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**Commerce Clause Challenges
to the Endangered Species Act's
Regulation of Intrastate Species
on Private Land**

By Lilly Santaniello 

I. Introduction

In the wake of the *Lopez*,¹ *Morrison*,² and SWANCC³ decisions, certain applications of Section 9 of the Endangered Species Act (Endangered Species Act) may be vulnerable to Commerce Clause challenges. Up until now, the Fifth, Fourth, and D.C. Circuits (as well as a few lower federal district courts) have uniformly upheld the constitutionality of the ESA against Commerce Clause challenges. These courts have, however, offered differing arguments of varying persuasiveness to harmonize the ESA with the Supreme Court's recent Commerce Clause jurisprudence.⁴ Analysis of several major cases addressing the constitutionality of Section 9 as applied to intrastate endangered species of little economic value on non-federal land suggests that the regulation of these extremely local creatures does not fit neatly into the framework established by

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1. *United States v. Lopez*, 514 U.S. 549 (1995).
2. *United States v. Morrison*, 529 U.S. 598 (2000).
3. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)[hereinafter SWANCC].
4. Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 19 Pace Envtl. L. Rev. 653, 669 (2002). Lazarus suggests that the Supreme Court will not agree to hear the issue of the constitutionality of the ESA in the absence of a circuit conflict, which to date does not exist.

the Supreme Court.⁵ This article examines the analyses relied on by several courts and evaluates the extent to which the courts are faithful to the standards laid out in *Lopez*, and more recently, *Morrison*.

Several sources of analytical difficulty have emerged for lower courts attempting to resolve the relationship between Section 9 of the ESA and the Supreme Court's newly limited vision of the Commerce Clause. One issue is the identification of the activity being regulated for purposes of Commerce Clause analysis. For example, when construction of a hospital threatens to take an endangered fly through habitat modification, is the activity being regulated the actual take of the fly or the activity of constructing the hospital? Courts have also offered varied solutions to the issue of what precisely constitutes an economic activity. Specifically, when someone kills an endangered wolf in order to protect his livestock, is the economic motivation enough to render the activity economic in nature? A third question is, when may the "aggregation principle" be applied to non-economic, intrastate activity without abrogating the holdings of *Lopez* and *Morrison*? Furthermore, how does the aggregation principle relate to the "larger

regulatory scheme" theory, which permits regulation of seemingly trivial, non-economic activities when this regulation is necessary to effectuate a larger economic regulatory scheme? Finally, what significance will the Supreme Court's recent insistence upon the distinction between what is truly national and what is truly local have on Section 9?

This article explores courts' answers to these questions through an analysis of four major decisions from three United States Courts of Appeals: *National Association of Home Builders, et al v. Babbitt*⁶ (a case was decided before *Morrison*), *Gibbs v. Babbitt*,⁷ *GDF Realty Investments, Ltd., v. Norton*,⁸ and *Rancho Viejo, LLC v. Norton*.⁹ First, Section 9 of the ESA and the Supreme Court's recent Commerce Clause decisions are described.

A. Section 9 of the ESA

"Person" is defined to include private individuals, corporations, and federal and non-federal officials and entities.¹⁰ Section 9 prohibits any "person" from doing any harm to members of listed species.¹¹ The definition of harm includes significant habitat modification or degradation.¹² The question raised by Section 9 is whether the ESA's application

5. In *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1997), the court upheld the Migratory Bird Treaty Act, as applied to sale and possession of Bald Eagle parts, under the Article I, Section 8 Necessary and Proper Clause, the Article II treaty-making power, and the Commerce Clause. Because the Bald Eagle offers a somewhat different case than the wholly intrastate species addressed in this paper, *Bramble* will not be discussed further.

6. 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, (1998).

7. 214 F.3d 483 (4th Cir. 2000), *cert. denied*, (2001).

8. 2003 U.S. App. LEXIS 5818 (5th Cir. Mar. 26, 2003).

9. 2003 U.S. App. LEXIS 6218 (D.C. Cir. Apr. 1, 2003).

10. THE ENDANGERED SPECIES ACT 104 (Stanford Environmental Law Society et al. eds., 1st ed. 2001).

11. *Id.*

12. *Id.* at 106.

to actions by private individuals, on private land, involving harm to members of purely local species of no known economic value, exceeds the constitutional limits of the Commerce Clause. An answer to that question requires answers to a whole host of accompanying questions: What are traditional state powers? Is regulation of endangered species a traditional sphere of state action? Is the question better formulated in terms of who traditionally has authority to regulate land? The environment? Scarce natural resources? Wildlife? How should non-economic motives for regulation be reconciled with requirements that the regulation have some connection with economic activity? The cases below offer some answers to the above questions.

B. Notable Supreme Court Commerce Clause Decisions

1. *Lopez*

In 1995, the Supreme Court held that Congress had exceeded its authority under the Commerce Clause when it enacted the Gun-Free School Zones Act of 1990 (GFSZA).¹³ The GFSZA made it a federal offense for any "individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."¹⁴ This decision marked a shift for the Court from

a long line of cases, beginning in 1937, that upheld legislation enacted under authority of the Commerce Clause.¹⁵ Perhaps the most extreme application of the Commerce Clause to wholly intrastate activity occurred in *Wickard v. Filburn*.¹⁶ The *Wickard* Court upheld application of the Agricultural Amendment Act to the production and consumption of home-grown wheat.¹⁷ The Court held that although one farmer's consumption of homegrown wheat might have a trivial effect on interstate commerce, the aggregate effects of many farmers growing wheat for their own consumption, and not purchasing wheat on the market, would affect the price of wheat and thus interstate commerce.¹⁸

The *Lopez* Court identified three categories of activity that Congress can regulate under its Commerce Clause power:

Congress may regulate the use of the channels of interstate commerce.

Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.

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

14. *Id.*

15. *Id.* at 554-55 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)). See *NLRB v. Jones*, 301 U.S. at 37 (upholding the National Labor Relations Act and abandoning the distinction between direct and indirect affects on interstate commerce; intrastate activities that "have such a

close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress's power).

16. *Lopez*, 514 U.S. at 556 (citing *Wickard v. Filburn*, 317 U.S. 11 (1942)).

17. *Wickard*, 317 U.S. at 127.

18. *Id.* (citing *Wickard* at 128-29).

Congress may regulate those activities having a substantial relation to interstate commerce; i.e., those activities that substantially affect interstate commerce.¹⁹

The *Lopez* Court then elucidated four reasons for finding that the GFSZA did not fit within the third category. (All parties agreed that the first two categories were inapplicable to these facts.)

The *Lopez* Court held first that the GFSZA is a criminal statute that “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”²⁰ Chief Justice Rehnquist contrasted the GFSZA with *Wickard*, as the exemplar of the Commerce Clause’s furthest reach, and found that the possession of a gun in a school zone, unlike the growing of wheat for home-consumption, was not an economic activity.²¹ The *Lopez* court distinguished the two cases: the statute at issue in *Wickard* was designed to increase the price of wheat, whereas the GFSZA was not part of a larger regulation of economic activity.²²

Second, the *Lopez* Court held that the GFSZA contained “no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm posses-

sion in question affects interstate commerce.”²³ Third, the Court pointed to the lack of legislative findings regarding the effects on interstate commerce of gun possession near schools.²⁴ Congressional findings are not a necessary element of a valid exercise of Commerce Clause power but they are helpful.²⁵ Fourth, the Court held that if the attenuated link between gun possession near schools and economic costs to the nation through poorer education and higher insurance rates is enough to sustain a Commerce Clause challenge, then federal power is limitless insofar as it would be difficult to imagine an activity that Congress could not regulate under this standard.²⁶

Harkening back the words of Chief Justice Marshall in *McCulloch v. Maryland*, the *Lopez* Court argued that the federal government is one of enumerated powers.²⁷ Furthermore, Rehnquist recalled the principle that “enumeration presupposes something not enumerated.”²⁸ These two ideas led the Court to conclude that a vision of the Commerce Clause that allows Congress to regulate any activity is necessarily flawed. Additionally, the *Lopez* Court concluded, such a vision blurs the important distinction between “what is truly national and what is truly local. This we are unwilling to do.”²⁹

19. *Lopez*, 514 U.S. at 558-59.

20. *Id.* at 561.

21. *Id.* at 560.

22. *Id.* at 561.

23. *Id.*

24. *Id.* at 562.

25. *Id.* at 562-63.

26. *Id.* at 564.

27. *Id.* at 566 (citing *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)).

28. *Id.* at 566 (citing *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)).

29. *Lopez*, 514 U.S. at 568-69.

2. *Morrison*

When it decided *U.S. v. Morrison* in 2000, the Court reaffirmed the new direction it had taken five years earlier in *Lopez*.³⁰ *Morrison* clarified that *Lopez* signified a new approach to Commerce Clause jurisprudence, not merely an anomaly.³¹ In *Morrison*, the Court struck down the Violence Against Women Act (VAWA)³², because it exceeded Congress's Commerce Clause authority.³³ The Court held that, under *Lopez*, the conclusion was clear: "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far . . . our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."³⁴ Furthermore, like the GFSZA, the VAWA lacked a jurisdictional element ensuring that the federal cause of action applied only to cases related to interstate commerce.³⁵

However, the VAWA was significantly different from the GFSZA in one respect: the VAWA was preceded by voluminous

congressional findings detailing the cost of violence against women.³⁶ The *Morrison* Court held that these findings were unpersuasive because they relied on the same flawed reasoning that the Court rejected in *Lopez*: attenuated but-for causation from the initial act to the most distant economic effects.³⁷ The real problem for the Court with the attenuated-effects argument was that this logic would permit Congress to regulate any crime shown to have an eventual economic impact and would ultimately allow Congress to use the Commerce Clause to "completely obliterate the Constitution's distinction between national and local authority."³⁸ The *Morrison* Court exhibited a strong concern for maintaining certain clearly-defined spheres of "traditional state regulation," such as marriage, family law, and crime.³⁹ The Chief Justice cited Justice Thomas's concurrence in *Lopez*: "We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power."⁴⁰

After *Lopez* and *Morrison*, two aspects of the decisions stand out: the insistence that the scope of the Commerce Clause must be limited to economic activity and

30. 529 U.S. 598 (2000).

31. Christy H. Dral & Jerry J. Phillips, *Commerce Clause by Another Name: The Impact of U.S. v. Lopez and U.S. v. Morrison*, 68 TENN. L. REV. 605, 615 (2001). The authors point out differing conclusions regarding *Lopez*'s reach among commentators. Dral and Phillips also point out that in *U.S. v. Robertson*, 514 U.S. 669 (1995), decided one week after *Lopez*, the Court upheld a conviction under RICO because the defendant imported people and goods into his state of residence from other states in order to conduct illegal business. Dral and Phillips argue generally that *Morrison* and *Lopez* offer unworkable and inconsistent standards regarding the Commerce Clause.

32. 42 U.S.C. § 13981 (2004).

33. *Morrison*, 529 U.S. at 598.

34. *Id.* at 613.

35. *Id.*

36. *Id.* at 614.

37. *Id.* at 615.

38. *Id.*

39. *Id.* at 615, 617.

40. *Id.* at 617-18.

the equally strong insistence that traditional federal-local distinctions be maintained—with the addition that one traditional and important distinction is the reservation of a general police power to the states. In fact, it seems as if the economic/non-economic distinction is a tool for maintaining the local-federal distinction.⁴¹ The *Morrison* Court asserted that “we reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”⁴² As the juxtaposition of these two sentences without any accompanying transitional phrase demonstrates, the Court does not fully explain why the need to maintain a distinction between what is state and what is federal requires a distinction between economic and noneconomic activity. This gap in the majority’s reasoning is addressed very ably by the dissenters.

Justice Souter began by pointing out that the Court’s previous cases stand for the proposition that Congress can “legislate with regard to activity [not economic activity] that, in the aggregate, has a substantial effect on interstate commerce.”⁴³ Justice Souter then went on to ask why the majority chooses to revive the formalist economic/noneconomic distinction, and he found that the answer was “that in the

minds of the majority there is a new animating theory that makes categorical formalism seem useful again . . . [it] is useful in serving a concept of federalism.”⁴⁴ The majority’s twin motives are perhaps what makes application of *Lopez* and *Morrison* so difficult for lower courts.

Justice Breyer had illuminating comments in his dissent as well. Justice Breyer asserted that the economic/noneconomic distinction is not easy to work with: For example, does the streetcorner mugger engage in economic or noneconomic activity when he steals for money?⁴⁵ Breyer argued that in certain circumstances, the Court has upheld the regulation of noneconomic activity (racial discrimination) at economic establishments (motels, restaurants).⁴⁶ Furthermore, in an example especially relevant to the ESA, Breyer asked why we should focus exclusively upon the nature of the cause—after all, if chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?⁴⁷ These points make the difficulties with the majority’s reasoning dramatically clear; the focus until *Lopez* was on the interstate commercial nature of the effects, not the commercial nature of the cause.⁴⁸ One commentator has argued that the Court’s new Commerce Clause jurisprudence may

41. *Id.* at 617.

42. *Id.* at 617-18.

43. *Id.* at 628.

44. *Id.* at 644.

45. *Id.* at 656.

46. *Id.* (citing generally, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

47. *Morrison*, 529 U.S. at 658.

48. *Id.*

actually produce the opposite effect from what the Court intended; this will occur when Congress ensures the constitutionality of its actions by deliberately broadening the scope of regulation in order to gather trivial, intrastate activities into the net of national regulation.⁴⁹

3. SWANCC

In 2001, the Supreme Court decided another case, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al* (SWANCC), that hinted at possible negative implications for the Endangered Species Act.⁵⁰ Two questions were raised in SWANCC. Did the Corps exceed its statutory authority when it interpreted the Clean Water Act to cover non-navigable, isolated, intrastate waters based on the presence of migratory birds? Alternatively, did Congress lack the power under the Commerce Clause to grant federal regulatory jurisdiction over such waters?⁵¹ The Court decided the case upon statutory grounds, thus avoiding the constitutional question.⁵² However, the Court did express doubt regarding the authority of Congress under the Commerce Clause to confer federal juris-

diction over such waters.⁵³ Regarding the constitutional challenge, Chief Justice Rehnquist returned to the question debated in *Lopez* and *Morrison*: What is “the precise object or activity that, in the aggregate, substantially affects interstate commerce”?⁵⁴ The SWANCC Court went on to suggest that allowing the Corps to claim “federal jurisdiction over ponds and mudflats falling within the Migratory Bird Rule would significantly impinge upon the State’s traditional and primary power over land and water use.”⁵⁵

The precise impact of SWANCC on the ESA and for environmental regulation in general is difficult to determine.⁵⁶ However, the decision at the very least hints at some skepticism in the Court regarding Congress’s ability to regulate intrastate environmental activities. As one commentator, Charles Tiefer, has said of the relevant portion of the decision:

The passage . . . preserves the uncertainty left by *Morrison and Lopez* about just how far a majority of the Court will go in rejecting—or accepting—regulation as commercial when, conceptu-

49. Adrian Vermuele, *Does Commerce Clause Review Have Perverse Effects?* 46 VILL. L. REV. 1325, 1332-33 (2001). Professor Vermuele argues that if the goal of the new Commerce Clause review is decentralization by shifting authority to the states, it may fail to achieve its purpose. Because Congress can regulate invalid provisions as part of a larger “regulatory program,” there is an incentive for Congress to create even more nation-wide programs than it had done before *Lopez*. Thus, the result is increased, rather than decreased, centralization. See 1325, 1333.

50. SWANCC, at 531 U.S. 159.

51. *Id.* at 165-66.

52. *Id.* at 173.

53. *Id.*

54. *Id.*

55. *Id.* at 174.

56. Michael J. Gerhardt writes that *Morrison* and SWANCC “seem to suggest that what matters for the purposes of aggregation in Commerce Clause cases is whether the basic purpose of the law is economic, not whether some economic activity is the means to achieve a non-economic goal.” *The Curious Flight of the Migratory Bird Rule*, 31 ELR 11079 (2001).

ally, it falls between the least commercial nature of the school-and-women-safety issues of those two cases, and the most commercial nature of regulation that focuses solely on commercial activities for commercial goals.”⁵⁷

In another recent article, Bradford Mank suggested that *Morrison* and SWANCC raise serious questions as to Congress’s authority to regulate intrastate species with little current economic value. Mank adds that the regulation of such species may also intrude on traditional state control over land use.⁵⁸

In his dissent, Justice Stevens responded to the majority’s Commerce Clause remarks by pointing out that, unlike the activities at issue in *Lopez* and *Morrison*, discharging fill material into “the Nation’s waters is almost always undertaken for economic reasons.”⁵⁹ Furthermore, Justice Stevens argued, migratory birds are the basis of a host of commercial activities engaged in by millions of people.⁶⁰ Next, Stevens explained that the Migratory Bird Rule does not blur the distinction between what is local and what is national because “the protection of migratory birds is a textbook example of a national problem.”⁶¹ Migratory birds typify many envi-

ronmental problems in that the benefits are local while the costs are dispersed beyond state limits.⁶² Stevens concluded by arguing that because the Commerce Clause gives Congress the power to regulate environmentally hazardous activities that may have effects in more than one state, the Commerce Clause must give Congress the power to regulate individual actions that, in the aggregate, would have the same effect.⁶³

II. Application of *Lopez* and *Morrison* to the ESA

A. *National Association of Homebuilders v. Babbitt*

In 1996, by a two-to-one vote, the D.C. Court of Appeals upheld a Commerce Clause challenge to the ESA.⁶⁴ The three separate opinions written in this case exemplify the difficulty of resolving *Lopez* (NAHB was decided before *Morrison*) with certain applications of the ESA. The case arose from a discovery that the proposed site for a new hospital in San Bernardino County was one of the last remaining habitats for the an endangered Delhi Sands Flower-Loving Fly (the Delhi Fly), listed by the U.S. Fish Wildlife Service (FWS) the day before construction was to begin.⁶⁵ The Delhi Fly’s remaining habitat, located exclusively in a small area of southern California, was no more than eight square miles. However, the particu-

57. Charles Tiefer, SWANCC: *Constitutional Swan Song for Environmental Laws or No More than a Swipe at Their Sweep?*, 31 ELR 11493 (2001).

58. Bradford C. Mank, *Protecting Intrastate Endangered Species: Does the ESA Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?* 36 GA. L. REV. 723, 754 (2002).

59. SWANCC, 531 U.S. at 193.

60. *Id.* at 194.

61. *Id.* at 196. (citing Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 435 (1920)).

62. *Id.*

63. *Id.*

64. NAHB, 130 F.3d 1041.

65. *Id.* at 1043-44.

lar population directly threatened by the hospital's construction numbered no more than six to eight individual flies in all.⁶⁶ In the past, the DelhiFly was widespread, but as of 1993, only 2 percent to 3 percent of its original habitat remained undeveloped.⁶⁷ The NAHB court addressed the following question: Can the federal government regulate the use of nonfederal lands to protect the Delhi Fly, even though it is found only within one state?⁶⁸ While the question was answered in the affirmative, the two affirming judges and the dissent came up with very different analyses of the Commerce Clause's relationship to this provision of the ESA.

Professor Nagle explains the crucial distinctions in the three judges' approaches very clearly in his article, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*.⁶⁹ Nagle points out that the three judges come up with different arguments because each of them asks a different question.⁷⁰ Judge Wald asks whether there is a substantial relationship between endangered species in general and interstate commerce. Judge Henderson asks whether there is a relationship between the hospital and interstate commerce. The dissenter, Judge Sentelle, asks whether there is a relationship between the Delhi Fly and interstate commerce.⁷¹

1. Judge Wald's Majority Opinion

Judge Wald argued that under the analysis laid out by the Supreme Court, the regulation of the taking of endangered species is within Congress's Commerce clause power under categories one and three of the *Lopez* test: regulation of the use of channels of interstate commerce and regulation of activities that substantially affect interstate commerce.⁷² Wald argued that the first category applied for two reasons. One, the government must prohibit takings of endangered species in order to prevent the transport of the species in interstate commerce. Second, the government has authority under the Commerce Clause, per *Heart of Atlanta Motel*, to keep the channels of interstate commerce free from immoral and injurious uses.⁷³

Regarding the first *Lopez* category, Wald compared NAHB to a case where the Ninth Circuit upheld a Commerce Clause challenge to purely intrastate possession of machine guns, because regulation of intrastate possession of machine guns is necessary to control interstate traffic in machine guns.⁷⁴ Wald also analogized between *Heart of Atlanta* and NAHB. In *Heart of Atlanta*, Congress used its Commerce Clause power to prohibit racial discrimination by a hotel serving interstate clients. Similarly, here Congress has

66. *Id.* at 1044.

67. <http://shanana.berkeley.edu/essig/endins/raphiomi.htm> (last visited April 15, 2004).

68. NAHB 130 F.3d 1045.

69. John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998).

70. *Id.* at 178.

71. *Id.*

72. NAHB, 130 F. 3d at 1046 (citing *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 256 (1964)).

73. *Id.*

74. *Id.* at 1047 (citing *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996)).

used its Commerce Clause power to prevent the destruction of a species by the construction of a hospital. The construction will use materials and construction workers from outside the state, and the hospital will employ and serve people from outside the state.⁷⁵ According to Wald, *Heart of Atlanta* stands for the proposition that “access to the channels of interstate commerce may be regulated in order to prevent injurious local practices that in turn have a substantial harmful effect on interstate commerce either by discouraging such commerce or by inciting a race to the bottom.”⁷⁶

Respecting the third *Lopez* category, Wald argued that Congress has the power to regulate any activity that substantially affects interstate commerce, whether or not the activity is commercial or non-commercial.⁷⁷ She proceeded to argue that the protection of endangered species substantially affects interstate commerce for two reasons. One, protecting the species protects biodiversity, which is valuable because we do not know which species may offer future medical cures that will be of great commercial value.⁷⁸ Second, the regulation of endangered species prevents a destructive race to the bottom.⁷⁹ Wald argued that several Supreme Court cases offer support for the proposition that wholly intrastate, non-commercial activities may be regulated in order to prevent a race to the bottom.⁸⁰

Specifically, she cited *Hodel* and *Darby*. *Hodel* required miners to restore land to its prior condition after mining was completed. The Court held that regulation of surface coal mining was necessary to prevent adverse effects on interstate commerce, and that the Commerce Clause permits regulation of activities causing environmental hazards that may affect more than one state.⁸¹ In *Darby*, the Court upheld wage regulations, aimed at preventing destructive interstate competition, for intrastate employees producing lumber for interstate commerce.⁸²

2. Judge Henderson's Concurrence

Judge Henderson argued that the first *Lopez* category, regulation of the channels of interstate commerce, did not apply to NAHB.⁸³ She read the decisions Wald relied on as limited to cases where “the object of regulation [is] necessarily connected to movement of persons or things interstate and could therefore be characterized as regulation of the channels of commerce.”⁸⁴ The Delhi Fly, however, does not move interstate, on its own or through human intervention. Therefore, the first category does not apply.⁸⁵ While Judge Henderson agreed that the third *Lopez* category did apply, she offered her own argument as to why. She refuted Wald's argument by pointing out that uncertain future medical and economic value is too hypothetical a possibility to count as a substantial affect on interstate

75. *Id.* at 1048.

76. *Id.* at 1049.

77. *Id.*

78. *Id.* at 1054-55.

79. *Id.* at 1056.

80. *Id.* at 1057 (citing *Hodel v. Indiana*, 452 U.S. 314, 324 (1981); *United States v. Darby*, 312

U.S. 100 (1941)).

81. *Id.* at 1055.

82. *Id.* at 1056.

83. *Id.* at 1058.

84. *Id.*

85. *Id.*

commerce.⁸⁶ Henderson did, however, uphold application of the ESA to the Delhi Fly because loss of biodiversity has a substantial effect on our ecosystem and thus on interstate commerce.⁸⁷ According to this rationale, the loss of one species (the Delhi Fly) will affect other lands and objects in interstate commerce, due to the interconnectedness of species and ecosystems.⁸⁸ Henderson found that the Commerce Clause reached the activity at hand—construction of the hospital—which had a clear connection with interstate commerce.⁸⁹ Henderson thus justified allowing the Commerce Clause to reach the Delhi Fly from two different directions: One, the loss of species can adversely affect ecosystems and thus affect things clearly involved in interstate commerce. Second, the ESA can be viewed as a regulation of land use and development. If this premise is accepted, the regulation of the construction of the hospital has a clear connection to interstate commerce.⁹⁰

3. Judge Sentelle's Dissent

Judge Sentelle's position on the application of the ESA to intrastate species is simply that killing flies in southern California is not commerce and it is not interstate.⁹¹ Quoting Judge Kozinski's description of the Commerce Clause as the "hey-you-can-do-whatever-

you-feel-like clause," Sentelle asserted that *Lopez* has put an end to unchallenged use of the Commerce Clause.⁹² First, Sentelle dismissed Judge Wald's admittedly weak argument that the first *Lopez* category—regulation of the channels of commerce—applied to the Delhi Fly. Sentelle pointed out in response to Wald's first argument that preventing habitat destruction does nothing to eliminate the Delhi Fly from the channels of interstate commerce.⁹³ Sentelle argued that the third *Lopez* category did not apply to this case either, because the regulation does not control a commercial activity or an activity necessary to the regulation of some commercial activity.⁹⁴

4. Analysis of NAHB

One weakness with NAHB as a precedent for upholding application of Section 9 against future Commerce Clause challenges is the majority's argument that the combined extinction of all endangered species substantially affects interstate commerce.⁹⁵ This argument seems to conflict with *Morrison*, which rejects the aggregation of noneconomic activities in order to achieve the requisite substantial affect on interstate commerce.⁹⁶ Another issue NAHB leaves somewhat unresolved is the identity of the activity being regulated—the taking of the fly, the construction of the hospital, or the protection of

86. *Id.*

87. *Id.*

88. *Id.* at 1059.

89. *Id.*

90. *Id.*

91. *Id.* at 1061.

92. *Id.*

93. *Id.* at 1063.

94. *Id.* at 1064.

95. NAHB, 130 F.3d at 1054.

96. Mank, *supra* note 57, at 761, 795. Mank suggests that after *Morrison*, Judge Wald's position is subject to doubt. However, Mank points out that the Supreme Court has not established a clear test for when aggregation is proper under the Commerce Power; therefore Wald's argument cannot be confidently embraced or rejected.

all endangered species? The answer to this question seems even more important after *Morrison* and SWANCC.

B. *Gibbs v. Babbitt*

In 2000, the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of the ESA against a Commerce Clause challenge.⁹⁷ The particular endangered species at issue, the red wolf perhaps posed a better test case for upholding the statute than did the seemingly insignificant Dehli Sands Flower-Loving Fly. Chief Judge Wilkinson, besides having more to work with, advanced a very coherent analysis of the issues. Wilkinson opened his opinion with the following words: “In this case we ask whether the national government can act to conserve scarce natural resources of value to our entire country.”⁹⁸ This formulation of the question makes the answer clear—yes, the federal government must have the authority to protect natural resources valuable to us all.

The particular facts of the case were this: the red wolf was once abundant in the southeastern region of the United States.⁹⁹ The wolf’s primary habitat was river bottomlands, where its principal prey, swamp and marsh rabbits, are found.¹⁰⁰ However, due mainly to human activities such as the drainage of lands for farming, building of dams, and hunting,

the wolf was near extinction. In 1967 it was listed as an endangered species.¹⁰¹ FWS captured the remaining species and placed them in captive breeding programs with the intention of reintroducing them back into the wild.¹⁰² Forty-two wolves were later reintroduced into national wildlife refuges, and some of the wolves moved from the refuges onto private land.¹⁰³ Federal regulations allow a red wolf to be taken on private land if the taking is in defense of human life or if it is done by landowners when the wolves are in the act of killing livestock or pets.”¹⁰⁴ In 1990, the plaintiff, Richard Mann, shot and killed a red wolf he thought was threatening his cattle.¹⁰⁵ Mr. Mann filed an action challenging the federal government’s authority to protect the wolves on private land, specifically alleging that the regulation exceeds Congress’ s power under the Commerce Clause.¹⁰⁶

1. An Economic Activity Substantially Affecting Interstate Commerce.

Judge Wilkinson began by asserting that according to *Morrison*, intrastate activities may be subject to federal regulation if the activity in question is some type of economic endeavor *and* the activity has a substantial effect on interstate commerce.¹⁰⁷ Therefore, the court must determine whether the taking of wolves on private land is in “any sense of the

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

98. *Id.* at 486.

99. Edward A. Fitzgerald, *Seeing Red: Gibbs v. Babbitt*, 13 VILL. ENVTL. L.J. 1, 2 (2002).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Gibbs*, 214 F.3d at 488.

104. 50 C.F.R. 17.84(c)(4) (2004).

105. *Gibbs*, 214 F.3d at 488.

106. *Id.* at 489.

107. *Id.* at 492.

phrase, economic activity.”¹⁰⁸ The court held that the taking of wolves is economic activity because the protection of commercial and economic assets is a primary reason for taking red wolves.¹⁰⁹

Next, the court explored the relationship between the wolf and interstate commerce. The *Gibbs* court found that the red wolf is commercial in four major aspects: tourism, scientific research, potential trade in pelts, and agriculture. Furthermore, the *Gibbs* court asserted that because the taking of wolves is an economic activity, under the aggregation principle, individual takings may be examined together; that is, while taking one red wolf may not substantially impact interstate commerce, the correct question is whether the taking of red wolves in the aggregate has a substantial impact on interstate commerce.¹¹¹ The *Gibbs* court further explained that each type of commercial effect—tourism, research, and trade—can be added together to determine whether the result is sufficiently substantial for Commerce Clause purposes.¹¹²

The *Gibbs* court stated that wildlife-related recreation in this country is an industry worth twenty-nine billion dollars a year and that red wolves can be expected to attract tourists to North Carolina through “howling events” and various educational programs.¹¹³

Scientific research is another area where the *Gibbs* court argued that red wolves play a significant role. The *Gibbs* court cited several studies on red wolves to support its contention that such research generates jobs as well as knowledge.¹¹⁴ Additionally, scientific research has potential future value in terms of unknown medical uses for animals, as well as knowledge leading to commercial development of the red wolf.¹¹⁵

The *Gibbs* court found another somewhat surprising potential value in the red wolf—a renewed trade in its pelt.¹¹⁶ In support of this theory of economic value, Wilkinson cited a Senate Report regarding the ESA, which argued that the protection of endangered species might eventually allow controlled exploitation of species, thereby producing profit and trade otherwise unavailable due to extinction.¹¹⁷ The *Gibbs* court proffered the American alligator as an instance where this process was successful. In 1975, the alligator was nearing extinction and became a listed species. Now there is a “vigorous trade” in its hide.¹¹⁸

Lastly, the *Gibbs* court asserted that the taking of the wolves relates to interstate agriculture.¹¹⁹ Landowners take wolves because they threaten livestock. Thus, while the regulation prohibiting such takes is an impediment to commercial activities, the effect on commerce

108. *Id.* at 492 (citing *Morrison*, 529 U.S. 598, 613 (2000)).

109. *Id.*

110. *Id.*

111. *Id.* at 493.

112. *Id.*

113. *Id.*

114. *Id.* at 494.

115. *Id.*

116. *Id.* at 495.

117. *Id.*

118. *Id.*

119. *Id.*

nonetheless legitimizes the regulation.¹²⁰ The *Gibbs* court stated that it is “well-settled under Commerce Clause cases that a regulation can involve the promotion or the restriction of commercial enterprises and development.”¹²¹ Citing *United States v. Darby*, the court explained that “the motive and purpose of a regulation of interstate commerce are matters for the legislative judgment.”¹²² The court found that “it is not beyond the power of Congress to conclude that a healthy environment actually boosts industry by allowing commercial development of our national resources.”¹²³

2. An Essential Part of a Larger Regulation of Economic Activity

In a very strong argument, Wilkinson analogized between the situation of the Red Wolf and the situation in *Hodel v. Indiana*, where the Supreme Court held, in connection with surface mining, that a “complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal.”¹²⁴ The *Gibbs* court goes on to explain that the regulation at issue here is part of the ESA, which Congress enacted in order to conserve the nation’s environmental health. As the *Gibbs* court pointed out, listed species are necessarily limited in number; the effects of taking these species should not be looked at individually, but rather

seen as part of a process of complete extinction of the species.¹²⁵ The goal of Congress in enacting the ESA was to halt the extinction of endangered species. Therefore, the taking of individual red wolves should be seen as part of an overall plan to reverse the extinction of the red wolf and endangered species generally.¹²⁶ The *Gibbs* court held that it would be extremely odd to argue that Congress has the power to regulate abundant species that have measurable impacts on commerce while those nearing extinction are outside of its reach.¹²⁷ The acceptance of such an argument would significantly, if not completely, impair the efficacy of the ESA; endangered species are by definition few in number.

One major advantage of Wilkinson’s argument that the specific provision is part of larger regulatory scheme is that it can apply to animals even less economically valuable than the red wolf. Going back to the Delhi Fly—Judge Wald was forced to assert, in her opinion, that it “was not beyond the realm of possibility” that the fly might have some commercial value in pollinating farms.¹²⁸ Clearly, such attenuated and hypothetical economic benefits are a very frail foundation for supporting Congress’s Commerce Clause authority. However, even the fly would be covered by the “larger regulatory scheme” theory as a necessary element of an over-arching regulation.

120. *Id.*

121. *Id.*

122. *Id.* (citing *United States v. Darby*, 312 U.S. 100, 115 (1941)).

123. *Id.* at 496.

124. *Id.* at 497 (citing *Hodel v. Indiana*, 452

U.S. 314, 329 n.17 (1981)).

125. *Id.* at 498.

126. *Id.*

127. *Id.*

128. NAHB, 130 F. 3d at 1053.

3. Federalism Issues

In response to *Lopez* and *Morrison*'s insistence upon the separation between the federal government and areas of traditional state sovereignty, Wilkinson argued that state regulation of wildlife is "circumscribed by federal regulatory power."¹²⁹ The *Gibbs* court cited several cases in support of this assertion. In *Hughes v. Oklahoma*, the Court held that states do not own the wildlife on their land, and that state laws regulating wildlife are limited by Congress's ability to regulate pursuant to its Commerce Clause power.¹³⁰ Furthermore, Wilkinson rejected the argument that the regulation of the taking of red wolves on private land intrudes on the "state's traditional police power to regulate local land use."¹³¹ The *Gibbs* court asserted that while states do retain significant control over local land use, it is clear that the federal government has authority to regulate private activities in order to protect the environment and wildlife.¹³² The *Gibbs* court distinguished the ESA's regulation of wildlife from the purpose of the statutes at issue in *Lopez* and *Morrison*, where the regulation of possession of a

firearm and of violence against women impinged on criminal laws—traditional state concerns.¹³³

Furthermore, Wilkinson argued that the necessity for federal regulation in this area is made more apparent by the need to prevent the destructive "race to the bottom" created by interstate competition, as explained by the Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*.¹³⁴ This motive was shared by the enactors of the ESA; the House avowed that protection of endangered species could not be handled without "coherent national and international policies."¹³⁵

Additionally, unlike the VAWA or GFSZA, where federal law coexisted with state law, in the case of the red wolf, the federal government is solely responsible for the species. As the court explains, § 17.84(c) does not replace or supplement any existing law regarding the wolf.¹³⁶

Finally, the ESA does not offer the danger the Supreme Court perceived in the VAWA and GFSZA, which was that the Acts contained no logical stopping

129. *Gibbs*, 214 F.3d at 499.

130. *Id.* (citing *Hughes v. Oklahoma*, 441 U.S. 326, 335 (1979)).

131. *Id.*

132. *Id.* at 500 (citing *United States v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997); *Babbitt v. Sweet Chapter of Cmty.s for a Great Or.*, 515 U.S. 687, 697 (1995)).

133. *Gibbs*, 214 F.3d at 500. In support of this contention, the court cited the following Acts: The Lacey Act of 1900, which penalized the taking of wildlife in violation of state law (16 U.S.C. § 701 (1994)); the Migratory Bird Treaty Act of 1918, which explicitly preempted state law in prohibition of the takings of many species (U.S.C. § 703-12); the Bald Eagle Protection Act of 1914, which

regulates nonfederal property by prohibiting the taking of Bald Eagles (16 U.S.C. § 668-668d (1994)); The Magnuson Fishery Conservation and Management Act of 1976 creates national standards for fishery conservation and management (16 U.S.C. § 1801-83 (1994 & Supp. III 1997)). In *Missouri v. Holland*, 252 U.S. 416, 432-33 (1920), the Court upheld the Migratory Bird Treaty Act as a necessary and proper means of executing Congress's treaty power because the conservation of endangered wildlife was a matter of the sharpest exigency for national well-being.

134. *Gibbs*, 214 F.3d at 501 (citing *Hodel*, 452 U.S. 264, 281-82 (1981)).

135. *Id.* at 502.

136. *Id.* at 503.

point—no limit to federal police power.¹³⁷ This anxiety is misplaced with regard to the ESA, the *Gibbs* court argued, insofar as federal power is already limited to the conservation of only those species that are endangered or threatened. Thus the ESA stops short of conferring a broad police power upon Congress.¹³⁸

4. Luttig's Dissent

Judge Luttig responded to Wilkinson's majority opinion with a strong dissent. Luttig was the author of *Brzonkala v. Virginia Polytechnic Institute*, the case overturning the VAWA, which the Supreme Court upheld in the renamed *U.S. v. Morrison*.¹³⁹ Luttig began his counterargument by asserting that the question before the court is not "whether the government can act to conserve scarce natural resources" but whether "this one particular Fish and Wildlife regulation exceeds Congress' power under the Commerce Clause."¹⁴⁰ Luttig found the evidence Wilkinson proffered in support of his argument that the red wolves have economic value through tourism, science, possible pelt trade, and agriculture inadequate and unconvincing.¹⁴¹ Because he rejected the evidence of the wolves' economic value, Luttig then asserted that the regulation does not touch economic activity as required by *Lopez* and *Morrison* and therefore is an invalid exercise of Commerce Clause authority.¹⁴² He supported this contention by stating that the

"killing of even all 41 of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity" for Commerce Clause purposes.¹⁴³ Luttig asserted that killing red wolves was not an economic activity. Consequently, he argued against the *Wickard* aggregation principle because the *Morrison* Court held that "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."¹⁴⁴

Luttig then proceeded to say that even if one did accept the takings of wolves as an economic activity, the regulation would still fail a Commerce Clause challenge because the activity is not one that has a substantial effect on interstate commerce.¹⁴⁵ In response to Wilkinson's suggestion that the regulations should be viewed as part a larger regulatory scheme, Luttig said only that the activity in question does not have an "obvious economic character and impact, such as is typically the case with non-wildlife natural resources, and even with other wildlife resources."¹⁴⁶ Luttig neither elaborated further on this assertion nor illuminated it with specific examples or citations. He concluded with these words: "The affirmative reach and the negative limits of the commerce clause do not wax and wane

137. *Id.*

138. *Id.*

139. 169 F.3d 820 (4th Cir. 1999).

140. *Gibbs*, 214 F.3d at 506.

141. *Id.* at 507.

142. *Id.*

143. *Id.*

144. *Id.* (citing *Morrison*, 529 U.S. 598, 613 (2000)).

145. *Id.*

146. *Id.* at 508.

depending upon the subject matter of the particular legislation under challenge.”¹⁴⁷

5. Analysis of *Gibbs*

Overall, the *Gibbs* decision is a strong one. The arguments that Wilkinson offered regarding, tourism, a larger regulatory scheme, and federal involvement with wildlife/resource protection are persuasive. The tourism argument, however convincing it is in this instance in demonstrating a “substantial” affect on interstate commerce, is unlikely to succeed with such species as the Dehli Sands Flower Loving Fly or the “subterranean, eyeless Tooth Cave Spider” or the “Kretchmarr Cave Mold Beetle,” species with very little current tourism value or potential.¹⁴⁸ One of the weaker aspects of the *Gibbs* decision is the assertion that because regulating the taking of red wolves will have a negative impact on commercial activities such as ranching and farming, the regulation is thus a valid exercise of Commerce Clause power.¹⁴⁹ This analysis seems contradictory to *Morrison* and *Lopez*; Congress cannot justify its regulation of an activity under the Commerce Clause by arguing that once it is regulated, it will effect commerce. The activity must have some demonstrable link to commerce—some economic quality—before the regulation is in place in order for the regulation of that activity to withstand a Commerce Clause challenge.¹⁵⁰ Otherwise, the Commerce Clause would

be without limitation; any activity can be regulated in such a way so as to affect commerce. This is the result *Morrison* and *Lopez* rejected.

C. *GDF Realty v. Norton*

The 5th Circuit offered an analysis of the ESA's constitutionality that borrowed from and improved upon the analysis of the 4th Circuit in *Gibbs*. Because the 5th circuit was faced with a more difficult challenge in terms of justifying the individual value of the endangered species itself—the spider versus the Red Wolf—the GDF court was forced to rely more heavily upon the larger regulatory scheme theory.¹⁵¹ Factually, the situation in GDF closely resembles the situation in NAHB. The FWS listed 6 subterranean invertebrate species as endangered in 1988 and 1993.¹⁵² These species were found on the property of the plaintiffs, who wished to develop their land for commercial and residential purposes.¹⁵³ The Cave Species are wholly intrastate, being found only in Texas.¹⁵⁴ The lower district court granted summary judgment to the FWS, holding the take provision to be constitutional under the Commerce Clause because it directly regulated plaintiffs' proposed property development.¹⁵⁵ The lower court pointed out that there could hardly be a more direct and substantial link to interstate commerce than a Wal-Mart, which was slated for the develop-

147. *Id.* at 509.

148. *GDF Realty* 2003 U.S. App. LEXIS 5818 (5th Cir. Mar. 26, 2003); these spiders will be discussed below.

149. *Gibbs*, 214 F.3d at 495.

150. *Morrison*, 529 U.S. at 615.

151. 2003 U.S. App. LEXIS 5818 at *50.

152. *Id.* at *2.

153. *Id.* *2-3.

154. *Id.* at *3.

155. *GDF Realty Invetsmenets Ltd. v. Norton*, 169 F. Supp 2d 648 (W.D. Tex. 2001).

ment.¹⁵⁶ The GDF court did not agree with the lower court's analysis, although in the end, it did uphold the take provision.¹⁵⁷

1. The Aggregation Principle

The GDF court found that there are two ways in which wholly intrastate activity may be found to substantially affect interstate commerce.¹⁵⁸ First, the activity itself may have a substantial affect on interstate commerce. Second, in some cases, the activity's effects "may be aggregated with those of other similar activities, the sum of which may be substantial in relation to interstate commerce."¹⁵⁹ The GDF court then explained that it is difficult to determine when Congress may lawfully apply the aggregation principle because any "imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity."¹⁶⁰ The GDF court argued that this was an unacceptable result because it would destroy any judicially enforceable limit on Congress' authority under the Commerce Clause, "thereby turning that clause into what it most certainly is not, a general police power."¹⁶¹ The GDF court explained that, as the Supreme Court has made clear in *Lopez* and *Morrison*, the aggregation principle is limited.¹⁶²

According to the GDF court, *Lopez* and *Morrison* seem to require that when the aggregation principle is applied to wholly intrastate activities, those activities must be economic in nature.¹⁶³ However, the GDF court also pointed out the *Lopez* holding that "[w]here a general regulatory scheme bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."¹⁶⁴ Additionally, *Lopez* held that the de minimis instance "must be an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activities were regulated."¹⁶⁵ The GDF court then analyzed the application of the above Supreme Court holdings to the specific circumstances of the Cave Species.

The GDF court asserted that under *Morrison*, the regulated activity must be economic. However, first the court must determine what exactly constitutes the regulated activity: the developers argued that for the purpose of evaluating substantial effect, the court should look solely at the taking of the Cave Species, while the FWS, on the other hand, proposed that the planned commercial development along with its effects on interstate commerce is the regulated activity.¹⁶⁶ While the lower court agreed with the analytical model propounded the FWS, the GDF court agreed with the developers; the

156. *Id.*

157. *Id.* at *52.

158. *Id.* at *15.

159. *Id.* at *16.

160. *Id.* *16-17.

161. *Id.* at *17 (citing *United States v. Ho*, 311

F.3d 589 (5th Cir. 2002)).

162. *Id.*

163. *Id.* at *18.

164. *Id.* at *18-19.

165. *Id.* at *19.

166. *Id.*

scope of the inquiry is “primarily whether the expressly regulated activity substantially affects interstate commerce, i.e., whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect.”¹⁶⁷ The GDF court held that nothing in the Commerce Clause or in the Supreme Court’s decisions interpreting the clause implies that activity may be regulated only because non-regulated conduct by the actor engaged in the regulated activity has some connection to interstate commerce.¹⁶⁸ While the effect of the ESA regulation may sometimes be to prohibit development, Congress is not directly regulating commercial development through the ESA.¹⁶⁹ The GDF court pointed out that the reasoning accepted by the lower courts would lead to inconsistent results; it “would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors.”¹⁷⁰ Furthermore, the GDF court argued that expanding the definition of the regulated activity would result in virtually unlimited regulatory authority under the Commerce Clause, a consequence forbidden by the Supreme Court.¹⁷¹ The GDF court disagreed with Judge Henderson’s concurrence in NAHB, which held that because the ESA regulation prohibiting takes affects the hospital and highway, which in turn have a connection to interstate commerce, the regulation is a valid exercise of Congress’ power.¹⁷²

FWS argued that Cave Species takes alone have a direct relationship to and substantial affect on interstate commerce through the scientific interest surrounding the species and the species’ possible future commercial value.¹⁷³ The GDF court found that the fact that some scientists have traveled to Texas to study the Cave Species and that articles have been written about them is insufficient to establish a substantial effect on commerce; it is an effect, but not a substantial one.¹⁷⁴ The GDF court distinguished the Cave Species from the Red Wolf in *Gibbs*, which clearly did have an impact on interstate tourism.¹⁷⁵ Additionally, the GDF court rejected FWS’s claim that the possible future commercial benefits of the Cave Species will substantially affect interstate commerce.¹⁷⁶ The GDF court found that the purely speculative, unknown future medicinal value of the Cave Species is far too “hypothetical and attenuated from the regulation in question to pass constitutional muster.”¹⁷⁷

FWS offered an alternative argument for the conclusion that takes of the Cave Species will have substantial affects on interstate commerce. FWS asserted that the takes of Cave Species may be aggregated with the takes of all other endangered species, which would certainly achieve a substantial affect on interstate commerce.¹⁷⁸ The GDF court rejected the assertion that takes of all endangered species can be aggregated for this pur-

167. *Id.* at *29-30.

168. *Id.* at *33.

169. *Id.*

170. *Id.*

171. *Id.* at *35.

172. *Id.* at *38.

173. *Id.* at *40-41.

174. *Id.* at *41.

175. *Id.*

176. *Id.* at *43.

177. *Id.*

178. *Id.* at *44.

pose, because the Supreme Court requires that intrastate activity must be in some sense economic before it can be aggregated.¹⁷⁹ FWS argued that all endangered species are aggregated; thus, “Cave Species takes will have a substantial affect on interstate commerce [and] these takes can be classified as commercial.”¹⁸⁰ The GDF court replied that this argument made no sense in that it would “render meaningless any ‘economic nature’ prerequisite to aggregation.”¹⁸¹ Clearly, the GDF court is correct with regard to the holdings of *Lopez* and *Morrison*. The *Lopez* Court did not necessarily reject the possibility that possession of guns near schools could have a substantial affect on interstate commerce, but rather the idea that the regulation of such non-economic activity traditionally handled by State governments could be justified under Congress’s Commerce Clause authority.

The GDF court upheld the ESA’s take provision on the theory that the “ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes.”¹⁸² The GDF court held that in order to invoke the “larger regulatory scheme” principle, that larger regulation must be economic in nature.¹⁸³ Looking to the legislative history of the ESA, the court found that

the statute’s protection of endangered species was primarily economic.¹⁸⁴ According to the House Reports, Congress was concerned about the unknown role different species play in the ecosystem and thus the effect their extinction could have upon humans and other non-endangered species.¹⁸⁵ Furthermore, the GDF court held that, although the ESA has no express jurisdictional element as *Lopez* suggested, it is limited in its application to instances connected to interstate commerce in that the direct link between endangered species, biodiversity, and the national economy is, according to the court, clearly established.¹⁸⁶ Finally, the GDF court argued that the link is not so attenuated as to make regulation of all general land use or wildlife preservation possible; it is limited to species loss, which in turn is linked to substantial commercial effects.¹⁸⁷

D. *Rancho Viejo v. Norton*

The DC Circuit again upheld a Commerce Clause challenge to Section 9 of the ESA, as applied to a wholly intrastate endangered species—the Arroyo Toad (Toad).¹⁸⁸ The *Rancho Viejo* court analyzed the regulation of the Toad first under *Lopez* and NAHB. Second, it examined the developers’ arguments that the analysis in NAHB was called into question by *Morrison* and SWANCC.¹⁸⁹ As the *Rancho* court asserted and the devel-

179. *Id.*

180. *Id.* at *46.

181. *Id.*

182. *Id.* at *52.

183. *Id.* at *46.

184. *Id.* at *48-51.

185. *Id.* at *52.

186. *Id.* at *52.

187. *Id.*

188. *Rancho Viejo*, 2003 U.S. App. LEXIS 6218 (D.C. Cir. Apr. 1 2003).

189. *Id.* at *11.

opers acknowledged, the facts of *Rancho* are virtually indistinguishable from NAHB.¹⁹⁰ Both cases deal with large commercial developments located exclusively in California and threatening the habitats of wholly intrastate endangered species. The developers in *Rancho* are less sympathetic than the county hospital-builders in NAHB; the hospital builders made many concessions on behalf of the Delhi Fly. Conversely, the developers in *Rancho* refused to move a fence that separated the Toads from a nearby creek and refused to substitute fill gathered off-site for fill taken from the Toad's habitat. These two accommodations would have been sufficient to allow the project to go forward, if the developers had agreed to them.¹⁹¹

The *Rancho* court first analyzed the facts in light of its own application of *Lopez* in NAHB.¹⁹² Because the facts in NAHB and *Rancho* were so similar, the conclusion that the housing construction would result in a take of the Toad was inevitable once the NAHB analysis was adopted.¹⁹³ The *Rancho* court next addressed the developers' contention that SWANCC and *Morrison* undermine the analysis and holding of NAHB.¹⁹⁴ The developers contended that under *Morrison*, the economic or noneconomic nature of the regulated activity is outcome determinative.¹⁹⁵ In

response, the *Rancho* court argued that according to *Morrison*, the question is whether the challenge is to a "regulation of activity that substantially affects interstate commerce."¹⁹⁶ Furthermore, the *Rancho* court stated that what SWANCC requires is a determination of "the precise object or activity that, in the aggregate, substantially affects interstate commerce."¹⁹⁷ The *Rancho* court held that that neither *Morrison* nor SWANCC altered the analysis conducted in NAHB.¹⁹⁸ Furthermore, the *Rancho* court held that the developers' argument that the *Morrison* court "came pretty close" to adopting a categorical rule against aggregating the effects of noneconomic activity was irrelevant to the case, because the regulated activity in *Rancho* was economic.¹⁹⁹

The *Rancho* court identified the takings, not the Toads themselves, as the relevant regulated activity. Consequently, the court reasoned, the activity at hand—commercial development—was clearly economic.²⁰⁰ The *Rancho* court explained its rationale in the following way: "[t]he ESA does not purport to tell toads what they may or may not do. Rather, section 9 limits the taking of listed species, and its prohibitions and corresponding penalties apply to the persons who do the taking, not to the species that are taken."²⁰¹ According to the *Rancho* court, *Morrison*

190. *Id.* at *23.

191. *Id.* at *7.

192. *Id.*

193. *Id.* at *17-23.

194. *Id.*

195. *Id.* at *26.

196. *Id.* (citing *Morrison*, 529 U.S. at 609 (2000))

197. *Id.* at *27 (citing SWANCC, 531 U.S. at 173

(2001)).

198. *Id.* at *41-42.

199. *Id.* at *26-27. The *Rancho* court does not address the distinction between interstate and intrastate noneconomic activity in its analysis of the impact of *Morrison* on NAHB's precedential value.

200. *Id.*

201. *Id.* See 16 U.S.C. § 1538(a)(1), (a)(1)(B)).

described the VAWA and the GFSZA as involving situations where “neither the actors nor their conduct had a commercial character, and neither the purposes nor the design of the statute had an evident commercial nexus.”²⁰² The *Rancho* court found that the Toad facts were distinguishable from the VAWA and GFSZA facts: the actor was a real estate developer and the conduct the construction of a housing project.²⁰³ Additionally, the *Rancho* court argued that the ESA has multiple purposes, at least one of which is preservation of the commercial value of species diversity.²⁰⁴

Next, the *Rancho* court addressed the argument that because the ESA bans other takings that are, unlike the housing project, clearly noncommercial, such as a hiker walking through the woods and harming a Toad, the regulation is unconstitutional as applied to the Toad.²⁰⁵ The *Rancho* court offered two responses to this argument. One, the court referred to the “larger comprehensive regulatory scheme” theory used by several of the courts addressing Commerce Clause challenges to Section 9 of the ESA.²⁰⁶ However, the court’s use of *Hodel v. Indiana* was new: because “much activity regulated by the ESA does bear a substantial relation to commerce, it may well be that the hiker hypothetical proffered by the plaintiff is of no consequence to the statute’s constitutionality.”²⁰⁷ In a footnote, the *Rancho*

court supplied an alternative basis for upholding the constitutionality of the ESA: the substantial effect the loss of biodiversity would have on interstate commerce.²⁰⁸ However, the court held that a determination regarding the applicability of the ESA to hikers was irrelevant because the developers had argued that Section 9 was unconstitutional as applied.²⁰⁹

Lastly, the *Rancho* court rejected the developers’ argument that under *Morrison*, the ESA is an “an unlawful assertion of congressional power over local land use decisions,” because local land use is an area of traditional state concern.²¹⁰ Citing extensively from *Gibbs*, the *Rancho* court held that the ESA is a response to a specific problem of national concern and does not infringe upon state power.²¹¹ The *Rancho* court did not, however, borrow from *Gibbs* the argument that this particular application of Section 9 could be upheld as part of a “larger regulatory program.”

1. Ginsburg’s Concurring Opinion

Chief Judge Ginsburg filed a concurring opinion in which he agreed with the majority opinion in full, but added one further point. Ginsburg averted to the Supreme Court’s requirement that there must be a “logical stopping point” to the rationale offered for upholding the application of Section 9 to the Toads.²¹²

202. *Id.* at *29 (citing *Morrison*, 529 U.S. at 611).

203. *Id.* at *30.

204. *Id.* at *31-32.

205. *Id.* at *42.

206. *Id.* (citing *Hodel v. Indiana*, 452 U.S. at 329 (1981)).

207. *Id.* at *42-43.

208. *Id.* at *44 n.20.

209. *Id.* at *43-44.

210. *Id.* at *48.

211. *Id.* at *49-51.

212. *Id.* at *53.

Ginsburg argued that the logical stopping point of the *Rancho* court's rationale with respect "to a species that is not an article in commerce and does not affect interstate commerce, [is that] a take can be regulated if—but only if—the take itself substantially affects interstate commerce."²¹³ Thus, according to Ginsburg, a person hiking in the woods or a homeowner who moves dirt to landscape his property is outside the reach of Section 9, even if he takes a Toad, because the activity that accomplished the take is not one that substantially affects interstate commerce.²¹⁴ Ginsburg pointed out that without this limitation, the government could regulate any activity that resulted in a take, no matter how unconnected to interstate commerce.²¹⁵

2. Analysis of *Rancho Viejo*

In *Rancho Viejo*, the court evaded the entire aggregation principle quandary by holding that the regulated activity was the housing development, not the taking of Toads. The decision that the commercial development constituted the relevant regulated activity is more problematic, in light of *Morrison* and SWANCC, then the *Rancho* court acknowledged. First, even within the D.C. Circuit in NAHB, only the concurring judge, Judge Henderson, held that the "regulated activity" was the construction of the hospital.²¹⁶ On the other hand, Judge Wald, writing for the majority, cited numerous cases in order to demonstrate that an activity need *not* be commercial in character in order to withstand

a Commerce Clause challenge.²¹⁷ However, the application of Section 9 to a take caused by a commercial development clearly does fall within the outer limits exemplified by *Lopez* and *Morrison*; both of those cases involved individual, noncommercial actors with no evident connection to interstate commerce. In other words, application of Section 9 to intrastate endangered species is, at the very least, a less extreme regulation of noneconomic, traditionally state-managed activity than the GFSZA or the VAWA. As Judge Ginsburg pointed out in his concurrence, the rationale offered by the *Rancho* court explicitly excludes from its reach individual, noncommercial actors with no evident connection to interstate commerce (the lone hiker.)²¹⁸

Judge Ginsburg's concurrence suggests that, under the rationale offered by *Rancho*, the *Gibbs* decision might have come out differently. The *Gibbs* court argued that because ranchers' shot wolves to protect their property, the taking was an "economic activity."²¹⁹ But under the *Rancho* rationale, shooting wolves resembles the lone hiker in the woods or the homeowner shifting dirt to landscape his property more than it resembles substantial commercial development. However, this does not mean that the *Rancho* court left the wolves wholly unprotected. The court did not explicitly reject the "larger regulatory scheme" theory put forth in *Gibbs* and GDF. In addition, the *Rancho* court raised the possibility that the loss of

213. *Id.* at *54.

214. *Id.*

215. *Id.* at *54.

216. NAHB, 130 F.3d at 1059.

217. *Id.* at 1049.

218. *Rancho Viejo*, 2003 U.S. App. LEXIS 6218, at *53-54.

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

biodiversity itself has substantial enough an effect to warrant regulation under the Commerce Clause.²²⁰

IV. Conclusion

Thus far, the majority of circuit judges seem strongly inclined to uphold the ESA. While Judge Luttig, writing the dissent for *Gibbs*, and Judge Sentelle, writing the dissent for NAHB, offered vehement arguments against allowing Section 9 of the ESA to be upheld under the Commerce Clause, the trend is clearly in favor of interpreting *Lopez*, *Morrison*, and SWANCC to allow regulation of noncommercial, intrastate endangered species.

However, will the Supreme Court agree with the appellate courts? GDF *Realty* and *Rancho* offer an interesting contrast—the two cases were decided with a week of each other, but used sharply divergent rationales for upholding Section 9 under the Commerce Clause. The GDF court's logic has the advantage of justifying the entire ESA in a single argument: the ESA is national regulatory program motivated at least in significant part by concern over the economic loss of endangered species, and thus even trivial intrastate takes may be included within its scope.²²¹ Additionally, the GDF court offered supplementary rhetoric in support of withholding a general police power from the federal government, which matches well with the concerns of the Court in *Morrison*, *Lopez*, and SWANCC.²²² The GDF rationale has the additional advantage of allowing the regulation of

takes by private actors—unlike the rationale relied upon by the *Rancho* court, the GDF court's larger, regulatory scheme theory would certainly include within its scope even the lone hiker in the woods stepping on an intrastate endangered species. The GDF court located the economic factor required by *Morrison* squarely in the over-all regulatory scheme, and therefore circumvented the need to identify the economic character of any individual take.²²³ Furthermore, the GDF court created at least the appearance of accommodating the holdings of *Morrison* and *Lopez* by stressing two requirements: that the larger regulatory scheme be *economic* in nature and that the intrastate, noncommercial activities included be *essential* to the regulation.²²⁴

One could argue, however, that the rationale offered by the GDF court will have an effect contrary to the current Court's expectations. As discussed in above, Professor Vermuele has explained that recent Commerce Clause jurisprudence, because it allows provisions that would be invalid when regulated alone to be included within a larger regulatory program that is valid when taken as a whole.²²⁵ Thus, the GDF rationale could be problematic in terms of *Morrison* and *Lopez* insofar as it lacks a clear limiting principle.

From the perspective of environmentalists, the GDF rationale has the virtue of simplicity. Under the GDF rationale, all endangered species may be protected,

220. *Rancho Viejo*, 2003 U.S. App. LEXIS 6218, at *42 n.20.

221. GDF, 2003 U.S. App. LEXIS 5818, at *50-52.

222. *Id.* at *16-17.

223. *Id.* at *46-47.

224. *Id.* at *46.

225. Vermuele, *supra* note 48, at 10.

and it is not necessary to examine or support the value of any particular species. Moreover, there are probably few environmental or natural resource regulations that cannot be described as economic in some sense. In fact, the ESA is most likely one of the least economically justified environmental regulations, insofar as the consequences of extensive species loss are somewhat speculative (as opposed, for example, to the known consequences of air pollution.) Furthermore, the GDF rationale does not require a separate justification and analysis for individual, non-commercial actors, such as the lone hiker.

Similarly, the *Rancho* rationale has both advantages and disadvantages. The *Rancho* court solved the relevant activity problem by identifying the construction that will effectuate the take as the regulated activity.²²⁶ The question remains, however, whether takes accomplished by smaller projects may be validly regulated under the Commerce Clause. When answering whether the regulated activity "substantially affected" interstate commerce, the *Rancho* court asserted that "there can be no doubt that such a relationship exists for costly commercial developments like Rancho Viejo's."²²⁷ How costly must the development be to fit within the *Rancho* framework? The answer to that question is not clear. Most takes are caused by commercial development, rather than hikers or private individuals landscaping their property, so this exception to the reach of Section 9 may be trivial. Additionally, the *Rancho* court left

open the possibility of Section 9 capturing the lone hiker within its scope through different arguments, although the court did not explain how those arguments would comport with *Morrison* and *Lopez*.²²⁸

In his concurrence, Chief Judge Ginsburg argued that the Supreme Court requires any rationale upholding an exercise of Commerce Clause power to have a logical stopping point.²²⁹ Ginsburg reasoned that in order to supply the requisite stopping point, the *Rancho* court's rationale must explicitly exclude the lone hiker and individual landscaper.²³⁰ This "logical stopping point" does mirror the factors the Court found important in *Lopez* and *Morrison*. Like the attacker woman-beater in *Morrison* or the gun-holder in *Lopez*, the lone hiker is a private individual, motivated by noneconomic concerns, who is normally subject only to a local police power rather than federal regulation. As Ginsburg explained, without the above limitation, no activity by any individual, would be beyond the power of the federal government to regulate, no matter how unconnected with interstate commerce.²³¹ However, unlike the "larger, regulatory scheme" theory supplied by the GDF court, the economic activity solution of *Rancho* could be less successful in environmental contexts other than the ESA. For example, what would happen to Justice Breyer's example of the home fireplaces causing environmental damage?²³² Would the fireplaces fit within the framework established by the *Rancho* court? It would appear not.

226. *Rancho Viejo*, 2003 U.S. App. LEXIS 6218, at *20-21.

227. *Id.* at *21.

228. *Id.* at *43, n.20.

229. *Id.* at *53.

230. *Id.* at *54.

231. *Id.*

232. *Morrison*, 529 U.S. at 658.

At this point in time, in the absence of a circuit split, Section 9 of the ESA seems as though it can be safely applied to noncommercial, intrastate endangered species. Furthermore, if in the future, the Court does in the future uphold a Commerce Clause challenge to Section 9, environmentalists have two additional lines of attack: the Treaty Power²³³ and the Property Clause.²³⁴ But for now, the toads and flies are safe.

233. Omar N. White, *The ESA's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 *ECOLOGY L.Q.* 215, 225 (2000). A discussion of the Treaty Power is outside the scope of this paper. However, White argues that, as established in *Missouri v. Holland*, 252 U.S. 416 (1920), the federal government has the authority to regulate to protect wildlife under the Treaty Power.

234. Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 *MINN. L. REV.* 1, 121-24 (2001). Again, a discussion of the Property Clause is beyond the scope of this paper. But, briefly, Professor Appel makes an interesting argument that in some cases the Property Clause may offer a better justification for protecting endangered species than the Commerce Clause. Citing *Kleppe v. New Mexico*, 426 U.S. 529 (1976), he explains

that the Court upheld regulation of wildlife on government property even though the government did not assert ownership of the wild horses at issue. Therefore, Appel suggests, Congress can regulate endangered species if those species occasionally occupy federal lands. In response to SWANCC, Appel argues that Congress could regulate some isolated wetlands by finding that migratory birds are an essential value of public lands, that they rely on isolated wetlands, and thus that filling such wetlands would damage the property of the United States.

Endangered Species Act Resource Guide

1. Robert V. Percival, "Greening" the Constitution - Harmonizing Environmental and Constitutional Values, 32 *Envtl. L.* 809 (2002).
Examining the relationship between the Constitution and environmental values in light of modern Commerce Clause jurisprudence.
2. Maya R. Moiseyev, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers: The Clean Water Act Bypasses a Commerce Clause Challenge, But Can the Endangered Species Act?*, 7 *Hastings W.-N.W. J. Env. L. & Pol'y* 191 (2001).
Application of the ESA post *Lopez*, *Morrison*, and SWANCC.
3. Jeff L. Massey, *Swanson Mining Reconsidered: Is Section 7 of the Wild and Scenic Rivers Act Constitutional Under the Supreme Court's New Commerce Clause Jurisprudence?*, 8 *Hastings W.-N.W. J. Env. L. & Pol'y* 95 (2001).
Describes the effects that *Lopez* and *Morrison* have had on application of the Wild and Scenic Rivers Act.
4. National Fish & Wildlife Service: at <http://endangered.fws.gov/>. See also the Species Information section at <http://endangered.fws.gov/wildlife.html> (information regarding official listing and status of endangered species.)
Website provides information on endangered species, bulletins, legislation and what actions citizens can take to influence environmental protection.
6. National Endangered Species Reform Coalition: at <http://www.nesarc.org/>
Electric, Farming and Building Industry funded website that provides information about the ESA (Endangered Species Act) ranging from legislation and listed species to the impact of the ESA.
7. Defenders of Wildlife: at <http://www.defenders.org/wildlife/esa/esahow.html>. See also State Endangered Species Acts at www.defenders.org/pubs/sesa02.html (Describes the constitutional sources of wildlife protection.)
Website devoted to current environmental problems affecting wildlife, including the effects of current regulations and proposals on endangered species.

