
ENVIRONMENTAL LAW & PROPERTY RIGHTS

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS V. U.S. FISH AND WILDLIFE SERVICE: DID GONZALEZ V. RAICH EVISCERATE ALL CONSTITUTIONAL LIMITS ON FEDERAL POWER?

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Note from the Editor:

This article discusses an ongoing case questioning the constitutionality of the Endangered Species Act, and favors the petitioners. As always, the Federalist Society takes no position on particular legal or public policy matters. Any expressions of opinion are those of the authors. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. When we do so, as here, we offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

- Jason Rylander, *Protecting Endangered Species Under the Commerce Clause: People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, ACS BLOG (September 25, 2015), available at <https://www.acslaw.org/acsblog/protecting-endangered-species-under-the-commerce-clause-people-for-the-ethical-treatment-of>.
- David Driesen, *Constitutional Law Professors' Brief Filed in Utah Prairie Dog Case*, ACS BLOG (April 22, 2015), available at <https://www.acslaw.org/acsblog/constitutional-law-professors%E2%80%99-brief-filed-in-utah-prairie-dog-case>.
- Brian Palmer, *Is The Endangered Species Act... Endangered?*, ON EARTH- EARTHWIRE (January 2015), available at <http://www.onearth.org/earthwire/endangered-species-act-endangered>.

On November 5, 2014, the District Court for the District of Utah struck down an Endangered Species Act regulation forbidding the “take” of any Utah prairie dog—a threatened species found only in Utah with no commercial use or market—as exceeding Congress’ power under the Commerce and Necessary and Proper Clauses.¹ This is the first time that a federal regulation of take has been struck down as unconstitutional and marks a sharp departure from the decisions of five Circuit Courts of Appeals, which upheld similar restrictions.² The decision squarely rejects the government’s argument, accepted by several circuits, that the Commerce Clause could be stretched to allow it “to regulate anything that *might* affect the ecosystem (to say nothing about its effect on commerce)” because, otherwise, “there would be no logical stopping point to congressional power under the Commerce Clause.”³ The government has appealed the decision to the Tenth Circuit, which held oral argument on September 28, 2015.⁴

I. BACKGROUND

The Endangered Species Act of 1973 provides for the listing of endangered and threatened species and mandates broad protections for those species.⁵ These protections include a prohibition against “take”—which is defined to encompass essentially any activity that adversely affects a single member of a species or its habitat⁶—that carries substantial civil and criminal penalties and can be enjoined by citizen suits.⁷ The statute also requires all federal agencies to exercise their discretionary powers to further the statute’s purposes and avoid taking any

action that could jeopardize a protected species.⁸

Though the statute was enacted nearly unanimously in 1973, it has been a continuous source of conflict, especially since the Supreme Court interpreted it in *TVA v. Hill*⁹ to require every species to be protected “whatever the cost.” As a consequence, the Endangered Species Act can impose harsh, punitive restrictions on private property owners whose lands provide needed habitat for species. Critics note that this creates a disincentive against maintaining suitable habitat, ultimately to the detriment of the species the statute is intended to protect.¹⁰ For these substantial costs, critics argue, we receive little measurable benefit. Only about one percent of species listed under the Endangered Species Act have ever recovered to the point that they could be delisted.¹¹

II. THE UTAH PRAIRIE DOG AND PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS

The Utah prairie dog has been listed under the Endangered Species Act since its enactment.¹² In 1984, when the population was estimated at 23,753, its status was changed from endangered to threatened. Since then, the population has nearly doubled, with recent estimates placing the population at over 40,000 individual animals. All of these animals are found in southwestern Utah, with approximately 70% of them residing on private property.

There is no market for Utah prairie dogs, nor are they used in any economic activity. However, the species has garnered some academic interest and is advertised on federal government websites to promote tourism to national parks.

Pursuant to the Endangered Species Act, the Fish & Wildlife Service has adopted a regulation forbidding the “take” of any Utah prairie dog unless authorized by a federal permit.¹³ These permits are available to owners of only certain types of

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properties and restrict the number of Utah prairie dogs eligible property owners are allowed to take.

People for the Ethical Treatment of Property Owners (PETPO) was formed by several residents of southwestern Utah who felt that their concerns had been consistently ignored by the bureaucrats in Washington charged with setting federal regulations. The organization has over 200 members, largely consisting of affected residents, property owners, and local governments. It advocates protecting the species without imposing such onerous burdens on property owners and the community, primarily by encouraging the safe, humane capture of Utah prairie dogs in backyards and residential neighborhoods, so that they can be moved to public conservation areas where they can be permanently protected.

The Utah prairie dog regulation severely impacts the organization's members. Owners of undeveloped lots in residential subdivisions are barred from building homes for their families if Utah prairie dogs move in first. Some have lost their investments in land intended to develop small businesses. Many others are unable to protect their backyards and gardens from the rodents. The local government of Cedar City, itself a member of the organization, is unable to protect playgrounds and sports fields from the burrowing animals, instead it has to fence areas off from local children. It also must get federal permission to remove Utah prairie dogs from the municipal airport, where they tunnel beneath runways and in critical safety areas, and the local cemetery, where they disturb the grounds, bark during funerals, and eat flowers left by mourners.

After the U.S. Fish & Wildlife Service adopted the Utah prairie dog regulation, PETPO challenged it as exceeding the government's constitutional authority. The District Court for the District of Utah agreed.¹⁴ In the wake of the district court's decision, Utah—which filed an amicus brief on behalf of itself and eight other states supporting PETPO in the Tenth Circuit—adopted a plan to conserve the species without such onerous burdens by moving Utah prairie dogs from developed neighborhoods and backyards to public conservation areas.¹⁵

III. DOES THE COMMERCE CLAUSE ALLOW THE FEDERAL GOVERNMENT TO REGULATE ANY ACTIVITY THAT AFFECTS ANY SPECIES THAT AFFECTS THE ENVIRONMENT?

Modern Commerce Clause jurisprudence has significantly expanded the scope of federal power beyond what the Constitution originally contemplated.¹⁶ Yet the Supreme Court has continued to insist that the power is and must be subject to judicially-enforceable limits.¹⁷ As presently understood, the clause permits Congress to regulate economic activity that has a substantial effect on interstate commerce.¹⁸ Notably, the Court has never upheld federal regulation of *noneconomic* activity—*i.e.* activity that isn't the production, distribution, or consumption of a traded commodity—under the Commerce Clause.

Since the so-called New Deal revolution, the Supreme Court has only struck down two laws as exceeding Congress' Commerce Clause power. In *United States v. Lopez*, the Supreme Court declared that a federal statutory provision that criminalized the possession of a gun in a school zone exceeded Congress' Commerce Clause power.¹⁹ And, in *United States v. Morrison*, the Court struck down a federal cause of action for victims of

gender-based violence on the same grounds.²⁰

Although the Court has only rarely struck down laws as exceeding Congress' lawmaking power under the Commerce Clause, its reasoning in these cases is instructive. In each, the Court began by asking whether the activity regulated on the face of the statutory provision is economic.²¹ Since neither possession of a gun nor gender-based violence are economic activities, these provisions could not be characterized as regulations of economic activity. Next, the Court asked whether the proffered connections to interstate commerce were so insignificant and logically attenuated that, if accepted, similar reasoning would justify federal regulation of anything.²² In *Lopez*, for instance, the Court rejected arguments based on the generalized impacts of crime and education on commerce as too attenuated to withstand scrutiny.²³

Relying on these cases, the district court concluded that the Utah prairie dog regulation exceeds the authority that Congress may delegate to the Fish and Wildlife Service under the Commerce Clause. The Utah prairie dog regulation broadly forbids *any* activity, regardless of its nature, that results in any adverse effect on a single Utah prairie dog or its habitat.²⁴ On its face, this broad ban on "take" is not a regulation of economic activity.

On appeal, the government argues that the Utah prairie dog regulation is a regulation of economic activity because the plaintiff's members wish to engage in land development and a variety of economic activities are ensnared by the broad ban.²⁵ PETPO responds that the first argument takes a crabbed view of the impacts that the regulation has on residents of Southwestern Utah and conflicts with the Supreme Court's approach to reviewing the Commerce Clause challenge in *Lopez*.²⁶ The defendant in *Lopez* was engaged in economic activity; he was paid to carry the gun to school to deliver it to a classmate. Yet the Court judged whether the statute regulated economic activity on its face rather than looking to the particular party's activity.²⁷ PETPO argues that the government's second argument would go even further by allowing the federal government to regulate any noneconomic activity, so long as it's regulated under a broad regulation that also ensnares economic activity. At a minimum, this would require overruling *Lopez* and *Morrison* as both of the laws challenged in those cases could be violated by economic activity (as the facts in *Lopez* demonstrate).

The district court also held that *Lopez* and *Morrison*'s ban on attenuated reasoning dooms the Utah prairie dog regulation. The federal government's argument in chief is that all activities that affect a single Utah prairie dog are within its power because the species as a whole affects the environment and the environment affects interstate commerce.²⁸ PETPO responds that this argument would mean that federal power has no logical limit. To take just one example, the human species significantly impacts the environment.²⁹ Therefore, under the federal government's argument, it could regulate any activity that affects a single person, because our species affects the environment, which affects commerce. This is far more attenuated than even the "costs of crime" rationale pressed—and rejected—in *Lopez*.³⁰

In the alternative, the government argues that take of the Utah prairie dog can have a direct effect on interstate commerce because, though it is not currently traded or used in commercial

activity, the species *could* become an object of commerce in the future. In support of this argument, it refers to this oft-quoted language in the statute's legislative history:

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?³¹

PETPO argues that this too admits of no logical limit. Literally any substance *could* conceivably become a subject of commerce at some unknown point in the future.³² And just as any species may hold cancer's cure, anyone might be the person to discover it. Yet the federal government does not have the power to regulate any activity that affects any person—nor any substance—on that basis.³³

IV. DOES THE NECESSARY AND PROPER CLAUSE, AS INTERPRETED BY *RAICH*, ALLOW THE FEDERAL GOVERNMENT TO REGULATE ANYTHING FOR ANY REASON PURSUANT TO A "COMPREHENSIVE SCHEME"?

If the Commerce Clause cannot sustain the Utah prairie dog regulation, the government must instead rely on the Necessary and Proper Clause.³⁴ The standard explanation of this clause is that it is not intended to convey any significant independent power;³⁵ rather, its purpose is to make clear that the federal government has the means required to exercise its other powers.³⁶ In *McCulloch v. Maryland*, Chief Justice Marshall explained the clause this way:

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.³⁷

Though this gives Congress wide latitude, it is not a blank check. The Necessary and Proper Clause does not authorize any regulation that is a rational means of accomplishing *some* government objective. Rather, the government must be able to show why the challenged regulation is reasonably necessary to implementing an enumerated power.³⁸

Consequently, the Necessary and Proper Clause supplements the Commerce Clause by allowing the federal government to regulate noneconomic activity if necessary for it to effectively regulate economic activity or the market for a commodity pursuant to a comprehensive regulatory scheme.³⁹ In *Gonzales v. Raich*, for instance, the Court sanctioned federal regulation of mere intrastate possession of marijuana for medical use under the Controlled Substances Act.⁴⁰ It explained that federal regulation of this activity was rational because marijuana grown and possessed solely in California for medical purposes is indistinguishable from marijuana traded in the illicit, interstate market. Exempting the former would frustrate the government's ability to regulate the latter pursuant to its comprehensive scheme to regulate the illicit interstate market and related economic activity.⁴¹

In the Utah prairie dog case, the government argues that the Utah prairie dog regulation must be upheld as a necessary part of the Endangered Species Act, which it explains is a comprehensive regulatory scheme to preserve species.⁴² PETPO

responds that this analysis fails to respect the limits of the Necessary and Proper Clause. The government is not arguing that, if it cannot regulate every activity that affects a single Utah prairie dog, it will not be able to regulate economic activity or the market for a commodity. As the district court noted in rejecting the government's argument, there is no market for Utah prairie dogs, nor are they used in any economic activity. Therefore, restrictions on the government's ability to regulate Utah prairie dog takes simply doesn't implicate its ability to regulate commerce.

Instead, the government argues that if it cannot regulate any activity that affects any Utah prairie dog (or any other species), the Endangered Species Act's ability to achieve its non-commercial, conservation goals would be undermined. Or, as the Fifth Circuit put it in upholding federal protection of cave bugs, the federal government must be able to regulate all life as part of its protection for the "interdependent web" of all species.⁴³

PETPO responds that this argument, if accepted, would cause any remaining difference between federal power and the states' police power to evaporate by subjecting both to the same meager limit. According to the government's argument, the Necessary and Proper Clause permits it to do anything, so long as it's rationally related to any policy objective. That is the same standard that constrains states' exercises of the police power under the Due Process Clause.⁴⁴ For instance, it would permit the federal government to regulate any criminal acts pursuant to a comprehensive scheme to regulate crime.

The Supreme Court has already implicitly rejected this argument in *Lopez* and *Morrison*, by striking down criminal provisions that were small parts of omnibus crime bills.⁴⁵ If the government's argument in the Utah prairie dog case were accepted, the opposite results should have been reached in both *Lopez* and *Morrison*. The challenged criminal provisions should have been upheld in order to effectuate the anti-crime goals animating those omnibus (*i.e.* comprehensive) crime bills.

V. CONCLUSION: WILL THE SUPREME COURT FINALLY SETTLE THIS CONFLICT?

Despite the number of previous constitutional challenges to federal regulation of take of intrastate, noncommercial species, the Supreme Court has never weighed in. This despite Chief Justice Roberts'—then on the D.C. Circuit—famous dissent from a denial of rehearing *en banc* that the grounds for upholding federal regulation of take are inconsistent with Supreme Court precedent.⁴⁶ The issue certainly presents an important question of federal law. The Endangered Species Act broadly forbids (in fact, criminalizes) *any* activity that adversely impacts a single member of a species or its habitat and applies this prohibition to approximately 1,500 species spread throughout the country.⁴⁷ With environmental groups seeking to add additional species to this list by the hundreds,⁴⁸ the consequences of getting this constitutional question right will only continue to grow. With a path breaking decision in the district court, and the possibility of a circuit split if it is affirmed, perhaps this will be the case where the Supreme Court finally resolves this question.

Endnotes

1 People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service, 57 F.Supp.3d 1337, 1342-46 (D. Utah 2014).

2 See San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011); Alabama-Tombigbee Rivers Coal. V. Kepthorne, 477 F.3d 1250 (11th Cir. 2007); GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003); Ranch Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

3 People for the Ethical Treatment of Property Owners, 57 F.Supp.3d at 1344-45; see, e.g., GDF Realty, 326 F.3d at 640 (upholding regulation of take of Texas cave bugs because they are part of the “interdependent web” of all species).

4 See Steve Davies, *Tenth Circuit releases audio of arguments in prairie dog case*, ESWR.COM ENDANGERED SPECIES & WETLANDS REPORT (Sept. 30, 2015), available at <http://www.eswr.com/2015/09/tenth-circuit-releases-audio-of-oral-argument-in-utah-prairie-dog-case-to-eswr/>.

5 16 U.S.C. § 1531 *et seq.*; see 16 U.S.C. § 1533.

6 16 U.S.C. § 1532(19) (defining “take”); see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 696-704 (1994) (upholding broad interpretation of “take”).

7 16 U.S.C. § 1538(a)(1)(B) (forbidding take); 16 U.S.C. §§ 1540(a), (b), (g) (authorizing civil and criminal penalties for violating the Endangered Species Act and citizen suits for injunctive relief).

8 16 U.S.C. § 1536.

9 Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

10 See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 356-57 (2014); REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (Adler, ed. 2011); Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27 (2003).

11 See M. Lynne Corn & Kristina Alexander, *The Endangered Species Act (ESA) in the 113th Congress: New and Recurring Issues*, Cong. Res. Serv. Rep. 7-5700 at 6 (Jan. 13, 2014), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42945.pdf>.

12 See Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158 (Aug. 2, 2012).

13 77 Fed. Reg. 46,158.

14 People for the Ethical Treatment of Property Owners, 57 F.Supp.3d at 1342-46.

15 See Br. of Utah, et al., People for the Ethical Treatment of Property Owners, Nos. 14-4151 & 14-4165 (10th Cir. filed May 26, 2015) available at <http://blog.pacificlegal.org/wp-content/uploads/2015/05/States-AC.pdf>.

16 See, e.g., Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (Congress may regulate a farmer’s growing of wheat to be consumed on his farm—without ever entering into any interstate market—under the Commerce Clause); *United States v. Wrightwood Dairy*, 315 U.S. 110, 120 (1942) (Congress’ power to regulate interstate commerce allows it to set a minimum price for milk produced and consumed within a single state); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-30 (1937) (Commerce Clause reaches individual firm’s hiring decisions); see also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1451 (1987) (describing the *Wickard* decision as standing the Commerce Clause upon its head).

17 See, e.g., *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 power” (quoting *United States v. Lopez*, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring))).

18 See *Lopez*, 514 U.S. at 567.

19 See *Lopez*, 514 U.S. at 556.

20 See *Morrison*, 529 U.S. at 601-02, 613-17.

21 See *Morrison*, 529 U.S. at 610, 613; *Lopez*, 514 U.S. at 560.

22 See *Morrison*, 529 U.S. at 615.

23 See *Lopez*, 514 U.S. at 563-64.

24 See 77 Fed. Reg. 46,158.

25 See Opening Br. for the U.S. Fish & Wildlife Serv., et al., People for the Ethical Treatment of Property Owners, Nos. 14-4151 & 14-4154 (filed Apr. 14, 2015) available at <http://blog.pacificlegal.org/wp/wp-content/uploads/2015/05/FWS-Opening-Brief.pdf>.

26 See Appellee’s Br., People for the Ethical Treatment of Property Owners, Nos. 14-4151 & 14-4165 (filed May 18, 2015) available at <http://blog.pacificlegal.org/wp/wp-content/uploads/2015/05/FINAL-PETPO-RESPONSE-BRIEF.pdf>; see also *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (“Such an approach seems inconsistent with the Supreme Court’s holdings....”). There is a circuit split on whether this is an appropriate way to analyze the constitutionality of the take prohibition. Compare *GDF Realty*, 326 F.3d at 634 (it isn’t) with *Rancho Viejo*, 323 F.3d at 1072 (it is).

27 See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

28 See *GDF Realty*, 326 F.3d at 640 (accepting this argument); *Home Builders*, 130 F.3d at 1052-54 (same).

29 See H.R. REP. NO. 93-412, at 143 (1973) (the Endangered Species Act was adopted in recognition of the significant impacts human development has on the environment).

30 See *Lopez*, 514 U.S. at 563-64.

31 H.R. REP. NO. 93-412, at 4.

32 See *Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring); see also *GDF Realty*, 326 F.3d at 638; *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting).

33 See *Morrison*, 529 U.S. at 613-19; *Lopez*, 514 U.S. at 560.

34 Cf. *Printz v. United States*, 521 U.S. 898, 922 (1997) (The Necessary and Proper Clause is the “last, best hope of those who defend ultra vires congressional action.”).

35 See *NFIB*, 132 S. Ct. at 2592.

36 U.S. CONST. ART. I, § 8, cl. 18.

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

38 See *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.”).

39 See *NFIB*, 132 S. Ct. at 2591-93.

40 See *Raich*, 545 U.S. at 22.

41 See *id.* (describing the Controlled Substances Act as “comprehensive legislation to regulate the interstate market in a fungible commodity” (emphasis added)); *id.* at 24-25 (an “essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut” (emphasis added)).

42 The Fourth and Ninth Circuits have upheld federal regulation of take on this basis. See *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1175-77; *Gibbs*, 214 F.3d at 498-99.

43 See *GDF Realty*, 326 F.3d at 640.

44 See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955) (Under the Due Process Clause, a state law need only be a rational means of advancing a legitimate legislative goal). As the Supreme Court has emphasized, federal power cannot be coextensive with the police power. See *Morrison*, 529 U.S. at 618-19.

45 See *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (omnibus crime bill containing the *Violence Against Women Act*); *Crime Control Act of 1990*, Pub. L. No. 101-647, 104 Stat. 4789 (1990) (omnibus crime bill containing the *Gun Free School Zones Act*).

46 See *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting).

47 See U.S. Fish & Wildlife Service, *ECOS: Environmental Conservation Online System*, <http://ecos.fws.gov/ecp/> (last visited Oct. 8, 2015) (online database of endangered and threatened species).

48 See Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES, Apr. 20, 2011, available at <http://www.nytimes.com/2011/04/21/science/earth/21species.html>.

