A Federal Crime Against Nature? The Federal Government Cannot Prohibit Harm to All Endangered Species Under the Necessary and Proper Clause

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Since McCulloch v. Maryland, the Necessary and Proper Clause has given Congress wide latitude in the choice of means to accomplish its legitimate ends. But these ends have always been constrained by the other enumerated powers. Therefore, Gonzales v. Raich's recognition that the federal government may regulate activity otherwise beyond the Commerce Clause if necessary to effectuate a comprehensive regulatory scheme is narrower than many have assumed. Under Raich, the challenged regulation must be necessary to avoid frustrating a comprehensive scheme's ability to function as a regulation of commerce. This means that the regulation of noneconomic activities must be necessary for the government to regulate economic activity or the market for a commodity. Though Congress can pursue many public policy goals while exercising its power under the Commerce Clause, it cannot rely on these general legislative "ends" and the Necessary and Proper Clause to expand beyond it.

This limit forecloses reliance on the Necessary and Proper Clause to sustain the federal government's prohibition against the take of all species listed under the Endangered Species Act. That statute is not a scheme to comprehensively regulate economic activity or the market for a commodity, but an environmental regulation to preserve species and biodiversity.[1] Yet it broadly forbids any activity—including noneconomic activity—that has a negative effect on endangered species or their habitats. The Necessary and Proper Clause cannot authorize this broad regulation of noneconomic activity because much of it—particularly the regulation of noneconomic activity that harms species with no appreciable tie to commerce—is unnecessary to the regulation of economic activity or the market for any commodity.

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1. Endangered Species Act, 16 U.S.C. § 1531 (2012).

I. INTRODUCTION

The sine qua non of the United States Constitution is that the federal government has only limited and enumerated powers.[2] The United States Supreme Court has repeatedly emphasized that *none* of those enumerated powers can be interpreted as a fount of limitless authority.[3] Yet, this appears to conflict with *Gonzales v. Raich*'s holding that the Necessary and Proper Clause gives the federal government authority to regulate any activity which, if unregulated, would frustrate a comprehensive regulatory scheme.[4] This precedent has been interpreted to give the federal government carte blanche to regulate anything, so long as it does so as part of a broad, complex scheme. Because such a scheme could be imagined for any type of human activity, *Raich* could provide a basis for unlimited federal power.

This Article reconciles this apparent conflict by explaining *Raich*'s limit—the challenged regulation of activity must be necessary to avoid frustrating a comprehensive regulatory scheme's ability to function *as a regulation of commerce*.[5] If the regulation is necessary to some purpose other than regulating commerce, *Raich* cannot apply. Otherwise, it would give Congress unconstrained power. Although Congress can pursue many public purposes when exercising its Commerce Clause power, e.g., reducing crime or protecting the environment, these purposes cannot extend the federal government's power beyond that clause's reach.[6] Consequently, a regulation can only be sustained as necessary and proper to the regulation of commerce if, otherwise, Congress would

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2. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).
3. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995).
4. 545 U.S. 1, 32-33 (2005).
5. *See* U.S. CONST. art. I, § 8, cl. 3; *Raich*, 545 U.S. at 22.
6. *See Lopez*, 514 U.S. at 565-66.

be frustrated in its ability to regulate economic activity or the market for a commodity.[7]

The failure to recognize this limit explains why the constitutionality of the Endangered Species Act's broad "take" prohibition has bedeviled courts. This broad prohibition cannot withstand scrutiny under *Raich*. The Endangered Species Act, its legislative history, and precedent make clear that it is an environmental scheme aimed at protecting species and biodiversity. True, because of the prohibition's breadth, some economic activity is ensnared by it. But much of the sweep of the prohibition encompasses activity that, if it were beyond the federal government's power, would in no way frustrate its ability to regulate economic activity or the market for any commodity.

This Article begins by discussing the limits of the Necessary and Proper Clause generally. Then, it explains the application to the Commerce Clause by sketching out *Raich*'s comprehensive regulatory scheme test and its limits. Next, the Endangered Species Act and its "take" prohibition are briefly introduced. Finally, this Article will explain why *Raich*'s comprehensive regulatory scheme analysis provides no constitutional basis for federal regulation of "take" of species with no appreciable connection to interstate commerce.

II. THE NECESSARY AND PROPER CLAUSE GIVES THE FEDERAL GOVERNMENT THE INCIDENTAL POWERS NEEDED TO EXERCISE ITS OTHER ENUMERATED POWERS

The Constitution grants the federal government only limited and enumerated powers.[8] To aid in the exercise of these powers, the Necessary and Proper Clause gives Congress authority "[t]o make all Laws which shall be necessary and proper for carrying [them] into Execution."[9] Though broad, this is not a power without limit. The enumerated powers cannot, either individually or collectively, be interpreted to confer a "police power."[10] The Founders intentionally

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7. *See Raich*, 545 U.S. at 22 (citing U.S. CONST. art. I, § 8, cls. 3, 18).

8. *See* U.S. CONST. amend. X; *see also* Printz v. United States, 521 U.S. 898, 919 (1997) (quoting U.S. CONST. amend. X); New York v. United States, 505 U.S. 144, 155 (1992) (quoting U.S. CONST. amend. X; Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 110-13 (2005) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)). *But see* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014).

9. U.S. CONST. art. I, § 8, cl. 18; *see* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 747-48 (1997) (quoting U.S. CONST. art. I, § 8, cl. 18).

10. United States v. Morrison, 529 U.S. 598, 618-19 (2000) ("'[W]e *always* have rejected readings of . . . the scope of federal power that would permit Congress to exercise a police

denied[11] this power to the federal government to protect individual liberty.[12]

During ratification, the Necessary and Proper Clause was an important point of contention between the Constitution's supporters and opponents.[13] Supporters argued that it merely made explicit what was necessarily implicit—that the federal government had all of the means required to exercise the other enumerated powers.[14] Their opponents feared that the clause would be a fount of unlimited power.[15] But both agreed that the intent was to create a federal government powerful enough to effectively exercise its given powers,[16] but not so powerful that it could touch any aspect of American life that caught its interest.[17]

Sensitive to these competing concerns, the Supreme Court has consistently recognized that the Necessary and Proper Clause gives the federal government broad, but not limitless, authority.[18] The first major test of the clause's scope was *McCulloch v. Maryland*, in which the Supreme Court was asked to construe "necessary" to mean "absolutely

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power'" (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)). The police power encompasses "numerous and indefinite" powers to do anything not forbidden by the Constitution. *See* THE FEDERALIST NO. 45 (James Madison).

11. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577-78 (2012) (quoting THE FEDERALIST NO. 45, at 293) (James Madison); United States v. Comstock, 130 S. Ct. 1949, 1964 (2010) (quoting *Morrison*, 529 U.S. at 618); *see also Gibbons*, 22 U.S. at 178. The states retain the police power and may adopt any law to protect the public health, safety, and welfare, unless prohibited by the Constitution, e.g., the Fourteenth Amendment's Due Process Clause. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 417 (1922); Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 285 (2012).

12. *See New York*, 505 U.S. at 181 ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also* Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

13. *See* AMAR, *supra* note 8, at 319-20 (quoting U.S. CONST. amend. I).

14. *See, e.g.*, THE FEDERALIST NO. 33 (Alexander Hamilton).

15. *See, e.g.*, ESSAYS OF BRUTUS (Jan. 31, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417, 421 (Herbert J. Storing ed., 1981).

16. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819).

17. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (quoting THE FEDERALIST NO. 45 (James Madison); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 301 (Boston, Hilliard, Gray & Co. & Cambridge, Brown, Shattuck & Co. 1833); Chief Justice John Marshall, *A Friend of the Constitution No. V*, ALEXANDRIA GAZETTE, July 5, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 190-91 (G. Gunther ed., 1969).

18. *See* United States v. Comstock, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 417-18); *id.* at 1972 (Thomas, J., concurring) (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960)); New York v. United States, 505 U.S. 144, 157 (1992); *McCulloch*, 17 U.S. (4 Wheat.) at 405; *id.* at 419. *But see* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5-6 (2014); Primus, *supra* note 8, at 578.

necessary."[19] In what came to be the definitive interpretation of this clause, Chief Justice Marshall rejected the invitation, explaining, "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."[20] As a result, the choice of the means to accomplish the federal government's goals is left

> primarily . . . to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.[21]

However, when Chief Justice Marshall explained that the "end" must be "legitimate," he was not merely saying that the statute must accomplish some beneficial public goal.[22] Although judicial review under the Necessary and Proper Clause and the Fifth Amendment's Due Process Clause are both deferential, they are not the same.[23] Under the Due Process Clause, a law need only be a rational means of advancing a legitimate legislative goal.[24] The Necessary and Proper Clause, on the other hand, is more restrictive. The only "end" which is "legitimate" for

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19. *See* 17 U.S. (4 Wheat.) at 413-15.

20. *Id.* at 421; *see* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2061 (2014); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271-72 (1993) (citing *McCulloch*, 17 U.S. (4 Wheat.) at 331-33, 367-68, 413-15, 418-20, 423; U.S. CONST. art. II, § 3; *id.* art. I, § 10, cl. 2).

21. Burroughs v. United States, 290 U.S. 534, 547-48 (1934) (citing Stephenson v. Binford, 287 U.S. 251, 272 (1932)).

22. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 161 (1824) ("Congress can do no more than they are *expressly* authorized to do; though the means of doing it are left to their discretion, under no other limit than that they shall be necessary and proper to the end."); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 605-06 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 411-15, 418-19, 421; Opinion of Alexander Hamilton on the Constitutionality of a National Bank (Feb. 23, 1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 97 (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley 1967) (1832)).

23. U.S. CONST. amend. V; *see Comstock*, 130 S. Ct. at 1971 (Thomas, J., concurring in part and dissenting in part) (quoting THE FEDERALIST NO. 45 (James Madison)); Reid v. Covert, 354 U.S. 1, 66 (1957) (Harlan, J., concurring) ("[T]he constitutionality of the statute . . . must be tested, not by abstract notions of what is reasonable 'in the large,' so to speak, but by whether the statute, as applied in these instances, is a reasonably necessary and proper means of implementing a power granted to Congress by the Constitution.").

24. *See* Schweiker v. Wilson, 450 U.S. 221, 234 (1981); Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955).

purposes of that clause is "the implementation of a constitutionally enumerated power."[25]

Without this limitation, problems can arise because many of the enumerated powers can be understood as both ends and means.[26] The courts have generally not scrutinized Congress's intent when exercising these powers, but have allowed it to pursue any goal it wishes.[27] Can Congress rely on the Necessary and Proper Clause to accomplish those public policy goals directly, irrespective of any relationship to the other enumerated powers? If it could pursue any "ends" under the Necessary and Proper Clause, *McCulloch*'s formulation would collapse into the standard for reviewing exercises of the police power under the Due Process Clause.[28] To demonstrate why, consider the Necessary and Proper Clause's application to the Military Regulations Clause,[29] the Postal Clause,[30] and the Enclave[31] and Property Clauses.[32]

The power to make rules for the regulation of the land and naval forces includes a broad power over servicemen and women, beyond merely ensuring military readiness.[33] Many of these regulations aim to accomplish important ends only tangentially related to the military, such

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25. *See Comstock*, 130 S. Ct. at 1956 (citing Sabri v. United States, 541 U.S. 600, 605 (2004)); Ilya Somin, *Taking Stock of* Comstock*: The Necessary and Proper Clause and the Limits of Federal Power*, 2010 CATO SUP. CT. REV. 239, 248-52 (citing U.S. CONST. art. I, § 8, cl. 18; *McCulloch*, 17 U.S. (4 Wheat.) 316); *see also Sabri*, 541 U.S. at 605; United States v. Morrison, 529 U.S. 598, 607 (2000); AMAR, *supra* note 8, at 319 (quoting U.S. CONST. amend. I); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 590-91 (1994).

26. One noteworthy example is the power to regulate commerce among the states. U.S. CONST. art. I, § 8, cl. 3. The "end" of this power is to make the rules of commerce uniform across the states. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 132-46 (2001) (citing U.S. CONST. art. I, § 8, cl. 3); THE FEDERALIST NO. 11 (Alexander Hamilton). But regulating commerce is also a means to an infinite number of ends, including regulating morality and public safety. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964); Lottery Case, 188 U.S. 321, 355-56 (1903); *see also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1397-98 (1987) (quoting U.S. CONST. art. I, § 8, cl. 18); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1234 (1994) (citing U.S. CONST. art. I, § 8, cl. 18).

27. *See Heart of Atlanta Motel*, 379 U.S. at 257; *Lottery Case*, 188 U.S. at 355-56; *see also* Hodel v. Indiana, 452 U.S. 314, 329 n.17 (1981). *But see* Jinks v. Richland County, 538 U.S. 456, 464-65 (2003) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 423; Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988)) (providing the pretext test).

28. *See* 17 U.S. (4 Wheat.) at 421.

29. U.S. CONST. art. I, § 8, cl. 14.

30. *Id.* art. I, § 8, cl. 7.

31. *Id.* art. I, § 8, cl. 17.

32. *Id.* art. IV, § 3, cl. 2.

33. United States v. Kebodeaux, 133 S. Ct. 2496, 2503-05 (2013) (upholding the federal government's power to punish a former service member for failing to update his sex offender registration under the Necessary and Proper Clause).

as "protect[ing] the public from those federal sex offenders and alleviate public safety concerns."[34] Although the federal government can pursue this end through the means of regulating the military, the Necessary and Proper Clause cannot extend the federal government's power to accomplish this end generally.[35] If it could—by allowing the federal government to punish such crimes irrespective of any connection to the military—the Necessary and Proper Clause would be exactly what the Founders and the Supreme Court have repeatedly said it cannot be: the police power.[36]

Similarly, courts have interpreted the Postal Clause to permit the federal government to punish activities related to the mail,[37] even for reasons unrelated to efficient mail delivery, such as regulating morality.[38] But, the government cannot rely on regulation of the mail to protect public morals as a bootstrap to comprehensively regulate morality without any connection to federal mail delivery.[39] This too is something that can only be done—if at all—under the states' police powers.

Perhaps the most obvious example where the "ends" pursued under the Necessary and Proper Clause must be limited to the implementation of an enumerated power is in relation to the federal government's authority to regulate the District of Columbia and federal property.[40] In these geographic areas, Congress may truly exercise the police power to

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34. *See id.* at 2503.

35. In *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), and *Reid v. Covert*, 354 U.S. 1 (1957), the federal government attempted to subject civilian dependents of servicemen to military prosecution. In both cases, the Court recognized that prosecution of *civilians* was not necessary and proper to the regulation of *the military* even though Congress could punish the same crimes if committed by servicemen. *Kinsella*, 361 U.S. at 248-49; *Reid*, 354 U.S. at 20-21; *see Kebodeaux*, 133 S. Ct. at 2513 (Thomas, J., dissenting) ("Protecting society from sex offenders and violent child predators is an important and laudable endeavor" but "[t]he power to protect society from sex offenders is part of the general police power that the Framers reserved to the States or to the people.").

36. *See Kebodeaux*, 133 S. Ct. at 2507 (Roberts, J., concurring); *id.* at 2516 (Thomas, J., concurring in part and dissenting in part); *see also* United States v. Morrison, 529 U.S. 598, 617 (2000) (finding no federal police power).

37. *See, e.g.*, 18 U.S.C. § 1708 (2012) (prohibiting theft of mail); *see also* Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531-32 (1870) *abrogated on other grounds by* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 325 n.21 (2002); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819) (quoting U.S. CONST. art. I, § 8, cl. 7).

38. *See, e.g.*, *Ex parte* Jackson, 96 U.S. 727, 736 (1877) (finding that the federal government may forbid materials from being mailed that are "injurious to the public morals").

39. *See* Bond v. United States, 134 S. Ct. 2077, 2086 (2014) ("A criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.'" (quoting United States v. Fox, 95 U.S. 670, 672 (1878))); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821) ("Congress cannot punish felonies generally.").

40. U.S. CONST. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2.

the same extent as state governments.[41] But the Necessary and Proper Clause cannot allow Congress to extend its plenary power beyond the District of Columbia or federal property, regardless of whether it would further the same goal of justifying the enactment within those areas, i.e., reducing violence or protecting the environment.[42]

The clauses discussed above enable the federal government to pursue any public policy goal while acting within the scope of those powers. But these goals cannot extend the government's power any further because the Necessary and Proper Clause gives the federal government no additional means to pursue those goals. The only "end" that the federal government can rely on under this clause is the exercise of an enumerated power.[43] Otherwise, the Necessary and Proper Clause would give the federal government a police power.[44]

III. THE FEDERAL GOVERNMENT MAY REGULATE BEYOND ITS COMMERCE CLAUSE POWER ONLY IF NECESSARY TO AVOID FRUSTRATING A COMPREHENSIVE REGULATORY SCHEME'S ABILITY TO FUNCTION AS A REGULATION OF COMMERCE

As explained above, the Supreme Court has recognized that the federal government can pursue a wide variety of public policy goals under some of its enumerated powers, but cannot rely on these ends to extend its power under the Necessary and Proper Clause. The federal government's ability to extend its power beyond the Commerce Clause is similarly limited.

Like these other clauses, the power to regulate commerce is both an "end" and a "means." Under the Commerce Clause, the federal government may regulate commerce in pursuit of non-commerce-related goals.[45] Among other things, the Clause empowers the federal government to regulate economic activity that has a substantial effect on interstate commerce.[46] Under modern precedent, it can regulate this

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41. *See* Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 604 (1987) (citing U.S. CONST. art. IV, § 3, cl. 2).

42. *See Bond*, 134 S. Ct. at 2086 (quoting *Fox*, 95 U.S. at 672).

43. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

44. *See id.*

45. *See* Hodel v. Indiana, 452 U.S. 314, 329 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964); Lottery Case, 188 U.S. 321, 355-56 (1903).

46. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (citing Wickard v. Filburn, 317 U.S. 111, 125 (1942)); United States v. Morrison, 529 U.S. 598, 615-17 (2000) (finding that the federal government cannot regulate noneconomic activity, like gender-based violence, because any impacts on interstate commerce are attenuated); United States v. Lopez, 514 U.S. 549, 567 (1995) (finding that the federal government cannot regulate noneconomic activity, like possession of a gun, that does not substantially and directly affect

economic activity to do more than merely ensure the free flow of goods across state lines.[47]

For example, in *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court refused to declare a regulation of economic activity unconstitutional because Congress's purpose was to stamp out racial discrimination—a moral wrong.[48] It has also upheld federal regulation of economic activity related to lotteries and drug use despite the obvious moral, rather than commercial, justification for the enactment.[49] And it has allowed the federal government to regulate industries to protect the environment.[50] But none of these ends can extend Congress's power to pursue them through means other than regulating economic activity that has a substantial effect on interstate commerce.

The Supreme Court explained the application of the Necessary and Proper Clause to the Commerce Clause in *Raich*.[51] In that case, the Court upheld federal regulation of the production and possession[52] of homegrown marijuana intended for private medical use.[53] The Court sustained the prohibition because Congress could have rationally

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interstate commerce); *Wickard*, 317 U.S. at 127-28; *see also* Gonzales v. Raich, 545 U.S. 1, 25-26 (2005) (defining economic activity as "the production, distribution, and consumption of commodities" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 720 (Philip Babcock Gove et al. eds., 1966)).

47. *See* Barnett, *supra* note 26, at 146.

48. 379 U.S. at 257.

49. *See Lottery Case*, 188 U.S. at 355-56 (lotteries); *cf. Raich*, 545 U.S. 1, 30-32 (marijuana).

50. *See Hodel*, 452 U.S. at 329 (regulating mining).

51. It was initially unclear whether *Raich* was a Commerce Clause or Necessary and Proper Clause case. Justice Stevens, writing for the majority, cited both but did not make clear which he was relying on. 545 U.S. at 22 (quoting U.S. CONST. art. I, § 8, cls. 3, 18). Justice Scalia, concurring, argued that it was a Necessary and Proper Clause case. *Id.* at 35 (Scalia, J., concurring). This controversy was later resolved by Chief Justice Roberts, in favor of the Necessary and Proper Clause. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2592-93 (quoting 545 U.S. at 22) (citing 545 U.S. at 19, 22).

Since the *National Federation of Independent Business* decision was issued, it has been debated whether the Chief Justice's entire analysis is dicta. *Compare* Timothy Sandefur, *So It's a Tax, Now What?: Some of the Problems Remaining After* NFIB v. Sebelius, 17 TEX. REV. L. & POL. 203, 212 (2013), *with* David Post, *Dicta on the Commerce Clause*, VOLOKH CONSPIRACY (July 1, 2012, 6:40 PM), http://www.volokh.com/2012/07/01/dicta-on-the-commerce-clause. Because the Court sustained the act only by adopting the Chief Justice's "saving construction"—which was only necessary because, as written, the individual mandate was invalid under the Commerce and Necessary and Proper Clauses—the Chief Justice's analysis was necessary to the decision and not dicta. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2600-01; Randy E. Barnett, *The Disdain Campaign*, 126 HARV. L. REV. F. 1, 10 (2012).

52. The Necessary and Proper Clause is implicated because the mere possession of something, even if that something is an object of commerce, is beyond the Commerce Clause power. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (finding that the federal government cannot regulate gun possession).

53. 545 U.S. at 5.

believed that failing to regulate the production and possession of homegrown marijuana would frustrate its "comprehensive regulatory scheme" to regulate an interstate market for a fungible commodity.[54] This authority is "narrow in scope" and "incidental" to the exercise of the commerce power.[55]

Whether a regulated activity is necessary to avoid frustrating a comprehensive economic regulatory scheme is analyzed under a deferential, rational basis standard.[56] But what end it is "necessary" to achieve is determined by the Court.[57] To date, the Court has confronted relatively easy cases—the challenged regulations were part of comprehensive schemes to regulate an industry or the market for a commodity.[58] But if a regime broadly regulates human activity to pursue some other end, the Court would have to strike it down lest it convert the Necessary and Proper Clause into a police power.

In fact, the Supreme Court has implicitly done this in *United States v. Lopez* and *United States v. Morrison*.[59] In each case, the constitutionality of a single criminal prohibition adopted as part of an omnibus crime bill was challenged.[60] It could hardly be denied that these

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54. *Id.* at 22 (reasoning that the Controlled Substances Act is "comprehensive legislation to regulate the interstate *market in a fungible commodity*" (emphasis added)); *id.* at 24-25 (finding the drug classification to be an "essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut" (quoting *Lopez*, 514 U.S. at 561 (emphasis added))); *id.* at 25 (describing the statute as "quintessentially economic"); *see Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2592; *cf.* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 571 (2005) (Souter, J., dissenting) (discussing whether speech may be regulated as part of a comprehensive regulatory scheme); United States v. United Foods, Inc., 533 U.S. 405, 411-12 (2001).

55. If constrained to comprehensive schemes to regulate economic activity or a commodity, the power recognized in *Raich* is a limited one. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2592-93 (citing *Raich*, 545 U.S. at 19, 22-23; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819)). Otherwise, it would not be limited.

56. This aspect of *Raich* has received substantial criticism on originalist and policy grounds. *See* Martin D. Carcieri, Gonzales v. Raich*: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PA. J. CONST. L. 1131, 1144, 1146 (2007); Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 516-17 (2006) (quoting *Raich*, 545 U.S. at 22; *Lopez*, 514 U.S. at 561).

57. *See Raich*, 545 U.S. at 22 (citing *Lopez*, 514 U.S. at 557); Burroughs v. United States, 290 U.S. 534, 547-48 (1934) (citing Stephenson v. Binford, 287 U.S. 251, 272 (1932)).

58. *See, e.g.*, *Raich*, 545 U.S. at 22 (comprehensive regulation of marijuana market); Hodel v. Indiana, 452 U.S. 314, 329 (1981) (comprehensive regulation of mining); Andrus v. Allard, 444 U.S. 51, 54-56, 56 n.2 (1979) (citing United States v. Allard, 397 F. Supp. 429, 432 (D. Mont. 1975)) (comprehensive regulation of bald eagles and their byproducts); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (comprehensive regulation of the market for wheat).

59. *See* United States v. Morrison, 529 U.S. 598, 615-17 (2000); *Lopez*, 514 U.S. at 561.

60. The Gun Free School Zones Act was but a small part of the Crime Control Act of 1990, which regulated a host of criminal acts, including money laundering, child abuse, drug trafficking, juvenile offenses, and gun possession near school zones. *See* 18 U.S.C. §§ 1-24

bills would constitute comprehensive schemes to regulate crime.[61] And, because of their sweep, some economic activity was regulated by them.[62] Yet, the Court gave no consideration to whether these provisions could be upheld as necessary to comprehensive schemes to regulate crime.[63] Nor could it have without running afoul of its repeated admonitions that the enumerated powers cannot be interpreted to convey the police power.[64]

IV. THE ENDANGERED SPECIES ACT PROHIBITS HARM TO SPECIES WITH NO RELATIONSHIP TO COMMERCE

In 1973, Congress adopted the Endangered Species Act "to provide a means whereby the ecosystems upon which . . . species depend may be conserved."[65] Congress enacted the statute to prevent further loss of biodiversity out of environmental, ethical, and economic concerns.[66] Although it was concerned that species loss was a consequence of economic growth and that the economy would ultimately suffer by the loss of biodiversity, the act was not tailored to regulate the economy. Rather, it pursues its goal of preserving ecosystems and biodiversity directly.[67]

(1994). Similarly, the Violence Against Women Act was a small part of the Violent Crime Control and Law Enforcement Act of 1994. *See* 42 U.S.C. § 13701 (1994).

61. *See Raich*, 545 U.S. at 23.

62. *See, e.g.*, United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993) (discussing a prosecution for violating the Gun Free School Zones Act by bringing a gun to school to deliver to a classmate for money), *aff'd*, 514 U.S. 549.

63. *See Morrison*, 529 U.S. at 613-18; *Lopez*, 514 U.S. at 561 (characterizing the test as whether the activity being regulated 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" (emphasis added)).

64. *See, e.g.*, *Lopez*, 514 U.S. at 566 (citing U.S. CONST. art. I, § 8).

65. Endangered Species Act, 16 U.S.C. § 1531(b) (2012); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1242-43 (2001) (citing 16 U.S.C. §§ 1533(a)-(d), (f), 1534, 1538, 1540 (1994)).

66. *See* H.R. REP. NO. 93-412, at 4-5 (1973); *Endangered Species: Hearing Before the Subcomm. on Fisheries & Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine & Fisheries*, 93rd Cong. 279-80 (1973) (statement of Rep. Robert A. Roe); *id.* at 281 (statement of Rep. G. William Whitehurst); *id.* at 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth, Wash., D.C.); *id.* at 306–07 (statement of Stephen R. Seater, Director, Pub. Relations, Defenders of Wildlife); *see also* J.B. Ruhl, *Past, Present, and Future Trends of the Endangered Species Act*, 25 PUB. LAND & RESOURCES L. REV. 15 (2004); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996).

67. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) (quoting 16 U.S.C. § 1531(c) (1976)); Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 3-4 (1996) (citing 16 U.S.C. § 1531-1542 (1994)); Brian E. Gray, *The Endangered Species Act: Reform or Refutation?*, 13 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 1, 1-2 (2007); Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 953, 971 (1997) (quoting 16 U.S.C. § 1531(b) (1994)).

It does this by establishing two lists: one of endangered[68] and one of threatened[69] species.[70] Once listed, the act protects these species by requiring federal agencies to "seek to conserve" them,[71] providing for the designation of "critical habitat,"[72] and criminalizing "take."[73] This last protection is a "sweeping prohibition on the taking of endangered species."[74] For good reason, innocent activities such as protecting a cemetery and an airport runway from a rodent infestation, pumping water to irrigate farmland, protecting cattle from predators, and building a hospital have all been prohibited under this provision.[75] The take prohibition forbade all of these because it broadly prohibits *all* activities that harm *any* member of a listed species or its habitat.[76]

The take prohibition has been widely criticized on policy and constitutional grounds.[77] Because of the prohibition's breadth, the

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68. 16 U.S.C. § 1532(6) (2012) (defining "endangered species").

69. *Id.* § 1532(20) (defining "threatened species").

70. *Id.* § 1533(a); *see* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1034 (1997) (citing 16 U.S.C. § 1533(b)(1)(A) (1994)).

71. 16 U.S.C. § 1531(c); *see Tenn. Valley Auth.*, 437 U.S. at 174 (finding that agencies must conserve species at all cost because "Congress intended endangered species to be afforded the highest of priorities"). In *Tennessee Valley Authority*, the survival of a small fish, the snail darter, was threatened by the completion of a nearly finished dam that had cost $100 million to build. *See id.* at 172-73. The Supreme Court construed the Endangered Species Act to forbid the government from finishing the dam in light of the threat to the snail darter. *Id.* at 174; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 628 (1990).

72. 16 U.S.C. § 1533(a)(3)(A)(i); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 296-97 (1993) (citing 16 U.S.C. § 1536(a)(2) (1988); *id.* § 1533(a)(3) (1988)).

73. 16 U.S.C. § 1538(a)(1)(B) (2012); *id.* § 1532(19) (defining "take"); *see* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 703-04 (1995) (quoting S. REP. NO. 93-307, at 7 (1973)) (upholding broad interpretation of take); Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991). Although the statute only prohibits the take of endangered species, the prohibition has been extended to threatened species by regulation. *See* 50 C.F.R. § 17.31 (2014); *see also* 16 U.S.C. § 1533(d) (2012).

74. *See Tenn. Valley Auth.*, 437 U.S. at 175 (citing 16 U.S.C. § 1534(c)) (distinguishing the Endangered Species Act of 1973 from its 1966 predecessor by noting that "[t]he 1966 statute was not a sweeping prohibition on the taking of endangered species").

75. *See* San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1169-70 (9th Cir. 2011) (quoting Laub v. U.S. Dep't of Interior, 342 F.3d 1080, 1086 (9th Cir. 2003)); Gibbs v. Babbitt, 214 F.3d 483, 489 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1044-45 (D.C. Cir. 1997); Jim Carlton, *In Utah, a Town Digs Deep To Battle Prairie Dogs*, WALL ST. J. (May 6, 2012, 10:12 PM) http://www.online.wsj.com/article/SB10001424052702304020104577384642186959960.html; *see also* Edward A. Fitzgerald, *Seeing Red:* Gibbs v. Babbitt, 13 VILL. ENVTL. L.J. 1, 3 (2002).

76. 16 U.S.C. § 1538(a)(1)(B).

77. *See* Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, *in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED

regulation falls particularly harshly on individuals who own property inhabited by protected species.[78] Often, the presence of species means that the owner cannot do anything with her property, lest developing or using it results in some harm to a resident species.[79] This has led some to worry that landowners will destroy these species before their presence is discovered by regulators, a phenomenon known as "shoot, shovel, and shut up."[80] As a result, the prohibition may be counterproductive—both extremely burdensome *and* ultimately harmful to the species it purports to protect.[81]

The constitutionality of the prohibition has also been controversial.[82] The federal government's authority to regulate the take of species found

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SPECIES ACT REFORM 6-7 (Jonathan Adler ed., 2011); Holly Doremus, *The Endangered Species Act: Static Law Meets Dynamic World*, 32 WASH. U. J.L. & POL'Y 175, 175 (2010); Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 ENVIRONS ENVTL. L. & POL'Y J. 105, 113-16 (2014).

78. *See* R. Neal Wilkins, *Improving the ESA's Performance on Private Land*, *in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM, *supra* note 77, at 56; Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 438-41 (1994); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 380-81 (2000); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 306 (1997).

79. *See* Gidari, *supra* note 78, at 439 (quoting Rob Taylor, *Preserving Forests May Pay Off*, SEATTLE POST-INTELLIGENCER, Oct. 13, 1990, at B1); Jonathan Wood, *PLF Asks Court To Rule on the Constitutionality of Utah Prairie Dog Regulation*, PAC. LEGAL FOUND. LIBERTY BLOG (Nov. 19, 2013), http://blog.pacificlegal.org/2013/plf-asks-court-to-rule-on-the-constitutionality-of-utah-prairie-dog-regulation/; Jonathan Wood, *PLF Fights Crippling, and Unconstitutional, Regulations that Put a Rodent Above the Constitutional Rights of People*, PAC. LEGAL FOUND. LIBERTY BLOG (Apr. 18, 2013), http://blog.pacificlegal.org/2013/plf-fights-crippling-and-unconstitutional-regulations-that-put-a-rodent-above-the-constitutional-rights-of-people/ (stating that the protection of the Utah prairie dog prevented people from starting businesses and protecting a cemetery from a rodent infestation).

80. RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 356 (2014) (quoting Ronald Bailey, *"Shoot, Shovel, and Shut Up": Celebrating 30 Years of Failing to Save Endangered Species*, REASON MAG. (Dec. 31, 2003, 12:00 AM), http://reason.com/archives/2003/12/31/shoot-shovel-and-shut-up); *see* Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 28 (2003).

81. Brian Seasholes, *Fulfilling the Promise of the Endangered Species Act: The Case for an Endangered Species Reserve Program* 7 (Reason Found., Policy Study No. 433, 2014); *see* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 303 (1996).

82. Supporters of the act have confidently asserted that the prohibitions' constitutionality is not subject to any serious doubt. *See, e.g.*, Michael C. Blumm & George A. Kimbrell, *Clear the Air:* Gonzalez [sic] v. Raich*, the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 494 (2005); Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 314 (2004); 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.

in only one state with little to no appreciable connection to interstate commerce has been challenged seven times.[83] In all but one of those cases, the court determined that the federal government has the authority to regulate the species under either the Commerce Clause or the Necessary and Proper Clause.[84] But in doing so, the courts have adopted conflicting rationales.[85] Two found constitutional authority under the Commerce Clause because the particular plaintiff wished to engage in economic activity.[86] Two upheld it under the Commerce or Necessary

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REV. 723, 793-95 (2002); Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 321 (1996); Philip Weinberg, *Endangered Statute? The Current Assault on the Endangered Species Act*, 17 VILL. ENVTL. L.J. 389, 389 (2006); *cf.* Robert J. Pushaw, Jr. & Grant S. Nelson, *The Likely Impact of* National Federation *on Commerce Clause Jurisprudence*, 40 PEPP. L. REV. 975, 995 (2013). Critics have argued that it cannot be upheld without eroding the Commerce and Necessary and Proper Clauses' limits. *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 406 (2005) (citing 16 U.S.C. §§ 1531-1544 (2000)); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 178-80 (1998).

83. *See* San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) (delta smelt); Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007) (Alabama sturgeon); GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (cave bugs); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (arroyo toad); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (red wolf); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi-sands flower loving fly); People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337 (D. Utah 2014) (Utah prairie dog).

84. The one exception is the most recent case on this issue: *People for the Ethical Treatment of Property Owners*, 57 F. Supp. 3d at 1346.

85. *See* Adler, *supra* note 82, at 406 (citing 16 U.S.C. § 1538(a) (2000)); John C. Eastman, *A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*, 2003-2004 CATO SUP. CT. REV. 469, 470; Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause? The Split in the Circuits over Whether the Regulated Activity Is Private Commercial Development or the Taking of Protected Species*, 69 BROOK. L. REV. 923, 991-92 (2004); *see also* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 259 (2005).

86. *Gibbs*, 214 F.3d at 495; *Rancho Viejo*, 323 F.3d at 1072; *see* Mank, *supra* note 85, at 934. *But see GDF Realty*, 326 F.3d at 634 (rejecting this argument because it would "effectually obliterate" limits on the federal government's power) (quoting Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)). In *Rancho Viejo*, Chief Judge Ginsburg wrote separately to explain that he would have limited the application of the take prohibition to economic activities. 323 F.3d at 1080 (Ginsburg, J., concurring). Although I cannot go into a detailed refutation of this argument here, these decisions cannot be squared with *United States v. Lopez*, which requires the court to look to the statute or regulation to define the nature of the activity being regulated, not the particular plaintiff. *See* 514 U.S. 549, 559-60 (1995); Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting) (citing *Rancho Viejo*, 323 F.3d at 1071-73); Jason Everett Goldberg, Note, *Substantial Activity and Non-Economic Commerce: Toward a New Theory of the Commerce Clause*, 9 J.L. & POL'Y 563, 600, 602 (2001) (citing United States v. Morrison, 529 U.S. 598, 608-10 (2000)). In fact, the D.C. and Fourth Circuits' rationale would have required Lopez's conviction to be upheld since he was paid to possess a gun in a school zone while delivering it to a classmate. *See* United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549.

and Proper Clause by aggregating all activities affecting all species threatened with extinction, finding that these activities threaten biodiversity, and that biodiversity has a substantial effect on interstate commerce.[87] Four, including both of the cases since *Raich*, upheld it under the Necessary and Proper Clause.[88]

In the lone case holding that the federal government exceeded its constitutional authority, the United States District Court for the District of Utah held that the regulation prohibiting the take of Utah prairie dogs could not be upheld under the Commerce Clause because, on its face, it is not a regulation of economic activity[89] that has a substantial effect on interstate commerce.[90] Nor can it be upheld under the Necessary and Proper Clause because the Utah prairie dog is not used in any economic activity or related to any commodity.[91]

In the next Part, this Article will explain why the courts of appeals that have relied on *Raich* to sustain the take prohibition have misapplied that decision by failing to recognize that the Necessary and Proper Clause is limited to authorizing regulations necessary to the regulation of commerce. A regulation of all activity that might harm species, even

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87. We will call this the "biodiversity" argument. *See Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1273; *Nat'l Ass'n of Home Builders*, 130 F.3d at 1053-54. *But see GDF Realty*, 326 F.3d at 638 (finding that this type of aggregation "would render meaningless any 'economic nature' prerequisite"). This "butterfly effect" approach to aggregation would eviscerate the Constitution's limits. *See* United States v. Wang, 222 F.3d 234, 239 (6th Cir. 2000) (describing the "butterfly effect"). All living things—including humans—are part of the ecosystem, yet clearly the federal government cannot regulate any activity affecting any human being as this would be the police power. *See* Adler, *supra* note 82, at 414; Nagle, *supra* note 82, at 198-99; *see also infra* notes 131-133 and accompanying text.

88. *See San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1177 (quoting Gonzales v. Raich, 545 U.S. 1, 17 (2005)); *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1274 (quoting *Raich*, 545 U.S. at 24); *GDF Realty Invs.*, 326 F.3d at 640 (5th Cir. 2003) (holding that the Endangered Species Act is a comprehensive regulatory scheme to protect the "interdependent web" of all species); Gibbs v. Babbitt, 214 F.3d 483,497 (4th Cir. 2000); *see also San Luis & Delta-Mendota Water Auth.*, 638 F.3d 1163); Dan A. Akenhead, Note, *Federal Regulation of Noncommercial Intrastate Species Under the ESA After* Alabama-Tombigbee Rivers Coalition v. Kempthorne *and* Stewart & Jasper Orchards et al. v. Salazar, 53 NAT. RESOURCES J. 325, 326 (2013) (citing *Ala.-Tombigee Rivers Coal.*, 477 F.3d 1250; John Gregory Koch, Comment, *Congress, Cave Bugs, Courts and the Commerce Clause: Did the Fifth Circuit Figure Out How to Regulate Intrastate Activity Under the Endangered Species Act?*, 16 VILL. ENVTL. L.J. 309, 312 (2005); Weinberg, *supra* note 82, at 389.

89. People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 1344 (D. Utah 2014) (quoting Plaintiff's Notice of Motion and Motion for Summary Judgment at 24, *People for the Ethical Treatment of Prop. Owners*, 57 F. Supp. 3d 1337 (No. 2:13-cv-00278)).

90. *Id.* at 1344-46 (citing Federal Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment at 12, *People for the Ethical Treatment of Prop. Owners*, 57 F. Supp. 3d 1337 (No. 2:13-cv-00278)).

91. *Id.* at 1345-46.

those that are not a commodity or used in economic activity, is not within this power.

V. MUCH OF THE ACTIVITY REGULATED BY THE TAKE PROHIBITION IS NOT NECESSARY TO AVOID FRUSTRATING THE FEDERAL GOVERNMENT'S ABILITY TO REGULATE COMMERCE

The Endangered Species Act's take prohibition regulates any activity, including noneconomic activity, in order to effectuate its purpose of conserving species and ecosystems.[92] Because the prohibition is not limited to economic activities, the reach of the prohibition can only be upheld, if at all, under the Necessary and Proper Clause.[93] But because the listing process is not limited to those species with some tie to interstate commerce, many of the activities regulated by the prohibition are wholly unnecessary to the federal government's ability to regulate economic activity or the market for any commodity.[94] This distinguishes the Endangered Species Act's broad take prohibition from the prohibition upheld in *Andrus v. Allard* and cited favorably in *Raich*.[95]

A few examples will illustrate this distinction. Consider the regulation that prohibits the take of the Utah prairie dog.[96] This rodent has only the most tenuous connections to interstate commerce. Neither it nor any byproduct of it is bought or sold.[97] It is not used as part of any commercial process.[98] Yet the regulation would forbid noneconomic

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92. *See supra* notes 73-76 and accompanying text.

93. Most of the cases finding federal authority, including both since *Raich* was decided, have relied on the Necessary and Proper Clause. *See Gibbs*, 214 F.3d at 497; *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1177; *Ala.-Tombigbee Rivers Coal.*, 477 F.3d at 1274; *GDF Realty Invs.*, 326 F.3d at 638-39; *cf.* Printz v. United States, 521 U.S. 898, 923 (1997) (stating that the Necessary and Proper Clause is the "last, best hope of those who defend ultra vires congressional action").

94. *See* 16 U.S.C. § 1533(a) (2012).

95. *See* 444 U.S. 51, 63 (1979) (upholding a prohibition against bald eagle takes as part of a comprehensive regulation of the market for eagle feathers and products made with them). The take prohibition is similarly distinguishable from the government's regulation of the mining industry to protect the environment. Hodel v. Indiana, 452 U.S. 314, 329 (1981) (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281-82 (1981)).

96. *People for the Ethical Treatment of Prop. Owners*, 57 F. Supp. 3d at 1340 (citing Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158 (proposed Aug. 2, 2012) (to be codified at 50 C.F.R. pt. 17)).

97. *See id.* at 1344-47; Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158; Endangered and Threatened Wildlife and Plants; Final Rule To Reclassify the Utah Prairie Dog as Threatened, with Special Rule To Allow Regulated Taking, 49 Fed. Reg. 22,330 (proposed May 29, 1984) (to be codified at 50 C.F.R. pt. 17).

98. *See People for the Ethical Treatment of Prop. Owners*, 57 F. Supp. 3d at 1344-47; Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie

activities affecting any of the animals, including a child throwing a rock at one of them.[99] If the federal government had no authority to regulate this child's activity, would its ability to regulate some industry, like agriculture or construction, be frustrated?[100] Would it be unable to protect other species for which there is an existing market?[101] Obviously, the answer to these questions is no.

Take the example of the Delhi Sands Flower-Loving Fly. This species is also not bought and sold, nor is it used for any commercial purpose.[102] Yet the federal government forbids any activity that might harm it, whether that is the construction of a hospital[103] or an annoyed person swatting one.[104] The federal government's ability to regulate the construction industry or waste disposal, both of which affect the Fly, is not undermined by denying it the power to regulate any individual who swatted one out of annoyance.[105] Nor would the federal government's ability to regulate the market for a commodity be frustrated if this act was beyond its reach. So why have so many courts upheld the federal government's authority in this arena? The simple answer is that they have not correctly identified *Raich*'s limit.

For example, the United States Court of Appeals for the Ninth Circuit upheld federal regulation of the take of the delta smelt, identifying no limits on the federal government's authority under *Raich*.[106] It rejected the argument that a *Raich* scheme has to be a comprehensive scheme to regulate economic activity or the market for a commodity.[107] As a consequence, the court never considered for what purpose the regulation was necessary.[108] According to the Ninth Circuit, as long as the broad regulatory scheme has some effect on interstate commerce—and it is difficult to imagine a broad scheme that would not—the

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Dog, 77 Fed. Reg. 46,158; Endangered and Threatened Wildlife and Plants; Final Rule To Reclassify the Utah Prairie Dog, 49 Fed. Reg. at 22,330.

99. *See* Endangered and Threatened Wildlife and Plants; Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158-59.

100. Both of these industries impact the Utah prairie dog. *See People for the Ethical Treatment of Prop. Owners*, 57 F. Supp. 3d at 1344.

101. *See id.* at 1345-46 (citing Gonzales v. Raich, 545, U.S. 1, 17-22 (2005)).

102. *See* Nagle, *supra* note 82, at 181-83.

103. *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1043 (D.C. Cir. 1997).

104. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, J., concurring) (noting that the text of the take prohibition would apply to the lone hiker in the woods who harms a listed species and arguing that this would be unconstitutional).

105. *See Nat'l Ass'n of Home Builders*, 130 F.3d at 1063 (Sentelle, J. dissenting).

106. *See* San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1175, 1177 (9th Cir. 2011) (quoting *Raich*, 545 U.S. at 17).

107. *Id.* at 1177.

108. *See id.*

government may regulate any activity, for any purpose, as part of that scheme.[109]

The United States Court of Appeals for the Eleventh Circuit used similarly flawed reasoning.[110] Because the Endangered Species Act prohibits all interstate and foreign commerce in endangered species, the court concluded that it is a comprehensive regulatory scheme with a substantial relation to commerce.[111] It also noted that biodiversity has incalculable impacts on interstate commerce, and at least some of the species regulated by the act are objects of commerce.[112] The court determined that the full scope of the act was necessary because Congress could have rationally concluded that any species could be the subject of commerce at some point in the future.[113] According to the Eleventh Circuit, mere speculation of future commerce is sufficient to justify comprehensive regulation.

Although the United States Court of Appeals for the Fifth Circuit acknowledged that a comprehensive regulatory scheme must be an economic scheme, it failed to properly apply *Raich*'s limits.[114] It found it "obvious" that a majority of takes would result from economic activity.[115] As a consequence of this and the potential for future commerce related to species, the Fifth Circuit determined that the Endangered Species Act is a comprehensive economic scheme.[116] According to the court, regulation of noneconomic activities affecting species with no tie to commerce—like cave bugs—is essential to that scheme because, without this power, the federal government's regulation of the "interdependent web" of all species would be frustrated.[117] And Congress could not be limited to protecting only certain species because it could not predict which would have a substantial effect on interstate commerce at some point in the future.[118]

Likewise, the United States Court of Appeals for the Fourth Circuit upheld the federal government's authority in this arena because the Endangered Species Act is "a comprehensive and far-reaching piece of legislation that aims to conserve the health of our national

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109. *See id.* at 1175, 1177 (quoting *Raich*, 545 U.S. at 17).

110. *See* Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1271-77 (11th Cir. 2007).

111. *Id.* at 1273 (citing 16 U.S.C. § 1538(a)(1)(F) (2006)).

112. *Id.* at 1273 (quoting H.R. REP. NO. 93-412, at 4 (1973)).

113. *See id.* at 1275.

114. *See* GDF Realty Invs. V. Norton, 326 F.3d 622, 639-41 (5th Cir. 2003).

115. *Id.* at 639.

116. *See id.* at 640-41.

117. *See id.* at 640 (quoting H.R. REP. NO. 93-412, at 6, 10 (1973)).

118. *See id.* at 639 (quoting S. REP. NO. 91-526, at 3 (1969)).

environment."[119] To effectuate that environmental purpose, it was reasonably necessary, according to the court, for the federal government to regulate any activity that affects any species.[120]

The rationales used to sustain the federal government's authority to regulate all activities affecting any species have to be rejected as inconsistent with the concept of limited federal power and the extensive line of precedent discussed above.[121] Take the courts' reliance on deference to the legislature.[122] Contrary to these decisions, the judiciary must determine what end the regulation of noneconomic activity is necessary to achieve.[123] Only the degree of necessity is subject to deferential review.[124]

Courts must determine whether the regulation is necessary to a legitimate end under the Necessary and Proper Clause, i.e., the execution of an enumerated power before assessing the degree of necessity.[125] Other public policy goals, be they reducing crime or protecting the environment, have no place in the analysis.[126] When courts have upheld this regulation because it would be improper for the courts to second-guess Congress's judgment whether these legislative goals are good public policy, they were asking the wrong question. They were applying the Due Process Clause's test, not the standard under *Raich*.[127]

Next, consider the argument that the federal government could reasonably think it necessary to regulate all activities affecting any species because it cannot predict which species could substantially

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119. Gibbs v. Babbitt, 214 F.3d 483, 497 (4th Cir. 2000).

120. *See id.* at 498.

121. *See supra* Part I-II.

122. *See Gibbs*, 214 F.3d at 501-02; Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1276-77 (11th Cir. 2007).

123. *See* Burroughs v. United States, 290 U.S. 534, 547-48 (1934) (citing Stephenson v. Binford, 287 U.S. 251, 272 (1932)); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (noting that if the limits of the Necessary and Proper Clause are not closely guarded by the courts, it will become a "pretext . . . for the accomplishment of objects not entrusted to the government"); *see also* United States v. Lopez, 514 U.S. 549, 566 (1995) (noting that limits on enumerated powers must be judicially enforceable).

124. *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (citing *Lopez*, 514 U.S. at 557); *supra* notes 55-57 and accompanying text.

125. *See supra* notes 22-27 and accompanying text (discussing the Necessary and Proper Clause generally); *supra* notes 51-64 (discussing *Raich*).

126. *See, e.g.*, Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 248 (1960) (explaining that the Necessary and Proper Clause does not give the federal government authority to subject civilian dependents to military tribunals even though it could subject servicemen to them for the same offenses); *see also supra* notes 33-42 and accompanying text.

127. *See supra* notes 22-27 and accompanying text.

impact interstate commerce at some point in the future.[128] This argument, if accepted, would allow the government to regulate anything.[129] Just as Congress cannot predict which species could hold the cure for cancer, it cannot predict which person might discover the cure. Yet, the federal government cannot generally prohibit violent crimes on the theory that the victim *could* have found that cure.[130] Just as hypothetical future commerce could not justify the individual insurance mandate in *National Federation of Independent Business v. Sebelius*, it cannot justify the take prohibition.[131]

Similarly, the biodiversity argument must be rejected because it would justify a federal police power. All species contribute to biodiversity and affect the environment, including humans.[132] Just as it can regulate crime and morality when regulating economic activity under the Commerce Clause, the federal government can pursue environmental protection while exercising this power.[133] But it cannot go beyond the Commerce Clause to comprehensively regulate any activity affecting anything that could affect the environment. If it could, it could regulate any activity that affects any person because, obviously, people affect the environment. But this would be a federal police power.[134]

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128. *See* Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1275 (11th Cir. 2007); GDF Realty Invs. v. Norton, 326 F.3d 622, 639 (5th Cir. 2003) (quoting S. REP. NO. 91-526, at 3 (1969)).

129. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2590 (2012) (rejecting potential future commerce as a basis for federal authority to regulate); United States v. Comstock, 130 S. Ct. 1949, 1964 (2010) (finding that every exercise of the Necessary and Proper Clause must be "legitimately predicted on an enumerated power").

130. *See* United States v. Morrison, 529 U.S. 598, 612-13 (2000) (quoting United States v. Lopez, 514 U.S. 549, 564 (1995)); *Lopez*, 514 U.S. at 560-61. This analogy is particularly apt since the Endangered Species Act essentially prohibits violent acts directed at a listed species. *See* 16 U.S.C. § 1538(a)(2)(B) (2012).

131. *See* 132 S. Ct. at 2590.

132. *See GDF Realty*, 326 F.3d at 640 (quoting H.R. REP. NO. 93-412, at 6 (discussing the "interdependent web" of all species)); *cf.* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994) (discussing the complexity of measuring the value of untraded resources).

133. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7412 (2012) (providing emissions limitations for major sources of air pollutants, i.e., industrial smokestacks); *see also supra* notes 45-50 and accompanying text.

134. *See supra* notes 56-64 and accompanying text. Nor can this result be avoided by relying on the fact that the Endangered Species Act only applies to listed species. The question is whether the theory of the Necessary and Proper Clause required to uphold a regulation is limited, not whether the challenged regulation has some limit. *See* Gonzales v. Raich, 545 U.S. 1, 73 (2005) (Thomas, J., dissenting) (citing *Lopez*, 514 U.S. at 600-01 (Thomas, J., concurring)). Otherwise, any federal assertion of power would be kosher so long as the government stopped short of full-fledged authoritarianism. Clearly, this is not required for a federal enactment to be ultra vires. *See Morrison*, 529 U.S. at 613-17; *Lopez*, 514 U.S. at 560.

Finally, consider the argument that because the majority of takes will result from economic activity, those that result from noneconomic activity cannot be excised.[135] This argument confuses the standard that applies under the Commerce Clause with that of the Necessary and Proper Clause.[136] Intrastate economic activities cannot be excised from a class of similar economic activities under the Commerce Clause.[137] If they could, the Commerce Clause power would die a death of a thousand cuts, because every class of economic activities could be divided into small enough subclasses to eliminate any substantial effect on interstate commerce.[138]

But the same analysis does not apply under the Necessary and Proper Clause. Under this clause, the regulated activity must be necessary to avoid frustrating a comprehensive scheme to regulate economic activity or the market for a commodity.[139] The mere fact that some of the activity regulated by a comprehensive scheme is economic activity that the federal government may regulate under the Commerce Clause says nothing about whether other noneconomic activities regulated by the scheme are necessary to its ability to function as a regulation of commerce.[140] As explained, this standard is not satisfied for noneconomic activities affecting species with no appreciable connection to interstate commerce.[141]

VI. CONCLUSION

That the federal government's powers are subject to judicially enforceable limits is no mere shibboleth.[142] The Supreme Court has consistently reaffirmed this principle, and *Raich* need not be construed to abandon it *sub silentio*. *Raich* can be reconciled with the principle of limited federal power by recognizing that it only allows for the regulation of noneconomic activity if necessary to avoid frustrating a comprehensive federal scheme's ability to regulate economic activity or the market for a commodity.

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135. *See, e.g.*, *GDF Realty Invs.*, 326 F.3d at 639.

136. *See Raich*, 545 U.S. at 22 (quoting *Lopez*, 514 U.S. at 557).

137. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (citing Nat'l Labor Relations Bd. v. Fainblatt, 306 U.S. 601, 606 (1939)).

138. *See id.* (citing *Fainblatt*, 306 U.S. at 606).

139. *See Raich*, 545 U.S. at 22 (citing U.S. CONST. art. I, § 8, cls. 3, 18).

140. *See id.* at 73 (Scalia, J. concurring) (quoting *Lopez*, 514 U.S. at 600 (Thomas, J., concurring)); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (indicating that government's interest in protecting society from the violent crimes committed by their dependents).

141. *See supra* notes 92-105 and accompanying text.

142. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

This standard is not satisfied for the Endangered Species Act's take prohibition. By regulating any activity that affects any listed species, the federal government has regulated numerous acts which are wholly unnecessary to its ability to regulate any industry or any market for a commodity. The prohibition could only be upheld by interpreting *Raich* to permit the federal government to regulate any activity to accomplish any purpose as part of a broad scheme. Because this would be inconsistent with the Supreme Court's centuries-long insistence that no enumerated power can be interpreted to convey the police power and an uninterrupted line of Necessary and Proper Clause precedent, it must be rejected.