Congress, Cave Bugs, Courts and the Commerce Clause: Did the Fifth Circuit Figure out How to Regulate Intrastate Activity under the Endangered Species Act

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CONGRESS, CAVE BUGS, COURTS AND THE COMMERCE CLAUSE: DID THE FIFTH CIRCUIT FIGURE OUT HOW TO REGULATE INTRASTATE ACTIVITY UNDER THE ENDANGERED SPECIES ACT?

I. INTRODUCTION

The ever-increasing demand for commercial and residential development confirms that if natural resources and species are not protected, they will soon be destroyed.1 Failure to protect the various species that inhabit our nation will inevitably invite large-scale ecological disaster because of the interdependence between species and ecosystems.2 Congress attempted to respond to this danger by

1. See Endangered Species Act, 16 U.S.C. § 1531(a)(1) (2000) (stating Congress' conclusion that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation."); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 639-40 (5th Cir. 2003) [hereinafter GDF Realty I] (implying continued failure to protect species against development will result in continued extinctions and implying failure to regulate endangered species takes will result in piecemeal extinction).

2. See Shankar Vedantam, Reports on Global Ecosystems Calls for Radical Changes, WASH. POST, Mar. 30, 2005, at A2 (explaining that experts concluded in Millennium Ecosystem Assessment that world's ecosystems are in danger and might not support future generations unless radical measures are implemented to revive and protect them); see also Neil Cunningham & Mike D. Young, Toward Optimal Environmental Policy: The Case of Biodiversity Conservation, 24 ECOLOGY L.Q. 243, 247 (1997) (arguing that preserving biodiversity is essential to maintenance of human life on earth because species and ecologies are interdependent). Gunningham and Young argued:

Ecosystem diversity refers to the variety of habitats and communities of different species that interact in a complex web of interdependent relationships.
Biodiversity is essential for the maintenance of human life on earth, and scientists have long acknowledged that the preservation of biodiversity is, by definition, vital for an ecologically sustainable society. Humanity derives much of its food, medicines, and industrial products from both domesticated and undomesticated components of biodiversity. Biodiversity is also an important source of natural ecosystem processes that are beneficial yet often grossly undervalued, such as water purification, soil fertilization, and groundwater recharge. Furthermore, loss of genetic diversity could frustrate needed improvements in agriculture.

Id. (footnotes omitted). See also Mary Gray Davidson, Protecting Coral Reefs: The Principal National and International Legal Instruments, 26 HARV. ENVTL. L. REV. 499, 515 (2002) (recognizing "growing knowledge that an individual species does not exist independent of its surroundings; rather, an ecosystem is a community in which all parts are interdependent"); see, e.g., Gibbs v. Babbit, 214 F.3d 483, 497 (4th Cir. 2000) (quoting Nat'l Ass'n of Home Builders v. Babbit, 130 F.3d 1041, 1059 (D.C. Cir. 1997) [hereinafter NAHB] (Henderson, J., concurring) ("[g]iven the

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enacting the Endangered Species Act of 1973 (ESA), which provides substantial, if controversial, protection to endangered species and their habitats within the United States.  

Of the approximately 1,082 species protected under the ESA, half live in habitats existing exclusively in one state. Without the ESA's protection, endangered species that reside solely in one state risk imminent piecemeal extinction because states often do not adequately protect them and development interests obscure the need to preserve them. Indeed, many scholars, judges and scientists agree that the threat of any species' extinction is a national problem demanding a national solution, i.e., federal legislative intervention. Hence, the utility and necessity of federal legislation like the ESA becomes evident, though not always well received.

The ESA and most federal environmental statutes are predicated on Congress' power under Article I, section 8, of the United States Constitution: the Commerce Clause. The United States Supreme Court recently restrained this broad power through the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems.


4. See NAHB, 130 F.3d at 1052 (discussing local nature of many endangered species). That is, 521 of the approximately 1,082 endangered species reside in only one of the 50 states. Id.

5. See, e.g., GDF Realty I, 326 F.3d at 644 (Dennis, J., concurring) (implying that many states do not adequately protect endangered species and asserting that extinction of endangered species is national problem requiring national solution); id. at 640 (agreeing with the United States Fish and Wildlife Service's (FWS) argument that piecemeal extinction may result from failure to regulate Cave Species takes). Texas, the home of the endangered species at issue in this case, is one such state, though it has apparently taken steps toward protection. Id. at 644. Further, states may lack resources to identify endangered species, or may be less likely to protect them in some instances due to economic pressure and the need for development, or may feel that they have just have bigger fish to fry.

6. See, e.g., Gunningham & Young, supra note 2, at 247 (stating that protection of species and ecosystems is essential to sustaining human life); GDF Realty I, 326 F.3d at 639 (stating that extinction of species is national concern); Jud Mathews, *Turning the Endangered Species Act Inside Out?*, 113 YALE. L.J. 947, 953-54 (2004) (opining that extinction of species is problem of "truly national concern").


8. See Christopher H. Schroeder, Environmental Law, Congress and the New Federalism Doctrine, 78 IND. L.J., 413, 414 (2003) (citing examples of how some environmental regulations may run awry of Commerce Clause). The "commerce power" is Congress' authority under the Commerce Clause which allows Congress to regulate activity involved in interstate commerce. See U.S. Const. Art. I § 8, cl. 3.
lowing two seminal decisions. In both *United States v. Lopez* and *United States v. Morrison,* the Court refused to hold that the Commerce Clause authorized federal regulation of intrastate crime and imposed the requirement that when Congress invokes its Commerce Clause authority to regulate an activity, that activity must be economic in nature. This recent diminution of the Commerce Clause's reach could have a substantial impact on the constitutionality of federal environmental legislation pertaining to endangered species protection because protecting such species may not always entail "economic" activity.

One of the most recent cases addressing the Commerce Clause issue as it pertains to endangered species was *GDF Realty Investments, Ltd. v. Norton (GDF Realty I).* The primary issue in *GDF Realty I* was whether the ESA's "take" provision could constitutionally apply to certain species that existed only in Texas and had no colorable ties to any economic activity. More abstractly, does the ESA's take provision, as applied to takes of noneconomic, intrastate protected species, fall within the purview of the Commerce Clause? The Fifth Circuit upheld the take provision, utilizing the "aggregation principle" and liberally applying the "economic regulatory scheme" mechanism to establish that takes of an intrastate species with no ties to commerce fell within the Commerce Clause's ambit.

The Fifth Circuit's decision seems brave in light of *Morrison* and the recent wave of federalism under the current Supreme Court, but perhaps appropriately so, for the sake of all species that do not enjoy economic viability.

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11. See *Lopez,* 514 U.S. at 563-68 (introducing economic requirement); *Morrison,* 529 U.S. at 614-19 (applying economic requirement).
12. See Schroeder, supra note 8, at 414 (indicating that reduction of commerce power could result in setback for environmental legislation).
13. 326 F.3d 622, 624 (5th Cir. 2003).
15. See *GDF Realty I,* 326 F.3d at 624 (discussing Commerce Clause issue).
16. See *id.* at 630, 638-40 (invoking economic regulatory scheme mechanism to establish Cave Species substantial effect on interstate commerce); *infra* notes 29-57 and accompanying text for a general explanation of the aggregation principle and the economic regulatory scheme.
17. See *id.* at 640 (holding that ESA's take provision as applied to Cave Species is valid, even under *Lopez* and *Morrison*).
This Comment first briefly reviews Congress' Commerce Clause power, focusing on the Supreme Court's seminal decisions in *Lopez* and *Morrison*. 18 The Comment then considers how some federal circuits have dealt with Congress' diminished power as applied to environmental legislation. 19 With an overview of Congress' Commerce Clause power, the Comment then explains the Fifth Circuit's *GDF Realty I* opinion. 20 Next, the Comment critically analyzes the Fifth Circuit's use of the economic regulatory scheme mechanism to establish how the Commerce Clause authorizes federal regulation of purely intrastate, noneconomic activity. 21 Finally, the Comment offers a view on the possible impact *GDF Realty I* may have on environmental legislation directed at endangered species. 22

II. RECENT COMMERCE CLAUSE JURISPRUDENCE

A. Introduction

The Commerce Clause of the United States Constitution grants Congress the authority to regulate, *inter alia*, "commerce among the several states," commonly referred to as "interstate commerce." 23 Over time, courts broadly interpreted the term "interstate commerce" to include any activity that might have a "substantial effect" on interstate commerce. 24 This broad interpretation in turn expanded Congress' jurisdiction over activities that were previously beyond its reach under the Commerce Clause. 25 Since 1995, however, the Supreme Court has reigned in Congress' ability to regulate various activities under the Commerce Clause.

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18. See infra notes 35-57 and accompanying text for a discussion of *Lopez* and *Morrison*.

19. See infra notes 58-71 and accompanying text for a discussion of how other circuits have addressed Commerce Clause issues in the context of environmental legislation.

20. See infra notes 79-148 for a detailed discussion of the *GDF Realty I* opinion.

21. See infra notes 149-210 for a critical analysis of the *GDF Realty I* opinion.

22. See infra notes 211-26 for a discussion of *GDF Realty I*'s potential impact on Commerce Clause jurisprudence and environmental regulation.

23. See infra notes 24-57 and accompanying text for a discussion of the Commerce Clause's scope.

24. See Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (allowing for regulation of local wheat growing because it substantially affected interstate commerce); *Lopez*, 514 U.S. at 558-59 (affirming that if activity has substantial effect on interstate commerce, it can be regulated under Commerce Clause).

25. See infra notes 29-34 and accompanying text for a discussion on Congress' Commerce Clause power before *Lopez* and *Morrison*.
through its decisions in *Lopez* and *Morrison*. To convey the significance of these cases and their potential effect on the ESA, the following section first briefly discusses *Wickard v. Filburn*, the seminal Commerce Clause case prior to *Lopez* and *Morrison*; then, this section sets forth the new limitations the Court placed on the Commerce Clause in *Lopez* and *Morrison*; and finally, this section surveys various Commerce Clause challenges to environmental legislation after *Lopez* and *Morrison*.

**B. The Commerce Power: *Wickard*, the Aggregation Principle, *Lopez* and *Morrison***

Until 1995, Congress enjoyed a very expansive interpretation of the Commerce Clause. Before 1995, Congress could regulate many intrastate activities only tenuously linked to interstate commerce. The most expansive interpretation came in *Wickard v. Filburn*. The issue in *Wickard* concerned the limits Congress set on the amount of wheat a local farmer could grow to prevent upsetting the interstate wheat market, even though the farmer used the wheat solely for personal consumption. In simple terms, Congress justified its regulation on the premise that locally growing and consuming one's own wheat, when aggregated with other similar instances, reduced the national demand for wheat, thereby reducing its market price and substantially affecting the interstate wheat market.

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26. *See Lopez*, 514 U.S. at 549-51 (rejecting federal regulation of gun control around schools); *Morrison*, 529 U.S. at 598 (rejecting federal regulation of violence against women).

27. *See Wickard*, 317 U.S. at 128-29 (allowing for regulation of local wheat growing because it substantially affected interstate commerce).

28. *See infra* notes 29-71 and accompanying text for a discussion of historic and recent Commerce Clause jurisprudence and Commerce Clause challenges to environmental legislation.

29. *See Lopez*, 514 U.S. at 553-58 (discussing how commerce power was expanded until recently).

30. *See id.* (reviewing history of Commerce Clause jurisprudence).

31. *Id.* at 556 (explaining how *Wickard* was one of two cases marking pinnacle of Congress' reach through Commerce Clause). In *Wickard*, a wheat farmer challenged legislation that regulated his ability to grow and consume his own wheat. *Wickard*, 317 U.S. at 118-20. The farmer argued that Congress could not regulate his activities because they were entirely local and were not involved in any commerce, let alone interstate commerce. *Id.* at 119. The Court held that the local growing and consuming of wheat did substantially affect interstate commerce. *Id.* at 127-29.

32. *Wickard*, 317 U.S. at 115-16 (explaining purpose of Agricultural Adjustment Act of 1938 (AAA)).

33. *See id.* at 127-29 (holding that Congress' commerce power certainly extends to intrastate activity that, when aggregated, would substantially affect interstate commerce). Essentially, when farmers grow and consume their own wheat,
Wickard solidified the aggregation principle, which allows Congress to combine a single, intrastate activity with other like activities to find the requisite substantial effect on interstate commerce.\textsuperscript{34}

In \textit{United States v. Lopez}, the current Supreme Court set a substantial limit on Congress' commerce power by requiring that any regulated activity be "economic" in nature to have the requisite substantial effect on interstate commerce.\textsuperscript{35} In \textit{Lopez}, the Supreme Court reversed the defendant's conviction for violating the Gun Free School Zones Act of 1990, which prohibited the possession of a gun within school zones.\textsuperscript{36} The Court reasoned the Act was unconstitutional because criminal possession of a gun was not an "economic" or commercial activity that substantially affected interstate commerce.\textsuperscript{37} Because the Court did not consider gun possession to be an economic activity, it refused to follow Wickard and aggregate multiple instances of gun possession to find that, in the aggregate, it substantially affected interstate commerce.\textsuperscript{38} The Court explained that if Congress could aggregate a clearly noneconomic activity, it would result in a carte blanche grant of federal police power to Congress.\textsuperscript{39} Unwilling to do this, the Court declared Con-
gress should only aggregate economic activities, disapproving of any link to interstate commerce that would require the Court to “pile inference upon inference” to find a substantial effect.40

Significantly, *Lopez* carved out an exception under which a facially noneconomic activity could be aggregated to establish that it substantially affects interstate commerce.41 If an activity is crucial to a larger economic regulatory scheme such that the scheme would be undercut but for regulating the particular activity, the activity could be considered “economic” for purposes of aggregation.42 For example, in *Wickard*, the Court explained that regulating growth and consumption of one’s own wheat was crucial to the larger economic scheme of the Agricultural Adjustment Act (AAA), which regulated production of wheat.43 Congress’ inability to regulate such activity would undercut the whole scheme because local consumption of one’s own wheat, when aggregated with all other instances, would reduce market demand for wheat.44 As

only economic activities can have a substantial effect on interstate commerce, and only economic activities can be aggregated if a single occurrence of an activity is not enough to establish a substantial effect. As the Court put it, “under [the Government’s] ‘costs of crime’ reasoning . . . Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.” *Id.* (alterations by author).

40. See *id.* at 563-64, 567 (refusing to pile on inferences to find substantial effect on commerce). Congress argued that guns in schools posed a substantial threat to the educational process, thereby threatening the learning environment, which in turn would handicap the educational process, which in turn would result in a less productive citizenry, which would then in turn affect the Nation’s economy and interstate commerce. *Id.* The majority disagreed with this reasoning, arguing that gun possession is not economic and required too many inferences to reach a substantial effect on interstate commerce. *Id.*

41. See *id.* at 561 (setting forth alternative means an activity can affect commerce aside being economic); see *infra* note 46.

42. See *Lopez*, 514 U.S. at 561 (asserting that section 922(q) could not be regulated on ground that it was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”). The Court indicated that because section 922(q) was not essential to a larger regulation of economic activity (a regulatory scheme), it could not be regulated “under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[,] interstate commerce.” *Id.* This language suggests that if an activity were essential to some larger regulatory scheme involved in regulating some commercial activity, that activity could be aggregated to find a substantial effect on interstate commerce. *Id.* Whereas, if no larger regulatory scheme were present, the activity has no real connection with any kind of commercial activity, thus it will not be economic in nature and it could not, under *Lopez* (and *Morrison*), be aggregated to find a substantial effect on interstate commerce. See *id.* at 560-61.

43. See *Wickard*, 317 U.S. at 115-16, 127-29 (explaining aggregation principle).

44. See *id.* (explaining aggregation principle). Because regulating local growth and consumption was apparently crucial to the proper functioning of the Act, the
such, all instances of local wheat growing could be aggregated to establish a relationship to interstate commerce.\textsuperscript{45} Lopez, therefore, recognized two instances where it is appropriate to aggregate an activity with other like activities to demonstrate that particular activity's effect on interstate commerce: (1) when the activity is economic in nature, or (2) when the activity is essential to a larger economic regulatory scheme such that the scheme would be undercut but for the regulation of the noneconomic activity.\textsuperscript{46}

Five years later the Supreme Court decided \textit{United States v. Morrison}, reaffirming Lopez' new restrictions on the commerce power, particularly the economic requirement.\textsuperscript{47} The Court declared section 13981 of the Violence Against Women Act unconstitutional, holding that violent acts against women were not economic in nature, and therefore, Congress lacked the power to regulate them under the Commerce Clause.\textsuperscript{48}

In addition, Morrison identified four factors relevant to determining whether an activity substantially affects interstate commerce. The first and most important factor is the economic nature of the regulated activity.\textsuperscript{49} The Court essentially stated that only economic activities should be regulated, even if a noneconomic activity, after aggregation, arguably affects interstate commerce.\textsuperscript{50}

\textsuperscript{45} See id. (explaining aggregation principle).
\textsuperscript{46} See Lopez, 514 U.S. at 558-67 (setting forth criteria for determining whether activity substantially affects interstate commerce); Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects?, 46 VILL. L. REV. 1325, 1332 (2001) (asserting that Lopez ratified economic regulatory scheme as means to permit aggregation and establish activity's substantial effect on commerce).
\textsuperscript{47} See Morrison, 529 U.S. at 617 (stating strongly that activities ought to be economic if they are to be regulated). Significantly, in Morrison, the Court indicated that it did not adopt a categorical rule against regulating any noneconomic activity, but it did not elucidate grounds for when a noneconomic activity could be regulated. \textit{Id.} at 613.

In Morrison, the Court reviewed a student's claims under the Violence Against Women Act of 1994, § 13981, against two students who allegedly raped her. \textit{Id.} at 602-03 (citing facts and relevant statute). The Violence Against Women Act created a civil statutory claim for compensatory and punitive damages against any person who commits a violent crime motivated by gender. \textit{Id.} at 605-06.

\textsuperscript{48} See id. at 610, 613, 618 (rejecting Government's argument that aggregate effect of gender motivated violence substantially affected interstate commerce on ground that activity was not economic and it robbed states of traditional power to regulate intrastate violent crime).

\textsuperscript{49} See id. at 610 (stating factors in substantial effects analysis). The Court relied heavily on this first factor in its reasoning, explaining that violence against women was not an economic activity. \textit{Id.} at 613, 615-18.

\textsuperscript{50} See id. at 617 (explaining that noneconomic activities are not proper subjects of regulation). The Court stated "[w]e accordingly reject the argument that
The second factor concerns jurisdictional limits on the regulated activity. The third factor considers any congressional findings that support the link between the regulated activity and interstate commerce. Finally, the fourth factor considers the Lopez "attenuation" principle; that is, whether the link between the regulated activity and commerce is too attenuated to substantially affect interstate commerce.

Morrison also buttressed the attenuation principle by declaring that when analyzing whether Congress is regulating an activity that falls within the Commerce Clause, congressional findings are only suggestive, not dispositive. By doing so, the Court reserved the final determination of whether an activity affects commerce to itself, rather than deferring to Congress' findings. In his dissenting opinion, Justice Souter argued the majority's refusal to show deference to Congress' ample findings amounted to imposing a new heightened standard of review on legislation based on the Commerce Clause. Whether Justice Souter was right or not, Morrison suggests the Court will not easily defer to Congress if Congress at-

Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." Id. at 617-18.

51. See id. at 611-12. In other words, the second factor addresses whether the statute regulating the activity poses any jurisdictional limits on the regulated activity. The Court held that the Violence Against Women Act had no saving jurisdictional limits keeping it from exceeding Commerce Clause limitations. Id. at 613.

52. See Morrison, 529 U.S. at 612 (explaining that congressional findings would be reviewed to help determine link between regulated activity and interstate commerce).

53. See id. (discussing attenuation principle of Lopez, which states inferences may not be piled upon inferences to establish link between regulated activity and interstate commerce).

54. See id. at 614 (declaring that Congress' findings alone are not sufficient to sustain regulations under Commerce Clause); id. at 615-16 (refusing to adopt Congress' findings that gender motivated violence has substantial effect because relationship to interstate commerce was too attenuated and will result in federal police power).

55. See Schroeder, supra note 8, at 417 (suggesting that Court would review Congressional findings with greater scrutiny after Morrison, where traditionally deferential rational basis review applied).

56. See Morrison, 529 U.S. at 636-38 (Souter, J., dissenting) (claiming that majority's statements that Congressional findings are not themselves sufficient to establish substantial effect, in addition to their argument that simply because Congress may conclude that particular activity affects commerce does not make it so, imposes improper heightened standard of review). In pointing to the extensive evidence Congress amassed, Justice Souter declared the Court's formalistic refusal to recognize the effect that "noneconomic" gender motivated violence has on interstate commerce amounted to the judiciary no longer employing rational basis review. Id. at 630-36 (Souter, J., dissenting).
tempts to base a regulation of noneconomic activity on its Commerce Clause authority.57

C. The Deflated Commerce Clause and Environmental Legislation

Since Lopez, the federal circuit courts have upheld several environmental regulations that roused Commerce Clause questions, including some arising under the ESA.58 For example, National Association of Home Builders v. Babbit (NAHB)59 involved a constitutional challenge to section 9(a)(1) of the ESA, which forbids “takes” of the Delhi Sands Flower-Loving Fly (the Fly). The United States Court of Appeals for the District of Columbia upheld the take provision as applied to the Fly on two grounds: (1) Fly takes affected the channels of interstate commerce; and (2) Fly takes substantially affected interstate commerce because extinction of the species would affect biodiversity, which in turn would affect commerce.60 The NAHB dissent asserted takes of the Fly were analo-

57. See id. at 630-35 (Souter, J., dissenting) (citing all evidence supporting Congress’ view that gender violence substantially affected interstate commerce and concluding a new standard of review had been adopted). Congress found, after four years of research, that gender motivated violence caused 5 to 10 billion dollars in losses to various industries in 1993 alone. Id. at 635 (Souter, J., dissenting). The dissent cites over two pages of documented evidence supporting the substantial effect that gender motivated violence has on the national economy. Id. at 630-633 (Souter, J., dissenting). It seems therefore, that unless an activity is economic, the Court will require a very convincing showing of an effect on interstate commerce. Id. (Souter, J., dissenting). Importantly, however, Morrison did not reject the tenet that a noneconomic activity essential to a larger economic regulatory scheme could affect interstate commerce as discussed in Lopez. See id. at 611-13 (failing to even mention Lopez’ brief treatment of the economic regulatory scheme mechanisms for establishing substantial effect on interstate commerce).

58. See United States v. Ho, 311 F.3d 589, 601-02 (5th Cir. 2002) (holding that regulation of intrastate asbestos removal under Clean Air Act (CAA) was permissible under Commerce Clause because intrastate asbestos removal was commercial activity that had substantial effect on interstate commerce when aggregated); Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000) (holding that regulating takes of red wolves was permitted under Commerce Clause because red wolf takes had substantial aggregate effect on interstate commerce); NAHB, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (holding that regulating takes of endangered species of fly found only in California was permitted under commerce power because takes sufficiently affected interstate commerce by preventing destruction of biodiversity and preventing destructive interstate competition).

59. See 130 F.3d at 1052 (holding that regulating takes of endangered fly found only in California was permitted under commerce power because takes sufficiently affected interstate commerce by preventing destruction of biodiversity and preventing destructive interstate competition; holding that fly was involved in interstate competition and the channels of commerce) (citing ESA, 16 U.S.C. §§ 1538(a)(1), 1532(19) (2000)).

60. See id. at 1046-49 (explaining how takes of Fly affected channels of commerce, thereby coming under Congress’ authority to regulate). For the purposes
gous to *Lopez* possession of guns in school zones, arguing neither were economic, nor were they a part of an economic regulatory scheme. The dissent also argued that "biodiversity" was too speculative and established too attenuated a link between noneconomic takes of the Fly and interstate commerce.

In addition to *NAHB*, the circuit courts have upheld other environmental regulations pertaining to intrastate activity in *Gibbs v. Babbit* and *United States v. Ho*. In *Gibbs*, the Fourth Circuit justified the ESA's prohibition of red wolf takes on private land because congressional findings established that red wolf takes amounted to economic activity, or were economic in nature. Because red wolf takes were economic, *Gibbs* easily fell within Congress' commerce power. In *Ho*, the Fifth Circuit upheld section 7412(h) of the Clean Air Act (CAA), which regulates, *inter alia*, procedures for local asbestos removal. The court reasoned asbestos removal was a commercial activity because many for-profit businesses were created

of this Comment, the court's holding regarding the channels of commerce is not of great importance, nor is any other case that deals mostly with the channels or instrumentalities of commerce.

61. *Id.* at 1064 (Sentelle, J., dissenting) (highlighting similarities between gun possession and Fly takes in terms of attenuated relation to interstate commerce).

62. *Id.* (arguing against biodiversity as a link to commerce). Judge Sentelle argued:

... because of some undetermined and indeed undeterminable possibility that the fly might produce something at some undefined and undetermined future time which might have some undefined and undeterminable medical value... Congress can today regulate anything which might advance the pace at which the endangered species becomes extinct.

*Id.* (Sentelle, J., dissenting).

63. 214 F.3d 483, 492 (4th Cir. 2000) (holding that regulating takes of red wolves was authorized by Commerce Clause because red wolves takes had substantial aggregate effect on interstate commerce).

64. 311 F.3d 589, 601-02 (5th Cir. 2002) (holding that regulation of intrastate asbestos removal was authorized by Commerce Clause because intrastate asbestos removal was commercial activity that had substantial effect on interstate commerce when aggregated).

65. *See Gibbs*, 214 F.3d at 488 (citations omitted) (recognizing that red wolves could increase tourism in North Carolina by 39 to 183 million dollars per year and recognizing also that red wolves are part of several interstate markets, e.g., pelt sales and scientific research).

66. *See id.* at 492 (explaining that red wolf takes constituted economic activity because they created large interstate tourism industry); *see also Lopez*, 514 U.S. at 560 (stating "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). Interestingly, by denying *certiorari*, the Supreme Court seems willing to give courts some leeway in determining what activities are economic. *See Gibbs v. Norton*, 531 U.S. 1145 (2001) (denying *certiorari*).

67. *See Ho*, 311 F.3d at 603-04 (upholding section 7412(h)).
for that purpose.\textsuperscript{68} The court also stated that the CAA's regulation constituted a larger economic regulatory scheme that would be undercut if section 7412(h)'s asbestos removal procedures did not regulate defendant Ho's asbestos removal business.\textsuperscript{69}

In considering these cases, it appears the circuit courts that have addressed the Commerce Clause issue are still open to upholding environmental legislation based on the Commerce Clause, notwithstanding \textit{Lopez} and \textit{Morrison}.\textsuperscript{70} Moreover, it appears they are willing to use \textit{Lopez}' second method of establishing that an activity has a substantial effect on interstate commerce if it is essential to a larger economic regulatory scheme.\textsuperscript{71}

D. Dissent Within the Fifth Circuit: The Rejected "Interactive Effect" Requirement

According to some of the Supreme Court's language in \textit{Lopez}, several circuit courts and numerous legal scholars, if an activity is not economic, the activity can still be aggregated to find a substantial effect on interstate commerce if it is an essential part of a larger, economic regulatory scheme, such that the scheme would be undercut if the activity were not regulated.\textsuperscript{72} Yet, some courts and scholars adamantly argue that limitations on this economic regulatory scheme mechanism are necessary to stay true to \textit{Lopez} and \textit{Morrison}. Two Fifth Circuit dissents, appearing in \textit{United States v.}

\textsuperscript{68} See \textit{id.} (explaining how asbestos removal was economic activity).

\textsuperscript{69} See \textit{id.} at 602 (arguing that CAA was economic regulatory scheme).

\textsuperscript{70} See \textit{supra} notes 58-69 and accompanying text for a discussion of cases upholding environmental laws against Commerce Clause challenges.

\textsuperscript{71} See \textit{supra} notes 58-70 for an explanation of how various circuits have applied some version of the economic regulatory scheme.

\textsuperscript{72} See, e.g., Vermeule, \textit{supra} note 46, at 1332-33 (arguing that \textit{Lopez} ratified economic regulatory scheme mechanism). Professor Vermeule argued:

The best reading of the cases [\textit{Lopez} and \textit{Morrison}] suggests that the comprehensive-scheme principle, unlike the aggregation principle, may allow Congress to regulate intrastate activities that are not themselves commercial or economic, so long as the regulation is integral to the success of a larger valid scheme of (interstate or commercial) regulation. The key passage from \textit{Lopez}, for example, suggests that the scheme taken as a whole must regulate economic activity, while the ancillary regulation need not itself do so, at least if the ancillary regulation "arises out of" or is "connected to" commercial activity.

\textit{Id.} (alterations added).
Hickman73 and United States v. McFarland74 respectively, proposed such a limitation. The dissenting judges argued that all aggregated activities must similarly affect interstate commerce and similarly affect a relevant regulatory scheme.75 The judges called this the “interactive effect” requirement.76 If applied, this requirement would place a significant burden on aggregating noneconomic activities because a particular activity and the activities with which it is to be aggregated would need to have a similar effect on interstate commerce.77 Although the requirement raises important issues, discussed infra, the GDF Realty I court merely mentioned it without applying or analyzing it.78

75. See Hickman, 179 F.3d at 233 (Higginbotham, J., dissenting) (arguing for interactive effect requirement); see also McFarland, 311 F.3d at 401 (Garwood, J., dissenting) (arguing for additional requirements for aggregation of noneconomic, intrastate activities). The relevant issue in Hickman was whether Congress exceeded its Commerce Clause authority in passing the Hobbs Act. Hickman, 179 F.3d at 231. The Hobbs Act “criminalizes efforts to obstruct, delay or affect commerce or the movement of any article in commerce by robbery or extortion.” Id. Defendants convicted under the Act challenged its constitutionality under the Commerce Clause, claiming that individual acts of robbery were not economic and did not substantially affect commerce. Id. The court found a substantial effect by aggregating all robberies under the Hobbs Act, where the economic effect would be substantial. Id.

In McFarland, the court again considered the Hobbs Act and an evenly divided en banc court upheld the legitimacy of aggregating robberies to find a substantial effect on commerce. See McFarland, 311 F.3d at 381-82. The dissent, again adopted by half the en banc court, agreed with the dissent in Hickman and argued there must be some limits on aggregation if an activity is not economic. Id. The dissent essentially argued that if activities are to be aggregated, they must be similar in nature, and must affect both the scheme regulating them and interstate commerce generally. Id. at 401. The dissent reasoned that without requiring some similarity between activities to be aggregated, a litigant could aggregate a clearly noneconomic activity with a totally unrelated economic activity and then argue the first activity substantially affects interstate commerce. Id.

76. See Hickman, 179 F.3d at 233 (Higginbotham, J., dissenting).
77. See id. (explaining that interactive effect requirement should apply to limit aggregation).
78. See GDF Realty I, 326 F.3d at 632 (citing prior dissenting Fifth Circuit opinions); see infra notes 184-90 and accompanying text for a discussion on the implications of the interactive effect requirement.
III. WHAT HAPPENED IN GDF REALTY I: FACTUAL BACKGROUND, THE PARTIES' ARGUMENTS AND THE FIFTH CIRCUIT’S ANALYSIS

In GDF Realty I, the Fifth Circuit affirmed the district court’s holding that the ESA’s take provision as applied to Cave Species was constitutional, but on different grounds. This section first sets forth the factual background of the case, then briefly presents the litigants’ arguments, and finally, it discusses the Fifth Circuit’s analysis. In explaining the Fifth Circuit’s analysis, this Comment addresses how the court established a deferential standard of review; how the court set forth Congress’ power under the Commerce Clause; how the court reviewed the ESA and its legislative history; and finally, how the court assessed the litigants’ arguments. In assessing the arguments, the court never directly addressed GDF Realty’s argument, yet the entire opinion seems geared toward refuting GDF Realty’s argument by establishing how the ESA’s take provision as applied to Cave Species is constitutional.

A. Factual Background

In 1983, the Purcell brothers and GDF Realty Investments, Ltd. (GDF) purchased property in Travis County, Texas. GDF subsequently began commercially developing the property, installing water and wastewater gravity lines, force mains and other utilities. In 1988, during development, the United States Fish and Wildlife Service (FWS) promulgated a rule listing six subterranean species, known as the “Cave Species,” as endangered under section 4 of the ESA. The Cave Species are known to exist only in underground portions of two Texas counties, Travis and Williams, the location of

79. See GDF Realty I, 326 F.3d at 637, 640 (rejecting district court’s reasoning, but affirming holding).
80. See infra notes 81-148 and accompanying text for a discussion of the GDF Realty I opinion.
81. See GDF Realty I, 326 F.3d at 630-40 (reviewing Commerce Clause jurisprudence and assessing litigants’ arguments).
82. See id. (addressing FWS’ arguments, but never directly addressing GDF’s argument). This Comment does not address the concurrence, which argued that aggregating the Cave Species was unnecessary to establish a substantial effect on commerce. Id. 326 F.3d at 641-44 (explaining ESA take provision was valid).
83. See id. 326 F.3d at 624 (stating facts of case).
84. See id. (stating facts of case).
85. See id. at 625 (citing ESA, 16 U.S.C. § 1533(a)(1) (2000); codified at 50 C.F.R. pt. 17.11 (2003)) (explaining regulation). The six species are the Bee Creek Harvestman, the Bone Creek Harvestman, the Tooth Cave Harvestman, the Tooth Cave Pseudoscorpion, the Tooth Cave Spider, the Tooth Cave Ground Beetle and the Kretschmarr Cave Mole Beetle. 50 C.F.R. pt. 17.11. The species are subterranean arachnids, some having eyes, and ranging from 1.4 to 8 millimeters in length. GDF Realty I, 326 F.3d at 625.
GDF's property. The Cave Species are not involved in any commercial market.

In 1994, the FWS notified GDF that the proposed development would probably constitute a take of the Cave Species. The ESA defines "take" as to "harass, harm, pursue, hunt, shoot, wound . . . " members of any particular endangered species. GDF subsequently attempted to circumvent the Cave Species obstacle by applying for several ESA section 10(a) incidental take permits to allow for the planned development, which FWS denied.

In 1999, GDF filed suit in federal court, challenging the constitutionality of the ESA take provisions as applied to the Cave Species, alleging the take provision contravened the limits placed on the Commerce Clause by Lopez and Morrison. For this action, the litigants agreed there were no factual disputes and each filed cross-motions for summary judgment. In 2001, the United States District Court for the Western District of Texas granted summary judgment to defendant FWS, upholding the ESA's take provision. GDF appealed to the Fifth Circuit, which reviewed only whether takes of the Cave Species adequately affected interstate commerce to fall under Congress' Commerce Clause power. The Fifth Circuit upheld the district court's opinion, but on a different line of reasoning.

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86. See GDF Realty I, 326 F.3d at 625 (reviewing facts about Cave Species and where they exist).
87. See id. (explaining non-commercial nature of Cave Species). In some cases, the scientists visited Texas from other states and some members of the Cave Species were transported out of state for research. Id. The Cave Species were transported to museums in New York, California, Pennsylvania, Illinois and Kentucky. Id. Fifteen scientists published at least fourteen scientific articles concerning the Cave Species in several different publications. Id.
88. See id. (reviewing facts and claiming development would also take two migratory bird species).
90. See id. (citing ESA, 16 U.S.C. § 1539(a) (2000)) (describing FWS' denial of incidental take permits for GDF). It should be noted that the GDF Realty I court admonished the FWS for dealing somewhat unfairly with GDF, who acted in good faith both in taking extensive measures to avoid Cave Species takes and in obtaining incidental take permits. Id.
91. See id. (reviewing facts and procedural history); see supra notes 35-57 and accompanying text for a discussion of Lopez and Morrison.
92. See GDF Realty, 326 F.3d at 627 (reviewing procedural history).
94. See id. at 622 (reviewing lower court's opinion).
95. See id. (reversing district court's opinion but retaining verdict).
B. GDF's Argument

GDF argued Congress lacked the constitutional authority to regulate takes of the Cave Species because the Cave Species were entirely unrelated to interstate commerce, and therefore did not fall within the Commerce Clause’s scope.96 Although GDF conceded that aggregating all takes of endangered species would substantially affect interstate commerce, it argued under *Morrison* that aggregating Cave Species was improper because Cave Species takes were not economic and they were not an essential part of an economic regulatory scheme (i.e., the ESA).97 Finally, GDF argued that when determining whether a regulated activity has a substantial effect on commerce, one must look to the regulated activity itself, not the motivation for engaging in the regulated activity.98

C. FWS' Argument

First, FWS argued that Cave Species takes alone substantially affected interstate commerce.99 FWS alternatively argued that, when aggregated with other takes of endangered species, Cave Species takes would have the requisite substantial effect.100 Finally, FWS argued the court should look to the GDF's motivation for engaging in activity that constituted Cave Species takes.101

96. See id. at 632 (stating GDF's argument).
97. See *GDF Realty I*, 326 F.3d at 632 (setting forth GDF's argument); see *Morrison*, 529 U.S. at 610, 613, 618 (requiring that activity must be economic in nature to be aggregated).
98. See *GDF Realty I*, 326 F.3d at 633 (explaining that GDF contends only regulated activity itself is relevant in Commerce Clause analysis).
99. See id. (discussing FWS' arguments).
100. See id. (discussing FWS' arguments).
101. See id. (discussing FWS' arguments). The District Court for the Western District of Texas agreed with FWS that, when determining whether an activity substantially affects interstate commerce, GDF's motivation for engaging in activity resulting in Cave Species takes is relevant. *Id.* The district court found that GDF's plans to build a shopping center, a residential subdivision and other things easily qualified as economic and easily affected interstate commerce. *Id.* In doing so, the court considered the motivation for engaging in the activity resulting in incidental takes instead of considering the commerciality of the actual regulated activity — Cave Species takes. *Id.* The Fifth Circuit rejected this approach to the substantial effects analysis, declaring that only the actual regulated activity is relevant, not the economic motivation for engaging in the regulated activity. *Id.*

At least one scholar disagrees with the Fifth Circuit's reasoning, asserting that the activity being regulated is that which actually results in the take, where if land development results in a take, then it is the land development that ESA regulates. See Mathews, *supra* note 6, at 951-54 (arguing that *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), had more rational approach in considering activity that resulted in take, rather than endangered species actually being taken, in ascertaining whether endangered species takes were economic).
FWS argued Cave Species takes alone, pre-aggregation, had a direct relationship with and substantial effect on interstate commerce.\(^{102}\) FWS asserted Cave Species takes affected commerce in two ways.\(^{103}\) First, there was a substantial scientific interest in them.\(^{104}\) According to FWS, scientific interest in Cave Species generated sufficient interstate activity through travel, study and scientific literature to affect interstate commerce.\(^{105}\)

Second, Cave Species could significantly benefit commerce in the future by improving scientific understanding, leading to medical advances and ensuring biodiversity.\(^{106}\) FWS maintained that possible future commercial benefits derived from the Cave Species, like developments in medicine, would be significant enough to substantially affect interstate commerce.\(^{107}\) FWS referred primarily to existing research indicating that certain endangered species were used to treat diseases to support its argument.\(^{108}\) Alternatively, FWS argued Cave Species takes, when aggregated with all endangered species takes, would have a sufficient impact on interstate commerce to satisfy the substantial effect requirement.\(^{109}\) FWS offered no argument supporting this contention, probably because GDF stipulated to it.\(^{110}\)

\(^{102}\) See GDF Realty I, 326 F.3d at 637 (reviewing FWS' argument).

\(^{103}\) See id. (stating that activity can affect commerce in two ways).

\(^{104}\) See id. (stating that activity can affect commerce directly, without aggregation).

\(^{105}\) See id. (reviewing FWS' argument). The court listed the ways scientific interest in the Cave Species could affect interstate commerce: "[s]ome scientists have studied the Cave Species. In doing so, some have traveled to Texas. In coordination with this research, some Cave Species have been transported to and from museums in five States. Finally, articles about the Cave Species have been published in scientific journals." Id.

\(^{106}\) See id. (reviewing FWS' argument that species could have future benefits affecting commerce).

\(^{107}\) See GDF Realty I, 326 F.3d at 687 (reviewing FWS' argument).

\(^{108}\) See id. at 637-38 (reviewing FWS' argument). In support of this argument, FWS asserted that:

*Although little is yet understood about these particular species, scientists have long observed that cave species . . . often exhibit incredibly low metabolic rates and possess extremely long life-spans . . . [s]uch characteristics suggest that further study of these species could lead to important developments in our understanding of longevity . . . .

Id. at 637-38 (emphasis added by Fifth Circuit; internal citations and quotations omitted by Fifth Circuit).

\(^{109}\) Id. at 638 (discussing FWS' alternative argument).

\(^{110}\) See id. at 638-40 (neglecting to analyze whether takes of all endangered species would substantially affect interstate commerce).
D. Standard of Review

Before analyzing the case, the Fifth Circuit indicated it would apply a rational basis standard of review to the issue of whether the ESA’s take provision could constitutionally apply to the Cave Species.\textsuperscript{111} By adding its own emphasis to \textit{Morrison}'s standard of review language, the court stressed that the judiciary should show deference to any congressional findings that Congress offers in support of its legislation, which reflects the traditional deference courts show to congressional action.\textsuperscript{112} The court’s approach suggests a departure from the incidental heightened standard the Supreme Court applied in \textit{Morrison}.\textsuperscript{113} From this deferential platform, the court analyzed Congress’ commerce power, and subsequently, whether regulating Cave Species takes fell within that power.\textsuperscript{114}

E. The Fifth Circuit’s Discussion of the Commerce Clause Analysis

The Fifth Circuit closely followed \textit{Lopez} and \textit{Morrison} when reviewing Congress’ commerce power.\textsuperscript{115} In doing so, the court first emphasized \textit{Morrison}'s warning that almost any close Commerce Clause analysis would engender legal uncertainty, most likely to demonstrate that determining what activities affect commerce is often a gray area.\textsuperscript{116} The court then repeated the two basic ways

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.} at 627 (discussing applicable standard of review).
  \item \textsuperscript{112} \textit{GDF Realty I}, 326 F.3d at 627. The court quoted the following language from \textit{Morrison}: \textit{"Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."} \textit{Id.} (quoting \textit{Morrison}, 529 U.S. at 598) (emphasis added by Fifth Circuit). As discussed above, there is some inconsistency between a rational basis review and what the \textit{Morrison} Court actually used. See \textit{supra} notes 54-57 and accompanying text for discussion on \textit{Morrison}'s standard of review.
  \item \textsuperscript{113} See \textit{GDF Realty I}, 326 F.3d at 627 (adopting rational basis standard, notwithstanding \textit{Morrison}'s heightened review of congressional findings); see \textit{supra} notes 54-57 and accompanying text (discussing standard of review).
  \item \textsuperscript{114} See \textit{GDF Realty I}, 326 F.3d at 627 (employing rational basis review). The court employed rational basis review by deferring to Congress’ findings on biodiversity and upholding the traditional presumption that Congress’ laws are constitutional. \textit{Id.} at 638-40.
  \item \textsuperscript{115} See \textit{id.} at 628-31 (setting forth \textit{Lopez} and \textit{Morrison} Commerce Clause principles).
  \item \textsuperscript{116} \textit{Id.} (quoting \textit{Morrison}, 529 U.S. at 610). In \textit{Morrison}, Justice Rehnquist stated that "[a]dmittedly, a determination whether an intrastate activity is commercial or non-commercial may in some cases result in legal uncertainty." \textit{Morrison}, 529 U.S. at 610. The Fifth Circuit seems to use this language to strengthen its argument that Cave Species, although not economic, can still be regulated under the Commerce Clause. See \textit{GDF Realty I}, 326 F.3d at 628-30 (implying that legal uncertainty of activity does not preclude regulation).
\end{itemize}
that an activity can affect commerce: it either directly affects commerce, or it can be aggregated with other like activities to affect commerce.\footnote{See \textit{GDF Realty I}, 326 F.3d at 629 (introducing aggregation principle).}

In analyzing what activities may be aggregated, the Fifth Circuit applied the economic regulatory scheme mechanism and the aggregation principle to reconcile \textit{Lopez} and \textit{Morrison}'s economic requirement with the intuitively noneconomic activity of Cave Species takes.\footnote{\textit{Id.} at 638-40 (applying analyses to establish that Cave Species takes substantially affect interstate commerce).} First, the court recognized \textit{Morrison}'s requirement that only economic activities could be aggregated.\footnote{\textit{Id.} at 629 (recognizing economic requirement and recognizing reason for economic requirement: to prevent carte blanche congressional power to regulate). In recognizing the requirement, the court quoted \textit{Morrison}'s statement that there was no categorical rule prohibiting aggregation and regulation of noneconomic activities. \textit{Id.} at 630 (quoting \textit{Morrison}, 529 U.S. at 613).} Then, the court declared an activity could be "economic" if it bore an essential relation to an economic regulatory scheme such that the scheme would be undercut if the activity were not regulated.\footnote{Id. at 630 (asserting that economic regulatory scheme mechanism established activity's "economic" nature).} According to the court, if an activity bears an essential relation to a regulatory scheme directed at economic activity, it can be aggregated to find a substantial effect on interstate commerce, despite that the activity is facially noneconomic.\footnote{Id. at 630-31 (discussing economic requirement and economic regulatory scheme mechanism). In sum, the court reviewed the method for showing how noneconomic activities can affect interstate commerce under the Commerce Clause in three different steps: (1) establishing that the activity has an essential relation to an economic regulatory scheme; (2) aggregating the activity with similar activities; and (3) establishing that, in the aggregate, the original noneconomic regulated activity substantially affects interstate commerce. \textit{Id.}.}

\section*{F. The Fifth Circuit Relied on the ESA's Legislative History to Bolster its Holding}

Before commencing the substantive analysis, the Fifth Circuit briefly explained the ESA and the purpose for which Congress enacted it.\footnote{See \textit{GDF Realty I}, 326 F.3d at 626 (discussing ESA). Section 9(a)(1) of the ESA proscribes a "take" of a member of any species listed as endangered. \textit{Id.} (citing ESA, 16 U.S.C. § 1538(a)(1)(B)). Congress enacted the ESA in 1973 to "halt and reverse the trend toward species extinction, whatever the cost." \textit{See id.} at 632 (quoting \textit{Tennessee Valley Auth. v. Hill}, 437 U.S. 153, 176 (1978)) (emphasis added by Fifth Circuit) (discussing purpose for which ESA was enacted). The Fifth Circuit recognized that the ESA was a response to threats to fish, wildlife and plants arising primarily from "pollution, destruction of habitat and the \textit{pressures of trade}."

See \textit{Tennessee Valley Auth. v. Hill}, 437 U.S. 153, 176 (1978)) (emphasis added by Fifth Circuit) (discussing purpose for which ESA was enacted). The Fifth Circuit recognized that the ESA was a response to threats to fish, wildlife and plants arising primarily from "pollution, destruction of habitat and the \textit{pressures of trade}."
cause, *inter alia*, "it is in the best interest of mankind to minimize the losses of genetic variations." The court recognized the ESA's take provision was the means designed to achieve Congress' goal of preventing the extinction of species. The court then indicated its task was to determine, taking into account Congress' findings, whether the Commerce Clause authorized the ESA's take provision as applied to the Cave Species. That is, whether Cave Species takes substantially affected interstate commerce. In executing this task, the court addressed both GDF's and FWS' arguments as to whether Cave Species takes would substantially affect interstate commerce.

G. Fifth Circuit Rejects FWS' First Argument, But Permits Aggregation

First, the Fifth Circuit disagreed that Cave Species takes alone substantially affected interstate commerce, noting the minimal contacts the species had with the outside world and the attenuated, speculative nature of any possible future commercial value the Cave

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123. *Id.* at 632 (quoting H.R. REP. No. 93-412, at 5) (emphasizing by Fifth Circuit) (discussing Congressional intent).

124. *Id.* at 625, 632-33 (discussing how take provision protects endangered species pursuant to Congress' goal). The take provision is applied to any species that the FWS lists as endangered and in need of special protection. *Id.* Pursuant to the ESA's policy, the Cave Species were listed as endangered for three reasons: first, they were threatened with "potential loss of habitat owing to ongoing development of activities;" second, no state or federal laws were in place to protect them or their habitat; and finally, "[the Cave Species] require the maximum possible protection provided by [the ESA] because their extremely small, vulnerable, and limited habitats are within an area that can be expected to experience continued pressures from economic and population growth." *Id.* at 625 (quoting Endangered and Threatened Wildlife and Plants, 53 Fed. Reg. 36,029, 36,031-32 (Sept. 16, 1988) (to be codified at 50 C.F.R. pt. 17) (explaining why Cave Species were placed on endangered species list)).

125. *Id.* (setting forth relevant issues).

126. *Id.* (stating that court's purpose was to determine whether Congress constitutionally regulated Cave Species takes).

127. *See GDF Realty I,* 326 F.3d at 633-40 (reviewing and evaluating arguments).
Species may have. Nevertheless, the court held that aggregating Cave Species takes with all endangered species takes was proper in this instance and, in the aggregate, endangered species takes would substantially affect interstate commerce.

The court allowed aggregation, declaring Cave Species takes bear an "essential relation" to the ESA, an economic regulatory scheme, because the ESA's central purpose is to protect endangered species and the ecosystems upon which they depend. The court explained that permitting Cave Species takes would fail to protect some endangered species and would negatively impact our ecosystems, thereby undercutting the ESA's purpose to protect endangered species. In addition, the court explained that Congress intended that the ESA protect biodiversity because reductions in biodiversity would substantially affect interstate commerce. As such, if Congress permitted Cave Species takes, biodiversity would be reduced, thereby further undercutting the ESA. Finally, the court adopted FWS' argument that "[a]llowing a particular take to escape regulation because, viewed alone, it does not substantially affect interstate commerce, would undercut the ESA's scheme and lead to piecemeal extinctions."

In addition to establishing that the Cave Species must be essential to a regulatory scheme for aggregation, the court placed great emphasis on the notion that the regulatory scheme itself must be directed at economic activity. According to the court, the ESA is

128. Id. at 637-38 (denying that Cave Species takes alone substantially affect interstate commerce). Specifically, the court reasoned that the possible future value of the Cave Species as a means to cure disease, or have some other commercial effect, was far too attenuated and speculative to pass the Lopez and Morrison economic requirement. See id.

129. See id. at 638-41 (holding that aggregation was proper to find substantial effect on interstate commerce). The court stated that "[t]here is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be." Id. at 638.

130. Id. at 640 (citing H.R. Rep. No. 93-412 (1973)) (explaining how failure to regulate endangered species takes would undercut purpose of ESA).

131. Id. (explaining ESA's purpose, setting forth FWS' argument and then concluding that Cave Species takes are essential to ESA).

132. See GDF Realty I, 326 F.3d at 640 (explaining ESA's purpose and why Cave Species are essential to it).

133. Id. (explaining that Cave Species are essential to ESA).

134. See id. at 640 (quoting FWS' argument). FWS further argued that takes of any species threatened the "interdependent web" of all species in derogation of Congress' finding that the interrelationships of plants and animals between themselves and their environment is critical. See id.

135. See id. 638-40 (asserting that larger regulatory scheme must be directed at economic activity).
directed at economic activity because endangered species are of "esthetic, ecological, educational, historical, recreational, and scientific value . . . ." The court also relied on the ESA's legislative history, which recognized the "incalculable" value of the genetic heritage that might be lost absent regulation. Based on these congressional findings, the court concluded the ESA was an economic regulatory scheme for the purpose of aggregating Cave Species takes with takes of all endangered species. The Fifth Circuit affirmed the district court's holding, asserting that the ESA section 9(a)(1) prohibition on endangered species takes was constitutional as applied to the Cave Species. Judge Dennis concurred, but argued aggregation was unnecessary and that Congress could regulate based on the Cave Species' relation to the ESA.

136. Id. at 639 (quoting ESA, 16 U.S.C. § 1531(a)(3)) (establishing that ESA is directed at activity economic in nature).

137. See GDF Realty I, 326 F.3d at 639 (quoting H.R. REP. No. 93-412, at 4). The court also quoted a Senate Report as a precursor to ESA, which also emphasized the importance of biodiversity with regard to interstate commerce:

[B]usinessmen 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 . . . is also irretrievably lost.

Id. (quoting S. REP. No. 91-526, at 1415 (1969) (emphasis added by Fifth Circuit; alteration by Fifth Circuit)).

138. See id. at 639-41 (finding that ESA is economic in nature, as required if noneconomic intrastate activities are to be permissibly aggregated).

139. See id. (setting forth court's holding).

140. See id. at 643-44 (Dennis, J., concurring) (explaining how intrastate activity can validly be regulated despite de minimis effect on commerce). Judge Dennis stated:

The prohibition of Cave Species takes is integral to achieving Congress's [sic] rational purpose in enacting the ESA. In particular, the ESA regulates interstate commerce by attempting to prevent the extinction of both commercial and non-commercial species. Regulations under the ESA therefore significantly affect the nation's economy and welfare. Non-commercial species are in many instances vital to the survival of ecosystems upon which commercial species are dependent . . . . The ESA is a necessary and proper means not only to conserve the nations valuable biological resources, but also to promote interstate commerce involving those resources.

Id.

Judge Dennis believes, therefore, that an essential relation to an economic regulatory scheme such that the scheme would be undercut without an activity's regulation is a sufficient condition to render regulating noneconomic intrastate activity constitutional. See id.
H. Denial of En Banc Rehearing: Dissent

On February 27, 2004, the Fifth Circuit denied GDF’s petition for a rehearing en banc. Judge Jones, joined by four other judges, filed a dissenting opinion to the denial. The dissent contested the following three points, asserting that under *Lopez* and *Morrison*, Cave Species clearly did not fall within the ambit of the Commerce Cause. First, the dissent rejected the notion that the ESA was directed at economic activity. The dissent criticized the court’s reliance on future effects endangered species and biodiversity might have on commerce, pointing out that the court had previously rejected this reason as speculative when it concluded Cave Species alone were not economic. Second, the dissent argued that the Cave Species were not essential to the ESA because the ESA would continue to function if Cave Species takes were permitted. Finally, the dissent emphatically argued that the Commerce Clause only authorizes Congress to regulate commerce, not ecosystems, sexual inequity or violent crime. The dissent argued that if Congress could regulate intrastate Cave Species takes by aggregating them through the economic regulatory scheme mechanism, Congress could regulate anything, resulting in a carte blanche federal police power.

IV. DOES THE FIFTH CIRCUIT’S USE OF THE ECONOMIC REGULATORY SCHEME MECHANISM WORK?

Although the Fifth Circuit’s reasoning in *GDF Realty I* may be controversial, the court nevertheless properly concluded that the ESA’s take provision is constitutional under *Lopez* and *Morrison*.  

141. See GDF Realty Invs., Ltd. v. Norton, 362 F.3d 286, 287-93 (5th Cir. 2004) [hereinafter *GDF Realty II*] (en banc) (per curiam) (denying petition for rehearing en banc).

142. See id. at 287-88 (Jones, J., dissenting) (disagreeing with majority’s denial for rehearing and dissenting to majority’s opinion in *GDF Realty I*, 326 F.3d at 630-40).

143. See id. at 291 (rejecting that ESA was an “economic” statute and relying on Supreme Court’s *Lopez* and *Morrison* opinions).

144. See id. (rejecting that ESA was an “economic” statute).

145. See id. (alleging inconsistency in court’s reasoning).

146. See *GDF Realty II*, 362 F.3d at 291-93 (rejecting that Cave Species takes were essential to ESA).

147. See id. (arguing that Commerce Clause did not permit regulating Cave Species takes).

148. See id. (arguing that allowing ESA to regulate Cave Species results in federal police power).

149. See infra notes 150-210 and accompanying text for a discussion on why the Fifth Circuit’s holding is proper. Again, it is worth noting that GDF did not
According to Lopez' interpretation of the Commerce Clause, a noneconomic activity, like Cave Species takes, may be aggregated with other similar activities to produce a substantial effect on interstate commerce if it is an essential part of an economic regulatory scheme. Because GDF conceded that all endangered species takes in the aggregate would have a substantial effect on commerce, the court did not directly address that issue. Rather, the court focused on whether the economic regulatory scheme mechanism would permit aggregation of the noneconomic Cave Species, despite the Morrison economic requirement. The following section examines the Fifth Circuit's use of the economic regulatory scheme mechanism to aggregate noneconomic Cave Species takes with all other endangered species takes and concludes that the Fifth Circuit's decision is permissible under current Commerce Clause jurisprudence.

A. Aggregation Part I: The ESA as an Economic Regulatory Scheme

The Fifth Circuit's conclusion that the ESA is an economic regulatory scheme rests in part on grounds the court previously rejected as speculative, though in a slightly different context. Again, for the Fifth Circuit to aggregate noneconomic activity by using the economic regulatory scheme mechanism, it must first establish that the ESA is directed at economic activity. To establish this, the court explained that: (1) the ESA is aimed at protecting

facially challenge the constitutionality of the ESA as a whole, but rather the ESA's take provision as applied to the Cave Species. GDF Realty I, 326 F.3d at 624. As such, the Fifth Circuit had to determine only whether the Commerce Clause permits regulating Cave Species takes. Id.

150. See Vermeule, supra note 46, at 1332-33 (arguing best reading of Lopez is that it ratified use of economic regulatory scheme mechanism to regulate noneconomic activity when activity can be appropriately connected to economic activity via economic regulatory scheme).

151. GDF Realty I, 326 F.3d at 658-43 (noting GDF conceded that all endangered species takes in aggregate would substantially affect interstate commerce and offering support for proposition that endangered species takes in the aggregate would substantially affect interstate commerce).

152. See id. at 638-41 (focusing on economic regulatory scheme mechanism).

153. See infra notes 154-210 and accompanying text for a discussion on how the Fifth Circuit applied the economic regulatory scheme and why its use of the scheme was proper.


155. See GDF Realty I, 326 F.3d at 639 (stating that ESA is economic if directed at economic activity) (citing United States v. Lopez, 514 U.S. 548, 561 (1995); United States v. Morrison, 529 U.S. 598, 610 (2000)).
biodiversity, which it accomplishes by prohibiting endangered species takes; (2) flourishing biodiversity could have substantial future effects on commerce, i.e., species could contribute to medicines and other assets important to commerce; therefore, (3) because the ESA protects biodiversity, it is directed at economic activity. Yet, when FWS asserted almost identical grounds to establish that Cave Species takes were “economic” in nature, the court rejected FWS' argument, stating that the “possibility of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster.” The court is thus inconsistent as to whether reductions in biodiversity and the future effects that species might have sufficiently affect interstate commerce to come under the purview of the Commerce Clause.

Nevertheless, this inconsistency is not fatal. When the court rejected FWS' future effects argument, it did so on the ground that any future effects the Cave Species alone, pre-aggregation, might have on commerce were too miniscule to substantially affect interstate commerce. Whereas, the possible future effects of Cave Species takes, when aggregated with all endangered species takes, seem far more likely to substantially affect interstate commerce than the future effects of Cave Species takes alone. Based on this distinction, the court was not overly inconsistent in characterizing Cave Species takes as noneconomic, holding that the ESA as a whole is a regulatory scheme directed at economic activity because all endangered species takes in the aggregate would constitute economic activity. Therefore, the court’s conclusion that the ESA is

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156. See id. at 638-40 (citing Congressional reports, which state biodiversity and "incalculable value" of species affects commerce).

157. See id. at 637-38 (concluding that Cave Species takes alone are not economic and citing Morrison's attenuation principle to negate FWS' argument). The court also rejected FWS' argument that Cave Species were economic because of scientific interest in them, holding that any commercial activity ensuing from the interest was nominal. Id. at 636.

158. See infra note 162 and accompanying text.

159. See infra notes 160-68 and accompanying text for a discussion on why the inconsistency does not destroy the validity of the court's holding.

160. GDF Realty I, 326 F.3d at 637 (holding that any effect Cave Species had on commerce was attenuated and nominal).

161. Cf. Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000) (holding that regulating takes of red wolves was authorized by Commerce Clause because red wolf takes had substantial aggregate effect on interstate commerce). If red wolf takes in the aggregate substantially affect interstate commerce, then all takes of any endangered species in the aggregate must affect interstate commerce. Id.

162. Compare GDF Realty I, 326 F.3d at 637 (holding that Cave Species are not economic), with id. at 639 (declaring that reduction in biodiversity in general, i.e.,
economic, based on future effects and biodiversity grounds, is defensible, especially considering that Congress and other courts have agreed with the Fifth Circuit.\textsuperscript{163}

An interesting alternative argument the court might have employed is that the ESA directly regulates at least some economic activity.\textsuperscript{164} For example, it regulates the red wolf takes considered in \textit{Gibbs} and, as Judge Jones mentioned in her dissent, the ESA regulates other commercially related activities like hunting, tourism and scientific research and, indirectly, commercial development.\textsuperscript{165} Based on this, the court might have argued that the ESA is economic because it is clearly directed at economic activity, regardless of whether it is incidentally directed at some noneconomic activity.\textsuperscript{166} As such, all the noneconomic activities the ESA regulates unchecked extinction of species, would substantially affect interstate commerce, and, therefore, would be "economic"). Also, it is important to remember that GDF conceded that all endangered species takes in the aggregate would substantially affect interstate commerce and therefore fall under the Commerce Clause. \textit{Id.}

As an aside, there is a logical quirk with this argument. That is, it may seem circular to argue that the ESA is economic based on the fact that it prevents all endangered species takes in the aggregate, when the purpose of establishing that the ESA is economic is to aggregate Cave Species takes with all endangered species takes to find a substantial affect on commerce. This quirk, however, is not detrimental to the argument. The premise is that all endangered species takes in the aggregate constitute economic activity insofar as they would substantially affect interstate commerce. This premise was conceded by GDF and there is substantial evidence supporting it. See \textit{supra} notes 1 and 2. If the premise that all endangered species takes in the aggregate would constitute economic activity in that they would affect interstate commerce is true, then the ESA must be directed at economic activity because the ESA is a regulatory scheme designed to prevent all endangered species takes. Ultimately, what FWS was trying to prove is that Cave Species takes can validly be aggregated \textit{with} all other endangered species takes, which is distinct from trying to prove that all endangered species takes in the aggregate affect commerce. Therefore, predicking the ESA's economic nature on the fact that it is directed at preventing all endangered species takes in the aggregate is not circular.

\textsuperscript{163} See \textit{GDF Realty I}, 326 F.3d at 626, 632, 640 (explaining Congressional findings behind ESA supporting that biodiversity reductions affect interstate commerce); \textit{supra} notes 1-2, 107-11, 122-23, 126, 128 and accompanying text for a discussion on biodiversity; \textit{NAHB}, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (stating that "elimination of... some... endangered species would have a staggering effect on biodiversity... and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species... . In the most narrow view of economic value, endangered plants and animals are valuable as sources of medicine and genes...").

\textsuperscript{164} \textit{GDF Realty II}, 362 F.3d 286, 291 (5th Cir. 2004) (conceding that ESA could regulate commercially related activity, including hunting, tourism and scientific research).

\textsuperscript{165} See \textit{Gibbs}, 214 F.3d at 488 (holding red wolf takes were economic in nature and proper subject of Congressional regulation); \textit{GDF Realty II}, 362 F.3d at 291-93 (Jones, J. dissenting).

\textsuperscript{166} See \textit{supra} note 165 (illustrating that ESA is directed at economic activity, though not exclusively). Indeed, the whole purpose of the economic regulatory
could be brought under the Commerce Clause’s scope on the ground that they are essential to the ESA such that the ESA would be undercut but for their regulation. This approach might have avoided the court’s reliance on biodiversity to show that the ESA is directed at economic activity, thereby avoiding the controversy brought on by the dissent.

B. Aggregation Part II: Cave Species Takes are Essential to the ESA

The Fifth Circuit was correct in concluding that the ESA’s take provision as applied to Cave Species is essential to the ESA. Judge Dennis articulated the court’s argument well in asserting that Congress passed the ESA to protect all endangered or threatened species and their ecosystems from extinction or harm. If some endangered species are not protected only because they are noneconomic, the purpose and efficacy of the ESA will be “undercut” because the ESA can no longer regulate precisely what Congress intended it to regulate. Analogously, in Wickard, the Supreme Court found that failure to regulate intrastate wheat production undercut the purpose of the AAA because it would upset the interstate wheat market, where the AAA was supposed to regulate all activity within the scope of that interstate market. Similarly, regulating Cave Species takes is essential to the ESA because its essential purpose and mandate to protect endangered species

scheme seems to be to permit aggregation in precisely these circumstances, e.g., when a statute regulates an activity, but that “activity” in some instances does not happen to be “economic.”

167. See infra notes 169-76 and accompanying text for a discussion on why the court’s conclusion that Cave Species takes are essential to ESA is reasonable. 168. See GDF Realty I, 326 F.3d at 639 (relying on biodiversity to establish how ESA is directed at economic activity).

169. See infra notes 170-76 and accompanying text for a discussion on why the court properly concluded that regulating Cave Species takes are essential to the ESA.

170. See GDF Realty I, 326 F.3d at 644 (Dennis, J., concurring) (explaining purpose of ESA).

171. See id. at 640 (Dennis, J., concurring) (explaining how Cave Species takes are essential to ESA); see also Babbit v. Sweet Home Chapter of Cmty. for a Great Oregon, 515 U.S. 687, 699 (1995) (5-4 decision) (stating that clear purpose of ESA was to protect endangered species from extinction at all costs). It is important to understand that what is required here is only to establish that Cave Species takes are essential to the ESA, not that the Cave Species takes independently affect interstate commerce.

172. See Wickard, 317 U.S. at 115-16, 127-29 (explaining AAA and aggregation principle); supra notes 29-34 for a discussion of Wickard.
would not be effectuated if it were not applied to any particular endangered species.\textsuperscript{173}

The foregoing points illustrate that for a regulated activity to be "essential" to a regulatory scheme, it is not necessary that the regulatory scheme completely disintegrate if a particular activity is not regulated; nowhere is such a thing required.\textsuperscript{174} If it were necessary, we would be left with the absurd conclusion that, assuming the absence of certain relevant factors, executing a statute in accordance with the statute's provisions is not essential to the statute.\textsuperscript{175} Consequently, it is not difficult to see why the Fifth Circuit concluded that the ESA's take provision as applied to any single endangered species, i.e., the Cave Species, is an essential part of the ESA.\textsuperscript{176}

C. Aggregation Part III: The Interactive Effect Requirement and Policy Choices

As previously argued, the Fifth Circuit implicitly declined to adopt the interactive effect requirement posited by the Hickman and McFarland dissents by simply not addressing it in its analysis of the case.\textsuperscript{177} It is unclear why the \textit{GDF Realty I} majority would bring it up without addressing it, but the rejected requirement flushes out an important underlying issue regarding the aggregation of Cave Species.\textsuperscript{178} Again, the interactive effect requirement stated that if activities are to be aggregated, they must all have a similar kind of effect on both the scheme regulating them and on interstate commerce.\textsuperscript{179} The \textit{GDF Realty I} majority adequately demonstrated that any given endangered species take has a similar effect on the ESA as

\textsuperscript{173} See ESA, 16 U.S.C. § 1531 (stating that purpose of ESA is to protect species susceptible to extinction); \textit{id}. § 1533(a-b) (setting forth provisions for "critical habitat designations" designed to protect habitats of endangered species). Congress enacted the ESA in 1973 to "halt and reverse the trend toward species extinction, whatever the cost." See \textit{GDF Realty I}, 326 F.3d at 632 (quoting \textit{Tenn. Valley Auth. v. Hill}, 437 U.S. 153, 176 (1978)) (emphasis added by Fifth Circuit).

\textsuperscript{174} See \textit{United States v. Lopez}, 514 U.S. 548 (1995) (failing to impose requirement that regulatory must be destroyed for activity to be essential to it).

\textsuperscript{175} \textit{Cf supra} note 173 (setting forth purpose of ESA: to generally prevent takes of any endangered species).

\textsuperscript{176} See \textit{id}. (noting that ESA is clearly designed to protect endangered species).

\textsuperscript{177} See \textit{supra} notes 74-78 and accompanying text for a discussion on the Fifth Circuit's implicit rejection of the interactive effect requirement.

\textsuperscript{178} See \textit{infra} notes 191-202 for a discussion of the federalism issues that the economic regulatory scheme causes, but the interactive effect requirement would not cause.

\textsuperscript{179} See \textit{GDF Realty I}, 326 F.3d at 631-32 (citing \textit{United States v. McFarland}, 311 F.3d 376, 401 (5th Cir. 2002) (Garwood, J., dissenting)) (explaining interactive
any other endangered species take, so this aspect of the require-
ment is inconsequential.180

The problem is whether Cave Species and other endangered
species have a similar effect on interstate commerce.181 For exam-
ple, economic red wolf takes, which cause significant pecuniary re-
ductions in North Carolina's interstate tourist industry, likely affect
interstate commerce far differently than takes of six non-commer-
cial subterranean arachnids.182 If Cave Species can only be aggre-
gated with other species that have a similar nominal impact on a
commercial market, it may be difficult to show how Cave Species
takes, when aggregated with other commercially insignificant species,
substantially affect interstate commerce.183

Although the interactive effect requirement is not controlling
law, as it appears only in two dissenting opinions to which the Su-
preme Court subsequently denied certiorari, the Fifth Circuit's re-
fusion to apply it points out the clandestine policy choice being
made.184 The interactive effect requirement directly conflicts with
the economic regulatory scheme mechanism because the former
would prohibit aggregating noneconomic Cave Species takes with
any economic takes, whereas the latter circumvents this quandary by
permitting aggregation if an activity is essential to an economic reg-
ulatory scheme.185 That is, the economic regulatory scheme mech-
anism does not care whether economic and noneconomic activities

180. See supra notes 74-78 and accompanying text for a discussion
on the rejected interactive effect requirement.

181. See infra notes 182-83 and accompanying text for an explanation of how
the interactive effect requirement is problematic.

182. See Gibbs v. Babbitt, 214 F. 3d 483, 493-94 (4th Cir. 2000) (explaining ex-
tent to which red wolf takes affected interstate commerce).

aggregating many instances of noneconomic activity will not render that activity
economic or create substantial effect on commerce; there must be some initial
exus between activity and interstate commerce).

184. United States v. Hickman, 179 F. 3d 230, 233 (5th Cir. 1999) (Higginboth-
am, J., dissenting) (en banc), cert. denied, 530 U.S. 1203 (2000) (proposing inter-
active effect requirement); McFarland, 311 F. 3d 376, 401 (5th Cir. 2002) (en banc),
cert. denied, 123 S. Ct. 1749 (Garwood, J., dissenting) (expounding on what Hick-
man called interactive effect requirement).

185. See supra notes 74-78 and 128-40 and accompanying text for discussions
on the interactive effect requirement and the Fifth Circuit's use of the economic
regulatory scheme to aggregate Cave Species takes with all other takes of endan-
gered species. The interactive effect requirement only permits aggregation of ac-
tivities that have a similar effect on interstate commerce or commercial market. Id.
If this requirement were to apply, noneconomic Cave Species takes would have a
different effect on the ESA than would economic takes insofar as one take affects a
commercial market and one does not. Id.
will be aggregated; rather, it only requires that all aggregated activities be essential to the relevant economic regulatory scheme.\textsuperscript{186}

Between these two alternative tests, the court chose the economic regulatory scheme mechanism, broadening the scope of the Commerce Clause and allowing the ESA to fulfill its purpose, which is to protect endangered species and their habitats.\textsuperscript{187} If the interactive effect requirement were to apply, the ESA would only protect some species nearing extinction and not others.\textsuperscript{188} Such a bizarre result, which would protect commercially viable endangered species but not other species nearing extinction, eviscerates the ESA’s science and policy goals.\textsuperscript{189} Therefore, it is no small wonder that the Fifth Circuit rejected the method of interpreting the Commerce Clause’s scope that unnecessarily leads to environmentally undesirable results.\textsuperscript{190}

D. The Dissent’s Carte Blanche Police Power Allegation

It is important to address the dissent’s contention that the Fifth Circuit’s use of the economic regulatory scheme mechanism created a carte blanche federal police power.\textsuperscript{191} This allegation cuts to the heart of federalism and the issue of how expansive, normatively, the Commerce Clause should be: how far can Congress go without abrogating state sovereignty under the Tenth Amendment?\textsuperscript{192}

\textsuperscript{186} See \textit{supra} note 46 (setting forth requirements of economic regulatory scheme); \textit{supra} notes 130-39 and accompanying text (setting forth Fifth Circuit’s application of economic regulatory scheme).

\textsuperscript{187} See \textit{GDF Realty I}, 326 F.3d at 638-41 (applying economic regulatory scheme); ESA, 16 U.S.C. § 1531 (stating that purpose of ESA is to protect species susceptible to extinction); \textit{id.} § 1533(a-b) (setting forth provisions for “critical habitat designations” designed to protect habitats of endangered species). Congress enacted the ESA in 1973 to “halt and reverse the trend toward species extinction, \textit{whatever the cost}.” See \textit{GDF Realty I}, 326 F.3d at 632 (quoting \textit{Tenn. Valley Auth. v. Hill}, 437 U.S. 153, 176 (1978)) (emphasis added by Fifth Circuit).

\textsuperscript{188} See \textit{supra} notes 74-78, 185 and accompanying text for a discussion on how the interactive effect requirement limits the aggregation principle based on a relationship between the regulated activity and interstate commerce.

\textsuperscript{189} See \textit{id.} (discussing Congress’ purpose in enacting ESA); see \textit{supra} notes 2, 106-11 and accompanying text for a discussion of Congress’ science and policy goals in enacting ESA.

\textsuperscript{190} See \textit{GDF Realty I}, 326 F.3d at 622-44 (implicitly rejecting interactive effect requirement by declining to address it in its analysis).

\textsuperscript{191} See \textit{GDF Realty II}, 362 F.3d 286, 289-93 (5th Cir. 2004) (arguing that allowing ESA to regulate Cave Species takes results in federal police power).

\textsuperscript{192} See \textit{U.S. Const.} amend. X (reserving those powers not enumerated in Constitution for people; establishing dual sovereignty).
Despite the grandiosity of the dissent's allegation, it lacks force.\textsuperscript{193}

The dissent's primary concern was that Congress could regulate \textit{any} purely intrastate, noneconomic activity by aggregating it with tenuously related economic activities and throwing the heap of them into one omnibus statute.\textsuperscript{194} If this were the case, Congress could easily establish that all activities that statutes regulate, in the aggregate, substantially affect interstate commerce.\textsuperscript{195} The problem with this contention is that the economic regulatory scheme mechanism presupposes a cohesive regulatory scheme, not a hodgepodge of regulations thrown under one bill.\textsuperscript{196} Moreover, if an activity is not essential to the scheme of regulation, then the economic regulatory scheme mechanism will fail.\textsuperscript{197} Therefore, under the economic regulatory scheme mechanism, Congress cannot regulate any intrastate activity it wishes; it must first show that the activity is essential to a comprehensive, economic regulatory scheme such that the scheme would be undercut but for that activity's regulation.\textsuperscript{198}

In the case of the ESA, there is one unified purpose: to protect endangered species living in the United States, and the habitats and ecosystems on which they depend.\textsuperscript{199} The ESA has several provisions that constitute a comprehensive scheme to effectuate that sin-

\begin{itemize}
  \item \textsuperscript{193} See infra notes 194-201 and accompanying text for a discussion on why the economic regulatory scheme does not grant Congress a carte blanche federal police power.
  \item \textsuperscript{194} See U.S. Const. amend. X (discussing danger of \textit{de facto} federal police power).
  \item \textsuperscript{195} See United States v. Lopez, 514 U.S. 548, 564 (2000) (stating that too much aggregation results in carte blanche federal police power because Congress could regulate anything); supra note 39.
  \item \textsuperscript{196} See supra notes 41-46 and accompanying text for a discussion on how an activity must be essential to an economic regulatory scheme. Professor Vermeule argued that "[t]he best reading of the cases [Lopez and Morrison] suggests that the comprehensive-scheme principle, unlike the aggregation principle, may allow Congress to regulate intrastate activities that are not themselves commercial or economic, so long as the regulation is integral to the success of a larger valid scheme of (interstate or commercial) regulation." (Alterations added).
  \item \textsuperscript{197} See GDF Realty I, 326 F.3d at 643 (Dennis, J., concurring) (explaining how economic regulatory scheme mechanism can be used to aggregate noneconomic activities); supra notes 115-25 and accompanying text for a discussion on the Fifth Circuit's application of the economic regulatory scheme mechanism.
  \item \textsuperscript{198} See GDF Realty I, 326 F.3d at 643 (Dennis, J., concurring) (explaining that economic regulatory scheme mechanism requires activity to be "essential" to regulatory scheme).
  \item \textsuperscript{199} See, e.g., Babbit v. Sweet Home Chapter of Cmty's. for a Great Oregon, 515 U.S. 687, 699 (1995) (stating that clear purpose of ESA was to protect endangered species from extinction at all costs).
\end{itemize}
gle purpose. Therefore, only those intrastate, noneconomic activities that are essential to that scheme can be aggregated with similar economic activities, i.e., other endangered species takes, to establish a substantial effect on interstate commerce. This clarification demonstrates that the dissent's concern is somewhat overblown, as it is simply not the case that any activity can be aggregated with any other activity whatsoever to find a substantial on commerce.

E. The Fifth Circuit's Conclusion is Consistent with Precedent

The most interesting thing about GDF Realty I is that it is the first appellate level case to explicitly employ the economic regulatory scheme mechanism, and only that mechanism, to establish that an entirely intrastate, noneconomic activity like Cave Species takes falls within Congress' Commerce Clause authority. I argue that the Fifth Circuit's use of the economic regulatory scheme mechanism is a valid method of aggregating noneconomic, intrastate activity to establish a substantial effect on interstate commerce. As posited earlier, Lopez created the mechanism when it analyzed whether the Gun Free School Zones Act had a substantial effect on interstate commerce. Moreover, Morrison did not reject that part of Lopez' analysis. In fact, the Morrison majority did not even address it, probably because the majority did not consider the Violence Against Women Act to be a comprehensive economic

201. See GDF Realty I, 326 F.3d at 643 (Dennis, J., concurring) (explaining how economic regulatory scheme mechanism can be used to aggregate noneconomic activities); supra notes 115-25 and accompanying text for a discussion on the Fifth Circuit's application of the economic regulatory scheme mechanism.
202. See supra notes 191-201 and accompanying text for a discussion on why the dissent's opinion is overblown.
203. Compare GDF Realty I, 326 F.3d at 622, with NAHB, 130 F.3d 1041, 1046-49 (D.C. Cir. 1997); United States v. Ho, 311 F.3d 589, 601-02 (5th Cir. 2002); Gibbs v. Babbit, 214 F.3d 483, 492 (4th Cir. 2000); United States v. Hickman, 179 F.3d 230, 233 (5th Cir. 1999); United States v. McFarland, 311 F.3d 376, 401 (5th Cir. 2002).
204. See supra notes 150-214 and accompanying text for a discussion supporting the Fifth Circuit's opinion.
205. See Lopez, 514 U.S. at 561 (asserting that gun possession could not be regulated on ground that it was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.").
206. See Morrison, 529 U.S. at 598-619 (failing to reject use of economic regulatory scheme to permit aggregation to find substantial effect on commerce and declaring that court will not adopt categorical rule against aggregating non-economic activity).
regulatory scheme in the first place.\(^{207}\) Furthermore, many of the circuit courts have recognized the legitimacy of the economic regulatory scheme mechanism by addressing or using it in their opinions.\(^{208}\) Even academics have interpreted *Lopez* and *Morrison* as allowing aggregation of noneconomic activity when that activity is essential to an economic regulatory scheme.\(^{209}\) Therefore, it seems sound to conclude that the economic regulatory scheme mechanism is a legitimate analytical tool courts may use to uphold federal regulation that may at times inadvertently apply to certain intrastate, noneconomic activities.\(^{210}\)

**V. WHAT DOES THE GDF REALTY I OPINION MEAN FOR ENVIRONMENTAL LEGISLATION AND THE COMMERCE CLAUSE?**

*GDF Realty I*’s holding, along with a slew of other circuit court case holdings, seems to suggest that the circuit courts do not interpret *Lopez* and *Morrison* as the death knell for federal regulation inadvertently targeting intrastate, noneconomic activities.\(^{211}\) Nevertheless, the issue remains extremely controversial, evident in the dissents of *GDF Realty II*, *NAHB* and *Gibbs*.\(^{212}\) The dissenting justices contend that the Commerce Clause simply does not authorize regulating violence, ecosystems or any other activity not intuitively commercial.\(^{213}\) Yet, the Supreme Court itself denied *certiorari* to *Gibbs*, *NAHB*, *Hickman*, *McFarland*, and recently, *GDF Realty II* all of which employed the economic regulatory scheme.\(^{214}\) Given the Supreme

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207. See id. at 598-627 (failing to address economic regulatory scheme mechanism introduced by *Lopez* when declaring Violence Against Women Act is unconstitutional). The Act allowed recovery of punitive damages for violent acts against women. See id.

208. See supra note 203.

209. Vermeule, supra note 46, at 1332 (stating that best reading of *Lopez* and *Morrison* is that they allow use of economic regulatory scheme mechanism to aggregate noneconomic activity).

210. See supra notes 203-09 and accompanying text for a discussion supporting the Fifth Circuit’s opinion.

211. See supra note 203.

212. See *GDF Realty II*, 362 F.3d at 289-93 (Jones, J., dissenting) (arguing against aggregation of noneconomic cave species takes); *NAHB*, 130 F.3d at 1060 (Sentelle, J., dissenting) (arguing that biodiversity does not establish how takes of fly substantially affected interstate commerce); *Gibbs*, 214 F.3d at 506 (Lutig, J., dissenting) (arguing that red wolf takes on private land was not type of economic activity *Lopez* contemplated).

213. See supra note 75 for a discussion of *McFarland’s* dissenting opinion; *supra* notes 141-48 and accompanying text for a discussion on Judge Jones’ argument that the Commerce Clause does not apply to non-commercial activities.

Court's refusal to hear these cases, the Court may still be willing to accept a relatively broad interpretation of the Commerce Clause when an intrastate activity can be linked to interstate commerce through its essentialness to a regulatory scheme colorably directed at economic activity. Moreover, the Court's decision to deny certiorari in the aforementioned cases could illustrate its reluctance to battle with Congress on how Congress should address national problems like large-scale species extinction.

Nevertheless, *GDF Realty I* lends substantial support to two propositions. First, it further solidifies the economic regulatory scheme mechanism as an analytical tool courts can use to establish a noneconomic intrastate activity's substantial effect on interstate commerce. Second, *GDF Realty I* reintroduces deference into the Commerce Clause analysis by applying a more deferential rational basis standard of review to Congress' statutes when *Morrison*, although purporting to apply the rational basis standard, seemed to apply a heightened intermediate standard. In fact, the Fifth Circuit deferred heavily to Congress' findings regarding the importance of protecting endangered species and biodiversity.

An additional, more political aspect of the Commerce Clause debate at issue that is worth mentioning is the real world consequences of the ESA's take provision on land use, development projects and property rights. In *GDF Realty I*, the possibility of


215. See *supra* note 214 (noting Supreme Court's denial of certiorari).

216. See *id.* (denying certiorari).

217. See *GDF Realty I*, 326 F.3d at 638-43 (applying economic regulatory scheme to establish that Cave Species substantially affected interstate commerce).

218. See *supra* notes 55-57, 111-14 and accompanying text for a discussion on the Supreme Court's standard of review in *Morrison* and the standard adopted in *GDF Realty I*. It remains to be seen how the Supreme Court will treat the issue of standard of review. It should be noted, however, that neither *Lopez* nor *Morrison* dealt with activity considered essential to a larger economic regulatory scheme. Moreover, the majority in *Morrison* simply stated that Congress' findings were not dispositive and were to be evaluated. See *supra* notes 52-57 and accompanying text for a discussion on *Morrison's* consideration of Congress' findings. In *GDF Realty I*, the court considered Congress' findings and found them adequate in terms of establishing that the ESA is directed at economic activity. *GDF Realty I*, 326 F.3d at 638-40. Of note, the court did not assume that Congress' findings established a de facto substantial effect on interstate commerce, but only that the ESA is directed at economic activity. See *id.* (implicitly declining to hold that Congress' findings are dispositive).

219. *GDF Realty I*, 326 F.3d at 638-40 (deferring heavily to Congress' findings on importance and necessity of ESA).

220. See U.S. Const. amend X (reserving all powers not granted to Congress, states and people).
killing a few tiny bugs stymied a large development project, even though GDF took great pains to prevent and mitigate any takes.\footnote{221}{GDF Realty I, 326 F.3d at 624 (reciting action GDF took to avoid takes and reciting consequences of FWS' agency action).}

Such unfortunate consequences elucidate the competing policy interests at stake: long term goals of natural resource conservation and consumption versus development interests, property rights and personal economic gain.\footnote{222}{See id. (juxtaposing position of land developers and FWS).}

As mentioned earlier, the Fifth Circuit just barely adopted the aforementioned policy choice in \textit{GDF Realty I}, but this choice appropriately defers to Congress' policy choice when it enacted the ESA in the first place.\footnote{223}{Id. at 643-44 (recognizing importance of protecting biodiversity); see also id. at 639 (citing congressional findings in 16 U.S.C. § 1531(a)(1)); ESA, 16 U.S.C. § 1531 (stating that purpose of ESA is, \textit{inter alia}, to protect species susceptible to extinction because of increased demand for development).}

Notwithstanding political controversy, the Fifth Circuit has made a solid case for Congress' jurisdiction over intrastate, noneconomic activity when such activity bears an essential relation to an economic regulatory scheme.\footnote{224}{See supra notes 149-214 and accompanying text for analysis supporting the Fifth Circuit's use of the economic regulatory scheme.}

Normatively, because species, ecosystems and natural resources will eventually be destroyed if Congress cannot protect them with federal legislation, posing a threat to public well being, the Fifth Circuit seems wise to allow Congress a means to regulate such intrastate activity through employing the economic regulatory scheme mechanism.\footnote{225}{See GDF Realty I, 326 F.3d at 643-44 (quoting Congress' conclusion that unchecked development resulted in extinctions of species and implying that continued failure to protect species against development will result in continued extinctions); id. at 640 (agreeing with FWS' argument that failure to regulate endangered species takes will result in piece-meal extinction); See Gunningham & Young, supra note 2, at 247 (discussing dangers of species extinction and destruction of ecosystems).}

Whatever one's feelings are about endangered species regulation and property rights, it may be more prudent to encourage federal administrative agencies like the FWS to administer Congress' statutes in a way that more adequately balances competing interests, rather than hamstring Congress and its ability to protect our environment by construing the Commerce Clause too narrowly.\footnote{226}{Cf. GDF Realty I, 326 F.3d at 622-41 (implicitly choosing to broaden rather than restrict scope of Commerce Clause, while admonishing FWS for somewhat inequitable enforcement of ESA in this case).}

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