

THE DUCKS STOP HERE?
THE ENVIRONMENTAL CHALLENGE TO FEDERALISM
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Forthcoming in 9 SUPREME COURT ECONOMIC REVIEW (Univ. of Chicago Press, 2001)

INTRODUCTION

There are an estimated 105.5 million acres of wetlands in the United States.¹ These lands range from mangroves and salt marshes to small ponds, mudflats and prairie potholes, the vast majority of which are located on private lands.² Federal regulations adopted in the 1970s limit the use and development of designated wetlands throughout the nation. At their outer limit, these regulations purport to control nearly any activity that could result in the “pollution” of wetlands.³ These rules have been controversial since their inception. Environmental activists question their effectiveness while landowners complain of the costs of compliance. There have even been questions whether federal wetland regulations exceed the constitutional limits on federal power.⁴

In *Solid Waste Association of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”),⁵ the Supreme Court considered whether federal regulatory authority reaches isolated wetlands and ponds due to the potential presence of migratory birds. Petitioners, a

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¹ Thomas E. Dahl, *Status and Trends of Wetlands in the Coterminous United States 1986-1997* 9 (US Fish & Wildlife Service, 2000). The term “wetlands” is used rather loosely in this paper to include lands defined as such by one of several federal agencies that operate wetlands programs, in addition to other, non-navigable, waters which might not otherwise be considered wetlands by some or all of these agencies.

² See Jon Kusler, *Wetlands Delineation: An Issue of Science or Politics?*, *Environment* 7, 29 (Mar 1992).

³ The U.S. Army Corps of Engineers even asserts the authority to regulate “walking, bicycling or driving a vehicle through a wetland,” though such activities are rarely regulated. See 58 Fed Reg 45008, 45020 (Aug 25, 1993).

⁴ This argument is made at length in 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 (1999), upon which portions of this article draw.

⁵ 121 S Ct 675 (2001).

consortium of local governments, sought to have such regulation of isolated wetlands declared unconstitutional. Voting 5-4, the Court rejected the expansive view of federal authority, but without reaching the constitutional question. Instead, the Court held that because the Clean Water Act (CWA) did not contain a clear indication that Congress sought to reach the outermost limits of its enumerated powers, the statute would not be construed to authorize the regulation of isolated, intrastate waters.

With this decision, the Court's majority continued the revival of federalism exemplified by recent cases such as *United States v. Lopez*⁶ and *United States v. Morrison*.⁷ Those cases held that Congress had exceeded the enumerated powers granted by the Constitution by attempting to regulate non-economic intrastate activities. *SWANCC* suggested, without holding, that Congress might also exceed those powers if it sought to regulate isolated waters within a state. By imposing a clear statement requirement on Congress, the Court effectively made it more difficult for Congress to test the limits of its authority in the area of environmental regulation.⁸ Given that the exact limits of Congress' constitutional authority are not easy to specify, and that congressional intent is not always clear, five Justices have decided that the risks of impeding Congress' authorized regulatory activity are outweighed by the need to protect the constitutional boundaries on congressional power.

The dissent argued that the majority ignored Congress' clear intent and, in the process, exposed millions of acres of wetlands to destruction. Without challenging the principle that Congress' authority is limited by the Constitution, the dissent maintained that the existence of "externalities" justifies federal regulation in certain fields, such as environmental protection, that might otherwise lie beyond Congress's grasp. Underlying the dissent's position is the view that

⁶ 514 US 549 (1995).

⁷ 170 S Ct 1740 (2000).

⁸ Cf. *Jones v United States*, 120 S Ct 1904 (2000).

expansive federal regulation is necessary for environmental protection. Specifically, without federal regulation, wildlife habitat will be irretrievably lost and Americans again will be exposed to “toxic water.”⁹ Commentators echoed this view.¹⁰

This article argues that the dissent’s concerns are theoretically and empirically unfounded. There is little reason to believe that interstate competition amongst states will produce a “race to the bottom” in environmental regulation today, if it ever did. Interstate competition is not likely to result in suboptimal environmental protection, at least when compared with the alternative of federal regulation. States will make trade-offs between environmental protection and other goals that are most consistent with the values of the people in those states. Moreover, interjurisdictional competition will promote the discovery of optimal environmental protection strategies. Although the presence of interstate externalities might sometimes justify federal environmental regulation, the presence of such externalities is often overstated, and the costs of addressing such externalities through federal regulation may well exceed the benefits of maintaining state primacy. Even if federal intervention is justified because wetlands are undersupplied by states, this need not mean federal regulation, as distinguished from economic incentives or the direct provision of environmental goods. In short, there is little basis for the argument that interstate externalities justify a departure from the approach to federalism that is now being applied in areas other than environmental regulation.

The *SWANCC* majority articulated its federalism rationale without addressing environmental concerns. The opinion rested on the broad federalism principles underlying the Court’s decisions in *Lopez*, *Morrison*, and other recent federalism cases. The interpretive canon employed in this case serves the same purpose as the constitutional doctrine itself. This clear-

⁹ *SWANCC*, 121 S Ct at 684 (Stevens, dissenting).

¹⁰ For example, Vermont Law School’s Patrick Parenteau opined that the *SWANCC* decision dealt the “nation’s water quality goals” a “major blow.” Patrick Parenteau, *Our Wetland Dominoes*, Natl L J (Feb 26, 2001) at A18.

statement rule, however, will not prevent the Court from having to face questions about the boundaries of congressional authority to impose environmental regulations. There are other environmental statutes, such as the Endangered Species Act, which assert extremely far-reaching federal authority, and do with far less ambiguity than the Clean Water Act. Eventually, the Court will have to confront the constitutional issue that it avoided in *SWANCC*, and the Court will then also be required to confront the race-to-the-bottom arguments offered by the *SWANCC* dissent. When that happens, the Court should receive such arguments with considerable skepticism.

I THE SUPREME COURT’S FEDERALISM

Scarcely two decades ago, the principles of federalism seemed to be a relic in American constitutional law. The New Deal era had seen a dramatic repudiation of the Supreme Court’s previous efforts to enforce limits on the scope of Congress’ power to regulate commerce, and a later series of decisions had rejected efforts to limit the national government’s power over the states themselves.¹¹ These cases “appeared to have signaled the end of judicial federalism and the demise of the Tenth Amendment as a constitutional limit on Congress’ Commerce Clause powers.”¹² Yet reports of federalism’s demise were premature. During the 1990s, the Supreme Court reversed course. Case by case, a slim majority has begun to restore the constitutional structure of “dual sovereignty” and enumerated powers.¹³ Continuation of this trend could

¹¹ See especially *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 558 (1985).

¹² Robert H. Freilich and David G. Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 Urb. Law 215 (1994).

¹³ There have been some notable exceptions to this trend, however, particularly in cases regarding federal preemption of state law. See, for example, *Geier v American Honda Motor Co.*, 120 S Ct 1913 (2000) (holding that federal auto safety rules preempt state tort suit despite existence of savings clause).

dramatically redefine the federal government’s role in addressing domestic problems, not least in environmental affairs.¹⁴

A. The Doctrine

The Supreme Court’s recent federalism cases can be loosely divided into two groups: enumerated powers cases and state sovereignty cases.¹⁵ Those in the first group, which are more important for the subject at hand, focus on whether a federal statute constitutes a proper exercise of a power delegated to Congress by the Constitution. In these cases, the Court’s majority has sought to enforce the principle that the federal government is one of discrete and limited powers. In *United States v. Morrison*,¹⁶ for example, the Supreme Court struck down a statute that provided a federal civil remedy for the victims of gender-motivated violence against women,¹⁷ concluding that Congress did not have authority to create such a remedy under the Interstate Commerce Clause¹⁸ or under Section 5 of the Fourteenth Amendment.¹⁹

The second group of cases deals directly with incidents of state sovereignty protected by the Tenth and Eleventh Amendments. In these cases, the Court has considered the extent to which states are immune to federal government efforts to influence or command state resources

¹⁴ This is discussed in fuller detail in Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 Geo Mason L Rev 573 (1998).

¹⁵ Not all cases fall neatly into one category or the other, and some commentators have characterized the cases somewhat differently. See, e.g., Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 Envtl L Rep 10980 (2000) (categorizing state sovereign immunity cases as “enumerated powers” cases under the 14th Amendment); .

¹⁶ 120 S Ct 1740 (2000).

¹⁷ 42 USC § 13981.

¹⁸ US Const, Article I, § 8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.”).

¹⁹ US Const, amend XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”). This provision refers to the Fourteenth Amendment guarantee that no state shall deprive any person of life, liberty, or property, without due process or deny any person equal protection of the laws.

and authority. The Court has invalidated federal statutes that sought to commandeer the use of state officials to implement a federal program, or that required a state legislature to enact a federally prescribed law.²⁰ The Court has also limited the power of Congress to abrogate state sovereign immunity to suit in federal or state court.²¹ All of these cases stress the importance of maintaining an appropriate balance between the state and federal sovereigns, and they assume that Congress cannot and should not be trusted to restrain itself from exceeding the proper scope of its own authority.

While both sets of cases have significant implications for environmental protection, the enumerated powers cases are particularly important. For decades, there seemed to be nothing beyond the federal government's reach under the Commerce Clause.²² That changed in 1995 with *United States v. Lopez*,²³ where the Court invalidated a federal statute that prohibited the possession of the federal Gun-Free School Zones Act, which made it illegal to possess a firearm within 1,000 feet of a school.²⁴ Regulation of guns near schools, a five justice majority declared, was not within any of the three broad categories of activity the Commerce Clause empowers Congress to regulate: 1) the use of the channels of interstate commerce; 2) the

²⁰ *Printz v United States*, 117 S Ct 2365 (1997) (holding that Congress may not compel state law enforcement officials to assist in implementing a federal gun control program); *New York v United States*, 505 US 144 (holding that Congress may not compel state legislatures to adopt a specified nuclear waste regulatory program).

²¹ See, for example, *Board of Trustees Univ of Ala v Garrett*, 531 S Ct ___ (2001) (sovereign immunity bars private suits against states under the Americans with Disabilities Act); *Kimel v Florida Bd of Regents*, 528 US 62 (2000) (sovereign immunity bars private suits against states under the Age Discrimination in Employment Act); *Alden v Maine*, 527 US 706 (1999) (sovereign immunity protects states from private suits under the Fair Labor Standards Act in state courts); *College Savings Bank v Florida Prepaid Postsecondary Ed Expense Bd*, 527 US 666 (1999) (Trademark Remedy Clarification Act does not abrogate state sovereign immunity); *Seminole Tribe of Florida v Florida*, 517 US 44 (1996) (Congress lacks power under Article I to abrogate state sovereign immunity).

²² After *NLRB v Jones & Laughlin Steel Corp* 301 US 1 (1937) (upholding the National Labor Relations Act), the Supreme Court went six decades before it finally invalidated a statute as outside Congress' Commerce Clause.

²³ 514 US 549 (1995).

²⁴ 18 USC § 922(q) (1988 ed. Supp. V).

instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) those activities that “substantially affect” interstate commerce.²⁵

The first two prongs of this *Lopez* framework are reasonably straightforward. If something is sold or used in interstate commerce, it can be regulated. Less obvious is what intrastate activities are subject to federal regulation because they “substantially affect” interstate commerce. Virtually all kinds of activity have the potential substantially to affect interstate through their indirect effects. Thus, for example, the widespread presence of guns in schools could adversely affect the educational environment, thus reducing the future productivity of the students and thereby eventually impacting interstate commerce. Yet as the *Lopez* court recognized, were the court to accept this argument, it would be “hard pressed to posit any activity by an individual that Congress is without power to regulate.”²⁶

The key to understanding the “substantial affects” test is that it examines the commercial nature of the activity as well as the activity’s effect on commerce. Just because insomnia has a significant national economic impact, it does not follow that the Commerce Clause authorizes Congress to regulate our sleeping habits.²⁷ Rather, the question is whether the activity to be regulated is itself related to “commerce’ or any sort of economic enterprise” or whether the regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁸ In other words, the activity must be “economic in nature” for the enactment to pass muster.²⁹ Thus, the

²⁵ *Lopez*, 514 US at 558-59.

²⁶ *Id.* at 564.

²⁷ See *Brzonkala v Virginia Polytechnic Inst.*, 169 F 3d 820, 839 (4th Cir 1999)(en banc)(citing estimates of insomnia's effect of between \$92.5 and \$107.5 billion per year as an analogy to violent crime's indirect effect on productivity), *aff'd sub nom United States v Morrison*, 120 S Ct 1740 (2000).

²⁸ *Lopez*, 514 US at 561.

²⁹ See *Morrison*, 120 S Ct at 1750.

regulation of industrial mining activity is a permissible regulation of commerce,³⁰ as is a national price maintenance regime for agricultural products.³¹ Federal regulation of domestic violence or gun possession near schools, however, is not regulable merely because these activities may have a significant economic fallout. While refusing to adopt a “categorical rule,” the *Morrison* Court noted that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity *only where that activity is economic in nature.*”³²

Pervading the Supreme Court’s federalist jurisprudence is the idea that some governmental functions are best provided by the federal government, while the rest should be performed at the state and local level. As Justice O’Connor noted in *New York v. United States*, “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”³³

State and federal governments each have areas in which they specialize. According to Hamilton:

The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.³⁴

³⁰ See *Hodel v Virginia Surface Mining & Reclamation Ass’n*, 452 US 264 (1981) (upholding the Surface Mining Control and Reclamation Act).

³¹ See *Wickard v Filburn* 317 US 111 (1942).

³² *Morrison*, S Ct at 1751 (emphasis added).

³³ *New York*, 505 US at 156.

³⁴ *The Federalist* No. 17, at 156 (Alexander Hamilton) (Isaac Kramnick ed. 1987).

Concern with preserving to the states some portion of their traditional jurisdiction is a common refrain in the Supreme Court’s recent cases. In *Lopez*, for example, the Court noted that both criminal law and education were traditional functions of state and local governments, along with family law.³⁵ In 1982 the Supreme Court declared regulation of land use a “quintessential state activity.”³⁶

To preserve the system of dual sovereignty, the courts must police each sovereign’s boundaries. The federal government must be constrained to operate within its constitutionally prescribed limits, while states are prevented from disrupting national markets. Otherwise, were “the Federal Government to take over the regulation of entire areas of traditional state concern, having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”³⁷

B. The Rationale

Both the state sovereignty and enumerated powers strands of the Court’s federalism jurisprudence are grounded in the notion of “dual sovereignty.” The division of authority between the federal and state governments is even more fundamental than the separation of powers among the branches of the federal government. As the Court explained in *Gregory v.*

³⁵ *Lopez*, 514 US at 561 n3 (“Under our federal system, the ‘states possess primary authority for defining and enforcing the criminal law.’” (citing *Engle v Isaac*, 456 US 107 (1982)); *Id.* at 564 (noting law enforcement, education and family law are matters traditionally left to the states); *Id.* at 580 (Kennedy, J., concurring) (“it is well established that education is a traditional concern of the states.”)).

³⁶ *FERC v Mississippi*, 456 US 742, 768 n30 (1982).

³⁷ *Id.* at 577 (Kennedy, J. concurring).

Ashcroft: “Just as the separation and independence of the coordinate branches of Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”³⁸ Moreover, a decentralized federal system produces government that is “more sensitive to the diverse needs of a heterogeneous society” and “more responsive by putting States in competition for a mobile citizenry.”³⁹

Perhaps the strongest argument for reserving substantial power to the states is that local tastes, conditions, and concerns will vary from place to place. Demographic variation, localized culture, differing geography, and varied economic strengths mean that one-size-fits-all approaches to policy too often fit nobody. Leaving substantial power in the hands of state and local governments helps those governmental units do a better job of matching local government policies with the tastes and preferences of local citizens than a national government could do. At the same time, decentralization enables a mobile citizenry to move to those areas where government policies (and other factors) are most in line with their own preferences.

Consider the following example suggested by Michael McConnell.⁴⁰ A nation is made up of two states, A and B. Each state has 100 residents. 70 percent of those in State A, and 40 percent of those in State B, favor banning smoking in public buildings. The remaining residents of each state oppose the ban. If a decision is made by popular vote at the national level, smoking in public buildings is banned by a vote of 110 to 90. However, if each state decides its own smoking policy by majority vote, the ban passes in State A, 70-30, but fails in State B, 40-60. Thus, 130 of the 200 residents are satisfied with the policy choice. The division of the nation into two states results in the satisfaction of 20 more people than would have occurred were

³⁸ *Gregory*, 501 US at 458.

³⁹ *Id.*

⁴⁰ Michael W. McConnell, *Federalism: Evaluating the Founder’s Design*, 54 U Chi L Rev 1484, 1494 (1987).

policy made at the national level. If people are mobile, even more people could be satisfied by moving to the state where the policy matches their personal preference. Assuming that as few as ten percent of people will move from a state with a disfavored policy to a state with a favored policy increases the number of satisfied citizens increases to 137 of 200.

In the real world, of course, people seldom if ever change their state of residence solely because of relatively trivial policy issues like the one in this hypothetical. But they may relocate in response to more significant policy choices, and there may be correlations among various preferences. Thus, for example, the same people who object to smoking in public buildings may share numerous other preferences, while those who favor smoking in public buildings may share contrary preferences among themselves. As a result, differing policy choices by state governments can have powerful effects at the margin.⁴¹

This dynamic – states' ability to adopt policies in line with local preferences and citizens' ability to move to states with policies they prefer – leads to the second argument for a federalist system: interjurisdictional competition.⁴² States compete for citizens by offering differing mixes of taxes, services, and regulations. This reinforces heterogeneity of tastes across states and homogeneity of tastes within states. Thus, public policy will vary from state to state, particularly in areas where there is no clearly optimal policy choice. Moreover, dispersing power and authority away from the central government and removing barriers to interstate competition constrain government's ability to maintain rent-seeking policies.⁴³

⁴¹ See, for example, Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J Leg Stud 201, 209-10 (1996) (finding that higher welfare payouts are significantly and positively correlated with immigration and significantly and negatively correlated with emigration); F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 Sup Ct Econ Rev 141 (1997) (evidence suggests that states offering generous welfare benefits are seeking to attract immigrants who are likely to support the dominant political coalition).

⁴² See generally, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).

⁴³ See Barry Weingast, *The Economic Role of Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. Econ. & Org. 1, 5-6 (1995).

The decentralization of authority also encourages state experimentation. In Justice Brandeis’ famous words: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴⁴ Such experimentation results from the possibility of competition among jurisdictions.⁴⁵ This is as true of competition between states as it is of competition between buyers and sellers in the marketplace. States essentially sell places to live, work, and produce goods, and will respond to market pressures. When the federal government intrudes into areas of traditional state concern, it “forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.”⁴⁶

It is, of course, true that decentralization is not an entirely unmixed blessing. Most importantly in the present context, the benefits of decentralization cannot easily be disentangled from the structural incentives it creates for the production of negative externalities and free riding. Sorting out these costs and benefits is among the most difficult and important questions in the field of environmental regulation, and it provided the main basis for the dispute between the majority and the dissent in *SWANCC*.

II. *SWANCC v. Corps of Engineers*

⁴⁴ *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932)(Brandeis, J., dissenting).

⁴⁵ See, for example, Steven G. Calabresi, “*A Government of Limited and Enumerated Powers*”: In Defense of *United States v. Lopez*, 94 Mich. L. Rev 752, 777 (1995).

⁴⁶ *Lopez*, 514 US at 583 (Kennedy, J., concurring).

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), the Court confronted the scope of federal regulatory authority over wetlands and other “waters of the United States” under the Clean Water Act (“CWA”).⁴⁷ Prior to *SWANCC*, the Supreme Court had never struck down a federal environmental enactment or agency regulation for exceeding the commerce power.⁴⁸ Yet it was only a matter of time before the Supreme Court would have to consider how the principles enunciated in *Lopez* applied in this field. Though the court’s majority ducked the ultimate issue of whether federal regulations of isolated waters exceed the constitutional scope of federal power, it reaffirmed the vitality of its federalism principles in the context of environmental protection.

A. Regulatory Background

The CWA was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴⁹ Section 404 regulates the discharge of material into “navigable waters” – simply defined as “waters of the United States.”⁵⁰ It prohibits the “discharge of any pollutant” – defined to include dredged material, rock, sand, and solid or industrial waste – into navigable waters without a federal permit.⁵¹ Section 404 authorizes the

⁴⁷ 33 USC §§ 1251-1385 (1994). The “Clean Water Act” is the conventional name for the Federal Water Pollution Control Act.

⁴⁸ In *New York v United States*, 505 US 144 (1992), however, the Supreme Court voided portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on federalism grounds. *See* note 21 and accompanying text.

⁴⁹ 33 USC § 1251(a).

⁵⁰ 33 USC § 1362 (7).

⁵¹ 33 USC §§1311(a), 1362 (6).

U.S. Army Corps of Engineers to issue such permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”⁵²

Federal regulations promulgated by the Army Corps of Engineers⁵³ define “waters of the United States” to include 1) all waters used for interstate commerce;⁵⁴ 2) all interstate waters and wetlands;⁵⁵ 3) all tributaries or impoundments of such waters⁵⁶; and, most significantly:

all other waters such as intrastate lakes, rivers, streams (including intermittent streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds) the use, degradation, or destruction of which *could affect* interstate or foreign commerce including any such waters: (i) Which are or *could be* used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or *could be* taken and sold in interstate or foreign commerce; or (iii) Which are used or *could be* used for industrial purpose by industries in interstate commerce.⁵⁷

This definition explicitly includes “wetlands adjacent to waters (other than waters that are themselves wetlands).”⁵⁸

The Supreme Court considered the scope of the Corps’ regulatory authority in the 1985 case of *Riverside Bayview Homes v. United States*,⁵⁹ in which a developer challenged federal

⁵² 33 USC § 1344 (a). Approval of a permit by the Corps is subject to the EPA’s veto authority. 33 USC § 1344(c). Additionally, the Corps must give the Fish and Wildlife Service and National Marine Fisheries Service the opportunity to comment on permit applications. 33 CFR § 320.4(c).

⁵³ The US EPA has parallel regulations at 40 CFR §§ 110 *et seq.*

⁵⁴ 33 CFR § 328.3 (a)(1).

⁵⁵ 33 CFR § 328.3 (a)(2).

⁵⁶ 33 CFR § 328.3 (a)(4), (5).

⁵⁷ 33 CFR § 328.3 (a)(3)(emphasis added).

⁵⁸ 33 CFR § 328.3 (a)(7). The regulatory definition also excludes prior converted cropland. 33 CFR § 328.3 (a)(8).

jurisdiction over “wetlands adjacent to navigable bodies of water and their tributaries” as exceeding the limits of the CWA.⁶⁰ The Court rejected this argument, finding that Congress sought “to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”⁶¹ In particular, the Court upheld “the Corps’ conclusion that adjacent wetlands are inseparably bound up with the ‘waters’ of the United States,” and therefore are subject to the Corps’ regulatory authority under the CWA.⁶² Yet the Court did not give the Corps carte blanche authority to regulate wetlands. It explicitly did not address whether the Corps’ authority extended to cover “wetlands not necessarily adjacent to other waters,”⁶³ and paid little attention to what, if any, limits the Commerce Clause placed on the Corps’ authority to regulate wetlands.

The Army Corps, however, did not see any limits on its jurisdiction. The year following *Riverside Bayview Homes*, the Corps published its interpretation of its authority, commonly referred to as the “migratory bird rule,”⁶⁴ which stated that the Corps’ regulatory authority extends to intrastate waters:

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

⁵⁹ 474 US 121 (1985).

⁶⁰ *Riverside Bayview Homes*, 474 US at 123.

⁶¹ *Id.* at 133.

⁶² *Id.* at 134. In reaching this conclusion, the Court relied upon the proposition that “[a]n agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.” *Id.* citing *Chemical Manufacturers Assn. v Natural Resources Defense Council*, 470 US 116, 125 (1985) and *Chevron USA. v NRDC*, 467 US 837, 842-45 (1984).

⁶³ *Id.* at 124 n2.

⁶⁴ This is more accurately be referred to as the “migratory bird interpretation,” as the Corps’ interpretation was issued without following the notice and comment procedures required under the Section 553 of the Administrative Procedure Act. See *SWANCC*, 121 S Ct at 678 n1.

- b) Which are or would be used as habitat by other migratory birds which come across state lines; or
- c) Which are or would be used as habitat for endangered species; or
- d) Used to irrigate crops sold in interstate commerce.⁶⁵

The Corps thereby effectively asserted its regulatory authority over all territory meeting the definition of waters or wetlands throughout the United States.

B. The *SWANCC* Litigation

This case arose out of localities' efforts to dispose of their trash.⁶⁶ The Solid Waste Agency of Northern Cook County (SWANCC) was a municipal corporation formed by 23 local jurisdictions in northern Illinois for the purpose of siting and operating a solid waste disposal facility. For this project, SWANCC purchased a 533-acre parcel straddling Cook and Kane Counties, previously used for gravel mining. SWANCC intended to use the site to construct a balefill – that is, a landfill for disposing of baled, non-hazardous solid waste. Much of the parcel consisted of mining pits and other depressions that filled with water, creating permanent or seasonal ponds. In 1986 and 1987, SWANCC asked the Army Corps whether portions of the balefill site were subject to federal regulation under the CWA due to the presence of “apparent wetlands.”⁶⁷ On each occasion, the Corps issued a letter stating that the site contained no

⁶⁵ 51 Fed Reg 41,217 (1986).

⁶⁶ Unless otherwise noted, the summary of the facts is taken from the opinion of the federal district court in *Solid Waste Agency of Northern Cook County v US Army Corps of Engineers*, 998 F.Supp. 946 (N.D. Ill. 1998), *aff'd* 191 F 3d 845 (1999), *rev'd* 121 S Ct 675 (2001).

⁶⁷ 998 F Supp at 948.

wetlands subject to federal regulation and that therefore the federal government did not have jurisdiction over the site.

In July 1987, the Illinois Nature Preserves Commission claimed that four different species of migratory birds had been observed at the site, prompting the Corps to reconsider its determination that the SWANCC balefill site was beyond its regulatory jurisdiction. Armed with this new information, the Corps reversed course and asserted jurisdiction over SWANCC's parcel due to its *potential* to serve as waterfowl habitat. The Corps never claimed that there was any hydrological connection between the portions of the site that SWANCC sought to develop and broader hydrological systems. Nonetheless, the Corps denied SWANCC's request for a permit to fill 17.6 acres of the 533-acre site, and SWANCC sued.

Neither the trial court nor the Seventh Circuit Court of Appeals were persuaded by SWANCC's argument that isolated waters were beyond the permissible scope of federal authority.⁶⁸ Both courts reasoned that the assertion of regulatory jurisdiction over isolated waters on the basis that migratory birds might use such land as a habitat posed no constitutional difficulty under *Lopez*. While the filling of fewer than two-dozen acres of isolated waters or wetlands might have a negligible economic impact, "the destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce."⁶⁹ The Seventh Circuit cited government estimates that over 3 million Americans spent an estimated \$1.3 billion dollars hunting migratory birds in 1996, and "about 11 percent of them traveled across state lines to do so."⁷⁰ Over ten million more traveled across state lines to birdwatch.⁷¹ On this basis, the Seventh Circuit affirmed the lower court and held that "the destruction of migratory bird habitat

⁶⁸ *Solid Waste Agency of Northern Cook County v US Army Corps of Engineers*, 998 F Supp. 946 (ND Ill 1998); *Solid Waste Ass'n of Northern Cook County v US Army Corps of Engineers*, 191 F 3d 845 (7th Cir 1999)

⁶⁹ *SWANCC*, 191 F 3d at 850.

⁷⁰ *Id.*

⁷¹ *Id.*

and the attendant decrease in the populations of these birds ‘substantially affects’ interstate commerce.’⁷²

C. The Supreme Court’s Decision

The Supreme Court reversed, though without reaching the constitutional question. Instead, the Court employed a clear statement rule, first developed in *Gregory v. Ashcroft*,⁷³ under which ambiguous statutes are read narrowly when a broader interpretation would upset the usual constitutional balance of federal and state powers. Given the importance of the Constitution’s underlying federalist structure, the Court made clear that it would find that Congress sought to reach the outer bounds of its commerce clause power only where the statutory language mandates such a result. Upsetting the federalist balance requires “a clear indication that Congress intended that result.”⁷⁴ Congress bears the burden to enact statutory language that leaves no question that it intended to displace state efforts in the area before an executive agency can assert such authority.

In each case construing Congress’ enumerated powers, the Court can make two possible errors. First, the Court could uphold a federal action that exceeds Congress’ delegated authority. Conversely, the Court could invalidate a federal action that is actually within Congress’ enumerated powers. In relying upon a canon of statutory interpretation that places the onus upon Congress to assert its intention to expand federal power, the *SWANCC* majority made clear its preference for avoiding the former error at the risk of committing more of the latter.

⁷² *Id.*

⁷³ 501 US 542 (1991) (requiring a “clear statement” of Congressional intent to preempt state authority).

⁷⁴ *SWANCC*, 121 S Ct at 683. *See also, United States v Bass*, 404 U.S.S. 336, 349 (1971) (stating that, unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance”).

Furthermore, by requiring a clear statement, the Court effectively raises the cost to Congress of exercising its rightful authority to upset the traditional federal-state balance, thus helping to prevent Congress from exercising its power too lightly.⁷⁵

Congress enacted the CWA in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁷⁶ To this end, the 1972 Act imposed technology-based effluent standards on industry and expanded funding for municipal sewage treatment. It also mandated permits for discharge of effluents or other materials into waters of the United States. However, states that met certain requirements became eligible to assume responsibility for administering the various permitting programs under federal supervision. As the Court noted, Congress not only expanded federal water quality efforts, it also sought to

recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority.⁷⁷

The Court was not convinced by the Corps' interpretation of its authority to include all waters, including wetlands, irrespective of their size, navigability, or location. As noted above, CWA section 404(a) authorizes the Corps to regulate the discharge of fill material into “navigable waters,” defined as “waters of the United States.”⁷⁸ The Court extended this definition no further than wetlands and other waters adjacent to navigable waters. While the Court would normally

⁷⁵ “Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.” *Gregory*, 501 US at 460.

⁷⁶ 33 USC § 1251(a).

⁷⁷ 33 USC § 1251(b).

⁷⁸ 33 USC § 1362(7).

give deference to an agency’s interpretation of a statute that it administers under the *Chevron* doctrine,⁷⁹ the Court refused to do so here. “Where an administrative interpretation of a statute invokes the outer limits of Congress’ power” the Court demands a “clear indication that Congress intended that result.”⁸⁰ The Court found insufficient evidence in the text or legislative history to conclude that Congress sought to reach “nonnavigable, isolated, intrastate waters,” in either the 1982 Act or amendments passed in 1977.⁸¹ Despite the Corps’ insistence to the contrary, the Court found no clear indication that “navigable waters” include “isolated ponds, some only seasonal, wholly located within two Illinois counties.”⁸²

While the Court did not directly address the Constitutional question, it noted that where an assertion of federal authority “alters the federal-state framework by permitting federal encroachment upon a traditional state power” it is particularly reluctant to stretch the bounds of Congress’ delegated power.⁸³ The majority noted that allowing the Corps “to claim federal jurisdiction over ponds and mudflats falling within the ‘migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.”⁸⁴ To avoid this result, the court interpreted the statute narrowly. The Court thereby adopted a decision rule designed to minimize the likelihood that it would erroneously compromise the federalist design, but at the same time failed to resolve whether federal regulation of isolated wetlands is beyond constitutional bounds. One year earlier, a unanimous Court applied the same principle to overturn a federal arson prosecution where there was no clear connection to interstate commerce, lest it adopt a statutory interpretation that would leave “hardly a [parcel of]

⁷⁹ *Chevron USA v NRDC*, 467 US 837 (1984)

⁸⁰ *SWANCC*, 121 S Ct at 683 (citing *DeBartolo Corp v Florida Gulf Coast Building & Contr. Trades Council*, 485 US 568, 575 (1988)).

⁸¹ *Id.*, at 682-83.

⁸² *Id.*, at 682.

⁸³ *Id.*, at 683.

⁸⁴ *Id.*, at 684.

land . . . outside the federal statute’s domain.”⁸⁵ If the Court is to resolve this issue, it will take a clear act of Congress, and not an administrative interpretation of a broad yet ambiguous statutory scheme.

Before discussing the environmental aspects of the Court’s decision, it is worth noting that the Court’s insistence on a “clear statement” of Congressional intent to intrude upon traditional state powers would seem to be particularly appropriate where it is an agency interpretation, and not the underlying authorizing statute, which is at issue. This is because the legislature can be expected to be more solicitous of state concerns than an executive agency. As the Court noted in *Garcia v. San Antonio Metropolitan Transit Authority*,⁸⁶ the political system contains “built in restraints” resulting from “state participation in federal governmental action” that work to limit federal intrusion in local matters.⁸⁷ Members of Congress are more responsive to the concerns of local regional concerns than centralized regulatory agencies. Congressional oversight could, in theory, reign in regulatory actions that run roughshod over federalism concerns, but this is unlikely to be an effective limit. Indeed, insofar as the Court’s federalism jurisprudence stands for the proposition that courts must safeguard federalism, this proposition should operate at its strongest in the context of administrative actions that do not directly respond to an explicit legislative command.

III. THE ENVIRONMENTAL CHALLENGE TO FEDERALISM

⁸⁵ *Jones v United States*, 120 S Ct 1904, 1911 (2000).

⁸⁶ 469 U.S. 528 (1985).

⁸⁷ *Id.* at 552, 556

Justice Stevens in dissent accused the *SWANCC* majority of “needlessly weaken[ing] our principal safeguard against toxic water.”⁸⁸ The dissent argues that using federalism doctrines to limit federal regulatory authority over environmental matters risks ecological ruin. Only federal regulatory intervention can prevent “the destruction of the aquatic environment” and ensure that “[o]ur Nation’s waters no longer burn.”⁸⁹ A given pond or wetland may be isolated hydrologically from other waters, but migratory waterfowl and other species connect such places with the broader ecosystem. In this regard, the dissent echoes much current commentary on the proper role of the federal government in environmental protection.⁹⁰

The argument for broad federal power to regulate environmental matters is grounded in a concern over interstate externalities. If the federal government is constrained by a narrow reading of its enumerated powers, there is a concern that states will be unable or unwilling to account for the effect that their regulatory decisions have upon other states or the nation as a whole. As the dissent explains:

The destruction of migratory bird habitat, like so many other environmental problems, is an action in which the benefits (e.g. a new landfill) are disproportionately local, while many of the costs (e.g., fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such

⁸⁸ *Id.*, at 684 (Stevens, J., dissenting). Justice Stevens was joined by Justices Breyer, Ginsburg, and Souter.

⁸⁹ *Id.*

⁹⁰ See, e.g., Oliver A Houck and Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev 1242, 1244 (1995) (stating that it is “as obvious today” as when the CWA was enacted “that the national interest in clean water and related wetlands functions merits a strong federal presence.”).

situations, described by economists as involving ‘externalities,’ federal regulation is both appropriate and necessary.⁹¹

The dissent cites two authorities for this analysis. The first is an article by Professor Richard Revesz arguing, among other things, that “[t]he presence of interstate externalities is a powerful reason for intervention at the federal level.”⁹² Second, the dissent cites *Hodel v. Virginia Surface Mining & Reclamation Association*, which upheld the Surface Mining Control and Reclamation Act against a commerce clause challenge.⁹³ The dissent notes that *Hodel* deferred to Congress’ finding that nationwide standards were “essential” in order to avoid “destructive interstate competition” that could undermine environmental standards.⁹⁴ Ironically, much of Revesz’s academic work has been devoted to challenging the conventional justifications for federal environmental regulation, particularly that advanced by *Hodel*.⁹⁵ Indeed, the central thesis of the article the dissent cites is that “destructive interstate competition” *cannot* justify federal environmental regulation.⁹⁶

The analytical confusion of the dissent notwithstanding, “externalities,” as used by the dissent, embraces three separate arguments that might be made to justify federal regulation of the environment under some conditions, including of isolated waters as in *SWANCC*.⁹⁷ First there is

⁹¹ *SWANCC*, 121 S Ct at 695 (Stevens, J., dissenting).

⁹² Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the ‘Race-to-the-Bottom’ Rational for Federal Environmental Regulation*, 67 NYU L Rev 1210, 1222 (1992).

⁹³ 452 US 264 (1981).

⁹⁴ *SWANCC*, 121 S Ct at 695 (citing *Hodel*, 452 US at 281-82) (Stevens, J., dissenting).

⁹⁵ See Revesz, *Rehabilitating Interstate Competition* (cited in note 92) (debunking race-to-the-bottom arguments). See also Richard Revesz, *The Race to the Bottom and Environmental Regulation: A Response to Critics*, 82 Minn. L. Rev 535 (1997); Revesz, *Federalism and Environmental Regulation: A Normative Critique*, in *The New Federalism: Can the States Be Trusted?* 97-127 (John Ferejohn and Barry R. Weingast, eds., Hoover Press, 1997); Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev 2341 (1996).

⁹⁶ See Revesz, *Rehabilitating Interstate Competition* (cited in note 92).

⁹⁷ See, e.g., Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in *The New Federalism: Can the States Be Trusted?* 5 (John Ferejohn and Barry R. Weingast, eds., Hoover Press, 1997) (noting the three distinct ways externalities may arise under federalism).

the perennial concern that leaving environmental protection to states will generate a “race to the bottom” as states relax environmental protections to compete with one another for industrial development. Second, activity in one state may result in an interstate “spillover” as pollution or some other ill effect is imposed on another jurisdiction. Third, insofar as an environmental resource, such as waterfowl habitat, has the characteristics of a public good, states may underinvest in its protection.

A. Race-to-the-Bottom

The race-to-the-bottom theory presumes that interjurisdictional competition creates a prisoner’s dilemma for states. Each state wants to attract industry for the economic benefits that it provides. Each state also wishes to maintain an optimal level of environmental protection. However, in order to attract industry, the theory holds, states will lower environmental safeguards so as to reduce the regulatory burden they impose upon firms. This competition exerts downward pressure on environmental safeguards as firms seek to locate in states where regulatory burdens are the lowest, and states seek to attract industry by lessening the economic burden of environmental safeguards.⁹⁸ Because the potential benefits of lax regulation are concentrated among relatively few firms, these firms can effectively oppose the general public’s preference for environmental protection regulation.⁹⁹ As one commenter explained, “[i]f each locality reasons the same way, all will adopt lower standards of environmental quality than they

⁹⁸ See, e.g. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev 570, 603-04 (1996).

⁹⁹ See generally, Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION* (1965). Proponents of the race-to-the-bottom theory also suggest that environmental advocates will have less political influence at the state and local level than at the national level. See, e.g., Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1213 (1977). See also, Esty, *Revitalizing* at 597-599 (cited in note 98). Note that other groups may be effective advocates for regulation, in part because of state competition for residents and industry. See text at note 135.

would prefer if there were some binding mechanism that enabled them simultaneously to enact higher standards, thus eliminating the threatened loss of industry or development.”¹⁰⁰ This will lead to social welfare losses even if environmental harm does not spill over from one state to another..

The race-to-the-bottom argument is probably the most common argument for federal environmental regulation, particularly for wholly or largely intrastate environmental problems, such as local air or water quality.¹⁰¹ But despite its currency, the theory has come under substantial fire. Revesz, the most prominent critic of the race-to-the-bottom theory, notes that environmental regulation is one of several respects in which states compete for business.¹⁰² Firm siting and relocation decisions are a function of numerous considerations apart from environmental regulation, ranging from taxes and infrastructure to the cost and skill base of the local workforce, to other regulatory policies. Moreover, for many citizens, stronger environmental protections are a reason to move *to* a state, a fact that creates pressures not to reduce environmental standards.¹⁰³ This likely offsets whatever race-to-the-bottom pressures, particularly since the same citizens that demand environmental protection make up the workforce that companies seek.

More fundamentally, Revesz demonstrates that while “game-theoretic interactions among the states could lead to underregulation absent federal intervention . . . it is equally plausible that in other instances the reverse would be true: that game-theoretic interactions among the states

¹⁰⁰ Stewart, *Pyramids of Sacrifice*, at 1212 (cited in note 99).

¹⁰¹ See e.g., *Hodel*, 452 US at 281-82

¹⁰² Revesz, *A Normative Critique*, at 105 (cited in note 95).

¹⁰³ Deborah Jones Merritt notes that “[r]esidents have flocked to some western states that use aggressive measures to protect the environment – despite the fact that these laws impose significant costs on business and taxpayers.” Deborah Jones Merritt, *Commerce!*, 94 Mich L Rev 674 (1995).

would lead to overregulation.”¹⁰⁴ For instance, if states determine that tax policy has a greater impact on firm siting decisions than environmental regulation, and interjurisdictional competition is assumed to generate a race to the bottom, states will adopt suboptimal tax rates – that is, tax rates on capital that are less than the cost of providing the infrastructure that capital requires. In this scenario it may be preferable for each state to adopt excessively stringent environmental regulations to prevent excessive industrial development.¹⁰⁵ Yet if each state follows this course, the result is too much regulation, not too little.

The race to the bottom argument also questionably assumes that federal intervention will solve the problem of chronic state underregulation. Because states compete for businesses on many fronts, establishing a federal minimum standard in one area simply shifts the competitive pressures into other arenas, such as tax policy or tort law. If reducing governmental burdens on business is necessary to attract corporate investment, and states will race to the bottom, establishing minimal environmental safeguards does not prevent the race from taking place, it merely shifts the policy area in which it occurs.¹⁰⁶ Instead of adopting suboptimal environmental regulations, states will compete by enacting suboptimal workplace or consumer protections. Thus, the race-to-the-bottom argument could just as easily become an argument for nationalizing all areas of public policy that affect corporate siting decisions. It is, in Revesz’s words, a “frontal attack” on federalism.¹⁰⁷

In support of the race-to-the-bottom theory, commentators point to survey data indicating that state policy makers consider the relaxation of regulatory standards to attract industrial

¹⁰⁴ Revesz, *Response to Critics*, at 539 (cited in note 95); *see also* Revesz, *Rehabilitating*, at 1241-42 (cited in note 92).

¹⁰⁵ Revesz, *A Normative Critique*, at 104-5 (cited in note 95).

¹⁰⁶ *Id.* at 106.

¹⁰⁷ *Id.* Of course, this argument assumes that there is nothing special about environmental protection that makes it more important for the protection of public health and welfare than other policy areas. Some advocates of federal intervention would argue that environmental protection requires greater safeguards than worker safety, wage rates, and the like because of moral or other considerations. *See, e.g.,* Stewart, *Pyramids*, at 1217-19 (cited in note 99).

investment more frequently than companies alter their siting decisions based upon environmental regulations.¹⁰⁸ One study reported survey results indicating that “a substantial minority of states relax their environmental standards in order to attract industrial firms.”¹⁰⁹ Yet the mere fact that state officials ease the burden environmental regulations impose on business does not necessarily mean that the welfare loss from the regulatory relaxation is greater than the welfare gain of increased economic activity. More fundamentally, this argument assumes an identity between the level of environmental protection and the costs imposed upon business. In other words, an environmental policy that makes a state more attractive to industry by reducing the costs of compliance with environmental rules does not necessarily compromise environmental protection.

An obvious example of how more lenient environmental rules are not necessarily inconsistent with environmental protection is the replacement of a command-and-control technology mandate with a performance standard. Mandating the use of a given technology or even imposing percentage emission reductions on a given industry may produce widely divergent costs across firms. Some firms will find it less expensive to reduce emissions through some means other than that mandated by law, perhaps by making different modifications to the production process. Under then-existing air pollution regulations, Amoco’s refinery in Yorktown, Virginia had to spend approximately \$40 million to reduce emissions of VOCs (volatile organic compounds) in the manner the law required. Yet in a top-to-bottom audit of the facility conducted with the cooperation of the Environmental Protection Agency, Amoco

¹⁰⁸ See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 *Hastings L.J.* 271 (1997). This study does not, however, purport to document declines in environmental quality resulting from such interjurisdictional competition. Rather, it assumes that when states reduce the stringency of environmental regulation this inevitably compromises environmental protection. Yet this assumption is unwarranted as discussed below.

¹⁰⁹ *Id.* at 356.

discovered that the facility could have generated the same emission reduction at one quarter of the cost had the facility merely been required to meet an environmental benchmark.¹¹⁰

Other firms may find it cheaper still to mitigate the environmental impact of their emissions by paying for emission reductions elsewhere. For instance, the imposition of a watershed or airshed-wide emission trading scheme may allow polluting companies to reduce their costs of compliance by paying for emission reductions by other firms with lower costs. For example, consider two companies that each emit 20 units of pollution per year at a cost to Firm A of \$20 per unit and to Firm B of \$30 per unit. If a regulation requires each company to reduce its emissions by 25 percent, the total cost of the emission reductions will be \$250 [(5 x \$20) + (5 x \$30)]. However, the same emission reductions could be achieved by allowing Firm B to comply by paying Firm A to reduce its emissions by five additional units, thereby producing the emission reductions for 20 percent or \$200 [(5 x \$20) + (5 x \$20)] lower cost. Indeed, under such a regime it could be possible to reduce emissions by two additional units at a lower cost than under the command-and-control regime.

This is not to say that such policy reforms will always be more cost-effective or available or that states will consistently adopt such policies if given the chance. It simply undercuts a key premise upon which the race-to-the-bottom theory relies – that reducing business' cost of environmental regulation must come at the expense of environmental protection.

It is also important to recognize that the trade-off between environmental protection and compliance costs will not remain constant over time. State policy makers and bureaucrats can, given the proper incentives, develop new means of reducing the severity of the trade-off. Interjurisdictional competition, by forcing states to compete for both industry and residents,

¹¹⁰ Ronald E. Schmitt, *The Amoco/EPA Yorktown Experience and Regulating the Right Thing*, 9 Nat. Resources & Env't (Summer 1994), at 13.

encourages this process. A state that wishes to provide a greater level of environmental protection to its citizens but does not want to create a less friendly investment climate for business will seek to adopt new types of environmental protection that do a superior job of meeting both goals. Interjurisdictional competition thus spurs a policy discovery process through which new means of reconciling environmental and economic concerns are developed and adopted.

Like the race to the bottom argument, empirical evidence that suggests the theory is flawed is not new. In the early part of the twentieth century, when the Supreme Court first struggled with the constitutional limits on the exercise of Congress’s commerce power, proponents of an expansive interpretation argued that federal regulation was necessary to protect the weak and disenfranchised from the vagaries of the market. Thus, in 1916 Congress enacted a law prohibiting the interstate shipment of goods produced in plants that employed children under the age of 14.¹¹¹ When challenged in the Supreme Court two years later, the government warned that without the law “[t]he shipment of child-made goods outside of one State directly induces similar employment of children in competing states.”¹¹² Yet at the time “every State in the Union” had a law regulating child labor.¹¹³

The race-to-the-bottom theory is no better at predicting state regulatory behavior in the context of environmental protection than it was with child labor. If the race to the bottom theory were accurate, one would expect states to lag behind the federal government in developing programs to protect wetlands, and states with the greatest proportion of wetlands to be slower to

¹¹¹ Act of Sept. 1 1916 ch. 432, 39 Stat. 675. The law also limited the number of hours that children between the ages of 14 and 16 could work.

¹¹² *Hammer v Dagenhart*, 247 US 251, 256-57 (1918). A similar race-to-the-bottom was made by the government in defense of the National Industrial Recovery Act. See *A.L.A. Schechter Poultry Corp. v United States*, 295 US 495, 549 (1935).

¹¹³ *Hammer*, 247 US at 275. The Supreme Court struck down the statute for exceeding the scope of Congress’ Commerce Clause power, but this decision was subsequently overturned in *United States v Darby*, 312 US 100 (1941).

protect wetlands than those with a lower proportion of wetlands. Assuming that limiting the use and development of wetlands imposes costs on industry and discourages economic investment, these costs will be greatest in states with the greatest proportion of wetlands that might be burdened by regulation. At the same time, the marginal cost of developing an acre of wetlands will be less in states with the greatest proportion of wetlands because such development will have a smaller proportionate impact on that state’s wetland inventory and, presumably, the ecological benefits that the wetlands provide. From this one can outline a testable hypothesis: “As a general rule, the larger a state’s wetland inventory, the more important it is to the nation, but the less important saving it may appear to the state itself—indeed, the more onerous the burden of protecting it will appear.”¹¹⁴

The history of state wetland regulation, however, paints quite a different picture. Not only did states not wait for the federal government to begin regulating wetlands, but the order in which state began to act is the *precise opposite* of what the race-to-the-bottom theory would predict. Fifteen states have more than ten percent of their land area in wetlands, according to the National Wetland Inventory.¹¹⁵ All of these states but Alaska enacted their first wetland protection statutes prior to 1975, when a federal court declared that the CWA applied to wetlands.¹¹⁶ Moreover, most of these states have some protections for inland wetlands, in addition to coastal wetlands. As noted in a recent review of state efforts, “most of the states with the largest wetland acreages have adopted wetland regulatory efforts for all or a portion of their

¹¹⁴ Houck and Rolland, at 1253 (cited in note 90).

¹¹⁵ See Jon. A. Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends* 5-8, Table 1 (Association of State Wetland Managers, 1994). These states are Alabama, Alaska, Delaware, Florida, Georgia, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, North Carolina, South Carolina, and Wisconsin.

¹¹⁶ This data is summarized in Adler, *Wetlands, Waterfowl*, at 41-54 (cited in note 4).

wetlands.”¹¹⁷ States with a lower proportion of wetlands generally enacted state regulatory programs later, if at all. This is the exact opposite of what the race to the bottom theory would predict.

The race-to-the-bottom theory suggests not only that states with the most wetlands would regulate last, but also that few states would regulate in excess of federal requirements. This would drive investments to other states just as would state regulation in the absence of federal regulation. Moreover, once the federal government regulates, states are likely to devote their resources to those areas not already occupied by the federal government where state efforts are likely to generate greater marginal returns both to the state as a whole and to politicians who need not share credit with federal officials.

Despite incentives not to act, many states have adopted programs that reach beyond federal wetlands regulations as implemented prior to *SWANCC*. Several states regulate sizable buffer zones, and not just the wetlands themselves. The Maryland Department of the Environment, for instance, regulates buffer zones for nontidal wetlands of between 25 and 100 feet.¹¹⁸ New York’s statute protects a 100 foot buffer zone that local governments may extend.¹¹⁹ Federal regulations contain no such protections.¹²⁰ In addition, some states have sought to develop non-regulatory programs to supplement or substitute for regulatory programs.¹²¹ States also are taking the lead in developing systems for classifying wetlands and

¹¹⁷ Kusler, et al., *State Wetland Regulation*, at 3 (cited in note 115).

¹¹⁸ See Stephen R. Rubin, Note, *An Analysis of Nontidal Wetland Regulation in Maryland*, 16 Va Env’t LJ 459, 477 (1997).

¹¹⁹ See Patricia Riexinger, *Local Implementation of New York’s Freshwater Wetlands Act*, in *Wetland Protection: Strengthening the Role of the States* (Ass’n of State Wetland Managers, 1985), at 229.

¹²⁰ See Rubin, *Nontidal Wetland Regulation* at 477 (1997) (stating that “[r]egulation of activities in the buffer zone is unique to state law, and is not found in the section 404 program.”) (cited in note 118).

¹²¹ See Kusler, et al., *State Wetland Regulation*, at 20-21, 31-35 (cited in note 115); *Symposium, Wetland Protection: Strengthening the Role of the States*, 599-635 (Ass’n of State Wetland Managers, 1985); Gordon Meeks Jr. & L. Cheryl Runyon, *Wetlands Protection and the States* 14-15 (National Conference of State Legislatures, April 1990).

evaluating their functions.¹²² Despite the supposedly greater sophistication and technical expertise at the federal level, there is little evidence that the Corps considers wetland function in the regulatory process at all.¹²³

If the race-to-the-bottom cannot explain this trend, what can? One possibility is suggested by the work of Nobel Prize winning economist F.A. Hayek, who noted that much valuable knowledge is particular to time and place.¹²⁴ Not until late in the twentieth century were wetlands valued for their ecological functions or the focus of substantial conservation efforts. Not until the 1970s was there widespread recognition of the ecological functions that wetlands provide, including water filtration and flood mitigation, as well as their value for waterfowl and other wildlife habitat. Most of these benefits are localized. Therefore, the greatest beneficiaries of wetland protection efforts would be those closest to the wetlands. Similarly, knowledge of the specific ecological functions provided by wetlands in a given region likely also would be localized. This puts state and local officials in a better position to address environmental concerns than federal officials in a centralized regulatory bureaucracy.¹²⁵ In the words of one local official, there is “a need for a community perspective not because local governments are more perfect, but because they are more local.”¹²⁶ Therefore, one possible explanation for the pattern of wetland regulation could be that states with the most wetlands were

¹²² For instance, as of 1992 ten states were using wetland classification systems to evaluate function and value in the regulatory process. See William E. Taylor & Dennis Magee, *Should All Wetlands Be Subject to the Same Regulation?* Natural Resources & Env, Summer 1992, at 34.

¹²³ See Michael Mortimer, *Irregular Regulation under Section 404 of the Clean Water Act: Is the Congress or the Army Corps of Engineers to Blame?* Draft presented at the Political Economy Research Center, June 1997.

¹²⁴ See, generally, F.A. Hayek, *The Use of Knowledge in Society*, 35 Amer Econ Rev 1 (1945).

¹²⁵ See Henry N. Butler & Jonathan R. Macey, *Using Federalism to Improve Environmental Policy* 27 (American Enterprise Institute, 1996) (stating that “[f]ederal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources.”).

¹²⁶ Maggy Hurchalla, *A Community Perspective for Wetlands Protection, in Wetland Protection: Strengthening the Role of the States* (Ass’n of State Wetland Managers, 1985), at 260 (Ms. Hurchalla was then Commissioner of Martin County, Florida).

most aware of the ecological values played by local wetlands. This also would explain why many localities choose to regulate wetlands even more stringently than their respective state governments.¹²⁷

It also should be the case that insofar as wetlands and other ecological goods provide economic benefits, industries and interests that rely upon these benefits will organize and lobby for greater protection. Industry is not a monolith. Although commercial developers may suffer from wetland regulation, other industries, such as tourism, and fishing, may benefit. Protecting ecological resources in some areas may also increase property values, thereby increasing rather than diminishing the tax base. Finally, states with abundant wetlands and strong environmental safeguards are likely to attract people that share preferences for these resources, and who would advocate reinforcing the protections that are in place. In this fashion, interjurisdictional competition should augment environmental protection rather than undermine it. These explanations for the pattern of wetland protection are speculative, but they are more consonant with the historical evidence than the race-to-the-bottom theory.

B. Spillover Problems

While the threat of a destructive race to the bottom may not provide a sound justification for federal intervention, the presence of interstate spillovers might.¹²⁸ This is particularly the

¹²⁷ For instance, in New York, many localities opt to implement the state wetlands program and tighten the regulatory requirements because “local governments know their resources better than the state regulating agency does.” Riexinger, at 229 (cited in note 119). Massachusetts, which enacted the first wetland protection statute in 1963, based its statute on preexisting local ordinances. See Alexandra D. Dawson, *Massachusetts’ Experience in Regulating Wetlands*, in *Wetland Protection: Strengthening the Role of the States* 255 (Ass’n of State Wetland Managers, 1985).

¹²⁸ See, e.g., Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 44 *Duke L.J.* 931 (1997). Merrill, an advocate of federalism, notes that “[g]iven the inherent difficulties in regulation by any single state, transboundary

case with transboundary pollution – “a physical externality or spillover that crosses state lines.”¹²⁹ This sort of interstate externality or spillover effect must be differentiated from the sort of pecuniary externality that results from the overuse of an interstate commons or failure to protect an ecological public good.¹³⁰ These latter effects are discussed in the next section.

Pollution that crosses political boundaries is a legitimate federal concern. Yet despite the dissent’s protestations to the contrary, it is not at all clear that any such spillovers were present in *SWANCC*. The question before the court was, explicitly, whether the federal regulatory authority reached isolated waters that, by definition, are not hydrologically connected to interstate or otherwise navigable waterways. There is, therefore, little reason to believe that *SWANCC* undermines the federal government’s legitimate role in the control of interstate pollution problems.

The dissent correctly noted that the development of waters that serve as habitats for migratory birds will, over time, produce measurable impacts in other states. Wetlands, in the words of two commentators, “are aptly seen as biological factories” producing wildlife and other interstate goods.¹³¹ If migratory birds have fewer habitats in Illinois, there may be fewer such birds in states throughout their migration path. In this sense, then, the Corps’ denial of *SWANCC*’s permit could be characterized as an effort to control such interstate externalities.

But this argument proves too much. If *SWANCC*’s development of hydrologically isolated waters can be regulated because of the marginal impacts on wildlife populations in other jurisdictions, then the concept of what constitutes an interstate spillover worthy of federal regulation begins to lose its analytical utility. Although migratory birds rely upon wetlands and

pollution would seem to present a clear case for shifting regulatory authority from local to more centralized levels of governance.”.

¹²⁹ *Id.* at 968.

¹³⁰ *See id.* at 968-69.

¹³¹ Houck & Rolland, at 1248 (cited in note 90).

fly across state lines, letting this alone establish a basis for federal regulation would obliterate any limit on federal regulatory authority, as would accepting the argument for federal regulation explicitly rejected in *Lopez*. The *Lopez* dissenters argued that the federal government could regulate the possession of guns in or near schools because of the potential externalities that guns in schools could disrupt the educational process, thereby depressing the earning potential or productivity of the future labor force and dramatically affecting the nation's economic future. Much as wetlands are “biological factories” to be regulated like industrial factories, schools could be seen as the factories that produce future workers and managers. But this was not enough to justify the regulation in *Lopez*.

Alteration of habitat or other lands that is likely to produce broad dispersed external effects on other jurisdictions is likely to have greater effects at the source. Whatever effects the SWANCC balefill will have on migratory waterfowl populations in Texas are dwarfed by the potential environmental impacts in Cook and Kane Counties, Illinois. This may explain why local environmental groups intervened on the side of the Army Corps from the onset of the litigation in the district court. While the dissent characterizes the waste disposal project as generating concentrated local benefits and dispersed costs on the nation at large, it is more common to characterize waste disposal facilities in the opposite fashion. Landfills, incinerators, and the like are generally considered “locally undesirable land-uses” or “LULUs” that impose substantial costs on local residents while providing dispersed benefits to a broader community. In the case of a landfill, for instance, local residents may suffer from odor, pollution, or depressed land values, while the broader region benefits from less expensive waste disposal.¹³²

¹³² See, e.g., Richard Epstein, *Waste & the Dormant Commerce Clause*, 3 Green Bag 2d 29 (1999) (arguing that local externalities from waste disposal facilities may justify limits on interstate commerce in solid waste). *But see*, Jonathan H. Adler, *Waste & the Dormant Commerce Clause – A Reply*, 3 Green Bag 2d 353 (2000) (arguing that no

Such concerns, whether justified on environmental grounds or not, tend to generate strong local opposition to LULUs – typically referred to as “NIMBYism” for “Not-In-My-Backyard” – or demands for compensation.¹³³ The strength of these local responses would suggest that federal intervention is unnecessary to prevent spillovers in many cases.

The problem with simply pointing to the presence of an externality is that it can authorize just about any environmental regulation because an individual's or jurisdiction's environmental decision often can displease someone else. A more reasonable standard is based upon the sort of tangible spillover effects that would be actionable at common law, such as emitting pollutants upstream, blocking water flow, and modifying river currents so as to induce flowing. Where transaction costs or political difficulties prevent states from engaging in Coasian bargaining or establishing interstate compacts, federal intervention to address such concerns may be warranted.¹³⁴ Regulating any land-use that could have a marginal impact on the greater ecosystem is not. Ironically, were it not for the CWA itself, states might have greater recourse to federal common law for redress of more serious interstate pollution.¹³⁵

The decision in *SWANCC*, although it limits federal regulatory authority, does not limit the federal government's regulatory authority over navigable waters that have substantial interstate characteristics, including wetlands. The Court's majority found the CWA to distinguish between the protection of water resources that are clearly interstate in character and those that are not. This affirms the federal role in controlling interstate environmental matters

limits on interstate commerce are justified); Richard Epstein, *Waste & the Dormant Commerce Clause – A Reprise*, 3 Green Bag 2d 363 (2000) (defending the original proposition).

¹³³ See, Adler, *Waste & The Dormant Commerce Clause* at 359-60 (cited in note 132).

¹³⁴ One possibility would be to adopt a “golden rule” for interstate pollution under which states could receive protection from upstream or upwind jurisdictions insofar as they protect their citizens from equivalent environmental harms. See Merrill, *Golden Rules* (cited in note 128).

¹³⁵ Prior to passage of the CWA, the Supreme Court recognized common law nuisance suits for interstate water pollution. See *Illinois v. Milwaukee*, 406 US 91 (1972). After passage of the CWA, however, the Court held that such suits under federal common law were preempted by the Act. See *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

without justifying the regulation of anything that could conceivably generate an interstate externality.

The decision therefore affirms the economies of scale – or perhaps the *ecologies* of scale – that characterize different environmental concerns. The local and regional nature of many environmental problems means that local knowledge and expertise is necessary to develop proper solutions. While pollution of a small, intrastate pond may create ripple effects on environmental resources in other states, the ecological life of that pond is still locally concentrated. Wetland type and function varies dramatically throughout the country. Local wetland protection programs can, and often do, take account of local conditions. In the words of one state wetland official, “Okeechobee County doesn’t need to worry about mangrove estuaries. Dade doesn’t need to worry about phosphate. Leon doesn’t need to worry about the Everglades.”¹³⁶ The diversity of state freshwater protection efforts reflects “the diversity of freshwater wetland types across the nation and state preferences.”¹³⁷

It should also be noted that direct federal efforts to control physical spillover problems have been rather limited. Only in recent years has the Environmental Protection Agency responded to concerns about interstate air pollution under the Clean Air Act.¹³⁸ Although the Clean Water Act also authorizes EPA regulation of interstate water problems, these provisions are rarely invoked.¹³⁹ Federal neglect of transboundary pollution suggests one of two conclusions. First, transboundary pollution may be mostly a relatively minor concern. Assuming that the impacts of pollution are generally most acute at or near the source, absent a race to the bottom most states and localities will act to address local environmental concerns before they generate substantial

¹³⁶ Hurchalla, *A Community Perspective*, at 260 (cited in note 126).

¹³⁷ Kusler, et al., *State Wetland Regulation*, at 12(cited in note 115).

¹³⁸ See, e.g., *Michigan v EPA*, 213 F 3d 663 (2000) (upholding most of EPA requirement that upwind states reduce downwind emissions of nitrogen oxide).

¹³⁹ See Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev 2341 (1996).

spillovers.¹⁴⁰ The second alternative is that the federal government is simply ineffectual at controlling interstate pollution, either due to special-interest pressures at the federal level or institutional incapacity. Either explanation of federal failure to control transboundary spillovers reinforces the conclusion that enumerated powers need not be stretched to accommodate expansive regulation in the name of environmental protection.

C. Habitat as a Commons

Not all interstate externalities are the result of pollution crossing state lines. There also can be externalities in the provision of an interstate public good, such as wildlife habitat. Local residents will not capture all of the benefits of their state's decision to create or protect local wildlife habitat. Individuals in other states who care about the survival of a species and those who wish to observe, hunt, or otherwise derive satisfaction from the prospering of the species also will benefit. This is particularly true in the case of habitat for migratory birds, the benefits of which are spread throughout their migratory range.

Because other states will free ride on a state's provision of habitat, there is understandable concern that states will protect a suboptimal amount of habitat. Just as private firms in a competitive market normally will undersupply goods that produce benefits for which they cannot charge, states in a federalist system would be expected to underproduce goods, such as wildlife habitat, whose benefits are enjoyed by taxpayers in other states.

The public-good characteristics of isolated waters that serve as habitat for migratory species could provide a rational basis for federal intervention, but of what kind? Governments

¹⁴⁰ See Merrill, *Golden Rules* at 976-77(cited in note 128).

provide most public goods, from lighthouses and courts to police and national defense, through their powers to tax and spend. Government does not require landowners to donate the use of their land for military installations. Instead, the government levies taxes and uses the revenue to purchase what is needed for national defense, in rare cases through the power of eminent domain.

If wetlands are a public good because they provide habitat for migratory birds, limiting the federal government’s ability to regulate the use of wetlands does not prevent the government from rectifying the suboptimal provision of wildlife habitat. The commerce clause limitation on federal regulatory authority under *SWANCC* does not meaningfully limit the use of the spending clause. Congress is as able to appropriate money for wetland conservation after *SWANCC* as it was at the height of the New Deal era.

There is ample evidence that spending programs can effectively subsidize the creation and protection of wetlands. Federal support for the protection of waterfowl habitat dates back some seventy years to the sale of “duck stamps” to hunters that created a dedicated source of revenue for conservation of an estimated 3.5 million acres.¹⁴¹ Today there are several programs that subsidize wetland conservation and restoration, including the Fish & Wildlife Service’s Partners for Wildlife program, the North American Waterfowl Management Plan created in 1986, and the Wetland Reserve Program. Under these programs, the federal government enters into private agreements with landowners to restore wetlands on their property, while subsidizing the cost of restoration and the purchase a permanent or multi-year easement to ensure that the wetland is protected. In 1995, these three programs restored an estimated 48,000 acres, 42,000 acres, and 118,000 acres of wetlands respectively, for a total of over 200,000 acres of restored

¹⁴¹ Meeks & Runyon, at 8 (cited in note 121).

wetlands in a single year.¹⁴² This compares favorably with an estimated an average gross wetland loss rate of 156,000 acres per year from 1982-1992.¹⁴³ The cost of these programs is relatively low – typically less than \$1,000 per acre, including the cost of restoration, technical assistance and the purchase of an easement.¹⁴⁴

Relying upon the federal spending power to provide environmental goods such as wildlife habitat also reduces the potential for regional rent-seeking. Federal regulation can enable one constituency to impose its policy preferences on another at minimal cost. States with strong “pro-wetland” sentiment, but few wetlands, are likely to support greater regulation of wetlands nationwide as they will receive the benefit of having their preference for more wetlands fulfilled without bearing the costs. Even if its assumed that wetlands generate positive externalities that are evenly distributed nationwide, such as larger populations of migratory waterfowl, regional disparities in the concentration of wetlands can lead to regional rent-seeking, as the costs of preserving wetlands are concentrated on those areas most (un)fortunate to have the most desirable ecological characteristics. Forcing the federal government to pay for the creation or conservation of wetlands reduces this problem, as both the costs and benefits of providing the environmental benefits are more widely dispersed.

¹⁴² Jonathan Tolman, *Swamped: How America Achieved ‘No Net Loss’* (Competitive Enterprise Institute, April 1997). Department of Agriculture analysts believe that this estimate is slightly inflated. See Ralph E. Heimlich, et al., *Wetlands and Agriculture: Private Interests and Public Benefits*, Agricultural Economic Report No. 765, 53 (USDA, 1998). But these analysts also state that the amount of restoration per year doubled from 1992 to 1996, and exceeds 180,000 acres per year. *Id.*

¹⁴³ *Id.* at 20, Table 2.

¹⁴⁴ Tolman, *Swamped*, at 13-14 (cited in note 142). In 1995, the per-acre cost of wetland restoration, including the costs of easements, was \$790 for the Wetland Reserve Program, and \$773 for the North American Waterfowl Management Program. *Id.* at 13-15.

It is important to note that simply because something meets the traditional economic definition of a public good, this does not mean that it will not be provided privately.¹⁴⁵ Many people place substantial value on the existence of species or the preservation of habitat and are willing to invest their time, money and effort in ensuring that certain species survive. In the case of migratory waterfowl, the most obvious example of this phenomenon is Ducks Unlimited (DU). According to the group's own estimates, it has restored and protected over 9 million acres of waterfowl habitat in North America.¹⁴⁶ Other, smaller and less-well-known groups engage in similar activities, as do some corporations. Individuals and corporations can also receive tax deductions for their contributions to such efforts, which may offset public goods problems. Even if this private activity does not fully offset under-provision of habitat due to its public good characteristics, it should be considered when assessing the need for federal intervention.

IV. THE FUTURE OF ENVIRONMENTAL FEDERALISM

Faced with the prospect of having to defend its federalism jurisprudence from the environmental challenge, the Supreme Court ducked. Whereas in *Lopez* and *Morrison* the Court majority articulated the rationale for maintaining substantive limits on federal regulatory authority, in *SWANCC* the Court simply said that Congress had not (yet) pushed Constitutional bounds.

One reason for the court's apparent reluctance to re-articulate the rationale for its federalist jurisprudence may have been the subject matter. The rhetoric of the *Lopez* and

¹⁴⁵ See, e.g., Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & Econ 357 (1974). See also Randy E. Barnett, *The Structure of Liberty* 160-167 (Oxford University Press, 1998) (discussing the private provision of "public goods").

¹⁴⁶ Ducks Unlimited, *Fact Sheet* <http://www.ducks.org/community/states/national_2000.pdf> (visited March 13, 2001).

Morrison dissents aside, there was little doubt that the provisions struck down in either case were not essential to address a pressing national concern. Few believe that the solution to school violence of domestic abuse was to be found in the provisions of the federal code at issue in *Lopez*. Gun possession and domestic violence are not traditional subjects of federal control. In fact, the same interstate competitive dynamic that could, at least theoretically, generate a race to the bottom in environmental regulation is likely to produce the opposite effect in the context of criminal law. The interjurisdictional race “cuts the opposite way” as states benefit from increasing, not decreasing, the stringency of criminal laws.¹⁴⁷ Whereas tightening economic regulations theoretically risks driving industry to other states, strengthening criminal codes and increasing law enforcement, at least with respect to violent or property crimes will, if anything, encourage more law-abiding families to migrate to the state and encourage prospective criminals to migrate to other states with less stringent standards.¹⁴⁸

By contrast, since the early 1970s, the federal government has played an increasing role in addressing environmental concerns. In the wake of the first Earth Day, Congress enacted major statutes to address air and water quality, solid waste, drinking water, endangered species, and abandoned hazardous waste sites. Whatever the other limits of federal authority, there is a pervasive belief that the federal government has a substantial role to play in addressing environmental concerns. Rather than confront this belief the court rested its decision on statutory grounds.

It is perfectly appropriate for the Court to avoid reaching unnecessary constitutional matters. In the case of the CWA, the statutory language was sufficiently opaque to resolve *SWANCC* on statutory grounds. This will not be so in the future. While commerce clause

¹⁴⁷ Richard A. Epstein *Constitutional Faith and the Commerce Clause*, 71 *Notre Dame L Rev* 167, 180 (1996).

¹⁴⁸ Michael S. Greve, *Real Federalism: Why It Matters, How It Could Happen* 32 (AEI Press 1999).

challenges to federal regulatory authority under the CWA may be off the table for the time being, challenges to other statutes are under way.¹⁴⁹

Perhaps the most likely area where the Court will be forced to confront the environmental challenge to federalism is the Endangered Species Act (ESA). Under section 9(a)(1) of the ESA, it is unlawful for any person to “take” any species listed as “endangered” under the Act.¹⁵⁰ To “take” a listed species means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”¹⁵¹ This prohibition applies on all private lands, and has the effect of requiring private landowners to provide habitat for endangered species.¹⁵² While those unfamiliar with the ESA might think that it primarily protects large, wide-ranging species, such as bald eagles, mountain lions, and grizzly bears, most listed species are actually rather small species, many of which do not travel at all. Indeed, there are listed species that do not exist in more than one state. Since *Lopez*, there have been several commerce clause challenges to the application of the ESA’s “take” prohibition to intrastate activities. Some of these cases, like *SWANCC*, involve activities and habitats that are completely contained within a given state.

In *Gibbs v. Babbitt*,¹⁵³ two North Carolina landowners and two counties challenged a federal plan to reintroduce red wolves in Dare and Tyrell Counties. By 1998, an estimated 75 wolves were in the state. Although originally introduced on federal land, most were believed to

¹⁴⁹ The court also may be asked to revisit the limits of the CWA, as the Army Corps and EPA are construing the decision very narrowly. According to a memorandum issued by EPA General Counsel Gary Guzy and Army Corps Chief Counsel Robert M. Anderson shortly after the decision, “the Court’s holding was strictly limited to waters that are “nonnavigable, isolated, [and] intrastate.” According to the memorandum, any waters that fall outside of that category are still fair game. (Memo on file with author.)

¹⁵⁰ 16 USC § 1538(a)(1).

¹⁵¹ 16 USC § 1532(19).

¹⁵² This has been compared to the “quartering” of troops in the revolutionary period. See Andrew P. Morriss and Richard L. Stroup, *Quartering Species: The Living Constitution, the Third Amendment and the Endangered Species Act*, 30 *Envl L* 769 (2000).

¹⁵³ 214 F 3d 483 (4th Cir 2000) *cert denied* __ S Ct __ (2001).

be on private land. To support the reintroduction effort, Fish & Wildlife Service promulgated regulations barring the “taking” of red wolves by private individuals.¹⁵⁴ Violators are subject to both civil and criminal penalties.¹⁵⁵ Plaintiffs challenged the federal “taking” regulations under the commerce clause. Regulating the capture or killing of wolves on private land, they contend, is not the regulation of commerce among the several states. The court nevertheless found that the killing of wolves to protect livestock or other animals and the potential revival of the 19th century practice of hunting wolves for their pelts related to commercial activities.¹⁵⁶ These rationales for regulation would seem to press against the limits of the commerce clause as defined in *Lopez* and *Morrison*.¹⁵⁷

*National Association of Home Builders v. Babbitt*¹⁵⁸ presented an even more questionable assertion of federal regulatory authority to protect endangered species. This case concerned federal efforts to protect the Delhi Sands Flower-Loving Fly, which was placed on the endangered species list in 1993.¹⁵⁹ Federal prohibition on “taking” flies delayed construction of a hospital and local road improvements.¹⁶⁰ Several trade associations and local governments launched a commerce clause challenge to this regulation because the habitat for the Delhi Sands Flower-Loving Fly “is located entirely within an eight mile radius in southwestern San Bernardino County and northwestern Riverside County, California.”¹⁶¹

¹⁵⁴ See 50 CFR § 17.84(c).

¹⁵⁵ See 16 USC § 1540(a)-(b).

¹⁵⁶ *Gibbs*, 214 F 3d at 495.

¹⁵⁷ See, e.g. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 Tex Rev L & Pol 365 (1998) (arguing that regulation of endangered species on private land may lie beyond the scope of the Commerce Clause).

¹⁵⁸ See *Nat'l Ass'n of Home Builders v Babbitt*, 130 F 3d 1041 (DC Cir 1997), *cert denied* 118 S Ct 2340 (1998) (*NAHB*).

¹⁵⁹ See 58 Fed Reg 49881 (1993).

¹⁶⁰ See *NAHB v Babbitt*, 949 F Supp 1, 2-3 (D DC 1996).

¹⁶¹ *NAHB*, 130 F 3d at 1043.

In both *Gibbs* and *NAHB*, divided circuit court panels upheld the federal regulation and the Supreme Court denied subsequent review. The regulatory scope of the ESA makes subsequent challenges likely, bringing the conflict between federal environmental regulation and federalism to bear. In the ESA context, there is no means to avoid the constitutional issue through an appeal to unclear statutory language. Regulating activities that may harm endangered species on private land is not geographically limited in the way that Corps' regulation under section 404 is limited to "waters of the United States."

If *Lopez* and *Morrison* are taken seriously, it will not be easy to distinguish the "taking" of wolves or flies on private land from the possession of a gun near a school. It is certainly true that the motivation for taking a wolf or a fly may be commercial, as when a rancher kills a wolf to protect livestock, or a developer destroys a fly while constructing a building. But it is equally true that one might have a commercial motive for possessing a gun near a school, as was the case in *Lopez* itself.¹⁶² The mere fact that one might have a commercial motivation for violating a regulation cannot be enough to make it a regulation of interstate commerce. Nor does it seem that preventing wolves and flies from being taken is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."¹⁶³ The purpose of the ESA is to protect endangered species, not to regulate their economic use.

Contrary to the fears of some, there is no more reason to think restricting the application of the ESA must threaten protection of endangered species than the outcome in *SWANCC* need undermine protection of wetlands. For example, states have an incentive to act to capture

¹⁶² See *United States v Lopez*, 2 F 3d 1342, 1345 (5th Cir 1993) ("After being advised of his rights, Lopez stated that 'Gilbert' had given him the gun so that he (Lopez) could deliver it after school to 'Jason,' who planned to use it in a 'gang war.' Lopez was to receive \$40 for his services.").

¹⁶³ *Lopez*, 514 US at 561.

tourism benefits from endangered species populations. The interstate externalities of species protection are, if anything, less than those of wetlands protection, since wetlands or waters that are a part of a larger hydrological system pose the potential for generating transboundary spillovers of the sort that would justify federal regulation. Finally, insofar as species are a public good, they can be provided for in much the same manner as wetlands or waterfowl habitat through federal recourse to the spending power.

CONCLUSION

Environmental advocates view the Supreme Court's revived interest in federalism and enumerated powers with trepidation. Limiting federal power, they fear, inevitably limits environmental protection. Yet the traditional arguments for federal involvement in many environmental concerns lack theoretical or empirical support. There is no need for federal regulation to prevent a "race to the bottom" or to respond to every conceivable interstate externality. If the protection of environmental resources imposes local costs but truly national benefits, the spending power, not the commerce power, is the appropriate tool to fix such problems.

Should the Supreme Court continue down its present path, it will inevitably confront the environmental implications of its federalist jurisprudence. There will not always be ambiguous statutory language or some other means to avoid addressing the environmentalist reservations about limiting federal regulatory power. When such a case arises, the Court will have to respond. The Court need not turn its back on either its federalist principles or the nation's

conservation heritage, for the two can be reconciled. When this lesson is learned, the environmental challenge to federalism will be met.