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# Federal Regulation of Noncommercial, Intrastate Species Under the ESA After *Alabama-Tombigbee Rivers Coalition v. Kempthorne* and *Stewart & Jasper Orchards et al. v. Salazar*

## ABSTRACT

*This article addresses the scope of Congress' power to regulate non-commercial, intrastate species through application of the Endangered Species Act ("ESA"). Due to the inconsistent application of the Supreme Court's Commerce Clause jurisprudence prior to *Gonzales v. Raich*, the extent to which Congress could regulate intrastate species remained a mystery. The Court's decision in *Raich*, however, appears to have outlined a clear approach to federal regulation of intrastate species, i.e., Congress may regulate purely intrastate activity so long as the regulated activity is a part of a larger comprehensive scheme with sufficient ties to interstate commerce. This article takes a closer look at how two circuit courts have applied the comprehensive scheme rationale to the federal regulation of wholly intrastate species after *Raich*. The article concludes by discussing the implications of the circuit courts' decisions as they relate to future efforts by the federal government to regulate noncommercial, intrastate species through application of the ESA.*

## INTRODUCTION

The extent to which Congress may regulate wholly intrastate activity pursuant to the Commerce Clause has been a frequent question before the High Court.<sup>1</sup> Perhaps not surprisingly, the Court's jurisprudence on this question has shifted over the years. At times the Court has interpreted the Commerce Clause narrowly so as to restrict Congress'

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1. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Wrightwood Dairy*, 315 U.S. 110 (1942); *Maryland v. Writz*, 392 U.S. 183 (1968); *Perez v. United States*, 402 U.S. 146 (1971); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Hodel v. Indiana*, 452 U.S. 314 (1981); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005).

commerce power.<sup>2</sup> At other times, however, the Court has interpreted the clause broadly so as to give Congress expansive regulatory authority.<sup>3</sup>

Between 1997 and 2003, four circuit courts addressed whether Congress could regulate purely intrastate, noncommercial species under the Endangered Species Act ("ESA"). Those courts applied the Supreme Court's Commerce Clause jurisprudence as set forth in *United States v. Lopez*<sup>4</sup> and *United States v. Morrison*.<sup>5</sup> Although each court held that Congress could regulate intrastate species under the ESA, the courts applied different rationales in reaching that conclusion. The Supreme Court set out to clarify its Commerce Clause jurisprudence within the context of federal regulation of intrastate activity in *Gonzales v. Raich*.<sup>6</sup> *Raich* made clear that Congress may regulate purely intrastate activity so long as the regulated activity is a part of a larger comprehensive regulatory scheme with sufficient ties to interstate commerce.<sup>7</sup> The rule announced in *Raich* has become known as the comprehensive scheme rationale.

Only two circuit courts have addressed whether Congress may regulate purely intrastate, noncommercial species under the ESA after the Supreme Court's decision in *Raich*. In both cases—*Alabama-Tombigbee Rivers Coalition v. Kempthorne*<sup>8</sup> and *San Luis & Delta Mendota Water Authority and Stewart & Jasper Orchards v. Salazar*<sup>9</sup>—the courts arrived at the same conclusion. Unlike the four circuit courts that resolved the question under the Supreme Court's jurisprudence in *Lopez* and *Morrison*, the courts in *Alabama-Tombigbee* and *Stewart & Jasper Orchards* applied the comprehensive scheme rationale as announced in *Raich*.<sup>10</sup> The holdings were clear: Congress may regulate purely intrastate, noncommercial species via application of the ESA because the ESA is itself a comprehensive regulatory scheme with sufficient ties to interstate commerce.<sup>11</sup>

This article takes a closer look at the courts' application of the comprehensive scheme rationale in *Alabama-Tombigbee* and *Stewart & Jasper Orchards*. The article then draws conclusions about the future impli-

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2. See, e.g., *Lopez*, 514 U.S. 549 (1995).

3. See, e.g., *Raich*, 545 U.S. 1 (2005).

4. *Lopez*, 514 U.S. 549 (1995).

5. *Morrison*, 529 U.S. 598 (2000).

6. *Raich*, 545 U.S. 1 (2005).

7. *Id.* at 22.

8. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007).

9. *Luis & Delta Mendota Water Authority and Stewart & Jasper Orchards v. Salazar*, 638 F.3d 1163 (9th Cir. 2011).

10. *Alabama-Tombigbee*, 477 F.3d 1250, 1273 (11th Cir. 2007); *Stewart & Jasper Orchards*, 638 F.3d 1163, 1175 (9th Cir. 2011).

11. *Id.*

cations of the Ninth and Eleventh Circuits' application of the comprehensive scheme rationale to federal regulation of intrastate species. The article concludes with the following takeaways, all drawn from the recent decisions in *Alabama-Tombigbee* and *Stewart & Jasper Orchards*: 1) the Supreme Court's decision in *Raich* clarified the Court's Commerce Clause jurisprudence as applied to federal regulation of intrastate activity; 2) the ESA is a comprehensive regulatory scheme bearing a substantial relation to interstate commerce; 3) future courts will likely apply the comprehensive scheme rationale within the context of federal regulation of intrastate species under the ESA; 4) future courts will likely uphold Congress' ability to regulate wholly intrastate species under the ESA; 5) *Alabama-Tombigbee* and *Stewart & Jasper Orchards* bolster the argument that the ESA, as a whole, is constitutional; 6) critics of the ESA will resort to new, creative methods of attacking the ESA; and 7) future litigators will use the comprehensive scheme rationale to justify federal regulation of intrastate activity in contexts other than the protection of endangered species, resulting in the gradual expansion of Congress' commerce power.

## I. FEDERAL REGULATION OF INTRASTATE ACTIVITY UNDER THE COMMERCE CLAUSE: THE SUPREME COURT'S JURISPRUDENCE

### A. Federal Regulation of Intrastate Activities Before the New Deal

The Supreme Court gave little deference to Congress in the years leading up to the New Deal. As a result, the Court frequently struck down national regulatory laws as exceeding the proper scope of Congress' power under the Commerce Clause.<sup>12</sup> Although Chief Justice Marshall used both expansive and restrictive language when addressing Congress' ability to regulate intrastate activities in an 1824 Commerce Clause case, *Gibbons v. Ogden*,<sup>13</sup> the Court focused on the limiting language of *Gibbons* until 1936,<sup>14</sup> leading to a narrow interpretation of Congress' commerce power. Before 1937, the Court relied on this language to prohibit federal regulation of activities that did not directly affect interstate commerce.<sup>15</sup> For example, Justice Hughes, writing for the majority

12. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 82 (17th ed. 2010).

13. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

14. Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause*, 78 U. COLO. L. REV. 375, 382 (Spring 2007).

15. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-13 (1895); *Hammer v. Dagenhart*, 247 U.S. 251, 271-72 (1918); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936).

in *A.L.A. Schechter Poultry Corp. v. United States*<sup>16</sup> in 1935, known as the "sick chicken case,"<sup>17</sup> held that the application of the National Industrial Recovery Act of 1933 to intrastate activities exceeded Congress' commerce power.<sup>18</sup> He reasoned that placing such restrictions on Congress was necessary to prevent the creation of a "completely centralized government."<sup>19</sup> Congress' commerce power gradually expanded, however, as President Roosevelt struggled to revive a sluggish economy in the late 1930s.

### B. Federal Regulation of Intrastate Activities After the New Deal and the Development of the "Comprehensive Scheme Rationale"

In 1937 the Court began taking a much more deferential stance towards Congress' commerce power. By appointing seven new Justices to the Court between 1937 and 1941, President Franklin D. Roosevelt played a central role in expanding congressional authority under the Commerce Clause.<sup>20</sup> Unlike the period before the New Deal, the Court would now uphold federal regulation of intrastate activities even when those activities did not directly affect interstate commerce.<sup>21</sup>

The Court upheld federal regulation of intrastate activities in every case until 1995, and in doing so created what has become known as the "comprehensive scheme rationale."<sup>22</sup> The comprehensive scheme rationale holds that Congress may regulate intrastate activities so long as the regulation is part of a comprehensive regulatory scheme that substantially relates to interstate commerce.<sup>23</sup> Federal district courts, as well as various circuit courts, have since used the comprehensive scheme rationale to justify Congress' authority to regulate intrastate activities.<sup>24</sup> The following cases illustrate the development of the Supreme Court's comprehensive scheme rationale. The cases further demonstrate that the Court has never ruled out the possibility of using the comprehensive scheme rationale in future Commerce Clause cases, despite the Rehn-

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16. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

17. SULLIVAN & GUNTHER, *supra* note 12, at 91.

18. *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495, 548 (1935).

19. *Id.*

20. SULLIVAN & GUNTHER, *supra* note 12, at 101.

21. See *United States v. Lopez*, 514 U.S. 549, 604-609 (1995) (Souter, J., dissenting); *Hodel v. Va. Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264, 276-82 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246, 252-53 (1964).

22. MANK, *supra* note 14, at 391-92.

23. *Id.*

24. See, e.g., *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003).

quist Court's "New Federalism"<sup>25</sup> of *Lopez* and *Morrison*. The fact that the Court has never ruled out the possibility of using the comprehensive scheme rationale is significant because the Court ultimately embraced the principle in the 2005 case of *Gonzales v. Raich*. Since that time, two circuit courts have also adopted the comprehensive scheme rationale when upholding the constitutionality of the ESA as applied to intrastate, noncommercial species.

In 1942 the Court decided *United States v. Wrightwood Dairy*,<sup>26</sup> a case dealing with the intrastate production and sale of milk. In upholding Congress' ability to regulate the intrastate production and sale of milk, the Court argued that Congress' commerce power extended to intrastate activity that substantially affected interstate commerce even when the activity itself is wholly intrastate.<sup>27</sup> Similarly, in *Wickard v. Filburn*,<sup>28</sup> a case about federal regulation of the intrastate production of wheat, the Court concluded that Congress' commerce power allows it to regulate intrastate activity where there is a rational basis that the activity substantially affects interstate commerce when aggregated.<sup>29</sup> The aggregation approach allowed Congress to regulate smaller intrastate activities as long as those activities were economic in nature. This development in Commerce Clause jurisprudence brought the Court one step closer to creating the comprehensive scheme rationale, which would allow Congress to regulate intrastate activities if those activities made up one part of a comprehensive regulatory scheme that substantially related to interstate commerce. The Court did just that in a series of Commerce Clause cases beginning in 1968 with *Maryland v. Writz*.<sup>30</sup>

*Writz* posed the question of whether the Commerce Clause authorized Congress to extend the application of the Fair Labor Standards Act to individual states.<sup>31</sup> The Court held that Congress' commerce power allowed it to regulate intrastate activities with "trivial" impacts on interstate commerce.<sup>32</sup> Congress could do so, however, only if the regulation was part of a comprehensive regulatory scheme bearing a substan-

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25. See generally Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217 (Oct. 2004); Megan Grill, *Walking the Line: The Rehnquist Court's Reverence for Federalism and Official Discretion in Deshaney and Castle Rock*, 10 LEWIS & CLARK L. REV. 487 (2006).

26. *United States v. Wrightwood Dairy*, 315 U.S. 110 (1942).

27. *Id.* at 121.

28. *Wickard v. Filburn*, 317 U.S. 111 (1942).

29. *Id.* at 124-25.

30. *Maryland v. Writz*, 392 U.S. 183 (1968).

31. *Id.* at 192-97.

32. *Id.*

tial relationship to interstate commerce.<sup>33</sup> While the Court did not define the boundaries of the comprehensive scheme rationale in *Writz*, the decision gave life to the idea that Congress could regulate activities that did not directly affect interstate commerce. *Writz* began to shift the Court's Commerce Clause analysis away from the regulated activity itself to the overall purpose of regulatory scheme. Future cases continued to expand Congress' commerce power by utilizing the *Writz* rationale.

In *Perez v. United States*,<sup>34</sup> a 1971 Commerce Clause case, the Court further explained when Congress could regulate an intrastate activity as part of a comprehensive federal statute. Justice Douglas, writing for the majority in *Perez*, held that Congress' commerce power allowed it to regulate a "class of activities" even though the regulated class might include intrastate activities that do not affect interstate commerce.<sup>35</sup> Although both *Writz* and *Perez* began to explain when Congress could use its commerce power to regulate intrastate activities under the comprehensive scheme rationale, neither opinion clearly outlined the boundaries of the seemingly new line of reasoning. The Court did, however, develop the boundaries of the comprehensive scheme rationale in two subsequent cases, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*<sup>36</sup> and *Hodel v. Indiana*.<sup>37</sup>

In *Hodel v. Indiana*, the Court held that Congress did not have to demonstrate that every aspect of a regulatory scheme bears a substantial relationship to interstate commerce.<sup>38</sup> Rather, a regulatory scheme could survive a constitutional challenge so long as the provisions in question were integral to the regulatory program and the regulatory scheme as a whole substantially related to interstate commerce.<sup>39</sup> In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the Court went on to say that it would apply a "rational basis" standard in cases involving challenges to Congress' commerce power, illustrating the Court's embrace of a very deferential standard of review in cases involving federal regulation of intrastate activities.<sup>40</sup> Both *Hodel* cases further defined the types of intrastate activities that Congress could regulate as part of a general regulatory scheme. Between 1981 and 1995 there was little doubt that Congress' commerce power reached intrastate activities with no direct

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33. *Id.*

34. *Perez v. United States*, 402 U.S. 146 (1971).

35. *Id.* at 152-55.

36. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

37. *Hodel v. Indiana*, 452 U.S. 314 (1981).

38. *Id.* at 329.

39. *Id.*

40. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. at 276.

affect on interstate commerce. That perspective changed, however, in 1995.

### C. Federal Regulation of Intrastate Activities Under *Lopez* and *Morrison*

Congress' commerce power seemed virtually unlimited until 1995, because the Court had not struck down a federal statute since the New Deal. As one scholar put it, "The world changed abruptly in 1995, however, when the Court decided that the Gun-Free School Zones Act of 1990 (GFSZA) exceeded the Commerce Clause power."<sup>41</sup> Chief Justice Rehnquist wrote for the majority in *United States v. Lopez*,<sup>42</sup> and he began the opinion by discussing the principles of federalism.<sup>43</sup> In an effort to place limits on Congress' commerce power, the Chief Justice described three general categories of regulation permitted by the Commerce Clause: 1) the regulation of the channels of interstate commerce; 2) the regulation of the instrumentalities of interstate commerce; and 3) the regulation of intrastate activities that have a substantial effect on interstate commerce.<sup>44</sup> In deciding what activities have a "substantial effect" on interstate commerce, the Court outlined a four-factor test.<sup>45</sup> Those factors are: 1) whether the object of the regulation is economic in nature; 2) whether the statute contains a nexus to interstate commerce; 3) whether congressional findings show a substantial effect on interstate commerce; and 4) whether the substantial effects on interstate commerce are too attenuated.<sup>46</sup> Chief Justice Rehnquist, joined with four other Justices, held that the GFSZA failed the "substantial effects" test. For the first time in sixty years the Court found that Congress acted beyond the scope of its commerce power in regulating the possession of handguns under the GFSZA. The Court did note, however, that Congress could regulate intrastate activities if the regulation was "an essential part of a larger regulation of economic activity" that would be undermined if Congress could not regulate the intrastate activities.<sup>47</sup> This portion of the opinion is significant because it demonstrates that, although *Lopez* appeared to greatly restrict Congress' commerce power to the three general categories of regulation announced by Chief Justice Rehnquist, the Court did not reject

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41. Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 317 (Spring 2004).

42. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

43. *Id.* at 552.

44. *Id.* at 558-59.

45. *Id.* 559-68.

46. *Id.*

47. *Id.* at 561.



the comprehensive scheme rationale as developed in *Wrightwood Darby*, *Writz*, *Perez*, and *Hodel*. Because the Court did not foreclose the opportunity of using the comprehensive scheme rationale in future cases involving federal regulation of intrastate activities, courts would ultimately embrace the rationale despite the *Lopez* Court's attempt to restrict Congress' commerce power.

The same five-member majority that struck down the GFSZA in *Lopez* rendered unconstitutional yet another statute in *United States v. Morrison*.<sup>48</sup> The federal statute at issue was the Violence Against Women Act ("VAWA"). The Court analyzed VAWA through the lens of the "substantial effects" test announced in *Lopez*.<sup>49</sup> And like the *Lopez* Court's decision about the constitutionality of the GFSZA, the *Morrison* Court held that VAWA exceeded the scope of Congress' commerce power.<sup>50</sup> The Court did not, however, adopt a bright-line rule against aggregating non-economic activities: "While we need not adopt a categorical rule against aggregating the effects of non-economic activity in order to decide these cases, thus far. . . our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."<sup>51</sup> Because the Court held that it "need not adopt a categorical rule against aggregating the effects of non-economic activity,"<sup>52</sup> it left available to future courts the rationales used in *Wickard*, *Writz*, *Perez*, and *Hodel*, i.e., the comprehensive scheme rationale. Those Courts held that Congress' commerce power allowed it to 1) aggregate intrastate activities; 2) regulate intrastate activities that have only trivial impacts on interstate commerce; 3) regulate classes of activities that included intrastate activities; and 4) regulate intrastate activities when those activities were integral to a comprehensive regulatory program. Although some scholars argued that *Lopez* and *Morrison* impliedly overruled these rationales,<sup>53</sup> the Court once again embraced them in *Gonzales v. Raich*,<sup>54</sup> decided in 2005. *Raich* made clear that neither *Lopez* nor *Morrison* foreclosed the possibility that future courts could use the rationales announced in *Wrightwood*, *Wickard*, *Writz*, *Perez*, or *Hodel* to justify Congress' ability to regulate intrastate activities.<sup>55</sup>

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48. *United States v. Morrison*, 529 U.S. 598 (2000).

49. *Id.* at 610.

50. *Id.* at 613-14.

51. *Id.*

52. *Id.* at 610.

53. See generally Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005).

54. *Gonzales v. Raich*, 545 U.S. 1, 17-22 (2005).

55. *Id.*

#### D. Federal Regulation of Intrastate Activities After *Raich*

Justice Stevens, the ranking dissenter from the Rehnquist Court, wrote for the majority in *Raich*. At least one commentator has noted that Justice Stevens may have viewed *Raich* as an opportunity to “free federal power from judicial restraints,” referring to the Court’s Commerce Clause jurisprudence since *Lopez*.<sup>56</sup> The question before the Court in *Raich* was whether application of the Controlled Substances Act (“CSA”) to the intrastate manufacture and possession of marijuana violated the Commerce Clause.<sup>57</sup> The Court held that the application of the CSA to the intrastate manufacture and possession of marijuana did not exceed Congress’ commerce power.<sup>58</sup> In arriving at its conclusion, the Court reached back to its rationales in both *Wickard* and *Perez*, reiterating that Congress may regulate intrastate activities that are part of an economic “class of activities” that substantially affect interstate commerce.<sup>59</sup> The Court also embraced the comprehensive scheme rationale, stating that Congress had the authority to regulate intrastate activities that substantially affect interstate commerce even if the individual intrastate activities have only a “de minimis” impact on interstate commerce.<sup>60</sup> So long as Congress had a rational basis for believing that the intrastate activities posed a threat to the national market, then Congress could regulate the entire class.<sup>61</sup>

While some scholars argue that *Raich* “hollowed out the core of contemporary Commerce Clause jurisprudence,”<sup>62</sup> others claim that Justice Stevens’ opinion merely revived parts of the Court’s Commerce Clause jurisprudence that had never been explicitly overruled.<sup>63</sup> The significance of *Raich* as it relates to Congress’ power to regulate intrastate activities, however, is fairly clear. As Professor Barnett<sup>64</sup> has pointed out, “in addition to the ‘substantial effects’ rationale for reaching intrastate activity that is economic in nature per *Morrison*, Congress may also reach intrastate activity—whether economic or not—if doing so is essen-

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56. ADLER, *supra* note 53, at 752–53.

57. *Raich*, 545 U.S. at 14–15.

58. *Id.* at 9–10.

59. *Id.* at 17–22.

60. *Id.* at 17.

61. *Id.*

62. ADLER, *supra* note 53, at 751.

63. See generally MANK, *supra* note 14.

64. Randy E. Barnett is a Professor of Law at Georgetown University Law Center. He argued the *Raich* case before the Supreme Court on behalf of the Respondents.

tial to a larger regulatory scheme that could be undercut unless the activity is reached."<sup>65</sup>

## II. THE CIRCUIT COURTS' APPLICATION OF THE SUPREME COURT'S JURISPRUDENCE BEFORE *GONZALES V. RAICH*: A SPLIT AMONG THE CIRCUITS

Part II of this article briefly describes four circuit court opinions that addressed Congress' ability to regulate intrastate, noncommercial species under the Endangered Species Act ("ESA") before the Supreme Court's decision in *Gonzales v. Raich*. Although each circuit court held that Congress could regulate intrastate, noncommercial species via application of the ESA, they did so for different reasons, therefore creating a split in reasoning among the circuits. The different rationales used by each circuit in upholding Congress' ability to regulate intrastate, noncommercial species are important for a number of reasons. First, they illustrate that *Lopez* and *Morrison* did not clearly articulate the Court's Commerce Clause jurisprudence as applied to federal regulation of intrastate activity. Second, the different rationales demonstrate the need for the Supreme Court to clarify its Commerce Clause jurisprudence in *Gonzales v. Raich*. Lastly, the courts' reasoning shows that many federal courts were under the impression that the comprehensive scheme rationale—a rationale used to uphold Congress' ability to regulate intrastate activity—was alive and well.

To understand the significance of the different approaches taken by the four circuit courts when evaluating constitutional challenges to the ESA, it is first necessary to understand the ESA itself. Subsection A of this article provides a brief summary of the ESA, with special attention placed on Sections 4, 7, and 9 of the ESA. Subsections B through E discuss the four circuit court opinions that have grappled with whether Congress may regulate intrastate, noncommercial species via application of the ESA.

### A. A Brief Summary of the ESA

Before enacting the ESA in 1973, Congress attempted to address the problem of species extinction and habitat conservation in two prior acts: the Endangered Species Preservation Act of 1966<sup>66</sup> and the Endan-

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65. Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 746-47 (Winter 2005).

66. Pub. L. No. 89-669, 80 Stat. 926, *repealed by* Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 884, 903 (1973).

gered Species Conservation Act of 1969.<sup>67</sup> Both Acts failed to adequately protect endangered or threatened species. The 1966 Act did not include any substantive provisions that affected land use, takings, constraints on federal agency actions that would “jeopardize” the survival of a listed species, or any comprehensive listing requirements.<sup>68</sup> Similarly, the 1969 Act focused almost exclusively on preventing the importation of, and interstate commerce in, endangered species, thus failing to address such issues as “takings” by federal agencies.<sup>69</sup> Both of these Acts were further limited in that they restricted federal protection of endangered species to federal lands, thereby preventing the government from protecting species located on state lands.<sup>70</sup> Due to the ineffectiveness of the 1966 and 1969 enactments, Congress began drafting a new law that would provide endangered or threatened species with additional protections.<sup>71</sup> The Senate developed four requirements that a new law would need to satisfy in order to provide adequate protection for endangered species.<sup>72</sup> Those requirements were to 1) give the Secretary of the Interior (“Secretary”) more discretion in listing endangered or threatened species; 2) to expand protection for endangered or threatened species to the entire nation; 3) to give the Secretary broader land acquisition authority; and 4) to involve current and state programs—and encourage new state programs—for the benefit of endangered species.<sup>73</sup> With these four requirements in mind, Congress eventually passed the ESA in 1973, which repealed both the 1966 and 1969 Acts. The Supreme Court has characterized the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>74</sup>

Critics of the ESA have challenged its constitutionality numerous times since its enactment. Three of the most hotly contested provisions of the ESA are Sections 4, 7, and 9. As will be shown in the upcoming subsections, opponents of the law have targeted the constitutionality of all three of these Sections within the context of federal regulation of intra-

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67. Pub. L. No. 91-135, 83 Stat. 275, *repealed by* Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 884, 903 (1973).

68. See George Cameron Coggins & Irma S. Russell, *Beyond Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433, 1450 (1982).

69. *Id.*

70. Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause? The Split in the Circuits Over Whether the Regulated Activity is Private Commercial Development or the Taking of Protected Species*, 69 BROOK L. REV. 923, 934 (Spring 2004).

71. *Id.* at 936.

72. S. REP. NO. 93-307, at 3 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2991-92.

73. *Id.*

74. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

state species. Each of these challenges—addressed within Part II of this article—has failed, albeit for different reasons.

Section 4 is one of the most extensive parts of the ESA.<sup>75</sup> It governs the process for identifying endangered or threatened species, listing those species on the endangered species list, identifying “critical habitat” needed for species conservation, conserving or restoring critical habitat, and removing species from the endangered species list.<sup>76</sup> One commentator has labeled Section 4 as “the gatekeeper of the statute’s strong substantive and procedural protections for species facing extinction.”<sup>77</sup> Those substantive and procedural protections include provisions that direct the development and implementation of species recovery plans, as well as the requirement that federal agencies implement monitoring programs for endangered or threatened species.<sup>78</sup> Because of the broad powers granted to federal authorities under Section 4, it is easy to understand why the Section has faced numerous constitutional challenges. Many of these challenges arise where federal agencies halt private development projects to protect an endangered or threatened species.

Like Section 4, Section 7 is a vital part of the ESA. Section 7 ensures that any action authorized, funded, or carried out by federal agencies will not jeopardize the continued existence of a listed species or destroy its designated critical habitat.<sup>79</sup> It also requires that federal agencies initiate a formal consultation process with the Fish and Wildlife Service (“FWS”) or the National Marine Fisheries Service (“NMFS”) when a proposed federal action may adversely affect a listed species or its designated critical habitat.<sup>80</sup> The consultation process concludes with the appropriate service issuing a biological opinion, which constitutes an official determination as to whether the proposed action is likely to jeopardize the continued existence of a listed species.<sup>81</sup> If appropriate, the biological opinion will include an incidental take statement, as well as reasonable and prudent alternatives, that the federal agency must implement in order to minimize the impacts of any anticipated “take” of an

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75. U.S. FISH & WILDLIFE SERVICE, *Endangered Species Program: An Introduction to the Endangered Species Act of 1973 Module 4*, 1 (Dec. 8, 2011), <http://www.fws.gov/angered/about/episodes/11/11%20Transcript.pdf>.

76. *See Id.*

77. *Id.*

78. *See Id.*

79. *See* U.S. FISH & WILDLIFE SERVICE, *Endangered Species Program: An Introduction to the Endangered Species Act of 1973 Module 7*, 1 (Dec. 8, 2011), <http://www.fws.gov/angered/about/episodes/15/15%20Transcript.pdf>

80. *Id.* at 2.

81. *Id.*

endangered or threatened species.<sup>82</sup> It is important to note that, although the scope of Section 7 appears limited to actions taken by federal agencies, Section 7 may also impact private persons engaged in activity that requires a federal permit. As illustrated by the Ninth Circuit's recent opinion in *Stewart & Jasper Orchards v. Salazar*—the topic of Part III of this article—disputes within this context may ultimately convince a party to challenge the constitutionality of Section 7 of the ESA.

Once the appropriate agency lists an endangered or threatened species pursuant to Section 4 of the ESA, Section 9 makes it unlawful for any person, including private and public entities, from “taking” an endangered species.<sup>83</sup> One commentator noted that “[t]he taking prohibition embodied in section 9 of the [ESA] is simple, unambiguous, and breathtaking in its reach and power.”<sup>84</sup> To illustrate the scope of Section 9's power, it is useful to look at how the language within Section 9 has been interpreted over time. To “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.<sup>85</sup> “Harm” in this context, according to federal regulations, includes the significant modification of habitat or degradation that kills or injures fish or wildlife by impairing essential behavior patterns.<sup>86</sup> Due to the broad interpretation of the language within Section 9, some scholars believe that the ESA may be the most powerful piece of wildlife legislation in the world.<sup>87</sup> Power has its drawbacks because Section 9's expansive reach has been subject to countless lawsuits. Like many of the challenges brought against Section 4 of the ESA, many of the challenges against Section 9 result when the government delays or prevents development in order to protect an endangered animal species or its habitat. The following cases demonstrate this trend. The cases also shed light on how challenges to the constitutionality of Sections 4, 7, and 9 may unfold throughout the course of litigation.

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82. *Id.*

83. U.S. FISH & WILDLIFE SERVICE, *Endangered Species Program: An Introduction to the Endangered Species Act of 1973 Module 9*, 1 (Dec. 8, 2011), <http://www.fws.gov/angered/about/episodes/16/16%20Transcript.pdf>.

84. Frederico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109, 109 (1991).

85. U.S. FISH & WILDLIFE SERVICE, *supra* note 83, at 1.

86. CHEEVER, *supra* note 84, at 110.

87. *Id.*

### B. *National Association of Home Builders v. Babbitt*

In *National Association of Home Builders v. Babbitt*<sup>88</sup> ("NAHB"), the issue before the D.C. Circuit was whether Congress' commerce power allowed it to regulate the Delhi Sands flower-loving fly—an intrastate, noncommercial species—through application of the ESA's take provision embodied in Section 9 of the Act.<sup>89</sup> The court began its Commerce Clause analysis by looking to the first prong of Chief Justice Rehnquist's test in *Lopez*,<sup>90</sup> which states that Congress may regulate the channels of interstate commerce.<sup>91</sup> Judge Wald, writing for the majority in *NAHB*, found application of the ESA to the flower-loving fly to be a valid exercise of congressional authority under the first prong of *Lopez* because the ESA regulated the interstate transport of listed species.<sup>92</sup> The court further held that, because the ESA kept the interstate channels free from "immoral and injurious uses," the first prong of *Lopez* applied.<sup>93</sup> The court also found that the third prong of *Lopez*—the "substantial affects" test—also supported Congress' authority to regulate the flower-loving fly.<sup>94</sup> Judge Wald held that the regulation of the fly substantially affected interstate commerce because it prevented destructive interstate competition.<sup>95</sup> It is important to note that Judge Henderson, who together with Judge Wald created a majority of the court, agreed that Congress' commerce power extended to the regulation of the intrastate fly, but for different reasons than did Judge Wald. While Judge Wald focused on the channels of interstate commerce argument under *Lopez's* first prong and the substantial effects test of the third prong, Judge Henderson emphasized that, "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce."<sup>96</sup> The disagreement between these judges, like the disagreement between the circuit courts, demonstrated that the Supreme Court's Commerce Clause jurisprudence as applied to federal regulation of intrastate activity was in need of clarity.

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

89. *Id.* at 1042.

90. *Id.* at 1046.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1049.

95. *Id.*

96. *Id.* at 1058–59.

### C. *Gibbs v. Babbitt*

Three years later, the Fourth Circuit addressed a very similar issue in *Gibbs v. Babbitt*.<sup>97</sup> Confronted with whether Congress' commerce power allowed it to regulate the taking of the red wolf, an intrastate species, pursuant to Section 9 of the ESA, the Fourth Circuit turned to the Supreme Court's commerce jurisprudence as set forth in *Lopez* and *Morrison*. The Fourth Circuit looked to the third prong of Chief Justice Rehnquist's decision—the substantial affects test.<sup>98</sup> In its analysis, the Fourth Circuit embraced both the aggregation approach and the comprehensive scheme rationale in upholding the constitutionality of the ESA's take provision. Judge Wilkinson, writing for the majority, held that the activity in question—the taking of red wolves—was an economic activity and, as a result, the court could aggregate for purposes of the Commerce Clause.<sup>99</sup> The court further held that the ESA's take provision was “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>100</sup> Concluding otherwise, according to Judge Wilkinson, would “eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head.”<sup>101</sup> With respect to the substantial effects test, Judge Wilkinson held that killing between fifty and seventy-five red wolves would undermine wolf-related tourism, hinder scientific research, and lead to other negative impacts that would substantially affect interstate commerce.<sup>102</sup>

### D. *GDF Realty Investments, Ltd. v. Norton*

The Fifth Circuit became the next circuit to consider whether Congress' commerce power allowed it to regulate intrastate, noncommercial species under the ESA. In *GDF Realty Investments, Ltd. v. Norton*,<sup>103</sup> the question before the court was whether Congress could regulate six tiny subterranean invertebrate arachnids and insects (“Cave Species”) under the ESA's take provision.<sup>104</sup> The Fifth Circuit embraced the aggregation approach, albeit in a slightly different manner than other courts had, while finding that the Cave Species had only a “de minimis” impact on

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

98. *Id.* at 492.

99. *Id.* at 493.

100. *Id.* at 497.

101. *Id.* at 498.

102. *Id.* at 492–93.

103. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003).

104. *Id.* at 624.



interstate commerce.<sup>105</sup> Unlike the courts in *NAHB* or *Gibbs*, the court in *GDF* aggregated the impact of causing harm to the Cave Species with the impact of causing harm to all other protected species.<sup>106</sup> The court justified this approach by arguing that all species are in fact interdependent.<sup>107</sup> The court upheld the application of the ESA's take provision on other grounds as well. Like the Fourth Circuit in *Gibbs*, the Fifth Circuit turned to the comprehensive scheme rationale in upholding the constitutionality of the ESA.<sup>108</sup> The court stated that the "ESA is an economic regulatory scheme [and] the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes. As noted, plaintiffs concede that such aggregation substantially affects interstate commerce."<sup>109</sup>

#### E. *Rancho Viejo, LLC v. Norton*

The D.C. Circuit once again addressed the issue of whether Congress may regulate intrastate, noncommercial species through application of the ESA's take provision in *Rancho Viejo, LLC v. Norton*.<sup>110</sup> The question before the court was whether the FWS—acting pursuant to Section 7 of the ESA—could halt the development of a residential area in order to protect the Southwestern Arroyo Toad.<sup>111</sup> The court resolved the question by applying the third prong of *Lopez*.<sup>112</sup> The court also adopted the reasoning that the Fifth Circuit in *GDF* had explicitly rejected, holding that the "regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens."<sup>113</sup> This highlights the fundamental difference between the *GDF* and *Rancho Viejo* decisions: while the court in *GDF* focused on the endangered species themselves, the *Rancho Viejo* court emphasized that the ESA regulates commercial activities that affect such species.<sup>114</sup> "To survive a Commerce Clause review," said the court, "all the government must establish is that a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce."<sup>115</sup> According to the D.C. Circuit, there was

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105. *Id.* at 640.

106. *Id.* at 640.

107. *Id.* at 640.

108. *Id.* at 642–43.

109. *Id.* at 640.

110. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003).

111. *Id.* at 1064.

112. *Id.* at 1067.

113. *Id.* at 1072.

114. *MANK*, *supra* note 70, at 926.

115. *Rancho Viejo*, 323 F.3d 1062, 1070 (D.C. Cir. 2003).

“no doubt” that such a relationship existed in this case.<sup>116</sup> The court focused on the nature of the proposed commercial development, describing the residential project as “costly” in nature.<sup>117</sup> Congress’ commerce power reached this type of development because the development itself “asserts a substantial economic effect on interstate commerce.”<sup>118</sup>

As Professor Bradford C. Mank has pointed out, the fact that the circuit courts have used different rationales in upholding the constitutionality of the ESA’s take provision is significant because the rationales directly affect the scope of the ESA’s regulatory reach.<sup>119</sup> In 2005, the Supreme Court decided *Gonzales v. Raich*,<sup>120</sup> a case that involved the intrastate production and consumption of medical marijuana. *Raich* had a direct impact upon the scope of the ESA’s regulatory reach. Whereas observers may have been unsure about the constitutionality of the ESA under the Supreme Court’s jurisprudence as set forth in *Lopez* and *Morrison*, the *Raich* Court’s adoption of the comprehensive scheme rationale seems to have placed the ESA on stable constitutional ground.

### III. THE CIRCUIT COURTS’ APPLICATION OF THE SUPREME COURT’S JURISPRUDENCE AFTER *GONZALES V. RAICH*: THE COMPREHENSIVE SCHEME RATIONALE

As we have seen, before *Gonzales v. Raich* four circuit courts applied the Supreme Court’s Commerce Clause jurisprudence inconsistently in cases that involved federal regulation of noncommercial, intrastate species via application of the ESA. Since the Court’s decision in *Raich*, however, only two circuits—the Eleventh and the Ninth—have revisited the Court’s Commerce Clause jurisprudence within this context. Part III of this paper takes a closer look at these two post-*Raich* circuit court decisions that involve federal regulation of intrastate, noncommercial species through application of the ESA. Part III also describes the analysis used by each circuit in order to draw conclusions about the implications of these decisions. Part IV of this article discusses those conclusions.

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116. *Id.*

117. *Id.*

118. *Id.*

119. MANK, *supra* note 70, at 926.

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

### A. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*

*Alabama-Tombigbee Rivers Coalition v. Kempthorne*<sup>121</sup> is significant as the first case in which a circuit court addressed Congress' authority to regulate intrastate, noncommercial species via application of the ESA after the Supreme Court's decision in *Gonzales v. Raich*. In 1999, the FWS proposed listing a fish known as the Alabama sturgeon as an endangered species under the ESA.<sup>122</sup> Shortly after listing the fish as endangered in 2000, the Alabama-Tombigbee Rivers Coalition ("Coalition"), a group of industries and associations opposed to the listing, brought suit under the citizen-suit provision of the ESA and under the judicial review provisions of the Administrative Procedure Act.<sup>123</sup> The district court dismissed the Coalition's lawsuit for lack of standing.<sup>124</sup> On appeal, however, the Eleventh Circuit reversed, arguing that the Coalition did have standing to bring suit.<sup>125</sup> On remand, the district court granted the Service's motion for summary judgment.<sup>126</sup> The Coalition once again appealed.<sup>127</sup> In reviewing the district court's grant of summary judgment de novo, the Eleventh Circuit addressed whether Congress' commerce power allows it to regulate intrastate, noncommercial species under the ESA.<sup>128</sup>

The Coalition argued that Congress exceeded its commerce power by authorizing the FWS to protect the Alabama sturgeon, an intrastate, noncommercial species.<sup>129</sup> To support this argument, the Coalition pointed to the Supreme Court's analysis in *Lopez* and *Morrison*, arguing that protecting the Alabama sturgeon was a non-economic activity and therefore outside the scope of Congress' commerce power.<sup>130</sup> The Coalition further argued that, because protecting the fish did not involve the regulation of activities that arose out of or were connected with a commercial transaction, the court could not view the effect of species loss in the aggregate to uphold federal regulation of the sturgeon.<sup>131</sup> And lastly,

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121. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007).

122. *Id.* 1253.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1254.

127. *Id.*

128. *Id.* at 1271.

129. *Id.*

130. *Id.*

131. *Id.*

the Coalition argued that the sturgeon did not concern any commercial or economic activity whatsoever.<sup>132</sup>

The court addressed the Coalition's arguments by first looking at the total economic impact of the ESA itself.<sup>133</sup> Judge Carnes, writing for the majority, stated that *Lopez* permits courts to aggregate economic effects where the federal action in question is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>134</sup> The court then turned to language in *Raich*, drawing particular attention to the Supreme Court's explanation of *Lopez* regarding the regulation of intrastate activity as part of a larger regulation of economic activity: "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce."<sup>135</sup> Judge Carnes found further support in the Supreme Court's decision in *Perez*, which stated that the courts "have never required Congress to legislate with scientific exactitude. When Congress decides that the total incidence of practice poses a threat to a national market, it may regulate the entire class."<sup>136</sup> According to Judge Carnes, if the process of listing endangered species is "an essential part of a larger regulation of economic activity," then whether that process "ensnares some purely intrastate activity is of no moment."<sup>137</sup> The court then agreed with other circuits that had held that the ESA is a general regulatory statute bearing a substantial relation to commerce. Citing *Raich*, Judge Carnes stated that, "[j]ust as it is apparent that the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce, it is clear that the listing process is 'an essential part' of that 'larger regulation of economic activity.'"<sup>138</sup>

In arguing that Congress' commerce power did not extend to the regulation of the Alabama sturgeon, a purely intrastate, noncommercial fish, the Coalition also argued that the court should treat the sturgeon separately from all species that have commercial value.<sup>139</sup> This argument led the court to examine whether Congress' decision to include purely intrastate activities within the regulatory scheme of the ESA was "consti-

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132. *Id.* at 1272.

133. *Id.* at 1273.

134. *Id.* at 1272.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1274.

139. *Id.*

tutionally deficient.”<sup>140</sup> The answer to that question, according to Judge Carnes, hinged on whether Congress rationally concluded that the regulation of intrastate species was an essential part of the larger regulatory scheme.<sup>141</sup> The court held that Congress did in fact rationally conclude that the regulation of intrastate species was an essential part of the ESA.<sup>142</sup> Judge Carnes found that Congress was concerned with “the unknown uses that endangered species might have,” such as undiscovered scientific or economic uses.<sup>143</sup> The court also found that Congress considered that the protection of an intrastate species could possibly “permit the regeneration of that species to a level where controlled exploitation [for commercial purposes could] be resumed.”<sup>144</sup> As a result, Judge Carnes concluded that Congress was not constitutionally obligated to carve out an exception for intrastate species from the ESA, an otherwise comprehensive statutory scheme.<sup>145</sup>

The majority concluded the opinion by discussing the history of the comprehensive scheme rationale. Judge Carnes stated that the comprehensive scheme rationale had a “much richer” history than the Coalition wanted the court to believe.<sup>146</sup> *Raich*, according to Judge Carnes, was the “logical application of the Court’s prior Commerce Clause jurisprudence,”<sup>147</sup> stretching back to the Court’s decisions in *Wickard*, *Perez*, and *Hodel*. As a result, Congress did not exceed its commerce power by authorizing the FWS to protect the Alabama sturgeon, despite the fact that the sturgeon is an intrastate, noncommercial species. The court denied the Coalition’s Petition for Rehearing En Banc, which led the Petitioners to file a Writ of Certiorari with the Supreme Court.<sup>148</sup> The Supreme Court denied the Petition.<sup>149</sup>

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140. *Id.*

141. *Id.*

142. *Id.* at 1274–75.

143. *Id.* at 1274.

144. *Id.* at 1275.

145. *Id.* at 1275–76.

146. *Id.* at 1276.

147. *Id.*

148. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), *petition for cert. filed*, 2007 WL 2726054 (U.S. Sept. 14, 2007) (No. 07-364).

149. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 877 (U.S. Jan. 7, 2008) (No. 07-364).

### B. *Stewart & Jasper Orchards et al. v. Salazar*

*San Luis & Delta Mendota Water Authority and Stewart & Jasper Orchards v. Salazar*,<sup>150</sup> is the most recent decision to date addressing whether application of the ESA to an intrastate, noncommercial species constitutes a violation of the Commerce Clause. In 2008, the FWS issued a biological opinion regarding the Bureau of Reclamation's and the California Department of Water Resource's joint operation of the Central Valley Project and the State Water Project (the "Projects"), two of the world's largest water diversion projects.<sup>151</sup> The biological opinion led to a reduction in the amount of water being diverted from the Projects to large-scale agricultural producers in California's Central Valley.<sup>152</sup> The purpose of these reductions was, in part, to protect a small fish called the delta smelt.<sup>153</sup> *Stewart & Jasper Orchards*, together with other large-scale agricultural producers, filed suit against the FWS.<sup>154</sup> They alleged that, since the delta smelt was a purely intrastate species with no commercial value, application of the ESA to the Projects was an invalid exercise of constitutional authority under the Commerce Clause.<sup>155</sup> The district court granted the FWS's motion for summary judgment, holding that the Service's protection of the delta smelt did not exceed Congress' commerce power.<sup>156</sup> *Stewart & Jasper Orchards* appealed.<sup>157</sup>

The issue before the Ninth Circuit was whether the district court erred in granting the FWS's motion for summary judgment on the issue of whether federal regulation of the delta smelt violated Congress' commerce power.<sup>158</sup> Judge Thomas, writing for the majority, began by discussing the "substantial effects" test announced in *Lopez*, arguing that, "the category most applicable here is the third [*Lopez*] category."<sup>159</sup> The court then mentioned the four factors that make up *Lopez*'s "substantial effects" test: 1) whether the statute has anything to do with commerce or any sort of economic enterprise; 2) whether the statute contains an express jurisdictional element; 3) whether the legislative history contains express congressional findings regarding the effects upon interstate commerce; and 4) whether the link between the regulated activity and the

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150. *San Luis & Delta Mendota Water Authority and Stewart & Jasper Orchards v. Salazar*, 638 F.3d 1163 (9th Cir. 2011).

151. *Id.* at 1167–68.

152. *Id.* at 1168.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1169.

158. *Id.* at 1174.

159. *Id.*

effect on interstate commerce is too attenuated.<sup>160</sup> Without analyzing any of the four "substantial effects" factors, Judge Thomas moved on to address the Supreme Court's decision in *Raich*.<sup>161</sup>

Judge Thomas first stated that *Raich* elaborated upon *Lopez* and *Morrison*: "Important for the purposes of this case, the Court held that its precedent 'firmly establishes' Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."<sup>162</sup> The court then embraced the comprehensive scheme rationale, stating that, "[i]n sum, Congress has the power to regulate purely intrastate activity as long as the activity is being regulated under a general regulatory scheme that bears a substantial relationship to interstate commerce."<sup>163</sup> According to the Ninth Circuit, *Raich* held that courts must look at the aggregate effect of the statutory scheme, rather than the effect of a single, isolated statutory provision, in determining whether a statute relates to commerce.<sup>164</sup> The principles set forth in *Raich*, according to Judge Thomas, were consistent with Ninth Circuit precedent.<sup>165</sup> After a brief discussion of each precedent case, Judge Thomas then addressed *Alabama-Tombigbee Rivers v. Kempthorne*.

The court began its analysis of *Alabama-Tombigbee* by noting that the Eleventh Circuit's decision was significant for being the first post-*Raich* decision to address federal regulation of intrastate, noncommercial species under the ESA.<sup>166</sup> Judge Thomas went on to analyze the similarities between *Alabama-Tombigbee* and *Stewart & Jasper Orchards*, stating that the Eleventh Circuit decision involved "almost identical circumstances as those confronting us here."<sup>167</sup> Importantly, Judge Thomas then pointed to the Eleventh Circuit's interpretation of *Raich* in upholding federal regulation of the Alabama sturgeon: "But, the court reasoned, if the challenged sections of the ESA were 'an essential part of a larger regulation of economic activity,' then whether that section "ensnares some purely intrastate activity is of no moment."<sup>168</sup> As the court's opinion in *Alabama-Tombigbee* illustrated, the important question was whether the ESA is a general regulatory statute bearing a substantial relation to commerce. In answering this question, Judge Thomas looked to *Alabama-*

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160. *Id.*

161. *Id.* at 1175.

162. *Id.* at 1174.

163. *Id.* at 1175.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1175-76.

*Tombigbee*, *GDF Realty*, *Gibbs*, *NAHB*, and Ninth Circuit precedent.<sup>169</sup> He held that the ESA was indeed a general regulatory statute bearing a substantial relation to commerce.<sup>170</sup> Before concluding the opinion, however, the court addressed one last argument put forth by *Stewart & Jasper Orchards*.

*Stewart & Jasper Orchards* argued that, under *Raich*, the ESA was not a “comprehensive economic regulatory scheme.”<sup>171</sup> In response, Judge Thomas stated that *Stewart & Jasper Orchards* misconstrued *Raich*: “The Supreme Court has never required that a statute be a ‘comprehensive economic regulatory scheme’ or a ‘comprehensive regulatory scheme for economic activity’ in order to pass muster under the Commerce Clause.”<sup>172</sup> In fact, according to Judge Thomas and the Ninth Circuit, the only requirement is that the “comprehensive regulatory scheme have a substantial relation to commerce.”<sup>173</sup> Contrary to what *Stewart & Jasper Orchards* argued, the statute need not be purely economic or commercial in nature. As a result, Judge Thomas concluded that, because the ESA is substantially related to interstate commerce, *Stewart & Jasper Orchards’* challenge to the ESA failed.<sup>174</sup>

#### IV. TAKEAWAYS FROM ALABAMA-TOMBIGBEE AND STEWART & JASPER ORCHARDS

As noted in Part II of this article, four circuit courts addressed the issue of whether Congress could regulate noncommercial, intrastate species through application of the ESA before *Raich*. All four of those courts held that Congress could regulate such species under the ESA, but they used different rationales in reaching that conclusion. The courts in *Alabama-Tombigbee* and *Stewart & Jasper Orchards*, however, used the same rationale to uphold federal regulation of intrastate activity. Rather than use the analysis set forth in the Supreme Court’s decisions in *Lopez* and *Morrison*, the Ninth and the Eleventh Circuits embraced the comprehensive scheme rationale as articulated in *Raich*. In fact, both courts relied on the exact same language from *Raich*: “[I]f the challenged sections of the ESA were ‘an essential part of a larger regulation of economic activity,’ then whether that section ‘ensnares some purely intrastate activity is of

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169. *Id.* at 1176.

170. *Id.*

171. *Id.* at 1177.

172. *Id.*

173. *Id.*

174. *Id.*



no moment.’”<sup>175</sup> Whereas the four pre-*Raich* circuit courts upheld federal regulation of intrastate species for different reasons, the courts’ consistent application of the comprehensive scheme rationale in *Alabama-Tombigbee* and *Stewart & Jasper Orchards* illustrates that the Supreme Court’s decision in *Raich* clarified the Court’s Commerce Clause jurisprudence as applied to federal regulation of intrastate species under the ESA. These courts’ decisions to embrace the comprehensive scheme rationale are significant for additional reasons as well.

*Alabama-Tombigbee* and *Stewart & Jasper Orchards* further strengthen the position that the ESA is a comprehensive regulatory scheme bearing a substantial relation to commerce such that Congress may regulate wholly intrastate, noncommercial species. Although the Ninth and the Eleventh Circuits both held that the ESA is a comprehensive regulatory scheme with sufficient ties to commerce, they did so for slightly different reasons. The following paragraphs describe how each circuit determined that the ESA is a comprehensive regulatory scheme with sufficient ties to commerce. The courts’ reasoning sheds light on the factors that courts may consider when deciding what constitutes a comprehensive regulatory scheme.

To justify its position that the ESA is a comprehensive regulatory scheme with sufficient ties to commerce, the court in *Alabama-Tombigbee* noted that the ESA prohibits all interstate and foreign commerce in endangered species.<sup>176</sup> According to the United Nations Environment Programme, the illegal component of the worldwide trade in wildlife generates between \$5 billion to \$8 billion in proceeds per year.<sup>177</sup> The court pointed to other reports as well, stating that trade in wildlife products comprises the world’s second largest black market, falling behind only to trade in illegal narcotics.<sup>178</sup> With respect to American participation in this market, the court noted that Americans pay \$200 million per year for illegally caught domestic animals and \$1 billion for those illegally caught in foreign countries.<sup>179</sup> The court then quoted a house report that accompanies the ESA, which explains that as human development pushes species towards extinction, “we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable.”<sup>180</sup> Before addressing how Section 4 of the ESA was “an essen-

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175. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007); *Luis & Delta Mendota Water Authority and Stewart & Jasper Orchards v. Salazar*, 638 F.3d 1163, 1175 (9th Cir. 2011); *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

176. *Alabama-Tombigbee*, 477 F.3d 1250, 1273 (11th Cir. 2007).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

tial part” of the ESA’s larger regulation of economic activity, the court briefly discussed the value of biodiversity, the importance of genetic diversity, and the role that habitat conservation plays in stimulating commerce by encouraging fishing, hunting, and tourism.<sup>181</sup> All of these issues, according to the court, demonstrate that the ESA is a comprehensive regulatory scheme bearing a substantial relation to commerce.

The court in *Stewart & Jasper Orchards* also held that the ESA is a general regulatory statute with sufficient ties to commerce, but for slightly different reasons. The court first noted that a species might become threatened or endangered precisely because of “overutilization for commercial purposes.”<sup>182</sup> The court then stated that the ESA protects the future and unanticipated interstate-commerce value of species, pointing to language from the Supreme Court’s decision in *Tennessee Valley Authority v. Hill*: “Even where the species. . . has no current commercial value, Congress may regulate under its Commerce Clause authority to ‘prevent the destruction of biodiversity and thereby protect the current future interstate commerce that relies on it.’”<sup>183</sup> And lastly, the court noted that interstate travelers stimulate interstate commerce through recreational activity and the scientific study of endangered or threatened species.<sup>184</sup> For these reasons, the court in *Stewart & Jasper Orchards* held that the ESA is a comprehensive regulatory scheme bearing a substantial relation to commerce.<sup>185</sup> The reasoning used by the Ninth and Eleventh Circuits sheds light on the factors that courts may look to when determining whether a statute is a comprehensive regulatory scheme.

The decisions in *Alabama-Tombigbee* and *Stewart & Jasper Orchards* are also significant for what they may reveal about future constitutional challenges to the ESA as well. The decisions suggest that future courts will likely apply the comprehensive scheme rationale when deciding whether Congress may regulate intrastate, noncommercial species through application of the ESA. Whereas courts struggled to consistently apply the Supreme Court’s Commerce Clause jurisprudence under *Lopez* and *Morrison*, especially in cases that involved federal regulation of intrastate activities, *Raich* made clear that courts could apply the comprehensive scheme rationale within this context. In other words, the Supreme Court’s decision in *Raich* proved that the Court had never precluded Congress from regulating intrastate activity so long as the regu-

181. *Id.* at 1273–74.

182. *San Luis & Delta Mendota Water Authority and Stewart & Jasper Orchards v. Salazar*, 638 F.3d 1163, 1176 (9th Cir. 2011).

183. *Id.*

184. *Id.*

185. *Id.* at 1177.

lated activity was an essential part of a larger comprehensive regulatory scheme. In fact, the Court held to the contrary on more than one occasion.

As mentioned in Part I of this article, the Court held in *Wickard* that Congress' commerce power allows it to regulate intrastate activity where there is a rational basis that the activity substantially affects interstate commerce when aggregated.<sup>186</sup> Nearly thirty years later, in *Perez*, the Court held that Congress could regulate a class of activities even though the regulated class might include intrastate activities with no affect on interstate commerce.<sup>187</sup> Similarly, in *Hodel*, the Court reasoned that Congress did not have to demonstrate that every aspect of a regulatory scheme bears a substantial relationship to interstate commerce; rather, a regulatory scheme could survive so long as the provisions in question are integral to the regulatory program and the regulatory scheme as a whole substantially related to interstate commerce.<sup>188</sup> And perhaps most importantly, the Court in *Lopez* held that Congress' commerce power allowed it to regulate intrastate activities so long as the regulation was an essential part of a larger regulation of economic activity.<sup>189</sup> Supreme Court precedent, combined with the more recent holdings in *Alabama-Tombigbee* and *Stewart & Jasper Orchards*, suggests that future courts will apply the comprehensive scheme rationale within the context of federal regulation of wholly intrastate, noncommercial species under the ESA.

Another aspect of *Alabama-Tombigbee* and *Stewart & Jasper Orchards* that supports the argument that future courts will apply the comprehensive scheme rationale within this context is that both courts determined that the ESA is itself a comprehensive regulatory scheme with sufficient ties to commerce. These cases not only provide support for the notion that the ESA is a comprehensive regulatory scheme, but also demonstrate that the comprehensive scheme rationale applies in the context of federal regulation of intrastate activities via application of the ESA. These two facts increase the likelihood that future courts will apply the comprehensive scheme rationale in similar cases.

It is also important to note that *Alabama-Tombigbee* and *Stewart & Jasper Orchards* seem to have adopted the comprehensive scheme rationale without hesitation. Although Justice O'Connor and Justice Thomas wrote dissenting opinions in *Raich*, neither *Alabama-Tombigbee* nor *Stewart & Jasper Orchards* embraced the views expressed within those opin-

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186. *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942).

187. *Perez v. United States*, 402 U.S. 146, 154 (1971).

188. *Hodel v. Indiana*, 452 U.S. 314, 329 (1981).

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

ions. In her dissenting opinion in *Raich*, Justice O'Connor explained that the majority had announced "a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision."<sup>190</sup> She went on to say that, "[t]he [comprehensive scheme rationale] and the result it produces in this case are irreconcilable with our decisions in *Lopez* and *United States v. Morrison*."<sup>191</sup> Similarly, Justice Thomas disagreed with the majority's embrace of the comprehensive scheme rationale in *Raich*:

The majority also inconsistently contends that regulating respondents' conduct is both incidental and essential to a comprehensive legislative scheme. . . . So long as Congress casts its net broadly over an interstate market, according to the majority, it is free to regulate interstate and intrastate activity alike. This cannot be justified under either the Commerce Clause or the Necessary and Proper Clause. If the activity is purely intrastate, then it may not be regulated under the Commerce Clause. And if the regulation of the intrastate activity is purely incidental, then it may not be regulated under the Necessary and Proper Clause.<sup>192</sup>

Rather than embrace the dissenting views expressed by Justice O'Connor and Justice Thomas in *Raich*, the courts in *Alabama-Tombigbee* and *Stewart and Jasper Orchards* adopted the comprehensive scheme rationale as announced by the *Raich* majority. This seemingly wholehearted acceptance of the comprehensive scheme rationale by the Ninth and the Eleventh Circuits may send a message to other courts. The message is clear: the comprehensive scheme rationale applies in the context of federal regulation of intrastate species under the ESA.

*Alabama-Tombigbee* and *Stewart & Jasper Orchards* also indicate that future lower courts will likely uphold the federal regulation of noncommercial, intrastate species under the ESA as a valid exercise of Congress' commerce power. The courts' holdings in these two cases are consistent, clear, and unequivocal. Both held that Congress may regulate noncommercial, intrastate species pursuant to the ESA because the ESA is itself a comprehensive regulatory scheme with sufficient ties to interstate commerce.<sup>193</sup> Furthermore, the courts' holdings in *Alabama-Tombigbee* and

190. *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting).

191. *Id.*

192. *Id.* at 71 (Thomas, J., dissenting).

193. *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007); *San Luis & Delta Mendota Water Authority and Stewart & Jasper Orchards v. Salazar*, 638 F.3d 1163, 1175 (9th Cir. 2011).

*Stewart & Jasper Orchards* are the same as the holdings reached by the four pre-*Raich* circuit courts that addressed whether Congress could regulate intrastate species under the ESA. All six cases held that Congress may regulate intrastate species. Observers should not overlook this fact, as it gives further credence to the argument that future courts will likely uphold Congress' ability to regulate intrastate, noncommercial species under the ESA.

It is worth mentioning that the challengers in both *Alabama-Tombigbee* and *Stewart & Jasper Orchards* petitioned the Supreme Court for a Writ of Certiorari.<sup>194</sup> The Court refused to grant certiorari in both instances,<sup>195</sup> which may indicate that, at least for now, the Court is willing to accept the lower courts' application of the comprehensive scheme rationale as announced in *Raich* and applied in both *Alabama-Tombigbee* and *Stewart & Jasper Orchards*. The challengers in both cases, however, believed otherwise.

In its Petition for a Writ of Certiorari, the Alabama-Tombigbee Rivers Coalition argued that, under *Lopez* and *Morrison*, intrastate activity may be regulated for its substantial effects on interstate commerce only if the regulated activity is economic in nature.<sup>196</sup> The Coalition further argued that the Eleventh Circuit relied on a misinterpretation of the Supreme Court's decision in *Raich*,<sup>197</sup> thereby asking the Court to clarify the Eleventh Circuit's interpretation and application of the comprehensive scheme rationale. Similarly, *Stewart & Jasper Orchards* argued that the Ninth Circuit's holding was in direct conflict with *Raich*.<sup>198</sup> They argued that the Ninth Circuit erroneously focused on the aggregate effect of the ESA, therefore overlooking the fact that aggregation "is appropriate only for the activities regulated by a statute, not the effect of its implementation."<sup>199</sup> A proper interpretation of *Raich*, according to *Stewart & Jasper Orchards*, would have led the Ninth Circuit to conclude that the ESA is a broad conservation statute that does not govern a commercial

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194. *Alabama-Tombigbee*, 477 F.3d 1250 (11th Cir. 2007), *petition for cert. filed*, 2007 WL 2726054 (U.S. Sept. 14, 2007) (No. 07-364); *Stewart & Jasper Orchards*, 638 F.3d 1163 (9th Cir. 2011), *petition for cert. filed*, 2011 WL 2532943 (U.S. June 22, 2011) (No. 10-1551).

195. *Alabama-Tombigbee*, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 877 (U.S. Jan. 7, 2008) (No. 07-364); *Stewart & Jasper Orchards*, 638 F.3d 1163 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 498 (U.S. Oct. 31, 2011) (No. 10-1551).

196. Petition for Writ of Certiorari Brief for Petitioner Alabama-Tombigbee Rivers Coalition at 14, *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007) (No. 07-364), 2007 WL 2726054.

197. *Id.* at 27.

198. Petition for Writ of Certiorari Brief for Petitioner *Stewart & Jasper Orchards* at 14, *San Luis & Delta Mendota Water Authority and Stewart & Jasper Orchards v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) (No. 10-1551), 2011 WL 2532943.

199. *Id.* at 15.

market or regulate economic activities.<sup>200</sup> In rejecting both parties' Petitions for Writ of Certiorari, the Court signaled that, at least for the time being, it is willing to live with the Ninth and the Eleventh Circuits' interpretation and application of the comprehensive scheme rationale.

Another takeaway coming out of *Alabama-Tombigbee* and *Stewart & Jasper Orchards* is that the courts' interpretation and application of *Raich* to the federal regulation of noncommercial, intrastate species provide additional support for the argument that the ESA, as a whole, is constitutional. Since its enactment in 1973, the ESA has faced dozens, if not hundreds, of constitutional attacks.<sup>201</sup> In 1978, nearly five years after Congress enacted the ESA, the Supreme Court released its opinion in *Tennessee Valley Authority v. Hill*,<sup>202</sup> which, according to one scholar, "is the single most important aspect of the legislative history of the Act."<sup>203</sup> In determining that an injunction against the completion of the Tellico Dam was an appropriate remedy to save the endangered Snail Darter, the Court said that, "the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."<sup>204</sup> Perhaps *Alabama-Tombigbee* and *Stewart & Jasper Orchards* reaffirm what the Court announced over thirty years ago in *Hill*: the legislative history of the ESA demonstrates that, as a whole, the Act is constitutional and, despite what its many critics might argue, endangered species should indeed be afforded the highest of priorities.

*Alabama-Tombigbee* and *Stewart & Jasper Orchards* also demonstrate that, due to the courts' consistent application of the comprehensive scheme rationale in upholding Congress' ability to regulate intrastate species, critics of the ESA may resort to new, creative methods of attacking the statute. Some of these methods are indeed already underway. Texas GOP Senator John Cornyn recently filed an amendment to a bill in the Senate that would prevent the FWS from offering ESA protections to the dunes sagebrush lizard, arguing that such action would undermine oil and gas development in West Texas.<sup>205</sup> Senator Conryn, while dis-

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200. *Id.* at 15.

201. See House Natural Resources Committee, *Examining the Financial Impacts of Endangered Species Act Lawsuits and Settlements* (March 6, 2012), <http://naturalresources.house.gov/UploadedFiles/03.06.12-ESABudgetHearingPreview.pdf>.

202. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

203. CHEEVER, *supra* note 84, at 136.

204. *Tennessee Valley Authority*, 437 U.S. 153, 174 (1978).

205. Phil Taylor, *Sen. Cornyn's Amendment Would Preempt Listing of Southwestern Lizard*, NEW YORK TIMES, ENERGY & ENVIRONMENT, (June 8, 2011), <http://www.nytimes.com/gwire/2011/06/08/08greenwire-sen-cornyns-amendment-would-pre-empt-listing-o-32404.html>.

curring the recent amendment, said, "this scaly political pawn will land on the Endangered Species List. . .and effectively bring new and existing oil and gas production in parts of Texas and New Mexico to a screeching halt."<sup>206</sup> Senator Conryn is not alone in his efforts to prevent the ESA from protecting endangered species by proposing amendments. As recently as February of 2012, the House Natural Resources Committee passed H.R. 4019, a bill requiring the Forest Service and Bureau of Land Management to permit logging, grazing, and oil and gas production on public lands to meet revenue targets for county budgets.<sup>207</sup> The bill would exempt these projects from the ESA.<sup>208</sup> Both of these examples suggest that critics of the ESA may turn to new methods of attacking the statute in light of recent court decisions upholding the constitutionality of the ESA, such as *Alabama-Tombigbee* and *Stewart & Jasper Orchards*.

Perhaps the last takeaway to emerge out of *Alabama-Tombigbee* and *Stewart & Jasper Orchards* is the increased likelihood that future litigators will use the comprehensive scheme rationale to justify federal regulation of intrastate activity in contexts other than the protection of endangered species under the ESA. Indeed, some may argue that the expansion of the comprehensive scheme rationale is already underway. After all, the Supreme Court's decision in *Raich* had nothing to do with federal regulation of intrastate species under the ESA; rather, the facts in *Raich* dealt with the intrastate production and consumption of medical marijuana. The application of the comprehensive scheme rationale in cases such as *Alabama-Tombigbee* and *Stewart & Jasper Orchards* is evidence that the expansion of the rationale is already occurring. The question thus becomes in what context will litigators next use the rationale to justify Congress' ability to regulate intrastate activity. In Justice O'Connor's dissenting opinion in *Raich*, she chastised the majority for announcing that the comprehensive scheme rationale "gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause[.]"<sup>209</sup> Perhaps Justice O'Connor's fear has become a reality, and Congress did in fact interpret *Raich* as granting a license to legislate broadly. While it may be impossible to understand how Congress interpreted the Supreme Court's holding in *Raich*, this much seems certain: the courts' decisions in *Alabama-Tombigbee* and *Stewart & Jasper Orchards* increase the likelihood that future litigators will apply the comprehen-

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206. *Id.*

207. Elly Pepper, *February 2012 Threats to the Endangered Species Act*, NATURAL RESOURCES DEFENSE COUNCIL STAFF BLOG (Feb. 29, 2012), [http://switchboard.nrdc.org/blogs/epepper/february\\_2012\\_threats\\_to\\_the\\_e.html](http://switchboard.nrdc.org/blogs/epepper/february_2012_threats_to_the_e.html).

208. *Id.*

209. *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting).

sive scheme rationale to justify federal regulation of intrastate activity in contexts other than protecting endangered species pursuant to the ESA.

## CONCLUSION

The recent circuit court decisions in *Alabama-Tombigbee* and *Stewart & Jasper Orchards* are significant for a number of important reasons. These decisions help observers understand how the Supreme Court's opinion in *Raich* may have altered the Court's Commerce Clause jurisprudence as it relates to federal regulation of intrastate activities in general. *Alabama-Tombigbee* and *Stewart & Jasper Orchards* illustrate that *Raich* did in fact revive the comprehensive scheme rationale within the context of regulating noncommercial, intrastate species under the ESA. The courts' consistent application of the comprehensive scheme rationale demonstrates this point. Moreover, the consistent application of the comprehensive scheme rationale to federal regulation of intrastate species under the ESA increases the likelihood that litigators will apply the rationale to justify federal regulation of intrastate activity in other contexts as well. The Ninth and Eleventh Circuit cases themselves already illustrate the expansion of the rationale from the facts set out in *Raich*, which dealt with the intrastate production and consumption of marijuana.

*Alabama-Tombigbee* and *Stewart & Jasper Orchards* are also significant for what they reveal about the ESA itself. Both cases support the notion that the ESA is a comprehensive regulatory scheme with sufficient ties to interstate commerce. The opinions do so by discussing the legislative history of the Act as well as compelling commercial and economic data. *Alabama-Tombigbee* and *Stewart & Jasper Orchards* also support the argument that the ESA, as a whole, is constitutional, possibly reaffirming the Supreme Court's strong language in favor of protecting endangered species in *Tennessee Valley Authority v. Hill*.

Lastly, the Ninth and Eleventh Circuit Court opinions are important for what they suggest about future constitutional challenges to the ESA. Courts facing similar issues in the future will likely apply the comprehensive scheme rationale in resolving whether Congress may regulate noncommercial, intrastate species under the ESA. It is more likely, therefore, that those courts will uphold federal regulation of intrastate species as a valid exercise of Congress' commerce power. This likelihood may push critics of the ESA to create new methods of attacking the statute, such as Senator Conryn's recent amendment and H.R. 4019. Whatever methods critics of the ESA develop over the next few years, it seems clear that the Court's revival of the comprehensive scheme rationale in *Raich*, combined with the application of the rationale in *Alabama-Tombigbee* and *Stewart & Jasper Orchards*, places the ESA on firm constitutional ground.