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## After *Gonzales v. Raich*: Is the Endangered Species Act Constitutional Under the Commerce Clause

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# AFTER GONZALES V. RAICH: IS THE ENDANGERED SPECIES ACT CONSTITUTIONAL UNDER THE COMMERCE CLAUSE?

BRADFORD C. MANK\*

*In both its 1995 decision United States v. Lopez and in its 2000 decision United States v. Morrison, the Supreme Court had adopted a narrow economic interpretation of congressional authority to regulate intrastate activities under the Commerce Clause. In four separate cases, three circuit courts (the District of Columbia, Fourth, and Fifth Circuits) struggled with deciding whether Congress may still protect endangered and threatened species that have little commercial value under the Commerce Clause after Lopez and Morrison. In each case, the court concluded that Congress did have the authority to protect endangered species under the Commerce Clause, including small isolated intrastate species, although there were dissenting opinions in each case. Because Lopez and Morrison failed to provide an adequate framework for analyzing Congress's authority under the Commerce Clause, the four decisions applied different and sometimes clearly contradictory rationales to justify regulation of endangered species under the Commerce Clause.*

*In 2005, however, the Court in Gonzales v. Raich limited the scope of Lopez and Morrison by allowing Congress greater latitude to regulate intrastate activities under the Commerce Clause if they are regulated as part of a comprehensive statutory scheme that on the whole appropriately regulates interstate commerce. By emphasizing the authority of Congress to regulate non-economic, intrastate activities as part of a comprehensive scheme of regulation, both the Raich majority opinion and Justice Scalia's concurring opinion—with its emphasis on the Necessary and Proper Clause—support the view that Congress has authority under the Commerce Clause to regulate all endangered species, in-*

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*cluding intrastate species or those with no direct commercial value in interstate commerce, because the ESA's comprehensive scheme is necessary to preserve interdependent species and ecosystems that do have significant impacts on interstate commerce. Furthermore, because the statute regulates only endangered and threatened species, leaves all other species to state regulation, and promotes concurrent federal-state regulation of wildlife, the ESA's regulation of endangered species is cabined by the type of limiting principles that Justice Scalia applied in his Raich concurrence, and, therefore, the ESA is consistent with the Constitution's federalist values.*

## I. INTRODUCTION

In its 1995 decision *United States v. Lopez*<sup>1</sup> and again in its 2000 decision *United States v. Morrison*,<sup>2</sup> the Supreme Court adopted a narrow, economic interpretation of congressional authority to regulate intrastate activities under the Commerce Clause.<sup>3</sup> In response, a series of commentators wrote articles addressing whether the two decisions' narrow, economic interpretation of the Commerce Clause raised doubts about Congress's authority under the Endangered Species Act (ESA)<sup>4</sup> to regulate either purely intrastate species or those with insignificant commercial value.<sup>5</sup> Concerns about the constitutionality

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1. 514 U.S. 549 (1995).

2. 529 U.S. 598 (2000).

3. The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3; *see infra* notes 84–90, 111–12 and accompanying text.

4. 16 U.S.C. §§ 1531–44 (2004).

5. *See, e.g.*, Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: Lopez, Morrison, SWANCC, and Gibbs*, *Envtl. L. Rep. (Envtl. L. Inst.)* 10,413 (Apr. 2001) (stating that *Lopez* raises serious questions about whether Congress has the authority to regulate endangered species that lack significant commercial value); 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, 735–36 (2002) (arguing that *Lopez* and *Morrison* raise serious constitutional concerns about Congress's authority to regulate endangered species with little economic value, especially species limited to one state); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 *MICH. L. REV.* 174 (1998) (same); Eric Brignac, *The Commerce Clause Justification of Federal Endangered Species Protection: Gibbs v. Babbitt*, 79 *N.C. L. REV.* 873, 874, 883 (2001) (same); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis*

of the ESA were heightened after the Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,<sup>6</sup> a case in which the Army Corps of Engineers (Corps) had claimed jurisdiction under the Federal Water Pollution Control Act (FWPCA) to regulate isolated, intrastate seasonal ponds that provided habitats for migratory birds.<sup>7</sup> The Court avoided the constitutional issue by narrowly interpreting the statute to exclude isolated waters and concluding that Congress intended the statute to apply only to navigable waters.<sup>8</sup> In dicta, however, the Court suggested that if Congress had sought to regulate non-navigable, intrastate waters in the statute, then such regulation might exceed its authority under the Commerce Clause because such intrastate land use regulation is a traditional area of local government control.<sup>9</sup> In conjunction with *Lopez* and *Morrison*, the Court in *SWANCC* suggested an interpretation of the Commerce Clause that might threaten the constitutionality of the ESA, which protects species that live in only one state as well as those with little commercial value.<sup>10</sup>

In four separate cases, three federal courts of appeals have struggled with deciding whether Congress may still protect en-

*Under the Commerce Clause and the Treaty Power*, 27 *ECOLOGY L.Q.* 215, 235 (2000) (same).

6. 531 U.S. 159 (2001).

7. See *id.* at 162–64; 33 U.S.C. § 1344 (2000); Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC*, 30 *ECOLOGY L.Q.* 811 (2003) (discussing *SWANCC*'s implication that Congress may not regulate isolated wetlands under the Commerce Clause).

8. *SWANCC*, 531 U.S. at 167–74; Mank, *supra* note 7.

9. *SWANCC*, 531 U.S. at 174 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”)); 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, 929, 959 (2004). In its 2006 decision *Rapanos v. United States*, the Supreme Court again focused on the statutory meaning of the Clean Water Act and did not reach the scope of Congress's authority under the Commerce Clause to regulate non-navigable waters. 126 S. Ct. 2208 (2006). In dicta, Justice Kennedy's concurring opinion cited *Raich* for the principle that Congress may regulate some intrastate activities as part of a comprehensive statutory scheme. *Id.* at 2250 (2006) (Kennedy, J., concurring in judgment).

10. See Michael C. Blumm & George A. Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 *ENVTL. L.* 309, 327 (2004) (“Many, perhaps most, listed species have no commercial, recreational, or medicinal value and exist only in one state.”); Mank, *supra* note 5, at 769–73 (same); *infra* notes 145, 255–59, 262 and accompanying text.

dangered and threatened species under the Commerce Clause.<sup>11</sup> In each case, the court concluded that Congress had the authority to protect endangered species under the Commerce Clause, including small isolated intrastate species that have little commercial value, although there were dissenting opinions in each case. Due to *Lopez's* and *Morrison's* failure to provide an adequate framework for analyzing Congress's authority under the Commerce Clause, the four decisions applied different and, sometimes, clearly contradictory rationales to justify regulation of endangered species.<sup>12</sup> Two of the circuit courts aggregated all endangered and threatened species in determining that such species have a substantial impact on interstate commerce and in concluding that the ESA is constitutional, but the Supreme Court has never validated that approach.<sup>13</sup>

In 2005, the Supreme Court limited the scope of *Lopez* and *Morrison* in *Gonzales v. Raich*<sup>14</sup> by allowing Congress greater latitude to regulate intrastate activities if those activities are regulated as part of a comprehensive statutory scheme that on the whole appropriately regulates interstate commerce; the *Lo-*

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11. See *GDF Realty Inv. v. Norton (GDF)*, 326 F.3d 622 (5th Cir. 2003), *reh'g denied*, 362 F.3d 286 (5th Cir. 2004) (en banc), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *reh'g denied*, 334 F.3d 1158 (D.C. Cir. 2003) (en banc); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt (NAHB)*, 130 F.3d 1041, 1052 (D.C. Cir. 1997); *Blumm & Kimbrell*, *supra* note 10, at 326–45 (discussing four cases addressing constitutionality of Endangered Species Act); *Mank*, *supra* note 9, *passim* (same).

12. See *supra* note 11 and accompanying text; *infra* notes 13, 145, 258–59, 340–46, 381–85 and accompanying text.

13. See *GDF*, 326 F.3d at 638–41 (stating that it did not directly aggregate the taking of the Cave Species with takings of other endangered species to find a substantial effect on interstate commerce, but concluding that, because the taking of all Cave Species is part of a larger economic regulation scheme of the ESA, the takings could be aggregated with other takings of endangered and threatened species to find a substantial impact on interstate commerce); *NAHB*, 130 F.3d at 1046 (“[Courts] may look not only to the effect of the extinction of the individual endangered species at issue in this case, but also to the aggregate effect of the extinction of all similarly situated endangered species.”).

14. 125 S. Ct. 2195 (2005); Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005); Michael Blumm & George A. Kimbrell, *Gonzalez v. Raich, the “Comprehensive Scheme” Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 494–98 (2005) (discussing *Raich's* use of the comprehensive scheme principle and arguing *Raich* increases the probability that the Supreme Court will find the Endangered Species Act constitutional).

*pez* and *Morrison* decisions had not addressed this issue.<sup>15</sup> In *Raich*, the Court held that the federal Controlled Substances Act (CSA)<sup>16</sup> did not exceed Congress's authority under the Commerce Clause because the power to prohibit the intrastate cultivation and use of marijuana in compliance with California law was rationally related to the regulation of interstate commerce in marijuana. Justice Stevens's majority opinion stated that even the *Lopez* decision had recognized the ability of Congress to regulate non-economic, intrastate activities if their regulation was necessary to effectuate regulation of interstate commerce.<sup>17</sup> Because of the likelihood that some medical marijuana would be diverted to interstate recreational drug use, the Court concluded that the CSA could prohibit intrastate, non-commercial cultivation and possession of cannabis for personal medical purposes.<sup>18</sup>

Not joining the majority opinion in *Raich*, Justice Scalia wrote an interesting and potentially influential concurring opinion that relied on the Constitution's Necessary and Proper Clause to justify regulation of medical marijuana under the Commerce Clause.<sup>19</sup> His emphasis on the role of the Necessary and Proper Clause could be especially helpful in defending Congress's authority to enact comprehensive statutes to regulate intrastate environmental harms that do not directly affect interstate commerce, but indirectly affect the environment in

15. See *infra* notes 158, 167 and accompanying text.

16. See Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-971 (2000)). The CSA makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the Act. 21 U.S.C. § 841(a)(1), 844(a); *Raich*, 125 S. Ct. at 2203.

17. *Raich*, 125 S. Ct. at 2210. Justice Stevens wrote the majority opinion in *Raich*, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justices Stevens, Souter, Ginsburg, and Breyer had dissented in both *Lopez* and *Morrison*. Justice Kennedy wrote a concurring opinion in *Lopez*. See *infra* notes 101-05, 178-79 and accompanying text.

18. See *Raich*, 125 S. Ct. at 2211-12; *infra* notes 173-76 and accompanying text.

19. *Raich*, 125 S. Ct. at 2215-20 (Scalia, J., concurring); Adler, *supra* note 14, at 766-68 (discussing and criticizing Justice Scalia's concurrence in *Raich*); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=880112](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880112) (same) (This paper was presented as the 2006 William Howard Taft Lecture at the University of Cincinnati School of Law); Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 814-15 (2005) (same).

ways that in the aggregate substantially affect interstate commerce.<sup>20</sup>

Both the *Raich* majority and Justice Scalia's concurring opinion, with its emphasis on the Necessary and Proper Clause, offer a way around many of the difficulties resulting from the failure of *Lopez* and *Morrison* to define the line between economic and non-economic activities under the Commerce Clause.<sup>21</sup> By emphasizing the authority of Congress to regulate non-economic, intrastate activities as part of a comprehensive scheme of regulation, *Raich's* reasoning implies that Congress has authority under the Commerce Clause to regulate endangered species.<sup>22</sup> In conjunction with the Necessary and Proper Clause, Congress may protect all endangered species, including intrastate species or those with no direct commercial value in interstate commerce, because the ESA's comprehensive scheme is necessary to preserve interdependent species and ecosystems that do have significant impacts on interstate commerce. Furthermore, because the statute regulates only endangered and threatened species, leaves all other species to state regulation, and promotes concurrent federal-state regulation of wildlife, the ESA's regulation of interstate

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20. See *infra* notes 311–12, 395–96, 411, 427 and accompanying text.

21. See Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1202, 1204–05, 1228, 1258–60 (2003) (arguing *Lopez* and *Morrison* fail to clarify which types of commercial activities are within the scope of the Commerce Clause and give courts too much discretion to decide the scope of the commerce power); Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1276–87 (2003) (discussing difficulties lower courts have encountered in distinguishing economic from non-economic activities); *infra* notes 129–31 and accompanying text.

22. See Adler, *supra* note 14, at 775–76 (suggesting that, after *Raich*, the Supreme Court is likely to uphold the constitutionality of the ESA as a comprehensive scheme); Blumm & Kimbrell, *supra* note 14, at 494–98. *But see* Supplemental Brief in Support of Certiorari 1–9, *GDF Realty Investments v. Norton*, 545 U.S. 1114 (2005) (No. 03-1619), available at [http://www.mayerbrownrowe.com/propertyrights/cases/GDF\\_Supp\\_Br.pdf](http://www.mayerbrownrowe.com/propertyrights/cases/GDF_Supp_Br.pdf) (arguing Cave Species and endangered species in general are not fungible commodities, distinguishing *Raich* from facts in *GDF* and contending that the ESA is unconstitutional and Supreme Court should grant certiorari); Randy E. Barnett, Foreword, *Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 747 (2005) (Professor Barnett argued the *Raich* case on behalf of the respondents) (“*Raich* could be construed simply as having adopted a limited ‘fungible goods’ rationale for why it is essential to the larger prohibition of a national market in a commodity that even the local cultivation and possession of such a commodity also be reached.”); *infra* notes 255, 311–12, 374–75, 395–96, 411–13, 417, 419–20 and accompanying text.

commerce is cabined by the type of limiting principles that Justice Scalia applied in his *Raich* concurrence and is therefore consistent with federalism.<sup>23</sup>

## II. HISTORY OF THE COMMERCE CLAUSE

To understand *Raich*, it is essential to discuss the history of the Supreme Court's interpretation of the Commerce Clause. Between 1937 and 1995, the Court developed a broad approach to interpreting the Clause that allowed Congress to regulate some intrastate activities if they were an essential part of a comprehensive national regulatory scheme. Beginning in 1995, the Court began to adopt a more restrictive interpretation of the Clause, but as *Raich* explained, the Court did not foreclose the use of the comprehensive statutory scheme rationale for federal regulation of some wholly intrastate, noncommercial activities. The comprehensive scheme rationale for the regulation of certain wholly intrastate, noncommercial activities is the key to justifying the ESA's regulation of all threatened and endangered species no matter how isolated or economically insignificant.

### A. Commerce Clause Cases Before 1937

Before 1937, the Supreme Court often read the scope of the Commerce Clause narrowly to prohibit federal regulation of intrastate activities, but it also sometimes read the Clause more broadly to allow regulation of intrastate activities if such regulation was necessary to effectuate certain congressional purposes. The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>24</sup> Commentators have disagreed about whether the original intent of the Commerce Clause was limited to only congressional regulation of interstate trade and transportation of goods or whether it contemplated broader regulation.<sup>25</sup>

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23. See *infra* notes 261–95 and accompanying text.

24. U.S. CONST. art. I, § 8, cl. 3.

25. Compare Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104 (2001) (arguing original intent of Commerce Clause was to regulate only interstate trade and transportation of goods), with Robert J. Pushaw, Jr. & Grant S. Nelson, Essay, *A Critique of the Narrow Inter-*



In *Gibbons v. Ogden*,<sup>26</sup> the Supreme Court offered mixed messages about the extent of Congress's authority under the Commerce Clause to regulate intrastate activities affecting interstate commerce.<sup>27</sup> Chief Justice Marshall stated that Congress's commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."<sup>28</sup> The Court refused to limit the term "commerce" to "prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."<sup>29</sup> However, the Court placed some limits on the scope of Congress's authority under the Clause by stating that it does not reach intrastate activities "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."<sup>30</sup>

From the late nineteenth century until 1936, the Supreme Court emphasized the limiting language in *Gibbons* and usually interpreted the Commerce Clause narrowly to exclude in-

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*pretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 707-15 (2002) (arguing original understanding of text of Commerce Clause allows broad regulation of activities connected to interstate commerce).

26. 22 U.S. (9 Wheat.) 1 (1824).

27. *Id.* at 186-98; Mank, *supra* note 5, at 735; Sophie Akins, Note, *Congress' Property Clause Power to Prohibit Taking Endangered Species*, 28 HASTINGS CONST. L.Q. 167, 169-71 (2000) (arguing that Justice Marshall's *Gibbons* opinion implied that commerce power reaches intrastate activities affecting interstate commerce); see also Louis J. Virelli III & David S. Leibowitz, "Federalism Whether They Want It or Not": *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 927-29 (2001) (arguing Justice Marshall's opinion in *Gibbons* adopted broad interpretation of commerce power).

28. *Gibbons*, 22 U.S. (9 Wheat.) at 196.

29. *Id.* at 190; Seinfeld, *supra* note 21, at 1256-57. There is continuing judicial and scholarly debate about whether *Gibbons*'s broad interpretation of the word "commerce" reflects the original intent of the Constitution's framers. See Seinfeld, *supra* note 21, at 1256-57 n.18. Compare Barnett, *supra* note 25, at 104 (arguing original intent of Commerce Clause was to regulate only interstate trade and transportation of goods), with Pushaw & Nelson, *supra* note 25, at 707-15 (arguing original understanding of text of Commerce Clause allows broad regulation of activities connected to interstate commerce). Justice Thomas's concurring opinion in *Lopez* argues that "at the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes," and did not include anything more. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

30. *Gibbons*, 22 U.S. at 195; Mank, *supra* note 5, at 736; Akins, *supra* note 27, at 170 ("The Court . . . acknowledged that the states have the sole ability to regulate completely intrastate commerce.").

trastate product, mining, or manufacturing activities—even if a product later entered interstate commerce—on the grounds that the intrastate manufacturing only indirectly affected interstate commerce.<sup>31</sup> In some “public morals” cases, however, the Court did read the Clause expansively to allow, for instance, congressional legislation regulating interstate movement of state lottery tickets.<sup>32</sup> Additionally, during the early twentieth century, the Court interpreted the Clause to authorize Congress to regulate a few intrastate activities if they were inextricably connected with interstate activities and had a direct effect on interstate commerce.<sup>33</sup> In 1935, the Court warned that it must limit Congress’s authority to regulate intrastate activities under the Clause because otherwise “there [would] be virtually no limit to the federal power and for all practical purposes we [would] have a completely centralized government.”<sup>34</sup>

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31. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (“Mining brings the subject matter of commerce into existence. Commerce disposes of it.”); *Hammer v. Dagenhart*, 247 U.S. 251, 271–72 (1918) (holding Commerce Clause did not authorize child labor laws because intrastate manufacturing is not interstate commerce even though products later entered interstate commerce), *overruled by* *United States v. Darby*, 312 U.S. 100, 116 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–13 (1895) (holding sugar manufacturers were outside Sherman Act because sugar manufacturing was intrastate activity even if sugar later entered interstate commerce, stating “Commerce succeeds to manufacture, and is not part of it.”); Mank, *supra* note 5, at 736; Seinfeld, *supra* note 21, at 1259–60; David W. Scopp, *Commerce Clause Challenges to the Endangered Species Act: The Rehnquist Court’s Web of Confusion Traps More Than the Fly*, 39 U.S.F. L. REV. 789, 796–97 (2005) (discussing *E.C. Knight’s* direct versus indirect test for Commerce Clause); John T. Winemiller, *The Endangered Species Act and the Imprecise Scope of the Substantial Effects Analysis*, 18 TUL. ENVTL. L.J. 159, 171 (2004).

32. *Lopez*, 514 U.S. at 571 (Kennedy, J., concurring) (“In the Lottery Case, the Court rejected the argument that Congress lacked [the] power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit.” (citation omitted)).

33. See *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 351 (1914) (explaining that Congress’s authority to regulate extended to intrastate “operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance”); Winemiller, *supra* note 31, at 171.

34. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935); Scopp, *supra* note 31, at 796–97; Winemiller, *supra* note 31, at 171.

### B. Commerce Clause Cases from 1937 Until 1995

From 1937 until 1995, the Supreme Court applied a very lenient rational basis standard for reviewing congressional legislation under the Commerce Clause, and upheld in every case congressional regulation of intrastate activities even if the activities had only indirect impacts on interstate commerce.<sup>35</sup> Most importantly, the Court developed the comprehensive scheme rationale to justify regulation of some intrastate activities. This rationale is the primary grounds for concluding that the ESA's regulation of many intrastate or commercially insignificant species is constitutional under the Commerce Clause.

During the late 1930s and early 1940s, the Supreme Court recognized that Congress had authority to regulate intrastate activities if doing so was necessary to enforce a comprehensive national regulatory scheme. In 1937, in the revolutionary case of *NLRB v. Jones & Laughlin Steel Corp.*,<sup>36</sup> the Court rejected its prior doctrine that intrastate manufacturing activities were beyond the scope of the commerce power, even if a product later entered interstate commerce. In approving the constitutionality of the 1935 National Labor Relations Act,<sup>37</sup> which gave the National Labor Relations Board broad authority to regulate the employment relationship between employers and many workers, including manufacturing industries,<sup>38</sup> the Court concluded

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35. See *Lopez*, 514 U.S. at 604–09 (Souter, J., dissenting) (discussing numerous Court decisions from 1937 until 1995 approving congressional legislation under Commerce Clause); see, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276–82 (1981) (upholding Surface Mining Control and Reclamation Act of 1977 regulating intrastate mining activities under Commerce Clause); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246, 252–53 (1964) (upholding civil rights legislation prohibiting racial discrimination in public accommodations under Commerce Clause); Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 482–84, 503–12 (discussing Supreme Court's highly deferential rational basis review used in wide range of cases from 1937 until 1990s); Brignac, *supra* note 5, at 874 ("After the Court's decision in *NLRB [v. Jones]* in 1937, the Commerce Clause was a virtual blank check that Congress could use to pass almost any legislation."); Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 880 (2005) (stating that from 1937 until *Lopez* in 1995 the Supreme Court did not strike down a federal statute as unconstitutional under the Commerce Clause); Seinfeld, *supra* note 21, at 1263 (same).

36. 310 U.S. 1 (1937).

37. Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. § 151–169 (2000)); Seinfeld, *supra* note 21, at 1261.

38. See *Jones & Laughlin Steel*, 301 U.S. at 22–49; see also *Lopez*, 514 U.S. at 606 (Souter, J., dissenting) (stating Court's finding in *Jones & McLaughlin Steel*

that intrastate activities that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions” are within the scope of the Commerce Clause.<sup>39</sup> Because labor strife in a single factory could affect labor relations in out-of-state factories and, as a result, could substantially affect national productivity in important national industries, the statute was valid.<sup>40</sup> The Court, however, observed that federalism required some limits on Congress’s authority to regulate intrastate activities.<sup>41</sup>

In 1941, the Court in *United States v. Darby* approved Congress’s regulation of certain intrastate activities closely related to interstate regulation of labor conditions under both the Commerce Clause and the Necessary and Proper Clause.<sup>42</sup> The Court held that Congress could use the commerce power to prohibit from interstate commerce all goods produced by employers who did not comply with wage and hour standards.<sup>43</sup> Furthermore, under the Necessary and Proper Clause alone, the Court held that Congress could require employers to keep employment records in order to demonstrate compliance with those standards because “the requirement for records even of

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has “since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects”); *Dral & Phillips, supra* note 5, at 10,413 (same).

39. *Jones & Laughlin Steel*, 301 U.S. at 37; Mank, *supra* note 5, at 736–37; Winemiller, *supra* note 31, at 172. Compare *Jones & Laughlin Steel*, 301 U.S. at 36–39 (holding statute prohibiting unfair labor practices is within commerce power), with *Carter*, 298 U.S. at 310–11 (rejecting similar labor laws in Bituminous Coal Conservation Act as exceeding commerce power).

40. *Jones & Laughlin Steel*, 301 U.S. at 37–41; Scopp, *supra* note 31, at 797–98. In *Morrison*, the Court described the *Jones* decision as having broadened congressional “latitude in regulating conduct and transactions under the Commerce Clause.” *United States v. Morrison*, 529 U.S. 598, 608 (2000); Winemiller, *supra* note 31, at 172.

41. *Jones & Laughlin Steel*, 301 U.S. at 37.

Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

*Id.*; Winemiller, *supra* note 31, at 172.

42. 312 U.S. 100, 121 (1941).

43. *Id.* at 113–21.

the intrastate transaction is an appropriate means to a legitimate end."<sup>44</sup>

In 1942, in *United States v. Wrightwood Dairy*,<sup>45</sup> the Court used both the Commerce Clause and the Necessary and Proper Clause to sustain federal regulation of the intrastate production and sale of milk because such regulation was essential to the federal regulation of interstate milk prices.<sup>46</sup> First, the Court explained that Congress's power to regulate interstate commerce "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."<sup>47</sup> The Court stated that the commerce power reached intrastate activities that substantially affected or obstructed interstate commerce even though the activities were wholly intrastate: "It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of congressional power."<sup>48</sup> Second, under the Necessary and Proper Clause, the Court stated that Congress had the authority to enact legislation regulating intrastate activity as "necessary and appropriate to make the regulation of the interstate commerce effective."<sup>49</sup>

In the 1942 case *Wickard v. Filburn*,<sup>50</sup> the Court first interpreted the Commerce Clause to authorize Congress to use an "aggregation" principle to reach far smaller intrastate activities than those in *Jones & Laughlin Steel* or even *Wrightwood Dairy*.<sup>51</sup> The Court held that Congress could prohibit farmers from growing wheat exclusively for home consumption because the aggregate impact of homegrown wheat used by thousands of farm families had a substantial effect on inter-

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44. *Id.* at 121-24.

45. 315 U.S. 110, 119 (1942).

46. *Id.* at 118-21; *Gonzales v. Raich*, 125 S. Ct. 2195, 2217 (2005) (Scalia, J., concurring) (discussing *Wrightwood Dairy* and the Necessary and Proper Clause); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 619 (same); Winemiller, *supra* note 31, at 172-73 (same).

47. *Wrightwood Dairy*, 315 U.S. at 119; Winemiller, *supra* note 31, at 173.

48. *Wrightwood Dairy*, 315 U.S. at 121; Winemiller, *supra* note 31, at 173.

49. *Wrightwood Dairy*, 315 U.S. at 121; *see also Raich*, 125 S. Ct. at 2217 (Scalia, J., concurring) (discussing *Wrightwood Dairy*); Winemiller, *supra* note 31, at 173. As will be discussed in Part IV, *infra*, Justice Scalia's concurring opinion in *Raich* emphasized the above-quoted language in *Wrightwood Dairy* and similar cases that used the Necessary and Proper Clause to justify Commerce Clause regulation.

50. 317 U.S. 111, 118 (1942).

51. *See id.* at 127-29; Scopp, *supra* note 31, at 798.

state commerce that was “far from trivial” by competing with commercially sold wheat in interstate commerce.<sup>52</sup> Although acknowledging that one farmer’s intrastate activities did not have a “substantial” impact on interstate commerce, the *Wickard* Court concluded that the Commerce Clause authorizes Congress to regulate such intrastate activities if there was a rational basis for Congress to believe that those intrastate activities substantially affect interstate commerce when aggregated “together with that of many others similarly situated.”<sup>53</sup> A significant problem with the *Wickard* aggregation doctrine is that it is unclear which intrastate activities courts should aggregate in determining whether the effect upon interstate commerce justifies legislation under the Commerce Clause.<sup>54</sup>

In two 1964 cases, the Court broadly aggregated intrastate activities to find substantial effects on interstate commerce that justified newly enacted civil rights legislation prohibiting racial discrimination in public accommodations, including those operated by private businesses. In *Heart of Atlanta Motel, Inc. v. United States*,<sup>55</sup> the Court held that Congress could prohibit racial discrimination by a motel that obtained seventy-five percent of its guests from outside of Georgia and was next to two interstate highways. Despite objections that the accommodations themselves did not move across state lines, the Court reasoned that racial discrimination practiced by the motel and similar motels or hotels in the aggregate harmed interstate commerce by discouraging travel by racial minorities. The Court refused to examine whether Congress’s real motive was promoting civil rights rather than increasing interstate commerce and concluded that “Congress was not restricted” by the fact that it was “dealing with what it considered a moral problem.”<sup>56</sup> *Heart of Atlanta Motel*’s recognition that Congress may regulate for moral reasons should defeat any attempt by

52. 317 U.S. at 124–25 (holding Congress may regulate homegrown wheat under the Agriculture Adjustment Act of 1938, 7 U.S.C. § 1281 (2000)); Mank, *supra* note 9, at 945.

53. Mank, *supra* note 9, at 945. In *Lopez*, Chief Justice Rehnquist described *Wickard* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.” *Lopez*, 514 U.S. at 560; Mank, *supra* note 9, at 946.

54. See Nagle, *supra* note 5, at 179–80 (“[W]hat *Wickard* does not answer is the level of generality that Congress is permitted to use when aggregating ‘similar’ activities.”).

55. 379 U.S. 241 (1964).

56. *Id.* at 257; Seinfeld, *supra* note 21, at 1263–64.

critics of the ESA to argue that it is invalid under the Commerce Clause because Congress probably had moral as well as economic motivations when it enacted the statute in 1973.

In *Katzenbach v. McClung*,<sup>57</sup> the Court upheld the application of civil rights legislation to a barbecue restaurant that had some out-of-state customers and purchased forty-six percent of its meat from an out-of-state supplier. The Court concluded that discrimination by the restaurant and similar establishments in the aggregate harmed interstate travel by discouraging travel by racial minorities.<sup>58</sup> It stated that Congress could consider the "total incidence" of the practice of discriminatory accommodations on commerce rather than merely the impact of individual restaurants.<sup>59</sup> The Court stated that it would examine the impact of a "class" of activities rather than the impact of individual businesses or activity on commerce.<sup>60</sup> Furthermore, the Court stated that it would apply a rational basis test in determining whether the class of activities had a significant impact on interstate commerce.<sup>61</sup> The *Katzenbach* decision supports the ESA's aggregation of all threatened and endangered species in determining their impact on the national economy and argues against considering the economic impact of each species separately.

During the late 1960s and early 1970s, in two Commerce Clause cases, the Court provided further—but incomplete—guidance on when federal legislation may regulate some intrastate activities as part of a comprehensive scheme. First, in *Maryland v. Wirtz*,<sup>62</sup> the Court held that the Commerce Clause authorized Congress to extend the Fair Labor Standards Act to the states because federal regulation of workers in state schools and hospitals was necessary to effectuate federal regulation of interstate competition among employers.<sup>63</sup> The original statute required employers to pay each employee who was engaged in commerce or the production of goods for commerce a specified minimum wage, but the challenged amendment extended the law to include all employees working for enterprises

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57. 379 U.S. 294.

58. *Id.* at 300-02.

59. *Id.* at 301.

60. *Id.* at 303.

61. *Id.* at 303-04.

62. 392 U.S. 183 (1968).

63. *Id.* at 189-90; Winemiller, *supra* note 31, at 173.

engaged in commerce or the production of goods for commerce, even if an individual employee was not involved in such an activity.<sup>64</sup> The Court held that it was rational for Congress to weigh an employer's impacts on interstate commerce rather than on individual employee's impact.<sup>65</sup> The Court refused "to excise, as trivial, individual instances" of the application of labor standards to an employer with a few employees who were not engaged in activities affecting interstate commerce, reasoning that the aggregate effect of excising all trivial instances would undermine the effectiveness of the regulatory program.<sup>66</sup> The Court, however, stressed that Congress could regulate intrastate activities with trivial impacts on commerce only if that regulation was part of a comprehensive regulatory scheme bearing a substantial relationship to interstate commerce.<sup>67</sup> The *Wirtz* decision suggests that Congress may regulate some endangered species that have only trivial impacts on interstate commerce as long as the ESA is a comprehensive regulatory scheme bearing a substantial relationship to interstate commerce.

Second, in its next Commerce Clause case, the Supreme Court provided a little more explanation of when a comprehensive federal statute may reach intrastate activities that would by themselves not be subject to the Clause. In *Perez v. United States*, the Court in 1971 upheld the constitutionality of a federal law against loan-sharking,<sup>68</sup> despite the fact that the federal government was usurping traditional general police powers belonging to state governments.<sup>69</sup> The *Perez* Court emphasized that Congress could regulate a class of activities that significantly affected interstate commerce even though the regulated class might include some intrastate activities that

64. *Wirtz*, 392 U.S. at 185–86; Alex Kreit, *Why Is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J.L. & PUB. POL'Y 169, 195 (2004).

65. *Wirtz*, 392 U.S. at 190–97 (stating that when the Court finds that a "rational basis for finding a chosen regulatory scheme [is] necessary to the protection of commerce, our investigation is at an end").

66. *Id.* at 192–93 (conceding that "labor conditions in businesses having only a few employees . . . may not affect commerce very much or very often" but stating that, under *Wickard v. Filburn*, 317 U.S. 111 (1942), courts do not "have power to excise, as trivial, individual instances falling within a rationally defined class of activities"); Winemiller, *supra* note 31, at 173.

67. *Wirtz*, 392 U.S. at 192–97.

68. Loan-sharking is the practice of loaning money at exorbitant interest rates, often with threats of violence or actual violence for failure to repay the loan.

69. *Perez v. United States*, 402 U.S. 146, 149–50, 154–57 (1971).



might not affect interstate commerce.<sup>70</sup> The Court observed that in *Darby* “a class of activities was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce.”<sup>71</sup> Quoting *Wirtz*, the *Perez* Court stated that “[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”<sup>72</sup> Following *Perez*, there is a strong argument that Congress has authority under the Commerce Clause to categorize all threatened and endangered species as a “class of activities” that significantly affect interstate commerce.

In the related cases of *Hodel v. Virginia Surface Mining & Reclamation Ass’n*,<sup>73</sup> and *Hodel v. Indiana*,<sup>74</sup> the Supreme Court more fully developed the comprehensive scheme rationale for justifying the regulation of some intrastate activities.<sup>75</sup> In *Hodel v. Indiana*, the Court stated:

A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.<sup>76</sup>

The Court upheld the constitutionality of the “prime farmlands” provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), even though most of the harm to such farmlands from mining had intrastate rather than interstate impacts.<sup>77</sup> In *Hodel v. Virginia Surface Mining*, the Court held the Act valid on the ground that the absence of federal legislation would likely lead to ruinous competition among states in lowering state environmental standards in order to

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70. *Id.* at 152–55.

71. *Id.* at 152.

72. *Id.* at 154 (quoting *Wirtz*, 392 U.S. at 193).

73. 452 U.S. 264 (1981).

74. 452 U.S. 314 (1981).

75. See Adrian Vermeule, *Centralization and the Commerce Clause*, 31 *Envtl. L. Rep.* (Envtl. L. Inst) 11,334, at 11,335 (Nov. 2001).

76. 452 U.S. at 329 n.17.

77. *Hodel v. Indiana*, 452 U.S. at 324; Winemiller, *supra* note 31, at 174.

retain or attract businesses from other states.<sup>78</sup> The Court concluded that the “prime farmland” provisions were reasonably necessary “to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce.”<sup>79</sup> It reasoned that Congress may enact legislation under the Commerce Clause to prevent states from engaging in a “race-to-the-bottom” to attract businesses because such competition would probably result in inappropriate intrastate environmental standards.<sup>80</sup> The Court stated that it would apply a deferential rational basis standard of review in determining “whether a particular exercise of congressional power is valid under the Commerce Clause” because the “Clause is a grant of *plenary authority* to Congress.”<sup>81</sup>

As will be discussed in Part V, the comprehensive scheme rationale in *Hodel v. Virginia Surface Mining* and a series of Supreme Court cases beginning in 1937 is probably the strongest justification for concluding that the regulation of isolated, economically insignificant endangered species is constitutional because such regulation is part of the Endangered Species Act’s comprehensive scheme for protecting all endangered species. Additionally, as will be discussed in Part V, *Hodel v. Virginia Surface Mining*’s conclusion that Congress may regulate intrastate activities to prevent a race to the bottom among states that would eventually harm interstate commerce supports federal protection of endangered or threatened species to prevent states from under-protecting such species. Under the compre-

78. *Hodel v. Va. Surface Mining*, 452 U.S. at 281–82; Mank, *supra* note 9, at 947.

79. *Hodel v. Indiana*, 452 U.S. at 327–29; Winemiller, *supra* note 31, at 174.

80. *Hodel v. Va. Surface Mining*, 452 U.S. at 281–82; accord *Hodel v. Indiana*, 452 U.S. at 329; see also Mank, *supra* note 9, at 947–48 (discussing *Hodel v. Virginia Surface Mining* and concept of states racing to bottom by lowering environmental standards to attract business); Neal D. Woods, *Interstate Competition and Environmental Regulation: A Test of the Race-to-the-Bottom Thesis*, 87 SOC. SCI. Q. 174 (2006) (presenting empirical evidence supporting “race-to-the-bottom” among states regulating surface-mining); Sara D. Van Loh, Note, *The Latest and Greatest Commerce Clause Challenges to the Endangered Species Act: Rancho Viejo and GDF Realty*, 31 ECOLOGY L.Q. 459, 483 (2004).

81. *Hodel v. Va. Surface Mining*, 452 U.S. at 276 (citations omitted) (emphasis added); see also Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 811 (1996) (discussing *Hodel v. Virginia Surface Mining*’s use of Necessary and Proper Clause).

hensive scheme rationale that allows Congress to regulate purely intrastate activities if they are an integral part of a larger regulatory scheme and the Court's highly deferential rational basis standard of review in Commerce Clause cases, if the Supreme Court had addressed the constitutionality of the ESA sometime between its enactment in 1973 and 1995, the Court almost certainly would have concluded that Congress had authority under the Clause to enact the ESA even though some of the species the statute regulates exist in only one state or have little direct economic significance.<sup>82</sup>

C. *A Lopez Revolution? The Supreme Court Narrows the Commerce Power to Economic Activities*

In 1995, the Court in *Lopez*, with a surprising five-to-four decision written by Chief Justice Rehnquist, held that a federal statute exceeded congressional authority under the Commerce Clause.<sup>83</sup> The Court held that the Gun-Free School Zones Act (GFSZA) of 1990, which made it a federal crime to possess a gun within a school zone (defined as a 1,000-foot radius around any school), exceeded congressional commerce power because the activity was primarily non-economic, had little direct relationship to interstate commerce, and regulation of intrastate crime was largely a state or local function.<sup>84</sup> The Court stated that the possession of a gun in a school zone "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."<sup>85</sup>

The *Lopez* decision focused on Congress's authority under the Commerce Clause to regulate "those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce."<sup>86</sup> Although the *Lopez* Court used the same rational basis standard of review as in prior cases, it applied the substantial effects test

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82. See also Mank, *supra* note 5, at 777-80 (arguing that federal regulation of endangered species is consistent with *Hodel v. Virginia Surface Mining's* rationale that federal government may regulate intrastate activities if there is a serious failure by state regulators to do so); Mank, *supra* note 9, at 923-24, 945 (same).

83. 514 U.S. 549 (1995). Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. See also Mank, *supra* note 9, at 948-53.

84. *Lopez*, 514 U.S. at 559-67; Mank, *supra* note 9, at 948.

85. *Lopez*, 514 U.S. at 560-61.

86. *Id.* at 558-59; Mank, *supra* note 9, at 948.

more strictly than had any Court since 1936.<sup>87</sup> The *Lopez* Court stated that Congress has authority under the Commerce Clause to regulate “economic activity” that substantially affects interstate commerce, but generally does not have power to regulate noncommercial activities that only indirectly affect interstate commerce.<sup>88</sup>

Rejecting prior interpretations of the Commerce Clause, Chief Justice Rehnquist declared that the Court would restrict *Wickard*'s aggregation doctrine to economic activities because the *Wickard* decision itself had stated that Congress may regulate only activities that “exert[ ] a substantial *economic* effect on interstate commerce.”<sup>89</sup> The Court stated “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”<sup>90</sup> The Court did acknowledge that Congress may enact legislation regulating some intrastate activities that lack a substantial impact on interstate commerce if the regulatory scheme is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>91</sup> The Court concluded that the GFSZA's regulation of gun possession near schools did not meet the “substantially affects” test for interstate commerce because it was neither a commercial activity in itself nor an essential ingredient for a primarily interstate economic activity.<sup>92</sup> Thus, the GFSZA went beyond the boundaries of the Commerce Clause.<sup>93</sup>

87. See *Lopez*, 514 U.S. at 557 (applying rational basis standard of review); Mank, *supra* note 9, at 949.

88. *Lopez*, 514 U.S. at 559–63; see also William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,741, at 10,763 (July 2001); Scopp, *supra* note 31, at 800–02; Mank, *supra* note 9, at 949.

89. *Lopez* 514 U.S. at 556 (emphasis added) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)); see also Mank, *supra* note 9, at 949; Schapiro & Buzbee, *supra* note 21, at 1222 (arguing that *Lopez* interpreted *Wickard* too narrowly as allowing aggregation of only economic activities).

90. *Lopez*, 514 U.S. at 561 (emphasis added); Mank, *supra* note 9, at 949–50.

91. *Lopez*, 514 U.S. at 561; see also Mank, *supra* note 9, at 950; Vermeule, *supra* note 75, at 11,335.

92. See *Lopez*, 514 U.S. at 561 (holding that the GFSZA is not “an essential part of a larger regulation of economic activity”); see also Dral & Phillips, *supra* note 5, at 10,414; Mank, *supra* note 9, at 950.

93. See *Lopez*, 514 U.S. at 567–68; Mank, *supra* note 9, at 950.

The *Lopez* decision suggested that the Court would more strictly review federal statutes under the Commerce Clause that infringed on subject areas traditionally regulated by state or local governments.<sup>94</sup> Chief Justice Rehnquist acknowledged that some of the Court's decisions, such as *Hodel v. Virginia Surface Mining*, had implied that the Court would grant almost complete deference to Congress if there was "any rational basis" for a congressional finding that a regulated activity affects interstate commerce.<sup>95</sup> Chief Justice Rehnquist, who concurred in the judgment in *Hodel v. Virginia Surface Mining*,<sup>96</sup> rejected such broad deference because it would undermine the federalist "distinction between what is truly national and what is truly local."<sup>97</sup>

The Court rejected Congress's "costs of crime" and "national productivity" rationales for the GFSZA because under these theories it is "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."<sup>98</sup> The Court also noted that regulation of school grounds was within the "general police power" retained by the states and, thus, not an appropriate area for federal regulation unless Congress could show a valid economic relationship with interstate commerce.<sup>99</sup> The Court concluded that GFSZA was unconstitutional because otherwise the Court would be "hard pressed to posit any activity by an individual that Congress is without power to regulate."<sup>100</sup>

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94. See *Lopez*, 514 U.S. at 561 n.3; see, e.g., Paul Boudreaux, *Federalism and the Contrivances of Public Law*, 77 ST. JOHN'S L. REV. 523, 543-47, 552-55, 563, 590 (2003) (discussing and criticizing the Rehnquist Court's use of "tradition" to restrict congressional authority under the Commerce Clause); Mank, *supra* note 5, at 770-72; Mank, *supra* note 9, at 950-51; Winemiller, *supra* note 31, at 175-77.

95. *Lopez*, 514 U.S. at 556-58, 567-68; see *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); see also Billionis, *supra* note 35, at 509.

96. See 452 U.S. at 311 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") (Rehnquist, J., concurring in judgment).

97. *Lopez*, 514 U.S. at 567-68 (citations omitted); Billionis, *supra* note 35, at 509.

98. See *Lopez*, 514 U.S. at 564; Mank, *supra* note 9, at 951.

99. See *Lopez*, 514 U.S. at 567; Mank, *supra* note 9, at 951; Winemiller, *supra* note 31, at 175-78.

100. *Lopez*, 514 U.S. at 564; Billionis, *supra* note 35, at 537-39.

In his concurring opinion, Justice Kennedy, joined by Justice O'Connor, agreed with the majority's federalist approach to interpreting the Commerce Clause when he stated that the Court should strictly review congressional legislation that regulates an "area[ ] of traditional state concern" to which "States lay claim by right of history and expertise."<sup>101</sup> Otherwise, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."<sup>102</sup> Nevertheless, he expressed reservations about the Court using its authority to strike down congressional legislation because courts must consider the differences between "the economic system the Founders knew" and "the single, national market still emergent in our own era."<sup>103</sup> He also warned that the Court should not radically change its approach to Commerce Clause jurisprudence, stating that "the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point."<sup>104</sup> Justice Kennedy appeared to adopt a more flexible approach to the substantial effects test than the majority opinion when he implied that Congress could regulate noncommercial activities having a nexus to interstate commerce if the legislation did not intrude on areas within the traditional state police power.<sup>105</sup>

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101. *Lopez*, 514 U.S. at 576–83 (Kennedy, J., concurring); Adler, *supra* note 14, at 756–57; Mank, *supra* note 5, at 740–41; Mank, *supra* note 9, at 951–52; White, *supra* note 5, at 238–39; Winemiller, *supra* note 31, at 176.

102. *Lopez*, 514 U.S. at 576–83 (Kennedy, J., concurring); Adler, *supra* note 14, at 757; Mank, *supra* note 5, at 740–41; Mank, *supra* note 9, at 951–52; White, *supra* note 5, at 238–39; Winemiller, *supra* note 31, at 176.

103. *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

104. *Id.* at 574; Adler, *supra* note 14, at 756.

105. See also Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 801–04 (1996) (discussing Justice Kennedy's "pragmatic" concurrence in *Lopez* as more moderate than Chief Justice Rehnquist's majority opinion); Bilionis, *supra* note 35, at 500–02, 549–51 (describing Justices Kennedy and O'Connor as taking more deferential approach to statutory review than Chief Justice Rehnquist or Justices Scalia or Thomas, but observing it is uncertain to what extent they will allow congressional regulation of non-traditional intrastate activities); Stephen R. McAllister, Essay, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause*, 44 U. KAN. L. REV. 217, 238–42 (1996) (praising Justice Kennedy's "pragmatic" approach to federalism as model for future cases). See generally *Lopez*, 514 U.S. at 576–81 (Kennedy, J., concurring); Blumm & Kimbrell, *supra* note 10, at 352–53; David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 404–05 (1998); Mank, *supra* note 5, at 740–41; Mank, *supra* note 9, at 952

In his dissenting opinion, Justice Breyer<sup>106</sup> argued that the majority opinion was inconsistent with the Court's prior decisions upholding statutes regulating activities that had much less impact on interstate commerce than the possession of a gun on school grounds.<sup>107</sup> He contended that the majority's distinction between "commercial" and "noncommercial" transactions was inconsistent with the Commerce Clause, which he maintained authorizes regulation of either type of activity as long as it significantly impacts interstate commerce.<sup>108</sup> Additionally, he maintained that the distinction was unworkable because it was inherently impossible to make such delineations and would create "legal uncertainty in an area of law that, until this case, seemed reasonably well settled."<sup>109</sup>

The *Lopez* decision did not clearly explain to what extent it sought to repudiate the Court's highly deferential approach in Commerce Clause cases between 1937 until 1995. As discussed in Parts III and IV, both the *Raich* majority opinion and Justice Scalia's concurring opinion argued that the *Lopez* decision acknowledged that Congress could regulate some intrastate, non-economic activities that are an "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated,"<sup>110</sup> although *Lopez* did not clearly explain when Congress could do so. The *Lopez* decision's narrow economic focus raised questions about the constitutionality of the ESA's

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n.174; Pushaw, *supra* note 35, at 908; White, *supra* note 5, at 238-39. Arguably, even Chief Justice Rehnquist's majority opinion implied that Congress might use the commerce power to regulate non-economic activities that do not intrude on traditional areas of state control. See Mank, *supra* note 9, at 952 n.174; Virelli & Leibowitz, *supra* note 27, at 954; see also Mank, *supra* note 5, at 741 n.106.

106. He was joined by Justices Stevens, Souter, and Ginsburg. *Lopez*, 514 U.S. at 615 (Breyer, J., dissenting).

107. *Lopez*, 514 U.S. at 615-16 (Breyer, J., dissenting) (citing cases); Dral & Phillips, *supra* note 5, at 10,414-15; Mank, *supra* note 9, at 952 n.175 (listing cases cited in Justice Breyer's *Lopez* dissent).

108. *Lopez*, 514 U.S. at 627-28 (Breyer, J., dissenting); Dral & Phillips, *supra* note 5, at 10,418-21; Mank, *supra* note 9, at 952.

109. *Lopez*, 514 U.S. at 627-28, 630 (Breyer, J., dissenting); accord *id.* at 608 (Souter, J., dissenting) (criticizing *Lopez*'s commercial versus noncommercial distinction as unworkable); Mank, *supra* note 9, at 952; Scopp, *supra* note 31, at 791-92, 802-13, 818-24 (discussing difficulties lower courts have encountered in applying *Lopez*'s distinction between economic from non-economic activities under the Commerce Clause); Seinfeld, *supra* note 21, at 1276-87 (same).

110. *Lopez*, 514 U.S. at 561; Mank, *supra* note 5, at 768; Mank, *supra* note 9, at 950; Vermeule, *supra* note 75, at 11,335.

protection of species with little economic value, but the decision's acknowledgement of the comprehensive scheme rationale left open the possibility that the statute is constitutional.

*D. The Morrison Court's Respect for Traditional State Authority and Federalism*

In 2000, in *Morrison*, a five-to-four decision written by Chief Justice Rehnquist that reflected the same division among justices as in *Lopez*, the Court applied *Lopez*'s economic approach to the substantial effects test to invalidate the Violence Against Women Act (VAWA). The Court held that the VAWA, which provided a civil damages remedy for victims of gender-based violence, exceeded the limits of the Commerce Clause because the activity was essentially non-economic and was only indirectly connected to interstate commerce.<sup>111</sup> Explaining *Lopez*'s substantial effects test, the *Morrison* Court emphasized that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."<sup>112</sup> Although the *Lopez* Court had indicated that Congress's failure to make legislative findings about the connection between guns at schools and interstate commerce was a factor in its decision, the *Morrison* Court struck down the VAWA even though Congress had made explicit findings in the statute regarding the economic impacts of gender-based violence on interstate commerce. The majority concluded that the causal connection between gender-based crimes and any economic consequences was too indirect and attenuated to justify regulation under the Clause.<sup>113</sup>

Additionally, reflecting *Lopez*'s federalist approach, the *Morrison* Court stated that it would examine the constitutionality of legislation under the Clause in light of protecting traditional state functions.<sup>114</sup> The *Morrison* Court stated that it

111. *United States v. Morrison*, 529 U.S. 598, 611–19 (2000); Mank, *supra* note 9, at 927–28, 954–55.

112. *Morrison*, 529 U.S. at 611; Mank, *supra* note 9, at 954.

113. *Morrison*, 529 U.S. at 615–16; Mank, *supra* note 9, at 928, 954.

114. *Morrison*, 529 U.S. at 618 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); Boudreaux, *supra* note 94, at 543–47, 552–55, 563, 590 (discussing and criticizing Rehnquist Court's use of "tradition" to restrict congressional authority under the



would usually reject legislation in which Congress had aggregated primarily non-economic activities to demonstrate a substantial effect on interstate commerce because such a test could support federal usurpation of traditional state functions.<sup>115</sup> If the Court accepted a theory of substantial effects based on the aggregation of primarily non-economic activities, "petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."<sup>116</sup>

Furthermore, the *Morrison* Court asserted that federalist principles supported its decision because such aggregation could "completely obliterate the Constitution's distinction between national and local authority."<sup>117</sup> As an example, the Court observed that the aggregation of non-economic activities could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."<sup>118</sup> The Court asserted that its prior decisions had aggregated only economic activities in determining whether an activity had substantial impacts on interstate commerce.<sup>119</sup> The *Morrison* decision, however, did not adopt a clear position that aggregating non-economic activities is always inappropriate, stating: "While we need not adopt a categorical 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*."<sup>120</sup>

In his dissenting opinion, Justice Souter argued that *Wickard* and its progeny demonstrated that "Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce."<sup>121</sup> Despite the majority's contention that it was applying a rational basis

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Commerce Clause); Mank, *supra* note 5, at 770–72 (same).

115. *Morrison*, 529 U.S. at 615–17; Mank, *supra* note 9, at 954.

116. *Morrison*, 529 U.S. at 615; Mank, *supra* note 9, at 954.

117. *Morrison*, 529 U.S. at 615; Mank, *supra* note 9, at 954.

118. *Morrison*, 529 U.S. at 615–16; Mank, *supra* note 9, at 954.

119. *Morrison*, 529 U.S. at 610–11; Mank, *supra* note 9, at 954.

120. *Morrison*, 529 U.S. at 613 (emphasis added); Mank, *supra* note 9, at 954–55.

121. *Morrison*, 529 U.S. at 628, 637–38 (Souter, J., dissenting); Mank, *supra* note 9, at 955.

standard and its “nominal adherence to the substantial effects test,” Justice Souter contended that the majority was in fact using a more stringent, uncertain standard for determining whether activities in the aggregate substantially affect interstate commerce because the Court would have upheld the statute if it had heard the case between 1942 and 1995.<sup>122</sup> In light of congressional legislative findings in the VAWA and its legislative history, he concluded that Congress had supplied rational evidence that gender-motivated violence significantly impacts interstate commerce and, therefore, the statute was constitutional.<sup>123</sup>

The *Morrison* decision raised uncertainties about when Congress may aggregate non-economic, intrastate activities as part of a national regulatory scheme. Additionally, the *Morrison* Court arguably departed from the traditional rational basis standard of review for a more stringent, but uncertain standard. As a result, *Morrison* raised questions about the constitutionality of the ESA’s protection of economically insignificant species, although it provided no clear answers. Nevertheless, as is discussed in Parts III and IV, both the *Raich* majority opinion and Justice Scalia’s concurring opinion observed that the *Morrison* decision acknowledged that Congress could regulate some intrastate, non-economic activities as part of a comprehensive national regulatory scheme that is primarily economic in nature. Thus, neither *Lopez* nor *Morrison* foreclosed the possibility that the ESA’s protection of species with little economic value is valid under the comprehensive scheme rationale.

#### *E. Analysis of the Lopez-Morrison Economic Approach to the Commerce Clause*

The *Lopez* and *Morrison* decisions made at least three significant changes to the Court’s Commerce Clause jurisprudence. First, both decisions emphasized that the Commerce Clause primarily concerns economic regulation and suggested that legislation regulating non-economic activities will receive

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122. *Morrison*, 529 U.S. at 628, 637–38 (Souter, J., dissenting); Mank, *supra* note 9, at 955.

123. *Morrison*, 529 U.S. at 628–38 (Souter, J., dissenting); Mank, *supra* note 9, at 955.

less deferential review from the Court.<sup>124</sup> Second, both decisions emphasized federalist principles as a basis for determining the appropriate level of scrutiny and implied that federal legislation intruding on traditional state areas of regulation will receive much less deference.<sup>125</sup> Third, *Morrison* explicitly limited Congress's authority to aggregate non-economic, intra-state actions to demonstrate a substantial effect on interstate commerce, except perhaps in unusual circumstances, both because the aggregation of non-economic activities could justify virtually any type of federal regulation and because the aggregation of non-economic activities threatened federal usurpation of traditional state functions.<sup>126</sup>

A fundamental problem with both the *Lopez* and *Morrison* decisions is that they failed to provide a workable test for distinguishing between economic and non-economic activities for the purpose of determining which intrastate activities may be aggregated to meet the Commerce Clause's substantial effects

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124. See *Morrison*, 529 U.S. at 611-17 (emphasizing that Commerce Clause primarily regulates economic activities); *United States v. Lopez*, 514 U.S. 549, 559-62 (1995) (same); Funk, *supra* note 88, at 10,763 (discussing emphasis in *Lopez* and *Morrison* on economic basis of Commerce Clause); Mank, *supra* note 5, at 737-38, 743 (same); Mank, *supra* note 9, at 957; *supra* notes 84-90, 111-12 and accompanying text.

125. See *Morrison*, 529 U.S. at 618-19; *Lopez*, 514 U.S. at 564-67; Mank, *supra* note 9, at 955, 957; see also Boudreaux, *supra* note 94, at 543-47, 552-55, 563, 590 (discussing and criticizing Rehnquist Court's use of "tradition" to restrict congressional authority under the Commerce Clause); Mank, *supra* note 5, at 770-72 (same); *supra* notes 94, 97-102, 114-15, 117-18 and accompanying text. The *Morrison* Court suggested that the scope of the Commerce Clause should be limited to economic activities in part for federalist reasons because states have traditionally regulated many non-economic activities through education, criminal and family law; however, some commentators have argued that there has been more concurrent federal regulation of these areas than the Rehnquist Court acknowledged. *Morrison*, 529 U.S. at 615-18 (suggesting federalism requires recognition of areas of exclusive state control over traditional areas of state and local control such as criminal and family law); *supra* notes 114-18 and accompanying text. *But see* Gardbaum, *supra* note 81, at 812 ("The thesis of this Article is that, contrary to the usual view, the constitutional status of the principle of federalism does not necessarily depend on the existence of areas of exclusive state power."); Mank, *supra* note 9, at 954-55, 957 (arguing federal government has often exercised concurrent authority over land use decisions and wildlife); see also Boudreaux, *supra* note 94, at 543-47, 552-55, 563, 590 (criticizing Rehnquist Court's use of "tradition" to restrict congressional authority under the Commerce Clause because federal government has played a role in many areas that *Morrison* and *Lopez* decisions treated as "traditional" areas of state control); Mank, *supra* note 5, at 770-72 (same); *infra* note 146 and accompanying text.

126. *Morrison*, 529 U.S. at 615-17; Mank, *supra* note 9, at 954-55; Pushaw, *supra* note 35, at 880-81, 894-95; *supra* notes 114-18 and accompanying text.

test.<sup>127</sup> The two decisions strongly imply that courts should aggregate only economic activities, although the decisions leave open the possibility of rare exceptions where non-economic activities might be aggregated.<sup>128</sup> Yet, the two cases provide no workable standard for distinguishing between economic and non-economic activities, or between commercial and noncommercial activities, which are arguably narrower terms than the economic and non-economic distinction.<sup>129</sup> The *Lopez* decision itself acknowledged that “a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty.”<sup>130</sup> Any simple categorical test or exclusion such as a direct/indirect test or an economic/non-economic test that is applied to a complex subject such as interstate commerce will inevitably fail to answer many difficult questions.<sup>131</sup> Chief Justice Rehnquist defended his approach by arguing that such uncertainty was an inherent problem in defining the boundaries of a limited constitutional

127. *Lopez*, 514 U.S. at 627–28 (Breyer, J., dissenting) (criticizing *Lopez* commercial versus noncommercial distinction as unworkable); *accord id.* at 608 (Souter, J., dissenting); *see also* Mank, *supra* note 9, at 928–29, 952 (arguing *Lopez* and *Morrison* fail to clarify which types of commercial activities are within scope of Commerce Clause and give courts too much discretion to decide scope of commerce power); Schapiro & Buzbee, *supra* note 21, at 1202, 1204–05, 1228, 1258–60 (same); Scopp, *supra* note 31, at 791–92, 802–13, 818–24 (same); Seinfeld, *supra* note 21, at 1276–87 (same and discussing difficulties lower courts have encountered in applying *Lopez* distinction between economic from non-economic activities under the Commerce Clause).

128. *See Morrison*, 529 U.S. at 611 n.4 (“[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn* the regulated activity was of an apparent commercial character.” (citation omitted)); Mank, *supra* note 9, at 954–55 (discussing *Lopez*’s and *Morrison*’s reasoning that Congress may not usually regulate non-economic activities under Commerce Clause); Scopp, *supra* note 31, at 802 (same); Seinfeld, *supra* note 21, at 1276–79 (same); *supra* notes 90–91, 114–20 and accompanying text.

129. Mank, *supra* note 9, at 928–29; Pushaw, *supra* note 35, at 880–81, 894–95 (arguing *Lopez* and *Morrison* fail to clarify which types of commercial activities are within scope of Commerce Clause and give courts too much discretion to decide scope of commerce power); Schapiro & Buzbee, *supra* note 21, at 1202, 1204–05, 1228, 1258–60 (same); Scopp, *supra* note 31, at 802, 811–12 (arguing *Lopez* and *Morrison* decisions failed to define “economic” and “non-economic” terms and that term “commercial” is narrower than “economic”); Seinfeld, *supra* note 21, at 1276–87 (discussing difficulties lower courts have encountered in distinguishing economic from non-economic activities).

130. *Lopez*, 514 U.S. at 566; Scopp, *supra* note 31, at 820–21; Winemiller, *supra* note 31, at 178–79.

131. *See Morrison*, 529 U.S. at 640, 644 (Souter, J., dissenting) (“[H]istory has shown that categorical exclusions have proven . . . unworkable in practice.”); Scopp, *supra* note 31, at 820–21.

power such as the Commerce Clause.<sup>132</sup> Yet, the Court from 1937 until 1995 was able to provide certainty by using a deferential rational basis that gave the political branches the primary responsibility for defining the limits of federal authority.<sup>133</sup>

A central assumption in *Lopez* and *Morrison* is that only economic activities can substantially affect interstate commerce, but this core assumption is clearly false because non-economic activities such as violence against women in fact have substantial impacts on interstate commerce.<sup>134</sup> In an attempt to side-step this reality, the *Lopez* and *Morrison* decisions tried to suggest that such impacts do not count because they are too attenuated: non-economic activities such as criminal violence only indirectly affect commercial activities that constitute interstate commerce.<sup>135</sup> There is no reason to believe, however, that the impact of non-economic activities on interstate commerce is any more indirect or attenuated than, for example, the impact of intrastate economic activities such as growing wheat for home consumption that *Wickard* recognized as appropriate for aggregation.<sup>136</sup> The Court's economic versus non-economic distinction is comparable to, and as flawed as, its pre-1937 dis-

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132. See Winemiller, *supra* note 31, at 178–79; *supra* note 130 and accompanying text. Compare *Lopez*, 514 U.S. at 565 with *Lopez*, 514 U.S. at 627–28, 630 (Breyer, J., dissenting) (arguing majority's distinction between “commercial” and “noncommercial” activities was unworkable because it was impossible to make such delineations and would create “legal uncertainty in an area of law that, until this case, seemed reasonably well settled.”).

133. Adler, *supra* note 14, at 765, 767–68 (arguing that after *Raich*, “the judicial safeguards of federalism are once again replaced with the political safeguards of federalism.”).

134. *Morrison*, 529 U.S. 598, 628 (Souter, J., dissenting); *Lopez*, 514 U.S. at 627–28 (Breyer, J., dissenting); Dral & Phillips, *supra* note 5, at 10,418–21; Mank, *supra* note 9, at 952, 955; Pushaw, *supra* note 35, at 881, 895; Scopp, *supra* note 31, at 802; Winemiller, *supra* note 31, at 178–79.

135. *Morrison*, 529 U.S. at 615–17; *Lopez*, 514 U.S. at 567; Scopp, *supra* note 31, at 802.

136. See *Morrison*, 529 U.S. at 657 (Breyer, J., dissenting) (“If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?”).

We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. 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.

*Id.* at 660 (citation omitted); Pushaw, *supra* note 35, at 881.

inction between direct and indirect affects that excluded the massive interstate impacts of manufacturing from the scope of the Commerce Clause.<sup>137</sup>

In a Commerce Clause case, a court must determine the central or “precise” “object” of a regulatory statute—whether the object is the statute’s regulatory “targets” or its beneficiaries—and how close the nexus must be between the object and the commercial purposes of the Commerce Clause.<sup>138</sup> *Lopez* and *Morrison* failed to provide a framework for courts to use in deciding: (1) which, of possibly several subjects regulated by a statute, is the central or precise “object” for determining whether the statute regulates economic or non-economic activities and (2) whether those activities have substantial impacts on interstate commerce. As one commentator observed, “a court cannot resolve whether an object or activity is ‘economic’ or ‘non-economic’ without identifying what that object or activity is.”<sup>139</sup>

For example, in dicta, the *SWANCC* decision suggested that the substantial effects test requires the government to demonstrate that any activity it seeks to regulate under the Commerce Clause is the precise “object” of the regulatory statute and also that the “object” has substantial effects on inter-

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137. *Lopez*, 514 U.S. at 608 (Souter, J., dissenting) (“[I]t 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.”); Boudreaux, *supra* note 94, at 543–55, 563, 590 (discussing and criticizing Rehnquist Court’s use of “tradition” to restrict congressional authority under the Commerce Clause and arguing that the Court’s approach is similar to pre-1937 cases using direct-indirect distinction); Mank, *supra* note 5, at 770–72 (same); Scopp, *supra* note 31, at 798–99, 802–03 (“The *Lopez-Morrison* test has not overcome the previous failures of the ‘direct’/‘indirect’ effects 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.”).

138. See Mank, *supra* note 9, at 928–29, 961–63; Schapiro & Buzbee, *supra* note 21, at 1202, 1204–05, 1228, 1258–60 (arguing *Lopez* and *Morrison* fail to clarify which types of commercial activities are within scope of Commerce Clause and give courts too much discretion to decide scope of commerce power); Scopp, *supra* note 31, at 800; Seinfeld *supra* note 21, at 1276–87 (discussing difficulties lower courts have encountered in distinguishing economic from non-economic activities).

139. Scopp, *supra* note 31, at 801. In a case involving the constitutionality of the Endangered Species Act under the Commerce Clause, the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton* commented that the *Lopez* and *Morrison* decisions had not “explicitly determined the scope of the substantial effects analysis.” 326 F.3d 622, 633 (5th Cir. 2003), *reh’g denied*, 362 F.3d 286 (5th Cir. 2004) (en banc), *cert. denied*, 545 U.S. 1114 (2005); Winemiller, *supra* note 31, at 179.

state commerce.<sup>140</sup> Because the *SWANCC* Court's discussion of what should be the "precise object or activity" in the case is far from clear,<sup>141</sup> commentators have disagreed whether the wetlands or the commercial activities filling in the wetlands are the "object" that must substantially affect interstate commerce.<sup>142</sup> Because the wetlands are not connected to navigable waters, and thus have no direct connection to interstate commerce, if they are the "object" of the statute then the Court may have suggested that the government's efforts to regulate iso-

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140. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 173 (2001) (stating that whether presence of migratory birds justified the government's regulation of intrastate, isolated wetlands "raise[d] significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."); Mank, *supra* note 9, at 960-63; Schapiro & Buzbee, *supra* note 21, at 1243 n.252 (arguing that *Lopez* and *Morrison* focused on the commercial activities that were the "target" of the challenged statute, but that "[t]he *SWANCC* decision, on the other hand, seemed to focus more on the beneficiaries of regulation - wetlands and migratory birds.").

141. See Scopp, *supra* note 31, at 801 ("[T]he [*SWANCC*] Court failed to give any guidance on how to identify the precise object.").

142. See Michael J. Gerhardt, *On Revolution and Wetland Regulations*, 90 *GEO. L.J.* 2143, 2163 (2002) (suggesting that *SWANCC* focused on the purpose of the statute and regulations); Christine A. Klein, *The Environmental Commerce Clause*, 27 *HARV. ENVTL. L. REV.* 1, 38 (2003) (discussing *SWANCC*).

[T]he *SWANCC* decision suggested that neither the value of the migratory birds nor the commercial activities that motivated the filling in of the wetlands could justify congressional regulation because they were not the precise object of the statute. Instead, the Court implied that the wetlands themselves are the 'object' that must substantially affect interstate commerce.

Mank, *supra* note 9, at 960-61; Schapiro & Buzbee, *supra* note 21, at 1243 n.252 (arguing that *Lopez* and *Morrison* focused on the commercial activities that were the "target" of the challenged statute, but that "[t]he *SWANCC* decision, on the other hand, seemed to focus more on the beneficiaries of regulation - wetlands and migratory birds"); Scopp, *supra* note 31, at 801. Compare Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 *HARV. J.L. & PUB. POL'Y* 849, 890 (2002) (stating "the object regulated [in *SWANCC*] is the intrastate water"), and Mank, *supra* note 9, at 962 ("While not clearly defining the 'precise object' at issue in the case, the stronger argument is that the *SWANCC* court was focusing on the purpose of the statute and regulations - benefiting wetlands - rather than on the commercial activity being regulated, the landfill . . . [T]he *SWANCC* Court[ ] focus[ed] on the environmental purposes of the statute and regulations rather than the landfill . . ."), with Marianne Moody Jenkins & Nim Razook, *United States v. Morrison: Where the Commerce Clause Meets Civil Rights and Reasonable Minds Part Ways: A Point and Counterpoint from a Constitutional and Social Perspective*, 35 *NEW ENG. L. REV.* 23, 54 (2000) (explaining that in the Clean Water Act, "Congress is not regulating wetlands use; it is regulating the economic, and often commercial activity of land use and development").

lated wetlands was beyond Congress's authority under the Commerce Clause.<sup>143</sup> If the Court meant that the commercial activities of filling in the wetlands are the "precise object or activity," there is probably a stronger argument that Congress could regulate isolated wetlands harmed by such activity, but the Court also suggested that it would not exclusively focus on the commercial activities causing the destruction of natural resources and would instead look to whether there was some close relationship between the natural object and the commercial activities.<sup>144</sup> The Court's failure to define what objects or activities are most important in analyzing whether a statutory scheme may regulate an activity under the Commerce Clause has caused especially difficult problems for courts deciding whether the ESA is constitutional under the Clause.<sup>145</sup>

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143. See Mank, *supra* note 7, at 854 (discussing SWANCC's implication that Congress may not regulate isolated wetlands under the Commerce Clause).

144. See Blumm & Kindrell, *supra* note 10, at 326.

But it is also possible [Chief Justice Rehnquist] was suggesting that the commercial nature of the landfill was too attenuated to provide the commerce necessary to support Clean Water Act jurisdiction. This might mean that the requisite commercial connection for the ESA take provision is the listed species' substantial effect on commerce, not the regulated activity's commercial nature.

*Id.*; Gerhardt, *supra* note 142, at 2163 (suggesting that SWANCC focused on the purpose of the statute and regulations); Klein, *supra* note 142, at 38 (discussing SWANCC); Mank, *supra* note 9, at 960–62.

[T]he SWANCC decision suggested that neither the value of the migratory birds nor the commercial activities that motivated the filling in of the wetlands could justify congressional regulation because they were not the precise object of the statute. Instead, the Court implied that the wetlands themselves are the 'object' that must substantially affect interstate commerce.

*Id.*; Schapiro & Buzbee, *supra* note 21, at 1243 n.252 ("The SWANCC decision, on the other hand, seemed to focus more on the beneficiaries of regulation – wetlands and migratory birds"); Scopp, *supra* note 31, at 801; *supra* notes 138–43 and accompanying text.

145. See Mank, *supra* note 9, at 929, 961–62 (discussing the failure of the SWANCC Court to define the object of a regulatory statute, relating the problem back to uncertainties in the *Lopez-Morrison* framework, and discussing difficulties in defining the regulatory object in endangered species cases when Congress may aggregate intrastate activities to show substantial effects on interstate commerce under the Commerce Clause); Scopp, *supra* note 31, at 792, 801–13, 819–24 (discussing failure of the *Lopez* and *Morrison* decisions to define what is the key object or activity of a statute, for determining what is economic or non-economic under Commerce Clause, and the struggles of lower courts to define what is the object of the Endangered Species Act); Winemiller, *supra* note 31, at 179–200 (discussing difficulties faced by lower courts in cases involving the Endangered Species Act in applying the substantial effects test and SWANCC's "object" analysis);



Finally, the Court's federalist attempt to use "tradition" as a way to limit national power is flawed because in many areas that *Lopez* and *Morrison* define as traditional areas of state control—including family law, land use law, education law and criminal law—there is a long history of concurrent national regulation.<sup>146</sup> The problem with using "tradition" as a test is that the Court did not explain clearly which areas of activity are "traditional" areas of state or local regulation immune from federal regulation.<sup>147</sup> Notably, in *National League of Cities v. Usery*, the Court in a 1976 opinion by Justice Rehnquist ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions."<sup>148</sup> In 1985, however, the Court in *Garcia v. San Antonio Metropolitan Transit Authority* overruled the decision because "[a]lthough *National League of Cities* supplied some examples of 'traditional governmental functions,' it did not offer a general explanation of how a 'traditional' function is to be distinguished from a 'nontraditional' one. Since then, federal and state courts have struggled with the task."<sup>149</sup>

The *Lopez* and *Morrison* decisions similarly failed to provide a workable test for distinguishing between traditional and non-traditional state functions. For example, some decisions

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*supra* notes 11–13 and accompanying text; *infra* notes 258–59 and accompanying text.

146. See Boudreaux, *supra* note 94, at 543–47, 552–55, 563, 590 (criticizing the Rehnquist Court's use of "tradition" to restrict congressional authority under the Commerce Clause because the federal government has played a role in many areas that the *Morrison* and *Lopez* decisions treated as "traditional" areas of state control); Mank, *supra* note 5, at 770–72; *supra* note 125 and accompanying text; *infra* notes 264–74 and accompanying text. *But see* Winemiller, *supra* note 31, at 191–92 (suggesting "tradition" is a valid test for limiting Congress's power under the Commerce Clause).

147. See Bilonis, *supra* note 35, at 500–02, 550–51 (describing Justices Kennedy and O'Connor as taking a more deferential approach to statutory review than Chief Justice Rehnquist or Justices Scalia or Thomas, but observing that it is uncertain to what extent they will allow congressional regulation of non-traditional intrastate activities); Boudreaux, *supra* note 94, at 543–47, 552–55, 563, 590 (discussing and criticizing the Rehnquist Court's use of "tradition" to restrict congressional authority under the Commerce Clause); Mank, *supra* note 5, at 770–72 (same).

148. 426 U.S. 833, 852 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

149. 469 U.S. 528, 530 (1985).

have treated environmental regulation as distinct from traditional land use regulation, but *SWANCC* in dicta suggested otherwise.<sup>150</sup> As Part V will show, the protection of endangered species is not a traditional area of state regulation because the federal government and state governments have exercised concurrent jurisdiction over these species for many decades.

The *Lopez* and *Morrison* decisions were wrong in asserting that Congress's authority under the Commerce Clause is limited to the regulation of economic activities, that Congress may not consider the aggregate impact of non-economic activities such as violence against women on the national economy, that federalist principles prohibit congressional regulation of intrastate activities, and that Congress may not regulate for moral purposes. Nevertheless, even accepting their reasoning, *Lopez* and *Morrison* did not overrule decisions applying the comprehensive statutory doctrine that Congress may regulate intrastate activities that are an integral part of a national regulatory scheme. Both because of the comprehensive scheme rationale and because protection of endangered species is not a traditional area of state regulation, Congress may regulate intrastate or economically insignificant species that in the aggregate do have a significant impact on interstate commerce.

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150. Justice Blackmun, in his concurring opinion in *National League of Cities*, stated that the decision "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856 (Blackmun, J., concurring). In *California Coastal Commission v. Granite Rock Co.*, the Supreme Court recognized that federal environmental protection is distinct from state land use regulation. See 480 U.S. 572, 586–87 (1987); see also *SWANCC*, 531 U.S. 159, 191 (2001) (Stevens, J., dissenting) (rejecting the majority's suggestion that the Corps' interpretation of Clean Water Act (CWA) allowing regulation of isolated wetlands infringed upon the traditional state authority over land use because "[t]he CWA is not a land-use code; it is a paradigm of environmental regulation" and "[s]uch regulation is an accepted exercise of federal power."); Matthew B. Baumgartner, *SWANCC's Clear Statement: A Delimitation of Congress's Commerce Clause Authority to Regulate Water Pollution*, 103 MICH. L. REV. 2137, 2158–60 (2005) ("The Court's recognition of environmental laws as distinct from land use laws – even where there is some overlap between the two – alleviates the concern underlying *Lopez* and *Morrison* about federal infringement of states' rights.").

### III. *GONZALES V. RAICH*: DISTINGUISHING *LOPEZ* AND *MORRISON*

In 2005, the Court addressed the scope of *Lopez* and *Morrison* in *Gonzalez v. Raich*,<sup>151</sup> which determined the constitutionality of the Controlled Substances Act.<sup>152</sup> The CSA prohibits and criminalizes the possession, distribution, or manufacturing of marijuana (cannabis) by intrastate growers and users.<sup>153</sup> Although acknowledging that Congress has authority to regulate interstate commerce in marijuana under the CSA, the respondents brought an action seeking injunctive and declaratory relief prohibiting the CSA's enforcement to the extent it prevented them from possessing, obtaining, or manufacturing cannabis for their personal medical use under the California Compassionate Use Act, which authorizes limited marijuana use for medicinal purposes.<sup>154</sup> After the district court denied respondents' motion for a preliminary injunction,<sup>155</sup> the Ninth Circuit reversed, finding that the respondents had demonstrated a strong likelihood of success on the claim that the CSA is an unconstitutional exercise of Congress's Commerce Clause authority.<sup>156</sup> The Ninth Circuit relied heavily on *Lopez* and *Morrison* in holding that "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law" constituted a "separate and distinct class of activities" that was beyond the reach of the otherwise

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151. 125 S. Ct. 2195 (2005).

152. 21 U.S.C. §§ 801–971 (2000). The CSA makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the Act. §§ 841(a)(1), 844(a); *Raich*, 125 S. Ct. at 2203.

153. The CSA classifies marijuana as a Schedule I substance, based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. 21 U.S.C. §§ 812(b)(1), 812(c). This classification renders the manufacture, distribution, or possession of marijuana a criminal offense. *Id.* §§ 841(a)(1), 844(a); *Raich*, 125 S. Ct. at 2204.

154. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996 & Supp. 2005); *Raich*, 125 S. Ct. at 2199–2200, 2204–05 n.3 ("The California Legislature recently enacted additional legislation supplementing the Compassionate Use Act." (citation omitted)).

155. See *Raich v. Ashcroft*, 248 F. Supp. 2d 918, 931 (N.D. Cal. 2003), *rev'd*, 352 F.3d 1222 (9th Cir. 2003).

156. See *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003), *rev'd*, 125 S. Ct. 2195 (2005).

valid federal authority to prohibit interstate commerce in cannabis.<sup>157</sup>

The *Raich* Court, in an opinion by Justice Stevens, vacated and remanded the decision of the Ninth Circuit holding that the CSA did not exceed Congress's authority under the Commerce Clause as applied to the respondents because Congress has the authority to regulate intrastate activities that substantially affect interstate commerce even if some of the individual intrastate activities have only a "*de minimis*" impact on interstate commerce; as long as Congress has a rational basis for believing that the intrastate activities as a class "pose[ ] a threat to a national market, it may regulate the entire class."<sup>158</sup> Observing that "[t]he similarities between this case and *Wickard* are striking," the Court maintained that the regulation of intrastate cultivation and use of marijuana was comparable to the Court's approval of government regulation of intrastate cultivation and use of wheat in *Wickard*.<sup>159</sup> The Court concluded: "Here too, Congress had a rational basis for concluding that

157. *Id.* at 1228; see also *Raich*, 125 S. Ct. at 2201 (stating that the Ninth Circuit decision "placed heavy reliance on [the Supreme Court's] decisions" in *Lopez* and *Morrison*).

158. *Raich*, 125 S. Ct. at 2205–06.

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

*Id.* (citations omitted); see also Pushaw, *supra* note 35, at 900–01.

159. *Raich*, 125 S. Ct. at 2206–07.

Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . . and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.

*Id.* (citations omitted).

leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”<sup>160</sup>

Rejecting the respondents’ arguments that *Lopez* and *Morrison* had significantly restricted congressional authority under the Commerce Clause, Justice Stevens emphasized that *Lopez* and *Morrison* had not radically changed the Court’s Commerce Clause cases dating to 1937. He stated: “In their myopic focus, they overlook the larger context of modern-era *Commerce Clause* jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents’ creation, they read those cases far too broadly.”<sup>161</sup> The *Raich* Court observed that the respondents’ challenge to the CSA was quite different from the challenges in *Lopez* and *Morrison* because the “respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress’s commerce power in its entirety.”<sup>162</sup> By distinguishing *Lopez* and *Morrison* as decisions about single-subject statutes rather than comprehensive statutes, the *Raich* decision gives Congress broad discretion to regulate non-economic, intrastate activities as long as it does so in a comprehensive statute.<sup>163</sup>

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160. *Id.* at 2207.

161. *Id.* at 2209.

162. *See id.* at 2209. *But see* Douglas W. Kmiec, *Gonzales v. Raich: Wickard v. Filburn Displaced*, 2004–2005 CATO SUP. CT. REV. 71, 87–88 (2005), available at <http://www.cato.org/pubs/scr/2005/gonzalesdecision.pdf> (criticizing Justice Stevens’s distinction in *Raich* between facial and as-applied challenges as a false dichotomy obscuring the need to distinguish between national and local activities).

163. *See* Adler, *supra* note 14, at 764–65.

Thus, so long as a statute largely regulates economic or commercial activity – or defines a given activity at a level of generality sufficiently broad to cover a substantial amount of economic activity – there is no limit to the amount of non-commercial, intrastate activity that may also succumb to federal power so long as Congress enacts a sufficiently expansive regulatory regime.

*Id.*; Ann Althouse, *Why Not Heighten the Scrutiny of Congressional Power When the States Undertake Policy Experiments?*, 9 LEWIS & CLARK L. REV. 779, 783 (2005); Kmiec, *supra* note 162, at 98 (“It is enough that Congress could rationally believe that regulating the activity (whether wholly local or not, and whether commercial or not) was part of a comprehensive regulatory scheme or, in *Congress’s sole judgment*, was necessary to make interstate regulation effective. Those ‘tests’ are without teeth.”); John T. Parry, “*Society Must be [Regulated]’: Biopolitics and the Commerce Clause in Gonzales v. Raich*,” 9 LEWIS & CLARK L. REV. 853, 859–60, 862 (2005); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 922–23 (2005) (observing

Justice Stevens argued that the respondents faced a more difficult challenge in *Raich* because “[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”<sup>164</sup> Distinguishing *Lopez*, Justice Stevens maintained that the GFSZA “did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity.”<sup>165</sup> Thus, the GFSZA was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>166</sup> In contrast, the CSA’s prohibition of intrastate cultivation and use of marijuana, even for personal medical use under state law, met *Lopez*’s standard for valid congressional legislation under the Commerce Clause because it was an essential part of a comprehensive scheme that “could be undercut unless the intrastate activity were regulated.”<sup>167</sup> Using a broad definition of economics, the *Raich* Court stated that “[b]ecause the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.”<sup>168</sup>

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that *Raich*’s comprehensive scheme limitation of *Lopez* and *Morrison* was predicted by some commentators); Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1332–33 (2001) (predicting that the Court could limit *Lopez* and *Morrison* by using comprehensive scheme rationale).

164. *Raich*, 125 S. Ct. at 2209 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971) (emphasis deleted)).

165. *Id.*

166. *Id.* at 2209 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

167. *Id.* at 2210 (quoting *Lopez*, 514 U.S. at 561).

168. *Id.* at 2211.

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. “Economics” refers to “the production, distribution, and consumption of commodities.” Webster’s Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.

*Id.*; see also Adler, *supra* note 14, at 763–64 (criticizing *Raich*’s broad definition of economic activity); Barnett, *supra* note 22, at 747 (same); Kmiec, *supra* note 162, at 88–89 (pointing out that medicinal use involves no commercial transactions); Parry, *supra* note 163, at 859–60 (“Congress is regulating economic activity in the broad sense defined by *Raich*, which includes production, distribution, possession,

In invalidating portions of the CSA, the Ninth Circuit treated “the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law” as a “separate and distinct” class of activities “different in kind from drug trafficking” that was beyond the scope of the Commerce Clause.<sup>169</sup> The CSA, however, clearly rejected any medicinal use of marijuana.<sup>170</sup> Furthermore, the Supreme Court was concerned that the attempts by the Ninth Circuit and Justice O’Connor, in her dissenting opinion, to treat such use as a “separate and distinct” class of activities beyond federal authority would logically place any recreational, intrastate use of the substance beyond federal regulation even if a state did not authorize its recreational use and such recreational use would clearly have substantial impacts on interstate commerce in the drug.<sup>171</sup> Additionally, under the Supremacy Clause, a state’s attempt to treat certain types of drug use as a separate class of activities distinct from the otherwise valid regulation of the CSA must fail because any such exception would swallow congressional authority over states and interstate commerce.<sup>172</sup>

Because of the “enforcement difficulties” in “distinguishing between marijuana cultivated locally and marijuana grown elsewhere” and potential “diversion[s] into illicit channels,”<sup>173</sup> the Court rejected arguments that intrastate cultivation and use of marijuana for personal medical use under state law was a separate class of activities from other intrastate or interstate use.<sup>174</sup> The majority stated: “[W]e have no difficulty concluding

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or consumption of a commodity that moves in interstate commerce or that either effects interstate commerce or effects the regulation of interstate commerce.”); Pushaw, *supra* note 35, at 898–900.

This judicial debate fulfills my prediction that the Court’s refusal in *Lopez* and *Morrison* to define “commerce,” and its careless equation of that word with “economics,” would eventually sabotage its attempt to reform Commerce Clause doctrine. Justice Stevens exploited that loose language by embracing the broadest possible meaning of “economics.”

*Id.*

169. *Raich*, 125 S. Ct. at 2211 (quoting *Raich v. Ashcroft*, 352 F.3d 1222, 1228–29 (9th Cir. 2003)).

170. *See id.* at 2211–12.

171. *See id.* at 2211.

172. *See Raich*, 125 S. Ct. at 2212–15.

173. *Id.* at 2209.

174. *See supra* notes 157, 169, 171–72 and accompanying text; *infra* notes 236–37, 248 and accompanying text.

that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.<sup>175</sup> Relying upon the Commerce Clause as well as the Necessary and Proper Clause, the Court concluded that Congress had the authority to regulate all intrastate cultivation and use of marijuana even if the respondents were correct that their individual use would not affect interstate commerce.<sup>176</sup> “That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.”<sup>177</sup>

Although it is possible to distinguish the facts and comprehensive statutory scheme in *Raich* from the statutes at issue in *Lopez* and *Morrison*, the approach to the Commerce Clause in Justice Stevens’s *Raich* majority opinion is closer to the Court’s pre-*Lopez* decisions. Justice Stevens and three of the four justices who joined his *Raich* majority opinion—Justices Souter, Ginsburg, and Breyer—had all dissented in both *Lopez* and *Morrison* so one may easily question whether they agree with the spirit of those cases.<sup>178</sup> Justice Kennedy, who had been with the federalist majority in *Lopez* and *Morrison*, also joined the *Raich* majority opinion.<sup>179</sup> Because he did not write a concurring opinion in *Raich*, it is impossible to know for sure why Justice Kennedy believed that federal regulation of intrastate medical marijuana was constitutional and thus different from the activities at issue in *Lopez* and *Morrison*. However, his *Lopez* concurrence appeared to give greater latitude to congressional authority to regulate intrastate activities so long as the legislation did not intrude on areas within the traditional state

175. *Raich*, 125 S. Ct. at 2209; Pushaw, *supra* note 35, at 900–01.

176. See *Raich*, 125 S. Ct. 2195; Adler, *supra* note 14, at 762–77 (arguing that *Raich* effectively overruled most of *Lopez* and *Morrison* where the litigant challenges a law as applied); Blumm & Kimbrell, *supra* note 14, at 494–98 (discussing *Raich*’s use of the comprehensive scheme principle and arguing that *Raich* increases the probability that the Supreme Court will find the Endangered Species Act constitutional); Pushaw, *supra* note 35, at 900–01.

177. *Raich*, 125 S. Ct. at 2209.

178. See Althouse, *supra* note 163, at 782 (“Stevens, like three other members of the *Raich* majority, dissented in *Lopez* and *Morrison*, and presumably has little interest in nurturing the commercial/noncommercial distinction. I would expect these four Justices some time soon to cite *Raich* for the proposition that the commercial/noncommercial distinction has been abandoned.” (citation omitted)).

179. *Raich*, 125 S. Ct. at 2197.



police power.<sup>180</sup> In cases involving a comprehensive statutory scheme, the *Raich* decision signals that the Court will apply a deferential rational basis approach in deciding whether Congress may regulate non-economic, intrastate activities if such regulation is necessary to effectuate regulation of interstate commerce as part of a comprehensive statutory scheme.<sup>181</sup> As the conclusion will show, after *Raich*, there is a much stronger probability that the Court will uphold the constitutionality of the ESA under the Commerce Clause and the Necessary and Proper Clause.<sup>182</sup>

#### IV. JUSTICE SCALIA'S *RAICH* CONCURRENCE: THE NECESSARY AND PROPER CLAUSE

Justice Scalia's concurrence relied on the Necessary and Proper Clause rather than the majority's comprehensive scheme rationale to justify congressional regulation of medical marijuana under the Commerce Clause. His approach to the Necessary and Proper Clause provides a second and separate argument for regulating endangered species under the Commerce Clause.

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180. See generally *United States v. Lopez*, 514 U.S. 549, 576–81 (1995) (Kennedy, J., concurring); Adler, *supra* note 14, at 768–70 (discussing possible reasons why Justice Kennedy joined *Raich* majority opinion); Althouse, *supra* note 105, at 801–04 (discussing Justice Kennedy's "pragmatic" concurrence in *Lopez* as being more moderate than Chief Justice Rehnquist's majority opinion); Mank, *supra* note 5, at 740–41 (discussing Justice Kennedy's "pragmatic" approach in rejecting federal interference with education, a traditional state concern); McAllister, *supra* note 105, at 238–42 (praising Justice Kennedy's "pragmatic" approach to federalism as model for future cases); *supra* notes 101–05 and accompanying text.

181. *Raich*, 125 S. Ct. at 2210; Barnett, *supra* note 22, at 747.

The majority in *Raich* adopted the most deferential version of the rational basis test. This is, perhaps, the most dangerous aspect of the Court's holding (and Justice Scalia's concurrence). Any heightened scrutiny provided by *Lopez* and *Morrison* could be evaded by a traditional rational basis approach to determining whether it is "essential" to reach the intrastate activity in question.

*Id.*; Blumm & Kimbrell, *supra* note 14, at 494–98 (discussing *Raich*'s use of the comprehensive scheme principle and arguing that *Raich* increases the probability that the Supreme Court will find the ESA constitutional).

182. Blumm & Kimbrell, *supra* note 14, at 494–98 (discussing *Raich*'s use of the comprehensive scheme principle and arguing that *Raich* increases the probability that the Supreme Court will find the ESA constitutional); see also Adler, *supra* note 14, at 762–65 (arguing *Raich* effectively overruled most of *Lopez* and *Morrison* where the litigant challenges the law as applied).

### A. Justice Scalia's Raich Concurrence

Although Justice Scalia agreed with the Court's holding, he concurred separately in the judgment.<sup>183</sup> He explained, "[M]y understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced."<sup>184</sup> Justice Scalia argued that the substantial effects test "is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the *Commerce Clause* alone."<sup>185</sup> Instead, he contended that since 1838 the Court had recognized that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."<sup>186</sup> Furthermore, he argued that "[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."<sup>187</sup> In contrast to the majority opinion, which only mentioned the Necessary

183. *Raich*, 125 S. Ct. at 2198, 2215–20 (Scalia, J., concurring); Adler, *supra* note 14, at 766–68 (discussing Justice Scalia's *Raich* concurrence).

184. *Raich*, 125 S. Ct. at 2215 (Scalia, J., concurring). *But see* Adler, *supra* note 14, at 762–63 ("Justice Scalia's concurrence, while providing a more nuanced—and perhaps a more doctrinally satisfying—rationale, was no less expansive in its impact. Both the majority and concurring opinions hollowed out *Morrison's* core—leaving it without any substance, if any life at all."); Kmiec, *supra* note 162, at 73, 90–91, 99 (criticizing Justice Scalia's *Raich* concurrence as imposing no meaningful restrictions on congressional power and ignoring original intent of framers in creating federalist structure in Constitution).

185. *Raich*, 125 S. Ct. at 2215–16 (Scalia, J. concurring) (second emphasis added).

186. *Id.* at 2216 (citing *Katzenbach v. McClung*, 379 U.S. 294, 301–02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914); *United States v. E. C. Knight Co.*, 156 U.S. 1, 39–40 (1895) (Harlan, J., dissenting); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838)); Gardbaum, *supra* note 81, at 807–11 (arguing courts and scholars have under-appreciated the role of the Necessary and Proper Clause in the development of Commerce Clause doctrine); Seinfeld, *supra* note 21, at 1288–91 (arguing Congress's expanded power to regulate commerce came not from direct power under the Commerce Clause, but rather from an interplay between the Commerce Clause and the Necessary and Proper Clause).

187. *Raich*, 125 S. Ct. at 2216 (Scalia, J. concurring); *see* Pushaw, *supra* note 35, at 901–02.

and Proper Clause, Justice Scalia placed far more emphasis on that Clause. Indeed, Justice Scalia quoted and applied Chief Justice Marshall's opinion in *McCulloch v. Maryland*.<sup>188</sup>

Justice Scalia argued that many of the Court's important Commerce Clause cases were in fact based in part on the Necessary and Proper Clause, and had reached intrastate activities under the latter Clause that they could not have reached under the former Clause alone.<sup>189</sup> He maintained that the Necessary and Proper Clause applied in "two general circumstances."<sup>190</sup> First and "[m]ost directly," he cited the *Jones & Laughlin Steel* decision for the principle that "the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants."<sup>191</sup>

Although *Lopez* and *Morrison* had limited the substantial effects test where it might "obliterate the distinction between what is national and what is local"<sup>192</sup> and had "rejected the argument that Congress may regulate *non-economic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences,"<sup>193</sup> Justice Scalia argued that the *Lopez* decision had "implicitly acknowledged" that "Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce."<sup>194</sup> Neither *Lopez* nor *Morrison* had directly invoked or discussed the Necessary and Proper

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188. 17 U.S. (4 Wheat.) 316, 421–22 (1819); see Reynolds & Denning, *supra* note 163, at 925.

189. *Raich*, 125 S. Ct. at 2216–18 (Scalia, J., concurring); Blumm & Kimbrell, *supra* note 14, at 496 (discussing Justice Scalia's *Raich* concurrence, which emphasized the Necessary and Proper Clause); Claeys, *supra* note 19, at 814–15 (same); Pushaw, *supra* note 35, at 901–02 (same).

190. *Raich*, 125 S. Ct. at 2216 (Scalia, J., concurring).

191. *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937)).

192. *Id.* at 2216 (quoting *United States v. Lopez*, 514 U.S. 549, 566–67 (1995) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935))).

193. *Id.* at 2217 (citing *Lopez*, 514 U.S. at 564–66 and *United States v. Morrison*, 529 U.S. 598, 617–18 (2000)); see Pushaw, *supra* note 35, at 901–02 (discussing *Lopez's* and *Morrison's* reasoning that Congress may not justify regulation under Commerce Clause by relying on remote, attenuated impacts); Seinfeld, *supra* note 21, at 1269–76.

194. *Raich*, 125 S. Ct. at 2217 (Scalia, J., concurring).

Clause.<sup>195</sup> He claimed that the *Lopez* decision had recognized that Congress could regulate non-economic, intrastate activities that are “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>196</sup> He argued that the *Lopez* decision meant by this statement to refer to previous decisions “permitting the regulation of intrastate activities ‘which in a substantial way interfere with or obstruct the exercise of the granted power.’”<sup>197</sup> He suggested that the *Lopez* Court would have approved the statement in the Court’s *Wrightwood Dairy* decision that “where Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’”<sup>198</sup>

Justice Scalia argued that the power under the Necessary and Proper Clause “to make . . . regulation effective” is “distinct” from congressional authority under the Commerce Clause to regulate economic activities that substantially affect interstate commerce, although he acknowledged that the two types of authority “commonly overlap[ ]” and that they “may in some cases have been confused.”<sup>199</sup> He contended that congressional power to regulate under the Necessary and Proper Clause is broader than under the Commerce Clause because “[t]he regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself ‘substantially affect’ inter-

195. See Beck, *supra* note 46, at 584, 616, 624–26, 648–49 (observing neither *Lopez* nor *Morrison* had invoked the Necessary and Proper Clause, but arguing both cases roughly followed the Clause’s jurisprudence as defined in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421–422 (1819)); Gardbaum, *supra* note 81, at 811 (observing that *Lopez* had not acknowledged Congress’s authority under the Necessary and Proper Clause).

196. *Raich*, 125 S. Ct. at 2217 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561).

197. *Id.* (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942), and citing *United States v. Darby*, 312 U.S. 100, 118–19 (1941) and *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914)).

198. *Id.* (quoting *Wrightwood Dairy Co.*, 315 U.S. at 118–19); see Beck, *supra* note 46, at 619 (discussing *Wrightwood Dairy*’s invocation of the Necessary and Proper Clause); Gardbaum, *supra* note 81, at 809–10 (same).

199. *Raich*, 125 S. Ct. at 2217 (Scalia, J. concurring) (quoting *Wrightwood Dairy Co.*, 315 U.S. at 119); cf. John T. Valauri, *The Clothes Have No Emperor, or, Cabining the Commerce Clause*, 41 SAN DIEGO L. REV. 405, 425–35 (2004) (arguing that the Necessary and Proper Clause is essential for Congress to exercise broad authority under Commerce Clause).

state commerce.”<sup>200</sup> Furthermore, as *Lopez* suggested,<sup>201</sup> Justice Scalia argued that “Congress may regulate even non-economic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”<sup>202</sup> He asserted that in determining congressional power to regulate under the Necessary and Proper Clause that “[t]he relevant question is simply whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power.”<sup>203</sup>

For example, Justice Scalia observed that in the important *Darby*<sup>204</sup> case, the Court reached some intrastate activities under the Commerce Clause, but relied on the Necessary and Proper Clause to affirm Congress’s requirement that employers keep employment records to demonstrate compliance with the FLSA regulatory scheme “on the sole ground that ‘[t]he requirement for records even of the intrastate transaction is an appropriate means to the legitimate end.’”<sup>205</sup> Justice Scalia observed that in 1914, long before the *Jones & Laughlin Steel* decision, the Court in the *Shreveport Rate Cases* stated that the Necessary and Proper Clause “does not give ‘Congress . . . the authority to regulate the internal commerce of a State, as such,’ but it does allow Congress ‘to take all measures necessary or appropriate to’ the effective regulation of the interstate market, ‘although intrastate transactions . . . may thereby be controlled.’”<sup>206</sup> He noted that the *Jones & Laughlin Steel* decision had concluded that the *Shreveport Rate Cases*’ broad ap-

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200. *Raich*, 125 S. Ct. at 2217 (Scalia, J. concurring).

201. *Id.* (quoting *Lopez*, 514 U.S. at 561).

202. *Id.* (citing *Lopez*, 514 U.S. at 561).

203. *Id.* (quoting *United States v. Darby*, 312 U.S. 100, 121 (1941)).

204. 312 U.S. 100 (1941).

205. *Raich*, 125 S. Ct. at 2217–18 (alteration in original) (quoting *Darby*, 312 U.S. at 125); see Beck, *supra* note 46, at 618–19 (discussing *Darby*’s invocation of the Necessary and Proper Clause); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POLY 107, 110–11 (1998) (“The Court also upheld . . . the wage and hour terms of the Act [in *Darby*], relying not on the Commerce Clause itself, but [on] . . . the Necessary and Proper Clause.”); Gardbaum, *supra* note 81, at 809 (discussing *Darby*’s invocation of the Necessary and Proper Clause); Seinfeld, *supra* note 21, at 1297–1300 (criticizing *Darby*’s interpretation of the Necessary and Proper Clause as overly broad); Valauri, *supra* note 199, at 427–28 (arguing that the Supreme Court in *Darby* recognized the limits of congressional authority under the Necessary and Proper Clause).

206. *Raich*, 125 S. Ct. at 2218 (Scalia, J., concurring) (alteration in original) (quoting *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914)).

proach to congressional authority under the Necessary and Proper Clause to implement Congress's authority under the Commerce Clause "[was] not limited to" the regulation of "instrumentalities of commerce," but that *Shreveport's* logic applied as well to the congressional regulation of intrastate activities that substantially affect interstate commerce.<sup>207</sup>

Justice Scalia rejected Justice O'Connor's argument that "by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to little 'more than a drafting guide.'"<sup>208</sup> He maintained that congressional authority under the Necessary and Proper Clause to implement Congress's authority under the Commerce Clause was limited because "the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective."<sup>209</sup> Defending the majority opinion, he argued, "As *Lopez* itself states, and the Court affirms today, Congress may regulate non-economic intrastate activities only where the failure to do so 'could . . . undercut' its regulation of interstate commerce."<sup>210</sup>

He concluded that congressional authority under the Necessary and Proper Clause to enact those measures necessary to make the interstate regulation effective "is not a power that threatens to obliterate the line between 'what is truly national and what is truly local.'"<sup>211</sup>

According to Justice Scalia, *Lopez* and *Morrison* had clarified that Congress may not use the Commerce Clause to "regulate certain 'purely local' activity within the States based solely on the attenuated effect that such activity may have in the interstate market."<sup>212</sup> Neither case, however, had "declare[d] non-economic intrastate activities to be categorically beyond the reach of the Federal Government."<sup>213</sup> *Lopez* and *Morrison* had not "involved the power of Congress to exert control over

207. *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38 (1937)).

208. *Id.* (quoting *id.* at 2223 (O'Connor, J., dissenting)).

209. *Id.*

210. *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)) (alteration in original).

211. *Id.* (quoting *Lopez*, 514 U.S. at 567–68).

212. *Id.* at 2218.

213. *Id.*; Blumm & Kimbrell, *supra* note 14, at 495.

intrastate activities in connection with a more comprehensive scheme of regulation.”<sup>214</sup> Indeed, according to Justice Scalia, “*Lopez* expressly disclaimed that it was such a case.”<sup>215</sup> Although the Supreme Court in *Morrison* did not address whether it was a case involving a comprehensive scheme, the court of appeals’ decision below “made clear that it was not.”<sup>216</sup> Thus, he contended that Justice O’Connor’s claim that there was no significant difference between the comprehensive scheme of the CSA and the more limited statutory regimes in *Lopez* and *Morrison* “misunderstand[s] the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation.”<sup>217</sup>

Justice Scalia argued that “there are other restraints upon the Necessary and Proper Clause authority.”<sup>218</sup> He observed that Chief Justice Marshall had written in *McCulloch v. Maryland*,<sup>219</sup> the first important Court case to address the Necessary and Proper Clause, that “even when the end is constitutional and legitimate, the means must be ‘appropriate’ and ‘plainly adapted’ to that end.”<sup>220</sup> Also, Chief Justice Marshall

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214. *Raich*, 125 S. Ct. at 2218 (Scalia, J., concurring); Blumm & Kimbrell, *supra* note 14, at 495.

215. *Raich*, 125 S. Ct. at 2218 (Scalia, J., concurring) (citing *Lopez*, 514 U.S. at 561).

216. *Id.* (citing *Brzonkala v. Va. Polytechnic Inst.*, 169 F.3d 820, 834–35 (4th Cir. 1999) (en banc)).

217. *Id.* (quoting *id.* at 2223 (O’Connor, J., dissenting); citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421–22 (1819)).

218. *Id.*

219. 17 U.S. (4 Wheat.) at 421–22.

220. *Raich*, 125 S. Ct. at 2218–19 (Scalia, J., concurring) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421); Gardbaum, *supra* note 81, at 812–17 (arguing Necessary and Proper Clause as interpreted by Chief Justice Marshall in *McCulloch v. Maryland* places limits on national power and respects federalist principles); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 286–89 (1993) (same). Some commentators have contended that the *McCulloch* decision did not primarily rely on the Necessary and Proper Clause. See, e.g., Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1134 n.33 (2001) (“Chief Justice Marshall did not rely on the text of the Necessary and Proper Clause to confer broad legislative authority on Congress; rather, he merely interpreted the Clause as confirming his preceding structural argument concerning the broad scope of implied congressional powers.”); see also Seinfeld, *supra* note 21, at 1289 n.161 (discussing Caminker’s argument that *McCulloch* did not rely on the Necessary and Proper Clause). Even if these scholars are right, the *McCulloch* decision has strongly influenced the Court’s understanding of the Clause. See Beck, *supra* note 46, at 584, 616, 624–26, 648–49 (ob-

had stated that the means “may not be otherwise ‘prohibited’ and must be ‘consistent with the letter and spirit of the constitution.’”<sup>221</sup> Justice Scalia maintained that two Court decisions from the 1990s prohibiting the federal government from forcing state officials to enforce federal laws, *Printz v. United States*<sup>222</sup> and *New York v. United States*,<sup>223</sup> “affirm that a law is not ‘proper for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional] principle of state sovereignty.’”<sup>224</sup> Thus, he suggested that the Necessary and Proper Clause respected federalist principles and would not obliterate the line between state and national authority.<sup>225</sup>

Addressing the facts in *Raich*, Justice Scalia argued that the Commerce Clause clearly authorized Congress to prohibit all commerce in marijuana, including non-economic possession for personal medical use, “as a necessary part of a larger regulation.”<sup>226</sup> He agreed with the majority opinion that Congress could appropriately prohibit all economic and non-economic use of marijuana because it is a “fungible commodit[y]” and, therefore, any marijuana used for personal medical reasons could easily be diverted to the interstate market in the drug.<sup>227</sup> Based on *McCulloch*’s principle that Congress does not have to trust state laws to accomplish a federal purpose, Justice Scalia

servicing neither *Lopez* nor *Morrison* had invoked the Necessary and Proper Clause, but arguing both cases roughly followed the Clause as defined in *McCulloch*, 17 U.S. (4 Wheat.) at 421–22; Gardbaum, *supra* note 81, at 820–22, 831 (arguing courts should follow *McCulloch*’s approach to interpreting Congress’s authority under the Necessary and Proper Clause); Seinfeld, *supra* note 21, at 1289 n.161, 1292–97 (arguing *McCulloch* decision has strongly influenced the Court’s understanding of the Clause even if that case did not actually rely on the Clause).

221. *Id.* at 2219 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

222. 521 U.S. 898 (1997).

223. 505 U.S. 144 (1992).

224. *Raich*, 125 S. Ct. at 2219 (Scalia, J., concurring) (quoting *Printz*, 521 U.S. at 923–24; citing *New York*, 505 U.S. at 166) (alteration in original); *see also* Beck, *supra* note 46, at 628–32 (discussing *Printz*, *New York* and Necessary and Proper Clause).

225. *See Raich*, 125 S. Ct. at 2219 (Scalia, J., concurring); Gardbaum, *supra* note 81, at 812–31 (arguing Necessary and Proper Clause places limits on national power and respects federalist principles); Lawson & Granger, *supra* note 220, at 271–72 (same). *But see Raich*, 125 S. Ct. at 2226 (O’Connor, J., dissenting) (arguing Necessary and Proper Clause does not give Congress unlimited power to undermine federalist principles); Pushaw, *supra* note 35, at 903 (same); Reynolds & Denning, *supra* note 163, at 924–26 (same).

226. *Raich*, 125 S. Ct. at 2219 (Scalia, J., concurring).

227. *Id.*



concluded that Congress in the CSA could reasonably conclude that it was necessary to enact a total prohibition on marijuana use rather than relying on state laws restricting the drug's use to medical purposes that might not be effective.<sup>228</sup>

### B. Raich's Dissenting Opinions

Three of the five justices who comprised the majority in *Lopez* and *Morrison* dissented in *Raich* because they found that its interpretation of the Commerce Clause was inconsistent with those decisions: Chief Justice Rehnquist, Justice O'Connor and Justice Thomas.<sup>229</sup>

#### 1. Justice O'Connor's Dissenting Opinion

In her dissenting opinion, Justice O'Connor, who was joined by Chief Justice Rehnquist and Justice Thomas,<sup>230</sup> argued that both the majority opinion and Justice Scalia's concurring opinion were inconsistent with *Lopez* and *Morrison* as well as broader federalist principles because they allowed Congress to regulate non-economic, intrastate activities.<sup>231</sup> Justice O'Connor criticized both the majority and Justice Scalia for using the comprehensive scheme rationale to evade federalist limits on congressional authority.<sup>232</sup> She argued that the Government had failed to demonstrate "that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce" or "that regulating such activity is necessary to an interstate regulatory scheme."<sup>233</sup> She also criticized the

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228. *Id.* at 2219–20 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 424).

229. Chief Justice Rehnquist wrote the majority opinion in both *Lopez* and *Morrison*, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Lopez*, 514 U.S. at 550; *Morrison*, 529 U.S. at 600. Justices Stevens, Souter, Ginsburg, and Breyer dissented in each case. *Lopez*, 514 U.S. at 550; *Morrison*, 529 U.S. at 600.

230. Justice Thomas did not join Part III of Justice O'Connor's dissenting opinion, which expressed her personal view that if she were a California citizen or legislator that she would not have supported California's law exempting certain categories of medical marijuana use. *Raich*, 125 S. Ct. at 2198; *id.* at 2220, 2229 (O'Connor, J., dissenting).

231. *Id.* at 2221–24 (O'Connor, J., dissenting); Pushaw, *supra* note 35, at 898–99.

232. *Raich*, 125 S. Ct. at 2221–23 (O'Connor, J., dissenting); Pushaw, *supra* note 35, at 903.

233. *Raich*, 125 S. Ct. at 2226 (O'Connor, J., dissenting).

majority's and Justice Scalia's use of the Necessary and Proper Clause to justify congressional regulation of medical marijuana because Congress's authority under the Necessary and Proper Clause had to be "consistent with basic constitutional principles," including federalism.<sup>234</sup> She argued that the majority's and Justice Scalia's approach to the Necessary and Proper Clause would logically have led the Court in *Lopez* to conclude that the GFSZA was constitutional under the Commerce Clause because possession of guns could "conceivabl[y]" have substantial impacts on interstate commerce.<sup>235</sup>

Addressing Congress's authority to regulate personal, medicinal use of marijuana despite state laws authorizing and regulating its use, Justice O'Connor contended that "[t]here is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime."<sup>236</sup> She argued that the respondents had demonstrated that such users were a separate class from recreational users of the drug and that the government had failed to demonstrate any diversion of medicinal marijuana into interstate markets.<sup>237</sup>

Justice O'Connor appropriately questioned whether the majority's deferential rational basis standard of review would have led it to decide that the VAWA at issue in *Morrison* was constitutional because of the congressional findings in the statute's legislative history concluding that gender-based violence has significant impacts on interstate commerce.<sup>238</sup> Her dissenting opinion failed, however, to grapple with the numerous decisions that *Lopez* and *Morrison* had not overruled and that the Court had never changed the deferential rational basis

234. *Id.*; Pushaw, *supra* note 35, at 903.

235. *Raich*, 125 S. Ct. at 2226 (O'Connor, J., dissenting).

Indeed, if it were enough in "substantial effects" cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are "never more than an instant from the interstate market" in guns already subject to extensive federal regulation, . . . recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act of 1990.

*Id.* (quoting *id.* at 2219 (Scalia, J., concurring in judgment) (citation omitted)).

236. *Id.*

237. *Id.* at 2226–29.

238. *Id.* at 2227–28.

standard of review that it had used since 1937.<sup>239</sup> The majority opinion and even Justice Scalia's concurrence may be at odds with the spirit if not the letter of *Lopez* and *Morrison*, but surely these opinions are consistent with *Wickard*, *Darby*, *Hodel* and *Wrightwood Dairy*, which remain good law.

In her dissenting opinion in *Garcia*, Justice O'Connor acknowledged that under the Commerce Clause "[e]ven if a particular individual's activity has no perceptible interstate effect, it can be reached by Congress through regulation of that class of activity in general as long as that class, considered as a whole, affects interstate commerce."<sup>240</sup> As Part V will show, courts have and should consider endangered and threatened species as a class rather than individual species. Her dissenting opinion in *Garcia* emphasized the need for the Court to balance national interests against state autonomy.<sup>241</sup> Part V will demonstrate that the ESA respects that balance. Although her retirement moots the issue, it is possible that Justice O'Connor would have voted in favor of the constitutionality of the ESA if the issue had come before her.<sup>242</sup>

## 2. Justice Thomas's dissenting opinion

In a solo dissenting opinion, Justice Thomas argued that the federal government may not regulate intrastate growth and consumption of marijuana "that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana."<sup>243</sup> Applying a narrow definition of the Commerce Clause's original meaning that interprets the Clause only to "empower[ ] Con-

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239. See *supra* notes 36–80 and accompanying text; *infra* notes 390–95 and accompanying text.

240. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting).

241. *Id.* at 584–89.

242. See Mank, *supra* note 5, at 734 (speculating that Justices O'Connor and Kennedy might support the constitutionality of the ESA); cf. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708–09 (1995) (O'Connor, J., concurring) (approving agency's broad interpretation of the term "take" under the ESA). See generally Byron Dailey, Note, *The Five Faces of Federalism: A State-Power Quintet Without a Theory*, 62 OHIO ST. L.J. 1243, 1274–77, 1280–82, 1286–87 (2001) (arguing Justices O'Connor and Kennedy apply more a moderate approach to state rights and national power issues than Chief Justice Rehnquist, Justice Scalia, and, particularly, Justice Thomas).

243. *Raich*, 125 S. Ct. at 2229 (Thomas, J., dissenting).

gress to regulate the buying and selling of goods and services trafficked across state lines,” he concluded that the respondent’s intrastate use did not constitute “commerce” as defined by the Clause.<sup>244</sup> Other justices and many commentators have disagreed with Justice Thomas’s narrow reading of the Commerce Clause’s original meaning or are unwilling to overrule decades of precedent authorizing Congress to use the Clause to regulate many economic activities beyond mere transportation of goods.<sup>245</sup>

Justice Thomas acknowledged that whether the CSA’s prohibition of personal medical use of marijuana that is grown and consumed entirely in one state is authorized by the Necessary and Proper Clause is a more difficult issue than whether the statute’s prohibition is valid under the Commerce Clause alone.<sup>246</sup> Quoting Chief Justice Marshall’s *McCulloch* opinion, Justice Thomas observed that Congress, to act under the Necessary and Proper Clause, “must select a means that is ‘appropriate’ and ‘plainly adapted’ to executing an enumerated power; the means cannot be otherwise ‘prohibited’ by the Constitution; and the means cannot be inconsistent with ‘the letter and spirit of the Constitution.’”<sup>247</sup> Applying the *McCulloch* standard, he concluded that the CSA’s regulation of the respondents’ conduct was not a valid exercise of Congress’s power under the Necessary and Proper Clause because the respondents’ medicinal use of the drug was separate and distinct from the commercial, interstate market in the drug, especially due to the restrictions on medicinal use in California’s Compassionate Use Act.<sup>248</sup> Even if it was correct that a small amount of medicinal marijuana was in fact diverted to commercial, interstate markets, he asserted that the Government had failed to demon-

244. *Id.* at 2229–30 (citing *United States v. Lopez*, 514 U.S. 549, 586–89 (1995) (Thomas, J., dissenting)).

245. *See, e.g.*, Mank, *supra* note 5, at 745; Kmiec, *supra* note 162, at 92–94 (“In his *Raich* dissent, Thomas does not discuss how he would reconcile the commerce power, properly limited, and the modern regulatory state, but he clearly indicates that if a satisfactory answer is to be found, it is best guided by original understanding.”); Pushaw, *supra* note 35, at 905, 907 (observing that Thomas’s originalist approach to Commerce Clause would require Court to overrule decades of precedent and raises many practical difficulties).

246. *Raich*, 125 S. Ct. at 2230 (footnotes omitted).

247. *Id.* at 2231 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–15 (1819); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888*, at 163–64 (1985)).

248. *Raich*, 125 S. Ct. at 2231–32.

strate that the CSA's prohibition on all medicinal use was "necessary" to achieve the statute's goals when the huge volume of commercial marijuana is compared to the tiny amount of medical marijuana that could be diverted.<sup>249</sup>

Additionally, Justice Thomas argued that "[e]ven assuming the CSA's ban on locally cultivated and consumed marijuana is 'necessary,' that does not mean it is also 'proper.'"<sup>250</sup> He argued that using the Necessary and Proper Clause to prohibit intrastate, noncommercial cultivation and consumption of marijuana was inconsistent with the letter and spirit of the Constitution's federalist structure and principles because the CSA impermissibly imposed a general police power over noncommercial, intrastate activities.<sup>251</sup>

Justice Thomas's originalist approach to the Commerce Clause and his narrow interpretation of *McCulloch* are inconsistent with decades of precedent allowing broad congressional regulation of economic activities beyond mere transportation of goods.<sup>252</sup> In light of his narrow, originalist interpretation of the Commerce Clause and the Necessary and Proper Clause, Justice Thomas is the Justice who is most likely to hold that the ESA is unconstitutional, at least in regard to intrastate or commercially valueless species.

#### V. THE ESA'S COMPREHENSIVE SCHEME FOR PROTECTING ALL ENDANGERED SPECIES IS A "NECESSARY AND PROPER" MEANS TO REGULATE INTERSTATE COMMERCE

In light of *Raich* and a series of Commerce Clause decisions from *Darby* to *Hodel v. Virginia Surface Mining*, this Part demonstrates that the ESA is constitutional under the Commerce Clause because it does not interfere with traditional state authority as the protection of threatened species has been a concurrent area of state and federal responsibility for many decades. Furthermore, comprehensive national regulation of these species prevents a "race to the bottom" among states. Additionally, the ESA's aggregation of all endangered species is

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249. *Id.* at 2233.

250. *Id.* at 2233.

251. *Id.* at 2233-34.

252. *Cf.* Pushaw, *supra* note 35, at 905, 907 (observing that Thomas's originalist approach to Commerce Clause would require Court to overrule decades of precedent and raises many practical difficulties).

necessary and proper because it serves several reasonable congressional purposes in protecting the biodiversity of important ecosystems that have significant current and potential future benefits. For all these reasons, it is appropriate for courts to defer to Congress's comprehensive scheme in the ESA under a rational basis standard of review.

A. *After Lopez and Morrison, Is the Endangered Species Act Constitutional Under the Commerce Clause?*

In enacting the 1973 ESA to protect a wide range of endangered and threatened species, "Congress primarily relied on its power under the Commerce Clause."<sup>253</sup> The text and the legislative history of the 1973 ESA justified regulation of endangered and threatened species under the Commerce Clause both by discussing their actual and potential impact on interstate commerce and also by explaining that commercial development affecting interstate commerce was a primary cause of their extinction.<sup>254</sup> Under its deferential approach to the

253. Mank, *supra* note 9, at 937–38; see Gibbs, 214 F.3d at 496–98; Nagle, *supra* note 5, at 192–93. "[Congress] also continued to use its authority under the Property Clause to regulate federal lands and the Spending Clause to regulate federal agencies and provide incentives for cooperation by states." Mank, *supra* note 9, at 937.

254. See 16 U.S.C. § 1531(a)(3) (stating that species threatened with extinction are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people"); *id.* § 1531(a)(1) (stating that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"); H.R. REP. NO. 93-412, at 4–5 (1973) (justifying the protection of endangered species under the Commerce Clause on the potential future economic and medical benefits of preserving a wide variety of species and a robust genetic heritage).

The value of this genetic heritage is, quite literally, incalculable. . . .

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.

*Id.* See generally Gibbs, 214 F.3d at 496–98 (discussing emphasis on future economic and medical benefits in 1973 ESA's legislative history and concluding that congressional concern for future economic benefits was appropriate basis for national regulation under Commerce Clause); NAHB, 130 F.3d 1041, 1052–54 (D.C. Cir. 1997) (same); Mank, *supra* note 5, at 729–30, 756–57, 789–92 (arguing that Congress, in the 1973 ESA legislative history, emphasized concern for future economic and medical benefits); Mank, *supra* note 9, at 937–38 (same); Nagle, *supra* note 5, at 193 (same).

Commerce Clause in 1973, the Court almost certainly would have upheld the constitutionality of the ESA.

The *Lopez*, *Morrison*, and *SWANCC* decisions raise serious questions about whether many of the species protected by the ESA have sufficient impacts on interstate commerce to justify regulation under the Commerce Clause, but ultimately those questions are answered by the comprehensive scheme and Necessary and Proper justifications in *Raich* for regulating intrastate activities.<sup>255</sup> About half of all endangered or threatened species have habitats limited to one state, and many intrastate species have little economic value in interstate commerce.<sup>256</sup> Similarly, many other threatened or endangered species that cross state lines lack significant commercial value.<sup>257</sup> Accordingly, in recent years, three federal courts of appeals have applied different and sometimes clearly contradictory rationales to justify regulation of endangered species under the Commerce Clause.<sup>258</sup> It is not surprising that courts have struggled

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255. See *supra* notes 4–10 and accompanying text; *infra* notes 256–59 and accompanying text.

256. See, e.g., *GDF*, 326 F.3d 622, 624 (5th Cir. 2003) (six species of subterranean, cave-dwelling invertebrate spiders and beetles living only in Texas); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (arroyo toad living only in California); *NAHB*, 130 F.3d at 1043 (Delhi Sand Flower-Loving Fly living only in California); *id.* at 1052 (half of endangered species living in one state); *id.* at 1058 (Henderson, J., concurring) (Delhi Sand Flower-Loving Fly living only in California). Hawaii has the most species that are found in only one state. See DAVID QUAMMEN, *THE SONG OF THE DODO: ISLAND BIOGEOGRAPHY IN AN AGE OF EXTINCTIONS* 19, 41, 214, 230–32, 252, 256, 264, 313–21, 342–43, 379, 606 (1996) (discussing unique extinct and endangered species on islands comprising Hawaii); Anne McKibbin, *The Whole-Ecosystem Approach to the Commerce Clause and Article III Standing in Environmental Cases* 15–16 (Sept. 28, 2004), <http://ssrn.com/abstract=597104> (“Thirty-six endangered and two threatened animal species exist only in Hawaii”; based on information downloaded from U.S. Fish and Wildlife Service’s website on Feb. 28, 2004). According to a 2004 study, thirty-one states, two territories, and the District of Columbia contain at least one isolated, intrastate species listed as endangered or threatened. McKibbin, *supra*, at 16 (listing the following: AL, AR, AZ, CA, CO, DC, FL, GA, HI, ID, IL, KY, LA, MA, MD, MI, MN, MO, MS, NC, NE, NM, NV, NY, OH, OR, Puerto Rico, TN, TX, UT, VA, VI, WA, WI, WV, WY, and Guam; based on information downloaded from U.S. Fish and Wildlife Service’s website on Feb. 28, 2004). A list of all threatened and endangered species is available at the U.S. Fish and Wildlife Service’s website at <http://www.fws.gov/endangered/wildlife.html#Species>.

257. See, e.g., *GDF*, 326 F.3d at 624–25 (six species of subterranean, cave dwelling invertebrate spiders and beetles with no commercial value); *Rancho Viejo*, 323 F.3d at 1072 (arroyo toad with no commercial value); *NAHB*, 130 F.3d at 1053 n.14 (Wald, J.), 1063 n.1, 1066 (Sentelle, J., dissenting) (Delhi Sand Flower-Loving Fly with no commercial value).

258. See *supra* notes 11–13 and accompanying text; *infra* notes 340–46, 381–85

to apply the rationales in the *Lopez*, *Morrison* and *SWANCC* decisions to the ESA because the Supreme Court in those cases failed to: (1) define which types of “traditional” state regulatory activity are protected from federal regulation under federalist principles; (2) explain the line between economic and non-economic activities; or (3) articulate when Congress may regulate intrastate non-economic activities as part of a comprehensive legislative scheme.<sup>259</sup>

The *Raich* Court’s highly deferential approach to evaluating the constitutionality of comprehensive statutory schemes under the Commerce Clause and Necessary and Proper Clause enables a court reviewing the constitutionality of the ESA to avoid these three complex and confusing issues. Regulation of intrastate species under the ESA is constitutional under the Commerce Clause and the Necessary and Proper Clause because, as will be shown in Parts B and C, there is a rational basis for including intrastate and commercially insignificant species within the ESA’s comprehensive scheme. Therefore, such regulation is consistent with federalist principles.<sup>260</sup>

### B. *The ESA Does Not Interfere with Traditional State Authority*

Both the *Lopez* and *Morrison* decisions emphasized the importance of preserving traditional state regulatory authority from federal usurpation as a factor in Commerce Clause analysis.<sup>261</sup> In dicta, the *SWANCC* decision added state and local government’s land use decisions as another area of traditional state authority that should be protected from overly broad federal regulation under the guise of the Commerce Clause.<sup>262</sup> Justice Scalia’s concurring opinion in *Raich* took a broad view of congressional authority under the Necessary and Proper

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and accompanying text.

259. See *supra* notes 127–50 and accompanying text.

260. See *infra* notes 298, 311–13, 315–20, 369–74, 402–04, 411–13, 417 and accompanying text.

261. See *supra* notes 94, 101, 105, 114–15, 118, 125–26 and accompanying text.

262. See *SWANCC*, 531 U.S. 159, 173 (2001) (stating broad interpretation of federal authority over isolated waters would “alter[ ] the federal-state framework by permitting federal encroachment upon a traditional state power”); Mank, *supra* note 5, at 769–73 (discussing *SWANCC*’s dicta discussion of Commerce Clause and traditional state authority); Mank, *supra* note 9, at 929, 959 (same); *supra* notes 9–10 and accompanying text.



Clause to effectuate federal regulation under the Commerce Clause, but also emphasized that federal authority under either Clause was limited by fundamental federalist principles in the Constitution.<sup>263</sup> On the other hand, the majority in *Raich* implicitly gave less deference to traditional state authority over intrastate activities that are regulated under a comprehensive federal statutory scheme.

Even under the broad view of states' rights in *Lopez* and *Morrison*, the ESA's comprehensive scheme is constitutional under the Commerce Clause. The ESA does not intrude on traditional state authority because the conservation of scarce natural resources, including endangered and threatened species, has been a concurrent area of state and federal responsibility for many decades.<sup>264</sup> In 1920, the Supreme Court in *Missouri v. Holland* held that the Migratory Bird Treaty Act of 1918 did not infringe on state rights guaranteed by the Tenth Amendment and that it did not divest states of their property right in wild birds because the treaty and its implementing legislation took precedence over any conflicting power of regulation under the Supremacy Clause.<sup>265</sup> In 1979, the Supreme Court in *Hughes v. Oklahoma*<sup>266</sup> held that states do not "own" the wildlife within their borders and that state laws regulating wildlife are subordinate to congressional regulation under the Commerce Clause.<sup>267</sup> The *Hughes* decision acknowledged that states have an important role in regulating wildlife within their borders, but held that the federal government has concurrent authority in conjunction with the states over any wildlife

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263. See *supra* notes 183–228 and accompanying text.

264. See *Gibbs v. Babbitt*, 214 F.3d 483, 492, 499–505 (4th Cir. 2000); MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 15–38 (3d ed. 1997) (discussing growth of federal regulation of wildlife and the continuing state role); Mank, *supra* note 5, at 770–80; Mank, *supra* note 9, at 993, 999–1001.

265. 252 U.S. 416, 433–34 (1920) (discussing Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2000))); Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 701–02 (2005).

266. 441 U.S. 322 (1979).

267. *Id.* at 329–35 (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896) (holding states own the wildlife in their borders)); Blumm & Ritchie, *supra* note 265, at 699–707 (discussing Supreme Court's gradual rejection of *Geer* doctrine that state own wildlife culminating in its *Hughes* decision); Mank, *supra* note 5, at 774 (same).

that affects interstate commerce.<sup>268</sup> In 1999, in *Minnesota v. Mille Lacs Band of Chippewa Indians (Mille Lacs)*,<sup>269</sup> the Court upheld Chippewa Indian rights under an 1837 treaty that authorized the Chippewa to hunt, fish, and gather independent of state regulation.<sup>270</sup> The Court concluded that the Native American treaty rights were “reconcilable with state sovereignty over natural resources.”<sup>271</sup> The *Mille Lacs* decision clearly stated that the federal government has concurrent powers with the states over wildlife.<sup>272</sup> Accordingly, Congress has the authority to regulate all wildlife because “in areas of concurrent power, Congress has unlimited constitutional authority to preempt the states—that is, legislatively to abolish constitutionally concurrent state lawmaking power and to convert concurrent federal power into exclusive power.”<sup>273</sup>

For over 100 years, the federal government has played a greater role than the states in preserving threatened or endangered species.<sup>274</sup> Due to public concerns about the impending extinction of bison in the Western plains, Congress established a national park system in 1894 by creating Yellowstone National Park, which “provided crucial habitat for the few remaining bison, preventing their complete extinction in the United States.”<sup>275</sup> In 1900, Congress took its first statutory step to

268. *Hughes*, 441 U.S. at 335–38; *Gibbs*, 214 F.3d at 499 (interpreting *Hughes* as giving federal government concurrent authority with states over wildlife); Mank, *supra* note 5, at 774 (same); Mank, *supra* note 9, at 1000 (same); Lilly Santaniello, *Commerce Clause Challenges to the Endangered Species Act’s Regulation of Intragrade Species on Private Land*, 10 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 39, 53 (2003); White, *supra* note 5, at 249 (same).

269. 526 U.S. 172 (1999).

270. *Id.* at 175–76, 208.

271. *Id.* at 205.

272. *Id.* at 204 (“Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers . . .”); Mank, *supra* note 5, at 775.

273. Gardbaum, *supra* note 81, at 797.

274. *Gibbs v. Babbitt*, 214 F.3d 483, 500–01 (4th Cir. 2000) (explaining Congress’s historical involvement in conservation); Mank, *supra* note 5, at 773–76 (arguing federal government has played leading role in protecting endangered species); Mank, *supra* note 9, at 1000 (same); White, *supra* note 5, at 221–22 (same); Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 469 (1999) (same).

275. SHANNON PETERSEN, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK 8 (2002); see also White, *supra* note 5, at 221 (same); Daniel J. Lowenberg, Comment, *The Texas Cave Bug and the California Arroyo Toad “Take” on the*

ward protecting threatened species with the Lacey Act,<sup>276</sup> which originally forbade the interstate transport of animals killed in violation of state law and now applies to all wild animals, including those bred in captivity, and to plants protected by treaty or state law.<sup>277</sup> Lower federal courts addressing the constitutionality of the Lacey Act, which does not preempt state wildlife laws, have all upheld the law as a permissible exercise of the commerce power.<sup>278</sup> In 1918, after President Woodrow Wilson signed a treaty with Canada to protect migratory birds, Congress enacted the Migratory Bird Treaty Act of 1918, which forbade the taking of many bird species and explicitly preempted inconsistent state laws.<sup>279</sup> In 1940, after the Supreme Court had adopted a broader interpretation of the Commerce Clause in *Jones & Laughlin Steel*, Congress invoked its authority under the Commerce Clause to enact the Bald Eagle Protection Act, which forbids taking, possessing, selling, or exporting bald eagles or any of their parts.<sup>280</sup>

States have not traditionally regulated or protected most threatened or endangered species.<sup>281</sup> The failure of states to

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*Constitution's Commerce Clause*, 36 ST. MARY'S L.J. 149, 161 (2004) (discussing late nineteenth-century congressional debate about impending extinction of the great plains bison).

276. Lacey Act, ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378 (2000)); see Mank, *supra* note 5, at 773–74 (discussing Lacey Act as first step in process of creating national regime for protecting endangered species); Mank, *supra* note 9, at 933 (same); White, *supra* note 5, at 221 (same); Petersen, *supra* note 274, at 469 (same). The Lacey Act now applies to all wild animals, including those bred in captivity, and to plants protected by treaty or state law. 16 U.S.C. § 3371 (discussing scope of the Act); see George Cameron Coggins & Anne Fleishel Harris, *The Greening of American Law: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247, 305–07 (1987) (discussing 1981 Lacey Act Amendments).

277. See 16 U.S.C. § 3371 (discussing scope of the Act); Mank, *supra* note 9, at 933; Petersen, *supra* note 274, at 469.

278. PETERSEN, *supra* note 275, at 9; Lowenberg, *supra* note 275, at 161–62.

279. 16 U.S.C. §§ 703–712; Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702; *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (holding Migratory Bird Treaty Act of 1918 constitutional under the Treaty Clause); Mank, *supra* note 9, at 934 (same); Petersen, *supra* note 274, at 469 (same). Great Britain signed the Treaty on behalf of Canada as overseer of Canadian foreign affairs. Petersen, *supra* note 274, at 469 n.52.

280. See Bald Eagle Protection Act, Pub. L. No. 76-567, 54 Stat. 250 (1940) (codified at 16 U.S.C. §§ 668–668d (2000)); Mank, *supra* note 9, at 934; Petersen, *supra* note 274, at 470.

281. Mank, *supra* note 5, at 776 (arguing states have not traditionally protected endangered species); Mank, *supra* note 9, at 1000 (same); White, *supra* note 5, at 250–52 (arguing state regulation of endangered species is inadequate and

provide effective protection for these species and the advantages of uniform national legislation eventually resulted in Congress's enactment of the ESA in 1973.<sup>282</sup> In the Endangered Species Preservation Act of 1966, Congress: (1) recognized that many states had failed to preserve these species; (2) explicitly authorized the Department of Interior to continue its practice of creating a list of endangered species; (3) created a National Wildlife Refuge System to prohibit the taking of listed endangered species living within federal lands; and (4) provided the government with authority to acquire additional federal land if necessary to accomplish preservation goals. However, the Act did not regulate private or state lands.<sup>283</sup> The failure of the 1966 Act and the slightly broader Endangered Species Conservation Act of 1969<sup>284</sup> to stop extinctions led to the far broader 1973 Act, which applies to all land in the United States and adds protection for threatened species.<sup>285</sup>

The ESA recognizes that states and the federal government have shared regulatory responsibilities in several ar-

federal government has greater expertise).

282. The ESA's legislative history stated that federal regulation of endangered and threatened species was required to achieve uniform, national standards and that inconsistent state laws likely hindered the protection of these species: "Protection of endangered species is not a matter that can be handled in absence of coherent national and international policies[;] the results of a series of unconnected and disorganized polices and programs by various states might well be confusion compounded." H.R. REP. NO. 93-412, at 7 (1973); see *Gibbs v. Babbitt*, 214 F.3d 483, 502 (4th Cir. 2000) ("A desire for uniform standards also spurred enactment of the ESA."); Mank, *supra* note 5, at 779 (arguing both the inadequacy of state laws and desirability of national uniform regulation led Congress to enact 1973 ESA); Mank, *supra* note 9, at 1000-01 (same).

283. See Pub. L. No. 89-669, 80 Stat. 926 (1966); PETERSEN, *supra* note 275, at 471 (discussing the 1966 Act); Edward A. Fitzgerald, *Seeing Red: Gibbs v. Babbitt*, 13 VILL. ENVTL. L.J. 1, 29-30 (2002) (same); Mank, *supra* note 9, at 934-36 (same); Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 295-96 (1991) (same); Davina Kari Kaile, Note, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEO. INT'L ENVTL. L. REV. 441, 448-54 (1993) (same).

284. See Pub. L. No. 91-135, § 2-3(a), 83 Stat. 275 (1969); PETERSEN, *supra* note 275, at 472 (discussing 1969 Act); Fitzgerald, *supra* note 283, at 30 (same); Mank, *supra* note 9, at 936 (same); Doremus, *supra* note 283, at 296-97 (same); Kaile, *supra* note 283, at 451-53 (same).

285. See 16 U.S.C. §§ 1533, 1538(a)(1) (2000); Fitzgerald, *supra* note 283, at 31 (discussing 1973 Act); Mank, *supra* note 9, at 936-45 (same); Kaile, *supra* note 283, at 454-56 (same and noting 1973 Act expanded beyond 1966 and 1969 Acts to include threatened species).

eas.<sup>286</sup> The ESA requires the Secretary of Interior to consider state efforts to preserve such species before any federal regulation may be imposed.<sup>287</sup> Also, the Act provides that the Secretary may enter into cooperative programs with states that have adequate programs for conserving threatened and endangered species and may provide financial assistance for such programs.<sup>288</sup> In Fiscal Year 2006, the federal government allocated \$82 million for Section 6 cooperative programs.<sup>289</sup> Additionally, the ESA encourages the federal government to cooperate with states in acquiring land for these species.<sup>290</sup>

Furthermore, the ESA is limited because the government must review its listing decisions every five years to determine if a species is still endangered or threatened.<sup>291</sup> Once a species “recovers” (in other words, is no longer endangered or threatened), the federal government must return regulatory responsibility for the species to the states.<sup>292</sup> Thus, the ESA places limits on national authority that are consistent with the Constitution’s federalist structure and comport with *Lopez* and *Morrison*, as well as with Justice Scalia’s interpretation of the

286. *Gibbs*, 214 F.3d at 502–05; Mank, *supra* note 5, at 780–81; see also Robert Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 101, 133–38 (2006) (discussing ESA’s provisions for cooperative federalism and ways to improve them); Robert L. Fischman & Jaelith Hall Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45, 80–89 (2002) (same); Mank, *supra* note 9, at 940–41, 998–1000 (same).

287. 16 U.S.C. § 1533(b)(1)(A) (2000) (Secretary may list a species as endangered or threatened only after reviewing “those efforts, if any, being made by any State . . . to protect such species.”); *Gibbs*, 214 F.3d at 503 (discussing 16 U.S.C. § 1533(b)(1)(A) (2000); Mank, *supra* note 9, at 999–1000; Mank, *supra* note 5, at 781.

288. 16 U.S.C. §§ 1535(c)–(d) (2000); Mank, *supra* note 5, at 781; Mank, *supra* note 9, at 1000.

289. Fischman, *supra* note 286, at 134.

290. 16 U.S.C. § 1535(a) (2000) (providing that the Secretary should acquire land in cooperation with the states).

291. *Id.* § 1533(c)(2)(A)–(B) (requiring Secretary of Interior to review listed endangered or threatened species at least once every five years to determine if they have recovered or require additional protection); *Gibbs*, 214 F.3d at 503; Mank, *supra* note 5, at 780–81; Mank, *supra* note 9, at 940, 993, 999.

292. See 16 U.S.C. § 1532(3) (2000) (defining “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”); *Gibbs*, 214 F.3d at 503; Mank, *supra* note 5, at 780–81; Mank, *supra* note 9, at 940, 993, 999 (2004); Santaniello, *supra* note 268, at 53.

Necessary and Proper Clause as limited by that structure.<sup>293</sup> In *SWANCC*, the Court, in dicta, suggested that the government's attempt to regulate all wetlands, including isolated, intrastate wetlands, raised serious constitutional concerns under the Commerce Clause, but the Court also stated that the government could regulate wetlands having a "significant nexus" to navigable waters.<sup>294</sup> Thus, *SWANCC* suggested that limited government regulation of the environment with a rational connection to interstate commerce is permissible. That is precisely what the narrowly tailored ESA does by regulating only those species at great risk whose extinction poses significant risks to ecosystems, biodiversity, our genetic heritage, future medical discoveries, agriculture, and ultimately the national economy, as Part C, *infra*, will demonstrate.<sup>295</sup>

### C. *Aggregation of All Endangered Species Is Necessary and Proper*

Whether Congress may regulate individual threatened or endangered species that lack significant commercial value depends on whether courts (1) allow Congress to aggregate the economic impact of all endangered species in measuring whether they have a substantial impact on interstate commerce or (2) treat each species separately in determining such impacts. If Congress may aggregate the economic impacts of the takings of all endangered species, there undoubtedly would be substantial impacts on interstate commerce because some endangered species like the grizzly bear and bald eagle have significant recreational value in generating tourism.<sup>296</sup> The crux of the issue is whether it is necessary and proper for Congress to aggregate all endangered species.<sup>297</sup> If the ESA is a

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293. *Gibbs*, 214 F.3d at 503; Mank, *supra* note 5, at 780–81; Mank, *supra* note 9, at 940, 993, 999; Santaniello, *supra* note 268, at 53.

294. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167–74 (2001).

295. See *supra* notes 291–94 and accompanying text; *infra* notes 339–412 and accompanying text.

296. *GDF*, 326 F.3d 622, 632, 639–40 (5th Cir. 2003), *reh'g denied*, 362 F.3d 286 (5th Cir. 2004) (en banc), *cert. denied*, 545 U.S. 1114 (2005); *id.* at 641–44 (Dennis, J., concurring); Mank, *supra* note 9, at 942, 965–69, 971, 980, 988–91, 997–98; Mank, *supra* note 5, at 782–87, 793–95; Nagle, *supra* note 5, at 184–86.

297. Compare Mank, *supra* note 5, at 782–87, 793–95 (discussing aggregation principle under Commerce Clause and arguing that it is appropriate under Necessary and Proper Clause to aggregate different endangered species to demonstrate

comprehensive regulatory scheme, then the fact that some species lack commercial value does not prevent Congress from regulating them to achieve the Act's legitimate commercial purposes.<sup>298</sup> Conversely, if it is inappropriate to aggregate different endangered species because each species has its own unique impact on interstate commerce, then Congress would have the authority to regulate and protect only those endangered species that possess significant commercial value.<sup>299</sup>

In the statute, Congress stated that the ESA is necessary to protect interstate commerce because "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."<sup>300</sup> The ecological value of endangered species refers to the role that animals and plants play in promoting air and water quality, regulating the climate, removing unwanted pests, creating and protecting soil, controlling floods and droughts, pollinating crops, protecting the earth from ultraviolet rays, and dispersing seeds and nutrients.<sup>301</sup> Endangered plants and animals are a present and future important source of drugs and other medical treatments.<sup>302</sup> Additionally, ecotourism accounts for billions of dollars annually.<sup>303</sup> Clearly, endangered and threatened species in the aggregate have significant commercial value, but that leaves open the question of whether

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substantial impacts on interstate commerce), and Mank, *supra* note 9, at 942, 965-69, 971, 980, 988-91, 997-98 (same), with Nagle, *supra* note 5, at 180, 193-202 (discussing aggregation principle under Commerce Clause and arguing that it is inappropriate under Necessary and Proper Clause to aggregate different endangered species to demonstrate substantial impacts on interstate commerce).

298. *GDF*, 326 F.3d at 639-40; *id.* at 641-44 (Dennis, J., concurring); Mank, *supra* note 9, at 942, 965-69, 971, 980, 988-91, 997-98; Mank, *supra* note 5, at 782-87, 793-95; Nagle, *supra* note 5, at 200 (discussing argument that ESA is valid under Necessary and Proper Clause).

299. See Nagle, *supra* note 5, at 180, 193-202 (discussing aggregation principle under Commerce Clause and arguing that it is inappropriate to aggregate different endangered species to demonstrate substantial impacts on interstate commerce); see *id.* at 186-89 (questioning ecosystem and biodiversity arguments that loss of even commercially insignificant endangered species is likely to have substantial adverse economic impacts and suggesting more proof of economic harm is required to justify the ESA under the Commerce Clause). But see Mank, *supra* note 5, at 782-87, 793-95 (discussing aggregation principle under Commerce Clause and disagreeing with argument that it is inappropriate to aggregate different endangered species); Mank, *supra* note 9, at 988, 997 (same).

300. 16 U.S.C. § 1531(a)(3) (2000).

301. Nagle, *supra* note 5, at 184.

302. *Id.*

303. *Id.*

Congress has authority to protect species with little commercial value.

Professor Nagle argues that *Wickard* does not support the aggregation of all endangered species because, although it is appropriate to aggregate a single commodity such as wheat, it is inappropriate to aggregate different endangered species that widely differ in their biological forms, their ecosystems, and their economic value to interstate commerce.<sup>304</sup> In arguing that it is inappropriate to aggregate different endangered species, he points out that the *Wickard* court aggregated “all wheat grown by farmers for their personal use,” but that the court did not aggregate all the different crops grown by farmers for their personal use.<sup>305</sup> Furthermore, he argues that the aggregation of wheat in *Wickard* was more justified under the commerce power because the consumption of homegrown wheat by a farmer directly and substantially affected interstate commerce; in contrast, the extinction of some endangered animals with no commercial economic value would not impact commerce.<sup>306</sup> Accordingly, Professor Nagle suggests that it is inappropriate to aggregate all endangered species because many such species lack any substantial connection to or impact on interstate commerce.<sup>307</sup> Additionally, he suggests that the *Lopez* decision raises serious doubts about the appropriateness of aggregating noncommercial species with commercially valuable species because the Court implied that it was usually inappropriate for Congress to broadly aggregate non-economic activities as a way to demonstrate that such activities nevertheless had substantial impacts on interstate commerce.<sup>308</sup> Although he acknowledges that courts have used a broad construction of the Necessary and Proper Clause to authorize Congress to regulate commercial activities that may include a few incidental activities without economic value, Professor Nagle argues that it is inappropriate for courts to aggregate a large number of commercially valueless species with commercially valuable

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304. *Id.* at 193–95; Mank, *supra* note 5, at 784 (discussing and critiquing Professor Nagle’s argument that it is inappropriate to aggregate all endangered species because they are too dissimilar); Mank, *supra* note 9, at 997 (same).

305. Nagle, *supra* note 5, at 194; Mank, *supra* note 5, at 784.

306. Nagle, *supra* note 5, at 195; Mank, *supra* note 5, at 784.

307. Nagle, *supra* note 5, at 197; Mank, *supra* note 5, at 784.

308. Nagle, *supra* note 5, at 197; Mank, *supra* note 5, at 785; Mank, *supra* note 9, at 997.



ones.<sup>309</sup> He suggests that Congress may aggregate commercially valueless species with species that substantially affect interstate commerce only if those species are substantially similar in form, habitat, relationship, or some other significant factor.<sup>310</sup>

The subsequent *Raich* decision weakens Professor Nagle's argument. If he wrote an article revisiting the subject in light of *Raich*, Professor Nagle could argue that *Raich* does not undermine his argument because the case involved a single commodity, marijuana. Nevertheless, *Raich* calls into question at least some of his argument because the Court and Justice Scalia's concurring opinion upheld congressional regulation of a noncommercial intrastate activity—medical marijuana use under state law—as part of a comprehensive statutory scheme.<sup>311</sup> Thus, the Court and Justice Scalia's concurring opinion authorized Congress, in at least some circumstances, to aggregate noncommercial intrastate activities with commercially valuable activities. In reviewing a comprehensive statutory scheme, both the *Raich* Court and Justice Scalia's concurring opinion implicitly placed the burden on the petitioners to explain why it was impermissible for Congress to aggregate noncommercial activities with commercially valuable activities.<sup>312</sup> If Congress can aggregate intrastate medical marijuana with commercial recreational use of the drug, then there is a rational basis for aggregating intrastate species with interstate species, or noncommercial species with commercially valuable species, especially because these species are often part of complex, independent ecosystems.<sup>313</sup>

The question of whether it is appropriate to aggregate all endangered and threatened species depends upon Congress's purpose for protecting them through the ESA.<sup>314</sup> There are

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309. Nagle, *supra* note 5, at 197–202 (discussing and quoting *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (“[I]f a statute regulates an activity which, through repetition, in aggregate has a substantial affect [sic] on interstate commerce . . . ‘the de minimis character of individual instances arising under the statute is of no consequence.’”)); see also Mank, *supra* note 5, at 785.

310. Nagle, *supra* note 5, at 193–202; Mank, *supra* note 5, at 784–85.

311. *Gonzales v. Raich*, 125 S. Ct. 2195, 2208–13 (2005); *id.*, at 2216–19 (Scalia, J., concurring); *supra* notes 163, 167, 181, 201–02, 214–17 and accompanying text.

312. *Raich*, 125 S. Ct. at 2208–13; *id.* at 2215–20 (Scalia, J., concurring); *supra* notes 164, 176–77, 181, 226–28 and accompanying text.

313. See *infra* notes 344–45, 361, 367, 371–72 and accompanying text.

314. Mank, *supra* note 5, at 785.

four reasons that Congress might aggregate all threatened and endangered species as part of a comprehensive statute that better protects the commercial value of these species than a more limited statute. First, Congress needed to provide uniform standards for protecting all threatened and endangered species to prevent a race to the bottom by states that may be tempted to lower their standards to promote economic development.<sup>315</sup> Second, Congress sought to preserve biodiversity by protecting all threatened and endangered species because many apparently obscure species are in fact essential to the workings of their ecosystems. Furthermore, different species often interact in such complex ways that the loss of apparently “valueless” species may affect commercially valuable species.<sup>316</sup> There is significant evidence that the environment is more valuable to interstate commerce if there are more species in the ecosystem.<sup>317</sup> Third, there is a rational argument that Congress could consider the potential future economic value of all endangered or threatened species in determining that it is necessary and proper to regulate all such species and not just those that have substantial economic impacts today on interstate commerce.<sup>318</sup> Fourth, and most importantly, courts should defer to legislative findings in the ESA that rely on the uniformity, biodiversity, and future benefits arguments because each justification strengthens the case that the ESA is a comprehensive scheme that depends upon protecting all threatened and endangered species to maximize the total value of these species to the national economy and to promote inter-

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315. See *infra* notes 321–38 and accompanying text.

316. See *GDF*, 326 F.3d 622, 640 (5th Cir. 2003) (arguing ESA aims to promote biodiversity as a means to assist interstate commerce), *reh'g denied*, 362 F.3d 286 (5th Cir. 2004) (en banc), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1074 (D.C. Cir. 2003) (same), *reh'g denied*, 334 F.3d 1158 (D.C. Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1218 (U.S. 2004); Blumm & Kindrell, *supra* note 10, at 330–31, 353–54; Mank, *supra* note 5, at 785–87; Mank, *supra* note 9, at 989–93, 997–98; see *infra* notes 344–45, 361, 367, 371–72 and accompanying text.

317. See Blumm & Kindrell, *supra* note 10, at 330–31; Mank, *supra* note 5, at 785–87; Mank, *supra* note 9, at 989–93, 997–98; Nagle, *supra* note 5, at 188–89 & n.59 (observing that the Delhi Sands flower-loving fly may have significant economic impacts on foods that are pollinated, such as “cashews, squash, mangos, cardamom, cacao, cranberries, and highbush blueberries”) (internal citations omitted); see *infra* notes 355–57 accompanying text.

318. Mank, *supra* note 5, at 785, 787–92; see *infra* notes 377–90 and accompanying text.

state commerce.<sup>319</sup> As part of the ESA's comprehensive scheme, Congress has the authority to aggregate all threatened and endangered species as necessary and proper to secure their protection and protect their value in interstate commerce.<sup>320</sup>

### 1. National Uniform Regulation and Preventing a Race to the Bottom

There is a strong argument that federal regulation of endangered and threatened species is necessary to prevent a "race to the bottom" among states engaged in over-exploitation of their resources to compete with other states.<sup>321</sup> For example, states might loosen standards for developing land or harvesting timber that could destroy critical habitat necessary for some endangered and threatened species.<sup>322</sup> Furthermore, piecemeal state regulation is less likely to be effective than federal

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319. See *infra* notes 391–412 and accompanying text.

320. Mank, *supra* note 5, at 785, 792–93; see *infra* notes 391–412 and accompanying text.

321. Gibbs v. Babbitt, 214 F.3d 483, 501–02 (4th Cir. 2000); Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 73–76 (1997) (arguing federal regulation is superior to state regulation of ecosystems because of incentives for states to over exploit resources); Mank, *supra* note 5, at 777–80 (same); Maxwell L. Stearns, *Crops, Guns & Commerce: A Game Theoretical Critique of Gonzales v. Raich* 31–33 (Geo. Mason U. Sch. of Law Working Paper Series, Paper No. 37, 2005) (arguing game theory predicts states will under-protect endangered species compared to federal regulation), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1036&context=gmulwps>; Santaniello, *supra* note 268, at 53; Van Loh, *supra* note 80, at 483; Woods, *supra* note 80, at 174–86 (presenting empirical evidence supporting "race-to-the-bottom" among states regulating surface-mining). But see Lowenberg, *supra* note 275, at 191–93 (arguing states and local governments are capable of addressing environmental problems, including protecting threatened and endangered species).

322. Karkkainen, *supra* note 321, at 74–75.

Despite biodiversity's global benefits, many biodiversity-rich landowners, communities, and states will calculate that they will be better off externalizing the costs of biodiversity by letting local land conversion and development proceed apace, while leaving the costs of conservation to others. Indeed, states and communities with the largest inventories of undisturbed habitat and ecosystems are probably the least inclined to protect them for two reasons. First, from a local perspective, these lands may appear to be an *overabundant* resource. Second, these localities may be reluctant to protect these resources because they would carry a disproportionate share of the localized costs of conservation if they must forego development on a disproportionate percentage of their lands.

*Id.*; Van Loh, *supra* note 80, at 483.

regulation.<sup>323</sup> The House of Representatives Report on the 1973 ESA specifically justified the statute as necessary because state efforts had been and were likely to continue to be ineffective, stating, “protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded.”<sup>324</sup> Additionally, in *Gibbs v. Babbitt*,<sup>325</sup> the Fourth Circuit concluded that the uniform standards of the ESA enhance interstate commerce by avoiding conflicting state standards.<sup>326</sup>

In *Hodel v. Virginia Surface Mining*,<sup>327</sup> the Court approved federal regulation of intrastate mining activities under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) because the absence of federal legislation would likely lead to ruinous competition among states, lowering each state’s environmental standards in order to retain or attract businesses from other states.<sup>328</sup> In approving federal regulation of intrastate mining operations, the Court stated, “The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause.”<sup>329</sup> Some commentators suggest that the framers of the Constitution would have approved of congressional legislation—based on the Commerce Clause—designed to prevent harmful national competition that states are unable to regulate effectively.<sup>330</sup> In *National Ass’n of Home Builders v. Babbitt (NAHB)*,<sup>331</sup> Judge Wald argued that *Hodel v. Virginia Surface*

323. See *Gibbs*, 214 F.3d at 501–02; Mank, *supra* note 5, at 777–80; Stearns, *supra* note 321, at 31–33; Van Loh, *supra* note 80, at 483.

324. See H.R. REP. NO. 93–412, at 7 (1973); *Gibbs*, 214 F.3d at 502; Mank, *supra* note 5, at 779.

325. 214 F.3d 483.

326. *Id.* at 502; Mank, *supra* note 5, at 779.

327. 452 U.S. 264 (1981).

328. *Id.* at 281–82 (observing congressional concern that such competition among states would prevent “adequate standards on coal mining operations within their borders.”); Mank, *supra* note 5, at 777; Mank *supra* note 9, at 947; Woods, *supra* note 80, at 174–86 (presenting empirical evidence supporting “race-to-the-bottom” among states regulating surface-mining).

329. *Hodel v. Va. Surface Mining*, 452 U.S. at 282.

330. See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271, 281–82 (1997); Mank, *supra* note 5, at 778.

331. 130 F.3d 1041 (D.C. Cir. 1997).

*Mining's* rationale that Congress has authority under the Commerce Clause to regulate intrastate activities to prevent destructive interstate competition was a persuasive ground for justifying congressional regulation of endangered species under the ESA.<sup>332</sup> Because a number of states do not possess effective regulatory schemes to protect endangered species, the *Hodel v. Virginia Surface Mining* decision supports an interpretation of the Commerce Clause that Congress may protect intrastate endangered species lacking significant value in interstate commerce to prevent significant under-regulation of these species by the states.<sup>333</sup>

Although it does not specifically address the issue of destructive interstate competition that was the focus of SMCRA, the ESA's legislative history does indicate that Congress wanted uniform federal standards because different state standards would likely lead to ineffective protection of endangered species.<sup>334</sup> Most of the benefits of biodiversity are national in scope rather than local, including the value of drugs derived from plants and animals, agricultural products, and the insurance value that healthy ecosystems provide against the possibility of catastrophic natural disasters.<sup>335</sup> Uniform federal standards under the ESA likely protect endangered or threat-

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332. The parallels between *Hodel v. Virginia Surface Mining* and the case at hand are obvious. The ESA and the Surface Mining Act both regulate activities—destruction of endangered species and destruction of the natural landscape—that are carried out entirely within a State and which are not themselves commercial in character. The activities, however, may be regulated because they have destructive effects, on environmental quality in one case and on the availability of a variety of species in the other, that are likely to affect more than one State. In each case, moreover, interstate competition provides incentives to states to adopt lower standards to gain an advantage vis-a-vis other states: in *Hodel v. Virginia Surface Mining* the states were motivated to adopt lower environmental standards to improve the competitiveness of their coal production facilities, and in this case, the states are motivated to adopt lower standards of endangered species protection in order to attract development. *Id.* at 1055 (citations and footnote omitted); Blumm & Kimbrell, *supra* note 10, at 328 n.122, 354; Mank, *supra* note 5, at 777–78; Mank, *supra* note 9, at 947–48; Santaniello, *supra* note 268, at 48.

333. See Mank, *supra* note 5, at 777–81; Mank, *supra* note 9, at 1001; Santaniello, *supra* note 268, at 53; *supra* notes 321–32 and accompanying text.

334. See H.R. REP. NO. 93–412, at 7 (1973) (“[P]rotection of endangered species is not a matter that can be handled in [the] absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded.”); *Gibbs v. Babbitt*, 214 F.3d 483, 501–02 (4th Cir. 2000) (stating “[a] desire for uniform standards also spurred enactment of the ESA.”); Mank, *supra* note 5, at 779.

335. Karkkainen, *supra* note 321, at 73–74.

ened species far more effectively than state regulation, both because of the advantages of federal uniformity and because many states lack adequate programs for biodiversity and habitat protection.<sup>336</sup> Furthermore, the Fourth Circuit in *Gibbs* determined that the ESA's uniform standards facilitate interstate commerce by preempting conflicting state standards.<sup>337</sup> Additionally, in the absence of the ESA, there is a significant risk that at least some states would race to the bottom to exploit timber or develop land and would destroy critical habitat currently protected by the ESA leading to the extinction of some valuable endangered or threatened species.<sup>338</sup> For all of these reasons, the *Hodel v. Virginia Surface Mining* precedent supports Congress's authority to regulate endangered or threatened species in order to prevent the harms to the environment and nature that would occur in the absence of comprehensive federal legislation.

## 2. Protecting Biodiversity

The ESA's legislative history emphasized the importance of protecting endangered or threatened species as a means to preserve biodiversity, which refers to ecosystems containing a wide range and sufficient number of often interdependent species that enhance the overall health of the ecosystem.<sup>339</sup> In *NAHB*, Judge Wald argued that the ESA's policy of protecting biodiversity provides substantial benefits to interstate com-

336. See Blumm & Kimbrell, *supra* note 10, at 336 (reporting *Gibbs's* court conclusion that eliminating federal regulation of endangered species would weaken their protection); Mank, *supra* note 9, at 779–80 (arguing federal government has greater expertise than states in environmental protection and wildlife conservation); Karkkainen, *supra* note 321, at 73–76 (arguing federal regulation is superior to state regulation of ecosystems because of incentives for states to over exploit resources); White, *supra* note 5, at 250–52 (same).

337. 214 F.3d at 502; Mank, *supra* note 5, at 779.

338. Van Loh, *supra* note 80, at 483; see also Woods, *supra* note 80, at 174–86 (presenting empirical evidence supporting “race-to-the-bottom” among states regulating surface-mining, but acknowledging other areas of environmental regulation may not lead to such a race).

339. H.R. REP. NO. 93–412, at 4–5 (1973) (stressing importance of preserving our “genetic heritage”); See *NAHB*, 130 F.3d 1041, 1050 (D.C. Cir. 1997) (“[O]ne of the primary reasons that Congress sought to protect endangered species from ‘takings’ was the importance of [the] continuing availability of a wide variety of species to interstate commerce.”); Mank, *supra* note 5, at 729, 786–87 (discussing legislative findings in 1973 ESA justifying preservation of biodiversity and species’ genetic material); Van Loh, *supra* note 80, at 484–85 (same).

merce by preserving a large number and wide range of different animal and plant species.<sup>340</sup> Current scientific data supported congressional findings in the ESA's 1973 legislative history that "'taking[s]' [of endangered species] . . . would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource—biodiversity."<sup>341</sup>

There is a strong biodiversity argument for preserving commercially insignificant endangered species that may affect other species and entire ecosystems that do have significant impacts on interstate commerce. In *NAHB*, Judge Henderson concurred because she did not agree with Judge Wald's argument that potential future medicinal or economic benefits from preserving biodiversity loss justified Commerce Clause regulation; in her view, these potential future impacts were too uncertain.<sup>342</sup> Instead, Judge Henderson argued that Congress had the authority under the Commerce Clause to regulate an obscure endangered Delhi Sands Flower-Loving Fly that only lived in a small area in California and had no apparent economic value because "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce."<sup>343</sup> She claimed that because of "the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce."<sup>344</sup> Thus, she contended that the ESA may reach commercially insignificant species because there is a

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340. 130 F.3d at 1052–53 (Wald, J., plurality opinion); Blumm & Kimbrell, *supra* note 10, at 329–30; Mank, *supra* note 9, at 986.

341. *NAHB*, 130 F.3d at 1053–54 (Wald, J., plurality opinion); Blumm & Kimbrell, *supra* note 10, at 329–31; Mank, *supra* note 9, at 986.

342. *NAHB*, 130 F.3d at 1057–58 (Henderson, J., concurring); Blumm & Kimbrell, *supra* note 10, at 330–31; Mank, *supra* note 5, at 758; Santaniello, *supra* note 268, at 48–49.

343. *NAHB*, 130 F.3d at 1058–59 (Henderson, J., concurring); Mank, *supra* note 5, at 758, 786. Judge Henderson concurred because she did not agree with Judge Wald's argument that potential future medicinal or economic benefits from preserving biodiversity loss justified Commerce Clause regulation; Judge Henderson argued these potential future impacts were too uncertain. *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring); Blumm & Kimbrell, *supra* note 10, at 330–31; Mank, *supra* note 5, at 758–59, 786.

344. *NAHB*, 130 F.3d at 1059 (Henderson, J., concurring); Blumm & Kimbrell, *supra* note 10, at 330–31; Mank, *supra* note 5, at 758–59, 786.

rational basis for Congress's assumption in the statute that their extinction could harm more commercially valuable species and, therefore, that their extinction could substantially affect interstate commerce.<sup>345</sup> Judge Henderson, however, failed to provide any specific evidence regarding how the extinction of the fly might affect other species or substantially affect interstate commerce.<sup>346</sup>

Although Professor Nagle argues that the biodiversity arguments for aggregation suggested by Judge Wald and Judge Henderson go too far because their reasoning would justify an "Earth Preservation Act" forbidding harm to any natural objects of the earth,<sup>347</sup> he fails to address adequately the more limited nature of the ESA. The ESA is restricted to protecting only those species that are threatened and endangered rather than all species.<sup>348</sup> Furthermore, the ESA returns control of species to states as soon as the species has recovered and is no longer threatened or endangered.<sup>349</sup>

The ESA complies with even the narrow approach to federalism of *Lopez* and *Morrison* because the statute contains an appropriate "limiting principle" as it applies to species only so long as they are threatened or endangered. In *GDF*, the Fifth Circuit concluded that interpreting the Commerce Clause to authorize Congress to regulate all threatened and endangered species does not interfere with a traditional area of state regulation because regulation of endangered species is a shared subject of national interest.<sup>350</sup> Furthermore, the Fifth Circuit concluded that the ESA's limited regulation of only endangered

345. *NAHB*, 130 F.3d at 1059 (Henderson, J., concurring) (citing *Lopez*, 514 U.S. at 549, 557–59); Blumm & Kimbrell, *supra* note 10, at 330–31; Mank, *supra* note 5, at 759, 786.

346. See *NAHB*, 130 F.3d at 1065 (Sentelle, J., dissenting) (arguing Judge Henderson's biodiversity and ecosystem protection arguments for validity of regulating fly failed to meet Supreme Court's requirement in *Lopez* that regulation must substantially affect commercial concerns); Mank, *supra* note 5, at 759–60; *but see* Nagle, *supra* note 5, at 188–89 & n.59 (observing that Delhi Sands flower-loving fly may have significant economic impacts on foods that are pollinated, such as "cashews, squash, mangos, cardamon, cacao, cranberries, and highbush blueberries").

347. Nagle, *supra* note 5, at 198–99; Mank, *supra* note 5, at 787.

348. See Mank, *supra* note 5, at 787; *supra* notes 253–54, 282, 285, 291–92 and accompanying text; *infra* notes 351–53 and accompanying text.

349. See Mank, *supra* note 5, at 787; *supra* notes 291–93 and accompanying text.

350. 326 F.3d 622, 639–40 (5th Cir. 2003); Blumm & Kimbrell, *supra* note 10, at 336, 340, 344–45, 353; Mank, *supra* note 9, at 989–90.



or threatened species, as opposed to all other species, comports with the statement in *Lopez* and *Morrison* that congressional legislation is more likely to be valid under the Commerce Clause if a statute has a limiting principle.<sup>351</sup> The *GDF* court determined that an appropriate limiting principle existed because the statute is limited to endangered species that would likely be affected by a small number of takes, and does not apply to abundant species.<sup>352</sup> Because of the ESA's limitation of its authority to only threatened and endangered species and its requirement that "recovered" species must return to state regulation, the Fifth Circuit concluded that the ESA "will not allow Congress to regulate general land use or wildlife preservation."<sup>353</sup>

The ESA's policy of preserving biodiversity meets the Court's substantial-effects-on-interstate-commerce standard for the Commerce Clause because the ESA produces significant current economic benefits to interstate commerce.<sup>354</sup> Because preserving genetic diversity may lessen the spread of diseases, protect food sources, and provide medicines, the ESA's policy of preserving biodiversity by protecting all threatened and endangered species—not just those that have direct commercial value—is a rational policy that sufficiently promotes the economic value of interstate commerce to be constitutional under the Commerce Clause.<sup>355</sup> For example, there is some scientific evidence that more biologically diverse ecosystems and wildlife populations are less prone to catastrophic diseases or pests.<sup>356</sup> Accordingly, preserving the diversity of plants and animals is

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351. *GDF*, 326 F.3d at 639–40 (discussing *United States v. Morrison*, 529 U.S. 598, 612–13 (2000)); Mank, *supra* note 9, at 990.

352. 326 F.3d at 639–40 (discussing *Morrison*, 529 U.S. at 612–13); Mank, *supra* note 9, at 990.

353. *GDF*, 326 F.3d at 640 (discussing *Morrison*, 529 U.S. at 612–13 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)) ("We rejected these . . . arguments because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime . . . .'")), *reh'g denied*, 362 F.3d 286 (5th Cir. 2004) (en banc), *cert. denied*, 545 U.S. 1114 (2005); Mank, *supra* note 9, at 989–90, 998–99.

354. See Blumm & Kimbrell, *supra* note 10, at 330–31; Coggins & Harris, *supra* note 276, at 253–57; Mank, *supra* note 5, at 788.

355. See Blumm & Kimbrell, *supra* note 10, at 330–31; Coggins & Harris, *supra* note 276, at 253–57; Mank, *supra* note 5, at 788. *But see* Lowenberg, *supra* note 275, at 185 (arguing only small percentage of species have useful genetic compounds).

356. Blumm & Kimbrell, *supra* note 10, at 330–31; Coggins & Harris, *supra* note 276, at 253–57; Mank, *supra* note 5, at 788.

advantageous for securing reliable sources of food for human beings because over-reliance on a few crops makes them more vulnerable to disease or pests.<sup>357</sup>

Furthermore, plants and animals are sources of chemicals and raw materials for many commercial products.<sup>358</sup> For instance, about half of all the drugs used in medicine are derived from plants or animals, including several endangered species, with a total value of billions of dollars every year.<sup>359</sup> Furthermore, many species that lack individual commercial value perform important “ecosystem services” by decomposing organic matter, renewing soil, mitigating floods, purifying air or water, or limiting destructive climatic variation.<sup>360</sup> In many instances, the loss of endangered species that have little direct commercial value in interstate commerce would adversely impact other species, both endangered and abundant, that have significant commercial value. Thus, the extinction of many commercially valueless endangered species would have a substantial impact on interstate commerce.<sup>361</sup> In *Gibbs*, the

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357. Coggins & Harris, *supra* note 276, at 253–55 (discussing crop composition of human diets); Mank, *supra* note 5, at 788; Nagle, *supra* note 5, at 185 (stating American farmers use genes from wild plant species in producing nearly \$1 billion of crops).

358. *NAHB*, 130 F.3d 1041, 1052–53 (D.C. Cir. 1997) (Wald, J., plurality opinion) (observing that plant genetic resources contributed to the “explosive growth in farm production” during the twentieth century); EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 281–310 (W.W. Norton 1999) (1992) (discussing medical and commercial value of several species, including endangered *Zea diploperennis*, a relative of corn with possible agricultural value; and *Catharanthus roseus*, rosy periwinkle, used to treat cancer); Blumm & Kimbrell, *supra* note 10, at 330–31 & n.128; Coggins & Harris, *supra* note 276, at 256–57 (providing examples of plants used in business and industry); Mank, *supra* note 5, at 788; McKibbin, *supra* note 256, at 24–25 (“The biodiversity literature abounds with examples of near-extinct species found, in the nick of time, to have useful pharmaceutical and agricultural properties.”).

359. *NAHB*, 130 F.3d at 1052–53 (Wald, J., plurality opinion) (observing that 50% of the most frequently prescribed medicines are derived from wild plant and animal species; those medicines had a 1983 value in excess of \$15 billion a year); Blumm & Kimbrell, *supra* note 10, at 330–31 & n.128; Coggins & Harris, *supra* note 276, at 255–56 (discussing role of plants in medicine); John Charles Kunich, *Preserving the Womb of the Unknown Species with Hotspots Legislation*, 52 *HASTINGS L.J.* 1149, 1163–64 (2001) (stating total value of drugs derived from wild organisms is \$14 billion per year); Mank, *supra* note 5, at 788; Nagle, *supra* note 5, at 185 (noting plants are being studied to find cure for AIDS); White, *supra* note 5, at 243–47 (discussing use of plants as sources of chemotherapy drugs).

360. Kunich, *supra* note 359, at 1164–65; Mank, *supra* note 9, at 989; Mank, *supra* note 5, at 786.

361. See Blumm & Kimbrell, *supra* note 10, at 330–31; Kunich, *supra* note 358,

Fourth Circuit concluded that "it is simply not beyond the power of Congress to conclude that a healthy environment actually boosts industry by allowing commercial development of our national resources."<sup>362</sup>

Because the ESA's policy of preserving as many endangered and threatened species as possible substantially affects interstate commerce by promoting biodiversity, courts should conclude that the ESA's aggregation of all endangered and threatened species is a necessary and proper means of the congressional commerce power.<sup>363</sup> In *TVA v. Hill*,<sup>364</sup> the Supreme Court recognized the congressional goal of using the ESA to protect ecosystems when it stated that in enacting the ESA in 1973, "Congress was concerned [not only] about the *unknown* uses that endangered species might have[, but also] . . . about the *unforeseeable* place such creatures may have in the chain of life on this planet."<sup>365</sup> In *Gibbs*, the Fourth Circuit concluded that "Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained."<sup>366</sup> Because commercially insignificant species often have important effects on commercially valuable species and ecosystems, the Fifth Circuit agreed that, despite the absence of an express jurisdictional element in the statute, "the ESA's take provision *is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'"<sup>367</sup> In *Rancho Viejo*, the District of Columbia Circuit held that Congress could justify the ESA in part on the non-economic goal of preserving biodiversity because the Commerce Clause authorizes statutes to have multiple purposes as long as economic regulation is a significant component of the legislation. It also held that Congress could regulate large commercial development with significant impacts on interstate commerce

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at 1164-65 (discussing numerous benefits both apparent and less visible created by living species); Mank, *supra* note 5, at 786.

362. *Gibbs v. Babbitt*, 214 F.3d 483, 496 (4th Cir. 2000).

363. Mank, *supra* note 5, at 786-87; *see also* Kunich, *supra* note 358, at 1164-65 (discussing ecosystem benefits created by having wide variety of living species).

364. 437 U.S. 153 (1978).

365. *Id.* at 178-79 (emphasis in original); *accord Gibbs*, 214 F.3d at 496; Mank, *supra* note 9, at 997; Mank, *supra* note 5, at 789-90.

366. 214 F.3d at 496; Mank, *supra* note 5, at 789-90.

367. *GDF*, 326 F.3d at 640 (emphasis in original) (quoting *United States v. Morrison*, 529 U.S. 598, 611-12 (2000)); Mank, *supra* note 9, at 997.

that would destroy the critical habitat of threatened or endangered species.<sup>368</sup>

In his concurring opinion in *GDF*, Judge Dennis relied on the Necessary and Proper Clause in arguing that the ESA's regulation of commercially insignificant species was constitutional under the Commerce Clause because the Supreme Court had recognized since the *Darby* decision in 1941 that "both commercial and noncommercial activity may be regulated by Congress if the regulation is an essential or integral part of a larger comprehensive scheme properly regulating activity substantially affecting interstate commerce."<sup>369</sup> He argued that Congress has the authority under the Commerce Clause to protect noncommercial, intrastate endangered species as an essential means of protecting commercially valuable ecosystems and species that have a substantial impact on interstate commerce.<sup>370</sup> Although there are legitimate questions about whether all endangered or threatened species are in fact essential for preserving commercially valuable species or ecosystems, Judge Dennis argued that courts should defer to the ESA's comprehensive statutory scheme because "[t]he interrelationship of commercial and noncommercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species from extinction or harm."<sup>371</sup> Recognizing these complex interrelationships, he concluded that it is appropriate for Congress, in the ESA, to aggregate the impact of all takes of

368. 323 F.3d 1062, 1073–76 (D.C. Cir. 2003), *reh'g denied*, 334 F.3d 1158 (D.C. Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1218 (2004); Mank, *supra* note 9, at 976–77.

369. *GDF*, 326 F.3d at 642–43 (Dennis, J., concurring); Blumm & Kimbrell, *supra* note 10, at 341; Blumm & Kimbrell, *supra* note 14, at 496 (arguing Judge Dennis' concurrence in *GDF* "emphasized that the Necessary and Proper Clause supported the ESA's constitutionality as a comprehensive scheme, of which the regulation of species takes is an essential part."); Mank, *supra* note 9, at 990.

370. *GDF*, 326 F.3d at 641 (Dennis, J., concurring); Mank, *supra* note 9, at 990–91.

371. *GDF*, 326 F.3d at 643–44 (Dennis, J., concurring); Mank, *supra* note 9, at 991. Given the limitations of scientific knowledge, it is unrealistic for a court to try to determine if a specific species has significant value to an ecosystem and, in turn, to interstate commerce. See generally Jamie Murphy, *The Quiet Apocalypse*, TIME, Oct. 13, 1986, at 80 (quoting Edward O. Wilson: "[W]e don't know for sure how many species there are, where they can be found or how fast they're disappearing. It's like having astronomy without knowing where the stars are."); WILSON, *supra* note 358, at 308 (stating that science cannot provide reliable estimates of the value of species).

endangered species because “the regulation is necessary and proper to . . . the ESA’s comprehensive scheme to preserve the nation’s genetic heritage and the ‘incalculable’ value inherent to that scarce natural resource, and because that regulatory scheme has a very substantial impact on interstate commerce.”<sup>372</sup> Judge Dennis made the strongest case that there was a rational basis for Congress to protect all endangered or threatened species for biodiversity benefits when he emphasized that preserving biodiversity was a central part of the ESA’s comprehensive scheme of protection and that Congress had authority to preserve biodiversity under both the Commerce Clause and the Necessary and Proper Clause.<sup>373</sup> The *Gibbs*, *Rancho Viejo*, and *GDF* decisions, as well as Judge Wald’s opinion in *NAHB* and Judge Henderson’s concurring opinion in *NAHB*, made strong arguments in favor of a biodiversity justification for the ESA’s protection of all endangered or threatened species under the Commerce Clause.

The *Raich* opinion’s deferential approach for reviewing congressional findings provides a strong rationale for concluding that courts should defer to the congressional findings in the ESA about the need to preserve endangered and threatened species as a way to preserve biodiversity and sensitive ecosystems.<sup>374</sup> Under *Raich*’s deferential standard for reviewing congressional findings of fact, Congress in the 1973 ESA more than adequately justified the statute as a means of preserving the benefits of biodiversity even if science still does not fully understand all of these benefits.<sup>375</sup>

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372. *GDF*, 326 F.3d at 644 (Dennis, J., concurring) (quoting Charles Tiefer, *After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?*, 30 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,888 (Sept. 2000)); Mank, *supra* note 9, at 991.

373. See *GDF*, 326 F.3d at 642–43 (Dennis, J., concurring); Blumm & Kimbrell, *supra* note 14, at 496 (arguing Judge Dennis’ concurrence in *GDF* “emphasized that the Necessary and Proper Clause supported the ESA’s constitutionality as a comprehensive scheme, of which the regulation of species takes is an essential part.”); Mank, *supra* note 9, at 990; *supra* notes 369–72 and accompanying text.

374. *Gonzales v. Raich*, 125 S. Ct. 2195, 2201–15 (2005); *id.* at 2219–20 (Scalia, J., concurring); *supra* notes 158, 175–76, 181, 187, 226–28 and accompanying text.

375. *Raich*, 125 S. Ct. at 2208 (“[w]e have never required Congress to make particularized findings in order to legislate absent a special concern such as the protection of free speech.” (citing *United States v. Lopez*, 514 U.S. 549, 562 (1995))).

### 3. Future Economic Benefits

There is a strong argument that courts should defer to Congress's rational argument that it is appropriate to preserve all endangered or threatened species because it is impossible to know which species may have important economic or social benefits in the future. Congress may consider the potential future economic value of endangered and threatened species in determining that it is necessary and proper to regulate all such species and not just those that have substantial economic impacts on interstate commerce today. In the 1973 ESA's legislative history, Congress emphasized the potential future economic and medical benefits of preserving a wide variety of species and genetic heritage.<sup>376</sup> The House Report explained that it was essential to preserve endangered species because the value of their "genetic heritage is, quite literally, incalculable":

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [*sic*] those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.<sup>377</sup>

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376. Mank, *supra* note 9, at 938–39; Mank, *supra* note 5, at 729–30; *infra* notes 377–84, 387–90 and accompanying text.

377. H.R. REP. NO. 93-412, at 4–5 (1973). Similarly, the Senate Report on the 1969 ESA noted:

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

S. REP. NO. 91-526, at 3 (1969), *as reprinted in* 1969 U.S.C.C.A.N. 1415.

The Fourth Circuit in *Gibbs* and Judge Wald of the District of Columbia Circuit in *NAHB* have stated that courts should defer to these congressional findings about the future value of endangered species, even if those benefits could not be precisely calculated.<sup>378</sup> The Fourth Circuit stated that the Supreme Court has traditionally deferred to congressional findings that regulation may produce economic or other benefits in the future as long as there is a rational basis for such legislative findings.<sup>379</sup> Thus, the Fourth Circuit concluded that Congress has authority under the Commerce Clause to regulate an endangered or threatened species because the species could have a substantial economic impact on interstate commerce in the future, even if that species has no current impact on interstate commerce.<sup>380</sup>

Judge Wald argued that it was appropriate to aggregate together all endangered species in assessing their economic impact on interstate commerce because the ESA produces significant current and future economic benefits to interstate commerce by preserving genetic diversity and conserving genetic resources that may have future medical value.<sup>381</sup> She contended that each time a species becomes extinct and the pool of wild species decreases, the extinction "has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes."<sup>382</sup> She acknowledged that the full value of many plants and animals is uncertain but nonetheless concluded that each endangered species is entitled to protection because "[a] species whose worth is still unmeasured has what economists call an 'option value'—the value of the possibility that a future discovery will make useful a species that is cur-

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378. *Gibbs v. Babbitt*, 214 F.3d 483, 496–98 (4th Cir. 2000) (discussing 1973 ESA's legislative history's focus on future economic and medical benefits and arguing that concern for future economic benefits was appropriate basis for congressional regulation under Commerce Clause); *NAHB*, 130 F.3d 1041, 1050–54 (D.C. Cir. 1997) (Wald, J., plurality opinion) (same); Mank, *supra* note 5, at 729–30, 756–57, 766, 782–92 (arguing legislative concern for future economic benefits in 1973 ESA's legislative history was appropriate basis for national regulation under Commerce Clause); Mank, *supra* note 9, at 938–39, 967 (same).

379. *Gibbs*, 214 F.3d at 496–97; Mank, *supra* note 5, at 766.

380. *Gibbs*, 214 F.3d at 496; Mank, *supra* note 5, at 766.

381. *NAHB*, 130 F.3d at 1052–53 (Wald, J., plurality opinion); Mank, *supra* note 5, at 756–57; Mank, *supra* note 9, at 967.

382. *NAHB*, 130 F.3d at 1053 (Wald, J., plurality opinion); Mank, *supra* note 5, at 756; Mank, *supra* note 9, at 967.

rently thought of as useless.”<sup>383</sup> She argued that “[t]o allow even a single species whose value is not currently apparent to become extinct therefore deprives the economy of the option value of that species.”<sup>384</sup> Conversely, the Fifth Circuit and other judges on the District of Columbia Circuit have criticized the potential future uses rationale for justifying congressional regulation under the Commerce Clause because that methodology would allow Congress to regulate any endangered species no matter how attenuated its relationship to interstate commerce or how speculative its future value to society.<sup>385</sup>

Following the *Raich* Court’s deferential approach to congressional findings, courts should defer to Congress’s rational finding that all endangered and threatened species should be preserved because of their potentially irreplaceable future benefits that society could otherwise lose forever. In *Raich*, the Court deferred to congressional findings that regulating intra-state markets in marijuana was an essential component in regulating the national market in the drug, but the Court also stated that the absence of particular congressional findings regarding medical marijuana use did not “call into question Congress’s authority to legislate.”<sup>386</sup> Accordingly under *Raich*, the ESA’s general findings about the importance of preserving bio-

383. *NAHB*, 130 F.3d at 1053 (Wald, J., plurality opinion); Mank, *supra* note 5, at 756–57; Mank, *supra* note 9, at 967. In one study, two scholars estimated that the option value, or economic value of biodiversity, for the entire world was between \$16 and \$54 trillion per year, with an average value of \$33 trillion, which is roughly double the annual global national product. KERRY TEN KATE & SARAH A. LAIRD, *THE COMMERCIAL USE OF BIODIVERSITY: ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING* 3 (1999).

384. *NAHB*, 130 F.3d at 1053 (Wald, J., plurality opinion); Mank, *supra* note 5, at 757; Mank, *supra* note 9, at 967.

385. *GDF*, 326 F.3d 622, 637–38 (5th Cir. 2003) (“The possibility of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster.” (citing *United States v. Morrison*, 529 U.S. 598, 612 (2000)); *NAHB*, 130 F.3d at 1057–58 (Henderson, J., concurring) (criticizing Judge Wald’s aggregation of all endangered species on biodiversity and future medical uses grounds because value of many species is too speculative); *id.* at 1065 (Sentelle, J., dissenting) (same); Akins, *supra* note 27, at 181 (criticizing Judge Wald’s aggregation of all endangered species because the “connection between the regulated activity and interstate commerce is too attenuated”); Nagle, *supra* note 5, at 183–84 (same); see also Mank, *supra* note 5, at 757 (discussing criticism of using potential future value of all endangered species to justify congressional regulation under the Commerce Clause); Mank, *supra* note 9, at 967, 988 (same).

386. *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005).



diversity and preserving our genetic heritage for future generations are sufficient even though Congress did not make particularized findings about the value of specific species. Because some commercially insignificant species likely will have value in the future, it was rational for Congress to protect all endangered and threatened species.<sup>387</sup> There is a good argument that it is safer to preserve as many species as possible because one can never be sure whether a species could be useful in the future.<sup>388</sup> The loss of any endangered species, even if it has no value today, arguably poses significant future economic harm to interstate commerce for future generations by reducing biodiversity and eliminating genetic material that could provide valuable medical and other benefits.<sup>389</sup> Despite the uncertain value of species in the future, following *Raich's* deferential approach to generalized congressional findings, courts should defer to Congress's reasonable judgment that society and interstate commerce will be better off in the future under the ESA's policy of protecting all endangered and threatened species instead of only those that have current economic value.<sup>390</sup> Even if courts reject this argument, the future benefits argument is not essential because the other three arguments—(1) preventing a race to the bottom among states; (2) preserving biodiversity and ecosystems; and (3) deferring to Congress's comprehensive scheme for preserving endangered and threatened species due to their present benefits to interstate commerce—are more than sufficient to sustain the constitutionality of the ESA as a necessary and proper exercise of the commerce power.

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387. Mank, *supra* note 5, at 758, 760, 789, 795 (conceding future benefits of endangered species is somewhat speculative).

388. The traditional econometric approach, weighing market price and tourist dollars, will always underestimate the true value of wild species. None has been totally assayed for all of the commercial profit, scientific knowledge, and aesthetic pleasure it can yield. Furthermore, none exists in the wild all by itself. Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the population of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage. WILSON, *supra* note 358, at 308; see Kunich, *supra* note 359, at 1166 (arguing that it is impossible to predict for certain which species will be valuable in future); Mank, *supra* note 5, at 788–89 (same); White, *supra* note 5, at 246 (same).

389. Mank, *supra* note 5, at 788–89.

390. Mank, *supra* note 5, at 791–95.

#### 4. Deference to Congress's Comprehensive Scheme under a Rational Basis Standard

Since its 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>391</sup> the Supreme Court has used a rational basis standard of review in deciding whether Congress has authority under the Commerce Clause to regulate specific activities.<sup>392</sup> In *Morrison*, the Court stated that there is a presumption that a statute enacted pursuant to the commerce power is constitutional.<sup>393</sup> Citing *Lopez*, the *Raich* Court explained that under the rational basis standard of review, in cases involving the constitutionality of a statute under the Commerce Clause, the Court “need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>394</sup> Both the *Raich* decision and Justice Scalia’s concurrence recognized that the Court applies the rational basis standard to the statute and the activities it regulates in the aggregate rather than to incidental, intrastate activities that fall within its scope.<sup>395</sup> In reviewing a comprehensive statutory scheme, both the *Raich* Court and Justice Scalia’s concurring opinion placed the burden on the petitioners to explain why it was impermissible for Congress to aggregate noncommercial activities with commercially valuable activities as a single class.<sup>396</sup>

“In enacting the ESA Amendments in 1973, Congress had a rational basis for believing that the statute would” protect species that substantially affect interstate commerce because of

391. 310 U.S. 1 (1937).

392. See *Dral & Phillips*, *supra* note 5, at 10,413; *Mank*, *supra* note 5, at 736–37.

393. *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment upon a plain showing that Congress has exceeded its constitutional bounds.”); *Blumm & Kimbrell*, *supra* note 10, at 322; *Mank*, *supra* note 5, at 792.

394. *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

395. *Id.* at 2208–13; *id.* at 2216–19 (Scalia, J., concurring); *Adler*, *supra* note 14, at 765–66; *Barnett*, *supra* note 22, at 747; *Blumm & Kimbrell*, *supra* note 14, at 494; *Parry*, *supra* note 163, at 859–60, 862; *supra* notes 310–312 and accompanying text.

396. *Raich*, 125 S. Ct. at 2208–13; *id.* at 2215–20 (Scalia, J., concurring); *supra* note 311 and accompanying text.

their direct and indirect economic value to biodiversity, complex ecosystems, and their "irreplaceable genetic heritage."<sup>397</sup> In applying the rational basis standard to assess the statute's constitutionality under the Commerce Clause and the Necessary and Proper Clause, courts consider whether it is a comprehensive regulatory scheme in determining the amount of scrutiny that will be applied to any single component of the statute. In *Hodel v. Indiana*,<sup>398</sup> the Court explained that a comprehensive regulatory scheme can meet a rational basis standard as long as the scheme as a whole is rational "without a showing that every single facet of the program is independently and directly related to a valid congressional goal."<sup>399</sup> Accordingly, the ESA's comprehensive scheme for protecting threatened and endangered species is constitutional even if some species by themselves lack sufficient economic value.

Similarly, the *Lopez* Court acknowledged that Congress may regulate intrastate activities that lack substantial commercial value if they are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>400</sup> Both *Raich* and Justice Scalia's *Raich* concurrence eloquently explain that the Court does not require each component of a comprehensive statutory scheme to have independent economic impacts on interstate commerce and that Congress may regulate non-economic, purely intrastate activities as long as they are an appropriate part of a valid comprehensive scheme. The burden is on a petitioner to demonstrate that Congress's definition of a class is inappropriate.<sup>401</sup>

The Fourth Circuit in *Gibbs* concluded that Congress has authority under the Commerce Clause to regulate any endangered or threatened species, no matter how few in number or how insignificant in its impact on interstate commerce, because the ESA is a comprehensive scheme for preserving endangered species that satisfies the substantial effects standard for the

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397. Mank, *supra* note 5, at 792-93.

398. 452 U.S. 314 (1981).

399. *Id.* at 329 n.17; Mank, *supra* note 5, at 767-68; Mank, *supra* note 9, at 947-48; Vermeule, *supra* note 75, at 11,335; *supra* note 75 and accompanying text.

400. *Lopez*, 514 U.S. at 561; Mank, *supra* note 5, at 768; Mank, *supra* note 9, at 950; Vermeule, *supra* note 75, at 11,335.

401. *Raich*, 125 S. Ct. at 2208-13; *id.* at 2215-20 (Scalia, J., concurring).

Clause.<sup>402</sup> The *Gibbs* court determined that applying the comprehensive scheme approach to the ESA was appropriate; otherwise, Congress would lack the power to protect the most endangered species simply because “there are too few animals left to make a commercial difference.”<sup>403</sup> Accordingly, the Fourth Circuit reasoned that a narrow interpretation of the Commerce Clause that examined each endangered species separately based on the number of animals at issue would “eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head.”<sup>404</sup>

The Fifth Circuit in *GDF* concluded that the ESA’s regulation of all endangered and threatened species was an essential component of the ESA’s broader regulatory scheme, and, therefore, that Congress had the authority under the Commerce Clause to aggregate all such species in determining their impact on interstate commerce.<sup>405</sup> The *GDF* decision determined that limiting the scope of the ESA to commercially valuable threatened and endangered species would thwart Congress’s goal of protecting the “interdependent web” of whole ecosystems and the complex interrelationships among all species by allowing “piecemeal extinctions.”<sup>406</sup> Additionally, the *GDF* decision found that “the link between species loss and a substantial commercial effect is not attenuated” because the statute is limited to endangered species that would likely be affected by a small number of “takes”—killings of individual animals—and does not apply to abundant species.<sup>407</sup> Furthermore, the *GDF* decision concluded that it was appropriate to aggregate all endangered species because the “ESA’s protection of endangered species is economic in nature.”<sup>408</sup> The court reached this deci-

402. *Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); Blumm & Kimbrell, *supra* note 10, at 335–36; Mank, *supra* note 5, at 767–68; Mank, *supra* note 9, at 971; Santaniello, *supra* note 268, at 52.

403. *Gibbs*, 214 F.3d at 498; Blumm & Kimbrell, *supra* note 10, at 335–36; Mank, *supra* note 5, at 768; Santaniello, *supra* note 268, at 52.

404. *Gibbs*, 214 F.3d at 498; Blumm & Kimbrell, *supra* note 10, at 335–36; Mank, *supra* note 5, at 768.

405. *GDF*, 326 F.3d 622, 640 (5th Cir. 2003); Blumm & Kimbrell, *supra* note 10, at 340; Mank, *supra* note 9, at 989, 997–98; Santaniello, *supra* note 268, at 56–58.

406. *GDF*, 326 F.3d at 639–40; Mank, *supra* note 9, at 989–90, 997–98; Santaniello, *supra* note 268, at 58.

407. *GDF*, 326 F.3d at 640; Mank, *supra* note 9, at 989–90, 998; Santaniello, *supra* note 268, at 56–58.

408. *GDF*, 326 F.3d at 639.

sion in light of the ESA's legislative history referring to the "incalculable value" of the genetic heritage that might be lost absent regulation" and because "it is obvious that the majority of takes would result from economic activity."<sup>409</sup> Accordingly, the *GDF* court concluded that regulating takes of a commercially insignificant Cave Species bat was an essential component of the ESA's broader regulatory scheme.<sup>410</sup>

Both *Raich* and Justice Scalia's *Raich* concurrence suggest that Congress may, under the Necessary and Proper Clause, regulate commercially insignificant intrastate activities as part of a comprehensive statutory scheme that appropriately regulates interstate commerce.<sup>411</sup> Under the Commerce Clause and the Necessary and Proper Clause, courts should defer to the ESA's comprehensive scheme. Courts should defer to Congress's rational assumption that protecting all threatened and endangered species would more likely promote interstate commerce by protecting biodiversity and complex ecosystems. Additionally, courts should defer to congressional findings concerning the possible future economic benefits of preserving these species. Accordingly, following *Raich*, courts should defer to Congress's comprehensive policy for protecting all endangered and threatened species as a rational legislative policy, even if Congress cannot prove that every single species would have economic value in interstate commerce.<sup>412</sup>

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409. *Id.* (quoting H.R. Rep. No. 93-412, at 4 (1973) ("The value of this genetic heritage is, quite literally, incalculable."); 16 U.S.C. § 1531(a)(1) (2000) (stating that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"); Mank, *supra* note 9, at 989, 996-97.

410. *GDF*, 326 F.3d at 639-40; Mank, *supra* note 9, at 997; Santaniello, *supra* note 268, at 56-58.

411. *Gonzales v. Raich*, 125 S. Ct. 2195, 2208-13 (2005); *id.* at 2216-19 (Scalia, J., concurring); *supra* notes 310-312 and accompanying text.

412. Blumm & Kimbrell, *supra* note 10, at 360.

We think defenders of the take provision should emphasize to the Supreme Court the comprehensive scheme rationale which the Court so recently endorsed, stressing the biodiversity protection evident in the ESA's ecosystem protection purpose, and the centrality of the take provision to achieving that purpose. The defenders of the ESA should also argue that without the ESA's comprehensive scheme, the states would engage in a destructive 'race to the bottom' that would damage biodiversity and environmental quality.

*Id.* (footnotes omitted).

## VI. CONCLUSION

Both *Raich* and Justice Scalia's *Raich* concurring opinion allow Congress to regulate some intrastate activities that have little economic value if the regulation is part of a comprehensive scheme that appropriately regulates activities that substantially affect interstate commerce.<sup>413</sup> They are right to conclude that Congress must be able to fashion comprehensive statutes to regulate activities that can harm interstate commerce and that courts should not invalidate a regulatory scheme even though it regulates some intrastate activities that standing alone would not justify national regulation.<sup>414</sup> This is consistent with the letter of *Lopez* and *Morrison*, which did not address the issue of a comprehensive statutory scheme, and would be undercut if Congress was not able to regulate some intrastate activities that have little economic value.<sup>415</sup> Nevertheless, *Raich* and Justice Scalia's *Raich* concurring opinion are more consistent with the spirit of *Wickard*, *Darby*, *Hodel*, and *Wrightwood Dairy* than with the narrow economic focus of *Lopez* and *Morrison*.<sup>416</sup>

If it is rational for Congress to preempt state regulation of medical marijuana because small amounts could be diverted to interstate markets for recreational drug use, it is surely rational for Congress to enact the ESA to protect all threatened and endangered species. There are strong scientific arguments that protecting all threatened and endangered species pro-

413. *Raich*, 125 S. Ct. at 2215–20.

414. *Id.* at 2216–19.

415. Pushaw, *supra* note 35, at 884, 898–909 (“I think it is impossible to determine whether the majority or the dissent correctly applied the *Lopez* and *Morrison* standards, because they are so malleable as to justify either result.”).

416. See Adler, *supra* note 14, at 751–54, 762–77 (arguing *Raich* effectively overruled most of *Lopez* and *Morrison* where litigant challenges comprehensive scheme statute as applied); Blumm & Kimbrell, *supra* note 14, at 494–98 (same). *But see* Pushaw, *supra* note 35, at 884.

I think it is impossible to determine whether the majority or the dissent correctly applied the *Lopez* and *Morrison* standards, because they are so malleable as to justify either result. Moreover, as the Justices implement these standards prudentially on a case-by-case basis, it is unwise to extrapolate far-reaching implications from any single decision. Just as many scholars prematurely heralded *Lopez* as the beginning of a Commerce Clause revolution, others now may be too quick to characterize *Raich* as the end.

*Id.* (footnotes omitted).

motes biodiversity and protects complex ecosystems that we do not fully understand, even if it is not possible to prove that every single species is valuable. There is reasonable evidence that promoting biodiversity and protecting complex ecosystems would more likely promote interstate commerce. Many species that do not have direct commercial value still have economic value by serving as food for valuable species, pollinating valuable flowers, or decomposing waste so that ecosystems stay healthy. Furthermore, there is a rational argument as well for protecting all threatened and endangered species for their possible future economic benefits. Under an appropriately deferential rational basis standard, as applied in both *Raich* and Justice Scalia's *Raich* concurring opinion, courts should defer to congressional findings about the economic value of protecting all threatened and endangered species in a comprehensive statutory scheme, even if it is not possible to prove that every single species has economic value.<sup>417</sup>

The ESA is consistent with the Constitution's federalist principles. It only regulates threatened and endangered species, not all species. Once a species recovers sufficiently, the federal government must return the species to state control. The Court has held that states do not own the wildlife within their borders, but share concurrent authority with the federal government; consistent with the Court's decisions, the ESA promotes concurrent federal-state regulation of species. Regulating threatened and endangered species is not a traditional state function. Since 1900, the Lacey Act has given the federal government a role in their protection; in 1894, Congress created Yellowstone National Park to protect endangered bison; in 1918, Congress regulated migratory birds and other federal statutes have protected certain endangered species for decades.<sup>418</sup> Thus, the ESA comports with federalist principles and is a necessary and a proper exercise of congressional authority under the Commerce Clause and the Necessary and Proper Clause.

In cases involving a comprehensive statutory scheme, the *Raich* decision signals that the Court will apply a deferential rational basis approach in deciding whether Congress may regulate non-economic, intrastate activities if such regulation

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417. See *supra* notes 310–312 and accompanying text.

418. See *supra* Part V.B.

is necessary to effectuate regulation of interstate commerce.<sup>419</sup> After *Raich*, there is a much stronger probability that the Court will uphold the constitutionality of the ESA under the Commerce Clause and Necessary and Proper Clause.<sup>420</sup> Professor Blumm and George Kimbrell argue that the Court's denial of certiorari in *GDF* was directly related to the Court's *Raich* decision. They write:

The *Raich* decision's aftershock effect on the ESA was apparently obvious to the Court: The Monday following the filing of the *Raich* decision, after holding the *GDF Realty* certiorari petition for more than a year (presumably while waiting for the *Raich* opinion), the Court denied certiorari in *GDF Realty* without comment.<sup>421</sup>

The appointment of Chief Justice Roberts to replace Chief Justice Rehnquist and the appointment of Justice Alito to replace Justice O'Connor will not diminish the *Raich* majority because both departing justices were on the dissenting side.<sup>422</sup>

419. *Gonzales v. Raich*, 125 S. Ct. 2195, 2210 (2005); Adler, *supra* note 14, at 751–54, 762–77 (arguing *Raich* effectively overruled most of *Lopez* and *Morrison* where litigant challenges law as applied); Blumm & Kimbrell, *supra* note 14, at 494–98 (discussing *Raich*'s use of comprehensive scheme principle and arguing *Raich* increases probability Supreme Court will find Endangered Species Act constitutional); Reynolds & Denning, *supra* note 163, at 932–34.

Barring a major, and unlikely, shift of the Court's composition, we now doubt that a robust judicially-enforceable federalism has much future left. We are unlikely to see a lower federal court, after *Raich*, strike down an act of Congress on Commerce Clause grounds, or even take the more modest step of upholding an as-applied challenge to a federal law.

*Id.*; *supra* note 180 and accompanying text.

420. See *supra* note 181 and accompanying text.

421. Blumm & Kimbrell, *supra* note 14, at 494; accord ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY 898 (5th ed., 2006).

One week after it decided *Gonzales v. Raich*, the Supreme Court denied review in the *GDF Realty* case, which it had held pending its decision concerning federal authority to prohibit cultivation and use of medical marijuana. This may indicate that the Court believes that there is no constitutional problem with applying the Endangered Species Act to species who are so endangered that their destruction would not itself substantially affect interstate commerce because, like intrastate use of marijuana, regulation is necessary to effectuate a broader regulatory scheme.

*Id.*

422. Blumm & Kimbrell, *supra* note 14, at 497–98 (arguing Chief Justice Roberts is likely to follow *Raich* precedent and that Supreme Court will find Endangered Species Act constitutional even if he does not vote in favor of the ESA).



While the comprehensive scheme rationale in the *Raich* majority opinion provides a strong rationale for sustaining the constitutionality of the comprehensive ESA, whether Justice Scalia's concurrence would also sustain the constitutionality of the statute raises interesting intellectual questions, although it is of less practical significance. Because he is often unsympathetic to environmental issues, it remains to be seen how Justice Scalia would personally assess the constitutionality of the ESA. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (Sweet Home)*, the Court upheld the Secretary of Interior's broad interpretation of its regulatory authority over private landowners.<sup>423</sup> Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote a dissenting opinion in which he argued that the words "take" and "harm" as used in the ESA could not possibly mean "habitat modification"; therefore, he argued that the Secretary could not regulate private landowners whose activities harm the critical habitat of threatened and endangered species.<sup>424</sup> Many environmentalists perceive Justice Scalia as hostile to environmental issues.<sup>425</sup> Nevertheless, Justice Scalia in *City of Chicago v. Environmental Defense Fund* sided with an environmentalist organization because the plain language of the statute was consistent with his textualist approach to statutory interpretation.<sup>426</sup> Thus, even if Justice Scalia personally disfavors the

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423. 515 U.S. 687, 707 (1995).

424. *Id.* at 714–36 (Scalia, J., dissenting); Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1265–66 (1996) (discussing Justice Scalia's dissenting opinion in *Sweet Home*).

425. See, e.g., David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. LAND USE & ENVTL. L. 451, 456–57 (2000) (criticizing Justice Scalia's narrow interpretation of standing for environmental plaintiffs); Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 727–29, 739, 764 (2000) (ranking Justice Scalia as the most anti-environmentalist in modern history from October Term 1969 until October Term 1998); Robert V. Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 827, 847 (2002) (criticizing Justice Scalia's approach to standing issues in environmental cases).

426. 511 U.S. 328, 339 (1994); Richard J. Lazarus & Claudia M. Newman, *City of Chicago v. Environmental Defense Fund: Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 23 & *passim* (1995) (discussing Justice Scalia's opinion in *City of Chicago*) (Professor Lazarus argued the *City of Chicago* case before the Supreme Court on behalf of the Environmental Defense Fund and Newman worked with him on the case); Mank, *supra* note 424, at 1232–

ESA, he may rule in favor of its constitutionality in light of his *Raich* concurrence.<sup>427</sup>

For all the above reasons, the ESA is constitutional under the Commerce Clause. Under *Raich*'s comprehensive scheme approach to the Commerce Clause, rational congressional findings about the ecological, biodiversity, medical, recreational, genetic, and other benefits of the statute are sufficient to justify the regulation of all threatened and endangered species, even if some have mainly intrastate impacts. To preserve these myriad benefits, Congress, under the Necessary and Proper Clause, may regulate all threatened and endangered species because apparently insignificant species can affect other species and ecosystems that have clear economic value. Further, the statute is not inconsistent with the federalism concerns of *Lopez* and *Morrison* because protection of endangered species is a concurrent area of federal and state regulation, there is a legitimate congressional concern in preventing a race to the bottom among states in preserving these species, and the ESA contains a limiting principle as recovered species return to state control.

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33, 1257–62, 1290–92 (discussing Justice Scalia's opinion in *City of Chicago*).

427. See Adler, *supra* note 14, at 766–68 (discussing and criticizing Justice Scalia's *Raich* concurrence for too broadly expanding federal power); Claey's, *supra* note 19, at 815 ("Nevertheless, Raich makes clear that Scalia will side with the nationalists in the unlikely event that the Court entertains Commerce Clause challenges to other federal schemes that regulate local activities on the pretense of guaranteeing certain consequences for interstate trade.").

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