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## I. Introduction

The delineation of Congressional authority by the Supreme Court in *United States v. Lopez*[1] and *United States v. Morrison*[2] raises significant questions regarding Congress' power under the Commerce Clause[3] to enact environmental statutes such as the Endangered Species Act[4] (hereinafter "ESA").[5] In *Lopez*, the Court reined in Congress' commerce power[6] by holding that Congress may only

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1. 514 U.S. 549 (1995).

2. 529 U.S. 598 (2000).

3. U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

4. 16 U.S.C. § 1531-44 (1999).

5. *Compare* Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 359-60 (1997) (stating that "to pass *Lopez* muster, the degradation or modification of an endangered species' habitat would have to be found an 'economic activity' having a substantial effect on interstate commerce"), J. Blanding Holman, IV, Note, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 185 (1995) (arguing that the *Lopez* Court would hold the links between habitat-modification and interstate commerce insufficient to justify the enactment of the ESA under Congress' commerce power), *and* David A. Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat For Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 423-26 (1998) (asserting that the ESA is not commercial in nature and the Court would reject the ESA as outside Congress' commerce power), *with* Stephen M. Johnson, United States v. Lopez*: A Misstep, But Hardly Epochal For Federal Environmental Regulation,* 5 N.Y.U. ENVTL. L.J. 33, 81-82 (1996) (arguing that the Court would uphold the ESA because the extinction of a species that could potentially benefit society, through medicine and research, has a potentially substantial effect on interstate commerce).

6. Before *Lopez*, "you wonder why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'" Alex

regulate the channels and instrumentalities of interstate commerce and activities that "substantially affect" interstate commerce.[7] Five years after *Lopez*, the Court in *Morrison* reaffirmed *Lopez*, stating that the Commerce Clause supports only Congress' regulation of activities that are economic in nature.[8]

Environmental statutes enacted at the beginning of the twentieth century would have arguably passed the "substantial effect" requirement because their primary function was to protect commerce by regulating economic activities.[9] Since then, however, Congress has used its commerce power to enact environmental regulations, like the ESA, that protect commerce as a secondary goal.[10] The ESA is controversial because it prohibits private individuals from harming endangered species on their land.[11] In analyzing whether the ESA "substantially affects" interstate commerce, it is not surprising that people ask, "what [do] cave beetles and blind salamanders have to do with interstate commerce?"[12]

In contrast with its delineation of Congress' commerce power in *Lopez* and *Morrison*, the Court has broadly interpreted Congress' power under the Property Clause.[13] The Property Clause allows

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Kozinski, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995); *see also* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 168 (1996) (characterizing *Lopez* as a dramatic "about face"). Before *Lopez*, the last time the Supreme Court struck down a regulation as exceeding the scope of Congress' commerce power was in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

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

8. *See Morrison*, 529 U.S. at 613.

9. *See* Rivers and Harbors Act, ch. 425, 9-25, 30 Stat. 1151-55 (1899) (codified at 33 U.S.C. §§ 401-18 (1997)) (enacting because too much refuse in the water could obstruct the flow of commerce in the waterway); Lacey Act, Ch. 553, § 1, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 701, 3371-3378 and 18 U.S.C. § 42 (1988)) (forbidding the interstate transport of animals killed in violation of state law). For more on the history of American wildlife and plant law see Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 287-305 (1991).

10. *See* 16 U.S.C. § 1533 (1999). *But see* Palila v. Hawaii Dep't of Land and Natural Res., 471 F. Supp. 985, 995 (1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (asserting that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature").

11. *See* 16 U.S.C. § 1538 (1999).

12. Gavin R. Villareal, Note, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After* United States v. Lopez, 76 TEX. L. REV. 1125, 1125 (1998).

13. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976); Camfield v. United States, 167 U.S. 518 (1897).

Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[14] The scope of Congress' property power is significant, considering that nearly one-third of land in the United States is owned by the federal government.[15] More importantly, the Court has upheld Congress' regulation, under the Property Clause, of private activity on private land because it impacted public land.[16]

This note discusses the constitutionality of Congress' power to prohibit the harming of endangered species under the Commerce and Property Clauses. Part II examines the history of the Court's interpretation of Congress' commerce power, culminating in the recent *Morrison* decision. Part III determines that the ESA's prohibition against harming endangered species is unconstitutional because endangered species are not economic in nature and do not have a substantial effect on interstate commerce. Part IV studies Congress' broad power to regulate federal, as well as private, lands under the Property Clause. Part V concludes that the Property Clause is a logical source of congressional authority to restrict private activity on private land where it may harm endangered species.

## II. The Evolution of Congress' Commerce Power

### A. The Expanse of the Commerce Clause in *Gibbons v. Ogden*

To understand the implications of *Lopez* and *Morrison* on the constitutionality of the ESA, it is necessary to examine the history of the Court's construction of Congress' Commerce Clause power.[17] One of the first notable Commerce Clause cases was *Gibbons v. Ogden*.[18] At issue in *Gibbons* was the federal government's right to license steamboat operations in New York waters when New York

14. U.S. CONST. art. IV, § 3, cl. 2.

15. *See* BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 11 (1999). Public lands represent about one-half of the land mass of the eleven western states in the lower forty eight, and about two-thirds of Alaska. *See* GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 11 (4th ed. 2001).

16. *See Kleppe*, 426 U.S. 529; *Camfield*, 167 U.S. 518.

17. This Note only requires a general understanding of the primary Commerce Clause doctrines. For a more comprehensive analysis of the Commerce Clause see BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE (1999).

18. 22 U.S. (9 Wheat.) 1 (1824).

state had granted a monopoly to a particular operator.[19] The Court stated that Congress' commerce power "acknowledges no limitations, other than are prescribed in the Constitution."[20] The Court held that the federal statute under which Gibbons held his license was a constitutional exercise of the commerce power because Congress has the power to regulate both intrastate activities affecting interstate commerce and interstate commerce.[21] The Court, however, acknowledged that the states have the sole ability to regulate completely intrastate commerce.[22] Those activities falling outside of Congress' commerce power were those "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government."[23]

### B. Post-*Gibbons*, Pre-*Lopez*: Scope of Congress' Commerce Clause Power

After *Gibbons*, the Court used various approaches to regulate Congress' commerce power, culminating in *Wickard v. Fillburn*,[24] which was "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."[25] In 1914, the Court revisited the question of the scope of Congress' commerce power in *Houston, E. & W. Texas Railway Company v. United States* (the *Shreveport Rate Case*).[26] The *Shreveport Rate Case* was decided during a time of significant technological change.[27] Advances in technology and transportation revolutionized industry with the result that business activities once purely local in nature became national in scope.[28] In the *Shreveport Rate Case*, the Interstate Commerce Commission imposed regulations on railroads to prevent railroads from charging lower rates for intrastate transportation of goods than for interstate transportation.[29] The railroads challenged the

19. *See id.*
20. *Id.* at 196.
21. *See id.* at 186-98.
22. *See id.* at 195.
23. *Id.* at 195.
24. 317 U.S. 111 (1942).
25. *Lopez*, 514 U.S. at 560.
26. 234 U.S. 342 (1914).
27. *See Lopez*, 514 U.S. at 556.
28. *See id.*
29. *See Shreveport Rate*, 234 U.S. at 346.

Commission's authority to do so under the Commerce Clause.[30] The Court upheld the disputed regulations stating that Congress can regulate the instruments of commerce if the regulated activities have a "close and substantial relation to interstate commerce."[31] The Court rationalized that the lower rates, although purely local, discouraged interstate shipping and, thus, had a substantial effect upon interstate commerce.[32]

Around the time it decided the *Shreveport Rate Case*, the Court also used formalistic approaches to invalidate legislation it considered outside the scope of Congress' commerce power.[33] For instance, in several cases, the Court distinguished between "manufacturing" and "commerce" to strike down legislation. In *United States v. E.C. Knight Co.*,[34] the Court held that sugar manufacturers were outside the reach of the Sherman Act because sugar manufacturing had too indirect an effect upon commerce. In *Hammer v. Dagenhart*,[35] the Court struck down a statute prohibiting the interstate shipment of goods produced by child labor because the statute regulated "manufacturing" and not "commerce."

The Court also drew distinctions between "indirect" and "direct" effects on commerce, holding that only activities with a direct effect on commerce could be regulated.[36] In *Carter v. Carter Coal Co.*, the Court struck down the congressional regulation of miners' wages and working hours because the miners' wages and hours only had a secondary and indirect effect on interstate commerce.[37] However, the Court abandoned the indirect and direct effects test a year later in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[38] In *Jones & Laughlin Steel,* the Court also discarded the "manufacture" and "commerce" distinction enunciated in *E.C. Knight Co.* and

30. *See id.* at 350.

31. *Id.* at 355.

32. *See id.*

33. *See* Warner, *supra* note 5, at 327.

34. 156 U.S. 1 (1895).

35. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 116 (1941).

36. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 309 (1936); Railroad Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (holding that the regulation of pension and retirement plans of railroad workers was remote from commerce); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (finding that the regulation of wages and hours have no direct relation to interstate commerce).

37. 298 U.S. at 309.

38. 301 U.S. 1, 37-38 (1937).

*Hammer*, stating that labor relations are within the scope of Congress' regulation.[39] The Court in *Jones & Laughlin Steel*, upheld the constitutionality of the National Labor Relations Act of 1935 because Congress' commerce power extends to regulation of intrastate activities that have a "close and substantial relation" to interstate commerce.[40] The Court abandoned the formalistic tests in *Jones & Laughlin Steel* for a level of analysis that more liberally construed Congress' Commerce Clause power.

The apex of the Court's expansive interpretation of Congress' commerce power came in *Wickard v. Filburn*.[41] In *Wickard*, the Court found that Congress could constitutionally reach into Filburn's farm plots and regulate the wheat Filburn grew for his farm's use.[42] Filburn's individual wheat growing certainly had little or no impact on interstate commerce. However, the Court examined the cumulative effects of those similarly situated as Filburn and Filburn's home-grown wheat on interstate commerce.[43] The Court rationalized that the cumulative effect of home-consumed wheat "would have a substantial influence on price and market conditions."[44] *Wickard* is significant because the Court allowed the regulation of a wholly intrastate activity because, as a class of activities, it cumulatively had a substantial effect on interstate commerce. It is from the broad construction of the Commerce Clause in *Wickard* that the Court dramatically departed, fifty-three years later in *Lopez*.

### C. Congress' Commerce Power in *United States v. Lopez*

In *Lopez*, the Gun-Free School Zones Act[45] (hereinafter "Act") was challenged as an unconstitutional extension of Congress' commerce power.[46] The Act makes it a federal offense for anyone to knowingly possess a gun in a school zone.[47] The Court in *Lopez* explained that there are "three broad categories of activity that

39. *Id.* at 36-37.

40. *Id.* at 37.

41. 317 U.S. 111 (1942). "*Wickard* . . . is perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560.

42. 317 U.S. at 128.

43. *See id.*

44. *Id.*

45. 18 U.S.C. § 922 (q)(1)(A) (1988 & Supp. V 1993).

46. 514 U.S. at 551.

47. 18 U.S.C. § 922 (q)(2)(A) (1988 & Supp. V 1993).

Congress may regulate under its commerce power."[48] First, Congress may enact laws that regulate the use of the channels of interstate commerce to keep them "free from immoral injurious uses"; second, Congress may regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce; and third, Congress may regulate activities that substantially effect interstate commerce.[49]

The first two tests are rather straightforward. Congress can regulate the channels of commerce, such as motels,[50] and the instrumentalities of interstate commerce, like railroad rates in the *Shreveport Rate Case*.[51] The Court quickly dismissed the Act as not falling into either of the first two categories of permissible legislation.[52] The Court then examined whether the Act regulates activity that has a "substantial affect" on interstate commerce.[53] The Court considered the government's arguments that the possession of a gun in a school zone may result in violent crime, thus affecting interstate commerce by increasing the costs of insurance and reducing the willingness of people to travel to unsafe areas.[54] However, the Court established an analytic framework (later used in *Morrison*) to invalidate the Act.

First, the Court analyzed the activity being regulated in the Act: the possession of a gun in a school zone.[55] The Court held that regulating gun possession in itself is not economic and rejected the Act as a criminal statute having nothing to do with interstate commerce.[56] Second, the Court looked at the legislative history of the Act to see if there were facts relating gun possession to interstate commerce.[57] The Court noted that the Act and the Act's legislative history did not contain express congressional findings that possession of a gun in a school zone affected interstate commerce.[58] Because

48. 514 U.S. at 558-59.

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

50. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). The Court in *Heart of Atlanta* held that the public accommodation provisions of the Civil Rights Act of 1964 are constitutional. *Id.*

51. 234 U.S. at 355 (upholding the constitutionality of legislation that regulated railroad rates).

52. *See Lopez*, 514 U.S. at 559.

53. *See id.*

54. *See id.* at 563-64.

55. *See id.*

56. *See id.* at 561-62.

57. *See id.* at 562-63.

58. *See id.* at 562.

there lacked a readily apparent connection between gun possession in a school zone and interstate commerce, the Court remarked that the absence of formal findings was significant.[59] Third, the Court noted that there was no jurisdictional element establishing that the Act was passed in pursuance to Congress' regulation of interstate commerce.[60]

The lack of a discernible connection between commerce and gun possession, the lack of congressional findings on the matter and the missing jurisdictional element led the Court to strike down the Act as exceeding Congress' commerce power. When *Lopez* was decided, fifty-nine years had passed since the last time the Court struck down a regulation as surpassing Congress' commerce power.[61] Indeed, a federal judge remarked that before *Lopez* "you wonder why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'"[62] *Lopez* was a dramatic change in the Court's treatment of regulations enacted under the Commerce Clause. Was *Lopez* an aberration or a signal of the Court's new, limited delineation of Congress' Commerce power? Five years later, the Court in *Morrison* arguably answered both questions by reiterating its narrow construction of Congress' commerce power.

### D. *United States v. Morrison*

The Court in *Morrison* considered the constitutionality of Section 13981 of the Violence Against Women Act of 1994.[63] Section 13981 states that "persons within the United States shall have the right to be free from crimes of violence motivated by gender."[64] Section 13981 was enacted because Congress found that gender crimes deter potential victims from traveling interstate and from engaging in interstate business, diminish national productivity, increase medical costs and decrease the demand and supply of interstate products.[65] Section 13981 (c) provides civil remedies in either state or federal court for violations of the act.[66] In *Morrison*, Ms. Brzonkala, a student, raped by football players at her school,

59. *See id.* at 562-63.
60. *See id.* at 561.
61. *See Carter Coal Co.*, 298 U.S. at 309.
62. Kozinski, *supra* note 6, at 5.
63. 529 U.S. 598 (2000).
64. 42 U.S.C. §13981 (b) (2000).
65. *See* H.R. CONF. REP. NO. 103-711, at 385 (1994).
66. 42 U.S.C. § 13981 (c) (2000).

Virginia Polytechnic Institute, brought suit against her attackers under Section 13981 of the Violence Against Women Act.[67] Ms. Brzonkala's attackers challenged Congress' power under the Commerce Clause to enact Section 13981 of the Violence Against Women Act.[68]

The Court in *Morrison* used *Lopez* as a framework for its analysis. First, the Court examined the economic nature of the regulated activity. The Court stated that "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."[69] The Court, citing *Lopez*, stated that if it were to accept the "costs of crime" and "national productivity" arguments, then Congress could regulate all violent crime, traditionally within the scope of the states' police power.[70] Therefore, the Court concluded that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[71]

Second, the Court stated that Section 13981 has no jurisdictional element establishing that Congress' regulation of interstate commerce creates the federal cause of action under Section 13981. Finally, the Court held that although Congress had made findings connecting gender violence to interstate commerce, the Constitution required a distinction between what is truly national and what is truly local.[72] Unlike the Gun-Free School Zones Act in *Lopez*, the enactment of Section 13981 was supported by data demonstrating the connection between violence against women and interstate commerce.[73] However, the Court disregarded those Congressional findings.[74] Instead, the Court asserted that "whether particular operations affect interstate commerce sufficiently to come under the constitutional

67. 529 U.S. at 602.

68. *See id.*

69. *Id.* at 613.

70. *See id.*

71. *Id.*

72. *See id.* at 615.

73. *See Morrison*, 529 U.S. at 629 (Souter, J., dissenting); *see, e.g., Violence Against Women, Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee of the Judiciary*, 102d Cong., 2d Sess. (1992); *Hearing on Domestic Violence, Hearing Before the Senate Committee on the Judiciary*, 103d Cong., 1st Sess. (1993) (S. Hearing 103-596); *Violent Crimes Against Women, Hearing Before the Senate Committee on the Judiciary*, 103d Cong., 1st Sess. (1993) (S. Hearing 103-726); *Violence Against Women: Fighting the Fear, Hearing Before the Senate Committee on the Judiciary*, 103d Cong., 1st Sess. (1993) (S. Hearing 103-878).

74. *See Morrison*, 529 U.S. at 614.

power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[75] That is, the Court stated that only it could determine if Congress was regulating a local, intrastate matter.

The Court's reasoning in *Morrison*, adopted from *Lopez*, has been characterized as narrow and shallow.[76] In both *Lopez* and *Morrison*, the challenged statutes covered areas traditionally regulated by the states' police power. Therefore, *Morrison* may only exemplify the Court's application of *Lopez* to a similar set of facts. Perhaps parties in future cases will successfully be able to argue factual differences in their cases to prevent the Court's narrow application of the Commerce Clause. However, it seems logical to interpret Morrison as rendering it virtually impossible for Congress to regulate any non-economic activity under the Commerce Clause.[77]

## III. The ESA cannot be upheld under the Commerce Clause

### A. Background of the ESA

Congress enacted the ESA in 1973 to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species."[78] Congress declared that "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[79] To accomplish these goals, the ESA protects endangered and threatened species listed pursuant to section four.[80] The ESA applies to both federal agency and private actions.[81]

75. *Id.* (quoting *Lopez*, 514 U.S. at 557, n.2).

76. *See* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1517 n.258 (2000).

77. *See* Alan J. Heinrich, *Symposium on New Directions in Federalism: Introduction*, 33 LOY. L.A. L. REV. 1275, 1276 (2000).

78. 16 U.S.C. § 1531(b) (2000).

79. § 1531(a)(3).

80. *See* 16 U.S.C. § 1533(b)(1)(a) (listing a species as endangered is done using the best scientific and commercial data, taking current government actions into account). Often, however, listing of a species becomes a highly politicized process. *See also* John Copeland Nagle, *Playing Noah*, MINN. L. REV. 1171 (1998) (discussing procedures involved in listing a species and arguing that the Fish and Wildlife Service "plays Noah" in the listing decision). The procedures and controversies surrounding a listing decision are outside the scope of this Note.

81. *See* 16 U.S.C. §§ 1536, 1538 (2000).

Section nine of the ESA applies to private actions.[82] Section nine prohibits any person from, among other things, importing or exporting,[83] taking,[84] selling,[85] shipping[86] or selling in interstate commerce[87] any listed endangered species.

The ESA defines "take" as meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct."[88] In *Sweet Home v. Babbitt*,[89] the Supreme Court upheld the Secretary of Interior's[90] definition of harm as including significant habitat modification or degradation where such modification or degradation actually kills or injures wildlife by significantly impairing essential behavioral patterns.[91] Private individuals, therefore, are prevented from "harming" listed species and from modifying or degrading the habitat of listed species on their property.

**B. Constitutionality of ESA's Taking Prohibition**

*Morrison* and *Lopez* provide the three part framework for analyzing the constitutionality of a Commerce Clause regulation. First, the Court should determine whether the ESA has a jurisdictional element showing that Congress enacted the ESA pursuant to its regulation of interstate commerce. The congressional findings and declaration of purposes and policy of the ESA, like the Gun-Free School Zones Act, do not mention interstate commerce, or even commerce, as a goal of the statute.[92] Like the Violence Against Women Act in *Morrison*, the ESA does not have a jurisdictional element specifying that it was passed in pursuance of Congress' commerce power. Therefore, the second issue is whether the ESA is an economic activity.

The ESA does not have a substantial relation to interstate

82. *See* § 1538(a)(1).

83. *See* § 1538 (a)(1)(A).

84. *See* § 1538 (a)(1)(B).

85. *See* § 1538 (a)(1)(D).

86. *See id.*

87. *See* § 1538 (a)(1)(E).

88. 16 U.S.C. § 1532 (19) (2000).

89. 515 U.S. 687 (1995).

90. *See id.* at 691 (explaining that the Secretary has the authority to promulgate, through the Fish and Wildlife Service, regulations that define terms in the ESA).

91. *See id.*

92. *See* 16 U.S.C. §1531 (2000).

commerce. Endangered species, like violent crime, are not an economic activity. Tourism, hunting and scientific research generated by endangered species may be economic activities. However, the ESA's section nine taking prohibition does not regulate these activities. It simply prohibits the "taking" of an endangered species. There is an argument that endangered species have a substantial effect on interstate commerce, albeit a fragile link, through ecotourism.[93] However, the flaw in this approach is that it examines the effect that ecotourism, and not endangered species, has on interstate commerce. This approach examines the secondary effect of regulating endangered species on interstate commerce. The ESA regulates endangered species that have no primary, direct effect on interstate commerce. Allowing the regulation of endangered species because they generate tourism, hunting, and research would permit Congress to regulate all activities that may lead to the taking of an endangered species "regardless of how tenuously they relate to interstate commerce."[94]

Finally, following *Lopez* and *Morrison*, the Court must consider the impact of the ESA on interstate commerce. The ESA, like the Gun-Free School Zones Act, does not have a substantial effect on interstate commerce that is "visible to the naked eye."[95] The answer to whether endangered species have a substantial effect on interstate commerce depends largely on the scope of the analysis. What constitutes the activity that must have a substantial effect on interstate commerce?[96] Is the "activity" the endangered specie, endangered species as an aggregate, or the commercial activity affecting an endangered specie, such as the construction of a home?[97]

The Hawaii district court in *Palila*[98] *v. Hawaii Department of Land and Natural Resources* stated that the legislative history from the ESA supported a connection with interstate commerce.[99] The *Palila* court stated that because Congress has determined that endangered species are of national importance, enough to rise to a

93. *See* § 1531(a)(3).

94. *Lopez*, 514 U.S. at 564.

95. *Id.* at 563.

96. *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1049-52 (D.C. Cir. 1997).

97. *See id.*

98. "Palila" is actually the name of the endangered bird in the case. "For the first time in American legal history a non-human became a plaintiff in court. Moreover, the bird won!" ROD NASH, THE RIGHTS OF NATURE 177 (1989).

99. 639 F.2d 495 (9th Cir. 1981), *aff'g*, 471 F. Supp 985, 994-95 (1979).

level of national concern, Congress may regulate endangered species under the Commerce Clause.[100] A legislative report on a preceding bill that contained the essential features of the ESA stated that "[i]t is in the best interests of mankind to minimize the losses of genetic variations. The reason is quite simple: they are potential resources."[101] The *Palila* court cited this report to confirm that "a national program to protect... endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists."[102] This level of analysis, however, examines the secondary effects of endangered species on interstate commerce. The Palila bird, in fact, never left Hawaii and was never directly in interstate commerce.[103]

The *Palila* court finds it sufficient that Congress determined that endangered species are of national importance to hold that Congress may regulate endangered species under its Commerce Clause power.[104] Using this rationale, the Court could have upheld Section 13981 of the Violence Against Women Act as a constitutional exercise of Congress' commerce power because gender violence rises to a level of national concern. Under *Morrison*, the ESA cannot be held as a constitutional exercise of Congress' Commerce Clause power simply because protecting endangered species rises to a level of national concern. The Court would likely hold that rising to a level of national concern is not equivalent to substantial effect on interstate commerce. The Court's analysis, still, would depend on which question is asked when analyzing Congress' power to regulate endangered species. Is it the endangered specie, endangered species as a whole, or the commercial activity affected by endangered species that must substantially affect commerce?

In *National Association of Home Builders v. Babbitt*, the appellate judges split on which of the three approaches to take in determining whether the ESA substantially affected interstate commerce.[105] In that instance, landowners and local governments challenged the taking provision of the ESA.[106] They claimed that the

100. 471 F. Supp. at 994-95.
101. H.R.REP. NO. 93-412, at 5 (1973).
102. 471 F. Supp. at 995.
103. *See id.* at 994.
104. *Id.* at 995.
105. 130 F.3d 1041 (D.C. Cir. 1997).
106. *See id.* at 1044.

ESA's prohibition against taking the Delhi Sands Flower-Loving Fly, an endangered specie, preventing the construction of an intersection near a hospital, exceeded Congress' commerce power.[107] Populations of the Delhi Sands Flower-Loving Fly are found entirely in southern California within an eight-mile radius.[108]

Judge Wald, writing for the court, held that section nine's prohibition against taking the Delhi Sands Flower-Loving Fly fit within *Lopez*'s first and third categories of constitutional regulation.[109] First, Judge Wald stated that the prohibition against taking the fly was within the use of channels on interstate commerce because it aids the prohibition against transporting and selling endangered species in interstate commerce.[110]

Judge Wald then put forth a "biodiversity" rationale, arguing that the extinction of a species "has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purpose."[111] Judge Wald stated that the aggregate effect of the extinction of all similarly situated endangered species had a substantial effect on interstate commerce.[112]

Perhaps taking an endangered specie not in interstate commerce can "substantially affect" interstate commerce by affecting other species or ecosystems in interstate commerce.[113] Congress utilized this rationale when enacting the Marine Mammal Protection Act of 1972 under its commerce power, reasoning that the disruption of marine mammals not in interstate commerce may disturb ecosystems affecting populations of animals that are the subject of interstate commerce.[114] As one commentator noted, "this theory might at its logical extreme support federal legislation with regard to everything that is alive."[115]

In *Lopez,* the Court voiced the same concern when striking down the Gun-Free School Zones Act, that the government may regulate any activity. "[I]f we were to accept the Government's arguments, we

107. *See id.* at 1044-45.
108. *See id.* at 1044.
109. *See id.* at 1046-49.
110. *See id.* at 1046-47.
111. *Id.* at 1053.
112. *See id.* at 1046.
113. *See* Johnson, *supra* note 5, at 81-82.
114. 16 U.S.C. § 1361(5)(B) (1999).
115. THOMAS A. LUND, AMERICAN WILDLIFE LAW 49 (1980).

are hard pressed to posit any activity... that Congress is without power to regulate."[116] The aggregate approach[117] used in Judge Wald's analysis is problematic in that, like the Gun-Free School Zones Act in *Lopez*, the connection between the regulated activity and interstate commerce is too attenuated and the possibility for regulation endless. If the Court were to examine the direct connection between an endangered specie and interstate commerce, the ESA would be held unconstitutional.

Judge Henderson, in her concurring opinion, stated that the appropriate gauge is whether the protection of the flies substantially affects commercial development activity.[118] Judge Henderson's approach does not analyze the primary effect of the fly on interstate commerce either. It focuses, instead, on the secondary effects of the fly on proposed construction. Judge Henderson's approach can be characterized as the "commercial activity approach" because she focuses her analysis on the effect of the prohibited construction and interstate commerce. Judge Henderson concluded that the fly affected plans to build a new intersection, therefore, the taking prohibition substantially affected interstate commerce.[119]

Judge Henderson's approach, like Judge Wald's proposition, has too many links in the causal chain between the regulated activity and interstate commerce. Using Judge Henderson's approach, any legislation could be a constitutional exercise of Congress' commerce power as long as it somehow affected interstate commerce through commercial activity. Seemingly *Morrison* would have been constitutional under this attenuated causal chain because gender violence affects interstate travel that in turn has an effect on interstate commerce. The Court explicitly rejected this approach in *Morrison*.[120]

Dissenting Judge Sentelle stated that the killing of flies that live in an eight-mile radius in southern California, not interstate and not in commerce, cannot be regulated by Congress under the Commerce Clause.[121] Judge Sentelle argued that the ESA, like the Gun-Free School Zones Act challenged in *Lopez*, does not regulate commerce

116. 514 U.S. at 564.

117. *See* Lisa Wilson, Comment, *Substantial Effects under* Lopez*: Using a Cumulative Impact Analysis for Environmental Regulations*, 11 TUL. ENVTL. L.J. 479, 480 (1998) (arguing that the ESA is constitutional under the Commerce Clause because the aggregate effect of endangered species has a substantial impact on interstate commerce).

118. *See Nat'l Ass'n of Home Builders,* 130 F.3d at 1058 (Henderson, J., concurring).

119. *See id.* at 1057-60 (Henderson, J., concurring).

120. 529 U.S. at 598.

121. *See* 130 F.3d at 1061 (Sentelle, J., dissenting).

because "[t]here is no commerce in the Delhi Sands Flower-Loving Fly."[122] Judge Sentelle, looking at the individual specie, correctly argued that a fly that lives completely intrastate cannot be said to substantially affect interstate commerce.[123]

If either Judge Wald's or Judge Henderson's approaches are adopted, then the Court's concern raised in *Lopez* and *Morrison* that the government may regulate any activity is applicable to the ESA. Seemingly anything could harm an endangered species and, thus, have a substantial effect on interstate commerce. Judge Sentelle also voiced these concerns by repeatedly stating that using Judge Wald's biodiversity approach and Judge Henderson's commercial activity approach, he saw no stopping point to what Congress could regulate under its commerce power.[124]

The Court's analysis of congressional Commerce Clause regulations in *Morrison* and *Lopez* raises serious doubt as to the validity of the ESA's section nine taking prohibition. The Fourth Circuit upheld ESA section nine in *Gibbs v. Babbitt*,[125] one month after the Court decided *Morrison*. In *Gibbs*, cattle ranchers and farmers challenged the ESA's section nine taking provision prohibiting the taking of red wolves on their land.[126] The *Gibbs* court held that the taking of red wolves is an economic activity because the protection of commercial and economic assets is a primary reason for the farmers and cattle ranchers to kill or harm the wolves.[127] The *Gibbs* court stated that there is a direct connection between the wolves and interstate commerce because of wolf-related tourism, scientific research and commercial trade in pelts.[128]

The *Gibbs* opinion is flawed in that, like Judges Henderson and Wald in *National Association of Home Builders*, the analysis is between interstate commerce and an activity related to endangered species. The *Gibbs* court does not analyze the direct connection, if any, between the red wolf and interstate commerce. Merely because the red wolves generate tourism does not signify the wolves as an economic or commercial activity. Basing such analysis is dangerous where a protected endangered specie, such as a fly, does not generate

122. *Id.* at 1067 (Sentelle, J., dissenting).

123. *See id.*

124. *See id.*

125. 214 F.3d 483, 492 (4th Cir. 2000) (petition for cert. filed on November 22, 2000).

126. *See id.* at 489.

127. *See id.* at 492.

128. *See id.*

tourism or scientific research. Could Congress only constitutionally protect tourism-generating species? The Court might be answering this question during this term as the farmers in *Gibbs* filed a petition for certiorari on November 22, 2000. Using the Commerce Clause as a foundation for the ESA after *Lopez* and *Morrison* forces courts to create irrational justifications to find a connection between endangered species and interstate commerce.

## IV. Congress' Property Power: Extending Over Public and Private Lands

The Property Clause grants Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[129] Congress has power under the Property Clause to protect public lands from harm and trespass, to control their occupancy and use, and stipulate the conditions upon which others can gain rights in the lands.[130] Federal public lands make up one third of all land in the United States.[131] And in the eleven westernmost states, almost half of the land is federally owned.[132] States have jurisdiction over the federal public land within their borders.[133] If state law conflicts with federal law, however, federal law preempts state law under the Supremacy Clause.[134] The scope of Congress' property power is, therefore, important because the federal government has jurisdiction over a vast amount of land.

In *Camfield v. United States,* the Court held that the federal government enjoys the same rights over federal public land as does a private landowner.[135] Those rights include the ability to protect the public lands from nuisances on adjoining private property.[136] In *Camfield,* the Court held that the federal government can regulate private activity on private land when such activity interferes with the

129. U.S. CONST. art. IV, § 3, cl. 2.

130. *See* Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917).

131. *See* BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, PUBLIC LAND STATISTICS 1 (1983).

132. *See* ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION 58 (William E. Riebsame et al. eds., 1997). In Nevada, for instance, nearly eighty-three percent of the state is federal public land compared with only seven-tenths of one percent in New York. *See id.*

133. *See Kleppe,* 426 U.S. at 543.

134. *See id.*; *see also* United States v. California, 332 U.S. 19, 36 (1947).

135. 167 U.S. 518, 526 (1897).

136. *See id.* at 524.

public lands.[137] The Court in *Camfield* invalidated the incidental enclosure of public lands by fences constructed on private lands resulting from the checkerboard land grant scheme relied upon by Congress to encourage settlement and growth in the West.[138]

The Court in *Kleppe v. New Mexico*[139] upheld the *Camfield* doctrine stating that "the power granted by the Property Clause is broad enough to reach beyond territorial limits."[140] In *Kleppe,* the Court held that the Property Clause also gives Congress the power to protect wildlife on the public lands.[141] In *Kleppe*, the New Mexico Livestock Board challenged the Wild Free-roaming Horses and Burros Act[142] as lying outside the scope of Congress' power under the Property Clause.[143] The Wild Free-roaming Horses and Burros Act prohibits the capture, branding, harassment or killing of wild free-roaming horses and burros.[144] A landowner who discovers protected horses or burros on his or her land may not destroy or remove the animals but must inform the nearest federal marshal or agent of the Secretary who will arrange to have the animals removed.[145]

The New Mexico Livestock Board raised the concern that the Act's protection of animals that stray onto private land would extend federal jurisdiction over every wild horse and burro that stepped on federal land.[146] The Court upheld the Wild Free-roaming Horses and Burros Act as a constitutional exercise of congressional power under the Property Clause.[147] The Court, however, refused to answer the extent that the Property Clause enables Congress to protect animals on private land.[148] The Court stated that "[w]e . . . leave open the question of the permissible reach of the Act over private lands under

137. *Id.* at 524-25.

138. *See id.* at 520, 525-26. (illustrating the checkerboard land division system granting odd-numbered sections of land to the railroads and reserving even-numbered sections for disposal by the federal government).

139. 426 U.S. 529 (1976).

140. *Id.* at 538.

141. *Id.* at 546.

142. 16 U.S.C. § 1331 (2000).

143. *See Kleppe*, 426 U.S. at 534.

144. *See* 16 U.S.C. § 1331 (declaring that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West).

145. *See* 16 U.S.C. § 1334.

146. *See Kleppe*, 426 U.S. at 546.

147. *See id.*

148. *See id.*

the Property Clause."[149] Still, the Court did state that it was clear that regulations under the Property Clause "may have some effect on private lands not otherwise under federal control."[150] *Kleppe* remains good law and courts have continued to uphold, but not broaden, congressional power under the Property Clause.

## V. The Property Clause: Congressional Authority for the ESA

Congress' regulation of the "taking" of endangered species under the Property Clause avoids the problems related to connecting endangered species to interstate commerce.[151] The decision regarding whether Judge Wald's biodiversity, Judge Henderson's commercial activity, or Judge Sentelle's individual specie approach should be applied is never reached. The effect of wiping out a species is not entirely known.[152] Scientific data cannot prove that the extinction of one species does not affect others.[153] The Property Clause approach validates congressional concern for endangered species because the extinction of one species could logically have an effect on other species located on federal land. Indeed, a reason for the enactment of the ESA was to protect "the unforeseeable place that such creatures may have in the chain of life on this planet."[154]

It is more logical to argue that the extinction of one species could affect other species on federal land, however, than to claim that extinction of a non-commercial species affects endangered species as an aggregate that in turn affects interstate commerce. The causal chain is much less attenuated in the former approach because the effect of the endangered species on interstate commerce is directly examined. This approach is somewhat related to Judge Wald's biodiversity argument. Instead of asking what secondary affects the

149. *Id.* at 547.

150. *Id.* at 546.

151. *See, e.g.*, John Copeland Nagle, *The Commerce Clause Meets the Dehli Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 186-87 (1998) (arguing that the choice in connecting endangered species is between a biodiversity or ecosystem approach).

152. *Compare* CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 122 (citing an estimate that "the loss of one species of plant eliminates en passant ten to thirty other species) *with id.* at 130-32 (arguing that it is possible to distinguish the value of species).

153. *See* Nagle, *supra* note 80, at 1210-11 (noting that endangered species serve a canary-in-the-mine function so that a loss may serve as an early warning that the rest of the ecosystem is in danger). *See also* NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 179-82 (1995).

154. Tennessee Valley Authority v. Hill, 437 U.S. 153, 179 (1978).

regulation of an endangered species has on interstate commerce, the approach under the Property Clause looks at the primary effect of an endangered specie on federal property. Locating Congress' power to regulate endangered species under the Property Clause is also a sensible approach. The Court has already upheld the regulation of animals on private and federal land.[155] Regulating endangered species on private land fits within this category of permissible regulation under the Property Clause.

## VI. Conclusion

This note provides an alternative for establishing the constitutionality of the ESA's section nine prohibition against taking an endangered specie. The Property Clause is a logical source of congressional power to regulate endangered species. Conserving endangered species and their habitats is a national priority because of scientific uncertainty regarding their loss. Therefore, providing a solid constitutional foundation for the regulation of endangered species should be of equal importance.

155. *See Kleppe*, 426 U.S. at 546.