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Is the Endangered Species Act Endangered in the Age of Strict Federalism? A Florida Perspective on the Recent Commerce Clause Challenges to the ESA

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NOTES

IS THE ENDANGERED SPECIES ACT ENDANGERED IN THE AGE OF STRICT FEDERALISM? A FLORIDA PERSPECTIVE ON THE RECENT COMMERCE CLAUSE CHALLENGES TO THE ESA

Kevin M. Shuler[*] [**]

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I. INTRODUCTION

Suppose that a ten-million-dollar development project in Levy County was suddenly stymied by the discovery of a nest of Florida salt marsh voles.[1] Such a delay could endanger a project bringing much-needed jobs

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* J.D. anticipated 2006, University of Florida Levin College of Law; B.A. in History, Duke University, 2002. This Note is dedicated to my parents, James and Diana Shuler, and to my sister Katie.

** *Editor's Note*: This Note won the Gertrude Brick Prize for the best Note in Spring 2005.

1. The Florida salt marsh vole is a listed endangered species; currently, the species resides only in one population cluster on private land in Levy County. *See* U.S. Fish and Wildlife Service, Recovery Plan for the Florida Salt Marsh Vole 1-4 (1997), http://ecos.fws.gov/docs/

to one of Florida's poorest counties.[2] Despite existing in only one county in one state, this newly discovered nest of Florida salt marsh voles would receive the full protection of the federal government. As a result, the current owners of the newly discovered habitat would have to satisfy a rigorous application process for permits if they wished to continue any planned development.

At first glance such a situation seems incredible, yet discoveries of endangered species and the resulting habitats can be a major headache for developers in exurban communities. In areas outside of Sacramento, California and Austin, Texas, development plans for hospitals and a Wal-Mart were frustrated after similarly rare populations of species were found on private land.[3] Currently, the U.S. Fish and Wildlife Services (FWS) lists one hundred eleven endangered species within Florida's borders, varying in size from the tiny Okaloosa darter to the large Florida panther.[4] Although some endangered species may exist solely within a single state's borders, Congress used its interstate commerce authority to enact the 1973 Endangered Species Act (ESA),[5] creating a regulatory system to protect the habitats of all endangered species. In Florida, the most famous beneficiaries of the ESA have been the Florida panther and the manatee, memorialized on license plates throughout the state;[6] yet it is the smaller, less-publicized animals that have created the greatest controversy.[7]

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recovery_plans/1997/970930d.pdf (last visited Sept. 28, 2005).

2. The annual per capita personal income for Levy County residents is roughly $10,000 lower than the per capita figures for Florida as a whole. *See* Levy County Profile, http://www.eflorida.com/profiles/CountyReport.asp?CountyID=62&Display=all (last visited Mar. 21, 2005).

3. *See* NAHB v. Babbitt, 130 F.3d 1041, 1043 (D.C. Cir. 1997); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 624-26 (5th Cir. 2003).

4. *See, e.g.*, U.S. Fish and Wildlife Service, Listings by State and Territory as of June 6, 2005, Florida, http://ecos.fws.gov/tess_public/TESSWebpageUsaLists?state=all (last visited June 6, 2005). Currently, the U.S. Fish and Wildlife Services (FWS), under the Department of Interior, and the National Oceanic and Atmospheric Administration (NOAA) Fisheries, under the Department of Commerce, share the regulatory duties under the Endangered Species Act (ESA). Division of Endangered Species, Listing Program, http://endangered.fws.gov/ whatwedo.html (last visited May 11, 2005). The FWS enacts regulations and promulgates permits for endangered species-related developments occurring within the United States whereas the NOAA is responsible for ocean-based endangered species. *See id.*; NOAA Fisheries, National Marine Fisheries Service, http://www.nmfs.noaa.gov (last visited Aug. 30, 2005).

5. 16 U.S.C. ch. 35 (2000).

6. In fact, the "Protect the Panther" and "Save the Manatee" specialty license plates were first and second, respectively, in sales from 2000 to 2003 among Florida's eighty-four available specialty plates. *See* Florida Dep't of Highway Safety & Motor Vehicles, 2004 Specialty Plate Sales Rankings, http://www.hsmv.state.fl.us/specialtytags/tagsales2004.pdf (last visited Aug. 30, 2005); Florida Dep't of Highway Safety & Motor Vehicles, Panther, http://www.hsmv.state.fl.us/ specialtytags/ProtectPanthers.html (last visited Aug. 30, 2005).

7. *See, e.g.*, John C. Eastman, *A Fistful of Denial: The Supreme Court Takes a Pass on*

Since the advent of the ESA, numerous authors have criticized the law on policy grounds; ironically, it appears that the greatest threat to the ESA is a constitutional challenge to its very existence.[8] When land developers' projects are stymied because of the threat posed to unpopular or unknown endangered species' habitats, nasty litigation seems certain.[9] Further inflaming ideological passions, oftentimes the ESA's "ugly stepchildren" reside in only a few counties of a state, thereby uniting two groups in opposition to the ESA—litigious developers and strict federalist ideologues.[10] The nexus between these disparate interest groups has culminated in recent years in increasing challenges to the constitutionality of congressional environmental regulations.[11] More specifically, developers and their supporters have sought judicial determination that the

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Commerce Clause Challenges to Environmental Laws, 2004 CATO SUP. CT. REV. 469, 490 (2004). The author of this article, John C. Eastman, criticized protection efforts for the endangered silvery minnow, as the FWS refused to release water to downstream states because of the effect it might have on the minnow's habitat. *Id.* According to Eastman, the refusal to release water caused an infestation of bark beetles that destroyed over 90% of Northern New Mexico's pinon trees. *Id.* Conservative organizations, such as the Pacific Legal Foundation, offer self-described programs that "put[] the Endangered Species Act on trial." *See* Pacific Legal Foundation, Endangered Species Act Program, http://www.pacificlegal.org/ (follow "Special programs" hyperlink; then follow "Endangered Species Act Reform Project" hyperlink) (last visited Aug. 30, 2005).

8. Commentators have frequently noted the "perverse" nature of the statute, as they argue it encourages landowners to "get rid of [the species] before the government knows it's there." *See, e.g.*, J.B. Ruhl, *Endangered Species Act Innovations in the Post-Babbittonian Era-Are There Any?*, 14 DUKE ENVTL. L. & POL'Y F. 419, 419 (2004). Other authors have noted the inherently reactive, rather than proactive, nature of the statute, as species receive no federal protection until they are on the brink of extinction. *See, e.g.*, Craig Manson, *The Collaborative Future of the Endangered Species Act: An Address to the Duke University School of Law*, 14 DUKE ENVTL. L. & POL'Y F. 291, 295 (2004).

9. *See* John T. Winemiller, *The Endangered Species Act and the Imprecise Scope of the Substantial Effects Analysis*, 18 TUL. ENVTL. L.J. 159, 198 (2004) (noting the creativity of the ESA's opponents and their various litigation strategies that portray the statute as pitting hospitals and schools against insignificant species).

10. For example, the Pacific Legal Foundation has written opinion articles challenging the constitutional basis of the ESA generally (as well as other federal environmental regulations) and the decision in *GDF Realty Invs., Ltd. v. Norton* specifically. *See* M. Reed Hopper, "The Endangered Species Act on Trial?", *available at* http://www.pacificlegal.org/ (follow "Op-Eds" hyperlink) (last visited Sept. 22, 2005). One of the Foundation's litigation strategies, in fact, centers on "challenging federal authority to regulate purely local species that have no connection to 'interstate commerce.'" Pacific Legal Foundation, *supra* note 7 (last visited Aug. 30, 2005).

11. In a non-ESA context, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was challenged as unconstitutional for exceeding Congress's Commerce Clause authority. *See* Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162, 164 (2001) (challenging the U.S. Army Corps of Engineers' definition of "navigable waters" on both a statutory and constitutional basis, as the Corps' definition permitted federal environmental regulation of isolated wetlands); United States v. Olin Corp., 107 F.3d 1506, 1510 (11th Cir. 1997) (holding that CERCLA was a validly enacted statute regulating activities having a substantial effect on interstate commerce).

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Commerce Clause does not provide Congress with the power to regulate the fate of intrastate species with little tangible commercial potential.[12] These arguments, although purportedly limited to challenging the ESA's applicability to intrastate endangered species, in actuality seek to challenge the constitutionality of the ESA itself, as almost half of all listed species reside in only a single state.[13] Further increasing the pressure on the FWS and the ESA's defenders has been the political dynamic inherent in court cases pitting environmental regulation against land development.[14]

The Supreme Court's decisions in *Lopez*[15]and *Morrison*[16] provided constitutional ammunition for these federalist-based challenges to congressional Commerce Clause powers. Since *Lopez* and *Morrison,* Commerce Clause challenges to the ESA have reached the Fourth, Fifth, and D.C. Circuits.[17] Although all these circuits have upheld the ESA as a

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12. *See, e.g.*, Brief of the State of Texas as Amicus Curiae Supporting Petition for Rehearing En Banc at 2, GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No.01-51099).

13. Jay Austin & Scott Schang, *Fundamentalist Federalism*, 21 THE ENVTL. F. 28, 32 (2004); *see also* NAHB v. Babbitt, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (noting that "[a]pproximately 521 of the 1082 species in the United States currently designated as threatened or endangered are found in only one state").

14. The re-election of George W. Bush could have a great impact on intrastate endangered species. Given the recent spate of constitutional-based challenges, the fate of the ESA may rest in the hands of the President's judicial nominees. However, if President Bush continues to appoint (and Congress continues to confirm) judges with ideological underpinnings sympathetic to the "Constitution in Exile" to the federal courts of appeal or the Supreme Court, the ESA is certain to face further challenges to its existence. For example, Judge Edith Clement of the Fifth Circuit, who dissented vociferously against ESA regulations in *GDF Realty*, was one of President Bush's judicial nominees from his first term. *See* Jeffrey Rosen, *Evaluating Strict Constructionists: How to Judge*, NEW REPUBLIC, Nov. 22, 2004, *available at* http://www.tnr.com/docprint.mhtml?i=20041129&s=rosen112904 (last visited June 18, 2005). For a definition of "Constitution in Exile," see Jeffrey Rosen, *How the Election Affects the Court: Supreme Mistake*, NEW REPUBLIC, Oct. 30, 2004, *available at* http://www.tnr.com/docprint.mhtml?i=20041108&s=rosen110804 (last visited June 18, 2005). The term comes from a 1995 article written by Judge Douglas Ginsburg, in which Judge Ginsburg argued that the true spirit of the constitution (as envisioned by the Founders) has been "in exile" since the advent of judicial deference towards New Deal legislation. *Id.*; *see also* Jay E. Austin et al., *Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act*, ENVT'L. LAW INST. 8 (2004), *available at* http://www.endangeredlaws.org/downloads/JudgingNEPA.pdf (noting the disparity in decisions in recent environmental cases by federal district court judges based on their nominating President). The authors found that Republican-appointed judges tended to rule in favor of environmental plaintiffs less than half as often as Democrat-appointed judges (roughly 28% versus 59%), and that judges appointed by President George W. Bush tended to rule in favor of environmental plaintiffs even less frequently (about 17% of cases). Austin, *supra*, at 8.

15. United States v. Lopez, 514 U.S. 549 (1995).

16. United States v. Morrison, 529 U.S. 598 (2000); *see also* Eastman, *supra* note 7, at 472 (arguing that after *Lopez* and *Morrison*, "the stage was set for new challenges to federal environmental laws having no connection to interstate commerce").

17. Gibbs v. Babbitt, 214 F.3d 483 (4th Cir 2000); GDF Realty v. Norton, 362 F.3d 286 (5th

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valid use of congressional Commerce Clause powers, there has been a wide divergence in the underpinning logic, with glaring inconsistencies as a result.[18] These divergences can be partially explained by the facts particular to each case, including the type of species implicated or the nature of the taking. However, while one court's argument seemingly runs afoul of *Morrison*,[19] another court seems to have so stretched the definitional basis of interstate commerce that the publication of a few scientific studies contributed to the finding of a link between the species and interstate commerce.[20] Although the circuits have upheld the ESA against the various Commerce Clause challenges, to inoculate the ESA from future challenges there ought to be a rationale consistent with *Lopez* and *Morrison* that protects all endangered species.

This Note will argue first and foremost for the continued need for federal regulatory protections of endangered species, analyzing the various constitutional arguments that courts have marshaled in support of the ESA. Part II will consider the history and current mechanics of the ESA, from prior congressional attempts at regulation to the modern statutory scheme. Of particular importance is the anti-take provision, which prohibits activities that may disturb endangered species through habitat alteration. Part III will analyze *Morrison* and *Lopez*, as these cases present the chief constitutional argument against the ESA. Part IV will review the relevant post-*Lopez* and post-*Morrison* circuit court decisions, exploring the logic of the opinions as situated with the individual circumstances of each case. Either through their natural range or due to recent environmental and development-related pressures, almost half of the listed endangered species now reside within the borders of a single state.[21] As such, Part V of this Note will analyze the federal regulatory concerns from a Florida-based perspective. For a state, such as Florida, that has its own list of protected species,[22] a federal regulatory program for species protection

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Cir. 2004); NAHB v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003).

18. *See* Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause? The Split in the Circuits Over Whether the Regulated Activity is Private Commercial Development or the Taking of Protected Species*, 69 BROOK. L. REV. 923, 994 (2004) (stating that the split in the circuits impacts "the scope of which types of projects the ESA may regulate").

19. *See id.* at 924 (suggesting that the D.C. Circuit Court's consideration of the commercial nature of the actor as the predicate for ESA regulation in *Rancho Viejo, LLC*, 323 F.3d 1062, was inappropriate).

20. *See* Gibbs v. Babbitt, 214 F.3d 483, 507 (4th Cir. 2000) (Luttig, J., dissenting).

21. *See supra* note 13 and accompanying text; *see also* Mank, *supra* note 18, at 924-25.

22. Florida lists one hundred eighteen species that are either endangered, threatened, or of special concern. *See* Florida Fish and Wildlife Conservation Commission, *Florida's Imperiled Species*, *available at* http://wildflorida.org/imperiledspecies (last visited Aug. 30, 2005). Florida

might seem redundant and unnecessary. However, environmental concepts such as a "race to the bottom" affect all states.[23] Furthermore, ecological protection and ecological diversity are concepts ill-suited to the arbitrary boundaries of our state system. Part VI will explore the latent, but real, impact of healthy ecosystems upon interstate commerce. Accordingly, this Note recommends the application of the Fifth Circuit's rationale,[24] as it seems best suited to provide protection to all endangered species from all sources of potential "takes." Unfortunately, the constitutional-based challenges to the ESA disguise and frustrate a meaningful debate about potential ESA reforms that could lessen the impact of regulations on landowners while simultaneously protecting some of our nation's scarce natural resources.[25] Therefore, this Note concludes with a recommendation for a more holistic approach to questions of ESA constitutionality, for an approach not limited to economic formulas but imbued with a greater appreciation of the option values[26] and biodiversity values endangered by the loss of species nationwide.

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currently has more species listed (and thus receiving state protection) than the number of endangered and threatened species that the FWS has listed for Florida. *Compare id., with supra* note 4 and accompanying text.

23. The phrase "race to the bottom" generally refers to, in the environmental context, a phenomenon in which states "race" downward from the minimum optimal environmental standard to lower environmental standards as a result of the competition for industry from fellow states. *See* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and is it "To the Bottom"?*, 48 HASTINGS L.J. 271, 274 (1997).

24. *See infra* Part IV.E.

25. Proponents and opponents of the ESA have argued for various reforms that could either make the Act more fair to affected landowners or make the Act more effective with species' rehabilitation, or both. *See* Ruhl, *supra* note 8, at 430-34 (listing various reforms, enacted by the Secretary of Interior during the Clinton administration, that sought to balance the goals of conservation with the protection of private property rights). Craig Manson, the Assistant Secretary for the FWS, has suggested the need for alternatives to critical habitat designation, as the designation simply frustrates legitimate development and the anti-take provisions are sufficient for species' protection. Manson, *supra* note 8, at 293-94. Manson also has touted landowner incentive programs, which provide money to owners of land affected by the discovery of endangered species. *Id.* at 296. The use of FWS funds to compensate landowners has not been without criticism, however. *See* Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It (Still) Matters*, 14 DUKE ENVTL. L. & POL'Y F. 441, 494-95 (2004) (questioning the payment of grant money by the FWS to private landowners when "the Service is not requesting adequate funding to carry out its primary functions").

26. The option effect, option benefit, or option value is "the value of the possibility that a future discovery will make useful a species that is currently thought of as useless." *See* NAHB v. Babbitt, 130 F.3d 1041, 1053 (D.C. Cir. 1997).

Shuler: Is the Endangered Species Act Endangered in the Age of Strict Fed

II. THE ENDANGERED SPECIES ACT: ITS HISTORY AND REGULATORY SCHEME

Historically, the federal government has acted to preserve individual endangered species, and federal wildlife regulations of varying types have been in force far longer than many other environmental regulations.[27] The Endangered Species Act should be viewed as the culmination of a series of attempts by Congress to protect the nation's endangered species.[28] In the Act's findings, Congress explicitly noted its concern about the "various species of fish, wildlife, and plants in the United States [which] have been rendered extinct as a consequence of economic growth and development."[29] Presumably, Congress derived its authority to implement this simple, albeit extensive, regulatory statute from its Commerce Clause powers.[30]

The Endangered Species Act requires the Secretary of Interior, via the Fish & Wildlife Services, first to determine whether an animal or plant species is threatened with extinction; if so, the species is then listed in the Code of Federal Regulations (CFR) as either endangered or threatened.[31] The Secretary must use the best scientific evidence and tools available for classification.[32] Once a species is listed as threatened or endangered, the

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27. *See* Mank, *supra* note 18, at 933 (noting the history of federal regulation of endangered species, beginning with the 1900 Lacey Act, which made interstate trafficking of animals killed in violation of state law a federal offense).

28. *See* Gibbs v. Babbitt, 214 F.3d 483, 494 (4th Cir. 2000) (commenting on the history of the 1973 Endangered Species Act in comparison to the prior Acts of 1966 and 1969, which had enacted regulations protecting endangered species, but which applied only to species located on federally owned land).

29. 16 U.S.C. § 1531(a)(1) (2000).

30. *See* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). Although Congress did not include a jurisdictional element clearly stating that the Commerce Clause was the constitutional predicate for the ESA, the absence of such a statement is not fatal; to withstand constitutional scrutiny, there need only be an independent judiciary review as to whether the regulated activities substantially affect interstate commerce. Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068 (D.C. Cir. 2003).

31. *See* 16 U.S.C. § 1533 (2000). The factors permitting such a finding include the destruction of the species' habitat, the overuse of the species for commercial or recreational purposes (overfishing or overhunting), disease, or otherwise insufficient regulatory mechanisms to protect the species or any other factors threatening the species' existence. 16 U.S.C. § 1533(a)(1)(A)-(E) (2000). This broad list of factors would permit the Secretary to classify practically any species threatened with extinction regardless of the source of the threat. *See id.*

32. *See* 16 U.S.C. § 1533(b) (2000). Sometimes the FWS has struggled with classifying endangered subspecies; and as technology has improved, the FWS has used DNA testing to insure that listed species are distinct species rather than just a population pocket of nonendangered species physically separated from the rest of the species. John Heilprin, *Mouse that Has Blocked Project Loses Status*, ST. LOUIS POST-DISPATCH, Jan. 30, 2005, at A03. A recent example of the difficulty of this determination is the recent planned de-listing of the Preble's meadow jumping mouse. After

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FWS will promulgate a recovery plan for the species that provides a description of the species and its habitat; the recovery plan also details the necessary actions that could lead to the successful delisting of a species (i.e., when the species achieves a more stable population size).[33]

Once a species is listed, it also receives regulatory protection against unpermitted "takes" of any kind.[34] To "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[35] The FWS-enacted regulations further clarify "harm" to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[36] The statute allows landowners with the proper permit to take an endangered species, provided the take was "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[37] Such permits must be approved by the FWS, and they can require a great deal of negotiation and flexibility on the part of the developer, who likely will not be able to fully develop the project as planned.[38] However, developments that threaten the entire existence of a species have, in all likelihood, no chance of approval.[39]

III. CONGRESSIONAL COMMERCE CLAUSE POWERS

Prior to the landmark decisions of *Lopez* and *Morrison*, congressional authority, when vested under Commerce Clause powers, seemed nearly absolute.[40] Since the New Deal era of federal regulation and the landmark

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a 1954 skeletal study, the species had been classified as a distinct subspecies; but following DNA testing, the FWS concluded that the mouse was identical to the nonendangered Bear Lodge meadow jumping mouse. *Id.*

33. 16 U.S.C. § 1533(f)(1) (2000).

34. 16 U.S.C. § 1538 (2000) ("[I]t is unlawful for any person . . . to . . . take any such species within the United States.").

35. 16 U.S.C. § 1532(19) (2000).

36. 50 C.F.R. § 17.3 (2004).

37. *Id.*; 16 U.S.C. § 1539(a)(1)(B) (2000).

38. *See* Burke, *supra* note 25, at 452 (noting the high relative costs for small landownders to obtain incidental take permits). A frequent compromise between landowners and the FWS consists of a Habitat Conservation Plan (HCP), in which the landowner receives a permit allowing incidental takes pursuant to certain FWS restrictions. *See* Ruhl, *supra* note 8, at 431-32. Recently, the FWS has also enacted a "banking" program similar to a banking program offered by the EPA under the Clean Water Act, in which landowners may consolidate parcels of their land for habitat preservation of listed species and may trade these accumulated parcels to other landowners who need habitat parcels to qualify for an HCP permit. *Id.* at 435.

39. *See, e.g.*, GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 625-26 (5th Cir. 2003).

40. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding that Congress may regulate local activities that individually do not impact interstate commerce if,

Darby decision,[41] the Supreme Court repeatedly upheld all forms of federal law enacted under the Commerce Clause.[42] In its first twenty years, the ESA appeared to be a legitimate exercise of congressional powers, furthering important national interests; the Supreme Court itself utilized the statute to enjoin the construction of a federally funded dam whose completion threatened the existence of the endangered snail darter.[43] Like many congressional regulations predicated on the Commerce Clause, the ESA appeared to be sufficiently related to interstate commerce so as to constitute a proper use of Article I powers.[44]

Nearly sixty years of unchallenged regulatory power came to an end with *United States v. Lopez*.[45] The statute at issue, entitled the Gun-Free School Zones Act, imposed federal criminal penalties for any individual who knowingly possessed a firearm within a school zone.[46] The Court overturned the Act for exceeding the Commerce Clause powers of Article I, as the Act was a criminal statute having "nothing to do with 'commerce' or any sort of economic enterprise . . . [it] is not an essential part of a larger regulation of economic activity."[47] Furthermore, the Gun-Free School Zones Act lacked a jurisdictional statement clarifying the constitutional authority and underlying reasons for congressional

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in the cumulative, these activities have a substantial and negative effect on commerce); Wickard v. Filburn, 317 U.S. 111, 127-29 (1942) (holding that conduct may be regulated even if such conduct, when isolated, does not affect interstate commerce, provided that the aggregation of such conduct nationwide does have a substantial affect on interstate commerce).

41. United States v. Darby, 312 U.S. 100 (1941). In *Darby*, the Court upheld the Fair Labor Standards Act of 1938, which had prohibited companies from shipping goods across states lines if the companies' wages were below the required minimum wage. *Id.* at 109, 114. Commentators cite *Darby* for its repudiation of earlier Commerce Clause decisions in which the Court consistently rejected congressional attempts to regulate intrastate activity having an "indirect effect[]" on interstate commerce. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3, at 253-54 (2d ed. 2002). Post-*Darby*, the Court consistently held that so long as the activity had a substantial effect on interstate commerce, Congress was within its powers to regulate that activity. *Id.* § 3.3, at 254.

42. *See* CHEMERINSKY, *supra* note 41, § 3.3, at 255 (noting that "[t]he law of the commerce clause during this era could be simply stated: Congress could regulate any activity if there was a substantial effect on interstate commerce," and that "in some cases, the Court even deleted the word 'substantial' and declared that Congress could regulate anything under the commerce clause so long as there was a rational basis for believing that there was an effect on commerce").

43. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 158, 189 (1978) (holding that the ESA forbade completion of the dam, as it would cause the endangered snail darter's extinction, even though Congress itself supplied federal funds for the completion of the dam).

44. *See* CHEMERINSKY, *supra* note 41, § 3.3, at 255. From 1937 until 1995, the Supreme Court refuted all challenges against Congressional regulations that were predicated on the basis of its Commerce Clause powers. *Id.*

45. 514 U.S. 549, 561 (1995).

46. *Id.* at 551.

47. *Id.* at 561.

regulation.[48] Although in hindsight it appears clear that an individual student's possession of a firearm in a school zone has almost zero effect upon interstate commerce,[49] the decision was revolutionary and seemingly signaled a rollback of the regulatory powers of Congress.[50] In *Lopez*, the Court established a three-part test for planned interstate commerce regulation: Congress may only regulate (1) the channels of interstate commerce, (2) an instrumentality or thing in interstate commerce, or (3) an activity substantially affecting interstate commerce.[51] The Court noted that the regulated activity (here, guns in schools) did not fall under the "channels" or "instrumentality" analysis.[52] As the link between firearms in schools and any effect on interstate commerce appeared tenuous,[53] the Court held that the Act exceeded congressional powers under Article I.[54]

Lopez seemingly reversed almost sixty years of Commerce Clause analysis overnight; the Court's decision in *Morrison* sent further shockwaves, as the Court demonstrated that, first, its decision in *Lopez* was not an aberration, and second, the Court would rigorously monitor laws that sought to regulate intrastate activities.[55] In *Morrison*, the issue was whether the Violence Against Women Act of 1994 and its civil remedy provision were constitutionally appropriate uses of Commerce Clause powers.[56] The Act specifically stated that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."[57] Per § 13981, a victim of such criminal violence could sue the perpetrator in federal court.[58] The Court reiterated that

48. *Id.*

49. *Id.* at 560 (noting that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not").

50. *See* Eastman, *supra* note 7, at 471.

51. *Lopez*, 514 U.S. at 558-59.

52. *Id.*

53. *Id.* at 563, 567. The Government did not argue that this particular instance of gun possession implicated interstate commerce but rather that gun possession in schools would result in violent crime. *See id.* at 563. Violent crime, when aggregated, affects the national economy through its inherent cost to victims (this cost is then passed onto the nation at large through insurance) and through its negative effect on individuals' willingness to travel. *Id.* at 563-64.

54. *Id.* at 567-68. The Court noted the Government's arguments that the aggregated cost of gun crime would cause substantial harm to the nation's economy and secondarily, that the cost of gun crime would damage the educational process occurring in the schools, adversely affecting the nation's economic potential. *Id.* at 563-64. The Court discounted the aggregation argument and reasoned that the Government's rationale could lead to the regulation of almost any noneconomic activity if it somehow impacted productivity of the citizenry and could infringe on state laws dealing with crime or family matters. *Id.* at 564.

55. *See* United States v. Morrison, 529 U.S. 598, 601-02, 608 (2000).

56. *Id.* at 601-02, 605-06.

57. 42 U.S.C. § 13981(b), *invalidated by Morrison*, 529 U.S. 598 (2000).

58. *Id.* § 13981(c).

"[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."[59] Utilizing the *Lopez* test, the Court found that *Morrison* fell into the third category of commerce regulation (intrastate activities that purportedly had a substantial effect on interstate commerce).[60] The Court noted first that, unlike the statute in *Lopez*, § 13981 provided congressional findings that clarified why Congress felt it important to legislate in this sphere.[61] However, the Court was not persuaded by these findings, and it expressed concern about the wide scope of potential regulations that could suddenly be deemed acceptable due to a tangential link to interstate commerce.[62] The Court was especially concerned by the potentially limitless scope of such regulations and the natural preemption of the states' traditional police powers.[63]

Had the Court considered the cost to society from the aggregation of gender-motivated crimes to be an appropriate rationale for regulation, *Morrison* probably would have had a different result. However, the Court rejected aggregation, and while it did not express a categorical rule against aggregation of noneconomic activity, it noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[64] The Court's rejection of congressional attempts to regulate noneconomic activities, which Congress had justified by aggregating the cost of all such activities under the guise of Commerce Clause authority, clearly presented issues for the Endangered Species Act.[65]

59. *Morrison*, 529 U.S. at 607.

60. *Id.* at 609.

61. *Id.* at 614. Some of the findings, as noted by the Court, included the effect gender violence has on the interstate economy by its effects on travel, employment opportunities, and related medical costs. *Id.* at 615.

62. *See id.*

63. *See id.*

64. *Id.* at 613.

65. In *Morrison*, the Court noted that the Gun-Free School Zones Act and the Violence Against Women Act both lacked a jurisdictional statement asserting that the legislation was pursuant to Congress's Commerce Clause powers. *Id.* Similarly, section 9 of the ESA has no jurisdictional statement, yet the Commerce Clause is its predicate authority. Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068 (D.C. Cir. 2003). Following *Lopez*, commentators quickly grasped the implications of the judicial narrowing of Commerce Clause authority. *See, e.g.*, Anthony Barone Kolenc, Casenote, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 861, [illegible] wildlife-protection statutes post-Lopez).

IV. THE ENDANGERED SPECIES ACT IN THE 4TH, 5TH, AND D.C. CIRCUITS

A. *The Delhi Sands Flower-Loving Fly*

Following Lopez, the only challenge to the ESA to reach the circuit courts of appeal was the 1997 case *National Association of Home Builders v. Babbitt.*[66] In 1993, after two years of study, the FWS officially listed the Delhi Sands flower-loving fly as an endangered species.[67] San Bernardino County had investigated several sites for a planned "earthquake-proof" hospital; and in 1992, before the fly was officially listed, the county purchased a 76-acre site.[68] The FWS notified the county that the site also served as habitat for the fly and that the planned construction would result in a violation of the anti-take provisions of section 9 of the ESA.[69] The parties modified the planned construction, and the hospital project moved forward.[70] In 1995, the county sought to redesign an intersection near the hospital, which would reduce the corridor area set aside for the fly's habitat. The FWS informed the county that the plan would result in an impermissible taking.[71] In 1995, the county, as well as the National Association of Home Builders (NAHB) and the City of Colton, filed suit, claiming that section 9 of the ESA was unconstitutional.[72]

The D.C. Circuit held that the prohibition on the taking of an endangered intrastate species was a proper use of the federal government's Commerce Clause authority.[73] Although the D.C. Circuit upheld the ESA, the court split in concurring opinions as to why the regulations were proper.[74] This first Commerce Clause challenge to the constitutionality of

66. 130 F.3d 1041 (D.C. Cir. 1997). The Delhi Sands flower-loving fly is an orange-and-brown-colored fly species about one inch in length. *See* Shawnetta Grandberry & Chris Nagano, *Protecting a Flower-loving Fly*, ENDANGERED SPECIES BULL., Sept./Oct. 1998, at 24, *available at* http://endangered.fws.gov/esb/98/09-10/24-25.pdf (last visited June 23, 2005). With flight skills comparable to those of a hummingbird, the Delhi Sands fly feeds on the nectar of desert flowers. *Id.* The fly's habitat is restricted to the dune areas of San Bernardino and Riverside Counties. *Id.*

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

68. *Id.*

69. *Id.*; *see supra* notes 34-39 and accompanying text.

70. *Id.* The County and FWS worked to modify some of the plans to eliminate the effect of construction on the fly. *Id.* This included moving the hospital 250 feet north of its original planned site and creating an 8.35 acre habitat preserve for the fly. *Id.* Of further importance, the parties agreed to create a one hundred-foot corridor to link two fly habitats, permitting fly breeding between the two different colonies. *Id.*

71. *Id.* at 1045.

72. *Id.* Specifically, the plaintiffs sought a declaration that the application of section 9 to takes of the fly, an intrastate species, was unconstitutional in light of *Lopez*. *Id.*

73. *Id.* at 1057.

74. *See id.* at 1046 n.3. The judges split on whether the first aspect of regulation was

the ESA was just a precursor to the flood of litigation following *United States v. Morrison*,[75] and the D.C. Circuit would later revisit its NAHB decision and reconsider its constitutional analysis of the ESA in *Rancho Viejo*.[76]

B. *The Red Wolf*

The red wolf's habitat once spread across the southeastern United States, but by 1976 its existence was threatened by both habitat destruction and hunting.[77] As a result, the species was listed as endangered and the remaining animals were captured and placed into a captive breeding program.[78] Between 1987 and 1992, forty-two red wolves were released back into the wild in the Alligator River National Wildlife Refuge in eastern North Carolina.[79] By 1998, however, more than half of the roughly seventy-five red wolves in the wild lived on private lands, potentially

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proper—that is, whether endangered species qualified as channels of interstate commerce (both judges agreed that biological diversity contributes to a substantial effect on interstate commerce). *See id.* Judge Wald found section 9 to be constitutional on several bases. *Id.* at 1046, 1049. First, Judge Wald stated that the anti-take provision fell under the congressional authority to regulate the channels of interstate commerce. *Id.* Judge Wald provided two reasons. First, the anti-take provision of the ESA is necessary to "control the transport of the endangered species in interstate commerce"; second, the anti-take provisions were an appropriate use of congressional authority "'to keep the channels of interstate commerce free from immoral and injurious uses.'" *Id.* (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)). Judge Wald also found regulation to be appropriate as the ESA substantially affected interstate commerce. *Id.* at 1049. Judge Wald cited the ESA's Congressional findings and an amicus brief, which expressed concern that extinction could foreclose the discovery of presently unknown cures. *Id.* at 1051, 1052-53. Although Judge Wald stated that the impact of extinctions on biodiversity substantially affected interstate commerce, she primarily focused on the immediate, albeit hypothetical, effects of extinction. *Id.* at 1053-54. While disagreeing with Judge Wald about the appropriateness of regulations based on "an uncertain potential medical or economic value," Judge Henderson concurred overall in the decision. Judge Henderson agreed specifically that biodiversity and its effect on the ecosystem substantially affect interstate commerce. *Id.* at 1058-59 (Henderson, J., concurring). Judge Henderson further reasoned that the ESA sought to regulate not just listed species, but their habitats as well. *Id.* at 1059 (Henderson, J., concurring). Because the construction of the hospital and the redesigned traffic intersection had a clear connection to interstate commerce, Judge Henderson found regulation to be appropriate. *Id.* (Henderson, J., concurring).

75. 529 U.S. 598 (2000); *see infra* Parts IV.B-D.

76. Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1066 (D.C. Cir. 2003).

77. Gibbs v. Babbitt, 214 F.3d 483, 488 (4th Cir. 2000). Red wolves generally have a mixed-color coat of black, brown, gray, and yellow fur (the red wolf moniker presumably comes from the reddish coats of Texan wolf populations). *See* Red Wolf, National Parks Conservation Association, http://www.npca.org/wildlife_protection/wildlife_facts/redwolf.asp (last visited June 26, 2005). The adult male red wolf weighs between sixty and eighty pounds while the adult female weighs between forty and sixty pounds. *Id.* Red wolves tend to hunt either alone or in small groups, preferring small mammals and occasionally deer. *Id.*

78. *Gibbs*, 214 F.3d at 488.

79. *Id.*

threatening landowners or their livestock.[80] These wolves were the center of controversy in *Gibbs v. Babbitt*.[81] Per section 9 of the ESA, the landowners were precluded from intentional takings, including harassing, harming, injuring or killing the animals.[82] In response to landowner concerns, the FWS permitted a taking if it was in defense of a person's life or if the wolves were in the act of killing the landowners' livestock.[83] Public pressure mounted, however, and several landowners filed a suit challenging the federal government's authority to regulate the red wolf on private land.[84]

What makes *Gibbs* unique among the ESA challenges is the nature of the endangered species at issue. Unlike the habitats of the species at issue in *Rancho Viejo* and *GDF Realty*, discussed *infra*,[85] the red wolf's habitat has not always been restricted to one state.[86] Using the analytical framework set out by the *Lopez* and *Morrison* decisions, the Fourth Circuit first emphasized that the taking of red wolves involved a number of commercial activities.[87] Although the red wolf's commercial impact at that time was miniscule, its potential future commercial impact merited significant consideration.[88] The court explicitly considered four areas in which the regulations protecting the red wolf implicated commercial concerns.[89] First, the court included the red wolf as part of the wildlife-related tourism industry, and noted the popularity of so-called "howling events" in which tourists traveled to North Carolina's Smoky Mountains National Park to listen to wolf howls.[90] The court also reasoned that

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80. *See id.* at 488-89.

81. *Id.* at 489.

82. *See supra* notes 34-39 and accompanying text.

83. *See Gibbs*, 214 F.3d at 488.

84. *See id.* at 489. In addition to the lawsuit, the North Carolina General Assembly passed a bill allowing landowners to kill red wolves if the landowner had already requested the FWS to remove the animals from the property. There was no actual conflict between the federal and state statutes as the North Carolina statute was never applied. *Id.*

85. *See infra* Parts IV.C-D.

86. *Gibbs*, 214 F.3d at 488. The Court noted the "pervers[ity] indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power." *Id.* at 498. Even commentators critical of the ESA's applicability to solely intrastate species have also stressed the absurdity of a regulatory program that loses the power of regulation just as the recipient of such regulation requires more federal protection. *See* Jeffrey H. Wood, *Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After* SWANCC, 19 J. LAND USE & ENVTL. L. 91, 117 (2003).

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

88. *Id.* at 495 (noting that "the relative scientific value and commercial impact of . . . red wolves is for Congress and the FWS, informed as they are by biologists, economists, and others whose expertise is best delivered to the political branches, not the courts").

89. *Id.* at 493-95.

90. *Id.* at 493. The dissent criticized this commercial impact, noting that it was based solely upon an unpublished study. *See id.* at 505 (Luttig, J., dissenting).

scientific study of the red wolf impacted interstate commerce,[91] as did the potential revival of the pelt trade, even though red wolf pelts were last routinely sold in the nineteenth century.[92] Finally, the court noted that the taking of red wolves by landowners was inherently related to the landowners' activity, i.e., agriculture.[93] Aside from any particular effect the red wolf had on interstate commerce, the court also stressed that the regulations were part of an overall federal system designed to protect endangered species in their role as scarce natural resources. To have ruled otherwise, the court noted, would negatively implicate the power of the federal government to protect rare resources for the betterment of citizens.[94]

C. *The Arroyo Toad*

The Arroyo toad, native to southern California and Mexico's Baja California region, was listed as an endangered species by the Secretary of Interior in December 1994.[95] Rancho Viejo, LLC planned a home development on a 202-acre site in San Diego County, but the discovery of Arroyo toads near an abutting creek drew the attention of the FWS.[96] Because Arroyo toads' habitats range about only one mile from the streams where they breed, the toads' existence was threatened by the large scale development.[97]

The FWS refused to permit Rancho Viejo's planned development due to the threat to the toads.[98] Despite a FWS proposal that would have allowed development under different circumstances,[99] Rancho Viejo

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91. *Id.* at 494.

92. *Id.* at 495.

93. *Id.* This final link between the take and the commercial nature of the actor has been cited in later cases (primarily in *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1067 n.2 (D.C. Cir. 2003)); but the link itself has been challenged by other courts in ESA cases as the argument "would allow application of otherwise unconstitutional statutes to commercial actors . . . [and] would 'effectually obliterate' the limiting purpose of the Commerce Clause." GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 634 (5th Cir. 2003).

94. *See Gibbs*, 214 F.3d at 495-96.

95. *Rancho Viejo*, 323 F.3d at 1065. The Arroyo toad is lightly colored, often grayish-green or tan, and only measures about two-to-three inches in length, with "warty skin." Endangered and Threatened Wildlife and Plants, http://endangered.fws.gov/r/fr94568.html (last visited Aug. 30, 2005). Development and dam construction in southern California destroyed much of the toad's natural habitat, and most of the remaining populations of toads are found near the Cleveland National Forest in San Diego County. *Id.*

96. *Rancho Viejo*, 323 F.3d at 1065.

97. *See id.*

98. *See id.*

99. Rancho Viejo planned to use roughly 750,000 cubic yards of fill dirt from seventy-seven acres of its land, including portions of the Keys Creek stream bed that served as the Arroyo toads' habitat. *Id.* The FWS proposed an arrangement in which Rancho Viejo could continue the housing

instead brought suit against the Secretary of the Interior, claiming that the ESA, and specifically the ESA's protection of an intrastate toad species, exceeded congressional powers under the Commerce Clause.[100] The D.C. Circuit Court treated the toads as an isolated, solely intrastate species[101] (conveniently ignoring that the Arroyo toad also lives in Baja California across the Mexican border).[102]

The D.C. Circuit Court also applied the necessary *Morrison* and *Lopez* logic, albeit in a different fashion than the Fourth Circuit in *Gibbs*.[103] Rather than focus on the commercial impact of the species itself, the court instead focused on the activity that was to be regulated, defining the regulated activity as "the construction of Rancho Viejo's housing development."[104] Furthermore, unlike the Fourth Circuit in *Gibbs*, the court held that the take itself was the object of regulation, not the toad.[105] Since the ESA sought "to regulate 'economic growth and development untempered by adequate concern and conservation,'"[106] the court interpreted *Morrison* and *Lopez* to allow the developer's actions, which were clearly commercial in nature, to be the focus, rather than the endangered species.[107] Because the housing development implicated interstate commerce, the court noted, Congress had every right to impose regulations upon the development via the ESA.[108] However, by the court's own admission, its focus on the nature of the taking entity would exclude the lone hiker or landowner whose takes are not part of a large commercial activity.[109]

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development provided that Rancho Viejo obtained fill dirt from an off-site source rather than from the Keys Creek stream bed. *Id.*

100. *Id.* at 1066.

101. *See id.* at 1069.

102. *See* Proposed Designation of Critical Habitat for the Arroyo Toad (Bufo californicus), 70 Fed. Reg. 7459, 7460 (Feb. 14, 2005) (to be codified at 50 C.F.R. pt. 17).

103. *Compare Rancho Viejo*, 323 F.3d at 1067 (referencing *NAHB v. Babbitt*, the court briefly noted the first rationale that the *NAHB* court had relied upon: the loss of biodiversity itself and its substantial effect on interstate commerce. *Id.* The *Rancho Viejo* court explicitly stated that even though it relied upon *NAHB*'s second rationale, it did "not mean to discredit the first." *Id.* n.2), *with* Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000) (finding a nexus between the red wolf itself and interstate commerce).

104. *Id.* at 1069.

105. *See id.* at 1072 (noting that the "regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens. The ESA does not purport to tell toads what they may or may not do."). *Contra Gibbs*, 214 F.3d at 492 (stating that the taking of a red wolf impacts interstate commerce because of the potential commercial nature of the species involved).

106. Rancho Viejo, 323 F.3d at 1072-73 (quoting 16 U.S.C. § 1531(a)(1) (2000)).

107. *See id.*

108. *Id.* at 1073.

109. *Id.* at 1077.

D. *The Texas Cave Invertebrates*

Following *Morrison*, the Fifth Circuit also heard a Commerce Clause challenge to the ESA, this time involving a planned development that threatened an assortment of six endangered invertebrate cave-dwellers near Austin, Texas.[110] In *GDF Realty*, the landowners bought the subject property in 1983 for investment purposes, but in 1989 the FWS notified the landowners that the planned development might amount to an impermissible take of an endangered species.[111] For the next nine years, the landowners and the FWS sparred over potential development, culminating in a FWS letter notifying the landowner that any permit for an incidental take would be denied, effectively blocking any development plan for the property.[112]

The landowners brought suit against the FWS, claiming that the ESA's take provisions exceeded the Commerce Clause powers granted under Article I, and as a result, were unconstitutional.[113] The district court, noting that the planned development included a Wal-Mart and an apartment complex, held that there was a sufficient link to interstate commerce and granted summary judgment for the FWS.[114] The district court found the commercial impact of the Cave Species to be fairly irrelevant, and focused instead on the development as the regulated activity.[115]

On appeal, the Fifth Circuit expressed concern that the expansive logic of the district court would uphold otherwise unconstitutional statutes solely because of their application to commercial actors.[116] The court rejected the district court's analytical underpinnings, which, like the *Rancho Viejo* court, upheld the ESA on the basis of the regulated actor's commercial intentions with the property.[117] Instead, the court narrowed its

110. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 624-25 (5th Cir. 2003). The Cave Species, as they are called, vary in size from 1.4 millimeters to 8 millimeters in length. *Id.* at 625. Four of the Cave Species are subterranean arachnids (a class of species including spiders and scorpions); the other two Cave Species are subterranean beetles. *Id.* Four of the six species are eyeless. *Id.* The Cave Species have been found only in two counties in Texas. *Id.* Because of the threat to their habitat, the lack of state or federal laws protecting them, and their inherently precarious existence, all of the Cave Species were placed on the endangered list by 1993. *Id.*

111. *Id.* at 624-25.

112. *Id.* at 626. The district court chastised the FWS for not actually denying the permits. Although the notification of future permit denial had the same effect, as issued it would seemingly prevent the landowners from challenging the denial in court. *Id.*

113. *Id.*

114. GDF Realty Invs., Ltd. v. Norton, 169 F. Supp. 2d 648, 658, 664 (W.D. Tex. 2001).

115. *Id.*

116. *GDF Realty*, 326 F.3d at 634.

117. *Id.* The court stated:

> Neither the plain language of the Commerce Clause, nor judicial decisions

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analysis to the "expressly regulated activity," i.e., the takes of the Cave Species and whether the takes had a substantial effect on interstate commerce.[118] Unlike the red wolves at issue in *Gibbs*, the Cave Species could not be said to impact interstate commerce via tourism or scientific study.[119] If the ESA's regulations were based solely on the takings of individual species, then the Cave Species clearly failed to implicate interstate commerce in any way.[120] The Cave Species' fate was preserved, however, as the court agreed with the FWS's alternative argument: The takes of all endangered species, including the Cave Species, should be aggregated, and as such, the aggregation of takes clearly has a substantial effect on interstate commerce.[121] The court found aggregation to be appropriate because the regulation of Cave Species was part of a comprehensive regulatory system, the ESA, which itself was in great part economic in nature.[122] Furthermore, each individual instance of the regulated activity (the taking) is essential to the ESA, as endangered species, by their very nature, exist in small groups; each allowed taking would strip the ESA of its very purpose.[123]

GDF petitioned the Fifth Circuit to rehear the case en banc, but per curiam, the court denied a rehearing.[124] The dissent argued for a species-by-species review rather than an aggregation approach, as it could not "fathom" how certain species, such as the Cave Species, were part of an economic regulatory system or how a taking of such species was a commercial activity.[125] Such an approach might permit the regulations, as they pertain to more overtly commercial species, such as the red wolf in

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> construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

Id.

118. *Id.* at 633.

119. *See id.* at 637.

120. *See id.* at 637-38. Furthermore, the court rejected the argument that the regulation of the Cave Species or their habitat could result in unknown future benefits implicating interstate commerce, as this was "simply too hypothetical and attenuated . . . to pass constitutional muster." *Id.* at 638.

121. *See id.* at 638-40.

122. *Id.* at 639-40. The court referred to the ESA's legislative history and referenced the cumulative impact of mass extinction on the ecological gene pool, which clearly would have a huge (albeit unknowable) effect on interstate commerce. *Id.*

123. *See id.* at 640.

124. GDF Realty Invs., Ltd. v. Norton, 362 F.3d 286 (5th Cir. 2004) (per curiam) (denying petition for rehearing en banc).

125. *Id.* at 290-91 (Jones, J., dissenting from the denial of rehearing en banc).

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Gibbs.[126] For the Cave Species, however, it would be the state's prerogative, not the federal government's, whether to permit the take.[127]

E. *Analysis of the Circuit Court Decisions*

Florida's judicial circuit, the Eleventh Circuit Court of Appeals, has not yet heard a Commerce Clause challenge to the ESA, and the wide variance in logic from circuit to circuit presents a challenge for those who would defend the Act in the Eleventh Circuit. Ultimately, all three federal circuits, when confronted with challenges to the ESA, upheld the statute; however, the split in the circuits regarding the appropriate basis for the ESA's constitutionality presents challenges for defenders of the Act.[128] The *Gibbs* court's willingness to consider the unknown or future economic value of an endangered species (in that case, the red wolf) would seemingly permit judicial tolerance of federal regulation of our nation's larger animals, especially mammals and birds.[129] The regulations prohibiting takes of such species could also form a nexus with the wildlife-related tourism industry.[130] Furthermore, an analysis dedicated to future economic impact, or the species' option effect, could potentially include endangered plant species, as extinction could foreclose medicinal advances.[131] However, such analysis does little for our nation's smaller animal species that cannot credibly be claimed to be a source for future tourism, trade, or scientific inquiry.

The *Rancho Viejo* court's analysis, with its focus on the commercial nature of the actor, leads to two problems.[132] First, a general suggestion that any congressional regulation may be proper if predicated on the regulated actor's commercial ties would seemingly contradict the logic of

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126. *Id.* at 291 (Jones, J., dissenting from the denial of rehearing en banc).

127. Incidentally, the regulations protecting the Cave Species prohibited not only private development, but also a planned state highway. *Id.* at 292 (Jones, J., dissenting from the denial of rehearing en banc). Had the court ruled differently, presumably both the private developer and the state would have begun construction, resulting in a taking of the species.

128. *See* Sara D. Van Loh, Note, *The Latest and Greatest Commerce Clause Challenges to the Endangered Species Act:* Rancho Viejo *and* GDF Realty, 31 ECOLOGY L.Q. 459, 482 (2004) (questioning the likely vitality of regulations for intrastate endangered species under either the *GDF Realty* or the *Rancho Viejo* opinions). The author instead suggests the ESA could be upheld on the basis of (1) avoiding a race to the bottom and (2) respecting congressional concerns about the loss of biodiversity. *Id.* at 483-84. Other authors have noted the discrepancy in the circuit court opinions regarding the actual object of regulation: The taking of an endangered species (per *GDF Realty*), or the commercial development that causes a taking (per *Rancho Viejo*). *See, e.g.*, Winemiller, *supra* note 9, at 160-61.

129. *See* Gibbs v. Babbitt, 214 F.3d 483, 492 (2000).

130. *See id.* at 493.

131. *See id.* at 494.

132. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1069 (D.C. Cir. 2003).

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Lopez and *Morrison* that the Commerce Clause power does not grant infinite powers to Congress.[133] Second, by the court's own admission, hikers or landowners would be exempt from federal environmental regulations prohibiting takes solely due to their status as noncommercial actors, despite the obvious threat unrelated takings might inflict upon endangered species regardless of the actor.[134]

The Fifth Circuit's rationale in *GDF Realty* appears best suited to respond to any future challenges to the ESA.[135] The Fifth Circuit's analysis would protect an endangered species, not just for its potential commercial value (as implicated in *Gibbs*), nor for the commercial nature of the threat to the species (for example, by commercial actors as in *Rancho Viejo*), but instead because of its status as an endangered species.[136] Realistically, the option value of the subterranean eyeless arachnid is low; yet if aggregated with all endangered species, the taking of it clearly implicates interstate commerce.

V. THE ENDANGERED SPECIES ACT AND FLORIDA'S WILDLIFE

Florida is home to one hundred eleven threatened and endangered species, the fourth highest number of listed species of any state in the

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133. *See, e.g.*, Mank, *supra* note 18, at 994. Mank notes that the

> Viejo court's focus on economic activity could allow Congress to regulate wedding ceremonies, which are not economic activities in themselves, if they result in the renting of a large hotel or reception hall that has significant impacts on interstate commerce. This is so even though *Lopez* and *Morrison* emphasized that family law and marriage are traditional areas of state regulation.

134. *Rancho Viejo*, 323 F.3d at 1077. Chief Judge Ginsburg, in his concurring opinion, further sought restriction of the holding to commercial actors only. *See id.* at 1080 (Ginsburg, C.J., concurring). Chief Judge Ginsburg stated:

> [A] take can be regulated if—but only if—the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce [and therefore this take may not be regulated].

Id. (Ginsburg, C.J., concurring).

135. Several commentators have similarly argued that the Fifth Circuit's rationale for upholding the ESA best addresses the constitutional challenge while also maintaining the comprehensive nature of the regulations. *See* Mank, *supra* note 18, at 996-97; Winemiller, *supra* note 9, at 199-200.

136. *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003).

https://scholarship.law.ufl.edu/flr/vol57/iss5/4

nation.[137] Any policy reconsideration of endangered species regulations should consider how Florida's distinctive and varied wildlife, whose habitat stretches from the Panhandle to the Florida Keys, is an economic boon in and of itself.[138] In fact, the estimated annual commercial impact of wildlife-related tourism on Florida's economy exceeds $1.3 billion.[139] Theme parks, aquariums, and zoos, featuring all types of Florida wildlife and fauna, are scattered throughout the state and are a tribute to the economic potential inherent in preserving our state's unique wildlife. However, the ESA and Florida's regulatory regime protect all endangered species, not just those that attract tourist dollars. Without the federal regulatory system under the ESA, the economic potential of conservation exhibits might be the last level of protection for our state's endangered and threatened species. A justification of regulation based on tourism dollars would likely make the continued fate for those species, such as the salt marsh vole, which presumably does not attract a zoological following, even more precarious.

Four years after the passage of the ESA, Florida enacted its own species-protection act, which provided for the listing and regulatory protection of endangered species.[140] This act, entitled "Florida Endangered and Threatened Species Act"[141] and corresponding to the federal Endangered Species Act,[142] created a listing of protected species separate from the listing in the Endangered Species Act.[143] Under the Declaration of Policy within the Endangered and Threatened Species Act, the Florida Legislature stated that, because "Florida has more endangered and threatened species than any other continental state, it is the intent . . . to conserve and protect these species as a natural resource."[144] Currently, the Florida Fish and Wildlife Conservation Commission (FWC) lists one hundred eighteen species that receive some form of regulatory

137. *See* U.S. Fish and Wildlife Service, Threatened and Endangered Species System Listings by State and Territory as of September 22, 2005, Table of Contents, http://ecos.fws.gov/tess_public/TESSWebpageUsaLists?state=all (last visited Sept. 22, 2005).

138. *See, e.g.*, FLA. STAT. § 372.072(2) (2005) (declaring that the "[l]egislature recognizes that the State of Florida harbors a wide diversity of fish and wildlife and that it is the policy of this state to conserve and wisely manage these resources").

139. William J. Snape II & Robert M. Ferris, *Saving America's Wildlife: Renewing the Endangered Species Act*, http://www.defenders.org/pubs/save04.html (last visited Aug. 30, 2005).

140. FLA. STAT. § 372.072 (2005).

141. *Id.*

142. FLA. STAT. § 372.0725 (2005).

143. FLA. ADMIN. CODE ANN. r. 68A-27.003 to 68A-27.005 (2005), Per FLA. ADMIN. CODE ANN. r. 68A-27.0012 (2005), The Florida Fish and Wildlife Conservation Commission makes listing decisions based on its findings without reference to the FWS listings.

144. FLA. STAT. § 372.072 (2005).

protection.[145] In many ways, the Florida Endangered and Threatened Species Act mirrors the ESA; similar to the anti-take provisions of the ESA, the FWC's regulations prohibit takings or other harassment of endangered species, threatened species, or species of special concern.[146]

As a result of Florida's laws and regulations, the federal court challenges to the ESA might seem remote or unconnected to Florida's wildlife concerns. After all, since Florida has its own regulatory system for its species, the trials and travails of Texan cave invertebrates or Californian toads might seem rather unimportant. However, Florida's regulatory system for endangered species does not exist in a vacuum; our state laws and regulations are backed by a federal regulatory program. These two systems tend toward mutual reinforcement.[147] If the federal regulatory system were held to be an unconstitutional regulation of state activities, this reinforcement mechanism would cease to exist. Furthermore, the sudden abrogation of a thirty-year nationwide preservation effort (with its inherent minimum standards for species protection) would be replaced instead with fifty competing standards.[148] Under such a scenario, it is unclear whether the fate of all federally listed species would be left to the individual states, or whether the ESA would remain viable only for certain interstate species or species with some

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145. Since its creation, Florida's Fish and Wildlife Conservation Commission has been charged with the responsibilities of species regulation. *See* Florida Fish and Wildlife Conservation Commission, Florida's Imperiled Species, http://wildflorida.org/imperiledspecies/ (last visited Aug. 30, 2005).

146. FLA. ADMIN. CODE ANN. ch. 68A-27 (2005). Under FLA. ADMIN. CODE ANN. r. 68A-27.0011 (2005), it is illegal to kill, wound, or attempt to kill or wound any designated endangered species. FLA. ADMIN. CODE ANN. r. 68A-27.003 (2005) and FLA. ADMIN. CODE ANN. r. 68A-27.004 (2005) list the state's endangered and threatened species; these regulations also prohibit takes of an endangered or threatened species. Per Regulation 68A-27.005, Florida has an additional category named Species of Special Concern, which includes species that may already be threatened (but there is a lack of conclusive data on the species' numbers) or may become threatened due to habitat modifications. FLA. ADMIN. CODE ANN. r. 68A-27.005 (2005). Like the endangered and threatened species, species of special concern may not be possessed, transported, sold, or "take[n]." FLA. ADMIN. CODE ANN. r. 68A-27.005(1)(a) (2005).

147. An individual species may be protected under both federal and state regulations, and an individual who takes a dually listed species may be criminally prosecuted under either the ESA or its Florida Statutory counterpart, or both. *See* 16 U.S.C. § 1540(b) and FLA. STAT. § 372.072 (2005).

148. In *GDF Realty*, several states (including Texas, the site of the controversy) submitted an amici curiae brief in support of the developers' petition for certiorari to the Supreme Court. These states argued that the "[s]tates have demonstrated that they are able and willing to protect endangered species within their borders, and the vast majority of States have enacted regulatory schemes for ensuring that protection." Brief of the States of Texas, Alaska, Delaware, and North Dakota as Amici Curiae in Support of Petitioner, GDF Realty Invs., Ltd. v. *Norton*, 125 S. Ct. 2898 (2004) (No. 03-1619). The willingness of the states to remove federal regulatory standards highlights this concern; clearly some states would permit development to the detriment of species' preservation.

commercial effect.[149] Were this to occur, the protection of individual endangered species might not rest on the scientific or ecological facts, but rather on the litigation skills of a particular species' proponent.

A final issue potentially confronting Florida (or any other state that maintains environmental protection laws for its endangered species) is the race to the bottom problem that plagues environmental regulations that differ from state to state.[150] To state it simply, imagine that Georgia or Alabama consistently allowed development resulting in the takings of endangered species while other states (such as Florida) denied such development projects. The "business-friendly" states would attract more investment and development while states retaining their environmental regulatory regimes would suffer a requisite loss in investment and economic growth. The market forces that initially benefit certain states would encourage (and pro-business citizens would demand) other states to follow suit.[151] This chain of events, resulting from the judicial dismantling of a minimum federal regulatory protection system, would threaten the almost half of all listed endangered species that reside in only

149. This uncertainty and the requirement of a case-by-case analysis for each species are an unmentioned drawback to the argument for continued federal regulation of certain species while leaving solely (and historically) intrastate species to the mercy of states. *See* Wood, *supra* note 86, at 118-21 (arguing for federal regulation only for those species whose historic range was not limited to a single state or those species that somehow have an effect on interstate commerce).

150. *See* Gibbs v. Babbitt, 214 F.3d 483, 501 (4th Cir. 2000) (noting that "[s]tates may decide to forego or limit conservation efforts in order to lower these costs, and other states may be forced to follow suit in order to compete"). The Fourth Circuit also stated that "[t]he Supreme Court has held that Congress may . . . arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment." *Id.*

151. Some authors have criticized the race to the bottom theory as an insufficient predicate for federal regulation and have argued that the so-called race does not even exist. *See, e.g.*, Wood, *supra* note 86, at 115. Wood notes that following the *SWANCC* decision, in which the Supreme Court held that the Army Corps of Engineers had no jurisdiction over isolated, nonnavigable bodies of water, states actually increased their regulatory programs to encompass these bodies of water. *Id.* This argument ignores the relatively short history following the *SWANCC* decision and the temptations that might arise to lower regulatory burdens over the next few years. Furthermore, several of the ESA cases have involved state and local government actors, whose planned developments or improvements were precluded as a result of the discovery of endangered species' habitats. *See, e.g.*, NAHB v. Babbitt, 130 F.3d 1041, 1043 (D.C. Cir. 1997). In *Gibbs*, the North Carolina General Assembly intervened in the red wolf controversy, as the state enacted laws directly contradicting federal regulations that pertained to the takings of the reintroduced species. *Gibbs*, 214 F.3d at 489. Had the North Carolina law been the sole regulation pertaining to red wolves, farmers could kill any red wolf on their land provided they had previously requested the FWS to remove the animal. *See id.* Wood's hopeful argument that his new approach to species protection will not result in a race to the bottom issue is questionable in light of actual state behavior, as in *Gibbs* and *GDF Realty*. Unlike the increased state role in wetlands protection programs, state action in these recent ESA court challenges suggest that intrastate endangered species will receive less protection without the federal role.

one state.[152] As a result of the ensuing market forces, Florida might have to succumb to this pressure and reconsider its regulatory protections for native species.

VI. BIODIVERSITY, ECOSYSTEMS, AND THE IMPRECISE MEASUREMENT OF COMMERCE

Although certain species may be limited territorially to a small region within one state, the effects of their very existence may be extremely difficult to measure.[153] In this age of sprawling suburban developments, an argument requiring that the economic value of a single species determine its ultimate viability undercuts a basic ecosystemic approach. Congress justified much of the ESA on the loss of species and its requisite effect, not only on genetic variety, but also on the potential loss of future benefits accruing from further study of the species.[154]

As scientific evidence accumulates, it appears incontrovertible that there is an ongoing interdependence among various species within ecosystems;[155] furthermore, it appears that ecosystems likewise are interdependent.[156] A narrow, commerce-oriented approach that views only those events resulting immediately in an exchange of monetary benefits

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152. *See* Austin & Schang, *supra* note 13, at 32.

153. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 644 (5th Cir. 2003) (Dennis, J., concurring) (noting that "[t]he interrelationship of commercial and non-commercial species is . . . complicated, intertwined, and not yet fully understood").

154. H.R. REP. NO. 93-412, at 4-5 (1973) ("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?").

155. *See, e.g.*, Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 786 (2002) (arguing that many species that lack any particular "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"); *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 36 (4th ed. 2003) (noting that scientists seek to understand all facets of the ecosystem and that a typical ecological slogan, "[E]verything is connected to everything else" furthers this concept of interdependence).

156. *See* Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1129 (1996) (criticizing the ESA for its "species-by-species, reaction-to-crisis approach" that ignores the need for a more holistic approach). The author argues forcefully that as "scientists have rediscovered that the world cannot meaningfully be broken down into isolated parts, that every part is connected to every other part." *Id.* A real world example of ecosystem interaction occurs each year as the snow from the Rocky Mountain region melts, forming the Colorado River, which provides the water supply for the southwestern region of the United States. *See* The Colorado River: Water and the Desert, http://www.desertusa.com/colorado/intro/du_introcr.html (last visited May 11, 2005). Degradation in the ecosystem of the River's origination point clearly would impact downstream states and their varied ecosystems. *See id.*

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would ignore the interdependence of our regions and the "option value"[157] of our endangered species.[158] Furthermore, if such an approach coincided with a strict belief in the sacredness of state boundaries, it would dismantle much of the federal environmental regulatory system, such as the Clean Water Act or the Clean Air Act.[159]

Unfortunately, the ecosystems we inhabit and the species we protect are not neatly divided along the arbitrary boundaries of our states. The Arroyo toad, Delhi Sands fly, and red wolf do not exist in an ecological vacuum, but rather are part of a greater food chain implicating regions larger than their natural habitat.[160] Migrating animals from other states potentially interact with endangered species, either as predators or prey. For example, one reason the red wolf was the bane of North Carolina farmers and ranchers was its propensity for attacking livestock.[161] Left unmentioned in the debate is the predatory effect of the wolves on the region's deer population.[162] Without natural predators, deer will overpopulate a region, negatively affecting both the environment and local industries.[163]

The effects of subtle changes in one ecosystem flow to, and affect, ecosystems across state lines regardless of federalist arguments to the

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157. The option value of species is similar to the option value of any commodity; it refers to a future value that we do not currently possess, but might in the future. *See supra* note 26 and accompanying text. In the case of endangered species, this is reflected in the findings of the House Report, which noted concern about the potential for medicines or genetic variation that are lost with each extinction. *See supra* note 154.

158. *See* NAHB v. Babbitt, 130 F.3d 1041, 1050-51 (D.C. Cir. 1997) (distinguishing congressional rationale regarding the ESA with rationale behind the Gun-Free School Zones Act in *Lopez*, as the House Report specifically mentions the possibility of future medical advances from endangered species' research). The court noted that it was restrained in its valuation of biodiversity; but it quoted favorably from biologist Edward O. Wilson, who stated that traditional economic approaches will undervalue the worth of species as there is still a fundamental connectedness among species within the food web. *Id.* at 1052 n.11 (quoting EDWARD O. WILSON, THE DIVERSITY OF LIFE 308 (1992)). According to Wilson, a loss of a few endangered species could threaten far more than is first appreciably realized. *Id.*

159. *See* Gibbs v. Babbitt, 214 F.3d 483, 502 (4th Cir. 2000).

160. *See* Mank, *supra* note 18, at 998 (arguing that "[b]ecause commercially insignificant species often exist interdependently with more valuable species, taking of any species will probably have important effects on commercially valuable species and ecosystems").

161. *See Gibbs*, 214 F.3d at 489.

162. *See supra* note 77; *see also Gibbs*, 214 F.3d at 495 (noting that red wolves "may in fact help [the landowners], and in so doing confer additional benefits on commerce . . . by killing the animals that destroy their crops").

163. If the population of deer exceeds the local region's carrying capacity, the population will consume all of the available vegetation, resulting in damage to timber reproduction and the local timber industry. For more information, see North Carolina State University's North Carolina Cooperative Extension Service, Deer Management (1995), http://www.ces.ncsu.edu/nreos/forest/woodland/won-12.html (last visited Aug. 5, 2005).

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contrary.[164] Despite the rationale utilized, be it the option value of species' gene pools, the actual commercial effect from their rehabilitation, or the aggregated effect of the mass extinction of all endangered species, it seems imperative that there remain a role for the federal government in endangered species regulation. While Florida may protect its threatened species independent of the federal government, it is likely that Florida cannot escape the ecological effect if, in the absence of a federal role, other states act differently.

VII. CONCLUSION

For ESA analysis, there are two questions: first, whether there needs to be a federal regulatory system in addition to any state provision for the protection of endangered species, and second, determining the appropriate rationale for such a system within current Commerce Clause analysis. Some authors have argued that a one-size fits all policy for endangered species is inappropriate for a nation as large and biologically diverse as the United States.[165] However, through congressional findings and accumulated scientific evidence, it appears that a federal regulatory scheme, especially with complementary state regulations, is an important and vital component of species protection. At the very least, a federal regulatory program provides minimum standards for species' protection, which states may then strengthen to reflect local priorities.

It is unpopular species, the favorite species for cases challenging the constitutionality of the ESA, that most need the protection of the federal government. The Florida panther, the manatee, and the American crocodile are identifiable species that certainly grab the public's attention more than an underground eyeless arachnid. Yet if it is true that all species remain interconnected within their ecosystem, their public appeal should not be the determining criterion for their continued survival. The ESA provides the necessary federal framework to ensure this.

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164. *See* Snape & Ferris, *supra* note 139 ("A fundamental tenet of the science of ecology is that all elements in an ecosystem are interconnected and interdependent."). The exact effect on an ecosystem of the loss of a single species is unknowable, but "the effect of losing even seemingly inconsequential species adds up over time . . . [and] may play a more important role in the integrity of some ecosystems than [] do bears and wolves." *Id.*

165. *See, e.g.*, Wood, *supra* note 86, at 117 (noting that a uniform regulatory system acting across state lines is "bad policy because of demographic variation, localized culture, differing geography, varied economic strengths, and limited federal resources"). Such an argument undercuts the assertion that, in the absence of the ESA, states would continue to protect endangered species just as they had enacted strict regulations in the aftermath of the *SWANCC* decision. *See supra* note 151 and accompanying text. This widespread variation in species' protection serves to bolster the race to the bottom argument that Wood had earlier stated was "unfounded." *See id.* at 115.

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The Supreme Court, through its *Lopez* and *Morrison* decisions, has emphatically shown that there are limits to congressional Commerce Clause powers.[166] Utilizing the logic of the Fifth Circuit, it would appear that the ESA does not fall outside of this scope; for if we aggregate the takings of endangered species, there is a clear effect on interstate commerce.[167] Such a view would protect all of Florida's species, from the Florida panther to the salt marsh vole, regardless of their immediate commercial influence. Furthermore, a resolution to the question of the ESA's constitutionality benefits all parties, as the recent constitutional challenges have sidetracked meaningful conversation about potential reforms that could increase the chances for the recovery of endangered species, while also respecting the legitimate concerns of landowners in fast-developing communities.

166. *See* United States v. Morrison, 529 U.S. 598, 608 (2000) (discussing United States v. Lopez, 514 U.S. 549 (1995)).

167. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 638-39 (5th Cir. 2003).