No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS ET AL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether the federal government exceeds its constitutional authority to "Regulate Commerce Among the States" when it exercises what is essentially a police power to assert regulatory jurisdiction over isolated intrastate waters solely because those waters serve as habitat for migratory birds.

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INTEREST OF AMICUS CURIAE[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that We the People delegated to the national government only certain, specifically enumerated powers and that the bulk of sovereign power, including the police power at issue here, was reserved to the States or to the people.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has a Center for Local Government, which promotes the theory and practice of self-government, emphasizing the themes of limited, constitutional government, federalism, property rights, and energetic citizenship. In addition, the Institute has published extensively about the constitutional limitations on the powers delegated to the national government, including a book edited by Gordon Jones and Institute Senior Fellow John Marini entitled *The Imperial Congress: Crisis in the Separation of Powers*.

In order to further advance its mission, the Claremont Institute in 1999 established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of amicus curiae briefs in cases such as this that involve issues of constitutional significance going to the heart of the founding principles of this nation. The Center for Constitutional Jurisprudence has previously participated as amicus curiae before this Court in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), *Boy Scouts of America* v. *Dale*, 120 S. Ct. 2446 (2000), and *California Democratic Party* v. *Jones*, 120 S. Ct. 2402 (2000).

The Claremont Institute, through its Center for Constitutional Jurisprudence, seeks to elaborate on the arguments that have been made by Petitioner regarding the scope of the power delegated to Congress under the Commerce Clause. The

Claremont Institute believes that its scholarly expertise about the theoretical and historical origins of the American constitutional system of government will aid this Court in evaluating whether the assertion of jurisdiction made by the Army Corps of Engineers over wholly intrastate waters merely because of the sometime presence of migratory birds exceeds Congress's authority to regulate commerce among the states.

SUMMARY OF ARGUMENT

Over the past decade, this Court has reinvigorated the Founders' vision of a constitutional system based on a division of the people's sovereign powers between the national and state governments. In *New York* v. *United States*, 505 U.S. 144, 156-57 (1992), for example, the Court recognized that the principle of reserved powers underlying the Tenth Amendment serves as a barrier to the exercise of power by Congress. In *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), the Court recognized that the principle was grounded not so much in the text of the Tenth Amendment but in the word "proper" of the Necessary and Proper clause, as informed by the overall structure of the Constitution and the numerous clauses that recognize the retention of sovereign powers by the States. This same idea of state sovereignty has been given voice in the parallel cases arising under the Eleventh Amendment: *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 119 S. Ct. 2240 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. CT. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. CT. 2199 (1999).

Yet for the Founders, the division of sovereign powers was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens. *United States* v. *Morrison*, 120 S. Ct. 1740, 1753 n.7 (2000); *United States* v. *Lopez*, 514 U.S. 549, 552, 582 (1995). And it was

designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people's control. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). The Tenth and Eleventh amendments are simply examples of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry.

In interpreting the federal Clean Water Act to cover waters which are or would be used by migratory birds which cross state lines, the United States Army Corps of Engineers has taken the statute well beyond the constitutional bounds of the Commerce Clause. The Corps' efforts to regulate any intrastate pond where migratory birds happen to alight is not a regulation of commerce, and it is not a law that gives effect to some regulation of commerce (much less a "necessary" and "proper" one). To construe the Commerce Clause as broadly as the Corps does here is to render meaningless the primary check on federal power envisioned by the founders—the doctrine of limited, enumerated powers. Moreover, by essentially preempting land use decisions of all 50 states and their thousands of municipal subdivisions, the Corps has here intruded upon the powers reserved to the States in a way that makes the intrusions at issue in *New York* v. *United States* and *Seminole Tribe* look like child's play.

ARGUMENT

I. In Interpreting the Clean Water Act to Cover Waters Utilized by Migratory Birds, the Corps Has Ignored the Principle of Enumerated Powers, a Principle Which the Founders Believed to Be Essential to Liberty.

When the framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; it could not counteract the crippling trade barriers that were being enacted by the several states against each other; and it could not even insure that its citizens, especially those living on the western frontier, were secure in their lives and property. *See, e.g.*, Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were "as great in many instances as those imposed on foreign Articles"); THE FEDERALIST NO. 22, at 144-45 (Hamilton) (C. Rossiter & C. Kesler eds., 1999) (referring to "[t]he interfering and unneighborly regulations in some States," which were "serious sources of animosity and discord" between the States); *New York*, 505 U.S., at 158 ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience") (quoting The Federalist No. 42, p. 267 (C. Rossiter ed. 1961)).

But the framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. *See, e.g.*, *Bartkus* v. *People of State of Illinois,* 359 U.S. 121, 137 (1959) ("the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power"); *Garcia* v. *San Antonia*

Metropolitan Transportation Authority, 469 U.S. 528, 568-69 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor). Our forebears had not successfully prosecuted the war against the King's tyranny merely to erect in its place another form of tyranny.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people's liberty. *See* THE FEDERALIST NO. 51, at 322 (Madison). The framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu, out of recognition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (Madison).

But the framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was sovereign and indivisible. Instead, the Founders contended that the people themselves were the ultimate sovereign, *see*, *e.g.*, James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 J. WILSON, THE WORKS OF JAMES WILSON 770 (R. McCloskey ed., 1967), and could delegate all or part of their sovereign powers, to a single government or to multiple governments, as, in their view, was "most likely to effect their Safety and Happiness," Declaration of Independence, ¶ 2. The importance of the division of sovereign powers was highlighted by James Wilson in the Pennsylvania ratifying convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a

> lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made *for* the people as well as *by* them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people.

James Wilson, Pennsylvania Ratifying Convention, (Dec. 4, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62.

As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves. *See, e.g.*, THE FEDERALIST NO. 39, at 256 (noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended");

Gregory, 501 U.S. at 457 ("The Constitution created a Federal Government of limited powers").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment. *See* U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in the main body of the Constitution itself. *See* U.S. CONST. ART. I, Sec. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis added)); Art. I, Sec. 8 (enumerating powers so granted); *see also M'Culloch*, 17 U.S. (4 Wheat.), at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted"); *United States* v. *Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers").

The constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, but rather "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S., at 552 (quoting *Gregory*, 501 U.S., at 458); *see also Morrison*, 120 S. Ct., at 1753 n.7 ("As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power" (citing *Arizona* v. *Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting); *Gregory*, 501 U.S., at 458-59; *Atascadero State Hospital* v. *Scanlin*, 473 U.S. 234, 242 (1985) (quoting *Garcia*, 469 U.S., at 572 (Powell, J., dissenting))); *Garcia*, 469 U.S., at 582 (O'Connor, J., dissenting) ("This division of authority, according to Madison, would produce efficient government and protect the rights of the people") (citing THE FEDERALIST NO. 51, pp. 350-351 (Madison) (J. Cooke ed. 1961)). "Just as the

separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S., at 582 (quoting *Gregory*, 501 U.S., at 458); *Gregory*, 501 U.S., at 459 (quoting THE FEDERALIST NO. 28, pp. 180-81 (Hamilton) (J. Cooke ed. 1961)); *id.* (quoting THE FEDERALIST NO. 51, p. 323 (Madison) (J. Cooke ed. 1961)); *see also Garcia*, 469 U.S., at 581 (O'Connor, J., dissenting) ("[The Framers] envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States" (citing *FERC* v. *Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting)); *id.*, at 571 (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government").

When Congress (or a federal agency, in supposed reliance on an act of Congress) acts beyond the scope of its enumerated powers, therefore, it does more than simply intrude upon the sovereign powers of the states; it acts without constitutional authority, that is, tyrannically, and places our liberties at risk. *See, e.g.*, THE FEDERALIST NO. 33, at 204 (Hamilton) (noting that laws enacted by the Federal Government "which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such").

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and morals of the people—the so-called police power. *See, e.g.*, THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order,

improvement, and prosperity of the State"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). The powers at issue in this case—the granting of land use permits and the regulation of wholly intrastate waters—are within the core of the police powers reserved to the states or to the people.

Congress does retain some measure of discretion to choose the means necessary for giving effect to its enumerated powers, of course, *see infra*, at 19-20, but it cannot use its discretionary power over means in furtherance of ends not granted to it. As Chief Justice Marshall noted in *M'Culloch* v. *Maryland*: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the [national] government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." 17 U.S. (4 Wheat.), at 423; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 317 (1936) (Hughes, C.J., separate opinion) ("Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly"). Because, as described below, Congress's attempts, as interpreted by the Corps of Engineers, to link the vintage exercise of the state police powers at issue here to its power to regulate interstate commerce is pretext of the highest order, Chief Justice Marshall's admonition is directly on point: It is the duty of this Court to say that the interpretation of the Clean Water Act propounded by the Corps of Engineers is not the law of the land.

II. The Migratory Bird Rule Is Neither a Regulation of Commerce Nor a Necessary and Proper Means of Giving Effect to a Regulation of Commerce.

B. As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade.

In upholding the Corps' "migratory bird rule" interpretation of the Clean Water Act, the Seventh Circuit Court of Appeals made a telling conflation of terms that demonstrates just how far removed from the Founders' conception of the Commerce power the Corps' claim really is. The Clean Water Act, as interpreted by the Corps to cover wholly intrastate waters visited on occasion by migratory birds, is a permissible exercise of Congress's power to regulate commerce among the states, noted the Seventh Circuit, because "[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," and some of those people travel across state lines to do so. 191 F.3d, at 850 (quoting *Hoffman Homes, Inc.* v. *EPA*, 999 F.2d 256, 261 (7th Cir. 1993).[2]

For the Founders, "commerce" was trade, not spending by people who happen to have crossed state lines. *See*, *e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for

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[2] We note that under the Court of Appeals' rationale, it would appear that the Corps of Engineers has been too stingy with its jurisdictional claims. The birds need not travel across state lines for the Corps to have jurisdiction, apparently, as long as some bird watchers travel across state lines to observe them. Thus, under the Seventh Circuit's rationale, the "migratory" part of the "migratory bird rule" is really unnecessary; indeed, the "bird" part of the rule would also appear to be unnecessary, since land-based critters, which are equally dependant on "waters," are also hunted, trapped and observed, sometimes by people who travel across state lines.

purposes of trade, be the object of the trade what it may"); *Lopez*, 514 U.S., at 585 (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield*, 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 120 S. Ct., at 1753). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate other kinds of business activity such as hunting or trapping (assuming that the hunting and trapping referenced by the Court of Appeals was for business rather than recreational purposes), therefore, was completely foreign to them. And *a fortiori*, any claim that the Commerce Clause encompassed a power to make land use regulations governing wholly intrastate waters because those waters are used by migratory birds, which might be hunted, trapped or observed by people, some of whom might have traveled across state lines, would have been beyond the pale.

This understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895), because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.*, at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture (as well as hunting and trapping), was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See*, *e.g.*, *E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.), at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891)); *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government....

156 U.S., at 13; *see also Carter Coal*, 298 U.S., at 301 (quoting *E.C. Knight*); *Garcia*, 469 U.S., at 572 (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S., at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*); *id.*, at 586 (Thomas, J., concurring) ("the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture"). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S., at 203; see also *id*., at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted recently in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government." 514 U.S., at 555 (quoting *Schechter Poultry*, 295 U.S., at 548).

As should be obvious, the interpretation of the Clean Water Act at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. The Solid Waste Agency of Northern Cook County seeks to dispose of non-hazardous waste generated by various communities in Northern Illinois, not from other states. Interstate "commerce" in garbage is therefore not at issue, even if such commerce could serve as the basis for regulation of the waste disposal site itself (as opposed to the actual shipment of or disposal fees for the garbage). *Cf*. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U.S. 93 (1994).

In order to perform its proposed task, SWANCC will need to fill approximately 17.6 acres of ponds that have formed on a former gravel pit. The ponds are not part of the channels of interstate commerce, because they have no connection to any navigable waters of the United States. They are, instead, merely a part of the land, land that is wholly located within the State of Illinois. Land, of course, is the quintessential thing that does not move in interstate commerce. *See Camps Newfound/Owatonna* v. *Town of Harrison, Maine*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

To be sure, some migratory birds have apparently taken a fancy to SWANCC's puddles since the gravel pit closed, but while migratory birds may become articles of commerce once they are captured, *see, e.g.*, *Bailey* v. *Holland*, 126 F.2d 317 (4th Cir. 1942), they are not articles of interstate commerce when they nest, feed or bathe in navigable waters, much less when they utilize wholly intrastate ponds and puddles. They are not articles of interstate commerce when they propel themselves across state lines. And they are not even articles of interstate commerce—under the original view of the clause —when they are hunted and trapped, even if the hunter or trapper intends subsequently to ship the captured birds in interstate commerce. *Cf. E.C. Knight Co.*, 156 U.S., at 12; *Kidd*, 128 U.S., at 20.

Nor does the Court of Appeals' recitation of Census Bureau statistics about the money spent by interstate-traveling hunters support the regulation at issue here under the Necessary and Proper Clause. *See, e.g.*, *Morrison*, 120 S. Ct., at 1751.[3] As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g.*, *Gibbons*, 22 U.S. (9 Wheat.), at 187 (describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch*, 17 U.S. (4 Wheat.), at 324 (describing the Necessary and Proper Clause as merely a means clause). There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here. Congress simply cannot use such a pretextual reed to support its exercise of what is essentially a police power. *M'Culloch*, 17 U.S. (4

[3] Were it otherwise, the fact that millions of people spend a whole lot of money traveling to be with relatives for Thanksgiving dinner would give the federal government authority under the Commerce Clause to regulate the family relationships that give rise to all that traveling. The absurdity of the exercise of power in the one case is as patent as it is in the other. *Cf. Lopez*, 514 U.S., at 564; *Morrison*, 120 S. Ct., at 1751.

Wheat.), at 423.[4] Thus, while it is undoubtedly true that, in today's world, the quantum of "commerce among the states" is much larger than in the founding era, the expansion in quantity does not give Congress a different qualitative power.

Under the original view of the Commerce Clause, therefore, this is an extremely easy case. Indeed, it is hard to imagine a regulation more removed from the Commerce Clause power, as originally understood, than the interpretation of the Clean Water Act put forward by the Corps of Engineers here.

C. Even under the expanded view of the Commerce Clause taken in this court's modern-era precedents, the migratory bird rule exceeds the outer limits of the power afforded to Congress.

Even when this Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress.

Thus, in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *Morrison*, 120 S. Ct., at 1749). Similarly, Justice Cardozo noted in

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[4] Indeed, the whole Clean Water Act, and not just the expanded interpretation propounded by the Corps of Engineers that is at issue here, is arguably unconstitutional pretext. Ensuring the navigability of the nation's waters would be a Commerce Clause purpose, but that is not what the Clean Water Act purports to do. *See infra*, at 19-20.

Schechter Poultry that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S. 495, 554 (1935) (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S., at 567; *Morrison*, 120 S. Ct., at 1753 n.6).

These reservations were key to this Court's decisions in *Lopez* and *Morrison*. *See Lopez*, 514 U.S., at 566; *Morrison*, 120 S. Ct., at 1748-49. As in those cases, the interpretation of the Clean Water Act at issue here does not regulate the channels or the instrumentalities of interstate commerce. Instead, the Court of Appeals based its decision on the claim that the filling of some ponds upon which migratory birds happen to light on occasion would in the aggregate have a "substantial effect" on interstate commerce because the filling of all such ponds would eliminate the habitat for migratory birds, which in turn would cause a decline in the migratory bird populations, which would in turn supposedly result in fewer people traveling across state lines to hunt, trap and observe the migratory birds, which would in turn cause a decline in expenditures made by such traveling bird hunters and bird watchers, which would amount to a substantial effect on interstate commerce. *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). Quite apart from the fact that each step of the lower court's logical syllogism is fatally flawed,[5] merely repeating the syllogism demonstrates that the Court of Appeals has piled "inference upon inference" to

[5] There is no evidence, for example, that the filling of some ponds would lead to the filling of all ponds. Indeed, practical experience suggests just the opposite; as natural habitats become more scarce, communities tend to become more vigorous in their protection of remaining habitats, and migratory birds are pretty adept at finding new habitats (just as they found the SWANCC ponds that formed on the abandoned gravel pit). And even if the filling of SWANCC's ponds could possibly cause a decline in the migratory bird populations, one might just as readily assume that travel by bird watchers intent on observing the remaining migratory bird populations would increase rather than decrease.

squeeze a police power purpose into a commerce clause box. *See Lopez,* 514 U.S., at 567. As this Court has made clear, that box just does not hold the water that the Corps of Engineers would like to regulate here. *Id.* (rejecting an "inference upon inference" assertion of power that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *Morrison,* 120 S. Ct., at 1752-53.

In short, even under the expanded view of the Commerce Clause that has been in place since the New Deal, the interpretation of the Clean Water Act proffered by the Corps of Engineers remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.

The statute enacted by Congress does not actually pretend otherwise. Its express purpose is not to insure the navigability of the nation's waterways—a proper commerce clause purpose—but is rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—a clear police power purpose. *See* 33 U.S.C. § 1251(a).

If the statute merely prohibited the discharge into navigable waters of dredged or filled material, or other pollutants that could reasonably threaten navigability, the law would be both a necessary and a proper means to further Congress's powers under the Commerce Clause, because such discharges could threaten navigation.[6] But the statute prohibits the discharge of

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[6] This is true even under the statutory definition of "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). "The waters of the United States" is both broader and more narrow than "navigable waters," from a commerce clause perspective. The phrase is broader because "waters" would seem to include non-navigable waters, which could be reached by Congress under the Necessary and Proper Clause (rather than the Commerce Clause directly), *if* regulation of

(continued...)

"any pollutant," not just dredged or filled material or other pollutants that would threaten navigability. 33 U.S.C. § 1311. And, under the Corps' interpretation, it prohibits the discharge of fill even in intrastate "mudflats, sandflats, wetlands, sloughs, prairie potholes," etc., waters having no connection whatsoever with navigable waters, demonstrating that water quality, not navigability, was Congress's chief concern. 33 C.F.R. § 328.3(a)(3); *see also* 33 U.S.C. § 1251(a). That is a police power purpose, and reliance on the Commerce Clause power is mere pretext for its exercise.

As the facts of this case make amply clear, the protection of the health, safety, and welfare of the people—the traditional definition of the police power reserved to the States, *see, e.g.*, *South Covington & C. St. R. Co. v. City of Covington*, 235 U.S. 537, 546 (1915)—requires a careful balancing of competing concerns, a balancing that is best left to the people and governments who will most directly bear the consequences of the decision. *See, e.g.*, *Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago*, 107 U.S. 678 (1883) (noting that the police power "can generally be exercised more wisely by the states than by a distant authority"). Here, the preservation of some puddles, formed in the trenches left in an abandoned gravel pit

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[6] (...continued)
such waters was both necessary and proper to further Congress's Commerce Clause powers. Hence, this Court's holding in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-35 (1985), that Congressional power extends to wetlands that are adjacent to, and thereby affect, navigable waters. The phrase is narrower because the clause "of the United States" has historically excluded waters that are wholly within a single state. *See, e.g.*, *Miller* v. *City of New York*, 109 U.S. 385, 395-96 (1883) ("by 'navigable waters of the United States' are meant such as are navigable in fact, and which, by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the states" (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870)); *South Carolina* v. *Georgia*, 93 U.S. 4, 10 (1876) (describing the navigable waters of the United States as those "which are accessible from a State other than those in which they lie"); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596 (1941) (same).

and about which some migratory birds have been observed, is pitted against the necessity of disposing of the non-hazardous waste produced by some 700,000 people in a environmentally sensitive yet cost-effective way. *See* Petn., at 5. Because of the well-known NIMBY ("not-in-my-back-yard") syndrome, siting of a landfill is almost an impossible political task, but the people in the 23 Northern Illinois communities that formed SWANCC have done it. Moreover, they did so after extensive consideration of the ecological issues, obtaining approval of the local zoning board and Cook County Board of Commissioners after ten public hearings and 2,500 pages of testimony, and receiving a permit from the Illinois Environmental Protection Agency after submitting a 1,700 page application and undergoing another four days of hearings. Petn., at 5.

The process described above demonstrates the proper exercise of the state police powers in action. Given this Court's recent solicitude for the sovereignty of the States, *see*, *e.g.*, *Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 119 S. CT. 2240 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. CT. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 119 S. CT. 2199 (1999), it would be odd indeed if Congress could intrude upon the powers reserved to the States, and hence on state sovereignty, in the much more substantial way presented by the Corps' interpretation of the Clean Water Act at issue here.

That does not mean that without comprehensive and expansive federal regulation, a State, through the exercise of its police powers, could immunize actions that have a detrimental effect in other states. Traditional tort and nuisance law remains available. *See, e.g.*, *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840 (4th Cir. 1999), *aff'd sub nom*, *United States* v. *Morrison*, 120 S. Ct. 1740 (2000); *Missouri* v. *Illinois.*, 180 U.S. 208 (1901). Even for waters that touch upon two or more States, the States remain free to enter

into agreements to regulate the waters to their mutual benefit. *See*, *e.g.*, *Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1893) (describing an agreement to drain a malarial district on the border between two States as an example of an interstate agreement that could "in no respect concern the United States"). And on the chance that such an agreement might be made to the detriment of other states, the Congressional consent requirement of the Compacts Clause of Article I, Section 10 provides a sufficient check. U.S. Const., Art. I, Sec. 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power"); *see also West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. . . . [I]t is also a means of safeguarding the national interest").

In short, there is as little need for federal regulation here as there is constitutional authority. That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of Northern Illinois provides no constitutional title for them to do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are almost exclusively borne by the people of Northern Illinois. Our Constitution leaves such decisions to the States for good reason. The inference-upon-inference reasoning of the Corps and the Court of Appeals below should not be allowed to alter that fundamental constitutional structure.

D. The aggregation principle of *Wickard* v. *Filburn* should be repudiated, in order to remove from Congress and the regulatory agencies the remotely colorable claim to unconstitutional assertions of power that it provides.

More fundamentally, the decision by the Court of Appeals below demonstrates just how pernicious the combination of the aggregation principle from *Wickard* v. *Filburn*, 317 U.S. 111, 127-28 (1942), and the substantial effects test discussed in

Lopez really is. Standing alone, the substantial effects test essentially converts the Necessary and Proper Clause from a means clause to an ends clause, and therefore renders it constitutionally suspect. *See Lopez*, 514 U.S., at 584-85 (Thomas, J., concurring); *M'Culloch*, 17 U.S. (4 Wheat.), at 423; *Carter Coal*, 298 U.S., at 317 (Hughes, C.J., separate opinion). But when combined with *Wickard*'s aggregation principle, there is absolutely nothing over which clever lawyers and bureaucrats in federal regulatory agencies cannot stake some claim of regulatory power, as this case amply demonstrates.

Striking down the Corps' migratory bird rule here is not enough. *Lopez* has been on the books for five years, yet the Corps (as well as countless other federal agencies) has persisted in asserting jurisdiction where, under any reasonable reading of *Lopez*, it has none. It has persisted despite a ruling by the Fourth Circuit Court of Appeals holding the regulation invalid, because it knew that it could, and did, find sympathetic courts willing to treat *Lopez* as mere anomaly rather than constitutional principle and to accept the Corps' contorted, inference-upon-inference arguments, made remotely colorable by the lingering vitality of the *Wickard* aggregation principle. Compare *United States* v.*Wilson*, 133 F.3d 251 (4th Cir. 1997), with the Ninth Circuit's decision in *Leslie Salt Co.* v. *United States*, 55 F.3d 1388 (9th Cir.), *cert. denied sub nom., Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995); *see also Morrison*, 120 S. Ct., at 1750 n.4 (noting that the dissenters in the case would apparently cast *Lopez* aside). And, as the *amicus curiae* brief by the Pacific Legal Foundation in support of the petition made clear, the Corps has even continued to assert jurisdiction based on the migratory bird rule in the Fourth Circuit, secure in the knowledge that the mere assertion of jurisdiction would force landowners into the extensive and costly section 404 permitting process (lest they risk criminal prosecution), and that once there, the Corps had the ability to "basically bleed a client to death financially," preventing in most cases any challenge to the

initial improper assertion of jurisdiction. PLF Br. in Support of Petition, at 22, 26-32.

The potential for such unlimited and abusive assertions of power is the reason that many constitutional scholars over the past half century have criticized *Wickard* as extra-constitutional, even those who favor the resulting expansion in federal powers. *See, e.g.*, R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN 148-51 (1987); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 56-57 (1990) (explaining that *Wickard* "abandoned" aspects of the Constitution that defined and limited national power); R. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 139 (1992) (contending that *Wickard* was a "manifestly erroneous" decision that left "no conceivable stopping point for the federal commerce power"); L. Graglia, *United States v. Lopez: Judicial Review Under The Commerce Clause*, 74 Tex. L. Rev. 719, 745 (1996) (referring to *Wickard* as a "notorious" decision); C. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 253 & n.18 (1996) (describing *Wickard* as a "repudiation" of the original Constitution that gave the national government "something close to general police powers"); B. Ackerman, *Liberating Abstraction*, 59 U. Chi. L. Rev. 317, 322, 324 (1992) (describing *Wickard* as a "wrenching break with the constitutional past," ringing the "death-knell for traditional notions of limited national government"); *cf*. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. 1, p. 831 n.29 (3d ed. 2000) (describing hypothetical "sham" legislation that could result from the combination of the substantial effects test and the aggregation principle); G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 191 (13th ed. 1997) (suggesting that *Wickard* "in effect abandon[ed] all judicial concern with federalism-related limits on congressional power"). The expansion of federal power that has followed on the *Wickard* decision and the concomitant retraction of liberty, not just in this arena but in numerous others, suggests that the time is long overdue for a reversal of that decision. *See Lopez*, 514 U.S., at 585 (Thomas, J., concurring). As the Corps' own

actions in this case demonstrate, nothing short of a full repudiation of that decision will suffice to rebuild the limits of the Commerce Clause and to reign in a federal government that continues to believe that the Constitution sets no bounds on its power.

CONCLUSION

The decision of the United States Court of Appeals for the Seventh Circuit should be reversed. The Corps of Engineers' migratory bird rule should be invalidated. And the aggregation principle of *Wickard* v. *Filburn*, which provided a remotely colorable basis for the Corps' assertion of jurisdiction over wholly intrastate puddles, should be repudiated.

Respectfully submitted,

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