

A FISH OUT OF WATER: THE DELTA SMELT REGULATED UNDER THE COMMERCE CLAUSE

I. INTRODUCTION

For decades, California has been a largely agricultural state.¹ California's abundant agriculture includes over 400 commodities.² The unique geography of the state, combined with its agriculture-friendly climate, has allowed California to become one of the most productive agricultural regions in the world.³ In 2007, California generated \$36.6 billion in income from agriculture and exported agricultural products to more than 156 countries worldwide.⁴ This agricultural production would not be possible without irrigation.⁵ California irrigates an average of 9.6 million acres by using approximately thirty-four million acre-feet of water yearly.⁶ This water is primarily surface water or groundwater pumped out of the ground or from a body of water.⁷

Water, however, can be a relatively scarce commodity in California.⁸ The year of 2009 will be the third consecutive year that California has suffered from a drought.⁹ Until recently, an important water source used by the farmers in the Central Valley and elsewhere was water pumped out of the Sacramento – San Joaquin Delta by the California-operated State Water Project¹⁰ and the Central Valley Project,¹¹ which is operated

¹ See The Measure of California Agriculture Highlights – University of California Agricultural Issues Center, <http://aic.ucdavis.edu/research1/mocahighlights06.pdf> (last visited Oct. 18, 2009).

² California Department of Food and Agriculture, <http://www.cdffa.ca.gov/Statistics> (last visited Nov. 3, 2009).

³ California Department of Water Resources, <http://www.owve.water.ca.gov/agdcv/> (last visited Aug. 24, 2009).

⁴ California Department of Food and Agriculture, *supra* note 2.

⁵ California Department of Water Resources, *supra* note 3.

⁶ *Id.*

⁷ *See id.*

⁸ See California Department of Water Resources, <http://www.water.ca.gov/drought/> (last visited Nov. 10, 2009).

⁹ *Id.*

¹⁰ See generally California State Water Project Overview – California Department of Water Resources, <http://www.water.ca.gov/swp/> (last visited Dec. 30, 2009).

by the United States (“U.S.”) Government.¹² Currently, federal regulation has caused California’s agricultural irrigation needs to become a secondary interest to a species of fish whose population has recently been in rapid decline – the delta smelt.¹³ However, the federal government’s regulatory power is limited by the U.S. Constitution. One such regulatory limit is Article I, Section 8 of the U.S. Constitution, or the Commerce Clause.¹⁴

This Comment shall examine the framework of the Endangered Species Act (“ESA”) and Article I, Section 8 of the U.S. Constitution.¹⁵ Secondly, it shall examine the history of judicial interpretation of the Commerce Clause, particularly interpretations that extend to endangered species. Finally, any inconsistencies between the interpretations of the Commerce Clause and its application to the delta smelt shall be addressed.

II. THE DELTA SMELT AND THE CONFLICT WITH AGRICULTURAL INTERESTS

The delta smelt (*Hypomesus transpacificus*)¹⁶ is a small, slender bodied fish which is found only in California.¹⁷ Adult fish commonly reach sizes of two to three inches, although some adult fish have been recorded as reaching up to five inches.¹⁸ The fish are found only in the Sacramento-San Joaquin Estuary.¹⁹ The delta smelt was classified as threatened and is currently protected under the ESA in 1993.²⁰

The government-regulated delta smelt recovery and agricultural irrigation have become mutually exclusive competing interests. This is because the water pumps operated by the State Water Project²¹ and the Cen-

¹¹ See generally California State Water Project and the Central Valley Project – California Department of Water Resources, <http://www.water.ca.gov/swp/cvp.cfm> (last visited Dec. 30, 2009).

¹² *Id.*

¹³ See generally Delta Smelt – U.S. Fish and Wildlife Service, http://www.fws.gov/sacramento/es/delta_smelt.htm (last visited Nov. 18, 2009).

¹⁴ U.S. CONST. art. I, §8.

¹⁵ *Id.*

¹⁶ Delta Smelt – California Department of Fish and Game, <http://www.delta.dfg.ca.gov/gallery/dsmelt.asp> (last visited Nov. 18, 2009).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 50 C.F.R. § 17.

²¹ See generally California State Water Project Overview – California Department of Water Resources, *supra* note 10.

tral Valley Water Project²² affect the delta smelt negatively in several ways.²³ First, the pumps incidentally entrap and kill fish when they draw water.²⁴ Additionally, the pumping mechanisms affect certain aspects of the water, such as turbidity²⁵ as well as temperature of water.²⁶

This issue was brought to the public's attention in 2007 with the case of *Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D.Cal. 2007), in which the plaintiff filed suit against Dirk Kempthorne in his capacity as Secretary of the Interior and the California Department of Water Resources.²⁷ The 2005 Biological Opinion ("BiOp"), a document of scientific findings about the status of an individual endangered species issued by the U.S. Fish and Wildlife Service ("FWS") and used to assess necessary mitigating measures, determined the delta smelt had not reached "jeopardy" status.²⁸ The complaint alleged that the status of the delta smelt was much more adversely affected than the BiOp determined it to be, and that the BiOp was therefore unlawful and inadequate to protect the delta smelt.²⁹ Specifically, it was contended that the Delta Smelt Risk Assessment Matrix³⁰ ("DSRAM"), as it was structured

²² See generally California State Water Project and the Central Valley Project – California Department of Water Resources, *supra* note 11.

²³ *Natural Resources Defense Council v. Kempthorne*, 2007 U.S. Dist. LEXIS 91968 at *8 (E.D.Cal. 2007)(factual findings regarding the delta smelt).

²⁴ *Id.* at *9.

²⁵ Turbidity is a measure of water clarity and is used to assess how much material is suspended in the water. Suspended materials can include, but are not limited to, soil particles, algae, plankton, and microbes. Turbidity increases water temperature, as the suspended particles absorb more heat, reduces the concentration of dissolved oxygen in the water, and also reduces the amount of light that penetrates the water. The suspended material can clog fish gills, resulting in lower resistance to disease, lower growth rates, and can affect egg and larval development. Turbidity – U.S. Environmental Protection Agency, <http://www.epa.gov/volunteer/stream/vms55.html>. (last visited Nov. 19, 2009.)

²⁶ *Natural Resources Defense Council v. Kempthorne*, 2007 U.S. Dist. LEXIS 91968 at 9.

²⁷ See *Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D. Cal. 2007)(holding that the 2005 Biological Opinion was unlawful and invalid).

²⁸ *Natural Resources Defense Council v. Kempthorne*, 2007 U.S. Dist. LEXIS 91968 at *7.

²⁹ *Id.* at *5.

³⁰ The Delta Smelt Risk Assessment Matrix is a mechanism designed to protect the delta smelt at Federal and State Delta export facilities. It consists of certain criteria which are evaluated on a monthly basis. When the criteria is exceeded it will result in a meeting of the Smelt Working Group, a group of experts in delta smelt biology from several different agencies, including the U.S. Fish and Wildlife Service, the U.S. Department of Environmental Protection, the California Department of Fish and Game, and the California Department of Water Resources. – "DSRAM" – U.S. Fish and Wildlife Service, http://www.fws.gov/sacramento/es/delta_smelt_working_group.htm (last visited Nov. 14, 2009.)

at the time, did not provide a reasonable degree of certainty that mitigating measures would take place.³¹ Furthermore, the BiOp did not address the impact of the pumping operations of the Central Valley Project and State Water Project on the continued survival of the delta smelt.³²

The factual determinations made by the Court were that the delta smelt species was in a state of jeopardy.³³ There was general agreement among the biologists and environmental experts who testified that the population of the delta smelt species was at a historic low.³⁴ Furthermore, the water pumping was a significant risk to the delta smelt, especially at the juvenile or larval stage.³⁵ The Court determined that the BiOp was unlawful, inadequate, and unsupported by scientific data.³⁶ Subsequently, the controversial water-pumping cutbacks were issued.³⁷

III. THE ENDANGERED SPECIES ACT OF 1973

Congress passed the ESA in 1973 for the purpose of protecting and assisting in the recovery of certain imperiled species and the ecosystems on which they depend.³⁸ The ultimate goal of the ESA is to bring the threatened species to a point of recovery so they no longer need to be protected.³⁹ The ESA authorizes the listing of species as threatened or endangered.⁴⁰ A species is labeled “endangered” when it is in danger of extinction throughout all or a significant portion of its range.⁴¹ A species is listed as “threatened” when it is likely to become endangered within the foreseeable future.⁴² Once deemed and listed as threatened or endangered, the unauthorized taking, possession, sale, and transportation of the species is prohibited.⁴³ Under the ESA’s definition, “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to engage in any such conduct.⁴⁴ Section 7 of the ESA requires federal

³¹ Natural Resources Defense Council v. Kempthorne, 2007 U.S. Dist. LEXIS 91968 at *33.

³² *Id.* at *4.

³³ *Id.* at *5.

³⁴ *Id.* at *7-8.

³⁵ *Id.* at *27.

³⁶ *Id.* at *5.

³⁷ *Id.* at *60.

³⁸ ESA Basics – U.S. Fish and Wildlife Service, http://www.fws.gov/Endangered/factsheets/ESA_basics.pdf (last visited Nov. 18, 2009).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 16 U.S.C. §1532 (19).

agencies to use their legal authority to promote the conservation purposes of the ESA, and to consult with the FWS.⁴⁵ In the rare case in which the FWS makes a jeopardy determination, the agency offers “reasonably prudent alternatives” about how the proposed action could be modified to avoid jeopardy.⁴⁶

IV. THE COMMERCE CLAUSE – LIMITATIONS ON FEDERAL REGULATORY POWER

California water agencies state that the water cutbacks are the most drastic that the state has ever experienced.⁴⁷ While farms and other agriculturally related business are deprived of water, more than 142,000 acre feet of water have been allowed to flow to the ocean due to the cutbacks.⁴⁸ This amount of water is sufficient to farm 53,000 acres or eighty-three square miles.⁴⁹ These cutbacks have caused the disappearance of thousands of jobs.⁵⁰ Some rural communities are experiencing tremendous declines in employment, such as Mendota’s thirty-eight percent unemployment rate.⁵¹

The complications for California’s farming communities go beyond the unemployment rate. California’s agricultural economy has also experienced huge losses.⁵² In 2008, Westlands Water District reported early losses from the water pumping cutbacks to be more than \$73 million.⁵³ Esajian Farming, which occupies approximately 7,000 acres in the Avenal-Lemoore area, was forced to abandon sections of alfalfa rather than apply increasingly precious water.⁵⁴ Due to the water pumping cutbacks, farmers have resorted to growing crops that are more drought tolerant, such as safflower and garbanzo beans, and turning away

⁴⁵ ESA Basics – U.S. Fish and Wildlife Service, *supra* note 38.

⁴⁶ *Id.*

⁴⁷ Backgrounder: The Delta Smelt and the Economic Impact of the Pumping Cutbacks – Pacific Legal Foundation, <http://community.pacificlegal.org/Document.Doc?id=287> (last visited Nov. 14, 2009).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Katie Paul, *Dying of the Vine*, NEWSWEEK, (Aug. 24, 2009), <http://www.newsweek.com/id/211381> (last visited Oct. 17, 2009).

⁵¹ *Id.*

⁵² California’s Water Future: Crops Wither—Along With Water Supply, Kate Campbell – California Farm Bureau Federation, <http://www.cfbf.com/agalert/AgAlertStory.cfm?ID=1070&ck=DC58EA306451C9D670ADCD37004F48F> (last visited Dec. 30, 2009).

⁵³ *Id.*

⁵⁴ *Id.*

from crops that require more water.⁵⁵ Also in 2008, Kern County Water Agency estimated that the crop loss within its service area would reach \$100 million.⁵⁶ Rangeland losses affecting cattle production were reported at approximately \$65 million.⁵⁷ These water pumping cutbacks have become very costly for the State of California.

The farmers who have been denied water have not accepted the Federal Government's view that agriculture is a lower priority than the delta smelt.⁵⁸ In May 2009, the Pacific Legal Foundation⁵⁹ filed a complaint on behalf of several Central Valley farmers claiming that the Federal Government's regulation of the delta smelt is unconstitutional.⁶⁰ More specifically, the complaint points out that the Federal Government's constitutionally vested power is limited to regulation of "commerce among the several states."⁶¹ However, the delta smelt is a fish that is found only in California, and the species is not bought or sold by anyone.⁶² The Pacific Legal Foundation's contention is that the Federal Government does not have the authority to regulate a fish species which is found only in one state, which is not involved in commerce of any kind as the fish is not bought or sold in commerce.⁶³

In October of 2009, the Federal Court for the Eastern District of California in Fresno ruled against the Pacific Legal Foundation's Commerce Clause challenge, finding that Congress had a rational basis for concluding that the delta smelt regulations were a protection of the commercial benefits of biodiversity.⁶⁴ Brandon Middleton, an attorney from the Pacific Legal Foundation who was involved in the litigation, stated that he

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Water Cutoff for Delta Smelt is Unconstitutional – Pacific Legal Foundation, <http://community.pacificlegal.org/Page.aspx?pid=900> (last visited Nov. 18, 2009).

⁵⁹ The Pacific Legal Foundation is a public interest legal organization that fights for limited government, property rights, individual rights, and a balanced approach to environmental protection. Established in 1973, the Pacific Legal Foundation is one of the oldest and most successful public interest legal organizations. About PLF – Pacific Legal Foundation, <http://community.pacificlegal.org/Page.aspx?pid=262> (last visited Nov. 18, 2009).

⁶⁰ Water Cutoff for Delta Smelt is Unconstitutional, *supra* note 58.

⁶¹ U.S. Const. art. I, § 8; Water Cutoff for Delta Smelt is Unconstitutional, *supra* note 58.

⁶² Water Cutoff for Delta Smelt is Unconstitutional, *supra* note 58.

⁶³ *Id.*

⁶⁴ Delta Smelt Consolidated Cases v. Salazar, 2009 U.S. Dist. LEXIS 94776 (E.D. Cal., Oct. 15, 2009). Brandon Middleton – Pacific Legal Foundation, <http://plf.typepad.com/plf/2009/10/thoughts-on-plfs-delta-smelt-commerce-clause-challenge.htm> (last visited Nov. 19, 2009).

believed the decision should be appealed.⁶⁵ This assertion rests on the claim that the District Court applied incorrect legal standards.⁶⁶ Furthermore, he is asserting that the “commercial benefit of biodiversity” rationale relied upon by the Court offers no limitations to the regulatory power of the Federal Government.⁶⁷

A. Interpretation of the Commerce Clause

Article 1, Section 8 of the United States Constitution grants the Federal Government the power to regulate commerce between the states.⁶⁸ Article 1, Section 8 is referred to as the Commerce Clause and has an extensive history of judicial interpretation as the nation has developed.⁶⁹ The modern interpretation is discussed in great length in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).⁷⁰

United States v. Lopez involved a twelfth-grade high school student who was charged with carrying a firearm in violation of the Gun-Free School Zone Act of 1990.⁷¹ The Gun-Free School Zone Act of 1990 (“GFSZA”) made it a federal offense for any individual to knowingly possess a firearm in what the individual knows, or should know, is a school zone.⁷² After a conviction at the district court level, the defendant appealed his conviction challenging that the GFSZA exceeded the commerce power enumerated by the Constitution.⁷³ The Government contended that possession of a gun in a school zone could substantially affect interstate commerce in two ways.⁷⁴ First, the substantial cost of violent crimes could create a rise in insurance costs which would be shared by the population.⁷⁵ Secondly, the risk of violent crimes would reduce the willingness of individuals to travel into parts of the country that are considered to be unsafe.⁷⁶

⁶⁵ Middleton – Pacific Legal Foundation, *supra* note 64.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ U.S. Const. art I, § 8.

⁶⁹ U.S. Const. art I, § 8; *see generally* *United States v. Lopez*, 514 U.S. 549 (1995).

⁷⁰ *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

⁷¹ *United States v. Lopez*, 514 U.S. at 551.

⁷² *Id.*

⁷³ *Id.* at 551-552.

⁷⁴ *Id.* at 563-564.

⁷⁵ *Id.* at 564.

⁷⁶ *Id.*

The Court defined three categories that the Federal Government could regulate under the Commerce Clause.⁷⁷ First, it can regulate the channels of interstate commerce.⁷⁸ Secondly, it can regulate the instrumentalities of interstate commerce.⁷⁹ Finally, the Government can regulate activities which have a substantial economic affect on interstate commerce.⁸⁰ The Court realized that the implications of the theory relied upon by the Government could have a detrimental affect upon the Constitutional boundaries of federal regulation.⁸¹ Under the “cost of crime” reasoning, Congress would be able to regulate not only all violent crimes, but also activities that had potential of leading to violent crimes, “regardless of how tenuously they relate to interstate commerce.”⁸² Furthermore, under the “national productivity” reasoning, Congress could regulate any activity found to have a relation to the productivity of individual citizens.⁸³ The Court declined to expand governmental regulation and affirmed the Appellate Court’s ruling.⁸⁴

United States v. Morrison involved two male collegiate athletes who were accused of raping a female student.⁸⁵ The plaintiff alleged a cause of action under 42 U.S.C. § 13981, a statute which provided a federal civil remedy for victims of gender-motivated violence.⁸⁶ The District Court dismissed plaintiff’s claim for failure to state a claim upon which relief could be granted, holding that although the plaintiff’s complaint stated a valid claim under 42 U.S.C. § 13981, the statute was invalid under the Commerce Clause.⁸⁷ The Court of Appeals affirmed.⁸⁸

On certiorari, the U.S. Supreme Court determined that the gender motivated crimes under § 922 were not economic activity in any sense of the phrase.⁸⁹ Regulation of violent, gender-motivated crimes was not regulation of the channels or instrumentalities of interstate commerce.⁹⁰ The Government argued that it could prove that gender-motivated, violent crimes fell into the third category: things having a substantial eco-

⁷⁷ *Id.* at 558.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 558-559.

⁸¹ *Id.* at 564.

⁸² *Id.*

⁸³ *Id.* at 567-568.

⁸⁴ *Id.*

⁸⁵ *United States v. Morrison*, 529 U.S. 598, 602 (2000).

⁸⁶ *United States v. Morrison*, 529 U.S. at 604.

⁸⁷ *Id.*

⁸⁸ *Id.* at 605.

⁸⁹ *Id.* at 610.

⁹⁰ *Id.* at 609.

conomic effect on interstate commerce.⁹¹ The defining fact that set *Morrison* apart from *Lopez* is that, in *Morrison*, the government put forth considerable documentation of factual findings on gender-motivated violent crimes and its link to economic activity.⁹²

The *Morrison* Court's analysis primarily dealt with the third category set forth in *Lopez*: activities having a substantial economic affect on interstate commerce.⁹³ Aware of the potential for the substantial affect on interstate commerce test to completely destroy the limitations on federal regulatory power, the Court looked to four considerations in order to ascertain if a substantial affect on interstate commerce was present.⁹⁴ The first consideration is if the activity is an "economic enterprise," or economic in nature.⁹⁵ The second requires a showing of a jurisdictional element linking the activity to interstate commerce.⁹⁶ The third asks if the activity is traditionally an activity regulated by state government.⁹⁷ The final consideration asks if the link between the activity and interstate commerce is attenuated, or too weak to support a substantial affect on interstate commerce.⁹⁸ The Court determined that the documentary evidence indicating the substantial economic effect of gender-motivated violent crimes on interstate commerce was insufficient, on its own, to sustain the constitutionality of regulation.⁹⁹ Furthermore, the Court rejected the argument that Congress can regulate non-economic, violent, criminal conduct solely based on its aggregated effect on interstate commerce.¹⁰⁰

"The Constitution requires a distinction between what is truly national and what is truly local."¹⁰¹ Regulation and punishment for violent crimes is a quintessential example of police powers, which the Constitution clearly allocates to the states.¹⁰² The Court concluded that although the victim was entitled to a civil remedy, that remedy would come from the commonwealth of Virginia, not the United States, and affirmed.¹⁰³

⁹¹ *Id.*

⁹² *Id.* at 614.

⁹³ *Id.* at 609-614.

⁹⁴ *Id.* at 609.

⁹⁵ *Id.* at 610.

⁹⁶ *Id.* at 611-612.

⁹⁷ *Id.* at 615-616.

⁹⁸ *Id.* at 612.

⁹⁹ *Id.* at 614.

¹⁰⁰ *Id.* at 617-618.

¹⁰¹ *Id.* at 618.

¹⁰² *Id.*

¹⁰³ *Id.* at 627.

V. THE COMMERCE CLAUSE AND THE ESA

The constitutional challenge to the regulation of the delta smelt is not the first constitutional challenge to a regulation of a species under the scope of the ESA.¹⁰⁴ The delta smelt is also not the first species to be challenged in this manner that could be found in a single state.¹⁰⁵ One of the earliest modern cases directly addressing the impact of the Commerce Clause upon the taking of a certain species of animal was *United States v. Bramble*, 894 F.Supp. 1384 (D.HI. 1995).¹⁰⁶ The Court of Appeals for the Ninth Circuit upheld the Migratory Bird Treaty Act.¹⁰⁷ Very similar to the ESA, the Migratory Bird Treaty Act made it illegal to take, kill, or possess migratory birds, or any part of a migratory bird.¹⁰⁸ The defendant was charged criminally on several accounts, the pertinent charge being possession of eagle feathers in violation of the Migratory Bird Treaty Act.¹⁰⁹ Upon a challenge by the defendant, asserting that the possession of eagle feathers in no way affected interstate commerce, the Migratory Bird Treaty Act was upheld.¹¹⁰ The Court found that the migratory birds, which the Act intended to protect, traveled between different states.¹¹¹ Therefore, under the reasoning in *Bramble*, regulation of a species of animal by the Federal Government satisfies the Commerce Clause if the animal travels or migrates from one state to another, or is found in more than one state.¹¹²

In 1997, the Court of Appeals for the District of Columbia decided *National Association of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). In this case, the plaintiff homebuilders association sought to expand an intersection in an area that was populated by the endangered Delhi Sands Flower-Loving Fly, an insect that was native to San Bernardino, California.¹¹³ This particular fly was found only in California.¹¹⁴ The FWS notified the plaintiffs that the expansion of the intersection

¹⁰⁴ See *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); see also *Shields v. Babbitt*, 229 F.Supp.2d. 638 (W.D.Tx. 2000); see also *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); see also *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003).

¹⁰⁵ *National Association of Home Builders v. Babbitt*, 130 F.3d 1045 (D.C. Cir. 1997).

¹⁰⁶ *United States v. Bramble*, 894 F.Supp. 1384 (D.HI. 1995).

¹⁰⁷ *Id.* at 1396.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1387.

¹¹⁰ *Id.* at 1396.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *National Association of Homebuilders v. Babbitt*, 130 F.3d at 1045.

¹¹⁴ *Id.* at 1043.

would lead to the taking of the Delhi Sands Flower-Loving Fly, in violation of the ESA.¹¹⁵ The homebuilders association refuted this accusation by challenging the constitutional grounds for regulating a species that was located only in one state which was not in any type of economic scheme which could be construed as interstate commerce.¹¹⁶ At trial, the District Court granted summary judgment for the defendant FWS.¹¹⁷

The Court of Appeals for the District of Columbia found that the regulation of the endangered fly was both a regulation of the channels of interstate commerce and also an activity having a substantial economic affect on interstate commerce.¹¹⁸ It was determined that regulation of endangered species was proper under Congress' power to regulate the channels of interstate commerce in two ways.¹¹⁹ First, the prohibition against the taking of endangered species is necessary to enable the government to control the transport of endangered species in interstate commerce.¹²⁰ Secondly, the prohibition against taking of endangered species falls under Congress' authority to keep the channels of interstate commerce free from immoral and injurious uses.¹²¹ As to a substantial economic affect of interstate commerce, the Court determined that the government's interest rested in biodiversity.¹²² At the time, approximately 521 of the 1082 species listed under the ESA could only be found in a single state, and that the variety of plants and animals in the United States are natural resources that commercial actors can use to produce marketable products.¹²³ In the narrowest view of economic value, endangered species have value in that they are possible sources of medicine.¹²⁴ According to this rationale, the Federal Government can choose to protect any species because of the possible genetic value that the species may possess, whether or not the species has any value at the time.

In 2000, the United States District Court for the Western District of Texas decided *Shields v. Babbitt*, 229 F.Supp.2d 638 (W.D.Tx. 2000). In this case, the subject of dispute was a group of species found in one specific area; the group of protected species was referred to, collectively, as the "Edwards Species."¹²⁵ The plaintiffs, similar to the farmers in the

¹¹⁵ *Id.* at 1045.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1046-1053.

¹¹⁹ *Id.* at 1046.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 1052.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Shields v. Babbitt*, 229 F.Supp. 2d 638, 643 (W.D.Tx. 2000).

delta smelt case, sought to withdraw or pump water out of the Edwards Aquifer for the purposes of agricultural irrigation.¹²⁶ It was determined that such “withdraws” from the Edwards Aquifer resulted in the taking of several of these endangered species.¹²⁷ Once again, the plaintiff took the position that the ESA regulation of the “Edwards Species” was unconstitutional in that it violated the Commerce Clause for the reason that the regulation is not connected to interstate commerce.¹²⁸

The Court identified several ways that the taking of the “Edwards Species” is within the commerce power. First, it identifies that groundwater is an article of interstate commerce, and therefore is subject to congressional regulation.¹²⁹ The regulation of water use affects the price and market conditions of both the crops raised using irrigation water and of the water itself, and therefore the taking of “Edwards Species” is connected to interstate markets for agricultural products and water.¹³⁰ Secondly, relying primarily on *National Association of Home Builders v. Babbitt*, the Court also recognized that regulation of the “Edwards Species” fall within Congress’ power to regulate channels of interstate commerce and activities which have a substantial affect on interstate commerce.¹³¹ As in *National Association of Home Builders v. Babbitt*, it was determined that Congress could regulate the taking of the “Edwards Species” in order to keep the channels of interstate commerce free from immoral or injurious action.¹³² Secondly, the taking of the “Edwards Species” had a substantial affect on interstate commerce through tourism and scientific research.¹³³

Also in 2000, the Court of Appeals for the Fourth Circuit decided *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), another Commerce Clause challenge involving the endangered species of Red Wolves.¹³⁴ The plaintiffs in this action challenged the ESA specifically as it related to the regulation of taking of Red Wolves on private land.¹³⁵ The Court held that the regulation of the taking of Red Wolves was a valid exercise of federal power under the Commerce Clause because the protection of

¹²⁶ *Id.* at 646.

¹²⁷ *Id.*

¹²⁸ *Id.* at 643.

¹²⁹ *Id.* at 658.

¹³⁰ *Id.*

¹³¹ *Id.* at 658-664.

¹³² *Id.* at 658.

¹³³ *Id.* at 664.

¹³⁴ *Gibbs v. Babbitt*, 214 F.3d 483, 486 (4th Cir. 2000).

¹³⁵ *Id.*

the Red Wolves substantially affected interstate commerce through tourism, trade, scientific research, and other potential economic activities.¹³⁶

In 2003, the Court of Appeals for the Fifth District decided *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003).¹³⁷ The plaintiff realty company sought to develop a piece of land commercially, which the FWS stated would result in the unauthorized taking of several cave dwelling species of invertebrates which were protected under the ESA.¹³⁸ This court recognized that the actual taking of the species must be linked to interstate commerce, not the activity that would result in the taking of the protected species.¹³⁹ This view is contrary to that taken in *National Homebuilders Association v. Babbitt* and *Gibbs v. Babbitt*.¹⁴⁰ The Court pointed out that the Congressional limits of regulation would be obliterated by looking beyond the primary activity being regulated.¹⁴¹ For example, in *Lopez* the Court ruled that a regulation of firearm possession was not within the bounds of the Commerce Clause.¹⁴² However, this restriction could be overcome by a showing that the person possessing the firearm was in the business of selling firearms. This demonstrates that, according to this analysis, the power of Congressional regulation under the Commerce Clause would be seemingly endless.¹⁴³

The Court determined that there is a strong economic interest in the preservation of the diverse gene pool of endangered species.¹⁴⁴ The genetic makeup of a species could have possible future economic value, most notably for scientific research, that could lead to the development of medicinal products.¹⁴⁵ The Court also determined that aggregation in this context was appropriate because the ESA was an economic regulatory scheme, and the regulation of taking endangered species was a vital part of the regulatory scheme.¹⁴⁶ Under this analysis, the Court upheld the constitutionality of the ESA regulation.¹⁴⁷

In *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) decided in 2003 by the District Court for the District of Columbia, a real estate de-

¹³⁶ *Id.* at 492-506.

¹³⁷ *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003).

¹³⁸ *Id.* at 624-625.

¹³⁹ *Id.* at 634-635.

¹⁴⁰ *See National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

¹⁴¹ *Id.* at 634-635.

¹⁴² *Id.* at 635; *see also United States v. Lopez*, 514 U.S. 549 (1995).

¹⁴³ *See GDF Realty Investments*, 326 F. 3d at 635.

¹⁴⁴ *Id.* at 639.

¹⁴⁵ *Id.* at 637.

¹⁴⁶ *Id.* at 640.

¹⁴⁷ *Id.* at 641.

velopment company sought to construct a 202-acre housing development in the San Diego region of Southern California.¹⁴⁸ The FWS determined that the construction of the housing development would jeopardize the continued existence of the Arroyo Toad, a species which had been listed as endangered by the FWS in 1994.¹⁴⁹ The Court found that the federal regulation was consistent with the Commerce Clause; furthermore that the Court was bound by the previous ruling in *National Association of Home Builders v. Babbitt*.¹⁵⁰ In response to arguments by the plaintiff real estate developer stating that the ruling in *National Association of Home Builders v. Babbitt* was inconsistent with the holdings in *Lopez* and *Morrison*, the Court reviewed the analysis done in *National Association of Home Builders v. Babbitt* which was consistent with *Lopez* and *Morrison* and granted summary judgment in favor of the FWS.¹⁵¹

VI. THE COMMERCE CLAUSE AND THE DELTA SMELT

There have been several theories upon which Federal Circuit and District Courts have found ESA regulations sufficient to withstand constitutional challenges under the Commerce Clause.¹⁵² It is necessary to apply these theories to the delta smelt issue and also to assess whether application of these theories seems to be consistent with the holdings of *Lopez* and the more recent *Morrison*.

A. Animals Which Cross Interstate Borders

United States v. Bramble established that an animal which is found in more than one state or which crosses state borders can be regulated under the Commerce Clause.¹⁵³ The principle articulated in *Bramble* does not require that the animal necessarily be bought or sold by anyone.¹⁵⁴ It rather seems to imply that the mere presence of a species of animal in more than one state, or the movement of a species of animal between states is enough to establish interstate commerce.¹⁵⁵

¹⁴⁸ *Rancho Viejo v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2003).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1080.

¹⁵¹ *Id.*; see *United States v. Morrison*, 529 U.S. 598 (2000); see *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁵² See *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003).

¹⁵³ *United States v. Bramble*, 894 F.Supp. at 1396.

¹⁵⁴ See *id.*

¹⁵⁵ *Id.*

This contention does not need extensive examination. The delta smelt is a species of fish which is found only in California.¹⁵⁶ It is not found in any other state and it does not move between any states. Therefore, the *Bramble* principle is not applicable to the delta smelt.

B. Channels/Articles of Interstate Commerce

Several of the earlier, pre-*Morrison* decisions have found that when regulation of the taking of a species protected under the ESA involves the regulation of one of the channels or articles of interstate commerce, the connection was sufficient to satisfy the constitutional requirement.¹⁵⁷ For instance, in *National Association of Home Builders v. Babbitt*, the Court determined that regulation of highway construction in order to prevent the further taking of the endangered fly was constitutional because the highways are channels of interstate commerce.¹⁵⁸ Likewise, in *Shields v. Babbitt*, constitutionality was upheld on a regulation of the “Edwards Species” because it involved limiting the pumping of groundwater, which was an article of interstate commerce.¹⁵⁹

This reasoning appears relevant to the delta smelt case. Particularly relevant is the case of *Shields v. Babbitt* because it dealt with pumping water, similar to the delta smelt issue.¹⁶⁰ However, this reasoning was criticized in *GDF Realty Investments v. Norton* by the Fifth District Court of Appeals, who refused to follow it.¹⁶¹ *GDF Realty Investments v. Norton*, a post-*Morrison* decision, made a distinction between the activity truly being regulated, and activities being regulated incidental to it.¹⁶² It was determined that in these instances of legal controversy involving ESA regulations, the activity at issue is the taking of an endangered species, not the activity leading to the taking of the endangered species (i.e.; freeway construction, water pumping, or housing development.)¹⁶³ The Court’s reasoning was that, given the *Morrison* decision, this view broadened the government’s regulatory power in a way that is inconsis-

¹⁵⁶ California Department of Fish and Game, *Delta Smelt*, available at <http://www.delta.dfg.ca.gov/gallery/dsmelt.asp>.

¹⁵⁷ See *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

¹⁵⁸ *National Association of Home Builders v. Babbitt*, 130 F.3d at 1046.

¹⁵⁹ *Shields v. Babbitt*, 229 F.Supp. 2d 638, 658 (W.D.Tx. 2000).

¹⁶⁰ See *Id.*

¹⁶¹ *GDF Realty Investments v. Norton*, 326 F. 3d 622, 635 (5th Cir. 2003).

¹⁶² *Id.*

¹⁶³ *Id.*

tent with the Constitution.¹⁶⁴ Furthermore, *GDF Realty Investments v. Norton* also determined that regulation of the taking of an endangered species could not fall into either of the first two categories that Congress can regulate under the Commerce Clause: channels and instrumentalities of interstate commerce.¹⁶⁵ It therefore is necessarily part of the third category: things which have a substantial economic effect on interstate commerce.¹⁶⁶

Arguably, in order to effectively protect the delta smelt it is necessary to regulate the pumping of water out of the Sacramento-San Joaquin Delta. Therefore, if the Delta is involved in interstate commerce, federal regulation is appropriate. This line of reasoning essentially would merge the regulation of the delta smelt and the regulation of pumping water from the Delta. However, following the more modern case law which strongly adheres to the *Morrison* reasoning, this argument inevitably fails.

C. Tourism

ESA regulations have been upheld on two different theories of things having a substantial economic affect on interstate commerce.¹⁶⁷ The first is that endangered species have a substantial economic affect on interstate commerce because they are tourist attractions; people will travel between states and in so doing will pay to observe certain species of animals in their natural habitat.¹⁶⁸ The argument that tourists observe wildlife certainly has merit; tourists are known to pay to go on “whale-watching expeditions” for example.¹⁶⁹

This theory was relied upon in *Gibbs v. Babbitt*, which upheld ESA regulation of Red Wolves, in part, because the wolves were a tourist attraction.¹⁷⁰ In *Gibbs v. Babbitt*, there was evidence that tourists did observe the wolves, reinforcing the argument that the wolves were a tourist attraction.¹⁷¹ Without any evidence comparable to that put forth in *Gibbs v. Babbitt*, that anyone desires to observe the delta smelt in this manner, it is irrational to believe that this fish is a tourist attraction. It can also be

¹⁶⁴ *Id.*; see also *Ranch Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting).

¹⁶⁵ See *GDF Realty Investments v. Norton*, 326 F. 3d at 634-636.

¹⁶⁶ See *Id.*

¹⁶⁷ See *Id.*

¹⁶⁸ See *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir. 2000).

¹⁶⁹ See Whale Watching Information, <http://whalewatchinginfo.com/>, (last visited Nov. 22, 2009).

¹⁷⁰ *Gibbs v. Babbitt*, 214 F.3d at 493.

¹⁷¹ *Id.*

inferred that, although some tourists may be taken with observing wolves in their natural habitat, the same tourists may not have the same passion for observing a relatively non-descript, three inch fish. Therefore, to conclude that the delta smelt can be regulated under the Commerce Clause because they have potential to draw tourists as an attraction is not rational, and cannot be the sole basis for concluding that the delta smelt are within the Government's constitutional power.

D. Medical/Scientific Research

The second theory that endangered species have a substantial affect on interstate commerce is that they are valuable for medical or scientific research.¹⁷² Almost without exception, cases involving the ESA and its regulatory power mention the theory that endangered species have economic potential either for manufacturing medical products or scientific research.¹⁷³ *GDF Realty Investments v. Norton*, which relies on one of the most narrow, *Morrison*-influenced interpretations of Commerce Clause authority, bases its decision in part on the grounds that biodiversity is an economic resource.¹⁷⁴

Under this line of reasoning, endangered species have a substantial economic affect on interstate commerce because their genetic make-ups can be used by medical researchers because of their potential medicinal properties.¹⁷⁵ Additionally, scientists research them and therefore travel to their habitats and have them transported to labs for this purpose.¹⁷⁶ Although linked, these seem to be two different contentions which require separate analysis.

To assert that the delta smelt should be protected because the species *may* contain a genetic attribute useful for its medicinal properties which has not yet been realized seems inconsistent with the holding of *Morrison*. In *Morrison*, the U.S. Supreme Court struck down regulation of gender-motivated, violent crimes because their link to interstate commerce was attenuated.¹⁷⁷ This occurred despite numerous Congressional findings that these gender-motivated, violent crimes did in fact have, and would continue to have, a substantial economic affect on interstate com-

¹⁷² *GDF Realty Investments v. Norton*, 326 F.3d 622, 639 (5th Cir. 2003); *National Association of Homebuilders v. Babbitt*, 130 F.3d 1041, 1052-1053 (D.C. Cir. 1997); *Shields v. Babbitt*, 229 F.Supp.2d 638, 659 (W.D.Tx. 2000).

¹⁷³ See *GDF Realty Investments v. Norton*, 326 F. 3d at 639; see also *National Association of Homebuilders v. Babbitt*, 130 F.3d at 1052-1053.

¹⁷⁴ *GDF Realty Investments v. Norton*, 326 F.3d at 639-641.

¹⁷⁵ *Id.*

¹⁷⁶ See *Shields v. Babbitt*, 229 F.Supp.2d at 664.

¹⁷⁷ *United States v. Morrison*, 529 U.S. at 627.

merce.¹⁷⁸ Here, the regulation of the delta smelt has been upheld, in part, because of the possibility of future medical and scientific benefits.¹⁷⁹ These grounds for regulation seem far more attenuated than the theories relied upon by the Government in *Morrison*; and these theories were struck down.¹⁸⁰

Secondly, the contention that the delta smelt have a substantial affect on interstate commerce because they are the object of scientific study is an assertion also seen *GDF Realty Investments v. Norton*, where it was determined that the cave species being regulated had been studied by a significant number of scientists, many of whom traveled to Texas in for the purpose of perform the studies.¹⁸¹ It was also asserted that, in coordination with scientific research, specimens of the cave species were removed and transported to museums where they could be viewed by the public.¹⁸² The cave species appeared in museums in five different states.¹⁸³ Finally, scientific journals had published articles concerning the cave species.¹⁸⁴ The Court determined that these findings were enough to determine that the cave species played a role in interstate commerce.¹⁸⁵

However, there are possibly some significant differences between the cave species at issue in *GDF Realty Investments v. Norton* and the delta smelt. It can be implied from the findings in *GDF Realty Investments v. Norton* that the cave species were unique or specialized organisms which drew scientific interest.¹⁸⁶ Short of a showing that there is interstate interest in the delta smelt, such as the fish being shipped to museums and aquariums throughout the U.S., it would appear that the delta smelt does not have the same scientific value that the cave species exhibited. If the delta smelt do not exhibit the same type of scientific interests as the cave species, the argument would fail. Furthermore, it does not seem accurate to assert that the delta smelt have a significant affect on interstate commerce solely because the species is studied by scientists. The fact that scientists perform studies on the delta smelt does not change the fact that the fish is still neither bought nor sold commercially.¹⁸⁷

¹⁷⁸ *Id.*

¹⁷⁹ *Delta Smelt Consolidated Cases v. Salazar*, 2009 U.S. Dist. LEXIS 94776, *70 (E.D.Cal. October 15, 2009).

¹⁸⁰ *United States v. Morrison*, 529 U.S. at 627.

¹⁸¹ *GDF Realty Investments v. Norton*, 326 F.3d 622, 625 (5th Cir. 2003).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ *Water Cutoff for Delta Smelt is Unconstitutional – Pacific Legal Foundation*, *supra* note 57.

E. Aggregation

In *GDF Realty Investments v. Norton*, the Court determined that the aggregation principle is appropriate to apply to the taking of species under the ESA.¹⁸⁸ The principle behind the aggregation theory is that there are two ways in which an activity can have a substantial affect on interstate commerce.¹⁸⁹ The most common approach is to look to the activity itself for a substantial affect on interstate commerce.¹⁹⁰ “However, in certain circumstances the activity can be aggregated with all other activities which are similar, the sum of which is a substantial affect on interstate commerce.”¹⁹¹ The pitfalls of inappropriate application of the aggregation principle are apparent; in the modern economy almost any activity, when aggregated with others like it, can be found to have some affect on interstate commerce.¹⁹² This could essentially allow the Commerce Clause to operate as a general police power.¹⁹³

In *GDF Realty Investments v. Norton*, the Court determined that the taking of the cave species, when viewed alone, might not amount to a substantial affect on interstate commerce.¹⁹⁴ However, if the taking of the cave species was aggregated with the taking of all other endangered species, there was a substantial affect on interstate commerce.¹⁹⁵ The Fifth Circuit Court of Appeals determined that the aggregation principle was appropriate and therefore the Commerce Clause challenge had to fail.¹⁹⁶ To apply the aggregation principle to the ESA in more basic terms, the theory is that individual takes of endangered species may not have a substantial affect on interstate commerce. However when all the takes of endangered species are considered, there is a substantial affect on interstate commerce.

The delta smelt species, as previously mentioned, is not economic in nature.¹⁹⁷ It is a small fish that nobody buys or sells.¹⁹⁸ There are findings that some endangered species that have a substantial affect on inter-

¹⁸⁸ *GDF Realty Investments v. Norton*, 326 F.3d at 640.

¹⁸⁹ *GDF Realty Investments v. Norton*, 326 F.3d at 640; *see also* *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

¹⁹⁰ *GDF Realty Investments v. Norton*, 326 F.3d at 629.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *See id.*

¹⁹⁴ *Id.* at 640.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 641.

¹⁹⁷ *See* *Water Cutoff for Delta Smelt is Unconstitutional* – Pacific Legal Foundation, *supra* note 57.

¹⁹⁸ *Id.*

state commerce.¹⁹⁹ An example would be the red wolves, which were shown to be a tourist attraction that would draw people to see.²⁰⁰ An appropriate question is: are the delta smelt and a species such as the red wolves so similarly situated that they should be treated the same? Furthermore, is it appropriate to aggregate one species which has an affect on interstate commerce and one that does not? Logic would suggest that the answer is no.

Since *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court has recognized the aggregation principle, by which Congress may reach an instance of an activity that itself does not “substantially affect” interstate commerce if a myriad of such instances in the aggregate have a substantial affect.²⁰¹ Recognizing the apparent pitfalls of undue abstraction, it does not seem appropriate to apply this principle to the ESA when there are instances of taking endangered species that have no affect on interstate commerce. Perhaps there is a select group of species that have an affect on interstate commerce, but there are also certain species, such as the delta smelt, which do not seem to have any affect upon interstate commerce whatsoever.

The aggregation principle appears to be more applicable to one individual species because they are all similarly situated. This is opposed to the current regime, where all of the species protected under the ESA are aggregated together.²⁰² The collective of species which are protected under the ESA do not appear to be similarly situated when it comes to having a collective aggregate affect upon interstate commerce.

F. A Concrete and Ascertainable Affect on Interstate Commerce

In order to be properly regulated under the Commerce Clause, there would need to be showing that there is a concrete and tangible affect that the delta smelt has upon interstate commerce. This would preclude the arguments for regulation based on the delta smelt’s potential for medical products, or that because regulation of the smelt incidentally involves the regulation of pumping water the Commerce Clause is satisfied. In short, there would need to be a showing that the fish, by itself, has a substantial affect on interstate commerce at the present time, not an unforeseeable

¹⁹⁹ See *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); see also *Shields v. Babbitt*, 229 F.Supp.2d 638 (W.D.Tx. 2000); see also *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); see also *GDF Realty Investments v. Norton*, 326 F.3d 622.

²⁰⁰ *Gibbs v. Babbitt*, 214 F.3d 493.

²⁰¹ *United States v. Hickman*, 179 F.3d 230 232 (5th Cir. 1999); see also *Wickard v. Filburn*, 317 U.S. 111 (1942).

²⁰² See *GDF Realty Investments v. Norton*, 326 F.3d at 640.

potential affect in the future. This is difficult because the delta smelt is not bought or sold by anybody.²⁰³

One possible argument would be interdependence of species. If it was scientifically shown that the demise of the delta smelt species would result in some type of ecological change, and this ecological change would have a substantial affect on interstate commerce, then the application of the Commerce Clause would be appropriate. This type of tangible, concrete affect on interstate commerce would be consistent with the *Lopez* and *Morrison* holdings, unlike the intangible future medical use theories relied upon by the Courts.

VII. CONCLUSION

It is difficult to find the proper balance between environmental protection and human interests.²⁰⁴ Although the Federal Government has claimed an interest in regulating activity which threatens to inflict further harm upon endangered species, there remain uncertainties of whether this activity is economic in nature and if the regulation can be sustained under the Commerce Clause. Despite the willingness of the courts to find that ESA regulation is clearly within the confines of the Commerce Clause,²⁰⁵ many questions arise. Is the ESA truly economic in nature, or is economics a convenient rationalization for the Government to ensure that it can prevent harmful affects on endangered species? Should the Government be allowed to regulate the delta smelt based solely on the slight chance that some economic benefit will be derived from the delta smelt's genetics in the future? Does the fact that an organism is studied by scientists indicate a substantial affect on interstate commerce despite the fact that the organism is not bought or sold by anyone?

The delta smelt is a quintessential example of the need for limitations on the regulatory power of the Federal Government. Under the theory of having a substantial affect on interstate commerce, the limitations of Governmental regulatory power in the U.S. Constitution would become invisible. As our country's economic structure becomes more complex, the rules defining what Congress can regulate under the Commerce

²⁰³ Water Cutoff for Delta Smelt is Unconstitutional – Pacific Legal Foundation, *supra* note 57.

²⁰⁴ See *id.*; see also Endangered Species Program – U.S. Fish and Wildlife Service, <http://www.fws.gov/Endangered/>.

²⁰⁵ See *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003); see also *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); see also *Shields v. Babbitt*, 229 F.Supp. 2d 638 (W.D.Tx. 2000); see also *National Association of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

Clause must evolve commensurate to the economic structure. Under the reasoning used to regulate the delta smelt, the Commerce Clause has become a general police power which can regulate anything that is or could become linked to interstate commerce, no matter how attenuated the link.²⁰⁶

In order to protect the Constitution, the courts must distinguish what is truly national and what is truly local. Courts must also distinguish what is truly economic and what is not. Finally, a regulatory scheme must not be upheld as constitutional simply because it is convenient for determining that the Federal Government has regulatory authority. If the constitutional integrity of the ESA is to be upheld, the inconsistencies cannot be ignored. The courts, as well as Congress, need to accept realization that a species of fish which is located within a single state and are not bought or sold commercially does not have a substantial economic affect on interstate commerce. To find to the contrary weakens the constitutionally prescribed separation of federal and state regulatory power.

BRIAN JONES

²⁰⁶ See *GDF Realty Investments v. Norton*, 326 F.3d at 634-635.