
COMMERCE CLAUSE CHALLENGES TO THE LISTINGS OF INTRASTATE, NON-COMMERCIAL SPECIES UNDER THE ENDANGERED SPECIES ACT

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In the early 1970s, Congress considered a series of bills aimed at instituting a federal system of land use management.¹ These efforts ultimately failed as a result of legitimate fears associated with federal encroachment into this area of traditional state control.² As we have since come to learn, the Endangered Species Act of 1973 (“ESA”)³ is a modern-day Trojan horse.⁴ Like the Greek’s gift to the City of Troy, this species protection program was at first well-received as Congress voted almost unanimously to enact the ESA.⁵ After all, it only gave federal agencies control where listed species or their habitats were concerned. Less than 100 species were on the 1973 version of the Endangered Species List—a list that was dominated by megafauna such as the red wolf, bald eagle, and peregrine falcon.⁶

However, with the listing of each additional species—the number is now over 1,300—the reach of federal power has continued to grow. In Hawaii (329 species), California (308 species), Alabama (117 species), and Florida (112 species), the number of listed species has grown so numerous that federal wildlife agencies now influence a wide range of commercial and noncommercial activities.⁷ This has led some to question the constitutional basis for this broad exercise of authority, especially with respect to species with no readily apparent relationship to legitimate federal interests.

In defense, the federal agency principally responsible for implementing the ESA, the Fish and Wildlife Service (“FWS”), points to the Interstate Commerce Clause of the Constitution, which grants Congress the authority to make laws which are “necessary and proper” to “regulate Commerce with foreign nations, and among the several states. . . .”⁸ Federal courts have so far agreed with FWS, adopting a variety of limitless theories based on “biodiversity” and the “interconnected web of life” or relying upon the commercial nature of the activities affecting the listed species. Thus far, a coherent, consistent constitutional framework justifying the exercise of federal regulatory power under the ESA has not been adopted by the courts.

The Supreme Court has not addressed the constitutionality of the ESA or the narrower question of whether a particular listing decision can be supported by the Commerce Clause. Only three federal appellate courts have weighed in on the constitutionality of the ESA, all of which involved challenges based on particular threatened “takes” associated with commercial activity: the D.C. Circuit in *National Association of Home Builders v. Babbitt* (“NAHB”) (desert flies)⁹ and *Rancho Viejo, LLC v. Norton* (toads);¹⁰ the Fourth Circuit in *Gibbs v. Babbitt* (red wolves);¹¹ and the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton* (cave bugs).¹² These cases were all hotly

debated, with no fewer than nine circuit court judges voting in dissent.¹³ In contrast to these cases, no circuit courts and only a few federal district courts have ever specifically addressed a facial commerce clause challenge to a final rule listing an endangered or threatened species.¹⁴

After providing a brief overview of federal and state efforts to protect wildlife, the Supreme Court’s Commerce Clause jurisprudence, and the circuit courts’ opinions addressing challenges to the ESA’s take provision, this article addresses the viability of facial Commerce Clause challenges to final rules listing intrastate, noncommercial species, and offers guiding principles and an appropriate framework for determining whether a final rule listing a particular species under the ESA should be vacated as exceeding federal Commerce Clause power.

I. FEDERAL & STATE EFFORTS TO PROTECT IMPERILED SPECIES

The ESA has been described as the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹⁵ Its stated purpose, among other things, is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species”¹⁶ To this end, Section 4 of the Act requires FWS to “list” any species found to be either “threatened” or “endangered.”¹⁷ The listing process is accomplished pursuant to traditional notice and comment rulemaking.¹⁸ The listing only becomes final upon publication of the final listing decision in the Federal Register. Concurrently with the listing decision, FWS is required to designate the species’ “critical habitat.”¹⁹

The ESA defines an “endangered” species as “any species which is in danger of extinction throughout all or a significant portion of its range.”²⁰ The ESA likewise defines a “threatened” species as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”²¹ In making a determination as to whether a particular species is either threatened or endangered, FWS is directed to consider: (1) the present or threatened destruction, modification, or curtailment of the species’ habitat or range; (2) the overutilization for commercial, recreational, scientific, or educational purposes; (3) the effect of disease or predation on the species; (4) the adequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species’ continued existence.²² Such a determination is also to be based “solely” on the “best scientific and commercial data available,” and FWS is prohibited from considering economic impacts when deciding whether or not to list a species.²³

Once a listing becomes final, the substantive provisions of the ESA are triggered. Of particular importance are the provisions found under ESA Section 9 and Section 7.

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Section 9 imposes civil and criminal liability for any “take” of an endangered species.²⁴ “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁵ Regulations further define “harass” as “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.”²⁶ The same regulations further define “harm” as “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.”²⁷ Read together, the ESA and its implementing regulations thus cover a limitless range of activities including habitat modification.

Under the ESA’s enforcement provisions, a violation of Section 9 can incur civil penalties up to \$25,000 per violation and criminal sanctions up to one year in prison and \$50,000 in fines.²⁸ Section 10 allows any person to lawfully take a listed species if he first obtains an “incidental take permit.” In order to obtain an incidental take permit, however, the landowner must present an acceptable habitat conservation plan that demonstrates that the modification is consistent with the long-term survival of the species. This is an expensive and time-consuming process, and FWS has wide discretion in determining whether to grant such permits.

Section 7 of the ESA requires every federal agency to consult with FWS in order to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat.²⁹ Federal agencies are required to comply with Section 7 strictly, regardless of economic or societal costs.³⁰ If FWS ultimately concludes the action will result in jeopardy or adverse habitat modification, FWS will issue a biological opinion outlining any “reasonable and prudent alternatives” that FWS believes will avoid those consequences.³¹ Though described as “alternatives,” FWS’ “reasonable and prudent alternatives” are typically mandatory in that they take the form of prescriptive measures. In the words of the Supreme Court, “while the biological opinion theoretically serves an ‘advisory function,’ in reality it has a powerful coercive effect on the action agency.”³²

Importantly, Section 7 covers any permit or license issued by a federal agency to a private party. Thus, private parties applying for a permit, for example, from the Corps of Engineers to dredge or fill waters of the United States will ultimately bear the brunt of any restrictions placed on the Corps by FWS as a product of Section 7’s consultation requirements. If FWS determines that granting a particular federal permit or license will jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat, then the applicant’s permit will most likely be denied.

States have long played a preeminent role in protecting wildlife found within their borders.³³ While many of these state laws originally focused on protecting wild game and

other wildlife of commercial value,³⁴ sixteen states had already adopted their own statutory programs protecting certain species classified as “endangered” prior to the adoption of the federal ESA.³⁵ Today, virtually all states have their own statutory or regulatory programs protecting endangered species.³⁶ Many states even protect species not on the federal ESA list.³⁷

II. FEDERAL JURISDICTION UNDER THE INTERSTATE COMMERCE CLAUSE

Congress’ power to protect endangered species emanates from the Commerce Clause. Under the Articles of Confederation, a weak central government was given very limited, specific powers, including the authority to declare war, to set weights and measures (including coins), and for Congress to serve as a final court for disputes between states. There was no authority for the central government to regulate commerce. This system of governance led states to adopt protectionist barriers to trade. At the Constitutional Convention, the framers retained the Confederation’s concept of a central government with only enumerated powers. However, the framers expanded those enumerated powers in light of the need for centralized control of interstate commerce—hence, the Commerce Clause was born. Wasting no words, Article I, Section 8, Clause 3 of the Constitution gave Congress the power “To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.”

A. From *Gibbons v. Ogden* to the New Deal Era

In the years following the adoption of the Constitution, Congress rarely used its Commerce Clause power, providing little opportunity for the Supreme Court to interpret its meaning and define its scope. In fact, the Supreme Court’s first meaningful interpretation of the Commerce Clause did not come until 1824 in *Gibbons v. Ogden*,³⁸ when the Supreme Court struck down a New York law creating a steamship monopoly for traffic between New York and New Jersey. Using somewhat broad language, Chief Justice John Marshall upheld Congress’ authority under the Commerce Clause to regulate trafficking of goods between two or more states. Justice Marshall recognized that the enumerated powers given under the Commerce Clause meant that there was at least some *commerce* that Congress could not reach.³⁹

During the first part of the twentieth century, the Court further refined the dimensions of the federal government’s commerce power, holding that only activities with a “direct effect” on *interstate* commerce could be subject to congressional regulation.⁴⁰ In other words, activities that affected interstate commerce directly were within Congress’ power; whereas activities that affected *interstate commerce indirectly or intrastate commerce* were outside Congress’ power.⁴¹ By issuing these decisions, the Court sought to prevent the development of a “completely centralized government” with “virtually no limit to the federal power.”⁴²

This allegiance to limited federal powers would eventually give way to political necessity. To help alleviate the misery of the Great Depression, President Franklin Roosevelt proposed sweeping social programs, many of which involved vast expanses in federal authority that were

eventually rejected as unconstitutional by the Supreme Court.⁴³ President Roosevelt did not take these defeats lying down. Rather, in the mid-1930s, he instituted his Court-packing scheme, and in response, the Supreme Court voluntarily “reformed” its view of the Commerce Clause power and other issues of importance to the President’s social and economic agenda. Starting in 1937, the Court began blurring the former distinctions between local manufacturing/production and interstate commerce and the distinction between direct and indirect impacts.⁴⁴

In *NLRB v. Jones & Laughlin Steel Corp*, the Court rejected the production versus commerce distinction and upheld legislation that simply “affect[ed] commerce,”⁴⁵ which was very different from the previous standard of a “close and substantial relation to interstate commerce.”⁴⁶ In 1941, in *United States v. Darby*,⁴⁷ the Court retreated from the production versus commerce distinction and the directness test, finding that Congress could regulate intrastate activities that “so affect interstate commerce or the exercise of the power of Congress over it.”⁴⁸ Then, in *Wickard v. Filburn*, the Court issued its “cumulative impact doctrine,” upholding Congress’ authority to set quotas for the amount of wheat one farmer could harvest.⁴⁹ Even though one farmer’s personal impact on the price of wheat was minuscule, the Court reasoned that Congress could regulate his activities because the cumulative impact on interstate commerce of all farmers in that farmer’s situation was significant.⁵⁰ For the next fifty years, the Court applied a “rational basis” test for concluding the regulated activity sufficiently affected interstate commerce.⁵¹

Finally, in *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court upheld the Surface Mining Control and Reclamation Act as a proper exercise of the commerce power, finding that “the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.”⁵² In light of the Court’s broad interpretation of federal Commerce Clause power, Congress began to push the envelope of its power even further.

B. Revival of Federalism: *Lopez*, *Morrison*, and *SWANCC*

In a 1995 landmark decision, *United States v. Lopez*,⁵³ the Supreme Court reminded Congress of its limited powers and articulated a more coherent framework for determining whether particular federal actions fall within Congress’ power to regulate “Commerce . . . among the several states.”⁵⁴ That decision was followed by *United States v. Morrison*,⁵⁵ which re-enforced the *Lopez* analysis and gave further content to the limitations on federal power. Congress’ unbridled power to enact environmental laws was eventually questioned in dicta in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”).⁵⁶

In *Lopez*, the Court addressed whether the Gun-Free School Zones Act of 1990 (“*GFSZA*”), which made it a federal offense to knowingly possess a firearm in a school zone, exceeded Congress’ authority to regulate interstate commerce.⁵⁷ After navigating through its prior precedents,

the Court succinctly provided the relevant analysis—one that recognizes the limited nature of federal power under our dual system of government.⁵⁸ Under *Lopez*, Congress may regulate (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce;” and (3) “those activities having a substantial relation to interstate commerce.”⁵⁹ After deciding that possession of a handgun did not fall within the first two categories of Commerce Clause regulation, the Court held that under the third category the *GFSZA* exceeded congressional authority to regulate commerce, reasoning that Congress failed to demonstrate that guns in a school zone had a “substantial effect” on interstate commerce.⁶⁰

At the outset, the *Lopez* Court revived a fundamental principle of our federal system: “[T]he Constitution creates a Federal Government of enumerated powers.” From there, the Court rejected the idea that the Commerce Clause gave Congress the power to regulate *intrastate* activities with only a *tenuous* connection to interstate commerce.⁶¹ The Court observed that *GFSZA* had “nothing to do with commerce or any sort of economic enterprise.”⁶² The Court distinguished its prior cases, such as *Wickard*, *Darby*, and *Heart of Atlanta Motel* by recognizing that those cases involved regulated activities which were economic in nature.⁶³ Specifically, the Court stated 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 possession of a gun in a school zone does not.”⁶⁴ The Court also noted that the *GFSZA* lacked a “jurisdictional element”—meaning that the statute lacked any provision limiting its application to contexts where a significant nexus to interstate commerce existed, such as requiring proof that the defendant purchased or transported the gun in interstate commerce.⁶⁵ Finally, the Court noted that Congress failed to make adequate findings demonstrating a link between gun possession in a school zone and interstate commerce.⁶⁶ The Court concluded by finding that the link between gun possession in a school zone and interstate commerce was too “attenuated” to pass constitutional muster.⁶⁷

Five years later, in *United States v. Morrison*,⁶⁸ the Court reaffirmed its holding in *Lopez* and provided additional guidance. In *Morrison*, the Court struck down the Violence Against Women Act (“*VAWA*”), rejecting the “argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁶⁹ With respect to the third *Lopez* category, the *Morrison* Court identified at least four factors that should be considered when determining whether an activity has a substantial relationship to interstate commerce: (1) whether the regulation involves economic activity; (2) whether the link between the regulated activity and interstate commerce is direct or attenuated; (3) whether the regulation includes an express jurisdictional element; and (4) whether Congress has made findings regarding the regulated activity’s effect on commerce.⁷⁰

Perhaps the most important of these three factors is the economic or commercial nature of the activity in question. Although the *Morrison* Court did not adopt a

“categorical rule against aggregating the effects of any noneconomic intrastate activity,” it recognized that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity *only* where the activity is economic in nature.”⁷¹ Importantly, the Court rejected congressional findings that gender-based violence had significant effects on interstate commerce because the connection between those crimes and their economic consequences were too indirect and attenuated.⁷² Simply because Congress says a regulated activity has a substantial relationship to interstate commerce does not make it so.

For many, an important question after *Lopez* was whether this revival of federalism would extend to environmental statutes. The answer came in 2001 when the Supreme Court issued its ruling in *SWANCC*.⁷³ The Court held that the Corps of Engineers lacked jurisdiction under the Clean Water Act to require a municipal solid waste landfill to obtain federal approval before disturbing isolated, intrastate wetlands, even though those wetlands provided important habitat for migratory birds. Though beyond the case’s central holding, the Court provided guidance on how to interpret *Lopez*’s third category.⁷⁴ The *SWANCC* Court suggested that the object or activities which are the focus of the regulation are the only activities that may properly be aggregated under *Lopez*’s third category.⁷⁵ The government argued that economic value of the migratory birds and the commercial activities being prohibited could justify federal action under the Commerce Clause. However, the Court rejected that argument, finding that the precise object of the statute was the wetlands themselves and that they must substantially affect interstate commerce. The Court suggested that it would not necessarily focus on the commercial activities causing the environmental harm; rather, it would consider whether there was some close relationship between the object of the regulation and the commercial activities.⁷⁶

C. *Gonzales v. Raich* and As-Applied Commerce Clause Challenges

After *SWANCC*, many wondered if the Court would take any further steps to limit federal power, possibly by expressly overruling *Wickard*—the Court’s most far-reaching endorsement of federal Commerce Clause power. The opportunity to review the *Wickard* analysis came recently when, in *Gonzales v. Raich*,⁷⁷ the Supreme Court upheld the constitutionality of the Controlled Substances Act as-applied to the intrastate possession and consumption of marijuana for medical purposes. This 2005 opinion began by reiterating that Congress may regulate “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”⁷⁸ Although the *Raich* Court failed to provide clear reasoning on how the *possession* and *consumption* of marijuana is “economic,” it claimed to follow the principles of *Lopez* and *Morrison* without expressly analyzing *Morrison*’s four factors. The outcome of this case is not surprising. After all, *Raich* is perhaps best understood as the twenty-first century’s version of *Wickard* as it only recognizes the federal government’s authority to regulate intrastate activities involving fungible (i.e., interchangeable) goods for which a substantial interstate market currently

exists.⁷⁹ In fact, the Court explained, “[l]ike the farmer in *Wickard*, respondents are cultivating, for home consumption, a *fungible* commodity for which there is an *established*, albeit illegal, *interstate market*.”⁸⁰ The lower courts are currently deciphering *Raich* and deciding how it affects the applicable Commerce Clause analysis.⁸¹

III. COMMERCE CLAUSE CHALLENGES TO THE APPLICATION OF THE ESA

While the Supreme Court has not addressed the constitutionality of the ESA as a whole, three circuit courts have issued decisions concerning the ESA’s take provision as-applied to particular species. Although all three circuits rejected the Commerce Clause challenges at issue, nine circuit court judges went on record to argue that, at the very least, the application of the ESA to intrastate, noncommercial species raised serious constitutional problems in light of *Lopez* and *Morrison*.

A. *Desert Flies, Toads & the D.C. Circuit*

The first case in which a U.S. Court of Appeals addressed a challenge to the ESA’s take provision was *National Association of Home Builders v. Babbitt*.⁸² That case involved a challenge brought by land developers and local governments to Section 9 of the ESA’s application to the Delhi Sands Flower-Loving Fly, a fly found only in a limited section of Southern California. The plaintiffs sought declarative and injunctive relief against any application of Section 9 by FWS to the construction of a hospital in Riverside County, California, which FWS concluded involved the destruction of fly habitat. In reviewing the constitutionality of Section 9 to the fly, the panel split three ways—Judges Wald and Henderson concluded that the application of Section 9 under the facts of the case was constitutional (although on different grounds), while Judge Sentelle dissented.

Judge Wald concluded that Section 9 of the ESA fit within *Lopez*’s first and third categories. Judge Wald believed that the regulation fit within the first category, as the regulation of the channels of interstate commerce, on two grounds: (1) the prohibition against takings of an endangered species is necessary to enable the government to control the transportation of endangered species in interstate commerce; and (2) the prohibition on takings of endangered animals is necessary “to keep the channels of interstate commerce free from immoral and injurious uses.”⁸³ Judge Wald likened Section 9’s “take” prohibition to federal laws which prohibited the possession of machine guns. “[I]t is necessary to regulate the possession of machine guns in order to effectively regulate the interstate traffic in machine guns. . . .”⁸⁴ Similarly, Judge Wald noted that “the prohibition on ‘taking’ endangered species is properly classified as a first category regulation because one of the most effective ways to prevent traffic in endangered species is to secure the habitat of the species from predatory invasion.”⁸⁵ Additionally, like *Heart of Atlanta*, in which the Court upheld a federal prohibition on racial discrimination in places of public accommodation serving interstate travelers, “Congress used this authority [under the ESA] to prevent

the eradication of an endangered species by a hospital that is presumably being constructed using materials and people from outside the state and which will attract employees, patients, and students from both inside and outside the state.”⁸⁶ Therefore, “like regulations preventing racial discrimination . . . regulations preventing the taking of an endangered species prohibit interstate actors from using the channels of interstate commerce to promot[e] or spread[] evil. . . .”⁸⁷

Judge Wald also concluded that Section 9’s “take” prohibition was justified as the regulation of activities “substantially affecting interstate commerce,” under *Lopez*’s third category. Judge Wald again relied on two different grounds for this conclusion, finding first that Congress has an interest in biodiversity. “Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes.”⁸⁸ Judge Wald noted that this value was “uncertain”—its *possible* future value was enough. “To allow even a single species whose value is not currently apparent to become extinct . . . deprives the economy of the option value of that species.”⁸⁹ Second, Judge Wald concluded that Section 9 properly regulated activity substantially effecting interstate commerce because many species’ extinct status was *produced* by “destructive interstate competition.”⁹⁰ Judge Wald likened the case to the Surface Mining Act of 1977, which required mine operators to restore the land after mining to its prior condition. Judge Wald reasoned that like the Surface Mining Act, upheld by the Supreme Court in *Hodel v. Virginia Surface Mining & Reclamation Association*,⁹¹ Section 9 of the ESA properly regulated environmental activity closely associated with commercial activity.

Judge Henderson disagreed, in part. Judge Henderson did not think Section 9 involved the regulation of the channels of interstate commerce under *Lopez*’s first category. The Delhi flies “are entirely *intrastate* creatures. They do not move among states either on their own or through human agency. As a result . . . the statutory protection of the flies ‘is not a regulation of the use of the channels of interstate commerce.’”⁹² Nor did Judge Henderson believe that the regulation of the fly under Section 9 fit under *Lopez*’s third category on the grounds that such species *might* be of economic value in the future. “It may well be that no species endangered now or in the future will have any of the economic value proposed. Given that possibility, I do not see how we can say that the protection of an endangered species has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value.”⁹³ However, Judge Henderson did agree that the regulation of the flies under Section 9 fit within *Lopez*’s third category because of the “interconnectedness” of all species. “Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce.”⁹⁴

Judge Sentelle, in dissent, would have none of it. The question before the Court as to whether Congress could regulate the “taking” of purely intrastate species reminded Judge Sentelle of the following old chestnut: “If we had some ham, we could fix some ham and eggs, if we had some eggs. . . . Similarly, the chances of validly regulating something which is neither commerce nor interstate under the heading of the interstate commerce clause power must likewise be an empty recitation.”⁹⁵ Judge Sentelle agreed with Judge Henderson that *Lopez*’s first category was not in play and added that Judge Wald’s reliance on *Heart of Atlanta* was entirely misplaced. “The fact that activities like the construction of a hospital might involve articles that have traveled across state lines cannot justify federal regulation of the incidental effects of every local activity in which those articles are employed.”⁹⁶ Judge Wald’s conclusion, in Judge Sentelle’s opinion, would improperly extend *Lopez*’s third category “to anything that is *affected* by commerce.”⁹⁷

Judge Sentelle disagreed with Judge Wald’s and Judge Henderson’s varying biodiversity/ecosystem justifications for federal regulation of the desert fly under *Lopez*’s third category. Relying on *Lopez*, Judge Sentelle gave three specific responses to this type of argument. First, “the regulation does not control a commercial activity, or an activity necessary to the regulation of some commercial activity. Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense.”⁹⁸ Second, like the statute at issue in *Lopez*, the ESA contained no jurisdictional provision which would ensure, on a case-by-case basis, that the activity at issue “affects interstate commerce.” Third, both Judge Wald and Judge Henderson relied on wholly speculative connections between the regulation of the desert fly and commerce—something prohibited by *Lopez*. Judge Sentelle also rejected the theory that *Lopez*’s third category granted Congress the authority to regulate purely intrastate noncommercial activities where the *regulation* enacted might itself affect interstate commerce.⁹⁹

The D.C. Circuit once again addressed the constitutionality of federal regulation of a purely intrastate noncommercial species in *Rancho Viejo, LLC v. Norton*.¹⁰⁰ That case involved the Arroyo Toad, an endangered species of toad found only in southern California. The court, finding that the case was governed by *NAHB v. Babbitt*, affirmed the district court’s dismissal of a developer’s challenge to the ESA as applied to the toad. In discussion, the court focused on the particular activity in which the plaintiff was engaged. “The regulated activity is Rancho Viejo’s planned commercial development, not the arroyo toad. . . .”¹⁰¹ The Court left open the question whether a similar commerce clause challenge would succeed if the alleged “taking” involved purely noneconomic activity, such as a “casual walk in the woods.”¹⁰² Thus, the panel opinion in *Rancho Viejo* made an adjustment to the scope of an as-applied challenge to a particular application of the ESA’s take provision. Unlike *NAHB v. Babbitt*, which characterized the appellant’s claim as a challenge to the ESA’s take provision *as applied to the Delhi Sands Loving Fly*, the *Rancho Viejo*

court focused on the constitutionality of the ESA's take provisions *as applied to the particular activity in which the appellants were engaged*. Framing the question thusly, the focus naturally shifted from the species to the commercial activity of the appellants.

In *Rancho Viejo*, the plaintiffs petitioned for rehearing en banc. Both Judges Sentelle and then-Circuit Judge John Roberts dissented from the Court's denial of the petition.¹⁰³ Judge Sentelle dissented on many of the same grounds expressed in his dissent in *NAHB v. Babbitt*. For his part, Judge Roberts also took issue with the court's focus on the effect of the *regulation*, rather than on the particular activity regulated. Judge Roberts noted the seeming inconsistency between this approach and *Lopez* and *Morrison*. "Under the panel's approach in this case . . . if the defendant in *Lopez* possessed the firearm because he was part of an interstate ring and had brought it to . . . sell it, or the defendant in *Morrison* assaulted his victims to promote interstate extortion, then clearly the challenged *regulations* in those cases would have substantially affected interstate commerce . . ."¹⁰⁴

B. Red Wolves & the Fourth Circuit

The Fourth Circuit took up a challenge involving Section 9 of the ESA in *Gibbs v. Babbitt*.¹⁰⁵ That case specifically involved the application of the "take" provision by regulation to the red wolf, which had been released into North Carolina under the ESA's experimental population program. *Gibbs* is thus notably different than either *NAHB v. Babbitt* or *Rancho Viejo*. *Gibbs* involved what appears to be a facial challenge to a final FWS rule—i.e., the final rule governing the experimental red wolf release program codified at 50 C.F.R. § 17.84(c). A group of plaintiffs challenged the federal government's authority under the Commerce Clause to regulate the "take" of a red wolf on private property pursuant to this regulation.

Judge Wilkinson, writing for the majority, upheld the regulation, concluding that it fit within *Lopez*'s third category. In so holding, Judge Wilkinson first focused his analysis on the red wolf, concluding that the taking of a red wolf implicated certain interstate activities. "The relationship between the red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf tourism, no scientific research, and no commercial trade in pelts."¹⁰⁶ Judge Wilkinson noted that many tourists traveled to North Carolina simply to hear the red wolves howl in the evening. The record specifically included one report predicting that North Carolina might see an increase of between \$171 and \$538 million per year based on red wolf-related tourism.¹⁰⁷ Judge Wilkinson similarly noted the interstate scientific draw to the wolves, the experimental release of which was seen as a model for other experimental release programs. Judge Wilkinson also observed that the trade in red wolf pelts was once rather substantial. Beyond the wolves themselves, Judge Wilkinson thought the regulation of "takings" was also related to commerce simply because the appellant farmers saw the wolves as an economic threat to their livestock. Ultimately, because the prohibition on "taking" a red wolf was part of Congress' broader goal of recovering the species as a whole, and the entire species

qua species was of concrete commercial interest, the regulation was a constitutional exercise of Congress' Commerce Clause authority.¹⁰⁸

Judge Luttig dissented, concluding that the majority opinion was flatly inconsistent with *Lopez* and *Morrison*. Judge Luttig was particularly concerned, as the author of the original Fourth Circuit *Morrison* opinion affirmed by the United States Supreme Court.¹⁰⁹ Judge Luttig looked at the four justifications outlined above and concluded that they were "not even arguably sustainable under *Lopez* [and] *Morrison* . . . much less for the reasons cobbled together by the majority. . . ."¹¹⁰ In comparing the case to *Lopez*, Judge Luttig concluded that the number of inferential leaps relied upon by the majority was "exponentially greater" than the inferential leaps rejected by the Supreme Court in *Lopez*.¹¹¹

C. Cave Bugs & the Fifth Circuit

In *GDF Realty Investments, Ltd. v. Norton*,¹¹² the Fifth Circuit was asked whether Section 9's "take" provision was constitutional as-applied to six species of subterranean cave bugs found only within two counties in Texas. The challenge was characterized in a manner akin to *NAHB v. Babbitt*'s challenge to section 9's take provision *as-applied to the desert fly*. The key issue to the panel was whether, in order to demonstrate that the regulation had substantial effects on interstate commerce, cave bug "takes" could be aggregated with takes of all other endangered species for purposes of *Lopez*'s third category.¹¹³ Finding that the court could do so, the panel affirmed the decision of the district court dismissing the appellants' claim.

As a preliminary matter, Judge Barksdale, writing for the majority, disagreed with the district court's focus on the appellants' commercial activities underlying any threatened "takes." "[T]he effect of regulation of ESA takes may be to prohibit . . . development in some circumstances. But, Congress, through the ESA, is not directly regulating commercial development."¹¹⁴ In contrast, Judge Barksdale concluded that "the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce. . . ."¹¹⁵ Moreover, unlike the red wolves in *Gibbs*, the court recognized that the cave bugs did not have any species-specific economic impacts on interstate commerce. However, in Judge Barksdale's opinion, the aggregate effects analysis could take into account not only the regulation of cave bug takes, but the regulation of all possible endangered species takes. Thus, because the take of a particular species could threaten the "interdependent web" of all species (which presumably would ultimately have some effect on interstate commerce), the regulation of cave bugs was necessary to fulfill the broader federal goal of maintaining the viability of the ecosystem in general.¹¹⁶

Six judges of the Fifth Circuit dissented from the Fifth Circuit's denial of a petition for en banc review.¹¹⁷ Judge Edith Jones authored a vocal dissent on behalf of the six dissenting judges. "The panel holds that because 'takes' of the Cave Species ultimately threaten the 'interdependent web' of all species, their habitat is subject to federal regulation. . . . Such unsubstantiated reasoning offers but a remote, speculative, attenuated, indeed more than improbable

connection to interstate commerce.”¹¹⁸ Judge Jones argued that the “interconnected web” argument was fundamentally inconsistent with *Lopez* and *Morrison*, observing that there was arguably a greater interconnectedness between humans, and that “the panel’s ‘interdependent web’ analysis of the [ESA] gives these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victims in *Morrison*.”¹¹⁹

Judge Jones noted that the only sort of legitimate aggregation under the ESA would be on a species-specific basis as employed in *Gibbs* or perhaps across certain species lines where some rational category could be crafted. However, unlike the red wolves in *Gibbs*, the record in *GDF Realty* provided no basis for the conclusion that the cave bug species, aggregated on a species-specific basis (or together) had any effect on interstate commerce. In conclusion, “[M]any applications of the ESA may be constitutional, but this one goes too far.”¹²⁰

These decisions were handed down prior to the Supreme Court’s opinion in *Raich*. As discussed above, *Raich* (like *Wickard*) merely recognizes the federal government’s authority to regulate intrastate activities involving fungible goods for which a substantial interstate market currently exists.¹²¹ All of the species at issue in *NAHB v. Babbitt*, *Rancho Viejo*, and *GDF Realty* are purely intrastate species for which there is no current market. The objections raised by the dissenters in this regard remain a substantial criticism of the majority opinions. Moreover, there is nothing “fungible” about endangered species. While a red wolf may be fungible with another red wolf, it is not fungible with an arroyo toad. And even conceding, as Judge Jones has, that some distinct category of species like the six species of cave bugs may be interchangeable with each other to a certain degree, they are not fungible broadly with all other endangered species. Additionally, *Raich*’s as-applied analysis focused on the particular “class of activities” regulated by the ESA—i.e., the intrastate possession and consumption of marijuana. The majority opinion in *GDF Realty* and the dissenting opinions in all of these cases were right to question any over-emphasis on the plaintiffs’ particular activities. As such, *Raich* does not provide any grounds for the majority holdings in these cases. The majority opinions, with the possible exception of *Gibbs*, thus go well beyond not only *Lopez* and *Morrison*, but the outer limits of constitutional authority delineated by *Raich*.

IV. “FACIAL” CHALLENGES TO LISTING DECISIONS

Purely facial challenges to the validity of the ESA *as a whole* have not been vigorously pursued, in large part due to the perception that such a claim would only succeed upon a showing that there is no set of facts upon which the statute could be constitutional.¹²² One could imagine any number of listed species the protection of which could have a substantial relationship to interstate commerce. For instance, in *Raich*, the Supreme Court footnoted that 16 U.S.C. § 668(a), a federal statute protecting the bald eagle, was a constitutionally permissible example of a statute “[p]rohibiting the intrastate possession . . . of an article of

commerce [that] is a rational (and commonly utilized) means of regulating commerce in that product.”¹²³ On the other hand, as discussed above, challenges to the ESA *as-applied to a particular application* of Section 9’s take prohibition tend to become bogged-down (rightly or wrongly) in an analysis of the relationship between the commercial development at issue and interstate commerce.

An entirely different question is whether a facial Commerce Clause challenge to the validity of a *federal regulation* listing a specific intrastate, noncommercial species could succeed. The closest circuit case to address such a challenge is *Gibbs*, although that case involved a challenge to the final rule implementing an experimental release of red wolves rather than a listing decision. Federal courts routinely entertain facial challenges to the constitutionality of specific final rules apart from the underlying statute.¹²⁴ Yet, similar challenges under the ESA have seldom been pursued.¹²⁵ Admittedly, this is where the distinction between facial and as-applied challenges begins to blur. Some might even classify the claim as a challenge to the ESA *as-applied to a particular species* (as opposed to challenges to the ESA *as-applied to a particular “take”*). However, the ESA imposes no obligations on its own and instead operates on a species-by-species basis through the promulgation of separate final rules. Each final rule must stand on its own merits—statutorily and constitutionally. As a result, a facial Commerce Clause challenge to a listing decision ultimately depends upon the unique facts of the particular species at issue, just as the constitutionality of the statutes in *Lopez* and *Morrison* rested on the unique facts of the particular subjects of regulation in those cases. Notably, even under a facial challenge, the actor’s specific economic motivations are irrelevant to the analysis.¹²⁶

A. Governing Principles

The *Lopez* and *Morrison* analysis (which involves the evaluation of three categories and, with respect to the third category, four factors) is not a “precise formulation[.]” although it should “point the way to a correct decision” in Commerce Clause cases.¹²⁷ This analysis should be informed by those principles underlying our Nation’s “dual system of government.”¹²⁸ At least five of these principles are especially relevant to the consideration of a facial challenge to the listing of an endangered or threatened species.

The first principle is that federal agencies can only possess those powers enumerated by the Constitution, nothing more and often much less. The “Constitution creates a Federal Government of enumerated powers.”¹²⁹ Every Commerce Clause analysis should start here. James Madison famously noted in *The Federalist* No. 45: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite.” Justice Marshall, in turn, explained that this “enumeration presupposes something not enumerated.”¹³⁰ In our own day, the Supreme Court has noted: “[T]he grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.”¹³¹ This maxim of limited powers is especially true for federal agencies asserting jurisdiction at the fringes of congressional authority.

Second, any Commerce Clause analysis should focus on the *subject* of the regulation and not the variety of activities somehow affected by the regulation.¹³² If the Supreme Court had looked to the aggregate effects of the actors' general conduct in *Lopez* and *Morrison* rather than the subject of the regulation itself, it would have been an easy task indeed for the Court to find some relationship between the regulatory programs at issue and interstate commerce.¹³³ The regulatory impositions of the ESA are triggered not by commercial activities as such.¹³⁴ Instead, federal involvement is triggered by the *need to protect listed species*, which is primarily for non-economic reasons. It is the protection of a listed species (from takes or otherwise) that should form the basis of the Commerce Clause analysis.¹³⁵ In the ESA context, this means that the relevant Commerce Clause analysis should focus on whether the listed species, which is the object of the listing decision, has a substantial relationship to interstate commerce and not on whether the commercial activities affecting that species have such a relationship. Looking beyond the regulated activity would "effectually obliterate" any limitation on federal Commerce Clause power.¹³⁶

Third, courts should refrain from employing the "cumulative" impacts or "aggregate" effects analysis unless the object of regulation (in this case, the listed species) is "economic" or "commercial" in nature.¹³⁷ The Supreme Court has held that federal power may properly extend to the regulation of various "intrastate" activities including intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, and hotels catering to interstate guests.¹³⁸ However, all of these involved "economic" activities.¹³⁹ The only time the Court has permitted the aggregation of *noneconomic intrastate* activities is where the regulation of such activities is a necessary part of a broad interstate, economic regulatory scheme which could be undercut unless the intrastate activity was also regulated.¹⁴⁰ For example, in *Wickard v. Filburn* and *Gonzales v. Raich*, the Supreme Court held that Congress could regulate the intrastate cultivation of wheat and marijuana, respectively, because the intrastate cultivation of such "fungible" agricultural goods could undermine Congress' ability to regulate the interstate market for those goods.¹⁴¹ However, this marks the absolute limit of the federal government's authority under the Commerce Clause.¹⁴² Indeed, the activities regulated in *Wickard* and *Raich* could properly be characterized as "economic activity."¹⁴³ To reach intrastate, noneconomic objects of regulation such as certain listed species lacking this necessary connection to economic regulation would render the central holding in *Lopez* and *Morrison* meaningless.¹⁴⁴

That is not to say that the aggregation analysis could never be used in the ESA context. The bald eagle, for instance, is fungible with other bald eagles and a substantial interstate market exists for eagles and eagle parts. Therefore, federalism concerns are not necessarily implicated by federal protection of this species.¹⁴⁵ Aggregation analysis might also apply to other commercial species with known interstate markets, including certain migrating birds, red wolves, and a

variety of other species. Still, a great number of federally listed species lack this kind of relationship to interstate commerce.

Fourth, speculative or attenuated theories should not be employed. For example, in *Lopez*, it was argued that the "costs of crime" and the impact of guns in a school zone on "national productivity" justified the federal regulation.¹⁴⁶ Rejecting those theories, the Court explained that such attenuated theories would justify federal regulation of *any* activity—a result contrary to the concept of a limited federal government.¹⁴⁷ Similarly, in *Morrison*, the Court rejected the argument that "but-for" gender-motivated violent crimes the victims would travel interstate conducting business or would otherwise impact the national economy.¹⁴⁸ Any theory that piles "inference upon inference" is simply insufficient to establish a substantial relationship to interstate commerce.¹⁴⁹ Unfortunately, many courts addressing Commerce Clause-based challenges in the ESA context ignore this well-established principle.

A fifth principle is that courts should look for current, not historic, connections to interstate commerce. The critical question under *Lopez* and *Morrison* is not whether an activity *had* a substantial relation to interstate commerce sometime in the past; rather, the relevant inquiry is whether Congress is regulating something "*having* a substantial relation to interstate commerce."¹⁵⁰ Commercial connections which are remote in time are simply insufficient to support federal jurisdiction.

B. Searching for a Substantial Relationship to Interstate Commerce

With the preceding principles in mind, a federal regulation establishing protections for an endangered species must, in order to be constitutional, fall within at least one of the three categories of activities which Congress may regulate pursuant to its Commerce Clause powers, as set forth in *Lopez* and *Morrison*. It is relatively well settled that federal protection of intrastate, noncommercial species does not fall within the first category of the *Lopez* analysis because it is not the regulation of "the use of the channels of interstate commerce."¹⁵¹ Likewise, with respect to *Lopez*'s second category, such federal regulations do not constitute the regulation of "instrumentalities of interstate commerce, or persons or things in interstate commerce."¹⁵² In fact, courts addressing Commerce Clause-based ESA challenges have never held that federal protection of endangered species fits within either of *Lopez*'s first two categories.¹⁵³ Thus, a final rule listing a threatened or endangered species must fall within the third category of the *Lopez* analysis if it is to survive constitutional scrutiny, and at least some listings may not, as the following analysis of *Morrison*'s four factors reveals.

Morrison's first factor requires courts reviewing a facial challenge to a final rule listing a species as threatened or endangered to determine whether the final rule concerns commerce or economic activity. The relevant inquiry is whether the listed species has a substantial relationship to interstate commerce, not whether, for instance, land development affecting that species has such a

relationship.¹⁵⁴ For the most part, federal protection of listed species cannot be said to concern commerce.

The second factor requires courts to consider whether the link between the subject of the federal regulation and interstate commerce is direct or attenuated. The fourth principle, articulated above, comes into play here and demands that the “biodiversity,” “genetic heritage” and “interconnected web” theories be rejected. These arguments are far too attenuated and speculative to provide a constitutional basis for any court to conclude that a listing decision has a “direct” link to interstate commerce.¹⁵⁵ Such an absolutely speculative connection to commerce is precisely the sort of inferential leap prohibited by *Lopez* and *Morrison*.¹⁵⁶ In fact, FWS’ “genetic heritage” and “interconnected web” theories are strikingly similar to the “costs of crime” and “national productivity” theories rejected by the Court in *Lopez* and the “but-for” gender-motivated violent crime argument rejected in *Morrison*.¹⁵⁷ And, as the Court observed in *Lopez*, “[I]f we were to accept [such] arguments . . . we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”¹⁵⁸

Nor can the prohibition on taking one listed species be aggregated with takes of all other listed species in an attempt to fabricate a direct connection to commerce. Judge Edith Jones, in her dissent from rehearing en banc in *GDF Realty*, made a similar observation concerning the cave bugs at issue in that case:

[T]he panel is unable to refute the attenuation concern of *Lopez* and *Morrison* because its analysis rests on the false implication that all takes of all species necessarily relate to an ecosystem, which by its very grandiosity must at some point be “economic” in actuality or in effect. This is precisely the reasoning rejected by the Supreme Court. . . . The Commerce Clause does not regulate crime [*Lopez*], sexual inequity [*Morrison*], or ecosystems as such—it regulates commerce.¹⁵⁹

For many listing decisions, the link between the species at issue and interstate commerce is nonexistent.

The third factor set forth in *Morrison* requires courts to consider whether the federal regulation at issue includes an express jurisdictional element that can serve to “limit its reach to a discrete set” of activities that substantially affect interstate commerce.¹⁶⁰ Other federal environmental statutes enacted in the 1970s included jurisdictional hooks of one kind or another. The National Environmental Policy Act, for example, only applies to “major Federal actions significantly affecting the quality of the human environment.”¹⁶¹ Likewise, jurisdiction under the Clean Water Act is limited to regulating discharges of pollutants into “navigable waters,” i.e., the “waters of the United States.”¹⁶² The ESA has no such “hooks.” In turn, listing decisions never include an express jurisdictional element, and as a result, the regulatory restrictions imposed on individuals engaging in activities in the vicinity of the listed species apply regardless of whether

there is any interstate or commercial nexus.¹⁶³ This factor should weigh heavily in favor of striking down final rules listing intrastate, noncommercial species, since those listing decisions cannot be limited in application to constitutional uses of federal power.¹⁶⁴

Finally, the fourth factor set forth in *Morrison* requires courts to consider whether the regulation possesses any specific jurisdictional findings regarding the listed species’ effect on interstate commerce. The ESA lacks findings of this nature.¹⁶⁵ Such findings are also generally non-existent in final rules listing new species. In fact, FWS often goes to great lengths to explain how federal protection of a particular species will *not* impact commercial activities in order to alleviate concerns among the regulated community of significant economic impacts related to the listing decision.¹⁶⁶

CONCLUSION

With each new listing decision, the reach of federal control over land use, water resources, and other activities continues to expand. At least some listing decisions, especially those concerning intrastate, noncommercial species, lack the “substantial” relationship to interstate commerce required by the Supreme Court’s decisions in *Lopez* and *Morrison*. Vacating listing decisions without this requisite nexus would not (as some fear) wreak havoc on imperiled species. State laws already protect many, if not most, of these species. In addition, Congress has other constitutional means available.¹⁶⁷ In other words, faithfully applying the principles of federalism in the ESA context will not be a death knell for intrastate, noncommercial species. Instead, it would preserve an endangered species of a different sort: the Constitutional principle that the “powers delegated by the . . . Constitution to the federal government are few and defined.”¹⁶⁸

FOOTNOTES

¹ See generally Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson & National Land-Use Legislation*, 28 URBAN LAWYER 7, 8 (1996).

² One of the more prominent proposals, the National Land Use Policy Act, was adopted overwhelmingly by the U.S. Senate and supported by the “Environmental President,” Richard Nixon, but the bill (and others like it) ultimately died in the House of Representatives. *Id.*

³ 16 U.S.C. § 1531 *et seq.*

⁴ We are not the first to refer to the ESA in this manner. See Congressman Bill Thomas, *What is the Most Compelling Environmental Issue Facing the World on the Brink of the Twenty-First Century?*, 8 FORDHAM ENVTL. L.J. 171, 174-75 (1996).

⁵ The Senate and the House passed the ESA 92-0 and 355-4. See John C. Nagle & J.B. Ruhl, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 118-19 (2002).

⁶ See Environmental Defense, *The Endangered Species Act: Facts vs. Myths*, available at <http://www.environmentaldefense.org/article.cfm?contentid=1158> (last visited Aug. 31, 2006). In fact,

during the first ten years of the ESA, relatively few species were added to the list. By 1982, the list still only included 224 species. See FWS, Number of U.S. Listed Species Per Calendar Year, available at http://endangered.fws.gov/stats/cy_count2002.pdf#search=%22FWS%20listed%20species%20per%20calendar%20year%22 (last visited Aug. 31, 2006).

⁷ See U.S. Fish & Wildlife Service, Listings by State, available at http://ecos.fws.gov/tess_public/StateListing.do?state=all (last visited Aug. 28, 2006).

⁸ U.S. CONST. art. I, § 8, cl. 3, 18.

⁹ 130 F.3d 1041 (D.C. Cir. 1997).

¹⁰ 323 F.3d 1062 (D.C. Cir. 2003).

¹¹ 214 F.3d 483 (4th Cir. 2000).

¹² 326 F.3d 622 (5th Cir. 2003).

¹³ See GDF Realty Investments, Ltd. v. Norton, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing *en banc*, and joined by Circuit Judges Jolly, Smith, DeMoss, Clement, and Pickering); Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of rehearing *en banc*); *id.* at 1160 (Roberts, J., dissenting from denial of rehearing *en banc*); *Gibbs*, 214 F.3d at 506 (Luttig, J., dissenting); *NAHB*, 130 F.3d at 1060 (Sentelle, J., dissenting).

¹⁴ See, e.g., Building Indus. Ass'n of Superior Cal. v. Babbitt, 979 F. Supp. 893 (D.D.C. 1997) (overruling facial Commerce Clause challenge to listing of fairy shrimp as endangered); *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985, 994-95 (D. Haw. 1979) (holding that the listing the Palila bird did not exceed Congress' Commerce Clause power).

¹⁵ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

¹⁶ 16 U.S.C. § 1531(b).

¹⁷ *Id.* § 1533.

¹⁸ *Id.* §§ 1533(b)(1), (4), (5) & (6).

¹⁹ *Id.* § 1533(a)(3)(A).

²⁰ *Id.* § 1532(6).

²¹ *Id.* § 1532(20).

²² *Id.* § 1533(a)(1).

²³ *Id.*

²⁴ *Id.* § 1538(a)(1).

²⁵ *Id.* § 1532(18).

²⁶ 50 C.F.R. § 17.3.

²⁷ *Id.*

²⁸ 16 U.S.C. § 1540(a) & (b).

²⁹ *Id.* § 1536(a)(2).

³⁰ See *Hill*, 437 U.S. at 172-73.

³¹ 16 U.S.C. § 1536(b)(3)(A).

³² *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (internal citation omitted).

³³ See *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 386-87 (1978); see also Susan George, William J. Snape, III & Michael Senatore, *State Endangered Species Acts: Past, Present and*

Future, Defenders of Wildlife, available at <http://www.defenders.org/pubs/sesa01.html> (Feb. 1998) [*hereinafter* George & Snape].

³⁴ George & Snape at § 1.

³⁵ *Id.* § 3 Part 1.

³⁶ *Id.* § App. A. Florida, for instance, has a comprehensive regulatory program protecting 118 species considered by that state to be imperiled. See Florida Fish & Wildlife Conservation Comm'n, Florida's Imperiled Species, available at <http://myfwc.com/imperiledspecies/> (last visited Aug. 29, 2006).

³⁷ *Id.* § 3 Part 1. For example, as of 1998, New Mexico had a comprehensive regulatory program protecting almost 100 species under the state ESA that are not listed under the federal ESA. *Id.*

³⁸ 22 U.S. (9 Wheat.) 1 (1824).

³⁹ See THE HERITAGE GUIDE TO THE U.S. CONSTITUTION at 102 (Edwin Meese ed., 2005).

⁴⁰ See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (holding that the Sherman Act did not reach a sugar monopoly because the Constitution did not allow Congress to regulate manufacturing); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating the Federal Child Labor Act of 1916 as having only an indirect effect on commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (invalidating a portion of the Bituminous Coal Conservation Act that forced collective bargaining of labor because it did not have a direct effect on interstate commerce).

⁴¹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (striking down federal regulations that fixed the hours and wages of employees of an intrastate business because the activities being regulated only indirectly affected interstate commerce).

⁴² *Id.* at 548.

⁴³ See e.g., *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935) (holding 5-4 that the Railroad Retirement Act of 1934 exceeded federal commerce power).

⁴⁴ See e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴⁵ 301 U.S. at 36.

⁴⁶ See *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342, 355 (1914) (holding that the Interstate Commerce Commission could set rates for train routes from Dallas to Marshall, Texas even though the route was in one state).

⁴⁷ 312 U.S. 100 (1941).

⁴⁸ *Id.*

⁴⁹ 317 U.S. 111 (1942).

⁵⁰ See *id.* at 124-26 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . .").

⁵¹ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255-58 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 298-305 (1964).

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

⁵³ 514 U.S. 548 (1995)

⁵⁴ *Id.* at 551.

⁵⁵ 529 U.S. 598 (2000).

⁵⁶ 531 U.S. 159, 174 (2001).

⁵⁷ *Lopez*, 514 U.S. at 551.

⁵⁸ *See id.* at 558-59.

⁵⁹ *Id.* (citations omitted).

⁶⁰ *Id.* at 559-68.

⁶¹ *Id.* at 552.

⁶² *Id.* at 561.

⁶³ *Id.* at 560.

⁶⁴ *Id.*

⁶⁵ *Id.* at 563.

⁶⁶ *Id.*

⁶⁷ *Id.* (finding that one had to “pile inference upon inference” to get from handgun possession to substantial effects upon interstate commerce).

⁶⁸ 529 U.S. 598 (2000).

⁶⁹ *Id.* at 617.

⁷⁰ *Id.* at 610-12.

⁷¹ *Id.* at 613.

⁷² *Id.* at 615-16.

⁷³ 531 U.S. 159, 174 (2001).

⁷⁴ *Id.* at 173.

⁷⁵ *Id.* at 173-74.

⁷⁶ *See* Mank, Bradford C., *Can Congress Regulated Intrastate Endangered Species Under the Commerce Clause?*, 69 BROOKLYN L. REV. 924 (2003-04).

⁷⁷ 125 S. Ct. 2195 (2005).

⁷⁸ *Id.* at 2205 (citing *Perez v. United States*, 402 U.S. 146 (1971)).

⁷⁹ *Id.* at 2206.

⁸⁰ *Id.*

⁸¹ In *United States v. Maxwell*, the Eleventh Circuit upheld a provision of the Child Pornography Prevention Act of 1996, which prohibited the knowing possession of child pornography. The Eleventh Circuit found “very little to distinguish Maxwell’s claim from Raich’s.” 446 F.3d 1210, 1216-17 (11th Cir. 2006). As recognized by that court, like marijuana, child pornography has become part of “[a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale.” *Id.* at 1217 (quoting legislative history). As the Fourth Circuit found in *United States v. Forrest*, which was relied upon by the Eleventh Circuit in *Maxwell*, child pornography is essentially a “fungible commodity.” 429 F.3d 73, 78 (4th Cir. 2005).

⁸² 130 F.3d 1041 (D.C. Cir. 1997).

⁸³ *Id.* at 1046 (quoting *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 256 (1964)).

⁸⁴ *Id.* at 1047.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1048.

⁸⁷ *Id.* (internal quotations omitted).

⁸⁸ *Id.* at 1053.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1054.

⁹¹ 452 U.S. 264 (1981).

⁹² *NAHB*, 130 F.3d at 1058.

⁹³ *Id.*

⁹⁴ *Id.* at 1059.

⁹⁵ *Id.* at 1061.

⁹⁶ *Id.* at 1063.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1064.

⁹⁹ *Id.* at 1067 (“Nowhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because the regulation itself can be crafted in such a fashion as to have such an effect.”).

¹⁰⁰ 323 F.3d 1062 (D.C. Cir. 2003).

¹⁰¹ *Id.* at 1072.

¹⁰² *Id.* at 1077.

¹⁰³ 334 F.3d 1158 (D.C. Cir. 2003).

¹⁰⁴ *Id.* at 1160.

¹⁰⁵ 214 F.3d 483 (4th Cir. 2000).

¹⁰⁶ *Id.* at 492.

¹⁰⁷ *Gibbs*, 214 F.3d at 494.

¹⁰⁸ *See id.* at 497-98.

¹⁰⁹ *See* *Brzonkala v. Virginia Polytechnic & State Univ.*, 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom*, *United States v. Morrison*, 529 U.S. 598 (2000).

¹¹⁰ *Id.* at 507.

¹¹¹ *Id.* at 507.

¹¹² 326 F.3d 622 (5th Cir. 2003).

¹¹³ *Id.* at 624.

¹¹⁴ *Id.* at 634.

¹¹⁵ *Id.* at 633.

¹¹⁶ *Id.* at 640.

¹¹⁷ 362 F.3d at 286 (5th Cir. 2004).

¹¹⁸ *Id.* at 287.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 293.

¹²¹ *See Raich*, 125 S. Ct. at 2206 (“Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a *fungible commodity* for which there is an established, albeit illegal, interstate market.” (emphasis added)).

¹²² *See Reno v. Flores*, 507 U.S. 292, 301 (1993).

¹²³ 125 S. Ct. at 2211 n. 36. The Bald Eagle Protection Act, 16 U.S.C. § 668(a), is directed at eliminating the existing interstate trade in bald eagle parts. *See United States v. Lundquist*, 932 F. Supp.

1237, 1244-45 (D. Or. 1996).

¹²⁴ See, e.g., *Reno*, 507 U.S. at 300 (involving facial challenge to INS regulations).

¹²⁵ See *supra* note 14.

¹²⁶ See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993). The Fifth Circuit's *Lopez* opinion makes it clear that the defendant had, in fact, brought a gun to school to sell it. "Lopez stated that 'Gilbert' had given him the gun so that he (Lopez) could deliver it after school to 'Jason,' who planned to use it in a 'gang war.' *Lopez was to receive \$40 for his services.*" *Id.* at 1345 (emphasis added). The Supreme Court did not even recognize this fact as relevant to its analysis.

¹²⁷ *Lopez*, 514 U.S. at 567.

¹²⁸ See *id.* at 557.

¹²⁹ *Id.* at 552.

¹³⁰ *Gibbons*, 22 U.S. at 195.

¹³¹ *SWANCC*, 531 U.S. at 174.

¹³² See *Lopez*, 514 U.S. at 567 (focusing on the subject of the GFSZA—i.e., the "possession of a gun in a local school zone").

¹³³ See *GDF Realty*, 326 F.3d at 634-35.

¹³⁴ See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 411 (2004).

¹³⁵ *Id.*

¹³⁶ See *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

¹³⁷ See *Morrison*, 529 U.S. at 610.

¹³⁸ See *id.*

¹³⁹ See *Lopez*, 514 U.S. at 560.

¹⁴⁰ See *id.* at 561.

¹⁴¹ See *Raich*, 125 S. Ct. at 2206-07.

¹⁴² See *Lopez*, 514 U.S. at 560.

¹⁴³ *Id.* at 559.

¹⁴⁴ Some have interpreted *Raich* as establishing a "broader scheme doctrine" where Congress is able to regulate noncommercial activity so long as it is part of a broad regulatory scheme. See Alex Kreit, *Rights, Rules, and Raich*, 108 W. VA. L. REV. 705, 720-21 (2006). That cannot be so as it would allow Congress to regulate virtually any activity so long as the statutory program was drafted broadly enough to encompass at least some commercial activities. This would also require one to believe that the Supreme Court overruled *Lopez* and *Morrison sub silentio*.

¹⁴⁵ See *Raich*, 125 S. Ct. at 2211 n. 36.

¹⁴⁶ 514 U.S. at 563-65.

¹⁴⁷ *Id.*

¹⁴⁸ 529 U.S. at 615-16.

¹⁴⁹ *Lopez*, 514 U.S. at 567.

¹⁵⁰ *Morrison*, 529 U.S. at 609 (emphasis added); see also *Jones v. United States*, 529 U.S. 848, 859 (2000) (interpreting a federal arson statute to cover "only property currently used in commerce," where a contrary interpretation would have raised serious constitutional problems under *Lopez* (emphasis added)).

¹⁵¹ See *Morrison*, 529 U.S. at 609; see also *United States v. Lopez*, 514 U.S. at 558; *Gibbs*, 214 F.3d at 491; *United States v. Rybar*, 103 F.3d 273, 288-89 (3d Cir. 1996) (Alito, J., dissenting) (explaining that *Lopez*'s first category simply "concerns Congress's power to regulate, for economic or social purposes, the passage in interstate commerce of either people or goods."). See also Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 755 (2005) ("The first two categories are rather unambiguous. If an item is used or sold in interstate commerce, it may be regulated, as may the channels through which such items flow.")

¹⁵² See *Lopez*, 514 U.S. at 558; *Gibbs*, 214 F.3d at 491; *Rybar*, 103 F.3d at 290 (Alito, J., dissenting).

¹⁵³ While Judge Wald concluded in *NAHB*, 130 F.3d at 1046, that such regulation fit within *Lopez*'s first category, that conclusion was rejected by Judge Henderson in her concurrence, *id.* at 1057-58, and Judge Sentelle in his dissent, *id.* at 1062-63, and thus, it was not adopted by that circuit.

¹⁵⁴ See *Morrison*, 529 U.S. at 613.

¹⁵⁵ See *NAHB*, 130 F.3d at 1064 (Sentelle, J., dissenting).

¹⁵⁶ See *Lopez*, 514 U.S. at 564-66; *Morrison*, 529 U.S. at 615-15.

¹⁵⁷ See *Lopez*, 514 U.S. at 563-66; *Morrison*, 529 U.S. at 615-16.

¹⁵⁸ *Lopez*, 514 U.S. at 564.

¹⁵⁹ *GDF Realty*, 362 F.3d at 293 (Jones, J., dissenting from denial of petition for rehearing *en banc*).

¹⁶⁰ *Morrison*, 529 U.S. at 612.

¹⁶¹ See 42 U.S.C. § 4332.

¹⁶² See 33 U.S.C. § 1342.

¹⁶³ See *NAHB*, 130 F.3d at 1064-65 (Sentelle, J., dissenting).

¹⁶⁴ See *Gibbs*, 214 F.3d at 508 (Luttig, J., dissenting).

¹⁶⁵ See Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L. Q. 215, 253 (2000) (concluding that Congress should amend the ESA to include findings regarding the relationship between endangered species and commerce). Congressional findings concerning the "incalculable value" of the "genetic heritage" of endangered species and similar theories lack any rational basis in law or fact, and should be afforded little or no deference by the courts. See *Lopez*, 514 U.S. at 557 n.2; *Morrison*, 529 U.S. at 614.

¹⁶⁶ See, e.g., 65 Fed. Reg. 26,438, 26,460 (2000) (FWS asserting that the listing of the Alabama sturgeon would not impact commercial navigation, ports or marinas, bridge or road construction, and other types of commercial activities).

¹⁶⁷ The "spending power," for example, which empowers the federal government to support federal, state, local, and private conservation programs aimed at protecting and restoring these species. See U.S. CONST. art. I, § 8. See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 437-46 (2004) (discussing constitutional limitations on the Spending Power and its impact on federal environmental laws).

¹⁶⁸ *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST No. 45 (1788)).