COMMENTS

The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause

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INTRODUCTION

Joey owns a small parcel of land, known as "Dryacre," in the Central Valley of California.[1] On the property is a small, clay-lined depression that fills with water during the rainy season and dries up in the spring. The depression features seasonal plants that the federal government has identified as native to wetland[2] areas. Dryacre, as the name suggests, is miles away from the nearest lake or stream.

The federal government would classify Dryacre's shallow depression as an isolated wetland.[3] Migratory birds[4] might land at this isolated wetland someday. Does this theoretical possibility

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[1] This is a hypothetical scenario.

[2] The U.S. Army Corps of Engineers (Corps) defines wetlands as areas that have sufficient water content to support vegetation that is typically found in wetlands areas. 33 C.F.R. § 328.3(b) (1993). The regulations further state that wetlands are typically "swamps, marshes, bogs, and similar areas." *Id.*

Applying this definition has been a source of heated controversy. H. Jane Lehman, *Landowners Drawing the Battle Lines*, L.A. TIMES, Oct. 11, 1992, at K2. In 1989 the Corps and the Environmental Protection Agency (EPA) issued a new manual for delineating wetlands that expanded the definition of the nation's wetlands by at least 65 million acres. *Position Statement: Written Statement of the National Association of State Departments of Agriculture Submitted to the Environment and Public Works Subcommittee on Clean Water, Fisheries, and Wildlife, United States Senate Re: Federal Wetlands Protection*, Federal News Service, Sept. 15, 1993, *available in* LEXIS, Nexis Library, CURRNT File [hereafter *Position Statement*]. The 1989 manual defined "wetlands" as those lands that have water within 18 inches of the surface for one week or more during the growing season and have either wetlands-type vegetation or surface inundation. *Id.* In 1991, the Bush Administration proposed a new manual which contained a narrower definition. *Id.* This new manual defined a wetland by the presence of wetlands-type vegetation, soils, and hydrology, in addition to water on the surface for at least 21 days. *Id.* The 1991 manual drew over 80,000 public comments and was never approved. *Id.* Finally, in 1991, Congress funded a new study for yet another manual and ordered the Corps to continue using the 1989 version of the manual until further notice. *Id.*

[3] *See infra* note 39 and accompanying text (describing physical and legal characteristics of isolated wetlands).

[4] A migratory bird is a bird that during the course of a year will move from one geographic area to another. JOHN K. TERRES, THE AUDUBON SOCIETY ENCYCLOPEDIA OF NORTH AMERICAN BIRDS 602 (1980). A nonmigratory bird will spend the entire year in one locale. *Id.*

allow the federal government to regulate Dryacre under the Commerce Clause?[5] At least one federal court has indicated that it can.[6]

Government agencies and environmental groups[7] are beginning to focus more of their resources on the preservation of isolated wetlands.[8] Because wetlands often are inhabited by many rare and endangered species,[9] they are a particularly valuable and unique form of habitat.[10] Unfortunately, the vast majority of these isolated wetlands are located on private land.[11]

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[5] U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause is one of the enumerated powers that the Constitution grants to Congress. *See infra* notes 47-48 and accompanying text (discussing nature of Commerce Clause power). For a discussion of congressional power to regulate activities under the Commerce Clause, see *infra* notes 45-108 and accompanying text (discussing judicial interpretations of commerce power).

[6] *See* Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991).

[7] The catalyst for the modern environmental movement was the publication of Rachel Carson's book, *The Silent Spring*, in 1961. PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES 661 (1983). The book warned of the dangers DDT posed to humans and wildlife. *Id.* For purposes of this Comment, environmental groups are those organizations that seek to end environmental degradation in the United States. Examples of such groups include the Sierra Club, League of Conservation Voters, and the Environmental Defense Fund. LOUIS FILLER, THE DICTIONARY OF AMERICAN CONSERVATISM 113 (1988).

[8] For example, the Houston Sierra Club and the Audubon Society are trying to get the Corps to implement new rules to protect isolated wetlands in the Katy Prairie area of Texas. Gaynell Terrell, *New Wetlands Policy Won't Be Enough to Save Katy Prairie, Activists Contend*, HOUS. POST, Sept. 24, 1993, at B3. Environmental groups in South Carolina opposed passage of a state wetlands protection law because it failed to include isolated wetlands. *Polls: Restrictions on Wetlands Developments Favored*, AP, Jan. 3, 1990, *available in* LEXIS, News Library, PAPERS File. Environmentalists hailed a Florida law which extended the state's wetlands preservation laws to isolated wetlands. Randy Loftis, *Wetlands Rules Make Builders Boil Over*, MIAMI HERALD, Dec. 8, 1986, at 3A. Some environmental groups contend that the consequences of not regulating isolated wetlands can be severe. Timothy B. Wheeler, *Wetlands Rule Sinks His Dream Home/Catonsville Man Told He Can't Build on Lot in Dorchester County*, BALT. EVENING SUN, June 25, 1991, at A1.

[9] Under the Endangered Species Act, an endangered species is one which is in danger of becoming extinct. 16 U.S.C. § 1532(6) (1988). A threatened species is one that is in jeopardy of becoming endangered. *Id.* § 1532(20).

[10] Thirty-five percent of endangered species in the United States are dependent on wetlands, but wetlands make up only five percent of the nation's lands. H.R. REP. NO. 259, 102d Cong., 1st Sess. 15 (1991). Fully one-third of all endangered species in the United States use wetlands for breeding, nesting, or spawning. Linda Kanamine, *Wetlands Policy Appeases, Doesn't Please/Conservation Effort Includes Flood Control*, USA TODAY, Aug. 25, 1993, at 6A.

[11] Two-thirds of the remaining wetlands in the United States are on private

Owners of these properties must deal with the enormous cost of complying with federal wetlands preservation regulations if they want to develop their holdings.[12]

The federal government regulates wetlands under the Clean Water Act.[13] The constitutional foundation for the Clean Water Act is the Commerce Clause.[14] If potential use of isolated

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property. Kanamine, *supra* note 10. Seventy-five percent of the wetlands in the lower 48 states are on privately owned land. *Position Statement*, *supra* note 2.

[12] U.S. Army Corps of Engineers community planner Peter Straub stated that the process of obtaining a permit to fill a wetland is "like an obstacle course" in which "[o]nly the strong" survive. Jane Kay, *Life Thrives in the Mud*, S.F. EXAM., Oct. 29, 1993, at A16. For instance, the Corps held up a $19 million school construction project in Juneau, Alaska, for six months at an estimated cost of $500,000 because the Corps discovered wetlands on the hillside site. Bridgid Schulte, States News Service, Jan. 21, 1992, *available in* LEXIS, Nexis Library, ARCNWS File. In another case, James City County, Virginia sought to solve a critical water shortage by building a dam on a swamp, thereby creating a reservoir. Richard Miniter, *Muddy Waters: The Quagmire of Wetlands Regulation*, POL'Y REV., Spring 1991, at 70. Litigation over Clean Water Act issues and the resulting delays in construction caused the county to incur $12 million in additional costs. *Id.* A Sacramento, California, developer discovered isolated wetlands on a commercial/residential expansion site and incurred over $1 million in redesign costs as a result. Janet Motenko, *Firm A-Vails-S Itself of Role as a One-Stop Shop for Builders*, BUS. J.-SACRAMENTO, Feb. 26, 1990, at 28. Wetlands regulations are now so burdensome that many landowners have tried to avoid areas which might possibly contain wetlands. H.R. REP. NO. 1089, 102d Cong., 2d Sess. 12 (1992).

[13] 33 U.S.C. § 1251 (1988 & Supp. V 1993).

[14] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985). The legislative history of the Clean Water Act reveals no other asserted constitutional basis for the law. *See id.* (explaining that legislative history discusses no other constitutional basis for Clean Water Act).

Theoretically, the next most likely basis for a congressional assertion of jurisdiction over isolated wetlands is the Treaty Clause. *See* U.S. CONST. art. 2, § 2 (granting federal government power to make treaties). The Supreme Court has held that Congress may be able to do by treaty what it could not do by statute alone. Missouri v. Holland, 252 U.S. 416, 433 (1920). In *Holland*, the Court validated the Migratory Bird Treaty Act of 1918, which Congress enacted to protect migratory birds. *Id.* at 435. Federal laws enacted to implement the treaty prohibit the killing or taking of any migratory bird. 16 U.S.C. § 703 (1988 & Supp. V 1993). Courts interpret this provision broadly. *See* Craig D. Sjostrom, Comment, *Of Birds and Men: The Migratory Bird Treaty Act*, 26 IDAHO L. REV. 371, 376-79 (1989) (reviewing cases which hold that § 703 prohibits affirmative actions that result in death of migratory birds). But even if the treaty power would allow Congress to regulate isolated wetlands, Congress has never indicated a desire to do so. Hoffman Homes v. Environmental Protection Agency, 961 F.2d 1310, 1322-23 (7th Cir. 1992), *vacated and reh'g granted at* 975 F.2d 1554 (7th Cir. 1992), but *incorporated into* concurring opinion of Judge Manion in Hoffman Homes v. Environmental Protection Agency, 999 F.2d 256, 262 (7th Cir. 1993).

wetlands by migratory birds is not a sufficient basis to invoke the Commerce Clause, Congress may not be able to regulate many isolated wetlands.[15] State and local authorities would then be responsible for the protection and regulation of isolated wetlands like those on Dryacre.[16] Conversely, if the Commerce Clause can reach isolated wetlands because of potential use by migratory birds, Congress can regulate Dryacre under the Clean Water Act.[17]

The consequences of a court finding that the Commerce Clause could reach Dryacre are profound.[18] There are 2.5 to 6 billion birds in the United States.[19] Of these billions, some two-thirds of the known species migrate.[20] Allowing federal regulation of any piece of land that migratory birds could use would appear to make the reach of the Commerce Clause virtually limitless.[21] An unbounded Commerce Clause has consequences

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The federal government could also invoke the Property Clause to regulate isolated wetlands on federal lands. *See* U.S. CONST. art. IV, § 3, cl. 2 (granting Congress power over federal property); *see also* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (holding that congressional power over federal lands under Property Clause is without limitation). In addition, if a state consents, Congress could obtain the power to regulate areas within that state which contain wetlands. *Kleppe*, 426 U.S. at 541-42 (holding that with state's consent, art. I, § 8, cl. 17 gives Congress legislative power over that state's land).

[15] *See infra* notes 31-35 and accompanying text (explaining that Commerce Clause defines limits of Clean Water Act).

[16] All powers not given to the federal government are reserved for the states or the people. U.S. CONST. amend. X. Currently, about 14 states have wetlands protection laws. Warren E. Leary, *In Wetlands Debate, Acres and Dollars Hinge on Definitions*, N.Y. TIMES, Oct. 15, 1991, at C4.

[17] *See infra* notes 45-46 and accompanying text (discussing enumerated powers doctrine and how it limits federal power).

[18] *See infra* notes 19-23 and accompanying text (describing consequences of Commerce Clause reaching isolated wetlands).

[19] TERRES, *supra* note 4, at 87.

[20] Two-thirds of the species of birds breeding in the northern United States migrate. *Id.* at 602. For instance, of the 215 species of birds which nest in the state of Michigan, only 20 do not migrate. *Id.* Among species that only migrate a few hundred miles are American goldfinches, tree sparrows, and meadowlarks. *Id.* at 602-03. Numerous species, including house wrens, some American robins, and tree swallows, move from northern states to southern states. *Id.* at 603. Many species, among them the brown creepers, grackles, red-winged blackbirds, American woodcocks, common snipe, and white-throated sparrows, nest in Canada and migrate to the Gulf of Mexico region. *Id.* California is a particularly common destination for migratory birds. *Id.* Finally, more than 100 species that spend the summer in the United States leave the country for the winter. *Id.*

[21] *See infra* notes 172-82 and accompanying text (noting that EPA interpretation

that go far beyond the realm of environmental regulation:[22] it will further the federal government's continuing absorption of state and local governmental functions.[23]

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of Clean Water Act is constitutionally limitless).

[22] *See infra* note 23 (describing other areas of law where federal government is asserting itself using Commerce Clause).

One attorney involved in isolated wetlands litigation has argued that if isolated wetlands substantially affect interstate commerce, everything substantially affects interstate commerce. Interview with Robin L. Rivett, Director, Environmental Law Section, Pacific Legal Foundation, in Sacramento, CA (July 1, 1993). A limitless Commerce Clause leaves nothing outside the scope of federal power. *Id.*

[23] The increase in the scope of federal power is a result of an expansive interpretation of the Commerce Clause. *See* Roger J. Miner, *The Consequences of Federalizing Criminal Law*, 4 CRIM. JUST. 16, 18 (Spring 1989) [hereafter *Federalizing Criminal Law*] (noting that increasing federal regulation of criminal conduct is due to broad reading of Commerce Clause). As illustrated below, federal power over environmental problems, crime, the economy, and state government has grown tremendously.

As former Delaware Governor Pete Du Pont noted, this broadening of federal power may mean that states will cease to exist in twenty-first century America. Pete Du Pont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J.L. & PUB. POL'Y 137 (1993). This trend is manifested in expanding federal entitlement programs, environmental regulations, and wetland definitions. *Id.* Indeed, every piece of state legislation faces the risk of interference by the federal government. Charles J. Cooper, *Independent of Heaven Itself: Differing Federalist and Anti-Federalist Perspectives on the Centralizing Tendency of the Federal Judiciary*, 16 HARV. J.L. & PUB. POL'Y 119, 125-26 (1993).

State and local government officials are very aware of the increasing role of the federal government. William Claiborne, *Nation's Mayors Press for Relief from Unfunded Mandates by Hill*, WASH. POST, Jan. 29, 1994, at A8. Unfunded federal mandates account for more than 11% of city budgets: the same percentage as police departments. *Id.* Sixteen percent of state and local budgets are made up of federal money. Al Gore, *The Big Squeeze: Why This Time Reform Will Make Our Government Smaller and Smarter*, WASH. POST, Sept. 12, 1993, at C1. One legislator estimates that federal mandates drive at least 40% of state spending. Bev Hermon, *Cheap Shot: Jim Bruner's Attack on the Legislature Was Unfounded*, PHOENIX GAZETTE, Sept. 19, 1993, at G2. According to the Heritage Foundation, as much as 60% of all state spending is for joint state-federal programs. *Federal Mandates: States Pay the Price*, ARIZ. REPUBLIC, Jan. 2, 1993, at A16. Federal health programs alone will consume 28% of state budgets by 1995. *No End in Sight: Unfunded Federal Mandates Burden States*, COLUMBUS DISPATCH, Mar. 28, 1992, at 8A. For example, Medicaid grew from 10.2% of state budgets in 1987 to 13.6% in 1991. Dave Von Drehle, *Bad Year for States' Budgets Expected to Lead to Worse One: Mandated Medicaid, Prison Construction Costs Cited*, WASH. POST, Oct. 30, 1991, at A2. Mandated expenses are growing at a rate far greater than overall state spending. *Id.*

Governor Wilder of Virginia stated that federal mandates drove 93% of all proposed new spending in his budget and imposed other programs beyond the state's control: the total amount was $863 million. Donald P. Baker, *In Maryland and Virginia, Legislatures Face the Gloom: Wilder Seeks Health-Care Providers Tax*, WASH. POST, Jan. 9, 1992, at A23. The governor of Missouri estimated that the federal government drives 35% of his state's budget. Robert L. Koenig, *Governors Wary of Bush Proposal to Shift*

This Comment maintains that Congress cannot regulate isolated wetlands solely because of potential use by any migratory bird.[24] Potential use is not a sufficient connection to interstate commerce to properly invoke the Commerce Clause.[25] Part I of this Comment briefly describes the history of the Clean Water Act and the growth of its jurisdiction to cover wetlands.[26] Part

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Programs, ST. LOUIS POST DISPATCH, Feb. 3, 1991, at 3A. He also stated that strings attached to federal mandates drove 80% of all new spending the previous year. *Id.*

Increasing federal control over environmental regulation and social spending is paralleled in the area of criminal law. Congressional power to create new federal crimes is the result of a very broad judicial interpretation of the Commerce Clause. Miner, *Federalizing Criminal Law*, *supra*, at 18. Republicans have proposed making most gun crimes a violation of federal law. *Senate Fields Alternate "3-Time-Loser" Crime Measure*, AP, Feb. 8, 1994, *available in* WESTLAW, PAPERS File. Under the proposed law, half a million gun crimes, ranging from armed robbery to murder, would be moved from state to federal court. *Id.* The only Commerce Clause basis for the law is that the gun have crossed state lines at some point in time. *Id.* In another proposed law, the Violence Against Women Act, rape and spousal abuse become potential federal civil rights violations and therefore subject to federal law enforcement. Edward Grimsley, *"Violence Against Women Act": Will Sexism Be a Federal Crime?*, RICHMOND TIMES-DISPATCH, Aug. 6, 1993, at A11. For an excellent history of the federalization of criminal law in the United States, see Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117 (1987). As Judge Miner points out, criminal law is only one of many areas where Congress intrudes on the traditional powers of the states. *Id.* at 128.

Similarly, every time Congress enacts a new criminal statute to deal with a problem in a state or region, Congress undermines the dual system of government set up by the Constitution. Miner, *Federalizing Criminal Law*, *supra*, at 19. As one federal judge recently put it, "I am afraid of federal prosecutors" because of their relatively unbridled power and discretion compared to that of a state prosecutor. *Id.* at 19. All of the above shows the growing role of the federal government in areas which were at one time reserved almost exclusively for the states. Grimsley, *supra*.

There are strong practical arguments in favor of maintaining a federal system of government. Justice Brandeis called the states "laboratories of democracy." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). States must have the power to experiment with economic and social regulations. *Id.* Justice Brandeis also called the consequences of not allowing states to experiment "serious." *Id.* Barry Wiengast has noted in his study of European nations in the eighteenth century that federalism and economic success are closely related. Barry R. Weingast, Federalism and the Political Comments Eyed to Sustain Markets (June 15, 1992) (unpublished manuscript), *cited in* Du Pont, *supra*, at 141 n.6. Finally, federalism is consistent with the intent of the Framers of the Constitution. DuPont, *supra*, at 138.

[24] *See infra* notes 190-216 and accompanying text (proposing additional requirements courts could impose to make reach of Clean Water Act constitutional).

[25] *See infra* notes 190-216 and accompanying text (outlining case law and demonstrating that potential use by migratory birds is not substantial connection to interstate commerce).

[26] *See infra* notes 31-44 and accompanying text (describing history of Clean Water

II reviews recent cases defining the reach of the Commerce Clause.[27] Part III reviews court decisions that have evaluated the power of the Commerce Clause to reach isolated wetlands.[28] Part IV analyzes the current state of the law, and argues that courts should not find isolated wetlands to be within the scope of the Commerce Clause.[29] Finally, Part V suggests requirements that courts can impose to keep the reach of the Clean Water Act within the bounds of the commerce power.[30]

I. THE CLEAN WATER ACT AND WETLANDS

In 1972, Congress enacted the Clean Water Act[31] to restore the purity of the nation's waters.[32] To achieve this goal, Congress prohibited the discharge of dredge or fill materials into those waters.[33] Courts have consistently interpreted the Clean Water Act's use of the word "waters" to mean all waters within the scope of the Commerce Clause.[34] Thus, any waters that are

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Act).

[27] *See infra* notes 45-108 and accompanying text (describing judicial interpretations of reach of Commerce Clause).

[28] *See infra* notes 109-27 and accompanying text (analyzing cases which have dealt with migratory birds and Commerce Clause).

[29] *See infra* notes 128-89 and accompanying text (explaining why courts should not find that Commerce Clause can reach isolated wetlands because of use by migratory birds).

[30] *See infra* notes 190-216 and accompanying text (describing limits courts could impose on reach of Clean Water Act).

[31] 33 U.S.C. § 1251.

[32] *Id.*

[33] *Id.* § 1344 (commonly known as Clean Water Act § 404). Persons who wish to discharge dredge or fill materials into a wetland or other body of water must acquire a § 404 permit from the U.S. Army Corps of Engineers. *Id.*

[34] *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (holding that Congress intended to regulate under Commerce Clause areas that might not meet traditional test of "navigability"); *see also* Quivira Mining Co. v. United States Envtl. Protection Agency, 765 F.2d 126, 129-30 (10th Cir. 1985) (holding that normally dry ditch which sometimes flooded and ran into navigable stream was subject to Clean Water Act jurisdiction because intent of Congress was to cover as many waters as possible); United States v. Earth Sciences, Inc., 599 F.2d 368, 374-75 (10th Cir. 1979) (defining limits of Clean Water Act as limits of Commerce Clause and finding that "at least some impact" on interstate commerce was only requirement for jurisdiction); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974) (finding that Congress intended Clean Water Act to cover navigable waters and tributaries and is valid exercise of commerce power); United States v. Akers, 651 F. Supp. 320 (E.D. Cal. 1987) (finding that Congress intended

outside the reach of the Commerce Clause are also outside the reach of the Clean Water Act.[35]

The United States Supreme Court has held that the Commerce Clause can reach wetlands that are adjacent to other bodies of water that are within the reach of the Commerce Clause.[36] Because the Clean Water Act extends to any waters within the reach of the Commerce Clause, the Clean Water Act applies to adjacent wetlands. An adjacent wetland's proximity to another body of water, therefore, allows the Clean Water Act and the Commerce Clause to reach it.[37] But not all wetlands

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definition of "waters of the United States" to cover maximum area possible under Commerce Clause); Leslie Salt Co. v. Froehlke, 403 F. Supp. 1292 (N.D. Cal. 1974) (holding that term "navigable waters" is to be given broadest possible interpretation under Commerce Clause), *rev'd on other grounds*, 578 F.2d 742 (9th Cir. 1978).

But see Hoffman Homes v. Environmental Protection Agency, 999 F.2d 256, 262 (7th Cir. 1993) (Manion, J., concurring) (finding that Congress did not intend Clean Water Act to reach isolated wetlands); McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988) (holding that fact that people might ultimately consume groundwater or might use groundwater for irrigation purposes was not enough to find Clean Water Act jurisdiction; government must show that groundwater is naturally connected to surface waters that constitute navigable waters for there to be Clean Water Act jurisdiction); United States v. GAF Corp., 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) (holding that underground waters not alleged to flow into or otherwise affect surface waters are not navigable waters protected under Clean Water Act).

The legislative history of the Clean Water Act merely states that Congress intended the term "navigable waters" to be given the broadest meaning constitutionally possible. H.R. REP. NO. 911, 92d Cong., 2d Sess. 131 (1972); S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 144 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822.

[35] *See supra* note 34 and accompanying text (noting that waters outside reach of Commerce Clause are not covered by Clean Water Act).

[36] *Riverside*, 474 U.S. at 133-34. Wetlands are those areas which have enough water to support wetlands-type vegetation under normal circumstances. 40 C.F.R. § 230.3(t) (1993). These areas generally consist of "swamps, marshes, bogs, and similar areas." *Id.*

[37] The Clean Water Act defines the bodies of water it covers as "navigable waters" which are in turn defined as "waters of the United States." 33 U.S.C. § 1251(7). EPA and Corps regulations further define "waters of the United States" as all waters used or usable in interstate commerce. 40 C.F.R. § 230.3(s) (1993). These regulations also include all waters that are: (1) subject to tidal action, (2) themselves interstate, (3) tributaries of interstate waters, (4) adjacent wetlands, or (5) nonadjacent wetlands connected to interstate commerce. *Id.*

The validity of these provisions in regard to the regulation of adjacent wetlands reached the U.S. Supreme Court in *Riverside*. In *Riverside*, the Army Corps of Engineers filed suit against a property owner for filling wetlands without a permit in violation of the Clean Water Act. *Riverside*, 474 U.S. at 123-24. The property owner challenged the validity of the Corps regulations that defined adjacent

are adjacent to another body of water.[38] These "nonadjacent" wetlands are known as "isolated wetlands."[39]

The Environmental Protection Agency (EPA)[40] and the U.S. Army Corps of Engineers (Corps)[41] have issued regulations under the Clean Water Act that deal with isolated wetlands.[42] Those regulations explain when an isolated wetland is within reach of the Commerce Clause and thus subject to the Clean Water Act.[43] Under these regulations, the Clean Water Act and

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wetlands as being covered by the Clean Water Act. *Id.* at 131. The Court unanimously held that regulation of adjacent wetlands was permissible under the Commerce Clause and that the Corps regulations were consistent with congressional intent. *Id.* at 133-34.

[38] A common type of isolated wetland is the vernal pool, which is a shallow depression found in California and Oregon that floods during rainy periods but is otherwise dry. Leary, *supra* note 16, at C4. A second common type of isolated wetland is the prairie pothole, which is simply a depression left by glacier movements through Midwestern states that fills with snowmelt or rainfall. *Id.*

[39] EPA regulations define isolated wetlands as wetlands that are intrastate and that when used or damaged could affect interstate commerce. 40 C.F.R. § 230.3(s)(3). The definition specifically includes wetlands used or usable (1) for recreation by interstate travellers, (2) the taking of fish/shellfish for sale in interstate commerce, or (3) industrial purposes by industries engaging in interstate commerce. 40 C.F.R. § 230.3(s)(3)(i)-(iii). The U.S. Army Corps of Engineers uses parallel definitions, which are found at 33 C.F.R. § 328.3(a)(3) (1993). In *Riverside*, the U.S. Supreme Court expressly declined to address the question of whether the federal government has the authority to regulate nonadjacent wetlands. *Riverside*, 474 U.S. at 131-32 n.8.

Adjacent wetlands come within the scope of the commerce power by virtue of their connection with other waters which themselves are either interstate or connected to interstate commerce. 40 C.F.R. § 230.3(t)(7) (1993). But isolated wetlands by definition are not associated with another body of water. *Id.* § 230.3(s). Isolated wetlands must thus be connected to interstate commerce in their own right. *Id.* § 230.3(s)(3).

[40] The EPA is the primary environmental protection arm of the federal government. 33 U.S.C. § 1222(b) (1988). It shares enforcement authority under the Clean Water Act with the U.S. Army Corps of Engineers. *Id.* § 1344(c).

[41] The Corps, a branch of the Defense Department, has traditionally been responsible for civil engineering projects on the nation's waterways. Hope Babcock, *Federal Wetlands Regulatory Policy, Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 24, 28 (1991). It shares enforcement responsibility for the Clean Water Act with the EPA. 33 U.S.C. § 1344(c).

[42] 40 C.F.R. § 230.3(s).

[43] *Id.* § 230.3(s)(3). The EPA's Chief Judicial Officer has held that this section requires only a potential and minimal effect on interstate commerce to establish Clean Water Act jurisdiction over a wetland. Hoffman Homes v. Environmental Protection Agency, 999 F.2d 256, 261 (7th Cir. 1993).

This potential and minimal effect can be in the form of a migratory bird. *Id.*; Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) (indicating that isolat-

the Commerce Clause will reach an isolated wetland if migratory birds that cross state lines could potentially use the wetland.[44]

II. THE BROAD REACH OF THE COMMERCE POWER

The Constitution provides a lengthy list of enumerated powers that Congress can exercise.[45] The federal government can only exercise powers that derive from this list.[46] Among the powers specified is the power to regulate interstate commerce (the Commerce Clause).[47] Today, courts define "interstate commerce" very broadly.[48]

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ed wetland which could serve as habitat for migratory birds was within reach of Commerce Clause), *cert. denied*, 498 U.S. 1126 (1991); *see* Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984) (holding that intrastate lake on flyway for migratory birds was within reach of Commerce Clause).

[44] 51 Fed. Reg. 41,217 (1988) (codified at 33 C.F.R. § 328.3(a)). In Hoffman Homes v. Environmental Protection Agency, 999 F.2d 256, 260 (7th Cir. 1993), the Seventh Circuit upheld the EPA's interpretation of this regulation. If the isolated wetland is used or is usable as a habitat for endangered species or to irrigate crops sold in interstate commerce, the Clean Water Act will reach it. *See id.* (interpreting EPA definition of Clean Water Act jurisdiction at 40 C.F.R. § 232.2(q), (r) (1993) as including use by endangered species). This Comment does not address the issue of the reach of the Commerce Clause in regard to the presence of endangered species in a given wetland.

For a complete history of the evolution of Corps and EPA regulations defining the reach of the Clean Water Act, see Stephen Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1 (1993).

[45] U.S. CONST. art. I, § 8, cls. 1-18.

[46] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (holding that federal government has limited powers); THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) (stating that Constitution makes federal government one with "few and defined" powers and reserves all other powers for states) *quoted with approval in Ashcroft*, 501 U.S. at 457-58. *But see infra* note 132 and accompanying text (stating notion that federal government is limited to enumerated powers is legal fiction).

[47] U.S. CONST. art. I, § 8, cl. 3.

[48] Perhaps the single greatest expansion of the commerce power came in the Supreme Court's decision in Wickard v. Filburn, 317 U.S. 111 (1942). The Court in *Wickard* found that a farmer's decision to grow wheat for his own consumption could affect the interstate market for wheat when taken in the aggregate with other such decisions. *Id.* at 127-28. The Court noted that the federal government can regulate a local activity that is not in itself commerce if it exerts a substantial economic effect on interstate commerce. *Id.* at 124-25.

The Supreme Court extended the *Wickard* holding in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). *Heart of Atlanta* involved a challenge to Title II of the Civil Rights Act of 1964. *Id.* at 242; 42 U.S.C. §§ 2000a to 2000a-6, 2000(a), (b)(1), (c)(1) (1988). Congress enacted Title II on the premise that discrimi-

There are three types of congressional legislation that raise Commerce Clause issues.[49] The first type includes laws containing a congressional finding that a given activity affects interstate commerce.[50] The second type involves broadly phrased laws that Congress restricts by stating that they will only extend to the limits of the Commerce Clause.[51] The third type involves laws that purport to regulate an activity but are silent about the Commerce Clause issue.[52]

The Supreme Court's decisions in *Hodel v. Virginia Surface Mining and Reclamation Association*[53] and *Hodel v. Indiana*[54] illustrate the first type of Commerce Clause case. The *Hodel* cases demonstrate that the reach of the Commerce Clause is very broad.[55] Both cases dealt with challenges to the Surface Mining Act of 1977.[56] The plaintiffs based their challenges on several grounds, one of which was that the Act exceeded the scope of

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nation in hotel accommodations has a substantial effect on interstate commerce. *Heart of Atlanta*, 379 U.S. at 251, 255. The Court held that even activities that are local in origin and destination can be regulated under the Commerce Clause if they might have a substantial effect on interstate commerce. *Id.* at 258.

This Comment argues that isolated wetlands cannot be reached under current Commerce Clause jurisprudence. An even stronger argument can be made, however, that isolated wetlands cannot be regulated under the original interpretation of the commerce power established in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824). For an excellent discussion of the original reach of the commerce power, see Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); see also United States v. Lopez, No. 93-1260, 1995 U.S. LEXIS 3039, at *63-65 (Apr. 26, 1995) (Thomas, J., concurring) (arguing Court should be "more faithful to the original understanding of that clause.").

[49] *See infra* notes 50-108 and accompanying text (illustrating three types of Commerce Clause cases).

[50] Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981); *see infra* notes 53-75 and accompanying text (describing cases where Congress passed laws which explicitly found substantial effect on interstate commerce).

[51] *See infra* notes 76-90 and accompanying text (describing cases where courts have evaluated laws which Congress intended to reach limits of Commerce Clause).

[52] *See infra* notes 91-104 and accompanying text (describing cases where Congress is silent about Commerce Clause, but statutes involved implicate Commerce Clause issues).

[53] 452 U.S. 264 (1981).

[54] 452 U.S. 314 (1981).

[55] Thomas L. Eggert & Kathleen A. Chorostecki, *Rusty Trustees and the Lost Pots of Gold: Natural Resource Damage Trustee Coordination Under the Oil Pollution Act*, 45 BAYLOR L. REV. 291, 303 n.53 (1993); Joseph C. Sweeny, *Protection of the Environment in the United States*, 1 FORDHAM ENVTL. L. REP. 1, 5 (1989).

[56] 30 U.S.C. § 1201 (1988 & Supp. V 1993).

the commerce power.[57] Justice Marshall held that federal courts will defer to congressional findings that an activity affects interstate commerce.[58] In doing so, courts will apply only the rational basis standard of review[59] to determine the constitutionality of the law.[60] This deferential standard of review requires only that the legislature's purpose be legitimate and that the law be rationally related to that purpose.[61]

The Surface Mining Act specifically states that the types of mining activities and areas it regulates affect interstate commerce.[62] In *Hodel v. Indiana*[63] the Court found that the activity Congress sought to regulate impacted only 0.006% of the nation's total prime farmland.[64] While this seems like an insubstantial amount, the Court noted that Congress had explicitly found that there was a substantial effect on interstate commerce.[65] The Court believed it was improper to substitute its

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[57] Hodel v. Virginia, 452 U.S. at 266.

[58] *Id.* at 276 (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964)).

[59] *Id.* at 278. The courts have created three basic standards of review for determining the constitutionality of government actions. Kenneth L. Karst, *Standard of Review, in* 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1720-21 (Leonard W. Levy et al. eds., 1986). The rational basis standard is the most deferential standard of review, requiring only that the legislature's purpose be legitimate and that the law be rationally related to that purpose. *Id.* at 1721; *see* Williamson v. Lee Optical, 348 U.S. 483 (1955) (applying rational basis standard of review). Strict scrutiny is the highest standard, requiring a compelling governmental purpose and that the means chosen to achieve it be necessary. Karst, *supra*, at 1720-21; *see* Philadelphia v. New Jersey, 437 U.S. 617 (1978) (applying strict scrutiny standard of review). In between these two extremes is intermediate scrutiny, which requires only that the law further an important government interest, and that the means chosen be substantially related to the purpose. Karst, *supra*, at 1720-21; *see* Southern Pac. v. Arizona, 325 U.S. 761 (1945) (applying intermediate scrutiny standard of review).

[60] Hodel v. Virginia, 452 U.S. at 266.

[61] *See supra* note 59 (describing standards of constitutional review).

[62] 30 U.S.C. § 1201(c) (Supp. V 1993).

[63] 452 U.S. 314 (1981).

[64] *Id.* at 322.

[65] *Id.* at 324-26. Congress made this finding by conducting extensive hearings and by drafting the legislation to regulate the mining activities as an entire class. *Id.*

The Court's opinion by Justice Marshall does not actually use the word "substantial." *Id.* It was unclear to Justice Rehnquist whether the Court meant to reduce the test from a "substantial effect" to "an effect," which is the primary reason he filed a concurring opinion rather than joining the majority. *Id.* at 312 (Rehnquist, J., concurring); *see infra* notes 71-75 and accompanying text (outlining Justice Rehnquist's concurring opinion in *Hodel* cases). However, the Supreme

own finding of insubstantiality for Congress' explicit finding of a substantial effect on interstate commerce.[66] The Court in *Hodel v. Virginia* noted that the legislative record amply supported these legislative findings.[67] It asserted that a substantial effect on interstate commerce was a rational finding.[68]

Justice Marshall's majority opinion in *Hodel v. Virginia* held that to exercise the commerce power, Congress must find that the regulated activity has a "substantial effect" on interstate commerce.[69] At several other points in the opinion, however, he did not characterize the necessary finding as "substantial."[70] Chief Justice Burger and Justice Rehnquist concurred in the judgment.[71] Both emphasized the importance of a congressional finding that the regulated activity has a "substantial effect" on interstate commerce.[72] Justice Rehnquist noted that without the "substantial" limitation, the test for the reach of the Commerce Clause would be impermissibly overbroad.[73] Rehnquist also pointed out that there are constitutional limits on the power of Congress to regulate under the Commerce Clause.[74] In particular, he observed that there are some activities that are so private or local in nature that they "simply may not be *in* commerce."[75]

An example of the second type of Commerce Clause case is *Russell v. United States*.[76] In *Russell*, the Supreme Court decided that setting fire to an apartment building was an activity within the reach of the Commerce Clause.[77] The statute at issue was

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Court's opinion in Lopez v. United States, No. 93-1260, 1995 U.S. LEXIS 3039, at *18-19 (Apr. 26, 1995), held that "substantial" is the proper standard. The Supreme Court's decision in *Lopez* came down just a few days before this Comment went to the printer.

[66] Hodel v. Indiana, 452 U.S. at 326.

[67] Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277-80 (1981).

[68] *Id.* at 280.

[69] *Id.*

[70] *Id.* at 277, 281.

[71] *Id.* at 305 (Burger, C.J., concurring); *id.* at 307 (Rehnquist, J., concurring).

[72] *Id.* at 305 (Burger, C.J., concurring); *id.* at 312 (Rehnquist, J., concurring).

[73] *Id.* at 309-11.

[74] *Id.* at 309.

[75] *Id.* at 310.

[76] 471 U.S. 858 (1985).

[77] *Id.* at 858-59.

the Organized Crime Control Act of 1970.[78] The Act made it a federal crime to burn property used in or affecting interstate commerce.[79] The Court interpreted the statutory language to mean that Congress intended to exercise its power to the full extent of the Commerce Clause.[80]

The Court held that the Organized Crime Control Act met constitutional muster.[81] The majority found that the rental of an apartment building substantially affected interstate commerce.[82] In dicta the Court also noted that the statute might not apply to residential homes.[83] The legislative history of the Organized Crime Control Act suggested that Congress was not sure that it could regulate such homes under the Commerce Clause.[84]

Lower courts have found instances where the same type of congressional action involved in *Russell* has exceeded the scope of the commerce power.[85] In *Michigan Protection & Advocacy Service v. Babin*,[86] a district court held that on the facts of the case, application of the Fair Housing Act Amendments[87] exceeded the limits of the Commerce Clause.[88] The housing dis-

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[78] *Id.*; 18 U.S.C. § 844(i) (1988).

[79] 18 U.S.C. § 844(i).

[80] *Russell*, 471 U.S. at 859 & n.4.

[81] *Id.* at 862.

[82] *Id.* One interesting recent example of a *Russell* type case was United States v. Ryan, No. 90-1357, 1994 WL 590254 (8th Cir. Oct. 31, 1994) (en banc). In *Ryan*, the government charged the defendant with arson under the same statute that the Supreme Court had before it in *Russell*. *Id.* at *1. The Eighth Circuit found that a closed commercial property had a sufficient connection with interstate commerce to justify regulation under the Commerce Clause. *Id.* at *4. In a vigorous dissent, Chief Judge Arnold sharply criticized the majority's conclusion, noting that Congress did not clearly intend to regulate so much conduct that was traditionally handled under state law. *Id.* at *9-10 (Arnold, C.J., dissenting in part and concurring in part).

Another interesting application of *Russell* was United States v. Ramey, 24 F.3d 602 (4th Cir. 1994), which held that merely having a trailer hooked up to an interstate power grid was a sufficient connection with interstate commerce to allow regulation under the Commerce Clause. *Id.* at 607.

[83] *Russell*, 471 U.S. at 860-62.

[84] *Id.*

[85] *See infra* notes 86-90 and accompanying text (describing cases where courts found that activities did not substantially affect interstate commerce).

[86] 799 F. Supp. 695 (E.D. Mich. 1992).

[87] Civil Rights Act of 1968, § 803(b), as amended, 42 U.S.C. § 3603(b) (1988).

[88] *Babin*, 799 F. Supp. at 742.

crimination alleged in *Babin* occurred during the sale of a home between two neighbors without the involvement of a broker.[89] The district court found that such discrimination does not substantially affect interstate commerce.[90]

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[89] *Id.*

[90] *Id.* The many cases cited by the district court supported the court's conclusion. *Id.* at 741-42. These cases arose under the Sherman Antitrust Act (Sherman Act). 15 U.S.C. §§ 1-7 (1988). In McLain v. Real Estate Board, 444 U.S. 232 (1980), the Court noted that the Sherman Act is meant to extend to the limits of the Commerce Clause. *Id.* at 241.

In Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1980), a pathologist sued a hospital alleging violations of the Sherman Act. *Id.* at 716. Specifically, the pathologist alleged that the defendants conspired to limit competition for pathological services and to fix prices. *Id.* The asserted connection to interstate commerce was that the hospital purchased supplies from out-of-state sellers. *Id.* at 718. However, the court of appeals held that this was not a connection to interstate commerce. *Id.* at 716. The court based its finding on the fact that plaintiff failed to allege that the conspiracy had any effect on the purchase of medical supplies or that the conspiracy had an affect on interstate commerce. *Id.* at 718. The court on rehearing allowed the plaintiff to attempt to prove an effect on interstate commerce. *Id.* at 719-20 (en banc).

The *Crane* court also held that a party seeking to establish Commerce Clause jurisdiction must show a nexus between the challenged activity and interstate commerce. *Id.* at 721-22 (citing Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976)) (stating that conspiracy to enlarge hospital building and monopolize hospital services affected interstate commerce because complaint alleged four specific ways conspiracy would damage interstate commerce); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding that mandatory fee schedule would affect interstate transactions and thus had "necessary connection" to interstate commerce); Burke v. Ford, 389 U.S. 320 (1967) (finding that liquor wholesalers' conspiracy resulted in fewer sales of interstate liquor and thus met interstate commerce test)); *see* Hodel v. Indiana, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring) (stating that mere nexus between person/activity and interstate commerce is not enough to satisfy "substantial effect" test). This nexus test cannot be satisfied by merely showing that an entity is engaging in or could be affected by interstate commerce. *Hodel v. Virginia*, 452 U.S. at 310 (Rehnquist, J., concurring).

In Sarin v. Samaritan Health Center, the Sixth Circuit found that a denial of staff privileges at a hospital had only a de minimis effect on interstate commerce and thus did not come within the Commerce Clause. 813 F.2d 755, 758 (6th Cir. 1987). The court of appeals expressly rejected the Ninth Circuit's holding to the contrary in Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). *Sarin*, 813 F.2d at 758 n.2.

The Fourth Circuit reached a similar conclusion to the one in *Sarin* in Harron v. United Hospital Center, 522 F.2d 1133 (4th Cir. 1975). In *Harron*, the court held that the hospital's decision to hire one radiologist rather than another could not violate the Sherman Act. *Id.* at 1134. The Second Circuit has held that a plaintiff must allege actions that will affect interstate commerce. Furlong v. Long Island College Hosp., 710 F.2d 922, 926 (2d Cir. 1983). The Ninth Circuit has also identified two categories of activities that are not within reach of the Commerce

The final type of case raising Commerce Clause issues involves laws that Congress passes that are silent about the commerce power but raise Commerce Clause issues.[91] A recent example of such a law is found in *United States v. Lopez*.[92] The case involved a challenge to the constitutionality of the Gun-Free Schools Act of 1990.[93] This Act made it a federal crime to knowingly possess a firearm in a school zone.[94] The Fifth Circuit Court of Appeals in *Lopez* stated that a substantial impact on interstate commerce is necessary for Congress to regulate such an activity.[95] The court noted that without the limitation that the impact must be "substantial," all activities would be subject to the commerce power because the chain of causation is limitless.[96] Despite this concern with maintaining limits on the Commerce Clause, the court noted that its standard of review is extremely deferential.[97] Courts apply this deferential standard of review whenever Congress makes formal[98] or informal[99] findings that an activity has a substantial effect on interstate commerce.[100]

Clause. *See* Bain v. Henderson, 621 F.2d 959 (9th Cir. 1980) (holding that selection of attorneys for list to represent indigents had insubstantial affect on interstate commerce); Thornhill Publishing v. General Tel. & Elecs., 594 F.2d 730 (9th Cir. 1979) (stating that restraints on commerce by telephone book publisher and distributor who purchased almost all supplies locally could not have substantial affect on interstate commerce).

But see Morgan v. Housing & Urban Dev., 985 F.2d 1451 (10th Cir. 1993) (holding that Fair Housing Act did not exceed scope of Commerce Clause); Senior Civil Liberties Ass'n, Inc. v. Kemp, 965 F.2d 1030, 1033-34 (11th Cir. 1992) (holding that Fair Housing Act was sustainable as exercise of commerce power); United States v. Weiss, 847 F. Supp. 819 (D. Nev. 1994) (upholding Fair Housing Act in face of Commerce Clause challenge).

[91] *See infra* notes 92-104 and accompanying text (describing cases where Congress passes law that appears to violate Commerce Clause but is silent about Commerce Clause limits).

[92] 2 F.3d 1342 (5th Cir. 1993), *aff'd*, No. 93-1260, 1995 U.S. LEXIS 3039 (Apr. 26, 1995).

[93] *Id.*; 18 U.S.C. § 922(q) (Supp. V 1993).

[94] 18 U.S.C. § 922(q).

[95] *Lopez*, 2 F.3d at 1362.

[96] *Id.*

[97] *Id.*

[98] *See supra* notes 53-75 and accompanying text (describing cases involving laws where Congress had made formal finding of substantial effect on interstate commerce).

[99] *See infra* note 163 (describing cases involving laws where Congress had made informal findings of substantial effect on interstate commerce).

[100] *Lopez*, 2 F.3d at 1363 (citing Preseault v. ICC, 494 U.S. 1, 17 (1990)).

They will uphold such legislation if there is any rational basis for doing so.[101] The Gun-Free Schools Act, however, contained absolutely no findings, formal or informal, for the court to evaluate.[102] The court held the Act invalid as applied in *Lopez*.[103] The Fifth Circuit reasoned that the Act went beyond the reach of the Commerce Clause without a specific finding of a connection to interstate commerce.[104]

The cases above illustrate three important points about Commerce Clause jurisprudence. First, the Commerce Clause confers

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[101] *Id.*

[102] *Id.* at 1363-64.

[103] *Id.* at 1367-68.

[104] *Id.*; *see also* United States v. Knowles, 29 F.3d 947 (5th Cir. 1994) (finding conviction of defendant under § 922(q)(1)(A) of Gun Free Schools Act unconstitutional on Commerce Clause grounds); United States v. Bownds, 860 F. Supp. 336 (S.D. Miss. 1994) (finding 18 U.S.C. § 922(o) (Supp. V 1993) prohibiting possession of unregistered machine gun unconstitutional on Commerce Clause grounds); United States v. Trigg, 842 F. Supp. 450 (D. Kan. 1994) (holding § 922(q) unconstitutional on Commerce Clause grounds); United States v. Morrow, 834 F. Supp. 364 (N.D. Ala. 1993) (holding § 922(q) unconstitutional on Commerce Clause grounds).

But see United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992) (upholding constitutionality of § 922(o)), *cert. denied*, 113 S. Ct. 1614 (1993); United States v. Edwards, 13 F.3d 291 (9th Cir. 1993) (holding that § 922(q) was valid exercise of Commerce Clause and explicitly rejecting Fifth Circuit's opinion in *Lopez*); United States v. Evans, 928 F.2d 858 (9th Cir. 1991) (upholding constitutionality of § 922(o)); United States v. Ornelas, 841 F. Supp. 1087 (D. Colo. 1994) (holding that Congress' failure to make formal or informal findings does not effect analysis of regulation under Commerce Clause); United States v. Glover, 842 F. Supp. 1327 (D. Kan. 1994) (upholding constitutionality of § 922(q) on Commerce Clause grounds); United States v. Holland, 841 F. Supp. 143 (E.D. Pa. 1993) (upholding constitutionality of § 922(q) under Commerce Clause); United States v. Sanders, 35 F.3d 61 (2d Cir. 1994) (per curiam) (upholding constitutionality of 18 U.S.C. § 922(g)(1) (Supp. V 1993) which prohibited possession of ammunition by felon). The Supreme Court's opinion in *Lopez* makes the continuing validity of these cases very questionable.

The court of appeals in *Lopez* declined to say how its analysis would change if Congress had made a specific formal or informal finding of a substantial impact on interstate commerce. *Lopez*, 2 F.3d at 1367-68.

For a time it seemed as if federal courts might strike down the new federal car-jacking statute on Commerce Clause grounds. *See* United States v. Cortner, 834 F. Supp. 242 (M.D. Tenn. 1993) (holding that interstate commerce is not implicated and, therefore, federal car-jacking statute is unconstitutional), *rev'd sub nom.* United States v. Osteen, 30 F.3d 135 (6th Cir. 1994). Other circuits that have considered the car-jacking statute have also rejected Commerce Clause challenges. *See* United States v. Overstreet, 40 F.3d 1090 (10th Cir. 1994); United States v. Harris, 25 F.3d 1275, 1280 (5th Cir. 1994); United States v. Johnson, 22 F.3d 106, 108-09 (6th Cir. 1994). It remains to be seen what impact the Supreme Court's decision in *Lopez* will have on these cases.

broad power on Congress to regulate the nation's economy.[105] Second, although this power is broad, it is not limitless.[106] Finally, at least some courts are willing to read statutes more narrowly when Congress has not made a finding that an activity substantially affects interstate commerce.[107] The cases below that have dealt with isolated wetlands and the Commerce Clause also illustrate these points.[108]

III. JUDICIAL INTERPRETATIONS OF THE COMMERCE CLAUSE AND THE CLEAN WATER ACT

There are only a few cases that have dealt with isolated wetlands and the Commerce Clause.[109] Generally, federal courts of appeal have found that Congress intended the Clean Water Act to extend to the limits of the Commerce Clause.[110] But the only Supreme Court decision to address the reach of the Commerce Clause and the Clean Water Act explicitly left the federal government's power over isolated wetlands undefined.[111]

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[105] *See supra* note 48 and accompanying text (demonstrating broad basis of commerce power).

[106] *See supra* notes 85-90 and accompanying text (citing cases holding that Commerce Clause is not limitless).

[107] *See supra* notes 85-90 and accompanying text (citing cases holding that activities do not substantially affect interstate commerce).

[108] *See infra* notes 109-27 and accompanying text (describing cases that involved isolated wetlands and Commerce Clause).

[109] *See infra* notes 110-27 and accompanying text (describing cases that involved isolated wetlands and Commerce Clause).

[110] *See, e.g.*, United States v. Tull, 769 F.2d 182, 184 (4th Cir. 1985) (citing with approval legislative history demonstrating congressional intent to regulate to limits of Commerce Clause), *rev'd on other grounds*, 481 U.S. 412 (1987); United States v. Lambert, 695 F.2d 536, 538 (11th Cir. 1983) (holding that Clean Water Act reaches to full extent permissible under Constitution); United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) (holding that Congress wanted Clean Water Act to be given broadest possible constitutional meaning); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1329 (6th Cir. 1974) (holding that Congress clearly intended Clean Water Act to apply to all water bodies and their tributaries). *But see* Hoffman Homes, Inc. v. Environmental Protection Agency, 999 F.2d 256, 262-63 (7th Cir. 1993) (Manion, J., concurring) (stating that Congress did not intend to regulate isolated wetlands under Clean Water Act).

[111] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (confirming that adjacent wetlands are within reach of commerce power). The Court explicitly chose not to address the issue of isolated wetlands. *Id.* at 131 n.8.

Other courts have dealt with the closely related issue of other isolated bodies of water, such as purely intrastate lakes and streams. For example, one of

The first reported federal case to deal specifically with the question of isolated wetlands and the commerce power was *Leslie Salt Co. v. United States.*[112] *Leslie Salt* involved several artificial ponds and wetlands that arguably had no connection to any other waters.[113] The Ninth Circuit Court of Appeals held that the Commerce Clause reaches local waters that could potentially provide habitat to migrating birds and endangered species.[114] However, the *Leslie Salt* court did not explain the reasoning for this decision.[115]

A recent Seventh Circuit Court of Appeals case also brought the issue of Commerce Clause jurisdiction over isolated wetlands squarely before a federal court.[116] In *Hoffman Homes v. EPA*

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the first cases to address the issue of whether the Commerce Clause reaches waters not connected to interstate waterways was Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984). In *Marsh*, the State of Utah claimed that the federal government could not use the Commerce Clause as the authority to regulate an intrastate lake with no hydrological connection to interstate waterways. *Id.* at 801. The court of appeals found that the Commerce Clause could reach the lake because interstate travellers used it for public recreation, it supported a commercial fishery that sold its products out of state, provided water for the irrigation of crops sold outside the state, and was on the flyway of migratory birds. *Id.* at 803-04.

In Residents Against Industrial Landfill Expansion v. Diversified Systems, Inc., 804 F. Supp. 1036 (E.D. Tenn. 1992), the district court had to deal with two apparently intrastate creeks. It found that both of these creeks — one located entirely on residential property and the other on agricultural and residential land used to provide water for livestock — might in some way affect interstate commerce. *Id.* at 1039. Hence, they were within the reach of the Commerce Clause and the Clean Water Act. *Id.*

In United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979), the court of appeals found that some impact on interstate commerce was all that the Commerce Clause required. *Id.* at 375. Moreover, the court held that although a stream's only connection to interstate commerce was that people used the stream's water to irrigate crops sold in interstate commerce, the connection was substantial enough to allow regulation under the Commerce Clause and the Clean Water Act. *Id.* at 374-75.

[112] 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991).

[113] *Id.* at 358-59.

[114] *Id.* at 360 (citing with approval Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984)).

[115] *Id.* Instead, the court relied on the reasoning of the Tenth Circuit in *Marsh*, 740 F.2d at 804. But see Judge Rymer's opinion in *Leslie Salt*, noting that the *Marsh* court might have found a substantial enough connection with interstate commerce if the flyway for migratory birds were the only connection to interstate commerce. *Leslie Salt*, 896 F.2d at 361 (Rymer, J., concurring in part and dissenting in part).

[116] Hoffman Homes v. Environmental Protection Agency, 999 F.2d 256 (7th Cir.

(*Hoffman I*),[117] a developer challenged the EPA's claim of jurisdiction over an isolated wetland on his property.[118] The sole basis for the EPA's claim of jurisdiction was that migratory birds might potentially use the isolated wetland.[119] In *Hoffman I*, the court held that potential use by migratory birds could not give Congress jurisdiction over an isolated wetland.[120] But shortly thereafter, that same Seventh Circuit panel voted to vacate the *Hoffman I* opinion, and granted relief to the developer on much narrower grounds (*Hoffman II*).[121]

The *Hoffman II* court first held that the EPA could reasonably interpret its regulation to mean that potential use by migratory birds substantially affects interstate commerce.[122] Next, the court looked at whether there was substantial evidence in the record to support the EPA's interpretation in this case.[123] The court entered judgment for the developer because the EPA had

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1993) [hereafter *Hoffman II*] (replacing prior opinion of Hoffman Homes v. Environmental Protection Agency, 961 F.2d 1310 (7th Cir. 1992) [hereafter *Hoffman I*]).

[117] 961 F.2d 1310.

[118] *Hoffman II*, 999 F.2d at 256. The developer also challenged the EPA's jurisdiction on the ground that Congress did not intend the Clean Water Act to reach isolated wetlands. *Id.* at 259. That argument is outside the scope of this Comment.

[119] *Id.* at 259.

[120] *Hoffman I*, 961 F.2d at 1316-23.

[121] *Hoffman II*, 975 F.2d at 1554.

The Pacific Legal Foundation noted that although the legal holding in *Hoffman II* is much narrower (and thus less attractive to those who seek to limit government power) than *Hoffman I*, the court of appeals essentially handed down an "unreviewable" decision. Robin L. Rivett, Federal Case Law Development Under the Clean Water Act 404 Permit Program for Discharge of Dredged or Fill Material into the Nation's Waters and Wetlands 8 (1993) (unpublished manuscript, on file with author). This decision is unreviewable because its results turn on the facts of the case, not a disagreement about the nature of the law. *Id.*

[122] *Hoffman II*, 999 F.2d at 261. Interestingly, the court only held that the EPA's construction of its own regulation was reasonable. *Id.* at 260. That part of the decision is consistent with Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984) (holding that if Congress does not directly address issue in statute, court must uphold agency interpretation unless arbitrary or capricious). *See also* Scott Bergstrom, Comment, *Overflowing Jurisdictional Banks: The Extension of Regulatory Authority over "Navigable Waters" Under Section 404 of the Clean Water Act*, 41 KAN. L. REV. 835, 860 (1993) (noting that courts should defer to Corps' interpretation of Clean Water Act). In contrast to *Hoffman I*, the *Hoffman II* court never addressed the scope of the Clean Water Act or the Commerce Clause issue in *Hoffman II*. *Compare Hoffman II*, 999 F.2d 256 *with Hoffman I*, 961 F.2d 1310.

[123] *Hoffman II*, 999 F.2d at 261.

failed to present substantial evidence that migratory birds could potentially use Hoffman's wetland.[124]

The panel's new opinion in *Hoffman II* resolved the stark circuit split between *Hoffman I* and *Leslie Salt*.[125] *Hoffman II* does not take issue with *Leslie Salt*'s holding that potential use by migratory birds confers Commerce Clause jurisdiction on an isolated wetland.[126] It is still unclear, however, what evidence the government must show to demonstrate that an isolated wetland might support migratory birds.[127]

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[124] *Id.* at 262. There were two wetlands on Hoffman Homes' property: Area *A* and Area *B*. *Id.* at 258. Hoffman Homes only contested EPA jurisdiction over Area *A*. *Id.* at 259. The court noted that the EPA presented expert testimony that Area *B* actually supported migratory birds. *Id.* at 261. The court held that this indicated the wetland in question was potentially a habitat for migratory birds. *Id.* The court stated that the EPA expert only observed Area *B*, so his testimony about Area *A* (the area in question) was mere speculation. *Id.* at 262. Explaining that the EPA's own expert testified that migratory birds will land just about anywhere, the court found it determinative that no one had ever seen birds at the wetland in question. *Id.*

This lack of evidence would be very important if the question before the court was whether or not the *actual presence* of migratory birds gives the government jurisdiction over an isolated wetland. *See* Bergstrom, *supra* note 122, at 863 (noting that substantial evidence showed that Area *A* was potential habitat for migratory birds). But the question is whether the *potential use* of a wetland by a migratory bird gives the government jurisdiction. *Hoffman II*, 999 F.2d at 260. If the question really is if the EPA presented substantial evidence that might allow a reasonable person to conclude that migratory birds could potentially use the wetland, the answer must be "yes." Bergstrom, *supra* note 122, at 863.

Finally, a careful examination of the majority opinion shows that the court only decided two issues. *Hoffman II*, 999 F.2d at 260. It decided that the EPA's interpretation of its own regulation was reasonable and that the EPA did not present enough evidence to meet the interpretation's requirements. *Id.* The court never actually ruled on whether the regulation itself was valid under the Clean Water Act or the Commerce Clause. *Id.*

But see Reuth v. United States Envtl. Protection Agency, 13 F.3d 227, 231 (7th Cir. 1993) (stating in dicta that *Hoffman II* means that nearly all wetlands fall within reach of Clean Water Act); *but cf.* Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (Easterbrook, J.) (characterizing *Hoffman II* decision as "conclud[ing] that the EPA did not exceed its power when promulgating [CWA regulations defining isolate wetlands] but that even a rule with such broad scope did not cover a one-acre wetland 750 feet from a small creek.") The *Oconomowoc* court concluded that a six acre retention pond was not within the EPA's reach. *Oconomowoc*, 24 F.3d at 965.

[125] Johnson, *supra* note 44, at 8.

[126] Where *Hoffman I* explicitly disagreed with *Leslie Salt*, *Hoffman II* does not address the issues raised in *Hoffman I*, except in Judge Manion's concurrence. *Hoffman II*, 999 F.2d at 262 (Manion, J., concurring).

[127] *See supra* note 124 (describing evidence of potential use by migratory birds

IV. ANALYSIS OF CURRENT LAW

A. Arguments in Favor of Finding that the Commerce Clause Reaches Isolated Wetlands

Only one federal court has tackled the issue of isolated wetlands directly.[128] That court noted that potential use by migratory birds is a sufficient connection to interstate commerce to allow Congress to regulate isolated wetlands.[129] Supreme Court opinions giving a consistently broad reading to the Commerce Clause arguably support this position.[130] The Court has said that it will not question a congressional judgment that an activity affects interstate commerce unless the effect is "clearly nonexistent."[131]

In his concurrence to the *Hodel* cases, Justice Rehnquist admitted that the Court's adherence to the enumerated powers doctrine is a charade.[132] He called the notion that Congress can only exercise the powers delegated to it, with the balance reserved for the states, a legal fiction.[133] The fact that the Supreme Court has only struck down three regulations enacted under the commerce power in the past fifty-six years supports this contention.[134]

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that EPA presented in *Hoffman II*); *see also* Bergstrom, *supra* note 122, at 863.

[128] Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991).

[129] *Id.* at 360 (stating "[t]he commerce clause power . . . is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species.").

[130] *See infra* notes 132-34 and accompanying text (raising general arguments about why Commerce Clause reaches isolated wetlands).

[131] Hodel v. Indiana, 452 U.S. 314, 326 (1981) (quoting with approval Stafford v. Wallace, 258 U.S. 495, 521 (1922)).

[132] *See infra* note 133 and accompanying text (describing Justice Rehnquist's view that notion of limited federal power is fiction).

[133] Hodel v. Indiana, 452 U.S. at 307 (Rehnquist, J., concurring).

[134] United States v. Diego Ornelas, 841 F. Supp. 1087, 1093 (D. Colo. 1994). The Court struck down federal regulations in National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530 (1985), and New York v. United States, 112 S. Ct. 2408 (1992). Both of those cases, however, involved the regulation of state governments by the federal government, implicating sovereign immunity issues not present in the regulation of isolated wetlands. The last Supreme Court case prior to *Lopez* to find that congressional regulation of private sector activities exceeded the scope of the commerce power was Carter v. Carter Coal Co., 298 U.S. 238, 316 (1936). In

Even if the Commerce Clause cannot technically reach isolated wetlands, Congress may still be able to regulate them under the Clean Water Act.[135] Courts will not strike down a law on Commerce Clause grounds because every part of the law is not independently related to a valid purpose.[136] All the Court requires is that the program as a whole pass constitutional scrutiny under the Commerce Clause.[137] Proponents of federal regulation could argue that the Clean Water Act as a whole is properly grounded in the Commerce Clause.[138] The fact that isolated wetlands do not always substantially affect interstate commerce could be inconsequential in light of the Clean Water Act's generally valid purpose.[139]

These factors support the view that Congress can exercise the commerce power to regulate isolated wetlands based on the potential presence of migratory birds.[140] However, a closer examination of precedent demonstrates that the potential presence

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Carter, the Court held unconstitutional regulation of coal mines that did not follow the law's "recommended" coal prices and wages for miners. *Id.* Thus, *Lopez* is truly a watershed case that will undoubtedly play a major role in any evaluation of the constitutionality of federal regulation of isolated wetlands.

For examples of the Court's present approach to Commerce Clause issues, see Katzenbach v. McClung, 379 U.S. 294, 302 (1964), where the court pointed out that the activities that are out of reach of the Commerce Clause are those which take place completely within a state, do not affect other states, and do not interfere with the general power of government. While citing this apparently limiting language, the Court found that Congress had the power to regulate local restaurants. *Id.* at 304. See also Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled by National League of Cities*, 426 U.S. at 840, 853, where the Court noted that the commerce power is broad but does have limits. *Id.* at 196. The *Wirtz* court noted that Congress cannot use a "trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.* at 196 n.27. The Supreme Court's decision in *Lopez* cites these cases extensively. *See* United States v. Lopez, No. 93-1260, 1995 U.S. LEXIS 3039 (Apr. 26, 1995).

[135] *See infra* text accompanying notes 136-39 (noting that court will look at entire regulatory scheme when evaluating constitutionality under Commerce Clause).

[136] Hodel v. Indiana, 452 U.S. at 329 n.17.

[137] *Id.*

[138] The Supreme Court has already held that Clean Water Act regulation of streams, lakes, and adjacent wetlands, is a valid exercise of the commerce power. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).

[139] *See supra* notes 136-38 and accompanying text (describing rule that regulation of commerce does not have to be precise).

[140] *See supra* notes 128-39 and accompanying text (describing arguments in favor of current state of law).

of migratory birds should not allow Congress to regulate isolated wetlands.[141] Federal courts should curtail congressional attempts to regulate isolated wetlands on that basis.[142]

B. Arguments Against Finding that the Commerce Clause Reaches Isolated Wetlands

Although Justice Rehnquist called the enumerated powers doctrine a charade, he also said that there are limits on the commerce power.[143] Some commentators argue that this is implicit in the textual make-up of the Constitution itself.[144] Additionally, the cases outlined in Part II of this Comment demonstrate that courts have found some activities are beyond the reach of the Commerce Clause.[145]

The *Leslie Salt* opinion allows the mere potential presence of migratory birds to serve as a sufficient connection to interstate commerce.[146] In his *Hoffman II* concurrence, however, Judge Manion noted that the mere presence of wildlife, actual or potential, is insufficient to invoke the Commerce Clause.[147] Rather, it would be necessary to show that people who actually or potentially could participate in interstate commerce observe, hunt, or photograph the migratory birds.[148]

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[141] *See infra* notes 143-89 and accompanying text (describing flaws in current state of law).

[142] *See infra* notes 190-216 and accompanying text (describing how courts should deal with isolated wetlands and Commerce Clause).

[143] Hodel v. Indiana, 452 U.S. 264, 309 (1981) (Rehnquist, J., concurring). As noted previously, the Supreme Court found such a limit in the *Lopez* case, striking down a federal prohibition on possession of a firearm within 1000 feet of a school. United States v. Lopez, No. 93-1260, 1995 U.S. LEXIS 3039, at *3-5 (Apr. 26, 1995).

[144] Martin H. Redish & Karen L. Drizen, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1 (1987). Redish and Drizen make a powerful argument that the enumeration of powers clearly shows real limits on congressional power. *Id.* at 13-14.

[145] *See supra* notes 85-90 and accompanying text (describing cases where courts found that Congress exceeded limits of Commerce Clause).

[146] *See supra* notes 112-15 and accompanying text (describing *Leslie Salt*'s approach to isolated wetlands and Commerce Clause).

[147] 999 F.2d 256, 262 (7th Cir. 1993) (Manion, J., concurring) (incorporating opinion at 961 F.2d 1310, 1320 (7th Cir. 1992)).

[148] *Hoffman I*, 961 F.2d at 1320. Stephen Johnson, an attorney with the Department of Justice, criticized this portion of Judge Manion's concurrence, noting that migratory birds are an "*item* of commerce." *See* Johnson, *supra* note 44, at 39. Johnson stated that items of commerce do not engage in commerce, but because

As support for this position, Judge Manion cited *Douglas v. Seacoast Products, Inc.*[149] In *Douglas*, the Supreme Court held that Congress could use the Commerce Clause to regulate the taking of fish in state waters if there is some effect on interstate commerce.[150] It was the taking of the fish by the fishermen, not the presence of the fish themselves, that gave Congress jurisdiction under the commerce power.[151] In *United States v. Helsley*,[152] the Ninth Circuit upheld the Airborne Hunting Act[153] because of the effect that airborne hunting has on interstate commerce.[154] As Judge Manion noted in *Hoffman I*, analysis of *Helsley* shows that the presence of birds was incidental to the justification of the law.[155] The hunting of the birds by people in interstate commerce provided the basis for the federal regulation.[156]

In *Palila v. Hawaii Department of Land and Natural Resources*,[157] a district court observed that a program to conserve habitat for an endangered species was a valid exercise of the commerce power.[158] The program protected the possibility of interstate

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there is interstate commerce in migratory birds, Congress may regulate it. *Id.*

The response to Johnson's critique is simply that migratory birds are not in and of themselves items of commerce. *Hoffman I*, 961 F.2d at 1320. Migratory birds are no more items of commerce than flying bugs, unless they are connected to human activity. *See infra* notes 149-61 and accompanying text (describing requirement of connection to human activity). The human activity can consist of reducing the bird to possession (in which case the bird becomes like any other good) or by interacting with it (by observing it, photographing it, and so forth). *Hoffman I*, 961 F.2d at 1320. What makes birds different from other "items of commerce" is the fact that, unlike a TV set, a bird has the ability to move itself across state lines without any assistance or activity on the part of a human being. *Id.* In its amicus brief in *Hoffman I*, the Pacific Legal Foundation noted that the only areas which would not be "potential habitat" for migratory birds would be fresh lava flows and glaciers. Amicus Brief of Pacific Legal Foundation at n.5, *Hoffman I*, 961 F.2d 1310 (7th Cir. 1992) (No. 90-3810) (copy on file with author).

[149] *Hoffman I*, 961 F.2d at 1320 (citing Douglas v. Seacost Prods., Inc., 431 U.S. 265 (1977).

[150] *Douglas*, 431 U.S. at 281-82.

[151] *Hoffman I*, 961 F.2d at 1320 (citing *Douglas*, 431 U.S. at 281-82).

[152] 615 F.2d 784 (9th Cir. 1979).

[153] 16 U.S.C. § 742j-1 (1988).

[154] *Hoffman I*, 961 F.2d at 1320; *see Helsley*, 615 F.2d at 786 (holding that Commerce Clause allows federal regulation of airborne hunting).

[155] *Hoffman I*, 961 F.2d at 1320.

[156] *Id.*

[157] 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

[158] *Id.* at 995.

commerce in the species itself and the movement of people in commerce who studied or observed it.[159] Unlike the statute construed in *Palila*, the Clean Water Act's purpose is not to protect possible future commerce in wildlife.[160] Federal precedent demonstrates that past or possible future human activity has always been present when courts found that wildlife substantially affected interstate commerce.[161]

Another flaw in the *Leslie Salt* analysis is that it allows Congress to regulate without making a finding that isolated wetlands affect interstate commerce.[162] Congress has made no finding that it intended to regulate isolated wetlands under the Clean Water Act.[163] Neither the Clean Water Act nor its legislative

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[159] *Id.*

[160] *See* 33 U.S.C. § 1251 (detailing purpose of Clean Water Act (CWA)). The CWA's purpose is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. *Id.*

The court in *Palila* noted that according to Brown v. Anderson, 202 F. Supp. 96 (D. Alaska 1962), the commerce power extends to wildlife only because of the interstate movement of people who use or study it. *Palila*, 471 F. Supp. at 995 n.39.

[161] *See supra* notes 149-60 and accompanying text (describing cases demonstrating necessity of human activity to find substantial effect on interstate commerce). In *Hoffman I*, the EPA cited Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991), for the proposition that no human activity is required. *Hoffman I*, 961 F.2d at 1321. In addition, Judge Manion noted that the EPA could have tried to cite United States v. Stoeco Homes, Inc., 498 F.2d 597, 607 (3d Cir. 1974) (stating in dicta without explanation that any activities affecting marine ecology could be regulated under Commerce Clause), *cert. denied*, 420 U.S. 927 (1975), and Zabel v. Tabb, 430 F.2d 199, 203-04 (5th Cir. 1970) (stating in dicta without explanation that harm to fish and wildlife has substantial effect on interstate commerce), *cert. denied*, 401 U.S. 910 (1971).

[162] *See Leslie Salt Co.*, 896 F.2d at 354 (finding federal power extended to isolated wetland without finding effect on interstate commerce).

[163] *See* 33 U.S.C. § 1251 (providing no language regarding isolated wetlands). In contrast to the statute in *Hodel v. Indiana*, nothing in either the Clean Water Act itself or its legislative history suggests that Congress made any finding that isolated wetlands have an effect, much less a substantial effect, on interstate commerce. *Compare* 33 U.S.C. § 1251 *with* Hodel v. Indiana, 452 U.S. 314 (1981); *see also Hoffman I*, 961 F.2d 1310, 1313-16 (7th Cir. 1992), *vacated and reh'g granted at* 965 F.2d 1554 (7th Cir. 1992) but *incorporated into* concurring opinion of Judge Manion in *Hoffman II*, 999 F.2d 256, 262 (7th Cir. 1993).

Thus a fundamental difference exists between statutes where Congress has made formal or informal findings of a substantial effect on interstate commerce, and those where Congress has made no such finding. *See supra* notes 49-104 and accompanying text (explaining different types of Commerce Clause cases). When Congress has made a formal or informal finding, the Supreme Court has without exception refused to strike down the legislation. *See, e.g.*, Equal Employment

Opportunity Comm'n v. Wyoming, 460 U.S. 226, 231-33 & n.3, 243 (1983) (upholding Age Discrimination in Employment Act); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 755-56 (1982) (upholding Public Utility Regulatory Policies Act); Hodel v. Indiana, 452 U.S. 314, 324-26 (1981) (upholding Surface Mining Control and Reclamation Act); Perez v. United States, 402 U.S. 146, 147 n.1, 154-55 (1971) (upholding Consumer Credit Protection Act); *see also, e.g,* Katzenbach v. McClung, 379 U.S. 294, 299-300 (1964) (upholding Title II of Civil Rights Act of 1964, finding that lack of formal findings not fatal to law's validity because evidence presented at hearings demonstrated regulated activity's effect on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 246, 261-62 (1964) (upholding same law as *Katzenbach* in different factual setting).

Courts cannot determine if a rational basis for a finding of a substantial effect on interstate commerce exists if the statute and the legislative history are silent on the matter. United States v. Lopez, 2 F.3d 1342, 1363-64 (5th Cir. 1993), *aff'd,* No. 93-1260, 1995 U.S. LEXIS 3039 (Apr. 26, 1995). The Supreme Court's opinion in *Lopez* found the Gun Free School Zones Act unconstitutional as an exercise of the commerce power. United States v. Lopez, No. 93-1260, 1995 U.S. LEXIS 3039, at *32-34 (Apr. 26, 1995). The Court stated that Congress does not need to make formal or particularized findings of a substantial burden on interstate commerce. *Id.* at *25. However, the Court noted, "[t]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." *Id.* The Court seems to be stating that in cases where the substantial effect on interstate commerce is tenuous or difficult to perceive, the absence of such findings could result in the invalidation of a law that might otherwise be constitutional. *See id.*

Other courts have followed the same analysis as the Fifth Circuit in *Lopez. See supra* note 104 (listing cases following *Lopez* analysis). For a discussion of *Lopez,* see *supra* notes 91-103 and accompanying text. The Fifth Circuit's decision in *Lopez* is also consistent with opinions in which other federal courts have found activities lacking a specific congressional finding do not to have a substantial effect on interstate commerce. *See supra* notes 85-90 and accompanying text (referencing cases where courts have found activities did not have substantial effect on interstate commerce).

Stephen Johnson recently wrote an article which criticizes the *Hoffman I* decision in general, and the idea that the interstate movement of migratory birds does not affect commerce in particular. *See* Johnson, *supra* note 44, at 22-42. He argues that the *Hoffman I* decision ignored the judiciary's traditional deference to a congressional finding that an activity substantially affects interstate commerce. *Id.* at 36. Johnson interprets *Hodel v. Indiana* to mean that the *Hoffman I* court should have deferred to a congressional finding that isolated wetlands that could be used by migratory birds have a substantial effect on interstate commerce. *Id.* at 36-37.

Johnson's other major criticism of the *Hoffman I* decision is that *Hoffman I* contradicts Supreme Court rulings which hold that when a class of activities is within the reach of the commerce power, individual members of that class cannot be found to be outside the scope of the Commerce Clause. *Id.* at 37 & n.192 (citing with approval Perez v. United States, 402 U.S. 146, 154 (1971)). However, the Court's other holdings belie Johnson's overly broad conclusion. *See supra* notes 45-108 and accompanying text (describing Commerce Clause cases). In each case where

history provides any grounds to conclude that the destruction of isolated wetlands substantially affects interstate commerce.[164] Thus, a reviewing court would not be questioning Congress' judgment if it found that potential use by migratory birds does not substantially affect interstate commerce.[165]

Even if Congress were to resolve that flaw by making a specific factual finding, another flaw in the *Leslie Salt* analysis would still exist.[166] This third flaw is that potential use by migratory birds does not substantially affect interstate commerce.[167] The chain of causation is infinite: all activities have at least some theoretical effect on commerce.[168] Courts must apply some limitation.[169] That limitation is the concept of substantiality, and it is vital as a limit on the commerce power.[170] If Congress is unwilling to acknowledge such limits, the courts must.[171]

Finally, the *Leslie Salt* approach does not allow for judicial limits on the use of the Commerce Clause to expand federal power at the expense of the states.[172] Justice Rehnquist characterized the Court's decision in *Hodel v. Virginia*[173] and *Hodel v.*

Congress has relied on a cumulative impact to justify regulation of a class of activities under the Commerce Clause, Congress has made factual findings alleging that such regulation was necessary to regulate local activities "to abate a cumulative evil affecting national commerce." Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 309 (1981) (Rehnquist, J., concurring) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 237 (1978)).

[164] *Hoffman I*, 961 F.2d at 1313-16.

[165] *See supra* notes 162-65 and accompanying text (demonstrating that Congress has made no finding that isolated wetlands substantially affect interstate commerce).

[166] *See infra* notes 167-71 and accompanying text (describing third flaw in *Leslie Salt* approach).

[167] *See infra* notes 172-82 and accompanying text (describing cases which show that potential effects on interstate commerce are not substantial effects).

[168] United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993). *Lopez* involved a conviction for possession of a firearm within 1000 feet of a school. *Id.* The Supreme Court strongly echoed this language. *See* United States v. Lopez, No. 93-1260, 1995 U.S. LEXIS 3039, at *27-28 (Apr. 26, 1995).

[169] *See Lopez*, 2 F.3d at 1362 (arguing that scope of Commerce Clause must be limited by concept of substantiality to preserve existence of intrastate commerce).

[170] *Id.* at 1361-62.

[171] *Id.*

[172] *See infra* notes 173-82 and accompanying text (noting that *Leslie Salt* approach provides no limits on federal power).

[173] Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981).

Indiana[174] as stretching the Commerce Clause to the "nth degree."[175] In those cases the Court upheld federal regulation of surface mining practices.[176] If the decision in the *Hodel* cases stretched the Commerce Clause to the "nth degree," attempted regulation of isolated wetlands stretches the clause past the breaking point. If unchecked, the tenuous connection between potential use of wetlands by migratory birds and the Commerce Clause will further undermine the distinction between local and national government.[177] The Supreme Court has said before that it will not allow the elimination of that distinction.[178]

At oral argument in *Hoffman I*, the EPA admitted that migratory birds sometimes land in parking lot puddles.[179] The EPA, in Judge Manion's opinion, "magnanimously conceded" that it would not attempt to regulate such puddles because they would not constitute wetlands.[180] The EPA's concession does not change the fact that it has adopted a limitless interpretation of the scope of the Commerce Clause power.[181] The *Hoffman II* concurrence also noted that commerce is a uniquely human activity; the mere fact that we want to protect certain animals does not invoke the commerce power.[182]

The Clean Water Act is similar to the statutes at issue in cases where the court has found no substantial effect on interstate commerce.[183] This is primarily because the category "migratory birds" includes more than just birds such as ducks and geese

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[174] 452 U.S. 314 (1981).

[175] Hodel v. Virginia, 452 U.S. at 311.

[176] *Id.* at 304; Hodel v. Indiana, 452 U.S. at 336.

[177] *Hoffman I*, 961 F.2d 1310, 1321 (7th Cir. 1992) (quoting Hodel v. Virginia, 452 U.S. at 309 (Rehnquist, J., concurring)), *vacated and reh'g granted at* 975 F.2d 1554 (7th Cir. 1992) but *incorporated into* concurring opinion of Judge Manion in *Hoffman II*, 999 F.2d 256, 262 (7th Cir. 1993).

[178] National Labor Relations Bd. v. Jones & McLaughlin Steel Corp., 301 U.S. 1, 37 (1937).

[179] *Hoffman II*, 999 F.2d at 262.

[180] *Hoffman I*, 961 F.2d at 1321 n.9.

[181] *Id.*

[182] *Id.* at 1322.

[183] *See supra* notes 76-90 and accompanying text (discussing cases involving statutes meant to go to limits of commerce power and involving activities that are not within those limits); *supra* notes 91-104 and accompanying text (discussing cases involving statutes where courts have found Congress exceeded commerce power).

that people frequently hunt, photograph, or observe.[184] Migratory birds include all birds that migrate, including birds that have no involvement with interstate commerce.[185] It is unreasonable to argue that the potential use of an isolated wetland by any species of migratory bird substantially affects interstate commerce.[186]

Even if the arguments opposing the *Leslie Salt* approach outweigh the arguments in favor of it, this does not mean that the federal government is powerless to regulate isolated wetlands under the Clean Water Act.[187] As the proposals below indicate, there are several different standards courts could impose on federal regulation of isolated wetlands.[188] These standards would keep the regulation of isolated wetlands within constitutional limitations on federal power.[189]

V. PROPOSED SOLUTION

There are several different ways courts could bring regulation of isolated wetlands within constitutional limits.[190] All of the proposed solutions share a common theme: that something beyond potential use by migratory birds is required for federal regulation to be constitutional.[191] First, courts could hold that neither actual nor potential use by migratory birds allows Congress to regulate isolated wetlands under the Commerce Clause.[192] Second, courts could use Judge Manion's human ac-

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[184] TERRES, *supra* note 4, at 246.

[185] *Id.* at 245; *see supra* note 20 and accompanying text (describing number and variety of migratory birds in United States).

[186] *See supra* notes 149-61 and accompanying text (discussing need for migratory birds to have some connection to human activity to have effect on interstate commerce).

[187] *See infra* notes 190-216 and accompanying text (noting ways federal government could regulate isolated wetlands without exceeding scope of Commerce Clause).

[188] *See infra* notes 190-216 and accompanying text (noting ways federal government could regulate isolated wetlands without exceeding scope of Commerce Clause).

[189] *See supra* notes 45-188 and accompanying text (reviewing case law and identifying limits on federal power).

[190] *See infra* notes 191-216 and accompanying text (describing proposed solutions to problem of federal regulation of isolated wetlands using commerce power).

[191] *See infra* notes 192-216 and accompanying text (describing several solutions which would help limit federal power).

[192] *See infra* notes 196-99 and accompanying text (suggesting that potential use by

tivity requirement.[193] Third, the courts could develop a more narrow definition of "potential."[194] Finally, courts could suggest that Congress amend the Clean Water Act to resolve the issue of isolated wetlands.[195] Each of these potential solutions is discussed in detail below.

As a remedy for the *Leslie Salt* approach's flaws, courts could rule that neither potential nor actual use by migratory birds allows Congress to regulate isolated wetlands using the commerce power.[196] Such an approach would have the salutary effect of making state and local government the primary protectors of isolated wetlands.[197] This would be a small step toward maintaining a viable system of state and local government.[198] This approach, however, is probably not supportable under the Supreme Court's extremely broad interpretation of the Commerce Clause.[199] Barring a sudden shift in the Court's approach to the Commerce Clause, a less radical solution must be developed.

A second, more realistic solution would be for courts to impose a human activity requirement.[200] As Judge Manion's concurrence in *Hoffman II* demonstrated, this solution would be

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migratory birds cannot bring isolated wetlands within scope of Commerce Clause).

[193] *See infra* notes 200-03 and accompanying text (describing Judge Manion's human activity requirement).

[194] *See infra* notes 204-11 and accompanying text (describing how courts could define potential use more reasonably).

[195] *See infra* notes 212-13 and accompanying text (proposing that Congress amend Clean Water Act).

[196] *See supra* notes 13, 42 and accompanying text (describing possible alternative enumerated powers and describing alternative connections to interstate commerce). This approach would not halt federal regulation altogether because there are several other ways the federal government could regulate isolated wetlands. *See supra* notes 13, 42 and accompanying text (describing possible alternative enumerated powers and describing alternative connections to interstate commerce).

[197] *See infra* note 217 and accompanying text (noting ability of states to regulate isolated wetlands).

[198] *See supra* note 23 and accompanying text (pointing out that expansion of Commerce Clause is taking place across broad spectrum of government activities).

[199] *See supra* notes 45-108 and accompanying text (describing Commerce Clause jurisprudence and noting its broad deference to Congress). However, in light of the Supreme Court's stunning decision in the *Lopez* case, such a proposal might well be acceptable to the federal courts.

[200] *See supra* notes 149-61 and accompanying text (describing human activity requirement).

consistent with precedent.[201] Using a human activity requirement would limit application of federal regulations to those wetlands that actually have a connection to economic activity.[202] This would also further federalism without requiring any break with past Supreme Court precedent.[203]

The courts could also develop a more reasonable definition of "potential."[204] This would involve taking a cue from the Sev-

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[201] *See supra* notes 116-20 and accompanying text (describing Judge Manion's opinion in *Hoffman I*, 961 F.2d 1310 (7th Cir. 1992)).

[202] *See supra* notes 149-61 and accompanying text (describing human activity requirement).

[203] *See supra* notes 149-61 and accompanying text (describing human activity requirement).

[204] *See infra* 205-11 and accompanying text (describing how courts could define potential use more reasonably). The federal courts have already developed one definition of "potential" that could usefully limit the meaning of "potential use" in the context of isolated wetlands. The definition of potential arose in Supreme Court jurisprudence defining "navigable waters" under the Rivers and Harbors Act. 33 U.S.C. § 401 (1988). For example, in Economy Light & Power Co. v. United States, 256 U.S. 113 (1921), the Court held that a river with the natural capacity to sustain commerce is within reach of the Commerce Clause, even if the river is not currently being used to carry commerce. *Id.* at 123-24, *quoted with approval in* United States v. DeFelice, 641 F.2d 1169, 1174 n.11 (5th Cir. 1981). Thus, potential commerce on a river is sufficient to give Congress Commerce Clause jurisdiction. *Id.*

An argument could be made that just as Congress can regulate potentially navigable waterways, it can regulate wetlands that migratory birds can potentially use. No court has ever directly addressed this question, although arguably the court in *Hoffman II* and the court in *Leslie Salt* did. *Cf. Hoffman II*, 999 F.2d 256, 262 (7th Cir. 1993); Leslie Salt Co. v. United States 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991). The potential navigability test states that rivers that can potentially be used for commerce are subject to congressional power. Potential does not refer to every square foot of land just because it might theoretically be possible to convert it to use as an artery of commerce.

The United States Supreme Court defined "potential" in United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). In this case, the Court held that navigable waters include not only those waters currently used for commerce but also those susceptible to such use. *Id.* at 406-07 (quoting with approval The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)). The Court stated that when considering the potential for a waterway's future use in commerce, courts must recognize that there are limits to what is susceptible. *Id.* at 407. The court stated that these limits take the form of a balancing test that weighs the cost of improving the body of water at a future time. *Id.* at 407-08. In other words, the test is whether the waterway could be an artery of commerce with "reasonable" improvements. *Id.* at 409. The Court had used this test in the past to find a stretch of the Rio Grande not susceptible to future use in commerce. *Id.* at 407 n.26 (quoting United States v. Rio Grande Irrigation Co., 174 U.S. 690, 699 (1899)).

This line of authority is still valid today. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 173-74 (1979) (citing *Appalachian Electric* with approval); Boone v.

enth Circuit's opinion in *Hoffman II*.[205] The *Hoffman II* majority seemed to hold that the federal government must show an isolated wetland has some special characteristic that makes it especially attractive to migratory birds.[206] Such an evidentiary burden would essentially require the government to show that a wetland is more suitable for use by migratory birds than the average piece of land.

Such a requirement could include a showing that the species of bird that would potentially use the isolated wetland substantially affects interstate commerce.[207] Courts could limit regulation to wetlands that are major migratory bird habitats, wetlands that migratory birds have historically used,[208] or wetlands that are on the flyways of migratory birds.[209] The courts could also require that the EPA show that there are not sufficient wetlands in a given region to support normal migratory bird populations.[210] Courts might further require that the actual use by migratory birds have occurred during the season in which the wetland is actually wet.[211] Any of these standards would bring interpretation of the Clean Water Act closer to a constitutional

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United States, 944 F.2d 1489 (9th Cir. 1991) (citing *Appalachian Electric* definition of navigability with approval); United States v. Harrell, 926 F.2d 1036, 1039, 1044 (11th Cir. 1991) (citing *Appalachian Electric* definition of navigability with approval and holding tributary stream not navigable); Miami Valley Conservancy Dist. v. Alexander, 692 F.2d 447, 449 (6th Cir. 1982) (citing *Appalachian Electric* and finding only portion of Great Miami River navigable), *cert. denied*, 462 U.S. 1123 (1983); United States v. DeFelice, 641 F.2d 1169, 1174 n.11 (5th Cir. Unit A Apr. 1981) (citing *Appalachian Electric* with approval).

[205] 999 F.2d 256 (7th Cir. 1993).

[206] *Id.* at 262.

[207] *See* Johnson, *supra* note 44, at 38-39 (noting that migratory birds such as waterfowl generate several billion dollars of commerce annually).

[208] *See Hoffman II*, 999 F.2d at 262 (appearing to require EPA to show actual historical use of isolated wetland to regulate under Clean Water Act).

[209] *See* Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984) (holding that lake on major flyway for migratory birds was connected to interstate commerce).

[210] The requirement would be consistent with Stephen Johnson's argument that not protecting isolated wetlands may create "wetland ghettos" by giving migratory birds progressively less habitat to chose from. Johnson, *supra* note 44, at 39.

[211] The requirement of actual use when the wetland is actually wet would be consistent with Justice Rehnquist's statement in Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 310 (1980), that there must be a nexus between the activity and the connection to interstate commerce. *See supra* notes 70-75 and accompanying text (describing Justice Rehnquist's view that there must be nexus between activity regulated and interstate commerce).

standard that preserves the distinction between local and federal government.

Finally, courts could suggest that Congress amend the Clean Water Act to resolve the issue.[212] This would move the topic from the realm of the courts to the democratic process.[213] Unfortunately, there is no guarantee that the resulting legislation would be more consistent with the limits of the Commerce Clause.

Each approach listed above has the virtue of being more consistent with the constitutional limits of the Commerce Clause than the *Leslie Salt* approach.[214] Courts could implement all but the first solution consistently with existing Supreme Court precedent.[215] Finally, none of these solutions would completely bar the federal government from regulating isolated wetlands.[216]

CONCLUSION

At a minimum, courts must develop a limit on the power of the federal government to regulate isolated wetlands. If they do not, the Commerce Clause may ultimately become limitless. The fifty-year trend toward centralized government will continue unchecked.

There is no reason why this must happen. States and local governments can protect isolated wetlands.[217] This Comment does not advocate the wanton destruction of isolated wetlands.

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[212] As a result of the *Lopez* decision, legislation was introduced in Congress to amend the Gun Free Schools Act to include findings of a substantial effect on interstate commerce. United States v. Trigg, 842 F. Supp. 450, 452 n.5 (D. Kan. 1994).

[213] *Id.*

[214] *See supra* notes 112-15, 128-89 and accompanying text (describing strengths and weaknesses of court's approach in Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991)).

[215] *See supra* notes 190-214 and accompanying text (describing proposed solutions to flaws in *Leslie Salt* approach). Again, the *Lopez* decision may make the first solution feasible under current case law.

[216] *See supra* notes 190-214 and accompanying text (describing proposed solutions to flaws in *Leslie Salt* approach).

[217] Leary, *supra* note 16 (noting that about 14 states already have such programs). Elizabeth Geltman notes that as of 1988, 16 states had wetlands protection programs and that these programs generally provided greater protection to wetlands than the federal program. Elizabeth Ann Glass Geltman, *Regulation of Non-Adjacent Wetlands Under Section 404 of the Clean Water Act*, 23 NEW ENG. L. REV. 615, 620 n.26 (1988).

Indeed, environmentalists who oppose the filling of any more wetlands could agree that the governmental entity that should regulate these wetlands is state government, not federal.[218] Federal regulation is a double-edged sword for environmentalists because the same federal government that provides nationwide protection of isolated wetlands under the Commerce Clause today can provide for their destruction tomorrow.

John A. Leman

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[218] *But see* Renee Stone, *Wetlands Protection and Development: The Advantages of Retaining Federal Control*, 10 STAN. ENVTL. L.J. 137 (1991) (maintaining that federal regulation of wetlands is better for both landowners and wetlands, but noting that state government responds better to local environmental conditions).