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The Commerce Clause and the Future of Environmental Regulation:

**Contemporary Supreme Court Interpretation and its effect on the
Environmental Protection Agency**

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Introduction

Environmental law is inherently mismatched with the structure of the US Constitution. Nowhere is Congress entrusted with the power to regulate pollution or mandate the preservation of nature. The United States constitution presents no “environmental” principle. Laws that have immense impact on the United States’ natural resources and quality of life are nowhere guided by an explicit Constitutional principle. This is not immediately problematic. Much of the current federal regulation is accommodated under the Commerce Clause. This unassuming clause in Article I, section 8 reads: “[The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” Since the Great Depression the Commerce Clause has been interpreted quite expansively, providing an unproblematic Constitutional home for federal environmental regulation, civil rights legislation, labor standards, among many other seminal and mundane Congressional ventures. Yet, judicial complacency with this seemingly limitless jurisdiction was challenged in the 1994 landmark case, *US v. Lopez*.¹ The court has been increasingly conservative and, under a revived federalist ideology of the Rehnquist Court, it began reverting to a states’ rights interpretation of the Clause. This paper focuses on the role of Article I Section 8 as the primary source of legitimacy for federal environmental regulation. Though the literature on this recent change it is far from conclusive, there is a general sense that the current reinterpretation (narrowing) of the Commerce Clause will either force judges to declare much of the environmental regulation to be unconstitutional or demand they make some large logical leaps for its defense. In some sense this is understandable

¹ United States v. Lopez (93-1260), 514 U.S. 549 (1995). This case held that the Gun Free School Zones Act of 1990 exceeded the constitutional power of Congress to regulate interstate commerce. Rehnquist wrote the opinion with a 5-4 majority that has continued to narrow the jurisdiction of legislation under the “Commerce Clause”

since it is not particularly easy to contend that a wetland, an inedible fish species, or a rare owl is relevant to interstate commerce.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (*SWANCC*)² marks the first time the Supreme Court has applied the jurisprudence of *United States v. Lopez* to an environmental case (Percival 2002). Since this case, the Environmental Protection Agency (EPA) has voiced frustration with its diminished capacity to enforce the Clean Water Act.

This paper will consist of a literature review and a proposed design for further research. In the literature review I will examine how the current jurisprudence on the Commerce Clause pertains to the federal environmental regulation. This project will help explain how the Supreme Court ruling successfully destabilizes an environmental regulatory regime. In the research design I plan to determine the causal power of the Supreme Court precedent in *SWANCC* on lower courts and the EPA. I hope to explain how Court is able to affect the implementation of the Clean Water Act despite its lack of enforcement capacity. Constitutional Law clearly has important political implications. I hope to explore the policy impacts of judicial decisions within a highly contentious area of law.

Literature Review

I. Environmental Law: Inherent Difficulties and the US Legal Structure

The literature on the Supreme Court's "environmentalism" is increasingly pessimistic.

The most prominent scholars are continually frustrated with the Court's persistent

² *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (99-1178) 531 U.S. 159 (2001) [191 F.3d 845, reversed.] The controversy in this case surrounds section 404(a) of the Clean Water Act. This section indicated that the act is applicable to the "navigable waters" of the United States. The Army Corps of Engineers had been applying this rule to wetlands using the "Migratory Bird Rule" (because they provide habitat for migratory birds). The Corps refused to grant the municipality a permit to fill several ponds in an abandoned gravel pit. The Court found that section 404(a) of the CWA could not be interpreted so broadly as the "migratory bird rule."

misunderstanding of environmental law. “The Supreme Court’s record on the environmental decisions demonstrates an inconsistent and therefore incomplete understanding of the “nature of environmental law” (Wolf in Intro 2005 p.3) (The SC has demonstrated similar inconsistency on water specifically: see (Klein 2003))

It is in some sense an incomplete view to simply attribute this dissatisfaction to the conspicuous absence of an “environmental” principle in the US constitution. Of course, the Congress consistently regulates many technologies, industries, and activities that never existed during the founding of the constitution. Environmental legal scholars argue that there is an “inherent mismatch” between the goals of environmental regulation and the US legal structure. It is necessary to consider what these environmental legal scholars believe constitutes the environment in a legal sense. (Lazarus 2004)

The most often cited scholar in their field is Richard J. Lazarus. In his view, the mitigation of “Ecological Injury” is the guiding principle of Environmental Regulation. He allows for the fact that society will cause unavoidable “transformative” effects on natural environment. “Broadly stated, environmental law regulates human activity in order to limit ecological impacts that threaten public health and biodiversity” (Lazarus 2004). Yet, this objective of environmental law is often thwarted by the structure of US institutions. In order to understand the inherent difficulties he explains what goes into the making of environmental laws.

First, the interdependence of law and science presents an array of challenges because human ecological understanding is changing as technology becomes more advanced and the discipline increases in understanding. There has been a shift in the scientific community away from understanding nature as “equilibrium based” system. Dan Tarlock addresses the effects of this shift in his article “Nonequilibrium Paradigm in Ecology and the Partial Unraveling of

Environmental Law” (Tarlock 1994). This shift in the science would ideally be reflected in the law but Congress is slow to pass new legislation and hesitant to delegate too much to the executive branch. It would be much easier to make laws if there were some knowable, stable, “natural” equilibrium but since the late 1980s there is growing realization that the cycles of nature are dynamic.

At the same time, even if current scientific knowledge were paradigmatically correct about how systems work in the nature the current models would be difficult to fit with the US Constitution and institutions. Lazarus is essentially making an argument about the inability of human institutions to reconcile the stability necessary for regulations with the dynamism of nature. “Ecosystems are dynamic in space and time and effective ecosystem management must, accordingly, constantly reconcile nature’s spatial and temporal scales with those of humankind, including the latter’s often far more limited planning horizons”(Lazarus 2004 p. 8).

However, this broad argument about the epistemological difficulties that I have discussed is more potently targeted at the United States. The system of law making in the US does not allow for expansive delegation to the executive branch on regulatory issues. This micro-management by Congress makes the US system particularly incapable of adapting to new scientific knowledge and the changing equilibriums of nature. “The essentially conservative, fragmented, and deliberately cumbersome process for lawmaking in the United States does not readily lend itself to such responsive, iterative lawmaking initiatives”(Lazarus 2004 p. 33).

In addition to these institutional roadblocks, environmental laws are often politically noxious in the US because they are often redistributive.³ There are often severe costs associated

³ “Environmental protection laws, whether green (natural resource management) or brown (pollution control) in character are... almost always radically redistributive in nature. They tend to impose costs on some for the benefit of others”(Lazarus 2005 p. 12).

with environmental regulation and the benefits tend to be disparate, non-human or future oriented. Redistributive policies are most politically cumbersome when there is a great deal of uncertainty and the science of ecological harm does often lend itself to certainty. There is often a disconnect between the capacities of science and policy-makers demands of certainty. Proof of harm is central to many parts of the US legal system especially for proving legal standing to sue (Hoban and Brooks 1996). Standing in environmental cases has been a contentious political issue⁴ especially since ecological harm is often uncertain, dispersed, or suffered by different species and inanimate objects. “Those subject to immediate restrictions on their economic activity will tend to perceive themselves as disproportionately burdened by substantial economic costs for the purpose of reducing speculative future risks to others...when spatial and temporal features deny the certainty of that effect and render invisible its causal mechanics, such short term, more immediate costs tend to be far less palatable”(Lazarus 2004 p. 27). These laws are highly contested because they can cause extreme economic damage to extractive economies and industry while the benefits are often uncertain and geared toward marginal species and isolated ecosystems.

On the forefront of this debate, conservative legal scholars are critical of attempts to stretch the Constitution for the benefit of environmental legislation. Michael Greve’s work *The Demise of Environmentalism in American Law* for the American Enterprise Institute for Public

⁴ In *Friends of the Earth, Inc v. Laidlaw Environmental Services* 528 U.S. 167 (2000) standing was granted to an environmental organization to sue a company for dumping mercury under the Clean Water Act. However, Justices Thomas and Scalia dissented. The conservatives on the Court are strong opponents of this broad allowance of standing; the narrowing of requirements of standing has major consequences for cases that are trying to prove environmental harm. Often the harm is caused to inanimate objects and only secondarily harmful to the plaintiffs. This is an important area for future research but is beyond the scope of this paper. For further discussion see Scalia 1983 in “The Doctrine of Standing as an Essential Element of the Separation of Powers” and Percival 2002. See also my discussion of Justice Douglas’s famous dissenting opinion in *Sierra Club v. Morton* in later sections of this paper.

Policy⁵ attributes the mismatch between US law and environmental regulation to the problematic ideology that undergirds all environmental legislation. Greve and Lazarus agree that there is a mismatch between the US legal structure and the objectives of environmental law, but in contrast to Lazarus, Greve attacks the “ecological paradigm” as force that threatens the rights and principles of the Constitution. According to Greve, environmental laws embed their jurisdiction in an emphasis on the interconnectedness of all activities, therefore undermining the rights of private individuals in favor of dispersed, public goods. “The ecological view of an infinitely complex and interdependent world has worked a drastic revision of traditional, common-law notions of rights. In a world of pervasive externalities, legal relations and instruments that are molded on private transactions seem hopelessly dysfunctional and illegitimate and must therefore be discarded”(Greve 1996 p.3-4). While this is perhaps a false dichotomy, the notion that environmental objectives are inherently dangerous is not isolated to the American Enterprise Institute.

Jonathan Adler has contributed a great deal to the rise of a new environmental conservatism. Alder is also relatively conservative but he is a proponent of a new conception of environmental law—one that comes to terms with firm limits on federal power. “To recognize and enforce limits on federal power in not to deny the importance of environmental conservation or the interconnected nature of ecological concerns. Environmental progress is wholly consistent with meaningful limits on federal power” (Adler 2007 p. 82). The *SWANNC* decision is one such roll-back of Congressional overreaching in the name of environmental protection (Alder 2007). These authors demonstrate the current politicization of environmental legal scholarship. There is growing concern among conservatives that environmentalism unconstitutionally extends

⁵ A prominent conservative think-tank. See their website at <http://www.aei.org/>

Congressional authority and the current Court has voiced that same unease in the recent cases on the Clean Water Act.

Finally, it is important to note that, ultimately, environmental law is not often dealing with “commerce.”⁶ There is intrinsic value in protecting habitat and preventing pollution; environmental degradation, in the aggregate, is clearly problematic but the loss of one particular species, wetland etc. is usually not directly (or even indirectly) economically or commercially relevant. The inherent difficulties of regulating a dynamic natural system are exacerbated in the US by a conspicuous lack of Constitutional grounding for environmental regulation.

The purpose of this section was to highlight the inherent instability of environmental law and create parameters around the overused term “environmental.” These together should make it clear that there are significant implications of the Court’s narrowed Commerce Clause interpretation. Before attempting to analyze the current controversy it is necessary to discuss the theories of judicial influence.

II. Judicial Policy and the Stability of Law

“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law” (Justice Holmes 1897, reprinted 1966 p.179).

It is unintuitive to assume that the “prophecies” of court decision-making constitute the law. If the courts make the law, how and why are their determinations efficacious? This section examines the relationship of judicial power to the stability and implementation of law in order to ascertain the concrete effects of *Lopez* and *SWANCC*. The Supreme Court claims the inherent

⁶ “The problem for environmental protection is that, although commerce is certainly of central relevance to environmental protection, it not ultimately that area of law’s central concern” Lazarus, Richard J. 2004. *The Making of Environmental Law*. Chicago: University of Chicago Press.

power to interpret and review the constitutionality of virtually all federal actions. This power is tempered and stabilized by the Court's reverence for its own precedent—or the principle of *stare decisis*. The Court's concern for stability and professed reverence for precedent is undermined by judicial activism.

Neither the nature nor the extent of the federal judiciary's power is explicit the United States Constitution. In Article 3 of the Constitution, the Supreme Court's jurisdiction is clearly expansive—including “all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” Yet, it is not obvious what judicial power really is. In *Marbury v. Madison*,⁷ Chief Justice John Marshall established the Court's power to review and rule on the actions of the other branches. Marshall's opinion reasons that this power is implied by the Constitution because if a case before the court that presents a law which conflicts with the Constitution, the court must decide between these conflicting laws (O'Brien 2008, Hansford and Spriggs 2006). Yet, just as Marshall gave the Court immense discretion and influence he denied the Court the power to actively *enforce* its rulings. Thus, the Court has a vast power of judicial review but not the capacity to directly enforce its interpretations. The aim of this paper is to better understand the circumstances that allow the Court to influence environmental regulation given its inability to directly implement its decisions.

⁷ 5 U.S. (1 Cranch) 137 (1803). Justice Marshall's decision established the Court's constitutional power to review the actions and policies of the legislative branch and executive branch in this case. At the same time, he argued that the “writ of mandamus” (or the direct mandate) was not an implied power of the Court. In other words, the Court cannot tell the other branches what to do, but it can rule on the Constitutionality of their actions. This is clearly a fine distinction and it was a politically calculated decision. O'Brien, DM. 2008. *Constitutional Law and Politics: Struggles for power and governmental accountability*: WW Norton & Co Inc.

This capacity of the Court to effect change through judicial review is tempered by the Court's reliance on its own rulings. "The norm of *stare decisis* is central to our legal system, and adherence to precedent yields a variety of benefits, including clarity, stability, and predictability in the law, efficiency, judicial legitimacy, and fairness" (Hansford and Spriggs 2006 p. 78). Potential litigants, lawyers, students, and lower courts can all rely on the principles laid out in the Court's precedents to make a reasonable prediction of the Court's decision in similar cases. In this way, "The Courts rulings are usually considered controlling for other similar cases and the larger political controversy they represent"(O'Brien 2008 p. 33). This consideration is important for this paper because it implies that legislation (for example the Clean Water Act) is only as effective as judges have interpreted. The jurisprudence of judges matters for a law's applicability because its ultimate enforceability is dependent on the how litigants expect the courts to interpret the law.

On other side of the coin from *stare decisis* there is judicial activism. Judicial review is the centerpiece of Constitutional law and this paper is less concerned with the cogent stability of law than it is with the ramifications of major jurisprudential changes. As Keck defines it, judicial activism is the willingness to move away from mechanistic, reverent decision-making. "[Judicial activism is] Simply the opposite of a commitment to judicial restraint—in other words, a relative willingness to exercise judicial power... as a growing number of scholars have recognized, the current Court falls at the activist end of the spectrum"(Keck 2004 p. 8). Keck expands this definition by placing it within a historical context. He argues that the left-leaning judicial activism during the New Deal and through the Warren Court has paved the way for right wing activism (Keck 2004). He argues that the left's commitment to a "modern regulatory welfare state" required a rejection of restraint. The literature on the history of the Commerce Clause

interpretations reflects the Court's waves of restraint and activism. The volatile legal history of Court precedent on the Commerce Clause is essential for understanding the current controversy of environmental law.

III. Commerce Clause Precedents: History and Contradictions

"Commerce, undoubtedly is traffic, but it is something more; it is intercourse"

-- Chief Justice Marshall in *Gibbons v. Ogden*⁸

The Commerce Clause is one of the primary sources of constitutional legitimacy for contemporary federal environmental regulation (Percival 2002). However, the literature on the Commerce Clause indicates that the Supreme Court's interpretation of this clause is neither linear nor unambiguous (O'Brien 2008; Percival 2002).

Early reading of the Clause was exceptionally broad; Chief Justice Marshall's political agenda clearly shaped this interpretation. He intended to strengthen the national government and override the divisive norms that prevailed under the Articles of Confederation. In *Gibbons v. Ogden* he defined commerce broadly as "intercourse" and placed Congressional authority over state laws (O'Brien 2008). However, most of the literature on the Commerce Clause sees this case as a sort of preamble to the history of Clause (Percival 2002) and the rest of the major Court decisions are delineated into three main subsections: First, the late 19th century-1936 which was decidedly restrictive on Congressional authority; Second, the New Deal era through *Lopez* (1994) as a period of great Judicial deference to Congress, and; Third, the post-*Lopez* period in which the Court has once again sought to restrain Congress (Coenen 2004). The important effect of these divergences has been the establishment of contradictory lines of Supreme Court precedent on the Commerce Clause. Instead of the older, more restrictive interpretation fading

⁸ 9 Wheat 22 US 1 (1824).

into history, the conservative justices have resurrected it and created dueling jurisprudential factions on the current Court.

This narrow interpretation was most prominent in the late 19th century. The Court concretized and narrowed Marshall's interpretation in order to promote industrialization and serve corporate interests.⁹ Since the late 1930's the clause was interpreted broadly, allowing for legislation like the Civil Rights Act and most of the country's environment legislation to be considered constitutionally valid. Essentially the conservatism of the decisions in the late 19th century could not survive the Great Depression. It was politically infeasible for the Court to dismantle the New Deal Legislation with a strict reading of the Commerce Clause. President Franklin Delano Roosevelt threatened to "pack" the Court after *A.L.A. Schechter Poultry Corp. v. United States*¹⁰ as the Court demonstrated a capacity and will to overrule significant parts of the New Deal legislation (O'Brien 2008). The Court responded to this threat and perhaps other political pressures in *National Labor Relations Board v. Jones and Laughlin Steele Corporation*.¹¹ This case and others that followed have been coined the "switch in time that saved nine," referring to the Court's sharp transition in interpretation that prevented Roosevelt's court packing plan from coming to fruition.

⁹ The Congress actually attempted to regulate industry with the Sherman Anti-Trust Act of 1890. The Court defended business against this Congressional policing in *US v. E.C. Knight Company*. The Court distinguished between "commerce" and "manufacturing," arguing that "commerce" was limited to the distribution and transportation of goods. In *Hammer v. Dagenhart* the Federal Child Labor Act of 1916 was ruled to be unconstitutional because Congress does not have the authority to regulate "manufacturing." This interpretation of the Commerce Clause was narrowed and defined in very specific terms in order to favor industry. See O'Brien, DM. 2008. *Constitutional Law and Politics: Struggles for power and governmental accountability*: WW Norton & Co Inc. and Coenen, Dan T. 2004. *Constitutional Law: The Commerce Clause Turning Point Series*. New York: Foundation Press.

¹⁰ 295 U.S. 495 (1935) "The Sick Chicken Case"

¹¹ 301 US 1 (1937).

One of the most expansive interpretations to come from this New Deal era is *Wickard v Filburn*.¹² In this case, the Court upheld fines brought against a farmer for growing wheat for his own household consumption. The Court found that this personal wheat production undermined New Deal legislation that aimed to raise the market price of wheat by regulating production per acre in the US. The Court dramatically expanded its conception of commerce in order to accommodate federal regulation in this case. Clearly the wheat was intra-state in production but its effects, in the aggregate, were considered within Congressional jurisdiction. These New Deal cases set the stage for the dramatic expansion of federal legislation of state-level activity.

Justice Douglas was the most adamant environmentalist justice to ever sit on the Court and he was also an integral part of the liberal judicial activism on the Warren Court. He was an unconventional justice in his blatant activism and involvement in environmental issues off the bench. For example, he endorsed *Silent Spring* with his image and a review on the inside cover. Most famously, in *Sierra Club v. Morton*¹³ he argued that damages suffered by inanimate objects should be considered for legal standing (Hoban and Brooks 1996).¹⁴ Douglas formally explicated this justification for this radical jurisprudence in the *Columbia Law Review* in 1949. This consideration is not a digression because it establishes the activist origins the modern line of Commerce Clause precedent. Douglas chronicles the development of the two contradictory Commerce Clause precedents¹⁵ and he explains that these contradictions are not problematic. “A

¹² 317 US 111 (1942)

¹³ 405 U.S. 727 (1972).

¹⁴ From Justice Douglas’s famous dissenting opinion: “The critical question of “standing” would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.”

¹⁵ He explains that *Hammer v. Dagenhart* 247 US 251 (1918) or the case that overruled child labor law is clearly contradicted by *Gibbons v. Ogden*, where the Marshall decision was much more broadly understood. Douglas, William O. 1949. *Stare Decisis*. *Columbia Law Review* 49 (6):735-758.

judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it... From age to age the problem of constitutional adjudication is the same... It is to keep one age unfettered by the fears or limited vision of another” (Douglas 1949 p. 736 and 755). This is an explicit critique of *stare decisis* and reverence for historically-based readings of constitutional law.

This New Deal break with the past is discussed in the section on the Commerce Clause; the presidencies since the Roosevelt Administration have demanded the expansion of federal government and the Commerce Clause has been stretched to facilitate these Congressional and Presidential agenda. There is some evidence that the expansive interpretations of the Constitution have allowed regulatory agencies to thwart core constitutional principles (Sunstein 1987). However, contrary to popular rhetoric about “strict constitutionalists”¹⁶ the rise in judicial political conservatism has not been accompanied by judicial passivity or restraint. “One of the defining features of modern conservatism had been a critique of judicial power, but now that the themselves had taken over the Court, they faced a strong incentive to put that institution to work on their own behalf” (Keck 2004 p. 13). This provides significant insight into the current controversy over Commerce Clause interpretations. The historical reinterpretations of this Clause continue to be a political process within the Court with important ramifications for law (Hansford and Spriggs 2006 p. 123).

¹⁶ Strict Constitutionalists are often following the lead of Edwin Meese. He argued that the New Deal judicial activism must be countered with a jurisprudence that looks to the founders for the original intent of the Constitution. Justices Scalia and Thomas are thought to be the most ardent proponents of this jurisprudence to have been on the Supreme Court. Clemetson, Lynette. 2005. Meese's Influence Looms in Today's Judicial Wars. *New York times*, August 17, 2005.

Judicial activism and restraint are present on both sides of the political spectrum. This history demonstrates that the current Court has inherited a contradictory set of precedents on the Commerce Clause. The volatile history of the Clause provides fertile ground for judicial activism because of the discretion historical precedents provide. Yet following the New Deal, the Court went sixty years without challenging Congressional jurisdiction under the Commerce Clause (Klein 2002). The literature is unanimous in its insistence that the trajectory of the Court into the 1990s was one of deference to Congress. However, the non-issue status of the Commerce Clause was an unstable equilibrium. *US v. Lopez* began an incremental and ambiguous roll-back of Congress's commerce powers. This paper seeks to better understand the character of the current Commerce Clause instability and the impact this has on environmental law. *Lopez* is indicative of the rising tide of conservative judicial power.

However, the capacity of any given case like *Lopez* to have an impact on current interpretation is variable. "We define precedent vitality as the legal authority or weight of a case... The meaning of a precedent is thus not fixed but can change over time as the Court interprets it in subsequent cases" (Hansford and Spriggs 2006 p. 110). I will examine the literature on *Lopez* that addresses the characteristics of the decisions that have affected its vitality, or its broader influence. In the next section a close examination *Lopez* case; the aim of this research is to determine the efficacy of a new Commerce Clause jurisprudence in the realm of environmental law.

IV. The Contemporary Commerce Clause: Destabilization since *US v. Lopez*

Since *Lopez*, there is growing academic interest in the increasing conservatism of the Supreme Court and the plausible ramifications of this change for areas of law that rely on the Commerce Clause. Most relevant here is the conservative justices' denial of Congressional

jurisdiction under the Commerce Clause, in favor of the states' power. The limitations placed on the clause are part of a conservative states' rights agenda. "This 'federalism revolution' as it has sometimes been called, began in earnest with *United States v. Lopez*, when the court struck down a federal statute on Commerce Clause grounds for the first time since the New Deal." (Keck 2004 p. 236). The case was decided on a bare majority with vehement dissents from the liberal justices. More interestingly, even the concurring opinions making drastically different claims. These various arguments for the whittling away of the Commerce Clause have significant consequences for environmental regulations like the Clean Water Act. Thus, the future of environmental regulations' enforceability is dependent on the current interpretations of *Lopez*.

In this case, the Court found the Guns-Free Zones Act of 1990 to be an unconstitutional use of Congressional power under the Commerce Clause. The Guns-Free Zones Act was a symbolic and particularly redundant piece of legislation since most states already prohibited guns in schools (Reynolds and Denning 2000). There was little concern that this would be a problematic piece of legislation, it passed almost unanimously but, "Even symbolic legislation, however, has consequences in the real world, and this legislation was no exception" (Reynolds and Denning 2000 p. 372). When Alfonso Lopez Jr., a high school student in Texas, brought a gun onto school premises he was charged under this recent federal law even though there was a state law that could have sufficed. He was convicted, but on appeal his lawyers argued that the law was an unconstitutional expansion of Congressional power under Commerce Clause. The rather conservative Fifth Circuit Court of Appeals¹⁷ affirmed this constitutional argument and US government brought the case to the Supreme Court.

¹⁷ Schwartz, John. 2010. 'Liberal' Precedes Ninth Circuit Court. *New York Times*, April 25, A33A. This article notes that, while the Ninth Circuit has a liberal reputation, other federal Courts, particularly the Fifth Circuit, are more conservative.

The reasoning of the Court in this case is varied, reflecting the severe divided between Justices in this decision. Justice Rehnquist's majority opinion is most compelling because he explicitly defends *both* historical lines of precedent; he draws on the constrictive and expansive cases to create a subtly new rule. In this sense, his judicial activism is masked as a benign reconciliation of the historical precedents. In his opinion there is a clear anxiety about limitless Congressional power to regulate through the Commerce Clause. Rehnquist wrote that, "To uphold the Government's contentions here [that guns on school property substantially affect interstate commerce], we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." This is actually activist because this decision is constructing a more exclusive sphere for state "police power"¹⁸ This Court is placing limits on Congressional power based less upon their actual relationship to commerce. Klein argues that the conservative justices are trying to limit Congress by developing a more precise definition of "substantial effects." The activist agenda is to carve out an arena of state control in particular affairs (Klein 2002). Yet, in the midst of this activism, Rehnquist is careful to leave the New Deal precedents intact. For example, he defends the precedent from *Wickard v. Filburn*, He argues that, even in this case that delved so deeply into personal activity, the Court still recognized that Congressional power is "subject to outer limits." Rehnquist's double-play has created a great deal of uncertainty.¹⁹ The Court has defined "substantial effects" in so many different ways and

¹⁸ "The state power the Justices aim to preserve is what is generally (if vaguely) referred to as the "police power"—that is general regulatory power for health, safety, and morals"(Klein 2002 p. 577).

¹⁹ "The cases narrow the category of activities regulable for their effect on commerce, while effectively preserving the Court's post 1937, pre-Lopez precedent for the regulation of channels and instrumentalities of commerce" Klein, Joshua A. 2002. Commerce Clause Questions after Morrison: Some Observations on the New Formalism and the New Realism. *Stanford Law Review* 55 (2):571-606.

Rehnquist did not narrow the field of available justifications (Reynolds and Denning). In

Rehnquist's opinion, both of the historical lines of Supreme Court precedent on the Commerce Clause are open and legitimate. This creates huge discretion for lower courts seeking to interpret and apply the ruling from case (Reynolds and Denning 2000).

Justice Thomas's concurrence, on the other hand, essentially argues that the modern precedents are invalid. He actually denies the "substantial effects" doctrine altogether. "The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has the authority over all activities that 'substantially effect' interstate commerce." He is calling for the reversal of previous precedents, with flagrant disregard for the New Deal interpretation of the Commerce Clause (Reynolds and Denning 2000 and Keck 2004). This is unswerving activism that would restrict Congress to its literal, enumerated powers. This opinion provides radical justification for the virtual dismissal of most modern federal regulation.

Justice Kennedy offers a concurrence that recognizes the significance of the effects that can come from reconsidering this Clause and limiting its scope. He asks for careful discretion and limitation of this case's effects. "The Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it had evolved to this point... That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th century economy... it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system." The opinion demonstrates recognition of the instability that

could ensue (Reynolds and Denning 2000; Keck 2004). This is particularly relevant for environmental regulation because it is already a mismatch for the US political system (Klein 2002; Greve 1996)

Clearly there is the potential for this case to change the role of the federal government but the effects of this case are debatable. In the wake of this decision, it was widely celebrated by conservatives. “After being ‘asleep at the constitutional switch’ for more than fifty years, the Court's decision to invalidate an Act of Congress on the ground that it exceeded the commerce power must be recognized as an extraordinary event”(Calabresi 1995). At least initially, there was a sense that this case could undo the modern precedents on the Commerce Clause. At the same time other authors see this case as a symbolic statement by the Court—a admonition for Congress (Reynolds and Denning 2000).

Objectively, this case has not yet been as influential as some conservatives had hoped Reynolds and Denning examine the reasons for lower courts’ inconsistent application of the *Lopez* decision. This case of conservative judicial activism has an inconclusive level of influence. “The most serious shortcoming of the *Lopez* opinion, however, is the lack of any explicit instructions or framework for the lower courts to apply.”(Reynolds and Denning 2000 p.377). In other words, this case has had destabilizing effects—not revolutionary—because the justices’ reasoning was unspecific and divided.

Klein offers an explanation of this effect. In his opinion, the reason for this uncertainty may be the commitment of the Supreme Court to activist/realist approaches. “*Lopez* and *Morrison* show an allegiance to variously stated, never-formalized federalist principles implying a realist approach to federalism”(Klein 2002 p. 576). This is an ideological, activist commitment that cannot be explicated in formalist rules like the Commerce Clause cases in the late 19th

century. As Keck puts it, “The conservative justices have evinced an interest in reviving pre-New Deal conceptions of the nature and scope of Congress’s enumerated powers” (Keck 2004 p. 237) but they cannot rely on the same formalist, objective, jurisprudence. The conservative justices hope to reassert traditional state powers but this cannot be explicated in formalist jurisprudence; the lack of specificity and their ideological disagreement contribute to the uncertainty of the *Lopez* precedent.

Interestingly, not all legal scholars see this as a shortcoming. Cass Sunstein sees this incomplete theorizing in Legal Realism (lack of procedural specificity) as an advantageous political move. In his book, *Legal Reasoning and Political Conflict*, Sunstein defends incomplete and obscure Supreme Court rulings. Sunstein would be a fan of the uncertainty *Lopez* has created because it shields the courts from taking an overtly activist role in political controversy (Sunstein 1996). *U.S. v. Lopez* is considered to be a case that could have substantial effects but was written with sufficient room for lower court discretion. In other words, *Lopez* was a tempered, unclear, federalist revolution with a great deal of wiggle room for the lower courts. It has successfully reinvigorated debate about state and federal police power. Taking into account the highly contested nature of the Commerce Clause and instability in the law, the literature provides tools for measuring the authority and efficacy of judicially contrived legal changes.

V. Impact of Supreme Court Activism: On Lower Courts and Implementing Agencies

The literature on judicial impact can be divided in two separate schools. First, are authors who empirically measure the Supreme Court’s impact on the lower Courts. The effectiveness of the Court’s policy change (often precedent-reversal, as in my case) is shaped by the compliance of the lower courts with the spirit and letter of the Supreme Court rulings. Even when the Court overrules past precedent, actual policy change is incremental, cumbersome, and

must be justified in terms of lasting legal principles. Second, are authors who attempt to bridge the divide between legal scholarship and mainstream political science. Together they offer insight into the change in Court jurisprudence and the effects of this change on the lower courts and administrative agencies. My research design builds on the work of both approaches.

This literature on the political impact of the Court began as a response to the popular attention to Supreme Court activism. As discussed above, following the New Deal, the modern Court could no longer pass as a restraintist, apolitical branch of the US government. As early as the late 1970s, there was interest in better understanding the effects of increasing conservatism on the Court's decisions (Baum 1988). Lawrence Baum sought to measure the policy changes that could be attributed to conservatism in the Court (Baum 1988). He focused on the Court's high degree of discretion in the cases it takes. Currently, less than 1 percent of the docket is granted certiorari (O'Brien 2008). Tracking the effects of ideological change must take this discretion, national issues change, and the personnel make-up of the court into account (Baum 1988). The outcome in *Lopez* was a result of such policy change in the Supreme Court.

Following this thinking about Court transformation and its relationship to reversal of precedent, there has been a growing literature on the effect of precedent-reversals on lower courts' decisions (early example see Johnson 1987). The lower court's responsiveness to the Supreme Court is a major determinant of the effect the Supreme Court can have on the implementation of policy. As mentioned above the Court has little direct access to the enforcement of its rulings except through the compliance of lower courts with its direction.²⁰ The efficacy of the Supreme Court is dependent on the compliance of the lower courts. "The impact

²⁰ "The Supreme Court is the principle, who subordinates, the courts of appeals, are the agents. If the circuit courts consisted of faithful agents, they would be obediently follow the policy dictates set down by the Supreme Court. But utility maximizing appeals court judges also have their own policy preferences, which they may seek to follow to the extent possible" (Songer Segal and Cameron 1994 p. 675).

of institutions in general and the Supreme Court in particular is eminently important, for in the Court's impact come the effectuation of policy. If the Supreme Court cannot instill its policy prescriptions in its own judicial agents, what influence can it have on society?"(Benesh and Reddick 2002 p.535)

Baum notes that the main mechanism of control is the lower courts' fear of reversal (Baum 1978) because the lower courts' prestige are bound to their reversal rate, thereby encouraging compliance with Supreme Court agenda. Other more recent works have found this to be the case based on statistical models of the lower court decision making. "The Courts of Appeals appear to gauge the High Court's reaction to an unfavorable application of precedent and base their decision to comply on that assessment"(Banesh and Reddick 2002 p. 547). In addition, litigants may be more likely to appeal to the Supreme Court when they realize that the lower court has deviated from Higher Court precedent (Songer Segal and Cameron 1994).²¹

Importantly, though, there are different degrees of compliance. In Baum's review of the literature on the Supreme Court in *Annual Review of Political Science* (Baum 2003) he points to Songer's recent work as one of the best explorations of this relationship (Songer et al. 1994). Songer et al. (1994) found that controlling for case facts, the degree of difference in political ideology between the appeals court and Supreme Court justices had a statistically significant effect on the level of compliance. Essentially, there is judicial autonomy at the lower levels and certain circumstances surrounding the cases and decisions of the Supreme Court can influence the degree of compliance in the lower courts. The lower courts have several options as they apply the Supreme Court precedent, "They can interpret the precedent narrowly, limiting it to the

²¹ "Appeals court judges must be constantly aware that losing litigants and their attorneys have both the competence and the will to scrutinize their decisions intensely and will bring flagrant doctrinal shirking to the attention of the principle" (Songer, Segal, and Cameron 1994 p. 693).

specific facts. They can cite their own opinions in lieu of the offending precedent. They can distinguish their case from the one for which Supreme Court prescription is available... they can criticize the Supreme Court while following it or they can simply ignore the offending precedent's existence"(Benesh and Reddick 2002 p. 536, see also Johnson and Cannon 1984). Thus, the lower courts can certainly maneuver within the constraints of Court precedent. My hope is to use this literature to better understand the mechanisms environmental law destabilization and regulatory policy change due to recent Supreme Court decisions on the Commerce Clause.

But, the question remains: what makes a particular case more compelling for lower courts? According to Johnson, "Whether a decision is compelling with respect to a lower court case may depend on the leeway for interpretation provided by at least three sets of legal factors: (1) original case characteristics, (2) follow-up decisions by the Supreme Court, and (3) similarities between the original and lower court cases" (Johnson and Cameron 1984). This is a fairly unspecific set of criteria because each factor can vary immensely. For example, when the Court entertains a "follow-up decisions," the second case may clarify or it may simply reassert the intentions of the Court in the previous case.

The more recent literature spends a great deal more time on the opinions of the justices—specifically, the complexity and uncertainty of the opinions.²² The uncertainty and complexity of a decision are further exacerbated by divided Court opinions (Johnson and Cannon 1984 and Banesh and Reddick 2002). As discussed in the section on the *Lopez* decision, all of these factors were central to *Lopez* (the same is true of *SWANCC*).

²² "Supreme Court doctrine is often characterized as ambiguous and complex, two factors that are also expected to reduce responsiveness"(Songer, Segal, and Cameron 1994 p. 678).

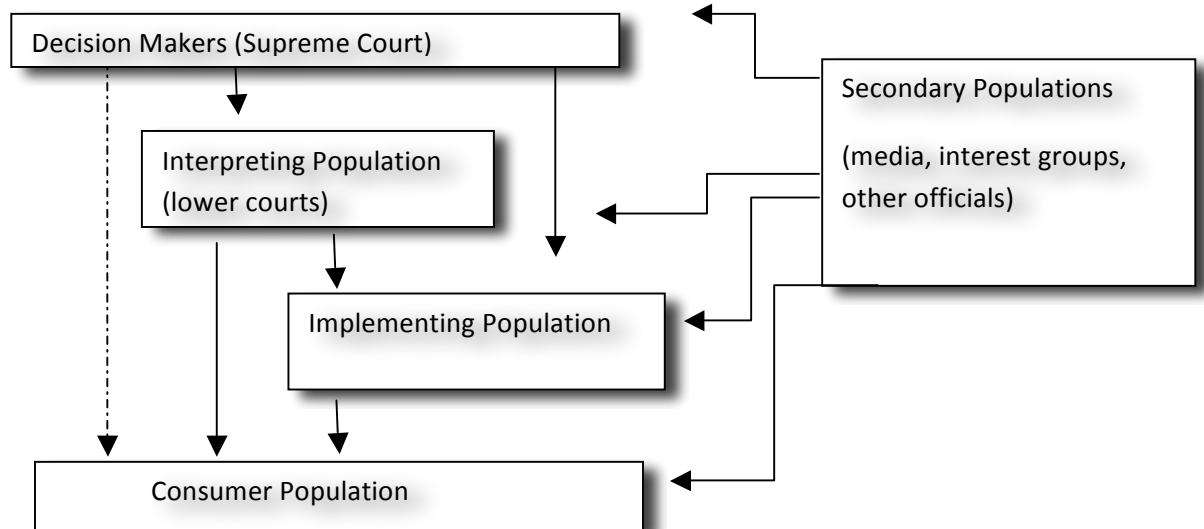
This literature on Court efficacy will guide the research design of the paper and help determine the affect of *SWANNC* and *Lopez* on the EPAs enforcement of the CWA. If these cases are symbolic assertions of a federalist agenda by the conservative justices, there is good reason to consider the efficacy of these rulings. The Court has provided a new and complex precedent with *Lopez* and its application in *SWANNC*. Ultimately, the lessons from this literature is that “All precedents are not created equally when it comes to lower court implementation” (Banesh and Reddick 2002 p. 548). In my research, I plan to investigate in a close case study the mechanisms of this process. It should help illuminate the way activist Supreme Court precedents on environmental issues and the Commerce Clause trickle down through the lower courts and begin to affect the EPA.

Though these precedents are important legally, in the research design I plan to determine the causal power of the Supreme Court precedent in *SWANCC* on more than just the lower courts. I hope to go beyond purely legal scholarship. The research design goes beyond the courts and hopes to explain what enables a Supreme Court ruling to successfully destabilize an environmental regulatory regime. The aim is to elucidate how the Court is able to affect the implementation of the Clean Water Act despite its lack of enforcement capacity. This involves bridging an entrenched gap in the literature between US Constitutional legal scholarship and mainstream political science.

Marin M. Shapiro led the development of this unifying approach in the mid 1960’s. “Shapiro’s main goal...was to demonstrate how much conventional political science could actually be applied to the study of courts—to the mutual benefit of conventional political scientists and court scholars” (Gillman 2004). Typical approaches to the Supreme Court fail to treat the Court as a *political* actor. Those that do, stop attempting to measure and theorize the

Supreme Court's influence beyond the lower courts' behavior. Alternatively, the Court's capacity to enforce "bureaucratic compliance" (for example the EPA's response to *SWANNC* and *Lopez*) has been neglected in favor of research on congressional and executive oversight (Spriggs 1997, Sunstein 1989).²³

Some authors, however, have pursued Shapiro's project. Below is a framework for thinking about the parties involved in implementing a court decision (Johnson and Cannon 1984 p. 15).



They address the mechanisms that permit some activist decisions to take affect much more immediately than others. They argue that the characteristics of each "population" above can vary to a large degree and that these variations determine the extent to which a new precedent is implemented. For example, if the implementing population is public there will be much greater adherence to precedent than if the implementing population is private. In their case study of *Roe v. Wade*, they assert that part of the reason there have such wide discrepancies in doctor's willingness to provide abortions is due to their role as private "implementers" of the Court

²³ For an example of this problem see: Who controls the bureaucracy?: Presidential power, congressional dominance, legal constraints, and bureaucratic autonomy in a model of multi-institutional policy-making. *Journal of Law, Economics, and Organization* 12 (1):119..

decision. If a public agency had been charged with implementing the right to privacy, abortion would be much more available, according to Johnson and Cannon. This is relevant to my case because the implementing population is the EPA and this agency claims to have been highly effected by the Court's recent decisions on the Commerce Clause²⁴.

R. Melnick more closely follows in Shapiro's footsteps and is a great guide for my research design. The purpose of his book is to assess validity of the common claim that the courts have improved the EPA enforcement of the Clean Air Act (Melnick 1983). One of Melnick's key arguments is that Supreme Court plays often increases the discretion and confusion of the lower courts. "In theory, Supreme Court review brings unity to a decentralized judicial system that promotes participation by a variety of groups. In practice it does not"(Melnick 1983 p.367). Following this lead in my research design, I hope to determine the effects of *SWANNC* and *Rapanos* on the uncertainty of lower courts and the EPA.

In contrast to Melnick's case study on the Clean Air Act, James F. Spriggs takes a large-N, broad theoretical approach, attempting to move beyond the case study method. He measures "bureaucratic compliance" of agencies with Supreme Court cases that ruled against these agencies from 1953 to 1990 (Spriggs 1997). Overall, he finds that 93.2 percent of the Supreme Court's opinions were met with the agency basic compliance and that bureaucracies altogether disregard the Court. This is a extraordinary finding and he presents a compelling theory for the virtual non-existence of agency defiance; he proposes that agencies comply because they are "repeat players" in the Court and do not want their non-compliance with one particular case to

²⁴ See their statement that begins "There are significant limitations that affect EPA's ability to identify serious problems quickly and take prompt action to correct them." Full quotation included in the research design.

hurt their chances in future cases. “My argument is that this outcome most likely results because of the ongoing and close relationship between the Supreme Court, federal agencies, and other relevant actors. A variety of societal interests—from winning litigants to other interested parties—scrutinize carefully how bureaucracies implement Court opinions”(Spriggs 1997 page 582). I will examine this theory in my case study by attempting to figure out which factors most influence decision-makers in the EPA.

However, there is some debate in the literature about the validity of any generalizations about the Supreme Court efficacy. As I discussed in the first section of the literature review, there are a multitude of reasons to presume that results of my research may be specific to the difficulties of the Commerce Clause and environmental law. As Shapiro states, “It is... impossible to speak in the abstract of the power or function of the Supreme Court. ... If a final answer can ever be offered to the question, What is the role of the Supreme Court?...it will be achieved by correlating various powers and functions in specific areas, rather than by a general examination of the nature of the Court” (Shapiro 1964b p. 2). Shapiro was an ardent defender of close, case study analysis. Even large-n empirical authors acknowledge the specificity necessary to understand the Court’s impact.²⁵ The more my research differs from the findings of general studies, the more I can argue that environmental law and its relationship with the Commerce Clause is particularly precarious and substantively unique.

Finally, there is a question in the literature about the *normative* or ethical impacts of court review of bureaucracies; Melnick was particularly concerned about the negative consequences of court review given their limited capacity to handle the technical issues involved in environmental

²⁵ “Available evidence on the extent of doctrinal responsiveness and congruence in the lower courts suggest wide variation across time, courts, and policy areas. The reason for this variation in response are still not well understood”(Songer, Segal, and Cameron 1994 p. 676).

issues (Melnick 1983). Cass Sunstein attempts considers some of the societal benefits of court oversight of bureaucracy. “The most obvious goal, or “benefit,” of judicial review is to increase the incidence of legality. Under this view, judicial review of administrative action is necessary above all to ensure that regulatory agencies comply with congressional commands”(Sunstein 522). My project is not measuring whether or not these cases are increasing the “legality” of EPA action. Still, Sunstien acknowledges that, in many ways, increasing legality does not necessarily increase social benefits (Sunstein 1989). There is, therefore, evidence that the courts have a high degree of influence over bureaucratic implementation of the law but little certainty about whether or not this court control is productive/beneficial. I am not, yet, making a normative argument for or against the Supreme Court decision in *SWANNC* or *Lopez* though the results of this study can inform normative judgments of the implications of *SWANNC* and the role of the Supreme Court more generally in environmental law. These cases were undeniably part of a conservative agenda and the EPA complains that the new Commerce Clause precedents have had severe societal consequences. The extent to which the Supreme Court has inhibited enforcement of the Clean Water Act is relevant to this project because I hope to explain how the Court has affected the EPA’s recent enforcement decisions.

VII. Case study of SWANNC and the jurisdiction of the Clean Water Act: a current focal point in the literature

Some headlines have been unsympathetic to the Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*. “Thousands of the nation’s largest water polluters are outside the Clean Water Act’s reach because the Supreme Court has left uncertain which waterways are protected by that law”(Duhigg and Roberts 2010). I want to investigate the validity of the claim and the mechanisms through which the Court has

affected the EPA. The literature on the Commerce Clause and environmental law revolves around this case and a follow up (*Rapanos*²⁶). There is now a general recognition in environmental law that “Any Commerce Clause-based regulation must now be evaluated through the lens of the *Lopez* Commerce Clause framework”(Baumgartner 2005 p. 2141) but that was not the case before *SWANCC*. The overall purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The controversial section for *SWANCC* states that the EPA “may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at disposal sites.” (Craig 2003). The “navigable” qualification of waters was not interpreted to be important determinant of jurisdiction. Before this case there was a consensus that the law allowed for the regulation of all water that “substantially affected commerce” (Baumgartner 2005). Yet, in this case “navigable waters” was interpreted to limit the jurisdiction of the Army Corps. The application of the navigable waters test harks back to the channels of commerce doctrine in the 19th century but the Court ultimately avoided directly addressing the constitutionality of the CWA (Klein 2003, Fitzgerald 2003). “Although the case was decided on narrow statutory grounds, the Court's dicta cast doubt upon the future of federal efforts to protect land and water resources...*SWANCC* specifically enumerated land and water use as areas within 'the States' traditional and primary power”(Klein 2003 p.19).

Since *SWANCC*, Clean Water Act wetlands protection has become a legal controversy with many challenges in court (Baumgartner 2005). It is a perfect case study for better understanding the mechanisms that allow the Court to affect policy implementation in environmental law.

²⁶ *Rapanos v. United States* 547 U.S. 715 (2006). Developers (*Rapanos*) were charged with felonies for filling wetlands. The Court opinion in this case limits the Clean Water Act to jurisdiction over only wetland with a “significant nexus” to “navigable waters.” Wetlands very often do not obviously fulfill this requirement.

Research Design

Research Question: How does the destabilization of the Commerce Clause pertain to the enforceability of current federal environmental regulation? What enables a Supreme Court ruling to successfully destabilize an environmental regulatory regime? I plan to assess the causal power of the Supreme Court rulings that have narrowed the Commerce Clause and determine whether this precedent had to first penetrate the lower courts before having an effect on the capacities of the Environmental Protection Agency.

Theory and Case Selection:

Environmental law is inherently mismatched with the structure of the US Constitution. After the Great Depression the Commerce Clause the Supreme Court expanded this clause and it now serves as the primary source of legitimacy for federal environmental regulation. This may all change because, starting with *US v. Lopez*, the Supreme Court has reverted to a more literal and narrow interpretation. *SWANCC*²⁷ marks the first time the Supreme Court has applied the jurisprudence of *Lopez*²⁸ to an environmental case.²⁹ The Court ruled that applying the Clean Water Act (CWA) to isolated wetlands “would result in a significant impingement of the States’

²⁷ *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (99-1178) 531 U.S. 159 (2001) [191 F.3d 845, reversed.] In this case section 404(a) of the Clean Water Act which indicated the act is applicable to the “navigable waters” of the United States. The Army Corps of Engineers had been applying this rule to wetlands using the “Migratory Bird Rule” (because they provide habitat for migratory birds). The Corps refused to grant the SWANCC a permit to fill ponds owned by the municipality. The Court found that section 404(a) of the CWA could not be interpreted so broadly as the “migratory bird rule.”

²⁸ *United States v. Lopez* (93-1260), 514 U.S. 549 (1995). This case held that the Gun Free School Zones Act of 1990 exceeded the constitutional power of Congress to regulate interstate commerce. Rehnquist wrote the opinion with a 5-4 majority that has continued to narrow the jurisdiction of legislation under the “Commerce Clause”

²⁹ Percival, Robert. 2002. “Greening” the Constitution: Harmonizing environmental and constitutional values. *Environmental Law* 32:809-872.

traditional and primary power over land and water use.” *Rapanos*³⁰ followed the logic from *SWANCC* and further specified the ways in which the EPA should be limited in its CWA jurisdiction. Legal scholarship tends to avoid examining the *effects* of court rulings. This research design aims to bridge the gap between legal and political questions. Most importantly, it intends to increase understanding of the importance of legal precedent for the stability and enforcement of law.

Determining the effects and the mechanisms whereby the CWA was destabilized will help predict the antecedent conditions that favor such destabilization in the future. This case also speaks to the power of the Supreme Court to affect other branches of government through its activist decisions and disregard for precedent.³¹ The Environmental Protection Agency (EPA) has already officially acknowledged its frustration with these recent rulings and goes so far as to say that these rulings have directly diminished their enforcement capacity³².

*“There are significant water quality problems facing too many communities; there are expanding universes of diffuse pollution sources, many which are not effectively regulated by the CWA; and there are significant limitations that affect EPA’s ability to identify serious problems quickly and take prompt action to correct them. Among these limitations are two Supreme Court decisions – its 2001 decision in Solid Waste Agcy. of Northern Cook Cty. v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (“SWANCC”) and its 2006 decision in Rapanos v. United States, 547 U.S. 715 (2006) (“Rapanos”) – that added layers of confusion regarding which water bodies are covered by the CWA in many parts of the country”*³³

³⁰ *Rapanos v. United States* 547 U.S. 715 (2006). Developers (*Rapanos*) were charged with felonies for filling wetlands. The Court opinion in this case limits the Clean Water Act to jurisdiction over only wetland with a “significant nexus” to “navigable waters.” Wetlands very often do not obviously fulfill this requirement.

³¹ Duhigg and Roberts 2010. “Rulings Restrict Clean Water Act, Foiling EPA.” *New York Times*.

³² From the Office of Enforcement and Compliance Assurance Clean Water Action Plan. October 15, 2009.

Given the EPA's insistence that these rulings have had a negative effect on its enforcement of the CWA, the research design is less concerned with determining whether or not there is any effect. The inclination that there has been an effect can be verified by measuring the level of enforcement over time and controlling for other changes. The more important question is how and why did the EPA begin to sense the Court's effects on the stability of the CWA. Answering this question will help explain what components of the precedent and its interpretation in the lower courts were most lethal for the EPA's understanding of its own jurisdiction. It is not as if all Supreme Court decisions are heeded by other branches of government with great immediacy. Therefore, process-tracing of this case will shed light on the conditions that lead to greatest instability of precedent and most dramatic effect on the enforcement of environmental law.

Hypothesis: The validity of environmental law is inherently ambiguous thus the SC rulings in *SWANCC* and *Rapanos* created sufficient uncertainty to have had a destabilizing effect on EPA's capacity to enforce the Clean Water Act. This effect was substantial regardless of the ensuing inconsistency in the lower courts.³⁴ On their own, these cases bring into question the constitutional standing of the EPA's Clean Water Act jurisdiction.

Confirmed if: vagueness of the Court rulings was enough to inhibit the EPA

Rejected if: The response of EPA was slow and they brought more cases to the lower courts to test the lower court's responsiveness.

Case study:

Part 1: Setting the Stage—Lower court cases interpreting precedent and measurement of the objective change in enforcement

³⁴ See "Event history" (Benesh and Reddick 2002) and "Principle-Agent model" (Songer et al. 1994)

Before determining how the Court affected the EPA it is necessary to determine the effect of the SC ruling in *SWANCC* and *Rapanos* on the lower courts. This involves shepardizing and determining which District Courts of Appeals have referenced *SWANCC* and *Rapanos* in their decisions. It is important to understand the extent to which the precedent has been applied or rejected by lower courts. This will indicate the level of consistency in their application of Court's precedent.

Another component of "setting the stage" is determining a good measure of the change in CWA enforcement before and after these cases supposedly made such a severe impact in the EPA. The Office of Enforcement and Compliance Assurance (OECA) publicizes the number and nature of cases brought under each statute on the EPA website.³⁵ The EPA brings both criminal and civil cases against the most egregious polluters. The objective level of enforcement on wetlands³⁶ can be compared over time, measuring the actual difference before and after these Supreme Court cases.

Process Tracing Methodology:

The analytical strength of the research design will come from opening the "black box" of EPA decision-making. I will rely on process-tracing of the period of change (from 3 years before the *SWANCC* and *Rapanos* rulings to the present³⁷). Process tracing is appropriate for this study because the primary goal is determining the *how* destabilization of the Commerce Clause

³⁵ EPA cases by statute. <http://cfpub.epa.gov/compliance/cases/index.cfm?templatePage=12&ID=3>

³⁶ "those areas that are 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. Wetlands generally include swamps, marshes, bogs and similar areas." from EPA <http://www.epa.gov/compliance/monitoring/programs/cwa/wetlands.html>

³⁷ "In before-after research designs... the investigator can use process-tracing to focus on whether the variable of interest was causally linked to any change in outcome and to assess whether other independent variables that change over time might have been causal." George and Bennett 2005. *Case Studies and Theory Development in the Social Sciences*. MIT Press: p. 221

pertains to the enforceability of current federal environmental regulation. The fairly obvious independent variable (SC ruling and lower court interpretation of precedent) is affecting a clear dependent variable (EPA enforcement) but how that happened is still unclear. The most interesting findings of this case study for the purpose of further theory development are the mechanisms underlying this straightforward causal relationship.³⁸ This will be a diachronic report of the events in the EPA and lower courts, respectively. In order to assess my hypothesis, I will compare the EPA's chronological response to the Supreme Court to the timeline of lower-court rulings. This will help me better determine the causal strength of the Supreme Court (independent of the lower courts) and the EPA's level of responsiveness to both levels of judicial interpretation.

Process-tracing within one case is often discouraged, however, George and Bennett (2005) defend this method. Ideally, they argue, "only one variable can change at the moment that divides the longitudinal case neatly in two."³⁹ My case is characterized by such a sharp divide and is therefore appropriate for this before-after process-tracing approach.

Elite interviewing will be the main source of information for the process-tracing. This is a qualitative study because the *mechanisms* are at issue, not the *effects* of a causal variable on an outcome. In *Learning from Strangers: The Art and Method of Qualitative Studies*, Robert Weiss suggests performing pilot interviews before engaging the primary respondents. In my case, this would require talking to lower officials before approaching the heads of the EPA offices. These are the people most able to speak to the decision-making process because they were either part of

³⁸ "In process tracing the investigator explores the chain of events or decision-making process by which initial case conditions are translated into case outcomes" (Van Evera 1997 p.64).

³⁹ George and Bennett 2005 p.166

this process or they are knowledgeable of the standard operating procedures that determined the outcome of considerations.

Before beginning the interviews, I will submit my proposal to the Reed College Human Subjects Research Committee⁴⁰ in order to assure the college that my research is in accordance with the federal Dept. of Health and Human Services guidelines for the protection of human subjects.⁴¹

People/positions to interview

The relevant departments within the OECA are:

Office of Remediation and Enforcement; Office of Civil Enforcement (brings civil cases); Office of Compliance; Office of Criminal Enforcement, Forensics and Training; Office Compliance (data, planning and results). The contact information for the directors of each of these offices is available online.⁴² Weiss also recommends that the interviewees come from different levels of the bureaucracy, with differing relationships to the organization. I am interested in EPA officials at all levels who had to decide whether or not to pursue enforcement of the CWA. These calculations may have differed at the various levels of the bureaucracy so a bureaucratic-cross section of is ideal. My interviewees are expert informants but I do not want a biased depiction of the events and decisions made since *Rapanos* and *SWANCC*.

Below I have listed some of the most important questions. The actual proceeding of the interviews will probably not follow a linear, prescribed set of questions. The goal of the

⁴⁰ Reed College Human Subjects Research Committee http://www.reed.edu/human_subjects/#submission

⁴¹ Department of Health and Human Services <http://www.hhs.gov/ohrp/humansubjects/guidance/45cfr46.htm>

⁴² Personnel contact information for the relevant EPA officials is available at:
<http://www.epa.gov/compliance/contact/index.html>

interviews would be to elicit responses to these questions and gain further information that I cannot anticipate.

This list of questions encompasses some of the information I need but this list will not be followed as a script. Weiss is critical of the ‘fixed question, open response method’ because “The interviewer is not actually free to encourage a respondent to develop any response at length”(Weiss 1994 p. 13). The primary goal of this research is to gain in-depth information that is not readily available in other formats. There is little advantage in standardization of the interview process.

Interview Guide:

I. PERCEIVED ROLE OF SUPREME COURT

- a. Relationship of branches of government: When has the Supreme Court come up in your work?
- b. How are court rulings incorporated into your job? Is there a general policy for staying informed about the courts?
- c. When have you been most concerned about a court ruling?

II. RAPANOS AND SWANCC SPECIFICALLY:

- a. When did you first hear about SWANCC? When did this first come up at work?
- b. When was the first official discussion of SWANCC at work? Was there ever an official policy with reference to this case?

III. TIMELINE

- a. When did wetlands enforcement become most problematic?
- b. What made the Clean Water Restoration Act a priority for the EPA?
- c. When did the most important changes in enforcement take place?

IV. DOCUMENTS AND DETAILS

- a. Where would you recommend I look for more information about this policy change?
- b. What would help me better understand the EPA enforcement of CWA since *Rapanos* and *SWANCC*?
- c. Are there any reports of documents you would recommend as a reference on these court cases?

Furthermore, public statements, official documents, and press releases will supplement the interview process. The information provided by interviewees can be verified by these sources and these documents can substitute some of the information. The interviews will help to open the

“black-box” of EPA decision-making but I am not trying to determine the internal psychology of the decision- makers. It is more important that the interviews help me build a timeline that illuminates the official statements and documentation that is already accessible.

Conclusion:

The capacity of the Supreme Court to affect the enforcement of environmental law through its recent Commerce Clause decisions is not fully understood or even addressed by most literature. The reversal of precedent (or resurrection of a dead line of precedent) causes instability in the law. Most prominent legal scholars admit that environmental law is inherently unstable under the Commerce Clause (Lazarus 2004) but they are hesitant to follow the effects of legal decisions to the world of bureaucratic legal enforcement. This study aims to bridge the gap in the literature and better explain when and why enforcement is thwarted most severely.

SWANCC was the first case to challenge the EPA’s jurisdiction based on the Commerce Clause jurisprudence in *Lopez*. This study aims to make the Court, the regulators involved, and the public better informed about how the Supreme Court influences outcomes in the real world.

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