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On the cover: *Sky Seekers*, blockprint
by Everett Ruess (1914–1934)

Everett Ruess was an artist and a writer who wandered throughout the Southwest, and mysteriously disappeared in southern Utah at the age of twenty. His woodblocks, which depict natural scenes in the Sierra Nevada, along the California coast, and in the deserts and canyons of the Four Corners region, were recently discovered, restored, and reprinted. A limited number of prints are available from:

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Commerce Clause Jurisprudence: Has There Been a Change?

Sam Saad

I. INTRODUCTION

The Commerce Clause of the federal Constitution has been the greatest source of power for the federal government in its regulation of all aspects of American life. One aspect, however, stands out as a mass consumer of the Commerce Clause's power—environmental regulation. The Commerce Clause states, "The Congress shall have the power . . . [t]o regulate Commerce . . . among the several States."[1] Nevertheless, the exact extent of the power granted by the Commerce Clause remains elusive. In *Gibbons v. Ogden*,[2] the State of New York argued that commerce is limited to traffic, the interchange of commodities, or to buying and selling.[3] For the Supreme Court, Chief Justice John Marshall found that definition too restrictive because commerce has too many applications.[4] The Chief Justice gave a sense of what interstate commerce meant when he stated, "[Commerce] is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . . "[5] Chief Justice John Marshall extolled in the commerce power "a wide breadth never yet exceeded;" and warned that the commerce power's restraint came from the political process, not the judicial process.[6] Chief Justice Marshall's interpretation indicates that interstate commerce is more than the exchange of goods and services between nations and states, it is trade and other business activities between those located in different states, particularly traffic in goods and travel of people between states.[7]

After *Gibbons*, the courts did not spend much time interpreting the positive commerce power until Congress enacted the Interstate Commerce Act—its first major assertion of the positive commerce power—and the Sherman Anti-Trust Act.[8] Principally in reaction to the Great Depression, Congress used its commerce power to pass a number of statutes imposing comprehensive federal regulation of the economy. However, the Supreme Court blocked almost every one of these attempts at economic regulation, declaring them beyond the power granted to Congress by the Commerce Clause. For example, in *A.L.A. Schecter*

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[1] U.S. CONST. art. I § 8 cl. 3.
[2] 22 U.S. (9 Wheat.) 1 (1824).
[3] *Id.* at 189–90.
[4] *Id.* at 189.
[5] *Id.* at 189–90.
[6] *Id.* at 194–95.
[7] *Id.* at 194–95.
[8] Wickard v. Filburn, 317 U.S. 111 (1942).

Poultry Corp. v. United States,[9] the Court held that activities with a direct effect on interstate commerce were within the commerce power, but activities indirectly affecting interstate commerce were not. Thus, Congress could not fix the wages and hours of intrastate businesses because of the slippery slope to total congressional control over the business.[10] Eventually, however, the Supreme Court changed direction. In 1937, in *NLRB v. Jones and Laughlin Steel Corp.*,[11] the Court began a massive expansion of the Commerce Clause.[12] This expansion of Congress' Commerce Clause power continued unabated until 1995 when, for the first time in sixty years, in *U.S. v. Lopez*,[13] the Supreme Court overturned an act of Congress for exceeding the power granted to Congress under the Commerce Clause.

When the Supreme Court handed down *Lopez*, the Court identified three broad categories of economic regulations that are permissible exercises of the commerce power: 1) the channels of interstate commerce; 2) the instrumentalities of commerce; and 3) activities that substantially affect interstate commerce.[14] Thereafter, the Supreme Court affirmed and refined *Lopez*. In *U.S. v. Morrison*,[15] the Supreme Court determined that, under the third category, even when all instances of violence against women are aggregated, such violence does not have a substantial economic effect on interstate commerce.[16] Thus, the Court determined that the Violence Against Women Act exceeded Congress' authority under the Commerce Clause.[17] For those concerned with environmental regulations, *Morrison* brings into question whether environmental regulations that rely on their aggregated consequences for substantial economic effect will survive the Supreme Court's new scrutiny of the Commerce Clause. However, following current federal jurisprudence, it is clear that the Com-

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[9] 295 U.S. 495 (1935).

[10]

> If the federal government may determine the wages and hours of employees in the internal commerce of a state, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.

Id. at 495.

[11] 301 U.S. 1 (1937) (holding that Congress could regulate activities with a close and substantial relationship to interstate commerce).

[12] *See* U.S. v. Morrison, 529 U.S. 598, 607 (2000) (stating that since *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), Congress has had wide latitude to regulate under the Commerce Clause). Recall that this is the period when the famous "Switch in time saved nine."

[13] 514 U.S. 549 (1995).

[14] *Id.* at 558.

[15] 529 U.S. 598 (2000).

[16] *Id.* at 613.

[17] *Id.*

merce Clause will continue to provide federal authorities with the power to enact and enforce environmental regulations.

The first step in analyzing environmental regulation under the Commerce Clause is to determine what test the regulation must pass. The test under the Commerce Clause is the three-prong test set out in *Lopez*, so the question becomes how to apply that test to environmental regulation. The Supreme Court defined the Commerce Clause test in *Lopez*, refined the test in *Morrison*, and lower courts further described the test in several decisions following *Lopez* and *Morrison*. To determine the correct analysis, several cases following *Lopez* and *Morrison* must be examined to determine how the courts have applied the three prongs of *Lopez* to environmental regulation. In addition, the Supreme Court's latest statement on the environment and the Commerce Clause, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[18] (*SWANCC*) must be examined. Once current federal jurisprudence is understood, then the limit of federal authority to enact and enforce environmental regulation must be determined. As stated, it will be shown that Commerce Clause jurisprudence, while limited by *Lopez* and *Morrison*, will not change federal authority to enact and enforce environmental regulation because environmental regulation has a substantial economic affect on interstate commerce. Further, it will be shown that because *SWANCC* avoids the Commerce Clause question, environmental regulation is likely to remain unaffected until the Supreme Court more clearly directs the lower courts on how to analyze environmental statutes under the Commerce Clause.

II. DEFINING THE TEST: THE THREE PRONGS OF THE COMMERCE CLAUSE

A. Reevaluating the Commerce Clause Under Lopez

In *U.S. v. Lopez*,[19] the United States Supreme Court held that the Gun-Free School Zones Act (GFSZA) exceeded Congress' Commerce Clause authority because possession of a gun in a local school zone was not an economic activity that substantially affected interstate commerce.[20] The Supreme Court stated that GFSZA, which regulated the possession of handguns near schools, did not regulate a commercial activity, nor did GFSZA require that the possession of handguns be connected to interstate commerce.[21]

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[18] 531 U.S. 159 (2001).

[19] 514 U.S. 549.

[20] *Id.* at 561–62. The Gun Free School Zone Act made knowingly possessing a firearm at a place that an individual knows or has reasonable cause to believe is a school zone a federal offense. *See* 18 U.S.C. § 922 (1988).

[21] *Lopez*, 514 U.S. at 561–62.

In *Lopez*, Alfonso Lopez, a 12th grade student at a San Antonio, Texas high school, brought a concealed .38 caliber pistol to school.[22] Before reaching its conclusion that GFSZA violated the Commerce Clause, the Supreme Court canvassed their Commerce Clause precedent and determined that the judicial history of the clause has created three types of regulation that the Court would sustain under the clause.[23] First, Congress may regulate the use of the channels of interstate commerce.[24] Second, Congress has the power regulate the instrumentalities of commerce or persons or things in interstate commerce.[25] Third, Congress has the power to regulate activities that have a substantial economic effect on interstate commerce.[26] In *Lopez*, the Court summarily dismisses the first two categories as possible reasons for upholding the GFSZA under the Commerce Clause.[27] The Court then turned to the third category—the substantial effects test.

Under the substantial effects test, the Court found three possible ways to link a regulation to interstate commerce. The Court considered: first, the regulation's aggregated effects on interstate commerce; second, whether the regulation contained a jurisdictional element limiting the regulation's applicability to interstate commerce; and third, whether Congress made findings demonstrating a link to interstate commerce that was not too attenuated.[28] In their examination of the aggregate effects test, the *Lopez* Court looked at *Wickard v. Filburn*[29] as the most far-reaching example of what the Court considers activities that, when aggregated, affect interstate commerce.[30] In *Lopez*, the Court distinguished GFSZA from the statute upheld in *Wickard*.[31]

Wickard upheld the Agricultural Adjustment Act of 1938 (AAA).[32] In upholding the Act, the Supreme Court pointed out that the purpose of the AAA

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[22] *Id.* at 551.

[23] *Id.* at 558.

[24] *Id. See also* U.S. v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Hotel, Inc. v. U.S., 379 U.S. 241 (1964).

[25] *Lopez*, 514 U.S. at 558. *See also* Shreveport Rate Cases, 234 U.S. 342 (1914). As will be seen, this prong does not pertain to environmental regulation; no case cites it as authority for environmental regulation.

[26] *Lopez*, 514 U.S. at 555–59. *See also Jones & Laughlin Steel Corp.*, 301 U.S. 1.

[27] *Lopez*, 514 U.S. at 559.

[28] *Id.* at 559–63.

[29] 317 U.S. 111.

[30] *Lopez*, 514 U.S. at 560. *See also* U.S. v. Perez, 402 U.S. 146, 150 (1971) (stating the Commerce Clause reaches three types of problems: 1) the use of channels of interstate or foreign commerce which Congress deems are being misused; 2) protection of the instrumentalities of interstate commerce; 3) those activities affecting commerce); Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 276–77 (1981) (finding that activity which is purely intrastate in character may be regulated when combined with like activities which effect commerce); *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258 (stating "The power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end. . . .").

[31] *Lopez*, 514 U.S. at 560.

[32] *Wickard*, 317 U.S. at 129.

was to control the price of wheat.[33] The Court stated, "It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions."[34] However, the Court was concerned that the aggregated effect of farmers who grow wheat for home-consumption would undermine Congress' authority to control the price of wheat.[35] The Court looked to the aggregated effects of all the farmers who grew wheat for home consumption and determined that Congress could properly regulate that wheat, even if wholly outside the scheme of regulation.[36] In applying the *Wickard* principle to GFSZA in *Lopez*, the Supreme Court determined that GFSZA was not part of a scheme of regulations that could be destabilized like the price controls at issue in *Wickard*. Therefore, the Court could not uphold GFSZA under the line of cases finding that aggregated activities substantially affect interstate commerce.[37] The Court then looked for other ways in which a regulation, without a substantial effect on interstate commerce might be sustainable under the Commerce Clause.[38] The Court stated that a jurisdictional element or congressional findings illustrating a substantial economic effect would help in a finding of constitutionality.[39]

The Supreme Court examined GFSZA for a jurisdictional element that would limit its application to cases where the regulated action affects interstate commerce. The Supreme Court determined that a jurisdictional element would ensure that in each case where the government prosecutes someone under GFSZA, the handgun possession in question actually affects interstate commerce.[40] In *Lopez*, the Court found no such jurisdictional element.[41]

Next, the Supreme Court looked for congressional findings in GFSZA to determine if Congress had found a link between guns in schools and interstate commerce, a link not immediately noticeable to the Court.[42] The Court stated that while congressional findings are not necessary, they help the Court find a nexus with interstate commerce "even though no such substantial effect [is] visible to the naked eye."[43] The government conceded that Congress had made no findings as to the effect on interstate commerce of handgun possession in

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[33] *Id.* at 128.

[34] *Id.*

[35] *Id.* at 129.

[36] *Id.*

[37] *Lopez*, 514 U.S. at 561.

[38] *Id.* 561–62.

[39] *See id.* (citing *U.S. v. Bass*, 404 U.S. 336 (1971), for the proposition that a jurisdictional element might provide the additional nexus to interstate commerce required to make a federal statute constitutional; and citing *Preseault v. ICC*, 494 U.S. 1, 17 (1990), for the proposition that legislative findings may be evaluated in determining constitutionality).

[40] *Lopez*, 514 U.S. at 562.

[41] *Id.*

[42] *Id.*

[43] *Id.*

schools, but argued Congress' expertise based on prior enactments.[44] The Supreme Court disagreed with the government, however, because prior acts of Congress do not speak to the relationship between handguns in schools and interstate commerce.[45]

In the their closing remarks, the Court determined that to pile inference upon inference, and allow a statute such as GRSZA to pass constitutional muster, would give Congress, under the Commerce Clause, a police power reserved only to the states.[46] The Court stated that while their decisions had taken "steps down that road," they would proceed no further. Moreover, the Court stated that they must maintain the "distinction between what is truly national and what is truly local."[47]

B. How the Courts Applied Lopez *to Environmental Regulations*

In 1995, in *Cargill, Inc. v. the United States*,[48] the Supreme Court denied certiorari to Cargill, Inc., stating that *Lopez* required the Ninth Circuit to look more carefully at its characterization of things in interstate commerce.[49] Cargill was the successor in interest to the Leslie Salt Company, the owner of a 153-acre tract of land southeast of San Francisco.[50] The suit arose from a dispute between the Army Corps of Engineers and Cargill over basins, used by Leslie Salt from 1919 to 1959, for salt production.[51] In 1985, the Army Corps of Engineers took jurisdiction over the 153-acre tract and filed a cease and desist order under the Clean Water Act (CWA). The Corps intended to stop Leslie Salt from digging a feeder ditch and siltation ponds on 12 acres of the property containing the basins.[52] Leslie Salt filed suit, but the Northern District of California found a sufficient nexus to interstate commerce in the use of the basins by migratory birds to permit the Corps to regulate the property.[53] The Ninth Circuit affirmed the decision.[54] Leslie Salt petitioned for, but the Supreme Court denied, a writ of certiorari.[55]

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[44] *Id.* at 563.
[45] *Id.*
[46] *Id.* at 657.
[47] *Id.*
[48] 516 U.S. 955 (1995).
[49] *Id.* at 956.
[50] *Id.* at 956.
[51] *Id.*
[52] *Id.*
[53] Leslie Salt Co. v. United States, 820 F.Supp. 478, 480 (N.D. Cal. 1992).
[54] Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995) (reversing and remanding the decision for a determination of whether the existence of migratory birds, who used the basins, created a sufficient nexus with interstate commerce so that the Corps would have jurisdiction).
[55] *Cargill*, 516 U.S. 955.

Justice Thomas dissented from the denial of certiorari arguing the case raised serious questions about the limits of federal land use regulations.[56] Justice Thomas believed that the Corps' basis of jurisdiction asserted under the CWA was even more far fetched than the basis rejected in *Lopez*.[57] The CWA prohibited the discharge of pollutants into navigable waters without a permit from the Corps.[58] The CWA only defined "navigable waters" as "waters of the United States."[59] The Corps promulgated rules further defining "navigable waters" as waters used in interstate and foreign commerce and, in the rule's preamble, said the definition included waters that migratory birds would use. This is commonly called the "Migratory Bird Rule."[60] The dissent worried that the Corps' jurisdiction over the land rested on a questionable basis—the presence or potential presence of migratory birds.[61] Justice Thomas stated the Migratory Bird Rule only required that the activity in question "could" affect interstate commerce, and did not require a substantial effect on interstate commerce.[62] Justice Thomas opined that the Corps incorrectly assumed that the self-propelled flight of birds across state lines connected them to interstate commerce, and that the Corps' expansive interpretation of the statute tested the bounds of reason as well as the bounds of the Commerce Clause.[63] The Corps argued that millions of Americans spend billions annually to observe, hunt, or trap migratory birds; and therefore, migratory birds have a substantial connection to interstate commerce.[64] Justice Thomas agreed that Congress had the power to preserve birds and bird habitats, but opined that the Corps did not have free rein to regulate every property used or possibly used by migratory birds.[65] Justice Thomas pointed out that the Corps made no showing that humans, save government inspectors, had ever visited the Cargill basins to observe, hunt or trap migratory birds.[66] Justice Thomas also observed that the Corps made no showing that Cargill's property had a substantial effect on interstate commerce, nor that the use of wholly isolated seasonal standing water would have any effect on interstate commerce.[67]

In 1997, the United States Court of Appeals for the District of Columbia Circuit decided *National Association of Home Builders v. Babbitt* (*NAHB*).[68] In *NAHB*, the National Association of Home Builders and San Bernardino

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[56] *Id.* at 959.
[57] *Id.* at 957.
[58] *Id.* (citing 33 U.S.C. §§ 1311(a), 1344(a), 1362(12) (2000)).
[59] *Id.* (citing 33 C.F.R. § 328.3(a) (1995)).
[60] *Id.* (citing 51 Fed. Reg. 41217 (1986)).
[61] *Id.*
[62] *Id.*
[63] *Id.* at 958.
[64] *Id.* (citing Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993)).
[65] *Id.* at 959.
[66] *Id.*
[67] *Id.*
[68] 130 F.3d 1041 (D.C. Cir. 1997).

County, California sued the Fish and Wildlife Service (FWS) to enjoin the FWS from applying the Endangered Species Act (ESA) to a tract of land where the county wanted to build a hospital and power plant.[69] In *NAHB*, a three-judge panel of the D.C. Circuit made three findings justifying the constitutionality of the ESA under the Commerce Clause.[70] First, the application of the ESA's prohibition against the taking of an endangered species to an endangered species of fly, the Delhi Sands flower-loving fly, was a proper exercise of the Commerce Clause because it regulated a use of the channels of interstate commerce.[71] Second, that the application of the ESA to the endangered species of fly was a constitutional exercise of the Commerce Clause power to regulate activities substantially affecting interstate commerce, in that it prevented destruction of biodiversity.[72] Third, because the taking of endangered species was the product of destructive interstate competition, which substantially affected interstate commerce, Congress could regulate the activity.[73]

In *NAHB*, the dispute arose when the FWS determined that the last of the Delhi Sands flower-loving fly, which lived entirely within an eight-mile radius in San Bernardino County, lived where San Bernardino County wanted to build its new hospital.[74] The FWS promulgated regulations making the fly an endangered species, thus subjecting the hospital project to strenuous federal regulation.[75] Writing for the majority, Judge Wald applied the *Lopez* three-prong test and determined that the regulation preventing the taking of the fly withstood a Commerce Clause challenge as a legitimate regulation of the channels of interstate commerce.[76] The court stated that section 9 of the ESA was necessary to enable the government to control the transport of the endangered species in interstate commerce, because securing the endangered species' habitat from invasion prevents traffic in the species.[77] The court also stated that the prohibition on ESA takings fell within the ambit of Congress' power to keep the channels of interstate commerce clear from immoral and injurious uses because the material and labor used in constructing the hospital traveled across state lines.[78]

The majority also found that section 9 of the ESA substantially affected interstate commerce even though the fly only lived in a limited area of Califor-

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[69] *Id.* at 1043. Appellants challenged the application of section 9(a)(1) of the ESA, which makes it unlawful for any person to "take any [endangered or threatened] species within the United States or the territorial sea of the United States . . . ." 16 U.S.C. § 1538(a)(1) (2000).

[70] *NAHB*, 130 F.3d at 1046.

[71] *Id.*

[72] *Id.* at 1054.

[73] *Id.*

[74] *Id.* at 1043.

[75] *Id.* at 1044. The FWS made findings and promulgated a rule that the fly was a protected animal during the development stages of the hospital building plan.

[76] *Id.* at 1045.

[77] *Id.* at 1046.

[78] *Id.* (citing *Heart of Atlanta Motel, Inc.*, 379 U.S. 241).

nia.[79] The majority stated that the prohibition against takings of endangered species prevented the destruction of biodiversity, thus protecting current and future interstate commerce.[80] Judge Wald compared the incalculable losses from biodiversity if an endangered species is lost to the potential medical and economic benefits yet untapped in the endangered species.[81] The majority opined that biodiversity is an important natural resource and that the regulated takings of endangered species substantially related to interstate commerce.[82] In addition, Judge Wald determined that Congress could regulate the taking of endangered species under its commerce power because destructive interstate competition caused the taking and Congress is empowered to act to prevent destructive interstate competition.[83] The Supreme Court denied certiorari in the case.[84]

In a concurrence, Judge Henderson agreed with the majority conclusion that the Commerce Clause reached the takings provision of the ESA, but disagreed with the majority's grounds for its holdings.[85] Judge Henderson compared the Delhi Sands flower-loving fly to the handgun possessed in *Lopez* and found that, like the handgun in *Lopez*, there was no interstate movement, thus the statute did not regulate the channels of interstate commerce.[86] The concurrence then found that scientists generally accept maintenance of biodiversity as necessary for the continued health of ecosystems.[87] Thus, the concurrence concluded that the interconnectedness of species made it reasonable to assume that the extinction of one species affects other species; therefore, intrastate regulation of one species has a substantial connection to interstate commerce.[88]

In a scathing dissent, Judge Sentelle found the majority's reasoning flawed. Judge Sentelle stated the issue as whether Congress can, under the Commerce Clause, "regulate the killing of flies, which is not commerce, in southern California, which is not interstate?"[89] The dissent reminisced about an old chestnut, "If we had some ham, we could fix some ham and eggs, if we had some eggs" and then, found that, since neither commerce nor interstate related to the fly, Congress could not regulate the fly under the Commerce Clause.[90] The dissent found the biodiversity argument irrational because it is undeter-

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[79] *NAHB*, 130 F.3d at 1049.
[80] *Id.* at 1053.
[81] *Id.*
[82] *Id.* at 1053–54.
[83] *Id.* at 1054.
[84] Nat'l Ass'n of Home Builders of U.S. v. Babbitt, 524 U.S. 937 (1998).
[85] *NAHB*, 130 F.3d at 1057 (Henderson, J., concurring).
[86] *Id.* at 1058.
[87] *Id.* at 1058–59.
[88] *Id.*
[89] *Id.* at 1061 (Sentelle, J., dissenting).
[90] *Id.* (citing Judge Alex Kozinski, who wondered, "why anyone would make the mistake of calling it the commerce clause instead of the 'hey-you-can-do-whatever-you-feel-like clause'" 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995)).

mined and undeterminable that the Delhi Sands flower-loving fly could have a medical value at some time in the future.[91] Judge Sentelle found nothing but the rankest of speculation in the hypothesis that a reduction or complete destruction of the Delhi Sands flower-loving fly affects interstate commerce.[92]

In addition, in 1997, in *United States v. Olin Co.*,[93] the Eleventh Circuit rejected a challenge from an Alabama chemical manufacturer that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) violated the Commerce Clause even though there had been no off-site damage from the manufacturer's on-site disposal.[94] In *Olin*, the government brought a civil action under CERCLA seeking an order requiring Olin Co. to clean up its former mercury and chlorine chemical plant in McIntosh, Alabama.[95] The Eleventh Circuit applied the three prong test announced in *Lopez* and determined that this case fit in the third prong.[96]

The Eleventh Circuit stated, "*Lopez* did not alter the constitutional standard for federal statutes regulating intrastate activities" and that the proper test required a determination of whether there was a substantial effect on interstate commerce by the regulated activities.[97] Citing *Lopez*, the Eleventh Circuit determined that Congress could include a jurisdictional element or make findings concerning a substantial effect on interstate commerce, or that the courts might find that the activities "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce."[98] In addition, the Eleventh Circuit determined that whether a statute regulates interstate commerce depends upon whether it is part of a larger regulatory scheme, which could be destabilized if intrastate activities were not regulated.[99] The Eleventh Circuit found that if a regulatory statute substantially relates to interstate commerce, "the de minimis character of individual instances arising under that statute is of no consequence."[100]

In evaluating CERCLA, the Eleventh Circuit noted that, while there was no jurisdictional element or legislative findings concerning interstate commerce, the class of activities regulated by CERCLA substantially affected interstate commerce.[101] The court found that the class of activities CERCLA regulated was the onsite disposal of hazardous waste at Olin's plant.[102] Olin

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[91] *Id.* at 1064.

[92] *Id.* at 1065.

[93] 107 F.3d 1506 (11th Cir. 1997).

[94] *Id.* at 1508.

[95] *Id.* The Government sued under sections 106(a) and 107 of CERCLA giving the President authority to clean up a site and hold the manufacturer liable. 42 U.S.C. §§ 9606(a), 9607(a) (2000).

[96] *Olin*, 107 F.3d at 1509.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 1510 (citing Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)).

[101] *Olin*, 107 F.3d at 1510.

[102] *Id.*

argued that the record contained no evidence of off-site damage from its on-site disposal of chemicals and that the record did not contain any findings of harm to interstate commerce.[103] The Eleventh Circuit found that Congress had a broad scheme to protect interstate commerce from pollution and that regulation of intrastate on-site waste disposal fit into the scheme.[104] Olin also argued that CERCLA did not regulate economic activities.[105] In response, the court opined that the degree to which the activity affects interstate commerce, and not the qualities of the regulated activity, were the important considerations.[106] The court concluded by holding that CERCLA was a permissible use of the commerce power.[107]

In *Building Industry Ass'n of Superior California v. Babbitt*,[108] several landowners brought an action challenging the FWS listing of fairy shrimp species as threatened or endangered under ESA.[109] The District Court for the District of Columbia held that the listing did not exceed Congress' federal Commerce Clause power.[110] The district court compared the fairy shrimp to the species of fly at issue in *NAHB*, and opined that like the fly, the shrimp, while endemic to California, still came within Congress' power to regulate under the Commerce Clause.[111] The district court noted the high priority Congress has given to protection of endangered species and that endangered species preservation leads to interstate commerce through reinvigorated trade of the species and tourism.[112]

Even though the Building Industry Association's challenge was an "as applied" challenge, the district court questioned the effect of the ruling in favor of the Building Industry Association would have on the ESA.[113] The Building Industry Association argued that Congress could only regulate species, which are plentiful across state lines and cannot regulate a species whose numbers have dwindled so that the species only exists in one state.[114] The district court opined that the Association's argument would substantially undermine the central purpose of the ESA and irrationally confine Congress.[115]

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[103] *Id.* at 1511.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1511.
[108] 979 F.Supp. 893 (D.C.C. 1997).
[109] *Id.* at 897.
[110] *Id.* at 908.
[111] *Id.* at 907.
[112] *Id.* (citing *U.S. v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996), which approves *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981) where the Ninth Circuit upheld an ESA listing of birds endemic only to Hawaii).
[113] *Building Indus. Ass'n*, 979 F.Supp. at 908.
[114] *Id.*
[115] *Id.*

III. REFINING THE TEST: SUBSTANTIAL EFFECTS

A. The Supreme Court Really Meant "Substantial": Morrison and Substantial Effects

In 2000, the Supreme Court reiterated the principles of *Lopez* in *United States v. Morrison*.[116] In *Morrison*, the Supreme Court held that Congress did not have the authority under the Commerce Clause to enact the civil remedy provision provided in the Violence Against Women Act (VAWA).[117] The Court held that the civil remedy provision of VAWA was not a regulation of an activity that substantially affects interstate commerce.[118] The Court maintained that Congress must not extend the commerce power so far that it embraces effects on interstate commerce so remote as to obliterate the distinction between national and local governments.[119] In *Morrison*, the Court restated the three-prong test announced in *Lopez*.[120] Using the substantial effect prong, the Court found that gender motivated crimes were not economic activities and that there was no jurisdictional element in VAWA establishing a nexus with interstate commerce.[121] The Court also determined that, despite volumes of congressional findings regarding the impact of gender motivated violence on victims, the "but-for" reasoning employed by Congress was unworkable.[122]

The Supreme Court ruled that courts should sustain legislation where economic activity substantially affects interstate commerce.[123] In identifying means for Congress to achieve its ends under the Commerce Clause, the Court noted that a jurisdictional element establishing that a federal cause of action is in pursuance of Congress' commerce power would help support the required nexus between the statute and interstate commerce.[124] The Court also concluded that while congressional findings are not necessary to a finding of constitutionality, such findings are helpful to the Court in determining the substantial effect of an activity on interstate commerce when no such finding is immediately noticeable.[125] However, the Court clarified that the existence of congressional findings by themselves is not enough to uphold the constitutionality of Commerce Clause legislation.[126] Thus, the Court stated, it will evaluate congressional findings; but whether a challenge to the Congress' authority ulti-

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[116] 529 U.S. 598 (2000).
[117] *Id.* at 617–19.
[118] *Id.* at 609–11.
[119] *Id.* at 608.
[120] *Id.* at 108–09.
[121] *Id.* at 608–12.
[122] *Id.* at 615–16.
[123] *Id.* at 610.
[124] *Id.* at 613.
[125] *Id.* at 614.
[126] *Id.*

mately succeeds, is a decision the Court must make.[127] In *Morrison*, the Court noted the volumes of congressional findings showing the impact gender motivated crimes have on the victims and their families, but still invalidated VAWA.[128]

In *Morrison*, the Supreme Court found that the "but-for" causal chain from the initial occurrence of a violent crime to every attenuated effect on interstate commerce must be limited or Congress could infer authority beyond its constitutionally granted power.[129] The Court also found that under our system of government, where federal authority is limited, Congress cannot regulate non-economic criminal conduct under the justification that violent crime, when aggregated, affects interstate commerce.[130] The Court, reiterating its statement in *Lopez*, ruled that the national/local dichotomy found in the Constitution had to be maintained.[131] The Court concluded that the Constitution did not grant the federal government carte blanche authority to regulate violent crime and that the Constitution reserves the police power for the states.[132]

*B. Post-*Morrison*: A Refined Substantial Effects Test and the Environment*

In *Gibbs v. Babbitt*,[133] several individual landowners and two North Carolina counties brought an action against the Department of Interior and the FWS, challenging the constitutionality of a regulation limiting the taking of red wolves on private land.[134] In *Gibbs*, the landowners challenged the ESA—Congress' attempt to protect various species from extinction due to economic development.[135] The ESA prevents the taking of species listed as endangered without a permit.[136] In *Gibbs*, the landowners wanted to "take" the red wolf because it threatened livestock herds.[137] This case arose because North Carolina enacted a statute allowing the killing of red wolves found on private land.[138] Gibbs and two North Carolina counties sued to have the anti-taking regulation, as applied to red wolves on private land, declared unconstitutional

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[127] *Id.*
[128] *Id.*
[129] *Id.* at 617.
[130] *Id.* at 615.
[131] *Id.* at 617–18 (citing *Lopez*, 514 U.S. at 568; *Jones and Laughlin Steel Corp.*, 301 U.S. at 30).
[132] *Morrison*, 529 U.S. at 618–19. The Court found "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."
[133] 214 F.3d 483 (4th Cir. 2000).
[134] *Id.* at 486.
[135] *Id.* at 487.
[136] 16 U.S.C. §§ 1538(a)(1)(B), 1539(a) (2000).
[137] *Gibbs*, 214 F.3d at 487–89.
[138] *Id.* at 489.

because the regulation exceeds the authority granted to Congress under the Commerce Clause.[139]

In *Gibbs*, the Fourth Circuit used the analytical framework set up by the Supreme Court in *Lopez* and *Morrison*.[140] Judge Wilkinson, writing for the majority, determined that this case fit under *Lopez's* third prong, the substantial effects test. Judge Wilkinson stated, "Economic activity must be understood in broad terms."[141] First, the majority found that the regulation of the taking of red wolves involved a number of commercial activities that were closely related to interstate markets.[142] The majority cited a direct link between the red wolf and interstate commerce through tourism, scientific research, and a trade in wolf pelts.[143] Because of the link to interstate commerce, the Fourth Circuit determined that they could aggregate the effects of the individual takings. Thus, in the aggregate, the taking of red wolves sufficiently impacted interstate commerce, and the regulation was therefore valid.[144]

Second, the Fourth Circuit found the protection of commercial assets, crops and livestock was the primary reason for taking red wolves.[145] The court found that farmers and ranchers were taking the wolves to protect their crops and livestock, and that the regulation specifically restricted red wolf takings for the protection of economic development.[146] The majority noted that such a decision was legislative and that Congress had the power to regulate the coexistence of endangered wildlife and commerce.[147] Further, the majority opined, it was for Congress, and not the courts, to decide between preservation of endangered species and inaction.[148]

The Fourth Circuit also sustained the takings regulation as part of a larger scheme of regulations, only a part of which regulates intrastate activity.[149] The majority found that Congress "undoubtedly" had the power to protect endangered species and "'the *de minimis* character of individual instances arising under [a] statute'" does matter in the context of a general regulatory scheme that substantially relates to interstate commerce.[150] The Fourth Circuit opined that it would be ridiculous to allow Congress to regulate abundant species, but to prevent Congress from regulating species nearer to extinction simply be-

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[139] *Id.*

[140] *Id.* at 490.

[141] *Id.* at 491.

[142] *Id.* at 492.

[143] *Id.* (citing *Lopez*, 514 U.S. at 567 (referring to the Supreme Court's refusal to pile inference upon inference)).

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

[145] *Id.* at 492.

[146] *Id.* at 495 (citing 50 C.F.R. § 17.84 (2000).

[147] *Gibbs*, 214 F.3d at 496.

[148] *Id.*

[149] *Id.* at 497 (*citing Lopez*, 514 U.S. at 561).

[150] *Gibbs*, 214 F.3d at 497–98 (quoting *Lopez*, 514 U.S. at 558).

cause a lower number of a species reduces its commercial significance.[151] The Fourth Circuit concluded its analysis by finding that the takings regulation was a valid exercise of the commerce power because regulating the taking of red wolves substantially affected interstate commerce.[152]

In *GDF Realty Investments, Ltd. v. Norton*, a real estate developer brought a declaratory action against the FWS alleging that the land use restrictions on his property resulting from ESA exceeded the power granted to Congress under the Commerce Clause.[153] On cross-motions for summary judgment, the District Court for the Southern District of Texas held that the application of the ESA, which precluded proposed development of shopping center, residential subdivision, and office buildings on the property containing six endangered species, did not exceed Congress' authority under the Commerce Clause.[154]

In *GDF Realty*, GDF wanted to develop 216 acres of land at an intersection of two major Texas state highways.[155] On that property, six species of invertebrates lived in underground caves; these invertebrates existed only in Travis and Williamson Counties, in central Texas.[156] Under section 9 of the ESA, the FWS forced GDF to pass on several opportunities to develop the land for commercial and residential use.[157] GDF argued that the restrictions placed on the land by the FWS, because of the invertebrates,[158] halted their economic use of the land, and that application of the ESA to them exceeds the power granted to Congress under the Commerce Clause.[159]

The GDF court's analysis looked at *Lopez*, stating, "a Commerce Clause challenge focuses on the activity being regulated, and its relation to interstate commerce."[160] Then the court noted that the regulated activity here is the alleged taking of invertebrates through GDF's proposed development.[161] In its analysis, the court followed the *Lopez* and *Morrison* framework determining that the regulation fell into the third category, the substantial effects test.[162] However, the court felt that because the challenge was an "as applied" challenge, and not a facial challenge the court might only have to analyze the effects of specific activity on interstate commerce.[163] However, the court also

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[151] *Id.* at 498.
[152] *Id.* at 486–87.
[153] 169 F. Supp.2d 648, 652 (S.D. Tex. 2001).
[154] *Id.* at 664.
[155] *Id.* at 650.
[156] *Id.*
[157] *Id.* at 653
[158] *Id.* at 651 (stating that the FWS promulgated a rule, 53 Fed.Reg. 36029 (Sept. 16, 1988), making the six invertebrates protected species because the caves the lived in could collapse if the development progressed.
[159] *Id.* at 650.
[160] *Id.* at 655
[161] *Id.* at 656.
[162] *Id.* at 657.
[163] *Id.* at 658.

looked at the four considerations set out in *Morrison*: whether the statute regulates economic activity, whether there is a jurisdictional element, whether congressional findings show a substantial effect, and whether the there is an attenuated relationship to interstate commerce.[164]

Because of their doubt as to *Morrison's* precedent in an "as applied" challenge, the court first determined that the regulation of the taking of invertebrates by development activity was an activity substantially effecting interstate commerce.[165] The court resolved that the takings provision applied broadly to any modification of habitat that killed or injured endangered species.[166] Thus, the court found that because one of the express purposes of the ESA prevented developments from extinguishing endangered species, the ESA covered GDF's commercial developments.[167] Moreover, the court found that because the regulated activity was commercial, they could aggregate the effects of similar endeavors when looking at the development's effect on interstate commerce.[168]

Second, the court applied the *Morrison* considerations to the case.[169] The court began with the nature of the regulated activity, finding that the hurdle was low and that GDF's plan to build a Wal-Mart and office buildings was as commercial an activity as there could be.[170] Next, the court considered the jurisdictional element of the takings regulation and determined that a jurisdictional element was not necessary because GDF did not present a facial challenge to the statute.[171] The court also found that because the economic and interstate nature of the activity was so obvious a jurisdictional element was irrelevant.[172] The court then considered the legislative history of the ESA, and found that the act contained ample findings of a relationship between interstate commerce and the takings regulations because the takings regulation protected the species as a commercial resource great value to the nation.[173] Lastly, the court looked at the link between interstate commerce and the regulated activity to determine if the link was too attenuated.[174] The court found a direct link to interstate commerce in the construction of a Wal-Mart, and despite GDF's argument that clearing the top of the land did not relate to a taking of cave species, the court maintained that development activities are the direct cause of such takings because of changes in the ground contours.[175] The court found for

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[164] *Id.* at 657.
[165] *Id.* at 658 (citations omitted).
[166] *Id.* at 659.
[167] *Id.*
[168] *Id.* (citing *Morrison*, 529 U.S. at 611 n.4 (discussing the *Wickard*, 317 U.S. 111, aggregation principle)).
[169] *GDF Reality*, 169 F.Supp. at 660.
[170] *Id.* at 660–61.
[171] *Id.*
[172] *Id.* at 661.
[173] *Id.*
[174] *Id.* at 662.
[175] *Id.* at 663.

the FWS, holding that, while the ESA did regulate purely intrastate activities substantially related to interstate commerce.[176] The court also found that while the Commerce Clause has limits, this case did not approach them.[177]

IV. THE SUPREME COURT AND THE ENVIRONMENT (POST-*MORRISON*)

A. SWANCC*: Passing on the Commerce Clause Question*

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*), a consortium of municipalities sued the Army Corps of Engineers, challenging the Corps' exercise of jurisdiction over an abandoned sand and gravel pit located in Illinois.[178] The consortium planned to develop a disposal site for non-hazardous solid waste out of abandoned sand and gravel pits; this action arose from a denial of a Clean Water Act (CWA) permit for that purpose.[179] The Court of Appeals affirmed the lower court's grant of summary judgment for the Corps.[180] The Supreme Court held that the Corps' *Migratory Bird Rule*, which extends the definition of "navigable waters" under the CWA to include intrastate waters used as habitat by migratory birds, exceeded the authority granted to the Corps under the CWA.[181]

In *SWANCC*, the Supreme Court had to determine if the CWA supported the Corps' Migratory Bird Rule.[182] The Migratory Bird Rule is the Corps' rule clarifying the reaches of its jurisdiction over waterways.[183] The rule included *intrastate* waterways which migratory birds would use as they crossed the state.[184] The Corps argued that "navigable waters" as used in the CWA gave them the jurisdiction to regulate abandoned gravel pits not adjacent to any navigable waterways.[185]

The Supreme Court addressed the issue by discussing their opinion in *Unites States v. Riverside Bayview Homes, Inc.* (*Bayview*),[186] a CWA case predating *Lopez*.[187] The Court noted that in *Bayview* it had ruled that the Corps had jurisdiction under the CWA to regulate wetlands that abutted navigable

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[176] *Id.* at 664.

[177] *Id.* at 664.

[178] 531 U.S. at 162.

[179] *Id.* at 166.

[180] *Id.*

[181] *Id.* at 174. This is the same Migratory Bird Rule that the Supreme Court denied certiorari to in *Cargill*, 516 U.S. 955.

[182] *SWANCC*, 531 U.S. at 167.

[183] *See* 51 Fed.Reg. 41217 (listing the intrastate waterways the Corps purports to regulate).

[184] *See id.*

[185] *SWANCC*, 531 U.S. at 167. Under the Clean Water Act , navigable waters are "the waters of the Unites States, including the territorial seas," (33 U.S.C. § 1362(7) (2000)) and section 404(a) authorizes the Corps to regulate the discharge of fill materials into those navigable waters.

[186] 474 U.S. 121 (1985).

[187] *SWANNC*, 513 U.S. at 167.

waters.[188] The Court also noted that in *Bayview* it found Congress intended to regulate wetlands because the wetlands were a part of the waters of the United States.[189] Additionally, the Court noted that in *Bayview* it had opined that "navigable" as used in the CWA was of "limited import" because Congress intended to regulate waters that were not navigable.[190] In *SWANCC*, the Court also distinguished *Bayview*, limiting it to the fact that the wetlands at issue in Bayview abutted navigable waterways.[191] The Court further stated that it made no findings in *Bayview* on the question of the Corps' authority to regulate wetlands not abutting open waters, basing its decision in *Bayview* on the "significant nexus between the wetlands and 'navigable waters'" at issue in that case.[192] The Court determined that the text of the CWA would not allow such a conclusion.[193]

After dispatching the Corps' arguments concerning the nexus between the gravel pits and navigable waters, the Court turned to the Corps' Commerce Clause argument.[194] The Court, citing *Morrison* and *Lopez*, stated, "The grant of authority to Congress under the Commerce Clause, though broad, is not unlimited."[195] Then the Court declined to answer the Commerce Clause issue because it found the Corps' interpretation of the CWA impermissible.[196] The Corps argued that the Commerce Clause provided the power for the Migratory Bird Rule because migratory birds have a substantial economic effect on interstate commerce.[197] The Court noted that giving the Corps jurisdiction over wetlands which fell under the Migratory Bird Rule would severely encroach on the State's traditional control of its land and water use.[198] However, the Court determined that it would not have to answer the constitutional issue because Congress did not clearly intend to reach the sand and gravel pits at issue in this case.[199] The Court, quoting from the CWA, found that Congress chose to recognize the states as the primary caretakers for the development and use of land and water resources, and the Corps had exceeded the power granted to it under the statute.[200]

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[188] *Id.*
[189] *Id.* (citing *Bayview*, 474 U.S. at 134).
[190] *Id.* (citing *Bayview*, 474 U.S. at 133).
[191] *Id.* at 168.
[192] *Id.* at 167.
[193] *Id.* at 168.
[194] *Id.* at 173.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 174 (citing Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 44 (1994).
[199] *SWANNC*, 531 U.S. at 174.
[200] *Id.* (citing 33 U.S.C. § 1251(b) (2000)).

B. The Lower Courts Are Going Full Steam Ahead

In *Rancho Viejo v. Norton*, Rancho Viejo, a housing developer, sued the FWS to prevent application of the ESA to an Arroyo Toad population claiming that, as applied to him, the ESA violated the Commerce Clause.[201] Viejo claimed the Commerce Clause did not give Congress the authority to regulate private lands because the toads lived entirely within California.[202] The court determined that Viejo did not present any novel circumstances; therefore, *NAHB* and its application of the substantial effects test controlled its judgment.[203]

In *Viejo*, Rancho Viejo raised two additional arguments beyond the substantial effects test.[204] Rancho Viejo first argued that in lieu of the Supreme Court's decision in *SWANCC*, *NAHB* no longer controlled the court's decisions regarding takings under the ESA.[205] The court distinguished *SWANCC* because the Supreme Court in that case resolved the issue on statutory grounds; thereby avoiding the constitutional question.[206] However, the Viejo court stated that dicta in *SWANCC* reaffirmed its position that courts must "focus on the 'precise object or activity that, in the aggregate, substantially affects interstate commerce.'"[207] Second, Rancho Viejo argued that Congress exerted its authority over land use that was traditionally under state control.[208] Citing *Gibbs*, the district court responded that Congress could regulate private land use for wildlife or environmental conservation.[209] Therefore, the court determined that, unlike *Lopez* and *Morrison* where the Supreme Court found that Congress usurped the states' police power, natural resource conservation was an appropriate area for federal regulation.[210] The court held that *Morrison* did not eviscerate *NAHB* and granted summary judgment for the FWS.[211]

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[201] 2001 WL 1223502 (D.D.C. 2001).

[202] *Id.* at *1. It is interesting that the court, in its opening paragraph, notes the existence of the Arroyo Toad across state lines, but summarizes the plaintiff's position as an argument that the ESA cannot control species that do not cross state lines. One wonders if the court correctly summarized the plaintiff's argument.

[203] *Id.* Note that the Ninth Circuit decided *NAHB* in 1997, two years before the Supreme Court's decision in *Morrison*.

[204] *Id.*

[205] *Id.*

[206] *Id.* (citing *SWANCC*, 531 U.S. at 162, 174).

[207] *Viejo*, 2001 WL 1223502 at *9 (quoting *SWANCC*, 531 U.S. at 173).

[208] *Id.* at *10.

[209] *Id.* (citing *Gibbs*, 214 F.3d at 500).

[210] *Id.*

[211] *Id.*

V. SO, WHAT ARE THE LIMITS OF FEDERAL AUTHORITY TO ENACT AND ENFORCE ENVIRONMENTAL REGULATION?

Perhaps there is an easy answer to the question of the limit on federal authority to enact and enforce environmental regulation. Maybe the answer is simply that to enact and enforce environmental regulation, the regulation must substantially relate to interstate commerce, just as the Supreme Court stated in *U.S. v. Morrison*. Unfortunately, the simple answer leaves open the question of what it takes for a regulation to substantially relate to interstate commerce. *Lopez* and *Morrison* state that if there is an aggregated effect, a jurisdictional element, or a finding of a nexus between the challenged regulation and interstate commerce and the nexus is not too attenuated, the courts should uphold the regulation. *SWANCC* suggests that the Supreme Court may begin curtailing federal authority over the environment because the link to interstate commerce is to attenuated, but appears to have fallen short in its mandate.

A. Lopez *and* Morrison*: What Do They Mean?*

After *U.S. v. Lopez*, courts must examine Commerce Clause cases under a three-prong test.[212] For a court to find the challenged regulation constitutional, the regulation must be a regulation of the channels of interstate commerce, a regulation of the instrumentalities of interstate commerce, or a regulation of an activity with a substantial effect on interstate commerce.[213] Under the substantial effects test, the Supreme Court directs courts to look at the aggregated affect of the activity being regulated.[214] If the regulated activity has a substantial economic effect on interstate commerce, then the regulation falls with the Congress' power to regulate interstate commerce.[215] A regulation may also satisfy the substantial effects test if the regulation contains a jurisdictional element limiting its application to interstate commercial activities, or if Congress has made findings that show a statute's connection to interstate commerce—a connection not otherwise readily apparent.[216]

In *Lopez*, the Court was concerned with the qualitative issues that the regulation affected; the Court looked to the nature of the regulation and the regulated activities.[217] The Court required more than a simple showing of a regulation's effect on the national economy and would extend the aggregation

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[212] *See Lopez*, 514 U.S. at 558–59 (canvassing the Supreme Court's precedent and eliciting three broad categories of regulation which the Commerce Clause covers).

[213] *Id.*

[214] *Id.* (citing *Wickard*, 317 U.S. 111).

[215] *Lopez*, 514 U.S. at 561.

[216] *Id.* at 551–52.

[217] *Id.* at 559; *see also* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 13–14 (1999).

principles of *Wickard v. Filburn*.[218] In addition, the Court stressed that possessing a gun in a school zone is not an economic activity, and that the Gun Free School Zone Act had nothing to do with commerce.[219] Under *Lopez*, the substantial effects test does not appear to be a quantitative measure of the economic impact an activity has on commerce.[220] The substantial effects test is more of a qualitative and imprecise examination of the regulated activity and the nature of the regulation.[221]

For environmental regulation, *Lopez* represented a narrowing of federal jurisdiction and not necessarily a "'wholesale invalidation of . . . the U.S. Code.'"[222] When Congress passes environmental regulation, it typically enacts sweeping reforms encompassing many different activities, some of which cross state lines and some of which do not.[223] *Lopez* did not seem to hinder Congress' ability to pass such sweeping legislation.[224] Although, *Lopez* may have called into question the broad interpretations promulgated in the rules passed by the agencies charged with enforcing environmental legislation.[225]

After *Lopez*, the Supreme Court handed down *U.S. v. Morrison*. In *Morrison,* the Court refined the substantial effects test and limited Congress' ability to make protracted inferences so that any activity Congress wishes to regulate might substantially affect interstate commerce.[226] *Morrison* required that regulated activities be economic in nature and substantially effect interstate commerce.[227] The Court considered whether the VAMA governed an activity substantially affecting interstate commerce, and determined it was necessary to look at the statute itself and whether the statute had support from congressional findings.[228] In its reasoning, the Court considered the strength of the link between the activities in question and interstate commerce, focusing on the criminal nature of the activity Congress attempted to regulate, noting its non-economic nature.[229] In *Morrison*, the Court determined that the statute at issue relied on a chain of inference so long that the effect on commerce was too re-

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[218] *Lopez*, 514 U.S. at 560–61 (finding that wheat growing is economic and gun possession is not); *see also* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 792 (W.D. Va. 1996).

[219] *Lopez*, 514 U.S. at 559; *see also Brzonkala*, 935 F. Supp. at 792.

[220] Adler, *supra* note 217, at 14.

[221] *Id.* (suggesting that courts question both the commercial impact of the regulation and the regulations affect on the federalist system).

[222] *See* Adler, *supra* note 217, at 18 (quoting Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 742–50 (1995)).

[223] Adler, *supra* note 217, at 18.

[224] *Id.* at 19.

[225] *See id.*; *see also SWANCC*, 531 U.S. at 167 (concluding that the Corps' interpretation of Clean Water Act in the Migratory Bird Rule "'is not fairly supported by the CWA'").

[226] *See Morrison*, 529 U.S. at 614 (rejecting Congress' attempt to regulate crime based on its aggregate nationwide impact).

[227] *Id.* at 610.

[228] *Id.* at 610–15.

[229] *Id.* at 615 (quoting H.R. CONF. REP. No. 103-711, at 385).

mote from the conduct.[230] It is clear from the Court's findings that it was not willing to allow such extended and inferential reasoning. Thus, the Court determined that such a long causal chain would give Congress the authority "to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[231]

At first glance, one might have read *Morrison* as arming the Court for an attack on environmental laws, especially environmental laws that require long chains of inference.[232] *Morrison* suggested a limit for the future of environmental regulation.[233] When the Supreme Court looked for a constitutional ground for legislation, *Morrison* seemed to reduce, perhaps end, the Supreme Court's deference to congressional findings concerning environmental regulation's aggregate impact on interstate commerce.[234] However, the courts that have interpreted *Morrison* in the context of environmental regulation have distinguished it and instead have used the *Lopez/Morrison* framework to validate environmental regulation.[235]

B. Where Does Environmental Regulation Fit into the Framework?

Questions concerning the regulation of the environment necessarily come under the third prong of the *Lopez* test, the substantial effects test, not because the other prongs do not apply, but because the instrumentalities and channels prong of the *Lopez/Morrison* framework are much clearer in their application.[236] The Supreme Court has stated that the channels of interstate commerce are the highways, interstates, railroads, rivers, canals, navigable waterways and effects along those channels.[237] Fundamentally, the channels of interstate

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[230] *Id.*

[231] *Id.* at 613–16.

[232] Charles Tiefer, *After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?*, 30 ENVTL. L. REP. 10888, 10888 (2000).

[233] *Id.*

[234] *Id.*

[235] *Compare Morrison*, 529 U.S. 598 (revising the *Lopez* test, specifically the four factors for the substantial effects test) *with Gibbs*, 214 F.3d at 491 (distinguishing *Morrison* and *Lopez*'s findings which invalidated the GFSZA and VAWA, respectively, because the regulated taking of red wolves involved economic activity) *and GDF Realty Investments*, 169 F. Supp. 2d at 662 (using the four factors laid out in *Morrison* to validate a takings regulation which prevented developers from making economic use of the their property).

[236] *See Morrison*, 529 U.S at 627 (Thomas, J., concurring) (calling the substantial effects test rootless and malleable, and calling for the replacement of the test); *See also Gibbs*, 214 F.3d at 490–91 (finding that the taking of red wolves does not implicate the channels or instrumentalities of interstate commerce); *Building Industry Assoc.*, 979 F. Supp. 893 (ruling on substantial effects of ESA application to fairy shrimp in California without mentioning the channels or instrumentalities of interstate commerce); *but see NAHB*, 103 F.3d 1041 (finding ESA regulations of the Delhi Sands flower-loving fly a permissible regulation of the channels of interstate commerce and finding the regulation substantially affecting interstate commerce).

[237] *See Lopez*, 514 U.S. at 555 (citing United States v. Darby, 312 U.S. 100, 118 (1941); *Heart of Atlanta Motel, Inc.*, 379 U.S. at 256). *See also SWANCC*, 531 U.S. at 167 (citing *Bayview*, 474 U.S 121 (upholding the regulation of wetlands abutting navigable waterways)).

commerce represent the traffic of commerce between the states.[238] The Supreme Court also stated that the instrumentalities of interstate commerce are the persons and things in interstate commerce; they are the vehicles, the trains, or the operators used in commerce.[239]

Environmental regulations are not regulations controlling wages or the hours truckers are allowed to spend on the road; they do not regulate the speed of trains or cars. Environmental regulations strike a balance between commercial development and the natural habitat that surrounds commerce.[240] Environmental regulations do not directly control any one aspect of commerce; they are conventions that propound the United States' national policy toward the environment.[241] Nevertheless, like all federal regulation, environmental regulation must have its source in the Constitution.[242] Therefore, environmental regulation passed by Congress under the Commerce Clause must fit into one of the three *Lopez* categories. However, the nature of the categories forces the most difficult questions of environmental regulation in the third category of *Lopez*– the substantial effects test.[243]

C. How Does the Substantial Effects Test Limit Environmental Regulation?

Since the substantial effects test is the test most often used by the courts to determine the constitutionality of environmental regulation, it must be determined how that test affects Congress' ability to regulate the environment. Clearly, the substantial effects test described in the third prong of the *Lopez* test and further refined by *Morrison* does not significantly affect the future of environmental regulations. "*Lopez* did not alter the Constitutional standard for federal statutes regulating intrastate activities."[244] *Lopez* reviewed and cata-

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[238] *See NAHB*, 130 F.3d at 1047 (citing United States v. Rambo, 74 F.3d 948, 951 (9th Cir. 1996) (proposing that the regulation of intrastate possession of machine guns effectively regulated the interstate trafficking of machine guns, which regulated the channels of commerce in machine guns)).

[239] *See Lopez*, 514 U.S. at 558 (citing *Shreveport Rate Cases*, 234 U.S 342 (1914) (finding the intrastate control of railroad rates constitutional)); S. R. Co. v. United States, 222 U.S. 20 (1911) (upholding amendments the Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez*, 402 U.S. 146 (determining that a rational basis is necessary for concluding that a regulation sufficiently affected interstate commerce).

[240] *See Gibbs*, 214 F.3d at 496 (determining that Congress can regulate the coexistence of commerce and endangered wildlife).

[241] *See id.* (opining that Congress may choose between inaction and preservation of species and has the power to manage the ecosystem's interdependence which contains endangered plants and animals).

[242] *See* Marbury v. Madison, 5 U.S. 137 (1803) (determining that laws enacted by Congress must be based on an enumerated power).

[243] *See Gibbs*, 214 F.3d at 490–91 (regulating the taking of red wolves does not implicate the channels or instrumentalities of interstate commerce); *see also Building Industry Assoc.*, 979 F. Supp. 893 (D.D.C.1997) (ruling on substantial effects of ESA application to fairy shrimp in California without mentioning the channels or instrumentalities of interstate commerce); *but see NAHB*, 103 F.3d 1041 (finding ESA regulations of the Delhi Sands flower-loving fly a permissible regulation of the channels of interstate commerce and finding the regulation substantially affecting interstate commerce).

[244] *Olin*, 107 F.3d at 1509.

loged the Supreme Court's precedent, placing its prior cases into compartments, and providing a framework of analysis for future Commerce Clause decisions.[245] *Morrison's* substantial effects test continues the cases decided after the New Deal and has not prevented Congress from reaching intrastate non-economic activity, including environmental regulations that regulate completely intrastate activities.[246] *Morrison*, despite its powerful rhetoric, seemed to be more a reminder that federal powers are limited and that the states do have a place in the regulation of the citizenry.[247] Thus, the application of the substantial effects test in *Morrison* does nothing to change the limit on Congress' power to regulate.[248] Therefore, after *Lopez* and *Morrison*, arguably the substantial effects test gives Congress the power to regulate non-commercial, non-economic behavior, including environmental concerns.[249]

Indeed, after *Morrison* the courts continued to allow environmental regulation of wholly intrastate activities with a questionable relation to interstate commerce. In *Gibbs v. Babbitt*, decided one month after *Morrison*, the Fourth Circuit upheld a regulation promulgated by the FWS to control the taking of red wolves on private property in eastern North Carolina.[250] In addition, in *GDF Realty Investments, Ltd., v. Norton*, the court for the Southern District of Texas found that the FWS could regulate the taking of six small invertebrates (spiders and scorpions) that lived in underground caves entirely within Travis and Williamson counties in Texas.[251] In both cases, the courts cited the substantial effects test, applied the test to the facts, and found that FWS validly regulated a species, which lived entirely within the borders of a single state.[252] Thus, the question arises: where is the "interstate" commerce?

In *Gibbs*, the court articulated the takings regulation's connection to interstate commerce as tourism, scientific research, trade in animal products, and advancing agricultural goals, stating that these connections amounted to substantial effects on interstate commerce.[253] However, the court found that the case involved only the taking of forty-one of seventy five wolves, all of which

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[245] *See Morrison*, 529 U.S. at 608–09 (observing, as the Court did in *Lopez*, that "modern Commerce Clause jurisprudence has identified three . . categories of activity that Congress may regulate under its commerce power").

[246] Arthur B. Mark, *United States v. Morrison, The Commerce Clause and Substantial Effects Test: No Substantial Limit on Federal Power*, 34 CREIGHTON L. REV. 675, 730 (2001); *see also NAHB*, 130 F.3d at 1041 (allowing the ESA to reach a fly whose entire habitat is within eight square miles of San Bernardino County, California); *Viejo*, 2001 WL 1223502 (allowing the ESA to reach the Arroyo Toad whose entire habitat is within southern and Baja California).

[247] *See* Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 OKLA. CITY U. L. REV. 843 (2000).

[248] *Lopez*, 514 U.S. at 584, 589 (Thomas, J., concurring).

[249] *See* Mark, *supra* note 246, at 734 (questioning the effect of the substantial affects test after *Morrison*).

[250] 214 F.3d 483, 488 n.1 (4th Cir. 2000).

[251] 169 F. Supp. 2d 648, 664 (S.D. Tex. 2001).

[252] *See supra* notes 140–44, 155–64 and accompanying text.

[253] *Gibbs*, 214 F.3d at 507 (Luttig, J., dissenting).

were on private property.[254] Thus, it appears that there is no economic activity at all, since the takings occurred on private property.[255] Furthermore, even if the activity was economic, it did not substantially affect interstate commerce.[256]

Moreover, in *GDF Realty*, the court stated in its conclusion, the takings provision of the ESA "covers purely local, intrastate activities *having no connection whatsoever with interstate commerce*."[257] However, the court refused to rule against the FWS because according to the Supreme Court's 1978 decision in *Tennessee Valley Authority v. Hill*,[258] the courts cannot strike a balance which favors development over the preservation of species.[259] The court found that because GDF Realty was building a Wal-Mart and some apartment complexes, their activity substantially affected interstate commerce.[260] However, in *GDF Realty* the court did not articulate how the Wal-Mart, and the potential killing these invertebrates, substantially affected interstate commerce.[261] Thus, the court has left the world to guess how little spiders and scorpions in Texas substantially affect interstate commerce.

The cases seem to show that despite the *Lopez/Morrison* framework and the substantial effects test, the courts are still willing to find activities with only a tenuous link to interstate commerce constitutional as a valid exercise of Congress' commerce power.[262] Since *Morrison*, no courts have found that environmental regulations exceeded Congress' commerce power.[263] The lower courts that have applied the substantial effects test as described in *Lopez* and *Morrison* to environmental regulations, have consistently determined that environmental regulations have a substantial economic impact on interstate commerce.[264] Therefore, in spite of any suggested retraction of Congress' power under the Commerce Clause after the decisions in *Lopez* and *Morrison*, the lower courts have found that under the substantial effects test Congress can still use the commerce power to regulate the environment.[265]

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[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] 169 F. Supp. 2d at 664 (emphasis added).

[258] 437 U.S. 153 (1978).

[259] *GDF Realty*, 169 F. Supp. 2d at 664.

[260] *Id.* at 660.

[261] *See id.* at 660 (stating the *Wickard* Aggregation principle applies, thus building a Wal-Mart substantially affects interstate commerce).

[262] *See infra* notes 263–65 and accompanying text.

[263] Maya R. Moiseyev, *Solid Waste Management of Northern Cook County v. United States Army Corps of Engineers: The Clean Water Act Bypasses a Commerce Clause Challenge, but Can the Endangered Species Act?*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 191, 196 (2001).

[264] *See Gibbs*, 214 F.3d 502; *GDF Realty*, 169 F.Supp. 2d 648.

[265] *See Gibbs*, 214 F.3d 502; *GDF Realty*, 169 F.Supp. 2d 648.

D. How Does SWANCC *Fit In?*

In *SWANCC*, the Supreme Court sidestepped the Commerce Clause question.[266] Instead, the Court chose to rule that the Migratory Bird Rule, which the Army Corps of Engineers promulgated under the CWA, exceeded the Corps' authority.[267] This leads one to question why *SWANCC* is mentioned in Commerce Clause jurisprudence. The answer lies at the very end of the *SWANCC* opinion where the Court stated "that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited."[268] This statement appears to provide insight into the High Court's philosophy on the Commerce Clause. Some have suggested that this decision marks a turning point in federal power to regulate the environment, and has revived the efforts of those who favor states' rights and a more traditional approach to federalism.[269]

The Court further states that to evaluate *SWANCC* under the Commerce Clause it would have to "evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."[270] However, the Court could not do so because the Corps claimed jurisdiction based on migratory birds' use of the sand and gravel pits, arguing that the regulation covered the pits because of their plainly commercial use as a landfill.[271] Thus, because of the Corps's inconsistency and because of the lack of clear congressional intent in the CWA, the Court left the future of environmental regulation under the Commerce Clause to speculation.

The *SWANCC* decision has clearly curtailed the Corps' ability to regulate isolated wetlands.[272] However, a question remains concerning the implications of *SWANCC* in other areas of environmental regulation beyond wetland regulation. In *SWANCC,* the Corps put on evidence of a billon-dollar tourist industry revolving around migratory bird habitats, but the Court determined that this was not a significant link to interstate commerce.[273] The Court maintained that the CWA regulated navigable waters of the United States and the Corps' regulation of isolated wetlands based on the wetlands being a migratory bird habitat was very different from such waters.[274] Therefore, while it may be that Congress and the courts have not felt the impact of the *SWANCC* decision, it has so far provided little guidance concerning Congress' power to regulate non-economic environmental activity under the Commerce Clause.

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[266] *SWANCC*, 531 U.S. at 174.
[267] *Id.* at 173.
[268] *Id.* (citing *Lopez*, 514 U.S. at 549); *Morrison*, 529 U.S. at 598).
[269] Jamie Tanabe, *The Commerce Clause Pendulum: Will Federal Environmental Law Survive in the Post-SWANCC Epoch of "New Federalism"?*, 31 ENVIRONMENTAL LAW 1051, 1053 (2001).
[270] *SWANCC*, 531 U.S. at 173.
[271] *Id.*
[272] *SWANCC*, 531 U.S. at 174.
[273] *Id.* at 173.
[274] *Id.*

E. The Future Appears Limited

After reviewing the Supreme Court's recent jurisprudence, it appears that the ability of federal authority to enact and enforce environmental regulation is still intact but will be limited in the future. The *Lopez/Morrison* framework added some hurdles to Congress' ability to exercise its power under the Commerce Clause. The Court will no longer sustain non-economic regulations, but now looks for a jurisdictional element or some substantial connection to interstate commerce.[275] Moreover, the Court will not defer to congressional findings showing how a regulated activity affects interstate commerce, and the link Congress provides must not be attenuated. The Court will be looking for a more direct link between congressional enactments and the Commerce Clause.

SWANCC infers another layer from the Court's thickening of the link to interstate commerce. The *SWANCC* decision showed the Court's willingness to attack environmental regulation.[276] The Supreme Court appears to be posturing. The Court noted the important constitutional questions raised in the case but chooses not to answer them, relying on its interpretive principle of avoiding the constitutional questions whenever possible.[277] Instead, the Court cited *Morrison* and *Lopez* and stated that the "grant of authority under the Commerce Clause, though broad, is not unlimited," suggesting that the Court intends to limit Congress' use of the Commerce Clause.[278]

VI. MAYBE AN ANSWER: POST-*SWANCC* MIGHT SUGGEST A PATTERN

After the Supreme Court handed down the *SWANCC* decision, many commentators and environmentalists expressed concern for the future of environmental regulation. These persons looked at *Lopez*, *Morrison*, and *SWANNC* and saw a trend in the Supreme Court's decisions striking down federal law because the federal government exceeded its authority under the Commerce Clause. When the Court decided *SWANCC*, environmentalists believed that federal regulation of the environment would become much more difficult and that their cause was in danger. However, a review of the case law has shown this is not the case. A look at the case law decided after each Supreme Court decision shows that lower courts are not willing to obliterate environmental regulation.[279] In some cases, the courts have bent over backwards to find a link between the regulation questioned and interstate commerce.[280]

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[275] *Morrison*, 529 U.S at 611–13.

[276] *See SWANCC*, 531 U.S at 174 (holding the Migratory Bird Rule unconstitutional).

[277] *Id.*

[278] *Id.* at 173.

[279] *See supra* text accompanying notes 48–115, 133–77, 201–11.

[280] *See, e.g.*, *Olin*, 107 F.3d 1506; *NAHB*, 130 F.3d 1041.

Even after the *SWANCC* decision, the courts have found an aggregate effect between isolated environmental problems and interstate commerce. One such example is *Viejo v. Norton,* where the court found a link to interstate commerce in an Arroyo Toad population living in California.[281] The *Viejo* court distinguished *SWANNC* and followed *NAHB*.[282] The court was unwilling to strike down the ESA as violation of the Constitution.[283] *Viejo* further suggested that the Supreme Court is going to have to be more explicit in its explanation on how attenuated the link to the Commerce Clause can be before the link is broken.[284] Indeed, the *Viejo* court, while dismissing the Commerce Clause discussion in *SWANCC* as dicta, noted that if the dicta were applicable to the case it would further confirm the ESA's constitutionality.[285]

Viejo appears repetitive of the pattern elicited after *Lopez* and *Morrison*. The courts, faced with a new test after *Lopez* and *Morrison,* continued to hold that environmental regulation was viable under the Constitution.[286] The courts sought out the requisite links to interstate commerce mandated by the Supreme Court's decisions.[287] After *Lopez*, the Ninth Circuit determined that the Army Corps of Engineers could regulate isolated waters used only by migratory birds.[288] In addition, the District of Columbia Circuit determined that the ESA allowed the Environmental Protection Agency (EPA) to prevent the taking of an endangered species of fly found only in San Bernardino County, California.[289] In a third case following *Lopez*, the Eleventh Circuit determined that even though a chemical manufacturer's on-site disposal of toxic chemicals produced no off-site damage and the disposal site was located entirely within one state, the EPA could still regulate the site under CERLCA.[290] These cases demonstrated the circuit courts' willingness to continue extending the Commerce Clause after the *Lopez* decision.

The trend was similar after the Supreme Court's decision in *Morrison*. Following *Morrison*, the Fourth Circuit determined that the taking of red wolves located on private lands entirely within one state implicated a wide va-

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[281] 2001 WL 1223502, at *9 (D.D.C. 2001).

[282] *Id.*

[283] *Id.* at *10.

[284] *See id.* at *9 (calling the language of the Clean Water Act in *SWANCC,* where the Court discusses the CWA's constitutionality, dicta).

[285] *Id. at* *9–*10 (citing *SWANCC*, 531 U.S. at 173 where that court stated that the "precise object or activity that, in the aggregate, substantially effects interstate commerce," and therefore the Court would focus on the plaintiff's activity which could take the Arroyo Toad from the environment).

[286] *See supra* notes 133–77, 48–115 and accompanying text.

[287] *See supra* notes 133–77, 48–115 and accompanying text.

[288] *See Leslie Salt Co.*, 55 F.3d 1388, *cert. denied*; *Cargill*, 516 U.S. 955 (finding that an individual's activity, even though it may seem insignificant, when taken together with many others is not trivial); *But see Cargill*, 516 U.S. at 957–58 (Thomas, J., dissenting) (arguing that the federal jurisdiction in this case is even more far fetched than that dismissed in *Lopez*).

[289] *See supra* notes 74–76 and accompanying text.

[290] *See Olin,* 107 F.3d at 1511 (ruling that CERLCA reflects congressional intent to regulate threats to interstate commerce from on-site disposal of chemical manufacturing).

riety of economic activity, and was closely connected to interstate commerce.[291] Thus, the FWS could regulate red wolf takings.[292] The Fourth Circuit made its decision that the FWS could regulate the takings occurring wholly on private lands because the eradication of species would have a substantial effect on interstate commerce.[293] Also after *Morrison*, the District Court for the Southern District of Texas decided that the FWS could regulate the taking of six species of spider and scorpion living in Travis County Texas. [294] Even though the species had no effect on commerce, because the plaintiffs wanted to build a Wal-Mart and an apartment complex, the court determined that the taking would substantially affected interstate commerce.[295] The court also questioned whether *Morrison* even applied to the case.[296] These courts' efforts to find a link between the Commerce Clause and environmental regulation demonstrate the courts' unwillingness to overturn environmental legislation despite the Supreme Court's apparent mandate that congressional legislation passed under the Commerce Clause contained more than a tenuous link to interstate commerce.[297]

The line of environmental cases following *Lopez* and *Morrison* suggests that the district and circuit courts are unwilling to overturn environmental legislation absent a direct mandate from the Supreme Court.[298] These cases suggest a pattern that the courts will find a link to interstate commerce despite an effort by the Supreme Court to force a closer connection between interstate commerce and congressional action under the Commerce Clause.[299] Therefore, if the Supreme Court does have an agenda that consists of reigning in Congress' power under the Commerce Clause, and it wishes its agenda to apply to environmental legislation, it appears that the Supreme Court will have to be more explicit in its mandates to the lower courts.

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[291] *Gibbs*, 214 F.3d at 492.

[292] *Id.*

[293] *Id.* at 493. The Fourth Circuit also noted that their decision would increase the number of red wolves and, while that might have moral implications because of the Supreme Court's decision in *Heart of Atlanta Motel, Inc.*, 379 U.S. 241, 257 (1964), the court based its decision on the economic impact of the takings.

[294] *See GDF Realty*, 169 F. Supp. 2d 648. The Court decided *GDF Realty* after the *SWANCC* decision, but found its dicta on the Commerce Clause inapplicable. *Id.* at 659 n.15.

[295] *Id.* at 658.

[296] *Id.*

[297] *See Gibbs*, 214 F.3d at 493 (eliciting from *Morrison* the requirement of a meaningful and identifiable economic enterprise for an activity to be subject to environmental regulation, but still finding the regulation of the taking of red wolves on private lands wholly within one state constitutional); *GDF Realty*, 169 F. Supp. 2d at 658 (applying *Morrison's* supposedly stringent requirements of a link to interstate commerce to a FWS regulation of the taking of invertebrates found only in Texas).

[298] *See supra* notes 48–115, 133–77 and accompanying text.

[299] *See supra* notes 279–97 and accompanying text.

VII. CONCLUSION

If a conclusion can be stated at this stage in the development of Congress' power under the Commerce Clause, it is that the Supreme Court must be precise in its determinations of constitutional actions, especially when dealing with environmental issues. The issues involving the environment are contentious, involving a careful balance of commercial and ecological interests, and as the Supreme Court has noted, this balance is to be weighed out in Congress.

However, as the Court has also noted, the judiciary has the duty of telling Congress whether they are authorized under the Constitution to engage in that balance. If the Court through *Lopez*, *Morrison,* and *SWANCC* is trying to tell the lower courts that the link between interstate commerce and congressional regulation must be stronger, then the lower courts do not seem to be getting the message. The Supreme Court must give a clearer directive to the lower courts on how to handle environmental regulation passed under the Commerce Clause.