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The United States uses a two-tiered federal system of government, with power vested in multiple layers of distinct sovereigns.[1] In theory at least, each sovereign, whether state or federal, exercises complete power within its proper sphere.[2] Practically speaking, however, it does not seem that many things in today's world escape Congressional control because of the United States Supreme Court's interpretation of Congress' commerce power.[3] The Court's expansive view has ruled since the New Deal era of the 1930's.[4] Some consider it merely an academic question whether federalism exists in the United States at all in the modern era.[5]

There can be no question that environmental protection is a compelling concern.[6] It is questionable, however, whether all pro-

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[1] H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 634 (1993)("According to the Court, 'the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.'" (citation omitted)); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 591-92 (1987); *see also* Debra L. Farmer, Recent Development, 68 TUL. L. REV. 1674, 1675 (1994)("Under our federal system of government, the framework within which Congress may legislate is defined by the powers granted to Congress by and enumerated in the Constitution." (citation omitted)).

[2] "Although the Constitution allows for a strong national government, it nonetheless reserves for the states those powers not delegated to Congress." Farmer, *supra* note 1, at 1675 (citation omitted).

[3] *See infra* text accompanying note 16.

[4] *See infra* text accompanying notes 15-38.

[5] "It is, therefore, notable that for most of the last half century, the United States has had no constitutional law of federalism." Powell, *supra* note 1, at 633.

[6] *See* Robert D. Icsman, Comment, *Hoffman Homes, Inc. v. Administrator, U.S. EPA: The Seventh Circuit Gets Bogged Down in Wetlands*, 54 OHIO ST. L.J. 809 (1993); *see generally* Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological*

tective policies are within Congressional power. It has been conclusively established that wetlands which are adjacent to interstate waterways have a substantial effect on interstate commerce[7] such that federal regulation is proper.[8] The current unresolved question, however, is whether intrastate, isolated wetlands are subject to federal regulation under the Clean Water Act.[9] It is in this area that the scope of the Commerce Clause may be decreasing in size. Commerce Clause jurisprudence may actually be devolving, and the intrastate wetland debate exemplifies this potential change in direction.

A recent article by Stephen Stokes[10] accurately describes the currently raging debate between environmental regulators and private property owners.[11] Stokes states that Congress is without authority under the Commerce Clause to regulate intrastate, isolated wetlands.[12] Unfortunately, Stokes' article argues without careful constitutional analysis that the Commerce Clause is somehow limited.[13] It is not so clear that the Supreme Court would choose to limit the range of the Commerce Clause as Stokes suggests. One commentator contends that "too much water has passed over the dam for there to be a candid judicial reexamination of the commerce clause that looks only to first principles."[14] Embracing this idea, this note will examine recent trends in Commerce Clause jurispru-

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Diversity, 18 Ecology L.Q. 265 (1991).

[7] Often referred to as "nature's kidneys," wetlands improve water quality by removing excess nutrients, sediments, and pollutants from water. They prevent flooding and soil erosion, and provide critical habitat for countless species of migratory waterfowl and endangered species. They also produce tremendous quantities of natural products. In addition to those tangible and intangible economic benefits, wetlands provide immeasurable recreation, educational, and aesthetic benefits.

Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 Envtl. L. 1, 2-3 (1993).

[8] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985).

[9] 33 U.S.C. §§ 1251-1387 (1988).

[10] Stephen J. Stokes, Note, *The Limit of Government's Regulatory Authority Over Non-Adjacent Wetlands: Hoffman Homes, Inc. v. EPA*, 15 ENERGY L.J. 137 (1994). *See generally* United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979).

[11] Stokes, *supra* note 10, at 138; *See generally* James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters — Is It Against Nature to Pay for a Taking?*, 27 Land & Water L. Rev. 309 (1992).

[12] Stokes, *supra* note 10, at 149-50.

[13] *Id.*

[14] Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

dence, in the context of non-adjacent wetlands, and based on that premise will suggest that the Court may be embarking on Mr. Stokes' suggested course.

I. THE SCOPE OF THE COMMERCE POWER AND ITS HISTORY

A great deal of Congressional action in the modern era[15] is founded on the Commerce Clause, which states Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."[16] Under the Court's current interpretation, anything that *substantially affects* interstate commerce is properly within the sphere of Congressional regulation.[17]

The Commerce Clause evolved to its present interpretation in a series of cases ranging from *Gibbons v. Ogden*[18] in 1824 to *Wickard v. Filburn*[19] in 1942.[20] In *Gibbons* the United States Supreme Court held that "navigation among the several states was interstate commerce."[21] During this era, the Court distinguished between commerce among the states, which Congress could regulate, and purely local commerce, which was beyond the purview of the Commerce Clause.[22] This distinction remained intact, at least for the most part, until the New Deal of the 1930's.[23]

In 1937 the Court abandoned its strict delineation between local and interstate commerce and adopted a burden test for determining when an activity "affects" commerce. The Court held in *NLRB v. Jones & Laughlin Steel Corp.*[24] that "labor disputes may have an effect on interstate commerce by burdening or obstructing interstate or foreign commerce."[25] This holding opened the door for expansive federal regulation which is commonplace in today's world.[26]

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[15] Since Franklin Roosevelt's New Deal in the 1930's. *See* Epstein, *supra* note 14, at 1443-54.

[16] U.S. CONST. art. I, § 8, cl. 3.

[17] *See infra* text accompanying note 31.

[18] 22 U.S. (9 Wheat) 1 (1824).

[19] 317 U.S. 111 (1942).

[20] For a more expansive examination of the evolution of the Commerce Clause, *see generally* Michigan Protection and Advocacy Serv., Inc. v. Babin, 799 F. Supp. 695, 733 (E.D. Mich. 1992); Epstein, *supra* note 14.

[21] *Michigan Protection*, 799 F. Supp. at 733.

[22] *Id.* at 734.

[23] *Id.*

[24] 301 U.S. 1 (1937).

[25] *Michigan Protection*, 799 F. Supp. at 734.

[26] *See* Epstein, *supra* note 14, at 1447 ("[T]he companion cases to Jones & Laugh-

Following *Jones & Laughlin*, the Court decided *United States v. Darby*[27] holding that Congress is permitted "to regulate purely intrastate activity as long as such regulation [is] necessary to permit the goal of regulating interstate commerce."[28] At this point the door that had opened to expansive federal regulation under the auspices of the commerce power became a broken floodgate. This expansionist trend culminated in the previously mentioned *Wickard v. Filburn*,[29] where the Court held the single act in question need not itself have an ascertainable effect on interstate commerce for Congress to have jurisdiction. Instead, if the aggregation of like activities would affect interstate commerce, then Congress could assert its power under the Commerce Clause and regulate otherwise wholly local activity.[30] "After *Wickard*, any activity could be regulated by Congress as long as it had a substantial effect on interstate commerce."[31] A substantial effect on interstate commerce remains the standard for measuring Commerce Clause challenges today,[32] and Congressional action will be upheld if Congress' chosen means are rationally related to achieving some legitimate end.[33] If there is any rational basis for believing that something affects commerce, then for all practical purposes it does.[34]

Modern perceptions of the commerce power show the truly expansive reach it has acquired.[35] Congress' efforts at curtailing

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lin showed that the 'internal concerns of a state' had become an empty vessel.").

[27] 312 U.S. 657 (1941).

[28] *Michigan Protection*, 799 F. Supp. at 735 (citing *Darby*, 312 U.S. at 120-23).

[29] 317 U.S. 111 (1942).

[30] The facts of *Wickard* found the Court approving Congressional regulation of the consumption of home-grown wheat. "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard*, 317 U.S. at 127-28.

[31] *Michigan Protection*, 799 F. Supp. at 735.

[32] *See* Hoffman Homes, Inc. v. E.P.A., 961 F.2d 1310, 1317 [hereinafter *Hoffman I*], *reh'g granted*, 975 F.2d 1554 (7th Cir. 1992).

[33] Avoyelles Sportsmen's League, Inc. v. Alexander, 511 F. Supp. 278, 286 (W.D. La. 1981)("The power of Congress over interstate commerce ... extends to those activities intrastate which so affect interstate commerce or the exercise of the power of congress over it as to make regulation of them appropriate means to the attainment of a legitimate end.").

[34] "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce." *Hoffman I*, 961 F.2d at 1317 (quoting Hodel v. Indiana, 452 U.S. 314, 323-24 (1981)).

[35] "As currently interpreted, the Commerce Power has a virtually unlimited sweep." Doremus, *supra* note 6, at 293 (citation omitted).

water pollution in the area of wetland regulation clearly evidence these perceptions. In *Golden Gate Audobon Society v. United States Army Corps. of Engineers*[36] the court refers, rather sarcastically, in a footnote to one of the parties' contentions that the "Corps [of Engineers] jurisdiction over wetlands is limited because it 'only' reaches as far as Congress' Commerce Clause power."[37] The court rejected the argument, indicating that Congress' power under the Commerce Clause is practically plenary.[38]

When speaking of the Clean Water Act,[39] courts often recite language that references limitations imposed by the Commerce Clause on Congressional, and therefore agency,[40] jurisdiction.[41] Only one of those courts, however, mentions anything in the context of wetlands that is beyond the reach of the Clause.[42] Significantly, as discussed below, that court vacated its opinion and replaced it with one not quite so hostile to the Commerce Clause.[43] That courts pay lip service to the Clause certainly indicates that today we view it as merely a formalistic vehicle upon which Congress can place any legislation and thereby drive it through the Constitution. This view may slowly be changing.

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[36] 796 F. Supp. 1306 (N.D. Cal. 1992).

[37] *Id.* at 1311 n.3 (emphasis in original).

[38] *Id.*

[39] 33 U.S.C. §§ 1251-1387 (1988).

[40] This note assumes that all administrative concerns regarding delegation and scope of agency authority are satisfied, and only questions of Congressional power are at issue.

[41] *See, e.g.*, Jentgen v. United States, 657 F.2d 1210, 1211 (Ct. Cl. 1981)("It is now well settled that Congress, in adopting the latter term, 'asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause.'"); *Golden Gate Audobon Society*, 796 F. Supp. at 1314 ("Therefore, so long as there are wetlands on the site, and they are in any way within Congress' Commerce Clause power, they are subject to the Corps jurisdiction."); Slagle v. United States, 809 F. Supp. 704, 708 (D. Minn. 1992)("The Supreme Court has recognized Congress' intent to give 'waters of the United States' the broadest possible meaning under the Commerce Clause." (citation omitted)); United States v. Akers, 651 F. Supp. 320, 322 (E.D. Cal. 1987)("It has repeatedly been held that Congress intended the statutory definition to assert 'federal jurisdiction over the Nation's waters to the maximum extent possible under the Commerce Clause of the Constitution.'"(citations omitted)). All of these statements strongly imply that something is beyond the reach of the Commerce Clause, but they never say what that something is.

[42] *See, e.g., Golden Gate Audobon Society*, 796 F. Supp. at 1313, where the court referred to exceptions based on the Commerce Clause power, but failed to list any specifically. This single example is repeated in all of the other wetlands cases, except *Hoffman I*, discussed *infra* at text accompanying notes 55-70.

[43] *See infra* text accompanying notes 71-84.

II. THE SEVENTH CIRCUIT GRAPPLES WITH THE COMMERCE POWER IN THE CONTEXT OF NON-ADJACENT WETLANDS

A. Adjacency or Non-Adjacency?

The early cases wrestling with the idea that wetlands could be considered waters of the United States under § 404 of the Clean Water Act[44] developed a standard recognizing adjacent wetlands as necessary to their neighboring navigable waters.[45] Such wetlands are therefore subject to Congressional regulation.[46] "The Seventh Circuit . . . found that regulating wetlands was justified by the negative effect that destruction of wetlands could have on the 'biological, chemical, and physical integrity of the [navigable] lakes *they adjoin.*'"[47] The courts' reliance on the physical proximity between the questioned wetland and some interstate body of water begs the question whether wetlands not so geographically, or hydrologically, situated should be subject to the same regulation.[48] This question requires an examination of the differences between adjacent wetlands and isolated, intrastate, or non-adjacent, wetlands.

A wetland is, according to both the Environmental Protection Agency and the Army Corps of Engineers, an area "that [is] normally inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions [does] support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[49] Significantly, the adjacency requirement is not imposed by the regulating agency, but is rather a substantive requirement imposed by the courts as an incident of the Commerce Clause.

An adjacent wetland serves to "prevent flooding, to prevent

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[44] 33 U.S.C. §§ 1251-1387 (1988).

[45] *See* United States v. Tull, 769 F.2d 182, 185 (4th Cir. 1985).

[46] *Id.*

[47] *Tull*, 769 F.2d at 185 (quoting *Byrd*, 609 F.2d at 1210 (citation omitted))(emphasis added).

[48] "The original sponsor of H.R. 3199, Congressman Roberts, responded that '[w]etlands adjacent to traditionally navigable waters remain under Federal jurisdiction. *Other wetlands* may be regulated by a State under its own program if approved by [the] EPA.'" 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, 904 (1993)(emphasis added).

[49] 40 C.F.R. § 230.3(t) (1992) (EPA); 33 C.F.R. § 328.3(b) (1992) (Corps). "Wetlands generally include swamps, marshes, bogs and similar areas." *Id.*; *see also* Icsman, *supra* note 6, at 815 n.25.

erosion, and to filter and purify water draining into adjacent bodies of water."[50] Based on this reasoning the Seventh Circuit considered isolated wetlands outside the reach of the Commerce Clause because they "have no hydrological connection to any body of water."[51] A non-adjacent wetland, then, would be a geographical area satisfying the regulatory definition for wetland as outlined above,[52] but not bearing any connection to other waters of the United States, and hence not having a direct bearing on interstate commerce.[53] The question that troubles the courts is whether some other connection to interstate commerce, like migratory birds, would suffice to warrant jurisdiction over non-adjacent wetlands under the Clean Water Act.[54]

B. The Hoffman Homes Cases

The case of *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*[55] appeared twice before the Seventh Circuit Court of Appeals. In the first instance the court denied the E.P.A. jurisdiction over a certain parcel of privately owned land[56] because the scope of the Commerce Clause did not extend far enough to cover it.[57] Upon reconsideration of its position the court changed its stance regarding the Commerce Clause.[58] It reached essentially the same result, however, by declaring the evi-

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[50] *Hoffman I*, 961 F.2d at 1314 (citing *Riverside Bayview Homes*, 474 U.S. at 134).

[51] *Hoffman I*, 961 F.2d at 1314.

[52] *See supra* note 49 and accompanying text.

[53] Some connection is necessary between the activity and interstate commerce before Congress has any power to regulate. This connection is commonly referred to as the nexus between the activity and commerce. "While the commerce power was being pushed to the extreme, however, the Court implicitly limited its deference to Congress by requiring findings or legislative history indicating a nexus between the regulated activity and interstate commerce." Farmer, *supra* note 1, at 1679 (citation omitted).

[54] Indeed, courts have allowed such other connections. *See, e.g.*, Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) (holding that migratory birds can satisfy the nexus requirement). This decision is examined in greater detail *infra*, note 78 and accompanying text.

[55] *Hoffman I*, 961 F.2d 1310, *reh'g granted*, 975 F.2d 1554 (7th Cir. 1992).

[56] Known as "Area A." *Hoffman I*, 961 F.2d at 1311.

[57] *Id.* ("Because this goes beyond the limits of the Clean Water Act and the Commerce Clause, we reverse.").

[58] "We also agree with the CJO that it is reasonable to interpret the regulation as allowing migratory birds to be that connection between a wetland and interstate commerce." Hoffman Homes, Inc. v. E.P.A., 999 F.2d 256, 261 (7th Cir. 1993) [hereinafter *Hoffman II*].

dence insufficient to warrant jurisdiction in the particular case.[59]

The facts of the *Hoffman* cases are relatively straightforward. Hoffman, in preparation for development of a 43 acre parcel of its property, filled "an 0.8 acre, bowl-shaped depression at the northeast border of the site."[60] Rainwater could not easily escape the site, and the E.P.A. classified it as a wetland.[61] It was an isolated, intrastate wetland because it had "no surface or groundwater connection to any other body of water."[62] The E.P.A. pursued the problem, and informed Hoffman that remedial action would have to be taken.[63] Aside from the administrative issues and the procedural questions, an Administrative Law Judge found, in Hoffman's favor, that the E.P.A. had no jurisdiction over Area A.[64] When the E.P.A. appealed this decision, the E.P.A. Chief Judicial Officer (CJO) found contrary to the ALJ, ruling that there was a sufficient connection with interstate commerce to merit jurisdiction because migratory birds could use Area A.[65] It was at this stage the case came before the Seventh Circuit.

The Court of Appeals held, in favor of Hoffman, that Area A was outside the limits of the Commerce Clause.[66] The court recognized that Area A was a non-adjacent wetland,[67] and the established criteria defining a connection to interstate commerce were not present.[68] In searching for alternative connections to interstate commerce, the *Hoffman* court developed a test which requires some connection to human activity before the Commerce Clause can become applicable in wetlands situations.[69] Because the court found that the E.P.A. had failed to raise any such connection, it decided that Area A was beyond the reach of the Commerce Clause.[70] This holding was vacated, and a new one put in its place,

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

[60] *Hoffman I*, 961 F.2d at 1311.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1312.

[65] *Id.*

[66] *Hoffman I*, 961 F.2d at 1321 ("[W]e cannot hold that filling Area A has any effect on interstate commerce.").

[67] *Id.* at 1313 ("Area A is an intrastate, non-adjacent . . . wetland.").

[68] *Id.* at 1317.

[69] "Thus, in these Commerce Clause precedents, the government has come forward with some connection, no matter how tenuous, with human activity. ... [W]ithout evidence connecting Area A with some human economic activity, we cannot hold that filling Area A has any effect on interstate commerce." *Hoffman I*, 961 F.2d at 1321.

[70] *Id.*

by the second *Hoffman* case, to which we now turn.

The facts of *Hoffman II* are the same as *Hoffman I*, of course, and the results of the cases are the same. The difference between the two cases appears in their methodology. In *Hoffman I* the court attacked the Commerce Clause and attempted a persuasive argument against extending it to cover isolated, non-adjacent wetlands.[71] In *Hoffman II* the court retreated from its strong position against the Commerce Clause, and, though conceding that the Clause could cover non-adjacent wetlands, found the evidence insufficient to merit coverage on the facts of the present case.[72]

The court's holding in *Hoffman II* regarding the Commerce Clause is more in line with modern interpretations of the Clause than its previous holding in *Hoffman I*. Essentially the question before the court was whether migratory birds could serve as the nexus between a wetland and interstate commerce, such that the wetland would be subject to regulation pursuant to the authority of the Commerce Clause.

Allowing migratory waterfowl to define the outer limits of the Commerce Clause is substantially equal to placing no limits whatsoever on the Clause. In his concurrence to *Hoffman II* Judge Manion makes this point quite clear, stating, "[t]he commerce power is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink."[73] It is precisely because of this limitless potential of the Commerce Clause that migratory birds provide an excellent stopping point, and it is the tension between drawing a line and continuing unfettered expansion that is evident in the Seventh Circuit's handling of the non-adjacent wetland issue.

Analyzing the question in terms of the rational basis test outlined above,[74] migratory birds should not serve as the nexus between non-adjacent wetlands and interstate commerce because the purported goal of the Clean Water Act has little to do with waterfowl. The stated purpose of the Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[75] Accepting that purpose, if one is to put any limits on the

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

[72] "Based on our examination of the record, we find the CJO's conclusion that Area A was suitable for migratory bird habitat to be unsupported by substantial evidence on the record as a whole." *Hoffman II*, 999 F.2d at 262.

[73] *Hoffman II*, 999 F.2d at 263 (Manion, J., concurring.)

[74] *See supra* note 33 and accompanying text.

[75] United States v. Byrd, 609 F.2d 1204, 1211 (7th Cir. 1979) (quoting 33 U.S.C.

Commerce Clause, means that the "Nation's waters" must be somehow limited,[76] or else "maintain[ing] the . . . integrity of [water]" would allow for the regulation of any water in the country. "Maintaining the . . . biological integrity of the Nation's waters" does not necessarily include migratory waterfowl.

One potential limitation, short of disqualifying all non-adjacent wetlands from Congressional control on this basis, would be to allow regulation of those non-adjacent wetlands that actually support migratory waterfowl or some endangered species. The Ninth Circuit promoted this approach in *Leslie Salt Co. v. United States.*[77] It stated that, "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."[78] After recognizing this potential base for jurisdiction, the court then remanded the case to the trial court for a determination of whether the wetland in question actually had the "requisite connections to interstate commerce."[79] The Seventh Circuit chose not to follow this course in the *Hoffman* cases, but it did come close in one respect. In *Hoffman II* the court recognized the potential reach of the Commerce Clause, but held that no connection was shown between the birds and interstate commerce and therefore found for Hoffman.[80] The only real difference between *Leslie Salt* and *Hoffman II* is that the latter court chose not to remand the case for further factual findings. Thus, the message from *Hoffman II* is clear: the Seventh Circuit requires any alleged connection between migratory birds and interstate commerce to be shown initially, because parties will not be given a second chance.

Hoffman II did more than require a connection between the alleged waterfowl and interstate commerce. It strongly implied that such a connection could only be satisfied if the wetland was actually used by waterfowl.[81] The case recognized a connection between waterfowl and human activity generally, in that persons often travel

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§ 1251(a)); *see supra* note 47 and accompanying text.

[76] "To hold that the Commerce Clause gives Congress the power to regulate isolated wetlands would be to hold the Commerce Clause virtually unlimited." Stokes, *supra* note 10, at 150 (citation omitted).

[77] 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991).

[78] *Leslie Salt*, 896 F.2d at 360.

[79] *Id.*

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

[81] "The migratory birds are better judges of what is suitable for their welfare than are we, the ALJ or CJO. Having avoided Area A the migratory birds have thus spoken and submitted their own evidence." *Hoffman II*, 999 F.2d at 262.

to hunt, observe, or photograph migratory birds.[82] This connection is not necessarily enough, however, in the case of a particular wetland. The *Hoffman II* holding leaves open the question of whether a non-adjacent wetland, which migratory birds could, but do not, use would be within the reach of the Commerce Clause. Also, would a wetland actually used by waterfowl but so isolated that the human contact with the birds is cut off be within reach? The Seventh Circuit has answered some questions for the birds, but has left itself some room to limit its decision in the future.

Recently, in *Rueth v. United States Environmental Protection Agency*[83] the court explained its prior decision, stating that "nearly all wetlands fall within the jurisdiction of the [Clean Water Act] since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland."[84] Whatever the amount of maneuvering room left open by the court in *Hoffman II*, the *Rueth* decision indicates the court will look harshly at any attempts toward exclusion of wetlands. In *Rueth* the court effectively backed down from any limitations it sought to impose on the Commerce Clause in the *Hoffman* cases.

C. Departing from the Rational Basis and other Constitutional Tests

Even though the Seventh Circuit backed away from its initial restrictive interpretation of the Commerce Clause, it still has indicated the Clause has lost some of its former glory. The court makes this clear by heralding the broad reach of the Commerce Clause, and using other principles to carve out exceptions to it.

In both *Hoffman I* and *Hoffman II* the court asked not whether non-adjacent wetlands as a group fell within the range of Commerce Clause regulation, but instead whether the particular wetland in question fell within the range.[85] If the court had focused on isolated wetlands as a class, then under the current broad interpretation of the Commerce Clause[86] it would almost certainly have found cov-

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[82] *Id.* at 261.

[83] 13 F.3d 227 (7th Cir. 1993).

[84] *Id.* at 231.

[85] *Compare Hoffman I*, 961 F.2d at 1317 ("[W]e held that adjacent wetlands were within 'constitutional reach' ... The issue thus becomes: Is Area A within constitutional reach under the Commerce Clause?") *with Hoffman II*, 999 F2d. at 262 ("[W]e find the CJO's conclusion *that Area A was suitable* for migratory bird habitat to be unsupported by substantial evidence on the record as a whole.")(emphasis added)).

[86] *See supra* notes 35-43 and accompanying text.

erage. Also, the court required more than a mere allegation of a connection to interstate commerce before it would allow regulation of a non-adjacent wetland.[87]

Both of the preceding restrictions, though certainly limited in scope, illustrate a departure from traditional rational basis review. When reviewing Commerce Clause questions, courts generally must allow Congressional regulation if the chosen means are somehow reasonably related to a legitimate end.[88] In practical terms this translates into the courts accepting any possible rationale for a law or regulation, as long as the end is legitimate.[89] The limits imposed by the Seventh Circuit are significant because the court chose not to bend over backwards and dream up some possible, albeit tenuous, connection to interstate commerce. This is very different from usual judicial treatment of Commerce Clause issues.

III. WILL NARROW INTERPRETATIONS OF THE COMMERCE CLAUSE BECOME THE NORM?

While in one breath acknowledging the broad reach of the Clause, the Seventh Circuit, in the next breath, worked its way out of applying the Clean Water Act.[90] This would not be so significant if the court had not attempted, in *Hoffman I*, to restrict the application of the Commerce Clause altogether. When viewed in this light it seems that *Hoffman II* is little more than subversive. Does the court's decision to reach the same result through different methods in the *Hoffman* cases equate with a limitation of the Com-

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[87] "No justification whatsoever is seen from the evidence to interfere with private ownership based on what appears to be no more than a well intentioned effort in these particular factual circumstances to expand government control beyond reasonable or practical limits. After April showers not every temporary wet spot necessarily becomes subject to government control." *Hoffman II*, 999 F.2d at 262. This certainly indicates that more than an hypothetical connection between birds and wetlands is necessary.

[88] *See supra* note 33 and accompanying text.

[89] For example, in the area of federal criminal law, a potential effect on interstate commerce is enough to merit federal jurisdiction under the Commerce Clause. *See e.g.*, United States v. Staszcuk, 517 F.2d 53 (7th Cir.)(en banc), *cert. denied*, 423 U.S. 837 (1975), where a payoff made to an alderman for a proposed zoning change was held enough of a potential effect on commerce, even though the builder changed his mind, the proposed building was never built, and the zoning change never took place. The court reasoned that the jury could reasonably find that had the zoning change taken place, the building would probably have been built with out of state materials, and thus interstate commerce would likely have been affected. *Id.* at 60. The Seventh Circuit certainly rejected this method in the context of non-adjacent wetlands.

[90] *Hoffman II*, 999 F.2d at 260-263.

merce Clause? It may well be that it does.

In *Hoffman I* the court decided that the Commerce Clause could reach no further in the wetlands context than it already did.[91] In light of the previously discussed unassailable status of the Clause,[92] it seems only reasonable that the Seventh Circuit would choose to recharacterize its position, and refuse to be the court that explicitly said the Clause could cover no more ground. So instead, the same three judges[93] decided to achieve substantially the same result using different, and less constitutionally bold, language.[94]

The fact that the court even considered beginning to limit the Clause is itself significant. Some commentators believe that the commerce power is already too expansive,[95] and it is not too much of a stretch to imagine that *Hoffman I* shows that at least one court may feel the same way. *Hoffman II* quite possibly only shows that the Seventh Circuit was unwilling to take the first limiting step—and not that it really changed its mind about the scope of the commerce power.

Another court recently offered its opinion about the scope of the Commerce Clause, and it indicated that some reigning in needs to be done. The Fifth Circuit, in *United States v. Lopez*,[96] decided that the Clause does not reach all the way to protecting "gun free school-zones."[97] As one commentator noted, the *Lopez* court "acknowledged and respected the vast scope of the commerce power and speculated that with adequate findings or legislative history, congressional legislation similar to [the Act] could be sustained."[98] The *Lopez* analysis is strikingly similar in some respects to the wetlands cases, wherein the courts routinely recognize that "the commerce power is not unlimited."[99] The Fifth Circuit recognized that "there must be some limit on the commerce power because in theory, especially under *Wickard's* 'cumulative effect' concept, virtually any intrastate activity could be found to have some effect

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[91] *See supra* discussion accompanying notes 55-71.

[92] *See supra* notes 35-38 and accompanying text.

[93] Judges Manion, Wood, and Roszkowski heard both cases, with Judge Manion writing the opinion in *Hoffman I* and concurring in *Hoffman II*. Judge Wood wrote the *Hoffman II* opinion.

[94] Judge Manion, in his concurrence to *Hoffman II*, stood by his previous opinion. At least one of the other judges changed his mind.

[95] *See generally*, Epstein, *supra* note 14.

[96] 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994).

[97] *Id.* at 1367-68; *see* Farmer, *supra* note 1, at 1675.

[98] Farmer, *supra* note 1, at 1684 (footnotes omitted).

[99] *Id.*; *see also supra* notes 35-38 and accompanying text.

on interstate commerce."[100] Thus, the Seventh Circuit is not alone in beginning to restrict the commerce power. The Fifth Circuit has gone through much the same process in determining something to be outside Congressional power. It seems likely that this currently developing trend will continue.

In affirming the Fifth Circuit decision, the United States Supreme Court wrote,

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . This we are unwilling to do.[101]

The Court found it appropriate to stop the unfettered expansion of the commerce power at the school yard because the Gun-Free School Zones Act, "neither regulates a commercial activity nor contains a requirement that the possession [of a gun] be connected in any way to interstate commerce."[102]

The *Lopez* decision continues a trend of the Court toward curtailing the scope of the Clause. In *New York v. United States*[103] the Court revived some of its federalism jurisprudence and removed certain aspects of state action from the reach of the Commerce Clause.[104] It is unnecessary in this note to examine the details of that decision. Instead, it is significant that in both the *New York* and *Lopez* opinions the Court has taken the opportunity to encourage federalism, and limit the scope of the commerce power.

For wetlands this emerging reassessment of the commerce power is quite important. Because the United States Supreme Court determined, in its consideration of *Lopez*, that the Clause can be limited in its reach, future courts of appeals in positions similar to that of the Seventh Circuit may not feel as constrained as the *Hoffman* court did.

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[100] Farmer, *supra* note 1, at 1684 (footnote omitted).

[101] *United States v. Lopez*, 115 S.Ct. 1624, 1634 (1995).

[102] *Id.*, at 1626.

[103] 112 S.Ct. 2408 (1992).

[104] *Id.* (involving constitutional challenge to the Low-Level Radioactive Waste Policy Act); *see generally* Powell, *supra* note 1.

IV. RAMIFICATIONS OF NARROW CONSTRUCTION OF THE COMMERCE POWER

There are several potential results that could flow from a changing perspective regarding the Commerce Power. The *New York* decision mentions three methods that the federal government has available for encouraging state action.[105] It is not unreasonable to carry these incentive programs into other contexts, including the wetlands area. There are methods through which Congress could achieve its intended protective results without instituting direct regulation. These methods, which will require incentives offered to the states for certain actions, may become necessary if the Court changes the scope of the Commerce Clause.

If Congress is forced to adopt an alternative strategy to protect wetlands or other environmental interests, will there be areas that Congress cannot protect? It is likely that Congressional reach will remain as expansive as it currently is, though Commerce Clause limitations might require greater substantive state participation in environmental programs. This could result in differing environmental policies from region to region, and perhaps a lag in protection for a period of time between Commerce Clause restructuring and implementation of Congress' new methodology. Neither of these problems is likely to be severe, however, and should not prevent the Court from reconsidering its Commerce Clause position. Both potential problems merit further study, but they can no doubt be solved.

CONCLUSION

Though the trend is far from clear, there appears to be a reevaluation of the Commerce Clause taking place in our nation's court system. The debate over Congressional control of intrastate wetlands serves as an excellent example of how this reevaluation is emerging. The debate over the extent of the Commerce Clause is not likely to subside in the near future, but the view that its breadth should be reduced is growing in strength.

For wetlands to remain within the scope of Congressional

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[105] "The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders." *New York*, 112 S. Ct. at 2416. The three types were mandatory incentives, access incentives, and a take title provision. *Id.*

control, it is imperative that some significant connection of the particular wetland in question to interstate commerce be established at the outset. A wetland without such a connection may fall outside Congressional authority, and according to the Seventh Circuit, parties will not receive a second chance at establishing the required connection. There are limits to the scope of the commerce power, and parties must prove a connection to interstate commerce initially in order to satisfy the jurisdictional requirements now imposed by the Commerce Clause.