Public Land and Resources Law Review

Volume 23

Gibbs v. Babbitt: Red Wolf Protection under the Endangered Species Act Leaps beyond the Outer Limits of the Commerce Clause

John M. Bowlin

Eric M. Brewer

Gibbs v. Babbitt: Red Wolf Protection Under the Endangered Species Act Leaps Beyond the "Outer Limits" of the Commerce Clause

John M. Bowlin & Eric M. Brewer

I. INTRODUCTION

Since the enactment of the Endangered Species Act of 1973[1] (ESA), the federal government has taken a rigid stance in an effort to halt extinctions of both flora and fauna.[2] Utilizing regulatory powers incorporated into the ESA, federal agencies such as the Fish and Wildlife Service (FWS) have established effective, conservation-based initiatives to enhance the recovery of threatened and endangered wildlife.[3] Through wildlife reestablishment programs devoted to species and habitat protection, many animals driven to the brink of extinction by the mid-twentieth century have made remarkable comebacks directly due to ESA initiatives.[4]

To a large extent, wildlife conservation has been met with public approval.[5] Concern for endangered and threatened species during the 1970s forced both the government and the people to recognize the value of our Nation's wildlife.[6] However, not everyone has been pleased. In recent years, FWS management policies involving endangered species, especially large predators, have been targeted by special interest groups.[7] Some critics accuse the FWS of engaging in tactics which violate constitutional rights.[8] The tenor of these disconcerted voices rings out loudly, demanding dominion over the land they own.

Gibbs v. Babbitt[9] delves into the heart of this conflict. In *Gibbs*, North Carolina; Charles Gilbert Gibbs; Richard Lee Mann; Washington County, North Carolina; and Hyde County, North Carolina (Plaintiffs) alleged that the ESA anti-taking regulations[10] protecting red wolves exceeded Congress' authority under the Commerce Clause.[11] Ultimately, the Fourth Circuit validated[12] both the anti-taking regulation and the overall legitimacy of the ESA regulations involving species protected under the Commerce

1. 16 U.S.C. §§ 1531-44 (1998).
2. Gibbs v. Babbitt, 214 F.3d 483, 487 (4th Cir. 2000).
3. *Id.*
4. Shannon Petersen, Comment, 29 Envtl. L. 463, 466 (1999).
5. *Gibbs*, 214 F.3d at 489.
6. *Id.* at 487.
7. *Id.* at 489.
8. *Id.* at 489.
9. *Gibbs*, 214 F.3d at 489.
10. 50 C.F.R. § 17.84(c) (1998).
11. U.S. Const. art. I, § 8, cl. 3.
12. *See generally*, *Gibbs*, 214 F.3d 483.

Clause. Upon first impression, the Fourth Circuit's decision appears to send a strong message to other courts suggesting that when considering environmental legislation, it is acceptable to stretch the parameters of the Commerce Clause to fit the facts at issue. However, a close examination of recent Supreme Court decisions regarding the regulable "outer limits" of the Commerce Clause reveals that such an ad hoc interpretation is likely to exceed recently established guidelines. In reality, even though the decision is a triumph for wolves, the effect on future environmental litigation will probably be negligible because it is grounded upon murky legal principles.

A. *History of the North American Red Wolf*

The saga of North American red wolf is bitter sweet. Undoubtedly one of the most vilified creatures roaming the wild lands of our nation, this unique species has been surrounded by both myths and misinformation for centuries. From the time settlers began raising livestock in wolf country, conflicts between humans and the red wolf have been both constant and bloody, with humankind faring far better than the red wolf.[13]

However, contrary to the skewed portrait of red wolves as painted by the brush of ignorance, an accurate examination of the species reveals one of the most fascinating creatures to inhabit the continent. For example, red wolves, like humankind, rely upon cooperative behavior to survive.[14] Additionally, adult members pair with life long mates and exist in communal units usually consisting of an adult breeding pair, young of the year, and young of the previous year.[15] After a family unit is established, they will hunt and forage as a group, thus increasing their chances for success and survival.[16]

Red wolves are carnivorous predators that, when driven by hunger, draw little distinction between eating wild game, domesticated sheep, or even the family pet. Despite their infamous reputation as a veracious predator, small prey such as raccoons, rabbits, and ground dwelling birds constitute the majority of their diet.[17] In fact, predation by wolves provides critical habitat advantages to not only the ecosystem but also to farming and ranching activities by controlling herbivorous prey species that compete with farming and ranching activities.[18] Unfortunately, due to initial conflicts between humans and the red wolf, any benefits generated by the spe-

13. *Gibbs*, 214 F.3d at 488.

14. Rachel E. Wells, *Wolf Song of an Alaska Volunteer* http://alaska.net/~wolfsong/red_wolf.html (Last updated Mar. 22, 2002).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

cies were not fully explored until their numbers had dropped to critical levels.[19]

Regrettably, though red wolves impart a benefit to the overall stability of the ecosystem, because their predatory nature often conflicts with man's activities, they have been targeted by livestock owners, market hunters, and trappers for centuries.[20] Prior to the mid-1800s, red wolves thrived in riverine habitats from southern Florida to central Texas, extending as far north as Kentucky and Carolinas.[21] Agricultural activities combined with predator control, loss of habitat, loss of prey species, and competition from coyotes expanding into their range served to reduce red wolf numbers to the point of near extinction by the 1960s.[22] Additionally, hybridization between the remaining red wolves and coyotes served to dilute the genetic identity of the red wolf genus, further threatening the genetic uniqueness of the species.[23] In 1967, the red wolf was officially listed under the ESA as an endangered species, and in the early 1970s, research conducted by the FWS documented only seventeen full-blooded red wolves, all of which were scattered along the Sabine River adjacent to the Texas-Louisiana border.[24] Finally, in 1976, steps were taken to save the species from extinction, and in a program initiated by the FWS, the remaining wolves were trapped and placed into captive breeding programs in hopes of reestablishing a viable breeding population.[25]

The breeding program was successful, and in 1986 the FWS outlined plans to reintroduce red wolves into the Alligator River National Wildlife Refuge in eastern North Carolina.[26] The Alligator River site was chosen because it provided optimal habitat for the species, a low density of human inhabitants, adequate numbers of small prey species, and an absence of feral dogs and coyotes.[27] In 1987, the FWS released four pairs of captive wolves into the refuge as an "experimental" population.[28] The "experimental" classification is given to reintroduced populations that are considered "nonessential" to the continued existence of the endangered species.[29]

Experimental populations like the red wolf are subjected to the federal

19. *Wolf Song of an Alaska Volunteer* http://alaska.net/~wolfsong/red_wolf.html.

20. *Id.*

21. *Gibbs*, 214 F.3d at 488.

22. *Id.*

23. *Wolf Song of an Alaska Volunteer* http://alaska.net/~wolfsong/red_wolf.html.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. 50 C.F.R. § 17.84(c).

29. 16 U.S.C. § 1539(j) (1982).

regulatory control of the FWS which provides more liberal management than traditionally afforded under te ESA.[30] With the red wolves, the FWS extended the takings provisions under §10(j), thus allowing landowners to kill a red wolf under certain circumstances.[31] Motives for relaxing the takings provision were two-fold. First, the experimental designation allowed the FWS to introduce the red wolf into an area unoccupied by the species.[32] Second, in anticipation of concerns and fears from ranchers and farmers, the FWS allowed individuals to take a red wolf on private land, "[p]rovided that such taking is not intentional or willful, or is in defense of that person's own life or the life of others."[33] Additionally, private landowners are permitted to take a red wolf when the animal is in the act of killing livestock or pets, and may harass wolves by nonlethal methods.[34]

From 1987 to 1996, the "experimental" red wolf population increased from eight to seventy-five animals.[35] As the wolves' numbers increased, so did their home range, and by 1994 approximately forty-one of the seventy-five animals migrated off the refuge and were residing on private land.[36] Naturally, as the wolves became established on private lands, their contact with, and predation on, privately-owned livestock increased, as did protests within the agricultural community.[37]

Unfortunately, efforts to quell apprehension vis-a-vis relaxed taking provisions did not eliminate all conflicts or legal challenges. In October 1990, Richard Lee Mann shot and killed a red wolf on his property, maintaining the animal threatened the safety of his cattle.[38] Mann's actions resulted in his federal prosecution under 50 C.F.R. §17.84 (c), which initiated public outcry questioning the equity of federal regulations controlling the illegal taking of red wolves.[39] From 1992 through 1994, surrounding communities enacted resolutions opposing red wolf reintroductions, and the North Carolina Department of Agriculture formally protested the red wolf program.[40] In 1994, the North Carolina General Assembly responded by passing "An Act to Allow the Trapping and Killing of Red Wolves by

30. 50 C.F.R. § 17.84(c).

31. *Id.*

32. Gibbs v. Babbitt, 31 F. Supp. 2d 531, 532 (1998).

33. 50 C.F.R. § 17.84(c)(4)(i).

34. *Gibbs*, 214 F.3d at 489.

35. *Id.*

36. *Id.*

37. *Id.* at 489.

38. *Id.*

39. *Gibbs*, 214 F.3d at 489 (Mann plead guilty and was sentenced to community service of building shelters for red wolves in captivity).

40. *Id.*

Owners of Private Land",[41] which challenged federal regulations.[42] Specifically, the Act made it legal to kill a red wolf in four North Carolina Counties if the animal was on private property, the landowner reasonably believed the wolf was a threat to people and/or livestock, and the landowner had made previous requests to the FWS to remove the wolf from the property in question.[43] Needless to say, this Act was in direct conflict with federal regulations under the ESA.

Disagreements between North Carolina red wolf reintroduction opponents and the federal government climaxed on March 3, 1997, when a complaint was filed in the United Sates District Court for the eastern District of North Carolina against Bruce Babbitt, Secretary of the Interior; the United States Fish and Wildlife Service; United States Department of Interior; and Jamie Clark, Director of the United States Fish and Wildlife Service (Defendants).[44]

The Plaintiffs alleged the federal government violated the Tenth Amendment by restricting the taking of red wolves on private land.[45] Cross motions for summary judgement were filed, and the court granted the Defendants' summary judgement maintaining the ESA regulation restricting the taking of red wolves was a legitimate exercise of federal power under the Commerce Clause.[46] The Plaintiffs appealed to the United States Court of Appeals, Fourth Circuit, arguing the anti-taking regulation imposed by the FWS in regard to the red wolf exceeded Congressional power under the Commerce Clause.[47]

B. *Holding*

The Fourth Circuit affirmed the lower court's decision,[48] concluding that the anti-taking regulation protected the red wolf on public and private lands, and that the overall ESA regulatory scheme involving the species was a valid exercise of power under the Commerce Clause on two distinct fronts. First, the court held that economic and commercial activities red wolves promulgate in the areas of tourism, scientific research, potential future fur trade, and agribusiness substantially affected interstate commerce subjecting them to federal regulatory authority under the Commerce

41. Statute legalizing killing a red wolf on private property if the landowner previously requested FWS to remove the wolf. 1994 N.C. Sess. Laws Ch. 635, § 1.

42. *Gibbs*, 214 F.3d at 498.

43. *Id.* at 489.

44. *Id.* at 483.

45. *Gibbs*, 31 F. Supp. 2d at 532.

46. *Id.* at 536.

47. *Gibbs*, 214 F.3d at 489.

48. *Id.* at 505, cert denied, Gibbs v. Norton, 531 U.S. 1145 (2001).

Clause.[49] Second, the court held that eviscerating the anti-taking clause of the red wolf reintroduction program would seriously weaken the entire ESA regulatory scheme, thereby unquestionably affecting interstate commerce.[50]

II. Background Law

When investigating the saga of the red wolf, it is necessary to not only examine how the red wolf fits into the ESA regulatory scheme, but also whether the red wolf enjoys protection under the Commerce Clause. This investigation requires an analysis of both the ESA and an historical summary of the Commerce Clause.

A. *ESA Legislation: Red Wolves as an "Experimental Species"*

Due to the success of the captive breeding program, prior to reintroducing the red wolf in North Carolina, the animal's endangered species status was legally reclassified as an "experimental" reintroduction species.[51] The "experimental" classification is given to reintroduced populations that are considered "nonessential" to the continued existence of the species.[52] Under the "experimental" classification, a species is treated as threatened rather than endangered, thus allowing the FWS to establish less restrictive regulations regarding management policies.[53] In the case of the red wolf, the "nonessential" status allowed the FWS to liberalize the taking regulation applied to the species.[54] This increased flexibility was authorized by Congress in 1982 when the ESA was substantially rewritten.[55] In the case of the red wolf, regulatory flexibility was designed to facilitate local acceptance.[56] Originally, under U.S.C. 16 § 1538(a)(1)(B)(2002), the taking provision prohibited harassing, harming, pursuing, hunting, shooting, wounding, trapping, capturing, or collecting any endangered species.[57] However, the red wolf reintroduction plan permit a person to take a wolf on private land when: 1) the taking is not willful or intentional; 2) the taking is done in defense of the person's life or the lives of others; 3) the wolves are in the act of killing livestock or pets, and there is evidence of freshly killed livestock or pets; and 4) after efforts to capture wolves by the FWS are aban-

49. *Gibbs*, 214 F.3d at 497.

50. *Id.* at 498.

51. *Gibbs*, 31 F. Supp. 2d at 532.

52. *Id.* at 532 note 2; *see generally* 16 U.S.C. § 1539(j) (2002).

53. *Id.* at 532 note 2; *see generally* 16 U.S.C. § 1539(j)(2)(C).

54. *Gibbs*, 214 F.3d at 487.

55. *Id.* at 487; *see generally*, Endangered Species Act Amendments of 1982 97 Pub. L. 304, 96 Stat. 1411 (Oct. 13, 1982).

56. *Gibbs*, 214 F.3d at 487.

57. *Id.*

doned and the takings are approved in writing (subject to a 24-hour reporting requirement).[58] In addition, red wolf regulations allow landowners to harass wolves by nonlethal or injurious methods.[59]

B. *Commerce Clause*

Throughout the development of our Nation's legal system, congressional regulatory authority under the Commerce Clause has evolved significantly. Legal scholars have identified shifting judicial opinions regarding the boundaries of the Commerce Clause between 1824 and 2002.[60] Modern Commerce Clause jurisprudence developed in the wake of the *Gibbons v. Ogden* decision.[61] In *Gibbons*, the Court recognized the broad and expansive power Congress wields in regulating intrastate activities that affect interstate commerce.[62] The decision established a precedent that stood for almost a century: Commerce Clause issues primarily addressed instances of state laws burdening interstate commerce and did not consider the scope of congressional Commerce Clause power.[63]

The regulatory power of the Commerce Clause was not significantly challenged again until the 1990s. In fact, the limits to federal regulation under the Commerce Clause were continually broadened over the next seventy-one years. For instance, following the Great Depression, the federal government began to reassess the problems instigated by the laissez-faire approach to business. With this reassessment came tighter federal control and expansion of the regulable "outer limits" of commerce.[64] Indeed, following the Great Depression, the federal regulatory power over activities affecting interstate commerce continued to expand significantly until 1995.[65]

The seminal case for this era was the 1937 Supreme Court decision in *NLRB v. Jones & Laughlin Steel Corp.*[66] In *NLRB*, the Plaintiffs charged that the Steel Corporation had violated rules applying to unfair labor practices.[67] The Steel Corporation alleged that the law was not subject to regu-

58. 50 C.F.R. § 17.84(c)(4)(i-111,v).

59. 50 C.F.R. § 17.84(c)(4)(iv).

60. J. Blanding Holman, IV, Note, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 141-148 (1995).

61. *Id.* at 140-43 (*citing Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 196-7 (1824).

62. 22 U.S. (9 Wheat) 1, 196-7 (1824).

63. Holman, *supra* note 60, at 142.

64. *Id.*

65. Eric Brignac, *Recent Development: The Commerce Clause Justification of Federal Endangered Species Protection: Gibbs v. Babbitt*, 79 N.C.L. Rev. 873, 873-74 (2001).

66. 301 U.S. 1 (1937).

67. *NLRB*, 301 U.S. at 5.

lation under the Commerce Clause because it involved intrastate activities, not interstate activities.[68] The Court held that activities having a substantial relationship to interstate commerce were within the scope of the Commerce Clause, even if the activities were precipitated by intrastate means.[69] Essentially, *NLRB* paved the way for courts to apply "rational review" analysis when determining if an activity was subject to congressional regulation under the Commerce Clause.[70] Under the rationality review identified in *NLRB*, if an activity was either directly or indirectly related to interstate commerce, it was subject to federal regulation under the Commerce Clause.[71]

Following *NLRB*, *Wickard v. Filburn* tested the breadth of Commerce Clause jurisprudence.[72] *Wickard* involved an Ohio farmer's violation of the Agricultural Adjustment Act of 1938 (AAA), precipitated by his producing more wheat than he was allotted under the AAA. Even though Mr. Wickard was allowed to farm only ten acres under the AAA, he farmed twenty-three acres, and utilized the surplus for personal consumption.[73] Though his actions were small, and seemingly insignificant, the Court found they were regulable under the Commerce Clause.[74] The Court held various activities were regulable under the Commerce Clause if they arose out of transactions, which when viewed in the aggregate, could significantly affect interstate commerce.[75] According to *Wickard*, any activity could be reached by Congress if the activity had a substantial effect on interstate commerce.[76]

Over the next sixty years, the scope of the federal regulatory authority under the Commerce Clause continued expanding, giving Congress virtual plenary power in regard to the regulation of commerce.[77] However, in 1995, for the first time in over 100 years, the Court held that Congress had exceeded its authority under the Commerce Clause in *United States v. Lopez*.[78] The *Lopez* decision served to redefine the "judicially enforceable

---

68. *Id.* at 25.

69. *Id.* at 37.

70. Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: Lopez, Morrison, SWANCC, and Gibbs*, 31 Envtl. L. Rev. 10414 (2001).

71. *Id.*

72. 317 U.S. 111 (1942).

73. *Wickard*, 317 U.S. at 114.

74. *Id.* at 132.

75. *Id.* at 127-28.

76. Heather Hale, Note, *United States v. Lopez: Resisting Further Expansion of Congressional Authority Under the Commerce Power*, 1996 Det. C. L. Rev. 99, 108 (1996).

77. *Id.* at 109.

78. 514 U.S. 549 (1995).

outer limits" of congressional authority under the Commerce Clause.[79]

The question in *Lopez* centered around whether the possession of a firearm in a school zone was an activity that substantially affected interstate commerce.[80] Alfonzo Lopez was a twelfth grade San Antonio, Texas student convicted under the Gun-Free School Zones Act (Act)[81] for possession of a concealed .38-caliber pistol and five bullets in a school zone.[82] To summarize, the Act made the possession of a firearm within a school zone a federal offense.[83] Lopez alleged Congress exceeded the scope of its authority under the Commerce Clause when it enacted the Act.[84] The Court analyzed the Act in the light of three acknowledged categories of what Congress could regulate under the Commerce Clause.[85]

> "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[86]

The Court focused on whether guns in school zones substantially affects interstate commerce in determining if Congress had overstepped the bounds of the Commerce Clause.[87] In explaining the last category of what may be regulated, the Court stated, "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[88]

The majority in *Lopez* gave four compelling reasons the Act was unconstitutional under the Commerce Clause: 1) the statute had nothing to do with commerce or any sort of economic enterprise, no matter how broadly the terms are defined; 2) the Act contained no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce; 3) the Act contained no express congressional findings confirming the effect of guns in school zones on inter-

79. *Lopez*, 514 U.S. at 566.

80. *Id.* at 551.

81. Gun-Free School Zone Act of 1990, 18 U.S.C. § 922(9)(1)(A)(2002).

82. *Lopez*, 514 U.S. at 551.

83. *Id.*

84. *Id.* at 552.

85. *Id.* at 558.

86. *Id.* at 558-59.

87. *Lopez*, 514 U.S. at 559.

88. *Id.*

state commerce; and 4) any connection between guns in schools and economic ramifications was too attenuated.[89] However, even though the Court held that the Act exceeded the limits of Commerce Clause regulatory authority, the majority suggested that had there been any type of legislative findings linking the possession of firearms with interstate commerce, the Court would be favorably disposed to consider such findings.[90]

Additionally, the Court affirmed rationality review as the proper means for analyzing a statute challenged under the Commerce Clause.[91] However, it is generally thought that *Lopez* increased the burden by using a "rational basis with teeth analysis."[92] Prior to the *Lopez* decision, the Court in *Heart of Atlanta Motel, Inc. v. United States*, formulated the rational review as: 1) whether Congress had a rational basis for its determination that the activity in question affected commerce; and 2) if it had a rational basis, whether the means selected to regulate this activity were reasonable and appropriate.[93] *Heart of Atlanta* involved an Atlanta motel's refusal to rent rooms to African Americans.[94] The Court applied the "cumulative effects" test set forth in *Wickard* and concluded that because seventy-five percent of the motel's guests were from out of state, racial discrimination in the lodging industry discouraged travel by certain minority groups, thus when examined in aggregate, these instances substantially effected interstate commerce.[95] *Heart of Atlanta* is a prime example of Congress asserting broad and expressive powers vis-a-vis the Commerce Clause. However, following *Lopez*, the Court implemented additional hurdles under ration review, hence the denomination "rational review with teeth."

The first significant case to apply the judicial parameters established in *Lopez* was *United States v. Morrison*.[96] In *Morrison*, the Court was faced with deciding whether the Commerce Clause authorized Congress to create a federal civil action on the basis of gender motivated violence.[97] The act challenged by Morrison was the Violence Against Women Act (VAWA).[98]

The Court examined the case under the framework set forth in *Lopez*.[99] *Morrison* affirmed the three categories established in *Lopez*, focus-

89. *Id.* at 567.

90. Holman, *supra* note 60 at 149-50.

91. *Lopez*, 514 U.S. at 557.

92. *Gibbs*, 214 F.3d at 490.

93. 379 U.S. 241, 258-59.

94. *Heart of Atlanta*, 379 U.S. at 258-59.

95. *Id.*

96. 529 U.S. 598 (2000).

97. *Morrison*, 529 U.S. at 602.

98. 42 U.S.C. § 13981 (1994).

99. *Morrison*, 529 U.S. at 608-609.

ing on whether the regulated activity substantially affected interstate commerce to determine what could be regulated by Congress under the Commerce Clause.[100] The Court used the *Lopez* test to determine if the economic impact of the VAWA was too attenuated to validate the law under the Commerce Clause.[101]

First, the Court explained the activity regulated, as in *Lopez*, was not economic in nature.[102] "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[103] The Court admitted that it had allowed purely intrastate activities to be regulated in the past, but only when the activity was "economic in nature."[104] The petitioner argued that economic findings offered as evidence directly supported the contention that violence perpetrated against women does have an overall, aggregated effect on interstate commerce.[105] However, the Court found that even if there was an indirect effect on interstate commerce due to violence against women, it lacked the "but-for" causal chain.[106] Absent this causal connection, violence against women was too attenuated to permit federal regulation under the Commerce Clause.[107] Therefore, the Court held this was a matter for states to regulate under their police powers.[108] Hence, the Court, as in *Lopez*, found no jurisdictional element "establishing that the federal cause of action is pursuant to Congress' power to regulate interstate commerce.[109]

Next, unlike *Lopez*, the record in *Morrison* demonstrated that Congress had made extensive findings on the economic impact of gender motivated violence.[110] However, the Court stated Congress' conclusion that a certain activity "substantially affects interstate commerce" does not necessarily make it so.[111] Though it is helpful if Congress has made findings supporting the effect on interstate commerce, it is not dispositive.[112] Determination of whether an activity affects interstate commerce is ultimately a

100. *Id.* at 609.
101. *Id.* at 610-12.
102. *Id.* at 610.
103. *Id.* at 613.
104. *Morrison,* 529 U.S. at 613.
105. *Id.* at 615-16.
106. *Id.* at 615.
107. *Id.*
108. *Id.* at 618.
109. *Morrison,* 529 U.S. at 613.
110. *Id.* at 614.
111. *Id.* at 614.
112. *Id.*

question for the Court, not the legislature.[113]

Finally, the Court considered whether the effect on commerce was too attenuated.[114] The Court refused to accept the argument that, but for violence against women, women would participate more fully in intestate commerce.[115] The Court countered: "If accepted, [this] reasoning would allow Congress to regulate any crime as long as the nationwide aggregated impact. . .has substantial effects on employment, production, transit, or consumption."[116]

The decision in both *Lopez* and *Morrison* narrowed the boundaries of the "outer limits" of regulable authority under the Commerce Clause. However, both of these cases have been harshly criticized as being too imprecise and ambiguous to serve as a predictable measure of congressional regulatory authority.[117] The primary concern voiced by critics is that even though the Court maintained that rational basis analysis was not abandoned in *Lopez* or *Morrison*, the majority struck down the legislation on a stricter premise than utilized previously in rational based analysis.[118] Most of the dissension centers around the Court's distinction between economic and noneconomic activities.[119] Commentators suggest that because the Constitution makes no distinction between the regulation of economic versus noneconomic activities affecting interstate commerce, *Lopez* and *Morrison* have essentially rewritten the Constitution.[120] Critics believe the Court's failure to strictly define what constitutes economic activity will become fertile ground for inconsistent interpretation and application of what constitutes interstate commerce and what types of activities are regulable under the Commerce Clause.[121]

III. *GIBBS V. BABBITT*

In the wake of *Morrison*, *Gibbs v. Babbitt* moved to center-stage, challenging the boundaries of the types of economic activities a court will deem regulable under the Commerce Clause. In *Gibbs*, the Federal District Court of North Carolina concluded that the reestablishment of red wolves was an economic activity significantly affecting interstate commerce, and therefore

113. *Id.*

114. *Morrison*, 529 U.S. at 612.

115. *Id.* at 615.

116. *Id.* at 615.

117. Dral & Phillips, *supra* note 70.

118. Dral & Phillips, *supra* note 70.

119. *Id.*

120. *Id.*

121. *Id.*

regulable under the Commerce Clause.[122] On appeal, the United States Court of Appeals (Fourth Circuit) affirmed that the commerce status the district court afforded the red wolves was also within the judicially enforceable parameters reestablished by the Supreme Court in *Lopez*.[123] Following the *Lopez* decision, forecasters from within the legal community predicted a significant narrowing in the scope of congressional regulatory authority under the Commerce Clause.[124] However, supporters of the decision rendered in *Gibbs* believe *Lopez* more conclusively signals the Court's success in identifying meaningful standards defining the boundaries of congressional authority pursuant the Commerce Clause.[125] The majority decision in *Gibbs* indicates that even though *Lopez* metaphorically "raised the bar" for Congress' attempts to apply Commerce Clause regulatory power, when measuring the commercial benefits precipitated by endangered species, some courts will attempt to define these concepts in broad terms.

To facilitate an understanding of *Gibbs*, a two-step analysis is conducted focusing on the reasoning, criticism and ramifications of the decision. First, to properly understand the Fourth Circuit's analysis and potential criticism, the issues of the case must be reviewed in light of the decision rendered. Second, following the case analysis an overview of the ramifications of *Gibbs* is conducted concentrating on what, if any, effect the decision is having on legal actions premised upon the Commerce Clause.

A. *Reasoning & Criticism*

The Fourth Circuit addressed the following three questions regarding the reintroduction of experimental red wolf populations: 1) Were federally-enacted regulations designed to protect red wolves a legitimate exercise of congressional power under the Commerce Clause; 2) Were protection initiatives prohibiting the taking of red wolves an integral cog in the overall ESA regulatory scheme and subject to regulatory authority under the Commerce Clause; and 3) Did the FWS overstep its authority and infringe upon traditional state functions by initiating anti-taking regulations on private lands?

1. *Commerce Power*

In answering the question as to whether federally-enacted regulations designed to protect red wolves are a legitimate exercise of congressional power under the Commerce Clause, the Fourth Circuit relied on the three

122. *Gibbs*, 31 F. Supp. 2d at 535.

123. *Gibbs*, 214 F.3d at 487.

124. Hale, *supra* note 76.

125. *Id.*

categories under which Congress can legislate pursuant to the Commerce Clause set forth in *Lopez*.[126] First, the court looked to determine if regulating the taking of red wolves on private lands involved the movement of wolves within the channels of interstate commerce.[127] The court decided it did not and dismissed analysis under the first category.[128] Second, the court discussed whether wolves were things in interstate commerce.[129] The court reasoned that even though red wolves were occasionally transported across state lines for the purpose of scientific study, these instances were isolated and relatively insignificant.[130] However, in addressing the third category, the court held the incidental takings of red wolves could significantly affect interstate commerce, and therefore, the FWS establishment of takings regulation in regard to the species was both appropriate and valid under the Commerce Clause.[131]

The Fourth Circuit reasoned, red wolf regulations were valid under the third category of *Lopez* test based upon the premise that killing wolves directly impacted interstate commerce in the areas of tourism, scientific research, the potential commercial trade of wolf pelts, and agribusiness.[132] In its analysis of wolf-related tourism, the court relied upon an unpublished study conducted by Dr. William E. Rosen.[133] The Rosen study predicted increased tourism activities generated by red wolf introductions could eventually increase tourism expenditures within North Carolina to between $39.61 and $183.65 million per year.[134] However, the court's reliance on speculative tourism revenues provided by an unpublished study casts serious doubts over how significantly red wolf reintroductions will affect the interstate commercial industry of tourism.

In its analysis of scientific research enhanced by red wolf introductions, the court focused upon the increased job opportunities generated as a direct result of scientific study of the wolves.[135] In particular, the court identified two studies which directly resulted from red wolf reintroductions.[136] The court maintained scientific research connected with the red

126. *Gibbs*, 214 F.3d at 490-91.

127. *Id.* at 490-91.

128. *Id.* at 491.

129. *Id.*

130. *Id.*

131. *Gibbs*, 214 F.3d at 492.

132. *Id.* at 494-95.

133. *Id.* at 493.

134. *Id.* at 494.

135. *Id.*

136. *Gibbs*, 214 F.3d at 494; *See* Donald E. Moore III & Roland Smith, *The Red Wolf as a Model for Carnivore Reintroductions*, 62 Symp. Zool. Soc. Land 263 (1990).

wolves created potential for future studies and employment qualifying it as an interstate market.[137] However, even though the reintroduction of red wolves has already encouraged limited scientific studies, thus far economic activity generated through scientific study has at best been only incremental.[138]

Additionally, in its analysis of future revenues generated by the establishment of a renewable trade in fur pelts, the court engaged in a comparison between the alligator-skin trade and the potential future of a wolf-pelt trade.[139] The court discussed how reintroductions and protection of endangered alligators during the mid-1970s allowed the species' numbers to rebound, parenting a vigorous skin trade by the late 1980s.[140] With the aid of a journal article, the court reasoned the reestablishment of a healthy red wolf population could lead to a potential fur trade and provide another economically-viable interstate market.[141] Despite the majority's speculative assumptions, there has not been a commercial wolf-pelt trade in the United States since the 1800s.[142] The court's broad interpretation of possible economic benefits seems to step far outside the narrow parameters established in both *Lopez* and *Morrison*. Indeed, in *Gibbs*, the Fourth Circuit seems willing to not only stretch the meaning of economic activity but to redefine economic activity to include speculative assumptions.

Lastly, the Fourth Circuit examined the red wolves' effects on agribusiness.[143] The court maintained, whereas it was true the wolves posed a detriment to livestock through predation, the overall affect of the species' carnivorous nature could not be limited to a mere cursory glance of the obvious effects on livestock.[144] The court reasoned that because the wolves also predated on wild animals responsible for crop destruction, the overall benefits conferred by the species might economically outweigh the harm caused to livestock.[145] Ultimately, the court provided no substantial reasoning in support of its findings, and concluded it is Congress and not the court that balances economic considerations.[146]

---

137. *Gibbs*, 214 F.3d at 493; Brian T. Kelly, *Alligator River National Wildlife Refuge Red Wolf (Canis Rufus) Scat Analysis: Preliminary Analysis of Mammilian Prey Consumed by Year, Season, Pack, Sex and Age* (April 1994) (unpublished, Joint Appendix at 942).

138. *Gibbs*, 214 F.3d at 507.

139. *Id.* at 495.

140. *Id.*

141. *Id.*; *See* Catherine L. Krieps, *Sustainable Use of Endangered Species Under Cities: Is it a Sustainable Alternative?* 7 U. Pa. J. Int'l Econ. L 461, 479-80 (1996).

142. *Gibbs*, 214 F.3d at 507.

143. *Id.* at 495.

144. *Id.*

145. *Id.*

146. *Id.*

Though the *Gibbs* court purported to follow the guidelines set out by *Lopez* and *Morrison*, it does not do so in effect. As stated above, the Court in *Lopez* and *Morrison* cast the "substantial affects" of interstate commerce in a different light than previously understood. While maintaining the rational review test for Commerce Clause challenges, *Lopez* and *Morrison* add significant hurdles. Prior to *Lopez* and *Morrison*, to defend a statute or regulation the government only had to prove that Congress had a rational basis for believing an activity affected commerce and that the regulations were reasonable and appropriate.[147] Applying the rational basis analysis to the facts at issue, Congress could have rationally thought that the recovery of endangered species had an effect on interstate commerce and prohibiting the take of those animals was rationally related to preventing this from happening.

Under *Lopez* and *Morrison*'s rational review with teeth analysis, the Court tests federal legislation that claims to regulate commerce using four elements: 1) the economic nature of the activity; 2) the required jurisdictional element; 3) the existence of express congressional findings; 4) and an examination to determine if the economic impact is too attenuated.[148] *Gibbs* examined only one of those factors, though it claimed to examine two. The Fourth Circuit purported to determine if the regulated activity was truly economic; however, all the court did was determine that the regulation in question had a nexus to interstate commerce.

Though *Lopez* and *Morrison* set forth four elements for judicial review of a regulation or statute challenged under the Commerce Clause, the *Gibbs* court failed to address all of these. In *Morrison*, the Court refused to enforce a law that regulated "noneconomic. . .conduct based solely on that conduct's aggregate effect on interstate commerce."[149] The *Gibbs* court stated that taking red wolves is an economic activity because "[t]he protection of commercial and economic assets is a primary reason for taking the wolves."[150] However, if all that is required of a regulated activity is that it be economic in character and have substantial affects on interstate commerce, the only time the regulation of taking wolves would be constitutional would be when the taking was done in defense of economic assets. Conversely, if a person went out to kill wolves for pleasure it would not be subject to regulation under the Commerce Clause because having fun is not a truly economic activity. Therefore, according to the court's analysis, if

147. *Heart of Atlanta*, 379 U.S. at 258-59.

148. *Morrison*, 529 U.S. at 610-12.

149. *Id.* at 617.

150. *Gibbs*, 214 F.3d at 492.

the killing of a red wolf is not done in protection of economic assets or interests, it is not subject to regulation as an economic activity.

Additionally, *Lopez* and *Morrison* both discuss the Court's desire for a jurisdictional element in the statute.[151] In *Lopez*, the Court explained the jurisdictional element would serve as a provision in the statute that would limit those regulated by the statute to those with "an explicit connection with or effect on interstate commerce."[152] An example of jurisdictional element for *Gibbs* would be: 1) the prohibition on taking red wolves only applies to those who purchased the gun or ammunition with which they take the wolf in interstate commerce; 2) those who will sell the story about the taking of the wolf in interstate commerce; 3) those who will transport the wolf in interstate commerce; or 4) those who may disturb the wolf with a vehicle purchased in interstate commerce.[153] There was no such jurisdictional element in the regulation, yet the court did not consider the issue.

Furthermore, though the Fourth Circuit did not expressly discuss the existence of congressional findings regarding the effect of the ESA on interstate commerce, it did touch on the issue. In the court's discussion of the connection between the possibility of a renewed trade in pelts and interstate commerce in mind, it quoted a Senate report that discussed the possibility bolstering the population of endangered species to a "level where controlled exploitation of that species can be resumed."[154] Though the report certainly sounds like Congress may have had an economic activity with effects on interstate commerce in mind, the Senate report cited was in consideration of The Endangered Species Conservation Act of 1969,[155] which was repealed by the ESA.[156]

Finally, in the court's examination of the effects on interstate commerce, tourism, scientific research, agribusiness, and the possibility of a renewed trade in pelts, it only discussed the nexus between the regulated activity (taking of wolves) and the regulations' effect on interstate commerce instead of discussing how it is a truly economic activity. This is contrary to the guidelines set forth in *Morrison*, which establish that even if there is an indirect effect on interstate commerce due to some particular activity, if the activity lacks the "but-for" causal chain it is too attenuated to permit federal regulation under the Commerce Clause.[157] Because the court

151. *Lopez*, 514 U.S. at 561-62; *Morrison*, 529 U.S. at 611-12.

152. *Lopez*, 514 U.S. at 562.

153. *Id.*

154. *Gibbs*, 214 F.3d at 495 (citing S. Rep. 91-526 at 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1415).

155. Pub. Law 91-135 (1969).

156. Pub. Law 93-205 § 14 (1973).

157. *Morrison*, 529 U.S. at 615-16.

in *Gibbs* failed to properly analyze the causal connection between the taking of red wolves and alleged economic windfalls precipitated by the animals, the Fourth Circuit's findings were not grounded upon objective facts, but rather, subjective reasoning.

2. *Protection Initiatives as Part of a Larger Scheme*

In answering the second question, the court held that protection initiatives aimed at limiting the taking of red wolves were an integral cog in the overall ESA regulatory scheme, and thus warranted protection under the Commerce Clause.[158] The court concluded, when any species was classified under the ESA as threatened or endangered, the species' continued existence was viewed as essential in maintaining a flourishing environment, and thus afforded stringent regulatory protection.[159] The appellants argued the taking of a few individual wolves on private land would not significantly affect wolves as a species for reintroduction efforts.[160] However, the court disagreed, reasoning the aggregated, long-term effects of such takings must be addressed.[161] The court maintained the effect of commerce, when viewed in the light of the Commerce Clause could not be measured by analyzing the consequences of taking one member of a species, but rather must be gauged by the latent economic differential between an extinct species and a recovered species.[162] Additionally, congressional efforts to protect endangered species under the ESA do not draw a distinction between how far down the numbers of various species have dwindled and the amount of protection they are provided.[163]

The court's analysis regarding whether red wolf protection initiatives are an integral cog in the overall ESA regulatory scheme is based largely upon the theory that the importance of red wolves cannot be analyzed in an isolated vacuum when attempting to establish the long-term ramifications of their reintroduction.[164] In support of this, the court presented a compelling argument based on the importance of the species genetic value.[165] However, when the potential economic value of the red wolf is used to support and crystallize the genetic value argument, the court missed the mark. By examining the red wolf as an individual species, instead of its importance within the entire ecosystem, the court lost the opportunity to show how

158. *Gibbs*, 214 F.3d at 497.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Gibbs*, 214 F.3d at 498.

164. *Id.*

165. *Id.* at 496.

economically devastating extinction of the species could be to the ecosystem as a whole.[166]

For example, in *National Association of Home Builders v. Babbitt*, the D.C. Circuit Court of Appeals stated that even though the extinction of one species (in this case the Dehli Sands Flower-Loving Fly) may not have a noticeable effect upon interstate commerce, because every species has a distinct place in the ecosystem, the effect on the larger system to which the species is a member, can be both ecologically and economically significant.[167] Such an analysis allowed the circuit court to establish its own level of certainty, and thus fits more closely within the general guidelines set forth in *Morrison*.[168] Conversely, the court in *Gibbs* essentially abandoned active rational review as set forth in *Lopez* and *Morrison* and passively accepted unpublished findings and speculative predictions concerning the economic value of red wolves.[169] In conclusion, this portion of the decision is not firmly grounded in valid legal precedent, and it is reasonable to assume the decision would probably not withstand scrutiny of a Supreme Court review.

3. *Traditional State Functions*

In answering the third and final question, the court held the FWS did not overstep its authority under the ESA, nor infringe upon traditional state functions by initiating regulations regarding the taking of red wolves on private lands.[170] The appellants argued that regulation of red wolf populations by the federal government intruded upon the state's right to manage wildlife species which are the property of the state.[171] The court disagreed, reasoning that historically, state control over wildlife has been superceded by federal regulatory power.[172] Additionally, the court maintained that in the case of endangered species, regulatory procedures have never been an exclusive or primary state function.[173] The appellants countered federal regulations restricting private land use infringed upon the state's police power to regulate local lands.[174] However, the court maintained even though species conservation imposed additional costs on private concerns, prior precedent has upheld federal authority to regulate private lands to sup-

166. Brignac, *supra* note 64, at 883.

167. 130 F.3d 1041 (D.C. Cir. 1997).

168. *National Association of Home Builders*, 130 F.3d at 886.

169. *See generally Gibbs*, 214 F.3d 483.

170. *Gibbs*, 214 F.3d at 499.

171. *Id.* at 499.

172. *Id.*

173. *Id.* at 500.

174. *Id.* at 499.

port wildlife and environmental conservation programs.[175]

The court's analysis regarding whether the FWS overstepped the authority granted to it by Congress under the ESA is the portion of the decision that is the most strongly supported federal statutory law. The ESA's taking provision barred persons from harassing, harming, pursuing, hunting, shooting, wounding, trapping, capturing, or collecting any endangered species.[176] Even though the red wolf is classified as a threatened species, restriction encompassing its subsequent management are prescribed by the FWS and supported by the ESA management scheme.[177] In light of the aforementioned factors, this portion of the decision seems to be firmly grounded in statutory law.

B. *Commerce Clause Ramifications*

To establish *Gibbs*' effect on subsequent case law, it is necessary to examine the decisions which have deferred to the Fourth Circuit's reasoning. Since the decision was rendered it has been cited in fifteen subsequent cases. Unfortunately, the citing courts have followed *Gibbs* in an ad hoc fashion. If there is an overarching principle enunciated by *Gibbs* that is spilling into the area of Commerce Clause jurisprudence, it would involve the idea that commerce must be analyzed in very broad terms.

A prime example of this broadening is seen in *Groome Resources LTD, LLC v. Parish of Jefferson*.[178] In this case, the Parish of Jefferson challenged a portion of the Fair Housing Amendment Act of 1988[179] on the grounds that Congress exceeded its authority under the Commerce Clause.[180] When discussing the constitutionality of the amendment, the Fifth Circuit looked to not only *Lopez* and *Morrison* for precedent,[181] but also to *Gibbs*.[182] *Groome Resources* relied upon *Gibbs* for the proposition that courts continue to give a broad reading to the term "economic" when addressing Commerce Clause challenges after *Morrison*.[183] The court continued, citing *Gibbs*' contention that "a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national

175. *Gibbs*, 214 F.3d at 501.

176. 16 U.S.C. § 1532(19) (1973).

177. *Gibbs*, 214 F.3d at 487-88.

178. 234 F.3d 192 (5th Cir. 2000).

179. 42 U.S.C. § 3604(f)(3)(A-C) (making housing discrimination against the handicapped illegal).

180. *Groome*, 234 F.3d at 195.

181. *Id.* at 200-17.

182. *Id.* at 208.

183. *Id.*

authority."[184]

The regulation of housing is probably more easily defined as being economic in nature than the regulation of red wolves, suggesting the court in *Groome* may have used *Gibbs* to illustrate the threshold of the Commerce Clause; if something as tenuously related to commerce as wolves could be regulated, then certainly housing could be regulated as well. The nature of the regulation in *Groome* did not require the use of *Gibbs* for validity. However the court pointed to the case to show that since *Lopez* and *Morrison*, courts have not applied the narrower standard, favoring a broader understanding of commerce despite Supreme Court precedent to the contrary.

In reverting back to the pre-*Lopez* philosophy of defining interstate commerce in broad terms, recent decisions advocating *Gibbs*' liberal interpretation of quasi-economic activity clearly denounce the spirit of *Lopez* and *Morrison*. In regard to both the former and the latter, the Supreme Court's message is both poignant and on point, ". . .in every case where we have sustained federal regulation under *Wickard's* aggregation principle, the regulated activity was of an apparent commercial character."[185] Unfortunately, courts across the land are riding on the coattails of *Gibbs* while nipping at the heels of the concept of "commercial character," thus serving to further muddy already turbid waters. Indeed, while there is limited evidence supporting the contention that some post-*Gibbs* case law reveals incremental Commerce Clause broadening, it would be presumptive to argue there is any clearly-marked pattern emerging. In reality, subsequent cases have tended to cite *Gibbs* to help support whatever argument they are making at the time. In fact, many of these decisions fail to recognize distinctions arising between *Gibbs*, *Lopez*, and *Morrison*, remaining only too content to incorrectly cite these cases together to stand for the same proposition. *Gibbs* represents a crystallization of the courts' inability to follow the narrow standard provided by *Lopez* and *Morrison*. Misunderstanding the new Commerce Clause jurisprudence as set forth in *Lopez* and *Morrison* appears to be the only constant.

IV. CONCLUSION

Though the court in *Gibbs* purported to decide the case in light of the relatively recent developments in Commerce Clause jurisprudence, it failed in almost all respects. The Court in *Lopez* identified four specific elements which must be satisfied when assessing if an activity rises to the level of substantially affecting interstate commerce. As previously discussed, these

184. *Id.*

185. *Morrison* 529 U.S. at 672, *citing Lopez* 514 U.S. at 559-60, 580.

necessary elements are the economic nature, jurisdictional element, congressional findings, and nexus between the regulated activity economic impact.

When considering the economic nature of the regulation, instead of determining whether the prohibition of killing wolves was truly economic, the Fourth Circuit merely talked about the economic impact of the regulation. The court avoided any discussion of a jurisdictional element in the regulation, though the Court in both *Lopez* and *Morrison* expressed the necessity of such an element to limit the reach of the regulation. The court also touched on the existence of congressional findings, though it did so incorrectly. Additionally, even though the court never provided any type of discussion regarding the existence of congressional findings, it did mentioned the existence of such findings. Unfortunately, the congressional findings the court cited were in support of the Endangered Species Conservation Act of 1969, which was repealed by the ESA. It has been argued that the 1969 act was a precursor to the 1973 ESA, and in fact Congress adopted the more hard-hitting regulatory regime of the 1973 ESA only after finding that its earlier efforts were not working.[186] Thus, doubts have been expressed that Congress changed its mind about the importance of endangered species protection vis-a-vis trade and other matters between 1969 and 1973.[187] Additionally, claims have been leveled that Congress felt the same, if not more strongly, about the importance of endangered species protection by 1973 and thus enacted the ESA to ensure that endangered species were actually protected.[188] Finally, the Fourth Circuit only examined the nexus between the regulated activity and its effect on interstate commerce, through its discussion of tourism, scientific research, possible renewed trade in pelts, and the effect of agribusiness.

Undoubtedly, the Fourth Circuit only conducted a cursory analysis of the criteria specifically enumerated in *Lopez*. It appears the court, in its attempt to keep the regulation of endangered species exclusively federal, ignored the Supreme Court precedent set forth in *Lopez* defining the parameters of Commerce Clause jurisprudence.

186. Email from Timothy Preso, Attorney, Earthjustice, to Eric M. Brewer (Mar. 25, 2002) (on file with author).

187. *Id.*

188. *Id.*