

The federal Endangered Species Act (ESA) is widely known for being the primary law in the United States that focuses on protecting biodiversity, and also for being a “pit bull” of environmental laws that has few exceptions and broad sweep. (For instance, the ESA was a major component of the litigation strategy by environmental groups to end harvesting of old-growth forests in the Pacific Northwest.)

But what is less widely known is that there have been a series of cases in which various regulated entities have argued that the ESA is unconstitutional – at least, as applied to species that are only present within one state, the ESA exceeds Congress’ powers under the Constitution. Specifically, in enacting the ESA Congress relied on the Constitution’s grant of powers to Congress to regulate interstate commerce, the Commerce Clause. At the time when the ESA was passed, in the early 1970s, this was uncontroversial. Contemporary Supreme Court precedent gave Congress wide authority under the Commerce Clause.

However, more recent Supreme Court precedent has significantly trimmed back on the scope of Congress’ powers under the Commerce Clause. In a series of decisions, the Court indicated that it would be skeptical of federal regulation of primarily non-commercial activity in areas that were historically reserved to state jurisdiction, particularly where the connections between the regulated activity and interstate commerce were tenuous.

The ESA regulates all “take” of endangered species by private parties. Take is broadly defined under the statute to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect. The agencies that implement the ESA have in turn promulgated regulations that define harm to include destruction of the habitat for a listed species where it will “actually kills or injures” a member of a listed species.

The constitutional controversy focuses on the application of the agency definition of take to include destruction of habitat for species present only within one state. The problem is twofold. First, species present only within one state do not clearly implicate “interstate commerce.” (In contrast, species that cross state borders are generally conceded to be part of “interstate commerce” such that Congress can regulate them.)

Second, challengers to the ESA argue that regulation of habitat destruction is not regulation of commercial activity. Habitat destruction – so goes the argument – involves a lot of different activities, not all of which are commercial activities. Moreover, the ESA and the implementing regulations do not limit the scope of regulation simply to commercial activities. The Supreme Court has indicated that the absence of jurisdictional language in the statute limiting the scope of regulation to activities relating to interstate commerce might make the Court more likely to strike down a statute as unconstitutional. Finally,

protecting habitat is a form of land-use control, which is an area of regulation typically done at the state or local level in the United States. (Generally, the ban on hunting activities for listed species under Section 9 has not been at issue because when you are hunting an animal for human use, the commercial nature of the activity, and the possibility that the animal might be transported in interstate commerce, is much more obvious.)

All the circuit courts that have addressed the issue so far have held the ESA to be constitutional even as applied to interstate species. A [case last week](#) out of the District Court of Utah held unconstitutional the ESA regulations protecting the Utah prairie dog, which (perhaps) is only present in one state. (The judge who issued the ruling has issued controversial [decisions](#) in the past against environmental groups and the government.) If that decision is appealed, it would go to the Tenth Circuit, one of the courts that have not considered this issue. And if the Tenth Circuit were to hold the ESA unconstitutional as applied in this case, that might open the door for the Supreme Court to weigh in - with the eventual outcome being highly uncertain.

Habitat protection for intrastate species matters: Habitat destruction is a primary threat to biodiversity in the United States, and according to [this article in Science](#) (paywall) about a third of all listed species are only found in one county, let alone one state. (That's why I'm skeptical about this [claim](#) by the Pacific Legal Foundation attorney that the goals of this litigation are narrowly focused on this one species.)

This is a case to watch.