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DOES THE ENDANGERED SPECIES ACT REGULATE COMMERCE?

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The Commerce Clause gives Congress power “to regulate Commerce with foreign Nations, and among the several States.” From the mid-1930s until the mid-1990s the Supreme Court abandoned the idea that this language is a significant constraint on federal power. In *Wickard v. Filburn*, 317 U.S. 111 (1942), for example, the Court held that Congress could regulate a farmer’s production of wheat for personal use in the home and on the farm because, in the aggregate, production for personal use affects the demand for wheat and therefore its price in the commercial market. For a long time it appeared that identifying *any* effect on interstate commerce—no matter how remote, tenuous, or insubstantial—was enough to empower the federal government to act. Based on that expansive understanding of federal authority, Congress and agencies such as the Environmental Protection Agency, the U.S. Army Corps of Engineers, and the Fish and Wildlife Service wrapped federal tentacles around activities for which the commerce connection was difficult to discern. The thesis of this article is that parts of the power seized by Congress and these agencies over environmental matters—the focus here is the Endangered Species Act—violate the Commerce Clause, as that provision has more recently been interpreted, and are likely to be struck down by the Supreme Court.

Setting the Scene: Lopez, Morrison and Jones and the Revival of Meaningful Limitations on the Federal Commerce Power

The Supreme Court’s hands-off approach to the commerce power started to change in 1995, when in *United States v. Lopez*, 514 U.S. 549 (1995), it struck down the Gun-Free School Zones Act (GFSZA) by a 5-4 majority. The commerce power did not permit federalizing the offense of possessing a gun in a school zone, the Court held, because (1) possessing a gun near a school *is not inherently economic or commercial in nature*; (2) the GFSZA contained *no express jurisdictional element* limiting its reach to conduct shown to have an effect on interstate commerce; (3) Congress had made no *specific findings* that possessing a gun in a school zone affects interstate commerce; and (4) the prosecutors’ proffered connections to commerce—possession of a gun around a school may result in violent crime, which is costly to society and may disrupt learning, which would result in a less productive citizenry—were so attenuated that if taken seriously they would *destroy the Framers’ system of enumerated federal and reserved state powers, bringing every aspect of life within the federal commerce power*.

This fourth factor may hold the key to the new Commerce Clause jurisprudence. As the Court explained, the federal government’s “costs of crime” justification for the GFSZA would allow Congress to “regulate not only all violent crime, but all activities that might lead to violent crime.” 514 U.S. at 564. Likewise “under the Government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens,” including “marriage, divorce, and child custody.” If an impact on national productivity were enough, the federal government could regulate what time a person gets up in the morning and decree for everyone a healthy breakfast and a four-mile run to start the day. The government’s theory, in short, left no “activity by an individual that Congress is without power to regulate.” As a result, it violated the principle that “[t]he enumeration [of federal powers in the Constitution] presupposes something not enumerated.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). The Tenth Amendment states that “powers not delegated to the United States by the Constitution are reserved to the States.” No theory about the scope of the federal commerce power is acceptable that makes the states’ reserved rights an empty set.

The effect of *Lopez* should have been dramatic. After all, the Court effectively limited *Wickard* to its facts, describing it as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.” 514 U.S. at 560. But the lower federal courts paid only lip service to *Lopez*, continuing to permit the federal government to insert itself anywhere it saw a national interest. The Court legitimized that point of view when it denied certiorari in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). In *NAHB*, Judges Wald and Henderson, each relying on different theories and over a blistering dissent from Judge Sentelle, ruled against a Commerce Clause challenge to Endangered Species Act protection of the Delhi Sands Flower-Loving Fly, an endangered insect that inhabits only a small area of California and that has no connection to interstate commerce. *Lopez* was reinvigorated, however, in *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 592 U.S. 848 (2000).

In *Morrison*, the Court (again 5-4) struck down provisions of the Violence Against Women Act (VAWA) on Commerce Clause grounds, using the four-factor analysis stated in *Lopez*. Unlike the GFSZA, the VAWA was supported by specific congressional findings detailing how “gender-motivated violence affects interstate commerce,” including “by deterring

potential victims from traveling interstate, * * * diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.” 529 U.S. at 615. The Court held these findings insufficient to sustain the statute, because they stretched “the but-for causal chain * * * to every attenuated effect upon interstate commerce,” using reasoning that would bring virtually all conduct within the commerce power and thereby obliterating the “distinction between what is truly national and what is truly local.” *Id.* at 615-18.

In *Jones*, the Court made clear that its view of the Commerce Clause provided a reason not just to strike down statutes with insufficient commerce connection, but also to read statutes narrowly, where possible, to avoid that constitutional problem. Citing *Lopez*, the Court construed the federal arson statute so as not to reach arson of an owner-occupied residence, because federalizing arson of a private residence would raise “grave and doubtful constitutional questions” under the Commerce Clause. 529 U.S. at 857. The Court recognized that “where a statute is susceptible of two constructions,” one of which raises serious doubts under the Commerce Clause and the other which avoids those doubts, “our duty is to adopt the latter.” *Id.*

The principle relied on in *Jones*, that constitutional doubts must be avoided where possible, applies when the challenged statutory interpretation is by an administrative agency. Only the clearest indication that Congress intended the construction adopted by an agency overcomes the presumption against an interpretation of questionable constitutionality. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Thus, not only are federal statutes subject to Commerce Clause challenge, but so are aggrandizements of regulatory authority found in agency interpretations. Indeed, the most powerful effect of *Lopez*, *Morrison*, and *Jones* may be as a counter-weight to *Chevron* deference. No deference is owed to a regulator’s statutory interpretation that raises serious constitutional questions.

Applying the New Commerce Clause Jurisprudence to Environmental Statutes: The Solid Waste Agency Decision

The Supreme Court began the job of applying its new Commerce Clause jurisprudence to federal environmental statutes in *Solid Waste Agency of Northern Cook County v. United States*

Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC). At issue in SWANCC was the U.S. Army Corps of Engineers' migratory bird rule.

The Clean Water Act (CWA) prohibits the discharge of “pollutants,” including dredged and fill material, into “navigable waters” without a permit. 33 U.S.C. §§ 1311(a), 1344(a) 1362(12). “Navigable waters” are “the waters of the United States.” 33 U.S.C. § 1362(7). Corps regulations broadly define the “waters of the United States” to include not only navigable waters but also “[a]ll other waters ... the use, degradation or destruction of which could affect interstate or foreign commerce.” 33 C.F.R. § 328.3(a)(3). In the preamble to 1986 regulations, the Corps further defined these “other” waters to include waters and wetlands “[w]hich are or would be used as habitat by migratory birds which cross state lines,” on the theory that use by migratory birds supplies a sufficient connection with interstate commerce to authorize federal regulation. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). According to the Corps, destruction of the habitat of migratory birds in the aggregate substantially affects interstate commerce because millions of people spend annually more than \$1 billion hunting, trapping, and observing migratory birds, and in doing so often travel or spend across state lines.

SWANCC is a municipal corporation formed by twenty-three Chicago-area towns to safely and efficiently dispose of municipal waste for their 700,000 inhabitants. SWANCC purchased land to create a balefill. Part of the site was an early successional stage forest that grew up on land previously used as a gravel strip mine. That part of the site contained trenches and depressions left by the strip mining, which collect rainwater and form ponds.

After ten public hearings and 2,500 pages of testimony, the county zoning board approved SWANCC's balefill project. SWANCC then obtained a permit for the project from the Illinois Environmental Protection Agency after a lengthy, searching, and costly regulatory process. Because SWANCC needed to fill 17.6 acres of ponds within the forested area to construct the balefill, it also requested rulings from the Corps as to whether it needed a permit under CWA § 404, 33 U.S.C. §1344(a). The Corps concluded that the isolated ponds on the balefill site were navigable waters of the United States within its jurisdiction under the CWA solely because they were used as habitat by migratory birds that cross state lines. SWANCC

submitted an application for a Section 404 permit, which the Corps denied, just as it denied SWANCC's revised application.

The Supreme Court held (5-4 again) that the CWA's grant of jurisdiction over "navigable waters" does not encompass isolated nonnavigable waters or wetlands just because they are used by migratory birds with some connection to commerce. Under the CWA, the Corps may assert jurisdiction only over waters that are or have been navigable in fact and wetlands that have a "significant nexus" to and are "inseparably bound up with" such waters, like the wetlands adjacent and physically connected to a navigable river that the Court held to be within the coverage of the Act in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985). (What nexus is significant enough is in issue in two cases to be heard by the Supreme Court in February 2006, *Rapanos* and *Carabell*, though *that* issue is unlikely to be decided, after SWANCC, under the "effects commerce" prong of the commerce power but rather under the "channels of commerce" prong that justifies federal regulation of navigable waters.)

SWANCC is most interesting for current purposes for the Court's use of the Commerce Clause. SWANCC contended that the migratory bird rule failed the *Lopez* analysis. Like the GFSZA and VAWA, the migratory bird rule prohibited activity that is not economic or commercial. It applied equally to a private homeowner who landscaped a backyard prone to flooding, filled a damp patch to prevent mosquitoes, or built a storage shed, and to a commercial developer who bulldozed a marsh. And it depended on a causal chain between the regulated activity and interstate commerce even longer and more speculative than those rejected in *Lopez* and *Morrison*: Individual instances of filling isolated ponds might lead to an aggregate loss of waters, which could in turn reduce the population of migratory birds, which could in turn impede the hunting, trapping, and observation of migratory birds, which could in turn result in reduced interstate expenditures by hunters and bird watchers.

As a practical matter, permitting the Corps to regulate any place that migratory birds use for their life requirements would give the Corps general land use power, though land use planning and landfill siting are long-standing functions of state and local government. And if the Corps' argument for regulatory authority were sufficient constitutionally, no area of human life would be immune from federal control. The Corps relied on the nexus between migratory birds

and bird-related hobbies that affect interstate commerce to justify regulation of the birds' environments. The hobbies themselves, however, are engaged in by people. It seems safe to assume that, whatever effect migratory birds might have on interstate commerce, the effect of hunters, trappers, and birdwatchers is even greater. Thus, the Corps would be permitted to regulate every aspect of the environment of people who hunt, trap, and watch migratory birds.

Because of its statutory ruling, the Supreme Court did not ultimately need to decide whether the migratory bird rule violates the Constitution. The Court did, however, make use of the probable constitutional defects in the rule in its statutory analysis, following the approach it articulated in *Jones*. The bird rule, the Court held, raises "significant constitutional and federalism questions." 531 U.S. at 174. There was a significant constitutional question whether regulating fill of isolated ponds used by migratory birds "substantially affects interstate commerce." There also was a significant federalism question because the bird rule "alters the federal-state framework" and "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 173-74. Because the bird rule in these ways "push[ed] the limit of congressional authority," it was not entitled to *Chevron* deference. *Id.* At 172-73. Instead, the Court construed the CWA narrowly to avoid the constitutional and federalism problems it detected, setting aside the bird rule as beyond the Corps' authority.

SWANCC and *Jones* magnify the impact of the new Commerce Clause jurisprudence. Plaintiffs no longer have to demonstrate that a regulatory claim of authority is unconstitutional, only that it comes close to the constitutional line or infringes traditional state powers in a way that Congress has not specifically authorized. Showing that an environmental regulation raises tough questions under *Lopez* and *Morrison* should now be enough to strike it down.

The Raich Detour

The Court's highly publicized decision in 2005 in *Gonzales v. Raich*, 125 S. Ct. 2195, does not work any change in the Court's recent jurisprudence. In *Raich* the Court turned back a Commerce Clause challenge to the federal criminalization of the wholly interstate manufacture and possession of marijuana for medical purposes. Unless the Court had been prepared to overturn *Wickard* itself, that was inevitable. There is a national commercial market in marijuana—a product as fungible as wheat—and its home grown consumption for medical use

impacts that market no more nor less than the home grown wheat at issue in *Wickard* affected the commercial market in wheat. Though *Wickard* may mark the furthest reach of the commerce power, there never seemed any doubt that it would be followed and would control the result in *Raich*.

The Court in *Raich* (over 3 dissents) distinguished *Lopez* and *Morrison* on the ground that they involved challenges to statutory provisions and not to “individual applications of a concededly valid statutory scheme,” but made clear that this distinction is relevant only when the challenge is to a “trivial” instance of the class.¹ That cannot be said, for example, of the extension of Endangered Species Act protection to thousands of intrastate, non-economic species. The Court pointed out too that the “production, distribution, and consumption of commodities,” like marijuana, “for which there is an established and lucrative interstate market” is “quintessentially economic,” unlike the activities regulated by the VAWA and GFSZA, and has “a significant impact on both the supply and demand sides of the market.” Most intrastate endangered species are quintessentially *non-economic*.

More troubling to those who think federal power needs to be meaningfully constrained is Justice Scalia’s concurrence (which was not essential to creating a majority and was joined by no other Justice). Justice Scalia would have upheld the application of federal law under the “necessary and proper” clause of the Constitution: “The authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.” Maverick separate opinions sometimes wither on the vine, but occasionally grow into the law of the land. Anyone litigating in this area would thus do well to explain why a challenged regulation is not “necessary”—a demanding

¹ Some commentators have mistakenly asserted that *Raich* puts to rest any dispute over the constitutionality of the Endangered Species Act. Michael C. Blumm and George A. Kimbrell, *Gonzalez v. Raich, The “Comprehensive Scheme” Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491 (2005). These authors assert that the ESA is a comprehensive economic regulatory scheme “that would be fatally undercut if piecemeal species extinction was permitted simply because the specific listed species or activity causing the take alone lacked a substantial effect on interstate commerce.” *Id.* at 492. The word “trivial” in *Raich* seems to have escaped them.

term that should require strong evidence and clear congressional findings—to the success of a scheme that more generally regulates interstate commerce.

***Commerce Clause Challenges to The Endangered Species Act:
The Fractured Rulings of the Courts of Appeals***

The major federal environmental statutes were adopted at a time when it was thought that Congress could reach any matter of national concern without paying close attention to whether the law was directed at “commerce.” Congress typically did not make detailed findings articulating a real and direct relationship between the regulated activity and interstate commerce, did not require case-by-case proof of a substantial effect on interstate commerce, and purported to regulate any activity that harms protected objects (like water or wildlife), regardless of whether the activity is economic in nature. For these reasons, elements of the federal environmental protection scheme are susceptible to Commerce Clause challenge, prime among them the undifferentiated scope of the Endangered Species Act.

The ESA allows the listing and protection of species that have no obvious connection to commerce. Moreover, it purports to impose restrictions on conduct that harms listed species regardless of whether that conduct is commercial in nature. The ESA thus makes it unlawful for any person to “take”—that is, “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”—any member of an endangered species, without requiring proof of a commercial nexus in the particular case. 16 U.S.C. § 1532(19). The “take” prohibition even extends to “habitat modification” that harms a listed plant or animal. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

Even after *Lopez*, Commerce Clause challenges to ESA regulation consistently have been rejected in the lower federal courts—though often over powerful dissents. So far, the Supreme Court has not granted certiorari in any of these cases. In my view, it is only a matter of time before the Supreme Court feels obligated to step in, and recent changes in the Court’s lineup increase that likelihood. The cases the Court has passed up illustrate the sorts of arguments the Court eventually will have to consider.

The Delhi-Sands Flower Loving Fly. *NAHB v. Babbitt* challenged the application of the ESA's take provision to the listed Delhi Sands Flower-Loving Fly, which lives only in a 40-square-mile area in California, appearing for a few weeks before breeding, burying its eggs in the sand, and promptly dying. For several years prior to the fly's listing in 1992, the County of San Bernardino had been planning to build a hospital to serve as its main emergency medical center in the event of an earthquake. The land on which the county planned to build the hospital contained part of the fly's habitat, and the U.S. Fish and Wildlife Service (FWS) determined that the impact of the anticipated construction would alter the fly's existing surroundings. While the county made a number of adjustments to reduce the hospital's effect on the fly, its redesign of a critical street intersection to provide emergency vehicle access proved unacceptable to FWS. According to FWS, because the intersection would traverse a corridor between two fly habitat areas, it would cause a taking of the fly in violation of the ESA.

Two members of a fractured panel of the D.C. Circuit found the ESA's regulation of land-use to protect a solely intrastate species to be within the commerce power. Judge Wald and Judge Henderson generally agreed that (1) the loss of biodiversity itself has a substantial effect on the ecosystem and, by extension, interstate commerce, and (2) application of the take prohibition of the ESA to the regulated activity, in this case construction of the new hospital, would substantially affect interstate commerce. Each judge took a different view of each of these rationales.

As to the biodiversity rationale, Judge Wald endorsed aggregation under the ESA, looking beyond the potential impact of the extinction of the fly on interstate commerce to the potential impact that a taking of all endangered species would have on future marketable products: "[t]he elimination of all or even some of these endangered species would have a staggering effect on biodiversity—defined as the presence of a large number of species of animals and plants—in the United States and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species." 130 F.3d at 1052. While she acknowledged that "it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce," *id.* at 1053, it was certain that "in the aggregate the extinction of endangered species will have a substantial effect on interstate commerce." *Id.* at 1053 n. 14. As to the regulated activity rationale, Judge Wald saw the ESA in

the context of other federal statutes intended to prevent ruinous competition and a “race to the bottom” driven by states’ and municipalities’ desires to satisfy commercial interests at the expense of environmental concerns.

Judge Henderson took a more radical line on the biodiversity rationale, concluding that the potential extinction of even a single species was adequate to find a substantial impact “[g]iven the interconnectedness of species and ecosystems.” *Id.* at 1059. Judge Henderson also thought it enough for federal regulation if, regardless of “the characteristics or range of the specific endangered species involved,” the regulated act that would precipitate the take affects interstate commerce. The construction of a traffic intersection and a hospital involves commercial activity and so its regulation to prevent a take satisfied the Commerce Clause.

Dissenting, Judge Sentelle criticized the notion that Congress may regulate intrastate takings of wildlife with no inherent commercial value based “upon the purely speculative future impact of an action with no demonstrable impact at all.” *Id.* at 1065. The majority’s holding, he stated, “not only ignored *Lopez*, but made the Commerce Clause into what Judge Kozinski [has] suggested: the ‘hey-you-can-do-whatever-you-feel-like clause.’” *Id.* In Judge Sentelle’s view, “[a] creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce.” *Id.* If such speculation were all that was needed, “Congress could [not] be prohibited from regulating any action that might conceivably affect the number or continued existence of any item whatsoever,” and congressional power would have “no stopping point.” *Id.*

The Arroya Toad. The D.C. Circuit in its post-*Morrison*, post-*SWANCC* ruling in *Rancho Viejo v. Norton* endorsed Judge Henderson’s regulated activities rationale in upholding the take prohibition of the ESA against another Commerce Clause challenge. 323 F.3d 1062, 1067 n.2 (D.C. Cir. 2003). *Rancho Viejo* involved the arroyo southwestern toad, which lives in scattered upland populations within a mile of the streams in which they breed. No toad or tadpole leaves California. The plaintiff developers sued after the Corps denied them a permit based on the determination that a residential project could affect the arroyo toad population in the area.

The D.C. Circuit, with Judge Garland writing, held that while the inferential chain between the destruction of the intrastate arroyo toad population and an effect on interstate commerce might be “too attenuated to be regarded as substantial,” plaintiffs were hard pressed to argue “that the effect of commercial construction projects is similarly attenuated.” 323 F.3d at 1069. Chief Judge Ginsburg, concurring, pointed out that that this route for upholding the constitutionality of the ESA’s take prohibition creates a strange dichotomy: “a species that is not an article in interstate commerce and does not affect interstate commerce” can be regulated if the act of taking substantially affects interstate commerce, as with “[t]he large-scale residential development that is the take in this case,” but “the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.” *Id.* at 1080. One portent in *Rancho Viejo* is the dissent from denial of rehearing en banc penned by Judge—now Chief Justice—John Roberts, who questioned the panel’s reasoning (while hinting that there might be other constitutional bases for species regulation). Judge Roberts, presumably, will be a vote in the “grant” column next time a Commerce Clause challenge to the outer reaches of the ESA reaches the Supreme Court.

The Red Wolf. The Fourth Circuit in *Gibbs v. Babbitt* upheld the application of the ESA’s take provision to listed red wolves that had established themselves on private land in North Carolina. 214 F.3d 483 (4th Cir. 2000). The Fourth Circuit adopted yet a different rationale. It found a substantial impact on interstate commerce because the primary motive for taking red wolves was economic (to protect livestock or cattle). In addition, the red wolves were themselves connected to interstate economic activity, specifically tourism, scientific research, and a potential future trade in red wolf pelts.

As Judge Luttig pointed out in his dissent, the majority’s rationale in *Gibbs* suffers from two fundamental weaknesses. While the majority pays lip service to the principal in *Morrison* that Congress may regulate purely intrastate activity “only where that activity is economic in nature,” *Morrison*, 529 U.S. at 613, the court fails to make a persuasive case that the taking of red wolves is in a meaningful sense economic activity. The fact that the *motive* for the taking is, in some cases, commercial (to protect property) does not make the *taking* commercial. The Secretary’s regulation is not limited to takings to protect cattle or livestock or other commercial assets. Moreover, if all that is needed for federal regulation is an attenuated commercial motive,

the federal government could regulate an endless array of conduct, from personal savings levels to any earnings-enhancing choice. After *Morrison*, it is difficult to maintain such an expansive interpretation of federal power.

In addition, the *Gibbs* majority's finding of a substantial impact on interstate commerce is based on speculative future commercial effects. Its reason for finding an impact on interstate tourism involves the following steps: *If* none of the wolves living on private land are taken, this *could* lead to "the recovery of the red wolf and increased visitor activities," 214 F.3d at 493, which *might* lead to an increase in tourist dollars spent in North Carolina, which "*could* result in a significant regional economic impact." *Id.* (emphasis added). As Judge Luttig observed in dissent, "[t]he number of inferences (not even to mention the amount of speculation)" involved in that reasoning is "exponentially greater than the number necessary in *Lopez* to show a substantial effect on interstate commerce from the sale of guns near schools or in *Morrison* to show a substantial effect on interstate commerce from domestic assault." *Id.* at 507-08.

Cave Bugs. In *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003), owners of 200 acres in the path of development around Austin, Texas, brought suit challenging the constitutionality of the ESA's take prohibition. Their plan to sell the plot for a commercial development to include a Wal-Mart was stymied by the discovery of six species of blind, subterranean invertebrates listed as endangered under the ESA that were limited to a small, intrastate area. The district court had followed Judge Garland's lead in *Rancho Viejo*, upholding the constitutionality of the take prohibition as applied to the landowners because of Wal-Mart's undeniable effect on interstate commerce. Judge Barksdale, writing for the Fifth Circuit panel, expressly rejected that rationale as inconsistent with *Lopez* and *Morrison*. Instead, Judge Barksdale looked to the impact of the taking of the Cave Bugs themselves for a substantial impact on interstate commerce—and, amazingly, found it.

The court acknowledged that scientific travel to conduct research on the Cave Bugs had a negligible impact on interstate commerce. It conceded that any potential future commercial or medical value of the Bugs was too speculative to survive scrutiny under the fourth *Lopez* factor. But, for reasons similar to those of Judge Wald in the Fly case, it allowed the take of the Cave Bugs to be aggregated with the take of all other endangered species to find a sufficient impact on

commerce. Aggregation was permissible because Judge Barksdale read the legislative history of the ESA's take prohibition as setting up a large economic regulation designed to prevent the elimination of valuable "genetic heritage that might be lost absent regulation." 326 F.3d at 639. Allowing particular takes to escape regulation because, viewed alone, they do not substantially affect interstate commerce would lead to piecemeal extinctions that through the chain of ecology might affect species whose existence or non-existence does affect interstate commerce, making regulation of even intrastate takes essential to the larger economic regulatory scheme of the ESA.

The Fifth Circuit's denial of rehearing en banc in *GDF Realty* prompted a vigorous dissent from Judge Edith Jones. 362 F.3d 286 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc). Joined by five other members of the court, Judge Jones lambasted the panel for "craft[ing] a constitutionally limitless theory of federal protection." *Id.* at 287. The "interdependent web" rationale, she wrote, "offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce." *Id.* at 287.

While Judge Jones agreed with the panel's determination "that the 'regulated activity' under the ESA is Cave Species takes, not the appellants' planned commercial development of the land," and that the cave bug takes, standing alone, do not have a "'direct relationship' with and substantial effect on interstate commerce," she sharply disagreed with the panel's "aggregation" theory upholding the federal agency action as "essential to preserving an 'economic' regulatory program." *Id.* at 288-89 (quoting *GDF Realty*, 326 F.3d at 638). Judge Jones argued that this theory "would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id.* at 289. She pointed out that *Lopez* and *Morrison*, taken together, "strongly suggest that when the Supreme Court has sustained Commerce Clause regulation under the aggregation principle, 'the regulated activity was of an apparent commercial character.'" *Id.* at 290 (quoting *Morrison*, 529 U.S. at 611). In Judge Jones's view, the panel had totally failed to explain how any cave bug takes were "part of a larger 'economic' regulatory scheme," how they were "so essential to the larger national scheme that the accidental crushing of one Cave Species underfoot (or even the diminutive species' destruction) threatens to undo the national program," and how they were "so significant to the commerce clause that Congress, for the first time in U.S. history, is authorized to aggregate purely intrastate, non-economic activity." *Id.* at 290-91.

In Judge Jones' words, "[t]he Commerce Clause does not regulate * * * ecosystems as such—it regulates commerce." 362 F.3d 286.

Despite the growing disagreement among the courts of appeals as to why the ESA's application to intrastate, non-economic species survives constitutional muster, and dissents by well-respected jurists in every case upholding the ESA, the Supreme Court initially held the certiorari petition in *GDF* for its ruling in *Raich* and thereafter denied review. It seems extremely unlikely, however, that the Supreme Court will continue to avoid the issue, in particular now that two jurists who are sympathetic to the federalist principles at work in *Lopez*, *Morrison*, and *SWANCC* have joined the Supreme Court who were not there when petitions in each of the cases discussed above were denied. Just as the Court joined by Chief Justice Roberts immediately granted review on the meaning of "navigable waters" under the CWA after five years of denying review on that very issue, so I expect that the next intrastate toad or bug to reach the Court will find itself subject to Supreme Court review and learn that it has to rely on the State for protection, not FWS.