NOTE

The Unfounded Fears of Environmental Balkanization: The Ninth Circuit's Dangerous Expansion of the Commerce Clause

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INTRODUCTION

The United States operates under a system in which the federal government and the states share responsibility for governing.[1] Under this structure, known as federalism, the states play a prominent role in enacting and enforcing the nation's laws.[2] In particular, the states are instrumental in protecting the nation's natural resources.[3] In fact, many commentators believe the future of environmental protection lies with state, not federal, legislation.[4] The Ninth Circuit's decision in *Conservation Force v. Manning*, however, undercuts the states' ability to

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[1] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[2] *Id.*; *see* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 571 (1996).

[3] *See, e.g.*, Exec. Order No. 13,132, 64 C.F.R. 43,255 (2000); Office of State & Local Relations, U.S. E.P.A., *Joint Policy Statement on State/EPA Relations*, *available at* http://epa.gov/ocirpage/nepps/jps.htm (last modified June 23, 2003); Steven A. Herman, *EPA's FY 1997 Enforcement and Compliance Assurance Priorities*, NAT'L ENVTL. ENFORCEMENT J., Feb. 1997, at 7.

[4] *See* Barry G. Rabe, *Power to the States: The Promise and Pitfalls of Decentralization*, *in* ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 32 (Norman J. Vig & Michael E. Kraft eds., 2000); DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 259 (1995); Robert Pear, *Shifting Power From Washington is Seen Under Bush*, N.Y. TIMES, Jan. 7, 2001, at A1.

enact effective environmental regulations.[5]

Like many states, Arizona has gone to great lengths to preserve its natural resources.[6] The state has made a considerable commitment to conservation efforts and has adopted a comprehensive regulatory framework to protect its natural resources.[7] A critical aspect of any conservation program is the protection of wildlife. Arizona, which boasts a thriving and diverse ecosystem, strictly regulates hunting to preserve certain populations of wildlife.[8]

In particular, the state protects its elk and deer herds with an innovative method of allocating its annual hunting permits.[9] Arizona awards an increased number of permits to those hunters who frequently apply.[10] The state also rewards those who pay for the program — Arizona residents — by limiting the number of permits available to nonresidents.[11] This system alleviates political pressure to increase the number of permits by appeasing those who hunt the most and those who pay for the program.[12] By funding wildlife management programs and issuing few hunting permits, the state has ensured the viability of its highly prized animals.[13]

In *Conservation Force, Inc. v. Manning*, The Ninth Circuit concluded that Arizona's system violated the Commerce Clause of the United States Constitution.[14] State laws that burden interstate commerce and economically discriminate against nonresidents are unconstitutional.[15] The Ninth Circuit held that Arizona's law substantially affected interstate commerce by discouraging interstate travel and burdening the

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[5] *See* Conservation Force, Inc. v. Manning, 301 F.3d 985, 993 (9th Cir. 2002).

[6] *See id.*; *infra* notes 140-45 and accompanying text.

[7] For example, in 1992, Arizona voters enacted the Heritage Fund program that provides $10 million annually for wildlife conservation programs. ARIZ. REV. STAT. § 17-296 (1990).

[8] *See* ARIZ. REV. STAT. § 17-331(A) (2003) (stating that persons shall not take wildlife without valid license); *Conservation Force*, 301 F.3d at 989. A permit tag is considered a valid license. ARIZ. REV. STAT. § 17-333(A)(17), (19).

[9] ARIZ. ADMIN. CODE 12-4-114 (2003).

[10] *Id.*

[11] *Id.* Only 10% of the permits are available to nonresidents. *Id.*

[12] *Conservation Force*, 301 F.3d at 998.

[13] *Id.* at 988-89.

[14] *See id.* at 1000.

[15] *See id.* at 991; C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 390-92 (1994); Or. Waste Sys., Inc., v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). *See generally* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 574-75 (1949); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851).

flow of commercial goods.[16] The court also held that the law discriminated against nonresidents.[17] Accordingly, the Ninth Circuit reversed the lower court decision upholding the law.[18]

This Note argues that, in deciding *Conservation Force*, the Ninth Circuit misapplied Commerce Clause precepts and, by doing so, has adopted an analysis that stands contrary to public policy.[19] Part I explains how courts determine whether a state law violates the Commerce Clause. Part I also examines a Supreme Court case that addressed the states' authority to regulate recreational hunting. Part II discusses the facts, rationale, and holding in *Conservation Force*. Part III argues that the Ninth Circuit deviated from settled case law and ignored recent Commerce Clause jurisprudence. Part III then concludes that *Conservation Force* unnecessarily limits the states' ability to protect their natural resources.

I. BACKGROUND

Throughout the eighteenth and nineteenth centuries, states exercised exclusive control over all wildlife within their borders.[20] Courts began questioning this practice as early as 1920 and have increasingly preempted state attempts to protect natural resources.[21] Nevertheless, states still retain broad authority to regulate their natural resources,

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[16] *Conservation Force*, 301 F.3d at 994.

[17] *See id.* at 1000.

[18] The Ninth Circuit remanded the case so that the district court could determine whether less restrictive means to achieving the state's conservation interest were available. *See id.*

[19] After this Note's completion, a district court in Wyoming adopted a substantially similar position to the one taken in this Note. *See* Schutz v. State of Wyoming, No. 02-CV-165-D (D. Wyo. May 29, 2003). As of the date of publication, *Schutz* had been appealed to, but not decided by, the 10th Circuit Court of Appeals. *See* Schutz v. State of Wyoming, No. 03-8051 (10th Cir. 2003). Because the District Court's order relies on the same sources cited herein, the decision has little bearing on the forthcoming analysis.

[20] *See* Geer v. Connecticut, 161 U.S. 519, 528-30 (1896) (holding that states control and regulate wildlife as trustees for residents). *See generally* The Abby Dodge v. United States, 223 U.S. 166, 173-75 (1912) (affirming holding and rationale of *Geer*).

[21] *See* Hughes v. Oklahoma, 441 U.S. 322, 329-35 (1979) (overruling *Geer*); *see also* Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 281-82 (1977) (striking down Virginia statute that denied commercial fishing licenses to aliens); Toomer v. Witsell, 334 U.S. 385, 404 (1948) (striking down South Carolina statute that charged out-of-state commercial shrimp harvesters licensing fees one hundred times those of residents under Privileges and Immunities Clause); Missouri v. Holand, 252 U.S. 416, 434 (1920) (holding that states may regulate killing and sale of wildlife, but that they do not have exclusive authority or paramount power over animals).

including the wildlife found within their borders.[22] When exercising this authority, however, states may not violate the United States Constitution.[23] In particular, the states must be vigilant to stay within the bounds of the Commerce Clause.[24]

A. The Commerce Clause

The Commerce Clause provides that Congress may regulate "Commerce with foreign Nations, and among the several States."[25] The Framers of the Constitution granted Congress this power to avoid the regional balkanization that had plagued the states under the Articles of Confederation.[26] The Commerce Clause ensures a national market and prohibits economic protectionism amongst the states.[27] To accomplish these dual purposes, the Commerce Clause has dual manifestations: the positive Commerce Clause and the negative, or dormant, Commerce Clause.[28]

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[22] *See* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 172-74 (2001) (discussing extent of federal jurisdiction over intrastate lands and concluding that congressional attempts to regulate such land would raise "significant constitutional questions"); Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 386 (1978) ("[T]he fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation does not compel the conclusion that it is meaningless in their absence."); Pac. N.W. Venison Producers v. Smith, 20 F.3d 1008, 1013 (9th Cir. 2002) ("Clearly, the protection of wildlife is one of the state's most important interests."); Terk v. Ruch, 655 F. Supp. 205, 206 (D. Colo. 1987); *see also* Maine v. Taylor, 477 U.S. 131, 138 (1986).

[23] *Hughes*, 441 U.S. at 329-35.

[24] *See* Conservation Force, Inc. v. Manning, 301 F.3d 985, 990 (9th Cir. 2002). After the district court granted summary judgment on their Commerce Clause claim, plaintiffs voluntarily dismissed their remaining claims. *See id.*

[25] *See* U.S. CONST. art. I, § 8, cl. 1, 3; United States v. Lopez, 514 U.S. 549, 552-53 (1995); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9 (1824) (interpreting Commerce Clause broadly).

[26] *See* Wardair Can. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986); *Hughes*, 441 U.S. at 325; H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-34 (1949). Soon after the Revolutionary War, the states began protecting their individual economic interests, not the interests of the nation. *See H.P. Hood & Sons*, 336 U.S. at 533. The Framers believed that this balkanization — breaking up into smaller, ineffective units which are frequently in conflict — threatened the peace and safety of the nation. *Id.*

[27] *See Hughes*, 441 U.S. at 325; Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 351-52 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970); *H.P. Hood & Sons*, 336 U.S. at 525.

[28] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35-36 (1980); *Gibbons*, 22 U.S. (9 Wheat.) at 80; Noel Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 20 (1940).

1. The Positive Commerce Clause

The positive Commerce Clause provides Congress with the authority to regulate interstate commerce.[29] Interstate commerce is the trade and other business between citizens located in different states.[30] This aspect of the Commerce Clause enables the national government to regulate the national economy.[31] Read broadly, the Commerce Clause can regulate every activity that affects interstate commerce.[32]

In recent years, however, the Supreme Court has curtailed the scope of the positive Commerce Clause.[33] For example, the Court now requires Congress to demonstrate that the activity it seeks to regulate substantially affects interstate commerce.[34] In addition, Congress may not use the Commerce Clause to regulate noneconomic activity that indirectly affects interstate commerce.[35]

2. The Negative Commerce Clause

Whereas the positive aspect of the Commerce Clause grants power to Congress, the negative aspect withdraws power from the states.[36] The

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[29] U.S. CONST. art. I, § 8, cl. 1, 3. Congress may enact legislation only if it is pursuant to an enumerated grant of authority found within the Constitution. *See* U.S. CONST. amend. X; *Lopez*, 514 U.S. at 552-53; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411-12 (1819).

[30] BLACK'S LAW DICTIONARY 263 (7th ed. 1998). The term interstate commerce is itself an amorphous, vague, and often litigated term. *H.P. Hood & Sons*, 336 U.S. at 534-35. Some courts have given the term a very expansive reading. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 256 (1964) (finding it well-established that commerce among states consists of intercourse and traffic between citizens). The Supreme Court, however, recently announced that the Commerce Clause is limited to: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *See Lopez*, 514 U.S. at 552.

[31] *See* The Daniel Ball, 77 U.S. (10 Wall.) 557, 565 (1871) (upholding congressional power to license ships in intrastate commerce if goods being shipped were coming from or going out of state); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 492 (rev. 1999).

[32] *See Heart of Atlanta Motel*, 379 U.S. at 252-53; Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964); Wickard v. Filburn, 317 U.S. 111, 125-28 (1942); United States v. Darby, 312 U.S. 100, 118 (1941).

[33] *See* United States v. Morrison, 529 U.S. 598, 617-18 (2000); *Lopez*, 514 U.S. at 567-68; *see also* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001). *See generally* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 3-15 (2002) (discussing Supreme Court's new jurisprudence that interprets states' rights broadly and federal rights narrowly).

[34] *See Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 558-59; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On The Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 330 (2001).

[35] *Lopez*, 514 U.S. at 567.

[36] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 5.3, at 401 (2d ed. 2002). The

negative Commerce Clause prohibits state laws that give the state's residents an economic advantage over nonresidents.[37] This negative aspect is also known as the dormant Commerce Clause because it operates even when Congress has not acted.[38] The dormant Commerce Clause prevents the regional isolationism that the Framers feared.[39]

Historically, courts used a variety of analyses to determine whether a state law was unconstitutional under the Commerce Clause.[40] Each of these approaches asked whether the state law substantially affected interstate commerce in a way that discriminated between residents and nonresidents.[41] If the law discriminates against nonresidents, it is likely unconstitutional.[42] This has always been a complex inquiry.[43] Modern courts have sought to clarify the doctrine by adhering to the following analysis.[44]

B. The Negative Commerce Clause Analysis

To sustain a dormant Commerce Clause claim, the court must first find that the state law substantially affects interstate commerce.[45] Next, the court must determine whether the law discriminates based on

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dormant Commerce Clause originated in the seminal Commerce Clause decision, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 70-71, 89-93 (1824) (explaining that when states regulate commerce with other states, they are unconstitutionally exercising power granted to Congress).

[37] *See, e.g.*, Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98-99 (1994); City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 351-52 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137, 141-42 (1970); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531 (1949); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 318 (1851).

[38] *See* CHEMERINSKY, *supra* note 36, § 5.3, at 401.

[39] *See* Wardair Can. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986); Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (explaining that Commerce Clause was necessary to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies"); *H.P. Hood & Sons*, 336 U.S. at 533-34 ("The necessity of centralized regulation of commerce among the states was so obvious and so fully recognized that the few words of the Commerce Clause were little illuminated by debate.").

[40] *See Pike*, 397 U.S. at 142 (describing various criteria that courts have used to determine validity of state statutes).

[41] *See id.* (explaining general rule that emerged from various approaches).

[42] *See, e.g., Or. Waste Sys.*, 511 U.S. at 99; *City of Philadelphia*, 437 U.S. at 622; *Hunt*, 432 U.S. at 333; *Pike*, 397 U.S. at 137; *H.P. Hood & Sons*, 336 U.S. at 525; *Cooley*, 53 U.S. at 318.

[43] *See, e.g., Pike*, 397 U.S. at 142 (attempting to harmonize various approaches).

[44] *See id.*

[45] *See* Conservation Force, Inc. v. Manning, 301 F.3d 985, 993 (9th Cir. 2002); *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 570 (1997); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 391 (1994); Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979).

residency.[46] If the law does not discriminate against nonresidents, the law is presumptively valid.[47] If the law does discriminate, it is likely invalid.[48]

1. Determining Whether the Statute Substantially Affects Interstate Commerce

When analyzing a dormant Commerce Clause claim, the court must first determine if the state law substantially affects interstate commerce.[49] If the law does not substantially affect a commercial activity, the Commerce Clause is inapplicable.[50] If the Commerce Clause does not apply, the courts cannot use it to invalidate a state law.[51] Thus, determining whether the statute affects interstate commerce is a critical inquiry.

Between 1936 and 1995, this analysis was simple: if Congress might conceivably conclude that the activity affected interstate commerce, then the dormant Commerce Clause applied.[52] The analysis was straightforward because Congress enjoyed unlimited deference from the courts in determining what kind of activity affected interstate commerce.[53] This analysis changed in 1995 with the Supreme Court's decision in *United States v. Lopez*.[54]

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[46] *Conservation Force*, 301 F.3d at 995; *see also* Sporhase v. Nebraska, 458 U.S. 941, 952 (1982).

[47] *See Pike*, 397 U.S. at 142; Pac. N.W. Venison Producers v. Smitch, 20 F.3d 1008, 1012 (9th Cir. 1994).

[48] *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); *Hughes*, 441 U.S. at 336; City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350-51 (1977).

[49] *Conservation Force*, 301 F.3d at 993; *Camps Newfound*, 520 U.S. at 574; *Hughes*, 441 U.S. at 326 n.2. The Ninth Circuit acknowledged that the definition of commerce is the same when used to strike down state legislation as when it is used to justify federal laws. *Conservation Force*, 301 F.3d at 993. Indeed, it even used the substantial effects language of *United States v. Lopez*, 514 U.S. 549, 584 (1995). *Id.* at 993. However, the court failed to acknowledge the axiomatic shift in Commerce Clause jurisprudence that would caution against reading the Commerce Clause expansively. *See* discussion *infra* Part I.B.1.

[50] *See Lopez*, 514 U.S. at 568.

[51] *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1989); *Pac. N.W. Venison Producers*, 20 F.3d at 1015.

[52] *Conservation Force*, 301 F.3d at 993-94 (quoting Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 282 (1977)).

[53] The Supreme Court did not find that Congress had exceeded the scope of its Commerce Clause power between 1936 and 1995. *See* CHEMERINSKY, *supra* note 36, § 3, at 260.

[54] 514 U.S. 549 (1995).

In *Lopez*, the Supreme Court considered the validity of the Gun-Free School Zones Act ("Act").[55] The Act made it a federal crime to knowingly possess a firearm in a school zone.[56] Alfonso Lopez challenged his conviction under the Act by arguing that the law exceeded Congress' Commerce Clause authority.[57] The Supreme Court agreed.[58] It held that the Act was not substantially related to interstate commerce and, therefore, not within the scope of the Commerce Clause.[59]

In reaching this conclusion, the Court emphasized that the federal government is one of limited, enumerated powers.[60] Congress can regulate a criminal activity only if the conduct affects interstate commerce.[61] All criminal conduct, however, affects interstate commerce in some way.[62] For many years indirect and minimal effects were sufficient to justify congressional action.[63] *Lopez*, however, requires Congress to make explicit findings that show how the activity affects interstate commerce.[64] Those effects must be direct and substantial.[65] By requiring direct and substantial effects, the Court ensures that Congress does not intrude on the states' legislative authority.[66]

Lopez is one aspect of the Supreme Court's ongoing effort to readjust the federal-state relationship.[67] Although the Court has not defined precisely what constitutes "direct and substantial," it is nonetheless clear that *Lopez* radically transformed Commerce Clause jurisprudence.[68]

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[55] 18 U.S.C. § 922(q) (2000).

[56] *Id.*

[57] *Lopez*, 514 U.S. at 568.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 552.

[61] *Id.* at 559. The Constitution does not expressly provide Congress with the authority to regulate criminal conduct. *Id.* Rather, crime is one of the police powers that the Constitution reserves to the states. *Id.*

[62] *Id.* If nothing else, high crime rates deter interstate travelers from visiting the area. *See id.* at 564.

[63] *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 253 (1964); Katzenbach v. McClung, 379 U.S. 294, 300-01 (1964). The Court did not invalidate a single law between 1936 and 1995. CHEMERINSKY, *supra* note 36, § 3.3.5, at 260.

[64] *Lopez*, 514 U.S. at 563; Bryant & Simeone, *supra* note 34, at 342.

[65] United States v. Morrison, 529 U.S. 598, 613 (2000); *Lopez*, 514 U.S. at 563; Bryant & Simeone, *supra* note 34, at 342.

[66] *See* Bryant & Simeone, *supra* note 34, at 342.

[67] *See* NOONAN, *supra* note 33, at 3-13 (surveying Court's ongoing readjustment of federal-state relations vis-à-vis Commerce Clause, Eleventh Amendment, and doctrines of sovereign immunity).

[68] *See* Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 486-88, 513 (2002); Bryant & Simeone, *supra* note 34, at 342; Diane McGimsey, *The Commerce Clause and Federalism after*

Indeed, *Lopez* was simply the first of several Supreme Court cases that have sought to limit the scope of the Commerce Clause.[69]

The next case to consider the breadth of Commerce Clause jurisdiction was *United States v. Morrison*.[70] In *Morrison*, the Court considered whether the civil damages provision of the Violence Against Women Act (VAWA) was constitutional.[71] Congress enacted VAWA because it perceived that state laws inadequately protected women from sexual assault and domestic violence.[72] Congress found that assaults against women nationwide had a three billion dollar annual effect on interstate commerce.[73] Nevertheless, the Court concluded that violent crime did not directly affect interstate commerce.[74] As a result, the Court deemed VAWA unconstitutional.[75]

Under *Morrison*, Congress cannot regulate noneconomic, violent, criminal conduct based on its aggregate, national effects.[76] The Court is particularly skeptical of federal attempts to regulate areas of law that traditionally fall within states' police powers.[77] This skepticism stems from the Court's belief that Congress may not regulate local problems.[78] The Constitution reserves that power to the states.[79] The Court believes

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Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1677-78 (2002) (noting that commentators viewed *Lopez* "as an indicator that a revolution in Commerce Clause jurisprudence was imminent, a revolution with potentially enormous implications for the relationship between the federal government and the states" but that extent of revolution is far from certain).

[69] *See* Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (referring to *Lopez* decision as "revolutionary and long overdue"); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 30 (2001) (concluding that *Lopez*, when viewed together with other recent cases, signals federalism revolution); Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1, B8 (describing *Lopez* as having helped put into play "fundamental questions about the essential nature of the Federal Government"); Timothy M. Phelps, *Judicial Revolution; Recent Cases Reveal Slant Towards States*, NEWSDAY, May 29, 1995, at A13 (calling *Lopez* decision indication of "revolutionary states-rights movement within the Court").

[70] 529 U.S. 598 (2000).

[71] *Morrison*, 529 U.S. at 601-02.

[72] 42 U.S.C. § 13981 (2000).

[73] *Morrison*, 529 U.S. at 632. Congress found that violent crime against women costs the country at least three billion dollars per year by deterring interstate travel, diminishing national production, and increasing medical costs. *Id.* at 635-36.

[74] *Id.* at 614.

[75] *Id.* at 617.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 617-18.

[79] *Id.*; *see* U.S. CONST. amend. X.

that violent crime is a local issue, which Congress may not regulate.[80]

The Court also considers wildlife management to be a local issue[81] because preserving natural resources is a traditional state function.[82] Indeed, some commentators have suggested that many of the federal environmental laws might be unconstitutional in light of *Lopez* and *Morrison*.[83] As the following case indicates, the Supreme Court appears to accept these arguments.[84]

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, the Court considered whether portions of the Clean Water Act (CWA) exceeded the scope of the Commerce Clause.[85] Pursuant to its positive Commerce Clause powers, Congress enacted the CWA to protect the nation's water resources. Ostensibly, the law only applies to bodies of water that affect interstate commerce.

Despite this implied limitation, the Army Corps of Engineers (Corps), the federal agency responsible for implementing the CWA, promulgated regulations that claimed jurisdiction over any wetlands that provided habitat for migratory birds.[86] The regulations were broad enough to include wholly intrastate waters, which have only attenuated effects on interstate commerce.[87]

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[80] *Morrison*, 529 U.S. at 617-18.

[81] *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 386 (1978); *cf.* Sporhase v. Nebraska, 458 U.S. 941, 963 (1982) (Rehnquist, J., dissenting).

[82] *See* discussion *supra* notes 20, 21 and accompanying text.

[83] *See, e.g.*, Chemerinsky, *supra* note 69, at 7, 12; Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 724 (2002); Jamie Y. Tanabe, *The Commerce Clause Pendulum: Will Federal Environmental Law Survive in the Post-SWANCC Epoch of "New Federalism"?*, 31 ENVTL. L. 1051, 1053, 1062 (2001). *But see* Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000) (distinguishing *Morrison* and upholding Endangered Species Act).

[84] *See generally* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (discussing extent of federal jurisdiction over intrastate lands and concluding that congressional attempts to regulate such land would raise "significant constitutional questions").

[85] *Id.* at 173. Congress enacted the Clean Water Act pursuant to its Commerce Clause powers. 33 U.S.C. § 1344(a) (2000).

[86] 51 F.R. 41206 (1986) (clarifying reach of 33 C.F.R. § 328 (1999)).

[87] The Clean Water Act purports to govern all waters used for interstate commerce, including those subject to the ebb and flow of the tide; interstate wetlands; and intermittent streams, the degradation of which could affect interstate commerce. 33 C.F.R. § 328.3 (1999). In addition, the Clean Water Act regulates wetlands that are adjacent to interstate waters. *Id.* The federal regulations define adjacent wetlands to include those bordering contiguous or neighboring navigable waters. *Id.*

SWANCC arose when a municipal government's waste agency sought to dispose hazardous waste in wetlands used by migratory birds.[88] The Corps asserted jurisdiction over the wetlands and refused to issue a permit.[89] The waste agency filed suit alleging that the Corps had exceeded the scope of the Commerce Clause.[90] The Corps responded that protecting migratory birds is a compelling national interest that substantially affects interstate commerce.[91]

In ruling for the waste agency,[92] the Court indicated that it is willing to circumscribe Congress' ability to protect the nation's natural resources.[93] The court of appeals had found that millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds.[94] Nevertheless, the Supreme Court expressed significant doubts as to whether Congress could regulate intrastate resources under the Commerce Clause.[95] Permitting the Corps to claim jurisdiction over intrastate waters, according to the Court, would infringe upon the states' autonomy.[96]

SWANCC, like *Lopez* and *Morrison*, indicates that the Court is willing to go to great lengths to reserve certain areas of law for state law treatment.[97] Collectively, these cases demonstrate that the current Supreme Court zealously guards the legislative autonomy of the states.[98] Accordingly, lower courts must conclusively determine that the law substantially affects interstate commerce consistent with *Lopez* and its progeny before they begin considering the law's discriminatory effects.[99]

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[88] *SWANNC*, 531 U.S. at 164-65.

[89] *Id.* Developers must obtain a federal permit before they fill or dredge a wetland subject to the Corps' jurisdiction under the Clean Water Act. *See* Clean Water Act § 404, 33 U.S.C. § 1344 (2000).

[90] *SWANCC*, 531 U.S. at 165-66.

[91] *Id.* at 173.

[92] The Court avoided the constitutional question by holding that the Corps had misinterpreted the statute. *Id.* at 174. Yet the dicta indicate that if it had reached the constitutional inquiry, it would have struck down the law. *Id.*

[93] *Id.*

[94] *Id.* at 173.

[95] *Id.*

[96] *Id.* at 174.

[97] *Id.*

[98] The Court has found that billion-dollar effects, *United States v. Morrison*, 529 U.S. 598, 633 (2000), and a billion dollar industry, *SWANCC*, 532 U.S. at 173-74, did not substantially affect interstate commerce.

[99] *Cf. Morrison*, 529 U.S. at 612.

2. Determining Whether the Statute Discriminates Against Interstate Commerce

Once a court establishes that the law substantially and directly affects interstate commerce, it then must determine whether the law discriminates against nonresidents.[100] Thus, courts apply two separate analyses: one for nondiscriminatory statutes,[101] and a second for discriminatory laws.[102] This threshold inquiry determines the appropriate level of judicial scrutiny.[103]

If a court determines the statute applies to residents and nonresidents evenhandedly, it will generally uphold the statute.[104] Neutral laws are presumptively valid.[105] If the state law is neutral but still affects interstate commerce, the courts use a balancing test.[106] The law is valid unless the law's burden on commerce clearly outweighs its local benefits.[107] Therefore, if the statute is evenhanded, the court is likely to uphold it.[108]

If, however, the law discriminates between residents and nonresidents, it is presumptively invalid.[109] A statute discriminates if it benefits in-state economic interests and burdens out-of-state economic interests.[110] A statute may discriminate on its face or in its practical effect, but this distinction does not affect the analysis.[111]

Courts consider several factors in determining whether the statute is discriminatory.[112] These factors include whether the law excludes one group of nonresidents, imposes unique costs on nonresidents, or protects

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[100] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 622-24 (1978).

[101] *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[102] *See, e.g.*, C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 391-93 (1994).

[103] *See* CHEMERINSKY, *supra* note 36, § 5.3.4, at 412.

[104] *Id.*

[105] *Pike*, 397 U.S. at 142; CHEMERINSKY, *supra* note 36, § 5.3.4, at 412. To prevail, the plaintiff must prove that the burden clearly exceeds the benefit. *Pike*, 397 U.S. at 142. Because the plaintiff carries the burden of proof, the statute is presumptively valid. *Id.* The state need not prove that the statute is valid. *Id.* Rather, the plaintiff must show that it is invalid. *Id.*; *see also* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

[106] *Pike*, 397 U.S. at 142.

[107] *Id.*

[108] *See* CHEMERINSKY, *supra* note 36, § 5.3, at 418.

[109] Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); Conservation Force, Inc. v. Manning, 301 F.3d 985, 995 (9th Cir. 2002).

[110] *See* C & A Carbone Inc. v. Clarkstown, 511 U.S. 383, 390 (1994); *Or. Waste Sys.*, 511 U.S. at 99; City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978).

[111] *See Or. Waste Sys.*, 511 U.S. at 93; *City of Philadelphia*, 437 U.S. at 617; Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 340 (1977).

[112] Pac. N.W. Venison Producers v. Smitch, 20 F.3d 1008, 1015 (9th Cir. 1994).

in-state economic interests.[113] Based on these factors, if the court concludes that the state is discriminating against nonresidents, it will subject the law to strict scrutiny.[114]

To survive strict scrutiny, the state must show that the law serves a legitimate state purpose that could not be achieved through less discriminatory means.[115] First, the state must show it has an important interest.[116] Protecting in-state industry is never a valid interest.[117] Reserving state resources exclusively for residents is suspect as well.[118] Protecting natural resources, however, is one of the state's most important interests.[119]

Next, the state must show that no less discriminatory means are available.[120] If a court believes that the state could protect its resources without discriminating, it will strike down the law.[121] States rarely satisfy this second requirement; laws rarely survive strict scrutiny.[122] Therefore, it is critical for the state to avoid strict scrutiny when defending its statute from a dormant Commerce Clause attack.[123] When the challenged law concerns recreational hunting, however, the states have a powerful ally to avoid strict scrutiny: *Baldwin v. Fish and Game Commission*.[124]

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[113] *See, e.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117, 126 (1978); *Hunt*, 432 U.S. at 333-34; H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533, 538 (1949); *Pac. N.W. Venison Producers*, 20 F.3d at 1015.

[114] *See Or. Waste Sys.*, 511 U.S. at 93-94; Hughes v. Oklahoma, 441 U.S. 322, 337 (1979); *City of Philadelphia*, 437 U.S. at 617; *Hunt*, 432 U.S. at 348.

[115] *Hughes*, 441 U.S. at 336.

[116] *Id.*

[117] C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 392 (1994).

[118] *See, e.g., Hughes*, 441 U.S. at 322; *City of Philadelphia*, 437 U.S. at 617.

[119] *See Hughes*, 441 U.S. at 337; Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959); Pac. N.W. Venison Producers v. Smitch, 20 F.3d 1008, 1013 (9th Cir. 1994).

[120] *See Hughes*, 441 U.S. at 336.

[121] *See C & A Carbone*, 511 U.S. at 392; *see also* Or. Waste Sys., Inc. v. Dept. of Envtl. Quality, 511 U.S. 93, 100-01 (1994).

[122] *See, e.g., Or. Waste Sys.*, 511 U.S. at 98; *Hughes*, 441 U.S. at 336; *City of Philadelphia*, 437 U.S. at 622; Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 336 (1977); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 532 (1949). *But see* Maine v. Taylor, 477 U.S. 131, 145 (1986) (upholding discriminatory law).

[123] Even if the law advances a very important state interest, the court is likely to strike it down using strict scrutiny. *See, e.g., Or. Waste Sys.*, 511 U.S. at 98; *Hughes*, 441 U.S. at 336; *City of Philadelphia*, 437 U.S. at 622.

[124] 436 U.S. 371 (1978).

C. The Supreme Court and Recreational Hunting

In *Baldwin v. Fish & Game Commission of Montana*, the Supreme Court held that a state may discriminate against nonresidents when it regulates recreational hunting.[125] Montana imposed substantially higher burdens on nonresidents applying for elk-hunting permits.[126] Baldwin, a Montana hunting guide who relied on nonresident customers, claimed that the law violated his constitutional rights.[127]

The district court found that big-game hunting is expensive, and that some people depend on it for their livelihood.[128] Nevertheless, the court concluded that hunting is a recreational sport, not commerce.[129] The court held, therefore, that the Constitution does not recognize any right to hunt.[130]

The Supreme Court affirmed.[131] Although the Court's holding rests on Privileges and Immunities grounds, the Court offered some instructive dicta applicable to the dormant Commerce Clause analysis. It agreed that elk hunting is a recreational sport, which is not a fundamental right under the Constitution.[132] The Court explained that states deserve broad discretion when managing their wildlife.[133] This deference stems from the special interest that states have in regulating and preserving wildlife.[134] Because the law did not violate any constitutional provision, the Supreme Court upheld the law.[135] In doing so, the Supreme Court held that states may prefer their own citizens when allocating recreational hunting permits.[136] The Court's holding in *Baldwin*, along with the dormant Commerce Clause analysis, provides the backdrop against which the Ninth Circuit decided *Conservation Force, Inc. v. Manning*.[137]

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[125] *Id.* at 388.

[126] *Id.* In 1976, Montana residents could purchase an elk-hunting license for six dollars. *Id.* at 373-74. Nonresidents, however, had to purchase licenses for $225. *Id.*

[127] *Id.* at 372. Specifically, the suit alleged that the law violates both the Article I Privileges and Immunities Clause and the Fourteenth Amendment's Equal Protection Clause. *Id.*

[128] *Id.* at 375-76.

[129] *Id.*

[130] *Id.* at 378.

[131] *Id.*

[132] *Id.* at 388.

[133] *Id.* at 391 (quoting Lacoste v. Dep't of Conservation, 263 U.S. 545, 552 (1924)).

[134] *Id.* at 392 (Burger, C.J., concurring).

[135] *Id.* at 391.

[136] *Id.*

[137] Conservation Force, Inc. v. Manning, 301 F.3d 985 (9th Cir. 2002).

II. *CONSERVATION FORCE, INC. V. MANNING*

In *Conservation Force, Inc. v. Manning*, a group of New Mexico residents challenged Arizona's system for allocating elk- and deer-hunting permits.[138] Hunting permits are an integral component of Arizona's longstanding efforts to preserve its wildlife.[139] Since 1913, Arizona has enacted a wide range of programs that have restored and protected the state's elk and deer populations.[140] These efforts have yielded some of the world's finest elk and deer herds.[141]

Arizona protects these valuable herds by strictly regulating hunting throughout the state.[142] Arizona prohibits commercial hunting and requires recreational hunters to obtain permits.[143] Furthermore, it is illegal for hunters to sell the edible portions of the animals.[144] These regulations have protected the elk and deer by removing the profit motive associated with hunting.[145]

To ensure the continued success of these programs, Arizona continuously experiments with regulations that balance wildlife protection and recreational opportunities.[146] The Game and Fish Commission works closely with its constituents, Arizona hunters, to reach compromises that will meet these dual objectives.[147] Arizona Administrative Code R12-4-114(E), the rule at issue in *Conservation Force*, was one such compromise.[148]

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[138] *Id.* at 988-90.

[139] *Id.* at 988-89.

[140] *See* Defendants' Statement of Material Facts at 1-2, Manning v. Conservation Force, Inc., No. 98-0239 (D. Ariz. Sept. 15, 2000) (No. 00-17394). In 1992, Arizona voters enacted the Heritage Fund program that provides 10 million dollars annually to wildlife conservation programs. ARIZ. REV. STAT. § 17-296 (1990).

[141] *Conservation Force*, 301 F.3d at 988-89.

[142] *Id.* In addition to the restrictions described in this paragraph, Arizona also limits the number of animals that hunters may harvest each year, the method in which they may kill the animal and the areas of the state in which they can hunt. ARIZ. REV. STAT. §§ 17-331 through 17-333 (1999).

[143] ARIZ. REV. STAT. § 17-331(A)(1) (prohibiting taking of wildlife without valid license). A permit tag is considered a valid license. *Id.* § 17-333(A)(17), (19).

[144] *Id.* § 17-309(A)(2).

[145] *Id.* §§ 17-309 to -333.

[146] *See* Defendants' Statement of Material Facts at 2-3, 5-6, Manning v. Conservation Force, Inc., No. 98-0239 (D. Ariz. Sept. 15, 2000) (No. 00-17394) (describing reasons for passing Rule 12-4-114) [hereinafter Defendants' Statement of Material Facts].

[147] *Id.*

[148] *Conservation Force*, 301 F.3d at 989 (citing Concise Explanatory Statement to ARIZ. ADMIN. CODE R12-4-121); ARIZ. ADMIN. CODE R12-4-114(E) (2003).

A. Facts and Procedure

In 1991, Arizona's Game and Fish Department amended its hunting regulations by placing a ten percent cap on the number of permits available to nonresidents.[149] The Department, responding to public pressure, amended the rule to ensure public support for its wildlife programs.[150] Many residents felt that nonresidents were receiving more than their fair share of the permits.[151] The amended rule ensured Arizona residents a better chance of receiving a hunting permit than nonresidents.[152]

A group of New Mexico residents filed suit against Arizona's Game and Fish Commissioners in the United States District Court for the District of Arizona.[153] The plaintiffs consisted of professional hunters and guides who believed the amended law had caused them economic harm.[154] The complaint alleged that Arizona's law violates the Privileges and Immunities, Equal Protection, and Commerce Clauses of the United States Constitution.[155] Both parties moved for summary judgment.[156]

The district court granted Arizona's motion to dismiss the Commerce Clause claim.[157] The court found that hunting is merely intrastate recreation and, therefore, not subject to the Commerce Clause.[158] It also noted that the plaintiffs failed to show that the law's burdens on interstate commerce outweighed its local benefits.[159] For both these reasons, the district court granted Arizona's motion for summary

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[149] *Conservation Force*, 301 F.3d at 989.

[150] *See* Defendants' Statement of Material Facts, *supra* note 146, at 5-6.

[151] *See id.* at 5.

[152] *Conservation Force*, 301 F.3d at 989-90. When an individual applies for a permit-tag, a computer assigns his or her application a random number. *See* Manning v. Conservation Force, Inc., No. 98-0239, slip op. at 3 (D. Ariz. Sept 15, 2000). The Department then administers three draws. *See id.* In the first draw, a maximum of 10 percent of the permits are given to the applicants with the most points. *See id.* In the second draw, the computer selects the lowest remaining number (those randomly assigned at the beginning of the process). *See id.* at 4. If tags are still available, the process is essentially repeated in the third draw. *See id.*

[153] *Conservation Force*, 301 F.3d at 990.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* After the district court granted summary judgment on their Commerce Clause claim, plaintiffs voluntarily dismissed the remaining claims. *Id.*

[158] Manning v. Conservation Force, Inc., No. 98-0239, slip op. at 31 (D. Ariz. Sept 15, 2000) (granting summary judgment).

[159] *Id.* at 32.

judgment.[160]

B. Holding and Rationale

The Ninth Circuit reversed the decision of the district court.[161] It held that Arizona's law substantially affected interstate commerce and impermissibly discriminated against nonresidents.[162] Before reaching the Commerce Clause analysis, the court spent considerable time describing and distinguishing *Baldwin v. Fish & Game Commission*.[163] The laws in both cases imposed substantially higher burdens on nonresident recreational hunters.[164] The court, however, identified a key distinction: the plaintiffs in *Conservation Force*, unlike those in *Baldwin*, argued their case on Commerce Clause grounds.[165]

The Ninth Circuit believed this distinction was sufficient.[166] Arizona argued that the *Baldwin* court did not reach the commerce issue because recreational hunting is clearly outside the scope of the Commerce Clause.[167] The Ninth Circuit disagreed.[168] Despite the cases' similarities, the court concluded that *Baldwin* was inapplicable[169] and then turned to its Commerce Clause analysis.[170]

1. The Regulation Substantially Affects Interstate Commerce

The Ninth Circuit held that hunting in Arizona constitutes interstate commerce.[171] As discussed in Part I, when analyzing a dormant Commerce Clause claim, courts must determine whether the law

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[160] *Id.* at 35.

[161] *Conservation Force*, 301 F.3d at 1000.

[162] *Id.*

[163] *Id.* at 992-94.

[164] *Compare id.* at 989, *with* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388, 392 (1978).

[165] *Baldwin*, 436 U.S. at 371. The Court in *Baldwin* concluded that the law did not violate the Privileges and Immunities Clause or the Fourteenth Amendment's Equal Protection Clause. *Id.* The Court did not specifically rule on the Commerce Clause claim. *Id.*; *see also Conservation Force*, 301 F.3d at 992-93.

[166] *Conservation Force*, 301 F.3d at 992-93.

[167] *See* Defendants' Cross Motion for Partial Summary Judgment Re: Commerce Clause at 6, Manning v. Conservation Force, Inc., No. 98-0239 (D. Ariz. Sept. 15, 2001) (No. 00-17394).

[168] *Conservation Force*, 301 F.3d at 993.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 995.

substantially affects interstate commerce.[172] The Ninth Circuit concluded that Arizona's law did so in two ways.[173] First, the court stated that hunting laws burden interstate travel.[174] Nonresidents travel to Arizona to hunt.[175] Travelers generate revenue for several types of businesses, such as hotels, diners, and retailers. Arizona's law discourages travelers from visiting the state by making it harder for nonresidents to obtain the requisite hunting permit.[176] Accordingly, the court concluded that the law affected interstate commerce by discouraging nonresidents from visiting the state.[177]

Second, the court found that the law substantially affected the interstate flow of goods.[178] Hunters may sell the nonedible portions of the animal, such as its antlers and hides,[179] in Arizona and in other states.[180] Because the goods might cross state lines, the Ninth Circuit concluded they are part of interstate commerce.[181] Arizona's law burdens this trade by limiting the nonresidents' ability to obtain antlers and hides.[182] Therefore, according to the Ninth Circuit, Arizona's law substantially affects interstate commerce.[183]

2. The Regulation Discriminates Against Interstate Commerce

Once a court establishes that a law substantially affects interstate commerce, it must then determine whether the law discriminates against nonresidents.[184] In *Conservation Force*, the Ninth Circuit concluded that Arizona's law discriminated against nonresidents.[185] Arizona restricts access to its wildlife based on the applicant's residency.[186] According to

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[172] *See id.* at 993; Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574 (1997); Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979); *cf.* United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 564 (1995).

[173] *Conservation Force*, 301 F.3d at 994.

[174] *Id.* at 993.

[175] *Id.*

[176] *Id.*

[177] *Id.* at 995.

[178] *Id.* at 994.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* at 995.

[184] *See* Or. Waste Sys., Inc. v. Dept. of Envtl. Quality, 511 U.S. 93, 101 (1994); City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978).

[185] *Conservation Force*, 301 F.3d at 995-96.

[186] *Id.*

the Ninth Circuit, this constitutes overt discrimination.[187] Courts subject state laws that overtly discriminate to strict scrutiny.[188]

To survive strict scrutiny, the state must show that the law serves a legitimate purpose and that it uses the least discriminatory means available.[189] The Ninth Circuit agreed that Arizona's interest in regulating its wildlife population was legitimate.[190] Nevertheless, the court did not believe that Arizona had used the least discriminatory means to achieve its goal.[191]

Arizona presented two arguments to persuade the court that this law was the least discriminatory means possible.[192] First, the state relied on polling data to show that, without the cap, the citizens of Arizona would withdraw support from the conservation efforts altogether.[193] Without the program, the state would be unable to protect its wildlife.[194] In addition, Arizona pointed to the fact that such regulations are common in other states.[195]

The Ninth Circuit found both arguments unpersuasive.[196] In response to the first, it explained that political pressure alone does not justify discriminatory laws.[197] To hold otherwise would undermine the public policy rationale behind the dormant Commerce Clause.[198] The Commerce Clause prevents states from passing protectionist laws in

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[187] *Id.*

[188] *Id.*; *see Or. Waste Sys.*, 511 U.S. at 101; Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); *City of Philadelphia*, 437 U.S. at 624; Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977).

[189] *Hughes*, 441 U.S. at 336.

[190] *Conservation Force*, 301 F.3d at 996.

[191] *Id.* at 998.

[192] *Id.* at 998-1000.

[193] *Id.*

[194] *See* Defendants' Statement of Material Facts, *supra* note 146, at 2-3, 5-6 (describing reasons for passing Rule 12-4-114).

[195] *Conservation Force*, 301 F.3d at 999 ("Nor can Arizona show that its 10% cap on nonresident hunting is narrowly tailored to legitimate interests because other states have similarly restricted nonresident hunting."). Other states that similarly cap permits allocated to nonresidents for limited hunts include: Alaska, California, Colorado, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, South Dakota, Utah, Vermont, West Virginia, and Wisconsin. *See* Brief of International Association of Fish and Wildlife Agencies as Amicus Curiae at 2 n.2, Schutz v. State of Wyoming, *appeal docketed*, No. 03-8051 (10th Cir. 2003).

[196] *Id.* at 998-1000.

[197] *Id.*

[198] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77-84 (1980).

response to in-state pressure.[199]

The Ninth Circuit also rejected the argument that states may discriminate if they can show that other states discriminate as well.[200] Otherwise, states could engage in the protectionist warfare that the Framers feared.[201] Thus, the Ninth Circuit rejected both of Arizona's attempts to show that it had used the least discriminatory means available to protect its wildlife.[202] Accordingly, under *Conservation Force*, states may rarely, if ever, prefer their own citizens when issuing recreational hunting permits.[203]

The implications of *Conservation Force* extend far beyond the confines of recreational hunting. Indeed, the decision seemingly applies to every context in which states are trying to protect their natural resources. *Conservation Force* effectively ties the hands of conscientious legislators who are trying to strike a political compromise between recreational pursuits and conservation. Because the decision curtails the states' ability to protect their natural resources, it is important to scrutinize the merit, rationale, and consequences of *Conservation Force*.

III. ANALYSIS

The Ninth Circuit wrongly decided *Conservation Force, Inc. v. Manning* for several reasons.[204] First, *Conservation Force* expands the scope of the Commerce Clause to include recreational hunting.[205] By doing so, the

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[199] *See* Wardair Can. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986); Hughes v. Oklahoma, 441 U.S. 322, 325 (1979); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-34 (1949).

[200] *See Conservation Force*, 301 F.3d at 998-1000; *see also* Sporhase v. Nebraska, 458 U.S. 941, 958 n.18 (1982).

[201] West v. Kan. Natural Gas Co., 221 U.S 229, 255 (1911) ("Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals... embargo may be retaliated by embargo, and commerce will be halted at state lines.").

[202] *Conservation Force*, 301 F.3d at 998-1000.

[203] Recreational hunting is an expensive sport that encourages interstate travel throughout the nation. *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 375-76 (1978). The Commerce Clause applies, according to the Ninth Circuit, because the sport encourages hunters to travel. *Conservation Force*, 301 F.3d at 993. If the Commerce Clause applies, and states distinguish between residents and nonresidents, then courts will subject the laws to strict scrutiny. *Id.* at 995. It is unlikely that any such law could withstand strict scrutiny. *Cf. Sporhase*, 458 U.S. at 941, 963-64.

[204] *See* Schutz v. State of Wyoming, No. 02-CV-165-D, at 11 (D. Wyo. May 29, 2003) (order granting summary judgment) (rejecting *Conservation Force v. Manning* and describing Ninth Circuit's position as "unprecedented").

[205] *Id.*; *see Baldwin*, 436 U.S. at 388, 392 (holding states may discriminate against nonresidents in assigning hunting permits); United States v. Romano, 929 F. Supp. 502, 509 (D. Mass. 1996); Terk v. Ruch, 655 F. Supp. 205, 215 (D. Colo. 1987); Shepherd v. Alaska, 897 P.2d 33, 42 (Ak. 1995).

court is interfering with an area of law traditionally reserved to the states. Second, the court erred by holding that recreational hunting substantially affects interstate commerce.[206] The court also was incorrect in finding that Arizona's law economically discriminates against nonresidents. Finally, *Conservation Force* is adverse to public policy as it unnecessarily hinders the states' ability to protect their natural resources.[207]

A. Conservation Force *Expands the Scope of the Commerce Clause*

Conservation Force expands the scope of the Commerce Clause to include noneconomic, recreational activity.[208] As previously discussed, the Commerce Clause prohibits state laws that substantially affect interstate commerce in a way that discriminates economically between residents and nonresidents.[209] If the law does not substantially affect interstate commerce, then presumptively, it does not offend the dormant Commerce Clause.

Courts throughout the nation, including the Supreme Court, have concluded that laws similar to Arizona's are valid.[210] *Conservation Force* implicitly rejects that line of cases in favor of a new, expanded reading of the Commerce Clause.[211] In *Baldwin*, the Supreme Court held that states may prefer their own citizens when allocating hunting permits.[212] The

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[206] *See* discussion *infra* Part III.B.

[207] *See* discussion *infra* Part III.D.

[208] *Conservation Force*, 301 F.3d at 988.

[209] *See, e.g.*, Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994); City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350-53 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949).

[210] *See Baldwin*, 436 U.S. at 388, 392; *Romano*, 929 F. Supp. at 509 (stating that recreational hunting is not commerce); *Terk*, 655 F. Supp. at 215 (refusing to apply dormant Commerce Clause to nonresident cap on hunting); *Shepherd*, 897 P.2d at 42 (holding that unharvested game is not article of commerce). In *Schutz v. State of Wyoming*, decided after *Conservation Force*, the court characterized the Ninth Circuit decision as "unprecedented." *Schutz*, No. 02-CV-165-D, at 11.

[211] *Baldwin*, 436 U.S. at 388, 392. The Ninth Circuit concluded that *Baldwin* does not control because it did not address the Commerce Clause claim. *See Conservation Force*, 301 F.3d at 993-94. Although the Supreme Court disposed of *Baldwin* on other grounds, it did discuss the Commerce Clause. *Baldwin*, 436 U.S. at 379. The opinion describes the expensive nature of the sport, noting that a typical hunter spends $1,250 per hunt. *Id.* at 374 n.9. However, the Court did not perceive these effects as sufficient enough to justify extending the Commerce Clause to a recreational sport. *See id.* at 371; *see also Romano*, 929 F. Supp. at 509; *Terk*, 655 F. Supp. at 215; *Shepherd*, 897 P.2d at 42 (holding that unharvested game is not article of commerce).

[212] *Baldwin*, 436 U.S. at 388.

Ninth Circuit reached a contrary conclusion.[213] Similarly, *Conservation Force* is inconsistent with every other federal court that has considered the issue; those courts concluded that recreational hunting is not commerce.[214] Therefore, the Ninth Circuit rejected the entire body of case law, on this point, that unequivocally indicated that Arizona's law was constitutional.[215]

Despite clear precedent to the contrary, the Ninth Circuit held that Arizona's law violated the Commerce Clause.[216] The court found that recreational hunting affects interstate commerce by impeding travel and the flow of goods.[217] These effects, according to the Ninth Circuit, transform a recreational sport into a commercial enterprise.[218] Thus, *Conservation Force* departs from precedent and expands the scope of the Commerce Clause to include recreational hunting.[219]

Ironically, the Ninth Circuit's doctrinal expansion of the Commerce Clause comes at a time when the Supreme Court is systematically curtailing it.[220] The Supreme Court has held repeatedly that the Commerce Clause only applies to activities that are economic in nature.[221] The Ninth Circuit seemingly disregarded those decisions in deciding *Conservation Force*.[222] Thus, *Conservation Force* imposes new restrictions on state legislatures at a time when the Supreme Court is imposing new restrictions on Congress.[223] This inconsistency could produce a jurisdictional vacuum in which neither federal nor state legislatures will be able to protect the nation's natural resources.[224] This conflict was not inevitable. Rather, it was the unfortunate result of the Ninth Circuit's flawed analysis.

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[213] *Conservation Force*, 301 F.3d at 993-94.

[214] *Romano*, 929 F. Supp. at 509; *Terk*, 655 F. Supp. at 215; *Shepherd*, 897 P.2d at 42.

[215] *See Baldwin*, 436 U.S. at 379; *Romano*, 929 F. Supp. at 509; *Terk*, 655 F. Supp. at 205; *Shepherd*, 897 P.2d at 42.

[216] *Conservation Force*, 301 F.3d at 995.

[217] *Id.*

[218] *Id.*

[219] *Compare Conservation Force*, 301 F.3d at 995, *with Baldwin*, 436 U.S. at 379, 388, *Romano*, 929 F. Supp. at 509, *Terk*, 655 F. Supp. at 215, *and Shepherd*, 897 P.2d at 42.

[220] *See* United States v. Morrison, 529 U.S. 598, 602 (2000); United States v. Lopez, 514 U.S. 549, 551 (1995); *see also* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 162 (2001).

[221] *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 567.

[222] *See Conservation Force*, 301 F.3d at 985-1000.

[223] *See* NOONAN, *supra* note 33, at 3-15.

[224] *Cf.* Karin J. Kysilka, *Recent Development: A Jurisdictional Vacuum in the Wake of* Camps Newfound/Owatonna?, 21 HARV. J.L. & PUB. POL'Y 288, 288 (1997) (noting that courts create jurisdictional vacuum by prohibiting both Congress and states from legislating).

B. Arizona's Regulation Does Not Substantially Affect Interstate Commerce

The Ninth Circuit's Commerce Clause analysis is flawed in several respects. First, recreational hunting is not interstate commerce. *Baldwin* implicitly held that recreational hunting is not subject to the Commerce Clause. Second, the court should not have considered the indirect effects of recreational hunting. Finally, the court did not address the implications of *United States v. Lopez*, which is now a cornerstone of interstate commerce jurisprudence.[225]

1. Recreational Hunting Is Not Interstate Commerce

Arizona's law does not substantially affect interstate commerce.[226] The Supreme Court has held that hunting is recreation, not commerce.[227] Accordingly, courts throughout the nation have determined that hunting is not subject to the Commerce Clause.[228] Because it regulated a recreational sport, Arizona's law was not subject to the Commerce Clause.[229]

Indeed, Arizona prohibits commercial hunting and imposes economic restrictions on recreational hunters.[230] In addition, hunting is an intrastate activity as it occurs entirely within the state's borders. Thus, the sport is a noncommercial, wholly intrastate activity. The Commerce

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[225] *See* discussion *infra* Part III.B.3.

[226] Rather, Arizona's law governs a recreational sport, which is not commerce. *See supra* notes 142-45 and accompanying text. The law's effects on commerce are incidental and indirect. *See* discussion *infra* Part III.B.2. The Commerce Clause does not govern indirect and incidental effects. Schutz v. State of Wyoming, No. 02-CV-165-D, at 17 (D. Wyo. May 29, 2003) ("Bringing [recreational hunting] statutes under the umbrella of Commerce Clause jurisdiction would run counter to the long standing precedent.... Moreover, extending the "substantial effect" analysis ignores the Court's recent curtailment of the Commerce Clause in *United States v. Morrison.*"); United States v. Morrison, 529 U.S. 598, 608 (2000).

[227] Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978).

[228] *See* United States v. Romano, 929 F. Supp. 502, 509 (D. Mass. 1996) (stating that recreational hunting is not commerce); Terk v. Ruch, 655 F. Supp. 205, 215 (D. Colo. 1987) (refusing to apply dormant Commerce Clause to nonresident cap on hunting); Shepherd v. Alaska, 897 P.2d 33, 42 (Ak. 1995) (holding that unharvested game is not article of commerce); *see also Baldwin*, 436 U.S. at 379, 388.

[229] States are free to act under their police powers so long as the legislation has only minimal effects on interstate commerce. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (explaining that states can and should regulate activities not surrendered to federal government); *see also* Maine v. Taylor, 477 U.S. 131, 152 (1986) (upholding statute that protected state's unique and fragile natural resources); *cf.* Sporhase v. Nebraska, 458 U.S. 941, 963-64 (1982) (Rehnquist, J., dissenting) (arguing that Commerce Clause does not apply to intrastate activity).

[230] ARIZ. REV. STAT. §§ 17-331 through 17-333 (2003).

Clause does not apply to noncommercial, intrastate activities.[231] The Ninth Circuit erred by using the Commerce Clause to invalidate Arizona's law, which regulates a noncommercial, intrastate activity.[232]

2. The Court Should Not Have Considered the Indirect Effects of Recreational Hunting

The plaintiffs in *Conservation Force* argued that the regulation affected interstate commerce in two ways.[233] First, they argued that the law substantially affects interstate travelers.[234] Admittedly, there is a body of case law that indicates the Commerce Clause applies to activities that affect interstate travel in some situations.[235] The plaintiffs argued that the law discouraged nonresident hunters from traveling to the state by making it harder for them to obtain the necessary permits.[236] This, according to the plaintiffs, triggered the Commerce Clause.[237]

Second, the plaintiffs argued that the law affected businesses that profit indirectly from the sport.[238] Arizona law allows hunters to sell the nonedible portions of the animals, such as the antlers and hides.[239] Arizona also allows professional guides, such as the plaintiffs, to profit from the sport.[240] Thus, the plaintiffs argue that in Arizona recreational hunting has a commercial aspect.[241] Previous courts have argued that any activity affecting commerce is subject to the Commerce Clause.[242]

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[231] *See generally* United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 551 (1995).

[232] *See Romano*, 929 F. Supp. at 509; *Terk*, 655 F. Supp. at 215; *Shepherd*, 897 P.2d at 42. This is especially true considering the Supreme Court's efforts to curtail the scope of the Commerce Clause. *See Morrison*, 529 U.S. at 608, 613; *Lopez*, 514 U.S. at 551; *see also* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 162 (2001).

[233] Conservation Force, Inc. v. Manning, 301 F.3d 985, 994 (9th Cir. 2002).

[234] *Id.*

[235] *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574 (1997) (suggesting that laws encouraging interstate travel might substantially affect commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241, 243 (1964); Katzenbach v. McClung, 379 U.S. 294, 300-01 (1964).

[236] *Conservation Force*, 301 F.3d at 993-94.

[237] *See* Plaintiffs' Response to Defendants' Cross Motion for Summary Judgment and Reply in Support of Their Motion for Partial Summary Judgment at 5, Manning v. Conservation Force, Inc., No. 98-0239 (D. Ariz. Sept. 15, 2000) (No. 00-17394).

[238] *Conservation Force*, 301 F.3d. at 994.

[239] ARIZ. REV. STAT. § 17-309(A)(2) (2003) (prohibiting hunting, buying, or selling except "as permitted by this title"). It is only illegal to sell the edible portions of the animal. *Id.*

[240] *Conservation Force*, 301 F.3d at 990.

[241] *Id.*

[242] *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 323-24 (1981) (holding that Commerce

Recent Supreme Court precedent, however, undercuts these arguments.[243] Both of the above effects are indirect byproducts of a recreational activity.[244] If courts consider an activity's indirect effects, they will eviscerate any meaningful limitation on federal power.[245] Virtually every activity has a commercial aspect.[246] This does not mean, however, that Congress may regulate every activity; some activities are expressly reserved to the states.[247] Thus, when acting under the Commerce Clause, courts must distinguish between commercial and noncommercial activities.[248]

These federalism concerns led the Supreme Court to reject similar arguments in deciding *Lopez*, *Morrison*, and *SWANCC*.[249] In each of these cases, the Court held that the Constitution reserves certain areas of law, including wildlife management, to the states.[250] It follows, therefore, that Congress cannot regulate those fields.[251] If Congress cannot regulate an activity, then courts cannot use the dormant Commerce Clause to invalidate state laws that regulate that activity.[252]

Clause applies to any activity that affects commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241, 254-58 (1964); Katzenbach v. McClung, 379 U.S. 294, 300-01 (1964); Wickard v. Filburn, 317 U.S. 111, 124 (1942); United States v. Darby, 312 U.S. 100, 114 (1941); NLRB v. Fainblatt, 306 U.S. 601, 606-07 (1939); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 72-73 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-37 (1937).

[243] *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388, 392 (1978); United States v. Romano, 929 F. Supp. 502, 509 (D. Mass. 1996) (stating that recreational hunting is not commerce); Terk v. Ruch, 655 F. Supp. 205, 215 (D. Colo. 1987) (refusing to apply dormant Commerce Clause to nonresident cap on hunting); Shepherd v. Alaska, 897 P.2d 33, 42 (Ak. 1995) (holding that unharvested game is not article of commerce).

[244] *Cf.* United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 566 (1995).

[245] *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 564-68.

[246] *Morrison*, 529 U.S. at 613 (explaining that under these theories, courts would be hard pressed to find any activity that Congress could not regulate).

[247] *Id.*; *see* U.S. CONST. amend. X.

[248] *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 566.

[249] *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 568.

[250] *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 564; *see also* Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159, 173-74 (2001).

[251] *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 564; *see also SWANCC*, 531 U.S. at 159.

[252] In determining whether the Commerce Clause is applicable, courts ask whether the activity has a substantial effect on interstate commerce such that Congress could regulate the activity. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574 (1997). If Congress cannot regulate an activity, then it is reserved to the states. U.S. CONST. amend. X; Kysilka, *supra* note 224, at 297 ("If the Court intends to invalidate on dormant commerce clause grounds, it must first show that Congress has the authority to regulate under the Commerce Clause.").

Courts, therefore, should be reluctant to preempt state laws that regulate a recreational activity.[253] A law may not be deemed invalid on the grounds that it might affect the propensity of citizens to travel.[254] Similarly, a few low-volume merchants do not substantially affect interstate commerce.[255] The national economy will not crumble because some New Mexico hunters did not receive permits to hunt in Arizona in a particular year.[256] The effects must be real and substantial.[257] By considering the indirect effects associated with recreational hunting, the Ninth Circuit disregarded the central meaning of *Lopez* and its progeny.

3. The Court Ignored the Implications of *Lopez*, *Morrison*, and *SWANCC*

The Ninth Circuit appeared to disregard the implications of *Lopez*, *Morrison*, and *SWANCC* when it decided *Conservation Force*.[258] The portion of the opinion that concludes that Arizona's law substantially affects interstate commerce does not cite *Lopez*, *Morrison*, or *SWANCC*.[259] These decisions have transformed the scope of the Commerce Clause, and courts should squarely confront them when deciding any Commerce Clause claim.[260]

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[253] This is supported by the Supreme Court's command to distinguish between that which is truly local and that which is truly national. *See Morrison*, 529 U.S. at 617-19.

[254] The Court in *Lopez* considered the argument that violent crime reduces the willingness of individuals to travel to those areas. *Lopez*, 514 U.S at 564. Similarly, in *Morrison*, Congress had found, and the United States had argued, that gender-motivated violent crimes substantially affect interstate commerce. *Morrison*, 529 U.S. at 629-34 (Souter, J., dissenting). In both instances, the Court rejected the arguments. *Id.* at 612-13; *Lopez*, 514 U.S. at 564-66.

[255] *Cf.* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 545-46 (Black, J., dissenting) (arguing it is inconceivable that Congress would regulate activity that only affects local interests). A state law's incidental effects on a region's economy do not justify usurping a state's sovereignty. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[256] The plaintiffs in question have received permits in recent years under the challenged system. Manning v. Conservation Force, Inc., No. 98-0239, slip op. at 9-10 (D. Ariz. Sept 15, 2000). They were denied permits in subsequent years, but only sometimes due to the 10 percent cap; other years they simply lost the random drawing. *Id.*

[257] *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 563.

[258] Schutz v. State of Wyoming, No. 02-CV-165-D, at 17 (D. Wyo. May 29, 2003) ("Extending the "substantial effect analysis [to recreational hunting] ignores the Court's recent curtailment of the Commerce Clause in *United States v. Morrison* [and] *United States v. Lopez*."). This may be due to the fact that Arizona did not argue, nor even cite *Lopez*, *Morrison*, or *SWANCC* in its brief. *See* Answering Brief for the Appellees, Conservation Force, Inc. v. Manning, 301 F.3d 985 (9th Cir. 2002).

[259] *See* Conservation Force, Inc. v. Manning, 301 F.3d 985, 992-95 (9th Cir. 2002).

[260] *Cf.* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1988) (citing *Lopez* in dormant Commerce Clause case).

Supporters of the Ninth Circuit's position could argue that *Lopez*, *Morrison*, and *SWANCC* do not apply to the dormant Commerce Clause. These holdings concerned the positive, not the negative, Commerce Clause.[261] The Supreme Court has not held that *Lopez* applies to the negative Commerce Clause.[262] Because *Conservation Force* is a negative Commerce Clause case, the Ninth Circuit arguably may have been correct to ignore *Lopez* and its progeny.[263]

Although this argument is somewhat logical, it is unpersuasive. Under this approach, interstate commerce would have one meaning when dealing with federal legislation and another when dealing with state legislation.[264] The Supreme Court has rejected such two-tiered definitions of the Commerce Clause.[265] The definition of interstate commerce is the same when used to strike down state legislation as when it is used to justify federal laws.[266] Because it failed to address *Lopez*, *Morrison*, and *SWANCC*, the Ninth Circuit either wrongly decided *Conservation Force*, or it inadequately supported its decision.[267]

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[261] *See Morrison*, 529 U.S. at 598-99 (overruling Violence Against Women Act); *Lopez*, 514 U.S. at 552 (overruling Gun Free Schools Zone Act); *see also* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 159 (2001) (discussing Clean Water Act).

[262] *Cf.* Kysilka, *supra* note 224, at 297-300 (noting possible gap between positive and negative Commerce Clause). However, the Supreme Court did cite *Lopez* when deciding *Camps Newfound/Owatonna v. Town of Harrison*, a dormant Commerce Clause case. Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 573 (1997).

[263] *Cf.* Kysilka, *supra* note 224, at 300-03 (noting Supreme Court has not consistently applied negative and positive Commerce Clause).

[264] *Cf.* City of Philadelphia v. New Jersey, 437 U.S. 617, 672 (1978) (rejecting two-tiered definition of interstate commerce).

[265] *See id.*

[266] Conservation Force, Inc. v. Manning, 301 F.3d 985, 993 (9th Cir. 2002) (quoting Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979)).

[267] The opinion summarily concludes that the law substantially affects interstate commerce but does not even attempt to quantify those effects. *Id.* at 995. The Supreme Court requires Congress to prepare an adequate record of economic effects when it acts under the positive Commerce Clause. United States v. Morrison, 529 U.S. 598, 615 (2000); United States v. Lopez, 514 U.S. 549, 557 (1995) (quoting Hodel v. Indiana, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)) (explaining that simply because Congress concludes that activity substantially affects interstate commerce does not necessarily make it so). Similarly, when courts act under the negative Commerce Clause, the record should include adequate findings of fact that demonstrate how the state law affects interstate commerce. *Cf.* Bryant & Simeone, *supra* note 34, at 342.

In making these findings, courts should only consider the direct effects of the statute. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 563. That is because nearly every policy decision has a fiscal impact. *Morrison*, 529 U.S. at 613. If courts pile inference upon inference, *Lopez*, 514 U.S. at 567, or aggregate the effects of noneconomic activity, *Morrison*, 529 U.S. at 617-18, they could find that every state law affects interstate commerce in some

If the state law does not substantially affect interstate commerce, then the Commerce Clause does not apply[268] — the inquiry ends there, and the court must uphold the law.[269] If, however, the law does substantially affect interstate commerce, the court must then determine whether the law discriminates economically against nonresidents.[270]

C. Arizona's Regulation Does Not Discriminate Economically

Under the dormant Commerce Clause, courts must determine whether the law discriminates economically against nonresidents.[271] The Ninth Circuit did not adequately explain how Arizona's law discriminates economically against nonresidents.[272] A critical part of this analysis is determining whether the law discriminates in an economic or noneconomic way.[273] The Commerce Clause does not necessarily prohibit state laws that discriminate in noneconomic ways.[274] It is well settled that courts apply strict scrutiny to laws that discriminate economically.[275] Courts, however, do not apply strict scrutiny to laws that regulate noneconomic activity, which have incidental effects on interstate commerce.[276]

The Ninth Circuit concluded that Arizona's law impermissibly discriminated against nonresidents.[277] The opinion, however, does not

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way. *Cf. Lopez*, 514 U.S. at 567. Courts should not use speculative effects to justify striking down legislation that achieves a legitimate state goal. *Cf. Morrison*, 529 U.S. at 613.

[268] *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981); Pac. N.W. Venison Producers v. Smitch, 20 F.3d 1008, 1015 (9th Cir. 1994).

[269] *Cf. Clover Leaf Creamery Co.*, 449 U.S. at 473; *Pac. N.W. Venison Producers*, 20 F.3d at 1017.

[270] *Conservation Force*, 301 F.3d at 995; *see* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977).

[271] *Conservation Force*, 301 F.3d at 995; *see Or. Waste Sys.*, 511 U.S. at 99; *City of Philadelphia*, 437 U.S. at 624; *Hunt*, 432 U.S. at 350.

[272] The court simply stated that the law facially discriminates without discussion. *Conservation Force*, 301 F.3d at 995.

[273] *See infra* note 274.

[274] In the most frequently cited descriptions of the dormant Commerce Clause, "economic" always qualifies "discrimination." *See, e.g., Or. Waste Sys.*, 511 U.S. at 99; Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); *City of Philadelphia*, 437 U.S. at 624 (1978); *Hunt*, 432 U.S. at 350-53. This stems from the central rationale for the dormant Commerce Clause, which is to prohibit state or municipal laws whose sole object is economic protectionism. *See* C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 390 (1994).

[275] *See, e.g., Or. Waste Sys.*, 511 U.S. at 99; *Hughes*, 441 U.S. at 336; *City of Philadelphia*, 437 U.S. at 622-23 (1978); *Hunt*, 432 U.S. at 350.

[276] *Cf.* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[277] Conservation Force, Inc. v. Manning, 301 F.3d 985, 995-96 (9th Cir. 2002).

adequately support that conclusion.[278] Arizona's law did not discriminate against nonresidents *economically*.[279] Arizona only discriminated against nonresidents by limiting their access to a recreational activity.[280] In analyzing state laws that limit nonresident access to recreation, courts should employ a balancing test.[281] Using that standard, the court should have upheld the law.[282] Protecting a state's ecosystem outweighed the minimal burdens the law imposed on the national economy.[283]

Despite its recreational nature, the plaintiffs argued that the law did in fact discriminate against their economic interests.[284] Arizona allows recreational hunters to sell antlers and hides.[285] The plaintiffs argued that hunting in Arizona, therefore, has an economic aspect.[286] Indeed, the plaintiffs hunt in Arizona in order to make a profit.[287] Hunting is their profession, not their recreation.[288] Because of this economic aspect, the argument goes, the state cannot prefer its citizens over nonresidents.[289]

Nevertheless, a careful reading of the case law supports Arizona's approach.[290] Courts have always recognized a difference between

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[278] *Id.*

[279] After the hunter converts an animal to a possession, by killing it, Arizona places identical economic restrictions on residents and nonresidents alike. ARIZ. REV. STAT. § 17-309 (2003).

[280] *Conservation Force*, 301 F.3d at 992.

[281] The district court appropriately used the balancing test. Manning v. Conservation Force, Inc., No. 98-0239, slip op. at 31-35 (D. Ariz. Sept 15, 2000). The Ninth Circuit, however, rejected this approach without elaboration. *Conservation Force*, 301 F.3d at 992.

[282] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The district court held that the plaintiffs failed to show that the burdens outweighed the benefits and accordingly upheld the statute. Manning v. Conservation Force, Inc., No. 98-0239, slip op. at 32-33 (D. Ariz. Sept. 15, 2000).

[283] *Id.*

[284] *See* Appellants' Opening Brief at 10, Conservation Force, Inc. v. Manning, 301 F.3d 985 (9th Cir. 2002) (No. 00-17394).

[285] *Conservation Force*, 301 F.3d at 990. It is only illegal to sell the edible portions of the animal. ARIZ. REV. STAT. § 17-309(A)(2) (2003).

[286] The plaintiffs claimed that the annual value of hunting elk and deer in Arizona is more than $12 million. Plaintiffs' Response to Defendants' Cross Motion for Summary Judgment and Reply in Support of Their Motion for Partial Summary Judgment at 4, Conservation Force, Inc. v. Manning, 301 F.3d 985 (9th Cir. 2002) (No. 00-17394).

[287] *Id.* at 2.

[288] *Id.*

[289] *See, e.g.*, Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977).

[290] *See* Sporhase v. Nebraska, 458 U.S. 941, 956 (1982) (admonishing courts to be reluctant when condemning state efforts to protect natural resource); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 532 (1949) (recognizing "broad power in the State to protect its

economic protectionism and resource conservation.[291] The former is prohibited; the latter is permitted in some situations.[292] For example, states can discriminate against nonresidents when allocating a scarce resource.[293] This distinction exists because preserving natural resources is one of the states' most important interests.[294]

A state may discriminate against nonresidents if the law is meant to protect the health of the population, not the health of its economy.[295] Arizona did not enact the law to help its citizens make money.[296] Arizona enacted the law to maintain a sustainable level of recreation.[297] Thus, precedent suggests that the Ninth Circuit should have upheld the law.[298] Arizona's approach is also more consistent with the Supreme Court's recent proclamations in favor of a strong federalist system — a system that affords more deference to state laws.[299]

D. Public Policy Considerations: Courts Should Give Deference to State Laws that Protect Natural Resources

Federal courts should be reluctant to use the dormant Commerce Clause to invalidate state laws that protect natural resources.[300] If courts

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inhabitants against perils to health or safety even by measures which bear adversely upon interstate commerce").

[291] *Sporhase*, 458 U.S. at 956 ("For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other."); *H.P. Hood & Sons*, 336 U.S. at 533 ("The distinction between the power of the State to shelter its people from menaces to their health and safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.").

[292] *Sporhase*, 458 U.S. at 956; *H.P. Hood & Sons*, 336 U.S. at 526; *see also* Maine v. Taylor, 477 U.S. 131, 145 (1986).

[293] *See Sporhase*, 458 U.S. at 956 ("In the absence of a contrary view expressed by Congress [courts should be] reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage.").

[294] *See* Pac. N.W. Venison Producers v. Smitch, 20 F.3d 1008, 1013 (9th Cir. 1994).

[295] *See Sporhase*, 458 U.S. at 956-57.

[296] In fact, the law actually hurt its citizens financially. The law discouraged nonresidents from coming to the state and spending money at local businesses, which would increase the state's tax revenues. In addition, nonresidents pay higher hunting permit fees. ARIZ. ADMIN. CODE R12-4-102 (2003).

[297] Conservation Force, Inc. v. Manning, 301 F.3d 985, 996 (9th Cir. 2002).

[298] *Sporhase*, 458 U.S. at 956; *H.P. Hood & Sons*, 336 U.S. at 526.

[299] United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 564 (1995); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[300] *See Sporhase*, 458 U.S. at 956 (stating that courts should be reluctant to condemn state efforts to preserve natural resources); Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959);

routinely strike down state laws, they will obviate the advantages of a federalist system, such as experimentation, accountability, and regional protection.[301] These benefits justify our continued adherence to federalism. It is my contention that these aspects of federalism provide a unique opportunity to enact a dynamic and comprehensive body of environmental law.[302]

First, a robust federalist approach allows for the most stringent environmental controls acceptable to the people.[303] Federal legislation provides a baseline of minimum protection, while states with progressive populations are free to adopt more stringent controls.[304] Congress may consider, and perhaps address, those problems that are national in scope.[305] These national standards act as baselines that ensure some minimum level of protection for everyone.

Congress, however, is not likely to act if the problem is confined to an isolated region, such as northern Arizona.[306] Fortunately for northern Arizona, states may go above and beyond the national baseline if it so

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Pac. N.W. Venison Producers v. Smith, 20 F.3d 1008, 1013 (9th Cir. 2002) ("Clearly, the protection of wildlife is one of the state's most important interests.").

[301] *See generally Gregory*, 501 U.S. at 458.

[302] *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 504 (1995); *see also* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?* 48 HASTINGS L.J. 271, 367 (1997); Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211-12 (1992). I am not arguing that states are the only governmental units capable of protecting the environment. Indeed, I readily admit that the federal government stands in a far superior position to enact comprehensive solutions for those systemic problems that do not stop at state boundaries and for those with high externality costs. Nevertheless, I believe that a robust body of state environmental laws is an indispensable counterpart to the existing federal regime. It is my contention that our nation will only achieve true sustainability if the states are allowed to vigorously protect their communities in ways that make sense for their residents.

[303] *Cf. Gregory*, 501 U.S. at 459 (discussing "double security" design of federalist system).

[304] *See* Richard Revesz, *Symposium: The Law and Economics of Federalism*, 82 MINN. L. REV. 535, 544 (1997) ("Federal environmental standards are generally minimum standards. The states remain free to impose more stringent controls.").

[305] *Cf. Gregory*, 501 U.S. at 460 (noting that Congress may legislate in areas traditionally regulated by states but that this power is "extraordinary" and must be exercised with caution).

[306] *See* H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 675 (1949) (Black, J., dissenting) (arguing it is inconceivable that Congress would attempt to control local problems with locally applicable and utterly inconsistent statutes); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77-84 (1980); James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1260 (1994) ("[F]ederalism provides a vehicle for allowing geographically defined constituencies, especially geographically designed minorities to have a measure of self rule within the political framework of a broader nation-state.").

chooses.[307] Thus, every community will ultimately adopt the most stringent controls acceptable to them.[308] As a matter of policy, the nation — and its courts — ought to respect these regional variations to ensure that the nation protects as many natural resources as possible.

Second, a federalist system ensures accountability.[309] State and municipal policymakers are more accountable to their constituents than are their federal counterparts.[310] They represent fewer people, smaller geographic areas, and are more accessible to the citizenry.[311] Accordingly, Arizona's government is better equipped to address the needs of Arizona.[312] In the context of environmental law, it is especially important to respect Arizona's autonomy considering how dependent the state is on its natural resources.[313] The region's unique ecosystem, wildlife, and recreational opportunities attract tourists from around the world, who contribute $30 billion to the state's economy and affect more than 450,000 jobs.[314] It is no surprise, therefore, that Arizona residents zealously guard these resources and have agreed to pay taxes that specifically fund conservation programs.[315] Similarly, it is understandable that the state is reluctant to share its resources with

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[307] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Arizona's regulatory system, complete with bonus points for frequent hunters regardless of citizenship, is one of many possible approaches. ARIZ. ADMIN. CODE 12-4-114 (2002). If another state finds an alternative that does not discriminate, then Arizona could follow. *See* Chemerinsky, *supra* note 302, at 504.

[308] *See* Revesz, *supra* note 302, at 1210. In some circumstances, the federal baseline will serve as a community's upper limit. *See id.*; Revesz, *supra* note 304, at 543-45. There is nothing wrong with such results. In fact, one would expect roughly half the states to prefer the federal baseline to serve as their upper limit. If every state exceeded the level set by federal legislation, one could conclude that the states' congressional representatives had set the bar too low.

[309] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[310] *Id.*

[311] *See* David L. Markell, *States as Innovators: It's Time for a New Look to our Laboratories of Democracy in the Effort to Improve our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 357 (1994); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210-15 (1977).

[312] *Gregory*, 501 U.S. at 458.

[313] *See* Sporhase v. Nebraska, 458 U.S. 941, 963 (1982) (Rehnquist, J., dissenting) (arguing that courts should uphold state laws that regulate intrastate natural resources because they are essential to well-being of citizens).

[314] *See* http://www.asu.edu/asunews/business/tourismimpact_071102.htm (showing economic affects of tourism in Arizona).

[315] One example of this support is the 1992 Heritage Fund, a citizen initiative prompted by those who engage in the state's outdoor recreational activities. ARIZ. REV. STAT. § 17-296 (2003). The program allocates $10 million annually to the Department of Fish and Game. *Id.* The Department must use $6 million to acquire, protect, and manage wildlife habitat. *Id.*

others who have not made similar investments.[316]

Finally, federalism protects geographic minorities from collective majorities.[317] It is far too easy and increasingly common for politically isolated states to bear the ecological burdens attendant to the nation's commercial progress.[318] By allowing states to determine their ecological futures, federalism ensures that no single state will become the nation's landfill.[319] By respecting the rights of localities, we ensure the collective rights of the nation.[320]

Federal courts, therefore, should uphold local laws that seek to preserve natural resources.[321] Such laws are not the sort of economic protectionism that the Commerce Clause prohibits.[322] The Commerce Clause was drafted to avoid the regional balkanization that had jeopardized the nation's viability.[323] It would be sadly ironic, therefore, if the Commerce Clause was used to strike down state laws that attempt to make our nation a sustainable one.

CONCLUSION

The Ninth Circuit wrongly decided *Conservation Force, Inc. v. Manning*.[324] The decision is inconsistent with recent Commerce Clause jurisprudence and is adverse to public policy. Recreational hunting does not substantially and directly affect interstate commerce. In addition, Arizona's law did not discriminate against nonresidents economically.

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[316] *Cf. Sporhase*, 458 U.S. at 957 (noting availability of groundwater is not happenstance, it is product of conservation).

[317] *Cf.* Gregory, 501 U.S. at 458-60; ELY, *supra* note 198, at 77-84.

[318] *See generally* Cinnamon Gilbreath, *Constitutional Law: Federalism in the Context of Yucca Mountain:* Nevada v. Department of Energy, 27 ECOLOGY L.Q. 577, 579-88 (2000) (discussing constitutional defects associated with federal attempts to confine ecological waste in one state).

[319] Or radioactive waste repository. *See* Gilbreath, *supra* note 318, at 583; Keay Davidson, *Nevada fights nuclear dump site; State sues over Bush plan to store waste under Yucca Mountain*, S.F. CHRON., Feb. 16, 2002, *at* http://sfdate.com/cgi-bin/article.cgi?file=chronicle/archive/2002/02/16/MN80433.DTL (describing political outcry over decision to locate spent nuclear fuel rods in Nevada despite state's vehement opposition). *But see* City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978) (holding that state may not prohibit importing refuse).

[320] *Cf.* ELY, *supra* note 198, at 80-84.

[321] *Cf. Sporhase*, 458 U.S. at 963 (Rehnquist, J., dissenting) (arguing that courts should give deference to state laws that protect natural resources).

[322] *Id.*

[323] *See* Wardair Can. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986); Hughes v. Oklahoma, 441 U.S. 322, 325 (1979); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-34 (1949).

[324] 301 F.3d 985 (2002).

The rule merely made it easier for Arizona residents to enjoy the state's recreational activities.

Conservation Force is especially dangerous in light of the Supreme Court's assault on federal power. The Ninth Circuit chose to constrain the states at a time when the Supreme Court has similarly restrained Congress. The result of this clash is a jurisdictional vacuum in which neither states nor Congress will be able to legislate effectively.[325] Courts should be especially reluctant to create such vacuums in the environmental context considering the irreversible and catastrophic injuries that stem from inaction.[326] Accordingly, the judiciary should respect state attempts to enact laws that preserve and protect our scarce resources.[327] The courts should reject *Conservation Force* and its rationale.

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[325] *See* Kysilka, *supra* note 224, at 300.

[326] *Cf.* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 744-48 (2000).

[327] *See* Sporhase v. Nebraska, 458 U.S. 941, 963 (1982) (Rehnquist, J., dissenting); *cf.* ALDO LEOPOLD, A SAND COUNTY ALMANAC: WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER 218-240 (Oxford University Press 1981) (arguing something is ethically "right" when it tends to preserve ecological resources).

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