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In October 1990, in violation of the Endangered Species Act of 1973,[1] North Carolina resident Richard Lee Mann shot a red wolf that he feared might threaten his cattle.[2] He pled guilty to the offense of illegally taking[3] a red wolf, but his prosecution sparked local opposition to the federal Endangered Species program protecting red wolves on private land.[4] Lending his voice to popular sentiment, Mr. Mann sued the Secretary of the Interior in federal court, arguing that Congress exceeded its power under the Commerce Clause[5] by regulating red wolf populations on intrastate, non-federal land.[6] In *Gibbs v. Babbitt*,[7] the United States District Court for the Eastern District of North Carolina upheld Congress's power under the Commerce Clause to enforce the Endangered Species Act.[8] On appeal, the United States Court of Appeals for the Fourth Circuit upheld the district court's decision.[9] This Recent Development examines the Fourth Circuit's decision in light of the Supreme Court's renewed interest in the constitutional limits of Congress's Commerce Clause power.

Modern Commerce Clause jurisprudence began in 1937[10] with

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1. 16 U.S.C. §§ 1531–1544 (1994 & Supp. IV 1998); 50 C.F.R. § 17.84(c) (1999) (categorizing red wolves as a protected "experimental population").

2. Gibbs v. Babbitt, 214 F.3d 483, 489 (4th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3552 (U.S. Feb. 20, 2001) (No. 00-844).

3. To "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (1994).

4. *Gibbs*, 214 F.3d at 489 (noting that several North Carolina counties and towns passed "resolutions opposing the reintroduction of the wolves"); *see also* Walter Williams, *Picking Us Off, One at a Time*, CHARLOTTE OBSERVER, Aug. 31, 2000, at 15A (arguing that Mann's conviction was an abuse of governmental rights in violation of the Fifth Amendment). *But see Gibbs*, 214 F.3d at 489 (acknowledging that most of the people and agencies involved supported the red wolf reintroduction program). *See generally* James Eli Shiffer, *Red-Wolf Renaissance*, NEWS & OBSERVER (Raleigh, N.C.), July 25, 2000, at 1A (describing positive and negative reactions to the red wolf reintroduction).

5. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the Power... To regulate Commerce... among the several States.").

6. *See Gibbs*, 214 F.3d at 489.

7. 31 F. Supp. 2d 531, 535–36 (E.D.N.C. 1998).

8. *Id.*

9. 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3552 (U.S. Feb. 20, 2001) (No. 00-844).

10. Due to its limited scope, this Recent Development does not provide an expansive history of the Commerce Clause. For a more in depth history, see Chief Justice

NLRB v. Jones & Laughlin Steel Corp.[11] In *NLRB*, the United States Supreme Court held that activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within the scope of the Commerce Clause, even if the activities are intrastate.[12] After the Court's decision in *NLRB*, the Commerce Clause was a virtual blank check that Congress could use to pass almost any legislation.[13]

Wickard v. Filburn,[14] characterized as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity,"[15] illustrates the extent of Congress's regulatory power after *NLRB*. In *Wickard*, the Supreme Court upheld federal regulation of Roscoe Filburn's consumption of home-grown wheat on the theory that Mr. Filburn's surplus wheat would negate his need to purchase wheat in interstate commerce.[16] As the Court explained, while one person's effect upon interstate commerce may not be "substantial," Congress may regulate that activity under the Commerce Clause if the individual's activity "together with that of others similarly situated" has a substantial economic impact.[17]

In 1995, almost sixty years after *NLRB*, the Supreme Court's decision in *United States v. Lopez*[18] substantially altered Commerce Clause jurisprudence. In *Lopez*, the Court invalidated the Gun-Free

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Rehnquist's summary in *United States v. Lopez*, 514 U.S. 549, 553–58 (1995).

11. 301 U.S. 1, 36–39 (1937) (upholding Congress's authority to regulate employment practices by preventing employers from refusing to allow employees to collectively bargain and unionize).

12. *Id.* at 37 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

13. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268 (1981) (upholding federal regulation of intrastate coal mining); Perez v. United States, 402 U.S. 146, 147 (1971) (upholding federal regulation of intrastate credit extortion); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964) (upholding federal regulation of a local motel because it catered to interstate guests). Indeed, Judge Alex Kozinski once characterized the Commerce Clause as the "Hey, you-can-do-whatever-you-feel-like Clause." Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995). For a critical summary of Congress's use of the Commerce Clause to regulate activity traditionally subject to local control, see Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 79–88 (1999).

14. 317 U.S. 111 (1942).

15. United States v. Lopez, 514 U.S. 549, 560 (1995).

16. *Wickard*, 317 U.S. at 125–30.

17. *Id.* at 127–28.

18. 514 U.S. 549 (1995).

School Zones Act of 1990,[19] which prohibited possession of a firearm in a school zone,[20] on grounds that the Act exceeded Congress's authority under the Commerce Clause.[21] In reaching its decision, the Court specifically identified three categories of activity that Congress is constitutionally allowed to regulate under its Commerce Clause power.[22] First, Congress may regulate the channels of interstate commerce.[23] Second, Congress may regulate and protect the instrumentalities, persons, or things in interstate commerce, even if the regulated activities are solely intrastate.[24] Third, Congress has the authority to regulate activities that have a *substantial effect* on or relation to interstate commerce.[25] Activities falling outside of these three categories are considered beyond the scope of congressional authority.[26] After concluding that the Gun-Free School Zones Act could only be sustained under the third category, the Court determined that the Act did not "substantially affect" interstate commerce and was therefore unconstitutional.[27]

Commentators disagreed about the potential reach of *Lopez*. Some argued that *Lopez* marked the genesis of an attempt to revive federalism principles dormant since 1937.[28] Others considered *Lopez*

19. 18 U.S.C. § 922(q)(1)(A) (1994).

20. *Id.*

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

22. *Id.* at 558.

23. *Id.* For example, Congress can regulate the actions of a motel that serves travelers, no matter how local its business. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 255–56 (1964).

24. *Lopez*, 514 U.S. at 558. For example, Congress can regulate cars and other vehicles used in interstate commerce. *See* S. Ry. Co. v. United States, 222 U.S. 20, 26 (1911).

25. *Lopez*, 514 U.S. at 558–59. Writing for the Court, Chief Justice Rehnquist emphasized that "third category" activity must "substantially affect," not simply "affect," interstate commerce. *Lopez*, 514 U.S. at 559. Observing that the Gun-Free School Zones Act did not relate to "commerce or any sort of economic enterprise," *id.* at 561, Chief Justice Rehnquist rejected the government's "causal chain" economic argument because it would eliminate any real limits on federal power by piling "inference upon inference" to take general police power away from the states until the desired result was achieved. *Id.* at 564, 567.

26. *Lopez*, 514 U.S. at 558; *see also* U.S. CONST. amend. X (reserving powers not delegated to the federal government by the Constitution to the states).

27. *Lopez*, 514 U.S. at 559–61.

28. *See, e.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (stating that *Lopez* "has shattered forever the notion that, after fifty years of Commerce Clause precedent, we can never go back to the days of limited national power"); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 168 (1996) ("This one abrupt departure from established practice has turned a safe stronghold into a new battleground for constitutional litigation.").

to be nothing more than a warning to Congress not to overstep its bounds so egregiously in future cases.[29] Despite academic attention, in the years following *Lopez*, however, the import of the Court's decision remained uncertain.[30]

Five years later, in *United States v. Morrison*,[31] the Supreme Court confirmed that *Lopez* in fact marked a dramatic shift in Commerce Clause jurisprudence when the Court struck down a section of the Violence Against Women Act of 1994[32] as beyond Congress's Commerce Clause authority.[33] Focusing solely on the third *Lopez* category—activities which substantially affect interstate commerce[34]—the Court began with the proposition that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[35] While avoiding establishing a categorical rule against congressional regulation of non-economic intrastate activity, the Court acknowledged that congressional authority to regulate such activity has historically been denied.[36] Despite numerous congressional findings supporting the link between gender-motivated

29. *See, e.g.*, Louis Pollak, *Foreword* to Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533, 550 (1995) (arguing that "*Lopez* will not prove 'epochal' "); H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH L. REV. 651, 651–52 (1995) (stating that *Lopez* will probably be nothing more than a warning to Congress to support statutes with legislative findings); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 554 (1995) (arguing that *Lopez* will not "inaugurate a major change" in the Court's approach to federal legislation).

30. John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 176 (1998) (noting the disagreement over "[w]hether *Lopez* mark[ed] a dramatic shift in Commerce Clause jurisprudence or [was] instead destined to be a 'but see' citation").

31. 120 S. Ct. 1740 (2000).

32. 42 U.S.C. § 13981 (1994).

33. *Morrison*, 120 S. Ct. at 1745 (invalidating the federal civil remedy for victims of gender-motivated violence provided by 42 U.S.C. § 13981 (1994 & Supp. IV 1998)).

34. The United States conceded that the statute could not be justified under the first two *Lopez* categories. *Morrison*, 120 S. Ct. at 1749.

35. *Id.* at 1751. The United States argued that there were congressional findings "supported by a massive legislative record, compiled over four years of hearings, which document the impact of violence against women on the national economy and interstate commerce." Reply Brief for the United States at 5, United States v. Morrison, 120 S. Ct. 1740 (2000) (No. 99-5, 99-29). The findings, however, did not go unchallenged. *See* Brief of Amicus Curiae of Women's Freedom Network at 1–2, United States v. Morrison, 120 S. Ct. 1740 (2000) (No. 99-5, 99-29) (arguing that the congressional findings are conclusory and do not present any real evidence).

36. *See Morrison*, 120 S. Ct. at 1751. In contrast, in January 2000, the Court unanimously affirmed that Congress has the right to regulate the sale of commercial goods, even if that sale occurs intrastate. Reno v. Condon, 528 U.S. 141, 141 (2000).

violence and interstate commerce,[37] the *Morrison* Court nonetheless concluded that Congress had exceeded its constitutional power.[38] In the Court's words, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[39] After further reminding Congress that the Court, not Congress, is the ultimate arbiter of the scope of congressional authority,[40] the Court concluded that the legislation's connection to interstate commerce was too tenuous to be sustained under the Commerce Clause.[41]

In validating *Lopez*, the Court clearly indicated its intent to actively police Congress's exercise of its commerce power. While the *Morrison* majority stated that due respect for Congress requires that the Court only invalidate a law after a "clear showing that Congress ... exceeded its constitutional bounds,"[42] in practice, the majority abandoned that language and used *Morrison* as a vehicle to expand the Court's role in Commerce Clause adjudication. Specifically, the majority's refusal to accept Congress's findings removes from Congress the ability to judge the relevance of its findings in relation to economic activity.[43] Thus, despite the majority's indication of a willingness to defer to Congress's judgment in Commerce Clause cases, the Court's actions reveal a posture that demands greater judicial scrutiny. This posture renders many previously undisturbed congressional regulations vulnerable to constitutional challenge.[44]

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37. *See Morrison*, 120 S. Ct. at 1752.

38. *See id.* at 1754.

39. *Id.* at 1752.

40. *Id.*

41. Writing for the Court, Chief Justice Rehnquist rejected Congress's findings because they were predicated on a previously rejected causal chain of reasoning that would impermissibly allow Congress to legislate against all violent crime. *Id.* at 1752–53. In particular, Chief Justice Rehnquist observed that "if accepted, petitioner's reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.*

42. *Id.* at 1748.

43. The majority emphasized that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Curt." *Id.* at 1752 (internal quotations omitted).

44. Notably, the Court declined to abandon *Lopez*'s third "substantial effects" category—an approach advocated by Justice Thomas. *See id.* at 1759 (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). In *Lopez*, Justice Thomas hinted that the majority had not gone far enough in restricting Congress's commerce power. *Lopez*, 514 U.S at 584 (Thomas, J., concurring). Despite

The Fourth Circuit's decision in *Gibbs v. Babbitt*, therefore, comes at a time of increasingly judicial suspicion of Congress's commerce power.

In *Gibbs*, the Fourth Circuit confronted a challenge to Congress's authority to pass a regulation under the Endangered Species Act (ESA)[45] protecting red wolves as a nonessential experimental population in North Carolina.[46] Paying particular attention to 16 U.S.C. §§ 1531–1544 and 50 C.F.R. § 17.84(c),[47] the Fourth Circuit first considered the three categories of permissible exercise of Commerce Clause power outlined by the Supreme Court in *Lopez*.[48] Applying *Lopez*'s categorical framework, the court quickly dismissed the argument that § 17.84(c) regulates a "channel of interstate commerce" (the first *Lopez* category)[49] The court next concluded that the wolf is not a "thing" in interstate commerce (the

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the majority's willingness to uphold congressional legislation that substantially affects interstate commerce under the Commerce Clause, according to Justice Thomas, the Commerce Clause provides Congress only the power to regulate sale and transport, rather than businesses generally. *Lopez*, 514 U.S. at 587 (Thomas, J., concurring). In Justice Thomas's view, the Constitution must be amended before Congress can control activities that substantially affect interstate commerce.

45. 16 U.S.C. §§ 1531–1544 (1994 & Supp. 1998). It is outside of the scope of this Recent Development to discuss the impact of *Gibbs* on federal environmental legislation as a whole. The ESA regulates enough activity however, so that any decision impacting it would have enormous practical and political effects. For a list of all endangered and threatened plants and animals, see U.S. Fish & Wildlife Service, *Threatened and Endangered Species System*, *at* http://ecos.fws.gov/webpage (last updated Sept. 15, 2000) (on file with the North Carolina Law Review).

46. An experimental population is a "population of endangered or threatened species that has been or will be released into suitable nature habitat outside the species' current natural range." 50 C.F.R. § 17.81(a) (1999). A nonessential experimental population is one whose loss will not likely reduce the survival of the species in the wild. 50 C.F.R. § 17.80(b) (1999).

47. *See Gibbs*, 214 F.3d at 487–90 (2000). The Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1994 & Supp. IV 1998), is the definitional and enabling provision that authorizes the Department of the Interior to enact endangered species regulation. As part of those regulations, 50 C.F.R. § 17.84(c) defines the red wolf as an experimental population and sets strict limits on the "taking" of a wolf: the regulation essentially limits takings to instances when human life is in danger or when livestock is being actively pursued or killed by a red wolf. *Id.* Specifically, the regulation prohibits one from taking a wolf that is merely harassing livestock. *Id.* (requiring evidence of "freshly wounded or killed" livestock or pets to justify a taking of a red wolf).

48. *See Gibbs*, 214 F.3d at 490 (citing United States v. Lopez, 514 U.S. 549, 558–59 (1995)); *see also supra* notes 22–27 and accompanying text (explaining the three *Lopez* categories).

49. *Gibbs*, 214 F.3d at 490–91 (quoting *Lopez*, 514 U.S. at 559). The court stated that "channels of interstate commerce" refers to navigable ways and actual interstate movement. *Id.* The wolf regulation, therefore, did not fall under this category because it "does not target the movement of wolves or wolf products in the channels of interstate commerce." *Id.*

second *Lopez* prong) simply because it has the potential to cross state lines.[50] Accordingly, the rest the court's analysis focused on determining whether regulation of the red wolf in North Carolina has a substantial effect or impact on interstate commerce (the third *Lopez* prong).[51]

In assessing whether the regulation fell into the third *Lopez* category, the Fourth Circuit was initially required to determine whether the taking of red wolves is "in any sense of the phrase, economic activity."[52] In laundry-list fashion, the court first examined takings by farmers and ranchers to protect their farms and "commercially valuable livestock and crops."[53] Next, the court declared that red wolves constitute part of a national tourism industry because tourists travel to North Carolina to hear wolves howl at night.[54] Then, the court identified a close connection between the wolves and the interstate market of commercial scientific research.[55] Finally, the court noted the relation of the congressional regulation to a potential renewal in the fur pelt trade.[56] The court thus concluded that preserving red wolves involved economic activity.[57]

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50. *Id.* at 491 (citing the *Lopez* court's parallel conclusion that guns were not a thing in interstate commerce simply because they crossed state lines).

51. *Gibbs*, 214 F.3d at 491.

52. *Id.* at 492 (quoting United States v. Morrison, 120 S. Ct. 1740, 1751–52 (2000)). *Morrison* affirmed the principle in *Lopez* that " '[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.' " *Morrison*, 120 S. Ct. at 1750 (quoting *Lopez*, 514 U.S. at 560); *see also supra* text accompanying note 36 (noting the *Morrison* Court's acknowledgment that Congress has historically been denied the power to regulate non-economic intrastate activity).

53. *Gibbs*, 214 F.3d at 492 ("The protection of commercial and economic assets is the primary reason for taking the wolves.").

54. *Id.* at 493–94 (relying on an unpublished study of wolf recovery in North Carolina that concluded that northeastern North Carolina could see an increase of up to $183 million in tourism related activities).

55. *Id.* at 494 (relying on several published and unpublished studies of the red wolf reintroduction program as a model for other carnivore reintroduction programs).

56. *Id.* at 495 (relying both on a successful revival in the alligator pelt trade after conservation efforts and on Congressional intent to revive a pelt trade in enacting the ESA).

57. *Id.* at 497. In dissent, Justice Luttig claimed that the majority's conclusion that regulation of the red wolf has economic impact is not even "arguably sustainable." *Id.* at 507 (Luttig, J., dissenting). In particular, Justice Luttig challenged the increased tourism argument because the majority relied exclusively on an unpublished study. *Id.* (Luttig, J., dissenting). Justice Luttig also challenged the scientific research ideas of the majority because they largely relied on the generation, not the substantive conclusions, of two articles. *Id.* (Luttig, J., dissenting). Finally, in response to the majority argument that red wolf regulation will inspire a renewed trade in wolf pelts, Justice Luttig pointed to the fact that "there has not been a trade in wolf pelts since the 1800s." *Id.* (Luttig, J., dissenting).

After demonstrating that the congressional regulation involved economic activity, the court considered whether that activity was "substantial" as defined by *Morrison*.[58] According to the court, the effects of each instance of wolf taking could be aggregated to measure the magnitude of the overall economic burden.[59] In assessing the aggregate economic impact of red wolf takings, the court noted that "northeastern North Carolina could see an increase of between $39.61 and $183.65 million per year in tourism-related activities," declaring "[t]his is hardly a trivial impact on interstate commerce."[60] In other words, the economic impact of the regulated activity was substantial enough to sustain the regulation.

While the court's conclusion that the regulation of the taking of red wolves qualifies as a permissible exercise of Congress's commerce power is arguably correct, it is open to criticism:[61] the court's analysis in *Gibbs* is inconsistent with *Lopez* and *Morrison* in two principal ways. First, the court relied too heavily on scientific findings of the economic value of red wolves—an approach that cuts against the grain of the Supreme Court's recent sweeping reform of Commerce Clause jurisprudence.[62] Second, the court exhibited a level of judicial deference to congressional findings that the Supreme Court actively counseled against in *Morrison*.[63]

The Fourth Circuit's detailed analysis of the wolves' economic impact is troubling for several reasons. As Justice Luttig's dissent noted, the scientific studies upon which the majority relied were of dubious credibility.[64] When compared to the substantial volume of congressional findings supporting the Violence Against Women Act,[65] which the Supreme Court struck down in *Morrison*,[66] the

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The fact that the majority and dissent disagree so fundamentally on the economic value of the wolves demonstrates the unpredictable patchwork-type adjudication that could result from a species-by-species analysis of economic value.

58. *Id.* at 493.

59. *Id.*

60. *Id.* at 494.

61. Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3552 (U.S. Feb. 20, 2001) (No. 00-844).

62. *See supra* notes 37–40 and accompanying text (discussing the specific findings in relation to *Lopez* and *Morrison*).

63. *See supra* notes 41–44 and accompanying text (analyzing the decreased role of judicial deference in recent Supreme Court Commerce Clause jurisprudence).

64. *Id.* at 506–08 (Luttig, J., dissenting); *see also supra* note 57 (listing Justice Luttig's criticisms of the reasoning of the *Gibbs* majority).

65. *See* United States v. Morrison, 120 S. Ct. 1740, 1760–64 (2000) (Souter, J., dissenting).

66. *See supra* notes 35–39 and accompanying text.

evidence relied on by the *Gibbs* majority did not present a strong case for "substantial economic impact." Indeed, the *Morrison* Court admonished that studies and findings are, by themselves, insufficient to compel the Court to "sustain the constitutionality of Commerce Clause legislation."[67] Thus, while the red wolf has an arguable connection to interstate commerce, the Fourth Circuit majority's primary reliance on a finding-supported, economic impact argument questioned by the *Morrison* majority does not place its decision on solid ground.[68]

The *Gibbs* majority, perhaps acknowledging the weakness of its scientific evidence,[69] explained that "[s]eparation of powers principles mandate that [the court] leave decisions such as [red wolf regulation] to Congress and to agencies with congressionally sanctioned expertise and authority.... Lacking such expertise, we must decide not whether the regulation meets with judicial favor, but whether it passes constitutional muster."[70] In other words, the court did not have to establish that the wolf has economic value (or even convince itself that it does).[71] Rather, it will uphold the statute as long as it finds that Congress had a rational basis for connecting the regulation to interstate commerce.[72] In fact, the court stated that it could only *invalidate* the act " 'upon a plain showing that Congress exceeded its constitutional bounds.' "[73]

The *Gibbs* majority found support for this high level of judicial deference in the text of recent Supreme Court opinions, including *Lopez* and *Morrison*.[74] While the Supreme Court's rational basis

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67. *Morrison*, 120 S. Ct. at 1760–64.

68. In *Morrison*, Chief Justice Rehnquist did not specifically reject the importance of congressional findings. *See id.* at 1751. Instead, he hinted that while they have some relevance, they are not dispositive. *See id.* at 1752 ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

69. *Gibbs*, 214 F.3d at 494 (acknowledging the critics of the tourism study).

70. *Id.* at 498.

71. *See id.*

72. *Id.* at 490. The court acknowledged, however, that the intellectual framework is "rational basis review with teeth." *Id.*

73. *Id.* (quoting United States v. Morrison, 120 S. Ct. 1740, 1748 (2000)).

74. *E.g.*, *Morrison*, 120 S. Ct. at 1748 ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." (citing Lopez, 514 U.S. at 577–78 (Kennedy, J., concurring))); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 703–04 (1995) ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation."); United States v. Lopez, 514 U.S. 549, 557 (1995) ("Since

review has paid lip service to judicial deference in these recent opinions,[75] the thrust of *Morrison* revealed an approach that requires a much more active judiciary.[76] Indeed, Chief Justice Rehnquist, writing for the Court in *Morrison* referenced the strong historical declaration of judicial authority in *Marbury v. Madison*[77] and explicitly advanced that Congress's authority under the Commerce Clause is not exempt from judicial oversight.[78] Ultimately, by acknowledging but dismissing the congressional findings, Chief Justice Rehnquist used rational basis review to challenge, not defer to, Congress's wisdom.[79] Despite language to the contrary, *Morrison* therefore demands that the courts not give Congress the benefit of judicial deference but instead examine the wisdom of its judgment.[80]

In contravention of the Supreme Court's activist approach in *Morrison*, the *Gibbs* majority accepted congressional findings with little discussion of their credibility or relevance.[81] Indeed, the majority stated that "[a]ssessing the relative scientific value and commercial impact of ... red wolves is for Congress and the [Fish and Wildlife Service], informed as they are by biologists, economists, and others whose expertise is best delivered to the political branches, not the courts."[82] In short, the deference to Congress that the Fourth Circuit exhibited in *Gibbs*, while justified by some textual support, is inconsistent with the standard established in *Morrison*.

[*NLRB*], the Court has ... undertaken to decide whether a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce.").

75. United States v. Morrison, 120 S. Ct. 1740, 1748 (2000); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 703–04 (1995); United States v. Lopez, 514 U.S. 549, 557 (1995).

76. *See generally* Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 843 (1996) (arguing that the Supreme Court used rational basis review in *Lopez* to challenge unwise federalization of crime); Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1389–1401 (1996) (arguing that in *Lopez*, Chief Justice Rehnquist took an activist role in Commerce Clause jurisprudence and changed the status quo that has been in place for almost sixty years).

77. *See Morrison*, 120 S. Ct. at 1748 (citing Marbury v. Madison, 5 U.S. 137, 176–80 (1803)). Chief Justice Rehnquist could have, of course, picked other precedent illustrating the same point. By specifically tying *Morrison* to the famous case of *Marbury*, Justice Rehnquist provided further evidence that he sees *Morrison* as an important reassertion of lost judicial authority.

78. *See Morrison*, 120 S. Ct. at 1748.

79. *See id.* at 1752.

80. For a post-*Lopez* insight that the Court would move in the direction of challenging Congress's authority, see Brickey, *supra* note 76, at 843.

81. *See Gibbs*, 214 F.3d at 493–97.

82. *Id.* at 495. This Recent Development does not examine the merits of the Fourth Circuit's decision on this point, but simply argues that the decision does not follow the Supreme Court's *Morrison* example of challenging congressional findings.

Even if one accepts the *Gibbs* majority's conclusion that red wolves have economic value, the court's decision fails to provide a tenable framework for evaluating the constitutionality of other endangered species legislation. The fact that wolves have potentially marketable pelts and tourist-friendly behavior makes them a special case of endangered species. Many endangered species, however, are plants,[83] and while these plants may have incidental value as potential medicinal sources,[84] one cannot forcibly argue that rare plants support a substantial interstate tourism market. Likewise, many of the animals on the endangered species list are insects, clams, or other animals[85] whose independent commercial value is highly speculative at best. In other words, while the *Gibbs* court characterized the congressional regulation of red wolves as "but one part of the broader scheme of endangered species legislation,"[86] its lupine-centric analysis actually makes the case an unworkable, fact-specific opinion that undermines the sweeping reforms of *Lopez* and *Morrison*.[87]

While the Fourth Circuit's reasoning in *Gibbs* deviates from the legal framework established by *Lopez* and *Morrison*, its conclusion—that Congress can constitutionally protect endangered species under the Commerce Clause—is not necessarily anomalous. Indeed, an examination of *National Association of Home Builders v. Babbitt*,[88] in which the D.C. Circuit Court of Appeals reached a similar conclusion in a manner more consistent with *Lopez* and *Morrison*, reveals how courts can preserve federal endangered species protection while remaining faithful to precedent.[89]

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83. *See* U.S. Fish & Wildlife, *supra* note 45.

84. *See* H.R. REP. NO. 93-412, at 4–5 (1973) (Sup. Docs. No. Y1.1/2: Serial 13020-4).

85. *See* U.S. Fish & Wildlife, *supra* note 45.

86. *Gibbs*, 214 F.3d at 493.

87. Justice Souter warned against the mare's nest of specific litigation that may arise once the general rule of *NLRB* is removed. *See* United States v. Lopez, 514 U.S. 549, 608 (1995) (Souter, J., dissenting). It seems unlikely that the current Supreme Court would decide the landmark cases of *Morrison* and *Lopez* simply to allow circuit courts to debate the feasibility of the wolf-pelt trade.

88. 130 F.3d 1041 (D.C. Cir. 1997).

89. The policy question of whether Congress *should* legislate in this area incorporates complex political, ecological, and economic concerns. This Recent Development does not discuss the issue in depth. Instead, assuming arguendo that one desires to uphold ESA regulations, this Recent Development examines the manner in which those regulations interact with *Lopez* and *Morrison*. For a general discussion of federal versus state environmental regulation, see generally Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-To-The-Bottom" Rationale For Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing that the traditional "race-to-the-bottom" arguments against state environmental control are inaccurate); Richard B.

In *Home Builders*, San Bernadino County challenged Congress's protection of the Dehli Sands Flower-Loving Fly, a species whose entire range is eight square miles in southern California.[90] Specifically, the petitioners sought a declaration that Congress's regulation of the fly under the ESA exceeded Congress's authority under the Commerce Clause.[91] The D.C. Circuit upheld Congress's authority but employed a rationale different from that of the Fourth Circuit in *Gibbs*.[92]

The D.C. Circuit Court was unable to rely on the independent economic value of the Dehli Sands Flower-Loving Fly to support its holding because, unlike the red wolf, the fly has no immediate connection to obvious economic activity such as tourism or pelt sales.[93] Instead, the D.C. Circuit relied on the government's argument that, while the taking of any one species may or may not have a noticeable effect on interstate commerce,[94] "every species has a place in the ecosystem. Extinction of a species can therefore have an important effect on the larger system of which it is a part."[95] Stated differently, the extinction of one species with no recognized economic value can negatively impact other species with obvious economic value. This "bio-diversity" argument compelled the court to conclude that the fly's continued existence has a substantial effect on interstate commerce.[96] In support of the court's conclusion that biodiversity itself has economic value, Justice Wald observed that medicines derived from plant and animal sources were worth fifteen billion dollars a year in 1983.[97] Justice Wald further explained that the genetic diversity of the ecosystem protects domestic animals and

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Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977) (arguing that states, left to their own devices, will lower environmental regulations in order to attract economic development); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decision Making: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977) (arguing that the absence of a federal non-degradation requirement would cause states to degrade their environment to a greater extent than they would otherwise).

90. *Home Builders*, 130 F.3d at 1043.

91. *Id.*

92. *See id.* at 1057.

93. The Dehli Sands Flower-Loving Fly also has the distinction of being the only one of the 80,000 known species of flies to be listed as endangered under the Endangered Species Act. Nagle, *supra* note 30, at 174.

94. At the time of the case, almost one-half of the domestic species listed as endangered or threatened were found in only one state. *Home Builders*, 130 F.3d at 1052.

95. *Id.* at 1052 n.11.

96. *Id.* at 1052–54.

97. *Id.* at 1053.

crops against potential genetic diseases and allows for constant improvement and growth of these commercially valuable animals and crops.[98] In a point with particular significance for the *Gibbs* case, Justice Wald explained that "[t]he traditional econometric approach, weighing market price and tourist dollars, will always underestimate the true value of wild species."[99] In concurrence, Justice Henderson stated the point even more directly: "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce."[100] Based on this genetic value of the biosphere as a whole, the court found that the shrinking pool of wild species has a substantial effect on interstate commerce as a whole.[101]

The D.C. Circuit's explicit reliance of the interstate commercial value of the biosphere lays the cornerstone for a rational judicial approach to reviewing the constitutionality of endangered species regulations.[102] As opposed to relying on the particular nature of the fly, the D.C. Circuit acknowledged the economic value of a healthy ecosystem,[103] which enabled the court to state its holding with greater

98. *Id.*

99. *Id.* at 1052 n.11 (quoting EDWARD O. WILSON, THE DIVERSITY OF LIFE 308 (1992)).

100. *Home Builders*, 130 F.3d. at 1058 (Henderson, J., concurring).

101. *Id.* at 1054.

102. One can argue that, after the *Morrison* decision, the D.C. Circuit Court of Appeals could utilize the *Home Builders* intellectual framework and arrive at a different conclusion. Because *Home Builders* was decided before *Morrison*, it does not represent the D.C. Circuit Court of Appeals post-*Morrison* opinion on the issue. Indeed, *Morrison*'s rejection of the Violence Against Women Act suggests that the Supreme Court may be willing to challenge the bio-diversity reasoning behind the entire ESA. *Home Builders*, therefore, does not represent the perfect post-*Morrison* adjudication of endangered species federalism issues—it simply provides a method of reasoning that is more consistent with recent Supreme Court precedent than the *Gibbs* court's reasoning.

103. A large body of literature exists concerning the economic benefits, both potential and realized, of biodiversity. *See generally* DANILO J. ANTON, DIVERSITY, GLOBALIZATION, AND THE WAYS OF NATURE 198 (1995) (arguing that the loss of biological diversity parallels a loss of cultural knowledge about the environment). Anton states that "human and biological diversity ... represents the bulk of the planet's natural and human resource base; reducing diversity will result in a gradual loss of options for the future." *Id.* at 198; *see also* ROGENE A. BUCHHOLZ, PRINCIPLES OF ENVIRONMENTAL MANAGEMENT: THE GREENING OF BUSINESS 328–29, 331 (1993) (arguing that "biological diversity ... is the foundation for the services [that] the ecosystem provides and on which we and other species depend on for our existence" and that "[t]he loss of biological diversity through species decimation is the most important process of environmental change, because it is the only process that is wholly irreversible"); SHARON LA BONDE HANKS, ECOLOGY AND THE BIOSPHERE: PRINCIPLES AND PROBLEMS 159 (1996) ("Ecosystems are complex and interconnected. The loss of a single species can [have] wide ranging effects on a system."). For a thorough analysis of the effects of the loss of a species in Australia see Australia Dep't of the Environment, *Biodiversity and its Value*, *at* http://www.environment.gov.au/life/general_info/op1.html (last modified Nov.

conviction. In contrast, by focusing on the particular economic value of the red wolf, the Fourth Circuit set a standard which can only be followed by an inefficient species-by-species adjudication, ultimately adding little to the discussion.

Not only is the D.C. Circuit's approach more manageable, the active approach taken by the D.C. Circuit in *Home Builders* fits within the general trend of *Morrison*. Unlike the Fourth Circuit's judicial restraint rationale, the majority in *Home Builders* declared that "in the *aggregate* we *can* be certain that a decline in bio-diversity will have a *'real and predictable'* effect on interstate commerce."[104] In making this determination, the court did not simply defer to Congress's findings, but found this level of certainty itself.[105] In other words, the D.C. Circuit utilized a judicial rational basis approach that reviews, rather than defers to the correctness of Congress's action.

In contrast, the Fourth Circuit employed a more deferential rational basis review—one that simply asked whether the challenged power was "beyond the power of Congress"—declaring that "[i]t is irrelevant whether judges agree or disagree with congressional judgments in this contentious area."[106] *Morrison*, however, demands a rational basis review that makes judicial agreement or disagreement with congressional judgments in contentious areas extremely relevant.[107] By deferring to congressional findings regarding the commercial value of red wolves, the Fourth Circuit failed to actively engage in rational basis review, following neither the Supreme Court's lead in *Morrison*, nor the D.C. Circuit's example in *Home Builders*.

In a post-*Lopez* world, environmental regulation potentially sets the stage for recurring challenges to Congress's power to preserve endangered species under the Commerce Clause. Recognition that biodiversity is essential to a healthy environment, however, requires legislators and courts to look beyond the specific environmental impact of a species toward the commercial impact that the species has on the environment as a whole.

For these reasons, when future courts grapple with the constitutional limits of Congress's environmental legislation, they

19, 1997) (on file with the North Carolina Law Review) (arguing that "benefits arising from the conservation of components of biological diversity can be considered in three groups: ecosystem services, biological resources and social benefits").

104. *Home Builders*, 130 F.3d at 1053 n.14.

105. *See id.* at 1051–57 (discussing the court's basis for its conclusion).

106. *Gibbs*, 214 F.3d at 496.

107. *See supra* notes 40–44 and accompanying text.

should avoid the type of reasoning exhibited by the Fourth Circuit in *Gibbs*. The Fourth Circuit's passive acceptance of scientific and congressional findings is not only inconsistent with the active rational basis review in which the Supreme Court engaged in *Lopez* and *Morrison*, it also fails to provide a sustainable approach to adjudicating future environmental issues. Instead, courts should look to the reasoning of the D.C. Circuit in *Home Builders*. By taking into account the complex commercial value of biodiversity, *Home Builders* presents a defensible rationale to sustaining Congress's authority to protect endangered species. Because the D.C. Circuit's approach more accurately reflects the intricate nature of the environment, it allows for intellectually consistent adjudication, regardless of whether a particular regulation can be sustained.

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