Hastings Environmental Law Journal

Volume 7
Number 2 *Winter 2001*

Article 12

1-1-2001

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By Maya R. Moiseyev◔

I. Introduction

On January 9, 2001, the United States Supreme Court issued a decision eagerly anticipated by both environmentalists and industry in the battle between clean water and economic realities. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,[1] the Court considered statutory and constitutional challenges to the federal regulation of isolated wetlands. The Court ruled that the Army Corps of Engineers' ("the Corps") definition[2] expanding its jurisdiction to isolated wetlands that serve as habitat for migratory birds extended beyond its authority under the Clean Water Act.[3] The Court found that the Act's use of "navigable waters"[4] indicated congressional intent to exclude these types of wetlands from the Act's jurisdiction.[5]

By deciding this matter on purely statutory grounds, the Court avoided the constitutional argument that the Seventh Circuit relied on in upholding the Corps' wetlands definition.[6] Consequently, the Court did not reach the question of whether Congress had exceeded its power in enacting the Clean Water Act and in subsequently attempting to regulate isolated wetlands under the Commerce Clause.[7] Furthermore, the Court, by focusing exclusively on statutory construction, bypassed the sec-

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1. 121 S. Ct. 675 (2001) (hereinafter "SWANCC").

2. Final Rule for Regulatory Programs for the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). This definition, commonly referred to as the Migratory Bird Rule, gave the Corps permitting authority over wetlands with actual or potential habitat for migratory birds.

3. SWANCC, 121 S. Ct at 678.

4. Federal Water Pollution Control Act §404(a), 33 U.S.C. §1344(a) (commonly known as the Clean Water Act).

5. SWANCC, 121 S. Ct at 680.

6. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999).

7. U.S. CONST. art. 1, § 8, cl. 3.

ond step of the *Chevron*[8] analysis and an examination of the rationality of the Corps' statutory interpretation as embodied in the Migratory Bird Rule.

The SWANCC opinion was contrary to the expectations of many environmentalists, who feared that the Court would take this opportunity to examine the issue under the Commerce Clause and determine that the Corps had erroneously relied on Congress' wrongful delegation of power to regulate isolated wetlands. Such a holding would have been an opportunity for the Court to use the Constitution to chip away at the Clean Water Act and to lay the groundwork for an invalidation of the private taking provisions of the Endangered Species Act.[9]

This Comment examines the Supreme Court's Commerce Clause jurisprudence leading up to its and the Seventh Circuit's decisions, culminating in the "non-application" of the constitutional challenge in the SWANCC case. Then, the Comment will turn to recent Commerce Clause attacks on the Endangered Species Act and what the SWANCC decision means for the future of federal wildlife regulation.

II. Modern Supreme Court Commerce Clause Jurisprudence

The SWANCC decision comes during a significant movement by the Supreme Court to curtail congressional power and strictly define the limits of federalism. Both *United States v. Lopez*[10] and *United States v. Morrison*[11] represent significant changes in the Court's Commerce Clause jurisprudence, as well as its growing reluctance to allow Congress to push through legislation that has only a tenuous connection to interstate commercial activity. In SWANCC, though the Court appropriately bypassed a direct Commerce Clause challenge to the Migratory Bird Rule. The Court is unlikely to allow the Endangered Species Act to survive when a similar challenge arises.

The Supreme Court in *Lopez* effectively revived the Commerce Clause by finding that Congress had exceeded its authority in passing the Gun-Free School Zones Act of 1990 ("GFSZA"),[12] which made it a federal crime to possess a gun in a school zone.[13] For the first time in more than 60 years, the Court refused to extend congressional power under the Commerce Clause and found the GFSZA unconstitutional.[14] In doing so, the Court identified three types of activity that Congress may regulate under the Commerce Clause: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, even if a threat to people or things comes only from intrastate activities; and (3) activities having a substantial effect on interstate commerce.[15] In order to determine which activities fall within the last category, the Court must further examine (a) whether the statute controls a commercial activity or some activity necessary to the regulation of commercial or economic activity; (b) whether the statute's language includes a jurisdictional requirement ensuring that the regulated activity affects interstate commerce; and (c) how far the rationale for upholding the statute extends.[16] The Court found that the GFSZA fell within this third category, but failed to meet the enumerated requirements; most significantly, the United States failed to make a showing that the Act regulated an activity with a substantial effect on interstate commerce.[17]

In *Morrison*,[18] the Supreme Court further restricted congressional power under the

8. Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Under *Chevron*, a court's review of an agency's statutory interpretation involves two steps. First, the court determines whether the plain meaning of a statute indicates congressional intent to support or prohibit the regulation. Second, if congressional intent is not clear, the court determines whether the agency's interpretation of the statute is reasonable. *Id.*

9. Endangered Species Act of 1973 § 9, 16 U.S.C. § 1538 (2000).

10. 514 U.S. 549 (1995).

11. 529 U.S. 598 (2000).

12. 18 U.S.C. § 922(q)(1) (1995), *amended by* Omnibus Appropriations Act of 1997, Pub. L. No. 104-208.

13. *Lopez*, 514 U.S. at 551.

14. *Id.* at 567.

15. *Id.* at 558.

16. *Id.* at 563-64.

17. *Id.* at 561.

18. United States v. Morrison, 529 U.S. 598, 681 (2000).

Commerce Clause by invalidating the civil remedy provision under the Violence Against Women Act ("VAWA"),[19] which allowed victims to bring suit for gender-motivated violence in federal court. By applying the L*opez* test, the Court found that though the VAWA sought to regulate activities with a substantial effect on interstate commerce, it failed to meet the requirements for such authority because gender-based violence is not an economic activity.[20] "L*opez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."[21] The Court noted that the statute's economic rationale for the regulation of gender-based crimes was far too attenuated, thus precluding congressional regulation of non-economic activity that is based solely on its aggregate impact on interstate commerce.[22]

Therefore, under both L*opez* and M*orrison*, if a law rests solely on a tenuous connection to interstate commerce, courts should not hesitate to invalidate the regulation. Moreover, "[t]he Constitution requires a distinction between what is truly national and what is truly local."[23] Given the historical and inherent power of local governments to regulate land use concerns, L*opez* and M*orrison* together set a precarious stage for the constitutionality of federal environmental statutes, such as the Clean Water Act and the Endangered Species Act. The Migratory Bird Rule squeaked by the Commerce Clause, although it suffered a painful death at the hands of the Court's statutory constructionists. In the hands of the current Supreme Court, the Endangered Species Act may not pass constitutional muster.

III. The SWANCC Decision

The SWANCC case began several years ago when the Solid Waste Agency of Northern Cook County applied to the Corps for a landfill permit. The agency wanted to create a solid waste disposal installation in an area encompassing a sand and gravel pit that was once part of a strip mine.[24] Left abandoned for more than 50 years, the former strip mine had evolved into a wetland haven for wildlife and vegetation, nurturing nearly 170 different species of plants and more than 100 species of birds.[25] In addition, "[m]ost notably, the site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois."[26] Although the wetlands were isolated — "not adjacent to bodies of open water"[27] — the Corps claimed jurisdiction over the site pursuant to the Migratory Bird Rule and declined to issue the permit.[28] The agency sued the Corps, challenging its jurisdiction to regulate the site and questioning the reasonableness of the Migratory Bird Rule's interpretation of the Clean Water Act.[29]

The Migratory Bird Rule resulted from a 1986 attempt to clarify the Corps' jurisdiction over "navigable waters" under section 404(a) of the Clean Water Act.[30] The Act's own definition of "navigable waters" is vaguely stated as "the waters of the United States, including the territorial seas."[31] The Act does not provide further guidance in determining which waters are subject to regulation under the federal statute. To clarify these jurisdictional issues, the Environmental Protection Agency and the Corps defined "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats,

19. 42 U.S.C. § 13981(b), (c) (2000).

20. I*d*. at 673.

21. I*d*. at 672.

22. I*d*. at 673.

23. I*d*. at 676.

24. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845, 848 (7th Cir. 1999).

25. I*d*.

26. I*d*.

27. SWANCC, 121 S. Ct. 675, 680 (2001). The Court previously decided that the Corps' jurisdiction under section 404 of the Clean Water Act, 33 U.S.C. § 1344(a), extended to hydrologically connected wetlands. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

28. *Solid Waste Agency of* N. *Cook County*, 191 F.3d at 847.

29. I*d*. at 849.

30. 33 U.S.C. § 1344(a) (2000).

31. 33 U.S.C. § 1362(7) (2000).

sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce."[32] The Corps' 1986 preamble codified its (and the EPA's) longstanding assumption that its wetlands jurisdiction extended beyond those activities with a potential effect on interstate commerce in certain circumstances.[33] The Corps' Migratory Bird Rule stated that "waters of the United States . . . also include . . . waters [w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or [w]hich are or would be used as habitat by other migratory birds which cross state lines."[34] As a result, the Corps' rule extended "navigable waters" to include intrastate wetlands "based on their actual or potential use as habitat for migratory birds."[35]

The Seventh Circuit upheld congressional authority under the Commerce Clause to regulate "navigable waters" under the Clean Water Act and found the Migratory Bird Rule was a reasonable interpretation of the Clean Water Act's language.[36] The court noted that "throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds."[37] According to the Seventh Circuit, these findings indicated a substantial direct impact on interstate commerce, consistent with the Supreme Court's holding in *Lopez*.

Then, turning to the *Chevron* test, the court found that

> the geographical scope of the [Clean Water Act] is as broad as the Commerce Clause allows. . . . Accordingly, because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the EPA and the Corps to interpret the Act in such a manner.[38]

Moreover, the court found that the Act was designed not only to protect national water quality (as claimed by the plaintiffs), but also to "restore and maintain the . . . physical and biological integrity"[39] of those waters. Sustaining the Corps' jurisdiction, reasoned the Seventh Circuit, would further those ends as a matter of public policy.

In a five-to-four opinion, the Supreme Court reversed the Seventh Circuit's decision on statutory construction grounds. The Court construed the Clean Water Act's language to avoid constitutional and federalism questions, rejecting the request for agency deference.[40] It held that the Corps could not regulate isolated wetlands through the Migratory Bird Rule because the Act's language did not include these wetlands in its definition of "navigable waters."[41] The Court concluded that extending the Corps' jurisdiction to seasonal wetlands located wholly within two counties in Illinois would effectively read "navigable" out of the language of the Act.[42] Although its decision in *United States v. Riverside Bayview Homes, Inc.*[43] recognized that the term, "navigable," was "of limited effect," thus permitting the Corps' jurisdiction over adjacent wetlands, the Court refused to deny the term any effect whatsoever.[44] "The term 'navigable' at least has the import of showing us what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or

32. 33 C.F.R. § 328.3(a)(3) (2000).

33. *Solid Waste Agency of* N. *Cook County*, 191 F.3d at 847.

34. Final Rule for Regulatory Programs for the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

35. *Solid Waste Agency of* N. *Cook County*, 191 F.3d at 847.

36. *Id*.

37. *Id*. at 849 (citing Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 261 (7th Cir. 1993)).

38. *Id*. at 851.

39. *Id*. (citing 33 U.S.C. §1251(a)).

40. SWANCC, 121 S. Ct. 675, 683 (2001).

41. *Id*. at 680.

42. *Id*. at 682-83.

43. 474 U.S. 121, 138-39 (1995).

44. SWANCC, 121 S. Ct. at 682.

had been navigable in fact or which could reasonably be made so."[45]

The Court also rejected the Corps' argument that Congress' failure to pass subsequent narrowing legislation represented acquiescence to their interpretation.[46] In 1977, the Corps adopted its current expansive definition of "navigable waters" that includes isolated wetlands and ponds.[47] Congress was aware of this broad interpretation when it adopted its 1977 amendments to the Clean Water Act, as apparent in a failed bill that would have limited the Corps' jurisdiction over waters of reasonable or actual navigability.[48] The Corps argued that the bill's failure to pass indicated congressional acceptance of a broad interpretation of "navigable waters," including isolated, non-navigable and intrastate bodies of water.[49] The Court dismissed this argument, noting that "[f]ailed legislative proposals are a 'particularly dangerous ground on which to rest an interpretation of a prior statute.'"[50] Proponents of the use of such legislative history must overcome a heavy burden of showing latent congressional intent supercedes the plain language, something the Corps was unable to demonstrate.[51]

Although the Court did not reach the Commerce Clause challenge to the Migratory Bird Rule, it did suggest that the Corps' interpretation breached the outer limits of congressional authority.[52] The Corps had significant support for extending the Commerce Clause power to the regulation of bird-inhabited wetlands, particularly precedent recognizing that migratory bird protection was a "national interest of very nearly the first magnitude."[53] Yet, the Court found it was "not clear" whether the regulated activity or object, in the aggregate, affects interstate commerce.[54] Moreover, it was indisputable that Congress intended to maintain local control over water resources and land use issues.[55] Thus, the Court determined there was no clear congressional statement justifying "federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use."[56]

Justice Stevens, writing for the dissent, attacked the Court for ignoring the purpose of the Clean Water Act and questioned its concern about breaching constitutional limits.[57] The dissent noted that the Corps had historical authority over navigable waters, so Congress intended to broaden its reach under the Clean Water Act to include the protection of "aesthetic, health, recreational and environmental uses."[58] Moreover, because of the Act's comprehensiveness, the Corps' jurisdiction had to be expanded as well.[59]

> Thus, although Congress opted to carry over the traditional jurisdictional term "navigable waters" from . . . prior versions of the [Clean Water Act], it broadened the definition of that term to encompass all "waters of the United States." Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word "navigable" from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion.[60]

45. *Id*. at 683.

46. *Id*. at 681.

47. *Id*. (citing 33 C.F.R. § 323.2(a)(5) (1978)).

48. *Id*.

49. *Id*.

50. *Id*. (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994)).

51. *Id*. at 682.

52. *Id*. (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

53. *Id*. (citing Missouri v. Holland, 252 U.S. 416, 435 (1920)).

54. *Id*.

55. *Id*. at 680 (noting the Clean Water Act preserved the "primary responsibilities and rights of the state to prevent, reduce and eliminate water pollution [and] to plan the development and use . . . of land and water resources").

56. *Id*. at 684.

57. *Id*. (Stevens, J., dissenting). Justices Souter, Ginsburg and Breyer joined the dissent.

58. *Id*. at 687.

59. *Id*.

60. *Id*.

Justice Stevens further reasoned that Congress must have intended jurisdiction under the Act to fall outside the traditional area of navigation because federal authority over navigation had already been long established.[61] "Why should Congress intend that its assertion of federal jurisdiction be given the 'broadest possible constitutional interpretation' if it did not intend to reach beyond the very heartland of its commerce power?"[62]

Convinced that the statutory construction of the Act permits the Corps' jurisdiction over isolated wetlands, Justice Stevens then turned to the Commerce Clause argument dodged by the Court.[63] The dissent concluded that the discharge of fill material into isolated wetlands inhabited by migratory birds substantially affects interstate commerce, and thus was an activity Congress may regulate under the Commerce Clause.[64] Unlike the activities regulated in *Lopez* and *Morrison*, "the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons."[65] Moreover, the dumping of fill material adversely affects the migratory bird population in the aggregate and impairs bird-related tourism.[66] According to Justice Stevens, federal authority here was proper because "the causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds is not 'attenuated,' [but instead] is direct and concrete."[67]

Although the Clean Water Act sidestepped a direct Commerce Clause challenge, the SWANCC decision is by no means a victory for environmentalists. Despite the reasoning of Justice Stevens and the Seventh Circuit, the Court applied a very limited, constructionist view of the Act to eviscerate federal wetlands regulation. Moreover, environmentalists can derive no comfort from the Court's dodging of the constitutional issue this time — it is all too possible that the Clean Water Act will not survive a direct Commerce Clause challenge. Most significantly, the question of whether the Endangered Species Act is a valid congressional exercise of the Commerce Clause remains open to scrunity by a post-SWANCC Court.

IV. The Endangered Species Act and the Commerce Clause

Very few lower courts have addressed Commerce Clause challenges to the Endangered Species Act ("ESA") under the *Lopez* analysis. Of those courts, none has found that Congress exceeded its authority under the Commerce Clause in enacting the ESA.[68] Although the Supreme Court avoided the Commerce Clause challenge in SWANCC, a court would be unable to rely on statutory construction to bypass a similar attack on the ESA.

For example, the D.C. Circuit directly addressed the Commerce Clause issue in *National Association of Homebuilders v. Babbitt*.[69] By a two-to-one vote, the three-judge panel upheld the constitutionality of the ESA's prohibition on the private taking of a protected species. The case involved a group of land developers and local governments seeking to build a hospital in an area inhabited by the geographically isolated and critically endangered Delhi Sands Flower-Loving Fly.[70] The fly's habitat had shrunk by 97 percent as a result of urban development and pollution, and was currently believed to exist only in a forty square-mile area straddling two counties, entirely within the state of California.[71] The proposed hospital

61. *Id.* (citing The Daniel Ball, 19 L. Ed. 999 (1871); Gilman v. Philadelphia, 18 L. Ed. 96 (1866); Gibbons v. Ogden, 6 L. Ed. 23 (1824)).

62. *Id.*

63. *Id.* at 693-94.

64. *Id.* at 694.

65. *Id.*

66. *Id.* at 694-95.

67. *Id.* at 695 (citing United States v. Morrison, 529 U.S. 598, 612 (2000); Gibbs v. Babbitt, 214 F.3d 483, 492-93 (4th Cir. 2000)).

68. *See, e.g.*, Strahan v. Coxe, 127 F.3d 155 (1st Cir.1997); Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995); Babbitt v. Sweet Home Chapter of Cmties. for a Great Or., 515 U.S. 687 (D.C. Cir. 1995).

69. 130 F.3d 1041 (D.C. Cir. 1997).

70. *Id.* at 1044.

71. *Id.*

construction would have wiped out the entire population and habitat of the species, violating section 9(a)(1)(B) of the ESA.[72]

The D.C. Circuit upheld the constitutionality of the ESA, although it issued three separate opinions. Judge Wald rejected the Commerce Clause challenge to the ESA by examining the potential effect of the extinction of endangered species in three areas. First, the section 9 "takings" provision regulates the use of channels of interstate commerce, meeting the first prong of the L*opez* test.[73] Judge Wald found that the government's regulation of transportation of endangered species was necessary to "keep the channels of interstate commerce free from immoral and injurious uses."[74] Second, the prohibition regulates an activity with a substantial effect on interstate commerce because it prevents the destruction of biodiversity.[75] This protects current and future interstate commerce, including significant economic benefits derived from potential medical uses of species.[76] Judge Wald interpreted L*opez* to mean that regulated activity need not be "commercial in character," but rather must only affect interstate commerce.[77] This effect can be determined by examination of the legislative history regarding the value of biodiversity and potential for future commerce.[78] Lastly, in examining scientific studies, Judge Wald found a sufficiently rational basis for Congress' finding that "takings [of endangered species] would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource — biodiversity."[79]

Judge Henderson concurred with the judgment, finding that a loss of biodiversity itself can have a substantial effect on interstate commerce.[80] However, she disagreed with Judge Wald's reasoning on two grounds. First, she noted that endangered species, which are not commercially marketable goods, cannot be regulated as channels of commerce.[81] Second, Judge Henderson found that the medical impact of the loss of diversity, as well as the resulting economic benefit, is too speculative to serve as the basis for a substantial effect on interstate commerce.[82] Instead, she found that the lynchpin of interstate commerce could be found in the nature of the taking itself. According to Judge Henderson, the restriction imposed on the hospital construction under the ESA substantially affects interstate commerce because it "relates to both the proposed redesigned traffic intersection and the hospital it is intended to serve, each of which has an obvious connection with interstate commerce."[83]

In his dissent, Judge Sentelle determined the ESA improperly extends congressional authority to regulate commercial activity. Judge Sentelle argued that any link drawn between the hospital's construction and interstate commerce was far too attenuated to support federal government intervention,[84] and that the court's inability to agree on its source within L*opez* indicated the ESA's invalidity.[85] Judge Sentelle rejected the "substantial effects" analyses used by the other two members of the panel and concluded that section 9 of the ESA is unconstitutional based on the three-part L*opez* test.[86] First, the ESA does not regulate an economic activity.[87] Second, like the statute in L*opez*, the ESA contains no jurisdictional provision that would ensure its application would only reach activities affecting interstate commerce.[88] Third, the medical impact of the loss of biodiversity is too speculative to support congressional authority and relies upon broad

72. 16 U.S.C. § 1538(a)(1)(B). This section prohibits the private "taking" of a listed species.

73. N*at'l Ass'n of Homebuilders*, 130 F.3d at 1046.

74. I*d*. at 1046-47 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 214, 246 (1964)).

75. I*d*. at 1053.

76. I*d*.

77. I*d*. at 1056.

78. I*d*. at 1055.

79. I*d*. at 1056.

80. I*d*. at 1057 (Henderson, J., concurring).

81. I*d*. at 1058.

82. I*d*.

83. I*d*. at 1059.

84. I*d*. at 1062 (Sentelle, J., dissenting).

85. I*d*.

86. I*d*. at 1064.

87. I*d*.

88. I*d*. at 1064-65.

theories that lack a "logical stopping point" to limit its scope.[89] To uphold the ESA under this rationale, according to Judge Sentelle, would not only ignore *Lopez*, but would also transform the Commerce Clause into the "hey-you-can-do-whatever-you-feel-like clause."[90]

Even more recently, the Fourth Circuit considered a Commerce Clause challenge to the ESA in *Gibbs v. Babbitt*.[93] In *Gibbs*, the plaintiffs, a group of private landowners and municipalities, challenged a Fish and Wildlife Service ("FWS") regulation prohibiting the taking of critically endangered red wolves on private land,[94] claiming that the prohibition represented an improper extension of federal jurisdiction under the Commerce Clause. The court disagreed, holding that the FWS reasonably concluded that the prohibition extended to economic activity under the third prong of the *Lopez* test.[95]

The court concluded that the regulated activity — the taking of wolves on private property — is economic, because the need to protect commercial assets, such as livestock, drives the unlawful taking of the species.[96] Moreover, "[t]he relationship between red wolf takings 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."[97] Given this economic nature, and the regulation's role in the broader statutory scheme of the ESA, the individual taking of a wolf could, in the aggregate, substantially affect interstate commerce for Commerce Clause purposes.[97] Accordingly, the court upheld the regulation, because "invalidating 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."[99]

The dissent argued that the FWS regulation was unconstitutional under *Lopez* because the taking of wolves on private property would not even marginally constitute an economic activity for Commerce Clause purposes.[100] Judge Luttig attacked the majority decision for treating both *Lopez* and *Morrison* as aberrations and for ignoring the requirements of economic activity, interstate characteristics and jurisdictional nexus.[101] "The affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge."[102]

V. Potential Impact on the Endangered Species Act

Although the Clean Water Act slipped by a direct attack, the stage seems to be set for a constitutional challenge to the Endangered Species Act.[103] The Supreme Court's recent history of increasingly anti-environmentalist, pro-development decisions compounds the likelihood of a direct challenge to the ESA.[104] If the Court grants review to a similar case challenging congressional power under the Commerce Clause to regulate a private activity under the

89. *Id*. at 1065.

90. *Id*. (quoting Judge Alex Kozinski, *Introduction to Volume* 19, 19 HARV. J.L. PUB. POL'Y 1, 5 (1995)).

91. *Id*. at 1063.

92. *Id*.

93. 214 F.3d 483 (4th Cir. 2000), *cert. denied*, Gibbs v. Norton, 69 U.S.L.W. 3383 (U.S. Feb 20, 2001) (No. 00-844).

94. 50 C.F.R. § 17.84(c).

95. *Gibbs*, 214 F.3d at 492.

96. *Id*.

97. *Id*.

98. *Id*. at 493.

99. *Id*. at 492. Also driving the court's decision was a reluctance to deviate since other courts "uniformly upheld endangered species legislation . . . based on many of the same current and future connections to interstate commerce articulated here." *Id*. at 496.

100. *Id*. at 507 (Luttig, J., dissenting).

101. *Id*.

102. *Id*. at 510.

103. The Supreme Court is aware of these Commerce Clause challenges to the ESA — witness Justice Stevens's use of *Gibbs* in the dissent in the SWANCC case. 121 S. Ct. 675, 695 (2001) (Stevens, J., dissenting). Also, the plaintiff in Gibbs filed for petition for certiorari with the Court in November. *Gibbs*, 214 F.3d 483 (4th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3383 (U.S. Nov. 20, 2000) (No. 00-844), *cert. denied*, Gibbs v. Norton, 69 U.S.L.W. 3383 (U.S. Feb 20, 2001) (No. 00-844).

104. *See, e.g.*, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997); Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996); Or. Waste Systems, Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994); Arkansas v. Oklahoma, 503 U.S. 91 (1992).

ESA, it will not be able to duck the larger constitutional question by ruling on strictly statutory grounds as in SWANCC. The Court will be obliged to meet head-on an essentially facial challenge to the ESA and to decide the issue of whether Congress overstepped its power in drafting the statute.

Environmentalists have good reason to fear that this type of challenge will arise to extinguish the Endangered Species Act altogether. This invalidation would inevitably lead to increased local control based on regional perceptions of the value of endangered species versus the benefits of development and resource use. These regional differences in turn would be the death knell for many threatened species, creating an unpredictable ripple effect on other species and fragile ecosystems.

SWANCC represents a small window of hope to environmentalists who feared the worst about the Court's intentions. Rather than lay clear precedent for a successful Commerce Clause challenge to the Endangered Species Act, the Court chose to sidestep the issue altogether and issued a purely statutory ruling. A cynic might assert that the Court has merely decided to wait for direct challenges to federal environmental statutes once it has a more supportive administration behind it. Alternatively, the Court's decision may implicitly indicate its lack of intent to make such drastic rulings or its extreme caution when dealing with critical and highly politicized issues.

Nevertheless, the SWANCC decision was not good news from an environmentalist standpoint. The ruling removes isolated wetlands from federal jurisdiction, striking a crippling blow against conservationist concerns and the protection of affected species and habitats. In enacting the Endangered Species Act, Congress has already indicated that it perceives a value in biodiversity that supersedes certain local economic interests. Whether or not the Court will support this legislative priority remains to be determined.