts a substantial effect on interstate commerce, the Seventh Circuit did not articulate what that substantial effect is. Again, even under a “rational basis” standard of review, a court should articulate what Congress might have rationally believed the substantial effects could be.¹⁹⁶ Moreover, in describing what effects an activity has on interstate commerce, the types of effects listed have generally been, for lack of a better term, *economic* effects.¹⁹⁷ *Gerke* characterizes the effects of wetland filling as “pollution of navigable waters.”¹⁹⁸ At first glance, this makes some sense because one can imagine, for example, Congress having the power to prohibit individuals from dumping toxic chemicals into wetlands, where the chemicals would inevitably find their way into rivers that exist as major channels of interstate commerce or that contribute to the water supply of multiple states.

What the argument misses, however, is that the CWA defines the term “pollutants” so as to include materials such as rock, sand, and tree stumps that are merely used as fill,¹⁹⁹ and that were exactly the type of “pollutants” at issue in *Gerke*.²⁰⁰ Again, the opinion does not explicitly explain what effect, economic or not, these materials have on interstate commerce. Rather, it simply concluded,

[I]t doesn't matter whether . . . the effect may be to reduce water levels in navigable waterways . . . or that the effect may be to increase the level of pollution in such waters by reducing the

195. *See supra* note 85 and accompanying text.

196. *See, e.g.,* *Gonzales v. Raich*, 125 S. Ct. 2195, 2211–15 (2005).

197. *See id.* at 2215 (“Congress could have rationally concluded that the aggregate impact on the national *market* of all the *transactions* exempted from federal supervision is unquestionably substantial.” (emphasis added)); *Wickard v. Filburn*, 317 U.S. 111, 126–29 (1942) (“Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing *its purpose to stimulate trade therein at increased prices.*” (emphasis added)).

198. *Gerke*, 412 F.3d at 807.

199. 33 U.S.C. 1362(6) (2005).

200. *Gerke*, 412 F.3d at 805.

supply of unpolluted wetlands water. . . . [T]he wetlands are “waters of the United States” within the meaning of the Act.²⁰¹

Even if the “pollution” in *Gerke* actually affected interstate commerce, the nexus between the activity in question and interstate commerce was very thin. The defendant in *Gerke* filled wetlands that drain into a tributary—of a tributary—of a navigable river. To sustain federal regulation based on the Commerce Clause alone, a court “would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”²⁰² and subscribe to the “view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.”²⁰³ In other words, permitting federal commerce jurisdiction on the basis of a remote chain of causation would allow the Commerce Clause to swallow the rule that federal power is limited and enumerated. The Supreme Court has explicitly rejected the view “that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.”²⁰⁴ This is perhaps the strongest reason why the substantial effects test cannot support federal wetland jurisdiction.

4. *Gerke* improperly addresses the dual sovereignty argument

The Seventh Circuit also sidestepped the federalism argument that “wetlands of the United States are so extensive that the Corps’ interpretation will tilt the balance between federal and state power too far.”²⁰⁵ This argument would apply a fortiori to the *Gerke* court’s conception, stemming from its definition of “adjacent,” because “all water is connected in some way.”²⁰⁶ The court concludes its opinion declaring that “‘adjacent’ can just mean ‘connected.’”²⁰⁷

201. *Id.* at 807 (citations omitted).

202. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

203. *Id.* at 567 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)).

204. *Gonzales v. Raich*, 125 S. Ct. 2195, 2217 (2005) (Scalia, J., concurring); *see also* *United States v. Morrison*, 529 U.S. 598, 617–18; *Lopez*, 514 U.S. at 564–66.

205. *Gerke*, 412 F.3d at 807.

206. Gartner Lee, *Water Sector* (2003), <http://www.gartnerlee.com/sectors/index.cfm?fuseaction=Sectorinformation&SectorID=35&mainSector=6>.

207. *Gerke*, 412 F.3d at 808.

In analyzing the federalism issue, the *Lopez* court emphasized the fact that criminal law is a traditional state function.²⁰⁸ Similarly, the *SWANCC* court recognized that “[r]egulation of land use [is] a function traditionally performed by local governments.”²⁰⁹ In *Gerke*, the defendant argued that wetlands “are so extensive” that federal regulation would impose upon state sovereignty.²¹⁰ The Seventh Circuit addressed the point with the brief explanation that “[t]he argument . . . is two-edged. The more extensive the wetlands, the greater their potential importance as a source of water to keep the navigable waterways full and clean.”²¹¹ The court’s statement, however, misses the point. Federalism is not a question of how substantially an activity is connected to interstate commerce, but of “whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment.”²¹²

Nevertheless, federal wetland regulation does not pose the same powerful implications of federalism concerns that have been deemed important enough to impose limits on that regulation,²¹³ especially in light of the more recent federalism analyses in the “anti-commandeering” cases.²¹⁴ *Gerke* did not come to the wrong conclusion regarding federalism, but it failed to adequately support its conclusion. As the next Section will explain, federal regulation of wetlands is a legitimate exercise of the commerce power as an essential part of a larger scheme.²¹⁵ Therefore, whatever role federalism still plays in Commerce Clause jurisprudence, it will not be likely to impose external limitations on federal environmental legislation that can overcome the inherent limits of enumerated powers.

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

209. *SWANCC*, 531 U.S. 159, 174 (2001) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

210. *Gerke*, 412 F.3d at 807.

211. *Id.*

212. *New York v. United States*, 505 U.S. 144, 155 (1992).

213. See Baumgartner, *supra* note 132, at 2150, 2156–57 (“The channels-of-commerce power is plenary and is given great deference by the Court because it does not raise the important federalism concerns that regulation of an intrastate activity affecting commerce does.”).

214. The two cases generally referred to as “anti-commandeering” cases are *New York v. United States*, 505 U.S. at 174 (striking provisions of the Low-Level Radioactive Waste Policy Act because Congress cannot force states to “take title to and possession of low level radioactive waste”), and *Printz v. United States*, 521 U.S. 898 (1997) (declaring as unconstitutional portions of the Brady Act that imposed obligations on state law enforcement agencies). See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2084 (2005).

215. See *infra* Part IV.B.3.

5. *Touching upon the correct rationale*

Without giving any explicit reasons, the Seventh Circuit stated that “Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect.”²¹⁶ As Section B will explain, this idea is right on target. It may be that the court was proposing precisely the same analysis as this Note. However, the bare statement of this proposition does not cure the defects of the opinion because the court neither explains the significance nor the source of this principle. Had the court adequately laid a foundation and applied this principle, the opinion could have been a model for other courts to uphold federal wetland regulations.

B. A Tenable Basis for Federal Wetland Regulation

This Section will explain the rationale upon which federal wetland regulation can be properly upheld. The idea begins with Justice Scalia’s proposition that the Necessary and Proper Clause allows Congress, under the substantial effects test, to regulate noneconomic intrastate activities that fall within a “larger regulation of economic activity.”²¹⁷ This Section explains that, by analogy, Congress can regulate noneconomic intrastate activity when that regulation is an essential part of a larger regulation of channels of commerce. In *Gerke*, the court’s upholding of federal jurisdiction over wetlands could not have been adequately supported by the Commerce Clause alone.²¹⁸ This Note now considers how the holding in *Gerke* could have been properly supported.

1. Justice Scalia’s conception applied to wetland regulation

The interplay between the Commerce Clause and the Necessary and Proper Clause, at least as interpreted by Justice Scalia, provides a way to put federal wetland regulation on a firm constitutional foundation. As explained in Part II, Justice Scalia’s concurring opinion in *Gonzales* focused on the relationship between the Commerce Clause and the Necessary and Proper Clause: “[U]nlike the channels, instrumentalities, and agents of commerce, activities that substantially affect commerce are not themselves part of interstate commerce, and thus the power to

216. *Gerke*, 412 F.3d at 806 (citing, inter alia, *Gonzales v. Raich*, 125 S. Ct. 2195, 2205–07 (2005); *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942)).

217. *Gonzales*, 125 S. Ct. at 2217 (Scalia, J., concurring).

218. *See supra* Part IV.A.

regulate them cannot come from the Commerce Clause alone,” but must also draw upon the Necessary and Proper Clause.²¹⁹ This allows Congress to regulate noneconomic intrastate activities as long as they are indispensable to a larger scheme of interstate economic regulation. By analogy, if Congress can regulate noneconomic activities that are essential to a larger regulatory scheme by virtue of the Necessary and Proper Clause, then it should be able to regulate nonnavigable waters that are essential to the larger regulatory scheme involving navigable waters.²²⁰

Wetlands and noneconomic activities are both, when taken in isolation, outside even Chief Justice Marshall’s broad commerce umbrella. Despite the fact that the Commerce Clause “comprehends navigation,”²²¹ many wetlands are simply not navigable. Similarly, noneconomic activity does not, by its very definition, involve the types of transactions that constitute “commerce.” However, the particular regulation of certain noneconomic activities may be an indispensable part of an interstate regulatory scheme that would be “undercut” in the absence of such particular regulation.²²²

For example, the prohibition of intrastate possession of marijuana, whether or not of economic nature in itself, is a necessary part of “a comprehensive framework for regulating the production, distribution . . . and consumption of commodities for which there is an established, and lucrative, interstate market.”²²³ A lucrative interstate market is a class of economic activity that Congress clearly has the power to regulate.²²⁴ In such a case, the Necessary and Proper Clause permits Congress to regulate particular intrastate activities falling within that larger class because “the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the

219. *Gonzales*, 125 S. Ct. at 2215–16 (Scalia, J., concurring) (internal citation omitted). The dissent also recognizes the significant role played by the Necessary and Proper Clause: “This power [to regulate activities that substantially affect interstate commerce] derives from the conjunction of the Commerce Clause and the Necessary and Proper Clause.” *Id.* at 2221 (O’Connor, J., dissenting).

220. *See* *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325, 1327 (6th Cir. 1974) (invoking the Necessary and Proper Clause in support of its upholding the CWA).

221. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

222. *Gonzales*, 125 S. Ct. at 2217 (Scalia, J., concurring); *United States v. Morrison*, 529 U.S. 598, 657 (2000) (Breyer, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 561 (1995).

223. *Gonzales*, 125 S. Ct. at 2219 (Scalia, J., concurring); *see also id.* at 2205–15 (majority opinion).

224. *Id.* at 2211.

high duties assigned to it, in the manner most beneficial to the people.”²²⁵ In other words, the Necessary and Proper Clause gives Congress authority in addition to its enumerated powers when that authority is necessary to carry out those enumerated powers and duties. The Necessary and Proper Clause allows a court to go beyond the question of whether a particular activity falls within the commerce power and to pursue the broader inquiry of whether the particular activity falls within a *class* of activities that substantially affect interstate commerce.²²⁶

As with the regulation of intrastate marijuana possession as a necessary component of national controlled substance regulation, the regulation of intrastate wetlands is a *necessary* part of the overall scheme of interstate water regulation. The relevant inquiry begins by asking: What is the overall scheme? The preamble to the CWA states that “[t]he objective of this [Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²²⁷ The question then becomes whether this is a “legitimate end”²²⁸ that can be supported by the Necessary and Proper Clause and whether the regulation in question is essential to that scheme.

The importance of federal environmental regulation has certainly been recognized and is, by almost any standard, a legitimate end.²²⁹ Around the time the CWA was enacted, the Sixth Circuit Court of Appeals observed,

Obviously water pollution is a health threat to the water supply of the nation. It endangers our agriculture by rendering water unfit for irrigation. It can end the public use and enjoyment of our magnificent rivers and lakes for fishing, for boating, and for swimming. These health and welfare concerns are, of course, proper subjects for

225. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

226. *See Gonzales*, 125 S. Ct. at 2215; *id.* at 2217 (Scalia, J., concurring) (“Although this power . . . commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct.”); *Lopez*, 514 U.S. at 600 (Thomas, J., concurring) (criticizing, but acknowledging that the Court “ask[s] whether the class of activities *as a whole* substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation”).

227. 33 U.S.C. § 1251(a) (2000).

228. *See McCulloch*, 17 U.S. (4 Wheat.) at 421.

229. *See, e.g., SWANCC*, 531 U.S. 159, 174–80 (2001) (Stevens, J., dissenting); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974). *But see* *Adler*, *supra* note 188, at 62–67 (questioning the efficacy of the CWA); *Adler*, *supra* note 13, at 464–65 (advocating the decentralization of environmental regulation).

263] *Federal Wetland Jurisdiction in Gerke Excavating*

Congressional attention because of their many impacts upon interstate commerce generally.²³⁰

This shows that even in 1974, the nation's water was recognized as an issue of national concern. More recently, one commentator has pointed out that the issue of interstate water pollution "poses the identical problem that gave rise to the need for an exclusive federal power over interstate commerce in the first place," which is the situation where individual state regulation is insufficient, and collective action is necessary.²³¹ In addition, the validity of federal regulation of actual channels of commerce has been established by almost two centuries of case law.²³² More specifically, the validity of the CWA as a whole has been recognized by the Supreme Court for more than three decades.²³³

With the legitimacy of the overall scheme established, the final inquiry becomes whether the regulation of the intrastate activity is an essential part of that overall scheme "in which the regulatory scheme could be undercut unless the intrastate activity were regulated."²³⁴ A court must ask whether the overall scheme would fail if the regulation in question were not sustained. In a sense, this exposes an apparent fallacy in the "class of activities" theory because the inquiry examines, essentially, how intrastate wetlands substantially affect interstate commerce. Nevertheless, the specific inquiry would not be proper if the broader inquiry could not be satisfied. Moreover, wetland regulation calls for the Necessary and Proper Clause to be applied to *channels* of commerce, rather than to activities that substantially affect commerce.

Regulation of wetlands is essential to the overall regulation of navigable waters. The effects of wetlands on the nation's waters are numerous and extensive.²³⁵ First, and perhaps most importantly, wetlands act as filters that absorb and neutralize harmful chemicals and microorganisms in water.²³⁶ The Supreme Court and Congress have

230. *Ashland Oil*, 504 F.2d at 1325.

231. Baumgartner, *supra* note 132, at 2161.

232. See sources cited *supra* note 172.

233. See, e.g., *SWANCC*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Ashland Oil*, 504 F.2d 1317.

234. *Gonzales v. Raich*, 125 S. Ct. 2195, 2217 (2005) (Scalia, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

235. See *supra* note 111.

236. HASLAM, *supra* note 111, at 166–77; KUSLER & OPHEIM, *supra* note 111, at 5–6; LEWIS, *supra* note 111, at 49–60; Holman, *supra* note 24, at 205 ("The [wetlands] . . . of the American landscape are the primary pollution control systems of the nation's water, and the primary determinants of their water quality."); Johnson, *supra* note 111, at 71; *Environmentalists Challenge*

recognized the need to protect the nation's interstate water system from wetlands connected to that system because "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."²³⁷ This goes directly to the heart of the CWA's primary objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²³⁸ Furthermore, wetlands provide floodwater storage for times of high water and slowly release that water in drier times.²³⁹ Wetlands adjacent to large rivers, lakes, and oceans provide upland areas with a barrier against erosion.²⁴⁰ In addition to the CWA goals that wetlands serve, wetlands provide many benefits that could potentially fall within the goals of other federal regulatory schemes, such as the Endangered Species Act.²⁴¹ In sum, "[t]he Clean Water Act could not achieve its purpose without such an expansive interpretation of navigability because big waters collect from small waters. The nature of the drainage network, rather than legal principles, forces the jurisdiction of the Clean Water Act to encompass wetlands."²⁴²

2. *Some additional concerns*

Allowing Congress to regulate wetlands simply because they fall within the broader scheme of interstate navigable waters regulation raises some questions. As Justice O'Connor pointed out, this principle could turn *Lopez* into a "drafting guide" that encourages Congress to legislate more broadly in order to extend the depth of its reach into intrastate affairs.²⁴³ In other words, if Congress had a question about the validity of an individual regulation, it could just write the statute more broadly to ensure that its desired piece of legislation would be upheld.

Bush's Earth Day Announcement, BushGreenwatch, Apr. 23, 2004, http://www.bushgreenwatch.org/mt_archives/000103.php.

237. *Riverside Bayview Homes*, 474 U.S. at 133 (quoting S. REP. NO. 92-414, at 77 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3742).

238. CWA § 101, 33 U.S.C. § 1251(a) (2000); see also *SWANCC*, 531 U.S. at 179 (Stevens, J., dissenting) ("The 'major purpose' of the CWA was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'" (citation omitted)).

239. HASLAM, *supra* note 111, at 24; KUSLER & OPHEIM, *supra* note 111, at 5; Johnson, *supra* note 111, at 71.

240. KUSLER & OPHEIM, *supra* note 111, at 5.

241. HASLAM, *supra* note 111, at 25; KUSLER & OPHEIM, *supra* note 111, at 6.

242. LEWIS, *supra* note 111, at 10; see also *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

243. *Gonzales v. Raich*, 125 S. Ct. 2195, 2223 (2005) (O'Connor, J., dissenting).

Alternatively, wherever possible, Congress could simply attach its questionable legislation to larger “pre-existing schemes” in order to achieve justification.²⁴⁴ As to the first concern, one must remember that although an essential part of a larger scheme of regulation will be upheld, Congress still must justify the larger scheme as being within its power. If the larger scheme is unconstitutional, the individual components will not survive.²⁴⁵ If, however, the larger scheme is a legitimate exercise of congressional power, then it should not be objectionable to preserve legislation that is essential to the efficacy of that scheme.

As to the second concern, allowing Congress to enact legislation because it falls within a broader scheme does not rob the courts of their power to strike that legislation where Congress has ingenuously alleged the connection. In the case of pre-existing schemes, it will be all the more difficult for Congress to effectively justify that its new legislation is “essential” to that scheme, simply by virtue of the fact that the scheme will have survived thus far without the proposed addition. In sum, the fact that the overall scheme must be legitimate and that no piece of legislation can ride on the coattails of that scheme without being “essential” to the scheme will ensure that the federal government does not “effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”²⁴⁶

V. CONCLUSION

The Seventh Circuit happened to get the correct outcome in *Gerke* but based the holding on inadequate rationale. A thorough examination of Commerce Clause jurisprudence reveals that because wetlands are an indispensable part of the larger scheme of regulating navigable waters, and because the CWA regulates a class of activities within Congress’s reach under its channels-of-commerce power, federal regulation of intrastate wetlands does not exceed the Constitution’s grant of commerce power. *Lopez*, *Morrison*, and *Gonzales* did not herald the fall of federal

244. *Id.*

245. For an application of this limitation, see *GDF Realty Investments, Ltd. v. Norton*, where the Fifth Circuit refused to extend this principle to the Endangered Species Act, Pub. L. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531–1544 (2000)), as applied to a certain cave insect because it lacked evidence that “any take of a Cave Species is (a) part of a larger ‘economic’ regulatory scheme [or] (b) so essential to the larger national scheme that the accidental crushing of one Cave Species underfoot . . . threatens to undo the national program.” 362 F.3d 286, 290–91 (5th Cir. 2004).

246. *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937).

environmental statutes but, rather, the honest examination of these statutes. *Gerke* is a prime example of the problem and the judicial attitude toward this issue.

With the federal courts of appeal in disagreement, and owners of wetland property in a state of uncertainty, the issue is ripe for Supreme Court review.²⁴⁷ The judiciary holds the highest duty of care in interpreting our Constitution clearly and candidly. While it is certainly laudable for a court to reach the right result in a case, our system of law requires explicit and correct reasoning as well so that judges have guidance for their decisions and so that everyone else has guidance for their conduct. This is especially important in cases that define the limits of the power of the government, for as Hamilton stated,

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.²⁴⁸

Joshua L. Lee

247. Two such cases are set for review in the 2005–06 term: *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005); *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (2005).

248. THE FEDERALIST NO. 78, at 414 (Alexander Hamilton) (J.R. Pole ed., 2005).