

Navigating “Navigable Waters” and WOTUS: How a Decades-Old Constitutional Question and New Statutory Interpretation Doctrines May Erode the CWA

Raleigh J. Hightower*

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I. INTRODUCTION

For decades, the task of defining the outer limits of the Clean Water Act’s (CWA) jurisdiction has vexed federal agencies and the nation’s courts. In 2023, the Supreme Court once again sought to clarify the boundaries of the CWA’s jurisdiction in *Sackett v. Environmental Protection Agency*.¹ As a result, the Court narrowed the Act’s jurisdiction extensively and confined agencies to the narrowest interpretation of the statute’s jurisdiction since the beginning of its wetlands regulation in 1977. Justice Thomas authored a concurring opinion that reignited another question endemic to CWA jurisprudence: To what extent does the CWA embrace the federal government’s regulatory authority under the Commerce Clause? Thomas’s answer is that the CWA embraces only

* © 2026 Raleigh J. Hightower, J.D. Candidate 2026, Tulane University Law School; B.S. 2023, Political Science/Pre-Professional Legal Studies, Murray State University. The author would like to thank Professor Mark Davis and the *TELJ* editors for their thoughtful insight and guidance during the writing process.

1. *Sackett v. Env’t Prot. Agency*, 598 U.S. 651 (2023).

Congress's authority to regulate the "channels of commerce," and the act is limited to regulating navigable waters or those waters susceptible to being used for highways of commerce. Thus, New Deal-era precedent allowing regulation based on an activity's "substantial effects on interstate commerce" is not applicable.

Amid a political climate that becomes increasingly more hostile to the administrative state by the day, it is certainly worth carefully considering the merits of such an argument. Seeing as litigants have already made their way to federal courts with arguments seeking to narrow the CWA's jurisdiction even further than the *Sackett* majority,² will Thomas's concurrence serve to provide the argument that breaks the act? This Comment will explore some of the questions raised by Thomas's concurrence. This Comment will first provide a discussion of relevant concepts such as the Clean Water Act and its jurisdictional provisions, federal regulatory authority based on the Commerce Clause, the historic relationship between the federal government's authority to regulate waters and the term "navigability," and the body of jurisprudence interpreting the CWA's jurisdiction. Then, this Comment will explore the extent to which the federal government may exercise its Commerce Clause authority when regulating waters and the challenges that may prevent a broad interpretation of the CWA's text. Finally, a brief conclusion will be provided.

II. BACKGROUND

The CWA, passed by Congress in 1972, is intended to be an "all-encompassing program of water pollution regulation."³ The codified objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴ The CWA makes the "discharge of any pollutant" into "navigable waters" unlawful.⁵ A "pollutant," as defined by the act, includes contaminants such as "chemical wastes," "biological materials," and "radioactive materials," as well as more common materials like "rock," "sand," and "cellar dirt."⁶ While the act makes clear what types of pollutants are prohibited, it cannot be said that the same level of clarity defines which "navigable waters" are included in the act's jurisdiction. The phrase "navigable waters" is

2. *White v. U.S. Env't Prot. Agency*, 737 F.Supp. 3d 310, 314 (E.D.N.C. 2024).

3. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981).

4. 33 U.S.C. § 1251(a).

5. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12)(A).

6. 33 U.S.C. § 1362 (6).

defined by the act to include “waters of the United States, including the territorial seas” (WOTUS).⁷

Congress never drafted its own definition of WOTUS, but instead left the responsibility of defining the outer limits of the CWA’s jurisdiction to the Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), and the courts.⁸ The Corps and the EPA, as joint enforcers of the act, have defined WOTUS by promulgating rules, whereas the courts have refined the definition of WOTUS through litigation.⁹ When challenges to the vagueness of the CWA’s jurisdiction arrive in the courts, they most often appear through cases regarding the application of the provision governing dredge and fill material permissions.¹⁰ Section 1344(g)(1) of the CWA simply authorizes the states to apply for EPA permission to administer programs to issue permits “for the discharge of dredged or fill material into some bodies of water.”¹¹ Section 1344(g)(1) specifies that the states may administer programs to regulate the discharge of dredged or fill material into “(1) any waters of the United States, (2) except for traditional navigable waters, (3) “including wetlands adjacent thereto.”¹²

At various times at various points in the development of CWA jurisprudence, the agencies responsible for enforcing the CWA have claimed jurisdiction over massive swaths of land, claiming that they were wetlands adjacent to navigable waters. At one point, the EPA claimed to have jurisdiction over half of Alaska and an area the size of California in the contiguous United States.¹³ With the Supreme Court’s recent *Sackett* decision, the Court continued its trajectory of decreasing the amount of land regulable under the wetlands provision, and some justices on the Court even expressed clear sentiments that the jurisdiction should be restricted even further.¹⁴ This recent trajectory by the nation’s high court has once again raised a question that has plagued the CWA since its conception: What are WOTUS, and what land can properly be regulated

7. 33 U.S.C. § 1362(7).

8. Christopher D. Thomas, *Can Anyone Define WOTUS? A Cranky History of Clean Water Act Jurisdiction*, 65 FED. LAW. 44 (July 2018).

9. 33 U.S.C. § 1251(d); 33 U.S.C. § 1344(d).

10. See *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 163 (2001) [hereinafter *SWANCC*]; *Rapanos v. U.S.*, 547 U.S. 715 (2006); *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 675 (2023).

11. *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 598 U.S. at 675.

12. *Id.*

13. *Rapanos*, 547 U.S. at 722.

14. *Id.* at 709-10 (Thomas, J., concurring); *Sackett*, 598 U.S. at 678-79.

by the federal government under the CWA? The following section of this Comment will provide an examination of several linked bodies of jurisprudence that are necessary to know in order to understand the limits of federal regulatory authority in this context. First, the federal government's historic and modern regulatory authority under the Commerce Clause will be considered. Then the legal concept of "navigability" and its relationship with the Commerce Clause will be discussed. Finally, the prior litigation of the CWA's wetlands issue will be explored.

A. *The Commerce Clause*

The Commerce Clause is perhaps the most important basis of federal regulatory authority. The Commerce Clause grants Congress the authority "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."¹⁵ This affirmative grant of regulatory authority has been referred to as the "active" aspect of the Commerce Clause.¹⁶ The Commerce Clause also has a "dormant" aspect.¹⁷ The dormant aspect is based on the premise that the federal government has the exclusive power to regulate interstate commerce and that states are prohibited from imposing unreasonable burdens on interstate commerce that are not authorized by Congress.¹⁸ Therefore, the Commerce Clause serves as both a source of federal regulatory authority and a limitation on state authority.¹⁹

The Supreme Court's interpretations of the Commerce Clause have gone through periods of both narrow and expansive readings. In the Court's first case offering significant interpretation of the Commerce Clause, *Gibbons v. Ogden*,²⁰ the Court held that "commerce," as used in the Commerce Clause, was meant to encompass the commercial intercourse in nations and parts of nations.²¹ The Court also concluded that by enumerating federal authority over specific classes of commerce, it is implied that other classes of commerce are left within the purview of

15. U.S. Const. art. 1, § 8, cl. 3.

16. Roderick E. Walston, *The Federal Commerce and Navigation Powers: Solid Waste Agency of Northern Cook County's Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699, 706 (2002).

17. *Id.*

18. *Id.* at 707.

19. *Id.*

20. 22 U.S. (9 Wheat) 1 (1824).

21. *Id.* at 189-190.

state regulation.²² Or, put differently, the framers contemplated limitations to the federal government's authority to regulate commerce. In early cases following *Gibbons*, the Supreme Court imposed several limitations on Congress's authority to regulate under the Commerce Clause. One such limitation is that federal regulatory authority was extended only to "commerce," not to "manufacturing" or the "production" of goods.²³ In other early cases, the Court held that "production" and "manufacturing" were not regulable as interstate commerce because these activities occur wholly within a state.²⁴ Another limitation was that federal regulatory authority only applied to activities that had "direct," as opposed to "indirect," effects on interstate commerce.²⁵ Thus, in early cases, the Court struck down congressional attempts to regulate labor practices, child labor, union membership, and wages and hours.²⁶

Much of what has become the modern Commerce Clause doctrine emerged during the New Deal era, a period characterized by expansive readings of the Commerce Clause. One key development to the Commerce Clause doctrine in the New Deal era was the idea that the Commerce Clause granted Congress the authority to regulate virtually every aspect of national life, so long as the regulated activity "affects" or "significantly affects" interstate commerce.²⁷ While several cases made similar holdings,²⁸ perhaps the best illustration of the "affects" phenomenon can be seen in the Court's opinion in *Wickard v. Filburn*.²⁹ In *Wickard*, the Court upheld the constitutionality of an amendment to the Agricultural Adjustment Act of 1938 restricting the production of homegrown wheat as a part of a greater scheme to control the market price of wheat.³⁰ The Court held that Filburn's private, local wheat production still fell within Congress's regulatory purview under the Commerce Clause because it could possibly exert "a substantial economic effect on interstate commerce."³¹ The *Wickard* decision also contributed an idea which came to be known as the "aggregation" principle. The aggregation

22. *Id.* at 195.

23. *U.S. v. E.C. Knight Co.*, 156 U.S. 1, 14 (1895).

24. *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936).

25. *Id.* at 309 (holding that the regulation of wages and hours had only "secondary and indirect" effects on commerce).

26. *Id.* at 710.

27. *Id.*

28. *See generally* *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

29. 317 U.S. 111 (1942).

30. *Id.* at 113-115.

31. *Id.* at 125.

principle is the idea that even though the conduct of an individual actor, such as Filburn, may have a limited effect on interstate commerce by itself, the effect of that conduct “taken together with that of many others similarly situated, is far from trivial.”³²

In more recent history, the Court has offered two opinions that have become highly influential in analyzing federal authority under the Commerce Clause. These decisions are *United States v. Lopez* and *United States v. Morrison*.³³ In *Lopez*, the Court struck down the Gun Free School Zones Act of 1990, which prohibited the possession of firearms near schools; in *Morrison*, the Court invalidated a provision of the Violence Against Women Act that provided a civil remedy for acts of violence against women.³⁴ *Lopez* and *Morrison* are important in the larger body of Commerce Clause jurisprudence because they established a more stringent analysis for evaluating legislation under Congress’s Commerce Clause authority.³⁵ *Lopez* and *Morrison* were among the only cases to strike down congressional legislation passed under Commerce Clause authority since the New Deal era.³⁶

The first major change that *Lopez* and *Morrison* brought to the Commerce Clause analysis was a requirement for a stronger nexus between the regulated activity and interstate commerce than that required by the New Deal era court.³⁷ The Court first tightened the nexus requirement in *Lopez* by resolving the ambiguity of whether a regulated activity must “affect” or “substantially affect” interstate commerce; ultimately, the Court held that a regulated activity must “substantially affect” interstate commerce to be within the regulatory authority of the Commerce Clause.³⁸ The Court further found that a showing of a reasonable nexus between the regulated activity and interstate commerce is required, rather than demonstrating a simple “but-for” connection.³⁹ *Lopez* and *Morrison* also notably clarified that “commerce,” as used in the Commerce Clause, only allows regulation of economic activities, and Congress’s regulatory authority does not extend to non-economic activities.⁴⁰ In *Morrison*, the Court said “in those cases where we have sustained federal regulation of intrastate activity . . . the activity in

32. *Id.* at 128.

33. 514 U.S. 549 (1995); 529 U.S. 598 (2000).

34. Walston, *supra* note 16, at 714.

35. *Id.*

36. *Id.*

37. *Id.* at 715.

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

39. Walston, *supra* note 16, at 714-15; *Morrison*, 529 U.S. at 613.

40. Walston, *supra* note 16, at 718.

question has been some sort of economic endeavor.”⁴¹ The *Morrison* opinion also seems to apply this economic and non-economic distinction to *Wickard*’s “aggregation principle,” stating that the Court “reject[s] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁴² It is also noteworthy that the *Lopez* opinion made effort to synthesize from the Court’s body of Commerce Clause jurisprudence three broad categories of activity that are regulable under Congress’s commerce power: (1) the channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) that have “substantial” effects on interstate commerce.⁴³

B. ‘Navigability’ and Federal Water Regulation

The concept of “navigability” is thoroughly embedded in federal constitutional and statutory law.⁴⁴ Navigability, which generally refers to the degree to which a particular water body can be used by boats or water crafts,⁴⁵ is analyzed by courts in several different contexts including: determining if a state holds title over a waterway’s beds and banks; establishing the admiralty jurisdiction of federal courts under Article III of the Constitution; limiting the scope of the federal navigational servitude; and limiting the scope of the federal government’s authority to regulate actions under the Commerce Clause.⁴⁶ Due to the wide variety of purposes served by these legal doctrines, the Supreme Court has adopted multiple different tests for navigability.⁴⁷ Most relevant to the discussion of the CWA and its jurisdictional reach is the navigability test for purposes of federal regulation under the Commerce Clause.

The Supreme Court’s landmark decision in *Gibbons*⁴⁸ illustrates the long relationship between navigation and the federal government’s regulatory authority under Commerce Clause. In *Gibbons*, the Supreme Court struck down a New York state law that granted Robert Livingston and Robert Fulton an exclusive license to navigate state waters by steam-

41. *Morrison*, 529 U.S. at 611.

42. *Id.* at 617.

43. *Lopez*, 514 U.S. at 558-59.

44. Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643, 1643 (2013).

45. *Id.*

46. *Id.* at 1647.

47. *Id.* at 1647-48.

48. 22 U.S. (9 Wheat.) 1 (1824).

or fire-powered boats.⁴⁹ Chief Justice Marshall reasoned that this state action was inconsistent with Congress's plenary power to regulate commerce.⁵⁰ Chief Justice Marshall also reasoned, motivated by the increased importance of waterways for facilitating the nation's commerce, that the phrase "commerce" as used in the Constitution comprehended navigation.⁵¹ With the fundamental relationship between commerce and navigation in mind, the Supreme Court offered its test for navigability in the context of federal regulatory authority under the Commerce Clause in *The Daniel Ball*.⁵² In *The Daniel Ball*, the Supreme Court decided that authority to regulate under the Commerce Clause extends to all waters navigable in fact and that water bodies are navigable in fact when "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."⁵³

Following *The Daniel Ball*, the court articulated some key expansions to the Commerce Clause navigability test; when interpreted together, the *Daniel Ball* test and these expansions have sometimes been referred to as the "expanded *Daniel Ball* test."⁵⁴ One of the first expansions came in *The Montello*, in which the Court held that a water body could still be considered navigable even if there were obstructions to its navigability, such as rapids or sand bars.⁵⁵ The Court also reasoned that the capability for purposes of transportation and commerce are the true criterion for navigability, not the extent and manner of the use.⁵⁶ Similarly the Court has also affirmed that a water body may be considered navigable when artificial improvements exist in the body that affect its actual capacity to be navigated if that waterway would have been navigable in its natural state.⁵⁷ In *United States vs. Appalachian Electric Power Co.*, the Court also notably upheld the federal authority over a water body when improvements might render that waterway navigable.⁵⁸

As the opinion in *Appalachian Electric Power Co.* brought the *Daniel Ball* navigability definition to its zenith, it contemporaneously

49. Adler, *supra* note 44, at 1670.

50. *Gibbons*, 22 U.S. (9 Wheat.) at 221.

51. *Id.* at 190.

52. 77 U.S. (10 Wall.) 557 (1870).

53. *Id.* at 563.

54. *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 702 (2023) (Thomas, J., concurring).

55. *The Montello*, 87 U.S. (20 Wall.) 430, 443 (1874).

56. *Id.*

57. *Econ. Light & Power Co. v. U.S.*, 256 U.S. 113, 123 (1921).

58. *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940).

deemphasized the role that navigability played in the analysis of federal authority under the Commerce Clause. In consideration of a request by the United States to enjoin the construction of a dam and electric power plant on Virginia's New River, the Court held that Congress's regulatory authority over navigable waters is not limited to the purposes of navigation.⁵⁹ Justice Reed reasoned that the federal government had the authority to control not only the navigation of navigable waters, but also the commerce occurring on the waters.⁶⁰ Justice Reed stated, "that [federal] authority is as broad as the needs of commerce" and that "navigability . . . is but a part of this whole. Flood protection, watershed development, [and] recovery of the cost of improvements through utilization of power are likewise parts of commerce control."⁶¹

A year later, the Court once again went beyond the rigid view that federal regulatory authority over waters extended only to purposes of controlling navigation and upheld federal regulatory authority over a non-navigable tributary for flood control purposes.⁶² In *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, the Court decided on a constitutional challenge to the Flood Control Act of 1938 as it pertained to the authorization to construct the Denison Reservoir on the Red River in Texas and Oklahoma.⁶³ In a unanimous opinion, the Court stated "it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions."⁶⁴ The Court also reasoned that "there is no constitutional reason why Congress or the courts should be blind to the engineering prospects of protecting the nation's arteries of commerce through control of the watersheds."⁶⁵ The Court further noted, "There is no constitutional reason why Congress cannot under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries."⁶⁶

It seems clear based on the Court's New Deal-era opinions in *Appalachian Electric Power Co.* and *State of Oklahoma ex rel. Phillips*, that the commerce clause was being construed broadly to allow federal regulatory authority over waters for activities other than those specifically

59. *Id.* at 426.

60. *Id.*

61. *Id.*

62. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941).

63. *Id.* at 510.

64. *Id.* at 523.

65. *Id.* at 525.

66. *Id.*

aimed at controlling navigation.⁶⁷ Two cases decided after the passing of the CWA also suggest that the “navigability” language continued to hold less and less importance under the Commerce Clause analysis. In 1979, the Court decided *Kaiser Aetna v. United States*,⁶⁸ a case that considered the scope of the federal navigational servitude and decided whether the federal government was required to pay just compensation if it required the defendant to open access to an improved navigable water to the public; although this case did not directly decide on the validity of federal regulation under the Commerce Clause, it provided extensive commentary as to the intersection between navigability and the federal government’s regulatory authority under the Commerce Clause. Writing for the majority, then-Justice Rehnquist stated that the “reference to the navigability of a waterway adds little if anything to the breadth of Congress’ regulatory power over interstate commerce.”⁶⁹ Also noteworthy in analyzing the role of navigability in Commerce Clause analysis is Rehnquist’s expressed view that Commerce Clause cases considering the “effects” of an economic activity on interstate commerce, such as *Wickard v. Filburn*, *United States v. Darby*, and *NLRB v. Jones & Laughlin Steel Corp.*, are applicable to cases involving water.⁷⁰

Another case that may be informative in determining the permissible federal regulatory authority over water based on the Commerce Clause is *Sporhase v. Nebraska*.⁷¹ The *Sporhase* case decided on the constitutionality of a Nebraska statute that established a permitting scheme for the transportation of groundwater to other neighboring states.⁷² In order to receive such a permit, the state that the Nebraska groundwater was being transported to was required to grant reciprocal withdrawal and transportation rights to Nebraska.⁷³ Notably, the Court’s majority in this case held that groundwater could be subjected to Commerce Clause analysis as an “article of commerce.”⁷⁴ This is a departure from previous cases, because rather than considering navigable capacity of a waterway, or the economic effects of conduct on a water body, water was brought under Commerce Clause scrutiny as an article of commerce.

67. U.S. v. Appalachian Electric Power Co., 311 U.S. 377, 426 (1940); *State of Oklahoma*, 313 U.S. at 523.

68. *Kaiser Aetna v. U.S.*, 444 U.S. 164, 164-65 (1979).

69. *Id.* at 173.

70. *Id.*

71. 458 U.S. 941 (1982).

72. *Id.* at 941.

73. *Id.*

74. *Id.* at 954-54.

C. CWA 'Wetlands' Jurisprudence

Thus far, no Supreme Court majority has ever made a holding regarding the question of whether the federal government can regulate “navigable waters” and “wetlands adjacent thereto” to the maximum extent constitutionally permissible under the Commerce Clause. Instead, the following cases have considered what adjacent wetlands constituted WOTUS as contemplated by the meaning of the CWA’s jurisdictional provision. While this analysis is inherently linked with the federal government’s regulatory authority under the Commerce Clause, the outer bounds of the CWA’s jurisdiction have remained a mystery. Even though the majority opinions in this body of jurisprudence do not offer extensive discussion of the constitutional issue, it is clear from concurrences and dissents that the Commerce Clause question has long been in the minds of the Court’s justices.⁷⁵

*United States v. Riverside Bayview Homes, Inc.*⁷⁶ was the first case in which the Supreme Court considered the “wetlands” jurisdictional issue. In *Riverside Bayview Homes*, the Court considered whether eighty acres of “low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan,” were “adjacent wetlands” under the Corps’s 1975 regulation defining WOTUS.⁷⁷ At the time of this litigation, the Corps defined WOTUS “to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce.”⁷⁸ The Corps also defined, by regulation, wetlands as including land “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”⁷⁹ The Court determined that the property at issue is jurisdictional so long as the Corps definition of WOTUS was a valid interpretation of the CWA.⁸⁰

The Court determined the reasonableness of the Corps’s WOTUS definition through an application of the now overruled “Chevron

75. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174-175 (2001) (Stevens, J., dissenting); *Sackett*, 598 U.S. at 684 (Thomas, J., concurring).

76. 474 U.S. 121 (1985).

77. *Id.* at 458.

78. *Id.* at 457; 40 Fed. Reg. 31320 (July 25, 1975).

79. 33 CFR § 323.2(c) (1978).

80. *Riverside Bayview Homes, Inc.*, 474 U.S. at 131.

Deference” doctrine.⁸¹ Under the Chevron analysis, the Court needed only to determine that the Corps’s definition was reasonable in light of the language, policy, and legislative history of the CWA.⁸² In this case, the Court determined that the definition was reasonable, looking heavily at the CWA’s legislative history.⁸³ The Court thought that by excluding any reference to navigability in WOTUS, the definition of “navigable waters,” that Congress intended “the term ‘navigable’ as used in the Act” to be of “limited import.”⁸⁴ The Court also, citing legislative history, seemed unequivocally convinced that Congress contemplated that waters not traditionally considered “navigable” were regulable under the CWA.⁸⁵ The Court also attached significance to the fact that both chambers of Congress were presented with amendments to the CWA that were consistent with the jurisdiction asserted by the Corps and, alternatively, with language that would narrow jurisdiction, but both chambers declined to narrow jurisdiction.⁸⁶

The Court next considered *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, a case which considered the ability of the Corps to assert jurisdiction over intrastate ponds as “wetlands” under the CWA.⁸⁷ The Corps was asserting jurisdiction over these intrastate ponds based on its “migratory bird rule” which extended the jurisdiction of the CWA’s fill and dredge provision to waters that could be used as habitats for migratory birds, other endangered species, or to irrigate crops sold in interstate commerce.⁸⁸ The court’s majority held that the intrastate ponds at issue were not jurisdictional under the CWA.⁸⁹ The majority concluded that although *Riverside Bayview Homes* gave the “navigable” language “limited import,” there was no basis for “reading the term ‘navigable waters’ out of the statute.”⁹⁰ The Court believed that the import of the “navigable waters” language was “showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact

81. *Id.*; see *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 369 (2024).

82. *Riverside Bayview Homes, Inc.*, 474 U.S. at 131.

83. *Id.* at 139.

84. *Id.* at 133.

85. *Id.* (citing 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell)).

86. *See id.* at 136-39.

87. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 163 (2001).

88. *Id.* at 164.

89. *Id.* at 168.

90. *Id.* at 172.

or which could reasonably be so made.”⁹¹ The Court acknowledged that its holding in *Riverside Bayview Home* means that some non-navigable waters are jurisdictional, but it declined to articulate exactly which non-navigable waters were jurisdictional.⁹²

Justice Stevens authored a dissenting opinion which is of great relevance to the Commerce Clause constitutional question. Stevens clearly expresses the opinion that the WOTUS language “requires neither actual nor potential navigability” for a water body to be jurisdictional under the CWA.⁹³ Stevens’s opinion is laden with references to the CWA’s legislative history. One of the first conclusions Stevens draws from the legislative history is that the CWA’s focus is to serve as a “comprehensive” pollution control scheme rather than a measure to protect navigation.⁹⁴ Stevens then cites legislative history asserting that the WOTUS definition “was intended to ‘be given the broadest possible constitutional interpretation.’”⁹⁵ Notably, Stevens also believed that waters could be regulated under the *Lopez* category of activities that “substantially affect” interstate commerce.⁹⁶

No discussion of the WOTUS question is complete without a discussion of two opinions from the case *Rapanos v. United States*.⁹⁷ The first *Rapanos* opinion, penned by Justice Scalia, is especially relevant to the modern state of wetlands law. Scalia’s opinion defined WOTUS to mean water “[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies.’”⁹⁸ Based on federalism concerns, Scalia’s WOTUS definition also excluded non-permanent or intermittently flowing bodies of water.⁹⁹ Having articulated his definition of WOTUS, Scalia then reasoned that the “wetlands” that were jurisdictional under the CWA were “only those wetlands with a continuous surface connection to bodies that are [WOTUS] in their own right, so that there is no clear demarcation between ‘waters’ and wetlands”¹⁰⁰ The second opinion, which dominated the regulatory landscape up until the Supreme Court’s decision

91. *Id.*

92. *Id.* at 171.

93. *Id.* at 176 (Stevens, J., dissenting).

94. *Id.* at 179.

95. *Id.* at 181 (citing S. Rep. No. 92-1236, at 144 (1972) (Conf. Rep.)).

96. *Id.* at 193.

97. 547 U.S. 715 (2006).

98. *Id.* at 732 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (2nd ed. 1954)).

99. *Id.* at 737-38.

100. *Id.* at 742.

in *Sackett*, was authored by Justice Kennedy. Kennedy believed that *SWANCC* required wetlands to bear a “significant nexus” to navigable waters to fall under jurisdiction of the CWA.¹⁰¹ Such a “significant nexus” exists if, based on the objectives of the CWA, “the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”¹⁰²

Finally, our most recent guidance on WOTUS and “wetlands” comes from the Supreme Court’s 2023 decision, *Sackett v. Environmental Protection Agency*.¹⁰³ *Sackett* involved a property, owned by Michael and Chantell Sackett, near Priest Lake in Idaho. The Sackett’s attempted to backfill the property in order to build a home, but the Environmental Protection Agency believed that the property contained wetlands protected by the CWA.¹⁰⁴ Thus, the Court was once again tasked with defining WOTUS and the phrase “wetlands adjacent thereto.”¹⁰⁵ The Court’s majority, in an opinion authored by Justice Alito, held that the WOTUS definition proffered by Justice Scalia in *Rapanos* was the correct definition.¹⁰⁶ The Court also states that the “CWA extends to more than traditional navigable waters” so the use of the term “navigable” signals that WOTUS “principally refers to bodies of navigable water like rivers, lakes, and oceans.”¹⁰⁷ The Court further held that the CWA’s jurisdiction only extends to wetlands when: (1) the water body adjacent to the wetland is itself a WOTUS, and (2) the wetland “has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”¹⁰⁸

Particularly important to the Commerce Clause question is a concurring opinion authored by Justice Thomas and joined by Justice Gorsuch. Thomas joined the majority’s opinion in full but wrote separately to discuss to what extent the terms “navigable waters” and “of the United States” inform the jurisdictional analysis. From the beginning of the opinion, Thomas argues that the CWA’s jurisdictional terms should be understood as invoking federal authority under the “channels of interstate commerce” Commerce Clause power.¹⁰⁹ Thomas states that the

101. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring).

102. *Id.* at 780.

103. *Sackett v. Env’t Prot. Agency*, 598 U.S. 651 (2023).

104. *Id.* at 651.

105. *Id.* at 663.

106. *Id.* at 671.

107. *Id.* at 672.

108. *Id.* at 678-79.

109. *Id.* at 685 (Thomas, J., concurring).

“channels of interstate commerce” authority is limited in two key ways: (1) the water has “to be capable of being used as a highway for interstate or foreign commerce,” and (2) Congress can only regulate for navigability purposes such as “regulating obstructions hindering navigable capacity.”¹¹⁰ Thomas also seems to reject the idea that “effects” on interstate commerce can trigger federal authority over “navigable waters.”¹¹¹ Then, Thomas argues that Congress’s authority over navigable waters remained tethered to the “channels of interstate commerce” even through the expansion of the Court’s conception of the Commerce Clause in the New Deal era.¹¹² Thomas concludes his opinion by holding that the CWA’s jurisdiction extends only as far as Congress’s traditional authority over navigable waters as reflected by the expanded *Daniel Ball* test.¹¹³

III. ANALYSIS

The Supreme Court has considered the constitutional question underlying the Clean Water Act’s jurisdiction twice now: once in Justice Stevens’s dissenting opinion in *SWANCC* and once in Justice Thomas’s concurring opinion in *Sackett*.¹¹⁴ These discussions come over twenty-two years apart, arrive at a different conclusion, and use a different methodology to do so. So, which justice was right? Is Stevens correct that the CWA’s jurisdiction was intended to extend to the broadest possible interpretation of the Commerce Clause, or is Thomas correct in concluding that the CWA’s jurisdiction was carefully limited to Congress’s Commerce Clause authority over the “channels of interstate commerce?”¹¹⁵ Even if it is constitutionally permissible for the CWA to embrace the maximum possible authority granted by the Commerce Clause, how might the Court treat this interpretation given the recent developments in the law of statutory interpretation? The following section will consider two questions: First, is it constitutionally permissible for the CWA to assert jurisdiction based not only on the “channels of interstate commerce,” but also on the other types of Commerce Clause authority such as the authority over “instrumentalities” or “articles” of interstate

110. *Id.*

111. *Id.* at 691.

112. *Id.* at 697.

113. *Id.* at 704, 709-10.

114. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174-175 (2001) (Stevens, J., dissenting); *Sackett*, 598 U.S. at 685 (Thomas, J., concurring).

115. *SWANCC*, 531 U.S. at 179 (Stevens, J., concurring); *Sackett*, 598 U.S. at 685 (Thomas, J., concurring).

commerce and the authority over “activities ‘substantially affecting’ interstate commerce”? And, second, even if such a broad reading is constitutionally permissible, are modern courts likely to accept a statutory interpretation broadening the CWA’s reach?

A. *The Constitutional Question*

With regard to the constitutionality question, there appears to be ample support for the conclusion that waters may be regulated based on Commerce Clause authority other than that over the traditional “channels of interstate commerce.” In *Appalachian Electric Power Co.*, the Court, with respect to the regulation of waters, clearly states that “the authority of the United States is the regulation of commerce on its waters.”¹¹⁶ The Court then explains, “Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.”¹¹⁷ The Court here makes it clear that this power to regulate and control commerce on its waters is “as broad as the needs of commerce.”¹¹⁸ Although *Appalachian Electric Power Co.* predates the seminal case on the Commerce Clause authority over activities that “substantially affect interstate commerce,” *Wickard v. Filburn*, the Court clearly seems to contemplate here that activities that affect navigable waters are a regulatory priority. Specifically citing the purposes of flood protection and watershed development, the Court appears to be conscious that regulation for these purposes is important to averting potentially disastrous effects on interstate commerce.

Only a year later, the Court, hearing a cause of action arising out of flood control legislation, expressed similar sentiments. In the *State of Oklahoma* case, the Court states that Congress may “exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions” further explaining that “there is no constitutional reason why Congress or the courts should be blind to . . . protecting the nation’s arteries of commerce through control of the watersheds.”¹¹⁹ It’s noteworthy that both of these cases use the language “watershed,” which is a clear acknowledgement from the Court that regulatory authority extends not only to traditional “channels of interstate commerce” and their tributaries, but also to other parts of a hydrological

116. U.S. v. *Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940).

117. *Id.*

118. *Id.*

119. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-25 (1941).

ecosystem where activities might affect commerce. This is further supported by the Court’s language in *State of Oklahoma*, “As repeatedly recognized by this Court . . . the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce.”¹²⁰ Before even considering more recent cases, these two cases alone seem to provide ample support for federal jurisdiction over the activities contemplated by the CWA’s “wetlands” provision. What is the § 404 fill and dredge prohibition, the provision at the center of this jurisdictional debate, if not an attempt to preserve commerce on navigable waters through flood control and watershed development? In fact, concurring opinions in *Sackett* clearly expressed such flood control concerns in light of the majority’s new WOTUS definition.¹²¹

If the Court’s language in its New Deal-era cases was too modest to signal its intent that the commerce power extends jurisdiction over waters to include regulation of activities “substantially affecting interstate commerce,” then its opinion in *Kaiser Aetna* can only be described as brazen. The majority opinion in *Kaiser Aetna* explicitly states that “reference to the navigability of a waterway adds little if anything to the breadth of Congress’ regulatory power over interstate commerce.”¹²² The Court in this case also lists cases such as *United States v. Darby*, *Wickard v. Filburn*, and *NLRB v. Jones Laughlin Steel Corp.* and claims that they show that “a wide spectrum of economic activities ‘affect’ interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved.”¹²³ Though *Kaiser Aetna* was decided before *Lopez* and *Morrison* articulated the current understanding of the Commerce Clause’s reach, Rehnquist’s assertion that activities “affecting” interstate commerce are subject to regulation irrespective of whether navigation or water is involved still seems to be true. The majority opinions in neither *Lopez* nor *Morrison* make any such distinction that activities involving water are solely to be analyzed under the “channels of interstate commerce authority.” A point that is made by the *Morrison* opinion, however, is that those activities regulable as “affecting” interstate commerce must be “economic” in nature.

120. *Id.* at 526.

121. *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 712 (Kagan, J., concurring); *id.* at 716 (Kavanaugh, J., concurring).

122. *Kaiser Aetna v. U.S.*, 444 U.S. 164, 173 (1979).

123. *Id.* at 174.

Armed with these cases, there seems to be substantial support for concluding that federal legislation can exercise the Commerce Clause's authority over activities "substantially affecting interstate commerce." In both *Kaiser Aetna* and *State of Oklahoma* the Court seems to explicitly contemplate that the "affecting interstate commerce" authority be extended to activities affecting navigable waters.¹²⁴ *Morrison* requires a nexus between the regulated activity and interstate commerce¹²⁵; activities affecting navigable waters like flood control and watershed development, as contemplated by *Appalachian Electric Power Co.*, would bear such a nexus. Thus, the "navigable" distinction would not be ignored by regulating activities "affecting interstate commerce"; instead the activities' effects on navigable waters is its requisite connection to interstate commerce. The *Lopez* and *Morrison* opinions place no restrictions or requirements that activities involving water be strictly confined to analysis as "channels of interstate commerce," but they do specify that an activity regulable based on "effects" on interstate commerce must be economic in nature. It also seems clear from the cited cases that the Court understands that events such as flooding can "paralyze commerce."¹²⁶ It would seem then that any activities taken to protect and preserve navigable waters would be activities inherently economic in their nature. More specifically, in the environmental context, many of the activities that result in the pollution that the CWA seeks jurisdiction over result from economic and commercial development endeavors such as agriculture, urbanization, mining, marinas, and landfills.¹²⁷

So far, we have only considered whether regulations concerning waters can be premised on Commerce Clause authority over activities "affecting" interstate commerce. Although there is less case law to inform an analysis, it is also worth mentioning that the Supreme Court has held that water can be regulated based on the second category of Commerce Clause authority articulated in *Lopez*, authority over "instrumentalities of interstate commerce, or persons or things in interstate commerce."¹²⁸ The Court in *Sporhase* held that groundwater could be subjected to Commerce Clause analysis as an article of commerce. Although there are likely fewer instances in which Commerce Clause authority would be exercised based

124. *Id.*; *State of Oklahoma ex rel. Phillips*, 313 U.S. at 526.

125. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

126. *State of Oklahoma ex rel. Phillips*, 313 U.S. at 525.

127. Brief for Constitutional Accountability Center as Amici Curiae Supporting Respondents, *Sackett v. Env't Prot. Agency* 598 U.S. 651 (2023) (No. 21-454).

128. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 953 (1982).

on water as an article of commerce in the context of environmental regulation, this holding still provides strong support that water can be regulated under authority other than the “channels of commerce authority.” Indeed, it would be rather strange for the Court to rigidly analyze Commerce Clause authority over water solely under the “channels of interstate commerce” analysis when it has previously made an express holding that water could be analyzed under a different aspect of Commerce Clause authority. This, taken together with the Court’s language about “effects” to interstate commerce in other water regulation cases, seems to provide an immutable presumption that the broadest possible constitutional interpretation of the Commerce Clause applies to cases involving water regulation.

B. The Statutory Interpretation Issue

Having established the constitutionality of regulating water based on all three categories of the *Lopez* commerce power, the jurisdictional analysis must next face the challenge of statutory interpretation. It is not enough that this broad interpretation of jurisdiction be constitutionally permissible, this interpretation must also find support in the text of the CWA. Past CWA cases interpreting the meaning of WOTUS were governed by the aforementioned Chevron Deference doctrine.¹²⁹ Under the now-defunct Chevron doctrine, courts applied a two-step framework to determine if an agency’s interpretation of a statute was valid.¹³⁰ First, courts would examine “whether Congress has directly spoken to the precise question at issue,” and, if the agency had not provided clear guidance on the issue, the court then asked whether the agency’s interpretation was “based on a permissible construction of the statute.”¹³¹ If the agency’s interpretation was permissible, courts were required to “mechanically afford binding deference to agency interpretations.”¹³²

Now, however, such mechanical, binding deference is no longer granted by courts. The Supreme Court overruled Chevron with the *Loper Bright Enterprises v. Raimondo* decision in 2024, and stated that courts must now exercise their “independent judgment” in deciding whether an agency acted within its statutory authority.¹³³ Some scholars have suggested, however, that some limited deference may still be available

129. See *supra* text accompanying notes 81-82. *Loper Bright Enterprises v. Raimondo* 603 U.S. at 369; *Riverside Bayview Homes, Inc.*, 474 U.S. at 131.

130. *Loper Bright Enterprises*, 603 U.S. at 379.

131. *Id.* at 372.

132. *Id.*

133. *Id.* at 412.

based on the Court's decision in *Skidmore v. Swift & Co.*¹³⁴ *Skidmore* ruled that an agency's interpretations constitute a "body of experience and informed judgment" that courts can resort to for guidance, but that the power of such guidance is dependent upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."¹³⁵ Thus, in our case, if an interpretation of WOTUS seeks to assert the maximum possible jurisdiction constitutionally permissible by the Commerce Clause, it is no longer entitled to mechanical deference and must survive the "independent judgment" of the courts. Because neither agency currently reads the statute to afford such jurisdiction, probably because of decades of decisions incrementally eroding the CWA's jurisdictional reach, this statutory interpretation challenge has worked its way into the courts by those litigants seeking to further narrow the CWA's jurisdiction by arguing Congress intended the act to apply only to traditional "navigable waters."¹³⁶ Accordingly, the following subsection will consider both the merits of an argument that Congress intended the CWA's jurisdiction apply more narrowly and any contrary evidence suggesting that jurisdiction was meant to be interpreted in a way more broadly consistent with the full available authority of the Commerce Clause.

The principle argument for those asserting that the CWA's jurisdiction was meant to be narrowly construed and confined to traditional "navigable waters" is that the cornerstone of the act's jurisdiction is, despite being defined as WOTUS, the "navigable waters" language.¹³⁷ This view is buttressed by the Court's majority in *SWANCC*. The Court in *SWANCC* states specifically that, despite the Court's holding in *Riverside Bayview* that the term "navigable" is of limited import, the "navigable" language at least has the effect of "showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."¹³⁸ Further, in his *Sackett* concurrence, Justice Thomas states that *SWANCC* clarified the fallacy that "the text of

134. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 711 (10th ed. 2024); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

135. *Skidmore*, 323 U.S. at 140.

136. Complaint at 9-10, *State of Texas et al v. U.S. Env't Prot. Agency et. al.*, (S.D. Tex. Jan. 18, 2023)(No. 3:23-cv-00017).

137. *Id.* at 12.

138. *Solid Waste Agency of Northern Cook County v. U.S Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

the CWA expands federal jurisdiction beyond Congress' traditional "commerce power over navigation."¹³⁹ Thomas also used rather condemnatory language in this opinion regarding the agencies' more expansive view at the time, stating that their interpretation, in line with Justice Kennedy's "significant nexus" test, "amounts to a federal police power, exercised in the most aggressive possible way."¹⁴⁰

This *SWANCC* language seems to be describing the exact same "expanded Daniel Ball" test that Justice Thomas advocates for in his *Sackett* concurrence. This is a very narrow reading of the CWA's jurisdictional language and it presents some serious issues for any statutory interpretation that seeks to assert a broader jurisdiction. This "expanded Daniel Ball" does not incorporate the broader view of water regulation asserted by cases like *Kaiser Aetna*, *State of Oklahoma*, and *Appalachian Electric Power Co.* which make clear that waters can be regulated irrespective of navigability. Instead, the "expanded Daniel Ball" test rigidly binds regulation to waters navigable in fact or those susceptible to being made so. This is especially important given that *SWANCC* seemingly still has a binding effect. Though the law has developed in the decades since *SWANCC*, there is no indication in the *Sackett* majority or Justice Thomas's concurrence suggesting that it has been in any way overruled. Actually, quite the opposite has been suggested. Justice Thomas suggests in this concurring opinion that the agencies' failure to implement the *SWANCC* decision has contributed to the ambiguity in the wetlands jurisprudence.¹⁴¹ Thomas's clear condemnation of agencies' regulations promulgated in a manner consistent with Justice Kennedy's "significant nexus" test may also be informative when trying to gauge the Court's response to an interpretation that narrows the CWA's jurisdiction. Kennedy's significant nexus test, which makes jurisdictional any wetlands that "significantly affect the chemical, physical, and biological integrity of other covered waters," uses language that is clearly reminiscent of *Lopez*'s third category of Commerce Clause activities.¹⁴² In fact, litigants in *Sackett* argued that the "significant nexus" test accurately reflected Congress's authority to regulate activities with a substantial effect on interstate commerce.¹⁴³

139. *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 706 (Thomas, J., concurring).

140. *Id.*

141. *Id.* at 703.

142. *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring in judgment).

143. Constitutional Accountability Center as Amici Curiae Supporting Respondents, *supra* note 127, at 20.

Such vehement condemnation of such an assertion of jurisdiction could hardly be considered a good tiding for any litigant seeking a broader interpretation of the CWA's jurisdiction.

Another argument advanced by Justice Thomas in support of a narrower interpretation of the CWA's jurisdiction is that the terms "navigable waters" and WOTUS are terms of art with a meaning that was well established before appearing in the text of the CWA. Thomas reasons that these terms are inseparably bound to invocations of "channels of interstate commerce" authority.¹⁴⁴ To support this claim, Thomas cites the Rivers and Harbors Act of 1899.¹⁴⁵ Thomas cites § 10 of the act, which requires permits to build "structures in any . . . water of the United States," and § 13, which prohibits discharging "any refuse matter . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water."¹⁴⁶ According to Thomas, these terms were used interchangeably and their strict meaning invoking the "channels of interstate commerce" authority and limiting regulation for navigational purposes persisted up until they appeared in the CWA.¹⁴⁷ Some considerations, however, may weaken the strength of this comparison. First, at the time in which these terms first appeared in the Rivers and Harbors act, cases expanding regulatory jurisdiction over waters not navigable in fact, such as *Appalachian Electric Power Co.* and *State of Oklahoma*, had not yet been decided, so Congress's conception of its own regulatory authority over the nation's waters was limited to waters that were navigable in fact or those susceptible to being made so. Further, as discussed by Stevens's dissent in *SWANCC*, the Rivers and Harbors Act's purpose was specifically to protect navigation, whereas the Clean Water Act was a comprehensive pollution control scheme.¹⁴⁸

Another piece of evidence cited in both the *SWANCC* majority and Thomas's *Sackett* concurrence that might support the argument that the meaning of "navigable waters," as it appears in statutes was a well settled term of art, is the Corps's 1974 regulation originally interpreting the CWA's jurisdiction in line with the "expanded Daniel Ball" test. The 1974 regulation defined "navigable waters" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are

144. *Sackett*, 598 U.S. at 689 (Thomas, J., concurring).

145. *Id.* at 689.

146. 33 U.S.C § 403; 33 U.S.C § 407.

147. *Sackett*, 598 U.S. at 699-700.

148. *Solid Waste Agency of Northern Cook County v. U.S Army Corps of Engineers*, 531 U.S. 159, 182 (2001) (Stevens, J., dissenting).

presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.”¹⁴⁹ Further, the regulations specified that it “is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.”¹⁵⁰ While this undoubtedly is strong evidence supporting the argument that the CWA’s jurisdictional provision was adopted against the backdrop of navigability in fact being a well understood limitation to federal authority, it is worth noting that these regulations predate the 1977 amendments that created the wetlands permitting provision. Also, the *Sackett* majority itself acknowledges “that the CWA extends to more than traditional navigable waters”¹⁵¹

Perhaps the most potent weapon in the Court’s arsenal to continue reading the CWA’s jurisdiction narrowly is the “major questions doctrine.” The “major questions doctrine,” which scholars argue became a formal doctrine in the Supreme Court’s October 2021 term,¹⁵² is a principle of statutory interpretation that requires agencies to show a “clear congressional authorization” in “extraordinary cases” involving questions of vast “economic and political significance.”¹⁵³ The idea behind the major questions doctrine is that although Congress often intends for an agency to fill gaps in a statutory scheme, “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation” when there is potential that it will have important effects on the nation’s political or economic landscape.¹⁵⁴ On many occasions throughout the body of CWA jurisdiction jurisprudence, the Court has expressed concerns that may be redressable by invocation of the major questions doctrine.¹⁵⁵

The jurisdictional reach of the CWA is a question that is extremely well suited for an invocation of the major questions doctrine. There is a very strong case that the balance between federal and state power over private property would be a question of “vast economic and political significance.” The states inherited their rights to water from the Crown

149. 33 CFR § 209.120(d)(1) (1974).

150. 33 CFR § 209.260(e)(1) (1974).

151. *Sackett*, 598 U.S. at 672 (majority opinion).

152. Samuel Buckberry Joyce, *Testing the Major Questions Doctrine*, 43 STAN. ENV’T L.J. 50, 52 (2024); Lawson, *supra* note 134, at 735 (discussing three cases decided during the October 2021 term giving the doctrine a firm basis in case law).

153. Joyce, *supra* note 152, at 52 (citing *West Virginia v. EPA*, 597 U.S. 697 (2022)).

154. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

155. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001); *Sackett*, 598 U.S. at 680.

upon independence.¹⁵⁶ As states entered the union, they received rights to their water equivalent to those inherited from the Crown by the original thirteen colonies.¹⁵⁷ The state retained full sovereignty over all waters subject only to the powers surrendered to the federal government. Any decision altering the states' primary regulatory authority over water must be considered in light of centuries of political practice. In terms of economic significance, this comment has already discussed that changes in the CWA's jurisdiction can affect commercial developments such as agriculture, urbanization, mining, marinas, and landfills across the entire nation.¹⁵⁸ Thus, in order to survive the scrutiny of the major questions doctrine, any interpretation that asserts a broader jurisdictional reach would require a clear expression of congressional intent. It can hardly be said that such an expression is present. The CWA's jurisdiction over wetlands came from an amendment authorizing the states to apply for EPA permission to administer fill and dredge permitting programs. This amendment in no way modified or amended the CWA's jurisdictional hook. Deciding that this amendment was an expression of intent sufficient to alter the balance of water federalism seems very unlikely given the Court's current composition. While the origin of the states' rights to the title of their waters bears this connection to colonial history, it is worth noting that the Court explicitly noted in *PPL Montana, LLC v. Montana* that the definition of navigability is different for purposes of title and for purposes of federal regulatory authority.¹⁵⁹ This is worth noting because while the states' right to title of their waters predates the founding, water has been regulated under the Commerce Clause for nearly all of our nation's history.

Despite the strong case supporting a view that the CWA's jurisdiction should be construed narrowly, there is still compelling evidence in the CWA's legislative history suggesting Congress has, at least to some degree, expressed or acquiesced to a broader jurisdictional interpretation. This legislative history is the primary subject of Justice Stevens dissent in *SWANCC*. The CWA was intended to be comprehensive and was described by members of congress as both "the most far-reaching water pollution bill we have ever drafted" and "the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment."¹⁶⁰ Stevens argues

156. Walston, *supra* note 16, at 721.

157. *Id.*

158. See *supra* text accompanying note 127.

159. 565 U.S. 576, 592-93 (2012).

160. *SWANCC*, 531 U.S. at 179 (Stevens, J., dissenting).

that Congress’s decision to drop the term “navigable” from WOTUS was intentional because Congress meant to exert authority more broadly than its authority to control navigation. Accordingly, Stevens cites a Senate conference report which explained that § 1362(7), the provision defining “navigable waters” as WOTUS, was meant to “be given the broadest possible constitutional interpretation.”¹⁶¹ Stevens responds to the majority’s claim that “navigable” was being read out of the statute by arguing that Congress had already considered the question and intended for it to be read out. Stevens also discusses that the Corps’ more expansive view of the CWA’s jurisdiction adopted by regulation in 1975 prompted debate in both chambers of Congress.¹⁶² In light of the Corps’s regulation, a proposal limiting the CWA’s jurisdiction to “waters that are used, or by reasonable improvement could be used, as a means to transport interstate or foreign commerce and their adjacent wetlands” passed in the House but failed in the Senate.¹⁶³ Stevens reasoned that this rejection, and the subsequent 1977 amendments adopted after it, indicates congressional acquiescence to the expansive reading.¹⁶⁴

While this history is compelling in its own right, some important practical considerations about its effect are worth noting. Firstly, this history has been available for decades at this point and has proven itself to be unpersuasive to the Court. Stevens recounted it in a dissenting opinion. Thus, it was not persuasive enough to persuade a majority then, and it has not proven persuasive enough to garner a majority in recent history either. Also, the Court has considered and rejected the arguments that follow naturally from this legislative history, such as the argument of congressional acquiescence. For example, the majority in *SWANCC* directly considered this argument and reasoned that “this Court recognizes congressional acquiescence to administrative interpretations of a statute with extreme care.”¹⁶⁵ The court went further, concluding that “failed legislative proposals,” like the one Stevens argues is evidence of acquiescence, “are a particularly dangerous ground on which to rest an interpretation of a prior statute”¹⁶⁶ Similarly, the Court’s majority rejected a similar argument that the expansive reading of the CWA’s jurisdiction had been “ratified” by the 1977 amendment in *Sackett*.¹⁶⁷

161. *Id.* at 180-81 (citing S. Rep. No. 92-1236, at 144 (1972) (Conf. Rep.)).

162. *Id.* at 184-85.

163. *Id.* at 185.

164. *Id.* at 186.

165. *Id.* at 677 (majority opinion).

166. *Id.*

167. *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 682-83 (2023).

IV. CONCLUSION

This Comment has discussed and concluded that a much broader interpretation of the CWA's jurisdiction embracing all three categories of Commerce Clause regulation articulated in *Lopez* is constitutionally permissible. However, this Comment also considered numerous obstacles to such an interpretation of the statute. What should be concluded from the foregoing discussion? First, and perhaps most importantly, it should be observed that the CWA is vulnerable to further narrowing of its jurisdiction and frustration of its purpose. Despite any criticisms of the Court's conservative bloc, there is little room for debate that the CWA was adopted for a pressing biological purpose. It is widely cited that the CWA was adopted in reaction to repeated fires on the Cuyahoga River in the 1960s.¹⁶⁸ But such blatant issues are not the only purposes Congress contemplated when passing the CWA. It is well documented in the wetlands jurisprudence that the outer bounds of CWA's jurisdiction is essential for purposes such as water purification, pollutant trapping, water filtration, runoff storage, and flood control.¹⁶⁹ These functions are essential to the ecological health of our nation and the jurisdiction necessary to fulfill them is being impeded by judicial politics. Despite the potential to frustrate the CWA's objectives the Supreme Court seems attached to a rigid, narrow reading of the act's jurisdiction. Other members of the conservative bloc and litigants around the country seem keen to narrow the act's jurisdiction and further interfere with its objectives to the detriment of the public.

Second, it is clear that congressional action may be the most effective or the only way to truly resolve this issue and protect the CWA's purposes. Courts have struggled with the jurisdictional question for decades. Now, however, with the emergence of the major questions doctrine and new precedent requiring a more stringent review of an agency's interpretation of statutes, courts have the mechanism to cripple agency efforts to offer a broader interpretation of jurisdiction. Thus, if the CWA's jurisdiction is to be anything other than narrowed, Congress may be the best and only actor that can effectively resolve the dispute. The CWA has been amended before and it could be amended again to clarify its jurisdiction. The CWA once had enough congressional support to

168. *EPA Celebrates 50th Anniversary of the Clean Water Act on the Banks of the Cuyahoga River*, EPA, <https://www.epa.gov/newsreleases/epa-celebrates-50th-anniversary-clean-water-act-banks-cuyahoga-river> (Oct. 18, 2022).

169. *Rapanos v. United States*, 547 U.S. 715, 779 (2006); *Sackett*, 598 U.S. at 712 (Kagan, J., concurring).

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override a presidential veto.¹⁷⁰ Failure to gather enough support to amend the text to protect the purposes of the act may be yet another example of problems indicative of the current state of legislative politics. If the jurisdictional reach of the CWA is doomed to be narrowed and narrowed, decade after decade, at the hands of our courts, our nation's waters may once again come to more closely resemble the Phlegethon rather than "highways of interstate commerce."

170. Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. CHI. L. REV. ONLINE (2023).