THE ENDANGERED SPECIES ACT AND THE PROTECTION OF INTRASTATE ANIMALS

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ABSTRACT

In 1973, Congress passed the Endangered Species Act (ESA) using its Commerce Clause power. An issue arises when the ESA attempts to regulate purely intrastate animals: animals who do not travel outside of state lines nor do they have any substantial effect on interstate commerce. Since these intrastate animals do not travel interstate, regulating these creatures could be outside the scope of Congress's authority. The current make-up of the Supreme Court, coupled with unsettled law concerning Congress's use of its Commerce Clause power with respect to the ESA, make this the opportune time to limit the Act. To bolster the ESA, Congress should instead rely on its spending power to condition the receipt of federal funds, from programs like the Cooperative Endangered Species Conservation Fund, to protect intrastate species.

"Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed."

-President Nixon, upon signing the Endangered Species Act[1]

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1. *Laws and Policies: Endangered Species Act*, NOAA, https://www.fisheries.noaa.gov/topic/laws-policies/endangered-species-act (last visited Jan. 22, 2026).

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INTRODUCTION

When it was passed, the Endangered Species Act ("ESA" or the "Act") was described as the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[2] Congress's express purpose for passing such a comprehensive act was to conserve those species that were deemed threatened or endangered.[3] To achieve that end, the ESA endows certain federal agencies with ample authority, as Congress specifically tasked federal agencies to use all methods and procedures necessary for the conservation and protection of that species.[4] Congressional intent is clear within the statute: federal agencies and their secretaries are to take all possible and necessary measures to protect and conserve those species that are listed as threatened or endangered.[5]

In order to pass the ESA, Congress had to rely on one of its enumerated powers found in the Constitution, its Commerce Clause power. This allows Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[6] Congress's use of its Commerce Clause power is sound when it is applied to mobile animals, whose range is interstate in the ordinary sense of the word.[7] However, with recent Supreme Court cases, the scope of Congress's Commerce Clause power has been narrowed.[8] The Court's decision in cases such as *Morrison* and *Lopez* require that a regulated entity under Congress's Commerce Clause power must have a substantial relationship to interstate commerce, or be an economic activity

2. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).
3. *Id.*
4. *Id.*
5. *Id.*
6. U.S. CONST. art. I. § 8, cl. 3.
7. Kevin Simpson, *The Proper Meaning of "Proper": Why the Regulation of Intrastate, Non-Commercial Species Under the Endangered Species Act Is an Invalid Exercise of the Commerce Clause*, 91 WASH. U.L. REV. 169, 170 (2013).
8. *See* United States v. Lopez, 514 U.S. 549, 567 (1995); United States v. Morrison, 529 U.S. 598, 613 (2000).

that has an impact on interstate commerce.[9] It is in this regard that the ESA faces a new danger. More than 1,200 species listed as threatened or endangered are confined to a single state.[10] Thus, these intrastate animals who have little to no economic value have given rise to new claims that Congress has exceeded its authority when attempting to regulate these animals and is therefore an invalid exercise of its Commerce Clause power.[11]

The Supreme Court has yet to rule on the ESA's reach to intrastate animals, leaving a handful of appellate courts to weigh in on the issue.[12] Thus, with renewed attempts to invalidate the ESA's protection over endangered or threatened animals, Congress should find a new regulatory mechanism to conserve and protect these intrastate, non-commercial animals.[13] This Note argues that new changes to the scope of Congress's Commerce Clause power willmake its regulation of these intrastate animals an overreach of its regulatory authority under the Commerce Clause. So, Congress should rely on its spending power to protect these intrastate animals, conditioning the receipt of certain federal funds to states who house such intrastate animals on the stipulation that those species be protected. Furthermore, this Note will argue that Congress's spending power is a better mechanism for the regulation of these animals given the narrowing of its Commerce Clause authority and will supplement existing protections to these important animals. Congress could do this through conditioning the receipts of federal funds through programs such as the Cooperative Endangered Species Conservation Fund or the Land and Water Conservation Fund.[14]

Section I discusses the background of the ESA.Section II provides the background for Congress's Commerce Clause and spending

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9. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 560.

10. Defenders of Wildlife, *Intrastate Species and the Endangered Species Act*, MEDIUM (Nov. 2, 2017) https://medium.com/wild-without-end/intrastate-species-and-the-endangered-species-act-94f4eb2b5c90.

11. *Id.*

12. Simpson, *supra* note 7, at 171; San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1163 (9th Cir. 2011), *cert. denied*, 574 U.S. 1074 (2015); Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1271–72 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); GDF Realty lnvs., Ltd. v. Norton, 326 F.3d 622, 624 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); Rancho Viejo, LLC. v. Norton, 323 F.3d 1062, 1062 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1006 (2004); Gibbs v. Babbitt, 214 F.3d 483, 486 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

13. Defenders of Wildlife, *supra* note 10.

14. *State and Local Grant Funding*, NAT'L PARK SERV.: LAND & WATER CONSERVATION FUND (July 24, 2025), https://www.nps.gov/subjects/lwcf/stateside.htm#:~:text=Through%20federal%20grants%20to%20states,to%20state%20and%20local%20governments; *Cooperative Endangered Species Conservation Fund*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/program/cooperative-endangered-species-conservation-fund#:~:text=Our%20Services,species%20and%20habitat%20conservation%20annually (last visited Jan. 23, 2026).

power.Section III analyzes the current state of the ESA, as challenged in federal courts, and demonstrates that the ESA may be in danger of being curtailed. Finally, Section IV proposes the best solution to this problem is for Congress to condition the receipt of federal funds on the protection of intrastate animals.

I. BACKGROUND ON THE ESA

The Endangered Species Act (ESA) was passed in 1973 in response to the increasing public concern for protecting endangered wildlife.[15] Congress passed the ESA with the purpose of conserving and protecting endangered and threatened species.[16] The ESA achieves this by creating a program for the conservation of such endangered and threatened species and provides for certain steps to be taken to achieve these goals.[17]

The central substantive and procedural provisions are largely found in five sections of the ESA.[18] Section 4 establishes the procedures for listing a species as threatened or endangered, designating critical habitat, and creating a recovery plan for those listed species.[19] Section 7 requires that federal agencies consult with the appropriate federal agencies and to ensure that actions by the federal government do not "jeopardize the continued existence" of the species.[20] Section 9 prohibits any person from taking or engaging in commerce with any endangered or threatened species.[21] Section 10 establishes specific exemptions, permits, and exceptions to Section 9.[22] Finally, Section 11 lays out civil and criminal penalties for those who violate Section 9.[23] Ultimately, Congress intended for these sections to act as an affirmative duty to conserve these animals, with the ultimate goal being recovery.[24]

Congress's "take" provision in Section 9 of the ESA arms agencies with the ability to prosecute individuals who seek to engage in prohibited conduct.[25] The "take" provision prohibits fishing, hunting, or harming any

15. DALE D. GOBLE, ET AL., WILDLIFE LAW CASES AND MATERIALS 915–20 (Robert C Clark et al. eds., 3d. ed. 2017).
16. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).
17. 16 U.S.C. § 1531 (2024).
18. §§ 1533, 1536, 1538, 1539, 1540 (2024).
19. GOBLE, *supra* note 15, at 915–20.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Simpson, *supra* note 7, at 169.

species listed in the ESA.[26] Additionally, the provision prohibits individuals from harassing, harming, shooting, pursuing, hunting, capturing, killing, collecting, or attempting to engage in any such conduct.[27]

To enforce these provisions, Congress tasked the Fish and Wildlife Service (FWS) to designate critical habitats for these species.[28] FWS may also purchase land that is crucial for the survival of these species and/or prohibit any adverse modification.[29] Congress designated the FWS as the enforcement arm of the ESA. This allows the agency to develop plans and procedures for how private parties and government entities should behave to conserve these animals and their critical habitats.[30] Moreover, Congress granted the ESA federal preemption over state laws, preempting states' authority over certain fish and wildlife.[31] Animals may be delisted when FWS is satisfied with a species recovery based on a five-factor analysis.[32]

II. BACKGROUND ON CONGRESS'S COMMERCE CLAUSE POWER AND SPENDING POWER

A. Commerce Clause

Congress's Commerce Clause power has enjoyed a series of expansions through the 18th, 19th, and 20th centuries.[33] Starting with *Gibbons v. Ogden*, the Court held that Congress's use of its Commerce Clause power preempted any state law that may inhibit the exercise of that power.[34] In the following years, the Court expanded the scope of this power in cases such as *United States v. Darby*. There, the Court held that the federal regulation of working conditions was a proper use of Congress's Commerce Clause as it had a significant effect on interstate commerce.[35] It was not until *Wickard v. Filburn* that Congress saw a major expansion to its Commerce Clause power.[36] In that case, the Court held that Congress may regulate wholly intrastate activities if that activity, when viewed in the aggregate, would have

26. *Id*. at 169–70.
27. GOBLE, *supra* note 15, at 915–20.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. U.S. FISH & WILDLIFE SERV., DELISTING A SPECIES 1 (2011).
33. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 238–60 (2d. ed. 2002) (discussing general principles of constitutional law and chronicles the expansion and contraction of Congress' Commerce Clause power).
34. Gibbons v. Ogden, 22 U.S. 1, 67 (1824).
35. 312 U.S. 100, 117 (1941).
36. 317 U.S. 111, 127–28 (1942).

a substantial effect on interstate commerce, even if the individual effect is trivial.[37] It is under this basis that some appellate courts have upheld the ESA's regulation of intrastate species, holding that while the extinction of an intrastate species may be trivial, in the aggregate, the extinction of every intrastate species would have a substantial effect on interstate commerce.[38]

Toward the end of the of the 21st century, the Supreme Court curtailed Congress's Commerce Clause power with *United States v. Lopez*.[39] It was in this case that the Court held that a regulatory scheme prohibiting guns in school zones as not an economic activity that substantially affected interstate commerce, nor could it in the aggregate have an effect.[40] The Court held that Congress could only regulate the channels of interstate commerce, an instrumentality of interstate commerce, or an activity that has a substantial effect on interstate commerce.[41] The Court emphasized thatfor Congress to regulate under its Commerce Clause power, it must be an economic activity that substantially affects interstate commerce.[42] Here, the regulation of firearms in school zones was not an economic activity, as there was nothing economic being regulated nor could the regulation be construed as an economic enterprise.[43]

At the turn of the 21st century, the Court reinforced its *Lopez* curtailment of the scope of Congress's Commerce Clause power with *United States v. Morrison*.[44] The Court held that a statute passed under the Commerce Clause was invalid as it was not sufficiently related to an economic activity and more broadly, interstate commerce.[45] The Court found that there was no economic activity that existed with the regulation of gender-based crimes, nor did the statute have a jurisdictional hook.[46] Gender-based crimes are not economic in nature.[47] Only cases upheld by the Court that regulate intrastate activity using Congress's Commerce Clause power have been economic in nature.[48] The Court went on to hold that it has only upheld regulation under the

37. *Id.*

38. *See* Gibbs v Babbitt, 214 F.3d 483, 493 (4th Cir. 2000); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640–41 (5th Cir. 2003).

39. *See* United States v. Lopez, 514 U.S. 549, 551 (1995).

40. *Id.* at 561.

41. *Id.* at 558–59.

42. *Id.* at 560.

43. *Id.* at 561.

44. *See* United States v. Morrison, 529 U.S. 598, 617–18 (2000).

45. *Id*. at 613.

46. *Id.* (A jurisdictional hook is language that Congress addes into an act that provides a jurisdicitional element establishing that a federal cause of action is pursuant to Congress's Commerce Clause Power and is therefore tied to Congress's interstate commerce power.)

47. *Id.*

48. *Id.*

Commerce Clause for intrastate activity when that activity is economic in nature.[49]

The Court's move toward the curtailment of Congress's Commerce Clause authority limits Congress'sability to regulate intrastate, noneconomic activity. As seen in *Lopez*, aggregating purely intrastate activities is limited to those activities which are economic in nature.[50] Thus, single-state, non-commercial activities, even taken in the aggregate may no longer be a basis for which Congress may regulate under its Commerce Clause authority.

B. Spending Power

Article I, Section 8, Clause I of the Constitution prescribes Congress's spending power, stating: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."[51] Alexander Hamilton took a broad view of this clause, stating that general welfare was as "comprehensive as any that could have been used."[52] The view embodied by Hamilton is that the general welfare of the United States comprised all things which may be advantageous to the general welfare of the country; it is not limited by the enumerated powers found in Article I, Section 8 of the Constitution.[53] In the brief for the Government in *United States v. Butler*, it argued that "Congress may tax (and appropriate) in order to promote the national welfare by means which may not be within the scope of the other Congressional powers."[54]

Even under a broad interpretation of Congress's spending power, it is still subject to certain limitations. In *Butler*, the Court adopted this broad construction of the Spending Clause, going insofar as to hold that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[55] The Court found that while Congress had broad power under its Spending Clause, it was still subject to limitation.[56] The Spending Clause is still subject to the ordinary limits of the Constitution, namely that powers

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49. *Id.*

50. *Id.*; *see* United States v. Lopez, 514 U.S. 549, 561 (1995).

51. U.S. CONST. art. I. § 8, cl. 1.

52. Alexander Hamilton, *Alexander Hamilton's Final Version of the Report on the Subject of Manufactures , [5 December 1791]*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007 (last visited Apr. 16, 2026).

53. United States v. Butler, 297 U.S. 1, 16 (1936).

54. *Id.*

55. *Id.* at 66.

56. *Id.* at 66–67.

granted to the federal government are specific and enumerated including powers derived from the exercise of its enumerated powers.[57] Congress cannot use its spending power in a manner that would be unlimited and general.[58]

Thus, when exercising its spending power, the purpose of such regulations should be for specific reasons, and Congress should not invade nor try to address local issues.[59] In *Butler*, the Court held that the Agricultural Act that was enacted by Congress invaded a right reserved for states. The power to regulate and control agricultural production is traditionally left to the states.[60] However, the Court does not go on to describe what is or is not general welfare, only stating that in exercising its Spending Clause power, Congress cannot use "general welfare" as a means to destroy state or local sovereignty.[61]

A part of Congress's spending power is its ability to condition the receipt of federal funds to the several states.[62] In *South Dakota v. Dole*, South Dakota sued the federal government for conditioning the receipt of federal funds contingent upon the state raising its drinking age to 21 years of age.[63] The Supreme Court held that conditioning the receipt of funds was constitutional, but had limits.[64] If Congress wants to condition funds, it must do so unambiguously, allowing states to understand the terms and the choice that is before them.[65] The conditions also must be of national concern and something Congress would have purview over.[66] Additionally, Congress cannot create conditions that would force the states to partake in activities that are unconstitutional.[67] Congress may use its spending power to broaden policy objectives that are not within Article I's enumerated fields. This allows Congress to pursue objectives that are not necessarily explicit within the Constitution.[68] Moreover, Congress may only spend money for the general welfare of the United States, although, the Court mentions that substantial deference should be given to the judgment of Congress.[69]

57. *Id.*
58. *Id.* at 67.
59. *Id.*
60. *Id.* at 68.
61. *Id.* at 77.
62. South Dakota v. Dole, 483 U.S. 203, 206–07 (1987).
63. *Id.* at 203.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 204.
68. *Id.* at 206–07.
69. *Id.* at 207.

Furthermore, Congress cannot create a scenario in which the conditions placed upon the subjected funds are so coercive that states have no choice but to accept Congress's terms.[70] In *Dole*, this was measured by looking at the percentage of funds that were being conditioned as compared to the state's overall budget.[71] Here, funds that had conditions placed upon them represented less than 5% of the state's overall budget and were found to not be coercive.[72] Even if Congress lacked the power to create a national drinking age, Congress's use of its spending power to induce state action was constitutional.[73]

In *National Federation of Independent Businesses v. Sebelius*, the federal government conditioned the receipt of federal funds on the condition that states implement the Medicaid expansion provisions and the individual mandate of the Affordable Care Act.[74] The federal government also stipulated that if states did not accept this proposal, they would have all of their Medicaid funds withheld.[75] The Court reaffirmed the federal government's ability to induce states to adopt policies that it could not impose itself.[76] The Court likened Congress's spending power and its ability to condition those funds to that of a contract; one in which states voluntarily and knowingly accept the terms of the contract.[77] Thus, when pressure turns into compulsion Congress has exceeded its power under the Constitution.[78] States cannot be required to regulate in the manner Congress prescribes if they do not want to accept the funds offered to them.[79] Spending Clause conditions do not pose a danger to states when they have the "legitimate" choice to accept the conditions in exchange for federal funds.[80]

Here, if states did not accept the conditions imposed by the federal government under the Affordable Care Act, they would lose over 10% of the state's overall budget.[81] This was found to be coercive and did not present states with a legitimate choice when it came to accepting or rejecting the conditions set forth by the federal government.[82] The federal government cannot surprise states with post-acceptance or retroactive conditions to the

70. *Id.* at 211.
71. *Id.*
72. *Id.*
73. *Id.* at 212.
74. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 519 (2012).
75. *Id.* at 519–20.
76. *Id.* at 537.
77. *Id.* at 577.
78. *Id.* at 577–78.
79. *Id.*
80. *Id.* at 578.
81. *Id.* at 582.
82. *Id.* at 584.

receipt of federal aid.[83] Thus, if states have been enjoying the money given to them for an existing program, Congress cannot create new conditions of funds for an already existing program.[84] Here, the federal government was found to be penalizing states that chose not to participate in the Affordable Care Act by taking away their existing Medicaid funding.[85] However, the Court did not define at what point conditions became coercive, only that in this case, the conditions were beyond that point.[86]

III. CURRENT STATE OF THE ESA

As mentioned above, the issue as to whether or not Congress has exceeded its enumerated powers via the Commerce Clause when passing the Endangered Species Act (ESA) has not been litigated in the Supreme Court.[87] However, that issue has been litigated in a number of lowercourts throughout the United States.[88]

A. The Ninth Circuit Upholds the ESA

One such case is *San Luis & Delta-Mendota Water Authority v. Salazar*.[89] In this case, a number of farmers banded together to sue the Fish and Wildlife Service due to water flows being reduced to protect the endangered Delta Smelt Fish.[90] The farmers argued that they received reduced water deliveries to grow their crops due to water being diverted to protect the critical habitat of the endangered fish.[91] The farmers argued that the fish were a purely intrastate species with no commercial value; ergo, Sections 7 and 9 of the ESA are an invalid exercise of Congress's Commerce Clause power.[92] The Court held that the ESA did bear a substantial relation to commerce.[93] The ESA is allowed to regulate purely local activities that are

83. *Id.*
84. *Id.*
85. *Id.* at 585.
86. *Id.*
87. Simpson, *supra* note 7, at 171; San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1163 (9th Cir. 2011), *cert. denied*, 574 U.S. 1074 (2015); Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1271–72 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); GDF Realty lnvs., Ltd. v. Norton, 326 F.3d 622, 624 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); Rancho Viejo, LLC. v. Norton, 323 F.3d 1062, 1062 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1006 (2004); Gibbs v. Babbitt, 214 F.3d 483, 486 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).
88. *E.g.*, *Salazar*, 638 F.3d at 1163; *Kempthorne*, 477 F.3d at 1271.
89. *Salazar*, 638 F.3d at 1163.
90. *Id.* at 1168.
91. *Id.*
92. *Id.*
93. *Id.* at 1174.

a part of an economic class of activities that have a substantial effect on interstate commerce.[94] Thus, *de minimis* individual instances that may arise under a statute are of no consequence to its constitutionality.[95] Even when species are of no commercial value, Congress may regulate under its Commerce Clause authority to prevent the destruction of biodiversity and protect current interstate commerce that relies on it.[96] Interstate travelers can stimulate interstate commerce by observing or studying purely instrastate endangered or threatened species. Regeneration of an endangered or threatened species may allow future commerce use of those species.[97] Here, the ESA, as a comprehensive regulatory scheme, is only required to have a substantial relation to commerce, rather than the scheme itself be an economic regulatory scheme.[98] Under these arguments, the Ninth Circuit upheld Congress's Commerce Clause power as applied to the ESA.[99]

B. The Eleventh Circuit Upholds the ESA

Another case would be *Alabama-Tombigbee Rivers Coalition v. Kempthorne*.[100] Here, a coalition sued the Fish and Wildlife Service's designation of the Alabama Sturgeon as endangered and argued that this purely intrastate animal violated Congress's use of its Commerce Clause power.[101] They argued that the fish was of little to no commercial value because there had been no reported commercial harvests of the fish for over a century.[102] Since the fish cannot and has not been harvested, protecting the fish was a noneconomic activity that could not be regulated, similar to those in cases like *Lopez* and *Morrison*.[103] In *Alabama-Tombigbee*, the Court upheld the ESA and Congress's use of its Commerce Clause power to enact it by holding that its total economic impact bared a substantial relation to interstate commerce.[104] The Court honed in on the argument that the ESA prohibited the trafficking of endangered species, and such a market generated up to eight billion dollars annually.[105] Thus, the ESA has a substantial relation to interstate commerce and, as such, the listing process contained

94. *Id.*
95. *Id.* at 1175.
96. *Id.* at 1176.
97. *Id.*
98. *Id.* at 1177.
99. *Id.*
100. Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1271 (11th Cir. 2007).
101. *Id*. at 1253.
102. *Id*. at 1271.
103. *Id*.
104. *Id*. at 1273.
105. *Id*.

within it was an essential part of a larger regulation of an economic activity.[106] The Court also held that Congress could have rationally concluded that the regulation of intrastate species was an essential part of the larger regulatory scheme as a whole.[107] Even if there was no commercial nexus here, the Court held that it could not "excise individual applications of a concededly valid statutory scheme."[108] Overall, the Court stated that the ESA was a valid application of Congress's Commerce Clause power by protecting all endangered species notwithstanding their geographic range.[109]

C. The Fifth Circuit Upholds the ESA

In the Fifth Circuit came the case *GDF Reality Investments, Ltd. v. Norton*.[110] In this case, GDF Reality Investments purchased a property and wanted to develop it commercially.[111] However, there existed six cave species of invertebrates that lived in and under the property that were classified as endangered by the Fish and Wildlife Service.[112] These cave species are only found in these few areas of Texas and there is no commercial value, nor market for them.[113] Once again, the plaintiffs argued that Congress had exceeded its power under the Commerce Clause when passing the ESA as applied to intrastate animals.[114] The Court held that "taking" these species under the ESA can be aggregated with all other endangered species under the ESA.[115] There can be two ways that an intrastate activity can affect interstate commerce. First, an activity that itself, based on the nature and scope of that activity, can affect interstate commerce. Second, the activity can be aggregated with similar activities, so that the sum of those activities have a substantial effect on interstate commerce.[116] In this situation, the cave species fall under the latter.[117] Any interstate impact generated by the cave species due to travel or publication are negligible.[118] However, this species, when aggregated with others, creates an important part of an economic regulatory

106. *Id*. at 1275.
107. *Id*.
108. *Id*. at 1276.
109. *Id*. at 1277.
110. GDF Reality Invs., Ltd. v. Norton, 326 F.3d 622, 622 (5th Cir. 2003).
111. *Id*. at 624.
112. *Id*. at 625.
113. *Id*.
114. *Id*. at 624.
115. *Id*.
116. *Id*. at 636.
117. *Id*. at 640.
118. *Id*. at 637.

scheme.[119] The regulation of interstate takes of these cave species is an integral part of the ESA economic regulatory scheme.[120]

D. The D.C. Circuit Court Upholds the ESA

Rancho Viejo, LLC. v. Norton, is a notable case not because the Court upheld the ESA, but because future Chief Justice John Roberts wrote a dissent.[121] In this case, a real-estate company sued the Fish and Wildlife Service's designation of an endangered toad as an improper use of Congress's Commerce Clause power.[122] The appellate court once again agreed that the ESA fell within the *Lopez* framework as a regulated activity that substantially affects interstate commerce.[123] The court held that the loss of biodiversity has a substantial effect on interstate commerce as well as the regulation of commercial development, which the court held was plainly interstate.[124] While Section 9 of the ESA has no jurisdictional hook, one is not required, nor has the absence of this hook resulted in any other appellate courts finding that the ESA was an invalid use of Congress's Commerce Clause power.[125] The absence of this jurisdictional element leaves courts to independently determine whether or not the regulated activity is substantially connected to and affects interstate commerce.[126] The court held that the ESA should not be struck down on a "noneconomic purpose test" because the ESA is a multipurpose statute, even though the economic concerns may not be the Act's true purpose.[127] Once again, the court held that Congress may act under its Commerce Clause authority to achieve a noneconomic objective.[128] The ESA is a statute of national concern and it has been the historical purview of the federal government to preserve resources for future Americans.[129]

Judge John Roberts, while at the D.C. Circuit Court of Appeals, offers a dissent against upholding the ESA under Congress's Commerce Clause authority.[130] Here, Judge Roberts argues that the court should be asking whether the activity being regulated actually affects interstate commerce rather than if the challenged regulation substantially affects interstate

119. *Id*. at 638–39.
120. *Id*. at 640.
121. Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003).
122. Rancho Viejo, LLC. v. Norton, 323 F.3d 1062, 1064 (D.C. Cir. 2003).
123. *Id.* at 1067.
124. *Id.*
125. *Id.* at 1068.
126. *Id.*
127. *Id.* at 1073.
128. *Id.* at 1074.
129. *Id.* at 1079–80.
130. Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003).

commerce.[131] Moreover, he argued that in ruling the way it did, the court is inconsistent with *Lopez* and *Morrison*, as those cases held that the regulated activity must substantially affect interstate commerce.[132] Judge Roberts asks at the end of his dissent how "regulating the taking of a hapless toad, that for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'"[133]

E. The Fourth Circuit Court Upholds the ESA

In *Gibbs v. Babbitt*, the appellants challenged the constitutionality of a Fish and Wildlife Service designation that prohibited the taking of red wolves under the ESA.[134] Here, the court held that to be upheld under *Lopez*, the economic or commercial activity must play a central role when determining if the statute will be upheld under the Commerce Clause.[135] However, that economic activity can be understood in broad terms.[136] The court held that the primary reason for protecting red wolves was based on commercial and economic concerns.[137] Here, the court applied a *Wickard*-like analysis, arguing that while taking one red wolf on private land may not be substantial, taking red wolves in the aggregate does have a sufficient impact on interstate commerce.[138] The specific regulation of a purely intrastate species is part of a broader scheme of endangered species regulation and protection.[139] Nor does the statute impinge upon an area that is traditionally an area of state concern.[140] As such, this is another indication of the proper use of Congress's Commerce Clause power.[141] While states may argue that the regulation of private land use is inherent in a state's police power, the court noted that this does not preclude Congress from regulating activities that take place on private land.[142] Overall, this court, like others, held that the conservation of natural resources is both an economic and commercial concern.[143]

131. *Id.*
132. *Id.*
133. *Id.* (quoting U.S. CONST. art. I. § 8, cl. 3).
134. Gibbs v. Babbitt, 214 F.3d 483, 486 (4th Cir. 2000).
135. *Id*. at 491.
136. *Id*.
137. *Id*. at 492.
138. *Id*. at 493.
139. *Id*.
140. *Id*. at 499.
141. *Id*.
142. *Id*. at 500.
143. *Id*. at 506.

However, this case had a notable dissent that argued against Congress's use of its Commerce Clause power to regulate intrastate species.[144] Here, the dissent notes that there are only 41 red wolves located on private property and only 75 in total. [145] Thus, the majority based their opinion on the premise that a taking of only 41 red wolves would substantially affect interstate commerce.[146] With such few numbers, it is unlikely that the killing of every red wolf on private property would constitute the type of economic activity that is sustainable under *Lopez* or *Morrison*.[147] Here, the regulation pertains to an intrastate activity that is noneconomic in nature and uses an inferential analysis to show that this activity would have a substantial effect on interstate commerce, more than *Lopez*, *Morrison*, and even *Wickard*.[148] The activity that is being regulated here cannot be said to have a plausible case for having a future or commercial economic impact.[149] Thus, there is no instance in which a localized regulation of an activity that is noneconomic in nature, or speculation that fur trade would once again become a central part of the economy, are valid applications of Congress's Commerce Clause authority.[150] Moreover, the dissent reasoned that the ESA would not be overturned by simply limiting its application to species that do have commercial or economic impact on interstate commerce.[151] Overall, the dissent argues that allowing Congress to prevail here would allow the federal government to encroach upon a state's police power.[152] Especially when Congress could easily regulate this activity under its spending power.[153]

F. A District Court in Utah's Central Division Held that the ESA Was Unconstitutional

In *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service*, the court held that the ESA was unconstitutionally passed using Congress's Commerce Clause power.[154] The court argued that based on *Lopez* and *Morrison*, Congress did not have the power to use the Commerce Clause to regulate intrastate animals.[155] In this case, the U.S. Fish

144. *Id*.
145. *Id*.
146. *Id*. at 507.
147. *Id*.
148. *Id*. at 507–08.
149. *Id*. at 508.
150. *Id*. at 508–09.
151. *Id*. at 508.
152. *Id*. at 509.
153. *Id*.
154. 57 F. Supp. 3d 1137, 1346 (D. Utah Cent. Div. 2014).
155. *Id*. at 1344.

and Wildlife Service passed regulations concerning the take of the Utah Prairie Dog, an intrastate species.[156] Once again, a similar line of logic is used against Congress's use of its Commerce Clause power. The court held that the take of an intrastate animal does not have a connection to interstate commerce, nor does the regulation prohibiting the take of the animal have any jurisdictional element that would relate to interstate commerce.[157] Here, the court argued that taking an animal that does not have an interstate economic market for it could not affect interstate commerce.[158] Moreover, the animals' biological value is a noneconomic concern, and thus, is not a basis for Congress's Commerce Clause power.[159] Even though the Prairie Dog may have garnered some interstate travel, that has never amounted to enough of a reason to justify the use of the Commerce Clause.[160]

G. Why the Supreme Court May Reverse Lower Courts Rationale

The Supreme Court has yet to hear a Commerce Clause challenge to the ESA.[161] However, the Court may hear a new challenge to settle this turbulent area of law.[162] While the aforementioned circuit courts have all upheld the ESA, they have done so under differing rationales.[163] Moreover, some members on the Supreme Court may be willing to overturn lower court precedent.[164] Justice Roberts's dissent in *Rancho Viejo*, coupled with Justice Thomas's and Justice Alito's strict views on constitutional and statutory interpretation, may be indicative of a Court that is ready to limit the ESA.[165] Before her ascent to the Supreme Court, Justice Barrett reportedly endorsed Justice Scalia's approach to the Affordable Care Act, opining that it was an unconstitutional regulation under the Commerce Clause.[166] Such a view would limit Congress's ability to regulate intrastate animals under the ESA.[167] Justice Gorsuch also holds a particularly narrow view on the scope of Congress's Commerce Clause authority and its ability to address

156. *Id*. at 1340.
157. *Id*. at 1344–45.
158. *Id*.
159. *Id*.
160. *Id*. at 1345.
161. Jennifer A Maier, *Outgrowing the Commerce Clause: Finding Endangered Species a Home in the Constitutional Framework*, 36 GOLDEN GATE UNIV. L. REV. 489, 508 (2006).
162. *Id*.
163. *Id*. at 509.
164. *Id*.
165. *Id*. at 512–13.
166. Jody Freeman, *What Amy Coney Barrett's Confirmation Will Mean for Joe Biden's Climate Plan*, VOX (Oct. 26, 2020), https://www.vox.com/energy-and-environment/21526207/amy-coney-barrett-senate-vote-environmental-law-biden-climate-plan.
167. *Id*.

environmental concerns.[168] While the ESA may still enjoy its validity thanks to Congress's Commerce Clause authority, the current make-up of the Supreme Court leaves one to ask not if the ESA will be curtailed, but rather when.

The ESA is also in danger of weakening from the executive branch. In 2020, President Trump changed how the law defined "critical habitat" to include only habitat that is currently occupied by a species, which could limit population growth.[169] Furthermore, on President Trump's first day in office for his second term, the President signed an Executive Order that allowed fast-tracking consultation during a national energy emergency.[170] Normally, this fast-tracking process was only reserved for natural disasters and other national defense and security emergencies.[171] Like in his first term, President Trump has continued to dismantle the regulations that are necessary to protect endangered and threatened species, demonstrating the need to find other ways to safeguard these species.[172]

IV. SOLUTION: CONGRESS SHOULD REGULATE THE PROTECTION OF ENDANGERED SPECIES UNDER ITS SPENDING POWER.

Congress could plainly regulate the protection of interstate species under its spending power.[173] The Endangered Species Act (ESA) is an important piece of legislation when it comes to the protection, conservation, and recovery of threatened or endangered species. To rest its viability on a faulty premise that could be subject to attack, especially when there is a more constitutionally sound option, risks lives of thousands of intrastate species.[174] With changes in the Supreme Court and opinions concerning federalism and state's police power becoming salient, public issues comes the risk of the Court striking down the ESA as it is applied to purely intrastate species.[175]

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168. Richard J. Lazarus & Andrew Slottje, *Justice Gorsuch and the Future of Environmental Law*, 43 STAN. ENV'T L.J. 1, 2 (2024).

169. Amanda Heidt, *Will the Endangered Species Act Survive Trump?*, SCIENCENEWS (Feb. 5, 2025), https://www.sciencenews.org/article/endangered-species-act-trump-esa.

170. *Id*.

171. *Id*.

172. *Id*.

173. Gibbs v. Babbitt, 214 F.3d 483, 509 (4th Cir. 2000).

174. Defenders of Wildlife, *supra* note 10.

175. Jonathan Wood, *The Endangered Species Act Exceeds Congress' Constitutional Powers*, PACIFIC LEGAL FOUND. (Oct. 24, 2013), https://pacificlegal.org/the-endangered-species-act-exceeds-congress-constitutional-powers/; David W. Scopp, *Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court's Web of Confusion Traps More Than the Fly*, 39 S.F. L.R. 789, 789 (2005); Eric Biber, *The ESA and the Commerce Clause*, LEGALPLANET (Nov. 18, 2014), https://legal-planet.org/2014/11/18/the-esa-and-the-commerce-clause.

Congress would clearly be within its constitutional authority when protecting intrastate species under its spending power. While the power is not unlimited, Congress's spending power would allow them to condition the receipt of federal funds on the conditions that these intrastate animals be protected. But what would this look like?

First, Congress would need to look to *South Dakota v. Dole*, as this case details important considerations when enacting legislation concerning Congress's spending power.[176] Under that case, Congress is allowed to attach conditions on the receipt of federal funds in the pursuit of the general welfare of the country.[177] While general welfare is not expressly defined, the cause must be one that is of national concern.[178] The preservation, conservation, and protection of endangered species is clearly a cause of national concern.[179] Examples can be seen in the district court cases mentioned previously.[180] Historically, the preservation of sacred resources and regulation over wildlife and the environment have been a national concern.[181] Conservation of biodiversity and the protection of scarce natural resources is an appropriate area for the federal government to regulate. While it may not be an enumerated power found in Article I of the Constitution, under its spending power, Congress may secure objectives that are outside of its enumerated or implied powers.[182] Moreover, courts should defer to Congress when they have decided when a particular expenditure is intended to serve a public purpose.[183] Like in *Dole*, where the Court found that the interstate problem of drinking and driving required an interstate solution, here, the protection of endangered or threatened species is an interstate problem that requires an interstate solution.[184]

While Congress could not have directly regulated the states on intrastate highways, the Court found that conditioning of funds would still be considered an interstate solution to a problem that was exclusively intrastate.[185] While some endangered species are intrastate, it may be that Congress cannot directly regulate their protection, but can condition funds to remedy a pervasive problem across multiple states—even if the particular instances are intrastate. Moreover, in *Dole*, the Court found that the condition

176. South Dakota v. Dole, 483 U.S. 203, 203 (1987).

177. *Id.*

178. *Id.*

179. *See Id.* at 203; Rancho Viejo, LLC. v. Norton, 323 F.3d 1062, 1079-80 (D.C. Cir. 2003).

180. *E.g.*, Gibbs v. Babbitt, 214 F.3d 483, 486–87 (4th Cir. 2000); GDF Reality Invs., Ltd. v. Norton, 326 F.3d 622, 644 (5th Cir. 2003).

181. *Babbit*, 214 F.3d at 500.

182. *Dole*, 483 U.S. at 207.

183. *Id.*

184. *Id.* at 208.

185. *Id.*

imposed by Congress for the receipt of highway funds was related to the objective it sought to address: safe highway travel.[186] Here, Congress can condition the receipt of federal funds used for conservation in the states. One such example would be the Great American Outdoors Act.[187] The federal government has recently announced a $2.8 billion investment in the 2025 fiscal year to support this act, which would protect and sustain public lands in all 50 states.[188] Of that $2.8 billion dollars, $900 million has been allocated to the Land and Water Conservation Fund.[189] Under this Fund, the federal government provides matching grants that states and communities can use to create and improve parks and safeguard natural and cultural heritage.[190] Much like how conditioning highway funds was related to incentivizing safe travel on highways, conditioning funds on the safeguarding of natural resources is related to the protection of intrastate species. Thus, it would be appropriate for Congress to condition the receipt of funds disbursed from the Land and Water Conservation Fund on the protection of intrastate animals.

In doing so, Congress would need to heed the Court's limitations on the Spending Clause. One such limitation is that Congress would need to condition the funds in a manner that is unambiguous, as to allow the states to understand the choice they are making.[191] Congress cannot hide these conditions from the states as that would violate this principle. Moreover, Congress cannot use these conditions to persuade the states to partake in activities would themselves be unconstitutional.[192] Here, a state regulating wildlife within its borders would not be an unconstitutional activity. The protection of intrastate animals would not violate the constitutional rights of any citizen. Congress would need to be weary to not allow this financial inducement to turn into coercion.[193] If Congress were to place conditions on too much funding, this may take away a state's ability to make an independent choice. Like in *Dole*, only 5% of a state's funds would be lost were the state not to accept the condition.[194] Here, if Congress were to use the Land and Water Conservation Fund as the vehicle to protect intrastate

186. *Id.*

187. *Agriculture and Interior Departments Invest $2.8 Billion to Protect Public Lands, Support Conservation Efforts Across the United States*, U.S. DEP'T OF AGRIC. (June 4, 2024), https://www.usda.gov/about-usda/news/press-releases/2024/06/04/agriculture-and-interior-departments-invest-28-billion-protect-public-lands-support-conservation.

188. *Id*.

189. *Id*.

190. NAT'L PARK SERV: LAND & WATER CONSERVATION FUND, *supra* note 14.

191. South Dakota v. Dole, 483 U.S. 203, 203 (1987).

192. *Id.* at 208.

193. *Id.* at 211.

194. *Id.*

species, it would hardly be coercive upon the states. The Land and Water Conservation Fund provides matching grants to states and local communities within them for the purpose of protecting natural resources.[195] By placing conditions on the receipt of these grants, Congress is not depriving the state of any part of its budget, only withholding grant money. As stated in *Steward Machine Co. v. Davis*: "[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."[196] Here, Congress would be providing mild encouragement or temptation to states to protect intrastate endangered or threatened species.

Sebelius provides more limits that Congress would need to adhere to when conditioning the receipt of federal funds.[197] First, if Congress were to choose another path besides using the Land and Water Conservation Fund, it would need to make sure that they do not withhold too much of a state's budget. In that case, 10% of the state's budget would be lost if they did not accept the conditions imposed by the federal government.[198] This was considered coercive.[199] More importantly, Congress would need to be cautious when choosing which program or path to condition funds to. In *Sebelius*, the federal government attached conditions to the funds of an existing program, the Medicaid program.[200] Under this program, states had come to expect certain funding and had already accepted certain conditions.[201] The federal government cannot, under its spending power, impose post-acceptance or retroactive conditions.[202] Congress cannot take away existing funding for state programs for choosing not to participate in new conditions.[203]

There are currently several existing programs created by the federal government to help states protect endangered or threatened species.[204] Some of these initiatives include the Habitat Conservation Plan Land Grants Program, the Conservation Planning Assistance Grants Program, the Recovery Challenge and Land Acquisition Grants Programs, and the Traditional Conservation Grant Program.[205] Another such program is the

195. NAT'L PARK SERV.: LAND & WATER CONSERVATION FUND, *supra* note 14.
196. Steward Machine Co. v. Davis, 301 U.S. 548, 548–49 (1937).
197. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 519 (2012).
198. *Id.* at 582.
199. *Id.*
200. *Id.* at 582–83.
201. *Id.* at 584.
202. *Id.*
203. *Id.* at 585.
204. *E.g.*, U.S. FISH & WILDLIFE SERV., *supra* note 14.
205. *What We Do*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/program/cooperative-endangered-species-conservation-fund (last visited Mar. 30, 2026).

Cooperative Endangered Species Conservation Fund.[206] This program helps states develop and implement conservation programs for listed, candidate, or at-risk species and roughly $51.8 million has been given to states for this program.[207] These programs would be the most natural fit to attach conditions to, as they are directly related to the protection of endangered species. However, if Congress would use these grant programs as the vehicle to protect intrastate species, they would need to make sure that post-acceptance conditions are not attached. Under *Sebelius*, the federal government cannot take an existing program and attach new conditions to it, without giving the states a meaningful choice concerning acceptance.[208]

Moreover, Congress would need to balance a state's reliance on these funds when carrying out conservation programs. If the federal government were to withhold all of a state's conservation funding, then a court may find that to be coercion. Congress could likely attach conditions to this grant program if it made sure that if a state did not accept, the loss of funds would not be determinative for a court. However, the Court in *Sebelius* did not articulate a precise level of funding that, if withheld by the federal government, would make it coercive upon the states.[209] Of course, this balancing act will be difficult. If Congress places conditions on too much funding, it may be deemed coercive but if too little funding has conditions placed upon it, that may not make the incentives worthwhile for a state. However, placing conditions on how these federal funds are used is well within the realm of constitutionality.

CONCLUSION

The Endangered Species Act (ESA) is an important piece of legislation that protects and preserves the Nation's wildlife. Since the enactment of the ESA, hundreds of species have been saved from extinction.[210] One such species is none other than our national bird: the bald eagle.[211] Through the Act, habitat protection allowed the bald eagle to recover once the federal government banned certain toxic chemicals that were affecting the birds.[212]

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206. *Id.*
207. *Id.*
208. *Sebelius*, 567 U.S. at 519.
209. *Id.* at 585.
210. *Celebrating 50 Years of Success in Wildlife Conservation*, U.S. DEP'T OF INTERIOR (Feb. 2, 2013) https://www.doi.gov/blog/endangered-species-act-celebrating-50-years-success-wildlife-conservation.
211. *Id*.
212. *Id.*

In 2007, the bald eagle was removed from the endangered species list.[213] It is a shame that we, as a country, almost let our national symbol blink out of existence. It would be a bigger shame to stand by and let thousands of other species go extinct, just because they lived within one state. Congress should protect these species by regulating them through its spending power; a less controversial and a more legally sound option than its Commerce Clause power. While this has not been overturned by the Supreme Court yet, waiting for it to occur will only be a disservice to the intrastate wildlife that depends upon federal protections. While protection is not guaranteed though Congress's spending power, it is a better alternative to no protection at all. In the words of Teddy Roosevelt: "The wildlife and its habitat cannot speak, so we must and we will."[214]

213. *Id*.

214. U.S. Fish & Wildlife Serv. (@USFWS), X (Mar. 14, 2024, 2:04 PM) https://x.com/USFWS/status/1768337314785153413.