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Of Prairie Dogs and Congressmen: Defining the Regulated Activity and Why it Matters for the Commerce Clause Substantial Effect Test

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**OF PRAIRIE DOGS AND CONGRESSMEN: DEFINING THE
REGULATED ACTIVITY AND WHY IT MATTERS FOR THE
COMMERCE CLAUSE SUBSTANTIAL EFFECT TEST**

Bethany Bostron*

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INTRODUCTION

The Commerce Clause is one of the most cited constitutional provisions and has been applied to a myriad of state activities to justify federal government regulation.¹ It seems nearly impossible to locate a practical limit to the definition of interstate commerce,² especially with the interconnectedness of our modern economy. One application of Commerce Clause regulatory power, the Endangered Species Act (ESA or the Act), has been the subject of great controversy.³ Opponents of the Act's far-reaching applications have introduced various bills and amendments to counteract the federal regulation, including the ESA Settlement Reform Act being considered by Senate and House subcommittees as of November 2016.⁴ Continuing the struggle between the federal government and private property owners, an organization representing private property owners in the state of Utah is making a strong argument for limiting federal regulation when it comes to prairie dogs that reside only within the state.⁵ An intrastate species challenge has yet to make its way to the

¹ See Robert J. Pushaw, Jr. & Grant S. Nelson, *The Likely Impact of National Federation on Commerce Clause Jurisprudence*, 40 PEPP. L. REV. 975, 979 (2013) (“[S]ince the New Deal era, the Court has sustained all major Commerce Clause legislation” (footnote omitted)).

² Jeffrey H. Wood, *Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC*, 19 J. LAND USE & ENVTL. L. 91, 92 (2003) (quoting Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting), cert. denied, 524 U.S. 937 (1998)).

³ Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 ENVIRONS 105, 106, 131 (2014).

⁴ See H.R. 585, 114th Cong. (2015); S. 293, 114th Cong. (2015) (This bill would put additional requirements on citizen suits against the federal government for failure to perform a duty related to an endangered species. The government must publish the complaint, give affected parties reasonable time to intervene, and not allow the court to award litigation costs in a settled citizen suit).

⁵ See Amicus Curiae Brief of Mountains States Legal Foundation in Support of Appellee

Supreme Court, but previous cases challenging the constitutionality of the ESA have paved the way for such a challenge to occur.⁶ A few pesky prairie rodents provide the perfect opportunity for a Supreme Court clarification of the limits of the ESA and to create a logical stopping point for interstate commerce regulatory power.

The Utah prairie rodent problem provides an opportunity to define a stopping point by clarifying the appropriate target of the Substantial Effect Test. This test is used to determine whether the activity in question has a strong enough connection to interstate commerce to make federal regulation constitutionally valid.⁷ This seemingly simple determination often becomes complex and highly controversial when the federal regulation in question involves a “non-commercial” focus such as the protection of endangered species.⁸ When the regulation under judicial review involves prohibitions stemming from the ESA, the Substantial Effect Test could focus on the regulatory scheme as a whole, the specific regulated act, or the animal itself as an object in commerce.⁹ As is illustrated by *People for the Ethical Treatment of Property Owners v. United States Fish & Wildlife Service (PETPO)*,¹⁰ only focusing the Substantial Effect Test on the specific regulated act provides any hope of establishing a consistent stopping point for federal regulatory power garnered from the Commerce Clause.¹¹ Focusing on the overall regulatory scheme or the animal as an article in commerce allows the federal government to stretch its rightful regulatory powers to ridiculous situations and endangers the system of federalism guaranteed by the Constitution.¹² There is also a strong policy argument for setting a limit to Commerce Clause regulatory power as the states are often better equipped to respond to local issues and have a higher stake in resolving the issue in a way that both protects the environment and preserves the local economy.¹³

This Note will examine the development of the Commerce Clause federal regulatory power and how its interpretation has changed throughout the years with the increasing interconnectedness of our society. This Note will also explore the source of federal authority for the ESA and litigation involving the classification of specific regulated species as purely intrastate or interstate animals. As this Note examines

Urging Affirmance at 3–5, *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014) (No. 14-4151).

⁶ See, e.g., Darren Botello-Samson, *You Say Takings, and I Say Takings: The History and Potential of Regulatory Takings Challenges to the Endangered Species Act*, 16 DUKE ENVTL. L. & POL'Y F. 293, 303–09 (2006) (arguing that *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), would open the gates for further challenges to the constitutionality of regulations that aim to protect intrastate species).

⁷ See *infra* Section II.B.

⁸ See *infra* Part IV.

⁹ See *infra* Part IV.

¹⁰ 57 F. Supp. 3d 1337 (D. Utah 2014).

¹¹ See *infra* Section IV.B; Part V.

¹² See *infra* Sections IV.A, IV.C.

¹³ See *infra* Section V.B.

the three different ways to apply the Substantial Effect Test in ESA cases, it will become evident that the Utah Prairie Dog situation provides an excellent opportunity for the Supreme Court to clarify the limits of interstate species regulation. This Note contends that focusing the Substantial Effect Test on the specific regulated act would best fulfill Congress's purpose in enacting the ESA while also preserving state sovereignty over purely intrastate issues.

I. *PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS V.
UNITED STATES FISH & WILDLIFE SERVICE*

A. *The Prairie Dog Invasion*

The Utah Prairie Dog is a small burrowing rodent ranging from one to three pounds that lives in large colonies with extensive underground tunnel systems.¹⁴ “[T]he westernmost species of prairie dog[,]” the Utah variety is found only within the southwestern corner of the state.¹⁵ The Utah Prairie Dog was added to the endangered species list in 1973 and downgraded to a threatened species in 1984.¹⁶ Under federal regulations, the “taking” of Utah Prairie Dogs is only allowed on agricultural lands, private property within a half mile of conservation lands, or when the animal “create[s] serious human safety hazards.”¹⁷ Any taking in these designated areas must be approved by the United States Fish & Wildlife Service (the Service) in writing before it occurs.¹⁸ The current problem arose when prairie dogs began moving out of rural grasslands and into urban areas such as Cedar City, Utah.¹⁹ “The town [of Cedar City] has been inundated with prairie dogs that are leaving parks, gardens, vacant lots, the golf course and even the local cemetery pockmarked with burrows and tunnels.”²⁰ In another area, the town of Parowan, Utah, reportedly has a population of 2,790 people and 3,435 prairie dogs.²¹ Due to the prairie dog invasion, property values in Parowan have significantly diminished, causing homeowners to suffer steep losses when attempting to sell their homes.²² The animals have also burrowed

¹⁴ *Endangered Species: Utah Prairie Dog*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/mountain-prairie/species/mammals/utprairiedog/> [<https://perma.cc/92AN-HUSL>] (last updated Nov. 6, 2013); see Amy Joi O’Donoghue, *Cedar City Strikes Back at Utah Prairie Dog Listing*, DESERET NEWS UTAH (Apr. 18, 2013, 12:30 PM), <http://www.deseretnews.com/article/865578529/Cedar-City-strikes-back-at-Utah-prairie-dog-listing.html?pg=all> [<https://perma.cc/K92E-HMHP>].

¹⁵ *Endangered Species: Utah Prairie Dog*, *supra* note 14.

¹⁶ *Id.*

¹⁷ 50 C.F.R. § 17.40(g)(2) (2016).

¹⁸ 50 C.F.R. § 17.40(g)(3)(iii), (4)(i)–(ii) (2016).

¹⁹ O’Donoghue, *supra* note 14.

²⁰ *Id.* (quoting Jonathan Wood, attorney of the Pacific Legal Foundation).

²¹ Jim Carlton, *In Utah, a Town Digs Deep to Battle Prairie Dogs*, WALL ST. J., May 7, 2012, at A1.

²² See Dan Gallo, *Utah Residents in Battle to Rid Town of Prairie Dogs*, FOX NEWS

holes in the airport runway, causing public safety concerns.²³ Despite the significant damage caused by the rodents, locals are prohibited from relocating the prairie dogs under the federal regulation's take provision, and towns have spent hundreds of thousands of dollars attempting to build underground fences to keep the animals out.²⁴ When these efforts proved unsuccessful and citizens could find no other legal recourse, a public interest organization made up of Utahns injured by federal regulation of the Utah Prairie Dog, challenged the constitutional validity of the ESA's Utah Prairie Dog regulation.²⁵

B. Current Litigation

The plaintiffs claim that the federal government is prohibited from regulating the Utah Prairie Dog because it is a purely intrastate species and the taking of the animal does not have a significant effect on interstate commerce.²⁶ The defendants agree that the animal in question is purely intrastate, but claim the power to regulate the taking of prairie dogs because economic activities have been prohibited by the ESA, and the animal has biological and commercial value that has a substantial effect on interstate commerce.²⁷ The district court focused its analysis on the taking of prairie dogs as the regulated activity with a possible substantial effect on interstate commerce instead of the regulation as a whole.²⁸ The opinion stated that *United States v. Lopez*²⁹ requires the court to look to the actual activity being regulated rather than the effect the regulation preventing that activity has on interstate commerce.³⁰ The court deemed the defendant's argument about the biological value of the prairie dog too attenuated to show a substantial effect.³¹ The court also held that "[t]he possibility of future substantial effects of the [intrastate noncommercial species] on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster."³² The

(June 26, 2012), <http://www.foxnews.com/us/2012/06/26/endangered-prairie-dog-outnumber-residents-in-utah-town.html> [<https://perma.cc/327U-7G8E>].

²³ Carlton, *supra* note 21, at A1.

²⁴ *Id.*

²⁵ See Petition for Review and Complaint for Declaratory and Injunctive Relief at 1–2, *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014) (No. 2:13-cv-00278-EJF).

²⁶ *PETPO*, 57 F. Supp. 3d at 1340.

²⁷ *Id.* at 1341, 1343.

²⁸ *Id.* at 1344.

²⁹ 514 U.S. 549 (1995).

³⁰ *PETPO*, 57 F. Supp. 3d at 1344 (citing *United States v. Morrison*, 529 U.S. 598 (2000); *Lopez*, 514 U.S. 549).

³¹ *Id.* at 1345.

³² *Id.* (alterations in original) (quoting *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 638 (5th Cir. 2003) (citing *Morrison*, 529 U.S. at 612), *cert. denied*, 545 U.S. 1114 (2005)).

opinion shows a very cautionary approach to extending the Commerce Clause authority to speculative areas.³³ If the case had been heard in a less conservative state than Utah, the deciding court may have had a more difficult time invalidating the federal regulation than it seemingly had. To the defendant's final argument, the court stated that the Necessary and Proper Clause does not justify the regulation because "takes of Utah prairie dogs on non-federal land—even to the point of extinction—would not substantially affect the national market for any commodity regulated by the ESA."³⁴

The Service appealed the invalidation of the Utah Prairie Dog regulation and the case was argued before the Tenth Circuit on September 28, 2015.³⁵ The district court's decision invalidating the prairie dog regulation was a significant moment in ESA litigation. United States Courts of Appeals have previously upheld ESA regulations of species ranging from the Delhi Sands Fly to the red wolf,³⁶ and the Supreme Court has yet to grant certiorari to an intrastate species case.³⁷ Predictions of such a grant of certiorari have yet to come to fruition.³⁸ However, the tides may be changing as the *PETPO* case provides the perfect opportunity for a Supreme Court ruling on the issue. The Utah Prairie Dog is decidedly intrastate and has no current economic or scientific value.³⁹ It is also not humans that wish to invade the prairie dog's habitat, like in most endangered species cases, but rather the prairie dog who is encroaching well-established human habitations.⁴⁰ Although the case focuses specifically on species regulation, a Supreme Court ruling would have a significant impact on the struggle between federal and state regulation of activities that hold a somewhat hazy connection to interstate commerce.

³³ See *id.*

³⁴ *Id.* at 1346.

³⁵ See Lindsay Whitehurst, *As Endangered Species Court Battle Looms, Utah Trapping Prairie Dogs from Overrun Town*, U.S. NEWS & WORLD REP. (Sept. 27, 2015, 11:46 AM), <http://www.usnews.com/news/us/articles/2015/09/27/after-ruling-utah-removing-hundreds-of-prairie-dogs> [<https://perma.cc/6R76-KEFX>].

³⁶ See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

³⁷ See Dan A. Akenhead, *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, 351–53 (discussing how circuit courts have used different rationales to uphold regulations of intrastate species on the ESA and commenting on recent species cases that the Supreme Court declined to hear).

³⁸ See *id.* at 351–53.

³⁹ See Jonathan Wood, *A Federal Crime Against Nature? The Federal Government Cannot Prohibit Harm to All Endangered Species Under the Necessary and Proper Clause*, 29 TUL. ENVTL. L.J. 65, 79 (2015). *But see* Akenhead, *supra* note 37, at 344 (noting that Congress may be concerned with "undiscovered scientific or economic" value) (footnote omitted).

⁴⁰ See Carlton, *supra* note 21, at A1; O'Donoghue, *supra* note 14.

II. COMMERCE CLAUSE DEVELOPMENT

A. Development of Interstate Versus Intrastate Commerce

The definitions of interstate and intrastate commerce began with that oft-cited case *Gibbons v. Ogden*⁴¹ in which the Supreme Court held that the Commerce Clause regulation power included the power of the federal government to regulate navigation on the nation's waterways.⁴² In that case, the Court held that commerce includes "commercial intercourse between nations, and parts of nations."⁴³ "Among the several States" was defined as commercial activities involving two or more states.⁴⁴ In the Court's opinion, Justice Marshall declared the large breadth of federal commercial power and "made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes."⁴⁵ However broad his view of the Commerce Clause, Justice Marshall likely did not foresee the power stretching to a small prairie-dwelling rodent. Nevertheless, his warning about restraints coming from the political process is certainly being played out in the modern federal versus state environmental regulation struggle.

A century later, the New Deal Era brought the Commerce Clause back to the national stage. The Clause was used to invalidate many of President Roosevelt's labor and industrial regulations.⁴⁶ The President responded to the barrier created by the Court by proposing a plan to add six additional justices to the Court.⁴⁷ In a sense, Justice Marshall's words proved to be prophetic, but in the opposite way. The political process brought an expansion to Commerce Clause interpretation, rather than a restraint on the power. The Court responded to the mounting political pressure and questionable job security by upholding the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.*⁴⁸ In this ruling, "[t]he Court concluded that Congress could reach even non-commercial or local activities if doing so was 'necessary and proper' to carry into effect its regulations of interstate commerce."⁴⁹ This

⁴¹ 22 U.S. (9 Wheat.) 1 (1824).

⁴² *Id.* at 193, 195–97.

⁴³ *Id.* at 189–90.

⁴⁴ Pushaw, Jr. & Nelson, *supra* note 1, at 981 (citing *Gibbons*, 22 U.S. (9 Wheat.) at 195, 203).

⁴⁵ *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (citing *Gibbons*, 22 U.S. (9 Wheat.) at 197).

⁴⁶ Pushaw, Jr. & Nelson, *supra* note 1, at 982 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 297–310 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

⁴⁷ A. Frank Reel, Letter to the Editor, *When a Switch in Time Saved Nine*, N.Y. TIMES, Nov. 10, 1985, at 26E.

⁴⁸ 301 U.S. 1, 30 (1937).

⁴⁹ Pushaw, Jr. & Nelson, *supra* note 1, at 982 n.39 (citing *NLRB*, 301 U.S. at 36–37).

ruling introduced the Substantial Effect Test for Commerce Clause application.⁵⁰ Under this provision, even purely intrastate activities can be regulated according to the effect on interstate commerce.⁵¹

B. The Substantial Effect Test

The Substantial Effect Test measures the constitutionality of a federal regulation applied in a specific situation (such as the ESA prohibiting the taking of Utah Prairie Dogs).⁵² The test is used to justify or invalidate federal regulatory power over activities that are not commercial in and of themselves, but that are found to have some “substantial effect” on true interstate commerce.⁵³ Although the standard itself is not found in the wording of the Constitution, courts have developed this test in an attempt to find some standard definition of what actually affects commerce in our highly connected commercial world.⁵⁴ However well-intentioned, the actual application of the test, Pushaw and Nelson point out, is practically toothless as virtually all statutes are found to meet the “substantial effect” standard.⁵⁵

The application of the Substantial Effect Test has developed over the years. The commerce power was further expanded in 1942, when the Supreme Court found that federal regulatory power extended to a farmer growing wheat in excess of the federal quota, even though the farmer consumed the wheat himself.⁵⁶ The reason the Commerce Clause applied in this situation was because the Court held that “Congress could determine the ‘substantial effect’ by aggregating all of the regulated activity (here, home-grown wheat) nationwide.”⁵⁷ This ruling made the federal commerce power nearly unstoppable. Essentially all intrastate activities can be hypothetically aggregated to create some substantial effect on interstate commerce. In the *PETPO* case, the government argued that aggregating the act of taking Utah Prairie Dogs with the taking of other similarly listed species could have a substantial effect on interstate markets.⁵⁸ This argument is a logical extension of the *Wickard* ruling and has succeeded in multiple

⁵⁰ See *id.* at 982 (citing *NLRB*, 301 U.S. at 34–40).

⁵¹ *Id.*

⁵² See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

⁵³ Pushaw, Jr. & Nelson, *supra* note 1, at 982.

⁵⁴ See U.S. CONST. art. I, § 8, cl. 3; Pushaw, Jr. & Nelson, *supra* note 1, at 976; *infra* Section II.C.

⁵⁵ Pushaw, Jr. & Nelson, *supra* note 1, at 982 n.44 (citing Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 79–88 (1999)) (noting that “the Court upheld every federal law enacted under the Commerce Clause from 1937 until 1994”).

⁵⁶ *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

⁵⁷ Pushaw, Jr. & Nelson, *supra* note 1, at 982 (citing *Wickard*, 317 U.S. at 127–28).

⁵⁸ *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1346 (D. Utah 2014).

endangered species cases.⁵⁹ However, it will become apparent that aggregating species' impact is not always a winning argument.⁶⁰

The broad grant of power in *Wickard* was extended even further by the Court when it upheld the Civil Rights Act of 1964.⁶¹ This began the rational basis standard for evaluating an activity's substantial effect on interstate commerce.⁶² Instead of a higher standard of strict scrutiny, rational basis review only requires that there be enough evidence to provide a rational argument that the activity in question has an aggregate effect on interstate commerce.⁶³ This standard provides for the approval of most federal regulations, including many environmental laws.⁶⁴

C. Searching for Limits

With the Rehnquist Court's so-called federalism revival came a renewal of limitations on the federal commerce regulatory power. In *United States v. Lopez* and *United States v. Morrison*,⁶⁵ the Supreme Court invalidated statutes as overreaches of the Commerce Clause.⁶⁶ The Court in *Lopez* held that a regulation prohibiting the carrying of firearms near school zones "did not regulate activity that was 'commercial,' either of itself or as 'an essential part of a larger regulation of economic activity.'"⁶⁷ In *Morrison*, the Court invalidated a portion of the Violence Against Women Act that provided a cause of action for gender-motivated violence.⁶⁸ Applying the rational basis test to this legislation, the Court determined that there was no rational reason for labeling gender-based violence as commercial activity.⁶⁹ These two cases struck down specific federal laws with similar existing state counterparts.⁷⁰

The next case in the substantial effect saga appeared in 2005. *Gonzales v. Raich*⁷¹ asked the question whether marijuana grown locally for personal consumption in

⁵⁹ See, e.g., *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1276–77 (11th Cir. 2007), cert. denied, 552 U.S. 1097 (2008); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998); see also *infra* Section IV.A.

⁶⁰ See *infra* Parts IV & V.

⁶¹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–62 (1964).

⁶² *Pushaw, Jr. & Nelson, supra* note 1, at 982–83 (citing *Heart of Atlanta Motel*, 379 U.S. at 255–58).

⁶³ See *Heart of Atlanta Motel*, 379 U.S. at 258.

⁶⁴ See *Pushaw, Jr. & Nelson, supra* note 1, at 983 (citing *Hodel v. Indiana*, 452 U.S. 314, 321–29 (1981); *Perez v. United States*, 402 U.S. 146, 147–58 (1971)).

⁶⁵ 529 U.S. 598 (2000).

⁶⁶ *Id.* at 627; *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

⁶⁷ *Pushaw, Jr. & Nelson, supra* note 1, at 983 (quoting *Lopez*, 514 U.S. at 561).

⁶⁸ *Morrison*, 529 U.S. at 601–19.

⁶⁹ *Id.* at 617–18.

⁷⁰ *Pushaw, Jr. & Nelson, supra* note 1, at 983 (citing Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 882, 892–97 (2005)).

⁷¹ 545 U.S. 1 (2005).

compliance with state medicinal marijuana laws could be federally regulated under the Commerce Clause.⁷² The Court in *Raich* ruled that the federal government could regulate the use of this marijuana because “the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana.”⁷³ The Court found marijuana use to have a more plausible direct connection to interstate commerce than carrying a gun near a school zone or bringing a federal cause of action for gender-based violence.⁷⁴ However the reasoning in these cases may have differed, the Court still applied a rational basis standard of review and based its decision on the rationality of the evidence presented.⁷⁵

Pushaw and Nelson attempt to make sense of the discrepancy between the *Raich* decision and the *Lopez/Morrison* decisions by arguing that the *Lopez/Morrison* framework is limited to recently enacted federal statutes and activities that “cannot plausibly be characterized as ‘commercial,’ either by [themselves] or as part of a larger economic regulatory scheme.”⁷⁶ Basically, the Court did not view the connection to commerce as rationally sound. Upon this foundation, the next Commerce Clause challenge was laid: the infamous protest against the Obamacare Individual Mandate in *National Federation of Independent Business (NFIB) v. Sebelius*.⁷⁷ The Court held that the Individual Mandate exceeded Congress’s power to regulate under both the Commerce Clause and the Necessary and Proper Clause.⁷⁸ While the Court went on to uphold the mandate as a valid use of the taxation power, it declined to extend the Commerce Clause to the regulation of inactivity.⁷⁹ Chief Justice Roberts stated: “[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.”⁸⁰ However, Justice Ginsburg wrote in her dissent that the Court should take a deferential view when it considers “Congress’s judgments about national economic and social welfare.”⁸¹ From this perspective, the Court could have determined that Congress had a rational basis for deciding that the Affordable Care Act had a substantial aggregate effect on interstate commerce.⁸² As is discussed below, whether the Court looks at the specific situation or the impact

⁷² *Id.* at 5, 9.

⁷³ *Id.* at 29–30.

⁷⁴ *See id.* at 23–25 (referring to the activities as “quintessentially economic”).

⁷⁵ *See id.* at 22.

⁷⁶ Pushaw, Jr. & Nelson, *supra* note 1, at 984 (citing *Raich*, 545 U.S. at 15–32).

⁷⁷ 132 S. Ct. 2566 (2012).

⁷⁸ Pushaw, Jr. & Nelson, *supra* note 1, at 985 (citing *Sebelius*, 132 S. Ct. at 2585–93 (opinion of Roberts, C.J.); *accord id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting)).

⁷⁹ *Sebelius*, 132 S. Ct. at 2591, 2594 (opinion of Roberts, C.J.).

⁸⁰ *Id.* at 2591.

⁸¹ Pushaw, Jr. & Nelson, *supra* note 1, at 987 (citing *Sebelius*, 132 S. Ct. at 2609, 2615–17, 2619 (Ginsburg, J., concurring in part, and dissenting in part)).

⁸² *Id.* (citing *Sebelius*, 132 S. Ct. at 2609–28).

of the regulation as a whole often determines whether there is a rational substantial effect on interstate commerce.⁸³ The real test for the success of a federal commercially based regulation may be what the court chooses to use as the activity in question when it applies the Substantial Effect Test. This is the fundamental disagreement that many Commerce Clause battles return to, whether the government is regulating medical insurance or prairie rodents.⁸⁴

III. APPLYING THE COMMERCE CLAUSE TO ENVIRONMENTAL REGULATION THROUGH THE ESA

A. Legal Foundation for the ESA

The ESA was originally passed in 1973 to provide a system of classifying endangered and threatened plant and animal species and to afford classified species federal protection.⁸⁵ The Act was passed after the Civil Rights Act of 1964 was upheld, but before the creation of the *Lopez/Morrison* framework in 1995 and 2000.⁸⁶ During this time, Congress made use of the new rational basis standard of review established by *Heart of Atlanta Motel, Inc. v. United States*⁸⁷ by expanding federal power to regulate the environment.⁸⁸ The Act included broad regulations regarding the “take” of listed species and any destruction or modification of species’ critical habitat.⁸⁹ Subsequent amendments have made minimal changes to the Act,⁹⁰ but the courts’ interpretation of the regulatory authority granted by the Act has substantially broadened since its adoption. For example, “courts have construed section 9 [harm to the species via critical habitat modification] broadly to include even unintentional harm to an endangered species.”⁹¹

In 1981, the Supreme Court held that the Commerce Clause power “permit[s] congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.”⁹² This ruling

⁸³ See *infra* Part IV.

⁸⁴ *Infra* Part IV.

⁸⁵ *Endangered Species Act: A History of the Endangered Species Act of 1973*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/esa-history.html> [<https://perma.cc/X5QJ-RRTM>] (last updated Aug. 23, 2016).

⁸⁶ See *supra* Sections II.B–C.

⁸⁷ 379 U.S. 241(1964).

⁸⁸ See *id.* at 255–58.

⁸⁹ See Endangered Species Act of 1973, Pub. L. No. 93-205, §§ 7(a)(B), 9, 87 Stat. 884 (codified at 16 U.S.C. §§ 1536, 1538 (2012)).

⁹⁰ *Endangered Species Act: A History of the Endangered Species Act of 1973*, *supra* note 85.

⁹¹ Wood, *supra* note 2, at 96 (citing *Babbitt v. Sweet Home Chapter of Cmty.*, 515 U.S. 687, 696, 708 (1995)).

⁹² *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 282 (1981) (footnote omitted).

demonstrated the broad reach of the Commerce Clause in environmental and species regulation. Even after *Lopez* and *Morrison* demonstrated that some limits to federal Commerce Clause power do exist, two cases upheld the power to regulate intrastate activities related to species protection.⁹³ In *National Ass'n of Home Builders (NAHB) v. Babbitt*,⁹⁴ the circuit court applied ESA section 9 to regulation of the Delhi Sans Flower-Loving Fly residing only in California.⁹⁵ In ruling that the regulation was a valid use of the Commerce Clause, the court looked at “the aggregate effect of the extinction of all similarly situated endangered species.”⁹⁶ The court held that potential medical discoveries and other future benefits from the fly species were enough to justify federal regulation.⁹⁷

B. Application of the Act to Various Species

In *Gibbs v. Babbitt*,⁹⁸ a federal red wolf breeding program came under judicial scrutiny when the wolves migrated onto private property and threatened livestock.⁹⁹ This case differs slightly from *NAHB* in that the wolves were not intrastate, but clearly exercised interstate movement.¹⁰⁰ Similarly to *NAHB*, the court examined the aggregate effect of the actual taking of the wolves in upholding the federal government’s power to regulate the species.¹⁰¹ The court stated that taking red wolves would affect tourism, commercial pelt trade, and possible scientific research.¹⁰² The standards developed by these cases led to the federal government’s favorite approach to applying the Substantial Effect Test: focusing on the regulation as a whole and the effect the overall legislation has on interstate commerce.¹⁰³

Another landmark case for federal species regulation, *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, was decided in 2001.¹⁰⁴ In this case, abandoned gravel pits had become seasonal ponds that served migratory birds.¹⁰⁵ The Army Corps of Engineers refused to issue a permit needed to develop the site and the developer challenged the Corps’ authority

⁹³ See *Gibbs v. Babbitt*, 214 F.3d 483, 487, 492–97 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

⁹⁴ 130 F.3d 1041 (1997), *cert. denied*, 524 U.S. 937 (1998).

⁹⁵ Wood, *supra* note 2, at 101–02 (citing *Nat’l Ass’n of Home Builders*, 130 F.3d at 1043).

⁹⁶ *Nat’l Ass’n of Home Builders*, 130 F.3d at 1046.

⁹⁷ *Id.* at 1052.

⁹⁸ 214 F.3d 483 (2000), *cert. denied*, 531 U.S. 1145 (2001).

⁹⁹ Wood, *supra* note 2, at 103–04 (citing *Gibbs*, 214 F.3d at 488–89).

¹⁰⁰ See *Gibbs*, 214 F.3d at 490.

¹⁰¹ Wood, *supra* note 2, at 104 (citing *Gibbs*, 214 F.3d at 493–94).

¹⁰² *Gibbs*, 214 F.3d at 492.

¹⁰³ See *supra* Section II.B.

¹⁰⁴ 531 U.S. 159 (2001).

¹⁰⁵ *Id.* at 162–63.

to regulate the ponds.¹⁰⁶ The Corps argued “that the ‘Migratory Bird Rule’ falls within Congress’ power to regulate intrastate activities that ‘substantially affect’ interstate commerce.”¹⁰⁷ The Court ruled that the Clean Water Act could not be extended to these ponds because it “would result in a significant impingement of the States’ traditional and primary power over land and water use.”¹⁰⁸ The Court cited *Lopez* and *Morrison* to reach the controversial conclusion that the federal Commerce Clause regulatory power does have some limits.¹⁰⁹ When the *SWANCC* decision was issued, it received a variety of interpretations in the academic world.¹¹⁰ Some commentators warned that it would open the floodgates for federalism challenges to federal environmental regulations, creating a virtual “race to the bottom” as states sacrificed environmental quality to entice industries to locate within their jurisdiction.¹¹¹ While such warnings have thus far proved unnecessary, it may be that the Court is awaiting a truly intrastate species challenge in which no economic development is being regulated. In that case, the *PETPO* challenge is the perfect opportunity to clarify the bounds of the Commerce Clause and environmental regulatory power by defining the application of the Substantial Effect Test.

C. Connecting the Endangered Species Act to Other Commerce Clause Decisions

Commerce Clause substantial effect challenges to the ESA and environmental regulations in general could take some reliance on Justice Ginsburg’s dissenting opinion in *NFIB v. Sebelius*.¹¹² Ginsburg argued that the Court should apply a deferential standard to areas where Congress is regulating an issue related to national “economic and social welfare.”¹¹³ Environmental quality and the protection of endangered species could be seen as valid social welfare issues even if they do not substantially affect economic welfare. Although the Court need only find that a rational basis for the regulation exists, it remains unsettled what specific aspect of the regulation needs to provide the substantial effect element. Some cases have examined the regulation itself and its aggregate effect on interstate commerce.¹¹⁴ Other

¹⁰⁶ *Id.* at 163–65.

¹⁰⁷ *Id.* at 173.

¹⁰⁸ *Id.* at 174.

¹⁰⁹ *Id.* at 173.

¹¹⁰ Compare Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 241 (2001) (predicting that a case would arise in which the Court would have to address the direct challenge that federalism poses to environmental protection), with Wood, *supra* note 2, at 108–09 (arguing that courts will be reluctant to use *SWANCC* to invalidate existing intrastate species regulation).

¹¹¹ Adler, *supra* note 110, at 224.

¹¹² Nat’l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609–77 (2012) (Ginsburg, J., concurring in part, and dissenting in part); see also *supra* notes 81–82 and accompanying text.

¹¹³ *Sebelius*, 132 S. Ct. at 2609, 2615–17, 2619.

¹¹⁴ See, e.g., Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041, 1046 (1997)

cases have viewed the species itself as an article of commerce.¹¹⁵ A third perspective is highlighted in the *PETPO* amicus briefs and is illustrated by *Morrison*: relying on the actual taking of the animal in question as creating a substantial impact on interstate commerce due to actual or potential social or economic value.¹¹⁶ Determining which perspective will be taken has a significant impact on the outcome of the case. In *PETPO*, the distinction will decide whether or not the federal government will be allowed to continue regulating the taking of Utah Prairie Dogs.

IV. THREE METHODS OF APPLYING THE SUBSTANTIAL EFFECT TEST TO INTRASTATE SPECIES

When it comes to regulating a purely intrastate species, the object being evaluated is crucial. Considering the aggregate effect of similar legislation is likely to bolster the federal government's argument, while viewing the animal itself as an article of commerce is likely to aid the state's argument. Using the effect of what is actually being regulated in the immediate case is more fact-specific and open to interpretation. However, the court's decision does not always fit neatly into one of these three options. As is discussed below, courts often combine methods of evaluating substantial effect or even state that a substantial effect exists without explaining which method was used to reach this conclusion.¹¹⁷

A. The Regulation Itself as the Activity in Question

1. *NAHB v. Babbitt*

The most obvious viewpoint and the one most often argued by the federal government is that the regulation itself (in our case, the ESA) has a substantial effect on

(finding that protecting all of the endangered species as a whole has a substantial impact on interstate commerce).

¹¹⁵ This view has succeeded in district court cases, including *Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 535 (E.D.N.C. 1998), *aff'd*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). While the circuit court ultimately rejected the holding that red wolves were "things in interstate commerce," this is an argument that advocates continue to make. *See Gibbs v. Babbitt*, 214 F.3d 483, 490 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

¹¹⁶ Amicus Curiae Brief of Mountain States Legal Foundation in Support of Appellee Urging Affirmance at 14–15, *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014) (No. 14-4151); *see also United States v. Morrison*, 529 U.S. 598, 613 (2000).

¹¹⁷ *See, e.g., Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1067–68 n.2 (D.C. Cir. 2003) ("In focusing on the second *NAHB* rationale, we do not mean to discredit the first. Nor do we mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation. We simply have no need to consider those other rationales to dispose of the case before us."), *cert. denied*, 540 U.S. 1218 (2004).

interstate commerce.¹¹⁸ As discussed previously, *NAHB v. Babbitt* illustrates this argument.¹¹⁹ The species being protected in that case was the Delhi Sands Flower-Loving Fly.¹²⁰ San Bernardino County intended to build a hospital on newly purchased land that was found to be prime Fly habitat.¹²¹ Although the county received a permit from the Service to build the hospital, constructing an intersection nearby would cause “a ‘taking’ of the Fly in violation of ESA section 9(a).”¹²² The plaintiffs challenged this “take” prohibition as an unconstitutional use of regulatory power.¹²³ The plaintiffs’ argument relied heavily on the *Lopez* decision “that the Gun-Free School Zones Act of 1990 . . . exceeded Congress’ Commerce Clause authority.”¹²⁴

In evaluating the substantial effect prong in this case, the court examined the legislative history of the ESA.¹²⁵ The plaintiff argued that the ESA exists in order to protect biodiversity, “including the potential medicinal benefits.”¹²⁶ Besides possible future medical discoveries, the district court noted that the Fly was displayed in museums, was the subject of scholarly articles, and attracted researchers from out-of-state.¹²⁷ The D.C. Circuit reasoned that the extinction of a species had the potential to substantially affect commerce.¹²⁸ The court also focused on the aggregation of all species being protected by the ESA and the destructive effect on interstate competition if these animals were destroyed.¹²⁹ In upholding the ESA’s application, the court likened the destruction of endangered species to the destruction of farmland in *Hodel v. Indiana*.¹³⁰ The court stated that both the ESA and the Surface Mining Act regulate activities that are “likely to have destructive effects on interstate commerce.”¹³¹

Judge Sentelle’s dissenting opinion argued that the regulation itself “does not control a commercial activity, or an activity necessary to the regulation of some commercial activity.”¹³² Here one can see the contrast between two different methods of analysis. The majority focused on the aggregated provisions of the Act itself

¹¹⁸ See *Nat’l Ass’n of Home Builders*, 130 F.3d at 1050.

¹¹⁹ See *id.* at 1041; see also *supra* notes 94–96 and accompanying text.

¹²⁰ *Nat’l Ass’n of Home Builders*, 130 F.3d at 1043.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1045.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1050–51.

¹²⁶ Wood, *supra* note 2, at 103 (citing *Nat’l Ass’n of Home Builders*, 130 F.3d at 1052).

¹²⁷ *Id.* at 103 n.82 (citing John C. Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 181 (1998)).

¹²⁸ *Nat’l Ass’n of Home Builders*, 130 F.3d at 1052.

¹²⁹ *Id.* at 1054–57.

¹³⁰ *Id.* at 1055–56 (citing *Hodel v. Indiana*, 452 U.S. 314 (1981) (upholding the Surface Mining Act requiring special mining precautions to be taken on land designated as “prime farmland” as a valid use of Commerce Clause regulatory power)).

¹³¹ *Id.* at 1056.

¹³² *Id.* at 1064 (Sentelle, J., dissenting).

as affecting interstate commerce.¹³³ Judge Sentelle on the other hand, looked at the specific activity being regulated here: the taking of Flies.¹³⁴ Judge Sentelle interpreted *Lopez* as requiring a “case-by-case inquiry” for intrastate commerce challenges.¹³⁵ The judge also gave a nod to the third method of analysis by stating that the Fly is not an article in interstate commerce.¹³⁶ As illustrated by this case, once a broad perspective is taken by analyzing the entire act rather than the specific situation, it is fairly easy to argue that small connections to commercial activity can be aggregated to reach the substantial effect benchmark. While scientific discoveries and tourism are cited examples,¹³⁷ any number of activities can be deemed as potentially impacting interstate commerce. Two cases involving fish species illustrate other ways of applying the regulation-focused test.¹³⁸

2. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*

The controversy in *Alabama-Tombigbee v. Kempthorne*¹³⁹ involved deciding whether two fish, the Alabama Sturgeon and the Shovelnose Sturgeon, actually constituted separate species.¹⁴⁰ If the Alabama Sturgeon was a separate species, it could rightfully be listed as endangered.¹⁴¹ The court looked at the ESA as a whole in reviewing the facts that led to the agency’s listing decision and found that there was “a rational basis for believing that regulation of an intrastate activity was an essential part of a larger regulation of economic activity.”¹⁴² The court stated that the Alabama Sturgeon itself had little or no commercial value but the Substantial Effect Test was to be applied to the regulation rather than the object regulated.¹⁴³ Similarly to *NAHB v. Babbitt*, the court reasoned that the possibility that taking endangered species could have an impact on national markets was sufficient to justify the endangered species regulation.¹⁴⁴ In this situation, the fact that the fish existed in Alabama’s rivers could possibly “stimulate commerce by encouraging fishing, hunting, and tourism.”¹⁴⁵ At one time, the Alabama Sturgeon had been commercially fished and

¹³³ See *id.* at 1046, 1054, 1056 (majority opinion).

¹³⁴ *Id.* at 1060–67 (Sentelle, J., dissenting).

¹³⁵ *Id.* at 1064 (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

¹³⁶ *Id.* at 1067.

¹³⁷ See *supra* note 102 and accompanying text.

¹³⁸ See *infra* Sections IV.A.2–3.

¹³⁹ 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008).

¹⁴⁰ *Id.* at 1252.

¹⁴¹ *Id.*; see also *Ala.-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1248–49 & n.4 (11th Cir. 2003).

¹⁴² *Kempthorne*, 477 F.3d at 1277.

¹⁴³ *Id.* at 1271–73.

¹⁴⁴ *Id.* at 1272. The court commented that Congress has never been required to “legislate with scientific exactitude.” *Id.* Thus a rational basis for such impact is enough to sustain the regulation. See *id.* at 1277.

¹⁴⁵ *Id.* at 1274.

the goal was to return the population to a level that would allow commercial fishing to resume.¹⁴⁶

In this case, the Eleventh Circuit Court of Appeals applied the rational basis standard to Congress's initial decision to create the ESA.¹⁴⁷ Considering the entire regulatory scheme is an easy way to validate any species regulation, even a species that is entirely intrastate with no economic value. If the examined act was the actual regulation of this specific species, the regulation would need more factual support to pass as a valid use of Commerce Clause regulatory power. In this situation, the previous commercial use of the fish and the possibility of a market for game fishing is potentially enough to uphold even the specific regulation of this species itself.¹⁴⁸ However, the argument would be much more difficult to make for the Utah Prairie Dog which has never been a game animal and whose pelt is very unlikely to ever create a commercial market.¹⁴⁹

3. *San Luis & Delta-Mendota Water Authority v. Salazar*

*San Luis & Delta-Mendota Water Authority v. Salazar*¹⁵⁰ also concerned a threatened fish species (the Delta Smelt), but here the plaintiff challenged the impact of the regulation on multiple state water projects.¹⁵¹ The state was not allowed to provide irrigation for nearby orchards by controlling the water flow in the delta because it could cause incidental taking of the protected smelt.¹⁵² Almond, pistachio, and walnut growers sued the government for the damage that the lack of water had caused to their crops.¹⁵³ The government responded that “[t]he ‘no-jeopardy’ provision in ESA section 7 requires an agency to ensure that any action it takes ‘is not likely to jeopardize the continued existence of any endangered or threatened species.’”¹⁵⁴ Despite the economic damage that the smelt regulation had created on the side of the growers, the court looked to the entirety of the ESA to uphold the regulation prohibiting the taking of smelt.¹⁵⁵ The court cited *Kemphorne* while also stating that “future and unanticipated interstate commerce value of species” supports the ESA’s authority to regulate intrastate species.¹⁵⁶ Similar to *Kemphorne*, it was the overall

¹⁴⁶ *Id.* at 1253, 1276.

¹⁴⁷ *Id.* at 1277.

¹⁴⁸ *See id.* at 1271–72.

¹⁴⁹ *See* Brief of the Chamber of Commerce of the U.S. & the Nat’l Fed’n of Indep. Bus. as *Amici Curiae* in Support of Plaintiffs-Appellees at 16, *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014) (No. 14-4151).

¹⁵⁰ 638 F.3d 1163 (9th Cir.), *cert. denied*, 132 S. Ct. 498 (2011).

¹⁵¹ *Id.* at 1167–68.

¹⁵² *Id.* at 1168.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1171 (citing 16 U.S.C. § 1536(a)(2) (2012)) (footnote omitted).

¹⁵⁵ *Id.* at 1177.

¹⁵⁶ *Id.* at 1176 (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178–79 (1978); *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996)) (footnote omitted).

impact, both actual and potential, of the ESA as a whole that satisfied the substantial effect test.¹⁵⁷

4. Questioning the ESA as a Whole in the Prairie Dog Case

The defendants in *PETPO* argue that regulating the take of the Utah Prairie Dog is “essential to the economic scheme of the ESA.”¹⁵⁸ In the alternative, if the regulation of only prairie dogs does not prove to be a significant part of the regulation, the defendants argue that excluding all intrastate species from the regulation would “substantially frustrate the ESA’s comprehensive scheme.”¹⁵⁹ Although these arguments focus on the validity of the ESA, they call into question the role of this specific species rather than the entire regulation. The district court denied this argument and instead chose to focus on the effect that taking prairie dogs has on interstate commerce rather than the connection between commerce and the ESA.¹⁶⁰ The court demonstrated that specific parts of the Act can be invalidated while still upholding the validity of the overall regulatory structure.¹⁶¹ However, the district court’s approach remains a minority position among the entirety of species regulation challenges.¹⁶²

If the Tenth Circuit (or the Supreme Court, should the case reach that level) chooses to focus on the application of the intrastate endangered species regulations as a whole, the federal government is likely to succeed in its argument that the prairie dog regulation is a valid use of Commerce Clause regulatory power. Under this regime, there would effectively be no limit to the reach of the ESA. Such a decisive ruling from the highest court would point us back to the question discussed in *NAHB v. Babbitt*: why would anyone “make the mistake of calling it the Commerce Clause instead of the ‘hey-you-can-do-whatever-you-feel-like’ clause?”¹⁶³

B. The Specific Regulated Act as the Activity in Question

The next way that a court could approach the Substantial Effect Test is considering the specific act being regulated and the effect that this act has on interstate commerce. As opposed to the previous facial challenge to the regulation as a whole, this approach

¹⁵⁷ *Id.* 1176–77.

¹⁵⁸ *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1341 (D. Utah 2014).

¹⁵⁹ *Id.* at 1341 (citation omitted).

¹⁶⁰ *Id.* at 1344–45.

¹⁶¹ *Id.* at 1346.

¹⁶² *See supra* Sections IV.A.1–3.

¹⁶³ *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1061 (1997) (Sentelle, J., dissenting) (quoting Judge Alex Kozinski, *Introduction to Volume 19*, 19 HARV. J.L. PUB. POL’Y 1, 5 (1995)).

can be seen as an as-applied challenge.¹⁶⁴ First, the court must decide which activity is actually being regulated: the physical taking of the animal in question or the desired activity (such as a commercial development) that is effectively being prohibited by the endangered species regulation.¹⁶⁵ Next, the court must examine the chosen activity and evaluate the effect of the target activity on some form of interstate commerce.¹⁶⁶ Several cases have taken this approach to endangered species regulation with varying results.

1. *GDF Realty Investments, Ltd. v. Norton*

In *GDF Realty Investments, Ltd. v. Norton*,¹⁶⁷ the Service listed “five subterranean invertebrate species [Cave Species] as endangered under section 4 of ESA[.]”¹⁶⁸ The Cave Species are found only within two counties in Texas and do not play a role in any current commercial market.¹⁶⁹ Scientific research has been conducted on the Cave Species and several scholarly articles have been published regarding the findings.¹⁷⁰ The issue in the case arose when a private party intended to develop a section of property where the creatures were known to live.¹⁷¹ The Service ruled that the development would constitute an illegal taking of the Cave Species and subsequently denied the developers an incidental take permit.¹⁷²

The Fifth Circuit Court of Appeals looked to *Lopez* and *Morrison* in evaluating the “attenuation of the link between the intrastate activity and its effect *vel non* on interstate commerce.”¹⁷³ The court stated that there are two ways in which an activity may be found to have a substantial effect on interstate commerce: the specific activity by itself may have such an effect or the activity may be aggregated with other similar activities to find a substantial effect.¹⁷⁴ In order to determine the effect, the

¹⁶⁴ *Id.* at 1064 (arguing that the *Lopez* test requires “case-by-case inquiry” to assess the effect on interstate commerce).

¹⁶⁵ *See, e.g., GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003) (stating that the key question is “what constitutes the ‘regulated activity.’”) In *GDF Realty*, it was either the taking of “six species of subterranean invertebrates found only within two counties in Texas” or the planned commercial development for the area where the species existed. *Id.* at 624–26, 633.

¹⁶⁶ This step could include considering an aggregation of the activity in question or possible future ties to commercial activity, similar to the analysis conducted under the overall ESA regulation approach. *See, e.g., id.* at 637.

¹⁶⁷ 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005).

¹⁶⁸ *Id.* at 625.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 624–26.

¹⁷² *Id.* at 626.

¹⁷³ *Id.* at 628–29 (citing *United States v. Morrison*, 529 U.S. 598, 612 (2000)).

¹⁷⁴ *Id.* at 629. The first method follows the as-applied method while the second aggregation method is a way of finding the regulation as a whole to be valid or invalid. *See id.*

court must first decide “what constitutes the ‘regulated activity.’”¹⁷⁵ The Court of Appeals held that the activity in question was the “expressly regulated activity,” meaning the actual taking of the Cave Species, as opposed to the prevented commercial development as the target activity.¹⁷⁶ The court noted that it was important to consider only the activity regulated in this specific situation because “looking primarily beyond the regulated activity . . . would ‘effectively obliterate’ the limiting purpose of the Commerce Clause.”¹⁷⁷

Although the court focused its analysis on the take provision rather than the ESA as a whole, it still found the Cave Species take prohibition to be an “essential part” of the ESA.¹⁷⁸ The court noted that the species may play an unforeseen role in the overall ecosystem and that allowing takes of all similar creatures could have a substantial effect on interstate commerce.¹⁷⁹ The court essentially combined the overall regulation method and the specific regulated act method to find that the reasoning behind the specific regulation was logical enough to justify an exercise of Commerce Clause regulatory power.¹⁸⁰ *GDF Realty* illustrates the ingenuity often used by courts to combine multiple approaches to the intrastate species question to ultimately find that the federal regulatory power has no limitation.

2. *Rancho Viejo, LLC v. Norton*

Another intrastate species case decided in 2003 took a different approach to the question of what activity is actually being regulated. In *Rancho Viejo, LLC v. Norton*,¹⁸¹ a California real estate developer wished to construct a housing development in an area that was a known habitat for the endangered Arroyo Southwestern Toad (Toad).¹⁸² The Toads are clearly an intrastate species as they reside near the creeks where they breed and none have been found outside of the state of California.¹⁸³ The Service refused to approve the developer’s site plan because an erected fence could prevent the movement of the Toads between habitats.¹⁸⁴ The Service ruled “that construction of the fence ‘[had] resulted in the illegal take . . . of federally endangered’ arroyo toads.”¹⁸⁵

The D.C. Circuit Court of Appeals looked to its 1997 *NAHB v. Babbitt* decision to focus its substantial effect analysis on the activity being prohibited by the species

¹⁷⁵ *Id.* at 633.

¹⁷⁶ *Id.* at 633–36.

¹⁷⁷ *Id.* at 634 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 (1937)).

¹⁷⁸ *Id.* at 640.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 638–40.

¹⁸¹ 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

¹⁸² *Id.* at 1064.

¹⁸³ *Id.* at 1065.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (citations omitted).

regulation, the commercial development.¹⁸⁶ Since prohibiting the taking of the Toad effectively shut down “the construction of a 202 acre commercial housing development[,]” there was clearly a substantial effect on interstate commerce.¹⁸⁷ The court justified its choice of the commercial development as the activity in question by stating that “[n]othing in the facts of *Morrison* or *Lopez* suggests that focusing on plaintiff’s construction project is inappropriate or insufficient as a basis for sustaining this application of the ESA.”¹⁸⁸ The court also noted that the Commerce Clause allows the ESA to “achieve noneconomic ends through the regulation of commercial activity.”¹⁸⁹ Chief Judge Ginsburg’s concurrence added the caveat that there is a “logical stopping point” to the court’s decision about what affects interstate commerce.¹⁹⁰ Although the residential development in question clearly affected interstate commerce, “the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.”¹⁹¹

3. Focusing on the Taking of Prairie Dogs as the Activity in Question

The approach taken by the district court in *PETPO* was to focus on the actual taking of prairie dogs as the activity that must uphold the Substantial Effect Test.¹⁹² The court cited *Gonzales v. Raich* in holding that “[t]he proper focus of the ‘substantial effect’ test is the ‘regulated activity.’”¹⁹³ Using this as-applied method, the court considered the defendant’s argument that the Utah Prairie Dog plays an important role in the ecosystem, could attract out of state tourists, and could someday be used

¹⁸⁶ *Id.* at 1067–68 (citing Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)).

¹⁸⁷ *Id.* at 1068, 1070.

¹⁸⁸ *Id.* at 1072.

¹⁸⁹ *Id.* at 1074.

¹⁹⁰ *Id.* at 1080 (Ginsburg, C.J., concurring) (footnote omitted). Judge Sentelle’s dissent in *National Ass’n of Home Builders v. Babbitt* states that the *Lopez* substantial effect test requires that:

the rationale offered to support the constitutionality of the statute (i.e., statutory findings, legislative history, arguments of counsel, or a reviewing court’s own attribution of purposes to the statute being challenged) has a logical stopping point so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states.

130 F.3d at 1064 (Sentelle, J., dissenting) (quoting *United States v. Morrison*, 529 U.S. 598, 613 (2000)). While many courts have neglected this requirement, it is imperative that future judicial decisions consider the logical stopping point of the ruling in order to maintain the bounds of Federalism and to avoid the appearance of judicial tyranny.

¹⁹¹ *Rancho Viejo*, 323 F.3d at 1080 (Ginsburg, C.J., concurring).

¹⁹² *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1344 (D. Utah 2014).

¹⁹³ *Id.* at 1344 (citing *Gonzales v. Raich*, 545 U.S. 1, 23 (2005)).

to support a significant scientific discovery.¹⁹⁴ However, these arguments “miss[] the mark” of the specific regulated act standard.¹⁹⁵ Claims of mass disruption to the ecosystem or that hypothetical medicinal breakthroughs will be thwarted by the removal of prairie dogs from non-federal lands can only succeed under a broad regulation-based approach.¹⁹⁶ The court stated that these claims are “simply too hypothetical and attenuated from the regulation in question to pass constitutional muster.”¹⁹⁷ Even if the Utah Prairie Dog was found to play an important role in tourism, the vast majority of this activity occurs on federal land where the take provision in question does not apply.¹⁹⁸

The narrow focus on the specific taking in question provides the “logical stopping point” in federal Commerce Clause regulatory power that Chief Judge Douglas H. Ginsburg highlighted in *Rancho Viejo* and Justice Sentelle’s dissent pointed out in *NAHB v. Babbitt*.¹⁹⁹ Unlike cases such as *NAHB v. Babbitt*, the law prohibiting the taking of prairie dogs is not prohibiting a large commercial development from destroying the rodent’s habitat.²⁰⁰ In contrast, it is the prairie dogs themselves who have moved from the protected federal land into agricultural and urban areas.²⁰¹ The only activity prevented by the ESA provision is the physical taking of problem prairie dogs.²⁰² When a federal provision is being challenged, it is certainly logical to consider what the provision actually provides rather than hypothesizing about unsubstantiated connections to other areas of commerce. Limiting judicial scrutiny to the specific case in question provides a “logical stopping point”²⁰³ and ensures that situations like “the lone hiker in the woods”²⁰⁴ do not become suddenly regulated under federal Commerce Clause power.

It is the Utah Prairie Dog take prohibition that provides the perfect opportunity for the courts to draw a logical stopping point line in the sand. Recent Supreme Court decisions such as *NFIB v. Sebelius*, indicate that the current Court may be willing

¹⁹⁴ *Id.* at 1344–45.

¹⁹⁵ *See id.* at 1344.

¹⁹⁶ *See supra* Section IV.A.

¹⁹⁷ *PETPO*, 57 F. Supp. 3d at 1345 (quoting *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 638 (5th Cir. 2003) (citing *United States v. Morrison*, 529 U.S. 598, 612 (2000), *cert. denied*, 545 U.S. 1114 (2005))).

¹⁹⁸ *Id.* at 1345–46.

¹⁹⁹ *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring), *cert. denied*, 540 U.S. 1218 (2004); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1064 (D.C. Cir. 1997) (Sentelle, J., dissenting), *cert. denied*, 524 U.S. 937 (1998).

²⁰⁰ *See Nat’l Ass’n of Home Builders*, 130 F.3d at 1044–45, 1058.

²⁰¹ *See Carlton, supra* note 21, at A1.

²⁰² *See Endangered Species Act of 1973*, Pub. L. No. 93-205, § 9(a), 87 Stat. 884, 893–94 (codified at 16 U.S.C. § 1538 (2012)).

²⁰³ *Rancho Viejo*, 323 F.3d at 1080 (Ginsburg, C.J., concurring).

²⁰⁴ *Id.*

to reign in federal regulatory power and protect state sovereignty.²⁰⁵ The principles of federalism require that “regulations affecting local citizens should have a nexus with local government.”²⁰⁶ The Utah Prairie Dog is a purely intrastate species with no substantial effect on any national market.²⁰⁷ The State of Utah also currently implements a Prairie Dog Management Plan including regulations providing a permitting process for limited takes of prairie dogs on non-federal lands.²⁰⁸ Thus, the federal take prohibition is an unnecessary overreach of federal regulatory power. Choosing *PETPO* as the case to limit federal power under the ESA would leave the Act largely intact as very few species hold the same position as the Utah Prairie Dog while still preserving the foundational principles of federalism and state sovereignty.

4. Focusing on the Damage Caused by the Prairie Dogs that Continues to Occur Because of the Regulation Against Taking the Rodents

The defendants in *PETPO* argued in the alternative that the rule preventing the taking of prairie dogs prevents various commercial activities from occurring.²⁰⁹ The rodents have infiltrated pastures and fields to the point where agricultural use is no longer feasible and has prevented development plans from being implemented in residential areas.²¹⁰ Apart from the activities indicated by the appellees, the prairie dogs have also destroyed airport runways; toppled gravestones and disrupted funeral services; and have reduced property values in many local areas.²¹¹ The prohibition against taking prairie dogs has certainly impacted interstate commercial activities, but the impact is quite different from that cited in other intrastate species cases. In

²⁰⁵ Brief of the State of Utah et al. as *Amici Curiae* in Support of Appellee and Affirmance at 7, *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014) (No. 14-4151) [hereinafter Brief of the State of Utah et al.] (citing *Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577–80 (2012) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–76 (1803))). The election of President Donald Trump and the continued Republican control of the Senate allows the President to fill Justice Scalia’s seat with a reliable conservative and return the Court to its previous ideologically balanced state. The remaining four or eight years of the Trump Administration coupled with multiple elderly Justices likely to become incapacitated or to seek retirement during that time will pull the Court into a conservative-leaning position. Under this new regime, there will be a greater willingness to reign in federal regulatory power and the Court may finally entertain a significant Commerce Clause challenge.

²⁰⁶ *Id.* at 16 (citing *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014)).

²⁰⁷ *PETPO*, 57 F. Supp. at 1346; Brief of the State of Utah et al., *supra* note 205, at 17.

²⁰⁸ Brief of the State of Utah et al., *supra* note 205, at 13–14 (citing UTAH ADMIN. CODE r. 657–70 (2015)); *Take & Control of Utah Prairie Dogs*, UTAH DIVISION WILDLIFE RESOURCES (May 8, 2015, 3:40 PM), <http://wildlife.utah.gov/learn-more/prairie-dogs.html> [<https://perma.cc/9AXL-H2L4>].

²⁰⁹ *PETPO*, 57 F. Supp. 3d at 1341.

²¹⁰ *Id.*

²¹¹ See O’Donoghue, *supra* note 14; Carlton, *supra* note 21, at A1.

most cases, it is a land developer that is attempting to move in and disrupt a creature's habitat.²¹² In the Utah Prairie Dog situation, the rodents have moved out of the remote areas and onto public and private property.²¹³ The take prohibition prevents citizens from protecting their property and threatens public health and safety.

It may be argued that the prairie dog situation is similar to the situation in *Christy v. Hodel*²¹⁴ where citizens were prevented from taking federally protected grizzly bears in order to protect their livestock.²¹⁵ In *Christy*, the court held that the plaintiff did not have the right to protect his own property from destruction caused by "federally protected wildlife."²¹⁶ However, this decision was not based on a Commerce Clause substantial connection to interstate commerce, but on the determination that the killing of plaintiff's livestock by federally protected grizzly bears did not constitute a Fifth Amendment taking.²¹⁷ The court noted that the plaintiff's loss was incidental to "reasonable regulation in the public interest."²¹⁸

The current Utah Prairie Dog regulation does not meet the standard of a "reasonable regulation in the public interest."²¹⁹ It is not only a prohibition against landowners exterminating the rodents, but also against moving the rodents to federal reserve areas where the creatures can thrive.²²⁰ The government has not shown that the supposed public interest of prohibiting prairie dog takes on non-federal property outweighs the clear public interest of maintaining public streets, airport runways, and ensuring that the rodents do not spread disease throughout the communities.²²¹ The plaintiff in *PETPO* also does not argue for government compensation due to a taking of private property by a federally controlled species.²²² The only connection the court needs to consider in this situation is what projects would be occurring in the absence of the federal take prohibition. Looking hypothetically to a world in which the State of Utah was allowed to manage prairie dog populations on non-federal

²¹² See, e.g., *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (addressing the attempted development in an area that would harm Cave Species), *cert. denied*, 545 U.S. 1114 (2005); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (addressing commercial development halted by fly protections), *cert. denied*, 524 U.S. 937 (1998).

²¹³ See Carlton, *supra* note 21, at A1.

²¹⁴ *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

²¹⁵ See *id.* at 1327.

²¹⁶ *Id.* at 1329.

²¹⁷ *Id.* at 1335.

²¹⁸ *Id.*

²¹⁹ See *id.*

²²⁰ See *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1340 (D. Utah 2014).

²²¹ Defendants argue that the Utah Prairie Dog serves as prey for other animals in the ecosystem and "attracts some interstate tourism." *Id.* at 1341 (citations omitted). However, the district court stated that hypothetical connections to interstate commerce are not enough to justify the regulation under the Commerce Clause. *Id.* at 1344–45.

²²² See *id.* at 1339–42.

land, there would be much less of a need to continually repair airport runways and replace cemetery markers toppled by rodents.²²³

However, even in this hypothetical world, the current rendition of the Commerce Clause as the “hey-you-can-do-whatever-you-feel-like clause”²²⁴ could be used to uphold the federal regulation. ESA proponents could argue that the prevention of property destruction gives the take prohibition a substantial connection to interstate commerce because now localities do not need to bring in pavers and gravestone manufacturers to fix the problems caused by prairie dogs, therefore depriving the market of interstate commerce. Such an argument does not follow from the current liturgy of intrastate species cases, but is a foreseeable future extension of federal regulatory power. If this is the future of intrastate species litigation, perhaps our framework for defining interstate versus intrastate needs to be reevaluated.

C. *The Regulated Animal as an Article of Commerce*

A third way that courts could measure the Substantial Effect Test is by viewing the animals themselves as “things in interstate commerce.”²²⁵ From this perspective, the court will ask if the animal itself or any information or product garnered from the animal moves in interstate commerce.²²⁶ This view differs from the first perspective in that it does not look at the regulation itself, but looks only to the object of the regulation.²²⁷ This third perspective also deviates from the specific regulated act view in that it examines whether the animals themselves have a direct substantial relationship with interstate commerce.²²⁸ However, as is the case with the previous two methods of analysis, this view may be combined with pieces of the other two perspectives to create a multifaceted approach.

1. *Gibbs v. Babbitt*

The district court decision in *Gibbs v. Babbitt* illustrates an application of this theory.²²⁹ The case involved federally protected red wolves that migrated onto private property and threatened people and livestock.²³⁰ The ESA restricted citizens’

²²³ See Carlton, *supra* note 21, at A1.

²²⁴ See Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting) (quoting Kozinski, *supra* note 163, at 5), *cert. denied*, 524 U.S. 937 (1998)).

²²⁵ *Gibbs v. Babbitt*, 214 F.3d 483, 490 (4th Cir. 2000) (quoting *Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 535 (E.D.N.C. 1998), *aff’d*, 214 F.3d 483 (4th Cir. 2000)). While the district court found that the red wolves in question constituted items in commerce, the circuit rejected this view. *Id.*

²²⁶ *Gibbs*, 31 F. Supp. 2d at 535.

²²⁷ See *supra* Section IV.A.

²²⁸ *Gibbs*, 31 F. Supp. 2d at 535; see also *supra* Section IV.B.

²²⁹ See generally *Gibbs*, 31 F. Supp. 2d 531.

²³⁰ *Gibbs*, 214 F.3d at 488–89.

ability to take the wolves in an attempt to protect themselves and their property.²³¹ Although the court of appeals rejected the argument that the wolves were themselves articles in commerce, the court held that “[t]he taking of red wolves implicates a variety of commercial activities and is closely connected to several interstate markets.”²³² Since the wolves physically crossed state lines, the court of appeals probably could have followed the district court decision and declared the red wolf to be an interstate species and called it a day.²³³ In reaching its conclusion, however, the court of appeals rejected this approach and instead considered current and possible future economic connections between the species and commercial activity.²³⁴ The Fourth Circuit found that red wolf tourism, scientific research, and the possibility of one day reviving the commercial pelt trade created a relationship between takings of the wolf and interstate commerce.²³⁵

Even though this method of analysis has not seen much success at the appellate level, there is significant room for interpretation should the animal successfully be considered such an article in commerce. One must decide how “the animal” will be defined. This determination could include only the physical animal moving on its own volition or it could include the information (i.e., scientific discoveries or tourists’ happy thoughts about the creature) gained from the animal’s existence that crosses state boundaries in a non-physical form.²³⁶ The district court in *Gibbs* considered the wolves “things in interstate commerce” not just because they crossed state lines, but because possible tourism and future scientific discoveries followed them across those lines.²³⁷ Thus, when an animal is found to move on its own accord, courts theoretically may be more willing to find tenuous connections to interstate commerce enough to create a substantial effect and validate Commerce Clause regulation.

2. Utah Prairie Dogs as Articles of Commerce

It is difficult to argue that Utah Prairie Dogs are articles in commerce under the *Gibbs* district court regime as they are burrowing creatures who have not been shown to cross states lines on their own.²³⁸ However, in this age of ever-expanding

²³¹ *Id.*

²³² *Id.* at 492.

²³³ The current state of Commerce Clause analysis has reached the point that an economic tie does not necessarily need to be shown if the item or animal is shown to be interstate in and of itself. *See, e.g., Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting) (quoting Kozinski, *supra* note 163, at 5), *cert. denied*, 524 U.S. 937 (1998)).

²³⁴ *Gibbs*, 214 F.3d at 492–93.

²³⁵ *Id.* at 492.

²³⁶ *See id.*

²³⁷ *Id.* at 490 (quoting *Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 535 (E.D.N.C. 1998)).

²³⁸ *See People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337, 1343 (D. Utah 2014).

federal regulatory power, it is conceivable that the Service would argue that the rodents could one day cross state lines, either physically or in the form of an out-of-state tourist sharing his vacation slides with reluctant relatives in Oklahoma. Or perhaps a golden eagle could scoop up an unsuspecting prairie dog and deposit the rodent in her Arizona nest. Under this method of analysis, once the rodent has physically crossed state lines, it is very easy to find some sort of connection to interstate commerce and validate federal regulation that curtails state authority. In *PETPO*, the district court rejected hypothetical arguments about such possible connections to interstate commerce.²³⁹ While the Utah Prairie Dog situation does not lend itself easily to this method of analysis, the opinion illustrates the need for the courts to finally draw that “logical stopping point” for federal Commerce Clause regulatory power.²⁴⁰ If such a limitation is not set, any movement across state lines, however minor or seemingly natural, will be used to uphold federal intervention.²⁴¹

V. SETTING A CLEAR STANDARD FOR THE SUBSTANTIAL EFFECT TEST IN ORDER TO PRESERVE LEGITIMATE FEDERAL AND STATE REGULATORY POWER

In evaluating the application of federal Commerce Clause regulatory power in the context of interstate and intrastate species, I contend that the courts have stretched the power too far. Although courts have found that the ESA as a whole is a valid use of regulatory power, the power to regulate purely intrastate species rightfully belongs to the states.²⁴² As Chief Judge Ginsburg stated, there must be a “logical stopping point” to this seemingly omnipotent federal regulatory power.²⁴³ To ignore such a limit is to cripple our system of federalism and to deny the very basis of the Commerce Clause as a whole: that there is a substantive difference between interstate and intrastate commerce. Even in our highly connected modern world where ideas and goods flow freely across state lines, there are some activities that remain purely intrastate.

The *PETPO* case serves as an opportunity to provide a much needed kickback to the continual expansion of the Commerce Clause and set a defining limit.²⁴⁴ In order for the Commerce Clause to avoid becoming the “hey-you-can-do-whatever-you-feel-like clause”²⁴⁵ in the specific application of the ESA, the Supreme Court

²³⁹ *Id.* at 1340–41, 1346.

²⁴⁰ *See* *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring), *cert. denied*, 540 U.S. 1218 (2004).

²⁴¹ *See supra* Section IV.C.1.

²⁴² *See, e.g., GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005).

²⁴³ *Rancho Viejo*, 323 F.3d at 1080 (Ginsburg, C.J., concurring).

²⁴⁴ *See, e.g., id.* (clarifying that there should be some limitation to be set for federal regulatory power in this arena).

²⁴⁵ *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting) (quoting Kozinski, *supra* note 163, at 5), *cert. denied*, 524 U.S. 937 (1998)).

needs to set a standard for what specific activity is the basis of the Substantial Effect Test. Three methods have been presented for determining the activity in question: focusing on the regulation itself, the specific act being regulated, or the animal as an article of commerce.²⁴⁶ As we have seen, the method chosen to define the activity in question greatly affects the outcome of a case. The Court can use the *PETPO* case to define the regulated act as the activity in question and preserve a small sector of state-only regulatory power.

A. Using the Specific Regulated Act as the Standard for the Substantial Effect Test Defines a Logical Stopping Point

If the Substantial Effect Test is based on the endangered species regulation as the activity in question, there will never be an effective limit to federal regulation in this area.²⁴⁷ Any new prohibition of individual action that supposedly affects a threatened species will be deemed constitutional merely because it is part of a comprehensive regulatory scheme.²⁴⁸ There will effectively be no evaluation of individual circumstances and the consequences of government action.²⁴⁹ As several cases have shown, even true intrastate species may be federally regulated when the regulation itself is the activity in question.²⁵⁰

Basing the Substantial Effect Test on the regulated animal as an article in commerce would also fail to create any meaningful limit.²⁵¹ If the animal (or products derived from the animal) is being commercially traded across state lines, there is no question that the species affects interstate commerce. In situations where no clear commercial trade is occurring, arguing that the animal is an article in commerce relies largely on future connections to commerce such as possible tourism or a scientific discovery.²⁵² It is extremely difficult to weigh the effect that hypothetical activities have on interstate commerce. Resigning the courts to this type of inquiry is highly impracticable and would not provide any clear stopping point to federal regulatory power.

In contrast to the above methods, the proper focus of the Substantial Effect Test is on the specific act being regulated. Using this standard necessitates a case-by-case analysis rather than an overarching approval of federal regulation.²⁵³ Under this standard, the court must evaluate the target of the regulation and whether allowing

²⁴⁶ See *supra* Part IV.

²⁴⁷ See *supra* Section IV.A.

²⁴⁸ See *supra* Section IV.A.

²⁴⁹ See *supra* Section IV.A.

²⁵⁰ See *supra* Section IV.A; see, e.g., *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

²⁵¹ See *supra* Section IV.C.

²⁵² See *supra* Section IV.C.

²⁵³ See *supra* Section IV.B.

or disallowing that specific activity has an actual effect on interstate commerce.²⁵⁴ In the *PETPO* case, the activity to be evaluated is physically moving Utah Prairie Dogs from private property to federal preservation land and preventing their reentry in private areas.²⁵⁵ If such activity is intrastate, it falls under state regulatory power and precludes federal regulation. Although many ESA regulations would certainly be upheld under this standard, it would preserve state sovereignty in cases of purely intrastate activity. This distinction is the entire basis of the Commerce Clause and should be the standard for evaluating any regulatory scheme based on this grant of federal power.

B. Implications of a Clear Standard and Related Environmental Concerns

Focusing on the specific regulated act allows a case-specific evaluation of the species regulation in question.²⁵⁶ The Commerce Clause provides that intrastate species regulation power resides with the states.²⁵⁷ This power will certainly be challenged in specific situations because proponents of the federal regulation will argue that there are great policy concerns that necessitate federal intervention in a given case. The case-by-case approach addresses the policy side of the argument for federal regulation of a given species. Rather than approving of a federal species regulation merely because it is part of a larger federal regulation, a court will examine both the federal and state responses to preserving the species in question.²⁵⁸ When there is evidence that a state is preserving a species on its own, the challenge will fail for both lack of intrastate regulatory authority and a strong policy justification.

In the Utah situation, the state already requires certification of registration in order for a person to lawfully take a Utah Prairie Dog.²⁵⁹ The Utah Division of Wildlife Resources has also implemented a comprehensive plan for managing the population of Utah Prairie Dogs and preserving habitat according to the species' historic range.²⁶⁰ This plan was created through the cooperation of the Utah Department of Natural Resources, U.S. Forest Service, the Bureau of Land Management, and several other federal and local organizations.²⁶¹ The state of Utah is clearly

²⁵⁴ See *supra* Section IV.B.

²⁵⁵ See *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014); O'Donoghue, *supra* note 14; Carlton, *supra* note 21, at A1.

²⁵⁶ See *supra* Section IV.B.

²⁵⁷ See U.S. CONST. art. I, § 8, cl. 3; *United States v. Lopez*, 514 U.S. 549, 552–58 (1995).

²⁵⁸ See *supra* Section IV.B.

²⁵⁹ UTAH ADMIN. CODE r. 657-19-4(3) (2016). The Utah State Prairie Dog Management Plan provides specific procedures for maintaining adequate population levels while the Utah Prairie Dog qualifies as an endangered species and after it has been delisted. UTAH DIV. OF WILDLIFE RES., UTAH PRAIRIE DOG MANAGEMENT PLAN FOR NON-FEDERAL LANDS 4 (2015). Utah estimates that delisting could occur in five to ten years. *Id.* As of 2013, 1,404 take permits have been authorized by the state. *Id.* at 7.

²⁶⁰ See UTAH DIV. OF WILDLIFE RES., *supra* note 259.

²⁶¹ *Id.* at 7.

concerned with preserving the Utah Prairie Dog species and has willingly worked with federal agencies to develop the current state regulation.²⁶²

Using the specific regulated act as the focus of the Substantial Effect Test provides for state-based approaches to localized issues while preserving federal power to address national concerns.²⁶³ However important an environmental issue may be, it does not justify a violation of state sovereignty when there remain alternative avenues to address the concern. The evaluation of these alternatives should not be excluded by focusing on the overall regulatory scheme, but should be left for the court to consider in each individual case.

CONCLUSION

The strange occurrence of prairie rodents destroying Utah cemeteries provides an opportunity to reevaluate the current state of federal regulatory power. The Commerce Clause provides the federal government with broad regulatory power over interstate activities, but this power is not without limits. The distinction between interstate and intrastate activities is vital in preserving federalism and legitimate state authority. The standard chosen for the application of the Substantial Effect Test determines whether that distinction is maintained. I contend that the proper focus of the Substantial Effect Test is on the specific regulated activity in question. Using this standard will provide a “logical stopping point”²⁶⁴ for what truly affects interstate commerce. The specific regulated activity standard preserves the federal government’s overall authority to protect species through the ESA, but also maintains state regulatory authority in purely intrastate species preservation.

²⁶² *Id.* at 7–8.

²⁶³ *See supra* Section IV.B.

²⁶⁴ *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring), *cert. denied*, 540 U.S. 1218 (2004).