A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws

John C. Eastman[1]

I. Introduction

Ever since the Supreme Court's landmark decision in *United States v. Lopez*[2] invalidating the Gun-Free School Zones Act[3] as beyond the scope of Congress's Commerce Clause power, scholarly commentators from both sides of the ideological spectrum have wondered whether the Court would apply the reasoning of that case in the context of federal environmental laws. Many agreed that, if faithfully applied, *Lopez* sounded a death knell for a slew of environmental legislation that had at best only a tenuous connection with interstate commerce.[4] For some, that was even more reason to deride the *Lopez*

[1]Professor Eastman was counsel of record in *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1506 (2004), and filed amicus curiae briefs on behalf of The Claremont Institute Center for Constitutional Jurisprudence in United States v. Morrison, 529 U.S. 598 (2000), and Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S. 159 (2001), all of which are addressed in this article.

[2]514 U.S. 549 (1995).

[3]18 U.S.C. § 922(q)(1)(A) (1990).

[4]See, e.g., Eric Brignac, The Commerce Clause Justification of Federal Endangered Species Protection: Gibbs v. Babbitt, 79 N.C. L. Rev. 873(2001); Alan T. Dickey, United States v. Lopez: The Supreme Court Reasserts the Commerce Clause as a Limit on the Powers of Congress, 70 Tul. L. Rev. 1207 (1996); John P. Frantz, The Reemergence of the Commerce Clause as a Limit on Federal Power: United States v. Lopez, 19 Harv. J.L. & Pub. Pol'y 161 (1995); William Funk, The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,741 (2001); Christine A. Klein, The Environmental Commerce Clause, 27 Harv. Envtl L. Rev. 1, 1 (2003); Bradford C. Mank, Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?, 36 Ga. L. Rev. 723, 770-80 (2002); Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez, 94 Mich. L. Rev. 554 (1995); John H. Turner, Lopez Lives: Can an Expansive View of Federal Wetlands Regulation Survive? An Overview of

decision, but for originalists, it was a welcome prospect. Not only would the Court be enforcing the Constitution's limits on Congressional power ''to regulate Commerce . . . among the . . . States,''[5] as it ought, but it would be resurrecting the sound theoretical foundation on which those limits were built, returning decisionmaking authority to a level of government close enough to the people to ensure that both the benefits *and costs* of environmental policy were fully considered by those who would suffer any adverse consequences of a wrong decision.

A fistful of five environmental cases pressing the Commerce Clause challenge were presented to the Court this past term by way of petitions for writs of certiorari. The first four petitions were summarily denied, and the fifth will not be considered until the Court returns to work in October. This article addresses the significance of those cases and places them in the larger context of the general recalcitrance of the lower courts to apply *Lopez* in the environmental law arena.

II. The *Lopez* Revolution: Revival of Constitutional Limits or Mere Anomaly?

Between the New Deal jurisprudential ''revolution'' and the Court's decision in *Lopez*, it appeared that the Court viewed Congress's commerce power over local environmental policy as virtually unbounded. Leading constitutional law scholars regarded limits inherent in the Constitution's structure or in the Commerce Clause itself as essentially unenforceable. By 1978, for example, Harvard Law Professor Lawrence Tribe would write, ''The Supreme Court has . . . largely abandoned any effort to articulate and enforce *internal* limits on congressional power—limits inherent in the grants of power themselves.''[6] Professor Gerald Gunther would write in the tenth edition of his Constitutional Law textbook shortly thereafter, ''After nearly 200 years of government under the Constitution, there

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Decisions Regarding the ''Proactive'' Reach of the Commerce Clause, in Wetlands Law and Regulation (ALI-ABA Course of Study), May 31, 2000, WL SE88 ALI-ABA 197, at 199-201; Jeffrey H. Wood, Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC, 19 J. Land Use & Envtl. L. 91 (2003).

[5]U.S. Const. art. I, § 8, cl. 3.

[6]Lawrence Tribe, American Constitutional Law 224 (1978).

are very few judicially enforced checks on the congressional commerce power.''[7]

Moreover, the virtually unfettered discretion Congress gave to the regulatory agencies ensured that the boundless power was fully exploited. The U.S. Army Corps of Engineers, for example, acting pursuant to a statute designed to protect the flow of commerce through the navigable waterways of the United States, successfully prosecuted the owner of a truck repair shop for removing some old tires from and adding fill dirt to his own land so that he could expand his garage.[8] The land became soggy during Pennsylvania's rainy season due to runoff from a nearby manmade overpass; it was deemed a ''wetland,'' therefore, which according to the Corps qualified it as a ''navigable water'' of the United States, necessitating a Clean Water Act permit before fill dirt—a ''pollutant'' under the Act—could be added.[9] Reached prior to *Lopez*, that decision was allowed to stand.

Given that near sixty-year history of judicial deference to the expansion of federal regulatory power, *Lopez* came as something of a shock. For the first time since the New Deal, the Supreme Court said ''no.'' Yet for five years thereafter, lower courts routinely rebuffed *Lopez*-like challenges to a host of federal laws having little or no connection to interstate commerce. Although petitions for certiorari were filed in many of these cases, the Supreme Court routinely denied certiorari in them, leading many commentators to believe that *Lopez* had quickly become merely an anomaly[10]: the Court had resurrected limits on Congress's power that it apparently had no stomach to enforce, particularly in controversial arenas such as environmental law.

Many legal scholars were surprised, therefore, when five years after *Lopez* the Court chose a challenge to the Violence Against Women Act[11] to reiterate its commitment to *Lopez* and its principled

[7]Gerald Gunther, Constitutional Law 113 (10th ed. 1980).

[8]United States v. Pozsgai, 999 F.2d 719, 721-23 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994).

[9]*Id.* at 721–24.

[10]See, e.g., Glenn H. Reynolds & Brannon P. Denning, Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 Wisc. L. Rev. 369 (2000) (citing cases).

[11]42 U.S.C. § 1371 et seq.

adherence to the doctrine that ours is a limited government of specifically enumerated powers. *United States v. Morrison*[12] was what is known as a ''bad facts'' case, involving an alleged gang rape of a young college student by two members of a university football team.[13] Surely the Court—surely Justice O'Connor, widely believed to be the key swing vote on the Court—would not deprive co-ed Christy Brzonkala of the federal remedy that Congress had provided over something as technical as the alleged rapists' claim that the Commerce Clause did not provide constitutional authority for the law. Yet even in this controversial arena, the Court adhered to its *Lopez* precedent and the original understanding of the Constitution's limits that it had begun to revive.[14] Without a connection to interstate commerce, criminal conduct such as Christy Brzonkala had alleged was a matter for state, not federal law.[15]

III. *Lopez* in the Environmental Law Context, and Lower Court Recalcitrance

With the lower courts suitably chastised for having ignored the high Court's *Lopez* decision, the stage was set for new challenges to federal environmental laws having no connection to interstate commerce. Yet the lower courts again proved reticent to apply the principles of *Lopez*, and now *Morrison*, in the environmental context. The Fourth Circuit, for example, widely regarded as one of the circuit courts most consistently committed to the original understanding of the Constitution, refused to apply (or rather artificially distinguished) *Lopez* and *Morrison* in a Commerce Clause challenge to the federal Endangered Species Act.[16] In that case, *Gibbs v. Babbitt*,[17] farmers challenged the constitutionality of the act as a defense against criminal prosecution for having shot federally protected red wolves that were threatening their crops and livestock.[18] (Shooting

[12]529 U.S. 598 (2000).

[13]*Id.* at 602.

[14]*Id.* at 607–18.

[15]*Id.* at 611–13.

[16]16 U.S.C. § 1631 et seq.

[17]214 F.3d 483 (4th Cir. 2000).

[18]*Id.* at 489.

a red wolf would have been permissible if the farmers' children were threatened, but only if the risk to them was imminent!)

The panel decision in *Gibbs* was held pending the Supreme Court's decision in *Morrison*. When rendered, *Morrison* all but compelled the conclusion that Congress had no authority under its commerce power to criminalize the taking of red wolves on private property. Red wolves had not been articles of commerce for more than a century![19] Nevertheless, the Fourth Circuit opinion by then-Chief Judge J. Harvey Wilkinson, over a vigorous dissent from Judge J. Michael Luttig, held that the fact that the red wolf was not an article of commerce was no barrier to congressional power. A nexus with interstate commerce was established, the panel's majority said, by tourists traveling to red wolf ''howling'' events in North Carolina,[20] by a few scientists traveling to the state to study the red wolf,[21] and by farmers seeking to protect crops destined for commerce.[22] Under such reasoning, *Morrison* would have been decided differently—at least if Congress could reasonably have believed the old adage that ''women love to shop.''[23] Yet the Court denied a petition for certiorari in the case, letting Judge Wilkinson's controversial decision stand.[24]

In short order, however, the Supreme Court accepted another opportunity to address the challenge presented by the Fourth Circuit and repeatedly pressed by the Department of Justice that *Lopez* simply did not apply to environmental laws. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[25] (hereinafter *SWANCC*), the Department of Justice contended that the U.S. Army Corps of Engineers had the power, pursuant to the Commerce Clause, to regulate a proposed local landfill because migratory birds sometimes stopped to bathe in the puddles that developed after a rain in the gravel pit that was to be the site of the

[19]*Id*. at 495; see also *id*. at 507 (Luttig, J., dissenting).

[20]*Id*. at 493.

[21]*Id*. at 494.

[22]*Id*. at 495.

[23]Sonya Hamlin, The Communication Challenges of the New Jury: Chapter Excerpt from What Makes Juries Listen Today (American Law Institute 14), June 6–7, 2002, quoting William Dunn, The Baby Bust: A Generation Comes of Age 40 (1993) (referring to the hobby-like fondness for shopping of ''twenty-something women'').

[24]Gibbs v. Norton, 531 U.S. 1145 (2001).

[25]531 U.S. 159 (2001).

landfill.[26] *Lopez* and *Morrison* were limited to criminal law matters, according to Justice Department lawyers, because such were traditional state functions.[27] Although the Supreme Court rejected the government's position on statutory construction grounds, it left no doubt that the *Lopez* analysis was not limited to criminal law but applied in the environmental law context as well.[28]

IV. The October 2003 Term: *Cert. Denied*

Thus, the path was again cleared for Commerce Clause challenges to federal environmental laws having nothing to do with interstate commerce. And again the lower courts skirted the clear import of *Lopez* and *Morrison*, and the equally clear dicta from *SWANCC*, to avoid enforcing the Constitution's limits on congressional power in the environmental arena. In *United States v. Rapanos*,[29] for example, the Sixth Circuit—*after a specific remand from the Supreme Court for further consideration in light of SWANCC*[30]—upheld the criminal convictions of John and Judith Rapanos for adding fill dirt to their own property, accepting the government's contention that the property contained ''wetlands'' that fell within the ''navigable waters'' jurisdiction of the U.S. Army Corps of Engineers under the Clean Water Act, even though the property was some twenty miles from the nearest navigable stream.[31] The Corps' claim of jurisdiction was premised on the regulatory definition of ''navigable waters'' as including ''wetlands adjacent to traditional navigable waters,'' and on the fact that a 100-year-old manmade drainpipe connected the Rapanos' marsh to Hoppler Creek, which in turn was connected to the Kawkawlin River and ultimately to Saginaw Bay and Lake Huron.[32] The opinion was written by then-Chief Judge Boyce Martin, and joined by Circuit Judges Alan Norris and John Rogers. The

[26]*Id.* at 167.

[27]Brief of Respondent, SWANCC v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (No. 99-1178), available at 2000 WL 1369439, at *38–39.

[28]SWANCC, 531 U.S. at 173–74.

[29]339 F.3d 447 (6th Cir. 2003), cert. denied, 124 S. Ct. 1875 (2004), petition for reh'g denied, 124 S. Ct. 2407 (2004).

[30]Rapanos v. United States, 533 U.S. 913 (2001).

[31]Rapanos, 339 F.3d at 449, 452–54.

[32]*Id.* at 449.

Supreme Court summarily denied the Rapanos' petition for certiorari on April 5, 2004, and their petition for rehearing on May 24, 2004.[33]

The Court likewise denied certiorari this past term in two other *SWANCC*-like cases despite a clear and expressly acknowledged split among the federal courts of appeals on the import of *SWANCC* to federal claims of jurisdiction over waters that are not adjacent to ''navigable-in-fact'' waters of the United States. It denied certiorari in a Fourth Circuit case, *United States v. Deaton*,[34] on the same day that it denied certiorari in the *Rapanos* case, and it denied certiorari earlier in the term in *United States v. Rueth Development Company*,[35] a case arising out of the Seventh Circuit.

Deaton involved a civil enforcement action against a Maryland property owner who dug a ditch across his own twelve-acre parcel of land to help drain some standing water that was causing unhealthful conditions on his property. Once drained, the standing water ran into a ''roadside ditch,'' then (at least when enough rain had fallen) through a culvert to another roadside ditch on the other side of the road, also known as the ''John Adkins Prong of Perdue Creek'' (amazingly, a point of contention in the litigation). From there, it flowed into Perdue Creek proper, which in turn flowed into Beaverdam Creek, ''a natural watercourse with several dams and ponds''[36]—the dams no doubt erected by the natural creatures after whom the creek was named. None of those waters was navigable, of course—not the standing water on Deaton's property, not the ''roadside ditch,'' not the culvert under the road, not the Adkins Prong, not even Beaverdam Creek.[37] More than eight miles from Deaton's property, however, Beaverdam Creek does flow into the Wicomico River, which is navigable in parts, and twenty-five miles further on the Wicomico River flows into the Chesapeake Bay.[38] The

[33]See note 29 *supra*.

[34]332 F.3d 698 (4th Cir. 2003), cert. denied, 124 S. Ct. 1874 (2004) (hereinafter ''Deaton II'').

[35]335 F.3d 598 (7th Cir. 2003), cert. denied, 124 S. Ct. 835 (2003).

[36]Deaton II, 332 F.3d at 702.

[37]*Id*. at 708 (noting appellant's argument that ''water flowing from the ditch must pass through several other nonnavigable watercourses before reaching the navigable Wicomico River'').

[38]*Id*. at 702.

Corps of Engineers asserted jurisdiction, therefore, not because some of Deaton's standing water made it to the Chesapeake Bay in a polluted condition (it did not), but because the dirt he had piled alongside the ditch he dug on his own property was considered a ''pollutant'' that he had ''deposited'' into a ''wetland'' without a permit—the ''wetland'' being the same area from which the dirt had been taken moments before it was ''deposited'' alongside the newly dug ditch.[39] Before the Fourth Circuit, the Corps prevailed in its claim that it had jurisdiction over Deaton's ditch, based on the contention that it was a ''navigable water'' of the United States, or at least adjacent to one, and that this was somehow properly within Congress's power to regulate commerce among the states.[40]

The land at issue in the Seventh Circuit's *Rueth Development* case[41] had a similarly attenuated connection to ''navigable waters'' of the United States. Rueth Development put some fill dirt on its property in Dyer, Indiana. The trial court found that the fill dirt was ''placed in wetlands 'adjacent to an unnamed tributary to Dyer Ditch, which flows north to Hart Ditch, which flows north to the Little Calumet River, which is a navigable water of the United States.'''[42] The Seventh Circuit, in an opinion by Judge Joel Flaum that was joined by Judges Richard Posner and Michael Kanne, upheld the Corps' claim that it had jurisdiction because Rueth Development's wetlands were ''adjacent'' to a navigable water, despite the fact that by the court's own description, the wetlands were five steps removed from the navigable Little Calumet River.[43]

Both the Fourth and Seventh Circuits, like the Sixth Circuit in *Rapanos* and the Ninth Circuit in another similarly attenuated case, *Headwaters, Inc. v. Talent Irrigation District*,[44] read *SWANCC* narrowly as applying only to the Corps' ''migratory bird'' claim of jurisdiction, and not to the broader constitutional principle also articulated in

[39]See, e.g., United States v. Deaton, 209 F.3d 331, 333–34 (4th Cir. 2000) (summarizing litigation history) (hereinafter ''Deaton I'').

[40]Deaton II, 332 F.3d at 702.

[41]United States v. Rueth Development Co., 333 F.3d 598 (7th Cir. 2003).

[42]*Id.* at 600.

[43]*Id.*

[44]243 F.3d 526 (9th Cir. 2001).

the decision.[45] In contrast, in an opinion by Judge Edith Jones, joined by Judges Thomas Reavley and Grady Jolly, the Fifth Circuit in *In re Needham*[46] rejected such a narrow reading of *SWANCC* (and the broad reading of the scope of the federal government's jurisdiction proffered by the Department of Justice), but nevertheless rendered judgment for the government because of a factual stipulation that an oil spill at issue in the case occurred in a waterway that was actually adjacent to navigable waters.[47] The case is currently on remand to the bankruptcy court for initial consideration of the bankrupt's other defenses, so it is not yet ripe for a petition for certiorari. Perhaps, after the case works its way back up through the courts after remand, the Supreme Court will give renewed consideration to this circuit split and to the stretched jurisdictional claims being made by the Corps of Engineers under the supposed authority of regulating commerce among the states.

On a parallel track to the Supreme Court this term were two challenges to listings, under the federal Endangered Species Act, of wholly intrastate, noncommercial species as ''endangered.'' In an opinion by Judge Merrick Garland, joined by Chief Judge Douglas Ginsberg and Judge Harry Edwards, the D.C. Circuit had held in *Rancho Viejo, LLC v. Norton*[48] that the extension of the Endangered Species Act to the Southwestern Arroyo Toad, which resides only in southern California and has never been an article of commerce, was permissible because the regulation affected home building and other economic activities.[49] The Fifth Circuit, in an opinion by Judge Rhesa Hawkins Barksdale, joined by Judges Eugene Davis and James Dennis, upheld the extension of the Endangered Species Act to several species of Texas cave bugs that, because of their isolation from other species, could not even be said to support a biological life chain that included commercial species.[50] Although both circuits upheld the extension of the Endangered Species Act to the species

[45]See notes 29 to 43 and accompanying text. See also Headwaters, 243 F.3d at 533.

[46]354 F.3d 340 (5th Cir. 2003).

[47]*Id.* at 346.

[48]323 F.3d 1062 (D.C. Cir. 2003), reh'g en banc denied, 334 F.3d 1158 (D.C. Cir. 2003).

[49]323 F.3d at 1065–69.

[50]GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622, 622 (5th Cir. 2003), reh'g en banc denied, 362 F.3d 286 (5th Cir. 2004).

at issue, they did so on mutually exclusive rationales, each rejecting the ground of decision on which its sister circuit had rested.

The extent of the conflict in reasoning between the two circuits was made clear by the two D.C. Circuit judges who dissented from the denial of a petition for rehearing that was filed in the *Rancho Viejo* case. Judge David Sentelle noted that the reasoning upon which the D.C. Circuit grounded its ruling was ''conspicuously in conflict'' with the reasoning of the Fifth Circuit in the *GDF Realty* case.[51] And newly-appointed Judge John Roberts noted in addition that the decision was also ''inconsistent'' with the Supreme Court's decisions in *Lopez* and *Morrison*.[52]

Judges Sentelle and Roberts actually raised several points of disagreement between the two circuit courts. First, and perhaps most fundamental, was whether the prohibition on the ''take'' of wholly-intrastate, noncommercial species could be viewed as aimed at economic activity simply because the particular litigant was an economic actor. The D.C. Circuit viewed Rancho Viejo's status as a home builder as dispositive.[53] The Fifth Circuit rejected that contention, noting,

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce . . . .To accept [such an] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.[54]

The Fifth Circuit found its analysis consistent with *SWANCC*, in which the Supreme Court, albeit in *dictum*, noted that aggregation

[51]Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1159 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of petition for reh'g en banc).

[52]*Id*. at 1160 (Roberts, J., dissenting from denial of petition for reh'g en banc).

[53]Rancho Viejo, 323 F.3d at 1068–69.

[54]GDF Realty, 326 F.3d at 634–35.

based on the nature of the actor, rather than on the activity that was the object of the regulation, would ''raise significant constitutional questions.''[55] Following the high Court's admonition in *SWANCC* that it is necessary ''to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce,'' and its focus on the activity ''to which the statute *by its terms* extends,'' the Fifth Circuit looked only to the specific regulated activity—''takes''—and not the commercial nature of the actor undertaking that activity.[56] The D.C. Circuit, in contrast, relying on the very same passage from *SWANCC*, held that the ''precise activity'' to be considered was Rancho Viejo's planned commercial development, not the ''take'' of species actually prohibited by the Endangered Species Act.[57]

The second point of disagreement between the two courts was a fairly technical but extremely important one, namely, whether the Supreme Court's pre-*Lopez* decision in *United States v. Salerno*[58] prevented a facial challenge on Commerce Clause grounds to any statute that reaches some commercial activity. As Judge Roberts noted in his dissent from the denial of the petition for rehearing en banc in *Rancho Viejo*, ''the approach [regarding *Salerno*] of the panel in [*Rancho Viejo*] . . . conflicts with the opinion of a sister circuit . . . .''[59] The D.C. Circuit relied on the older decision in *Salerno* despite the obvious inconsistency between *Salerno* and *Lopez*—Alfonso Lopez had brought his gun to school in order to sell it, a commercial transaction that, under *Salerno*, would have prevented the facial challenge accepted by the Supreme Court in *Lopez*. The Fifth Circuit, in contrast, rejected the applicability of *Salerno* in the post-*Lopez* Commerce Clause context. ''[L]ooking primarily beyond the regulated activity [i.e., beyond the ''take'' of endangered species, to commercial development that is only indirectly regulated by the Endangered Species Act] in such a manner would 'effectually obliterate' the limiting

[55]*Id*. at 634 (citing SWANCC, 531 U.S. at 173).

[56]326 F.3d at 634.

[57]Rancho Viejo, 323 F.3d at 1072.

[58]481 U.S. 739 (1987).

[59]Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of petition for reh'g en banc).

purpose of the Commerce Clause,'' the Fifth Circuit held.[60] More fundamentally, the Fifth Circuit recognized that, if *Salerno* were carried over to the Commerce Clause context, ''the facial challenges in *Lopez* and *Morrison* would have failed.''[61] ''[R]egulation of gun possession near schools, at issue in *Lopez*, would arguably pass constitutional muster as applied to a possessor who was a significant gun salesman,'' noted the Fifth Circuit, so the Gun Free Schools Zone Act ''could not have been facially unconstitutional.''[62] The Fifth Circuit also noted that ''the Violence Against Women Act, at issue in *Morrison*, would arguably have been a constitutional exercise of congressional power if it were used to prosecute a person who committed violence against women and then sold a substantial number of videotapes of the encounter in interstate markets.''[63] That would have been enough for the Violence Against Women Act to withstand a facial challenge, but such a result is contrary to the actual holding of *Morrison*.

In holding that GDF Realty's own nature as a commercial developer was not sufficient for the Commerce Clause analysis, the Fifth Circuit apparently found dispositive from *Lopez* the fact that Alfonso Lopez brought his gun to school for sale.[64] The D.C. Circuit, in contrast, dismissed that fact, contending that because it was not mentioned in the Supreme Court's own *Lopez* opinion, ''the Supreme Court attached no significance to it.''[65] The D.C. Circuit seems to have missed the point of the Supreme Court's refusal to attach any significance to this uncontested evidence. While hugely significant under the D.C. Circuit's *Salerno* analysis, the fact that Alfonso Lopez brought his gun to school *to sell*—an obvious commercial motivation on the part of the actor—had no significance for the Supreme Court in *Lopez* or the Fifth Circuit in *GDF Realty* precisely because ''neither the purposes nor the design *of the statute* ha[d] an evident commercial

[60]GDF Realty, 326 F.3d at 634 (citing National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

[61]GDF Realty, 326 F.3d at 635.

[62]*Id*. at 634 (citing Salerno, 481 U.S. at 745).

[63]326 F.3d at 635.

[64]*Id*.; see also United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993), aff'd, 514 U.S. 549 (1995).

[65]Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1072 (D.C. Cir. 2003).

nexus.''[66] A recent decision of the Ninth Circuit reached the same conclusion (albeit with respect to a different statute): ''[T]he regulation [banning possession of machine guns] does not have an economic purpose . . . . More likely, [it] was intended to keep machineguns out of the hands of criminals—an admirable goal, but not a commercial one.''[67]

Third, the Fifth and D.C. Circuits disagreed on whether *Lopez* and *Morrison* permitted aggregation of non-economic as well as economic activity for purposes of demonstrating a substantial effect on interstate commerce—another important issue, for if aggregation is permitted, even trivial effects on the national economy would justify Congress's regulatory power. While the D.C. Circuit held that noneconomic activity could be aggregated to determine whether there was a substantial enough effect on interstate commerce to authorize federal action,[68] the Fifth Circuit held that ''[i]n the light of *Lopez* and *Morrison*, the key question for purposes of aggregation is whether the nature of the regulated activity is economic.''[69] This was important, according to the Fifth Circuit, lest the Commerce Clause be stripped of all limits. ''[A]ny imaginable activity of mankind can affect the alertness, energy, and mood of human beings,'' noted the Fifth Circuit, ''which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, *thereby turning that clause into what it most certainly is not, a general police power*.''[70]

The Fifth Circuit recognized that the Supreme Court in ''*Morrison* noted, for aggregation purposes, the importance of the economic nature of the regulated activity'' when it specifically acknowledged that it had heretofore aggregated intrastate activity ''*only* where that activity *is economic in nature*.''[71] To allow aggregation of ''noneconomic and noncommercial activity'' ''so long as, if aggregated,''

[66]United States v. Morrison, 529 U.S. 598, 611 (2000) (quoting Lopez, 514 U.S. at 580 (Kennedy, J., concurring)) (emphasis added); GDF Realty, 326 F.3d at 634—35.

[67]United States v. Stewart, 348 F.3d 1132, 1137 (9th Cir. 2003).

[68]Rancho Viejo, 323 F.3d at 1072.

[69]GDF Realty, 326 F.3d at 630.

[70]*Id.* at 629 (quoting United States v. Ho, 311 F.3d 589, 599 (5th Cir. 2002)).

[71]326 F.3d at 630 (quoting Morrison, 529 U.S. at 613 (emphasis added)).

there would be ''a substantial effect'' on commerce, held the Fifth Circuit, ''would vitiate *Lopez* and *Morrison*'s seeming requirement that the intrastate instance of activity be commercial.''[72] ''*Lopez* and *Morrison* stand against such a proposition.''[73]

By contrast, the D.C. Circuit, relying on the identical passage from *Morrison*, implied that the Supreme Court had rejected a categorical rule, thus permitting the aggregation of noneconomic activity in order to demonstrate a substantial effect on commerce.[74]

The Fifth Circuit's position is not only a better reading of *Morrison*, but it is in accord with decisions of the First, Second, Third, Fourth, Ninth, and Eleventh Circuits as well.[75]

Although the Supreme Court denied certiorari in *Rancho Viejo* on March 1, 2004, the conflict in reasoning between the circuits was highlighted even more by six judges on the Fifth Circuit Court of Appeals whose own opinions dissenting from that court's denial of the petition for rehearing en banc in the *GDF Realty* case were released on February 27, 2004—the very day that the Supreme Court considered the D.C. Circuit's *Rancho Viejo* case at conference.

Particularly significant is the lengthy opinion by Circuit Judge Edith Jones—joined by Circuit Judges Grady Jolly, Jerry Smith, Harold DeMoss, Edith Brown Clement, and Charles Pickering—dissenting from the denial of the petition for rehearing en banc.[76] In her opinion, Judge Jones referenced explicitly the circuit split that has developed between the Fifth Circuit in *GDF Realty* and the D.C.

[72]326 F.3d at 638.

[73]*Id.*

[74]Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1072 (D.C. Cir. 2003); see also United States v. Rodia, 194 F.3d 465, 481 (3d Cir. 1999) (''the specific activity that Congress is regulating need not itself be objectively commercial, as long as it has a substantial effect on commerce''); cf. United States v. Bongiorno, 106 F.3d 1027, 1031 (1st Cir. 1997) (noting that the Court consistently has interpreted the Commerce Clause ''to include transactions that might strike a lay person as 'noncommercial'').

[75]See United States v. Zorrilla, 93 F.3d 7, 8 (1st Cir. 1996); United States v. Holston, 343 F.3d 83, 88 (2d Cir. 2003); Freier v. Westinghouse Electric Corp., 303 F.3d 176, 200-03 (2d Cir. 2002), cert. denied, 538 U.S. 998 (2003); United States v. Whited, 311 F.3d 259, 271 (3d Cir. 2002), cert. denied, 538 U.S. 1065 (2003); Gibbs v. Babbitt, 214 F.3d 483, 491 (4th Cir. 2000); United States v. McCoy, 323 F.3d 1114, 1119–20 (9th Cir. 2003); United States v. Cortes, 299 F.3d 1030, 1035 (9th Cir. 2002); United States v. Ballinger, 312 F.3d 1264, 1270 (11th Cir. 2002).

[76]GDF Realty Investments, Ltd. v. Norton, 362 F.3d 286, 287–93 (5th Cir. 2004) (Jones, J., dissenting from denial of petition for reh'g en banc).

Circuit in *Rancho Viejo*. She stated that in *GDF Realty*, the Fifth Circuit ''panel correctly determined, *unlike other courts,* that the 'regulated activity' under the ESA is Cave Species *takes*, not the appellants' planned commercial development of the land.''[77] The mention of ''other courts'' that had reached the opposite conclusion refers expressly to the *Rancho Viejo* case, which found, as noted by Judge Jones, ''that the regulated activity was not the ESA take but rather the 'construction of a commercial housing development.' ''[78]

Judge Jones' opinion also highlighted how the decisions in both *GDF Realty* and *Rancho Viejo*, despite their contradictory reasoning, are fundamentally at odds with the Supreme Court's decisions in *Lopez*, *Morrison*, and *SWANCC*. The Fifth Circuit ''panel's 'interdependent web' analysis of the Endangered Species Act,'' she wrote, ''gives . . . subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in M*orrison*.''[79] Jones properly concluded that ''the panel's commerce clause analysis [was] in error,'' and that the panel's broad interpretation of the aggregation principle ''would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*.''[80]

Nevertheless, as noted, the Supreme Court denied certiorari in *Rancho Viejo* on March 1, 2004, and denied a petition for rehearing in that case on April 19, 2004. A petition for a writ of certiorari was filed in *GDF Realty* on May 27, 2004—too late to be considered in the Court's 2003 term. The government's opposition was filed in early September, however, so we should soon know whether the Court will take up the issues presented by *GDF Realty* and *Rancho Viejo* in the October 2004 term.

V. Why This Matters

With the Court granting certiorari in roughly eighty cases out of approximately 8,000 petitions filed each term, denials of petitions are certainly the norm, not the exception, and a denial in most cases is hardly newsworthy. Why the attention to these cases, then?

[77]*Id.* at 288 (emphasis added).

[78]*Id.* at 288–89 (citing Rancho Viejo, 323 F.3d at 1062).

[79]362 F.3d at 288–89.

[80]*Id*. at 289.

There are several reasons why this fistful of certiorari denials is both noteworthy and significant. Regarding the three Clean Water Act cases (*Rapanos*, *Deaton*, and *Rueth Development*), the Court has already acknowledged the certiorari-worthy nature of the issues presented. Two terms ago, in *Borden Ranch Partnership v. United States Army Corps of Engineers*,[81] the Court considered a similar Commerce Clause challenge to Clean Water Act regulations by a farmer who was fined (massively) for plowing his central California fields using a ''deep-ripping'' method designed to allow rainwater to actually reach the roots of his crops.[82] The Ninth Circuit upheld the fines,[83] but after granting the certiorari petition the Supreme Court was unable to reach a decision. With Justice Kennedy recusing himself because he knew the farmer in the case, the Court affirmed the judgment of the Ninth Circuit when it divided 4–4.[84] An affirmance under such circumstances does not have precedential value, so the issue remains unresolved at the Supreme Court level. The Court's refusal to grant certiorari in any of the three Clean Water Act cases presented to it this term, raising nearly identical issues, is therefore noteworthy.

The Court's denials are significant from a long-term jurisprudential perspective as well. While the Court will often wait, sometimes for years, to resolve splits among the lower courts, it typically moves much more quickly when fundamental rights are involved, and when the lower courts seem to be challenging very recent precedent from the Supreme Court itself. Both are at stake in these cases.

Unlike many of the rights that the Court seems to be recognizing or creating with increasing frequency,[85] the property rights at issue in the cases discussed above are expressly protected in the federal Constitution, protections that the Founders believed to be one of the core purposes of just and consensual government. As the publisher of this *Review* recently stated the matter,

[81]261 F.3d 810 (9th Cir. 2001), aff'd by an equally divided Court, 537 U.S. 99 (2002).

[82]261 F.3d at 812.

[83]*Id.* at 818.

[84]Borden Ranch Partnership v. United States Army Corps of Engineers, 537 U.S. 99 (2002).

[85]See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996); Roe v. Wade, 410 U.S. 959 (1973); Goldberg v. Kelly, 397 U.S. 254 (1970); Griswold v. Connecticut, 381 U.S. 479 (1965).

> America's Founders understood clearly that private property is the foundation not only of prosperity but of freedom itself. Thus, through the common law and the Constitution, they protected property rights—the rights of people to freely acquire and use property. With the growth of the modern regulatory state, however, governments at all levels today are eliminating those rights through so-called regulatory takings—regulatory restraints that take property rights, reducing the value of the property, but leave title with the owner. And courts are doing little to protect such owners because the Supreme Court has yet to develop a principled, much less comprehensive, theory of property rights.[86]

In contrast with the Court's quick grants of certiorari in unenumerated rights cases, often without the benefit of circuit splits among the lower courts, the slow percolation the Court often allows in cases involving property rights lends credence to the view that there is a hierarchy of rights and that property rights are near the bottom of the hierarchy.

Equally fundamental is the continued vitality of *Lopez* itself, and the vision of a limited Constitution the case revived, particularly with respect to the scope of the Commerce Clause. To understand the significance of *Lopez* it is important to appreciate what the Founders understood they had delegated to the national government—and what they had not delegated.

When the Framers met in Philadelphia in 1787, it was widely acknowledged that a stronger national government was necessary if the United States was to survive and thrive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; and it could not ensure the limbs and property of its citizens, especially those living on the western frontier. Perhaps of greatest concern, however, was the inability of the central government to counteract the crippling trade barriers that were being enacted by the several states against each other, for the Framers rightly perceived that the disputes over commerce threatened the national unity that was critically important to

[86]Roger Pilon, Property Rights and Regulatory Takings, Cato Handbook for Congress, 108th Congress, at 145 (2002).

the survival of the new nation.[87] Indeed, the first convention called to address problems with the Articles of Confederation, held at Annapolis in 1786, was specifically devoted to concerns about interstate commerce and navigation.[88] There was thus general agreement about the need to give the national government more power over interstate commerce.

But the Framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong centralized government.[89] Our forebears had not successfully prosecuted the war against the King's tyranny merely to erect another form of tyranny in its place.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people's liberty.[90] The Framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu, out of recognition that the ''accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.''[91]

[87]See, e.g., Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), reprinted in 3 The Founders' Constitution 473–74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were ''as great in many instances as those imposed on foreign Articles''); The Federalist No. 22, at 144–45 (Alexander Hamilton) (C. Rossiter & C. Kesler eds., 1999) (referring to ''[t]he interfering and unneighborly regulations of some States,'' which were ''serious sources of animosity and discord'' between the states); New York v. United States, 505 U.S. 144, 158 (1992) (''The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience'') (quoting The Federalist No. 42, at 267 (C. Rossiter ed., 1961)).

[88]See generally, Report of the Annapolis Convention of 1786, reprinted in 3 The Annals of America 68 (1968).

[89]See, e.g., Bartkus v. Illinois, 359 U.S. 121, 137 (1959) (''the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power''); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 568–69 (1985) (Powell, J., dissenting, joined by Burger, C.J., Rehnquist, J., and O'Connor, J.).

[90]See The Federalist No. 51, at 322 (James Madison) (C. Rossiter ed., 1961).

[91]The Federalist No. 47, *supra* note 90, at 301 (James Madison).

But the Framers added their own contribution to the science of politics. In what can only be described as a radical break with past practice, they rejected the idea that the government was sovereign and indivisible. Instead, they contended that the people themselves were the ultimate sovereign;[92] they could delegate all or part of their sovereign powers to a single government or to multiple governments as, in their view, was ''most likely to effect their Safety and Happiness.''[93] As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves.[94]

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment.[95] Rather, it is inherent in the doctrine of enumerated powers that is embodied in the Constitution itself. Article I of the Constitution provides, for example, that ''All legislative Powers *herein granted* shall be vested in a Congress of the United States.''[96] And the specific enumeration of powers, found principally in Article I, section 8, was likewise limited.

[92]See, e.g., James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), reprinted in 2 J. Wilson, The Works of James Wilson 770 (R. McCloskey ed., 1967).

[93]The Declaration of Independence para. 2 (U.S. 1776).

[94]See, e.g., The Federalist No. 39, *supra* note 90, at 256 (James Madison) (noting that the jurisdiction of the federal government ''extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects''); The Federalist No. 45, *supra* note 90, at 292–93 (James Madison) (''The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.''); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) (''We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended.''); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (''The Constitution created a Federal Government of limited powers.'').

[95]See U.S. Const. amend. X (''The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'').

[96]U.S. Const. art. I, § 1 (emphasis added); see also U.S. Const. art. I, § 8 (enumerating powers so granted); McCulloch, 17 U.S. (4 Wheat.) at 405 (''This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted.''); United States v. Lopez, 514 U.S. 549, 552 (1995) (''We start with first principles. The Constitution creates a Federal Government of enumerated powers.'').

Perhaps foremost among the powers granted to the national government was the power to regulate commerce among the states, but for the Founders, ''commerce'' was trade, or commercial intercourse between nations and states, not business activity generally.[97] Indeed, in *Gibbons v. Ogden*,[98] the first major case arising under the Commerce Clause to reach the Supreme Court, it was contested whether the commerce power even extended as far as to include ''navigation.'' Chief Justice Marshall, for the Court, held that it did, but even under his definition, ''commerce'' was limited to ''intercourse between nations, and parts of nations, in all its branches.''[99]

This is a far cry from the expansive reading of Marshall's opinion in *Gibbons* that prevailed after *Wickard v. Filburn*[100] and the other New Deal-era Commerce Clause cases. Rather, the *Gibbons* Court specifically rejected the notion ''that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.''[101] In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate all other kinds of business activity was completely foreign to the Marshall Court.

That understanding of the Commerce Clause, the original understanding, continued for nearly a century and a half. Manufacturing

[97]See, e.g., Corfield v. Coryell, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) (''Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may.''); Lopez, 514 U.S. at 585 (Thomas, J., concurring) (''At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes.'').

[98]22 U.S. (9 Wheat.) 1 (1824).

[99]*Id*. at 190; see also Corfield, 6 F. Cas. at 550 (''Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states.'').

[100]317 U.S. 111 (1942).

[101]Gibbons, 22 U.S. (9 Wheat.) at 194 (quoted in United States v. Morrison, 529 U.S. 598, 616 (2000)).

was not included in the definition of commerce, held the Court in *United States* v. *E.C. Knight Co.*,[102] because ''Commerce succeeds to manufacture, and is not a part of it.''[103] ''The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . .''[104] Neither were retail sales included in the definition of ''commerce.''[105] For the Founders and the Courts that decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture was part of the police power reserved to the states, not part of the power over commerce delegated to Congress.[106] And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government . . . .[107]

[102]156 U.S. 1 (1895).

[103]*Id.* at 12.

[104]*Id.* at 13; see also Kidd v. Pearson, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce).

[105]See The License Cases, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); see also A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

[106]See, e.g., E.C. Knight, 156 U.S. at 12 (''That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State.'') (citing Gibbons, 22 U.S. (9 Wheat.) at 210; Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 448 (1827); The License Cases, 46 U.S. (5 How.) at 599; County of Mobile v. Kimball, 102 U.S. 691 (1880); Bowman v. Chicago & Northwestern Railway Co., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890); In re Rahrer, 140 U.S. 545, 555 (1891)).

[107]E.C. Knight, 156 U.S. at 13; see also Carter v. Carter Coal Co., 298 U.S. 238, 301 (1936) (quoting *E.C. Knight*); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 572 (1985) (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist and O'Connor, JJ.) (''federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties'').

Thus, much more than constitutional purity was at stake when the Supreme Court decided *Lopez*, and much more remains at stake as the principles of *Lopez* are applied in parallel contexts. The Founders believed that centralized government would tend to become tyrannical, but they also thought it would become unaccountable and inefficient. As with the notoriously erroneous five-year plans of Stalin's Soviet Union, command-and-control bureaucracies are simply not very good at balancing costs and benefits, or getting right the incentives necessary for good policymaking. Indeed, in many instances, they may be legally disabled from even considering the economic costs of their regulatory policies.

Two news items of 2003 highlight the nature of the problem. Because of the absolutist nature of the Endangered Species Act, extraordinary efforts have been demanded by the U.S. Fish and Wildlife Service to protect the silvery minnow in Colorado, including the refusal to release water to downstream users from the reservoirs that serve as the minnow's habitat. The Service's demands exacerbated the drought conditions in northern New Mexico, leaving an insufficient supply of water for the region's piñon trees. Without enough water, the trees were unable to produce sap, their primary defense against insects. The result was a bark beetle infestation that, by latest estimates, will destroy between 80 and 85 percent of the region's piñon trees, and has already destroyed 96 percent of the trees in some higher elevation areas.[108]

Even more troubling were the October 2003 California wildfires. The Endangered Species Act was again the culprit. Required by law to protect species habitat to the exclusion of all else, the U.S. Fish and Wildlife Service prevented California officials from utilizing prudent forestry management tools because of a putative threat to the southwestern arroyo toad habitat—the same critter at issue in the *Rancho Viejo* case discussed above—leaving southern California's forests a tinderbox of excessive growth and dead brush.[109] The tragic

[108]See Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003); Tom Sharpe, Colder Weather Has Not Stopped Beetles, The Santa Fe New Mexican, Nov. 11, 2003, at A-1.

[109]See, e.g., Jia-Rui Chong, Federal Agency Faulted in Fires; San Bernadino Officials Say the Fish and Wildlife Service Held Up Crucial Controlled Burns, Los Angeles Times, Dec. 15, 2003, at B1.

irony: In addition to the loss of human life and property, much of the sacrosanct species habitat was itself destroyed by the fires.[110]

The lower courts' reticence to apply the principles of *Lopez* in the environmental context, and the Supreme Court's denials of certiorari in the face of that reticence, is therefore not only a threat to constitutional principle but to sound environmental policy as well.

This fall, the Court will have the opportunity to end its silence with respect to the Endangered Species Act when it considers the still-pending petition for certiorari in the *GDF Realty* case. Within a year or two it may well have the opportunity to speak again on the permissible scope of federal regulation under the Clean Water Act, should the *Needham* case work its way to the Court. The Court demonstrated in *Lopez*, *Morrison*, and *SWANCC* that it was up to the task. The next round of decisions on petitions for certiorari may well demonstrate whether it remains so.

[110]See, e.g., Ben Goad and Jennifer Bowles, Fire Official Faults Agency, The Riverside Press-Enterprise, Dec. 16, 2003, at A1.