

The Latest and Greatest Commerce Clause Challenges to the Endangered Species Act: *Rancho Viejo* and *GDF Realty*

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Since its enactment in 1973, the Endangered Species Act (ESA) has enjoyed considerable judicial deference, yet attacks on its constitutionality have arisen recently in the wake of Lopez and Morrison. In the latest cases, Rancho Viejo and GDF Realty, the D.C. and Fifth Circuits considered Commerce Clause attacks on the ESA. While both upheld the ESA, the courts used different rationales, diverging in their definition of the “regulated activity” for the purpose of ascertaining the impact on interstate commerce. This note concludes that Congress does and should have the authority to regulate intrastate species pursuant to its Commerce Clause powers, under the theory that deleterious effects on biodiversity substantially affect interstate commerce. Furthermore, Congress has the authority to regulate when a “race to the bottom” between states is likely to occur.

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INTRODUCTION

Since its enactment in 1973, the Endangered Species Act (ESA) has enjoyed considerable judicial deference, notwithstanding the frustration of many individual landowners whose activities have been curtailed by the existence of an endangered species on their property.¹ When the U.S. Fish and Wildlife Service determines that particular activities undertaken by landowners threaten an endangered species, the federal government

1. See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (enjoining completion of an almost-finished dam to preserve an endangered species as required by the Endangered Species Act).

must intervene and order landowners to cease or modify those activities so as to preserve the species or its habitat.² Refusal to abide by the federal scheme may result in government-imposed criminal penalties,³ levied both to deter landowners from engaging in activities that negatively impact endangered species and to preserve the species to the greatest extent possible.

The federal government's power to enact such a regulatory scheme stems from the Commerce Clause of the Constitution, which the courts have consistently interpreted as providing Congress with ample legislative authority. However, in 1995, the U.S. Supreme Court shocked the nation by invalidating a federal statute for exceeding Congress's authority under the Commerce Clause because the statute lacked the requisite connection to interstate commerce.⁴ With this ruling, the court changed the nature of Commerce Clause jurisprudence, affording Congress much less deference than it had enjoyed in the past. In this case, *United States v. Lopez*, the Court implemented a more stringent standard for judicial review of federal regulatory authority, requiring a closer analysis of the relationship between a statute's regulated activity and interstate commerce. Environmental statutes in particular are feeling the brunt of this recent shift in the judiciary, as illustrated by several recent cases questioning the validity of the Endangered Species Act in light of *Lopez*.⁵

In the latest cases, *Rancho Viejo* and *GDF Realty*, the D.C. and Fifth Circuits considered Commerce Clause attacks on the ESA.⁶ In each case, the plaintiffs argued that because the endangered species at issue existed entirely within the boundaries of a single state, the species had no impact on interstate commerce. Both circuit courts ultimately concluded that Congress did have the authority to promulgate the Endangered Species Act under the Commerce Clause, even when applied to a species existing entirely within one state. Although these cases came out in support of the ESA, the courts used very different rationales in coming to their conclusions—the Fifth Circuit explicitly rejected the reasoning used by the D.C. Circuit.⁷ The key distinction between the courts' rationales is

2. *Id.* at 160, n. 9.

3. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 625 (5th Cir. 2003).

4. *United States v. Lopez*, 514 U.S. 549 (1995).

5. See, e.g., *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

6. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003).

7. *GDF Realty*, 326 F.3d at 634 ("Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity . . . solely because

their diverging definitions of the “regulated activity” for the purpose of ascertaining the impact on interstate commerce. The Fifth Circuit focused on the endangered species themselves, while the D.C. Circuit looked instead to the development prohibited by the existence of such species to find an interstate commerce impact. Unfortunately, both courts’ rationales are problematic, making the future of certain provisions of the ESA seem tenuous at best.

In Part I, this Note revisits historical Commerce Clause jurisprudence, highlights the dramatic shift that occurred in the mid-1990s, and concludes with a discussion of where the Endangered Species Act fits within these juridical trends. Part II lays out the factual and procedural background of *Rancho Viejo* and *GDF Realty*, detailing and contrasting the differing analyses these courts have undertaken, while Part III outlines the deficiencies in each courts’ rationale. Part IV concludes that Congress does and should have the authority to regulate intrastate species pursuant to its Commerce Clause powers, under the theory that deleterious effects on biodiversity substantially affect interstate commerce. Furthermore, Congress has the authority to regulate when a “race to the bottom” between states is likely to occur.

I. THE COMMERCE CLAUSE AS LEGISLATIVE AUTHORITY FOR THE ENDANGERED SPECIES ACT

A. *Commerce Clause*

1. *The Pre-Lopez Liberal Approach*

Congress derives its authority to legislate from the United States Constitution, which limits that authority to specific enumerated powers⁸ and reserves to the states those powers not explicitly delegated.⁹ To justify far-reaching legislation unanticipated by the Constitution, Congress has generally relied upon the Commerce Clause of the Constitution, which grants Congress the power to “regulate commerce with foreign nations, among the several States, and with Indian tribes.”¹⁰ While initially the courts limited the scope of congressional authority

non-regulated conduct . . . by the actor engaged in the regulated activity will have some connection to interstate commerce.”).

8. U.S. CONST. art. I, § 1 (stating, “All legislative Powers herein granted shall be vested in a Congress of the United States”).

9. The Tenth Amendment mandates, “The powers not delegated to the United States by the Constitution . . . are reserved to the States.” As a result, states have extensive legislative control over their own affairs, including such areas as law enforcement, education, and marriage.

10. U.S. CONST. art. I, § 8, cl. 3.

under the Commerce Clause,¹¹ after Roosevelt's New Deal in the 1930s courts began to undertake a more liberal, deferential review when determining whether Congress had exceeded its regulatory authority.¹² This approach survived for nearly six decades, during which time the Supreme Court struck down not a single federal law.¹³

The Supreme Court articulated three types of activities that Congress may regulate under the Commerce Clause. The first is the "use of channels of interstate . . . commerce," which includes activities such as shipping stolen goods or transporting kidnapped persons across state lines.¹⁴ The second is the "protection of the instrumentalities of interstate commerce," which allows Congress to regulate activities such as theft from interstate shipments as "persons or things in commerce."¹⁵ Finally, the Commerce Clause grants Congress the authority to regulate "those activities affecting commerce."¹⁶ It is from this third area of permissible regulation that Congress's ability to protect endangered species stems.¹⁷ While for decades the courts have broadly construed congressional authority under the third category, upholding any law rationally related to a conceivable government purpose, in the 1990s the Supreme Court abruptly curbed this authority with one swift blow.

2. *United States v. Lopez: Restraining Congressional Authority*

In *United States v. Lopez*, the Supreme Court eschewed its traditionally deferential review of congressional regulation by striking down a federal law because the legislative record failed to demonstrate that the regulated activity substantially affected interstate commerce.¹⁸ In

11. The Supreme Court determined that certain areas of commerce were beyond Congress's Commerce Clause authority, including "production," "manufacturing," and "mining" as falling under traditional state regulatory authority. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

12. Beginning in the early 1940s, the Court concluded that Congress had the power to regulate any activity that could "affect" interstate commerce, which significantly expanded congressional regulatory authority. See e.g., *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act's imposition of wage and hour requirements on the businesses shipping goods in interstate commerce); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding federal regulation of private wheat cultivation for personal use as impacting interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the Civil Rights Act prohibition of racial discrimination in places of public accommodation); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding amendments to the Fair Labor Standards Act that extended its reach to any enterprise engaged in commerce); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (enjoining completion of an almost-finished dam to preserve an endangered species as required by the Endangered Species Act).

13. See note 12 *supra*.

14. *Perez v. United States*, 402 U.S. 146, 150 (1971).

15. *Id.*

16. *Id.*

17. See Part I(B)(2) *infra*.

18. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

Lopez, a criminal defendant was charged and convicted with violating the 1990 Gun-Free School Zones Act (GFSZA),¹⁹ which prohibited the knowing possession of a firearm within a public or private school zone.²⁰ The defendant appealed on the ground that Congress had exceeded its Commerce Clause authority by regulating a non-economic activity bearing no tenable connection to interstate commerce.²¹ The U.S. Supreme Court determined that because Congress failed to demonstrate a rational basis tying together the regulated activity—gun possession—and interstate commerce, the defendant’s conviction could not be sustained.²²

The *Lopez* Court analyzed GFSZA under the third category of permissible federal regulation under the Commerce Clause, activities having a substantial effect on interstate commerce.²³ Ultimately, the Court concluded that the Act’s prohibition on gun possession near schools bore no meaningful relationship to interstate commerce under the substantial effects test, deeming the GFSZA to be an unconstitutional exercise of federal legislation.²⁴ Central to the Court’s analysis was the fact that the law prohibited gun possession, an entirely intrastate, non-economic activity lacking obvious connection to interstate commerce. Although the Court acknowledged that it would uphold federal regulation of an intrastate activity upon a showing that the particular activity did in fact substantially affect interstate commerce, it found in *Lopez* that the government had failed to make such a showing and thus the regulation could not stand.²⁵

The *Lopez* Court offered guidelines for future analysis of Commerce Clause issues by outlining the factors for determining whether an activity substantially affects interstate commerce, known as the substantial effects test. These factors include: 1) whether the activity itself is economic or non-economic, 2) whether the statute includes an express jurisdictional hook that would limit its application to activities in interstate commerce, 3) whether the statute’s legislative history contains references supporting the nexus between the activity and interstate commerce, and 4) whether the activity’s connection to interstate commerce is attenuated.²⁶ These factors have since become the framework for every judicial determination

19. 18 U.S.C. § 922(q)(1)(A) (2000).

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

21. *Id.* at 551-52.

22. *Id.* at 567-68.

23. The Court focused on this category because gun possession cannot be characterized as either a channel or instrumentality of interstate commerce. *Id.* at 559. [hereinafter “substantial effects test”].

24. *Id.* at 568.

25. *Id.* at 567-68.

26. *See id.* at 559-568.

of the constitutionality of federal statutes promulgated under Commerce Clause authority.²⁷

However, despite its efforts at clarification, the *Lopez* Court provided insufficient guidance to the lower courts on the adequate implementation of the substantial effects test, a shortcoming evidenced both by the flurry of subsequent law review articles speculating on the extent of *Lopez*'s reach and by the lower courts' varying interpretations of the four factors described above.²⁸ As a likely result of this confusion, the Supreme Court shortly thereafter granted *certiorari* to *United States v. Morrison*, another Commerce Clause challenge to a federal statute.

3. *United States v. Morrison: Affirming the Lopez Limitations on Congressional Authority*

In *Morrison*, decided five years after *Lopez*, the Court again invalidated a federal statute as regulating an activity insufficiently related to interstate commerce. The plaintiff filed a civil suit under the Violence Against Women Act (VAWA),²⁹ which provided a civil remedy to victims of gender-motivated violence, against three fellow students whom she alleged had sexually assaulted her.³⁰ The defendants responded by arguing that Congress did not have the constitutional authority to promulgate such a law under the Commerce Clause.³¹ As in *Lopez*, the statute's constitutionality depended on showing that the regulated activity substantially affected interstate commerce.³² The Court determined that the civil remedies provision of the VAWA could not pass constitutional muster because the regulated activity – violence against women – was insufficiently related to interstate commerce, notwithstanding extensive evidence provided by the government that the occurrence and perpetuation of such violence did affect interstate commerce.³³

Subsequent courts facing Commerce Clause challenges have relied on the *Lopez* and *Morrison* analytical framework to evaluate the constitutionality of a variety of statutes.³⁴ These decisions have provided

27. See *infra* note 344 and accompanying text.

28. See, e.g., Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, Or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (2000); John Copeland Nagle, *The Commerce Clause Meets the Dehli Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998); see also *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

29. 42 U.S.C. § 13981 (2000).

30. *United States v. Morrison*, 529 U.S. 598, 601-04 (2000).

31. *Id.*

32. *Id.* at 609.

33. *Id.* at 614.

34. See, e.g., *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (upholding regulation of landowner's actions on local, private property under Clean Water Act); *Nebraska v. EPA*, 331

plaintiffs with ammunition to challenge a variety of long-standing federal regulations and environmental protection statutes in particular, including the Endangered Species Act³⁵ and the Clean Water Act (CWA).³⁶ The plaintiffs in these cases argued that the national scope of the regulations exceeds Congress's authority under the Commerce Clause, because the activities and species subject to regulation often exist entirely within a single state. Furthermore, Plaintiffs argue that the connection between such activities and interstate commerce is too attenuated to confer the necessary congressional powers authorized by the U.S. Constitution. Although these arguments have been unsuccessful in the lower courts thus far,³⁷ the Supreme Court has not directly addressed environmental regulations in light of these arguments, and the probable outcome of such a case is far from clear.³⁸

B. *Endangered Species Act*

1. *Statutory Framework*

In 1973, Congress enacted the Endangered Species Act (ESA) to halt further extinction and depletion of fish, wildlife, and plants that had occurred in the absence of such regulation.³⁹ Congress recognized the "esthetic, ecological, educational, historical, recreational, and scientific value [of endangered species] to the Nation and its people."⁴⁰

F.3d 995 (2003) (upholding Safe Water Drinking Act against facial challenge under the Commerce Clause); *United States v. Holston*, 343 F.3d 83 (2d Cir. 2003) (upholding federal statute prohibiting local production of child pornography). *But see* *United States v. Bird*, 279 F. Supp. 2d 827 (S.D. Tex. 2003) (dismissing charge against defendant for violating the Freedom of Access to Clinic Entrances Act for lack of Commerce Clause authority).

35. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding protection of red wolf population in response to Commerce Clause challenge to ESA); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding protection of spotted owl in response to Commerce Clause challenge to ESA).

36. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (challenging application of CWA under Commerce Clause) [hereinafter *SWANCC*].

37. *See generally* Reynolds, *supra* note 28 (noting that lower courts frequently did not invalidate legislation even though ostensibly applying the new *Lopez* standard).

38. In *SWANCC*, the Supreme Court faced a commerce clause challenge, *inter alia*, to the Clean Water Act, but the case was decided on other grounds and the commerce clause challenge was not adjudicated. However, Chief Justice Rehnquist indicated in dictum that such a challenge could potentially be successful in future cases. *SWANCC*, 531 U.S. at 173-74.

39. Endangered Species Act, 16 U.S.C. § 1531(a)(1)-(2) (2000). Congress had previously enacted two predecessor statutes to the ESA that were much more limited in scope, which proved to be ineffective for species preservation as a result. For further discussion on this point, *see* *Gibbs v. Babbitt*, 214 F.3d 483, 494 (4th Cir. 2000) (noting that "[t]he Endangered Species Acts of 1966 and 1969 initially targeted conservation efforts only on federal lands, but they met with limited success. . . . The [ESA] of 1973 was motivated in part by the need to extend takings regulation beyond the limited confines of federal land.").

40. 16 U.S.C. § 1531(a)(3) (2000).

Furthermore, the ESA's legislative history reflects that Congress enacted the ESA in an effort to ensure the continued availability of genetic resources for scientific endeavors and to preserve biodiversity for the national economy.⁴¹ Lower courts also have acknowledged the importance of biodiversity, with one court upholding the ESA's application because "the provision prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it."⁴²

Pursuant to section 4 of the ESA, the Secretary of the Interior utilizes the "best scientific and commercial data available" to determine whether a particular species qualifies for threatened or endangered status and therefore falls under the protection of the Endangered Species Act.⁴³ The list of threatened and endangered species is periodically revised when the Secretary concludes that a particular species is no longer in immediate danger of extinction, resulting in a malleable list that the Secretary may frequently update and adjust.⁴⁴

Once the Secretary places a particular species on the threatened or endangered list, section 9(a)(1) of the ESA mandates that "with respect

41. The House Report, in relevant part, states:

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

Rancho Viejo, 2001 WL 1223502, at * 8 (D.D.C. 2001) (quoting H.R. REP. NO. 93-412, at 4-5 (1973)). The Senate Report states:

From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case, businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.

Id. at *9 (quoting S. REP. NO. 91-526, at 3 (1969)).

42. *Nat'l Ass'n of Home Builders v. Babbitt* (NAHB), 130 F.3d 1041, 1052 (D.C. Cir. 1997).

43. 16 U.S.C. § 1533 (2000).

44. *Id.* The Fish and Wildlife Service has primary responsibility for maintenance of the list, as well as for ensuring that these requirements and purposes of the ESA are carried out and fulfilled.

to any endangered species of fish or wildlife . . . it is unlawful for any person [to] . . . take any such species within the United States."⁴⁵ For guidance, Congress provided that "[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct,"⁴⁶ and the implementing regulations define "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation . . . by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."⁴⁷ However, under section 10(a)(1)(B) Congress provided the Secretary with the power to authorize a limited number of takes that the ESA would otherwise prohibit to soften the broad reach of its provisions, so long as the taking "is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."⁴⁸

The ESA significantly expanded the federal government's role in species' preservation. Section 7 requires all federal agencies to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical."⁴⁹ This provision requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) when embarking on a course of action that could potentially harm an endangered species, with action being broadly defined as anything "authorized, funded, or carried out" by a federal agency.⁵⁰ The FWS first determines whether the agency's actions will place a species in jeopardy, then recommends any feasible alternatives that will circumvent the identified harm. The ESA mandates that the agency follow such alternatives.⁵¹

As a result, government agencies have incredibly broad authority under the ESA to regulate the activities of private citizens when endangered species are implicated, which has bred resentment against what some landowners see as a burdensome and unjustified governmental intrusion.⁵² Prior to *Lopez*, disgruntled landowners had little recourse against an application of the ESA, but in *Lopez*, the

45. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 690-91 (1995) (quoting 16 U.S.C. § 1538(a)(1)).

46. *Id.* at 691 (quoting 16 U.S.C. § 1532(19)).

47. *Id.* (quoting 50 C.F.R. § 17.3 (1994)).

48. 16 U.S.C. § 1539(a)(1)(B) (2000). The permit this provision provides is commonly referred to as an "Incidental Take Permit." *NAHB*, 130 F. 3d at 1044.

49. 16 U.S.C. § 1536(a)(2) (2000).

50. *Id.*

51. *Id.* Agency activities may also qualify for an exception under certain circumstances, similar to the section 10 incidental take permits. § 1536(h).

52. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995).

Supreme Court displayed receptivity to Commerce Clause arguments and a new willingness to assess the breadth of congressional authority, giving landowners new hope for defeating certain ESA prohibitions. Several important Commerce Clause cases followed.

2. *Commerce Clause Challenges to the Endangered Species Act Since U.S. v. Lopez*

In *National Association of Home Builders v. Babbitt (NAHB)*, San Bernadino County's plans to build a hospital were thwarted when the FWS determined that the proposed construction would result in the illegal take of an endangered species, the Dehli Sands Flower-Loving Fly, which existed entirely within the state of California.⁵³ The county filed suit in federal district court, challenging the legality of the ESA under the Commerce Clause as applied to the fly.⁵⁴ The district court found, and the D.C. Circuit agreed, that Congress did have authority to promulgate the ESA, even in light of the recently decided *Lopez* case. In the appellate court majority opinion, Judge Wald upheld the application of the ESA to the fly under the *Lopez* substantial effects test, concluding that a) the proposed development, rather than the species' take, was properly characterized as the regulated activity at issue,⁵⁵ and b) in the aggregate, a decline in biodiversity would have a predictable detrimental effect on interstate commerce, rendering species protection within the scope of Congress's Commerce Clause authority.⁵⁶

In a similar vein, the Fourth Circuit recently confronted a Commerce Clause challenge to the ESA in *Gibbs v. Babbitt*, where the FWS, acting under the auspices of the ESA, reintroduced a small population of endangered red wolves onto federal lands in eastern North Carolina and Tennessee.⁵⁷ When the wolves migrated off the federal lands, inhabiting private property and threatening local livestock, the FWS prohibited the plaintiffs from removing the red wolves from their property because they were protected under the ESA.⁵⁸ The plaintiffs brought suit in federal district court, arguing that the FWS lacked authority under the Commerce Clause to apply the ESA to the intrastate activities on private property.⁵⁹ The appellate court upheld the application of the ESA after

53. 130 F.3d 1041(D.C. Cir. 1997).

54. *Id.* at 1045.

55. *Id.* at 1055, n. 18.

56. *Id.* at 1053-56. The majority opinion also concludes that the ESA is a constitutional exercise of federal authority as a use of the channels of interstate commerce, but because both the concurring and dissenting opinions in this case reject that rationale, this portion of the opinion generally is accorded little precedential value. *Id;* see, e.g., Nagle, *supra* note 28.

57. *Gibbs v. Babbitt*, 214 F.3d 483, 488-89 (2000).

58. *Id.*

59. *Id.*

determining that the regulated activity – red wolf takes – substantially affected interstate commerce, as required by *Lopez*, through its relation to tourism, trade, and scientific research.⁶⁰ The court in *Gibbs v. Babbitt* also upheld the ESA's application to the red wolf population on private property because it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," as elucidated in *Lopez*.⁶¹ However, because many protected species lack the red wolves' popular attraction value, commentators have questioned whether the reasoning of *Gibbs v. Babbitt* would extend to other cases where these types of challenges might arise.⁶²

As illustrated in *NAHB* and *Gibbs v. Babbitt*, determining a statute's impact on interstate commerce under *Lopez* first requires defining the regulated activity: the *taking* of the species itself or the *activity* that results in the take. Although the definition of the regulated activity was not a critical piece of the lower courts' analyses in *NAHB* or *Gibbs v. Babbitt*, subsequent cases have shown that this element is crucial for the ESA's survival.

II. THE LATEST LOPEZ INTERPRETATIONS: RANCHO VIEJO AND GDF REALTY

The latest line of cases challenging the ESA's constitutionality, *Rancho Viejo* and *GDF Realty*, demonstrate the importance of defining the regulated activity, either as the take of the species or the activity that leads to the take. In *Rancho Viejo*, the D.C. Circuit determined that the development was the regulated activity, while in *GDF Realty* the Fifth Circuit explicitly rejected this characterization, concluding instead that the appropriate inquiry was the physical take of the species.⁶³ Both courts ultimately upheld the ESA's validity, but flaws in each court's rationale could prove insufficient to withstand the scrutiny of the Supreme Court should the issue come before it. The D.C. Circuit's use of the prohibited development to find a substantial impact on interstate commerce and the Fifth Circuit's reliance on principles of aggregation each seem unlikely to withstand opposing arguments, though potentially effective alternative rationales may be gleaned from prior case law, even after *Lopez*.

60. *Id.* at 497.

61. *Id.* at 497 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

62. *See, e.g.*, Dave Owen, *Gibbs v. Babbitt*, 28 *ECOLOGY L.Q.* 377 (2001).

63. *Rancho Viejo*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty*, 326 F.3d 622 (5th Cir. 2003).

A. *Development as the Regulated Activity: Rancho Viejo v. Norton*

1. *Factual Background*

In the late 1990s, Rancho Viejo purchased a 202-acre parcel of land bordered by Keys Creek, a tributary of the San Luis Rey River in northern San Diego County, for the purpose of developing a housing community.⁶⁴ The proposed development required fifty acres for the construction of 280 homes, with another seventy-seven acres used as a “borrow area,” from which the developers would remove up to six feet of topsoil for transportation to the housing construction site to be used as fill material.⁶⁵ Prior to the project’s commencement, Rancho Viejo applied for a permit from the Army Corps of Engineers (ACE) under section 404 of the Clean Water Act (CWA), because the development would result in the discharge of fill material into waters of the United States, which the CWA explicitly regulates.⁶⁶

Upon completing an initial evaluation, ACE discovered the presence of an endangered species, the arroyo southwestern toad⁶⁷ on the property and determined that the development could adversely affect the toad population.⁶⁸ Pursuant to section 7 of the ESA, which prohibits federal authorities from engaging in any activity that could “jeopardize the continued existence of any endangered or threatened species which is determined by the Secretary . . . to be critical,”⁶⁹ ACE requested a formal consultation with the FWS to determine whether the development would in fact adversely impact the arroyo toad.⁷⁰ Concluding that such an impact would occur if the development continued as planned, the FWS, in accordance with section 7 of the ESA, proposed an alternative development plan that would not unduly interfere with the arroyo toad’s habitat, allow Rancho Viejo to obtain a section 404 permit, and enable the completion of the housing development.⁷¹

Rancho Viejo rejected this alternative and instead filed suit against the FWS, alleging that the ESA exceeded Congress’s regulatory authority under the Commerce Clause in this instance because the arroyo toad existed entirely within the borders of California and had insufficient

64. *Rancho Viejo*, 323 F.3d at 1065.

65. *Id.*

66. *Id.* (citing Clean Water Act, 33 U.S.C. § 1344(a)).

67. *Id.* The toad was listed as an endangered species on December 16, 1994. Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Arroyo Southwestern Toad, 59 Fed. Reg. 64,859.

68. *Rancho Viejo*, 323 F.3d at 1065.

69. *Rancho Viejo, LLC v. Norton*, 2001 WL 1223502, *1 (D.D.C. 2001) (citing the Endangered Species Act, 16 U.S.C. § 1536(a)(2)).

70. *Id.* at *2.

71. *Id.*

commercial impact to appropriately implicate federal regulation.⁷² Both Rancho Viejo and FWS filed motions for summary judgment, and the district court found in favor of the government, relying on the D.C. Circuit's holding in *National Association of Home Builders v. Babbitt (NAHB)*.⁷³ The D.C. Circuit Court of Appeals affirmed the district court's order, also finding the judgment consistent with its earlier decision in *NAHB*, a case it held withstood the Supreme Court's ruling in *United States v. Morrison*.⁷⁴ Relying on the rationale applied in *NAHB*, the D.C. Circuit concluded that the regulated activity relevant for the *Lopez* analysis was the planned development.⁷⁵

2. District Court Opinion

Applying the *Lopez* four-factor substantial effects test to determine whether the regulated activity substantially affected interstate commerce, the district and appellate courts upheld the constitutionality of the ESA as applied to the arroyo toad. Because the Supreme Court in *Morrison* emphasized the first *Lopez* factor, whether the regulated activity is economic in nature, more heavily than the other three factors,⁷⁶ most of the district and appellate court opinions address this issue, and this Note will focus on this aspect of the analysis.

The district court cited four separate grounds for rejecting Rancho Viejo's contention that the taking of arroyo toads was non-economic. First, the court distinguished both *Lopez* and *Morrison* because the federal regulation in those cases applied to non-economic and potentially violent criminal conduct, areas of traditional state regulation, while the ESA "regulates activities that threaten endangered species, which is a subject traditionally within the federal government's province."⁷⁷ Second, the court defined the regulated activity as the proposed development, rather than the arroyo toad itself,⁷⁸ because the court "must focus on the

72. *Id.*

73. *Rancho Viejo*, 323 F.3d at 1066.

74. *Id.* at 1070-71.

75. *Id.* at 1072-73. Although the court focused on the *NAHB* rationale that the regulated activity is the development itself, the fact that *NAHB* also determined that loss of biodiversity has a substantial effect on interstate commerce was noted, but the court did not address this aspect of the case because the first argument was deemed sufficient to settle the case. *Id.* at 1067, n.2.

76. *Morrison*, 529 U.S. 598, 613 (2000) ("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").

77. *Rancho Viejo*, 2001 WL 1223502, at *6 (D.D.C. 2001) (noting that the court in *Gibbs*, 214 F.3d at 497, determined, "Congress undoubtedly has the constitutional authority to pass legislation for the conservation of endangered species.").

78. Other circuits have defined the regulated activity as the taking of a species, as discussed in Part II *infra*, and this distinction dramatically affects the courts' reasoning in determining whether the ESA passes constitutional muster.

actual activity being regulated – in this case the building of the homes.”⁷⁹ Third, the court concluded that even if the regulated activity were defined as species takes, previous cases had specified that such takes, and the concomitant loss of biodiversity through eventual extinction, affects commercial activity because scientists, students, and professionals travel to the state to observe species. Furthermore, the toad’s unique genetic material has potential commercial value.⁸⁰ Finally, the court rejected Rancho Viejo’s argument that each individual take must substantially affect interstate commerce, relying on the *Lopez* determination that “where a general regulatory statute bears a substantial relation to commerce, the *de minimus* character of individual instances arising under the statute is of no consequence,” meaning that a showing that each take affected commerce was unnecessary.⁸¹ For these reasons, the court concluded that the regulated activity was economic in nature; therefore, the first *Lopez* consideration weighed in favor of federal regulatory authority for the ESA.

The district court also emphasized the differences between the ESA and the regulations at issue in *Lopez* and *Morrison*, focusing on the federal government’s encroachment on traditional state concerns in the latter cases, *i.e.* “general police power, family law, and crime.”⁸² Based on this distinction and the court’s determination that the *Lopez* factors weighed in favor of the ESA’s application, the court granted summary judgment in favor of the defendants, upholding the ESA as a constitutional exercise of federal authority, as applied to the arroyo toad.

3. *The D.C. Circuit Opinion*

The Court of Appeals for the D.C. Circuit, relying on *NAHB*, affirmed the district court’s decision after undertaking a similar *Lopez* analysis and addressed additional arguments not included in the district court opinion.⁸³ The court determined that the relevant regulated activity was the proposed development and building of 280 homes, which the court deemed to be “plainly an economic activity.”⁸⁴ As a result, the circuit court limited its inquiry solely to whether the development as a whole substantially impacted interstate commerce.⁸⁵ In assessing the

79. *Rancho Viejo*, 2001 WL 1223502, at *6.

80. *Id.* at *7.

81. *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

82. *Id.* at *10.

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

84. *Rancho Viejo*, 2001 WL 1223502, at *6.

85. *Id.* The court determined that in our national economy, it is almost inevitable that any commercial enterprise will necessarily rely on materials in interstate commerce, which the court deemed sufficient to give Congress regulatory authority under the Commerce Clause. *Id.*

economic nature of the regulated activity,⁸⁶ the court noted that “the prohibited taking is accomplished by commercial construction, and the unlawful taker is Rancho Viejo,” concluding that both the development and the developing real estate company “have a plainly commercial character,” which therefore substantially affected interstate commerce.

On appeal, the developer in *Rancho Viejo* argued that *Morrison* and another recent Supreme Court decision⁸⁷ overruled the reasoning the court utilized in *NAHB*, thereby rendering the lower court’s application of *NAHB* to the facts of the case judicial error. Rancho Viejo contended those cases stood for the proposition that whether or not the regulated activity is economic is dispositive. In other words, Rancho Viejo argued that Congress may not regulate *any* non-economic activity under the Commerce Clause.⁸⁸ Because the arroyo toads cannot be considered economic in and of themselves, Rancho Viejo argued that the toads’ impact on interstate commerce could not be aggregated, rendering them beyond the reach of congressional authority.⁸⁹ However, the appeals court noted that *Morrison* explicitly “declined to adopt a categorical rule against aggregating the affects of non-economic activity,” but did not directly address this issue because it concluded that the proper inquiry of the regulated activity was the proposed development, not the arroyo toad. As such, the aggregation argument was moot.⁹⁰

4. *En Banc Rehearing Denied*

Rancho Viejo requested an *en banc* hearing after the circuit court’s three-judge panel rejected its appeal from the district court’s grant of summary judgment in favor of the government. On July 22, 2003, a majority of the D.C. Circuit voted to deny the request.⁹¹ However, Judges Sentelle and Roberts each wrote dissenting opinions from the order noting that the Fifth Circuit in *GDF Realty* explicitly rejected the D.C.

86. *Rancho Viejo*, 323 F.3d at 1072. Although the court analyzed all four *Lopez* factors, because the Court in *Morrison* had emphasized the importance of the first factor over the others, the court in this case focused mainly on the economic nature of the regulated activity. However, the court did conclude that section 9 of the ESA did not have a jurisdictional hook, the existence of legislative history under circumstances where the regulated activity is so obviously economic is irrelevant, and because Rancho Viejo failed to argue that its development proposal was attenuated from interstate commerce, the court concluded that the development was not attenuated. *Id.* at 1068-69.

87. *SWANCC*, 531 U.S. 159 (2001). The court dismissed Rancho Viejo’s argument relying on this case because the Court in *SWANCC* specifically chose not to address the issue of whether the law at issue (the Clean Water Act) was constitutional under the Commerce Clause, basing the inquiry and decision on other grounds. *Rancho Viejo*, 323 F.3d at 1071.

88. *Rancho Viejo*, 323 F.3d at 1071-72 (citing *United States v. Morrison*, 529 U.S. 598, 610 (2000)).

89. *Id.*

90. *Id.*

91. *Rancho Viejo v. Norton*, 334 F.3d 1158, 1158 (D.C. Cir. 2003) (*en banc* hearing denied).

Circuit panel's majority opinion and arguing that the regulated activity should be defined as the taking of an endangered species rather than the proposed development.⁹²

B. Species Takes as the Regulated Activity: GDF Realty Investments v. Norton

1. Factual Background

In 1983, Dr. Fred Purcell purchased 216 acres of land near Austin, Texas, for the purpose of commercial development.⁹³ The topography of this particular area was composed of multiple caves, sinkholes, and canyons, including several caves collectively known as the Cave Cluster.⁹⁴ In furtherance of his intended development, Purcell commenced installation of the requisite public utilities and infrastructure, which he dedicated to the city of Austin as a right-of-way, as a condition for the city's approval of the project.⁹⁵

However, in 1988 the FWS listed five subterranean invertebrate species on Purcell's property, collectively known as the "Cave Species,"⁹⁶ as endangered under section 4 of the ESA.⁹⁷ A year later, the FWS informed Purcell that his development plans could result in a take of one or more of the endangered Cave Species, a violation of section 9 of the ESA.⁹⁸ Attempting to appease the FWS, Purcell deeded six acres of Cave Species habitat areas located on the property to a non-profit environmental organization and gated the most "ecologically sensitive" caves pursuant to expert recommendations.⁹⁹ Notwithstanding these efforts, the FWS refused to approve Purcell's development plans, and in 1991 Purcell's attempted sale of a portion of the property failed as a result of the encumbrance.¹⁰⁰

Subsequently, the FWS indicated that development could proceed provided that Purcell adhered to FWS recommendations such as drainage allowances and the relocation of the development to an area farther away

92. *Id.* at 1159-60.

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

94. *Id.*

95. *Id.* at 624-25.

96. The Cave Species include the Bee Creek Cave Harvestman, the Bone Creek Harvestman, the Tooth Cave Pseudoscorpion, the Tooth Cave Spider, the Tooth Cave Ground Beetle, and the Kretschmarr Cave Mold Beetle. *Id.* at 625.

97. *Id.* at 625 (citing Endangered Species Act, 16 U.S.C. § 1533(a)(1); 53 Fed. Reg. 36,029 (Sept. 16, 1988)). The FWS added a sixth species in 1993. 58 Fed. Reg. 43,818 (Aug. 18, 1993)).

98. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 625 (5th Cir. 2003).

99. *Id.*

100. *Id.* at 626.

from the canyons that the Cave Species inhabited.¹⁰¹ In response, Purcell applied for an incidental take permit under section 10 of the ESA so that the development could proceed as planned.¹⁰² Ultimately, FWS refused to grant the permits, precluding Purcell from developing as he had intended. He filed suit against the FWS in federal district court, alleging *inter alia* that Congress lacked authority under the Commerce Clause to regulate species that exist entirely intrastate and that the ESA was unconstitutional as applied to the intrastate Cave Species.

The district court granted summary judgment in favor of the government, determining that Congress did have Commerce Clause authority to regulate the Cave Species under section 9 of the ESA.¹⁰³ The appellate court affirmed the district court's ruling, utilizing the factors set forth in *Lopez* and *Morrison*. Although the outcome of this case accords with *Rancho Viejo*, the Fifth Circuit's rationale diverges dramatically from that of the D.C. Circuit.¹⁰⁴

2. *The District Court Opinion*

The district court narrowed the inquiry from a broad examination of all possible species takes to the take of Cave Species in this particular instance, stating that "this case involves defendants' regulation of one specific take—the alleged take of the Cave Species by Plaintiffs' proposed commercial development."¹⁰⁵ By narrowing the scope in this manner, the court identified the commercial development as the regulated activity, which it easily deemed economic in nature and linked to interstate commerce.¹⁰⁶

Purcell also objected to the regulation's constitutionality on the ground that it encroached upon areas of state authority, namely land use and zoning, and undermined the federalist form of government.¹⁰⁷ The court rejected this argument as well, observing that state and federal

101. *Id.* at 624-25.

102. *Id.* at 626. Section 10 of the ESA allows the taking of endangered species under certain limited circumstances. 16 U.S.C. § 1539(a) (2000).

103. *GDF Realty*, 326 F.3d at 626.

104. *See id.*

105. *GDF Realty Invs., Ltd. v. Norton*, 169 F. Supp. 2d 648, 656 (W.D. Tex. 2001).

106. *Id.* at 657-58. For the second *Lopez* factor, the district court determined that section 9 did not have a jurisdictional hook that would limit its applicability to activities that truly affect interstate commerce, but its absence was insignificant because the regulated activity was economic in and of itself. *Id.* at 661. The court similarly disregarded the third *Lopez* factor because the economic nature of the regulated activity was apparent; however, the court noted that Congress had demonstrated the relationship between the take provision and interstate commerce in its legislative history. *Id.* at 662. Finally, the court rejected plaintiff's contention that because the ground clearing only indirectly harmed the Cave Species, the relationship was attenuated, concluding that the development activities directly caused the take through the species' habitat destruction. *Id.* at 662-63.

107. *Id.*

governments have traditionally shared supervision over wildlife and environmental conservation and that judicial precedent supports the federal government's regulation of private land for environmental reasons.¹⁰⁸ Based on this analysis, the district court concluded that as applied in this case, section 9 regulated activity "clearly connected to interstate commerce," and granted summary judgment in favor of the defendants.¹⁰⁹

3. *The Fifth Circuit Opinion*

The Fifth Circuit Court of Appeals affirmed the district court's decision but relied on a different rationale. Rather than characterizing the proposed development as the regulated activity, the circuit court concluded that the appropriate measure for determining an activity's economic nature is the activity *expressly* regulated.¹¹⁰ In this case, the court found the expressly regulated activity to be the actual Cave Species take, not the development that results in species takes.¹¹¹ The Fifth Circuit rejected the District Court's rationale, shared by the D.C. Circuit in *Rancho Viejo*, that the development was the regulated activity, because it determined that "to allow the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors."¹¹² Furthermore, the court noted that while "the *effect* of regulation of ESA takes may be to prohibit . . . development in some circumstances . . . Congress, through the ESA, is not directly regulating commercial development."¹¹³ This determination was mirrored in the *NAHB* dissent.¹¹⁴

However, characterizing the regulated activity as species takes itself could prove problematic for environmental regulation under the *Lopez* analysis because, as the Fifth Circuit conceded, assigning economic or commercial value to the Cave Species takes would be difficult.¹¹⁵ The court circumvented this difficulty by aggregating the impact of Cave Species takes with all other endangered species takes, thereby providing

108. *Id.* at 663-64 (citing *Gibbs v. Babbitt*, 214 F.3d 483, 500 (4th Cir. 2000); *Groome Res. Ltd., v. Jefferson*, 234 F.3d 192, 216 (5th Cir. 2000)).

109. *Id.* at 664.

110. *GDF Realty*, 326 F. 3d at 634-35.

111. *Id.* at 633.

112. *Id.* at 634. In other words, under the district court's reasoning, the ESA's authority depended on the commercial nature of a particular development, which would fail to reach the "lone hiker" in the woods, or the homeowner clearing property of brush, activities which certainly fall within the ambit of the ESA's prohibitions should an endangered species take result.

113. *Id.* at 634 (emphasis in original).

114. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1067 (D.C. Cir. 1997) (Sentelle, J., dissenting).

115. *GDF Realty*, 326 F.3d at 638.

the requisite impact on interstate commerce otherwise lacking if the Cave Species takes were considered alone. In its analysis, the court noted that although *Lopez* and *Morrison* stand against aggregating non-commercial, non-economic intrastate activities, such activities may be aggregated when they constitute an essential part of a larger regulation of economic activity.¹¹⁶ Specifically, “where a general regulatory statute bears a substantial relation to commerce, the *de minimus* character of individual instances arising under that statute is of no consequence.”¹¹⁷ The court concluded that the Endangered Species Act is such a general regulatory statute. The ESA’s legislative history makes clear that that Congress considered the economic impact of species decline, also acknowledging that the majority of endangered species takes result from economic activity.¹¹⁸

Additionally, to permit aggregation, the *de minimus* instance at issue must be *essential* to the regulatory scheme. That nearly fifty percent of listed endangered species reside entirely within one state strongly suggests that the regulation of intrastate species is crucial to the ESA’s purpose and effectiveness.¹¹⁹ If intrastate species takes are deemed beyond the scope of federal regulatory authority, the ESA would no longer reach a substantial number of species takes, leaving those species without federal protection and undercutting the ESA’s overall effectiveness. The court’s responsibility to uphold the ESA’s purpose of preserving biodiversity directly places the ESA within the *de minimus* exception carved out by *Lopez*. As the court in *GDF Realty* concluded, this exception provided ample justification for aggregation of endangered species takes, even though the economic impact of the Cave Species takes individually might be negligible.¹²⁰

4. *En Banc Rehearing Denied*

On February 27, 2004, a majority of judges on the Fifth Circuit Court of Appeals voted to deny an *en banc* rehearing of *GDF Realty*, though six of the eighteen judges joined a strongly worded dissenting opinion.¹²¹ In the dissent, Judge Jones condemns the majority’s analysis, stating, “The panel holds that because ‘takes’ of the Cave Species ultimately threaten the ‘interdependent web’ of all species, their habitat is subject to federal regulation by the [ESA]. Such unsubstantiated reasoning offers but a

116. *Id.*

117. *United States v. Lopez*, 514 U.S. 549, 558 (1995) (emphasis in original) (internal citations omitted).

118. *GDF Realty*, 326 F.3d at 639.

119. *NAHB*, 130 F.3d at 1052.

120. *GDF Realty*, 326 F.3d at 639.

121. *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004).

remote, speculative, attenuated, indeed more than improbable connection to interstate commerce.”¹²² The judge further noted that the court’s conclusions provided “these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*. The panel’s commerce clause analysis is in error.”¹²³ This vehement opposition to such federal regulation easily could prove persuasive to other courts, which does not bode well for future of the Endangered Species Act.

III. RANCHO VIEJO AND GDF REALTY’S RATIONALES ARE BOTH FLAWED

A. *Development Defined as the Regulated Activity is Overinclusive*

The D.C. Circuit’s rationale in *NAHB* and *Rancho Viejo* that the ESA survives constitutional challenges when regulating intrastate species may be attractive to ESA proponents, but critical deficiencies with the court’s reasoning could undermine the ruling’s efficacy. The first problem is that the court’s rationale might result in the over-inclusion of many activities as falling within Congress’s regulatory authority that may have no effect on interstate commerce whatsoever, either individually or in the aggregate, so the logical stopping point for federal authority would be difficult to ascertain.¹²⁴ The courts have addressed this concern, known as the “line-drawing problem,” in several cases where federal laws have been challenged under the Commerce Clause, although line-drawing concerns typically arise in the context of a dissenting or concurring opinion.¹²⁵ The argument centers on the fact that Congress could use its Commerce Clause power to regulate virtually any activity, because in our national economy almost every activity inevitably relies on materials or things somehow connected to interstate commerce. Judge Sentelle addressed this issue in his dissent from the majority opinion in *NAHB*, in which he criticized the development-as-regulated-activity rationale for allowing federal regulatory control over an intrastate species.¹²⁶ In the dissenting opinion, he stated, “Nowhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because

122. *Id.* at 287 (Jones, J., dissenting).

123. *Id.*

124. Judge Sentelle’s *NAHB* dissent nicely illustrates this point. He says, “A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medial, scientific, or economic value which could then propel it into interstate commerce. There is no stopping point.” *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting).

125. *See id.*

126. *Id.* at 1067.

the regulation itself can be crafted in such a fashion as to have such an effect.¹²⁷

The line-drawing problem also arose in the present cases. In addition to rejecting the reasoning utilized in *NAHB* and *Rancho Viejo*, the court in *GDF Realty* cited this logical stopping point argument as determinative in rejecting the development's connection to commerce as justification for regulation. The court noted, "To accept [that the development is the regulated activity] would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress's authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce."¹²⁸

Furthermore, in *Rancho Viejo*, Chief Judge Ginsburg wrote a concurrence to specifically address this issue, because he felt the majority opinion insufficiently limited federal authority to those instances where interstate commerce is actually affected.¹²⁹ To this end, he stated, "Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if—but only if—that take itself substantially affects interstate commerce."¹³⁰

B. Development Defined as the Regulated Activity is also Underinclusive

The development-as-regulated-activity rationale also may prove underinclusive. Many endangered species takes that occur in violation of the ESA's prohibitions are not committed by development companies, but by individuals under circumstances that could never be characterized as economic in nature, such as a homeowner clearing brush from her property and inadvertently destroying an endangered species' habitat. The federal government's authority to regulate takes of endangered species must rest on the fact that the takes substantially affect interstate commerce. The ESA is not limited to takes that occur in the context of development but rather encompasses *all* takes of endangered species, regardless of the source.¹³¹ Under the D.C. Circuit's reasoning, the federal government would lack the authority to regulate takes of endangered species that were not commercially motivated. One example is the hypothetical lone hiker in the woods who may inadvertently harm an endangered species, an action currently falling within the regulatory ambit of the ESA. By defining development as the regulated activity to

127. *Id.*

128. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003).

129. *Rancho Viejo*, 323 F.3d at 1080.

130. *Id.*

131. 16 U.S.C. § 1538 (2000).

satisfy the impact on interstate commerce requirement, as in *Rancho Viejo*, the ESA could no longer reach the lone hiker's actions. Commentators have seized upon this problem as a fatal flaw in the D.C. Circuit's rationale.¹³²

In his *Rancho Viejo* concurrence, Chief Judge Ginsburg clarified that the ESA's authority would extend only to those instances where interstate commerce is truly affected, stating, "The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce."¹³³ This concurrence illustrates the very heart of the difficulty with this reasoning: resting Commerce Clause authority on commercial development also threatens the ESA's purpose of biodiversity preservation, because analyzing the issue this way precludes the regulation of a substantial number of endangered species takes.

C. *Aggregating Individual Takes May Not Survive Morrison*

The rationale the court used in *GDF Realty* to satisfy the substantial effects test, that the aggregation of all endangered species takes results in a substantial impact on interstate commerce, may fare no better than the D.C. Circuit's focus on commercial development as the regulated activity should the Supreme Court decide to hear a case on these issues.

Although the Supreme Court in *Morrison* deferred determination of whether non-economic activities may be aggregated to reach the requisite substantial effect on interstate commerce, the court noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity *only where that activity is economic in nature*,"¹³⁴ a note the *GDF Realty* court acknowledged.¹³⁵ Ultimately, however, the Fifth Circuit determined that aggregation was appropriate for endangered species takes because it concluded that such takes were an essential part of a larger economic regulatory scheme deserving exemption from *Lopez*'s non-aggregation policy. Federal regulation of intrastate endangered species was therefore appropriate.

The efficacy of the Fifth Circuit's reasoning is questionable. In *Lopez*, the Supreme Court invalidated the GFSZA because the regulated activity—gun possession—failed to implicate any economic or commercial

132. See Nagle, *supra* note 28 (concluding that the regulated activity consists of the endangered species takes, and without a demonstrable relationship to interstate commerce those takes are beyond the reach of the federal government).

133. *Rancho Viejo*, 323 F.3d at 1080.

134. *Morrison*, 529 U.S. 598, 613 (2000) (emphasis added).

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

enterprise, either individually or as an essential part of a larger economic regulation.¹³⁶ The Court concluded that “[i]t cannot, therefore, be sustained under our cases upholding regulations of activities that *arise out of or are connected with a commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce.”¹³⁷ The holding in *Lopez* reflects the Court’s intention to require a closer nexus to interstate commerce for applying federal laws to the states than previous Courts had mandated. Subsequently in *Morrison*, the Court narrowed the scope of permissible federal regulation based on the Commerce Clause by noting the inherent economic nature of the aggregated activities.¹³⁸ Therefore, although the circuit court in *GDF Realty* concluded that the ESA is an economic regulation based on the substantial impact of aggregated endangered species takes, the Supreme Court could easily deem this nexus to commerce insufficient to satisfy this more restrictive substantial effects test. Furthermore, the court in *GDF Realty* conceded that “Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be.”¹³⁹ As a result, if the Supreme Court continues to require a close fit between the regulated activity and the impact on interstate commerce and determines that endangered species takes are insufficiently linked to commerce to warrant aggregation after *Morrison*, then permissible federal regulation of intrastate endangered species is nearing its end.

IV. HOW THE COURTS SHOULD ANALYZE COMMERCE CLAUSE CHALLENGES TO THE ENDANGERED SPECIES ACT

Because the circuit courts have not consistently applied the Supreme Court’s Commerce Clause analysis in recent years, the likelihood that the Court will address these issues again is high. While the outcome of such a case is far from clear, upholding the constitutionality of the ESA appears to be a priority with the lower courts; therefore, those courts should use the reasoning that the Supreme Court would be most likely to find persuasive. The rationales espoused in both *Rancho Viejo* and *GDF Realty*, for the reasons previously set forth, are likely insufficient to withstand a constitutional challenge, but prior case law indicates two more persuasive justifications for the ESA: Congress’s need to prevent a race to the bottom and the preservation of biodiversity.

136. 514 U.S. at 566-67.

137. *Id.* at 561 (emphasis added).

138. *Morrison*, 529 U.S. at 613.

139. *GDF Realty*, 326 F.3d at 638.

A. *Preventing a Race to the Bottom Is a Legitimate Reason to Regulate*

An argument briefly discussed in *Rancho Viejo* but notably absent from *GDF Realty* is that the federal government has the authority to regulate activities that result in a “race to the bottom” among states.¹⁴⁰ Absent uniform federal regulation, states competing for development may find themselves economically disadvantaged by implementing statutes intended to preserve and protect endangered species, and economic interests seem the likely winner in such cases. For example, if one state restricts landowners’ rights in an effort to protect a particular species that inhabits a piece of property, and a neighboring state has no such restriction, then all other things being equal, incoming developers would certainly choose the state that lacks such limitations on landowners’ rights. In order to maintain their competitiveness, states would be less likely to impose regulations that could drive developers or businesses to a neighboring state, thereby creating the race to the bottom. The result could be a nationwide dearth of state and federal regulation protective of threatened species.

In previous years the Supreme Court addressed this very issue, concluding that the race to the bottom legitimately warrants the imposition of federal legislation where the relevant issue is one of nationwide concern.¹⁴¹ In *Hodel v. Virginia Surface Mining*, the Court sustained the Surface Mining Control and Reclamation Act, which established national standards and imposed federal regulation on all mining operations nationwide, because the Court found such provisions necessary to ensure that states did not engage in a regulatory race to the bottom.¹⁴² The Court held that “the prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause.”¹⁴³ Likewise, preservation of endangered species requires nationwide regulation because the race to the bottom is a foreseeable consequence of allowing piecemeal state regulation that may cause developers to favor one state over another. Furthermore, the Commerce Clause challenges in *Lopez* and *Morrison* are distinguishable from those in ESA cases because the absence of federal regulation for either gun possession near schools or violence against women is unlikely to result in a race to the bottom as would likely result from the absence of federal environmental regulation.

140. *Rancho Viejo*, 323 F. 3d at 1078-80 (citing *Gibbs v. Babbitt*, 214 F.3d 483, 499-502 (4th Cir. 2000)).

141. See e.g. *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 281-82 (1981).

142. *Id.*

143. *Id.* at 282.

B. *The Importance of Biodiversity*

Although the courts have approached the constitutional challenges to the ESA in different ways, each court ultimately concluded that the Constitution does provide Congress with regulatory authority to promulgate and enforce the ESA provisions. These decisions may demonstrate the underlying view that the importance of biodiversity justifies the necessity of imposing such a requirement onto the states. Generally, the concept of biodiversity arises upon examination of the third factor of the *Lopez* substantial effects test—whether the legislative history of the federal law at issue demonstrates a connection between the regulated activity and interstate commerce. The legislative history of the ESA is replete with economic justifications for the preservation of biodiversity, such as protecting the abundance of genetic material in a wide variety of species available for future scientific endeavors.¹⁴⁴

The argument in favor of biodiversity preservation for economic reasons is not infallible. In his dissenting opinion in *NAHB*, Judge Sentelle argued that allowing the regulation of intrastate species to preserve biodiversity is essentially nonsensical:

[B]ecause of some undetermined and indeed undeterminable possibility that the [Dehli Sands Flower-Loving] fly might produce something at some undefined and undetermined future time which might have some undefined and undeterminable medical value, which in turn might affect interstate commerce at that imagined future point, Congress can today regulate anything which might advance the pace at which the endangered species becomes extinct.¹⁴⁵

While environmentalists might emphatically respond to this criticism that Congress should have authority to regulate for the reasons Judge Sentelle facetiously stated, the Supreme Court after *Lopez* and *Morrison* could agree that the connection to commerce is too attenuated to defeat a constitutional challenge. The court in *GDF Realty* apparently found this argument compelling, concluding that “[t]his contention [that the Cave Species will have some future economic value], whatever its merits may ultimately be, runs afoul of the attenuation consideration. 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.”¹⁴⁶

On the other hand, the argument in favor of congressional legislative authority for the preservation of biodiversity is also strong. In *Gibbs v.*

144. H.R. REP. NO. 93-412, at 4-5 (1973).

145. *NAHB*, 130 F. 3d at 1064 (Sentelle, J., dissenting).

146. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 638 (5th Cir. 2003) (emphasis in original).

Babbitt, which arose after the Supreme Court established the substantial effects test in *Lopez*, the court emphasized the judicial deference due to congressional findings,¹⁴⁷ stating that “Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained . . . [I]t is reasonable for Congress to decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss.”¹⁴⁸

CONCLUSION

Although to date the courts have upheld the ESA against Commerce Clause challenges, the underlying reasoning on which they have relied has varied considerably by jurisdiction. Taken separately, the reasoning in *Rancho Viejo* and *GDF Realty* may fail to provide adequate justification to uphold the ESA’s constitutionality before the Supreme Court, while the importance of biodiversity and the prevention of a race to the bottom among states could prove sufficient. It is possible that that the U.S. Supreme Court will reject the provisions of the ESA that allow federal regulation of intrastate species, leaving the realm of biodiversity preservation largely a matter for individual states to address. While this outcome is far from certain, the courts have been narrowing the federal government’s reach over the states, and the ESA’s vulnerability in this area is clear.

147. The court also conceded that *Morrison* clearly held that congressional findings of a connection to interstate commerce alone would be insufficient to sustain a federal law challenged under the Commerce Clause, but the court also noted its duty to defer under the rational basis (with teeth) test to reasonable congressional conclusions. *Gibbs v. Babbitt*, 214 F.3d 483, 496 (4th Cir. 2000)

148. *Id.*

