The Endangered Species Act: Does It Have a Stopping Point?

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Introduction

In several recent decisions, the United States Supreme Court has held that Congress cannot use its Commerce Clause powers to regulate certain activities. In two of these cases, the Court found that Congress had exceeded the powers granted to it in the Constitution.[1] In others, it managed to avoid such knotty constitutional questions through twists of statutory interpretation.[2] In *United States v. Lopez*, for example, the Court held that the Gun-Free School Zones Act of 1990 exceeded the authority of Congress to regulate commerce.[3] However, in *Solid Waste Agency v. United States Army Corps of Engineers* ("SWANCC"),[4] the Court "avoid[ed] . . . significant constitutional and federalism questions" by rejecting the Corps' attempt to use its power to promulgate regulations that extended the definition of "navigable waters" to include purely intrastate waters.[5]

These decisions prompt an examination of other statutes and regulations that are the product of Congress' exercise of its Commerce Clause powers, including the Endangered Species Act. Because the Act applies to animal species, it sometimes involves activities that are remote from interstate commerce. Nevertheless, the Act purports to regulate the use of private property.[6] *SWANCC*, which involved regulations promulgated under Section 404(a) of the Clean Water Act, suggests that there are limits to Congress' power to reach certain property, and *Lopez* and *Morrison* each held that some activities are simply beyond the reach of Congress. To date, however, the courts of appeals have been unreceptive to claims that, as applied, the Endangered Species Act exceeds Congress' authority under the Commerce Clause.

This article will discuss the court of appeals' decisions applying the Supreme Court's Commerce Clause jurisprudence to challenges to the Endangered Species Act. First, it will discuss the Supreme Court's recent Commerce Clause decisions. Next, it will examine the court of appeals' application of that jurisprudence to the cases before them. These decisions have strained the meaning of commerce and, thereby, leave no apparent stopping point to the application of the Commerce Clause in this context. Finally, this article will discuss some problems that have resulted from the court of appeals' holdings.

I. The Court's Commerce Clause Jurisprudence

The Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[7] The Fifth Circuit has observed, "Though seldom used in the nineteenth century, the Commerce Clause [has become] the chief engine for federal regulatory and criminal statutes in the latter two-thirds of the twentieth century."[8] As the Supreme Court has noted, post "Switch-in-Time" Supreme Court decisions involving New Deal statutes "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause."[9] Even so, the Court has pointed to the need to limit the scope of the Commerce Clause lest it "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[10] The Fifth Circuit identifies this "alarming and dangerous prospect" as well as the "need to identify judicially enforceable limits on the Commerce Clause" as the "motivating force" behind the Supreme Court's recent Commerce Clause jurisprudence.[11] In this regard, Judge Jerry Smith has noted, "Without any judicially enforceable limits and with inevitable political pressures, the Commerce Clause all too easily would become the general police power denied to Congress by the Constitution."[12]

After decades of leniency following the New Deal cases, the Court first began to re-establish limits in its decision in *Lopez*. There, the Court considered the Gun-Free School Zones Act of 1990, which prohibited the possession of firearms in a school zone. The Court identified three "broad categories of activity that Congress may regulate under its commerce power."[13] Those are: (1) 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) activities that "substantially affect" interstate commerce.[14] Because the Gun-Free School Zones Act neither regulated the channels of interstate commerce nor protected things in interstate commerce, the Court considered whether the activity in question substantially affected interstate commerce.

The Court concluded that the possession of a firearm in a school zone did not substantially affect interstate commerce. It rejected the contention that, because such possession could lead to violent crime, the costs of violent crime, its effect on travel, and its effect on the educational process added up to a substantial effect on interstate commerce. Rather, "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[15] Accepting the government's arguments to the contrary, the Court continued, would make it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. . . . [, and we would be] hard pressed to posit any activity by an individual that Congress is without power to regulate."[16]

Lopez is noteworthy not only because of its result, which declared an activity to be beyond the scope of Congress' power to regulate through the Commerce Clause, but also because of its concurring opinions. In the first, Justice

Kennedy, joined by Justice O'Connor, reviewed the Court's Commerce Clause jurisprudence against the backdrop of America's commercial and industrial history. Justice Kennedy invoked *stare decisis* as a "fundamental restraint on our power" that should "foreclose[ ] us from reverting to an understanding of commerce that would serve only an 18th-century economy."[17] Furthermore, he observed, *stare decisis*

> mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.[18]

Last, Justice Kennedy pointed to the federalism costs that are imposed when the federal government intrudes on areas traditionally left to the States. Writing separately, Justice Thomas recognized that returning to the original understanding of commerce would be difficult but suggested that the Court needed to reexamine the substantial effects test, although not in this case.[19]

The Court found another criminal activity to be outside the reach of Congress' Commerce Clause powers in *United States v. Morrison*.[20] There, the Court held that the creation of a federal civil remedy for gender-related violence that did not affect interstate commerce was beyond the power of Congress. As in *Lopez*, the only possible basis for invoking the Commerce Clause was the contention that such gender-motivated violence substantially affected interstate commerce. The Chief Justice rejected the "downplay[ing] [of] the role that the economic nature of the regulated activity plays in our Commerce Clause analysis."[21] After all, he explained, these types of crimes "are not, in any sense of the phrase, economic activity."[22] It is unnecessary to espouse a "categorical rule against aggregating the effects of any noneconomic activity"; however, the Chief Justice continued, it is worth noting 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."[23] As in *Lopez,* the Court found that the aggregation principle admitted of no limitation on Congress' power and intruded into an area traditionally reserved to the States.

In the same term, the Court also resorted to statutory construction to avoid addressing the constitutionality of an expansive interpretation of the Commerce Clause in *Jones v. United States*.[24] There, the Court held that arson of an owner-occupied private residence did not satisfy the jurisdictional element of the statue.[25] It rejected an "expansive interpretation" of the statute, because, under it, "hardly a building in the land would fall outside the federal statute's domain."[26] Instead, citing "the concerns brought to the fore in *Lopez*," the Court avoided the constitutional question that would have arisen if federal power reached this instance of "'traditionally local criminal conduct.'"[27]

The conduct involved in *Lopez, Morrison,* and *Jones* was criminal. *SWANCC* was the first indication that the Court's concern about the scope of the Commerce Clause power applied in other contexts. In *SWANCC*, the Court avoided "significant constitutional and federalism questions" by holding that the Army Corps of Engineers exceeded its authority under the Clean Water Act when it defined "navigable waters" to include certain intrastate waters.[28] SWANCC*,* a consortium of 23 suburban Chicago cities and villages, sought to construct a landfill on the site of an abandoned sand and gravel pit. The pit property contained a "scattering of permanent and seasonal ponds of varying size [and depth]" that provided habitat for migratory birds.[29] The Corps refused to grant SWANCC a permit to discharge dredged or fill material or fill in some of the ponds.

The Corps' permitting authority derived from Section 404(a) of the Clean Water Act, which allows it to issue permits for the discharge of materials "into the navigable waters."[30] The term "navigable waters" is defined in statute,[31] Corps regulation,[32] and a Corps Rule.[33] As a general matter, the "navigable waters" include not only navigable rivers, but also their tributaries and adjacent wetlands, even if not themselves navigable. The Corps' denial of SWANCC's permit application, however, broadened that customary understanding to include "isolated ponds, some only seasonal, wholly located within two Illinois counties"[34] that were neither adjacent nor connected to navigable waters.

The Court concluded that the application of the Corps' Migratory Bird Rule to the SWANCC property was not supported by the Clean Water Act. The Court first determined that Congress had not adopted the expansive jurisdiction claimed by the Corps. It noted that it was appropriate to give the component of navigability some meaning, a standard that the ponds at issue could not meet. Such a reading was not only consistent with statute, but also with Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[35] Neither could the Corps' more expansive reading be justified as a valid exercise of its authority to promulgate rules.[36] Rather, the Court hesitated to endorse an "administrative interpretation [that] alters the federal-state framework by permitting federal encroachment upon a traditional state power."[37] The Corps sought to justify its Rule by pointing to its ability to regulate intrastate activities that substantially affect interstate commerce, but the Court was unreceptive. It pointed to the "significant constitutional questions" that would be raised if the Corps could regulate the "abandoned sand and gravel pit" involved in *SWANCC*, and it declined to sanction the "significant impingement of the States' traditional and primary power over land and water use" that would result from such regulation.[38] Accordingly, it held that the application of the Migratory Bird Rule to *SWANCC's* prop-

erty exceeded the Corps' authority.

In *Lopez* and *Morrison*, the Court found that certain activities were beyond the scope of Congress' Commerce Clause powers. In *Jones* and *SWANCC,* the Court relied on *Lopez* and *Morrison* to give a limiting construction to an overbroad application of a statute or regulation. In each case, the Court acted to prevent the federal government from encroaching on interests that had been, traditionally and primarily, left to the States.[39]

II. The Endangered Species Act

These Supreme Court decisions have prompted challenges to the application of the Endangered Species Act. The challenged applications involve the extension of federal regulatory power to intrastate properties, which must be connected to a substantial effect on interstate commerce to be sustained. Notwithstanding the difficulty of making such a connection, the courts of appeals have rejected these challenges, opting to put the protection of the Delhi Sands Flower-Loving Fly, red wolves, six species of subterranean invertebrates (such as the Bear Creek Cave Harvestman), the silvery minnow, and other such creatures ahead of the interests of the property holders.

In the Act, Congress prohibited the "taking" of any endangered species,[40] defining "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[41] The Fish & Wildlife Service has promulgated regulations that further define the terms "harass"[42] and "harm."[43] In addition, when the Fish & Wildlife Service and National Oceanic and Atmospheric Administration list a new species as threatened or endangered, they describe the kinds of activities that would constitute a taking. One author complains, however, that those descriptions are ambiguous and overlapping, stating that he:

> examined all of the final listings of species as endangered between January 1997 and May 1998. According to the agency's explanations in those listings, activities that could constitute a take include bulldozing, livestock grazing, grass mowing, plowing, road construction, off-road vehicle use, hazardous waste cleanup, pesticide use, mining, brush removal, water impoundment, predator control, dredging, timber harvesting, and low-level flights. Activities that would *not* constitute a take include road kills, camping, lawn maintenance, flood control, mining, housing construction, road construction, pest control activities, controlled burns, horseback riding, pesticide use, boating, fishing, birdwatching, livestock grazing, residential lighting, removal of insects from birdbaths, and hiking.[44]

The first post-*Lopez* Commerce Clause-based challenge to the Endangered Species Act came in *National Ass'n of Home Builders v. Babbitt* ("NAHB").[45] There, the D.C. Circuit rejected a challenge to the application of the Act to protect a purely intrastate animal, the Delhi Sands Flower-Loving Fly. The Fly's habitat lies exclusively within two California counties[46] and includes the site of a proposed state-of-the-art, earthquake-proof hospital and primary burn care center that the County of San Bernardino wanted to build. The County moved the hospital complex 250 feet north and created a habitat preserve and a flight corridor in an attempt to obtain a permit from the Fish & Wildlife Service. The Service, however, balked at the County's plans to redesign a highway interchange to allow for emergency vehicle access to the new hospital.

A divided panel of the D.C. Circuit upheld the application of the Act. Writing for the majority, Judge Wald reasoned that the application of the Act could be justified as a regulation of both the channels of interstate commerce and an activity that substantially affects interstate commerce. As to the latter ground, Judge Wald explained that Congress could prevent the destruction of biodiversity in order to "protect[ ] the current and future interstate commerce that relies upon it" and control adverse effects of unbridled interstate commerce.[47] Judge Henderson, concurring, rejected the channels rationale, pointing out that the Flies are "entirely *intra*state creatures. They do not move among states either on their own or through human agency."[48] However, Judge Henderson asserted, the loss of biodiversity affects interstate commerce and the protection of the flies therefore regulates interstate commercial development activity.

In justifying the protection of biodiversity, Judge Wald pointed to the tangible and intangible benefits of variety in plants and animals. The extinction of a species, the present value of which is unclear, results in the loss of "what economists call an 'option value'—the value of the possibility that a future discovery will make useful a species that is currently thought of as useless."[49] While our limited knowledge regarding these possible uses makes it "impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce. . . . , we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce."[50] Judge Henderson disagreed, noting the possibility that a species will have no economic value, but she likewise asserted that Congress could use its Commerce Clause powers to protect biodiversity. She explained that the "interconnectedness of species and ecosystems" makes it "reasonable to conclude that the extinction of one species affects others."[51] Protecting a "purely intrastate species" therefore "substantially affect[s] land and objects that are involved in interstate commerce," and Congress has a "'rational basis' for concluding that the 'taking' of endangered species 'substantially affects' interstate commerce."[52]

Judge Sentelle dissented, rejecting the biodiversity rationale. He noted that Judge Henderson had rejected Judge Wald's rationale and joined her in reasoning that "we cannot

then 'say that the protection of an endangered species [the economic value of which is unknown] has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value.'"[53] He further rejected Judge Henderson's biodiversity rationale, finding it to be "indistinguishable in any meaningful way from that of Judge Wald."[54] He explained that her focus on "the interconnectedness of species and ecosystems" failed because the "Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.'"[55] While the Framers may not have known the term "ecosystems," they "certainly [knew] as much about the dependence of humans on other species and each of them on the land as any ecologist today. An ecosystem is an ecosystem, and commerce is commerce."[56] Furthermore, he observed, there is no logical stopping point to either Judge Wald's or Judge Henderson's rationales.

Subsequently in *Rancho Viejo v. Norton*,[57] the D.C. Circuit upheld the application of the Act to protect the arroyo southwestern toad. Rancho Viejo sought to build a residential development in San Diego County, California, on toad habitat. The Fish & Wildlife Service refused the developer's request for a permit that proposed to use portions of a streambed as a borrow area to provide fill and declined to use offsite sources. The district court relied on *NAHB* in granting summary judgment for the United States.[58] On appeal, the D.C. Circuit relied on *NAHB's* second rationale, that protecting the Flies "'regulate[d] and substantially affect[ed] commercial development activity which is plainly interstate,"[59] in upholding the application of the Act.

Construction of a housing development is plainly a commercial activity, the court noted. It dismissed Rancho Viejo's contention that the effect of preserving the toads on interstate commerce was too attenuated to be substantial, shifting the burden to Rancho Viejo to show that "its project and those like it are without substantial interstate effect."[60] The court minimized the fact that the arroyo toad and the project were located solely in California, pointing to the fact that the materials and labor for the project would have a substantial connection to interstate commerce. In addition, the court endorsed Judge Wald's "race to the bottom" rationale.[61]

Last, since *NAHB* was decided before *Morrison* and *SWANCC*, the court went on to distinguish those decisions. It held, "Nothing in the facts of *Morrison* or *Lopez* suggests that focusing on plaintiff's construction project is inappropriate or insufficient as a basis for sustaining this application of the ESA."[62] It deemed Rancho Viejo's reliance on *SWANCC* to be "even further from the mark" given the commercial nature of Rancho Viejo's proposed project.[63] The court construed the statute, and, thereby, the regulated activity, to be "*takings, not toads.*"[64]

In *Gibbs v. Babbitt,*[65] the Fourth Circuit Court of Appeals rejected a challenge to a regulation promulgated by the Fish & Wildlife Service that limited the taking of red wolves on private lands. Those wolves had been reintroduced into the Alligator River National Wildlife Refuge in North Carolina, but had migrated from the Refuge onto private lands, where they sometimes preyed on livestock and pets. In fact, the Service estimated that about 41 of the approximately 75 wolves in the wild lived on private land.[66] The Service permitted the taking of red wolves on private land "'provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others.'"[67]

The Fourth Circuit upheld the regulation, reasoning that, while it did not regulate either the channels of interstate commerce or things in interstate commerce, it did regulate an activity that substantially affected interstate commerce. The majority found an economic nexus from two elements, the desire to protect commercial and economic assets such as livestock that motivated the taking, and a "quite direct" relationship between red wolf takings and interstate commerce.[68] The majority aggregated the takings, noting that 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."[69] The fact that the "regulation is but one part of the broader scheme of endangered species legislation" further reinforces this aggregate impact.[70] Furthermore, the protection of wolves on private land was necessary because the wolves wandered; without such protection the "entire program of reintroduction and eventual restoration of the species" might founder.[71]

Judge Luttig, dissenting, disagreed with the majority's conclusion that the taking of wolves on private property substantially affected interstate commerce. In his view, no commercial activity was involved in the taking. Instead, "[w]e are not even presented with an activity as to which a plausible case of future economic character and impact can be made."[72] Judge Luttig suggested that the majority's view of the Commerce Clause power was more like the dissents in *Lopez* and *Morrison* than the majority opinions. *Lopez* and *Morrison*, he concluded, compel the invalidation of the regulation. He explained, "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."[73]

More recently, in *GDF Realty Investments, Ltd. v. Norton*,[74] the Fifth Circuit Court of Appeals upheld the application of the Endangered Species Act to real property in Travis County, Texas, near Austin. The property owner desired to develop the property by building a shopping center, a residential subdivision, and commercial office buildings, but it was home to several endangered species, including six subterranean invertebrate creatures (the "Cave Species"). The Fish & Wildlife Service denied the property owner's application for an incidental taking permit, and the owner filed

suit contending that the application of the Endangered Species Act to the Cave Species was unconstitutional. The district court granted summary judgment in favor of the Fish & Wildlife Service, concluding that, because of the commercial character of the proposed development, the application of the Act was substantially related to interstate commerce.[75]

On appeal, the Fifth Circuit concluded that the Act is "an economic regulatory scheme" and that the prohibition on taking the Cave Species was an integral part of it.[76] Therefore, it held, "Cave Species takes may be aggregated with all other ESA takes."[77] The court rejected the district court's reliance on the connection between the proposed commercial development and interstate commerce explaining, "[L]ooking primarily beyond the regulated activity in such a manner would 'effectually obliterate' the limiting purpose of the Commerce Clause."[78] In addition, the court found that the scientific interest in the Cave Species had a "negligible" effect on interstate commerce that was "too attenuated" to rise to the level of a substantial relationship.[79] Likewise, it deemed "[t]he *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, [to be] simply too hypothetical and attenuated . . . to pass constitutional muster."[80] In the end, however, the court concluded that, because the Act's taking provision is economic in nature, the *de minimis* effects of the taking of the Cave Species could be aggregated with all other takings to produce the necessary substantial effect on interstate commerce.

Finally, in *Rio Grande Silvery Minnow v. Keys,*[81] the Tenth Circuit held that the Bureau of Reclamation had the discretion to reduce previously contracted deliveries of water in order to protect the silvery minnow, an endangered species. The water deliveries arose from statutorily-authorized water projects that allowed the diversion and transfer of water among many rivers and reservoirs. The City of Albuquerque and other entities entered into contracts with the Secretary of the Interior allowing them to draw water from this system for municipal, domestic, and industrial uses. The plaintiffs contended that, in order to preserve the water flows necessary to support the silvery minnow, the Bureau of Reclamation could limit the previously-contracted water deliveries and change the operations of its reservoir facilities. The Tenth Circuit majority concluded that, as a matter of contract interpretation, the Bureau of Reclamation had the discretion to reduce contract deliveries.[82]

While the Tenth Circuit's decision primarily involves matters of contract interpretation, the Endangered Species Act provides the basis for the claim. In its conclusion, the majority waxes elegiac:

> Scientific literature likens the silvery minnow, to a canary in a coal mine, the "last-remaining endemic pelagic spawning minnow in the Rio Grande basin." As its population has steadily declined and now rests on the brink of extinction since its listing in 1994, we echo *Hill's* "concern over the risk that might lie in the loss of *any* endangered species." . . . Like all parts of that puzzle [which the court cannot solve, *i.e.,* the importance of a particular species], the silvery minnow provides a measure of the vitality of the Rio Grande ecosystem, a community that can thrive only when all of its myriad components—living and non-living—are in balance.[83]

Judge Kelly's dissent, however, asserted that the majority's contractual interpretation "renders the contracts somewhat illusory."[84] Furthermore, its holding is in "considerable tension" with the Reclamation Act and Supreme Court decisions, which "recogniz[e] that the federal government generally must respect state-law water rights and lacks any inherent water right in water originating in or flowing through federal property."[85] He continued, "Under the court's reasoning the ESA, like Frankenstein, despite the good intentions of its creators, has become a monster."[86]

These decisions reflect great creativity in upholding expansive interpretations of the scope of the Commerce Clause power. The judges of the courts of appeals have seen themselves as variously protecting the channels of interstate commerce, biodiversity, and the country from harmful products, preventing a race to the bottom by the States, aggregating the effects of noneconomic activity, and shifting the focus from the effect of the taking to its motivation. The effect of these decisions is to uphold the application of federal regulations to private property or interests, and that effect comes with certain costs that are not taken into account.

III. The Costs of Federal Regulation

The rejection of challenges to the application of the Endangered Species Act by the courts of appeals, and the resulting protection of the Delhi Sands Flower-Loving Fly, arroyo toad, red wolf, subterranean insects, and silvery minnow, raises concerns regarding constitutional interpretation, federalism, and basic economics. As a matter of constitutional interpretation, the expansive readings of the Commerce Clause threaten to leave no stopping point to the Clause's application, something that the Supreme Court has warned against. Those expansive applications of federal power reach into areas that have traditionally and primarily been the responsibility of the states. Finally, because of the way the Act works, such applications produce perverse economic incentives.

The decisions of the courts of appeals display an inappropriately expansive view of the Commerce Clause power. In reaching their conclusions, the courts have aggregated activities that cannot easily be characterized as commercial. Such aggregation has been undertaken despite Supreme Court precedent to the contrary. In *Citizens Bank v. Alafabco, Inc.*,[87] for example, the Court explained that its decision to aggregate debt-restructuring transactions (easily classified as commercial activities) to satisfy the test for "involving

commerce" in the Federal Arbitration Act was "well within our previous pronouncements on the extent of Congress' Commerce Clause power."[88] Conversely, the Court has found that possession of a handgun and gender-motivated violence are not commercial activities, so their effects could not be aggregated to find the necessary interstate commerce nexus.[89] Indeed, in *Morrison*, the Chief Justice pointed out that, while the Court was not "adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity," it had previously "upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature."[90] Viewed in that light, the taking of a red wolf may be motivated by the desire to protect something of commercial value from the wolf's depredations but is not itself commercial, and any trade in wolf pelts, which would be commercial, can be independently regulated.[91]

The court's alternative focus on the activity that results in the taking is likewise flawed. Judge Ginsburg explained this focus as he addressed the taking of the arroyo southwestern toad by the housing development in *Rancho Viejo*:

> I think it clear that our rationale for concluding the take of the arroyo toad affects interstate commerce does indeed have a logical stopping point, though it goes unremarked in the opinion of the court. Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, 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.[92]

Others, however, have been prosecuted for more attenuated takings. In *Gibbs v. Babbitt*, plaintiff Richard Mann was prosecuted for shooting a red wolf that he feared would threaten his cattle.[93] Likewise, the Commerce Clause reached a farmer who grew wheat for his own operation's consumption.[94] A homeowner's improvement of his property affects its value in the clearly commercial resale market.[95] In addition, one could find that the activity of hiking affects interstate commerce through the related travel and market in clothing. In sum, the exceptions advanced by Chief Judge Ginsburg may be, at best, trivial and, at worst, non-existent.

In any event, the expansive reading of the Commerce Clause in these cases intrudes on state interests. In *SWANCC*, the Court declined to allow the Corps to claim jurisdiction over the ponds at the landfill site in order to avoid "a significant impingement of the States' traditional and primary power over land and water use."[96] In *Gibbs v. Babbitt,* the court's ruling pre-empted North Carolina statutes that "facially conflict[ed]" with the taking regulation, but also gave a greater degree of protection to North Carolina's citizens and their property.[97] The *Gibbs* majority further rejected the contention that the application of the taking regulation in favor of the red wolves adversely affected the federal-state balance, advancing the national interest in the protection of scarce resources.[98] Even so, the application of the Act reaches deep into the interior of the States, and, in *NAHB* and *Silvery Minnow*, actively thwarts the interests of the local and State governments.

Furthermore, the application of the Act to private property can produce perverse economic results. The Delhi Sands Flower-Loving Fly colony in California delayed construction of a new hospital and cost taxpayers some $3.5 million,[99] but the Act remains inflexible.[100] Likewise, the United States may be liable for breaching its water delivery contracts,[101] but the Act still remains inflexible. These perverse effects follow from the Act's distortion of incentives and restriction of tradeoffs. Richard Stroup, senior associate at the Political Economy Research Center ("PERC"), explains that, while the Act allows the government to determine how a private landowner may use his land, it does not require the government to bear the costs of these decisions. Since the land is "almost a free good" to the government, the government can be "lavishly wasteful of some resources (such as land) while ignoring other ways of protecting the species (such as building nest boxes)."[102] Stroup points to one landowner who manages his land for wildlife (particularly wild turkeys), but also clear-cuts timber on other portions of his property to reduce the possibility that the woodpeckers would nest there.[103] The clear-cutting violated no law and permitted the landowner to profit from the timber sale while preserving those portions of the property from the woodpeckers that might otherwise nest there and turn the land into a public zoo or forest preserve.

The harm that results from overly broad applications of the Endangered Species Act can be cured only by the Supreme Court. The courts of appeals for the D.C., Fourth, Fifth, and Tenth Circuits have upheld the application of the Act against the interests of the State of New Mexico, county governments, and private landowners. In brief, the Act has no stopping point in their hands, and only the Supreme Court can trump their view, if it chooses to do so.

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Footnotes

[1] *See United States v. Morrison*, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[2] *See*, *e.g.*, *Jones v. United States,* 529 U.S. 848 (2000).

[3] 514 U.S. at 551 (finding that the Act "neither regulates a commercial activity nor contains a requirement that the possession [of a

firearm] be connected in any way to interstate commerce").
[4] 531 U.S. 159 (2001).
[5] *Id.* at 162, 174.
[6] One commentator explains: "With one exception, the regulatory provisions of the Endangered Species Act (ESA) apply to the federal government, not to private parties. That exception, however, is a doozy. Section 9 of the ESA makes it illegal for any one to 'take' an endangered species." John Copeland Nagle, *The Meaning of the Prohibition on Taking an Endangered Species*, BRIEFLY . . . , Sept. 1998, at 1, 1.
[7] U.S. CONST. art. I, § 8, cl. 3.
[8] *United States v. Ho,* 311 F.3d 589, 596 (5th Cir. 2002).
[9] *United States v. Lopez*, 514 U.S. 549, 556 (1995).
[10] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).
[11] *Ho*, 311 F.3d at 597.
[12] *Id.*
[13] *Lopez*, 514 U.S. at 558.
[14] *Id.* at 558-59.
[15] *Id*. at 567.
[16] *Id*. at 564.
[17] *Id*. at 574 (Kennedy, J., concurring).
[18] *Id.*
[19] *Id.* at 601-02 (Thomas, J. concurring).
[20] 529 U.S. 598 (2000).
[21] *Id.* at 610.
[22] *Id.* at 613.
[23] *Id.*
[24] 529 U.S. 848 (2000).
[25] *See* 18 U.S.C. § 844(i). Unlike the statutes at issue in *Lopez* and *Morrison*, the arson statute contains a jurisdictional element requiring the establishment of an interstate commerce nexus.
[26] *Jones*, 529 U.S. at 857.
[27] *Id*. at 858 (citation omitted).
[28] *Solid Waste Agency v. U.S. Army Corps of Eng'rs* ("SWANCC"), 531 U.S. 159, 162, 174 (2001).
[29] *Id.* at 163.
[30] 33 U.S.C. § 1344(a).
[31] *See* 33 U.S.C. § 1362(7); *see also United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985) (holding that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term").
[32] *See* 33 C.F.R. § 328.3(a)(3) (1999) (defining "waters of the United States" to include: "waters such as 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").
[33] *See SWANCC*, 531 U.S. at 164 (noting issuance by the Corps of a so-called "Migratory Bird Rule," which covers intrastate waters that "are or would be used as habitat" by various migratory birds or endangered species or are used to "irrigate crops sold in interstate commerce") (citation omitted).
[34] *Id.* at 171.
[35] *Id.* at 172.
[36] *Cf. id*. at 164 n.1 ("The Corps issued the 'Migratory Bird Rule' without following the notice and comment procedures outlined in the Administrative Procedure Act.").
[37] *Id.* at 173.
[38] *Id.* at 174.
[39] *See*, *e.g.*, *id.* (noting the "States' traditional and primary power over land and water use"). The protected interests are not limited to the criminal law and land and water use, but include family law and education. *See* United States v. Lopez, 514 U.S. 549, 564-66 (1995) (discussing family law and education).
[40] 16 U.S.C. § 1538(a)(1).
[41] 16 U.S.C. § 1532(19).
[42] 50 C.F.R. § 17.3 (1975) ("Harass in the definition of 'take' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.").
[43] *Id.* ("Harm in the definition of 'take' in the Act means 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."). In *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.,* 515 U.S. 687 (1995), the Court upheld the regulatory definition of "harm" against a facial challenge.
[44] Nagle, *supra* note 6, at 7.
[45] 130 F.3d 1041 (D.C. Cir. 1997).
[46] *See* U.S. Fish & Wildlife Service, *Delhi Sands Flower-loving Fly: Rhaphiomidas Terminatus Abdominalis*, at http://endangered.fws.gov/i/I0V.html (last modified Nov. 20, 2000); *see also NAHB,* 130 F.3d at 1060 (Sentelle, J., dissenting) (noting that "there are fewer than 300 breeding individuals of this species, all located within forty square miles in southern California" and hospital construction "would harm a colony of six to eight flies").
[47] *NAHB,* 130 F.3d at 1052.
[48] *Id.* at 1058 (Henderson, J., concurring).
[49] *Id.* at 1053 (opinion of Wald, J.).
[50] *Id.* at 1053-54.
[51] *Id.* at 1059 (Henderson, J., concurring).
[52] *Id.* (citation omitted).
[53] *Id.* at 1064 (Sentelle, J., dissenting) (citation omitted).
[54] *Id.* at 1065.
[55] *Id.*
[56] *Id.*
[57] 323 F.3d 1062 (D.C. Cir. 2003).
[58] *Id.* at 1066.
[59] *Id.* at 1067 (quoting *NAHB*, 130 F.3d at 1058 (Henderson, J. concurring)). The court observed: "In focusing on the second *NAHB* rationale, we do not mean to discredit the first [*i.e.,* protection of biodiversity]. Nor do we mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation." *Id.* at 1067 n.2.
[60] *Id.* at 1069.
[61] *Id.* at 1069 n.7. Judge Wald suggested that "the states are motivated to adopt lower standards of endangered species protection in order to attract development." *NAHB*, 130 F. 3d at 1055.
[62] *Rancho Viejo*, 323 F.3d at 1072.
[63] *Id*. at 1071.
[64] *Id.* at 1072.
[65] 214 F.3d 483 (4th Cir. 2000).
[66] *See id.* at 488 & n.1.
[67] *Id.* at 488 (citation omitted).
[68] *Id.* at 492.
[69] *Id.* at 493.
[70] *Id.*
[71] *Id.* at 494.
[72] *Id.* at 508 (Luttig, J. dissenting).
[73] *Id.* at 510.
[74] 326 F.3d 622 (5th Cir. 2003)
[75] GDF Realty Invs., Ltd. v. Norton, 169 F. Supp. 2d 648, 664 (W.D. Tex. 2001).
[76] *GDF Realty Invs., Ltd*, 326 F.3d at 640.
[77] *Id.*
[78] *Id.* at 634.
[79] *Id.* at 637.
[80] *Id.* at 638.
[81] 333 F.3d 1109 (10th Cir. 2003).
[82] *Id*. at 1130-31.
[83] *Id.* at 1138.
[84] *Id.* at 1157 (Kelly, J. dissenting).
[85] *Id.* at 1157-58.
[86] *Id.* at 1158.
[87] 123 S. Ct. 2037 (2003).
[88] *Id.* at 2040.
[89] *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).
[90] *Morrison,* 529 U.S. at 613 (emphasis added).
[91] *See Andrus v. Allard,* 444 U.S. 51, 63 & n.19 (1979).

[92] 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring).
[93] *Gibbs v. Babbitt*, 214 F.3d 483, 489 (4th Cir. 2000); *see also Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988) (upholding a civil penalty assessed for Christy's killing of a grizzly bear that had moved toward his herd of sheep).
[94] *Wickard v. Filburn,* 317 U.S. 111 (1942).
[95] *But cf. Jones v. United States,* 529 U.S. 848 (2000) (holding that arson of an owner-occupied private residence does not affect interstate commerce). Alternatively, if Chief Judge Ginsburg's example is correct, the owner who moved dirt to landscape on property that he rented out could run afoul of the Endangered Species Act. *Cf. Russell v. United States*, 471 U.S. 858 (1985) (finding the interstate commerce nexus satisfied by arson of rental property).
[96] 531 U.S. 159, 174 (2001) (stating that "'regulation of land use [is] a function traditionally performed by local governments'") (citation omitted) (alteration in original).
[97] *See* 214 F.3d at 488-89.
[98] *Id.* at 499-506.
[99] *NAHB*, 130 F.3d 1041, 1060 (D.C. Cir. 1997) (Sentelle, J., dissenting).
[100] *Cf. id.* at 1057 n.1 (Henderson, J., concurring) ("[T]he extent of inconvenience the County experiences if the unlawful taking is prevented is irrelevant so long as the prevention is authorized under the Commerce Clause.") (internal citation omitted).
[101] *See Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003).
[102] RICHARD STROUP, ECO-NOMICS: WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND THE ENVIRONMENT 6-7 (2003); *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) ("The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.").
[103] STROUP, *supra* note 102, at 56-57.