Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court's Web of Confusion Traps More Than the Fly

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Only within the moment represented by the present century has one species—man—acquired significant power to alter the nature of (our) world.
—Rachel Carson[1]

WITHIN THE NEAR future, the Supreme Court may declare the Endangered Species Act ("ESA" or "Act") unconstitutional.[2] Under the Court's current analysis, congressional authority under the Commerce Clause[3] is limited to regulating economic activities that have a substantial impact on interstate commerce.[4] Because the ESA is a comprehensive statute regulating both economic and non-economic activities, circuit courts have been forced to apply inconsistent reasoning, while still finding the statute constitutional. This discrepancy begs the question of whether the Court's current Commerce Clause jurisprudence effectively addresses statutes that regulate both economic and non-economic objects.

Throughout its history, the Supreme Court has struggled to find an interpretive model that can properly determine the scope of Congress's authority under the Commerce Clause.[5] Between 1887 and

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1. RACHEL CARSON, SILENT SPRING 5 (Houghton Mifflin 1962).

2. *See* Jud Mathews, *Turning the Endangered Species Act Inside Out?*, 113 YALE L.J. 947, 948 (2003) (contending that in light of recent Supreme Court decisions, the lower courts' justifications for upholding the ESA are tenuous).

3. U.S. CONST. art. I, § 8, cl. 3. ("The Congress shall have power . . . [t]o regulate commerce . . . among the several states.").

4. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

5. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 628 (5th Cir. 2003).

1937 the Supreme Court maintained that Congress only had the authority to regulate local activities that "directly" affected interstate commerce.[6] Eventually, this framework buckled under the pressure of FDR's need to confront the Depression with legislation designed to stabilize the economy.[7] The Supreme Court recognized that the formalistic test failed to provide consistent results or properly correlate to a statute's impact on interstate commerce.[8] Consequently, the Court developed the substantial effects test,[9] a deferential analysis that looked to a statute's attenuated affect on interstate commerce to determine its constitutionality.[10]

Despite the previous failure of the categorical limitations to congressional authority, the Supreme Court resuscitated its attempt to provide categorical limitations to congressional authority in *United States v. Lopez* and *United States v. Morrison* (collectively "*Lopez-Morrison*"), abandoning sixty years of precedent under the more deferential substantial effects test.[11] In establishing the *Lopez-Morrison* framework, the Court replaced the previous "direct"/"indirect" categorical distinction with an "economic"/"non-economic" distinction. It all but declared that Congress does not have authority under the Commerce Clause to regulate objects with no "economic" value.[12] In doing so, the Court implicitly assumed that "non-economic" objects cannot impact interstate commerce.[13] Through this rigid approach, the Rehnquist Court attempted to provide a workable framework for limiting congressional authority to the regulation of activities that substantially affect interstate commerce.[14] Further, the Rehnquist Court attempted to use the requirement that the object of the regulation be "economic" to provide this limitation. This sea change was not without its detractors. Justice Souter emphasized in his *Morrison* dissent that the

6. *See Lopez*, 514 U.S. at 570 (Kennedy, J., concurring); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935); United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895).

7. *See Morrison*, 529 U.S. at 642 (Souter, J., dissenting); Wickard v. Filburn, 317 U.S. 111, 120 (1942).

8. *See Morrison*, 529 U.S. at 644 (Souter, J., dissenting).

9. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937).

10. *See Lopez*, 514 U.S. at 607 (Souter, J., dissenting).

11. *See Morrison*, 529 U.S. 607–19 (Souter, J., dissenting); *Lopez*, 514 U.S. at 608 (Souter, J., dissenting).

12. *See Lopez*, 514 U.S. at 567.

13. *Id.*

14. JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 128–30 (Univ. of Cal. Press 2002).

Court's previous experimentation with categorical exemptions proved unworkable.[15]

Indeed, environmental statutes, such as the ESA, expose the limitations of the *Lopez-Morrison* framework. In enacting the ESA, Congress intended to conserve entire ecosystems through the preservation of listed endangered species.[16] While many of these listed species are isolated to one state and have no "economic" value,[17] their protection is essential to the delicate balance of our ecosystems.[18] Furthermore, Congress comprehended the national economic effects of preserving biodiversity.[19] Thus, there is tension between a statute that must regulate intrastate, "non-economic" activities in order to attain a broader goal that impacts interstate commerce and an interpretation of the Commerce Clause that assumes that "non-economic" activities cannot affect interstate commerce.

Despite this tension, or perhaps because of it, the Supreme Court has not directly addressed whether the ESA violates congressional authority under the Commerce Clause. Moreover, the Act has remained unscathed in the circuit courts; the Fourth, Fifth, and D.C. Circuits have each upheld the constitutionality of the ESA against Commerce Clause challenges.[20] Yet each court has developed vastly different and sometimes conflicting rationales for doing so as they struggle to harmonize the ESA with the *Lopez-Morrison* framework.

This Comment contends that Commerce Clause challenges to the ESA expose the failure of the Rehnquist Court to accomplish its own goals with the *Lopez-Morrison* analysis. The Court's formalistic reliance on the "economic"/"non-economic" distinction is not workable and does not correlate to a statute's effect on interstate commerce. Moreover, any attempt to cure the incomprehensibility of *Lopez-Morri-*

15. *See Morrison*, 529 U.S. at 640 (Souter, J., dissenting).

16. *See* NOONAN, *supra* note 14, at 128–30.

17. Michael C. Blumm & George Kimbrell, *Symposium Article: Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 LEWIS & CLARK ENVTL. L.J. 309, 327 (2004).

18. *See* Nat'l Ass'n of Home Builders ("NAHB") v. Babbitt, 130 F.3d 1041, 1058 (D.C. Cir. 1997) (Henderson, J., concurring) (citing Stephen M. Johnson, United States v. Lopez*: A Misstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 79 (1996)).

19. 16 U.S.C. §1531(a)(3) (2001) (noting that "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nations and its people").

20. *See, e.g.*, *NAHB*, 130 F.3d 1041; GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003); Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

son would further limit its ability to properly determine when a statute affects interstate commerce. Thus, if the Supreme Court grants certiorari in a case challenging the constitutionality of the ESA under the Commerce Clause, it should abandon the question of whether the object of the regulation is "economic" and return to the more practical question of whether the ESA substantially affects interstate commerce.

Part I explores the history of the interpretation of the Commerce Clause. The section begins by introducing two judicial models of Commerce Clause interpretation: formalism and judicial deference.[21] It then details the reasons for the rise and fall of the formalistic "direct"/"indirect" effects test.[22] After nearly sixty years of judicial deference under the substantial effects test,[23] the Rehnquist Court returned to a formalistic approach by requiring that the object of the regulation be "economic."[24] The Court attempts to use this "economic" distinction to provide a workable framework and to determine when a statute affects interstate commerce.[25] The section asserts that because the categorical distinction of the "direct"/"indirect" effects failed to meet these asserted goals it is fair to ask whether the Rehnquist Court can address these failures.[26]

Part II answers this question in the negative, contending that Commerce Clause challenges to the ESA demonstrate that the *Lopez-Morrison* framework has not successfully addressed the failures of the "direct"/"indirect" effects test. First, the circuit courts have created incoherent results, as they have not consistently identified the proper object of the regulation.[27] Furthermore, this inconsistency is the result of an unworkable test rather than any failures of the circuit courts. Second, the *Lopez-Morrison* test fails to recognize the real, substantial effects of the ESA on interstate commerce. Thus, the "economic" distinction does not properly correlate to the goal of the Commerce Clause.

Part III contends that attempts to cure the confusion in the circuits within the *Lopez-Morrison* framework would take the test further away from the goals of the Commerce Clause. Categorical exemptions

21. *See Lopez*, 514 U.S. at 569, 571 (Kennedy, J., concurring).

22. *See id.* at 570.

23. *See Morrison*, 529 U.S. at 642 (Souter, J., dissenting); Wickard v Filburn, 317 U.S. 111, 120 (1942).

24. *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 567.

25. *See* NOONAN, *supra* note 14, at 128–30.

26. *Lopez*, 514 U.S. at 608 (Souter, J., dissenting).

27. *See generally* cases cited *supra* note 20.

are inherently imprecise[28] and difficult to apply,[29] and any attempt to solve this problem would create more questions. This Comment concludes that if the Court considers a Commerce Clause challenge to the ESA, it must abandon the question of whether a particular species or activity is "economic" and instead focus on whether the statute as a whole substantially affects interstate commerce.

I. Commerce Clause Interpretation: Recycling History in Search of a Workable Doctrine

The federal government justifies much of its legislation as supported by the Commerce Clause. Since it is often Congress's most effective and far-reaching legislative tool it has provided the Court with such fits throughout the country's history—alternatively restricting, then expanding its reach.

In the face of congressional attempts to regulate an increasingly industrialized economy, the Supreme Court implemented the "direct"/"indirect" effects test, which attempted to determine a statute's constitutionality by drawing a categorical distinction between those that had a direct or indirect impact on interstate commerce. The Court abandoned that approach during the 1930s in favor of the more deferential "substantial effects" test. After sixty years of judicial deference, the Rehnquist Court returned to a categorical approach in a renewed attempt to provide a workable judicial test that parallels the goals of the Commerce Clause. Considering this is a return to a categorical analysis similar to the one that the Court had previously abandoned, in order to be successful, the new test must resolve the failures of the "direct"/"indirect" effect test.

A. Two Competing Theories of Commerce Clause Interpretation

The Commerce Clause of the United States Constitution gives Congress the authority to "regulate Commerce . . . among the several States."[30] The history of the Supreme Court's struggle to interpret these six words has proven tumultuous.[31] In this struggle, the Supreme Court has attempted to provide a doctrine that is both workable and able to account for the complexities of a society that has

28. *See Morrison*, 529 U.S. at 640 (Souter, J., dissenting).
29. *Id.*
30. U.S. CONST. art. I, § 8, cl. 3.
31. *See Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

evolved from a simple agrarian economy to an industrialized, interconnected one.[32]

Two conflicting theories of jurisprudence have competed to provide guidelines for determining the constitutional limits on congressional authority: formalism and practical deference.[33]

Proponents of formalism, those supporting the "direct"/"indirect" effects test and the *Lopez-Morrison* framework, purport that the Supreme Court should use formal rules to provide judicial restrictions on congressional authority.[34] These formal rules must both create comprehensible results[35] and honor the original intent of the Commerce Clause—to limit congressional authority to regulating interstate commerce.[36] Formalists contend that without categorical enclaves, Congress would have unlimited authority, as any activity may affect interstate commerce in a causal manner.[37] Thus, the Court's deferential approach renders the Commerce Clause meaningless.

In contrast, the opposing perspective, practical deference, which underlies the Court's substantial effects jurisprudence, allows for a broader recognition of congressional authority by focusing on whether a statute actually affects interstate commerce.[38] This view of jurisprudence purports that categorical exclusions are difficult to work with and therefore create incomprehensible results.[39] Furthermore, the theory recognizes that local or "non-economic" activities may impact interstate commerce. Consequently, categorical exclu-

32. *See generally id.* at 568–74.

33. *See Morrison*, 529 U.S. at 640 (Souter, J., dissenting).

34. *See Lopez*, 514 U.S. at 569 (Kennedy, J., concurring) ("One approach the Court used to inquire into the lawfulness of state authority was to draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not.").

35. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6 (1983).

36. *Lopez*, 514 U.S. at 585 (Kennedy, J., concurring); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (Princeton Univ. Press 1997).

37. *Morrison*, 529 U.S. at 616 n.6 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Cardozo, J., concurring)). The *Morrison* majority stated:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is their size."

Id.; *see also* SCALIA, *supra* note 36, at 44–47.

38. *See Lopez*, 514 U.S. at 573 (Kennedy, J., concurring); *id.* at 604–07 (Souter, J., dissenting).

39. *See id.* at 574 (Kennedy, J., concurring).

sions may not correlate to an activity's actual effects on interstate commerce.[40]

Finally, this perspective holds that the Court should defer to Congress because it has a greater institutional capacity than nine unelected individuals to determine when a statute relates to interstate commerce.[41] The more fluid approach of Congress is better equipped to make subtle judgments about precisely how much a federal statute will or will not affect interstate commerce.[42] Furthermore, Congress has a superior ability to gather empirical findings and studies in an attempt to make these complicated determinations.[43]

These two competing theories mark the development of the Court's Commerce Clause doctrine, addressed below. The formalists dominated the "direct"/"indirect" test, followed by sixty years of practical deference, which the Rehnquist Court recently abandoned in a return to formalism. The inability of either theory to properly address practical limitations has contributed to the Court's shifting approach to the Commerce Clause throughout the last two hundred years.

B. The Rise and Fall of the "Direct"/"Indirect" Effects Test: The Court's Categorical Analysis Fails

During the rapid industrial development of the late nineteenth century, the Supreme Court perceived a need to simultaneously limit the reach of legislative authority and provide lower courts with a framework to coherently interpret the constitutionality of statutes.[44] Thus, the Court developed the categorical "direct"/"indirect" effects test.[45] Under this test, Congress had the authority to regulate local activities that "directly" affected interstate commerce but did not have the authority to regulate local activities that "indirectly" affected interstate commerce.[46]

This attempt at clarity failed, however, as the country moved from industrialization into the Depression. The Court's theory of categorical analysis did not translate into the practical implementation of limiting federal law. Indeed, lower courts were not harmoniously

40. *Id.* at 625–26 (Breyer, J., dissenting).

41. *See id.* at 616–18.

42. *Id.*

43. *Id.*

44. *Id.* at 569–70, 575 (Kennedy, J., concurring); *Morrison*, 529 U.S. at (Breyer, J., dissenting).

45. *Lopez*, 514 U.S. at 569.

46. *Id.* at 570.

interpreting statutes' constitutionality, and as a result the Court abandoned the test.

1. The Rise of the "Direct"/"Indirect" Effects Test

United States v. E.C. Knight Co.,[47] which initiated the "direct"/"indirect" effects test, made the rigid distinction between manufacturing and commerce.[48] In doing this, the Court hoped to create a clear framework for lower courts while staying true to the purpose of the Commerce Clause by limiting federal power.[49] In *E.C. Knight*, the Supreme Court faced the question of whether Congress had the authority to use the Sherman Antitrust Act to regulate a manufacturer's domination over the nation's sugar refining capacity.[50] The Court held that Congress could not regulate manufacturing because it was not "commerce" and merely had an "indirect" effect on interstate commerce.[51] The Court reasoned that the effects were "indirect" because Congress merely intended to prevent private gain from monopolistic manufacturing of sugar, rather than through the control of interstate commerce.[52] The Court expressed fear that extending congressional authority to such "indirect" effects would include all activities and effectively obliterate state sovereignty.[53]

The Court again emphasized the importance of the "direct"/"indirect" test in *A.L.A. Schechter Poultry Corp. v. United States*,[54] in which it struck down regulations of fixed hours and wages of employees of an intrastate business because employment conditions only applied to interstate commerce "indirectly."[55] Chief Justice Hughes, writing for the Court, viewed labor conditions as an issue of local management and any consequential effects on prices was "indirect."[56] Furthermore, the Court characterized the distinction between "direct" and "indirect" effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional

47. 156 U.S. 1 (1895).
48. *Id.* at 14.
49. *Id.* at 13.
50. *Id.* at 11.
51. *Id.* at 16.
52. *Id.* at 17.
53. *Id.* at 16.
54. 295 U.S. 495 (1935).
55. *Id.* at 550.
56. *Id.* at 549.

system."[57] Indeed, the Court saw this categorical distinction as essential in providing effective limits to congressional authority.[58]

2. The Supreme Court Abandons the Categorical Approach: The Rise of the Substantial Effects Test

Eventually, confronted with the judicial crisis of 1937,[59] the Court abandoned its formalistic test. In marked contrast, the Court adopted the deferential substantial effects test, which considered the actual effects of an activity on interstate commerce.[60]

In *NLRB v. Jones & Laughlin Steel Corp.*,[61] the Court commenced its departure from the "direct"/"indirect" distinction by upholding Congress's authority to regulate unlawful labor practices under the National Labor Relations Act.[62] The Court recognized that the test created idle distinctions, which failed to measure remote, yet catastrophic, effects.[63] Chief Justice Hughes wrote for the Court that

> [w]e are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern.[64]

Thus, the Court took a more realistic approach and recognized that merely because local activities may have remote, "indirect" effects on interstate commerce does not preclude the fact that industrial activities can have real effects on interstate commerce. The Supreme Court reasoned that because the industries had organized on a national

57. *Id.* at 548.

58. *Id.* at 546.

59. During the Judicial Crisis of 1937, President Franklin D. Roosevelt confronted the Supreme Court's expansion of power by threatening to appoint Justices whom shared his ideologies. In addition to the theoretical failures of the categorical approach, this political confrontation contributed to the Court's adoption of the more deferential model. *See* Alpheus T. Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L.J. 791, 796 (1952); Robert L. Stern, *The Commerce Clause and the National Economy 1933–1946*, 59 HARV. L. REV. 645, 677 (1946).

60. United States v. Morrison, 529 U.S. 598, 642 (2000) (Souter, J. dissenting); Wickard v. Filburn, 317 U.S. 111, 120 (1942).

61. 301 U.S. 1 (1937).

62. *Id.* at 30.

63. *Id.* at 41.

64. *Id.*

scale, strife among workers threatened productivity in a particular plant, which affected the entire nation's supply of a vital resource.[65]

In *Jones & Laughlin Steel Corporation*, the Court expanded congressional authority to regulate activities that substantially affect interstate commerce.[66] Thus, the Court created the foundation of what has become the current test, stating Congress may regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; or (3) activities that substantially affect interstate commerce.[67]

In *Wickard v. Filburn*,[68] the Court created the "aggregation principle," in an attempt to create a test that could recognize real effects on interstate commerce.[69] The Court upheld the Agricultural Adjustment Act, reasoning that, while one farmer's consumption of homegrown wheat had a negligible effect on interstate commerce, the aggregate effects of several farmers consuming their own wheat would lower the demand for national wheat.[70] This decreased demand substantially affects interstate commerce.[71] Justice Jackson explained the rationale for adopting the deferential approach by asserting, "The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause exemplified by this statement has made the mechanical application of legal formulas no longer feasible."[72]

The Court abandoned the "direct"/"indirect" effects test in these cases because of a realization that the test was unworkable and did not correlate to the goal of the Commerce Clause.[73] In his *Morrison* dissent, Justice Souter noted this failure, writing that "history has shown that categorical exclusions have proven . . . unworkable in practice."[74] Furthermore, the *NLRB* Court recognized that categorical distinctions cannot recognize actual impacts on interstate commerce.[75] Due to the complexity of modern economics, the categorical enclaves may not comprehend a real effect on interstate commerce and, alternatively, may see a connection when one does not exist.

65. *Id.*
66. *Id.* at 37.
67. United States v. Lopez, 514 U.S. 549, 558–59 (1995); *Jones & Laughlin Steel*, 301 U.S. at 36.
68. 317 U.S. 111 (1942).
69. *Id.* at 127–29.
70. *Id.* at 128–29.
71. *Id.*
72. *Id.* at 123.
73. United States v. Morrison, 529 U.S. 598, 640, 644 (2000) (Souter, J., dissenting).
74. *Id.* at 640 (Souter, J., dissenting).
75. *Id.* at 644 (Souter, J., dissenting).

For sixty years the Court followed the substantial effects test. It did so in reaction to the failings of the categorical test that preceded it. Nevertheless, beginning in 1995, the Court once again abandoned precedent and altered the Court's holding in *Jones* by narrowing the analysis of those activities "that substantially affect interstate commerce," thus creating the *Lopez-Morrison* analysis.[76]

C. *Lopez-Morrison*: The Rehnquist Court Revisits the Principles of the "Direct"/"Indirect" Effects Test

In *Lopez* and *Morrison*, the Supreme Court returned to the principles of the "direct"/"indirect" effects test, once again using categorical enclaves to limit congressional authority.[77] It did so by establishing a framework for analyzing the third prong of the test developed in *NLRB*—thus formalizing the "substantial effect" on interstate commerce analysis. This time the Court attempted to provide effective bounds to the Commerce Clause by focusing on the "economic" nature of the regulated activity.[78] Therefore, as Justice Souter contends, "it seems fair to ask whether the step taken by the [*Lopez*] Court . . . does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago."[79] Accordingly, to be successful, the *Lopez-Morrison* test must not make the same mistakes. It must create coherent results and must successfully correlate to a statute's impact on interstate commerce.

1. The Rehnquist Court Attempts to Use a Categorical Approach to Provide a Workable Framework

a. The "Economic" Nature of the Regulated Activity Is Central

In *Lopez*, the Rehnquist Court returned to a categorical approach. The Court faced the question of whether the Commerce Clause gave Congress the power to use the Gun Free School Zones Act ("GFSZA") to regulate gun possession near a school.[80] Since the regulation of gun possession near a school constituted neither a regulation of a channel of interstate commerce nor a regulation of an instrumentality of interstate commerce, the statute's constitutionality depended upon whether it substantially affected interstate commerce.[81] The sharply

76. *Lopez*, 514 U.S. at 607 (Souter, J., dissenting).
77. *Id.* at 608 (Souter, J., dissenting).
78. *See id.* at 557, 559–61; *Morrison*, 529 U.S. at 607, 613.
79. *Lopez*, 514 U.S. at 608 (Souter, J., dissenting).
80. *Id.* at 551–52.
81. *Id.* at 558–59.

divided Court held that Congress exceeded its power under the Commerce Clause because possession of a gun near a school did not substantially affect interstate commerce.[82] The Court presented four factors for determining whether a statute substantially affects interstate commerce: (1) whether the object of the regulation is "economic" in nature; (2) whether the statute contains a nexus to interstate commerce; (3) whether congressional findings show a substantial effect on interstate commerce; and (4) whether the substantial effects on interstate commerce are too attenuated.[83]

In striking down the GFSZA, the Rehnquist Court emphasized the first factor, which it perceived as the "non-economic" nature of gun possession in a school zone.[84] Chief Justice Rehnquist observed that the regulation of gun possession "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[85] Although the Court did not resolve whether the "non-economic" status of an activity completely prohibited congressional oversight, the "non-economic" characterization nonetheless played a major role in the Court's determination that gun possession did not substantially affect interstate commerce.[86] Thus, considering subsequent case law, while on the surface the *Lopez-Morrison* framework only explicitly limits the traditional deferential approach, in reality it constitutes a return to the categorical approach.

Five years later in *Morrison*, the Court reemphasized the importance of the "economic" classification of the regulated activity. In *Morrison*, the Court faced the question of whether the Violence Against Women Act ("VAWA") regulated activity that substantially affected interstate commerce.[87] Chief Justice Rehnquist noted that "a fair reading of *Lopez* shows that the non-economic, criminal nature of the conduct at issue was central to our decision in that case."[88] Applying this principle, the Court reasoned that gender motivated crimes are not "economic" and therefore may not be aggregated to show an effect on interstate commerce.[89] Again, Chief Justice Rehnquist was clever with respect to the threshold nature of the "economic" characterization. The Chief Justice wrote, "While we need not adopt a cate-

82. *Id.* at 567.
83. *See id.* at 559–68.
84. *See id.* at 567.
85. *Id.* at 561.
86. *Id.* at 561, 567.
87. *See* United States v. Morrison, 529 U.S. 598, 602–07 (2000).
88. *Id.* at 610.
89. *See id.* at 617.

gorical rule against aggregating the effects of non-economic activity in order to decide these cases, thus far . . . our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[90] Thus, the factor is central but not necessarily dispositive. This creates a strong potential for confusion in the lower courts.

b. The "Economic" Requirement Forces the Identification of the Precise Object of the Regulation

By emphasizing the importance of the "economic" nature of the regulation, the *Lopez-Morrison* analysis has forced lower courts faced with ESA challenges to precisely identify the object or activity of the regulation. Indeed, it seems intuitive that a court cannot resolve whether an object or activity is "economic" or "non-economic" without identifying what that object or activity is.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers[91] ("*SWANCC*") solidified the importance of identifying the precise object of the regulation. The Supreme Court addressed the question of whether Congress had authority to protect intrastate wetlands that provided habitats for migratory birds from the development of a municipal landfill.[92] In *SWANCC*, the Court could have viewed the precise object of the regulation as the development of the landfill or, alternatively, as the protection of the wetlands.[93] In dicta, Chief Justice Rehnquist reasoned that a court must identify the precise object of the regulation to answer the questions raised by the substantial effects analysis.[94] The Court, however, avoided identifying the precise object of the regulation evading the constitutional issue and holding that the wetlands in question was beyond the scope of the Clean Water Act.[95] Furthermore, the Court failed to give any guidance on how to identify the precise object.[96]

90. *Id.* at 613.
91. 531 U.S. 159 (2001).
92. *Id.* at 166.
93. *See id.* at 173.
94. *See id.*
95. *See id.*
96. *See id.* at 174.

2. The Rehnquist Court Attempts to Use the "Economic"/"Non-economic" Distinction to Limit the Commerce Clause Doctrine to Interstate Commerce

The Rehnquist Court attempts to use the "economic" requirement as a proxy to distinguish between activities that substantially affect interstate commerce and those that do not.[97] If a regulated intrastate activity is determined to be "economic," it can be aggregated to show substantial effects on interstate commerce.[98] If the activity is not "economic," however, it may not be aggregated, and any effects on interstate commerce are, therefore, too attenuated.[99] Implicit in this requirement is a belief that limiting the Commerce Clause to "economic" activities will somehow limit the Commerce Clause to interstate commerce. Unfortunately, Chief Justice Rehnquist never explained how the economic character of an activity inherently alters the degree or substantiality of its impact on interstate commerce. Chief Justice Rehnquist has merely argued that the Court has never upheld the regulation of a "non-economic" activity that substantially affects interstate commerce.[100]

II. The *Lopez-Morrison* Framework Does Not Accomplish Its Own Goals

The Court has returned to a categorical approach—similar to the one that failed under the pressures of the Depression. The Court's previous experience with a categorical approach to the Commerce Clause proved unworkable and did not correlate to a statute's affect on interstate commerce, yet the Court has returned to a similar approach. As Justice Souter presciently asked in his *Lopez* concurrence, can the Court's current approach overcome the failures that doomed the "direct"/"indirect" effects test?[101]

As applied to the ESA, the answer is a resounding no. The *Lopez-Morrison* test has not overcome the previous failures of the "direct"/"indirect" effects test. The Court has not created clarity for the lower

97. *See* NOONAN, *supra* note 14, at 128–30.

98. United States v. Lopez, 514 U.S. 549, 560 (1995); United States v. Morrison, 529 U.S. 598, 610 (2000).

99. *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 617. Though Chief Justice Rehnquist did not create a per se rule, some scholars believe that he did so in effect. *See* Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in* United States v. Morrison, 18 CONST. COMMENT. 563, 566–67 (2001).

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

101. *See Lopez*, 514 U.S. at 608 (Souter, J., dissenting).

courts, as circuit courts have not consistently identified the proper object of ESA. These incoherent results reflect the failures of the Rehnquist Court's test, rather than any failure in the application of the test. Furthermore, the test does not successfully correlate to the statute's impact on interstate commerce; the "economic"/"non-economic" distinction fails to capture the ESA's real effects on interstate commerce.

A. Commerce Clause Challenges to the ESA Demonstrate the Incomprehensibility of the *Lopez-Morrison* Analysis

One of the primary goals of the *Lopez-Morrison* framework is to create a workable system for lower courts to interpret Commerce Clause challenges to statutes.[102] In other words, the *Lopez-Morrison* analysis must produce coherent results from any possible fact pattern. Under Commerce Clause challenges to the ESA, however, the circuit courts have not been able to coherently or consistently identify the particular object of the regulation that must be "economic." This designation has led to incoherent results. Moreover, this confusion represents the failures of the *Lopez-Morrison* framework, rather than the failures of the circuit courts' application—and therefore demonstrates that the framework is incomprehensible.

1. The Circuit Courts Have Inconsistently Identified the Proper Object of the Regulation: the Conduct, the Individual Target, or the Comprehensive Goal

Because the *Lopez-Morrison* analysis hinges upon the determination of whether the object of the regulation is "economic," lower courts must first identify the object that is being regulated. Under Commerce Clause challenges to the ESA, the circuits have inconsistently defined the proper object as the conduct, the individual target, or the comprehensive goal.

The Fourth Circuit and the D.C. Circuit view the proper object of the ESA as the human conduct taking the species ("conduct approach").[103] For example, under the conduct approach, the commercial development that destroys a critical habitat would be the object of the ESA. However, this approach has not been fully accepted; the

102. *See* NOONAN, *supra* note 14, at 128–30.

103. Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1072–73 (D.C. Cir. 2002); Gibbs v. Babbit, 214 F.3d 482, 495 (4th Cir. 2000) (reasoning that landowners, who consider the red wolf a menace, kill them in an effort to protect their livestock which has commercial value).

Fifth Circuit expressly rejected the conduct approach in *GDF Realty Investors, Ltd. v. Norton* ("*GDF*").[104]

Additionally, the object of the regulation could also be defined as the target of the regulation. There are two separate ways to define the target of the regulation. First, as the Fourth Circuit held in *Gibbs v. Babbit*,[105] the target of the regulation could be viewed as the loss of the individual species ("individual target approach"). Second, the target could be the effect that losing a species has on the comprehensive goal of preserving biodiversity ("comprehensive approach") as the D.C. Circuit did in *National Association of Home Builders v. Babbitt* ("*NAHB*")[106] and the Fifth Circuit did in *GDF*.[107] Even within the comprehensive purpose approach, the circuits cannot reach a consensus as to why preserving biodiversity affects interstate commerce. Judge Wald's majority opinion in *NAHB* provides that the preservation of biodiversity substantially affects interstate commerce through its protection of potential pharmaceuticals.[108] On the other hand, *NAHB* and *GDF* both reasoned that preserving biodiversity substantially affects interstate commerce through its effects on the health of ecosystems.[109]

a. The *NAHB* Court Adopts Both the Conduct Approach and the Comprehensive Approach

NAHB demonstrates the confusion that a single court may have in applying the *Lopez-Morrison*[110] framework.[111] The D.C. Circuit addressed the question of whether Congress could protect the purely intrastate, "non-economic" Delhi Sands Flower-Loving Fly ("Delhi Fly") from the development of a hospital and roadway.[112] Considering the three approaches outlined above, the court could have taken one

104. 326 F.3d 622, 623 (5th Cir. 2003).

105. 214 F.3d 483 (4th Cir. 2000).

106. 130 F.3d 1041, 1053–54 (D.C. Cir. 1997).

107. *GDF Realty*, 326 F.3d at 640–41.

108. NAHB v. Babbitt, 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Congress contemplated that listed species may contain actual medicines and that these medicines could provide templates for the multibillions pharmaceutical industry to synthesize prescription drugs. *See* H.R. REP. NO. 93-412, at 4–5 (1973); GARY WATTS ET AL., THE ENDANGERED SPECIES ACT AND CRITICAL HABITAT DESIGNATION: AN INTEGRATED BIOLOGICAL AND ECONOMIC APPROACH, IMPACTS OF CLIMATE CHANGE ON SOCIETY 191–92 (Apr. 1997).

109. *GDF Realty*, 326 F.3d at 640–41.

110. *NAHB* was decided before *Morrison*. Nevertheless, for matters of clarity, the Comment refers to the *Lopez-Morrison* test when referring to its impact on *NAHB*.

111. *See NAHB*, 130 F.3d at 1041.

112. *See id.* at 1043, 1046.

of three paths. Under the conduct approach, the object of the regulation would have been the development of the hospital and the roadway. Under the individual target approach, the object of the regulation would have been the Delhi Fly. Finally, under the comprehensive approach, the object of the regulation would have been the effect of the loss of the Delhi Fly on biodiversity. While the D.C. Circuit upheld the ESA, the two affirming judges and the dissenting judge applied significantly different reasoning.[113]

None of the judges attempted to adopt the individual target approach, since the Delhi Fly arguably does not fit the Rehnquist Court's view of the term "economic" and is completely isolated to California.[114] The court reached this conclusion despite the important niche that the Delhi Fly plays in its habitat; it pollinates flowers, which other species depend upon.[115] Nonetheless, under the *Lopez-Morrison* analysis, the Delhi Fly may not be aggregated to show a substantial effect on interstate commerce because it is an intrastate "non-economic" object. Consequently, it is likely that the Rehnquist Court would find that regulating the Delhi Fly violates the Commerce Clause.

In the majority opinion, Judge Wald reasoned that the provision was constitutional based on two of the *Lopez-Morrison* categories; it constituted proper congressional control over the channels of interstate commerce[116] and it substantially affected interstate commerce.[117] Judge Wald relied on two justifications for holding that the ESA provision substantially affects interstate commerce. First, she adopted the comprehensive approach, arguing that in the aggregate the listed species contain genetic diversity and therefore may have potential commercial medicinal value.[118] Second, she reasoned that the Act substantially affects interstate commerce by preventing states from lowering environmental regulations in an attempt to attract industry,

113. *Id.* at 1052 n.10.

114. *Id.* at 1067 (Sentelle, J., dissenting).

115. *Id.* at 1043–44; G. TYLER MILLER, JR., ENVIRONMENTAL SCIENCE: WORKING WITH THE EARTH 64 (Thomson Learning, 10th ed. 2004).

116. *NAHB*, 130 F.3d at 1046; Blumm & Kimbrell, *supra* note 17, at 329. No circuit, however, has applied the channels of interstate commerce category to an ESA case since *NAHB*.

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

118. *Id.* Although the Fifth Circuit later adopted the comprehensive approach in *GDF Realty*, it rejected Judge Wald's aggregation of listed species rationale and instead emphasized the effect of biodiversity on the health of ecosystems. *See generally* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 628 (6th Cir. 2003). This reasoning mirrors Judge Henderson's concurrence in *NAHB*. *See NAHB*, 130 F.3d at 1058–60 (Henderson, J., concurring).

a phenomenon known as the race to the bottom.[119] This race to the bottom rationale expands the conduct approach to include preventing destructive state policy, rather than merely private conduct that threatens protected species.

Judge Henderson's concurring opinion joined the majority's comprehensive approach but asserted different reasons for its substantial effects upon interstate commerce. While Judge Wald relied upon the potential medical benefits of all listed species, Judge Henderson relied upon the effects of a healthy ecosystem on interstate commerce.[120] She reasoned that the potential commercial effects of undiscovered medicines are too attenuated to satisfy the substantial effects test.[121] Instead, she contended that because of the interconnectedness of species and ecosystems, the loss of one species affects land and objects that are involved in interstate commerce.[122] Thus, the protection of a purely intrastate species substantially affects interstate commerce.[123]

In addition to the comprehensive purpose argument, Judge Henderson relied upon the conduct approach; the commercial development that was potentially going to destroy the Delhi Fly constituted the object of the regulation.[124] Since the commercial land development was clearly "economic," Judge Henderson's opinion reasoned that the conduct could be aggregated to show a substantial effect on interstate commerce.[125] As explained below, although the D.C. Circuit did not adopt this approach in its majority opinion in *NAHB*, it later adopted it in *Rancho Viejo, L.L.C. v. Norton*.[126]

In his *NAHB* dissent, Judge Sentelle relied on the individual target approach to conclude that the protection of the Delhi Fly violated the Commerce Clause.[127] He reasoned that Congress may not protect the Delhi Fly because it is a "non-economic" object.[128] In reaching this conclusion, Judge Sentelle rejected Judge Wald's comprehensive approach for failing all of the *Lopez* factors: an ecosystem is not com-

119. *NAHB*, 130 F.3d at 1052. The race to the bottom occurs when states attempt to attract industry by lowering the costs of business through minimizing environmental regulations. *Id.* at 1054–57.

120. *Id.* at 1059 (Henderson, J., concurring).

121. *Id.* at 1058 (Henderson, J., concurring).

122. *Id.*

123. *Id.*

124. *Id.* at 1059–60 (Henderson, J., concurring).

125. *Id.*

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

127. *NAHB*, 130 F.3d at 1067 (Sentelle, J., dissenting).

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

merce,[129] the statute contained no jurisdictional limit,[130] and the reasoning had no logical stopping point.[131] He also rejected Judge Henderson's conduct approach, reasoning that it would contradict *Lopez* by providing no effective bounds to congressional authority and allow the regulation of "non-economic" activities where the regulation substantially affects interstate commerce.[132]

b. The *Rancho Viejo* and *GDF* Courts Adopt Conflicting Reasoning

The 2003 decisions in *Rancho Viejo* and *GDF* further illustrate that applying the *Lopez-Morrison* framework has confused different circuit courts.[133] Although *Rancho Viejo* and *GDF* both upheld the ESA against Commerce Clause challenges within a week of each other, each circuit used strikingly conflicting reasoning.[134] In choosing the object of the regulation, the *Rancho Viejo* court upheld the ESA based on the conduct approach,[135] while the *GDF* court upheld the ESA based on the comprehensive approach.[136]

In *Rancho Viejo* the D.C. Circuit addressed the question of whether the Commerce Clause gave Congress authority to protect the intrastate, "non-economic" arroyo toad from a residential development.[137] Under the conduct approach, the object of the regulation would have been the residential development. Under the individual target approach, the object of the regulation would have been the arroyo toad. Finally, under the comprehensive approach, the object of the regulation would have been the effects of the loss of the arroyo toads on Congress's goal of preserving biodiversity.

The D.C. Circuit upheld the ESA based on the conduct approach, determining that the regulated activity was the planned residential development, rather than the arroyo toad that it threatened.[138] The court reasoned that conduct could serve as the object of the regulation because Congress had contemplated protecting endangered species by regulating the development of land.[139] The

129. However, this is debatable based on one's definition of commerce.
130. *NAHB*, 130 F.3d at 1064–65 (Sentelle, J., dissenting).
131. *Id.* (Sentelle, J., dissenting).
132. *Id.* at 1067 (Sentelle, J., dissenting).
133. *See generally* Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 628 (5th Cir. 2003).
134. *See generally Rancho Viejo*, 323 F.3d 1062; *GDF Realty*, 326 F.3d 622.
135. *See Rancho Viejo*, 323 F.3d 1062.
136. *GDF Realty*, 326 F.3d at 640–41.
137. *See Rancho Viejo*, 323 F.3d at 1064.
138. *Id.* at 1072.
139. *Id.* at 1072–73.

court further found that regulating the residential development substantially affected interstate commerce because it required workers and materials from other states.[140]

Significantly, the conduct approach may not, however, completely protect against constitutional challenges to the ESA. In his concurring opinion, Judge Ginsburg emphasized that the conduct approach is limited to commercial conduct, which eliminates ESA protection for a species that is threatened by a lone hiker or landscaping homeowner.[141]

As though addressing its opinion at Judge Ginsburg's *Rancho Viejo* opinion, the Fifth Circuit refuted the conduct argument in *GDF*, stating that while the effect of the ESA may be to sometimes prohibit commercial development, Congress is not directly regulating development.[142] The Fifth Circuit addressed whether the Commerce Clause provided Congress the authority to protect invertebrate cave species from a commercial development.[143] In rejecting the conduct approach, the court reasoned that there is a distinction between the act of taking and the purpose of taking, and the ESA prohibits taking a species through *any* conduct, rather than specifically through commercial development.[144] Furthermore, the conduct reasoning would lead to inconsistent results; it "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors."[145] Finally, the conduct approach would lead to virtually unlimited authority under the Commerce Clause, which would obliterate its limiting purpose.[146]

Instead, the *GDF* court relied on Judge Henderson's *NAHB* concurrence that employed the comprehensive approach in upholding the ESA.[147] The court reasoned that a noncommercial, intrastate activity (the loss of cave species) was essential to the ESA's overall economic regulatory scheme, since allowing piecemeal extinctions threatens the interdependent web of all species and therefore undermines the ESA's essential purpose of protecting ecosystems.[148] Indeed, the *GDF* court went beyond Judge Henderson's concurring

140. *Id.* at 1069.
141. *Id.* at 1080 (Ginsburg, C.J., concurring).
142. *See GDF Realty*, 326 F.3d at 633.
143. *Id.* at 624.
144. *Id.* at 633.
145. *Id.* at 634.
146. *Id.*
147. *Id.* at 640–41.
148. *Id.* at 640.

opinion in *NAHB*, providing evidence of the importance of ecosystem health and balance.[149] Endangered species perform critical "ecosystem services" such as decomposing organic matter, renewing soil, mitigating floods, purifying air and water, or partially stabilizing climatic variations.[150]

The Fifth Circuit rejected the individual target approach, however, stating that cave species, themselves, do not have a significant effect on interstate commerce.[151] The court reasoned that the scientific interest generated by the species and their possible future "economic" benefits was either negligible or too hypothetical to satisfy the *Morrison* requirement that there must be a close link between an intrastate activity and its effect on interstate commerce.[152] Thus, with its rejection of the conduct approach and its approval of the comprehensive approach, the Fifth Circuit in *GDF* employed starkly different reasoning than the D.C. Circuit in *NAHB* in upholding the ESA's constitutionality.

c. *Gibbs v. Babbitt* Relied on Both the Individual Target and the Conduct Approaches

In *Gibbs*, the Fourth Circuit held that Congress could prevent ranchers from shooting red wolves.[153] In contrast to the D.C. and Fifth Circuits, the Fourth Circuit upheld the ESA based on the individual target approach; red wolves affect interstate commerce in the aggregate, since they create value in tourism, scientific research, and the pelt trading industry.[154] This approach, though sufficient on the particular facts of *Gibbs*, cannot apply to "non-economic," intrastate species, such as the Delhi Fly or cave species, since they do not fit the Rehnquist Court's definition of "economic" and therefore cannot be aggregated. The Fourth Circuit also endorsed the conduct approach by reasoning that landowners, who consider the red wolf a menace, kill[155] them in an effort to protect their livestock.[156] Since, the con-

149. Judge Sentelle's dissent in *NAHB* criticized Judge Henderson's concurrence because it did not explain how the health of ecosystems significantly affects interstate commerce. *See* NAHB v. Babbitt, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting).

150. *GDF Realty*, 326 F.3d at 640; *see* John Charles Kunich, *Preserving the Womb of the Unknown Species with Hotspots Legislation*, 52 HASTINGS L.J. 1149, 1164–65 (2001) (discussing role of many commercially insignificant species in achieving ecosystem survival).

151. *GDF Realty*, 326 F.3d at 637.

152. *Id.*

153. *See* Gibbs v. Babbitt, 214 F.3d 483, 492–93 (2000).

154. *See id.* at 494–95.

155. "Species takes" is the term of art that refers to the killing of an endangered or listed species. *See* 16 U.S.C. § 1532 (19) (2001). Section 4 of the ESA does not allow anyone

duct of killing the species is "economic" in nature, it can be aggregated to show a substantial effect on interstate commerce.[157]

As *GDF* departed from *NAHB*, *Gibbs* employs different reasoning than other courts that have addressed the ESA's constitutionality. Where *Lopez-Morrison* places importance on identifying an object as "economic," the various courts attempting to follow the dictates of the Court's decisions are unable to do just that which the Rehnquist Court believes is the first step in Commerce Clause analysis.

2. The Incoherent Results Reflect the Incomprehensibility of the *Lopez-Morrison* Analysis Rather Than Any Failures of the Circuit Courts

Since defining the object of the regulation is essential to determining whether or not it is "economic," lower courts need guidance in making this determination. Furthermore, because of the centrality of the "economic" requirement, a precise definition of the word "economic" seems essential. Finally, since, the definition of "economic" probably determines which analytic approaches to the object regulated by the ESA would survive, it likely influences how a court sees the proper object. It is the Rehnquist Court's failure to resolve these issues that causes such confusion in the lower courts.[158]

a. The Rehnquist Court Failed to Give Proper Guidelines for Determining the Proper Object of the Regulation

Although the resolution of the proper object of the regulation is essential to determining whether that object is "economic" or not, neither *Lopez* nor *Morrison* discussed the issue. Furthermore, *SWANCC* mandated this requirement, but did not give any guidelines for determining the proper object.[159] The determination of this question is crucial because it significantly affects the scope of the ESA under the Commerce Clause.

If the proper object of the regulation were the conduct that destroys the species, any species could be regulated under the ESA, as long as the conduct is "economic." Therefore, the Delhi Fly would be

to "harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect or to attempt to engage in any such conduct." *Id.*

156. *Gibbs*, 214 F.3d at 495.

157. *Id.* at 493.

158. *See* Mathews, *supra* note 2, at 948.

159. *See* Solid Waste Agency of No. Cook County ("SWANCC") v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001).

protected from a hospital development in *NAHB*, the arroyo toad would be protected from the residential development in *Rancho Viejo*, the cave species would be protected from the commercial development in *GDF*, and the red wolves would be protected from the ranchers shooting them in an attempt to protect their ranches in *Gibbs*. Nonetheless, no species, regardless of any "economic" value, would be protected from a "non-economic" activity, such as a landscaping homeowner or an off-road vehicle.

Under the individual target approach, only the red wolves would survive, since none of the other species have a measurable "economic" value. The red wolves have an "economic" value in the aggregate through their effects on tourism, pelt trading, and science.

Finally, under the comprehensive purpose approach, the ESA would survive a Commerce Clause challenge as applied to any *listed* species or any activity. This is rational because the listing process ensures that congressional authority is limited to those species that are endangered or threatened and thus are necessary to the preservation of biodiversity.

b. The Court's Failure to Define the Scope of "Economic" Contributed to the Confusion of the Circuit Courts

Unfortunately, neither *Lopez* nor *Morrison* gave any guidance in defining "economic" activity. Rather, the Court's conclusions rest on the assumption that gun possession and gender-based violence are unarguably "non-economic."[160] The distinction, however, is not that simple. The word "economic" could be seen as the allocation of resources, where money is a claim on resources.[161] This view may include activities such as housework because it involves the cost of working for an extended period of time and the benefits of a clean house.[162]

Perhaps, the Court meant to limit the question to "commercial" activity, which is more limited and would only include the creation or exchange of services.[163] In *Lopez*, for example, the Court used the two words interchangeably.[164] Indeed, the Rehnquist Court has not clearly given lower courts guidance and has, in essence, applied the "I know it

160. *See* United States v. Morrison, 529 U.S. 598, 617 (2000); United States v. Lopez, 514 U.S. 549, 567 (1995); Ides, *supra* note 99, at 567.

161. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 3 (4th ed. 1992).

162. *Id.*

163. *See* Ides, *supra* note 99, at 570–71.

164. *Lopez*, 514 U.S. at 565–66.

when I see it" standard.[165] The Court's definition probably lies somewhere between the broad definition and the more narrow "commercial" definition.[166]

This distinction is significant because it affects which approaches to the proper object would be upheld as constitutional under Commerce Clause challenges to the ESA. Undoubtedly, the definition of "economic" influences how a court views the proper object of the regulation. Under a broad "economic" definition the individual approach may survive a Commerce Clause challenge to the ESA, since even the killing of a "non-economic" species would be a form or resource allocation. Under the more narrow view of "economic," however, the ESA would only protect popular, "economic" species, such as the red wolf, and would not protect the majority of the listed species. Thus, the ESA would be completely ineffectual. On the other hand, under the "commerce" view, only the conduct approach survives, since it is the only approach that encompasses the creation or exchange of services. By creating a shopping center, a developer is literally creating a forum for consumption as well as relying upon workers and supplies in the development process. Surely, this is "commerce" under even the narrowest view. It is still unclear whether either view of "economic" would include the comprehensive approach, thus contributing to the confusion in the circuits.

c. The Rehnquist Court Fails to Clarify the Significance of the Essential Part of a Larger Economic Regulation Exception

One way in which the regulated activity may be seen as "economic" is when a noncommercial activity is fundamentally important to a larger economic regulation.[167] The Supreme Court, however, has not properly resolved whether this remains an exception.[168] *Lopez* implied that a federal regulation of noncommercial activities does not violate the Commerce Clause if the intrastate, noncommercial activities were "an essential part of a larger regulation of economic activity."[169] Chief Justice Rehnquist nonetheless dismissed the VAWA as not being "a larger regulation of economic activity" without much analysis, thus leaving the lower courts with no guidelines as to the

165. Ides, *supra* note 99, at 574.
166. *Id.*
167. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640–41 (5th Cir. 2003).
168. *Cf.* United States v. Morrison, 529 U.S. 598 (2000).
169. *Id.* at 610.

boundaries of this possible exception.[170] Moreover, *Morrison* does not discuss whether the essential part of a larger regulation of "economic" activity argument may be presented, thus making its viability even less clear.[171] Finally, *SWANCC* emphasized the vulnerability of the Clean Water Act's application to intrastate, noncommercial wetlands even though the overall purpose of the Clean Water Act is to preserve *navigable* waterways, which provides a jurisdictional restriction to "economic" activity.[172] Therefore, it remains unclear whether this "larger regulation of economic activity" exception still applies, and if it does, the boundaries remain unclear.

The unresolved issue of whether a noncommercial activity's "essential importance to a larger economic regulation" can satisfy the substantial effects test is dispositive as to whether the *GDF* court's comprehensive approach is tenable. The court aggregated the extinction of species ("non-economic" activities) to create an impact on ecosystems (which substantially affects interstate commerce).[173] Without the exception, the *GDF* court seems to have violated the *Lopez-Morrison's* essential dogma of not aggregating a "non-economic" activity.

Because the Rehnquist Court has failed to provide a framework that the circuit courts can coherently apply, the *Lopez-Morrison* framework is incomprehensible. Beyond this incomprehensibility, *Lopez-Morrison* fails to achieve its own goals as it regulates statutes in a manner inconsistent with the intent of the Commerce Clause.

B. As Applied to the ESA, the Critical "Economic" Requirement Does Not Correlate to a Regulated Activity's Effect on Interstate Commerce

The ESA has real impacts on the interstate economy. The *Lopez-Morrison* analysis, however, fails to recognize these effects when applied to an intrastate, "non-economic" species.[174] Therefore, the test fails to correlate to the goal of the Commerce Clause.

170. *Id.*

171. *Cf. id.*

172. *See generally* SWANCC v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).

173. *GDF Realty*, 326 F.3d at 640–41.

174. *See* Bradford C. Mank, *Protecting Intrastate Endangered Species: Does the ESA Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 754 (2002) [hereinafter Mank, *Protecting Intrastate Endangered Species*] (suggesting that *Morrison* and *SWANCC* raise serious questions as to Congress's authority to regulate intrastate species with little current economic value); Lilly Santaniello, *Commerce Clause Challenges to the Endangered Species Act's Regulation of Intrastate Species on Private Land*, 10 HASTINGS W.- NW. J. ENVTL. L. & POL'Y 39, 41 (2003).

1. The ESA Substantially Affects Interstate Commerce

Congress enacted the ESA with the intent of preserving individual species in order to protect biodiversity.[175] Congress comprehended that protecting biodiversity would, in turn, substantially affect interstate commerce.[176] Indeed, empirical studies confirm that preserving biodiversity does, in fact, affect interstate commerce.

a. Congress Comprehended the Necessity of Protecting Individual Species in Order to Protect Entire Ecosystems

Protecting an individual species is essential to Congress' comprehensive goal of preserving biodiversity. Ecologists recognize that species are interconnected and that the loss of one species can affect biodiversity, which affects entire ecosystems.[177] Each species performs an ecological niche, or role, in its habitat, and other species depend upon the performance of this niche for their survival.[178]

The food chain represents one potential relationship between species; each species acts as a source of food for the next.[179] For example, a hawk may eat a robin, which consumed caterpillars that ate leaves.[180] Decomposers consume the remains of the leaf, caterpillar, robin, and hawk after they each die.[181] Thus, the protection of each of these species is essential to the survival of the others.

The Delhi Fly in *NAHB* provides another example of an individual species whose protection is essential to the preservation of biodiversity. Many plant species depend upon insects, such as the Delhi Fly, to pollinate their flowers.[182] Moreover, humans and other animals depend upon plants for food, either by eating them or by eating animals that consume them.[183] In essence, without pollinating insects, very few vegetables would be available for humans or other species to consume.[184] In fact, if all insects disappeared today, most of the earth's animals would become extinct within a year because of the

175. NAHB v. Babbitt, 130 F.3d 1041, 1058 (D.C. Cir. 1997) (Henderson, J., concurring) ("Congress recognized the interconnection of the various species and the ecosystems."); MILLER, *supra* note 115, at 98.

176. 16 U.S.C. § 1531(b) (2001).

177. *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring) (citing Johnson, *supra* note 18, at 79).

178. MILLER, *supra* note 115, at 98.

179. *Id.* at 76.

180. *Id.* at 75.

181. *Id.*

182. *NAHB*, 130 F.3d at 1043–44; MILLER, *supra* note 115, at 64.

183. MILLER, *supra* note 115, at 64.

184. *Id.*

disappearance of so much plant life.[185] Even less alarmist results would surely affect interstate commerce to a significant degree.

The ESA's listing process of endangered species shows that Congress comprehended the interconnectedness of all species and recognized that the protection of each listed species is essential to the overall goal of preserving biodiversity. Section 4 of the ESA[186] provides that the Secretary of the Interior must ascertain which species are endangered or threatened and designate critical habitats when necessary.[187] Sections 4(b)(1) and 4(b)(2) provide that the Secretary's decision must be based solely on the best scientific and commercial data available.[188] Indeed, the Secretary may not consider the economic impact of protecting a species in the listing process,[189] which indicates that Congress was aware of the economic impact of the ESA and directed the Secretary of the Interior to disregard those impacts.

This is unusual and relatively extreme for an environmental statute,[190] which begs the question: why did Congress not want the Secretary to consider the economic effects of listing one species? The answer lies in the complexity of the problem. When narrowly viewing the loss of one species, such as a sand fly, it may appear that the economic losses of restricting commercial development may outweigh the benefits of protecting the species. Congress, however, understood that each listed species is essential to biodiversity on a national level. Since each species is essential to biodiversity, the loss of one species could substantially affect interstate commerce through its negative impact on ecosystems.

b. Congress Comprehended That Preserving Biodiversity Would Substantially Affect Interstate Commerce

As stated above, Congress protected individual species with the intent of preserving broader biodiversity. The text of the ESA expressly states that Congress's purpose in passing the ESA is "to provide

185. *Id.*

186. 16 U.S.C. § 1532(6) (2001).

187. *Id.*; Mank, *Protecting Intrastate Endangered Species*, *supra* note 174, at 730.

188. 16 U.S.C. § 1533(b)(1)(A) (2001); Mank, *Protecting Intrastate Endangered Species*, *supra* note 174, at 940.

189. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 187–88 (1978).

190. Congress generally balances economic costs with the environmental interest when enacting a statute. *See* Thomas R. Mounteer, *The Inherent Worthiness of the Struggle: The Emergency of Mandatory Pollution Prevention Planning as an Environmental Regulatory Ethic*, 19 COLUM. J. ENVTL. L. 251, 298 (1994).

a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[191]

Congress also recognized that protecting biodiversity would, in turn, affect interstate commerce. The ESA House Report shows that Congress was concerned with the actual and potential commercial value of biodiversity.[192] First, the text of the ESA provides that many endangered species are of "esthetic, ecological, educational, historical, recreational, and scientific *value* to the Nation and its people."[193] Although it could be argued that *value* may refer to a more intrinsic value, Congress contemplated and focused on the economic value of biodiversity.[194] Furthermore, a broad definition of the term of "economics" would surely include the protection of species as a form of resource allocation.[195] Second, the House Report provides that if we do not protect biodiversity, we endanger the genetic heritage of the threatened species', as well as our own.[196] This genetic heritage has an incalculable *value* because it may contain endless possibilities for cures for cancer or other diseases, present or future.[197] Additionally healthy ecosystems affect the economy through ecosystem services: renewing soil, mitigating floods, decomposing organic material, purifying air and water, and partially stabilizing climatic variations.[198]

Alternatively, Congress understood that the ESA would prevent commercial development that destroys listed species, thus having a negative substantial effect on interstate commerce. Congress indicated that untempered economic growth and development was a pri-

191. 16 U.S.C. § 1531(b) (2001); NAHB v. Babbitt, 130 F.3d 1041, 1058 (D.C. Cir. 1997) (Henderson, J., concurring).

192. *See NAHB*, 130 F.3d at 1050–52 (discussing that the ESA's legislative history shows an emphasis on the future economic and medical benefits); Gibbs v. Babbitt, 214 F.3d 483, 496–97 (4th Cir. 2000) (same); Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause? The Split in the Circuits Over Whether the Regulated Activity is Private Commercial Development or the Taking of Protected Species*, 69 BROOK. L. REV. 923, 938 (2004) [hereinafter Mank, *Split in the Circuits*]; John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 193 & n.76 (1998).

193. 16 U.S.C. §1531(a)(3) (2001) (emphasis added).

194. *See* H.R. REP. No. 93-412, at 4–5 (1973). For example, biodiversity creates "economic" value by providing the pharmaceutical and tourism industries with essential resources. Consequently, these industries funnel billions of dollars into interstate commerce. *NAHB*, 130 F.3d at 1052–53; MILLER, *supra* note 115, at 74; WATTS ET AL., *supra* note 108, at 191–92.

195. *See* POSNER, *supra* note 161, at 3.

196. *Id.*

197. *Id.*; MILLER, *supra* note 115, at 74.

198. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640 (5th Cir. 2003); *see also* Kunich, *supra* note 150, at 1164–65 (discussing the role of many commercially insignificant species in achieving ecosystem survival).

mary cause of species extinction.[199] The text of the Act explains 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 for conservation."[200]

c. Empirical Studies Confirm That the ESA Actually Affects Interstate Commerce

As Congress comprehended, preserving biodiversity positively impacts interstate commerce by providing valuable resources, as well as by contributing to the availability of ecosystem services. A rich variety of genes, species, and biological communities provide our economy with food, wood, fibers, energy, raw material, industrial chemicals, and medicines.[201] For example, a species' genetic information not only allows it to adapt to changing environmental conditions but is also used in genetic engineering to produce new types of crops, foods, and pharmaceuticals.[202] These contributions funnel billions of dollars into the world economy each year.[203] Furthermore, eco-tourism generates at least $500 billion per year worldwide.[204]

Empirical evidence supports these contentions and shows that the ESA actually affects the national economy. In fact, an empirical study performed by a professor at Massachusetts Institute of Technology indicates that the listing of a species under the ESA may have a positive impact on the agricultural sector's performance.[205] Furthermore, another empirical study indicates that the critical habitat designation under the ESA may enhance recreational activities and economic development in other areas through the reallocation of water resources.[206] Finally, the impacts of the ESA are typically regional, rather than local, and thus affect interstate commerce.[207]

199. 16 U.S.C. § 1531(a)(1) (2001); Mank, *Split in the Circuits*, *supra* note 192, at 938.

200. 16 U.S.C. § 1531(a)(1); Mank, *Split in the Circuits*, *supra* note 192, at 938; Nagle, *supra* note 192, at 193.

201. *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring) (quoting Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1129 (1996)); MILLER, *supra* note 115, at 74; STEPHEN M. MEYER, THE ECONOMIC IMPACT OF THE ENDANGERED SPECIES ACT ON THE AGRICULTURAL SECTOR, MIT PROJECT ON ENVIRONMENTAL POLITICS & POLICY 2 (Oct. 1995).

202. MILLER, *supra* note 115, at 454.

203. *Id.* at 74.

204. *Id.* at 454.

205. *See* MEYER, *supra* note 201, at 2.

206. WATTS ET AL., *supra* note 108, at 2–3.

207. *Id.* at 25.

Additionally, preserving biodiversity facilitates the availability of crucial ecosystem services. Healthy ecosystems renew soil, mitigate floods, decompose organic material, purify air and water, and partially stabilize climatic variations.[208] Furthermore, species diversity increases ecosystem stability by providing more ways to respond to stresses.[209]

On the other hand, the designation of a habitat has negative substantial effects on interstate commerce by preventing commercial developments, the harvesting of trees, or the agricultural use of streams.[210] Either way, the ESA substantially affects interstate commerce.

2. The Formalistic "Economic" Requirement May Cause Courts to Miss the ESA's Substantial Effect on Interstate Commerce

The ESA highlights *Lopez-Morrison*'s analytic weaknesses. Specifically, the test is unable to effectively address a statute that regulates "economic" and "non-economic" activity, but nevertheless has a substantial effect on interstate commerce. Indeed, the circuit courts' inconsistent reasoning in constitutional challenges to the ESA demonstrate that the Rehnquist Court has failed to successfully distinguish between regulations that affect interstate commerce and those that do not. Recall the comprehensive purpose—defining the object of the ESA as the loss of one species on the biodiversity and the resulting impact on interstate commerce. Under *Lopez-Morrison*, the comprehensive purpose approach lies on extremely shaky ground because it aggregates "non-economic" activities (destroying cave species), which the *Lopez-Morrison* framework may not allow.[211] Without the "essential part of a larger regulation of economic activity" exception, which the Court has never explicitly articulated, the cave species are not "economic" in nature and are not fit for aggregation under *Lopez-Morrison*.[212]

Yet stretching this exception to the ESA seems to obliterate the limits of the Commerce Clause doctrine. Under this view the possession of guns or gender-based violence both seem to be essential to a

208. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640 (2003); *see also* Kunich, *supra* note 150, at 1164–65 (discussing the role of many commercially insignificant species in achieving ecosystem survival); Mank, *Protecting Intrastate Endangered Species*, *supra* note 174, at 787; MILLER, *supra* note 115, at 74.

209. MILLER, *supra* note 115, at 155.

210. WATTS ET AL., *supra* note 108, at 2.

211. United States v. Lopez, 514 U.S. 549, 561 (1995); Mathews, *supra* note 2, at 951.

212. *Cf.* United States v. Morrison, 529 U.S. 598 (2000).

larger regulation that has some "economic" impact.[213] The Supreme Court is not likely to accept this approach, since it would force the Court to confront and possibly overrule both the *Lopez* and *Morrison* holdings. Perhaps this is why the Court denied certiorari for *Rancho Viejo*.[214]

As detailed above, however, the complicated connection between modern economics and biodiversity elucidates that the ESA's comprehensive scheme does substantially affect interstate commerce. Therefore, the "economic" requirement does not properly correlate to a substantial effect on interstate commerce, nor must the Court extend the "larger part of an economic regulation" exception in order to find the ESA constitution.

The "economic" requirement also fails to properly correlate to substantial effects on interstate commerce, as applied to the conduct approach. Although this approach has a better chance of surviving a Commerce Clause challenge, it does not provide comprehensive protection to listed endangered species, which is essential to the success of the ESA's national goal. When the ESA prevents commercial development, it regulates an "economic" activity that, under *Lopez-Morrison*, a court can aggregate.

There are several reasons that the conduct approach is inadequate. Initially, this approach contradicts the ESA's legislative history, since it argues that the statute is essentially a regulation of commercial development rather than of biodiversity. Furthermore, it has not been unanimously accepted; the Fifth Circuit expressly rejected it and *SWANCC* indicated disapproval of the approach.[215] Most strikingly, even if the conduct approach were accepted, it does not accomplish the national goal of preserving biodiversity. It is arbitrary to allow Congress to regulate species that are threatened from commercial development, while not allowing Congress to regulate species that are threatened by a lone hiker, off road vehicle, or homeowner.

In his *Morrison* dissent, Justice Breyer provides an example that illustrates these arbitrary results. Justice Breyer writes, "[I]f chemical emanations through indirect environmental change cause identical, severe commercial harm outside the state, why should it matter whether local factories or home fireplaces release them?"[216] Similarly,

213. *See* Mathews, *supra* note 2, at 951.

214. Rancho Viejo, L.L.C. v. Norton, 540 U.S. 1218 (2004).

215. *See GDF Realty*, 326 F.3d at 633; SWANCC v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001).

216. *Morrison*, 529 U.S. at 657 (Breyer, J., dissenting).

it is arbitrary to allow Congress to regulate endangered species that are threatened by "economic" activity but not to allow Congress to regulate species that are threatened by "non-economic" activities. Both sets of species are equally important to the overall goal of preserving biodiversity and have an equal affect upon interstate commerce.

Finally, while the ESA may still be constitutional as applied to interstate, "economic" species under the target approach, this limited application would make the ESA completely ineffectual. Most of the species that the ESA must regulate to preserve biodiversity would not satisfy the "economic" requirement of the *Lopez-Morrison* analysis. Also, this would create illogical results in that Congress would be able to regulate species when they are abundant and spread across state lines but not when the species are so depleted as to exist in only one state. The depleted species are closer to extinction and therefore more important to the comprehensive purpose of preserving biodiversity.

III. The *Lopez-Morrison* Framework Cannot Be Fixed: The More the Court Tries to Make the Test Workable, the Less it Would Correlate to Interstate Commerce

As detailed above, *Lopez-Morrison* has not effectively avoided the analytical difficulties that doomed the "direct"/"indirect" effects test. Moreover, any attempt to define precisely the proper object of the regulation or the Rehnquist Court's definition of the word "economic" would drive the Court's Commerce Clause doctrine further into formalism, creating more imprecise categorical exemptions. Indeed, creating more categorical exemptions to combat the current confusion would simply make the *Lopez-Morrison* analysis even less capable of correlating to an effect on interstate commerce.

A. Categorical Exemptions Create Arbitrary Results

Categorical exemptions result in legal uncertainty.[217] Indeed, the *Lopez* Court conceded this point, stating that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty."[218] Furthermore, Justice Breyer's dissent in *Morrison* warned that the unworkability of the cate-

217. *Lopez*, 514 U.S. at 610.
218. *Id.*

gorical distinction is not due to any jurisprudential defect but rather a practical reality.[219] Justice Breyer wrote:

> We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental changes. Those changes taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate.[220]

Jurisprudence without considering a statute's overall purpose creates incomprehensible results.[221] The Rehnquist Court uses the precise definition of "economic" in an attempt to limit the Commerce Clause to interstate commerce at the expense of an understanding of why this distinction would accomplish that goal. As Lon Fuller writes, "[s]urely the judicial process is something more than a cataloguing procedure."[222] Fuller purports that interpretive problems should never turn on a single word because a judge has a larger responsibility in interpreting a case.[223] The difficulties of the lower courts in determining the proper object of the regulation demonstrate the unworkability of the "economic" distinction

B. Choosing the Proper Object of the Regulation: More Incoherence and Less Correlation to the Commerce Clause's Purpose

Defining the proper object of the regulation would not cure this defect but instead would take the Court further away from properly determining when a statute actually affects interstate commerce. If the Court simply chose the proper object of the ESA, the scope of that object would remain unclear. Furthermore, viewing the potential effects of one object on interstate commerce would not capture the Act's true economic impacts.

1. If the Court Chose the Proper Object of the Regulation, the Scope of that Object Would Remain Unclear

If the Court assigned the individual species as the proper object of the regulation, the extent of the species' proper aggregation to show a substantial effect on interstate commerce would remain un-

219. *Id.* at 660 (Breyer, J., dissenting).
220. *Id.*
221. *Id.*
222. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 666 (1958).
223. *Id.*

clear. For example, it is unclear whether the effects of the loss of all red wolves could be aggregated in *Gibbs*.[224] On the other hand, if the Court assigned the conduct as the proper object of the species, the proper scope of this conduct would also be unclear. Would it simply include the development threatening the species, or would it incorporate the interstate transfer of labor and supplies?[225] An even broader view of conduct would include the race to the bottom phenomenon.[226]

Finally, even if the Court accepts the comprehensive purpose as the object of the regulation, more questions would ensue. Can that species be aggregated with all endangered species.[227] Furthermore, the essential part of a larger economic regulation is difficult to use. For example, when is the regulation of an object "essential" to a comprehensive purpose? Also, when is an overall purpose "economic?" Does an "economic" purpose have to be Congress's motivating factor, or can it be one of many goals? Thus, solving the confusion with attempts to venture further into formalism would not make the *Lopez-Morrison* test more workable.

2. Limiting the Analysis to One Object Would Not Capture the True Effects on Interstate Commerce

As demonstrated in Part IIB, choosing the proper object of the regulation would make the *Lopez-Morrison* analysis less likely to correlate to any real effects on interstate commerce. The individual species approach would only capture the interstate commerce effects of "economic" species, such as the red wolf. This would miss the effects on interstate commerce of the more critically endangered species that cannot be defined as "economic." Ironically, these species may be more important to the critical balance of ecosystems.[228] The conduct approach does not capture a species' impact on the national economy when it is threatened by "non-economic" activities. Finally, the comprehensive approach captures the true impacts of the ESA on inter-

224. *See* Gibbs v. Babbitt, 214 F.3d 483, 493 (4th Cir. 2000) (allowing the aggregation of red wolves because red wolves are "economic").

225. *See* Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (allowing the aggregation of the development because it is "economic").

226. NAHB v. Babbitt, 130 F.3d 1041, 1052 (D.C. Cir. 1997).

227. GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 638 (5th Cir. 2003) (not allowing aggregation of all listed species); *NAHB*, 130 F.3d at 1052 (allowing the aggregation of all listed species).

228. The depleted species are closer to extinction and therefore more important to the comprehensive purpose of preserving biodiversity.

state commerce but would force the Court to overrule *Lopez* and *Morrison.*

Conclusion

The *Lopez-Morrison* analysis fails to accomplish its own goals because it creates incoherent results and cannot comprehend real and intuitive connections between modern interstate commerce and biodiversity. Indeed, the dollar value of a particular species has absolutely no relationship to its biological value. The "economic" value of the species does not determine the degree to which the food web, and therefore its habitat, depends upon a particular species' survival. Most importantly, the "economic" value of the species does not account for the degree to which that habitat, which is dependant upon the survival of non-economic species, affects interstate commerce. It is this biological value that Congress recognized as having an impact on interstate commerce.

The Rehnquist Court's requirement that the species of the particular controversy be "economic" misses this intuitive connection. Moreover, in trying to reconcile the ESA with the overly literal *Lopez-Morrison* test, circuit courts have gotten lost in a forest of confusion. Most of this confusion has centered around the question of which regulated object needs to have an "economic" value: (1) Is it the conduct that threatens the species; (2) is it the species of the particular controversy; or (3) is it that species' effect on biodiversity? This question cannot be resolved without adding more strands to the web of confusion.

Perhaps the Supreme Court has denied certiorari for Commerce Clause challenges to the ESA because it understands the serious problems of this paradox. Upon reviewing such a case, the Court would be forced to (1) hopelessly go deeper into the forest of formalism, which would further decrease the ability of the *Lopez-Morrison* analysis to limit the Commerce Clause to interstate commerce; (2) overturn *Lopez* and *Morrison*; or (3) deny Congress the authority to regulate a problem that has substantial effects on interstate commerce. The most viable option for the Court is to create a test that has a bird's eye view of the forest—one that comprehends the complexities of modern interstate economics as well as the relationship between that economy and biodiversity.

If the true rationale of the Rehnquist Court is to distinguish between activities that substantially affect interstate commerce and those that have no such effect, then the question should not be whether a

particular species is "economic." Instead, courts must focus on whether the environmental regulation as a whole, specifically the preservation of ecosystems, substantially affects interstate commerce. Thus, if the Supreme Court considers a Commerce Clause challenge to the ESA, it should take heed of the *Lopez* and *Morrison* dissents of Justice Breyer and Justice Souter and abandon its failed experiment.