

Setting Boundaries for Extraterritorial Applications of the Property Clause: An Assessment of an Alternative Source of Authority for Environmental Regulations

CYRIL ROBERT EMERY*

TABLE OF CONTENTS

INTRODUCTION.....	515
I. THE “NEXUS” TEST AND HYPOTHETICAL ACTS.....	519
A. <i>The “National Parks Clean Air Act”</i>	520
B. <i>The “Gun-Free Federal Building Zones Act”</i>	520
C. <i>The “Clean Water Act”</i>	521
D. <i>The “Endangered Species Act”</i>	521
E. <i>The “National Parks Periphery Act”</i>	522
II. APPLYING <i>LOPEZ</i> AND <i>MORRISON</i> TO THE PROPERTY CLAUSE.....	522
A. <i>Police Power</i>	523
B. <i>Aggregation of Effects</i>	524
C. <i>Areas of Traditional State Concern</i>	526
III. THE “DIRECT PHYSICAL HARM” TEST.....	528
CONCLUSION.....	531

INTRODUCTION

The Supreme Court severely limited Congress’s authority to enact legislation under the Commerce Clause in *United States v. Lopez*¹ and *United States v. Morrison*.² Scholars have made much of these decisions, questioning their validity and long-term viability.³ Environmental law commentators have particular cause

* J.D. Candidate, 2004, Indiana University School of Law—Bloomington; B.A. 2000 Columbia College, Columbia University. I would like to thank Professor Dawn Johnsen for her advice and comments. I would also like to thank Amy Cohen and Josh Chanin for their assistance in editing this Note. Finally, I would especially like to thank Chelsea T. Wald for her editorial and emotional support.

1. 514 U.S. 549 (1995) (holding that Congress exceeded its authority under the Commerce Clause in regulating the possession of guns near schools in the Gun-Free School Zones Act).

2. 529 U.S. 598 (2000) (holding that the civil remedy provisions of the Violence Against Women Act went beyond the scope of the Commerce Clause).

3. See, e.g., John A. Frerejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1034-35 (2002); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 138-43 (2001). The Indiana University School of Law dedicated a symposium to the issues raised in part by *Morrison* and *Lopez*, entitled *Congressional Power in the Shadow of the Rehnquist Court: Strategies for the Future*, 78 IND. L.J. 1 (2003). The topics covered by participants included possible strategies for restricting the Court’s power. See, e.g., Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Super Majority Rule*, 78 IND. L.J. 73 (2003) (proposing a requirement of a supermajority for the Court to overturn acts of Congress enacted under the Commerce Clause); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003) (encouraging Congress to use the appointments process to keep a check on the Court). This summary of the

for concern. The Court's suggestion in these cases, that Congress may regulate only "economic activity" under its commerce power,⁴ has particular relevance in the context of environmental law where little of the conduct regulated is "economic" on its face. In fact, the Court has already intimated that Congress does not have authority under its commerce power to protect isolated wetlands,⁵ and scholars predict that the Court may strike down the takings provision of the Endangered Species Act.⁶ In an attempt to preserve Congress's continued ability to regulate in these areas, some have suggested an alternative source of authority—the Property Clause.⁷

Under the Property Clause, Congress has the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."⁸ The Court has interpreted Congress's property power very broadly, stating in the past that it is "without limitation."⁹ Most recently, however, in *Kleppe v. New Mexico*,¹⁰ the Court hedged on this proclamation, stating that the "furthest reaches of the power granted by the

symposium is based on Marci A. Hamilton's brief synopsis of the above papers in *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 312 n.2. Hamilton ultimately disagrees with those seeking to limit the Court's power, concluding that "the Court's federalism jurisprudence is performing a direly needed public service for the people." *Id.* at 320.

4. *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 559-60.

5. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001) (The Court did not make this determination on constitutional grounds, but it limited the Clean Water Act's scope to exclude isolated wetlands, noting that a broader interpretation "would result in a significant impingement of the States' traditional and primary power over land and water use," raising "significant constitutional questions."); see also Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31 ENVTL. L. REP. 11,079, 11,082 (2001) ("There seems to be little, if any, doubt that if Congress ever were to pass a law employing similar means or seeking to [protect isolated wetlands] that the Court would strike it down as violating the Commerce Clause.").

6. Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 3 (2001); Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. 10,980 (2000); Sophie Akins, Note, *Congress' Property Clause Power to Prohibit Taking Endangered Species*, 28 HASTINGS CONST. L.Q. 167 (2000); Gavin R. Villareal, Note, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76 TEX. L. REV. 1125, 1125-26 (1998). For the view that Congress's power to enact environmental legislation is not affected by *Lopez* or *Morrison*, see Stephen M. Johnson, *United States v. Lopez: A Misstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 81-82 (1996) (making the argument after *Lopez*); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 793-95 (2002); Christopher H. Schroeder, *Environmental Law, Congress and the Court's New Federalism Doctrine*, 78 IND. L.J. 413 (2003).

7. Appel, *supra* note 6, at 6; Gerhardt, *supra* note 6, at 10,990; Akins, *supra* note 6, at 168-69; Villareal, *supra* note 6, at 1147-53.

8. U.S. CONST. art. IV, § 3, cl. 2.

9. Appel, *supra* note 6, at 2 (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

10. 426 U.S. 529 (1976) (upholding the Wild Free-Roaming Horses and Burros Act). For additional discussion about *Kleppe*, see *infra* note 20 and text accompanying notes 106-10.

Property Clause have not yet been definitively resolved,"¹¹ leaving open the "question of the permissible reach . . . over private lands."¹² The question of how much power the Property Clause gives Congress to regulate activities on non-federal lands is of key importance to anyone hoping to use the Property Clause to enact environmental legislation. While the federal government owns more than one-quarter of the land in the United States¹³ and has extensive power over that land,¹⁴ those hoping to use the Property Clause as alternative authority for wide-reaching regulations like the Endangered Species Act¹⁵ need the clause to apply extraterritorially, or beyond the boundaries of federal lands.

The Supreme Court has upheld extraterritorial applications of the Property Clause, but only in cases dealing with physical threats to federal property coming from immediately adjacent lands.¹⁶ Would the Court uphold an act promulgated under the Property Clause that involves regulation of activity that takes place far afield, like the Endangered Species Act, which under the Commerce Clause prohibits the taking of protected animals anywhere?¹⁷ As Peter A. Appel puts the overarching question of this Note, "What are the 'furthest reaches' of the power that the Court has otherwise described as 'without limitation'?"¹⁸

Among scholars advocating the Property Clause as an alternative source of power for Congress's environmental regulations, only Appel has attempted to answer this question.¹⁹ Appel envisions an expansive property power analogous to

11. *Kleppe*, 426 U.S. at 539.

12. *Id.* at 547.

13. 27.7% to be exact. PUBLIC LAND STATISTICS 2000, at 7 tbl.1-3 (2000), reprinted in GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 10 (5th ed. 2002).

14. Appel provides an in-depth history of the broad power held by the government on its lands in the post-*Dred Scott* era. Appel *supra* note 6, at 55-78 (citing, e.g., *Kleppe v. New Mexico* 426 U.S. 529 (1976); *United States v. San Francisco*, 310 U.S. 16, 29 (1940); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *Light v. United States*, 220 U.S. 523 (1911); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1872)).

15. See Appel, *supra* note 6, at 6; Gerhardt, *supra* note 6, at 10,990; Akins, *supra* note 6, at 168-69; Villareal, *supra* note 6, at 1147-53.

16. *United States v. Alford*, 274 U.S. 264 (1927) (upholding a federal statute imposing criminal punishment for failure to extinguish a fire built near federal lands); *Camfield v. United States*, 167 U.S. 518 (1897) (upholding a statute prohibiting the enclosure of public lands, even when the enclosing fences are built on surrounding private lands). Lower courts have also dealt with statutes having extraterritorial effects, most notably in *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981) (upholding provisions of the Boundary Waters Canoe Area Wilderness Act, which regulated the use of motorboats and snowmobiles on adjacent non-federal lands and waters). See also *United States v. Arbo*, 691 F.2d 862 (9th Cir. 1982) (upholding compliance inspection of a mining claim by government agents on land adjacent to federal property); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (upholding limits on duck hunting occurring in close proximity to federal lands); Appel, *supra* note 6 at 77-78. No court, however, has dealt with regulations of activity well distant from public lands.

17. 16 U.S.C. § 1538(a)(1)(B) (2000).

18. Appel, *supra* note 6, at 2. Appel is referring, of course, to limits other than those that apply to all legislation, such as the Due Process Clause. See *id.* at 79.

19. Eugene R. Gaetke and Joseph L. Sax proposed tests in the pre-*Lopez* era for finding the limits of the Property Clause. Gaetke developed a balancing test that weighed the value of an extraterritorial regulation to the public lands against the imposition that regulation

the “plenary congressional authority” once held under the commerce power, but free of the limits of *Lopez* and *Morrison*.²⁰ To this end, he proposes a test that allows Congress to regulate extraterritorial activities under the Property Clause as long as it can “demonstrate a nexus between the rule or regulation and the federal property being protected.”²¹

This Note contends, however, that if an easy-to-satisfy test, such as the “nexus” test, defines the outer limits of the property power, that power will come to present the same concerns the Court expressly considered in *Morrison* and *Lopez*: an unchecked federal police power;²² the aggregation of effects that, on their face, have nothing to do with the clause at hand;²³ and interference by the federal

would put on the owners of affected property, Eugene R. Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381, 398 (1981), while Sax relied on language from *Camfield v. United States*, 167 U.S. 518 (1897), the earliest property case investigating a regulation of non-federal property, in a proposal that the government only be able to regulate nuisance-like activities. Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 250-55 (1976). Appel is convincing in his assertion that Gaetke’s proposed “rough calculus” gives an inappropriate amount of policy-making power to the judiciary, Appel, *supra* note 6, at 87-89. Appel also draws attention to the flaws of Sax’s proposal, indicating that it “incorporates the inherent weaknesses of substantive nuisance law and fails to define the outer boundary of congressional authority under the Property Clause.” *Id.* at 88. See *infra* text accompanying notes 100-05 for a discussion of a test proposed by Blake Shepard, *The Scope of Congress’ Constitutional Power Under the Property Clause: Regulating Non-Federal Property to Further the Purposes of National Parks and Wilderness Areas*, 11 B.C. ENVTL. AFF. L. REV. 479 (1984).

20. Appel, *supra* note 6, at 96, 98, 101-02. Appel additionally concludes that the federalism limits of the Tenth Amendment should not apply to the property power. *Id.* at 103-17. This Note does not question that judgment in large part because the modern Court’s first case limiting congressional commerce power due to federalism concerns, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), was decided within a week of *Kleppe v. New Mexico*, 426 U.S. 529 (1976), see *supra* text accompanying notes 10-12, where the Court unanimously “ignored New Mexico’s effort to base a claim on the tenth amendment.” Sax, *supra* note 19, at 253 n.72 (citing Appellec’s Motion to Dismiss or Affirm at 25). *Kleppe*, although unanimous, has been found to have had doubters. In a recently discovered note to Justice Marshall, Justice Burger expressed concern about the case, writing, “I assumed ranchers would want to be free to shoot trespassing burros but if Byron [White] and Bill Rehnquist want to put wild burros on a new form of ‘welfare’ I will submit.” COGGINS ET AL., *supra* note 13, at 193 (quoting J. Burger).

21. Appel, *supra* note 6, at 83.

22. *United States v. Lopez*, 514 U.S. 549, 567 (1995) (“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.”); see also *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” (quoting *Lopez*, 514 U.S. at 564)).

23. *United States v. Morrison*, 529 U.S. 598, 615 (2000) (“If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”).

government in areas of traditional state concern.²⁴ Therefore, if the Court continues to make decisions based on these concerns, it probably will not adapt Appel's "nexus" test to assess legislation Congress enacts under the Property Clause. In reaching this conclusion, Part II of this Note analyzes Appel's "nexus" test and presents a number of hypothetical acts he finds valid under it. Part III utilizes these acts to show how legislation enacted under a broadly construed property power would likely present the same concerns that prompted the decisions in *Morrison* and *Lopez*. Part IV proposes a "direct physical harm" test as an alternative for finding the limits of the Property Clause and examines the ramifications of adopting it. Part V concludes that, in light of *Lopez* and *Morrison*, the "direct physical harm" test provides a better guide than the "nexus" test in predicting how the Court will review wide-reaching environmental regulations enacted under the Property Clause.

I. THE "NEXUS" TEST AND HYPOTHETICAL ACTS

Appel bases his proposed limits on the property power on the text of the Constitution and through analogy to the Commerce Clause.²⁵ Appel creates his test for determining the limits on the property power without the benefit of decisive Supreme Court interpretation, as *Kleppe v. New Mexico* did not resolve the "question of the permissible reach" of Congress when legislating under its property power "over private lands."²⁶

Article IV of the Constitution states that Congress may "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."²⁷ Appel identifies the terms "needful" and "respecting" as two key elements of this clause.²⁸ Since the Court will defer to Congress in determinations of what is "needful" federal action, he correctly observes that the meaning of "respecting" is the only element left open to interpretation.²⁹

The requirement of "respecting" federal property will easily be met when Congress is legislating activities on its own land, any of which will "respect" that land. When Congress attempts to legislate extraterritorially, on the other hand, the meaning of "respecting" becomes very important. Appel states that the requirement merely imposes a limitation that demands Congress "demonstrate a nexus between the rule or regulation and the federal property being protected."³⁰ Just how expansive the authority Appel believes Congress possesses under this "limitation"

24. *Id.* at 611 (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur . . .").

25. Appel, *supra* note 6, at 79-80, 94-96.

26. 426 U.S. 529, 547 (1976). *Kleppe* dealt with regulations affecting federal property. It held that Congress could prohibit takings of burros on public lands contrary to New Mexico state law legitimating the practice. The Court found Congress's determination that horses and burros constituted "an integral part of the natural system of the public lands," meant that regulations of their taking constituted "'needful' regulation 'respecting' the public lands." *Id.* at 535-36.

27. U.S. CONST. art. IV, § 3, cl. 2.

28. Appel, *supra* note 6, at 80.

29. *Id.* at 82 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

30. *Id.* at 83.

can be seen in the ways he demonstrates this “nexus.” First, Congress can demonstrate a “nexus” by aggregating effects, which allows regulation of “activities that, in the aggregate, harm federal lands in a demonstrable way.”³¹ Second, Congress can demonstrate the “nexus” based solely on “the tangible presence of federal property” near the activity being regulated.³²

Appel believes that the near-plenary extraterritorial authority thus provided Congress under the Property Clause is analogous to the power created in the Court’s Commerce Clause jurisprudence and therefore represents a valid proposal for limits on the property power.³³ This Note examines a number of hypothetical acts Appel finds valid under his proposed test to illustrate how extensive a broadly interpreted property power can be.

Appel uses the first two of these hypothetical acts specifically to show the broad power Congress would enjoy under his vision of the Property Clause. The final three acts represent legislation that either replaces current commerce power regulations in danger of being struck down by the courts or that Congress has already considered.

A. *The “National Parks Clean Air Act”*³⁴

Appel proposes the “National Parks Clean Air Act” to be a “broad statute regulating the emission of sulfur dioxide (SO₂) and oxides of Nitrogen (NO_x)” enacted “because these emissions are precursors to acid rain, which harms national parks.”³⁵ Appel imagines this statute as reaching polluters “both within and outside of the state in which federal lands lie.”³⁶ This statute is easily found valid under Appel’s broad vision of the Property Clause, as he finds that there is clearly a “nexus between the rule or regulation and the federal property being protected” because the emissions, taken together, create acid rain that will damage federal lands, or in other words, “in the aggregate, harm federal lands in a demonstrable way.”³⁷

B. *The “Gun-Free Federal Building Zones Act”*

Appel’s hypothetical “Gun-Free Federal Building Zones Act” simply mirrors the Gun-Free School Zones Act of 1990,³⁸ which the Court struck down in *United*

31. *Id.* at 84.

32. *Id.* at 125.

33. *Id.* at 94-96.

34. The hypothetical acts in this Note will always appear in quotation marks, to distinguish them from official acts of Congress.

35. Appel, *supra* note 6, at 80. To avoid proposing a statute that would have been valid under Sax’s nuisance theory of the property clause, see *supra* note 19, Appel asserts that the level of this regulation “would exceed the level produced through a nuisance-abatement action.” *Id.* at 81.

36. *Id.* at 80. It was presumably the thought of statutes like this that prompted Eugene R. Gaetke to worry that a Property Clause “without limitations” could lead, hypothetically, to “a state containing no federal lands [to] be subjected to . . . federal regulation.” Gaetke, *supra* note 19, at 394 n.73.

37. Appel, *supra* note 6, at 83-84.

38. 18 U.S.C. § 922(q)(1)(A) (2000).

States v. Lopez.³⁹ The Gun-Free Schools Zones Act made it a federal offense to carry a firearm in a school zone. Appel's version merely switches the source of congressional power from the Commerce Clause to the Property Clause, and changes the School Zones Act to "within 1000 feet of a federal building."⁴⁰ Appel finds the nexus between carrying firearms and federal property to exist because firearms located near a federal building "can cause death and serious injury, limit worker productivity, and create increased security costs for the federal government to protect its property."⁴¹

C. The "Clean Water Act"

Appel's version of the "Clean Water Act" utilizes the Property Clause instead of the Commerce Clause as the source of congressional authority. The Act is otherwise unchanged,⁴² except that under Appel's version it could reach isolated wetlands that the Supreme Court interpreted the Commerce Clause version not to reach in *Solid Waste Agency v. United States Army Corps of Engineers*.⁴³ Appel believes that reaching these wetlands is valid under his "nexus" test if Congress "in clear legislation indicate[s] that migratory birds constitute an essential attribute of the beauty and value of public lands; that migratory birds rely on isolated wetlands for their habitat and breeding; and that filling such wetlands would damage the property of the United States."⁴⁴

D. The "Endangered Species Act"

Appel is not alone in his notion that the Property Clause could provide an alternative source of authority for congressional regulation of takings of endangered species,⁴⁵ and this Note will examine both his version of an "Endangered Species Act" and one proposed by Sophie Akins. Appel confines his version of the Act to "those species [that] sometimes occupy federal lands," and the protection of which Congress determines "preserves the overall value of the federal lands."⁴⁶ The limitation requiring that the species touch the land, however, seems to

39. 514 U.S. 549 (1995).

40. Appel, *supra* note 6, at 80. Appel points out that carrying firearms *into* federal buildings is already prohibited. *Id.* at 80 n.372 (citing 18 U.S.C. § 930 (2000)).

41. *Id.* at 98.

42. It would prohibit the discharge of pollutants into waters, just like the original, 33 U.S.C. § 1344(a) (2000); 33 C.F.R. § 328.3(a)(3) (2003).

43. 531 U.S. 159, 173-74 (2001) (The Court did not make this determination on constitutional grounds but did suggest that the broader interpretation would raise "significant constitutional questions.").

44. Appel, *supra* note 6, at 123. Appel admits that because of the requirement of a "nexus" built on migratory birds his version of the Act may not reach all the wetlands reached by the Commerce Clause version. *Id.* Thus, Appel presumably means that he envisions the Property Clause version as a supplement to the original.

45. See Akins, *supra* note 6; Villareal *supra* note 6. The need for alternative authority for the takings clause of the current Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B) (2000), may never arise since the Supreme Court recently declined to hear a *Morrison*-like challenge to the Act. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001). See also Mank, *supra* note 6, at 793-95.

46. Appel, *supra* note 6, at 122.

unnecessarily limit Congress's power under Appel's "nexus" test. If all that is required is that the regulated activity "in the aggregate, harm[s] federal lands in a demonstrable way,"⁴⁷ Sophie Akins's argument that Congress can regulate any endangered species, "because the extinction of one species could logically have an effect on other species located on federal land,"⁴⁸ would meet Appel's property power standard just as easily.

E. The "National Parks Periphery Act"

Appel does not name the next hypothetical act, but this Note will address it as the "National Parks Periphery Act" because Appel envisions it as a "statute that dictates land-use planning within a certain radius around a national park," where the "Park Service directly regulates everything from the presence of fast food restaurants and trinket shops to the color and style of the buildings in order to protect the visual corridor leading to [that] . . . park."⁴⁹ This Act is different from those above because "some evidence exists that Congress has attempted to extend the reach of its Property Clause power to this extent."⁵⁰ Suggesting that this Act provides a closer call than his other hypothetical regulations,⁵¹ Appel nonetheless concludes that, "the tangible presence of federal property . . . provides a sufficient nexus between the federal concern and the activity regulated."⁵²

The breadth and variety of these extraterritorial regulations exhibits an extremely broad property power that could significantly supplement and, if necessary, replace the power Congress has under the Commerce Clause to create environmental and other regulations.

II. APPLYING *LOPEZ* AND *MORRISON* TO THE PROPERTY CLAUSE

In *Lopez* and *Morrison*, the Court considered a variety of factors in coming to a decision to limit the scope of the commerce power: the possible development of an unchecked federal police power,⁵³ Congress's aggregation of noneconomic

47. *Id.* at 84.

48. Akins, *supra* note 6, at 185. Akins does not suggest any limit on Congress's power under the Property Clause except to mention that *Kleppe v. New Mexico*, 426 U.S. 529 (1976), left "open the question of the permissible reach of the Act over private lands." Akins, *supra* note 6, at 184-85.

49. Appel, *supra* note 6, at 124.

50. *Id.* Appel references the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 554 (2000), enacted under the Commerce Clause (in the pre-*Lopez* era), which a Ninth Circuit Court in *Columbia River Gorge United-Protecting People and Prop. v. Yeutter*, 960 F.2d 110, 113-14 (9th Cir. 1992), noted might have legitimately been enacted under Property Clause authority. Appel, *supra* note 6, at 124 n.551.

51. Appel, *supra* note 6, at 124.

52. *Id.* at 125.

53. *United States v. Lopez*, 514 U.S. 549, 567 (1995); *see also United States v. Morrison*, 529 U.S. 598, 613 (2000) ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.") (quoting *Lopez*, 514 U.S. at 564).

effects,⁵⁴ and interference by the federal government in areas of traditional state concern.⁵⁵ The limitations imposed by these areas of concern are what those hoping to provide authority for environmental regulations under the Property Clause wish to avoid.⁵⁶ The question remains, however: will similar concerns arise under an expansive property power, inciting the Court to limit congressional power under the Property Clause?

In an attempt to address that question, this Note will examine each area of concern to determine whether any of the hypothetical extraterritorial acts above, legitimate under Appel's broad vision of the property power, would create problems in that area. Finally, the acts that present a majority of the *Morrison* and *Lopez* concerns will be identified as creating the most tension with the Court's jurisprudence in those cases.

A. Police Power

The Court in *Morrison* and *Lopez* stressed that the "[federal] government is acknowledged by all to be one of enumerated powers."⁵⁷ One of the arenas of regulation that the Constitution reserves for the states is a plenary police power.⁵⁸ Interference with this power was a principal concern of the Court in *Morrison* and *Lopez*. As the Court put it when discussing the Gun-Free School Zones Act,⁵⁹ "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."⁶⁰

The hypothetical "National Parks Periphery Act"⁶¹ illustrates how an act, legitimate under a broad view of the Property Clause, can present precisely the police power concerns that motivated the Court in *Lopez* and *Morrison*. According to Appel, this Act is a legitimate use of Congress's property power because the "tangible presence of federal property" near extraterritorial activities forms a "nexus" between the rule and those activities.⁶²

While the "National Parks Periphery Act" specifically regulates land-use, if Congress, under a broad view of the property power, can legislate wherever there is the "tangible presence of federal property," it could regulate any activity that takes

54. *Morrison*, 529 U.S. at 615. ("If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.")

55. *Id.* at 611 (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur . . .").

56. *See, e.g.*, *Akins*, *supra* note 6, at 185.

57. *Lopez*, 514 U.S. at 566 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)) (alteration in original); *Morrison*, 529 U.S. at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.")

58. *Lopez*, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.") (citing U.S. CONST. art. I, § 8).

59. 18 U.S.C. § 922(q)(1)(A) (2000).

60. *Lopez*, 514 U.S. at 567.

61. *See supra* text accompanying notes 49-52.

62. Appel, *supra* note 6, at 125.

place “within a certain radius”⁶³ of public lands. For example, as Ronald F. Frank and John H. Eckhard fear in their contemplation of a broad property power, “it could be argued that Congress could control the volume on transistor radios played within the hearing of an animal in a federal wildlife preserve, even if the owner of the radio was on his own property fifty miles away.”⁶⁴ The requirement of “tangible presence of federal property” simply puts no limits on the types of activities that Congress could regulate, nor on how large a “radius” around federal lands it could control.

Thus, under the “nexus” test, in any state with a great deal of federal land,⁶⁵ it is conceivable that a broadly construed Property Clause could give Congress the specifically proscribed plenary police power, allowing it to regulate any activity in that state.⁶⁶ The “National Parks Periphery Act” presents the same problem of an unchecked federal police power that the Court addressed in *Morrison* and *Lopez*.

B. Aggregation of Effects

In *United States v. Morrison*, the Supreme Court struck down certain provisions of the Violence Against Women Act of 1994.⁶⁷ Despite Congress’s “numerous findings” that gender-motivated violence in the aggregate affects interstate commerce,⁶⁸ the Court rejected the government’s argument that “Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁶⁹ The Court feared such reasoning because “[i]f accepted [it] would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”⁷⁰

The Court will probably fear extraterritorial applications of an expansive property power for similar reasons. Just as aggregation of noneconomic activity has no effect on interstate commerce “visible to the naked eye,”⁷¹ aggregation of extraterritorial activities frequently has no effect on public lands that is “visible to the naked eye.” Or, as Eugene R. Gaetke writes, at some point in regulating extraterritorial activity, “[t]he connection between the conduct regulated on nonfederal property . . . may become so tenuous that it *requires* a judicial

63. *Id.* at 124.

64. Ronald F. Frank & John H. Eckhard, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will “Respecting Property” Go the Way of “Affecting Commerce”?*, 15 NAT. RESOURCES LAW. 663, 664 (1983).

65. Nevada, 82.9%; Alaska, 62.4%; Utah, 64.5%; Idaho, 62.5%. PUBLIC LAND STATISTICS 2000, reprinted in COGGINS ET AL., *supra* note 13, at 10.

66. Appel believes the greater concern is that the prohibition of “the exercise of federal police power to protect its lands within a state ‘would place the public domain of the United States completely at the mercy of state legislation.’” Appel, *supra* note 6, at 101 (quoting *Camfield v. United States*, 167 U.S. 518, 526 (1897)). While this is a valid concern it does not preclude a property power narrower than the one Appel envisions.

67. 529 U.S. 598 (2000) (striking down the civil remedy provisions found in 42 U.S.C. § 13981(c) (2000)).

68. *Id.* at 614.

69. *Id.* at 617.

70. *Id.* at 615.

71. *United States v. Lopez*, 514 U.S. 549, 563 (1995).

conclusion that the legislation is . . . no[t] ‘respecting the federal lands.’”⁷² Thus, aggregating the effects of extraterritorial activities to demonstrate an effect on federal lands can be seen as analogous to aggregating the effects of noneconomic activity to demonstrate an effect on interstate commerce. In both cases, an interpretive leap is required to connect the activities in question to the clause of the Constitution empowering Congress to regulate that activity. The Court in *Morrison* held that such an interpretation would grant Congress a power without any meaningful limits.⁷³

A number of the hypothetical acts discussed earlier present examples of how aggregation of effects in extraterritorial applications of a broad property power potentially could lead to the kind of limitless congressional power the Court feared in *Lopez* and *Morrison*. None of these acts regulate activities with effects on public lands that are “visible to the naked eye.”

First, the “National Parks Clean Air Act”⁷⁴ requires aggregation of effects to meet the requirement of “respecting” federal property. An isolated emission of NO_x or SO₂ will not lead to acid rain in levels necessary to noticeably touch federal lands, but the aggregated effects of a system of emissions will. Similarly, the “Gun-Free Federal Buildings Zones Act”⁷⁵ can regulate extraterritorial activity because of the aggregation of perceived effects caused by the presence of guns near federal buildings. In order for this Act to “respect” federal property, one must make the cognitive leap between threats to federal employees and impact on federal property.

The hypothetical “Clean Water Act”⁷⁶ does not require the aggregation of effects to reach activity “respecting” federal property. Filling a wetland has a direct negative effect on migratory birds that Congress considers essential attributes of federal property.⁷⁷ Finally, while Appel’s version of the “Endangered Species Act”⁷⁸ similarly does not require aggregation of effects as it limits takings of animals directly related to the federal property,⁷⁹ Akins’s does. As shown in Part II, Akins’s version is equally valid under a broad vision of the Property Clause.⁸⁰ Her version of the Act requires aggregation of the effects of takings of entirely extraterritorial endangered species in order to make the connection to animals (presumably through food chains and habitat overlap) that touch federal property.⁸¹

Thus, a broad property power could, to mirror the language of the Court, *allow Congress to regulate any extraterritorial activity as long as the nationwide, aggregated impact of that activity has substantial effects on federal employees on public lands, the budget for public lands, or extraterritorial endangered species.*⁸² The Court in *Morrison* was wary of aggregating effects of noneconomic activity

72. Gaetke, *supra* note 19, at 395 (emphasis added).

73. See *supra* text accompanying note 66.

74. See *supra* text accompanying notes 35-37.

75. See *supra* text accompanying notes 38-41.

76. See *supra* text accompanying notes 42-44.

77. See *supra* text accompanying note 44.

78. See *supra* text accompanying notes 45-48.

79. Related because of the presence of the species on the public lands. Appel, *supra* note 6, at 122.

80. See *supra* text accompanying notes 45-48.

81. Akins, *supra* note 6, at 185.

82. See *United States v. Morrison*, 529 U.S. 598, 615 (2000) (“[P]etitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”).

that, through the intermediaries of impact on employment, production, transit, and consumption, had an effect on interstate commerce. Similarly, the Court will likely look askance at regulation requiring the aggregation of extraterritorial activities that, through intermediary steps, have an effect on public lands.

Potential extraterritorial applications of a broadly construed property power, like the "National Parks Clean Air Act," the "Gun-Free Federal Building Zones Act," and the "Endangered Species Act," therefore can be seen as promoting similar concerns of aggregating effects that arose in the context of the commerce power. In order to address those concerns, the Court will, in all probability, look for some guide in determining when Congress may aggregate effects when legislating under the property power, just as it did in *Morrison* and *Lopez* by creating the economic/noneconomic distinction.

C. Areas of Traditional State Concern

In *United States v. Lopez*, Justices Kennedy and O'Connor, providing the votes necessary to strike down the Gun-Free School Zones Act, were concerned that the Act "intrude[d] upon . . . area[s] of traditional state concern."⁸³ As Justice Kennedy wrote, "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."⁸⁴

The majority opinion in *Lopez* also expressed concern that the Gun-Free School Zones Act of 1990,⁸⁵ which made it a federal offense to carry a firearm in a school zone, treaded on "areas such as criminal law enforcement or education where States historically have been sovereign."⁸⁶ In examining the Civil Rights Remedy of the Violence Against Women Act of 1994,⁸⁷ the Court in *Morrison* was concerned not only about federal interference with the regulation of crime⁸⁸ but also family law and by extension a number of other "areas of traditional state regulation."⁸⁹

The Court revisited the Commerce Clause and "areas of traditional state concern" issue more recently in *Solid Waste Agency v. United States Army Corps of Engineers*.⁹⁰ While the Court did not make a constitutional ruling on the Clean Water Act,⁹¹ it did limit the Act's scope to exclude isolated wetlands, noting that a

83. 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

84. *Id.* at 577, quoted in *Morrison*, 529 U.S. at 611.

85. 18 U.S.C. § 922(q)(2)(A) (2000).

86. *Lopez*, 514 U.S. at 564. Kennedy in concurrence focused primarily on education stating that "An interference . . . occurs here, for it is well established that education is a traditional concern of the States." *Id.* at 580 (Kennedy, J., concurring) (citing *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

87. 42 U.S.C. § 13981(c) (2000).

88. "[T]he suppression of which has always been the prime object of the States' police power." *Morrison*, 529 U.S. at 615.

89. *Id.* at 615-16 (listing "marriage, divorce, and childrearing" as "areas of traditional state regulation").

90. 531 U.S. 159 (2001).

91. 33 U.S.C. § 1344(a) (2000); 33 C.F.R. § 328.3(a)(3) (2002).

broader interpretation “would result in a significant impingement of the State’s traditional and primary power over land and water use.”⁹²

In considering extraterritorial applications of the property power, Gaetke recognized that “the property clause regulation of conduct on nonfederal property encroaches upon the state’s traditional regulatory role,” and therefore is a matter of “significant concern.”⁹³ Many of the extraterritorial hypothetical acts, valid under Appel’s broadly reaching property power and discussed in Part II of this Note, conflict with areas of traditional state concern.

The “Gun-Free Federal Building Zones Act” intrudes upon state criminal law enforcement in the same manner as the Court found the Gun-Free Schools Zones Act to do.⁹⁴ Two of Appel’s other hypothetical regulations with extraterritorial reach, the “National Park Periphery Act” and the “Clean Water Act,” also raise problems of intrusion into areas of state concern. First, the concern in *Solid Waste Agency*, that regulation of isolated wetlands “would result in a significant impingement of the State’s traditional and primary power over land and water use,”⁹⁵ applies just as much under the Property Clause as the Commerce Clause. Similarly, as Appel admits, the “National Parks Periphery Act” “regulates wholly intrastate conduct that falls within the ambit of activities traditionally regulated by states and local governments.”⁹⁶ Thus, a number of Appel’s hypothetical acts raise issues of intrusion into areas of state or local concern.

Legislation enacted under a broadly reaching property power like that hypothesized by Appel, and limited only by the “nexus” test, can present problems in all three of the areas of concern addressed in *Morrison* and *Lopez*: an unchecked federal police power;⁹⁷ the aggregation of effects that, on their face, have nothing to do with the clause at hand;⁹⁸ and interference by the federal government in areas

92. *Solid Waste Agency*, 531 U.S. at 174.

93. Gaetke, *supra* note 19, at 394. Appel, on the other hand, while recognizing that the Court’s concern with areas of traditional state regulation in the cases mentioned above *could* impose a limit on the extraterritorial power Congress wields under the Property Clause discounts any effect such a concern might have on his hypothetical extraterritorial regulations. Appel, *supra* note 6, at 101-02.

94. *United States v. Lopez*, 514 U.S. 549, 564 (1995) (stating that the government’s position would lead to intrusion into “areas such as criminal law enforcement or education where States historically have been sovereign”). Appel argues that since firearm possession is “a subject of federal regulation from early times,” the “Gun-Free Federal Building Zones Act” poses no threat to areas of traditional state concern. Appel, *supra* note 6, at 102. That argument, however, fails to address the Court’s concern in *Lopez* that the criminal aspect of the Act intruded upon areas of state concern.

95. *Solid Waste Agency*, 531 U.S. at 174.

96. Appel, *supra* note 6, at 125. Appel, however, does not return to the question of whether this intrusion might cause problems under *Morrison* and *Lopez*.

97. *Lopez*, 514 U.S. at 567 (“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.”); *see also* *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” (quoting *Lopez*, 514 U.S. at 564)).

98. *Morrison*, 529 U.S. at 615. (“If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”).

of traditional state concern.⁹⁹ Regulations that will likely cause the greatest concern for the Court are those that present a majority of the above problems. The "Gun-Free Federal Building Zones Act," Akins's version of the "Endangered Species Act," and the "National Parks Periphery Act," all raise two of the three *Morrison* and *Lopez* concerns. Appel's version of the "Endangered Species Act," the "Clean Water Act," and the "National Parks Clean Air Act," each present only one of the *Morrison* and *Lopez* concerns. Appel's broad vision of the property power, with its limits defined by the "nexus" test, makes no distinction between the extraterritorial regulations above, permitting them all. However, a court wishing to address the concerns laid out in *Morrison* and *Lopez* will presumably adopt a more rigorous test.

III. THE "DIRECT PHYSICAL HARM" TEST

Relying heavily on Blake Shepard, this Note proposes a test that courts wishing to consider the concerns of *Morrison* and *Lopez* might accept for determining if extraterritorial applications of the property power are valid. Shepard imagines a two-prong test for limiting the property power that permits Congress, in its first part, "to regulate activity on non-federal property in order to protect federal lands from physical harm."¹⁰⁰ If the first prong is not met, Shepard allows, in the second half of his test, for Congress to declare a "purpose" for federal lands.¹⁰¹ Once Congress makes such a declaration, it can regulate activities (on or off federal lands) that interfere with a "use of [the] federal property" that is in line with its federal "purpose."¹⁰²

Even as the first half of Shepard's test imposes a useful limit, the second undermines it. If permitting Congress to make unlimited determinations on what affects interstate commerce transforms the Commerce Clause into the "[h]ey, you-can-do whatever-you-feel-like Clause,"¹⁰³ allowing legislators to determine the "purpose" of federal lands and then regulate for that "purpose" similarly establishes a broad Property Clause.¹⁰⁴ Under this test, Congress would enjoy broad interpretive powers only differentiated from its pre-*Lopez* commerce power in that

99. *Id.* at 611 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur" (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring))).

100. Shepard, *supra* note 19, at 535. Appel addresses Shepard's Property Clause theory, but confines his criticism to the portion of the theory that addresses regulations of activity on federal lands, providing little insight to Shepard's extraterritorial considerations. Appel, *supra* note 6, at 94-96 n.427.

101. Shepard, *supra* note 19, at 535.

102. *Id.*

103. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995). While this Note sees Kozinski's phrase as applying equally to broad commerce and property powers, Akins cites Kozinski only to emphasize Congress's pre-*Lopez* power under the Commerce Clause but does not mention his words in regards to her broad interpretation of the property power. See Akins, *supra* note 6, at 167 n.6.

104. The Eighth Circuit promoted the same argument in upholding the Boundary Waters Canoe Area Wilderness Act, which regulated the use of motorboats and snowmobiles on adjacent non-federal lands and waters, in the pre-*Lopez* era, but the Supreme Court never heard the question. *Minnesota v. Block*, 660 F.2d 1240 (1981), *cert. denied*, 455 U.S. 1007 (1982).

it would be determining the “purpose” of federal lands instead of what affects “interstate commerce.”

For this reason, a court might dismiss the second half of the Shepard test and look at the first half alone. Thus, the outer limits of the property power will allow Congress to “regulate activity on non-federal property in order to protect federal lands from physical harm.”¹⁰⁵ Without slight alteration, however, this formulation also gives Congress incredibly broad interpretive power, allowing it to make determinations of what “harms” federal lands. Just as the Court limited the power of Congress to make determinations of what affects interstate commerce with an “economic/noneconomic” inquiry, this Note suggests that the Court might respond favorably to a test that looks to directness, permitting Congress to regulate extraterritorial activity only to protect federal lands from *direct* physical harm.

Although *Kleppe v. New Mexico* did not define the limits of Congress’s extraterritorial property power,¹⁰⁶ the decision proves useful in analyzing how the “direct physical harm” test might function. In *Kleppe*, the Court upheld the Wild Free-Roaming Horses and Burros Act in the face of a challenge that the regulation exceeded Congress’s power under the Property Clause.¹⁰⁷ In making the decision, the Court briefly mentioned a number of congressional findings that went into the Act.¹⁰⁸ One of these findings deemed horses and burros “‘an integral part of the natural system of the public lands’ of the United States.”¹⁰⁹ In other words, Congress had determined that the animals in question were *part* of the federal lands. This determination suggests an interesting refinement of the “protect from direct physical harm” test. Namely, that Congress can decide, through legislation, what constitutes the federal property that it can “protect from direct physical harm” when regulating extraterritorially. Congress’s interpretive discretion in such a decision can be limited by requirement that anything determined to be part of the federal lands must form “an integral part of the natural system” of those lands.¹¹⁰ Granting this congressional determination gives Congress a broader power than the “protect from direct physical harm” test suggests on its face, while still imposing meaningful limits on interpretation not present in more speculative determinations of the public lands’ “purpose” or what constitutes “harm” to it.¹¹¹

Having examined the “direct physical harm” test under *Kleppe*, it is now important to determine whether it addresses the concerns of *Morrison* and *Lopez*. The test can be justified in a similar way to the limitations imposed in *Morrison* and *Lopez*. In those cases, the Court determined that every regulation it had authorized under the Commerce Clause had dealt with “economic activity.”¹¹²

105. Shepard, *supra* note 19, at 535.

106. 426 U.S. 529, 530 (1976) (“The question of the Act’s permissible reach under the Property Clause over private lands to protect wild free-roaming horses and burros that have strayed from public land need not be, and is not, decided in the context of this case.”).

107. *Id.* at 529.

108. *Id.* at 535-36. The Court did not see the need to examine them very deeply because “determinations under the Property Clause are entrusted primarily to the judgment of Congress.” *Id.* at 536.

109. *Id.* at 535 (quoting 16 U.S.C. § 1331 (Supp. IV 1970)).

110. *Id.*

111. See *supra* text accompanying notes 101-06.

112. United States v. Morrison, 529 U.S. 598, 610 (2000) (citing United States v. Lopez, 514 U.S. 549, 559-60 (1995)).

Similarly, every instance the Supreme Court has found the property power to apply extraterritorially has involved the threat of some "direct physical harm."¹¹³

An analysis under the "direct physical harm" test of the hypothetical acts discussed within this Note demonstrates how this test accounts for new commerce power jurisprudence by invalidating the hypothetical acts that present a majority of the *Morrison* and *Lopez* concerns.

First, the "National Parks Clean Air Act," which regulates the emissions of SO₂ and NO_x and poses a single *Morrison* and *Lopez* concern, is a valid regulation under the "direct physical harm" test. While each individual emission of NO_x or SO₂ may not lead to acid rain in a level necessary to noticeably harm the federal lands, the general activity of emitting these compounds is a direct threat to public lands because it is the specific elements from those emissions that form the acidic compounds that come down in acid rain, and as Appel suggests, "harm federal lands in a demonstrable way."¹¹⁴

Also valid under the "direct physical harm" test is Appel's "Clean Water Act." Using reasoning similar to Appel's in creating his "nexus" test,¹¹⁵ Congress could, as it did in *Kleppe* with burros and wild horses, identify migratory birds that touch federal lands as "'an integral part of the natural system of the public lands' of the United States,"¹¹⁶ or, simply, as part of the public lands. Since filling wetlands causes "direct physical harm" to these birds, regulating such activity would protect a part of the public lands from harm.

Appel's version of the "Endangered Species Act"¹¹⁷ is also valid under the "direct physical harm" test, but Akins's version is not. Under Appel's version of the Act, Congress could identify endangered species as "an integral part of the natural system" of the public lands as long as those species touch federal property. The regulation of the extraterritorial takings of these animals would be, therefore, a regulation of activity that poses a direct threat of "physical harm" to the public lands. Akins's version of the same Act,¹¹⁸ which arouses a majority of the *Morrison* and *Lopez* concerns, would not be valid under the "physical harm" test because it calls for protection of species found nowhere on federal lands. These species could not be considered part of the public lands, and therefore, protecting them would not prevent a direct physical threat to those lands.

Like Akins's "Endangered Species Act," the "Gun-Free Federal Building Zones Act" presents two of the three *Morrison* and *Lopez* concerns and, in the same manner, is not valid under the "physical harm" test. The Act regulates the

113. See *United States v. Alford*, 274 U.S. 264 (1927) (In making the failure to extinguish a fire built near public lands a crime, Congress clearly was protecting the federal lands from the *direct physical harm* of forest fire.); *Camfield v. United States*, 167 U.S. 518, 525-26 (1897) (Congress's prohibition on fences that enclose federal property is a protection from *direct physical harm*, as *species integral to the natural systems of the public lands*, and therefore part of the federal property, would be physically harmed by the fences, which prohibit natural grazing and hunting patterns necessary for the survival of these species.).

114. Appel, *supra* note 6, at 84.

115. Appel suggests that Congress should identify the migratory birds as an "essential attribute of the beauty and value of public lands," in order to create a "nexus" to those lands. *Id.* at 123.

116. *Kleppe v. New Mexico*, 426 U.S. 529, 535 (1976) (quoting 16 U.S.C. § 1331 (Supp. IV 1970)).

117. See *supra* text accompanying notes 45-48.

118. See *supra* text accompanying notes 45-48.

carrying of firearms near federal buildings, which can “cause death and serious injury, limit worker productivity, and create increased security costs.”¹¹⁹ Thus, the Act regulates activity that directly threatens “physical harm” to the people and employees on the public lands, but not the public lands themselves. While visitors and employees, unlike the species in the Akins “Endangered Species Act,” are on the public lands, they can hardly be seen as integral to the “*natural system* of the public lands.”¹²⁰ Therefore, employees on public lands cannot be determined by Congress to be part of those lands, and the “Gun-Free Federal Building Zones Act” fails the “direct physical harm” test.

Finally, the “National Parks Periphery Act,” which presents police power and interference with areas of traditional state regulation concerns, also fails to pass the “direct physical harm” test. Unlike the Acts discussed before it, the “National Parks Periphery Act” is not aimed at a threat of “physical harm”; at most, it could be said to protect public lands from an aesthetic harm. Thus, the “National Parks Periphery Act” also fails the “direct physical harm” test.

The “direct physical harm” test, therefore, shows its efficacy in dealing with the *Morrison* and *Lopez* concerns by invalidating all the hypothetical acts that present a majority of the concerns addressed in those cases.

CONCLUSION

Peter Appel’s broad vision of the property power validates a number of hypothetical extraterritorial environmental regulations. He concludes that acting pursuant to the property power, Congress could regulate pollution, endangered species, land-use, and wetlands both on and off the federal lands. For scholars looking for alternative congressional authority for regulating the environment in the face of limits on the commerce power, Appel’s hypothetical acts serve as a beacon of hope.

An examination of the property power, however, has revealed that it presents a number of the same concerns that inspired the Court to limit the commerce power: an unchecked federal police power;¹²¹ the aggregation of effects that, on their face, have nothing to do with the clause at hand;¹²² and interference by the federal government in areas of traditional state concern.¹²³

119. Appel, *supra* note 6, at 98.

120. *Kleppe*, 426 U.S. at 535 (quoting 16 U.S.C. § 1331 (Supp. IV 1970)) (emphasis added).

121. *United States v. Lopez*, 514 U.S. 549, 567 (1995) (“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.”); *see also* *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.” (quoting *Lopez*, 514 U.S. at 564)).

122. *Morrison*, 529 U.S. at 615. (“If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”).

123. *Id.* at 611 (“Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.” (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring))).

With this in mind, it becomes clear that the Court will have great incentive to place limitations on the property power as well. What that limitation will be is not clear from property power jurisprudence. The “direct physical harm” test proposed in this Note, however, is a prediction of the type of limitation the Court might adopt.¹²⁴ The test accommodates new Commerce Clause jurisprudence by separating hypothetical acts in this Note that present a majority of *Morrison* and *Lopez* concerns from those that do not. Environmentalists should be relieved to see that, even under this test, Congress would still have the opportunity to regulate undesirable activities as long as the legislation is designed to protect the public lands from “direct physical harm.” They should not, however, expect the Court that limited the commerce power in *Morrison* and *Lopez* to turn a blind eye to the concerns of those cases when addressing the property power.

124. This Note does not try to answer the question of whether the Court *ought* to adopt the “direct physical harm” test or any test that limits Congress’s Property Clause power.