STUDENT ARTICLE

THE "NEW" COMMERCE CLAUSE: DOES SECTION 9 OF THE ESA PASS CONSTITUTIONAL MUSTER AFTER *GONZALES V. RAICH*?

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INTRODUCTION

Since its passage in 1973, the Endangered Species Act (ESA) has been one of the central elements in the United States' legislative scheme for preserving "[t]he Nation's heritage in fish, wildlife and plants."[1] Through a process of identifying and listing

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endangered species of plants and animals,[2] then affording them protection from harm by the government and private individuals,[3] the ESA seeks to conserve the remaining living members of the species and provide an opportunity for them to recover.[4] One of the central provisions of the ESA is the prohibition on "takes" in section 9 of the ESA,[5] which describes a series of "prohibited acts" that may be enforced against private actors with civil or criminal penalties.[6] These prohibitions are mainly geared towards preventing commerce in the species, for instance by prohibiting their import and export from the country and their movement in interstate commerce.[7] However, section 9(a)(1)(B) of the ESA also makes it unlawful for any "person" to "take any such species within the United States or the territorial sea of the United States."[8]

There has been significant resistance to some of the consequences of the ESA. This resistance has manifested in a number of forms, including court challenges to the statute's constitutionality. The most prominent of these constitutional challenges have focused on whether Congress has the authority, under the Commerce Clause, to enact portions of the ESA, such as the section 9 prohibition on takes.[9] Recent changes in Commerce

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[1] Endangered Species Act of 1973 § 2(a)(5), 16 U.S.C. § 1531(a)(5) (2000) (introductory findings of the Endangered Species Act).

[2] *Id.* § 1533.

[3] *Id.* § 1536 (requirements for federal agencies when taking actions that will have a significant impact on listed species); *id.* § 1538 (forbidding private takes of listed species).

[4] *See id.* § 1531(b) (describing the purposes of the ESA); *id.* § 1533(f) (requiring "recovery plans . . . for the conservation and survival of endangered . . . and threatened species").

[5] *Id.* § 1538(a)–(b).

[6] *Id.* § 1540(a)–(b).

[7] *See id.* § 1538.

[8] *Id.* § 1538(a)(1)(B). The meaning of the word "take" in this context will be discussed below. *See infra* text accompanying notes 14–15.

[9] This provision has been challenged as both congressional overreaching under the Commerce Clause and as affecting a taking of private property without just recompense under the Takings Clause. *See* U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. amend. V (Takings); *see, e.g.*, Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) (a takings challenge to an application of the ESA that impinged on vested water rights).

Clause jurisprudence, including the *Lopez*, *Morrison* and *Raich* decisions in the Supreme Court, have called into question the ESA's constitutionality.[10] This Note will discuss the constitutional viability of section 9 of the ESA under current law and argue that the constitutional fate of section 9 is less certain, given the recent changes in Commerce Clause jurisprudence, than other scholars have previously suggested. In the process, this Note will seek to identify different legal models that might explain the relationship among the three Supreme Court cases, taking as a starting point the approaches used by the federal courts of appeals to understand the effects of *Lopez* and *Morrison* before the *Raich* case. The Note will then seek to apply these models to the facts of a potential post-*Raich* challenge to the ESA and understand where and how a future Supreme Court could choose to come out on these issues.

Part I of this Note introduces the challenged provisions of the ESA, specifically the section 9 "no-take" provision, and briefly explores its importance in the context of the endangered species protection policy of the United States. Part II examines the historical Commerce Clause jurisprudence and explains why there was little reason to believe, when the ESA was passed in 1973, that it presented any constitutional problems. Part III examines the cases that have been dubbed the "Rehnquist Revolution" in Commerce Clause Jurisprudence, *United States v. Lopez* and *United States v. Morrison*, as well as the cases challenging the constitutionality of the ESA in the period following these decisions, and looks at the implications these cases have for section 9.[11] Part IV examines the 2005 case of *Gonzalez v. Raich*,[12] which has provoked the present reanalysis of the meaning of the Commerce Clause. This section also lays out the three possible understandings of the Commerce Clause invited by the

This Note will not focus on the takings challenges that have been made to specific applications of section 9, since all such challenges would be moot if the Commerce Clause challenges that are the focus of this Note were to succeed.

[10] *See* Gonzales v. Raich, 545 U.S. 1 (2005); United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); *see also* Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000).

[11] *See generally* Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004) (discussing the Rehnquist Court's limitations on the power of Congress under the Commerce Clause).

[12] 545 U.S. 1 (2005).

present state of the law. Section V begins with an effort to analyze the fate of the ESA under the different theories and concludes by noting the opportunities available to the Court to either uphold or strike down section 9 under any theory.

I. CHALLENGES TO SECTION 9 OF THE ENDANGERED SPECIES ACT

The prohibition on "takes" in section 9 has been the center of many challenges to the ESA. Two aspects of the prohibition on takes are particularly important for understanding the effect of this provision and the resistance that it has generated. First, the prohibition applies to private as well as public actors, reflecting the definition of the word "person" in the ESA.[13] As a result, the prohibition applies to takes regardless of who commits them and regardless of whether they occur on private or public land. Second, the prohibition has been understood to apply to an extremely broad range of conduct. "Take" is defined in the statute to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[14] On its face, therefore, any behavior which serves to harm or harass protected animals is forbidden. In addition, the Fish and Wildlife Service (FWS) has defined "harm" in this context to not only include positive behaviors which interfere with the welfare of specific animals but also modifications of animal habitats that have a negative impact on the welfare of a species.[15] This interpretation has been adopted as a regulation and upheld by the courts.[16] Given these two aspects of the law, a private actor taking any action on private land that might even indirectly lead to the death of a listed species would be potentially subject to civil or even criminal liability.

The Commerce Clause challenges to section 9 generally arise from a governmental attempt to prohibit a private party, such as a developer, from modifying the habitat of an endangered or

[13] 16 U.S.C. § 1532(13) (2000).

[14] *Id.* § 1532(19).

[15] 50 C.F.R. § 17.3 (2005) (defining "harm" as "an act which actually kills or injures wildlife" including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering").

[16] *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995).

threatened species that resides solely within a single state.[17] Such challenges often arise when an environmental group or private party has obtained an injunction forcing the government to enforce section 9 against the challenger, thus leaving the government in the awkward position of being forced to take action and then being sued for taking that action. These applications of the section 9 prohibition are susceptible to a challenge under the Commerce Clause because the Clause authorizes federal regulation of interstate commerce and there is no obvious interstate element to the federal government regulating the habitat of an endangered species that resides in only one state.

II. SECTION 9 UNDER THE "OLD" COMMERCE CLAUSE

There was little reason to believe that the provisions of section 9 of the ESA were problematic as exercises of federal power when they were passed in 1973. Since the prevailing interpretation imposed few limitations on congressional power, it was hard to believe that section 9 would run afoul of the Commerce Clause.

Prior to 1936 the Commerce Clause had been understood to allow the government to regulate the instrumentalities of interstate commerce[18] and goods actually in motion between states for commercial purposes.[19] The government was not allowed to regulate anything outside of that, including the manufacture or sale of goods within a single state.[20] Under this interpretation, section 9 would have been clearly unconstitutional in almost all of its applications, and it could certainly not have been used to prevent

[17] *See, e.g.*, Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1064 (D.C. Cir. 2003); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 625 (5th Cir. 2003).

[18] *See, e.g.*, Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914) (*Shreveport Rate Cases*) (finding federal regulation of the intrastate rates charged by railroad freight carriers to be constitutional). In this context an instrumentality is anything that is helpful to making interstate commerce possible, including highways and trucks, ports and ships, and airplanes and airports. *See* Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 203–04 (1885).

[19] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 76 (1824) (defining interstate commerce as "the transportation and sale of commodities" among states).

[20] *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 13–18 (1895) (finding unconstitutional an application of the Sherman Act to prevent a monopoly on sugar production when the sugar producer did not contemplate a market for his goods outside the state).

takes of species whose habitat was in one state alone. However, in 1937 the Supreme Court changed its approach to these issues. In *NLRB v. Jones & Laughlin Steel Corp.*, the Court held that provisions of the National Labor Relations Act forbidding employers from firing employees who were involved in organizing a union was a constitutional exercise of the Commerce Clause power, even against a manufacturer with facilities in only one state.[21] This decision marked a sea change in the understanding of the Commerce Clause, and in its aftermath a three part test developed for when a regulation would constitute a valid exercise of federal power.[22]

The first two prongs of this three-part test are basically the same as the pre-*Jones & Laughlin* categories of valid commercial regulation. The first was that the federal government had the power to regulate the channels of interstate commerce, for instance interstate roads or navigable rivers.[23] Second, Congress was authorized to regulate the "instrumentalities of interstate commerce, or persons or things in interstate commerce."[24] This includes, for example, railroads and the contents of freight trains. This authorization is broader than the old understanding of "things in interstate commerce" in that it specifically includes things that had moved in interstate commerce even if they are no longer in the "current."[25] Finally the courts found that Congress can regulate "activities having a substantial relation to interstate commerce."[26] It is this final category which provides Congress with the ability to pass much of the regulation that is part of the modern administrative state,[27] including arguably section 9 of the ESA. In

[21] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–38 (1937) ("Although activities may be intrastate in character when separately considered, if they 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, Congress cannot be denied the power to exercise that control.").

[22] *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).

[23] *Id.* at 558.

[24] *Id.*

[25] *Compare* Stafford v. Wallace, 258 U.S. 495, 515–18 (1922) (finding that Congress may regulate intrastate activities if those activities are a part of the "current" of interstate commerce), *with Jones & Laughlin Steel Corp.*, 301 U.S. at 36 ("The congressional authority to protect interstate commerce . . . is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce.").

[26] *Lopez*, 514 U.S. at 558–59.

[27] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 301–06 (1964) (holding

addition this third prong is the source of much of the debate about the exact limits of congressional power.

The outer limits of Congress' power under the "substantial relation to interstate commerce" test were never well defined. This is in large part because between 1937 and 1995 the Supreme Court upheld almost every act that was challenged as unconstitutional under the Commerce Clause.[28] Two principles were developed in this period which became central to the broadness of the concept of "substantial relationship to interstate commerce." The first of these principles, the aggregation principle, was established in *Wickard v. Filburn*.[29] In this case, the Secretary of Agriculture, Wickard, sought to enforce wheat production limitations on a small commercial farmer, Filburn. Filburn argued that it was unconstitutional for the federal government to seek to regulate his behavior because the wheat that he produced in excess of his quota was meant for consumption on his farm, and thus the effects of his decision to grow the excess were purely local.[30] The court held that while Filburn's own actions may well have had a minimal effect on interstate commerce, on-farm consumption of wheat in general has a large effect on the national wheat market, which is a major interstate commercial market.[31] In essence, the court gave Congress the power to regulate local, facially non-economic behavior if that activity, when engaged in by a broad section of the population would in the aggregate have a significant impact on interstate commerce.

The second major principle in the broadening understanding of the Commerce Clause power, here called the attenuation principle, arose in the context of enforcing the Civil Rights Act of 1964. In these cases, the Court took pains to determine that activities that might be considered inherently local substantially affect interstate commerce, by outlining a series of connections

that the Civil Rights Act of 1964 was an appropriate use of Congress' commerce power because of a substantial relationship to interstate commerce); Gonzales v. Raich, 545 U.S. 1, 17–19 (2005) (holding that the Controlled Substances Act as applied to intrastate production and possession of marijuana is within Congress' commerce power because of a substantial relationship to interstate commerce).

[28] *See* Chemerinsky, *supra* note 11, at 2.

[29] *See* Wickard v. Filburn, 317 U.S. 111, 127–28 (1942). The term "aggregation" was not used in the case but has since come to be applied to the principle therein established.

[30] *See id.* at 119.

[31] *See id.* at 125–28.

between the regulated activity and the interstate economy. For example, in *Katzenbach v. McClung*, in which a restaurant owner refused service to African-American patrons in violation of the provisions of the Civil Rights Act of 1964, the court found that even an inherently local activity such as operating a restaurant may substantially affect interstate commerce.[32] To establish this link, the court outlined the series of connections linking the refusal to serve African-Americans to interstate commerce.[33] The Court noted that almost half of the food that the restaurant purchased locally had been "bought from a local supplier who had procured it from outside the State," forming a chain in which the restaurant customer was connected to the local produce supplier and then to an interstate supplier, which operated in interstate commerce.[34] To complete the chain of effects, the Court found that Congress had a reasonable basis to conclude that racial discrimination diminishes total spending in the area and that "[t]he fewer customers a restaurant enjoys the less food it sells and consequently the less it buys," leading to "an artificial restriction" on the demand for the interstate supplier's goods.[35] In effect, the court found that a change in the conditions at one end of the chain, in local activity, could affect the conditions at the other end, affecting interstate commerce.[36]

In his article *The Commerce Clause Meets the Dehli Sands Flower-Loving Fly*, John Copeland Nagle recognized the attenuation principle, although under a different name.[37] This article sought to examine one of the first challenges to an application of the ESA after the events described below that called the aggregation and attenuation model of the Commerce Clause into question.[38] In an effort to construct a model in which the

[32] *See* Katzenbach v. McClung, 379 U.S. at 301–04.

[33] *See id.* at 296–97.

[34] *See id.*

[35] *See id.* at 299 (citing S. REP. NO. 88-872, at 18–19 (1964)).

[36] *See id.* at 303.

[37] *See* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 193–94 (1998) (discussing attenuation as a very broad form of aggregation).

[38] *See id.* (discussing Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997)). *National Association of Home Builders* was decided before *United States v. Morrison*, 529 U.S. 598 (2000). The D.C. Circuit subsequently revisited the issue in *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), which is examined in detail below. *See infra* text

change the Supreme Court was making could be measured and understood, Professor Nagle looked at different levels of aggregation, to determine the breadth of the field over which aggregation should be allowed.[39] He recognized that under the model of Commerce Clause jurisprudence in favor from 1937 to 1995, the approach to aggregation was so broad as to allow Congress to regulate virtually anything.[40] The court had clearly repudiated this position in cases like *United States v. Lopez*, discussed below.[41] However, Professor Nagle noted that, at least in the field of endangered species protection, the effect of requiring that each target of regulation be sufficiently "widespread and familiar to consumers," that is, of independent commercial significance, is contrary to the very nature of endangerment and leads to "terminal silliness."[42] In effect he separates the Court's analysis of the scope of allowed aggregation from their analysis of when, after aggregation is complete, significance has been achieved.[43] This is a sufficiently powerful analytic tool to explain the outcomes in both *Wickard* and *Katzenbach* while creating a framework in which it is possible to examine critically what the court might be trying to achieve through cases narrowing the Commerce Clause power. *Wickard* is a case where the scope of the aggregation is very narrow, wheat production for home use on farms, but once the activity is aggregated, the effect is significant.[44] *Katzenbach* uses a much broader aggregation, which sweeps in not only restaurant service but also related commerce in restaurant supplies, before aggregating to commercial significance.[45] For the purposes of this article, "attenuation" refers to this notion of the scope of allowable aggregation.

With the aggregation and attenuation principles firmly ensconced in the Commerce Clause jurisprudence at the time the ESA was passed, there were few limitations on congressional power, and section 9 of the ESA seemed safe as a valid exercise of

accompanying notes 90–98.

[39] *See* Nagle, *supra* note 37, at 196–99.

[40] *See id.* at 199–204.

[41] *See* United States v. Lopez, 514 U.S. 549 (1995).

[42] Nagle, *supra* note 37, at 205–06.

[43] *See id.* at 196–99.

[44] *See id.* at 193–94; *see also* Wickard v. Filburn, 317 U.S. 111, 124–29 (1942).

[45] *See* Katzenbach v. McClung, 379 U.S. 294, 300–01 (1964); *see also* Nagle, *supra* note 37, at 189–90.

power under the Commerce Clause. The fact that there might otherwise be commerce in products that are the results of takes of some endangered species, for instance red wolf pelts or bald eagle feathers, if the ESA did not prohibit such activity, would be sufficient interstate commercial activity to make the act of taking those animals "substantially related to interstate commerce." Thus the legislation would be valid as applied to those species. Other species have ranges that cross state lines. These species would at least have an interstate aspect to their existence and might potentially fall within the "in interstate commerce" category under the first prong of the Commerce Clause test. Most importantly, however, the owner of land on which a listed species lives and who desires to develop that land in a way that represents a negative habitat modification will almost certainly have a commercial purpose for doing so.[46] Thus the federal government can reach this activity using the attenuation principle to link the behavior that will cause the take to its commercial purpose and then allowing aggregation of similar commercial actions until together there is a "substantial effect on interstate commerce." Most activities that result in the taking of a listed species will fall into one of these categories. Even if there were species or situations that did not fall into one of these categories, the Necessary and Proper Clause, which allows Congress to regulate things that are not directly within the Article I, Section 8 powers but which they need to regulate in order to reach the full limit of the enumerated powers, might be invoked to permit the regulatory regime to extend to exceptional cases, thus rendering the no-take provision of the ESA constitutional on the whole.[47] In general, almost all actions are interstate commerce under this understanding, and as a result many people believed that the Commerce Clause limitation had simply been read out of the Constitution or that it had only very narrow

[46] *See* Nagle, *supra* note 37, at 189–90 (noting the connections to interstate commerce where development threatened endangered species habitat). The Court has found that negative habitat modifications that lead to listed species deaths, even indirectly, can be classified as takes. *See supra* note 15 and accompanying text; *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995).

[47] This issue of Congress' powers under the Necessary and Proper Clause as opposed to their powers under the other clauses of Article I, Section 8 would prove to be central to Justice Scalia's perspective on the proper scope of the Commerce Clause. *See infra* notes 130–131 and accompanying text.

applicability.[48] This state of affairs was deeply problematic for many of the people affected by the no-take provision, especially developers in the West who turned to legislative efforts to undermine the efficacy of the ESA.[49]

III. THE "NEW" COMMERCE CLAUSE CASES: *LOPEZ* AND *MORRISON* AND THEIR IMPLICATIONS FOR THE ESA

A. Lopez *and* Morrison

In 1995 the theoretical underpinnings of the prevailing Commerce Clause jurisprudence were called into question by *United States v. Lopez*, which ended the trend of the Court finding virtually every act challenged under the Commerce Clause constitutional.[50] The Court found that Congress had exceeded its Commerce Clause power in passing one of the major provisions of the Gun-Free School Zones Act, which made it a criminal offense to possess a firearm in a school zone.[51] The government had argued that the Gun-Free School Zones Act was an application of Congress' legitimate powers under the Commerce Clause because it was substantially related to interstate commerce, using both the aggregation principle and the attenuation principles. The government outlined the chain that connected the presence of guns in school to interstate commerce because guns in school are connected to student safety, which has a direct bearing on students' ability to learn and the quality of education, which in turn substantially affects interstate commerce because an educated workforce is a necessity for future commercial and economic

[48] *See, e.g.*, Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since* Lopez*: A Survey*, 32 CAP. U. L. REV. 671, 689 (2004) (noting that after 1937 no statute was overturned on Commerce Clause Grounds until *Lopez* in 1995); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387 (1987) (pointing out that, under the construction of the Commerce Clause at the time, the federal government could always show an effect on interstate commerce sufficient to ground its exercise of power).

[49] This led in part to the election of politicians on ESA reform platforms from western states, including Rep. Richard Pombo, proponent of H.R 3824, 109th Cong. (2005) (proposing to rework the Endangered Species Act, including making it more difficult to list endangered or threatened species, and repealing critical habitat requirements). *See, e.g.*, Timothy Egan, *Look Who's Hugging Trees Now*, N.Y. TIMES, July 7, 1996, § 6 (Magazine), at 28.

[50] United States v. Lopez, 514 U.S. 549, 549 (1995).

[51] *See id.*

success.[52] The majority opinion, written by Justice Rehnquist, rejected the government's argument. It began by determining that there was no facial relationship between guns in schools and commerce and thus neither of the first two prongs of the Commerce Clause test could possibly have been met.[53] The opinion then rejected the government's argument for substantial effects based on aggregation and attenuation.[54] The Court concluded that if such arguments were taken to their logical ends, they would lead to a general federal police power because the aggregation and attenuation principles could be used to connect anything to the welfare of the workforce.[55] Based on this, the majority rejected the legislation as being outside of Congress' power.[56] However, none of the opinions in the majority provided a clear understanding of the "substantial effects on interstate commerce" test as it was applied in the case.[57] Because the majority described what they found objectionable with the Gun-Free Schools Zones Act only in broad terms, it was very difficult to determine what test would be applied to future legislation. Some of the language in the majority opinion implied that the

[52] *See id.* at 563–64.

[53] *See id.* at 559.

[54] The Court summarizes the government's argument as follows:

> "The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce."

The Court then rejects this line of reasoning. *Id.* at 563–64 (citations omitted).

[55] *See id.* at 564.

[56] *See id.* at 567–68.

[57] *See id.* The majority opinion recites language from the *Jones & Laughlin* case that the question of the limits of congressional powers "is necessarily one of degree" and the concurrences do not provide anything more concrete. *See id.* at 566. The one exception is Justice Thomas' concurrence which describes the Commerce Clause jurisprudence of the last century as a deviation from the true meaning of the clause and recommends a return to a much stricter, either pre-New Deal or 1791 era, test. *Id.* at 585–600 (Thomas, J., dissenting).

problem with the Act was simply the failure of Congress to include any findings that explained how the Act was related to interstate commerce.[58] As a result it was inevitable that another case would come up soon afterwards to seek a clarification.

The follow up case, *United States v. Morrison*, more clearly defined the limits on Congress' Commerce Clause power.[59] The Court struck down a provision in the Violence Against Women Act of 1994 that created a civil remedy for gender-motivated violence in federal court. The challengers argued that there was no substantial relationship between gender-motivated violence and interstate commerce, and a majority of the court agreed.[60] Because every action has an economic consequence at some remove, the majority started with the proposition that the test for the outer limit of the Commerce Clause power will always be one of degree. They then proceeded to place significant, concrete limitations on the core principles of the pre-1995 understanding of the Commerce Clause. First, they implied that the *Wickard* aggregation principle only automatically applies to those situations where the underlying activity is commercial in character and may not apply at all elsewhere.[61] Second, they rejected the attenuation principle, at least with reference to certain potential links in the chain which the court saw as potentially generalizing the Commerce Clause power beyond recognition. For example, reasons such as the "cost of crime" or "national productivity" were not allowed.[62] In addition, the opinions in both *Morrison* and *Lopez* also discounted the "inhibition of travel" of a subset of the population as a substantial effect on interstate commerce, which is an argument that was central to the decision in the *Katzenbach* case that allowed the Civil Rights Act to be effectively regulated as interstate commerce, when it required equal access to local public accommodations.[63]

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[58] *See id.* at 562–63 (majority opinion).

[59] *See* United States v. Morrison, 529 U.S. 598 (2000).

[60] *See id.* at 627.

[61] *Id.* at 610–11, 613. While some of the language in this section is quoted from the *Lopez* decision, it is in this decision that the Court makes clear that this is the reason for its decision and a rule that it is establishing, rather than comments in dicta provided for context.

[62] *See id.* at 612–15.

[63] *Compare id.* at 612–14 (reasserting that the inhibition of interstate travel is insufficient to establish a link to interstate commerce), *and Lopez*, 514 U.S. at 564–65 (rejecting the government's argument that "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived

Finally, the majority made clear that the problem in *Lopez* could not have been cured by congressional findings linking the legislation to interstate commerce.[64] As the dissent pointed out, in this case Congress had gone farther than was usual in providing findings that linked the legislation to interstate commerce. It had provided not only theoretical connections between violence against women and the economic health of the nation, but also significant empirical evidence of such a link.[65] The majority did not respond directly to this criticism. However, their decision to ignore it implied a new principle that displaced the aggregation and attenuation principles, that the Court will examine the theoretical relation of an act of Congress to interstate commerce, regardless of any proof of actual interstate commercial effect that the government may provide.[66]

Lopez and *Morrison* created considerable uncertainty about the scope of federal authority under the Commerce Clause. Scholars began referring to these two cases as representing a "federalism revolution," a decisive break from the interpretations of the Commerce Clause that held sway since 1937.[67] Scholars responded to this shift with multiple approaches. Some attempted to articulate a coherent meaning for the phrase "commerce among the several states" that responded to *Lopez* and *Morrison* through historical exegesis.[68] There has been, however, little agreement as to what the contemporary meaning of the words would be, and

to be unsafe" which substantially affects interstate commerce), *with* Katzenbach v. McClung, 379 U.S. 294, 300 (1964) (asserting that there was "ample basis for the conclusion that . . . interstate travel was obstructed directly by" racial discrimination and linking that discrimination in restaurants to interstate commerce), *and* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252–56 (1964) (finding "overwhelming evidence that discrimination by hotels and motels impedes interstate travel" and that interstate commerce "include[s] the movement of persons through more states than one" regardless of "whether the transportation is commercial in character").

[64] *See Morrison*, 529 U.S. at 614–16.

[65] *See id.* at 628–34 (Souter, J., dissenting).

[66] *See id.* at 617–19 (majority opinion) (noting that the punishment of intrastate violence is a police power reserved to the states).

[67] *See, e.g.*, Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 8–11 (2001); Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1 (2000) (examining the uncertainty resulting from recent cases invoking federalism); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) (noting the beginning of a constitutional revolution that includes federalism).

[68] *See* Mark, *supra* note 48, at 691–716.

both broad and narrow readings have been proposed and defended based on the historical record.[69] Some commentators have looked at the cost of a narrowing of the understanding of the Commerce Clause to its pre-New Deal limits, but there has been little consensus as to the outcome of this analysis either.[70] Others have examined the effect of the different interpretations of the Commerce Clause as a question of the appropriate division of powers between the branches of government, both along the federal-state dimension and along the legislative-judicial dimension.[71]

Perhaps more interesting were the efforts to develop a predictive model for decisions under the *Lopez*/*Morrison* rubric. Some scholars sought a general test while others attempted to look at particular applications of the law as it was developing. Christy H. Dral and Jerry J. Phillips have convincingly shown that none of the issues raised by the Supreme Court in the text of the *Lopez* and *Morrison* decisions are viable as a predictive test of the Court's behavior in the future, since none of the issues are sufficiently definite to allow coherent extrapolation.[72] In the environmental arena in particular, scholars came to incompatible conclusions

[69] *See, e.g.*, Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1 (1999); Mark, *supra* note 48.

[70] *See, e.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995); Richard A. Epstein, Propter Honoris Respectum, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996); Nelson & Pushaw, *supra* note 69.

[71] *See, e.g.*, Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

[72] *See* Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 616–30 (2001). Scholars attempted to analyze a number of acts under the "New" Commerce Clause and came to different conclusions. For example, Elizabeth Saylor has examined two acts that might face Commerce Clause challenges, the Child Support Recovery Act and the Freedom of Access to Clinic Entrances Act, finding that both might well survive analysis under the new Commerce Clause rubric, because the targets of both were intimately tied to economic activity, either the collection of debts or access to a place of commerce. *See* Elizabeth S. Saylor, *Federalism and the Family after* Morrison*: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 HARV. WOMEN'S L.J. 57, 138 (2002).

about the viability of different environmental regulatory schemes; however, they all ultimately concluded that the basis of their disagreement turned on the definition of "commerce" the Court would choose to adopt.[73] It is in this context of uncertainty that people began to challenge the courts to provide a clearer set of rules for the "New" Commerce Clause.

B. *The Fall-Out of* Lopez *and* Morrison *for the ESA*

In the context of the uncertainty in the wake of the *Lopez* and *Morrison* decisions, plaintiffs began challenging a range of federal statutes as being beyond the scope of legitimate congressional authority under the newly defined limits of the Commerce Clause. One of the targets of such challenges was section 9 of the ESA as applied to actions that stood only to affect endangered or threatened species that resided entirely within the boundaries of one state. The challengers in these cases generally argued that the application of the ESA in these cases was analogous to the application of the Gun-Free School Zones Act or the Violence Against Women Act, in that they regulated a non-commercial phenomenon that the Constitution had left to state control.[74] The historical argument, that the federal government could control certain non-economic activities because they had an impact on other activities that, taken together, had a substantial effect on interstate commerce, had been called into question by the weakening of the attenuation and aggregation principles.[75] In this environment the no-take provision appeared very vulnerable.

Three of these challenges to section 9 of the ESA made it to the courts of appeals. Each court upheld section 9 but did so for very different reasons. The Fourth Circuit found that the ESA was

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[73] *See, e.g.*, Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 406–17 (2005) (analyzing the appellate decisions to that date on the constitutionality of section 9 of the ESA and arguing that some of the proffered rationales exceed what the Supreme Court is likely to accept as "commerce"); Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 314–15 (2004) (expressing some concern about whether the Court would be willing to find the commercial basis for the ESA in the nature of the regulatory scheme itself).

[74] *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1066–67 (D.C. Cir. 2003); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 626–27 (5th Cir. 2003).

[75] *See* United States v. Morrison, 529 U.S. 598 (2000); *see also supra* text accompanying notes 59–66.

an act regulating scarce natural resources, a task which is economic in all of its instances and one traditionally within the purview of the federal government.[76] The D.C. Circuit determined that the ESA regulates the actions of people who seek to perform takes rather than the species being taken, and so long as those people are engaged in commercial acts, the application of the statute is constitutional.[77] The Fifth Circuit found that the ESA was a statute seeking to protect endangered species generally, whether or not the taking of any particular species was likely to have substantial commercial effects.[78] Because of the ways in which species are intertwined in nature, the court found it to be essential to the achievement of the legitimate congressional goal of preventing the extinction of species for even takes that do not appear to have substantial commercial effects to be forbidden.[79] Finally, the court found that Congress' overall desire was a regulation of interstate commerce because the full effect of possible trade in some or all of the protected species was substantial.[80] Each of these cases found the challenged application of section 9 to be valid; however, the reasons given by the courts and the understandings of *Lopez* and *Morrison* used by each are incompatible.

The Fourth Circuit case, *Gibbs v. Babbitt*, found that section 9 of the ESA was directly commercial and was a part of an area of regulation where power was reserved to the federal government.[81] The case was a challenge to the FWS's regulations extending some section 9 protections to reintroduced populations of red wolves in South Carolina. The court pointed briefly to the context of the section 9 protections as an essential part of a larger, valid regulation of economic activity but quickly moved on to its central

[76] *See infra* text accompanying notes 81–89.

[77] *See Rancho Viejo*, 323 F.3d at 1072; *see also infra* text accompanying notes 90–98.

[78] *GDF Realty*, 326 F.3d at 632–33 (noting that the no-take provision has no jurisdictional element limiting "its application to species bearing some relationship to interstate commerce").

[79] *Id.* at 640.

[80] *See id.* ("ESA is an economic regulatory scheme."); *see also infra* text accompanying notes 100–107.

[81] *See* Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000). *Gibbs* was actually argued on October 28, 1999, before the *Morrison* decision was handed down on May 15, 2000, although it was not decided until June 6, 2000, after *Morrison* was handed down. *See* United States v. Morrison, 529 U.S. 598 (May 15, 2000); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. June 6, 2000).

argument.[82] The majority focused the heart of its argument on showing, based on historical and contemporary sources, that the protection of "scarce and vital natural resources" had traditionally been an area in which Congress had been involved, unlike the acts struck down in *Lopez* and *Morrison* which fell in areas of "traditional state concern."[83] In conclusion, the court held section 9 to be a valid exercise of Congress' commerce power because it is both directly commercial and a rational regulation in an area where federal control is the dominant mode.[84] The panel chose not to stop with that general defense of section 9. They also attempted, perhaps in response to the more specific command of *Morrison*, to show that the taking of red wolves under consideration in this case was actually economic activity. The panel argued first that the concept of economic activity must be understood broadly in order for the Commerce Clause to have meaning.[85] Then they determined that the taking of red wolves was an economic activity in part because the takes in this case were primarily motivated by an effort on the part of local farmers to protect commercial and economic assets threatened by the wolves.[86] The court also noted direct intra- and inter-state commercial effects of the existence of red wolves, in terms of tourism, research and, if the regulation were removed, trade in wolf pelts.[87] As a result, the court found that *Wickard* aggregation was appropriate in the case and that the overall effect of the regulated behavior was substantial.[88] The court buttressed this conclusion by noting that, when a species is endangered, there are "by definition only a few remaining animals" and as a result it is inherently logical to look at the cumulative effects of individual takes in the context of species extinction rather than treating each take as an isolated event.[89]

The second major challenge to the ESA in this period came up in the D.C. Circuit, in the case of *Rancho Viejo, LLC v. Norton*,

[82] *See Gibbs*, 214 F.3d at 497 (citing United States v. Lopez, 514 U.S. 549, 561 (1995)).

[83] *Id.* at 496, 499–506 (citing *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

[84] *Id.* at 492, 497.

[85] *See id.* at 491–92.

[86] *See id.* at 492.

[87] *See id.* at 492–96.

[88] *See id.* at 493.

[89] *Id.* at 498.

which found that the ESA was valid when the actions that caused the takes were commercial.[90] The case was initiated by the efforts of the challengers to build a housing development on the habitat of the arroyo southwestern toad.[91] The reviewing panel again found the statute and its application constitutional, but for very different reasons than those cited by the Fourth Circuit. This court extrapolated a four part test from *Lopez* for whether a piece of legislation is a permissible exercise of the Commerce Clause power. The four factors were: whether the "activity has anything to do with commerce or any sort of economic enterprise"; whether there is a limiting jurisdictional element in the statute that would force it to only apply to interstate commerce; whether there are congressional findings or legislative history that rationally link the regulation to interstate commerce; and whether the relationship between the regulation and interstate commerce is too attenuated.[92] The court rejected the argument that *Morrison* changed this fundamental test, finding rather that it simply affirmed that none of the factors were independently dispositive.[93] The court then determined that the "ESA *regulates takings not toads*" which meant that it is the Rancho Viejo development that had to be analyzed to determine if it was commercial under the four part test.[94] The court rejected any analysis of whether the purpose of the ESA was commercial, finding that inquiries into congressional purpose are inherently flawed and dangerous in light of the separation of powers.[95] The court noted both the arguments raised by the *Gibbs* court: that the challenged provision is an essential element of a valid legislative scheme and that the regulation of natural resources is a traditional area of shared federal and state regulation.[96] However, the court chose to settle its decision on fundamentally different grounds. Once the court determined that the development was the proper object of analysis, the arguments

[90] *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1073–76 (D.C. Cir. 2003).

[91] *See id.* at 1064.

[92] *Id.* at 1068–69.

[93] *See id.* at 1071–72.

[94] *See id.* at 1072.

[95] *See id.* at 1073–74.

[96] *See id.* at 1077 (discussing the comprehensive scheme rationale); *id.* at 1078–80 (discussing the traditional zones of competence argument and relying heavily on the analysis in the *Gibbs* case); Gibbs v. Babbitt, 214 F.3d 483, 499–506 (4th Cir. 2000).

that were central to the Fourth Circuit's reasoning were relatively unimportant because of the obviously economic character of a 280-unit housing development.[97] While the plaintiffs petitioned for both an en banc rehearing and certiorari to the Supreme Court, both petitions were denied.[98]

The third case that was decided in this time period was *GDF Realty Investments v. Norton*, in the Fifth Circuit, which found that the ESA is a commercial regulatory scheme of which section 9 is an essential part.[99] This case, which involved four species of arachnids and two species of beetles, the habitats of which would be destroyed by a planned development, upheld the no-take provision of section 9, for yet a third set of reasons which were incompatible with those expressed by the Fourth and D.C. Circuits.[100] The court in this case rejected the "regulating takes not toads" analysis of the D.C. Circuit out of hand.[101] The court then moved on to dismiss the possibility that takings of these six species, collectively described in the decision as the "cave species," would have an independent effect on interstate commerce. In so doing the majority did not go all the way to rejecting the logic of the Fourth Circuit that the unit of analysis is the taker not the species being taken; however, they found that the Fourth Circuit's logic was totally inapplicable to the takes in question in this case and to those in question in many section 9 situations.[102] Instead the court turned to the question of aggregation, not along traditional *Wickard* lines, which it implied would not be available in this case because of the non-commercial nature of the act of taking the cave species, but instead with reference to the entire regulatory scheme of the ESA.[103] They

[97] *See Rancho Viejo*, 323 F.3d at 1072–73.

[98] *See* Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (denying an en banc rehearing, with then Circuit Judge now Chief Justice of the Supreme Court Roberts dissenting), *cert. denied*, 540 U.S. 1218 (2004).

[99] GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640–41 (5th Cir. 2003).

[100] *See id.* at 625, 640–41.

[101] *See id.* at 634. The *GDF Realty Investments* case in the Fifth Circuit and the *Rancho Viejo* case in the D.C. Circuit were decided within one week of each other. Neither decision refers to the other. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. Apr. 1, 2003); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. Mar. 26, 2003).

[102] *See GDF Realty*, 326 F.3d at 637–39 (finding no present significant commercial impact of the cave species and refusing to give weight to speculative future commercial impacts).

[103] *See id.* at 638–39.

determined that in order to aggregate non-economic activity with other activity, the non-economic activity must be "essential to an economic regulatory scheme."[104] The majority found the ESA to be an economic regulatory scheme in light of its national scope and the likely long term economic effects of widespread species loss in terms of forgone opportunities for controlled commerce and science.[105] In order to find the application of section 9 to these particular developers "essential" to the functioning of the ESA at large the court looked to congressional concern with the unforeseeable repercussions of removing any individual species from "the chain of life on this planet."[106] As a result they found that it was impossible to tell whether preventing the extinction of any particular species is essential to the commercial interests of the United States and so it was necessary to protect all such species in order for the ESA to meet its goals.[107]

At the end of 2004 these three different circuit courts had attempted to analyze the ESA in light of the "New" Commerce Clause jurisprudence of *Lopez* and *Morrison*. Each had upheld the statute and the application of section 9 within it for a different, and likely incompatible, reason from the other two. If the understanding in *Rancho Viejo* that the correct unit of analysis is the taker rather than the victim of the take then the analysis in *Gibbs* and *GDF Realty* must be incorrect since both focus on the protectability of the species. Also under this rubric, an effort to destroy protected species for non-economic reasons, for example out of malice, would be immune from the regulation. The analysis in *Gibbs*, while powerful in reference to red wolves, does not work well when applied to animals that neither enhance nor threaten other commercial enterprises and which do not easily fit into the rubric of "scarce and vital natural resources," like the cave species at issue in *GDF Realty*. The *GDF Realty* court explicitly rejected the reasoning of both the *Gibbs* and *Rancho Viejo* courts. While the alternative analysis it presents is the only one strong enough to protect all applications of section 9, it used the most expansive definition of "commerce" of any of the courts, and it was therefore the most vulnerable to being rejected out of hand by the Supreme

[104] *Id.* at 639 (emphasis and internal quotation marks omitted).
[105] *See id.*
[106] *Id.* at 640 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 179 (1978)).
[107] *See id.*

Court, causing the entire provision to fall. While the statute and section 9 had been upheld against all challenges, it is hard to tell how vulnerable the ESA is to Commerce Clause challenges in the future. Each analyzing court had explicitly or implicitly rejected the reasoning of the other two, and, at the time that the most recent case of the "New" Commerce Clause theory was decided, the Supreme Court was considering an appeal of *GDF Realty*.[108]

IV. *GONZALES V. RAICH*: WHAT CHANGED?

A. *The* Gonzales v. Raich *Opinion*

In November of 2004, the Supreme Court heard one more major Commerce Clause case, in an effort to further clarify its holdings in *Morrison* and *Lopez*. The Court's decision once again fundamentally changed how the reach of the Commerce Clause was understood, and forced a reevaluation of many of the cases decided in the previous decade, including those challenging the constitutionality of section 9. It was the appeal of a case brought by Angel McClary Raich and Diane Monson against the Attorney General.[109] Raich and Monson availed themselves of a California compassionate use law to obtain and use marijuana for treatment of their chronic conditions.[110] They sued the government to obtain an injunction preventing the application of the Federal Controlled Substances Act to their activity.[111] The district court denied their injunction, but a panel of the Ninth Circuit voted two to one that, in light of the decisions in *Lopez* and *Morrison*, the application of the Controlled Substances Act (CSA) to Raich and Monson was an action of Congress in excess of that permitted by the Commerce

[108] A petition for certiorari for the *GDF Realty* case was filed 14 months after the final decision came down and 3 months after a petition for an en banc rehearing was denied. This petition was denied on June 13, 2005, seven days after *Raich* was decided. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. Mar. 26, 2003), *reh'g denied*, 362 F.3d 286 (5th Cir. Feb. 27, 2004), *petition for cert. filed*, No. 03-1619, 2004 WL 1243138 (May 27, 2004), *cert. denied*, 125 S.Ct. 2898 (June 13, 2005); Gonzales v. Raich, 545 U.S. 1 (June 6, 2005). While no absolute conclusion can be drawn from the proximity of these dates, it is at least possible that the members of the Court were aware of the request of the petitioners in the *GDF Realty* case at the time they finalized their decisions in *Gonzales v. Raich.*

[109] Gonzales v. Raich, 545 U.S. at 6–7.

[110] *See id.* at 6–7.

[111] *See id.* at 7.

Clause power.[112] The Ninth Circuit began by determining that medical marijuana use was a separate class of activities from general drug use and trafficking due to its different economic purposes and health effects.[113] Once intrastate marijuana cultivation and use under California's medical marijuana statute was chosen as the unit of analysis, the court had little difficulty in finding that this law did not regulate a form of economic activity and thus dismissed *Wickard* aggregation as a mechanism by which the behavior of the plaintiffs might achieve commercial significance.[114] The court then went through the other aspects of the four part test that the D.C. Circuit extrapolated from *Lopez* in *Rancho Viejo* for whether a piece of legislation is a permissible exercise of the Commerce Clause power: whether the activity "has anything to do with commerce or any sort of economic enterprise;" whether there is a limiting jurisdictional element in the statute that would force it to only apply to interstate commerce; whether there are congressional findings or legislative history that rationally link the regulation to interstate commerce; and whether the relationship between the regulation and interstate commerce is too attenuated.[115] The court found that Raich's use of marijuana had nothing to do with commerce or any sort of economic enterprise; they found no limiting jurisdictional element in the CSA that would force it to only apply to interstate commerce; they dismissed the congressional findings that purported to link the CSA to interstate commerce as irrelevant to Raich's marijuana use; and they found the relationship between Raich's behavior and interstate commerce too attenuated to ground a finding that her drug use actually had such an effect.[116] Based on this analysis the court granted the plaintiffs an injunction.[117] This was the form of analysis that the section 9 challengers above had repeatedly sought to apply to the constitutionality of that provision, and while it had previously failed, the CSA, like the ESA was an obvious target under the "New" Commerce Clause.

The Supreme Court reversed the Ninth Circuit, finding that

[112] *See id*. at 8–9.

[113] *See* Raich v. Ashcroft, 352 F.3d 1222, 1228 (9th Cir. 2003).

[114] *See id.* at 1228–31.

[115] *Id.* at 1229–34; *see also* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068–69 (D.C. Cir. 2003).

[116] *See* Raich v. Ashcroft, 352 F.3d at 1229–34.

[117] *See id.* at 1235.

the CSA affected a national market and was therefore economic in nature.[118] The majority analyzed this case as being almost precisely analogous to *Wickard*, which found wheat growing quotas permissible under the Commerce Clause, even when the wheat was for personal consumption.[119] The court continued to treat both the holding and the reasoning of *Wickard* as valid law, reaffirming the power of the federal government to regulate the purely local activity when it is part of an "economic class of activities" with a substantial effect on interstate commerce.[120] Thus the Court held that they had to read the Constitution to let the federal government regulate behavior like that at issue in *Wickard* so that national markets, which are clearly interstate commerce, could also be regulated.[121] The opinion went on to emphasize that the decision in *Wickard* stands on the fact that the class of activities in that case, wheat growing or farming, is a commercial enterprise.[122] Similarly, the court argued, marijuana exists in a potential interstate market that the federal government has the power to seek to quash. If there were an exception to the CSA's general provisions for medical marijuana, there would be a risk that quantities of the drug would leak out of the system and undermine the government's goal of preventing a general market in marijuana from arising.[123] The case also reaffirmed a related standard which had been part of the original expansion of the Commerce Clause power, namely that if Congress finds that a statutory scheme is substantially related to the regulation of interstate commerce the court will accept that finding so long as there is any rational basis to so believe.[124] As a result, the power of congressional findings to insulate laws from Commerce Clause challenges, which had been called into question, although not specifically refuted by *Morrison*, was reaffirmed.[125]

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[118] *See* Gonzales v. Raich, 545 U.S. 1, 10, 17–19 (2005).

[119] *See id.* at 17–19; *see also* Wickard v. Filburn, 317 U.S. 11, 127–29 (1942).

[120] *See* Gonzales v. Raich, 545 U.S. at 17–18 (internal quotation marks omitted).

[121] *See id.* at 19.

[122] *See id.* at 26.

[123] *See id.* at 30–33.

[124] *See id.* at 22.

[125] While neither *Lopez* nor *Morrison* directly disavowed the rational basis standard, the dissents in both cases argued that the majority's action was not in line with those principles. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 634 (2000) (Souter, J., dissenting); United States v. Lopez, 514 U.S. 549, 608–

This argument underlies the Court's second major assault on the Ninth Circuit's decision in the case: Congress had a rational basis to conclude that the marijuana involved in California's compassionate use scheme was not separately analyzable from the potential national market and the present black market in marijuana.[126] Using this finding, the Court saw a critical distinction between this case and the *Lopez* and *Morrison* cases based on the *Raich* plaintiffs' concession that the overall scheme of the CSA is valid and only certain specific actions under it represented overreaching. In the other cases, the Court argued, it was entire statutory schemes or provisions that were challenged as non-commercial in nature.[127] The court concluded that the CSA is a "closed regulatory system" by engaging in an analysis of the history of the federal regulation of drugs in the United States and the passage of the Drug Abuse Prevention and Control Act, of which the CSA is a portion.[128] The court went on to imply that an essential part of a larger, otherwise valid, regulatory scheme could be valid exercise of congressional power even if standing alone it would fail under the court's precedents.[129] Justice Scalia concurred, mainly to elaborate on this issue. He focused on the ability of Congress, through a combination of the Commerce and Necessary and Proper Clause powers, to regulate non-commercial activity so long as doing so is necessary to make regulations that are otherwise valid under the Commerce Clause effective.[130] In addition, in order for an extension to work, the means that Congress has chosen to regulate must be "appropriate and plainly adapted" to the end of the commercial regulation.[131] While Justice Scalia's vote was not necessary for the majority opinion to carry, it presents an explanation for the application of one of the central tenets of the "New" Commerce Clause jurisprudence and by extension a logic for understanding its limitations.[132]

615 (1995) (Souter, J. dissenting).

[126] *See Raich*, 545 U.S. at 26–27.

[127] *See id.* at 23.

[128] *See id.* at 10–13.

[129] *See id.* at 24–25.

[130] *See id.* at 33–35 (Scalia, J., concurring).

[131] *Id.* at 39 (internal quotation marks omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

[132] *See id.* The majority opinion, written by Justice Stevens, was signed by Justices Kennedy, Souter, Ginsburg and Breyer, giving five votes for the majority's reasoning without needing to incorporate Justice Scalia's independent

B. *Harmonizing the Three "New" Commerce Clause Cases*

It is clear that, in order to understand what the court will uphold as a valid application of the Commerce Clause going forward, *Lopez*, *Morrison* and *Raich* must be read together. The legal community must either choose a reading that harmonizes the apparent differences between the cases or it needs to make a determination as to what parts of this history to reject as having been implicitly overturned by the court. Any explanation of the "New" Commerce Clause must also align these cases with some of the older Commerce Clause cases, especially *Wickard* and *Katzenbach*, which are cited in, and the outcomes of which are affirmed by, the newer cases. Due to the complexity of the issues involved and the fact specific analysis involved in the decisions of each of the cases, there is more than one possible way to read the cases together.

One explanation of the outcomes in these cases is that the court is relying on traditional definitions of commerce or traditional notions of the different zones of control of the state and federal governments. *Lopez*, *Morrison* and *Raich* are all about criminal statutes.[133] Each opinion asserts that the states have traditional authority for defining and enforcing the criminal law. The statutes in question in the first two cases ultimately serve to define as federal offenses things that almost every state has a native statute prohibiting as part of their criminal codes (concealed weapons and assault). These acts are also generally perceived as *malum in se*, and therefore the logical place for them to be regulated is in the criminal code, a traditional province of the states and perhaps the central aspect of the exercise of state police power.[134] *Raich* on the other hand is about a statute regulating drug sale and use. This conduct is ultimately *malum prohibitum*,

concurrence. Since Justice Scalia's complaint with the majority opinion is merely that it is "misleading and incomplete," not that it is necessarily incorrect, and his opinion is, in the main harmonizable with the majority opinion, it is an open question as to how much weight future courts will give to his reasoning. *Id.* at 34.

[133] *See supra* Part III; *see also Raich*, 545 U.S. 1; United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[134] *See, e.g.*, *Raich*, 545 U.S. at 66 (Thomas, J., dissenting); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 221 (2005).

and, as the California Compassionate Use Act makes clear, left to their own devices, some states might not make it illegal in all cases. While regulation of acts which are social ills by their very nature might be seen as traditionally the province of the state, for instance in its role as the source of the primary criminal law, the more subtle regulation where "the choice of the individual must give way to the convenience of the many"[135] might instead be considered an area of shared authority in accordance with the different competencies of the local and national government.[136] In addition the CSA, while establishing criminal penalties, is also an inherently coherent regulatory scheme for the scheduled substances. The definition of a "drug" is an inherently complex matter that is necessarily going to require a level of research and reflection better suited to a national regulatory agency than a local legislative or executive actor. Also, given that "drugs" can move easily between states, the laws regulating "drugs" will have to be enforced on an interstate level. All of these elements point to a traditional distinction between the appropriate roles of state and national government in the federal system in the United States.[137] The distinction between the traditional zones of competence of the states and the national government may be doing even more of the work in these cases than the size of the discussion of it may suggest, as it would also explain many of the post-1936 Commerce Clause cases that are cited in the majority opinions of *Lopez*, *Morrison* and *Raich*. In particular, the statute in *Wickard* was a quota based regulation of national economic production, an issue of clear national character, especially in the years of the

[135] PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 16 (1968).

[136] *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law."); Screws v. United States, 325 U.S. 91, 109 (1945) ("Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."); Jerome v. United States, 318 U.S. 101, 105 (1943) ("[T]he administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress."); Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 493 (1887) (asserting that "by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property"); BLACK'S LAW DICTIONARY 971 (7th ed. 1999) (defining *malum in se* and *malum prohibitum*).

[137] *See Lopez*, 514 U.S. at 561 n.3; *id.* at 580–83 (Kennedy, J., concurring); Gibbs v. Babbitt, 214 F.3d 483, 497–505 (4th Cir. 2000) (discussing historical boundaries on state and federal power).

Depression and attendant explosion in national economic regulation. Similarly the statute in *Katzenbach*, while immediately affecting "public accommodations" was about securing civil rights without regard to race, a task that the states had proven themselves incapable of completing and which, by 1964, was rapidly becoming an issue of national character, if not one of national security.[138] On the other hand, as previously noted, the statutes in *Lopez* and *Morrison* both deal with matters of "classic" criminal law.[139] This analysis of traditional zones of control may have great predictive power going forward; however, it has one critical limitation. None of the Supreme Court cases analyzed in this article rely on this distinction directly, and of the circuit court decisions only the *Gibbs* case comes close. The Court going forward will likely choose to make a showing of analyzing their precedents directly, rather than through this lens, and, therefore, any complete understanding of how future Commerce Clause challenges will have to find a firmer grounding in the text of the decisions.

On the opposite end of the spectrum, it is possible to still take the Court at its word that it has not overruled any of its prior precedent but look to extract a predictive test from the legal holdings of the prior cases rather than searching for an external predictive element. The simplest way is to look at *Raich* as a harmonization of the reasoning of *Lopez* and *Morrison* with the logic of *Wickard* and *Katzenbach* taking into account a need to uphold the outcomes of all four cases simultaneously. Under this analysis, *Raich* and *Morrison* can be understood as defining opposite ends of a spectrum of places in which the federal government could attempt to regulate graded by their "commercial" character. *Lopez* then becomes an example of regulation in a field that is more like *Morrison* than it is like *Raich*. Although *Raich* and *Morrison* both involve petitioners who have been able to show that their illegal actions have no effects in

[138] *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 26–29 (1994) (arguing that the Cold War made continuing American segregation and racial discrimination into an international relations issue); *see also* Katzenbach v. McClung, 379 U.S. 294 (1964).

[139] This may be especially true for *Lopez*, for which most of the government's arguments as to why the statute affected interstate commerce had to do with effects on education, another area of traditional state or even local control. *See Lopez*, 514 U.S. at 563–64; *see also* United States v. Morrison, 529 U.S. 598, 610–11, 617–18 (2000).

interstate commerce, the difference between them is that in *Raich*, the underlying "field of regulation" was the drug market, which the Court found to be a commercial place, while in *Morrison* the field was criminal law enforcement, which the Court refused to see as commercial. Similarly *Lopez* is like *Morrison* because it is about either a pure criminal law statute or a statute regarding education policy, another non-commercial sphere. As a result, the Court finds that *Wickard* style aggregation should be allowed in *Raich*, which is commercial, but not in *Lopez* or *Morrison*. A possible rule that could be extrapolated from this would be that in order for Congress to regulate under the substantial relationship to interstate commerce prong of the traditional Commerce Clause test, they can either aggregate individual small instances of a regulated behavior which is already economic in nature to achieve a substantial effect or assert an attenuated link between single substantial instances of non-economic behavior and the commercial sphere, but they can not do both. Therefore, if they are already regulating in the commercial sphere, Congress can aggregate up, making *Wickard* and *Raich* work, but if they are operating in the non-commercial sphere Congress cannot both attenuate to the commercial and aggregate to significance, thus forbidding the statutes analyzed in *Lopez* and *Morrison*.

A third, entirely different way of transforming the precedents in this field into a coherent predictive theory of the Commerce Clause is not to try to harmonize all precedents, but rather allow that some or all of the precedents have been abandoned by the Court. In particular, *Raich* may act as a complete or partial repudiation of *Lopez* and *Morrison*, or it may signal a return to a broader view of the *Wickard* rule. While the *Raich* majority claimed to be honoring all of the prior decisions including *Lopez* and *Morrison*, they severely limit the set of cases where they would refuse to apply the *Wickard* rule, contrary to the reasoning of the majority in *Lopez* and later in *Morrison*. The question after *Raich* in this scenario becomes how many other cases will fit into this set where *Wickard* does not apply. One possibility is that by adopting the logic of *Raich* the Court abandons that of *Lopez* and *Morrison* and is declaring that only those two cases on their facts will lead to their result. The dissent complains that the majority has gutted the meaning of the decisions in *Lopez* and *Morrison* and

rendered them into a set of complex drafting rules for Congress.[140] This may not be an entirely unfair assertion. *Raich* can be read as outlining a set of circumstances under which Congress can regulate an activity that has no meaningful connection to interstate commerce, namely by making it an essential part of a regulatory scheme the primary function of which is to regulate a commercial market. The market need not be a real one, as the Court reaffirmed its commitment to reviewing congressional findings of commercial purpose with a rational basis standard.[141] In addition the market may be one which Congress is seeking to regulate out of existence, as *Raich* itself proves.[142] According to this logic, Congress could once again pass any legislation, so long as the Court approved.[143] For example, the Gun-Free School Zones Act could be redrafted as part of a comprehensive gun control regime. If Congress added provisions with specific punishments for possession of a gun in densely populated places, where incidental damage would be most likely, they could achieve the effect of making it a federal crime to have guns in schools. The Violence Against Women Act would be harder to reword correctly, but in the context of a more comprehensive civil rights act, one focused explicitly on encouraging safe travel, it might be possible. It is clear that once the baseline requirement that the regulatory regime have a commercial nature is met, the *Wickard* aggregation rule applies, and the *Katzenbach* attenuation principle would not be needed. The question under this reading is how broadly the Court will choose to define economic or commercial activity, or contrariwise, what is left in the set of cases, such as *Lopez* and *Morrison*, where *Wickard* would not apply.

Justice Scalia's concurrence in *Raich* can be read as reacting in part to this question, by attempting to give a firm theoretical footing to Congress' power to regulate beyond the limits of what is specifically interstate commerce.[144] Justice Scalia distinguishes the power to regulate instrumentalities of and objects in interstate commerce from the power to regulate things substantially related to interstate commerce by finding the former powers in the Commerce Clause alone and the latter in the Commerce Clause

[140] *See* Gonzales v. Raich, 545 U.S. 1, 46 (2005) (O'Connor, J., dissenting).
[141] *See id*. at 22 (majority opinion).
[142] *See id.* at 19–20 n.29.
[143] *See supra* text accompanying note 48.
[144] *See* Gonzales v. Raich, 545 U.S. at 33–42 (Scalia, J., concurring).

operating in conjunction with the Necessary and Proper Clause.[145] By tethering the "substantially related to interstate commerce" prong of the test, with its historical potential for limitless expansion, to the concept of what is necessary and proper for the execution of the concrete aspects of the Commerce Clause power, Justice Scalia is able to place absolute boundaries on both the substance and the form of the legislation that Congress can pass under this rubric. Substantively, Justice Scalia explains the difference between the present case and *Lopez* in terms of a congressional ability to regulate non-economic activity when it forms "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[146] Formally, Justice Scalia argued that "even when the end is constitutional and legitimate," all invocations of the Necessary and Proper power are bound by a requirement that "the means must be appropriate and plainly adapted to [the] end."[147] However, as Justice Scalia cast the sixth vote for the outcome that the Court reached, it is impossible to tell what influence his interpretation of the present decision will have on future cases.[148]

Further complicating efforts to determine the appropriate interpretation of the decision in *Raich* are the changes which have occurred in the composition of the Supreme Court since the decision. When this case was decided, Chief Justice William Rehnquist and Justice Sandra Day O'Connor were on the Court; they have since been replaced by Chief Justice John Roberts and Justice Samuel Alito. Chief Justice John Roberts sat on the D.C. Circuit when a panel of that court decided *Rancho Viejo*, and he wrote in dissent against the decision to deny the petition for a rehearing en banc.[149] The grounds for his desire to have the case reheard were twofold. First, he believed the panel that issued the opinion to have been in error when they determined that the building project was the proper unit of analysis for determining whether the regulated activity was commercial under the standard

[145] *Id.* at 34.

[146] *Id.* at 36 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

[147] *Id.* at 39 (internal quotation marks omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

[148] *See supra* Part IV.B.

[149] Rancho Viejo, LLC. v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting).

of *Lopez*, rather than the taking of the toads.[150] Secondly, and more tellingly, he implied that he did not perceive the "taking of a hapless toad that, for reasons of its own, lives its entire life in California [to constitute] regulating 'Commerce . . . among the several States.'"[151] As a result, regardless of what method of analysis is chosen, there is likely to be at least one vote that would find the section 9 prohibition to be non-commercial. Justice Samuel Alito is formerly of the Third Circuit, which did not ultimately hear one of the post *Lopez* and *Morrison* ESA cases; it is harder to tell what his perspective on this issue is. It is important to note that the votes that the two new Justices replace, those of Chief Justice Rehnquist and Justice O'Connor, were both in the dissent in *Raich*. As a result they will not have the power, even if they have the will, to directly overturn that decision. However, as the analysis above demonstrates, reinterpretation of past precedent may be a more powerful way of shaping future outcomes than direct reversal.

V. THE FATE OF THE ESA

How will the ESA fare under this new understanding of the Commerce Clause power? As discussed above, before the *Raich* decision, there were at least three different rationales for allowing the section 9 prohibition on takes to survive a Commerce Clause challenge.[152] The Fourth Circuit had found that the ESA serves to regulate scarce natural resources and that this by definition links the application of the statute to interstate commerce, since rare goods must be regulated with reference to the needs of society generally rather than local interest. In addition they noted the traditional role of the federal government in regulating such resources. The D.C. Circuit determined that the appropriate test was to examine the commercial nature of the action that was prevented, rather than the take itself. The Fifth Circuit focused on the known commercial potential of some regulated species and determined that, since the commercial potential of other species is unknown, it is reasonable for Congress to forbid all such takes. The question becomes: Do any of these justifications survive the *Raich* decision and if so, how does the *Raich* decision change

[150] *See id.*
[151] *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3).
[152] *See supra* Part III.B.

them?

A. *Scholarly Approaches*

Two scholars have already attempted to answer the question directly of whether these justifications survive *Raich*. Michael Blumm and George Kimbrell, in a recent article in the journal *Environmental Law*, argue that the *Raich* decision serves to "immuniz[e]" the no-take provision of the ESA from Commerce Clause scrutiny.[153] The *Raich* Court, and Justice Scalia's concurrence in particular, determined that even if marijuana cultivation and sale was purely intrastate commerce, or not commerce at all, it was necessary to analyze the entire CSA as a comprehensive scheme. Blumm and Kimbrell take this reaffirmation of the comprehensive scheme principle as a positive adoption of the logic of the Fifth Circuit in the *GDF Realty* case that all applications of such schemes are allowable exercises of the Commerce Clause power so long as the scheme as a whole regulates in a commercial sphere.[154] They assume that the ESA as a whole, or at least section 9, is a comprehensive scheme regulating interstate commerce, and, therefore, specific applications of the law will be upheld even if they regulate only intrastate or non-commercial activities.[155] They go on to point to Justice Scalia's concurrence as additionally protective of the no-take provision. So long as the fundamental purpose of the scheme is a valid exercise of the Commerce Clause power, any portions on the "edge", they argue, will be covered by the Necessary and Proper Clause power.[156] As a result, the comprehensive scheme rationale is strengthened by being enshrined in both the Commerce and Necessary and Proper Clauses.[157] Finally, the article argues that the *Raich* decision represents a "cabining" of the holdings of *Morrison* and *Lopez*, "the high watermarks of the so-called

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[153] *See* Michael C. Blumm & George A. Kimbrell, Gonzalez v. Raich*, the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 496 (2005).

[154] *See id.* at 494–95; *see also* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 639 (5th Cir. 2003).

[155] Blumm & Kimbrell, *supra* note 153, at 492.

[156] *See id.* at 496; *see also* Gonzales v. Raich, 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring).

[157] Blumm & Kimbrell, *supra* note 153, at 496.

federalism 'revolution,'" to their facts.[158] They even go so far as to suggest that the holdings in *Lopez* and *Morrison* may ultimately be seen "as aberrations in the Court's Commerce Clause jurisprudence."[159]

Scholars in other fields have examined *Raich* and come to different conclusions. In his article *Limiting Raich*, Randy Barnett sets out an agenda for a court determined to limit the holding in *Raich* and to reinvigorate the "federalism revolution" of *Morrison* and *Lopez*.[160] In doing so he notes some critical weaknesses in the *Raich* holding, any one of which a court, even if not interested in implementing his entire program, could rely upon to refrain from extending the logic of *Raich* to a less politically popular statute. First, Professor Barnett notes that *Raich* does not extend on its terms to facial challenges to statutes, and thus any statute which regulated a field that was entirely non-economic would fail for the same reason that the statutes in *Lopez* and *Morrison* did.[161] More interestingly, he notes that the Court's acceptance of the "essential to a larger regulatory scheme" argument in the context of the Controlled Substances Act could be limited either by taking a narrow view of what a particular regulatory scheme encompasses or what is "essential" for its operation.[162] Perhaps most powerfully, Professor Barnett notes that the Court's analysis of the limits of "economic" activity is not robust, and ultimately may be read as dicta.[163] In particular he notes that, while the Court has made clear that the economic or non-economic nature of a regulatory scheme is essential to determining where it stands in

[158] *Id.* at 495–97.

[159] *Id.* at 497.

[160] *See* Randy E. Barnett, *Limiting* Raich, 9 LEWIS & CLARK L. REV. 743 (2005).

[161] *See id.* at 744–45.

[162] *See id.* at 745–48. Professor Barnett does note that the Court takes a rational basis approach to the notion of what is "essential" and that under such an approach limitation would be difficult. However, he also notes that the specific facts of the CSA may be characterized as making the need to reach all controlled substances particularly salient to the Court and that the legislative findings in the statute made clear that Congress believed that only complete elimination of such substances from the market would allow it to achieve its goals. Also the word "essential" on its face seems open to an interpretation where it creates a high bar for congressional action. *See id.* at 747. Justice Scalia's concurrence may lend significant support to this position. *See* Gonzales v. Raich, 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring).

[163] *See* Barnett, *supra* note 160, at 749–50.

reference to the Commerce Clause, the Court does little to define what constitutes economic activity, and, if the Court chose, it could repudiate what little it did say and interpret *Raich* as merely applying the common sense notion that drug sales are economic but violence and guns are not.[164] The Court could then limit the apparent effect of *Raich* by looking much more deeply into what is "economic." Even if the Court stands by its current definition of "economic" as something related to "the production, distribution, and consumption of commodities," there are, as Professor Barnett notes, many things that fail to meet this definition.[165]

B. *A More Balanced Approach?*

While the positions taken by Blumm and Kimbrell and by Barnett are each coherent ways of understanding the effect of *Raich* on the Commerce Clause and the ESA in particular, there is more to the story. The *Raich* decision certainly does contain some support for the argument that the no-take provision is a valid exercise of the Commerce Clause power. In addition to the reasons identified by Blumm and Kimbrell, there are other grounds for believing that the ESA can be analogized to the CSA and that it may thus survive a Commerce Clause challenge. By approving the CSA as a statute that tries to regulate the interstate market in drugs by preventing it from existing, the Court explicitly endorses the idea that it is a valid form of regulation of interstate commerce to seek to ban such commerce. This is valuable precedent for the ESA, in that the no-take clause cannot be written off as an invalid form of commercial regulation for Commerce Clause purposes, simply because it destroys the commercial properties of the species that are the targets of the regulation.

The constitutionality of the ESA then clearly cannot be determined merely by trying to analogize it directly to *Lopez*, *Morrison* or *Raich*. There are, as discussed above, at least three different ways of putting *Raich* into the context of the Commerce Clause decisions of the last century: 1) the traditional conceptions approach, which relies on the subject matter of the cases, 2) the harmonization approach, which relies on the legal holdings of the

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[164] *See id.* at 748–50.

[165] *See id.* Professor Barnett focuses on literature, sex and crime as his examples. As discussed above, flies, scorpions and spiders may well fit into the same category, and it is an open question whether the occasional wolf will be enough to save them. *See supra* Part III.B.

prior cases, and 3) the repudiation approach, which treats neither the facts nor the holdings as viable predictors of future court behavior.[166] Blumm and Kimbrell presume that *Raich* is a decision partially repudiating, or as they put it "cabining," the effects of the *Lopez* and *Morrison* decisions while Barnett sets out a roadmap to a cabining of *Raich*.[167] It seems important then, that each of the possible understandings of the "New" Commerce Clause be examined for their effects on the no-take provision before any conclusion is drawn as to the fate of section 9. Under the harmonization approach, where *Raich* creates a coherent limitation on how a regulation may or may not be manipulated in terms of the aggregation and attenuation principles to reach a "substantial effect on interstate commerce," the no-take provision may not be on solid ground. Even under the repudiation theory assumed by Blumm and Kimbrell, where all that is left of the set of cases that will be decided in accordance with the holdings of *Lopez* and *Morrison* is those two cases on their facts, the analysis adopted by those scholars may be short sighted while that suggested by Barnett's remains far-fetched.

Under the "*Raich* as harmonization" approach to analyzing the limits of the Commerce Clause power, the first question is what the ESA as a scheme seeks to regulate. However, it is not

[166] *See supra* Part III. Some scholars have attempted to analyze how courts deal with precedent and explore the choices available to and used by judges to respond where precedents are conflicting or open to multiple interpretations. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) (describing three different methods judges can use to approach decision making as well as the role that legal precedent and judges' subconscious desires play in each); KARL N. LLEWELLYN, *This Case System: Precedent*, *in* THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY, 56, 66–69 (1930) (describing the use of precedent in the Anglo-American legal system as "Janus-faced," in that precedent is either followed through a loose interpretation when helpful to the desired result or narrowed so as to be inapplicable to the case); KARL N. LLEWELLYN, *The Leeways of Precedent*, *in* THE COMMON LAW TRADITION 62, 77–87 (1960) (listing sixty-four "[a]vailable [i]mpeccable" techniques for either following or avoiding existing precedent or making new precedent); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710–13 (1976) (examining the formal choices judges make between rules and standards, in both reading and making precedent, in terms of the substantive content of their decisions). This article does not have any such lofty ambitions, and it is sufficient for present purposes to note that there are different possible interpretations of the available precedent and that the Court will be obliged to choose one or none of the above.

[167] *See* Blumm & Kimbrell, *supra* note 153, at 495; Barnett, *supra* note 160, at 744–50.

trivial to say with certainty what the ESA regulates. One critical difference, however, between the prohibition of cultivation and sale of marijuana examined in *Raich* and the no-take provision of the ESA is the relationship of the particular case to the general state of the "industry." By seeing marijuana in *Raich* as an example of a controlled substance, the Court was able to use the logic that even if this instance of controlled substance use did not involve interstate commerce, most interactions surrounding controlled substances are commercial. This makes it possible for the majority to declare the "core" of the CSA to be commercial. Then the Court says that making an "exception" for this one situation could lead to a hole in the statutory coverage that would be fatal to the goal the "core" of the statute seeks to advance. Thus the Necessary and Proper Clause can be invoked to save the CSA where its application strays beyond the strict bounds of the Commerce Clause. The situation with the ESA is more complex. While the original intent of the ESA may have been to save animals that were the targets of interstate commerce, many if not most of the animals currently listed (and certainly the majority of the listings that have made headlines in recent years) would not be in any sort of commerce even if they were not listed. If the Court is unable to find the core of the ESA to be the regulation of interstate commerce and thus within the ambit of the Commerce Clause, it may be far less willing to use the Necessary and Proper Clause to salvage the remainder.[168] As a result, Blumm and Kimbrell's assertion that even a handful of valid reasons for the ESA to operate will make the entire comprehensive regulatory scheme pass muster is at best an overstatement.

The Court could easily also find that the purpose of the ESA was never to eradicate the market in endangered animals, but rather to preserve endangered species for their own sake. The legislative findings and statement of purpose of the ESA do not mention the potential commerce in endangered species specifically,[169] and while *Morrison* makes clear that the presence

[168] The mismatch between the means and the end might be particularly disturbing to Justice Scalia given the content of his concurrence in *Gonzales v. Raich*. *See* Gonzales v. Raich, 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring); *see also supra* notes 145–148 and accompanying text.

[169] *See* 16 U.S.C. § 1531 (2000) (legislative findings and statement of purpose of the ESA as enacted, which do not mention commerce in endangered species); *see also* S. REP NO. 93-307, at 2 (1973) (noting that "[t]he two major causes of extinction are hunting and destruction of natural habitat," not mentioning

of congressional findings is not dispositive on the question of whether a piece of legislation actually serves to regulate interstate commerce, *Lopez* seems to indicate that the absence of such findings might be nearly dispositive. In that case, the analogy of the section 9 no-take provision to the CSA falls apart completely. Under this analysis, any commercial effects of the statute would be purely incidental to the core of the statutory scheme, which is to preserve natural resources, a non-commercial topic clearly outside of Congress' power to regulate under the Commerce Clause.

Even under the scenario advocated by Blumm and Kimbrell where *Raich* limits or "cabins" *Lopez* and *Morrison* to their facts, it is possible that the Court would find the ESA to be indistinguishable from the statutes analyzed in those cases. Depending on what issues are determined to be relevant to the analysis, the ESA may well be a better analogy to the Violence Against Women Act, which was struck down, than it is to the Controlled Substances Act, which was upheld. Structurally the ESA is similar to the CSA in that both have a process for determining the precise scope of the regulation (listing for the ESA and scheduling for the CSA). The authority to determine the scope is then delegated to a relevant agency with expertise.[170] The statutes differ, however, in their treatment of the listed regulatory targets. The CSA has over twenty-four different substantive provisions regulating every aspect of the existence of listed substances and their interactions with society, all of which are ultimately justified in terms of the Commerce Clause.[171] The ESA on the other hand has only fourteen provisions total and only one, section 9, creates obligations on private parties.[172] In this way the ESA might not be a "comprehensive regulatory scheme" at all but rather a single statute targeted at preventing a specific behavior, although one with broad consequences. This is a close analogy to

commerce in protected species).

[170] *Compare* 21 U.S.C. § 811(a)(1) (2000) (granting the Attorney General the power to add or remove drugs from the schedule of controlled substances by rule if conditions are met), *with* 16 U.S.C. § 1533 (2000) (giving the Secretary of the Interior the power to list or delist endangered and threatened species if conditions are met).

[171] 21 U.S.C. §§ 821–830 (2000) (regulating manufacture and sale); 21 U.S.C. §§ 841–864 (2000) (defining civil and criminal offenses and penalties).

[172] 16 U.S.C. § 1538 (titled "Prohibited acts"). The other sections of the ESA create numerous obligations of different government actors. *See id.* §§ 1531–1544.

the Violence Against Women Act found unconstitutional in *Morrison*, where violence against women, an evil with broad consequences, is targeted by the government for regulation through a single statute creating civil penalties. The Gun-Free School Zones Act is also of this form. Therefore, even if the Court wished to understand *Raich* as limiting those cases severely, the ESA could still be unconstitutional since it shares a central core of operative fact with cases that have already been decided and which the Court has not reversed. The Court would then be forced either to reverse *Lopez* and *Morrison* fully or strike down the ESA.

If the *Raich* as harmonization scenario is adopted, the Court's outcome will be controlled by their analysis of the purpose of the statute. If they find that the purpose of the ESA is to regulate a commercial activity then it will be possible to aggregate all of the individual takes that would happen in the absence of the statute to significance. The only additional challenge for the Court under this scenario would occur if they found, as per the analysis adopted by the D.C. Circuit, that the purpose of the statute is to regulate the individual commercial enterprises, such as hunting, fishing, land development, agriculture, or ranching, that result in takes.[173] While the statute would then be commercial on the whole, there would not be a single unifying enterprise that the ESA can be easily seen as controlling. Then the question will be whether a new kind of aggregation, that of different commercial purposes, is possible. This sort of aggregation is not directly addressed by any of the "New" Commerce Clause cases. Alternatively if the purpose of the ESA was not commercial at all but rather an attempt to regulate land use for ecological or social purposes, then aggregation will be unavailable. Since it is likely to be the rare case where a single action will be sufficient to have a significant effect on species preservation, it will be difficult for those in favor of regulation to show that many takes, especially those of species with ranges entirely within one state, are valid topics of federal concern.

Alternatively, the Court may adopt the traditional zones of control approach, in which case whatever answer the Court comes to as to what the ESA regulates, they will then have to determine whether that area is a traditional concern of the federal or state

[173] *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1072–73 (D.C. Cir. 2003).

government. This is another non-trivial analysis, and one that is unlikely to support the constitutionality of the ESA, since most of the possible answers to the questions are areas that have traditionally been areas of either shared or disputed authority between the two levels of government. For example, while the Fourth Circuit saw the ESA as concerned with the allocation of scarce natural resources, this is not a universally strong argument for federal control. Natural resources have not been uniformly treated as a distinct regulatory category throughout American history, and some of the most important elements that constitute the modern concept of natural resources have always, and are to this day, regulated primarily by state and local governments.[174] For instance, water rights are almost always allocated by state schemes with little direct federal oversight or power to intervene.[175] Thus, under the traditional zones of control approach, even if the Fourth Circuit's logic as to what the ESA does is accepted along with its determination that scarce natural resource allocation is an economic issue, the Court could still find that section 9 of the ESA represents an overreaching of federal power because it is an economic issue that is traditionally seen as intrastate in nature and thus subject to purely state regulation. The other possible regulatory targets or purposes for the ESA are similarly problematic from a traditional zones of control perspective. States are the traditional controllers of hunting and fishing rights on state land while the federal government has been in charge of the same on federal lands, so if the no-take provision is a hunting regulation the outcome is no clearer. Another possibility is that the regulation may control land use and development, which is an area of clear historical state and often local control. In any case, the Court will have to make at least one complex decision in determining the outcome under this rationale.

[174] *See* JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 253 (2004) (noting that the National Environmental Policy Act, passed in 1969, was the first major statute of modern era environmental law).

[175] *See id.* at 727–29.

CONCLUSION

In the end, the constitutional viability of the no-take provision will turn on how the Court chooses to classify the purpose of the ESA. If it is fundamentally commercial, either based on a single commercial target or an aggregation of commercial purposes, then *Raich* changes nothing and may place the ESA on a firmer foundation than it has stood on since 1995. If it is fundamentally non-commercial, there is an argument that the scheme was suspect even before *Lopez*, and the "New" Commerce Clause cases simply serve to make that clear. In light of the less than clear position of the ESA under each of the proposed logical rubrics, the position taken by Blumm and Kimbrell seems short sighted in suggesting that there will not be viable challenges to applications of section 9 in the future, even if the Court is uninterested or unwilling to go all the way to undoing the holding of *Raich* as recommended by Barnett. As long as the meaning of the "New" Commerce Clause cases is unclear, neither side of this debate has grounds for either the celebration or mourning in which they are presently engaged. Ultimately, the battleground on which this must be fought is the application of the language of *Raich* to the ideas of the cases that came before it. As this article has sought to show, the actual meaning and limitations of Congress' power under the Commerce Clause is as deeply uncertain now as it was five or ten years ago, perhaps as uncertain as it has ever been in American history.