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The Texas Cave Bug and the California Arroyo Toad Take on the Constitution's Commerce Clause.

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COMMENTS

THE TEXAS CAVE BUG AND THE CALIFORNIA ARROYO TOAD "TAKE" ON THE CONSTITUTION'S COMMERCE CLAUSE

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I. INTRODUCTION

Five years ago the Arroyo Southwestern Toad[1] hopped out of obscurity in the Southern California desert, over a fence and a dirt quarry, and

1. *See* Endangered and Threatened Wildlife and Plants, 66 Fed. Reg. 9414, 9414 (Dep't Interior Mar. 9, 2001) (to be codified at 50 C.F.R. pt. 17) (determining that California is home to an extensive population of Arroyo Toads; the Arroyo Toad, *Bufo*

found itself on the steps of the federal courthouse with San Diego County landowner and housing developer Rancho Viejo, L.L.C.[2] The United States Fish and Wildlife Service (FWS) threatened to prosecute Rancho Viejo for building a fence which allegedly impeded the Arroyo Toad's safe passage to its Keys Creek breeding and burrowing grounds.[3] Keys Creek, an Arroyo Toad habitat, meanders through Rancho Viejo's residential development project in Fallbrook, California.[4] FWS also refused to issue a grading permit to Rancho Viejo, claiming that excavation of dirt from the creek bed to use as "fill" for house lots posed a threat to Arroyo Toad colonies.[5]

Meanwhile, scientists discover species of rare "Cave Bugs"[6] on private rural acreage near Austin, Texas, mostly eyeless, cave-dwelling beetles and arachnids (spiders) so small they are nearly invisible to the naked eye.[7] The FWS ordered GDF Realty Investments and its co-tenants to

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californicus, an endangered species under the Endangered Species Act (ESA)); Endangered Species Act, 16 U.S.C. § 1532(6) (1999) (providing the definition of the term "endangered species"); Reply Brief for Appellants at 12, Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (No. 01-5373) (noting the United States Fish and Wildlife Service (FWS) stipulation that Mexico is home to large numbers of Arroyo Toads). The Arroyo Toad grows up to 3.2 inches (88 millimeters) in length, and stays within 0.3 miles of shallow streams and pools where it breeds. Endangered and Threatened Wildlife and Plants, 66 Fed. Reg. 9414, 9414 (Dep't Interior Mar. 9, 2001) (to be codified at 50 C.F.R. pt. 17). In 2001, the FWS set aside 182,360 acres in southern California as "critical habitat" for the Arroyo Toad under the ESA, explaining that development in southern California since 1920 resulted in the destruction of seventy-six percent of the Arroyo Toad's viable breeding habitat. *Id.*

2. *See* Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1065-66 (D.C. Cir. 2003) (summarizing Rancho Viejo's Arroyo Toad litigation).

3. Rancho Viejo, L.L.C. v. Norton, No. CIV.A.1:00CV02798, 2001 WL 1223502, at *1 (D.D.C. 2001 Aug. 20, 2001) (mem.).

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

5. *Id.*

6. *See* Reply Brief for Appellants at 1 n.2, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099) (defending use of the term "Cave Bugs"). Apparently the FWS attorneys objected to "Cave Bugs" as an inappropriate, pejorative characterization of these endangered species. *Id.* This was likely a tactic to saddle the plaintiffs with the "position that some endangered species are entitled to more protection than others." John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1259 (1998) (quotation marks omitted). But "Cave Bugs" paints a word picture and is preferable to politically-correct terminology and entirely appropriate because these species are in fact bugs found in caves. *See* Reply Brief for Appellants at 1 n.2, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (describing why the term is appropriate). Nevertheless, use of the term "Cave Bugs" in this Comment is not intended to minimize the importance of Cave Bugs in the endangered species hierarchy or to disparage legal protections afforded to endangered species.

7. Brief for Appellant at 1 n.2, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099). The smallest Cave Bug grows to a *maximum* of 1.4 millimeters in length, the largest to 8 millimeters in length. *Id.* at 8. The Cave Bugs have either no eyes

cease all commercial development of the 216-acre Hart Triangle Property in order to prevent a "take" of the Cave Bugs.[8] The commercial market value of the GDF Realty property exceeded $60 million.[9] Once zoned by the FWS as a Cave Bug preserve, the value of the land plummeted, sending the owners to the brink of foreclosure.[10]

Such tales are a legacy of the Endangered Species Act[11] (ESA), recent examples of why "any property holder who currently farms his land, utilizes it for extractive purposes, or contemplates making improvements in the future must worry about the ESA. . . . The ESA, in short, is every property owner's nightmare."[12] Consequently, litigating against the ESA

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or "rudimentary" eyes, and dwell exclusively in "karst topography, in which water percolating through limestone rock creates . . . caves, sinkholes, and steep canyons." *Id.* at 7. Due to their small size and underground existence, "there are no more than a handful of people who have ever seen these Cave Bugs." *Id.* at 9. The Cave Bugs are, in no particular order: The Kretschmarr Cave Mold Beetle (*Texamaurops reddelli*); Tooth Cave Ground Beetle (*Rhadine persephone*); Tooth Cave Spider (*Neoleptoneta myopica*); Tooth Cave Pseudoscorpion (*Tartarocreagris texana*); Bone Cave Harvestman (*Texella reyesi*); Bee Creek Harvestman (*Texella reddelli*); Bone Creek Harvestman (*Texas reyesi*). *Id.* at 8. In 1988, the FWS began listing the five species of Cave Bugs found on GDF Realty's property as endangered. Brief of Appellants at 9, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099). The largest of the caves and sinkholes inhabited by these Cave Bugs is less than 200 feet deep; most are a great deal smaller. Endangered and Threatened Wildlife and Plants; Final Rule to Determine Five Texas Cave Invertebrates to Be Endangered Species, 53 Fed. Reg. 36,029, 36,030 (Dep't Interior Sept. 16, 1988) (to be codified at 50 C.F.R. pt. 17). According to the FWS:

> Proximity of the caves inhabited by these species to the City of Austin makes them vulnerable to the continuing expansion of the Austin metropolitan area . . . . Unless proper safeguards can be devised, this development could result in the filling in or collapsing of caves during road and building site preparation, and in alteration of drainage patterns that could affect the cave habitat . . . . Development in this area is also likely to increase human visitation and vandalism in the caves, which are so small that even occasional episodes could adversely alter the cave habitat.

Id. at 36,031. However, the FWS report seems to discount attempts by the Hart Triangle landowners to mitigate the effect of development on Cave Bug habitat. For example, the landowners set aside Cave Bug nature preserves and "placed gates over the entrances to the most ecologically sensitive caves." Affidavit of James R. Reddell at 5, GDF Realty Invs. v. Norton, 169 F. Supp. 2d 648 (W.D. Tex. 2001) (No. A-00-CA-369SS). GDF Realty owns an undivided thirty percent of the Hart Triangle property; two brothers, Fred and Gary Purcell, acquired an undivided seventy percent interest in 1983. *GDF Realty Invs.*, 326 F.3d at 624.

8. *See GDF Realty Invs.*, 326 F.3d at 624-25 (5th Cir. 2003) (discussing the economic impact of the Cave Bug habitat on GDF Realty's development plans).

9. *See* Brief for Appellants at 7, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099) (estimating the pre-litigation value of the Hart Triangle property).

10. *See id.* at 23 (discussing the financial impact of the Cave Bug on GDF Realty).

11. Endangered Species Act, 16 U.S.C. §§ 1531-44 (2004).

12. Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 344-45 (1997); *see also* Jonathan H. Adler, *Bad for*

is often a landowner's only recourse in asserting the right to use private property free from *unreasonable* governmental interference.[13]

The Arroyo Toad and Cave Bug stories come from *Rancho Viejo v. Norton*[14] and *GDF Realty v. Norton*,[15] in which two federal circuit courts contradict each other regarding the ESA's authority to regulate pursuant to the Constitution's Commerce Clause.[16] The conflicting ESA ratio-

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Your Land, Bad for the Critters, WALL ST. J., Dec. 31, 2003, at A8, *available at* 2003 WL-WSJ 68132196 (quoting a former FWS official's comment that "'[t]he incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears.'"); *cf.* Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) (criticizing the FWS's administrative definition of "harm" to species because it "imposes unfairness to the point of financial ruin – not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use").

13. Mark O. Hatfield, *Can't See the Forests for the Endangered Species*, WASH. POST, June 12, 1992, at A23 (suggesting that the only way to challenge the ESA is through litigation). Former Senator and Endangered Species Act sponsor Mark Hatfield of Oregon once recommended amending the ESA because "Congress always considered the human element as central to the success of the ESA. . . . The situation has gotten out of control." *Id.* Contradictory as it may seem to environmentalists, commercial development tends to help, not harm, endangered species. *See* Hugh Hewitt, *Up in Smoke: A Decade and a Half of Species Protection Planning Helps Bring on a Species Disaster in the Fires of California*, WEEKLY STANDARD, Oct. 30, 2003, at 3, *available at* http://www.weeklystandard.com (questioning the benefits that "habitat conservation plans" actually provide). For example, the destruction of vast areas of endangered species "critical habitat" in California from the 2003 fire devastation was due to FWS restrictions preventing landowners from taking fire precautions on their land, such as clearing brush. *Id.* Hewitt puts the "human element" of the ESA in perspective:

> The species that live close to humans are the ones that are faring the best. When the chips are down, we are species-centric, and rush to save the lives and property of human beings. Habitat conservation planners would be well advised to remember that the proximity of human housing to species preserves isn't a threat to those preserves, it is a guarantee of active and species-saving management.

Id.; *cf.* Charles C. Mann & Mark L. Plummer, *The High Cost of Biodiversity*, SCIENCE, June 25, 1993, at 1868 (declining to "equate saving biodiversity with creating wilderness. . . . [W]hat is needed are better ways for people to live compatibly with the biodiversity around them."). The "human element" can also prevent the ESA from becoming an obstacle to national security. *See* Lee H. Rosenberg, *Eco Regs Endanger Combat Training*, 11/1/02 U.S. Naval Inst. Proceedings 63, *available at* 2002 WL 10394915 (criticizing the manner in which the ESA "imposes training limitations so that endangered species living in military areas are not harmed by . . . encroaching on the only realistic terrain available to [the military] for training" and concluding that while "[r]ealistic training can be accomplished without destroying the environment[,] . . . [t]he services need to send warriors to the front, not game wardens.").

14. 323 F.3d 1062 (D.C. Cir. 2003).

15. 326 F.3d 622 (5th Cir. 2003).

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

nales in *Rancho Viejo* and *GDF Realty* reflect the ESA's shaky grounding in *United States v. Lopez*[17] and *United States v. Morrison*,[18] landmark cases from the United States Supreme Court which revived the long-abandoned idea that the Commerce Clause functions as a considerable constraint on the power of Congress to regulate matters of local concern.[19]

Historically, the Supreme Court has allowed the ESA's power to go virtually unchecked, even at significant economic cost.[20] But the circuit split over the ESA is more likely to attract the unfavorable attention of the Court: While *Rancho Viejo* and *GDF Realty* are ESA cases, the transcending issue is federal power and the role of the Commerce Clause in striking a balance between state sovereignty and federal authority. Still, the outcome of an ESA Commerce Clause decision in the Court remains uncertain because "[i]n light of their concurring opinion in *Lopez* and support for protection of endangered species on private lands . . . Justices

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17. 514 U.S. 549 (1995).

18. 529 U.S. 598 (2000); *see also* Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1138 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004) (ratifying the authority of the federal Bureau of Reclamation (BOR) to unilaterally modify the terms of a water-release contract it had with New Mexican consumers in order to protect the habitat of the Rio Grande Silvery Minnow). Yet another ESA case in 2003, *Rio Grande Silvery Minnow v. Keys*, merits a discussion beyond the scope of this Comment. *Rio Grande Silvery Minnow* construed language in a water-allocation contract as reserving to the BOR the right to conserve water for any reason, as long as the conservation measures reasonably justified the exercise of its discretionary power. *Rio Grande Silvery Minnow*, 333 F.3d at 1138. Accordingly, the FWS prevailed upon the BOR to curtail the release of water from Rio Grande River dams in violation of the BOR's contract with New Mexico consumers, concerned that drainage from the Rio Grande would cause undue harm to the Silvery Minnow and its habitat. *Id.* New Mexico farmers and municipalities sued, arguing that because negotiations with the BOR occurred *before* the enactment of the ESA, the ESA should have no impact on their water rights under the contract. *Id.* The court nevertheless held that the FWS's endangered species concerns preempted the water release contract between the BOR and its New Mexico clients. *Id.* at 1119. *But see* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 207-08 (1978) (Powell, J., dissenting) (allowing that while the ESA requires governmental agencies to account for endangered species in planning their operations, "there is not even a hint in the legislative history that Congress intended to compel the undoing or abandonment of any project or program later found to threaten a newly discovered species"). The Tenth Circuit eventually vacated its opinion in *Rio Grande Silvery Minnow* as moot because of "climatological circumstances" which "rendered the injunction [to reduce water flow] superfluous." Rio Grande Silvery Minnow v. Keys, 355 F.3d 1215, 1219-20 (10th Cir. 2004).

19. *Lopez*, 514 U.S. at 567-68.

20. *See, e.g.*, *Sweet Home*, 515 U.S. at 708 (holding that the Secretary of Interior reasonably interpreted the intent of Congress when he defined "harm" to encompass "'significant habitat modification or degradation that actually kills or injures wildlife'"); *Hill*, 437 U.S. at 171-75 (explaining numerous situations in which the ESA has halted million dollar projects).

O'Connor and Kennedy may provide key swing votes . . . to [uphold] federal regulation of intrastate endangered species under the Commerce Clause."[21] Many recent decisions by the Court exhibit its willingness to constrain federal power. Yet other opinions by the Court demonstrate an ambivalence about federalism when it comes to the ESA.[22] *Rancho Viejo* and *GDF Realty* are lower court decisions which are perhaps the product of this uncertainty; as one environmental law attorney observes, "[C]onflicting analyses albeit consistent outcomes in the *Rancho Viejo* and *GDF Realty* cases, illustrate the unsettled jurisprudence underlying the ESA."[23]

The ESA's constitutional grounding to regulate intrastate species on private land is based in part on the right of Congress to regulate interstate commerce.[24] Arroyo Toads and Cave Bugs are endangered species found only in *one* state, and the Constitution's Commerce Clause enumerates the power of Congress "[t]o regulate Commerce . . . among the *several* States."[25] The narrow constitutional issue presented in *Rancho Viejo* and *GDF Realty* is whether federal regulation of an endangered species found in only one state is a non-economic, non-commercial activity that is nevertheless "substantially related to interstate commerce," and therefore

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21. Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 728 (2002).

22. *See Sweet Home*, 515 U.S. at 709 (O'Connor, J., concurring) (agreeing with the majority opinion, in which Justice Kennedy joined, that "harm" to endangered species under the ESA's "take" provision includes indirect harm by "habitat modification," in addition to direct, intentional conduct); *cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 592 (1992) (Blackmun, J., dissenting) (claiming that two biologists had standing to sue under the citizen-suit provision of the ESA because their "professional backgrounds in wildlife preservation . . . make it likely—at least far more likely than for the average citizen – that they would choose to visit these areas of the world where species are vanishing"). *But cf.* Bennett v. Spear, 520 U.S. 154, 176-77 (1997) (holding in a unanimous decision that ranchers and irrigation districts had standing to sue the FWS under the citizen-suit provision of the ESA for harm caused by the FWS "zealously but unintelligently pursuing their environmental objectives").

23. Kenneth J. Warren, *Is the Endangered Species Act Endangered?*, 6/19/2003 LEGAL INTELLIGENCER 7, at *4 (italics added).

24. U.S. CONST. art. I, § 8, cl. 3; *see also* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1046 (D.C. Cir. 1997) (holding that the ESA's protection of an intrastate species of fly is within the scope of congressional power under the Commerce Clause). The ESA is also constitutionally grounded in the international treaty-making power of Congress, and is structured on a variety of treaties, including "migratory bird treaties with Canada and Mexico; the Migratory and Endangered Bird Treaty with Japan; the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, [and] the International Convention for the Northwest Atlantic Fisheries." 16 U.S.C. § 1531(a)(4)(A)-(D) (2003).

25. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

within the scope of Congress's authority to regulate under the Commerce Clause.[26]

Rancho Viejo and *GDF Realty* struggle with how *Lopez* and *Morrison* relate to the protection of biodiversity (claimed to be the *raison d'etre* of the ESA).[27] Roughly half of all species in the United States classified as "endangered" or "threatened" are intrastate species like the Cave Bug and the Arroyo Toad,[28] and eighty percent are found on non-federal lands.[29] This fact makes the constitutionality of the ESA's authority to regulate "biodiversity" an important question. But does "biodiversity" impact interstate commerce to a degree that necessitates federal protection? Six dissenting Fifth Circuit judges say "no" and note the absurdity of giving insects the same kind of federal protection denied to school children in *Lopez* and rape victims in *Morrison*.[30] Ironically, while regulation of guns in school zones (*Lopez*) or violence against women (*Morrison*) is *not* constitutional under the Commerce Clause, federal regulation of Cave Bugs found in a Texas school zone and regulation of violence against Arroyo Toads *is* constitutional.

In fact, *GDF Realty* rejects *Rancho Viejo*'s rationale for allowing Congress to regulate biodiversity.[31] Moreover, each court "read[s] the Endangered Species Act as if it were two different statutes."[32] One critic of the Court's new Commerce Clause jurisprudence commends *Lopez* and

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26. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) (providing 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").

27. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1073 (D.C. Cir. 2003) (holding that the potential, future commercial value of a given species renders the ESA as substantially related to interstate commerce, regardless of whether the protection of the species at issue is a purely intrastate issue). *Contra* GDF Realty Invs. v. Norton, 326 F.3d 622, 638 (5th Cir. 2003) (rejecting *Rancho Viejo*'s premise as unconstitutional because the potential commercial value of biodiversity is a concept "simply too hypothetical and attenuated from the [power of Congress to regulate interstate commerce] . . . to pass constitutional muster").

28. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1052.

29. Oliver A. Houck, *More Unfinished Stories*: Lucas, Atlanta Coalition, *and* Palila/ Sweet Home, 75 U. COLO. L. REV. 331, 410 (2004).

30. *See* GDF Realty Invs. v. Norton, 362 F.3d 286, 287 (5th Cir. 2004) (per curiam) (Jones, J., dissenting) (expressing dismay at the Fifth Circuit's contradictory Commerce Clause jurisprudence).

31. *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting) (distinguishing the *Rancho Viejo* and *GDF Realty* approach to the ESA and the Commerce Clause).

32. Jud Mathews, Comment, *Turning the Endangered Species Act Inside Out?*, 113 YALE L.J. 947, 954 (2004); *see also* Rancho Viejo, L.L.C. v. Norton, 334 F.3d 1158, 1159 (D.C. Cir. 2003) (per curiam) (Sentelle, J., dissenting) (identifying the *Rancho Viejo-GDF Realty* split).

Morrison's attempt to limit Congress's power to legislate under the Commerce Clause, but comments that the different ESA Commerce Clause rationales in *Rancho Viejo* and *GDF Realty* show "why *Lopez* and *Morrison* are poor guides to its [the Commerce Clause] meaning."[33]

Critics thus claim that *Lopez* and *Morrison* provide an unhelpful Commerce Clause roadmap for the lower federal courts. But Judge Sentelle of the D.C. Circuit, a dissenter from the *Rancho Viejo*'s denial of en banc rehearing, rejects such criticism and suggests that the *Rancho Viejo* opinion stems from a disregard for—not a misunderstanding of—the Court's Commerce Clause jurisprudence.[34] Judge Sentelle's opinion is not isolated: Judge Roberts, another *Rancho Viejo* dissenter, notes that the Fifth Circuit pointedly rejects the D.C. Circuit's ESA Commerce Clause jurisprudence.[35] Finally, in a forceful dissent to a denial of en banc rehearing in *GDF Realty*, Judge Edith Jones was joined by five Fifth Circuit judges in expressing bewilderment at "[h]ow the panel's conclusion follows from its generally excellent preceding discussion of *Lopez* and *Morrison*."[36] The Supreme Court has already denied a petition for writ of certiorari in *Rancho Viejo*.[37] But the significance of these lower court dissents and the fact that *GDF Realty* suffers from several serious defects not common to *Rancho Viejo*[38] may compel the Court to grant certiorari in *GDF Realty*.[39]

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33. Jud Mathews, Comment, *Turning the Endangered Species Act Inside Out?*, 113 YALE L.J. 947, 954 (2004).

34. *See* Rancho Viejo, L.L.C. v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Sentelle, J., dissenting) (per curiam) (condemning the court's majority opinion for blatantly ignoring contemporary Supreme Court Commerce Clause jurisprudence).

35. *Rancho Viejo*, 334 F.3d at 1160 (D.C. Cir. 2003) (per curiam) (Roberts, J., dissenting) (noting the Fifth Circuit's rejection of the majority opinion's holding).

36. *See* GDF Realty Invs. v. Norton, 362 F.3d 286, 287 (5th Cir. 2004) (per curiam) (Jones, J., dissenting) (describing the majority opinion as giving "new meaning to the term *reductio ad absurdum*").

37. Rancho Viejo, L.L.C. v. Norton, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied*, 70 U.S.L.W. 3658 (U.S. Apr. 19, 2004) (No. 03-761).

38. *See* Jud Mathews, Comment, *Turning the Endangered Species Act Inside Out?*, 113 YALE L.J. 947, 951-52 (2004) (addressing the many weaknesses of *GDF Realty*'s Commerce Clause analysis as compared to that of *Rancho Viejo*). *GDF Realty* is ripe for reversal by the Supreme Court because it is (1) a "Commerce Clause formula that would undo the results of *Lopez* and *Morrison*"; (2) because it "relied heavily on claims about Congress's motive for passing the ESA that are hard to substantiate . . . brandishing a few sentences as evidence that Congress passed the ESA to enable the future commercial exploitation of protected species"; and (3) because it attempted to justify the ESA in terms of economics, when in fact "[a]ll the provisions of the Act are directed to the preservation of species without regard to their commercial possibilities." *Id.* (italics added).

39. *See* Mountain States Legal Foundation, GDF Realty, *et al.* v. United States, *at* http://www.mountainstateslegal.org/legal_cases.cfm?legalcaseid=98 (last visited Apr. 15,

This Comment criticizes the *Rancho Viejo* and *GDF Realty* rationales as legislation from the bench under a "presumption that without active federal involvement, there will be insufficient environmental protection."[40] In offering different takes on why the Commerce Clause should regulate biodiversity, *Rancho Viejo* and *GDF Realty* both "end up endorsing sophisticated nonsense and nature worship."[41] *Rancho Viejo* and *GDF Realty* thus raise a question: Can federal government trust land-developing commercial enterprisers to be good neighbors to endangered species? The Supreme Court has so held in the past, though *Rancho Viejo* and *GDF Realty* imply otherwise.[42]

2004) (reporting the plaintiff's intention to petition for *writ* of *certiorari* in *GDF Realty Invs. v. Norton*).

40. Jonathan H. Adler, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 626 (1998).

41. PHILLIP E. JOHNSON, REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW, & EDUCATION 108 (InterVarsity Press 1995).

42. *Compare* GDF Realty Invs. v. Norton, 326 F.3d 622, 639 (5th Cir. 2003) (blaming economic activity for the wholesale loss of endangered species and asserting that harm to the Texas Cave Bugs "would occur as a result of [the] plaintiffs' planned commercial development"), *and* Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1078 (D.C. Cir. 2003) (affirming the injunction against Rancho Viejo's commercial activity on grounds that its operations posed imminent harm to the Arroyo Toad), *with* Cappaert v. United States, 426 U.S. 128, 141 (1976) (permitting a rancher adjacent to Devil's Hole National Monument to pump water from a pool in the Monument's underground cavern which contained an endangered species of desert fish). The Court held that pumping water from the cave did not constitute harm to the fish as long as the water level of the pool "be preserved . . . to the extent necessary to preserve its scientific interest." *Cappaert*, 426 U.S. at 141. Yet the Court justified the National Park Service injunction against Cappaert as reasonable because it was narrowly "tailored . . . to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole" and thus honored Cappaert's right to access the water source under the implied reservation of water rights doctrine. *Id.* *Cappaert*'s Solomonic holding accommodated the landowner's rights while affording protection to the endangered species. *Cappaert*'s holding that land use and endangered species protection are not mutually exclusive distinguishes it from *Rancho Viejo*, which chose to ignore expert testimony that the fence on Rancho Viejo's property allegedly threatening the Arroyo Toad habitat "would easily allow passage of arroyo toads should any occupy the surrounding area." Opening Brief for Appellant at 5, Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (No. 01-535). The *GDF Realty* court was similarly unimpressed by the cooperation between GDF Realty, the FWS, and local environmental advocates to comply with ESA. GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003). GDF Realty went to great lengths in setting aside Cave Bug preserves and conducting research to assure that GDF Realty's commercial development plans did no harm to the Cave Bug or its habitat. Brief for Appellants at 11, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099). James Reddell, the world's leading expert on the Cave Bugs and their habitat, states: "In my professional opinion, [the] FWS' position that the uplands . . . cannot be developed because such development will harm the karst invertebrates [i.e., the Cave Bugs] is not supported by sound science." Affidavit of

Part II of this Comment surveys the history of the ESA and relevant ESA provisions. Part II also offers background on the Supreme Court's Commerce Clause jurisprudence prior to the *Lopez* and *Morrison* decisions. Further discussion is devoted to the most relevant theoretical grounding of the *Rancho Viejo* and *GDF Realty* decisions, the principle of aggregation articulated by the Court in the late 1930s.

Part III of this Comment distinguishes *Rancho Viejo* and *GDF Realty*'s explanation of why and how biodiversity has a substantial impact on commerce. The analysis demonstrates that neither *Rancho Viejo* nor *GDF Realty* substantiates a plausible connection between isolated intrastate species and commerce. Regulation of Arroyo Toads and Cave Bugs has, at best, *de minimus* commercial ramifications. According to the Supreme Court, "[A] relatively trivial impact on commerce [is not] an excuse for broad general regulation of state or private activities."[43] *Rancho Viejo* and *GDF Realty* ignore or discount this holding in the name of protecting biodiversity, and in doing so "claim the authority of science as validating claims that in fact are not testable by experiment, and that may go far beyond the available evidence."[44]

Part IV concludes with thoughts on whether taking away the ESA's power to regulate isolated intrastate species such as Cave Bugs and Arroyo Toads would harm biodiversity. "Just as 'states rights' became a code word of support for segregation during the civil rights debates of the 1950s and 1960s, cries for greater state autonomy are viewed by many environmentalists today as cover for efforts to roll back environmental standards."[45] Yet local control over wildlife preservation is the more practical, effective approach to environmental stewardship because, unlike the FWS, state and local governments are not forced to manage power disproportionately to their resources and expertise.[46]

James R. Reddell at 6, GDF Realty Invs. v. Norton, 169 F. Supp. 2d 648 (W.D. Tex. 2001) (No. A-00-CA-369SS).

43. Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968); *see also* United States v. Lopez, 514 U.S. 549, 558 (1995) (citing the same passage in *Wirtz* as authority establishing a "logical stopping point" beyond which aggregation cannot justify the broad federal regulation of state and local activities under the commerce power); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1067 (D.C. Cir. 1997) (Sentelle, J., dissenting) (refuting the notion that Congress can use its commerce power to "regulate activities not having a substantial effect on commerce [simply] because the regulation itself can be crafted in such a fashion as to have such an effect").

44. PHILLIP E. JOHNSON, THE WEDGE OF TRUTH: SPLITTING THE FOUNDATIONS OF NATURALISM 37 (InterVarsity Press 2000).

45. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144 (1995).

46. *See* Randy Lee Loftis, *Endangered Species Act Survives 3 Decades*, DALLAS MORNING NEWS, Dec. 28, 2003, at A11, *available at* 2003 WL 71203762 (interviewing Craig

This critical analysis of *Rancho Viejo* and *GDF Realty* is not intended to impugn endangered species legislation or to antagonize environmentalists by making high-toned arguments for federalism, appealing to the "genius of the states."[47] Rather, this Comment utilizes the *Rancho Viejo* and *GDF Realty* decisions to show "the very power they seek to save is what makes the ESA not worth saving" and furthermore, that local administration of endangered species laws is preferable to a "Washington-based environmental lobby [that] cares less about saving endangered species than about saving the Endangered Species Act."[48] A more judicious standard of interpretation for the ESA is a step in that direction.[49]

Manson, Assistant Interior Secretary for Fish and Wildlife and Parks, and reporting Mr. Manson's observation that "the Endangered Species Act is 'broken' because litigation over critical habitat has sapped resources for other tasks"). According to Mr. Manson, the Bush Administration wants to change the ESA's adversarial posture toward landowners, but an ESA legislative amendment is unlikely anytime soon because of the absence of a political consensus in Congress. *Id.* at A10; *see also* Jonathan H. Adler, *Bad for Your Land, Bad for the Critters*, WALL ST. J., Dec. 31, 2003, at A8, *available at* 2003 WL-WSJ 68132196 (noting that "[m]any Congressional Republicans and Democrats from rural districts would like to reform the ESA, and ease its grip on private land, but . . . [m]ere mention of ESA reform is enough to send the green lobby into conniptions").

47. *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1143 n.11 (1995) (criticizing federalism enthusiasts as often being sanctimonious and motivated by political expediencies).

48. Jonathan H. Adler, *Bad for Your Land, Bad for the Critters*, WALL ST. J., Dec. 31, 2003, at A8, *available at* 2003 WL-WSJ 68132196; *cf.* Brief for Appellants at 19, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099) (citing a federal district court's condemnation of FWS for arrogant conduct in its negotiations with GDF Realty). The Federal District Court for the Western District of Texas characterized FWS as "totally irresponsible" in its negotiations with GDF Realty because of "overwhelming evidence" that the FWS "intentionally delayed" GDF Realty's development plans for "some inexplicable reason." *Id.* This supercilious attitude is not confined to GDF Realty's experience. Hugh Hewitt, an attorney for Rancho Viejo, testifies, "I have been a participant in many of these discussions, as a lawyer representing landowners, and know first hand the arrogance of the agencies that issue these orders and devise these grand schemes." Hugh Hewitt, *Up in Smoke: A Decade and a Half of Species Protection Planning Helps Bring on a Species Disaster in the Fires of California*, WEEKLY STANDARD, Oct. 30, 2003, at 2, *available at* http://www.weeklystandard.com (last visited Nov. 9, 2004).

49. *See* John Earl Duke, Note, *Giving Species the Benefit of the Doubt*, 83 B.U. L. REV. 209, 250 (2003) (urging courts "to use a principle when interpreting the ESA to prevent it from becoming a tool to impose personal preferences"). Duke's thesis is that endangered species are often "merely a pawn in . . . environmentalists' fight with developers over land." *Id.* at 223. These environmentalist ideologues often masquerade their real political agendas (usually loathing and distrust of free market capitalist economics) with "environmentalist" concern for the welfare of an endangered species or its ecosystem. *Id.* at 225. To illustrate his point, Duke cites the infamous 1990 Barton Springs salamander controversy in Austin, Texas:

> Austin's environmental community was not really motivated by the desire to save the Barton Springs salamander from extinction . . . . The environmentalists first tried to

II. BACKGROUND

A. *A Brief History of the ESA*

Passed by Congress in 1973, the ESA's preamble states that its purpose is "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 [these] purposes."[50] The ESA protects endangered species because of their "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[51]

Whether there is a commercial regulatory function inherent to these purposes is debatable. After all, the ESA's original intent was to protect specifically identified "charismatic megafauna," such as the bald eagle, not "biodiversity" *per se*,[52] though both *Rancho Viejo* and *GDF Realty* extrapolate this very idea from the ESA's legislative history.[53]

Interestingly, the ESA assumes jurisdiction over state, municipal, and private lands whereas prior endangered species laws assumed power only over *federal* lands.[54] The ESA has international recognition and a progressive status as the world's pre-eminent environmental statute, due to

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limit *growth* through local ordinances. When these ordinances did not adequately advance their agenda, they turned to the ESA to shift the fight to an alternative political forum . . . as a means by which to accomplish their distinctly non-species preservation ends.

Id. at 224 (emphasis added).

50. Endangered Species Act, 16 U.S.C. § 1531(b) (2003).

51. 16 U.S.C. § 1531(a)(1).

52. *See* PAMELA BALDWIN, *The Endangered Species Act: Consideration of Economic Factors*, *in* ENDANGERED SPECIES: ISSUES AND ANALYSES 6 (Paul Foreman ed., Nova Science Publishers 2002) (discussing the objectives underlying the enactment of the ESA); *see also* GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM 574 (Viking Penguin 1995) (observing that "President Richard Nixon, who signed the Endangered Species Act into law, might not have done so had he understood what he was attaching his name to. . . . Had Nixon realized that the act applies to insects, he might not have affixed his signature.").

53. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1074 (D.C. Cir. 2003); GDF Realty Invs. v. Norton, 326 F.3d 622, 640 (5th Cir. 2003).

54. *See* Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 728-29 (2002) (explaining that prior to 1973, versions of the ESA were believed inadequate to address the dangers of species extinction, leading to the 1973 legislation).

the fact that it places wildlife preservation above any impact the enforcement of its regulations may have on people, places, or commerce.[55]

Congress laid the foundation for the ESA in the 1870s, beginning with its interest in preserving the great plains bison.[56] Federal protection for species officially arrived in 1900 with passage of the Lacey Act.[57] The Lacey Act criminalizes interstate trafficking in animals protected under any *state* law, and charges the Secretary of Agriculture with responsibility for conservation of game animals and birds.[58] Lower federal courts confronting the issue of whether the Lacey Act is constitutional have all "upheld the law as a permissible exercise of the commerce power. The Lacey

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55. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) (concluding that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost"); GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM 573 (Viking Penguin 1995) (extolling the ESA as the only endangered species law in the world effectively and consistently enforced by a government and noting that the ESA's enactment more than thirty years ago "indicates the extent to which important conservation notions were taken seriously in the United States long before it was politically expedient to do so"); Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325, 352 (2002) (emphasizing the necessity to protect biodiversity because it upholds the "entire tapestry of nature"); Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 1-2 (1997) (commenting that biodiversity is a central concern of federal environmental laws). *But see* MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 90 (AEI Press 1996) (criticizing the ESA's enforcement mechanism and listing standard because the absurd idea "that we must save every last subspecies whatever the cost to society at large and without regard to the burdens imposed on private landowners . . . . [S]uch policy encourages private landowners to destroy endangered species or their habitat before their land is integrated, without compensation, into the public ecosystem."); J. Bishop Grewell, *Faux Protection: Environmental Policy That Hurts Everyone-and Thing*, NAT'L REV., Mar. 14, 2002, at 2 (introducing research that the ESA causes "incentive to harm listed species" because landowners will attempt to avoid federal regulation by engaging in "preemptive habitat destruction" to discourage endangered species from settling on their land).

56. *See* Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, ECOLOGY L.Q. 215, 220 (2000) (discussing late nineteenth-century congressional debate over the fate of the great plains bison which were then on the brink of extinction); *see also* SHANNON PETERSON, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK 8 (University Press of Kansas 2002) (explaining how Congress did not simply pass laws against the "taking" of bison; instead, Congress created a national park system beginning with Yellowstone National Park in 1894 which "provided crucial habitat for the few remaining bison, preventing their complete extinction in the United States").

57. 18 U.S.C. § 42 (2003).

58. *Id. But cf.* TEX. PARKS & WILD. CODE ANN. § 1.011(a) (Vernon 2002) (asserting that "[a]ll wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state").

Act did not preempt state wildlife regulation, but it did mark the first significant foray of the federal government into wildlife protection."[59]

However, the ESA's substantive predecessor was the Wilderness Act of 1964.[60] Under the Wilderness Act, Congress could reclaim land determined to be endangered species habitats, a feature incorporated into the ESA nine years later.[61]

The ESA became the law in 1973,[62] in a decade defined by environmentalism. This environmentalist decade culminated with *Tennessee Valley Authority v. Hill*,[63] the famous ESA case ruling that construction of a gigantic dam could be stopped due to the presence of the tiny Snail-Darter fish in the Little Tennessee River.[64] A defining moment for the ESA, *Hill* wrote into law the "idea that we must save every last subspecies whatever the cost to society at large and without regard to the burdens imposed on private landowners."[65]

ESA proponents originally envisioned that the ESA would achieve its goals under a "cooperative federalism" plan "in which the federal government dictates the content of programs and state governments carry out the programs. Because all biodiversity issues, like all politics, are local. . . ."[66]

Yet "[r]elatively little was known about environmental policy in the 1970s. Research and analysis were necessary to identify all but the most obvious problems and solutions, so it seemed logical that centralizing expertise would allow for a sound setting of priorities."[67] The idea that the ESA could operate on a model of "cooperative federalism" gave way to the ESA as it is structured today, with its command-and-control regulatory structure. The ESA thus evolved into a centralized bureaucracy, in conformity with ideas promulgated by the "public-law" theorists influential in 1970s and 1980s legal academia.[68] "Public-law scholars view the

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59. SHANNON PETERSON, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK 9 (University Press of Kansas 2002).

60. 16 U.S.C. § 1131 (2003).

61. *See* National Wilderness Act of 1964, 16 U.S.C. § 1131(a) (2003) (setting aside federally owned land for endangered species).

62. 16 U.S.C. § 1531 (2003).

63. 437 U.S. 153 (1978).

64. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172-73 (1978).

65. MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 90 (AEI Press 1996).

66. Jean O. Melious, *Enforcing the Endangered Species Act Against the States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 605, 609 (2001).

67. Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 628 (1998).

68. MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 12-13 (AEI Press 1996).

common law as . . . incompatible with the requirements of an increasingly complex and interdependent world. Deeply suspicious of private orderings, they seek to conceptualize the law from the perspective of collective purposes or public values."[69]

B. *Concession to the Landowner: The ESA's Incidental Take Permit, Habitat Conservation Plan, and Biological Assessment Provisions*

The ESA prohibits the "take" of endangered species.[70] The FWS as administrator of the ESA, defines "harm" to wildlife within the meaning of the take prohibition as "an act which actually kills or injures wildlife. Such act[s] may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[71] Harm to a species under the ESA triggers severe criminal and civil penalties, up to $25,000 for a civil infraction and $50,000 and up to a year of prison for a criminal conviction.[72]

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69. *Id.*

70. 16 U.S.C. § 1538(a)(1)(B) (2003).

71. 50 C.F.R. 17.3; *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 709 (1995) (rejecting a challenge to the FWS definition of "harm" to species as improperly including "significant habitat modification or degradation," as the legislative history of the ESA indicates that Congress "delegated broad administrative and interpretive power" to the FWS because "proper interpretation of a term such as 'harm' involves a complex policy choice"). *But cf.* Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv., 273 F.3d 1229, 1233 (9th Cir. 2001) (holding that the FWS "acted in an arbitrary and capricious manner . . . imposing terms and conditions on land use permits, where there either was no evidence that the endangered species existed on the land or no evidence that a take would occur if the permit were issued"). The conduct of the FWS was "arbitrary and capricious" in its interpretation of the ESA's "harm" provision, refusing to issue an incidental take permit for livestock grazing despite the fact that neither the razorback sucker fish nor the pygmy owl (the species at issue) existed on the land in question. Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv., 63 F. Supp. 2d 1034, 1034-36 (D. Ariz. 1998). *Arizona Cattle Growers* stands for the idea that "courts should . . . give landowners and developers, rather than species, the benefit of the doubt when the data [underpinning ESA decisions is] inconclusive." John Earl Duke, Note, *Giving Species the Benefit of the Doubt*, 83 B.U. L. REV. 209, 211 (2003). Environmental special interest groups, such as the Center for Biological Diversity, exert a tremendous political influence over the FWS, a position from which "environmentalists often use the ESA not to protect species from destruction, but instead as a tool to stop all kinds of development, whether it's timber harvesting, housing construction, farming, mining, or ranching." *Id.* at 225 (quotation marks omitted).

72. *See* 16 U.S.C. § 1540(a)(1)-(b)(1) (2003) (outlining the civil and criminal penalties for ESA violations).

The ESA does allow for landowner exemption when harm to a species occurs due to extenuating circumstances, a rare occurrence.[73] In fact, there has been only one such exemption in the entire history of the ESA.[74]

The listing of an endangered animal species triggers all ESA restrictions, including the "take" prohibition.[75] The economic impact of the ESA restrictions triggered by a listing, or the effect of such restrictions on private property, must not factor into the decision whether to list a species as endangered.[76] In addition to listings, the ESA requires the FWS to "designate critical habitat . . . on the basis of the best scientific data available and *after taking into consideration the economic impact*, and any other relevant impact, of specifying any particular area as critical habitat."[77] While the listing process is based only on scientific data, critical habitat designation includes an analysis of its impact on property.[78]

The ESA also conscripts federal agencies in a way that potentially constricts private property rights, requiring them to consult with the FWS.[79] This is commonly referred to as the ESA's "federal nexus" provision because it comes into play only when a landowner's development project involves some kind of federal approval or participation.[80] For example, this ESA provision impelled the United States Army Corps of Engineers (Corps) to refuse Rancho Viejo's request for a wetlands fill permit.[81] The Corps took note of the FWS rule designating Arroyo Toad "critical habitat" in denying the permit, a rule cautioning federal agencies to be

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73. M. Lynne Corn & Pamela Baldwin, *Endangered Species Act: The Listing and Exemption Processes*, ENDANGERED SPECIES: ISSUES AND ANALYSES 34 (Paul Foreman ed., Nova Science Publishers 2002). Activity causing "harm" to an endangered species must pass four tests for exemption: (1) The conduct adversely affecting the species must be unavoidable; (2) on balance, the beneficial aspects of the conduct exceed any alternatives consistent with protecting the species or its critical habitat, and the conduct serves the public interest; (3) the conduct has regional or nationwide importance; (4) the prior commitment of resources did not obviate the possibility of alternatives to an exemption from conduct resulting in a take of a species. 16 U.S.C. § 1536(h)(1)(A)(i)-(iv) (2003).

74. M. Lynne Corn & Pamela Baldwin, *Endangered Species Act: The Listing and Exemption Processes*, ENDANGERED SPECIES: ISSUES AND ANALYSES 34 (Paul Foreman ed., Nova Science Publishers 2002).

75. 16 U.S.C. § 1538(a)(1) (2003).

76. 16 U.S.C. § 1533(b)(1) (2003).

77. 16 U.S.C. § 1533(b)(2) (2003) (emphasis added).

78. *Id.*

79. *See* 16 U.S.C. § 1536(a)(2) (2003) (requiring federal agencies to ask FWS whether their actions would "jeopardize the continued existence of any endangered species, or result in the destruction or adverse modification of [critical] habitat of such species").

80. ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 393-94 (Island Press 1999).

81. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1065 (D.C. Cir. 2003).

aware of "[d]egradation or loss of surrounding riparian and upland [Arroyo Toad] habitats."[82]

A 1982 amendment to the ESA allows private landowners the benefits of a limited partnership with the FWS in order to mitigate the impact of ESA restrictions on private land.[83] Endangered species listings tend to "trigger massive government mapping exercises, as the [FWS] is obliged to designate 'critical habitat' for every species it denominates as 'threatened' or 'endangered.'"[84] Accordingly the "incidental take" permit and its accompanying "Habitat Conservation Plan" (HCP) allow landowners "who frequently cannot be sure in advance whether their planned activities will or will not constitute a take [of an endangered species]" to participate in critical habitat planning.[85] In the absence of a "federal nexus," the HCP allows landowners to incorporate ESA restrictions in the least intrusive manner with regard to listed species on their property; known as the ESA's "incidental take" provision, HCPs permit the incidental "take" of species on private property as long as the FWS extends its advance approval of the proposed HCP.[86]

In recent times, the HCP has become a contractual arrangement between the FWS and regional governments, simply because governmental entities have the financial resources which individual landowners do not have in order to prepare a complexly managed HCP. Essentially, the HCP is a regional alliance formed to inject some measure of local control into federal land management, accomplished by mapping out which areas are permissible for development in order to assure compliance with the ESA listings and the critical habitat designations that may accompany such listings.[87]

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82. Endangered and Threatened Wildlife and Plants, 66 Fed. Reg. 9414, 9416 (Dep't Interior Mar. 9, 2001) (to be codified at 50 C.F.R. pt. 17).

83. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 4, 96 Stat. 1411 (1982) (amending Endangered Species Act, 16 U.S.C. § 1536(7) (1973)).

84. Hugh Hewitt, *Up in Smoke: A Decade and a Half of Species Protection Planning Helps Bring on a Species Disaster in the Fires of California*, WEEKLY STANDARD, Oct. 30, 2003, at 2, *available at* http://www.weeklystandard.com (last visited Nov. 9, 2004).

85. Jean O. Melious, *Enforcing the Endangered Species Act Against the States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 605, 621 (2001).

86. 16 U.S.C. § 1539(a)(1)(B).

87. *See* San Diego, Cal., Multiple Species Conservation Plan, *at* http://www.sannet.gov/mscp/plansum.shtml (last visited Jan. 5, 2004) (preserving 900 square miles as an HCP "for over 1000 native and nonnative plant species and more than 380 species of fish, amphibians, reptiles, birds, and mammals"); Travis County, Tex., Balcones Canyonlands Conservation Plan, *at* http://www.co.travis.tx.us/tnr/bccp/ (May 2, 1996) (preserving 30,428 acres to protect endangered species habitat and securing an obligation from incidental take permit holders "to provide for ongoing maintenance, patrolling, and biological management of the preserved habitat"). *But cf.* Hugh Hewitt, *Up in Smoke: A Decade and a Half of Species Protection Planning Helps Bring on a Species Disaster in the Fires of*

When a "federal nexus" exists, as it does in *Rancho Viejo*, the incidental take permit will issue pursuant to a "Biological Assessment" (BA) of the situation prepared by the FWS.[88] The BA is the counterpart of the HCP, "used to bless incidental takings when a federal nexus exists."[89]

Once convinced of the possible presence of an endangered species on the landowner's property, the FWS conducts its BA.[90] If the FWS determines that harm to the species is not imminent, it then *may*, but is not required, to issue the landowner an incidental take permit, especially if the BA prepared by the FWS expresses some concern over the possibility of species harm.[91] In such circumstances, the FWS may condition its issue of the incidental take permit on whether the landowner implements recommended cautionary measures that will eradicate the BA's perceived danger to the species.[92]

In summary, the incidental take permit allows a landowner to "take" endangered species where "(1) the taking will be incidental to an otherwise lawful activity; (2) the applicant will minimize and mitigate the impacts of the taking; (3) there will be adequate funding for the conservation plan, and; (4) the taking will not appreciably reduce the likelihood of species survival."[93]

C. *Fool's Gold*

While the ESA's incidental take permit process represents some concession to landowners, the gesture to the autonomy of private landowners is often fool's gold. The FWS holds the power in the incidental take permit process—as *Rancho Viejo* and *GDF Realty* show, the FWS can withhold a permit at its discretion.[94] Furthermore, because "almost 80% of

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California, WEEKLY STANDARD, Oct. 30, 2003, at 1, *available at* http://www.weeklystandard.com (noting that HCPs are "to species protection what Soviet five-year plans were to steel production").

88. *See* 16 U.S.C. § 1536(b)(4)(B)–(c)(1) (requiring FWS to conduct biological assessments which affirm the propriety of incidental takings).

89. ROBERT MELTZ ET AL, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND - USE CONTROL AND ENVIRONMENTAL REGULATION 395 (Island Press 1999).

90. *See* 16 U.S.C. § 1536(c) (mandating a biological assessment once the FWS determines the landowner's activity to constitute an incidental take of a protected species).

91. *Id.*

92. *See* 16 U.S.C. § 1536(c) (outlining the process of obtaining an incidental take permit).

93. Jeanine A. Scalero, *The Endangered Species Act's Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 CHAP. L. REV. 317, 321 (2000).

94. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1064 (D.C. Cir. 2003); GDF Realty Invs. v. Norton, 326 F.3d 622, 626 (5th Cir. 2003).

all protected species have some or all of their habitat on privately owned land, the [FWS's] influence over local land use is immense."[95]

Rancho Viejo applied for a permit from the Corps to dig dirt from the Keys Creek bottoms, which triggered the ESA's "federal nexus."[96] Noting that Keys Creek comprised a portion of the Arroyo Toad's critical habitat, the Corps was obligated under the ESA to consult with FWS over whether to issue the permit.[97] Subsequently, the FWS conducted a BA determining that dirt excavation from the creek comprised a "take" of the Arroyo Toad.[98]

The FWS did then offer the incidental take permit, but only if Rancho Viejo agreed to obtain "fill" from an alternative location.[99] Rancho Viejo rejected this conditional offer because of the prohibitive expense of obtaining "fill" from alternate locations.[100] In court, Rancho Viejo further objected, arguing that the Arroyo Toad did not meet the ESA's legal definition of an "endangered species."[101]

The FWS concluded in its BA that the fence constructed along Keys Creek constituted harm to the Arroyo Toad.[102] Rancho Viejo challenged this claim with expert witnesses who offered evidence that "[t]he upland

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95. Jeanine A. Scalero, *The Endangered Species Act's Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 CHAP. L. REV. 317, 321 (2000).

96. *Rancho Viejo*, 323 F.3d at 1065. The Clean Water Act required Rancho Viejo to seek a permit from the U.S. Army Corps of Engineers (Corps) for digging operations that "involve[d] the discharge of 'fill into waters of the United States, including wetlands.'" *Id.* With the ESA's "federal nexus" established, the Corps notified the FWS of the project's possible impact on the Arroyo Toads in the vicinity of Keys Creek. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Opening Brief for Appellant at 5, Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (No. 01-5373).

101. Opening Brief for Appellant at 18, Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (No. 01-5373). There is a significant population of Arroyo Toads in Baja California, Mexico, and as Rancho Viejo pointed out, the Arroyo Toad does not fall within the ESA's definition of "endangered species" as a "species which is in danger of extinction throughout all *or a significant portion* of its range." *Id.* at 18 n.5 (quoting Endangered Species Act, 16 U.S.C. § 1532(6)); *see also* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1052 n.10 (D.C. Cir. 1997) (recognizing the legitimacy of the ESA's regulatory oversight "only insofar as the Act prevents activities that are likely to cause the elimination of species"); Cal. Dep't of Fish and Game, State and Federally Listed Endangered and Threatened Animals of California, *at* http://www.dfg.ca.gov/whdab/html/lists.html (Jan. 2004) (reporting that an October 30, 2002 federal court ruling invalidated the Arroyo Toad critical habitat designations and instructed the FWS to redesignate the Arroyo Toad's critical habitat).

102. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1065 (D.C. Cir. 2003).

portion of the fence . . . would easily allow passage of Arroyo Toads should any occupy the surrounding area."[103]

Rancho Viejo's battle with the FWS to obtain an incidental take permit was fairly straightforward. In contrast, the *GDF Realty* suit was the result of "years of wrangling with and attempting to appease the FWS."[104] According to the plaintiffs, FWS used "shifting and inconsistent rationales to disapprove of all the proposed development scenarios"[105] over a ten-year period, including the denial of seven different Cave Bug incidental take permits/HCP proposals for development of the Hart Triangle Property (the land of the Cave Bugs). The FWS responded that the special scientific worth of the Cave Bugs justified restrictions on development that would provide the most protection for the small, vulnerable Cave Bug habitats.[106]

In 1988, after the FWS claimed that development would perpetrate a "take" of the Cave Bugs, the Hart Triangle landowners (GDF Realty and its co-tenants, Fred and Gary Purcell) sought to allay FWS concerns by working with the FWS, Texas Systems of Natural Laboratories (TSNL) (a non-profit environmental research think-tank), and Dr. James Reddell, the world's foremost expert on the Cave Bugs, to transfer title to portions of the Hart Triangle to TSNL to be managed as Cave Bug preserves.[107] At the recommendation of Dr. Reddell, they also "placed gates over the entrances to the most ecologically sensitive caves."[108] The Purcells, at considerable personal cost, financed the hiring of experts and the funding of research and surveys necessary to determine how best to protect the Cave Bugs.[109]

After such efforts to protect the Cave Bugs and satisfy the FWS's concerns, the FWS shifted its concern to two other listed endangered species on the property, the Golden-Cheeked Warbler and the Black-Capped Vireo, mandating that the landowners formulate an HCP that accommodated the birds as well as the Cave Bugs.[110]

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103. Appellant's Opening Brief at 5, Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (No. 01-5373).

104. GDF Realty Invs. v. Norton, 323 F.3d 286, 287 (5th Cir. 2003) (Jones, J., dissenting).

105. Brief for Appellants at 16, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099).

106. Brief for Appellee at 10-11, 56, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099).

107. *Id.* at 11.

108. Affidavit of James R. Reddell at 5, GDF Realty Invs. v. Norton, 169 F. Supp. 2d 648 (W.D. Tex. 2001) (No. A-00-CA-369SS).

109. Brief for Appellants at 11, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099).

110. *Id.* at 12.

The Hart Triangle landowners took the FWS to federal district court and won a declaratory judgment forcing the FWS to acknowledge that reasonable development would not cause a take of either the endangered insects or birds, and exacted a promise from the FWS that an incidental take permit would soon issue.[111] Six years of negotiations followed.[112]

The wrangling over the endangered birds and the endangered Cave Bugs ended when GDF Realty and the Purcells filed a Fifth Amendment Takings claim against the FWS. At this point, the FWS revised its position on the incidental take permit to allow development on a few acres, but most of the 216 acres remained off-limits to development.[113]

The incidental take permit process thus thwarted what Rancho Viejo and GDF Realty viewed as reasonable and responsible development of their properties, compelling both to file suits which argue that the ESA's "take" provision is unconstitutional under the Commerce Clause as applied to Arroyo Toads and Cave Bugs, respectively.

D. Wickard, Lopez, Morrison, *and* National Association of Home Builders: *The ESA's Intersection with Seminal Commerce Clause Decisions*

1. Defining "Commerce"

The rejection of ESA Commerce Clause challenges in *Rancho Viejo* and *GDF Realty* are the most recent in a long line of decisions in which "lower courts uniformly failed to apply *Lopez* to federal statutes that have nothing to do with regulating economic conduct. ESA cases are part of that pattern."[114]

Gibbons v. Ogden[115] was the first important ruling on Congress's commerce power by the United States Supreme Court.[116] Establishing what is known as the "effects" branch of jurisprudence under the Commerce Clause, *Gibbons* implies some limitation on congressional power to regulate an intrastate activity as it relates to interstate commerce.[117] *Lopez* and *Morrison* pick up where Justice Marshall left off in *Gibbons*, 200 years after the fact.

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111. *See id.* at 13-14 (discussing the declaratory judgment results).

112. Brief for Appellee at 11, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099).

113. Brief for Appellants at 21, *GDF Realty Invs.* (No. 01-51099) (citation omitted).

114. Michael S. Greve, *A Poorly Traveled Toad*, NAT'L L.J., Nov. 25, 2002, at A9-A10.

115. 22 U.S. (9 Wheat.) 1 (1824).

116. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 873 (2002).

117. *Id.* at 882.

Justice Marshall observed in dicta that the constitutionality of law enacted pursuant to the commerce power depends on a subjective analysis of the term "commerce."[118] Where "commerce" begins and ends in terms of congressional authority over intrastate activity was a question eventually leading to significant augmentation of the legislative powers of Congress in the twentieth century, beginning with the New Deal.[119]

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118. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (limiting the scope of Congress's commerce power); *see also* United States v. Lopez, 514 U.S. 549, 586-87 (1995) (Thomas, J., concurring) (noting that "the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture" because "[a]griculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles"); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 863, 874-75 (2002) (noting the difficulty of discerning limitations on the scope of the commerce power strictly from analysis of Justice Marshall's dicta in *Gibbons*). *Gibbons* does not specifically prohibit extension of the commerce power to regulate intrastate activities, and perhaps explains why commentators tend to contradict each other when extrapolating the "original intent" of the Commerce Clause from *Gibbons*. *Gibbons*, 22 U.S. at 197. "Commerce" is a common word with a commonly understood meaning; thus, arguments among commentators over the meaning of "commerce," while interesting, often are nothing more than esoteric speculation that should have no bearing on the interpretation and practical application of the commerce power. *Id.* Nevertheless, a search for a meaning of "commerce" proper for constitutional exegesis is useful. As such, scholars take either the narrow or broad view of the meaning of "commerce" at the time of the founding of the Constitution. The "narrow" camp contends that "commerce" specifically meant trade or exchange, while the "broad" camp claims that it refers generally to any activity implicating the marketplace, however indirectly that activity bears on the marketplace. Randy E. Barnett, *New Evidence on the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 853 (2003). To assess the merits of these conflicting claims, Professor Barnett "asked two research assistants . . . independently to examine every use of the term 'commerce' in the Pennsylvania Gazette [published by Benjamin Franklin] that appeared from 1728-1800" and to make note of any use of the term "commerce" "that even arguably represented a broader meaning." *Id.* at 856-57. An examination of over 1500 uses of the word "commerce" showed that the "commonplace public meaning of commerce . . . was 'trade and exchange,'" as opposed to the ambiguous meaning of the word ascribed to it by scholars who claim it had a much broader public meaning. *Id.* at 861-62.

119. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (introducing "aggregation" into Commerce Clause analysis in order to uphold a federal cap on wheat production exceeded by a single wheat farmer—a violation that while "trivial by itself [was] not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, [was] far from trivial"); United States v. Darby, 312 U.S. 100, 113-14 (1941) (upholding as constitutional a federal statute prohibiting the interstate shipment of goods manufactured by employees whose wages did not meet the minimum requirements of the statute); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-31 (1937) (ruling the National Labor Relations Act as a proper exercise of the commerce power); *see also* United States v. Ho, 311 F.3d 589, 596 (5th Cir. 2002) (observing that even though it was "seldom used in the nineteenth century, the Commerce Clause became the chief engine for federal regulatory and criminal statutes in the latter two-thirds of the twentieth century").

So who decides where the outer boundaries of federal authority lie? The Necessary and Proper Clause of the United States Constitution does give Congress latitude to carry out its work, granting an implied (unwritten) power to implement congressional power as is "necessary and proper."[120] On the other hand, judicial review is a check on this implied power and can prevent Congress from interfering in governmental matters reserved to the states and the people by the Tenth Amendment.[121] This dynamic balance of power between state and national government is called federalism,

> a dual system of government in which two sovereigns have different, although at times overlapping, powers. The Constitution clearly gives the federal government exclusive control over certain areas, such as the military and foreign affairs, while explicitly reserving other, unenumerated powers to the states. . . . The purpose of this explicit enumeration is obvious. The Framers intended the enumeration of powers to serve as a limit on federal governmental power.[122]

While the Tenth Amendment does not grant *specific* powers to the states and the people, it does give *something* to the states. Consequently, under the regime of constitutional federalism, a determination of the meaning of the word "commerce" in the Commerce Clause is not an exercise in semantics, but is consistent with the Constitution's overall emphasis on limited federal government.[123] A broad meaning will give Congress a broad commerce power, and a narrow meaning will restrict that power; *Lopez* began the process of swinging the judicial pendulum back to the narrow meaning:[124]

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120. *See* U.S. CONST. art. I, § 8, cl. 18 (stating that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

121. *See* U.S. CONST. amend. X (establishing that "powers not delegated to the United States by the Constitution . . . are reserved to the States").

122. Diane McGimsey, Comment, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1683 (2002) (footnotes omitted).

123. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 862 (2002).

124. *See id.* at 873 (commenting that Justice Marshall's opinion in *Gibbons* "reveal[s] a limited conception of Congress's powers, in keeping with the original understanding"). The Tenth Amendment is an effective, though limited, check on federal power; it provides in full: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. However, a landmark 1979 ESA decision held that the Tenth Amendment does not detract from the ability of Congress to enforce the ESA against the states. *See* Palila v. Hawaii Dep't of Land & Natural Res., 471 F. Supp. 985, 996 (D. Haw. 1979) (holding that

> That words can have knowable and determinate meaning is axiomatic to the rule of law. The failure of subsequent commerce power cases to maintain the distinction between that which is commerce . . . and all other activities that merely affect commerce has resulted in the Supreme Court's apparent approval of the last century's massive expansion of federal regulation into every facet of local life. And it is the attempt to restore some fixed meaning to words like "commerce" that has produced an opinion like *United States v. Lopez*.[125]

2. *Lopez*, *Morrison*, and the "New" Federalism

As the first Supreme Court decision in sixty years to hold that a federal law exceeded the authority of Congress to regulate under the Commerce Clause,[126] *Lopez* struck down the federal Gun-Free School Zones Act and declared that the power to regulate noneconomic conduct not proximately affecting interstate commerce does not emanate from the Commerce Clause.[127] "Until 1995, the standard law school summary of Congress's commerce power was something along the lines of 'Congress can do whatever it wants'. . . . [T]he Commerce Clause had become an 'intellectual joke,' a sort of get-out-of-court-free card good for virtually any piece of federal legislation."[128] Because President Roosevelt's Su-

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"the Tenth Amendment does not restrict enforcement of the Endangered Species Act, both because of the power of Congress to enact legislation implementing valid treaties and because of the power of Congress to regulate commerce").

125. David A. Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 372 (1998) (footnotes omitted).

126. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (holding the National Industrial Recovery Act of 1932 as unconstitutional). *Schecter* was the last Supreme Court decision until *Lopez* to strike down legislation as an overbroad application of the commerce power. *Id.*

127. *See* United States v. Lopez, 514 U.S. 549, 549 (1995) (stating that the Gun-Free School Zones Act is a criminal law and regulates the noneconomic activity of weapons possession, activity which falls under the jurisdiction of the police powers of the state and not under the more limited federal powers).

128. Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1258 (2003); *see also* Vince Hazen & Paul Terrill, *The Renewal of Federalism*, LIBERTY MATTERS J., *at* http://www.libertymatters.org/libertymattersjournal/summer01-3.htm (last visited Sept. 18, 2004) (observing that prior to the *Lopez* decision "a federal government of limited, enumerated powers was thought by many to be in deep slumber, if not terminally comatose—at least as far as restrictions on the federal commerce power were concerned"). *But cf.* Carol D. Leonig, *Dancing? It's Good for the Constitution. Janet Reno and Friends Try an Unconservative Approach*, WASH. POST, Aug. 4, 2003, at 2, *available at* 2003 WL 56510504 (reporting on the inaugural party for the American Constitution Society for Law and Policy, intended to rival the Federalist Society). In remarks at the American Constitution Society's first national convention, United States District Judge Oberdorfer told more

preme Court appointees were sympathetic to the centralization of power that facilitated Roosevelt's New Deal programs in the 1930s,[129] "the Court found federalism review difficult to take seriously."[130] Federalism in American law slumbered until re-awakened in *Lopez*.

Lopez and *Morrison* reprise Justice Marshall's attempt in *Gibbons* to interpret any limitations placed on federal power and the Commerce Clause.[131] Notably, Justice Thomas believes *Lopez* further confuses rather than clarifies a definition of "commerce" because the *Lopez* "substantial relationship" to interstate commerce rule "appears to grant Congress a police power over the Nation. When asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words."[132]

The Supreme Court decided in *Lopez* that carrying a firearm in a school zone was not an activity within Congress's power to regulate interstate commerce.[133] The Supreme Court's holding rendered unconstitutional the federal Gun-Free School Zones Act of 1990,[134] which made illegal "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[135]

Lopez reasoned that a regulated activity may be characterized as "commerce," if and only if it falls in at least one of three categories: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of

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than 200 law students in his speech that "[i]f you do it right, you people here will become law clerks and the law clerks will become judges and the assistant secretaries and *you'll run the world*." *Id.* (emphasis added). Judge Oberdorfer's admonition to future lawyers and judges to "do it right" so they can "run the world" is to be distinguished from the philosophy of those who wrote the Constitution, who

> have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the [n]ew . . . that the solid happiness of the people is to be sacrificed to the views of the political institutions of a different form?

THE FEDERALIST No. 45, at 233 (James Madison) (Buccaneer Books 1992).

129. *See* Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 742 (1996) (identifying resignations from the Supreme Court during President Roosevelt's second term, noting the subsequent opportunities for Roosevelt to appoint replacements who would be sympathetic to his political objectives, and pointing to these developments as the beginning of a new era in Commerce Clause jurisprudence).

130. Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 742 (1996).

131. United States v. Lopez, 514 U.S. 549, 599-600 (1995) (Thomas, J., concurring).

132. Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 725-26 (1996).

133. *Lopez*, 514 U.S. at 599.

134. Gun-Free School Zones Act, 18 U.S.C. § 922 (1996).

135. 18 U.S.C. § 922(q)(2)(A) (1996).

interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relationship to interstate commerce."[136] *Morrison* later expounded on the problematic third category of *Lopez*—the one criticized by Justice Thomas in his *Lopez* concurrence—the "substantial relationship" rule.[137]

At issue in *Morrison* was the constitutionality of a federal statute "provid[ing] a federal civil remedy for the victims of gender-motivated violence."[138] The Court held that the Violence Against Women Act[139] did not have a "substantial relationship to interstate commerce" because "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[140]

Morrison established that Congress may not regulate an activity under the rubric of "commerce" simply because "the act of regulating catches an entity or an action that is itself commercial."[141] For example, Rancho Viejo is a commercial entity participating in interstate commerce, whereas Rancho Viejo erecting a fence on its property is not "economic activity substantially affect[ing] interstate commerce."[142]

Under *Morrison*, the "substantial relationship" prong of *Lopez* turns on whether "the rationale offered to support the constitutionality of the statute . . . has a logical stopping point so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states."[143]

3. Aggregation

Wickard v. Filburn[144] is the most influential of the pre-*Lopez*, New Deal cases which liberally construed Congress's power to regulate under the Commerce Clause, and it is directly related to the *Rancho Viejo* and *GDF Realty* holdings.[145] *Wickard* held that aggregation of an activity

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

137. *Id.* at 599-600.

138. United States v. Morrison, 529 U.S. 598, 601-02 (2000).

139. Violence Against Women Act, 42 U.S.C. § 13981 (1994).

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

141. Rancho Viejo, L.L.C. v. Norton, 334 F.3d 1158, 1159 (D.C. Cir. 2003).

142. *Morrison*, 529 U.S. at 610.

143. Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1064 (D.C. Cir. 1997) (Sentelle, J., dissenting); *see also* United States v. Lopez, 514 U.S. 549, 566 (1995) (observing that legal uncertainty is often engendered by a federalist constitution, necessitating "judicially enforceable outer limits" to resolve balance-of-power questions).

144. 317 U.S. 111 (1942).

145. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1070 (D.C. Cir. 2003) (citing *Wickard* in the court's analysis of interstate commerce); GDF Realty Invs. v. Norton, 362

(e.g., "takes" of endangered species) across state lines by those "similarly situated" may bring a purely intrastate, non-economic activity within the regulatory jurisdiction of the Commerce Clause.[146] Wickard grew wheat in excess of a federally mandated quota on wheat production for personal use, but not for sale in the marketplace.[147] The Court held that this activity, though "trivial by itself is not enough to remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, is far from trivial."[148]

Wickard is still good law, and so an aggregation of non-economic activity such as growing wheat for personal use rationalizes the constitutional authority of a law under the Commerce Clause.[149] However, *Morrison* addresses the problem of *Wickard*'s residual influence, providing courts with a four-part test to aid a determination of whether a local non-economic activity "substantially affecting" commerce is within the scope of Congress's commerce power:

(1) While not specifically prohibiting a court from aggregating the effects of non-economic activities to bring a statute within the scope of the commerce power,[150] the Court in *Morrison* made clear that central to a determination of the constitutional legitimacy of a law enacted pursuant the commerce power was the commercial/noncommercial distinction.[151]

(2) Regulation of noncommercial local activity by Congress required that a "jurisdictional nexus" substantiate Congress's lawmaking authority in that area.[152]

(3) Simply "appending" legislative history to substantiate the connection between noncommercial local activity and Congress's authority to regulate under the Commerce Clause does not insulate the regulation in question from judicial review.[153]

F.3d 286, 288 (5th Cir. 2004) (per curiam) (Jones, J., dissenting) (citing *Wickard* in the court's discussion of interstate commerce).

146. Wickard v. Filburn, 317 U.S. 111, 128 (1942).

147. *See id.* at 128-29 (justifying the regulation of home-grown wheat in excess of a federally mandated quota as within the power of Congress because such activity could conceivably affect price controls set by the Agricultural Adjustment Act).

148. *Id.* at 127-28.

149. *Id.*

150. United States v. Morrison, 529 U.S. 598, 613 (2000).

151. *Id.* at 610; *cf.* United States v. Bramble, 103 F.3d 1475, 1481 (9th Cir. 1996) (upholding the Eagle Protection Act because "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity"). Regulation of a significant interstate black market in Bald Eagles and their valuable anatomical parts is a rational basis for exercising the commerce power through the Bald Eagle Protection Act. *Bramble*, 103 F.3d at 1481.

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

153. *Id.*

(4) Finally, *Morrison* rejects grandoise theories that connect a regulated activity (e.g., violence against women) to interstate commerce, and in doing so definitively addresses the concern expressed by Justice Thomas in his *Lopez* concurrence that the "substantial effects" prong of *Lopez* unwittingly allowed Congress a general police power over the states via the Commerce Clause.[154] *Morrison* is unequivocal in holding that "[t]he Commerce Clause does not regulate crime, sexual inequity, or ecosystems as such—it regulates commerce."[155]

The difference between *Rancho Viejo* and *GDF Realty* is over the proper application of *Morrison*'s four-part test to the constitutional grounding of ESA "to regulate a matter of unique local concern" traditionally reserved to state and local government.[156] The following analysis explores why differing rationales in *Rancho Viejo* and *GDF Realty* result from evading an honest reliance on *Lopez* and *Morrison*, and how this bifurcated evasion points to a conclusion that the Commerce Clause authority of the ESA to regulate Cave Bugs and Arroyo Toads is constitutionally unsupportable.[157]

III. ANALYSIS

> "I call it a Myth because it is, as I have said, the imaginative and not the logical result of what is vaguely called 'modern science'. . . . What the Myth uses is a selection from the scientific theories—a selection made at first, and modified afterwards, in obedience to imaginative and emotional needs. It is the work of the folk imagination, moved by its natural appetite for an impressive unity. It therefore treates its *data* with great freedom—selecting, slurring, expurgating, and adding at will."[158]
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> —C.S. Lewis

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154. *See id.* at 615 (rejecting the idea that violence against women substantially affects interstate commerce as the type of improbable rationalization indicted by *Lopez*).

155. GDF Realty Invs. v. Norton, 362 F.3d 286, 293 (5th Cir. 2004) (per curiam) (Jones, J., dissenting); Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1260 (2003).

156. *GDF Realty Invs.*, 362 F.3d at 292 n.6 (per curiam) (Jones, J., dissenting).

157. *See* Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003) (noting that "evidence of willful judicial foot-dragging" explains the tendency of lower federal courts to narrowly interpret *Lopez*). Critics initially feared that the consequence of *Lopez* and *Morrison* would be the invalidation of numerous important federal laws, when such occurrences have been rare. *Id.*

158. C.S. LEWIS, *The Funeral of a Great Myth*, *in* THE SEEING EYE AND OTHER SELECTED ESSAYS FROM *Christian Reflections* 113, 114 (Walter Hooper ed., Ballantine Books 1992) (1986).

What Bjørn Lomborg calls "The Litany" is a set of popular environmental beliefs; beliefs nourished by the "Myth" described by C.S. Lewis.[159] According to this Litany, "the environment is in poor shape here on Earth. . . . The planet's species are becoming extinct in vast numbers . . . . The world's ecosystem is breaking down. We are fast approaching the absolute limit of viability, and the limits of growth are becoming apparent."[160] *Rancho Viejo* and *GDF Realty* listen to the Litany and make use of the Myth in "selecting, slurring, expurgating, and adding at will"[161] in order to keep ESA regulation of intrastate species within Commerce Clause boundaries.

Preservation of endangered species and biodiversity science are of course important national issues, and there is something romantic, some indefinable ecological truism, about the idea that our federal government should assume the responsibility to protect the "interdependent web" of all species for the good of the Earth.[162] Plausible as that thesis may or may not be, removing intrastate species from the ESA's regulatory authority does not threaten that interdependent web, nor are the ESA, Arroyo Toads, or Cave Bugs substantially related to commerce—much less interstate commerce. No Commerce Clause jurisprudence exists giving Congress the right to punish murder or felonies under the "interdependent web" analysis, yet human beings have a more substantial link to interstate commerce than do Cave Bugs or Arroyo Toads.[163]

A. *Commerce and Biodiversity*

Rancho Viejo "sustains the application of the [ESA] in this case because Rancho Viejo's commercial development constitutes interstate commerce and the [ESA] regulation impinges on that development, not because the incidental taking of Arroyo Toads can be said to be interstate commerce."[164] *Rancho Viejo* looked not to the ESA itself but to the commercial aspect of the Rancho Viejo project to connect the ESA with interstate commerce—a construction project drawing on *out-of-state* la-

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159. *Id.*

160. BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 4 (Hugh Matthews trans., Cambridge University Press 2001).

161. C.S. LEWIS, *The Funeral of a Great Myth*, *in* THE SEEING EYE AND OTHER SELECTED ESSAYS FROM *Christian Reflections* 113, 114 (Walter Hooper ed., Ballantine Books 1992) (1986).

162. *See* GDF Realty Invs. v. Norton, 362 F.3d 286, 287 (5th Cir. 2004) (per curiam) (Jones, J., dissenting) (paraphrasing the panel's holding in *GDF Realty*).

163. *GDF Realty Invs.*, 362 F.3d at 287 (Jones, J., dissenting).

164. Rancho Viejo, L.L.C. v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (per curiam) (Roberts, J., dissenting).

bor and resources.[165] *Rancho Viejo* also looked to the "option value" of endangered species as a future source of commercially vital raw materials (medicine, chemicals, etc.) in order to establish a substantial relationship between interstate commerce and Rancho Viejo's development project.[166]

Rancho Viejo distinguished its facts from another Supreme Court Commerce Clause ruling, *Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers* (*SWANCC*).[167] *SWANCC* held that the definition of "navigable waters" under the Clean Water Act,[168] which regulates the discharge of material into the "navigable waters" of the United States,[169] does not include ponds in abandoned gravel pits, simply because these ponds attract the presence of migratory birds protected under the Clean Water Act.[170] Writing that *SWANCC* requires a Commerce Clause "evaluation of 'the precise object or activity that, in the aggregate, substantially affects interstate commerce,'"[171] the *Rancho Viejo* court noted that the housing construction project at issue in its decision—unlike the abandoned gravel pits in *SWANCC*—was the requisite "precise object" with a direct relation to interstate commerce.[172]

Rancho Viejo additionally holds that "Congress contemplated protecting endangered species through regulation of land and its development . . . . Such regulation, apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce."[173]

Thirdly, *Rancho Viejo* holds that the mere possibility of future commercial viability of the Arroyo Toad (and, by extension, "biodiversity") makes "harm" to the Arroyo Toad an activity having a substantial relationship to interstate commerce.[174]

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165. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1069 (D.C. Cir. 2003).

166. *Id.* at 1069-70.

167. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (finding that a congressional statute significantly impinged the states' usual power over land and water).

168. 33 U.S.C. § 1344 (2001).

169. 33 U.S.C. § 1344(a) (2001).

170. *Solid Waste Agency of N. Cook County*, 531 U.S. at 174.

171. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1072 (D.C. Cir. 2003) (quoting Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001)).

172. *Id.*

173. *Id.* at 1073 (quoting Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1059 (D.C. Cir. 1997)).

174. *See id.* (construing the legislative history of the ESA to define "biodiversity" as substantially affecting commerce).

While the focus of *Rancho Viejo* is on the commercial activity causing the "takes," *GDF Realty* characterizes the ESA as an economically-oriented statute in order to justify an interstate commerce nexus.[175] *GDF Realty* thus disagrees with *Rancho Viejo*'s interpretation of *SWANNC*, stressing that "Congress, through the ESA, is not directly regulating commercial development."[176] *GDF Realty*'s analysis focused on species "takes," as opposed to the commercial activity of the developer, reasoning that the ESA is ultimately a commercial and economic statute because industry has a direct impact on the health of our ecosystem and the "interdependent web" of all forms of life.[177]

Hence, the mere *possibility* of harm to any species the FWS deems to be endangered may "threaten the 'interdependent web' of all species" upon which humanity depends to maintain the Earth's ecological balance.[178] Furthermore, "[a]llowing a particular take to escape regulation . . . would undercut the ESA and lead to piece-meal extinctions. . . . Therefore, [intrastate species] takes may be aggregated with all other ESA takes. . . . [A]pplication of [the] ESA's take provision to [intrastate species] is a constitutional exercise of the Commerce Clause power."[179] This is the Commerce Clause analysis sharply rebuked by Judge Jones in her dissent.[180]

The *Rancho Viejo* approach stems from its D.C. Circuit predecessor, *National Association of Home Builders v. Babbitt (NAHB)*.[181] *NAHB* was the first Commerce Clause challenge to the ESA's jurisdiction over intrastate species. *NAHB* formulated the "option value" theory of species in establishing the ESA as "substantially related to interstate commerce":[182]

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

176. *Id.*

177. *Id.*

178. *Id.* at 640.

179. *Id.* at 640-41.

180. *See* GDF Realty Invs. v. Norton, 362 F.3d 286, 287 (5th Cir. 2004) (per curiam) (Jones, J., dissenting) (stating that *GDF Realty* offers "but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce"). It is much easier to comprehend how harm to humans can be linked to an impact on interstate commerce rather than harm to tiny Cave Bugs or other species. "Yet the panel's 'interdependent web' analysis gives these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*." *Id.*

181. 130 F.3d 1041 (D.C. Cir. 1997).

182. *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1041 (D.C. Cir. 1997) (upholding the application of the ESA to the Delhi Sands Flower-Loving Fly, a species unique to California). Wildlife Biologists determined that the construction would harm six to eight Delhi Sands Flower-Loving Flies. *Id.* at 1060. The small number of flies ended up delaying the construction of a Southern California hospital and costing taxpayers $3.5 million. Alexander F. Annett, *Reforming the Endangered Species Act to Protect Species and*

> A species whose worth is still unmeasured has what economists call an "option value"—the value of the possibility that a future discovery will make useful a species that is currently thought of as useless. . . . Because our current knowledge of each species and its possible uses is limited, it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce. In the aggregate, however, we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.[183]

Rancho Viejo faithfully applies *NAHB*'s premise to the Arroyo Toad. Because "the occasional sale of a toad [say, to a botanist] is too trivial" to justify regulation of Arroyo Toad takes as constitutional via the Commerce Clause, "the government wants to move to a more general level: Somewhere in the endangered universe, there may be a species with the genetic material for a miracle cure or a similarly promising commercial venture."[184]

GDF Realty diverges from *Rancho Viejo* on the "option value" rationale, stressing that "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."[185]

While aggregation helps both *Rancho Viejo* and *GDF Realty* to the conclusion that "takes" of the Cave Bug and Arroyo Toad are substan-

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Property Rights, HERITAGE FOUNDATION BACKGROUNDER, Nov. 13, 1998, at 6, *available at* http://www.heritage.org/Research/EnergyandEnvironment/BG1234.cfm (last visited Nov. 9, 2004); *cf. GDF Realty Invs.*, 362 F.3d at 292 (citing a *Houston Chronicle* story about building a state highway over Cave Bug caverns). "Perversely, federal protection of the [Cave Bug] has become a device to thwart not only these appellants' prospects of land development but also the State's construction of a highway, the quintessential modern artery of commerce." *GDF Realty Invs.*, 362 F.3d at 292.

183. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1053-54 (citations omitted).

184. William S. Greve, *A Poorly Traveled Toad*, NAT'L L.J., Nov. 25, 2002, at A9; *see also* BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 251 (Hugh Matthews trans., Cambridge University Press 2001) (relating the results of research on the total worth of biodiversity). Lomborg reports that biodiversity researchers estimate the total annual worth of biodiversity "from $3-33 trillion or 11-127 percent of the world economy. BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 251 (Hugh Matthews trans., Cambridge University Press 2001). These high values have then been used as general arguments as to the importance of biodiversity." *Id.* Lomborg implies that this insight is of questionable value, considering that the researchers give themselves a margin for error of 115 percent or $30 trillion. *Id.*

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

tially related to interstate commerce, their rationales are both constitutionally and scientifically unsupportable.

On one hand, *Rancho Viejo* and *GDF Realty* make sense because "federalism not only limits the federal government but also gives it very powerful means to carry out the tasks assigned to it."[186] On the other hand, *Lopez* and *Morrison* require that these "powerful means" do not trample established Supreme Court precedent which sustains Commerce Clause regulation of intrastate activity under the aggregation principle "only where the activity is economic in nature."[187]

Rancho Viejo and *GDF Realty* essentially differ over the relationship of "biodiversity" to the Commerce Clause. According to *Rancho Viejo*'s "option value" theory, all species are part and parcel of the tapestry of interstate commerce, and therefore the "potential benefits of even microscopic species should not be overlooked."[188] As a result, "[w]hen we chip away at the biodiversity of our planet, we chip away at our potential for knowing more about, and surviving better in the world."[189]

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186. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 852 (2002).

187. United States v. Morrison, 529 U.S. 598, 613 (2000).

188. Deanne M. Barney, *The Supreme Court Gives an Endangered Act New Life:* Bennett v. Spear *and Its Effect on Endangered Species Act Reform*, 76 N.C. L. REV. 1889, 1933 (1998); *see also* Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325, 353 (2002) (defining biodiversity as nothing less than the "entire tapestry of nature"); Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 2 (1997) (declaring that increasing biodiversity is a central policy objective of all federal environmental law). *But cf.* Dixy Lee Ray & Louis R. Guzzo, Environmental Overkill: Whatever Happened to Common Sense? 83-84 (Regnery Gateway 1993) (challenging the validity of the "endangered" status of certain species which are merely subspecies of non-endangered animals). Because the transitional boundaries between species are often amorphous and ill-defined, the classification of species as "endangered"—especially lower forms of life such as worms and single-celled organisms—often amount to subjective (i.e., unscientific) judgment calls. DIXY LEE RAY & LOUIS R. GUZZO, ENVIRONMENTAL OVERKILL: WHATEVER HAPPENED TO COMMON SENSE? 83-84 (Regnery Gateway 1993). Because the ESA does not make allowances for the complexities of endangered species taxonomy, it makes it "possible for government agencies and their employees to identify any creature as a species—or subspecies—or geographical population—or whatever best suits their purposes for listing it as 'endangered' or 'threatened.'" *Id.* at 85. While the listing process is the source of much controversy surrounding the ESA, endangered species science generally goes unchallenged. One lawyer rues the fact that "[t]he government's science on biological issues has been shown again and again to be flawed, but the government is slow to admit its inability to measure key data accurately because . . . [of] an almost impossible-to-rebut presumption of expertise which the federal courts are obliged to honor." Hugh Hewitt, EDITORIAL ARCHIVES, Oct. 27, 2003, at http://www.hughhewitt.com/cgi-bin/calendar.pl (last visited Nov. 9, 2004).

189. Jeanine A. Scalero, *The Endangered Species Act's Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 CHAP. L. REV. 317, 349 (2000).

GDF Realty rejects the "option value" rationale as the type of overly attenuated rationale rejected by the Court, but concludes that an alternative to the *Rancho Viejo* ESA Commerce Clause theory is an unavoidable necessity because "the threat of extinction of species and loss of their habitat is both a worldwide and a national problem that requires at least a comprehensive national solution."[190] Here, *GDF Realty*'s circular reasoning becomes apparent: In order to fit intrastate endangered species within a "national solution" (i.e., the ESA), *GDF Realty* had to perform a *Wickard*-like aggregation of "takes" of all intrastate species similarly situated to the Cave Bug "in order to arrive at a sum effect on interstate commerce that is, post-aggregation, substantial."[191] But even its reliance on *Wickard* is shaky: *Wickard* specifically tailored its inquiry to the aggregate commercial effect of a particular *commercial activity* (the impact of home-grown wheat production on the open market for wheat); the Court has never expanded *Wickard*'s aggregation principle to allow federal regulation of non-economic conduct such as Cave Bug takes.[192]

The *GDF Realty* and *Rancho Viejo* biodiversity arguments typify the overly-attenuated rationales *Lopez* and *Morrison* intended to abolish—engagement in "intellectual exercise[s] . . . finding any chain of inferences linking the regulated activity, whatever its nature, to an effect on commerce, whatever its magnitude."[193]

If the take of a Cave Bug cannot be causally related to the take of a species in another state, then aggregation is, on its face, unwarranted.[194] In other words, a Cave Bug take has absolutely no connection to, say, an Arroyo Toad take, but the principle of aggregation allows the *GDF Realty* court to manufacture a link—"all takes are essential, therefore all

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190. GDF Realty Invs. v. Norton, 326 F.3d 622, 644 (Dennis, J., concurring).

191. *Id.* (Dennis, J., concurring).

192. GDF Realty Invs. v. Norton, 362 F.3d 286 (5th Cir. 2004) (per curiam) (Jones, J., dissenting), *pet. for cert. filed*, 2004 WL 1243138, at *1 (U.S. May 27, 2004) (No. 03-1619); Petition for Writ of Certiorari, GDF Realty Invs. v. Norton, 2004 WL 1243138, at *15-16 (No. 03-1619).

193. David A. Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998); *cf.* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (stating that while federal laws must be accorded wide discretion to accomplish their purpose, "the powers of the government are limited" so that the scope of federal law must "consist with the letter and spirit of the constitution"); THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Buccaneer Books 1992) (proclaiming that "the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority").

194. GDF Realty Invs. v. Norton, 362 F.3d 286, 290-91 (5th Cir. 2004) (per curiam) (Jones, J., dissenting).

takes have a substantial commercial effect."[195] The *GDF Realty* analysis is in error because Arroyo Toad "takes" at the Rancho Viejo southern California development site are causally independent from Cave Bug "takes" in Travis County, Texas. In other words, an Arroyo Toad "take" does not make it "substantially more or less likely" that a Cave Bug "take" will occur. "A Cave Bug take does not depend on whether an endangered fish, for instance, is taken in the Pacific Northwest or whether an endangered bird or bug is taken in Colorado or *vice versa*."[196]

As Justice Rehnquist notes in *Lopez*, "pil[ing] inference upon inference" in this way makes it simple to characterize *any* activity as substantially related to interstate commerce and therefore makes it possible for Congress to regulate virtually anything it wants to under the rubric of the Commerce Clause.[197] Hence, the only reasonable constitutional use for "inference-stacking" is for analysis of activities which may *reasonably* be characterized as economic or commercial in nature. And reasonably speaking, the design of the ESA is to regulate *species*—not commerce.

In the final analysis, then, the *GDF Realty* aggregation scenario is nothing more than a bar room stunt:

> The Kevin Bacon game . . . wherein the contestant is challenged to link the actor Kevin Bacon to another totally unrelated actor in as few steps as possible . . . . For instance, Kevin Bacon can be linked to Marilyn Monroe by the following progression:
>
> 1. Marilyn Monroe was in Some Like It Hot with Jack Lemmon;
> 2. Jack Lemmon was in the Out of Towners with Shelly Duval;
> 3. Shelly Duval was in the Shining with Jack Nicholson;
> 4. Jack Nicholson was in A Few Good Men with Kevin Bacon.
>
> Of course, everyone knows that Kevin Bacon has absolutely no connection to Marilyn Monroe other than through this series of contrived coincidences.[198]

Comparatively, using aggregation to uphold the regulation that a farmer's personal consumption of wheat under the Agricultural Adjust-

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195. *Id.*; *see also* United States v. Lopez, 514 U.S. 549, 560, 568 (1995) (declining to extend the aggregation principle to non-economic activity because it would lead to establishment of "congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

196. Petition for Rehearing En Banc for Appellants at 14, GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (No. 01-51099).

197. *Lopez*, 514 U.S. at 567.

198. David A. Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 382 n.107 (1998).

ment Act of 1938 in *Wickard* was no such bar room stunt. Under *Morrison*'s requirement of jurisdictional element and commercial nexus for regulation under the Commerce Clause, *Wickard* is constitutional where *GDF Realty* is not. Thus, if thousands of other intrastate wheat farmers exceeded quota due to growth of personal crop, the resulting national wheat surplus would depress the market price of wheat in a manner Congress intended the Agricultural Adjustment Act to prevent.

Cave Bug takes under the ESA have no such conceivable economic ramifications, and therefore, *GDF Realty*'s aggregation argument is defective. In *GDF Realty*, "the only aggregate effect articulated by the panel is on biodiversity, which the panel somehow equates with 'economic' or commercial activity. It seems clear, though, that biodiversity is a condition of nature, not a human activity."[199]

B. *The Option Value of Beetles*

Rancho Viejo's theory that the "option value" of biodiversity makes the ESA an extension of the commerce power is equally incompatible with *Wickard*.

About 1.6 million species of life inhabit the earth.[200] Most of these species are insects, including "beetles, ants, flies, as well as worms, fungi, bacteria, and viruses."[201] Because of this immense variety, biodiversity's "option value" is virtually imperceptible. Furthermore, notes Professor Eugene Volokh, "Medical research benefits from biodiversity—but biodiversity captured in a lab, not necessarily in the wild."[202]

Because biodiversity's "option value" is so insignificant, it stands to reason that the impact of "option value" on interstate commerce is *de minimus*. The research of scientist Bjørn Lomborg bears this out:

> [T]he value [of biodiversity is the value] of losing the last beetle of a million species of beetles. Here, several analyses show that the human value of the final species of plants or animals for medicine is

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199. *GDF Realty Invs.*, 362 F.3d at 292 n.5 (per curiam) (Jones, J., dissenting).

200. BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 250 (Hugh Matthews trans., Cambridge University Press 2001).

201. *Id.* More than 1,000,000 species of insects and 4,200 species of amphibians have been documented since the year 1600. *Id.* Out of 1033 documented species extinctions, 98 were insect species and 5 were amphibian species. *Id.* Given that twenty percent of all species on the planet are beetles, beetle protection is a questionable policy objective; research shows that "there are estimated to be 100 million beetles in existence for each one human being. The United States contains 28,000 known species of beetle and may host thousands more." GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM 575 (Viking Penguin 1995).

202. Eugene Volokh, *Will Endangered Species Endanger the GOP?*, THE VOLOKH CONSPIRACY, Jan. 3, 2004, *at* http://volokh.com/ (on file with the *St. Mary's Law Journal*).

> extremely low—mainly because we have either found what we were looking for long before getting to the end of the line, or because to search all the way through all species would have been fantastically expensive.[203]

Other research on the "option value" of biodiversity finds that "when several species contain a useful genetic compound, only the first discovery of the compound adds significant societal value. Only ten in 250,000 species, at best, are projected to produce commercially valuable genetic discoveries, which yields a maximum expected value per marginal species of less than $10,000."[204]

Whether under the rubric of option value or under the rationale of the interdependent web of all species, "biodiversity" is precisely the type of irreducible, highly attenuated link to "commerce" among the several states that the U.S. Supreme Court's new Commerce Clause jurisprudence places outside of Congress's authority to regulate. A theory which makes the Commerce Clause a virtually limitless source of power for the federal government should be invalid by *Lopez* and *Morrison* standards: "Anything has option value—e.g., nubile women and rich bachelors. If the feds may protect . . . Arroyo toads, they may also ensure the continued 'availability' of Heather Locklear or Donald Trump. But *Lopez* and *Morrison* hold that the feds may not regulate the marriage market, notwithstanding its manifest economic effects."[205]

GDF Realty and *Rancho Viejo* thus illustrate how the principle of aggregation transformed the Commerce Clause "from its original role of granting the authority to regulate commerce between the states into the '[h]ey, you-can-do-whatever-you-feel-like-Clause.'"[206] In the final analy-

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203. BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 251 (Hugh Matthews trans., Cambridge University Press 2001).

204. Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1136 (1999). A more convincing argument for the relationship of biodiversity to commerce is "the direct, and historically free, services that the species . . . as part of their ecosystems, provide . . . what many analysts have begun to call 'ecosystem services.'" *Id.* Examples of ecosystem services provided by individual species are waste decomposition, pest control, soil regeneration, and climate control—all services of inestimable worth to civilization. *Id.* But the value of biodiversity to ecosystem services remains difficult to quantify because "[t]he contribution of individual species to these ecosystem services will vary tremendously and must be measured at a marginal level." *Id.*

205. Michael S. Greve, *A Poorly Traveled Toad*, NAT'L L.J., Nov. 25, 2002, at A9.

206. Vince Hazen & Paul Terrill, *The Renewal of Federalism*, LIBERTY MATTERS J., Summer 2001, *at* http://www.libertymatters.org/libertymattersjournal/summer01-3.htm (last visited Sept. 19, 2004); *see also* Diane McGimsey, Comment, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1691 (2002) (defining aggregation as the process in which

sis, what the *Rancho Viejo* and *GDF Realty* courts "felt like" doing with the Commerce Clause is protecting biodiversity.[207]

IV. CONCLUSION

One biologist believes that "'without politics, there can be no biodiversity.'"[208] This also seems to be the underlying thesis of *Rancho Viejo* and *GDF Realty*, inconceivable as it is that "there can be no biodiversity" if these two courts held that the application of the ESA to Cave Bugs and Arroyo Toads is unconstitutional.

"the Court simply ask[s] whether Congress ha[s] a rational basis to conclude that the activity in question, when aggregated with similar activities, substantially affected commerce" and is therefore appropriate to regulate pursuant to the commerce power); *cf.* MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 4 (AEI Press 1996) (commenting that "the central premise and operating principle of modern environmentalism" is the universal interconnectedness among the earth and all living things).

207. *See* Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The "Living Constitution," the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 770-71 (2000) (applying a "living" constitutional analysis of the Third Amendment to the ESA). As some creative legal scholars explain in a trenchant essay on the ESA and the myth of the "living Constitution," the *Rancho Viejo* and *GDF Realty* interpretation of the Commerce Clause arguably violates the Constitution's Third Amendment by "quartering" Arroyo Toads and Cave Bugs on the Rancho Viejo and GDF Realty's land without the landowners' consent. *Id.* The ESA can violate the Third Amendment's constitutional protections because "[j]ust as the Quartering Acts required landowners to allow British soldiers to make use of their property, so the Endangered Species Act requires landowners to allow non-human, but nonetheless potentially unwelcome, species to occupy their land." *Id.* at 798. While this analysis may seem ridiculous especially because the Third Amendment plainly prohibits *soldiers*—not endangered species—from being quartered in a *house* (not just on the land) without the owner's consent, "[a] focus on specific words is inconsistent with the 'living Constitution' analysis. . . . Thus, plain meaning is not a bar, in this view, to understanding the principles behind the Third Amendment" and can be adapted to contemporary social and economic problems such as presented by the ESA's impositions on landowners. *Id.* at 774. The authors' Third Amendment analysis of the ESA is, of course, an exercise in illustrating absurdity by being absurd, and similarly offers a startling insight into why *Rancho Viejo* and *GDF Realty* interpret the Commerce Clause using an apparently reasonable, though actually absurd, constitutional hermeneutic.

208. Gregory J. Anderson, *The Nearly Invisible Voice of Organismal Biology in Public Policy*, 52 BIOSCIENCE 85, 87 (2002) (quoting organismal biologist David Blockstein). *But cf.* Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1299 (2003) (explaining why an unwillingness to accept the *Lopez* line of cases in lower federal courts explains, in part, "lower court resistance to the Supreme Court's recent Commerce Clause decisions"). Yet the politics of biodiversity seem to influence *Rancho Viejo* and *GDF Realty* much more than either court's ideological resistance to the "new" federalism.

In reality, politics is an *obstacle* to true science.[209] Michael Crichton once told an audience that "science offers us the only way out of politics. And if we allow science to become politicized, then we are lost . . . . [I]t's time to abandon the religion of environmentalism, and return to the science of environmentalism, and base our public policy decisions firmly on that."[210]

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209. *See* JULIAN SIMON, HOODWINKING THE NATION 62-63 (Transaction Publishers 1999) (analyzing why many biologists tend to claim expertise in areas in which they have no training, knowledge, or experience). According to Simon, biologists "are not protected against error from grossly unrepresentative samples" and are therefore at liberty to turn an emotional reaction (say, to the plight of Cave Bugs or Arroyo Toads) into a scientific truism about biodiversity. *Id.* at 60. Correspondingly, the *Rancho Viejo* and *GDF Realty* courts felt "qualified to render a policy judgment" on the application of the ESA to Arroyo Toads and Cave Bugs. *Id.* at 61. Furthermore, notes Professor Phillip Johnson, the "fact that science speaks so authoritatively in our culture tempts ideologues and worldview promoters to claim the authority of science as validating claims that in fact are not testable by experiment, and that may go far beyond the available evidence." PHILLIP E. JOHNSON, THE WEDGE OF TRUTH: SPLITTING THE FOUNDATIONS OF NATURALISM 37 (InterVarsity Press 2000). Simon theorizes that because a biologist works with nonhuman species, it "predisposes [that] person to have relatively little faith in the adjustment capacities of human beings." JULIAN SIMON, HOODWINKING THE NATION 62 (Transaction Publishers 1999).

210. Michael Crichton, *The Religion of Environmentalism, Remarks to the Commonwealth Club*, (Sept. 15, 2003), *at* http://www.mitosyfraudes.8k.com/polit/enviro.html (last visited Nov. 8, 2004). *See generally* GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM 130-32 (Viking Penguin 1995) (demonstrating how "Earthianity," Easterbrook's name for the religion of environmentalism referred to by Michael Crichton, borrows liberally from the Christian doctrine of original sin). *Political* environmentalism—which should be distinguished from a common desire to have clean water, clean air, abundant wildlife, etc.— is at bottom a vision of "a world in which everything is connected to everything else and. . . . aims to eviscerate common-law rights and to replace them with a legal regime that would organize transactions among individual citizens for a single public purpose, environmental protection." MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 1 (AEI Press 1996). This theory of interconnectedness among all things is captured in "the first law of ecology" so that "when a butterfly in China flaps its wings, the effects may ripple through the entire ecosystem." *Id.* at 4. The butterfly effect is the philosophical basis for the Endangered Species Act. *Id.* The butterfly effect is enough to convince courts such as *Rancho Viejo* and *GDF Realty* that intrastate species such as the Arroyo Toad and the Cave Bug need to be rescued because "in areas of the world where humans cannot be excluded, their activities must be carefully monitored and controlled, since even seemingly innocent actions may produce catastrophic environmental consequences, especially in the aggregate." *Id.* ESA legislative history in fact expresses alarm at the possibility of a worldwide biodiversity crisis; these concerns of Congress are cited with approval by *Rancho Viejo* and *GDF Realty* as proof of a substantive link between biodiversity and commerce. If biodiversity itself is approaching a condition of irreversible decline, so goes these arguments, then the ESA must be "substantially related to interstate commerce" because biodiversity in its entirety is the *sine qua non* of a habitable planet, and therefore a problem of *national* concern inappropriate for management by the "disorganized policies and programs" of the states,

A. *Environmental Policy and Public Preference*

Rancho Viejo and *GDF Realty* thus serve to perpetuate the politicization of the ESA as it concerns biodiversity. "Any system that allows representatives from Massachusetts and North Carolina—where there are no [Arroyo Toads or Cave Bugs]—to have such a profound impact on the

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especially when the ESA embodies a cohesive national policy to address Congress's concern over biodiversity. *See* Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1079 (D.C. Cir. 2003) (relying on the Fourth Circuit's favorable treatment of ESA legislative history to buttress its holding); GDF Realty Invs. v. Norton, 326 F.3d 622, 640 (5th Cir. 2003) (citing ESA legislative history in support of the court's holding that it is constitutional to extend the jurisdiction of the ESA over intrastate species). *But cf.* United States v. Morrison, 529 U.S. 598, 599 (2000) (rejecting judicial reliance on "Congress' findings" that follow a "but-for causal chain . . . to every attenuated effect upon interstate commerce"); JAQUES ELLUL, PROPAGANDA 112-13 (Konrad Keelen trans., Knopf 1965) (analyzing the close relationship between propaganda and the empirical evidence used by propaganda to justify a desired outcome). "[P]ropaganda does not base itself on errors, but on exact facts. . . . The greater a person's knowledge of political and economic facts, the more sensitive and vulnerable is his judgment. Intellectuals are most easily reached by propaganda, particularly if it employs ambiguity." *Id.* at 113. For example, *GDF Realty* justifies the ESA's regulation of Cave Bug takes in terms of Congress's vague findings in the ESA's legislative history on the "'critical nature of the interrelationships of plants and animals between themselves and with their environment.'" *GDF Realty Invs.*, 326 F.3d at 640. But the "butterfly effect" is not a canon of construction, and neither *Rancho Viejo* nor *GDF Realty* address how removing the ESA's authority over intrastate species would diminish biodiversity, notwithstanding the "interdependent web" analysis. Again, "The Litany:" orthodoxy of *Rancho Viejo* and *GDF Realty* and throughout the field of biology "'that biodiversity is in such danger that the United States must "cease 'developing' any more relatively undisturbed land" is but a "first step" to the solution." Charles C. Mann, *Extinction: Are Ecologists Crying Wolf? Questioning Prophecies of Mass Distinctions*, 253 SCIENCE 736, 736 (1991) (identifying biologists Paul Ehrlich of Stanford and E.O Wilson of Harvard as leading proponents of "an exaggerated and distorted bio-dogma" with a jaundiced view of humanity and its impact on the environment); *cf.* Nicholas D. Kristoff, *Make Way for Buffalo*, N.Y. TIMES, Oct. 29, 2003, at A25, *available at* 2003 WL 65709148 (urging the government to consider halting development in great plains states such as North Dakota in order to create a "Buffalo Commons" which would be "the world's largest nature park, drawing tourists from all over the world to see . . . buffalo, elk, grizzlies, and wolves"). *But cf.* Jonah Goldberg, *Big Oil, Caribou, and Greed*, NAT'L REV. ONLINE, July 20, 2001, *at* http://www.nationalreview.com/goldberg/goldberg072001.shtml (last visited Nov. 9, 2004) (betting that "if you asked someone from Greenpeace if there were any place in the world that is devoid of humans and also ugly, they wouldn't be able to name one"). As a U.S. Forest Service administrator confided to one reporter, no credible scientific evidence exists of an imminent mega-extinction of species across the planet, "[b]ut if you point this out, people say you are collaborating with the devil." Charles C. Mann, *Extinction: Are Ecologists Crying Wolf? Questioning Prophecies of Mass Distinctions*, SCIENCE 736, 736 (1991).

daily lives of [citizens in California and Texas] is pushing, and probably exceeding, the limits of legitimacy."[211]

A possible alternative is the "cooperative federalism" model of environmental regulation—streamlining the ESA, beginning with devolving its authority to regulate intrastate species to the states.[212] The result: An ESA with a manageable jurisdictional scope and an ESA whose resources are not thinly spread, creating governmental savings which could be earmarked for wildlife preservation schemes administered by and within the several states.[213]

Cooperative federalism is preferable to a system that administers the ESA by court order, *vis-à-vis Rancho Viejo* and *GDF Realty*. In that regard, the current system is a tremendous waste of resources, because *local* issues relating to protecting wildlife such as the Arroyo Toads and the Cave Bugs are better left to the *local* institutions uniquely suited to administrate local endangered species and biodiversity concerns—state and local governments.[214]

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211. John C. Eastman, *Deadly Sucker Fish*, THE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY, *at* http://www.claremont.org/projects/jurisprudence/010827eastman.html (Aug. 27, 2001).

212. *See* Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995) (listing the elements of a successful cooperative federalism approach). According to Babich, cooperative federalism can improve hazardous waste regulation (and by extension, can improve endangered species regulation) if the federal government has a disciplined approach that consciously seeks to "(1) provide for state implementation; (2) set clear standards; (3) reflect respect for state autonomy; (4) provide mechanisms to police the process; and (5) apply the same rules to government and private parties." *Id.*

213. *See* Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 578 (1998) (characterizing cooperative federalism as a process in which "'states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards'").

214. *See* J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 642 n.267 (1995) (discussing how current federal species conservation policies actually undermine the goal of biodiversity preservation). The ESA's prohibition of the "take" of endangered species "by habitat modification" boils down to coercion of landowners by the federal government, which Professor Ruhl believes is antithetical to sound environmental policy:

> To imagine . . . that the federal government has the wisdom and knowledge to determine a single set of ecosystems for the nation and precisely locate potentially tens of thousands of miles of ecosystem boundaries, establish agreed-upon and measurable goals of the performance and desired condition of each of these ecosystems in all its complexity, and manage the intricacies of all the natural and human forces that affect the living and nonliving things on the landscape to reach those goals is to credit the federal government with an omniscience that simply does not exist in the real world.

Issues of endangered species protection and habitat conservation unique to an individual state (e.g., Arroyo Toads and Cave Bugs) are well-suited to be regulated according to the discretion of the states and not according to a federal mandate. Justice Kennedy's criticism of the Gun-Free School Zones Act's overbreadth also applies to the ESA, because both prevent "the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."[215] With respect to that overbreadth, this Comment has demonstrated that "takes" of intrastate species such as Arroyo Toads and Cave Bugs are activities "beyond the realm of commerce in the ordinary and usual sense of the term."[216]

States are already well-equipped with species protection statutes and habitat conservation frameworks that make the role of the ESA in local wildlife habitat protection issues superfluous, redundant, and intrusive.[217] Preemption of *all* existing state wildlife protection laws is emphatically *not* within the purview of the ESA and is beyond the constitutional scope of any federal environmental regulation, for that matter.[218]

Additionally, a cooperative federalism is already woven into the ESA framework to a certain extent; in fact, "states spend more money on envi-

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Id. (quotation marks omitted); *see also* Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 627 (1991) (identifying the sources of myopia and inefficiency in comprehensive federal regulatory schemes such as the ESA). In particular, Professor Sunstein criticizes "Congress's unwillingess to understand that regulatory programs involve complex tradeoffs among competing social goals; interest group 'capture' of the regulatory process (an important but overstated phenomenon); and failure on the part of agencies to deal with regulatory obsolescence over time." Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 627 (1991).

215. United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

216. *Id.*

217. *See, e.g.*, ALA. CONST. amend. 543 § 3(b) (1901) (establishing the Alabama Forever Wild Land Trust to acquire and maintain "areas supporting threatened or endangered species"); COL. REV. STAT. § 24-33-111(2)(a) (2001) (creating a species conservation trust fund for species listed as threatened or endangered under state or federal law); N.J. REV. STAT. § 13:8c-2 (2003) (creating a state habitat preservation trust fund "for endangered, threatened, and other rare species . . . necessary to preserve this biodiversity"); TEX. NAT. RES. CODE ANN. § 201.001 (Vernon 2004) (declaring it is "the public policy and in the public interest of the State of Texas to protect and preserve all caves on or under any of the land in the State of Texas").

218. *See* Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 391 (1977) (holding that because wildlife protection is a responsibility peculiar to the police powers of the states, federal interference is inappropriate in this arena barring a blatant constitutional violation); Sierra Club v. City of San Antonio, 112 F.3d 789, 797 (5th Cir. 1997) (stating that "the Endangered Species Act cannot fairly be described as an attempt to preempt all state law related to conservation and the protection of endangered species").

ronmental matters and employ more environmental bureaucrats than does the federal government. . . . In addition, the local and regional nature of many environmental problems means that local knowledge and expertise is necessary to develop proper solutions."[219] Coupled with the fact that "a substantial number of Americans believe there is nothing incompatible with the devolution of power and environmental protection,"[220] the *Rancho Viejo-GDF Realty* split perhaps represents the beginning of the end of the ESA's expansive interpretations.

B. *The "Race to the Bottom"*

Rancho Viejo in fact warns against devolvement of environmental protection to the states. According to *Rancho Viejo*'s "race to the bottom" theory, the effect of state assumption over environmental protections "would damage the quality of the national environment."[221] In the absence of centralized control, so the argument goes, "States may decide to forego or limit conservation efforts in order to lower these costs, and other states may be forced to follow suit in order to compete."[222]

There is a two-fold problem with this argument: First, because of the public's enthusiasm for environmental protection, the states are equally likely to engage in a "race to the top" as opposed to a "race to the bottom" in terms of protecting the environment.[223] Studies have demonstrated that given the opportunity, state and local government will seek to implement "innovative ways of making environmental programs more flexible, predictable, and efficient, without compromising environmental quality."[224]

In fact, state environmental standards often surpass the federal requirements when it comes to environmental concerns, and some states regulate the environment in areas unregulated by the federal govern-

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219. Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 628 (1998).

220. *Id.* at 632. A 1996 survey found that sixty-five percent of registered voters "felt that state or local government was better at environmental protection. . . . Rightly or wrongly, a substantial number of Americans believe there is nothing incompatible with the devolution of power and environmental protection." *Id.*

221. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1079 (D.C. Cir. 2003).

222. *Rancho Viejo*, 323 F.3d at 1079 (quoting Gibbs v. Babbitt, 214 F.3d 483, 502 (4th Cir. 2000)); *see also* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1055 (D.C. Cir. 1997) (contending that the absence of federal controls would encourage states "to adopt lower standards of endangered species protection in order to attract development").

223. Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 630 (1998).

224. *Id.* at 630.

ment.[225] Additionally, "many states are seeking to create business-friendly environments through administrative reforms that will not compromise environmental protection."[226]

The "race to the bottom" argument also doesn't work because it is relevant only to circumstances in which "commerce in [a] thing being regulated [encourages the States] to maneuver for a competitive advantage."[227] Competition among the States to create better overall business climates does not sufficiently justify the "race to the bottom" theory because such a rationale "would essentially allow Congress to regulate everything"—an argument fundamentally at odds with the *Morrison* limitations upon the congressional commerce power.[228]

The "race to the bottom" theory assumes environmental catastrophe would ensue in the absence of centralized, command-and-control environmental regulatory schemes. This theory fails to account for the subtleties of "free market government" captured by our federal Constitution, designed to release the collective, creative dynamic of the states in making their own policy decisions.[229]

Local government is competent enough to deal with environmental challenges.[230] Furthermore, ceding more environmental stewardship to local government makes sense because "the states spend more money on environmental matters and employ more environmental bureaucrats than

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225. *Id.* at 630-31. As reported by the Environmental Council of the States, states initiate more than 85% of environmental enforcement actions, and for about 80% of all environmental program spending. *Id.* at 626 n.363.

226. *Id.* at 631.

227. Reply Brief for Appellants at 16, Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (No. 01-5373).

228. *Id.*

229. *See* JULIAN SIMON, HOODWINKING THE NATION 39-40 (Transaction Publishers 1999) (criticizing command-and-control administration of environmental regulations). Professor Simon relates his experience at a town hall hearing over whether Champaign County, Illinois, should permit rezoning of farmland for industry, where he was informed by attendees that "'I'm for growth, but for *controlled* growth, of course.' When . . . ask[ed] why growth must be controlled by a planner or agency, they look at you blankly, as if you are lacking in elementary intelligence." *Id.*

230. *See* Kerry Cavanaugh, *The Plant That Won't Die Arundo Crowding Creeks, Wetlands*, L.A. DAILY NEWS, July 5, 2003, at 2-3, *available at* 2003 WL 5680573 (reporting on the effort of southern California counties to eradicate the Arundo plant in order to protect threatened and endangered species of flora and fauna). Recent environmental news from California reports on the Arundo plant, a "thirsty weed [which] drains [the Los Angeles River], taking water away from the fragile populations of Santa Ana Suckers and *Southwestern Arroyo Toads*." *Id.* at 2 (emphasis added). This story illustrates the competency of state and local governments in recognizing and dealing with environmental problems which threaten endangered species habitats.

does the federal government. . . . Centralized expertise is no longer necessary; it can actually be counterproductive."[231]

But when it comes to ceding more control to local government through the ESA, an amendment by Congress is unlikely because the endangered species issue is such a political "hot potato." Judicial reform of the ESA is equally unlikely so long as courts such as *Rancho Viejo* and *GDF Realty* continue to believe that "the government need[s] to be freed from the shackles of separation of powers so that a professional class of government bureaucrats [can] manage the government, the economy, and our lives with precision and efficiency."[232] As demonstrated, the Supreme

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231. Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 628-29 (1998).

232. John C. Eastman, *Is the EPA "The Very Definition of Tyranny"?*, THE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY, *at* http://www.claremont.org/projects/jurisprudence/000925eastman.html (Sept. 25, 2000). Professor Alan Dershowitz believes that such a "progressive" interpretation of the Constitution actually aligns with the Founders "original intent" as to interpreting the meaning of the Constitution; in other words, the Founders subscribe to the notion of a "living Constitution." *See* Alan Dershowitz, *Has the Supreme Court Gone too Far?*, COMMENT, Oct. 2003, at 32, *at* http://www.freerepublic.com/focus/f-news/994062/posts (challenging the "original intent" method of constitutional analysis). Professor Dershowitz dislikes judicial exegesis of "original intent" because it is an inexact science – "original intent" being a malleable concept susceptible to hypocritical posturing on both sides of the political aisle. *Id.* "Original intent" is insufficient to unlock the "conundrum of states' rights in a federal republic" and suggesting a "strict constructionist" constitutional analysis is dangerous because it confines the interpretation of the Constitution to the "narrow vision" of the Founding Fathers. *Id.* But the issue in both *Rancho Viejo* and *GDF Realty* is primarily textual, not one of "original intent" – an attempt to determine the meaning of "Commerce" used in the Constitution, not what the framers intended meaning of the word to be. Here, the philosophy of Professor Dershowitz and his many counterparts align with *Rancho Viejo* and *GDF Realty*'s public-law approach to ESA interpretation; that is, "biodiversity" is a national public value appropriate for federal oversight and administration, and therefore should be added to the meaning of the Commerce Clause. *But see* THE FEDERALIST NO. 17, at 80 (Alexander Hamilton) (Buccaneer Books 1992) (expressing a Founder's "original intent" with regard to states' rights). Hamilton urged that "[t]he administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, *all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.*" *Id.* (emphasis added). In terms of "original intent," Hamilton clearly did not "intend" the federal government to interfere with unique, local affairs of the states (*e.g.*, protection of Arroyo Toad and Cave Bug habitats). *Id.* The criticism Professor Dershowitz makes is instructive: Presumably, he subscribes to a "living Constitution" which changes as the *opinions* of the judicial aristocracy change. Alan Dershowitz, *Has the Supreme Court Gone too Far?*, COMMENT, Oct. 2003, at 32, *at* http://www.freerepublic.com/focus/f-news/994062/posts. By contrast, "original intent" attempts to interpret the Constitution from the Founder's point of view that certain unchanging principles and objective

Court's new federalism jurisprudence does not conform to this worldview.[233]

GDF Realty will thus test the committment of the Supreme Court's more liberal justices to the "new" federalist jurisprudence. Justice Ginsburg, writing for a unanimous Court in *Jones* v. *United States*,[234] recently struck down the Seventh Circuit's broad interpretation of a federal arson statute regulating the arson of property used in interstate commerce.[235] "Were we to adopt the Government's expansive interpretation, hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas . . . bears [a] trace of interstate commerce."[236]

From Justice Ginsburg's lips to the Court's ears: Will the Court apply the same logic in ruling on the ESA's constitutional limits? The ESA deserves no less skepticism for its Commerce Clause rationale than does a federal arson statute. "The justification for an appointed, life-tenured judiciary, after all, is that it will fearlessly apply the law, not that it will fearlessly fail to do so."[237]

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truths not subject to change in opinion are what underlie the rule of law. According to Dershowitz, this is the inferior "narrow view" of the Constitution. *Id.*

233. *See, e.g.*, Bradley C. Bobertz, *Blowing the Whistle on Postmodern Federalism*, 21 PACE ENVTL. L. REV. 83, 83 (2003) (expressing outrage that the resurgence in federalism "threatens the existence and effectiveness of environmental law" and condemning this resurgence as "nurtured for more than a quarter century by right-wing charities"); Oliver A. Houck, *More Unfinished Stories:* Lucas, Atlanta Coalition, *and* Palila/Sweet Home, 75 U. COLO. L. REV. 331, 407, 423-24 (2004) (suggesting that a Republican point of view is bad for the environment and intimating that federal circuit judges hold a preconceived bias against environmental protection due to participation in "industry-sponsored judicial education seminars on the inefficiencies of government environmental programs").

234. Jones v. United States, 529 U.S. 848, 856 (2000).

235. *Id.* at 857.

236. *Id.*

237. Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1257 (2003).