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Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC

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Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC

Cover Page Footnote

The author expresses gratitude to Professor J.B. Ruhl for his guidance in developing this article.

RECALIBRATING THE FEDERAL GOVERNMENT'S AUTHORITY TO REGULATE INTRASTATE ENDANGERED SPECIES AFTER SWANCC

JEFFREY H. WOOD*
Table of Contents

I.	INTRODUCTION	91
II.	FRAMEWORK OF THE ENDANGERED SPECIES ACT	94
III.	JURISDICTION OF THE ESA	98
	A. <i>Traditional Commerce Clause Framework</i>	98
	B. <i>The Lopez and Morrison Commerce Clause Framework</i>	100
	C. <i>Commerce Clause Challenges to the ESA Prior to SWANCC</i>	101
IV.	SWANCC & ITS JURISDICTIONAL EFFECTS ON THE ESA	105
	A. SWANCC	105
	B. <i>Possible Jurisdictional Effects of SWANCC on the ESA</i>	107
	C. <i>ESA Case Law After SWANCC</i>	109
V.	ARGUMENTS BEHIND THE FEDERALISM & ESA DEBATE	114
	A. <i>Practicality Issue</i>	114
	B. <i>Externalities Issue</i>	115
	C. <i>Logicity Issue</i>	117
VI.	A COHERENT TEST FOR FEDERAL REGULATION OF INTRASTATE SPECIES	117
	A. <i>The "Intrastate Species Test"</i>	118
	B. <i>Impact of the "Intrastate Species Test"</i>	120
VII.	CONCLUSION	121

I. INTRODUCTION

*[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.*¹

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1. James Madison, THE FEDERALIST NO. 45 (1788), *reprinted in* THE FEDERALIST PAPERS, at 292-93 (Clinton Rossiter ed., 1961). Concerning this constitutional principle, the Fifth Circuit recently stated, "No authority need be cited for [this] fundamental and well-known limitation on the power of our Federal Government." *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 627 (5th Cir. 2003).

Over the past thirty years, the federal government has regulated activities based on endangered species regardless of the species' range or impact on interstate commerce. For example, the D.C. Circuit held that the scope of the Endangered Species Act ("ESA" or "the Act") even reached a type of fly that occurred in only one state and had no known impact on interstate commerce.² "So wide-ranging has been the application of the [Commerce] Clause as to prompt one writer to 'wonder why anyone would make the mistake of calling it the Commerce Clause instead of the 'hey-you-can-do-whatever-you-feel-like clause'."³

However, over the past decade, the Supreme Court has revived the principles of federalism and has limited the scope of Congress' Commerce Clause power.⁴ In a recent Clean Water Act decision, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"), the Supreme Court strongly implied that the federal government's regulation of isolated, intrastate ponds that provided habitat to migratory birds was unconstitutional.⁵ Many commentators believe that the Court's language will have serious implications for the federal government's authority to regulate other environmental concerns, including endangered species. Specifically, I will address whether the language in the SWANCC decision will affect the federal government's ability to protect intrastate, endangered or threatened species under the ESA.

In both the constitutional and practical sense, disagreement rages over whether the Supreme Court's revival of federalism in the context of environmental laws is a positive event.⁶ Many argue that an expansive reading of the SWANCC decision will dilute the benefits accruing to the environment from federal regulation and

2. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043-45 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1995) ("NAHB v. Babbitt").

3. *Id.* at 1061 (Sentelle, J., dissenting). See Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1724-25 (2002) (contending that, given the lower courts' expansive readings of *United States v. Lopez* in the area of species regulation, further reform of the Commerce Clause test is necessary).

4. See *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that a federal statute prohibiting gun possession in a school zone exceeded Congress' authority under the Commerce Clause); Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) (applauding the revival of federalism as "revolutionary and long overdue").

5. 531 U.S. 159, 174 (2001) (stating that such regulation would "result in a significant impingement of the States' traditional and primary power over land and water use").

6. See, e.g., Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 4 (2003) (providing an extensive study of case law involving the "environmental commerce clause" and criticizing the recent revival of federalism in the environmental context).

will result in the proverbial “race-to-the-bottom.”⁷ On the other hand, some argue that the recent trend will allow the environment to reap the benefits of federalism — benefits like encouraging more local involvement and allowing for a marketplace of more diverse conservation ideas.⁸ In addition, the proponents of federalism argue that Congress can use other means besides direct regulation to protect endangered species, like providing grants to states and using the tools of cooperative federalism.

Part II provides an overview of the goals and structure of the ESA, focusing on the most important provisions of the Act. Likewise, Part II briefly addresses the statutory authority for federal agencies to regulate local activities based on the existence of intrastate species — statutory authority like the “take prohibition” and the “no jeopardy or adverse modification provision.” Moreover, Part II explains how the Act encompasses all types of species regardless of a species’ range or impact on interstate commerce.

Part III patches together the traditional Commerce Clause framework that developed prior to the recent revival of federalism, followed by a discussion of the Supreme Court’s decisions in *United States v. Lopez* and *United States v. Morrison*. After laying out the pre-SWANCC Commerce Clause framework, I also discuss two important cases applying that framework to the ESA — *NAHB v. Babbitt*, in which the D.C. Circuit upheld the application of the ESA to the Delhi Sands Flower-Loving Fly, and *Gibbs v. Babbitt*, in which the Fourth Circuit upheld the application of the ESA to red wolves.⁹

Part IV discusses the Supreme Court’s decision in *SWANCC* and its possible jurisdictional effects on the ESA. More specifically, I explain the facts of the case, the statutory and constitutional issues involved, and the Court’s rationale. Importantly, Part IV discusses the Commerce Clause dicta found at the end of the majority opinion and explains briefly how the dicta reflects the Court’s desire to expand the revival of federalism into the environmental context. Also, this part illustrates how litigants are attempting to use the *SWANCC* dicta to challenge the constitutionality of the ESA and how courts are reluctant to accept such arguments. I explore how courts limit *SWANCC* in the ESA context but simultaneously

7. See CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP* 22-25 (Environmental Law Institute 2003) (discussing the scholarly debate surrounding the “race-to-the-bottom theory” and noting that the theory is the “central underpinning” of federal environmental regulation).

8. See *id.* at 32-35.

9. See *NAHB v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *Gibbs v. Babbitt*, 214 F.3d 483, 486-87 (4th Cir. 2000).

construe *SWANCC* broadly in other environmental areas. Part IV concludes by exploring two recent circuit court cases refusing to apply *SWANCC* to the ESA — one preventing a housing development based on an endangered toad and the other preventing development of a shopping center based on cave-dwelling bugs.¹⁰

Part V analyzes three arguments against limiting the ability of the federal government to regulate intrastate species. Not only do I present the federalist arguments, but I also counter common attacks such as the “proverbial race to the bottom.” Specifically, Part V addresses: (A) the practicality issue of determining a species’ effect on interstate commerce; (B) the externality issue fueling the race to the bottom dispute; and (C) the logicity issue of allowing federal regulation of abundant species but forbidding it when the species becomes so depleted as to be intrastate. The implications of these three arguments provide the groundwork for my proposal in Part VI.

Part VI presents my own recommendations for how the courts should handle this pivotal area. Uniquely, my proposed “intrastate species test” narrowly defines intrastate species and bars federal regulation based on such species. After laying down my rule, I discuss how *NAHB v. Babbitt* would have come out differently, and arguably better, under my rule, but also how, on the other hand, *Gibbs v. Babbitt* would have incurred the same result. As litigants continue to challenge the authority of federal agencies to regulate activities pursuant to intrastate species, and as the Supreme Court continues to hint that such action may be unconstitutional, a clear rule is needed to provide certainty in this area. Finally, I note some constitutional steps Congress and federal agencies should take in their efforts to protect intrastate species.¹¹

II. FRAMEWORK OF THE ENDANGERED SPECIES ACT

The Endangered Species Act does not distinguish between intrastate species and interstate species, and courts have consistently construed the ESA to equally protect both intrastate and interstate species. Since plant and animal species are of “esthetic, ecological, educational, historical, recreational, and scientific value,” Congress purposed to protect them and their

10. See *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003).

11. In addition to the Commerce Clause, the federal government may protect species using the spending power, the treaty power, and the Property Clause. See U.S. CONST. art. I, § 8; art. II, § 2; art. IV, § 3; see also Sophie Akins, *Congress’ Property Clause Power to Prohibit Taking Endangered Species*, 28 HASTINGS CONST. L. Q. 167 (2000). This paper focuses solely on the Commerce Clause.

ecosystems.¹² In fact, courts have recognized that Congress wanted to halt and reverse the extermination of endangered and threatened species and to protect those species *whatever the cost*.¹³ Five core provisions dominate the ESA framework: section 4's listing provisions; section 7's federal conservation duty and its jeopardy or adverse modification prohibition; section 9's take prohibition; section 10's incidental take permit provision; and section 11's enforcement and citizen suit provisions.¹⁴ These five provisions combine to extensively regulate and restrict local activities, and it is the regulatory impact of these provisions that litigants hope to avoid by objecting to the federal government's authority to protect intrastate species.¹⁵

First, section 4 provides the process for listing a species as endangered or threatened, and is considered the starting point of the ESA.¹⁶ A species may be listed for one of several reasons including "the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence."¹⁷ Concurrently with the listing decision, the agency must also designate critical habitat for the listed species.¹⁸ Unlike the listing decision, the agency may consider economic impact prior to designating critical habitat, in addition to the best scientific data.¹⁹ Section 4 also directs the listing agency to develop recovery plans for the "conservation and survival of the species."²⁰

After a species is listed, section 7 and section 9 protect the species — section 7 applies to federal agencies and section 9 applies

12. 16 U.S.C. § 1531(a)(3) (2000).

13. *See, e.g.,* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

14. *See* 16 U.S.C. §§ 1533-1540.

15. Most federal environmental laws, such as the Clean Water Act, employ a "cooperative federalism" approach, meaning that states have the opportunity to secure primary responsibility for clean water enforcement. *See* RECHTSCHAFFEN & MARKELL, *supra* note 7, at 15-16 (noting that laws using the cooperative federalism approach "reserve a prominent role for the states"). The ESA, on the other hand, is a federally administered statute which means that the federal government is the sole enforcer of its restrictions. *See id.*

16. *See* 16 U.S.C. § 1533. Two federal agencies are delegated the responsibility to implement the ESA: the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). *See id.* § 1533(a). Under the authority of the Secretary of the Interior, FWS is responsible for listing terrestrial and freshwater species. Under the authority of the Secretary of Commerce, NMFS is responsible for listing marine and anadromous species. *See id.* § 1533(a)(2).

17. *Id.* § 1533(a)(1)(A)-(E).

18. *See id.* § 1533(a)(3)(A).

19. *See id.* § 1533(b)(2).

20. *Id.* § 1533(f)(1).

to everyone.²¹ Section 7 imposes two specific duties on all federal agencies.²² Section 7(a)(1) imposes a conservation duty on all federal agencies, directing them to use their power to conserve listed species.²³ Section 7(a)(2) prohibits all agencies from “jeopardizing” any listed species or from making any “adverse modifications” to the habitat for any listed species.²⁴ Importantly, the no jeopardy or adverse modification provision applies to any activity a federal agency authorizes, funds, or carries out, including permitting, development approvals, and federal grants.²⁵

Section 9 makes it unlawful for any person, including private individuals, businesses, and state and local governments, to “take” any listed species.²⁶ A “take” can occur when someone harasses, harms, pursues, hunts, shoots, wounds, kills, traps, captures, or collects, or even attempts to engage in this conduct.²⁷ FWS has defined “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife.”²⁸ In fact, courts have construed section 9 broadly to include even unintentional harm to an endangered species.²⁹ That is, a person may violate the ESA by just attempting to harm an endangered species or simply engaging in an activity that might unknowingly harm an endangered species.³⁰ A federal agency may be permitted to violate section 9 by obtaining an incidental take statement.³¹ Together, section 7 and section 9 significantly impact local land use activities by preventing development that might harm a listed species — even an intrastate species with little impact on interstate commerce.

Providing some relief from sections 7 and 9, section 10 allows any person to lawfully take a listed species if he or she first obtains

21. *See id.* §§ 1536, 1538.

22. *See id.* § 1536.

23. *Id.* § 1536(a)(1).

24. *Id.* § 1536(a)(2).

25. *See id.*

26. *Id.* § 1532(13). *See id.* § 1538(a)(1).

27. *Id.* § 1532(19).

28. 50 C.F.R. § 17.3 (commonly referred to as “take by habitat modification”). The take by habitat modification provision is the most often used tool in the ESA arsenal to encroach on private land development rights. *See* Jeanine A. Scalero, *The Endangered Species Act's Application to Isolated Species: A Substantial Effect on Interstate Commerce*, 3 CHAP. L. REV. 317, 321 (2000).

29. *See* *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 696, 708 (1995) (upholding agency regulation defining “harm” to include habitat modification that results in actual injury or death).

30. *See, e.g., United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998) (holding a hunter guilty of a taking where he accidentally shot a threatened species).

31. *See* 16 U.S.C. §1536(g).

an “incidental take permit.”³² In order to obtain an incidental take permit, however, the landowner must present an acceptable habitat conservation plan that demonstrates that the modification is consistent with the long-term survival of the species.³³ FWS has wide discretion in determining whether to grant such permits.³⁴

Finally, section 11 provides the ESA’s enforcement mechanisms, imposing both criminal and civil sanctions.³⁵ Specifically, a violator faces civil penalties up to \$25,000 per violation and criminal sanctions up to one year in prison and \$50,000 in fines.³⁶ Section 11 relies heavily on citizen suits to enforce the ESA.³⁷ For example, a citizen may sue to enjoin any person or governmental agency that has violated the Act or failed to carry out a mandatory duty under the Act.³⁸

The Act defines an endangered species to mean “any species which is in danger of extinction throughout all or a significant portion of its range.”³⁹ Likewise, the Act defines a threatened species to mean “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁴⁰ As these definitions indicate, the ESA attempts to engulf all types of species under its umbrella of protection regardless of a species’ range or impacts on interstate commerce. For example, FWS has prevented the operation of a dam, has impacted the location of a hospital, and has criminally prosecuted private individuals based on the presence of completely isolated species that existed only in one state.⁴¹ The rest of this article will address the constitutional authority of the federal government to regulate activities based on intrastate species. At the conclusion of my article, I will offer a constitutional definition

32. *Id.* § 1539(a).

33. *See id.* (providing that a permit will be issued if (1) the proposed taking of an endangered species will be incidental to an otherwise lawful activity; (2) the permit applicant will minimize and mitigate the impacts of the taking “to the maximum extent practicable”; (3) the applicant has insured adequate funding for its conservation plan; and (4) the taking will not appreciably reduce the likelihood of the survival of the species).

34. *See Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985) (holding that FWS did not act arbitrarily or capriciously in granting an incidental take permit for butterfly and snake species).

35. *See* 16 U.S.C. § 1540.

36. *Id.* § 1540(a)-(b).

37. *See id.* § 1540(g).

38. *Id.* § 1540(g)(1)(A)-(C).

39. *Id.* § 1532(6).

40. *Id.* § 1532(20).

41. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978); *NAHB v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

of "intrastate species," but at this point, assume this term refers to isolated species that occur in only one state.⁴²

III. JURISDICTION OF THE ESA

Over the Constitution's first two centuries, the power of the federal government to regulate local activities based on the Commerce Clause expanded steadily. This gradual expansion of federal authority occurred in the area of environmental regulation as well.⁴³ Part III reviews the traditional Commerce Clause framework, explains the modern understanding of the Commerce Clause in light of last decade's revival of federalism, and discusses two important pre-SWANCC cases applying the Commerce Clause framework to the ESA.

A. Traditional Commerce Clause Framework

Like most cases or articles written from a federalist perspective, I introduced my article with a quote from James Madison, an author of the Federalist Papers. Federalism, defined as a "system that distributes governmental authority between state and nation," was the specific design of the Framers and the impetus for passage of the Constitution.⁴⁴ The Constitution creates a Federal Government of enumerated powers that are "few and defined."⁴⁵ Among other powers like defending the nation and minting money, the Constitution grants Congress the power "[t]o regulate Commerce with foreign nations, and among the several states, and with the Indian tribes," and to make laws that are "necessary and proper" to execute that power.⁴⁶

Through a series of cases spanning two centuries, Congress' authority to regulate interstate commerce became "one of the most prolific sources of national power."⁴⁷ In 1824, the Supreme Court issued its first meaningful interpretation of the Commerce Clause, holding in *Gibbons v. Ogden* that Congress had the authority to regulate both interstate commerce and intrastate activities that

42. See Scalero, *supra* note 28, at 318 (referring to intrastate species as those plant or animal species which are "indigenous to a specific geographic region" of only one state, and are "nonmigratory").

43. See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-82 (1981) (reasoning that the Commerce Clause is broad enough to uphold environmental regulation).

44. GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 149 (3d ed., Aspen Law & Business 1996).

45. See U.S. CONST. art. I, § 8; THE FEDERALIST NO. 51, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

46. U.S. CONST. art. I, § 8, cl. 3, 18.

47. *Hughes v. Oklahoma*, 441 U.S. 322, 326 n. 2 (1979).

affect interstate commerce.⁴⁸ Under this decision, Congress had the authority to regulate the persons that could conduct commerce on the nation's navigable waters.⁴⁹ The rationale in *Gibbons* prevailed throughout the rest of the nineteenth century, meaning that only the regulating of activities occurring completely within a single state that did not affect other states exceeded the Commerce Clause power.⁵⁰

A century later, in the Shreveport Rate cases, the Supreme Court held that the federal government could set rates for *intrastate* train routes.⁵¹ Introducing the substantial relation test, the Court reasoned that Congress had the authority to regulate activities that have a "close and substantial relation to interstate commerce" and could take all measures necessary to foster and protect interstate commerce.⁵²

Importantly, in *Wickard v. Filburn*, the Court issued its cumulative impact doctrine upholding Congress' authority to set

48. 22 U.S. (9 Wheat.) 1 (1824) (involving a case where the state of New York gave one person a monopoly to operate steamboats in New York waters, but Congress gave another person the right to navigate the same waters).

49. *See id.*

50. *See id.* at 186-98; *Champion v. Ames*, 188 U.S. 321 (1903) (upholding a federal law proscribing the transportation of lottery tickets interstate).

51. *See Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342, 355 (1914) (holding that the Interstate Commerce Commission could set rates for train routes from Dallas to Marshall, Texas even though the route was in one state).

52. *Id.* But, the Commerce Clause has not always been interpreted so broadly. In a series of cases over the first thirty years of the twentieth century, the Court held that only activities with a "direct effect" on interstate commerce could be subject to congressional regulation. *See, e.g., United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (holding that the Sherman Act did not reach a sugar monopoly because the Constitution did not allow Congress to regulate manufacturing); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (invalidating a portion of the Bituminous Coal Conservation Act that forced collective bargaining of labor because it did not have a direct effect on interstate commerce). In other words, activities that affected interstate commerce directly were within Congress' power, whereas activities that affected interstate commerce indirectly were outside Congress' power. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (striking down federal regulations that fixed the hours and wages of employees of an intrastate business because the activities being regulated only indirectly affected interstate commerce). By issuing these decisions, the Court was preventing the development of a "completely centralized government" with "virtually no limit to the federal power." *Id.* at 548. To accommodate President Roosevelt and his New Deal legislation, the Court departed from its direct effect test in 1937 and adopted the close and substantial relation test, stating that Congress could regulate intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that Congress could act to prevent a labor stoppage of intrastate manufacturing activities where it had a substantial effect on interstate commerce). *See also United States v. Darby*, 312 U.S. 100, 118 (1941) (upholding the Fair Labor Standards Act and stating that Congress' power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end").

quotas for the amount of wheat one farmer could harvest.⁵³ Even though one farmer's personal impact on the price of wheat was minuscule, the Court reasoned that Congress could regulate his activities because the cumulative impact of all farmers in that farmer's situation was significant.⁵⁴ Based on these decisions, the Court embarked on a fifty year period of using the Commerce Clause to uphold many types of federal action if there was a rational basis for Congress to believe that an activity sufficiently affected interstate commerce.⁵⁵

Finally, in *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court upheld a piece of environmental legislation as a proper exercise of the Commerce Clause power, stating that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."⁵⁶ In light of this decision, the ESA and other environmental laws have withstood many Commerce Clause challenges; however, this reality came into question last decade with the Court's revival of federalism.

B. The Lopez and Morrison Commerce Clause Framework

After fifty years of rubber-stamping congressional Commerce Clause action, the Supreme Court in 1995 finally found a limit to the extent of that power.⁵⁷ In *United States v. Lopez*, the Court held that the Gun Free School Zone Act exceeded congressional authority to regulate commerce because Congress failed to demonstrate that guns in a school zone had a substantial effect on interstate commerce.⁵⁸ A few years later, the Court reexpressed its desire for Congress to pay more attention to its constitutional limits.⁵⁹ In *United States v. Morrison*, the Court struck down the Violence Against Women Act, rejecting the "argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."⁶⁰ In these two cases, the Court was in essence reminding Congress that there are limits to its powers.

53. 317 U.S. 111 (1942).

54. *See id.* at 124-26.

55. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964).

56. 452 U.S. 264, 276-82 (1981) (upholding a federal law requiring mine operators to restore the land after mining to its prior condition).

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

58. *Id.* at 560.

59. *See United States v. Morrison*, 529 U.S. 598 (2000).

60. *Id.* at 617.

Lopez and *Morrison* resulted in a redesigned Commerce Clause framework. The Court identified three categories of activities that Congress could regulate under the Commerce Clause.⁶¹ Congress may regulate (1) “the use of channels of interstate commerce”; (2) “instrumentalities of interstate commerce, persons or things in interstate commerce even though the threat may only come from intrastate activities”; and (3) “activities having a substantial relation to interstate commerce.”⁶²

Unlike the first two categories, the third category includes its own test for determining when an activity has a substantial relation to interstate commerce.⁶³ Specifically, the Court asks four questions: (a) whether the regulation reaches economic activity; (b) whether the link between the regulated activity and interstate commerce is direct or attenuated; (c) whether the regulation includes an express jurisdictional element; and (d) whether Congress has made findings regarding the regulated activity's effect on commerce.⁶⁴ Despite these two Supreme Court cases, other lower federal courts have been reluctant to expand the Court's reasoning to the ESA context, as explained in the next section.

C. Commerce Clause Challenges to the ESA Prior to SWANCC

Plant and animal species continued to enjoy federal protection pursuant to the Commerce Clause despite *Lopez* and *Morrison*.⁶⁵ Two federal circuit court cases, *NAHB v. Babbitt* and *Gibbs v. Babbitt*, expressly addressed Congress' authority to regulate intrastate activities based on the existence of intrastate species.⁶⁶ Whereas one case involved a rare species of fly which was clearly an intrastate species and the other case involved red wolves which were arguably an interstate species, the courts in both cases upheld the federal action.⁶⁷

1. *NAHB v. Babbitt: The Fly Case*

In *NAHB v. Babbitt*, the D.C. Circuit addressed whether “application of section 9 of the ESA to the Delhi Sands Flower-

61. *Id.* at 609; *Lopez*, 514 U.S. at 558.

62. *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 558-59.

63. *See Morrison*, 529 U.S. at 610-12.

64. *Id.*

65. *See United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1997) (upholding the Bald Eagle Protection Act against a Commerce Clause challenge); *Bldg. Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997).

66. *See* 130 F.3d 1041 (D.C. Cir. 1998), *cert. denied*, 524 U.S. 937 (1998); 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 148 L. Ed. 2d 957 (2001).

67. *See NAHB*, 130 F.3d at 1043-44; *Gibbs*, 214 F.3d at 486.

Loving Fly ("the Fly"), which is located only in California, exceeds Congress' Commerce Clause power.⁶⁸ Eleven known colonies of the Fly exist, all within an eight mile radius encompassing two counties in California's interior.⁶⁹ Nearing extinction after ninety-seven percent of its habitat was destroyed, the Delhi Sands Flower-Loving Fly has an estimated population in the low hundreds.⁷⁰ As its name entails, the Fly is one of only a few species of fly attracted to the nectar in flowers that pollinates native plant species.⁷¹

Since being listed as endangered, the ESA prohibits any person from harming the Fly or its habitat and forbids any federal agency from approving projects that could do the same.⁷² Thus, when San Bernardino County wanted to construct a half-billion dollar hospital on Fly habitat, the FWS required modification of the plans to prevent a "take" of the Fly.⁷³ After efforts to accommodate the FWS' requests failed, the County along with the National Association of Home Builders filed a complaint seeking a declaration that section 9 of the ESA as applied exceeded Congress' power under the Commerce Clause.⁷⁴

The Fly controversy netted three "strikingly diverse explanations" regarding whether a federal agency could constitutionally require protection of the Fly habitat.⁷⁵ In the majority opinion, Judge Wald justified the regulation based on three arguments. First, she reasoned that Congress has the authority to control the uses of the channels of interstate commerce.⁷⁶ Second, she upheld the regulation because Congress is authorized "to keep the channels of interstate commerce free from immoral and injurious . . . uses."⁷⁷

Third, she believed that the intrastate activities involved were subject to federal regulation because they substantially affected

68. *NAHB*, 130 F.3d at 1043.

69. *Id.* at 1043-44.

70. *Id.* at 1044.

71. *Id.* at 1043-44.

72. See 16 U.S.C. §§ 1536, 1538(a)(1) (2000).

73. *NAHB*, 130 F.3d at 1044.

74. *Id.* at 1045.

75. John C. Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998) (stating that the Fly is the "only fly to divide the D.C. Circuit three ways concerning the meaning of the Commerce Clause"). In addition to Judge Wald's majority opinion, Judge Henderson agreed that the "protection of the flies regulates and substantially affects commercial development activity which is plainly intrastate." *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring). On the other hand, Judge Sentelle fervently dissented, asking "by what constitutional justification does the federal government purport to regulate local activities that might disturb a local fly?" *Id.* at 1061 (Sentelle, J., dissenting).

76. *NAHB*, 130 F.3d at 1046 (stating the takings prohibition is "necessary to enable the government to control the transport of the endangered species in interstate commerce").

77. *Id.* (citing *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 214, 256 (1964)).

interstate commerce.⁷⁸ Important to this analysis was her assertion that the court should look to the “aggregate effect of the extinction of all similarly situated endangered species.”⁷⁹ She proffered two reasons to explain why the regulation of endangered species like the Fly substantially affects interstate commerce. One, the ESA protects biodiversity and “thereby protects the current and future interstate commerce that relies upon it,” including the potential medicinal benefits.⁸⁰ That is, the “biodiversity argument insists that the availability of a large number of animal and plant species has a substantial effect on interstate commerce” by improving “the probability that we will find a species that possesses the medicinal, nutritional, or other benefit that we seek.”⁸¹ Two, the taking of endangered species is “destructive interstate competition,” and as such should be subject to federal regulation.⁸²

2. *Gibbs v. Babbitt: The Red Wolves Case*

Unlike the Fly, the red wolves in *Gibbs v. Babbitt* only split the Fourth Circuit in two, not three.⁸³ Specifically, the court addressed whether the federal government could regulate the taking of red wolves on private land.⁸⁴ Red wolves are endangered species originally found living in riverine habitats throughout the southeastern United States.⁸⁵ Due to habitat destruction and hunting, the red wolf population was reduced to meager levels. As a result, the FWS initiated a captive breeding program and reintroduced forty-two wolves on to federal land in North Carolina.⁸⁶

Unfortunately, several red wolves migrated to private property in North Carolina, outraging local landowners fearing the resurgence of the red wolf would harm their livestock and bring

78. *Id.* at 1052.

79. *Id.* at 1046.

80. *Id.* at 1052.

81. Nagle, *supra* note 75, at 188-89.

82. See *NAHB*, 130 F.3d at 1054. Interestingly, Judge Wald did not attempt to argue that the Fly itself actually affected interstate commerce, even though the district court found that the Fly did. See Nagle, *supra* note 75, at 182. The record reflected that (1) the Fly was on display in three museums outside California, (2) people outside California, on at least two occasions, bought the Fly from an insect catalog, (3) others traveled interstate to study the Fly, and (4) various scholarly articles had been written about the Fly in other states. *Id.* at 181. While these facts clearly indicate some relationship to commerce, as John C. Nagle explained, “it is hard to maintain that they are the substantial relationships needed to invoke the Commerce Clause.” *Id.* at 181.

83. See 214 F.3d 483, 486 (4th Cir. 2000). Chief Judge Wilkinson wrote the majority opinion. Judge Luttig vehemently opposed the majority opinion, arguing that the red wolf’s affect on commerce can hardly be characterized as “substantial.” *Id.* at 506-07.

84. *Id.* at 486.

85. See *id.* at 488.

86. See *id.*

their land under federal regulation.⁸⁷ In response, two citizens and two counties filed an action in federal court seeking a declaration that the federal government did not have the constitutional authority to prohibit the taking of red wolves on private property.⁸⁸ Siding with the FWS, the district court held the prohibition of red wolf takings was proper under the Commerce Clause because red wolves were “things in interstate commerce” and they substantially affected interstate commerce.⁸⁹

Applying the rational basis test, the Fourth Circuit stated that it was “reasonable for Congress . . . to conclude that [the takings prohibition] regulates economic activity.”⁹⁰ Based on this assertion, the court considered the aggregate affect that the takings of many red wolves would have on interstate commerce.⁹¹ Without red wolves, the court reasoned, there would be “no red wolf related tourism, no scientific research, and no commercial trade in pelts.”⁹² In addition, the court noted that the red wolf reintroduction program generated numerous studies and the resulting scientific research created jobs.⁹³ Like Judge Henderson in *NAHB v. Babbitt*, the Fourth Circuit argued that biodiversity leads to “inestimable future value” in the form of medicines and knowledge.⁹⁴ The court concluded that these factors combined to satisfy the substantial affect prong of the test laid out in *Lopez*.⁹⁵ However, the court rejected the district court’s assertion that the red wolves were “things in interstate commerce.”⁹⁶

87. *Id.* at 488-89. One landowner, Richard Lee Mann, “shot a red wolf that he feared might threaten his cattle.” *Id.* The federal government prosecuted him for violating a special rule promulgated to prevent the taking of red wolves. Federal actions like this angered area residents and several counties. In fact, the North Carolina legislature passed a law that made it legal “to kill a red wolf on private property if the landowner had previously requested the FWS to remove the red wolves from the property.” *Id.* at 489.

88. *See id.* at 489.

89. *Id.* at 489-90. *See Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 535 (E.D.N.C. 1998) (stating, “[t]he record in this case clearly demonstrates that the red wolves are ‘things in interstate commerce’ . . . tourists do cross state lines to see the red wolf, . . . red wolves are to be found in several states, and that some of the red wolves . . . either have crossed states lines or may cross state lines in the future . . . [The red wolf] is more clearly a ‘thing in interstate commerce’ than the Delhi Sands Flower-Loving Fly”).

90. *Gibbs*, 214 F.3d at 492.

91. *Id.* at 493.

92. *Id.* at 492-93 (stating that “red wolves are part of a \$29.2 billion national wildlife-related recreational industry”).

93. *Id.* at 494.

94. *Id.*

95. *Id.*

96. *Gibbs*, 214 F.3d at 491 (stating, “[a]lthough the Service has transported the red wolves interstate for the purposes of study and the reintroduction programs, this is not sufficient to make the red wolf a ‘thing’ in interstate commerce”).

IV. SWANCC & ITS JURISDICTIONAL EFFECTS ON THE ESA

After the Supreme Court's decision in *Lopez*, litigants renewed their efforts to stave off federal restrictions on their activities by arguing that such regulation violated the Commerce Clause. This federalism reviving trend began with *Lopez*, gained credibility with *Morrison*, and was possibly expanded by *SWANCC*. Part IV explores the *SWANCC* case and its constitutional dicta, and will discuss its possible jurisdictional effects on the ESA. Finally, this part concludes by analyzing two recent decisions where the D.C. Circuit and the Fifth Circuit refused to apply *SWANCC* in a way that would limit federal regulation of intrastate species.

A. SWANCC

The *SWANCC* case raised the interesting question of whether the jurisdiction of the Army Corps of Engineers ("Corps") to require dredge and fill permits into navigable waters extended to isolated, abandoned sand and gravel pits with seasonal ponds which provided habitat to migratory birds.⁹⁷ In order to locate and develop a disposal site for non-hazardous solid waste, several Illinois communities united to form a consortium called the Solid Waste Agency of Northern Cook County, or *SWANCC*.⁹⁸ *SWANCC* purchased a 533-acre parcel that was last used in the 1960s as a sand and gravel pit mining operation, which left many pits scattered throughout the parcel.⁹⁹ After being abandoned, the pits evolved into a "scattering of permanent and seasonal ponds," providing habitat to several species of migratory birds.¹⁰⁰

A federal agency's ability to regulate under the Clean Water Act is limited in scope by the language of the statute. Specifically, the CWA grants the Corps the authority to issue permits for discharges into "navigable waters," which the statute defines as "waters of the United States."¹⁰¹ The Corps issued regulations defining the term "waters of the United States" broadly to include intrastate ponds or wetlands whose use or misuse "could affect interstate or foreign commerce."¹⁰² Even more expansively, the Corps operated under an informal policy, known as the Migratory Bird Rule, that considered

97. 531 U.S. at 162.

98. *Id.*

99. *Id.* at 163.

100. *Id.*

101. 33 U.S.C. §§ 1344(a), 1362(7) (2000).

102. 33 C.F.R. § 328.3(a)(3) (1999).

an isolated water body to be jurisdictional if it provided habitat to migratory birds.¹⁰³

To ensure compliance with the law, SWANCC requested and was granted the necessary state and local permits to operate the landfill.¹⁰⁴ Likewise, SWANCC asked the Corps whether a federal Clean Water Act permit would be necessary.¹⁰⁵ At first, the Corps conceded that no federal permit was needed as it lacked jurisdiction over the site.¹⁰⁶ Later, however, the Corps learned that over a hundred species of migratory birds frequented the parcel, and pursuant to the Migratory Bird Rule, the Corps asserted jurisdiction.¹⁰⁷ After efforts failed to create satisfactory mitigation techniques, the Corps denied SWANCC's request for a federal permit.¹⁰⁸

In response, SWANCC filed suit in federal court challenging the Corps' jurisdiction over the site on two grounds.¹⁰⁹ First, SWANCC argued that the Corps exceeded its statutory authority by broadly interpreting the CWA to cover "nonnavigable, isolated, intrastate waters based upon the presence of migratory birds."¹¹⁰ Second, SWANCC contended, if Congress intended to cover this type of water body, such an exercise of federal authority would exceed the Commerce Clause power.¹¹¹ The Seventh Circuit disagreed with SWANCC on both grounds.¹¹² Writing for the majority, Chief Justice Rehnquist reversed the Seventh Circuit, holding that the Migratory Bird Rule exceeded the Corps statutory authority under the CWA.¹¹³ Thus, the Court agreed with SWANCC on its first argument and did not need to reach a conclusion as to the constitutional issue.¹¹⁴

The Court did, however, communicate its frustration with a federal agency trying to assert such expansive power in contravention to the statutory and constitutional limits placed on it. Even if the statute supported the Migratory Bird Rule, the Court

103. See 51 Fed. Reg. 41217; *SWANCC*, 531 U.S. at 164, n.1 (noting, "the Corps issued the 'Migratory Bird Rule' without following the notice and comment procedures" of the APA).

104. *SWANCC*, 531 U.S. at 163.

105. *Id.*

106. *Id.* at 164 (stating that the Corps believed that the parcel did not qualify as a jurisdictional "wetland").

107. *Id.*

108. *Id.* at 164-65.

109. *Id.* at 165.

110. *Id.* at 165-66.

111. *Id.* at 166.

112. *Id.*

113. *Id.* at 167 (reasoning that the CWA was written to cover navigable waters and wetlands adjacent to navigable waters).

114. *Id.*

explained, such regulation would “push the limit of congressional authority” and “alter the federal-state framework by permitting federal encroachment upon a traditional state power.”¹¹⁵ Citing *Lopez* and *Morrison*, the Court reminded the Corps that “the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.”¹¹⁶ The Court concluded that permitting this sort of federal regulation “would result in a significant impingement of the States’ traditional and primary power over land and water use.”¹¹⁷

Importantly, the Court also addressed, without answering, the controversial issue of what “precise object or activity” receives the aggregate impact treatment for the purposes of determining if there is a substantial effect on interstate commerce.¹¹⁸ The Corps argued that the Court should consider the aggregate impact of the municipal landfill, which was “plainly of a commercial nature.”¹¹⁹ In rejecting this argument, the Court intimated that the object or activity that is the focus of the statute (i.e., the regulated waters) receives the aggregate treatment.¹²⁰ In fact, the Court reasoned the Corps’ argument for aggregate treatment based on the landfill being a commercial activity “is a far cry, indeed, from the ‘navigable waters’ and ‘waters of the United States’ to which the statute by its terms extends.”¹²¹ As the next section addresses, much debate exists over the potential effects the constitutional dicta in *SWANCC* will have on the ESA.

B. Possible Jurisdictional Effects of SWANCC on the ESA

In general, three arguments are proffered for the impact that the *SWANCC* dicta will have on the regulation of intrastate species. First, some argue that the Court’s dicta will have serious implications for federal regulation of intrastate species.¹²² Second, others argue that the Court’s dicta will not impact the scope of federal regulation of intrastate species.¹²³ Finally, I argue that the

115. *Id.* at 173.

116. *Id.*

117. *Id.* at 174.

118. *Id.* at 173.

119. *Id.*

120. *Id.*

121. *Id.*

122. See Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205 (2001).

123. See Charles Tiefer, *SWANCC: Constitutional Swan Song for Environmental Laws or No More Than a Swipe at Their Sweep*, 31 ENVTL. L. REP. 11493 (2001) (arguing that *SWANCC* was a result of O’Connor’s & Kennedy’s strict statutory interpretation and not the Court foreshadowing coming constitutional limits on environmental laws); but see *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276-82 (1981) (reasoning that the

Court's dicta should, but will not, limit the ability of federal agencies to regulate activities based on intrastate species.

In his article, *The Ducks Stop Here? The Environmental Challenge to Federalism*, Jonathan Adler argues that the Court's continued "revival of federalism" in *SWANCC* will impact "other environmental statutes, such as the Endangered Species Act, which assert extremely far-reaching federal authority with far less ambiguity than the Clean Water Act."¹²⁴ Weighing the Court's rationale in the CWA context and comparing it to the ESA, Adler believes "[r]egulating activities that may harm endangered species on private land is not geographically limited in the way that Corps' regulation under [the CWA] is limited to 'waters of the United States'."¹²⁵ Thus, he argues that courts will be inclined to expand the *Lopez* and *Morrison* rationales to the ESA context more readily after *SWANCC*.

On the other hand, other commentators argue that the *SWANCC* decision reflects the Court's desire to narrowly construe statutes rather than a desire to strike down environmental legislation.¹²⁶ This view is supported by the fact that the more moderate Justice O'Connor and Justice Kennedy are less likely to rubber-stamp an opinion striking down federal regulation of intrastate species.¹²⁷ Under this view of the *SWANCC* dicta, "appellate courts . . . should not take *SWANCC* as any more than a light swipe, not a serious strike, at the [ESA]."¹²⁸

Finally, I argue that *SWANCC* should signal to other courts that the *Lopez* and *Morrison* framework applies with equal force to environmental and land use regulations as it does to education, crime, and other issues of traditional state concern. Several reasons explain why courts will be reluctant to use the *SWANCC* dicta to strike down regulation of an intrastate species. First, many believe that the social problems addressed in *Lopez* and *Morrison* — gun

Commerce Clause is broad enough to uphold environmental regulation).

124. Adler, *supra* note 122, at 207-08.

125. *Id.* at 241. See Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11042, 11043 (2002) (arguing that, instead of rubber-stamping federal jurisdiction under the "almost-everything-goes 'affecting commerce' theory, courts and agencies must now ask whether federal jurisdiction over a particular geographic feature was in fact intended by Congress").

126. See Tiefer, *supra* note 123, at 11493; *Rancho Viejo, LLC v. Norton*, 32 ENVTL. L. REP. 20112, 20115 (D.D.C. 2001) (refusing to extend *SWANCC* to the ESA context, reasoning that *SWANCC* was resolved on narrow statutory grounds).

127. See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (involving a case where Justice O'Connor joined the majority upholding the ESA's implementing regulations, refusing to join Chief Justice Rehnquist, Justice Scalia, and Justice Thomas).

128. Tiefer, *supra* note 123, at 11493.

possession and domestic violence — were not going to be solved by the federal legislation at issue in those cases, whereas the public generally feels that the federal government is a critical player in the preservation of biodiversity.¹²⁹ Likewise, as previously stated, a majority of the Court is not likely to support a broad rejection of Congress' power to protect species.¹³⁰ Third, with the vast amount of case law on point upholding the ESA under Commerce Clause challenges, courts are unlikely to strike down any regulation based on intrastate species without a clear word from the Supreme Court.¹³¹ That is, courts are more likely to cite to the rationale in *NAHB v. Babbitt* and *Gibbs v. Babbitt* than to strike down any regulation based on dicta in the *SWANCC* decision.¹³² However, if a case were to be certified involving a truly intrastate species (as defined in Part VI-A of this paper), the Court would confront an ideal situation for clarifying the outer limits of the Commerce Clause power in the environmental arena.¹³³

C. ESA Case Law After SWANCC

Since the Supreme Court only used dicta to address the Commerce Clause issue in *SWANCC*, Congress' authority to restrict local activities based on intrastate species is uncertain at best. One thing is clear, however, litigants are revamping their efforts to evade the ESA based on *SWANCC*.¹³⁴ For the most part, courts

129. See Adler, *supra* note 122, at 237.

130. Justice Kennedy, concurring in *Lopez*, stated that “the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise.” 514 U.S. 549, 568. He apparently had a limited view of the holding in *Lopez* as involving a case where “neither the actors nor their conduct [had] a commercial character, and neither the purposes nor the design of the statute [had] an evident commercial nexus.” *Id.* at 580. However, Justice Kennedy also reasoned that “[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.” *Id.* at 577 (citing *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part)). See 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, 794 (2002) (stating, “Justices O'Connor and Kennedy, likely the Court's swing voters, might take a more deferential approach to federal regulation of intrastate endangered species under the Commerce Clause”).

131. See, e.g., *NAHB v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

132. See, e.g., *Rancho Viejo, LLC v. Norton*, 32 ENVTL. L. REP. 20112 (D.D.C. 2001), *aff'd*, 323 F.3d 1062 (D. C. Cir. 2003) (rejecting the argument that *SWANCC* changes the outcomes reached in earlier decisions like *NAHB v. Babbitt*).

133. The Supreme Court declined to review *Gibbs v. Babbitt*, possibly showing its reluctance to address these questions. 531 U.S. 1145 (2001).

134. See *Shields v. Norton*, 289 F.3d 832 (5th Cir. 2002), *cert. denied*, 154 L.Ed.2d 565, 123 S. Ct. 663 (2003); *Alabama-Tombigbee River Coalition v. Norton*, 2002 WL 227032 (D. Ala. Jan. 29, 2002) (involving claim that Section 4(a) of the ESA was unconstitutional as applied

have been extremely reluctant to apply the dicta in *SWANCC* to the ESA.¹³⁵ Part V will address this phenomenon and analyze the approaches courts have taken in the year and a half since the *SWANCC* decision.

1. *Rancho Viejo, LLC v. Norton: The Toad Case*

In *Rancho Viejo, LLC v. Norton*, a federal district court rejected the argument that *SWANCC* changes the outcomes reached in earlier decisions like *NAHB v. Babbitt*.¹³⁶ In *Rancho Viejo*, a developer was denied permits to construct a housing development because the project would damage the habitat of the endangered arroyo toad.¹³⁷ In response, the developer filed suit arguing that FWS lacked “the authority under the Commerce Clause to regulate private lands in order to protect the arroyo toads on those lands, because [the toads] live entirely within California.”¹³⁸ In actuality, the record indicated that the toad’s habitat stretched from coastal Southern California to Mexico.¹³⁹ Paralleling the D.C. Circuit’s rationale in *NAHB v. Babbitt*, the court labored to explain how *SWANCC* “does nothing to bolster” the developer’s argument.¹⁴⁰ Uncertain over whether the rational basis test or the substantial affect on interstate commerce test applied, the district court evaluated the case under both tests and concluded that under either the regulation must be upheld.¹⁴¹ The district court even went to the extent of trying to prove that the regulation of a toad itself is “economic in nature because ‘extinction of [a species] would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity’.”¹⁴²

to the listing of the Alabama Sturgeon because Congress exceeded its Commerce Clause power by regulating an intrastate species in which there is no commercial trade); *Maine v. Norton*, No. 00-250-B-C, 2003 U.S. Dist. LEXIS 6911 (D. Me. Apr. 24, 2003) (rejecting a Commerce Clause challenge to the listing of a distinct population segment of the Atlantic Salmon).

135. See *Bldg. Indus. Ass’n of So. Cal. v. Norton*, 247 F.3d 1241, 1247 n. 8 (D.C. Cir. 2001), cert. denied, 534 U.S. 1108 (2002) (rejecting a Commerce Clause challenge to federal protection of a species of aquatic invertebrates known as fairy shrimp that are found in vernal pools in California).

136. 32 ENVTL. L. REP. 20112 (D.D.C. 2001) (finding no “valid basis upon which to conclude that the holding of [*NAHB v. Babbitt* and *Gibbs v. Babbitt*] has been undermined by recent Supreme Court jurisprudence interpreting Congress’ power under the Commerce Clause”).

137. *Id.* at 20112-13.

138. *Id.* at 20112.

139. *Id.*

140. *Id.* at 20115.

141. *Id.* at 20114.

142. *Id.* (quoting *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1997)). One must wonder if the court was referring to the possibility of future business in the consumption of toad legs or even a hit Disney movie about the arroyo toad. To me, saying that protecting a toad is economic in nature is strange — protecting a toad is ecological in nature, biological in

Affirming the district court, the D.C. Circuit settled on the substantial affect on interstate commerce test but remained noncommittal concerning whether the biodiversity argument or the commercial development activity created the substantial affect.¹⁴³ Believing that it was “highly unlikely” that *SWANCC* dictated a different outcome than that decided in *NAHB*, the D.C. Circuit followed once again the four-part test laid out in *Lopez* for determining whether an activity has a substantial relation to interstate commerce.¹⁴⁴ Most importantly, the regulated activity at issue, the court reasoned, was “Rancho Viejo’s planned commercial development, not the arroyo toad that it threatens.”¹⁴⁵ Since this development had a substantial impact on interstate commerce in the aggregate, the court found no constitutional violation.¹⁴⁶ Interestingly, the majority opinion failed to address how its rationale included a logical stopping point, as required by *Lopez* and *Morrison*.¹⁴⁷

nature, zoological in nature, or even scientific in nature, but certainly not economic in nature.

143. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003). In fact, the court appeared hesitant to criticize any rationale that would lead to the conclusion that a substantial affect on interstate commerce was involved. *Id.* (stating, “In focusing on the [commercial development rationale], we do not mean to discredit the first. Nor do we mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation.”).

144. *Id.* at 1068-71.

145. *Id.* at 1072 (reasoning that the “ESA regulates takings, not toads”). The D.C. Circuit seemingly adopts a broader view of the “precise object or activity” used to determine a substantial affect on interstate commerce than contemplated by the Supreme Court in *SWANCC*. *Id.* at 1072 (emphasis added). In *SWANCC*, the Court rejected the argument that a municipal landfill, which was “plainly of a commercial nature,” received the aggregate treatment under the substantial affect test. *See SWANCC*, 531 U.S. at 173.

146. *Rancho Viejo*, 323 F.3d at 1079-80.

147. *See Lopez*, 514 U.S. at 564. Chief Judge Ginsburg attempted to rectify this omission in his concurrence, explaining that a “take can be regulated if — but only if — the take itself substantially affects interstate commerce.” *Rancho Viejo*, 323 F.3d at 1080. (C.J. Ginsburg, concur) (stating that “large-scale residential development” clearly affects interstate commerce but a “homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce”). One possible explanation for the majority’s omission of this point is the fact that the majority adopted the biodiversity argument as an alternative justification for this federal regulation. Under Chief Judge Ginsburg’s rationale, the biodiversity argument fails for want of a logical stopping point because it holds that any taking of any species under any circumstances has a substantial affect on interstate commerce because of its detrimental impact on biodiversity.

2. *GDF Realty Investments, Ltd. v. Norton: The Cave Bugs Case*

In *GDF Realty Investments, Ltd. v. Norton*, the district court rejected a Commerce Clause challenge to the ESA where a federal agency used the ESA to preclude the proposed development of a shopping center, a residential subdivision, and office buildings on property containing six endangered species of cave-dwelling invertebrates.¹⁴⁸ The species, which included spiders, beetles, and pseudoscorpions, had ranges spread over just two counties within Texas.¹⁴⁹ The developers argued that the *SWANCC* decision required courts to focus on the object of the take prohibition, i.e., the listed species.¹⁵⁰ Even though these were clearly intrastate species, the district court rejected the developers' constitutional challenge to the regulation, holding that the planned commercial development substantially affected interstate commerce.¹⁵¹ The developers argued that *SWANCC* required courts to focus on the object of the take prohibition, i.e., the listed species, when determining the effect on interstate commerce.¹⁵² Rejecting this argument, the district court stated the "*Solid Waste* dicta cited by plaintiffs is . . . inapplicable in this case."¹⁵³ Like *Rancho Viejo*, the court struggled to explain how the protection of intrastate bugs had a "substantial affect on interstate commerce," even going to the extent of analyzing the case under several different tests.¹⁵⁴

Admitting that this area of constitutional jurisprudence is full of "legal uncertainty" and subject to "controversial questions [of aggregation]," the Fifth Circuit embarked on the difficult task of fitting federal regulation of cave bugs within the *Lopez* and *Morrison* Commerce Clause framework.¹⁵⁵ The Fifth Circuit, in light of *SWANCC*, rejected the district court's reliance on the development's impact on interstate commerce because that justification would "effectually obliterate' the limiting purpose of the Commerce Clause."¹⁵⁶ In addition, the Fifth Circuit reasoned

148. 169 F. Supp. 2d 648 (D. Tex. 2001), *aff'd*, 326 F.3d 622 (5th Cir. Tex. 2003).

149. *See id.* at 651.

150. *Id.* at 659.

151. *Id.* at 658.

152. *See id.* at 659.

153. *Id.* at 659 n. 15.

154. *See id.* at 657-58 (considering the case under the court's own version of the *Morrison* approach and considering the case under a "purely as-applied Commerce Clause challenge" based on the effect of the specific activity on interstate commerce).

155. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 629-30 (5th Cir. 2003).

156. *Id.* at 633-35 (stating that the district court's rationale provides "no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce"). This seemingly conflicts with the reasoning of the D.C. Circuit in *Rancho Viejo*. *See Rancho Viejo*, 323 F.3d 1062, 1072 (D.C. Cir. 2003) (holding that the regulated activity was the planned

that the taking of cave bugs alone did not have a substantial effect on interstate commerce.¹⁵⁷ Nonetheless, the court affirmed the district court, holding that Congress could regulate in this area because the taking of all endangered species in the aggregate had a substantial effect on interstate commerce.¹⁵⁸

These cases, like their progenitors, reflect the lengths courts must travel to fit federal regulation of intrastate species into the Commerce Clause box. Admittedly, many courts have been reluctant to use *SWANCC* as a means of restricting federal power. In fact, as of the time of this paper, no court has construed *SWANCC* to the serious detriment of federal regulation of intrastate species.¹⁵⁹ Nonetheless, several recent cases in other environmental arenas indicate that not all courts ignore *SWANCC*.¹⁶⁰ My proposal, as explained in Part VI, provides a more reasonable and comprehensible approach to determining whether species regulation

commercial development).

157. See *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d at 636-37 (rejecting argument that the scientific interest generated by the cave bugs and their possible future commercial benefits were sufficient to trigger congressional action).

158. See *id.* at 638-41. The Fifth Circuit reasoned that aggregation is appropriate when dealing with intrastate species for three reasons: (1) the ESA is "directed at activity that is economic in nature;" (2) the "regulated intrastate activity [is] an 'essential' part of the economic regulatory scheme;" and (3) there is a direct link between species loss and a substantial commercial effect. *Id.* at 639-40.

159. In June 2002, the Supreme Court issued a writ of certiorari in a case addressing the scope of activities the Corps is authorized to regulate under the CWA. See *Borden Ranch Partnership v. Corps of Engineers*, No. 01-1243 (9th Cir. June 10, 2002). This case may present the Court with an opportunity to clarify its constitutional rationale in *SWANCC*.

160. In *Rice v. Harken Exploration Co.*, the Fifth Circuit construed *SWANCC* broadly stating, "[u]nder [*SWANCC*], it appears that a body of water is subject to regulation under the [CWA] if the body of water is actually navigable or is adjacent to an open body of navigable water." 250 F.3d 264, 269 (5th Cir. 2001), *reh'g denied*, 263 F.3d 167 (5th Cir. Tex. 2001); see *Albrecht & Nickelsburg*, *supra* note 125, at 11044 (stating that *Rice* "articulated a broad vision of the import of *SWANCC* for federal jurisdiction"). In *Rice*, several landowners filed suit against an oil producer alleging the company had discharged oil into "navigable waters" in violation of the Oil Pollution Act, an act analogous to the CWA. See *Rice*, 250 F.3d at 265-67. Even though the waters at issue could possibly feed into a navigable river located down gradient, the waters were, in fact, just small "seasonal creeks" that often had "no running water at all." *Id.* at 270. Citing to *SWANCC*, the court rejected the landowners' argument that a groundwater connection to navigable waters was sufficient to trigger federal regulation. See *id.*

Likewise, in *United States v. Newdunn Associates*, a federal district court reasoned the Corps of Engineers lacked jurisdiction over several acres of wetlands without a showing there was some actual connection to navigable waters. 195 F. Supp. 2d 751 (E.D. Va. 2002). In *U.S. v. Rapanos*, another federal district court explained that *SWANCC* establishes a "new mode of analysis" for determining the extent of federal jurisdiction. 190 F. Supp. 2d 1011, 1015 (E.D. Mich. 2002) (dismissing criminal prosecution for illegal filling of "navigable waters" because there was no evidence that the wetlands were navigable or adjacent to navigable waters). Thus, even though courts have been willing to broadly construe *SWANCC* in the CWA context, they have been simultaneously unwilling to expand *SWANCC*'s constitutional rationale to the ESA context.

is constitutional. Before doing so, the next part explains the policy arguments that fuel courts' hesitation to strike down federal species protection.

V. ARGUMENTS BEHIND THE FEDERALISM & ESA DEBATE

As courts and commentators battle this issue in the federal reporters and law reviews, several arguments for and against limiting federal regulation based on intrastate species provide the battleground. A voluminous amount of literature addresses these policy issues, so I will briefly address just three issues critical to my proposal: (A) the practicality issue of determining a species' effect on interstate commerce; (B) the externality issue fueling the race to the bottom dispute; and (C) the logicality issue of allowing federal regulation of abundant species but forbidding it when the species becomes so depleted as to be intrastate. Part V will present these arguments, favor the federalist perspective, and lay the groundwork for my proposal in Part VI.

A. Practicality Issue

Most proponents of federalism in the ESA context advocate limiting federal species regulation to those species that individually have a substantial effect on interstate commerce. However, opponents of restricting federal regulation in this way argue that it would be impractical to force courts to make an individualized determination of a single species effect on interstate commerce.¹⁶¹ As the district court in *Rancho Viejo* stated, courts should accept "Congress' more general finding that the preservation of species in the aggregate is crucial to the commerce of this Nation. Given that approximately 13 to 30 million different species now exist," it would be too difficult "to make a determination as to whether each individual species 'substantially affects interstate commerce'."¹⁶²

Two responses mitigate this concern. First, the only species for which substantial affect determinations are made are listed species. Therefore, such a determination will only need to be made for around 1800 species, as litigation requires, not the tens of millions feared by the district court in *Rancho Viejo*.¹⁶³ Second, the listing process is extremely arduous with vast amounts of research compiled on each species.¹⁶⁴ This information will likely provide

161. See *Rancho Viejo, LLC v. Norton*, 32 ENVTL. L. REP. 20112 (D.D.C. 2001).

162. *Id.* at 20114. See also *NAHB v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

163. See 50 C.F.R. §§ 17.11, 17.12 (2003) (providing the endangered and threatened species list for animals and plants, respectively).

164. See, e.g., *Determination of Endangered Status for the Delhi Sands Flower-loving Fly*,

most of the information needed to determine whether a particular species has a substantial effect on interstate commerce.¹⁶⁵ As discussed in Part VI, my proposal will address the substantial effect determination by removing it from the forefront of the Commerce Clause test in the ESA context.

B. Externalities Issue

As Jonathan Adler recognizes, a central “argument for broad federal power to regulate environmental matters is grounded in a concern over interstate externalities.”¹⁶⁶ Externalities arise where the benefits of a particular action are disproportionately local, while many of the costs are borne by citizens living in other states.¹⁶⁷ Generally, opponents of restricting federal regulation of intrastate species make three arguments based on the idea of externalities.

First, they contend that leaving protection of intrastate species to the states will result in a “race to the bottom” as states reduce conservation efforts to attract business.¹⁶⁸ This fear is simply unfounded.¹⁶⁹ For example, many feared that the states would respond to the SWANCC decision by allowing wetlands to go unprotected. “But in fact, many states have responded to SWANCC by enacting or recommending the enactment of relatively aggressive regulatory programs to protect isolated wetlands now beyond the reach of the federal government.”¹⁷⁰ The same should be expected if the federal government could no longer regulate activities based on intrastate species.

58 Fed. Reg. 49,881 (Sept. 23, 1993) to be codified at 50 C.F.R. pt. 17 (providing extensive background information on the Fly and the process leading up to its final listing).

165. *See id.* (providing the historic and current range of the species, activities affecting the species, and other relevant information important to a determination of whether the species is an “intrastate species” for the purposes of my proposal).

166. *See Adler, supra* note 122, at 222.

167. *See id.*

168. *See id.*

169. The “race to the bottom” has been challenged thoroughly and effectively by leading commentators. *See id.* at 223-31 (discussing extensively the “race to the bottom” and concluding that the states are unlikely to act in this way); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the ‘Race-to-the-Bottom’ Rational for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992) (arguing that “destructive interstate competition” is an insufficient justification for federal environmental regulation).

170. JOHN C. NAGLE & J.B. RUHL, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 583 (2002); *see Agency Implementation of SWANCC Decision: Hearings Before the Subcomm. on Energy Policy, Natural Resources, & Regulatory Affairs of the House Comm. on Government Reform*, 107th Cong. 8 (Sep. 19, 2002) (statement of Assistant Attorney General Thomas L. Sansonetti) (recognizing that “states, such as Wisconsin and Ohio, have enacted legislation providing new authority to fill the ‘gaps’ created in federal regulatory jurisdiction by SWANCC”).

Second, some argue that using federal environmental regulation is necessary to prevent states from imposing “spillover” effects on other states.¹⁷¹ For instance, they argue that the extinction of one intrastate species could have a major impact on the delicate balance of the ecosystem or reduce the possibility of future scientific advancement.¹⁷² Third, they argue that intrastate species protection, if left to the states, will protect a “suboptimal amount of habitat.”¹⁷³ That is, some citizens will vote for reduced species protection because they know that other states will engage in conservation efforts.

In response, the federal government cannot accomplish seemingly worthwhile goals by unconstitutional means.¹⁷⁴ Even more, the evidence is just as strong that interjurisdictional competition among the states will lead to optimal species protection plans, as states compete to draw species-related tourism income.¹⁷⁵ Moreover, one of the main justifications for a federalist form of government is that states are able to experiment with different programs, and eventually, other states will adopt the most effective program.¹⁷⁶ Also, states better understand the unique characteristics of their ecosystem and economy, and they can use this understanding to accommodate both. Finally, the federal

171. See RECHTSCHAFFEN & MARKELL, *supra* note 7, at 25-27 (providing a general discussion of the debate surrounding “negative externalities” in environmental law).

172. See *Rancho Viejo, LLC v. Norton*, 32 ENVTL. L. REP. 20112-14 (D.D.C. 2001) (reasoning that the extinction of an intrastate species of toad would “substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity”).

173. See Adler, *supra* note 122, at 235.

174. See David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 366, 396-99 (1998) (arguing that regulation of endangered species on private land may lie beyond the scope of the Commerce Clause).

175. See RECHTSCHAFFEN & MARKELL, *supra* note 7, at 19 (noting that, over the past two decades, “[s]tates have made significant investments in their capacity to administer environmental and natural resource programs,” so much so that, in the aggregate, states currently invest more in environmental protection than the federal government).

176. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (explaining that the federalist structure preserves several advantages such as increasing the “opportunity for citizen involvement in democratic processes” and allowing for “more innovation and experimentation in government”); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (explaining that states play a “role as laboratories for experimentation to devise various solutions where the best solution is far from clear”); Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2375-76, 2383 (1996) (discussing federalism and the argument that states are laboratories for social and economic experiments); RECHTSCHAFFEN & MARKELL, *supra* note 7, at 33 (stating, “the existence of 50 state governments inherently provides the opportunity to experiment with a wide variety of approaches in a short time frame”); DEFENDERS OF WILDLIFE, STATE ENDANGERED SPECIES ACTS: PAST, PRESENT AND FUTURE, available at <http://www.defenders.org/pubs/sesa01.html> (last visited Oct. 21, 2002) (recognizing that states have been the “nation’s principal laboratories for policy change” in many areas including conservation).

government lacks sufficient resources to effectively protect *all* endangered species.¹⁷⁷ Simply put, a one-size-fits-all approach to protecting intrastate species is bad policy because of demographic variation, localized culture, differing geography, varied economic strengths, and limited federal resources.¹⁷⁸ The federal government should allow states and localities to make these value judgments, or choose to alter their decisions by constitutional means like appropriating money to states that meet federal goals.¹⁷⁹

C. Logicality Issue

Finally, courts upholding federal regulation of intrastate species have challenged the logic behind allowing Congress to regulate species when they are abundant and spread across state lines, but disallowing it when the species are so depleted as to abide in only one state.¹⁸⁰ For instance, the district court in *Rancho Viejo* believed that it made sense to allow a federal agency to protect the arroyo toad to prevent it from becoming an intrastate species.¹⁸¹ Admittedly, even though there is little evidence that states will not adequately protect such species, if the federal government can constitutionally regulate a species at some point in the past, it should be able to do so in the future as well. Thus, under my proposal, I mitigate this concern by considering the historic range of the species when defining intrastate species.

VI. A COHERENT TEST FOR FEDERAL REGULATION OF INTRASTATE SPECIES

After establishing a new test for deciding the constitutionality of federal regulation of intrastate species, Part VI will conclude by analyzing how two different cases, *NAHB v. Babbitt* and *Gibbs v. Babbitt*, would have fared under my approach. I hope that, after reading the analysis of these two hypothetical decisions, those disfavoring the federalist perspective will realize that my approach is not so draconian after all.

177. See RECHTSCHAFFEN & MARKELL, *supra* note 7, at 20 (pointing out the resource constraints faced by federal environmental agencies).

178. See Adler, *supra* note 122, at 213.

179. See *id.* at 235 (contending that the use of the federal spending power can effectively subsidize conservation efforts without violating the Constitution). The ESA already provides a mechanism for federal grants to states. See 16 U.S.C. § 1535(d) (2002).

180. See *Rancho Viejo, LLC v. Norton*, 32 ENVTL. L. REP., 20112, 20115 (D.D.C. 2001).

181. See *id.*

A. The "Intrastate Species Test"

Most importantly, the Supreme Court should more effectively graft the authority of Congress to regulate intrastate species into the *Lopez* and *Morrison* framework. The *SWANCC* decision ambiguously addressed whether the Court would extend its revival of federalism into the environmental context.¹⁸² Thus, under the current regime, courts are forced to justify this sort of regulation on the laughable assertion that, among other things, a fly "substantially affects interstate commerce." Instead of forcing courts to engage in the laborious task of fitting the protection of a listed species under the substantial affect prong, the courts should decide the ESA cases under the "things in interstate commerce" prong, as advocated by the district court in *Gibbs v. Babbitt*.¹⁸³

Under my simple test, courts would ask whether the species at issue is an "intrastate species." If the species qualifies as an intrastate species, then the federal government would be unable to regulate the species and activities that affect the species. Obviously, the linchpin of the test will be the definition of intrastate species. Under my proposal, an intrastate species is a species that (1) has a current and historic range limited to one state, (2) is not susceptible to traveling across state lines, and (3) does not itself substantially affect interstate commerce.¹⁸⁴ Thus, as a "thing of interstate commerce," a court could more readily explain how a species becomes subject to federal regulation. This test also provides the all-important function of providing a logical stopping point for congressional authority to regulate species.¹⁸⁵

182. See *id.* at 20114-15 (analyzing the constitutionality of federal regulation pursuant to the ESA under various tests); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1070-71 (D.C. Cir. 2003) (stating that the Supreme Court's analysis in *SWANCC* makes it highly unlikely that it undermines previous precedent); Mank, *supra* note 130, at 751 (stating that the *SWANCC* decision suggests "the fact that a species crosses state lines does not automatically make its habitat entitled to protection under the Commerce Clause without further analysis regarding the relationship of the habitat to the species and commercial activity").

183. See *Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 535 (E.D.N.C. 1998), *cert. denied*, 531 U.S. 1145 (2001). However, I understand that many judges, including Judge Sentelle, do not consider species regulation to fall within the "things in interstate commerce" prong. See *NAHB v. Babbitt*, 130 F.3d 1041, 1062 (D.C. Cir. 1997). The issue of whether species regulation can be justified under the "things in interstate commerce" rationale has yet to be comprehensively addressed by a court.

184. See Scalero, *supra* note 28, at 318 (referring to intrastate species as those plant or animal species which are "indigenous to a specific geographic region" of only one state, and are "nonmigratory"); Mank, *supra* note 130, at 735 (stating, "[m]any endangered species are located in only one state, do not cross state lines, and have insignificant commercial or recreational value").

185. See *United States v. Morrison*, 529 U.S. 598, 610 (2000) (stating that Congress' enumerated powers must have "judicially enforceable outer limits"); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634-35 (5th Cir. 2003); Nagle, *supra* note 75, at 191-92

Importantly, the elements of the definition ameliorate the concerns expressed by several courts. For example, the element contemplating the historic and current range of the species disposes of the “locality concern,” discussed in Part V-A, that it is illogical to empower Congress to regulate a species when it is abundant and spread across state lines but to disallow such regulation when the species is depleted to just one state.¹⁸⁶ Furthermore, courts can ensure that the federal government can protect species that might become interstate species in the future by excluding migratory species from the definition.¹⁸⁷ Finally, by excluding from the definition of intrastate species those species that individually substantially affect interstate commerce, the courts will provide a way for Congress to protect those species that contribute to medical advances or are involved in interstate tourism or commerce.¹⁸⁸

Therefore, if a species meets this definition, it is not subject to federal regulation. If it does not meet this definition, then it is an interstate species subject to federal regulation. Based on strictly geographic terms, about half of the listed species exist in only one state.¹⁸⁹ Under my proposal, much less than that would be free from federal regulation due to the impact of considering the historic range, migratory nature of the species, and the exception for species

(interpreting *Lopez* to mean that “the Commerce Clause cannot justify federal legislation of everything. I will not abandon that principle because it lies at the heart of *Lopez*.”).

186. See *GDF Realty Investments, Ltd. v. Norton*, 169 F. Supp. 2d 648, 659 n. 14 (W.D. Tex. 2001) (arguing that it is nonsensical to allow the federal government to regulate a species when it is “scattered plentifully across state lines” but prohibit such regulation when “that same species becomes more scarce and its population reduced to a single state”); *Rancho Viejo*, 323 F.3d at 1073-74; *Gibbs*, 31 F. Supp. 2d at 535 (reasoning that red wolves are interstate species because they “either have crossed state lines or may cross state lines in the future”); see also *Mank*, *supra* note 130, at 752-53 (stating, “Whether a species is located in one state should be a factor, but not dispositive, in deciding whether it substantially affects interstate commerce.”).

187. By using the term “not susceptible to traveling across state lines,” I hope to encompass species that are migratory and not isolated in the interior of a single state. Federal Clean Water Act regulations use a similar term in defining the scope of “waters of the United States.” See 40 C.F.R. § 122.2 (2000) (defining “waters of the United States” to mean “[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce”).

188. See *NAHB v. Babbitt*, 130 F.3d 1041, 1058 (D. C. Cir. 1997) (Henderson, J. concurring) (describing the Delhi Sands Flower-Loving Fly as an intrastate species because they “do not move among states either on their own or through human agency”). Thus, under my proposal, an otherwise intrastate species can be subject to federal regulation if it travels in interstate commerce through human agency if it has a substantial effect on interstate commerce. Possible examples include a species used to develop medicines or a species used for its fur in a commercial industry.

189. See *id.* at 1052 (stating that approximately 521 of the 1082 listed species in the United States were found in only one state) (citing the Brief of Amici Curiae Center for Marine Conservation, Defenders of Wildlife, Environmental Defense Fund, National Audubon Society, and World Wildlife Fund at 20-21).

that substantially impact interstate commerce. Section B of this part considers how my proposal would change the courts' rationales and outcomes in *NAHB v. Babbitt* and *Gibbs v. Babbitt*.

Likewise, Congress and various agencies can take steps to improve species' protection under my proposal. As stated earlier, Congress can avoid constitutional problems by using its spending power to encourage states to take actions the federal government deems necessary to safeguard intrastate species. For example, if Congress finds it necessary to ensure that the habitat of the Delhi Sands Flower-Loving Fly is protected, it can provide federal monies to states to include the species in its own endangered species program. In addition, the FWS should focus its efforts on protecting interstate species, which will lead to a more efficient and effective use of conservation resources. It is important under my approach, however, that agencies make detailed factual findings supporting the listing of a species as interstate or intrastate, so that a court will have adequate information readily available to determine if a species is, in fact, interstate or intrastate.

B. Impact of the "Intrastate Species Test"

A brief examination of *NAHB v. Babbitt* and *Gibbs v. Babbitt* in light of my proposal will illustrate the simplicity and reasonableness of the "intrastate species test." As discussed earlier, the court in *NAHB v. Babbitt* upheld the FWS' regulation of a completely intrastate species of fly. If the intrastate species test had been employed by the court, the decision would have been much different — in terms of outcome and logic. Under my test, the court would have asked whether the Fly was an intrastate species under the "things in interstate commerce prong" of the Commerce Clause test. The Fly would not have been subject to federal regulation because (1) the Fly had a current and historic range that only included California, (2) the Fly was not susceptible to traveling across state lines because it was isolated and located deep within California's interior, and (3) the Fly itself did not substantially affect interstate commerce. However, the FWS could bring the Fly under its jurisdiction by making factual findings that the Fly could in the future traverse state lines or by showing that the Fly itself is medically important or has some other substantial effect on interstate commerce.

On the other hand, the outcome in *Gibbs v. Babbitt* would be the same — the court would have upheld the federal regulation of the red wolves. The court would have asked whether the red wolves were "intrastate species." Since red wolves were originally found living in riverine habitats throughout the southeastern United

States, the court would have reasoned that red wolves did not meet the definition of an intrastate specie.¹⁹⁰ Likewise, FWS could justify the regulation by relying on the migratory nature of red wolves or the fact, if proven, that the red wolves are critical to a million dollar tourism or hunting industry.¹⁹¹

VII. CONCLUSION

The Supreme Court's constitutional dicta in *SWANCC* should signal its intention to expand the revival of federalism into other environmental areas. However, with the weighty authority of *NAHB v. Babbitt* and *Gibbs v. Babbitt* still on the books, courts are likely to continue upholding constitutional challenges to federal regulation of intrastate species under the ESA. The "Intrastate Species Test" would significantly reduce the confusion surrounding Congress' ability to regulate flies, toads, cave bugs, red wolves, and thousands of other species. Likewise, my approach would encourage optimum species protection by reaping the benefits of federalism. In the end, it is all speculation until the Supreme Court finally addresses whether Congress may regulate intrastate species. Only then will we learn whether the powers delegated by the Constitution to the federal government are "few and defined" or whether Congress can do whatever it "feels like" under the guise of species protection.

190. *Id.* at 488.

191. Even Rancho Viejo would have made more sense under my approach. Instead of arguing that toads substantially affect interstate commerce, the court could have relied on the international character of the toad species to justify the federal regulation.

