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Outgrowing the Commerce Clause: Finding Endangered Species a Home in the Constitutional Framework

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COMMENT

OUTGROWING THE COMMERCE CLAUSE:

FINDING ENDANGERED SPECIES A HOME IN THE CONSTITUTIONAL FRAMEWORK

> The one process now going on that will take millions of years to correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us.
>
> E.O. Wilson[1]

INTRODUCTION

The impacts of species extinction are immense and irreversible. Species that were once found throughout the nation in abundant populations find themselves fighting for survival. They are contained in small populations in even smaller geographical ranges, often located wholly within the borders of one state.[2] About half of the species included on the federal endangered species list are "intrastate" species,

[1] EDWARD WILSON, BIOPHILIA, 121 (1984).

[2] *See* Nat'l Ass'n of Home Builders v. Babbit, 130 F.3d 1041, 1052 (D.C. Cir. 1997) ("NAHB") (Approximately 521 of the 1082 species in the United States currently designated as threatened or endangered are found in only one state).

experiencing all stages of their life cycle within a single state.[3] While protections for these species exist within the Endangered Species Act ("ESA"), recent events indicate the protections for intrastate species might be weakened, or completely eliminated in the near future.[4]

In 1973, Congress passed the ESA[5] under the Commerce Clause.[6] Although the Supreme Court has not reviewed the constitutionality of the ESA,[7] some believe that it is in danger of future attacks.[8] Precedent set within the last decade limits the scope of the Commerce Clause.[9] Additionally, several circuit courts agree about the strong constitutional status of the ESA, but remain divided in their reasoning.[10] This fractured jurisprudence remains a problem, creating instability for the ESA if the constitutionality of the ESA ever reaches the Supreme Court, where the new additions of Justices Roberts and Alito are certain to impact the Court's analysis.[11] Whereas some ESA proponents believe that the Supreme Court's recent expansion of Commerce Clause authority over the regulation of intrastate goods will impact the ESA's application positively,[12] this Comment proposes that judicial activism will ultimately determine the outcome of the ESA controversy.[13]

This Comment examines the controversial relationship between the ESA and the Commerce Clause. Part I provides an overview of the

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[3] *Id.*

[4] *See infra* notes 193-213 and accompanying text.

[5] 16 U.S.C. §§1531-1544 (1973).

[6] U.S. CONST. art. I, §8, cl. 3 (the "Commerce Clause").

[7] The Commerce Clause jurisprudence is a mix of both facial challenges and "as applied" challenges to the regulation of certain activities under the ESA. While this is an important distinction in the law, the scope of this article only examines an "as applied" challenge to the ESA's constitutionality, whereby if found against the Act, would only be found unconstitutional as applied to the challenger's activity and not facially invalidated as a body of law.

[8] *See* Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause? The Split in the Circuits over Whether the Regulated Activity is Private Commercial Development or the Taking of Protected Species*, 69 BROOK. L. REV. 923, 924-25 (2004); *see also* Michael C. Blumm and George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 326-327 (2004); *see also* David W. Scopp, *Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court's Web of Confusion Traps More Than the Fly*, 39 U.S.F. L. REV. 789, 789 (2005); *see also* Jud Matthews, *Turning the Endangered Species Act Inside Out?*, 113 YALE L.J. 947, 954 (2004).

[9] U.S. v. Lopez, 514 U.S. 549, 565 (1995) (holding that the possession of a gun in a school zone is not economic activity and does not substantially affect interstate commerce); U.S. v. Morrison, 529 U.S. 598, 610 (2000) (interpreting the "noneconomic, criminal nature of the conduct" to be central to the holding in Lopez").

[10] Matthews, *supra* note 8.

[11] *See infra* notes 202-213 and accompanying text.

[12] Blumm, *supra* note 8, at 493.

[13] *See infra* notes 193-201 and accompanying text.

Commerce Clause and the ESA.[14] Part II reviews the evolution of the Commerce Clause and examines, in its current form, the Constitution's capacity to support the ESA.[15] Part III examines the likelihood of Supreme Court review of the ESA due to conflicting circuit court opinions and recent changes in the Supreme Court composition.[16] Part IV identifies several factors that endanger the ESA at the Supreme Court level.[17] The Comment concludes that, despite several seemingly favorable factors, the Commerce Clause framework is still inadequate to support the ESA, which remains in danger of a constitutional attack at the Supreme Court level. Though our current constitutional framework leaves the ESA vulnerable to attack, the ESA should not suffer as a result of our court system's shortcomings. Therefore, Part V proposes solutions to this inadequacy, including a shared responsibility between state and federal entities, several legislative remedies, and a recommendation for the Supreme Court to adopt the Fifth Circuit's rationale.[18] Within these solutions, the Comment ultimately favors the comprehensive scheme rationale as applied to the ESA. Though not perfect in all respects, it is the solution that would allow for the broadest protection for all endangered species, and is therefore the most desirable among those in the environmental community.

I. BACKGROUND

A. THE COMMERCE CLAUSE

In its simplest application, the Commerce Clause authorizes Congress to make laws regulating interstate commerce.[19] Environmental laws were originally passed under the Commerce Clause because the environment was viewed primarily as a commodity to be regulated.[20] More recent environmental laws like the ESA protect species even

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[14] *See infra* notes 19-99 and accompanying text.

[15] *See infra* notes 101-179 and accompanying text.

[16] *See infra* notes 180-189 and accompanying text.

[17] *See infra* notes 190-213 and accompanying text.

[18] *See infra* notes 214-283 and accompanying text.

[19] U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to regulate "[c]ommerce . . . among the several States").

[20] *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*. 90 IOWA L. REV. 377, 404 (2005) (stating that, ". . . when the various environmental statutes were adopted, the underlying assumption was that the Commerce Clause 'grants virtually carte blanche authority to Congress to legislate for environmental protection'").

though they lack significant commercial value.[21] Though views of the environment have changed, the Commerce Clause remains the primary avenue to pass laws both to exploit and preserve the environment.

The Supreme Court decisions that define the scope of the Commerce Clause represent three distinct eras.[22] Over time, the composition of the Supreme Court has affected the scope of the Commerce Clause, first expanding it, then constricting it, then expanding it again. This pattern of giving and taking power away from Congress is the product of changing times and changing Courts. Throughout these changes, the line of jurisprudence remains intact, the Court rarely overruling precedent. Therefore the current analytical framework that the Roberts Court is faced with constitutes both a compromise of authority and a contradiction of opinions.

A 1941 Supreme Court case involving a farmer's intrastate production of wheat, *Wickard v. Filburn,*[23] represents the high-water mark in Commerce Clause jurisprudence. The Supreme Court determined that in deciding whether an activity substantially affected interstate commerce, intrastate economic activity could be viewed in the aggregate.[24] This is known as *Wickard's* "aggregate effects test" whereby the judiciary can analyze the cumulative effects of otherwise de minimus economic activities to ascertain whether, when aggregated, these activities exert a substantial effect on interstate commerce.[25] Those who wish to expand the Commerce Clause's power to regulate certain activity rely heavily on *Wickard.*[26]

Two other cases narrow the scope of the Commerce Clause by developing a three-prong analysis that centers on an activity's connection to interstate commerce.[27] In addressing the constitutionality of the Gun Free School Zones Act,[28] the Supreme Court in *U.S. v. Lopez* identified three broad categories of activity that Congress may regulate under its commerce power.[29] Congress can regulate the use of channels of

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[21] Mank, *supra* note 8, at 924-925.

[22] The historical eras of Commerce Clause jurisprudence are often represented chronologically: cases before 1937, cases from 1937-1995, and cases after 1995. These eras coincide with landmark Supreme Court cases. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES. 238-268 (2d ed. 2002).

[23] Wickard v. Filburn, 317 U.S. 111, 114-115 (1942).

[24] *Id.* at 127-128.

[25] *Id.*; Mank, *supra* note 8, at 946.

[26] Gonzales v. Raich, 125 S.Ct. 2195, 2206 (2005) ("Our decision in *Wickard* is of particular relevance").

[27] *Lopez,* 514 U.S. at 559

[28] 18 U.S.C. § 922(q) (1990) (Gun Free School Zones Act of 1990).

[29] *Lopez* 514 U.S. at 558-559.

interstate commerce; Congress can regulate and protect the instrumentalities of commerce; and Congress can regulate those activities having a substantial relation to interstate commerce.[30] *Lopez* interpreted this last power to include those activities that substantially affect interstate commerce.[31] Later in *U.S. v. Morrison*, the Court addressed a facial attack on the Violence Against Women Act[32] that provided a civil remedy for victims of gender motivated crimes.[33] In both cases, the Supreme Court held that the challenged laws dealt with non-economic activities that should be regulated by the states, as they traditionally have been.[34]

In 2005, the Supreme Court decided a case based largely on *Wickard's* large grant of power.[35] *Gonzales v. Raich* made a bold return to *Wickard's* principles by aggregating the effects of home-grown, intrastate medical marijuana for the purpose of proving a substantial effect on interstate commerce.[36] In applying *Wickard* to *Raich*, the Court concluded that there were striking factual similarities between the two.[37] The Supreme Court determined that, as in *Wickard*, "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[38] As the Supreme Court held in *Wickard,* the *Raich* Court found that the aggregate effect of not regulating intrastate marijuana would have a substantial effect on interstate commerce by rendering the comprehensive scheme of the Controlled Substances Act[39] ("CSA") ineffective.[40] In describing the applicability of the comprehensive scheme rationale to the CSA, the majority concluded that the CSA is an economic regulatory scheme, and regulating intrastate marijuana is an essential part of that scheme.[41]

Raich applied the economic requirement, using *Lopez* and *Morrison* as guidelines, but eventually distinguished those cases from the CSA on the basis of what constituted "economic activity."[42] The Supreme Court

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[30] *Id.*

[31] *Id.*

[32] 42 U.S.C. § 13981 (Violence Against Women Act); *Morrison,* 529 U.S. at 598.

[33] *Id.* at 602.

[34] *Id.* at 615-616; *Lopez*, 514 U.S. at 560.

[35] *Raich*, 125 S.Ct. at 2209.

[36] *Id.* at 2209, 2211 (using *Wickard's* aggregation principles in addition to using *Lopez* and *Morrison's* narrow definition of "economic").

[37] *Id.* at 2206-2207.

[38] *Id.*

[39] 21 U.S.C. § 841, et. seq. (Controlled Substances Act).

[40] *Raich*, 125 S.Ct. at 2209, 2215.

[41] *Id.* at 2208-2209.

[42] *Id.* at 2211.

in *Raich* cautioned that *Lopez* and *Morrison* cannot be read too broadly.[43] Many argue it is in this way that *Lopez* and *Morrison* left the Commerce Clause blurred in distinctions based on undefined terms and ambiguous language.[44]

The ambiguous Commerce Clause framework of *Lopez* and *Morrison* has plagued intrastate wetland protection as well. Until 2001, intrastate wetlands protections were strong; then, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC") signaled a changing trend in intrastate protections and may signal what could be the beginning of the Supreme Court's movement towards limiting the protections of environmental laws.[46] Since there are many parallels between intrastate wetlands and intrastate species protections, many view the Supreme Court decision to strip intrastate wetlands from federal protection as a relevant indicator of the future of the ESA.[47] The *SWANCC* Court did not extend Clean Water Act jurisdiction to wetlands that did not have a hydrological connection and were not adjacent to a navigable waterway.[48] Writing for the majority, Chief Justice Rehnquist stated in dicta that because migratory birds utilize isolated wetlands, this does not bring those wetlands into the realm of affecting interstate commerce.[49]

Recently, the Supreme Court granted certiorari on three cases involving intrastate wetlands.[50] *U.S. v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers* involve statutory jurisdiction issues similar to *SWANCC*, and when decided, will be relevant indicators of how the ESA might be treated in the Supreme Court.[51] In both cases, landowners sought to discharge fill material into intrastate wetlands and challenged the Corps' statutory authority to regulate those parcels under the Clean

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[43] *Id.* at 2209.

[44] *See* Blumm, *supra* note 8, at 493.

[45] *See* Mank, *supra* note 8, at 958-959 (stating that the dicta in *SWANCC* mirrors the federalism concerns expressed in *Lopez* and *Morrison*).

[46] Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

[47] *See* Mank, *supra* note 8, at 958-959 (stating that the dicta in *SWANCC* mirrors the federalism concerns expressed in *Lopez* and *Morrison*).

[48] *SWANCC*, 531 U.S. at 174.

[49] *Id.* at 173.

[50] Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 414 (Oct. 11, 2005) (No. 04-1384); United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 126 S.Ct. 414 (Oct. 11, 2005) (No. 04-1034); S.D. Warren County v. Bd. of Envtl. Prot., 868 A. 2d 210 (2005), *cert. granted*, 126 S.Ct. 414 (2005) (No. 04-1527).

[51] *Rapanos*, 376 F.3d at 634-635; *Carabell*, 391 F.3d at 707; *S.D. Warren County v. Bd. of Envtl. Prot.*, 868 A.2d at 214-217 (involving a Clean Water Act Section 401 state certification, not a jurisdictional case).

Water Act ("CWA").[52] The U.S. Courts of Appeals for the Sixth Circuit, in each case, affirmed the lower court's decisions, applying *SWANCC* in favor of the government.[53] Appeals to both were granted certiorari on October 11, 2005.[54] The outcome of those cases could either reaffirm *SWANCC*'s application of the Commerce Clause to intrastate entities, or it could pave a new direction in intrastate wetlands protection, further threatening the ESA.

B. THE ENDANGERED SPECIES ACT

The ESA is arguably the most aggressive environmental law of its time.[55] Critics of the ESA focus on the statute's expansive nature and unsympathetic view towards property owners and developers.[56] For example, in *Tennessee Valley Authority v. Hill*, ("TVA"), a large dam project was halted after it was 70-80% complete because of the existence of the small, endangered fish, the snail darter.[57] The district court found that "some $53 million would be lost in non-recoverable obligations."[58] Despite the cost, the Court refused to put a price tag on the existence of the snail darter, or on any other endangered species, no matter how important or unimportant it may appear to be.

The powerful nature of the ESA has also made it an appropriate target for recent attempts to weaken its provisions.[59] In September of 2005, Congressman Richard Pombo of California introduced a bill in the House of Representatives that would substantially weaken the ESA's critical habitat provision, and offer a generous compensation scheme to land owners who find themselves "victims" of the ESA.[60] So while the ESA remains a powerful protection, one might wonder if changing times

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[52] *Rapanos*, 376 F.3d at 632-633, 635-644; *Carabell*, 391 F.3d at 705-708.

[53] *Rapanos*, 376 F.3d at 648; *Carabell*, 391 F.3d at 710.

[54] *See supra* note 50.

[55] *See e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) ("T.V.A.") (halting a dam construction project to preserve the habitat of the snail darter, a small fish).

[56] *See* John T. Winemiller, *The Endangered Species Act and the Imprecise Scope of the Substantial Effects Analysis*, 18 TUL. ENVTL. L.J. 159, 198 (2004).

[57] *TVA*, 437 U.S. at 195.

[58] *Id.* at 166.

[59] "Threatened and Endangered Species Recovery Act of 2005", H.R. 3824, 109th Cong. (2005).

[60] *Id.*; *See generally* Michael E. Kraft, *Environmental Policy in Congress: From Consensus to Gridlock*, ENVIRONMENTAL POLICY 4th ed. 136 (Norman J. Vig & Michael E. Kraft eds., Congressional Quarterly 2000). (In 1995, California Rep. Pombo and Alaska Rep. Young introduced a Bill that would have weakened the ESA's provisions by considering the special interests of property owners and the economic impacts that the ESA has on landowners and developers. The 104th Congress never approved a final bill.) *Id.*

are creating new opportunities for the Act's adversaries.

Most of the ESA litigation discussed in this Comment focuses on the constitutionality of Section 9, as applied to intrastate species.[61] Section 9 of the ESA protects critical habitats against modification or destruction by preventing the "taking" of a listed species.[62] Therefore, Section 9 of the ESA is often referred to as the "take" provision. To "take" a species, by statutory definition, is "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[63] Additionally, the majority of the ESA cases discussed in this Comment are circuit court cases.[64] While the Supreme Court has never decided the constitutionality of the "take provision" as applied to intrastate species, the ESA has withstood several constitutional challenges at the circuit court level.[65] Each circuit's analysis hinges on different rationales, which has resulted in splintered reasoning among the circuits.[66]

For example, in *National Association of Home Builders v. Babbit*[67] ("NAHB"), the D.C. Circuit held that Congress could regulate the taking of an intrastate species under the Commerce Clause based on four different rationales in the main opinion alone.[68] At the time, the Delhi Sands Flower-Loving Fly was located only in California, after urban development, trash dumping and off-road vehicle use eliminated over 97 percent of its historic habitat.[69] The proposed development project would have taken a portion of the fly's remaining habitat, contrary to the ESA's prohibitions.[70] The developer brought a constitutional challenge and the district court ultimately held that the application of the ESA's "take" provision to the fly was constitutional.[71]

The D.C. Circuit affirmed, focusing on the "substantial effects" prong of *Lopez*.[72] It found under *Wickard's* aggregation principle, the taking of the fly viewed in the aggregate of all other intrastate endangered species takes, would substantially affect interstate

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[61] 16 U.S.C. § 1538 (1973).

[62] *Id.*

[63] *Id.* at § 1532.

[64] *See infra* notes 67-99 and accompanying text.

[65] *Id.*

[66] *See* Adler, *supra* note 20, at 406; *see also* Blumm, *supra* note 8, at 327; *see also* Scopp, *supra* note 8, at 803-810; *see also* Winemiller, *supra* note 56, at 179-187.

[67] *NAHB*, 130 F.3d 1041.

[68] *Id.* at 1057.

[69] *Id.* at 1044.

[70] *Id.* at 1044-1045.

[71] *Id.* at 1045.

[72] *Id.* at 1049-1057.

commerce.[73] The court based this finding on the "option value" of biodiversity, i.e., that species might hold some undiscovered potential medicinal or scientific value.[74]

Three years later, a case emerged from the Fourth Circuit, the outcome of which was the same as *NAHB*, but was based on the direct economic nature of the species rather than a reliance on biodiversity.[75] *Gibbs v. Babbitt* ("Gibbs") involved the taking of the red wolf.[76] Like *NAHB*, the *Gibbs* court focused on *Lopez's* substantial-effects prong.[77] Since *Lopez* identifies this prong as requiring some sort of economic endeavor in order to be fulfilled,[78] the *Gibbs* court asked "whether the taking of red wolves on private land is in any sense of the phrase economic activity," and answered in the affirmative.[79]

According to *Gibbs*, the judiciary must take a broad view of economic activity or commerce.[80] *Gibbs* found that the taking of the wolves was economic for two main reasons. First, the protection of economic and commercial assets was the primary motivation for taking the wolves.[81] Second, a direct relationship exists between wolves and commerce: "[w]ith no red wolves, there would be no-red-wolf related tourism, no scientific research, and no commercial trade in pelts."[82] Wolves are "incubators for commerce in the same way that parks and public waters generate commercial activity related to their study and enjoyment."[83] The court produced statistics about red-wolf-related tourism, claiming that it is an industry projected to generate millions of dollars and "result in a significant regional economic impact."[84] After deeming the takings as sufficiently economic, the court then aggregated their effects and found that the takings substantially affected interstate commerce.[85]

The *Gibbs* court also briefly introduced the concept of a regulatory scheme, holding that the ESA is a comprehensive, economic regulatory

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[73] *Id.* at 1046-1047.

[74] *Id.* at 1052-1053.

[75] Gibbs v. Babbitt, 214 F.3d 483, 493-495 (4th Cir. 2000).

[76] *Id.* at 488.

[77] *Id.* at 491.

[78] *Lopez*, 514 U.S. at 559.

[79] *Gibbs*, 214 F.3d at 491.

[80] *Id.* at 490.

[81] *Id.* at 491.

[82] *Id.* at 492.

[83] *See* Winemiller, *supra* note 56, at 180.

[84] *Gibbs*, 214 F.3d at 493.

[85] *Id.* at 498.

scheme, and that the take provision is an essential part of it.[86] While not fully explored in *Gibbs*, this concept was central to the Fifth Circuit decision to follow.

Another circuit court opinion, *GDF Realty Inv. LTD v. Norton* ("GDF"), involving the projected taking of an endangered Cave Species Spider, but ultimately relied on the "comprehensive scheme rationale" to reaffirm the ESA as constitutional in intrastate species situations.[87] The court reasoned that the ESA's protections are economic in nature due to the incalculable value of genetic heritage.[88] In addition, the "ESA is truly national in scope," and comprehensive in nature.[89] But for the regulation of each individual take, the ESA's comprehensive scheme would be undercut and would "lead to piece-meal extinctions."[90]

GDF rejected the view that the "regulated activity" of the ESA should be defined as the action (in this case, it was commercial development) that caused the projected takes of the Cave Species.[91] Three months later, the D.C. Circuit turned its back on *GDF* and embraced that very view in *Rancho Viejo LLC v. Norton*, involving the taking of the intrastate Southwestern Arroyo Toad.[92] The D.C. Circuit did not attempt to give the toad economic characteristics. Instead, the court reasoned that in a Commerce Clause analysis of the ESA, the element that needs to be examined for economic characteristics is not the taking of the species or the species themselves, but the activity that is the cause of the takes.[93] The D.C. Circuit held that ESA regulates those "offending activities" that commit the takes, not the takes themselves.[94] Here, the activity that is causing the takes, development, is an economic activity and can therefore qualify under the "substantial effects" prong of *Lopez*.[95] The opinion is significant because it represents the first case in ESA jurisprudence which bases its entire decision on the rationale of redefining the target of the ESA's regulation as the offending activity.

The D.C. Circuit later denied Rancho Viejo's petition for rehearing en banc.[96] The two dissenting opinions from Justice Roberts and Justice

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[86] *Id.* at 497.

[87] GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622, 630 (5th Cir. 2003) ("GDF").

[88] *Id.* at 639; H.R. Rep. No. 93-412, at 4.

[89] *GDF*, 326 F.3d at 639.

[90] *Id.* at 640-641.

[91] *Id.* at 633-636.

[92] Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1064 (D.C. Cir. 2003).

[93] *Id.* at 1072.

[94] *Id.*

[95] *Id.* at 1070.

[96] Rancho Viejo v. Norton, 334 F.3d 1158 (2003) *reh'g denied.*

Sentelle reflect concerns that this case represents a divergence of the circuit courts from contemporary Supreme Court jurisprudence.[97] Justice Roberts stated in his dissent that only the regulations and laws themselves can satisfy the *Lopez* framework, not the offending activity.[98] He then commented that the "taking of a hapless toad that, for reasons of its own, lives its entire life in California. . . ."[99] Roberts's comment may indicate his judicial view against federal regulation for intrastate species, one that he may carry with him to his new position as Chief Justice.

II. APPLYING THE COMMERCE CLAUSE JURISPRUDENCE TO THE ESA

The ESA was passed through the Commerce Clause, which regulates interstate commerce and traditionally requires some connection to commerce in order to be valid.[101] Species protection is not categorically commercial in nature, which has raised concerns about the ESA's constitutionality.[102] Within the Commerce Clause, the focus on commercial activity provoked cases like *Lopez* and *Morrison* to rely heavily on the commercial/economic requirement in their decisions that the Commerce Clause did not apply to non-economic, intrastate activities.[103] Recently, *Raich* applied that precedent in support of federal regulation.[104] This Comment contends that *Lopez's* and *Morrison's* ambiguities contribute to a flawed Commerce Clause framework.[105] In addition, this Comment proposes that *Raich* actually misapplies precedent to effectuate an ends-oriented decision.[106]

A. THE FLAWED COMMERCE CLAUSE ANALYSIS OF *LOPEZ* AND *MORRISON*

While never formally overruled, the Supreme Court in *Lopez* pulled away from *Wickard's* large grant of power and limited Congress's

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[97] *Id.* (Sentelle & Roberts JJ., dissenting).

[98] *Id.* (Roberts, J., dissenting).

[99] *Id.*

[101] *See also* Winemiller, *supra* note 56, at 170-172 (discussing the different interpretations of what the Commerce Clause requires).

[102] Daniel J. Lowenberg, *The Texas Cave Bug and the California Arroyo Toad "Take" on the Constitution's Commerce Clause*, 36 ST. MARY'S L.J. 149, 160 (2004).

[103] *See* Scopp, *supra* note 8, at 799.

[104] *Raich*, 125 S.Ct. at 2205-2215.

[105] *See infra* notes 107-140 and accompanying text.

[106] *See infra* notes 141-165 and accompanying text.

authority under the Commerce Clause.[107] Many argue that *Lopez* and *Morrison* represent flawed legal analyses, not because they narrowed the scope of the Commerce Clause, but because they did so using ambiguous standards that are difficult to apply to future cases.[108] Through either the Supreme Court's inability or unwillingness to clarify the standards and requirements of the Commerce Clause analysis, the current Court is left with a flawed framework to decide future cases. This lack of guidance leaves the Commerce Clause vulnerable to dangerous interpretations that have the capacity to reach outside the scope of current precedent. The Court would then have the opportunity to either extend the Commerce Clause to situations past that of *Wickard* or decimate the power of the Commerce Clause altogether, as unintended by the *Lopez* progeny.

1. Flaw #1: The Amorphous Economic Standard

One problem with *Lopez* and its progeny is that the term, "economic," has not been consistently defined.[109] Often, cases use "economic" interchangeably with "commerce," which is not entirely accurate.[110] In *Lopez*, the Supreme Court does not define what is economic. They simply dismiss the certain activities as being non-economic.[111] Despite the fact that it is a pivotal determination in the Commerce Clause analysis,[112] what is "economic" remains an evolving, amorphous standard.[113] *Lopez's* and *Morrison's* economic requirement seems to preclude the Commerce Clause from applying to the ESA since the ESA protects intrastate subjects that have, arguably, little to no economic value.[114] Controversy remains, however, over whether the ESA's effects are economic, and whether these are adequate enough to affirm the ESA's constitutionality.[115] Since *Lopez* and *Morrison* provide

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[107] *Lopez*, 514 U.S. at 607 (Souter, J., dissenting).

[108] *See also* Scopp, *supra* note 8, at 810-814 (discussing the inadequacies of the *Lopez/Morrison* framework in application to the ESA).

[109] Scopp, *supra* note 8, at 811-812.

[110] *See Lopez*, 514 U.S. at 560 (using "commerce"); *See id.* at 565 (using "economic activity").

[111] *Id.* at 565.; *See* Scopp, supra note 8, at 811-812, nn.160 & 165.

[112] Scopp, *supra* note 8, at 810.

[113] *Id.*; Mank, *supra* note 8, at 928, n.30.

[114] Mank, *supra* note 8, at 924, nn.10 &11.

[115] *Gibbs*, 214 F.3d at 493-495 (relying on a rationale where red wolves provide for an industry); *GDF* 326 F.3d at 637, 640 (relying on a rationale that each individual take fits into a larger regulatory economic scheme of the ESA because the Cave Species spider does not provide such industries); *NAHB* 130 F.3d at 1052-1054 (relying on the potential value of endangered species as opposed to actual economic value); *See also* Mank, *supra* note 8, at 992, 996-997 (discussing the different rationales).

little guidance on the issue,[116] what the current Court will determine as "economic" is difficult to predict.

2. *Flaw #2: The Unstated Object of Regulation*

When analyzing the ESA in a Commerce Clause analysis, the ESA's object (or target) of regulation needs to be economic in order to have a substantial effect on interstate commerce under the *Lopez* test's third prong.[117] *Lopez* and *Morrison*, once again, provide little guidance on how to determine what the ESA's object of regulation is.[118]

Some circuit courts viewed the "offending activity" as the object of regulation, claiming that the ESA places restrictions on activities that would harm an endangered species.[119] Others claim that the ESA is regulating the taking of the species, regardless of the nature of the activity that is doing the taking.[120] Many speculate on what the ESA is truly regulating, and whether or not the object of that regulation is economic in nature.[121] While the ESA's constitutionality turns on this seemingly simple analysis,[122] there are several ways to apply it to the ESA based on existing jurisprudence. *Lopez, Morrison, Raich* and *Wickard* shed some light on what the Supreme Court considers the "regulated activity" to be, but do not directly answer these inquiries.[123]

In each case, the challenged statute regulated some intrastate activity which the Court then deemed to be economic or non-economic.[124] In *Lopez, Morrison, Wickard* and *Raich*, the regulated activities are fairly unambiguous. In *Lopez*, it was the possession of a handgun.[125] In *Morrison*, it was gender-motivated crime.[126] In *Wickard*, it was the marketing of wheat in excess of a quota.[127] And in *Raich*, it

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[116] Scopp, *supra* note 8, at 811.

[117] *Morrison*, 529 U.S. at 610; *See also* Scopp, *supra* note 8, at 810-811.

[118] Scopp, *supra* note 8, at 810.

[119] *Rancho Viejo*, F.3d at1072; *Gibbs*, 214 F.3d at 495.

[120] *Rancho Viejo*, 334 F.3d at 337.

[121] Mank, *supra* note 8, at 991-996; Matthews, *supra* note 8, at 947-948; Scopp, *supra* note 8, at 803-804; Winemiller, *supra* note 56, at 184-186.

[122] Scopp, *supra* note 8, at 810.

[123] Winemiller, *supra* note 56, at 171-175.

[124] *Lopez*, 514 U.S. at 560 (finding that the intrastate activity was non-economic); *Morrison*, 529 U.S. at 613 (finding that the intrastate activity was non-economic); *Raich*, 125 S.Ct. at 2211 (finding that the intrastate activity was economic); *Wickard*, 317 U.S. at 125 (stating that the homegrown wheat is not "commerce," but is intertwined in the economic activity of the wheat industry).

[125] *Lopez*, 514 U.S. at 560.

[126] *Morrison*, 529 U.S. at 613.

[127] *Wickard*, 317 U.S. at 124.

was the cultivation of medical marijuana.[128] While the ESA seems to regulate, or prohibit, the taking of listed species, the ESA also places controls on the activity that causes the "takes" of those species.

Deciding what the ESA is truly regulating is an essential step in the analysis because it determines what the Court analyzes for economic character[129] for the purpose of aggregating under *Wickard*.[130] If the "regulated activity" of the ESA is found to be the actual taking of the species, the Court might not aggregate the effects of those takes due to their non-economic nature, because pursuant to *Wickard*, only economic activity may be aggregated.[131] If the "regulated activity" of the ESA is the offending activity, the Court will look to this activity to deem whether it is economic in nature. Those who advocate the former view, that the "regulated activity" is the takes themselves, rely on the plain language of the ESA which clearly prohibits "taking" a listed species.[132] The statute does not prohibit development, grading earth in preparation of development, or anything else that might have commercial implications.[133] The statute plainly prohibits the "taking" of a listed species, whatever the motivation.[134] The language in *Rancho Viejo, Gibbs,* and *Wickard* promotes the latter view, that the "regulated activity" is the offending activity.[135] *Gibbs* discussed that since the reasons for taking the red wolves were economically motivated, the takes took on an economic nature.[136] In addition to wheat being an agricultural commodity, the *Wickard* Court held that the intrastate cultivation of wheat was economically motivated.[137] *Wickard* discussed how a farmer, growing wheat for his personal use on the farm, would be economically enticed to distribute that wheat in an interstate market due to rising prices.[138] In both cases, the motivation of the takes played a crucial role in determining whether or not the activity was economic in character.

The D.C. Circuit in *Rancho Viejo* identified the ESA's object of

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[128] *Raich*, 125 S.Ct. at 2211.

[129] Scopp, *supra* note 8, at 810 (discussing the importance of "object of regulation" inquiry).

[130] *Wickard*, 317 U.S. at 125. finding that though the appellee's activity of growing wheat for self-consumption was "commerce," the wheat industry itself was an economic enterprise; *Id.* at 127-128 (finding that though minimal, the appellee's acts taken together with others in the same position, might exert a substantial economic effect on interstate commerce).

[131] *Id.* at 127-128.

[132] *Rancho Viejo*, 334 F.3d at 337.

[133] 16 U.S.C. § 1538 (1973).

[134] *Id.*

[135] *See infra* notes 136-140.

[136] *Gibbs*, 214 F.3d. at 492, 495.

[137] *Wickard*, 317 U.S. at 128.

[138] *Id.*

regulation as the offending activity.[139] The majority stated that "[t]he ESA does not purport to tell toads what they may or may not do. Rather, Section 9 limits the taking of listed species, and its prohibitions and corresponding penalties apply to the persons who do the taking, not to the species that are taken."[140] *Rancho Viejo* marks the first time this rationale was used as the primary basis for affirming the ESA's constitutionality, but the issue still remains blurred at the Supreme Court level. The statutes in *Lopez*, *Morrison*, *Wickard* and *Raich* do not lend themselves to a smooth application to the ESA and make it difficult to understand the full effect of those decisions.

B. *RAICH'S* MISAPPLICATION OF PRECEDENT

Based on *Lopez* and *Morrison*, we know that handgun-possession crimes and gender-motivated crimes do not fit into the Commerce Clause,[141] but we have only a vague vision of what does. In addition, the exact legal effect of *Wickard* remained untested until the Supreme Court decided *Raich*, which extended Commerce Clause authority to the federal regulation of intrastate production, distribution and consumption of medical marijuana.[142]

1. Raich Misapplies Wickard

While the majority opinion cited the analytical framework of *Lopez* and *Morrison* to support its decision, the *Raich* Court also relied upon the early case of *Wickard* in a lengthy factual and legal comparison.[143] Those looking not to expand the scope of the Commerce Clause, however, could find many considerable differences between *Raich* and *Wickard*.

When the Court looked at the similarities between *Wickard* and *Raich*, it discussed how the intrastate production of each commodity

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[139] *Rancho Viejo*, 323 F.3d at 1072.

[140] *Id.*

[141] *Lopez*, 514 U.S. at 565; *Morrison*, 529 U.S. at 627.

[142] *Raich*, 125 S.Ct. at 2215.

[143] The Supreme Court in *Wickard* held that the Commerce Clause gave Congress the authority to regulate intrastate production and consumption of wheat. The Court stated that the aggregate effects of one man's production of wheat would affect the interstate market of that commodity, and therefore can be regulated (*Wickard*, 317 U.S. at 127-129). While *Wickard* was never explicitly overruled, the subsequent line of Commerce Clause cases that came nearly 60 years after *Wickard*, including *Lopez* and *Morrison*, receded from *Wickard's* broad grant of authority. *Lopez* and *Morrison* restrained the scope of the Commerce Clause without overruling *Wickard* (*See* Mank, *supra* note 8, at 955).

could easily be pulled or enticed into the interstate market because of economic motivations, creating a substantial effect on interstate commerce.[144] Several aspects are wrong with *Raich's* application of *Wickard* in this instance.

First, *Raich* is unclear about the nature or size of the market that will be affected by this conversion of intrastate commodities to interstate commodities.[145] The Court in *Raich* states that Americans pay 10.5 billion dollars a year for marijuana, however, the Court does not indicate whether this revenue is for medical or recreational use.[146] The Court ignores the distinction between the two markets, and ignores the considerable differences between the two.[147] *Wickard* was concerned with the economic effect that unchecked production of intrastate wheat would have on the interstate wheat market.[148] *Raich* attempts to parallel its case to *Wickard* by claiming that the unchecked cultivation of intrastate marijuana would substantially affect the interstate market for it.[149] The cultivation and consumption of medical marijuana would not likely substantially affect the interstate commerce of the marijuana market in the same way as the cultivation and consumption of wheat in the 1930s affected the interstate wheat market. Wheat can be legally grown by any landowner, whereas medical marijuana can only be legally grown by those permitted to do so based on their medical requirements. One would logically reason that the quantity of marijuana being pulled into the interstate market is much smaller than the potential quantity of wheat being pulled into the interstate market, simply based on those authorized to grow the crop.[150] Therefore, one must conclude that adding a limited intrastate market for medical marijuana would not substantially affect interstate commerce to the same extent as in *Wickard.*

Raich claims that the introduction of intrastate medical marijuana into the interstate market might leave a "gaping hole" in the CSA.[151] However, the intrastate market would be limited by the potential patients for whom marijuana was recommended. So, the introduction of this limited quantity of medical marijuana into the interstate market might not leave such a "gaping hole" in the CSA's regulatory scheme as *Raich* had predicted due to the limited potential pool of people bringing that good

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[144] *Raich,* 125 S.Ct. at 2206-2207.

[145] *See infra* notes 146-147 and accompanying text.

[146] *Raich,* 125 S.Ct. at 2208, n.31.

[147] *Id.* at 2208.

[148] *Wickard,* 317 U.S. at 125-129.

[149] *Raich,* 125 S.Ct. at 2207.

[150] However, this does not take into account those who grow marijuana illegally.

[151] *Raich,* 125 S.Ct. at 2209.

from the intrastate to the interstate market.[152] The ability to predict the actual effect of deregulation was clear in *Wickard*, where the Court cited substantial findings of this nature.[153] *Raich* cited no findings as to the actual effect of this deregulation to the degree of certainty that *Wickard* appears to require.[154]

Second, the differences in the Agricultural Adjustment Act ("AAA") and the CSA are too great to be overlooked. The main purpose of the AAA was price protection of the agricultural industry.[155] The CSA prohibited all marijuana cultivation and possession except in limited circumstances,[156] which appears to parallel closer to controlling behavior and crime as opposed to regulating market forces. Therefore, any in-depth comparison of the two statutes is stunted due to their divergent purposes.

In addition, as an underlying policy consideration, the Court should not recognize an illegal, recreational market for marijuana in making decisions about its legal use. In assuming that a thriving illegal market for marijuana exists, the Court is basing the legality of a useful medical drug on the prospective criminal activity arising from that illegal market.[157]

While proponents of the ESA currently focus on the legal arguments in applying *Raich* broadly to the ESA,[158] the primary focus should be on the consequences in doing so. The Supreme Court expanded the scope of the Commerce Clause past that of *Wickard* in an attempt to obtain the desired holding to regulate a widely abused drug.[159] The Supreme Court might find considerable differences between the CSA and the ESA and perhaps not interpret *Raich* to be applicable to the latter.

2. *Raich Misapplies Lopez and Morrison*

Raich distinguishes itself from both *Lopez* and *Morrison* by distinguishing between the economic or non economic character of the activities at issue.[160] *Raich* states that the non-economic nature of

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[152] *Id.*

[153] *Wickard*, 317 U.S. at 125-129.

[154] *Raich*, 125 S.Ct. at 2226-2227 (O'Connor, J., dissenting).

[155] *Wickard*, 317 U.S. at 115.

[156] *Raich*, 125 S.Ct. at 2204 (classifying marijuana as a Schedule I drug, which has no legitimate uses and is flatly prohibited by the CSA except for limited scientific purposes).

[157] *Id.* at 2212. As a policy consideration, the Court should not assume that an illegal market in marijuana will continue to thrive post-CSA.

[158] Blumm, *supra* note 8, at 493-497.

[159] *See infra* notes 193-201 and accompanying text.

[160] *Raich*, 125 S.Ct. at 2211.

handgun possession and gender-motivated violence weighed heavily on the Court's decision to invalidate the statutes in *Lopez* and *Morrison*.[161] Unlike the statutes at issue in *Lopez* and *Morrison*, *Raich* concludes that the Controlled Substances Act governs "quintessentially economic activities," "economic" referring to the "production, distribution and consumption of commodities."[162] So even though *Raich* actually criminalizes behavior as does *Lopez*, for example, the Court in *Raich* makes a distinction based on the shallow premise that controlled substances can be "consumed" in the traditional sense of being taken in by the body, which makes them more of an economic commodity.[163] This is an arbitrary distinction because "consumption" has a broader meaning as well, which encompasses the general "use" of a good. The Gun Free School Zones Act in *Lopez* governed the "use" or "consumption" of handguns, but was not considered "economic" based on that premise.[164]

While the CSA may or may not have been regulating truly economic activity, *Lopez* and *Morrison* provided little guidance on how to define the term, "economic", which has led to the arbitrary distinctions in *Raich* and will continue to cause confusion and inconsistency in Court opinions until the ambiguity is resolved.[165]

C. *SWANCC*, FEDERALISM, AND THE ESA

Intrastate species protections encounter similar legal roadblocks as intrastate wetland protections, and they might be headed for a similar fate at the Supreme Court level. Until 2001, intrastate wetlands were protected under the Clean Water Act ("CWA"). Then *SWANCC*, in which a constitutional limitation was included in the language of the opinion, rejected the argument that isolated wetlands should be included in the CWA's protections.[166] In *SWANCC*, the Court discusses concerns of federalism, and infringement on state sovereignty in cases that present federal law attempts to regulate intrastate matters.[167] While *SWANCC's* holding is limited to statutory interpretation under the CWA and was not

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[161] *Id.* at 2209-2210.

[162] *Id.* at 2211.

[163] *Id.*

[164] *Lopez*, 514 U.S. at 560.

[165] Scopp, *supra* note 8, at 799-802.

[166] While not decided on Commerce Clause grounds, the Supreme Court did include in its dicta its stance on the limitations of the Clean Water Act to include isolated wetlands and vernal pools. *SWANCC*, 531 U.S. at 174.

[167] *Id.*

decided under the Commerce Clause,[168] the two concepts are inextricably related in this situation. The discussion of federalism concerns by the majority in *SWANCC* easily translates into similar concerns of the ESA infringing on states' rights under the Commerce Clause.[169] In both cases, a federal statute dictates what a state must do with its own land resources in regards to wetlands or to critical habitats. Despite this seemingly striking similarity, there are also several distinctions between wetland protections and endangered species protections.[170]

One distinction between the two is the possible difference in the target of the statute's protections. Wetlands, under the CWA are regulated as part of the geography of the land.[171] Endangered species and critical habitats designated pursuant to the ESA are regulated as a means to protect the species themselves.[172] Wetlands protections under the CWA are essentially a land regulation with the indirect protection of living creatures that the wetlands support, whereas species protections under the ESA are direct protections of those living creatures.[173] This distinction is also relevant as a states' rights issue. Land regulation is an area of traditional state control[174] and is less likely to be relinquished to the federal government than the regulation of living creatures that are not technically part of the land.

Another distinction turns on the effects of the resources that the

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[168] *SWANCC*, though dealing with statutory interpretation, *id.*, provides insight as to what that Court would argue had it involved Commerce Clause jurisdiction. The majority held that intrastate, isolated wetlands are not "navigable waters," and therefore, not covered by the Clean Water Act, which can only assert statutory jurisdiction over navigable waters. This is significant for two reasons. First, the decision shows that the Court interprets "navigable waters" narrowly, through its plain meaning, as waters capable of being used for navigation. Therefore, had this case involved Commerce Clause jurisdiction, the Court would have most likely found that these sorts of wetlands cannot be regulated under the Commerce Clause because they do not fall within the traditional, plain meaning of the word, commerce. Second, the decision turns on whether these wetlands had a hydrological connection to a navigable waterway. Since they did not, they were not held to be navigable waterways. Had the Court found a hydrological nexus between the wetlands and a navigable waterway, the outcome might have been different. Therefore, the scope of this decision is unknown because it is factually-driven, determinative upon the finding of a hydrological connection. *Id.*; *Cf.* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (finding a hydrological nexus).

[169] Blumm, *supra* note 8, at 325-326; Winemiller, *supra* note 56, at 187-189.

[170] *See infra* notes 171-179 and accompanying text.

[171] 33 U.S.C. § 1344 (1972).

[172] 16 U.S.C. § 1531 (1973).

[173] However, this is a technical distinction and could be easily dismissed by a judge who believes that in protecting the nation's waters, Congress also meant to protect the biodiversity that exists in those waters.

[174] Matthew B. Baumgartner, *SWANCC's Clear Statement: A Delimitation of Congress's Commerce Clause Authority to Regulate Water Pollution*, 103 MICH. L. REV. 2137, 2158-2159 (2005).

CWA and the ESA protect and if they are widespread enough to be considered "national" as opposed to "intrastate."[175] Protecting endangered species is an integral step in preserving biodiversity.[176] Though the existence of intrastate species is local, the benefits of biodiversity are felt nationwide (and worldwide).[177] Wetlands offer buffering and filtering of precipitation, minerals, and chemicals.[178] They provide flood control and are habitats for a significant number of plants and animals.[179] While all of these are important and valuable functions, their immediate effects are generally local. In the case of an intrastate wetland that has no hydrological connection to any navigable waterway (besides the connection created by the broad argument that all the nation's waters are connected, no matter how distant they are from one another), the benefits of that wetlands functions are most likely felt locally.

III. HOW LONG WILL THE ESA'S CONSTITUTIONALITY REMAIN UNDECIDED?

The Supreme Court has not affirmed the ESA's constitutionality. This may be because of a reluctance to detract from the legislative intent behind the ESA. The ESA is not only a powerful law but a powerful message that the preservation of biodiversity is an important value to the public and to the government that represents the public's interests. However, considering the following facts, it might be only a matter of time before the new Roberts Court decides that the Commerce Clause cannot support provisions of the ESA or the ESA in its entirety.

A. CIRCUIT COURTS' SPLINTERED RATIONALE

One reason the Supreme Court might grant certiorari in a near-future ESA constitutionality case is to decide an unsettled issue of law. The circuit court cases of *NAHB, Gibbs, GDF* and *Rancho Viejo* all affirmed the ESA was constitutional as applied to intrastate species,[180]

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[175] *Morrison*, 529 U.S. at 617-618 (citing *Lopez*, 514 U.S. at 568) ("The Constitution requires a distinction between what is truly national and what is truly local . . . .").

[176] *NAHB*, 130 F.3d at 1052.

[177] *Id.* at 1052 n.11.

[178] Carey Schmidt, *Private Wetlands and Public Values: "Navigable Waters" and the Significant Nexus Test Under the Clean Water Act*, 26 PUB. LAND & RESOURCES L. REV. 97, 97-98 (2005).

[179] *Id.*

[180] *NAHB*, 130 F.3d at 1057; *Gibbs*, 214 F.3d at 506; *GDF*, 326 F.3d at 641; *Rancho Viejo*, 323 F.3d at 1071.

but did so using very different rationales.[181] While the unified outcome makes a strong statement in favor of the ESA's constitutionality, the differences in the rationales undermine the stability of the holdings.[182]

Though *GDF* points out the differing viewpoints among *NAHB, Gibbs* and itself,[183] it claims it is consistent with these cases as well as current Commerce Clause precedent.[184] However, *GDF* rejects the rationale that *Rancho Viejo* accepts in its opinion four months later.[185] This splintered decision-making weakens these circuit court decisions and makes for precarious precedent. The court system is built on principles of predictability, precedent, and consistency, but these circuit court decisions rely on a plethora of justifications. So while they all claim the ESA is constitutional, they are not in agreement as to why it is constitutional. The Supreme Court might recognize the need to decide for itself which rationale, if any, is correct.

B. WETLANDS AND ENDANGERED SPECIES

In many ways, wetland protection under the CWA paralleled endangered species protections under the ESA up until 2001 when *SWANCC* was decided.[186] Some would even consider intrastate wetlands decisions at the Supreme Court level as good predictors of how the Court might treat future intrastate ESA cases.[187] Currently, two of the three wetlands cases that were granted certiorari by the Supreme Court on October 11, 2005, involved statutory jurisdictional issues in the same vein as *SWANCC*.[188] Both cases arose from the Sixth Circuit, and in both cases, the courts issued favorable decisions for the federal government, allowing it to assert jurisdiction over intrastate wetlands.[189] One might speculate as to what exactly prompted the Supreme Court to grant certiorari over these cases at this time and whether the ESA is next on the docket.

Ultimately, granting certiorari signals that some aspect of those

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[181] *See generally*, Mank, *supra* note 8.

[182] Paul Ziel, *Interstate Commerce and Intrastate Endangered Species: The Controversy and the Need for Compromise*, 20 BYU J. PUB. L. 167, 184-185 (2005) (discussing how *Rancho Viejo* undermines the stability of *GDF*).

[183] *GDF*, 326 F.3d at 635-637.

[184] *Id.* at 635.

[185] Matthews, *supra* note 8, at 947.

[186] *See generally* Adler, *supra* note 20 (discussing similar Constitutional issues encountered by wetlands protection and endangered species protection).

[187] *See generally* Adler, *supra* note 20.

[188] *See supra* notes 50-51 and accompanying text.

[189] *Id.*

cases, or of that area of law was not being dealt with correctly by the circuit courts. The Supreme Court might look at the ESA in the same way. Granting certiorari in *Rapanos* and *Carabell* may signal the Supreme Court's potential pursuit of more clarity in environmental jurisdiction.

IV. THE ESA'S LIKELIHOOD OF SUCCESS IN THE SUPREME COURT

If the Supreme Court decides to review the ESA's constitutionality, several factors threaten the Act's likelihood of success.[190] Though the Court is bound by precedent, individual beliefs inevitably tend to maneuver their way into any given justice's decision. This Comment proposes that *Raich* was a product of judicial activism.[191] In addition, this Comment speculates that judicial activism may work against environmental laws in the long run.[192]

A. JUDICIAL ACTIVISM AND THE ESA

Judicial activism[193] permeates the court system and has both positive and negative impacts. On one hand, judicial activism allows the Court to analyze the Constitution as an evolving document. Changes in everything from social viewpoints to ideas of equity and fairness require the Court to analyze the Constitution flexibly and make it applicable to current situations. It is in this way that the Court ended segregation in schools, provided for a woman's right of reproductive bodily autonomy, and interpreted the Bill of Rights as including within its penumbra a right to privacy.[194] On the other hand, judicial activism includes instances where judges impose their own views into case opinions. Impartiality is required of all judges, but preconceived notions of a fair outcome, bias, and political pressure are all difficult to overlook. Occasionally a judge

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[190] *See infra* notes 193-213 and accompanying text.

[191] *See infra* notes 193-201 and accompanying text.

[192] *Id.*

[193] Judicial activism is a phenomenon used to describe justices who do not construe the words of statutes and the Constitution closely to their plain meaning if there are circumstances that require them to interpret the meaning to adapt to those circumstances. In general, judicial activism has a negative connotation because it creates less predictability in Court decisions and might reflect personal biases. However, though most judicial liberals are looked at as more activist than judicial conservatives, this Comment contends that it may be present at both ends of the political spectrum. *See* Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*. 9 LEWIS & CLARK L. REV. 791 (2005) (discussing the dichotomy of judicial conservatives).

[194] *See* Brown v. Bd. Of Educ., 349 U.S. 294 (1955) (ordering the end to racial segregation in public schools); *See* Roe v. Wade, 410 U.S. 113 (1973) (legalizing abortion); *See* Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing a right to privacy).

will make an "ends oriented" decision, meaning that he or she decides what the outcome should be, then finds ways to rationalize it in an opinion. The benefits of judicial activism have advanced the environmental movement, just as the disadvantages of judicial activism have proved detrimental.

As applied to the ESA, the effects of judicial activism could be determinative at the Supreme Court level. This Comment contends that *Raich* was a product of judicial activism within the Supreme Court.[195] Many agree that "while the *Raich* majority purports to be following the doctrinal contours of *Lopez* and *Morrison*, it actually represents a repudiation of th[o]se prior cases."[196] In addition, many factual and legal differences exist between *Raich* and *Wickard* and should have been distinguished further in the *Raich* opinion.[197] *Raich's* outcome was partially based on the subject matter of the case. The federal government took a stand on the "war on drugs" and *Raich* represents immense support from the judiciary for that crusade.[198] If the Court were faced with the ESA rather than the CSA, it might not have reached the same conclusion so readily. The ESA does not regulate the health and safety of the public to the extent of the CSA.[199] In addition, the ESA has formidable opponents with deep pockets, tenth amendment concerns, and promises to revive economically depressed regions with new development. These differences might matter to an activist judiciary. As long as activism is present in the court system, the legal status of environmental laws like the ESA will never be certain or safe.

On the other hand, judicial activism could also help the ESA succeed at the Supreme Court level if the Court recognizes that the Commerce Clause should evolve as changing circumstances require. *Gibbs* stated that commerce should not be confined to its 18th century form.[200] Many could argue that this statement directly expands the role of the Commerce Clause into supporting environmental laws that are not traditionally commercial. The danger in this interpretation would be the broad overuse of the Commerce Clause, which would upset many who believe that the original intent of the Clause was to provide for regulation of interstate commerce in the more traditional sense.

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[195] *See supra* notes 193-194; see *infra* notes 196-201 and accompanying text.

[196] *See generally* Jonathan Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005).

[197] See *supra* notes 143-159 and accompanying text.

[198] *Raich*, 125 S.Ct. at 2202.

[199] The CSA regulates controlled substances, which are related to public health. *Raich*, 125 S.Ct. at 2203 (stating that the CSA sought to conquer drug abuse).

[200] *Gibbs*, 214 F.3d at 491.

Either way, judicial activism is present and remains a factor in the ESA's likelihood of affirmation at the Supreme Court level.[201] The following subpart explores how the composition of the Court will reveal which direction judicial activism will take.

B. THE ROBERTS COURT

The Supreme Court's nine justices hold their positions for life, [202] so changes in the Court composition are rare, though recently, the Supreme Court has undergone four significant changes. With the addition of Justices Roberts and Alito and the loss of Justice O'Connor and Chief Justice Rehnquist, many speculate as to what interpretive changes in the law will ensue.[203]

Raich is binding precedent. However, the new Roberts Court would likely see weaknesses in applying *Raich* to the ESA and decide against using *Raich's* rationale in ESA cases.[204] Based on his dissent in *Rancho Viejo*, Justice Roberts appears as if he would likely be a stark opponent to reaffirming the ESA's constitutionality concerning intrastate components of habitat and species protection.[205] Some contend that Roberts will be bound by the decision in *Raich* and will be forced to construe the Commerce Clause broadly.[206] To counter this argument, this Comment cautions that *Lopez* and *Morrison* also represent good law which narrows the scope of the Commerce Clause.[207] In addition, the ESA can be distinguished from the CSA in *Raich*.[208] Because of these variables, *Raich* supports the ESA due to its reading of Commerce Clause authority, however it cannot be solely (or firmly) relied upon in the Roberts Court. Roberts' jurisprudence suggests that he provides a "willingness to closely scrutinize acts of Congress to ensure they are a

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[201] Though judicial activism and judicial conservatism are seen as opposites, many judicial conservatives still maintain an activist role by deciding cases in part by the subject matter of the case.

[202] *But See* Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*. 9 LEWIS & CLARK L. REV. 915, 922 (2005) (rejecting a proposal that Supreme Court justices be elected for a single 18 year term as opposed to their current lifetime term).

[203] *See generally* Adler, *supra* note 196, (analyzing Justice Kennedy and his versatile role on the Supreme Court); *See also* Jeff Bleich, Michelle Friedland & Daniel Powell, *The New Chief*. 66-NOV OR. ST. B. BULL. 18 (2005) (discussing Justice Roberts' role as the new Chief Justice of the Supreme Court).

[204] *See supra* note 201 and accompanying text.

[205] Bleich, *supra* note 203, at 23.

[206] Blumm, *supra* note 8, at 498; Ziel, *supra* note 182, at 185.

[207] *Lopez* and *Morrison* were not overruled by *Raich* and remain binding precedent; *See generally* Adler, *supra* note 196 (discussing the effect *Raich* will have on *Morrison*).

[208] *See supra* notes 143-149 and accompanying text.

proper exercise of the Commerce power."[209]

In addition to Justice Roberts, several other variables exist within the current composition of the Supreme Court. Justices Scalia and Thomas are threats to the ESA mainly because of their strict constructionist views of Constitutional and statutory interpretation.[210] Furthermore, newly confirmed Justice Alito is also labeled a strict constructionist, which has earned him the moniker, "Scalito," meaning "Little Scalia."[211] Justice Alito replaces Justice O'Connor, who was the deciding vote in many crucial social justice cases.[212] Her retirement removed a neutral middleman justice from the Supreme Court.[213] These changes in Supreme Court composition may or may not be determinative in an ESA case. Unfortunately, many of the changes indicate that if the new members of the Court make any impact at all, it will not favor the ESA.

V. THREE PLAUSIBLE SOLUTIONS

This Comment explored the likelihood of the ESA's "take" provision being upheld by the Supreme Court, and came to the disheartening conclusion that the likelihood is slim.[214] Three plausible solutions exist within the states, the legislature, and the Supreme Court.

A. FEDERALISM: EXCLUSIVE STATE AUTHORITY

Some environmental laws incorporate aspects of cooperative federalism into their provisions.[215] However, the arguments for giving *exclusive* authority to the states to protect intrastate species and critical habitats are weak. This subpart of the Comment explores the benefits

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[209] Bleich, *supra* note 203 at 23.

[210] *See generally,* Claeys, *supra* note 193.

[211] Shannon P. Duffy, LAW.COM *The Mild-Mannered Scalia*, Feb. 11, 2006, http://www.law.com/jsp/article.jsp?id=1046288236052.

[212] Though Justice O'Connor was a swing vote on many social issues, she was in the majority in many cases that limited the scope of Commerce Clause authority (*See* majority opinions of *Lopez, Morrison* and *SWANCC, supra* notes 9 & 46). The addition of Alito and Roberts would therefore probably not affect the Court's decisions concerning those rules of law.

[213] Her likely "middleman" replacement would be Justice Kennedy; *See also* Adler, *supra* note 196, at 768-769 (stating that though Kennedy joined the majority in *Raich*, he is known for his strong views on state autonomy).

[214] *See supra* notes 180-213 and accompanying text.

[215] Cooperative federalism divides responsibilities between federal and state entities by allowing the federal government to make "floors," or minimum standards. The states can then create more stringent standards more tailored to their individual needs as long as it meets the minimum laid out by the federal government.

and weaknesses of allowing states to exclusively regulate intrastate endangered species. To remedy these weaknesses, some propose giving incentives to the states so they will be motivated to promulgate stringent protections.[216]

While the Supreme Court found in *SWANCC* that states were best equipped to regulate intrastate wetlands exclusively, it does not precisely follow that states are best equipped to regulate intrastate endangered species exclusively. As stated in Section I, *supra*, wetlands serve a very important ecosystem function of both buffering and filtering rain and run-off as well as providing habitats for many plants and animals.[217] They mostly, however, affect only the area or state they are located in which make them largely a land use issue, which has traditionally been left to the states.[218] Biodiversity loss and extinction, even in an intrastate species, however, affect more than just the state where the species is located. The effects of biodiversity loss cross state lines and reverberate through the entire world.[219] In addition, many species that are now only located within one state, once had an interstate population that crossed borders and would probably have fallen under the Commerce Clause, such as in *Gibbs* with the red wolf population.[220] Ironically, some of these species might not be able to remain under the ESA's protection because we neglected to safeguard them before their populations became so small that they became confined within a single state.

Many argue that federal jurisdiction over intrastate endangered species serves to prevent a "race to the bottom."[221] Allowing states to set their own environmental standards leaves intrastate resources vulnerable to deregulation in an attempt to attract industry and business to that state.

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[216] *See* Winemiller, *supra* note 56, at 198-199 (suggesting compensating developers by offering them tax credits and subsidies when they encounter situations where they own land where endangered species are found to exist). However, this article contends that motivating states to enact more stringent protections for endangered species and critical habitats strikes the correct balance between allowing states to distribute compensation how they see fit as opposed to directly overcompensating developers for simply complying with the ESA. States may choose to compensate landowners and developers in this way, but giving states the responsibility to disperse the funds preserves ideals of state autonomy while still ensuring better environmental protections, all the while bypassing a Commerce Clause conflict.

[217] Schmidt, *supra* note 178, at 97-99.

[218] Mank, *supra* note 8, at 959.

[219] *NAHB*, 130 F.3d at 1052 (supporting the theory that preserving any given intrastate species would benefit not only the single state in which the species is located, but would contribute to the ultimate benefits of genetic variation and species diversity conservation).

[220] *Gibbs*, 214 F.3d at 488.

[221] The phrase, "race to the bottom" is used to describe situations where states promote relaxed standards in order to attract more business and industry. A competition begins between states to see which can lower their standards the most in order to profit economically.

This is especially dangerous in the case of biodiversity loss where the distribution of endangered species is not uniform throughout the country and where some states hold a large share of these species. However, as mentioned *supra*, states can be prompted to implement more stringent regulations of their own through the use of economic incentives.[222] If states are compensated for the loss of development due to the large presence of endangered species within their borders, then the race to the bottom might not be an issue. However, one cannot overlook the argument that giving states exclusive authority to regulate the "takings" of intrastate endangered species would be to strip the federal government of the power to prevent biodiversity loss. This would have global repercussions.

B. LEGISLATIVE SOLUTION

In certain cases, legislative solutions might be the only remaining option for some aspects of environmental law. This Comment contends that the ESA is in need of a legislative solution which will eventually lead to the correct legal outcome. In addition to providing economic incentives in order to motivate states to enact strict regulations, *supra*,[223] two other solutions exist within formal legislative processes.

1. Constitutional Amendment

The Constitution has been amended for a number of reasons, most all of which were to advance the social and legal evolution of this country.[224] While amending the Constitution could take a long time and could prove to be ineffective against near-future attacks on the ESA, it would prove to be the most effective method to ensure stability in the court system for environmental laws in the long run.

If the Commerce Clause was never intended to be used to pass laws like the ESA that have intrastate, arguably non-economic properties, then perhaps a different authority is needed to ensure full protection of the environment.[225] An environmental amendment in the US Constitution

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[222] *See supra* note 216 and accompanying text.

[223] See *supra* note 216 and accompanying text.

[224] U.S. CONST. amend. XIII (abolishing slavery); U.S. CONST. amend. XV (granting suffrage to all races); U.S. CONST. amend. XIX am (granting suffrage to women).

[225] *Raich*, 125 S.Ct. at 2215-2216 (Scalia, J., concurring) (suggesting that the CSA be upheld through the Necessary and Proper Clause); *See also* Dan L. Gildor, *Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect, and Promote the Environment*, 32 Ecology L. Q. 821, 846 (2005) (claiming that the Constitution itself is too flawed to support environmental laws, which has resulted in the confusion and conflict over the current

would allow Congress to enact environmental laws without the use of the Commerce Clause, in an effort to protect a precious resource common to all people. In addition, a precautionary principle should be adopted especially concerning threats of irreversible damage to the environment.[226]

Environmental impacts are felt on local, national, and global scales.[228] Those impacts cross state lines and know no boundaries of race or ethnicity.[229] An environmental amendment would not only substantively solve the issue of intrastate, non-economic protections, but might also signal a paradigm shift in this country in recognizing the right to a healthy environment.

Many other countries have incorporated some sort of declaration in favor of environmental protection and stewardship of the Earth in their Constitutions.[230] These declarations come in the form of preambles, rights, duties and fundamental freedoms that the government is required to protect.[231] Modeling a Constitutional amendment for the United States after language from any number of countries would not only promote environmental freedoms in our own country, but would make an international statement that the United States is prepared to be responsible for its environment and future inhabitants.

Environmental problems are unlikely to diminish in the near future. More environmental laws are needed with each passing decade to address these problems that are not diminishing, but rather growing in number and intensity. We need to recognize this epidemic by ensuring the passing and enforcement of more aggressive environmental laws. Passing an environmental constitutional amendment would guarantee the stability of environmental laws, and would increase the predictability in regards to the Supreme Court upholding them or not.

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environmental agenda).

[226] *See e.g*, RIO DECLARATION ON THE ENVIRONMENT AND DEVELOPMENT, Principle 15, *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163

[227] *See e.g.*, STOCKHOLM DECLARATION ON THE HUMAN ENVIRONMENT, Principle 21, *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503

[228] *See supra* note 219.

[229] *Id.*

[230] Don Anton, *Australia -- Comparative Constitutional Language for Environmental Amendments to the Australian Constitution,* ENVIRONMENTAL LAW ALLIANCE WORLDWIDE, May 31, 2006, http://www.elaw.org/resources/text.asp?ID=1082.

[231] *Id.*

2. ESA Amendment

A statutory amendment to the ESA has many advantages over a Constitutional Amendment, but also exerts less power over the stability of future environmental laws due to its narrow focus.[232] To be effective, an ESA amendment would have to safeguard against the deficiencies found in the statutes by *Lopez* and *Morrison*, as follows.[233]

The *Lopez* Court identified four factors that could aid the Court in its determination of an activity substantially affecting interstate commerce.[234] First, an activity is more likely to substantially affect interstate commerce when it involves "commerce" or some kind of economic enterprise.[235] Second is the presence of a jurisdictional element "which would ensure, through a case-by-case inquiry" that the activity affects interstate commerce.[236] Third is whether or not findings exist to expressly support the notion that the activity substantially affects interstate commerce.[237] Fourth is the causal link between the activity and a substantial effect on interstate commerce, and whether that link is too attenuated.[238] If Congress amended the ESA so as to block future judicial challenges based on the four *Lopez* factors, the Supreme Court would likely find the ESA constitutional even under *Lopez's* strict framework.

By amending the ESA to clarify the statute through additional language or additional findings, Congress would evince its intent in passing the ESA through the Commerce Clause. Primarily, Congress can design this amendment after one of two options. The first option is tailored after *Rancho Viejo's* attempt to define the regulated activity of the ESA.[239] The second option follows the concurrence in *NAHB* in recognizing Congress's power to prevent destructive interstate competition.[240]

a. Option 1: Defining Development as the Regulated Activity

The *Rancho Viejo* majority identified the ESA's regulated activity

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[232] An amendment to a statute can be passed quicker, and altered easier. In addition, it will be more narrowly tailored to the particular problems with the ESA.

[233] *Lopez*, 514 U.S. at 559-560; *Morrison*, 529 U.S. at 609-619.

[234] *Lopez*, 514 U.S. at 559-560.

[235] *Id.* at 559.

[236] *Id.* at 560.

[237] *Id.*

[238] *Id.*

[239] *See infra* notes 241-257 and accompanying text.

[240] *See infra* notes 258-264 and accompanying text.

as the offending activity, which is economic in nature and substantially affects interstate commerce.[241] By defining the regulated activity of the ESA, *Rancho Viejo* attempts to clarify the statute and offer the Supreme Court direction in interpreting the ESA. Though not decided solely on this rationale, the *Gibbs* court also supported the idea that economic motivations can be used to satisfy the "economic" requirement of *Lopez*.[242] However, the Supreme Court will likely accept this rationale only if it is clear that Congress intended it. If the legislature were clearly to spell out that the ESA's regulated activity is the offending activity, then the Supreme Court would most likely defer.[243]

Unfortunately, this option exposes a problem of scope.[244] Under *Rancho Viejo's* rationale, the ESA's "take" provision will only be constitutional if the regulated activity in any given situation is economically motivated. This would exclude the non-economically motivated taker from being covered under the ESA.[245] In addition to the scope of this rationale being too narrow, it might be too broad as well. Some argue that this rationale covers nearly every situation where a taking of an endangered species occurs since most activity that would take a species occurs due to some sort of economic incentive.[246]

Aside from the criticism this option receives,[247] an amendment using this rationale could easily dispel confusion as to what the regulated activity of the ESA is, solving one of the problems that the precedent creates. By Congress conveying its clear intent, the judiciary would defer to the plain language included in the ESA amendment.[248] Additionally, an amendment tailored after this approach would include

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[241] *Rancho Viejo,* 323 F.3d at 1072; *Id.* at 1080 (Ginsburg, J., concurring)

[242] *Id.*

[243] Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (declared a two part test now known as the "Chevron deference", whereby the Court, in reviewing an agency interpretation will first determine whether the plain language of the statute is clear, and in finding that it is not, will defer to that agency interpretation so long as it is reasonable).

[244] *See* Ziel, *supra* note 182, at 187-190 (discussing the drawbacks to taking an approach as in *Rancho Viejo*).

[245] Without a jurisdictional element, the non-commercially motivated take and the commercially motivated take are treated the same which causes issues with the facial validity of the ESA, passed under the Commerce Clause. *See* Adler, *supra* note 196, at 775 ("A teenager's spiteful use of a slingshot can be just as criminal as a developer's profit-seeking use of land movers." Concerning a facial challenge, "the federal government's authority to regulate both activities will rise or fall together").

[246] *See* Adler, *supra* note 20, at 409 (stating that not only is the rationale in *Rancho Viejo* too broad, but it is in contention with *Lopez*); *See also* Matthews, *supra* note 8, at 948 (stating that *Rancho Viejo* has shortcomings, but they are a reflection of the poor framework of *Lopez* and *Morrison*).

[247] *See* Ziel, *supra* note 182.

[248] *See supra* note 243 and accompanying text.

findings which would conclude that the majority of takings occur because of commercial development or economic motivations by way of poaching or illegal trafficking. An amendment of this nature would work primarily because it would allow little opportunity for the Supreme Court to formulate an activist decision, either for or against the ESA. An ESA amendment would allow the Supreme Court to look to the plain language alone, which many of the justices would agree is the most accurate method of statutory interpretation.[249]

An amendment drafted in this way satisfies three of *Lopez's* four requirements, *supra*.[250] First, by defining the regulated activity as the thing that causes the takings, the regulated activity becomes economic in nature as long as the offending activity is an economic endeavor.[251] Second, the Comment suggests adding findings to support the conclusion that the activity causing the takes is the regulated activity of the ESA.[252] Though the existence of findings is not determinative as to whether or not the statute will be found constitutional,[253] the Supreme Court has criticized statutes without such findings and found those statutes to be unconstitutional.[254] Also, the causal link between the regulated activity and commerce is clear when the takings occur as a result of an economic endeavor.[255] To satisfy *Lopez's* fourth factor, Congress might also include a jurisdictional element which would provide that the ESA can only regulate those things that substantially affect interstate commerce, are an instrumentality of interstate commerce or are channels of interstate commerce. Like the absence of findings, the absence of a jurisdictional element is not fatal.[256] However, *Lopez* heavily criticized the Gun Free School Zone Act for lacking a jurisdictional element that would more readily link the activity to interstate commerce.[257]

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[249] *See* Claeys, *supra* note 193, at 797 (Justice Scalia is a strict constructionist, "erring on the side of minimalism" (*Id.*)).

[250] *See supra* 234-238 notes and accompanying text.

[251] *Rancho Viejo*, 130 F.3d at 1072.

[252] *See supra* note 237.

[253] *Rancho Viejo*, 130 F.3d at 1069 (stating that ". . . neither findings nor legislative history is necessary").

[254] *Lopez*, 514 U.S. at 560 (emphasizing that though ". . . Congress is not normally required to make formal findings as to the substantial burdens that an activity has on interstate commerce," they aid the Court in finding a connection where one is not apparent to the naked eye).

[255] *Rancho Viejo*, 130 F.3d at 1068 (comparing the instant case to *NAHB* in that both involve regulated activities that are characterized as economic development, creating a clear connection to interstate commerce).

[256] *Id.* (stating that the absence of a jurisdictional hook did not dissuade the *NAHB* Court from finding the ESA constitutional).

[257] *Lopez*, 514 U.S. at 560.

b. Option 2: Preventing a "Race to the Bottom" Among the Several States

The *NAHB* court concurrence held that the taking of species can be regulated as something that substantially affects interstate commerce because it is the product of destructive interstate competition, something that the Commerce Clause was designed to prevent.[258] This theory of preventing a "race to the bottom" is tied closely with the concerns of allowing states to hold exclusive jurisdiction over intrastate species, *supra*.[259]

An amendment should state that Congress utilized its power to prevent destructive interstate competition between states in passing the ESA through the Commerce Clause. Language of this nature would provide a basis for the Supreme Court to find that regulating intrastate activity pursuant to the ESA's take provision is within Congress's power. Given the statistics of existing destructive interstate competition, [260] regulating intrastate takes are necessary to achieve that important governmental purpose. Without federal regulation of intrastate takes, states might adopt their own loose protections in order to introduce new industry within their borders.[261] This argument is closely tied to the many problems that exist with giving states exclusive authority to protect intrastate species, *supra*.[262] The distribution of species across the states is overwhelmingly disproportionate.[263] In addition to distribution concerns, not all states may share the vision of protecting species to the extent mandated by the ESA. The Court has established that federal regulation is appropriate to prevent this destructive interstate competition.[264]

C. AFFIRMING THE COMPREHENSIVE SCHEME RATIONALE

Relying heavily on the reasoning in *Morrison*, the *GDF* court stated that a regulated activity may be considered economic when it is an essential part of a larger economic regulatory scheme, which could be

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[258] *NAHB*, 130 F.3d at 1053.

[259] *See supra* note 221 and accompanying text.

[260] *NAHB*, 130 F.3d at 1053-1057 (discussing the different activities that the Court has found to be vulnerable to destructive interstate competition).

[261] *See supra* note 221.

[262] *Id.*

[263] ROBERT V. PERCIVAL ET. AL., ENVIRONMENTAL REGULATION, 889 (4th ed. 2003).

[264] *See supra* note 258.

undercut but for the particular intrastate regulation.[265] In showing a regulatory scheme, the court used the original ESA findings.[266] These findings evinced a clear economic regulatory purpose in enacting the ESA to combat the accelerated extinction rate due to economic activity.[267] Discussed in the opinion, House Report No. 93-412 and Senate Report No.91-526 illustrate how the ESA's protections are economic in nature.[268] Though the *GDF* court reiterated that the Cave Species Spider is not economic or commercial in any way,[269] the economic effects of biodiversity as well as the economic motivations present behind the takes give an economic character to the takes themselves.[270] In addition to requiring the larger regulation to be directed at economic activity,[271] *GDF* also reiterates that the activity needs to be an "essential" component to the larger regulatory scheme.[272] Even de minimus takes are essential to prevent undercutting the goals of the ESA by preventing piecemeal extinction.[273]

The Supreme Court should follow *GDF* for three primary reasons. First, the Supreme Court used the comprehensive-scheme rationale in deciding *Raich,* [274] which is now binding precedent.[275] The concern, however, in applying *Raich* is that many factual differences exist between the CSA and the ESA which might cause a different outcome for the ESA.[276] Since this Comment suggests that *Raich* was a product of judicial activism,[277] it cannot predict whether the Roberts Court will honor *Raich* by applying it to the ESA or whether it will read it narrowly so as to limit its impact on other areas of law. If the Court chooses to adhere to the rationale in *Raich*, it is likely that the Court would also uphold the ESA in subsequent challenges.[278] The second reason the Court should follow *GDF* is that safeguards exist within the

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[265] *GDF*, 326 F.3d at 630.

[266] *Id.* at 638.

[267] *Id.* at 639; 16 U.S.C. §1531 (1973).

[268] *GDF*, 326 F.3d at 639 (citing H.R. Rep. No. 93-412, at 4).

[269] *Id.* at 625.

[270] *Id.* at 639.

[271] *Id.*

[272] *Id.*

[273] *Id.*, at 640.

[274] *Raich*, 125 S.Ct. at 2203 ("Congress devised a closed regulatory system").

[275] *Gibbs*, 214 F.3d at 493 (This rationale was also discussed by the Fourth Circuit in *Gibbs* though was not central to its holding because *Gibbs* already found that the red wolves themselves were economic in nature (*Id.* at 271)).

[276] *See supra* notes 197-199 and accompanying text.

[277] *See supra* notes 193-201 and accompanying text.

[278] *See* Ziel, *supra* note 182.

comprehensive scheme rationale to prevent it from being too narrow or overbroad. As discussed in *GDF*, the individual activity must be an essential component to the comprehensive scheme, with its deregulation undercutting the entire scheme.[279] This provides a two step analysis, *supra*,[280] which can ensure limited, yet adequate scope. The final reason why the Court should follow *GDF* is that the Fifth Circuit actually unifies the seemingly splintered circuit court decisions. Despite *GDF's* refusal to define the regulated object of the ESA as the offending activity,[281] it still uses economic motivation to characterize the takes as economic.[282] The court is therefore looking to the offending activity to define whether or not the takes are economic. Ironically, *GDF* arrives at a similar conclusion as *Rancho Viejo* and others that believe the ESA is regulating the offending activity. In addition, by using economic motivation and economic effects of biodiversity loss as arguments to characterize the Cave Species takes as economic, the court utilizes the rationales from both *Gibbs* and *NAHB*, respectively.[283]

VI. CONCLUSION

For the past thirty-three years, the ESA has been providing the basis for protecting some of the world's most precious and irreplaceable resources. The reasons for the ESA's existence are the same as they were thirty-three years ago, and the proponents and critics are pleading the same arguments they were pleading thirty-three years ago. Though much has stayed the same, the aspects that have changed signal a dark future for the ESA and the environmental movement. Though this Comment contends that the ESA's constitutionality is headed down a troubled path on its likely journey to the Supreme Court, it also proposes solutions that would increase the likelihood of the ESA's survival. An amendment to the ESA, in conjunction with the Supreme Court adopting the comprehensive scheme rationale from *GDF* and *Raich,* would provide the best short term protections for the future of the ESA.

This Comment intentionally omits possible solutions based solely on *Gibbs'* "incubator for commerce" theory[284] and *NAHB's* "option value

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[279] *GDF*, 326 F.3d at 638-639.

[280] *See supra* note 279 and accompanying text.

[281] *GDF*, 326 F.3d at 634 (maintaining that, ". . . Congress, through the ESA, is not directly regulating commercial development").

[282] *Id.* at 639.

[283] *See supra* notes 73-79, 81 & 88.

[284] *Gibbs*, 214 F.3d at 493 (claiming that the red wolves are economic, the court states that they provide for revenue based on several activities making them "incubators for commerce").

nexus"[285] for two reasons. First, in the case of *Gibbs*, the theory is too narrow to fully protect species to the extent that the ESA mandates, due to the inherent requirement that the species generate some sort of tangible, economic revenue.[286] Second, *NAHB's* "option value nexus" is too speculative to survive the Court's heightened rational basis review.[287]

The *Gibbs* court relies heavily on statistical data to support its claim that red wolves provide a range of commercial enterprises. The court creates the connection to commerce by finding that the species provides a basis for 1) tourism, 2) academic study or 3) a presumed market for goods after the species is no longer endangered.[288] The *Gibbs* rationale of using species as "incubators for commerce" was later recognized in *GDF* as valid only in those circumstances where supporting data can be brought forth, as in *Gibbs*.[289] Some species do not have economic value in the sense that this reasoning would require, and would therefore not be covered by this finding.[290]

The *NAHB* majority's reasoning, that the "option value" of endangered species creates a link from those species to commerce, is attenuated and would not survive a heightened rational basis review. The Court would not find that this nexus is rational based on the easily dismissed findings from *Morrison*.[291]

While the concurrence in *NAHB* makes a strong point in that extinction as a whole has a real and predictable effect on interstate commerce by limiting genetic diversity,[292] the "option value" of a species does not provide a certain enough link to commerce. Though many species provide commercially marketable products, many do not. To protect all species based on their individual, potential contribution to commerce is too attenuated.

The Supreme Court could easily dismiss *NAHB's* option value nexus as a rational basis even though the rationale is still highly revered among scholars and scientists.[293] A loss of biodiversity could be devastating for a number of reasons.[294] Many think that cures for thus-

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[285] *NAHB*, 130 F.3d at 1052-1053 (stating that species loss diminishes a potential resource that could be used for commercial purposes).

[286] *Gibbs*, 214 F.3d at 493.

[287] *Id.* at 490. (recognizing that this is a "rational basis review with teeth").

[288] *Id.* at 492-497.

[289] *GDF*, 326 F.3d at 637.

[290] *Id.* at 638 ("Cave Species takes are neither economic nor commercial."). *Id.*

[291] *Morrison*, 529 U.S. 598, 614-615.

[292] *NAHB*, 130 F.3d at 1058-1060.

[293] EDWARD WILSON, BIOPHILIA, 121 (1984).

[294] *T.V.A, 437 U.S. at 178-179* (citing H.R.Rep. No.93-412 at 4-5 (1973) ("From the most narrow possible point of view, it is in the best interest of mankind to minimize the losses of genetic

far incurable diseases lurk deep in the rainforests or deserts.[295] Some think that a loss of one species could set off a catastrophic chain of events that would lead to a drastic imbalance in the ecosystem.[296] The lure of assigning value to biodiversity through an option value theory will never disappear from the realm of environmental law. However appealing the rationale is, that an insect in the middle of the desert might hold the cure for a debilitating disease, the legal system limits what is acceptable in the eyes of the Court. In *Morrison*, the Court held that the findings regarding the impacts of gender-motivated violence would open the door to unlimited Congressional power to regulate just about anything.[297] Just as the findings in *Morrison* were too attenuated to survive, the findings here might wither as well at the hands of an even more conservative Supreme Court.[298] Fortunately, other remedies exist to protect these species so that we can realize their value in time, and within the confines of the legal system.

While many had speculated that the ESA might be in trouble, recent events only confirm such fears. This law review topic was developed before President Bush appointed John Roberts or Samuel Alito, before the Supreme Court decided *Raich*, before Congressman Pombo proposed a weakening of the ESA, and before the Supreme Court granted certiorari on the first CWA cases in five years. Many solutions offer valuable opportunities for the ESA and the future of environmental laws in general. We can only hope that by the time the next article is written on this subject, it will speak to the prosperous existence of the ESA and not its difficult fight for survival.

JENNIFER A. MAIER*

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variations. The reason is simple: they are potential resources.")).

[295] *Id.* at 178 ("Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?").

[296] *Id. at* 178-179 ("Congress was concerned about . . . the unforeseeable place such creatures may have in the chain of life on this planet").

[297] *Morrison*, 529 U.S. at 614-616.

[298] *Id.*

* J.D. Candidate, Golden Gate University School of Law, San Francisco, CA, May 2007; B.S., Environmental Science and Policy, University of Maryland, College Park, MD. This comment is dedicated to my mother, grandmother and late grandfather, who raised me to value a strong work ethic and commitment to academics. I would also like to thank Ida Martinac, Angela Lipanovich, Josh Shey, Trent Latta and the Law Review Board, all of whom contributed greatly to the creation and completion of this comment. In addition, this comment would not have been possible without Professor Cliff Rechtschaffen, who not only served as an insightful faculty mentor, but also continues to serve as an inspiration for those of us in the environmental law community. Finally, I owe a thousand thank-you's to my soon-to-be husband, Chris Alcorn, for his patience with me

AUTHOR'S POSTSCRIPT:

After this Comment was finalized for press in the middle of February 2006, two wetland cases were argued before the Supreme Court, which continues to shape the controversy surrounding the ESA's constitutionality.[299]

On February 21, 2006, the Supreme Court heard arguments from the two consolidated wetland jurisdiction cases, *Rapanos v. United States* and *Carabell* v. *United States Army Corps of Engineers*, challenging the applicability of the Clean Water Act.[300] In the transcripts of the *Rapanos* and *Carabell* arguments, Justice Scalia's aggressive questioning and Chief Justice Roberts' penchant for questioning both sides about the definitions of such terms as "tributary" and "hydrological connection," set the tone of the new Court.[301] Although, Justice Souter made a "take-home" point by identifying the weakness in the Petitioner's arguments, that any polluter could "get away scot-free" if they "dump the pollutant further - far enough upstream in the watershed."[302]

Justice Kennedy, however, may hold the key to unlocking the mystery as to how applicable these wetlands cases would be to an ESA case at the Supreme Court level. In the transcript, Justice Kennedy expresses his concern over stripping states of their rights to govern water and land resources.[303] Justice Kennedy voted with the majority in *SWANCC*, but has voted also with the majority in other cases that were decided in favor of heavier environmental protection like *Friends of the Earth v. Laidlaw*.[304] This disparity in his opinions demonstrates his pro-states rights stance, even in environmental cases. If an ESA case were to be decided by the current Supreme Court, based on Justice Kennedy's record and his comments in the *Rapanos/Carabell* arguments, the ESA

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throughout this process and his loving support in both law school and life.

[299] *See infra* note 300.

[300] Transcript of Oral Argument, Rapanos v. United States, No. 04-1034 (argued Feb. 21, 2006), 2006 WL 496220; Transcript of Oral Argument, Carabell v. U.S. Army Corps of Eng'rs, No. 04-1384 (argued Feb. 21, 2006), 2006 WL 496220.

[301] *See* Transcript of Oral Argument at 9, *Rapanos & Carabell*, 2006 WL 496220 (Nos. 04-1034 & 04-1384).

[302] *Id.* at 14-15.

[303] *Id.* at 58.

[304] *SWANCC*, 531 U.S. 159; Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000); *see generally, Anthony Kennedy on the Environment*, ON THE ISSUES, http://www.ontheissues.org/Court/Anthony_Kennedy_Environment.htm.

proponent should point out the differences between wetland protections and the ESA, *supra*.[305] It is in this way that the argument will appeal to Justice Kennedy's interest in maintaining state sovereignty.

While this Comment still contends that wetland jurisdiction cases at the Supreme Court level might indicate how the Court will treat subsequent ESA cases, the *Rapanos* and *Carabell* arguments seem to sidestep broader constitutional implications, as did the Court in *SWANCC*.[306] The Court's narrow questioning pertained mostly to statutory interpretation of the Clean Water Act, which might lead to a narrow holding, as in *SWANCC*. This indicates the Court's reluctance to deal with the Commerce Clause issue if they are not wholly confronted with it. Regardless, these cases will have some impact on future ESA cases and many are anxiously awaiting a Court opinion.

Although these arguments and subsequent judicial theories all occurred after this Comment was finalized for press, the issue of the ESA's constitutionality remains undecided. In general, this issue has been becoming more volatile as development continues to increase and more and more species become endangered or extinct every day. So while the *Rapanos/Carabell* arguments were not able to be included substantively in this Comment, one would hope that readers will be inspired to continue to follow this issue and take action when appropriate.

[305] *See supra* notes 171-179.

[306] *See supra* note 49.