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Interstate Commerce and Intrastate Endangered Species: The Controversy and the Need for Compromise

“Destroying species is like tearing pages out of an unread book, written in a language humans hardly know how to read, about the place where they live.”

- Holmes Rolston III

I. INTRODUCTION

In the fifty-eight year period from 1937 to 1995, the Supreme Court declined to strike down a single Congressional Act promulgated under the Commerce Clause. With this power, Congress accomplished many essential and, indeed, long overdue goals such as the landmark Civil Rights Act of 1964. Also important, Congress took advantage of the Court’s highly deferential rational basis regime to pass the acclaimed Endangered Species Act (hereinafter ESA).

While the Court’s lenient rational basis standard gave Congress an avenue it needed to bring about reform in some of the nation’s most important issues, it concurrently raised questions regarding federalism. Noting these concerns, one commentator observed that the “Commerce Clause had become an intellectual joke among academics and attorneys” because the provision no longer had enforceable limits. Perhaps coming to the same conclusion, the Supreme Court, in its surprising and sweeping 1995 United States v. Lopez decision, declared that the Gun-Free School Zones Act of 1990 (hereinafter GFSZA) exceeded the

legislative power derived from the Commerce Clause.\textsuperscript{7}

This landmark case involved a violation of GFSZA when a San Antonio high school senior carried a concealed .38-caliber handgun to school.\textsuperscript{8} In striking down the statute, Chief Justice Rehnquist quoted James Madison’s Federalist No. 45. “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”\textsuperscript{9} Using Madison’s logic, Rehnquist continued, “[J]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”\textsuperscript{10} This language clearly indicates that the Court felt compelled to reign in congressional use of the Commerce Clause in order to prevent federal abuse of power.

Operating under the premise that there are indeed limits on the scope of the Commerce Clause, the Chief Justice articulated three categories under which Congress could regulate using this power.\textsuperscript{11} First, Congress could regulate “the use of the channels of interstate commerce, such as using interstate transportation routes.”\textsuperscript{12} Next, the Commerce Clause could be used for “[the] protect[ion] of the instrumentalities of interstate commerce, or persons or things in interstate commerce, such as proscribing theft of goods destined for interstate shipment.”\textsuperscript{13} Finally, Congress could use the power to involve itself in “intrastate activities having a substantial effect on interstate commerce.”\textsuperscript{14} The majority made it a point to state that the third category, dealing with intrastate activities, “required a substantial effect, not just any effect.”\textsuperscript{15}

The Court created a four-pronged analysis to determine whether an intrastate issue amounted to a substantial effect on interstate commerce.\textsuperscript{16} The factors include 1) whether the statute is economic in nature; 2) whether the statute has an express jurisdictional limit to its reach so it

\begin{thebibliography}{9}
\bibitem{8}Lopez, 514 U.S. at 551.
\bibitem{9}Id. at 552 (quoting \textit{THE FEDERALIST} No. 45, at 292-293 (James Madison) (Clinton Rossiter ed., 1961)).
\bibitem{10}Id.
\bibitem{11}Blumm & Kimbrell, supra note 7, at 318; \textit{see also} Lopez, 514 U.S. at 558.
\bibitem{12}Blumm & Kimbrell, supra note 7, at 318; \textit{see also} Lopez, 514 U.S. at 558.
\bibitem{13}Blumm & Kimbrell, supra note 7, at 318; \textit{see also} Lopez, 514 U.S. at 558.
\bibitem{14}Blumm & Kimbrell, supra note 7, at 318; \textit{see also} Lopez, 514 U.S. at 559.
\bibitem{15}Blumm & Kimbrell, supra note 7, at 318; \textit{see also} Lopez, 514 U.S. at 558-59..
\bibitem{16}Lopez, 514 U.S. at 559.
\end{thebibliography}
only regulates activities that have a clear connection to interstate commerce; 3) whether the statute has congressional findings linking the substantial effect to interstate commerce; and 4) whether the statute’s effect on interstate commerce is too attenuated.17

If there were any uncertainty remaining about the Court’s concern regarding the overreaching of power from the federal government, it eviscerated that doubt five years later in United States v. Morrison.18 Here, the Court invalidated the Violence Against Women Act (hereinafter VAWA) of 199419 after two Virginia Tech football players, accused of repeatedly raping a female student, challenged the constitutionality of the act under the Commerce Clause.20 Once again, Chief Justice Rehnquist expressed concern about Congress infringing on the authority of the states and reiterated language in Lopez that if the Commerce Clause had no judicially enforceable limits, Congress could use this power to “obliterate the distinction between what is national and what is local and create a completely centralized government.”21

While addressing concerns with federalism, the Lopez and Morrison precedents also have brought into question the constitutionality of some federal environmental regulations. Section 9 of the ESA is particularly susceptible to attack under the Court’s new Commerce Clause jurisprudence.22 Congress has the power under Section 9 not only to regulate the federal government’s actions, but also to create limits on private property.23 Two relatively recent federal circuit decisions, issued in 2003 and within a week of each other, highlight the tension between the Lopez and Morrison holdings and Section 9. The two cases came out of the Fifth and the District of Columbia Circuit Courts of Appeal (hereinafter D.C. Circuit) respectively and each addressed the issue of protecting purely intrastate, endangered, or threatened species from

17. Id. at 560-75. See also United States v. Morrison, 529 U.S. 598, 610-12 (2000) (Chief Justice Rehnquist subsequently paraphrased the four-prong limitation on the regulation of intrastate activities).
   Pursuant to the affirmative power of Congress to enact this subtitle under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this subtitle to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.
20. Morrison, 529 U.S. at 608.
21. Id. (quoting Lopez, 514 U.S. at 577-78).
22. See, e.g., Mank, supra note 2, at 941.
23. Id. at 925.
development of private lands.\footnote{Id. at 925-26.}

In \textit{GDF Realty Invs., Ltd. v. Norton}\footnote{326 F.3d 622 (5th Cir. 2003), cert. denied, 125 S. Ct. 2898 (2005).} (hereinafter \textit{GDF}) the Fifth Circuit held that even though intrastate spiders and beetles have no inherent economic impact, harming species does have a substantial impact on interstate commerce if aggregated.\footnote{GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 638 (5th Cir. 2003), cert. denied, 125 S. Ct. 2898 (2005).} The D.C Circuit, in contrast, rejected this line of reasoning in its \textit{Rancho Viejo L.L.C. v. Norton}\footnote{323 F.3d 1062 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004).} decision (hereinafter \textit{Rancho Viejo}), which involved private development in an area inhabited by the intrastate arroyo toad.\footnote{\textit{Rancho Viejo}, 323 F.3d at 1064; see also Mank, supra note 2, at 926.} Here, the D.C. Circuit focused on the commercial development as opposed to the toad and enjoined the project, stating that the “regulated activity is Rancho Viejo’s planned commercial development, not the arroyo toad that it threatens.”\footnote{\textit{Rancho Viejo}, 323 F.3d at 1072.}

Whether one applies \textit{GDF}’s aggregated impacts approach or \textit{Rancho Viejo}’s restriction on commercial development, each holding appears to stand in contradiction to \textit{Lopez}’s emphasis that Congress cannot regulate intrastate activities that do not have a substantial effect on interstate commerce.\footnote{\textit{Lopez}, 514 U.S. at 595; (see also pp. 565 and 612) 30} However, the Supreme Court may have bridged the gap between these apparent inconsistencies with its recent decision in \textit{Gonzales v. Raich}.\footnote{125 S. Ct. 2195 (2005).} \textit{Raich} involved California’s Compassionate Use Act\footnote{Compassionate Use Act, Cal. Health & Safety Code § 11362.5 (2005).} (hereinafter CUA), which authorized the use of marijuana for medical purposes.\footnote{Gonzales v. Raich, 125 S. Ct. 2195, 2196 (2005).} Specifically at issue was whether the federal Controlled Substances Act\footnote{Controlled Substances Act, 21 U.S.C. §§ 801-971 (2005).} (hereinafter CSA), which Congress passed using its Commerce Power, “includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.”\footnote{Raich, 125 S. Ct. at 2200.} Justice Stevens’ majority analysis sounded reminiscent of the Court’s pre-\textit{Lopez} jurisprudence. Here, the Court determined that the CSA was within the Commerce Power and that Congress exercised “rational basis” by including marijuana in Subsection 5 of the CSA. The majority noted its 1971 \textit{Perez}\footnote{Perez v. United States, 402 U.S. 146 (1971).} precedent, indicating that “[w]hen Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it
may regulate the entire class.”

With the help of Perez, the Court was able to distinguish Raich from Lopez and Morrison. In those decisions, explained Justice Stevens, the Court struck down entire acts. The CSA was not at issue in Raich, rather the issue involved the use of medical marijuana. Having established that the CSA is a valid use of congressional power, the Court “refuse[d] to excise individual components of that larger scheme.”

In light of the majority’s logic in Raich, one could argue that the outcomes in both GDF and Rancho Viejo now pass constitutional muster because the respective species are part of an overall class of endangered species. While this argument cannot be dismissed, neither can the fact that Raich declined to overturn Lopez and Morrison. Given the responsibility that society has to safeguard the environment and the species that it supports, we must be cautious about basing this protection on shaky constitutional ground. Perhaps, we should even consider other constitutional solutions to resolve this national problem.

Part II of this comment outlines the facts, procedural posture, and holdings surrounding both GDF and Rancho Viejo. Part III illustrates how GDF and Rancho Viejo arguably exceed the scope of the Commerce Clause under Lopez. By contrast, Part IV illustrates that the rationales in both GDF and Rancho Viejo likely pass constitutional scrutiny under Raich. Despite this fact, Part IV outlines concerns about protecting species under the Raich approach. Part V asserts that GDF and Rancho Viejo represent confusion and inconsistency in environmental and land use jurisprudence. Such disarray is unfair to many groups and undermines environmental efforts. Part VI suggests that Congress should consider using alternative means such as its Spending Power when regulating activities with attenuated connections to interstate commerce. Part VII offers a brief conclusion.

37. Raich, 125 S. Ct. at 2206 (quoting Perez, 402 U.S. at 154-55).
38. Raich, 125 S. Ct. at 2209.
39. Id. at 2209.
II. GDF REALTY INVESTMENTS, LTD. V. NORTON AND RANCHO VIEJO L.L.C. V. NORTON: FACTS AND HOLDINGS

A. GDF Realty Investments, Ltd. v. Norton

1. The facts

Dr. Fred Purcell and his brother purchased a substantial interest in a 216-acre property near Austin, Texas in 1983. Six years later, the United States Fish and Wildlife Service (hereinafter FWS) interrupted the brothers’ development plans of installing water lines and other utilities. The agency informed the Purcells that the planned development might result in the taking of Cave Species in violation of Section 9 of the ESA. The concern over a possible take had arisen one year earlier, in 1988, when FWS listed as endangered five subterranean invertebrate species. FWS listed a sixth species in 1993.

The property is part of the Jollyville Plateau and features limestone rock in which percolating water creates caves, sinkholes, and canyons. The caves serve as habitat for the Bee Creek Cave Harvestman, the Bone Creek Harvestman, the Tooth Cave Pseudoscorpion, the Tooth Cave Spider, the Tooth Cave Ground Beetle, and the Kretschmarr Cave Mold Beetle. Each of the species is subterranean and four of the species are eyeless. They range in size from 1.4 mm to 8 mm. These Cave Species have no commercial value and are only found in underground...
portions of Travis and Williamson Counties, Texas. The Cave Species, however, are the subject of scientific interest, having had at least fourteen scientific articles published about them by fifteen scientists. Some scientists visited Texas to study the species and the Cave Species have been shipped to and from museums in New York, California, Pennsylvania, Illinois, and Kentucky for study.

Responding to the FWS notification that development would probably constitute a take of the Cave Species, the Purcells deeded approximately six acres of the property, which encompassed areas known as Cave Species’ habitats, to Texas Systems of Natural Laboratories, Inc., a non-profit organization. Following the recommendation of Cave Species experts, the Purcells additionally constructed gates covering the most ecologically sensitive caves.

Tensions between FWS and the Purcells began escalating in 1991 when an agreement for the Purcells to sell the property fell apart because FWS refused to accept the proposition that future development on the property would not constitute a take. Just two years later, FWS initiated a federal criminal investigation against Dr. Purcell for clearing brush on his property, which might have amounted to an endangered species take. The Purcells and their partners initiated action in federal court seeking a declaratory judgment to state that developing their property would not constitute an endangered species take.

2. Procedural history

The United States District Court for the Western District of Texas ordered FWS to conduct an environmental review. FWS summarized its findings in a 1994 letter, which stated that the proposed development would likely constitute an endangered species take. Not only did the take involve the Cave Species, but FWS added two bird species as well. Because FWS failed to determine whether a take had indeed occurred, the district court dismissed the criminal action in September of 1994.

49. Id.
50. Id.
51. Id.
52. Id.
53. Id. at 626.
54. Id.
55. Id.
57. GDF Realty, 326 F.3d at 626.
58. Id. The two bird species were the golden-cheeked warbler and black-capped vireo.
The Purcells once again attempted to convene construction plans in 1997 by applying for an incidental take permit.\(^5^9\) Rather than applying to FWS, the Purcells tried their chances with the Balcones Canyonlands Conversation Plan, a regional organization that grants incidental take permits upon the payment of “mitigation fees.”\(^6^0\) The organization rejected the application because the land fell completely within a protected area.\(^6^1\) This rejection forced the Purcells to apply for an incidental take permit through FWS.\(^6^2\) In responding to the application, FWS decided that the preserves previously designated by the Purcells could not adequately protect the endangered Cave Species.\(^6^3\) Tensions again arose between FWS and the Purcells in July of 1998 when FWS told the Purcells that it would not allow the incidental take permit, but never issued the official denial.\(^6^4\) Thus, the Purcells could not challenge the action, so, once again, the brothers filed suit in federal court.\(^6^5\) The United States District Court for the Western District of Texas ruled that FWS denied the permits de facto, prompting FWS to deny officially any permits on the property.\(^6^6\) The district court upheld the determination while admonishing FWS for refusing to issue a formal rejection.\(^6^7\)

After failing twice in challenging FWS’s denials, the Purcell brothers brought the instant action claiming that the regulation violated the Commerce Clause as interpreted by United States v. Lopez.\(^6^8\) The third time was not the charm; once again, the district court sided with FWS, this time by holding that the take provision of the ESA is indeed constitutional because the development substantially related to interstate commerce.\(^6^9\) In explaining its decision, the court observed that, because development plans included a Wal-Mart, it would be “hard-pressed to find a more direct link to interstate commerce . . . .”\(^7^0\)

On appeal, the Fifth Circuit Court of Appeals upheld the district court’s determination that the ESA properly precluded GDF’s development and did not exceed Commerce Clause powers as interpreted

\(^{59}\) Id. The Purcells applied for the permits pursuant to ESA § 10(a). See 16 U.S.C. § 1539(a). The GDF court explained that “[t]hese permits allow takes of endangered species under certain circumstances, as listed in 16 U.S.C. § 1539(a)(2)(B).”

\(^{60}\) GDF Realty, 326 F.3d at 626.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id.; see also GDF Realty, Invs., Ltd. v. United States, No. 98-CV-772 (W.D. Tex. 1998).

\(^{67}\) GDF Realty, 326 F.3d at 626.

\(^{68}\) Id.; see Lopez, 514 U.S. 549.

\(^{69}\) GDF Realty, 326 F.3d at 627.

\(^{70}\) Id.
by *Lopez* and *Morrison*. However, the Fifth Circuit rejected the lower court’s reasoning, which it summarized as primarily considering “plaintiffs’ commercial motivations that would underlie the takes.” The appellate court reasoned that this analysis “would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress’ authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.” Rather, the court announced that the proper inquiry “is primarily whether the *expressly regulated activity* substantially affects interstate commerce, i.e., whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect.”

Operating within the framework of *Lopez*, the Fifth Circuit recognized that the Cave Species have nothing to do with neither the “channels” nor the “instrumentalities” of interstate commerce; rather, the issue at bar was whether the Cave Species takes “substantially affect” interstate commerce. Under *Lopez*, the first factor that courts must decide under the “substantially affects” prong is whether the regulation is economic in nature. The Fifth Circuit noted that, even if one considers the connection between the Cave Species and “scientific travel or publication industries[,]” the Cave Species’ impact on interstate commerce is, at best, negligible. When the court could not find a significant connection between the Cave Species and interstate commerce, the Fifth Circuit looked to the ESA, which the court determined was “economic in nature.”

Looking at the Cave Species within the context of the larger ESA protective scheme, the court noted that allowing the taking of these Species would “undercut the ESA scheme and lead to piece-meal extinctions.” The court reasoned that it was essential to the ESA’s regulatory scheme to disallow this take; otherwise, the ESA could not preclude future takes of this nature, and, if aggregated, these takes would have a substantial effect on the ESA’s regulation of interstate commerce.

Having established that the taking of the Cave Species substantially affects interstate economic activity because the Cave Species fall under

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71. *Id.* at 633.
72. *Id.* at 634.
73. *Id.* at 633.
75. *GDF Realty*, 326 F.3d at 637.
76. *Id.* at 640.
77. *Id.*
78. *Id.* at 639. The court noted that under *Lopez* it is acceptable to use aggregation to uphold regulated intrastate activities when it is an “‘essential’ part of the economic regulatory scheme.”
the umbrella of the larger ESA protective scheme, the court next addressed the fact that the ESA does not have an express jurisdictional limit. The court held that *Lopez* did not preclude upholding the regulation merely because of this deficiency: Although ESA does not expressly provide a jurisdictional limit, it has an implicit limit because “ESA’s take provision is limited to instances which ‘have an explicit connection with or effect on interstate commerce.’”

The court explained the third *Lopez* factor in connection with its prior economic analysis: “ESA’s take provision is economic in nature and supported by Congressional findings to that effect.” More specifically, addressing the ESA’s legislative history that linked it to interstate commerce, the court referred to the act’s “national scope” and that its drafters concerned themselves with the “incalculable value of the genetic heritage that might be lost absent regulation.”

The Fifth Circuit concluded by noting that “the link between species loss and a substantial commercial effect is not attenuated.” Furthermore, the court added that its decision does not overextend federal authority because nothing in this holding “allow[s] Congress to regulate general land use or wildlife preservation.”

GDF Realty appealed the Fifth Circuit’s decision to the United States Supreme Court, which denied certiorari in June 2005 in the wake of *Raich*.

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79. *Id.* at 640; *see also* *Lopez*, 514 at 561.
81. *GDF Realty*, 326 F.3d at 640.
82. *Id.* at 639. The *GDF* court went on to quote the ESA Senate Report that explains the congressional findings linking the ESA to interstate commerce:

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

*Id.* (quoting S. Rep. No. 91-526 (1969)).
83. *GDF Realty*, 326 F.3d at 640.
84. *Id.*
B. Rancho Viejo L.L.C. v. Norton

1. The facts

Rancho Viejo, a home construction company, made plans to build a 280-home residential development located on 202 acres within San Diego County. The property bordered Keys Creek on one side, which is a tributary of the San Luis Rey River. The company dedicated a portion of the property as a “borrow area” in order to excavate fill for the housing project. The borrow area included parts of the Keys Creek streambed in which the company intended to remove six or more feet of soil.

Under the Clean Water Act, Rancho Viejo needed to obtain a permit from the U.S. Army Corps of Engineers (hereinafter “the Corps”) before engaging in the fill project. The Corps, however, denied the permit because surveys confirmed that arroyo toads inhabited areas on, and adjacent to, the excavation site. In denying the permit, the Corps noted that “the project ‘may affect’ the arroyo toad population in the area.”

In an effort to further development, Rancho Viejo erected a fence that ran parallel to Keys Creek. In addition to finding toads in their breeding area in the creek, toads were later discovered on the upland side of the fence as well. After the Corps had initially rejected the permit, FWS reviewed the application pursuant to Section 7 of the ESA. In its review of the application, FWS expressed the opinion that the fence “‘has resulted in the illegal take and will result in the future illegal take of federally endangered’ arroyo toads ‘in violation of the Endangered Species Act.’” Later, FWS issued a formal Biological Opinion in which it determined that the borrow area was “likely to jeopardize the

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87. Id.
88. Id.
89. Id.
90. 33 U.S.C. § 1344(a) (2005). This provision provides that developers must obtain permits when projects involve the discharge of fill into navigable waters.
91. Rancho Viejo, 323 F.3d at 1065.
92. Id. at 1065. After the United States Army Corps of Engineers rejected the permit, the Fish and Wildlife Service reviewed the application pursuant to Section 7 of the Endangered Species Act.
93. Id.
94. Id.
95. Id.
96. Id. (quoting a letter dated May 22, 2000 from the Fish and Wildlife Service explaining its finding).
continued existence” of the toads.\textsuperscript{97} FWS stated that Rancho Viejo could complete the project if it would obtain the fill dirt off-site rather than from the borrow area.\textsuperscript{98} Because it would cost Rancho Viejo millions of dollars\textsuperscript{99} to excavate the fill off-site, the company decided to challenge FWS’s determination.\textsuperscript{100}

2. Procedural history

Rancho Viejo filed a complaint with the United States District Court for the District of Columbia.\textsuperscript{101} In its complaint against the Secretary of the Interior and other federal defendants, the company alleged that FWS’s requirement that the company must obtain fill dirt off-site exceeded the power of the federal government under the Commerce Clause.\textsuperscript{102} The district court relied on its recent ruling, which upheld an FWS finding in the face of a Commerce Clause challenge.\textsuperscript{103} In that case, \textit{National Ass’n of Home Builders v. Babbitt (NAHB)},\textsuperscript{104} FWS halted hospital construction because the agency believed that the development would create the take of the Delhi Sands Flower-Loving Fly.\textsuperscript{105} Declaring the instant case indistinguishable from \textit{NAHB}, the court granted the government’s motion for summary judgment.\textsuperscript{106} In its reasoning, the district court noted that no opinions from the Supreme Court had cast doubt on \textit{NAHB} subsequent to that ruling.\textsuperscript{107}

After losing in district court, Rancho Viejo appealed to the District of Columbia Circuit Court of Appeals, which upheld the lower court’s ruling.\textsuperscript{108} The appellate court reasoned that the regulations imposed on the development properly fit within the framework of \textit{Lopez}’s four-part substantial affects test for regulating intrastate activities under the Commerce Clause.\textsuperscript{109}

\textsuperscript{97} Rancho Viejo, 323 F.3d at 1065.
\textsuperscript{98} Id. The Fish and Wildlife Service made the compromise pursuant to ESA § 7(b)(3)(A) and 50 C.F.R. § 402.02 (2003).
\textsuperscript{100} Rancho Viejo, 323 F.3d at 1065.
\textsuperscript{101} Id. at 1066.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} 130 F.3d 1041 (D.C. Cir. 1997).
\textsuperscript{105} Rancho Viejo, 323 F.3d at 1066.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 1068, 1080.
\textsuperscript{109} Id. at 1069-70; see also Mank, \textit{supra} note 2, at 973; and United States v. Morrison, 529 U.S. 598, 610-12 (2000) (in which Chief Justice Rehnquist paraphrased the four prongs limiting the regulation of intrastate activities).
Addressing the first *Lopez* factor, whether a regulation is economic in nature, the D.C. Circuit relied on the district court’s *NAHB* holding. The court stated:

[T]he construction of a hospital, power plant, and supporting infrastructure [in *NAHB*] was plainly an economic enterprise. As . . . [the *NAHB* court] observed, “the Department’s protection of the flies regulates and substantially affects commercial development activity. . . . The same is true here, where the regulated activity is the construction of a 202-acre commercial housing development.”

Next, the court analyzed the second *Lopez* factor: “whether the statute in question contains an ‘express jurisdictional element.’” The D.C. Circuit very candidly admitted that Section 9 of the ESA “has no express jurisdictional hook that limits its application. . . .” Nevertheless, the *Rancho Viejo* court dismissed the problem reasoning that “*Lopez* did not indicate that such a hook is required . . . .” The court continued:

[The] absence [of a jurisdictional limit] did not dissuade the *NAHB* court from finding application of the ESA constitutional. Nor did it dissuade the Fourth Circuit from finding a similar application of the ESA constitutional in *Gibbs v. Babbit* . . . . Indeed, all of the circuits that have addressed the question since *Lopez* . . . have concluded that the absence of an express jurisdictional element is not fatal to a statute’s constitutionality under the Commerce Clause. Rather, in a case like this, “the absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce.”

*Lopez* next requires the court to examine whether a statute has

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10. *Rancho Viejo*, 323 F.3d at 1068.
12. *Rancho Viejo*, 323 F.3d at 1068.
13. Id.
15. *Rancho Viejo*, 323 F.3d at 1068 (quoting United States v. Moghadam, 175 F.3d 1269, 1276 (11th Cir. 1999) (which held that the lack of a jurisdictional element does not preclude regulation of intrastate activities); *see also* Norton v. Ashcroft, 298 F.3d 547, 557 (6th Cir. 2002); Groome Res. Ltd. v. Parish of Jefferson, 234 F.3d 192, 211 (5th Cir. 2000); United States v. Bird, 124 F.3d 667, 675 (5th Cir. 1997).
congressional findings linking the substantial effect to interstate commerce.\textsuperscript{116} Again, the court admitted deficiency with this prong because there were no specific findings or history with respect to “the effect of commercial housing construction on interstate commerce.”\textsuperscript{117} The D.C. Circuit looked to the language of \textit{Lopez} to overcome this deficit and cited the statement that “Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.”\textsuperscript{118} The court further observed that “such evidence merely ‘enables [the court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.’”\textsuperscript{119} The D.C. Circuit concluded that this case did not merit scrutiny beyond the naked eye because there were general “express findings and legislative history indicating that Congress enacted the ESA out of concern that land development and habitat modification were leading to species extinction and had to be controlled by federal legislation.”\textsuperscript{120}

Just as Rancho Viejo failed to convince the D.C. Circuit on the first three \textit{Lopez} prongs, the company struck out on the fourth and final \textit{Lopez} factor: whether the relationship between the statute and interstate commerce is too attenuated.\textsuperscript{121} The fatal blow to the company was its inability to show that this project did not have a substantial effect on interstate commerce.\textsuperscript{122} After holding that the relationship between the Rancho Viejo construction and interstate commerce is not too attenuated; the D.C. Circuit declared that the relationship between interstate commerce and the arroyo toad would have been too attenuated by itself to survive this prong of the \textit{Lopez} test.\textsuperscript{123} Though the court did not specifically cite to \textit{GDF}, it stated in a footnote that it did not “mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation.”\textsuperscript{124}

After losses in both the United States District Court for the District of Columbia and the District of Columbia Circuit Court of Appeals, Rancho Viejo appealed to the Supreme Court, which denied certiorari.\textsuperscript{125}

\textsuperscript{116} \textit{Lopez}, 514 U.S. at 561-62.
\textsuperscript{117} \textit{Rancho Viejo}, 323 F.3d at 1069.
\textsuperscript{118} \textit{Id.} (quoting \textit{Lopez}, 514 U.S. at 562); \textit{accord} United States v. Morrison, 529 U.S. 598, 612 (2000).
\textsuperscript{119} \textit{Rancho Viejo}, 323 F.3d at 1069 (quoting \textit{Lopez}, 514 U.S. at 563); \textit{accord} Morrison, 529 U.S. at 612.
\textsuperscript{120} \textit{Rancho Viejo}, 323 F.3d at 1069. See infra Part III.B.
\textsuperscript{121} See \textit{Lopez}, 514 U.S. at 563-67; \textit{accord} Morrison, 529 U.S. at 612.
\textsuperscript{122} \textit{Rancho Viejo}, 323 F.3d at 1069.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 1067, n.2; see also Mank, supra note 2, at 926.
III. Basing Endangered Species Protection on the Respective Rationales in GDF and Rancho Viejo May Prove Inadequate Under Lopez

Most reasonable people recognize that GDF and Rancho Viejo hit on the important truth that society needs to protect endangered species and their habitats. The problem with these circuit court opinions is that their reliance on the Commerce Clause to regulate intrastate activities stands on shaky constitutional ground. Raich bolsters these opinions; however, Raich did not overturn Lopez. Whether the Roberts’ Court favors the Lopez or the Raich line of reasoning remains unknown.

Because it is unknown which direction the transitioning Roberts’ Court will follow in its Commerce Clause jurisprudence, it is instructive to analyze the weaknesses from which both GDF and Rancho Viejo suffer under the Lopez analysis. A careful evaluation of the four Lopez intrastate factors shows significant vulnerabilities.

A. Rancho Viejo’s Vulnerabilities under Lopez.

Interestingly, the GDF court highlighted Rancho Viejo’s susceptibility under the first Lopez prong, which requires courts to determine whether the regulated activity is economic in nature. GDF undermined Rancho Viejo’s analysis when it rejected the Texas district court’s determination that it could regulate the commercial activity threatening the Cave Species. Of course, the Texas district court’s reasoning was identical to the D.C. Circuit’s reasoning in Rancho Viejo. In rejecting this rationale, the GDF court noted that this logic “would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress’ authority to regulate intrastate activities, so long as those


126. Because I had the privilege of growing up in Idaho near some of the nation’s most treasured and pristine wilderness areas and national parks, there are few more adamant about protecting the environment and endangered species than me. The ESA is of vital importance to the protection of both wildlife and the environment. The arguments presented in this paper are not intended to undermine the ESA as originally enacted and as it has been amended. Despite my support for the ESA, I argue that the statute may not protect intrastate noncommercial species adequately because of constitutional concerns outlined in this analysis. Indeed, the statute is currently under attack because of these concerns. See Christopher Getzan, Controversial Attack on Endangered Species Act May Backfire, THE NEW STANDARD, July 12, 2005, available at: http://newstandardnews.net/content/?action=show_item&itemid=2078. The intent of this paper is to present an honest analysis about this difficult situation and encourage thoughtful debate regarding how we can best meet our responsibility to the environment.

127. Id. at 559.
subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.”

Whether the Court adopts this same philosophy in a future challenge remains unknown. However, if the Court does support this argument, Rancho Viejo’s logic will likely fall outside of Lopez’s emphasis that an intrastate activity must be economic in nature. If this were to occur, the final three prongs would almost certainly fall as well.

Rancho Viejo frankly admitted that ESA lacked the second Lopez factor, whether the statute contains an express jurisdictional limit. The D.C. Circuit dismissed this problem stating that “Lopez did not indicate that such a hook is required . . . .” The court further remarked, “all of the circuits that have addressed the question since Lopez . . . have concluded that the absence of an express jurisdictional element is not fatal to a statute’s constitutionality under the Commerce Clause.”

Given the weight of the precedent cited by the Rancho Viejo court, there is little reason to doubt that the absence of a jurisdictional limit should be fatal to a statute. The problem, however, with the D.C. Circuit’s analysis is the potential deficiencies the decision encounters with the other three prongs.

Just as there were no jurisdictional limits, there were no congressional findings linking the endangered species takes to interstate commerce. Regarding the congressional findings prong, the D.C. Circuit openly confessed the insufficiency of the congressional findings only to subsequently dismiss this issue as insubstantial. Because there were no legislative findings supporting the court’s premise, it quoted the following line from Lopez: “Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.”

Just as one could disregard deficiencies dealing with the second prong, one could easily apply the same deferential analysis to this Lopez factor. However, in light of the questionable rationale classifying this activity as economic in nature and having no jurisdictional limits, this undifferentiated deference could easily be overturned in future challenges.

In looking at the final Lopez factor, whether the connection to interstate commerce is too attenuated, the Rancho Viejo court simply stated that its holding was not too attenuated because of Rancho Viejo L.L.C.’s inability to show that its project did not have a substantial effect

128. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 634 (5th Cir. 2003).
130. Id.
on interstate commerce. If a future Supreme Court adopts the GDF argument that cases exercising Rancho Viejo’s logic do not qualify as economic in nature, the D.C. Circuit’s argument that the company would have to show that the project is not too attenuated may prove inadequate.

B. GDF’s Vulnerabilities under Lopez

In determining whether the regulation was economic in nature, GDF arguably fared better than Rancho Viejo because its decision is grounded in established constitutional precedent. The Fifth Circuit believed that it was obligated to disallow the take of the Cave Species in order to preserve the integrity of the ESA. Adopting analysis similar to the famous 1942 Supreme Court case Wickard v. Filburn, the Fifth Circuit noted that future takes of this nature, if aggregated, would have a substantial impact on interstate commerce.

In the same manner that GDF arguably enjoys the upper hand over Rancho Viejo on the first prong, the Fifth Circuit’s reliance on Wickard could help establish the validity of the remaining prongs under Lopez. In each factor, the court has the ability to invoke Wickard’s aggregate effects doctrine. Indeed, under this doctrine, the court easily explained how it remained within jurisdictional limits despite the ESA lacking the specific language. The court accomplished the task by arguing that there was an implicit jurisdictional limit. GDF explained that the “take provision is limited to instances which ‘have an explicit connection with or effect on interstate commerce.’” Under the aggregated approach, the explicit connection to interstate commerce is arguably clearer. The same is true with the congressional findings prong. Here, the court simply needed to state that “ESA’s take provision is economic in nature and supported by Congressional findings to that effect.” Finally, the regulation does not seem too attenuated using this logic, which has been established constitutional law since 1942.

While Wickard offers constitutional credence to GDF’s approach, GDF is not free from Lopez. Chief Justice Rehnquist, in Lopez, articulated the most serious susceptibility in this line of reasoning: “Wickard... is perhaps the most far reaching example of Commerce

132. Rancho Viejo, 323 F.3d at 1069.
133. GDF Realty, 326 F.3d at 639-40.
134. 317 U.S. 111 (1942).
135. GDF Realty, 326 F.3d at 639-40.
136. Id. at 624.
137. Id. (quoting United States v. Morrison, 529 U.S. 598, 611-12 (2000)).
138. GDF Realty, 326 F.3d at 640.
Clause authority over intrastate activity.\textsuperscript{139} Some commentators have even suggested that Lopez intended to limit Wickard.\textsuperscript{140} For example, one analysis argued that substantial discrepancy existed between the two cases. The commentator argued that “[r]ather than confronting this language, the Lopez majority insisted that the facts of Wickard, concerning wheat production, supported the notion that Congress could reach only economic activity. By recasting Wickard in this manner, the Court began to dismantle the core of the post-1937 revolution in Commerce Clause jurisprudence.”\textsuperscript{141} Another commentator echoed these concerns in stating that “Lopez’s treatment of Wickard was meant to limit the aggregation principle to statutes that regulate economic activity.”\textsuperscript{142}

The Rehnquist Court’s Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers\textsuperscript{143} (hereinafter SWANCC) decision suggests that concerns regarding Lopez limiting Wickard are not without merit. In SWANCC, the Corps, under the 1972 Federal Water Pollution Control Act,\textsuperscript{144} asserted jurisdiction over an abandoned gravel and sand pit when migratory birds were spotted in the area.\textsuperscript{145} The Court had two issues before it. First, the Court decided whether the Corps could properly exert statutory authority over the waters.\textsuperscript{146} Second, the Court heard the issue of whether the authority was proper under the Commerce Clause.\textsuperscript{147} The Court decided the case against the Corps on narrow statutory grounds.\textsuperscript{148} Even though the SWANCC court declined to rule on the constitutional issue, it said in dicta: “federal jurisdiction over ponds and mudflats falling within the Migratory Bird Rule would significantly impinge upon the State’s traditional and primary power over land and water use.”\textsuperscript{149} SWANCC’s impact on intrastate environmental regulation in cases such as GDF remains unknown. However, this dicta shows that GDF could be just as vulnerable as Rancho Viejo.

The Rancho Viejo court exposed another susceptibility of GDF.

\begin{itemize}
  \item \textsuperscript{139} United States v. Lopez, 514 U.S. 549, 560 (1995).
  \item \textsuperscript{140} Robert A. Schpiro & William W. Buzbee, Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication, 88 CORNELL L. REV. 1199, 1222 (2003).
  \item \textsuperscript{141} See Schpiro and Buzbee, supra note 140 at 1222.
  \item \textsuperscript{142} Alex Kreit, Why is Congress Still Regulating Noncommercial Activity?, 28 HARV. J.L. & PUB. POL’Y 169, 174 (2004).
  \item \textsuperscript{143} 531 U.S. 159 (2001).
  \item \textsuperscript{144} See generally Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000).
  \item \textsuperscript{145} Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 162 (2001).
  \item \textsuperscript{146} SWANCC, 531 U.S. at 162.
  \item \textsuperscript{147} Id.
  \item \textsuperscript{148} Id. at 174.
  \item \textsuperscript{149} Id.
\end{itemize}
Rancho Viejo made a conscious decision to uphold the regulation on the activity infringing on the species rather than the species themselves. The court then, in a footnote, implicitly referred to GDF and noted that it did not “mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation.” Rancho Viejo was sincere in not wanting to undermine the mode in which GDF established the economic nature of the activity; however, the court recognized the inconsistency and declined to follow its analysis. Certainly, the D.C. Circuit is under no obligation to follow the Fifth Circuit. However, just as the D.C. Circuit does not have to follow GDF’s reasoning, the Supreme Court is also free to depart from its precedent and follow Lopez more closely. In fact, then Judge Roberts, now Chief Justice Roberts, wrote on this very issue that the discrepancies between the circuits “afford the opportunity to consider alternative grounds for sustaining the application of the Act that may be more consistent with Supreme Court precedent.” The bottom line is that we cannot be certain that just because GDF faithfully applied Wickard, future Supreme Court cases will do the same.

IV. RAICH’S RATIONAL COULD SUSTAIN THE RESPECTIVE REASONING IN BOTH RANCHO VIEJO AND GDF IF THE COURT IS WILLING TO DISREGARD LOPEZ

If the Roberts’ Court chooses to adhere more closely to the Court’s recent Raich holding, the rationales in both GDF and Rancho Viejo will likely meet little resistance in future challenges of a similar nature. Justice Stevens’ majority opinion articulated two vital concepts that should shield the circuit courts’ rationales. First, the Court seemed to adopt a rational basis standard reminiscent of pre-Lopez Commerce Clause jurisprudence. For example, the Court reasoned: “Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.” Even though this individual component of the CSA may not pass the Lopez factors by itself, the Court still decided that it would defer to Congress.

The second concept that would uphold GDF and Rancho Viejo is the

151. Id. at 1067 n.2; see also Manik, supra note 2, at 926.
152. Rancho Viejo, 334 F.3d at 1160 (Roberts, J., dissenting). Rancho Viejo was decided by a panel of D.C. Circuit judges and Judge Roberts is dissenting from a denial of an appeal to hear the case en banc in this passage.
The Court’s repeated statements indicating that “where the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”\footnote{Raich, 125 S. Ct. at 2209.} In another passage, Justice Stevens wrote:

> Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce. As we stated in \textit{Wickard}, “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” We have never required Congress to legislate with scientific exactitude. When congress decides that the ‘total incidence’ of practice poses a threat to a national market, it may regulate the entire class. In this vein, we have reiterated that when a general regulatory statute bears, a substantial relation to commerce, the \textit{de minimis} character of individual instances arising under that statute is of no consequence.\footnote{Id. at 2205-2206.}

The Cave Species and the arroyo toads contribute to the overall biodiversity and likely qualify as “individual instances” of an overall class. Following this logic, Justice Steven’s language above likely protects these species.

While little argument exists that the Court would sustain either \textit{GDF} or \textit{Rancho Viejo} under a strict application of \textit{Raich}, the question remains whether the Court is willing to move beyond \textit{Lopez}.\footnote{Lauren K. Saunders, a passionate advocate for expanded congressional powers under the Commerce Clause expressed the view that “Raich may prove to be an isolated case.” See Lauren K. Saunders, \textit{The Judicial Threat to Congressional Power}, NSCLC at 7, July 19, 2005, available online at: http://www.watchingjustice.org/pub/doc_697/kelo_congressproc.pdf.} This question of where the Court’s loyalty lies could be answered in short order because it recently granted certiorari on an issue that may force it to address the discrepancies between \textit{Raich} and \textit{Lopez}. \textit{Rapanos v. United States},\footnote{Rapanos v. United States, No. 04-1034 (2005).} along with two companion cases,\footnote{See Carabell v. Army Corps of Eng’ns, 04-1384 (2005); S.D. Warren Co. v. ME Bd of Envtl Prot, 04-1527 (2005).} addresses “[w]hether application of the Clean Water Act to the wetlands at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.”\footnote{Brief of the Respondent at I, Rapanos v. United States, No. 04-1034 (April 4, 2005).} The issue in \textit{Rapanos} is substantially the same as in \textit{GDF} and \textit{Rancho Viejo}. 

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\item[154.] \textit{Raich}, 125 S. Ct. at 2209.
\item[155.] \textit{Id.} at 2205-2206.
\item[156.] Lauren K. Saunders, a passionate advocate for expanded congressional powers under the Commerce Clause expressed the view that “Raich may prove to be an isolated case.” See Lauren K. Saunders, \textit{The Judicial Threat to Congressional Power}, NSCLC at 7, July 19, 2005, available online at: http://www.watchingjustice.org/pub/doc_697/kelo_congressproc.pdf.
\item[157.] \textit{Rapanos} v. United States, No. 04-1034 (2005).
\item[158.] See Carabell v. Army Corps of Eng’ns, 04-1384 (2005); S.D. Warren Co. v. ME Bd of Envtl Prot, 04-1527 (2005).
\item[159.] Brief of the Respondent at I, Rapanos v. United States, No. 04-1034 (April 4, 2005).
\end{itemize}
with perhaps two differences. First, *Raponos* will examine the issue within the context of the Clean Water Act as opposed to the ESA. Second, the United States is arguing that the issue involves the channels and instrumentalities prong of interstate commerce rather than the “substantially effects” prong.\footnote{160}{Brief of the Respondent, supra note 159, at 23.}

The arguments surrounding *Raponos* reveal that *Raich* does not yet firmly control intrastate environmental issues. For example, one of the petitioner’s contentions highlights the tension between *Raich* and *Lopez*. The argument embraces one of the central tenants of the Rehnquist federalism revolution, namely, the idea that the allowance of the regulation would “completely obliterate the Constitution’s distinction between national and local authority.”\footnote{161}{Id. at 24.} *Raich*’s rational basis standard, along with its refusal to excise individual instances of a class, would likely dismiss the concern expressed by the petitioners in *Raponos*. On the other hand, a court concerned with federalism might agree with *Raponos*’ assertion. A significant argument exists that if Congress can regulate intrastate species with no known commercial value such as the Cave Species and the arroyo toad, Congress could arguably regulate most activities.

The United States’ Brief in Opposition of the Petitioner counters the argument listed above with the same logic demonstrated in *Raich*. Namely, that Congress only needs a rational basis in concluding that the activity substantially affects interstate commerce.\footnote{162}{Id. at 23-24.} The outcome in *Raponos* very well could vindicate regulating intrastate, noncommercial environmental interests with the Commerce Clause. In the meantime, the *Raponos* controversy illustrates the substantial risk in using the Commerce Clause to regulate intrastate, non-commercial activities.

V. **EVEN IF DETERMINED CONSTITUTIONAL, THE GDF AND RANCHO VIEJO DECISIONS UNDERMINE EFFORTS TO PROTECT ENDANGERED SPECIES AND THE ENVIRONMENT**

**A. GDF and Rancho Viejo’s Respective Lines of Reasoning Offer Inadequate Safeguards in Protecting Endangered Species**

The motivation behind this comment is to promote the protection of as many endangered species as possible, including the Cave Species and the arroyo toad. Even if we could never find any commercial value for the Cave Species, for example, I believe that we have an obligation to
protect our planet and its resources. It is precisely because of our duty to take care of our natural resources that it is unwise to follow the reasoning of either *GDF* or *Rancho Viejo*. Even though these decisions appear to fulfill this objective, their reasoning is shortsighted and tenuous.

*Rancho Viejo*'s deficiency in protecting endangered species is apparent and has rightly been the subject of criticism by many commentators; indeed, even the concurring opinion in *Rancho Viejo* recognized the court’s failure.\(^{163}\) Chief Justice Ginsberg of the D.C. Circuit Court eloquently articulated the problem:

> Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if—but only if—the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect commerce.\(^{164}\)

With each of us belonging to a society with the responsibility of protecting these species, the *Rancho Viejo* precedent should alarm us. Simply stated, the rationale exposes endangered species to exploitation and extinction as long as there is no “commercial activity” behind the take.

The pitfall with *GDF*’s logic is much more nuanced and discrete than what we see in *Rancho Viejo*; nevertheless, the court managed to expose the Cave Species to danger by relying on a Senate report that focuses on species with “some commercial value” and that allows exploitation once a species regenerates.\(^{165}\) Under this rationale, if the Purcell brothers were to show that the species are not commercial, or that their efforts to

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163. See Mank, *supra* note 2, at 926-927. Professor Mank echoed the language of Chief Justice Ginsberg’s concurrence when he observed the following:

> If a court focuses on the ESA’s means in regulating the economic impact of the activities that harm endangered species, then the government likely can regulate large scale construction projects, but not a lone hiker walking through a forest or perhaps even individual homeowners, although in the aggregate both types of activities could cause significant harm to these species.

164. Rancho Viejo v. Norton, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring). See also Mank, *supra* note 2, at 923 n.20. Professor Mank noted that “[t]he majority opinion in *Viejo* suggested that the lone hiker might be subsumed within the statute’s broader purposes, but declined to answer the question because the facts of the case involved a substantial commercial housing development and not a lone hiker.” See Rancho Viejo, 323 F.3d at 1077-78.

preserve the Cave Species would result in the rejuvenation of the Species, then they might begin exploiting the Cave Species to some extent. The bottom line is that the Senate report on which the court relies does not sufficiently explain when the ESA protects a given species. Alarmingly, its primary guide appears to address when business interests may exploit creatures with “some commercial value” after “rejuvenation”.

B. Holdings Such as GDF and Rancho Viejo Erode Support for Environmental Regulations and Unnecessarily Pit Various Groups against Each Other

The respective rationales in GDF and Rancho Viejo create unnecessary tension between environmentalists and other groups such as private property owners and policy makers. Given the experiences of the plaintiffs in GDF and Rancho Viejo, one can easily understand why tensions might escalate. For GDF Realty, not only were the owners deprived of the option of developing or selling their land, but they also received notice of criminal charges for clearing brush on their own property. These criminal charges came after voluntarily deeding six acres of the property to a conservation group and constructing protective fences for the benefit of the Cave Species.

In fairness, if GDF Realty had notice that clearing brush on its property amounted to a take, the criminal charges do not seem so extreme. Nevertheless, leveling charges of this nature arguably has the effect of exponentially increasing tensions while decreasing the incentive various groups have to work with each other to reach a solution that is best for the environment. A perfect example of this phenomenon is occurring in connection with the Supreme Court granting certiorari in Raponos. Mr. Raponos has gained enormous sympathy and galvanized people on every side of the issue because of the potential prison sentence.

166. Recall that the Purcell brothers deeded the most sensitive portions of the property to a conservation group and subsequently gated the areas in order to further protect the Cave Species. See supra Part II.A.1.

167. GDF Realty, 326 F.3d at 639 (quoting S. REP. NO. 91-526 (1969)). Perhaps the redeeming quality of the Senate Report is the fact that it also addresses the importance of protecting ecosystems. My hope is that protecting ecosystems, as opposed to dictating when businesses may exploit the creatures, is the primary purpose behind the Senate Report. If this is the primary purpose behind the Senate Report, my argument that the legislative language on which GDF relies exposes the creatures to danger fails. This is one argument in which I hope I am incorrect.

168. See Blumm & Kimbrell, supra note 7.

169. GDF Realty, 326 F.3d at 626.

170. Id. at 625.
he faces for filling in wetland areas on his property.\textsuperscript{171}

The situation for Rancho Viejo was undoubtedly just as frustrating. The company constructed a fence hoping to protect the arroyo toad after the Corps denied a permit for Rancho Viejo to obtain fill from its own property.\textsuperscript{172} FWS responded to the company’s effort to protect the toads with a Biological Opinion that the fence was the source of present and future illegal takes.\textsuperscript{173} The only way that Rancho Viejo L.L.C. could proceed with its project is if it obtained fill off-site, which would have cost several million dollars.\textsuperscript{174} FWS should not be unduly criticized for denying the permit nor for issuing the unfavorable biological opinion regarding the fence. The agency was undoubtedly executing its duty in a faithful manner. However, this case, similar to \textit{GDF} and \textit{Raponos}, illustrates the extremely polarizing regulatory scheme in place under the Commerce Clause. Rather than working for the good of the environment, groups form every side seem to focus more on why they are correct in supporting/not supporting the use of the Commerce Clause. Rather than fostering respect for the environment and encouraging its preservation, we are creating opponents of preservation.

VI. CONGRESS’ SPENDING POWERS: A POSSIBLE COMPROMISE AND SOLUTION

Having illustrated some of the problems in basing the protection of intrastate noncommercial species on the Interstate Commerce Clause, this article now addresses a possible solution. The heart of the controversy surrounding the ESA boils down to the tension between federalism and private property rights versus the federal government’s desire to protect endangered species. Congress’ Spending Powers represent a particularly intriguing alternative to address this tension.

In the landmark 1987 \textit{South Dakota v. Dole}\textsuperscript{175} (hereinafter \textit{Dole}) decision, the Court articulated a five-pronged analysis for the spending powers that, if followed, could substantially resolve the dilemma presented in regulating noncommercial intrastate species. \textit{Dole} involved the question of whether Congress exceeded its spending powers by

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\item\textsuperscript{172} Rancho Viejo L.L.C. v. Norton, 323 F.3d 1062, 1065 (D.C. Cir. 2003).

\item\textsuperscript{173} Id. (quoting a letter dated May 22, 2000 from the Fish and Wildlife Service explaining its finding).


\item\textsuperscript{175} South Dakota v. Dole, 483 U.S. 203 (1987).
\end{itemize}
conditioning federal highway funds on states adopting a uniform minimum drinking age. In deciding that the highway grant condition did not exceed Congress’ spending powers, Chief Justice Rehnquist, writing for the Court, first examined whether Congress exercised the spending power for the general welfare. Next, the Court looked at whether Congress provided the states with an unambiguous option of whether they would comply. The third prong that the Court concerned itself with was whether the grant related to a federal interest. Fourth, the Court required that Congress could not use its spending powers inconsistently with other constitutional provisions such as the Tenth Amendment or the Bill of Rights. Finally, the Court declared that the penalty must not be too severe or coercive for non-complying states.

Applying the Dole framework to the regulation of intrastate noncommercial species arguably resolves the conflict between federalism and the national goal of protecting all endangered species. Dole allows room for Congress to influence and regulate purely intrastate activity such as a housing development infringing upon the arroyo toads; yet Dole’s analysis still respects a state’s right to pursue its own environmental policy.

Dole’s first prong, which allows Congress to use its spending powers for the general welfare, shows how the Spending Power can be used to regulate intrastate activity such as development causing potential harm to the Cave Species and arroyo toads. Under this prong, Congress should have little problem declaring that it is providing for the general welfare by protecting these species. From an environmental prospective, Congress simply needs to argue that preserving individual ecosystems contributes to human health and helps strengthen our natural resources. Congress could also explain that the decision to protect these species contributes to the nation’s general welfare because of the positive applications for science.

Despite the strong possibility that some groups will question the link between intrastate noncommercial species and the nation’s general welfare, environmental proponents have little to fear from this Dole prong. The primary reason why this prong is advantageous for conservationists is that it is arguably easier to justify protecting noncommercial intrastate species under a general welfare scheme, as

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176. *Id* at 205.
177. *Id* at 206-207.
178. *Id* at 207.
179. *Id*.
180. *Id*.
181. *Id* at 211.
opposed to an interstate commerce analysis. Clearly, there is a strong link between a healthy ecosystem and our nation’s general welfare. By contrast, the very fact that the D.C. and Fifth circuits could not agree regarding the relationship of the endangered species to interstate commerce shows that this link is not as strong as the general welfare connection.

Having examined Dole’s first prong, which arguably satisfies environmental proponents’ desire to protect these species on a federal level, it is important to review Dole’s other prongs, which help to preserve federalism. These prongs require Congress to uphold the Tenth Amendment and provide states with an unambiguous option of whether they will comply with the regulation. Additionally, these Dole provisions ensure that Congress does not punish states in unrelated areas nor levy unduly severe penalties for not complying. Dole concluded that Congress was not acting coercively in denying five percent of South Dakota’s highway funds for noncompliance. If Congress were to apply a five percent penalty to a related interest for allowing the takes of intrastate noncommercial endangered species, it would eliminate the “race to the bottom” problem of not regulating. At the same time, states would still maintain ultimate control.

Like any other regulatory scheme, Dole likely suffers from some flaws; however, one commentator articulately framed the argument for considering this approach:

[T]he problem arises in the application of such broad statutes to problems of tangential connection to interstate commerce, such as isolated wetlands and isolated species, where no overt or substantial effect on interstate commerce is discernible. By making almost all of the environmental statutes dependent on one clause, albeit a broad clause of the Constitution, Congress has placed at risk many environmental statutes. If the Commerce Clause applies, then the Spending Clause is superfluous. If, however, the Commerce Clause does not encompass such environmentally sensitive matters as isolated wetlands or species, then Congress may still accomplish these goals by attaching conditions to federal funds.

182 Id.

183 The term “race to the bottom” is an economic term that refers to the phenomenon that rational actors will negatively exploit their own resources to compete with another economic actor. In a context such as endangered species, a race to the bottom scenario would occur if no regulations existed and two states allowed businesses to negatively exploit creatures in return for the tax dollars that those businesses would generate.

184 Denis Binder, Spending Clause Symposium: The Spending Clause as a Positive Source of Environmental Protection, 4 CHAP. L. REV. 147, 162 (Spring 2001).
Clearly, this alternative merits further consideration and could prove successful in forging a compromise between advocates of both federalism and endangered species.

VII. CONCLUSION

Society has the responsibility to protect the environment and the endangered species that it supports. The ESA has been, and hopefully will continue to be an important tool in fulfilling this paramount responsibility. Despite the ESA’s success, substantial controversy surrounds its application to intrastate noncommercial species. Sadly, frustration from decisions like GDF and Rancho Viejo has created significant opposition to the entire provision. Indeed, a recent draft of a congressional bill proposed scaling back ESA provisions and eventually sunsetting the Act by 2015.185 Rather than scrapping the entire ESA, I believe that a compromise such as using Congress’ Spending Power would be in everybody’s best interest.186 Of course, conflict is unavoidable and we can never reach a Utopia where everyone will be happy and there are only winners. As a society, we must make difficult decisions that will inevitably affect some adversely. Nevertheless, there is no reason why we cannot find a better way to address this problem. Hopefully, the controversy surrounding GDF and Rancho Viejo will have the positive effect of forcing an open, honest discussion about how best to fulfill our duty to protect our planet and all of its species.

Paul Ziel


186. While I believe that the Spending Powers represent the most promising compromise, I think that other viable options exist such as the Treaty Powers. This, and other options, should be considered as well.

* J.D. Candidate, April 2006, J. Reuben Clark Law School, Brigham Young University; B.S. Economics, Brigham Young University; A.S. Business Management, Ricks College. I want to thank the editors of the BYU Journal of Public Law for their hard work on this Note. I especially want to thank Jared Perkins for his insightful feedback. I dedicate this comment to my son Isaac and my nephew Ashton with the hope that we protect and preserve the environment for their generation.