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PROTECTING INTRASTATE THREATENED SPECIES: DOES THE ENDANGERED SPECIES ACT ENCROACH ON TRADITIONAL STATE AUTHORITY AND EXCEED THE OUTER LIMITS OF THE COMMERCE CLAUSE?

*Bradford C. Mank**

I. INTRODUCTION

After broadly construing the scope of congressional authority under the Commerce Clause for nearly sixty years, in 1995, the Supreme Court stunned many legal commentators by striking down a federal statute regulating intrastate gun possession near local schools in *United States v. Lopez*,¹ a five-to-four decision. The Court reasoned that such noneconomic activity was traditionally a state regulatory function and therefore outside the scope of the Clause.² Five years later in *United States v. Morrison*,³ another five-to-four decision, the Court held that a federal statute penalizing intrastate gender-based violence intruded on traditional state authority over criminal matters and thus exceeded the scope of the Commerce Clause—despite congressional findings about the effects of gender-based violence on the national economy.⁴ Because federal environ-

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¹ 514 U.S. 549 (1995).

² *Id.* at 567-68. Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.* at 550. The same five justices were in the majority in *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (SWANCC), discussed below. See *infra* notes 117-30, 145-75 and accompanying text (discussing positions taken by Justices). Justices Stevens, Souter, Ginsburg, and Breyer dissented in *Lopez*, *Morrison* and SWANCC. *Lopez*, 514 U.S. at 550; *Morrison*, 529 U.S. at 655; *Solid Waste Agency*, 531 U.S. at 176.

³ 529 U.S. 598.

⁴ *Id.* at 614. Chief Justice Rehnquist wrote the majority opinion, joined by Justices

mental statutes rely on the Commerce Clause as the basis for congressional authority, a broad reading of *Lopez* and *Morrison* might call into question the constitutionality of at least some environmental statutes or regulations.

In particular, the Endangered Species Act of 1973 ("ESA")⁵ is likely to raise concerns under the Court's recent interpretation of the Commerce Clause because the statute regulates numerous species that have little commercial value and affects individual landowners.⁶ While the Court's Commerce Clause jurisprudence is ultimately more concerned with the impacts of activities upon interstate commerce than the activities' location,⁷ most judges and commentators have assumed that whether a species is located in only one state or crosses state boundaries is an important factor.⁸ A large number of endangered or threatened species—approximately half—have habitats limited to one state.⁹

O'Connor, Scalia, Kennedy and Thomas. *Id.* at 600. Justices Stevens, Souter, Ginsburg, and Breyer again dissented. *Id.*

⁵ 16 U.S.C. §§ 1531-44 (1994).

⁶ See Stephen M. Johnson, *United States v. Lopez: A Missstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 66-67 (1996) [hereinafter Johnson, *United States v. Lopez: A Missstep*] (explaining certain provisions of ESA "regulate both commercial and noncommercial activities . . . [and] often regulate local land use"); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215, 217-18 (2000) (comparing species with commercial value as tourist objects to species that "appear to be of interest only to researchers"; both are protected); Jeanine A. Scalero, Case Note, *The Endangered Species Act's Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 CHAP. L. REV. 317, 318-21 (2000) (discussing ESA). Whether the Endangered Species Act can be justified under the Treaty Power is beyond the scope of this Article. See White, *supra*, at 224-34 (arguing Treaty Power provides less stable support for Endangered Species Act than Commerce Clause because treaties may be amended by either United States or another nation).

⁷ See *infra* notes 72-87 and accompanying text (discussing Commerce Clause).

⁸ One commentator has questioned whether intrastate endangered species necessarily raise greater Commerce Clause issues than some species that live in more than one state, but lack significant commercial value. See John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 185 n.49 (1998) ("Why the fact that a bird or animal crosses state lines of its own violation and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained."); see *infra* notes 333-56 and accompanying text (discussing Commerce Clause and ESA). Nevertheless, most judges and commentators have assumed that exclusively intrastate species raise the most serious questions under the Commerce Clause. See *infra* notes 188-91 and accompanying text (discussing significance of interstate characteristic).

⁹ See Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (observing 521 of 1082 species in United States listed as endangered or threatened in 1997

Many of these intrastate endangered species do not currently possess significant economic value in interstate commerce.¹⁰ Moreover, many threatened and endangered species that do cross state lines lack significant commercial value, and as a result, even their regulation under the ESA may present significant Commerce Clause issues.¹¹ Furthermore, most endangered or threatened species are located on primarily non-federal land and thus not subject to protection under the Property Clause, discussed below.¹²

In 2001, the Supreme Court indirectly addressed the impact of *Lopez* and *Morrison* on federal environmental law. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"),¹³ yet another five-to-four decision, the Court held that an Army Corps of Engineers' ("the Corps") regulation defining the Corps' jurisdiction to include "isolated" intrastate wetlands and waters that serve as habitat for migratory birds exceeded its statutory authority under the Clean Water Act.¹⁴ The Court concluded that the Act's reliance on the term "navigable waters" in defining the scope of the statute's wetlands jurisdiction demonstrated that Congress did not intend to include "isolated" intrastate wetlands or waters that had no connection to navigable

were found in only one state).

¹⁰ See Nagle, *supra* note 8, at 182 (discussing several intrastate endangered species with no known commercial or recreational value); Eric Brignac, Recent Development, *The Commerce Clause Justification of Federal Endangered Species Protection: Gibbs v. Babbitt*, 79 N.C. L. REV. 873, 883 (2001) (arguing many endangered species have little commercial value).

¹¹ See *infra* notes 333-56 and accompanying text (discussing concerns of ESA and Commerce Clause).

¹² Scalero, *supra* note 6, at 321 ("[A]lmost 80% of protected species have some or all of their habitat on privately owned land."). According to the General Accounting Office, in 1993, 781 species were listed under the ESA—over 90% of these species have some or all of their habitat on nonfederal lands. *Gibbs v. Babbitt*, 214 F.3d 483, 502 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001). Nearly three-fourths of the listed species had over 60% of their habitat on nonfederal lands. *Id.*

¹³ *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).

¹⁴ *Id.* at 174; William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 *Envtl. L. Rep. (Envtl. L. Inst.)* 10741 (News & Analysis) (July 2001) (discussing *SWANCC*); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 *Envtl. L. Rep. (Envtl. L. Inst.)* 10669 (News & Analysis) (June 2001) (discussing *SWANCC*); Maya R. Moiseyev, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers: The Clean Water Act Bypasses a Commerce Clause Challenge, But Can the Endangered Species Act?*, 7 *HASTINGS W.-NW. J. ENVTL. L. & POL'Y* 191, 194-95 (2001) (discussing court's analysis in *SWANCC*).

waters within the Act's jurisdiction.¹⁵ The Court deliberately read the statute's jurisdiction over "navigable waters" narrowly to avoid the constitutional question of whether federal regulation of isolated waters and wetlands would violate the Commerce Clause.¹⁶ Because its decision was based solely on statutory grounds, the Court did not decide whether federal regulation of isolated intrastate wetlands exceeded congressional authority under the Commerce Clause, although, in dicta, the decision suggested that the Corps' interpretation may have exceeded that authority.¹⁷ Nevertheless, while not directly addressing the scope of the Commerce Clause, the *SWANCC* Court's narrow interpretation of the Clean Water Act to exclude regulation of intrastate isolated wetlands reflected its concern that the Corps' broader interpretation would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power."¹⁸

Now that it has decided the issue of isolated wetlands in *SWANCC*, the Court is likely to next address whether the Endangered Species Act may provide federal protection to intrastate endangered species that lack significant commercial value. Unlike the situation in *SWANCC*, the Supreme Court cannot simply avoid the issue of whether the Endangered Species Act's regulation of intrastate species on non-federal land is constitutional under the Commerce Clause by applying a narrow construction of the statute.

¹⁵ See *Solid Waste Agency*, 531 U.S. at 163-64 (interpreting Federal Water Pollution Control Act § 404(a), Clean Water Act, 33 U.S.C. § 1344(a) (1994)). See generally Funk, *supra* note 14, at 10746-59 (criticizing *SWANCC* for construing term "navigable waters" too narrowly in light of *Riverside Bayview Homes* precedent and legislative history of Clean Water Act); Michael P. Healy, *Textualism's Limits on the Administrative State: Of Isolated Waters, Barking Dogs, and Chevron*, 31 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10928, 10929-35 (News & Analysis) (Aug. 2001) (criticizing *SWANCC* for using restrictive textualist interpretation that was inconsistent with Court's prior interpretation of term "navigable waters" in *Riverside Bayview Homes*); Johnson, *supra* note 14, at 10672 (observing *SWANCC* interpreted term "navigable waters" inconsistently with *Riverside Bayview Homes* precedent).

¹⁶ See *Solid Waste Agency*, 531 U.S. at 172-73 (discussing how court analyzes administrative interpretations of statutes). See also *infra* Part III.E (discussing *SWANCC*).

¹⁷ *Solid Waste Agency*, 531 U.S. at 172-73; Johnson, *supra* note 14, at 10673 (discussing constitutional impact of *SWANCC*); Moiseyev, *supra* note 14, at 195 ("Although the Court did not reach the Commerce Clause challenge to the Migratory Bird Rule, it did suggest that the Corps' interpretation breached the outer limits of congressional authority.").

¹⁸ *Solid Waste Agency*, 531 U.S. at 173 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (“*Sweet Home*”),¹⁹ the Court itself upheld the Secretary of Interior’s broad interpretation of its regulatory authority over private landowners.²⁰ Accordingly, if a private landowner or a state challenges restrictions on the taking of endangered or threatened species, including destruction of their critical habitat, the Court will likely have to address whether the statute’s application to intrastate species that lack significant commercial value is constitutional under the Commerce Clause.

After the Supreme Court decided *Lopez*, a number of commentators speculated about its impact on the Endangered Species Act.²¹ This Article reexamines the issue in light of *Morrison* and *SWANCC*. Part V demonstrates that, even after *Lopez*, *Morrison*, and *SWANCC*, the Commerce Clause reaches federal regulation of intrastate endangered or threatened species because conservation of such species has traditionally been a shared federal and state function that recognizes the legitimacy of federal regulation whenever the need for preservation is great and states have failed to address important conservation issues.²² Additionally, Part V shows federal regulation of endangered or threatened species does not undermine states’ traditional role in regulating non-threatened species.²³ Finally, Part VI establishes that the preservation of endangered or threatened species serves long-range national economic interests in preserving biodiversity and potentially valuable genetic material that deserve deference from courts even

¹⁹ 515 U.S. 687 (1995).

²⁰ *Id.* at 696-708.

²¹ See generally Johnson, *United States v. Lopez: A Misstep*, *supra* note 6, at 66-71 (examining constitutionality of certain provisions of ESA after *Lopez*); White, *supra* note 6, at 240-53 (applying *Lopez* to ESA); David A. Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 419-27 (1998) (arguing ESA infringes on “[i]and use regulation . . . [which] is traditionally within the expertise of the states and their local political subdivisions, not Washington, D.C.”); Scalero, Note, *supra* note 6, at 331-49 (discussing court decision since *Lopez* regarding endangered species and concluding whether *Lopez* is “real threat” to environmental regulation “can only be tested with time.”).

²² See *infra* notes 296-310 and accompanying text (analyzing traditional state activities).

²³ See *infra* notes 357-72 and accompanying text (arguing ESA does not blur line between federal and state authority).

though their exact value is unascertainable at present.²⁴ Applying a rational basis test, Part VI concludes that courts should defer to Congress' goal of preserving our genetic and biological heritage as a reasonable policy substantially advancing America's long-term commercial goals.²⁵ In light of their concurring opinion in *Lopez* and support for protection of endangered species on private lands in *Sweet Home*, Justices O'Connor and Kennedy may provide key swing votes if the Court is to take a more deferential approach to federal regulation of intrastate endangered species under the Commerce Clause.²⁶

II. ENDANGERED SPECIES ACT

A. THE STATUTORY SCHEME

The current Endangered Species Act applies to endangered or threatened species of fish and wildlife on all land in the United States and territorial seas.²⁷ By contrast, the Endangered Species Acts of 1966 and 1969 protected species on federal land only, and, as a result, had failed to address the growing problem of species extinction.²⁸ In response to these concerns, Congress amended the

²⁴ See *infra* notes 429-38 and accompanying text.

²⁵ See *infra* notes 373-438 and accompanying text.

²⁶ See *infra* notes 67-68 and accompanying text (discussing moderate positions taken of these justices in previous cases).

²⁷ *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995). However, endangered or threatened plants are only protected on federal lands or non-federal land covered by a state statute. 16 U.S.C. § 1538(a)(2)(B) (1994). See generally George Cameron Coggins & Anne Fleishel Harris, *The Greening of American Law: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247, 278-304 (1987) (discussing ESA's limited protection of plants).

²⁸ The Endangered Species Act of 1966 established a National Wildlife Refuge System and prohibited disturbing animals or habitat within the System. Pub. L. No. 89-669, § 4, 80 Stat. 926, 927-29 (1966). The Endangered Species Act of 1969 required the Secretary of the Interior to develop a list of endangered species and prohibited the importation of these animals or any of their byproducts without a permit. Pub. L. No. 91-135, §§ 2-3(a), 83 Stat. 275, 275 (1969). These statutes also required federal agencies to conserve species "insofar as is practicable," Pub. L. No. 89-669, § 1(b), 80 Stat. 926, 926 (1966), and to the "extent practicable," § 3(a), 83 Stat. at 275. See Davina Kari Kaile, Note, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEO. INT'L ENVTL. L. REV. 448, 449-54 (1993) (outlining 1966 and 1969 Acts).

ESA in 1973 to prohibit takings of endangered species on all land in the United States, including state, municipal, or private land.²⁹ In *TVA v. Hill*,³⁰ the Supreme Court described the 1973 Act as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”³¹ According to the *Hill* Court, “[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”³² For example, section 2 of the Act provides that one of its main purposes is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . .”³³

To a significant extent, Congress relied on its Commerce Power as a basis for enacting the 1973 ESA Amendments. For instance, the statute states that many of the species threatened with extinction are of “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”³⁴ The statute also observes that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.”³⁵

In the 1973 ESA’s legislative history, Congress emphasized the potential future economic and medical benefits of preserving a wide variety of species and genetic heritage.³⁶ The House Report explained:

As we homogenize the habitats in which these plants
and animals evolved, and as we increase the pressure

²⁹ 16 U.S.C. § 1538(a)(1) (1994); Kaile, *supra* note 28, at 556.

³⁰ 437 U.S. 153 (1978).

³¹ *Id.* at 180.

³² *Id.* at 184.

³³ 16 U.S.C. § 1531(b) (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995).

³⁴ 16 U.S.C. § 1531(a)(3).

³⁵ *Id.* § 1531(a)(1).

³⁶ See *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1050 (D.C. Cir. 1997) (“[O]ne of the primary reasons that Congress sought to protect endangered species from ‘takings’ was the importance of continuing availability of a wide variety of species to interstates commerce.”).

for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage.

The value of this genetic heritage is, quite literally, incalculable. . . .

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.³⁷

The ESA requires the Secretary of Interior to determine which species are “in danger of extinction throughout all or a significant portion of [their] range.”³⁸ Then the Secretary must establish a list of all “endangered” and “threatened” species, and also identify critical habitat necessary for the survival of such species.³⁹ The Secretary next determines whether a species is endangered or threatened “solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the

³⁷ H.R. REP. NO. 93-412, at 4-5 (1973). Similarly, the Senate Report on the 1969 ESA noted:

From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.

S. REP. NO. 91-526, at 3 (1969).

³⁸ 16 U.S.C. § 1532(6). The Secretary of Commerce also plays a role. *Id.*

³⁹ *Id.* § 1533(a).

species. . . ."⁴⁰ Only after determining that a species is endangered or threatened can the Secretary issue a regulation protecting it.⁴¹ Then, the Secretary must develop recovery plans for the "conservation and survival" of listed species.⁴² Once a species has recovered and its survival is no longer threatened, federal regulatory control ceases, and, accordingly, the animal is subject only to state authority.⁴³

The ESA's regulation of federal lands, its authorization for the acquisition of land to support conservation efforts, and its restrictions on the behavior of federal agencies does not raise any serious constitutional concerns under either the Spending Clause⁴⁴ or the Property Clause.⁴⁵ Under section 5 of the ESA, the Secretary may acquire land to assist in the preservation of such species, and section 6 provides that the Secretary should do so in cooperation with the States.⁴⁶ Section 7 of the ESA directs federal agencies to "insure that any action authorized, funded, or carried out by [such agency . . . is not likely to] jeopardize the continued existence of [endangered species or threatened species] or result in the destruction or modification of [critical] habitat."⁴⁷ Under this section, all federal agencies must consult with the Secretary before undertaking projects that could harm endangered or threatened species or their critical habitat.⁴⁸

Section 9 is the most controversial portion of the ESA because it extends the Act's coverage to non-federal lands, including private

⁴⁰ *Id.* § 1533(b)(1)(A).

⁴¹ *Id.* § 1533(d).

⁴² *Id.* § 1533(f).

⁴³ *Gibbs v. Babbitt*, 214 F.3d 438, 503 (4th Cir. 2000).

⁴⁴ See U.S. CONST. art. I, § 8, cl. 1 (detailing Congress's spending power); White, *supra* note 6, at 223 (observing certain provisions in ESA are valid pursuant to Spending Clause). See generally *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (permitting Congress to condition funds on State's adoption of minimum drinking age); Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147 (2001) (discussing how Spending Clause can validate environmental legislation).

⁴⁵ See U.S. CONST. art. IV, § 3, cl. 2 (detailing Congress's control over federal lands); Sophie Akins, Note, *Congress' Property Clause Power to Prohibit Taking Endangered Species*, 28 HASTINGS CONST. L.Q. 167, 183-86 (2000) (noting Congress's broad authority over both private and public land under Property Clause).

⁴⁶ 16 U.S.C. §§ 1534, 1535(a) (1994).

⁴⁷ *Id.* § 1536(a)(2).

⁴⁸ *Id.* § 1536(a)(3); *TVA v. Hill*, 437 U.S. 153, 172-73 (1978).

property. Section 9(a)(1) prohibits any person from taking any endangered or threatened species without a permit or other authorization.⁴⁹ The statute defines the term "take" to include any private activities "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."⁵⁰ Any person who knowingly destroys the critical habitat of an endangered species is subject to criminal penalties—up to a fine of \$50,000, one year in prison or both.⁵¹

To implement section 9(a)(1)'s prohibition against taking endangered species, the Fish and Wildlife Service ("FWS") of the Department of Interior has issued regulations forbidding "significant habitat modification or degradation where it actually kills or injures wildlife."⁵² In other words, private landowners may not destroy the critical habitat of endangered species. However, a landowner may apply for an incidental takings permit that allows some incidental harm to endangered species from habitat modification if the owner presents an acceptable habitat conservation plan that demonstrates that the modification is consistent with the long-term survival of the species.⁵³

B. *SWEET HOME*

In *Sweet Home*,⁵⁴ decided two months after the *Lopez* decision, the Supreme Court upheld regulations prohibiting private landowners from destroying critical habitat and indirectly taking endangered species unless they obtain an incidental taking permit.⁵⁵ Justice Stevens' majority opinion concluded that regulation was consistent with section 9(a)(1)'s text and the goals of the Endangered Species Act.⁵⁶ First, the Court used the dictionary definition

⁴⁹ 16 U.S.C. § 1538(a)(1)(B).

⁵⁰ *Id.* § 1532(19).

⁵¹ *Id.* § 1540(b).

⁵² 50 C.F.R. § 17.3 (2001).

⁵³ See 16 U.S.C. § 1539(a)(1)(B) ("[I]f such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.").

⁵⁴ 515 U.S. 687 (1995).

⁵⁵ *Id.* at 696-708.

⁵⁶ *Id.* at 697-99. See Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better Than*

of the verb form of “harm” to find that the regulation’s inclusion of indirect harm to endangered species from destruction or harm to the species’ critical habitat was consistent with the “ordinary understanding” of the word and that such a definition “naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.”⁵⁷ According to the Court, “the broad purpose of the ESA supports the Secretary’s decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.”⁵⁸ Additionally, the Court determined that Congress’ addition in 1982 of the section 10 “incidental take” permit provision,⁵⁹ which allows the Secretary to grant an exception to the section 9(a)(1)(B) takings prohibition by granting permits activities that will cause incidental harm to an endangered species if the applicant provides a satisfactory conservation plan for minimizing any such harm, was evidence that Congress understood the Act to apply to indirect as well as direct harm because the most likely use for such a permit was to avert liability for habitat modification.⁶⁰ Finally, the Court invoked the *Chevron* deference principle—that courts should defer to an agency’s interpretation if a statute is ambiguous and the interpretation is reasonable.⁶¹ The Court stated that “[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary’s reasonable interpretation,” and that “[w]hen it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. . . . The proper interpretation of a term such as ‘harm’ involves a complex policy choice.”⁶² The Court concluded: “When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for

Judicial Literalism, 53 WASH. & LEE L. REV. 1231, 1263-64 (1996) (examining *Sweet Home* decision from textualist approach).

⁵⁷ *Sweet Home*, 515 U.S. at 697-98.

⁵⁸ *Id.* at 698-99.

⁵⁹ 16 U.S.C. § 1539(a)(1)(B).

⁶⁰ *Sweet Home*, 515 U.S. at 700-01.

⁶¹ *Id.* at 703-08; Mank, *supra* note 56, at 1265; see generally *Chevron U.S.A. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984) (establishing “*Chevron*” principle).

⁶² *Sweet Home*, 515 U.S. at 703, 708.

his.”⁶³ Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote a dissenting opinion in which he argued that the words to “take” and to “harm” as used in the Act could not possibly mean “habitat modification.”⁶⁴

The five justices who constituted the majority in *Lopez*, *Morrison*, and *SWANCC*—Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas—did not vote together in *Sweet Home*. Justice Kennedy joined the majority opinion,⁶⁵ and Justice O’Connor concurred in the decision with the understanding that the FWS regulation was limited to “significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals.”⁶⁶ While concerned with preserving the role of states in a federalist system, Justices O’Connor and Kennedy appear more willing to accept national regulatory schemes than Chief Justice Rehnquist, Justice Scalia and Justice Thomas.⁶⁷ As discussed below, Justice Kennedy wrote a concurring opinion in *Lopez*, joined by Justice O’Connor, that arguably took a more moderate approach to judicial review of legislation under the Commerce Clause.⁶⁸ In light of their votes in *Sweet Home* and *Lopez*, Justices Kennedy and O’Connor might be reluctant to conclude that the regulation that they upheld in *Sweet Home* is invalid under the Commerce Clause, although they never had to address whether the regulation was valid for purely intra-state endangered species as opposed to those that are subject to interstate transportation or trade.

In both *Hill* and *Sweet Home*, the Supreme Court broadly construed the scope of the ESA.⁶⁹ However, neither case directly addressed whether Congress has the authority under the Commerce

⁶³ *Id.* at 708.

⁶⁴ *Id.* at 714-36 (Scalia, J., dissenting). See Mank, *supra* note 56, at 1265-66 (discussing dissenting opinion in *Sweet Home*).

⁶⁵ *Sweet Home*, 515 U.S. at 688.

⁶⁶ *Id.* at 708-09 (O’Connor, J., concurring).

⁶⁷ See generally Byron Dailey, Note, *The Five Faces of Federalism: A State-Power Quintet Without a Theory*, 62 OHIO ST. L.J. 1243, 1248-50, 1267-87 & *passim* (2001) (arguing Justices O’Connor and Kennedy apply more moderate approach to state rights and national power issues than Chief Justice Rehnquist, Justice Scalia and particularly Justice Thomas).

⁶⁸ See *infra* notes 102-07 and accompanying text (discussing Justice Kennedy’s *Lopez* concurrence).

⁶⁹ See *supra* notes 30-33, 55-68 and accompanying text (discussing *Hill* & *Sweet Home*).

Clause to protect intrastate endangered species that are located on state, local, or private lands. Many endangered species are located in only one state, do not cross state lines, and have insignificant commercial or recreational value.⁷⁰

III. THE SUPREME COURT NARROWS THE COMMERCE CLAUSE: *LOPEZ AND MORRISON*

The Commerce Clause gives Congress the authority to “regulate Commerce with foreign Nations, and among the several States. . . .”⁷¹ While the scope of congressional authority to regulate interstate commerce is often the subject of litigation, courts have been especially concerned with whether various intrastate activities sufficiently affect interstate commerce to justify federal regulation. Thus, in determining whether the Commerce Clause authorizes regulation of various endangered species, the determinative issue is whether those species, either individually or perhaps in the aggregate, affect interstate commerce. However, courts have often focused on whether an activity or species is purely intrastate, even though intrastate travel by itself is not determinative in deciding whether an activity or species substantially affects interstate commerce.

A. A BRIEF HISTORY OF THE COMMERCE CLAUSE

In *Gibbons v. Ogden*,⁷² Chief Justice Marshall first articulated the notion that Congress had authority under the Commerce Clause to regulate intrastate activities affecting interstate commerce.⁷³

⁷⁰ See, e.g., Nagle, *supra* note 8, at 182-83 (identifying Peck’s cave amphipod, Cowhead Lake thi chub, and Desert milk-vetch as being among species that are “hard[] to connect to interstate commerce”); Brignac, *supra* note 10, at 883-84 (arguing that plants and some animals on endangered species list have “independent commercial value [that] is highly speculative at best”).

⁷¹ U.S. CONST. art. I, § 8, cl. 3.

⁷² 22 U.S. (9 Wheat.) 1 (1824).

⁷³ *Id.* at 186-98. See also Louis J. Virelli III & David S. Leibowitz, “Federalism Whether They Want It or Not”: *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 927-29 (2001) (arguing Justice Marshall’s opinion in *Gibbons* adopted broad interpretation of Commerce Power); Akins, *supra* note 45, at 169-71 (arguing Justice Marshall’s *Gibbons* opinion implied

According to the *Gibbons* Court, the Commerce Power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."⁷⁴ However, the Court also stated that the Commerce Clause does not apply to intrastate activities "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."⁷⁵

Though generally taking an expansive approach to the Commerce Power, *Gibbons* was vague enough to allow narrower interpretations by subsequent courts. Before 1936, the Supreme Court often read the Commerce Clause narrowly to exclude intrastate manufacturing activities even if a product later entered interstate commerce on the grounds that the intrastate manufacturing only indirectly affected interstate commerce.⁷⁶ Beginning in 1937, in the seminal case of *NLRB v. Jones & Laughlin Steel Corp.*,⁷⁷ the Court extended the breadth of the Commerce Power, holding that 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" are within the scope of the Commerce Clause.⁷⁸ After 1937, the Court applied a rational basis review to legislation enacted pursuant to the Commerce Clause and did not generally distinguish between activities that

Commerce Power reaches intrastate activities affecting interstate commerce).

⁷⁴ *Gibbons*, 22 U.S. at 196.

⁷⁵ *Id.* at 195; see *Akins*, *supra* note 45, at 170 ("The Court . . . acknowledged that the States have the sole ability to regulate completely intrastate Commerce.").

⁷⁶ See *Hammer v. Dagenhart*, 247 U.S. 251, 271-72 (1918) (holding Commerce Clause did not authorize child labor laws because intrastate manufacturing is not interstate commerce even though products later entered interstate commerce), *overruled by* *United States v. Darby*, 312 U.S. 100, 116 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-13 (1895) (holding sugar manufacturers were outside Sherman Act because sugar manufacturing was intrastate activity even if sugar later entered interstate commerce).

⁷⁷ 310 U.S. 1 (1937).

⁷⁸ *Id.* at 37. Compare *id.* at 36-39 (holding statute prohibiting unfair labor practices is within Commerce Power), with *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936) (rejecting similar labor laws in Bituminous Coal Conservation Act as exceeding Commerce Power). See generally *White*, *supra* note 6, at 235 (describing court's deference to Congress in legislating based on Commerce Clause).

directly or indirectly affected interstate commerce.⁷⁹ From 1937 to 1995, the Supreme Court deferentially reviewed most regulatory laws enacted pursuant to the Commerce Clause to the point that the limitations of the clause became almost a nonissue.⁸⁰

In *Wickard v. Filburn*,⁸¹ the Court broadly construed the scope of the Commerce Clause in holding that the federal government could forbid a farmer from growing wheat exclusively for home use because homegrown wheat competes with wheat in interstate commerce.⁸² *Wickard* is notable both for the Court's willingness to find that a purely intrastate activity could substantially affect interstate commerce and for its willingness to aggregate small individual effects in determining the activity's impact.⁸³ The *Wickard* Court concluded that the Commerce Power reaches individually insignificant activities that have a substantial economic impact when aggregated "together with that of many others similarly situated."⁸⁴ In *Lopez*, Chief Justice Rehnquist referred to *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."⁸⁵ Under *Wickard*, a very wide range of intrastate activities might qualify for regulation under the Commerce Clause.

Recently, the Supreme Court has generally sought to limit the Commerce Power to legislation regulating "economic" activities that have a substantial impact on interstate commercial matters,

⁷⁹ See *United States v. Lopez*, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) (stating Court's finding in *Jones & McLaughlin Steel* has "since been seen beginning the abandonment, in practical purposes, of the formalistic distinction between direct and indirect effects"); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: Lopez, Morrison, SWANCC, and Gibbs*, 31 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10413, 10413 (*News & Analysis*) (Apr. 2001).

⁸⁰ See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281-83 (1981) (approving under Commerce Power federal regulation of intrastate mining activities under the Surface Mining Control and Reclamation Act of 1977 to prevent ruinous competition among states likely to lead to inadequate environmental standards); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding use of Commerce Power to enact civil rights legislation prohibiting racial discrimination in public accommodations); Brignac, *supra* note 10, at 874 ("After the Court's decision in *NLRB*, the Commerce Clause was a virtual blank check that Congress could use to pass almost any legislation."); Dral & Phillips, *supra* note 79, at 10413 (pointing out "broad and sweeping power of Congress to legislate").

⁸¹ 317 U.S. 111 (1942).

⁸² *Id.* at 125-30.

⁸³ *Id.* at 123-30.

⁸⁴ *Id.* at 128.

⁸⁵ *United States v. Lopez*, 514 U.S. 549, 560 (1995).

although the line between economic and noneconomic issues is often not clear.⁸⁶ Additionally, the Court is especially likely to scrutinize federal regulations that infringe on areas of traditional state concerns, such as criminal or family law, even if Congress makes findings about their indirect economic impact on the national economy.⁸⁷

B. LOPEZ

In *United States v. Lopez*,⁸⁸ the Supreme Court, for the first time since 1936, held a federal statute unconstitutional under the Commerce Clause.⁸⁹ The *Lopez* Court held that the Gun-Free School Zones Act of 1990 ("GFSZA"), which made possession of a gun within a school zone a federal offense, exceeded Congress' authority under the Commerce Clause despite congressional findings that violent crime affects interstate commerce.⁹⁰ Chief Justice Rehnquist's majority opinion narrowly read the scope of the Commerce Clause by limiting congressional authority to "economic activity" that has substantial effects on interstate commerce.⁹¹

Analyzing previous Commerce Clause cases, the *Lopez* Court explained that Congress could regulate three broad categories of activity: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce."⁹² The Court concluded

⁸⁶ See *id.* at 566 (stating such "legal uncertainty" is mandated by enumeration of powers under Commerce Clause after *Lopez* and *Morrison*); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (describing circumscriptions on Congress's power to legislate under the Commerce Clause). See generally Dral & Phillips, *supra* note 79, at 10415-24 (describing Commerce Clause after *Lopez* and *Morrison*).

⁸⁷ Charles Tiefer, *After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?*, 30 *Envtl. L. Rep. (Envtl. L. Instit.)* 10888, 10890 (News & Analysis) (Oct. 2000).

⁸⁸ 514 U.S. 549 (1995).

⁸⁹ *Id.* at 567-68; Funk, *supra* note 14, at 10763.

⁹⁰ *Lopez*, 514 U.S. at 559-67.

⁹¹ *Id.* at 559-63; Funk, *supra* note 14, at 10763.

⁹² *Lopez*, 514 U.S. at 558-59 (citing *Perez v. United States*, 402 U.S. 146, 150 (1971) and

that possession of a gun is not primarily an economic activity and, therefore, clearly did not fit the first two categories.⁹³ Additionally, the Court determined that gun possession could not be regulated under the third category as an activity that “substantially affects” interstate commerce because it was neither commercial in its own right, nor was it an essential component of interstate economic activity.⁹⁴ Moreover, the Court explained, Congress had made no specific findings about the effect of gun possession in school zones on interstate commerce, but only more generalized conclusions about the impact of violent crime in general on interstate commerce.⁹⁵ Because Congress had no rational basis for finding that gun possession within school zones has a substantial impact on interstate commerce, the Court held the statute was unconstitutional under the Commerce Clause.⁹⁶ The Court’s only concession was its suggestion that Congress could enact legislation regulating some intrastate activities that lack a substantial impact on interstate commerce if the regulatory scheme was “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”⁹⁷

The Court suggested that it would carefully review congressional authority under the Commerce Clause whenever federal legislation attempted to regulate areas traditionally controlled by state or local governments.⁹⁸ In *Lopez*, the Court rejected the “costs of crime” and “national productivity” justifications for the GFSZA because, under these theories, it was “difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”⁹⁹ The Court was

Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 276-77 (1981).

⁹³ See *id.* at 559 (explaining “first two categories of authority may be quickly disposed of” when GFSZA is viewed in this framework).

⁹⁴ See *id.* at 561 (stating GFSZA is not “an essential part of a larger regulation of economic activity”); Dral & Philips, *supra* note 79, at 10414 (discussing shortcomings highlighted in majority opinion).

⁹⁵ *Lopez*, 514 U.S. at 562-64.

⁹⁶ *Id.* at 567-68.

⁹⁷ *Id.* at 561; Adrian Vermeule, Dialogue, *Centralization and the Commerce Clause*, 31 *Envtl. L. Rep. (Envtl. L. Inst.) (News & Analysis)* 11334, 11335 (Nov. 2001).

⁹⁸ *Lopez*, 514 U.S. at 557-68.

⁹⁹ *Id.* at 564.

clearly concerned that an expansive reading of the Commerce Clause to include noneconomic activities that are traditionally regulated by states would undermine our federal system of government.¹⁰⁰ The Supreme Court stressed that the regulation of school zones was within the "general police power" retained by the states and thus not within the normal scope of the Commerce Clause.¹⁰¹

In his concurring opinion, which Justice O'Connor joined, Justice Kennedy took a more "pragmatic" approach to interpreting the Commerce Clause than the majority and dissenting opinions.¹⁰² Justice Kennedy argued that courts should interpret the outer boundaries of the Commerce Power in light of the overarching goal of balancing federal and state authority, especially in noncommercial areas traditionally regulated by states.¹⁰³ Because education is a traditional state concern, Kennedy argued that courts should be cautious in using the Commerce Clause to authorize federal legislation that regulates "areas of traditional state concern" upon which "States lay claim by right of history and expertise."¹⁰⁴ In particular, he contended that one of the great dangers of the federal government regulating areas of traditional state concern is that "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."¹⁰⁵ Yet Justice Kennedy's concurrence implied a broader reading of the Commerce Power than Chief Justice Rehnquist's majority opinion

¹⁰⁰ See *id.* at 561 n.3, 564, 567-68 (stating that delicate balance of power exists between state and federal government, and balance is disturbed when Congress enacts legislation intruding on state policy decisions); accord *United States v. Morrison*, 529 U.S. 598, 617-19 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local.").

¹⁰¹ See *Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions where, 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.").

¹⁰² See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 801-04 (1996) (describing Justice Kennedy's "pragmatic" concurrence in *Lopez* as more moderate than Chief Justice Rehnquist's majority opinion); Stephen R. McAllister, Essay, *Is There a Judicially Enforceable Limit to Constitutional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 238-42 (1996) (praising Justice Kennedy's "pragmatic" approach to federalism as model for future cases).

¹⁰³ *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring); see also White, *supra* note 6, at 238-39 (discussing Justice Kennedy's concurrence).

¹⁰⁴ *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

¹⁰⁵ *Id.* at 577.

by suggesting that Congress could regulate noncommercial activities having a nexus to interstate commerce if the legislation does not intrude on areas within the traditional state police power.¹⁰⁶ Because Justices Kennedy and O'Connor are perceived by many as the key swing votes on Commerce Clause issues, Justice Kennedy's concurrence suggests that the impact of legislation on the balance between federal and state authority is an important factor to consider in addition to whether the regulated activity is commercial in nature.¹⁰⁷

In his dissenting opinion, Justice Breyer argued that Congress had a rational basis for finding a substantial relation between the possession of a gun in a school zone and interstate commerce.¹⁰⁸ He contended that the majority opinion was inconsistent with several Court decisions that had sustained legislation that had far less impact on interstate commerce than the GFSZA.¹⁰⁹ Additionally, he maintained that the majority's distinction between "commercial" and "noncommercial" transactions was unworkable because of the difficulty in drawing such a line.¹¹⁰ Furthermore, he argued that

¹⁰⁶ *Id.* at 578. See White, *supra* note 6, at 238-39 (analyzing Justice Kennedy's concurring opinion); Linehan, Note, *supra* note 21, at 404-05 ("The Act usurped from the states their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."); Scalero, Note, *supra* note 6, at 329 (noting Justice Kennedy's feeling if there is no infringement on state sovereignty under Commerce Clause, Congress may regulate noncommercial activity with "nexus to interstate commerce"). Arguably, even Chief Justice Rehnquist's majority opinion implied that Congress might use the Commerce Power to regulate noneconomic activities that do not intrude on traditional areas of state control. See Virelli & Leibowitz, *supra* note 73, at 954 ("The Court criticized the statute for regulating non-economic and interfering with existing criminal laws, an area it considered traditionally reserved for the state").

¹⁰⁷ *Lopez*, 514 U.S. at 576-81 (Kennedy, J., concurring). Justices O'Connor and Kennedy are often swing votes in five-to-four votes in the Supreme Court. During the 2000-2001 term, Justices O'Connor and Kennedy were in the majority in those cases twenty out of twenty-six cases, the most of any Justices on the Court. See Marcia Coyle, *Supreme Court Review, 2000-2001 Term: Taking Charge*, NAT'L L.J., Aug. 6, 2001, at C3 (breaking down voting alignment for 2000-01 term).

¹⁰⁸ *Lopez*, 514 U.S. at 618 (Breyer, J., dissenting).

¹⁰⁹ *Id.* at 625-27 (citing *Perez v. United States*, 402 U.S. 146 (1971) (holding federal loan sharking criminal statute was within Commerce Clause), *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding Civil Rights Act of 1964 within Commerce Clause), *Daniel v. Paul*, 395 U.S. 298 (1969) (holding regulation of intrastate amusement park within Commerce Clause), and *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding regulation of consumption of homegrown wheat within Commerce Clause)); see also Dral & Phillips, *supra* note 79, at 10414-15.

¹¹⁰ *Lopez*, 514 U.S. at 627-29 (Breyer, J., dissenting).

this distinction was inconsistent with the Constitution because the Commerce Clause allows regulation of either type of activity as long as it substantially affects interstate commerce.¹¹¹ Finally, Breyer's dissent contended that the majority was creating "legal uncertainty in an area of law that, until this case, seemed reasonably well settled."¹¹²

Justice Souter's dissenting opinion criticized the majority for departing from the highly deferential rational basis review applied by the Court since 1937.¹¹³ He argued that the Court had returned to the uncertain pre-1937 jurisprudence by qualifying its rational basis review depending on whether a subject was commercial or noncommercial despite the difficulties in classifying many activities.¹¹⁴ Furthermore, he contended that the Court had introduced even more uncertainty by suggesting that its application of rational basis review would depend on whether a statute dealt with an area of traditional state regulation or contained explicit factual findings supporting a congressional determination that an activity substantially affected interstate commerce.¹¹⁵

C. MORRISON

The Violence Against Women Act ("VAWA") created a "right to be free from crimes of violence motivated by gender" and provided a civil damages remedy for victims of gender-based violence.¹¹⁶ In *United States v. Morrison*,¹¹⁷ the Supreme Court held that the VAWA, like the GFSZA, was beyond the scope of the Commerce Clause because the activity was essentially noneconomic and only indirectly connected to interstate commerce.¹¹⁸ Following *Lopez*, the

¹¹¹ *Id.* at 627-28; see also Dral & Phillips, *supra* note 79, at 10418-21.

¹¹² *Lopez*, 514 U.S. at 630.

¹¹³ *Id.* at 603-08 (Souter, J., dissenting).

¹¹⁴ *Id.* at 608.

¹¹⁵ *Id.* at 608-11. Justice Souter also dissented in *Morrison*, discussed below, arguing that the Court should have applied rational basis review to a statute which provided a civil damages remedy for victims of gender-based violence. *United States v. Morrison*, 529 U.S. 598, 628-36 (2000) (Souter, J., dissenting).

¹¹⁶ 42 U.S.C. § 13981 (1994).

¹¹⁷ 529 U.S. 598 (2000).

¹¹⁸ *Id.* at 613-19. The Court also held that Congress lacked authority under § 5 of the Fourteenth Amendment to enact § 13981 of the VAWA, *id.* at 619-27, but that issue is beyond

Morrison Court emphasized that “in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”¹¹⁹ Additionally, *Morrison* emphasized that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”¹²⁰ The Court rejected congressional findings that gender-based violence had impacts on interstate commerce because the causal chain between such crimes and any economic impacts was too attenuated.¹²¹ The congressional findings on the VAWA improperly “[sought] to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the states’ police power) to every attenuated effect upon interstate commerce.”¹²²

Moreover, the Court “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”¹²³ According to the Court, permitting aggregation of noneconomic activities as a basis for regulation under the Commerce Clause would permit the federal government to regulate virtually every activity.¹²⁴ Allowing Congress to justify legislation by aggregating noneconomic activities under the Commerce Clause would “completely obliterate the Constitution’s distinction between national and local authority.”¹²⁵ The Court noted as an example that the aggregation of noneconomic activities could be applied just as easily “to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”¹²⁶ The Court stated that courts should

the scope of this Article.

¹¹⁹ *Id.* at 611.

¹²⁰ *Id.* at 614.

¹²¹ *Id.* at 615-16.

¹²² *Id.* at 615.

¹²³ *Id.* at 617.

¹²⁴ *Id.* at 615-17. “If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.” *Id.* at 615.

¹²⁵ *Id.* at 615.

¹²⁶ *Id.* at 615-16.

limit the aggregation principle to economic activities,¹²⁷ emphasizing that “in every case where [the Court had] sustained federal regulation under *Wickard*’s aggregation principle, the regulated activity was of an apparent commercial character.”¹²⁸ The *Morrison* Court found that the VAWA impermissibly intruded on traditional state authority over family law and criminal issues.¹²⁹ The Court noted that there was “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”¹³⁰ As in *Lopez*, the *Morrison* court emphasized that courts should carefully evaluate legislation in view of federalism concerns: “The Constitution requires a distinction between what is truly national and what is truly local. . . .”¹³¹

D. TO WHAT EXTENT DID *LOPEZ* AND *MORRISON* CHANGE THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE?

Many commentators have criticized *Lopez* and *Morrison* for failing to articulate a clear standard for evaluating the Commerce Power.¹³² The two cases purported to apply a traditional rational basis standard of review.¹³³ However, the actual standard applied appears to be far more stringent than previous cases.¹³⁴ For example, the *Morrison* Court did not defer to congressional findings

¹²⁷ *Id.* at 610-11.

¹²⁸ *Id.* at 611 n.4.

¹²⁹ *Id.* at 618.

¹³⁰ *Id.*

¹³¹ *Id.* at 599.

¹³² See, e.g., Dral & Phillips, *supra* note 79, at 10417-18 (arguing *Lopez* and *Morrison* purported to apply rational basis test for whether legislation is authorized under Commerce Clause, but in fact applied more stringent and uncertain standard); Jason Everett Goldberg, Note, *Substantial Activity and Non-Economic Commerce: Toward a New Theory of the Commerce Clause*, 9 J.L. & POL’Y 563, 571, 594-603 (2001) (arguing *Morrison* claimed to apply rational basis review, but actually applied far more stringent standard that it never clearly articulated).

¹³³ In *Morrison*, the Court declared: “Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment upon a plain showing that Congress has exceeded its constitutional bounds.” 529 U.S. at 607.

¹³⁴ Dral & Phillips, *supra* note 79, at 10417-18; see Brignac, *supra* note 10, at 881-82 (arguing Supreme Court’s rational basis review has paid “lip service” to judicial deference in recent opinions, but *Morrison* aggressively reviewed whether activity substantially affects interstate commerce).

that gender-based violence substantially affected interstate commerce, findings that should have cleared the traditional rational basis test.¹³⁵ By failing to articulate a clear new standard for reviewing statutes under the Commerce Clause, the *Lopez* and *Morrison* decisions have created considerable uncertainty for lower courts attempting to follow the Supreme Court's evolving jurisprudence in this area.¹³⁶

Because of the differing views about the scope of the Commerce Power, even among the majority in *Lopez* and *Morrison*, the impact of these decisions for future cases remains uncertain. In his concurring opinion in *Lopez*, Justice Thomas stated that he would return to the "original understanding" of the Commerce Clause when it was ratified in the late 1780s, which limited the Commerce Power to transportation of goods across state boundaries.¹³⁷ He argued that the "substantial effects test is but an innovation of the 20th century"¹³⁸ and suggested that the Court should overrule it.¹³⁹ In his concurring opinion in *Morrison*, Justice Thomas reiterated his "view that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and this Court's early Commerce Clause cases."¹⁴⁰ However, no other justice joined Justice Thomas' *Lopez* and *Morrison* concurrences.

By contrast, Justice Kennedy's concurring opinion in *Lopez*, which was joined by Justice O'Connor, clearly approved of the "substantial effects" test.¹⁴¹ Justice Kennedy argued that the Court

¹³⁵ *Morrison*, 529 U.S. at 607 (stating deferential presumption of constitutionality standard). See also *id.* at 614-15 (declining to defer to congressional finding that gender-based violence substantially affects interstate commerce); Brignac, *supra* note 10, at 882 ("Morrison therefore demands that the courts not give Congress the benefit of judicial deference but instead examine the wisdom of its judgment.").

¹³⁶ See Dral & Phillips, *supra* note 79, at 10417-18 (criticizing *Lopez* and *Morrison* for using uncertain standard of review); Goldberg, *supra* note 132, at 606-08 (arguing uncertain standard of review in *Lopez* and *Morrison* has confused lower courts).

¹³⁷ See *United States v. Lopez*, 514 U.S. 549, 585-602 (1995) (Thomas, J., concurring) (rejecting idea Congress can regulate everything that affects interstate commerce); Dailey, *supra* note 67, at 1248 (stating Justice Thomas felt Commerce Clause "grants Congress power to regulate only actual trafficking of merchandise across state borders").

¹³⁸ *Lopez*, 514 U.S. at 596.

¹³⁹ *Id.* at 584-602 (Thomas, J., concurring); Dailey, *supra* note 67, at 1248.

¹⁴⁰ *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

¹⁴¹ *Id.* at 368.

could not return to an 18th century conception of the Commerce Power in light of sixty years of precedent reading that power far more broadly.¹⁴² While accepting the substantial effects standard applied in numerous cases between 1937 and 1995, Justice Kennedy interpreted the Commerce Clause in light of federalist principles that prohibit Congress from enacting legislation that has only incidental commercial concerns and interferes with traditional state functions.¹⁴³ The current composition of the Supreme Court suggests that Justice Kennedy's approach to federalism and the Commerce Clause is more likely to be influential than Justice Thomas' call for a return to early 19th Century jurisprudence.¹⁴⁴ Nonetheless, there is considerable uncertainty about how the Court will address future cases involving the Commerce Power.

E. SWANCC

In *SWANCC*,¹⁴⁵ the Supreme Court addressed whether the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("the Corps") could regulate isolated intrastate waters and wetlands that are not connected or adjacent to navigable waters. While not directly relying on *Lopez* and *Morrison*, the *SWANCC* decision reflects similar concerns with limiting the scope of the Commerce Clause to economic matters and to protecting "traditional state power" from "federal encroachment."¹⁴⁶ The Court

¹⁴² See *Lopez*, 514 U.S. at 570-74 (Kennedy, J., concurring) (describing Court's development of Commerce Power in past cases); Althouse, *supra* note 102, at 802 (arguing Justice Kennedy's concurring opinion in *Lopez* recognized need for modern understanding of Commerce Power in light of today's economic system); McAllister, *supra* note 102, at 229 (analyzing Justice Kennedy's concurring opinion); Dailey, *supra* note 67, at 1248-49 (arguing Justice Kennedy's concurring opinion in *Lopez* clearly rejected Justice Thomas' proposed return to 18th century understanding of commerce).

¹⁴³ See *Lopez*, 514 U.S. at 575-83 (Kennedy, J., concurring) (recognizing duty to protect federalism and limit Commerce Power).

¹⁴⁴ See Dailey, *supra* note 67, at 1286-88 (discussing how five justices—Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas—vote in federalism cases and arguing Justice Thomas' views about Commerce Power are "extreme").

¹⁴⁵ 531 U.S. 159 (2001).

¹⁴⁶ See *Solid Waste Agency v. United States Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.") (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)); Dral & Phillips, *supra* note 79, at 10421 (noting both *Lopez* and *Morrison* sought to maintain

suggested in dicta that the Corps' regulation of such wetlands raised serious constitutional questions because states and local governments had traditionally regulated isolated, non-navigable intrastate waters.¹⁴⁷ Section 404 of the Clean Water Act requires all persons to obtain a permit from the Corps "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."¹⁴⁸ The Act defines the crucial term "navigable waters" to "mean[] the waters of the United States, including the territorial seas."¹⁴⁹ Both the EPA and Corps have issued regulations broadly defining the term "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . ."¹⁵⁰

In 1985, in *United States v. Riverside Bayview Homes, Inc.*,¹⁵¹ the Supreme Court held that the Corps had jurisdiction over non-navigable wetlands that are adjacent to navigable waters.¹⁵² The Court concluded that jurisdiction existed both because there was evidence that Congress intended to give the Corps authority over adjacent wetlands and because such wetlands often have a significant impact on navigable wetlands.¹⁵³ However, the *Riverside Bayview* Court did not decide whether the Corps could regulate isolated, intrastate wetlands or waters that are clearly not adjacent to navigable waters.

There are sound ecological reasons to protect isolated intrastate wetlands. They are home to many birds and other wetland species,

distinction between national and local power); Johnson, *supra* note 14, at 10673 (stating broad reading of Migratory Bird Act would impede on traditional state power).

¹⁴⁷ *Solid Waste Agency*, 531 U.S. at 172-74.

¹⁴⁸ 33 U.S.C. § 1344(a) (1994).

¹⁴⁹ *Id.* § 1362(7).

¹⁵⁰ 33 C.F.R. § 328.3(a)(3) (2001) (Corps regulation); 40 C.F.R. § 230.3(s)(3) (2001) (EPA regulation); Funk, *supra* note 14, at 10741.

¹⁵¹ 474 U.S. 121 (1985).

¹⁵² *Id.* at 132-35.

¹⁵³ See *id.* at 129-35 (finding legislative history and policy support Corps' definition of wetlands); Funk, *supra* note 14, at 10742-44 (discussing *Riverside Bayview Homes*); Johnson, *supra* note 14, at 10672 (arguing *Riverside Bayview Homes* allowed regulation of many waters and wetlands that are not navigable in fact). See also Johnson, *supra* at 10674-75 (discussing nexus standard for relationship between adjacent wetlands and navigable waters).

and they often serve as a buffer against local flooding.¹⁵⁴ In 1986, the Corps issued a regulation claiming to extend its jurisdiction to isolated, intrastate wetlands or waters that are not adjacent to navigable waters "based on their actual or potential use as habitat for migratory birds."¹⁵⁵ The so-called "Migratory Bird Rule" stated that "waters of the United States . . . also include . . . waters [w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or [w]hich are or would be used as habitat by other migratory birds which cross state lines."¹⁵⁶ The regulation was based on the premise that the destruction of isolated, intrastate wetlands would reduce the suitable habitat for migratory birds, and in turn, the death of many birds from the destruction of these wetlands would in theory reduce interstate commerce in birdwatching and bird hunting.¹⁵⁷

Resolving a conflict in the circuit courts,¹⁵⁸ the *SWANCC* Court held that the migratory bird regulation was invalid because Congress did not intend to include "isolated" wetlands or waters within the term "navigable waters," when it enacted the Clear Water Act.¹⁵⁹ In dicta, the *SWANCC* Court indicated that regulation of isolated intrastate wetlands would raise serious questions under the Commerce Clause because local land use regulation is a traditional state and local function.¹⁶⁰ While previous cases had stated that migratory bird protection was a "national interest of very nearly the first magnitude,"¹⁶¹ the Court found it was "not

¹⁵⁴ See Johnson, *supra* note 14, at 10670-71 (discussing benefits of isolated wetlands and impact of *SWANCC*).

¹⁵⁵ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,216, 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. pts. 320-30); Funk, *supra* note 14, at 10741; Moiseyev, *supra* note 14, at 193-94.

¹⁵⁶ Final Rule for Regulatory Programs for the Corps of Engineers, 51 Fed. Reg. at 41,217.

¹⁵⁷ *Id.*; Funk, *supra* note 14, at 10741; Moiseyev, *supra* note 14, at 193-94.

¹⁵⁸ *Compare Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 262-63 (7th Cir. 1993) (holding regulation of isolated, intrastate wetlands constitutional under Commerce Clause), and *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990) (finding regulation to be constitutional), with *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (holding Corps' regulation of isolated intrastate wetlands is unconstitutional under Commerce Clause).

¹⁵⁹ Federal Water Pollution Control Act § 404(a), Clean Water Act, 33 U.S.C. § 1344(a) (1994); *Solid Waste Agency v. United States Corps of Eng'rs*, 531 U.S. 159, 162-63 (2001); Moiseyev, *supra* note 14, at 194.

¹⁶⁰ *Solid Waste Agency*, 531 U.S. at 172-74; Moiseyev, *supra* note 14, at 195.

¹⁶¹ *Solid Waste Agency*, 531 U.S. at 173 (quoting *Missouri v. Holland*, 252 U.S. 416, 435

clear” whether the regulated activity or object, in the aggregate, affects interstate commerce.¹⁶² The Court observed that the Clean Water Act preserves significant local control over water resources and land use issues.¹⁶³ According to the Court, the Clean Water Act does not “express[] a desire to readjust the federal-state balance in this manner, but instead by enacting the statute Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources’ ”¹⁶⁴

Because there was no clear statement in the Act indicating that Congress wished to give the federal government authority over isolated wetlands, the Court refused to broadly interpret the Act to include “federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ [that] would result in a significant impingement of the States’ traditional and primary power over land and water use.”¹⁶⁵ Accordingly, the Court “read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation, and therefore rejected the request for administrative deference.”¹⁶⁶ The actual impact of the *SWANCC* opinion remains uncertain because the line between isolated, purely intrastate wetlands and those wetlands that are adjacent to navigable waters is often unclear and depends in part how the Corps and the EPA define the term “wetlands” and “navigable waters.”¹⁶⁷

In his dissenting opinion, Justice Stevens argued that the majority should have deferred to the Corps’ reasonable interpretation of the term “navigable waters” in the Clean Water Act to

(1920)).

¹⁶² *Id.* at 173; Moiseyev, *supra* note 14, at 195.

¹⁶³ *Solid Waste Agency*, 531 U.S. at 166-67 (noting Clean Water Act preserved “primary responsibilities and rights of the state to prevent, reduce and eliminate water pollution [and] to plan the development and use . . . of land and water resources”); Moiseyev, *supra* note 14, at 195.

¹⁶⁴ *Solid Waste Agency*, 531 U.S. at 174 (quoting Clean Water Act, 33 U.S.C. § 1251(b) (1994)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See Funk, *supra* note 14, at 10743-45, 10771-72 (arguing future of wetlands regulation is uncertain because definition of adjacent wetland is not clear); Johnson, *supra* note 14, at 10676-77 (discussing uncertainty for future of wetland regulation).

include isolated intrastate wetlands.¹⁶⁸ Additionally, Justice Stevens contended that Congress may regulate isolated wetlands inhabited by migratory birds under the Commerce Clause.¹⁶⁹ He maintained that regulation of isolated wetlands is proper under the Commerce Clause because, in contrast to the local activities impermissibly regulated in *Lopez* and *Morrison*, "the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons."¹⁷⁰ Justice Stevens further argued that the destruction of isolated wetlands substantially affects interstate commerce because it significantly harms the migratory bird population in the aggregate and reduces tourism¹⁷¹ and that "the causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds is not 'attenuated,' "¹⁷² but instead "is direct and concrete."¹⁷³ Furthermore, Justice Stevens contended that the Migratory Bird Rule did not blur the line between national and local activities because the protection of migratory birds is a national problem that has traditionally been a federal responsibility.¹⁷⁴ Accordingly, Justice Stevens concluded that regulation of intrastate isolated wetlands could be sustained under the Commerce Clause solely because of its impact on interstate migratory birds.¹⁷⁵

¹⁶⁸ See *Solid Waste Agency*, 531 U.S. at 175-92 (Stevens, J., dissenting) (giving justification for Corps interpretation of "navigable waters"); see also Moiseyev, *supra* note 14, at 195 (describing Corp's reasoning for their definition of navigable waters). Justices Souter, Ginsburg and Breyer joined the dissent. *Solid Waste Agency*, 531 U.S. at 174.

¹⁶⁹ *Solid Waste Agency*, 531 U.S. at 192-97 (Stevens, J., dissenting); Moiseyev, *supra* note 14, at 196.

¹⁷⁰ *Solid Waste Agency*, 531 U.S. at 193 (Stevens, J., dissenting); Moiseyev, *supra* note 14, at 196.

¹⁷¹ *Solid Waste Agency*, 531 U.S. at 192-95 (Stevens, J., dissenting); Moiseyev, *supra* note 14, at 196.

¹⁷² *Solid Waste Agency*, 531 U.S. at 195 (Stevens, J., dissenting) (quoting *United States v. Morrison*, 529 U.S. at 612); Moiseyev, *supra* note 14, at 196.

¹⁷³ *Solid Waste Agency*, 531 U.S. at 195 (Stevens, J., dissenting) (citing *Gibbs v. Babbitt*, 214 F.3d 483, 492-93 (4th Cir. 2000)); Moiseyev, *supra* note 14, at 196.

¹⁷⁴ *Solid Waste Agency*, 531 U.S. at 195-97 (Stevens, J., dissenting).

¹⁷⁵ *Id.*

F. DOES IT MATTER WHETHER A SPECIES IS INTRASTATE?

Professor Nagle has questioned the significance of whether a species is purely intrastate or may cross state lines in determining whether the species substantially affects interstate commerce. He asks, "Why the fact that a bird or animal crosses state lines of its own volition and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained."¹⁷⁶ For example, what is the constitutional significance of whether the Illinois Cave Amphipod lives only in caves in Illinois instead of living in a couple of caves in Missouri as well?¹⁷⁷ Similarly, in *Cargill, Inc. v. United States*,¹⁷⁸ Justice Thomas, dissenting from the Court's denial of certiorari, stated that the assumption that "the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds . . . likely stretches Congress' Commerce Clause powers beyond the breaking point."¹⁷⁹ In *SWANCC*, the Court did not directly address whether the presence of migratory birds was sufficient to justify regulation of intrastate, isolated wetlands under the Commerce Clause, but it stated that such argument "raise[d] significant constitutional questions[;] [f]or example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."¹⁸⁰ While dicta, this portion of *SWANCC* suggests that 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.

¹⁷⁶ Nagle, *supra* note 8, at 185 n.49.

¹⁷⁷ See Final Rule to List the Illinois Cave Amphipod as Endangered, 63 Fed. Reg. 46,900, 46,902 (Sept. 3, 1998) (codified at 50 C.F.R. pt. 17 (2001)) (listing issue 1 as: "The Federal Government . . . does not have the authority to list a species found in only one state, because regulation of such species does not impact upon interstate commerce."); Nagle, *supra* note 8, at 182-83 (stating there is already litigation about whether Illinois Cave Amphipod affects interstate commerce).

¹⁷⁸ 516 U.S. 955 (1995).

¹⁷⁹ *Id.* at 958.

¹⁸⁰ *Solid Waste Agency*, 531 U.S. at 173.

Professor Nagle acknowledges that most judges and commentators have assumed that purely intrastate species raise greater constitutional concerns under the Commerce Clause than those that travel interstate.¹⁸¹ As is discussed in Part IV.A, in *National Ass'n of Home Builders v. Babbitt* ("Home Builders"),¹⁸² a three-judge panel of the Court of Appeals for the District of Columbia Circuit appeared to attach significance to the fact that the endangered Delhi Sands Flower-Loving Fly was a purely intrastate species.¹⁸³ Remember that in *Wickard*, the fact that the wheat was grown solely in one state did not prevent the Court from finding that the federal government could regulate intrastate activities that affect interstate commerce.¹⁸⁴ It is significant that Chief Justice Rehnquist in *Lopez* remarked on the extraordinary breadth of *Wickard* precisely because the intrastate nature of the activity involved in the case has made it a landmark for establishing the outer limits of the Commerce Clause.¹⁸⁵ Before 1937, the Supreme Court often distinguished interstate commerce from intrastate manufacturing activities that it viewed as beyond the scope of the Commerce Clause.¹⁸⁶ Thus, courts have treated whether an activity is intrastate as an important factor,¹⁸⁷ although Professor Nagle may well be correct that they have exaggerated its significance.

Whether a species is located in one state should be a factor, but not dispositive, in deciding whether it substantially affects interstate commerce. *Wickard* establishes that intrastate activities can

¹⁸¹ Nagle, *supra* note 8, at 185 n.49.

¹⁸² 130 F.3d 1041 (D.C. Cir. 1997).

¹⁸³ See *infra* notes 192-99 and accompanying text (explaining Congress was allowed to prohibit private taking of Delhi Sands Flower-Loving Fly under Commerce Clause even though it existed in only one state).

¹⁸⁴ *Wickard v. Filburn*, 317 U.S. 111, 127 (1942).

¹⁸⁵ *United States v. Lopez*, 514 U.S. 549, 560 (1995) (calling *Wickard* "perhaps the most far reaching example of Commerce Clause authority over intrastate activity").

¹⁸⁶ See *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918) (holding Commerce Clause did not authorize child labor laws because intrastate manufacturing is not interstate commerce even though products later entered interstate commerce), *overruled by* *United States v. Darby*, 312 U.S. 100, 116-17 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding sugar manufacturers were outside Sherman Act because sugar manufacturing was intrastate activity even if sugar later entered interstate commerce).

¹⁸⁷ For example, the Supreme Court in *Lopez* rejected congressional regulation of intrastate possession of a gun, but undoubtedly would have approved legislation prohibiting interstate transport of that same gun. See *Lopez*, 514 U.S. 549, 559-67.

affect interstate commerce sufficiently to fall within the ambit of the Commerce Clause.¹⁸⁸ On the other hand, the fact that a species crosses interstate lines or is located in more than one state does not automatically mean that it has significant commercial value. The Delhi Sands Flower-Loving Fly has little immediate commercial value whether it is located in one state or two, or whether it occasionally flies across state borders.¹⁸⁹ Nevertheless, whether a species crosses state boundaries has been and should be a factor in evaluating whether it affects interstate commerce. For example, whether a species crosses state boundaries may affect the extent to which it is an object of tourism, affects agriculture, or contributes to biodiversity.¹⁹⁰ As discussed below, whether a species crosses state lines could be a factor when courts address such issues as whether Congress has the authority to regulate destructive competition among states or to aggregate species together in determining whether they affect interstate commerce.¹⁹¹

Regardless of whether an endangered species is located in one state is an important distinction, there is still the issue of whether the Commerce Clause authorizes Congress to protect the many endangered and threatened species that lack immediate commercial value. To what extent may Congress consider a species potential medical or genetic benefits? Is it appropriate to aggregate commercially valuable species with those that have little value?

¹⁸⁸ *Wickard*, 317 U.S. 111 at 123-30.

¹⁸⁹ See Nagle, *supra* note 8, at 182-83 (arguing many endangered species lack any commercial value).

¹⁹⁰ Apparently intrastate species may have significant economic impacts, but all things being equal, an interstate species can potentially affect a wider range of people and other animals. For example, in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001), the court discussed the wide-ranging economic and commercial impacts of red wolves. See *generally infra* notes 261-95 (discussing *Gibbs v. Babbitt*).

¹⁹¹ See *generally infra* notes 375-438 and accompanying text (discussing argument in favor of aggregation).

IV. LOWER COURT DECISIONS ADDRESSING THE
CONSTITUTIONALITY OF THE ESA: *GIBBS* AND
NATIONAL ASSOCIATION OF HOME BUILDERS

Despite the Supreme Court's recent trend to narrow the scope of congressional authority under the Commerce Clause, both the Fourth and the District of Columbia Circuits have held that Congress may regulate intrastate species under the ESA. Both circuits relied on congressional findings that protecting endangered species may have a significant effect on preserving genetic and biodiversity resources in concluding that protecting intrastate species is significant economic activity encompassed by the Commerce Clause. However, in light of *Morrison* and *SWANCC*, there is a serious question whether Congress may regulate intrastate endangered species that currently generate little or no interstate commerce. There are also serious questions about whether federal regulation of intrastate endangered species impermissibly intrudes on traditional state and local control over land usage.

A. *NATIONAL ASSOCIATION OF HOMEBUILDERS*

In *National Ass'n of Home Builders v. Babbitt*,¹⁹² by a fractured two-to-one decision, the D.C. Circuit held that Congress had authority under the Commerce Clause to prohibit the private taking of an endangered species that existed in only one state and did not directly generate any significant interstate commerce.¹⁹³ As a result of commercial development and pollution, the habitat of the Delhi Sands Flower-Loving Fly ("the fly") was apparently limited to a forty-square-mile area entirely within the state of California.¹⁹⁴ There was no significant interstate trade in or transportation of the fly.¹⁹⁵ The construction of roads to a proposed hospital would have destroyed most of the fly's habitat and possibly the entire population of the endangered fly.¹⁹⁶ The Fish and Wildlife Service ("FWS")

¹⁹² 130 F.3d 1041 (D.C. Cir. 1997).

¹⁹³ *Id.* at 1046-49.

¹⁹⁴ *Id.* at 1043-44.

¹⁹⁵ *Id.*; Brignac, *supra* note 10, at 884.

¹⁹⁶ *Home Builders*, 130 F.3d at 1044-45.

determined that the proposed road construction was a "taking" of endangered species under section 9(a)(1).¹⁹⁷ The developers argued that the federal government did not have the authority under the Commerce Clause to regulate the use of private lands to protect the fly because it is found only within a single state.¹⁹⁸ They contended that "the Constitution of the United States does not grant the federal government the authority to regulate wildlife, nor does it authorize federal regulation of non-federal lands."¹⁹⁹

1. *Judge Wald's Opinion.* By a two-to-one vote, *Home Builders* upheld the constitutionality of the ESA as applied to the fly,²⁰⁰ but the two judges in the majority disagreed about the grounds for finding authority under the Commerce Power. In her opinion, Judge Wald argued that the ESA was constitutional under the first and third categories of interstate regulation outlined in *Lopez*: "channels of commerce" and activity "substantially affecting" interstate commerce.²⁰¹ Initially, she concluded that section 9(a)(1)'s prohibition against "takings" of endangered species meets the first prong of the *Lopez* test—whether an activity affected the "channels of interstate commerce" through an extension of the *Wickard* aggregation rule. According to Judge Wald, "we may look not only to the effect of the extinction of the individual endangered species at issue in this case, but also to the aggregate effect of the extinction of all similarly situated endangered species."²⁰² Judge Wald argued that the prohibition against taking endangered species is necessary to achieve the government's regulation of transportation of endangered species.²⁰³ Like laws forbidding the transfer and possession of machine guns, the takings prohibition was necessary to control interstate trafficking of endangered species.²⁰⁴ The takings prohibition was within Congress' authority to "keep the channels of interstate commerce free from immoral and injurious uses," akin to

¹⁹⁷ *Id.* at 1044.

¹⁹⁸ *Id.* at 1045.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1057 (holding regulation of fly is constitutional under Commerce Clause).

²⁰¹ *Home Builders*, 130 F.3d at 1046; Scalero, *supra* note 6, at 337.

²⁰² *Home Builders*, 130 F.3d at 1046.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1047; Scalero, *supra* note 6, at 337.

other prohibited noxious or harmful behaviors, such as racial discrimination and unfair labor practices.²⁰⁵

Judge Wald also concluded that the takings prohibition in the ESA meets *Lopez's* third prong—activities that have substantial impacts on interstate commerce.²⁰⁶ Judge Wald interpreted the prong to include commercial or noncommercial activities alike,²⁰⁷ although some would question whether the *Lopez* Court was as willing to so readily include noneconomic impacts.²⁰⁸ She deferred to congressional findings in the ESA's 1973 legislative history about the value of biodiversity and the potential for future medical uses from a wide range of endangered species in concluding that "takings [of endangered species] . . . would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource—biodiversity."²⁰⁹ By preserving biodiversity, the ESA produces significant current and future economic benefits to interstate commerce by preserving genetic diversity and conserving genetic resources that may have future medical value.²¹⁰

Judge Wald concluded that, each time a species becomes extinct and the pool of wild species decreases, the extinction "has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purpose."²¹¹ She acknowledged that the full value of many plants and animals is uncertain but nonetheless concluded that each endangered species is entitled to protection because "[a] species whose worth is still unmeasured has what economists call

²⁰⁵ *Home Builders*, 130 F.3d at 1048-49 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 214, 246 (1964) (upholding use of Commerce Power to enact civil rights legislation prohibiting racial discrimination in public accommodations), *United States v. Darby*, 312 U.S. 100, 113-14 (1941) (upholding use of Commerce Power to enact legislation requiring employers to adopt minimum wage and maximum hour limitations)); Scalero, *supra* note 6, at 337-38.

²⁰⁶ *Home Builders*, 130 F.3d at 1049.

²⁰⁷ *Id.*

²⁰⁸ See Linehan, *supra* note 21, at 421-22 (arguing Judge Wald's broad approach to evaluating noncommercial impact such as biodiversity was more consistent with Justices Breyer and Souter's dissenting opinions in *Lopez* than majority opinion).

²⁰⁹ *Home Builders*, 130 F.3d at 1052-54; Scalero, *supra* note 6, at 338.

²¹⁰ *Home Builders*, 130 F.3d at 1052-53.

²¹¹ *Id.* at 1053.

an 'option value'—the value of the possibility that a future discovery will make useful a species that is currently thought of as useless."²¹² She continued, "To allow even a single species whose value is not currently apparent to become extinct therefore deprives the economy of the option value of that species."²¹³ In the aggregate, she concluded, the extinction of endangered species had a substantial effect on interstate commerce.²¹⁴

However, there are serious problems with Judge Wald's aggregation of all endangered and threatened species in assessing whether a particular endangered species has a substantial effect on interstate commerce. By aggregating the benefits of all endangered species, Judge Wald could defend the protection of any endangered species no matter how attenuated its relationship to interstate commerce.²¹⁵ In particular, Judge Wald used the aggregation approach to justify preservation of an isolated fly population without having to demonstrate that the species has any economic value now or is likely to in the future.²¹⁶ Such aggregation is arguably appropriate only if there is a significant relationship among different endangered species, resulting in their having a substantial cumulative impact on interstate commerce, although less significant impacts satisfy the requirement if they cannot be easily separated from a comprehensive scheme essential to the promotion of commerce.²¹⁷ As discussed in Part VI, a possible justification for a broad aggregation principle for all endangered and threatened species would be deference to congressional findings in the ESA's legislative history.²¹⁸

²¹² *Id.* (citing Bryan Nolan, *Commodity, Amenity, and Morality: The Limits of Quantification in Valuing Biodiversity*, in *BIODIVERSITY* 200, 202 (Edward O. Wilson ed., 1988)).

²¹³ *Id.*

²¹⁴ *Id.* at 1053-54.

²¹⁵ See Akins, *supra* note 45, at 180-81 (concluding "connection between the regulated activity and interstate commerce is too attenuated").

²¹⁶ See Nagle, *supra* note 8, at 183-84.

²¹⁷ See *infra* notes 433-38 and accompanying text (discussing implications of aggregation if broader regulatory scheme).

²¹⁸ See *infra* notes 415-28 and accompanying text (discussing need for deference to congressional finding).

Judge Wald also argued that Congress has the power under the Commerce Clause to regulate destructive economic competition.²¹⁹ Accordingly, she concluded that Congress could regulate intrastate endangered species if economic competition among states was likely to prevent them from providing adequate protection to such species.²²⁰ The issue of when Congress may regulate activities to prevent a "race to the bottom" by competing states will be discussed below in Part V.B.²²¹

2. *Judge Henderson's Concurring Opinion.* Concurring with the court's judgment, Judge Henderson agreed with Judge Wald that the taking prohibition in section 9(a)(1) of the ESA is valid under the Commerce Clause.²²² However, Judge Henderson reached her conclusion by a somewhat different reasoning process. First, she disagreed with Judge Wald's claim that the statute regulates channels of commerce because endangered species, unlike machine guns or lumber, are not commercially marketable goods.²²³ Second, Judge Henderson questioned whether the ESA's protection of biodiversity would have a substantial impact on interstate commerce because of the loss of potential medical or economic benefit.²²⁴ She criticized Judge Wald's biodiversity theory because the medical and economic benefits of preserving biodiversity are too speculative to meet *Lopez's* substantial effect on interstate commerce test.²²⁵

In concluding that the Commerce Clause reached the FWS' regulation of the fly, Judge Henderson determined that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce."²²⁶ She contended that "[given] the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved

²¹⁹ *Home Builders*, 130 F.3d at 1054-57.

²²⁰ *Id.*

²²¹ See *infra* notes 340-56 and accompanying text.

²²² *Id.* at 1057 (Henderson, J., concurring).

²²³ *Id.* at 1057-58.

²²⁴ *Id.* at 1058.

²²⁵ *Id.*

²²⁶ *Id.* at 1058-59.

in interstate commerce.”²²⁷ Accordingly, she maintained that there is a rational basis to believe that the taking of an endangered species substantially affects interstate commerce and that section 9(a)(1) is within the commerce power of Congress.²²⁸ However, Judge Henderson presented no evidence about how the extinction of the fly might affect other species or interstate commerce.

Alternatively, Judge Henderson concluded that the destructive impact of the hospital construction on the fly’s habitat substantially affected interstate commerce.²²⁹ By requiring consideration of how such construction will affect endangered species like the fly, the ESA “relates to both the proposed redesigned traffic intersection and the hospital it is intended to serve, each of which has an obvious connection with interstate commerce.”²³⁰ Thus, even if the fly itself is not in interstate commerce, the hospital construction is clearly a commercial activity that directly affects the habitat of the fly. Arguably, the relationship between the construction of the hospital and the destruction of the fly’s habitat is relatively direct and should be enough to bring the protection of the fly within the Commerce Clause.²³¹

3. *Judge Sentelle’s Dissenting Opinion.* In his dissent, Judge Sentelle contended that section 9(a)(1)(B) of the ESA is unconstitutional under *Lopez’s* three-part standard because the statute does not regulate commerce.²³² Evaluated under *Lopez’s* first prong, the ESA does not affect use of the channels of interstate commerce because the fly does not engage in interstate travel.²³³ Considering the second prong of *Lopez*, whether a regulation governs found “the instrumentalities of interstate commerce,” Judge Sentelle found the ESA deficient because it does not control a commercial activity.²³⁴

²²⁷ *Id.* at 1059.

²²⁸ *Id.* (citing *United States v. Lopez*, 514 U.S. at 549, 557-59 (1995)).

²²⁹ *Id.*

²³⁰ *Id.* See also Linehan, *supra* note 21, at 422-24 (arguing Commerce Clause does not encompass protection of noncommercial activities such as protection of fly simply because there is some connection to commercial enterprise).

²³¹ See Nagle, *supra* note 8, at 189-91, 208-14 (discussing choice of activity problem, whether focus should be on fly’s impact on interstate commerce or hospital construction’s impact).

²³² *Home Builders*, 130 F.3d at 1061-62 (Sentelle, J., dissenting).

²³³ *Id.* at 1063.

²³⁴ *Id.* at 1062.

Further, as a secondary matter, the ESA contains no jurisdictional provision limiting its scope to regulate only activities affecting interstate commerce.²³⁵ Under *Lopez's* third prong, whether an activity has substantial effects on interstate commerce, Judge Sentelle agreed with Judge Henderson's concurrence, concluding that Judge Wald's argument about the potential medical value of protecting biodiversity is too speculative to support congressional regulation under the Commerce Clause.²³⁶

Judge Sentelle also argued that Judge Henderson's ecosystem argument was too far removed from commerce in light of the Supreme Court's requirement in *Lopez* that regulation must substantially affect commercial concerns.²³⁷ According to Judge Sentelle, if there was a sufficient connection between the hospital construction's involvement with articles of commerce and the incidental result of the construction destroying the fly's habitat there no "stopping point" in defining the Commerce Power—Congress could regulate any noncommercial activity that has some impact on or is affected in some way by articles in interstate commerce.²³⁸ Thus, the fly was simply not an article in interstate commerce and, therefore, not within the Commerce Power.²³⁹

4. *Is Home Builders Consistent with Lopez, Morrison and SWANCC?* The *Home Builders* case was decided after *Lopez*, but before *Morrison* and *SWANCC*. Judge Sentelle clearly believed that the majority's decision was inconsistent with both the spirit and letter of *Lopez*.²⁴⁰ The subsequent *Morrison* and *SWANCC* decisions do not explicitly resolve the questions at issue in *Home Builders*. It is likely that Judge Wald and Judge Henderson would reach the same conclusions even in light of *Morrison* and *SWANCC*. Nevertheless, *Morrison* and *SWANCC* raise additional doubts about whether Judge Wald and Judge Henderson's opinions are consistent

²³⁵ *Id.* at 1064-65.

²³⁶ *Id.* at 1065.

²³⁷ *Id.* See also Linehan, *supra* note 21, at 424 (advancing same argument).

²³⁸ *Home Builders*, 130 F.3d at 1063, 1067 (Sentelle, J., dissenting).

²³⁹ *Id.*

²⁴⁰ *Id.*

with the Supreme Court's narrow reading of the Commerce Power and protectiveness toward traditional state authority.

While many endangered species have significant impacts on interstate commerce, the rejection in *Morrison* of the aggregation of noneconomic activities raises concerns about Judge Wald's argument that it is appropriate to aggregate together the benefit of preserving all endangered species in determining their present and future value to the national economy.²⁴¹ If a court must examine the interstate commercial value of the fly alone, it is more difficult to demonstrate a significant effect on interstate commerce. For example, in *SWANCC*, the Court of Appeals found that protection of migratory birds had a substantial impact on commerce because "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds."²⁴² However, the Supreme Court concluded that arguments about the value of preserving isolated wetlands to protect migratory birds raised "significant constitutional questions" and that "we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."²⁴³ While its reasoning is based on statutory and not constitutional grounds, the Court's concern with the "precise object or activity that, in the aggregate, substantially affects interstate commerce" might demand more precision and detailed justification than Judge Wald's argument. For example, Judge Wald never presented evidence of interstate trafficking in the fly or showed that it is likely to have medical value.²⁴⁴ On the other hand, as discussed in Part VI, Congress had a rational basis for its findings in the ESA's legislative history that preserving biodiversity would result in future economic and medical benefits.²⁴⁵

²⁴¹ Compare *United States v. Morrison*, 529 U.S. 598, 615 (2000) (rejecting aggregation of noneconomic impacts in determining whether activity has substantial impact on economy), with *Home Builders*, 130 F.3d at 1046, 1053-54 (approving aggregation of impacts from loss of large numbers of or all endangered species).

²⁴² *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001).

²⁴³ *Id.*

²⁴⁴ See Scalero, *supra* note 6, at 337.

²⁴⁵ See *infra* notes 394-400, 415-17 and accompanying text (discussing Congress's findings).

In *Lopez*, the Court suggested it would have been more willing to uphold the GFSZA if the statute contained a "jurisdictional element which would ensure, through case-by-case inquiry," that the activity at issue substantially affects interstate commerce.²⁴⁶ While the ESA includes congressional findings about the long-term value of protecting endangered species, it does not clearly define when the protection of endangered species affects interstate commerce.²⁴⁷ When it enacted the ESA, Congress did not include an explicit jurisdictional element limiting its applicability to specific commercial activities.²⁴⁸ Yet *Lopez* did not hold that a statute must contain a jurisdictional element defining the statute's relationship to interstate commerce.²⁴⁹ The absence of a jurisdictional element leaves for the courts to decide whether the activity in question substantially affects interstate commerce.

Judge Henderson argued that the Commerce Clause applies to regulation of the fly because the species would have been substantially affected by the hospital construction, which was clearly a commercial activity.²⁵⁰ By contrast, Judge Sentelle argued in dissent that any relationship between the hospital's construction and its impact in destroying the fly's habitat was too attenuated to support federal regulation under the "substantial effects" test because there would be no "stopping point" in defining the Commerce Power if Congress could regulate any noncommercial activity that had some impact on or was affected in some way by articles in interstate commerce.²⁵¹ A key disagreement between Judge Henderson and Judge Sentelle in applying the Commerce Clause to the facts of the case was whether the focus should be on the economic nature of the hospital construction or on the fly's lack of

²⁴⁶ *United States v. Lopez*, 514 U.S. 549, 561 (1995).

²⁴⁷ *See White*, *supra* note 6, at 242 (distinguishing ESA from other federal statute which limited its scope to specific commercial activities).

²⁴⁸ *See id.* (distinguishing ESA from Civil Rights legislation which also lacks jurisdictional element but applies to readily apparent cases).

²⁴⁹ *Id.* at 243, 253-54 (suggesting Congress might evade Commerce Clause problems by adding jurisdictional limit).

²⁵⁰ *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1059 (D.C. Cir. 1997) (Henderson, J., concurring).

²⁵¹ *Id.* at 1063, 1067 (Sentelle, J., dissenting).

commercial value.²⁵² Depending upon whether one views the extinction of the fly as caused by commercial activities or as a noncommercial issue because the fly itself is not valuable, one reaches different answers about whether protection of the fly substantially affects interstate commerce.²⁵³ In this regard, consider that the Supreme Court in *Morrison* rejected congressional findings that gender-based violence had impacts on interstate commerce because the Court viewed gender-based violence as a noneconomic activity that had only attenuated impacts on interstate commerce.²⁵⁴

In *Sweet Home*, which was decided after *Lopez*, the Supreme Court approved a regulation that prohibited private landowners from destroying the critical habitat of endangered species.²⁵⁵ While *Sweet Home* never directly addressed the issue of whether Congress had authority under the Commerce Clause to enact the ESA, there is a strong argument that a regulation that controls development activities on private lands that contain critical habitat has a direct impact on interstate commerce. In *Sweet Home*, the respondents challenging the prohibition were small landowners, logging companies, and families dependent on the forest products industries in the Southeast and Pacific Northwest.²⁵⁶ In the concluding paragraph of his majority opinion in *Sweet Home*, Justice Stevens asserted that: "the Act encompasses a vast range of economic and social enterprises and endeavors."²⁵⁷ The respondents were undoubtedly engaged in commerce. In the aggregate, all the persons affected by the regulation likely had a substantial effect on interstate commerce. While *Sweet Home* never addressed congressional authority under the Commerce Power, the Court's approval of federal regulation of private lands containing the critical habitat of endangered species at least suggests that the Court may be less hostile to federal regulation in this area than it was in *Lopez*,

²⁵² See *supra* notes 232-39 and accompanying text (discussing Judge Sentelle's dissent).

²⁵³ See Nagle, *supra* note 8, at 178-79, 189-91, 208-14 (discussing whether focus should be fly or hospital construction).

²⁵⁴ *United States v. Morrison*, 529 U.S. 598, 615-16 (2000).

²⁵⁵ *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-708 (1995).

²⁵⁶ *Id.* at 692.

²⁵⁷ *Id.* at 708.

Morrison, or *SWANCC*.²⁵⁸ On the other hand, the Court could limit the regulation approved in *Sweet Home* to species that are directly involved in interstate commerce.

Judge Wald and Judge Henderson each offered interesting arguments for concluding that regulation of intrastate endangered species is constitutional under the Commerce Clause. Part VI will analyze Judge Wald's argument that courts should defer to congressional findings about the value of preserving biodiversity in more depth.²⁵⁹ Judge Henderson's argument that a court should focus on whether the commercial development that harms an endangered species substantially affects interstate commerce is valuable, and, arguably, is implicitly consistent with *Sweet Home's* approval of regulation of private landowners.²⁶⁰ However, her argument is incomplete without examining whether the regulation of commercial activities that affect intrastate endangered species interferes with traditional state authority over local land use.

B. *GIBBS*

In 2000, immediately after the Supreme Court decided *Morrison*, the Fourth Circuit, in a two-to-one decision by Chief Judge Wilkinson, rejected a Commerce Clause challenge to the ESA in *Gibbs v. Babbitt*.²⁶¹ The *Gibbs* plaintiffs were private landowners and municipalities in eastern North Carolina who challenged a FWS regulation that prohibited the taking of endangered red wolves on private land.²⁶² The Court estimated that there were approximately 75 red wolves in eastern North Carolina, slightly more than half on private land.²⁶³

1. *The Majority: Taking Red Wolves Substantially Affects Interstate Commerce.* While acknowledging that the taking of an

²⁵⁸ See *supra* notes 88-191 and accompanying text.

²⁵⁹ See *supra* notes 200-20 and accompanying text (discussing Judge Wald's argument).

²⁶⁰ See *supra* notes 222-39 and accompanying text (discussing Judge Henderson's argument).

²⁶¹ 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001). See generally Dave Owen, *Gibbs v. Babbitt*, 28 *ECOLOGY L.Q.* 377 (2001) (providing in-depth review and analysis of case).

²⁶² *Gibbs*, 214 F.3d at 489.

²⁶³ *Id.* at 488.

individual wolf may be relatively insignificant, the majority concluded that the taking of red wolves in the aggregate implicates several commercial activities that substantially affect interstate commerce as defined in *Lopez* and *Morrison*.²⁶⁴ The Court found that red wolves are part of a \$29.2 billion national wildlife-related recreational industry that involves tourism and interstate travel.²⁶⁵ In particular, numerous tourists travel to North Carolina from other states for "howling events"—evenings of listening to wolf howls accompanied by educational programs.²⁶⁶ Additionally, the protection of red wolf takings stimulated scientific research that had clear economic value.²⁶⁷ Moreover, preservation of red wolves could eventually allow a revival of the trade in their fur pelts once populations recovered to a sufficient extent.²⁶⁸ The Fourth Circuit's holding in *Gibbs* was sufficient to save ESA regulation of the red wolf because of the species' peculiar economic value. However, many other endangered species have no apparent economic value and thus benefit little from the reasoning in *Gibbs*.²⁶⁹ Accordingly, this portion of the *Gibbs* decision is limited to the specific facts involving the wolf.²⁷⁰

The *Gibbs* court also found that the taking of wolves on private property was directly motivated by the economic interests of farmers and ranchers, and that this connection clearly qualified as economic under the Commerce Clause.²⁷¹ This would be so even if some might believe that the preservation of wolves is economically harmful rather than beneficial.²⁷²

²⁶⁴ *Id.* at 492-93. See Owen, *supra* note 261, at 382-83 (noting that "even after *Lopez*, protecting endangered species was within Congress's power under the Commerce Clause"). But see Vermeule, *supra* note 97, at 11336 (questioning whether killing single red wolf is commercial or economic activity).

²⁶⁵ *Gibbs*, 214 F.3d at 493.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 493-94.

²⁶⁸ *Id.* at 495.

²⁶⁹ See Brignac, *supra* note 10, at 883 (describing wolf as "special case" of endangered species due to its marketable pelts and tourist-friendly behavior).

²⁷⁰ See Owen, *supra* note 261, at 391, 398 (arguing *Gibbs* may have limited precedential effect because red wolf has more obvious connection to interstate commerce than many other endangered species).

²⁷¹ *Gibbs*, 214 F.3d at 495.

²⁷² *Id.* But see Vermeule, *supra* note 97, at 11336 (questioning whether farmer killing red wolf to protect livestock or homestead is sufficiently commercial or economic activity under

By restricting the taking of red wolves, § 17.84(c) is said to impede economic development and commercial activities such as ranching and farming. This effect on commerce, however, still qualifies as a legitimate subject for regulation. The regulation here targets takings that are economically motivated, in that farmers take wolves to protect valuable livestock and crops.²⁷³

Thus, the Commerce Power encompasses a regulation preserving the red wolves not only because the red wolf itself has economic value but also because the regulation of the wolf has a direct impact on ranching and farming activities that are clearly a part of interstate commerce.²⁷⁴

Furthermore, the *Gibbs* majority echoed Judge Wald in arguing that courts should defer to congressional findings about the future value of endangered species even if those benefits could not be precisely calculated.²⁷⁵ The court noted that the Supreme Court has traditionally deferred to congressional findings that regulation may produce economic or other benefits in the future as long as there is a rational basis for such legislative findings.²⁷⁶ Accordingly, Congress may protect an endangered species because it might have a significant economic effect in the future even if it has no present value or effect.²⁷⁷

In response to the dissent's argument that the taking of a few red wolves did not have a substantial impact on commerce, the majority concluded that it was appropriate to consider the impact of the entire regulatory scheme on interstate commerce because the regulation was part of a comprehensive statute seeking to preserve the species as a whole.²⁷⁸ Because the regulation of red wolves is primarily an economic issue,²⁷⁹ the court concluded it was proper,

Lopez).

²⁷³ *Gibbs*, 214 F.3d at 495.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 496.

²⁷⁶ *Id.* at 496-97.

²⁷⁷ *Id.* at 496.

²⁷⁸ *Id.* at 497-98.

²⁷⁹ *Id.* at 493. The Court observed:

unlike the aggregation of noneconomic activities rejected in *Lopez* or *Morrison*, for Congress to aggregate the total impact of taking all wolves in determining that such takings could substantially affect interstate commerce for Commerce Clause purposes:

Because the taking of red wolves can be seen as economic activity in the sense considered by *Lopez* and *Morrison*, the individual takings may be aggregated for the purpose of Commerce Clause analysis. While the taking of one red wolf on private land may not be "substantial," the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold this regulation. This is especially so where, as here, the regulation is but one part of the broader scheme of endangered species legislation.²⁸⁰

Furthermore, if Congress has the authority to enact a comprehensive scheme for preserving endangered species,²⁸¹ courts should not invalidate individual regulations because a particular population is relatively small.²⁸² In *Hodel v. Indiana*,²⁸³ the Supreme Court stated:

A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an

While the regulation might also reflect a moral judgment concerning the importance of rehabilitating endangered species, this does not undermine the economic basis for the regulation. See *Heart of Atlanta Motel, Inc. v. United States*, . . . ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

Id. at 493 n.2.

²⁸⁰ *Id.* at 493 (citations omitted).

²⁸¹ See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 699 (1995) (endorsing Congress's broad purposes behind ESA).

²⁸² *Gibbs*, 214 F.3d at 497-98.

²⁸³ 452 U.S. 314 (1981).

integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.²⁸⁴

Even the *Lopez* Court acknowledged that Congress may regulate intrastate activities that lack substantial commercial value if they are an "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."²⁸⁵ Otherwise, the *Gibbs* court noted, Congress would lack the power to protect the most endangered species simply because "there are too few animals left to make a commercial difference."²⁸⁶ According to the *Gibbs* court, such a narrow interpretation of the Commerce Power based solely on the number of animals at issue would "eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head."²⁸⁷

2. *Judge Luttig's Dissenting Opinion.* Judge Luttig's dissent argued that the FWS regulation was unconstitutional under *Lopez* and *Morrison's* interpretation of the Commerce Power because the taking of a handful of red wolves on private property did not come close to constituting a significant economic activity under the Commerce Clause.²⁸⁸ He criticized the majority decision for failing to follow the relatively narrow definitions of economic activity and interstate commerce used in both cases.²⁸⁹ Judge Luttig implied that regulations protecting endangered species would more likely be constitutional if the ESA contained an express interstate jurisdictional requirement limiting its scope to interstate commercial activities such as trade or transportation in pelts or animals.²⁹⁰ Judge Luttig suggested that the majority's affinity to approve environmental regulations had led it to misapply the Supreme

²⁸⁴ *Id.* at 329 n.17.

²⁸⁵ *Lopez v. United States*, 514 U.S. 549, 561 (1995); Vermeule, *supra* note 97, at 11335.

²⁸⁶ *Gibbs*, 214 F.3d at 498.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 507 (Luttig, J., dissenting); see also Virelli & Leibowitz, *supra* note 73, at 968-74 (arguing majority decision in *Gibbs* is inconsistent with Supreme Court's holding in *Morrison*).

²⁸⁹ *Gibbs*, 214 F.3d at 507-08 (Luttig, J., dissenting).

²⁹⁰ *Id.* at 508.

Court's new definition of what constitutes substantial interstate commerce: "The affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge."²⁹¹

3. *Is Gibbs Consistent with SWANCC?* On first impression, the Supreme Court's decision in *SWANCC* casts considerable doubt over *Gibbs*. *SWANCC* suggested in dicta that it is not clear whether the filling of isolated intrastate wetlands, an activity that affects large numbers of migratory birds, is within the Commerce Power.²⁹² It is likely that the commercial value of the migratory birds is greater than the few dozen red wolves resident on private property in *Gibbs*. However, despite the economic differences, an argument that the regulation of red wolves affects interstate commerce is stronger than an argument that isolated intrastate wetlands are within the jurisdiction of the Commerce Clause. The ESA regulates animals that are frequently directly involved in interstate commerce through transportation, tourism, trade in pelts, and harms or benefits to agriculture.²⁹³ By contrast, isolated intrastate wetlands by themselves do not necessarily affect interstate commerce.²⁹⁴ Their preservation may indirectly affect migratory birds; however, this has not been conclusively established. In fact, there are some questions about to what extent the destruction of isolated, intrastate wetlands would harm migratory birds because not all intrastate wetlands would be destroyed, and wetlands in or adjacent to navigable waters would retain protection.²⁹⁵ It is the birds, not the wetlands themselves, that are most directly connected to interstate commerce.

²⁹¹ *Id.* at 510.

²⁹² *Solid Waste Agency v. United States Army Corps. of Eng'rs*, 531 U.S. 159, 172-74 (2001).

²⁹³ See *supra* notes 264-74 (discussing transportation, tourism, trade in pelts and effects on agriculture resulting from protection of Red Wolves).

²⁹⁴ See Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10980, 10988 (News & Analysis) (Nov. 2000) ("The isolated wetland in *SWANCC* is at least a few steps removed from interstate commerce.").

²⁹⁵ See Anna Johnson Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 *VAND. L. REV.* 271, 305 (2000) (illustrating tenuous link between wetland regulation and commercial effects of migratory birds); Linehan, *supra* note 21, at 418-19 (same).

One may disagree with the *SWANCC* majority that the connection between the wetlands and birds is too remote, but the wetlands are only indirectly implicated in commerce, unlike many endangered species that directly affect interstate commerce. Accordingly, *SWANCC*'s analysis does not necessarily portend that the Supreme Court will conclude the ESA does not substantially affect interstate commerce. Nonetheless, even if the *Gibbs* Court correctly concluded that the red wolves in eastern North Carolina substantially affect interstate commerce, will courts apply the same analysis to all endangered species, including those that currently have little or no apparent value?

V. THE FEDERAL GOVERNMENT HAS A SPECIAL ROLE IN CONSERVING WILDLIFE

The *Gibbs* majority determined that regulation of endangered species is consistent with the federal government's historic role in conserving natural resources: "Invalidating this provision would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans."²⁹⁶ Accordingly, the *Gibbs* majority concluded that federal regulation of endangered species does not intrude on traditional state authority, unlike the statutes invalidated in *Lopez* and *Morrison*.²⁹⁷ This Part examines whether the argument in *Gibbs*, that regulation of endangered species is primarily a federal activity, is still valid in light of *SWANCC*'s statement that land use regulation is a traditionally local concern.²⁹⁸

A. TRADITIONAL STATE ACTIVITIES: WHERE IS THE LINE?

In *Lopez*, the Court emphasized that it would carefully review congressional authority under the Commerce Clause whenever federal legislation attempted to regulate areas traditionally

²⁹⁶ *Gibbs*, 214 F.3d 483 at 492.

²⁹⁷ *Id.*

²⁹⁸ *Solid Waste Agency*, 531 U.S. at 174.

controlled by state or local governments.²⁹⁹ The Court suggested that areas traditionally within the state's regulatory control included matters "such as criminal law enforcement or education where States historically have been sovereign."³⁰⁰ Similarly, in his concurring opinion in *Lopez*, Justice Kennedy argued that courts should be hesitant in allowing Congress to use the Commerce Power as the basis for federal regulation in an "area of traditional state concern" that "States lay claim by right of history and expertise."³⁰¹ He maintained, with such an expansive definition of the Commerce Power, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."³⁰²

Both *Morrison* and *SWANCC* were concerned that an expansive interpretation of congressional authority under the Commerce Clause could erode federalism by sanctioning legislation that excessively intruded on traditional areas of state authority. In *Morrison*, the Court stated that it was inappropriate for courts to aggregate noneconomic activities traditionally regulated by states for purposes of deciding whether they substantially affect interstate commerce because such an approach would "completely obliterate the Constitution's distinction between national and local authority."³⁰³ The *SWANCC* Court rejected the Corps interpretation of the Clean Water Act to include regulation of intrastate isolated wetlands because an interpretation that extended beyond traditional federal jurisdiction over navigable waters would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power."³⁰⁴

There is a strong argument that the *Lopez*, *Morrison* and *SWANCC* decisions underestimated the difficulties in defining the

²⁹⁹ See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995); accord *United States v. Morrison*, 529 U.S. 598, 619-20 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local.").

³⁰⁰ *Lopez*, 514 U.S. at 564-67.

³⁰¹ *Id.* at 580, 583 (Kennedy, J., concurring).

³⁰² *Id.* at 577.

³⁰³ *Morrison*, 529 U.S. at 615.

³⁰⁴ *Solid Waste Agency v. United States Corps of Eng'rs*, 531 U.S. 159, 173 (2001) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance") (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

limits of traditional state authority.³⁰⁵ In his dissenting opinion in *Morrison*, Justice Souter asserted that the majority's efforts to preserve a sphere of state interests separate from the national government was doomed to fail just as the similar effort to protect "traditional government function" from federal regulation in *National League of Cities v. Usery*³⁰⁶ had been subsequently overruled as unworkable in *Garcia v. San Antonio Metropolitan Transit Authority*³⁰⁷ because the line between state and federal authority was too hard to define.³⁰⁸ Furthermore, the contours of federalism, the balance of state and federal powers, have clearly changed since 1789.³⁰⁹ If change is the norm in federalism, what is a traditional state activity?

The Supreme Court should return to the more deferential standard of rational basis review that it used before *Lopez* in determining whether congressional legislation impermissibly interferes with areas of traditional state regulation. In his *Morrison* dissent, Justice Souter correctly argued that "politics, not judicial review, should mediate between state and national interests."³¹⁰ Nevertheless, regardless of the difficulties in defining traditional state authority, regulation of endangered species is *not* a traditional state function even under the inappropriately stringent approach used in *Lopez*, *Morrison* and *SWANCC*.

³⁰⁵ See Dral & Phillips, *supra* note 79, at 10421-22 (assailing such standards as "too imprecise to provide any sort of basis for a credible and predictable limitation on congressional power."); Johnson, *supra* note 6, at 53-54 (predicting that such standards "will likely result in inconsistent and irreconcilable decisions.").

³⁰⁶ 426 U.S. 833 (1976).

³⁰⁷ 469 U.S. 528 (1985).

³⁰⁸ *Morrison*, 529 U.S. at 645-46 (Souter, J. dissenting) (arguing effort to define traditional government function for purposes of Tenth Amendment had failed and similar efforts to define traditional state functions for purposes of commerce power are likewise likely to fail); see also Dral & Phillips, *supra* note 79, at 10421-22 (reiterating Justice Souter's argument); Johnson, *supra* note 6, at 53-54 (same); Virelli & Leibowitz, *supra* note 73, at 943-45 (same).

³⁰⁹ Beginning in 1937, the Supreme Court substantially expanded the breadth of the Commerce Clause and, thereby expanded federal authority at the expense of states. See *supra* notes 72-87 and accompanying text.

³¹⁰ *Morrison*, 529 U.S. at 647; Dral & Phillips, *supra* note 79, at 10421-22.

B. THE FEDERAL GOVERNMENT HAS THE AUTHORITY TO PROTECT SCARCE NATURAL RESOURCES

While SWANCC suggested that land use regulation is a traditionally local concern,³¹¹ in fact, there is concurrent or overlapping federal and state regulation over private land and wildlife management in various contexts.³¹² Although states and local governments possess broad regulatory and zoning authority over land within their jurisdictions,³¹³ numerous cases have held that Congress can regulate even private land use for environmental and wildlife conservation.³¹⁴ Since 1900, Congress has enacted a number of statutes preserving endangered wildlife regulation,³¹⁵ which strongly suggests that the conservation of scarce natural resources has not been an exclusive or primary state function for quite some time. Instead, whenever states have failed to address important conservation issues, the courts have recognized that the federal government has a legitimate role in addressing gaps in conservation and preservation efforts.³¹⁶ For example, in 1900, Congress enacted the Lacey Act, which established penalties for the taking of wildlife in violation of state laws.³¹⁷ The Migratory Bird Treaty Act of 1918

³¹¹ See *Solid Waste Agency v. United States Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (“[R]egulation of land use [is] a function traditionally performed by local governments”) (quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

³¹² *Gibbs v. Babbitt*, 214 F.3d 483, 499-501 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001).

³¹³ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (granting local governments ability to enact zoning ordinances under police power); *Johnson*, *supra* note 6, at 67 (stating “many courts might consider (local land use) to be an area of ‘traditional state concern.’”).

³¹⁴ See, e.g., *Gibbs*, 214 F.3d at 500 (providing overview of cases allowing Congress to regulate private land for environmental conservation).

³¹⁵ *Id.* at 500-01 (listing legislation since 1900).

³¹⁶ See *id.* (“States may decide to forego or limit conservation efforts in order to lower . . . costs . . . Congress may take cognizance of this dynamic . . . in order to prevent interstate competition whose overall effect would damage the quality of the national environment); *cf.* *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982) (holding water to be “article of commerce”).

³¹⁷ Act of May 25, 1900, ch. 553, 31 Stat. 187 (codified as amended at 16 U.S.C. §§ 701, 3371-78 (1994)); *Gibbs*, 214 F.3d at 500 (explaining significance of Migratory Bird Treaty Act of 1918); Philip Weinberg, *Does That Line in the Sand Include Wetlands? Congressional Power and Environmental Protection*, 30 *Envtl. L. Rep. (Envtl. L. Inst.) (News & Analysis)* 10894, 10897 (Sept. 2000). The Lacey Act now applies to all wild animals, including those bred in captivity, and to plants protected by treaty or state law. 16 U.S.C. § 3373 (1994) (establishing

went a step further in setting a national regulatory agenda for conservation by forbidding the takings of a wide range of bird species and explicitly preempting inconsistent state laws.³¹⁸ Additionally, several federal statutes regulate the taking, management or export of wildlife on non-federal property.³¹⁹

In 1896, the Supreme Court declared that wildlife was the property of the state in *Geer v. Connecticut*.³²⁰ By the early twentieth century, however, the Court had already begun the process of carving out significant exceptions to that general rule.³²¹ In *Missouri v. Holland*,³²² the Court upheld the Migratory Bird Treaty Act as a necessary and proper means of executing Congress' Treaty Power.³²³ The Court stated that the conservation of endangered wildlife was a "national interest of very nearly the first magnitude."³²⁴ In 1979 the Court overruled *Geer*, holding that states do not own the wildlife within their borders and that state laws regulating wildlife are limited by Congress' authority under the Commerce Clause.³²⁵ The Court acknowledged that states have a legitimate interest in wildlife regulation, but suggested that states must share that authority with the federal government.³²⁶

The Supreme Court has also sustained federal conservation statutes that apply to non-federal and private land. In 1977, the Supreme Court held that Congress had the authority under the Commerce Clause to issue federal fishing licenses for use in state

penalties for violating provision); see Coggins & Harris, *supra* note 27, at 305-07 (discussing 1981 Lacey Act Amendments).

³¹⁸ 16 U.S.C. §§ 703-12 (1994).

³¹⁹ See, e.g., The Bald Eagle Protection Act of 1940, 16 U.S.C. §§ 668-668d (1994) (forbidding taking, possession, selling, or exporting of bald eagles or any of their parts); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h (1994 & Supp. III 1997) (regulating taking and export of marine mammals); Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-83 (1994 & Supp. III 1997) (establishing national standards for fishery conservation).

³²⁰ 161 U.S. 519 (1896) (upholding Connecticut statute prohibiting interstate transportation of game birds that had been killed within state); White, *supra* note 6, at 248-49.

³²¹ See *Hughes v. Oklahoma*, 441 U.S. 322, 329 (1979) ("The erosion of *Geer* began only 15 years after it was decided."); *Gibbs*, 214 F.3d at 499 (noting "w[as] modified early in the twentieth century.").

³²² 252 U.S. 416 (1920).

³²³ *Id.* at 435.

³²⁴ *Id.* at 435.

³²⁵ *Hughes*, 441 U.S. at 326, 335.

³²⁶ *Id.* at 335-36; *Gibbs*, 214 F.3d at 499; White, *supra* note 6, at 249.

waters, and, thus, preempted conflicting state laws.³²⁷ Two years later, in *Andrus v. Allard*, the Court stated that the “assumption that the national commerce power does not reach migratory wildlife is clearly flawed.”³²⁸ In its 1999 decision, in *Minnesota v. Mille Lacs Band of Chippewa Indians (“Mille Lacs”)*,³²⁹ the Court reiterated that “[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers.”³³⁰ In *Mille Lacs*, the Court upheld Chippewa Indian rights under an 1837 treaty that allowed the Chippewa to hunt, fish, and gather independent of territorial, and later state, regulation.³³¹ The Court concluded that the Native American treaty rights were “reconcilable with state sovereignty over natural resources.”³³²

It is possible to argue that the federal role in conservation has focused primarily in areas with significant interstate commercial value and that the ESA goes beyond that role. For instance, numerous species such as the bald eagle and other migratory birds have significant commercial value.³³³ Furthermore, hunting and fishing licenses can have significant commercial value. Thus, an argument can be made that federal regulation of scarce resources has traditionally involved only commercial activities. By contrast, not all endangered or threatened species have commercial value. Accordingly, it is possible to argue that federal regulation of migratory birds, fishing and hunting does not provide a precedent for the ESA.

However, in light of Justice Kennedy’s concurring opinion in *Lopez*, a better question to ask is whether the ESA interferes with

³²⁷ *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 281-82 (1977).

³²⁸ 444 U.S. 51, 63 n.19 (1979).

³²⁹ 526 U.S. 172 (1999).

³³⁰ *Id.* at 204.

³³¹ *Id.* at 175-76, 208.

³³² *Id.* at 205.

³³³ See *Solid Waste Agency v. United States Corps of Eng’rs*, 531 U.S. 159, 192-95 (2001) (Stevens, J., dissenting) (arguing migratory birds have significant value in aggregate and affect tourism); *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (destruction of bald eagle would have substantial impact on commerce).

a traditional area of state regulation.³³⁴ States have not traditionally regulated scarce or endangered species.³³⁵ Even if Congress's enactment of the ESA in 1973 expanded the scope of federal regulation of scarce resources beyond traditional commercial categories, the ESA generally did not displace existing state law concerning endangered species, as little state regulation existed.³³⁶ Because the ESA does not infringe on an area of traditional state land use regulation, federal courts should apply a deferential approach in analyzing whether the ESA affects interstate commerce rather than the constricting approach applied in *Lopez*, *Morrison*, and even *SWANCC*.

While tightening the scope of the Commerce Clause, the *Lopez* decision did not call into question cases holding that the federal government has an independent role in conservation of endangered wildlife or scarce natural resources. Shortly after *Lopez*, in *Sweet Home*, the Court upheld a FWS regulation defining "harm" in the Endangered Species Act to include "significant habitat modification" on both private and public land, although the Court never mentioned *Lopez* or the Commerce Clause.³³⁷ Subsequently, several lower court decisions have approved federal regulation of non-federal land despite *Lopez*. For example, the Ninth Circuit has concluded that the Bald Eagle Protection Act is within the scope of the Commerce Clause because Congress could rationally conclude that "extinction of the eagle would have a substantial effect on interstate commerce."³³⁸ Additionally, the Eleventh Circuit has held that the private, on-site, intrastate disposal of hazardous waste was within Congress's authority to regulate because such disposal "significantly impacts interstate commerce."³³⁹

³³⁴ See *supra* notes 88-115 and accompanying text (discussing *Lopez*).

³³⁵ See White, *supra* note 6, at 250-52 (arguing federal government has greater expertise than states in environmental protection and wildlife conservation).

³³⁶ In 1973, Congress enacted the current version of the Endangered Species Act because protection of endangered species on federal land alone had failed to stop species extinction, and thus state regulation was clearly ineffective. See *supra* notes 28-29. See also White, *supra* note 6, at 251-52 (arguing state regulation of endangered species is inadequate).

³³⁷ *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-708 (1995).

³³⁸ *Bramble*, 103 F.3d at 1482.

³³⁹ *United States v. Olin*, 107 F.3d 1506, 1509-11 (11th Cir. 1997); Weinberg, *supra* note 317, at 10897.

The preservation of endangered species is an especially appropriate role for federal regulation. According to *Gibbs*, the Supreme Court has recognized that federal regulation of scarce natural resources is often necessary to prevent a "race to the bottom" among states engaged in over-exploitation of their resources to compete with other states.³⁴⁰ In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*,³⁴¹ the Court approved federal regulation of intrastate mining activities under the Surface Mining Control and Reclamation Act of 1977 to prevent ruinous competition among states that would likely lead to inadequate environmental standards.³⁴² In approving federal regulation of intrastate mining operations, the Court stated, "The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause."³⁴³ In *Home Builders*,³⁴⁴ Judge Wald argued:

The parallels between *Hodel v. Virginia* and the case at hand are obvious. The ESA and the Surface Mining Act both regulate activities—destruction of endangered species and destruction of the natural landscape—that are carried out entirely within a State and which are not themselves commercial in character. The activities, however, may be regulated because they have destructive effects, on environmental quality in one case and on the availability of a variety of species in the other, that are likely to affect more than one State. In each case, moreover, interstate competition provides incentives to states to adopt lower standards to gain an advantage vis-à-vis other states: In *Hodel v. Virginia* the states were motivated to adopt lower environmental standards to

³⁴⁰ *Gibbs v. Babbitt*, 214 F.3d 483, 501-02 (4th Cir. 2000), cert. denied sub nom., *Gibbs v. Norton*, 531 U.S. 1145 (2001).

³⁴¹ 452 U.S. 264 (1981).

³⁴² See *id.* at 281-82 (observing congressional concern such competition among states would prevent "adequate standards on coal mining operations within their borders.").

³⁴³ *Id.* at 282.

³⁴⁴ 130 F.3d 1041 (D.C. Cir. 1997).

improve the competitiveness of their coal production facilities, and in this case, the states are motivated to adopt lower standards of endangered species protection in order to attract development.³⁴⁵

There has been a vigorous academic debate about whether competition among states results in a lowering of environmental standards—a “race-to-the-bottom.”³⁴⁶ More important for the purposes of this Article is whether Congress has authority under the Commerce Clause to regulate the local impacts of interstate competition. First, there is evidence that the Framers intended the Commerce Clause to allow congressional regulation of commercial issues that affected the nation as a whole and could not be effectively addressed at the state level.³⁴⁷ Accordingly, there is a good argument based on the Framers’ intent that the Commerce Clause authorizes Congress to prevent destructive interstate competition.³⁴⁸

Second, the Supreme Court clearly approved congressional regulation of destructive interstate competition in *Hodel*.³⁴⁹ Because courts still apply a rational basis test in evaluating the constitutionality of congressional regulation under the Commerce Clause,³⁵⁰ it is likely that the Supreme Court would give considerable deference

³⁴⁵ *Id.* at 1055 (citations and footnote omitted). In dissent, Judge Sentelle argued that regulation protecting the habitat was not commercial in character and hence was unlike the regulation of commercial intrastate mining in *Hodel*. *Id.* at 1066 (Sentelle, J., dissenting). However, he seems to have missed Judge Wald’s point that the environmental values protected from destructive economic competition in *Hodel* were at least partially noncommercial and were similar to the environmental protection of endangered species.

³⁴⁶ Compare Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271, 352 (1997) (arguing empirical evidence suggests interstate competition results in “race-to-the-bottom” that lowers environmental standards), with Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211 (1992) (challenging conventional wisdom that interstate competition lowers environmental standards and arguing that any losses are more than made up by compensating gains from increased economic activity). See also Richard L. Revesz, *The Race to the Bottom and Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 545 (1997) (responding to critics of his argument disputing “race to the bottom rationale”).

³⁴⁷ See Engel, *supra* note 346, at 281-82 (discussing justification for federal regulations).

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 282.

³⁵⁰ See *infra* notes 415-22, 429-38 and accompanying text (discussing viability of rational basis test).

to a congressional finding that federal regulation is necessary to prevent a race to the bottom in a particular area.³⁵¹ However, because Congress never made explicit findings that there was a race to the bottom among states that was leading to species extinction,³⁵² the Court might refuse to follow Judge Wald's approach in applying the *Hodel* analysis to the ESA.

On the other hand, the prevention of such a race to the bottom is arguably implicit in the ESA's goal of setting uniform standards among states. In *Gibbs*, the Fourth Circuit recognized that "[a] desire for uniform standards also spurred enactment of the ESA."³⁵³ According to the House Report on the 1973 Amendments to the ESA, "protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded."³⁵⁴ The *Gibbs* Court concluded that the uniform standards of the ESA promote interstate commerce by preventing companies from having to comply with conflicting state standards.³⁵⁵

Furthermore, while commentators disagree about whether economic competition among states results in an environmental race to the bottom, there is little question that many states lack adequate programs for biodiversity and habitat protection.³⁵⁶ It is likely that federal regulation will result in greater conservation of endangered species, and ultimately promote greater commerce in such animals when species achieve recovery. Thus, there are strong policy reasons for courts to read the commerce power broadly to

³⁵¹ Funk, *supra* note 14, at 10767.

³⁵² See generally *supra* notes 27-53 (discussing legislative history of Endangered Species Act). The ESA's legislative history does refer to the need for Uniform Standards: "[P]rotection of endangered species is not a matter that can be handled in absence of coherent national and interstational policies; the results of a series of unconnected and disorganized polices and programs by various states might well be confusion compounded." See H.R. Rep. 93-415, at 5 (1973); *Gibbs v. Babbitt*, 214 F.3d 483, 501-02 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001).

³⁵³ *Gibbs*, 214 F.3d at 502.

³⁵⁴ H.R. REP. NO. 93-412, at 7 (1973).

³⁵⁵ *Gibbs*, 214 F.3d at 502.

³⁵⁶ See White, *supra* note 6, at 250-52 (arguing federal government has greater expertise than states in environmental protection and wildlife conservation).

include federal regulation of the commerce in and protection of endangered species.

C. THE ENDANGERED SPECIES ACT DOES NOT BLUR THE LINE BETWEEN FEDERAL AND STATE AUTHORITY

In his concurring opinion in *Lopez*, Justice Kennedy argued that courts should be cautious in using the Commerce Clause to authorize federal legislation that regulates an "area of traditional state concern" to which "States lay claim by right of history and expertise."³⁵⁷ According to Justice Kennedy, courts should carefully review federal regulatory statutes that intrude on traditional state concerns because such legislation tends to undermine the delicate balance between state and federal authority.³⁵⁸ If the Supreme Court approves an overly broad reading of the Commerce Clause, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."³⁵⁹

The Endangered Species Act does not blur the line between state and federal regulation of wildlife.³⁶⁰ The ESA extends federal regulation only to "a single limited area"³⁶¹—threatened and endangered species, and only after reviewing "those efforts, if any, being made by any State . . . to protect such species."³⁶² All other species are left to state control.³⁶³ Thus, the ESA does not give the federal government an unlimited police power inconsistent with the Constitution's explicit and implicit concerns about federalism.³⁶⁴ If the ESA is successful, eventually most, if not all, endangered species will achieve recovery and return to complete state control.³⁶⁵

³⁵⁷ *United States v. Lopez*, 514 U.S. 549, 580-83 (1995) (Kennedy, J., concurring).

³⁵⁸ *Id.* at 577.

³⁵⁹ *Id.*

³⁶⁰ *See Gibbs*, 214 F.3d at 502-03 (discussing principles of cooperative federalism in ESA).

³⁶¹ *Id.* at 503.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *See id.* (quoting, 16 U.S.C. § 1532(3) (1994), which defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary").

The ESA recognizes the need for cooperative federalism by involving the states in the protection of endangered species. For instance, the Secretary may list a species as endangered or threatened only after reviewing "those efforts, if any, being made by any State . . . to protect such species."³⁶⁶ Furthermore, the ESA provides that the Secretary of Interior may enter into cooperative programs with states that have adequate programs for conserving threatened and endangered species and provide financial assistance for such programs.³⁶⁷ Finally, once the species has recovered and is "delisted," states regain primary authority in regulating the species.³⁶⁸

Using a narrow interpretation of the Commerce Clause to strike down the ESA would intrude on the traditional federal role in the conservation of endangered species and unduly expand state authority beyond its traditional limits. In *Gibbs*, the Fourth Circuit argued:

It is as threatening to federalism for courts to erode the historic national role over scarce resource conservation as it is for Congress to usurp traditional state prerogatives in such areas as education and domestic relations. Courts seeking to enforce the structural constraints of federalism must respect the balance on both sides.³⁶⁹

Despite the state's traditional role in land use regulation, the federal government has taken the primary role in conserving endangered species. Federalist principles suggest that the courts should read the Commerce Power broadly to support the vital federal role in preserving threatened species.

³⁶⁶ See *id.* (discussing 16 U.S.C. § 1533(b)(1)(A) (1994)).

³⁶⁷ 16 U.S.C. §§ 1535(c),(d) (1994).

³⁶⁸ *Gibbs*, 214 F.3d at 503.

³⁶⁹ *Id.* at 505.

D. *GIBBS* PROBABLY SURVIVES *SWANCC*

In *Lopez* and *Morrison*, a majority of the Supreme Court put limitations on the use of the Commerce Clause to justify broad federal intrusion into traditional state areas such as education and criminal law. In *SWANCC*, the Court emphasized "States' traditional and primary power over land and water use."³⁷⁰ While *SWANCC* highlighted the role of states in controlling land use decisions, the Court did not suggest that the federal government has no role in environmental regulation, an area that does not raise the same federalism concerns as gun control and family law. Thus, Judge Wilkinson's argument in *Gibbs* that the conservation of endangered species is a special area where the federal government has at least concurrent and perhaps primary jurisdiction³⁷¹ is potentially compatible with *SWANCC*. In *Sweet Home*, which followed *Lopez*, the Court approved a broad interpretation of federal authority over the taking of endangered species on private property.³⁷² Accordingly, even if the Supreme Court is strongly committed to preserving traditional state authority over land use, federalism concerns should not impede the federal regulation of scarce resources, including endangered species, which has been a primary federal responsibility since the early 20th century.

VI. COURTS SHOULD DEFER TO THE ENDANGERED SPECIES ACT'S
GOALS OF PRESERVING OUR GENETIC HERITAGE AND
PRESERVING BIODIVERSITY

A. AGGREGATION OF DIFFERENT ENDANGERED SPECIES: ARE THEY SIMILAR ENOUGH?

Because the future benefits of any particular endangered or threatened species are usually uncertain, an important issue is whether courts may aggregate the economic impact of all endan-

³⁷⁰ *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

³⁷¹ See *supra* notes 261-87 and accompanying text.

³⁷² *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-708 (1995).

gered species or must examine the impact of individual species that currently have little value. Neither *Wickard* nor *Lopez* specify the prerequisites for aggregating similar activities in assessing their impact on interstate commerce.³⁷³ In *Morrison*, the Court refused to aggregate primarily noneconomic activities, such as violent acts against women, in determining whether the statute at issue had a substantial impact on the interstate commerce.³⁷⁴ By contrast, in *Gibbs*, Judge Wilkinson persuasively argued that preserving red wolves has enough of an economic impact even in light of *Morrison*'s economic aggregation test to justify the aggregation of all red wolves in calculating the value of a regulation preserving them.³⁷⁵ However, even if the *Gibbs* Court was correct that red wolves have economic value, what about species that have no apparent value?

In *Home Builders*,³⁷⁶ Judge Wald seemed to accept the government's argument that the limited commercial value of the Delhi Sands Flower-Loving Fly was irrelevant and that it was appropriate to consider the aggregate value of all endangered species.³⁷⁷ She argued that because the *Wickard* Court considered the impact of all wheat on interstate commerce, it was an appropriate analogy for courts to aggregate all endangered species in evaluating their impact on commerce.³⁷⁸ Similarly, because the ESA is a "comprehensive statute" that seeks to maximize both present and future economic benefits, the *Gibbs* court suggested that courts should aggregate the total economic and social benefits of preserving

³⁷³ See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 226 (3d ed. 1996) (suggesting neither *Wickard* nor *Lopez* specify how similar activities must be to be aggregated); Nagle, *supra* note 8, at 179-80 (making same argument).

³⁷⁴ See *Morrison v. United States* 529 U.S. 598, 615-17 & n.4 (2000) (arguing only economic activities should be aggregated in determining whether law has substantial impact on interstate commerce).

³⁷⁵ *Gibbs v. Babbitt*, 214 F.3d 438, 493 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001).

³⁷⁶ 130 F.3d 1041 (D.C. Cir. 1997).

³⁷⁷ See *id.* at 1046 (describing class to be aggregated as "all similarly situated endangered species"); see also Brief for the Appellees at 27, Nat'l Ass'n. of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (No. 96-5354) (asserting "[t]he appropriate analytical framework aggregates the effects of all conduct within the class of activities regulated by the challenged statutory provision") [hereinafter U.S. Brief]; Nagle, *supra* note 8, at 194-95 n.83 (noting Judge Wald may have been referring to narrow class of "similarly situated" endangered species).

³⁷⁸ *Home Builders*, 130 F.3d at 1049 n.7.

endangered and threatened species.³⁷⁹ The persuasive reasoning of *Gibbs* suggests that the ESA's prohibition on the taking of such species is likely to substantially affect interstate commerce for Commerce Clause purposes.³⁸⁰

Under the Constitution's Necessary and Proper Clause, Congress may enact statutes that are necessary and proper to effectuate the Commerce Power.³⁸¹ Because the ESA creates a comprehensive regulatory scheme that substantially affects interstate commerce, Judge Wald suggested that courts should not focus on the intrastate location or noncommercial value of species that are encompassed with the necessary and proper workings of the statute.³⁸² She quoted *Lopez* for the principle that "where a general regulatory scheme bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence."³⁸³

Professor Nagle argues that *Wickard* does not necessarily support the aggregation of all endangered species.³⁸⁴ *Wickard* aggregated "all wheat grown by farmers for their personal use," but did not aggregate all crops grown by farmers for their personal use.³⁸⁵ Additionally, while the amount of wheat consumed by the farmer directly affected interstate commerce, the destruction of some endangered animals with no economic value would not impact commerce unless such harm threatens their extinction.³⁸⁶ Professor Nagle questions whether it is appropriate to aggregate all endangered species if many of those species lack any significant connection to interstate commerce.³⁸⁷ While courts have used the broad principles inherent in the Necessary and Proper Clause to allow Congress to regulate commercial activities that may include a few

³⁷⁹ See *Gibbs*, 214 F.3d at 497 (identifying ESA as "comprehensive" and "far-reaching").

³⁸⁰ *Id.* at 493.

³⁸¹ See U.S. CONST. art. I, § 8, cl. 17 (giving Congress powers necessary to execute its duties).

³⁸² Nagle, *supra* note 8, at 200.

³⁸³ *Home Builders*, 130 F.3d at 1046, 1053 n.14 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)) (emphasis omitted).

³⁸⁴ Nagle, *supra* note 8, at 193-95.

³⁸⁵ *Id.* at 194.

³⁸⁶ *Id.* at 195.

³⁸⁷ *Id.* at 197.

isolated examples that lack commercial value, Professor Nagle argues that it is appropriate for courts to ignore species that lack commercial value if there are only a few *de minimis* examples of such noncommercial species—and only if those species are substantially similar enough to be aggregated with species that substantially affect interstate commerce.³⁸⁸ While it does not directly address how courts should aggregate activities, *Lopez* was clearly concerned with overly broad aggregations, especially those that interfere with areas of traditional state authority.³⁸⁹

The question of whether it is appropriate to aggregate all endangered and threatened species depends upon whether they are similar enough to be considered together. At first glance, it might seem inappropriate to aggregate species that are markedly different in biological form such as grizzly bears, flies, and fish. Furthermore, why should courts aggregate commercially valuable species with those that lack value?

There are three good rationales for aggregating all endangered species. First, the biodiversity argument postulates that different species often affect each other and that, as a result, the environment is better off if there are more species in the ecosystem.³⁹⁰ Second, the future benefits argument states that while the future value of any particular species is often unclear, the future value of preserving as many threatened and endangered species as possible is considerable.³⁹¹ Finally, courts should defer to legislative findings in the ESA that rely on the biodiversity and future benefits arguments because, as mentioned below, they do not raise the same federalism concerns that attracted heightened scrutiny in *Lopez* and *Morrison*.³⁹²

³⁸⁸ *Id.* at 201-02 (discussing *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (“[I]f a statute regulates an activity which, through repetition, in aggregate has a substantial affect on interstate commerce . . . ‘the *de minimis* character of individual instances arising under the statute is of no consequence.’ ”)).

³⁸⁹ *Id.* at 197.

³⁹⁰ See *infra* notes 393-401 and accompanying text.

³⁹¹ See *infra* notes 402-28 and accompanying text.

³⁹² See *infra* notes 429-38 and accompanying text.

B. THE BIODIVERSITY RATIONALE FOR AGGREGATING ENDANGERED SPECIES

The value of biodiversity provides a strong argument for aggregating together endangered and threatened species. As Judge Wald suggested in *Home Builders*,³⁹³ the presence of a large number of different animal and plant species provides substantial benefits to interstate commerce.³⁹⁴ According to Judge Wald, scientific data supported congressional findings in the ESA's 1973 legislative history that "takings [of endangered species] would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource—biodiversity."³⁹⁵ Furthermore, Judge Henderson in her concurring opinion pointed out that "[g]iven the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce."³⁹⁶ Under the biodiversity rationale for aggregation, individual species are important only in that each species potentially affects the preservation of large numbers of species.³⁹⁷ Many species that lack individual commercial value perform important "ecosystem services" such as the decomposition of organic matter, renewal of soil, mitigation of floods, purification of air and water, or partial stabilization of climatic variation.³⁹⁸ These are substantial ecosystem benefits that substantially affect interstate commerce. Accordingly, the loss of even those endangered species that have little present economic value frequently adversely impacts other species that have commercial value.³⁹⁹ Because the preservation of as many endangered and

³⁹³ 130 F.3d 1041.

³⁹⁴ *Id.* at 1052-53.

³⁹⁵ *Id.* at 1052-54; Scalero, *supra* note 6, at 338.

³⁹⁶ *Home Builders*, 130 F.3d at 1059 (Henderson, J., concurring).

³⁹⁷ John Charles Kunich, *Preserving the Womb of the Unknown Species with Hotspots Legislation*, 2 HASTING L.J. 1149, 1164-65 (2001) (detailing subtle and overlooked functions of ordinary species). *See also* Nagle, *supra* note 8, at 188-89 (discussing importance of large number of species).

³⁹⁸ *See* Kunich, *supra* note 397, at 1164-65 (discussing concept of ecosystem survival).

³⁹⁹ *See id.* (discussing numerous benefits both apparent and less visible created by living

threatened species as possible significantly affects interstate commerce by maintaining biodiversity, the aggregation of all endangered and threatened species is justifiable under the *Wickard* rule.⁴⁰⁰

Professor Nagle posits that the biodiversity arguments for aggregation suggested by Judge Wald and Judge Henderson go too far because their reasoning would justify an "Earth Preservation Act" forbidding harm to any natural objects of the earth.⁴⁰¹ However, a limited biodiversity rationale is consistent with federalist principles. While it would be inappropriate to infringe on traditional state regulation of animals and land use by regulating all living things for all time, there is a strong argument for a limited and concurrent federal regulatory role in preserving the limited number of threatened and endangered species until they can recover sufficiently to be returned to state control. Because federal regulation in the ESA is limited in both scope and time, the statute does not interfere with traditional state control over land use or animals.

C. MAY COURTS CONSIDER THE POTENTIAL FUTURE BENEFITS OF ENDANGERED SPECIES?

Both Judge Wald and Judge Wilkinson argued that it was appropriate for courts to consider the future economic benefits and medical potential of all endangered species in evaluating whether their protection substantially affects interstate commerce. In *Home Builders*, Judge Wald concluded that the ESA substantially affected interstate commerce by conserving genetic resources that may have future medical value.⁴⁰² Similarly the *Gibbs* court argued that, under the Commerce Clause, Congress may protect an endangered species with no present economic value or effect because it might have a significant economic effect in the future.⁴⁰³ By contrast,

species).

⁴⁰⁰ See *id.* 1164-68 (discussing ecosystem benefits created by having wide variety of living species).

⁴⁰¹ Nagle, *supra* note 8, at 198-99.

⁴⁰² *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1050-53 (D.C. Cir. 1997).

⁴⁰³ *Gibbs v. Babbitt*, 214 F.3d 483, 498 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v.*

Judge Sentelle and Judge Luttig contended that the benefits of the Delhi Sands Flower-Loving Fly⁴⁰⁴ and the Red Wolf⁴⁰⁵ respectively were far too speculative to justify regulation under the Commerce Clause. Both argued that there is no proof that either species will provide significant future economic or medical benefits.⁴⁰⁶

The loss of endangered species threatens significant future economic harm by reducing biodiversity and eliminating genetic material that could provide valuable medical and other resources. Preserving the diversity of plants and animals is important for providing a reliable source of food for human beings because over-reliance on a few crops makes them more vulnerable to disease and pests.⁴⁰⁷ Additionally, plants and animals are sources of chemicals and raw materials for many commercial products.⁴⁰⁸ Approximately half of all drugs used in medicine are derived from plants or animals, including several endangered species, with a total value exceeding \$14 billion per year.⁴⁰⁹

Despite rapidly developing scientific knowledge, scientists often do not know which species will prove valuable in the future. The pharmaceutical industry actively tests plants and animals to discover new medicines.⁴¹⁰ The biotechnology industry has developed advanced methods of screening called bioprospecting to

Norton, 531 U.S. 1145 (2001).

⁴⁰⁴ *Home Builders*, 130 F.3d at 1064-65 (Sentelle, J., dissenting).

⁴⁰⁵ *Gibbs*, 214 F.3d at 507 (Luttig, J., dissenting).

⁴⁰⁶ See *Home Builders*, 130 F.3d at 1064-65 (Sentelle, J., dissenting) (arguing fly at issue in case has no apparent value); *Gibbs*, 214 F.3d at 507 (Luttig, J., dissenting) ("We are not even presented with an activity as to which a plausible case of future economic character and impact can be made."); see also Nagle, *supra* note 8, at 183-84 (admitting there is no available evidence of fly's value but scientists do not know everything about fly).

⁴⁰⁷ See Coggins & Harris, *supra* note 27, at 253-55 (discussing crop composition of human diets); Kunich, *supra* note 397, at 1167 (asserting possibility of insignificant species becoming significant). For example, American farmers use genes from wild plant species in producing nearly \$1 billion of crops. Nagle, *supra* note 8, at 185.

⁴⁰⁸ See Coggins & Harris, *supra* note 27, at 256-57 (providing examples of plants used in business and industry).

⁴⁰⁹ See *id.* at 255-56 (discussing role of plants in medicine); Kunich, *supra* note 397, at 1163-64 (stating total value of drugs derived from wild organisms is \$14 billion per year); Nagle, *supra* note 8, at 185 (noting plants are being studied to find cure for AIDS); White, *supra* note 6, at 243-47 (discussing impact of biological diversity). For instance, an extract from the Pacific yew tree is the source of the chemotherapy drug Paclitaxel, which is used to treat ovarian and breast carcinomas. *Id.* at 244-45.

⁴¹⁰ See White, *supra* note 6, at 244-46 (providing examples of successful pharmaceutical discoveries).

determine if an organism's genetic material is suitable for creating new pharmaceuticals.⁴¹¹ Nevertheless, less than one-half of one percent of all flowering plants have been assayed for potential pharmaceuticals.⁴¹² While scientific knowledge about genetics is continually advancing, it is impossible to know for certain what value a species will have in the future.⁴¹³ Accordingly, there is a strong argument that it is safer to preserve as many species as possible because we can never be sure whether a species could be useful in the future.⁴¹⁴

Even though many of the future benefits of endangered species are necessarily speculative, courts should defer to congressional findings in the ESA's 1973 legislative history about the potential value of preserving their genetic heritage for future scientific development.⁴¹⁵ In *Gibbs*, the majority argued that congressional findings about the value of endangered species were entitled to significant deference even if the exact value was not clear.⁴¹⁶ The *Gibbs* court stated:

Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained. The Supreme Court has held that the congressional decision to maintain abandoned railroad track is reasonable "even if no future rail use for it is currently foreseeable." The Court reasoned that "[g]iven the long tradition of congressional regulation of railroad abandonments, that is a judgment that Congress is

⁴¹¹ White, *supra* note 6, at 244.

⁴¹² See Marvin J. Cetron & Owen Davies, *Trends Now Changing the World: Economics and Society, Values and Concerns, Energy and Environment*, 35 THE FUTURIST 30,43 (Jan.-Feb. 2001) (describing species loss as having "powerful negative impact on human well-being" and noting less than 0.5% of plants have been evaluated for pharmaceutical potential); Kunich, *supra* note 397, at 1164 (noting pharmaceuticals come from only few hundred of available species).

⁴¹³ Kunich, *supra* note 397, at 1166.

⁴¹⁴ See White, *supra* note 6, at 246 (arguing as technology advances, different species may become important).

⁴¹⁵ *Id.*

⁴¹⁶ *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001).

entitled to make." Similarly, Congress has long been involved in the regulation of scarce and vital natural resources. The full payoff of conservation in the form of tourism, research, and trade may not be foreseeable. Yet it is reasonable for Congress to decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss.⁴¹⁷

Courts commonly defer to rational congressional concerns about the future impacts of regulated activities, including those affecting the Commerce Power. For example, the Supreme Court has cautioned that courts should give additional deference to administrative agencies addressing the "frontiers" of science such as nuclear waste technology.⁴¹⁸ Similarly, in *TVA v. Hill*,⁴¹⁹ the Supreme Court suggested that courts should defer to congressional concerns in the ESA regarding "the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet."⁴²⁰ More specifically, in holding that the Bald Eagle Protection Act was within the scope of the Commerce Clause, the Ninth Circuit in *United States v. Bramble*⁴²¹ relied in part on the impact that extinction of the eagle would have on future interstate commerce:

Extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either

⁴¹⁷ *Id.* at 496 (citations omitted).

⁴¹⁸ *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

⁴¹⁹ 437 U.S. 153 (1978).

⁴²⁰ *Id.* at 178-79; *accord Gibbs*, 214 F.3d at 496 ("Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained.")

⁴²¹ 103 F.3d 1475 (9th Cir. 1996).

from eagles or from analysis of their genetic material.⁴²²

Conversely, critics of the future benefits justification for the ESA contend that there is no proof that some endangered species with no present economic value will ever have future economic or medical benefits.⁴²³ Additionally, there would be a stronger case for considering uncertain future benefits if an activity has some present value or had value in the past. For example, in *Preseault v. ICC*,⁴²⁴ abandoned railroad tracks had some past value and the continued presence of the rights-of-way made it plausible that the land might be used that way again.⁴²⁵ Accordingly, critics of the future benefits justification would argue that there is not a rational basis for assuming that endangered species without present economic value have benefits that are ever likely to affect interstate commerce in any significant manner.⁴²⁶ Yet even these critics acknowledge that these species could have unknown benefits yet to be discovered.⁴²⁷ The question is whether those possible future benefits are enough to justify federal regulation under the Commerce Clause.

Because it is difficult to predict the future value of any given species, it is appropriate for courts to defer to Congress' judgment that preserving all endangered species will yield substantial overall future economic benefits rather than demanding proof that any given species is likely to provide medical or other economic value. The ESA is also likely to benefit future medical research and other areas of interstate commerce by preserving biodiversity and genetic material for future generations.⁴²⁸ Courts should aggregate the benefits of all endangered species because it is impossible to estimate all the present, much less the future, effects particular

⁴²² *Id.* at 1481.

⁴²³ See Nagle, *supra* note 8, at 182-83 (arguing many endangered species lack any present or likely future commercial value).

⁴²⁴ 494 U.S. 1 (1990).

⁴²⁵ *Id.* at 19. See also Nagle, *supra* note 8, at 206-07 (distinguishing evidence of past effect on interstate commerce from speculative effects).

⁴²⁶ Nagle, *supra* note 8, at 182-83.

⁴²⁷ See *id.* at 183-84 (conceding some endangered species could have future commercial value).

⁴²⁸ See *supra* notes 393-401 and accompanying text (describing benefits of biodiversity).

species will have on interstate commerce. Thus, the statute is unlike the primarily noneconomic criminal statutes that the Court refused to aggregate in *Lopez* and *Morrison*.

D. APPLYING RATIONAL BASIS REVIEW TO THE AGGREGATION ISSUE

Even after *Lopez* and *Morrison*, the Supreme Court purports to apply a rational basis review in deciding whether a statute based on the Commerce Clause regulates activities substantially affecting interstate commerce.⁴²⁹ In *Morrison*, the Court stated that there is a presumption that a statute enacted pursuant to the Commerce Power is constitutional.⁴³⁰ In enacting the ESA Amendments in 1973, Congress had a rational basis for believing that the statute would advance the nation's long-term commercial interests. Accordingly, courts should defer to congressional findings about the long-term value of preserving endangered species and their irreplaceable genetic heritage. The ESA's goal of preserving genetic material of endangered species for the benefit of future generations clearly meets a rational basis standard of review even though the exact benefit of preserving any given species is often not clear. The total benefits from preserving all endangered species are likely to be substantial.

Because Congress had a rational basis for believing the protection of all threatened and endangered species would produce both present and future social benefits, courts should aggregate all such species when evaluating their impact and conclude that the ESA substantially affects interstate commerce, both in the present and the future.⁴³¹ While it is a complex statute addressing both economic and noneconomic interests, the ESA's comprehensive regulatory scheme substantially affects today's interstate commerce by preserving many species that have current substantial economic value.⁴³² Even after *Lopez* and *Morrison*, if a statute is primarily

⁴²⁹ See Dral & Phillips, *supra* note 79, at 10417-18 (discussing unworkable standards set forth in *Lopez* and *Morrison*).

⁴³⁰ *United States v. Morrison*, 529 U.S. 598, 607 (2000).

⁴³¹ See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir. 2000), *cert. denied sub nom.*, *Gibbs v. Norton*, 531 U.S. 1145 (2001) (aggregating individual takings of red wolves).

⁴³² *Id.* at 492-93, 497-98.

economic in nature, a court looks at its total impact on interstate commerce rather than examining individual portions of the statutory scheme to determine if each part has substantial impacts on commerce.⁴³³

Congress may regulate intrastate activities that do not substantially affect interstate commerce if they are "an integral part of [a] regulatory program" that addresses a broader problem that substantially affects interstate commerce.⁴³⁴ Thus, a comprehensive scheme that is necessary for regulating interstate commerce may reach some activities that are both intrastate and lack substantial commercial value.⁴³⁵ While holding that the GFSZA was not such a comprehensive regulatory scheme, the *Lopez* decision confirmed this principle and allowed the regulation of "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."⁴³⁶ By implication, under *Lopez*, if a comprehensive regulatory scheme is needed to address a serious national problem that substantially affects interstate commerce, Congress may, as part of an integral scheme, regulate intrastate activities that do not in themselves substantially affect interstate commerce.⁴³⁷ In applying this principle of aggregation to the ESA, courts should defer to the congressional judgment that the ESA's integral regulatory scheme is necessary to protect important interstate commercial interests even if the statute may encompass some intrastate species that presently lack substantial impacts on interstate commerce in their own right.⁴³⁸

VII. CONCLUSION

This Author would prefer to return to the more deferential review of legislation applied before *Lopez*. However, even in light of *Lopez*,

⁴³³ See, e.g., *id.* at 492-93 (looking at effect of takings total impact).

⁴³⁴ *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981).

⁴³⁵ *Id.*

⁴³⁶ *United States v. Lopez*, 514 U.S. 549, 561 (1995).

⁴³⁷ *Id.*; see also Vermeule, *supra* note 97, at 11335 (discussing "comprehensive scheme principle" in *Lopez*).

⁴³⁸ See *supra* notes 415-22 (arguing court should defer to congressional findings).

Morrison and *SWANCC*, the ESA's regulation of intrastate endangered species is clearly constitutional. Since the early 20th century, the federal government has exercised concurrent or primary authority to conserve endangered species and resources. By contrast, in *Lopez*, *Morrison* and *SWANCC*, the challenged legislation intruded in areas of traditional state concern. The long history of federal regulation of endangered species and scarce natural resources supports a finding of legitimacy under the Commerce Power. In light of their concurring opinion in *Lopez* and support for protection of endangered species on private lands in *Sweet Home*, there is reason to believe that 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.

Additionally, the ESA does not undermine federalism nor blur the state-federal distinction. Because its scope is limited to endangered and threatened species, the ESA does not broadly displace state authority and is unlike the intrusive federal statutes in *Lopez* and *Morrison* that were found to have impermissibly interfered with traditional state concerns. Furthermore, the federal government returns control of species that achieve recovery to the states. By leaving all non-threatened species to state control, the ESA recognizes that states and the federal government share concurrent, yet well demarcated, roles in regulating animals. Under the ESA's well-defined jurisdiction, there is no danger that species with abundant populations will fall under federal control.

Perhaps the most difficult and complex issue discussed in this Article is whether it is appropriate to aggregate commercial valuable species with those that currently lack value. While *Wickard* suggests that Congress has broad authority to aggregate activities that in themselves have little value, the Supreme Court has never established a clear test for when aggregation is proper under the Commerce Power. Under the Necessary and Proper Clause, Congress has authority to enact statutes that regulate activities that have a significant commercial impact even if the regulation encompasses some items that lack commercial value. The unanswered question concerns the limits of aggregation when

Congress adopts necessary and proper measures to enforce the commerce power.

This Article offers three arguments for aggregating all threatened and endangered species in assessing their impact on interstate commerce. First, preserving as many threatened and endangered species as possible promotes biodiversity. Even a species that lacks its own commercial value may affect others that have such value. Second, while the future value of preserving endangered or threatened species is somewhat speculative, courts should defer to legislative findings that preserving genetic material of these species is likely to produce significant future benefits in medical research and other commercial areas. The legislative history of the 1973 ESA amendments demonstrates that Congress believed that the national government should err on the side of preservation because the loss of species and their genetic material could create incalculable losses. Because it is impossible to know the precise value of endangered species in the future, courts ought to give greater deference to congressional concerns than when reviewing noneconomic regulations that significantly intrude on traditional areas of state regulation. Finally, under the rational basis test used in *Lopez* and *Morrison*, courts should defer to congressional findings that preserving endangered species will serve the nation's long-term national interests. Accordingly, under these three justifications, Congress may regulate even the most commercially invaluable and geographically isolated species pursuant to its broad authority under the Commerce Clause.

