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Defending the Constitutionality of the Endangered Species Act: The Case of the Utah Prairie Dog

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On the Merits:

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS (PETPO), Plaintiff-Appellee, v. U.S. FISH & WILDLIFE SERVICE, et al., Defendants-Appellants. No. 14-4165, U.S. Court of Appeals for the Tenth Circuit

Issue: Whether, consistent with the Commerce Clause, the U.S. Fish & Wildlife Service may regulate takes of the Utah Prairie Dog, a wholly intrastate species that does not substantially affect interstate commerce. Pursuant to the Endangered Species Act (ESA), the U.S. Fish & Wildlife Service adopted a regulation forbidding any "take" (defined broadly as any activity that adversely affects) of the Utah Prairie Dog, a threatened species of prairie dog that resides only in southwestern Utah. Claiming interference with the use and enjoyment of their property, southwestern Utah property owners and local governments formed People for the Ethical Treatment of Property Owners (PETPO) and challenged the constitutionality of the regulation in federal district court. PETPO argued that the government's ban on the "take" (a noneconomic activity) of a species with no substantial effect on interstate commerce violates the Commerce Clause.

The government and intervenor amici argued that Utah Prairie Dogs have a substantial effect on interstate commerce because they contribute to the ecosystem and attract some tourism, and that the regulation is thus essential to the ESA's economic scheme. The U.S. District Court of Utah held that the regulation cannot be sustained under the Commerce Clause because it is not a regulation of economic activity and any impacts on interstate commerce are too attenuated to withstand constitutional scrutiny. The court also held that, under *Gonzales v. Raich*, 545 U.S. 1 (2005), the Necessary and Proper Clause does not authorize such a regulation because it is not necessary to ensure that the federal government can regulate economic activity or the market for a commodity. The government appealed to the Tenth Circuit.

Anthony T. Caso of Chapman University School of Law argued that the Tenth Circuit should affirm the lower court:

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For reversal: Michael C. Blumm

The U.S. Fish & Wildlife Service's "take" regulation concerning the threatened Utah Prairie Dog, 50 C.F.R. § 17.40(g), is clearly within the Constitution's Commerce Clause power. The district court's decision to

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the contrary should be overruled. This case is not the first constitutional challenge to the ESA. All previous attacks on the statute have failed. Although the Utah Prairie Dog exists only in southwestern Utah and may generate only incidental economic effects, the Commerce Clause restricts ESA regulation neither to interstate species nor to species that produce substantial economic effects.

First, the case law clarifies that the trigger for Commerce Clause regulation is its effect on economic activity. The Supreme Court has repeatedly ruled that it is the commercial nature of the regulated activity that determines the applicability of Commerce Clause regulation, not whether the beneficiary of the regulation affects commerce. For example, the Court declared in *United States v. Lopez*, 514 U.S. 549, 561 (1995), that a regulation substantially affects commerce if it concerns "commerce or any sort of economic enterprise, however broadly one might define those terms." The *Lopez* Court looked to the subject of the regulation at issue—handgun possession—in concluding that there was no requisite commercial activity to sustain the GunFree School Zone Act because mere possession had "nothing to do with 'commerce' or any sort of economic enterprise." *Id*. Similarly, in both *United States v. Morrison*, 529 U.S. 598, 610 (2000), and in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2585-87 (2012), the Court repeated that the focus of the Commerce Clause inquiry is on the regulated activity (finding that neither gender-motivated violence nor a requirement to obtain health care concerned economic activity).

The D.C. Circuit has twice applied this framework in upholding ESA regulation. In *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), the court ruled that a 280-unit residential development was sufficient to justify ESA regulation protecting the Arroyo Southwestern Toad. And in *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), the court upheld application of an ESA regulation protecting the Delfi Sands Flower-Loving Fly to planned commercial development. The Fourth Circuit agreed in *Gibbs v. Babbitt*, 214 F.3d 483, 495 (4th Cir. 2000), finding constitutional an ESA regulation protecting the red wolf because it would affect economic activities such as ranching and farming. Here, there is no question that the prairie dog regulation affects numerous economic activities, including land development, agricultural activities, livestock grazing, and oil and gas development. Because the prairie dog regulation restricts what are obviously economic activities, having substantial effects on interstate commerce, the regulation is well within Commerce Clause authority. The district court's failure to acknowledge these economic effects was in error and provides sufficient ground for reversal.

A second ground for upholding the prairie dog regulation is that the Supreme Court has long held that Congress may use Commerce Clause authority to regulate economic activity to serve non-economic ends. For example, in *United States v. Darby*, 312 U.S. 100, 113 (1941), the Court upheld the application of the Fair Labor Standards Act's minimum-wage provisions to workers at a Georgia lumber company, even though the purpose was to improve working conditions, not affect commerce. And in *Heart of Atlanta Motel v. United S*tates, 379 U.S. 241, 243-44, 258 (1964), the Court upheld the Civil Rights Act on Commerce Clause grounds, even though the statutory purpose was to outlaw racial discrimination.

Thus, even if the ESA's purpose—to protect ecosystems in order to preserve their biodiversity—is not expressly commercial, the Commerce Clause does not require a commercial purpose, only regulation of commercial activity. As noted above, the prairie dog regulation clearly restricts economic activities.

Moreover, the cumulative effects of a decision to restrict the scope of the ESA to species with demonstrable interstate effects would virtually dismantle the statute, as over two-thirds of listed species are located in a single state. The judicial function is not to retroactively strike down a four-decades-old regulatory program responsible for reversing the decline of countless species. Consequently, just as Congress may employ the Commerce Clause to curb the moral and social wrong of racial discrimination, so too it may invoke the Commerce Clause to regulate economic activity adversely affecting listed species and their ecosystems.

A third reason that the prairie dog regulation is constitutional concerns the role it plays as part of a comprehensive regulatory scheme that substantially affects interstate commerce, even if the particular regulation concerns local, non-economic activity. In *Gonzales v. Raich*, the Supreme Court ruled that Congress could regulate intrastate marijuana cultivation for local consumption under the Controlled Substances Act, even though it did not involve economic activity, because it was part of a comprehensive regulatory scheme that substantially affected interstate commerce. 545 U.S. 1, 23-25 (2005) ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise as trivial, individual instances' of the class") (citation omitted). As Justice Scalia commented in a concurring opinion in *Raich*, regulation of non-economic activity is permissible because the Constitution's Necessary and Proper Clause, combined with the Commerce Clause, allows Congress to regulate non-economic activity "when that regulation is a necessary part of a more general regulation" substantially affecting interstate commerce. Id. at 37 (Scalia, J., concurring).

Post-*Raich* cases have upheld the ESA as "a general regulatory statute bearing a substantial relation to commerce." *San Luis & Delta-Mendota Water Auth. V. Salazar*, 639 F.3d 1163 (9th Cir. 2011); *Alabama Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007). Although not necessary for the court to sustain the prairie dog regulation, the court should join the other circuits in upholding the regulation as a permissible means of controlling interstate commerce, even if the prairie dog involves intrastate activity that does not itself "substantially affect" interstate commerce. *Raich*, 545 U.S. at 37 (Scalia, J., concurring).

For these reasons, the lower court's decision should be overruled.

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Michael C. Blumm is Jeffrey Bain Faculty Scholar & Professor of Law at Lewis and Clark Law School, where he has taught natural resources law for nearly four decades; he is one of 42 law professors who signed on to an amicus brief in support of the prairie dog regulation, from which this comment is adapted.

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