New Takings Doctrine, Lopez's Return to State Power, and Impacts on Environmental Protection: A Look at Isolated Wetlands Regulation, The

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I. Introduction

There is both political and legal disagreement over which governmental entity, the federal government or the states, should bear the responsibility for implementing environmental protection laws. This conflict arises particularly when environmental regulations appear intra-state in nature (e.g., isolated wetlands regulation under the Clean Water Act). Proponents of state regulation argue that the federal government exceeds its power when it regulates intra-state isolated wetlands. They also contend that states are in a better position to know how to regulate environmental concerns within their borders. Proponents of broad federal power argue, on the other hand, that the Commerce Clause is expansive enough to encompass this type of regulation and that federal regulation will assure uniform protection for those environmental issues that transcend state borders.

Recent Supreme Court decisions have heightened the importance of this debate and its outcome. In *Lopez v. United States*, the Court returned regulatory power to the states for the first time in decades by invalidating a congressional statute on the grounds that it had an insufficient nexus to interstate commerce under Article I, section 8 of the Constitution. If *Lopez* becomes the norm for scrutinizing congressional commerce power, certain federal environmental laws, like those protecting isolated wetlands, might become open to challenge on similar grounds.

The Court has also extended the regulatory takings doctrine, opening the door to more private property owners seeking compensation from the government. In a series of cases beginning with *Nollan v. California Coastal Commission*, the Court expanded the doctrine by requiring compensation for lost property value due to land use restrictions under state law.

The combined legal effect of these two trends in the Court’s jurisprudence is potentially devastating to some environmental protection statutes and regulations. While a *Lopez* approach to environmental legislation would put power over protecting the environment into states’ hands, the *Nollan* line of cases essentially forces these states into deregulation or non-implementation due to the tremendous costs of compensating private landowners. In this scenario, states may have the power to promulgate regulations, but would be powerless to implement them in light of this financial burden.

Therefore, in order to continue substantive legal protec-

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tion of vital national natural resources, it is important for the Court to either isolate the effects of Lopez or return to Justice Holmes' practical approach to compensation under the Fifth Amendment, which characterized the Court's approach throughout most of this century: a balance between the ability of government to effectively regulate and the private landowner's right to be compensated. Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.

This note will look first at the value of wetlands and current federal regulatory schemes for their protection. It will then analyze Lopez and the commerce power and undertake a regulatory takings analysis in light of Nollan, Lucas, and Dolan. Finally, it will evaluate the combined effects of these two constitutional doctrines on isolated wetlands protection and examine what can be done to maintain the current level of government intervention in the protection of these wetlands.

II. Background On Wetlands Regulation

"Wetlands are areas inundated or saturated by surface or groundwater 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." They include swamps, marshes, bogs and other similar types of land. Wetlands are typically put into two categories: adjacent wetlands (wetlands directly connected or tidally connected to a navigable body of water); and isolated wetlands (wetlands not located in or adjacent to a navigable or tidally affected body of water). A common type of isolated wetland in California and Oregon is a vernal pool with a shallow depression that sporadically floods during rainy periods but otherwise remains dry. A second example in midwestern states is a prairie pothole—a depression in the ground left by glacial movements, which fills with either snowmelt or rainfall. Approximately 90 percent of remaining wetlands are inland wetlands while the other 10 percent are coastal.

Only within the past twenty years have wetlands come to be appreciated for their ecological and economic value. In fact, prior to the 1970's, the filling and destruction of wetlands was an encouraged policy of the United States and its courts. Wetlands were thought to be useless, muddy, bacteria-infected nuisances to American land. People perceived direct profitability in converting wetlands into agricultural, industrial or residential uses. As a result of this ill-informed attitude toward wetlands, more than 50 percent of wetlands in the lower 48 states have been destroyed. Even with today's increased awareness and laws to protect the nation's remaining wetlands, they continue to disappear at a rate of nearly 300,000 acres annually. Recent studies estimate that of the 215

3. In Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922), Justice Holmes stated, "if the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id.

4. Id. at 413.


6. See id.


10. See id.


14. The U.S. Supreme Court said wetlands were "the cause of malnourishment and malnourishers" and stated that "the police power is never more legitimately exercised than in removing such nuisances." Leovy v. United States, 177 U.S. 621, 636 (1900).


16. "On average, this means that the lower 48 states have lost over 60 acres of wetlands for every hour between the 1780's and the 1980's. California has lost the largest percentage of original wetlands within the state (91%). Florida has lost the most acreage (9.3 million acres)." T.E. Dahl, U.S. DEP'T. OF THE INTERIOR, WETLAND LOSSES IN THE UNITED STATES 1780's TO 1980's 5 (1991).

millions of acres of continental wetlands in existence during the colonial era, only 95 million acres remain.18

The importance of wetlands conservation in maintaining the health of animals (including humans) and the environment is exemplified by their numerous functions. Wetlands provide important spawning, nesting, and feeding habitat for many animals including migratory birds and one-third of the nation's endangered species. While so many animal species are dependent on them for survival, wetlands only make up five percent of the nation's total land area.20 Wetlands also act as a natural flood control mechanism by collecting and storing water runoff from adjacent land.21 For example, prairie potholes store large amounts of storm water runoff and prevent surface water runoff from entering other bodies of water.22 Wetlands act as natural sponges in the earth, with one acre-foot holding about 360,000 gallons of water when flooded.23 The tragedy of wetlands destruction with respect to flood control was witnessed in the summer of 1993, with the flooding of over 16,000 square miles of land in the Midwest.24 Wetlands play an essential role in regulating local hydrology,25 in protecting water quality by filtering pollutants, sediments and excess nutrients out of the water,26 and replenishing groundwater aquifers.27 Additionally, wetlands help prevent erosion.28

Each of these wetland functions provide an economically valuable service. "The Fish and Wildlife Service estimates that 55 million people spent almost $10 billion in 1980 observing and photographing waterfowl and other wetland-dependent species of birds."29 Conservative estimates for the total recreational value of all wetlands in California alone is estimated to be $160 million per year.30 There are other numerous examples of wetland functions, such as providing jobs and services that we would otherwise have to produce artificially (e.g. cleansing our water supplies).

Based on the obvious ecological and economic value of wetlands and the present trend to protect those remaining from further degradation, it is significant to note that according to some estimates, 75 percent of wetlands in the lower 48 contiguous states are privately owned.31 The effect of this allocation is that any law protecting wetlands will directly impact the rights of private land owners. Intuitively, this results in increased conflict and difficulty in implementing protective mechanisms.

The primary protective mechanism for wet-

21. See Kanamine, supra note 19, at 6A.
28. See Kanamine, supra note 19.
lands is the federally enacted Clean Water Act (CWA). 32 Congress enacted the CWA in 1972 in order to protect the health of the nation's waters. Section 404 of the CWA prohibits discharging dredged or fill materials into the “waters” of the United States without an Army Corps of Engineers (Corps) permit. 33 The term “waters” in the CWA has been interpreted broadly by the regulatory agencies in charge of its promulgation, 34 as well as the courts. 35 “Waters” has been defined as any body of water reachable under the Commerce Clause. 36 Although the statute does not explicitly include wetlands in its definitions, the Corps and the Environmental Protection Agency (EPA) assert jurisdiction over wetlands, including isolated wetlands, the “use, degradation or destruction of which could affect interstate or foreign commerce.” 37 Thus, the Corps and EPA regulate isolated wetlands if they have a “site-specific impact on interstate commerce,” but they may regulate any adjacent wetland without further restrictions. 38 Isolated wetlands are defined as those wetlands, intra-state in nature, that when used or damaged could have an impact on interstate commerce. 39 Since there is a stronger argument for regulating adjacent wetlands as part of the “waters of the United States” under the CWA, this paper will focus primarily on isolated wetlands and the government’s ability to protect them in a battle against the courts’ narrow interpretations.

33. See id. Congress intended to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Id.
34. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) are the two administrative agencies responsible for wetlands regulation.
35. See United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985) (held Congress intended to regulate waters which might not meet the traditional test of “navigability”); Leslie Salt Co. v. Froehlke, 403 F. Supp. 1292, 1296-97 (N.D. Cal. 1974) (held the term “navigable waters” to include the broadest possible commerce clause interpretation), rev’d on other grounds, 578 F.2d 742 (9th Cir. 1978).
36. See Hoffman Homes, Inc. v. Environmental Protection Agency, 999 F.2d 256, 262-63 (7th Cir. 1993) (Manion, J., concurring) (found Congress did not intend to reach isolated wetlands under the Clean Water Act and “isolated wetlands by definition have no effect on the waters of the United States”).
38. See Riverside Bayview Homes, 474 U.S. at 133.

III. Commerce Clause Analysis In Light Of Lopez v. United States

The United States Constitution provides Congress with a list of enumerated powers. 40 The Supreme Court has interpreted these powers as limiting the power that the federal government can exercise. 41 The Commerce Clause, as one of the enumerated powers, allows Congress to regulate interstate and foreign commerce. 42 Over time, Congress expanded its use of the Commerce Clause, and it is now among the most common bases for Congress’ exercise of power. Consequently, since 1937 the Court has also defined “interstate commerce” very broadly in upholding Congressional legislation.

Before 1937 the Court drew categorical distinctions between intrastate activity and interstate activity, or direct and indirect effects on interstate commerce. Post-1937 Supreme Court decisions consider the gray areas of “affecting interstate commerce,” and do away with black and white categories for distinguishing valid uses of the commerce power from invalid, over-expansive uses. 43 Wickard v. Filburn was a critical case in the commerce power evolution. There, the Court held that “even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” 44 The Court also determined that the proper category of analysis is the application of the law to all people simi-

37. 33 C.F.R. § 328.3 (1997). The Corps regulations state in part:

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams); mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadow, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce. Id.
38. Prolo, supra note 5, at 93 n. 12 (citing 33 C.F.R. section 328.3 (a), (c) (1993)).
42. “The Congress shall have Power […] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, sec. 8, cl. 2.
43. See 317 U.S. 111, 124 (1942).
44. Id. at 125.
larly situated and not just to the individual plain-
tiff.43 In other words, although the law's application to one person might not substantially affect interstate commerce, if all similarly situated people taken together create a substantial impact, the law is within federal regulatory jurisdiction.46 This is now known as the "cumulative effect" test.

Today, when Congress legislates under the aus-
pices of the Commerce Clause there are three potential scenarios with which the courts are faced. First, Congress might pass a law with an explicit finding that the regulated activity affects interstate commerce.47 Both Hodel v. Virginia48 and Hodel v. Indiana49 illustrate this type of legislation and demonstrate the broad reach of the commerce power. Upon a challenge to the Surface Mining Act of 1977 in Hodel v. Virginia, Justice Marshall held that the Court must defer to federal findings of an effect on interstate commerce by applying a "rational basis" standard of review to determine the constitutionality of the law.50 The Court further held the legis-
lation to be rational and adequately sup-
ported by the legislative record.51 Although the Court in Hodel v. Indiana disagreed with the substantial-
ity of the effect on interstate commerce, it deferred to Congress' explicit finding of a substan-
tial effect in order to avoid substituting its own find-
ings for those of Congress.52 Second, Congress may implicitly exercise its complete Commerce Clause power.53 The final type of case raising commerce power concerns is where Congress makes no refer-
ce to the Commerce Clause but the legislation itself raises the issue. This was the case in Lopez v. United States.54

During its 1995 term, the Supreme Court threw a wrench into nearly 70 years of Commerce Clause jurisprudence by invalidating a congressional statute in Lopez.55 Lopez involved a challenge to the federal Gun-Free School Zones Act of 1990 (Act) which prohibited the "knowing possession of a firearm in a school zone."56 Lopez argued that the Act was beyond the legislative power of Congress as enumerated in the Constitution.57 The Court agreed, holding that the Act neither regulated a commercial activity nor met the substantial relation to interstate commerce requirement.58 The Court rejected the government's argument that posses-
sion of a firearm eventually affects the national economy and stated that under such "national pro-
ductivity reasoning" Congress could regulate virtually any activity related to the economic productivity of individual citizens.59 The Court acknowledged its deferential approach to reviewing formal and even informal findings of Congress, but held that there was no rational basis for upholding the legis-
lation, since no findings were made in support of a substantial connection to interstate commerce.60 The Court's stricter requirement that the regulated activity substantially affects interstate commerce subjects federal statutes to review under a tough-
ened rational basis standard.61

It is highly likely that Lopez will have a deleteri-
ous effect on a Commerce Clause analysis regarding the regulation of isolated wetlands under the CWA. In a dissenting opinion to the denial of a writ of certiorari in the case of Cargill, Inc. v. United States, Justice Thomas stated that "the basis asserted to create federal jurisdiction over petitioner's land in this case seems to me to be even more far-fetched than that offered and rejected in Lopez."62 Justice Thomas was eager to decide whether the potential or occasional existence of migratory birds on isolated wetlands created a sufficient nexus with inter-
state commerce to permit regulation.63 It is clear from his opinion that Justice Thomas finds the Corps' expansive interpretation of its regulatory

45. See id. at 127-28.
46. See id.
48. See 452 U.S. at 276 ("The court must defer to a con-
gressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding").
49. See 452 U.S. 314.
50. 452 U.S. at 276 (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964)). The rational basis standard of review is the most deferential standard applied by the Court and simply requires the legislation to be rationally related to a legitimate purpose. See KENNETH L. KARST, STANDARD OF REVIEW, IN 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1720-21 (Leonard W. Levy et al., eds., 1986).
54. 514 U.S. at 559-63.
55. Id. at 567.
57. See Lopez, 514 U.S. at 563.
58. See id. at 567.
59. Id. at 563.
60. See id. at 561-563.
63. See id.
powers to be a long stretch from Congress' true Commerce Clause powers as set forth in Lopez.\footnote{See id. at 408-09.}

"The specific issue of whether the Corps has CWA jurisdiction over isolated wetlands has yet to reach the U.S. Supreme Court."\footnote{Pino, supra note 5, at 95.} The Supreme Court recognized the Corps' authority under section 404 of the CWA to regulate adjacent wetlands, but expressly refused to decide the issue of isolated wetlands in the case of \textit{United States v. Riverside-Bayview Homes}.

In \textit{Riverside-Bayview Homes}, the Court relied on Congress' intent to have a "broad systemic view of the goal of maintaining and improving water quality" and the broad federal power necessary to achieve this goal.\footnote{474 U.S. at 131 n.8.}

The Court considered the legislative history surrounding the CWA determinative of the fact that Congress intended to implement a broad interpretation of the phrase "waters of the United States."\footnote{Id. at 132.}

Other courts have addressed the related issue of federal regulation of other isolated, intra-state bodies of water under the Commerce Clause.\footnote{68. In the 1972 CWA Amendments, Congress rejected the 1899 River and Harbors Act's narrow interpretation of "navigable waters." See \textit{Riverside-Bayview Homes}, 474 U.S. at 133 (citing S. Rep. No. 92-1236 at 144 (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3822).}

\textit{Utah v. Marsh} was one of the first cases deciding whether the Commerce Clause reached these intra-state bodies of water.\footnote{69. John A. Leman, \textit{The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause}, 28 U.C. Divs. L. Rev. 1237, 1255 n.111 (1995).}

The Court of Appeals held the water could be reached through the Commerce Clause because: 1) interstate travelers sometimes used the lake in question; 2) the lake supported a commercial fishery selling its products out-of-state; 3) the lake provided water to irrigate crops sold in the national market; and 4) the water was frequented by migratory birds.\footnote{70. 740 F.2d 799 (10th Cir. 1984).}

Two other federal cases also found the commerce power broad enough to encompass regulation of intra-state waters.\footnote{71. See id. at 803-04.}

The first federal case to deal specifically with the commerce power's relation to the regulation of isolated wetlands was \textit{Leslie Salt Co. v. United States}.\footnote{72. See Residents Against Industrial Landfill Expansion v. Diversified Systems, Inc., 804 F. Supp. 1036, 1039 (E.D. Tenn. 1992) (two intrastate creeks used to provide water to livestock were held to be within the reach of the Commerce Clause and the CWA because they might affect interstate commerce to some extent); see also United States v. Earth Sciences, Inc., 599 F.2d 368, 374-75 (10th Cir. 1979) (people's use of an intrastate stream's water to irrigate crops sold in interstate commerce is a substantial enough connection to justify regulation by the federal government).}

Petitioner owned land southeast of San Francisco which included 12.5 acres of isolated wetlands used as habitat by 55 species of migratory birds.\footnote{74. 896 F.2d 354 (9th Cir. 1990); see also Leslie Salt Co. v. United States 5 F.3d 1388 (9th Cir. 1995). See also Cargill, Inc. v. United States 516 U.S. 955, 956 (1995).}

The court held that "the 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."\footnote{75. Leslie Salt Co., 55 F.3d at 1390-91.}

The court found the legislative history of the CWA supportive of the Corps action based on "Congress' intent to extend Act jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause."\footnote{76. Leslie Salt Co., 55 F.3d at 1395 (citing S. Rep. No. 92-1236 at 144 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3776).}

Further, the court relied on \textit{United States v. Riverside Bayview Homes, Inc.} to support the Corps' interpretation of the statute by recognizing similarities between adjacent wetlands and isolated wetlands.\footnote{77. See id.}

The court also quoted the following reasoning from \textit{Palila v. Hawaii Department of Land and Natural Resources} for upholding the Endangered Species Act against a Commerce Clause challenge: "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species."\footnote{78. Id. at 1396 (quoting Palila v. Hawaii Department of Land and Natural Resources, 471 F.Supp. 985, 993 (D. Haw. 1979), aff'd, 639 F.2d 493 (9th Cir. 1981)).}

Although the court in \textit{Leslie Salt} upheld the regulations as a valid exercise of the commerce power, it did express some reservations about the reasonableness of the migratory bird nexus when there is no evidence of human contact with the seasonally ponded wetlands.\footnote{Id. at 1396.}

In light of Lopez, this explicit concern by some courts places wetlands regulation on unstable ground. However, this reservation should be dispelled by taking a closer look at the argument in Palila. The key phrase in the Palila court's holding is its emphasis that, by improving
the natural habitats of endangered species and migratory birds, the government is preserving the possibilities of interstate commerce in these species along with the movement of persons. The key distinction in the Palia court's analysis is that commerce relating to these species does not have to take place on petitioner's land in order to create the nexus with interstate commerce. The nexus is instead created by the fact that more birds will come to California, Oregon and Washington and be available for bird-watching or hunting as a result of preserving available habitat within these states. It would be an entirely different story if the birds themselves were permanently isolated on the Leslie Salt land and never became subjects of interstate commerce, but this is not the case since the nature of the birds is "migratory."

Hoffman Homes Inc. v. EPA is another federal case holding that the Corps has legitimate power to regulate isolated wetlands where there is some site-specific connection to interstate commerce. However, the Hoffman Homes court still entered judgment in favor of Hoffman Homes Inc. because it found that the EPA failed to demonstrate substantial evidence that birds could potentially use the isolated wetlands in question. The court established a difficult standard to meet due to its lack of clarity in defining the standard. It seems to require more proof of a migratory bird presence than it intimates.

Presently, the Corps asserts jurisdiction over isolated wetlands when: (1) the wetlands are used or can potentially be used by migratory birds which cross state lines; (2) the wetlands are used or can potentially be used by migratory birds protected by migratory bird treaties; (3) the wetlands are used by endangered species; (4) the wetlands prevent flooding; (5) the wetlands protect interstate waters against pollution, and (6) the wetlands are used for recreational purposes by interstate travelers. Since none of these specific attempts to establish a nexus between isolated wetlands regulation and a substantial effect on interstate commerce has been decided by the Supreme Court, there are inconsistencies with their application in different federal districts. Although the courts typically can find a "site-specific" connection to interstate commerce, there are many isolated wetlands lacking this connection. As a result, they are considered outside of the zone of regulation.

In order to guarantee broad, effective regulation over isolated wetlands, the Corps should argue for application of the cumulative effects test as established in Wickard v. Filburn. Under this doctrine each isolated wetland alone would not need a site-specific substantial effect on interstate commerce because the test would be whether all wetlands similarly situated and regulated, if taken together, would have a substantial impact on interstate commerce.

However, since Lopez has initiated a return to pre-1937 notions of the commerce power and has created a narrower interpretation of "substantially affects interstate commerce," the nexus between regulation of isolated wetlands and the Commerce Clause will be difficult to establish. Although Justice Rehnquist stated the Court was not overturning any precedent, such as Wickard v. Filburn, it fundamentally reinvented the meaning and application of this case, and others, by demanding the regulated intrastate activity be some sort of economic enterprise. It is clear an inferential argument will do little to convince this majority that the activities regulated "arise out of or are connected with a commercial transaction." Without meeting this "economic enterprise" requirement, the "cumulative effect" doctrine is out of reach. If and when the Supreme Court decides to grant certiorari to decide the legitimacy of these regulations under the Commerce Clause, it will impact federal protection of some very important natural resources.

IV. Analysis Of The New Regulatory Takings Doctrine

The Fifth Amendment's just compensation clause provides "nor shall private property be taken for public use, without just compensation." Inverse

81. 999 F.2d 248, 261 (7th Cir. 1993).
82. Id. at 262. Some argue that the EPA presented substantial evidence, and that the Court erred in applying too heavy a burden. See Pono, supra note 5, at 97, 98.
83. See Pono, supra note 5, at 100 (the Seventh Circuit requires more than a general statement by an agency expert that an isolated wetland is a suitable habitat for migratory birds).
84. See Leslie Salt Co., 55 F.3d at 1394-95.
condemnation, a government regulation which results in a taking without formal condemnation proceedings, occurs when the government either physically occupies private property,93 or “takes” property purely through regulatory means.94 The landmark regulatory takings case, written by Justice Holmes, held that “if regulation goes too far it will be recognized as a taking.”95 For decades the Court has struggled with trying to define when government regulation of private property “goes too far” and becomes a taking under the 5th Amendment.

Since the Lochner era of substantive review of economic regulations ended, courts generally have given broad deference to the legitimacy of state regulation, even over private property interests. The fundamental two-prong test to ascertain whether a regulation effectuates a taking is: (1) does the regulation of the property substantially advance a legitimate state interest, and (2) does the regulation deny the owner an economically viable use of his/her property?96 If “yes” is the answer to either prong, there might be a compensable regulatory taking.

In Nollan v. California Coastal Commission,97 the Court departed from its traditional, lenient review of state land regulation in order to find a compensable taking. The Nollans sought a permit from California to rebuild their house on a beachfront lot in Ventura County.98 The California Coastal Commission (Commission) determined that the new house would be a “psychological hindrance” to the public by blocking visual access to the beach, effectively deterring the public from using the beaches.99 The Commission granted the Nollans’ permit but conditioned it upon the establishment of a public easement across their beachfront property where it paralleled the beach.100 The Commission hoped to offset the burden on the public’s ability to use the shorefront by providing a walkway in front of the Nollans’ home with lateral access to the beaches on either side. Although the lower courts had found the permit condition did not deprive the Nollans of all reasonable use of their property, and only partially diminished the value of their lot, the Supreme Court held that the condition amounted to a taking under the Fifth Amendment.101

Justice Scalia, writing for the majority, found that this particular land use regulation did not meet the long-recognized requirements that are necessary to prevent a taking,102 including “substantially advancing legitimate state interests,” and not “den[y]ing an owner economically viable use of his land.”103 He reasoned that the essential nexus did not exist because the condition of the easement did not further the end advanced by the Commission.104 However, as Justice Brennan illustrated in his dissent, the Commission was trying to “offset (the encroachment on public access by the Nollans’ new home) by obtaining an assurance that the public may walk along the shoreline in order to gain access to the ocean.”105 The dissent also criticized the majority’s high level of scrutiny of the State’s exercise of its police power.106 Traditionally, the Court had only determined whether the means are “rationally related” or “reasonably necessary” to accomplish the ends.107

Justice Scalia engages in judicial arrogation of legislative authority when he invalidates legislative decisions not found to be clearly arbitrary and unreasonable. Justice Brennan expounds on the potential effects of Scalia’s opinion when he states in his dissent, “the Court’s use of an unnecessarily demanding standard for determining the rationality of state regulation in this area thus could hamper innovative efforts to preserve an increasingly fragile national resource.”108

Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing.

93. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (physical occupation of private property with cable television hookup is considered to be a taking).
97. 483 U.S. 825 (1987)
98. See id. at 827.
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Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user.\textsuperscript{109}

The Nollan majority rejected the California Coastal Commission's efforts to deal with these complex relationships surrounding property and instead substituted its own judgment.

The Court did not stop with Nollan. It continued to expand the application of regulatory takings in requiring compensation for private landowners affected by actions of the state police power. Lucas v. South Carolina Coastal Council,\textsuperscript{110} also written by Justice Scalia, was the next significant decision. South Carolina's legislature enacted the Coastal Zone Management Act and the Beachfront Management Act in order to protect "critical areas" along the coast from destruction.\textsuperscript{111} The latter Act prevented Lucas from building two single family homes on property he owned along South Carolina's coast due to instability of the land.\textsuperscript{112}

Scalia outlined two categorical tests for determining whether there had been a taking: (1) any physical occupations are takings; and (2) if the taking would deprive the owner of full value of his/her property, then full compensation is necessary.\textsuperscript{113} However, the Court also established exceptions to these general applications. First, if a regulation prohibits uses of property that were not previously permissible under relevant property laws and nuisance principles of the common law then there is no taking.\textsuperscript{114} Secondly, there is no taking if there is not total value loss, and the regulation substantially advances a legitimate government interest.\textsuperscript{115}

This second exception is the "ad hoc taking test," used when there is no "categorical taking."\textsuperscript{116} The test generally involves a balancing approach, exemplified by the Court in Penn Central v. Mahon, where courts assess the character of the governmental regulation, the economic impact, and the owner's reasonable investment-backed expectations to determine whether a taking has occurred.\textsuperscript{117} Generally, wetlands cases will focus on the two latter elements because courts will often find a sufficient nexus between wetlands regulation and the legitimate end sought by the regulator.\textsuperscript{118} However, when isolated wetlands are at issue, there will likely be more focus on the character of the governmental regulation because of doubts about the true ecological significance of isolated wetlands.

There are several problems with Justice Scalia's test. One problem is that the Court fails to identify what the "nuisance at common law" exception covers. The exception could be applied literally, requiring an identical nuisance that is recognized at common law. However, if analogizing is appropriate for establishing a nuisance, then most harms today might be compared to a nuisance in the 19th century. Although Justice Scalia clearly endorses the use of analogies to common law nuisances,\textsuperscript{119} he tempers the use of the exception by requiring that the regulation reflect limitations "in the title itself, and in the restrictions that background principles of the state's law of property and nuisance already place upon land ownership" at the time of purchase.\textsuperscript{120} "Thus, it appears that a state legislature cannot insulate the government from a successful taking claim by 'finding' that the regulated activity constituted a 'nuisance'" because there would have had to be an expectation that the activity in question would be prohibited under state property and nuisance laws.\textsuperscript{121}

The most significant problem with the majority opinion is how the Court defines and evaluates the property interest. Compensation under this decision hinges on how one defines the property interest and whether or not "all value" has been taken. Ultimately the test seems to be a subjective one. Here, the Court found that all of Lucas' property value was "taken" by the regulation and required full compensation.\textsuperscript{122} However, even

\textsuperscript{109} Id. at 863-64 (Brennan, J., dissenting) (quoting Joseph Sax, Takings, Private Property, and Public Rights, 81 YALE L.J. 149, 152 (1971)).
\textsuperscript{110} 505 U.S. 1003 (1992).
\textsuperscript{111} See id. at 1009.
\textsuperscript{112} See id. at 1015.
\textsuperscript{113} See id. at 1022-1032.
\textsuperscript{114} See id. at 1016.
\textsuperscript{115} Id. at 1052.
\textsuperscript{116} See Chertok, supra note 94, at 1176.
\textsuperscript{117} See id. at 1176-77.
\textsuperscript{118} Id. at 1029.
\textsuperscript{119} Chertok, supra note 94, at 1175.
\textsuperscript{120} See Lucas, 505 U.S. at 1018.
though Lucas was prohibited from building the two houses, he was not prohibited from using his property in other ways. For instance, some critics argue he could pitch a tent on the land or live in a movable trailer and still have full enjoyment of the ocean-front property.\textsuperscript{123} He could also sell the land. Scalia diminishes the intrinsic value of nature, and land itself, by assuming that leaving land "substantially in its natural state" deprives the owner of all economically beneficial or productive use of his/her land.\textsuperscript{124}

Lucas also left unresolved the issue of whether, the takings test must be applied to the parcel as a whole or if some lesser entity, such as the affected area only, can be used. "It is well-settled that a mere diminution in value does not, without more, constitute a taking."\textsuperscript{125} Thus, it is particularly important in wetlands cases to determine whether the whole parcel is the applicable unit for analysis, since most wetlands regulations only affect a portion of the owner's land, leaving much of the land unregulated.\textsuperscript{126} If the Court allows the wetland portion to be isolated for the takings analysis, chances for compensation are greatly increased under both the categorical test and/or the ad hoc balancing approach.\textsuperscript{127}

The issue seemed well-settled by cases such as \textit{Penn Central Transportation Co. v. City of New York}\textsuperscript{128} and \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis,}\textsuperscript{129} explaining that the inquiry was into the whole parcel, not just the affected portion.

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, the Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole.\textsuperscript{130}

However, Justice Scalia brought the issue into question with footnote seven to his majority opinion in Lucas.

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded is one recognized at the common law.\textsuperscript{131}

This issue was not only well-settled before Lucas, but it was extraneous to the case since the size of the property was not in question.\textsuperscript{132} It is curious that Justice Scalia even brought up the issue; yet, the consequences of his doing so are exemplified by recent decisions of the federal circuit courts. Although a number of alleged takings cases regarding wetlands have addressed this issue and resolved that the whole parcel should be the unit of analysis,\textsuperscript{133} some recent post-Lucas Federal Court of Claims decisions are quite unsettling.

\textit{Loveladies Harbor v. United States} was the first wetlands-taking case to hold that the relevant parcel for defining whether there is a regulatory taking is the affected parcel, not the entire holding of land.\textsuperscript{134} The size of the property affected by the permit

\textfootnote{123.}{See id. at 1044 (Blackmun, J., dissenting) (finding that all economic value has been taken is erroneous because Lucas still possesses rights in the bundle of rights, such as the right to exclude others and use his property).}

\textfootnote{124.}{See id. at 1018.}

\textfootnote{125.}{Chertok, supra note 94, at 1172 (citing Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)).}

\textfootnote{126.}{See id.}

\textfootnote{127.}{See id.}

\textfootnote{128.}{438 U.S. 104, 130-31 (1978) (the air space above the station was not considered independently from the entire property in the takings analysis. The Court found no compensable taking had occurred).}

\textfootnote{129.}{480 U.S. 470, 500 (1987) (the Court did not consider an underground, coal, estate support independently from the rest of the company's coal reserves for determining the lost value in a takings analysis).}

\textfootnote{130.}{Penn Central, 438 U.S. at 130-31 (emphasis added).}

\textfootnote{131.}{Lucas, 505 U.S. at 1016.}


\textfootnote{133.}{See Deltona Corp. v. United States, 657 F.2d 1184, 1192-93 (Ct. Cl. 1981); Lentgen v. United States, 657 F.2d 1210, 1213-14 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982); Ciampitti v. United States, 22 Cl. Ct. 310, 319 (1991).}

\textfootnote{134.}{Loveladies Harbour v. United States, 21 Cl. Ct. 193 (1990), aff'd, 28 F.3d 1171, 1181 (Fed. Cir. 1994).}
denial was 12.5 acres and the original tract owned by Loveladies was 250 acres, although much of this had been developed and sold before they applied for permits to fill the 12.5 acres of wetlands.\(^ {135}\) When the Loveladies applied for the development permit, they still owned a total of 57 4 of the original acres, including the 12.5 acres in question.\(^ {136}\) “Even if the appropriate unit [for evaluating whether there was a taking] was the 57 4 acres still owned by Loveladies at the time of permit application, less than twenty-five percent of the parcel was restricted.”\(^ {137}\) This diminution in value probably would not have qualified the Loveladies for takings compensation based on Supreme Court precedent.\(^ {138}\) The Court, however, only considered the lost economic value of the 12.5 acre parcel. Since this amounted to a 99 percent loss of value, the majority found a taking based on Justice Scalia’s categorical imperative from \textit{Lucas}.\(^ {139}\)

In \textit{Florida Rock Industries v. United States}, the Court “limited its inquiry to the approximately 98 acres of the entire 1560-acre property that was the subject of the Corps permit application for limestone mining, even though the remainder of the site was eventually to be mined.”\(^ {140}\) Judge Plager, the same judge who later wrote \textit{Loveladies}, created a new compensable violation of the Takings Clause in “partial takings” of property through government wetlands regulation.\(^ {141}\) The \textit{Lucas} majority never decided this issue because it incorrectly assumed a total deprivation of economic value in the land and called it a categorical taking.\(^ {142}\) Judge Plager wrote in his opinion that the Court was compelled to decide the issue since it had been “much debated” after the \textit{Lucas} decision.\(^ {143}\)

These two post-\textit{Lucas} cases definitely extended the takings doctrine set forth in recent Supreme Court decisions, but their radical new approach was largely instigated by the open window of opportunity found in footnote seven of \textit{Lucas}.\(^ {144}\) These decisions also represent a trend in constitutional jurisprudence toward recognizing more regulatory takings and awarding more compensation. Although \textit{Loveladies} and \textit{Florida Rock} are federal court decisions, it is foreseeable their new doctrine will spread into state court decisions if the Supreme Court fails to clearly overrule their break from precedence.

Finally, in the Supreme Court’s most recent regulatory takings decision, \textit{Dolan v. City of Tigard},\(^ {145}\) the Court created a sequel to \textit{Nollan}’s essential nexus test by applying a heightened level of scrutiny to government actions involving land use regulation. Dolan applied to the City of Tigard, Oregon for a building permit to double her store-size and pave more of her lot for parking.\(^ {146}\) The City Planning Commission approved her permit with two restrictions, in order to protect the floodplain between her property and an adjacent creek and compensate for the likely increase in automobile traffic following her store expansion.\(^ {147}\) The Commission required a dedication to the city of 7000 square feet of her property lying within the creek’s floodplain for a storm drainage system and an additional fifteen square feet adjacent to the floodplain for a bicycle-pedestrian pathway.\(^ {148}\)

The majority opinion, authored by Justice Rehnquist, concluded that there was an essential nexus between the legitimate state interests, preventing flooding and reducing traffic congestion, and the city’s permit conditions.\(^ {149}\) After adopting this essential nexus test from \textit{Nollan}, the Court went on to analyze the degree of connection required between the impact of Dalon’s future land development and the regulations imposed upon her.\(^ {150}\) The Court defined the standard as “rough proportionality,” meaning that the City must make a case specific determination that the development restrictions relate both in nature and extent to the impact of Dolan’s land development.\(^ {151}\) “Therefore, under \textit{Dolan}, local planning agencies must now show that permit conditions

\begin{itemize}
\item \textit{See} Blumm, supra note 132, at 171-184.
\item \textit{See} id.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See}, \textit{e.g.}, \textit{Loveladies}, 28 F.3d at 1179-82; Chertok, supra note 94, at 1174.
\item \textit{Chertok}, supra note 94, at 1174.
\item \textit{See} Florida Rock Industries v. United States, 18 F.3d 1560, 1570 (Fed. Cir. 1994).
\item \textit{Lucas}, 505 U.S. at 1019. Justices Kennedy, Blackmun, Stevens and Souter did question the legitimacy of finding a “total deprivation of economic value” in Lucas’ property. \textit{Id.} at 1032-33 (Kennedy, J., concurring); \textit{Id.} at 1043-45 (Blackmun, J., dissenting); \textit{Id.} at 1043 (Stevens, J., dissenting); \textit{Id.} at 1077-78
\item \textit{Id.}
\item \textit{See} id.
\item \textit{See} id.
\item \textit{See} id.
\item \textit{See} id.
\item \textit{See} id.
\item \textit{See} id.
\item \textit{See} id.
\item \textit{See} id. at 388.
\end{itemize}
imposed on planned developments are roughly proportional to the projected impact of the development.” In applying its newest test, the Court found that the City did not make an individualized determination of why Dolan should have to dedicate a portion of her property to the City in order to protect the public from flooding or traffic congestion. The Court reasoned there were other ways for the City to accomplish its legitimate ends without forfeiting Dolan’s right to exclude others from her property. With respect to the bikepath, the Court found that the City had not definitively demonstrated that traffic congestion would be offset.

The dissent criticized the majority for placing yet a “new constitutional hurdle in the path of [the City’s] conditions.” Justice Stevens argued that the majority failed to consider the effect of the regulation on Dolan’s property rights as a whole and instead looked to the effect on one strand of property rights. Further, the Court never acknowledged the benefits that Dolan would gain, such as protection from flooding and an increase in passersby who might be potential buyers. Justice Stevens was especially concerned about the consequences of applying such a burdensome test on state regulators. He stated that any expansion of Nollan should be limited, and the Court should “venture beyond considerations of a condition’s nature or germaness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development’s adverse effects that it manifests motives other than land use regulation on the part of the city.”

Many critics, including Justice Stevens, argue that placing the burden on local government to show that they have complied with the rough proportionality test severely hampers the government’s ability to effectively regulate land development for the benefit of the public. If the government can demonstrate that the conditions it has imposed in a land-use permit are rational, impartial and conducive to fulfilling the aims of a valid land-use plan, a strong presumptive validity should attach to those conditions. Therefore, if a landowner wishes to challenge the constitutionality of a regulation that the government has demonstrated to be rational, then she should have the burden of proof. Instead, under this new standard, the government must demonstrate that the regulation is related "both in nature and extent to the impact of the proposed development." While the majority views its "rough proportionality" standard as a constitutional check on the state’s police power, in actuality it will simply create inefficiency and difficulty for the regulatory agency. Regarding this newest test for constitutional analysis in the changing era of regulatory takings, Justice Stevens wrote:

> in our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. Where there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur.

According to some scholars, this new era in regulatory takings law “conveys[s] two unmistakable points: the government has the burden of justifying its regulation, and the justification must be reconciled with the common law of property.” Some even go so far to say that "no public harm is created, by the landowner undertaking a common law use [of property].” According to others, this trend exemplifies the danger of defining a Takings Clause test: "what level of scrutiny applies to government actions in the land use regulatory context.” The Court is going too far in these cases in applying heightened scrutiny to government regulations and forcing the state to jump through hoops, some insurmountable, just to regulate land use for the benefit of society.

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152. Sosnosky, supra note 147, at 1683.
153. See Dolan, 512 U.S. at 395.
154. See id.
155. See id.
156. Id. at 397 (Stevens, J., dissenting).
157. See id. at 398 (Stevens, J., dissenting).
158. Id. at 398 (Stevens, J., dissenting).
159. See id. at 402 (Stevens, J., dissenting).
160. Id. at 411 (Stevens, J., dissenting).
161. See id. (Stevens, J., dissenting).
162. Id. at 391; Julian R. Kossow, Dolan v. City of Tigard,
V. The Dual Effect On Environmental Protection Legislation

If Lopez lives up to its potential, the Court has given more power to the states to regulate under the guise of federalism and Congressional power. On another level, under Fifth Amendment takings analysis, the federal judiciary actually usurps power better left in the hands of majoritarian state legislative determination. The essence of the dilemma is that both federal and state branches of government could be unable to promulgate and maintain effective environmental regulations, such as isolated wetlands regulations.

Already, legal scholars and other interested parties are “plotting to ‘Lopez’ environmental regulations.”168 As a specific remedy to cases like Leslie Salt, one scholar suggests courts rule “that neither potential nor actual use by migratory birds allows Congress to regulate isolated wetlands using the commerce power.”169 Even those with less radical viewpoints about the consequences of Lopez foresee a resurgence of commerce clause challenges. “Wetland and similar environmental regulations are particularly vulnerable.”170 “It is not apparent, however whether the case ultimately will be judged an aberration or a watershed.”171

A common reassurance by those who call for an extension of Lopez to federal environmental laws is that “states and local governments can protect isolated wetlands.”172 Indeed, many of these promoters do not call for the wanton destruction of wetlands, but find the proper regulating entity to be the state. However, even if the proper regulating entity were the state, its ability to adequately protect wetlands is highly questionable given states’ limited financial resources. “[I]ncreased compensation requirements [under the Takings Clause] will produce less regulation, which in turn will produce more environmental injuries.”173 Although property-rights advocates celebrated the victories in Nollan, Lucas and Dolan, they may have less to celebrate in the future when regulatory agencies become paralyzed with effectuation of land use and environmental regulations and people realize that governments will either go bankrupt under the current majority trend in takings jurisprudence, implement new taxation programs to fund “ takings,” or be forced to give up the invaluable service of protecting our threatened environment.174

Due to concern over the potential increase in compensation to be paid for regulatory takings, a Philadelphia real estate developer wrote: “Wetlands laws protect property values by keeping communities attractive and by buffering floods Also the sheer cost of paying property owners for their claims and the specter of continual litigation would dramatically undermine our environmental laws.”175

It is possible that Lopez will not be a conservative counterrevolution and will simply be used as a definition of the outer limits to federal activism.176 It is also possible that the new trend in takings jurisprudence will be tempered by an opinion in the next takings case for which the Supreme Court grants certiorari. However, some effects will come of these cases as it is likely the Court will not revert to prior precedents immediately after swaying from them.

VI. Proposal

The federal government has clearly taken the lead in the regulatory field of environmental protection. It has established (and it enforces) national, uniform standards for many environmental problems, including the protection of isolated wetlands. Congress has established such standards and programs, like the Clean Water Act, in order to protect national resources and prevent national disasters. States are free to develop their own programs and standards as long as they are consistent with and do not fall below the standards set by Congress. In fact, many environmental statutes, including the Clean Water Act, encourage


169. Leman, supra note 69, at 1268.


172. Leman, supra note 69, at 1271-72.

173. Blumm, supra note 132, at 180.

174. See Kossow, supra note 162, at 244.


176. See Merritt, supra note 61, at 750 (“The modest ambition proclaimed by the majority — to prune an excessive and unnecessary piece of congressional meddling while leaving prior Commerce Clause decisions untouched — insulates those two principles from reversal. Lopez will be distinguished, but it is unlikely to be reversed.”).

But see, Lopez, 514 U.S. at 614-15 (Souter, J., dissenting) (“Today’s decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings.”).
states to establish their own policies to handle unique environmental problems within their borders. The existing federal environmental regulations have many downfalls, but the only assurance for safeguarding values and interests of proven national significance is through federal stewardship.

While some may doubt the true national significance of intra-state isolated wetlands, scientific findings and our increase in knowledge of ecosystems demonstrate that our interdependent system is affected by the destruction of such wetlands.\(^177\) The effects transcend borders due to the important roles these wetlands play in the survival of migratory bird populations, the survival of endangered species, maintenance of a healthy watershed, prevention of flooding, and encouraging recreation, just to name a few. Each of these effects extends beyond the state in which the isolated wetland is located. The impact is economic as well as ecological. Therefore, it is critical that Congress has authority to regulate national environmental concerns.

In order to avoid potential constriction of environmental protection regulations stemming from such management there are several options available. First, I would argue that Lopez was incorrectly decided. The majority's break from precedent is laid out in the dissenting opinions of Justice Souter and Justice Breyer. They demonstrated how the majority failed to apply the well-established rational basis review for congressional legislation. Justice Souter explained that the existence of federal legislation implies a finding by Congress that a particular activity substantially affects interstate commerce.\(^178\) "The only question is whether the legislative judgment is within the realm of reason."\(^179\) Justice Breyer writes, "the [Gun-Free School Zones] statute falls well within the scope of the commerce power as this Court has understood that power over the last half-century."\(^180\) "[A] holding that the particular statute falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply preexisting law to changing economic circumstances. It would recognize that, in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being."\(^181\)

The essential nexus between regulating guns in school zones and a substantial effect on interstate commerce is not an unreasonable, inferential argument. Today, the effect on our nation of gun-related violence in and around schools is a significant commercial and human problem.\(^182\) The Court should have respected the rationality of the legislation based on this finding in comport with commerce power precedence.

Alternatively, if Lopez endures as a representation of an outer limit to the federal commerce power, isolated wetlands regulation can be distinguished from the Gun-Free School Zones Act in order to survive a commerce clause challenge. First, Congress and the regulatory agencies have made it clear that they will regulate any wetlands which could have a substantial effect on interstate commerce.\(^183\) In promulgating regulations, both the EPA and the Corps have listed specific examples constituting a "substantial effect" such as the presence of migratory birds on isolated wetlands, the presence of interstate travelers, or prevention of flooding.

The nexus between the destruction of isolated wetlands and the loss of these interstate benefits is different from the nexus between guns in school zones and a decrease in national economic productivity. The former does not require a piling of "inference upon inference," a criticism of the government's nexus argument in Lopez.\(^184\) For instance, destruction of an isolated wetland which provides habitat to migratory birds will have a direct impact on the birds' survival and, therefore, on any commercial or economic benefit of the birds to other states or interstate travelers. Although one destroyed intra-state isolated wetland might simply force the birds to migrate elsewhere, the cumulative effect of wetland destruction would be devastating. Since Lopez did not overrule Wickard v. Filburn, this cumulative approach to analyzing wetlands destruction (as an economic activity) is still constitutionally valid.\(^185\) This type of argument is not as expansive as the national productivity reasoning in Lopez because the substantial effect on interstate commerce is clear without resorting to an inferential argument. It also appears from the majority opinion that an explicitly detailed congressional record of why the regulation pertains to interstate commerce will lend itself to more deferential review.\(^186\) So any manipulation of the record to strengthen the government's argument will be beneficial.

It is important to consider that the Court does

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177. See supra notes 19-28 and accompanying text.
178. See Lopez, 514 U.S. at 613 (Souter, J., dissenting).
179. Id.
180. Id. at 615 (Breyer, J., dissenting).
181. Id. at 624-25 (Breyer, J., dissenting) (citations omitted).
182. See id. at 623 (Breyer, J., dissenting).
183. See supra notes 84-90 and accompanying text.
184. Lopez, 514 U.S. at 567.
185. Id. at 557-58.
186. See id. at 563.
not want to interfere with the states' general police power within their own borders. When states, acting separately, face difficulty in protecting environmental interests, however, it is clear that extensive federal regulation is justified. 187 "A case could be made that there is a relationship between the nation as a whole and the natural heritage of the nation considered as a whole, that gives rise to a general interest in our environment and resources that is not just the sum of the interests of the states." 188

However, if states take responsibility for protecting their own isolated wetlands without help from the federal government, the Fifth Amendment's Taking Clause should not present such a heavy burden that it would stifle effective government regulation. The new, strict takings tests are an unreasonable break from precedent and unjustifiable in the modern regulatory state where traditional views about property rights and community rights are evolving toward even greater interconnectedness and interdependency. Justice Stevens, in his Lucas dissent, emphasized how property gets redefined as our society evolves. 189 "[O]ur ongoing self-education produces changes in the rights of property owners: New appreciation of the significance of endangered species, importance of wetlands, and the vulnerability of coastal lands shapes our evolving understandings of property rights." 190

"Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." 191 First, the Supreme Court's new doctrine that if a property-owner was not subject to a certain limitation when she purchased the property (the nuisance exception), there is no government exception within a takings analysis, is ill-conceived. Secondly, the categorical taking approach emphasized in Lucas, eliminates any balancing of the property owner's interests with the government's interest in protecting the community, and it creates innumerable difficulties in consistently defining the property interest at stake. Finally, the Nollan and Dolan innovation of placing the burden of proof on the government to demonstrate the regulation is not only necessary to achieve a legitimate end but roughly proportional to the impact created by the property owner is unreasonable and not based on solid constitutional precedent.

Even in applying the new tests, courts should be able to avoid overburdensome regulatory takings compensations by using the "nuisance at common law" exception. "Nuisance determinations are both local and dynamic. As the subtleties of local ecology are better understood by modern science and incorporated into local conceptions of harm, the house built yesterday may not be the equivalent of the house built today." 192 Similarly, in his dissent in Lucas, Justice Blackmun explained that in order to determine when there is a nuisance, courts must look to whether a particular use is harmful. 193 He then questioned why the majority trusts judges in the 18th and 19th centuries to distinguish a harm from a benefit, but not 20th century judges or legislators. 194

A nuisance is defined by subjective interpretations of society. These definitions will not remain static. Just as Justice Rehnquist gave the example of building a nuclear plant on a fault line as something that would be a nuisance at common law, so would the destruction or impairment of isolated wetlands. Building a nuclear plant on a fault line is a nuisance because of our knowledge that if there was an earthquake, toxic material and radiation leaks would cause significant environmental damage. Similarly, destroying wetlands is a nuisance because of our knowledge today that if we lose too many, we will also endanger our health, our natural environment and irreplaceable plants and animals.

188. Id. at 582.
189. See Lucas, 505 U.S. at 1069-70 (Stevens, J., dissenting).
190. Id. (citations omitted).
191. Id. at 1039-40 (Blackmun, J., dissenting).
193. See Lucas, 505 U.S. at 1054-55.
194. See id.
VII. Conclusion

We live in an ecologically interdependent world where wetlands, whether isolated or adjacent, are vital life support systems. The Supreme Court’s shift to limiting federal power under the Commerce Clause, combined with its shift to create more compensable regulatory takings under the Fifth Amendment, might unduly restrict appropriate protective mechanisms for these natural resources. It is unnecessary to interpret the Constitution so restrictively and it runs counter to the regulatory state in which we live. These trends must either be reversed or limited in order for the government, whether state or federal, to protect the environment in a way the private sector alone has failed to do.