

ONE FOR THE BIRDS: THE CORPS OF ENGINEERS'

"MIGRATORY BIRD RULE"

by

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Does the use by migratory birds of isolated, intrastate waters establish enough of a connection to “navigable waters” and interstate commerce to permit federal regulation under the Clean Water Act (“CWA”) and Commerce Clause? The Army Corps of Engineers thinks so, but courts and commentators have not been entirely sympathetic to the Corps’ so-called “migratory bird rule.”² The Fourth Circuit and Justice Thomas (in a dissent from denial of certiorari) have rejected such a broad jurisdictional reach in no uncertain terms.³ Even the Ninth Circuit, one of two federal courts of appeal to approve the migratory bird rule, has recognized that it “certainly tests the limits of Congress’s commerce powers and, some would argue, the bounds of reason.”⁴ And many academic commentators question whether the rule is constitutional after *United States*

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² 51 Fed. Reg. 41,206, 41,217 (1986).

³ *Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari); *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

⁴ *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995) (*Leslie Salt II*).

v. *Lopez*,⁵ which arguably ushered in an era of more demanding review of federal action under the Commerce Clause.⁶

We believe that the migratory bird rule warrants renewed attention as the U.S. Supreme Court considers whether to hear a challenge to the rule presented in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“*SWANCC*”).⁷ In that case, the U.S. Court of Appeals for the Seventh Circuit held that the CWA gives the Corps jurisdiction over isolated waters that are neither navigable nor connected or adjacent to navigable waters, but that provide habitat for birds that cross state lines or are protected by Migratory Bird Treaties. The Seventh Circuit also held that this vast extension of the Corps’ jurisdiction does not exceed the federal commerce power.

In this article, we examine the migratory bird rule through the prism of the *SWANCC* case and explain why it lacks a sound statutory or constitutional basis. *SWANCC* is a fine vehicle to test the bird rule. That decision has halted the collective (and costly) efforts of 23 Chicago-area municipalities to develop land as a solid waste balefill serving their 700,000 citizens, even though

⁵ 514 U.S. 549 (1995).

⁶ See, e.g., Challis, *Standing Alone in Murky Waters*, 34 Wake Forest L. Rev. 1179 (1999); Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. 174 (1998); Gilbert, *The Migratory Bird Rule After Lopez*, 39 Wm. & Mary L. Rev. 1695 (1998); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 Tex. Rev. L. & Pol’y 365 (1998); Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 Am. U. L. Rev. 931 (1997); Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 Duke Env’tl L. & Pol’y F. 321 (1997); Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. Davis L. Rev. 1237 (1995); Bablo, *Leslie Salt Co. v. United States: Does the Recent Supreme Court Decision in United States v. Lopez Dictate the Abrogation of the “Migratory Bird Rule”?*, 14 Temp. Env’tl L. & Tech. J. 277 (1995); Lessner, *Leslie Salt Co. v. United States: Keep the Birds Out of Your Birdbath*, 2 Vill. Env’tl L.J. 463 (1991).

⁷ 191 F.3d 845 (7th Cir. 1999), petition for cert. filed Jan. 14, 2000 (No. 99-1178).

the Corps has not established even the remotest connection between the wet areas on the land and either interstate waters or interstate commerce. *SWANCC* starkly illustrates how the bird rule impinges on powers of state and local authorities that the Framers of the Constitution intended to preserve as an integral element of our federalist system of government. Of course, private landowners are equally at the mercy of the Corps under the bird rule. Accordingly, representatives of agriculture (American Farm Bureau Federation), residential developers (National Association of Home Builders), and industry (Cargill, Incorporated) all filed *amicus* briefs urging the Supreme Court to review the *SWANCC* decision, as did the public interest Pacific Legal Foundation.

The Migratory Bird Rule

The CWA prohibits the discharge of “pollutants,” including dredged and fill materials, into “navigable waters” without a permit from the Corps.⁸ “Navigable waters” are defined in the CWA only as “the waters of the United States.”⁹

The Corps has defined the “waters of the United States” in its regulations to include not only navigable waters, tidal waters, and waters adjacent to such waters, but also

[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, the use, degradation or destruction of which could affect interstate or foreign commerce * * *.¹⁰

In the *preamble* to regulations adopted in 1986, the Corps further defined these “other” waters in what has come to be known as the “migratory bird rule”:

⁸ 33 U.S.C. §§ 1311(a), 1344(a), 1362(12).

⁹ 33 U.S.C. § 1362(7).

¹⁰ 33 C.F.R. § 328.3(a)(3). The Environmental Protection Agency has issued an identical definition, 40 C.F.R. § 230.3(s).

EPA has clarified that waters of the United States at [33] CFR 328.3(a)(3) also include the following waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines.¹¹

Despite the fact that it looks like, operates like, and is universally referred to as a “rule,” the “migratory bird rule” has never been promulgated as such in accordance with Section 553 of the Administrative Procedure Act and hence has never been tested in the crucible of the notice and comment procedure. This prompted the Fourth Circuit in *Tabb Lakes* to invalidate the bird rule a decade ago on the ground that the Corps had failed to comply with APA rulemaking requirements.¹² Heedless of *Tabb Lakes*—and the other serious problems we discuss below—the Corps unapologetically continues to rely on the bird rule, and did so in SWANCC’s case to overturn an important public project that had received every necessary state and local approval.

SWANCC’s Balefill Project And The Corps’ Exercise Of Jurisdiction

SWANCC is a municipal corporation formed by 23 northern Cook County, Illinois, towns and villages to develop a system for the safe and efficient disposal of non-hazardous municipal waste for the residents of its member communities.¹³ With that goal in mind, SWANCC purchased a 533-acre parcel of land to create a balefill—a landfill where baled, rather than loose, waste is dumped—on 410 acres of the site. Part of the balefill site was agricultural land and part, 298 acres, an “early successional stage forest” that had grown up on land previously used as a

¹¹ 51 Fed. Reg. at 41,217.

¹² *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988) (the migratory bird rule is invalid as a substantive rule promulgated without notice and comment), *aff’d*, 885 F.2d 866 (4th Cir. 1989). The Seventh Circuit in *SWANCC* rejected a similar APA challenge to the bird rule.

¹³ *SWANCC*, 191 F.3d at 847.

strip mine for gravel. The forested portion of the site contained “a labyrinth of trenches and other depressions” left by the strip mining. These collect rainwater during some or all of the year, forming “permanent or seasonal ponds” ranging from one-tenth of an acre to several acres in size, and from a few inches to several feet in depth.¹⁴

In 1987, after ten public hearings and 2,500 pages of testimony, the local zoning board and the Cook County Board of Commissioners approved SWANCC’s balefill project. In 1989, SWANCC obtained a permit for the project from the Illinois Environmental Protection Agency, which had reviewed SWANCC’s 1,700 page application and conducted four days of hearings. Because SWANCC needed to fill 17.6 acres of trenches and depressions within the forested area to construct the balefill, it also requested rulings from the U.S. Army Corps of Engineers as to whether it needed a permit under Section 404 of the CWA, 33 U.S.C. § 1344(a). The Corps informed SWANCC twice, in 1986 and again in 1987, that those 17.6 acres were not subject to the Corps’ regulatory authority and that a Section 404 permit was not required.¹⁵

The Corps changed its position after the Illinois Nature Preserves Commission informed the Corps in July 1987 that its staff had observed migratory bird species on the property during a brief site visit.¹⁶ Based on that assessment, and invoking its “migratory bird rule,” the Corps concluded that the isolated, intrastate strip-mining depressions on the balefill site were “navigable” “waters of the United States” within its jurisdiction under the CWA solely because they “are or

¹⁴ 191 F.3d at 848.

¹⁵ *Ibid.*

¹⁶ 191 F.3d at 848–849.

could be used as habitat by migratory birds which cross state lines.”¹⁷ SWANCC submitted an application for a Section 404 permit, which the Corps denied in 1991, just as it denied SWANCC’s revised application in 1994.

SWANCC’s Challenge To The Migratory Bird Rule

SWANCC promptly brought suit against the Corps in the District Court for the Northern District of Illinois challenging the Corps’ jurisdiction. SWANCC contended that the Corps lacks authority under the CWA to regulate isolated waters that are in no way connected or related to navigable waters of the United States. Alternatively, it argued, the regulation of isolated waters not connected with interstate commerce, on the sole basis that they were used as habitat by migratory birds, exceeded the scope of federal power under the Commerce Clause. In an argument that combines these two points, SWANCC contended that constitutional doubt about whether the bird rule comports with the Commerce Clause mandated rejection of the Corps’ broad interpretation of its CWA powers, because an agency’s interpretation is not entitled to *Chevron*¹⁸ deference when it raises “serious constitutional concerns” and “there is another interpretation that may fairly be ascribed” to the statute.¹⁹ The district court rejected SWANCC’s arguments, granting summary judgment to the Corps.²⁰

¹⁷ 191 F.3d at 849.

¹⁸ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

¹⁹ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988).

²⁰ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 998 F. Supp. 946, 948 (N.D. Ill. 1998).

On SWANCC’s appeal, the Seventh Circuit affirmed. It rejected SWANCC’s argument that the migratory bird rule violates the Commerce Clause, or at least raises enough constitutional problems to mandate a narrower interpretation of “navigable” “waters of the United States.”²¹ The court acknowledged that the migratory bird rule can be justified, if at all, only under the third prong of federal regulatory power set forth in *United States v. Lopez*²²: “regulation of activities that ‘substantially affect’ interstate commerce.”²³ It then held that although the Corps had made no showing that the use of SWANCC’s balefill site by migratory birds had any effect on interstate commerce, “a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce”²⁴—the “aggregation principle” most famously applied in *Wickard v. Filburn* to justify federal jurisdiction over wheat grown for a farmer’s own domestic consumption.²⁵ Finally, the court held that “destruction of the natural habitat of migratory birds in the aggregate ‘substantially affects’ interstate commerce” because “millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds,” including by “trave[l] across state lines.”²⁶

²¹ *SWANCC*, 191 F.3d at 849–851.

²² 514 U.S. 549 (1995).

²³ *SWANCC*, 191 F.3d at 849, quoting 514 U.S. at 558–559.

²⁴ 191 F.3d at 850.

²⁵ 317 U.S. 111 (1942).

²⁶ 191 F.3d at 850.

Turning to SWANCC's argument that the migratory bird rule is not a permissible interpretation of the CWA, the court of appeals held that the "scope of the Act reaches as many waters as the Commerce Clause allows."²⁷ Accordingly, it concluded, "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the * * * Corps to interpret the Act in such a manner."²⁸

Finally, the Seventh Circuit rejected SWANCC's argument that an interpretation of the Clean Water Act must be tied to water quality. Brushing aside concerns that jurisdiction under the CWA is now tied to the interstate movement of birds instead of to any real effect on interstate waters, the court focused on the CWA's stated purpose "to restore and maintain the * * * biological integrity of the Nation's waters."²⁹ According to the Seventh Circuit, "SWANCC's suggestion that the Corps' jurisdiction must be defined solely by reference to water quality is itself inconsistent with the Act and must be rejected."³⁰

Although it builds on Circuit precedent,³¹ we think the *SWANCC* court got just about everything wrong. It upheld agency action that is lawless and an affront to our federalism. Taking the language and history of the CWA seriously, and having due regard to the post-*Lopez* scope of federal commerce power, the Corps should not have jurisdiction over isolated waters

²⁷ 191 F.3d at 851.

²⁸ *Ibid.*

²⁹ 191 F.3d at 852, quoting 33 U.S.C. § 1251(a).

³⁰ *Ibid.*

³¹ See *Hoffman Homes, Inc. v. United States EPA*, 999 F.2d 256 (7th Cir. 1993).

solely because they are habitat to migratory birds. This is an important enough issue, and has generated enough judicial and academic controversy, that we think it is ripe for Supreme Court review.

The Seventh Circuit’s Statutory Misinterpretation

“[A]n administrative agency’s power to regulate * * * must always be grounded in a valid grant of authority from Congress.”³² But one searches the Clean Water Act in vain for any grant of authority to regulate isolated ponds and puddles solely because migratory birds use them. The Seventh Circuit’s conclusion that the bird rule is a reasonable interpretation of the CWA cannot be reconciled with the language and history of the Act.

The CWA limits the Corps’ jurisdiction to “navigable waters,” which are defined in the Act only as “waters of the United States.”³³ Traditionally, “navigable waters” meant “waters navigable in fact.”³⁴ Over time, however, courts extended the concept of the navigable waters to include waters capable of navigation through reasonable improvement.³⁵ The legislative history of the CWA indicates that by using the phrase “navigable waters” but defining it as “waters of the United States,” Congress intended to reject the traditional approach adopted in *The Daniel Ball* and embrace the slightly broader view of federal jurisdiction set forth in *Appalachian Electric* and similar cases. The CWA’s floor manager in the House, Representative Dingell, was explicit in this regard. He said that the bill sought to avoid the most “limited” or “technical” definition of

³² *FDA v. Brown & Williamson Tobacco Corp.*, 2000 WL 289576, at *23 (U.S. Mar. 21, 2000).

³³ 33 U.S.C. §§ 1344(a), 1362(7).

³⁴ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

³⁵ *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 398–399 (1940).

navigable waters “derived from *The Daniel Ball*” in favor of a definition “in line with more recent judicial opinions” that “expanded that limited view of navigability * * * to include waterways which would be ‘susceptible of being used * * * with reasonable improvement,’ as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera.”³⁶ It is in that context that the statement in the House and Senate Conference reports on the bill that “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation” must be understood.³⁷ Congress was well aware that the reach of the federal commerce power over waters was limited by the concept of navigability, but meant to give the broadest possible interpretation to that concept.

The Supreme Court too has insisted that there be some real connection with navigable waters before federal power is triggered. In *Federal Power Comm’n v. Union Elec. Co.*,³⁸ for example, the Court interpreted the jurisdictional provision of the Federal Power Act giving an agency authority over “navigable waters” and “other * * * waters * * * over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States.”³⁹ The Court held that federal authority under this broad language did *not* reach “intrastate nonnavigable waters which do not flow into any navigable streams.”⁴⁰ And in *United States v.*

³⁶ 118 Cong. Rec. 33,756 (1972), citing *United States v. Utah*, 283 U.S. 64 (1931). Accord 118 Cong. Rec. at 33,699.

³⁷ S. Conf. Rep. No. 92-1236, at 144 (1972); H.R. Rep. No. 92-911, at 131 (1972).

³⁸ 381 U.S. 90 (1965).

³⁹ 16 U.S.C. § 817.

⁴⁰ 381 U.S. at 97 & n.9.

Riverside Bayview Homes,⁴¹ though the Court recognized that the CWA applies to “at least *some* waters that would not be deemed ‘navigable’ under the classical understanding,” its limited holding was that wetlands “adjacent” to navigable waters are covered by the CWA only because pollution in wetlands could affect water quality in the navigable waters next door.⁴²

What is missing from all this is any sign that the federal government can regulate intrastate, isolated waters that have *no* hydrologic connection to navigable waters. Yet the migratory bird rule grabs jurisdiction for the Corps in just those circumstances—where there is absolutely no hydrologic connection, only use of the isolated water “by birds protected by Migratory Bird Treaties” or “which cross state lines.”⁴³ That, we submit, as a matter of the CWA’s plain language and history, is not a permissible interpretation and ought to be struck down.

We are not alone in this view. In *United States v. Wilson*,⁴⁴ the Fourth Circuit struck down the “other waters” rule⁴⁵—of which the bird rule purports to be a “clarification”⁴⁶—“as a matter of statutory construction.”⁴⁷ “[W]aters of the United States,” the Fourth Circuit reasoned, “when used to define the phrase ‘navigable waters’ refers to waters which, if not

⁴¹ 474 U.S. 121, 133 (1985).

⁴² *Id.* at 133–134 (emphasis added); see *ibid.* (“wetlands may serve to filter and purify water draining into adjacent bodies of water * * * and to slow the flow of surface runoff into” navigable waters).

⁴³ 51 Fed. Reg. at 41,217.

⁴⁴ 133 F.3d 251 (4th Cir. 1997).

⁴⁵ 33 C.F.R. § 328.3(a)(3).

⁴⁶ 51 Fed. Reg. at 41,216.

⁴⁷ 133 F.3d at 257.

navigable in fact, are at least interstate or closely related to navigable or interstate waters.”⁴⁸ Because 33 C.F.R. § 328.3(a)(3) defined “‘waters of the United States’ to include intrastate waters that need have nothing to do with navigable or interstate waters,” the court held that it illegitimately “expands the statutory phrase ‘waters of the United States’ beyond its definitional limit.”⁴⁹ The same goes for the bird rule, in spades. It does not require any connection with navigable or interstate waters as the foundation for the exercise of federal power—only a connection with migratory birds. Under the CWA, that is not enough.⁵⁰

The Corps contends that its bird rule is nevertheless authorized because the CWA regulates waters in part to protect wildlife.⁵¹ But Congress meant its goal to protect wildlife to be pursued within the jurisdictional limits imposed elsewhere in the statute: the reference to wildlife was not a separate jurisdictional grant, as the government now contends. To regard it as such a grant (impossible anyway as a matter of plain statutory language) proves far too much. If protection of wildlife were sufficient for CWA jurisdiction no bird-bath or ornamental pond would be safe from federal regulation. Equally, no swimming pool would be beyond the Corps’ power, because another goal of the CWA is to protect waters for their recreational use!⁵² “[W]e must be guided to a degree by common sense” in interpreting a statute,⁵³ and common sense dictates that the

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ See also *Hoffman Homes*, 999 F. 2d at 262–263 (Manion, J., concurring in the judgment) (the CWA gives no federal jurisdiction over “isolated wetlands” that “have no effect on the waters of the United States”).

⁵¹ *E.g.*, U. S. Brief in Opposition to Cert. in *SWANCC* at 14–15, relying on 33 U.S.C. § 1251(a).

⁵² 33 U.S.C. § 1251(a)(2).

⁵³ *FDA v. Brown & Williamson Tobacco Corp.*, 2000 WL 289576, at *7 (U.S. Mar. 21, 2000).

agency may not stray so far from waters with some real connection to the navigable waters of the United States.

What Have Birds Got To Do With Interstate Commerce?

Even if there were any doubt, using traditional tools of statutory construction, that the bird rule is far beyond the pale (and we do not think there is), the rule could not survive the settled principles that statutes are to be interpreted to avoid constitutional problems and that *Chevron* deference is not owed to constitutionally suspect agency interpretations.⁵⁴ As the Fifth Circuit recently explained, a court is to “reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* step-two if it believes the agency’s reading raises serious constitutional doubts.”⁵⁵

Can there be any question that these established principles ought to be the end of the bird rule? Even *defenders* of the rule, after all, acknowledge that it “tests the limits of Congress’s commerce powers.”⁵⁶ In SWANCC’s case, the Seventh Circuit recognized that migratory birds on SWANCC’s property themselves had “no discernible effect on interstate commerce.”⁵⁷ And the Corps made no finding beyond that required by the bird rule itself—that SWANCC’s wet depressions and ponds were used by migratory birds and birds that cross state lines. It made no finding of any connection to interstate commerce (nor could it). The bird rule’s lack of any

⁵⁴ See, e.g., *Edward J. DeBartolo Corp.*, 485 U.S. at 574–577.

⁵⁵ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 443 n.95 (5th Cir. 1999), cert. petitions pending. See also, e.g., *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995).

⁵⁶ *Leslie Salt II*, 55 F.3d at 1396.

⁵⁷ *SWANCC*, 191 F.3d at 850.

connection to commerce, reflected in the lack of any agency finding of such a connection in SWANCC's case, makes the basis for federal jurisdiction "even more farfetched than that offered, and rejected, in *Lopez*" and raises, at minimum, "serious doubts" about the "propriety of the Corps' assertion of jurisdiction."⁵⁸ The Fourth Circuit in *Wilson* held the Corps' "other waters" rule invalid for precisely the same reason.⁵⁹

The Corps' defense against Commerce Clause challenge is the aggregation rule. The Corps contends, and the Seventh Circuit agreed, that "[c]ommerce associated with migratory birds has a measurable impact on the national economy" in the form of expenditures by birdwatchers and hunters, and that the "aggregate effects" of filling "isolated waters that are actually used as habitat for migratory birds" have a "substantial impact" on this commerce.⁶⁰

There are deep flaws in this theory. First, the Corps and court aggregated the wrong thing: "the destruction of the natural habitat of migratory birds."⁶¹ All the Seventh Circuit's⁶² and the government's figures⁶³ on migratory bird-related commerce are gross figures that in no way attribute economic effects to the loss of particular types of habitat. Yet the appropriate question to test whether the bird rule is sufficiently tied to interstate commerce is *what is the impact on*

⁵⁸ *Cargill, Inc.*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari). The migratory bird rule contains no "jurisdictional element which would ensure, through case-by-case inquiry" that particular waters "affect interstate commerce." *Lopez*, 514 U.S. at 561.

⁵⁹ See 133 F.3d at 257.

⁶⁰ U.S. Brief in Opposition to Cert. in *SWANCC* at 17–18.

⁶¹ 191 F.3d at 850.

⁶² *Ibid.*

⁶³ U.S. Brief in Opposition to Cert. in *SWANCC* at 18–19.

commerce of the filling of isolated, intrastate waters used by migratory birds. The Corps has never made a showing that there is *any* such impact. To be sure, the Supreme Court has not yet provided much guidance on the proper application of the aggregation principle. But Professor Nagle is surely correct that “available clues counsel against overly broad aggregations” like that relied on by the Corps and the Seventh Circuit.⁶⁴ The Supreme Court’s “frequently stated concern about federalism pushes towards less sweeping aggregations. And lower courts have rejected the contention that Congress can satisfy the Commerce Clause simply by choosing a broad category of activities whose aggregate effect on interstate commerce is substantial.”⁶⁵

The second problem with trying to use the aggregation principle to save the bird rule is the glaring disconnect between the class covered by the CWA—“navigable” “waters of the United States”—and the asserted basis of federal jurisdiction—expenditures by birdwatchers and hunters related to migratory birds. If this sleight of hand can pass constitutional muster, what area of Americans’ lives will be beyond federal control?

Finally, and most simply, the bird rule is outside the commerce power because the self-propelled flight of birds across state lines is just not commercial in character. Like “any conduct in this interdependent world of ours,” such flight may have “an ultimate commercial * * * consequence.”⁶⁶ But any “commercial nexus” here is too strained: “Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that

⁶⁴Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 Mich. L. Rev. at 197–198.

⁶⁵*Ibid.* See also 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 825 n.68 (3d ed. 2000).

⁶⁶*Lopez*, 514 U.S. at 580 (Kennedy and O’Connor, JJ., concurring).

interference [with local control] contradicts the federal balance the Framers designed.”⁶⁷ If the federal government can justify regulating every place and thing used by migratory birds merely by pointing in a generalized way to expenditures by hunters and birdwatchers, then we have truly “obliterate[d] the distinction between what is national and what is local and create[d] a completely centralized government.”⁶⁸

The Migratory Bird Rule Offends Our Federalism

The final reason why the Seventh Circuit erred in upholding the bird rule is a more specific complaint about the rule’s anti-federalist effects. A court will not assume that Congress intended to substantially “alter sensitive federal-state relationships” by regulating conduct “traditionally subject to state regulation” unless Congress said so clearly.⁶⁹ Congress in the CWA didn’t say *anything* about regulating isolated waters, still less about doing so based on the presence of migratory birds. So the Corps should not be permitted to use the bird rule, which “radically readjusts the balance of state and national authority.”⁷⁰

Since at least *Village of Euclid v. Ambler Realty Co.*,⁷¹ the Supreme Court has recognized “the authority of state and local governments to engage in land use planning.”⁷² Yet the bird rule imposes a federal agency on top of the local land use planning process, allowing the Corps to sit

⁶⁷ *Id.* at 583.

⁶⁸ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

⁶⁹ *Rewis v. United States*, 401 U.S. 808, 811–812 (1971).

⁷⁰ *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

⁷¹ 272 U.S. 365 (1926).

⁷² *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

in final judgment on whether a project that involves filling isolated waters is in the “public interest.”⁷³ It does so when, as in SWANCC’s case, the project had already been approved, after exhaustive inquiry, by all state and local authorities, and even when, as in SWANCC’s case, the project is an important *public* project serving critical local needs. And if the bird rule is permissible, there is no logical stopping point to this federal infringement on local powers. Migratory birds may settle anywhere, and land that is migratory-bird free one year may be habitat the next. Virtually no land, building, or tree will be beyond the potential scope of federal powers to overrule local land use determinations. Given the Supreme Court’s renewed interest in federalist limits on centralized power, on display in a host of decisions over the past few terms, federal regulation for which no limits can be identified is highly suspect.

The Supreme Court Should Strike Down the Bird Rule

SWANCC’s certiorari petition sets forth all these reasons why the bird rule is unauthorized by the CWA and also outside the commerce power. But the Supreme Court is not a court of error. It does not hear cases just to correct mistakes, only *big* mistakes that are of *great importance*, and generally ones made as to issues that have *divided the lower courts*. And the Court likes some assurance that it needs to get involved *now*, rather than letting the issue percolate longer in the lower courts.⁷⁴

SWANCC’s case satisfies these criteria. First, there is a split among the circuits, because *Wilson* invalidated the “other waters” regulation that is the basis for the bird rule and clearly

⁷³ 33 C.F.R. § 320.4(a).

⁷⁴ See generally Bishop & Sarles, *Earning Your Quill: How to Petition the United States Supreme Court for Certiorari*, CBA Record 16 (Feb./Mar. 1997).

would have decided SWANCC's case the opposite way. Scholarly commentators too are sharply divided over the propriety of the rule. Second, the amicus briefs in support of the petition from agricultural, developer, and industrial representatives show that the question of the bird rule's legality is of broad national importance. The fact that the petitioner is a municipal corporation serving 700,000 citizens is another indicator of importance. Third, letting the issue percolate in the lower courts is unlikely to be productive. All the relevant questions are already well aired in *SWANCC*, *Wilson*, *Leslie Salt*, and Justice Thomas' dissent from denial of certiorari in *Cargill*. And as the Pacific Legal Foundation points out in its amicus brief, cases presenting the legality of the bird rule have been and will be few and far between. That is because the costs of pursuing final agency action on a Section 404 permit, followed by a petition for review to the federal courts, is prohibitive for most landowners. And it is because the Corps appears deliberately to avoid "ripening" a court challenge by refusing to make a *final* agency determination on a permit application.⁷⁵ And ripening a case will become more difficult in the future with the institution of a new administrative appeals process that has to be completed before a landowner can go to court.⁷⁶

The Corps' migratory bird rule misinterprets the CWA, undermines the Constitution's protection of a sphere for local action, and cries out for Supreme Court review. We hope the Court grants certiorari in SWANCC's case to curb the Corps' regulatory excesses.

⁷⁵ See amicus brief of Pacific Legal Foundation in *SWANCC* at 9–14.

⁷⁶ See 33 C.F.R. §§ 320.1(a)(2), 331.1 to 331.12 (1999).