LIBERTY UNIVERSITY

Liberty University Law Review

Volume 5 | Issue 1 Article 5

2015

How the Constitution Draws A "Line in the Sand" for the Extent of Federal Control Over Non-Navigable Waterways

Jason J. Heinen

NOTE

HOW THE CONSTITUTION DRAWS A "LINE IN THE SAND" FOR THE EXTENT OF FEDERAL CONTROL OVER NON-NAVIGABLE WATERWAYS

Jason J. Heinen[†]

I. INTRODUCTION

Congressional power over navigation predates the Constitution itself.[1] With the passage of the Northwest Ordinance in 1787, Congress stipulated that the waterways between the St. Lawrence and Mississippi Rivers shall always "be common highways and forever free"[2] for everyone in the Union. This command by Congress was not an effort to establish a large regulatory scheme over the nation's waterways. Rather, it was to ensure that when the land in the northwest was used to establish new states, the waterways running through those states would remain open for travel and commerce.[3] However, the scope of congressional power over navigation is becoming an increasing source of controversy as the federal government becomes more involved in environmental regulation, specifically in the areas of water purity, runoff, and welfare of tributary wetlands.[4]

---

† Symposium Editor, LIBERTY UNIVERSITY LAW REVIEW, Volume 5; J.D. candidate Liberty University School of Law, 2011; B.A. in History and Political Science, 2008, University of Wisconsin. A special thank you to Dean Jeffrey Tuomala at Liberty University School of Law for his instruction and guidance. Not only is my understanding of the Commerce Clause clearer than ever, but so too my appreciation for Justice Marshall's interpretation of it. The author is available at jjheinen@hotmail.com.

1. Prior to 1789, the Continental Congress exercised this power. This Congress was a part of a separate government from the Congress that later replaced it. After the new government was established, the first Congress incorporated the Northwest Ordinance, thus making it binding law on the states. The Northwest Ordinance is considered one of the United States' founding documents. Its adoption by Congress in 1789 shows the desire the founders had in maintaining open navigation between the states, rather than any regulatory or national governance over these waterways. Northwest Ordinance, 1 Stat. 50 (1789).

2. *Id*. at art. IV.

3. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 11 (Melville M. Bigelow ed., William S. Hein & Co., Inc. 5th ed. 1994) (1891) (citing THE FEDERALIST NO. 42 (James Madison)).

4. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY 599 (6th ed. 2009); JOHN W. JOHNSON, UNITED STATES WATER LAW: AN INTRODUCTION 4 (2009).

Water moves in a vast ecological cycle that affects not only most of the environment, but also many areas of human activity.[5] Without limitations, federal power could theoretically extend over this whole cycle and all human activities that are affected by it. By its very nature, water and its interaction with land is very fluid, with little to no difference at times between one waterway and another, or one area of the ecological cycle and another.[6] With this in mind, the question of to what extent the federal government has power over rivers and navigation becomes an important one to address.[7] This is particularly the case in environmental law, where there is a need to know jurisdictional boundaries between governments, such as which government has the prerogative to act when an environmental problem arises. Knowing these boundaries allows governments to enforce effectively the laws needed to stop pollution before it happens.[8] Without clarity in jurisdictional boundaries, some regulatory areas may be overlooked, people will have difficulty holding their governments accountable, and certain environments may even go unprotected.

Rapanos v. United States is the Supreme Court's most recent attempt to determine the extent of the federal government's power over rivers and navigation.[9] However, the Court created more unanswered questions than answers. As a result, the environmental law community continues to ask which waterways are within the federal government's power to regulate.[10] The problem with this is that the environmental law community is asking the wrong question. The federal government has never been restricted by geography, but rather by powers.[11] Thus, the question should be: What powers can the federal government constitutionally exercise over

---

5. JOHNSON, *supra* note 4, at 441 fig.5.

6. BRUCE FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS xvii–xxv (2002) (discussing the complexity of determining boundaries between land and water).

7. JOHNSON, *supra* note 4, at 2 ("Federal authority to regulate is often based on navigability under the Commerce Clause. The definition of navigable waters is extremely important in determining if federal regulation is appropriate under the Commerce Clause.").

8. Joseph L. Sax, *Preface* to CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT xvii (Clifford Rechtschaffen & Denise Antolini eds., 2007).

9. Rapanos v. United States, 547 U.S. 715, 730 (2006) (Scalia, J., plurality).

10. Bren Mollerup, *Rapanos v. United States: "Waters of the United States" Under the Clean Water Act*, 12 DRAKE J. AGRIC. L. 521, 521 (2007).

11. U.S. CONST. art. 1, § 8; THE FEDERALIST NO. 45, at 324-29 (James Madison) (Benjamin F. Wright ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined.").

waterways? If geography remains a legal factor in determining the extent of federal power, then certain geography, due to its nature, is outside any plain application of the federal government's powers. For example, if the federal government had only the power to regulate the harvesting of timber, there would be no reason for any federal regulation over treeless landscapes. Unless, of course, the treeless landscapes were involved in the timber harvesting process, in which case the government would only have power to enact a regulation relating to that process.

This Note will address how continuing to ignore the constitutional issues in the federal regulation of waterways, such as the purpose of the Commerce Clause and the real extent of its application, will only result in arbitrary judicial determinations based on broad geographic distinctions. As a case in point, *Rapanos* shows both the problems that arise from decisions based on geographic distinctions and the solution provided for those problems by the constitutional issues in the case. To fully appreciate the arbitrariness of the *Rapanos* decision, it is necessary to understand the historical development of how the Commerce Clause has been interpreted and how its interpretation has led to the expansion of federal water regulation. Part II will discuss this development and expansion. Part III will both explain the facts and analysis involved in *Rapanos* and examine the constitutional matters the Court failed to analyze in the case, and specifically, the problems that result when these constitutional matters are ignored. Part IV will propose a simple solution to resolving these problems: limiting federal regulation of navigable waterways to the power and intent enumerated in the Commerce Clause.

II. BACKGROUND

Environmental regulation of waterways is a fairly recent development in federal law.[12] Prior to the passage of amendments to the Federal Water Pollution Control Act in 1972, the federal government did not directly regulate water pollution or quality for the purpose of protecting the wellbeing of the environment.[13] Despite the radical change in the amount of federal oversight that eventually took place, this development occurred gradually. The 1972 amendments resulted mostly because of the popular

12. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 644 (6th ed. 2009).

13. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 101(a), 86 Stat. 816, 816 (1972); ROBIN CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT 7 (2d ed. 2009).

awakening over environmental issues in the 1960s and 1970s.[14] However, this radical change in federal law could not have happened without a broad judicial interpretation of the Commerce Clause.[15] The legal history behind the Commerce Clause, then, is also a history of the development of federal power over the environmental regulation of waterways. By the time Congress passed the 1972 amendments, later named the Clean Water Act (CWA), the courts had vastly expanded the scope of the Commerce Clause from its original understanding reflected in *Gibbons v. Ogden* to the point where the Constitution was interpreted to allow for direct regulation of water pollution for the purpose of protecting the environment.[16] To fully appreciate this dramatic shift, it is essential to understand how the Court viewed the enumerated powers of the Commerce Clause with regard to navigation.

A. The Commerce Clause Power As It Applies to Navigation

1. General Purpose and Application of the Commerce Clause

The members of the Constitutional Convention in Philadelphia inserted the Commerce Clause in the Constitution as a means of preventing many of the trade and commerce problems that plagued the Confederacy, such as interstate tariffs and tolls.[17] The Convention acknowledged how similar unions functioning under weaker federal systems, such as the Swiss Confederation and the German Empire, required a common market without

---

14. CRAIG, *supra* note 13, at 1.

15. 4 ROBERT E. BECK, WATER AND WATER RIGHTS § 35.01 (Matthew Bender & Co. 2003) (1967); *see also* CRAIG, *supra* note 13, at 22 ("Congress' reduction of the state role in water quality regulation was probably spurred, at least in part, by the Court's increasing recognition of Congress' ability, under the Constitution's Interstate Commerce Clause, to regulate in-state activities.").

16. The Court in *Ashland* found the need for regulation based more on health and welfare interests, which tend to be police powers traditionally held by the state, but in *Gibbons* the court acknowledges the need for a direct link between regulation and commerce. *Compare* Gibbons v. Ogden, 22 U.S. 1, 189 (1824) *with* United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325 (6th Cir. 1974). *See also* United States v. Gerke Excavating, 412 F.3d 804, 807 (7th Cir. 2005) ("Congress's power to regulate commerce is not limited to removing obstructions; otherwise it could not forbid trafficking in controlled substances, a program designed to reduce a form of commerce. Congress may forbid the pollution of navigable waters even if the pollution has no effect on navigability . . . .").

17. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 855-59 (2002); THE FEDERALIST NO. 11, at 136-42 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

trade restrictions.[18] Prior to ratification of the Constitution, James Madison acknowledged in THE FEDERALIST NO. 42:

> The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience . . . . A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter.[19]

This "defect" was evident to many of the constitutional drafters. In fact, one member of the Convention in Philadelphia stated that he believed it was "a matter of general Consent"[20] that "because the States individually are incompetent . . . the United-States should also regulate the Commerce of the United-States foreign [and] internal . . . ."[21] The drafters and proponents of the Commerce Clause saw the purpose of the Commerce Clause exclusively as the protection of a common market.

Many of the individuals who aided in drafting or ratifying the Commerce Clause were later elected to Congress, which makes the First Congress's actions under the enumerated power an important testimony to how the Clause should be understood.[22] Of significant note, the First Congress did not pass legislation for the building of dams or bridges.[23] States were considered the primary decision makers on whether to conduct improvements, such as cleaning harbors or rivers, building lighthouses and piers, or constructing other navigational infrastructure. The First Congress based the need for its authorization of such projects and improvement not on the Commerce Clause, but rather on Section 10 of Article 1, which prohibits states from using imposts or duties.[24] The application of the Commerce Clause during the early years of the United States was strictly

---

18. THE FEDERALIST NO. 42, at 306 (James Madison) (Benjamin F. Wright ed., 1961).

19. *Id.* at 305.

20. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 102 (James H. Hutson ed., 1987).

21. *Id.*

22. DAVID WALTER BROWN, THE COMMERCIAL POWER OF CONGRESS: CONSIDERED IN THE LIGHT OF ITS ORIGIN: THE ORIGIN, DEVELOPMENT, AND CONTEMPORARY INTERPRETATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, FROM THE NEW JERSEY REPRESENTATIONS, OF 1778, TO THE EMBARGO LAWS OF JEFFERSON'S SECOND ADMINISTRATION, IN 1809, at 153-54 (1910).

23. E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 108 (1898).

24. *Id.* at 107-09.

for the prevention of local prohibitions and obstructions to commerce.[25] Even matters of navigational infrastructure were not wholly within the realm of federal control.[26] The application of the Commerce Clause has undergone extensive changes since these early foundations. However, before discussing these changes, a brief introduction on the application of this congressional power, specifically to navigation, is necessary.

2. Congressional Power over Navigation

The power of Congress to govern navigation has been an established principle since the earliest years of the Republic.[27] Although unlike the modern scope of navigation regulation, the early Court understood this power to be directly connected to commerce.[28] Congressional power to regulate waterways, or anything by way of the Commerce Clause, extended only so long as "[t]he subject to be regulated [was] commerce."[29] Throughout the nineteenth century, this common-sense legal principle remained a doctrine espoused by the Court.[30] The idea of classifying different waterways as navigable or non-navigable was not seen as a

---

25. *See, e.g.*, Willson v. The Black Bird Creek Marsh Co., 27 U.S. 245, 250 (1829); Gibbons v. Ogden, 22 U.S. 1, 189-96 (1824).

26. This assertion does not agree with the Court's opinion in *Cooley v. Bd. of Wardens of the Port of Philidelphia*. In fact, this understanding of federal and state jurisdiction did not contradict Justice Marshall's opinion in *Gibbons v. Ogden*, in which he acknowledged the states having an interest and legitimate objective in doing inspections or having taxes on commercial goods. *Compare Gibbons*, 22 U.S. 1, 200-05 (1824), *with Cooley*, 53 U.S. 299 (1851).

27. Northwest Ordinance, art. IV, 1 Stat. 50 (1789); *Gibbons*, 22 U.S. at 190; STORY, *supra* note 3, at 6.

28. *Gibbons*, 22 U.S. at 197 ("The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'").

29. *Id.* at 189.

30. Rhea v. Newport N. & M.V.R. Co., 50 F. 16, 21 (C.C.D. Ky. 1892).

> The *commerce clause of the constitution* includes control of all navigable waters of the United States, so far as may be necessary to insure their free navigation. By navigable waters are meant such as are navigable in fact, and which by themselves, or by their connections with other waters, form a continuous channel with foreign countries or among the states.

Id. (emphasis added) (recognizing that the Commerce Clause was intended to maintain free trade and commerce, and that the subject of the regulation must be Commerce); *see also* Miller v. New York, 109 U.S. 385, 395 (1883); Escanaba & Lake Michigan Transp. Co. v. Chicago, 107 U.S. 678, 683 (1883).

necessity through much of the nineteenth century because, regardless of geography, federal power extended only as far as regulation of commerce extended. It was not until 1870 that the Court began to classify waterways specifically, and even then, the purpose of such classifications was for determining admiralty jurisdiction, not regulating the use of waterways.[31] In fact, when the Court ruled that navigability extended beyond its common law definition of being subject to "the ebb and flow of the tide,"[32] it was the use of water for commerce between the states and foreign nations that became the new determining factor for which waterways were navigable-in-fact.[33] In other words, navigable-in-fact waterways are those watercourses that are used in interstate commerce.

Even when the Court acknowledged congressional power over navigable-in-fact waterways, it never acknowledged unlimited power to regulate those waters. During these early years, the Court consistently held that federal power extended only to ensuring free navigation among the states and foreign nations.[34] This was because the Court understood the original intent behind the Commerce Clause: to maintain a common economic market among the several states.[35] Thus, until more recently, the Court never considered the federal government to have complete power over navigable waterways simply because they were navigable.[36] States retained ownership—as the sovereign in public trust—of the navigable waterways.[37] They were still free to exercise their police powers over those waters.[38] The states also maintained complete ownership and regulatory

---

31. The Daniel Ball, 77 U.S. 557, 563 (1871).

32. *Id.*

33. *Id.*

34. *Gibbons*, 22 U.S. at 231.

35. Cardwell v. Am. River Bridge Co., 113 U.S. 205, 210 (1885).

36. Chicago & N.W.R. Co. v. Fuller, 84 U.S. 560, 569 (1873) (holding that states still retain police powers that may interfere or intertwine with commerce, but this is not "obnoxious" to the Commerce Clause).

37. United States v. Cress, 243 U.S. 316, 320 (1917).

38. *Gibbons*, 22 U.S. at 203; *see also* Willson v. The Black Bird Creek Marsh Co., 27 U.S. 245 (1829) (holding that a state-built dam that restricted free navigation for health and welfare reasons did not violate the Commerce Clause when Congress had been silent). Under CWA, Congress is never silent with navigable and non-navigable waterways. As a result, states are no longer free to act as they may have at the time of the *Black Bird Creek* decision. Instead, states and individuals must meet EPA or Army Corps of Engineers standards and possibly acquire the proper permit beforehand.

control over the natural resources in the navigable waterways.[39] The Court understood that the Commerce Clause gave Congress the power to veto these state powers only when they restricted free navigation among the several states.[40]

B. The Necessary Commerce Clause Expansion

Shortly after the turn of the twentieth century, the Court's interpretation of the federal government's power under the Commerce Clause began to change immensely. Perhaps due to strong precedent on navigation, all these changes came to fruition in cases unrelated to navigable waterways. The changes wrought by the Court's interpretation resulted in expansive federal power that continues even to this day.

The first major change came in 1903, when the Court, for the first time, legitimized congressional power to *restrict* commerce in *Champion v. Ames*.[41] Prior to this decision, the Court had consistently acknowledged that the Commerce Clause was intended only to prevent obstructions to free trade among the several states.[42] The *Champion* decision essentially paved the way for the Court to abandon any acknowledgment of the Clause's intended purpose. Eventually, this abandonment of intent led the Court to abandon the subject of the Clause that Justice Marshall had acknowledged so many years before.[43]

In 1942, the Court decided the infamous case of *Wickard v. Filburn.* In *Wickard*, the Court extended federal power beyond the regulation of commerce among the states to include regulation of agricultural production.[44] What made the *Wickard* decision infamous was that the regulation was being applied to a farmer using his wheat for family subsistence; the grain never even crossed state lines.[45] After *Wickard*, Congress had the power to legislate on intrastate matters so long as there

---

39. Manchester v. Massachusetts, 139 U.S. 240, 259 (1891); State v. Sawyer, 94 A. 886, 887 (Me. 1915).

40. *Gibbons*, 22 U.S. at 210.

41. Champion v. Ames, 188 U.S. 321 (1903).

42. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 880 (2002).

43. *See* Wickard v. Filburn, 317 U.S. 111, 128 (1942) (extending the Commerce Clause to the *intra*state activity of growing wheat on one's own farm and for one's consumption because it would have an effect on *inter*state commerce if taken in the aggregate with others acting similarly).

44. *Id.*

45. *Id.* at 114.

was a "substantial economic effect on interstate commerce,"[46] even if the matters were not in the stream of commerce.[47] This expansion included, but was not limited to, the power to set wage restrictions,[48] prohibit production,[49] and exercise police powers over anything that crossed state borders in commerce.[50] The Court's abandonment of the original intent and subject matter of the Commerce Clause opened the door for vast expansion of federal power. Navigable waterways were not exempt from this expansion, and federal power over the waterways would eventually increase like most other areas of Commerce Clause regulation.

C. Two Expansions in Federal Power over Waterways

The expanding scope of the Commerce Clause opened the door for two general expansions in the federal government's power to regulate navigable waterways. The first expansion recognized congressional power to regulate any effects on water, regardless of whether or not they impeded one state's right to a common market between all the states. The second expansion acknowledged congressional power to regulate directly any environments beyond those waterways that are navigable-in-fact. While both of these expansions were the result of attenuating the connection between the objects of the various regulations and the act of navigation, an analysis of each expansion shows how they have perpetuated each other and have led to confusion by way of semantics.

1. First Legal Expansion—Beyond the Regulation of Commerce

Beginning in the 1960s, the public became increasingly aware of the harm being done to the environment.[51] The influence of this movement was widespread and would eventually propel a vast amount of federal legislation, such as the Clean Water Act.[52] Like many other movements involving politics, those within the environmental movement did not ignore the judiciary as a potential avenue for change. Thus, the courts began to search for clever application of old laws to further new means. The Rivers

---

46. *Id.* at 125.

47. *Id.* at 118.

48. Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

49. Gonzales v. Raich, 545 U.S. 1 (2005).

50. United States v. Taylor, 226 F.3d 593, 598 (7th Cir. 2000).

51. Stacy J. Silveira, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497, 503 (2001).

52. CRAIG, *supra* note 13, at 169.

and Harbors Act of 1899 (RHA)[53] became one such law, where the courts tried to manipulate an existing law for new means. Most of the RHA listed various navigation improvements, but one clause essentially gave authority to the Secretary of War, who oversaw the Army Corps of Engineer at that time, to issue permits for waste disposal of any waste larger than runoff. The congressional purpose for this clause is seen in how the Act only regulated refuse disposed in a manner "whereby navigation shall or may be impeded or obstructed."[54] This limited provision is exactly how the Act had been applied up until the 1960s. Even though the Court's perspective toward the federal role in navigable waters was shifting, in 1960 the Supreme Court was still acknowledging this obstruction requirement.[55]

Only six years later, the Supreme Court dropped the legal requirement for prohibiting obstruction, possibly for reasons of political expediency in protecting the environment. In *United States v. Standard Oil Co.*, the Court defined the term "refuse" in the RHA to include aviation gasoline.[56] The Court acknowledged that "[t]his case comes to us at a time in the Nation's history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well."[57] With this case, the Court actively reached beyond the limited purpose of the Commerce Clause. The Court essentially gave its approval of federal authority to regulate waterways for purposes other than navigation. As a result, the federal government could regulate the quality and health of the water, regardless of its effect on navigation. The Court essentially overlooked the purpose of the RHA and instead acknowledged a congressional purpose to prevent any pollution simply for the environmental health of navigable waterways.[58]

In 1972, Congress codified the ruling in *Standard Oil* by enacting the CWA. The Act's purpose was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[59] While this purpose was clear, the Act never substantiated it with either the intent or subject of the Commerce Clause. Following the expressly stated purpose,

---

53. Rivers and Habors Appropriation Act of 1899, Pub. L. No. 55-425, § 13, 30 Stat. 1121, 1152 (1899).

54. *Id.*

55. United States v. Republic Steel Corp., 362 U.S. 482 (1960).

56. United States v. Standard Oil Co., 384 U.S. 224 (1966).

57. *Id.* at 225.

58. *Id*. at 226.

59. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 101(a), 86 Stat. 816, 816 (1972).

the CWA alluded to a congressional policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."[60] Despite this affirmation, the Act was the first of its kind to implement direct federal regulation and enforcement procedures on property owners. The Act authorized the Environmental Protection Agency (EPA) to set national standards with which all states and citizens had to comply.[61] States could regulate their own pollution when their enforcement standards and procedures complied with federal standards.

A state's failure to adequately enforce these regulations or to grant permits that the EPA or Army Corps of Engineers required would allow federal authorities to retake control over enforcement. While states retained the ability to set water quality standards in 1972, later legislation gave the EPA authority to disapprove and change the standards in accordance with standards set forth in 1972.[62] The CWA also provided in numerous instances for federal preemption of state law unless the state law has more stringent standards than what federal law would require.[63] Empowered by the Commerce Clause, the CWA suddenly gave the federal government immense authority to regulate the nation's waterways in more areas than navigation. Because of the second legal expansion of the Commerce Clause, the CWA was not even limited to navigable waterways.

2. Second Legal Expansion—Beyond Navigation-in-Fact

The expanded understanding of the Commerce Clause also opened up non-navigable waterways to the scrutiny of federal regulation. The definition of navigable or non-navigable waterways from the start was less about geography and environment and more about use. Legislation dealt mostly with regulating actual navigation, rather than the environment that potentially had the capacity for navigation.[64] As Manifest Destiny gripped the country, legislation regarding dams, bridges, canals, and dredging was practically inevitable. As these types of regulations and legislation increased, the Court established a framework for how the navigability of a waterway could be determined factually. Culminating in the 1870 Supreme

60. *Id.* § 101(b), 86 Stat. 816.

61. *Id.* § 301, 86 Stat. 816, 845.

62. 33 U.S.C. § 1313(a)(2)–(3), (c)(2)(A) (2006).

63. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 501, 86 Stat. 816, 885 (1972). Without a provision that allows for the stricter provision to rule, the Supremacy Clause would require federal law to preempt state law.

64. 4 BECK, *supra* note 15, at 34-2.

Court case referred to as *The Daniel Ball*, the Court held that federal admiralty jurisdiction only extended to waters that were navigable-in-fact.[65] As stated earlier, this determination of a waterway being navigable-in-fact was inextricably linked to how the water could be used for commerce between the states.[66]

In *United States v. Appalachian Electric Power Co.*,[67] the Supreme Court applied *The Daniel Ball* to federal jurisdiction generally, thus creating somewhat of an artificial legal barrier between regulating actual navigation and deciding that a waterway is navigable-in-fact. This barrier led to the trend of federal regulations being based on the geographic distinction between navigable and non-navigable waterways. Congress no longer determined navigability on a case-by-case basis, referencing actual commercial activity. Instead, it was a theoretical determination based on geography and potential for navigation in the future. Waterways were now subject to federal jurisdiction, not for their actual use in commerce, but based purely on the geographic features they had.[68]

Part of the congressional intent in passing the CWA was to extend federal regulation of water quality as far as the Commerce Clause would permit.[69] This included going beyond waterways that were navigable-in-fact. Since the RHA already involved non-navigable waterways, it was not much of a logical leap for Congress to extend regulation beyond navigable waterways in the CWA by defining the regulated area to include those same non-navigable waters of the United States. In the CWA, Congress authorized the EPA to regulate all waters within the nation's water basins, defined as "rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes, and portions thereof, as well as the lands drained thereby."[70] The EPA set down regulations that specifically defined what waters this included: "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 . . . ."[71] Thus, the CWA extended to as many waterways as possible, regardless of

65. The Daniel Ball, 77 U.S. 557, 563 (1870).

66. *See supra* Part II.A.2.

67. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

68. *Id.* at 412.

69. United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985).

70. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §102(c)(3), 86 Stat. 816 (1972).

71. 33 C.F.R. § 328.3(a)(3) (2010).

their navigability. The difference from the RHA was that the CWA provided for direct regulation of those non-navigable waterways, rather than incidental regulation based on commercial interference in navigable waterways.

D. Commerce Clause Jurisprudence After CWA

Judicial developments in the interpretation of the Commerce Clause did not cease in 1972 with the passage of the CWA. In fact, there have been significant judicial developments in the interpretation of the Commerce Clause since the passage of the CWA. Prior to these developments, courts often dealt with issues involving the interpretation and application of the Act itself. Specifically, courts faced the issue of identifying the intended reach of the CWA.

1. Interpretation of the CWA after its passage

In the years immediately following the passage of the CWA, the Supreme Court never directly affirmed the constitutionality of the Act.[72] Instead, courts only interpreted provisions of the Act itself. These cases held that Congress intended the CWA to extend to the limits of the Commerce Clause.[73] This is especially significant because in *Rapanos* the plurality held the regulation at issue in that case extended beyond the CWA.[74] Yet, the Court never addressed the constitutional concerns in *Rapanos* associated with a regulation extending beyond the Commerce Clause, which the Court should have if the agencies were enforcing unconstitutional regulations.[75]

When the Supreme Court finally granted certiorari for a CWA issue, it unequivocally reaffirmed the expansion of regulation beyond waterways that were navigable-in-fact.[76] For the Court, arriving at this legal conclusion was not difficult. The Court affirmed the ability of Congress to regulate non-navigable waterways in the roughly seventy-five year old RHA. The Supreme Court addressed the CWA issue in *United States v. Riverside*

---

72. While the Supreme Court never directly affirmed the constitutionality of the CWA, several courts addressed the issue shortly after its passage (yet all prior to *Lopez*). *E.g.*, United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

73. CRAIG, *supra* note 13, at 119 n.70.

74. Rapanos v. United States, 547 U.S. 715, 739 (2006) (Scalia, J., plurality).

75. *Id.*

76. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

Bayview Homes, Inc.[77] There the Court held that the CWA included wetlands that were adjacent to navigable waterways and their tributaries within federal jurisdiction.[78] Similar to the Court's analysis in *Rapanos*, the Court never considered the constitutionality of the CWA, but rather considered the regulations in light of the CWA. The Court reasoned that the wetlands at issue were within federal jurisdiction, not because they were within a rational exercise of the Commerce Clause power but because Congress intended for the phrase "waters of the United States" in the CWA to be broadly defined.[79]

2. Uncertainty After *United States v. Lopez*

The Supreme Court case of *United States v. Lopez*[80] was a stark departure from the trend of Commerce Clause interpretation that had gripped the Court for roughly the past century.[81] The decision caused the economic nature of things affecting interstate commerce again to be a relevant and required element. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990 was unconstitutional because it exceeded the scope of the Commerce Clause.[82] This Act essentially prohibited the possession of guns in a school zone with no regard for how this activity related to interstate commerce in a school zone.[83] The Court was unwilling to allow the Commerce Clause to extend so far into state and local control. It reasoned that to do so it would have to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[84] The Court understood that if the scope of the Commerce Clause

77. *Id.*

78. *Id.* at 139.

79. *Id.* at 133.

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

81. *Compare* Champion v. Ames, 188 U.S. 321 (1903) (expanding the scope of federal power under the Commerce Clause) *with* 514 U.S. 549 (1995) (restricting the scope of federal power under the Commerce Clause); *see also* ROBERT MELTZ, CONSTITUTIONAL BOUNDS ON CONGRESS' ABILITY TO PROTECT THE ENVIRONMENT vii (2003) ("In 1995, the Supreme Court sustained a Commerce Clause challenge to a federal law for the first time in 60 years . . . .").

82. *Lopez*, 514 U.S. at 567.

83. *Id.* at 551.

84. *Id.* at 567.

continued to expand, the enumerated powers of the Constitution would only be a façade for limited power.[85]

While the Court acknowledged the need to go no further with expanding the scope of the Commerce Clause in *Lopez*, it was unwilling to reverse any of the expansions that had happened since 1903, including its 1942 holding in *Wickard*.[86] Regardless of *Lopez's* impact on precedent, it brought uncertainty to the legitimacy and present extent of federal regulation of both navigable and, especially, non-navigable waterways.[87] The limitation in *Lopez* substantially affects many of the circuit court decisions handed down prior to its decision regarding the legitimacy and application of the CWA. The Court's ruling in *Lopez* essentially requires any activity regulated by Congress under the Commerce Clause to be economic in nature.[88] In other words, congressional regulations can only affect commercial activities or enterprises. Many of the activities regulated and prohibited in the CWA, however, are not economic in nature, especially when the activity has no effect on navigation or other commercial activity.

The uncertainty of *Lopez's impact* on navigable waterways began to disappear with the Supreme Court's decision in *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*.[89] In this decision, the Supreme Court overruled the "Migratory Bird Rule" by finding that it was not within the scope of the CWA.[90] The Army Corps of Engineers first articulated this rule as part of a definition for "waters of the United States" in the CWA. The rule essentially allowed federal regulation of any waterways used by migratory birds, even those that were completely isolated.[91] In *SWANCC*, the Court acknowledged that the "Migratory Bird Rule" ran into numerous constitutional issues, especially in light of *Lopez*.[92] However, rather than address these constitutional issues, the Court concluded that the "significant nexus" required in *Riverside* was not present for the "waters" in the CWA to include the isolated waterways at issue.[93] For the Court, this "significant

85. *Id.*

86. *Id.* at 560.

87. *See* Elaine Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U. L. REV. 931 (1997).

88. *Lopez*, 514 U.S. at 560.

89. Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs, 531 U.S. 159 (2001) [hereinafter *SWANCC*].

90. *Id.* at 167.

91. Definition of Waters of the United States, 33 C.F.R. § 328 (2010).

92. *SWANCC*, 531 U.S. at 173.

93. *Id.* at 167-68, 174.

nexus" meant wetlands that "affect the water quality of adjacent lakes, rivers, and streams" and that "serve significant natural biological functions."[94] Thus, rather than face the real issue that continues to confront it, the Court chose to arbitrarily exclude from the CWA isolated waters that did not have a "significant nexus" to navigable waterways. This continued uncertainty meant that it was only a matter of time before a new case arose that factually fell between *Riverside* and *SWANCC*.

III. EXTENT OF FEDERAL JURISDICTION OVER NAVIGABLE WATERWAYS

Arbitrary judgments will remain arbitrary exercises of political will by those who make them until they are either supported or revoked by political right.[95] As Chief Justice John Marshall briefly noted in the first United States Supreme Court decision to hold a law unconstitutional, "the discretion of a court always means a found, legal discretion, not an *arbitrary* will."[96] Any geographic distinction made by the Supreme Court will only be an arbitrary line drawn in the sand unless there is constitutional support for such a determination.[97] Until this constitutional "line" is either enforced by the Court or changed by the People, all other lines will remain an arbitrary act of judicial will. The Court will never put to rest the issue of how to distinguish waterways included in the CWA and those not included until it acknowledges that the real distinction lies in which waterways the Constitution authorizes Congress to regulate.[98]

When the Supreme Court granted certiorari for *Rapanos v. United States*,[99] many thought the decision would bring clarity to the confusion in administrative regulation of waterways brought about by recent Commerce

---

94. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).

95. John Locke acknowledged a limitation on political will when he stated, "The legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees; but is bound to dispense justice, and to decide the rights of the subject, by promulgated, standing laws, and known authorized judges." JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 160 (Ian Shapiro ed., Yale University, 2003) (1690).

96. Marbury v. Madison, 5 U.S. 137, 153 (1803) (emphasis added).

97. The Court may also make a geographic distinction with statutory support, but the statute must still fall within the constitutional power granted to Congress.

98. Idaho State Bar & Norman M. Semanko, *When Land Is Water: Clean Water Act Jurisdiction*, 50 ADVOC. 23, 24 (2007) [hereinafter Semanko].

99. Rapanos v. United States, 547 U.S. 715 (2006).

Clause and CWA interpretations.[100] The expectations for clarity were not unwarranted; the facts of the case provided the perfect opportunity for the Court to permanently answer the question of the federal regulation's extent and establish how far upstream the Commerce Clause truly reaches. The case addressed four civil enforcement proceedings the federal government brought in Michigan against a developer who backfilled three wetland areas without a permit.[101] The issue before the Court was whether these wetlands fell within the scope of the CWA.[102] The wetlands at issue were eleven to twenty miles from the nearest navigable waterway and connected only by way of ditches and culverts that stayed dry through a substantial part of the year.[103] The Court also stipulated that "it is the discharge of 'dredged or fill material'—which, unlike traditional water pollutants, are solids that *do not readily wash downstream*—that we consider today."[104] These facts presented the Court with a scenario where the waterways at issue had minimal to zero ecological connection to any navigable waterways; this required the Court to determine the precise extent of federal jurisdiction beyond navigable waterways. This only bolstered the expectation the case would finally lay the issue to rest.

A. A Plurality Decision That "Muddied The Waters"[105]

In 2006, when the Court issued the *Rapanos* opinion, the expectation for clarity was dashed to pieces. The Court handed down a plurality decision written by Justice Scalia. He found that the CWA did not extend to wetlands with a "mere hydrological connection,"[106] but rather included "only relatively permanent, standing or flowing bodies of water," described in ordinary parlance as "'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies'

---

100. Kevin P. Pechulis, *Scope of 'Waters of the United States' Unclear After Rapanos v. United States*, 38 ABA TRENDS 4, 4 (2006).

101. *Rapanos*, 547 U.S. at 719 (Scalia, J., plurality).

102. *Id.* at 729 (Scalia, J., plurality).

103. *Id.* at 720 (Scalia, J., plurality).

104. *Id.* at 723 (Scalia, J., plurality) (emphasis added).

105. Jared Fish, *United States v. Robinson: The Case for Restoring Broad Jurisdictional Authority under the Federal Clean Water Act in the Wake of Rapanos' Muddied Waters*, 36 ECOLOGY L.Q. 561, 561 (2009) ("In 2006, the United States Supreme Court restricted and muddied the legal reach of the Clean Water Act (CWA) with its holding in [*United States v. Rapanos*]. Since then, both district courts and circuit courts of appeals have had a difficult time interpreting agency jurisdictional scope under the CWA.").

106. *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality).

of water 'forming geographic features.'"[107] On the other hand, Justice Kennedy's concurrence set down a requirement for the regulated waterways to "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[108] According to his dissent, Stevens believed that the CWA extended beyond these geographic and legally created barriers and wanted to defer to the established regulations set down by the EPA, which had been in use for thirty years.[109]

Numerous critiques have taken aim at the 4-1-4 split-decision for the confusion that it created in the government regulation of waterways.[110] The opinions have been criticized for confusing the various agencies that enforce the legislation.[111] Other critics have recognized the expansion of federal power under the Commerce Clause and the vagueness of the CWA, and yet they have still criticized the *Rapanos* decision for not deferring to the definition adopted by the Corps.[112] While many of these criticisms are warranted due to the confusion from the opinion, most of them are directed at how the *Rapanos* decision unjustly limited the CWA and the need for broader federal power to address environmental threats.

B. Constitutional Problems at Issue in Rapanos

Similar to the many cases before it, the only issues addressed in this complex, plurality decision were the meaning and application of the CWA and whether the administrative regulations properly reflected that meaning and application.[113] Specifically, the Court addressed what "waters of the

---

107. *Id.* at 732-33 (Scalia, J., plurality).

108. *Id.* at 759 (Kennedy, J., concurring in the judgment).

109. *Id.* at 807 (Stevens, J., dissenting).

110. CRAIG, *supra* note 13, at 131; Pechulis, *supra* note 100, at 5.

111. Peter Henner, Rapanos *and* Warren*—A Tale of Two Cases: The Supreme Court Bats .500*, 12 ALB. L. ENVTL. OUTLOOK J. 52, 55 (2007) ("The decision in *Rapanos* will create substantial confusion for the Corps in administering its wetlands program, and also in issuing permits for dredging and filling wetlands under § 404 of the CWA. Of equal importance, *Rapanos* will create substantial confusion for the EPA and state agencies in the regulation of the 'discharge of pollutants' into streams, waters, and lakes under § 402 of the CWA.").

112. Brian Elwood, Raponos v. United States*: The Supreme Court's Failed Attempt to Interpret Wetland Regulation Under the Clean Water Act*, 56 CATH. U. L. REV. 1343, 1370 (2007).

113. Rapanos v. United States, 547 U.S. 715, 729 (2006); SWANCC v. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

United States" in the CWA was intended to mean.[114] Nothing in the case addressed issues related to the Commerce Clause, and the Supreme Court maintained its precedent of avoiding discussion on the constitutional grounds for the regulatory power being exercised.[115] Instead, all nine members of the Court started their analysis with the assumption that any pollution control in the "waters of the United States" defined in the CWA was completely within the intent and power enumerated in the Commerce Clause.[116] Rather than acknowledge the larger legal problems at issue, the Court focused on whether the administrative regulations were in accord with the CWA and interpreted the CWA with the assumption that Congress intended it to be within the scope of the Commerce Clause.[117]

1. The *Lopez* Requirement of "Economic Affect" Mostly Ignored

There was, and really continues to be, significant doubt about whether the regulations at issue in *Rapanos* can logically fall within a Commerce Clause precedent that includes *Lopez*.[118] As noted above, *Lopez* specifically held that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[119] In order for the regulation of wetland fill at issue in *Rapanos* to withstand the *Lopez* standard, there must be some sense in which it is "an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[120] It might be argued, as was the case in *United States v. Byrd*, that harming the health of non-navigable waterways could harm the health or existence of the navigable waterways and that this would in turn significantly impact interstate commerce, thus invoking a valid use of the Commerce Clause power.[121] However, allowing Congress to regulate anything that could potentially threaten the health of the nation's navigable

114. *Rapanos*, 547 U.S. at 729 (Scalia, J., plurality).

115. *Cf. SWANCC*, 531 U.S. 159, 162 (2001) (stating the issues on appeal); United States v. Riverside Bayview Homes, 474 U.S. 121, 123 (1985). While these cases brought up constitutional concerns with regard to the regulations at issue, the constitutional issues were not directly related to the power of environmental regulation.

116. *Rapanos*, 547 U.S. at 722 (Scalia, J., plurality).

117. *Id.*

118. *See* Pechulis, *supra* note 100; Bueschen, *supra* note 87.

119. United States v. Lopez, 514 U.S. 549, 560 (1995).

120. *Id.* at 567.

121. 609 F.2d 1204, 1210 (7th Cir. 1979) ("Destruction of all or most of the wetlands around Lake Wawasee, for example, could significantly impair the attraction the lake holds for interstate travelers by degrading the water quality of the lake, thereby indirectly affecting the flow of interstate commerce.").

waterways would leave federal regulation of human activity involving or affecting water virtually limitless. Roughly seventy percent of the earth's surface is covered in water, and the cycle of water through the environment impacts our lives on a daily basis.[122] With enough inferences, Congress could regulate everything from land use to how much water each household can use.

Yet, wetland fill that has no impact on navigable waterways is not economic in nature in any sense that the Court could have used that term.[123] Regardless of this legal inconsistency, the Court never mentioned *Lopez* in its *Rapanos* decision. If it had taken up the constitutional issues, the Court could have limited federal regulation to those activities that are considered economic in nature.

2. Plainly Adapted to the Intent and Objective Behind the Commerce Clause

The Court could have also analyzed the administrative regulations at issue in *Rapanos* with regard to whether they were plainly adapted to the text of the Commerce Clause. In order for a statute to be plainly adapted, the stated or possible purpose of the legislation must comport with the intent and subject of the Commerce Clause. The constitutional support currently cited by Congress and several inferior courts for federal power over *noncommercial* matters in waterways and various wetlands *not used for commerce* is Article I, section 8, where the legislature is given the power, "To regulate *Commerce* . . . among the several States . . . ."[124]

In *Gibbons v. Ogden*, Chief Justice John Marshall stated that legislation had to be plainly adapted to the enumerated powers of the Constitution.[125]

---

122. BERNARD J. NEBEL & RICHARD T. WRIGHT, ENVIRONMENTAL SCIENCE: THE WAY THE WORLD WORKS 239-40 (4th ed. 1993).

123. *Lopez*, 514 U.S. at 560. "Economic" is an adjective describing something that is of or relating to the economy. "Economy" is defined as "1. The management or administration of the wealth and resources of a community (such as a city, state, or country). 2. The sociopolitical organization of a community's wealth and resources. [or] 3. Restrained, thrifty, or sparing use of resources; efficiency." BLACK'S LAW DICTIONARY 553 (8th ed. 2004).

124. U.S. CONST. art. I, § 8, cl. 3 (emphasis added). Under *Wickard*, congressional power could theoretically go farther than even noncommercial matters and involve noneconomic matters if in the aggregate. While *Lopez* brings significant doubt to the possibility, *Lopez* has yet to be applied to a navigable waterway fact scenario. *E.g.*, United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).

125. Gibbons v. Ogden, 22 U.S. 1, 91, 204 (1824).

In *United States v. Fisher*, Justice Marshall explained the principle of being plainly adapted in greater depth.[126] He analyzed what the "plainly expressed" meaning of the statute itself was:

> It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.[127]

In applying this reasoning to a requirement for statutes to be plainly adapted to a constitutional provision, the same principles would apply, just as Justice Marshall applied them in *McCulloch v. Maryland*.[128] A statute must comprehend the objective of the constitutional provision and further that object with plainly expressed language.

Under this analysis, it is evident that many of the federal regulations of navigable and non-navigable waterways are not plainly adapted to the Commerce Clause, including the CWA. As an example, the regulations in *Rapanos* had the objective of preventing destruction of a wetlands area and plainly prohibited without approval "the discharge of dredged or fill material into the navigable waters,"[129] while defining navigable waters as including "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds."[130] The CWA itself plainly states that "[t]he objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[131] Nowhere does either of these pieces of legislation allude to the plainly expressed meaning and objective of the Commerce Clause, but rather Congress has substituted its own objectives, as seen in the legislation's expressly stated purpose statements. Not only has Congress

---

126. United States v. Fisher, 6 U.S. 358, 386 (1805).

127. *Id.*

128. McCulloch v. Maryland, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

129. 33 U.S.C. § 1344(g)(1) (2010).

130. 33 U.S.C. § 328.3(a)(3) (2010).

131. 33 U.S.C. § 1251(a) (2006).

abrogated the objective of the Commerce Clause, but done so with great inconvenience to itself in legislating such complexity and the courts in deciphering its application.

C. Arbitrary Line in Geography

The problem is not in where Scalia, Kennedy, or Stevens drew their lines, but rather on what basis their lines were drawn. The Court's response to the confusion prior to *Rapanos* was really to draw another arbitrary line. This time, because the judicial conservatives were able to garner a majority with Kennedy's concurrence, it was just a little farther downstream. The line drawn by the Court was arbitrary because the federal government has not been directly limited by geography, which was the basis of the Court's opinion.[132] Congress is limited by what it can regulate, and this in turn limits where it can regulate depending on the nature of the thing being regulated. Instead of acknowledging that what Congress was seeking to regulate in this instance was outside of its constitutional limits, the Court chose to interpret the statute to reflect traditional geographical boundaries.

Besides being contrary to our republican form of government, arbitrary lines blur the real constraints built into the Constitution. There are those who see continued environmental harm in an under-inclusive application of the CWA, and on the other hand, there are those who see continued harm to development and commerce in an over-inclusive application.[133] Instead of ruling on whether the CWA itself is constitutional, the Court has chosen to be a mediator and find a middle line. As a result, it will continue to be lobbied for a better, more accurate, middle line.[134] Setting down a clear ruling on the constitutionality of the regulation at issue in *Rapanos*, and even the CWA itself, would force political lobbying to be done for a constitutional amendment or stronger state legislation.

1. Continued Environmental Regulation Requires Geographic Boundaries

While the Court never addressed the constitutional problems at issue in *Rapanos* directly, there was some acknowledgement that they existed.

---

132. Rapanos v. United States, 547 U.S. 715, 735 (2006) (Scalia, J., plurality).

133. *Compare* Brian Elwood, Note, Rapanos v. United States*: The Supreme Court's Failed Attempt To Interpret Wetland Regulation Under the Clean Water Act*, 56 CATH. U. L. REV. 1343, 1366 (2007), *with* Rob Fowler & Gretchen Morgan, *The Clean Water Restoration Act of 2007: Got a Permit for That Puddle?*, 10 ABA ENVTL. LITIG. & TOXIC TORTS COMM. NEWSL. 20 (2008).

134. *See* Semanko, *supra* note 98.

Justice Scalia stated that the Court granted certiorari to decide, among other things, "whether the [Clean Water] Act is constitutional."[135] He also stated later in the opinion that "the Corps' interpretation [of the CWA] stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power."[136] Despite these acknowledgements, the Court never took up the issue of the constitutionality of the regulation or even the CWA itself. Scholarly reviews of the case have also noted the constitutional problems at issue and the Court's decision in light of the *Lopez* decision.[137]

It is possible that the Court is unwilling to address the constitutional issues because of the legal implications that would result in regard to other laws and regulations that have been legitimized under the Commerce Clause. Bringing the CWA into question would also bring into question laws as old as the Interstate Commerce Act, as broad as the Civil Rights Act of 1964, and as recent as the current healthcare bills going through Congress. The expansion of the Commerce Clause has justified more federal government growth than any other enumerated power in the Constitution. Questioning the extent of federal regulation in navigable waterways would begin a swift destruction of the fragile support holding up the administrative state.[138] All federal laws that do not involve the regulation of commerce among the states for the creation of an uninhibited market would be in question.

The Court also has made a precedent of avoiding constitutional issues if the dispute can be resolved without constitutionally reviewing legislation or interpreting constitutional provisions. In his concurring opinion in *Ashwander v. Tennessee Valley Authority*, Justice Brandeis laid out the seven factors the Court considers when deciding not to take up a constitutional matter.[139] First, the Court looks at whether the case involves a "friendly, nonadversary, proceeding," and is not "of real, earnest, and vital

---

135. *Rapanos*, 547 U.S. at 730 (Scalia, J., plurality).

136. *Id*. at 738 (Scalia, J., plurality).

137. Paul Boudreaux, *A Case for Recognizing Unenumerated Powers of Congress*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 551, 563 n.60 (2006); Daniel A. Farber, *Federalism and Climate Change: The Role of the States in a Future Federal Regime*, 50 ARIZ. L. REV. 879, 912 (2008).

138. Steven K. Balman, *Constitutional Irony:* Gonzales v. Raich*, Federalism and Congressional Regulation of Intrastate Activities Under the Commerce Clause*, 41 TULSA L. REV. 125, 165 (2005).

139. Ashwander v. Tenn. Valley Authority, 297 U.S. 288, 346-49 (1936) (Brandeis, J., concurring).

controversy."[140] Second, the Court does not "anticipate a question of constitutional law in advance [of] deciding."[141] The Court then analyzes, third, whether a rule would be formulated broader than the facts of the case; fourth, whether there is some other ground on which to decide the case; and fifth, whether the statute did not injure the person seeking review.[142] Sixth, the Court determines if the person seeking review availed himself of the statute's benefits, and finally, it examines whether some reading of the statute would allow for the question to be avoided.[143]

While the Court does well to avoid constitutional issues whenever possible, *Rapanos* is one case in which the constitutional concerns should have outweighed any priority to avoid judicial review. One may be able to argue that the issues in *Rapanos* fail three of the seven factors, but it is more likely that all seven factors should have told the court to review the statute's constitutionality. With two separate cases and four different wetlands at issue, one could hardly say the matter was not a real and vital enough controversy to satisfy the first factor in *Ashwander*.[144] The ruling in *SWANCC* that brought other CWA applications into question only further substantiates this argument.[145] As far as the second factor, it is likely the Court anticipated the constitutional matters if Justice Scalia acknowledges them in his opinion.[146] The wetland's distance from navigable waterways in *Rapanos* makes the facts narrow enough to meet the third factor. As discussed earlier, the facts of *Rapanos* made the case a prime scenario in which to establish the constitutional extent of federal jurisdiction over navigable and non-navigable waterways.[147] In regard to the fourth factor, the way the case was decided shows that the Court was able to find other grounds upon which to decide the case. However, the confusion from the plurality decision seems to suggest that facing the constitutional issues directly may have been better.[148] This also suggests that the seventh factor would have been met as well, and the constitutional questions could not have been avoided. *Rapanos* affected both individual property rights and the state of Michigan's right to regulate its own health and safety. In terms

140. *Id.* at 346.

141. *Id.*

142. *Id.* at 347.

143. *Id.* at 348.

144. Rapanos v. United States, 547 U.S. 715, 729 (2006) (Scalia, J., plurality).

145. Bueschen, *supra* note 87.

146. *Rapanos*, 547 U.S. at 730 (Scalia, J., plurality).

147. *See supra* Part III.

148. *See* Fish, *supra* note 105, at 561.

of the fifth factor, the parties involved were certainly harmed and likely realized little to no benefit in the CWA, just like many other landowners and business operators.

The Court will be forced to create geographic boundaries if it is unwilling to find constitutional problems in federal legislation intended to regulate the environmental health of the nation's waterways. As stated earlier, water moves in a continuous ecological cycle.[149] Unless the federal government is allowed to regulate every aspect of this cycle, there needs to be some determination of boundaries for when in the cycle the federal government can and cannot regulate water. In other words, all water eventually leads to a navigable river or the navigable ocean, including bath water.[150] If federal regulation is not limited by the Constitution, a geographic boundary is needed to prevent federal regulation of all water, even bath water. At the moment, the federal government remains split between the various holdings in *Rapanos*, but there have also been cases that suggest the federal government could go as far as regulating groundwater.[151]

2. Difficulty in Drawing Any Authoritative Geographic Line

Any avid outdoors person knows that there is no such thing as a straight line in nature. Close observation and science has also shown that stark distinctions between geographic areas is also a fallacy, especially when distinctions are trying to be made broad enough to include numerous areas.[152] Supreme Court Justice Hugo Black stated it best in a case dealing with a boundary dispute between Louisiana and the United States when he wrote the following:

> Settling and identifying boundaries on land is a surveyor's job; he must go to the land with his instruments and mark it off. Identifying [a water] boundary . . . is a much more complex job; it takes much time by surveyors, cartographers, photographers, and oceanographers, a knowledge of angles, tides, rolling waters, higher mathematics, etc. Shorelines are constantly changing and thus . . . even this painstaking work cannot provide a means of marking the boundary for all time. I cannot accept the argument

149. JOHNSON, *supra* note 4, at 441 fig.5.

150. *Id.*

151. Sporhase v. Nebraska, 458 U.S. 941 (1982).

152. United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985); FLUSHMAN, *supra* note 7, at 69 (discussing how geography is mutable and always in flux).

> that Congress never intended to impose on this Court such an unjudicial job.[153]

Unlike property or jurisdictional related issues, drawing a geographic line in federal regulation is much more difficult; one might even argue that it is impossible. The lines drawn between property and jurisdictions are artificially based and often built upon man-made grids and landmarks. In the regulatory boundary drawn in *Rapanos*, the line is based completely on the natural contours and construction of the land. A broad bright-line legal test on the federal level has the potential for being grossly unjust for being over-inclusive or under-inclusive—over-inclusive by including environments that do not need protection, and under-inclusive by preventing the state from legislating protection where it is needed. While determining geographic limitations of a regulation is a little less specific than determining boundary lines of property, the difficulty remains because the intention of the Court is to determine what areas of land are within the regulatory scheme and which are without, and to do so on a national level.

D. Adverse Legal Effects of Arbitrary Regulatory Lines

The negative legal consequences of arbitrary rules can be numerous. This is especially the case with navigable waterways where an arbitrary ruling can affect a very broad array of waterways and geography, as shown above in Part III.C. An arbitrary rule in federal water law can also have a substantial effect on the foundational and structural aspects of United States law, especially in the areas of federalism and individual rights.

1. Force Rather Than Right Supports Environmental Law

The most negative consequence of arbitrary rules is that they are not an accurate expression of what the law truly is.[154] "Law, in its most general and comprehensive sense, signifies a rule of action . . . . And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey."[155] In this instance, the people of the United States have prescribed by their Constitution what the law is, and the justices, as inferior

---

153. Louisiana Boundary Case, 394 U.S. 11, 85 (1968) (Black, J., dissenting).

154. BLACK'S LAW DICTIONARY 112 (8th ed. 2004) ("arbitrary, *adj*. 1. Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact.").

155. 2 WILLIAM BLACKSTONE, COMMENTARIES *38; *see also* LOCKE, *supra* note 95.

to that people, are bound by its limits.[156] Enforcing a rule outside of the law constitutes mere force, and force remains only as long as those in power agree with the rule.

Protecting our natural resources requires the support of law, whether by establishing a large administrative bureaucracy or simply enforcing property rights. An arbitrary ruling subverts the law and, in turn, the protection our natural resources require. By making a broad, arbitrary decision for the whole country along the lines of geography, the Court is bound to be either over-inclusive or under-inclusive of the resources that need protection. An arbitrary ruling also leaves open the possibility that a later court will simply change the rule, essentially moving the line. Meanwhile, while natural resources are being harmed or individuals' property rights are being infringed, a more accurate and legitimate rule of law could be established on the local level.

2. Infringement on States' Rights

The founding fathers knew that one of the best ways to protect liberty was to localize government and power.[157] The need for federalism rings no more true than in the area of environmental law, where differing geographies require differing laws of protection. For example, the low farmer's field in Southern Wisconsin does not need the same protection as the prairie potholes in Central North Dakota. This example is only exaggerated more when one considers all the geographic diversity between the Florida everglades and the Alaskan rivers. However, the area of environmental law is often where federalism is attacked the most.[158] While the CWA pays "lip-service to federalism and states' rights,"[159] it can hardly be consider a piece of legislation that preserves such principles in actuality. First and foremost, the CWA directly states that its objectives are those of health and welfare; traditional police powers are reserved to the states.[160]

---

156. The author in no way intends to falsely contextualize Blackstone's statements, which quite blatantly relate to God establishing the law of nature to which "inferior" man is subject. However, understanding this principle as the very essence of what law is displays how negative arbitrary rulings are.

157. FORREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876, at 46 (2000) (quoting Jefferson's First Inaugral Address: "the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies").

158. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1196 (1977).

159. 2 WILLIAM H. ROGERS, RODGERS' ENVIRONMENTAL LAW § 4.2 (2009).

160. 33 U.S.C. § 1251(a) (2006).

Second, under the CWA, the EPA must establish a national standard for all of the states to adhere.[161] It is only after they have shown they can uphold this standard that local officials are allowed to enforce the standard on private citizens.[162] To enforce the federal standards, the CWA grants the EPA power to police and prosecute the states and their citizens.[163]

3. Impact on Individual Property Rights and the Takings Clause

The lack of acknowledgement for constitutional abdication in this area of law has also led to infringement on the rights of individuals, particularly property rights.[164] This is largely because federal regulation of the environment has put a form of land use regulation on a national scale. Land use law, left traditionally to local governments, is now subject to broad, nation-wide rules and standards. Arbitrary judgments, such as those drawn in *Rapanos*, leave no room for the local discretion necessary to ensure the proper balance between the protection of the environment and the liberty of those affected by the regulation, or lack thereof. Land use regulation is often for the benefit of those who are affected by the use of the land, in particular those who live within the land's locality.[165] An arbitrary decision causes over-breadth in what waterways or land areas are regulated. This over-breadth creates unnecessary infringement on the rights of property owners.[166]

---

161. 33 U.S.C. § 1254(a) (2006).

162. 33 U.S.C. § 1256(e) (2006).

163. 33 U.S.C. § 1319(a)(2) (2006).

164. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or *to the people*." (emphasis added)).

165. The argument that impacts on the environment of navigable waterways affect everyone is not sound because the nationwide aspect of the issue does not make it a federal concern. For example, car accidents happen nationally, but traffic safety is still a local government matter. In addition, the Court stipulated in *Rapanos* that the impact of the wetland fill did not even leave Michigan. *See* Rapanos v. United States, 547 U.S. 715, 723 (2006) (Scalia, J., plurality).

166. An arbitrary decision also affects the application and use of the Takings Clause of the Constitution. There is little debate that originally the Takings Clause of the Constitution was understood to apply strictly to a full removal of the bundle. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995). However, at the time of its drafting, there was much less land use regulation than there is today. Unfortunately, the rise in land regulation and the Court's ruling in *Pennsylvania Coal* have made the application of the Takings Clause a very difficult and messy area of the law. *Id.* By allowing the national land use regulation of the CWA to

IV. ACKNOWLEDGE THE INTENT AND SUBJECT OF COMMERCE CLAUSE

The simple answer to how the constitutional issues and arbitrary lines in *Rapanos* can be resolved is for the Court to address the constitutional constraints that bind Congress rather than continue to dance around them. Addressing these constraints in *Rapanos* would have made the decision much simpler. In fact, the plurality opinion acknowledged that the "pollution" at issue would never even enter a navigable waterway.[167] After acknowledging this fact, the only conclusion the Court had left to make was that without any obstructing or inhibiting effect on the free flow of interstate commerce in navigable waterways, the federal government lacked the constitutional power to regulate it. In coming to this conclusion, the Court would be making its geographic distinction according to where the Constitution draws the "line in the sand." Rather than being concerned about the hydrological connection between different geographic areas and differentiating between landscapes, the Court would have centered the federal government's limitation on where the founding fathers placed it—regulating commerce.

A. Benefits of Addressing Constitutional Issues

If addressed correctly, the constitutional problems at issue in *Rapanos* would provide a legitimate and authoritative line in the proverbial sand. It would be legitimate and authoritative because it would be where the people of the United States have drawn the line. The Commerce Clause enumerates to the federal government the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[168] As stated earlier, the purpose of this clause was to create a common market among the states.[169] In the words of James Madison:

> A very material object of [the Commerce Clause] power is the relief of the States which import and export through other States . . . . The experience of the American States during the confederation abundantly establishes that such arrangements

withstand any constitutional criticism, the Court has essentially brought this grey area of the law over any land affected by water that will enter a navigable waterway.

167. Rapanos v. United States, 547 U.S. 715, 723 (2006) (Scalia, J., plurality).

168. U.S. CONST. art. I, § 8, cl. 3.

169. *See supra* Part II.A.

> could be, and would be made under the stimulating influence of local interests, and the desire of undue gain.[170]

From an understanding of the subject and purpose of the Commerce Clause, drawing a line becomes simply a matter of inference.

A plainly adapted CWA may look something like the RHA of 1899. This is because a plain reading of the Commerce Clause and an understanding of its intent require pollution not just to affect navigable waterways, but also to inhibit commerce. In other words, Congress has only been given the power to regulate pollution, discharge, or backfill that is found to inhibit the pursuit of commerce on navigable waterways. The objective of Congress should be the regulation of commerce among the states so as to prevent division and local protection in a common market. Until given the power to seek the objective of the CWA, Congress can at most prevent pollution as a coincidental side effect of preventing obstructions and dangers on the navigable waterways.

A proper application of the Commerce Clause leaves states sovereign in the police powers they have reserved to themselves, such as maintaining health and safety in any and all of their waterways and wetlands.[171] A proper application also protects the right of property owners by not allowing the federal government to make broad national land use decisions.[172] If the members of Congress desire the power to regulate the health of the nation's waterways, the Constitution requires that they first propose a Constitutional Amendment to the people.[173]

B. Other Legal Avenues to Protect the Environment

A large reason for the continued support of environmental laws with questionable legality is fear on the part of their supporters that if overruled the environment would go unprotected.[174] In conjunction with this fear is the obvious reality that many of the threats to the environment are nationwide, and if left to the individual states, a problem of the "tragedy of

---

170. STORY, *supra* note 3, at 11 (quoting THE FEDERALIST NO. 42 (James Madison)).

171. Gibbons v. Ogden, 22 U.S. 1, 203 (1824).

172. *Id.* at 208-09 (discussing the ability of states and individuals to construct the buildings they want to build on their property).

173. U.S. CONST. art. V.

174. CRAIG, *supra* note 13, at 4. Fear is a motivator behind many justifications for state, or positive law, involvement in an area of human activity.

the commons" arises.[175] While it is not the focus of this Note, it is important to briefly mention some of the legitimate alternatives that are all too often quickly dismissed by environmental legal scholars. The following areas of the law would fill any void created by a Supreme Court decision that properly considered the constitutional problems at issue in environmental regulation.

1. Free-Market Solutions

Protecting the environment does not necessarily require a governmental actor or regulatory scheme. Some scholars dismiss the fact that businesses and individual landowners many times have just as much a vested interest in protecting natural resources as anyone else.[176] This is particularly the case when those natural resources have recognized property value. "Free market environmentalism stresses the importance of well-specified property rights as the proper mechanism to provide the incentive for entrepreneurs acting on specific time and space information."[177] An alternative to federal administrative oversight would be the recognition of property rights in the nation's waterways. Whether individuals, conservation organizations, or local governments, owners would recognize property value in the purity and protection of water and wetlands. The Commerce Clause would still grant federal power over navigation, allowing for public travel over the waterways.[178] However, simply having better-defined property rights in water quantity and quality would give owners of those rights greater interest in protecting those water properties against upstream abuses.[179]

Diversifying the definition of property rights in various natural resources creates an atmosphere in which the value of those resources is more widely recognized, particularly by their owner. It also allows for greater fluidity in transferring those resources to their best possible use.[180] By reforming aspects of property law, endangered natural resources are valued and

175. Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587, 1592 ("The national government must establish a framework for local decision-making processes and act when the benefits of standardized solutions outweigh the advantages of local control.").

176. Michael C. Blumm, *The Fallacies of Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 371, 387-88 (1992).

177. Terry L. Anderson & Donald R. Leal, *Free Market Versus Political Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 297, 303 (1992).

178. Much like federal control over a "postal road" that runs across or adjacent to private property.

179. *See* Anderson, *supra* note 177, at 303.

180. *Id.*

incorporated into the economic market. In one study on the water quality of various rivers around the globe, "[a] measure of property-rights protection was also included in the estimating procedure, [and] it showed significant improvements in water quality for countries with greater property-rights certainty."[181] A vast amount of scholarship has also been done on the application of free market environmentalism to continuing problems that current government regulation has failed to address, such as the tragedy of the commons in commercial ocean fishing.[182] The application of free market principles to navigable waterways would provide a viable option in the absence of federal regulation.

2. Federal Common Law

While not always intended for the greater protection of the environment, the common law did provide significantly for the protection of one's own environment through causes of action such as nuisance and trespass.[183] Too often the common law has been dismissed as inferior to administrative regulation.[184] Even if it cannot provide perfect solutions, reviving its use may prove to be a welcome substitute for the large administrative state.[185] Lest we forget, the common law has sufficiently protected most natural resources far longer than any statutory or regulatory scheme put in place by the federal government, including the natural resources of waterways.[186] Under the common law, "the riparian owner has the right to have water flowing past his land in its natural state of purity."[187] This is a very high

---

181. Roger E. Meiners et al., *Burning Rivers, Common Law, and Institutional Choice for Water Quality*, *in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 54, 56 (Roger E. Meiners & Andrew P. Morriss eds., 2000).

182. Katrina M. Wyman, *The Property Rights Challenge in Marine Fisheries*, 50 ARIZ. L. REV. 511 (2008).

183. Denise E. Antolini and Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, *in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 12, 18-30 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

184. David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, *in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 3 (Roger E. Meiners & Andrew P. Morriss eds., 2000).

185. *Id.* at 4-19.

186. Roger Bate, *Protecting English and Welsh Rivers: The Role of the Anglers' Conservation Association*, *in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 87 (Roger E. Meiners & Andrew P. Morriss eds., 2000).

187. *Id.*

standard, especially in light of modern science where natural purity can be determined down to the atomic level. Courts recognizing this high standard would allow any downstream landowners to keep upstream landowners such as *Rapanos* in check. Downstream landowners could be anyone from a private individual, conservation association, or local government. The point is not that the common law is a completely waterproof solution, only that it is an important alternative that is being overlooked and dismissed too quickly.

3. State Law or Constitutional Amendment

States are more than able to protect many of the natural resources the CWA seeks to protect. In fact, some states have much broader definitions of navigable waterways.[188] While this Note will not address the legitimacy of state laws regulating the environment, many states have strong environmental protection policies written into their laws.[189] These laws and policies would quickly and easily replace any federal withdrawal from this area. In fact, there is a strong argument that all the federal regulation has in fact stifled state action.[190] The repercussions of the Supreme Court's decision in *SWANCC* are one example of how state law can fill any absence of federal environmental regulation. Following the decision that federal regulation did not extend to isolated ponds, nineteen states passed legislation that allowed state governments to regulate such waterways.[191]

A common objection to returning environmental regulation to state governments is the potential for national environmental problems to be overlooked.[192] However, this is an objection that can be quickly answered with two suggested solutions: the common law of public nuisance and interstate compacts and treaties. Under public nuisance law, downstream states could hold upstream states in check from allowing water in an unnatural state to enter its borders. This would require upstream states to

---

188. *See* MINN. STAT. § 103G.005(15) (2003); WIS. ADMIN. CODE NR § 320.03(11) (2010) ("In Wisconsin, a navigable body of water is capable of floating the lightest boat or skiff used for recreation or any other purpose on a regularly recurring basis.").

189. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

190. Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67 (2007).

191. *Id.* at 113 n.187.

192. Indur M. Goklany, *Empirical Evidence Regarding the Role of Nationalization in Improving U.S. Air Quality*, *in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 27 (Roger E. Meiners & Andrew P. Morriss eds., 2000).

maintain environmental standards as high as downstream states, but no higher than necessary to avoid litigation. Prior to the federal regulatory scheme in place today, these common law venues were used as some states became cognizant of the environmental harms crossing their borders.[193] However, development in this area of common law has been slow since the introduction of federal regulation.[194] Interstate compacts and treaties are already in use on some level, but they could be expanded in the absence of federal regulation.[195] The Constitution provides for federal jurisdiction over any disputes between states, thus allowing the federal government to be the arbitrator of such treaties and compacts.[196]

If the American people still do not find these alternatives to federal regulation satisfactory, there is always the option of amending the federal Constitution. Ratification of an amendment to the Constitution would obviously be a difficult political avenue, but if realized, it could undoubtedly provide solid legal support for current federal regulation. An amendment would definitely preclude infringement of state rights and, depending on its precise wording, would likely prevent claims of infringement against individual rights. Support for such an amendment might not be as sparse as critics are quick to claim. When the Supreme Court took up *Rapanos*, "thirty-three states filed amicus briefs which favored ceding their traditional jurisdiction and responsibility to the Army Corps of Engineers."[197] Thirty-three is only five short of the amount of states needed for ratification of a constitutional amendment.[198] The public awareness of national action against environmental harm is also much higher today than in the 1960s when the movement was first making political inroads.

V. CONCLUSION

Some environmental law scholars freely admit "environmental constitutional jurisprudence may have progressed to the point where the very structure of the Constitution impedes necessary solutions to

193. *E.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972); New York v. New Jersey, 256 U.S. 296 (1921); Missouri v. Illinois, 200 U.S. 496 (1906).

194. *See* Antolini, *supra* note 183, at 12.

195. *E.g.*, An Act Granting the Consent of Congress to a Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968).

196. *See* U.S. CONST. art. III, § 2.

197. Ann Graham, *Searching for* Chevron *in Muddy Watters: The Roberts Court and Judicial Review of Agency Regulation*, 60 ADMIN. L. REV. 229, 244 (2008).

198. *See* U.S. CONST. art. V.

increasingly difficult environmental issues . . . ."[199] In *Rapanos*, the Court chose to continue ignoring the constitutional constraints. One constitutional lawyer has gone as far as stating that "it would be more intellectually honest for the federal courts to recognize formally that Congress has the power to regulate matters outside of interstate commerce or other specified powers. Because it would be more honest, a doctrine of unenumerated [sic] powers might form a more stable basis for social legislation in an era of growing skepticism of a limitless commerce power."[200] While tyranny may produce stability, it is not the form of government to which Americans should be willing to succumb. However, it is the form the country would have if Congress were given limitless power.[201] The objective in addressing the constitutional issues in *Rapanos* should be both stability and liberty.

The nation's waterways are a valuable resource and must be cared for in order to preserve their beauty, well-being, and even existence. The laws in place to do this must be stable and established enough to last as long as the waterways themselves. Yet currently, many of the laws protecting these waterways are an exercise of illegitimate federal legislation beyond the enumerated powers of the Constitution. While the Court does well to understand that this legislation needs limiting, its limit in *Rapanos* is only another exercise of arbitrary and illegitimate judicial power.

The federal government is limited in what it can do, not in where it can do it. The Constitution provides a stark and authoritative limit, or "line in the sand," for the extent of federal power over the nation's waterways. Rather than limit the federal government in which geographic areas it can regulate, the Constitution limits the federal government to regulating commerce, and, as the Court has found, this entails navigation. The federal government has not been given the power to regulate the environmental health of any geographic areas, regardless of their use in navigation.

The Constitution also provides liberty by restraining the powers in place. In order to preserve that liberty, the legal methodologies for granting power must be acknowledged and used. Some members of Congress have responded to *Rapanos* with legislative bills that are intended to expand the definition of "navigable waters" in the CWA.[202] The new definition would essentially reinstate the administrative definitions overruled by the Court in

---

199. CRAIG, *supra* note 13, at 4.

200. Paul Boudreaux, *A Case for Recognizing Unenumerated Powers of Congress*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 551, 554 (2006).

201. *See* LOCKE, *supra* note 95, at 188.

202. S. 787, 111th Cong. (2009); H.R. 1310, 111th Cong. (2009).

SWANCC and *Rapanos*.[203] By ignoring the constitutional problems in these cases, the Court has either authorized or deceitfully led Congress to the conclusion that it has a power it has never been given. "Wherever law ends, tyranny begins . . . ."[204] Thus, the first step in preventing tyranny and protecting liberty is in acknowledging where the law ends. For the federal regulation of navigable and non-navigable waterways, it is the plainly adapted objective of the Commerce Clause.

---

203. S.B. 787, 111th Cong. § 4 (2009).

> The term 'waters of the United States' means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.
>
> *Id*.

204. LOCKE, *supra* note 95, at 189.