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Flies, Wolves, Spiders, Toads, and the Constitutionality of the Endangered Species Act's Take Provision

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SYMPOSIUM ARTICLES

FLIES, SPIDERS, TOADS, WOLVES, AND THE CONSTITUTIONALITY OF THE ENDANGERED SPECIES ACT'S TAKE PROVISION

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The Endangered Species Act's prohibition against taking listed species has been the statute's most controversial provision because it can impose restrictions on private property. ESA opponents have mounted repeated attacks against the take provision, claiming that it exceeds Congress's constitutional authority under the Commerce Clause. These attacks have not succeeded: Four federal appellate decisions have upheld the provision, but they have employed strikingly different reasoning in doing so. This Article evaluates each of these decisions and considers whether the Supreme Court would affirm and on what grounds. The authors predict that the Court would uphold the ESA's take provision as having a sufficient commercial nexus under the Commerce Clause; that is, the statute is a comprehensive economic regulatory scheme aimed at preserving the economic benefits of biodiversity and avoiding economically destructive interstate competition.

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I. INTRODUCTION

The Endangered Species Act (ESA)[1] has become the *bête noir* of property rights activists, states' rights enthusiasts, and the neo-conservative crowd. The Act has been pilloried as inflexible, draconian, and environmental overkill.[2] A poster child for congressional deregulators, the ESA has become a constant target of legislative reformers.[3]

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[1] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

[2] For a few examples throughout the last decade, see, e.g., *Radanovich to Deliver Keynote Address to Mid Pacific Water Users Conference*, U.S. NEWSWIRE, Jan. 22, 2003, 2003 WL 3727146 (draconian); Jonathan Brinckman, *Coho Stripped of 'Threatened' Status by Judge*, OREGONIAN, Sept. 14, 2001, at B1 (draconian); Eric Brazil, *Klamath Basin Farmers Losing Irrigation to Save Endangered Fish*, S. F. CHRON., May 8, 2001, at A3 (draconian); *Endangered Species Act, Our View: Reintroduction of Lynx Shows Why the Law Needs Revision*, ROCKY MOUNTAIN NEWS, Jan. 4, 1999, at 3A (inflexible); Jonathan Brinckman, *Kitzhaber Champions Resource Cooperation*, OREGONIAN, Dec. 5, 1998, at A1 (harsh and inflexible); Rob Taylor, *Bulkheads Found to Destroy Some Vital Marine Habitat; A Salmon Fight on the Beach*, SEATTLE POST-INTELLIGENCER, Mar. 18, 1999, at A1 (draconian); Tom Kenworthy, *Interior Report Says Species Act Works; Law to Protect Endangered Plants, Animals Is Under Attack on Hill*, WASH. POST, Oct. 31, 1995, at A11 (inflexible and heavy handed); J. Madeleine Nash, *The $25 Million Bird: As Endangered California Condors Return to the Wild, the Law that Saved Them is Under Attack*, TIME, Jan. 27, 1992, at 56 (inflexible).

[3] Donald J. Barry, *Amending the Endangered Species Act,* The Ransom of Red Chief*, and*

But the ESA has remained surprisingly impervious to legislative amendment. And in truth, the ESA is actually not nearly as inflexible or draconian as its critics complain. The Clinton Administration made several administrative changes that made implementation of the statute quite economically sensitive.[4] Moreover, a close study of on-the-ground implementation would reveal that biological consultation, required of federal activities adversely affecting listed species,[5] is frequently concerned with

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Other Related Topics, 21 ENVTL. L. 587, 589–91 (1991) (discussing bills in the 101st Congress). For a review of some of the ESA reform bills introduced in the 103d and 104th Congresses, see Douglas L. Huth, *Endangered Species Act Reauthorization: Congress Proposes a Rewrite with Private Landowners in Mind*, 48 OKLA. L. REV. 383 (1995) (discussing bills in the 103d Congress); Nancy Kubasek et al., *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329 (1994) (same); J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1153–60 (1995) (discussing bills in the 104th Congress); Eva Tompkins, *Reauthorization of the Endangered Species Act—A Comparison of Two Bills that Seek to Reform the Endangered Species Act: Senate Bill 768 and House Bill 2275*, 6 DICK. J. ENVTL. L. & POL'Y 119 (1997) (same). *See also* Lawrence Michael Bogert, *That's My Story and I'm Stickin' To It: Is the "Best Available" Science* Any *Available Science Under the Endangered Species Act?*, 31 IDAHO L. REV. 85, 140–50 (1994) (discussing why the ESA listing process is prone to error and calling for statutory reform of the listing process); Larry J. Bradfish, *Recent Developments in Listing Decisions Under the Endangered Species Act and Their Impact on Salmonids in the Northwest*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 77, 93–97 (1995) (discussing multiple bills to amend the ESA in the 103d and 104th Congresses). For a discussion of the most recent attempt to amend the ESA, see Michael J. Brennan et al., *Square Pegs and Round Holes: Application of the "Best Scientific Data Available" Standard in the Endangered Species Act*, 16 TUL. ENVTL. L.J. 387, 440–41 (2003) (discussing bills of the 108th Congress).

[4] *See, e.g.*, Fred Bosselman, *The Statutory and Constitutional Mandate for a No Surprises Policy*, 24 ECOLOGY L.Q. 707, 717–19 (1997) (noting the ESA's mandate for the "No Surprises Policy" for private landowners and the necessity for such agreements under the Constitution); Joseph Sax, *The Ecosystem Approach: New Departures for Land and Water: Closing Remarks*, 24 ECOLOGY L.Q. 883, 884–86 (1997) (discussing the benefits of assurance agreements to private landowners under the ESA); George Frampton, *Ecosystem Management in the Clinton Administration*, 7 DUKE ENVTL. L. & POL'Y F. 39, 40 (1996) (discussing the comprehensive management plan put in place to protect the northern spotted owl (*Strix occidentalis caurina*) and other species while balancing economic interests); *see* Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 316–18 (1997) (noting the availability of incidental take permits for property owners); Karin L. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 320–26 (1998) (generally discussing the application of the ESA to private property); Jon P. Tasso, *Habitat Conservation Plans as Recovery Vehicles: Jump-Starting the Endangered Species Act*, 16 U.C.L.A. J. ENVTL. L. & POL'Y 297, 297–318 (1999) (suggesting that habitat conservation plans could further the ESA's goal of recovering listed species); Shi-Ling Hsu, *The Potential and the Pitfalls of Habitat Conservation Planning under the Endangered Species Act*, 29 Envtl. L. Rep. (Envtl. L. Inst.) 10,592, 10,596–97 (Oct. 1999) (noting that habitat plans tend to benefit businesses and private landowners to the detriment of the ESA's purpose of recovering species). For a related innovation, the use of "Candidate Conservation Agreements" as an alternative to listing a species as endangered, see Nancy K. Kubasek et al., *Cross-Examining Market Approaches to Protecting Endangered Species*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,721, 10,726 (Sept. 2000); Martha Phelps, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. ENVTL. AFF. L. REV. 175 (1997).

[5] 16 U.S.C. § 1536(a)(2) (2000).

balancing economic costs against species protection.[6] Nevertheless, the calls for ESA reform continue unabated.[7]

The ESA's critics certainly have not limited their attacks on the statute to the congressional arena, however. Litigation aimed at disabling various aspects of ESA implementation has been commonplace as well.[8] In the most celebrated case, advocates of increased timber harvest on public land challenged the application of the statute's take provision to habitat destruction.[9] The ESA's take provision is especially controversial because it is not limited to restricting the activities of the federal government but includes limits on private property as well.[10] But a divided Supreme Court surprisingly upheld the challenged regulation in 1995.[11] As a result, ESA critics shifted their focus from challenging the administrative interpretation of the statute to challenging its constitutionality.

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[6] *See, e.g.*, Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons from the Columbia Basin*, 74 WASH. L. REV. 519, 554–55, 581–82, 598–99 (1999) (giving examples of and discussing the National Marine Fisheries Service's willingness to balance cost concerns against salmon protection).

[7] For a discussion of the most recent attempt to amend the ESA, see Brennan et al., *supra* note 3, at 440–41 (discussing bills of the 108th Congress). For examples of the general continuing call for ESA reform, see Joe Rojas-Burke, *Coho Story Excites White House*, OREGONIAN, Aug. 13, 2003, at A1; Libby Quaid, *Graves: Endangered Species Law Needs Overhaul*, AP NEWSWIRE, July 17, 2003, *available at* http://www.citizenreviewonline.org/july_2003/graves.htm; Dan Fagin, *A New Environment: Bush Seeks to Reshape the Laws of Our Land (and Air)*, NEWSDAY, Jan. 12, 2003, at A4; NATIONAL ENDANGERED SPECIES ACT REFORM COALITION, ISSUE ALERT, LEGISLATORS CALL FOR ESA REFORM AFTER SILVERY MINNOW COURT DECISION (June 24, 2003), *available at* http://www.nesarc.org/minnow.pdf; Press Release, Rep. Greg Walden, (R-Or.), Walden Re-Introduces Legislation to Add Peer Review to Endangered Species Act (Apr. 8, 2003), *available at* http://walden.house.gov/press/releases/2003/04Apr/pr0408a03.htm.

[8] *See, e.g.*, Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv., 273 F.3d 1229 (9th Cir. 2001) (challenging the U.S. Fish and Wildlife Service's incidental take statement, which prohibited cattle grazing in areas where habitat modification could occur); Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001) (challenging final National Marine Fisheries Service rule listing coho salmon as threatened); N.M. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv., 248 F.3d 1277 (10th Cir. 2001) (challenging critical habitat designations for the southwestern willow flycatcher (*Emphidonax traillii extimus*)); Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) (challenging EPA's imposition of water-use restrictions as a prohibited taking under the Fifth Amendment); Kandra v. U.S., 145 F. Supp. 2d 1192 (D. Or. 2001) (challenging the suspension of irrigation deliveries, intended to maintain water levels for threatened and endangered fish species, as a breach contract water rights). For more on the Klamath conflict, see Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279 (2003) (discussing the controversial role of the ESA as a tool for environmental protection and suggesting possible alternatives for sharing limited water resources in the future).

[9] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or. (*Sweet Home*), 515 U.S. 687 (1995); *see* 16 U.S.C. § 1538(a)(1)(B) (2000) (prohibiting the "take" of listed species); 50 C.F.R. § 17.3 (2003) (defining "take" to include significant habitat destruction or degradation).

[10] Section 9 of the ESA prohibits "any person" from taking listed species. 16 U.S.C. § 1538(a)(1)(B) (2000).

[11] *Sweet Home*, 515 U.S. at 708 (upholding the Secretary of the Interior's regulatory definition of "take" to include "significant habitat modification or degradation that actually kills or injures wildlife" as reasonable in light of the ordinary meaning of "harm" and the broad purpose and intent of the ESA).

As the Rehnquist Court has narrowed the basis for federal Commerce Clause regulation,[12] the ESA has become vulnerable to constitutional challenge because the basis for species protection is not exclusively commercial in nature, but is instead a mixture of philosophy, morality, aesthetics, and utility.[13] Although the statute is widely defended on moral and aesthetic grounds,[14] the utilitarian argument for protecting endangered species is actually quite strong if understood to include more than just the commercial, medicinal, or recreational uses of particular species and to encompass the role of species as indicators of the health of ecosystems necessary for human health and welfare.[15] However, this "canary-in-the-coal-mine" function is often subsumed by moral and aesthetic claims for species protection, making it seem that the ESA fulfills only noncommercial functions.[16] This perception has encouraged ESA opponents to mount constitutional challenges to the application of the Act's take provision against the activities of various private landowners.

In a series of cases, discussed in Section III of this Article, these opponents alleged that the ESA's take provision was an unconstitutional exercise of the Commerce Clause power. Their efforts have yet to bear fruit, however, as all four appellate decisions—from three different courts of appeals—rejected their contentions.[17] But two of the decisions drew dissents from well-known "conservative" judges.[18] Moreover, the circuits have been unable to agree as to why the ESA's take provision is constitutional, supplying several different rationales.[19] Thus, Supreme Court review of the issue is not out of the question, despite the lack of a circuit split, particularly in this era in which the Court has revolutionized the

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[12] *See infra* Section II.

[13] *See, e.g.*, Zygmunt Z.B. Plater, *The Embattled Social Utilities of the Endangered Species Act—A Noah Presumption and a Caution Against Putting Gas Masks on the Canaries in the Coalmine*, 27 ENVTL. L. 845 (1997) (discussing the ESA's protections as fulfilling basic human social interests).

[14] *See, e.g.*, STEPHEN R. KELLERT, THE VALUE OF LIFE: BIOLOGICAL DIVERSITY AND HUMAN SOCIETY 6 (1996) (noting the moralistic, humanistic, naturalistic, and aesthetic justifications for species protection).

[15] *See* Plater, *supra* note 13, at 852–54; Oliver A. Houck, *Why Do We Protect Endangered Species and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 327–28 (1995) (describing endangered species as "wildlife indicators" and the ESA as a test of Earth pollution levels); John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1212–13 (1998) (discussing the "canary-in-the-mine" rationale for the ESA)).

[16] But note that while it did not expressly include the commercial value of species protection, Congress emphasized a wide variety of ensuing human benefits. *See* 16 U.S.C. § 1531(a)(3) (2000) (expressing congressional determination that endangered "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value"). Congress also drew a direct connection between species loss and unrestrained economic growth and commercial development. *Id.* § 1531(a)(1).

[17] *See infra* Section III.

[18] We highlight "conservative" because we think that their conservatism does not extend to the exercise of judicial power. See, e.g., the colloquy between Judges Wilkinson and Luttig, *infra* notes 175–79 and accompanying text, in which Chief Judge Wilkinson accused Judge Luttig of espousing unwarranted judicial activism.

[19] *See infra* Section III.

constitutional federal-state balance. Referring to this revolution as a reinvigoration of "Our Federalism,"[20] the Court has struck down federal legislation for exceeding the Commerce Clause authority for the first time since the New Deal.[21]

In this Article, we consider the fate of the ESA's take provision in this new judicial era. Section II examines the federalism revolution created by the Rehnquist Court over the past decade. Section III analyzes the four circuit court decisions on the constitutionality of the ESA's take provision. Section IV then considers the likelihood of the various rationales adopted by the circuits being accepted by the Rehnquist Court, focusing especially on the concurrence of Justice Kennedy in *United States v. Lopez* (*Lopez*),[22] the case that initiated the Court's modern federalism revolution.

The Article concludes that the Court would have little difficulty in upholding the Commerce Clause basis for the ESA where either the particular species or regulated take has substantial effects on commerce.

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[20] The term was coined in the modern era first in *Younger v. Harris*, 401 U.S. 37, 44 (1971) (Brennan, J.) (noting that the concept represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . always endeavors to [act] in ways that will not unduly interfere with the legitimate activities of the States"). For further discussion of this concept, see *Alden v. Maine*, 527 U.S. 706, 748 (1999) (Kennedy, J.) ("Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999) (Ginsberg, J.) (stating that "Our Federalism" means neither complete centralization nor "blind deference" to the rights of States, but requires "sensitivity to the legitimate interests" of both governments); *Printz v. United States*, 521 U.S. 898, 921 (1997) (Scalia, J.) (maintaining that the separation of state and federal governments "is one of the Constitution's structural protections of liberty"); *Camp Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting) (rejecting the "negative Commerce Clause" because it has "no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application"); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[O]ur federalism" allows the States, as laboratories, "to devise various solutions where the best solution is far from clear."); *Ankenbrant v. Richards*, 504 U.S. 689, 705 (1992) (White, J.) (refusing to extend the notion of comity, which the court deemed "critical to *Younger*'s 'Our Federalism,'" when there is no pending state proceeding); *Deakins v. Monaghan*, 484 U.S. 193, 208–09 (1988) (White, J., concurring) (arguing that "Our Federalism" means that federal courts should not adjudicate claims for damages while a state criminal case dealing with the same issue is pending); *Kelly v. Robinson*, 479 U.S. 36, 49 (1986) (Powell, J.) (using concept of "our federalism" to aid in the Court's interpretation of the Bankruptcy Code); *Murray v. Carrier*, 477 U.S. 478, 500 (1986) (Stevens, J., concurring) (discussing the complexities of "our federalism" and the interplay of state and federal governments when a habeas corpus petition is filed); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 103 (1981) (Rehnquist, J.) (reflecting on "the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism'"); *Hicks v. Miranda*, 422 U.S. 332, 356–57 (1975) (Stewart, J., dissenting) (arguing that the converse of *Younger* should hold true, and "'Our Federalism'" should not allow state courts to interfere with the legitimate functioning of federal courts).

[21] *See infra* Section II. The Court had not struck down a federal statute on Commerce Clause grounds in nearly sixty years, the last time being *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (holding that Congress lacked Commerce Clause authority to regulate maximum hours and minimum wages in the coal industry because coal mining and processing were "production," not commerce; "production is a purely local activity").

[22] 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).

However, these justifications would leave many species and some kinds of take outside the permissible reach of the ESA. A justification that would uphold the take regulation with respect to all listed species was provided by both the Fourth and Fifth Circuits, which ruled that the commerce necessary to sustain ESA regulation was in the statute's comprehensive economic regulatory scheme. We think that, while the matter is certainly not free from doubt, the Court would sustain this approach, since Justice Kennedy has indicated that the purpose or design of a statute can supply the requisite commerce nexus,[23] and regulation of wildlife or endangered species is certainly not an area traditionally of exclusive state concern.[24]

II. THE REHNQUIST COURT'S RESURRECTION OF "OUR FEDERALISM"

Until 1995, there was little question that the ESA was constitutional. The statutory findings stated that "economic growth and development untempered by adequate concern and conservation" were a primary cause of species extinctions,[25] and the ESA's legislative history indicated that "the pressures of trade" threatened fish, wildlife, and plants,[26] seeming to place the Act squarely within Congress's Commerce Clause power.[27] The Supreme

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[23] *See infra* notes 61–73 and accompanying text.

[24] *See infra* notes 169–73, 198, 231–33, 280–81, 352, and accompanying text. *See also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) (explaining that states share authority to manage wildlife with the federal government).

[25] 16 U.S.C. § 1531(a)(1) (2000).

[26] H.R. REP. NO. 93-412, at 2 (1973), *reprinted in* COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 149 (Comm. Print 1982).

[27] U.S. CONST., art. I, § 8, cl. 2. The ESA could also be sustained under either the Treaty Clause or the Property Clause powers. *Id.*, art. VI, cl. 2 (Treaty Clause); *id.* art. IV, § 3, cl. 2 (Property Clause). Fulfilling international treaty obligations is clearly a purpose of the ESA. *See* 16 U.S.C. § 1531(a)(4) (2000) (listing at least six international treaties related to endangered species protection); *id.* § 1531(b) (stating that the purposes of the Act include taking "such steps as may be appropriate to achieve the purposes" of the treaties mentioned in subsection (a)(4)). Commentators have disagreed over whether existing treaty obligations would justify the Act's take provision. *See* Gavin R. Villareal, *One Leg to Stand On: The Treaty Power and Congressional Authority For the Endangered Species Act After* United States v. Lopez, 76 TEX. L. REV. 1125, 1161 (1998) (concluding that the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Western Convention) justifies the ESA's habitat protection); 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, 230–31 (2000) (maintaining that the Western Convention only justifies the ESA's take provision for eight species listed both in the annex of the convention and under the ESA). This latter interpretation of the ESA protections predicated upon the Western Convention stems from Article VIII of the convention, specifying that only species listed in the treaty's Annex "shall be protected as completely as possible, and their hunting, killing, capturing, or taking shall be allowed only with the permission of the appropriate government authorities." Convention Between the United States of America and Other American Republics Respecting Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, art. VIII, 56 Stat. 1354, 1366, 161 U.N.T.S. 193, 200 (entered into force April 30, 1940) [hereinafter Western Convention]; *see also* 16 U.S.C. § 1537(a) (2000) (authorizing the President to assist foreign countries to develop conservation plans for endangered species). However, Article V of the Western Convention, which is not limited to species listed in the Annex, commits the signatory

Court had not struck down a federal statute as being in excess of the Commerce Clause since the New Deal,[28] sustaining regulation of intrastate coal mining,[29] intrastate credit transactions,[30] restaurants using interstate supplies,[31] inns catering to interstate guests,[32] and even production of wheat consumed on-farm.[33] In 1981, the Court upheld, against a Commerce Clause attack, the Surface Mining Control and Reclamation Act,[34] on the ground that Congress could rationally conclude that the regulation of private land strip mining was necessary to control adverse effects on interstate

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governments "to adopt . . . suitable laws and regulations for the protection and preservation of flora and fauna with their natural boundaries . . . [outside] natural parks, national reserves, nature monuments, or strict wilderness reserves." Western Convention, *supra*, art. V, cl. 1, 56 Stat. at 1362–64, 161 U.N.T.S. at 198.

The United States has signed, but has yet to ratify, the Convention on Biological Diversity, written at the 1992 Earth Summit in Rio de Janeiro, which would commit the U.S. to "promote the recovery of threatened species." Convention on Biological Diversity, June 5, 1992, art. 8(f), 31 I.L.M. 818. Both Article 18 of the Vienna Convention on the Law of Treaties and section 312 of the *Restatement of Foreign Relations Law of the United States* maintain that prior to the entry into force of a treaty, a country that has consented to it may not take steps that would defeat its purpose. The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336, 25 I.L.M. 556 (entered into force Jan. 27, 1980); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (1987).

The Property Clause would serve to justify the ESA take provision for species inhabiting federal lands and for species whose extinction would harm or threaten to harm public lands. *See, e.g.*, Camfield v. United States, 167 U.S. 518, 525 (1897) (using the Property Clause to justify tearing down fences on private land); United States v. Alford, 274 U.S. 264, 267 (1927) (using the Property Clause to justify prohibiting fires on private lands that endanger national forests); 1 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 3.14 (rev. ed. 2003) (collecting numerous other lower court cases on the extraterritoriality of the Property Clause power); Peter A. Appel, *The Power of Congress is "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 94–96 (2001) (maintaining that the reach of the Property Clause power is determined by whether the aggregated effects of extraterritorial activities are "substantially related to" federal property); *see also id.* at 122 (suggesting that the Property Clause could justify federal regulation of listed species off federal property if the species sometimes inhabited federal lands and Congress determined that such extraterritorial regulation was important to the overall value of federal lands); Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 292 (1991) (asserting that the Court's reasoning in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), upholding the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (1988), on Property Clause grounds, "could justify federal protection of virtually any biological resource"). The Property Clause would thus seem to justify federal regulation of many more species than the Treaty Clause, but it would not support regulation of those species with no connection to federal public lands. This would appear to be the case with the Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*), the Texas cave species, and perhaps the southwestern arroyo toad (*Bufo californicus*).

[28] *See supra* note 21 and accompanying text.

[29] Hodel v. Virginia Surface Mining & Reclamation Ass'n (*Va. Surface Mining*), 452 U.S. 264, 268 (1981) (upholding federal reclamation requirements); Hodel v. Indiana, 452 U.S. 314, 317 (1981) (upholding federal regulations restricting surface or mining prime farmland).

[30] Perez v. United States, 402 U.S. 146, 147 (1971).

[31] Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964).

[32] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964).

[33] Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

[34] Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, 1202, 1211, 1231–1279, 1281, 1291–1309, 1309a, 1309b, 1311–1316, 1321–1328 (2000).

commerce due to "air or water pollution, or other environmental hazards."[35] Whatever limits there were on Commerce Clause authority seemed theoretical, mostly because the Court as long ago as 1942 had sanctioned "aggregation" of economic effects to produce an effect on interstate commerce, meaning that the cumulative effects of many others similarly situated may be accumulated to produce an effect on interstate commerce.[36] There were even reputable academic suggestions that the Court completely eschew Commerce Clause review of federal statutes.[37]

The world changed abruptly in 1995, however, when the Court decided that the Gun-Free School Zones Act of 1990 (GFSZA)[38] exceeded the Commerce Clause power.

A. United States v. Lopez*: New Limits on the Commerce Clause*

Congress enacted and President George H.W. Bush signed the GFSZA in 1990.[39] The Act made it a federal crime to knowingly possess a firearm in a school zone, which the statute defined as "within a distance of 1,000 feet from the grounds of a public, parochial, or private school."[40] In 1992, a senior at a San Antonio, Texas high school brought a concealed .38 caliber handgun to school and was charged with violating the GFSZA.[41] After he was indicted, he moved to dismiss the charges on the ground that the GFSZA violated the Commerce Clause, but the district court denied his motion, ruling that the business of education affects interstate commerce.[42] The defendant was subsequently convicted and sentenced to six months in jail and two years supervised release.[43] He appealed to the Fifth Circuit, which reversed the

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[35] *Va. Surface Mining*, 452 U.S. 264, 282 (1981) (also citing congressional findings that "many surface mining operations [burden] and adversely affect commerce and the public welfare by destroying [the] utility of land [by] causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, [and] by impairing [natural beauty]").

[36] *Wickard*, 317 U.S. at 127–28 (upholding Commerce Clause regulation of a farmer's wheat grown for home consumption, on the ground that this consumption, when considered with the home wheat consumption of other farmers, was "far from trivial").

[37] *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171–259 (1980).

[38] Pub. L. No. 101-647, Title XVII, § 1702, 104 Stat. 4844 (1990).

[39] *Id.* Note, however, that in signing the GFSZA, the first President Bush seemed to invite litigation with the following statement: "Most egregiously, [the GFSZA] inappropriately overrides legitimate State firearms law with a new and unnecessary Federal law. The policies reflected in [the provisions of the Act prohibiting gun possession] could legitimately be adopted by the States, but they should not be imposed upon the States by Congress." Statement of President George Bush Upon Signing S. 3266, Pub. L. No. 101-647, *reprinted in* 1990 U.S.C.C.A.N. 6696-1 (1990).

[40] 18 U.S.C. § 921(a)(25) (2000).

[41] The student was first charged with violating a Texas law prohibiting firearms on school premises, but those charges were dismissed after he was federally charged. *Lopez*, 514 U.S. 549, 551 (1995). The student actually brought the gun to school to complete a sale. Chief Justice Rehnquist's opinion never mentioned this fact, although it appeared in the Fifth Circuit's opinion. United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd* 514 U.S. 549 (1995).

[42] *Lopez*, 514 U.S. at 551.

[43] *Id.* at 352.

conviction and struck down the statute, holding that the GFSZA had insufficient congressional findings and legislative history to support Commerce Clause authority.[44] The Supreme Court granted certiorari and affirmed the Fifth Circuit in *Lopez*, its first decision striking down a federal statute since the New Deal.[45]

Chief Justice Rehnquist wrote the majority opinion for a sharply divided court, which split five to four.[46] He began by announcing "first principles" of federalism: the Constitution's granting the federal government powers that are "few and defined"—in contrast to the authorities of the states which are "numerous and indefinite"—in order to protect fundamental liberties and reduce the risk of tyranny.[47] Retracing the Court's Commerce Clause jurisprudence,[48] the Chief Justice identified three broad categories of regulation authorized by the Commerce Clause: 1) the use of the channels of interstate commerce, such as using interstate transportation routes; 2) the protection of the instrumentalities of interstate commerce or persons or things in interstate commerce, such as proscribing theft of goods destined for interstate shipment; and 3) intrastate activities having a substantial effect on interstate commerce.[49] The latter category—which Chief Justice Rehnquist emphasized required a *substantial* effect, not just any effect[50]—was the focus of judicial attention concerning the GFSZA, as it is with respect to the take provision of the ESA.

Chief Justice Rehnquist announced that there were four factors to consider in deciding whether an intrastate activity had a substantial effect on interstate commerce.[51] He found the GFSZA lacking on all counts. First, the statute's prohibition of gun possession in school zones had nothing to do "with commerce or any sort of economic enterprise."[52] The Court went on to characterize all its previous decisions upholding Commerce Clause regulation as involving economic activity that substantially affected

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[44] United States v. Lopez, 2 F.3d at 1367–68.

[45] *See supra* note 21.

[46] Justices Stevens, Souter, Ginsberg, and Breyer dissented in three separate opinions. *Lopez*, 514 U.S. at 602 (Stevens, J., dissenting); *id.* at 603 (Souter, J., dissenting); *id.* at 614 (Breyer, J., dissenting).

[47] *Id.* at 552.

[48] The opinion amounted to a restatement of the Commerce Clause decisions from *Gibbons v. Ogden*, 9 Wheat. 1, 189–90 (1824), to *Va. Surface Mining*, 452 U.S. 264, 266–70 (1981). *See Lopez*, 514 U.S. at 553–59.

[49] *Lopez*, 514 U.S. at 558–59 (citing cases, including *Va. Surface Mining*, 452 U.S. at 276–77, which the Court cited for all three categories).

[50] The effect was to make a majority opinion of then Associate Justice Rehnquist's concurrences in the surface mining cases, cited *supra* note 29. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 307 (1981) (Rehnquist, J., concurring).

[51] As subsequently paraphrased by the Chief Justice in *United States v. Morrison* (*Morrison*), these factors are: 1) whether the statute regulates commerce or an economic activity; 2) whether the statute has an express jurisdictional limit restricting its application to activities with an explicit connection or effect on interstate commerce; 3) whether the statute contains congressional findings indicating that the activity has a substantial effect on interstate commerce; and 4) whether the activity has too attenuated an effect on interstate commerce. *Morrison*, 529 U.S. 598, 610–12 (2000).

[52] *Lopez*, 514 U.S. at 561 (citing 18 U.S.C. § 922(q)).

interstate commerce.[53] However, significantly in terms of the constitutionality of the ESA's take provision, the Court did note that federal regulation of noncommercial activities was constitutionally permissible if the statute was "an essential part of a larger regulation of economic activity" that could be undercut if the intrastate activity was not regulated.[54] But Chief Justice Rehnquist concluded, without much analysis, that the prohibition on gun possession was not part of such a comprehensive scheme.[55]

Second, the legislative gun prohibition contained no internal jurisdictional limit guaranteeing an effect on interstate commerce.[56] Third, Congress made no findings demonstrating the link between gun possession in school zones and effects on interstate commerce.[57] Finally, the government's litigation argument, which did attempt to make such a link, was too attenuated, requiring the piling of "inference upon inference" to produce the requisite effect.[58] The Chief Justice suggested that if the Court were to accept the government's theory of effect,[59] the result would make it "difficult to perceive any limitation on federal power," destroying the important distinction between what is "truly national and what is truly local."[60]

Justice Kennedy, joined by Justice O'Connor, concurred.[61] Because these two justices supplied the deciding votes to overturn the GFSZA's ban of gun possession, the concurrence deserves close scrutiny. Justice Kennedy began by observing that the history of Commerce Clause jurisprudence "counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power."[62] He noted that

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[53] *Id.* at 559.

[54] *Id.* at 561.

[55] *Id.* ("Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.").

[56] *Id.*

[57] *Id.* at 562. The Court clarified that Congress did not have to make formal findings, but observed that findings were helpful for judicial evaluation when no substantial effect on interstate commerce was "visible to the naked eye." *Id.* at 562–63.

[58] *Id.* at 564–67.

[59] The government argued that the "costs of crime" (e.g., insurance increases and less travel due to safety concerns) and reduced national productivity (e.g., crime in schools producing an inadequate educational process and consequently a less productive work force and a poorer economy) illustrated the requisite adverse effects on interstate commerce. *Id.* at 564 (internal quotations omitted). The Court responded that under such reasoning Congress could regulate any activity related to the economic productivity of individual citizens, including family law matters such as marriage, divorce, and child custody. *Id.* at 564, 567.

[60] *Id.* at 564, 568.

[61] *Id.* at 568 (Kennedy, J., concurring). Justice Thomas also wrote a concurrence, joined by no other justice, in which he called for reconsideration of the "substantial effects" aspect of Commerce Clause jurisprudence, suggesting that it was inconsistent with original intent, the Court's early Commerce Clause cases, and the notion of a federal government of limited and defined powers. *Id.* at 584 (Thomas, J., concurring). *See also Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("By continuing to apply this rootless and malleable standard [the "substantial effects" test] . . . the Court has encouraged the Federal Government to persist in its view that the Commerce Clause virtually has no limits.").

[62] *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring). *See also id.* at 577 ("Whatever the

the judicial history of the Commerce Clause was "not marked . . . by a coherent or consistent course of interpretation."[63] From the history he drew two lessons: 1) "content-based" boundaries (like the manufacturing-commerce dichotomy adopted by the Court in *United States v. E.C. Knight Co.*[64]) alone are insufficient to draw Commerce Clause limits, and 2) stare decisis should be applied vigorously when the "essential principles" of congressional power are at issue.[65]

Despite these caveats, Justice Kennedy agreed with the majority opinion that the GFSZA was beyond the commerce power. He thought that federalism, "the unique contribution of the Framers to political science and political theory,"[66] could not depend solely upon the political branches of government, since "momentary political convenience" could undermine the federal balance which is an "essential . . . part of our constitutional structure and plays a vital role in securing [individual] freedom."[67] Because he agreed that neither Lopez nor his gun possession had commercial character, and since neither the "purposes nor the design" of the GFSZA's gun prohibition had a proper "commercial nexus,"[68] the statute overreached.

While acknowledging that the interconnectedness of the modern world gave commercial consequences to almost any conduct, Justice Kennedy counseled that the Court had not "yet" extended the Commerce Clause that far.[69] Where legislation attempted to reach beyond commercial activity "in the ordinary and usual sense of the term," the proper judicial inquiry was to ask whether the statute intruded upon an area of traditional state control which, according to Justice Kennedy, was an area to which "States lay claim by right of history and expertise."[70] This judicial role was justified, he maintained, because otherwise the states could lose their important roles as "laboratories for experimentation," in this case by displacing state authority with "an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property."[71] This physical preemption would produce federal encroachment on state judgment, causing the federal-state boundaries to "blur," making political accountability "illusory."[72] Since the GFSZA concerned education, an area of traditional state regulation, Justice Kennedy concluded that the principles of federalism required state

judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.").

63 *Id.*

64 156 U.S. 1 (1895) (finding that the sugar refining cartel, which processed 98% of the sugar consumed in the country, was not subject to Commerce Clause regulation under the Sherman Act because it was engaged in "manufacturing," not "commerce").

65 *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring). Justice Kennedy observed that "Congress can regulate in the commercial sphere on the assumption we have a single market and a unified purpose to build a stable economy." *Id.*

66 *Id.* at 575 (Kennedy, J., concurring).

67 *Id.* at 578 (Kennedy, J., concurring).

68 *Id.* (Kennedy, J., concurring) (citing Chief Justice Rehnquist's opinion, *id.* at 559–61).

69 *Id.* (Kennedy, J., concurring).

70 *Id.* at 583 (Kennedy, J., concurring).

71 *Id.* at 581, 583 (Kennedy, J., concurring).

72 *Id.* at 577 (Kennedy, J., concurring).

control, especially absent a strong nexus with the "commercial concerns that are central to the Commerce Clause."[73]

B. United States v. Morrison*: Reinforcing the New Commerce Clause Limits*

Congress enacted the Violence Against Women Act (VAWA)[74] in 1994 to give federal civil remedies to victims of gender-motivated crimes.[75] In September 1994, a female student at Virginia Tech was allegedly raped repeatedly by two members of that school's football team.[76] The victim filed a complaint with the university and, after a hearing, the school suspended Morrison for two semesters for violating the school's sexual assault policy.[77] But the suspension was lifted after an administrative appeal, largely because the sexual assault policy had not been widely circulated to the student body.[78] The victim then filed suit, alleging that the football players violated VAWA.[79] The defendants argued that VAWA exceeded Congress's Commerce Clause authority, and the district court agreed.[80] A divided panel of the Fourth Circuit reversed, but the full Fourth Circuit, sitting *en banc*, vacated and affirmed the district court's opinion.[81]

A divided Supreme Court affirmed the opinion in *United States v. Morrison* (*Morrison*), again splitting five to four. Chief Justice Rehnquist again wrote the Court's majority opinion for Justices O'Connor, Scalia,

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[73] *Id.* at 583 (Kennedy, J., concurring). Thus, Justice Kennedy seemed to suggest that a successful challenge to a Commerce Clause-based statutory provision had to meet a two part test: 1) no strong nexus to commerce; and 2) an invasion into an area of traditional state concern. As discussed below, the commercial nexus may be established by the commercial nature of the regulated species, the commercial nature of the activity itself, or the commercial nature of the regulatory scheme. *See infra* notes 246–89 and accompanying text.

The commentary on *Lopez* includes: Stephen M. Johnson, U.S. v. Lopez: *A Misstep But Hardly Epochal For Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33 (1996); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez*, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369; and Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 28–31 (2003).

[74] 42 U.S.C. §§ 13931–14053 (2000).

[75] 42 U.S.C. § 13981 states that all persons in the United States have a right to be free from crimes of violence motivated by gender and gives individual victims of such crimes (defined as constituting felonies presenting a serious risk of physical injury) the right to compensatory and punitive damages and injunctive and declaratory relief. *Id.* § 13981(b)–(d).

[76] *Morrison*, 529 U.S. 598, 602 (2000).

[77] *Id.* at 602–03. The school determined that there was insufficient evidence against the other student-player. *Id.* at 603.

[78] Morrison was subsequently found guilty of the school's Abusive Conduct Policy for using abusive language, but the university's senior vice president and provost set aside the punishment as excessive in light of other punishments under that policy. *Id.* at 603.

[79] The victim also alleged that Virginia Tech violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688, but the district court dismissed this claim. Brzonkala v. Va. Polytechnic & State Univ. (*Brzonkala I*), 935 F. Supp. 779, 781 (W.D. Va. 1996). The full Fourth Circuit remanded, indicating that the victim may have a hostile environment claim under Title IX. Brzonkala v. Va. Polytechnic Inst. & State Univ. (*Brzonkala II*), 169 F.3d 820, 827 n.2 (4th Cir. 1999) (en banc), *aff'd*, *Morrison*, 529 U.S. 598 (2000).

[80] *Brzonkala I*, 935 F. Supp. at 801.

[81] *Brzonkala II*, 169 F.3d at 889, *vacating* 132 F.3d 949 (4th Cir. 1997).

Kennedy, and Thomas, the same five-member majority that decided *Lopez*. The Chief Justice began by drawing upon Justice Kennedy's concurrence in *Lopez* to acknowledge that "[d]ue 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."[82] But this presumption of constitutionality did not, as the *Lopez* opinion made clear, mean that the commerce power had no judicially enforceable outer limits; otherwise, it could be used to "obliterate the distinction between what is national and what is local and create a completely centralized government."[83]

Focusing again on the "substantial effects" category of Commerce Clause jurisprudence, the *Morrison* majority found that VAWA suffered from defects similar to the GFSZA. Chief Justice Rehnquist observed that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."[84] He emphasized that "[g]endered-motivated crimes of violence are not, in any sense of the phrase, economic activity."[85] This emphasis on the regulated activity would have an influence on the subsequent ESA cases.[86]

Although the Court refused to adopt "a categorical rule against aggregating the effects of any noneconomic activity," Chief Justice Rehnquist claimed that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[87] Thus, the government could not defend VAWA by aggregating the effects of all gender-motivated violence to produce a substantial effect on interstate commerce.[88] According to the Chief Justice, if the government could aggregate in this context, it would assume a general

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[82] *Morrison*, 529 U.S. at 607 (citing, *inter alia*, *Lopez*, 514 U.S. 549, 577–78 (1995)).

[83] *Id.* at 608 (quoting *Lopez*, 514 U.S. at 556–57 (citations omitted)).

[84] *Id.* at 610. *See also id.* at 610–11 (citing both the majority opinion in *Lopez* and Justice Kennedy's concurrence numerous times to illustrate the importance of the noneconomic nature of the conduct to that decision).

[85] *Id.* at 613.

[86] *See infra* notes 145–241 and accompanying text (discussing the red wolf (*Canis rufus*), Texas cave species, and arroyo toad cases).

[87] *Morrison*, 529 U.S. at 613 (citing *Lopez*, 514 U.S. at 559–60).

[88] The majority also faulted VAWA for lacking a jurisdictional element that would support a conclusion that the statute was sufficiently linked to interstate commerce. Even though the statute did contain congressional findings about the substantial effects of gender-motivated violence on interstate commerce, the congressional findings did not bind the Court. *Id.* at 613–14. Chief Justice Rehnquist thought that both the congressional findings and the government's arguments in court were too attenuated:

> 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. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Id. at 615. *See also id.* at 615–16 (observing that the government's argument could justify a federalization of family law).

police power police reserved to the states by the Constitution.[89] This apparent restriction on aggregating effects constitutes the greatest threat to the constitutionality of the ESA's take provision.

C. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*: Commerce Clause Restrictions as Statutory Interpretation*

The Clean Water Act[90] requires a permit for filling "navigable waters," which the statute defines as "waters of the United States."[91] The jurisdictional scope of waters of the United States has always been controversial,[92] even though the statute's legislative history clearly indicates that Congress intended to assert jurisdiction over all waterbodies to the limits of the Commerce Clause.[93] The longstanding regulatory definitions

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[89] *Id.* at 618 ("Indeed, we 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 victims.") (citing *Lopez*, 514 U.S. at 566). For more on *Morrison*, see Charles Tiefer, *After* Morrison*, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?*, 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,888 (Sept. 2000).

The Court also rejected the argument that VAWA should be upheld as an exercise of congressional remedial power under section 5 of the Fourteenth Amendment, which was specifically invoked in the text of VAWA, because the statute lacked the requisite "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," since it was not specifically directed at any state or state officials. *Id.* at 625–26 (quoting Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999)).

[90] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

[91] *Id.* § 1344 (permit requirement); *id.* § 1362(7) (definition).

[92] After the United States District Court for the District of Columbia rejected a narrow interpretation of the scope of the Clean Water Act's regulatory authority as promulgated by the United States Army Corps of Engineers (the Corps) in *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (ruling that the Clean Water Act's use of the term "navigable waters" was "not limited to the traditional tests of navigability"), the Corps expanded the scope of its regulations, creating a furor in the farming, forestry, and development communities. *See, e.g.*, Michael C. Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institution and Programmatic Perspective*, 8 ECOLOGY L.Q. 409, 417–18 (1980) (describing a Corps press release which suggested federal permit requirements for farmers and ranchers, twice prompting the House of Representatives to pass bills which would have restricted the jurisdiction of the 404 program to traditionally navigable waters). *See also* William Funk, *The Court, the Clean Water Act, and the Constitution:* SWANCC *and Beyond*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,741, 10,750–57 (July 2001) (containing a detailed account of the evolution of the section 404 regulations and congressional responses and concluding that "a one-quarter century of consistent interpretation, uninterrupted practice, judicial corroboration, and congressional acquiescence provides . . . evidence of congressional ratification of the Corps' and EPA's interpretation that 'waters of the United States' are not restricted by considerations of navigability or connections to navigable waters").

[93] *See* H.R. REP. NO. 92-911, at 131 (1972) ("The Committee fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation"); S. CONF. REP. 92-1236, at 144 (1972) ("The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation."); S. REP. NO. 95-370, at 75 (1977) ("The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent."). Professor Funk's conclusion was that the 1972 legislative history, unlike the plain language of the statute or subsequent

promulgated by the statute's implementing agencies, the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps), asserted jurisdiction over intrastate waters "the use, degradation, or destruction of which could affect interstate or foreign commerce."[94] In addition, under what became known as the migratory bird rule, the Corps claimed regulatory authority over intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties, by other migratory birds which cross state lines, [or] by endangered species."[95] The Corps applied the migratory bird rule in determining that the Solid Waste Agency of Northern Cook County, Illinois (SWANCC) needed a permit to fill ponds with solid waste on an abandoned sand and gravel pit; the agency then refused to issue the permit.[96] SWANCC filed suit, claiming that the Corps lacked jurisdiction over the ponds. The district court agreed, but the Seventh Circuit reversed in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*).[97] The Supreme Court, in yet another five to four decision authored by Chief Justice Rehnquist, reversed the Seventh Circuit.

Chief Justice Rehnquist rested his opinion on statutory grounds, ruling that the term "navigable waters" in the Clean Water Act required that intrastate, nonnavigable waters like the ponds at issue in *SWANCC* must have a significant nexus to waters that are in fact navigable.[98] Thus, the jurisdictional reach of the statute did not extend to those so-called "isolated waters" covered by the migratory bird rule.[99] If it did, the Chief Justice

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legislative history, indicated an intent to extend federal jurisdiction only to a broad interpretation of navigability, not a broad connection with commerce. Funk, *supra* note 92, at 10,749. However, as mentioned in the preceding note, Funk maintained that Congress later acquiesced in a broader commerce-based interpretation by EPA, the Corps, and the courts. *Id.* at 10,757.

94 33 C.F.R. § 328.3(a)(3) (2003) (Corps regulation); 40 C.F.R. §§ 122.2, 230.3(s)(3) (2003) (EPA regulations).

95 The migratory bird rule was not actually codified as a rule. Instead, it appeared in the preamble to the Corps' 1986 regulations. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (also asserting jurisdiction over intrastate waters which are used to irrigate crops sold in interstate commerce).

96 *See* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 164–65 (2001).

97 The Seventh Circuit first vacated and remanded in part the district court's first decision, holding that it misapplied the standard for permissive intervention in denying the motion to intervene of a local citizen group. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 101 F.3d 503, 509 (7th Cir. 1996). On remand, the district court granted summary judgment in favor of the Corps. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 998 F. Supp. 946, 957 (N.D. Ill. 1998). The Seventh Circuit this time affirmed. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs (*SWANCC I*), 191 F.3d 845, 853 (7th Cir. 1999), *rev'd SWANCC*, 531 U.S. 159 (2001).

98 *SWANCC*, 531 U.S. at 167–68.

99 Other categories of non-navigable, intrastate, isolated waters, such as those used by interstate travelers for recreation, those from which fish or shellfish are taken and sold in interstate commerce, and those used for industrial purposes by interstate industries, were not subject to the Court's ruling. Professor Funk believes these other categories likely would survive Commerce Clause scrutiny because each category has an express jurisdictional basis grounded on a particular class of waterbodies' effect on interstate commerce. Funk, *supra* note

suggested that it would raise "significant constitutional questions," requiring the identification of the "precise object or activity" which in the aggregate substantially affects interstate commerce.[100] Yet unlike gun possession in *Lopez* or gender-motivated violence in *Morrison*, there was little question that the regulated activity—the creation of a municipal landfill—was a commercial activity.[101] Although Chief Justice Rehnquist recognized that the proposed municipal landfill was "'plainly of a commercial nature,'"[102] he opined that Clean Water Act jurisdiction over isolated waters could impinge on the "[s]tates' traditional . . . power over land and water use."[103] This suggestion that land- and water-use regulation could be an area of traditional state concern was among the more ominous inferences in the *SWANCC* decision.[104]

Another troublesome aspect of the *SWANCC* decision was the Court's unwillingness to accept the government's argument that the requisite link to commerce was satisfied by the proposed municipal landfill, despite the Court's acknowledgment that the landfill was "'plainly of a commercial nature'," and the Court's instruction that the judicial inquiry should be to "the precise object or activity that, in the aggregate, substantially affects interstate commerce."[105] Part of the problem may have been that the government's primary argument in the lower courts was that the requisite commerce was supplied not by the nature of the regulated activity, but by the fact that migratory birds used ponds at the landfill site.[106] Perhaps

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92, at 10,770.

100 *SWANCC*, 531 U.S. at 173. However, the Court expressly declined to reach the constitutional issue. *Id.* at 162.

101 *See id.* (describing the government's argument, which focused on the commercial nature of filling isolated wetlands to create a municipal landfill). The Seventh Circuit found the requisite commerce connection in the fact that the public spent over $1 billion in 1996 on migratory bird hunting and bird-related tourism, and that protection of bird-habitat would therefore have a direct effect on commerce. *SWANCC I*, 191 F.3d at 850. The *SWANCC* dissent also relied on migratory bird tourism. *SWANCC*, 531 U.S. at 195 (Stevens, J., dissenting); *see also infra* note 106. When the government raised instead the argument that regulation of a municipal landfill was regulation of commerce, the Supreme Court questioned the late nature of the argument and suggested that this argument was "a far cry, indeed, from the 'navigable waters' or 'waters of the United States' to which the statute by its terms extends." *SWANCC*, 531 U.S. at 173.

102 *SWANCC*, 531 U.S. at 173 (quoting the Brief of Federal Respondents at 43, *SWANCC* (No. 99-1178)).

103 *Id.* at 174.

104 *See supra* note 73 (describing Justice Kennedy's formulation, under which a successful Commerce Clause challenge would have to demonstrate both a lack of commerce nexus and an invasion of an area of traditional state concern).

105 *SWANCC*, 531 U.S. at 173.

106 *Id.* The *SWANCC* dissent also relied in part on the direct commerce effects stemming from migratory bird tourism and tourism-related activity, noting the conclusions of several federal agency studies:

> In 1984, the U.S. Congress Office of Technology Assessment found that, in 1980, 5.3 million Americans hunted migratory birds, spending $638 million. U.S. Congress, Office of Technology Assessment, Wetlands: Their Use and Regulation 54 (OTA-O-206, Mar. 1984). More than 100 million Americans spent almost $14.8 billion in 1980 to watch and photograph fish and wildlife. Ibid. Of 17.7 million birdwatchers, 14.3 million took trips in

Justice Rehnquist was simply reacting adversely to the change in litigation tactics. But it is also possible he was suggesting that the commercial nature of the landfill was too attenuated to provide the commerce necessary to support Clean Water Act jurisdiction.[107] This might mean that the requisite commercial connection for the ESA take provision is the listed species' substantial effect on commerce, not the regulated activity's commercial nature.

III. THE CONSTITUTIONALITY OF THE ESA'S TAKE PROVISION

The ESA's take provision has been controversial since its enactment, since the ESA's definition of "take" expanded the definition contained in earlier wildlife statutes like the Migratory Bird Treaty Act.[108] By adding the term "harm" to the list of proscribed actions,[109] the statute authorized the Department of the Interior to promulgate regulations defining habitat modification or degradation as "take."[110] This regulation was upheld by the Supreme Court in a six to three decision in 1995.[111] As a result, the focus of challenges to ESA implementation shifted from whether habitat protection was authorized by the statute to whether such protection exceeded Congress's Commerce Clause authority.

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order to observe, feed, or photograph waterfowl, and 9.5 million took trips specifically to view other water-associated birds, such as herons like those residing at petitioner's site. U.S. Dept. of Interior, U.S. Fish and Wildlife Service and U.S. Dept. of Commerce, Bureau of Census, 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 45, 90 (issued Nov. 1997).

Id. at 195 n.17 (Stevens, J., dissenting). The *SWANCC* dissenters also cited Judge Wilkinson's tourism-related commerce conclusion in *Gibbs v. Babbitt*, 214 F.3d 483, 492–93 (4th Cir. 2000), discussed *infra* Section III.B, which relied upon the direct effect of red wolf tourism on interstate commerce. *SWANCC*, 531 U.S. at 195 ("The relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism . . . ." (citing *Gibbs*, 214 F.3d at 492–93)).

107 *SWANCC*, 531 U.S. at 173 ("But [the commercial nature of the landfill] is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."). For more on *SWANCC*, *see generally* Funk, *supra* note 92; Robin Kundis Craig, *Beyond* SWANCC*: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113 (2003); Klein, *supra* note 73, at 35–39; Bradford C. Mank, *The Murky Future of the Clean Water Act After* SWANCC*: Using a Hydrlogoical Connection Approach to Saving the Clean Water*, 30 ECOLOGY L.Q. 811 (2003).

108 Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2000). *See id.* § 703 (Migratory Bird Treaty's prohibition on pursu[ing], hunt[ing], tak[ing], captur[ing], [or] kill[ing], migratory birds, or attempting to do any of the foregoing). The implementing regulations define "take" to mean to "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt" any of the foregoing. 50 C.F.R. § 10.12 (2004).

109 16 U.S.C. § 1532(18) (2000) (including "harass" among the proscribed "takes").

110 50 C.F.R. § 17.3 (2004). The regulation was first promulgated in 1975, 40 Fed. Reg. 44,412, 44,416 (1975), and revised in 1981, 46 Fed. Reg. 54,748, 54,750 (1981). On the evolution of the regulation, see MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 213–14 (3d ed. 1997).

111 *Sweet Home*, 515 U.S. 687, 704–05 (1995) (ruling that specific intent was not a prerequisite for an activity to produce a proscribed take).

The Supreme Court's determination to impose limits on federal Commerce Clause regulation quickly raised questions about the constitutionality of the ESA. Many, perhaps most, listed species have no commercial, recreational, or medicinal value and exist only in one state. Under the Court's new version of "Our Federalism," if these species lacked a substantial effect on interstate commerce, their regulation under the ESA would be beyond Commerce Clause authority.

Although all the courts in the cases considered below concluded that the listed species had a sufficient effect on interstate commerce to satisfy Commerce Clause scrutiny, there was no agreement as to why. Some judges found the requisite effect in the relationship of the listed species to interstate commerce; some found it in a generic interrelationship between all listed species and interstate commerce; some found it in the relationship of the regulated activity to interstate commerce; some found more than one reason to uphold the ESA's take provision. The key issues concerned whether the effects of the species could be aggregated, so that the cumulative effects of their loss could be added to produce a substantial effect on interstate commerce, and the nature of the appropriate class of activities for aggregation.

A. The Delhi Sands Flower-Loving Fly and the Biodiversity Defense

The first appellate case to consider the constitutionality of the ESA's take provision involved the Delhi Sands flower-loving fly (*Raphiomidas terminatus abdominalis*), an intrastate species known to exist only within an eight-mile radius in San Bernardino and Riverside Counties, California, and one of only a few species that pollinate native plant species of the region.[112] The fly is not bought or sold in interstate commerce; tourists do not seek it out; it has no current medical value; it is a quintessential noncommercial species. However, as a pollinator, the fly is part of a class of species that provides essential agricultural services: The value of all insect-pollinated plants in the United States was estimated at more than $19 billion in the late 1980s.[113] After the fly lost over 97% of its historic habitat due to urban development, unauthorized trash dumping, and off-road vehicle use, and after receiving two citizen petitions,[114] the Secretary of Interior listed the species as endangered in 1993.[115] It was the first time a species of fly was listed under the ESA.[116]

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112 Nat'l Ass'n of Home Builders v. Babbitt (*NAHB*) , 130 F.3d 1041, 1043–44 (D.C. Cir. 1997).

113 Jim Chen, *Webs of Life: Biodiversity Conservation as a Species of Information Policy*, 89 IOWA L. REV. 495, 547 (2004) (citing DONALD JOYCE BORROR ET AL., INTRODUCTION TO THE STUDY OF INSECTS (1989)).

114 16 U.S.C. § 1533(b)(3)(A) (2000) (citizen petitions for listings). The citizen petition process for listings is an overlooked aspect of the ESA. *See* Blumm & Corbin, *supra* note 6, at 586–87 (noting that most listings under the ESA were the result of citizen petitions).

115 Endangered and Threatened Wildlife and Plants, Determination of Endangered Status for the Delhi Sands Flower-Loving Fly, 58 Fed. Reg. 49,881, 49,885 (1993).

116 *See* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 174 (1998) (noting that there are some 80,000 fly species).

The listing disrupted the plans of San Bernardino County to build a hospital, since the proposed hospital site included fly habitat. As a result, the county modified its plans to eliminate effects on fly habitat (and also eliminate the need for an ESA permit), creating an eight-acre preserve of fly habitat and a 100-foot corridor allowing interbreeding between two fly populations.[117] Subsequently, the county obtained an ESA permit to construct a power plant for the hospital on four acres of fly habitat by acquiring and preserving an additional 7.5 acres of habitat.[118] However, when the county sought to redesign an intersection to improve emergency vehicle access to the hospital, the Interior Department notified the county that it would need another ESA permit. Rather than seek another permit, the county, joined by two building groups and two nearby cities, filed suit, claiming that the ESA's take prohibition, as applied to the fly, was unconstitutional.[119] The district court rejected the challenge, concluding that the federal government had the constitutional authority to regulate wildlife and nonfederal lands that supply habitat for endangered species.[120] A fractured D.C. Circuit affirmed, Judge Wald writing an opinion in which Judge Henderson joined in part, while Judge Sentelle dissented.[121]

Judge Wald thought the take provision was constitutional on two different grounds: 1) it was proper congressional control over the channels of interstate commerce, both because it regulated the interstate transport of listed species and because it kept the interstate channels free from immoral and injurious uses;[122] and 2) it substantially affected interstate commerce by preventing injurious destructive interstate competition[123] and protecting

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117 *See NAHB*, 130 F.3d at 1044.

118 *See id.* at 1044–45.

119 The county was joined by the Building Industry Legal Defense Fund, the California Building Industry Association, and the cities of Colton and Fontana. *See id.* at 1045.

120 Nat'l Ass'n of Home Builders of the United States v. Babbitt, 949 F. Supp. 1, 5 (D.D.C. 1996), *aff'd*, *NAHB*, 130 F.3d 1041 (D.C. Cir. 1997).

121 *NAHB*, 130 F.3d at 1043 (Wald, J.); *id.* at 1057 (Henderson, J., concurring); *id.* at 1060 (Sentelle, J., dissenting).

122 *Id.* at 1046 (Wald, J.). Judge Wald analogized the take prohibition to the prohibition of machine gun possession, 18 U.S.C. § 822(o) (2000), upheld by four circuits as a proper regulation of the channels of interstate commerce. *Id.* at 1047. Like the effective regulation of machine gun trafficking, which requires regulation of intrastate possession, she concluded that "one of the most effective ways to prevent traffic in endangered species is to secure the habitat of the species from predatory invasion and destruction." *Id. See, e.g.*, United States v. Kirk, 105 F.3d 997 (5th Cir. 1997) (en banc) (holding that in order to regulate the interstate trade in machine guns, it was necessary to regulate the possession of them). Judge Wald also upheld the take prohibition because it prevented the channels of interstate commerce from being used for immoral or injurious purposes. *Id.* at 1048 (relying principally on *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 258 (1964), which upheld a prohibition on racial discrimination in public accommodations serving interstate travelers, and *United States v. Darby*, 312 U.S. 100, 114 (1941), which upheld federal wage and hour regulations on the ground that Congress may "exclude from commerce goods that will have injurious effects").

123 Judge Wald reasoned that the ESA's regulation of fly taking would prevent injurious interstate competition, drawing a parallel to the Surface Mining Control and Reclamation Act, the constitutionality of which the Supreme Court sustained on the ground that the regulation of intrastate surface mining was "necessary to protect interstate commerce from the adverse effects that may result from that activity." *Id.* at 1055 (citing *Va. Surface Mining*, 452 U.S. 264,

biodiversity.[124] She observed that there was little question that Congress, in enacting the ESA, was quite concerned with preserving the commercial value of species diversity.[125] Judge Henderson joined in the biodiversity rationale, but neither Judge Henderson nor any other judge considering the ESA's constitutionality agreed with Judge Wald that the ESA was justified as a proper regulation of the channels of interstate commerce.[126]

Judge Wald and Judge Henderson agreed that the take regulation substantially affected interstate commerce by protecting biodiversity, although they did not agree as to why. Assuming the applicability of aggregation, Judge Wald made no attempt to ascertain the fly's effect on interstate commerce and focused instead on the effect of all listed species on interstate commerce. She noted that endangered plants and animals are and could be valuable sources of medicine and genetic material, the loss of which could have substantial commercial consequences.[127] While she

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281 (1981), a case in which the Supreme Court also noted, at 452 U.S. at 282, that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulations of activities causing air or water pollution, or other environmental hazards that may have effects in more than one state"). This "destructive competition" rationale was not endorsed by either of the other two judges of the panel, but it was later found persuasive by the Fourth Circuit and another panel of the D.C. Circuit. *See infra* notes 172, 234, and accompanying text.

124 *Id.* at 1052. Judge Wald defined biodiversity as "the presence of a large number of species of animals and plants." *Id.*

125 *Id.* at 1050–51 (citing H.R. REP. NO. 93-412, at 4–5 (1973) and S. REP. NO. 91-526, at 3 (1969)). Congress expressly determined that endangered species have aesthetic, educational, and recreational value. 16 U.S.C. § 1531(a)(3) (2000). The House Report cited by Judge Wald specifically stressed the preservation of listed species to assure the "continuing availability of a wide variety of species to interstate commerce" and expressed concern that "[a]s we homogenize the habitats in which these plants and animals evolved . . . we threaten their—and our own—genetic heritage." *NAHB*, 130 F.3d at 1050–51. Because the value of diversity is "incalculable . . . it is in the best interests of mankind to minimize the losses of genetic variations . . . [for] they are potential resources." *Id.* at 1051. The 1969 Senate Report cited by the court focused on preserving listed species to "permit the regeneration of [particular] species to a level where controlled exploitation of that species can be resumed" because "with each species we eliminate, we reduce the [genetic] pool . . . which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminants." *Id.* at 1051. Note that the 1969 Senate Report is relevant because the 1973 Senate Report on the ESA was based on the reasoning of the 1969 Senate Report on the Endangered Species Conservation Act of 1969, which was its predecessor.

126 Judge Henderson rejected Judge Wald's "channels" rationale because the fly was not transported in interstate commerce. *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring) ("[The desert-loving flies] are . . . entirely *intra*state creatures. They do not move among states either on their own or through human agency. As a result, like the Gun-Free School Zones Act in *Lopez*, the statutory protection of the flies 'is not a regulation of the use of the channels of interstate commerce.'" (quoting *Lopez*, 514 U.S. 549, 559 (1995)). *See also id.* at 1063 (Sentelle, J., dissenting) (agreeing with Judge Henderson's rejection of the channels of commerce rationale).

127 For example, Judge Wald observed that 50% of the most frequently prescribed medicines are derived from wild plant and animal species; those medicines had a 1983 value in excess of $15 billion a year. *Id.* at 1052–53. *See also id.* at 1052–54 (noting that species with unknown value may have future economic value as a result of scientific discoveries, so-called "option value"). Judge Wald also noted that plant genetic resources contributed to the "explosive growth in farm production" during the twentieth century. *Id.* at 1053. The option value, or economic value of biodiversity, was estimated between $16 and $54 trillion per year, with an

acknowledged that it is impossible to know precisely what effect the loss of a particular species might have on interstate commerce, she maintained that "the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce."[128] Judge Wald also observed that the Ninth Circuit upheld the Bald Eagle Protection Act[129] as a valid exercise of Commerce Clause authority on similar grounds: since "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity."[130]

Although Judge Henderson concurred with Judge Wald that the loss of biodiversity has a substantial effect on ecosystems, she did not agree that potential future medicinal or economic effects of biodiversity loss justified Commerce Clause regulation, finding these potential effects to be too uncertain.[131] Nevertheless, she agreed that the loss of biodiversity due to the taking of listed species had a substantial effect on interstate commerce because, due to 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 (like the Delhi Sands Flower-Loving Fly) will therefore substantially affect land and objects that are involved in interstate commerce."[132] The interconnectedness that Judge Henderson found persuasive holds that the whole is greater than the sum of its parts; that it is the number of species, not their individual characteristics, that is valuable. Biodiversity requires large numbers of species, and large numbers will improve the chances that a particular species will provide great human benefits, like medicinal cures or nutritional advances.[133] This judicial concern for protecting biodiversity has

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average value of $33 trillion (or roughly double the annual global national product), in a 1997 study. KERRY TEN KATE & SARAH A. LAIRD, THE COMMERCIAL USE OF BIODIVERSITY: ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING 3 (1999).

128 *NAHB*, 130 F.3d at 1053–54. Judge Wald complained that while both Judges Henderson and Sentelle cited her acknowledgment of the imprecise nature of the exact effect of a loss of a species, both ignored her argument that "a decline in biodiversity will have a '*real and predictable*' effect on interstate commerce." *Id.* at 1053 n.14 (emphasis in original). Judge Wald added that because "biodiversity has a real, substantial, and predictable effect on both the current and future interstate commerce, 'the *de minimis* character of individual instances arising under [the ESA] is of no consequence." *Id.* (emphasis in original) (quoting *Lopez*, 514 U.S. at 558). Here, Judge Wald was anticipating the comprehensive plan defense that would be more fully articulated by the Fourth and Fifth Circuits. *See infra* notes 163–68, 197–203, and accompanying text.

129 16 U.S.C. §§ 668–668d (2000).

130 *NAHB*, 130 F.3d at 1054 (quoting United States v. Bramble, 103 F.3d 1475, 1481 (9th Cir. 1996)). Similarly, a district court upheld the constitutionality of the Lacey Act, 16 U.S.C. §§ 3371–3378 (2000), which makes it a federal offense to transport species acquired in violation of state or foreign law, as within the federal commerce power. United States v. Romano, 929 F. Supp. 502, 507–09 (D. Mass. 1996).

131 *Id.* at 1058 (Henderson, J., concurring).

132 *Id.* at 1059 (Henderson, J., concurring).

133 *See* Nagle, *supra* note 116, at 188–89 & n.59 (noting that the flower-loving fly might have significance to foods that are pollinated, such as "cashews, squash, mangos, cardamom, cacao, cranberries, and highbush blueberries").

solid grounding in science,[134] and the willingness to defer to reasonable congressional determinations[135] reflects judicial restraint.

In addition to embracing the biodiversity defense, Judge Henderson also concluded that the nature of the particular take that the county proposed—commercial land development with "a plain and substantial effect on interstate commerce"—made the application of the take regulation to the rerouted intersection a lawful exercise of Commerce Clause authority.[136] This focus on the commercial nature of the regulated activity was materially different from the focus on the effects of the loss of the fly on interstate commerce, raising questions about where the proper focus for Commerce Clause analysis should be.[137] Since Judge Henderson's alternative ruling on the commercial nature of the hospital road was not joined by Judge Wald, the majority decision was based on the biodiversity defense. But an ensuing panel of the D.C. Circuit would find the focus on the commercial nature of proposed land development to be persuasive.[138]

Judge Sentelle dissented, concluding that the take prohibition was unconstitutional because the fly was neither "interstate nor commerce" nor within the *Lopez* decision's taxonomy.[139] Judge Sentelle objected to the majority's biodiversity rationale for failing all of the *Lopez* tests: The regulated activity was not commercial; the statute contained no jurisdictional limit; and the reasoning had no logical stopping point.[140] He

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134 *See id.* (relying, *inter alia*, on Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1129 (1996)). As E.O. Wilson noted:

> The traditional econometric approach, weighing market price and tourist dollars, will always underestimate the true value of wild species. None has been totally assayed for all of the commercial profit, scientific knowledge, and aesthetic pleasure it can yield. Furthermore, none exists in the wild all by itself. Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the population of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage.

EDWARD O. WILSON, THE DIVERSITY OF LIFE 308 (1992).

135 *See supra* note 16 (congressional findings).

136 *NAHB*, 130 F.3d at 1059–60 (Henderson, J. concurring).

137 *See* Nagle, *supra* note 116, at 208 (arguing that either focus should be available to provide the requisite connection to interstate commerce).

138 *See infra* notes 212–25 and accompanying text (discussing the southwestern arroyo toad decision).

139 *NAHB*, 130 F.3d at 1067 (Sentelle, J., dissenting) ("In the end, attempts to regulate the killing of a fly under the Commerce Clause fail because there is certainly no interstate commerce in the Delhi Sands Flower-Loving Fly.").

140 *Id.* at 1064–65 (Sentelle, J. dissenting). On the first factor—the commercial nature of the regulated activity—Judge Sentelle stated, "Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense. . . . The activity regulated in the present case involves local land use, a . . . traditional stronghold of state authority." *Id.* at 1064. He made no mention of the commercial nature of the hospital or the traffic intersection. The last factor—no logical stopping point—was the dissent's repeated refrain throughout his disagreement with both Judge Wald and Judge Henderson. *Id.* at 1064–67 (Sentelle, J. dissenting).

emphasized that the Framers authorized Congress to regulate commerce, not ecosystems, and "[a]n ecosystem is an ecosystem, and commerce is commerce."[141]

Judge Sentelle also rejected Judge Henderson's alternative rationale that emphasized the commercial nature of the hospital and road.[142] He thought that this focus on the regulated activity was inconsistent with *Lopez* because it lacked a stopping point and would allow the regulation of noncommercial activities where the regulation substantially affects interstate commerce.[143] Instead of focusing on the regulated activity, he insisted that the proper focus was on whether the fly had substantial effects on interstate commerce, and he concluded it had none.[144]

B. The Commercial Effects of Red Wolves and the Importance of a Comprehensive Scheme

The second appellate decision to consider the constitutionality of the ESA's take provision involved a species with much closer connections to commerce than the flower-loving fly: the red wolf (*Canis rufus*). Red wolves were once common throughout the southeastern United States, especially in riverine habitats where they preyed on marsh rabbits (*Sylvialagus palustris*).[145] But due largely to the drainage of swamps and wetlands for agricultural production and the success of predator control efforts, the red wolf was listed as endangered in 1967.[146] Because of their perilously low numbers, the Fish and Wildlife Service (FWS) began trapping red wolves for a captive breeding program in the mid-1970s, with the idea that they would eventually be reintroduced into the wild.[147] In the late 1980s, the Service began reintroducing red wolves into Alligator National Wildlife Refuge in eastern North Carolina, and later expanded to the Pocosin Lakes National Wildlife Refuge in Tennessee in the early 1990s.[148] The red wolves would not

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141 *Id.* at 1065 (Sentelle, J. dissenting).

142 *See also supra* notes 136–37 and accompanying text. Judge Sentelle also rejected Judge Wald's "channels" rationale, since the fly did not travel in interstate commerce, nor was it connected to persons or things that did, nor, he maintained, did preventing destruction of its habitat contribute to the suppression of an injurious use. *NAHB*, 130 F.3d at 1063 (Sentelle, J., dissenting) (noting that Judge Wald's position on the "channels" issue was not a majority position). In addition, he thought that Judge Wald's "destructive competition" rationale was improperly applied to the fly habitat, since it did not involve commercial activity. *Id.* at 1066 (Sentelle, J. dissenting).

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

144 *Id.* at 1066–67 (Sentelle, J. dissenting).

145 Endangered and Threatened Wildlife and Plants; Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,790, 41,791 (1986).

146 Native Fish and Wildlife: Endangered Species, 32 Fed. Reg. 4001 (1967).

147 *See* Endangered and Threatened Wildlife and Plants; Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. at 41,791.

148 Gibbs v. Babbitt, 214 F.3d 483, 488 (4th Cir. 2000).

stay on federal lands, however, and by 1998 over half of the population of approximately 75 wolves had migrated onto private lands.[149]

The wolves were not popular with local landowners, who saw them as threats to their livestock. But an FWS regulation prohibited the take of red wolves unless in defense of human life or when wolves are in the act of killing pets or livestock.[150] In 1990, a landowner shot a red wolf he thought was threatening his cattle. The federal government prosecuted the landowner, who pleaded guilty. The prosecution triggered local opposition to the red wolf program, and the North Carolina legislature responded by passing a statute allowing trapping and killing of red wolves by landowners in four eastern counties.[151] This state statute was in facial conflict with the ESA wolf regulation, although no actual conflicts ensued, since there were apparently no prosecutions after the enactment of the statute.

Nevertheless, a group of plaintiffs, including the landowner who had been prosecuted earlier,[152] filed suit against the red wolf take regulation, claiming that it exceeded the federal Commerce Clause power. The district court rejected the claim, determining that the regulation was permissible because red wolves "are things in interstate commerce," they move across state lines, are followed by tourists, academics, and scientists, and the tourism they produce substantially affects interstate commerce.[153] A divided Fourth Circuit affirmed in *Gibbs v. Babbitt* (*Gibbs*), a case significant for being the first appellate court decision on the constitutionality of the ESA's take provision in the wake of the Supreme Court's *Morrison* opinion.

Writing for the majority, Chief Judge Wilkinson acknowledged that *Lopez* and *Morrison* recognized that the Commerce Clause power has judicially enforceable limits, but he cautioned that courts "may not simply tear through the considered judgments of Congress" and may invalidate a federal statute "only upon a plain showing that Congress has exceeded its constitutional bounds."[154] Like the D.C. Circuit in the flower-loving fly case, he focused on the third prong of Commerce Clause analysis identified by the

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149 *Id.* (noting that approximately 41 of 75 wolves resided on private lands).

150 Because the wolves were reintroduced into the wild, they were considered to be "experimental populations" under section 10(j) of the Act. 16 U.S.C. § 1539(j) (2000). This designation provides for relaxed take standards, allowing take in defense of lives or livestock and pets (provided that freshly wounded or killed pets or livestock are evident). *Id.* The Fish and Wildlife Service has abandoned efforts to capture the wolves in question and approves private takes in writing, requiring such takes to be reported to the Service within 24 hours. 50 C.F.R. § 17.84(c) (2004) (also allowing landowners to harass wolves by methods that are not lethal or physically injurious).

151 *See Gibbs*, 214 F.3d at 489.

152 Richard Mann, the landowner who was federally prosecuted, was joined by Charles Gibbs and two North Carolina counties. *Id.* at 490.

153 Gibbs v. Babbitt, 31 F. Supp. 2d 531, 535 (E.D.N.C. 1998).

154 *Gibbs*, 214 F.3d at 490 (quoting *Morrison*, 529 U.S. 598, 607 (2000)). Judge Wilkinson quoted from Justice Kennedy's concurrence in *Lopez* that "[t]he substantial element of political judgment in Commerce Clause matters leaves our institutional capacity more in doubt than when we decide cases, for instance, under the Bill of Rights." *Id.* (quoting *Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring)).

Lopez opinion—whether the regulated activity, alone or in the aggregate, substantially affects interstate commerce.[155]

Schooled by Chief Justice Rehnquist's opinion in *Morrison*,[156] Judge Wilkinson emphasized the importance of the commercial character of the regulated activity, but he also noted that "under the Commerce Clause, economic activity must be understood in broad terms."[157] With this principle in mind, he determined that a take of a red wolf on private land is economic activity because:

> The relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts. . . . While a beleaguered species may not presently have the economic impact of a large commercial enterprise, its eradication nonetheless would have a substantial effect on interstate commerce. And through preservation the impact of an endangered species on commerce will only increase.[158]

The court also observed that landowners, who consider the red wolf a menace, take them in an effort to protect livestock of commercial value and claim that restrictions on such take adversely affect interstate commerce. Judge Wilkinson found this also to be a sufficient basis for Commerce Clause regulation, since Congress may choose to promote or to restrict commercial enterprises.[159]

Because the take of wolves was economic activity, the majority ruled that individual takings could be aggregated for Commerce Clause analysis, "especially . . . where, as here, the regulation is but one part of the broader scheme of endangered species legislation."[160] Thus, the court considered the

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[155] *Id.* at 491–92. The court determined that the wolf take regulation would not satisfy the first part of the *Lopez* Commerce Clause analysis because it did not target the use of the channels of interstate commerce, nor attempt to prohibit the interstate transport of a commodity through those channels. *Id.* at 490. Judge Wilkinson identified the following as included in the term "channel of interstate commerce": navigable waters; interstate railroads, highways, and telephone and telegraph lines; air traffic routes; and television and radio broadcast frequencies. *Id.* at 490–91 (citing United States v. Miles, 122 F.3d 235, 245 (5th Cir. 1997)). The court ruled that the wolf take regulation also did not implicate the second element of the *Lopez* test, since red wolves were not "things" in interstate commerce, even though wolves had been transported interstate for the purposes of study and reintroduction programs. *Id.* at 491.

[156] *Id.* at 491 (citing *Morrison*, 529 U.S. at 611 n.4, for the proposition that in all previous cases using the aggregation principle "the regulated activity was of apparent commercial character").

[157] *Id.* at 490. *See also id.* at 491 (cautioning against "a cramped view of commerce [that] would cripple a foremost federal power and in so doing would eviscerate national authority").

[158] *Id.* at 492–93.

[159] *Id.* at 495. Judge Wilkinson interpreted *Lopez* and *Morrison* to instruct courts to rule that a federal statute exceeds the Commerce Clause when it "has only a tenuous connection to commerce *and* infringes on areas of traditional state concern." *Id.* at 491 (emphasis added). Apparently Judge Wilkinson sanctioned this two-part test for striking down a statute for exceeding the bounds of the commerce power. *See also supra* notes 68 & 73, *infra* notes 271–72, and accompanying text (discussing Justice Kennedy's two-part test in his *Lopez* concurrence).

[160] *Gibbs*, 214 F.3d at 493.

take regulation's connection to the estimated economic value of wolf recovery in terms of tourism, scientific research, and the possibility of a renewed trade in wolf pelts.[161] It also concluded that wolf preservation could produce economic benefits through wolf predation on agricultural pests by helping to create a healthier ecosystem.[162]

In addition to its conclusions about the commercial nature of wolf take, the *Gibbs* majority upheld the red wolf take regulation on the ground that it was "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[163] Judge Wilkinson quoted the Supreme Court to the effect 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.'"[164] The red wolf regulation was sustainable because it was part of the ESA, a regulatory scheme with clear connections to commerce,[165] and could not be viewed only from the taking of one wolf "but from the potential commercial differential between an extinct and a recovered species."[166] Otherwise, the result could be that the fewer the members of a species, the less the federal authority to prevent its extinction, a result Judge Wilkinson termed "perverse" because it would "eviscerate the comprehensive federal scheme

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161 *Id.* at 493–95. The court explained that:

> The full payoff of conservation in the form of tourism, research, and trade may not be foreseeable. Yet it is reasonable for Congress to decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable commercial loss.

Id. at 496. Supreme Court authority exists for the proposition that Congress can regulate potential future markets. *See* Presault v. Interstate Commerce Comm'n, 494 U.S. 1, 19 (1990) (holding that Congress could authorize maintenance of abandoned railroads even if there was no foreseeable future use). Judge Wilkinson's partial reliance in *Gibbs* on a renewed trade in wolf pelts, although criticized by the dissent, is also consistent with the legislative history of the ESA: "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." S. REP. NO. 91-526, at 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1415.

162 *Gibbs*, 214 F.3d at 495–96. Here, Judge Wilkinson included a plea for judicial restraint:

> It is within the power of Congress to regulate the coexistence of commercial activity and endangered wildlife in our nation and to manage the interdependence of endangered animals and plants in large ecosystems. It is irrelevant whether judges agree or disagree with congressional judgments in this contentious area. . . . Congress could find that conservation of endangered species and economic growth are mutually reinforcing. It is simply not beyond the power of Congress to conclude that a healthy environment actually boosts industry by allowing commercial development of our natural resources.

Id. at 496.

163 *Id.* at 497 (quoting *Lopez*, 514 U.S. 549, 561 (1995)).

164 *Id.* (quoting Hodel v. Indiana, 452 U.S. 314, 329 n.17 (1981)); *see also id.* ("'It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme as a whole satisfies this test.'") (quoting Hodel v. Indiana, 452 U.S. at 329 n.17).

165 The majority concluded that "[o]f course, natural resource conservation is economic and commercial." *Id.* at 506.

166 *Id.* at 497.

for conserving endangered species and turn congressional judgment on its head."[167] This comprehensive scheme rationale, which moves the focus away from the commercial nature of the species and the regulated activity and to the statutory scheme, would be adopted by the Fifth Circuit in the Texas cave species case.[168]

The majority acknowledged that *Lopez* and *Morrison* require "a distinction between what is truly national and what is truly local" but rejected the appellants' contention that the ESA wolf regulation infringed on traditional state control of wildlife.[169] The court observed that state wildlife authority has long been shared with the federal government and circumscribed by it.[170] Citing a lengthy history of federal wildlife regulation, the court concluded that "endangered wildlife regulation has not been an exclusive or primary state function."[171] Further, the Fourth Circuit ruled that ESA regulation was sustainable as a federal effort to prevent destructive interstate competition from producing a "race to the bottom" that would damage national environmental quality.[172] Thus, unlike the statutes at issue in *Lopez* and *Morrison*, the ESA regulation was within the traditional federal sphere: A ruling to the contrary would not "preserv[e] traditional state roles [but would instead] dismantl[e] historical federal ones."[173] Moreover, the ESA regulation had a natural stopping point—only regulation of listed species was authorized—so there was no danger of the ESA being used as a general police power.[174]

In response to Judge Luttig's dissent, the majority cautioned against judicial activism that "would rework the relationship between the judiciary and its coordinate branches."[175] The majority chided Judge Luttig's apparent disapproval of the substance of the red wolf regulation and accused him of seeking to reverse the traditional presumption in favor of an enactment's constitutionality, suggesting that he would impose a burden on those defending the constitutionality of legislation.[176] This result would, according to the Fourth Circuit, unwisely thrust courts "into the thick of political

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167 *Id.* at 498.

168 *See infra* notes 197–203 and accompanying text (discussing the Fifth Circuit's "comprehensive scheme" rationale).

169 *Gibbs*, 214 F.3d at 499 (quoting *Morrison*, 529 U.S. 598, 617–18 (2000)).

170 *Id.* (relying on Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204–05 (1999), and Hughes v. Oklahoma, 441 U.S. 322, 326, 329 (1979)).

171 *Id.* at 500. The court cited the 1900 Lacey Act, 16 U.S.C. § 701 (1994), the 1918 Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (1994), the 1940 Bald Eagle Protection Act, 16 U.S.C. §§ 668–668d (1994), the 1972 Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421h (1994 & Supp. III 1997), and the 1976 Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1883 (1994 & Supp. III 1997), as well as several Supreme Court and circuit court decisions upholding these statutes. *Id.* at 500–01.

172 *Id.* at 501–02 (citing *Va. Surface Mining*, 452 U.S. 264, 281–82 (1981)). Thus, the Fourth Circuit echoed, without citing, the concerns of Judge Wald in the flower-loving fly case. *See supra* note 123.

173 *Id.* at 504.

174 *Id.*

175 *Id.*

176 *Id.* at 504–05.

controversy."[177] The court rejected the dissent's contention that *Lopez* and *Morrison* called for transforming the traditional judicial protection of state activities "into a sword dismembering a long recognized federal [activity]."[178] Judge Wilkinson concluded, "It is as threatening to federalism for courts to erode the historic national role over scarce resource conservation as it is for Congress to usurp traditional state prerogatives in such areas as education and domestic relations."[179]

Judge Luttig's spirited dissent took issue with the majority's wolf-commerce conclusions, referring to the inferences and speculation necessary to reach them as "exponentially"[180] greater than what would be needed to find a commerce connection in *Lopez* and *Morrison*.[181] He thought that the killing of red wolves on private property did not constitute economic activity, and therefore could not be aggregated for the purpose of finding a substantial effect on commerce.[182] Judge Luttig accused the majority of adopting the approach of the dissents in *Lopez* and *Morrison* and unwisely deferring to the political branches to safeguard states against federal encroachment.[183]

C. The Texas Cave Species and the Comprehensive Scheme Principle (Again)

Whereas the red wolf case involved a species with evident effects on interstate commerce, six tiny subterranean invertebrate arachnids and insects, located only in caves in two Texas counties near Austin, had a much more tenuous link to commerce. Nevertheless, these rather anonymous species were listed under the ESA and combined to block a landowner's plans to develop a Wal-Mart shopping center, a residential subdivision, and

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177 *Id.* at 505.

178 *Id.*

179 *Id. See also id.* at 506 ("If we were to decide that this regulation lacked a substantial effect on commerce and therefore was invalid, we would open the door to standardless judicial rejection of democratic initiatives of all sorts.").

180 *Id.* at 506–10 (Luttig, J., dissenting).

181 *Id.* at 507–08 (Luttig, J., dissenting) (rejecting the majority's conclusions about tourism, scientific research, the possible resurrection of interstate trade in wolf pelts, and the beneficial commercial effects of wolf protection). Judge Luttig was the author of the Fourth Circuit opinion that the Supreme Court sustained in *Morrison*. *See Brzonkala II*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd*, *Morrison*, 529 U.S. 598 (2000). His dissent in *Gibbs* attempts to discredit the economic studies of wolves because they were not published. *Gibbs*, 214 F.3d at 507 (Luttig, J., dissenting). This critique, however, overlooks the fact that it is not the academic prestige attached to the science, but the mere fact that the research was undertaken at all, since business and employment was generated by the scientific inquiry, which is the basis for Commerce Clause jurisdiction.

182 *Gibbs*, 214 F.3d at 507 (Luttig, J., dissenting). In this respect, Judge Luttig's conclusion was similar to Judge Sentelle's in the flower-loving fly case. *See supra* note 139 and accompanying text.

183 *Id.* at 509 (Lutting, J., dissenting) ("*Morrison* has left no doubt . . . that the interpretation of the [Commerce Clause] of the Constitution, no less than any other, must *ultimately* rest not with the political branches, but with the judiciary.").

office buildings.[184] When FWS denied the landowner an incidental take permit for the development,[185] the landowner sued, alleging that the ESA's take provision, as applied to the Texas cave species, was in excess of the Commerce Clause power.[186] The district court rejected this claim, ruling that the take provision was constitutional under the Commerce Clause because the proposed development had a substantial effect on interstate commerce, as the court was "hard-pressed to find a more direct link to commerce than a Wal-Mart."[187]

The Fifth Circuit reversed the lower court's reasoning but unanimously affirmed the result. After observing that one of the "first principles" of constitutional law is the notion that the federal government is one of limited powers,[188] Judge Barksdale noted that in *Morrison*—where the Supreme Court defined the outer limits of the Commerce Clause power—the Court identified several considerations for determining whether an intrastate activity had substantial effects on interstate commerce, primarily whether the regulated activity was economic or commercial in nature.[189] But, drawing

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184 GDF Realty Invs., Ltd. v. Norton (*GDF Realty*), 326 F.3d 622, 625 (5th Cir. 2003). The four arachnids (arthropods with four pairs of legs and no antennae) are the Bee Creek Cave harvestman (*Texella reddelli*), the Bone Cave harvestman (*Texella reyesi*), the Tooth Cave pseudoscorpian (*Tartarocreagris texana*)—all eyeless, ranging from 1.4 to four millimeters—and the Tooth Cave spider (*Neoleptoneta myopica*), which has eyes and measures 1.6 millimeters. The two insects are the Tooth Cave ground beetle (*Rhadine persephone*) and the eyeless Kretschmarr Cave mold beetle (*Texamaurops reddelli*), varying in size from three to eight millimeters. *Id.* at 624. The Fish and Wildlife Service listed five of the species in 1988 and a sixth in 1993, due largely to habitat loss from land development activities. *Id.* at 625.

185 The permit denial came only after the landowner had deeded 6 of its 216 acres, containing caves and sinkholes, to a nonprofit environmental group, in order to alleviate concerns about the effects of its development plans on the cave species, but the Fish and Wildlife Service would not state that the development would not take the listed species and later informed the landowner that brush clearing on the site was under investigation for an illegal take. *Id.* at 625–26. The landowner then joined in a suit seeking a judicial declaration that future development of the area would not constitute a take. The district court ordered the Service to conduct an environmental review, which culminated in a letter concluding that proposed development would not only likely constitute a take of the cave species but also of two other listed bird species, although the agency also opined that the development could be modified to avoid take if it was scaled back from canyons and if surface and subsurface drainage and nutrient exchange was provided. *Id.* at 626 (discussing Four Points Util. Joint Venture v. United States, No. 93-CA-655 (W.D. Tex. 1993), and the Fish and Wildlife Service letter). Other legal proceedings ensued, with the landowner attempting to obtain a formal decision on the permit, which finally occurred in 1998. *Id.*

186 *Id.* at 627.

187 GDF Realty Investments, Ltd. v. Norton, 169 F. Supp. 2d 648, 662, 664 (W.D. Tex. 2001), *aff'd*, *GDF Realty*, 326 F.3d 622 (5th Cir. 2003).

188 *GDF Realty*, 326 F.3d at 627 ("No authority need be cited for the fundamental and well-known limitation on the power of our Federal Government: the Constitution grants it limited and enumerated powers; those powers not so granted the Federal Government are retained by the States.") (citing United States v. Ho, 311 F.3d 589, 596–601 (5th Cir. 2002)). The court quoted Justice Kennedy's statement that the Framers thought the division of power between the federal and state governments necessary to the protection of fundamental liberties. *Id.* at 628 (quoting *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (asserting that freedom was enhanced with two governments, rather than just one)).

189 *Id.* at 628. The other factors the court mentioned were 1) whether there was a jurisdictional element in the statute; 2) whether there were any congressional findings or

support from both the D.C. Circuit in the fly case and Fourth Circuit in the red wolf case, the Fifth Circuit defined the regulated activity to be merely cave species take, not a commercial land development scheme.[190] In so doing, it rejected the district court's reliance on the interstate effects of the landowner's planned commercial development.[191] Judge Barksdale observed that although the effect of the ESA's cave species' regulation was to prohibit commercial development, the ESA was not directly regulating commercial development, only cave species take. Thus, the focus of the judicial inquiry was not on the general conduct or the motivation of the regulated party, but instead on the economic nature of the regulated activity—the take of cave species—either alone or in combination with other regulated takes.[192] The court bolstered this conclusion with language from the Supreme Court's *SWANCC* opinion, suggesting that relying on the commercial motivation of the regulated conduct would allow noncommercial actors to escape regulation.[193]

With the focus thus narrowed to the effect of cave species take, the Fifth Circuit proceeded to reject the government's argument that the Texas cave species themselves had a substantial effect on interstate commerce. The court determined that the scientific interest generated by the species and their possible future economic benefits was either negligible or too hypothetical to satisfy *Morrison*'s requirement that there must be a close link

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legislative history concerning the effect of the regulated activity on interstate commerce; and 3) whether there was too attenuated a link between the interstate activity and the effect on interstate commerce. *Id.* at 629 (relying on *Morrison*, 529 U.S. 598, 611–12 (2000)).

190 *Id.* at 635–36 (acknowledging that the other circuit decisions looked "at times to the nature of the actor's general conduct," but interpreting the primary thrust of both decisions to be based on the substantial commercial effects of fly take and red wolf take; in the former case, through the loss of biodiversity).

191 *Id.* at 636 ("[T]he district court erred in looking primarily to the plaintiffs' motivations.").

192 *Id.* at 633 ("[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."). The court interpreted both the *NAHB* decision, involving the Delhi Sands flower-loving fly, and the *Gibbs* decision, involving the red wolf, as based partly (in the former, in Judge Henderson's concurrence) or primarily (in the latter) on the substantial effects of the regulated activities on interstate commerce. *Id.* at 635–36.

193 *Id.* at 634 (quoting the Supreme Court's observation in *SWANCC* that the Court had yet to determine the "precise object or activity that, in the aggregate substantially affects interstate commerce" (quoting *SWANCC*, 531 U.S. 159, 173 (2001))). Although in *SWANCC* the Court noted that the Clean Water Act's jurisdiction was grounded on the fact that the area at issue contained water used by migratory birds, the government's focus before the Court was on the commercial nature of the landowner's planned municipal landfill, "which is plainly of a commercial nature." *SWANCC*, 531 U.S. at 173 (internal quotation omitted). On this point the Court stated "But this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.*

The Fifth Circuit concluded that focusing on the effect that take regulations had on planned commercial development "would allow application of otherwise unconstitutional statutes to commercial actors but not to non-commercial actors," claiming that such a line of reasoning would uphold application of the GFSZA in *Lopez* to a possessor who was a significant gun salesman, or application of VAWA in *Morrison* to a person who committed violence against women and then sold a substantial number of videotapes of the encounter in interstate commerce. *GDF Realty*, 326 F.3d at 634.

between an intrastate activity and its effect on interstate commerce.[194] Consequently, the court concluded that take of Texas cave species, with no present or historic market (unlike red wolves) and only a possible future market, had only a *de minimis* effect on interstate commerce.[195] The court therefore refused the government's invitation to aggregate cave species take with all other endangered species take to produce an aggregate substantial effect on interstate commerce.[196]

Although it rejected aggregating acts with negligible interstate commerce effects to produce a cumulative substantial effect, the Fifth Circuit nevertheless upheld the application of the ESA's take provision to the cave species using the aggregation principle because it concluded that this noncommercial, intrastate activity was essential to the ESA's overall economic regulatory scheme. The court reasoned that the ESA's language, legislative history, and application indicated that the statute was intended, in the main, to regulate economic activity.[197] Moreover, as "truly national" legislation, the ESA did not conflict with areas of traditional state concern, since authority over land use and wildlife preservation was shared with the federal government.[198] Further, the cave species take regulation was "essential" to the ESA's economic regulatory scheme because disavowing it would "undercut" the ESA by allowing piecemeal extinctions, threaten the "interdependent web" of all species, and undermine the ESA's "essential purpose" of protecting ecosystems upon which both humans and other species depend.[199]

Thus, while rejecting the idea that the use of Commerce Clause power could be justified by the commercial aspirations of the regulated entity, the Fifth Circuit allowed aggregation of the effects of an intrastate activity with the negligible effects on interstate commerce where the regulation was an essential part of the ESA's regulatory scheme—which was designed to regulate mainly commercial activity. This reasoning, based on the rationality of regulating both commercial and noncommercial activities, would sustain all ESA take regulations under the Commerce Clause regardless of the conduct or motivation of the activity subject to the regulation. The Fifth Circuit thus echoed the concurrence in the flower-loving fly case concerning

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194 *GDF Realty*, 326 F.3d. at 637–38 (concluding that any connection between the take of cave species and effects on the scientific travel or publication industries was negligible, and that future commercial benefits from the species—in terms of developments in understanding longevity—was conjecture).

195 *Id.* at 636.

196 *Id.* at 638 ("To accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation. An 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 the activity be commercial.").

197 *Id.* at 639 (citing *Morrison*, 529 U.S. 598, 617–18 (2000)).

198 *Id.* (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), for the shared powers principle).

199 *Id.* at 640 (quoting the Fish and Wildlife Service's brief and the ESA's legislative history).

the interdependence of species, and vindicated the overriding ecosystem preservation purpose of the ESA.[200]

Judge Dennis wrote a concurrence which elaborated on the court's "comprehensive scheme" principle. He justified the ESA's regulation of both commercial and noncommercial species: Since their interrelationship is central to the survival of both, it was rational for Congress to regulate both.[201] Judge Dennis added that the Constitution's Necessary and Proper Clause justified the cave species' regulation in addition to the Commerce Clause.[202] He sustained the regulation under this rationale "because such regulation is essential to the efficacy of—that is, the regulation is necessary and proper to—the ESA's comprehensive scheme . . . because the scheme has a very substantial impact on interstate commerce."[203] Thus, the commerce necessary to support the regulation came not from the motivation of the regulated party or from the character of the regulated activity, but from the comprehensive economic regulatory scheme of which the regulation was an essential part.

D. The Arroyo Southwestern Toad and Commercial Land Development

Another species with a tenuous link to interstate commerce is the arroyo southwestern toad (*Bufo californicus*), which lives in scattered populations along the West Coast from Baja California, Mexico to Monterey County, California. The toad breeds in shallow sand or gravel pools near streams but spends most of its life in upland habitats, even though toads venture no more than 1.2 miles from their natal streams.[204] Largely due to the loss of 76% of its California habitat as a result of land development, the Secretary of Interior listed the toad as endangered in 1994.[205]

In 2000, this listing came into conflict with a 280-home residential development proposed by Rancho Viejo along Keys Creek in San Diego County. The developer proposed to use parts of the Keys Creek streambed, which supplies toad habitat, for a "borrow area" to provide fill for home construction on 52 upland acres.[206] Because the development involved a

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200 *Id.* at 640; *cf. supra* notes 131–35 and accompanying text (concerning Judge Henderson's concurrence); 16 U.S.C. § 1531(b) (2000) (ecosystem purpose of the ESA).

201 According to Judge Dennis, federal regulation of both commercial and noncommercial activity is justified "if the regulation is an essential or integral part of a larger comprehensive scheme properly regulating activity substantially affecting interstate commerce." *GDF Realty*, 326 F.3d at 643 (Dennis, J., concurring).

202 *Id.* at 641–42 (citing, *inter alia*, McCulloch v. Maryland, 17 U.S. 316 (1819)).

203 *Id.* at 644.

204 *See* Rancho Viejo, LLC v. Norton (*Rancho Viejo*), 323 F.3d 1062, 1065 (D.C. Cir. 2003).

205 Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad, 66 Fed. Reg. 9414 (Feb. 7, 2001). None of the toads at issue in the case travel outside the state of California. *Rancho Viejo*, 323 F.3d at 1065 (citing Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Arroyo Toad, 66 Fed. Reg. at 9415).

206 *Rancho Viejo*, 323 F.3d at 1065 (noting that the developer intended "to remove six feet or more of soil from the surface of the borrow area, amounting to approximately 750,000 cubic yards of material," for the housing sites).

discharge of fill into waters of the United States, it required a section 404 permit under the Clean Water Act, which in turn triggered biological consultation under the ESA.[207] While consultation was underway, the developer dug a trench and erected a fence along Keys Creek, which impeded toad migration between the stream and the uplands, and which the FWS determined, in May 2000, constituted an unauthorized take of the toads.[208] Three months later, in August 2000, the Service issued a biological opinion which concluded that the planned excavation would result in the taking of toads and would also jeopardize the continued existence of the species. Consequently, the Service proposed an alternative that would use fill dirt from off-site sources, thus allowing the development to proceed without jeopardizing the toad.[209] The developer decided not to remove the fence or adopt the agency's alternative; instead, it filed suit in federal district court in the District of Columbia, alleging that application of the ESA to its development was unconstitutional under the Commerce Clause.[210] The district court rejected the developer's claim based on the D.C. Circuit's flower-loving fly decision four years earlier.[211]

The D.C. Circuit unanimously affirmed, on the basis of one of the grounds in the divided ruling of the fly case.[212] Judge Garland interpreted the earlier decision as upholding the constitutionality of ESA's take provision as applied to the intrastate fly because the regulated activity substantially affected commerce for two reasons: 1) the loss of biodiversity caused by the take would have a substantial effect on ecosystems and therefore on interstate commerce; and 2) the take provision regulated a commercial development that clearly had interstate effects.[213] The court concluded that the second rationale governed the toad case.[214]

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[207] *Id.* (discussing the requirements of section 404 of the Clean Water Act, 33 U.S.C. § 1344, and section 7 of the ESA, 16 U.S.C. § 1536). Section 404 permit jurisdiction was also at issue in *SWANCC*. *See supra* notes 90–107 and accompanying text.

[208] *Rancho Viejo*, 323 F.3d at 1065.

[209] *Id.*

[210] *Id.* at 1065–66.

[211] Rancho Viejo v. Norton, 32 Envtl. L. Rep. (Envtl. L. Inst.) 20,112 (D.D.C. Aug. 20, 2001).

[212] *Rancho Viejo*, 323 F.3d at 1067.

[213] *Id.* at 1067 (relying on *NAHB*, 130 F.3d 1041, 1046 n.3, 1056 (D.C. Cir. 1997) (Wald, J.); *id.* at 1057 (Henderson, J., concurring)). The fact that Judge Garland cited Judge Wald for the proposition that the fly regulation was valid under the Commerce Clause seems somewhat of a stretch, as her primary reasons for upholding the fly take regulation concerned the adverse effects on biodiversity, and therefore commerce, that would result from the loss of the fly, and that the regulation was a permissible regulation of the channels of interstate commerce. *See supra* notes 122–26 and accompanying text. Judge Wald also stated, however, that the fly regulation substantially affected interstate commerce by preventing the destruction of interstate competition that is harmful to the environment and, in doing so, mentioned that "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." *NAHB*, 130 F.3d at 1056.

[214] The court did not reject the biodiversity rationale embraced by the *NAHB* court, noting, "In focusing on the second *NAHB* rationale, we do not mean to discredit the first." *Rancho Viejo*, 323 F.3d at 1067 n.2. The court later observed:

Like the hospital and the intersection in the fly case,[215] the 200-acre development—the activity regulated by the ESA take provision—was, according to the D.C. Circuit, "plainly an economic enterprise."[216] Thus, the effect of the development could be considered with other similar developments in the aggregate, and from that perspective the court had "no doubt" there was a rational basis for the government's contention that the residential housing development had a substantial effect on interstate commerce.[217]

Perhaps the developer's strongest argument (the court labeled it the "principal argument") was that *Morrison* "came pretty close" to adopting a categorical rule against regulating noneconomic activity regardless of its effect on interstate commerce.[218] Since the toad was "not itself 'the subject of commercial activity,'" the developer maintained that the effects of its take could not be aggregated to produce a substantial effect on interstate commerce.[219] Unlike the Fifth Circuit in the cave species case,[220] the D.C. Circuit rejected this line of reasoning, concluding that since "the ESA regulates takings, not toads," the "regulated activity [was therefore] the planned commercial development, not "the arroyo toad that it threatens."[221] The court emphasized that penalties and prohibitions of section 9 of the ESA apply to "the persons who do the taking, not to the species that are taken."[222]

Reinforcing the same point, Judge Garland quoted from *Morrison* to assert that "'the proper inquiry' is whether the challenge is to 'a *regulation of activity* that substantially affects interstate commerce.'"[223] Moreover, according to the court, regulating a housing development was clearly regulating commercial activity, which was materially different from

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> 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. There are also 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.

Id. at 1069 n.5 (citation omitted).

215 The D.C. Circuit rejected the developer's assertion that the flower-loving fly decision was no longer good law in the wake of *Morrison* and *SWANCC*. *Id.* at 1070–71. The court ruled that *Morrison* only clarified the *Lopez* framework, it did not change it. And while the language of *SWANCC* suggested that courts must clearly discern the "precise object or activity" that substantially affected interstate commerce, the district court had done just that by pointing to the housing development. *Id.* at 1071 (citing *SWANCC*, 531 U.S. at 173).

216 *Id.* at 1068.

217 *Id.* at 1070.

218 *Id.* at 1071–72 (quoting Appellant's Reply Brief at 4, *Rancho Viejo* (No. 01-5373)).

219 *Id.* at 1072 (quoting Appellant's Reply Brief at 15, *Rancho Viejo* (No. 01-5373)).

220 The cave species decision was handed down on March 26, 2003; the toad case was issued less than a week later, on April 1, 2003. Thus, neither opinion influenced the other.

221 *Rancho Viejo*, 323 F.3d at 1072 (emphasis deleted). The court elaborated: "The ESA does not purport to tell toads what they may or may not do. Rather, [the statute] limits the taking of listed species." *Id.*

222 *Id.* (citing 16 U.S.C. §§ 1538(a)(1)(B) (2000) ("Except as provided . . . it is unlawful for any *person* subject to the jurisdiction of the United States to take any such species . . . .) (emphasis added); *id.* § 1540 ("Any *person* who knowingly violates . . . ") (emphasis added)).

223 *Id.* (emphasis in original) (quoting *Morrison*, 529 U.S. 598, 609 (2000)).

regulating gender-motivated violence in *Morrison* or gun possession in *Lopez*, where "neither the actors nor their conduct had a commercial character, and neither the purposes nor the design of the statute had an evident commercial nexus."[224] Judge Garland quoted from the ESA's findings to show that its purpose was to regulate "economic growth and development untempered by adequate concern and conservation" which produced species extinctions.[225]

The court also rejected the developer's allegations that the ESA had an unconstitutional noneconomic purpose of preserving biodiversity, and that the regulation at issue impermissibly preserved toads with no economic value. First, the court reaffirmed Judge Wald's sentiments in the flower-loving fly case to the effect that "there is no question that the commercial value of preserving species diversity played an important role in Congress' deliberations."[226] Second, the court noted that, like many statutes, the ESA had multiple purposes, which included economic concerns, and judicial attempts to discern a "true or primary legislative purpose" were an unwise recipe for judicial intervention into the political process.[227] Third, Judge Garland observed that both *Morrison* and *Lopez* affirmed the "long held" and continuously exercised capability of Congress to employ the Commerce Clause to achieve noneconomic ends.[228] For example, the Homeland Security Act of 2002,[229] prohibiting the use or possession of explosives, weapons of mass destruction, and firearms by convicted felons, was not enacted, the court stated, "merely (or even primarily) to protect commercial property."[230]

Finally, the D.C. Circuit rejected the developer's claim that the ESA amounted to an unlawful intrusion on land-use decisions, an alleged area of traditional state regulation, because the court ruled that the ESA is not a general land-use statute.[231] Instead, the court stated that "the ESA represents a national response to a specific problem of 'truly national' concern."[232] Relying heavily on Chief Judge Wilkinson's opinion in the red wolf case, the D.C. Circuit agreed that the regulation of wildlife and natural resources is a

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224 *Id.* (quoting *Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring))).

225 *Id.* at 1072–73 (quoting 16 U.S.C. § 1531(a)(1) (2000)).

226 *Id.* at 1073 (citing *NAHB*, 130 F.3d 1041, 1050 (D.C. Cir. 1997) (Wald, C.J.) and *Gibbs*, 214 F.3d 483, 494 n. 3 (4th Cir. 2000)).

227 *Id.* at 1073–74.

228 *Id.* at 1073–76 (citing, *inter alia*, Champion v. Ames, 188 U.S. 321, 355–57 (1903) (upholding a federal statute banning interstate transport of lottery tickets, passed "for the protection of public morals"); Hoke v. United States, 227 U.S. 308, 317–320 (1913) (upholding the Mann Act, which prohibited the transport of women in interstate commerce "for immoral purposes")).

229 Pub. L. No. 107-276, 116 Stat. 2135 (codified in scattered sections of 5 U.S.C., 6 U.S.C., 18 U.S.C., 44 U.S.C., and 49 U.S.C.).

230 *Rancho Viejo*, 323 F.3d. at 1075 (citing Homeland Security Act of 2002, Pub. L. No. 107-296, § 1123, 116 Stat. 2135, 2283–85). Nor, according to the court, did Congress make the murder of public safety officers a federal crime or ban the shipment of child pornography for commercial reasons. *Id.* at 1075–76.

231 *Id.* at 1078.

232 *Id.* at 1078–79.

power shared between the federal government and the states, and therefore the ESA did not "'trench impermissibly upon state powers.'"[233] Also, Judge Garland agreed with the Fourth Circuit that federal regulation of endangered species and their habitat was necessary to "arrest the 'race to the bottom'" that would occur from interstate economic competition "'whose overall effect would damage the quality of the national environment.'"[234]

Judge Garland concluded with a call for judicial restraint by quoting *Morrison*: "'Due respect for the decision 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.'"[235] Since the developer in *Rancho Viejo* made no such "plain showing," the court upheld the application of the arroyo southwestern toad regulation to the proposed housing development as indistinguishable from the challenge to the hospital development that the D.C. Circuit rejected earlier in the flower-loving fly decision.[236]

Chief Judge Ginsberg wrote a brief concurrence which emphasized that, under *Lopez*, there must be a "logical stopping point to [the Court's] rationale" for upholding congressional exercise of Commerce Clause power.[237] He found this stopping point in the toad case in the fact that the regulated "large-scale residential development" substantially affected interstate commerce.[238] But, he cautioned, a "lone biker in the woods" or a "homeowner who moves dirt in order to landscape his property" does not affect interstate commerce by executing an action that produces a take of the listed toad.[239] He was convinced that "[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."[240] The majority did not share Chief Judge Ginsberg's sentiment that the ESA could not reach an individual hiker or hunter.[241]

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233 *Id.* at 1079 (quoting *Gibbs*, 214 F.3d 483, 500–01 (4th Cir. 2000)).

234 *Id.* at 1079 (quoting *Gibbs*, 214 F.3d at 501). Judge Wald also endorsed this rationale in the flower-loving fly case. *See supra* note 123.

235 *Id.* at 1080 (quoting *Morrison*, 529 U.S. 598, 607 (2000)).

236 *Id.*

237 *Id.* (Ginsburg, C.J., concurring) (citing *Lopez*, 514 U.S. 549, 564 (1995)).

238 *Id.* (Ginsburg, C.J., concurring).

239 *Id.* (Ginsburg, C.J., concurring). A more destructive beneficiary of the exemption for small actors Judge Ginsberg would create are off-road vehicle enthusiasts who destroy endangered species habitat in pursuit of recreation.

240 *Id.* (Ginsburg, C.J., concurring).

241 Judge Garland observed that in *Lopez*, Chief Justice Rehnquist 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.'" *Id.* at 1077 (quoting *Lopez*, 514 U.S. at 558). Judge Garland concluded that "because much activity regulated by the ESA does bear a substantial relation to commerce, it may well be that the hiker hypothetical . . . is 'of no consequence' to the statute's constitutionality." *Id.* Judge Garland also noted that the application of the ESA to hikers or toad hunters could be also be upheld on the biodiversity rationale endorsed in *NAHB*. *Id.* at 1077 n.20.

IV. WOULD THE SUPREME COURT UPHOLD THE TAKE REGULATION?

The four decisions discussed above are notable for their fractured reasoning, so even though there is no split among the circuits in terms of results, there is hardly agreement on the reasons why the take provision of the ESA is constitutional. In addition, two of the decisions prompted dissents from well-known members of the Federalist Society, Judges Luttig and Sentelle,[242] so it is possible that the Supreme Court might decide to take up the issue, even without a circuit split.[243]

The key question in the cases concerns the circumstances under which aggregation of effects is permissible since, if it is, the links between listed species and interstate commerce can be readily demonstrated. In *Morrison*, the Court refused to rule out aggregating noncommercial species, but Chief Justice Rehnquist rationalized all past cases in which the Court allowed aggregation as involving "some sort of economic endeavor."[244] Related to that question are questions about the proper scope of aggregation, whether potential but unknown effects may be used to produce substantial effects on commerce, and whether these effects are so attenuated that they would countenance virtually all assertions of federal power.[245] We focus on the critical commercial character question first.

A. The Commercial Nexus

The reasoning of courts of appeal on the economic nature of the activity breaks down into three different categories: 1) decisions emphasizing the substantial commercial effects of the listed species, 2)

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[242] *See* Simon Lazarus, *Don't Be Fooled: They're Activists Too*, WASH. POST, June 3, 2001, at B3 (describing the rise of the Federalist Society and noting Judge Luttig as "one of the most outspoken advocates of the new judicial federalism"); Marcia Coyle, *Panel That Chose Starr Has Conservative Ties*, THE NAT. L.J., Aug. 22, 1994, at A13 (noting Judge Sentelle's connections with the Federalist Society in the context of the Clinton investigations).

[243] The Supreme Court denied *certiorari* on *Gibbs* and *NAHB*. Gibbs v. Norton, 531 U.S. 1145 (2001); Nat'l Ass'n of Homebuilders of the U.S. v. Babbitt, 524 U.S. 937 (1998). The D.C. Circuit denied *en banc* rehearing in *Rancho Viejo* on July 22, 2003. Rancho Viejo v. Norton, 334 F.3d 1158 (D.C. Cir. 2003). Both Judge Sentelle and Judge Roberts filed dissents to the denial of rehearing. Rancho Viejo v. Norton, 334 F.3d at 1158–60 (Sentelle, J., dissenting); *id.* at 1160 (Roberts, J., dissenting). Judge Sentelle's dissent echoed his earlier dissent in *NAHB*, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting), arguing that the taking of the toad did not have a substantial relationship to interstate commerce because the regulated activity was not economic. Rancho Viejo v. Norton, 334 F.3d at 1158–60. Both he and Judge Roberts also maintained that rehearing was proper because *Rancho Viejo*'s reasoning in relying on the regulated activity's substantial relationship to interstate commerce was now at odds with the Fifth Circuit. Rancho Viejo v. Norton, 334 F.3d at 1158–60 (Sentelle & Roberts, J.J., dissenting) (noting the split with *GDF Realty*, 326 F.3d 622, 634–35 (5th Cir. 2003)). GDF Realty has filed a petition to the Fifth Circuit to rehear and rehear *en banc*. U.S. Court of Appeals for the Fifth Circuit Case Summary, GDF Realty Investments, Ltd. v. Norton (No. 01-51099) (on file with author). *See infra* Section VI.

[244] *Morrison*, 529 U.S. 598, 611 (2000). *See supra* note 87 and accompanying text.

[245] *See* Nagle, *supra* note 116, at 191 (suggesting the first two questions); Funk, *supra* note 92, at 10,769–70 (discussing the latter two). On the last question, see *supra* notes 58–60 and accompanying text.

decisions emphasizing the substantial commercial effects of the regulated activities taking the listed species, and 3) decisions emphasizing the comprehensiveness of the ESA's economic scheme. In the latter category, we include the biodiversity defense recognized by the D.C. Circuit in the fly case and the avoidance of destructive interstate competition discussed by Judge Wald in the D.C. Circuit, the Fourth Circuit, and the full panel of the D.C. Circuit in the toad case, because they help to explain the commercial functions served by the ESA's comprehensive scheme.

1. The Commercial Effects of Listed Species

We think the easiest case for the Supreme Court to sustain the ESA's take provision is the red wolf case, because the Fourth Circuit determined that the species itself had substantial effects on interstate commerce.[246] Chief Judge Wilkinson concluded that the taking of red wolves on private land was an economic activity for a variety of reasons: 1) farmers took wolves for economic reasons, such as to protect livestock;[247] 2) conversely, wolf taking could substantially harm commerce by removing an important predator of animals that eat farmers' crops;[248] and 3) the loss of red wolves would, in the aggregate, have "quite direct" effects on interstate commerce by damaging tourism, inhibiting scientific research, and thwarting a possible renewed trade in wolf pelts.[249] The court cited studies indicating that red wolf recovery could produce perhaps hundreds of millions of dollars in tourism annually.[250] In light of these assertions, we think a majority of the Supreme Court would have little difficulty in affirming the Fourth Circuit. But the trouble with this line of reasoning is that it would uphold the constitutionality of the ESA's take provision only with respect to megafauna, which do not constitute the majority of listed species. For those species which are little known and which generate no interstate travel for science or recreation—like the flower-loving fly, the cave species, or the arroyo toad—this defense of the ESA take provision is less than half a loaf.

2. The Commercial Nature of Regulated Take

An alternative defense, which we think the Court would also embrace, concerns the interstate commercial effects of the activity subject to ESA regulation. This rationale engendered the most disagreement among the circuit courts. The D.C. Circuit in the arroyo toad case was the most notable

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246 *Gibbs*, 214 F.3d 483, 492–97 (4th Cir. 2000); *see supra* notes 158–59 and accompanying text.

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

248 *Id.* at 495 (noting that red wolves prey on raccoons, deer, and rabbits).

249 *Id.* at 492–95; *see supra* note 161 and accompanying text. The dissenter, Judge Luttig, denied that the loss of all of the estimated 41 red wolves on private land would have any effect on interstate commerce. *Id.* at 507 (Luttig, J., dissenting).

250 *See id.* at 493–94 (citing a study by a Cornell University researcher that estimated an increase in tourism-related dollars of between $39 million and $183 million in northeastern North Carolina and between $132 million and $354 million in the Great Smoky National Park).

adherent to this view, upholding the constitutionality of the application of the take provision by focusing on the commercial nature of the residential development that was proposed.[251] Both Chief Judge Wilkinson for the Fourth Circuit in the red wolf case and Judge Henderson concurring in the flower-loving fly case approved reliance on the commercial nature of the regulated activity as supplementary to their primary reasoning.[252] Relying on the economic activity being regulated draws support from both the language of the statute[253] and the language of the Supreme Court.[254]

On the other hand, the Fifth Circuit in the cave species case overruled a district court decision because it relied on the planned commercial development of the site, ruling that the lower court wrongly defined the scope of the regulated activity.[255] The Fifth Circuit stated that it was improper to consider the commercial motivations of the regulated conduct which, among other things, would allow regulation of commercially motivated take but would make regulation of noncommercial take unconstitutional.[256] The court felt that such a result would be inconsistent with the successful facial challenges in *Lopez* and *Morrison*.[257]

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[251] *Rancho Viejo*, 323 F.3d 1062, 1070 (D.C. Cir. 2003); *see supra* notes 216–25 and accompanying text.

[252] Chief Judge Wilkinson noted the economic motivation of those who took red wolves on private land, even though he relied primarily on the interstate effects the loss of the species would produce. *Gibbs*, 214 F.3d at 495. Judge Henderson included the economic nature of the intersection for the hospital as supplementary to her reliance on the biodiversity defense. *NAHB*, 130 F.3d 1041, 1058–59 (D.C. Cir. 1997) (Henderson, J., concurring). *See also* Shields v. Babbitt, 229 F. Supp. 2d 638, 663 (W.D. Tex. 2000) (holding that the regulated activity—the pumping of groundwater for agricultural purposes from the interstate Edwards Aquifer—was a sufficient effect on interstate commerce), *vacated on other grounds*, Shields v. Norton, 289 F.3d 832 (5th Cir. 2002).

[253] *See supra* note 222 and accompanying text.

[254] In *SWANCC*, Chief Justice Rehnquist observed that by relying on the aggregate value of migratory birds affected by the development, the Seventh Circuit "raise[d] significant constitutional questions" requiring a judicial inquiry into "the precise object or activity that, in the aggregate, substantially affects interstate commerce." *SWANCC*, 531 U.S. 159, 173 (2001). He also seemed to discount the government's argument before the Court that, in addition to the economic value of the migratory birds, the commercial nature of the municipal landfill fell within the reach of the commerce power, stating: "This is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.*

The first statement, directing the judicial inquiry into the "object or activity" being regulated, seems to support the D.C. Circuit's approach in the arroyo toad case, where the court relied on the commercial nature of the residential development at issue. *See supra* notes 216–17, 221–25 and accompanying text. However, the second statement appears to refocus the judicial inquiry toward the "terms of the statute," perhaps its purposes or goals. In the case of the ESA, its express purpose is to protect listed species and the ecosystems that sustain them, 16 U.S.C. § 1531(b) (2000), seemingly lending support to the comprehensive scheme rationale discussed below.

[255] *GDF Realty*, 326 F.3d 622, 633–36 (5th Cir. 2003).

[256] *Id.* at 634 ("To accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors.").

[257] *Id.* at 635 (noting that if the constitutionality of the GFSZA turned on the commercial motivations of the gun possessor, the statute as applied to a gun salesman would have passed muster; similarly, VAWA would have been constitutional if the perpetrator of the violence sold videotapes of the incident in interstate markets).

The split between the D.C. Circuit and the Fifth Circuit on this issue illustrates the unsettled state of the law. The Fifth Circuit's unwillingness to consider the commercial nature of the regulated activity seems to countenance a judicial disaggregation of the act of taking from the purpose of the take. For example, according to Judge Sentelle, the dissenter in the D.C. Circuit's flower-loving fly case, the activity being regulated was "killing flies[,] . . . controlling weeds[, and] . . . digging holes," not constructing an intersection to facilitate traffic flow to the hospital.[258] This parsing allowed him to assert that the take was neither "inherently nor fundamentally commercial in any sense."[259] Distinguishing the actual act of taking from the purpose of the take in this manner seems like an invitation to engage in legal legerdemain permitting judges to declare unconstitutional regulations they personally oppose. This invitation to government by the judiciary led to unhappy results a century ago in what has become known as the *Lochner* Era.[260] As Chief Judge Wilkinson in the red wolf case warned, "a judge's view of the wisdom of enacted polices affords no warrant for declaring them unconstitutional."[261]

But the D.C. Circuit's position, focusing on the commercial nature of the regulated activity, is also troublesome. As Chief Judge Ginsberg's concurrence in the arroyo toad case made clear, this approach means that while the ESA could regulate a 200-acre residential development, regulation of a "lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property" would be unconstitutional.[262] Although Judge Ginsberg did not mention them, a far greater threat to listed species may come from off-road vehicle enthusiasts. While it might make sense for a regulatory scheme to exempt small takes, that seems like a political or administrative decision. Why the Constitution should demand such exemptions is hardly clear.

3. The Commercial Nature of the ESA's Comprehensive Scheme

A third rationale for sustaining the ESA's take provision on the grounds of the commercial effects of the species was provided by both the Fourth Circuit in the red wolf case and the Fifth Circuit in the cave species case, where those courts ruled that the take provision was constitutional because the take provision was an essential part of the ESA's economic regulatory structure.[263] This reasoning is attractive from an environmental perspective because it avoids questions over whether the listed species has commercial

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258 *NAHB*, 130 F.3d 1041, 1064 (D.C. Cir. 1997) (Sentelle, J., dissenting).

259 *Id.*

260 *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 9–31 (1992) (describing the structure of what Horwitz termed the "classical legal thought" of the *Lochner* Era).

261 *Gibbs*, 214 F.3d 483, 504 (4th Cir. 2000).

262 *Rancho Viejo*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsberg, C.J., concurring).

263 *Gibbs*, 214 F.3d at 497–99; *see supra* notes 163–68 and accompanying text (Fourth Circuit); *GDF Realty*, 326 F.3d 622, 639–40 (5th Cir. 2003); *see supra* notes 197–200 and accompanying text (Fifth Circuit).

effects, or whether the regulated activity is commercial in nature.[264] Instead, its focus is on the nature of the statute—whether, for example, the ESA is

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264 The comprehensive scheme rationale set forth in *Lopez*, 514 U.S. 549, 561 (1995), is properly understood to apply to activities *both* intrastate and non-commercial, not just intrastate activities. Chief Justice Rehnquist articulated the scheme rationale not only to authorize courts to aggregate intrastate activity, which under *Wickard v. Filburn*, 317 U.S. 111 (1942), was already possible, but instead as a means of considering facially non-commercial activity to be "economic" for purposes of the statute. This subtle but crucial distinction explains why the Chief Justice did not consider the scheme rationale in either *Lopez* and *Morrison* as part of his discussion of aggregation of intrastate activity but instead as the first factor in the four-factor "substantially affects" analysis: whether the statute regulates commerce or an "economic" activity. *Morrison*, 529 U.S. 598, 610 (2000) (quoting *Lopez*, 514 U.S. at 561). In discussing whether an activity was "economic" the Chief Justice noted:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 992(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were unregulated.

Lopez, 514 U.S. at 561. Justice Kennedy's concurrence supports this interpretation, maintaining that so long as a regulation is part of a statute that is economic in "purpose[] and design," the regulation has an "evident commercial nexus," and is therefore constitutional. *Id.* at 580 (Kennedy, J., concurring); *see also Morrison*, 529 U.S. at 610. We believe that the Court's recognition that the commerce clause could justify regulation of some non-commercial activity was the reason the Court refused to adopt a categorical rule against aggregating the effects of non-economic activity. *Morrison*, 529 U.S. at 613.

Note also that the Court's commerce clause jurisprudence has always viewed whether an activity was commercial in nature as a term of art, to be understood in broad terms, and the Court long ago rejected the notion that an activity could be economic only through its direct effects. Indeed, *Lopez* quoted approvingly from *Wickard* to the effect that "'even if . . . [an] activity be local and though *it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial effect on interstate commerce.'" *Lopez*, 514 U.S. at 555 (quoting *Wickard*, 317 U.S. 113, 125 (1942)). *See Lopez*, 514 U.S. at 574 (recognizing the Court's evolution "from an understanding of commerce that would serve only an 18th-century economy"); United States v. Bailey, 115 F.3d 1222, 1228 n.7 (5th Cir. 1997) ("The construction of the term 'commerce' is a practical one and embraces economic activity beyond that which is traditionally considered commerce."); United States v. Gregg, 226 F.3d 253, 262 (3d Cir. 2000) ("We thus hold that although the connection to economic or commercial activity plays a central role in whether a law is valid under the Commerce Clause, we hold that economic activity can be understood in broad terms."); Groome v. Parish of Jefferson, 234 F.3d 192, 208–09 (5th Cir. 2000) ("Although the connection to economic or commercial activity plays a central role in whether a regulation will be upheld under the Commerce Clause, economic activity must be understood in broad terms. Indeed, a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority." (quoting *Gibbs*, 214 F.3d at 491)).

Several circuit court decisions have used the comprehensive scheme rationale to sustain regulation of noncommercial activities outside the context of the ESA. *See, e.g.*, Freier v. Westinghouse Elec. Co., 303 F.3d 176, 201 (2nd Cir. 2002) (upholding a provision of the Comprehensive Environmental Response, Compensation and Liability Act imposing a federal commencement date, even though the provision had no connection to interstate commerce, because it was an integral part of the "regulatory program"), *cert denied*, 123 S. Ct. 1899 (2003); *cf.* United States v. Bird, 124 F.3d 667, 678 (5th Cir. 1997), *cert denied*, 523 U.S. 1006 (1998) (noncommercial, intrastate activity—threats and intimidation directed at provider of abortion services—may be aggregated to find substantial effect). See also *infra* note 272 for other examples of courts upholding regulation under the scheme principle.

designed to regulate commercial activity, and whether the take regulation is an essential part of the regulatory scheme.[265] The Fourth, Fifth, and D.C. Circuits all have ruled that the ESA was at least in part an economic regulatory scheme.[266] And the Fifth Circuit's conclusion in the cave species case that the take provision was central to the ESA finds support in the express congressional concern over the "critical nature of the interrelationships of plants and animals between themselves and with their environment" and in the legislative history's proclamation that the ESA's "essential purpose" is "to protect the ecosystems upon which we and other species depend."[267]

Perhaps more importantly, the "essential part of a comprehensive economic regulatory scheme" defense has grounding in the Supreme Court's recent federalism cases. In *Lopez*, for example, the Court struck down the GFSZA in part because it was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[268] The *Lopez* opinion did not make clear whether the regulated activity must be commercial in order to aggregate its effects. But over two decades ago, in upholding the constitutionality of the Surface Mining Control and Reclamation Act, the Court noted 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 test."[269] The Fifth Circuit in the cave species case interpreted *Lopez* to authorize regulation of noncommercial, intrastate species if: 1) the statute was directed at activity that is economic in nature; and 2) the regulated noncommercial activity is an essential part of the overall economic regulatory scheme.[270]

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265 *Gibbs*, 214 F.3d at 498; *GDF Realty*, 326 F.3d at 639.

266 *Gibbs*, 214 F.3d at 494 n.3; *GDF Realty*, 326 F.3d at 640 (citing the ESA's language and legislative history); *Rancho Viejo*, 323 F.3d at 1073–74.

267 H.R. REP. NO. 93–412, at 6, 10 (1973).

268 *Lopez*, 514 U.S. at 561.

269 Hodel v. Indiana, 452 U.S. 314, 329 n.17 (1981). *See also* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 757 n.22 (1982) (upholding the constitutionality of the Public Utility Regulatory Practices Act of 1978, drawing support from *Hodel*'s comprehensive scheme rationale); Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (holding that "where a general regulatory scheme bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence").

270 *GDF Realty*, 326 F.3d at 639–40 (citing *Lopez*, 514 U.S. at 558, 561). The Fifth Circuit cited the ESA's legislative history for its conclusion that the ESA's protection of endangered species is economic in nature. *Id.* at 632, 639 (citing H.R. REP. NO. 93-412, at 4–5 (1973), for the proposition that the value of biodiversity is "incalculable" and "it is in the best interest of mankind to minimize the losses of genetic variations . . . [because they] are potential resources" that might otherwise be lost absent ESA regulation, and citing S. REP. NO. 91–526, at 3 (1969), for the proposition that marketing species and their genetic material may constitute commercial value that would otherwise have been eliminated from commerce). The court also noted that in addition to the adverse economic effects of species loss, most of these costs would be imposed by economic activities. *Id.* at 639 (citing 16 U.S.C. § 1531(a)(1), (f) (2000)). Finally, the court

Moreover, Justice Kennedy's concurrence in *Lopez* observed that so long as a regulation is a part of a statute that is economic in "purpose[] and design," the regulation is constitutional,[271] thus suggesting that the requisite commercial link for Commerce Clause purposes could be found in the statutory structure as well as in the commercial nature of the listed species or the regulated activities.[272] Justice Kennedy noted that "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."[273] He also emphasized that the constitutional framework has been flexible enough, over the course of two centuries, to accommodate enormous changes in the power of the federal government.[274] It seems quite possible that Justice Kennedy might see that flexibility as sufficient to accommodate the ESA take provision, particularly in light of the fact that wildlife regulation is not a traditional function to which the states "lay claim by right of history and expertise"[275] because the Court recently ruled that wildlife regulation is a power that states share with the federal government.[276] Thus, we think it is

concluded that the ESA is "truly national" legislation—not an invasion of traditional areas of state concern—because land use control and wildlife preservation are areas of shared federal and state authority. *Id.*

271 *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

272 *Id.* at 579. Circuit courts have relied upon the "essential part of a larger . . . regulatory scheme [that] could be undercut unless the intrastate activity was regulated" rationale to support Commerce Clause constitutionality in numerous other contexts as well. *See, e.g.*, United States v. Adams, 343 F.3d 1024, 1033 (9th Cir. 2003) ("In contrast to *Lopez*, here the statute criminalizing possession of child pornography is an essential part of a [larger economic regulatory scheme.]"); United States v. Angle, 234 F.3d 326, 338 (7th Cir. 2000) (same, involving a statute that criminalized the possession of child pornography); United States v. Rodia, 194 F.3d 465, 479 (3d Cir. 1999) (same); Freier v. Westinghouse Elec. Corp., 303 F.3d 176, 201–03 (2d Cir. 2002) (concluding that the federally required commencement date is constitutional because it "is an integral part of the regulatory scheme established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, furthering CERCLA's goals in various ways") *cert denied*, 123 S. Ct. 1899 (2003); United States v. Cortes, 299 F.3d 1030, 1035 (9th Cir. 2002) (holding a car-jacking statute constitutional because it was an essential part of a larger regulation of economic activity, the Anti-Car Theft Act of 1992); United States v. Taylor, 226 F.3d 593, 599 (7th Cir. 2000) (same); United States v. Ho, 311 F.3d 589, 602–04 (5th Cir. 2002) (holding that the regulation of asbestos removal was proper because it was an essential part of a larger economic regulatory scheme); United States. v. Haney, 264 F.3d 1161, 1168–69 (10th Cir. 2001) (holding that the prohibition of post-1986 machine guns was Constitutional because it was an essential part of the federal scheme to regulate interstate commerce in dangerous weapons); United States v. Cardoza, 129 F.3d 6, 12 (1st Cir. 1997) (holding that a provision of the Youth Handgun Safety Act that prohibits juveniles from possessing handguns was constitutional because it was an essential part of a larger regulatory scheme).

273 *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

274 *Id.* at 575 (Kennedy, J., concurring) (citing New York v. United States, 505 U.S. 144, 157 (1992)).

275 *Id.* at 583 (Kennedy, J., concurring).

276 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999). *See also* Hughes v. Oklahoma, 441 U.S. 322, 336–39 (1979) (holding that state regulation of wildlife is circumscribed by the federal commerce power).

unlikely that Justice Kennedy would see wildlife regulation in the same light that he viewed education in the *Lopez* case.[277]

Also worth noting is Justice Kennedy's statement that where a statute's "purpose and design" has no "commercial nexus," and where "neither the actors nor their conduct has a commercial character," the proper judicial inquiry becomes whether "the exercise of national power seeks to intrude upon an area of traditional concern of the state."[278] Under this reasoning, whether a federal statute intrudes on an area of traditional state concern becomes a relevant consideration only where a statute attempts to regulate noncommercial activity. The inference of course is that not all federal regulation of noncommercial activity is proscribed. Justice Kennedy agreed that the GFSZA in *Lopez* exceeded the federal commerce power because it regulated non-commercial conduct *and* it intruded on a traditional area of state concern.[279]

Both the Fourth Circuit in the red wolf case and the D.C. Circuit in the arroyo toad case expressly rejected the notion that the ESA's regulation of wildlife intruded on a traditional area of exclusive state concern.[280] Since the Court recently ruled that wildlife and land-use regulation are powers shared between the federal and state governments,[281] it would seem unlikely that the Supreme Court would disturb these conclusions. Thus, it may be that under Justice Kennedy's two-part test, the ESA's take provision would withstand constitutional scrutiny even if the Court concluded it regulated noncommercial activity.[282]

Another defense of the ESA take provision based on the commercial effects of the species was supplied by the majority in the flower-loving fly case, where the D.C. Circuit ruled that the loss of the listed species would adversely affect biodiversity, and this loss would substantially affect interstate commerce.[283] Judges Wald and Henderson agreed that the

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277 *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States.").

278 *Id.* at 580; *see supra* notes 70, 73, and accompanying text.

279 Justice Kennedy observed: "The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

280 *Gibbs*, 214 F.3d 483, 499–501 (4th Cir. 2000); *Rancho Viejo*, 323 F.3d 1062, 1078–80 (D.C. Cir. 2003).

281 *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 204 ("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 . . . ."). Note, however, that Justice O'Connor was the author of this opinion, while Justice Kennedy was part of the four-member dissent.

282 Although in *Morrison* Chief Justice Rehnquist suggested that economic activity was a prerequisite to aggregating effects, he did not rule out aggregating noneconomic effects. *Morrison*, 529 U.S. 598, 611 (2000) (suggesting only that the Court's cases in which it has aggregated effects to produce a substantial effect on interstate commerce all involved "some sort of economic endeavor").

283 *NAHB*, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (Wald, J.); *id.* at 1059 (Henderson, J.). Judge Wald, alone among the appellate judges considering the constitutionality of the take provision of the ESA, upheld the provision on the basis that it was a proper regulation of the channels of

regulation of take of listed species is justified by the Commerce Clause, since take affects the biodiversity of supporting ecosystems, the loss of which would substantially affect interstate commerce.[284] This rationale has the advantage of conforming the law to ecological reality,[285] which is of considerable concern to those worried about the constitutive aspects of environmental law.[286] We think, however, that the biodiversity defense is best combined with, and made part of, the comprehensive scheme rationale because an express purpose of the ESA—the comprehensive scheme—is the protection of ecosystems.[287] We also think that the comprehensive scheme rationale would be bolstered by arguing that without an ESA that comprehensively protects all listed species, the result would be a predictable destructive interstate "race to the bottom," with states competing for economic development that undermines species protection and biodiversity. This rationale was endorsed by the Supreme Court in *Virginia Surface Mining and Reclamation Association v. Hodel*[288] and by the Fourth and D.C. Circuits in the ESA cases.[289]

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interstate commerce. *Id.* at 1046–48 (Wald, J.); *see supra* note 122 and accompanying text. Given the lack of judicial enthusiasm for this line of reasoning, we do not pursue it here.

284 *NAHB*, 130 F.3d at 1052 (Wald, J.) (noting that "current and future interstate commerce relies on the availability of a diversity array of species"); *id.* at 1059 (Henderson, J., concurring) (concluding that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise interstate commerce"). Chief Judge Wald thought that even unknown species might have genetic, medicinal, and other commercial worth. *Id.* at 1052. However, Judge Henderson thought this potential commercial effect was too speculative for Commerce Clause purposes; she instead focused on the interconnectedness of all species. *Id.* at 1058 (Henderson, J., concurring). Although the D.C. Circuit in the arroyo toad case did not rely upon the biodiversity defense, the court did cite it favorably. *Rancho Viejo*, 323 F.3d at 1069 n.5 (noting ESA legislative history supporting the biodiversity defense); *see supra* note 214 and accompanying text.

285 For more on the biological and ecological "interconnectedness," see ROBERT P. MCINTOSH, THE BACKGROUND OF ECOLOGY: CONCEPT & THEORY (1985); FRANK B. GOLLEY, A HISTORY OF THE ECOSYSTEM CONCEPT IN ECOLOGY: MORE THAN THE SUM OF THE PARTS 19–22 (1993); DONALD WORSTER, NATURE'S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS 199–202 (1985); Steward T.A. Pickett et al., *The New Paradigm* in *Ecology: Implications for Conservation Biology Above the Species Level*, *in* CONSERVATION BIOLOGY: THE THEORY AND PRACTICE OF NATURE CONSERVATION PRESERVATION AND MANAGEMENT 65 (1992); DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY (1990). For articles on the relationship of ecological interconnectedness and the law, see Judy L. Meyer, *The Dance of Nature: New Concepts in Ecology*, 69 CHI.-KENT L. REV. 875 (1994); Reed F. Noss, *Some Principles of Conservation Biology as They Apply to the Law*, 69 CHI.-KENT L. REV. 893 (1994); Robert B. Keiter, *Conservation Biology and the Law: Assessing the Challenges Ahead*, 69 CHI.-KENT L. REV. 911 (1994).

286 *See, e.g.*, Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295 (2003).

287 16 U.S.C § 1531(b) (2000) (proclaiming that the purpose of the ESA is, *inter alia*, "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved").

288 452 U.S. 264, 281–82 (1981); *see supra* notes 29,123.

289 *Gibbs*, 214 F.3d 483, 501–02 (4th Cir. 2000); *NAHB*, 130 F.3d at 1049; *Rancho Viejo*, 323 F.3d at 1069, 1079; *see supra* notes 123 (fly), 172 (wolf), 234 (toad), and accompanying text.

B. Statutory Links to Interstate Commerce

Interpreting *Lopez*, the *Morrison* Court listed two factors to consider regarding whether a Commerce Clause regulation substantially affects interstate commerce, in addition to the economic nature of the regulated activity. First, an express jurisdictional element in the statute explicitly limiting the regulation to effects on interstate commerce can support a judicial conclusion that an interstate activity has a substantial effect on interstate commerce.[290] Second, congressional findings or legislative history can help courts discern substantial effects in interstate commerce, even when not "visible to the naked eye."[291] Neither the GFSZA in *Lopez* nor VAWA in *Morrison* contained a statutory jurisdictional element, although VAWA did contain numerous congressional findings concerning the serious adverse effects of gender-motivated violence on interstate commerce.[292] However, the *Morrison* Court rejected VAWA's congressional findings, determining that accepting them would allow Congress "to completely obliterate the Constitution's distinction between national and local authority."[293] Chief Justice Rehnquist thought that VAWA's findings—which maintained that gender-motivated violence substantially affected interstate commerce by deterring potential victims from traveling interstate, from working in interstate businesses, and from engaging in interstate business transactions—were too attenuated to preserve any limits on Congress's commerce power.[294] Thus, the presence or lack of legislative findings seems less significant than the attenuation principle, discussed below.

In the case of the ESA, the statute expressly links species loss to unwise economic growth and development.[295] It also mentions the "esthetic, ecological, educational, historical, recreational, and scientific value" of healthy species to the nation, which would include economic value.[296] In addition, the ESA's legislative history includes findings about the importance of biodiversity to commerce, particularly potential medicinal effects.[297] These findings may be enough to convince a majority of the Court of the rationality of Congress's determination that failure to preserve listed species would, in the aggregate, substantially harm interstate commerce. However, since there is nothing in the statute ensuring that each listed species has

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290 *Lopez*, 514 U.S. 549, 562 (1995); *Morrison*, 529 U.S. 598, 611–12 (2000).

291 *Lopez*, 514 U.S. at 563. *See also Morrison*, 529 U.S. at 612 (citing *Lopez*, 514 U.S. at 563).

292 *Morrison*, 529 U.S. at 614 (citing H.R. CONF. REP. NO. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1803, 1853; S. REP. NO. 103-138, at 40 (1993); S. REP. NO. 101-545, at 33 (1990)).

293 *Id.* at 615.

294 *Id.* ("The reasoning that petitioners advance seeks to follow the but-for causal chain . . . to every attenuated effect upon interstate commerce.").

295 16 U.S.C. § 1531(a)(1) (2000).

296 *Id.* § 1531(a)(3).

297 H.R. REP. NO 93-412, at 5 (1973) (mentioning medicinal benefits); S. REP. 93-307, at 2 (1973) (noting that many species perform vital biological functions, and that biological diversity is necessary for scientific purposes); *see also supra* note 127 (noting that species-derived prescription medicines had a value of $15 billion in 1983 and that the "option value" of biodiversity is estimated at $33 trillion per year).

substantial commercial effects,[298] we think it would be wise for the listing agencies to include in their listing decisions a discussion of the substantial actual and potential effects of that species on interstate commerce. Even if they do, that reasoning will be subject to judicial scrutiny under the attenuation principle.[299]

C. The Proper Scope of Aggregation and the Attenuation Principle

In both *Lopez* and *Morrison*, the Court concluded that the government's claims about the links of gun possession within school zones and gender-motivated violence to commerce were too attenuated.[300] The Court refused to follow the government's proffered reasoning in *Lopez*: Gun possession in school zones leads to violence; violence increases insurance rates, inhibits interstate travel, and retards the educational process, all adversely affecting national productivity and interstate commerce.[301] Similarly, the Court thought that Congress's claim that gender-motivated violence deterred interstate travel, employment, and business suffered from the same deficiency: The "but-for" causal chain employed could authorize federal regulation of "any crime, as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[302] The trouble with each statute—the lack of a stopping point short of complete federalization—might also characterize the ESA.

The attenuation principle affects the proper scope of aggregation. The key question is whether, assuming that aggregation is permissible, the effects of a species take can be aggregated to include the loss of all members of that species, or indeed members of all listed species? Or are those one or two bridges too far? If they are not, a substantial effect on interstate commerce is much more likely to be demonstrated. The Supreme Court has yet to pronounce the proper scope of aggregation, except for Chief Justice Rehnquist's suggestion in *Morrison* that the aggregation in *Wickard v. Filburn*[303]—where the Court aggregated a farmer's on-farm consumption of wheat to all on-farm consumption by similarly situated farmers[304]—was "perhaps the most far reaching example" available.[305] The circuit courts

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298 Professor Funk has suggested that all three categories of waters currently regulated under the CWA—1) waters used by interstate travelers, 2) waters from which fish or shellfish are marketed in interstate commerce, and 3) waters used by interstate industries—possess the requisite jurisdictional element of a direct effect on interstate commerce. Funk, *supra* note 92, at 10,770.

299 Of course, ESA listings that discussed the substantial commercial effects of listed species would also be subject to scrutiny under the attenuation principle.

300 *Lopez*, 514 U.S. 549, 564 (1995); *Morrison*, 529 U.S. 598, 615–17 (2000).

301 *Lopez*, 514 U.S. at 563–64.

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

303 317 U.S. 111 (1942).

304 *Id.* at 127–28 (ruling that Filburn's "contribution to the demand for wheat," though perhaps insignificant itself, was "not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial").

305 *Morrison*, 529 U.S. at 610 (internal citations omitted).

considering the aggregation issue in the context of the ESA have generally upheld aggregation,[306] but they have varied both in terms of the scope of the permissible aggregation and the rationale for employing it.

The Fourth Circuit in the red wolf case concluded that because the take of wolves involved economic activity, the loss of that species could be aggregated to produce a substantial effect on interstate commerce, including effects on future commerce.[307] This is the easiest case to make concerning the proper scope of aggregation: It is rational to conclude that the unregulated loss of members of a species could lead to extinction of that species, since that result has occurred many times in the past. If the loss of that species itself would have substantial effects on present or future commercial activity, that would not seem to offend the Court's attenuation principle, especially in the case of species like red wolves which have been in interstate commerce in the past, and which arguably have substantial effects on commerce today.[308] This interpretation of the attenuation principle, however, would not benefit species without those commerce links, which probably includes most listed species.

A more challenging aggregation situation was the cave species case, where the Fifth Circuit concluded that the government's argument concerning the potential medicinal benefits of these noneconomic species was too speculative a basis upon which to ground aggregation.[309] In other words, these uncertain medicinal benefits were too attenuated to produce a substantial effect on commerce.[310] Therefore, the court refused to allow the government to aggregate the effects of a loss of the cave species with all other listed species.[311] Nevertheless, the Fifth Circuit did approve aggregating the effects of all listed species on the ground that regulation of the cave species was an essential part of the ESA's regulation of economic activity.[312]

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306 For example, the D.C. Circuit, in the toad case, found it unnecessary to consider the aggregation issue because it determined that the developer's planned commercial development clearly had substantial commercial effects by itself. *Rancho Viejo*, 323 F.3d 162, 1072 (D.C. Cir. 2003) ("Here . . . both the 'actor,' a real estate company, and its 'conduct,' the construction of a housing development, have a plainly commercial character.").

307 *Gibbs*, 214 F.3d 483, 493–97 (4th Cir. 2000); *see supra* notes 156–62 and accompanying text. The Fourth Circuit did cite approvingly Judge Henderson's concurrence in the fly case concerning the idea that the extinction of one species would affect other species and their ecosystems, and therefore would substantially affect interstate commerce. *Gibbs*, 214 F.3d at 497 (citing *NAHB*, 130 F.3d 1041, 1059 (D.C. Cir. 1997) (Henderson, J., concurring)).

308 *See Gibbs*, 214 F.3d at 493–94 (citing economic figures concerning red wolf-related tourism).

309 *GDF Realty*, 326 F.3d 622, 638 (5th Cir. 2003).

310 *Id.* ("[I]n a sense, Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be.").

311 *Id.* ("To accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation.").

312 *Id.* at 638–40. The D.C. Circuit in the toad case also noted that the design of the ESA was "in part to regulate 'economic growth and development untempered by adequate concern and conservation.'" *Rancho Viejo*, 323 F.3d 1062, 1072–73 (D.C. Cir. 2003) (quoting 16 U.S.C. § 1531(a)(1)). *See also* note 225, *infra*.

The Fourth Circuit in the wolf case also approved this rationale, under which aggregation of all listed species is permissible as a vital component to a comprehensive economic regulatory scheme.[313] Both courts relied on the *Lopez* opinion, where the Supreme Court stated that "where a general regulatory scheme bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."[314] This reasoning allows regulation of non-commercial activities to be aggregated with regulation of commercial activities to produce substantial commercial effects due to the commercial nature of the regulatory scheme. This kind of aggregation would ratify regulation of all listed species, not merely species with clear commercial links like the red wolf. Whether it would offend the Court's attenuation principle, forbidding aggregations that would sanction unlimited federal regulation,[315] is less clear. However, we think that given the Court's endorsement of the comprehensive scheme rationale in *Lopez*,[316] the fact that endangered species regulation is not an area of traditional state concern,[317] and Justice Kennedy's approval of statutes whose "purpose[] . . . [and] design . . . [have] . . . evident commercial nexus,"[318] aggregation based on the commercial nature of the ESA's regulatory scheme is not likely to be too attenuated for a majority of the Court.

V. CONCLUSION

We believe that, as currently constituted, the Supreme Court would likely uphold the constitutionality of the ESA's take provision, although the issue is certainly not free from doubt. The dissenters in the circuit court decisions, Judges Sentelle and Luttig—well-known members of the Federalist Society[319]—denied that the listed flower-loving fly and red wolf

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313 *Gibbs*, 214 F.3d at 497–98; *see also NAHB*, 130 F.3d 1041, 1053 n.14 (D.C. Cir. 1997) ("[B]ecause biodiversity has a real, substantial, and predictable effect on both the current and future interstate commerce, the *de minimis* character of individual instances arising under [the ESA] is of no consequence." (quoting *Lopez*, 514 U.S. 549, 558 (2000)) (internal quotation omitted)).

314 *See Gibbs*, 214 F.3d at 498 (quoting *Lopez*, 514 U.S. at 558 (emphasis omitted) (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)). *See also GDF Realty*, 326 F.3d at 639 (citing *Lopez*, 514 U.S. at 561).

315 *See Lopez*, 514 U.S. at 564 (rejecting the notion that Congress may "regulate any activity that it found was related to the economic productivity of individual citizens . . . [because under such a rationale,] it is difficult to perceive any limitation on federal power").

316 *See supra* note 54 and accompanying text; *see also supra* notes 163 & 313 and accompanying text (Fourth Circuit's reliance on *Lopez*).

317 *See Morrison*, 529 U.S. 598, 611 (2000) (citing *Lopez*, 514 U.S. at 577 (Kennedy, J. concurring) (worrying that if the federal government could "take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur")); *see also supra* note 280 (Fourth and D.C. Circuit's conclusions that wildlife regulation is not a traditional area of exclusive state concern).

318 *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

319 *See supra* note 242.

had any economic effects at all.[320] Therefore, they would allow no aggregation of effects, and they refused to consider the economic nature of the regulated activities. It is possible that some members of the Supreme Court—perhaps Justices Scalia and Thomas[321]—would adopt the perspective of Judges Sentelle and Luttig, but we do not believe that a majority of the Court would.

Chief Justice Rehnquist's statements in *SWANCC* concerning the importance of identifying the "precise object or activity" having commercial effects seem to indicate that he would favor the approach of the D.C. Circuit in the arroyo toad case, where that court concentrated on the commercial nature of the regulated activity, a planned large-scale residential development.[322] Yet the Chief Justice's *Lopez* opinion sanctioned regulation that 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."[323] Coupled with Justice Kennedy's approval of statutes whose "purposes" and "design" have a commercial nexus,[324] we believe a majority of the Court would be willing to sustain the ESA take provision as an essential part of the ESA's comprehensive economic regulatory scheme. Affirming the ESA take provision on this ground would be ecologically preferable to an affirmation on the grounds that either the listed species or the regulated activity would have substantial effects on interstate commerce. The former would largely be limited to megafauna, like red wolves,[325] while the latter would exempt small actors, the putative "hiker in the woods or the homeowner landscaping his property."[326]

Since the comprehensive scheme defense of the take provision is grounded in the purposes and design of the statute, it seems likely to appeal to Justice Kennedy. We think its prospects would be bolstered by linking the comprehensive scheme rationale to the maintenance of biodiversity—which, after all, is a purpose of the ESA[327]—and to the avoidance of the destructive economic "race to the bottom" endorsed by both the Supreme Court and

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320 *NAHB*, 130 F.3d 1041, 1064–65 (D.C. Cir. 1997) (Sentelle, J., dissenting); *Gibbs*, 214 F.3d 483, 507–09 (4th Cir. 2000) (Luttig, J., dissenting). The dissenters did not subscribe to the Fourth and D.C. Circuits' rulings that the scope of commercial or economic activity necessary to sustain Commerce Clause regulation must be construed broadly. *Gibbs*, 214 F.3d at 491; *GDF Realty*, 326 F.3d 622, 638 (5th Cir. 2003).

321 We can envision either justice echoing the sentiments of Judge Sentelle to the effect that "[a]n ecosystem is an ecosystem, and commerce is commerce." *NAHB*, 130 F.3d at 1065 (Sentelle, J., dissenting). Justice Thomas views the post-1937 expansion of Commerce Clause power as inconsistent with the Court's earlier precedent and the Framers' intent, and wants to revisit the Commerce Clause jurisprudence of the last 65 years, see *supra* note 61, a proposition with which Justice Kennedy clearly did not agree. *See supra* notes 62–65 and accompanying text (endorsing stare decisis).

322 *SWANCC*, 531 U.S. 159, 167–68 (2001). *See supra* note 100; *cf. supra* notes 221–25 (D.C. Circuit's reasoning).

323 *Lopez*, 514 U.S. at 561.

324 *Id.* at 580 (Kennedy, J., concurring).

325 *See supra* text following note 250.

326 *See supra* note 262 and accompanying and following text.

327 16 U.S.C. § 1531(b) (2000).

several circuits.[328] We think the comprehensive scheme rationale could earn five, or perhaps six, votes from the Court. Adoption of this rationale by the Court would avert the perverse result of endangered species—which by definition must be "in danger of extinction throughout all or a significant portion of its range"[329]—having so few members that they cannot demonstrate a substantial effect on interstate commerce. As Chief Judge Wilkinson explained for the Fourth Circuit, such a result would mean that "the more endangered the species, the less authority Congress has to regulate the taking of it . . . because there are too few animals left to make a commercial difference. [This result] would eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head."[330]

A less satisfactory ground for upholding the constitutionality of the ESA's take provision would be to focus on the commercial nature of the regulated activity, the approach of the D.C. Circuit in the arroyo toad case as well as Judge Henderson in the fly case.[331] Upholding the take provision on the basis of the commercial nature of the regulated activity would have sound constitutional footing,[332] but it would leave noncommercial activities free to harm listed species.[333] A still less satisfactory ground would be to affirm the ESA's take provision where listed species could show a substantial effect on interstate commerce, as in the wolf case.[334] Such a result would limit ESA protection to megafauna, less than half of listed species.[335]

We think defenders of the take provision should emphasize to the Supreme Court the comprehensive scheme rationale which the Court so recently endorsed,[336] stressing the biodiversity protection evident in the ESA's ecosystem protection purpose,[337] and the centrality of the take provision to achieving that purpose. The defenders of the ESA should also argue that without the ESA's comprehensive scheme, the states would engage in a destructive "race to the bottom" that would damage biodiversity and environmental quality.[338] If they do, our crystal ball predicts at least five votes for upholding the constitutionality of the ESA's take provision.

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328 *See supra* notes 288–89 and accompanying text.

329 16 U.S.C. § 1532(6) (2000).

330 *Gibbs*, 214 F.3d 483, 498 (4th Cir. 2000).

331 *Rancho Viejo*, 323 F.3d 1062, 1072–73 (D.C. Cir. 2003); *NAHB*, 130 F.3d 1041, 1059 (D.C. Cir. 1997) (Henderson, J., concurring).

332 *See Lopez*, 514 U.S. 549, 553–60 (1995) (Rehnquist, C.J.) (discussing the history of Commerce Clause interpretation); *id.* at 568–75 (Kennedy, J., concurring) (discussing the same history).

333 *See supra* notes 258–62 and accompanying text.

334 *See supra* notes 246–50 and accompanying text.

335 *Id.*

336 *Lopez*, 514 U.S. at 561. *See supra* note 54 and accompanying text.

337 16 U.S.C § 1531(b) (2000).

338 *See supra* notes 287–89 and accompanying text.

VI. EPILOGUE

While this Article was in press, two developments occurred just three days apart which merit brief mention. First, on March 1, 2004 the Supreme Court denied *certiorari* in *Rancho Viejo v. Norton*.[339] Second, three days earlier on February 27, 2004, the Fifth Circuit denied the plaintiff-appellants petition for rehearing and rehearing *en banc* in *GDF Realty Investments, Ltd. v. Norton*, with 6 of its 16 active judges dissenting.[340] Judge Edith Jones wrote the dissent, agreeing with the panel's analysis of Commerce Clause precedent, but disagreeing both with its application of the comprehensive scheme principle and the panel's conclusion that species protection did not constitute an invasion of traditional state land-use regulation.[341]

Regarding the former, the dissent asserted that the panel offered "little reasoning" why the regulation of cave species was "an essential part of a larger economic scheme."[342] Judge Jones thought that the *GDF Realty* panel "convert[ed] the ESA [into an economic regulatory scheme] by opining that the majority of species takes would result from economic activity and 'the Cave Species takes would occur as a result of plaintiffs' planned commercial development'[,]"despite the fact the panel had earlier rejected the argument that commerce connections could stem from the activity regulated.[343] We respectfully disagree. Initially, we note that Judge Jones has no generic quarrel with the "comprehensive scheme" principle of commerce clause jurisprudence since, in another context, she has approved the scheme rationale to justify regulation of non-economic activity.[344] Although the activity regulated in this case *was* clearly a commercial development,[345] this

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339 124 S. Ct. 1506 (2004). For the previous case history of *Rancho Viejo*, *see supra* note 243.

340 GDF Realty Investments, Ltd. v. Norton, No. 01-51099, 2004 WL 396975 (5th Cir. Feb. 27, 2004).

341 Id. at *5. Judge Jones argued that 1) in the absence of direct connections to commerce from the species "the panel attempts to convert the ESA to an economic regulatory statute by opining that the majority of species takes would result from economic activity," *id.* at *6, and 2) that the holding would "trample" the federal-local distinction and "result in a significant impingement of the States' traditional and primary power over land . . . use". *Id.* at *7 (quoting *SWANCC*, 531 U.S. 159, 173–74 (2001)).

342 Id. at *5.

343 *Id.* at *6 (quoting *GDF Realty*, 326 F.3d 622, 639 (5th Cir. 2003)).

344 Judge Jones has indicated that she recognizes the comprehensive scheme principle to create the commercial nexus necessary to sustsain some commerce clause regulation of otherwise non-economic activity. *See* United States v. Kirk, 105 F.3d 997, 1013–14 (5th Cir. 1997) (*en banc*) (Jones, J. dissenting) (distinguishing regulation of economic activity that substantially affects interstate commerce from regulation of simple "activity" essential to maintaining a larger scheme of interstate commerce regulation). Judge Jones explained that "[a]mong the three elements of *Lopez*' s substantial effects test, the first and most critical is that of characterization: whether § 922(o) fulfills the mission of regulating interstate commerce as (1) a regulation of *economic activity* which, although itself local, has substantial effect on interstate commerce, or (2) a regulation of *activity* which is essential to maintaining a larger, interstate regime of economic regulation" and "[b]ecause we have concluded that mere intrastate possession is neither *economic activity* nor an intrastate *activity* whose regulation is essential to a larger commercial regulatory regime, § 922(o) cannot pass muster under the *Lopez* substantial effects test." *Id.* at 1014 (emphasis added).

345 GDF Realty Investments, Ltd. v. Norton, 169 F. Supp. 2d 648, 662 (W.D. Tex. 2001) (noting

happenstance was not the trigger that "convert[ed]" the Act into an economic regulatory scheme. As evidenced by its text, legislative history, and application, the ESA is a multi-purpose statute directed at, in the main, activity "economic in nature."[346] In Justice Kennedy's words, the ESA's "structure" and "design" fulfills commercial functions.[347] We think it significant that all three circuit court decisions to address the question—the cave species, red wolf, and arroyo toad cases—concluded that the ESA was unquestionably an economic regulatory scheme.[348]

As to Judge Jones's latter argument, the Fourth, Fifth, and D.C. Circuits all maintained that the regulation of wildlife is a matter of national concern, authority over which is shared with the states.[349] Her dissent here, like Judge Luttig in *Gibbs*,[350] argued not for safeguarding an area of traditional exclusive state concern but instead, as Chief Judge Wilkinson put it for the Fourth Circuit, for the "dismember[ing]" of "long recognized federal" power.[351] We think that, if the Supreme Court chooses to review the cave species case, it will side with Judge Wilkinson, not Judge Jones, since it has recently reaffirmed the substantial federal role in wildlife regulation.[352]

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the difficulty in finding "a more direct link to interstate commerce than a Wal-Mart").

346 *GDF Realty*, 326 F.3d at 639 (citing text and legislative history of the ESA). For our discussion and analysis see *supra* notes 16, 163–68, 197–203, 225, 263–270 and accompanying text.

347 *Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring).

348 *See GDF Realty*, 326 F.3d at 639; *Rancho Viejo*, 323 F.3d 1062, 1073–74 (2003); *Gibbs*, 214 F.3d 483, 497, 506 (4th Cir. 2000). *See also supra* notes 263–70.

349 *Gibbs*, 214 F.3d at 499; *GDF Realty*, 326 F.3d at 639; *Rancho Viejo*, 323 F.3d at 1078.

350 *Gibbs*, 214 F.3d at 506–10 (Luttig, J., dissenting).

351 *Id.* at 505. For our discussion and analysis see *supra* notes 169–79, 198, 231–34, 275–82.

352 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) (O'Connor, J.) ("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."). *See generally* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW (3d ed. 1997).