Protecting Property Rights, Preserving Federalism and Saving Wetlands

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Executive Summary

The U.S. Supreme Court missed a recent opportunity to give landowners, federal regulators and the states clear guidance about which wetlands are under federal control and what actions can be taken to protect and/or develop them. Some federal court decisions have limited the federal government's power over isolated wetlands, but their rulings have been inconsistent. On June 19, 2006, in a narrow 5-4 decision, the Supreme Court further clouded the issue, leaving lower courts to set limits on a case-by-case basis.

The federal government historically viewed wetlands as an obstacle to progress and a nuisance. Swamps bred mosquitoes, which spread malaria. As a result, the United States has lost more than half of all the wetlands that existed in colonial times. However, wetlands are not just public nuisances. Many provide economically and ecologically valuable services — such as water filtration, flood mitigation and habitat for species — which were not fully understood or considered until relatively recently.

The 1972 Clean Water Act expanded federal authority over "navigable waterways" to prevent pollution. But with a vague definition of navigable waterways, the Clean Water Act was vulnerable to wide interpretation and soon very little water was left outside the scope of Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the Corps) regulation. For example:

- A Supreme Court ruling radically expanded the Clean Water Act to encompass regulation of any discharge into wetlands that eventually drain into navigable waterways.
- The Migratory Bird Rule became known as the Glancing Goose Test because federal regulators claimed that if a migratory bird glanced down and spotted a small pond, soggy ground or a temporarily flooded pasture, even if it didn't stop, federal control and regulations extended to that water.

As a result, the Corps and EPA have pursued civil and criminal prosecutions for small, technical violations of the Act in order to intimidate property owners and developers into compliance, although the complexity of the regulatory process and the unsettled state of the law makes compliance difficult. In the

process, they have arguably stepped on the constitutional prerogatives of the states to control land use within their borders and the rights of individuals to control their property. For instance:

- When a Baptist congregation in Florida wanted to build a new church and parking lot, federal officials intervened, usurped local authorities' power to regulate development and refused to grant the church a permit.
- A Maryland developer created several wildlife ponds on his land and was found guilty of violating the CWA by filling wetlands; he was sentenced to 21 months in federal prison and fined $4 million.
- A father and son both spent 21 months in federal prison for filling a dry ditch — which the government argued was a seasonal wetland — with clean sand in order to build the son's home.

The current position of the Corps and the EPA goes beyond clear congressional intent and, arguably, what the Constitution allows. But even for those wetlands over which the federal government has legitimate authority, evidence indicates that states and private parties are more than capable of protecting them. For example:

- Ducks Unlimited has preserved over 10 million acres of wildlife habitat; on the East Coast, about 11,000 private duck clubs protected 5 million to 7 million acres of wetlands from destruction.
- Over 1,200 land trusts have protected more than 6.2 million acres through donation or purchase of the land in fee simple or conservation easements.
- Under the U.S. Fish and Wildlife Service's Partners for Wildlife Program, landowners restored 48,800 acres of wetlands in 2001 and 65,000 acres in 2002.

With so many ways to protect wetlands, there is ample reason to believe they will continue to receive protection, even if the regulatory scope of the Clean Water Act is limited.

Introduction

"The federal government claims authority over almost all wetlands."

Over more than three decades, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the Corps) have stretched the regulatory scope of the Clean Water Act so far they now claim authority over almost all waters in the United States. They have pursued civil and criminal prosecutions for small, technical violations of the Act in order to intimidate property owners and developers into compliance, although the complexity of the regulatory process and the unsettled state of the law makes compliance difficult. In the process, they have arguably stepped on the constitutional prerogatives of the states to control land use within their borders and the rights of individuals to control their property.

Some recent federal court rulings have limited the federal government's power over isolated wetlands, but different appellate courts have reached contradictory decisions concerning precisely what the limits are. The U.S. Supreme Court missed a recent opportunity to provide clear answers on these unresolved issues in its decision in two cases: *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*. Many analysts had hoped the Supreme Court would draw a bright line to give landowners, federal regulators and the states clear guidance about what counts as protected wetlands and what actions can be taken to protect and/or develop them. In these particular cases, the question was whether or not the Supreme Court would limit the regulatory authority of the Corps and EPA by redefining the scope of the Clean Water Act.

"Wetlands have been defined to include prairie potholes, ditches and even soggy ground."

Unfortunately, on June 19, 2006, in a narrow 5-4 decision, the Supreme Court ruled only that the EPA and the Corps *may* have misinterpreted the federal government's power to regulate or protect wetlands under the Act. The decision only further clouded the issue, leaving lower courts to set limits on a case-by-case basis, at least in the short term.

On the positive side, the ruling highlights the need for two reforms of the Clean Water Act: 1) to properly respect individual property rights and the legitimate power and authority of each state over lands lying solely within its jurisdiction, and 2) to foster incentives to promote and expand wetlands.

This paper first briefly examines the legislative and judicial history of government efforts to regulate wetland use. Second, it proposes reforms which would arguably limit the loss of ecologically valuable wetlands and hopefully foster their (re)creation, while respecting the constitutionally protected individual right to develop one's property with a minimum of government interference.

From Swamps to Wetlands

"For more than 100 years, the federal government encouraged states to drain wetlands."

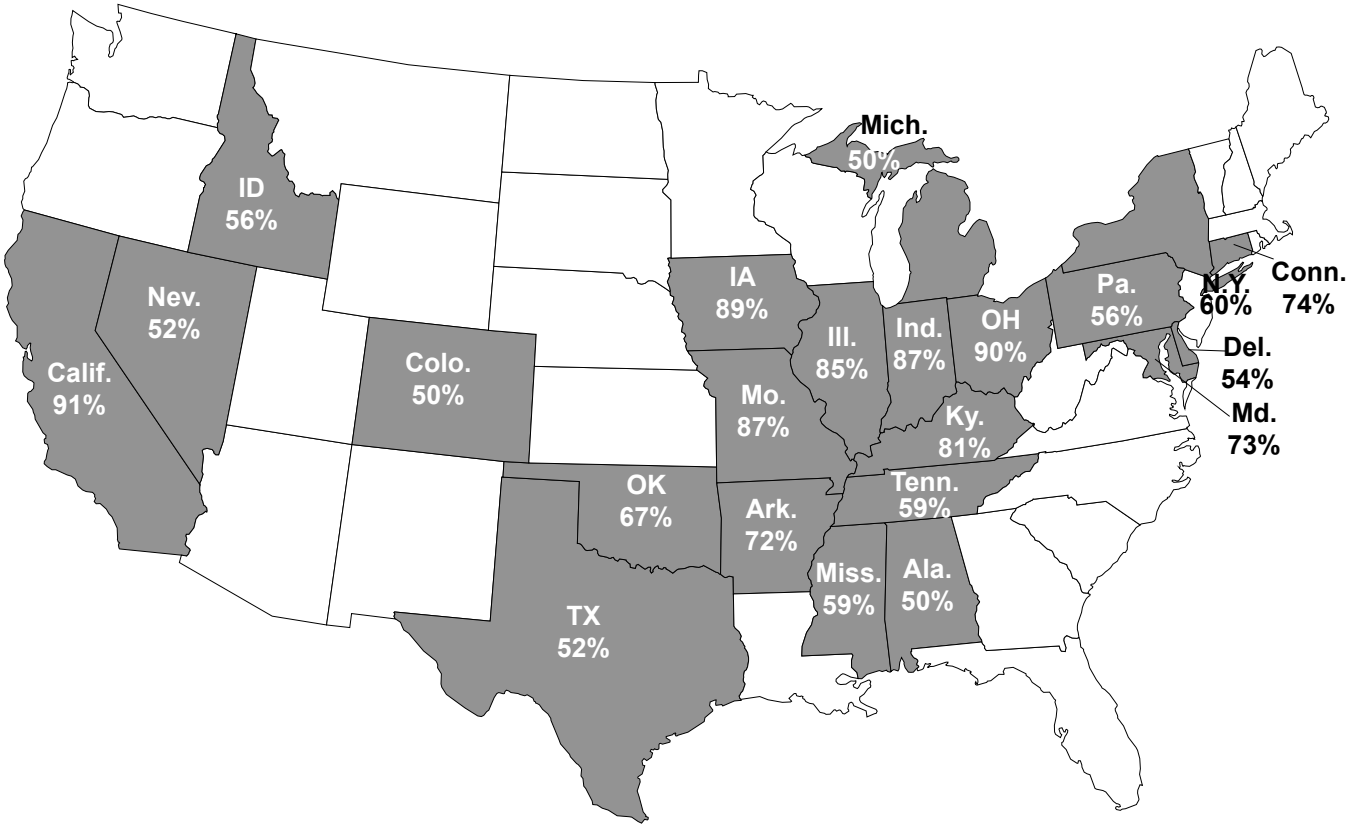
The federal government historically viewed wetlands as an obstacle to progress and a nuisance. Swamps bred mosquitoes, which spread malaria and other diseases, so draining them was a high priority. Beginning with the Swamp Lands Act of 1849, the federal government distributed some 65 million acres to 15 states for reclamation purposes.[1] The federal grants were predicated on draining the swamps to "improve" them. Leading farm states such as California, Illinois, Iowa, Indiana and Ohio have eliminated more than 85 percent of their original wetlands acreage.[2] [See Figure I.] Thus, much of the current debate revolves around activities in states that still have a sizable portion of their original wetlands, along with smaller areas in states that developed their wetlands earlier.

At the turn of the 20th century, courts supported the federal government's role in converting wetlands. Indeed, the U.S. Supreme Court characterized wetlands as the cause of malarial and malignant fevers and proclaimed

FIGURE I

States with Highest Wetland Losses

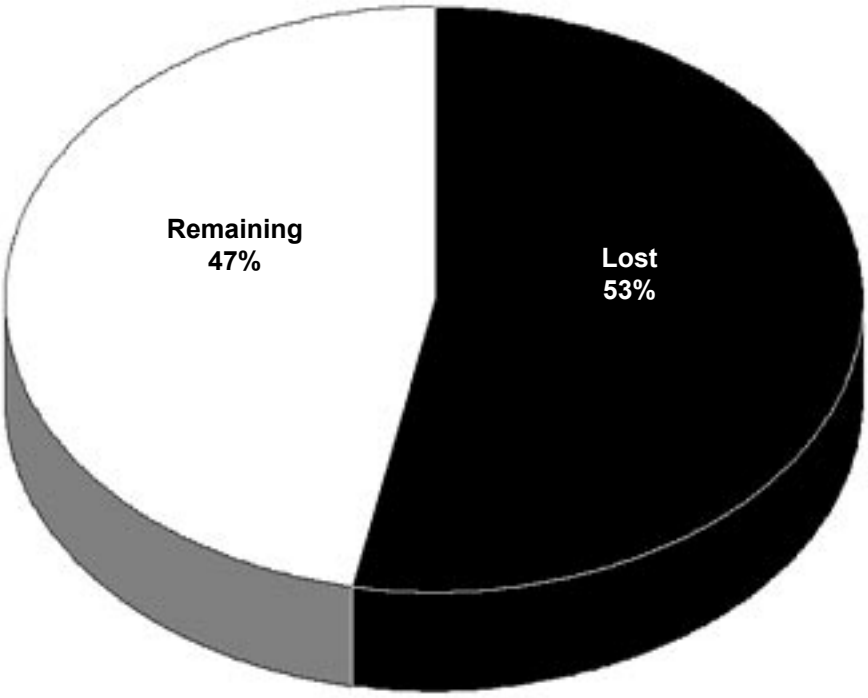
(1780s — mid-1980s)



Source: Thomas E. Dahl, "Wetland Losses in the United States, 1780s to 1980s," U.S. Department of the Interior, Fish and Wildlife Service, 1990.

FIGURE II

Wetland Losses, 1780s-1980s*



* Note: Of 221 million acres originally in the lower 48 states.

Source: Thomas E. Dahl, "Wetland Losses in the United States, 1780s to 1980s," U.S. Department of the Interior, Fish and Wildlife Service, 1990.

"As a result, more than half of U.S. wetlands have been lost."

"the police power is never more legitimately exercised than in removing such nuisances."[3] Given this historic attitude toward wetlands, it is not surprising that the United States has lost more than half of all the wetlands that existed in colonial times.[4] [See Figure II.]

Cleaning Up the Nation's Waters: The Clean Water Act

"Concern about water pollution led to the passage of the Clean Water Act."

In the 19th century, Congress was not concerned with protecting wetlands, but rather in keeping navigable waterways free from physical obstruction and interference by prohibiting the construction of piers and dams and the unauthorized dumping of dredged materials.

As environmental concerns gained traction, in 1972 Congress used its authority to regulate commerce to prohibit pollution as well as regulate navigable waterways by passing the Clean Water Act (CWA).[5] While the discharge of pollutants does not necessarily hamper navigation, it does impact water quality. And public health risks can loom large, particularly when the pollution involves the infectious agents found in municipal sewage. Thus,

arguably, there is a role for government to regulate the introduction of such materials into publicly owned bodies of water. In addition, in order to protect water quality, the government may occasionally find it necessary to impose certain restrictions on land along a shoreline or adjacent to nearby rivers and streams. The Clean Water Act gave the Corps and the EPA the regulatory authority to prohibit the discharge of any pollutant into "navigable waters" without a permit.[6] It defined navigable waters as "waters of the United States, including the territorial seas."[7] The problem is that the term "navigable waters" is not very descriptive. [See the sidebar: "What Are Navigable Waters?"]

"The Clean Water Act led to federal control over adding or removing dirt from wetlands."

Because Congress didn't precisely define navigable waters in the CWA, the Corps and EPA did. In 1974, the Corps first defined "waters of the United States" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[8] It further explained that the defining characteristic of navigable waters "is the water body's capability of use by the public for purposes of transportation or commerce."[9] In essence, the Corps' 1974 regulatory definition was the traditional definition, which tied navigable waters to navigation, or being able to boat on water.

This all changed in 1975, following the Supreme Court's decision in *Natural Resources Defense Council* (*NRDC*) *v. Callaway.*[10] The NRDC argued that the Corps' definition of navigable waters was too narrow and the Supreme Court agreed.[11] The decision expanded the Clean Water Act to encompass regulation of any discharge into wetlands that eventually drain into navigable waterways.

The Section 404 Rule. In 1977, the Corps promulgated new regulations of substantially expanded scope under Section 404 of the Clean Water Act. Relying on the full extent of Congress' commerce clause authority, the Section 404 rule covered both navigable waters and other "waters of the United States."[12] The latter included: "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."[13]

The regulations required anyone who wished to discharge dredged or fill material into U.S. waters to obtain a permit beforehand.[14] Agencies implementing the law have interpreted Section 404 as granting federal oversight of any activity resulting in the deposit of any material into a wetland. And while the Corps issues the actual permits, the EPA provides the guidelines and has the authority to veto the Corps' issuance of a permit. The U.S. Fish and Wildlife Service (under the Department of the Interior), the Soil Conservation Service (under the U.S. Department of Agriculture), and the National Marine Fisheries Service (under the Department of Commerce) all participate in the process.

The Glancing Goose Test. In 1986, the Corps went even further than the 1977 rule and promulgated the so-called Migratory Bird Rule,[15] which states that the Corps' regulatory authority extends to waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

What Are "Navigable Waters"?

To the average citizen, the term "navigable waters" seems pretty self-explanatory — navigable waters ought to have something to do with navigation, or being able to boat on water. For a long time that is exactly what the term meant. In 1870, in The Daniel Ball case, the Supreme Court limited navigable waters more explicitly to waters used for commerce.[1] Thirty years later, Congress passed the Rivers and Harbors Act of 1899 (RHA), its most significant exercise of its authority to regulate navigable waters up to that time.[2] In Section 13 of the RHA, Congress charged the Corps with the responsibility to regulate the discharge of "refuse" into any navigable waters.[3]

With increasing concerns about pollution during the 1960s and early 1970s, Congress, commentators and courts[4] began to view Section 13 as a tool to help reduce water pollution.[5] As a result, Congress passed the 1972 amendments to the Federal Water Pollution Control Act,[6] and these are now called the Clean Water Act (CWA).[7] Congress explained that it passed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[8]

To implement these goals, part of the CWA superseded RHA Section 13;[9] but like it also prohibited the "discharge of any pollutant by any person" into "navigable waters" without a permit.[10] Unlike the Supreme Court's 1870 decision, however, Congress left the term "navigable waters" largely undefined, merely stating that they are "waters of the United States, including the territorial seas."[11]

[1] 77 U.S. (10 Wall.) 557 (1870). The Supreme Court explained:

> [R]ivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

[2] See Act of March 3, 1899, ch. 425, § 9–10, 30 Stat. 1151.

[3] 33 U.S.C. § 407 (2000).

[4] See, for example, *United States v. Republic Steel Corp.,* 362 U.S. 482, 490–92 (1960), which notes that "refuse" in RHA § 13 was a broad enough term to include industrial waste.

[5] Virginia S. Albrecht and Stephen M. Nickelsburg, "Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act," *Environmental Law Review*, Vol. 32, 2002, pages 11,042-11,058.

[6] The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 47 (1972).

[7] Environmental Protection Agency, Clean Water Act History. Available at http://www.epa.gov/region5/water/cwa.htm.

[8] 33 U.S.C. § 1251(a) (2000).

[9] See CWA § 407.

[10] CWA § 301 & 502(12); 33 U.S.C. § 1311, 1362(12) (2000).

[11] CWA § 502(7); 33 U.S.C § 1362(7) (2000).

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.[16]

Under the Migratory Bird Rule and the expansive 1977 definition of U.S. waters, there was very little water outside the scope of the Corps' regulation. Indeed, under the Migratory Bird Rule, the Corps and the EPA defended in court what became known as the Glancing Goose Test: if a migratory goose glanced down and spotted a small pond, soggy ground or a temporarily flooded pasture or woodlot, even if it didn't stop, the mere glance extended the reach of federal control and regulations to that privately owned body of water.

"A wetland came to mean any place a goose might land."

Wetland Protections: Harming Property Owners, Criminalizing Development. In 1989, the scope of federal wetlands protection activities was further expanded when President George H.W. Bush pledged to achieve "no net loss" of wetlands. The Corps and the EPA developed a "Memorandum of Agreement" to create a uniform jurisdictional definition of wetlands within the federal government.[17] Unfortunately, they wrote the guidelines so broadly that it became difficult to find acreage outside the federal regulatory reach. At the same time, to meet the president's goal, the agencies expanded the conditions a landowner must meet to receive a permit to develop property containing wetlands, heightened enforcement efforts and sought increased punishment against those who violated the new standards.

The government imposed several new requirements on landowners desiring to develop property on jurisdictional wetlands (that is, wetlands as defined by regulations); among them, that the property owner must create, reclaim or reestablish wetlands elsewhere. More often, however, permits were simply denied. For instance, when a Baptist congregation in Florida wanted to build a new church and adjacent parking lot, federal officials intervened, usurped local authorities' power to regulate development and refused to grant a permit to build the church.[18]

"Virtually all private land is at risk of being declared a federally regulated wetland."

Wetlands Witch Hunt. In December 1990, the EPA and the U.S. Army Corps of Engineers issued a joint memorandum outlining a publicity campaign against wetland regulation violations. The memorandum directed regional officials to nominate regulatory violations for high-profile prosecutions in time to meet an Earth Day 1991 deadline.[19] It endorsed both civil and criminal penalties. The latter were not to be limited to egregious violations; they could apply even in cases of negligence.

With a few criminal prosecutions, the federal government intended to frighten other wetlands owners into meek compliance. In Maine, landowner Gaston Roberge found this out firsthand. Roberge had allowed a town to dump fill-dirt on his 2.8-acre commercial lot, but when he attempted to sell the lot, the Corps charged him with illegally filling a wetland. An internal Corps memo was discovered that said, "Roberge would be a good one to squash and set an example."[20]

As a result of this memorandum, some property owners not only lost their property rights and suffered economic consequences, many were sent to or threatened with prison for mere technical violations. For instance:

- Maryland developer James Wilson created several wildlife ponds on his land and was found guilty of violating the CWA by filling wetlands; he was sentenced to 21 months in federal prison and fined $4 million.
- Ocie Mills and his son both spent 21 months in federal prison for filling a dry ditch — which the government argued was a seasonal wetland — with clean sand in order to build the son's home.[21]

"A father and son went to prison for filling a dry ditch with sand."

In addition, when Wall Street-millionaire Paul Tudor Jones III tried to create a waterfowl habitat on his land along the Chesapeake Bay, the EPA determined that this was a criminal act. Jones paid a $1 million fine and "donated" a second million to support a wildlife refuge, thereby avoiding trial. But William Ellen, Jones' employee, was sentenced to six months in jail and several additional months of home detention. Despite the fact that he had sought and secured 38 separate permits to construct a waterfowl habitat on his employer's land, the government considered him a willful violator of the law.[22]

In perhaps the most famous case, Hungarian immigrant John Pozsgai of Morrisville, Pa., was fined $5,000 and sentenced to three years in jail. After purchasing a 14-acre dump site to build a home and to expand his truck repair business, he carted off over 7,000 old tires and several rusting cars from his land and a storm-water drainage ditch. During heavy rain the ditch flooded and the tires became a breeding ground for mosquitoes. Pozsgai carted off the tires to reduce the mosquitoes and then leveled the drainage ditch and about five acres with clean fill dirt. The EPA prosecuted him for dumping dirt without permission. He served one and a half years in prison, another 18 months in a halfway house and five years of supervised probation. Fighting the case forced his family into bankruptcy, and his daughter is still seeking a presidential pardon for her father.[23]

"Another man went to prison for carting off 7,000 old tires (a breeding ground for mosquitoes) and filling the area with dirt."

Courts Begin to Rein in Federal Wetlands Authority. A number of legal scholars have argued that the federal government claims unconstitutional authority over wetlands, violating both the separation of powers between the federal and state governments (federalism) and the "takings clause" of the Fifth Amendment to the Constitution, which requires just compensation when private property is taken for public use.[24] Over time, some federal courts began to recognize the injustices resulting from prosecutions and the arguably unconstitutional authority the government claimed.

For example, in a 1991 case, a Missouri farmer moved dirt to repair a broken levee on his farm. He was accused of destroying wetlands and was tried, but not convicted.[25] The farmer's attorney forced an EPA witness to

admit that if a baseball diamond were built on the type of soil typical of wetlands, a player knocking dirt off his cleats could be in technical violation of Section 404. The court felt this went too far.

In 1998, a federal appeals court held that the Corps was limited to regulating the "filling" of wetlands and had to stop regulating activities that could not be characterized as such.[26] This case overturned the so-called Tullock rule, which prohibited dredging of wetlands. Under the Tullock rule, the Corps claimed they could regulate dredging and require property owners to get permits because some material might fall back into the wetlands. But the court noted: "Congress could not have contemplated that the attempted removal of 100 tons of [dredged material] could constitute an addition simply because 99 of it were actually taken away."[27]

To meet the standards set by the court, while providing the same type of regulation as the original Tullock rule, the Clinton administration proposed, and the Bush administration implemented, a new regulation covering dredged material that could be defined as more than incidental and which settles beyond its original place of removal.[28]

Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers. In 2001, the Supreme Court finally stepped in, telling the Corps and EPA that defining navigable waters to mean any habitat used by migratory birds is obviously stretching the government's power to regulate wetlands too far.[29] *SWANCC* dealt with whether or not the Corps could use the Migratory Bird Rule to regulate wetlands isolated from any streams, rivers or lakes of any kind. The Supreme Court held that the CWA did not authorize the Migratory Bird Rule.[30]

SWANCC revolved around the decision of solid waste agencies in Cook County, Ill., to use an abandoned sand and gravel pit for a municipal land fill. The pit was isolated and unconnected to any navigable waters, though it held some permanent and seasonal water. Citing the Glancing Goose Test, the Corps argued that filling the pit would violate the CWA. In overturning the lower courts and the Migratory Bird Rule, the Supreme Court determined that while it may be reasonable to regulate wetlands adjacent to navigable waters, the CWA does not grant the Corps *carte blanche* to regulate all waters.[31] The Court argued that while Congress evidenced some intent to regulate at least some nonnavigable waters, it did not write "navigable" out of the statute.[32] The Court explained that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[33]

"Regulators want to interpret the mandate to regulate navigable waters into carte blanche authority to regulate all waters."

Instead of expansively interpreting "navigable waters" and "waters of the United States" to mean any water permissibly regulated under Congress' commerce clause powers, the Court found "nothing approaching a clear state-

ment from Congress that it intended CWA Section 404(a) to reach an abandoned sand and gravel pit," at issue in this case.[34] Instead, the Supreme Court found that the CWA did not extend to isolated wetlands.[35]

While *SWANCC* clearly showed that isolated wetlands were not necessarily regulable under the CWA, as the *Rapanos* and *Carabell* cases demonstrate (see below), the Corps and EPA were loathe to relinquish any more regulatory authority than necessary.

Rapanos v. United States.[36] *Rapanos* concerns the desire of John Rapanos to develop three parcels of land he owns in Michigan. Starting in 1988, Rapanos hired contractors to prepare the three sites for development. In December of 1988 the Michigan Department of Natural Resources (MDNR) informed him that one site was likely a wetland. In spite of cease-and-desist letters from the MDNR in 1992 and the EPA in 1997, Rapanos continued to prepare the land for construction, without applying for a CWA permit. He felt that the Act did not apply to "nonnavigable, intrastate wetlands far removed from any traditional navigable waters."

The federal government charged Rapanos with civil and criminal offenses under the Clean Water Act. The district court found that there was a surface hydrologic connection between two of the sites and two rivers. None of these wetlands, however, are physically adjacent to a navigable waterway, nor did Rapanos ever fill any actual navigable waters.[37]

"One judge refused the federal government's request to imprison a landowner for moving sand from one end of his property to the other."

The government argued that the CWA provides authority to regulate wetlands that are adjacent to tributaries which in turn have a connection to navigable waters. In *Rapanos*, the 6th Circuit Court held that "[t]here is no 'direct abutment' requirement in order to invoke CWA jurisdiction"; rather, "[n]on-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke CWA jurisdiction."[38]

The federal government wanted Rapanos to spend 63 months in jail for repeated violations of the CWA; however, Chief District Judge Lawrence Zatkoff decided that it would be outrageous to jail him for these offenses:

> "So here we have a person who comes to the United States and commits crimes of selling dope and the government asks me to put him in prison for 10 months. And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and the government wants me to give him 63 months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I'm not going to do it."[39]

Judge Zatkoff sentenced Rapanos to three years probation and fined him $185,000. But the federal government wanted to make an example of Rapanos, so they appealed Judge Zatkoff's decision — and won.[40] The appeals

court sent the case back to the District Court for resentencing — meaning harsher sentencing — arguing that the District Court improperly deviated from the U.S. Sentencing Guidelines Manual for a crime of the magnitude Rapanos committed.

Carabell v. United States Army Corps of Engineers.[41] The Carabells wanted to build condos on their acreage in Michigan. Fifteen of the 19.6 acres were a forested wetland. But the property is hydrologically isolated from any navigable water by nonpermeable berms along two sides of the property.[42] The Carabells' first application for a permit from the Michigan Department of Environmental Quality was denied, even after they agreed to construct a functional wetland on 3.7 acres of their land. The state agency recommended a permit be issued, but the EPA objected and asserted federal jurisdiction on the grounds that the property was a wetland adjacent to navigable waters.

The Corps took over the case from the EPA, and even though they conducted three site inspections, they never found a hydrological connection between the property and any navigable waterway. Instead, the Corps argues that it has regulatory authority because the land is "adjacent to a drain which empties directly into a [traditional navigable] water."[43]

The federal district court and, on appeal, the 6th Circuit Court agreed with the Corps that it had authority to regulate the land. The Carabells appealed to the Supreme Court and the Supreme Court agreed to hear the case, consolidating it with the Rapanos case.

Court Decision Muddies Wetlands Regulation. On June 19, 2006, the Supreme Court issued a fractured (5-4) opinion in the *Rapanos* and *Carabell* cases. It overturned the lower courts' decisions, arguing that the Corps misinterpreted the government's reach under the CWA in denying both Rapanos and the Carabells permits to develop their properties. Writing for a plurality of the Supreme Court, Justice Scalia noted the significant hurdles the average applicant for a permit had to overcome. He said the Corps exercises the powers of an "enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation' and 'in general, the needs and welfare of the people,'" when deciding whether to grant a permit to alter or develop a wetland.[44] Confronting civil and criminal penalties, landowners cannot easily avoid the substantial costs involved in the permitting process. The average applicant spends 788 days and more than $271,000 to gain an individual permit.[45]

"Justice Scalia said the Army Corps of Engineers exercises the powers of an enlightened despot."

While these burdens might be justified to protect permanent wetlands adjacent to or connected by flowing surface water to navigable waterways, the Supreme Court found that the CWA did not intend "waters of the United States" to include ditches, canals and other channels through which water flows intermittently or briefly.[46]

Scalia — joined by Chief Justice Roberts, Justice Alito, and Justice Thomas — set out a two-part test to determine whether the Corps has juris-

diction over a wetland. First, the wetlands must be adjacent to an essentially permanent body of water connected to traditionally defined navigable waters. Second, the wetlands must have a continuous surface connection with that water.[47] This seems relatively straightforward. The Supreme Court vacated the 6th Circuit's opinion and remanded both back to the lower courts. Scalia made it clear that he thought both Rapanos and the Carabells should win.

The plurality's straightforward opinion, however, was muddled by the separate concurring opinion of Justice Kennedy. He agreed in overturning the lower courts' rulings but not in the criteria set forth by Scalia. Kennedy argued that as long as the Corps could establish a significant connection with navigable waters it could legally exercise jurisdiction over wetlands that were not navigable or were adjacent to nonnavigable waterways.[48] Some analysts argue that since Kennedy was the swing vote, his opinion should control. This would open the door for the appellants to lose — as long as the Corps establishes the hydrological, biological and other functions of the wetlands and their connection to navigable waters in each case.

"The Supreme Court couldn't agree on the definition of a federally regulated wetland."

Would Less Federal Regulation Be Bad for the Environment?

Contrary to the federal government's view for its first one and one-half centuries, wetlands are not public nuisances. Many wetlands provide economically and ecologically valuable services — such as water filtration, flood mitigation and habitat for species — which were not fully understood or considered until relatively recently. Clearly, both Kennedy's concurring opinion and the minority opinion in the *Rapanos* and *Carabell* cases indicate some justices are concerned that the environment would suffer greatly if the Clean Water Act's regulatory authority was restricted.

Even so, the current position of the Corps and the EPA goes beyond clear congressional intent and, arguably, beyond what the Constitution allows. But even where the federal government has legitimate authority over wetlands, evidence indicates that states and private parties are more than capable of protecting much of the nation's ecologically valuable wetlands.

Protecting Wetlands. To establish a proper wetlands policy, it should first be explicitly acknowledged that while many wetlands are economically or ecologically valuable, others are not — rather, they are simply a breeding ground for pests. A rational wetlands policy would distinguish between the two — and arguably, the federal government has no legitimate role when the question is whether or not a private party, state or local government should be allowed to develop a non-vital wetland.

Second, it is clear that the federal government has direct authority and responsibility to manage publicly owned wetlands:

- Approximately 25 percent of wetlands in the lower 48 states are on federal property, and Article IV, Section 3 of the Constitution grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."
- Executive Order 11990, issued in May 1977 by President Carter, requires executive branch agencies to avoid adverse impacts on wetlands to the "maximum extent possible."[49]

Thus, federal wetlands regulations on federally owned property raise no constitutional issues. However, federal lands often abut state or private property. When the government determines a particular wetland or adjoining land is ecologically valuable and split ownership threatens to degrade the wetland, the government should purchase the portion it doesn't own.[50]

Ending Subsidies That Harm Wetlands. Another critical step the federal government could take to protect wetlands is to end subsidies that encourage unwise and destructive development of fragile, valuable wetlands.[51] For instance, agricultural subsidies encourage farmers to cultivate as many acres as possible, often at the expense of wetlands. From 1986 to 1997, the conterminous United States experienced a net loss of 644,000 acres of wetlands, according to a report by the U.S. Fish and Wildlife Service (USFWS).[52] While wetland losses have slowed in recent years and there are other causes of wetland depletion, the draining of wetlands for agricultural use continues to be the leading cause of wetland loss. Wetland conversion for agricultural use is responsible for: [53]

"Federal subsidies encourage farmers and developers to destroy wetlands."

- 87 percent of all wetland losses from the 1950s to the 1970s,
- 54 percent of wetland loss from the 1970s through the 1980s, and
- 49 percent of wetlands lost from 1986 to 1997.

A growing amount of wetlands acreage is also lost to commercial and residential development on the coasts and along rivers. Much of this development would not be undertaken were it not for federally subsidized flood control programs and flood insurance. Indeed, the Heinz Center, an environmental research institute, determined that without federal flood insurance and flood control programs, development density in areas at high risk of flooding — almost always made up of or containing wetlands — would be about 25 percent lower than in areas at lower risk.[54]

Ending federal subsidies for farming and flood insurance would reduce the destruction of wetlands and allow the reclamation of some wetlands that have been converted to other uses.

Federal versus State Authority over Wetlands. State governments also have a great deal of authority over wetlands within their borders. Indeed, federalism is a core principle of the Constitution. Federalism is the separation

of power between the federal and state governments. The Founding Fathers thought that divided powers were necessary to protect the rights of citizen by creating two opposing powers. James Madison and others hoped that this would create a "double protection" to the people.[55] Federalism should not be confused with states' rights. States do not have rights, they have powers. The Ninth and Tenth Amendments in particular demonstrate that the Founding Fathers were not confused over the distinction between rights and powers:

- Amendment IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
- Amendment 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."

Today, however, the principle of federalism is more rhetoric than reality in our nation's Capitol — and this is nowhere more true than in the federal government's assertion of authority to control the development of isolated plots of occasionally soggy ground. History indicates this federal usurpation of state and local authority over development is not only unjustified but unnecessary.

Race-to-the-Bottom of Wetlands. Some have argued that federal programs are needed because states will engage in an environmentally destructive "race-to-the-bottom" in which they will compete for development by sacrificing their environmental amenities.[56] Intuitively, race-to-the-bottom has a certain appeal, but there are many reasons why it only occurs in theory.[57] The most important reason is that environmental regulations are only one aspect over which states compete for business.[58] Furthermore, while states want to lure businesses, they also need employees — and environmental amenities are one factor that lures people to one state over another. This desire for environmental amenities creates pressure for more environmental protections.[59]

"States have an incentive to protect wetlands because they compete to lure people seeking environmental amenities."

If race-to-the-bottom were a good predictor of state regulatory decisions, one would expect the states to lag behind the federal government in the protection of environmental amenities. This is not the case, especially with respect to state regulation of wetlands. According to environmental policy expert Jonathan Adler, "Not only did states not wait for the federal government to begin regulating wetlands, but the order in which states began to act is the precise opposite of what the race-to-the-bottom theory would predict."[60] Consider:

- According to the National Wetland Inventory, 15 states have more than 10 percent of their land area in wetlands; with the exception of Alaska, all of them enacted their first wetland protection statutes before the CWA was applied to wetlands.

- Moreover, most of these states have some protections for inland wetlands in addition to coastal wetlands — the exact opposite of what the race-to-the-bottom theory would predict, says Alder.[61]

It is not surprising that the states often take the lead for the protection of wetlands; after all, the individual states have the "primary responsibilities and rights … to prevent, reduce, and eliminate pollution."[62] According to the EPA and Corps, 15 states had programs that addressed isolated wetlands before *SWANCC*; since *SWANCC*, two states have adopted such legislation, while others are considering similar programs.[63]

"Hunters and resort developers have protected millions of acres of wetlands."

Private Protection of Wetlands. Long before either federal or state governments recognized the value of wetlands, individuals and private associations were actively protecting them. Indeed, in the late 19th and early 20th centuries, while the federal government was encouraging the development of coastal wetlands for ports and urban areas in major cities on the East Coast, about 11,000 private duck clubs managed to protect five to seven million acres of wetlands from destruction. While the federal government continued to promote the development, through subsidized insurance, of environmentally sensitive barrier islands, the commercial interests at Hilton Head Island, S.C., discovered that conservation was good.[64]

Private protection of wetlands continues today. There are over 1,200 land trusts that protect land through donation or purchase of the land in fee simple, or through the donation or purchase of conservation easements.[65] According to the Land Trust Alliance, land trusts have protected more than 6.2 million acres.

Various conservation organizations also work to protect wetlands:

- Ducks Unlimited has preserved over 10 million acres of wildlife habitat.[66]
- The National Audubon Society has been working for the last 100 years to protect wetlands for bird habitat.[67]
- In Maine, the New England Forestry Foundation purchased an easement to preserve 72,000 acres of wetlands in perpetuity.[68]

Numerous other landowners have created or preserved wetlands to attract wildlife.[69] For example, California grape growers voluntarily created a no-crop buffer zone along streams, based on an economic model developed by a local agency.[70]

With so many ways to protect wetlands, there is ample reason to believe they will continue to receive protection by states, local governments and private parties, even if the regulatory scope of the CWA is limited. In fact, some research suggests wetlands may be *better* protected through public and private incentive-based programs for wetland restoration.[71]

"Due to private organizations, there has been no net loss of wetlands since the mid-1980s."

Incentive-Based Programs. The voluntary, incentive-based programs of the U.S. Fish and Wildlife Service's Partners for Wildlife Program and the Department of Agriculture's Wetland Reserve Program, along with state, local and private efforts, have been largely responsible for stemming the loss of wetlands since the mid-1980s.[72] EPA's *Clean Water Action Plan* recognizes the role these incentive-based programs have played and will continue to play in wetland conservation and restoration.[73]

For instance:

- Under the Partners for Wildlife Program, landowners restored 48,800 acres of wetlands in 2001 and 65,000 acres in 2002.
- In Orange County, N.C., one family joined a Natural Resource Conservation Service project to restore 17 acres of wetlands in 2001.
- And in Oregon, a married couple worked with government to repair 260 acres of wetlands along the Sprague River.[74]

An examination of federally reported data concluded that while the United States has achieved the stated goal of no net loss of wetlands, this would have been the case even without Section 404. In fact, according to this analysis, diverting the funds allocated to the Corps' regulatory program to voluntary incentive programs would have actually increased the rate of gain.[75]

Conclusion

With the *Rapanos* and the *Carabell* decisions, the Supreme Court placed further restraints upon the federal government's ability to limit individuals' use of their property in order to protect wetlands. However, just what those limits are is still unclear. Justice Scalia's plurality opinion provides meaningful restrictions on federal authority, but Justice Kennedy's concurring opinion leaves the extent of federal authority just as unsettled as before these cases. The federal government has a legitimate role in protecting some wetlands, but the Clean Water Act is not the only or the most effective way to protect wetlands over which it has no legitimate authority. Until the EPA and the Corps provide clearer rules, and Congress acts to respect the states' role in protecting wetlands and to preserve private property rights, the courts should continue to narrow the scope of the CWA. By doing so, the judiciary will respect states' authority over water quality and wetlands within their borders and encourage individual efforts to promote conservation, while upholding constitutionally protected property rights.

"The federal government should protect wetlands on its property, and let the states protect theirs."

NOTE: Nothing written here should be construed as necessarily reflecting the views of the National Center for Policy Analysis or as an attempt to aid or hinder the passage of any bill before Congress.

Notes

[1] *Wetlands: Their Use and Regulation* (Washington, D.C.: U.S. Congress, Office of Technology Assessment, PB84-175918, March 1984), pages 37-38.

[2] Thomas E. Dahl, "Wetlands Losses in the United States, 1780s to 1980s," U.S. Department of the Interior, Fish and Wildlife Service, 1990, page 6.

[3] *Leovy v. U.S.,* 177 U.S. 621, 636 (1990).

[4] Thomas E. Dahl, "Status and Trends of Wetlands in the Conterminous United States 1986 to 1997," U.S. Department of the Interior, Fish and Wildlife Service, 2000, page 9.

[5] While commonly known as the Clean Water Act, when it passed in 1972 the Act was titled the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 47 (1972).

[6] CWA § 301 & 502(12); 33 U.S.C. § 1311, 1362(12) (2000).

[7] CWA § 502(7); 33 U.S.C § 1362(7) (2000).

[8] 33 C.F.R. § 209.120(d)(1) (1974).

[9] 33 C.F.R. § 209.260(e)(1) (1974).

[10] 392 F.Supp. 685 (D.D.C 1975).

[11] Ibid.

[12] See 33 C.F.R. § 323.2 (1978).

[13] 33 C.F.R. § 323.2(a)(5) (1978). A regulatory definition of wetlands emerged tied to the existence of certain soil types and moisture-loving vegetation along with brief periods of coverage by water — as little as seven days in the early definitions. See "Corps of Engineers Wetlands Delineation Manual," U.S. Army Corps of Engineers, Environmental Laboratory, Technical Report Y-87-1, January 1987. Available at http://www.wetlands.com/regs/tlpge02e.htm.

[14] Clean Water Act, 33 U.S.C. §1251 et seq. (1977). Available at http://www4.law.cornell.edu/uscode/html/uscode33/usc_sec_33_00001251----000-.html

[15] The "Migratory Bird Rule" is not a rule, rather it is an interpretation. As the Supreme Court explained in *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers,* 531 U.S. 159 (2001), the "Migratory Bird Rule" was issued "without following the notice and comment procedures outlined in the Administrative Procedures Act."

[16] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41,217 (1986).

[17] "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act," U.S. Environmental Protection Agency and U.S. Department of the Army, January 19, 1989. Available at http://www.epa.gov/owow/wetlands/guidance/404f.html; and "Section 404 of the Clean Water Act: How Wetlands Are Defined and Identified," U.S. Environmental Protection Agency, Wetlands Fact Sheet, last updated February 22, 2006. Available at http://www.epa.gov/owow/wetlands/facts/fact11.html.

[18] Kent Jeffreys, "Progressive Environmentalism: Principles for Regulatory Reform," National Center for Policy Analysis, Policy Report No. 194, June 1995.

[19] U.S. Army Corps of Engineers, "Wetlands Enforcement Initiative," *Regulatory Guidance Letter*, No. 90-9, December 17, 1990.

[20] R.J. Smith, "Clean Water Act Sanity on the Horizon?" *Human Events Online*, July 3, 2006. Available at http://www.humanevents.com/article.php?id=15854.

[21] Ibid.

[22] Kent Jeffreys, "Progressive Environmentalism: Principles for Regulatory Reform."

[23] R.J. Smith, "Clean Water Act Sanity on the Horizon?"

[24] For instance, James V. DeLong, *Property Matters* (New York: The Free Press, 1997); Mark L. Pollot, *Grand Theft and Petit Larceny* (San Francisco: Pacific Research Institute for Public Policy, 1993); William Perry Pendley, *It Takes a Hero* (Bellevue,

WA: Free Enterprise Press, 1994); and Karol J. Ceplo, "Land-Rights Conflicts in the Regulation of Wetlands," in Bruce Yandle, ed., *Land Rights* (Lanham, Md: Rowman and Littlefield, 1995).

[25] Kent Jeffreys, "Whose Lands Are Wetlands?" *Journal of Regulation and Social Costs,* March 1992, pages 33-59.

[26] *National Mining Association v. U.S. Army Corps of Engineers*, 145 F. 3d 1399 (DC Cir., 1998) .

[27] Ibid., at 1404.

[28]Though President Clinton finalized the rule in late 2000, President Bush delayed the implementation date in order to review the regulation. On April 16, 2001, the Bush administration finalized the Clinton proposal. *Federal Register* 66, no. 11 (17 January 2001): 4,549. Two groups are pursuing a legal challenge to the new regulation — the National Association of Homebuilders and the National Stone, Sand and Gravel Association.

[29] 531 U.S. 159 (2001).

[30] *SWANCC*, 531 U.S. at 166.

[31] See *SWANCC*, 531 U.S. at 171–72; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

[32] See *SWANCC*, 531 U.S. at 172.

[33] Ibid**.**

[34] See *SWANCC*, 531 U.S. at 174.

[35] See *SWANCC*, 531 U.S. at 162, 174.

[36] Rapanos Brief at 5-6 and Government Reply Brief to Rapanos at 10–13.

[37] Rapanos Brief at 6.

[38] Government Reply Brief to Rapanos at 14.

[39] See *United States v. Rapanos*, 235 F.3d 256, 260 (6th Cir. 2000) (citing the lower court).

[40] Rapanos appealed to the Supreme Court. The Supreme Court did not hear his case in 2001, but instead remanded it to the lower court for reconsideration in light of the Supreme Court's ruling in *SWANCC* — though it eventually wound up back before the Supreme Court.

[41] Carabell Brief at 3, 6 and 7-8.

[42] A satellite view of the land is available at http://tinyurl.com/gqlkd. The Carabell's land is the forested land shaped like an inverted right triangle with Donner Road forming one of the sides.

[43] Corps Reply to Carabell at 10.

[44] *Rapanos et ux., et al. v. United States,* 126 S.Ct. 2208, 2214 (2006).

[45] Ibid.

[46] David Loos, "Wetlands: Supreme Court Decision Could Force Agency Rulemaking, Experts Say," E&E News PM, June 20, 2006.

[47] *Rapanos* at 2221.

[48] Ibid., at 2252.

[49] Gail Bingham et al., ed., "Issues in Wetlands Protection: Background Papers Prepared for the National Wetlands Policy Forum," Conservation Foundation, 1990, page 24.

[50] Aside from the CWA there are a variety of federal programs that protect wetlands, including: the Food Security Act's Swampbuster requirements, Wetlands Reserve Program (Dept. of Agriculture), grant programs such as Partners in Wildlife (administered by the USFWS), the Coastal Wetlands Restoration Program (administered by the National Marine Fisheries Service), the State Grant, Five Star Restoration, National Estuary Programs (administered by EPA), and the Migratory Bird Conservation Commission (composed of the Secretaries of Interior and Agriculture, the Administrator of EPA and Members of Congress). 68 Fed. Reg. 1991, at 1995.

[51] H. Sterling Burnett, "Protecting the Environment through the Ownership Society – Part One," National Center for Policy Analysis, Policy Report No. 282, January 2006.

[52] Thomas E. Dahl, "Status and Trends of Wetlands in the Conterminous United States 1986 to 1997," U.S. Department of the

Interior, Fish and Wildlife Service, 2000.

[53] U.S. Department of the Interior, "The Impact of Federal Programs on Wetlands — Volume II," March 1994. Available at http://www.doi.gov/oepc/wetlands2/index.html; and Thomas E. Dahl, "Status and Trends of Wetlands in the Conterminous United States 1986 to 1997," U.S. Department of the Interior, Fish and Wildlife Service, 2000.

[54] James Madison, "The Union as a Safeguard Against Domestic Faction and Insurrection (cont'd)," The Federalist Papers, No. 10.

[55] James Madison, *Federalist Papers,* No. 10.

[56] See, for example, Richard B. Stewart, "Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy," *Yale Law Journal*, Vol. 86, May 1977, pages 1196, 1211-12; Richard B. Stewart, "The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act," *Iowa Law Review*, Vol. 62, 1977, pages 713, 747; Craig N. Oren, "Prevention of Significant Deterioration: Control-Compelling Versus Site-Shifting," *Iowa Law Review*, Vol. 74, 1988, pages 1, 29; Scott R. Saleska and Kirsten H. Engel, "Facts Are Stubborn Things: An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting," *Cornell Journal of Law and Public Policy*, Vol. 8, 1998, page 55.

[57] See, for example, Richard L. Revesz, "Federalism and Environmental Regulation: A Public Choice Analysis," *Harvard Law Review*, Vol. 115, 2001, page 553; Jonathan H. Adler, "Let 50 Flowers Bloom: Transforming the States into Laboratories of Environmental Policy," *Environmental Law Reporter*, Vol. 31, 2001, page 11,284; Jonathan H. Adler, "The Ducks Stop Here? The Environmental Challenge to Federalism," *Supreme Court Economic Review*, Vol. 9, 2001, pages 205, 223-231; Richard L. Revesz, "The Race to the Bottom and Federal Environmental Regulations: A Response to Critics," *Minnesota Law Review*, Vol. 82, 1997, page 535; Richard Revesz, "Federalism and Environmental Regulation: A Normative Critique," in John Ferejohn and Barry R. Weingast, eds., *The New Federalism: Can the States Be Trusted?* (Stanford: Hoover Press, 1997), pages 97-127; Richard L. Revesz, "Federalism and Environmental Regulation: Lessons from the European Union and the International Community," *Virginia Law Review*, Vol. 83, 1997, page 1331; Wallace E. Oates, "On Environmental Federalism," *Virginia Law Review*, Vol. 83, 1997, page 1321.

[58] Richard Revesz, "Federalism and Environmental Regulation: A Normative Critique," in John Ferejohn and Barry R. Weingast, eds., *The New Federalism: Can the States Be Trusted?* (Stanford: Hoover Press, 1997), pages 97-127, 105. States also compete on taxes, infrastructure, the skill of local workers, local workplace regulations and so forth.

[59] Deborah Jones Merritt, "Commerce!" *Michigan Law Review*, Vol. 94, 1995, pages 674, 706.

[60] Jonathan H. Alder, "The Ducks Stop Here? The Environmental Challenge to Federalism," *Supreme Court Economic Review*, Vol. 9, 2001, pages 205, 228.

[61] Jonathan H. Alder, "The Ducks Stop Here?" pages 228-229.

[62] *SWANCC*, 531 U.S. at 167.

[63] State governments are also helping to preserve wetlands through federal grants and by working with federal agencies. For example, the EPA's Wetland Program Development Grants are available to state and local governments for improving wetland program capacities. The U.S. Department of Justice and other federal agencies cosponsored a national wetlands conference with the National Governors Association Center for Best Practices, National Conference of State Legislatures, the Association of State Wetlands Managers and the National Association of Attorneys General. EPA also is providing funding to the National Governors Association Center for Best Practices to help states develop policies and take action to protect intrastate isolated waters. 68 Fed. Reg. 1991, at 1995.

[64] "Special Report: The Public Benefits of Private Conservation," in *Environmental Quality: The Fifteenth Annual Report of the Council on Environmental Quality* (Washington, D.C.: CEQ, 1984), pages 387-394.

[65] Land Trust Alliance, "About Land Trusts." Available at http://www.lta.org/aboutlt/index.html.

[66] Ducks Unlimited, "National Fact Sheet," April 2006. Available at http://www.ducks.org/media/News/_documents/National.pdf.

[67] National Audubon Society, "Audubon Turns 100!" Press Release, January 5, 2005. Available at http://www.audubon.org/centennial/Press_Kit_Materials/Jan%205%20Release.doc.

[68] Gale Norton and Anne Veneman, "There's More Than One Way to Protect Wetlands," *New York Times*, March 12, 2003.

[69] See, for example, Robert J. Smith, "Viansa Winery Wetlands," Competitive Enterprise Institute, June 1, 1997, examining Viansa Winery and their efforts to create a private wetland. Available at http://www.cei.org/gencon/025,01363.cfm. See also

Robert J. Smith, "Cypress Bay Plantation, Cummings, South Carolina," Competitive Enterprise Institute, Issue Analysis, December 1, 2000, which tells about the private conservation efforts of Skeet Burris on his plantation, including wetlands creation.

[70] U.S. Environmental Protection Agency and U.S. Department of Agriculture, "Clean Water Action Plan: Restoring and Protecting America's Waters," EPA-840-R-98-001, February 1998.

[71] See, for example, Jonathan Tolman, "Swamped: How America Achieved 'No Net Loss,'" Competitive Enterprise Institute, April 1997. Available at http://www.cei.org/pdf/2302.pdf. See also Courtney LaFountain, "Saving Wetlands without Soaking Landowners," Center for the Study of American Business, Policy Brief No. 164, 1996.

[72] See Jonathan Tolman, "Swamped: How America Achieved 'No Net Loss.'"

[73] U.S. Environmental Protection Agency and U.S. Department of Agriculture, "Clean Water Action Plan: Restoring and Protecting America's Waters."

[74] Gale Norton and Ann Veneman, "There's More Than One Way to Protect Wetlands," *New York Times*, March 12, 2003.

[75] Jonathan Tolman, "Swamped: How America Achieved 'No Net Loss.'"

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About the NCPA

The NCPA was established in 1983 as a nonprofit, nonpartisan public policy research institute. Its mission is to seek innovative private sector solutions to public policy problems.

The center is probably best known for developing the concept of Medical Savings Accounts (MSAs), now known as Health Savings Accounts (HSAs). The *Wall Street Journal* and *National Journal* called NCPA President John C. Goodman "the father of Medical Savings Accounts." Sen. Phil Gramm said MSAs are "the only original idea in health policy in more than a decade." Congress approved a pilot MSA program for small businesses and the self-employed in 1996 and voted in 1997 to allow Medicare beneficiaries to have MSAs. A June 2002 IRS ruling frees the private sector to have flexible medical savings accounts and even personal and portable insurance. A series of NCPA publications and briefings for members of Congress and the White House staff helped lead to this important ruling. In 2003, as part of Medicare reform, Congress and the President made HSAs available to all non-seniors, potentially revolutionizing the entire health care industry.

The NCPA also outlined the concept of using tax credits to encourage private health insurance. The NCPA helped formulate a bipartisan proposal in both the Senate and the House, and Dr. Goodman testified before the House Ways and Means Committee on its benefits. Dr. Goodman also helped develop a similar plan for then presidential candidate George W. Bush.

The NCPA shaped the pro-growth approach to tax policy during the 1990s. A package of tax cuts, designed by the NCPA and the U.S. Chamber of Commerce in 1991, became the core of the Contract With America in 1994. Three of the five proposals (capital gains tax cut, Roth IRA and eliminating the Social Security earnings penalty) became law. A fourth proposal — rolling back the tax on Social Security benefits — passed the House of Representatives in summer 2002.

The NCPA's proposal for an across-the-board tax cut became the focal point of the pro-growth approach to tax cuts and the centerpiece of President Bush's tax cut proposal. The repeal by Congress of the death tax and marriage penalty in the 2001 tax cut bill reflects the continued work of the NCPA.

Entitlement reform is another important area. With a grant from the NCPA, economists at Texas A&M University developed a model to evaluate the future of Social Security and Medicare. This work is under the direction of Texas A&M Professor Thomas R. Saving, who was appointed a Social Security and Medicare Trustee. Our online Social Security calculator, found on the NCPA's Social Security reform Internet site (www.TeamNCPA.org), allows visitors to discover their expected taxes and benefits and how much they would have accumulated had their taxes been invested privately.

Team NCPA is an innovative national volunteer network to educate average Americans about the problems with the current Social Security system and the benefits of personal retirement accounts.

In the 1980s, the NCPA was the first public policy institute to publish a report card on public schools, based on results of student achievement exams. We also measured the efficiency of Texas school districts. Subsequently, the NCPA pioneered the concept of education tax credits to promote competition and choice through the tax system. To bring the best ideas on school choice to the forefront, the NCPA and Children First America published an *Education Agenda* for the new Bush administration,

policymakers, congressional staffs and the media. This book provides policymakers with a road map for comprehensive reform. And a June 2002 Supreme Court ruling upheld a school voucher program in Cleveland, an idea the NCPA has endorsed and promoted for years.

The NCPA's E-Team program on energy and environmental issues works closely with other think tanks to respond to misinformation and promote commonsense alternatives that promote sound science, sound economics and private property rights. A pathbreaking 2001 NCPA study showed that the costs of the Kyoto agreement to halt global warming would far exceed any benefits. The NCPA's work helped the administration realize that the treaty would be bad for America, and it has withdrawn from the treaty.

NCPA studies, ideas and experts are quoted frequently in news stories nationwide. Columns written by NCPA scholars appear regularly in national publications such as the *Wall Street Journal*, the *Washington Times*, *USA Today* and many other major-market daily newspapers, as well as on radio talk shows, television public affairs programs, and in public policy newsletters. According to media figures from Burrelle's, nearly 3 million people daily read or hear about NCPA ideas and activities somewhere in the United States.

The NCPA home page (www.ncpa.org) links visitors to the best available information, including studies produced by think tanks all over the world. Britannica.com named the ncpa.org Web site one of the best on the Internet when reviewed for quality, accuracy of content, presentation and usability.

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- TIME

"Oftentimes during policy debates among staff, a smart young staffer will step up and say, 'I got this piece of evidence from the NCPA.' It adds intellectual thought to help shape public policy in the state of Texas."

- Then-GOV. GEORGE W. BUSH

"The [NCPA's] leadership has been instrumental in some of the fundamental changes we have had in our country."

- SEN. KAY BAILEY HUTCHISON

"The NCPA has a reputation for economic logic and common sense."

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