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NOTES

THE MIGRATORY BIRD RULE AFTER *LOPEZ*: QUESTIONING THE VALUE OF STATE SOVEREIGNTY IN THE CONTEXT OF WETLAND REGULATION

Before a land owner may lawfully undertake development that could result in wetland destruction, even if the affected wetland is wholly within the limits of his estate, he must first obtain a permit from the Army Corps of Engineers.¹ This federally operated permit program is a product of section 404 of the Clean Water Act.² The Clean Water Act authorizes federal jurisdiction over all "navigable waters."³ By defining navigable waters broadly, Congress contemplated federal jurisdiction over wetlands to operate to the full extent of the Commerce Clause.⁴ In crafting regulations for the enforcement of section 404, the EPA adopted what is known as the "migratory bird rule" (MBR). The MBR extends the Army Corps's section 404 jurisdiction to wetlands "whose use by and value to migratory birds is well established."⁵

This Note explores the constitutional validity⁶ of the MBR as

1. See Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended by the Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977), at 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)).

2. See *id.*

3. See Sam Kalen, *Commerce To Conservation: The Call For a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873, 887 (1993); Richard G. Kozlowski & Howard Bleichfeld, *Wetlands Enforcement: Lion or Lamb?*, RESOURCES & ENV'T, Winter 1996, at 62, 63.

4. See Kalen, *supra* note 3, at 898 (asserting that the 1977 congressional amendments make evident that Congress accepted the Corps's regulations, which defined jurisdiction to the extent of the Commerce Clause).

5. 51 Fed. Reg. 41,206, 41,217 (1986); see J. Blanding Holman, IV, Note, *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, 167 (citing EPA memorandum from Francis S. Blake, General Counsel, to Richard E. Samderson, Acting Assistant Administrator, Office of External Affairs (Sept. 12, 1985)).

6. In determining "constitutional validity," this Note asks whether a reviewing court ought to uphold the MBR as an act of commerce power.

one method to determine whether a wetland comes under federal commerce power jurisdiction. Commerce power jurisdiction is a prerequisite to federal regulation of any isolated wetland pursuant to section 404 of the Clean Water Act.⁷ In the wake of the *United States v. Lopez*⁸ decision, which explicitly recognized a limit to federal commerce power, many scholars examined congressional extensions of commerce power with renewed interest.⁹ In *Leslie Salt v. United States*¹⁰ a landowner challenged the MBR's extension of congressional commerce power. By the time the challenger petitioned for certiorari, the United States Supreme Court already had issued the *Lopez* decision. The Court denied certiorari, but Justice Thomas dissented, questioning the MBR's validity in view of the *Lopez* decision.¹¹ Several authors have shared his concern.¹²

7. See Kalen, *supra* note 3, at 896 (explaining the Army Corps's regulations interpreting jurisdiction over isolated wetlands and water bodies, intermittent streams, and other waters not connected to interstate or navigable waters); John A. Leman, Comment, *The Birds: Regulation of Isolated Wetlands and The Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237, 1255 (1995) (noting that "[g]enerally, federal courts of appeal have found that Congress intended the Clean Water Act to extend to the limits of the Commerce Clause").

8. 514 U.S. 549 (1995).

9. See Mark A. Chertok, *Federal Regulation of Wetlands*, in ENVIRONMENTAL LITIGATION, 1133, 1137 (ALI-ABA Course of Study, June 24, 1996) available in Westlaw SA85/3 ALI-ABA 1133; 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); Stephen M. McJohn, *The Impact of the United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1 (1995); Edward Alburo Morrissey, *The Jurisdiction of the Clean Water Act Over Isolated Wetlands: The Migratory Bird Rule*, 22 J. LEGIS. 137, 141-44 (1996); 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); Eric Grossman, Comment, *Where Do We Go From Here? The Aftermath and Application of United States v. Lopez*, 33 HOUS. L. REV. 795 (1996); Jonathan G. Hieneman, Note & Comment, *The Shrinking Reach of the Commerce Power: Is Wetland Jurisdiction in Danger?*, 10 J. NAT. RESOURCES & ENVTL. L. 341, 353-56 (1995); Holman, *supra* note 5; Leman, *supra* note 7, at 1253-67 (noting that the Fifth Circuit's holding in *Lopez*, 2 F.3d 1342 (5th Cir. 1993), represents a limitation of commerce power potentially relevant to the Clean Water Act).

10. 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom.* Cargill v. United States, 516 U.S. 955 (1995).

11. See *Cargill*, 516 U.S. at 955 (Thomas, J., dissenting). Due to the procedural complexity of the *Leslie Salt* line of cases, arguably, the Supreme Court denied certiorari based on issues other than the merits. See *infra* notes 61-96 and accompanying text.

12. See, e.g., Morrissey, *supra* note 9, at 141-43; Bablo, *supra* note 9, at 289-92;

This Note concludes that the MBR survives the *Lopez* test and that the denial of certiorari to *Leslie Salt* can be reconciled with the *Lopez* decision. Other notes and articles have scrutinized the strength of the MBR's interstate commerce nexus.¹³ A careful reading of *Lopez*, however, suggests that its application to the MBR should focus not exclusively on the strength of the interstate commerce nexus, an essentially formalistic test,¹⁴ but also on the broad implications to the federal-state balance in sustaining the rule as constitutional expression of commerce power—a functionalist or pragmatic test. The *Lopez* test introduces a novel, albeit intuitive, criterion for assessing the constitutionality of federal regulation based on the commerce power. By scrutinizing the impact of a federal regulation on the constitutionally contemplated federal-state balance, *Lopez* invites a broad inquiry into the relative merits of permitting federal regulation in favor of state regulation in a given arena. In effect, this permits the obvious and welcome inquiry into whether federal regulation in a particular area is more or less consistent with the organizing principles behind the structure of the government. Because the Framers deliberately designed the federal-state balance with a specific purpose in mind, it seems fair to assert that the Framers' federal-state sovereignty distinction warrants exten-

Holman, *supra* note 5, at 198-99; Leman, *supra* note 7, at 1259-61.

13. See Morrissey, *supra* note 9, at 141-43; Bablo, *supra* note 9, at 289-92; Holman, *supra*, note 5, at 198-99; Leman, *supra* note 7, at 1259-61. These inquiries focused on whether the activity in question, i.e., destroying a wetland that is a habitat to migratory birds, substantially affects interstate commerce.

14. For a history of Commerce Clause jurisprudence, see *United States v. Lopez*, 514 U.S. 549, 551-60 (reciting the history of the Commerce Clause); Grossman, *supra* note 9, at 815-32; Robert Wax, Comment, *United States v. Lopez: The Continued Ambiguity of Commerce Clause Jurisprudence*, 69 TEMP. L. REV. 275, 277-84 (1996). The interstate commerce nexus is, or was, a formalistic test inquiring whether a regulated activity substantially affects interstate commerce. See *Lopez*, 514 U.S. at 559 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)); see also Alan R. Arkin, Comment, *Inconsistencies in Modern Federalism Jurisprudence*, 70 TUL. L. REV. 1569, 1579 (1996) (noting the acceptance of the "substantial economic effect" approach to commerce power jurisdiction after *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *Wickard v. Filburn*, 317 U.S. 111 (1942)). Over time the test, while maintaining formalistic language, became more open ended, departing from the formalistic test and becoming effectively all-inclusive. See Arkin, *supra*, at 1582 (noting that the Commerce Clause has "been expanded into an amorphous legislative tool with few limits").

sion only insofar as it furthers their contemplated purpose.

A broad inquiry into the MBR in the context of the Framers' contemplated federal-state balance produces two conclusions. First, the federal rather than state government is better situated to protect the economic interests in the nation's wetlands. Development and destruction of wetlands results in a market failure that demands a regulatory solution.¹⁵ Because this market failure stems from interstate economic externalities, corrective regulations are best fashioned and administered on a federal level. Second, the reasons that justify the presumption of state regulation of most matters do not support state regulation of isolated wetlands. The MBR may represent an accession to power by the federal government at the states' expense, but it does not upset the guiding principles behind the constitutionally contemplated federal-state balance.

The first section of this Note traces the development of the MBR as one of several tests applied to define the limits of Commerce Clause jurisdiction over regulation of isolated wetlands. The second section describes and analyzes the *Lopez* decision in the context of Commerce Clause jurisprudence. The Note then applies the *Lopez* test to the MBR and concludes that the MBR would survive the *Lopez* test. The Note arrives at this conclusion by applying the more traditional aspects of the *Lopez* test as well as the less traditional, more functionalist aspects of the *Lopez* test. Pursuant to the functional-federalism inquiry, this section also examines the impact of sustaining the MBR as a valid expression of congressional commerce power on the federal-state balance of power. The Note argues that state, not federal, regulation frustrates efficient and representationally fair wetland regulation. The Framers did not decide arbitrarily to reserve to the states the vast majority of regulatory power. The Framers recognized that certain benefits would flow from state sovereignty.¹⁶ These "benefits," however, are absent in the context of wetland regulation. This Note concludes that whatever its merit, the presumption of state sovereignty should extend only so far as the reasons that justify its existence. The Note

15. See *infra* notes 268-76 and accompanying text.

16. See *infra* notes 280-92 and accompanying text.

asserts in conclusion that *Lopez*, properly understood, should not threaten federal regulations designed to correct market failures involving significant interstate externalities.

SECTION 404 OF THE CLEAN WATER ACT AND THE MIGRATORY BIRD RULE

In the last thirty years, society's perception of wetlands, including swamps, bogs, marshes, prairie potholes, and similar areas, has changed. Once considered valueless obstacles to economic development,¹⁷ wetlands are now recognized to perform valuable and irreplaceable functions.¹⁸ The recognized ecological functions provided by wetlands include floodpeak reduction, shoreline erosion control, water quality control, and provision of fish and wildlife habitat.¹⁹ In addition to recognizing ecological contributions of wetlands, society recognizes intrinsic,²⁰ aesthetic,²¹ and recreational²² values in wetland preservation.

The nation's rapid growth came at the expense of the American wetland. In the continental United States, of 221 million acres of wetland, only 103 million remain, and 200,000 to 300,000 acres are lost yearly.²³

In 1972, Congress enacted the "Clean Water Act" (CWA)—officially, the Federal Water Pollution Control Act.²⁴ The CWA's

17. See Chertok, *supra* note 9, at 1137; Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 2-3 (1993). Through the Swamp Lands Act of 1849, 1850, and 1860, Congress actively encouraged the destruction of 65 million acres of wetland in part to reduce malaria. See James K. Jackson & William A. Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act—The Riverside Bayview Decision, its Past and Future*, 7 PUB. LAND L. REV. 21, 22 (1986).

18. See Chertok, *supra* note 9, at 1137; Jackson & Nitze, *supra* note 17, at 22-23.

19. See Jackson & Nitze, *supra* note 17, at 21, 23.

20. See *id.* at 23.

21. See HOLMES ROLSTON, *PHILOSOPHY GONE WILD* 81 (1989).

22. See *id.* at 78.

23. See Chertok, *supra* note 9, at 1137; see also Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1251 (1995) (estimating that of 215 million acres of original wetland acreage, less than half remain, suggesting annual loss at 300,000 acres per year nationally).

24. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended by the Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977), at 33 U.S.C. §§ 1251-1387

self-stated purpose "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²⁵ In recognition of wetland value and massive wetland destruction, Congress included in the CWA section 404, which prohibits the discharge of dredge or fill into wetlands or other waters without a permit.²⁶ The language of the CWA, however, refers not to wetlands but rather to "navigable waters."²⁷ The CWA defines navigable waters as "waters of the United States."²⁸ By defining "navigable waters" broadly, Congress intended for the regulation to apply to the full extent of the Commerce Clause.²⁹ Between 1974 and 1986, pursuant to authority granted in the CWA,³⁰ the Army Corps of Engineers promulgated regulations interpreting the scope of section 404 jurisdiction.³¹

The Army Corps's regulations require permits for discharges into three types of waters: interstate waters, waters that are adjacent to other waters of the United States, and "[a]ll other waters such as intrastate lakes, rivers, . . . wetlands, . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce."³² In 1986, in an attempt to set section 404 guidelines for wetland jurisdiction, the Corps adopted regulatory criteria to define wetlands subject to federal jurisdiction by virtue of federal commerce power.³³ The Corps recognized the EPA's interpretation of "waters of the United States" that includes, *inter alia*, waters: "(a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or (b) Which are or would be used as habitat by other migratory birds which cross state lines."³⁴ This regulation codi-

(1988 & Supp. V 1993)); see Chertok, *supra* note 9, at 1138.

25. Federal Water Pollution Control Act § 101(a), 33 U.S.C. § 1251(a) (1994).

26. See *id.* § 404; Johnson, *supra* note 17, at n.14.

27. Federal Water Pollution Control Act § 404(a), 33 U.S.C. § 1344.

28. *Id.* § 502(7).

29. See Kalen, *supra* note 3, at 898 (asserting that the 1977 congressional amendments make evident that Congress accepted the Corps's regulations that defined jurisdiction to the extent of the Commerce Clause); Johnson, *supra* note 17, at 9-10.

30. See 33 U.S.C. § 1.

31. See Johnson, *supra* note 17, at 10-13.

32. *Id.* at n.53 (quoting 33 C.F.R. § 328.3a(3) (1991)).

33. See *id.* at 13.

34. *Id.* at n.55 (quoting 51 Fed. Reg. 41,206, 41,217 (1986)).

fied an EPA memorandum describing what has become known as the "Migratory Bird Rule:"

[I]f a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition [of "waters of the United States"] (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used).³⁵

The Migratory Bird Rule, somewhat radically, expands federal jurisdiction over wetlands by recognizing a not so intuitive nexus between wetlands and interstate commerce. This nexus is based on the commercial industry surrounding wetland-dependent migratory fowl. In 1980, 5.3 million Americans spent 10 billion dollars hunting migratory birds.³⁶ That same year, 55 million Americans spent nearly 10 billion dollars to watch and photograph wetland-dependent birds.³⁷ Migratory bird related commerce is dependent on the preservation of migratory birds' wetland habitats—many of which are isolated wetlands.³⁸ Although commerce power jurisdiction over U.S. waters in the past has been limited to waters connected to, or at least adjacent to, interstate waterways, the MBR is unique in that it creates an interstate commerce nexus that includes *intrastate*, isolated waters.³⁹ Two circuits have reviewed the substance of the MBR.⁴⁰ The Supreme Court has upheld permitting authority

35. Holman, *supra* note 5, at 167 (citing EPA memorandum from Francis S. Blake, General Counsel, to Richard E. Samderson, Acting Assistant Administrator, Office of External Affairs (Sept. 12, 1985)); *see* 51 Fed. Reg. 41,206, 41,217 (1986).

36. *See* Houck & Rolland, *supra* note 23, at 1248.

37. *See id.*

38. *See id.*

39. *See supra* note 32 and accompanying text.

40. *See* Leslie Salt Co. v. United States, 55 F.2d 1388, 1392 (9th Cir. 1995); Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993). In *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989), a district court held that the Corps's adoption of the MBR violated notice and comment. *See id.* at 728. Consequently, the Corps no longer applies the MBR in the Fourth Circuit. The Corps does not, however, give effect to the *Tabb Lakes* decision

over an adjacent wetland,⁴¹ but has not reviewed the application of section 404 to an isolated wetland.

*United States v. Hoffman Homes*⁴²

In the *Hoffman Homes* line of cases, the Seventh Circuit asked whether use by migratory birds provided a sufficient nexus with interstate commerce to render a wetland subject to federal regulation.⁴³ In 1986, the Army Corps of Engineers investigated a construction site in the Village of East Hoffman, Illinois.⁴⁴ The Corps determined that Hoffman Homes, Inc. violated the CWA by filling in two wetlands, "Area A" and "Area B."⁴⁵ On November 19, 1990, the EPA's Chief Judicial Officer, (CJO), reversing an Administrative Law Judge,⁴⁶ assessed a \$100,000 fine against Hoffman.⁴⁷ The CJO determined that potential use by migratory birds created a constitutional basis for section 404 jurisdiction.⁴⁸ The wetland in question qualified as suitable habitat for migratory birds and therefore as "waters of the United States."⁴⁹

The court of appeals reversed the EPA's decision and struck down the MBR.⁵⁰ The court of appeals, in an opinion by Judge Manion, held that the CJO's extension of federal jurisdiction violated language of the CWA and the Commerce Clause.⁵¹

outside of the Fourth Circuit. See Carol E. Dinkens & Sharon M. Mattox, *Regulatory Obstacles to Development and Redevelopment: Wetlands and Other Essential Issues*, in THE IMPACT OF ENVIRONMENTAL LAW ON REAL ESTATE AND OTHER COMMERCIAL TRANSACTIONS 731, 739-40 (ALI-ABA Course of Study, Oct. 10, 1996) available in Westlaw SB18 ALI-ABA 731.

41. See *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

42. 999 F.2d 256 (7th Cir. 1993).

43. See *Hoffman Homes*, 999 F.2d at 260.

44. See *id.* at 257-58.

45. See *id.* at 258-59.

46. See *In re Hoffman Group*, 1990 WL 657313 (EPA Nov. 19, 1990) *1, *rev'd sub nom.* *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310 (7th Cir. 1992). The ALJ found that Area A had no relation to interstate commerce apart from potential use by migratory birds. See *id.* He found this an insufficient connection to interstate commerce to justify inclusion of Area A as "Waters of the United States." See *id.*

47. See *Hoffman Group*, 1990 WL 657313 (EPA) at *1.

48. See *id.* at *8-9.

49. *Id.*

50. See *Hoffman Homes*, 961 F.2d at 1321-23.

51. See *id.*

Judge Manion criticized the MBR for failing to require human activity.⁵² Absent actual hunting, birdwatching or photographing, Judge Manion did not agree that birds' presence, much less their potential presence, could affect interstate commerce.⁵³

The following year the Seventh Circuit granted an EPA petition to rehear the *Hoffman* case.⁵⁴ The court reached the same disposition but employed a different rationale.⁵⁵ Unlike Judge Manion in *Hoffman I*, Senior Circuit Judge Wood upheld the CJO's interpretation of section 404 of the CWA.⁵⁶ The court held that potential use by migratory birds provided a sufficient nexus with interstate commerce to justify defining a wetland as "waters of the United States."⁵⁷ Although the court deferred to the CJO's statutory interpretation, it looked to the ALJ's factual findings.⁵⁸ The ALJ concluded that "the evidence did not support the conclusion that Area A had characteristics whose use by and value to migratory birds is well established."⁵⁹ The court concluded whimsically, by invoking the judgment of the birds themselves, that "[h]aving avoided Area A the migratory birds have thus spoken and submitted their own evidence. We see no need to argue with them."⁶⁰ Ultimately the *Hoffman Homes* line of cases upheld the migratory bird rule, if not its application to the wetland in question.

Leslie Salt v. United States

In the *Leslie Salt* line of cases, the Ninth Circuit summarily upheld the MBR without an in-depth exploration of its

52. See *id.* at 1320 (stating that "[u]ntil they are . . . impacted by people who do . . . engage in interstate commerce, migratory birds do not ignite the Commerce Clause").

53. See *id.*

54. See *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993).

55. See *id.*

56. See *id.* at 261 (stating that "[w]e also agree with the CJO that it is reasonable to interpret the regulation as allowing migratory birds to be [the] connection between a wetland and interstate commerce").

57. *Id.*

58. See *id.* at 262 (noting that "[t]he ALJ . . . was in the unique position to view the evidence, to hear the testimony, and to judge the credibility of the witnesses").

59. *Id.*

60. *Id.* at 262.

constitutionality.⁶¹ *Leslie Salt* concerned a property owned by a salt manufacturer in Newark, California.⁶² At issue on appeal were 12.5 acres out of a 143 acre parcel that contained defunct salt crystallizing pits and unused calcium chloride pits.⁶³ Since 1959 the pits were inactive in salt production but during winter and spring, pooling rainwater created temporary ponds in the pits.⁶⁴ Migratory birds used these ponds for habitat.⁶⁵ Neither party contested that the "ponds" were isolated—they were neither connected nor adjacent to other water bodies.⁶⁶ In October, 1985, Leslie Salt Company began digging a feeder ditch and a siltation pond on these properties.⁶⁷ This activity resulted in the discharge of fill in the area subject to seasonal ponding.⁶⁸ In response to this activity, the Corps issued a cease and desist order asserting jurisdiction over the "waters" in question.⁶⁹

*Leslie Salt I*⁷⁰

In *Leslie Salt I*, the company successfully challenged the Army Corps's jurisdiction.⁷¹ The Corps relied on the MBR to establish jurisdiction; however, the district court never reached the issue of the rule's constitutionality.⁷² Instead, the district court noted that before the interstate commerce connections could be addressed, the property had to be properly classified as "other waters" as defined by section 328.3(a)(3) of the Code of Federal Regulations.⁷³ The court held that the seasonal ponding in the

61. See *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (*Leslie Salt IV*).

62. See *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 478 (N.D. Cal. 1988) (*Leslie Salt I*).

63. See *Leslie Salt IV*, 55 F.3d at 1391.

64. See *Leslie Salt I*, 700 F. Supp. at 480.

65. See *id.* at 481.

66. See *id.* at 480.

67. See *id.* at 481.

68. See *Leslie Salt IV*, 55 F.3d at 1391.

69. See *Leslie Salt I*, 700 F. Supp. at 481.

70. See *id.* at 476.

71. See *id.*

72. See *id.* at 485.

73. See *id.* Section 328 of the Code of Federal Regulations defines "the term 'waters of the United States' as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act." 33 C.F.R. § 328.1 (1997).

former salt pits fell outside the definition of "other waters" because the pits were artificial, "not natural" and "dry most of the year."⁷⁴

*Leslie Salt II*⁷⁵

In *Leslie Salt II*, the Ninth Circuit rejected the district court's interpretation of the term "other waters" in 33 C.F.R. § 328.3(a)(3).⁷⁶ After deciding the issue presented on appeal, i.e. the statutory definition of "other waters," the court of appeals noted that the lower court "failed to determine whether the crystallizers and pits" had sufficient connection to interstate commerce to come under the Corps's jurisdiction.⁷⁷ The court noted that the Corps had adopted the MBR and that the record indicated the potential presence of migratory birds on the property.⁷⁸ In one sentence, the court asserted the constitutionality of the MBR, stating that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps's jurisdiction to local waters that may provide habitat to migratory birds."⁷⁹ After reversing the district court's conclusion that the area in question fell outside the regulatory definition of "other waters," and after summarily resolving the constitutionality of the migratory bird nexus, the court of appeals remanded the case to determine whether the property had sufficient connections to interstate commerce.⁸⁰

74. *Id.*

75. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) (*Leslie Salt II*).

76. *See id.* at 359-60. The question presented on review was whether the statute's definition of "other waters" included the land at issue in light of the facts that the ponding was seasonal and the government was, in part, responsible for the wetlands creation. *See id.* at 359. As explained below, however, the court spoke to the issue of the MBR's constitutionality.

77. *Id.* at 360.

78. *See id.* (stating that "[t]he record showed . . . that migratory birds . . . may have used the property as habitat").

79. *Id.* (citing *Utah v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984); *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985, 991-95 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981)). Whether the MBR is a valid exercise of commerce power was not a question presented on appeal to this court. The court, however, used language that seemed to uphold the MBR as constitutional but provided no analysis of its constitutionality.

80. *See id.*

*Leslie Salt III*⁸¹

In *Leslie Salt III*, the district court found that the property at issue was properly subject to the Corps's jurisdiction.⁸² The court noted that some fifty-five species of migratory birds used the seasonal ponds as habitat and that this fact, in conjunction with the Ninth Circuit's instructions on remand, led to a finding of jurisdiction.⁸³

*Leslie Salt IV*⁸⁴

On second appeal to the Ninth Circuit, the plaintiff "urge[d] the court to revisit the *Leslie Salt II* court's determination that the Corps' jurisdiction under the Act reaches isolated waters used only by migratory birds."⁸⁵ The court, citing the law of the case doctrine, refused to rehear "matters resolved in a prior appeal to another panel in the same case."⁸⁶ The court stated that the "validity of the 'migratory bird rule' was established in the first appeal, and this court's review should generally be limited to the issues decided on remand—the property's specific connections to interstate commerce due to migratory bird use."⁸⁷ In response to the plaintiff's protestations, the court conceded that the court in *Leslie Salt II* affirmed the rule without analysis or explanation.⁸⁸ The court in *Leslie Salt IV* noted, however, that "even summarily treated issues become the law of the case."⁸⁹ The court examined the merits of the case only enough to determine whether the matter should be reconsidered. The standard of review for such an inquiry asks whether the previous finding is "clearly wrong."⁹⁰ Citing the language of the

81. 820 F. Supp. 478 (N.D. Cal. 1992) (order for judgment) (*Leslie Salt II*).

82. *See id.* at 482.

83. *See id.* at 480; *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (*Leslie Salt IV*).

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

85. *Id.* at 1388.

86. *Id.*

87. *Id.*

88. *See id.*

89. *Id.* (quoting *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (D.C. Cir. 1994)).

90. *Id.* at 1393.

Act, *United States v. Riverside Bayview Homes*,⁹¹ and *Hoffman Homes Inc. v. EPA*,⁹² the court found that *Leslie Salt II*'s determination—that the Corps's migratory bird nexus interpretation of section 404 was reasonable—could not be construed as clearly wrong.⁹³ As such, the court refused to revisit the validity of the MBR.

Leslie Salt: The Denial of Certiorari

On October 30, 1995, the Supreme Court denied certiorari to *Leslie Salt IV*.⁹⁴ Justice Thomas dissented to the denial of certiorari, explaining that he would have granted certiorari "to resolve whether the potential or occasional existence of migratory birds on petitioner's property creates a sufficient nexus with interstate commerce to permit Corps regulation of these lands."⁹⁵ Justice Thomas questioned the MBR's legitimacy in view of the Supreme Court's decision in *Lopez*. The MBR, opined the Justice, relied on an even more attenuated connection to interstate commerce than did the connection in *Lopez*—a connection deemed constitutionally impermissible.⁹⁶

UNITED STATES V. *LOPEZ* IN CONTEXT

Commerce Clause Jurisprudence

Lopez is often cited as a break with over fifty years of Commerce Clause precedence.⁹⁷ The Commerce Clause enumerates a federal power. Article I, section 8, of the United States Constitution provides that, Congress "shall have Power . . . To regulate Commerce . . . among the several States."⁹⁸ For more than 170 years the Supreme Court has struggled to define the limits of

91. 474 U.S. 121 (1985).

92. 999 F.2d 256 (7th Cir. 1993).

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

94. See *Cargill v. United States*, 516 U.S. 955 (1995).

95. *Id.* at 956-57 (Thomas, J., dissenting).

96. See *id.* at 957-58 (Thomas, J., dissenting).

97. See, e.g., *United States v. Bishop*, 66 F.3d 569, 575 (3d Cir. 1995); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995); McJohn, *supra* note 9, at 1.

98. U.S. CONST. art. I, § 8, cl. 1, 3.

federal commerce power.⁹⁹

In the first Supreme Court inquiry into the Commerce Clause, Justice Marshall, in *Gibbons v. Ogden*,¹⁰⁰ held that the Constitution vested Congress with a plenary power to regulate any intrastate activity that affected commerce among the states.¹⁰¹ Justice Marshall cautioned that the word "among" required involvement of more than one state.¹⁰²

In the late nineteenth and early twentieth century, the Court introduced restrictions to congressional commerce power.¹⁰³ The Court held that certain activities, such as manufacturing, production, and mining, fell outside the definition of commerce for the purposes of Commerce Clause regulation.¹⁰⁴ Similarly, the Court drew distinctions between activities whose effects on interstate commerce were "direct" and those that were "indirect."¹⁰⁵ Activities whose effects were indirect, the Supreme Court held, could not be regulated under commerce power.¹⁰⁶

With its decision in *NLRB v. Jones*,¹⁰⁷ the Court initiated a trend toward relaxing its more formalistic application of the Commerce Clause.¹⁰⁸ The court held that legislation that acted to prevent labor strikes was within the commerce power because even intrastate strikes had interstate consequences.¹⁰⁹ This trend reached its peak in the 1942 case of *Wickard v. Filburn*.¹¹⁰ Under the Court's analysis in *Wickard*, wheat grown for home consumption was an activity that, in the aggregate, affected interstate commerce by influencing national wheat

99. For a concise history of the Commerce Clause, see Stephen R. McAllister, *Is There a Judicially Enforceable Limit To Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 220-25 (1996).

100. 22 U.S. (9 Wheat.) 1 (1824).

101. *See id.* at 193-97.

102. *See* McAllister, *supra* note 99, at 223.

103. *See id.*

104. *See id.*

105. *See id.* (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935)).

106. *See id.*

107. 301 U.S. 1 (1937).

108. *See id.* at 34-41; McAllister, *supra* note 99, at 223.

109. *See* McAllister, *supra* note 99, at 223.

110. 317 U.S. 111 (1942).

prices.¹¹¹ The Court found Congress's commerce power sufficient to regulate wheat produced for personal consumption.¹¹²

A liberal interpretation of commerce power led the Court to apply the commerce power to effect social policy.¹¹³ For example, the Court justified Title II of the Civil Rights Act of 1964,¹¹⁴ as applied to hotels, motels, and restaurants, as a valid exercise of federal commerce power.¹¹⁵

The expansion of federal commerce power permitted legislation criminalizing carjacking, domestic violence, arson, failure to pay child support, and the liberation of research animals.¹¹⁶ Also, under the guise of the Commerce Clause, Congress enacted regulatory programs including the Endangered Species Act (ESA) and the Clean Water Act.¹¹⁷

Under the New Deal conception, the commerce power covered three categories: "regulating the use of channels of interstate commerce; protecting goods or people in commerce and the instrumentalities of interstate commerce; and regulating activities affecting commerce."¹¹⁸ The Commerce Clause cases of the New Deal era advanced a broad interpretation of the commerce power.¹¹⁹ Many cases contained dicta suggesting some limitation on the federal commerce power,¹²⁰ but none of these cases expressly limited commerce power.¹²¹ Consequently, when *Lopez* held that Congress's enactment of a federal criminal statute exceeded the commerce power, it captured the attention of constitutional law scholars.¹²²

111. See *id.* at 112.

112. See *id.* at 130-31.

113. See McAllister, *supra* note 99, at 224.

114. 42 U.S.C. § 2000a (1994).

115. See *Katzenbach v. McLung*, 379 U.S. 294 (1964). The Court endorsed this application of the commerce power, stating that these restaurants and hotels served food products that moved in interstate commerce. See *id.* at 304.

116. See McAllister, *supra* note 99, at 225.

117. See Johnson, *supra* note 9, at 67-82 (discussing congressional authority for the CWA and the ESA).

118. McJohn, *supra* note 9, at 10.

119. See *id.* at 13.

120. See *United States v. Lopez*, 514 U.S. 549, 555-58 (1995).

121. See McJohn, *supra* note 9, at 13.

122. See, e.g., Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695

Federalism Jurisprudence: The Tenth Amendment

Commerce Clause jurisprudence should be viewed in the context of the Tenth Amendment.¹²³ The Tenth Amendment reserves to the states all powers not expressly delegated to the federal government in the Constitution.¹²⁴ The language of the Tenth Amendment, as supported by the structure of the Constitution and the comments of the Framers, contemplates that the federal government's powers be few and individually enumerated and that the states retain more generalized powers governing the day to day affairs of the people and their property.¹²⁵

In recent history, the Supreme Court has wrestled with opposing views of the Tenth Amendment. Under one view, the Tenth Amendment is a judicially enforceable substantive limit on federal power.¹²⁶ Under the other view, the Tenth Amendment is a procedural limit on federal power to be structurally enforced by the political process rather than the courts.¹²⁷

In *National League of Cities v. Usery*,¹²⁸ the Court imposed a substantive limit on federal commerce power holding that Congress could not exercise its power in a manner that interfered with "traditional state functions."¹²⁹ The Court held that federal regulation that intruded upon areas of traditional state gov-

(1996); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996).

123. U.S. CONST. amend. X.

124. See *id.* ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

125. See Russell F. Pannier, *Lopez and Federalism*, 22 WM. MITCHELL L. REV. 71, 81 (1996) (citing THE FEDERALIST NO. 45 (James Madison)).

126. See Arkin, *supra* note 14, at 1583-86 (discussing *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) and *New York v. United States*, 505 U.S. 144 (1992)); see also *United States v. Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring) (noting that the Court has, in the past "participated in maintaining the federal balance," and asserting that it is within its role to continue to do so).

127. See Arkin, *supra* note 14, at 1586 (citing *Garcia*, 469 U.S. at 528, and noting that it "transformed the Tenth Amendment from a judicial doctrine into a political doctrine").

128. 426 U.S. 833 (1976).

129. See *id.* at 852.

ernmental functions, "devoure[d] the essentials of state sovereignty" by upsetting the constitutionally intended federal-state balance of power.¹³⁰

Ten years later, in 1985, the Court overruled *National League of Cities* with *Garcia v. San Antonio Metropolitan Transit Authority*.¹³¹ Noting the difficulty in defining traditional state government functions, the Court asserted that the political process best enforced the Tenth Amendment.¹³² As support for its holding, the majority noted that the Framers intended the structure of the government to provide procedural restraints on federal power.¹³³ Although these two views represent contrasting approaches, the Court's opinions reflect an unwillingness to select one to the exclusion of the other.¹³⁴ Without overruling *Garcia*, the Court has engaged in judicial enforcement Tenth Amendment as a substantive restraint on federal power. In *Gregory v. Ashcroft*,¹³⁵ the Court imposed a requirement that when legislation intrudes on an area of traditional state concern, Congress must plainly state its intention to do so.¹³⁶ For the Court to enforce such a requirement it must necessarily engage in the forbidden and supposedly "impossible" activity of distinguishing traditional from nontraditional state government functions.¹³⁷ Finally in *New York v. United States*,¹³⁸ the Court once again defined boundaries between federal and state power.¹³⁹ Without actually overruling *Garcia*, the Court appeared to return to a model of federalism

130. *Id.* at 855 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

131. 469 U.S. 528, 531, 557 (1985).

132. *See id.* at 556.

133. *See id.* at 552 (citing THE FEDERALIST NO. 43 (James Madison)).

134. *See* McJohn, *supra* note 9, at 1 n.3; Arkin, *supra* note 14, at 1589.

135. 501 U.S. 452 (1991).

136. *See id.* at 464 (noting the constraint *Garcia* placed on judicial enforcement of federal-state balance, but asserting that the "plain statement" requirement is consistent with that constraint).

137. *See Garcia*, 469 U.S. at 539-47 (noting that the distinction between traditional and nontraditional state functions is unworkable).

138. 505 U.S. 144 (1992).

139. *See id.* at 157 (noting that "[t]he Tenth Amendment thus directs [the Court] to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power").

that contemplated judicial enforcement. The *Lopez* decision continues this tradition of ambiguity.

Lopez Facts

On March 10, 1992, respondent Alfonso Lopez, Jr., a twelfth-grade student, carried a concealed weapon into his high school.¹⁴⁰ The government charged Lopez with violating the Gun-Free School Zones Act of 1990, which prohibits "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone."¹⁴¹ The district court held that section 922(q) was a constitutional exercise of federal commerce power.¹⁴² The court of appeals reversed, concluding that the Gun-Free School Zones Act of 1990 fell outside the constitutional grant of federal commerce power.¹⁴³ The Supreme Court affirmed.¹⁴⁴ Chief Justice Rehnquist delivered the opinion of the court in which Justices O'Connor, Scalia, Kennedy, and Thomas joined.¹⁴⁵ Justice Kennedy filed a concurring opinion in which Justice O'Connor joined.¹⁴⁶

Majority Opinion

In reciting the history of Commerce Clause jurisprudence, Justice Rehnquist noted that even the "modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."¹⁴⁷ The Court recognized three categories of activity subject to commerce power regulation: "the channels of interstate commerce"; the "instrumentalities of interstate commerce, or persons or

140. See *United States v. Lopez*, 514 U.S. 549, 551 (1995).

141. *Id.* at 549 (quoting 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988)).

142. See *id.* at 551-52.

143. See *id.* at 552.

144. See *id.*

145. See *id.* at 551-68.

146. See *id.* at 568-83 (Kennedy, J., concurring). In addition, Justice Thomas filed a concurring opinion, *id.* at 584-602 (Thomas, J., concurring), and Justices Stevens, *id.* at 602-03 (Stevens, J., dissenting); Souter, *id.* at 603-15 (Souter, J., dissenting); Breyer, *id.* at 615-31 (Breyer, J., dissenting); and Ginsburg, *id.* at 615-31 (Ginsburg J., dissenting), dissented.

147. *Id.* at 556-57.

things in interstate commerce, even though the threat may come from intrastate activity;" and "activities having a substantial relation to interstate commerce."¹⁴⁸ The Court concluded that it could sustain section 922(q) only as regulation of the third type—activities that substantially affect interstate commerce.¹⁴⁹ Chief Justice Rehnquist concluded that case law established a clear pattern suggesting that "[w]here *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹⁵⁰ Chief Justice Rehnquist continued by finding that section 922(q) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."¹⁵¹ Because he construed *Wickard's*¹⁵² aggregate principle to require an activity "that arise[s] out of or [is] connected with a commercial transaction," Chief Justice Rehnquist determined that section 922(q) could not benefit from a "*Wickard* type" analysis.¹⁵³

Further the Court noted that the statute contained no jurisdictional hook.¹⁵⁴ The statute included no requirement that the government examine each instance of firearm possession on a case-by-case basis to determine whether it actually affected interstate commerce prior to applying the statute.¹⁵⁵ The Court noted that the statute was unaccompanied by any legislative findings showing the regulated activity's nexus with interstate commerce.¹⁵⁶ The Court indicated that such findings were not mandatory, but that their presence might have worked in the government's favor.¹⁵⁷

The government offered several arguments asserting that

148. *Id.* at 558-59.

149. *See id.* at 559.

150. *Id.* at 560 (emphasis added).

151. *Id.* at 561.

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

153. *See Lopez*, 514 U.S. at 561. The *Wickard* principle permits regulation of an activity that, in the aggregate, has a substantial effect on interstate commerce. *See Wickard*, 317 U.S. at 111. Chief Justice Rehnquist, in *Lopez*, limited the *Wickard* analysis to activities that themselves are economic or commercial in nature. *See Lopez*, 514 U.S. at 560-61.

154. *See Lopez*, 514 U.S. at 561.

155. *See id.* at 562.

156. *See id.*

157. *See id.* at 562-63.

possession of a gun in a school zone could substantially affect interstate commerce.¹⁵⁸ Chief Justice Rehnquist, instead of attacking the logic of the offered nexus, considered the logical consequences of the government's arguments.¹⁵⁹ He opined that "if we were to accept the Government's arguments, we [would be] hard-pressed to posit any activity by an individual that Congress is without power to regulate."¹⁶⁰ Chief Justice Rehnquist conceded that the ambiguous distinction between that which is commercial, and that which is not, may result in uncertainty but noted that "[t]he Constitution mandates this uncertainty by withholding from Congress a plenary police power."¹⁶¹

Chief Justice Rehnquist refused to expand commerce power any further; however, because past cases defined the Commerce Clause so broadly, and because Chief Justice Rehnquist refused to reverse prior case law, the Chief Justice had to import a new analysis into Commerce Clause jurisprudence. He did so by recognizing that affirming this statute would obliterate the boundaries between federal and state sovereignty, and, as such, he implicitly imported a Tenth Amendment analysis.¹⁶² Affirming the statute, opined the Chief Justice, would contravene the constitutionally contemplated federal-state structure. In other words, affirming the statute would violate the Tenth Amendment.¹⁶³

Justice Kennedy's Concurrence

Justice Kennedy's concurrence, like the majority opinion, emphasized the consequences in affirming the regulation—especially the impact on federalism.¹⁶⁴ His concurring opinion adopted a functionalist, or pragmatic approach, under

158. *See id.* at 563-64.

159. *See id.*

160. *Id.* at 564. For a discussion of Chief Justice Rehnquist's test of consequences, see H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 656-58 (1995).

161. *Lopez*, 514 U.S. at 566.

162. *See id.* at 566-67.

163. *See id.* at 567 (asserting by implication that to uphold the statute would violate the Tenth Amendment; to uphold the statute "would require [the Court] to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated").

164. *See id.* at 568 (Kennedy, J., concurring).

which a regulation is examined in the broad context of the federal-state balance of power.¹⁶⁵ Justice Kennedy, although paying lip service to the view of federalism that contemplates enforcement through the political process,¹⁶⁶ asserted that the Court actively had defined the federal-state boundary in the past and should, in limited situations, continue to do so.¹⁶⁷

Justice Kennedy recognized that any activity in the modern world arguably "has an ultimate commercial origin or consequence."¹⁶⁸ Despite this, however, Justice Kennedy accepted Chief Justice Rehnquist's assessment that section 922(q) sought to regulate a noncommercial activity without any evident commercial purpose.¹⁶⁹ Or, at least, he concurred that the statute reached into an area not *previously* recognized as within commerce power limits. Any congressional attempt to extend the boundaries of the Commerce Clause into areas so tenuously connected to commerce, Justice Kennedy opined, demanded judicial scrutiny of its implications on the balance of federal and state power.¹⁷⁰ Having concluded that affirming section 922(q) would represent an expansion of the recognized commerce power, Justice Kennedy asked whether this "exercise of national power s[ought] to intrude upon an area of traditional state concern."¹⁷¹ Having found that it did so intrude, his inquiry continued.¹⁷² The structure of his analysis suggested that such a finding, rather than being dispositive of the issue, triggered heightened scrutiny.¹⁷³ In scrutinizing the regulation, Justice Kennedy concluded that a single national (federal) solution was not necessary to achieve the goals of the regulation.¹⁷⁴ Most states had already addressed the problem, noted Justice Kenne-

165. See *id.* at 575-77 (Kennedy, J., concurring); McAllister, *supra* note 99, at 238-39.

166. See *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring).

167. See *id.* (Kennedy, J., concurring).

168. *Id.* at 580 (Kennedy, J., concurring).

169. See *id.* (Kennedy, J., concurring).

170. See *id.* at 580-83 (Kennedy, J., concurring).

171. *Id.* at 580 (Kennedy, J., concurring).

172. See *id.* (Kennedy, J., concurring).

173. See *id.* at 581 (Kennedy, J., concurring) ("In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed.").

174. See *id.* (Kennedy, J., concurring).

dy, and federal regulation would effectively "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise."¹⁷⁵ Like Chief Justice Rehnquist, Justice Kennedy determined that section 922(q)'s extension of commerce power so upset the federal-state balance of power that, absent a stronger, or more evident connection with interstate commerce, the statute must fall.¹⁷⁶

Lopez Analyzed

Commentators

Commentators have characterized *Lopez* as everything from a "revolutionary and long overdue revival" of judicially enforced limits on federal government¹⁷⁷ to a "mundane disagreement over the application of a long-settled test."¹⁷⁸ Any view that characterizes *Lopez* as radically reversing commerce power expansion is not reconciled easily with Chief Justice Rehnquist's contention that his opinion followed relevant precedent.¹⁷⁹ With a few exceptions, most scholars have at least recognized the possibility, if not actually asserted, that the *Lopez* decision may not signal a dramatic shift in Commerce Clause jurisprudence.¹⁸⁰

Most commentators and courts, however, tend to agree that *Lopez* stands for an unwillingness to let the trend of commerce power expansion continue unbridled.¹⁸¹ Professor Pannier iden-

175. *Id.* at 583 (Kennedy, J., concurring).

176. *See id.* (Kennedy, J., concurring).

177. Calabresi, *supra* note 97, at 752.

178. Powell, *supra* note 160, at 651.

179. *See Lopez*, 514 U.S. at 551-68 (reciting the relevant case law and placing his opinion within that context without purporting to overrule precedent).

180. *See, e.g.,* McAllister, *supra* note 99, at 220 ("[M]any, if not most, activities . . . are unaffected by the Court's decision. Thus, the true impact of *Lopez* is not practical."); Pannier, *supra* note 125, at 118 (lamenting that *Lopez* will not advance the return to a federalist nation very far); Arkin, *supra* note 14, at 1596 ("[I]t is certainly possible that the shift will not be as dramatic as many may hope.").

181. *See, e.g.,* United States v. Kirk, 105 F.3d 997, 998 (5th Cir.), *cert. denied*, No. 96-1759, 1997 WL 250452, at *1 (Oct. 6, 1997) ("[T]he Supreme Court intended to establish an outer limit to congressional authority, not to retreat from well-established Commerce Clause precedent."); Doe v. Hartz, 970 F. Supp. 1375, 1414 n.35 (N.D. Iowa 1997) (stating that *Lopez* "made a renewed search for the 'outer limits' of

tified six possible interpretations of the *Lopez* decision.¹⁸² One, *Lopez* indicates that the proper congressional exercise of commerce power should include a jurisdictional hook whereby each application of the regulation will require a connection to interstate commerce.¹⁸³ Two, Congress can ensure the constitutionality of an exercise of commerce power by including legislative findings that describe the regulatory nexus with interstate commerce.¹⁸⁴ Three, commerce power is restricted to regulation of activities that are commercial in the "ordinary sense" of the meaning.¹⁸⁵ Four, the *Darby* method of legislation is unconstitutional.¹⁸⁶ Under the *Darby* method of legislation, congressional regulation of intrastate activities is justified on the grounds that such regulation is necessary and proper to give effect to another statute that directly regulates interstate commerce.¹⁸⁷ Five, Congress may regulate intrastate activity as a "necessary and proper" means to effect an interstate purpose, but such regulation is limited when the subject of such regulation is not "commercial."¹⁸⁸ The final interpretation is similar to the fifth, except that special limitations apply when the regulation imposes on an area of traditional state regulation.¹⁸⁹ Professor Pannier admits uncertainty regarding which, if any, of the interpretive limitations on the Commerce Clause courts will impose in the name of *Lopez*.¹⁹⁰ In all likelihood, elements of all, or at least a combination of, these interpretations will impact the courts and legislature.

Since *Lopez*, numerous criminal defendants have challenged the constitutionality of various federal criminal statutes on Com-

Commerce Clause power"); Johnson, *supra* note 9, at 47 (noting that the Court in *Lopez* was "refusing to expand the breadth of the Commerce Clause beyond prior decisions"); McJohn, *supra* note 9, at 1 (asserting that *Lopez* "breaks a long line of cases deferring to congressional action").

182. See Pannier, *supra* note 125, at 95-100.

183. See *id.* at 95.

184. See *id.*

185. See *id.* at 95-96.

186. See *id.* at 97-98; see also *United States v. Darby*, 312 U.S. 100 (1944) (determining Congress's constitutional power under the 1938 Fair Labor Standards Act).

187. See Pannier, *supra* note 125, at 97-98.

188. See *id.* at 98.

189. See *id.* at 99-100.

190. See *id.* at 118 (noting the uncertainty as to what interpretation will prevail).

merce Clause grounds.¹⁹¹ Most courts, however, have declined to extend *Lopez* beyond its narrow application to section 922(q).¹⁹² Not without difficulty, lower courts have endeavored to extract a test from the *Lopez* opinion often noting that the Court left several questions unanswered.¹⁹³ Although analysis of the lower courts' interpretations and applications of *Lopez* is outside the scope of this Note, most courts have applied *Lopez* conservatively—many emphasizing its retention of the rational basis test.¹⁹⁴

Importing the Tenth Amendment

The most insightful comments on *Lopez* recognize that the opinion imported Tenth Amendment federalism questions into the Commerce Clause analysis and that, in doing so, the Court expressed the underlying inconsistencies in its competing federalism philosophies.¹⁹⁵ Chief Justice Rehnquist tested the validity of commerce power based on its consequences to the balance of federal-state power.¹⁹⁶ Similarly, Justice Kennedy's concurrence, instead of dwelling on the formalistic Commerce Clause test, plunged into a functional-federalism analysis after determining that the suggested formal interstate commerce nexus for

191. See *United States v. Wall*, 92 F.3d 1444, 1447 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 690 (1997).

192. See *id.* at 1447-49.

193. See, e.g., *id.* at 1460 (asking whether "[i]n order to be constitutional . . . a statute [must] satisfy all three sub-parts of this test"); *Anisimov v. S. Lake D.D.S.*, 1997 WL 538718, *5 (N.D. Ill. Aug. 27, 1997) (stating that "there are several questions that appear to be left unanswered").

194. See, e.g., *United States v. Robinson*, 119 F.3d 1205, 1210 (5th Cir. 1997) (stating that "nothing in *Lopez* suggests that the Supreme Court has replaced the rational basis test with a more exacting standard"); *United States v. Bishop*, 66 F.3d 569, 577-78 (3d Cir.), *cert. denied*, 116 U.S. 688 (1995) (noting that Chief Justice Rehnquist confirmed the rational basis test in *Lopez*); *United States v. Nichols*, 928 F. Supp. 302, 308 (S.D.N.Y. 1996) (noting that *Lopez* asserted that the reviewing court's role was narrow and confined to the rational basis test).

195. See McAllister, *supra* note 99, at 228-29; McJohn, *supra* note 9, at 5; Arkin, *supra* note 14, at 1600-02; Eric W. Hagen, Note, *United States v. Lopez: Artificial Respiration for the Tenth Amendment*, 23 PEPP. L. REV. 1363 (1996).

196. See *United States v. Lopez*, 514 U.S. 549, 563-64 (1995) (suggesting that the government's argument proves too much in that it would permit intrusions in areas where states traditionally have been sovereign).

section 922(q) was weak.¹⁹⁷ Both Justice Kennedy and Chief Justice Rehnquist recognized that a commerce power without limits was blatantly inconsistent with the allocation of federal and state power articulated in the Tenth Amendment.¹⁹⁸ Both Justices also recognized that Commerce Clause jurisprudence had come to articulate a nexus test that was, in effect, all encompassing.¹⁹⁹ In a reconciliatory effort to impose a limit on commerce power while respecting *stare decisis*, the Justices imported a federalism analysis.²⁰⁰ By judicially enforcing the Tenth Amendment through the use of the traditional state function analysis, however, the Court's reasoning ran counter to the *Garcia* decision.²⁰¹ In limiting the commerce power through a federalism analysis, the Court enforced substantive limits on federal power in the name of the Tenth Amendment. Such an enforcement is contrary to the federalism jurisprudence that advocates procedural or politically imposed limits on federal power.²⁰²

197. See *supra* notes 165-76 and accompanying text.

198. See *Lopez*, 514 U.S. at 567-68 (noting that to uphold the statute would be to obliterate commerce power limits and thus "there never [would] be a distinction between what is truly national and what is truly local"); *id.* at 568-83 (Kennedy, J., concurring) (describing the federal-state balance and suggesting that a limitless commerce power would contradict the Framers' federalist dictate).

199. See Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 748 (1996) (noting that pre-*Lopez* Commerce Clause doctrines "provid[ed] Congress with legislative authority for every need"); Pannier, *supra* note 125, at 81 (concluding that the pre-*Lopez* interpretation of the Commerce Clause granted Congress general welfare powers).

200. See *Lopez*, 514 U.S. at 567-69 (suggesting that to uphold the statute would violate the Tenth Amendment's dictate in that it "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated"); *id.* at 580 (Kennedy, J., concurring) (stating that the statute upsets the federal-state balance).

201. See Arkin, *supra* note 14, at 1601.

202. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). But see *New York v. United States*, 505 U.S. 144 (1992). *Garcia* did not suggest that the judiciary lacked the power to enforce the federal-state balance indirectly through a determination that a federal regulation fell outside the enumerated commerce power. See *Garcia*, 469 U.S. at 528. If Congress passed a law pursuant to the commerce power, and the newly enacted law had no cognizable interstate commerce nexus, then a court could strike down the law. The questioned judicial enforcement occurs when a court determines that some activity, for no reason other than that it is traditionally performed by the states, or that it destroys the balance of federalism, is outside the purview of federal legislation—even if Congress acted pursuant to an

Resolving all the intellectual inconsistencies in federalism and Commerce Clause jurisprudence, however, is not necessary to unveil the commerce power test put forth in the *Lopez* decision. Chief Justice Rehnquist's opinion suggests a test that Justice Kennedy's concurrence further articulates.

The Lopez Test Exposed

Despite employing traditional language, Chief Justice Rehnquist did not state explicitly that section 922(q) regulated an area that could not substantially affect interstate commerce. Instead he found that: One, the statute had nothing to do with commerce or regulation of an economic activity;²⁰³ two, the statute had no jurisdictional hook;²⁰⁴ three, the statute was unaccompanied by legislative findings;²⁰⁵ and four, the statute, if affirmed, would upset the federal-state balance of power.²⁰⁶ After describing the nexus proposed by the state,²⁰⁷ the Chief Justice never addressed or attacked the direct logic behind its nexus.²⁰⁸ Instead, he argued that accepting the government's argument would destroy the constitutionally contemplated federal-state balance.²⁰⁹ Professor Powell appropriately termed this "the test of consequences."²¹⁰

Of the four factors that the Chief Justice applied to conclude that section 922(q) was an unconstitutional exercise of commerce

otherwise cognizable enumerated federal power. See *Garcia*, 469 U.S. at 557 (explaining that the political process is suited adequately to delineate the federal-state balance of power).

203. See *Lopez*, 514 U.S. at 560-61.

204. See *id.* at 561.

205. See *id.* at 562-64.

206. See *id.* at 564-68; *United States v. Miles*, 122 F.3d 235, 250 (5th Cir. 1997) (extracting from *Lopez* the principle that extensions of commerce power must be scrutinized for their impact on federalism); McJohn, *supra* note 9, at 27, 29.

207. See *Lopez*, 514 U.S. at 563-64.

208. See *id.*

209. See *id.*; *United States v. Nichols*, 928 F. Supp. 302, 307 (S.D.N.Y. 1996) (noting that it was "in . . . refuting the government's argumentation that the majority reveal[ed] its underlying constitutional justification for striking down [section 922(q)]"). The district court thus indicated that the *Lopez* majority's underlying constitutional justification was that the government's theory had to be flawed because under its theory the federal government's power would become unlimited.

210. Powell, *supra* note 160, at 656.

power, three of them qualify as logical subcomponents to the broader question of whether the statute regulates an activity that substantially effects interstate commerce. If, for instance, the regulated activity itself is economic or commercial, then the statute's nexus with interstate commerce is probably apparent to the naked eye. Additionally, should the statute include an effective jurisdictional hook, then the hook may insure that the statute applies only when the regulated activity actually effects interstate commerce. Finally, if Congress supports the statute with legislative findings identifying the nexus with interstate commerce then, although the court will still conduct an independent inquiry, its job is easier. In contrast, however, the final factor does not assist in evaluating the nexus with interstate commerce and is not a subcomponent of that over-arching question.

Investigating the statute's federalism consequences does not fall under the umbrella of evaluating the statute's interstate commerce nexus. This broad inquiry into federalism is the *Lopez* opinion's most significant, if overlooked, contribution to the Commerce Clause test. For Chief Justice Rehnquist, structural federalism implications appeared to be as important to his conclusion as any of the applications of the subcomponents to the traditional nexus test.²¹¹ Sustaining this regulation, the Chief Justice reasoned, would pave the way for unlimited commerce power, a consequence blatantly inconsistent with the Tenth Amendment's dictate.²¹²

Chief Justice Rehnquist's *Lopez* analysis reflects the Court's newfound willingness to add factors to the Commerce Clause analysis when deciding a difficult case. He recognized that previous Commerce Clause cases had so emasculated the formal commerce power test that it easily could be stretched to incorporate the expansion argued for in *Lopez*.²¹³ In order to slow—or

211. See *Lopez*, 514 U.S. at 567-68.

212. See *id.* The Chief Justice fails to recognize what should be a very effective limit on commerce power expansion—the political system. Simply because a court's decision could permit unlimited expansion of federal power does not mean that Congress will exercise such power. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-54 (1985). The Chief Justice's opinion is yet another example of this Court's willingness to ignore, without overruling, the *Garcia* mandate. See notes 131-39 and accompanying text.

213. See *Lopez*, 514 U.S. at 567-68 ("Admittedly, some of our prior cases have tak-

end—the expansion of commerce power, Chief Justice Rehnquist's analysis abandoned the strict confines of the weakened traditional test. The traditional Commerce Clause machinery adequately can evaluate most extensions of commerce power. Section 922(q), however, challenged the logic of the traditionally employed Commerce Clause machinery. In an effort to better evaluate section 922(q), that is, to find a way to weed out section 922(q), Chief Justice Rehnquist applied the old machinery, but in doing so he also broadened the inquiry. Ultimately, the *Lopez* test permits a broad examination, including an examination of the role of the statute in the context of the federal-state balance of power.²¹⁴ Chief Justice Rehnquist's concession that the traditional nexus test excludes little regulation²¹⁵ reveals that his addition is less drastic than it may appear. The Court's opinion reflects a willingness to evaluate a statute's utility and relationship to the entire government structure.

Professor Kathleen Sullivan has shown that the separation-of-powers functionalist and formalist theories can also competently describe competing approaches to maintaining the federal-state balance of power.²¹⁶ She applied the formalist/functional theories to what she referred to as horizontal separation of powers²¹⁷ and vertical separation of powers.²¹⁸ Professor Sullivan stated that "[f]unctional approaches . . . tend to be pragmatic and evolutionary in method, and . . . rest on a theory of balance of powers rather than strict separation. They permit structural innovations that are substantively consistent with the efficiency and antityranny rationales for the separation of [both horizontal and vertical] powers."²¹⁹ Because Chief Justice Rehnquist's opinion focused on the destructive impact that sustaining the law would have on the federal-state balance of power, the opin-

en long steps down that road, giving great deference to congressional action The broad language in these opinions has suggested the possibility of additional expansion.").

214. See *id.*

215. See *id.*

216. See Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 91-97 (1995).

217. See *id.* at 92.

218. See *id.* at 95.

219. *Id.* at 93.

ion embraces—or at least approaches—a functionalist model of enforcing federalism.

If the majority opinion invited a more functionalist approach, Justice Kennedy's concurrence responded to that invitation and proposed a more detailed test.²²⁰ Under Justice Kennedy's analysis, if the regulated activity was commercial in character and had a strong nexus with interstate commerce, then the Court would presume that the regulation fell within the commerce power.²²¹ Absent an "evident nexus," Justice Kennedy asked whether the regulation intruded on "an area of traditional state concern."²²²

Because the regulation lacked an evident interstate commerce nexus and also intruded on an area of traditional state concern, Justice Kennedy considered whether the regulation interfered with the principles of federalism envisioned by the Framers.²²³ In this analysis, Justice Kennedy queried whether there is one indisputably best approach to the problem.²²⁴ As part of this question, Justice Kennedy recognized that the statute may foreclose the states from "perform[ing] their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."²²⁵ The concurrence also considered whether states, independently, had addressed adequately the subject of the federal regulation.²²⁶

Justice Kennedy's analysis isolated one, of several, recognized values of the federalist system—the states as "social laborato-

220. See *Lopez*, 514 U.S. at 568-83 (Kennedy, J., concurring).

221. See *id.* at 580 (Kennedy, J., concurring). Justice Kennedy noted that this statute did not regulate an activity with a commercial character nor did it have an "evident commercial nexus." *Id.* (Kennedy, J., concurring). Justice Kennedy recognized that almost any activity could be connected with commerce, but he noted that any such far-fetched connection deserved additional inquiry. See *id.* (Kennedy, J., concurring).

222. *Id.* (Kennedy, J., concurring); see McAllister, *supra* note 99, at 239.

223. See *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

224. See *id.* at 581 (Kennedy, J., concurring) (noting that "considerable disagreement exists about how best to accomplish" the reasonable goal of keeping guns out of schools).

225. *Id.* (Kennedy, J., concurring). Using the states as social laboratories is recognized as one of the very important benefits of the federalist system. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

226. See *Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring).

ries" principle.²²⁷ When areas of regulation are left to the states, the argument suggests, the states, through experimentation, craft the regulations most amenable to their specific circumstances.²²⁸ Ultimately, the theory holds, with states across the nation engaged in experimentation, the nation as a whole can more effectively resolve its problems. Because the regulation at hand frustrated this important purpose of federalism, Justice Kennedy concluded that "[a]bsent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce."²²⁹ Justice Kennedy, like Chief Justice Rehnquist, abandons exhaustive scrutiny of the "substantially effects interstate commerce" nexus, in favor of analyzing the statute's potential impact on the federalist system as envisioned by the Framers. Justice Kennedy's concurrence indicates that whenever sustaining a statute would, in the Court's opinion, frustrate some important value of the federalist system, then the statute should fall.²³⁰ This approach is consistent with Professor Sullivan's vertical separation-of-powers functionalism.²³¹

The *Lopez* opinion recognized that Commerce Clause jurisprudence effectively relaxed the commerce power test to a level of all-inclusiveness.²³² The majority opinion also reflects conflicting desires to both respect *stare decisis*,²³³ but also limit fur-

227. See *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting); see *infra* note 260 and accompanying text.

228. See *Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring) (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973)); *New State Ice*, 285 U.S. at 311 (Brandeis, J. dissenting); *infra* note 260 and accompanying text.

229. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

230. See *id.* at 580 (Kennedy, J., concurring).

231. See Sullivan, *supra* note 216, at 91-97. See generally MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 137 (1993) (explaining that the functionalist separation-of-powers approach asks "whether present practices undermine constitutional commitments that should be regarded as central" (quoting Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV L. REV. 421, 495 (1987))).

232. See *Lopez*, 514 U.S. at 567 (admitting that prior case law commanded great deference to congressional action and actually suggested the possibility of increased expansion).

233. See *id.* at 553-68 (placing the Court's decision in the context of prior case law without suggesting any overruling).

ther expansion of the Commerce Clause.

Lopez suggests that the Commerce Clause test need not be strictly confined to the traditional nexus. When a regulation proves difficult to evaluate with the traditional commerce power tests—or, in the opinion's parlance, when the connection to interstate commerce is not apparent to the "naked eye"²³⁴—the court may broaden the scope of its inquiry to evaluate the regulation. If the statute's nexus with interstate commerce is not apparent to the naked eye after considering the economic nature of the activity regulated, any legislative findings, and any possible jurisdictional hook, then *Lopez* endorses further analysis under the "test of consequences" or Justice Kennedy's functionalist-federalism analysis.²³⁵

THE *LOPEZ* TEST APPLIED TO THE MIGRATORY BIRD RULE

The question still remains: Are *Lopez* and the Supreme Court's denial of certiorari to *Leslie Salt* irreconcilable? Or, in other words: Can the MBR withstand the *Lopez* commerce power analysis?

Looking for the Nexus: A More "Formalist" Inquiry

The *Lopez* test recognizes that the traditional threshold is very low and ambiguous and contemplates, in difficult cases, an additional in-depth inquiry into whether the consequence of affirming the regulation harms federalism.²³⁶ Although the remainder of this Note largely examines the federalism inquiry of

234. *Id.* at 563.

235. *See id.* This point follows from the Court's willingness in *Lopez* to pursue an inquiry into the constitutionality of section 922, a statute with a weak interstate nexus that did not regulate a commercial activity. This interpretation of *Lopez* permits the Court to openly apply the traditional Commerce Clause test in a result-oriented manner. When presented with a difficult exercise of commerce power, the Court, instead of scrutinizing whether the regulation substantially effects interstate commerce, can ask whether the regulation has a compelling purpose that is generally consistent with our governmental structure. If the answers to the Court's broad inquiries prove reassuring, then it may approve of the regulation; if the answers to the Court's broad inquiries are disconcerting, then it may conveniently find the nexus slightly lacking.

236. *See supra* notes 195-99 and accompanying text.

the *Lopez* test, the nexus test deserves brief attention.

Chief Justice Rehnquist's test begins by evaluating the statute's nexus with interstate commerce. The *Lopez* test initially asks whether the statute regulates a commercial or economic activity.²³⁷ The test suggests that any regulation of a commercial activity will command substantial deference from the Court.²³⁸ Section 404 of the Clean Water Act indiscriminately bans the discharge of dredge or fill into wetlands or other waters without a permit.²³⁹ Section 404 does not specifically define the activity it regulates as commercial or economic in nature.²⁴⁰ Certainly one could argue that the activity regulated by section 404, although frequently commercial in nature, need not be commercial; and therefore section 404 is not a regulation of a commercial activity.²⁴¹ As Chief Justice Rehnquist noted, however, almost any activity can be characterized as commercial or economic.²⁴² It is certainly not beyond the realm of reason, therefore, that filling in a wetland is as economic an activity as growing wheat for home consumption.²⁴³ A court could reasonably characterize section 404 either way.

Next, the *Lopez* test asks whether section 404, as applied to isolated wetlands, includes a jurisdictional hook that incorporates a case-by-case Commerce Clause analysis.²⁴⁴ The MBR is this jurisdictional hook.²⁴⁵ Instead of indiscriminately subjecting all isolated wetlands to federal regulations, the MBR limits

237. See *Lopez*, 514 U.S. at 559-61.

238. See *id.* (explaining that even in cases where the nexus is weak, if the activity is of an "economic nature," as in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court will sustain the exercise of commerce power).

239. See Federal Water Pollution Control Act § 404(a), 33 U.S.C. § 1344 (1994).

240. See *id.*

241. See Holman, *supra* note 5, at 195 (stating in reference to the migratory bird rule that "agency interpretation of the CWA has extended the statute to cover activities that are not commercial in nature").

242. See *Lopez*, 514 U.S. at 565 (stating that "any activity can be looked upon as commercial").

243. See *Wickard*, 317 U.S. at 111 (holding that growing wheat for home consumption touches upon the interstate economy sufficiently to warrant commerce power regulation).

244. See *supra* notes 154-55 and accompanying text.

245. The migratory bird rule is the very definition of a jurisdictional hook. It forces the Army Corps to engage in a case-by-case analysis of each wetland to determine whether such wetland has the characteristics to justify federal regulation.

section 404 regulation to those wetlands, the destruction of which, in the aggregate, effect interstate commerce based upon migratory birds.

As a final factor to evaluate the nexus with interstate commerce, the *Lopez* test examines legislative findings. The Clean Water Act does not include any findings of fact that support the logic upon which the MBR is based.²⁴⁶

Section 404, as applied through the MBR, differs from section 922(q), thus far, in only one respect. Unlike section 922(q), section 404, as applied through the MBR, incorporates a jurisdictional hook. Due to the lack of legislative findings and the difficulty a court might have characterizing the activity regulated as commercial or economic, however, the MBR probably qualifies as a difficult case. The MBR's nexus with interstate commerce is not readily apparent to the naked eye. Following the *Lopez* test, therefore, a court would ask whether the MBR is consistent with the constitutionally contemplated structure of government.

Exploring the Federalism Consequences: A Functional Inquiry

Infringement on Traditional State Concern

Because the MBR "nexus test" is not visible to the naked eye, the *Lopez* test asks whether section 404 of the Clean Water Act, the regulation justified by the MBR, regulates in an area of traditional state concern.²⁴⁷ This is the first consideration in examining the impact that sustaining the law would have on the structure of government. Section 404, as an example of land use control, almost unquestionably intrudes on an area traditionally reserved to the states or their localities.²⁴⁸ Generally, states and local governments dictate land-use policies for their jurisdictions.²⁴⁹ Section 404, therefore, infringes on territory traditionally reserved to the states. In this respect the MBR and section 922(q) are the same.

246. See Holman, *supra* note 5, at 199.

247. See *supra* notes 171-76 and accompanying text.

248. See Holman, *supra* note 5, at 195.

249. See Paul D. Barker, Note, *The Chesapeake Bay Preservation Act: The Problems With State Land Regulation of Interstate Resources*, 31 WM. & MARY L. REV. 735, 739 (1990) (citing MODEL LAND DEV. CODE art. 7 commentary at 252-53 (1975)).

Were he reviewing the MBR, Chief Justice Rehnquist's analysis would proceed by asking whether sustaining the statute would effectively obliterate the constitutionally contemplated boundaries between federal and state sovereignty.²⁵⁰ To satisfy the Chief Justice, proponents of the MBR would need to demonstrate that the logic behind the MBR would not open the door to a regulatory parade of horrors in which Congress could expand the federal commerce power without limits.²⁵¹ Chief Justice Rehnquist's concern would not be unfounded. The MBR advocates federal regulation over wetlands on grounds that their interstate commerce connection is provided by their potential use by migratory birds that cross state lines.²⁵² One could inquire, as some commentators have²⁵³ whether any and all land used, or potentially used, by migratory birds could come under federal regulation by virtue of the bird's interstate migration. But the MBR does not propose that the mere potential use of any land by migratory birds could subject that land to federal commerce power jurisdiction. The MBR proposes that when a very special type of land, the *wetland*,²⁵⁴ is the *habitat* for a certain type of bird, the migratory bird, that land may come under federal regulation.²⁵⁵ The logic of the MBR is that destruction of wetland habitats threatens to devastate the commerce associated with migratory birds.²⁵⁶ The MBR implicitly recognizes the unique symbiotic relationship between the wetland and the migratory bird. Because section 404 is a logical and principled extension of

250. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (striking down the law because it "would require [the Court] to conclude . . . that there never will be a distinction between what is truly national and what is truly local").

251. See *id.* at 564-68 (suggesting a parade of horrors that would follow an affirmation of this exercise of the commerce power).

252. See *supra* notes 34-39 and accompanying text.

253. See Bablo, *supra* note 9, at 289 (stating that "[m]igratory birds land everywhere (even parking lot puddles)"); Holman, *supra* note 5, at 197 (stating that the migratory bird rule "operates as a limiter-manque—a limiting rule with no limits").

254. See *supra* notes 34-39 and accompanying text. The Corps defines "wetland" pursuant to 33 C.F.R. § 328.3(b) (1997) to include "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

255. See *supra* notes 34-39 and accompanying text.

256. See *id.*

the commerce power, a point elaborated further in the following sections, its affirmation would not represent a relaxation of commerce power resulting in unbridled federal police power.²⁵⁷ If the Commerce Clause test consisted solely of the formal nexus inquiry, then the Chief Justice would have a valid concern. The *Lopez* test, however, includes, in addition to the formal nexus test, a broad functionalist inquiry into the consequences of affirming an extension of the commerce power. Although an inauspicious extension of federal commerce power based on the presence of migratory birds might pass the traditional nexus test, presumably its inauspicious character would warrant its failure under the functional inquiry.

After satisfying the Chief Justice by demonstrating that the MBR's extension of commerce power does not open the door to a parade of horrors, the question remains whether the application of the MBR alone, regardless of its precedent-setting consequences, so intrudes upon state sovereignty as to unconstitutionally upset the federal-state balance. An analysis of the MBR indicates that it does not frustrate the system of federalism contemplated by the Constitution.

Federalism

In order to determine whether the MBR is consistent with the federal-state balance of power, this section explores the constitutionally contemplated balance of power and the reasons that justify its existence. This analysis suggests that the Framers structured the government to achieve certain benefits. As such, the Court must enforce the structure of the government to ensure that the nation reaps the benefits of that structure; however, the Court should enforce the Framers' vision only insofar as it produces the Framers' contemplated benefits—or insofar as the alleged benefits are actually beneficial.

The constitutionally mandated system of federalism, like the system of checks and balances between separate branches of

257. Although probably unsatisfactory to the Chief Justice, arguably, the political, or structural, limitations on commerce power offer adequate restraints to allay fears of the slippery slope. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

government, aids in preserving individual liberties against the tyranny of the government by diffusing governmental power on different levels.²⁵⁸ A number of welcome benefits flow from this unique system of federalism. An oft-quoted statement of Justice Brandeis reflects the aspect of federalism on which Justice Kennedy focused in *Lopez*:²⁵⁹ "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."²⁶⁰ The Tenth Amendment's deference to state sovereignty also permits increased access to the political system for individuals to make policy on a local level.²⁶¹ Such policy, the argument goes, accommodates local diversity and gives effect to the knowledge and expertise of those most familiar with local conditions.²⁶² Moreover, some commentators have noted that the federalist system creates a climate wherein states are encouraged to compete for the affections of the people.²⁶³ The values that justify the dual system of federalism can be divided into two categories. First are those that "maximize governmental efficiency by placing responsibility for various matters in the government that has the most expertise or that is in the best position to resolve any problematic issues with the least expenditure of resources."²⁶⁴ Second are those that "maximize personal liberty by diffusing sovereign power for the protection of individual freedom."²⁶⁵ With respect to governmental efficiency, the MBR does not violate the principles behind the balance of power between the federal and state sovereignty. The MBR,

258. See CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 334-35 (1992); Sullivan, *supra* note 216, at 95.

259. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting)).

260. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that the federalist structure "allows for more innovation and experimentation in government").

261. See *Gregory*, 501 U.S. at 458; Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853 (1979).

262. See *Gregory*, 501 U.S. at 458; Kaden, *supra* note 261, at 854.

263. See *Gregory*, 501 U.S. at 458 (stating that federalism puts "[s]tates in competition for a mobile citizenry").

264. McAllister, *supra* note 99, at 240.

265. *Id.*

rather, operates to further efficient correction of a market failure. With respect to individual freedoms, the MBR makes a concession to federal tyranny over the state sovereigns. This Note argues, however, that the states, as a collective, should have jurisdiction to resolve problems that involve interstate externalities.

The MBR and Federalism

The federal government is better situated to accomplish effectively the goals of wetland regulation. The constitutional presumption of deference to state sovereignty, therefore, should not apply to the regulation of isolated wetlands. The logic upon which Congress reserved regulatory power to the states breaks down when that regulatory power is directed towards an activity, the cost and benefits of which are not confined substantially within the borders of individual states.²⁶⁶ If an activity significantly affects the interests of a constituency broader than a state's population, then the state government cannot protect effectively that constituency's interests. Such is often the case with regulation of isolated wetlands. When wetlands are destroyed in one state, for example, the impact on the waterfowl industry is felt outside the boundaries of that state.²⁶⁷ The MBR triggers federal regulation of isolated wetlands only when interests not represented by the solitary state government are affected—that is, when the cost of a given wetland's destruction falls exterior to the state in which the wetland is located. As explained below, such interstate externalities represent market failures that demand correction. Intuitively, a political unit larger than a state is better qualified to correct market failures that arise out of interstate externalities.

266. See Calabresi, *supra* note 97, at 782 (asserting that interstate externalities provide strong support for centralized government). Calabresi noted: "The national government can prevent serious negative externalities caused by state governmental action by adopting policies that force the states generating those externalities to pay for the associated costs." *Id.* at 783.

267. See Houck & Rolland, *supra* note 23, at 1248 (noting that isolated wetland destruction in North Dakota has threatened to eliminate two species of migratory birds in Virginia, Maryland, and Delaware).

The Need for Land-Use Regulation

The externality, or market failure, that arises out of wetland destruction creates the need for corrective regulation. Generally, the government recognizes an occasional need to impose land-use regulations upon private land owners.²⁶⁸ A privately-owned wetland has value that the owner may realize through developing, and thereby destroying, that wetland. Any such wetland also has an economic value that is shared by many more people than its private owners—a “positive externality.”²⁶⁹ A wetland may act to purify water, to prevent flooding, and to support migratory fowl that are the focus of a multimillion dollar interstate hunting and birdwatching industry.²⁷⁰ These are economic values shared by the commons. When the wetland is destroyed, the costs in water purification, flood prevention, and migratory bird habitats are shared by the hundreds, thousands, or even millions of people affected.²⁷¹ In contrast, when a developer destroys that wetland, the value created in converting that parcel from wetland into development is not conferred upon the same broad constituency that bore the cost of its destruction. Because the creation of value is concentrated on the owner while the costs are borne in part externally, the owner’s economic incentives point toward unbridled development at the expense of wetland preservation.²⁷² At the same time, no single individual beneficiary of the wetland’s “positive externality” has enough stake in the wetlands’ existence to advocate for its preservation.²⁷³ In order to protect resources of the commons, therefore,

268. See Lynda L. Butler, *Private Land Use, Changing Public Values, and Notions of Relativity*, 1992 BYU L. REV. 629, 650-51, 656.

269. See Houck & Rolland, *supra* note 23, at 1244-52.

270. See *id.*

271. See *id.*

272. See Butler, *supra* note 268, at 650.

Unless private landowners are forced to consider the third party costs of their land use decisions, the landowners have no incentive to protect common resources affected by their uses [I]ndividual users of common resources will not exercise self-restraint to restrict their own use if others do not take similar action; nor will they voluntarily incur costs to preserve the commons.

Id.

273. See *id.*

a collective constituency must force private landowners to internalize the externalities that their land use practices cause.²⁷⁴

One method of internalizing economic externalities is through regulation designed to correct the market's failure.²⁷⁵ The MBR is one way of identifying wetlands whose destruction would impose external costs. Section 404 authorizes a representative of the affected constituency, the federal government, to balance the costs and benefits of the wetland's destruction. In this sense, it forces the landowner to consider the external costs of wetland destruction, or put differently, it forces the landowner to internalize that cost.²⁷⁶

The Need for Federal Land-Use Regulation

Establishing the need for land-use regulations to internalize the external costs of the land-use practices does not explain why these regulations should originate from the federal, rather than the state, government. When the costs of a land-use practice fall external not only to the property owner, but also to the state's boundaries, state regulation begins to look less ideal. The same incentives for unbridled development, which create the need for land-use regulation in the first place,²⁷⁷ can act as incentives on a state government level to accommodate that unbridled development.²⁷⁸ If the costs of wetland destruction fall external to the state while the benefits fall within the state, then the people of the state have little incentive to internalize those costs.

274. See *id.*; Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2374-75 (1996) (stating that "[t]he presence of interstate externalities constitutes a market failure. In the absence of other market failures or public choice problems, correcting the externality leads to the maximization of social welfare.").

275. See STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 7-8 (1979) (noting the use of environmental regulation to correct spillover costs or regulations).

276. For a discussion of internalizing externalities and land use, see JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 49-53 (1993).

277. See Butler, *supra* note 268, at 650.

278. See James C. Buresh, Note, *State and Federal Land Use Regulation: An Application to Groundwater and Nonpoint Source Pollution Control*, 95 YALE L.J. 1433, 1440 (1986) (noting that "[a] community may tolerate pollution-causing land uses because of a desire to attract development, or a reluctance to regulate politically influential land users").

The MBR triggers federal regulation only when the wetland's destruction would contribute to a significant cost external to the state in which the wetland is located.²⁷⁹

Wetland Regulation and State Sovereignty

Assuming it is desirable to correct the market failure associated with wetland destruction, the analysis now asks whether principles of federalism militate for state jurisdiction. The commonly recognized benefits associated with the constitutionally contemplated presumption of state jurisdiction over general regulatory matters do not impart cognizable benefits to wetland regulation. This section identifies some of the recognized benefits associated with the constitutional deference to state sovereignty and asks whether those benefits are consistent with correcting the market failure associated with wetland destruction. The economic particularities of wetland development and destruction render the interests sought in wetland regulation inconsistent with the values associated with state sovereign regulation. Moreover, any activity that shares these characteristics demands federal, rather than state, attention.

Social Laboratories

The benefits associated with states acting as social laboratories²⁸⁰ do not militate for state control over wetland destruction. First, states and local governments, having had the opportunity to experiment in the past, have failed to address the problem effectively, causing commentators to question their expertise in this field.²⁸¹ Second, allowing states the freedom to address problems that affect constituencies outside of their jurisdiction is counterintuitive and comes at the expense of outsiders' interests.

279. See *supra* notes 34-39 and accompanying text.

280. The notion of states as social laboratories comes from Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See *supra* notes 227-31, 260, and accompanying text.

281. See Barker, *supra* note 249, at 738-39 (noting the problems that have accompanied local land use regulation and suggesting that the same problems have burdened states); Buersh, *supra* note 278, at 1439-40 (noting the failure of local governments to implement adequate land use regulation).

As laboratories, the states may craft remedies that suit their own interests, but when the problems affect the people of other states,²⁸² experimentation on a state level lacks merit.

*Regulatory Flexibility*²⁸³

Similarly, promoting regulatory flexibility to accommodate local diversity frustrates the aim of wetland regulation. In deciding how best to keep guns out of schools, a system that allows localities to develop legislation that accommodates their cultural and social idiosyncrasies is worthy of praise.²⁸⁴ Allowing the same flexibility in wetland regulation, however, opens the door to opportunism. States in which wetlands represent a significant portion of developable land may craft regulatory programs allowing the residents to profit at the expense of foreign states.²⁸⁵

Increased Public Participation

State regulation, in opposition to federal regulation, increases the degree to which the individual has political access.²⁸⁶ An individual's vote has a greater impact at the state level as opposed to the federal level.²⁸⁷ This function of state sovereignty ceases to be a benefit when the individual votes on legislation affecting people unrepresented in the forum. There is little merit to increasing the individual's representation in crafting legislation unless that legislation regulates an activity whose costs and benefits are concentrated on the voters of that political forum. In the case of wetlands, even isolated wetlands, the costs of their

282. For examples of the transboundary effects of wetland destruction, see Houck & Rolland, *supra* note 23, at 1245-50.

283. For a brief discussion regarding how decentralization creates governments more responsive to "[l]ocal [t]astes and [c]onditions," see Calabresi, *supra* note 97, at 775.

284. See *United States v. Lopez*, 514 U.S. 549, 581-82 (1995).

285. States can allow their regulations to permit residents to convert wetlands into more profitable land without internalizing the full cost of the wetland's destruction. In this sense, then, the landowners profit at the nation's expense. Such a situation ultimately leads to destructive development. See Butler, *supra* note 268, at 650 (citing Garnett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244-45 (1968)).

286. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

287. See *id.*

degradation usually falls, in part, outside of the state in which they exist.²⁸⁸ Increasing the individual's access to the state political forum, therefore, only furthers the likelihood that the regulation will fail to take into account costs that are incurred outside the political forum.²⁸⁹

*Interstate Competition for Citizen Affection*²⁹⁰

The notion that state sovereignty fosters a healthy competition between states for the affection of the nation's citizens does not support the assertion that state regulation of wetlands would encourage the evolution of a better regulatory system. Rather, one could expect a regulatory "race to the bottom" whereby states might compete to attract business development interests by deregulating wetland development.²⁹¹ States attempting to attract developers might create an environment wherein developers could retain all of the benefits of wetland development while placing the costs of wetland destruction on others.²⁹²

Federalism Summary

Federalism dictates leaving to the states the routine powers of regulation.²⁹³ Federalism, however, should extend only as far as the logic that justifies its existence. The benefits of state regulation are absent when the activity regulated involves costs

288. See Houck & Rolland, *supra* note 23, at 1248 (describing the transboundary nature of wetlands).

289. THE FEDERALIST NO. 10 (James Madison) suggests that smaller political entities are more apt to fall prey to interest group's influence.

290. For a brief discussion of the value in state competition that flows from decentralization, see Calabresi, *supra* note 97, at 776.

291. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977). But see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211 (1992) ("challeng[ing] the accepted wisdom on the race to the bottom").

292. See *supra* note 291.

293. See *supra* notes 123-25 and accompanying text.

imposed outside of the state. Many of the values of natural resources like wetlands are values shared by the commons.²⁹⁴ The many benefits associated with leaving regulation to the states frustrate the aim of effective wetland regulation. Wetland regulation is an effort to balance the interests of society against the interest of the individual property owner. Government cannot achieve such a balance of interests absent the representation of all of those interested. In the interest of efficient government, then, the states, as a collective, should have jurisdiction to regulate matters that defy resolution by individual state sovereigns. Admittedly, this power represents a minor concession to federal tyranny over the states, but because it is a concession based on sound principles, it does not represent a significant threat to the general rule that routine regulatory matters are reserved to the states.

An Answer To The Lopez Test's Final Question

This analysis demonstrates that effective wetland regulation depends upon balancing the *wetland-destruction-interest* of the individual owner against the *wetland-preservation-interest* of society; and further suggests that this regulation, for principled reasons, is best achieved on a federal level. Having recognized the need for land-use regulation to balance the property interests of the individual wetland owner against the preservation interest society has in wetlands,²⁹⁵ the conclusion that the federal government is in a better position to effectively legislate in this area is inescapable. Unlike legislating to prevent guns in schools,²⁹⁶ wetland regulation does call for a single national solution.

The foregoing federalism analysis has argued that the benefits that flow from state, rather than federal, regulation, actually run counter to the needs of effective wetland regulation.²⁹⁷ Whatever "benefits" state sovereignty could offer in the realm of protecting personal liberty would frustrate the proper balancing of national versus private property owners' interests. Protection

294. See Houck & Rolland, *supra* note 23, at 1248.

295. See *supra* notes 268-79 and accompanying text.

296. See *United States v. Lopez*, 514 U.S. 549 (1995).

297. See *supra* notes 266-92 and accompanying text.

of property owners' interests against tyranny of the government²⁹⁸ would come at the expense of the interests of those numerous individuals who bear the cost of the property owners' land-use practices. Because courts should respect and extend the general deference to state sovereignty only so far as the reasons that justify its existence, the courts should permit federal jurisdiction over wetlands. Moreover, because this extension of commerce power is a principled one, allowing the extension should not open the door to a parade of unjustified extensions. Rather, it should have the desirable consequence of opening the door to federal regulation of similar activities that create interstate externalities. The forgoing analysis answers the *Lopez* test's last question, as applied to the MBR, in the negative—that is, this regulation does not unduly upset the federal-state balance nor does it fail the “test of consequences.” Or, to draw on the structural or functionalist arguments of separation-of-powers analysis, federal regulation of wetland destruction does not “undermine [a] constitutional commitment[] that should be regarded as central.”²⁹⁹

Reconciling Lopez and Leslie Salt

Given this analysis, the denial of certiorari to *Leslie Salt* and *Lopez* are reconcilable. Although it is not apparent to the naked eye that the MBR has a nexus with interstate commerce, the functional-federalism analysis should persuade the Court to uphold the MBR as a valid exercise of commerce power.³⁰⁰ Unlike section 922(q), the MBR does not undermine the constitutionally contemplated structure of federalism.

Finally, opening the door to federal regulation of wetlands does not open the door to unlimited federal regulation as warned against in *Lopez*.³⁰¹ For example, it would not open the door to

298. See DUCAT, *supra* note 258, at 334-35.

299. GERHARDT & ROWE, *supra* note 231, at 137 (quoting Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495 (1987)). The point here is that the MBR does not make inroads on constitutionally protected rights that the people of the states can rightfully claim. State sovereignty does not exist to allow individuals to profit at the nation's expense.

300. See *supra* notes 247-99 and accompanying text.

301. See *Lopez*, 514 U.S. at 564.

regulations like section 922(q). At most, affirming federal regulation of isolated wetlands creates an exception³⁰² in areas of traditional state regulation when the regulated activity imposes substantial extra-statal costs. Creating this "exception" does not mean that these areas inevitably are destined for federal micromanagement. This "exception" simply expands the conceptual area in which the Court will defer to a congressional decision to legislate in the name of the commerce power. All of the political process limitations on congressional power continue to apply.³⁰³

Over the years, the Court has allowed expansion of commerce power to outgrow the literal language of the Commerce Clause. In the process, the Court crafted lenient tests defining commerce power to accommodate the regulatory needs of the complex, technologically advanced commercial world. The Court in *Lopez* added to that test. In *Lopez*, the Court examined the exercise of commerce power in the broad context of the constitutionally contemplated structure of government—an inquiry that reflects a functional approach. Courts should take advantage of the *Lopez* invitation to evaluate extensions of commerce power based on their practical effects. This Note suggests that regulation of activities that create interstate externalities qualify under *Lopez* for federal commerce power jurisdiction.

CONCLUSION

The MBR represents a valid expression of congressional commerce power even after the *Lopez* decision. Contrary to Justice Thomas's dissent, the Court's decision to deny certiorari to *Leslie Salt* is reconcilable with *Lopez*. Applying the *Lopez* analysis to the MBR does not entail exclusive and intensive scrutiny to the law's nexus with interstate commerce. Even if the nexus is weak, the *Lopez* decision, especially Justice Kennedy's concur-

302. "Exception" may not be the correct word. It is actually just the outcome reached by applying the test and determining that the MBR falls on the "permissible federal regulation" side.

303. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-52 (1985) (explaining that the Framers intended the structure of the government to create political limits on federal power over the states).

rence, mandates a pragmatic, or functionalist approach investigating the federalism consequences of sustaining the legislation in question. Having recognized the nearly all-inclusive flexibility of the traditional interstate commerce nexus requirement, the majority opinion suggests that the findings of the Court's functional-federalism analysis is just as important to the outcome of the case. The functional-federalism analysis reveals that effective land-use regulation of resources whose destruction imposes costs not only external to the landowner, but external to the state, can only emanate from the federal government. Federal land-use regulation involves balancing the interests of all those affected by the land-use practice against the interests of the private land owner. An honest balancing cannot occur absent the representation of all those interested. In other words, a regulation that aims to correct a market failure arising out of an interstate externality is best crafted by the United States rather than states acting individually.

The MBR acts, as one among several mechanisms, to ensure that the federal government will impose section 404 jurisdiction over only wetlands, the destruction of which, in the aggregate, will impose a substantial cost on the nation. Sustaining the MBR does not undermine, in a meaningful way, any of the contemplated benefits of state sovereignty. The MBR does not frustrate the constitutionally mandated federal-state balance in that it does not open the door to limitless federal regulation. Whatever its merits, judicially imposed deference to state sovereignty should extend only so far as the reasons that justify state sovereignty as a principle.

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