The Endangered Species Act and the Imprecise Scope of the Substantial Effects Analysis

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I. INTRODUCTION

Since the United States Supreme Court famously pronounced in *United States v. Lopez*[1] that the commerce power is "broad" but "not unlimited,"[2] courts and commentators alike have struggled to map its outer boundaries. The struggle resounds in rich counterpoint in a string of recent decisions involving the antitaking provision of the Endangered Species Act (ESA).[3]

Four times in the past seven years, commercial actors and their allies have asked federal appellate courts to hold that Congress lacks the power under the Commerce Clause to regulate the "taking" of endangered species that exist on private property within the borders of a single state and that have no demonstrated commercial value. In three cases involving endangered flies, toads, and subterranean insects, the application of the antitaking provision of the ESA stopped major development projects.[4] In the fourth, it prevented farmers from shooting Red Wolves that they believed posed a threat to their livestock.[5] In each of the four cases, all decided after *Lopez* and three decided after

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1. 514 U.S. 549 (1995); *see* United States v. Morrison, 529 U.S. 598 (2000) (reaffirming the interpretation of Commerce Clause power stated in *Lopez*).

2. *See* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (explaining that *Lopez* and *Morrison* "reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited").

3. Section 9(a)(1)(B) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544 (2000), makes it unlawful for any person to "take" an endangered species or "to attempt to engage in any such conduct." ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19). By regulation, the definition of "harm" includes "significant habitat modification or degradation." 50 C.F.R. § 17.3 (2003); *see* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (upholding the regulatory definition of "harm" to include habitat destruction). The term "harass," as used in the ESA, has been administratively defined by the Fish and Wildlife Service (FWS) to include any "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

4. *See* GDF Realty Invs., Ltd. v. Norton, 169 F. Supp. 2d 648 (W.D. Tex. 2001), 326 F.3d 622 (5th Cir. 2003), *aff'd, reh'g and reh'g en banc denied*, 362 F.3d 286 (5th Cir. 2004), *petition for cert. filed* (U.S. May 27, 2004) (No. 03-1619) (mixed office, retail, and residential development); Rancho Viejo, LLC v. Norton, No. CIV.A.1:00CV02798 (ES), 2001 WL 1223501 (D.D.C. Aug. 20, 2001), *aff'd*, 323 F.3d 1062, *reh'g en banc denied*, 334 F.3d 1158 (D.D.C. 2003), *cert. denied*, 124 S. Ct. 1506 (2004) (residential development); Nat'l Ass'n of Home Builders v. Babbitt, 949 F. Supp. 1 (D.D.C. 1996), *aff'd*, 130 F.3d 1041 (D.D.C. 1997), *cert. denied*, 524 U.S. 937 (1998) (hospital, power plant, and intersection development).

5. Gibbs v. Babbitt, 31 F. Supp. 2d 531 (E.D.N.C. 1998), *aff'd*, 214 F.3d 483 (4th Cir. 2000), *cert denied*, Gibbs v. Norton, 531 U.S. 1145 (2001).

Morrison, the court concluded that the commerce power authorizes Congress to prohibit the taking of endangered species.[6]

Despite the similar outcomes, the twelve opinions making up these four decisions use markedly different perspectives to analyze the question of whether there is a sufficient commercial nexus to satisfy the requirements of the Commerce Clause. This analytical diversity typifies Commerce Clause cases since *Lopez*, as judges labor to determine whether and how a particular activity regulated by Congress substantially affects commerce.[7]

As these cases demonstrate, the struggle lies in identifying what aspect of the regulated activity should occupy the focus of the analysis. In particular, should the analysis evaluate the actor and the conduct that is the subject of the regulation, the immediate consequence of the regulated activity, the ultimate object of the statute, or something else?[8] Depending on the scope of analysis adopted, Congress's permitted reach can dramatically expand or contract.[9] As a practical matter, therefore, these cases indicate that *Lopez* and *Morrison* were revolutionary to the extent that they have forced courts to consider the limits of the commerce power in a systematic fashion, but largely hortatory to the extent that they have not meaningfully curtailed Congress's ability to enact laws in any area

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6. *See GDF Realty Invs.*, 326 F.3d at 639; *Rancho Viejo*, 323 F.3d at 1072; *Gibbs*, 214 F.3d at 501-03; *Nat'l Ass'n of Home Builders*, 130 F.3d at 1041-42.

7. While this Article explores the struggle to define commerce power in the context of environmental laws, courts have faced the same struggle in a range of contexts. *See* United States v. Ho, 311 F.3d 589 (5th Cir. 2002) (deciding whether the procedures for removing and disposing of asbestos required by the Clean Air Act §§ 112(h), 114(a), 42 U.S.C. §§ 7412(h), 7414(a) (2000), exceeded the commerce power); United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (deciding whether the aggregation of individual intrastate robberies substantially affected commerce so as to support a conviction under the Hobbs Act, 18 U.S.C. § 1951 (2000)); Groome Res. Ltd. v. Parish of Jefferson, 234 F.3d 192, 216 (5th Cir. 2000) (deciding whether the reasonable accommodations provision of the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B), which mandates equal access to housing options by the disabled, substantially affects commerce); United States v. Bird, 124 F.3d 667 (5th Cir. 1997) (deciding whether a challenge to a conviction for threatening and intimidating abortion services providers under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a)(1), substantially affects commerce).

8. *See* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (describing the task as "evaluat[ing] the precise object or activity that, in the aggregate, substantially affects interstate commerce"); *see also Groome Res.*, 234 F.3d at 204 (stating that courts must look only at the expressly regulated activity in determining whether there is a sufficient commercial nexus).

9. This reality underlies Judge Kozinski's quip that the Commerce Clause has become little more than the "Hey-you-can-do-whatever-you-feel-like Clause." *See* Judge Alex Kozinski, *Introduction*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995) ("[One] wonder[s] why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'"). It might be more accurate, however, to describe the limits of the commerce power using another familiar judicial aphorism: "I know it when I see it. . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

except those relatively few realms of authority traditionally assigned to the States.

Part II of this Article reviews the factual context of the four principal cases. Part III looks at the Supreme Court's evolving Commerce Clause jurisprudence. Part IV explores the two modes of analysis used by the judges who have reviewed the four antitaking cases. The first mode of analysis, which has two principal variants, evaluates whether the *object* or goal of the antitaking provision "substantially affects" commerce, as required by *Lopez*.[10] The first variant, used in different ways by the United States Court of Appeals for the District of Columbia Circuit in *National Ass'n of Home Builders v. Babbitt* and the United States Court of Appeals for the Fourth Circuit in *Gibbs v. Babbitt*, upholds the provision by concluding that species preservation (the object of the regulation) substantially affects commerce because species are commodities or natural resources.[11] The other variant, used in the United States Court of Appeals for the Fifth Circuit's decision in *GDF Realty Investments v. Norton* and the Fourth Circuit's alternative holding in *Gibbs*, upholds the provision by concluding that the ESA is an economic regulatory scheme designed to regulate the national market of scarce biological resources and that the prohibition of takings is necessary to achieve the goal of that scheme.[12] The second mode of analysis evaluates whether the *subject* of the antitaking provision substantially affects commerce. This mode, which the D.C. Circuit used in *Rancho Viejo v. Norton*, upholds the provision whenever the actor or the conduct regulated are commercial in nature.[13]

Part V concludes that the ends-based approach underlying *GDF Realty Investments* and *Gibbs* best satisfies *Lopez*'s central concern with federalism and, in particular, the balance between local and national governmental responsibilities while demonstrating the required link to interstate commerce through the ESA itself. Using the recent decision of *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers* as a foil, Part V argues that the proper scope of substantial-effects analysis should consider whether the object of regulated activity (as opposed to its subject) has the necessary commercial nexus to pass

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10. *See* United States v. Lopez, 514 U.S. 549, 559 (1995) ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

11. *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1047 (D.C. Cir. 1997); *see also Gibbs*, 214 F.3d at 492.

12. *See* GDF Realty Invs., Ltd. v. Norton, 362 F.3d 622, 636-41 (5th Cir. 2003); *see also Gibbs*, 214 F.3d at 498-99.

13. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068-69 (D.C. Cir. 2003).

constitutional muster. The ESA, Part V demonstrates, is itself a constitutionally comprehensive scheme for the control of scarce natural resources. Most importantly, because the scheme addresses a national problem and concerns an area in which the federal government shares authority with the States, it does not run afoul of the federalism concerns running through *Lopez* and *United States v. Morrison*.

Finally, Part VI briefly considers some policy implications of the legal success of the antitaking provision. With court approval of the antitaking provision firmly established, it is likely that the battlefront will move from the courts to Congress. In order to head off wholesale changes to the ESA, this Article proposes the use of federal monies to subsidize the costs of species conservation on private land, either through limited grants or tax subsidies.

II. THE FACTUAL CONTEXTS

Each of the four recent cases testing the antitaking provision of the ESA involved the interaction of commercial actors with creatures of little obvious commercial value.[14] With one exception, the species are not known to exist outside the boundaries of one state.[15]

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14. The ESA protects listed endangered species in several ways. It provides for the acquisition of land to implement conservation programs. ESA § 5, 16 U.S.C. § 1534 (2000). It establishes an elaborate scheme of cooperation with the States, including financial assistance, to advance the goals of endangered species conservation. ESA § 6, 16 U.S.C. § 1535. It requires federal agencies to utilize their authority to further the purposes of the Act. ESA § 7, 16 U.S.C. § 1536. It authorizes the use of federal monies to assist foreign countries in the implementation of conservation programs. ESA § 8, 16 U.S.C. § 1537. Most significantly, the antitaking provision of the ESA prohibits "any person" from engaging in a variety of activities that affect endangered species. No one may import or export endangered species; take them within the United States or upon the high seas; possess, sell, deliver, carry, transport, or ship endangered species that have been taken; deliver, receive, carry, transport, or ship them in interstate commerce; sell them in interstate commerce; or violate any regulation pertaining to them. ESA § 9, 16 U.S.C. § 1538(a)(1).

15. *See Gibbs*, 214 F.3d 483; *see also* Determination of Environmental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,790 (Nov. 19, 1986) (to be codified at 50 C.F.R. pt. 17). Courts, litigants, and commentators routinely assume that the intrastate nature of a species is significant to the analysis of whether an application of the antitaking provision is constitutional. *See* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 185-86 n.49 (1998) ("Why the fact that a bird or animal crosses state lines of its own volition and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained."); *see also* Jeffrey H. Wood, *Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After* SWANCC, 19 J. LAND USE & ENVTL. L. 91, 118-21 (2003) (proposing an "intrastate species test," under which qualifying species and "activities that affect the species" could not be regulated); Branford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 724, 751-53 (2002) ("While the Court's Commerce Clause jurisprudence is ultimately more concerned with the impacts of activities upon interstate

A. National Ass'n of Home Builders v. Babbitt

The Delhi Sands Flower-Loving Fly (Fly) is no ordinary fly. Engineered like a hummingbird, this inch-long fly hovers in the air as it imbibes flower nectar with its long butterfly-like proboscis.[16] Its realm now consists of no more than a few patches of fine, sandy soil situated entirely on private land within an eight-mile radius covering two counties in southern California, an area that represents only about three percent of its original habitat.[17] Despite—or perhaps because of—its circumspect existence, the Fly is the subject of exhibits, trade among insect collectors, and scientific research.[18]

Unfortunately for the Fly, its five remaining habitats are separated by a busy interstate highway and well-traveled railroad tracks and are "surrounded by petroleum facilities, railroad storage yards, a landfill, a cement quarry, and a sewage treatment plant," as well as a sand mine.[19] The area, which lies within an industrial development zone,[20] was the chosen site for the construction of a new county hospital and a power plant.[21] On the day before ground was to be broken on the project, the Fish and Wildlife Service (FWS) listed the Fly as an endangered species.[22] In the listing, the FWS stated that the Fly was in "imminent danger of extinction due to extensive habitat loss and degradation."[23]

Pursuant to ESA regulations, the developers took several steps to modify the plans, moving the building site about 250 feet in one direction and creating sanctuaries connected by safe-passage corridors.[24] They drew the line, however, when the plan for the redesign of a roadway intersection was rejected because it encroached on one of the safe-passage corridors.[25] San Bernardino County, along with the National Association of Home Builders, several other trade groups, and a few

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commerce than the activities' location, most judges and commentators have assumed that whether a species is located in only one state or crosses state boundaries is an important factor.").

16. Determination of Endangered Status for the Delhi Sands Flower-Loving Fly, 58 Fed. Reg. 49,881 (Sept. 23, 1993) (to be codified at 50 C.F.R. pt. 17).

17. *Id.* at 49,881, 49,884.

18. Nat'l Ass'n of Home Builders v. Babbitt, 949 F. Supp. 1, 7-8 (D.D.C. 1996).

19. Determination of Endangered Status for the Delhi Sands Flower-Loving Fly, 58 Fed. Reg. at 49,884.

20. *Id.*

21. *See Nat'l Ass'n of Home Builders*, 949 F. Supp. at 2-3.

22. *Id.* at 2; *see also* Determination of Endangered Status for the Delhi Sands Flower-Loving Fly, 58 Fed. Reg. at 49,881.

23. Determination of Endangered Status for the Delhi Sands Flower-Loving Fly, 58 Fed. Reg. at 49,881-882 (describing the lack of habitat available to the fly).

24. *See* 50 C.F.R. § 17.3 (2003); *Nat'l Ass'n of Home Builders*, 949 F. Supp. at 3.

25. *See Nat'l Ass'n of Home Builders*, 949 F. Supp. at 3.

municipalities, sued the FWS in the United States District Court for the District of Columbia to challenge the constitutionality of the antitaking provision as applied to the hospital project.[26] The district court granted summary judgment for the FWS.[27]

B. Gibbs v. Babbitt

The Red Wolf could serve as something of a poster child for the ESA. Once prevalent throughout a wide swath of the southeastern United States, its population succumbed to various land management projects and predator control efforts.[28] By the mid-1970s, only a small population remained along the border of Louisiana and Texas.[29] The surviving Red Wolf population, which had been listed as an endangered species, was captured and placed in a captive breeding program.[30] By 1986, there were six separate captive breeding programs located in public and private zoos in the United States.[31]

As envisioned by the ESA,[32] the FWS drew up an elaborate recovery plan to reintroduce several mated pairs of Red Wolves into a refuge in eastern North Carolina.[33] In an effort to secure public support for the plan, the FWS designated the released Wolves a "nonessential experimental population," a move that allowed it to promulgate a special rule that permitted takings of the animals in the defense of humans and when the Wolves were in the act of killing livestock or pets.[34]

The reintroduction program was successful, and the Wolves attracted tourists, academics, and scientists.[35] As predicted, however, the Wolves soon roamed out of the refuge onto private lands.[36] In 1990, a

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26. *Id.* at 7.

27. *Id.* at 9.

28. 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 (Nov. 19, 1986) (to be codified at 50 C.F.R. pt. 17).

29. *Id.*

30. *Id.*

31. *Id.* at 41,792.

32. *See* ESA § 4(f)(1), 16 U.S.C. § 1533(f)(1) (2000) (stating that the Secretary shall develop and implement a recovery plan for the conservation of endangered species).

33. *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.

34. *See* 50 C.F.R. § 17.84(c)(3)-(5), (10) (2003). The special rule was apparently intended to blunt local criticism of the recovery plan.

35. *See* Gibbs v. Babbitt, 31 F. Supp. 2d 531, 535 (E.D.N.C. 1998), *aff'd*, 214 F.3d 483 (4th Cir. 2000).

36. By 1998, about seventy-five Red Wolves populated eastern North Carolina. *Id.* at 534. A similar program in the Great Smoky Mountains region, covering the border of North Carolina and Tennessee, was not successful. *See id.* at 534 n.6. Still, according to the district

local farmer was prosecuted for violating the antitaking provision by shooting a Wolf, which he thought was threatening his cattle but which had not actually attacked.[37] The prosecution of the farmer instigated something of a citizen's revolt, leading to a handful of county and municipal resolutions opposing the Red Wolf program and a state law that purported to allow the trapping and killing of Red Wolves on private land when the owner had a reasonable belief that his livestock was threatened—the kind of taking for which the farmer had been prosecuted.[38] In 1997, the *Gibbs* lawsuit was filed to challenge the constitutionality of the FWS regulation prohibiting the taking of red wolves on private lands.[39]

C. Rancho Viejo, LLC v. Norton

Rancho Viejo, a real estate development company, sought to construct a housing development on 202 acres of land in southern California.[40] Its plans envisioned the construction of 280 houses on about a quarter of the acreage.[41] This parcel was to be built up using fill excavated from another section of the property.[42] Because the section from which the fill was to be taken was adjacent to a creek, the company applied for a permit from the United States Army Corps of Engineers (Corps) in order to comply with the Clean Water Act (CWA).[43]

The Corps determined that the project might affect the Arroyo Southwestern Toad (Toad),[44] an endangered species.[45] These creatures live in an area stretching from Monterrey County, California, south to Baja California, in Mexico.[46] They are spawned in "shallow pools with minimal current" and spend their lives restricted to "shallow, gravelly

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court, Red Wolves are now found in North Carolina, South Carolina, Florida, and Mississippi. *See id.* at 535 n.10.

37. *See Gibbs*, 214 F.3d at 489; *see also* 50 C.F.R. § 17.84(c)(4)(iii) ("Any private owner . . . may take [R]ed [W]olves found on his or her property . . . when the [W]olves are in the act of killing livestock or pets . . . .").

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

39. *Gibbs*, 31 F. Supp. 2d 531.

40. *See* Rancho Viejo, LLC v. Norton, No. CIV.A.1:00CV02798, 2001 WL 1223502, at *2 (D.D.C. Aug. 20, 2001).

41. *See id.*

42. *See id.*

43. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1065 (D.D.C. 2003); *see also* CWA § 404, 33 U.S.C. § 1344 (2000).

44. *See Rancho Viejo*, 323 F.3d at 1065.

45. *See* Determination of Endangered Status for the Arroyo Southwestern Toad, 59 Fed. Reg. 64,859 (Dec. 16, 1994) (to be codified at 50 C.F.R. pt. 17).

46. *See id.*

pools adjacent to sandy terraces."[47] Development has reduced the habitat of the Toad by about three-quarters.[48]

As required by section 7 of the ESA, which governs the conduct of federal actors in relation to endangered species, the Corps consulted with the FWS about the Toad.[49] The FWS concluded that the project would result in a taking because the plan to excavate fill would interfere with the Toad's migration between its breeding ground in the creek and its upland habitat.[50] Rather than nixing the project altogether, however, the FWS proposed an alternative plan involving the importation of fill.[51] Apparently because the cost of the alternative was prohibitive, the company rejected it and instead sued, challenging the antitaking provision as applied.[52] The district court granted summary judgment for the defendants based on *National Ass'n of Home Builders*.[53]

D. GDF Realty Investments, Ltd. v. Norton

Developers owned a 216-acre tract of undeveloped land in a fast-growing area outside of Austin, Texas.[54] Seizing on what must have appeared to be a good opportunity, they began to develop the land in the early 1980s.[55] Their plans called for the erection of a residential subdivision, office buildings, and a shopping center anchored by a Wal-

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47. *Id.*

48. *See id.*

49. *Rancho Viejo*, 323 F.3d at 1065. Section 7 imposes an affirmative duty on all federal agencies to consult with federal wildlife experts in "any action authorized, funded, or carried out" that might affect a listed species, so as not to "jeopardize" the existence of the species through such actions. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2000). If the agency finds that its proposed action could adversely affect a protected species, it must formally consult with the FWS. *See id.* Following such a consultation, the FWS issues a Biological Opinion, which summarizes the relevant findings and determines whether the proposed action is likely to jeopardize the continued existence of the protected species. *See* CWA § 404, 33 U.S.C. § 1344 (2000). If the proposed action is likely to result in an incidental taking of the protected species, the FWS may issue an Incidental Taking Statement, which imposes conditions on the proposed action. *See* 50 C.F.R. § 402.14 (2003). This statement serves as a safe harbor that immunizes federal agencies and federal actors from the penalties of the antitaking provision.

50. *Rancho Viejo*, 323 F.3d at 1065. The FWS also determined that Rancho Viejo had already committed a taking by digging a trench and erecting a fence running parallel to the creek. *Id.*

51. *See id.*

52. *See id.* at 1066.

53. Rancho Viejo, LLC v. Norton, No. CIV.A.1:00CV02798, 2001 WL 1223502 (D.D.C. Aug. 20, 2001).

54. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 624 (5th Cir. 2003).

55. *See id.* at 626.

Mart.[56] The project had the blessing of local government, and some infrastructure work was completed.[57]

The infrastructure work was, no doubt, complicated by the karst topography of the area, which featured a system of caves, sinkholes, and canyons cut through the limestone by water.[58] Little did the developers know the complications lurking in those caves. In 1988, the FWS added five species of miniscule, subterranean invertebrates found only in those caves to the list of endangered species protected by the ESA.[59] A sixth species was added in 1993.[60] In listing these six species of "cave bugs"[61] as endangered, the FWS warned that they were threatened with "potential loss of habitat owing to ongoing development activities" and were unprotected by any Texas law.[62]

Following the first listing, the FWS warned the owners that their proposed development might constitute a taking under the antitaking provision of the ESA.[63] In response, the owners deeded some of the land, including known habitats, to a nonprofit organization.[64] Unmoved, the FWS refused to state that future development would not constitute a taking.[65]

After the government's position scratched a potential sale of the land, the owners sought a declaratory judgment that development of the property would not constitute a taking under the ESA's antitaking

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56. *See id.* at 624.

57. *See id.*

58. *See id.* (describing a number of caves including a collection of caves known as the Cave Cluster).

59. Endangered and Threatened Wildlife and Plants; Final Rule to Determine Five Texas Cave Invertebrates to Be Endangered Species, 53 Fed. Reg. 36,029 (Sept. 16, 1988) (to be codified at 50 C.F.R. pt. 17). The five species are the Bee Creek Cave Harvestman, the Tooth Cave Pseudoscorpion, the Tooth Cave Spider, the Tooth Cave Ground Beetle, and the Kretschmarr Cave Mold Beetle. Harvestmen and Pseudoscorpions are eyeless arachnids. *Id.* at 36,030. All range from 1.4 mm to 4 mm in length. *Id.*

60. *See* Coffen Cave Mold Beetle (Batrasodes Texanus) and the Bone Cave Harvestman (Texella Rlyess) Determined to Be Endangered, 58 Fed. Reg. 43,818 (Aug. 18, 1993) (to be codified at 50 C.F.R. pt. 17). The sixth species is the Bone Cave Harvestman, which the panel opinion refers to as the "Bone Creek Harvestman." *See GDF Realty Invs.*, 326 F.3d at 625.

61. On appeal, the plaintiffs used the term "cave bugs" derisively, but the supporters of their protection embraced the term. *See* Brief for the United States at 7, GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099).

62. Endangered and Threatened Wildlife and Plants; Final Rule to Determine Five Texas Cave Invertebrates to Be Endangered Species, 53 Fed. Reg. at 36,031-32 ("Cave protection laws of the city of Austin do not apply because these areas are all outside the city limits.").

63. *See GDF Realty Invs.*, 326 F.3d at 625.

64. *See id.*

65. *See id.* at 626.

provision.[66] The district court ordered the FWS to conduct an environmental review, which, upon completion, concluded that development would likely cause a taking.[67] The case was later dismissed.[68]

The owners subsequently attempted to obtain an incidental take permit.[69] The FWS informed them that their application was inadequate but never actually issued a denial.[70] The owners again sought a declaratory judgment that the FWS had denied their incidental-taking application.[71] This prompted the FWS to issue a formal denial, which it premised on its conclusion that prohibited takings would occur if development were permitted.[72]

Armed with the denial of their incidental take permit, the landowners filed suit to challenge the application of the antitaking provision to them as an unconstitutional exercise of congressional power.[73] The district court granted summary judgment for the government.[74]

III. THE MODERN COMMERCE CLAUSE

When each of the four antitaking cases was appealed, the issue was identical: is the commerce power so broad as to allow Congress to regulate the taking of endangered species that are known to exist on private property within the borders of a single state and that lack demonstrated commercial value?[75] There can be little doubt that the

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66. *See* Four Points Util. Joint Venture v. United States, No. 93-CA-655, 1994 U.S. Dist. LEXIS 20915 (W.D. Tex. Oct. 3, 1994).

67. *GDF Realty Invs.*, 326 F.3d at 626.

68. *See id.*

69. *See id.* Congress added various exceptions to the antitaking provision of the ESA that allow incidental takings of endangered species under limited circumstances. *See* ESA § 10, 16 U.S.C. § 1539 (2000). For example, the Secretary may permit an incidental taking of an endangered species upon review of the applicant's submitted conservation plan detailing the impact of the proposed taking, the steps the applicant will take to minimize and mitigate such impact, the reasons why alternatives to the proposed taking are inadequate, and anything else the Secretary may require to determine the appropriateness of the application. *See* ESA § 10(a)(2), 16 U.S.C. § 1539(a)(2).

70. *GDF Realty Invs.*, 326 F.3d at 626.

71. *See id.* (citing GDF Realty Invs., Ltd. v. United States No. 98-CV-772 (W.D. Tex. 1998).

72. *Id.*

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

74. *Id.* at 662 (stating it would be "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart").

75. *See GDF Realty Invs.*, 326 F.3d at 628; Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1066 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1043 (D.C. Cir. 1997).

filing of these appeals, and the initial litigation, was encouraged by the Supreme Court's decision in *Lopez*, for that decision was the first indication in generations that Congress's commerce power was not effectively plenary.[76] This Part revisits Commerce Clause jurisprudence leading up to, and including, *Lopez* and *Morrison*.[77]

A. The Commerce Power Defined

The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[78] Notwithstanding James Madison's description of the powers of the federal government as "few and defined," the boundaries of the commerce power have not always proven to be easily defined over the past two hundred years.[79] While the commerce power was generally treated as plenary (and thus easily defined) for the better part of the twentieth century, such was not always the case.

1. Commerce as Intercourse

Chief Justice Marshall famously described commerce as "intercourse" in *Gibbons v. Ogden*.[80] In a word, he framed the great debate over the parameters of Congress's commerce power. By rejecting a cramped definition of commerce as mere trade, he recognized Congress's authority to set the rules governing that intercourse: "Commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[81] This pronouncement gave Congress broad berth to regulate all aspects of commerce. Indeed, the power "to prescribe the rule by which commerce is to be governed" is, it would appear from Marshall's words, the power to control all activities related to the "carrying on" of commercial intercourse.[82]

But Marshall also recognized that the power to regulate commerce was not unlimited. He wrote that Congress could not reach purely

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76. *See* United States v. Lopez, 514 U.S. 549, 589 (1995).

77. For a more thorough study of Commerce Clause jurisprudence prior to *Lopez*, see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-4 to 5-7, at 305-13 (2d ed. 1988).

78. U.S. CONST. art. I, § 8, cl. 3.

79. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

80. *See* 22 U.S. (9 Wheat.) 1 (1824).

81. *Id.* at 189-90.

82. United States v. Lopez, 514 U.S. 549, 553 (1995).

intrastate activities that did not affect other states: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one."[83] Thus, Marshall ultimately describes a power that can be wielded to govern all activities related to the carrying on of commercial intercourse between the states.

2. Commerce as Trade

Despite Marshall's expansive definition of commerce, the Supreme Court of the nineteenth century construed most purely intrastate activity as separate from commercial intercourse between states.[84] In particular, activities that preceded trade—production, manufacturing, and mining, for example—were not considered related to the carrying on of commerce and therefore were beyond the reach of Congress.[85]

When intrastate activities intersected with interstate activities, however, and the regulation of interstate commerce required the incidental regulation of intrastate activities, the Court allowed Congress to act.[86] Even so, the Court for a long time limited such regulation to contexts in which the intrastate activities had a direct effect on interstate commerce, lest "there . . . be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."[87]

3. Commerce as Activity

Over the course of several seminal decisions, the Court abandoned the direct-effect test in favor of a substantial-effect test. In *NLRB v.*

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83. *Gibbons*, 22 U.S. at 194.

84. As Justice Kennedy observed, early cases about the Commerce Clause generally concerned the states' regulation of interstate activity:

> [F]or almost a century after the adoption of the Constitution, the Court's Commerce Clause decisions did not concern the authority of Congress to legislate. Rather, the Court faced the related but quite distinct question of the authority of the States to regulate matters that would be within the commerce power had Congress chosen to act.

Lopez, 514 U.S. at 568-69 (Kennedy, J., concurring).

85. *See* Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not part of it.").

86. *See* Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 351 (1914) (explaining that Congress's authority to regulate extended to intrastate "operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance").

87. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935).

Jones & Laughlin Steel,[88] the Court effectively granted Congress considerably expanded "latitude in regulating conduct and transactions under the Commerce Clause."[89] In particular, it explained that Congress could regulate *any* intrastate activity that substantially affected interstate commerce: intrastate activities having "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions," as well as "to foster, protect, control, and restrain" it, lie within Congress's sphere of control.[90] Congress, the *Jones & Laughlin Steel* Court pronounced, had plenary power over all aspects of activity substantially affecting interstate commerce, tempered only by federalism concerns.[91]

Similarly, in *United States v. Darby*, the Court stated:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.[92]

And, like the *Jones & Laughlin Steel* Court before it, the *Darby* Court acknowledged that Congress's power had limits under the principles of federalism.[93] Thus, it was for the courts "to determine whether the particular activity regulated or prohibited [was] within the reach of the federal power."[94]

The combination of the substantial-effects test and the federalism concern focused intensely on the nature of the activity regulated and whether the cause or effect of that activity was constitutionally relevant.

In *United States v. Wrightwood Dairy*, the Supreme Court upheld the federal regulation of the intrastate production and sale of milk because such regulation was essential to the federal regulation of interstate milk prices.[95] Repeating its language in *Darby*, the Court explained that Congress's power to regulate interstate commerce

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88. 301 U.S. 1 (1937).

89. United States v. Morrison, 529 U.S. 598, 608 (2000).

90. *Jones & Laughlin Steel*, 301 U.S. at 36-37.

91. *Id.* at 37 ("Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.").

92. 312 U.S. 100, 118 (1941).

93. *See id.* at 120.

94. *Id.* at 120-21.

95. 315 U.S. 110, 119 (1942).

"extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."[96] In response to the dairy's protests that it was not engaged in interstate commerce, the Court explained that the relevant constitutional analysis focused on the effect of the regulated activity, not on its cause: "It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of [c]ongressional power."[97] Hence, Congress has the power to enact such regulations of intrastate activity as are "necessary and appropriate to make the regulation of the interstate commerce effective."[98]

In *Wickard v. Filburn*, the Supreme Court likewise upheld certain amendments to the Agriculture Adjustment Act of 1938 that regulated the production and consumption of home-grown wheat because such regulation was necessary to Congress's control of the national market in wheat.[99] The Court discounted both the local and noncommercial nature of Mr. Filburn's activity, concluding that his conduct, when aggregated with other such conduct, had an effect on interstate commerce that was "far from trivial": "[E]ven if appellee's 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 economic effect on interstate commerce . . . ."[100] Again, the Court focused its constitutional analysis on the effect on interstate commerce and downplayed the importance of the cause of that effect.[101]

In *Maryland v. Wirtz*, the Court dismissed a challenge to the application of the 1966 amendments to the Fair Labor Standards Act to the states.[102] As in its decision in *Darby*, the Court concluded that federal regulation of the labor conditions in schools and hospitals was necessary to effectuate federal regulation of interstate competition between employers.[103] Because Congress validly decided to regulate competition

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96. *Id.*

97. *Id.* at 121.

98. *Id.* ("We conclude that the national power to regulate the price of milk moving interstate into the Chicago, Illinois, marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective; and that it includes authority to make like regulations for the marketing of intrastate milk whose sale and competition with the interstate milk affects its price structure so as in turn to affect adversely the Congressional regulation.").

99. 317 U.S. 111, 118 (1942); *see also* Agriculture Adjustment Act of 1938, 7 U.S.C. § 1281 (2000).

100. *Wickard*, 317 U.S. at 125.

101. *See id.* at 124-25.

102. *See* 392 U.S. 183 (1968).

103. *See id.* at 189-90.

between employers, the Court refused to "excise, as trivial, individual instances" of such regulation, as for example the application of labor standards to an employer with only a few employees.[104] Otherwise, the aggregated effect of excising all trivial instances would be to undermine the effectiveness of the regulatory program. The Court warned that its conclusion did not allow limitless federal regulation of state activities because any activity with only a trivial impact on commerce must nonetheless arise under a comprehensive regulatory scheme bearing a substantial relation to commerce in order to lie within Congress's reach:

> Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only 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.[105]

In short, through the operation of aggregation, Congress can only reach conduct that is truly essential to a general regulatory statute that substantially affects interstate commerce. It can, however, reach any such conduct.

In *Hodel v. Indiana*, the Supreme Court upheld the constitutionality of the "prime farmlands" provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[106] The Court found that "Congress was entitled to find that the protection of prime farmland is a federal interest that may be addressed through Commerce Clause legislation."[107] It further concluded that the "prime farmland" provisions were reasonably calculated, and necessary, "to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce."[108] In rejecting

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104. *See id.* at 192-93 (acknowledging that "labor conditions in businesses having only a few employees . . . may not affect commerce very much or often" but stating that, under *Wickard*, courts do not "have power to excise, as trivial, individual instances falling within a nationally defined class of activities").

105. *Id.* at 197 n.27.

106. *See* 452 U.S. 314 (1981). These regulations require mine operators to remove, segregate, stockpile, and subsequently restore top soil layers affected by mining operations. Surface Mining and Reclamation Act of 1977, § 508, 30 U.S.C. § 1258 (2000).

107. *Hodel*, 452 U.S. at 324.

108. *Id.* at 327, 329. The Court also stated that "the Act reflects the congressional goal of protecting mine operators in States adhering to high performance and reclamation standards from disadvantageous competition with operators in States with less rigorous regulatory programs." *Id.* at 329 (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S 264 (1980) (echoing United States v. Darlog, 312 U.S 100 (1941); Maryland v. Wirtz, 392 U.S 183 (1968)).

the argument that some of the challenged provisions were not related to the goal of preventing adverse effects on interstate commerce, the Court stated that any showing of a provision's integral role in a comprehensive regulatory scheme was sufficient to justify its federal regulation:

> A complex regulatory program such as established by [SMCRA] 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 [the substantial-effects] test.[109]

The *Hodel* Court also dismissed the argument that the provisions impermissibly encroached on state land-use regulation, explaining that the challenged rules "are concerned with regulating the conditions and effects of surface coal mining."[110] Thus, the Court implicitly addressed the federalism concerns woven throughout this line of cases.[111]

B. United States v. Lopez *and* United States v. Morrison

The expansive reading of the commerce power established in the 1930s and 1940s through *Jones & Laughlin Steel*, *Darby*, *Wrightwood Dairy*, and *Wickard* remained the rule without serious refinement for sixty years, until the Court issued its eye-opening decisions in *Lopez* and *Morrison*.[112] For the first time in several generations, the Supreme Court held a federal statute to be unconstitutional as exceeding Congress's authority under the Commerce Clause. In particular, it ruled in *Lopez* that the Gun-Free School Zones Act, which prohibited the possession of firearms in school zones, was an impermissible exercise of the commerce power.[113]

In *Lopez*, a majority of the Court sought to give new life to Madison's description of the powers of the federal government as "few and defined."[114] Writing for the divided Court, Chief Justice Rehnquist framed *Lopez* as a position statement on federalism. The founders created a dual system of government with defined powers "to ensure protection of our fundamental liberties" by reducing "the risk of tyranny

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109. *Id.* at 329 n.17.
110. *Id.* at 330 n.18.
111. *Id.*
112. 514 U.S. 549 (1995); 529 U.S. 598 (2000).
113. 514 U.S. at 551.
114. THE FEDERALIST NO. 45, *supra* note 79, at 313 (stating that state power is indefinite).

and abuse from either front."[115] Respect for this system, he explained, required the Court to treat the commerce power as limited.[116]

Justice Kennedy's concurrence even more clearly articulated *Lopez*'s federalism mantra. Federalism, he wrote, requires "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States."[117] When the Federal Government oversteps its bounds, these lines become blurred and liberty is threatened.[118] Moreover, federal encroachment on "areas of traditional state concern" risks depriving the country of the valuable solutions to shared problems by "foreclos[ing] the States from experimenting and exercising their own judgment in [areas] to which States lay claim by right of history and expertise."[119]

With such federalism concerns in mind, Chief Justice Rehnquist identified three broad but distinct spheres of activity in which Congress may regulate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially affect interstate commerce.[120]

The borders of the first two spheres are more or less self-evident and (relatively speaking, at least) uncontroversial. The difficulty lies in identifying the borders of the third sphere and, in particular, Congress's ability to regulate activities that it cannot reach standing alone because

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115. *Lopez*, 514 U.S. at 552 (quoting Gregory v. Ashcroft, 510 U.S. 452, 458 (1991)).

116. *Id.* at 567-68 ("To uphold the [challenged legislation] here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do." (citations omitted)).

117. *Id.* at 576 (Kennedy, J., concurring).

118. *Id.* (Kennedy, J., concurring) ("Were the Federal Government to 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 and political responsibility would become illusory.").

119. *Id.* at 583 (Kennedy, J., concurring). One potent problem that Justice Kennedy skims over is precisely when each of these two lines of authority comes to the fore, for the notion of "areas of traditional state concerns" is not well defined. Still, Justice Kennedy tempered his concurrence by stressing the importance of *stare decisis* in considering the "essential principles now in place respecting the congressional power to regulate transactions of a commercial nature." *Id.* at 574 (Kennedy, J., concurring).

120. *Id.* at 558-59 (citing Perez v. United States, 402 U.S. 146, 150 (1971)).

they occur intrastate and lack a substantial effect on commerce in their own right.[121]

In order to respect the federalist framework of the commerce power, the *Lopez* Court enumerated four factors that courts should consider in determining whether a regulated intrastate activity substantially affects interstate commerce. First and foremost, courts should consider whether the regulated activity was commercial in character, either standing alone or as "an essential part of a larger regulation of economic activity."[122] Second, the inclusion of a jurisdictional element in the challenged statute ensures that the targeted conduct, in fact, substantially affects interstate commerce.[123] Third, the existence of legislative findings can aid the courts in understanding Congress's "judgment that the activity in question substantially affected interstate commerce."[124] Finally, it is for the courts to determine whether the regulation of a particular activity is so attenuated from Congress's enumerated powers as to encroach on state authority and thus to violate the principles of federalism by obliterating the distinction between "what is truly national and what is truly local."[125]

Applying the four factors, the Court concluded that the Gun-Free School Zones Act was an impermissible exercise of Congress's authority under the Commerce Clause.[126] The Court's decision rests on two principal findings. First, as a criminal statute, section 922(q) regulates conduct falling squarely in a traditional area of state authority—and thus beyond Congress's constitutional reach.[127] Any connection between school-zone gun possession and interstate commerce was too attenuated to justify federal regulation. Second, section 922(q) does not substantially affect interstate commerce because it regulates neither economic activity nor activity that is necessary to make a valid regulatory program effective:

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121. The antitaking cases each involve the third sphere. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 636-41 (5th Cir. 2003); Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068-69 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 492, 498-99 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1047 (D.C. Cir. 1997).

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

123. *See id.* (stating that the Gun-Free School Zones Act, 18 U.S.C. § 922(g) (2000), contains no jurisdictional element which ensures that the firearm possession in question affects interstate commerce).

124. *Id.* at 563.

125. United States v. Morrison, 529 U.S. 598, 599 (2000); *see also Lopez*, 514 U.S. at 564 (stating that the government's argument makes it "difficult to perceive any limitation on federal power, even in areas . . . where states historically have been sovereign").

126. *See Lopez*, 514 U.S. at 549.

127. *See id.* at 561 n.3.

> 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 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.[128]

The Court's discussion of the absence of either a jurisdictional element or congressional findings merely amplifies its conclusion that section 922(q) lacks any commercial nexus.[129]

In *Morrison*, the Supreme Court struck down a provision of the Violence Against Women Act that provided victims of gender-motivated violent crime with a private cause of action.[130] The Court rejected Congress's findings that the effects of violence against women, when added up, caused diminished national productivity, increased costs, and decreased supply and demand.[131] Such reasoning, the Court explained, "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects" on interstate commerce.[132] The Court thus held that Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[133] This is so because "[t]he Constitution requires a distinction between what is truly national and what is truly local."[134] These two sentences distill the essence of the Court's Commerce Clause jurisprudence in *Lopez* and *Morrison*. Under these cases, a congressional enactment pursuant to the Commerce Clause must respect the federalist principles of the Constitution and must regulate conduct that is economic in character.

The question of what exactly constitutes activity that is "economic in character," however, remains frustratingly unclear following the *Lopez* and *Morrison* decisions. Chief Justice Rehnquist conceded as much in *Lopez*: "Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal

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128. *Id.* at 561. Thus, the possession of a gun "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567.

129. This summary analysis of *Lopez* comports with the Court's own description of the case in *Morrison*: "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." *Morrison*, 529 U.S. at 610.

130. *See id.* at 602.

131. *See id.* at 613.

132. *Id.* at 615.

133. *Id.* at 617.

134. *Id.* at 617-18.

uncertainty."[135] Yet this uncertainty is a necessary consequence of the existence of limits on the commerce power. For with limits come boundaries, and with boundaries come questions about the lines of local and national authority demarcated by those boundaries.

IV. THE SCOPE OF THE SUBSTANTIAL EFFECTS ANALYSIS

The current struggle to make sense of *Lopez* and *Morrison* is immediately concerned with locating the boundaries of the commerce power. Courts facing challenges to the ESA's antitaking provision must make some kind of determination about what is being regulated and whether it substantially affects interstate commerce either standing alone or aggregated with similar activities.[136] The problem in making this determination, as the *GDF Realty Investments* panel lamented, is that the Supreme Court has not "explicitly determined the scope of the substantial effects analysis."[137] It should come as little surprise, therefore, that judges facing these challenges have used markedly different frameworks to approach the question of whether the antitaking provision substantially affects interstate commerce.

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135. United States v. Lopez, 514 U.S. 549, 566 (1995); *see Morrison*, 529 U.S. at 656 (Breyer, J., dissenting) ("The 'economic/noneconomic' distinction is not easy to apply."); United States v. Ho, 311 F.3d 589, 597 (5th Cir. 2002) ("The Supreme Court's Commerce Clause jurisprudence sometimes has yielded vague and uncertain legal standards."); *see also* Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 605 (2001) ("[T]he standards announced in *Lopez* and *Morrison* are too imprecise to provide any sort of basis for a credible and predictable limitation on congressional power.").

The Chief Justice further muddied the waters in *Morrison*, writing that "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613. Chief Justice Rehnquist commented about this determination: "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.* at 611. "[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn* . . . the regulated activity was of an apparent commercial character." *Id.* at 611 n.4.

136. With one exception, all writing judges considered the constitutionality of the antitaking provision under the third prong of *Lopez*, which required a determination of whether the provision regulated "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 559; *see supra* note 121 & accompanying text. Judge Wald argued that the provision also implicated "the use of channels of interstate commerce." Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1046 (D.D.C. 1997) (explaining that the antitaking provision was necessary "to control the transport of the endangered species in interstate commerce"). According to this analysis, takings may be prohibited because species that cannot be taken cannot be transported.

137. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 633 (5th Cir. 2003).

This Part examines the different analytical approaches taken in antitaking cases. The examination shows how the writing judges have used two distinct modes of analysis, each of which focuses on different facets of the regulation at issue.

A. The Species-Commerce Nexus

The first mode of substantial effects analysis examines the relationship between the protected species and commerce. In particular, it asks whether the species itself is in any way commercial.[138] This analysis is relatively straightforward when the particular endangered species at issue is itself a thing in commerce.[139] As a practical matter, however, few endangered species are recognizable commodities.[140]

In the absence of any obvious present value as commodities, several judges have determined that endangered species, like all species, have inherent, future commercial value as natural resources beyond any status as commodities.[141] Accordingly, if a species is allowed to go extinct, any future use of the species in commerce will be prohibited.[142] Applying the aggregation principle, this approach combines the inherent values of multiple endangered species to find a substantial effect on commerce: "the effect on commerce must be viewed not from the taking of one [single animal that is an endangered species], but from the potential commercial differential between an extinct and a recovered species."[143]

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138. *See* Jud Matthews, *Turning the Endangered Species Act Inside Out?*, 113 YALE L.J. 947 (2004) (observing the irony of upholding a provision of the ESA, which is dedicated to the preservation of endangered species, by construing endangered species as articles of commerce).

139. For example, the prohibition of the taking of a protected species of salmon is not problematic because salmon are regularly caught and sold for food. Salmon are not, however, immune from controversies related to the ESA. A current debate concerns whether fishery-raised salmon that share genetic identities with wild salmon should be counted for the purposes of determining whether a given species is threatened or endangered. *See* Bennett v. Spear, 520 U.S. 154 (1997).

140. *See* United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996) (upholding the Bald Eagle Protection Act § 1, 16 U.S.C. § 668 (2000), against a constitutional challenge in part because eagle feathers are articles of commerce).

141. For example, Judge Wald, writing in *National Ass'n of Home Builders*, stated: "The variety of plants and animals in this country are, in a sense, a natural resource that commercial actors can use to produce marketable products." Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1052 (D.D.C. 1997).

142. Gibbs v. Babbitt, 214 F.3d 483, 496 (4th Cir. 2000).

143. *Id.* at 497; *see also Bramble*, 103 F.3d at 1481 ("Extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity. . . ."); United States v. Romano, 929 F. Supp. 502, 508 (D. Mass. 1996) (upholding the Lacey Act, 16 U.S.C. §§ 3371-3378, which prohibits conduct endangering fish, by citing congressional findings about the value of protecting future commercial activity related to endangered species).

There are several variations of natural resources analysis. In one, species are treated as incubators for commerce in the same way that parks and public waters generate commercial activity related to their study and enjoyment.[144] Hence, the *Gibbs* panel decision largely turned on the fact that the Red Wolf is the object of commercial activities like tourism and research.[145] Not all species can function as economic engines, of course. Consequently, the *GDF Realty Investments* panel declined to reach a similar conclusion about the cave bugs because they attract little scientific attention and no ecotourism.[146] Still other judges dismiss out of hand the relevance of species-related commerce to the constitutional analysis.[147]

A second variation of the natural resource analysis treats endangered species as frontiers for future commercial discovery.[148] This approach assigns present value to species based on their inherent but unknown (and unquantifiable) commercial value as genetic or medicinal resources: "In the most narrow view of economic value, endangered plants and animals are valuable as sources of medicine and genes."[149] Judge Wald, a proponent of this approach, applied the economic concept of "'option value'—the value of the possibility that a future discovery will make useful a species that is currently thought of as useless"—to the analysis of the commercial value of endangered species.[150] She also drew support from statistical evidence about the billion-dollar industry in medicines derived from plants and animal species.[151]

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144. *Gibbs*, 214 F.3d at 497.

145. *Gibbs* noted, for example, the existence of tourism organized around "howling events," during which participants gathered to listen to red wolves in the nighttime. *See id.* at 493 ("Many tourists travel to North Carolina from throughout the country for 'howling events'—evenings of listening to wolf howls accompanied by educational programs.").

146. *See* GDF Realty Invs., Ltd. v. Norton, 362 F.3d 286, 291 (5th Cir. 2004) (Jones, J., dissenting) ("It is undeniable that many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under *Lopez* and *Morrison* because they involve commercial or commercially-related activities like hunting, tourism and scientific research."); *see also* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 637 (5th Cir. 2003) ("Obviously, the commercial impact of red wolves is significantly greater than that of the Cave Species.").

147. *See Gibbs*, 214 F.3d at 507 (Luttig, J., dissenting) (deriding the relevance of wolf-related tourism, research, or trade in pelts); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1073-74 (D.D.C. 1997) (Sentelle, J., dissenting) ("There is no commerce in the Delhi Sands Flower-Loving Fly.").

148. *See Nat'l Ass'n of Home Builders*, 130 F.3d at 1053.

149. *Id.* at 1052.

150. *Id.* at 1053; *see also id.* at 1053 n.14 (explaining that the aggregate effect of species extinction will be a "'real and predictable' effect on interstate commerce").

151. *Id.* at 1052-53 ("Fifty percent of the most frequently prescribed medicines are derived from wild plant and animal species. Such medicines were estimated in 1983 to be worth over $15 billion a year.").

The *GDF Realty Investments* court, like her fellow panel members, dismissed Judge Wald's argument as too speculative: "The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster."[152] Indeed, despite the romantic appeal of the notion that the cure to cancer awaits discovery among members of the wild kingdom, the argument that Congress can regulate activity related to endangered species based on their potential future value requires the kind of aggregation of effects that the *Lopez* court rejected in rebutting Justice Breyer's dissent.[153]

A third variation on the natural resources analysis relies on the importance of maintaining healthy ecosystems as a part of wise natural resource management.[154] Judge Henderson, writing in *National Ass'n of Home Builders*, concluded that the application of the antitaking provision was proper because the loss of biodiversity through species extinction threatens ecosystems: "Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems. . . ."[155] In turn, much commerce depends on healthy ecosystems.[156] Thus, the component parts of ecosystems, in the aggregate, substantially affect commerce: "the protection of a purely intrastate species (concededly including the Fly) will therefore substantially affect land and objects that are involved in interstate commerce."[157] This rationale assumes that each member of an ecosystem is necessary to the health of the whole.

A fourth variation, used by the *GDF Realty Investments* and *Gibbs* courts, is conceptually related to the ecosystem rationale proposed by

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152. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 638 (5th Cir. 2003).

153. *See* United States v. Lopez, 514 U.S. 549, 561 (1995).

154. *See Nat'l Ass'n of Home Builders*, 130 F.3d at 1053.

155. *Id.* at 1059. *But see id.* at 1065 (Sentelle, J., dissenting) ("[T]he Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.' An ecosystem is an ecosystem, and commerce is commerce.").

156. *See* ESA § 2(b), 16 U.S.C. § 1531(b) (2000). This section provides:

> The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

See also Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.").

157. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1059.

Judge Henderson. Whereas the ecosystem approach found the commercial nexus in the relationship of species to ecosystems, this variant explores whether the prohibition of takings is an essential part of a properly enacted regulatory scheme.[158] Because the *GDF Realty Investments* panel rejected the notion that the species alone substantially affected commerce, it focused its attention on whether the aggregation principle could be used to justify regulation.[159] It explained that "in order to aggregate, the regulated intrastate activity must . . . be an 'essential' part of the economic regulatory scheme."[160] Hence, the panel first asked whether the ESA was such a comprehensive program.[161] Using congressional findings and legislative history, it concluded it was.[162]

Next, the panel asked whether each application of the antitaking provision was essential to the success of the ESA. Based on the interdependence of species, it concluded that all takings could be aggregated: "[O]ur analysis of the interdependence of species compels the conclusion that regulated takes under ESA do affect interstate commerce."[163] Thus, it held, the "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes."[164]

Judge Dennis's concurrence to the *GDF Realty Investments* decision added further insight to the comprehensive scheme analysis. In

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158. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640 (5th Cir. 2003); *see also* Gibbs v. Babbitt, 214 F.3d 483, 491 (4th Cir. 2000) ("This regulation of red wolf takings on private land does not target the movement of wolves or wolf products in the channels of interstate commerce.").

159. *GDF Realty Invs.*, 326 F.3d at 636 (explaining that "there are two ways in which intrastate activity can substantially affect interstate commerce"—standing alone or when aggregated with similar activities).

160. *Id.* at 639 (criticizing Judge Wald's opinion because it did not discuss "Lopez's earlier requirement that de minimis instances of activity subsumed within a regulatory scheme must be *essential* to that scheme, so that it could be *undercut* without the particular regulation").

161. *See id.*

162. *See id.* at 640 ("ESA's take provision is economic in nature and supported by Congressional findings to that effect.").

163. *See id.* In her dissent from the denial of rehearing *en banc*, Judge Jones scorned the panel's interdependence conclusion. In particular, she scoffed at the idea that Congress, which has no general power to criminalize felonies, could regulate the taking of endangered species but not the killing of humans: "Congress has no general right to punish murder or felonies generally," yet "there is more force to an 'interdependence' analysis concerning humans, and thus a more obvious series of links to interstate commerce, than there is to 'species.'" GDF Realty Invs., Ltd. v. Norton, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of en banc rehearing) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)). Judge Jones neglects to acknowledge that regulating crime is a traditional state activity while regulating the environment is an activity shared by the state and federal governments. *Id.*

164. *GDF Realty Invs.*, 326 F.3d at 640.

particular, he explained how the interaction of the Commerce Clause and the Necessary and Proper Clause animated the second step of the analysis.[165] The prohibition of all takings of endangered species—commercial and noncommercial alike—is both rational and necessary to the ESA's goal of preserving scarce natural resources precisely because of our limited knowledge of the consequences of species extinction: "The interrelationship of commercial and non-commercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species from extinction or harm."[166] Indeed, *Lopez* supports this proposition, stating "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."[167]

Gibbs also relied on the comprehensive regulatory scheme analysis as an alternative basis for its decision.[168] It determined that the regulation was also permissible as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[169] In sum, each and every prohibited take is directly related to a valid congressional goal, namely the conservation of scarce natural resources.[170]

B. The Takings-Commerce Nexus

The second mode of substantial effects analysis addresses the commercial nature of the conduct prohibited by the antitaking provision. It places the actor whose conduct is controlled by Congress at the center of the analysis, asking whether the actor or its conduct is commercial in character.

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165. *See id.* at 642 (Dennis, J., concurring) ("[T]he Supreme Court's cases, from *Darby* to the present, confirm that Congress has the authority under the Constitution, through the intersection of the Commerce Clause and the Necessary and Proper Clause, to regulate an intrastate activity that it could not reach standing alone, if the regulation is essential or integral to the maintenance of a larger regulatory scheme properly governing interstate commerce."); *see also id.* at 642 n.8 (citing Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2001) (discussing the comprehensive scheme analysis); Adrian Vermeule, *Centralization and the Commerce Clause*, 31 ENVTL. L. REP. 11,334 (2001)).

166. *Id.* at 644 (Dennis, J., concurring) ("[T]he FWS can prohibit the Cave Species takes because such regulation is essential to the efficacy of—that is, the regulation is necessary and proper to—the ESA's comprehensive scheme to preserve the nation's genetic heritage and the 'incalculable' value inherent to that scarce natural resource, and because that regulatory scheme has a very substantial impact on interstate commerce.").

167. *See* United States v. Lopez, 514 U.S. 549, 558 (1995).

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

169. *Id.* at 497 (quoting *Lopez*, 514 U.S. at 561).

170. *See id.* at 496.

While each panel included some consideration of the commercial nature of the prohibited conduct, the *Rancho Viejo* panel most clearly articulated this approach.[171] It stated that the regulated activity was "the construction of a 202 acre commercial housing development."[172] It disposed of any concern about *Lopez*'s discussion of jurisdictional elements, congressional findings, or attenuation, concluding that it was self-evident that the construction of such a housing development affects interstate commerce: "[T]he naked eye requires no assistance here."[173] Under this approach, the species and the particular facts of its habitat are irrelevant: "[A]ll the government must establish is that 'a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce.'"[174]

In *National Ass'n of Home Builders*, both Judge Wald and Judge Henderson devoted parts of their opinions to considering the actors' conduct, though in significantly different terms.[175] Judge Wald viewed the regulation of takings as permissible under Congress's authority to control the interstate transportation of endangered species and its authority "to keep the channels of interstate commerce free from immoral and injurious uses."[176] Judge Henderson concluded that the activity regulated by the antitaking provision was the commercial development that would result in the taking: "Congress contemplated protecting endangered species through regulation of land and its development, which is precisely what the Department has attempted to do here."[177] Thus, she concluded, "Insofar as application of [the antitaking provision] of ESA here acts to regulate commercial development of the land inhabited by the endangered species, 'it may . . . be reached by Congress' because 'it asserts a substantial economic effect on interstate commerce.'"[178]

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

172. *Id.* at 1068 (comparing the regulated activity to the "construction of a hospital, power plant, and supporting infrastructure" in *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1055 (D.C. Cir. 1997)).

173. *Id.* at 1069.

174. *Id.* at 1070 (quoting *Lopez*, 514 U.S. at 557).

175. *See Nat'l Ass'n of Home Builders*, 130 F.3d at 1041, 1048, 1059.

176. *Id.* at 1048 (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 256 (1964)).

177. *Id.* at 1059 (Henderson, J., concurring) ("In this case the regulation relates to both the proposed redesigned traffic intersection and the hospital it is intended to serve, each of which has an obvious connection with interstate commerce.").

178. *Id.* (Henderson, J., concurring) (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)). In response to Judge Sentelle's dissent, Judge Henderson explained, "The rationale on which I rely permits regulation only of activities (including land use) that adversely affect species that affect, or are involved in, interstate commerce." *Id.* at 1060 n.6 (Henderson, J., concurring).

The *Gibbs* majority briefly worked through the nexus between the farmer's conduct and interstate commerce. It explained that the farmer shot the Red Wolf because he thought it threatened his livestock assets.[179] Thus, it suggested, the farmer's conduct could be regulated because the act of protecting farm assets was inherently commercial and substantially affects interstate commerce.[180] Finally, the *GDF Realty Investments* panel, which initially rejected the idea that the regulated activity could be the planned commercial development resulting in the take, later acknowledged that species takings would generally occur from economic activity, including the planned commercial development.[181]

V. FOCUSING THE SCOPE

Congress's reach extends in significantly different ways under the modes of analysis discussed in Part III, though each recognizes that the commerce power remains broad following *Lopez*.[182] If, as the species-as-natural-resources analysis concludes, Congress can regulate activities related to endangered species simply because all species belong to ecosystems and most ecosystems somehow (and to varying degrees) affect economic activity, then Congress probably could regulate *any* activity that merely stimulates or even has the capacity to stimulate economic activity. It is difficult to discern an appreciable difference between this reasoning and the arguments rejected in *Lopez*, which declined to allow Congress to "regulate any activity that it found was related to the economic productivity of individual citizens."[183]

If, as the *Rancho Viejo* court concluded, Congress can regulate all commercial activities that affect endangered species simply because the conduct is commercial in nature, then a court could interpret Congress's reach to extend to *all* commercial conduct regardless of the context in

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This suggests that she believes the application of the antitaking provision was constitutional because the regulated activity—the construction of the hospital—affects interstate commerce only because species diversity—which would be adversely affected by the construction—affects interstate commerce. If so, Judge Henderson's opinion should not be read to say that the application of the antitaking provision was constitutional because it regulated commercial development that *itself* substantially affects interstate commerce.

179. *See* Gibbs v. Babbitt, 214 F.3d 483, 489 (4th Cir. 2000).

180. *See id.* at 491-92.

181. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 633-34, 639 (5th Cir. 2003).

182. Likewise, the antitaking decisions yield differing levels of protection for endangered species. *See* Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 360 (2004) (analyzing the level of protection afforded by the four court decisions).

183. United States v. Lopez, 514 U.S. 549, 567 (1995).

which that conduct occurred.[184] The logical extension of such an analysis would be radical indeed, for it would recognize in the Commerce Clause a general federal power to regulate such commercial conduct as land development, commercial sales,[185] and professional practice—all activities that have traditionally been governed by local authority. Moreover, such a broad power would perversely offer incomplete protection to endangered species, for it would not allow Congress to act with regard to noncommercial conduct that resulted in a taking.

Under the approach used by the *GDF Realty Investments* and *Gibbs* courts, in which Congress can regulate takings to effectuate the purposes of the ESA, Congress's power is still very broad. However, that power is limited by two requirements: first, that the particular regulatory scheme (of which the challenged regulation is a part) falls within the federal government's traditional realm of authority, and second, that it substantially affect commerce.

Is the substantial effects analysis really so flexible as to support the starkly different approaches of these modes of analysis, which look at the constitutional question from opposite angles? This Part uses the lens of another recent Supreme Court decision to focus the scope of the analysis.

A. Solid Waste Agency of North Cook County v. United States Army Corps of Engineers

Dicta in the Supreme Court's recent decision in *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers* (*SWANCC*) at once complicates and clarifies the scope of the substantial effects analysis.[186] In *SWANCC*, a CWA case, the Court struck down the Corps' assertion of authority to regulate intrastate bodies of water used as habitats by migratory birds—the "migratory bird rule"—as exceeding Congress's intent in enacting the CWA.[187] The Corps had promulgated the rule based on the CWA's jurisdiction over "navigable waters" and had applied it in denying a permit to fill solitary ponds that had formed in an

184. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1070 (D.C. Cir. 2003) ("[T]o survive Commerce Clause review all the government must establish is that 'a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce' [a]nd there can be no doubt that such a relationship exists for costly commercial developments like Rancho Viejo's." *Id.* (quoting *Lopez*, 514 U.S. at 557).

185. Indeed, under this reasoning there would be nothing to prevent Congress from enacting a federal Uniform Commercial Code.

186. 531 U.S. 159 (2001).

187. CWA § 404(a), 33 U.S.C. § 1344(a) (2000). This section authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.*

abandoned sand and gravel pit, which SWANCC wanted to use as a solid waste dump.[188] The Corps interpreted the words "navigable waters" to include intrastate waters that are used by migratory birds or endangered species or that are used to irrigate crops sold in interstate commerce.[189] Because it decided the case on statutory grounds, the Court declined to address the Corps' alternative argument that the regulation "falls within Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce."[190] Nonetheless, the Court alluded to the merits of the constitutional argument in a manner that has drawn the attention of many commentators looking for clues about the effect of the Court's new federalism on environmental legislation.[191]

The government initially focused its argument on the ends accomplished by the Corps' rule. It noted that the protection of migratory birds is a "national interest of very nearly the first magnitude" and that recreational activities related to migratory birds generated over a billion dollars of commerce annually.[192] Before the Court, however, the Corps emphasized the significance of the subject of the regulation. It argued that the regulated activity was SWANCC's proposed landfill, which was "plainly of a commercial nature."[193] "These arguments," the Court cryptically observed, "raise significant constitutional questions" that would require it "to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."[194]

In line with its holding that the Corps had exceeded Congress's intentions in promulgating the migratory bird rule, the Court declined to analyze whether or how Congress itself could have acted to stop SWANCC's landfill plans within the bounds of federalism imposed by *Lopez* and *Morrison*.[195] It observed that the exercise of control over ponds and mudflats would impinge on "the States' traditional and primary power over land and water use," whereas Congress had declared

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188. *See SWANCC*, 531 U.S. at 163.

189. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,217 (Nov. 13, 1986).

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

191. *See* Wood, *supra* note 15, at 118 (concluding that *SWANCC* extends the federalism concerns of *Lopez* and *Morrison* to federal land-use and environmental regulations); Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 221 (2001) (concluding that courts should now examine the intent behind a challenged congressional enactment); Charles Tiefer, SWANCC*: Constitutional Swan Song for Environmental Laws or No More Than a Swipe at Their Sweep*, 31 ENVTL. L. REP. 11,493, 11,493 (2001) (concluding that the narrow grounds of *SWANCC* will not affect analysis of the ESA).

192. *SWANCC*, 531 U.S. at 173 (quoting Missouri v. Holland, 252 U.S. 416, 435 (1920)).

193. *Id.*

194. *Id.*

195. *See id.* at 171-72.

its intent in the CWA "to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'"[196] Thus, it concluded that the CWA was "written to avoid the significant constitutional and federalism questions raised by [the Corps'] interpretation."[197]

While *SWANCC*'s analysis of an agency rule does not answer the constitutional question posed by the statute challenged in the ESA-prohibited takings cases, it nonetheless focuses attention on the distinction between the object and the subject of a given regulation. In particular, in stating that "we find nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit such as we have here," the Court suggests that it is insufficient for the consequence of the regulated activity to substantially affect interstate commerce when the States have primary authority over the subject of the regulation.[198] In turn, this could suggest that the substantial effects analysis needs to focus particularly on the subject of the challenged regulation.

If this is correct, then *SWANCC* should be read to favor the mode of analysis adopted by the *Rancho Viejo* panel, which upheld the antitaking provision because it regulated commercial conduct.[199] The problem with this reading, as far as the antitaking provision is concerned, however, is that it would limit the federal government to regulating conduct not within an area of traditional state concern. This could alter the outcome in all four cases. In three of the cases, the subject of the regulation—according to the *Rancho Viejo* approach—was commercial development activity. The regulation of building on private land falls squarely within the bailiwick of the states.

B. The Comprehensive Scheme Approach

SWANCC can also be read to suggest that it is sufficient for the consequence of the regulated activity to substantially affect interstate commerce when that subject of regulation *does not* fall within the realm of the states. Support for this interpretation comes from the two themes

196. *Id.* at 174 (quoting CWA § 101(b), 33 U.S.C. § 1251(b) (2000)).
197. *Id.*
198. *Id.*
199. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1078 (D.C. Cir. 2003); *see also* Blumm & Kimbrell, *supra* note 182, at 359 ("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.").

of *Lopez* and *Morrison* discussed earlier, themes which emerge from a long line of cases from *Jones & Laughlin Steel*[200] through *Hodel v. Indiana*.[201] According to one theme, Congress can regulate intrastate commerce that substantially affects interstate commerce. According to a second, sometimes countering theme, Congress's regulation under the commerce power is limited only under the principles of federalism.

Regarding the first theme, the Court has frequently explained that Congress could regulate intrastate activity that substantially affected interstate commerce. In *Jones & Laughlin Steel*, it explained that intrastate activities having "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions," as well as "to foster, protect, control, and restrain" it, lie within Congress's sphere of control.[202] The Court's concern in these cases lies with the effect on interstate commerce of the regulated activity, not the cause of that effect. Hence, in *Wickard*, the apogee of aggregation, the Court concluded that a single farmer's production of wheat for his private consumption could be aggregated with other such conduct to determine whether it had more than a trivial effect on interstate commerce.[203] And recently in *Lopez*, the Court struck down the challenged criminal statute 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."[204]

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200. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

201. 452 U.S. 314 (1981).

202. *Jones & Laughlin Steel*, 301 U.S. at 37. Congress, the Court explained, had plenary power over all aspects of activity substantially affecting interstate commerce, tempered only by federalism concerns. *Id.* ("Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."); *see also* United States v. Darby, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."); United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942) ("It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power.").

203. Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's 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 economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

204. United States v. Lopez, 514 U.S. 549, 561 (1995).

Without fail, the Court discussed Congress's ability to regulate whole areas of activity based on a comprehensive scheme along with recognition of the dual system of government. For example, in *Jones & Laughlin Steel*, the Court explained that Congress's plenary power over all aspects of activity substantially affecting interstate commerce was tempered only by federalism concerns:

> Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.[205]

This same concern lies at the heart of Justice Kennedy's concurrence in *Lopez*.[206] The Gun-Free School Zones Act overreached, he maintained, because it effectively closed off the States' ability to experiment with legislative solutions to two types of problems—crime and education—that are the primary responsibility of each State.[207]

As discussed earlier, the interaction of the effects and federalism themes underlies the *Lopez* and *Morrison* decisions. In neither case was the challenged statute in any sense a rule of commerce. The conduct in *Lopez* was a simple act of possession of a gun within 1000 feet of a school.[208] The conduct in *Morrison* was a rape.[209] In both cases the statutes addressed an area of concern that traditionally has been left to the States. The statute at issue in *Lopez* had been enacted to protect school children by creating safe learning environments.[210] The statute at issue in *Morrison* was enacted to provide victims of violent crime with a civil cause of action.[211] Hence, Justice Kennedy wrote that the statutory prohibition at issue in *Lopez* was unconstitutional because "neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial

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205. *Jones & Laughlin Steel*, 301 U.S. at 36-37; *see also Darby*, 312 U.S. at 120-21 (stating that it was for the courts "to determine whether the particular activity regulated or prohibited [was] within the reach of the federal power"). Like the *Jones & Laughlin Steel* Court before it, the *Darby* Court acknowledged that Congress's power had limits under the principles of federalism. Thus, it was for the courts "to determine whether the particular activity regulated or prohibited [was] within the reach of the federal power." *Darby*, 312 U.S. at 120-21.

206. *See Lopez*, 514 U.S. at 579 (Kennedy, J., concurring).

207. *See id.* at 580, 582 (Kennedy, J., concurring).

208. *Id.* at 551 & n.1.

209. United States v. Morrison, 529 U.S. 598, 602 (2000).

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

211. *Morrison*, 529 U.S. at 619-20.

nexus."[212] And Chief Justice Rehnquist concluded in *Morrison* that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[213]

C. The ESA as a Comprehensive Scheme

In order for the antitaking provision to be constitutional under the comprehensive scheme approach, the ESA must itself have a substantial effect on interstate commerce. Some commentators have criticized the notion that the ESA can be seen as economic regulation, arguing instead that the ESA simply seeks to preserve endangered species.[214]

The findings and declarations at the beginning of the ESA make clear, however, that Congress enacted the ESA to regulate the national market in scarce biological resources, resources that are important to the health and welfare of the country: because various species of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people" have become, and are threatened with becoming, extinct, "as a consequence of economic growth and development untempered by adequate concern and conservation," conservation programs are "key . . . to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants."[215]

Furthermore, the legislative history of the ESA reveals Congress's intent to protect and preserve scarce biological resources exactly because of their proven and potential value. The House Report warned that the extinction of any species deprived the nation of genetic resources: "As we homogenize the habitats in which these [endangered] plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage."[216] The value of these genetic resources, the Report states, is "incalculable."[217] This value derives from the hidden potential all species hold for useful, even life-saving, discoveries.[218]

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212. *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring).

213. *Morrison*, 529 U.S. at 612.

214. Matthews, *supra* note 138, at 951 ("[T]o justify the ESA, the Fifth Circuit twisted its meaning, making its master narrative a story about economics. But the ESA is not about monetizing endangered species; it is about preserving them in their natural state.").

215. ESA § 2(a)(1), (3), (5), 16 U.S.C. § 1531(a)(1), (3), (5) (2000).

216. H.R. REP. NO. 93-412, at 4 (1973).

217. *Id.* ("The value of this genetic heritage is, quite literally, incalculable.").

218. The House Report stated:

> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask. . . . Who knows, or can say, what

Based on the potential of each species, the Report declared that it is in the Nation's interest to prevent any species from going extinct: "[W]ho is prepared to risk . . . those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious."[219] "The institutionalization of [this] caution," the Report proclaimed, "lies at the heart of [the ESA]."[220]

The Senate shared the House's view that all species should be preserved to protect both the known and potential commercial value of each. Commenting about the precursor to the ESA, the Senate stated that endangered species protection served to restore existing commercial markets that were threatened by the endangered nature of valuable species:

> From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time.[221]

Of greater significance, however, is the Report's focus on the potential value of each and every species. It declares that the loss of any distinctive genetic material through species extinction robs mankind of potentially invaluable discoveries:

> Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminants, is also irretrievably lost.[222]

As with the House Report, the Senate Report sets forth a policy determination that the Nation has a compelling interest in preserving all distinctive genetic material for its current and future commercial value—

> potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?

Id. at 5.

219. *Id.*

220. *Id.*

221. S. REP. NO. 91-526, at 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1415.

222. *Id.*

and, more globally, for the benefit of humanity. In short, the Senate explained that the ESA was necessary both to safeguard the "biological diversity" needed "for scientific purposes," and to safeguard the "vital biological services" endangered species perform "to maintain [the] 'balance of nature' within their environments."[223]

The Supreme Court placed its imprimatur on Congress's rationale for enacting the ESA in *Tennessee Valley Authority v. Hill*.[224] In *Hill*, private citizens sought to halt construction of a federal dam project because the Tennessee Valley Authority had failed to conform its actions to section 7 of the ESA, which prohibits federal agencies from taking endangered species through projects they authorize, fund, or carry out.[225] The Court favorably explained that the ESA institutionalized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet."[226] In upholding the ESA's protection of the lowly snail darter in the face of a multi-million dollar federal dam project on the Little Tennessee River, the Court explained that "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost."[227] The sweeping nature of this intent is apparent in the holistic structure of the ESA: "Virtually all dealings with endangered species, including taking, possession, transportation, and sale, [are] prohibited, except in extremely narrow circumstances."[228] The Court refused to override Congress's determination that the preservation of all endangered species was necessary to the larger goal of preserving scarce genetic resources for their current and future benefit:

> It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated. In any event, we discern no hint in the deliberations of Congress relating to the 1973 Act that would compel a different result than we reach here. Indeed, the repeated expressions of congressional concern over what it saw as the potentially enormous danger presented by the eradication of *any* endangered species suggest how the balance would have been struck had the issue been presented to Congress in 1973.[229]

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223. S. REP. NO. 93-307, at 2990 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2988, 2990.
224. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).
225. *See id.* at 158-60.
226. *Id.* at 178-79.
227. *Id.* at 184.
228. *Id.* at 180 (statutory citation omitted).
229. *Id.* at 185-86.

The Supreme Court thus expressed support for Congress's ability to preserve scarce national resources based on their potential value.

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court relied on the comprehensive nature of the ESA to uphold the FWS's interpretation of the antitaking provision as prohibiting habitat destruction on private lands.[230] The Court repeated its language in *Hill* that "[t]he plain intent of Congress in enacting [the] statute was to halt and reverse the trend toward species extinction, whatever the cost."[231] Based on this goal, and the plain language of the antitaking provision, the Court found that the FWS's definition of "harm" was a reasonable interpretation of the statute. In particular, it stated that the definition was proper because "the broad purpose" of the ESA justified the prohibition of all activities —including habitat destruction—that "cause the precise harms Congress enacted the statute to avoid."[232] Although the Court did not directly address the validity of the ESA under the Commerce Clause, it implicitly concluded that federal regulation of development activities on private lands containing critical habitats was proper because such activities had a direct impact on interstate commerce: "the Act encompasses a vast range of economic and social enterprises and endeavors."[233]

D. The ESA and Federalism Concerns

A pessimist could be forgiven for believing that the Court's new federalism almost certainly bodes ill for environmental regulations like the ESA and its antitaking provision. But neither *Lopez* nor *Morrison*

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230. 515 U.S. 687, 696 (1995). The Court also found support in Congress's enactment, in 1982, of the incidental take provision. ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B) (2000). It concluded that the addition showed that Congress understood that the take provision prohibited not only direct harm to endangered species but also indirect harm, such as habitat destruction. This is so because incidental taking permits are perhaps most useful to allow development activities that would otherwise cause habitat destruction. *Sweet Home*, 515 U.S. at 700-01; *see also* Mank, *supra* note 15, at 734 (discussing *Sweet Home*).

The Supreme Court also considered the ESA in *Bennett v. Spear*, 520 U.S. 154 (1997). There, a group of ranchers and irrigation districts challenged an FWS opinion analyzing the effect of the Klamath Irrigation Project on two endangered fish. *Id.* at 158-59. The petitioners claimed the FWS failed to base its opinion on the best scientific and commercial data available, as required. *Id.* at 159-60. In upholding the petitioners' right to bring this particular claim under the Administrative Procedure Act—but not under the ESA's citizen-suit provision—the Court recognized not only that "the ESA's overall goal [is] species preservation" but also that "economic consequences are an explicit concern of the ESA." *Id.* at 176-77. While the Court's attention here was on the economic consequences to the petitioners, it nonetheless acknowledged the substantial impact the ESA has on commerce.

231. *Sweet Home*, 515 U.S. at 699.

232. *Id.* at 698.

233. *Id.* at 708.

purports to diminish the federal government's role so much as to curtail its encroachment into the States' realms of authority. In this context, the Court's own precedents show that environmental regulation is a proper area for federal involvement.

It is well settled that the regulation of wildlife, in general, is a responsibility shared by the federal and state governments. In *Minnesota v. Mille Lacs Band of Chippewa Indians*, a case decided between *Lopez* and *Morrison*, the Court reaffirmed the federal government's authority to regulate natural resources: "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. . . ."[234] Indeed, the conservation of scarce natural resources, wherever they are located, for the benefit of the entire nation has traditionally been the responsibility of the federal government.[235] The reason for this is simple: the several States are often individually incompetent to regulate interstate matters.[236] Hence, the Fourth Circuit wrote that "[i]t 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."[237]

In this respect, the antitaking provision is fundamentally unlike those statutes at issue in *Lopez* or *Morrison*, each of which concerned an

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234. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999); *see* Hughes v. Oklahoma, 441 U.S. 322, 329 (1979) (holding that states do not own the fauna living within their borders and that state wildlife laws are circumscribed by congressional enactments pursuant to the Commerce Clause); Gibbs v. Babbitt, 214 F.3d 483, 499 (4th Cir. 2000) ("State control over wildlife . . . is circumscribed by federal regulatory power.").

235. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (discussing the role of federal regulation of scarce natural resources in preventing a race to the bottom among states engaged in competitive resource exploitation).

236. The House Report concerning the passage of the ESA reflects this need for national legislation: "[P]rotection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded." H.R. REP. NO. 93-412, pt. 1, at 7 (1973) (recognizing the critical role the states must play in the day-to-day management of endangered species); *see also* 119 Cong. Rec. 25669 (1973) (statement of Sen. Tunney) ("[N]o one State should be responsible for balancing its interests, with those of other States, for the entire Nation. Central authority is necessary to oversee endangered species protection programs and to insure that local political pressures do not lead to the destruction of a vital national asset."); Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 547 (2001) (exploring the nexus of the effect of environmental regulation on interstate commerce and the competency of individual states to handle such regulation).

237. *Gibbs*, 214 F.3d at 505 (admonishing that "[c]ourts seeking to enforce the structural constraints of federalism must respect the balance on both sides").

enactment falling squarely within traditional spheres of state authority.[238] Yet *Lopez* and *Morrison* endorse the kind of application of federalism found in the *GDF* and *Gibbs* decisions, for it is consistent with the principles of federalism the Supreme Court has articulated. Thus, as a valid exercise of the commerce power, the ESA can prescribe the rules by which endangered species are to be conserved anywhere within the nation. In any event, the antitaking provision regulates only those activities affecting endangered species. States are responsible for the protection of all other species.[239] Any federal encroachment on state land-use regulation is limited to those times when a species is recognized as threatened or endangered.

VI. CONSEQUENCES

The ESA has long been the target of attacks in the popular press and certain circles of intellectuals, where it is routinely condemned as "inflexible, draconian, and environmental overkill."[240] It has also been the subject of regular legislative reform efforts.[241] And since its enactment, it has been challenged in the courts on both regulatory and constitutional

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238. Although Texas, for example, has enacted an endangered species act, it does not list the six species at issue in *GDF Realty Investments*. TEX. PARKS & WILDLIFE CODE ANN. §§ 68.001-68.021 (Vernon 2002), *available at* http://www.tpwd.state.tx.us/nature/endang/animals/invertebrates.htm.

239. Both the *Gibbs* majority and the *GDF Realty Investments* en banc dissent suggest that the federal government can regulate endangered species that are closely related to commercial activities like hunting, tourism, and scientific research. *See* GDF Realty Invs., Ltd. v. Norton, 362 F.3d 286, 291 (5th Cir. 2004) (denying rehearing en banc) (Jones, J., dissenting) ("It is undeniable that many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under *Lopez* and *Morrison* because they involve commercial or commercially-related activities like hunting, tourism and scientific research."); *Gibbs*, 214 F.3d at 493-95 (describing tourism, scientific research, and trade in pelts as three interstate markets related to the wolves); *see also* Mank, *supra* note 15, at 753 (stating that the intrastate nature of a species "should be a factor in evaluating whether it affects interstate commerce" because, for example, "whether a species crosses state boundaries may affect the extent to which it is an object of tourism, affects agriculture, or contributes to biodiversity"). In the absence of some comprehensive piece of legislation controlling conduct related to species in general, this suggestion is problematic. The federal government cannot regulate nonendangered species (or other natural resources) simply because they are closely related to hunting, tourism, and scientific research, any more than it can regulate private land development simply because it is closely related to hunting and tourism.

240. Blumm & Kimbrell, *supra* note 182, at 310 (reporting cases of criticism); *see Judge Orders Review for Western Species*, *at* http://www.cnn.com/2004/TECH/science/06/28/endangeredspecies.apl (June 28, 2004) (reporting on lawsuit over the delay in adding a plant and two animals to the endangered list); Kirk Johnson, *Debate Swirls Around the Status of a Protected Mouse*, N.Y. TIMES, June 27, 2004, at A14; Kirk Johnson, *One Man's Cuddly Critter Is Another Man's Varmint*, N.Y. TIMES, May 23, 2004, Section 4 (Week in Review), at 12.

241. *See* Blumm & Kimbrell, *supra* note 182, at 310 & n.3 ("[A] poster child for congressional deregulators, the ESA has become a constant target of legislative reformers.").

grounds.[242] Its opponents are, quite simply, persistent, creative, and well-funded.

One group working against the ESA, the Pacific Legal Foundation, has devised a three-pronged strategy to overturn, or at least curtail, the ESA.[243] Its battle for public opinion cites the ESA's cost[244] and seizes on delays in constructing hospitals and schools to denounce the ESA as "species first, people last."[245] Its legal strategy of challenging the constitutionality of the antitaking provision, while unsuccessful thus far, has nonetheless defined the terms of the debate.[246] And its legislative strategy has found friends in Congress.[247]

If the Supreme Court does not reverse the trend of upholding the antitaking provision against constitutional challenge, then the battleground will move more squarely to Congress. This will almost certainly pose a serious threat to the future of the ESA. The specter of flies, toads, and cave bugs thwarting the construction of hospitals, schools, and Wal-Marts is sure to encourage some in Congress to vote for changes to the ESA.

In enacting the ESA, Congress implicitly weighed the consequence of species extinction against the consequence of controlling commercial conduct through the antitaking provision.[248] As the antitaking provision is used to stop or curtail developments with increasing success, it is possible that Congress will bow to the pressure of groups like the Pacific Legal Foundation and amend the ESA in various respects.

One possible answer to the continued legislative challenges to the ESA is to spread the cost of species preservation by offering subsidies or tax credits to individuals or developers who must alter plans to protect an

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242. *See id.* at 310 & n.8 (listing litigation challenges to the ESA).

243. For more information, see M. David Stirling, *Challenging the Endangered Species Act's Expansive Application in the Courts*, *at* http://www.pacificlegal.org/view_SearchDetail.asp?tid=Commentary&sField=CommentaryID&iID=92 (last visited Oct. 24, 2004).

244. *See* Randy T. Wimmons & Kimberly Frost, *Accounting for Species: The True Costs of the Endangered Species Act*, *available at* http://www.perc.org/publications/articles/ESA_costs.pdf (last visited Oct. 24, 2004) (critiquing the FWS's report that $610 million in taxpayer dollars was spent on endangered species in FY 2000 and estimating that the true cost was probably four times as much).

245. Stirling, *supra* note 243.

246. The Pacific Legal Foundation contributed amicus briefs in each of the four principal cases discussed in this Article.

247. *See* Pac. Legal Found., 17 Suggestions for Legislative Reform of the Endangered Species Act (Nov. 2002) (unpublished manuscript, on file with the *Tulane Environmental Law Journal*); *see also* 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 reform proposals in 108th Congress).

248. *See* ESA § 7, 16 U.S.C. § 1536 (2000); 50 C.F.R. § 402.02 (2003) (requiring federal agency consultation and the proposal of "reasonable and prudent alternatives").

endangered species. The ESA already authorizes federal expenditures to encourage the States and foreign governments to undertake activities that further the purposes of the Act.[249] Similar subsidies for private actors could broaden support for the ESA, or at least dampen developers' criticism.[250]

Fairness supports the expenditure, too. If it is a national priority to preserve endangered species, then it is unfair to impose the costs of that priority exclusively on individuals who own land on which the species are discovered. Thus, for example, in *Rancho Viejo*, the commercial actors balked at the additional cost of trucking in fill instead of moving dirt from the toad's breeding ground to the housing site.[251] A government grant could have subsidized the additional cost of the importation of fill.

To be sure, any such federal assistance should not provide windfalls to individuals whose development plans would not require additional expenditures to avoid taking of a species. Nor should it go to persons who specifically concocted development plans in order to become eligible to receive a federal grant or tax credit. Properly managed, however, a subsidy program would accomplish two national goals—economic development and species preservation.

VII. CONCLUSION

When thinking about the shape of the commerce power as it is drawn today, it would be wise to recall Justice Kennedy's circumspect concurrence in *Lopez*. "*Stare decisis*," he wrote, "operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature."[252] This same wisdom lies at the heart of the analytical approach taken by the Fifth and Fourth Circuits in their assessments of the constitutionality of the ESA's antitaking provision.

In *GDF Realty Investments* and, as an alternate holding, in *Gibbs*, the Fifth and Fourth Circuits considered the challenged provision in the context of a long line of Supreme Court decisions evaluating Congress's

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249. *See* ESA § 7, 16 U.S.C. § 1536.

250. There is ample precedent for use of federal resources to encourage corporate behavior that benefits the environment, including alternative energy credits. *See* Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN. ST. ENVTL. L. REV. 15 (2004) (discussing alternative energy credits).

251. *See* Rancho Viejo, LLC v. Norton, No. CIV.A.1:00CV0278(ES), 2001 WL 1223502, at *2 (Aug. 20, 2001).

252. United States v. Lopez, 514 U.S. 549, 575 (1995).

ability to erect comprehensive schemes to address national problems.[253] These decisions, coming from the same two circuits that shepherded *Lopez* and *Morrison* to the high court, also are attuned to federalism concerns that permeate not just those important decisions but also their predecessors. Ultimately, the scope of substantial effects analysis followed by these circuits is rather conservative.[254]

By contrast, the approach taken by the D.C. Circuit in *Rancho Viejo* opens itself to criticism from both sides of the debate. On the one hand, the decision allows a gap in the protection of endangered species by failing to address takings at the hands of noncommercial actors. On the other hand, it effectively allows the federal government to encroach on traditional areas of state concern, such as the control of construction projects.

By staying true to the Supreme Court's precedents, *GDF Realty Investments* and *Gibbs* have shown that the dictates of *Lopez* and *Morrison* do not necessarily signal a shrinking of the commerce power. Thus, with the passage of time and the benefit of a growing body of law interpreting them, it appears that while *Lopez* and *Morrison* have updated the navigational equipment used by the lower courts, they have not caused a sea change in constitutional jurisprudence. At the end of the day, this is the most important lesson of the four recent challenges to the constitutionality of the antitaking provision of the ESA.

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253. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 627-28 (5th Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 490-91 (4th Cir. 2000).

254. It is also worth noting in closing that the starting point for constitutional review of commerce power cases is the rational basis standard of review. *Lopez*, 514 U.S. at 563 ("[W]e must limit our inquiry to a determination of whether Congress could have had a rational basis to conclude that its enactment of [the statute] was a valid exercise of its commerce power."). Under this deferential standard, courts "must discipline [their] scrutiny to ensure that [they] are about the business of judicial review and not the business of social policy." United States v. Kirk, 105 F.3d 997, 999 (5th Cir. 1997) (Higginbotham, J., concurring). Courts are therefore bound to uphold a challenged application of antitaking provision if they find that Congress could have had a rational basis for concluding that its enactment of the provision was valid under the Commerce Clause, mindful of both "the 'first principles' of a Constitution that establishes a federal government with 'enumerated powers,' and [the courts'] judicial role, which requires deference to properly enacted congressional regulations." Groome Res. v. Jefferson, 234 F.3d 192, 202 (5th Cir. 2000) (citing *Lopez*, 514 U.S. at 552, 556).