Washington Legal Foundation

June 5, 2015

On the Merits:

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS (PETPO),

Plaintiff-Appellee,

v.

U.S. FISH & WILDLIFE SERVICE, *et al*.,

Defendants-Appellants.

No. 14-4165

U.S. Court of Appeals for the Tenth Circuit

Question Presented: Whether, consistent with the Commerce Clause, the U.S. Fish & Wildlife Service may regulate takes of the Utah Prairie Dog, a wholly intrastate species that does not substantially affect interstate commerce.

Summary of the Case: Pursuant to the Endangered Species Act (ESA), the U.S. Fish & Wildlife Service adopted a regulation forbidding any "take" (defined broadly as any activity that adversely affects) of the Utah Prairie Dog, a threatened species of prairie dog that resides only in southwestern Utah. Claiming interference with the use and enjoyment of their property, southwestern Utah property owners and local governments formed People for the Ethical Treatment of Property Owners (PETPO) and challenged the constitutionality of the regulation in federal district court. PETPO argued that the government's ban on the "take" (a noneconomic activity) of a species with no substantial effect on interstate commerce violates the Commerce Clause. The government and intervenor *amici* argued that Utah Prairie Dogs have a substantial effect on interstate commerce because they contribute to the ecosystem and attract some tourism, and that the regulation is thus essential to the ESA's economic scheme.

The U.S. District Court of Utah held that the regulation cannot be sustained under the Commerce Clause because it is not a regulation of economic activity and any impacts on interstate commerce are too attenuated to withstand constitutional scrutiny. The court also held that, under *Gonzales v. Raich*, 545 U.S. 1 (2005), the Necessary and Proper Clause does not authorize such a regulation because it is not necessary to ensure that the federal government can regulate economic activity or the market for a commodity. The government appealed to the Tenth Circuit.

On The Merits:
Judgment for Plaintiff-Appellee
Anthony T. Caso
Chapman University School of Law

The federal government is one of enumerated powers. *Marbury v. Madison*, 1 Cranch 137, 176 (1803). Enumeration implies limitations on the powers. *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824); *see Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). That is, the federal government does not have the "police power" exercised by the states over the general health, safety, morals,

and welfare of all things within their boundaries. *Keller v. United States*, 213 U.S. 138, 148 (1909); *see Bond v. United States*, 134 S. Ct. 2077, 2086 (2014). Instead, each branch of the federal government must find its powers listed in the Constitution.

The United States Fish & Wildlife Service promulgated the regulation at issue in this case pursuant to the ESA. 16 U.S.C. §§ 1531 *et seq*. That Act generally prohibits a "take" of an endangered species, and allows the Secretary of the Interior to determine if a species is "endangered" or "threatened." 16 U.S.C. §§ 1532, 1538. Pursuant to its authority under the Act, the Fish & Wildlife Service designated the Utah Prairie Dog as "threatened" and promulgated rules limiting the "take" of the species. A "take" includes "any significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. Without a permit from the Fish & Wildlife Service, a use of land that alters the prairie dog's habitat in a manner that injures the animal is a crime. 16 U.S.C. § 1540.

Congress has the power to "regulate commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. Art I, § 8. The Supreme Court has ruled that this includes the power to regulate the "channels of interstate commerce" (highways, railroads, rivers, etc.), "people or things in commerce," and actions that substantially affect interstate commerce (local economic activity that, taken together, has an impact on interstate commerce). *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2579 (opinion of Roberts, C.J.); *United States v. Morrison*, 529 U.S. 598, 609 (2000); *United States v. Lopez*, 514 U.S. 549, 558 (1995). This is an expansive power, but it is not unlimited. *Lopez*, 514 U.S. at 557.

In particular, the courts will not interpret federal legislation in a manner that allows intrusion on state powers without a clear indication that Congress intended such a result. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001). One of the most sensitive areas of regulation reserved to the states is the regulation of land use within a state's boundaries. Indeed, the Supreme Court has identified control of land-use regulation as a "quintessential" state power. *Rapanos v. United States*, 547 U.S. 715, 737 (2006). Therefore, this court must tread carefully where an agency of the United States claims superior authority over this "quintessential" state power.

Plaintiffs here seek not to overturn the entire ESA, but ask only that the court review the regulation prohibiting the "take" of the Utah Prairie Dog. As the name suggests, the Utah Prairie Dog is found only in the State of Utah. The animal is not an article in interstate commerce. There is no market for prairie dogs in general or the Utah Prairie Dog in particular. The only question then is whether a local "take" of this prairie dog through alteration of its habitat will have a substantial effect on interstate commerce. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 628 (5th Cir. 2003). We do not believe that either Congress or the agency is permitted to exercise power under the Commerce Clause based on speculation about "unknown uses" of a threatened or endangered species. *See id*. at 640. Congress's power under the Commerce Clause is to regulate commerce—not future hypotheticals.

The Fish & Wildlife Service argues that the regulation is aimed at activity, such as developing land for home construction, that affects interstate commerce. Thus, according the Fish & Wildlife Service, prohibiting the "take" of the Utah Prairie Dog is a regulation of commerce for purposes of the Commerce Clause. The problem with that argument, however, is that the regulation at issue is not limited to economic activity. *See Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc). Instead, it reaches *any* activity that "takes" a prairie dog – including merely filling in prairie-dog holes. The Commerce Clause, however, only empowers Congress to regulate *economic* activity. *See Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. at 2587; 2646 (Joint dissenting opinion). In order to be sustained under the

Commerce Clause, "the activity in question [must be] some sort of economic endeavor." *United States v. Morrison*, 529 U.S. 598, 611 (2000).

This regulation prohibits all activity that alters prairie-dog habitat—not just economic activity. The Utah Prairie Dog is not traded in interstate commerce and there is no showing that a "take" of a prairie dog will have an effect (substantial or otherwise) on interstate commerce. Accordingly, we affirm the judgment of the district court and find this regulation beyond the power of Congress under Article I, § 8 of the Constitution.

Dissenting View:
Michael C. Blumm
Lewis & Clark Law School

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

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

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

The D.C. Circuit has twice applied this framework in upholding ESA regulation. In *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), the court ruled that a 280-unit residential development was sufficient to justify ESA regulation protecting the Arroyo Southwestern Toad. And in *Nat'l Ass'n of Home Builders v. Babbitt* 130 F.3d 1041 (D.C. Cir. 1997), the court upheld application of an ESA regulation protecting the Delfi Sands Flower-Loving Fly to planned commercial development. The Fourth Circuit agreed in *Gibbs v. Babbitt*, 214 F.3d 483, 495 (4th Cir. 2000), finding constitutional an ESA regulation protecting the red wolf because it would affect economic activities such as ranching and farming.

Here, there is no question that the prairie dog regulation affects numerous economic activities, including land development, agricultural activities, livestock grazing, and oil and gas development. Because the prairie dog regulation restricts what are obviously economic activities, having substantial effects on interstate commerce, the regulation is well within Commerce Clause authority. The district court's failure to acknowledge these economic effects was in error and provides sufficient ground for reversal.

A second ground for upholding the prairie dog regulation is that the Supreme Court has long held that Congress may use Commerce Clause authority to regulate economic activity to serve non-economic ends. For

example, in *United States v. Darby*, 312 U.S. 100, 113 (1941), the Court upheld the application of the Fair Labor Standards Act's minimum-wage provisions to workers at a Georgia lumber company, even though the purpose was to improve working conditions, not affect commerce. And in *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243-44, 258 (1964), the Court upheld the Civil Rights Act on Commerce Clause grounds, even though the statutory purpose was to outlaw racial discrimination.

Thus, even if the ESA's purpose—to protect ecosystems in order to preserve their biodiversity—is not expressly commercial, the Commerce Clause does not require a commercial purpose, only regulation of commercial activity. As noted above, the prairie dog regulation clearly restricts economic activities. Moreover, the cumulative effects of a decision to restrict the scope of the ESA to species with demonstrable interstate effects would virtually dismantle the statute, as over two-thirds of listed species are located in a single state. The judicial function is not to retroactively strike down a four-decades-old regulatory program responsible for reversing the decline of countless species. Consequently, just as Congress may employ the Commerce Clause to curb the moral and social wrong of racial discrimination, so too it may invoke the Commerce Clause to regulate economic activity adversely affecting listed species and their ecosystems.

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

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

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

Anthony T. Caso is a Clinical Professor of Law at Chapman University's Dale E. Fowler School of Law, where he serves as Director of the Constitutional Jurisprudence Clinic. **Michael C. Blumm** is Jeffrey Bain Faculty Scholar & Professor of Law at Lewis and Clark Law School, where he has taught natural resources law for nearly four decades; he is one of 42 law professors who signed on to an *amicus* brief in support of the prairie dog regulation, from which this comment is adapted.

