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# Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause?

## THE SPLIT IN THE CIRCUITS OVER WHETHER THE REGULATED ACTIVITY IS PRIVATE COMMERCIAL DEVELOPMENT OR THE TAKING OF PROTECTED SPECIES\*

*Bradford C. Mank†*

### I. INTRODUCTION

In enacting the 1973 Endangered Species Act (ESA)<sup>1</sup> to protect a wide range of endangered and threatened species, Congress primarily relied on its authority under the Commerce Clause.<sup>2</sup> From 1937 until 1995, the Supreme Court applied a very lenient rational basis standard for reviewing congressional legislation under the Commerce Clause.<sup>3</sup> Under

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<sup>1</sup> 16 U.S.C. §§ 1531-44 (2000).

<sup>2</sup> See *infra* notes 85-91 and accompanying text.

<sup>3</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 604-09 (1995) (Souter, J., dissenting) (criticizing the *Lopez* majority for claiming to use but failing to follow deferential rational basis review used by the Court since 1937); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281-83 (1981) (approving under Commerce Power federal regulation of intrastate mining activities under the Surface Mining Control and Reclamation Act of 1977 to prevent ruinous competition among states likely to lead to inadequate environmental standards); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding use of Commerce Power to

that highly deferential rational basis, the Court would almost certainly have approved the constitutionality of the ESA.<sup>4</sup> However, since 1995, the Court has applied a more stringent approach in *United States v. Morrison*<sup>5</sup> and *United States v. Lopez*,<sup>6</sup> rejecting two federal statutes as exceeding congressional authority to regulate interstate commerce.<sup>7</sup> A number of commentators have observed that *Morrison* and *Lopez* raise serious questions about whether Congress has authority under the Commerce Clause to regulate either purely intrastate species or those with insignificant commercial worth.<sup>8</sup> Many endangered or threatened species, about half,

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enact civil rights legislation prohibiting racial discrimination in public accommodations); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: Lopez, Morrison, SWANCC, and Gibbs*, *Envtl. L. Rep. (Envtl. L. Inst.)*, Apr. 2001, at 10413, 10413 (discussing highly deferential standard of review in Commerce Clause cases from 1937 until 1995); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 735-36 (2002) (same); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1216-19 (2003) (same); Eric Brignac, *The Commerce Clause Justification of Federal Endangered Species Protection: Gibbs v. Babbitt*, 79 N.C. L. REV. 873, 874, 883 (2001) ("After the Court's decision in *NLRB v. Jones* in 1937, the Commerce Clause was a virtual blank check that Congress could use to pass almost any legislation."); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215, 235 (2000) (same); *infra* notes 135, 201 and accompanying text.

<sup>4</sup> See Mank, *supra* note 3, at 792 (arguing 1973 ESA clearly meets rational basis standard for advancing commercial interests under the Commerce Clause).

<sup>5</sup> 529 U.S. 598 (2000).

<sup>6</sup> 514 U.S. 549 (1995).

<sup>7</sup> See *infra* notes 151-212 and accompanying text.

<sup>8</sup> See, e.g., Mank, *supra* note 3, at 723-27 & *passim* (arguing *Lopez* and *Morrison* involve significant issues regarding whether Congress has the authority to regulate endangered species that lack significant commercial value or exist in only one state); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998) (arguing *Lopez* raises serious questions about whether Congress has the authority to regulate endangered species that lack significant commercial value); White, *supra* note 3, at 217-18 (observing *Lopez* raises questions about authority of Congress to regulate species with little commercial value). If the Supreme Court struck down the Endangered Species Act as exceeding congressional power under the Commerce Clause, Congress and the President might be able to achieve some level of protection through the Constitution's treaty power, but that issue is beyond the scope of this Article. See U.S. CONST., art. II, § 2, cl. 2 (treaty power); *id.* art. VI, cl. 2 (stating treaties are "supreme Law of the Land" and binding on states); *Missouri v. Holland*, 252 U.S. 416, 430-35 (1920) (upholding treaty between United States and Great Britain, on behalf of Canada, to protect migratory birds); White, *supra* note 3, at 224-34 (discussing possible use of treaty power to protect endangered species). Undoubtedly, some endangered or threatened species such as the bald eagle or grizzly bear have enough commercial value from tourism or medicinal value to satisfy even a narrow interpretation of the commerce power. See Nagle, *supra*, at 184-86.

have habitats limited to one state.<sup>9</sup> Most endangered or threatened species limited to one state have little economic value in interstate commerce.<sup>10</sup> Furthermore, many threatened and endangered species that cross state lines lack significant commercial value and, therefore, even their regulation under the ESA may present significant Commerce Clause issues.<sup>11</sup>

Ruling on the ESA in the Spring of 2003, both the Fifth and the District of Columbia Circuits held that Congress has the authority under the Commerce Clause to protect solely intrastate endangered or threatened species from the harms stemming from the development of private lands. The two circuits, however, used completely opposite reasoning to reach the same result. On March 26, 2003, the Fifth Circuit in *GDF Realty Investments v. Norton*<sup>12</sup> rejected the government's argument that the economic impact of the commercial development regulated under the statute was the appropriate focus of the recent Supreme Court test, namely, whether the statute regulates activities having a substantial effect on interstate commerce. Instead, the Fifth Circuit concluded that intrastate spiders and beetles, which have no economic impact by themselves, do have substantial impacts on interstate commerce when their impacts are aggregated with the impacts of all other protected species, and that aggregation of all endangered species is appropriate because of the "interdependence of all species."<sup>13</sup>

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<sup>9</sup> See Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (observing that 521 of 1082 species in United States listed as endangered or threatened in 1997 were found in only one state). One commentator has questioned whether intrastate endangered species necessarily raise greater Commerce Clause issues than some species that live in more than one state, but lack significant commercial value. See Nagle, *supra* note 8, at 185-86 n.49 ("Why the fact that a bird or animal crosses state lines of its own volition and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained."). Both judges and commentators, however, have suggested that exclusively intrastate species raise the most difficult issues under the Commerce Clause. See Mank, *supra* note 3, at 751-53 (disagreeing with Professor Nagle that distinction between interstate and intrastate species has no legal significance).

<sup>10</sup> See Mank, *supra* note 3, at 725; Nagle, *supra* note 8, at 182 (discussing several intrastate endangered species with no known commercial or recreational value).

<sup>11</sup> See Mank, *supra* note 3, at 725, 753; Nagle, *supra* note 8, at 186 (arguing many endangered species have little commercial value); Brignac, *supra* note 3, at 883 (same).

<sup>12</sup> 326 F.3d 622 (5th Cir. 2003), *reh'g denied*, No. 01-51099, 2004 U.S. App. LEXIS 3933 (5th Cir. Feb. 27, 2004) (en banc) [hereinafter *GDF*].

<sup>13</sup> *Id.* at 640. See *infra* notes 416-26 and accompanying text.

By contrast, on April 1, 2003, in *Rancho Viejo LLC v. Norton (Viejo)*,<sup>14</sup> the District of Columbia Circuit adopted the reasoning that the Fifth Circuit had explicitly rejected, concluding that the “regulated activity is Rancho Viejo’s planned commercial development, not the arroyo toad that it threatens.”<sup>15</sup> In a footnote, without citing *GDF*, the District of Columbia Circuit stated that it did not “mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation.”<sup>16</sup> On July 22, 2003, the District of Columbia Circuit by a seven-to-two vote denied Rancho Viejo’s request for a rehearing en banc.<sup>17</sup> In separate dissenting opinions from the denial of rehearing en banc, Judges Sentelle and Roberts each cited *GDF* in arguing that the three-judge panel decision was inconsistent with recent Supreme Court Commerce Clause decisions because it inappropriately focused on the commercial development rather than on the toad.<sup>18</sup>

The differences in the rationales of the *GDF* and *Viejo* courts are significant because they affect the scope of which types of projects the ESA may regulate. If a court focuses on the ESA’s means in regulating the economic impact of the activities that harm endangered species, then the government likely can regulate large scale construction projects, but not a lone hiker walking through a forest or perhaps even individual homeowners, although in the aggregate both types of activities could cause significant harm to these species.<sup>19</sup> Indeed, Chief Judge Ginsburg in his concurring opinion in *Viejo* stated:

Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if – but only if – the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the

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<sup>14</sup> 323 F.3d 1062 (D.C. Cir. 2003).

<sup>15</sup> *Id.* at 1072.

<sup>16</sup> *Id.* at 1067 n.2.

<sup>17</sup> *Rancho Viejo LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (en banc), *cert. denied*, 2004 U.S. LEXIS 1652 (U.S. Mar. 1, 2004) [hereinafter *Viejo*].

<sup>18</sup> *Id.* at 1158-60 (Sentelle, J., dissenting from denial of rehearing en banc); *id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc).

<sup>19</sup> See Nagle, *supra* note 8, at 189-91, 208-15 (discussing choice of activity problem under Endangered Species Act of 1973 and arguing courts should limit statute to commercial activities that destroy endangered species or their habitat).

homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.<sup>20</sup>

By contrast, under the rationale of *GDF*, the government could regulate a lone hiker or landscaping homeowner who harms any endangered species, no matter how insignificant, because the loss of any endangered species threatens the delicate balance of ecosystems, and harm to ecosystems would cause substantial harms to interstate commerce.<sup>21</sup>

The disagreement between the Fifth and District of Columbia Circuits is understandable because the Supreme Court's recent decisions do not provide clear answers to how courts should analyze legislation under the Commerce Clause, especially regarding how to distinguish between commercial activities within the scope of the commerce power and non-commercial activities outside Congress's authority.<sup>22</sup> In 1995, the Supreme Court in *United States v. Lopez*,<sup>23</sup> a five-to-four decision written by Chief Justice Rehnquist, held that a federal statute regulating intrastate gun possession near local schools exceeded Congress's power because the Gun-Free School Zones Act (GFSZA) regulated activities that did not substantially affect interstate commerce.<sup>24</sup> The Court stated, "the possession of a gun in a school zone . . . has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."<sup>25</sup> In 2000, in *United States v. Morrison*,<sup>26</sup> a five-to-four decision written by Chief Justice Rehnquist and involving a split among exactly the same justices who had

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<sup>20</sup> *Viejo*, 323 F.3d at 1080 (Ginsburg, C.J., concurring). The majority opinion in *Viejo* suggested that the lone hiker might be subsumed within the statute's broader purposes, but declined to answer the question because the facts of the case involved a substantial commercial housing development and not a lone hiker. *Id.* at 1077-78; see also *infra* notes 333-35, 441 and accompanying text.

<sup>21</sup> See *infra* notes 416-26 and accompanying text. Undoubtedly, some endangered or threatened species such as the bald eagle or grizzly bear have enough commercial value from tourism or medicinal value to satisfy even a narrow interpretation of the commerce power. See Nagle, *supra* note 8, at 184-86.

<sup>22</sup> See Schapiro & Buzbee, *supra* note 3, at 1202, 1204-05, 1228, 1258-60 (arguing *Lopez* and *Morrison* fail to clarify which types of commercial activities are within scope of Commerce Clause and give courts too much discretion to decide scope of commerce power); Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1276-87 (2003) (discussing difficulties lower courts have encountered in distinguishing economic from non-economic activities).

<sup>23</sup> 514 U.S. 549 (1995).

<sup>24</sup> *Id.* at 559-63.

<sup>25</sup> *Id.* at 560-61.

<sup>26</sup> 529 U.S. 598 (2000).

disagreed in *Lopez*,<sup>27</sup> the Court held that a federal statute penalizing intrastate gender-based violence fell outside the commerce power because the law regulated activities that were essentially non-economic in nature.<sup>28</sup> The Court struck down the statute even though Congress had made explicit findings in the statute regarding the economic impacts of gender-based violence on interstate commerce.<sup>29</sup> While the cases reflect a more narrow interpretation of the Commerce Clause, it is unclear how far the Court in *Lopez* and *Morrison* intended to repudiate prior decisions. Numerous commentators have speculated regarding the extent to which the reasoning in *Lopez* and *Morrison* could be used to invalidate other legislation based on the Commerce Clause, but there are few clear answers to how courts should distinguish between economic and non-economic activities.<sup>30</sup>

A more recent Supreme Court decision only raises further questions about how closely related the commercial activities must be to the regulated entities for the commercial activity to justify legislation under the Commerce Clause. In 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC),<sup>31</sup> the Army Corps of Engineers (Corps) claimed jurisdiction under the 1972 Federal Water Pollution Control Act<sup>32</sup> (FWPCA) to regulate isolated, intrastate seasonal ponds that provided habitats for migratory birds. The landowner challenged the regulation both on the ground that the Corps exceeded its statutory authority by regulating isolated waters, or, alternatively, that Congress exceeded its Commerce Clause power by seeking to regulate

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<sup>27</sup> Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, Kennedy and Thomas. *Id.* at 600. Justices Stevens, Souter, Ginsburg, and Breyer again dissented. *Id.*

<sup>28</sup> *Id.* at 613-19. The Court also held that Congress lacked authority under § 5 of the Fourteenth Amendment to enact § 13981 of the Violence Against Women Act, 42 U.S.C. § 13981(b) (1994), but that issue is beyond the scope of this Article. *Id.* at 619-27; see also A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001).

<sup>29</sup> *Morrison*, 529 U.S. at 614.

<sup>30</sup> See Schapiro & Buzbee, *supra* note 3, at 1202, 1204-05, 1228, 1258-60 (arguing *Lopez* and *Morrison* fail to clarify which types of commercial activities are within scope of Commerce Clause and give courts too much discretion to decide scope of commerce power); Seinfeld, *supra* note 22, at 1276-87 (discussing difficulties lower courts have encountered in distinguishing economic from non-economic activities).

<sup>31</sup> 531 U.S. 159 (2001).

<sup>32</sup> See generally Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000).

such waters. The Court avoided the constitutional issue by narrowly interpreting the statute to exclude isolated waters, concluding that Congress intended the statute to apply only to navigable waters. In dicta, however, the Court suggested that a broader reading of the statute would have raised significant concerns under the Commerce Clause because land use regulation is a traditional area of local government control.<sup>33</sup>

The Corps had initially relied on the commercial value of the migratory birds as justifying congressional regulation of the isolated, intrastate waters that provided habitat for the birds, but late in the appellate process the government also contended that the commercial value of the projects causing harm to the waters was another basis for finding substantial impacts on interstate commerce.<sup>34</sup> The SWANCC Court suggested in dicta that the commercial activities were too far removed from the statute's "object" of regulating "navigable waters."<sup>35</sup> The GDF court read this dicta in SWANCC as casting doubt upon the viability of predicated Commerce Clause regulation on the commercial activity that harms wildlife.<sup>36</sup> Unfortunately, SWANCC itself failed to provide a clear answer about how lower courts should decide what is the central "object" of a statute – either the statute's regulatory "targets" or its beneficiaries – and how close the relationship must be between the object of the statute and the commercial purposes of the Commerce Clause.<sup>37</sup>

Because the *Lopez* and *Morrison* decisions do not clearly define the categories of commercial activities that Congress may regulate or the appropriate boundaries of federalism, there is no simple answer to whether lower courts determining the constitutionality of the ESA should focus on the commercial activities that may harm the endangered species or on the commercial impacts of the endangered species themselves.<sup>38</sup>

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<sup>33</sup> SWANCC, 531 U.S. at 174 (citing *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.")).

<sup>34</sup> *Id.* at 173.

<sup>35</sup> *Id.*

<sup>36</sup> See GDF, 326 F.3d 622, 633-35 (5th Cir. 2003), *reh'g denied*, No. 01-51099, 2004 U.S. App. LEXIS 3933 (5th Cir. Feb. 27, 2004) (en banc); *infra* notes 385-88 and accompanying text.

<sup>37</sup> Schapiro & Buzbee, *supra* note 3, at 1227-28, 1248-49 (arguing SWANCC fails to clarify whether the targets or beneficiaries of regulatory statute are its "object" and which types of commercial activities are within scope of Commerce Clause).

<sup>38</sup> See Schapiro & Buzbee, *supra* note 3, at 1202, 1204-05, 1228, 1258-60 (arguing *Lopez* and *Morrison* fail to clarify which types of commercial activities are

Nevertheless, *Viejo's* commercial activities approach is arguably both over- and under-inclusive. It is potentially over-inclusive because the government could regulate any non-commercial intrastate objects, such as toads, that are affected by a large interstate commercial enterprise, such as building construction, even if the intrastate objects do not substantially affect interstate commerce, and even if they do fall within a traditional area of state regulation. Thus, as the *GDF* court argued, under the commercial activities approach, the statutes in *Lopez* and *Morrison* would be constitutional if the violator was engaged in commercial activities that affected interstate commerce, but, as the *GDF* decision convincingly demonstrated, that result would contradict the holdings in those two cases.<sup>39</sup> Furthermore, a broad reading of the commercial activities rationale would arguably allow the federal government to usurp local and state regulation of non-commercial, intrastate activities, such as protection of wildlife, solely because non-regulated conduct by an actor, such as commercial development, has some connection to interstate commerce. This result would be achieved at the expense of federalism principles that require state or local regulatory control over non-commercial, intrastate activities.<sup>40</sup> On the other hand, *Viejo's* commercial activities approach is arguably under-inclusive because in the aggregate, lone hikers, landscaping homeowners, or off-road enthusiasts may harm a significant number of endangered species, but without the "hook" of large-scale, commercial activity, they cannot be regulated at all.<sup>41</sup>

The *GDF* court's approach of aggregating all endangered and threatened species regardless of their commercial value might seem questionable in light of *Lopez* and *Morrison's* emphasis that the Commerce Clause is generally limited to regulating activities that have significant economic impacts on interstate commerce. Nevertheless, there is a rational basis for Congress's assumption in the ESA that it is necessary to preserve all endangered species to avoid serious

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within scope of Commerce Clause and give courts too much discretion to decide scope of commerce power); Seinfeld, *supra* note 22, at 1276-87 (discussing difficulties lower courts have encountered in distinguishing economic from non-economic activities).

<sup>39</sup> See *GDF*, 326 F.3d at 635; see also *infra* notes 389-95 and accompanying text.

<sup>40</sup> See *GDF*, 326 F.3d at 634-35 (rejecting the commercial activities approach later used in *Viejo*); *infra* notes 385-91 and accompanying text.

<sup>41</sup> See *infra* notes 438-40 and accompanying text.

potential losses to interstate commerce, and neither *Lopez* nor *Morrison* purported to demand more than such a rational basis to justify legislation once the connection to commerce is established.<sup>42</sup> The *GDF* court convincingly concluded that there is such a strong interdependency among all species and ecosystems that the loss of any endangered species must be avoided to prevent harm to interstate commerce.<sup>43</sup> Accordingly, the *GDF* court correctly determined that protecting commercially insignificant endangered species is an essential component of a larger regulatory scheme that is valid under the Commerce Clause.<sup>44</sup> Furthermore, from an environmental policy standpoint, *GDF*'s aggregate approach of considering the impact of all endangered and threatened species provides more protection to these species than the approach used in *Viejo*.<sup>45</sup>

The crucial difference between the *GDF* and *Viejo* decisions is that the former focused on the endangered species themselves while the latter emphasized that the ESA regulates commercial activities that affect such species. There is some support in the ESA for either approach because the statute suggests that both commercial activities that harm species and the species themselves affect interstate commerce.<sup>46</sup>

However, the *Lopez* and *Morrison* decisions, as well as dicta in *SWANCC*, imply that courts must determine a statute's central regulatory objective in determining whether the activities it regulates are the type of commercial activities within Congress's authority under the Commerce Clause.<sup>47</sup> While this author would prefer that the Court return to the

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<sup>42</sup> See *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); Mank, *supra* note 3, at 792-93 (arguing *Lopez* and *Morrison* did not claim to overrule prior decisions applying rational basis review to statutes challenged as exceeding congressional commerce power and *Morrison* explicitly stated that there is presumption that statute is constitutional under Commerce Clause); see also *infra* notes 201-06 and accompanying text.

<sup>43</sup> See *infra* notes 416-26 and accompanying text.

<sup>44</sup> See *infra* notes 416-26 and accompanying text.

<sup>45</sup> See *infra* notes 438-40 and accompanying text.

<sup>46</sup> See *Nagle*, *supra* note 8, at 210 (stating "either the means or the ends should be able to provide the requisite connection to interstate commerce"); *Schapiro & Buzbee*, *supra* note 3, at 1245-47 (arguing the Endangered Species Act seeks to address a variety of interests, including targets of regulation and beneficiaries); see also *infra* notes 91, 332, 429 and accompanying text.

<sup>47</sup> See *Schapiro & Buzbee*, *supra* note 3, at 1201-05, 1219-23, 1258-60 (arguing *Lopez* and *Morrison* require court's to identify the central object of a regulatory statute in determining whether it regulates commercial activities within scope of Commerce Clause and criticizing this "unidimensional" approach).

deferential approach used from 1937 until 1995, this Article attempts to discern whether *Viejo* or *GDF* better comply with the Court's current but highly flawed Commerce Clause jurisprudence. Proceeding along that framework, the Article concludes that the primary object or goal of the ESA is to protect endangered species rather than to regulate commercial activities.<sup>48</sup> Accordingly, this Article proposes that courts follow *GDF's* approach for two reasons. First, because it is more consistent with *Lopez* and *Morrison's* rationale that the Commerce Clause preserves state and local control over most non-commercial, intrastate activities, unless national regulation of those intrastate activities is an essential component of a broader regulatory program for interstate commerce. Second, it provides superior support for achieving Congress's clear goal in the 1973 Act of protecting all endangered species.<sup>49</sup>

Section II summarizes the early efforts of Congress to protect endangered species and discusses the enactment of the comprehensive 1973 ESA. Section III examines the Supreme Court's deferential interpretation of the Commerce Clause from 1937 until 1995 and its recent emphasis in *Lopez*, *Morrison*, and *SWANCC* that the commerce power is generally limited to commercial activities and does not usurp traditional state authority over non-commercial, intrastate activities. Section IV discusses the first two court of appeals decisions to assess the constitutionality of the ESA after *Lopez* or *Morrison*: the District of Columbia Circuit's decision concerning an obscure fly in *National Association of Home Builders v. Babbitt (NAHB)* and the Fourth Circuit's decision regarding the red wolf in *Gibbs v. Babbitt*. Section V critically examines the District of Columbia Circuit's commercial activities rationale in *Viejo*. Section VI positively assesses the Fifth Circuit's aggregation of all endangered species approach in *GDF*. Section VII concludes that *GDF's* aggregation methodology is more consistent with the Court's decisions in *Lopez*, *Morrison*, and *SWANCC*, but also criticizes the Court's recent Commerce Clause jurisprudence for creating substantial uncertainties about which activities fall within the commerce power.

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<sup>48</sup> See Schapiro & Buzbee, *supra* note 3, at 1246 (acknowledging "the stated purpose of endangered species law is the protection of endangered species," although arguing Act seeks to address a variety of other interests); *infra* notes 350, 381-84, 430-72 and accompanying text.

<sup>49</sup> See *infra* notes 84, 89-96, 430 and accompanying text.

## II. THE ENDANGERED SPECIES ACT

### A. *The 1966 and 1969 Acts: Protecting Endangered Species on Federal Lands Is Not Enough*

There is a long history of federal regulation of endangered species, although the 1973 ESA represents a culmination of federal regulation.<sup>50</sup> In 1900, Congress enacted the Lacey Act, which prohibits interstate commerce in animals, birds, or the byproducts of animals or birds killed in violation of state law, and requires the Secretary of Agriculture to protect game animals and birds.<sup>51</sup> By enacting the Lacey Act, Congress took a cautious first step toward acknowledging that protecting endangered species was a national problem requiring federal regulation.<sup>52</sup> Nevertheless, during the early twentieth century, federal authority over wildlife was more limited than today.<sup>53</sup> At the time, the Supreme Court still recognized state ownership of all wildlife, a doctrine the Court fully rejected only in 1979.<sup>54</sup> Lower court decisions of that era

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<sup>50</sup> See Mank, *supra* note 3, at 773-75. See generally Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 *ECOLOGY L.Q.* 265, 287-305 (1991) (discussing growth of national regulation of American wildlife and plant law); Davina Kari Kaile, Note, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 *GEO. INT'L ENVTL. L. REV.* 441, 448-54 (1993) (same).

<sup>51</sup> Lacey Act, ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. § 701, 16 U.S.C. §§ 3371-3378, and 18 U.S.C. 42 (2000)) (forbidding the interstate transport of animals killed in violation of state law); Philip Weinberg, *Does That Line in the Sand Include Wetlands? Congressional Power and Environmental Protection*, *Envtl. L. Rep. (Envtl. L. Inst.)*, Sept. 2000, at 10894, 10897; Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 *ENVTL. L.* 463, 469 (1999). The Lacey Act now applies to all wild animals, including those bred in captivity, and to plants protected by treaty or state law. 16 U.S.C. § 3373 (2000) (establishing penalties for violating provision); White, *supra* note 3, at 221 (discussing enactment in 1900 of Lacey Act); see also George Cameron Coggins & Anne Fleishel Harris, *The Greening of American Law?: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 *NAT. RESOURCES J.* 247, 305-07 (1987) (discussing 1981 Lacey Act Amendments).

<sup>52</sup> See Mank, *supra* note 3, at 773-74 (discussing Lacey Act as first step in process of creating national regime for protecting endangered species); Kaile, *supra* note 50, at 446-48 (same); Petersen, *supra* note 51, at 469 (same).

<sup>53</sup> See Doremus, *supra* note 50, at 287-92.

<sup>54</sup> See *Geer v. Connecticut*, 161 U.S. 519 (1896) (upholding Connecticut statute prohibiting interstate transportation of game birds that had been killed within state), *overruled*, *Hughes v. Oklahoma*, 441 U.S. 322, 329 (1979) ("The erosion of *Geer* began only 15 years after it was decided."); Mank, *supra* note 3, at 774; Doremus, *supra* note 50, at 287-88; White, *supra* note 3, at 248-49.

concluded that the federal government did not have authority under the Commerce Clause to regulate migratory birds.<sup>55</sup>

In 1916, avoiding uncertainties about the scope of federal authority over interstate commerce by instead relying on the Constitution's Treaty Clause,<sup>56</sup> the federal government took another step toward national regulation of wildlife when it signed a treaty with Canada to protect migratory birds.<sup>57</sup> To implement the treaty, Congress enacted the Migratory Bird Treaty Act of 1918, which forbade the taking of many bird species and explicitly preempted inconsistent state laws.<sup>58</sup> In the 1920 case *Missouri v. Holland*,<sup>59</sup> the Supreme Court upheld the Act as a necessary and proper exercise of Congress's treaty power.<sup>60</sup> The Court concluded that the conservation of endangered wildlife was a "national interest of very nearly the first magnitude."<sup>61</sup> In 1940, after the Supreme Court had adopted a broader interpretation of the Commerce Clause,<sup>62</sup> Congress used its authority under the commerce power to enact the Bald Eagle Protection Act, which forbids taking, possessing, selling, or exporting bald eagles or any of their parts.<sup>63</sup>

In the Endangered Species Preservation Act of 1966,<sup>64</sup> recognizing that many states had failed to preserve these species, Congress sought a more comprehensive approach to

<sup>55</sup> See *United States v. McCallagh*, 221 F. 288 (D. Kan. 1915) (holding Department of Interior did not have authority under Commerce Clause to regulate migratory birds); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594 (1919); Doremus, *supra* note 50, at 292-93.

<sup>56</sup> See U.S. CONST. art. II, § 2, cl. 2 (treaty power); *id.* art. VI, cl. 2 (treaties binding on states); White, *supra* note 3, at 224-34 (discussing using treaty power to protect endangered species).

<sup>57</sup> Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., T.S. No. 628. Great Britain signed the Treaty on behalf of Canada as overseer of Canadian foreign affairs. See also Petersen, *supra* note 51, at 469.

<sup>58</sup> 16 U.S.C. §§ 703-712 (2000); *Gibbs v. Babbitt*, 214 F.3d 483, 500 (4th Cir. 2000) (explaining significance of Migratory Bird Treaty Act of 1918); Petersen, *supra* note 51, at 469.

<sup>59</sup> 252 U.S. 416 (1920).

<sup>60</sup> *Id.* at 435; Mank, *supra* note 3, at 774.

<sup>61</sup> See *Missouri*, 252 U.S. at 435.

<sup>62</sup> Beginning in 1937, the Supreme Court adopted a far more deferential rational basis approach to reviewing congressional legislation enacted pursuant to the Commerce Clause. See *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *supra* note 3 and accompanying text.

<sup>63</sup> See Bald Eagle Protection Act, Pub. L. No. 76-567, 54 Stat. 250 (1940) (codified at 16 U.S.C. §§ 668-668d (2000)); Petersen, *supra* note 51, at 470.

<sup>64</sup> See Pub. L. No. 89-669, 80 Stat. 926 (1966).

protecting the growing number of endangered species.<sup>65</sup> Congress explicitly authorized the Department of Interior to continue its practice of creating a list of endangered species.<sup>66</sup> Furthermore, using its spending power authority<sup>67</sup> to control the actions of federal agencies, Congress encouraged the Departments of Agriculture and Defense to cooperate voluntarily with the Department of Interior to conserve species "insofar as is practicable" in light of their statutory missions.<sup>68</sup>

The 1966 Act focused on preserving endangered species on federal lands and on acquiring additional federal land if necessary to accomplish preservation goals.<sup>69</sup> Using its authority under the Property Clause to regulate federally owned lands,<sup>70</sup> Congress created a National Wildlife Refuge System to prohibit the taking of listed endangered species living within the System.<sup>71</sup> Because the federal government owns one-third of all land in the United States, and almost half of all land in the eleven westernmost states, the Property Clause gives Congress significant authority to protect many endangered species.<sup>72</sup> Nevertheless, the 1966 Act did not protect

<sup>65</sup> Edward A. Fitzgerald, *Seeing Red: Gibbs v. Babbitt*, 13 VILL. ENVTL. L.J. 1, 29-30 (2002) (discussing 1966 Act); Kaile, *supra* note 50, at 448-51 (same); Petersen, *supra* note 51, at 471 (same).

<sup>66</sup> See § 1(c), 80 Stat. at 926 (repealed 1973); Petersen, *supra* note 51, at 471.

<sup>67</sup> See U.S. CONST. art. I, § 8, cl. 1; White, *supra* note 3, at 223 (observing that certain provisions in Endangered Species Act are valid pursuant to Spending Clause). Congress can also use its financial resources to encourage voluntary compliance with its policies by states or others. See generally Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147 (2001) (discussing how Spending Clause can validate environmental legislation); South Dakota v. Dole, 483 U.S. 203 (1987) (permitting Congress to condition funds on State's adoption of a minimum drinking age).

<sup>68</sup> See § 1(b), 80 Stat. at 926; Doremus, *supra* note 50, at 296; Kaile, *supra* note 50, at 451-53; Petersen, *supra* note 51, at 471; White, *supra* note 3, at 221. The 1969 Act required federal agencies to conserve species to the "extent practicable." See Pub. L. No. 91-135, § 3(a), 83 Stat. 275 (1969); Kaile, *supra* note 50, at 449-53.

<sup>69</sup> See Doremus, *supra* note 50, at 295-96; Kaile, *supra* note 50, at 449.

<sup>70</sup> See U.S. CONST. art. IV, § 3, cl. 2; Sophie Akins, Note, *Congress' Property Clause Power to Prohibit Taking Endangered Species*, 28 HASTINGS CONST. L.Q. 167, 183-86 (2000) (discussing congressional authority under property clause to protect environment and endangered species).

<sup>71</sup> See § 4, 80 Stat. at 926-29 (1966) (repealed 1973); Fitzgerald, *supra* note 65, at 29-30 (discussing 1966 Act); Doremus, *supra* note 50, at 296; Petersen, *supra* note 51, at 472 (same); White, *supra* note 3, at 221 (same). The Property Clause grants Congress the "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," including purchasing land or regulating existing land to pursue federal policies, but does not provide authority to regulate non-federal lands. See U.S. CONST. art. IV, § 3, cl. 2; Akins, *supra* note 70, at 183-86.

<sup>72</sup> Akins, *supra* note 70, at 183.

the majority of endangered or threatened species in the United States because most are located on non-federal land that cannot be regulated under the Property Clause.<sup>73</sup>

Like the 1966 statute, the Endangered Species Conservation Act of 1969 focused on preserving endangered species on federal lands and acquiring new federal lands for preservation.<sup>74</sup> Additionally, Congress in the 1969 Act recognized the international causes of the extinction problem by requiring the Secretary of the Interior to develop a list of species "threatened with worldwide extinction" and prohibiting the importation of these animals or any of their byproducts without a permit.<sup>75</sup> Congress used its authority under Commerce Clause to prohibit such imports.<sup>76</sup> Furthermore, the 1969 Act enlarged federal authority to acquire habitat for endangered species.<sup>77</sup> Moreover, the 1969 Act expanded the definition of "fish or wild life" to include amphibians, reptiles, and invertebrates.<sup>78</sup> Finally, the 1969 Act encouraged the executive branch to negotiate an international convention to protect endangered species from extinction, which later led to the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), which primarily applies to the import and export of endangered species.<sup>79</sup>

## B. *The 1973 Amendments*

In response to evidence that the 1966 and 1969 Acts did not reduce the growing numbers of species extinction because

<sup>73</sup> See Jeanine A. Scalero, Case Note, *The Endangered Species Act's Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 CHAP. L. REV. 317, 321 (2000) (stating "almost 80% of all protected species have some or all of their habitat on privately owned land"). According to the General Accounting Office, in 1993 there were 781 species listed under the ESA – over 90 percent of these species have some or all of their habitat on nonfederal lands. *Gibbs v. Babbitt*, 214 F.3d 483, 502 (4th Cir. 2000), cert. denied, sub nom. *Gibbs v. Norton*, 531 U.S. 1145 (2001). Nearly three-fourths of the listed species had over 60 percent of their habitat on nonfederal lands. *Gibbs*, 214 F.3d at 502.

<sup>74</sup> See Kaile, *supra* note 50, at 451-52.

<sup>75</sup> See Pub. L. No. 91-135, §§ 2-3(a), 83 Stat. 275 (1969); Fitzgerald, *supra* note 65, at 30; Kaile, *supra* note 50, at 451-53; Petersen, *supra* note 51, at 472.

<sup>76</sup> See Fitzgerald, *supra* note 65, at 30; Petersen, *supra* note 51, at 472.

<sup>77</sup> See Doremus, *supra* note 50, at 297; Fitzgerald, *supra* note 65, at 30; Petersen, *supra* note 51, at 472.

<sup>78</sup> § 2, 83 Stat. 275; Doremus, *supra* note 50, at 296; Petersen, *supra* note 51, at 472.

<sup>79</sup> § 5, 83 Stat. 275; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087; Petersen, *supra* note 51, at 472-73 (discussing the Convention); White, *supra* note 3, at 222, 226 (same).

these statutes were restricted to federal lands,<sup>80</sup> Congress with the support of President Richard Nixon<sup>81</sup> enacted a new ESA in 1973, which repealed the 1966 and 1969 Acts.<sup>82</sup> The 1973 Act covered both more species and more territory than the 1966 and 1969 statutes. The 1973 Act prohibited takings of not only “endangered” species but also “threatened” species, defined as those that may become endangered in the near future.<sup>83</sup> Most significantly, the 1973 Act went beyond regulation of federal lands to protect endangered and threatened animals on all land in the United States, including state, local governmental or private land, and the territorial seas of the United States.<sup>84</sup>

In enacting the broader 1973 ESA, Congress primarily relied on its power under the Commerce Clause, although it also continued to use its authority under the Property Clause to regulate federal lands and the Spending Clause to regulate federal agencies and provide incentives for cooperation by states.<sup>85</sup> The text and the legislative history of the 1973 Act extensively discussed the potential impact of endangered species themselves on interstate commerce while also indicating that commercial development was a primary cause of their extinction.<sup>86</sup> As an example, the ESA states that many of the species threatened with extinction are of “esthetic, ecological, educational, historical, recreational, and scientific

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<sup>80</sup> See Fitzgerald, *supra* note 65, at 31; Kaile, *supra* note 50, at 446; Petersen, *supra* note 51, at 473.

<sup>81</sup> In 1972, President Nixon proposed the enactment of a stricter statute to protect endangered species, stating that “even the most recent act to protect endangered species, which dates only from 1969, simply does not provide the kind of management tools needed to act early enough to save a vanishing species.” 118 CONG. REC. 3140, 3143 (1972) (special message to Congress from President Richard Nixon outlining the 1972 Environmental Program); Doremus, *supra* note 50, at 297 (discussing Nixon Administration’s support for stronger Endangered Species Act); Petersen, *supra* note 51, at 473, 476, 480 (same). On December 28, 1973, President Nixon signed the ESA into law. Petersen, *supra* note 51, at 476.

<sup>82</sup> See Kaile, *supra* note 50, at 454.

<sup>83</sup> See 16 U.S.C. §§ 1533, 1538(a)(1) (2000); Fitzgerald, *supra* note 65, at 31 (discussing 1973 Act); Kaile, *supra* note 50, at 454 (same and noting 1973 Act expanded beyond 1966 and 1969 Acts to include threatened species).

<sup>84</sup> See 16 U.S.C. § 1538(a)(1) (2000); Fitzgerald, *supra* note 65, at 31 (discussing 1973 Act); Kaile, *supra* note 50, at 456.

<sup>85</sup> Congress could have attempted to rely on its treaty power to justify regulation of non-federal land, but the scope of its authority is less certain. See White, *supra* note 3, at 224-34 (arguing treaty power provides less stable support for Endangered Species Act than the Commerce Clause because treaties may be amended by either United States or another nation). Whether the Endangered Species Act can be justified under the treaty power is beyond the scope of this Article.

<sup>86</sup> See Nagle, *supra* note 8, at 193; *infra* notes 87-91 and accompanying text.

value to the Nation and its people."<sup>87</sup> Additionally, supporting *Viejo's* commercial activities theory, the ESA found that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation."<sup>88</sup> However the 1973 ESA's legislative history shows that Congress placed the greatest emphasis in justifying the protection of endangered species under the Commerce Clause on the potential future economic and medical benefits of preserving a wide variety of species and a robust genetic heritage.<sup>89</sup> The House Report explained:

As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their – and our own – genetic heritage.

The value of this genetic heritage is, quite literally, incalculable . . . .

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.<sup>90</sup>

<sup>87</sup> 16 U.S.C. § 1531(a)(3) (2000).

<sup>88</sup> *Id.* § 1531(a)(1); Nagle, *supra* note 8, at 193. See also H.R. 37, 93d Cong., 2(a) (1973) (proposing legislative finding that "one of the unfortunate consequences of growth and development in the United States and elsewhere has been the extermination of some species or subspecies of fish and wildlife").

<sup>89</sup> See Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1050-52 (D.C. Cir. 1997) (discussing emphasis on future economic and medical benefits in 1973 ESA's legislative history and concluding that congressional concern for future economic benefits was appropriate basis for national regulation under Commerce Clause); Gibbs v. Babbitt, 214 F.3d 483, 496-97 (4th Cir. 2000) (same); Mank, *supra* note 3, at 729-30, 756-57, 782-92 (arguing congressional concern for future economic benefits in 1973 ESA's legislative history was appropriate basis for national regulation under Commerce Clause); see also Nagle, *supra* note 8, at 193 & n.76 (discussing congressional concern for future economic and medical benefits in 1973 ESA's legislative history).

<sup>90</sup> H.R. REP. NO. 93-412, at 4-5 (1973). Similarly, the Senate Report on the 1969 ESA, noted:

From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has

Although the statute and legislative history provide some support for the *Viejo* court's focus on the effect of commercial activities on endangered species, the above quotation from the House Report shows that the actual and potential commercial value of the endangered species themselves appears to have been of the greatest interest to Congress.<sup>91</sup>

The ESA currently asserts protection over every endangered or threatened species of fish and wildlife in the United States.<sup>92</sup> In *Tennessee Valley Authority v. Hill*,<sup>93</sup> a 1978 case involving the endangered "snail darter" fish and a massive federal dam project that threatened to cause its extinction, the Supreme Court characterized the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>94</sup> The *Hill* Court observed, "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."<sup>95</sup> As an example, the Court cited Section 2 of the ESA, which states that one of its main purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ."<sup>96</sup>

Other sections of the Act illuminate the depth of the federal government's commitment to protecting endangered species. Section 4 mandates that the Secretary of Interior

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developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.

S. REP. NO. 91-526, at 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1415.

<sup>91</sup> See Mank, *supra* note 3, at 729-30, 756-57, 782-92 (arguing Congress in 1973 ESA's legislative history emphasized concern for future economic and medical benefits); see generally *Nat'l Ass'n of Home Builders*, 130 F.3d at 1052-54 (discussing emphasis on future economic and medical benefits in 1973 ESA's legislative history and concluding that congressional concern for future economic benefits was appropriate basis for national regulation under Commerce Clause); *Gibbs*, 214 F.3d at 496-98 (same).

<sup>92</sup> See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995). However, endangered or threatened plants are only protected on federal lands. See 16 U.S.C. § 1538(a)(2)(B) (2000); see generally *Coggins & Harris*, *supra* note 51, at 278-303 (discussing Endangered Species Act's limited protection of plants).

<sup>93</sup> 437 U.S. 153 (1978).

<sup>94</sup> *Id.* at 180.

<sup>95</sup> *Id.* at 184.

<sup>96</sup> 16 U.S.C. § 1531(b) (2000); *Sweet Home*, 515 U.S. at 698.

ascertain which species are "in danger of extinction throughout all or a significant portion of [their] range . . . ."<sup>97</sup> After the Secretary makes a judgment under Section 4 regarding the danger of extinction, Section 5 requires the Secretary to create a list of all "endangered" and "threatened" species and to identify the scope of the critical habitat necessary for the survival of these species.<sup>98</sup> The Secretary must decide whether a species is endangered or threatened "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species . . . ."<sup>99</sup> The Secretary must first conclude that a species is endangered or threatened before he can issue a regulation protecting it.<sup>100</sup> Next, the Secretary must establish recovery plans for listed species that will achieve their "conservation and survival."<sup>101</sup> As soon as a species has recovered and its survival is no longer threatened, the federal government may no longer protect it; non-threatened animals are under exclusive state authority unless they enter federal lands.<sup>102</sup>

Congress still uses its authority under the Property and Spending Clauses to protect endangered species on federal land or from actions by federal agencies, respectively. In Section 5 of the current ESA,<sup>103</sup> Congress has used its authority under the Property Clause to authorize the Secretary of Interior to acquire land to assist in the preservation of endangered and threatened species.<sup>104</sup> Section 6 qualifies that authority by providing that the Secretary should acquire land in cooperation with the States.<sup>105</sup>

Pursuant to Congress's authority under the Spending Clause to control federal agencies and their budgets, Section 7 directs federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse

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<sup>97</sup> The Secretary of Commerce also plays a role. See 16 U.S.C. § 1532(6) (2000); Mank, *supra* note 3, at 730.

<sup>98</sup> 16 U.S.C. § 1533 (2000); Mank, *supra* note 3, at 730.

<sup>99</sup> 16 U.S.C. § 1533(b)(1)(A) (2000); Mank, *supra* note 3, at 730-31.

<sup>100</sup> 16 U.S.C. § 1533(d) (2000); Mank, *supra* note 3, at 731.

<sup>101</sup> 16 U.S.C. § 1533(f) (2000); Mank, *supra* note 3, at 731.

<sup>102</sup> See *Gibbs v. Babbitt*, 214 F.3d 483, 503 (4th Cir. 2000); Mank, *supra* note 3, at 731, 781.

<sup>103</sup> See 16 U.S.C. § 1534 (2000).

<sup>104</sup> See *id.* § 1535(a).

<sup>105</sup> See *id.* § 1535(a).

modification of [critical] habitat . . . .”<sup>106</sup> According to Section 7, all federal agencies must consult with the Secretary before undertaking projects that could harm endangered or threatened species or their critical habitat.<sup>107</sup> After consulting with the Secretary, federal agencies in theory can refuse to follow the Secretary’s views on whether a project will harm endangered or threatened species, but the Secretary’s authority to seek civil or criminal penalties generally ensures that federal agencies will comply with the FWS’s interpretation of the ESA.<sup>108</sup>

### C. Section 9 and Private Land

Section 9 of the ESA raises the most concerns about the scope of congressional authority because it relies on the Commerce Clause to regulate all non-federal lands, including private property.<sup>109</sup> During the 1973 congressional debates preceding the enactment of the ESA, some members of Congress raised concerns that Section 9 would necessarily preempt all state laws regulating wildlife, but congressional supporters of the ESA successfully argued that the proposed statute promoted concurrent federal-state regulation of endangered species rather than purely national control.<sup>110</sup> Section 9(a)(1) of the ESA prohibits “any person,” including private individuals, from taking any endangered or threatened species without a permit or other authorization from the Secretary.<sup>111</sup> Section 9 defines the term “take” to include any private activities “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>112</sup> Under the statute, any person who knowingly destroys the critical habitat of an endangered species is subject

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<sup>106</sup> *Id.* § 1536(a)(2).

<sup>107</sup> *See id.* § 1536(a)(3); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 172-73 (1978).

<sup>108</sup> 16 U.S.C. § 1540(b) (2000); 18 U.S.C. §§ 3559(a)(6), 3571(b), (e) (2000).

<sup>109</sup> *See Mank, supra* note 3, at 731-32.

<sup>110</sup> *See Petersen, supra* note 51, at 474.

<sup>111</sup> 16 U.S.C. § 1538(a)(1)(B) (2000). Section 9 only prohibits the taking of endangered wildlife and does not protect endangered plants on private property. *See id.*; Petersen, *supra* note 51, at 465 n.23, 480 n.162. The statute protects only endangered or threatened plants that are on federal lands or on non-federal land where a state statute specifically provides protection to a plant. *See* 16 U.S.C. § 1538(a)(2)(B) (2000); Mank, *supra* note 3, at 728 n.27. *See generally* Coggins & Harris, *supra* note 51, at 278-303 (discussing ESA’s limited protection of plants).

<sup>112</sup> 16 U.S.C. § 1532(19) (2000).

to criminal penalties – a fine of up to fifty thousand dollars, one year in prison, or both.<sup>113</sup>

An important issue is the definition of “taking” an endangered species, especially by the destruction of critical habitat on private land. In defining Section 9(a)(1)’s ban against taking endangered species, the Fish and Wildlife Service (FWS) of the Department of Interior has issued regulations prohibiting “significant habitat modification or degradation where it actually kills or injures wildlife . . . .”<sup>114</sup> Accordingly, private landowners may not substantially modify or harm the critical habitat of endangered species if such changes will result in the death or injury of those species. Congress, however, has provided some exceptions to this prohibition. A property owner may apply for a permit authorizing habitat modification that will cause incidental harm to endangered species if the owner provides an appropriate habitat conservation plan showing that the proposed modifications comport with the long-term preservation of the species.<sup>115</sup> Accordingly, although the taking provision imposes potentially significant restrictions on states, local governments, private persons, and their property, the ESA is limited because the statute only seeks to assert regulatory authority where it is necessary to preserve threatened or endangered species and otherwise leaves regulatory authority within state or local control.<sup>116</sup>

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (Sweet Home)*,<sup>117</sup> the Supreme Court in 1995 upheld the FWS regulations prohibiting private land owners from engaging in activities causing “significant habitat modification or degradation where it actually kills or injures wildlife.”<sup>118</sup> In his majority decision, Justice Stevens concluded that the regulations comported with the “ordinary understanding” and the dictionary definition of the verb form of “harm” in Section 9(a)(1)’s text because that verb “naturally

<sup>113</sup> *Id.* § 1540(b); 18 U.S.C. §§ 3559(a)(6), 3571(b), (e) (2000).

<sup>114</sup> 50 C.F.R. § 17.3 (2002).

<sup>115</sup> *See* 16 U.S.C. § 1539(a)(1)(B) (2000) (“if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity”).

<sup>116</sup> *See* Mank, *supra* note 3, at 777-80 (arguing federal regulation of endangered species is consistent with *Hodel’s* rationale that federal government may regulate intrastate activities if there is a serious failure by state regulators to do so); *infra* notes 432, 457, 472 and accompanying text.

<sup>117</sup> 515 U.S. 687 (1995).

<sup>118</sup> *Id.* at 696-708 (addressing 50 C.F.R. § 17.3).

encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.”<sup>119</sup>

Additionally, the Court determined that the regulations were consistent with Congress’s broad statutory goal of preventing species extinction.<sup>120</sup> Furthermore, the Court concluded that Congress’s 1982 amendments to the statute, which added Section 10’s “incidental take” permit provision,<sup>121</sup> showed that Congress interpreted the Act to include indirect as well as direct harm because these permits would most likely apply to indirect critical habitat modification by private individuals.<sup>122</sup> In his dissenting opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the words to “take” and to “harm” as used in the Act could not possibly mean “habitat modification,” but should be understood to prohibit only direct attempts to kill wildlife.<sup>123</sup>

Significantly, the Court decided *Sweet Home* two months after its *Lopez* decision, suggesting that the Court believed that neither Section 9 nor the FWS regulations exceeded the limits of the Commerce Clause, although that issue was not before the Court.<sup>124</sup> It is notable that Justice Kennedy joined Justice Stevens’s majority opinion in *Sweet Home*.<sup>125</sup> As discussed below, Justice Kennedy wrote a concurring opinion in *Lopez*,<sup>126</sup> joined by Justice O’Connor, that adopted an arguably less restrictive approach to reviewing congressional legislation under the Commerce Clause than Chief Justice Rehnquist’s majority opinion.<sup>127</sup> Additionally, in *Sweet Home*, Justice O’Connor wrote a concurring opinion that agreed with the majority as long as the FWS regulation was

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<sup>119</sup> *Id.* at 697-98.

<sup>120</sup> *Id.* at 698-99.

<sup>121</sup> 16 U.S.C. § 1539(a)(1)(B) (2000).

<sup>122</sup> *Sweet Home*, 515 U.S. at 700-01.

<sup>123</sup> *See id.* at 714-36 (Scalia, J., dissenting); Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1265-66 (1996).

<sup>124</sup> *See* Mank, *supra* note 3, at 734-35 (arguing that Supreme Court’s decision in *Sweet Home* shortly after it decided *Lopez* at least suggests that the Court did not perceive a significant commerce clause problem with section 9 of the ESA and FWS’s regulations protecting critical habitat on private land).

<sup>125</sup> *Id.* at 734.

<sup>126</sup> *See infra* notes 170-74, 209-12 and accompanying text.

<sup>127</sup> *See* Mank, *supra* note 3, at 734, 740-41 (arguing Justice Kennedy’s concurring opinion in *Lopez* suggests he applies more deferential approach to reviewing congressional legislation than Chief Justice Rehnquist, Justice Scalia or Justice Thomas).

limited to "significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals."<sup>128</sup> While it did not address the issue of whether Congress has authority under the Commerce Clause to pass the ESA, the Court's *Sweet Home* decision provides some indirect support for the statute's constitutionality because it is likely that the Court would have at least hinted about the issue if a majority perceived a serious constitutional problem.

Moreover, the *Sweet Home* Court showed deference that the SWANCC Court eschewed. In *Sweet Home*, the Court determined that pursuant to the *Chevron* doctrine it was appropriate to defer to the Secretary's interpretation of the statute. The doctrine states that courts should defer to an agency's interpretation if a statute is ambiguous and the interpretation is reasonable.<sup>129</sup> The *Sweet Home* decision declared that "[w]hen it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary," and deference was especially appropriate here where "[t]he proper interpretation of a term such as 'harm' involves a complex policy choice."<sup>130</sup> By contrast, the SWANCC Court declined to defer under the *Chevron* doctrine to the government's interpretation of the Clean Water Act over "isolated," intrastate wetlands because the majority stated that there were serious questions whether Congress has the power under the Commerce Clause to regulate such wetlands.<sup>131</sup>

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<sup>128</sup> See *Sweet Home*, 515 U.S. at 708-14 (O'Connor, J., concurring).

<sup>129</sup> *Id.* at 703-08; Mank, *supra* note 123, at 1265.

<sup>130</sup> *Sweet Home*, 515 U.S. at 708.

<sup>131</sup> Initially, the SWANCC Court stated that the *Chevron* doctrine did not apply because the Court concluded that Section 404 of the Act, which governs wetlands was not ambiguous, but "clear." SWANCC, 531 U.S. 159, 172 (2001). The Court added, however, that "even were we to agree with respondents" that the statute was ambiguous, "we would not extend *Chevron* deference here." *Id.* The Court invoked the principle of statutory interpretation that it would avoid interpretations that raised serious constitutional questions unless there was a clear statement in the statute demonstrating Congress desired such a broad interpretation. *Id.* at 172-73; 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.-NW. J. ENVTL. L. & POL'Y 191, 195 (2001). The Court did not find any clear statement in the Act demonstrating that Congress intended to include isolated, intrastate wetlands within the statutory definition of navigable waters defining the statute's jurisdiction, especially because "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." SWANCC, 531 U.S. at 174. Accordingly, the Court rejected the Corps' "request for administrative deference" to the

Arguably, if it had similar constitutional concerns under the Commerce Clause, the *Sweet Home* Court would not have so easily deferred to the FWS's interpretation of the "take" provision, although that issue was not before the *Sweet Home* Court. The Court in *Sweet Home*, however, was addressing a case involving the fairly significant spotted owl endangered species and not the truly isolated intrastate species that are the subject of this Article. It thus remains to be seen how the Court, especially Justices Kennedy and O'Connor, would address the issues in cases similar to *GDF* and *Viejo*.

### III. THE COMMERCE CLAUSE AND CONGRESSIONAL AUTHORITY

The Commerce Clause gives Congress the authority to "regulate Commerce with foreign Nations, and among the several States . . . ." <sup>132</sup> While the breadth of congressional authority to regulate interstate commerce raises many questions, <sup>133</sup> a particularly difficult issue is determining when intrastate activities sufficiently impact interstate commerce to trigger Commerce Clause authority. Frequently, a crucial issue in Commerce Clause analysis is the question of whether Congress may aggregate various intrastate activities in determining their impact on interstate commerce. <sup>134</sup> In this context, the question becomes whether courts should evaluate the impacts of individual endangered species or the aggregate impacts of all endangered species.

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interpretation of the Act in the migratory bird rule. *Id.* Instead, the Court read the statute "as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference. *Id.*

<sup>132</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>133</sup> For instance, there is a long standing debate about whether the original intent of the Commerce Clause was limited to only interstate trade and transportation of goods or allows broader regulation. Compare Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (arguing original intent of Commerce Clause was to regulate only interstate trade and transportation of goods), with Robert J. Pushaw, Jr. & Grant S. Nelson, Essay, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 707-15 (2002) (arguing original understanding of text of Commerce Clause allows broad regulation of activities connected to interstate commerce).

<sup>134</sup> Compare Mank, *supra* note 3, at 782-95 (arguing courts should defer under rational basis test to Congress's decision in ESA to aggregate together impacts of all endangered species because there is limited number of such species and concurrent federal authority exists to regulate endangered species), with Nagle, *supra* note 8, at 180, 192-204 (discussing aggregation problem relating to Endangered Species Act and arguing it is inappropriate in light of *Lopez* to aggregate often dissimilar endangered species).

A. *The Development of the Commerce Clause: To Aggregate or Not to Aggregate Interstate Activities?*

From 1937 until 1995, the Court invariably upheld congressional regulation of intrastate activities on the ground that they had broader impacts on interstate commerce.<sup>135</sup> Most notably, in the 1942 case *Wickard v. Filburn*,<sup>136</sup> the Court for the first time aggregated small, intrastate activities to determine their total impact on interstate commerce. There, the Court held that Congress could prohibit farmers from growing wheat exclusively for home consumption because homegrown wheat competed with commercially sold wheat in interstate commerce. The Court reached this conclusion despite the fact that the wheat was grown and consumed entirely within state borders, and in relatively small individual quantities.<sup>137</sup> While acknowledging that one farmer's intrastate activities did not have a "substantial" impact on interstate commerce, the *Wickard* Court concluded that the Commerce Clause encompasses apparently inconsequential actions that substantially affect interstate commerce when aggregated "together with that of many others similarly situated."<sup>138</sup> In *Lopez*, Chief Justice Rehnquist described *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."<sup>139</sup>

A significant problem with the *Wickard* aggregation rationale is that it is unclear which intrastate activities courts should aggregate in determining whether the effect upon interstate commerce justifies legislation under the Commerce Clause.<sup>140</sup> Subsequently, in *Heart of Atlanta Motel, Inc. v.*

<sup>135</sup> See *United States v. Lopez*, 514 U.S. 549, 604-09 (Souter, J., dissenting) (discussing numerous Court decisions from 1937 until 1995 approving congressional legislation under Commerce Clause); see, e.g., *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 276-82 (1981) (upholding Surface Mining Control and Reclamation Act of 1977 regulating intrastate mining activities under Commerce Clause); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246, 252-53 (1964) (upholding civil rights legislation prohibiting racial discrimination in public accommodations under Commerce Clause); *Dral & Phillips*, *supra* note 3, at 10413; *Mank*, *supra* note 3, at 737, 742, 746; *Brignac*, *supra* note 3, at 874.

<sup>136</sup> 317 U.S. 111 (1942).

<sup>137</sup> See *id.* at 125-30.

<sup>138</sup> See *id.* at 127-28.

<sup>139</sup> See *Lopez*, 514 U.S. at 560 (discussing *Wickard*).

<sup>140</sup> See *Nagle*, *supra* note 8, at 179-80 (stating "[w]hat *Wickard* does not answer is the level of generality that Congress is permitted to use when aggregating 'similar' activities.").

*United States*,<sup>141</sup> the Court broadly applied the aggregation principle in upholding civil rights legislation prohibiting racial discrimination in public accommodations, such as hotels, despite objections that the accommodations themselves did not move across state lines. The Court reasoned that in the aggregate these establishments clearly affected interstate travel.<sup>142</sup> However, the much more recent *Lopez* and *Morrison* decisions have limited aggregation to economic activities, except perhaps in unusual circumstances.<sup>143</sup>

In a case even more clearly regulating purely intrastate activities, *Hodel v. Virginia Surface Mining and Reclamation Ass'n*,<sup>144</sup> the Court approved federal regulation of intrastate mining activities under the Surface Mining Control and Reclamation Act of 1977. Although the regulation aimed to prevent purely intrastate environmental harms, the Court held it valid on the ground that the absence of federal legislation would likely lead to ruinous competition among states in lowering state environmental standards in order to retain or attract businesses from other states.<sup>145</sup> In other words, Congress under the Commerce Clause could enact legislation to prevent states from engaging in a "race-to-the-bottom" to attract businesses because such competition would probably result in inappropriate intrastate environmental standards.<sup>146</sup> In approving federal regulation of intrastate mining operations, the Court stated, "The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause."<sup>147</sup> In the related case of *Hodel v. Indiana*,<sup>148</sup> the Supreme Court stated 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. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this

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<sup>141</sup> 379 U.S. 241 (1964).

<sup>142</sup> *Id.* at 246.

<sup>143</sup> See *infra* notes 160-63, 189-95, 207 and accompanying text.

<sup>144</sup> 452 U.S. 264 (1981).

<sup>145</sup> See *id.* at 281-82 (observing congressional concern that such competition among states would prevent "adequate standards on coal mining operations within their borders") (internal quotation marks omitted).

<sup>146</sup> See *id.*

<sup>147</sup> *Id.* at 282.

<sup>148</sup> 452 U.S. 314 (1981).

test.”<sup>149</sup> Under *Hodel*’s rationale, one could reasonably justify regulation of purely intrastate endangered species on the ground that states might fail to protect them because of economic competition.<sup>150</sup>

*B. A Lopez Revolution: The Supreme Court Narrows the Commerce Power*

For the first time since 1936, the Supreme Court in the 1995 case *United States v. Lopez*<sup>151</sup> determined that a federal statute exceeded congressional authority under the Commerce Clause.<sup>152</sup> The Court held that the Gun-Free School Zones Act (GFSZA) of 1990,<sup>153</sup> which made possession of a gun within a school zone a federal criminal offense, exceeded congressional commerce power because the activity was primarily non-economic, it had little direct relationship to interstate commerce, and because regulation of intrastate crime was largely a state or local function.<sup>154</sup> It remains to be seen the extent to which *Lopez* constitutes a rejection of the Court’s lenient review from 1937 until 1995 of federal statutes relying on the Commerce Clause.

Chief Justice Rehnquist’s majority opinion contended that Congress’s authority under the Commerce Clause was limited to regulating three types of activities: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce . . .”; and (3) “those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.”<sup>155</sup> Although *Lopez*’s three-part test is on its face consistent with prior cases, many commentators have argued that the *Lopez* Court applied these tests more strictly than the Court had since 1936.<sup>156</sup> The *Lopez*

<sup>149</sup> *Id.* at 329 n.17; see Adrian Vermeule, Dialogue, *Centralization and the Commerce Clause*, 31 *Envtl. L. Rep.* (Envtl. L. Inst.), Nov. 2001, at 11334, 11335.

<sup>150</sup> Mank, *supra* note 3, at 778.

<sup>151</sup> 514 U.S. 549 (1995).

<sup>152</sup> William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, *Envtl. L. Rep.* (Envtl. L. Inst.), July 2001, at 10741, 10763.

<sup>153</sup> 18 U.S.C. § 922(q) (1988 & Supp. 1990).

<sup>154</sup> *Lopez*, 514 U.S. at 559-67.

<sup>155</sup> *Id.* at 558-59 (citations omitted).

<sup>156</sup> See *id.* at 608-09 (Souter, J., dissenting) (arguing *Lopez* majority did not use rational basis standard in reviewing statute as it claimed, but a more stringent standard that was not clearly explained); Dral & Phillips, *supra* note 3, at 10417-18 (arguing *Lopez* and *Morrison* claimed to use rational basis standard for reviewing

Court determined that the GFSZA was not justified under the first two tests primarily because the statute lacked any nexus or jurisdictional requirement limiting its scope to guns that had moved through interstate commerce.<sup>157</sup> The Court, however, did not mandate that a statute must have an express jurisdictional requirement to survive review, perhaps because such a nexus might be implied for some types of commercial activities even without an explicit legislative finding or limitation.<sup>158</sup>

The *Lopez* Court arguably applied the third test, the substantial effect standard, more narrowly than had any Court since 1936. Stressing that the Commerce Clause is usually about economic regulation, the *Lopez* decision suggested that Congress has authority under the commerce power to enact legislation regulating "economic activity" that has substantial impacts on interstate commerce, but generally does not have power to regulate non-commercial activities that may indirectly affect interstate commerce.<sup>159</sup> Rejecting the view that a statute may aggregate a wide range of commercial and non-commercial activities as long as some of them have a substantial impact on interstate commerce, Chief Justice Rehnquist argued that the aggregation principle used in *Wickard* should be limited to genuinely economic activities because the *Wickard* Court had stated that Congress may regulate activity that "exerts a substantial economic effect on interstate commerce."<sup>160</sup> The

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legislation under Commerce Clause, but actually used more stringent and uncertain standard); Mank, *supra* note 3, at 744-45 (same); Schapiro & Buzbee, *supra* note 3, at 1219-23 (arguing *Lopez's* emphasis on primarily economic basis of Commerce Clause is contrary to prior cases and makes it unlikely Court will approve legislation regulating non-commercial activities); Brignac, *supra* note 3, at 881-82 (arguing *Morrison* court claimed to use rational basis review, but *Morrison* decision stringently reviewed whether activity substantially affects interstate commerce); Jason Everett Goldberg, Note, *Substantial Activity and Non-Economic Commerce: Toward a New Theory of the Commerce Clause*, 9 J.L. & POL'Y 563, 571, 594-603 (2001) (arguing that *Morrison* purported to use rational basis review, but actually applied far more stringent yet uncertain standard).

<sup>157</sup> See *Lopez*, 514 U.S. at 561.

<sup>158</sup> See *GDF*, 326 F.3d 622, 640 (5th Cir. 2003), *reh'g denied*, No. 01-51099, 2004 U.S. App. LEXIS 3933 (5th Cir. Feb. 27, 2004) (en banc) (concluding ESA is limited to interstate activities even though statute lacks express jurisdictional element); Mank, *supra* note 3, at 762 (observing *Lopez* encouraged but did not require jurisdictional statement); White, *supra* note 3, at 243, 253-54 (suggesting Congress might evade Commerce Clause problems by adding jurisdictional limit).

<sup>159</sup> *Lopez*, 514 U.S. at 559-63; Funk, *supra* note 152, at 10763.

<sup>160</sup> *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (emphasis added); see also *Lopez*, 514 U.S. at 560 (emphasizing *Wickard* was case involving economic activity and arguing its aggregation principle applies only to economic activities); Schapiro &

Court stated “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”<sup>161</sup> The Court emphasized that the congressional commerce power authorizes regulation of only activities that have a “substantial relation to interstate commerce” and “substantially affect interstate commerce.”<sup>162</sup> The Court did suggest that Congress may enact legislation regulating some intrastate activities that lack a substantial impact on interstate commerce if the regulatory scheme is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>163</sup>

The Court concluded that gun possession did not fall within the third test for activities that “substantially affect[]” interstate commerce because it was neither a commercial activity in itself nor an essential ingredient for a primarily interstate economic activity.<sup>164</sup> Furthermore, the Court concluded that the statute’s legislative history had made only general conclusions about the impact of violent crime on interstate commerce, failing to make specific findings about the effect on interstate commerce of gun possession in school zones.<sup>165</sup> Accordingly, the Court held that the statute exceeded congressional authority under the Commerce Clause because there was no evidence supporting Congress’s assertion that gun possession in school zones had a substantial impact on interstate commerce.<sup>166</sup> Although demanding more specific evidence that an activity has substantial economic impacts on interstate commerce, the *Lopez* Court failed to explain whether or how its approach differed from rational basis review, leading to considerable confusion for lower courts.

A clue for understanding *Lopez* lies in its underlying federalist or states’ rights philosophy that national regulation

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Buzbee, *supra* note 3, at 1222 (arguing Chief Justice Rehnquist in *Lopez* read *Wickard* too narrowly as authorizing aggregation of economic activities).

<sup>161</sup> *Lopez*, 514 U.S. at 560.

<sup>162</sup> *Id.* at 559.

<sup>163</sup> *See id.* at 561; Vermeule, *supra* note 149, at 11335.

<sup>164</sup> *See Lopez*, 514 U.S. at 561 (holding that the GFSZA is not “an essential part of a larger regulation of economic activity”); Dral & Philips, *supra* note 3, at 10414.

<sup>165</sup> *See Bryant & Simeone, supra* note 28, at 341 (discussing *Lopez*’s observation that GFSZA lacked congressional findings supporting legislative conclusion that guns near schools affected interstate commerce).

<sup>166</sup> *See Lopez*, 514 U.S. at 567-68.

of non-economic activities that have traditionally been regulated by state or local governments would weaken our federal system.<sup>167</sup> The Court implied that it would more strictly review federal statutes under the Commerce Clause when federal regulation intruded on subject matters traditionally controlled by state or local governments. The *Lopez* Court rejected Congress's "costs of crime" and "national productivity" justifications for the GFSZA because under these rationales it is "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."<sup>168</sup> The Court also observed that regulation of school areas was within the "general police power" retained by the states and therefore not appropriate under the Commerce Clause absent a valid economic relationship with interstate commerce.<sup>169</sup>

In his concurring opinion, Justice Kennedy, joined by Justice O'Connor, also adopted a federalist approach to interpreting the Commerce Clause, but his methodology was arguably more flexible than that employed in Chief Justice Rehnquist's majority opinion.<sup>170</sup> Justice Kennedy maintained that the Court should delineate the outer reaches of the commerce power in view of a policy of balancing federal and state authority, especially in non-commercial areas traditionally regulated by states.<sup>171</sup> Because education is traditionally a state rather than federal subject, Justice Kennedy contended that courts should be reluctant to sanction federal legislation that targets an "area of traditional state concern" to which "States lay claim by right of history and expertise."<sup>172</sup> Under an overly broad interpretation of the commerce power that sanctioned federal regulation of

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<sup>167</sup> See *id.* at 561 n.3; Mank, *supra* note 3, at 770-72; *infra* notes 171-74, 196-98, 208-12 and accompanying text.

<sup>168</sup> *Lopez*, 514 U.S. at 564.

<sup>169</sup> See *id.* at 567.

<sup>170</sup> See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 801-04 (1996) (discussing Justice Kennedy's "pragmatic" concurrence in *Lopez* as more moderate than Chief Justice Rehnquist's majority opinion; Mank, *supra* note 3, at 740-41, 746, 771; Stephen R. McAllister, Essay, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause*, 44 U. KAN. L. REV. 217, 238-42 (1996) (praising Justice Kennedy's "pragmatic" approach to federalism as model for future cases)

<sup>171</sup> *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring); Mank, *supra* note 3, at 740-41 White, *supra* note 3, at 238-39.

<sup>172</sup> *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring); Mank, *supra* note 3, at 740-41.

traditional areas of state concern, he warned that "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."<sup>173</sup> Justice Kennedy stated that Congress could regulate non-commercial activities having a nexus to interstate commerce if the legislation did not intrude on areas within the traditional state police power.<sup>174</sup>

In his dissenting opinion, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, argued that the majority opinion was inconsistent with prior decisions by the Court upholding statutes regulating activities that had much less impact on interstate commerce than the possession of a gun on school grounds.<sup>175</sup> He maintained that Congress had a rational basis for finding a substantial relation between the possession of a gun in a school zone and interstate commerce.<sup>176</sup> Moreover, he contended that the majority's distinction between "commercial" and "noncommercial" transactions was inconsistent with the Commerce Clause, which he maintained authorizes regulation of either type of activity as long as it significantly impacts interstate commerce.<sup>177</sup> Additionally, he maintained that the majority's distinction between "commercial" and "noncommercial" activities was unworkable because it was impossible to make such delineations.<sup>178</sup>

<sup>173</sup> *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring); Mank, *supra* note 3, at 740-41.

<sup>174</sup> See generally *Lopez*, 514 U.S. at 576-81 (Kennedy, J., concurring); David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, at 404-05 (1998); Mank, *supra* note 3, at 740-41; Scalero, *supra* note 73, at 329; White, *supra* note 3, at 238-39. Arguably, even Chief Justice Rehnquist's majority opinion implied that Congress might use the commerce power to regulate non-economic activities that do not intrude on traditional areas of state control. See Louis J. Virelli III & David S. Leibowitz, "Federalism Whether They Want It or Not": *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 954 (2001); see also Mank, *supra* note 3, at 741 n.106.

<sup>175</sup> *Lopez*, 514 U.S. at 615-16 (Breyer, J., dissenting) (citing *Perez v. United States*, 402 U.S. 146 (1971) (holding federal loan sharking criminal statute within Commerce Clause), *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding the Civil Rights Act of 1964 within Commerce Clause), *Daniel v. Paul*, 395 U.S. 298 (1969) (holding the regulation of an intrastate amusement park within Commerce Clause), and *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding the regulation of consumption of homegrown wheat within Commerce Clause)); Dral & Phillips, *supra* note 3, at 10414-15.

<sup>176</sup> *Lopez*, 514 U.S. at 618 (Breyer, J., dissenting).

<sup>177</sup> *Id.* at 627-28 (Breyer, J., dissenting); Dral & Phillips, *supra* note 3, at 10418-21.

<sup>178</sup> *Lopez*, 514 U.S. at 627 (Breyer, J., dissenting).

Furthermore, he criticized the majority for fomenting "legal uncertainty in an area of law that, until this case, seemed reasonably well settled."<sup>179</sup>

In a separate dissenting opinion, Justice Souter attacked the majority opinion for quietly undermining the rational basis test that the Court had used since 1937 to review legislation under the Commerce Clause.<sup>180</sup> After providing a thorough historical review of the Court's Commerce Clause decisions before 1937, he contended that the Court had regressed to its problematic pre-1937 approach by requiring more than a rational basis for non-commercial activities even though it was impossible in many cases to distinguish between commercial and non-commercial activities.<sup>181</sup> Also, he argued that the Court had created additional confusion by implying that whether it used rational basis review would depend on whether a statute addressed a subject of traditional state regulation.<sup>182</sup> Moreover, he criticized the Court for suggesting that it would apply rational basis review only for statutes in which Congress had included explicit factual findings justifying its legislative conclusion that an activity substantially affects interstate commerce.<sup>183</sup>

### C. Morrison Follows Lopez

In 2000, the Supreme Court in *United States v. Morrison*<sup>184</sup> held that the Violence Against Women Act (VAWA), which provided a civil damages remedy for victims of gender-based violence,<sup>185</sup> exceeded congressional authority under the Commerce Clause because the activity was essentially non-economic and was only indirectly connected to interstate commerce.<sup>186</sup> Following *Lopez's* third test, the *Morrison* Court

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<sup>179</sup> *Id.* at 630 (Breyer, J., dissenting).

<sup>180</sup> *Id.* at 603-08 (Souter, J., dissenting).

<sup>181</sup> *Id.* at 608 (Souter, J., dissenting) (criticizing *Lopez's* commercial versus non-commercial distinction as unworkable); Seinfeld, *supra* note 22, at 1276-87 (discussing difficulties lower courts have encountered in distinguishing economic from non-economic activities).

<sup>182</sup> *Lopez*, 514 U.S. at 608-09 (Souter, J., dissenting).

<sup>183</sup> *Id.*

<sup>184</sup> 529 U.S. 598 (2000).

<sup>185</sup> 42 U.S.C. § 13981(b) (1994).

<sup>186</sup> *Morrison*, 529 U.S. at 613-19. The Court also held that Congress lacked authority under § 5 of the Fourteenth Amendment to enact § 13981, but that issue is beyond the scope of this Article. *Id.* at 619-27; Bryant & Simeone, *supra* note 28, at 328.

emphasized that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."<sup>187</sup> The Court rejected congressional findings that gender-based violence had significant effects on interstate commerce because the causal connection between gender-based crimes and any economic consequences was too indirect and attenuated.<sup>188</sup>

Furthermore, the *Morrison* Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."<sup>189</sup> Because the aggregation of non-economic activities could justify federal usurpation of traditional state functions, the Court expressed strong reservations about allowing Congress to aggregate non-economic activities to show a substantial effect on interstate commerce.<sup>190</sup> "If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."<sup>191</sup> Additionally, judicial acquiescence to congressional legislation based on the aggregation of non-economic activities under the Commerce Clause could "completely obliterate the Constitution's distinction between national and local authority."<sup>192</sup> For instance, Chief Justice Rehnquist's majority opinion maintained that the aggregation of non-economic activities could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."<sup>193</sup> The *Morrison* Court reiterated that past decisions had aggregated only economic activities in determining whether an activity had substantial impacts on interstate commerce.<sup>194</sup> The *Morrison* Court, however, did not adopt a firm rule that aggregating non-economic activities is always inappropriate, stating: "While we

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<sup>187</sup> *Morrison*, 529 U.S. at 611.

<sup>188</sup> *Id.* at 615-16.

<sup>189</sup> *Id.* at 617.

<sup>190</sup> *Id.* at 615-17.

<sup>191</sup> *Id.* at 615.

<sup>192</sup> *Morrison*, 529 U.S. at 615.

<sup>193</sup> *Id.* at 615-16.

<sup>194</sup> *Id.* at 610-11.

need not adopt a categorical rule against aggregating the effects of *noneconomic* 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*.<sup>195</sup>

Moreover, the *Morrison* decision, like *Lopez*, asserted federalist concerns in determining that the VAWA improperly interfered with traditional state control over family law and criminal issues.<sup>196</sup> The Court stated, “[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”<sup>197</sup> As had the *Lopez* Court, the *Morrison* Court cautioned that courts should examine the constitutionality of legislation under the Commerce Clause in light of this principle. “The Constitution requires a distinction between what is truly national and what is truly local.”<sup>198</sup>

By contrast, in his dissenting opinion, Justice Souter again relied on *Wickard* and its progeny in contending that Congress “has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce.”<sup>199</sup> He argued that the Court should have applied a rational basis standard and concluded that Congress did have a rational basis for determining that gender-motivated violence significantly impacts interstate commerce.<sup>200</sup>

#### D. *The Impact of Lopez and Morrison on the Congressional Commerce Power*

It is not clear whether the *Lopez* and *Morrison* decisions created a new standard for reviewing legislation under the Commerce Clause, but both cases applied a far more restrictive approach than the Court had between 1937 and 1995.<sup>201</sup> Neither

<sup>195</sup> *Id.* at 613 (emphasis added).

<sup>196</sup> *Morrison*, 529 U.S. at 618.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 617-18.

<sup>199</sup> *Id.* at 628 (Souter, J., dissenting).

<sup>200</sup> *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

<sup>201</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 604-09 (1995) (Souter, J., dissenting) (criticizing the *Lopez* majority for claiming to use but failing to follow deferential rational basis review used by the Court since 1937); Dral & Phillips, *supra* note 3, at 10417-18 (arguing *Lopez* and *Morrison* claimed to apply rational basis standard in reviewing legislation under Commerce Clause, but actually used more stringent yet uncertain standard); Mank, *supra* note 3, at 744-45 (same); Goldberg,

case explicitly rejected past decisions using a rational basis test, but it is not clear whether the standard of review that they used is the same as rational basis review. In *Morrison*, the Court employed a standard of legislative review similar to but not exactly the same as rational basis review, declaring: "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."<sup>202</sup> Yet both decisions employed a far less deferential approach than prior Commerce Clause decisions despite using an arguably similar standard.<sup>203</sup> Notwithstanding its purportedly deferential test for reviewing congressional legislation, the *Morrison* Court refused to bow to congressional conclusions about the substantial impact of gender-based violence on interstate commerce not because the Court doubted that there was such an impact, but rather because any indirect impact, no matter how substantial, was deemed irrelevant when it flowed from non-commercial, intrastate activities.<sup>204</sup> In his *Morrison* dissent, Justice Souter argued that the majority in both *Lopez* and *Morrison* had purported to use a substantial effects test, but in fact had applied a different and uncertain standard.<sup>205</sup> By applying the rational basis test in a different

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*supra* note 156, at 571, 594-603 (arguing that *Morrison* claimed to apply rational basis review, but actually used more stringent standard that was never clearly explained); *supra* notes 156, 180-83 and *infra* notes 202-06 and accompanying text.

<sup>202</sup> *Morrison*, 529 U.S. at 607. See also Mank, *supra* note 3, at 744-45; Goldberg, *supra* note 156, at 607.

<sup>203</sup> See *United States v. Lopez*, 514 U.S. at 604-09 (Souter, J., dissenting); *Morrison*, 529 U.S. at 628, 637 (Souter, J., dissenting) (criticizing the *Morrison* majority for purportedly using deferential rational basis review, but actually applying more stringent standard); Dral & Phillips, *supra* note 3, at 10417-18; Mank, *supra* note 3, at 744-45 (same); Brignac, *supra* note 3, at 881-82 (arguing *Morrison* court claimed to use rational basis review, but *Morrison* decision stringently reviewed whether activity substantially affects interstate commerce); Goldberg, *supra* note 156, at 571, 594-603 (2001) (arguing that *Morrison* purported to use rational basis review, but actually applied far more stringent yet uncertain standard).

<sup>204</sup> *Morrison*, 529 U.S. at 607 (stating deferential presumption of constitutionality standard); *id.* at 614-15 (declining to defer to congressional finding that gender-based violence substantially affects interstate commerce); Bryant & Simeone, *supra* note 28, at 343-44 (arguing *Morrison* acknowledged truth of congressional findings that gender-based violence affected interstate commerce, but deemed such impacts irrelevant because such violence is non-commercial, intrastate activity outside boundaries of Commerce Clause); Mank, *supra* note 3, at 744-45 (criticizing *Morrison* for failing to defer to legislative findings of impact of gender-based violence on interstate commerce and suggesting Court applied less deferential standard than previous cases).

<sup>205</sup> See *Morrison*, 529 U.S. at 637-38 (Souter, J., dissenting); *Lopez*, 514 U.S. at 603-11 (Souter, J., dissenting); Dral & Phillips, *supra* note 3, at 10417 & n.99; Mank, *supra* note 3, at 742, 744-45.

way than prior Commerce Clause decisions without fully articulating why and without explaining the precise contours of the test or the manner of its application, Justice Souter maintained that the *Lopez* and *Morrison* decisions failed to provide clear direction for lower courts.<sup>206</sup>

The *Lopez* and *Morrison* decisions did provide at least two significant additions to Commerce Clause jurisprudence that suggest when the Court will apply heightened rational basis review. First, both *Lopez* and *Morrison* emphasized that the Commerce Clause primarily concerns economic regulation and suggested that non-economic legislation will receive less deferential review from the Court.<sup>207</sup> Second, both decisions emphasized federalist principles as a basis for determining the appropriate level of scrutiny and implied that federal legislation intruding on traditional state areas of regulation will receive much less deference.<sup>208</sup> The two principles are interrelated because states have traditionally regulated many non-economic activities through criminal and family law. The *Lopez* and *Morrison* decisions suggest that the Court will strictly review legislation that regulates non-economic activities traditionally regulated by states.

Consistent with the above ideas, Justice Kennedy's concurring opinion in *Lopez* may provide the best explanation for how the Court is likely to decide close Commerce Clause cases in the future.<sup>209</sup> Although agreeing with the rational basis test used by the Court between 1937 and 1995, Justice Kennedy's concurring opinion in *Lopez* interpreted the Commerce Clause in light of federalist principles that prohibit Congress from enacting legislation that has only incidental commercial concerns and interferes with traditional state functions.<sup>210</sup> In cases not involving traditional state regulation,

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<sup>206</sup> See Dral & Phillips, *supra* note 3, at 10417-18 (criticizing *Lopez* and *Morrison* for using uncertain standard of review); Mank, *supra* note 3, at 744-46 (same); Goldberg, *supra* note 156, at 606-08 (arguing uncertain standard of review in *Lopez* and *Morrison* has confused lower courts).

<sup>207</sup> See *Morrison*, 529 U.S. at 611-17 (emphasizing that Commerce Clause primarily regulates economic activities); *Lopez*, 514 U.S. at 559-62 (same); Funk, *supra* note 152, at 10763 (discussing emphasis in *Lopez* and *Morrison* on economic basis of Commerce Clause); Mank, *supra* note 3, at 737-38, 743 (same).

<sup>208</sup> See *Morrison*, 529 U.S. at 618-19; *Lopez*, 514 U.S. at 564-67; Mank, *supra* note 3, at 770-71; *supra* notes 171-74, 196-98 and accompanying text; *infra* notes 209-12 and accompanying text.

<sup>209</sup> See *Lopez*, 514 U.S. at 576-81 (Kennedy, J., concurring); Mank, *supra* note 3, at 740-41, 746, 771.

<sup>210</sup> See generally *Lopez*, 514 U.S. at 575-83 (Kennedy, J., concurring)

Justice Kennedy has suggested that he will apply the deferential rational basis review in determining whether activities have "substantial effects" on interstate commerce. He has explicitly rejected Justice Thomas's argument that the Court adopt a narrow, laissez-faire pre-1937 interpretation of the commerce power.<sup>211</sup> Until there are substantial changes in the membership of the Supreme Court, Justice Kennedy's approach to federalism and the Commerce Clause is likely to predict future decisions.<sup>212</sup>

### E. SWANCC and the "Precise Object" of Commerce Clause Regulation

Another crucial aspect of the Court's Commerce Clause analysis is determining exactly what a statute seeks to regulate. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*,<sup>213</sup> the Supreme Court in a five-to-four decision held that a regulation defining the Corps' jurisdiction to include "isolated" intrastate wetlands and waters serving as habitat for migratory birds exceeded its statutory authority under the Clean Water Act.<sup>214</sup> Notably, the same five justices constituted the majority in *Lopez*, *Morrison*, and *SWANCC*: Chief Justice Rehnquist, Justices O'Connor, Scalia, Kennedy, and Thomas. Moreover, Justices Stevens, Souter, Ginsburg, and Breyer dissented in each case.<sup>215</sup> The *SWANCC* Court concluded that the Act's reliance on the term "navigable waters" in defining the scope of the statute's wetlands jurisdiction demonstrated that Congress

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<sup>211</sup> See generally *id.* at 574-83 (Kennedy, J., concurring); Althouse, *supra* note 170, at 802 (arguing Justice Kennedy's concurring opinion in *Lopez* recognized need for modern understanding of the commerce power in light of today's economic system); McAllister, *supra* note 170, at 229 (same); Byron Dailey, Note, *The Five Faces of Federalism: A State-Power Quintet Without a Theory*, 62 OHIO ST. L.J. 1243, 1248-49 (2001) (arguing Justice Kennedy's concurring opinion in *Lopez* clearly rejected Justice Thomas' proposed return to 18th century understanding of commerce).

<sup>212</sup> See generally Dailey, *supra* note 211, at 1286-88 (discussing how five justices, Chief Justice Rehnquist, Justices Justice O'Connor, Scalia, Kennedy and Thomas, vote in federalism cases and arguing that Justice Thomas' views about commerce power are "extreme").

<sup>213</sup> *SWANCC*, 531 U.S. 159 (2001).

<sup>214</sup> *Id.* at 174 (invalidating Final Rule for Regulatory Programs for the Corps of Engineers, 51 Fed. Reg. 41,217 (1986)); Funk, *supra* note 152 (discussing *SWANCC*); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, Env'tl. L. Rep. (Env'tl. L. Inst.), June 2001, at 10669 (same); Mank, *supra* note 3, at 725 (same); Moiseyev, *supra* note 131, at 194-95 (2001) (same).

<sup>215</sup> See *Lopez*, 514 U.S. at 550; *Morrison*, 529 U.S. at 655; *SWANCC*, 531 U.S. at 176.

did not intend to reach "isolated" intrastate wetlands or waters that are not connected or adjacent to navigable waters.<sup>216</sup> The Court narrowly interpreted the Act's jurisdiction to include only "navigable waters" or non-navigable waters that are adjacent to or have a "significant nexus" with navigable waters.<sup>217</sup> By basing its holding exclusively on statutory interpretation, the Court avoided determining whether federal regulation of isolated, intrastate waters or wetlands was beyond the scope of the Commerce Clause.<sup>218</sup>

In dicta, however, the Court implied that the Corps' purported regulation of isolated, intrastate waters lay outside the purview of the commerce power because states and local governments had traditionally exercised exclusive jurisdiction over those waters.<sup>219</sup> Accordingly, the Court determined that to include "federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."<sup>220</sup> While dicta, the SWANCC decision's discussion of the Commerce Clause demonstrates similar federalism concerns as those expressed in *Lopez* and *Morrison*.<sup>221</sup>

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<sup>216</sup> See SWANCC, 531 U.S. at 163-64, 167-68 (interpreting Federal Water Pollution Control Act §404(a), 33 U.S.C. §1344(a) (commonly known as the Clean Water Act)). See generally Funk, *supra* note 152, at 10746-59 (criticizing SWANCC for construing term "navigable waters" too narrowly); Michael P. Healy, *Textualism's Limits on the Administrative State: Of Isolated Waters, Barking Dogs, and Chevron*, Env'tl. L. Rep. (Env'tl. L. Inst.), Aug. 2001, at 10928 (same); Johnson, *supra* note 214, at 10672 (same); Mank, *supra* note 3, at 725-26 (same).

<sup>217</sup> See SWANCC, 531 U.S. at 172-73 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); Mank, *supra* note 3, at 726.

<sup>218</sup> See SWANCC, 531 U.S. at 172-73 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); Johnson, *supra* note 240, at 10673 (discussing SWANCC's deliberate avoidance of constitutional issue, but possible impact of its dicta); Mank, *supra* note 3, at 726 (same); Moiseyev, *supra* note 131, at 195 ("Although the Court did not reach the Commerce Clause challenge to the Migratory Bird Rule, it did suggest that the Corps' interpretation breached the outer limits of congressional authority.").

<sup>219</sup> See SWANCC, 531 U.S. at 174 (citing *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments")); Mank, *supra* note 3, at 726, 748 (discussing SWANCC decision's dicta regarding role of state and local governments in land use regulation); Moiseyev, *supra* note 131, at 195 (same).

<sup>220</sup> See SWANCC, 531 U.S. at 174; Mank, *supra* note 3, at 726, 748; Moiseyev, *supra* note 131, at 195.

<sup>221</sup> See SWANCC, 531 U.S. at 173 (citing *United States v. Bass*, 404 U.S. 336 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); Dral & Phillips, *supra* note 3, at 10421 (discussing SWANCC decision's dicta regarding role of state and local

Additionally, in dicta, the *SWANCC* decision questioned whether the fact that migratory birds frequently cross state lines makes all of their habitat entitled to protection under the Commerce Clause, and suggested that the government had failed to demonstrate the extent to which isolated, intrastate wetlands were crucial habitat necessary to preserve the birds' commercial value.<sup>222</sup> The Corps contended that the migratory bird regulation was justified under the Commerce Clause's authority to regulate activities that "substantially affect" interstate commerce because the birds generated over one billion dollars a year from recreational activities such as hunting and tourism.<sup>223</sup> In the 1920 decision *Missouri v. Holland*,<sup>224</sup> which upheld a treaty protecting migratory birds, the Supreme Court recognized the economic importance of migratory birds, stating that their preservation was a "national interest of very nearly the first magnitude."<sup>225</sup> However, in dissenting from the Court's denial of certiorari in *Cargill, Inc. v. United States*,<sup>226</sup> Justice Thomas stated that the assumption that "the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds . . . likely stretches Congress' Commerce Clause powers beyond the breaking point."<sup>227</sup> In *SWANCC*, the Court did not directly address whether the presence of migratory birds was sufficient to justify regulation of intrastate, isolated wetlands under the Commerce Clause, but it stated that this argument "raise[d] significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."<sup>228</sup>

Although its reference to "precise object or activity" is not absolutely clear, the *SWANCC* decision suggested that neither the value of the migratory birds nor the commercial activities that motivated the filling in of the wetlands could justify congressional regulation because they were not the

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governments in land use regulation); Johnson, *supra* note 214, at 10673 (same); Mank, *supra* note 3, at 726, 748-49 (same); Moiseyev, *supra* note 131, at 195 (same).

<sup>222</sup> *SWANCC*, 531 U.S. at 173.

<sup>223</sup> *Id.*

<sup>224</sup> 252 U.S. 416, 435 (1920).

<sup>225</sup> *Id.* at 435.

<sup>226</sup> 516 U.S. 955 (1995).

<sup>227</sup> *Id.* at 958.

<sup>228</sup> *SWANCC*, 531 U.S. at 173.

precise object of the statute.<sup>229</sup> Instead, the Court implied that the wetlands themselves are the “object” that must substantially affect interstate commerce.<sup>230</sup> In the lower courts, the Corps had based its authority to regulate the petitioner’s land on the presence of “water areas used as habitat by migratory birds.”<sup>231</sup> Perhaps anticipating the majority’s concern with whether isolated, intrastate wetlands were essential to the commercial value of the birds, the Corps before the Court added a new argument that the threatened wetlands had a relationship to interstate commerce because the petitioner’s construction project, a municipal landfill, had significant economic impacts on interstate commerce.<sup>232</sup> The Court suggested that it was unhappy with the Corps’ last minute shift in its arguments, stating, “For although the Corps has claimed jurisdiction over petitioner’s land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner’s municipal landfill, which is ‘plainly of a commercial nature.’”<sup>233</sup> More importantly, the Court expressed doubts about the Corps’ new argument because “this is a far cry, indeed, from the ‘navigable waters’ and ‘waters of the United States’ to which the statute by its terms extends.”<sup>234</sup> The Court suggested that it would not exclusively focus on the commercial activities causing the destruction of natural resources and instead would look to whether there was some close relationship between the natural object and the commercial activities.

However, the SWANCC decision failed to provide a clear direction to lower courts about how they should decide what is the central “object” of a statute – specifically about whether the

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<sup>229</sup> See Moiseyev, *supra* note 131, at 195.

<sup>230</sup> See Schapiro & Buzbee, *supra* note 3, at 1243 n.252 (arguing *Lopez* and *Morrison* focused on the commercial activities that were the “target” of the challenged statute, but that “[t]he SWANCC decision, on the other hand, seemed to focus more on the beneficiaries of regulation—wetlands and migratory birds.”); see also Michael J. Gerhardt, *On Revolution and Wetland Regulations*, 90 GEO. L.J. 2143, 2163 (2002) (suggesting SWANCC focused on the purpose of the statute and regulations); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 38 (2003) (suggesting SWANCC focused on the environmental benefits of the statute and regulations); Moiseyev, *supra* note 131, at 195.

<sup>231</sup> SWANCC, 531 U.S. at 173.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (citing Brief for Federal Respondents, at 43).

<sup>234</sup> *Id.*; Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right?: A Legislative History of the Clean Water Act*, 32 Env’tl. L. Rep. (Env’tl. L. Inst.) 11042, 11053 (September 2002).

object is the statute's regulatory "targets" or its beneficiaries – and how close the nexus must be between the object and the commercial purposes of the Commerce Clause.<sup>235</sup> Some commentators have argued that "the object regulated [in SWANCC] is the intrastate water."<sup>236</sup> Others contend that in the Clean Water Act, "Congress is not regulating wetlands use; it is regulating the economic, and often commercial activity of land use and development."<sup>237</sup> While not clearly defining the "precise object" at issue in the case, the stronger argument is that the SWANCC court was focusing on the purpose of the statute and regulations – benefiting wetlands – rather than on the commercial activity being regulated, the landfill.<sup>238</sup> As discussed below, the SWANCC Court's focus on the environmental purposes of the statute and regulations rather than the landfill supports the argument in *GDF* and weakens that in *Viejo*, although the evidence is admittedly not perfect.<sup>239</sup>

In his dissenting opinion, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, argued that Congress could validly regulate isolated, intrastate wetlands inhabited by migratory birds for two reasons: because filling the wetlands usually has significant impacts on interstate commerce and because the birds themselves substantially affect interstate commerce through hunting and tourism. First, unlike the majority, he accepted the government's late argument that construction activities destroying isolated wetlands frequently have significant interstate commercial impacts, observing that "the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons."<sup>240</sup> Additionally, he contended that eliminating isolated, intrastate wetlands significantly impacts interstate commerce by reducing the

<sup>235</sup> Schapiro & Buzbee, *supra* note 3, at 1227-28, 1248-49 (arguing SWANCC failed to clarify whether the targets or beneficiaries of regulatory statute are its "object" and which types of commercial activities are within scope of Commerce Clause).

<sup>236</sup> Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 890 (2002).

<sup>237</sup> Marianne Moody Jenkins & Nim Razook, *United States v. Morrison: Where the Commerce Clause Meets Civil Rights and Reasonable Minds Part Ways: A Point and Counterpoint from a Constitutional and Social Perspective*, 35 NEW ENG. L. REV. 23, 54 (2000).

<sup>238</sup> See Schapiro & Buzbee, *supra* note 3, at 1243 n.252; see also Gerhardt, *supra* note 230, at 2163; Klein, *supra* note 230, at 38 (2003).

<sup>239</sup> See *infra* notes 381-84 and accompanying text.

<sup>240</sup> SWANCC, 531 U.S. 159, 193 (2001) (Stevens, J., dissenting); Moiseyev, *supra* note 131, at 196.

migratory bird population and thereby decreasing hunting and tourism.<sup>241</sup> He argued that congressional legislation regulating isolated wetlands was constitutional because "the causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds is not 'attenuated,'<sup>242</sup> [but instead] is direct and concrete."<sup>243</sup> Moreover, he maintained that the migratory bird rule did not intrude on a traditional area of local government responsibility because the national government had long assumed the role of protecting migratory birds as a national asset.<sup>244</sup> With the above analysis in mind, this Article will now examine two important court of appeals decisions addressing the commerce power in the more specific context of endangered species.

#### IV. PREVIOUS ENDANGERED SPECIES DECISIONS: *NAHB* AND *GIBBS*

Before the recent *GDF* and *Viejo* decisions, two important cases had addressed the constitutionality of the Endangered Species Act under the Commerce Clause in light of *Lopez*. First, in 1997, in *National Association of Home Builders v. Babbitt (NAHB)*,<sup>245</sup> by a two-to-one vote, the Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the ESA in a case involving the endangered Delhi Sands Flower-Loving Fly, a purely intrastate species that had no significant commercial value.<sup>246</sup> The significance of *NAHB* was arguably weakened by the fact that the two judges in the majority largely disagreed about the grounds for finding the ESA constitutional as applied to the fly. Additionally, *NAHB* was decided before *Morrison* or *SWANCC*, and it is important to assess its precedential value in light of those two cases.

In 2000, twenty-two days after the Supreme Court had decided *Morrison*, in *Gibbs v. Babbitt*,<sup>247</sup> the Fourth Circuit in a

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<sup>241</sup> *SWANCC*, 531 U.S. at 194-95 (Stevens, J., dissenting); Moiseyev, *supra* note 131, at 196.

<sup>242</sup> *SWANCC*, 531 U.S. at 195 (Stevens, J., dissenting) (quoting *United States v. Morrison*, 529 U.S. at 612); Moiseyev, *supra* note 131, at 196.

<sup>243</sup> *SWANCC*, 531 U.S. at 195 (Stevens, J., dissenting) (citing *Gibbs v. Babbitt*, 214 F.3d 483, 492-93 (4th Cir. 2000)); Moiseyev, *supra* note 131, at 196.

<sup>244</sup> *SWANCC*, 531 U.S. at 195-96 (Stevens, J., dissenting).

<sup>245</sup> 130 F.3d 1041 (D.C. Cir. 1997).

<sup>246</sup> See generally *infra* notes 248-87 and accompanying text.

<sup>247</sup> 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom.* *Gibbs v. Norton*, 531 U.S. 1145 (2001); see Dave Owen, *Gibbs v. Babbitt*, 28 *ECOLOGY L.Q.* 377 (2001).

two-to-one decision by Chief Judge J. Harvey Wilkinson IV rejected a Commerce Clause challenge to the ESA in a case addressing a FWS regulation prohibiting the taking of endangered red wolves on private land. The *Gibbs* decision is arguably distinguishable from *NAHB*, *Viejo*, and *GDF* because red wolves create interstate commercial value through tourism, pelts and, negatively, by harming farm animals that are objects of interstate trade. Because both *GDF* and *Viejo* extensively discuss these two cases, it is essential to examine *NAHB* and *Gibbs*.

A. *NAHB's Competing Rationales: Preserving Biodiversity, Saving Ecosystems, and Regulating Private Development*

Commentators have viewed *NAHB* as an important case because the fly is such an insignificant species, possessing no real commercial value and existing only in one state.<sup>248</sup> In *NAHB*, previous commercial development and pollution had limited the fly's habitat to a forty square-mile area entirely within the state of California.<sup>249</sup> There is no significant commercial market in either the fly or interstate transportation of the fly.<sup>250</sup> To build a proposed hospital, developers needed to build new roads that would likely have destroyed the fly's habitat and possibly its entire population.<sup>251</sup> The FWS concluded that the proposed road would result in the "taking" of the endangered fly in violation of Section 9(a)(1) of the ESA. In response, the developers mounted a Commerce Clause challenge on the grounds that the fly resided in only one state and did not substantially affect interstate commerce.<sup>252</sup>

Judges Wald and Henderson together constituted the majority in *NAHB*, but they made generally different arguments for sustaining the validity of the FWS's action. In dissent, Judge Sentelle contended that the fly was simply not an article in interstate commerce and therefore not within the commerce power.<sup>253</sup> He also disagreed with Judge Wald's "channels of commerce" and "biodiversity" arguments as well

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<sup>248</sup> See, e.g., Nagle, *supra* note 8 (focusing on *NAHB* fly case).

<sup>249</sup> *NAHB*, 130 F.3d at 1043-44.

<sup>250</sup> *Id.* at 1043-44; Brignac, *supra* note 3, at 884.

<sup>251</sup> *NAHB*, 130 F.3d at 1044-45.

<sup>252</sup> *Id.* at 1045.

<sup>253</sup> *Id.* at 1062-67 (Sentelle, J., dissenting).

as Judge Henderson's ecosystem impacts and commercial development arguments.<sup>254</sup>

### 1. Judge Wald's Opinion

Judge Wald emphasized that it is appropriate to consider the aggregate value of all endangered and threatened species in determining their impact on interstate commerce, refusing to accept the developers' argument that the appropriate focus was the commercial value of the fly alone.<sup>255</sup> By aggregating the total value of all endangered and threatened species, Judge Wald argued that the regulation of the fly was constitutional under *Lopez's* first category, concerning the use of channels of commerce, and third category, regarding activity that substantially affects interstate commerce.<sup>256</sup> First, she determined that the FWS's prohibition against "taking" the fly under Section 9(a)(1) of the ESA satisfied *Lopez's* first prong because regulations forbidding the taking of endangered species are crucial to accomplish the federal regulation of interstate transportation of these species.<sup>257</sup> Similar to laws disallowing the transfer and possession of machine guns, she argued, regulations forbidding the taking of endangered species are essential to laws restricting interstate sales of endangered species.<sup>258</sup>

Additionally, Judge Wald argued that the ban against the taking of endangered species was within Congress's authority to "keep the channels of interstate commerce free from immoral and injurious uses" because forbidding the taking of endangered species prevented their immoral trade in interstate commerce.<sup>259</sup> She maintained that the Supreme Court

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<sup>254</sup> See *infra* notes 266, 273, 277-78, 282, 287 and accompanying text.

<sup>255</sup> See *NAHB*, 130 F.3d at 1046.

<sup>256</sup> *NAHB*, 130 F.3d at 1046; Mank, *supra* note 3, at 755; Scalero, *supra* note 73, at 337.

<sup>257</sup> *NAHB*, 130 F.3d at 1046; Mank, *supra* note 3, at 755.

<sup>258</sup> *NAHB*, 130 F.3d at 1046; Mank, *supra* note 3, at 755; Scalero, *supra* note 73, at 337.

<sup>259</sup> *NAHB*, 130 F.3d at 1048-49 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246 (1964) (upholding use of commerce power to enact civil rights legislation prohibiting racial discrimination in public accommodations), and *United States v. Darby*, 312 U.S. 100 (1941) (approving congressional use of commerce power to enact legislation mandating employers meet minimum wage and maximum hour limitations)); Scalero, *supra* note 73, at 337-38.

in *United States v. Darby*,<sup>260</sup> by prohibiting the exploitation of employees producing lumber for interstate commerce, and *Heart of Atlanta, Motel, Inc. v. United States*,<sup>261</sup> by forbidding racial discrimination by a hotel serving an interstate travelers, had allowed Congress to use its commerce power "to rid the channels of interstate commerce of injurious uses to regulate the conditions under which goods are produced for interstate commerce."<sup>262</sup> She determined that Congress in the ESA had likewise used this authority to prevent the elimination of an endangered species "by a hospital that is presumably being constructed using materials and people from outside the state and which will attract employees, patients, and students from both inside and outside the state."<sup>263</sup> She concluded, "Congress is therefore empowered by its authority to regulate the channels of interstate commerce to prevent the taking of endangered species in cases like this where the pressures of interstate commerce place the existence of species in peril."<sup>264</sup>

Judge Henderson, however, disagreed with Judge Wald's argument that the ESA regulates channels of commerce because endangered species are usually not commercially marketable goods and therefore are different from commercial products such as machine guns or lumber.<sup>265</sup> In his dissenting opinion, Judge Sentelle argued that Section 9(a)(1)(B) of the ESA as applied to the fly is unconstitutional under *Lopez's* first prong, contending that the ESA as applied to the fly does not affect the channels of interstate commerce because the fly does not traverse interstate boundaries.<sup>266</sup>

Furthermore, Judge Wald determined that the ESA's takings prohibition, even as applied to the fly, satisfies *Lopez's* third prong, regarding activities that have substantial impacts on interstate commerce.<sup>267</sup> She read *Lopez* as encompassing both commercial and noncommercial activities that have

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<sup>260</sup> 312 U.S. 100 (1941) (approving congressional use of commerce power to enact legislation mandating employers meet minimum wage and maximum hour limitations).

<sup>261</sup> 379 U.S. 241, 246 (1964) (approving congressional use of commerce power to enact civil rights legislation outlawing racial discrimination in public accommodations).

<sup>262</sup> *NAHB*, 130 F.3d at 1048-49.

<sup>263</sup> *Id.* at 1048.

<sup>264</sup> *Id.* at 1048.

<sup>265</sup> *Id.* at 1057-58 (Henderson, J., concurring).

<sup>266</sup> *Id.* at 1063 (Sentelle, J., dissenting).

<sup>267</sup> *NAHB*, 130 F.3d at 1049.

substantial impacts on interstate commerce, although it is debatable whether the *Lopez* majority intended to include non-economic impacts within its substantial impacts test.<sup>268</sup> Deferring to congressional conclusions in the ESA's 1973 legislative history relating to the importance of preserving biodiversity and the potential value of future medical benefits, Judge Wald found that "takings [of endangered species] . . . would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource – biodiversity."<sup>269</sup>

In response to the argument that the fly did not significantly affect interstate commerce because it had little economic value, Judge Wald contended that each endangered species, including the fly, is valuable because every time a species becomes extinct and the number of wild species is reduced, the extinction "has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes."<sup>270</sup> She conceded that the economic and medical value of many plants and animals is uncertain, but she argued that each endangered species is entitled to protection because "[a] species whose worth is still unmeasured has what economists call an 'option value' – the value of the possibility that a future discovery will make useful a species that is currently thought of as useless."<sup>271</sup> In the aggregate, Judge Wald concluded, the extinction of endangered species has significant impacts on interstate commerce because of species' unknown future benefits.<sup>272</sup> Both Judges Henderson and Sentelle, however, disagreed with Judge Wald's biodiversity argument on the ground that the medical and economic benefits of preserving biodiversity are too speculative to meet *Lopez's* substantial effect on interstate commerce test.<sup>273</sup>

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<sup>268</sup> *Id.*; but see Linehan, *supra* note 174, at 421-22 (arguing Judge Wald's broad approach to evaluating noncommercial impacts such as biodiversity was more consistent with Justices Breyer and Souter's dissenting opinions in *Lopez* than the majority opinion).

<sup>269</sup> *NAHB*, 130 F.3d at 1052-54; Scalero, *supra* note 73, at 338.

<sup>270</sup> *NAHB*, 130 F.3d at 1053.

<sup>271</sup> *Id.* (citing Bryan Nolan, *Commodity, Amenity, and Morality: The Limits of Quantification in Valuing Biodiversity*, in *BIODIVERSITY* 200, 202 (Edward O. Wilson ed., 1988)).

<sup>272</sup> *Id.* at 1053-54.

<sup>273</sup> *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring); *id.* at 1064-65 (Sentelle, J., dissenting).

Further, relying on *Hodel*, Judge Wald contended that Congress has the authority under the Commerce Clause to regulate destructive economic competition resulting from economic incentives that prevent states from regulating destructive intrastate behavior.<sup>274</sup> She determined that Congress may regulate intrastate endangered species if economic competition among states was likely to prevent them from providing adequate protection to such species.<sup>275</sup> Since Congress enacted the 1973 Amendments to the ESA because regulation by states had failed to protect endangered species, Judge Wald concluded that the analysis in the two *Hodel* decisions was applicable to the ESA and supported the statute's constitutionality.<sup>276</sup> Judge Sentelle rejected her use of the reasoning in the two *Hodel* decisions on the ground that Congress may only prevent destructive competition where states are regulating commercial activities and that those cases were inapplicable because the fly had no commercial value.<sup>277</sup> He argued, "Although [Judge Wald] asserts 'striking parallels' between [the *Hodel* and *Darby*] cases and the present one, I see no parallel at all. In each of those cases, Congress regulated arguably intrastate *commercial* activities, specifically mining and lumber production for interstate commerce."<sup>278</sup>

## 2. Judge Henderson's Concurring Opinion

Concurring with the court's judgment, Judge Henderson agreed with Judge Wald that Section 9(a)(1)'s prohibition on taking endangered species comports with the Commerce Clause, but the former reached her conclusion by a somewhat different reasoning process than the latter. Judge Henderson determined that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce."<sup>279</sup> She asserted, "Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1066.

<sup>278</sup> *NAHB*, 130 F.3d at 1066 (Sentelle, J., dissenting).

<sup>279</sup> *Id.* at 1058-59 (Henderson, J., concurring).

interstate commerce.<sup>280</sup> Thus, she agreed that there was a rational basis to support the congressional assumption in the ESA's legislative history that the taking of endangered species substantially affected interstate commerce.<sup>281</sup> However, in dissent, Judge Sentelle argued that Judge Henderson failed to cite any evidence regarding how the extinction of the fly would substantially affect commerce by harming its ecosystem, other species, or anything else in interstate commerce.<sup>282</sup>

Additionally, Judge Henderson determined that the ESA's regulatory scheme significantly influences interstate commerce because the ESA regulates the hospital and road construction on the fly's critical habitat.<sup>283</sup> By obligating an evaluation of how the development of pristine land will impact endangered species such as the fly, the ESA "relates to both the proposed redesigned traffic intersection and the hospital it is intended to serve, each of which has an obvious connection with interstate commerce."<sup>284</sup> Accordingly, even if the fly itself did not substantially affect interstate commerce, she maintained that the hospital construction was an activity that obviously affected interstate commerce. She contended that the hospital and road construction was enough to bring the fly within the scope of the Commerce Clause because there was a relatively direct connection between the construction and the destruction of the fly's critical habitat.<sup>285</sup> Judge Wald agreed that the case in part involved the ESA's regulation of the hospital construction and that commercial activity was enough

<sup>280</sup> *Id.* at 1059 (Henderson, J., concurring) (citing *Lopez*, 514 U.S. at 557-59); but see Nagle, *supra* note 8, at 186-189, 199 (questioning ecosystem and biodiversity arguments that loss of even commercially insignificant endangered species is likely to have substantial adverse economic impacts and suggesting more proof of economic harm is required to justify Endangered Species Act under Commerce Clause).

<sup>281</sup> *NAHB* at 1059 (Henderson, J., concurring) (citing *Lopez*, 514 U.S. 549 (1995)); but see Nagle, *supra* note 8, at 186-189, 199.

<sup>282</sup> *NAHB*, 130 F.3d at 1065 (Sentelle, J., dissenting); Linehan, *supra* note 174, at 424.

<sup>283</sup> *NAHB*, 130 F.3d at 1059 (Henderson, J., concurring).

<sup>284</sup> *Id.* at 1059 (Henderson, J., concurring); Nagle, *supra* note 8, at 189-91, 208-15 (discussing choice of activity problem, whether the focus should be on the fly's impact on interstate commerce or the hospital construction's impact on fly and arguing hospital construction is the appropriate focus); Linehan, *supra* note 174, 422-24 (arguing Commerce Clause does not encompass protection of noncommercial activities such as protection of fly simply because there is some connection to commercial enterprise).

<sup>285</sup> See Nagle, *supra* note 8, at 189-91, 208-15 (discussing choice of activity problem, whether the focus should be on the fly's impact on interstate commerce or the hospital construction's impact on fly and arguing hospital construction is the appropriate focus).

to make the statutory scheme valid under the Commerce Clause. She stated:

Like *Darby*, the case at hand involves a regulation of the conditions under which commercial activity takes place. The statute in *Darby* regulated the wages and hours of workers in Georgia who were engaged in producing lumber for interstate commerce. Similarly, the statute in this case regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population.<sup>286</sup>

Judge Sentelle, however, argued that any relationship between the hospital or road construction and the ancillary consequence of eliminating the fly's habitat was too diluted to justify federal intervention under the Commerce Clause's "substantial effects" standard because there was no "stopping point" in defining the commerce power if Congress could regulate any non-economic activity that was indirectly affected by any article in interstate commerce.<sup>287</sup>

#### B. *Gibbs: The Red Wolf and the Federal Role*

In *Gibbs*, the Fourth Circuit in a two-to-one decision rejected a Commerce Clause challenge brought by private landowners and municipalities in eastern North Carolina against a FWS regulation prohibiting the taking of endangered red wolves on private and municipal lands. The district court had found that there were a total of seventy-five red wolves in eastern North Carolina, approximately half of which resided on private property.<sup>288</sup> In his majority opinion, Chief Judge J. Harvey Wilkinson IV concluded that the goal of the FWS regulation was valid under the Commerce Clause because private development killing approximately forty to seventy-five red wolves would substantially affect interstate commerce in several ways: the wolves promoted tourism, were the object of scientific research, possessed potentially valuable pelts (once their population recovered), and had negative impacts on farming and ranching, a valid commerce connection even

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<sup>286</sup> *NAHB*, 130 F.3d at 1056 (Wald, J.) (citation omitted); see also *id.* at 1046 n.3 (agreeing with Judge Henderson that ESA appropriately regulates commercial development of critical habitat).

<sup>287</sup> *Id.* at 1063, 1067 (Sentelle, J., dissenting).

<sup>288</sup> *Gibbs v. Babbitt*, 214 F.3d 483, 488 (4th Cir. 2000).

though the economic impact was negative rather than positive.<sup>289</sup>

Answering the argument in Judge Luttig's dissenting opinion that the taking of a handful of red wolves did not have a substantial impact on commerce, the majority determined that it was fair to consider the effects that the whole ESA regulatory scheme had on interstate commerce because the regulation was part of a comprehensive statute seeking to preserve the entire species.<sup>290</sup> Because regulations protecting red wolves have clear economic impacts,<sup>291</sup> the Fourth Circuit decided it was appropriate, in contrast to the aggregation of non-economic activities rejected in *Lopez* or *Morrison*, for Congress to aggregate the total impact of taking wolves in determining that such takings could substantially affect interstate commerce.<sup>292</sup> Notably, because red wolves arguably have significant economic value, the *Gibbs* decision may only justify protecting species having some economic value in interstate commerce and may not support congressional authority over the numerous other endangered species that have no current economic worth.<sup>293</sup>

#### V. *VIEJO*: FOCUSING ON THE ESA'S REGULATION OF DEVELOPMENT AS COMMERCE

Having explicated the relevant case law above, this Article now turns its attention to the two cases at issue, first discussing the *Viejo* decision and then, in the next section, addressing *GDF*. In *Viejo*,<sup>294</sup> the District of Columbia Circuit

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<sup>289</sup> *Id.* at 492-93 (citing *United States v. Lopez*, 514 U.S. 549, 560-61 (1995), and *United States v. Morrison*, 529 U.S. 598, 610-15 (2000)); Owen, *supra* note 247, at 382-83; but see Vermeule, *supra* note 149, at 11336 (questioning whether killing a red wolf is a commercial or economic activity).

<sup>290</sup> *Gibbs*, 214 F.3d at 497-98.

<sup>291</sup> The Court observed:

While the regulation might also reflect a moral judgment concerning the importance of rehabilitating endangered species, this does not undermine the economic basis for the regulation. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

*Gibbs*, 214 F.3d at 493 n.2.

<sup>292</sup> *Id.* at 493.

<sup>293</sup> See Owen, *supra* note 247, at 391, 398 (arguing *Gibbs* may have limited precedential effect because the red wolf has more obvious connection to interstate commerce than many other endangered species); Brignac, *supra* note 3, at 883 (same).

<sup>294</sup> 323 F.3d 1062 (D.C. Cir. 2003).

focused on the ESA's regulation of a significant commercial real estate development rather than the commercially insignificant arroyo toad in order to demonstrate that the activity substantially affected interstate commerce and thus was valid under the Commerce Clause.<sup>295</sup> The court stated that the "regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens."<sup>296</sup> In essence, it approved and expanded Judge Henderson's concurring opinion in *NAHB*.<sup>297</sup> Before proceeding to the analysis, a brief review of the facts is in order.

A. *Rancho Viejo's Proposed Development and the Arroyo Toad*

The Plaintiff Rancho Viejo planned to build a 280-home residential development on a 202-acre site in San Diego County, California.<sup>298</sup> When the plaintiff sought a Section 404 Clean Water Act<sup>299</sup> permit from the Army Corps of Engineers to fill wetlands on the site, the Corps "determined that the project 'may affect' the arroyo toad population in the area, and sought a formal consultation with the FWS pursuant to ESA Section 7."<sup>300</sup> The FWS issued a Biological Opinion that concluded that "excavation of the 77-acre borrow area would result in the taking of arroyo toads and was 'likely to jeopardize the continued existence' of the species."<sup>301</sup> The FWS proposed that Rancho Viejo could still build the project by using fill dirt from off-site sources, but because using off-site fill would be more expensive the plaintiff filed suit against the Secretary of Interior, "alleging that the listing of the arroyo toad as an endangered species under the ESA, and the application of the ESA to Rancho Viejo's construction plans, exceeded the federal government's power under the Commerce Clause."<sup>302</sup> "Holding that Rancho Viejo's case was indistinguishable from *NAHB*, and finding nothing in subsequent Supreme Court opinions to

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<sup>295</sup> See *infra* notes 304-35 and accompanying text.

<sup>296</sup> *Viejo*, 323 F.3d at 1072.

<sup>297</sup> See *supra* notes 283-86 and accompanying text; *infra* notes 306, 342-43 and accompanying text.

<sup>298</sup> *Id.* at 1065.

<sup>299</sup> 33 U.S.C. § 1344 (2000).

<sup>300</sup> *Viejo*, 323 F.3d at 1065.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 1065-66.

cast doubt on that decision,” the district court granted the government’s motion for summary judgment.<sup>303</sup>

On appeal, the District of Columbia Circuit affirmed the district court’s grant of summary judgment in favor of the government and agreed with its conclusion that *NAHB* was still valid.<sup>304</sup> Notably, the *Viejo* court’s emphasis on Judge Henderson’s regulation of commercial development rationale rather than the channels of commerce, biodiversity, or ecosystem arguments in *NAHB* implies *sub silentio* that the *Viejo* court thought those arguments to be weak or wrong.

### B. Reviewing *Lopez*

The *Viejo* court concluded that the FWS’s regulation of Rancho Viejo’s proposed real estate development satisfied *Lopez*’s four-factor test for determining if regulations or legislation sufficiently affects interstate commerce to fall within the commerce power.<sup>305</sup> As to the first *Lopez* factor – simply whether the regulated activity is commercial in nature – the *Viejo* court concluded:

The regulated activity at issue in *NAHB* – the construction of a hospital, power plant, and supporting infrastructure – was plainly an economic enterprise. As Judge Henderson observed, “the Department’s protection of the flies regulates and substantially affects commercial development activity.” *NAHB*, 130 F.3d at 1058; see *id.* at 1056 (Wald, J.) (“[T]he case at hand involves a regulation of the conditions under which commercial activity takes place.”). The same is true here, where the regulated activity is the construction of a 202 acre commercial housing development.<sup>306</sup>

Notably, the *Viejo* court quoted Judge Henderson, the author of the *NAHB* concurrence, and cited Judge Wald only to the extent that she agreed with her colleague.

The court then looked to the second *Lopez* factor – whether a statute contains an express jurisdictional element.<sup>307</sup> Section 9 of the ESA does not contain an express jurisdictional provision restricting its scope, for instance, to takes “in or affecting commerce.”<sup>308</sup> The *Viejo* court observed, however, that

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<sup>303</sup> *Id.* at 1066.

<sup>304</sup> *Id.* at 1068, 1080; see generally *id.* at 1068-80.

<sup>305</sup> *Viejo*, 323 F.3d at 1068 (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995), and *United States v. Morrison*, 529 U.S. 598, 610 (2000)).

<sup>306</sup> *Id.* at 1068.

<sup>307</sup> *Id.* (citing *Lopez*, 514 U.S. at 561-62, and *Morrison*, 529 U.S. at 611-12).

<sup>308</sup> *Id.* (internal quotation marks omitted).

neither *Lopez* nor *Morrison* had required a valid statute to include an express jurisdictional element.<sup>309</sup> The *Viejo* court noted that *NAHB*, *Gibbs*, and decisions in three other circuits had upheld the constitutionality of the ESA despite the absence of an express jurisdictional provision.<sup>310</sup> In the absence of an express jurisdictional element, a court “must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce.”<sup>311</sup>

As to the third *Lopez* factor – “whether there are ‘express congressional findings’ or legislative history ‘regarding the effects upon interstate commerce’ of the regulated activity”<sup>312</sup> – there were no such specific findings regarding commercial housing construction.<sup>313</sup> There were more general “express findings and legislative history indicating that Congress enacted the ESA out of concern that land development and habitat modification were leading to species extinction and had to be controlled by federal legislation.”<sup>314</sup> However, the *Viejo* court observed that *Lopez* did not require specific findings in the legislative history if it was clear that an activity significantly affected interstate commerce,<sup>315</sup> and concluded that “the naked eye requires no assistance here” to discern that a 202-acre housing development affected interstate commerce.<sup>316</sup>

Rancho Viejo also lost under the fourth factor, which addresses whether the connection between a regulated activity and interstate commerce is “too attenuated.”<sup>317</sup> Focusing on the species instead of the construction, Rancho Viejo contended that preserving the toad, a species of little or no commercial value, had too attenuated an impact on interstate commerce to

<sup>309</sup> *Id.* at 1068 & n.3.

<sup>310</sup> *Viejo*, 323 F.3d at 1068 & n.4 (citing *Norton v. Ashcroft*, 298 F.3d 547, 557 (6th Cir. 2002), *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000), *United States v. Moghadam*, 175 F.3d 1269, 1275-76 (11th Cir. 1999), and *United States v. Bird*, 124 F.3d 667, 675 (5th Cir. 1997)).

<sup>311</sup> *Id.* at 1068 (quoting *Moghadam*, 175 F.3d at 1276 (internal quotation marks omitted)).

<sup>312</sup> *Id.* at 1069 (citing *Lopez*, 514 U.S. at 561-62).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 1069 n.5.

<sup>315</sup> *Viejo*, 323 F.3d at 1069 (citing *United States v. Lopez*, 514 U.S. 549, 562-63 (1995), and *United States v. Morrison*, 529 U.S. 598, 612 (2000)).

<sup>316</sup> *Id.* at 1069.

<sup>317</sup> *Id.* (citing *Lopez*, 514 U.S. at 563-67, and *Morrison*, 529 U.S. at 612).

satisfy this factor.<sup>318</sup> However, the court concluded otherwise for two reasons: “[b]ecause the rationale upon which we rely focuses on the activity that the federal government seeks to regulate in this case (the construction of Rancho Viejo’s housing development), and because we are required to accord congressional legislation a ‘presumption of constitutionality.’”<sup>319</sup>

C. NAHB *Survives Morrison and SWANCC*

Because the facts in *Viejo* were so similar to *NAHB*, Rancho Viejo primarily argued that *NAHB* was no longer “good law” in light of *Morrison* and *SWANCC*.<sup>320</sup> The *Viejo* court concluded that neither *Morrison* nor *SWANCC* cast doubt on *NAHB*.<sup>321</sup> Because *Morrison* closely followed *Lopez*’s four-factor framework,<sup>322</sup> the *Viejo* court determined that *Morrison* did not undermine the court’s *NAHB* decision, which had followed that same framework.<sup>323</sup> While rejecting the plaintiff’s assertion that *Morrison* had changed *Lopez*’s first prong by limiting the Commerce Clause to only economic regulation,<sup>324</sup> the *Viejo* court maintained that the ESA prohibition against taking toads was economic in nature “because the ESA *regulates takings, not toads*.”<sup>325</sup> In other words, in the court’s view, the ESA regulates commercial development that causes the taking of endangered species and not the species themselves. Seen that way, because the ESA regulates an activity – commercial development of land – that substantially affects interstate commerce, it is consistent with *Morrison*’s instruction that “the proper inquiry” is whether the challenged regulation is “a *regulation of activity* that substantially affects interstate commerce.”<sup>326</sup>

The court asserted that “Rancho Viejo’s reliance on *SWANCC* is even further from the mark.”<sup>327</sup> The court correctly

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<sup>318</sup> *Id.*

<sup>319</sup> *Viejo*, 323 F.3d at 1069 (quoting *Morrison*, 529 U.S. at 607).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 1070-71.

<sup>322</sup> *Viejo*, 323 F.3d at 1071; see *United States v. Morrison*, 529 U.S. 598, 609 (2000) (“*Lopez* . . . provides the proper framework for conducting the required analysis . . .”); *Norton v. Ashcroft*, 298 F.3d 547, 556 (6th Cir. 2002) (“Rather than breaking new Commerce Clause ground, *Morrison* derived its four-factor framework directly from *Lopez*.”).

<sup>323</sup> *Viejo*, 323 F.3d at 1071.

<sup>324</sup> *Id.* at 1071-72 (citing *Morrison*, 529 U.S. at 613).

<sup>325</sup> *Id.* at 1072 (emphasis in original).

<sup>326</sup> *Id.* (quoting *Morrison*, 529 U.S. at 609) (emphasis added in *Viejo*).

<sup>327</sup> *Id.* at 1071.

observed that the SWANCC decision was based on its statutory interpretation of the term “navigable waters” in the Clean Water Act, which was read to exclude the isolated, intrastate waters and wetlands that the Corps sought to regulate.<sup>328</sup> In dicta, the SWANCC Court did observe that to consider the constitutionality of regulating isolated, intrastate waters and wetlands to protect migratory birds the Court “would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.”<sup>329</sup> The *Viejo* court claimed that “identifying the ‘precise activity’ at issue in Rancho Viejo’s case only strengthens the conclusion that the take provision of the ESA can constitutionally be applied to plaintiff’s construction project” because of the obvious impacts of that project on interstate commerce.<sup>330</sup> As the Fifth Circuit in *GDF* recognized, however, what the SWANCC Court meant by “precise object or activity” raises questions about whether review of the ESA under the Commerce Clause requires a focus on the commercial projects that the statute indirectly regulates or the endangered species that are the main focus of the statute.<sup>331</sup>

*D. Following Judge Henderson’s Commercial Development Approach*

The *Viejo* court rejected the plaintiff’s arguments that the ESA was unconstitutional under the Commerce Clause either because of the statute’s significant non-economic purposes or because it was overly broad in reaching non-commercial activities. Rejecting Rancho Viejo’s two-pronged contention that a statute must be directed primarily at an economic purpose to survive Commerce Clause review and that the ESA fails that test because its real purpose is the non-economic goal of preserving biodiversity, the District of Columbia Circuit concluded that the Commerce Clause authorizes statutes having multiple purposes as long as economic regulation is a significant component of the

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<sup>328</sup> See *Viejo*, 323 F.3d at 1071 (discussing SWANCC, 531 U.S. 159, 167, 171-72 (2001) (interpreting term “navigable waters” in 33 U.S.C. § 1344(a) to exclude isolated, intrastate waters and wetlands)).

<sup>329</sup> SWANCC, 531 U.S. at 173.

<sup>330</sup> See *Viejo*, 323 F.3d at 1071-73.

<sup>331</sup> See *GDF*, 326 F.3d 622, 634 (5th Cir. 2003), *reh’g denied*, No. 01-51099, 2004 U.S. App. LEXIS 3933 (5th Cir. Feb. 27, 2004) (en banc); *infra* notes 381-84 and accompanying text.

legislation.<sup>332</sup> Additionally, the court declined the plaintiffs' "overbreadth" argument that "[b]ecause the ESA's prohibition on takings applies as much to a hiker's 'casual walk in the woods' as to the commercial activities of a real estate company . . . the statute cannot constitutionally be applied to its taking of arroyo toads."<sup>333</sup> Questioning the validity of the plaintiffs' "hiker" argument for a statute that primarily regulates commercial development, the court determined that the plaintiff could not raise the hiker hypothetical because its case involved commercial development,<sup>334</sup> and because *Lopez* had stated that "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."<sup>335</sup>

In his concurring opinion, Chief Judge Ginsburg agreed with the majority that the "large-scale residential development that is the take in this case clearly does affect interstate commerce."<sup>336</sup> He asserted, nonetheless, that *Lopez* "requires . . . a logical stopping point to our rationale for upholding the constitutionality of the exercise of the Congress's power under the Commerce Clause here challenged."<sup>337</sup> Accordingly, Chief Judge Ginsburg argued, "Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order

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<sup>332</sup> See *Viejo*, 323 F.3d at 1073-76; see generally Schapiro & Buzbee, *supra* note 3, at 1237-43 (arguing most statutes have multiple purposes).

<sup>333</sup> See *Viejo*, 323 F.3d at 1077-78.

<sup>334</sup> See *id.* at 1077-78.

<sup>335</sup> See *id.* at 1077 (quoting *Lopez*, 514 U.S. 549, 558 (1995) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27 (1968)) (emphasis omitted)).

<sup>336</sup> *Id.* at 1080 (Ginsburg, C.J., concurring).

<sup>337</sup> *Id.* (Ginsburg, C.J., concurring) (quoting *Lopez*, 514 U.S. at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."), *United States v. Morrison*, 529 U.S. 598, 613 (2000), and *United States v. Wall*, 92 F.3d 1444, 1455-56 (6th Cir. 1996) (Boggs, J., dissenting in part) ("[T]he rationale offered to support the constitutionality of the statute . . . has a logical stopping point, so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states.")). See generally Nagle, *supra* note 8, at 196-204 (arguing *Lopez* suggests Congress may not satisfy substantial effects on interstate commerce standard under Commerce Clause by using overly broad aggregations such as hypothetical Earth Preservation Act prohibiting harm to any natural object). Chief Judge Ginsburg's argument echoes Professor Nagle's argument that *Lopez* requires a statute based on the Commerce Clause to have a logical stopping point involving significant commercial activity. In the case of the ESA, Professor Nagle and Chief Judge Ginsburg each argue that the statute may regulate commercial development that "takes" endangered species, but not a lone hiker. See Nagle, *supra* note 8, at 211-14 (arguing people trampling endangered flies or their habitat by walking in the area are beyond the scope of legitimate Commerce Clause legislation).

to landscape his property, though he takes the toad, does not affect interstate commerce."<sup>338</sup> Chief Judge Ginsburg contended that this limitation in reading the ESA was essential because "[w]ithout this limitation, the Government could regulate as a take any kind of activity, regardless whether that activity had any connection with interstate commerce."<sup>339</sup> He did not consider whether hikers or homeowners engaging in landscaping could in the aggregate significantly affect interstate commerce, or when, as *Lopez* stated, a statute might regulate de minimis activities as part of a general regulatory scheme.<sup>340</sup>

Additionally, the *Viejo* court agreed with the Fourth Circuit's *Gibbs* decision that regulation of endangered species is a national issue and that the ESA does not infringe on an area of traditional state regulation.<sup>341</sup> In footnotes, the *Viejo* court noted Judge Wald's arguments regarding biodiversity<sup>342</sup> and the prevention of destructive interstate competition,<sup>343</sup> but did not rely upon them. Implicitly, the *Viejo* court suggested that in light of *Lopez*'s strongly economic interpretation of the commerce power, the stronger rationale for justifying Section 9's prohibition against taking commercially insignificant intrastate species was Judge Henderson's regulation of commercial development reasoning instead of her protecting ecosystems argument or Judge Wald's arguments.

<sup>338</sup> *Viejo*, 323 F.3d at 1080 (Ginsburg, C.J., concurring).

<sup>339</sup> *Id.*

<sup>340</sup> "[W]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." See *id.* at 1077 (quoting *Lopez*, 514 U.S. 549, 558 (1995) (emphasis omitted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27 (1968))).

<sup>341</sup> *Id.* at 1078-80 (discussing *Gibbs v. Babbitt*, 214 F.3d 483, 499-505 (4th Cir. 2000)); see generally Mank, *supra* note 3, at 770-82 (arguing *Gibbs* is consistent with *Lopez*, *Morrison* and *SWANCC* because ESA appropriately regulates endangered species, which are subject of national concern and not traditional state regulation).

<sup>342</sup> *Id.* at 1069 n.5 (citing *NAHB*, 130 F.3d at 1050 (Wald, J.)) ("There is ESA legislative history that supports the other primary rationale relied upon in *NAHB* – the effect of the loss of biodiversity on interstate commerce.").

<sup>343</sup> *Id.* at 1069-70 n.7 (citing *NAHB*, 130 F.3d at 1054-56 (Wald, J.), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, (1981)) ("Application of the ESA to habitat degradation has a further impact on interstate commerce by removing the incentives for states 'to adopt lower standards of endangered species protection in order to attract development,' thereby preventing a destructive 'race to the bottom.'").

*E. Rehearing En Banc Denied: Judges Sentelle and Roberts Dissent*

On July 22, 2003, the District of Columbia Circuit by a seven-to-two vote denied Rancho Viejo's request for a rehearing en banc in a per curiam decision without an opinion.<sup>344</sup> In separate dissenting opinions, Judges Sentelle and Roberts each cited *GDF* in arguing that the emphasis on commercial development rather than the toad was inconsistent with the *Lopez* and *Morrison* decisions.<sup>345</sup> In his dissenting opinion, Judge Sentelle reiterated the argument in his *NAHB* dissent that the *NAHB* decision was wrongly decided in light of *Lopez* and contended that the *Viejo* decision was even more clearly wrong in the wake of *Morrison's* further emphasis on the primarily economic nature of the Commerce Clause.<sup>346</sup> According to Judge Sentelle, the toad was clearly not an article of commerce and did not substantially affect interstate commerce.<sup>347</sup> He further maintained that the FWS could not regulate the residential development under the ESA because it was too far removed from the statute's central concern with endangered species.<sup>348</sup> Additionally, he argued neither the land preparation that might lead to the destruction of the toad nor the construction of the homes themselves were sufficiently interstate and commercial in nature to qualify for regulation under the Commerce Clause – a very narrow interpretation of the Clause raising possible similarities to the pre-1937 understanding.<sup>349</sup>

Judge Roberts agreed with Judge Sentelle that the *Viejo* decision was wrong to emphasize the relationship between residential development and interstate commerce rather than determining whether the statute's true focus, the endangered toad, has a substantial impact on interstate commerce.<sup>350</sup> In his view, under the *Viejo* court's analysis any activity remotely

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<sup>344</sup> *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (en banc), cert. denied, 2004 U.S. LEXIS 1652 (U.S. Mar. 1, 2004).

<sup>345</sup> *Id.* at 1158-60 (Sentelle, J., dissenting from denial of rehearing en banc); *id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc).

<sup>346</sup> *Id.* at 1158-60 (Sentelle, J., dissenting from denial of rehearing en banc).

<sup>347</sup> *Id.* at 1158-59.

<sup>348</sup> *Viejo*, 334 F.3d at 1159 (Sentelle, J., dissenting from denial of rehearing en banc).

<sup>349</sup> *Id.*

<sup>350</sup> *Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc).

connected to a commercial activity could be regulated under the Commerce Clause, an outcome that was inconsistent with *Lopez* and *Morrison's* emphasis on the limits to Congress's commerce power.<sup>351</sup> Indeed, as the *GDF* decision pointed out, Judge Roberts contended that under the *Viejo* court's commercial development rationale the statutes that the Supreme Court struck down in *Lopez* and *Morrison* arguably would have been constitutional as long as they were applied only to large-scale commercial actors, but he maintained such a result was plainly inconsistent with those two Court decisions.<sup>352</sup> While acknowledging that the *Viejo* decision was consistent with *NAHB*, Judge Roberts argued that en banc review was appropriate in light of the conflict with the Fifth Circuit's decision in *GDF*.<sup>353</sup> Unlike Judge Sentelle, Judge Roberts explicitly stated that there might be alternative grounds other than the commercial development rationale for sustaining the ESA's regulation of the toad, perhaps the reasoning in *GDF*.<sup>354</sup>

## VI. *GDF*: AGGREGATING ALL ENDANGERED SPECIES

In *GDF Realty Investments v. Norton*,<sup>355</sup> the Fifth Circuit concluded that the FWS regulations protecting intrastate spiders and beetles were constitutional under the Commerce Clause, despite these species' lack of commercial value, because endangered species as a whole have substantial impacts on interstate commerce. Moreover, the court held that it was appropriate to aggregate the impacts of the spiders and beetles at issue with other endangered species because of the "interdependence of all species." The *GDF* court did not accept the reasoning advanced by the Secretary of Interior in her briefs, which the District of Columbia Circuit subsequently adopted in *Viejo*, that the economic impact of the commercial development was the relevant locus.

The Fifth Circuit's approach of aggregating all endangered species would potentially protect more endangered species than *Viejo's* commercial development analysis. Under

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<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> 326 F.3d 622 (5th Cir. 2003), *reh'g denied*, No. 01-51099, 2004 U.S. App. LEXIS 3933 (5th Cir. Feb. 27, 2004) (en banc).

*GDF's* aggregation approach, the government could regulate a lone hiker or landscaping homeowner who harms any endangered species, even if the species is commercially insignificant, because harm to any endangered species regardless of the size or commercial value of the regulated activity threatens the sensitive interdependence of ecosystems, which in turn may cause significant damage to interstate commerce. By contrast, *Viejo's* rationale may not reach the lone hiker or landscaping homeowner hypotheticals;<sup>356</sup> Chief Judge Ginsburg argued that a commercial development analysis would definitely exclude those examples and ought to do so because *Lopez* implies that federal regulation has a logical stopping point when the regulated activity no longer substantially affects interstate commerce.<sup>357</sup>

A. *The FWS Protects the Cave Species*

In *GDF*, the court referred to six species of subterranean, cave-dwelling invertebrates listed as endangered under Section 4 of the ESA.<sup>358</sup> The Cave Species are found only in underground portions of Travis and Williamson Counties, Texas.<sup>359</sup> The FWS listed these Cave Species as endangered because "their extremely small, vulnerable, and limited habitats are within an area that can be expected to experience continued pressures from economic and population growth."<sup>360</sup> It is undisputed that there is no commercial market for the Cave

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<sup>356</sup> See generally *Viejo*, 323 F.3d at 1077-78 (suggesting that ESA prohibition against taking endangered species might apply to a lone hiker because a statute that generally has substantial relationship to commerce may include isolated examples that do not, but declining to address "loner hiker" hypothetical posed by plaintiff because the plaintiff's large-scale commercial housing development was not similar to lone hiker hypothetical); *supra* notes 19-21, 41 and *infra* notes 338-40 and accompanying text.

<sup>357</sup> *Viejo*, 323 F.3d at 1080 (Ginsburg, C.J., concurring).

<sup>358</sup> The six species referred to by the court were the Bee Creek Cave Harvestman, the Bone Cave Harvestman, the Tooth Cave Pseudoscorpion, the Tooth Cave Spider, the Tooth Cave Ground Beetle and the Kretschmarr Cave Mold Beetle. See *GDF*, 326 F.3d at 625; ESA, § 4, 16 U.S.C. § 1533(a)(1) (requiring Secretary to list endangered species); 53 Fed. Reg. 36,029 (16 Sept. 1988) (listing 5 species); 58 Fed. Reg. 43,818 (18 Aug. 1993) (listing sixth species). The Bee Creek Cave Harvestman, the Bone Cave Harvestman, and the Tooth Cave Pseudoscorpion are subterranean, eyeless arachnids that have four pairs of legs and no antennae; they vary in size from 1.4 to 4 mm. *GDF*, 326 F.3d at 625. The Tooth Cave Spider is a subterranean arachnid with eyes and measures 1.6 mm in length. The Tooth Cave Ground Beetle and the Kretschmarr Cave Mold Beetle are subterranean insects, the latter being eyeless; they range in size from 3 to 8 mm. *Id.*

<sup>359</sup> *GDF*, 326 F.3d at 625.

<sup>360</sup> *Id.* (quoting 53 Fed. Reg. at 36,032).

Species.<sup>361</sup> However, scientists visited Texas to study the Cave Species and have published at least fourteen scientific articles regarding them.<sup>362</sup> Museums in New York, California, Pennsylvania, Illinois, and Kentucky have acquired specimens.<sup>363</sup>

The Purcell brothers and GDF Realty Investments, Inc. owned 216 acres in Travis County, Texas, near the City of Austin, which contained several caves in which the endangered species lived.<sup>364</sup> In 1989, the FWS notified the Purcells that their commercial development plans for the property, including installing water lines and other utilities, might result in the taking of Cave Species in violation of Section 9 of the ESA.<sup>365</sup> To address the FWS's concerns, the Purcells deeded approximately six acres of the property, which included various caves and sinkholes in which the species were known to live, to Texas Systems of Natural Laboratories, Inc., a non-profit environmental organization.<sup>366</sup> The Purcells also followed the FWS's recommendation to construct gates covering the most ecologically sensitive caves.<sup>367</sup>

These steps, however, were not enough to convince the FWS that the remainder of the land could be developed without harming the Cave Species. In 1991, the Purcells contracted to sell a portion of the property, but the potential purchaser declined to purchase the land when the FWS refused to guarantee that it would allow future development of the property.<sup>368</sup>

In 1997, the Purcells attempted to obtain incidental take permits under Section 10(a) of the ESA,<sup>369</sup> which would have allowed them to develop the property and take a limited number of endangered creatures if they submitted a plan that guaranteed the overall preservation of the species.<sup>370</sup> Their

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *GDF*, 326 F.3d at 624-25.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 625.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 626. Whether the inability of the Purcells to sell their property might constitute a regulatory taking is beyond the scope of this article and would likely depend on whether they could develop some portion of the property. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

<sup>369</sup> See *GDF*, 326 F.3d at 626 (discussing incidental take permit under 16 U.S.C. § 1539(a)) (2000).

<sup>370</sup> See *id.* (discussing 16 U.S.C. § 1539(a)(2)(B) (2000)).

permit applications stated they planned to develop a shopping center, including a Wal-Mart store, a residential subdivision, and commercial office buildings.<sup>371</sup> In 1998, because it decided that the deeded preserves were inadequate to protect the Cave Species, the FWS told the Purcells that it would deny their permit applications, although it never issued formal denials.<sup>372</sup>

In 1999, the Purcells filed suit, alleging that the ESA's Section 9 take provision, as applied to the Cave Species, was unconstitutional under the Commerce Clause in light of *Lopez*. The plaintiffs later amended their claim to include *Morrison*.<sup>373</sup> In 2001, the district court granted summary judgment to the defendants.<sup>374</sup> Because of the plaintiffs' extensive proposed commercial development plans for the property, the district court concluded that it would be "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart."<sup>375</sup>

*B. Rejecting the District Court's Commercial Development Approach*

On appeal, the Fifth Circuit summarized the district court's opinion as "*primarily* consider[ing] plaintiffs' commercial motivations that would underlie the takes" rather than the takes themselves.<sup>376</sup> The Fifth Circuit disagreed with the district court's approach, stating: "[W]e conclude that the scope of 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."<sup>377</sup>

The Fifth Circuit applied the four-part test used in *Lopez* and *Morrison* to determine whether that intrastate activity substantially affected interstate commerce. The second factor was easy to resolve. The Fifth Circuit observed that the "ESA's take provision has no jurisdictional requirement that might otherwise limit its application to species bearing some

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<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> GDF Realty Investments, Ltd. v. Norton, 169 F. Supp. 2d 648 (W.D. Tex. 2001); see also GDF, 326 F.3d at 626.

<sup>375</sup> GDF, 326 F.3d at 627 (quoting GDF Realty Investments, Ltd. v. Norton, 169 F. Supp. 2d at 662).

<sup>376</sup> *Id.* at 633 (emphasis in original).

<sup>377</sup> *Id.* (emphasis in original).

relationship to interstate commerce.<sup>378</sup> Moreover, the list of protected species is not fixed, but the FWS adds to or subtracts from the list of species protected by the take provision.<sup>379</sup>

In addressing the first *Lopez* factor, determining whether the activity was economic, the Fifth Circuit acknowledged that the Supreme Court had not provided a clear test for which activities regulated by a statute are the proper focus of the analysis.<sup>380</sup> The Fifth Circuit interpreted dicta in *SWANCC*, however, as raising doubts about focusing on the developer's commercial plans rather than on the actual impact of regulated natural resources.<sup>381</sup> Building on *SWANCC*'s dicta, the Fifth Circuit argued that under all three of *Lopez*'s categories, the primary focus in determining congressional authority under the Commerce Clause is on how the "*object of regulation* relates to interstate commerce: channels, instrumentalities, or activities."<sup>382</sup> The object of regulation is the principal focus, the court contended, because "[n]either the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce."<sup>383</sup> Accordingly, the Fifth Circuit in *GDF* concluded it was inappropriate for the district court to place the primary focus on the developer's commercial plans rather than on taking Cave Species.<sup>384</sup> In other words, the Fifth Circuit concluded that courts should examine a developer's project only to the extent that it harmed endangered or threatened species rather than focusing on how much money the developer's project would generate.

Furthermore, the Fifth Circuit concluded that the district court's commercial activities approach was inconsistent with *Lopez* and *Morrison* because "[t]o accept the district court's analysis would allow application of otherwise

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<sup>378</sup> *GDF*, 326 F.3d at 632-33.

<sup>379</sup> See *id.* at 633 (citing 16 U.S.C. § 1533(c) (2000) (requiring publication in Federal Register of listed species and review of list at least once every five years)).

<sup>380</sup> *Id.* at 633.

<sup>381</sup> *Id.* at 633-34.

<sup>382</sup> *Id.* 634.

<sup>383</sup> *GDF*, 326 F.3d at 634.

<sup>384</sup> *Id.* at 634-35.

unconstitutional statutes to commercial actors, but not to non-commercial actors.”<sup>385</sup> The Fifth Circuit argued that “looking primarily beyond the regulated activity in such a manner would ‘effectually obliterate’ the limiting purpose of the Commerce Clause.”<sup>386</sup> The court contended that under the district court’s approach “the facial challenges in *Lopez* and *Morrison* would have failed.”<sup>387</sup> As an example, the *GDF* court claimed that under the district court’s analysis “regulation of gun possession near schools, at issue in *Lopez*, would arguably pass constitutional muster as applied to a possessor who was a significant gun salesman. Therefore, § 922(q)(1)(A) could not have been facially unconstitutional.”<sup>388</sup> Additionally, the Fifth Circuit claimed that “the Violence Against Women Act, at issue in *Morrison*, would arguably have been a constitutional exercise of Congressional power if it were used to prosecute a person who committed violence against women and then sold a substantial number of videotapes of the encounter in interstate markets. It too would have withstood a facial attack.”<sup>389</sup> Accordingly, under the district court’s analysis, the *GDF* court reasoned that “[t]here would be no limit to Congress’s authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.”<sup>390</sup> The Fifth Circuit concluded that “[s]uch results, of course, run contrary to *Lopez* and *Morrison*.”<sup>391</sup> Some commentators, however, might question whether the relatively case-specific holdings in those two Supreme Court decisions provide clear answers to the hypotheticals posed by the Fifth Circuit in attacking the district court’s reasoning.

The Fifth Circuit acknowledged that in *NAHB* and *Gibbs*, the District of Columbia Circuit and the Fourth Circuit, respectively, had examined to some extent the actor’s “general conduct,” including the impact of its commercial plans. However, the Fifth Circuit argued that those courts had relied on other factors as well. The *GDF* court argued that in “*NAHB* and *Gibbs*, however, the actor’s general conduct was not the

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<sup>385</sup> *Id.* at 634.

<sup>386</sup> *Id.* (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

<sup>387</sup> *Id.* at 635.

<sup>388</sup> *GDF*, 326 F.3d at 635.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 634 (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

<sup>391</sup> *Id.* at 635.

sole basis for finding economic activity or a substantial effect on interstate commerce.<sup>392</sup> In *NAHB*, Judge Wald's "main opinion" had approved the ESA on two grounds: first, "as a valid regulation of the channels of interstate commerce," and second, because taking the flies substantially affected interstate commerce.<sup>393</sup> While her substantial effects approach focused on all endangered species, the Fifth Circuit conceded that her "channels of interstate commerce" analysis had examined the actor's conduct, but argued that "[t]here is, of course, good reason to look beyond the regulated activity to determine whether such channels are being used; whether an actor deals in these channels is directly relevant."<sup>394</sup>

According to the Fifth Circuit, Judge Henderson's *NAHB* concurrence had focused on the impact of takes on biodiversity, and how harm to ecosystems substantially affected interstate commerce.<sup>395</sup> The Fifth Circuit de-emphasized the importance of the hospital and road construction in Judge Henderson's opinion, stating that she "briefly noted, however, that the regulation plainly affected interstate commerce because '[it] relates to both the proposed redesigned traffic intersection and the hospital it is intended to serve . . . .'"<sup>396</sup> The Fifth Circuit made the questionable assertion that Judge Henderson's discussion of the traffic intersections related to the traditional channels of interstate commerce analysis rather than the substantial effects analysis used by the district court in *GDF*:

Of course, the ESA regulation at issue in *NAHB* did not relate to traffic intersections; it related to fly takes. Judge Henderson relied, in part, on the following language from *Heart of Atlanta Motel* to support her conclusion: "The facilities and instrumentalities used to carry on this commerce such as railroads, truck lines, ships, rivers, and even highways are also subject to congressional regulation, so far as is necessary to keep interstate traffic upon fair and equal terms." 379 U.S. at 271 (emphasis added). This statement provides an example of Congress' power to regulate the use of the channels of interstate commerce, rather than those activities having a substantial effect on interstate commerce.<sup>397</sup>

<sup>392</sup> *Id.*

<sup>393</sup> *GDF*, 326 F.3d at 635.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* (quoting *NAHB*, 130 F.3d at 1059 (Henderson, J., concurring)).

<sup>397</sup> *Id.* at 636 (quoting *Heart of Atlanta Motel*, 379 U.S. at 271).

To the extent that Judge Henderson's *NAHB* concurrence relied on the substantial effects caused by the construction on interstate commerce, the Fifth Circuit agreed with Judge Sentelle's dissent in *NAHB* that such reliance was improper because the Commerce Clause only authorizes regulations that directly affect interstate commerce and does not support regulation of non-commercial activities that may have some indirect impacts on interstate commerce.<sup>398</sup> The Fifth Circuit concluded: "Judge Henderson did not rely *primarily* on the commercial development, but instead analyzed the expressly regulated activity – the takes' effect on biodiversity."<sup>399</sup>

Discussing *Gibbs*, the *GDF* court acknowledged that the Fourth Circuit, in concluding that regulating wolf takes substantially impacted interstate commerce, relied to some extent on the regulation's impact on farmers rather than the economic impact of taking wolves.<sup>400</sup> The Fifth Circuit determined that "*Gibbs* held primarily, however, that the expressly regulated activity – red wolf takes, regardless of farmers' motivations – was economic in nature."<sup>401</sup> The *GDF* court concluded: "In the light of the successful *facial* challenges in *Lopez* and *Morrison* and the emphasis our court and sister circuits have placed on the economic nature *vel non* of the expressly regulated activity, the district court erred in looking primarily to plaintiffs' commercial motivations."<sup>402</sup>

### C. *Aggregating All Endangered Species Is Appropriate*

After setting its focus on the takes instead of commercial development, the Fifth Circuit next addressed whether Cave Species takes have a substantial impact on interstate commerce. The FWS argued that the Cave Species have two significant impacts on interstate commerce: first, "the 'substantial' scientific interest generated by the Cave Species, and second, their *possible* future commercial benefits."<sup>403</sup> Unlike the far more commercially valuable red wolves, the Fifth Circuit concluded that for the Cave Species, "any connection between takes and impact on the scientific travel or publication

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<sup>398</sup> *GDF*, 326 F.3d at 636.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *GDF*, 326 F.3d at 637 (emphasis in original).

industries is . . . negligible. Under *Morrison's* fourth consideration, any claim that the connection rises to a 'substantial relationship' is far too attenuated to pass muster."<sup>404</sup> In response to the FWS's arguments about the potential future commercial value of the Cave Species, the *GDF* court determined: "The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster."<sup>405</sup>

Alternatively, if the Cave Species themselves do not have a significant impact on interstate commerce, the FWS argued that Cave Species takes may be aggregated with those of all other endangered species and that the aggregate impact of all takes on interstate commerce is substantial.<sup>406</sup> The plaintiffs acknowledged that the aggregate effect of all takings of every endangered species would have a substantial impact on interstate commerce.<sup>407</sup> They contended, however, that such aggregation is inappropriate because Cave Species takes are completely non-economic in character and are not an essential part of a regulatory scheme, as required by *Lopez*.<sup>408</sup>

In determining whether it was appropriate to aggregate Cave Species takes with those of all other endangered species, the *GDF* court observed that "*Lopez* and *Morrison* instruct courts to consider, *inter alia*, the activity's economic or commercial nature."<sup>409</sup> Even under a lenient definition of economic activity, the Fifth Circuit concluded "Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture."<sup>410</sup> The *GDF* court questioned the FWS's aggregation argument since "[a]n activity cannot be aggregated based solely on the fact that, post-aggregation, the sum of the activities will have a substantial effect on commerce. This would vitiate *Lopez* and *Morrison's* seeming requirement that the intrastate instance of

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<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 637-38 (emphasis in original) (citing *U.S. v. Morrison*, 529 U.S. at 612).

<sup>406</sup> *Id.* at 638.

<sup>407</sup> *Id.* at 632.

<sup>408</sup> *GDF*, 326 F.3d at 632.

<sup>409</sup> *Id.* at 638.

<sup>410</sup> *Id.*

activity be commercial.”<sup>411</sup> A stronger argument for aggregation, however, was that the ESA’s prohibition against taking Cave Species was part of a broader regulation of activity, but the Fifth Circuit observed that non-economic, intrastate activities may be aggregated under this rationale only if they are “essential” to an *economic* regulatory scheme’s efficacy . . . .<sup>412</sup>

Nonetheless, in determining that aggregation was appropriate, the Fifth Circuit first concluded that the “ESA’s protection of endangered species is economic in nature” because the ESA’s legislative history refers to the “incalculable” value of the genetic heritage that might be lost absent regulation.”<sup>413</sup> Some commentators, however, might question whether the legislative history’s reference to value was really about economics or might refer instead to aesthetic, moral, or other types of value. Additionally, the *GDF* court determined that “it is obvious that the majority of takes would result from economic activity.”<sup>414</sup> Furthermore, the ESA’s regulatory scheme does not interfere with a traditional area of state regulation because regulation of endangered species is a shared subject of national interest.<sup>415</sup>

Second, the *GDF* court concluded that regulating Cave Species takes was an essential component of the ESA’s broader regulatory scheme.<sup>416</sup> The FWS argued that allowing the taking of some endangered species would undermine Congress’s goal of protecting the chain of life and the “interdependent web” of all species by allowing “piece-meal extinctions.”<sup>417</sup> There is significant scientific evidence that many endangered or threatened species that possess little commercial value perform critical “ecosystem services” such as decomposing organic

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<sup>411</sup> *Id.*

<sup>412</sup> *GDF*, 326 F.3d at 639 (emphasis in original).

<sup>413</sup> *Id.* (citing H.R. Rep. No. 93-412, at 4).

<sup>414</sup> *See id.* at 639 (citing 16 U.S.C. § 1531(a)(1) (2000) (“various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation”)).

<sup>415</sup> *Id.*; *see also* *Rancho Viejo LLC v. Norton* 323 F.3d 1062, 1078-80 (D.C. Cir. 2003) (determining ESA’s regulation of endangered species is subject of national concern and not traditional state regulation); *Gibbs v. Babbitt*, 214 F.3d 483, 499-505 (4th Cir. 2000) (same); *see generally* Mank, *supra* note 3, at 770-82 (arguing *Gibbs* is consistent with *Lopez*, *Morrison* and *SWANCC* because ESA appropriately regulates endangered species, which are subject of national concern and not traditional state regulation).

<sup>416</sup> *GDF*, 326 F.3d at 639-40.

<sup>417</sup> *Id.* at 640.

matter, renewing soil, mitigating floods, purifying air and water, or partially stabilizing climatic variation.<sup>418</sup> Relying on credible evidence that the taking of endangered or threatened species often has significant impacts on commercially valuable species and ecosystems, the Fifth Circuit concluded that “the link between species loss and a substantial commercial effect is not attenuated,” that “regulated takes under ESA do affect interstate commerce,” and, despite the absence of an express jurisdictional element in the statute, that “the ESA’s take provision is *limited* to instances which ‘have an explicit connection with or effect on interstate commerce.’”<sup>419</sup>

Because the statute is limited only to endangered and threatened species, the Fifth Circuit concluded that its “holding will not allow Congress to regulate general land use or wildlife preservation” in violation of the rationale of *Lopez* and *Morrison* that statutes are valid under the Commerce Clause only if they have a limiting principle.<sup>420</sup> The *GDF* court determined that an appropriate limiting principle existed because the statute is limited to endangered species that would likely be affected by a small number of takes, and does not apply to abundant species.<sup>421</sup>

#### D. Judge Dennis’s Concurrence

In his concurring opinion, Judge Dennis offered additional reasons for concluding that the ESA was constitutional under the Commerce Clause. Judge Dennis argued that the Supreme Court and lower courts had recognized since the *Darby* decision in 1941 that “both commercial and noncommercial activity may be regulated by Congress if the regulation is an essential or integral part of a larger comprehensive scheme properly regulating activity substantially affecting interstate commerce.”<sup>422</sup> He argued that

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<sup>418</sup> See John Charles Kunich, *Preserving the Womb of the Unknown Species with Hotspots Legislation*, 2 HASTING L.J. 1149, 1164-65 (2001) (discussing role of many commercially insignificant species in achieving ecosystem survival); Mank, *supra* note 3, at 786 (same).

<sup>419</sup> *GDF*, 326 F.3d at 640 (quoting *Morrison*, 529 U.S. at 611-12) (emphasis in original and internal quotations omitted).

<sup>420</sup> See *id.* at 640 (discussing *Morrison*, 529 U.S. at 612-13, and quoting *Lopez*, 514 U.S. at 564 (“We rejected these . . . arguments because they would permit Congress to ‘regulate not only all violent crime, but all activities that might lead to violent crime . . . .’”).

<sup>421</sup> *Id.* at 640.

<sup>422</sup> *Id.* at 642-43 (Dennis, J., concurring).

the ESA is a comprehensive and integrated statute for protecting endangered and threatened species and their essential ecosystems.<sup>423</sup> To conserve the ecosystems in which commercial species dwell, Congress has the authority under the Commerce Clause to protect non-commercial, intrastate endangered species as an essential means of protecting commercially valuable ecosystems and species that have a substantial impact on interstate commerce.<sup>424</sup> While some might question whether preserving the Cave Species is integral to protecting commercial species, Judge Dennis argued that deference to the statutory scheme is appropriate because “the interrelationship of commercial and non-commercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species from extinction or harm.”<sup>425</sup> Because of these complex interrelationships, he concluded that it is appropriate to aggregate the impacts of all takes of endangered species, including the Cave Species, “because such regulation is essential to the efficacy of – that is, the regulation is necessary and proper to – the ESA’s comprehensive scheme to preserve the nation’s genetic heritage and the ‘incalculable’ value inherent to that scarce natural resource, and because that regulatory scheme has a very substantial impact on interstate commerce.”<sup>426</sup> Elaborating on the majority opinion, Judge Dennis’s concurring opinion helpfully explained why the ESA is a comprehensive statute that requires protection of all endangered species, both commercially valuable and insignificant, to conserve their value for interstate commerce.

## VII. CONCLUSION: COURTS SHOULD FOLLOW *GDF* AND REJECT *VIEJO*

### A. *Regulating Commercial Motivations or Endangered Species*

Both the *GDF* and *Viejo* courts tried to follow the general principle in *Lopez* and *Morrison* that congressional

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<sup>423</sup> *GDF*, 326 F.3d at 641 (Dennis, J., concurring).

<sup>424</sup> *Id.* at 641 (Dennis, J., concurring).

<sup>425</sup> *Id.* at 643-44 (Dennis, J., concurring).

<sup>426</sup> *Id.* at 644 (Dennis, J., concurring) (quoting Charles Tiefer, *After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?*, 30 *Envtl. L. Rep.* (Envtl. L. Inst.) 10888 (2000)).

authority under the Commerce Clause must have some limits, but they disagreed over whether those limits should adhere to the means or the ends of regulation under the ESA. Because the *Lopez* and *Morrison* courts failed to provide a clear test for distinguishing between economic activities within the commerce power and non-economic activities outside its scope, lower courts have struggled with deciding whether various types of legislation such as the ESA are constitutional under the Commerce Clause.<sup>427</sup> The Supreme Court's Commerce Clause jurisprudence has sometimes emphasized either the means of regulation, such as regulation of the channels of commerce, or the ends of regulation, in *SWANCC* arguably the isolated wetlands and waters, rather than the construction activities that affect them.<sup>428</sup> There are plausible arguments for emphasizing either the ESA's end of protecting endangered species or its means of regulating commercial development.<sup>429</sup>

Nevertheless, while regulating commercial activities is an important component of the ESA, the *GDF* court properly emphasized that Congress's ultimate goal in enacting the 1973 amendments was to protect as many endangered species as possible, and that considering their aggregate benefits best accomplishes that goal in a manner consistent with federalism values.<sup>430</sup> Furthermore, although focusing on commercial development in some ways is more consistent with *Lopez* and *Morrison's* emphasis that the Commerce Clause concerns commercial activities, the *Viejo* court's commercial motivations approach is potentially too broad because it would allow the federal government to regulate any activity indirectly connected to a commercial activity even if the indirect activity is traditionally regulated by state and local governments.<sup>431</sup> Conversely, the *GDF's* aggregation of both commercial and non-commercial endangered species does raise questions about the limits of aggregating non-commercial activities, but is

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<sup>427</sup> See Seinfeld, *supra* note 22, at 1276-87 (discussing difficulties lower courts have encountered in distinguishing economic from non-economic activities); see also Mank, *supra* note 3, at 738, 741 (observing line between economic and non-economic activities is often unclear); Mank, *supra* note 3, 770-72 (arguing line between national and traditional state areas of regulation raises many problems).

<sup>428</sup> See Christopher H. Schroeder, *Environmental Law, Congress, and the Court's New Federalism Doctrine*, 78 IND. L.J. 413, 437-41 (2003) (arguing modern judicial conception of commerce power can reach either means or ends or both).

<sup>429</sup> See Nagle, *supra* note 8, at 210 (stating "either the means or the ends should be able to provide the requisite connection to interstate commerce").

<sup>430</sup> See *supra* notes 49, 89-96, 416-26 and accompanying text.

<sup>431</sup> See *supra* notes 39-40, 345-52, 381-91 and accompanying text.

ultimately more compatible with *Lopez* and *Morrison's* federalist principles because the aggregation is limited to only endangered species – species for which there is a long history of concurrent federal regulation and for which the federal government seeks to achieve recovery and ultimate return to state control.<sup>432</sup>

### B. Assessing Viejo

Building on Judge Henderson's concurring opinion in *NAHB*, the *Viejo* court focused on the ESA's regulation of commercial activities that are the means of harming endangered species and their habitat. Because large-scale commercial development of land generally has significant effects on interstate commerce and is economic in nature, the *Viejo* development approach has the advantage of emphasizing activities that are clearly within the scope of the Commerce Clause, unlike regulation of commercially insignificant species such as the fly or Cave Species.<sup>433</sup> The *Viejo* court relied most heavily on *Heart of Atlanta Motel*, upholding civil rights legislation prohibiting racial discrimination in intrastate public accommodations on the ground that the establishments in the aggregate substantially affected interstate commerce because most of the clients were out-of-state travelers.<sup>434</sup> Similarly, the *Viejo* decision claimed it was appropriate to consider the interstate commercial impacts of a real estate development threatening endangered species in order to justify the ESA's regulation of intrastate endangered species that have no economic impacts themselves.<sup>435</sup>

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<sup>432</sup> See 16 U.S.C. § 1532(3) (1994) (defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"); *Gibbs v. Babbitt*, 214 F.3d at 502-03 (discussing ESA's scheme for shared federal and state authority over endangered species); *Mank*, *supra* note 3, at 780-81 (arguing ESA does not violate federalism principles in *Lopez* and *Morrison* because ultimate goal is recovery of species and return to state control); *infra* notes 457, 472 and accompanying text.

<sup>433</sup> See *Nagle*, *supra* note 8, at 189-91, 208-15 (discussing choice of activity problem relating to Endangered Species Act and arguing that commercial activities affecting endangered species may be regulated under the Commerce Clause).

<sup>434</sup> *Id.* at 261.

<sup>435</sup> See *Viejo*, 323 F.3d at 1075-76 & n.19 (stating *Heart of Atlanta Motel* was decided using both channels of commerce analysis and substantial effects analysis and supports use of commercial impacts to justify non-economic regulation); *Nagle*, *supra* note 8, at 190 (discussing implications of *Heart of Atlanta Motel*); see *Morrison*, 529 U.S. at 610 (implying *Heart of Atlanta Motel* decision allowing civil rights regulation of public accommodations was decided in part because motel had substantial effects on

However, like the Fifth Circuit in *GDF*, this Article asserts that the *Viejo* court's approach is both under- and over-inclusive, and in its breadth weakens the federalist underpinnings of *Lopez* and *Morrison*. For example, the *Viejo* court's focus on economic activity could allow Congress to regulate wedding ceremonies, which are not economic activities in themselves, if they result in the renting of a large hotel or reception hall that has significant impacts on interstate commerce. This is so even though *Lopez* and *Morrison* emphasized that family law and marriage are traditional areas of state regulation.<sup>436</sup> Furthermore, a broad interpretation of the rationale in *Viejo* would arguably allow the federal government to usurp local land use planning and zoning functions as long as it regulated only commercial actors that affect interstate commerce. However, that result appears to be inconsistent with *SWANCC*'s dictum that states possess "traditional and primary power over land and water use."<sup>437</sup> In sum, *Viejo*'s economic activity analysis would arguably allow Congress to regulate any non-economic activity affected by a commercial actor even if the regulated activity was traditionally regulated by states.

Additionally, the commercial activity approach is potentially under-inclusive. In his concurring opinion in *Viejo*, Chief Judge Ginsburg argued that the commercial development approach was consistent with *Lopez* and *Morrison*'s emphasis on limiting the commerce power because the commercial development approach would not reach activities that have little commercial significance, such as a lone hiker or landscaping homeowner. He implied that the commerce power should not apply to hobbyists, but only to commercial

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interstate commerce); *Lopez*, 514 U.S. at 559 (same); *supra* notes 142-43, 264-65, 401, 440 and accompanying text. Similarly, in *Katzenbach v. McClung*, the Court concluded that the government could forbid discrimination by a local, intrastate restaurant because its substantial purchases from out-of-state sources substantially affected interstate commerce. See *Katzenbach*, 379 U.S. 294, 296, 300-01 (1964); *Viejo*, 323 F.3d at 1076 n.19 (stating *Katzenbach* was decided using both channels of commerce analysis and substantial effects analysis); Nagle, *supra* note 8, at 190 (discussing implications of *Katzenbach v. McClung*).

<sup>436</sup> See *United States v. Morrison*, 529 U.S. 598, 615-18 (2000) (characterizing family law as traditional area of state regulation); Schroeder, *supra* note 428, at 442-44 (discussing marriage and divorce as traditional areas of state regulation); William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE. L.J. 769, 795 (same).

<sup>437</sup> *SWANCC*, 531 U.S. at 174 (citing *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.")).

enterprises. Yet, like the sole farmer raising wheat for personal consumption in *Wickard*, the lone hiker or landscaping homeowner may pose substantial dangers if exempted from ESA regulation across-the-board. At its worst, Judge Ginsburg's *Viejo* concurrence would arguably revive the discredited pre-1937 distinction between direct and indirect effects in which the Court had allowed Congress to only regulate activities that directly affected interstate commerce, such as interstate sales of goods, but excluded intrastate manufacturing because it only indirectly affected commerce after the manufactured good entered the market.<sup>438</sup>

By allowing only regulation of large-scale commercial activities that have direct effects on interstate commerce, the commercial activities approach in *Viejo* or Judge Henderson's concurring opinion in *NAHB* would too narrowly interpret legitimate congressional authority to regulate activities that in the aggregate substantially affect interstate commerce. While a single hiker or homeowner is likely to have little impact on an endangered species, unless it is down to its very last few members, the aggregate impact of all hikers or landscaping homeowners could ultimately destroy many endangered species. For example, Professor Nagle has suggested that persons driving Off-Road Vehicles (ORVs) that may harm endangered species or their critical habitat are not within the scope of the Commerce Clause because the individual impact of any user is so small and the activity is a hobby rather than a commercial venture.<sup>439</sup> Yet ORVs in the aggregate may well

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<sup>438</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (concluding Bituminous Coal Conservation Act exceeded commerce power because mining was intrastate activity); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding Commerce Clause did not authorize child labor laws because intrastate manufacturing is not interstate commerce even though products later entered interstate commerce), overruled by *United States v. Darby*, 312 U.S. 100, 116-17 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding sugar manufacturers were outside Sherman Act because sugar manufacturing was intrastate activity even if sugar later entered interstate commerce); *Schapiro & Buzbee*, *supra* note 3, at 1210-11; *supra* notes 181, 211, 349 and accompanying text. In some pre-1937 cases, however, especially those involving public carriers such as railroads, the Court concluded the Commerce Clause authorized limited regulation of intrastate commerce where interstate and intrastate commerce were so blended together that regulation of interstate commerce required incidental regulation of intrastate commerce. See, e.g., *Shreveport Rate Cases*, 234 U.S. 342 (1914).

<sup>439</sup> See Nagle, *supra* note 8, at 211-12. Moreover, Professor Nagle suggests that the ORV industry as a whole is beyond regulation, a more debatable point because the sale of the vehicles and their transportation across state lines arguably has substantial effects on interstate commerce, although he argues that allowing the transportation of such vehicles across state lines to be the basis for regulation would

have substantial impacts on endangered species, especially because it is common for ORV enthusiasts to form clubs or attend large jamborees.<sup>440</sup> The analysis in *Viejo* or Judge Henderson's concurring opinion in *NAHB* would arguably exclude all small-scale commercial and social activities that do not individually affect interstate commerce, regardless of whether those activities may in the aggregate harm many endangered species or their critical habitat.

The commercial activities approach would be more acceptable if it examined the aggregate impacts of seemingly small activities or treated them as an integral part of the overall statute. The majority opinion in *Viejo* suggested that the lone hiker might be subsumed within the statute's broader purposes, but declined to answer the question because the facts of the case involved a substantial commercial housing development.<sup>441</sup> This Article would be more comfortable with the commercial development approach if it subsumed individually insignificant activities that in the aggregate have a substantial impact, but as discussed in subpart C, aggregating all endangered species provides a generally better approach than *Viejo's* commercial analysis.

C. *Aggregating All Endangered Species: GDF Offers a Better Approach*

The *GDF* court's aggregation of all endangered species is more appropriate under *Lopez* and *Morrison*. First, in light of *Lopez* and *Morrison's* emphasis that aggregation is generally appropriate for economic activities, the Fifth Circuit concluded that the "ESA's protection of endangered species is economic in nature" because the ESA's legislative history refers to the "incalculable" value of the genetic heritage that might be lost

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likely result in too broad a reading of the Clause to include too many activities. *See id.* at 212.

<sup>440</sup> *See* Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002) (holding Bureau of Land Management has duty under Federal Land Policy and Management Act of 1976 and National Environmental Policy Act to consider harm from ORVs to public lands); *see* ATV Connection Magazine Website, at <http://www.atving.com/resources/clubs> (listing and discussing clubs for ORV members); Jeep Jamboree USA 2003, at <http://jeepjamboreeusa.com> (announcing large jamboree for ORV users).

<sup>441</sup> *Viejo*, 323 F.3d 1062 (D.C. Cir. 2003).

absent regulation.”<sup>442</sup> Also, consistent with *Viejo*’s emphasis on economic activity, the *GDF* court likewise determined that “it is obvious that the majority of takes would result from economic activity.”<sup>443</sup>

In criticizing Judge Wald’s biodiversity<sup>444</sup> and Judge Henderson’s ecosystem<sup>445</sup> arguments in *NAHB*, Professor Nagle contended that aggregating all endangered species was inappropriate because each endangered species was dissimilar, unlike the wheat in *Wickard*, and that an overly broad aggregation principle would contradict *Lopez*’s emphasis on the need for a limiting principle on the scope of congressional authority under the Commerce Clause.<sup>446</sup> The *GDF* court, however, concluded that regulating Cave Species takes was an essential component of the ESA’s broader regulatory scheme.<sup>447</sup> In *TVA v. Hill*,<sup>448</sup> the Supreme Court had stated that in enacting the ESA in 1973 “Congress was concerned [not only] about the *unknown* uses that endangered species might have[, but also] about the *unforeseeable* place such creatures may have in the chain of life on this planet.”<sup>449</sup> The FWS argued in *GDF* that ignoring the taking of some endangered species would undermine Congress’s goal of protecting the chain of life and “interdependent web” of all species by allowing “piece-

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<sup>442</sup> *GDF*, 326 F.3d 622, 639 (5th Cir. 2003), *reh’g denied*, No. 01-51099, 2004 U.S. App. LEXIS 3933 (5th Cir. Feb. 27, 2004) (en banc) (citing H.R. Rep. No. 93-412, at 4).

<sup>443</sup> See *GDF*, 326 F.3d at 639 (citing 16 U.S.C. § 1531(a)(1) (2000) (“various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation”).

<sup>444</sup> *NAHB*, 130 F.3d 1041, 1052-54 (D.C. Cir. 1997); Mank, *supra* note 3, at 756-57.

<sup>445</sup> *NAHB*, 130 F.3d at 1058-59 (Henderson, J., concurring) (stating that “the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce” and that “[given] the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce.”); Mank, *supra* note 3, at 758-59.

<sup>446</sup> Nagle, *supra* note 8, at 180, 193-202 (discussing when it is appropriate to aggregate activities to determine their impact under Commerce Clause); see also Nagle, *supra* note 8, at 186-189 (questioning ecosystem and biodiversity arguments that loss of even commercially insignificant endangered species is likely to have substantial adverse economic impacts and suggesting more proof of economic harm is required to justify Endangered Species Act under Commerce Clause).

<sup>447</sup> *GDF*, 326 F.3d at 639-40.

<sup>448</sup> 437 U.S. 153 (1978).

<sup>449</sup> *Id.* at 178-79 (emphasis in original).

meal extinctions.”<sup>450</sup> This principle, in context, does have reasonable limits. Because commercially insignificant species often exist interdependently with more valuable species, taking of any species will probably have important effects on commercially valuable species and ecosystems. The Fifth Circuit agreed that, despite the absence of an express jurisdictional element in the statute, “the ESA’s take provision is *limited* to instances which ‘have an explicit connection with or effect on interstate commerce.’”<sup>451</sup>

Furthermore, the *GDF* court concluded that “the link between species loss and a substantial commercial effect is not attenuated” because the statute is limited to endangered species that would likely be affected by a small number of takes and does not apply to abundant species.<sup>452</sup> Moreover, as Judge Dennis’s concurring opinion argued, there is an additional argument that under a deferential rational basis standard, a standard which neither *Lopez* or *Morrison* purported to change or overrule,<sup>453</sup> courts should defer to the ESA’s aggregation of all species even if there are plausible arguments that they are too dissimilar or that their interdependency is questionable.<sup>454</sup>

Further, because the statute is limited to only endangered and threatened species, the Fifth Circuit in *GDF* correctly concluded that its “holding will not allow Congress to

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<sup>450</sup> *GDF*, 326 F.3d at 640.

<sup>451</sup> *Id.* (emphasis in original) (quoting *Morrison*, 529 U.S. at 611-12 (internal quotations omitted)); but see Nagle, *supra* note 8, at 186-189, 199 (questioning ecosystem and biodiversity arguments that loss of even commercially insignificant endangered species is likely to have substantial adverse economic impacts and suggesting more proof of economic harm is required to justify Endangered Species Act under Commerce Clause).

<sup>452</sup> *GDF*, 326 F.3d at 640.

<sup>453</sup> *Morrison*, 529 U.S. 528, 607 (2000) (stating deferential presumption of constitutionality standard, “Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”); Mank, *supra* note 3, at 792-93 (arguing *Lopez* and *Morrison* did not claim to overrule prior decisions applying rational basis review to statutes challenged as exceeding congressional commerce power and *Morrison* explicitly stated that there is presumption that statute is constitutional under Commerce Clause); *supra* notes 42, 201-06 and accompanying text.

<sup>454</sup> *GDF*, 326 F.3d at 641 (Dennis, J., concurring); Mank, *supra* note 3, at 784-93 (disagreeing with Professor Nagle’s narrow approach to aggregating endangered species and arguing that interdependence of endangered species and deference to congressional findings justifies aggregation of all endangered species); but see Nagle, *supra* note 8, at 180, 192-204 (discussing aggregation problem relating to Endangered Species Act and arguing it is inappropriate in light of *Lopez* to aggregate often dissimilar endangered species).

regulate general land use or wildlife preservation[.]”<sup>455</sup> The number of endangered and threatened species is limited, and the government must review its listing decisions every five years to determine if a species is still endangered.<sup>456</sup> Additionally, as soon as a species recovers sufficiently so that its survival is no longer endangered or threatened, the federal government may no longer regulate those animals and must recognize exclusive state authority unless an animal enters federal lands.<sup>457</sup> Accordingly, the ESA is consistent with *Lopez*’s broad rationale that congressional legislation must have some limit under the Commerce Clause.

Moreover, from a federalist perspective, both the Fourth Circuit in *Gibbs* and Fifth Circuit in *GDF* agreed that the ESA’s regulatory scheme does not interfere with a traditional area of state regulation because regulating endangered species is a concurrent area of shared responsibility and a subject of national interest.<sup>458</sup> The ESA specifically seeks to avoid interfering with state programs protecting endangered species by requiring the Secretary of Interior to first review “those efforts, if any, being made by any State . . . to protect such species” before including a species on the national list of

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<sup>455</sup> See *GDF*, 326 F.3d at 640 (discussing *Morrison*, 529 U.S. at 612-13 (quoting *Lopez*, 514 U.S. at 564)) (“We rejected these . . . arguments because they would permit Congress to ‘regulate not only all violent crime, but all activities that might lead to violent crime . . . .’”).

<sup>456</sup> 16 U.S.C. § 1533(c)(2)(A), (B) (2000) (requiring Secretary of Interior to review listed endangered or threatened species at least once every five years).

<sup>457</sup> See 16 U.S.C. § 1532(3) (2000) (defining “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”); *Gibbs*, 214 F.3d at 502-03; Mank, *supra* note 3, at 780-81.

<sup>458</sup> *GDF*, 326 F.3d at 639; see also *Rancho Viejo LLC v. Norton*, 323 F.3d 1062, 1078-80 (D.C. Cir. 2003) (determining ESA’s regulation of endangered species is subject of national concern and not traditional state regulation); *Gibbs v. Babbitt*, 214 F.3d 483, 499-505 (4th Cir. 2000) (same); see generally *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (stating “although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers”); *Hughes v. Oklahoma*, 441 U.S. 322, 326, 329, 335 (1979) (holding states do not own the wildlife within their borders and federal government has concurrent authority over wildlife under Congress’s commerce power) (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896)); Mank, *supra* note 3, at 770-82 (arguing *Gibbs* is consistent with *Lopez*, *Morrison* and *SWANCC* because ESA appropriately regulates endangered species, which are subject of national concern and not traditional state regulation); see generally *Schapiro & Buzbee*, *supra* note 3, at 1224 (stating “[t]he states and federal government now enjoy extensive areas of jurisdictional overlap”).

endangered or threatened species.<sup>459</sup> Additionally, the ESA encourages the Secretary to enter into cooperative agreements with states that have adequate programs for conserving threatened and endangered species, as well as providing financial assistance for such programs.<sup>460</sup>

Furthermore, the ESA does not infringe on an area of traditional state land use regulation. In 1979, the Supreme Court in *Hughes v. Oklahoma*<sup>461</sup> overruled its 1896 decision, *Geer v. Connecticut*, which held that states own the wildlife in their borders.<sup>462</sup> The *Hughes* Court held that states do not own the wildlife within their borders and that state laws regulating wildlife are limited by Congress's authority under the Commerce Clause.<sup>463</sup> The *Hughes* decision recognized that states have a legitimate role in regulating wildlife within their borders, but concluded that the federal government has concurrent authority with states over wildlife that affects interstate commerce.<sup>464</sup>

There are strong arguments that the federal government should play a greater role than states in protecting endangered species because uniform national regulation is more effective and there is no long history of state regulation in this area. Beginning with the Lacey Act in 1900,<sup>465</sup> the federal government has played a greater role than the states in preserving threatened or endangered species.<sup>466</sup> Most states have not traditionally regulated or protected threatened or endangered species.<sup>467</sup> Indeed, the lack of effective state

<sup>459</sup> See 16 U.S.C. § 1533(b)(1)(A) (2000); *Gibbs*, 214 F.3d at 503 (discussing 16 U.S.C. § 1533(b)(1)(A) (2000)); Mank, *supra* note 3, at 781 (same).

<sup>460</sup> 16 U.S.C. § 1535(c),(d) (2000); Mank, *supra* note 3, at 781 (discussing cooperative programs between states and federal government to protect endangered species).

<sup>461</sup> 441 U.S. 322, 329 (1979).

<sup>462</sup> 161 U.S. 519 (1896) (upholding Connecticut statute prohibiting interstate transportation of game birds that had been killed within state).

<sup>463</sup> See Mank, *supra* note 3, at 774; Doremus, *supra* note 50, at 287-88; White, *supra* note 3, at 248-49.

<sup>464</sup> See *Hughes*, 441 U.S. at 335-36; *Gibbs v. Babbitt*, 214 F.3d 483, 499 (4th Cir. 2000) (interpreting *Hughes* as giving federal government concurrent authority with states over wildlife, especially endangered species); Mank, *supra* note 3, at 774 (same); White, *supra* note 3, at 249 (same).

<sup>465</sup> See *supra* notes 51-52 and accompanying text.

<sup>466</sup> See Mank, *supra* note 3, at 773-76 (arguing federal government has played leading role in protecting endangered species); White, *supra* note 3, at 250-52 (arguing federal government has greater expertise in protecting endangered species).

<sup>467</sup> See Mank, *supra* note 3, at 776 (arguing states have not traditionally protected endangered species); White, *supra* note 3, at 250-51 (arguing state regulation of endangered species is inadequate).

protection and the need for uniform national legislation led Congress to enact the ESA in 1973.<sup>468</sup> By contrast, a federal statute purporting to regulate all species on non-federal lands would pose substantial issues under *Lopez* and *Morrison*.<sup>469</sup> Additionally, because many states lack effective programs to protect endangered species,<sup>470</sup> aggregating all endangered species comports with *Hodel's* principle that the federal government may regulate intrastate natural resources where there is significant under-regulation by states.<sup>471</sup>

While this Article would prefer that the Court return to the more deferential approach used from 1937 until 1995, it concludes that *GDF* is more consistent with the Court's current, though flawed, Commerce Clause jurisprudence. In light of *Lopez* and *Morrison's* essential reasoning that congressional regulation under the Commerce Clause must have a limited scope, the Supreme Court should adopt the reasoning in *GDF* and reject the analysis in *Viejo*. A broad reading of the commercial activities rationale in *Viejo* would potentially allow the federal government to regulate a virtually unlimited number of intrastate activities as long as they are indirectly connected to a commercial actor, even if those activities have been traditionally regulated by state and local governments. By contrast, the *GDF* court's conclusion that the Department of Interior may aggregate all endangered and threatened species to justify its regulation of any given species comports with the Supreme Court's recent decisions because such regulation is limited to only those listed species, many of which are commercially valuable and interconnected with many others, and the goal of the regulation is to return all species to state control as soon as they achieve recovery.<sup>472</sup>

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<sup>468</sup> The ESA's legislative history justified federal regulation of endangered and threatened species based on the need for uniform, national standards: "[P]rotection of endangered species is not a matter that can be handled in absence of coherent national and international policies; the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded." See H.R. Rep. 93-415, at 5 (1973); *Gibbs v. Babbitt*, 214 F.3d 483, 501-02 (4th Cir. 2000) (stating "[a] desire for uniform standards also spurred enactment of the ESA"); Mank, *supra* note 3, at 779.

<sup>469</sup> Mank, *supra* note 3, at 780-81.

<sup>470</sup> Mank, *supra* note 3, at 779-80; White, *supra* note 3, at 250-52.

<sup>471</sup> See Mank, *supra* note 3, at 777-81 (arguing federal regulation of endangered species is consistent with *Hodel's* rationale that federal government may regulate intrastate activities if there is a serious failure by state regulators to do so); *supra* notes 144-50 and accompanying text.

<sup>472</sup> See *supra* notes 432, 457 and accompanying text.

