THE POTENTIAL IMPACT OF *UNITED STATES v. LOPEZ* ON ENVIRONMENTAL REGULATION

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United States v. Lopez, which held a statute unconstitutional for exceeding Congress's commerce power, raises complex issues regarding federalism and the nature and scope of federal authority under the Commerce Clause. The decision is significant in relation to environmental regulation because many environmental protection statutes were passed pursuant to the commerce power and may now be susceptible to challenge. This Article assesses the vulnerability of certain provisions of the Clean Water Act and the Endangered Species Act in light of the *Lopez* decision. In particular, the Article explores whether the destruction of isolated wetlands and the degradation of endangered species' habitat are economic activities that substantially affect interstate commerce. While plausible arguments may be made to the contrary, this author ultimately concludes that the analyzed provisions satisfy *Lopez*, and are thus capable of withstanding constitutional challenge.

INTRODUCTION

Under Article I, Section 8, Clause 3 of the Constitution, Congress has the power to regulate interstate commerce. Because courts have defined the commerce power quite broadly since the 1930s, Congress has enjoyed some sixty years of essentially plenary legislative power. So long as Congress could show that the regulated activity affects

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interstate commerce, however indirectly, the Court would uphold the exercise of federal authority.[1]

Despite broad judicial interpretation giving the Commerce Clause seemingly infinite reach, the United States Supreme Court has consistently adhered to the notion that the commerce power is limited.[2] Until its five-to-four decision in *United States v. Lopez*,[3] issued April 26, 1995, however, the Court seemed unable to fix an outer limit on the commerce power.[4] In *Lopez*, the Court held that Congress had exceeded the authority granted to it by the Commerce Clause in enacting the Gun-Free School Zones Act of 1990.[5]

In reaching its decision, the majority ruled that under the Commerce Clause, Congress can permissibly regulate economic activity that substantially affects interstate commerce.[6] Possession of a gun in a school zone, however, was found to be a noncommercial, purely local activity in an area of regulation traditionally left to the states, and thus beyond the reach of the commerce power.[7]

Though *Lopez* purports to be a Commerce Clause decision, the majority opinion seems influenced more by an underlying concern for protection of state sovereignty than by the absence of a nexus to interstate commerce.[8] In reaching its conclusion that possession of a gun in a school zone is not an economic activity that substantially

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1. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (upholding imposition of federal standards for minimum wage and maximum hours under Fair Labor Standards Act); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal regulation of wheat grown for home consumption).

2. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (reasoning that the enumeration of powers "presupposes something not enumerated"); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (warning that the scope of commerce authority "must be considered in light of our dual system of government" and may not be so expansive as to "create a completely centralized government"); United States v. Lopez, 115 S.Ct. 1624, 1634 (1995) (indicating the commerce power is limited by the enumeration of powers doctrine and concepts of federalism).

3. 115 S.Ct. 1624 (1995).

4. Starting with its decision in *Jones & Laughlin Steel*, the Court had not found any instance in which Congress exceeded its commerce authority until its decision in *Lopez*.

5. The Gun-Free School Zones Act of 1990 forbids any individual from knowingly possessing a firearm in a place he knows to be a school zone. 18 U.S.C. § 922(q)(1)(A) (1994).

6. *Lopez*, 115 S.Ct. at 1630.

7. *Id.* at 1634.

8. For instance, the Court "pause[d] to consider the implications of the Government's arguments" and concluded they were limitless: "Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas . . . where [the] States historically have been sovereign." *Id.* at 1632.

affects interstate commerce, the Court focused on the impact that upholding the Act would have on state sovereignty.[9]

As the first case in some sixty years to strike a statute for exceeding congressional power under the Commerce Clause, *Lopez* has understandably sparked a flurry of legal commentary, much of which has focused on the issue of federalism.[10] *Lopez*, however, also presents a new opportunity to challenge other statutes enacted pursuant to that authority.[11] In particular, environmental protection statutes, grounded as they are for the most part on the commerce power, may now be susceptible to Commerce Clause challenges. This article assesses the vulnerability of certain provisions of selected environmental statutes, specifically, the Clean Water Act and the Endangered Species Act.[12]

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9. *See id.* at 1634. The majority decision indicates a willingness to protect the distinction between what is truly local and what is truly national. The Court declined to accept the government's causal connections to interstate commerce because to do so would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* Echoing a concern for preserving state sovereignty, Justice Kennedy stated: "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 1638 (Kennedy, J. concurring).

10. *See, e.g.*, Anthony B. Ching, *Travelling Down the Unsteady Path*: United States v. Lopez, New York v. United States, *and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99 (1995); John P. Frantz, Recent Developments, *The Reemergence of the Commerce Clause as a Limit on Federal Power*, 19 HARV. J.L. & PUB. POL'Y 161, 174 (1995); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Stephen M. Mcjohn, *The Impact of* United States v. Lopez: *The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1 (1995); Russell F. Pannier, *Lopez and Federalism*, 22 WM. MITCHELL L. REV. 71 (1996); Barry C. Toone & Bradley J. Wiskirchen, Note, *Great Expectations: The Illusion of Federalism after* United States v. Lopez, 22 J. LEGIS. 241 (1996); Russell L. Weaver, *Lopez and the Federalization of Criminal Law*, 98 W. VA. L. REV. 815 (1996).

11. *See, e.g.*, Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1995); Kelly G. Black, Comment, *Removing Intrastate Lawsuits: The Affecting-Commerce Argument after* United States v. Lopez, 1995 B.Y.U. L. REV. 1103 (1995); Kathleen A. Burdette, Comment, *Making Parents Pay: Interstate Child Support Enforcement after* United States v. Lopez, 144 U. PA. L. REV. 1469 (1996); Ronald S. Kornreich, Note, *The Constitutionality of Punishing Deadbeat Parents: The Child Support Recovery Act of 1992 after* United States v. Lopez, 64 FORDHAM L. REV. 1089 (1995).

12. For additional articles addressing this and related topics see, Michael Bablo, Note, Leslie Salt Co. v. United States: *Does the Recent Supreme Court Decision in* United States v. Lopez *Dictate the Abrogation of the "Migratory Bird Rule"?*, 14 TEMP. ENVTL. L. & TECH. J. 277 (1995) (arguing tenuous connection between migratory birds and interstate commerce does not satisfy the tests enunciated in *Lopez*); Jonathan G. Hieneman, Note and Comment, *The Shrinking Reach of the Commerce Power: Is Wetland Jurisdiction in Danger?*, 10 J. NAT. RESOURCES & ENVTL. L. 341 (1994-1995) (suggesting Congress is without authority under Commerce Clause to regulate intrastate isolated wetlands solely on the potential presence of

Being the first case in decades to find that Congress exceeded its power under the Commerce Clause, *Lopez* may signal a new phase in Commerce Clause jurisprudence with far-reaching implications. To appreciate the significance of *Lopez*, it is necessary to understand its historical context. Section I of this article reviews landmark Commerce Clause cases preceding *Lopez*. Because preservation of the proper balance between state and federal authority is an underlying theme of *Lopez*, Section II of this article also discusses attempts by the Court to develop a working concept of federalism. The *Lopez* decision itself is then analyzed in Section III, and the application of the *Lopez* standard to environmental regulations is analyzed in Section IV. *Lopez* presents little threat to many federal environmental protection statutes, such as pollution abatement statutes, because the regulated activity is economic and substantially affects interstate commerce. In other areas of regulation, however, such as the regulation of isolated wetlands, the outcome is not as certain because the connection to interstate commerce is more attenuated. Ultimately, the implications of *Lopez* will depend on the manner in which the Court defines the terms "economic" and "substantially affects," and the extent to which the Court protects principles of federalism.

I. HISTORICAL OVERVIEW OF COMMERCE CLAUSE JURISPRUDENCE

The United States Constitution creates a federal government of specifically enumerated powers.[13] One of the powers delegated to Congress in the Constitution is the power "[t]o regulate Commerce

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migratory waterfowl); J. Blanding Holman IV, *After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139 (1995) (analyzing potential application of *Lopez* to CWA and ESA); Edward Alburo Morrissey, *Legislative Reform, The Jurisdiction of the Clean Water Act over Isolated Wetlands: The Migratory Bird Rule*, 22 J. LEGIS. 137 (1996) (advocating amendment to CWA to extend legislative protection to isolated wetlands potentially used by migratory birds). *See also*, Stephen M. Johnson, United States v. Lopez: *A Misstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33 (1996) (arguing that federal environmental laws, including Section 9 of ESA and Section 404 of CWA, will continue to be immune to Commerce Clause challenges after *Lopez*). Professor Johnson's article, published after this article was completed, was not reviewed in preparation of this article. However, it addresses similar issues and reaches similar conclusions.

13. The Constitution provides a lengthy list of enumerated powers that Congress can exercise. U.S. CONST. art. I, § 8, cls. 1-18. Congress can only exercise powers derived from this list. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (holding that the federal government has limited powers).

with foreign Nations, and among the several States, and with the Indian Tribes[.]"[14] It is this clause to which most federal power can be traced.[15]

A. *Gibbons v. Ogden: The Roots of Modern Commerce Power*

Congress's power to regulate interstate commerce has traditionally been interpreted quite broadly. The nature of the commerce power was first described by the Supreme Court in *Gibbons v. Ogden*.[16] Indeed, the breadth the commerce power has enjoyed is said to have its roots in *Gibbons*.[17] At issue in *Gibbons* was the constitutionality of a New York statute that granted an exclusive franchise permitting steamships to trade between New York and New Jersey only with the permission of the franchisee.[18] The Court held that navigation could be regulated under the commerce power even while the vessel was within the interior waters of a state and not merely at the boundary where it crossed into the waters of another.[19]

Writing for the Court, Chief Justice Marshall described Congress's authority under the Commerce Clause broadly as the power "to prescribe the rule by which commerce is to be governed."[20] Marshall wrote: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the

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14. U.S. CONST. art. I, § 8, cl. 3.

15. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) ("The labor statutes, the civil rights statutes, the farm and agricultural statutes, and countless others rest on the commerce power, or more accurately on a construction of the commerce clause that grants the federal government jurisdiction so long as it can show (as it always can) that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly.").

16. 22 U.S. (9 Wheat.) 1, 189-190 (1824).

17. *See, e.g.*, James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1803 (1994); Epstein, *supra* note 15, at 1400.

18. *See* Epstein, *supra* note 15, at 1401 n.36. *See also, Gibbons*, 22 U.S. (9 Wheat.) 1. In response to the New York statute, New Jersey passed a retaliatory law allowing citizens of New Jersey sued in New York for violating the New York law to recover treble damages against the New York citizen in a New Jersey court. Epstein, *supra* note 15, at 1401 n.36.

19. *See Gibbons*, 22 U.S. (9 Wheat.) at 194 ("Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."); *see also* Maloney, *supra* note 17, at 1804.

20. *Gibbons*, 22 U.S. (9 Wheat.) at 196.

[C]onstitution."[21] Despite this seemingly sweeping language, *Gibbons* specifically recognized limitations on the commerce power inherent in the language of the Commerce Clause itself.

> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusive internal commerce of a State.[22]

Thus, even the earliest analysis of the commerce power recognized limits on that power inherent in the clause itself.

B. *Early Commerce Clause Jurisprudence*

During the first century following the adoption of the Constitution, the Supreme Court rarely was required to determine the authority of Congress to legislate under an exercise of its commerce power.[23] Rather, the predominant issue in early Commerce Clause jurisprudence was the authority of the States to regulate matters that would be within the commerce power had Congress chosen to act.[24]

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21. *Id.*

22. *Id.* at 194-95; *see also*, Epstein, *supra* note 15 (explaining *Gibbons*); Maloney, *supra* note 17.

23. *See* Wickard v. Filburn, 317 U.S. 111, 121 (1942).

24. United States v. Lopez, 115 S.Ct. 1624, 1634 (1995) (Kennedy, J., concurring); *see also, Wickard*, 317 U.S. at 121 (noting the primary focus of the early cases was the permissibility of state activity that was claimed to discriminate against or burden interstate commerce).

When eventually presented with the question of the scope of congressional authority under the Commerce Clause, the Court applied various, often conflicting approaches. In some cases, the Court struck legislation by applying formalistic distinctions between "manufacture," "mining," or "production," and "commerce."[25] The Court also drew distinctions between "direct" and "indirect" effects on commerce, striking regulation of activity that exerted only an indirect effect on commerce.[26] Other decisions addressed Congress's authority to prohibit the interstate movement of items in commerce[27] and the instruments of commerce.[28]

C. *Modern Commerce Power*

Eventually the Court recognized that many types of intrastate activity had such effects on interstate commerce as to make the intrastate activity a proper subject for federal regulation.[29] A key point for modern Commerce Clause jurisprudence was reached in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[30]

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25. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895) (applying manufacture-commerce distinction to hold manufacturers' combined control of some 98% domestic sugar refining capacity beyond the reach of Sherman Act; Court reasoned that conspiracies to control manufacture, agriculture, mining, production, wages, or prices had too "indirect" an effect on interstate commerce); Hammer v. Dagenhart, 247 U.S. 251, 272 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941) (striking statute prohibiting interstate shipment of goods produced by child labor as regulating "manufacturing" rather than "commerce"); Carter v. Carter Coal Co., 298 U.S. 238, 303-04 (1936) (striking statute prohibiting unfair labor practices in coal industry as regulating "mining" and "production" rather than "commerce").

26. *See, e.g., Carter Coal Co.*, 298 U.S. at 309 (holding no congressional authority to regulate wages and hours for miners and price of coal because such had only secondary and indirect effect on interstate commerce); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (holding wage and hour provisions of National Industrial Recovery Act had no direct relation to interstate commerce); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330, 368 (1935) (holding mandatory retirement and pension plan for railroad employees was too remote from any regulation of commerce as commerce); *see also, Wickard*, 317 U.S. at 121 (describing development of Commerce Clause jurisprudence).

27. *See, e.g.*, Lottery Case, 188 U.S. 321 (1903) (upholding congressional power to prohibit interstate movement of lottery tickets). *But see Hammer*, 247 U.S. 251 (striking down prohibition on interstate transportation of goods manufactured in violation of child labor laws).

28. *See, e.g.*, Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases), 234 U.S. 342 (1914) (Court upheld federal rate schedules for interstate carriers reasoning that congressional power over interstate carriers as instruments of interstate commerce extended to the incidental regulation of intrastate commerce having a close and substantial relationship to interstate traffic).

29. *See Wickard*, 317 U.S. at 123.

30. 301 U.S. 1 (1937).

decided by the Court in 1937. In *Jones & Laughlin Steel*, the Court abandoned the distinction between "direct" and "indirect" effects on interstate commerce and held that it is within Congress's power to regulate intrastate activities that have such a close and substantial relation to interstate commerce as to burden commerce.[31] The Court also declined to apply the manufacturing/commerce distinction expounded in earlier cases.[32] Instead, the Court concluded that labor relations were within the broad powers of Congress to protect interstate commerce from burdens and obstructions, regardless of the source.[33]

In the years following *Jones & Laughlin Steel*, the Court defined the reach of the commerce power expansively. Over time, the Court discarded the distinctions that had previously limited the exercise of the commerce power. For instance, in *United States v. Darby*,[34] the Court declared that Congress's power over interstate commerce is not confined to the regulation of commerce among the states. Overruling earlier precedent,[35] *Darby* held that Congress had the power to exclude any article from interstate commerce.[36] *Darby* determined that Congress's power over interstate commerce extends to those intrastate activities "which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[37]

The expansive interpretation of the commerce power started by *Jones & Laughlin Steel* reached its peak in *Wickard v. Filburn*.[38]

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31. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (Court upheld the constitutionality of the National Labor Relations Act of 1935 which granted employees the right to form unions, imposed duties to engage in collective bargaining, and created the National Labor Relations Board, with power to act against unfair labor practices affecting commerce).

32. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895); Carter v. Carter Coal Co., 298 U.S. 238, 303-04 (1936).

33. Jones & Laughlin Steel, 301 U.S. at 36-37.

34. 312 U.S. 100 (1941) (Court upheld the Fair Labor Standards Act prohibiting interstate shipment of goods if minimum wage and maximum hour standards were violated respecting anyone employed in their production).

35. Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

36. *Darby*, 312 U.S. at 115-16.

37. *Id.* at 118.

38. 317 U.S. 111 (1942). The Court in *Lopez* described *Wickard* as perhaps the most far-reaching example of Commerce Clause authority over intrastate activity. United States v. Lopez, 115 S.Ct. 1624, 1630 (1995). In *Wickard*, Filburn owned a small farm on which he raised cattle

Wickard held that a farmer who raised grain, not for market but solely for his own use, was subject to regulation under the Commerce Clause. The Court determined that formalistic distinctions such as those between direct and indirect effects or between production and commerce had no bearing on the scope of the commerce power.[39] Although the growing of small quantities of wheat for home consumption might have been trivial by itself, it was "far from trivial" when cumulated with like behavior of similarly situated farmers.[40] Thus, even if an activity had a minimal effect on interstate commerce, the Court ruled that Congress could have found it necessary to regulate home-grown wheat in order to control nationwide wheat markets.[41] *Wickard* thus signaled the beginning of judicial deference to congressional findings that a regulated activity affects interstate commerce, where such findings have any rational basis.[42]

As the Court discarded its earlier distinctions limiting the commerce power, three alternative bases for justifying legislation emerged. Under the commerce power, Congress could (1) regulate the use of the channels of interstate commerce;[43] (2) protect goods or people in commerce and the instrumentalities of interstate

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and poultry. *Wickard*, 317 U.S. at 114. It was Filburn's practice to plant a small acreage of winter wheat, sown in the fall and harvested the following July. *Id.* Filburn customarily sold part of the harvest, used part to feed his livestock and poultry, milled a portion into flour for home consumption, and kept the rest for the following seeding. *Id.* Amendments, 55 Stat. 203 (1941), to the Agricultural Adjustment Act of 1938, 52 Stat. 31, established a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat per acre. *Id.* Filburn planted 11.9 acres more than allotted, which yielded him an excess of 239 bushels of wheat. *Id.* Under the terms of the Act, this wheat was a market excess subject to a penalty of 49 cents per bushel. *Id.* at 114-15. The Court sustained the application of the Act to Filburn in part because one of the purposes of the Act was to increase the market price of wheat by limiting the volume that could affect the market. *Id.* at 128. The Court reasoned that wheat grown for home consumption that was in a marketable condition might flow into the market due to the attractive rising prices, thereby counteracting price increases. *Id.* The Court further reasoned that even if it never actually enters the market, wheat grown for home consumption competes with wheat in commerce because the farmer who grew it would otherwise satisfy his needs by purchasing it on the open market. *Id.*

39. *Wickard*, 317 U.S. at 120, 124-25 ("[Q]uestions of federal power cannot be decided simply by finding the activity in question to be 'production,' nor can consideration of its economic effects be foreclosed by calling them 'indirect.'").

40. *Id.* at 127-28 (Court reasoned that wheat grown for home consumption overhangs the market and competes with wheat in the market by reducing the amount of wheat the farmer would otherwise purchase in the open market)..

41. *Id.* at 128-29.

42. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276-80 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964).

43. *See* United States v. Darby, 312 U.S. at 100.

commerce;[44] and (3) regulate activities affecting commerce.[45] This was the status of modern commerce jurisprudence when the Court decided to hear *Lopez*.

Another limit on Congress's commerce power comes not from judicial interpretation of the Commerce Clause itself, but from the Tenth Amendment, discussed in Section II.

II. FEDERALISM AND TENTH AMENDMENT LIMITATIONS ON COMMERCE POWER

Despite the ever-expanding view of congressional power under the Commerce Clause, the Court has nevertheless continued to adhere to the notion that the commerce power is limited.[46] In some sixty years of modern Commerce Clause jurisprudence, however, the Court has identified few boundaries on the commerce power. One particular issue with which the Court has struggled is whether state sovereignty imposes a limitation on the commerce powers of Congress.

In balancing congressional power under the Commerce Clause against states' rights under the Reservation of Powers Clause of the Tenth Amendment, the Court has traditionally found that a lawful exercise of the commerce power does not infringe on state sovereignty.[47] In *Maryland v. Wirtz*, the Court upheld the application of the Fair Labor Standards Act to state-operated schools and hospitals.[48] The Court found that where a state was acting in a manner that resembled other employers, it would be subject to federal regulations to the same degree as other employers.[49] If the general regulations were within the commerce power, it made no difference whether a

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44. *See Heart of Atlanta Motel*, 379 U.S. 241.

45. *See, e.g.*, Perez v. United States, 402 U.S. 146, 150 (1971).

46. *See, e.g.*, United States v. Lopez, 115 S.Ct. 1625, 1628 (1995); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (noting that the commerce power must be viewed in light of our dual system of government).

47. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968), *overruled by* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

48. *Wirtz*, 392 U.S. at 201 (the particular issue in *Wirtz* was the applicability of federal minimum wage and maximum hour regulations in the Fair Labor Standards Act to employees of state-operated schools and hospitals).

49. *Id.* at 193-94. The Court also noted that the federal statute would apply even to what might be considered core governmental functions as well as proprietary activities. *Id.* at 196-97.

state was among the regulated entities.[50] Thus, the application of the Fair Labor Standards Act to the states did not infringe on state sovereignty protected by the Tenth Amendment.[51]

Some years later, in *National League of Cities v. Usery*,[52] the Court held that the Commerce Clause did not give Congress power to regulate "the States as States."[53] The Court found that the Tenth Amendment acted as a substantive limit on the commerce power.[54] The Court recognized an express declaration of limitation from the language of the Tenth Amendment itself: "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[55] Thus, the Court concluded that Congress exceeded its Commerce Clause authority because the challenged regulations operated directly to displace the states' freedom to structure integral operations in areas of traditional governmental functions.[56]

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50. *Id.* at 196-97.

51. *Id.* at 198-99. In a subsequent case, *Fry v. United States*, 421 U.S. 542 (1925), although upholding the exercise of congressional commerce authority, the Court signaled a retreat by positing that state governments might be less subject to federal regulation than other entities. *Id.* at 548. In his dissent to *Fry*, Justice Rehnquist voiced concerns that the regulations in question violated affirmative limits on the ability of Congress to regulate traditional governmental activities of the states. *Id.* at 557-59 (Rehnquist, J., dissenting). The tenor of this dissent was adopted the following term as the majority opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

52. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

53. *National League of Cities*, 426 U.S. at 842. At issue in *National League of Cities* was whether the Fair Labor Standards Act applied to state and local governments. By a sharply divided vote, the Court ruled that the Commerce Clause does not empower Congress to enforce the minimum wage and overtime provisions of the Act against the States "in areas of traditional governmental functions." *Id.* at 852.

54. *Id.* at 842. The Court reasoned that the very structure of the federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the States as States through the exercise of the commerce power. *Id.* In attempting to ascertain the scope of such limits, the Court drew an analogy between individual rights granted by the Constitution and States' rights. That is, even a federal statute passed under the commerce authority would be invalid if it violated some individual right such as the right to a fair trial or to due process. Likewise, a federal statute passed under the commerce authority could not displace the States' freedom to structure integral operations in areas of traditional governmental functions. *Id.* at 852.

55. *Id.* at 843 (quoting *Fry*, 421 U.S. at 547).

56. *National League of Cities*, 426 U.S. at 852. Although *National League of Cities* listed several examples of "traditional government functions" such as fire prevention, police protection and public health, it did not identify guidelines by which lower courts could distinguish between a traditional and nontraditional function when considering the issue of state immunity under the

Less than a decade later, *National League of Cities* was overturned by *Garcia v. San Antonio Metro. Transit Authority* in which the Court held that congressional power under the Commerce Clause is not limited by the sovereignty of states.[57] *Garcia* completely redefined the Court's approach to the issue of federalism.[58] In overturning *National League of Cities*, the Court, in essence, rejected the idea of judicially created substantive limits on congressional power to regulate under the Commerce Clause, choosing instead to rely on the intrinsic protections of the political process inherent in the structure of the federal system.[59]

While adhering to the political process view of federalism, the Court, in *New York v. United States*, nevertheless ruled that Congress did not have constitutional authority to "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[60] Although the decision in

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Commerce Clause. *Id.* at 851. Identifying which functions were immune from regulation proved to be a difficult task for the lower courts, and frequently resulted in inconsistent and arbitrary distinctions. *Compare* Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967-969 (W.D. Mo. 1982), *aff'd on other grounds*, 705 F.2d 1005 (8th Cir. 1983) (regulation of ambulance services entitled to immunity), United States v. Best, 573 F.2d 1095, 1102-1103 (9th Cir. 1978) (licensing of automobile drivers immune), Amersbach v. City of Cleveland, 598 F.2d 1033, 1037-1038 (6th Cir. 1979) (operating municipal airport traditional state function), *and* Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841, 845-846 (1st Cir. 1982) (operating highway authority immune), *with* Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977) *cert. denied*, 434 U.S. 902 (1977) (regulation of traffic on public roads not traditional governmental function), Hughes Air Corp. v. Public Utilities Comm'n of Cal., 644 F.2d 1334, 1340-1341 (9th Cir. 1981) (regulation of air transportation not immune), *and* Williams v. Eastside Mental Health Ctr., Inc., 669 F.2d 671, 680-681 (11th Cir. 1982) *cert. denied*, 459 U.S. 976 (1982) (operation of a mental health facility not entitled to immunity under *National League of Cities*).

57. 469 U.S. 528 (1985). At issue in *Garcia* was whether the San Antonio Metropolitan Transit Authority (SAMTA), a public mass-transit authority, could be subject to the minimum-wage and overtime requirements of the Fair Labor Standards Act. Citing its inability to define the scope of the governmental functions protected under *National League of Cities*, the lack of a workable standard for determining when a governmental function was traditional, and the inconsistent results reached by the courts in their attempts to identify which governmental functions were immune from regulation, the Court concluded that any attempt to define state regulatory immunity in terms of "traditional governmental function" was "unsound in principle and unworkable in practice" and expressly overruled that case. *Garcia*, 469 U.S. at 546-47.

58. *See* Mcjohn, *supra* note 10, at 17.

59. *Garcia*, 469 U.S. at 550-53. In other words, while recognizing that the Constitution required protection of state sovereignty, the Court found sufficient protection in the procedural safeguards of the constitutional structure, making substantive limits unnecessary. The procedural protections referenced by the Court were such things as the Constitution's grant of only limited, enumerated powers to Congress, the states' role in selecting members of the federal government, and representation of the states in Congress. *Id.* at 550-51.

60. 112 S.Ct. 2408, 2428 (1992).

United States v. New York did not rest on Tenth Amendment grounds, the Court discussed the scope of the Tenth Amendment in relation to congressional power. The Court reiterated that the text of the Tenth Amendment does not directly limit the authority of Congress,[61] but it restrains congressional power by requiring the Court to determine "whether an incident of state sovereignty is protected by a limitation on an Article I power."[62] Recently, in *Seminole Tribe of Fla. v. Florida*, the Court again considered traditional principles of federalism in holding that the commerce power cannot be used to abrogate a state's sovereign immunity from suit by private persons.[63] Although *Seminole Tribe* arose from a challenge to the Indian Gaming Regulatory Act, the Court indicated that its reasoning would apply to a broad range of cases. In particular, the Court specifically overruled a previous decision that held that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 authorized a

61. *Id.* at 2418.

62. *Id.* ("[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.").

63. 116 S.Ct. 1114 (1996).

private action against a state for monetary damages.[64] This was the state of the law when the Court decided to hear *Lopez*.

III. UNITED STATES V. LOPEZ[65]

The issue before the Court in *Lopez* concerned the authority of Congress to regulate citizens, rather than a state, and thus did not raise the notion of federalism in the traditional sense.[66] Nonetheless, the Court considered principles of state sovereignty and essentially concluded that the Gun-Free School Zones Act was an impermissible

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64. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989). For some fifty years, the predecessor of Union Gas had operated a coal gasification plant which produced coal tar as a by-product. The plant was dismantled in 1950. In 1980, shortly after acquiring easements in the property along the creek adjacent to the former plant and while excavating for flood control, the state struck a large deposit of coal-tar which began to seep into the creek. EPA determined that the coal tar was a hazardous substance and designated the area a Superfund site.

The United States jointly cleaned up the site with the state and reimbursed the state for its costs. The United States then sought to recoup these costs from Union Gas under CERCLA §§ 104 and 106, 142 U.S.C. §§ 9406, 9606 (1994), claiming Union Gas was liable because it and its predecessor had deposited the coal tar into the ground near the creek. Union Gas brought a third-party action against the state, asserting that the state was also responsible as an "owner or operator" of the site under CERCLA § 107, 142 U.S.C. § 9607 (1994). The appellate court's initial decision affirming the district court's dismissal of the action based on Eleventh Amendment immunity was vacated and the case remanded for reconsideration in light of the Superfund Amendments and Reauthorization Act of 1986, passed while the petition for certiorari was pending. On remand, the appellate court held that the amended language of CERCLA clearly rendered the states liable for monetary damages and that Congress had the power to do so when legislating pursuant to the Commerce Clause.

The Court, by a weak majority, affirmed, finding that because states were included in the definition of persons, and excluded from the definition of owner or operator only in certain limited circumstances, Congress intended states to be liable for clean up costs under CERCLA § 107. The Court further found that Congress had the authority to override the states' immunity when legislating pursuant to its commerce power because that power is plenary. By ratifying the Constitution containing the Commerce Clause, the states thereby relinquished their immunity and consented to suits against them where Congress finds it necessary, in the exercise of the commerce authority, to render the states liable.

The Court therefore held that Congress had the authority to abrogate the states' sovereign immunity and had done so in CERCLA.

65. 115 S.Ct. 1624 (1995).

66. *See* Mcjohn, *supra* note 10, at 24 (arguing that the Lopez court left no doubt that the question of traditionally state-regulated activity was now part of determining the extent of federal commerce power and predicting that the principal doctrinal effect of *Lopez* will be that state sovereignty concerns will move from a background policy concern in Commerce Clause analysis to an explicit part of the test). The Court framed the main issue in *Lopez* as whether firearm possession in a school zone substantially affects interstate commerce, but its actual analysis was rooted in concerns for protecting state autonomy in areas traditionally left to state control. Thus, it is important to understand the prevailing principles of federalism to fully comprehend the import of *Lopez*.

attempt by Congress to exercise a general police power over matters traditionally left to the states.[67]

A. *Facts*

Alphonse Lopez, Jr., a twelfth-grade student at a Texas high school, was found in possession of an unloaded .38 caliber revolver and five bullets.[68] Lopez was initially charged under Texas law with possession of a firearm on school premises.[69] The state charge was dismissed, however, after federal authorities charged Lopez with violating the Gun-Free School Zones Act of 1990.[70]

Lopez was indicted by a federal grand jury on one count of knowing possession of a firearm at a school zone, in violation of § 922(q)(1)(A).[71] Lopez moved to dismiss the indictment on the ground that § 922(q) unconstitutionally sought to legislate control over the Texas public schools and exceeded Congress's enumerated powers.[72] The district court denied the motion, concluding that § 922(q) was a constitutional exercise of Congress's power to regulate activities in and affecting commerce, and the "business" of schools affects interstate commerce.[73] Following a bench trial, Lopez was found guilty of violating § 922(q) and sentenced to six months in prison and two years on supervised release.[74]

On appeal, Lopez reargued his claims that the statute was an unconstitutional exercise of congressional commerce power.[75] Observing the absence of congressional findings establishing a

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67. *See Lopez*, 115 S.Ct. at 1633. A constant thread throughout the majority opinion is the concept that Congress is limited to the powers enumerated in the Constitution. For instance, the Court stressed that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Id.* Similarly, the Court reaches its decision because to accept the government's argument that the Act was constitutional would "bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 1634.

68. *Id.* at 1626.

69. *See* TEX. PENAL CODE ANN § 46.03(a)(1) (West Supp. 1994). *See also Lopez*, 115 S.Ct. at 1626.

70. Pub. L. No. 101-647, 104 Stat. 4789. The Act defines "school zone" as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25) (Supp. IV 1992).

71. *Lopez*, 115 S.Ct. at 1626.

72. *Id.*

73. *Id.*

74. *Id.*

75. Lopez v. United States, 2 F.3d 1342 (5th Cir. 1993).

connection between gun possession in a school zone and interstate commerce, the Fifth Circuit reversed the conviction, holding that § 922(q) was an unconstitutional extension of the powers granted to Congress under the Commerce Clause.[76] In a five-to-four decision, the United States Supreme Court affirmed, finding that the Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.[77]

B. *Majority Opinion of the United States Supreme Court*

The Gun-Free School Zones Act of 1990 made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[78] The majority held that in enacting this statute, Congress exceeded its authority to regulate commerce among the several states.[79]

Writing for the majority, Chief Justice Rehnquist began with "first principles": the Constitution creates a federal government with enumerated powers, few and defined, while the powers remaining with the states are numerous and indefinite.[80] The Court engaged in a lengthy review of the historical structure of Commerce Clause jurisprudence and ultimately identified three broad categories of activity that can be regulated by Congress under its commerce power. First, Congress may regulate use of the channels of interstate commerce.[81] Second, Congress may regulate instrumentalities of interstate commerce and people or things that move in interstate commerce, even where the threat to interstate commerce may come solely from intrastate activities.[82] Finally, Congress may regulate those activities that substantially affect interstate commerce.[83]

In this last category, decisions over the years had been unclear as to whether an "effect" or a "substantial effect" on interstate com-

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76. *Id.* at 1367-68.
77. *Lopez*, 115 S.Ct. at 1634.
78. 18 U.S.C. § 922(q)(1)(A) (Supp IV 1992).
79. *Lopez*, 115 S.Ct. at 1626.
80. *Id.* (quoting The Federalist No. 45, at 292-293 (James Madison) (C. Rossiter, ed. 1961)).
81. *Id.* at 1629.
82. *Id.*
83. *Id.* at 1629-30.

merce was required.[84] The majority acknowledged this past inconsistency and summarily pronounced that the proper test was whether the regulated activity "substantially affects" interstate commerce.[85]

Applying this framework to the case at hand, the Court determined that only the third category had any potential application to the Gun-Free School Zones Act of 1990.[86] The issue as framed by the Court, therefore, was whether the Gun-Free School Zones Act regulated an activity that substantially affected commerce. In determining this issue, the Court departed from the rational-basis scrutiny traditionally employed in Commerce Clause cases. Prior to *Lopez*, the Court had generally deferred to congressional determination that the interstate commerce nexus existed.[87] Congressional action had previously been scrutinized only to the extent of determining whether Congress could rationally have concluded that a regulated activity sufficiently affected interstate commerce.[88] Although the *Lopez* majority cited several cases in which the Court applied this low-level scrutiny, deference was not granted in this case. Instead, the Court engaged in its own evaluation of the effects gun possession in a school zone had on interstate commerce.[89]

Conducting an independent analysis, the majority found the Act deficient in three regards. First, the Court found that "[s]ection 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[90] The Act also could not be sustained under the *Wickard* line of reasoning because Section 922(q) was not an essential part of a larger economic regulatory scheme that could be

84. *Id.* at 1630.

85. *Id.*

86. *Id.* (Court summarily dismissed the applicability of the first two categories, finding that 18 U.S.C. § 922(q) (Supp. IV 1992) did not regulate "the use of the channels of interstate commerce" nor seek to protect "a thing in interstate commerce.").

87. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964).

88. *Lopez*, 115 S.Ct. at 1629. *See also, e.g.*, Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 276-80; Perez v. United States, 402 U.S. 146, 155-56 (1971); *Heart of Atlanta Motel*, 379 U.S. at 252-253.

89. *Lopez*, 115 S.Ct. at 1631-32. *See also*, Mcjohn, *supra* note 10, at 27-28 (suggesting Court has abandoned its previous deference to Congress in favor of its own independent assessment of the effect on commerce); Adam D. Hirsh, United States v. Lopez: *A Commerce Clause Challenge*, 32 IDAHO L. REV. 505, 510-511 (1996) (theorizing that from now on the Court will be less deferential and continue to engage in an independent review of congressional action).

90. *Lopez*, 115 S.Ct. at 1630-31.

undercut unless the intrastate activity were regulated.[91] The Court reasoned that, unlike the Agricultural Adjustment Act under consideration in *Wickard*, Section 922(q) did not regulate activity that arises out of or is connected with a commercial transaction which, when viewed in the aggregate, substantially affects interstate commerce.[92]

In addition, the Act was deficient because the challenged provision had no jurisdictional element through which a case-by-case inquiry could establish the requisite nexus between the firearm possession in question and interstate commerce.[93]

Finally, the Court remarked on the complete absence of any congressional indication of the burden on interstate commerce in both the legislative history and the Gun-Free School Zones Act itself. The Court acknowledged that formal congressional findings of the substantial burden an activity has on interstate commerce are not generally required.[94] However, the absence of formal findings in this case was significant because the connection between gun possession in a school zone and interstate commerce was not readily apparent.[95]

In reaching its ultimate conclusion that Section 922(q) was an unconstitutional exercise of congressional power under the Commerce Clause, the Court rejected the government's contention that possession of a firearm in a local school zone "does indeed substantially affect interstate commerce."[96] Attempting to establish the connection, the government argued that possession of firearms in school zones affects interstate commerce by increasing violent crime. An increase in violent crime deters citizens from traveling to areas perceived to be unsafe, and further, the substantial cost of this violence is spread through the population via the mechanism of insurance.[97] The government further argued that the presence of guns in school zones threatened the educational process itself by creating an environment hostile to learning, resulting in a less

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91. *Id.* at 1631.

92. *See id.* That is, the Act was not a part of a larger regulation of economic activity in which the economic scheme could be undercut unless the intrastate activity were regulated.

93. *See id.*

94. *See id.*

95. *See id.* at 1631-32 (majority indicated that congressional findings are helpful in evaluating whether the regulated activity substantially affects interstate commerce where, as here, "no such substantial effect [is] visible to the naked eye . . . .").

96. *Id.* at 1632.

97. *See id.*

productive citizenry, and ultimately adversely affecting the economic health of the nation.[98]

The Court rejected these arguments, not because they failed to establish a connection to interstate commerce, but because accepting such arguments would have far-reaching implications to state sovereignty. That is, if it accepted the "costs of crime" reasoning, Congress would be empowered to regulate not only all violent crime, but also any activity that might eventually lead to violent crime, even where the connection to interstate commerce was quite thin.[99] Similarly, by accepting the "national productivity" rationale, the Court would be authorizing Congress to regulate every aspect of human activity that might influence the productivity of any individual citizen.[100] The majority expressed reluctance to expand the scope of federal commerce authority in the manner suggested by the government because Congress might thereby be authorized to regulate in areas traditionally left to state control.[101]

Essentially, the majority rejected these arguments because of the perceived need to find some outer limit to congressional commerce power. The Court stated: "Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas . . . where States historically have been sovereign."[102] The Court reasoned that if it accepted the government's arguments, it would be hard-pressed to posit any activity by an individual that Congress is without power to regulate.[103] The Court therefore declined to extend the commerce power in the manner posited by the government because to do otherwise would essentially convert the power into a general police power of the sort retained only by the states.[104]

While *Lopez* purports to be decided solely on the basis of the Commerce Clause, the Court's determination that Congress exceeded its authority under the Commerce Clause seems to be directed more by a concern for state sovereignty than because the Act lacked the

98. *Id.*

99. *Id.*

100. *Id.* The "national productivity" rationale could conceivably be extended to open to federal control areas such as marriage, divorce, and child custody. *Id.*

101. *Id.* The areas the Court noted were traditionally in the state domain included criminal law enforcement, education, and family relationships. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1634.

necessary nexus to interstate commerce.[105] The implication of *Lopez* is that the commerce power may now be limited by the reservation of power to the states under the Tenth Amendment such that an exercise of congressional power over an activity that affects interstate commerce can nevertheless be found to be unconstitutional if that federal regulation infringes on state sovereignty. By analyzing the commerce authority in this fashion, the Court interjected the issue of federalism into traditional Commerce Clause doctrine, potentially imposing a new limitation on the commerce power and thereby narrowing the reach of the Commerce Clause.[106]

IV. POTENTIAL *LOPEZ* CHALLENGES TO ENVIRONMENTAL LAWS

Because the Commerce Clause has long served as the principal source of congressional authority to enact federal environmental protection laws, the Court's resolution of *Lopez* may call into question the scope and possibly the validity of existing federal environmental laws.[107] While it is true that some environmental laws have been based on authority arising from other Constitutional clauses, such as the Property Clause,[108] most of the environmental

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105. *See id.* at 1634 (expressing concern for maintaining the "distinction between what is truly national and what is truly local"). *Lopez* has been credited with being "a necessary first step in the revitalization of federalism . . . ." Frantz, *supra* note 10, at 174.

106. *See* Mcjohn, *supra* note 10, at 30 (arguing *Lopez* combines previously separate doctrines of commerce power analysis and Tenth Amendment analysis to increase scrutiny of federal regulation in areas of traditional state concern).

107. Recently, the Southern District of Alabama rejected a proposed consent decree and dismissed a CERCLA complaint brought by the United States against the owner of a manufacturing operation that had shut down in 1982. The court held that the Commerce Clause did not authorize federal regulation of post-CERCLA contamination. The court interpreted *Lopez* to require:

> 1) that the statute itself regulate economic activity, which activity substantially affects interstate commerce; and 2) that the statute include a jurisdictional element which would ensure, through case-by case inquiry, that the statute in question affects interstate commerce.

United States v. Olin Corp., 927 F. Supp. 1502, 1532 (S.D. Ala. 1996) (appeal pending). The court found it "doubtful" that CERCLA regulated an "economic activity" as that term is used in *Lopez*, because the statute was aimed at non-functioning facilities. *See Id.* The court also observed that the law regulating real property is a matter of traditional state concern and noted the lack of a jurisdictional element in the statute. *See Id.* The government filed a motion for expedited consideration of its appeal citing the impact of the ruling on other CERCLA cases. *See* Recent Developments, 32 CHEM. WASTE LIT. R. 516 (1996).

108. *See, e.g.,* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

enactments depend on an expansive reading of congressional commerce power.[109]

The holding in *Lopez* opens the door to several potential challenges to environmental statutes passed pursuant to the commerce power. Under the language of *Lopez*, two substantive challenges could be made: (1) that the regulated activity is not an "economic" activity; and (2) that the regulated activity does not "substantially affect" interstate commerce. *Lopez* might be read to suggest that the determination of whether an activity is economic is a separate inquiry from whether an activity substantially affects interstate commerce.[110] Under a strict application of the *Lopez* formulation, it may be necessary to meet both prongs before Congress will be deemed to have acted within its Commerce Clause authority. If so, then Commerce Clause authority arguably does not extend to all activities substantially affecting interstate commerce, but only to those "economic" activities with such an effect.[111] About the only exception to this strict interpretation would be that in which the challenged provision was "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[112]

On the other hand, the two factors might be applied as a balancing test of sorts, such that a substantial impact on interstate commerce would be sufficient to support federal regulation of even a non-economic activity. Alternatively, it is possible that the "economic" factor will prove to be a false limitation, because, as

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109. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (upholding regulation of adjacent wetlands under Clean Water Act against Commerce Power challenge); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (upholding regulation of intrastate coal mining operations as within the commerce power); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (upholding federal fishing license program as valid under Commerce Clause); Hoffman Homes, Inc. v. Environmental Protection Agency, 999 F.2d 256 (7th Cir. 1993); Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985 (D. Haw. 1979) (upholding application of Endangered Species Act to State of Hawaii under commerce and treaty powers).

110. Richard Lazarus, *A Substantial Effect on Environmental Law*, ENVTL F., July-Aug. 1995, at 7 ("Whether the activity is 'economic' is a distinct judicial inquiry. It presents a threshold question of *kind*, unlike the 'substantially affecting' inquiry, which present a question of *degree*.").

111. *See id.*; Hirsh, *supra* note 89, at 508 (commenting on the significance of the economic/non-economic distinction).

112. *Lopez*, 115 S.Ct. at 1631.

feared by the *Lopez* dissent, almost any activity can be classified as economic.[113]

Lopez also lends itself to an underlying policy argument that the regulated activity is one within an area of traditional state concern and thus beyond the power of Congress to regulate. That is, an intrastate activity that has a substantial effect on interstate commerce may nonetheless be beyond Congress' authority to regulate if the activity is in an area of traditional state concern.

Many environmental statutes will be capable of meeting even the strictest application of *Lopez*. For instance, federal environmental protection statutes that seek to control pollution will be capable of satisfying the *Lopez* criteria because most pollution has significant interstate effects and can generally be characterized as resulting from "economic activity." Some environmentally harmful activity, however, is arguably not economic and may not have the necessary connection to interstate commerce.[114]

In the past, Commerce Clause challenges to various environmental statutes have been largely unsuccessful.[115] Under former interpretation of the commerce power, courts always found a sufficient nexus to interstate commerce to uphold congressional action.[116] Such findings were facilitated by the deference the Court has traditionally accorded Congress. The *Lopez* court, however, appears to have abandoned this deferential standard, preferring instead to engage in an independent assessment of the substantial effects an intrastate activity has on interstate commerce.[117] Therefore, certain environmental statutes, in particular the Clean Water Act and the Endangered Species Act, may now be vulnerable to challenge.

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113. *See id.* at 1663-64 (Breyer, J., dissenting).

114. For instance, Justice Thomas asserted his belief that Congress lacks the authority to regulate littering. *See id.* at 1642 (Thomas, J., concurring).

115. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (holding Congress can regulate adjacent wetlands pursuant to its Commerce Clause power); *Hodel*, 452 U.S. 264 (upholding Surface Mining & Reclamation Act against Commerce Clause challenge); *Seacoast Products*, 431 U.S. 265 (holding Congress can regulate the taking of wildlife that affects interstate commerce pursuant to the Commerce Clause).

116. *See, e.g., Riverside Bayview Homes*, 474 U.S. at 133-34 (holding integral relationship of adjacent wetlands to navigable waters and importance of wetlands in protecting and enhancing water quality is sufficient connection to interstate commerce to justify regulation pursuant to the commerce power); *Hodel*, 452 U.S. at 280 (holding Congress could have had a rational basis for concluding that surface mining has substantial effects on interstate commerce).

117. *See Lopez*, 115 S.Ct. at 1630-31.

A. *Challenges to the Clean Water Act Section 404 Program*

The Clean Water Act prohibits any discharge of dredged or fill materials into "navigable waters" unless authorized by a permit issued by the Army Corps of Engineers (the Corps).[118] Navigable waters is defined by the Act as "waters of the United States."[119] Although the Corps initially construed the Act to cover only waters that were actually navigable, in 1975, the Corps redefined "the waters of the United States" to include tributaries of navigable waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce.[120] The Corps further construed the Act to cover all freshwater wetlands that were adjacent to other waters covered by the Act. The inclusion of adjacent wetlands in the definition of navigable waters has been challenged as exceeding the commerce power.[121]

1. *Regulation of Adjacent Wetlands.* In *United States v. Byrd*,[122] the Seventh Circuit found that the commerce power was broad enough to allow Congress to regulate adjacent wetlands. Byrd, a land developer, attempted to fill swamp lands bordering Lake Wawasee in Indiana to make them suitable for residential development.[123] The lake is a 2,500 to 3,000 acre freshwater lake used by interstate travelers and seasonal residents for recreational purposes.[124] Byrd asserted, in part, that Congress and the Corps lacked authority under the Commerce Clause to regulate activities on and around the intrastate lake, even if the lake was used by interstate travelers.[125] Byrd argued that Congress lacked the authority to regulate non-commercial activities on areas that were not within the traditional definition of navigable waters, in particular, activities on adjacent wetlands.[126] The court rejected this argument, finding that Congress

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118. 33 U.S.C. §§ 1311, 1344 (1994).

119. 33 U.S.C. § 1362(7) (1994).

120. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (1975).

121. *See, e.g.*, United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); *Riverside Bayview Homes*, 474 U.S. at 133-34.

122. 609 F.2d 1204 (7th Cir. 1979).

123. *See id.* at 1205-06.

124. *See id.* at 1205.

125. *See id.* at 1209.

126. *Id.*

intended to give the term "navigable waters" the broadest possible interpretation.[127] Thus, if Byrd's fill activity exerted a substantial economic effect on interstate commerce, that activity could be regulated irrespective of whether it was wholly local. The court found Byrd's activity had such an effect, reasoning that destruction of the wetlands surrounding the lake could impair the value of the lake to interstate visitors by degrading the water quality, thus affecting the flow of interstate commerce. The Court concluded that Congress constitutionally may extend its regulatory control of navigable waters under the Commerce Clause to wetlands adjacent to waters covered by the Clean Water Act.[128]

Similarly, in *Riverside Bayview Homes*, the Supreme Court held that the regulation of wetlands adjacent to navigable or interstate waters and their tributaries was within the reach of the Commerce Clause.[129] The Court first determined that Congress intended to exercise its commerce power to its full extent and thus to regulate under that authority even those areas not meeting the traditional navigability test.[130] The Court found that regulation of wetlands adjacent to navigable waters was permissible based on the integral relationship between adjacent wetlands and the navigable waters and the key role wetlands play in protecting and enhancing water quality.[131] In particular, the Court noted that adjacent wetlands filter and purify water, prevent flooding by slowing the flow of surface

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127. *Id.* (citing S. REP. NO. 92-236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3822, and Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975)).

128. *Byrd*, 609 F.2d at 1210. At the time *Byrd* was decided, Corps regulations expanded the traditional definition of navigable waters to include intrastate lakes used by interstate travelers for water-related recreational purposes and freshwater wetlands contiguous or adjacent to other navigable waters and supporting freshwater vegetation. *Id.* at 1206. The court found these regulations to be reasonably related to the Clean Water Act's stated purpose to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. *Id.* at 1210-1211.

129. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133-34. Because Congress had the authority under its commerce power to regulate navigable waters, the Court reasoned that it likewise had the authority to regulate those wetland areas adjacent to those waters that could have a substantial effect on commerce. *Id.*

130. *See id.* at 133. The Court deferred to the Corps' determination that wetlands adjacent to navigable waters played a key role in protecting an enhancing water quality. *See id.* "We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States—based as it is on the Corps' and EPA's technical expertise—is unreasonable.' *Id.* at 134. The Court concluded that the Corps' judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Clean Water Act. *See id.*

131. *Id.* at 133-34.

run-off, and serve as habitat for aquatic species. It was therefore reasonable for the Corps to regulate all adjacent wetlands.[132]

In light of this history, a challenge to federal jurisdiction over adjacent wetlands under the *Lopez* framework would have little chance of surviving any but perhaps the strictest application of *Lopez*. If the "economic" requirement is applied as a threshold factor, one might successfully argue against federal jurisdiction extending to the regulation of private land development activities on privately owned land.

However, under a more moderate application of *Lopez*, the economic character of the activity is established by the fact that the *Byrd* and *Riverside Bayview Homes* defendants were each engaged in commercial land development.[133] Further, the hydrologic connection between waters subject to Corps jurisdiction and their adjacent wetlands establish the necessary connection to interstate commerce. Activities conducted on adjacent wetlands substantially affect interstate commerce by having a substantial and direct impact on the quality of the body of water that is within the Corps jurisdiction. The connection between fill activities on wetlands adjacent to covered waters and interstate commerce is therefore obvious and clearly within the reach of the Commerce Clause. Under the *Wickard* reasoning, which is still endorsed and adhered to by the Court, even wholly local development activities that have the potential, in the aggregate, to exert a substantial effect on interstate commerce can be regulated under the commerce power.[134]

2. *Regulation of Non-Adjacent Wetlands.* A question specifically reserved by the Court in *Riverside Bayview Homes* is whether Congress has the authority to regulate nonadjacent waters, such as isolated wetlands.[135] This presents a closer question when analyzed in light of *Lopez*. Congress' authority to regulate isolated, intrastate waters that share no surface connection to regulated waters, while not

132. *Id.* at 134-35.

133. *See* United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

134. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

135. *Riverside Bayview Homes,* 474 U.S. at 131 n.8.

yet definitively addressed by the United States Supreme Court,[136] has been presented to several lower courts.

In *Tabb Lakes, Ltd. v. United States*,[137] the district court was called on to decide whether the Corps had jurisdiction over an isolated wetland and could thus require the owner to secure a permit prior to filling the land. The underlying issue was whether a sufficient interstate commerce connection existed to warrant the exercise of Corps jurisdiction over isolated wetlands. The standards used by the Corps to determine when there was a sufficient connection to interstate commerce to warrant the exercise of its jurisdiction were listed in a memorandum issued to all district Corps offices.[138] The particular standard in question, the so-called migratory bird rule, asserted Corps jurisdiction over "[w]aters which are used or could be used as habitat by other migratory birds which cross state lines."[139]

The court did not reach the issue of whether the potential presence of migratory birds was a sufficient connection to interstate commerce to authorize congressional action. Rather, the court found that the standards used by the Corps for determining its jurisdiction were substantive rules.[140] In promulgating these rules, the Corps was required to comply with the notice and comment provisions of the Administrative Procedure Act, but had failed to do so.[141] Accordingly, the court determined that the Corps did not have jurisdiction. In *dicta*, the court expressed reservations that Corps jurisdiction could be predicated on as tenuous a connection to interstate commerce as the presence or potential presence of migratory birds. The court noted that although it was not required to decide the issue, it had "grave doubts that a property now so used, or seen as an expectant habitat for some migratory birds, can be

136. *But see* Cargill, Inc. v. United States, 116 S.Ct. 407 (1995) (Thomas, J., dissenting). This is the latest of the *Leslie Salt* suite of cases. Cargill, the successor in interest to Leslie Salt, appealed after remand that the presence of migratory birds on its property did not create a sufficient connection to interstate commerce to permit Corps regulation. *See id.* The Court's denial of certiorari six months after its decision in *Lopez* is some indication that the so-called migratory bird rule will survive a *Lopez* challenge. *See id.* Justice Thomas's dissent presumes without discussion, that the filling of isolated wetlands is not an economic activity. Justice Thomas disagreed that the mere presence of migratory birds is a sufficient to establish the necessary nexus to interstate commerce after *Lopez*. *See id.* at 409.

137. 715 F. Supp. 726, 728 (E.D.Va. 1988), *aff'd per curiam*, 885 F.2d 866 (4th Cir. 1989).

138. *See id.*

139. *Id.*

140. *See id.* at 728-29.

141. *See id.* at 729.

declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction[.]"[142]

Tabb Lakes was affirmed by the Fourth Circuit *per curiam* without published opinion. However, the authority of Congress to regulate isolated wetlands has been discussed by both the Seventh and Ninth Circuits.[143]

In *Hoffman Homes, Inc. v. EPA*,[144] the Seventh Circuit was called on to determine whether a small, isolated wetland was subject to regulation under the Clean Water Act.[145] Hoffman Homes, a residential developer, had been penalized for violating the act by filling in portions of two wetlands areas without a permit. In disputing the penalties, Hoffman Homes challenged the EPA's authority under the Clean Water Act to regulate the isolated wetland. The EPA claimed jurisdiction solely on the basis that the isolated wetland could potentially be used by migratory birds. Initially, the court held that potential use by migratory birds could not form the basis of congressional authority to regulate under the Commerce Clause.[146] The court later vacated *Hoffman Homes I*, however, and ultimately issued *Hoffman Homes II*, a much narrower opinion limited to its facts.[147]

In *Hoffman Homes II*, the court determined that the EPA could reasonably interpret its jurisdiction to extend to waters with merely a potential and minimal connection to interstate commerce.[148]

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142. *Id.*

143. *See* Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993) [hereinafter *Hoffman Homes II*] (replacing prior opinion in Hoffman Homes v. Environmental Protection Agency, 961 F.2d 1310 (7th Cir. 1992) [hereinafter *Hoffman Homes I*]); Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991), *on remand*, 820 F. Supp. 478 (N.D. Cal. 1992), *appeal after remand*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied* 116 S.Ct. 407 (1995).

144. *Hoffman Homes I*, *supra* note 141, 961 F.2d 1310 (7th Cir. 1992), *withdrawn and replaced by Hoffman Homes II*, *supra* note 141, 999 F.2d 256 (7th Cir. 1993).

145. Findings of fact entered by the Administrative Law Judge showed that Area A, an isolated wetland of less than an acre in dimension, had no surface or groundwater connection to other regulated water. The ALJ recognized that under administrative regulations, Area A would be subject to EPA and Corps jurisdiction if the wetlands nevertheless affected interstate commerce. Under agency regulations, the Corps and EPA consider an isolated wetland to affect interstate commerce if, for instance, it serves as a habitat for migratory birds. However, no evidence was presented that showed actual use by migratory birds of Area A nor of any special characteristics that would attract migratory birds to Area A. *Hoffman Homes II*, *supra* note 141, 999 F.2d at 259.

146. *Hoffman Homes I*, *supra* note 141, 961 F.2d at 1316-23.

147. *Hoffman Homes II*, *supra* note 141, 999 F.2d at 256, 261-62.

148. *See id.* at 261. The court reasoned that the cumulative loss of wetlands reduces populations of birds and consequently reduces the ability of people to travel in interstate

Further, potential use by migratory birds of an isolated wetland could reasonably establish that connection to interstate commerce.[149] While agreeing that the agency's interpretation was reasonable, the court nevertheless determined that Hoffman Homes did not violate the Clean Water Act.[150] Hoffman Homes admitted filling Area A, but the court found that the EPA presented no evidence that Area A was a suitable or potential habitat for migratory birds prior to being filled.[151] There was no evidence that migratory birds actually used Area A, nor that Area A contained any characteristic that would render it especially attractive to migratory birds compared to any other land that at one time contains water.[152] In so finding, the court essentially required evidence of actual use or evidence that the particular wetland was uniquely suitable[153] for use by migratory birds to bring the wetland within the reach of the Act. Absent such evidence, the court concluded "on the particular facts and findings below that Area A is not subject to regulation under the Clean Water Act."[154]

Addressing a similar issue, the Ninth Circuit pronounced without discussion that the Commerce Clause reaches local waters that might provide habitat to migratory birds and endangered species.[155] The dispute in *Leslie Salt* centered around a parcel of property abutting the San Francisco Bay National Wildlife Refuge and lying near Newark Slough, a tidal arm of San Francisco Bay.[156] Until 1959, the property had been used for the production of salt.[157] The property still contained pits and shallow basins that had been excavated in connection with the salt manufacturing process.[158] For most of the year, these artificially created pits and basins were dry. However,

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commerce to trap, hunt, photograph or observe those species.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. That is, that the wetland sought to be regulated had some special characteristic that would make potential use by migratory birds more likely. *See id.*

154. *Hoffman Homes II*, 999 F.2d at 262.

155. Leslie Salt v. United States, 896 F.2d 354, 360 (9th Cir. 1990), *cert. denied* 498 U.S. 1126 (1991), [hereinafter *Leslie Salt II*] (citing with approval *Utah v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984)).

156. Leslie Salt v. United States, 55 F.3d 1388, 1390 (9th Cir. 1995) [hereinafter *Leslie Salt IV*].

157. *See id.*

158. *See id.*

during the rainy season the depressions filled with water, creating temporary ponds that were visited by migratory birds.[159] In 1985, Leslie Salt began excavating a feeder ditch and siltation pond in an attempt to drain the land. Upon learning that Leslie Salt was discharging fill into the seasonally ponded areas, the Corps issued a cease and desist order under section 404 of the Clean Water Act. Leslie Salt filed suit challenging the Corps's jurisdiction.

The district court held that the Corps had no jurisdiction over the property because the ponds were artificially created and temporary and thus not "other waters" as defined by agency regulations.[160] The appellate court reversed and remanded, holding in part that the ponds were not excluded from Corps jurisdiction simply because they were artificially created and dry part of the year.[161] The court further held that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps's jurisdiction to local waters which *may* provide habitat to migratory birds and endangered species."[162] The case was remanded to the district court for a factual determination of whether any part of the property had sufficient connection to interstate commerce to be subject to the Corps's jurisdiction under the Clean Water Act.[163]

On remand, the district court found that some 12.5 acres of seasonally ponded areas were subject to Corps jurisdiction based on evidence that some 55 species of migratory birds actually used the seasonally ponded areas as habitat.[164] On appeal after remand, the Ninth Circuit declined to reconsider its prior holding in *Leslie Salt II* that isolated, seasonally dry intrastate waters used only by migratory birds are within the regulatory reach of the Clean Water Act, and thus the Commerce Clause.[165] The court held that its decision on the prior appeal, that jurisdiction of the Corps under the Clean Water Act reached isolated waters used only by migratory birds, was not

159. *See id.* at 1391.

160. Leslie Salt Co. v. United States, 700 F. Supp. 476 (N.D.Cal. 1989) [hereinafter *Leslie Salt I*]. The court found that the temporary ponds and pits had been artificially created and were dry most of the year, and thus held that the ponds did not come under the definition of "other waters" in 33 C.F.R. § 328.3(a)(3) (1995). *See id.*

161. *Leslie Salt II*, 896 F.2d 354, 359-60 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991).

162. *Id.* at 360 (emphasis added).

163. *Leslie Salt IV*, 55 F.3d 1388, 1392 (9th Cir. 1995).

164. Leslie Salt Co. v. United States, 820 F. Supp. 478, 480 (N.D.Cal. 1992) [hereinafter *Leslie Salt III*].

165. *Leslie Salt IV*, 55 F.3d at 1395.

"clearly erroneous," and thus, under the doctrine of law of the case,[166] did not warrant reconsideration.[167]

Because *Lopez* arguably imposes substantive limits on Congress's exercise of the commerce power, the holdings of *Leslie Salt* and *Hoffman Homes* might be subject to challenge.[168] At issue in each case was the EPA's assertion of jurisdiction over isolated wetlands "the use, degradation or destruction of which could affect interstate or foreign commerce."[169] This regulation has been interpreted to require only a potential, minimal effect on interstate commerce.[170] Under the migratory bird rule, this minimal effect is satisfied if the isolated wetland in question could potentially be used by migratory birds.[171]

Each court's decision upheld the exercise of federal jurisdiction over isolated wetlands solely on the basis of potential use by migratory birds. Although the potential use of an isolated wetland by migratory birds was characterized as a minimal connection to interstate commerce, both courts found it sufficient to justify the exercise of federal power. The *Lopez* decision, however, clearly requires a "substantial" effect on interstate commerce to invoke the commerce power. The question thus becomes whether the use or

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166. Under law of the case doctrine, an appellate court generally will not reconsider matters resolved in a prior appeal in the same case absent an intervening change in controlling authority, new evidence, or a finding that the previous determination was clearly erroneous and would work a manifest injustice. *See id.* at 1392-93.

167. *See id.* at 1396. The court noted:

> The migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason. In this case, there is no evidence of human contact with the seasonally ponded areas. The only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations. Nevertheless, given the broad sweep of the Commerce Clause, the holding in *Leslie Salt II* cannot be considered clearly erroneous on this ground.

Id.

168. For additional analysis of the impact of *Lopez* on environmental regulation see generally, Holman, *supra* note 12, and Hieneman, *supra* note 12.

169. 40 CFR § 230.3(s)(3) (1996).

170. *See Hoffman Homes II*, 999 F.2d 256, 259 (7th Cir. 1993) (Chief Judicial Officer required EPA to show destruction of isolated wetland would have "some minimal, potential effect on interstate commerce" to assert jurisdiction over the wetland; the minimal potential effect was shown by proof that the subject wetland provided a suitable habitat for migratory birds).

171. *See id.* at 261.

potential use of an isolated wetland by migratory birds substantially affects interstate commerce and thus justifies federal regulation over the degradation of isolated wetlands.

In *Hoffman Homes I*, later vacated by the court but adopted as part of the concurrence, Judge Manion asserted that the mere presence of wildlife alone, whether actual or potential, has never been sufficient to invoke the Commerce Clause power.[172] He argued that migratory birds do not engage in commerce, even when flying interstate,[173] and do not "ignite the Commerce Clause" until they are "watched, photographed, shot at or otherwise impacted" by a person capable of participating in interstate commerce.[174] Based on the requirement in *Lopez* that the effect an activity has on interstate commerce be substantial, Judge Manion's argument in *Hoffman Homes I* might be used to argue against finding that the Commerce Clause reaches isolated wetlands.

A rule permitting jurisdiction to be determined solely by potential use of a wetland by migratory birds is arguably too tenuously connected to interstate commerce to trigger the commerce power in light of *Lopez*'s substantiality requirement.[175] First, the migratory bird rule may not be a good measure of when the filling of an isolated intrastate wetland substantially affects interstate commerce because it requires nothing more than finding that an isolated wetlands be potentially suitable habitat.[176] Potential use of an isolated wetland by migratory birds in no way connects that wetland to any of the myriad of activities that normally serve as the interstate

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172. *Hoffman Homes I*, 961 F.2d 1310, 1320 (7th Cir. 1992) (incorporated in *Hoffman Homes II*, 999 F.2d at 262 (Manion, J., concurring) citing Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (holding the Commerce Clause broad enough to regulate the taking of fish in state waters not because of the mere presence of the fish, but because of the effect on interstate commerce, here the movement of vessels in search of fish, the catching of fish, and the transport of the catch to processing plants)). *See also* United States v. Helsley, 615 F.2d 784 (9th Cir. 1979) (upholding Airborne Hunting Act based on effect on interstate commerce of people in interstate commerce hunting; presence of birds incidental to constitutionality of Act).

173. *See Hoffman Homes I*, 961 F.2d at 1320 (incorporated in *Hoffman Homes II*, 999 F.2d at 262 (Manion, J., concurring)).

174. *Id.*

175. *See* Holman, *supra* note 12, at 195 (arguing that the Migratory Bird Rule is too tenuous a link of isolated wetlands to interstate commerce to justify regulation pursuant to the Commerce Clause). *But see* Morrissey, *supra* note 12, at 142-43 (suggesting CWA be amended to extend federal protection to isolated wetlands as "waters of the United States" and incorporating Migratory Bird Rule in definition).

176. *See* Holman, *supra* note 12, at 195 (arguing that the Migratory Bird Rule does not guarantee that the filling of isolated wetlands will substantially affect interstate commerce).

commerce links between wildlife and regulated waters.[177] The rule requires no showing that people participating in interstate commerce interact in any manner with the migratory birds that might potentially use a particular isolated wetland.

Often, as was the case in both *Hoffman Homes* and *Leslie Salt*, the filling of isolated wetlands is for an economic purpose such as commercial land development. In such cases, the first limitation articulated by *Lopez*, that the regulated activity be economic, will be satisfied if the Court interprets "economic activity" liberally. However, because the Clean Water Act reaches private as well as commercial activity, the migratory bird rule at least contemplates jurisdiction over non-commercial, intrastate activity based solely on minimal effects (i.e., potential effects) on migratory birds who might have used the isolated wetlands.[178] This is seemingly the same posture the Gun-Free School Zones Act held before the *Lopez* court.[179]

A *Lopez*-type challenge to the migratory bird rule would nonetheless be unlikely to succeed. *Lopez* itself recognizes that the Commerce Clause authorizes regulation of local activities such as the filling of an isolated wetland, if such activities exert a substantial economic effect on intestate commerce.[180] While the destruction of a single intrastate, isolated wetland may not substantially affect migratory birds and consequently interstate commerce, the cumulative effect of the degradation or destruction of all intrastate isolated

177. Typically, courts note the large number of interstate travelers spending billions of recreational dollars to view, photograph, hunt, trap or study migratory birds. *See, e.g., Hoffman II*, 999 F.2d at 261 (noting that throughout North America, "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds"); Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985, 995 (D. Haw. 1979) (noting preservation of endangered species habitat "preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species"); *see also* Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 38-39 (1993) (noting "commerce relating to migratory waterfowl alone exceeds billions of dollars per year in North America").

178. *See* Holman, *supra* note 12, at 198 (noting the CWA regulates both commercial and noncommercial activity to achieve its purpose of restoring the Nation's waters).

179. Thus, extending the commerce power to regulate the filling of isolated wetlands arguably "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 115 S. Ct. at 1634.

180. *See Lopez*, 115 S. Ct. at 1631; *see also* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

wetlands that provide habitat to migratory birds is substantial.[181] The loss of habitat causes a decline in the populations of migratory birds that in turn affects interstate commerce by causing a decline in the opportunities for hunting, photographing, and observing migratory birds.[182] Thus, considering the billions of interstate dollars spent annually on activities connected to migratory birds, the destruction of individual, isolated wetlands could be regulated as a class of intrastate activities which in the aggregate have a substantial economic effect on interstate commerce.[183]

However, the treatment of federalism by the *Lopez* majority suggests that if the activity is one within the realm of traditional state concern, the Court will be more hesitant in finding a substantial effect on interstate commerce. In the alternative, *Lopez* could also be interpreted to mean that where the federal government seeks to regulate in an area of traditional state concern, the connection to interstate commerce must be established without stacking "inference

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181. *See supra* notes 38-42 and accompanying text (discussing the *Wickard* analysis). Johnson, *supra* note 173, at 38-39, estimates that commerce relating to migratory waterfowl alone exceeds billions of dollars per year in North America. Further:

> The loss and degradation of habitat for migratory birds is a major cause of the declining populations of waterfowl. Although the loss of individual isolated wetlands may not have a direct impact on the ability of waterfowl to thrive, the cumulative effect of the loss of numerous wetland habitats is devastating. As the habitat for migratory birds decreases, greater numbers of birds are forced to share less space, and "wetland ghettos" are created, where diseases spread rapidly. As populations of migratory birds decline, the opportunities for hunting, photographing, and observing migratory birds decline. The loss of habitat, therefore, clearly affects the interstate commerce of migratory birds.

Id. at 39. (citations omitted).

182. Johnson, *supra* note 173, at 39 n.204 (citing U.S. FISH AND WILDLIFE SERVICE, NORTH AMERICAN WATERFOWL MANAGEMENT PLAN 1989, U.S.-Can. 1 (1989).); *see also* U.S. DEP'T OF THE INTERIOR FISH AND WILDLIFE SERV., 1994 UPDATE TO THE N. AMERICAN WATERFOWL MANAGEMENT PLAN 4 (1994) (documenting that more than 30 million North Americans spend several million dollars annually to observe, hunt or otherwise interact with waterfowl) [hereinafter 1994 UPDATE].

183. *See, e.g.*, Perez v. United States, 402 U.S. 146, 154-55 (1971) (upholding federal jurisdiction over local loan-sharking operations because "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce"); Wickard v. Filburn, 317 U.S. 111, 127-28 (1992) ("That appellees's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial"). *But see* Holman, *supra* note 12, at 196-98 (arguing that the filling of isolated wetlands that have *no impact* on interstate commerce could not be included in the class of regulated activity).

upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[184]

Arguably, jurisdiction based on the mere presence of migratory birds is, without more, insufficient under *Lopez* to support congressional commerce power.[185] In *Hoffman Homes I*, Judge Manion asserted that the presence of migratory birds is not in itself commerce nor an economic activity. If this is so, a potential effect on interstate commerce can be postulated only when the presence of wildlife provokes activities such as observation, hunting, trapping, or other human endeavors engendered by the presence of migratory birds. Consequently, if the wetland in question is not the situs of human activity related to migratory birds, the connection to interstate commerce may arguably be too tenuous.[186]

Judge Manion would require evidence that people travel interstate to visit particular isolated wetlands to view, hunt, or otherwise interact with wildlife before finding that Congress would be authorized to regulate under the Commerce Clause.[187] It is unlikely that non-commercial, privately-owned wetlands would be visited by interstate travelers for the purpose of interacting with migratory fowl. Nonetheless, requiring the direct conduct of interstate commerce activity on the precise wetland sought to be regulated before the commerce authority is triggered ignores the realities of interstate commerce in migratory birds.

Isolated wetlands provide habitat to migratory birds whose continued existence supports billions of dollars in interstate commerce.[188] The incremental destruction of migratory bird habitat

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184. *Lopez*, 115 S.Ct. at 1634.

185. *See* Holman, *supra* note 12, at 197-99 (maintaining this position).

186. *See* Holman, *supra* note 12, at 196 (arguing that wetlands with no impact on interstate commerce, that is those wetlands on which no appreciation of migratory waterfowl is conducted, could not be regulated under the Commerce Clause).

187. In *Hoffman Homes I*, incorporated into the concurrence of *Hoffman Homes II*, Judge Manion queried that any spot in the United States is a potential landing spot for migratory birds, including a puddle in the median of a highway. Thus he concluded "[t]he Commerce Clause, at the very least, requires some connection to human commercial activity. It does not allow regulation of animals just because they are animals which we want to protect. Commerce is a uniquely human activity; thus, Congress, or the EPA, must demonstrate some human impact before the Commerce Clause comes into play." *Hoffman Homes I*, 961 F.2d 1310, 1321-22 (7th Cir. 1992) (incorporated in concurrence to *Hoffman Homes II*, 999 F.2d 256, 263 (7th Cir. 1993)).

188. *See* 1994 UPDATE, *supra* note 178, at 20 (noting all migratory waterfowl and nearly half of all threatened and endangered species, depend on wetland and associated upland habitats for

directly and negatively impacts migratory bird populations and, thereby interstate commerce.[189] Isolated wetlands are a crucial link in the direct chain of causation between healthy migratory bird populations and interstate commerce.[190] It should, therefore, be irrelevant whether a migratory bird is ever observed, photographed, or hunted at the particular isolated wetland in question. Unlike in *Lopez*, the connection of isolated wetlands to interstate commerce is well-documented and does not require the Court to "pile inference upon inference" in a manner that gives rise to a general federal police power.[191] Consequently, although land use regulation is an area of traditional state concern, the strength of the connection between isolated wetlands and interstate commerce via migratory birds should be more than sufficient to withstand a Commerce Clause challenge.

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survival). The loss and degradation of migratory bird habitat is the major migratory bird management problem in North America. *Id.*

189. *Id.* More than 30 million people participate in recreational activities focusing on waterfowl and generate a "direct expenditure of several billion dollars annually." *Id.* at 4. Thus, a healthy waterfowl population secures a strong economy in waterfowl-related recreation. A decrease in waterfowl populations ultimately translates into fewer opportunities for waterfowl-related recreation. The destruction of wetland and associated upland habitats needed for breeding, migration and wintering has been cited as the principle cause of the drastic decline of duck populations in the 20th Century. *Id.* at B-1.

190. *See* SUSAN M. GALATOWITSCH & ARNOLD G. VAN DER VALK, RESTORING PRAIRIE WETLANDS (1995). Waterfowl require wetland complexes, that is, a mix of wetland types, to adequately satisfy requirements for food and shelter during different life stages of migration, courtship, brood rearing and molting. *Id.* at 23. Seasonal changes in water levels and temperatures affect the availability of food for migrating and breeding waterfowl. *Id.* Shallow ephemeral basins, sheetwater areas, and temporary wetlands thaw much earlier than larger, deeper and more permanent wetlands, and provide an early season food supply that is unavailable in other, deeper wetlands nearby. *Id.* Small, temporary wetlands also isolate courting pairs and provide loafing sites for males near nesting hens. *Id.* at 23-24. Habitat conditions along migration routes and in wintering areas directly affect survival of migrating birds and influence reproductive success the following spring. 1994 UPDATE, *supra* note 178, at B-3. Many key areas of migration and wintering habitat have been lost and the quality of remaining habitat has decreased substantially. *Id.*

191. *See* 1994 UPDATE, *supra* note 178, at 4 (recognizing the importance of waterfowl as measurable indicators of a healthy environment).

B. *Challenges to the Endangered Species Act*

The Endangered Species Act (ESA),[192] once held to be a valid exercise of Congress's treaty-making and Commerce Clause powers,[193] may also be vulnerable to a *Lopez*-based challenge. The stated purposes of the ESA are the conservation of endangered and threatened species and the protection of the ecosystems upon which they depend.[194] The ESA directs the Secretary of the Interior to identify and list endangered or threatened species[195] and to designate their critical habitat.[196] Under the ESA, it is unlawful for any person to "take" endangered or threatened species.[197] The term "take" is statutorily defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[198] These descriptive terms are not otherwise defined by the statute, however Fish & Wildlife Service (FWS) regulations further define "harm" to include significant habitat modification that kills or injures wildlife.[199] In the same term that *Lopez* was decided, the Supreme Court upheld the inclusion of habitat modification as harm amounting to a "taking" under the ESA against a facial challenge.[200]

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the D.C. Circuit court's ruling that habitat modification was not a taking under the ESA created a split in the circuits. The D.C.

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192. 16 U.S.C. §§ 1531-1543 (1994) (hereinafter ESA).

193. Palila v. Hawaii Department of Land and Natural Resources, 471 F. Supp. 985, 999 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

194. 16 U.S.C. § 1531(b) (1994). The Secretary must determine which species are endangered or threatened by using "the best scientific and commercial data available" and must take into account State conservation efforts such as by predator control or protection of habitat. 16 U.S.C. § 1533(b)(1)(A).

195. 16 U.S.C. § 1533(a)(1) (1994).

196. 16 U.S.C. § 1533(b)(2) (1994).

197. 16 U.S.C. § 1538(a)(1)(B) (1994).

198. 16 U.S.C. § 1532(19) (1994).

199. 50 C.F.R. § 17.3 (1995). The regulations define the statutory term "harm" as follows:

> Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

Id.

200. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S.Ct. 2407 (1995).

Circuit reasoned that the statutory term "harm" referred only to the direct application of force to an endangered species, and thus did not include harm by an indirect means such as habitat modification. The Supreme Court reversed, holding that the Fish & Wildlife Service reasonably interpreted "harm" to include habitat modification.

Some fifteen years prior to the decision in *Sweet Home*, federal authority to prohibit habitat modification under the takings provision of the ESA was considered by the district court of Hawaii. In *Palila v. Hawaii Department of Land and Natural Resources*,[201] the defendants challenged the application of the Endangered Species Act to the palila, an endangered Hawaiian bird, arguing that the Commerce Clause did not grant Congress the authority to enact federal legislation concerning the species, since the palila neither moves interstate nor inhabits federal lands. The district court rejected the argument, holding that Congress had the authority to regulate the palila through the ESA under its Treaty and Commerce powers.

The palila is a six-inch long finch-billed member of the Hawaiian honeycreeper family that is found exclusively in the State of Hawaii.[202] At the time of suit, experts agreed that the palila were dangerously close to their minimal population level, below which the species cannot fall without being doomed to eventual extinction.[203] The State of Hawaii maintained populations of feral goats and sheep for sport-hunting within a State Game Management Area that encompassed most of the palila critical habitat.[204] The grazing habits of the goats and sheep had a destructive impact on the mamane-naio woodlands, the critical habitat of the palila.[205]

An action for declaratory and injunctive relief was filed in the name of the palila, pursuant to the Endangered Species Act of 1973.[206] Complainants contended that the defendants were "taking"[207] the palila in violation of Section 9 of the ESA by maintaining

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201. 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

202. *Palila*, 471 F. Supp. at 988.

203. *Id.*

204. Id. at 989.

205. *Id.* at 990. The feral sheep and goats feed on the mamane trees. *See* Palila v. Hawaii Dept. of Land & Natural Resources, 852 F.2d 1106, 1107 (9th Cir. 1988) (*Palila IV*). The palila is totally dependent on the mamane-naio woodlands; it feeds, shelters, and nests on the mamane tree. *Id.* at 1107 n.2.

206. 16 U.S.C. § 1531-1543 (1994).

207. The Act defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1994). Following the Supreme Court's decision in Babbitt v. Sweet Home Chapter of Communities for

destructive populations of feral sheep and goats in the palila's critical habitat.[208]

The State of Hawaii challenged the power of the United States to enforce the ESA against it on behalf of the palila.[209] The defendants argued that the state had exclusive sovereignty over the palila.[210] Finding that Congress had determined that the protection of any endangered species anywhere is of the utmost importance to mankind and that a major cause of extinction is the destruction of natural habitat, the district court rejected the defendants' Tenth Amendment argument.[211]

> In this context, a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.[212]

Thus, the court concluded that the Tenth Amendment did not restrict enforcement of the ESA against the state because it was a valid exercise of Congress's power to regulate commerce.[213] The district court's order that the State of Hawaii remove the goats and sheep was affirmed by the Ninth Circuit.[214]

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a Great Oregon, 115 S.Ct. 2407 (1995), "taking" also specifically includes habitat modification.

208. *Palila*, 471 F. Supp. at 987.

209. *Id.* at 992.

210. *Id.*

211. *Id.* at 994-95.

212. *Id.* at 995.

213. *Id.* The court also noted that the ESA could be upheld as a legitimate exercise of Congress's power to enact legislation implementing valid treaties. *Id.* at 993-94. The court noted that the ESA specifically implemented the United States-Japan Convention for the Protection of Migratory and Endangered Birds, and the Convention on Nature and Wildlife Preservation in the Western Hemisphere. *Id.* at 993.

214. Palila v. Hawaii Dept. Land & Natural Resources, 639 F.2d 495 (9th Cir. 1981) (*Palila II*). Five years later, the Sierra Club amended its original complaint to add mouflon sheep as destructive animals to be removed from the palila's habitat. The mouflon sheep, game animals introduced by the State in the 1960s, were not included in the original complaint because their impact on the palila's critical habitat had not yet been determined. The mouflon sheep also feed on the mamane trees. The district court found the presence of the mouflon sheep harmed the palila by destroying the mamane woodland through grazing and thus caused habitat degradation that could result in extinction. The court also found that the mamane woodland would not

Had the issue in *Palila* been decided after *Lopez,* the decision regarding Congress's authority under the Commerce Clause might have been different. In *Palila*, the trial court concluded that the Tenth Amendment did not restrict enforcement of the ESA against the State of Hawaii because the ESA was a valid exercise of Congress's commerce power. The court found sufficient links to interstate commerce in that the ESA preserved the possibilities of interstate commerce in endangered species in the future and interstate movement of persons wishing to view or study endangered species. The primary question thus becomes whether, after *Lopez*, the possibility of some future effect on interstate commerce is sufficient to trigger congressional regulation of private activity under the commerce power.[215]

Today, in the wake of *Lopez*, Congress has the authority to protect endangered species such as the palila pursuant to the commerce power only if the regulated activity, "substantially affects" interstate commerce. *Lopez* indicates further that the regulated activity must be economic before Congress will be found to have acted pursuant to its commerce powers.[216] Whether an activity is economic or commercial, however, is a matter of definition.[217] The *Lopez* majority itself concedes that "depending on the level of generality, any activity can be looked upon as commercial."[218] Despite the uncertainty engendered by its determination, the majority adheres to the distinction in order to preserve the balance of state and federal power.[219] Therefore, to pass *Lopez* muster, the degradation

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regenerate with the continued presence of the mouflon sheep and the palila would not recover to a point where it could be de-listed. Palila v. Hawaii Dept. of Land & Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986) (*Palila III*). The Ninth Circuit again affirmed that harm includes habitat degradation that could result in extinction, and concluded that the finding of a taking under the ESA was not clearly erroneous. Palila v. Hawaii Dept. of Land & Natural Resources, 852 F.2d 1106, 1110 (9th Cir. 1988) (*Palila IV*). The appellate court did not reach the issue of whether harm includes habitat degradation that prevents recovery of an endangered species. *Id.* at 1110-11.

215. *See* Holman, *supra* note 12, at 178-79 (suggesting the "habitat-harm" regulation is similar to the provision struck down in *Lopez* and therefore oversteps Congress's power to enact legislation under the Commerce Clause).

216. United States v. Lopez, 115 S. Ct. 1624, 1630 (1995) ("[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

217. *But see* Holman, *supra* note 12, at 179-80 (arguing that the ESA is not essentially an economic-based statute).

218. *Lopez*, 115 S. Ct. at 1633.

219. *Id.* Explaining the necessity, despite the difficulty, of distinguishing commercial activity subject to congressional commerce authority from noncommercial activity, the Court stated:

or modification of an endangered species' habitat would have to be found an "economic activity" having a substantial effect on interstate commerce.

Where habitat degradation occurs incident to commercial development, it is not difficult to characterize the activity as economic. So, for instance, clear-cutting a stand of trees that is critical habitat to the red-cockaded woodpecker[220] for the sale of lumber or the development of a shopping center might easily be classified as commercial activity. On the other hand, habitat-modifying activity engaged in by a landowner for his own, rather than commercial benefit, is not as easily identified as economic activity. If the term is narrowly defined, the land-owner who clear-cuts critical habitat of the red-cockaded woodpecker to build a swimming pool or tennis court may not be engaged in economic activity because his activity is for personal rather than commercial interest. Using a more flexible definition of the term, however, the landowner seeking to improve his property is arguably engaged in commercial activity to the extent that he hires contractors, or rents or purchases materials, equipment, or supplies. One might also argue that activity directly affecting the value of property is commercial because of the potential for sale of the property.

Economic activity alone is insufficient to trigger the Commerce Clause; *Lopez* also requires that the activity substantially affect interstate commerce. Similar to the migratory bird rule discussed

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> But, so long as Congress's authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty' . . . . Any possible benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated powers.

Id. (citations omitted).

220. This woodpecker was listed as an endangered species in 1970 pursuant to the statutory predecessor of the ESA. 50 C.F.R. § 17.11(h) (1995) (issued pursuant to the Endangered Species Conservation Act of 1969, 83 Stat. 275); *see also* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2410 n.4 (1995) (explaining same). The red-cockaded woodpecker has frequently been the subject of litigation. *See, e.g.,* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991) (challenge to timber management activities as having an adverse impact on the red-cockaded woodpecker); Sierra Club v. Glickman, 67 F.3d 90 (5th Cir. 1995) (challenge to U.S. Forest Service even-aged logging management practice for habitat of red-cockaded woodpecker); *see also* State of Texas v. United States Forest Serv., 805 F.2d 524 (5th Cir. 1986) (holding state not entitled to stay pending appeal of USFS plan to clear cut area of national forest and noting special consideration given by U.S. Forest Service to nine colonies of red-cockaded woodpecker in area to be managed).

above, whether the habitat modification regulation can survive a *Lopez*-based challenge must turn on the strength of the links established between endangered species and interstate commerce.

In *Palila*, the district court found that habitat modification affected interstate commerce by preserving the possibility of future trade in the palila. Preserving the potential for future trade in an endangered species, however, seems a remote and intangible concept to characterize as a substantial effect.[221]

The *Palila* court also noted that the habitat modification regulation preserves the possibility of the interstate movement of people seeking to study or view endangered species. This justification of federal jurisdiction parallels the analysis associated with the migratory bird rule. Degradation of critical habitat causes a decline in population of the endangered species, thus presenting fewer opportunities for people to travel interstate to study or view the species.[222]

The argument is less compelling, however, in regard to the habitat modification regulation than in regard to the migratory bird rule. Preservation of potential migratory bird habitat on isolated wetlands preserves interstate commerce in migratory birds even where that commerce-related activity occurs on land other than the wetland sought to be regulated. It is not necessary to the success of the argument that people travel interstate to the precise location of the isolated wetlands sought to be regulated; that isolated wetlands are necessary to support continued interstate commerce in migratory birds at other locations is sufficient.

On the other hand, where critical habitat of an endangered species is completely contained within the boundaries of privately owned land, the connection to interstate commerce is less obvious, and it might be necessary to show that people travel interstate to interact with the endangered species on that land. Persons wishing to view or study an endangered species have no right to enter privately

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221. Moreover, to effect its purpose of conserving endangered species, the ESA bans commerce in endangered species. It seems counter-intuitive, therefore, that the potential for future trade in endangered species could serve as a sufficient basis for federal jurisdiction. *See* Holman, *supra* note 12, at 184 (arguing that "future entrance into commerce" is an insufficient basis for commerce power because ESA purports to ban traffic in endangered species, not enable it). This argument is somewhat flawed because the essential purpose of the ESA is recovery of endangered species to a point where it is no longer endangered. Once a species recovered sufficiently to be de-listed, the possibility of trade in that species revives.

222. Indeed, species driven to extinction by critical habitat destruction present no opportunity for the interstate movement of people.

owned property to do so. The possibility of such interstate travel, therefore, may be too remote and intangible to support the conclusion that its curtailment via habitat modification would substantially affect interstate commerce.[223] A commerce power premised on such an abstract, theoretical possibility, it might be argued, is one that threatens to obliterate the distinction between national and local control and to convert congressional commerce power to a general police power of the sort retained by the States.[224]

Moreover, as was the case in *Lopez*, the ESA takings prohibition contains no jurisdictional element linking a particular violation of Section 9 to a substantial effect on interstate commerce.[225] Further, the ESA also lacks any congressional findings that conservation of endangered species substantially affects interstate commerce.[226] Thus, at least where endangered species habitat degradation results from a private use of privately-owned land,[227] *Lopez* might arguably support a conclusion that the federal government is without authority to regulate.[228] This may be especially true because regulation of land use is an area traditionally considered to be within a state's police power.

Simply because private activity is engaged in on private land is not, however, sufficient to remove an activity from federal regulation. Judicial interpretation extends commerce authority over wholly local activity, even where that activity has minimal or no impact on commerce, if, in the aggregate, the class of activity substantially affects interstate commerce.[229] Under the class theory, Section 9 takings through habitat modification by a private individual on private land could be regulated as a class of activities, the regulation of which

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223. *See* Holman, *supra* note 12, at 184 (asserting "'possibility-of-travel' argument would not apply where species is ensconced on private land").

224. *Id.*; *see also* United States v. Lopez, 115 S.Ct. 1624, 1629-34 (1995).

225. Holman, *supra* note 12, at 185.

226. *Id.*

227. This argument also presumes that the species is non-migratory and its critical habitat is wholly contained on private land.

228. In *Lopez*, the Court concluded that 18 U.S.C. § 922(q) (1994) was an unconstitutional extension of Congress's commerce power after finding that (1) the section was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms[;]" (2) it contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce[;]" and (3) the statute lacked any congressional findings of the substantial effect on interstate commerce and "no such substantial effect was visible to the naked eye[.]" *Lopez*, 115 S. Ct. at 1630-32.

229. *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942).

is necessary to effectuate the purpose of the Act, the preservation of endangered species.[230]

Because of the federalism concerns expressed in *Lopez*, *Palila* also raises the question of the federal government's authority to regulate states as states. The *Lopez* notion of federalism suggests that the Court will hesitate to find a substantial effect on interstate commerce where the activity is in a realm traditionally left to state control. This notion would appear to be a resurgence of the *National League of Cities* concept that the Tenth Amendment limits the commerce power in a manner that allows the states to "structure integral operations in areas of traditional government functions."[231]

Lopez implies that there are areas of exclusive state regulation but does not identify categorically those areas reserved exclusively to the states. Assuming a revitalization of substantive limits on the commerce power based on the enumeration of powers doctrine and the Tenth Amendment, if *Palila* were decided today, the result could likely favor the State. A state performing a traditional governmental function, such as the regulation of state lands, could be immune from congressional regulation. If the ESA was shown to be destructive to state sovereignty, as could certainly be argued about the enforcement of the ESA against a state on state lands, it is at least conceivable that the Court would now hold that Congress lacked commerce power to enforce the ESA against the state.

Nevertheless, a lack of congressional commerce power to enforce the ESA does not necessarily mean that the Act is unenforceable against the states. The ESA has been held to be predicated not solely on the Commerce Clause, but also on the treaty power. Thus, other possible bases for enforcing the ESA exist, and the ultimate outcome of the issue may be no different. However, depending on the rigidity with which the Court applies *Lopez*, the commerce power might be insufficient to sustain the enforcement of the ESA against the states as states. Ultimately, considering the extent to which federal regulations can infringe on a state's freedom to structure its integral governmental operations, the Tenth Amendment may once again be

230. *But see* Holman, *supra* note 12, at 181-183 (arguing that non-commercial intrastate habitat-modification can be regulated as a class only if such regulation is essential to an overall scheme to regulate interstate commerce; since the underlying purpose of the ESA is not essentially commercial, private habitat-modification cannot be regulated under a class theory).

231. National League of Cities v. Usery, 426 U.S. 833, 852 (1976). *See also* Gardbaum, *supra* note 10 (suggesting *Lopez* might have been attempting to fashion new and fresh approach to issue of federalism).

read to impose substantive limits on congressional power to regulate the states' control of their own lands and the wildlife thereon.

CONCLUSION

Lopez raises complex issues regarding the nature and scope of federal authority under the Commerce Clause and the concept of federalism. Arguably, *Lopez* revives the notion of substantive limitations on congressional commerce power. What is clear from the case is that a majority of the Court is unwilling to allow Congress to be the final arbiter of its own power.[232] By considering principles of federalism in analyzing congressional authority under the Commerce Clause, the Court seemingly contemplates that certain areas of law are the exclusive province of the states.

Whether *Lopez* presents a real threat to environmental regulation can only be tested by time. It can be expected that *Lopez* will be the vehicle by which many federal environmental statutes will be challenged.[233] At first glance, many environmental statutes appear to be vulnerable to challenge. Many of the statutes lack legislative findings of the substantial effect the subject of regulation has on interstate commerce. Many statutes contain no jurisdictional element that would establish, through case-by-case inquiry, the necessary connection. In addition, many environmental statutes regulate areas historically considered the concern of the states.

The ultimate impact of *Lopez* on environmental regulation will turn on how its requirements are defined and applied. A strict application of *Lopez* might require the challenged statute to regulate economic activity, to be essentially economic regulation. If that hurdle were cleared, the regulated activity would then be examined to determine whether it had a substantial effect on interstate commerce. *Lopez* seems to indicate that the Court will be less inclined to find a substantial effect on interstate commerce if the regulated activity is an area of traditional state concern. Because the Clean Water Act, the Endangered Species Act, and other environmental protection schemes regulate areas that traditionally have been considered the province of the states, such as land-use, future cases

232. *See Lopez*, 115 S. Ct. at 1633.

233. *See, e.g.*, United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996) (appeal pending) (holding commerce authority did not extend to regulation of post-CERCLA contamination).

may conclude that federal environmental regulation represents a constitutionally impermissible exercise of a federal police power.

More likely, however, *Lopez* will not be interpreted to permit the wholesale abandonment of federal environmental regulation. The impact of *Lopez* will be tempered by difficulty in applying the Court's limitations. The distinction between economic and non-economic activity is not likely to survive the test of time. Indeed, there is little reason to distinguish between two local activities that have an identical effect upon interstate commerce if one but not the other is commercial in nature.[234] That is, no reasonable rationale could justify federal regulation over destruction of wetlands by a commercial land developer but not over destruction of wetlands by the private homeowner. The effect on interstate commerce, such as the negative impact on migratory bird populations, is the same and should be regulated similarly.

In addition, most, if not all, environmental statutes in fact have a substantial connection to interstate commerce. Conceivably, the stronger the connection to interstate commerce, the less weight that will be given to other factors. For example, the migratory bird rule will likely survive a Commerce Clause challenge because the potential impact on interstate commerce in migratory birds is well-documented.[235] That the rule regulates in an area traditionally left to the states becomes a secondary consideration where a substantial effect on interstate commerce can be shown. *Lopez* is a difficult decision to understand and may prove to be even more difficult to apply. It remains to be seen whether the case signals a new era of Commerce Clause jurisprudence.

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234. *See Lopez*, 115 S. Ct. at 1663 (Breyer, J., dissenting).

235. In fact, the denial of certiorari in Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom.* Cargill v. United States, 116 S. Ct. 407 (1995), is a fairly strong indication that the Court would find that actual or potential use of a wetland by migratory birds is sufficient to establish federal authority to regulate.