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ENDANGERED STATUTE? THE CURRENT ASSAULT ON THE ENDANGERED SPECIES ACT

PHILIP WEINBERG*

I. INTRODUCTION

The Endangered Species Act (ESA),1 a keystone congressional environmental protection measure, is itself endangered. Widely endorsed as vitally needed ever since its 1973 enactment, the ESA—and particularly its provision safeguarding critical habitats—has in recent years come under relentless assault. As part of an attempt to roll back environmental protection, the usual suspects have not only resisted vigorous enforcement of the ESA, but have contended it exceeds Congress's powers. So far, no court has actually so held, but some dissenting opinions and law review articles have claimed the commerce power does not support the ESA, at least as it relates to regulating land used to prevent the loss of habitat for endangered fish and wildlife.2

This Article submits that Congress acted well within its powers in enacting the ESA. Its habitat provisions are not only constitutionally valid but are vitally needed if the ESA's purposes “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” are to be achieved.3 Further, a definitive Supreme Court ruling to that effect will clarify and strengthen federal jurisdiction under the Clean Water Act (CWA),4 currently under a similar challenge.

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3. See 16 U.S.C. § 1531(b) (explaining why habitat provisions of ESA are needed).
II. THE ENDANGERED SPECIES ACT: A SUMMARY

Congress enacted the ESA (the Act) in 1973 to furnish substantial congressional protection for species of fish, wildlife and plants found to be endangered or threatened. Like most federal environmental legislation, it is firmly grounded in Congress’s authority under the Commerce Clause.\footnote{5. See U.S. Const. art. I, § 8, cl. 3 (giving Congress power to regulate interstate commerce).}

Although Congress was not writing on a totally clean slate, the Act vastly strengthened earlier legal safeguards for endangered species. The first significant congressional protection for the egret—whose feathers were in demand by fashion-conscious milliners—as well as other migratory birds, was overturned by the courts nearly a century ago as interfering with the states’ power to regulate hunting under the Tenth Amendment.\footnote{6. See United States v. Shauver, 214 F. 154, 157 (E.D. Ark. 1914) (holding statute protecting migratory birds invalid); United States v. McCullagh, 221 F. 288, 296 (D. Kan. 1915) (invalidating statute protecting migratory birds).} Those rulings were based on the doctrine that wildlife was literally the property of the states, a notion inherited from English common law, and thus could not be an article of commerce, even after the bird was taken and became a commodity in the economic sense. The Supreme Court upheld this notion in 1896 when it decided \textit{Geer v. Connecticut}.\footnote{7. 161 U.S. 519, 530 (1896).}

A treaty with Britain, implemented in the Migratory Bird Treaty Act of 1918,\footnote{8. See Pub. L. No. 65-186, 40 Stat. 755 (codified as amended at 16 U.S.C. §§ 703-712 (2000)).} was required to empower Congress to protect egrets under the then-current expansive reading of the Tenth Amendment. That statute was sustained by a unanimous Court in \textit{Missouri v. Holland},\footnote{9. 252 U.S. 416 (1920).} where Justice Holmes presciently and eloquently noted that the treaty power trumped Tenth Amendment concerns and that “[t]o put the claim of the State upon title is to lean upon a slender reed.”\footnote{10. See id. at 434 (stating state power to regulate killing and sale of game is not exclusive).} Foreshadowing the recognition of environmental concerns that were to surface decades later, Justice Holmes went on to describe the covered birds as “the protectors of our forests and our crops . . . .”\footnote{11. See id. at 435 (expressing importance in protecting environment through protecting specific species).}
The slender reed finally snapped in *Hughes v. Oklahoma*, \(^\text{12}\) when the Court in 1979 ruled that wildlife, once caught, is indeed an article of commerce subject to regulation. But the regulation, a law barring the shipment of minnows beyond Oklahoma's borders, in that case was adopted by the state, not Congress. The Court held the state law discriminated against interstate commerce in violation of the dormant Commerce Clause. \(^\text{13}\)

Congress had earlier adopted the Lacey Act in 1900, which prohibited the interstate shipment of wildlife taken in contravention of state law. \(^\text{14}\) This statute was clearly valid even under the then-narrow construction of the commerce power because the Supreme Court had sustained federal laws similarly barring interstate traffic in lottery tickets and other items regarded as immoral or otherwise harmful. \(^\text{15}\) It is worth noting that the Court, rejecting the claim that upholding similar laws might enable Congress to "arbitrarily exclude from commerce . . . any article," ruled that the "possible abuse of a power is not an argument against its existence." \(^\text{16}\) Indeed, the Lacey Act has been upheld as a valid exercise of the commerce power. \(^\text{17}\)

It was not until 1969 that Congress significantly expanded the Lacey Act. The Endangered Species Conservation Act \(^\text{18}\) of that year empowered the Secretary of the Interior to promulgate a list of endangered animals and bar the importation or sale of those animals or any product made from them. \(^\text{19}\) But the list was comprised of only subspecies on the verge of extinction, leading to the comment that it was more commemorative than protective. Listing only subspecies of tigers, crocodiles and similar endangered species afforded scant protection. It is difficult for customs officials to

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\(^{12}\) 441 U.S. 322 (1979).

\(^{13}\) See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (holding invalid New Jersey statute prohibiting importation of most solid or liquid waste collected outside New Jersey).


\(^{15}\) See Champion v. Ames, 188 U.S. 321 (1903) (holding federal government may regulate interstate traffic in lottery tickets).

\(^{16}\) See id. at 362-63 (discussing possible dangers of holding).

\(^{17}\) See United States v. Romano, 929 F. Supp. 502 (D. Mass. 1996) (upholding Lacey Act). For a discussion of Lacey Act, see infra notes 104-11 and accompanying text. See also United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996) (upholding, as against similar claims, Bald Eagle Protection Act). For a discussion of the Bald Eagle Protection Act, see infra note 116 and accompanying text.


\(^{19}\) See id. (setting forth Secretary of the Interior's power under Endangered Species Conservation Act).
identify the particular subspecies from a skin at the airport or loading dock. This led New York to enact a far more protective statute, the Mason Law, in 1969, which bans the sale of skins or articles made from all varieties of tigers, leopards, alligators and the like. That law was upheld against claims of federal preemption and undue burden on commerce, paving the way for other states’ legislation. It also encouraged the Secretary of the Interior to strengthen the federal list because it essentially closed New York, a major fashion and apparel market, to endangered species.

In 1973, Congress enacted the present ESA. Building on the earlier Act, it affords protection to threatened as well as endangered species and, most relevant to the current challenges, empowers the Secretary to safeguard the critical habitat of endangered species of both animals and plants. It further bars federal agencies from taking actions “likely to jeopardize the continued existence of any endangered species or threatened species” or its critical habitat. The legislative history of the ESA emphasized the need to preserve endangered species for scientific and genetic purposes. The House Report found “[t]he value of [their] genetic heritage is, quite literally, incalculable. [T]hey are potential resources[:] potential cures for cancer or other scourges, present or future . . . .” This legislative history, however, sheds virtually no light on whether Congress enacted the ESA under its commerce power, although its control of imports and sales surely falls within recognized Commerce Clause authority. In addition, the Senate Report noted that many endangered species “perform vital biological services to maintain a ‘balance of nature’ within their environ-

21. See id. (banning sale of certain wild animals or wild animal products).
24. See id. at § 1536(a)(2) (prohibiting all federal agencies from jeopardizing critical habitat of any endangered or protected species).
ments" and noted "the need for biological diversity for scientific purposes." 

The habitat provision soon reached the Supreme Court in *Tennessee Valley Authority v. Hill* (Hill), the so-called "snail darter case." The Secretary found construction of a dam by the Tennessee Valley Authority (TVA), a federal agency, would result in the extinction of an endangered fish. Because the ESA requires federal entities to "use . . . all methods and procedures which are necessary" to preserve endangered species, Chief Justice Burger, writing for the Court, affirmed an injunction against its construction. The validity of the ESA was not questioned in this lawsuit. The Court pointed out that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . . ." Congress amended the ESA in the wake of this decision, providing for an inter-agency Endangered Species Committee with authority to exempt agencies from the provision barring them from actions jeopardizing endangered or threatened species where a particular project had regional significance. Contrary to congressional expectations, that committee voted not to exempt the dam from the Act's mandate, largely because the dam was not needed to generate electric power—the raison d'être for the TVA—and was to flood a great deal of farmland to create a recreational lake. That determination was, however, trumped by Congress. No doubt acting on the precept that there are times to rise above principle, Congress attached a rider to a budget bill explicitly requiring completion of the dam notwithstanding any provision of the ESA. The bill was enacted and the dam finished.

29. See id. at 161-62 (discussing Secretary's finding about dam construction).
31. See Hill, 437 U.S. at 194 (stating congressional support for protection of endangered species).
33. See Margot Hornblower, Panel Junks TVA Dam; Cites Cost, Not Snail Darter, WASH. POST, Jan. 24, 1979, at A12 (noting reasons other than snail darter for barring dam's barred completion).
ending, additional snail darters were discovered in adjacent streams, and the fish was taken off the endangered list.36

Aimed in large measure at halting the hunting of endangered species as well as imports and sales of those species or articles made from them, the Act in recent years has been increasingly used to protect their habitats. At first, as in Hill, its habitat provisions applied only to federal agencies. In 1995, however, the Supreme Court ruled that destroying an endangered species habitat amounted to a "taking"—that is, killing—of that species, in violation of the Act.37 This widened the reach of the ESA to protecting habitats not just from federal government entities but from private actors, states and municipalities. For example, in Rancho Viejo, LLC v. Norton (Rancho Viejo),38 the Interior Department's Fish and Wildlife Service (FWS) ordered a developer to remove a fence that interfered with the habitat of the endangered arroyo toad.39 It is these habitat-protecting determinations that have triggered recent challenges to Congress's authority to enact the ESA.

III. THE ACT AND THE COMMERCE POWER

Little thought seems to have been spent in 1973 as to Congress's authority to enact the ESA. Had the issue arisen, its power under the Commerce Clause would surely have been seen as the basis for the Act. The statute, after all, regulates importation and sale both of articles derived from endangered species and the animals and plants themselves—clearly matters substantially related to interstate and foreign commerce.40 The ESA followed on the heels of the Clean Air Act41 and the CWA,42 whose validity under the Commerce Clause seemed crystal clear. Perhaps most important, Supreme Court decisions since the late 1930s had uniformly upheld congressional legislation on a wide variety of subjects as valid under the commerce power.43 There was not a cloud on the horizon in-

36. See id. (noting presence of fish in Alabama and Georgia).
38. 323 F.3d 1062 (D.C. Cir. 2003) [hereinafter Rancho Viejo].
39. See id. at 1065 (discussing facts).
43. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding federal law as to labor relations); United States v. Darby, 312 U.S. 100, 118-19 (1941) (upholding federal law as to wages and hours); Wickard v. Filburn, 317 U.S. 111, 128 (1942) (finding Commerce Clause power appropriate dealing with agriculture);
hibiting federal power pursuant to the Commerce Clause. Indeed, not too long after the ESA’s enactment, the Court sustained an environmental statute regulating land use, the Surface Mining Control and Reclamation Act,44 as a valid exercise of the commerce power45—the very concern that was raised more recently regarding the ESA.

In the past decade though, the Court began to find that some congressional enactments exceeded the commerce power. Congress may likely have shrugged off that prospect and legislated with blithe unconcern over its constitutional limits. The Court quite rightly ruled in United States v. Lopez46 that a federal law criminalizing mere possession of a handgun near a school bore no substantial relation to commerce.47 Congress soon amended the statute to require that the gun moved in, or otherwise affected, the stream of commerce.48 Again, in United States v. Morrison,49 the Court set aside a federal law creating a tort cause of action for gender-motivated violence, finding no sufficient link to commerce.50 Chief Justice Rehnquist, writing for the Court, pointed out that such crimes “are not, in any sense of the phrase, economic activity.”51 The Court rejected the government’s claim “that gender-motivated violence affects interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate business,” and the like, sensibly finding these effects too attenuated to substantially affect commerce.52


47. See id. at 564 (holding handgun possession law invalid under Commerce Clause).
49. 529 U.S. 598 (2000) [hereinafter Morrison].
50. See id. at 645 (holding law had insufficient link to commerce).
51. See id. at 613 (refuting attempt by government to show link to commerce).
52. See id. at 615 (rejecting attempt to create but-for causal link between violent crime and interstate commerce). The Court held that the Commerce Clause did not authorize Congress to enact a civil remedy in the Violence Against Women Act. See id. at 607 (citing 42 U.S.C. § 13981 (1994)).
The Court easily distinguished cases like *Heart of Atlanta Motel v. United States (Heart of Atlanta)*,\(^5^3\) which upheld the Civil Rights Act of 1964's ban on racial discrimination by restaurants and other places of public accommodation,\(^5^4\) because the conduct Congress regulated there was plainly commercial in nature.\(^5^5\) It specifically rebuffed arguments like those that carried the day in *Heart of Atlanta* that gender-based violence, like racial discrimination in hotels and restaurants, curtailed interstate travel and employment.\(^5^6\)

More recently, the Court averted a commerce power clash by narrowly construing a provision of the CWA. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*\(^5^7\) involved a Corps regulation requiring a permit to place landfill in ponds used as habitat for migratory birds.\(^5^8\) The Government argued that here too, with clear relevance to the ESA, the commerce power reached the safeguarding of migratory birds' habitat because their hunting and viewing involved prodigious amounts of interstate travel and economic activity.\(^5^9\) The challenge, of course, asserted that this was a replay of *Lopez* and *Morrison*, noting that the rule covered ponds whether or not navigable, and questioned Congress's power to regulate a non-navigable waterway.\(^6^0\) In another 5-to-4 decision (as were both *Lopez* and *Morrison*), the Court finessed the constitutional issue and found the CWA did not support the Corps' rule.\(^6^1\) The CWA is by its terms applicable to "the waters of the United States" without regard to their navigability,\(^6^2\) although the specific provision dealing with discharges of landfill and the like, Section 404, speaks of "navigable waters."\(^6^3\) Concluding that "there are significant constitutional questions," the Court steered

\(^{53}\) 379 U.S. 241 [hereinafter *Heart of Atlanta*].
\(^{54}\) See id. at 250 (finding Congress had ample power to enforce equal access to public accommodations through Commerce Clause). See also 42 U.S.C. § 2000a(b) (2000) (banning discrimination or segregation in establishments "affecting interstate commerce").
\(^{55}\) See id. at 250, 243-44 (holding law valid under Commerce Clause). See also 42 U.S.C. § 2000a(b) (2000).
\(^{56}\) See *Morrison*, 529 U.S. at 635 (concluding gender-based violence does not affect interstate commerce although racial discrimination in public accommodations does).
\(^{57}\) 531 U.S. 159 (2001) [hereinafter SWANCC].
\(^{58}\) See id. at 162 (recapping facts of case).
\(^{59}\) See id. at 193 (noting specific regulated activity at issue).
\(^{60}\) See id. at 165-66 (noting petitioner's argument).
\(^{61}\) See id. at 162 (holding extension of "navigable waters" definition in CWA to include migratory bird habitats exceeded Corps' authority under CWA). CWA section 404(a) does not extend to the waters at issue in the case. See id.
\(^{63}\) See id. § 1344(a) (noting provisions for issuing permits for dredging).
clear by finding no “clear statement from Congress that it intended Section 404(a) to reach” this non-navigable waterway. The ruling leaves the ball in Congress’s court to amend the CWA to explicitly apply to non-navigable lakes and ponds.

The Supreme Court recently has ruled in a case raising similar issues. In United States v. Rapanos, the Sixth Circuit held CWA Section 404 applied to a wetland connected to navigable waters only by a man-made ditch or drain. The court found this constituted a hydrologic connection and thus a “significant nexus between the wetlands and navigable waters” as required by SWANCC. The Supreme Court, in a closely divided ruling, remanded for the lower courts to decide whether the wetlands at issue fell within Section 404. Justice Kennedy, who cast the deciding vote, adopted the “significant nexus” test. The Court did not reach the constitutional question, just as in SWANCC, though Justice Scalia’s plurality opinion, which garnered four votes, concluded “the Corps’ interpretation stretches the outer limits of Congress’s commerce power.”

What light do these decisions shed on the validity of the ESA? While some scholars have seen Lopez and Morrison as a conservative Court’s assault on congressional power, the better-reasoned view, I submit, is that they were belated wake-up calls to a complacent Congress that had simply taken for granted its ability to legislate on subjects far beyond its commerce power. But what of the ESA? Surely the bulk of the Act, dealing with imports and sales of endan-

64. See SWANCC, 531 U.S. 159, 174 (2001) (highlighting respondents raised “significant constitutional questions”).


67. See id. at 632 (noting holding).

68. See id. at 638-39 (quoting SWANCC, 531 U.S. at 167) (noting minority of courts have read SWANCC to limit CWA's jurisdiction to “navigable waters and non-navigable waters that directly abut navigable waters”).


70. See id. at 224 (citing Scalia's opinion).


gered species or goods made from their hides, is a thoroughly valid exercise of the commerce power. So too is the Act’s regulation of federal agency activities, an unexceptionable subject of congressional authority. It is the Act’s restrictions on property owners that have raised some scholarly and judicial eyebrows, and on which this Article will focus.

IV. IS THE ACT SUBSTANTIALLY RELATED TO COMMERCE?

The Act’s provisions preventing the destruction of habitat clearly bear a substantial relation to commerce, as required by *Lopez*. As noted, the ESA prohibits any person from taking, or attempting to take, an endangered species, and, as we have seen, encompasses the destruction of its habitat. In *National Association of Home Builders v. Babbitt (Home Builders)*, the United States Court of Appeals for the District of Columbia Circuit sensibly upheld these provisions.

*Home Builders* challenged a ruling of the FWS, the arm of the Department of the Interior charged with ESA implementation, aimed at protecting an endangered fly’s habitat. Despite its exotic name, that species, the Delhi Sands Flower-Loving Fly is found only in a small area near San Bernardino, California. The FWS notified San Bernardino County that a proposed road intersection near a planned hospital would injure that habitat and therefore would likely violate the Act. The county, joined by others, asserted the Act’s habitat provision exceeded congressional power.

Judge Wald, writing for the District of Columbia Circuit, affirmed the lower court’s judgment upholding the statute. But the court fragmented as to whether, and if so how, the taking provision was a valid exercise of the commerce power. *Lopez* held Congress may regulate the channels of commerce (interstate transport), the instrumentalities of commerce (trains, vehicles and the like), and matters substantially related to commerce (economic activities such

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74. *See id.* § 1532(19) (defining “take”).
75. 130 F.3d 1041 (D.C. Cir. 1997) [*hereinafter Home Builders*].
76. *See id.* at 1043 (upholding ESA’s taking provision).
77. *See id.* (noting facts).
78. *See id.* (noting fly’s habitat is located within “eight mile radius” in San Bernardino County).
79. *See id.* (noting construction would likely result in “taking”).
80. *See Home Builders*, 130 F.3d at 1043 (asserting that section 9 of ESA exceeds Commerce Clause power).
81. *See id.* at 1043 (noting holding).
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as working conditions). Judge Wald found the taking statute valid both as a regulation of the channels of commerce and as substantially related to commerce. Judge Henderson, concurring, relied on its substantial relation to commerce alone. And Judge Sentelle, dissenting, concluded neither category applied.

Judge Wald noted that Congress and reviewing courts may look to "the aggregate effect of the extinction of all similarly situated endangered species." Wickard v. Filburn (Filburn), which she found "directly analogous" to this case, is useful here. That Supreme Court decision sustained a federal law limiting the amount of crops farmers might produce, in order to reduce supply and thus raise prices during the Great Depression. The Court upheld the law as to a farmer diverting a small volume of wheat for his own use, holding the fact that his action "may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

Based on Filburn, Judge Wald concluded the statute was valid as a regulation of the channels of commerce, prohibiting takings of endangered species "to enable the government to control the transport" and "to keep the channels of interstate commerce free from immoral and injurious uses." This is a bit of a stretch. The connection between safeguarding a species' critical habitat and ensuring that it can be shipped in commerce is tenuous, particularly as to a fly, as here, unlikely to be a subject of intentional transport between states.

Judge Wald, joined by Judge Henderson, was plainly on more solid ground in upholding the taking provision as substantially related to commerce, relying on Filburn. Here, she aptly noted the scientific consensus that every species is a potential genetic or medi-

83. See Home Builders, 130 F.3d at 1046 (highlighting court's reasoning).
84. See id. at 1058 (Henderson, J., concurring) (upholding statute as substantially related to commerce).
85. See id. at 1061 (Sentelle, J., dissenting) (striking down taking provision).
86. See id. at 1046 (noting court does not only have to focus on effect of endangered species at issue).
87. 317 U.S. 111 (1942) [hereinafter Filburn].
88. See Home Builders, 130 F.3d at 1049 n.7 (noting aggregation analysis).
89. See Filburn, 317 U.S. at 128-29 (noting holding).
90. See id. at 127-28 (noting effects if Court allowed individual action to stand).
91. See Home Builders, 130 F.3d at 1046 (citing Lopez, 514 U.S. 549, 558 (1995)) (noting action is not commercial in nature).
cal resource, whose loss is irretrievable. As the House Report on the ESA noted, "[a]s we homogenize the habitats in which these plants and animals evolved, . . . we threaten their—and our own—genetic heritage." Thus, Judge Wald ruled, "[t]he elimination of all or even some of these endangered species would have a staggering effect on biodiversity . . . and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species." She went on to note that the takings statute "regulat[es] the conditions under which commercial activity takes place" and is therefore sustainable on that ground as well, as in the decisions upholding the Surface Mining Act.

Concurring, Judge Henderson sensibly rejected the channels-of-commerce approach. She agreed that Congress is empowered to protect biodiversity, not because endangered species necessarily have scientific or medicinal value, but because "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce." She relied on the congressional finding in the ESA that "development untempered by adequate concern and conservation" is a significant cause of extinction, so that "Congress contemplated protecting endangered species through regulation of land and its development, which is precisely what the Department has attempted to do here." This was especially true where, as here, the regulation involved a traffic intersection and a hospital, each with a clear "connection with interstate commerce."

92. See id. at 1050-51 (citing H.R. REP. No. 93-412, at 4-5 (1973)) (describing value of endangered species' genetic heritage).
93. See id. at 1050 (citing H.R. REP. No. 93-412, at 4-5 (1973)). See also Tenn. Valley Auth. v. Hill, 437 U.S. 153, 178-79 (1978). Congress enacted the ESA in part due to concerns "about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet." See id. (emphasis in original).
94. See Home Builders, 130 F.3d at 1052 (explaining court's environmentally sound rationale).
95. See id. at 1056 (explaining constitutional reasoning for holding).
96. See Hodel v. Virginia Surface Mining, 452 U.S. 264 (1981) (citing another instance where similar reasoning was used); see also Hodel v. Indiana, 452 U.S. 314 (1981) (citing another statute to which such reasoning was used).
97. See Home Builders, 130 F.3d at 1058 (Henderson, J., concurring) (explaining opinion that environmental reasons alone are sufficient).
98. See id. at 1059 (citing 16 U.S.C. § 1531 (a)) (highlighting legislative purpose in protecting biodiversity).
99. See id. (connecting actions of case to what Congress sought to prevent).
100. See id. (emphasizing relation to interstate commerce makes holding more important).
Judge Sentelle, dissenting, insisted the regulation concerned “an activity which is neither interstate nor commerce.”101 He asserted, dubiously, that the Framers of the Constitution “certainly [knew] as much about the dependence of humans on other species and each of them on the land as any ecologist today.”102 This astounding remark casually shrugs off a century of scientific and medical discovery as to the interdependence of species and their environments, together with pharmaceutical uses of animals and plants undreamed of in the eighteenth century.

It is particularly ironic that Judge Sentelle quotes at length Justice Story’s 1833 Commentaries to argue that Congress lacked power here.103 The great Justice was a product of his time, and tellingly claimed Congress could not regulate manufacturing, agriculture, wages and roads,104 all the subjects of federal legislation whose validity not even Judge Sentelle would likely dispute.105

At about the same time as Home Builders, a federal court upheld the Lacey Act, which, as amended in 1981, prohibits the purchase of wildlife taken in violation of state law.106 This amendment strengthened the original Act, described earlier, that barred the interstate shipment of such wildlife.107 In United States v. Romano (Romano),108 the court rebuffed a Commerce Clause challenge, noting that “Congress has perceived a need to secure the long-term availability of scarce natural resources for commercial purposes.”109 Romano, however, involved a defendant who hired a guide and hunted in violation of state law.110 As to this, the court, relying on cases like Filburn, held that while “[a] solitary unlicensed hunter . . . for sport,

101. See id. at 1061 (Sentelle, J., dissenting) (concluding activity did not qualify for interstate commerce with environmental purpose).
102. See Home Builders, 130 F.3d at 1065 (Sentelle, J., dissenting) (using framers’ intent to show dependence on biodiversity is not new issue).
103. See id. at 1051 n.21 (relying on Justice Story’s writings in arguing for statute’s invalidation).
104. See id. at 1067 (citing Joseph Story, 2 Commentaries on the Constitution § 1075 (1833)) (showing historical opinion which limited congressional activity).
109. See id. at 508 (noting congressional concern for commercial effects of illegal trade in fish and wildlife).
110. See id. at 503-04 (discussing facts).
poses little or no threat to interstate commerce; a rash of illegal hunting, on the other hand, may well result in a reduction in wildlife-related goods and services.”

It cited Perez v. United States, which sustained the federal loan-sharking statute: “[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.”

Finally, the court rebuffed the argument that Romano was not himself engaged in commerce, a claim relevant to the ones voiced in challenges to the ESA’s habitat-taking provisions. As the court held, the Supreme Court has upheld congressional regulation of private non-commercial acts as long as their aggregate impacts substantially affect commerce. National Organization for Women, Inc. v. Scheidler sustained the Racketeering Influenced and Corrupt Organization Act (RICO) as applied to persons threatening an abortion clinic with violence, although their motives were ideological and not commercial.

In the same vein, the United States Court of Appeals for the Ninth Circuit upheld the federal Bald Eagle Protection Act’s provision barring possession of eagle feathers because “[b]oth commerce in and possession of eagle parts . . . have substantial effects on interstate commerce, because both activities, even when conducted purely intrastate, threaten the eagle with extinction.” Closer to the issue here is Palila v. Hawaii Dept. of Land and Natural Resources (Palila), which sustained the ESA’s taking provision as applied to damage to the critical habitat of the palila, an endangered bird. The lawsuit alleged the state’s maintenance of feral

114. See Romano, 929 F. Supp. at 506 (finding litigant was involved in commerce).
115. See Home Builders, 130 F.3d at 1041, 1055 (interpreting Commerce Clause).
117. See id. at 250 (upholding Racketeering Influenced and Corrupt Organization Act as applied to antiabortion protesters).
118. See United States v. Bramble, 103 F.3d 1475, 1481 (9th Cir. 1996) (explaining Bald Eagle Protection Act forbids simple possession of eagle parts, not only commerce or attempted commerce).
119. 471 F. Supp. 985 (D. Haw. 1979), aff’d, 639 F.2d 495 (9th Cir. 1981) [hereinafter Palila].
120. See id. at 995 (upholding ESA’s taking provision).
sheep and goats was destroying the plants on which the bird depends for survival.\textsuperscript{121}

The \textit{Palila} court reaffirmed the ESA's validity as applied to this bird as local to its state as were the species involved in \textit{Home Builders}.\textsuperscript{122} It held "[a] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species that would otherwise be lost by state inaction."\textsuperscript{123} The \textit{Palila} court relied on \textit{Hill}, where the Supreme Court emphasized the congressional finding with regard to protecting endangered species that "[t]he value of [their] genetic heritage is, quite literally, incalculable."\textsuperscript{124}

Most recently, \textit{Rancho Viejo}\textsuperscript{125} explored some of these same issues. There, the Interior Department restricted a landowner from interfering with the habitat of the endangered arroyo toad.\textsuperscript{126} The District of Columbia Circuit reaffirmed the constitutionality of the ESA's taking provision, adhering to \textit{Home Builders}.\textsuperscript{127} The court explicitly ruled that nothing in \textit{Morrison},\textsuperscript{128} decided after \textit{Home Builders}, would alter this result.\textsuperscript{129} The concern in \textit{Rancho Viejo} was that excavating a streambed in order to construct homes, for which a CWA section 404 permit is required, would jeopardize the toad's habitat.\textsuperscript{130} The District of Columbia Circuit rebuffed the claim that the lack of congressional findings was fatal, pointing out that the Supreme Court in \textit{Lopez} and \textit{Morrison} expressly ruled "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."\textsuperscript{131} It

\begin{itemize}
  \item \textsuperscript{121} See \textit{id.} (alleging state activity was harming Palila bird).
  \item \textsuperscript{122} See \textit{id.} at 994-95 (noting protecting endangered species is of utmost importance).
  \item \textsuperscript{123} See \textit{id.} at 995 (elaborating on Congress's determination that major cause of species extinction is natural habitat destruction).
  \item \textsuperscript{125} 323 F.3d 1062, 1064 (D.C. Cir. 2003).
  \item \textsuperscript{126} See \textit{id.} (reviewing restricted activity).
  \item \textsuperscript{127} See \textit{id.} (following precedent in upholding ESA's taking provision).
  \item \textsuperscript{128} For a full explanation about case, see \textit{supra} notes 49-52 and accompanying text.
  \item \textsuperscript{129} See \textit{Rancho Viejo}, 323 F.3d at 1071 (concluding Supreme Court's decision in \textit{Morrison} would not alter holding).
  \item \textsuperscript{130} See \textit{id.} at 1065 (discussing activity that would endanger arroyo toad).
  \item \textsuperscript{131} See \textit{id.} at 1069 (citing \textit{United States v. Lopez}, 514 U.S. 549, 558 (1995)), \textit{United States v. Morrison}, 529 U.S. 598, 612 (2000)) (examining previous Supreme Court decisions in evaluating lack of congressional findings).
\end{itemize}
noted that a 202-acre project near a major interstate highway, just as with the hospital in *Home Builders*, “is presumably being constructed using materials and people from outside the state . . . .”

In any event, the District of Columbia Circuit in *Rancho Viejo* held, “the ESA regulates takings, not toads. *Morrison* instructs that ‘the proper inquiry’ is whether the challenge is to ‘a regulation of activity that substantially affects interstate commerce.’” It cited *Terry v. Reno (Terry)*, which sustained as an exercise of the commerce power a federal statute regulating the obstruction of abortion clinics by protestors. The *Terry* court pointed out that the regulated activity need not be commercial as long as it substantially affects commerce—a view more recently reaffirmed by the Supreme Court in *Gonzales v. Raich (Raich)*, described later.

The *Rancho Viejo* ruling gave rise to the controversial dissents of Judge Sentelle and Judge (now Chief Justice) Roberts questioning the authority of Congress over habitat restrictions. The court denied rehearing en banc in *Rancho Viejo*, with those two judges dissenting. Dissenting as he had in *Home Builders*, Judge Sentelle emphasized the “noncommercial nature of the regulated entity and activity” and argued that even if one were to look at the construction as the relevant activity, “construction of houses hardly constitutes interstate commerce.” He relied on *GDF Realty Investments, Ltd. v. Norton (GDF)*, a United States Court of Appeals for the Fifth Circuit decision, as “explicitly reject[ing] the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the ‘take’ was itself economic.” But *GDF* actually sustained the Act as applied to regulating development on an endangered species’ habitat, holding there was the requisite sub-

132. See id. (noting out-of-state help in developing project).
133. See id. at 1072 (explaining it did not matter if court did not agree with plaintiff's argument) (emphasis omitted).
134. 101 F.3d 1412 (D.C. Cir. 1996).
135. See *Rancho Viejo*, 323 F.3d at 1072 n.10 (citing *Terry v. Reno*, 101 F.3d at 1072) (holding that commerce power could regulate anti-abortion protest).
136. See *Terry*, 101 F.3d at 1417-18 (determining commerce clause extends beyond commercial actors and has authority over individuals who interfere with commercial activities in interstate commerce).
137. See *Rancho Viejo*, 334 F.3d 1158 (Sentelle, J., dissenting) (disagreeing with majority’s determination that Congress can regulate taking because of commercial activities of entity).
138. See id. at 1159-60 (arguing building houses does not constitute interstate commerce).
139. 326 F.3d 622 (5th Cir. 2003) [hereinafter *GDF*].
140. See *Rancho Viejo*, 334 F.3d at 1159 (Sentelle, J., dissenting) (suggesting majority’s conclusion conflicted with Supreme Court and Fifth Circuit decisions).
stantial effect on interstate commerce where the "takes" are "aggregated with those of all other endangered species." Taking its cue from *Hill*, the *GDF* court noted the potential in medicine and genetics that "may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed." *GDF* did reject the claim that the commercial development of the parcel justified applying the Act because "Congress, through [the] ESA, is not directly regulating commercial development," and it contended that "analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to noncommercial actors."

Judge Roberts, as noted, also dissented in *Rancho Viejo*. He too objected to the court asking "whether the challenged regulation substantially affects interstate commerce, rather than [asking] whether the activity being regulated does so" and also objected to the court "sustain[ing] the application of the Act in this case because *Rancho Viejo*'s commercial development constitutes interstate commerce . . . , not because the incidental taking of arroyo toads can be said to be interstate commerce." He also relied on the distinction raised in *GDF*. Judge Roberts concluded by suggesting that en banc review would "afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent."

What are these alternative grounds? Judge Roberts referred to a footnote in the original panel's *Rancho Viejo* decision highlighting two decisions from other circuits sustaining similar federal statutes. One of these decisions is *Gibbs v. Babbitt* (*Gibbs*), which upheld a FWS regulation, adopted pursuant to the ESA that limits the taking of wolves on private land. Writing for the court, Judge Wilkinson ruled that "[i]nvalidating this provision would call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all Americans." The court found "[t]he relationship between red wolf tak-

141. See *GDF*, 326 F.3d at 624 (holding ESA applies when there is substantial effect on interstate commerce).
142. See id. at 632 (validating regulation based on scientific and medical value).
143. See id. at 634 (limiting scope of ESA to commercial actors).
144. See *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting) (noting approach of majority is contrary to Supreme Court holdings).
145. See *GDF*, 326 F.3d at 632 (relying on *GDF* in reaching decision).
146. See id. (criticizing majority's reasoning for denying rehearing).
147. See id. at 1067 n.2 (citing "alternative grounds" through other decisions).
148. 214 F.3d 483 (4th Cir. 2000) [hereinafter *Gibbs*].
149. See *Gibbs*, 326 F.3d at 624 (holding ESA applies when there is substantial effect on interstate commerce).
150. See id. at 492 (specifying reason for holding).
ings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." Thus, the taking of these species is in fact an economic activity that may be aggregated as in Filburn and Heart of Atlanta—"especially so where, as here, the regulation is but one part of the broader scheme of endangered species legislation." While the court described tourists’ visits to red wolf habitats in North Carolina in support of its holding, it emphasized that those visits were to public lands, not the private parcels subject to the hunting restriction, and noted that the ESA "was motivated in part by the need to extend takings regulation beyond the limited confines of federal land." In any event, the need to conserve these species for scientific research exists whether or not tourists travel to view them, and the court aptly held "[i]t is not for the judiciary to move from species to species, opining that species A possesses great commercial potential, but species B does not."

The Gibbs court relied on the Ninth Circuit’s holding in United States v. Bramble, sustaining the Bald Eagle Protection Act, discussed earlier. That court emphasized, as did Home Builders, “the interconnectedness of species and ecosystems,” where Congress could reasonably find “the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce.”

Finally, with particular relevance to the arroyo toad and similar obscure and unglamorous species, the Gibbs court pointed out that:

the effects on interstate commerce should not be viewed from the arguably small commercial effect of one local taking, but rather from the effect that single takings multiplied would have on advancing the extinction of a species. . . . [If] endangered species would lie beyond congressional protection because there are too few animals left to make a commercial difference. Such reason-

151. See id. (describing relationship between hunting red wolves and interstate commerce).
152. See id. at 493 (indicating aggregation of economic activity is appropriate).
153. See Gibbs, 214 F.3d at 494 (describing intent of ESA to extend takings regulation).
154. See id. at 495 (stating court’s opinion).
155. 103 F.3d 1475, 1481 (9th Cir. 1996).
ing would eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head. 157

Whatever doubt remained about whether the commerce power encompasses activities such as habitat protection should have been resolved earlier this year when the Supreme Court decided Raich. 158 The Court upheld the Controlled Substances Act 159 as applied to marijuana grown for home medical use, as authorized by a California law. 160 The federal law, if valid, of course preempted a conflicting state law, and the Court sustained the Controlled Substances Act’s regulation of “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce,” citing Perez and Filburn. 161 Writing for the Court, Justice Stevens noted that there only need be, and in fact was, a rational basis for Congress to find that growing marijuana for home use substantially affects interstate commerce. 162 He pointed to the enforcement problems in “distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels . . . .” 163 The fact that the marijuana used medicinally by Raich was never in the stream of commerce was irrelevant.

As Raich reminds us, Lopez itself, the poster child for the current assault on the commerce power, reiterated that as long as “a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.” 164 Raich further reaffirms that “the absence of particularized findings [relating to interstate commerce] does not call into question Congress’s authority to legis-

157. See Gibbs, 214 F.3d at 498 (stating how commercial effect should be viewed).
158. 545 U.S. 1, 7 (2005) [hereinafter Raich].
161. See Raich, 545 U.S. at 16 (citing Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, 317 U.S. 111 (1942)) (stating Court sustained Controlled Substances Act).
162. See Raich, 545 U.S. at 2 (applying and finding rational basis in reaching decision).
163. See id. at 24 (pointing to problems in distinction).
164. See id. at 17 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)) (stating de minimis character of individual instances under statute is of no consequence). See also United States v. Lopez, 514 U.S. 549, 558 (1995).
late." What is especially significant to analysis of the ESA is the statistic—not from Congress but from the President's Executive Office—that "American users spent $10.5 billion on the purchase of marijuana." The amount spent on viewing wildlife, including endangered species, is likewise prodigious.

Which of the two approaches suggested in *Home Builders* and *Rancho Viejo* better supports congressional authority to regulate takings through habitat destruction under the ESA? Each of them fully justifies a court holding that Congress could rationally find the activities the Act regulates are substantially related to interstate commerce. Surely the irreversibility of extinction and the scientific recognition of the medical and genetic importance of individual species fits the bill. This is corroborated by the interdependence of species in the food chain and the ecosystem they inhabit. One scholar has pointed out the vital need for "maintenance of species communities, compris[ing] the vast majority of organisms," where communities of species control as well as depend on the existence of individual species, even if some may not be economically important, "although nature viewers and pharmaceutical firms would be among those quick to dispute that assertion" of lack of economic importance. It is quite late in the day to seriously dispute these facts. They support congressional protection for the habitat of arroyo toads as much as for alligators and bison. The authority of Congress to act to protect subjects of its commerce power does not hinge on their commercial importance or their appeal to sightseers.

Just as with the small amount of wheat Filburn withheld from the market or the economically insignificant loan-sharking of Perez, these species are not somehow immune from congressional protection—any more than was the commercially unimportant snail darter that was the subject of *Hill*. The ability of Congress to

165. See *id.* at 21 (stating that absence of particularized finding does not call Congress's authority to legislate into question).


167. See Gibbs v. Babbitt, 214 F.3d 483, 493 (4th Cir. 2000) (highlighting endangered species are part of billion dollar recreational, tourism and interstate travel industry).


safeguard these endangered animals and plants, whether from hunting or loss of habitat, surely bears a substantial relation to commerce in ways that carrying a gun near a school and gender-related violence do not. The long history of federal control of endangered species, extending back to the Migratory Bird Treaty to protect the egret, bears witness to this.170

Similarly, the restrictions on taking endangered species by destroying their habitat are equally valid because they, by definition, concern commercial activities substantially linked to interstate commerce. Home Builders involved a traffic intersection adjacent to a planned earthquake-proof hospital “to serve as the central emergency burn center for the San Bernadino County area in the event of an earthquake and to serve as a primary burn care center and teaching facility.”171 The road was for emergency vehicle access to that hospital.172 Recognizing the economic stakes involved, the National Association of Home Builders brought the lawsuit. Rancho Viejo concerned a 202-acre housing development.173 Can it seriously be contended that these are not activities closely related to interstate commerce? They surely implicate commerce more than the home-grown marijuana in Raich. To deny that the construction industry is substantially related to interstate commerce—a major industry subject to a host of federal laws such as the National Labor Relations Act—would be to backpedal to the era that the Court ended during the Great Depression.174

It may be argued that, as Judge Ginsburg concluded in his concurrence in Rancho Viejo, though “[t]he large scale residential development that is the take in this case clearly does affect interstate commerce . . . the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property . . . does not . . .”175 But that issue can await another day. Its likely answer will be that the lone hiker and individual homeowner are not different from the marijuana grower in Raich or the sole proprietor loan shark in

170. For a discussion of the history of federal control of endangered species, see supra notes 8-11 and accompanying text.
172. See id. at 1045 (stating road’s purpose).
174. For a discussion of construction industry, see supra note 37 and accompanying text.
175. See Rancho Viejo, 323 F.3d at 1080 (Ginsburg, J., concurring) (stating Justice Ginsburg’s conclusion).
Perez—"de minimis . . . individual instances . . . of no consequence" in judging the validity of the statute.176

V. CONCLUSION

The courts should uphold the ESA’s habitat provisions as valid exercises of the commerce power. Failing to do so would not only hamstring a vitally-needed statute whose importance is recognized by the scientific community; it would also undermine congressional authority to regulate activities clearly and substantially affecting interstate commerce, threatening the CWA, gun control statutes and a host of others. Lopez and Morrison set sensible boundaries for Congress. The courts should not override them.

176. See Gonzales v. Raich, 545 U.S. 1, 17 (citations omitted) (stating likely answer).