# THE PROPER MEANING OF "PROPER": WHY THE REGULATION OF INTRASTATE, NON-COMMERCIAL SPECIES UNDER THE ENDANGERED SPECIES ACT IS AN INVALID EXERCISE OF THE COMMERCE CLAUSE

## INTRODUCTION

> California has a new endangered species on its hands in the San Joaquin Valley—farmers. Thanks to environmental regulations designed to protect the likes of the three-inch long delta smelt, one of America's premier agricultural regions is suffering in a drought made worse by federal regulations. . . . [T]ens of billions of gallons of water from mountains east and north of Sacramento have been channelled away from farmers and into the ocean, leaving hundreds of thousands of acres of arable land fallow or scorched. . . . The result has already been devastating for the state's farm economy. In the inland areas affected by the court-ordered water restrictions, the jobless rate has hit 14.3%, with some farming towns like Mendota seeing unemployment numbers near 40%. Statewide, the rate reached 11.6% in July, higher than it has been in 30 years.[1]

In 1973, Congress enacted the Endangered Species Act[2] ("ESA" or the "Act") in response to a growing awareness of the interconnected nature of the ecosystem and the need to maintain species diversity.[3] The ESA arms its administering agencies[4] with ample weaponry to achieve that end.[5] The "take" provision in section 1538 of the Act prohibits the fishing, hunting, or harming of any species listed on the Act's endangered species list.[6] To

1. *California's Man-Made Drought*, WALL ST. J. (Sept. 2, 2009, 12:49 PM), http://online.wsj.com/article/SB10001424052970204731804574384731898375624.html.

2. 16 U.S.C. §§ 1531–1544 (2006).

3. *See* 16 U.S.C. § 1531(b) (2006) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . . .").

4. The ESA tasks the Department of the Interior and the Department of Commerce with enforcing its provisions. *See* 16 U.S.C. § 1532(15) (2006).

5. *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) (describing the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation").

6. 16 U.S.C. § 1538(a)(1)(B) (2006). To "take" is defined in full as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16

ensure enforcement of the take provision, the ESA authorizes the United States Fish and Wildlife Service[7] ("FWS") to designate a "critical habitat" for each endangered species.[8] Section 1536 gives regulatory bite to this authority by allowing the FWS to issue biological opinions dictating how federal agencies and affected private parties should act to preserve these critical habitats.[9] Developers, farmers, and other adversely impacted private parties have frequently clashed with the FWS and various environmental groups over the limits of this authority.[10] The delta smelt in California is just one among many instances where various competing interests have tussled over how best to balance short-term economic, agricultural, and development concerns with long-term environmental vitality.

But below the surface of these difficult policy issues lies an equally tangled and critical issue of constitutional law. Congress enacted the ESA under the authority of the Article I Interstate Commerce Clause.[11] Because the ESA primarily regulates species and activities that flow through interstate commerce, Congress's reliance on the Commerce Clause is facially sound.[12] But many species regulated by the ESA are found only within the confines of one state and have no commercial value, and thus

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U.S.C. § 1532(19) (2006). The Act mandates the promulgating of the endangered species list established in 16 U.S.C. § 1533(c) (2006).

7. The FWS is one of the two agencies within the Department of the Interior charged with the implementation and enforcement of the ESA. 50 C.F.R. § 402.01(b) (2012). The other agency is the National Marine Fisheries Service, and its role is beyond the scope of this Note. *Id.*

8. 16 U.S.C. § 1533(a)(3)(A)(1) ("The Secretary . . . shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat . . . .").

9. *See* 16 U.S.C. § 1536(b)(3)(A) (2006) ("[T]he Secretary shall provide to the Federal agency and the [private party], if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.").

10. For a full discussion of ESA cases decided by the Supreme Court, see J.B. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487 (2012).

11. U.S. CONST. art. I, § 8, cl. 3 ("[Congress shall have the power] To regulate Commerce . . . among the several States . . . ."). Although the text of the ESA neither expressly invokes the Commerce Clause nor provides a jurisdictional hook limiting the ESA's application to objects related to interstate commerce, courts reviewing the Act's validity under the Commerce Clause have overlooked these deficiencies. *See, e.g.*, Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068 (D.C. Cir. 2003) (quoting United States v. Moghadam, 175 F.3d 1269, 1276 (11th Cir. 1999)) ("[T]he absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce.").

12. The Supreme Court has consistently held that a successful facial challenge "must establish that no set of circumstances exists under which the [regulation] would be valid." Reno v. Flores, 507 U.S. 292, 301 (1993) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

are not involved in "interstate commerce" in the term's ordinary sense.[13] This apparent regulatory overreach has given rise to claims that the ESA, as applied to certain intrastate, non-commercial species, is an invalid exercise of the commerce power. But since 2000, all five federal circuits deciding as-applied challenges to the ESA have, under various and conflicting analyses, upheld the agency action.[14] The Supreme Court has left the question open; although the Court has decided ESA cases on issues of standing and statutory construction,[15] it has yet to grant certiorari in a case challenging the Act's constitutionality.[16]

This Note argues that the ESA's regulation of purely intrastate, non-commercial species is an invalid exercise of the Commerce Clause. Reviewing courts have reached the opposite conclusion via two doctrinal avenues: (1) by finding that the species in question bore "a substantial relation to interstate commerce" in satisfaction of the Court's framework set forth in *United States v. Lopez*,[17] or (2) by holding that the species was an "essential part[] of a larger regulation of economic activity," an alternate path to Commerce Clause validity employed by the Court in its 2005 *Gonzales v. Raich* decision.[18] Though these doctrines have the Court's approval, they do not flow from the commerce power alone. Because these approaches allow for regulation of objects or activities that merely *affect* interstate commerce, both implicitly rely on the classic constitutional catch-all: the Necessary and Proper Clause.[19] This reliance

13. Robert P. Fowler et al., *Commerce Clause Challenges to the Listings of Intrastate, Non-Commercial Species Under the Endangered Species Act*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Oct. 2006, at 69, 77.

14. San Luis & Delta-Mondota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 498 (2011); Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo*, 323 F.3d 1062, *cert. denied*, 540 U.S. 1218 (2004); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

15. The Supreme Court has decided only five ESA cases: Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687 (1995); Bennett v. Spear, 520 U.S. 154 (1997); and Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

16. *See* Fowler, *supra* note 13, at 69.

17. 514 U.S. 549, 558–59 (1995) (citing NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

18. Gonzales v. Raich, 545 U.S. 1, 24–25 (2005) (quoting *Lopez*, 514 U.S. at 561).

19. U.S. CONST. art. I, § 8, cl. 18 ("[The Congress shall have Power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). The most prominent judicial recognition of this interpretation is Justice Scalia's concurring opinion in *Raich*, 545 U.S. at 34 ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate

requires that the regulation be both necessary for the achievement of a legitimate congressional purpose and constitutionally proper in its means of attaining it.[20] Because the ESA's regulation of intrastate, non-commercial species impermissibly encroaches on areas of traditional state sovereignty, it is not constitutionally "proper," and is therefore unconstitutional.

Although many scholars have addressed the validity of the ESA as applied to intrastate, non-commercial species, the discussion has largely taken place within the framework employed by the lower federal courts.[21] This Note is the first to contend that the Act is an invalid exercise of its true constitutional anchor: the Necessary and Proper Clause.[22] Part I of this Note examines the development of the Court's Necessary and Proper doctrine, with particular focus on the "proper" element. Part II explores the relationship between the Necessary and Proper Clause and the Court's Commerce Clause jurisprudence, and Part III discusses the lower court rulings on the ESA's constitutionality and explains why the ESA's regulation of intrastate, non-commercial species is not "proper."

## I. REGULATION ENACTED PURSUANT TO THE NECESSARY AND PROPER CLAUSE MUST BE BOTH "NECESSARY" AND "PROPER"

The Supreme Court's modern Necessary and Proper Clause jurisprudence dates back to *McCulloch v. Maryland*,[23] when Chief Justice Marshall held that the establishment of a national bank was necessary and proper for carrying into execution Congress's enumerated Article I powers.[24] Though prior decisions had held that this clause only supplemented, and did not add to, Congress's powers, Marshall read the

commerce) derives from the Necessary and Proper Clause."). This Note argues for the adoption of this minority view.

20. *See id.* at 39.

21. *See* Michael C. Blumm & George A. Kimbrell, Commentary, Gonzalez v. Raich, *the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 494 (2005); Bradford C. Mank, *After* Gonzales v. Raich*: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 459 (2007); Jud Mathews, Case Comment, *Turning the Endangered Species Act Inside Out?*, 113 YALE L.J. 947, 948 (2004); Jennifer A. Maier, Comment, *Outgrowing the Commerce Clause: Finding Endangered Species a Home in the Constitutional Framework*, 36 GOLDEN GATE U. L. REV. 489, 521 (2006); Fowler, *supra* note 13, at 77.

22. Professor Mank analyzed this issue in the context of Justice Scalia's *Raich* concurrence but concluded that "the ESA places limits on national authority that are consistent with . . . Justice Scalia's interpretation of the Necessary and Proper Clause . . . ." Mank, *supra* note 21, at 434–35.

23. 17 U.S. (4 Wheat.) 316 (1819).

24. *Id.* at 420.

Clause to allow Congressional acts that would otherwise have been plainly beyond the scope of Article I.[25] Later cases relied on this concept of implied powers to validate far-reaching congressional regulation. In the Commerce Clause context, for example, the Court in *United States v. Darby* upheld a statute requiring employers to keep records of intrastate transactions, because good record-keeping was necessary to ensure that Congress's regulatory labor scheme was properly implemented.[26]

Though Justice Marshall wrote that the terms "necessary" and "proper" were "probably to be considered as synon[y]mous,"[27] later cases began to treat the two terms separately. While "necessary" came to mean "convenient" or "reasonably adapted,"[28] and not actually necessary in the denotative sense of the word, the Court understands "proper" to invoke the Constitution's external limits on Congress's power.[29] Thus, even if a regulation were necessary to effectuate Congress's power over interstate commerce, it could still be improper because it violated, say, the Tenth Amendment.[30]

These external limits include federalism concerns and respect for traditional areas of state sovereignty such as land use,[31] criminal law,[32] and

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25. *See id.* at 419.

26. United States v. Darby, 312 U.S. 100 (1941). Though *Darby* does not expressly mention the Necessary and Proper Clause, it cites to *McCulloch* for the proposition that

> [t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

*Id.* at 118 (citing *McCulloch*, 17 U.S. (4 Wheat) at 421).

27. *McCulloch*, 17 U.S. at 324.

28. United States v. Comstock, 130 S. Ct. 1949, 1956–57 (2010).

29. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 272 (1993).

30. *See* Printz v. United States, 521 U.S. 898, 923–24 (1997) ("When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier . . . it is not a "La[w] . . . proper for carrying into Execution the Commerce Clause. . . ."") (internal citations omitted); New York v. United States, 505 U.S. 144, 166 (holding that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, does not permit Congress to control a state's regulation of its intrastate commerce); s*ee also* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 186 (2003) (detailing statements by Founders that the Necessary and Proper Clause was not intended to expand the scope of Congress's enumerated powers); Lawson & Granger, *supra* note 29, at 272.

31. *See, e.g.*, Craig Anthony (Tony) Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 36 (1991) (discussing the emerging federalism tension in land use law).

32. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (striking down a federal criminal law as infringing on state police powers); United States v. Morrison, 529 U.S. 598 (2000) (same).

more.[33] The word "proper" in the Clause, then, demands that Congress respect those areas not allocated to them in Article I. In the context of regulation of commerce, the Court has held since *Gibbons v. Ogden*[34] that the powers retained by the states include purely intrastate commerce: "[t]he enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."[35]

Although the Court had previously hinted that it is possible for a Congressional act to be "necessary" but not "proper,"[36] Chief Justice Robert's opinion in *NFIB v. Sebelius*[37] gave new force to this distinction and greatly expanded the ways in which legislation could fail to be "proper." Although the disjointed nature of the *NFIB* opinions makes it unclear what in the case actually constitutes a holding and what is dicta,[38] five of the justices felt that Congress's mandate that all persons purchase health insurance was invalid under the commerce power, even as supplemented by the Necessary and Proper clause.[39] The reason, they said, is that while the mandate may have been necessary, it was not proper. Roberts recognized that "[i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause."[40] He added that "Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be

33. Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 826 (1999) (discussing state sovereignty in certain areas of commandeering, taxing, and regulating).

34. 22 U.S. (9 Wheat.) 1 (1824).

35. *Id.* at 195.

36. Printz v. United States, 521 U.S. 898, 923-34 (1997).

37. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

38. Justice Ginsburg argues in her concurrence that it was unnecessary for the Court to reach a holding on the Commerce Clause issue because five members of the Court upheld the minimum coverage provision under the taxing power, and that the Commerce Clause holding was therefore not "outcome determinative." *Id.* at 2629 n.12 (Ginsburg, J., concurring). *Compare* Ilya Somin, *A Simple Solution to the Holding vs. Dictum Mess*, THE VOLOKH CONSPIRACY (July 2, 2012, 3:47 PM), http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess/ (arguing that the Commerce Clause section of Roberts's opinion is a holding and not dicta because the liberals joined with his statement that "[t]he Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity."), *with* David Post, *Dicta on the Commerce Clause*, THE VOLOKH CONSPIRACY (July 1, 2012, 6:40 PM), http://www.volokh.com/2012/07/01/dicta-on-the-commerce-clause/ (arguing that the quoted statement does not transform the Commerce Clause section of the opinion into a holding).

39. *NFIB*, 132 S. Ct. at 2592 (Roberts, C.J., opinion); *Id.* at 2646 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

40. *Id*. at 2592 (Roberts, C.J., opinion) (quoting United States v. Comstock, 130 S. Ct. 1949, 1967–68 (Kennedy, J., concurring)).

outside of it."[41] Justice Roberts cited *Printz v. United States*[42] as an example of legislation that was improper because it violated the Tenth Amendment's concept of state sovereignty.[43] Significantly, *NFIB* is the first case to explicitly strike down regulation under the Commerce Clause, even as supplemented by the Necessary and Proper Clause.

Together, these cases set forth a bright-line rule: congressional enactments pursuant to the Necessary and Proper Clause must be both "necessary" and "proper." But while that rule may be easy to articulate, it is difficult to apply.

## II. THE COURT'S MODERN COMMERCE CLAUSE DOCTRINE INHERENTLY RELIES UPON THE NECESSARY AND PROPER CLAUSE

### *A. Pre-*Lopez *Development of the Commerce Clause Doctrine was Expressly Tied to the Necessary and Propery Clause*

In his majority opinion in *NFIB*, Chief Justice Roberts quipped that "[t]he path of our Commerce Clause decisions has not always run smooth."[44] This understatement puts a diplomatic gloss on nearly 200 years of mixed signals in the Court's Commerce Clause jurisprudence. But on this twisting course from *Gibbons v. Ogden*[45] in 1824 to the Court's most recent Commerce Clause decision in *NFIB*, the development of the doctrine has an unmistakable trend: expansion.[46] In the time between the Court's assertion in *Gibbons* that Congress has "limited authority to regulate commerce . . . between the different States"[47] and its admission in *NFIB* that "it is now well established that Congress has broad authority

41. *Id.*
42. 521 U.S. 898 (1997).
43. *See NFIB*, 132 S. Ct. at 2592.
44. *Id.* at 2585.
45. 22 U.S. (9 Wheat.) 1 (1824). *Gibbons* was the first great expansion of the scope of Congress's power under the Commerce Clause, with the Court holding that "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196.
46. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 556–57 (1995) (discussing the expansion of the Commerce Clause to address issues that are increasingly national). Scholars at the beginning of the twentieth century recognized this trend before the modern Commerce Clause era increased the federal government's reach even further. *See, e.g.*, Walter C. Noyes, *Development of the Commerce Clause of the Constitution*, 16 YALE L.J. 253, 258 (1907).
47. *Gibbons*, 22 U.S. at 125.

under the Clause,"[48] Congress "ushered in a new era of federal regulation under the commerce power."[49]

Although the Court struggled to adopt a consistent test for the limits of the Commerce Clause in the first part of the twentieth century,[50] Franklin Roosevelt's aggressive New Deal policies required a more centralized federal control and mandated a broader conception of the commerce power.[51] Beginning with the Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp*. that upheld federal regulation of purely intrastate manufacturing activities,[52] the Court declined to strike down a single piece of federal legislation enacted under the Clause until its 1995 *Lopez* decision invalidated the Gun-Free School Zones Act.[53] During this period, the Court developed two categories of regulation sustainable under the Commerce Clause that now underpin the ESA's regulation of intrastate, non-commercial species: (1) regulation of "activity that substantially affects interstate commerce,"[54] and (2) regulation of intrastate activity that is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[55] In summarily reciting these categories without adequate regard for their evolution in the cases since 1937, the *Lopez* Court glossed over their textual hook: the Necessary and Proper Clause.[56] The Court's decisions since the New Deal era often expressly invoked this clause as the justification for extending the reach of the Commerce Clause to certain intrastate activity.[57]

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48. *NFIB*, 132 S. Ct. at 2585.

49. *Lopez*, 514 U.S. at 554.

50. Although this Note cites cases preceding the modern Commerce Clause era, it does so only insofar as modern cases rely on them. The development of the Commerce Clause doctrine before 1937 is beyond the scope of this Note. For a full discussion thereof, see generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 252–59 (4th ed. 2011).

51. *See* Fowler, *supra* note 13, at 70–71.

52. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).

53. *See* Mank, *supra* note 21, at 384.

54. *Lopez*, 514 U.S. at 559.

55. *Id.* at 561.

56. *See* Case Comment, *Substantial Effects Test—Controlled Substances Act*, 119 HARV. L. REV. 169, 176 (2005) ("[T]he textually justifiable limiting principle that the Court failed to find in *Lopez* [is that] the intrastate regulation must be 'necessary' and 'proper' to an exercise of the express power to regulate the channels of, instrumentalities of, or persons and things in interstate commerce."); *see also* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 616–19 (arguing that the intersection between the Commerce Clause and the Necessary and Proper Clause best explains the "substantial effects" prong).

57. *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 589–94 (2010) (tracing the development of the Necessary and Proper Clause in Commerce Clause jurisprudence through a similar set of cases).

### *1. The "Effects" Prong of the Commerce Clause is anchored by the Necessary and Proper Clause*

In *Jones & Laughlin*, the Court upheld the authority of the National Labor Relations Board to regulate employer-employee relations and prevent unfair labor practices in the manufacturing industry—even when the employees and factories in question operated entirely within one state.[58] By the time *Jones & Laughlin* was decided, it was already well established that Congress could regulate two categories of activities that essentially comprise interstate commerce: (1) the channels of interstate commerce[59] and (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce.[60] These two categories were not contentious because they represented a categorical, formalistic conception of what interstate commerce is. Less clear, however, was the extent to which Congress could regulate activities or objects that are not themselves interstate commerce but merely affect it. The Court in *Jones & Laughlin*, declining to follow its previous "current of commerce"[61] and "direct and indirect effects"[62] tests, stated that the relevant inquiries are whether the regulated activities "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"[63] and "[w]hether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control."[64]

In supporting the proposition that Congress's power may reach wholly intrastate activities, the *Jones & Laughlin* Court relied on precedent in *A.L.A. Schechter Poultry Corporation v. United States*,[65] *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co. (Chicago, B. & Q. Ry. Co.)*,[66] and the *Shreveport Rate* case.[67] These cases

58. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).
59. Caminetti v. United States, 242 U.S. 470, 491 (1917).
60. Houston E. & W. Tex. Ry. Co. v. United States (*Shreveport Rate*), 234 U.S. 342, 353 (1914).
61. Swift & Co. v. United States, 196 U.S. 375, 399 (1905).
62. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 544–46 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 307 (1936).
63. *Jones & Laughlin*, 301 U.S. at 37.
64. *Id.* at 32.
65. 295 U.S. 495, 551 (invalidating federal regulations of poultry slaughterhouses as reaching into purely intrastate activity, even though the poultry had once been in the "stream of commerce.").
66. 257 U.S. 563, 588 (1922) (upholding the federal fixing of rail carrier rates even on intrastate rails in order to stabilize the corresponding rate changes on interstate lines).
67. Houston, E. & W. Tex. Ry. Co. v. United States (*Shreveport Rate*), 234 U.S. 342 (1914) (upholding the federal fixing of rail carrier rates even on intrastate rails in order to stabilize the corresponding rate changes on interstate lines).

all expressly or impliedly cite the Necessary and Proper Clause as the basis for this extension of the commerce power. The *Schechter*, opinion explained that when Congress seeks to regulate complex national commerce, the Necessary and Proper Clause affords it the "necessary resources of flexibility and practicality."[68] The *Chicago, B. & Q. Ry. Co.* Court held that "orders as to intrastate traffic are merely *incidental* to the regulation of interstate commerce and *necessary* to its efficiency."[69] And in the *Shreveport Rate* case, the regulation of intrastate affairs was upheld because Congress "possess[es] the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end."[70] The precedent cited in *Jones & Laughlin*, along with the Court's language on the subject in that case ("essential or appropriate"),[71] evinces the Court's recognition at the genesis of the modern "effects" category that Congress's power in this regard is rooted in the Necessary and Proper Clause.

As this line of cases developed, the Court continued to acknowledge the Necessary and Proper Clause as the textual anchor of the "effects" prong. In *United States v. Darby*, the Court upheld the application of the Fair Labor Standards Act of 1938 (establishing a minimum wage and other working conditions standards) to employees who manufactured goods for sale in interstate commerce.[72] The Court agreed that the employees were not themselves participating in interstate commerce, but nonetheless held that Congress could regulate their working conditions under the Commerce Clause.[73] The opinion cites *McCulloch*—the seminal Necessary and Proper case—to support its assertion that Congress's power under the Commerce Clause "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ."[74]

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68. *Schechter*, 295 U.S. at 530.

69. *Chicago, B. & Q. Ry. Co.*, 257 U.S. at 588 (emphasis added). Here, the Court's use of the term "incidental" refers to the powers under the Necessary and Proper Clause—a characterization dating back to the Court's earliest Necessary and Proper Clause jurisprudence. *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (repeatedly referring to Congress's authority under the Clause as "incidental").

70. *Shreveport Rate*, 234 U.S. at 353.

71. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

72. United States v. Darby, 312 U.S. 100 (1941).

73. *Id.* at 125.

74. *Id.* at 118.

The next year, the Court applied the same logic in *United States v. Wrightwood Dairy Co*.[75] In affirming the validity of a federal statute setting minimum prices for milk as applied to milk sold only intrastate, the Court ruled that the regulation properly fit into the "effects" category.[76] The Court again concluded that this effects analysis was appropriate because "the national power to regulate the price of milk moving interstate . . . extends to such control over intrastate transactions . . . as is necessary and appropriate to make the regulation of the interstate commerce effective . . . ."[77]

The cases in the "effects" line immediately following *Wrightwood Dairy* neglected to expressly reference the Necessary and Proper Clause. But by continuing to cite the cases just discussed when explaining the effects prong, these later opinions impliedly incorporated the reasoning of the earlier cases.[78] Moreover, both Justice Hugo Black's concurrence in *Heart of Atlanta Motel, Inc. v. United States* and Justice O'Connor's dissent in *Garcia v. San Antonio Metropolitan Transit Authority* discuss the role of the Necessary and Proper Clause.[79] Whether expressly or impliedly, the Court's Commerce Clause jurisprudence in this regard consistently recognized that the expansion of the commerce power to intrastate activity relies on the Necessary and Proper Clause.[80]

### *2. The Necessary and Proper Clause Underpins the Court's "Larger Regulatory Scheme" Analysis*

While the effects prong received most of the Court's attention in its early 20th century Commerce Clause jurisprudence, the cases slowly developed an alternate articulation of Congress's power to regulate objects and activities falling outside the two traditional categories. Beginning with *Jones & Laughlin*, the Court gradually began to uphold regulation of activities that, though not affecting interstate commerce, were members of

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75. 315 U.S. 110 (1942).

76. *Id.* at 121 ("It is the effect upon interstate commerce or upon the exercise of the power to regulate it . . . which is the criterion of Congressional power.").

77. *Id.*

78. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 123–24 (1942) (citing *Shreveport Rate* and *Wrightwood Dairy Co.*).

79. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 271–72 (1964) (Black, J., concurring); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 584–85 (1985) (O'Connor, J., dissenting) ("It is through [the Necessary and Proper Clause] that an intrastate activity 'affecting' interstate commerce can be reached through the commerce power.").

80. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 301–02 (1964) (citing the Necessary and Proper Clause and *Wrightwood Dairy Co.* in support of Congress's power to regulate intrastate activity under the commerce power).

a "class of activities" affecting interstate commerce.[81] This category eventually morphed into the post-*Lopez* doctrine as activity that is "an essential part of a larger regulation of economic activity . . . ."[82] This reasoning takes a slightly different tack than the effects analysis. Whereas the effects prong allows Congress to regulate intrastate activity bearing a close and substantial relationship to interstate commerce,[83] the "class of activities" test validates regulation of activities that concededly have no impact on interstate commerce on their own.[84] Despite this, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[85]

Though the Court often cites the 1942 case of *Wickard v. Filburn*[86] as the birth of this test,[87] its logic was employed as early as *United States v. Darby*.[88] The Fair Labor Standards Act did more than establish a minimum wage and regulate working conditions in intrastate manufacturing plants; it also required employers to keep records of the number of hours worked by their employees.[89] Though the keeping (or not) of these records would admittedly have no effect on interstate manufacturing, the Court held that Congress "may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it."[90] This mirrors the Court's later reasoning that "the regulatory scheme could be undercut unless the intrastate activity [is] regulated."[91]

Just as in the effects prong, Congress's authority to reach purely intrastate activity under the "class of activities" analysis cannot properly be understood as an exercise of its commerce power alone. The *Darby* court recognized the implicit role of the Necessary and Proper Clause in this extension of the commerce power when it wrote that "[t]he requirement for records even of the intrastate transaction is an appropriate means to the legitimate end" of regulating interstate commerce.[92] The

81. Perez v. United States, 402 U.S. 146, 152–54 (1971).
82. United States v. Lopez, 514 U.S. 549, 561 (1995).
83. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).
84. Gonzales v. Raich, 545 U.S. 1, 18 (2005) ("Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.").
85. *Perez*, 402 U.S. at 154 (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968)).
86. 317 U.S. 111 (1942).
87. *See, e.g.*, *Perez*, 402 U.S. at 151; *Raich*, 545 U.S. at 17.
88. 312 U.S. 100, 118 (1941).
89. *Id.* at 111.
90. *Id.* at 125.
91. United States v. Lopez, 514 U.S. 549, 561 (1995).
92. *Darby*, 312 U.S. at 125.

Court noted further that the requirements were "incidental" to Congress's power to regulate working conditions.[93] As discussed above, the term "incidental" is a direct reference to *McCulloch*'s foundational Necessary and Proper analysis.[94]

The Court expanded and clarified this category of regulation in *Wickard v. Filburn*.[95] The Court now considers this landmark case "perhaps the most far reaching example of Commerce Clause authority over interstate activity . . . ."[96] Congress, attempting to normalize and regulate the national market for wheat, enacted the Agricultural Adjustment Act of 1938.[97] To combat oversupply problems, the act authorized the Secretary of Agriculture to prescribe annual limits on the acreage of wheat that farmers were allowed to grow.[98] Filburn was a farmer who brought an as-applied challenge to the regulation. He contended that his wheat production could not be regulated under the Commerce Clause because he grew it solely for personal consumption.[99] The Secretary took the position that, by growing wheat for consumption within his own home, Filburn was—however slightly—reducing the national demand for wheat.[100] That effect, when taken together with all similar effects across the country, amounted to a substantial impact on the demand for wheat.[101] In siding with the Secretary's position, the Court established the important "similarly situated" aggregation principle.[102] That Filburn's "own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[103] By permitting Congress to consider the cumulative effect of all "similarly situated"[104] regulated

93. *Id.* at 124–25.

94. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418 (1819); Chicago, B. & Q. Ry. Co., 257 U.S. 563, 588 (1922) ("[O]rders as to intrastate traffic are merely *incidental* to the regulation of interstate commerce and necessary to its efficiency.") (emphasis added); *see also supra* text accompanying note 69.

95. 317 U.S. 111 (1942).

96. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2588 (2012) (quoting *Lopez*, 514 U.S. at 560).

97. Wickard v. Filburn, 317 U.S. 111, 115 (1942).

98. *Id.* at 114–15.

99. *Id.* at 118.

100. *Id.* at 127.

101. *Id.* at 128.

102. *Id.*

103. *Id.* at 127–28.

104. Vexingly, the Court neglected to define how precisely articulated these "similarly situated" activities must be. The effect the aggregated activities have on interstate commerce varies with how

activities in a comprehensive scheme, the Court allowed for regulation of the minutest intrastate activity. And by citing the same *McCulloch* language authorizing regulation constituting "appropriate means to the attainment of a legitimate end,"[105] the *Wickard* court adopted the precedent cases' recognition of the Necessary and Proper Clause as the textual footing for this exercise of the Commerce Clause.[106]

Following *Wickard* and throughout the pre-*Lopez* era, the Court continued to refine and expand the types of activities subject to federal regulation under the "class of activities" framework. The Court in *Maryland v. Wirtz* reaffirmed that it could not "excise, as trivial, individual instances falling within a rationally defined class of activities . . . ."[107] And the Court hammered the point home in *Perez v. United States*, approving of the *Darby* Court's holding that a class of activities can be "properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce."[108] The Court's justification for this reach, as always, was that such regulation was an "appropriate means for the attainment of a legitimate end . . . ."[109]

The pre-*Lopez* lines of cases for both the effects prong and the "class of activities" test demonstrated the Court's recognition that, when seeking to regulate activity beyond the channels and instrumentalities of interstate commerce and persons and things in interstate commerce, Congress must rely on more than its enumerated commerce power. Only in conjunction with the Necessary and Proper Clause can Congress validly reach intrastate, non-commercial activity.[110] Though the Court's Commerce

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broadly those activities are defined. *See* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 194 (1998).

105. *Wickard*, 317 U.S. at 124.

106. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418 (1819)*; see also supra* text accompanying note 94.

107. Maryland v. Wirtz, 392 U.S. 183, 193 (1968). Here, the "rationally defined" language is a reference to the Court's stance toward Congress's fact-finding duty. In this line of cases (and today), the Court has held that Congress's burden to show that a regulatory scheme will have a substantial effect on interstate commerce is low. It must show only that there is a "rational basis for finding a chosen regulatory scheme necessary to the protection of commerce." *Id.* at 190 (quoting Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964)).

108. Perez v. United States, 402 U.S. 146, 152 (1971) (emphasis omitted).

109. *Id.* at 151.

110. *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807–08 (1996) ("[T]he [New Deal] Court did not simply and directly enlarge the scope of the Commerce Clause itself, as is often believed. Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce. In other words, the Court acknowledged that the regulation of local activity affecting interstate commerce is not itself a

Clause cases after *Lopez* give only perfunctory notice to this principle, the bedrock laid by precedent continues to inform the doctrine.

### *B. Telling Congress "No":* Lopez *and* Morrison *Made a Stand for the Necessary and Proper Clause (Without Realizing it)*

#### *1.* United States v. Lopez*: How the Court did the Right Thing the Wrong Way*

The landmark ruling in *United States v. Lopez* marked the end of the Court's hands-off approach to Congress's enactments under the Commerce Clause.[111] In a 5–4 decision, the Court struck down the Gun-Free School Zones Act, invalidating Congressional exercise of the Commerce Clause for the first time since *Carter Coal*.[112] The challenger argued that the Commerce Clause does not empower Congress to forbid "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone."[113] Chief Justice Rehnquist, writing for the majority, agreed that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[114] To find otherwise, he wrote, the Court "would have to pile inference upon inference . . . ."[115] Distinguishing previous cases in which the Court had allowed Congress to consider the aggregate effect of otherwise trivial impacts on commerce (notably *Wickard*), the Court reasoned that those other regulated actions were fundamentally economic in nature.[116]

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regulation of interstate commerce; Congress's power over commerce is not confined to that granted by the Commerce Clause.") (footnote omitted).

111. United States v. Lopez, 514 U.S. 549, 567-68 (1995).

112. Carter v. Carter Coal Co., 298 U.S. 238, 301 (1936) (striking down federal regulation of purely intrastate coal manufacturing).

113. *Lopez*, 514 U.S. at 551 (quoting the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1988)).

114. *Id.* at 567.

115. *Id.* The chain of causal reasoning the Court rejected ran thus: "[T]he 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." *Id.* at 564.

116. *Id.* at 561. The court distinguished Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) (concerning intrastate coal mining); Perez v. United States, 402 U.S. 146 (1971) (intrastate extortionate credit transactions); Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurants utilizing substantial interstate supplies); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (inns and hotels catering to interstate guests); and Wickard v. Filburn, 317 U.S. 111, (1942) (production and consumption of homegrown wheat).

The Court noted two other defects in the statute: it provided no "jurisdictional element" attempting to limit the statute's application only to guns that were related to interstate commerce,[117] and it contained no legislative findings as to the commercial impact of possessing a handgun in a school zone.[118] The significance of these flaws followed logically from the Court's new position that trivial, intrastate activity cannot be aggregated to demonstrate a substantial effect on interstate commerce unless the activity is economic in nature; if the regulated activity is non-economic, the Court would not defer to Congress's rational-basis judgment that the regulated activity affects interstate commerce.[119]

The new requirement that regulated activity be "economic" was met with derision by the dissent and by commentators.[120] The distinction between economic and non-economic activity was supported only by the Court's assertion that a "pattern" of cases upheld federal regulation of activities that were economic in nature.[121] Though it conceded that "[t]hese examples are by no means exhaustive,"[122] and despite the fact that not a single exercise of the commerce power had been struck down since the development of its modern doctrine, the Court saw fit to derive from these cases the principle that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[123] The Court's decision to distinguish between economic and non-economic activity, especially in light of its admission that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty,"[124] was dubious.

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117. *Lopez*, 514 U.S. at 561.

118. *Id.* at 562–63.

119. *Id.* (Noting that although "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," they should do so when "no such substantial effect [is] visible to the naked eye.") (citation omitted).

120. *See id.* at 627–29 (Breyer, J., dissenting); *see also, e.g.*, 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, 618–25 (2001); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 220–22 (2000); Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1395–97 (1996).

121. *Lopez*, 514 U.S. at 560.

122. *Id.*

123. *Id.* One commentator writes that this principle relies on "the coincidence of the adjudication of economic activity in previous cases." Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 U. PA. J. CONST. L. 11, 17 (2012) (emphasis omitted).

124. *Lopez*, 514 U.S. at 566.

Though the Court's choice lacks adequate justification in the opinion, it is defensible in the context of the textual anchor for Commerce Clause effects analysis: the Necessary and Proper Clause. Though the opinion does not mention the Clause, limiting Congress's control of trivial, intrastate activities to those that are economic and refusing to deferentially review Congress's basis for finding that possession of a gun affects interstate commerce can be understood as efforts to define the boundaries of what is necessary and proper.[125]

Take the majority's complaint that the act contained no legislative findings as to the relationship between possession of a handgun in a school zone and interstate commerce.[126] Although the Court's Commerce Clause cases had consistently deferred to such conclusory congressional statements dating back to the New Deal era, the *Lopez* Court faulted the challenged act for not being more explicit.[127] The Court's statement that "no such substantial effect was visible to the naked eye"[128] implicitly questioned whether Congress's prohibition of gun possession was "necessary" to the regulation of interstate commerce.[129]

But the core of the Court's decision—refusing to aggregate non-economic, intrastate activities to demonstrate a substantial effect on interstate commerce—rests on firmer ground than a judicially created, artificial distinction. By denying Congress the ability to preempt the states' traditional police power in a manner so attenuated to the regulation of interstate commerce, the Court was fundamentally respecting the requirement that federal regulation under the effects prong of the Commerce Clause be "proper."[130] The majority was concerned that upholding the Guns-Free School Zones Act "would obliterate the distinction between what is national and what is local"[131] and recognized "areas such as criminal law enforcement [and] education where States historically have been sovereign."[132] These concerns echo Chief Justice

125. *See* Gardbaum, *supra* note 110, at 811 ("The majority held that the federal Gun-Free School Zones Act of 1990 failed the modern test of whether the regulated activity substantially affects interstate commerce without in any way acknowledging that this test states the circumstances under which the Necessary and Proper Clause authorizes federal control of local activities as the means to a legitimate end.").

126. *Lopez*, 514 U.S. at 562.

127. Gardbaum, *supra* note 110, at 830–31.

128. *Lopez*, 514 U.S. at 563.

129. Gardbaum, *supra* note 110, at 830.

130. *See id.* at 831. *See also* Gonzales v. Raich, 545 U.S. 1, 36 (2005) (Scalia, J., dissenting) (positing that the *Lopez* Court "implicitly acknowledged" the Necessary and Proper Clause).

131. *Lopez*, 514 U.S. at 567 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)).

132. *Lopez*, 514 U.S. at 564.

Marshall's concern that legislation under the Necessary and Proper Clause be both "necessary" and "proper".[133]

*2.* United States v. Morrison*: The Court Holds the Fort*

In *United States v. Morrison*,[134] the Court was tasked with deciding how far its federalism concerns in *Lopez* would go toward invalidating federal regulation of criminal activity. The case concerned the constitutionality of the Violence Against Women Act ("VAWA"), which created a federal civil remedy for victims of gender-motivated violence.[135] Congress learned from its mistake in *Lopez* and bolstered the VAWA with "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families" in an attempt to demonstrate the link between gender-motivated violence and interstate commerce.[136] Despite a valiant effort by Congress to show a causal relationship,[137] the Court retorted that Congress's findings were "substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers."[138] The Court, sticking to its reasoning in *Lopez*, held that validating such a tenuous connection between the regulated activity and interstate commerce would "completely obliterate the Constitution's distinction between national and local authority . . . ."[139]

The Court also reaffirmed the *Lopez* Court's concern for what constitutes proper regulation of activity that is not itself interstate commerce. The Court feared expanding the Commerce Clause to traditional areas of sovereign state authority, such as family law.[140] *Morrison* doubled down on the Court's recognition in *Lopez* of the requirement that federal regulation of activity outside interstate commerce be proper.

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133. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 366–67 (1819) ("It is not 'necessary or proper,' but 'necessary and proper.' The means used must have both these qualities.").

134. 529 U.S. 598 (2000).

135. *Id.* at 601.

136. *Id.* at 614.

137. The act claimed that interstate commerce would be affected "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." *Id.* at 615 (quoting H.R. CONF. REP. NO. 103–711, at 385 (1994)).

138. *Morrison*, 529 U.S. at 615.

139. *Id.*

140. *Id.* at 615–16.

### *C.* Gonzales v. Raich*: A Return to Inconsistency*

Despite these detours from Commerce Clause deference, the Court in *Gonzales v. Raich* upheld the Controlled Substances Act's prohibition on the growth of marijuana as applied to instances where the marijuana was grown for purely intrastate consumption.[141] Holding that the *Lopez* and *Morrison* decisions had not significantly changed the Court's Commerce Clause doctrine, the majority reaffirmed *NLRB*'s holding that regulation of intrastate activity is permissible so long as it prevents a valid, national scheme from being undercut.[142]

Significant to the purpose of this Note, Justice Scalia wrote a concurring opinion that clearly delineated the third prong of the *Lopez* rule.[143] He explained that, because the Constitution grants Congress the power to regulate commerce, the Court's validation of activities that merely "substantially affect[]" interstate commerce fundamentally rely on the Necessary and Proper Clause.[144] Congress is not actually regulating commerce—it is regulating things that *affect* commerce. This is acceptable, according to Scalia, but only because this regulation is often necessary to effectuate Congress's granted commerce power. Thus, rather than relying on an ever-shifting understanding of whether challenged legislation substantially affects interstate commerce, courts should look to whether the legislation is an "appropriate means of achieving [a] legitimate end . . . ."[145]

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141. Gonzales v. Raich, 545 U.S. 1 (2005).

142. *Id.* at 24–25.

143. *Id.* at 33 (Scalia, J., concurring).

144. *Id.* at 33–34.

145. *Id.* at 40. For scholarly responses to Scalia's framework, see David M. Crowell, Gonzales v. Raich *and the Development of Commerce Clause Jurisprudence: Is the Necessary and Proper Clause the Perfect Drug*?, 38 RUTGERS L.J. 251 (2006). *See also* Case Comment, *Substantial Effects Test—Controlled Substances Act*, 119 HARV. L. REV. 169, 174 (2005) (arguing that the Necessary and Proper Clause is the best justification for the application of the commerce power to intrastate activity) ("Had the Court squarely addressed the problem, it could have abandoned the *Lopez* economic framework altogether and reattached the 'substantial effects' doctrine to its only justifiable textual anchor: the Necessary and Proper Clause. Under such an approach, the courts would more closely scrutinize the necessity of federal regulation the more it encroaches into traditional state areas, denying federal power in spheres of local economic activity with only attenuated links to interstate regulation."); Randy Barnett, *Understanding Justice Scalia's Concurring Opinion in Raich*, THE VOLOKH CONSPIRACY (Mar. 9, 2012, 4:13 PM), http://www.volokh.com/2012/03/09/understanding-justice-scalias-concurring-opinion-in-raich/ (arguing that use of the Necessary and Proper Clause to supplement the Commerce Clause is just as restrictive as it is expansive).

Indeed, as Scalia explained, defining this category of regulation as activities that "affect" interstate commerce is "incomplete," because:

> [T]he authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.[146]

The "effects" label, therefore, is both over and under inclusive.

Examining the Court's Commerce Clause jurisprudence from 1937 to the present, it is clear that the Necessary and Proper Clause is the textual underpinning of any federal regulation under the commerce power that reaches purely intrastate and non-commercial activities. Though the Court does not always expressly acknowledge this principle, the precedent has remained consistent with Justice Scalia's argument: if Congress is not regulating something in interstate commerce, then it cannot be relying solely on the Commerce Clause.

## III. THE ESA'S REGULATION OF PURELY INTRASTATE, NON-COMMERCIAL SPECIES IS AN IMPROPER EXERCISE OF THE NECESSARY AND PROPER CLAUSE

When the Court handed down its *Lopez* decision in 1995, the legal community began questioning what other federal regulatory schemes could be subjected to Commerce Clause scrutiny, including the ESA.[147] Although the Court warned in *Katzenbach* that it would not conduct a searching review of Congress's intent in creating regulatory schemes under its commerce power, the *Lopez* majority's focus on the distinction between economic and non-economic activity (a focus echoed in *Morrison*) cast uncertainty on "statute[s] that by [their] terms [have] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[148] The ESA, which had appeared to be on solid constitutional footing since its enactment in 1973,

146. *Raich*, 545 U.S. at 34–35 (Scalia, J., concurring).

147. *See, e.g.*, Dral & Phillips, *supra* note 120, at 618–25; Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 735–36 (2002); Nagle, *supra* note 104 and accompanying text; Eric Brignac, *The Commerce Clause Justification of Federal Endangered Species Protection:* Gibbs v. Babbitt, 79 N.C. L. REV. 873, 883 (2001).

148. United States v. Lopez, 514 U.S. 549, 561 (1995).

suddenly seemed to fall into the same impermissible category as the Gun-Free School Zones and Violence Against Women Acts. Just as the *Lopez* opinion criticized Congress for failing to state its legislative findings as to the nexus between gun violence and interstate commerce, the ESA's text makes no attempt to rationally relate its regulation of endangered species to commerce of any kind.

*Raich*, with its affirmation of the "comprehensive regulatory scheme" notion from *Jones & Laughlin*, provided seemingly independent grounds for validating the application of the commerce power to intrastate, non-commercial species. Indeed, the two circuit court cases that addressed this issue after *Raich* relied primarily on that case in rejecting Commerce Clause challenges: *San Luis & Delta-Mendota Water Authority v. Salazar*[149] and *Alabama-Tombigbee Rivers Coal. v. Kempthorne*.[150] In particular, the courts relied on this statement from *Raich*: "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[151]

### *A. When Faced with a Commerce Clause Challenge, the Court's Decision Turns in Part on Whether the Regulation is "Proper"*

Up to this point, federal courts of appeals have upheld the application of the ESA to species that are purely intrastate and have no commercial value. Ordinarily, this activity would be beyond Congress's reach under the Commerce Clause. The courts have given two justifications for extending the commerce power to regulation of these species: (1) the taking of intrastate, non-commercial species substantially impacts interstate commerce, as per the third prong of the *Lopez* test, or (2) under a *Raich* analysis, regulation of these species is permitted as a necessary component of a concededly valid, nationwide regulatory scheme—the ESA.

But the mechanical way in which the lower courts have employed these two avenues to uphold regulation of purely intrastate, non-commercial species vividly illustrates the weakness of the Supreme Court's approach to the Commerce Clause since *Lopez*. In 1995, at the start of the so-called "Federalism Revolution,"[152] the Court made clear that it intended to draw

149. 638 F.3d 1163 (9th Cir. 2011).
150. 477 F.3d 1250 (11th Cir. 2007).
151. *Raich*, 545 U.S. at 23 (quoting Perez v. United States, 402 U.S. 146, 154 (1971).
152. Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001).

a line in the sand: Congress's power to regulate under the Commerce Clause "is subject to outer limits."[153] Unfortunately, the Court awkwardly attempted to reconcile this ultimatum with sixty years of case law in which Congress's authority under the Clause seemed boundless.[154] Because it declined to overturn a single case from that era, the Court was forced to construct a non-textual test by which it could plausibly flunk the Gun Free School Zones Act. This necessity gave rise to the Court's much-maligned economic/non-economic distinction.[155] Rather than recognize that Congress's exercise of the commerce power felt intuitively wrong because regulating gun possession in school zones is not a "proper" means of regulating interstate commerce, the Court cabined its rationale in the Commerce Clause alone.

Since then, the Court has shown a willingness to create new tests and distinctions on a whim when it feels Congress has overstepped the bounds of propriety in its Commerce Clause regulation. *NFIB v. Sebelius*[156] is notable in this regard. *NFIB* required the Court to resolve whether Congress's enactment of an individual mandate on all persons to purchase health insurance under the Patient Protection and Affordable Care Act ("PPACA")[157] was a valid exercise of the Commerce Clause. The PPACA requires health insurance companies to, among other things, guarantee coverage for individuals regardless of their preexisting medical conditions.[158] Knowing that this requirement would greatly increase the risk to insurers and may drive them from the market, Congress enacted the "individual mandate."[159] The mandate requires all individuals, with limited exceptions, to purchase health insurance.[160] Because many healthy individuals would be required to purchase health insurance, the insurers could effectively subsidize the cost of insuring individuals with preexisting conditions.[161]

The Secretary characterized the individual mandate as a proper exercise of the Commerce Clause because, under the effects prong, "the failure to

153. Lopez, 514 U.S. at 557.

154. Mathews, *supra* note 21, at 947 ("[*Lopez* and *Morrison*] upended fifty years of conventional wisdom about the limits on Congress's power under the Commerce Clause—namely, that there were effectively none—and left lower courts with an uncertain new framework to apply.") (footnote omitted).

155. *Id.*

156. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

157. 26 U.S.C. § 5000A (2010).

158. *NFIB*, 132 S. Ct. at 2645.

159. *Id.* at 2645.

160. *Id.* at 2580.

161. *Id.* at 2645.

purchase insurance has a substantial and deleterious effect on interstate commerce . . . ."[162] Given the expansive list of commercial activities the Court has allowed Congress to regulate, the Secretary's assertion that the national market for health insurance belongs on that list seems perfectly reasonable.. Because Congress was now requiring health insurers to insure all individuals regardless of their level of risk, the failure of healthy individuals to offset that burden would certainly affect the interstate market in health insurance; insurers would be driven out of the market. Even the Court's new test in *Lopez* was easily satisfied—the regulated activity (the purchase of health insurance) is a fundamentally economic activity.

But Chief Justice Roberts was not swayed by this argument. He wrote that "the power to *regulate* commerce presupposes the existence of commercial activity to be regulated,"[163] and "the individual mandate . . . does not regulate existing commercial activity."[164] Rather, it "compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."[165] Roberts believed this authority would go too far, because "[a]llowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him."[166]

As Justice Ginsburg noted in her concurrence, Roberts's "limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or our decisions."[167] Indeed, like Chief Justice Rehnquist's artificial distinction between economic and non-economic activity in *Lopez*, Roberts located his intuitive conviction that Congress overreached in a new doctrinal test. Worse, it is not entirely clear that the individual mandate flunks that test. As Justice Ginsburg argues, the supposed "inaction" of failing to buy health insurance "can be seen as actively selecting another form of insurance: self-insurance."[168] The argument that inaction on one front amounts to action on another left Roberts able only to grumble that "the distinction between doing something and doing nothing would not have

162. *Id.* at 2585 (internal citation and quotation marks omitted).
163. *Id.* at 2586.
164. *Id.* at 2587.
165. *Id.*
166. *Id.*
167. *Id.* at 2621 (Ginsburg, J., concurring).
168. *Id.* at 2622 (Ginsburg, J., concurring).

been lost on the Framers, who were practical statesmen, not metaphysical philosophers."[169]

Roberts's attempt to check this apparent congressional overreach thus left him grasping at tenuous semantic distinctions. But that was not his only option. Roberts's concern, obviously, was not that Congress had crossed some critical line between the regulation of action and inaction. His concern was for the protection of federalism. He quoted *Bond v. United States* for the proposition that "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."[170] The mandate risked an erosion of federalism and an invalid intrusion on individual liberty. But Roberts's failure to acknowledge the Necessary and Proper Clause as the backbone of the effects prong required him to create the action/inaction distinction to achieve the necessary result. Interestingly, Roberts *did* separately address the government's argument that the Necessary and Proper Clause independently validates the individual mandate.[171] In that analysis, he delineated the function of the term "proper" in the Clause and solidified the lesson from *Printz* and *New York v. United States* that the term acts as an independent limit.[172] That line of reasoning, employed correctly in the Commerce Clause analysis, would have avoided the creation of the dubious activity/inactivity test.

Unlike Scalia's *Raich* concurrence, Roberts performed a thorough analysis of why the Necessary and Proper Clause, though used as a tool in *Raich*, can also be a limitation.[173] A law that is not "consistent with the letter and spirit of the constitution" is not a "*proper* means for carrying into [e]xecution Congress's enumerated powers."[174] Roberts was vague as to what exactly constitutes an improper act that is not consistent with the letter and spirit of the Constitution. Notably, though, he cited Justice Kennedy's concurrence in *Comstock*[175] for the proposition that consideration of whether a law is "proper" includes "whether essential attributes of state sovereignty are compromised by the assertion of federal

169. *Id.* at 2589 (internal citation and quotation marks omitted).
170. *Id.* at 2578 (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)).
171. *Id.* at 2591–93.
172. *Id.* at 2592.
173. *See* Barnett, *supra* note 145 (arguing that Scalia's invocation of the Necessary and Proper Clause carried with it the inherent limits that adhere to the term "proper").
174. *NFIB*, 132 S. Ct. at 2592 (internal citation and quotation marks omitted).
175. United States v. Comstock, 130 S. Ct. 1949 (2010).

power under the Necessary and Proper Clause . . . ."[176] Whatever the Court may mean by "proper," that requirement includes at least due consideration of whether the federal government is impermissibly encroaching on traditional areas of state authority. Further, and relevant to both the ESA cases and *Raich*, Roberts opined that an act fails the "proper" analysis if it "reach[es] beyond the natural limit of its authority and draw[s] within its regulatory scope those who otherwise would be outside of it."[177]

Of course, arriving at this conclusion is only the beginning of the analysis. The more difficult question—the one that various factions of the Court have tussled over for years—is where and how to draw the line of propriety. The next section explores this challenge through the prism of the ESA's regulation of non-commercial, intrastate protected species.

### *B. Though the ESA's Regulation of Intrastate, Non-Commercial Species May Mechanically Satisfy the Court's Current Commerce Clause Doctrine, Such Regulation is not "Proper"*

As explained above, the lower courts have upheld federal regulation of intrastate, non-commercial species in essentially two ways: by framing either the species themselves or the activities involved with "taking" the species as having a substantial effect on interstate commerce,[178] or by upholding specific listings of the species as members of a "class of activities" affecting interstate commerce.[179]

Both of these justifications inherently and implicitly call upon the Necessary and Proper Clause. Neither the taking of these species nor the species themselves are an activity or object in interstate commerce: the species are entirely contained within the state, and they often have no commercial value.[180] Therefore, regulating the taking of these species cannot be understood only as an exercise of the commerce power. Whether through the substantial effects prong or the larger regulatory scheme

176. *NFIB*, 132 S. Ct. at 2592 (quoting *Comstock*, 130 S. Ct. at 1967–68 (Kennedy, J., concurring)).

177. *Id*.

178. *See* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

179. Two cases have used this reasoning since it was employed in *Raich*: San Luis Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 498 (2011), and Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008).

180. Fowler, *supra* note 13, at 76–77 ("For the most part, federal protection of listed species cannot be said to concern commerce.").

framework, regulation of this activity is valid only insofar as it is *necessary and proper* to effectuate Congress's *actual* power: the power to regulate interstate commerce.

Once in this framework, the limitations imposed on the Necessary and Proper Clause in the *NFIB* holding come into play. Congress can no longer regulate at will without regard to the external restraints of the Tenth Amendment, as it admittedly could if acting directly within its commerce power. Instead, the considerations of federalism and state sovereignty enter the calculus.

The difficulty comes in the Court's patchwork approach to elucidating the meaning of "proper." Any reference to the Tenth Amendment will necessarily be tautological: Congress cannot do anything it is not expressly empowered to do.[181] As the Court explained in *U.S. v. Darby*, "[t]he amendment states but a truism that all is retained which has not been surrendered."[182] The cases bear out the inconsistency this kind of line-drawing creates. Why, for example, is the regulation of non-commercial, intrastate marijuana valid, but regulation of a gun in a school zone is not? These questions go to the heart of the Court's longstanding federalism debate, and there are no easy answers. The best that can be done is to parse the Court's decisions on the issue and delineate a fair guideline for what is proper and what is not.

A good place to start is all the way back at *McCulloch*, in which Chief Justice Marshall authored the seminal conception of federal regulation under the Commerce Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[183] This language, while helpful guidance, can lead to circular problems: if the federal government is regulating within its sphere of authority, any regulation is valid—but how should the moving target that is the commerce power be defined? Further, Marshall mentions that the "end" must be legitimate. But in *Hammer v. Dagenhart*,[184] the Court seemed to dispel that notion. The Court stated that, regardless of Congress's true purpose in enacting legislation, it is valid if it can be seen as the regulation

181. U.S. v. Darby, 312 U.S. 100, 124 (1941).
182. *Id.*
183. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
184. Hammer v. Dagenhart, 247 U.S. 251 (1918).

of interstate commerce (though the Court ultimately struck down that particular statute).[185]

The same issue seems to apply to the ESA. The text of the legislation makes no attempt to rationally relate the protection of endangered species to the regulation of interstate commerce.[186] But doesn't *Hammer v. Dagenhart* suggest that no such attempt is required? No. *Hammer* stands in part for the proposition that Congress's ends are proper if Congress is *actually regulating interstate commerce*.[187] In that case, the regulation in question clearly fell within the second category of the modern Commerce Clause doctrine: it regulated the sale in interstate commerce of products manufactured by child laborers.[188] In the ESA cases at hand, by contrast, Congress is operating within the third prong, and the regulation relies on the Necessary and Proper Clause to reach activity that is not actually related to interstate commerce. If the regulation in question could find its home in the Commerce Clause alone, any analysis of its true purpose would be inappropriate. But the ESA's reliance on the Necessary and Proper Clause when it regulates species that are in no way involved in interstate commerce subjects it to an analysis of its means and its ends.

This analysis should proceed by culling the lessons from each of the Court's discussions of what is "proper" and attempting to define general guidelines. As luck would have it, the rules of thumb employed by the Court in its misguided attempt to set boundaries on the commerce power can be reframed to determine how the Court views the "proper" requirement. Recall that the decisions in *Lopez*, *Morrison*, and *NFIB* can be viewed as statements by the Court that the congressional regulation in question was improper. Rather than framing the issue in these terms, the Justices set forth the "economic/non-economic" and "activity/inactivity" categories by reviewing the Court's Commerce Clause cases and determining that they were consistent with these distinctions.[189] But though these distinctions are inapt for restraining Congress's authority

185. *Id.* at 276 ("We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States."). In *Hammer*, Congress hadtried to crack down on the abuse of child labor by prohibiting the sale in interstate commerce of products produced by child labor. *Id.* at 268. Its stated purpose was moral, not commercial. *Id.* at 271–72. The Court struck down the regulation as an invalid exercise of the commerce power. *Id.* at 276–77.

186. Fowler, *supra* note 13, at 69.

187. *Hammer*, 247 U.S. at 276.

188. *Id.*

189. *See supra* text accompanying notes 148–51.

under the Commerce Clause itself,[190] they provide reasonable bases for determining what congressional action is proper or not.

Take the economic/non-economic distinction. As Justice Scalia noted in *Raich*, this categorization is, for Commerce Clause purposes, both over- and under-inclusive.[191] Many activities or objects that have no economic nature will properly be reached by the Necessary and Proper Clause, and many activities that are economic will not be reached by the Commerce Clause alone. But as a yardstick for whether federal regulation is *proper*, the economic requirement is an adequate rule of thumb. Randy Beck, a preeminent Necessary and Proper Clause scholar, explained it like this:

> Given the close relationship between intrastate and interstate economic activity, a statute regulating local economic conduct will usually be calculated to accomplish an end legitimately encompassed within the plenary congressional authority over interstate commerce. Likewise, the causal relationship linking economic means with economic ends will generally be plain or obvious. Thus, limiting Congress to the regulation of local *economic* activity ensures that such regulations will, in most circumstances, be plainly adapted and really calculated to achieve some legitimate end connected with the interstate economy.[192]

In *Lopez*, then, the Court's fundamental holding was that Congress's true purpose—protecting schoolchildren from gun violence—lacked a "plain or obvious" link between economic means and economic ends. Indeed, the Court refused to "pile inference upon inference" to establish the requisite economic nexus.[193] The requirement that the regulated activity be economic acted as the Court's proxy for an articulable limit on Congress's commerce power as aided by the Necessary and Proper Clause.

Likewise, the court offered a rule of thumb in *Morrison* that makes more sense when connected to the Necessary and Proper Clause than to the Commerce Clause. In that case, the Court considered the validity of the Violence Against Women Act (providing federal civil remedies for domestic violence victims).[194] Just as in *Lopez*, the Court found that no sufficient nexus existed between domestic violence and interstate

190. *See supra* text accompanying notes 148–51.

191. *Gonzales v. Raich*, 545 U.S. 1, 235 (2005) (Scalia, J., concurring). *See also supra* text accompanying notes 143–46.

192. Beck, *supra* note 56, at 625 (footnote omitted).

193. United States v. Lopez, 514 U.S. 549, 567 (1995).

194. *See supra* text accompanying notes 134–40.

commerce.[195] Although the government argued that the Court should aggregate the impact of all domestic violence in order to determine its effect on interstate commerce, the Court declined to do so.[196] The Court announced the rule that "Congress may [not] regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[197] This rule, limiting the aggregating principle employed by the Court in *Wickard*, is best viewed as a limitation on the Necessary and Proper Clause, rather than the Commerce Clause. Although Congress made a "mountain" of findings regarding the effects that domestic violence has on interstate commerce,[198] the Court simply couldn't stomach such a far-reaching exercise of federal power. It worried that such authority would destroy the "distinction between what is truly national and what is truly local"—the epitome of federalism.[199] If the federal government could aggregate *any* discrete activity to demonstrate an effect on interstate commerce and thus bring that activity under its control, there would be nothing left for the states to govern. Finding no recourse in its Commerce Clause jurisprudence to prevent this destruction of federalism, the Court was once again forced to construct a judicial rule to cabin federal power. But because the regulation of domestic violence cannot be understood as a regulation of interstate commerce, the rule is in reality a guiding principle for what is "proper" when the Necessary and Proper Clause supplements the Commerce Clause.

Finally, Chief Justice Roberts's creation in *NFIB* of the activity/inactivity distinction was at its core an attempt to check federal power over individual liberty when no Commerce Clause doctrine seemed to provide a limit. The individual mandate required all individuals to purchase health insurance, regardless of their perceived need for it.[200] Roberts worried that "[a]llowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him."[201] But a simple application of the Court's Commerce Clause doctrine seems to have allowed that result. Only by

195. United States v. Morrison, 529 U.S. 598, 627 (2000).
196. *Id.* at 613.
197. *Id.* at 617.
198. *Id.* at 628 (Souter, J., dissenting).
199. *Id.* at 617–18 (citing United States v. Lopez, 514 U.S. 549, 568 (1995)).
200. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).
201. *Id.* at 2587.

crafting the activity/inactivity distinction could Roberts assuage the federalism concerns underlying the mandate.

Each of these judicial checks on what is "proper" regulation under the Commerce Clause acts to invalidate certain applications of the ESA to intrastate, non-commercial species. The first question in the analysis is whether federal regulation of such species can be viewed as a regulation of commerce itself: the channels, persons, things, or instrumentalities of commerce (prongs one and two). Courts in every case have had no difficulty determining that it cannot be so framed.[202] Because the ESA as applied to these species is not directly regulating commerce, then, it relies on the Necessary and Proper Clause as expressed in the third prong of the Court's Commerce Clause doctrine. Accordingly, such regulation must be proper. In many of the cases decided by the lower courts, this standard has not been met.

Take the delta smelt, the species at issue in *San Luis Water Auth. v. Salazar*.[203] Federal regulation of this species has had wide-ranging impacts in key areas of traditional state sovereignty.[204] The biological opinion issued by the FWS at issue in *San Luis* regulated the water levels in the San Joaquin valley.[205] The low levels prescribed by the opinion have devastated local farming, destroyed thousands of jobs, and created a massive food shortage in California.[206] Food supply, water reclamation, and the local economy are all areas that have traditionally been left to the states to govern. By inhibiting the ability of the states to solve the problems this national regulation is creating, application of the ESA to the delta smelt risks eroding the line between what is national and what is local—the fundamental premise of a sound federal system.

But by mechanically applying the "effects" and "class of activities" prongs of the Commerce Clause to this question, the lower court failed to check this erosion of federalism. The court would have been better served to assess whether federal regulation of an interstate, non-commercial species is truly "proper" based on the guidelines provided by the Court in *Lopez*, *Morrison*, and *NFIB*. Each of those guidelines cuts against a finding of propriety.

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202. *See, e.g.*, San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1174 (9th Cir. 2011) ("By all accounts, the category most applicable here is the third—the 'substantial effects' category.").

203. *Id.* at 1167.

204. Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 913 (2008).

205. *California's Man-Made Drought*, *supra* note 1.

206. *Id.*

The delta smelt, like the possession of a gun or an act of domestic violence, is concededly not economic in nature. The *San Luis* court admitted that "the delta smelt presently has no commercial value."[207] Nor is the regulation itself—prescribing maximum water levels—an inherently economic activity or regulation. *Lopez*'s teaching that regulation of non-economic objects and activities is improper suggests that this application of the ESA is suspect. The Ninth Circuit, though, moored its holding on the *Raich* principle: "[t]hat a regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme."[208] The court's reliance on the "larger regulatory scheme" category is deficient, however, because the regulation in question flunks the economic/non-economic distinction where the statute in *Raich* did not. Though the homegrown medical marijuana at issue in *Raich* was "not intended for . . . the stream of commerce,"[209] the Court saw fit to capture it in the regulatory sweep of the Controlled Substances Act because it was "a fungible commodity for which there is an established, albeit illegal, interstate market."[210] It refused to excise incidental intrastate activity, not incidental non-economic activity. The delta smelt, conversely, is not a commodity. Nor is there a market—interstate or otherwise—for its sale.[211] It is not "economic" in any sense of the word.

Imposing a requirement that the regulated object or activity be economic allows for a principled distinction between the proper regulation in *Raich* and the improper regulation in *Salazar*. Congress's larger regulatory scheme in *Raich* clearly had the goal of upending the market for illegal drugs, but the Controlled Substances Act was found constitutional under the Commerce Clause because it "regulated" that interstate, commercial market. Any marijuana that was manufactured, no matter its intended purpose, was a potential commodity in that market. Its inarguable economic nature thus subjected it to federal regulation. But federal regulation of species under the ESA is putatively constitutional to the extent that Congress is regulating objects or activities that affect interstate commerce. There is no enumerated power of species preservation. Accordingly, to extend Congress's reach under the ESA to intrastate

207. *Salazar*, 638 F.3d at 1167.
208. *Id.* at 1175 (quoting Gonzales v. Raich, 545 U.S. 1, 22 (2005)).
209. Gonzales v. Raich, 545 U.S. 1, 9 (2005) (internal citation omitted).
210. *Id.* at 18.
211. *Salazar*, 638 F.3d at 1167.

species like the delta smelt that have no commercial value is to permit improper means for the attainment of an extra-constitutional end.

But the court in *Salazar* went on to argue that the aggregate of all protected species under the ESA effects interstate commerce.[212] This move is barred by *Morrison*'s principle that no analysis of whether certain regulation is "proper" can resort to the aggregation of non-economic objects.[213] The facts here further illustrate the impropriety of doing so. Indiscriminately lumping together the delta smelt with every other protected species to claim an economic impact would pave the way to federal regulation of nearly anything. The Court in *Morrison* was rightly concerned that application of this reasoning could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."[214]

Finally, *NFIB*'s activity/inactivity distinction shows in part why this regulation is improper: the delta smelt are not engaged in any commercial activity. The Ninth Circuit speculatively argued that "[e]ven where the species . . . has no current commercial value, Congress may regulate under its Commerce Clause authority to prevent the destruction of biodiversity and thereby protect the current future interstate commerce that relies on it."[215] By requiring California to reduce its water levels, the FWS has called the State into action on behalf of a commercially inactive species of fish. The Ninth Circuit's justification of this requirement—that doing so could create a market in the distant future that could then be appropriately regulated by Congress—is strikingly similar to the individual mandate's creation of previously non-existent commercial activity for the purpose of regulating it. "The power to *regulate* commerce," wrote Roberts, "presupposes the existence of commercial activity to be regulated."[216] This application of the ESA to non-commercial species, like the individual mandate, "vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power . . . [and] draw within its regulatory scope those who otherwise would be outside of it."[217]

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212. *Id.* at 1175 ("Pursuant to *Raich*, when a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute (rather than an isolated application) in determining whether the statute relates to 'commerce or any sort of economic enterprise.'").

213. United States v. Morrison, 529 U.S. 598, 617 (2000).

214. *Id.* at 615–16.

215. *Salazar*, 638 F.3d at 1176 (internal quotation marks and brackets omitted).

216. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2572, 2586 (2012).

217. *Id.* at 2592.

## CONCLUSION

In crafting its Commerce Clause jurisprudence over the past century, the Supreme Court has articulated a workable test for what activities fall within the scope of Congress's power. But, like any other language handed down by the Court, the "effects" and "class of activities" tests cannot be understood in a vacuum. Part of the blame lies with the Court for its undisciplined muddying of the nexus between the Commerce Clause and the Necessary and Proper Clause. Rather than expressly embracing the Necessary and Proper Clause as the textual underpinning of part of its Commerce Clause doctrine, the Court's recent decisions have attempted to reconcile seemingly incongruent opinions. These judicial gymnastics have obscured doctrine that was relatively clear at its genesis.

Further, the lower courts have worsened the issue by mechanically applying these tests in a manner divorced from the values underpinning them. The ESA's regulation of species that exist entirely within the confines of one state and that have no commercial or economic value represents the furthest possible federal reach into the province of state authority. If the Constitution's promise of powers retained by the States is to have any meaning, this is one place where courts must draw a line in the sand.

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