JOHN NAGLE MEETS THE DELHI SANDS FLOWER-LOVING FLY

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INTRODUCTION: CALLING JOHN NAGLE

This is a difficult "law review article" to write: a tribute to a best friend; a tribute to his scholarship; an effort to capture certain aspects of his life and work in a few pages. What a task!

Ironically, it is precisely the sort of project for which I would always consult my friend, John Nagle. I was regularly in the habit of seeking John's advice on writing projects. We were the best of friends—I will have more to say about this in a moment. And we were also professional colleagues. We regularly floated our half-baked (or quarter-baked) scholarly writing ideas by each other. We regularly commented on each other's drafts of articles. I read several of his articles and book chapters in draft. *But John . . . wow*! John was truly Mr. Incredible in this regard: I've counted literally scores of times when John is listed in the "star footnote" of one of my articles. That's the unnumbered first footnote in which an author thanks—or shares the blame with—friends and colleagues who read the work in draft. John was uncommonly generous with his time in this way. He read every word of every chapter of my co-authored book on the Constitution, sometimes in multiple drafts. He wrote an overly generous "blurb" for the book, too. John was, in addition to everything else, the very best of professional colleagues.

John was uncommonly *insightful*, *honest*, and *gracious* in his comments. Think about those three rather different things: Many law professors have insights to share—views to inflict upon others, one might say—but they lack grace, patience, care. Others are unfailingly honest but have little useful to say; they lack either insight or the empathy to get inside the head of someone else—to think about *others'*

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ideas—and provide comments that are more than just the reflections of their own views. And some are kind and gentle enough, but to a fault. They don't tell you the things you really need to hear or pose the hard questions you need to think about.

John hit the trifecta. He was gentle, but persuasive, in his criticisms. He frequently would talk me out of saying things that were ridiculous or ill-considered. (Sometimes I ignored his advice and went ahead and said foolish or outlandish things anyway.) Equally often, John would talk me *into* saying things of which I was unsure, giving me assurance, and thus confidence, that what I was proposing to say was not all *that* crazy after all. (Can you hear John's inflection in that sentence, those of you who knew him personally or had him as a teacher?) To be sure, it might not be what *he* would say or quite the way he would put it. He might even vigorously disagree with it. But John could always see connections, possibilities, plausible arguments. He would always have the telling, brilliant insight. He would always notice what critical point was missing, what linchpin of the argument lacking.

John Nagle would always pose the right questions. And he did so with uncommon wisdom, humility, good judgment, and good humor.

All these features were the distinguishing characteristics of his own, magnificent, brilliant, charming, generous scholarly writing. (I'll return to this theme, later in this Essay.) And these were the same qualities John brought to commenting, and advising, others on theirs. He did this for me literally all the time.

So now I need his help again: What is appropriate to write for a *Notre Dame Law Review* symposium in honor of a great friend, a great Christian man, and a great scholar and teacher? How can one capture, fully enough if incompletely, and simply, a best friend's impact, legacy, and character in just a few pages, while engaging meaningfully with his scholarship?

As I said, this is precisely the type of enterprise for which I always called on John for thoughts, insights, and advice. And I still do! Or at least I try to. I "call" upon John, drawing on thirty years of experience of our friendship to channel John Nagle as best I can, for advice on writing about John Nagle. "What Would John Nagle Do?" (John would be amused by this.)

I can hear his voice (kind of):

It's okay to offer a "tribute," of sorts, John would reassure me. *You could say something along the lines of what you said at the memorial service for John two years ago. But keep it fairly short! Don't overdo it*, John counsels me, a characteristically humble twinkle in his eye. *People do want to hear that sort of thing. But they might grow impatient with it if it goes on too long. Short and sweet, to the point.*

Then make sure to engage with your longtime friend's scholarship, John would advise. *After all, it is a law review symposium and not a memorial service. Discussion of scholarship is the special contribution that's appropriate for this particular forum, so make sure not to ignore that. Besides, it's part of the picture of the whole person and this is the place to color in that part of the picture.*

How to go about this? *I'll tell you what you shouldn't do*, John advises me, with a grin. *Don't try to do a "razzle-dazzle grand tour" of the whole body of John Nagle scholarship. That*, he emphasizes, self-deprecatingly, *really would get tedious! Pick out just one article or essay or book—a personal favorite, maybe—that somehow illustrates the character, insights, humor, and warmth of "John Copeland Nagle, Scholar"* (he adds, with a chuckle). *Focus on one article, have a little something to say about it—not too much—and then be done.*

And one more thing. Don't put too much pressure on it. This doesn't have to be (and can't be) the definitive treatment of everything about the life and times and scholarship of John Nagle. Just let it be simple and from the heart. Write about something of John's that brings a smile to your face. And share that smile with others.

So that's my goal here. The first Part of this Essay is simply about my friend John Nagle and about our friendship, fellowship, and shared faith. (I hope that's okay, and that you'll indulge me in doing this.) The second Part is about my favorite John Nagle article of all time—*The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*[1] and the window it offers on John as a scholar—his interests, his insights, his humility, his humor, and his character. But I won't say too much about it, because I want you to read it yourself.

I. JOHN NAGLE, THE MAN

First, the important part. Let me tell you about my friend, John Nagle.

John Nagle was the best friend I've ever had and the best man I've ever known. I loved him as a brother. I had the honor of being a friend of John's for thirty years—from the day we first met, in May 1989, working together as young attorneys in the Office of Legal Counsel of the Department of Justice, until May of 2019, when he went to be with the Lord. He wasn't expecting to go so soon. He wanted to get a needed surgery out of the way, in plenty of time to recuperate and attend his daughter Laura's college graduation at St. Andrews in Scotland. We talked on the phone about this, shortly before his surgery. As is so

1 John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998).

often the case in life, things didn't turn out as planned. As is always the case, God has his own plans. We sometimes question those plans. From our human perspective they don't always seem to be right, or the timing seems wrong. But one thing I can say with assurance: John is with the Lord. This, at least, is in perfect conformity with God's eternal plan for John. (I'll say a little more about our shared faith in a moment.)

Being friends with John was the easiest, most natural thing in the world. We just talked. And shared each other's lives. Most of the time it was a "long distance" friendship. Except for those first two years, when we overlapped at the Department of Justice, we never lived in the same city. We never taught at the same university. So, we didn't see each other every day, or even all that often. Mostly, we just talked on the phone. His cell number, which I always tapped out by hand, is still blazed into my memory, years after the last time I called it. (574-514-0647). And it didn't matter if one of us dropped the ball for a while. (Total Guy Thing.) It didn't matter if we failed to pay attention to each other for a few weeks, or a month. We'd just pick up wherever we'd left off. To use a John Nagle phrase, ours was a "low-maintenance" friendship.

We'd talk about everything, and we'd talk about nothing in particular—about things important and unimportant. We'd talk about articles and book projects and current legal events. But that was almost the least of it.

We talked about our families. John was an incredible family man, devoted to his wife Lisa and to his daughters, Laura and Julia. He was always talking about his girls—what they were doing, activities they were involved in, middle school basketball, horse competitions, college searches. We once had an amusing conversation about which costs more, a horse (for his daughter) or a cello (for mine). The answer is, of course, that it all depends.

We'd talk about travel schedules and speaking gigs. John was always on the move! Keeping track of his whereabouts, even if he'd told me about some planned research or speaking excursion before, was nearly impossible. A classic conversation, which occurred in various forms at least a hundred times: John would call me and immediately say, mischievous lilt in his voice: "*Guess* where *I'm* calling from." Inevitably the answer would be something like: "I'm driving on some obscure road in southwestern Oklahoma headed toward some national park no one's ever heard of to research some endangered species of prairie dog." Or: "I'm in the Aleutian Islands of Alaska about to rent a sea kayak." Or: "I'm rendezvousing with Lisa at O'Hare where one of us will leave the car for the other for when Lisa returns from China while I head off with one of the girls to Antarctica. How

cool is *that*?" I swear, some version of a conversation like that last one occurred dozens of times. It was dizzying and delightful. Or it could be something as simple as: "I'm sitting here working at a Starbucks in [random small town in western Michigan] while waiting to pick up Julia at a horse competition."

We talked about life crises—parents' deaths, job changes, major decisions, issues, difficulties.

We talked about faith challenges. As I mentioned, John and I were brothers in the Lord, fellow struggling, imperfect, yet committed Christians. This was an important aspect of our friendship, of course.

John increased my faith. He had a way about him—how he would think about spiritual problems and faith questions—that I found the most reassuring intellectually, emotionally, and spiritually, of any person I've ever known. Presented with a challenge, or issue, he would, first, acknowledge the problem as a serious one. He wouldn't just wave it away. (Some Christian believers do, and they are hard to talk with. Their supposed certainty, and the feeling of their incredulity toward your uncertainty, or temerity in making the inquiry, is a barrier to the growth of faith.) Next, he would offer assurance that it was not whacky or at all "faithless" to be thinking that way. Sometimes, he'd share, he had had—or still had—similar thoughts and concerns. It was all right.

Then, he'd offer the most humble, thoughtful, non-pat-answer "answer," or hypothesis, or musing—and perhaps he'd relate a story about someone else's experience, or a sermon he'd heard, or a book he'd read. And finally, in doing so, he would typically be able to zoom out and offer some enlarged view of the problem that would put it in its proper place. (Often the problem was that my conception of God was in some way too small, or my estimation of my own judgment or capacity to understand too exalted.)

There was always something I found uniquely convincing about this—about these conversations. In part it was the value of his honest, humble, thoughtful testimony: *if John Nagle was persuaded of something, it was a reasonable thing to believe and accept.*

Now, when I say that John Nagle was the best friend I've ever had, I know I'm not alone in feeling that way. John was a best friend to *many* people. He was just that kind of guy. John Nagle was an Infinite Franchise of Friendship.

If you're close friends with someone for thirty years, you get something of a window into their soul. John was a good soul, the best man I've ever known. John was singular. He was warm and kind. He was friendly and genuine. He had a great sense of humor and was fun to be around. John was trustworthy. I'd trust him with anything. John was a man of integrity. John was a strong person—quietly fearless and courageous, but without a trace of "swagger." He was unassuming and

unpretentious; there wasn't an arrogant bone in his body. He was *brilliant*—I'll get to a glimpse of his scholarship in a moment—but somehow *egoless*. (Or at least so it seemed to me. I can almost hear him saying, "Well *that's* not true! I have problems with ego as much as anyone!"—and start mirthfully refuting the point, in a self-deprecating manner. John was humble even about his own humility.)

John's heart may have failed him, in a physical sense, but John Nagle had the best heart of any guy I've ever known and loved.

II. JOHN NAGLE MEETS THE DELHI SANDS FLOWER-LOVING FLY (AND THE COMMERCE CLAUSE)

A. "A Fly Went By": On John Nagle's Scholarly Interests, Style, Humor, and Warmth

On to Professor John Copeland Nagle, brilliant legal scholar!

There are many boring, tedious law review articles about the Commerce Clause.[2] John Nagle's *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly* is not one of them.[3] It is at turns insightful and amusing—and wonderfully well written. It simultaneously brings a smile to the face and a why-didn't-I-see-that-before palm slap to the forehead. It makes intelligible and accessible (and fun) a topic of constitutional law—the scope of Congress's enumerated power to legislate under the Constitution's grant of authority to "regulate commerce among the states"[4]—that, important and practical though it may be, produces a deserved ho-hum yawn from most sensible law students, law professors, and real people. (The Commerce Clause seems to fascinate constitutional law professors out of all proportion to its intrinsic interest. Mountains out of molehills and all that.) John's article is the antidote to Commerce Clause boredom. I typically assign to my students just one article to read on the Commerce Clause. John's *The Fly* is the one.

The article stands at the intersection of two of John's great scholarly interests and passions: constitutional law and environmental law. I first met John when he and I were attorneys in the Justice Department's Office of Legal Counsel (OLC), which dealt with a wide variety of interesting and unusual constitutional law issues. After his time at OLC, John moved to the Environment Division of Department of Justice where he litigated issues of government lands, environmental impact, endangered species, clean air, clean water, and more. John cared deeply about the U.S. Constitution, both out of intellectual interest and because of its status as the fundamental law of the nation he lived in and loved. John cared deeply about the environment, and the laws for its protection and preservation, out of a deep respect for God's creation and command of faithful human stewardship of that creation. John's teaching and scholarly work reflected these dual passions.

2 What? Did you think I was going to *list* them and thereby incur the wrath of all those guilty law professors who find endlessly fascinating a constitutional law topic that students (rightly) find interminably dull?

3 Nagle, *supra* note 1.

4 U.S. CONST. art. I, § 8, cl. 3.

So, it was a natural fit when the U.S. Court of Appeals D.C. Circuit in 1997 decided the case of *National Association of Home Builders v. Babbitt*,[5] involving the question of Congress's power (pursuant to the interstate Commerce Clause) to protect endangered species by law under the Endangered Species Act. Specifically, the question was whether that power could be deployed to justify an injunction against construction of a hospital, electrical power station, and revamped traffic intersection in order to protect the habitat of a rare but seemingly ordinary species of fly—a fly whose habitat was confined to a small area entirely within the borders of a single state (California), that did not travel in interstate commerce, had no known commercial uses, and did not itself substantially affect interstate commerce in any way.[6]

As John, writing in 1998, teed up the case:

> Today only a few hundred Delhi Sands Flower-Loving Flies survive in less than a dozen [patches of sand] located in an eight-mile radius split by I-10 and the Southern Pacific railroad tracks. Therein lies the Fly's claim to fame. Of the 80,000 known species of flies, the Delhi Sands Flower-Loving Fly is the only one to be listed as endangered under the Endangered Species Act, and it is the only fly to divide the D.C. Circuit three ways concerning the meaning of the Commerce Clause.[7]

John's *Fly* article captures, perfectly, correct and important insights about the Commerce Clause that govern in this context and others. I will get to those in a moment. But what I really love about this article is that it reflects, perfectly, several aspects of John's *character*—his personality. John had a wonderful, gentle, humble sense of humor: mirth combined with warmth. And this article is a delightful demonstration of these attributes.

Consider just the article's title: *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*. Its Godzilla-Meets-Kong echoes gently mock the genuine importance of John's general topic and its specific application. The Commerce Clause actually *is* a Godzilla of a congressional power, truth be told. But the real ironic smiler is the too-long-named peculiar fly whose protection generated this clash of the titans between the Constitution and the Endangered Species Act. Wit and warmth pervade John's discussion, from the article's opening line: "The protagonist in our story has six legs, is one inch long, and dies two weeks after it emerges from the ground."[8] John cites, in a

5 Nat'l Ass'n of Home Builders v. Babbit, 130 F.3d 1041 (D.C. Cir. 1997).
6 *See id.* at 1043.
7 Nagle, *supra* note 1, at 174 (footnote omitted).
8 *Id.*

faux-erudite law review footnote, one of his favorite children's books: *A Fly Went By*.[9]

The article makes meaningful substantive points with droll wit. It's hard to pluck a few out of context to illustrate. And it's probably a bad idea to try: explaining a joke renders it unfunny. But let me risk a few tidbits, just to illustrate. Describing what led San Bernardino to resort to the Commerce Clause to resist an injunction against construction of a hospital, John wrote: "Disdaining more conventional weapons for fighting flies, the county turned to the Supreme Court's decision in *United States v. Lopez*."[10] Mocking the government's having "bravely suggested" that the Delhi Sands Flower-Loving Fly "was active in interstate commerce," John wrote:

> Suffice it to say that the Fly does not offer a noticeable contribution to the economy of San Bernardino County or anywhere else. The Fly does not possess any known medical value. Tourists do not flock to see it. People do not eat it. Scientists have searched in vain for any contributions that the Fly makes to human life. It is not the subject of the popular imagination or a key performer in the popular culture.[11]

(It was at this point where John dropped his scrupulously hedged scholarly footnote reference to *A Fly Went By*.)[12] Noting that the Fly is not alone among endangered species in its lack of observable connection to interstate commerce, John rhapsodized on the habitat of Peck's cave amphipod as a " 'zone of permanent darkness' in a single underground aquifer in Texas."[13] He then paid homage to the Cowhead Lake tui chub and the Deseret milk-vetch.[14] John discussed the dissenting judge's sarcastic speculation whether a fly splattered on a windshield might qualify as traveling in interstate commerce.[15] As to whether the Fly's asserted connections to the entire ecosystem—the Great Circle of Life argument—John noted laconically: "If the Fly disappears, the ecosystem will change. But if the Fly does not disappear, the ecosystem will change."[16]

You get the idea. (Any more vignettes and the previews risk spoiling the movie.).

Another feature of John Nagle, legal scholar, that *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly* illustrates well: his unique

9 *Id.* at 181 n.27 (citing MIKE MCCLINTOCK, A FLY WENT BY (1958)).
10 *Id.* at 175.
11 *Id.* at 181.
12 *Id.* at 181 & n.27.
13 *Id.* at 182.
14 *Id.*
15 *Id.* at 183.
16 *Id.* at 187.

combination of brilliance and humility. John was truly a brilliant scholar, writer, and teacher. But it was never in his character to *act* that way. "*Fly*" reflects this quality. Humor and humility deflect the reader's attention, negating any hint of arrogance or showy-offy-ness. (John was never afflicted with the professors' disease of self-importance. This, I think, was a reflection of his sincere Christian faith: truly believing that one is accepted as a child of God by God's sheer grace and goodness is humbling; and John embraced that acceptance genuinely and lived it in his character.) John's scholarly brilliance was untainted by egotism. John's dazzling insights waft up unassumingly, charmingly, allowing readers occasionally to chuckle even as they are being led, almost unconsciously, along the path to understanding (as it were, on the *Fly*).

A master teacher doesn't beat his students over the head with his knowledge. A master scholar need not trumpet his brilliance. Such actions are barriers to persuasion. They interfere with letting the ideas speak pretty much for themselves. John had a way, typified by this article, of posing questions and pretending (a little bit) not to answer them, but leading others to answer them correctly for themselves.

B. Seven Takeaways.

Which leads me to the article's analytic insights, with which I promised to engage, if only briefly. (You really do need to go read the article itself, for the full effect and sheer delight.)

The Commerce Clause Meets the Delhi Sands Flower-Loving Fly is all about asking the right question. In order for the federal government to regulate conduct pursuant to its power to regulate "commerce among the states," *what exactly is it* that has to bear a sufficiently substantial connection to interstate commercial activity?

The Fly presented that question in a way that split the three-judge panel of the D.C. Circuit essentially three ways, John observed.[17] Was the required connection between *the Fly* and interstate commerce? Was the needed connection between *endangered species* in general and interstate commerce? Or was the only required connection between the proposed hospital construction / power station / reconfigured traffic intersection and interstate commerce—even though being regulated for a non-commercial purpose such as protection of an endangered species of fly? Each of the judges framed the question a different way and it was therefore no surprise that each answered the question a different way: "The explanation for their different

17 *Id.* at. 174.

explanations . . . is quite simple," John wrote.[18] "[E]ach of the D.C. Circuit judges focused on a different question. . . . This article explores who asked the right question."[19]

John untangled the question, and thus got to the answer. Along the way, John also untangled numerous sub-questions (and sub-answers) and explained some seemingly inscrutable doctrines lucidly and exceptionally clearly. *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly* is a masterpiece both of Commerce Clause teaching and scholarship. It goes beyond its specific answer to the specific question (whether the Fly's habitat can be protected against interference from a construction project) to elucidate the meaning of the Commerce Clause generally. Even more than that, the article is a classic in legal interpretive methodology: it tells you how to divide and conquer legal questions of all types.

So, what are the key takeaways from Nagle's *Fly* and Commerce article? I count several.

First, and at the most general level, is the point I've just noted: *it's important to ask the right question*. The key to solving a difficult legal puzzle—or for that matter a religious, or personal, or practical conundrum—is to step back from it and make sure that you see the larger picture and think about the problem the right way. That not only helps you figure out the right answer or range of possible answers; it is actually indispensable to doing so. It keeps you from wasting too much time persistently heading down wrong paths and keeps you from getting lost when you do wander off the main path. John was all about asking the right questions, in law and in life. (Recall my description of how John increased my faith, by his reassuring ability to see the problem clearly and from an enlarged perspective. It's the same principle.)

Second, and somewhat in tension with the first point: *it's sometimes worth going down wrong paths to see why they're wrong*. Different paths are often worth exploring, even if they might prove not to lead to the right destination. (John was a great explorer, personally, intellectually, spiritually. And he was of course quite literally a lover of exploring nature and the environment.) Sometimes you have to figure out what's wrong in order to figure out what might be right. Crossing off wrong paths can help lead to right ones by a process of elimination. It's related to the idea of stepping back and figuring out the right question to ask. (The most frustrating legal scholars are those who doggedly keep pursuing the wrong path, flailing and slashing, moving forward relentless in the wrong direction, without ever asking the

18 *Id.* at 178.
19 *Id.*

question whether this is the right path to be on in the first place. That doesn't mean that one should never explore unexplored trails. It means that one shouldn't get lost in them. Keep your eyes open, be aware of your surroundings, and remember where you diverged from the main trail, so you can find your way back.)

In law, as in mathematics, there is probably such a thing as an "indirect proof" of a proposition: posit an answer you think is *wrong*, explore its logical implications, and see if it ends up contradicting some known truth or premise. If so, that proves the wrong answer wrong. And that often points back to the right answer. Part of what makes John's answer to the *Fly* riddle so persuasive is the myriad problems posed by the other possible approaches and the contradictions they create with other elements of (correctly) settled Commerce Clause doctrine. For example, if you take the wrong path, you might wind up concluding that Congress can regulate everything under the Commerce Clause. Or you might illogically conclude that, because this path yields an extreme and implausible answer, that no other path works.

Third, with respect to the Commerce Clause power and endangered species in particular, then, the key question is *not* the impact of the Delhi Sands Flower-Loving Fly on interstate commerce. It is *not* the impact of endangered species generally on interstate commerce. (These are wrong paths worth looking into, cheerfully and mirthfully, playfully, in the spirit of inquiry, and John's *Fly* article does exactly that, in the service of showing why these are not in the end the right paths to pursue.) The right question to ask is *whether what is being regulated*—hospital construction, traffic intersections, electrical stations—fits within the definition of "commerce" and whether that commerce is, either alone (as by a jurisdictional element) or in the (relevant) aggregation, sufficiently related to interstate transactions or occurrences, either as the means employed or the ends sought to be attained, so as to fall within the scope of the constitutional power.

Ask the right question, get the right answer: regulating commerce (with sufficient interstate connections) that affects a particular fly species' habitat *is a regulation of interstate commerce*. The right answer, then, is that such a measure is within the scope of the Commerce Clause (as augmented by the Necessary and Proper Clause) precisely to the extent that it *is* a measure regulating commerce with a substantial interstate connection.[20]

20 As John pointed out, the requisite connection can be supplied by a law regulating either commerce *means* or commerce *ends*. Congress can regulate interstate commerce-connected activity as the means of addressing some other policy concern (like saving endangered species, prohibiting racial discrimination, or stopping prostitution, lotteries,

This in turn suggests a fourth takeaway (and, in a moment, another one, that follows logically, too). Congress's *motive, or purpose, for enacting a regulation of commerce does not matter*, so long as what it is doing *is* a regulation of commerce. The Commerce Clause (and Necessary and Proper Clause) power can be employed for "noncommercial" policy purposes, like combatting racial discrimination (the lesson of the Civil Rights Act of 1964 cases, like *Heart of Atlanta Motel*).[21] Or protecting endangered species: the purpose of protecting rare flies (and other species) need not be a commercial purpose; it need only be effectuated by a regulation of commerce. A regulation of commerce is a regulation of commerce. It either falls within the scope of the enumerated power or it doesn't. (John was a pretty darned good formalist. The legal consequences of a formal legal rule might be different from the purported purposes for which a rule might have been designed or intended. The consequences might even be surprising, perhaps even distressing to one's preconceptions. But a rule is a rule. A power is a power.)[22]

A fifth takeaway, about the Commerce Clause power generally, is a commonsense intuition about which John Nagle agreed with the Supreme Court, or at least accepted the Court's premise. (Such Nagle-confirmation makes the intuition far more likely correct than if the Supreme Court alone had said it.) *Not everything in the world is "commerce."* Otherwise, the word has no meaning. Not all imaginable human conduct can be regulated under the rubric of "commerce"—or else, not only does the word have no meaning, but the Constitution's structure and logic (and text) of enumerated powers has no meaning either. John accepted these premises. Consider his simple illustrative insight: children walking barefoot through the sand of a fly's habitat cannot be regulated by the Commerce Clause power, in the name of protecting endangered species.[23] Otherwise, everything in the world can be regulated in the name of "commerce." And that just can't be right.

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or loan-sharking) and Congress can regulate activity in order to further the end of protecting commerce: "But *either* the means or the ends should be able to provide the requisite connection to interstate commerce." Nagle, *supra* note 1, at 210.

21 *Id.* at 190; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

22 Echoes of these same Nagle-ish formalist principles with respect to enumerated powers can be heard in my own writing on such topics. John influenced my views. *See* Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 1004 n.54 (2008) (an article that, not coincidentally, cites John's *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*); Michael Stokes Paulsen, *The Power to Destroy*, PUB. DISCOURSE (Aug. 8, 2012), https://www.thepublicdiscourse.com/2012/08/6096/ [https://perma.cc/92GU-S5FC].

23 Nagle, *supra* note 1, at 211–12.

As "Syndrome," the evil boy-would-be-superhero-turned-resentful-grown-man-villain in *The Incredibles* (a movie John and I both appreciated and enjoyed, though not mainly for its legal insights) expressed the point in an admittedly rather different context: "When everyone is super . . . heh, heh, heh . . . *no one will be*."[24] Syndrome's villainous scheme was to give everybody superpowers through technology, so that true superpowers would become meaningless and superheroes with special powers useless things of the past. So too, if everything is commerce (heh, heh, heh), if there's nothing special, nothing commercial, about the Commerce Clause power, then it's simply a universal superpower that defeats the specialness of any and all enumerated legislative powers. This is the insight of *Gibbons v. Ogden*—the enumeration presupposes something not enumerated[25]—carried forward (recently, at the time John was writing) in *United States v. Lopez*.[26] Call it the Anti-Syndrome Insight.

Likewise, if everything that *isn't* commerce can be regulated as "necessary and proper" to the regulation of interstate commerce because one can imagine, or concoct, some hypothetical connection or effect—if one can simply, in *Lopez*'s words, "pile inference upon inference" to make everything regulable pursuant to the Commerce Clause—then the Constitution's scheme of enumerated powers becomes meaningless.[27] There must be *something* that cannot be regulated under the Commerce Clause power.

John was persuaded that these were correct features of the Court's Commerce Clause doctrine. Thus, Congress does not have power to protect endangered species simply as an abstract proposition—that is, to protect them from all human activity of any kind whatsoever. (Children walking barefoot through the sand.) Congress has the power to regulate commerce, possessing a substantial interstate nexus, that affects endangered species.[28]

24 THE INCREDIBLES (Pixar Animation Studios 2004).

25 Gibbons v. Ogden, 22 U.S. 1, 194–95 (1824).

26 *See* United States v. Lopez, 514 U.S. 549, 553 (1995).

27 *Id.* at 567.

28 This principle seems to me to make the Commerce Clause holding of a majority of justices in *NFIB v. Sebelius*, 567 U.S. 519 (2012), that the federal-law "individual mandate" to purchase health insurance contained in the Affordable Care Act could not be sustained as an exercise of congressional power under that clause, at least arguably correct. *Id.* at 561. The essential insight, as set forth in Chief Justice Roberts's controlling opinion, is that the act of *not* engaging in commerce—not buying a product—cannot be regulated pursuant to the power to regulate commerce. *Id.* at 552. Otherwise, Congress could regulate essentially all human conduct by making people buy a good or service concerning that conduct. (The weakness in the argument is that nonpurchase of a commercial product or service can be a form of marketplace commercial conduct and, further, that all individuals are participants, actively or passively, in the health care market, and certainly so over time. Further yet, there

A sixth takeaway builds on the preceding two. Recall first, that the right question is whether a regulation, for whatever policy purpose enacted, is in fact a regulation of commercial activity with sufficient interstate connection. And recall also that this cannot justify regulation of every type of human activity, or else "commerce" becomes a limitless and therefore meaningless term. Combining these points yields another: that a statute, written in general terms like the Endangered Species Act, that prohibits acts that destroy or impair the habitat of a species, will be *constitutional in some of its applications*—those covered by the Commerce Clause power (like building hospitals and traffic intersections)—but *not constitutional in some of its other applications*—those not included within the Commerce Clause power (like children walking barefoot through the sand). The latter possible unconstitutional applications do not render the *statute itself* unconstitutional and incapable of being applied where it constitutionally may be applied without presenting any constitutional trouble. The unconstitutional applications are simply situations where the command of the statute *cannot be applied*, because it is in conflict with the Constitution's limitations on the scope of Congress's power *in such instances*.

This is by now a familiar principle. It was another subject about which John wrote, in one of the most sensible and intelligent articles written about the topic of "severability"—the principle that unconstitutional applications of a statute, or parts of a statute, do not of their own force impair constitutional applications of a statute, or parts of a statute. John's article on severability was brilliantly titled,

is a strong Necessary and Proper Clause argument, rejected by the majority on similar this-might-permit-the-regulation-of-everything intuitions, that a requirement of marketplace participation might be appropriate for carrying into execution a power of comprehensive market regulation in other respects. These points were made in the *NFIB* dissents. *Id.* at 603–9, 619–23 (Ginsburg, J., dissenting).)

I wonder what John thought! I do not recall talking with John about the Commerce Clause power question in *NFIB v. Sebelius*. (I'm sure we *did* talk about it—we talked about a lot of things—but I just don't recall the conversation.)

At all events, John's *Fly* seems to me to frame the right questions about the commerce power issue in *NFIB*, even if some of Nagle's insights might be thought to point in somewhat opposing directions: the commerce power can't be a power to regulate everything (my fifth takeaway); but an enumerated power can be employed for reasons or motives that reach beyond the supposed purposes of the power, and can do so even if that sometimes yields surprising or counterintuitive results (my fourth takeaway). Asking the right questions is necessary to get the right answers. But it is not always sufficient. Sometimes the right questions merely define the appropriate parameters of the relevant legal debate—they define the field of play—but don't compel ineluctable or certain right answers.

simply, *Severability*[29]—a smiler of a title in a different way than the smiler of a title *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*. The long and short of severability (to oversimplify a bit) is that *statutes* are not unconstitutional in the abstract. *Specific applications* of statutes are unconstitutional: a provision or rule contained within a statute cannot supply the governing "law" *in a given situation or judicial case*, where it would conflict with a rule of law of superior obligation supplied by the Constitution. But where a statute's rule *can* be given effect without constitutional problem, the fact that other applications of the statute cannot so be given effect does not nullify the unproblematic applications. The constitutional applications are "severable" from the unconstitutional applications.[30]

This leads me to wonder about a seventh possible takeaway from John's *Fly* article. Again, it builds on some of the propositions just discussed. If a statute is constitutional as applied—because its command or prohibition, as applied to the situation at hand, falls within the scope of Congress's Commerce Clause power—it doesn't matter that *other* applications of the statute are not (or might not be) constitutional because they are not within the scope of the Commerce Clause power. (That's the sixth takeaway.) Here's the next step: If a statute is constitutional (in certain of its applications) because its command or prohibition, as applied, falls within the scope of Congress's Commerce Clause power, why should it matter that the statute, as applied, might not be within the scope of some *other* enumerated power on which Congress purported to rely? Given the principles that justify severability of constitutional from unconstitutional applications of a statute, it is hard to think of any persuasive reason to treat this situation differently. *If a statute's application in a given situation is constitutional under one of Congress's enumerated powers, it does not matter that it would not be constitutionally authorized by a different power, even if Congress cited, invoked, stressed, or insisted on the "wrong" power as its basis for enacting the statute.*

29 John Copeland Nagle, *Severability*, 72 N.C. L. Rev. 203 (1993). I'm in danger of violating my own rule about not engaging in a comprehensive review of John's scholarship. But I don't think I'm in all-out violation just yet: this is only a brief aside and it is connected to the *Fly* article about the Commerce Clause power.

30 In the *Fly* article, John carefully and correctly distinguished this situation—the severability of unconstitutional applications of a statute from constitutional applications of a statute—from the question whether Congress possesses substantive constitutional power to reach *individual instances* of conduct that do not by themselves substantially affect interstate commerce but *in the aggregate, when combined with other instances of such conduct by others*, have a substantial interstate commerce effect. In such a case, application of the rule to the individual is not unconstitutional. Nagle, *supra* note 1, at 202–3; *see* Wickard v. Filburn, 317 U.S. 111, 124–29 (1942); *see also* Gonzalez v. Raich, 545 U.S. 1, 18–19 (2005).

Suppose for example that Congress purported to base its enactment of the Endangered Species Act on an asserted "General Welfare Clause" power. (There is no freestanding general-welfare power; Article I, Section 8, clause 1 uses the term in describing the broad purposes for which Congress has power *to impose taxes.*)[31] Would that invalidate the applications of the Endangered Species Act that were constitutionally within Congress's power under the Commerce Clause?

I think not![32] *A constitutionally valid application of a statute is a constitutionally valid application of a statute. Period.* It does not matter that other applications of the statute might not be constitutionally authorized. And it does not matter that a different power of Congress would not authorize this application, if valid under any enumerated power Congress has. There is no "magic words" formula that requires Congress to cite the right power source in order for a law to be constitutionally valid. Thus, if the Obamacare individual mandate to purchase health insurance is sustainable under Congress's taxing power, it is valid regardless of whether or not it is sustainable under the Commerce Clause power (just as the majority held in *NFIB v. Sebelius*) or for that matter whether or not Congress mentioned any particular enumerated power at all. Congressional "findings" might provide evidence in support of the valid exercise of some powers, but the absence of such findings does not defeat the existence of a power that does not require any findings for its exercise.

Another example: In 1883, in the *Civil Rights Cases*, the Supreme Court held—probably wrongly, but that's beside the point I wish to make here—that Congress's power, under Section Five of the Fourteenth Amendment, to enforce the provisions of that amendment, did not authorize a federal statute prohibiting racial discrimination by private commercial businesses in the areas of lodging, transportation, and public amusements.[33] Further, the Court—probably doubly wrongly—*declined to consider* whether the Civil Rights Act of 1875 might be independently sustainable *under the*

31 U.S. CONST. art. I, § 8, cl. 1.

32 This reminds me of a pseudo-intellectual joke John and I sometimes shared. Famed philosopher René Descartes walks into a café and orders lunch. The waiter asks him, "And will you be having the soup today, Mr. Descartes?" To which he replies, "I think not." Poof! He vanishes. John and I reduced the joke to a shorthand reference. One of us might say, in response to some proposition put forth by the other, "I think not!" To which the speedy reply: "Poof!" I'm not sure there's a real lesson here. But it remains a fair point that a congressional power does not cease to exist, where it in fact exists, just because a different (wrong) power was asserted by Congress.

33 Civil Rights Cases, 109 U.S. 3, 24–25 (1883).

Commerce Clause power.[34] In fact, it was sustainable under the Commerce Clause. As *Heart of Atlanta Motel* correctly and unanimously held, nearly a century later, with respect to the essentially identical provisions of the Civil Rights Act of 1964, provisions of this sort fall within the power to regulate interstate commerce, as aided by the Necessary and Proper Clause.[35] If *Heart of Atlanta Motel* is right, the decision in the *Civil Rights Cases* was wrong even if the Section Five power holding was correct. The Court in the *Civil Rights Cases* should have upheld the provisions of the Civil Rights Act of 1875 as being authorized by the Commerce Clause, whether or not they were authorized by the Section Five power.

Which brings me to *City of Boerne v. Flores*,[36] decided in 1997, a year before John's *Fly* article was published. *City of Boerne* held that the federal Religious Freedom Restoration Act was unconstitutional, insofar as it affected *state* laws, because it exceeded Congress's power under Section Five of the Fourteenth Amendment to enforce the amendment's prohibitions of state action, for reasons similar to those the Court invoked in the *Civil Rights Cases*—that Section Five does not authorize direct regulation of private conduct or direct displacement of state law—coupled with a healthy smack of judicial supremacist arrogance. (How dare Congress disagree with the reasoning of *Employment Division v. Smith*!)[37] In the Court's view, RFRA thus could not supply a federal law basis supporting a church's claimed right to construct an addition to and modification of its sanctuary, overriding a state-law "landmarking" restriction.[38]

City of Boerne is wrong for a bunch of reasons: It is wrong (in my humble opinion) in its understanding of the scope of the Free Exercise Clause of the First Amendment as a limitation on state action—the predicate premise of its Section Five power holding. And it is wrong (in my humble opinion) in its understanding of the Section Five power even if the Free Exercise Clause holding was correct.

But no matter: *Even if it were right* on these points, *City of Boerne* is still wrong *because the application of RFRA to enable a church construction project free from state regulatory interference was sustainable under the Commerce Clause power*. Just as prohibiting a county's building of a hospital and traffic intersection, in order to protect a rare fly's habitat,

34 *Id.* at 19.

35 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964).

36 City of Boerne v. Flores, 521 U.S. 507 (1997).

37 *Id.* at 534–36*; see* MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 305 (2015) ("In the end, *City of Boerne* was more about judicial supremacy—and perhaps affronted judicial pride—than federalism.").

38 *Id.* at 512.

is a constitutional application of the Commerce power, prohibiting state law from interfering with the building of a church's sanctuary construction / renovation project is a constitutional application of the Commerce power.

Indeed, something like such reasoning was, in part, the premise supporting the adoption of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), enacted in the wake of *City of Boerne*'s holding partially invalidating RFRA.[39] But think about it: if RLUIPA, as applied to zoning and landmarking and other land-use restrictions on churches, is within Congress's constitutional power under the Commerce Clause, *then so was RFRA*, as applied to the same questions. And it was (of course) constitutional at the time *City of Boerne* was decided. *City of Boerne*, the case purporting to restrict RFRA's religious liberty rule to actions of the federal government, was quite simply wrong for, of all things, *Commerce Clause reasons* (in addition to everything else).

John Nagle did not draw this conclusion. (He did not travel *that* far outside his main topic, just as the Delhi Sands Flower-Loving Fly does not stray that far from home.) But I think it follows from John's analysis. If the Endangered Species Act's application to commercial activity possessing a sufficient interstate nexus, for the purpose of protecting endangered species, falls within Congress's constitutional power under the Commerce Clause, then by the same logic RFRA's application to state laws regulating commercial activity (possessing a sufficient interstate nexus), for the purpose of protecting religious liberty, also falls within Congress's constitutional power under the Commerce Clause.

CONCLUSION

How could an article that is so much fun be the source of so many legal insights? That was, and remains, part of the magic of John Nagle's scholarship. *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly* is a durable article: its insights are not short term, case-specific, transitory, or contingent in any way. What it says was right and remains right. What it says was valuable and remains valuable.

The same can be said of John Nagle's life as a whole. John did it right. His was a great life, supremely well lived—faithfully, meaningfully, happily, with love of God, family, friends, others, and the world God created, all creatures great and small. That is something of more than short-term, transitory, contingent value, as well. It is

39 Religious Land Use and Institutionalized Persons Act, Pub. L. 106-274, 114 Stat. 803 (2000).

something of enduring significance—one might even say *eternal* significance. What John Nagle was all about as a scholar—and who John Nagle was as a person—were valuable and will remain so.