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Gibbs v. Babbitt

Dave Owen*

In Gibbs v. Babbitt, the Fourth Circuit upheld the Endangered Species Act's take provision against a Commerce Clause challenge. The court found that federal regulation of the take of red wolves on private land was consistent with the precedents set by the Supreme Court in U.S. v. Lopez and U.S. v. Morrison and described a range of ways in which endangered species may be connected to interstate commerce. While connections between wolves and commerce were particularly strong, Gibbs, in combination with several other similar cases, may signal that Congress' Commerce Clause power allows regulation of all take of endangered species.

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INTRODUCTION

Following the Supreme Court's decision in United States v. Lopez, numerous commentators speculated that the Endangered Species Act (ESA) "take" provision might stand on shaky ground. Lopez signaled the Court's renewed willingness to narrowly interpret the scope of Congressional power under the Commerce Clause and indicated that protection of endangered species on private lands might be beyond the power of the federal government. In Gibbs v. Babbitt, however, the Fourth Circuit upheld the application of the ESA "take" provision in the face of a Commerce Clause challenge. Addressing the constitutionality of regulations preventing taking of red wolves, the court applied the precedents set forth in Lopez and affirmed in United States v. Morrison, but nevertheless held that

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1. 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act, which prohibited possession of a handgun within 1,000 feet of a school, was an unconstitutional overextension of Congress' authority to regulate interstate commerce).
2. 16 U.S.C. § 1538(a)(1)(B) (making it "unlawful for any person subject to the jurisdiction of the United States to... take any such species within the United States or the territorial sea of the United States"). Under the ESA, the term "take" means "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(19).
4. U.S. CONST. art. I, § 8 (granting Congress the power "to regulate Commerce with foreign Nations, and among the several states and with the Indian Tribes"). Despite this modest language, the Commerce Clause is the source of Congressional power for much modern regulation, including many environmental regulations.
6. 529 U.S. 598 (2000) (holding that the Violence Against Women Act, which allowed a federal cause of action for victims of gender-motivated violence, exceeded
protecting wolves on private land was within the federal Commerce Clause power. In so holding, the Fourth Circuit signaled that the ESA might survive the Supreme Court's re-interpretation of the constitutional Commerce Clause.

The holding in Gibbs is important on two levels. First, it indicates that even a relatively conservative circuit is willing to apply a less-than-revolutionary version of Lopez to the ESA. Second, Gibbs builds on a developing line of cases that recognize broad and significant connections between endangered species and commerce. Particularly strong facts may prevent Gibbs alone from establishing any general legal principle, but the numerous acknowledged connections between endangered species and commercial activity may have value as precedent in future Commerce Clause challenges to endangered species protection.

1

BACKGROUND

A. The Red Wolf

The red wolf originally inhabited the southeastern United States, from Texas north to Illinois and east to the Atlantic coast. Historical evidence suggests that the wolf was common in bottomlands and riverine habitats. The incursions of people upon these habitats, through draining, inundation, and direct efforts at predator control, nearly extirpated the wolf. In 1967, the United States Fish and Wildlife Service ("FWS") listed the species as endangered. By the mid-1970s, only one small population, living in southwest Louisiana and southeast Texas, survived. In an effort to preserve the species and eventually facilitate its reintroduction into the wild, FWS trapped the survivors and placed them in a captive breeding program.

Captive breeding proved successful. Consequently, in 1987, FWS released four pairs of red wolves into North Carolina's
Alligator River National Wildlife Refuge. Over the next six years, FWS released a total of forty-two wolves. The wolves repopulated the refuge, but also wandered onto surrounding private lands. In 2000, the Forest Service estimated that between seventy and eighty wolves survived in the wild.

FWS designated the released wolves as an experimental, non-essential population; meaning that the wolves received less protection than would an existing endangered population. FWS selected this lesser level of protection hoping that retaining flexibility in its ability to manage the reintroduced population would ease the concerns of local citizens and other agencies. Nevertheless, FWS regulations promulgated under Section 9(a)(1) of the ESA specifically state that "no person may take this species" outside of certain limited circumstances. The ESA defines "take," as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species, "or to attempt to engage in any such conduct."

Despite these relaxed regulations, the wolf's reintroduction created local conflict. In October 1990, a local landowner, Richard Lee Mann, shot and killed a red wolf. Mann claimed he feared the wolf might threaten his cattle, but the federal government prosecuted him under Section 17.84(c) of the FWS regulations promulgated under the ESA. After Mann pled guilty to taking a red wolf illegally, opposition to the reintroduction program crystallized. Opponents of the program passed two county resolutions opposing the reintroduction

14. Id.
15. Id.
16. Id. at 488 n.1.
17. 51 Fed. Reg. at 41,790. By designating the species as experimental, FWS retained discretion to "recapture . . . wolves to replace transmitter or capture collars, provide routine veterinary care, return animals to the refuge which have strayed outside its boundaries, or return to captivity animals that are a threat to human safety or property, or which are severely diseased or injured." Additionally, the wolf would not be treated as a listed species when outside of wildlife refuge or national park lands. Id. By contrast, a non-experimental population would have been stringently protected regardless of its location.
18. 50 C.F.R. § 17.84(c) (1998).
20. Gibbs, 214 F.3d at 489.
21. Id.
program. The North Carolina State Department of Agriculture filed a protest against the program, and the state legislature passed a bill that conflicted with the FWS take provision and set a far more lenient standard for killing red wolves on private land. Finally, Mann and a group of other plaintiffs brought an action challenging the constitutionality of the FWS take regulation.

B. The District Court's Ruling

The district court evaluated whether ESA Section 17.84(c), the regulation that prevented the taking of red wolves on private land, was an over-extension of the federal government's Commerce Clause power. Courts have recently begun to reevaluate the scope of this power. In 1995, in U.S. v. Lopez, the Supreme Court struck down the Gun-Free School Zones Act as beyond the federal government's Commerce Clause power, thereby ending a sixty-year period during which the Supreme Court never found a regulation unjustified under the Commerce Clause. The Lopez opinion signaled the Court's renewed willingness to evaluate the validity of federal laws justified under the Commerce Clause, and set forth a new standard for such analysis.

Nevertheless, the district court in Gibbs held that Section 17.84(c) survived under the Lopez standard. The court found that wolves crossed state lines and were followed by interstate tourists, academics, and scientists. On the basis of these findings, the court concluded that wolves were "things in interstate commerce" and also had a substantial effect upon interstate commerce. Accordingly, the district court granted summary judgment to the federal defendants.

23. Gibbs, 214 F.3d at 489.
24. Id.
25. Id.
27. 514 U.S. 549 (1995) (discussing the history, the Court noted that the expansion of the Commerce Clause "in part... was a recognition of the great changes that had occurred in the way business was carried on in this country.... But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce." 514 U.S. at 556).
28. 31 F. Supp. 2d at 535.
29. Id.
30. Id. at 536.
C. The Circuit Court's Ruling

1. The Majority Opinion

The plaintiffs appealed the case to the United States Court of Appeals for the Fourth Circuit, which upheld the District Court by a 2-1 margin. While the Fourth Circuit has been at the cutting edge of recent conservative trends, Chief Judge Wilkinson's majority opinion in *Gibbs* defended, on numerous alternative grounds, Congress' power to protect endangered species. The majority found that, even after *Lopez*, protecting endangered species was within Congress's power under the Commerce Clause, and buttressed this conclusion by documenting numerous connections between red wolves and commerce.

a. Connections Between Red Wolf Protection and Commerce

The court found that red wolves substantially affected commerce in several ways. It emphasized that wolves drew numerous out-of-state tourists to "howling" events and were the subject of numerous scientific studies. A revived wolf population might also renew trade in pelts; the court noted that a similar trade had resulted from the rejuvenation of endangered alligator populations. In addition, the court suggested that further study might reveal currently unforeseeable additional commercial uses for wolves. Finally, the court found that, by preying upon wildlife that could destroy agricultural crops, wolves might confer economic benefits through maintaining healthy ecosystems. On the basis of all of these conclusions, the court found that red wolves substantially affected commerce.

In addition, the court found that the activities regulated by Section 17.84(c) substantially affected interstate commerce. The

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31. See Brooke A. Masters, *4th Circuit Keeps Steering to the Right; Supreme Court Likes Appeals Panel's Direction but Keeps It from Pushing Too Far, Experts Say*, THE WASH. POST, July 5, 2000, at B1 (noting that numerous decisions involving such diverse subjects as the Commerce Clause, Miranda rights, standing, and the death penalty have established the Fourth Circuit as willing to push the Supreme Court in a more politically conservative direction).

32. *Gibbs*, 214 F.3d at 493-94. Under *Lopez*, Congress may regulate the instrumentalities of interstate commerce, persons or thing in interstate commerce, or activities that substantially relate to or substantially affect interstate commerce. 514 U.S. at 558-59.

33. *Gibbs*, 214 F.3d at 495.

34. Id. at 494.

35. Id. at 496.
court described Section 17.84(c) as a regulation protecting an endangered species from commercially motivated activities, noting that "farmers take wolves to protect valuable livestock and crops." It then held that the prohibited activity, as well as the protected resource, could be the nexus connecting a regulation to commerce, stating, "it is well-settled in Commerce Clause cases that a regulation can involve the promotion or the restriction of commercial enterprises and development." Accordingly, the court determined that since the "take" prohibition specifically targeted economic activity, it was valid for reasons independent of the economic value of the protected wolves.

The court rejected the petitioners' argument that individual takings lacked economic effect, finding their focus on the economic impact of individual wolves inconsistent with Commerce Clause precedent. Instead, the court noted that this precedent requires analysis of the aggregate effect of individual activities where regulation of those individual activities is a necessary component of a broader regulatory scheme. The court thus held that its inquiry should focus on the commercial impact of red wolves as a species and not as isolated individuals. In addition, the court held that the potential impact of a revived red wolf population, rather than the current impact of a tiny endangered population, should be considered. To hold otherwise, the majority noted, would create an absurd situation in which the ESA's protections grew constitutionally suspect as the resource to be protected grew more scarce, effectively excluding the government from protecting those resources most in need of protection. Moreover, the court placed the takings of red wolves within the broader context of the entire ESA. The court noted that the entire Act has clear connections to commerce and represents well-established and judicially recognized law. Accordingly, the court held it inappropriate to isolate and strike a particular regulation promulgated under this wider law.

36. Id. at 495.
37. Id.
38. Id.
39. See id. at 497.
40. Id. at 498.
41. Id.
42. Id.
43. Id.
44. Id. at 497-98 (citing TVA v. Hill, 437 U.S. 153 (1978) and Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) in support of
b. Red Wolf Protection and Federalism

After considering the effects of red wolves on commerce, the court turned to federalism concerns. The majority first rejected the petitioners' assertion that the regulation infringed upon a traditional area of state concern. It did note, "Lopez and Morrison rest on the principle that where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power." While acknowledging that nineteenth century courts had adhered to the doctrine that wildlife was state property, the court cited cases replacing this doctrine with the principle that state regulatory power over wildlife was shared with, and could be trumped by, federal authority.

Likewise, the court rejected the petitioner's argument that the clause impermissibly infringed upon the traditional state function of regulating land use. While agreeing with the plaintiffs that land use was a traditional area of state concern, the court noted that federal wildlife protections restricting land use, including the ESA itself, were also well established and had repeatedly been recognized and approved by courts. Accordingly, the court held that the protection of wildlife on private land fell well within the sphere of traditional federal authority.

The court also concluded that the rationale used to justify the regulation was not so broad as to obliterate limits on federal power. In so doing, the court distinguished the Gibbs regulation from those at issue in Lopez and Morrison. While the "costs of crime" approach used by Congress to justify the Gun-Free School Zones Act could have been used to justify almost any federal criminal or educational statute, and thus would have left no area of criminal or educational regulation outside the sphere of federal power, the Gibbs majority found that the rationale

the proposition that since the Supreme Court has previously considered the meaning of specific sections of the ESA, the constitutionality of the entire act has been presumed.

45. Id. at 500.
46. Id. at 491.
47. Id. at 499 (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Hughes v. Oklahoma, 441 U.S. 322 (1979); and Greer v. Connecticut, 161 U.S. 519 (1896)).
48. Id. at 500.
49. Id.
50. Id. at 503.
used to justify Section 17.84(c) was limited to particular connections between endangered species and commerce. Such a self-limiting rationale, the court held, was entirely different from the reasoning unsuccessfully employed by the government in *Lopez* and *Morrison*.

### 2. The Dissent

In a short dissent, Judge Luttig disputed both the majority's willingness to recognize connections between wolves and interstate commerce and the deference granted by the majority to Congressional judgment. In stark contrast to the majority's statement that "of course natural resource conservation is economic and commercial," Judge Luttig argued that the assertion of a connection between wolves and interstate commerce was "exponentially" more speculative than the connections rejected in *Lopez* and *Morrison*.

Instead, the dissent suggested that killing all forty-one red wolves living on private property would still have no cognizable interstate commerce effect. By finding otherwise, he suggested, the majority aligned itself with the overly broad interpretations of commercial activity espoused by the *Lopez* and *Morrison* dissents, and adopted a doctrine that, if accepted by the Supreme Court, would consign both *Lopez* and *Morrison* to aberration. In addition, Judge Luttig rejected the notion that any deference should be granted to Congressional assessment of the bounds of its own Commerce Clause power. Judge Luttig concluded that a faithful adherence to the principles of *Lopez* and *Morrison* required invalidating Section 17.84(c).

In response to this dissent, the majority opinion closed with a strongly worded rejoinder. The majority expressed consternation at the dissent's unwillingness to acknowledge connections between natural resources and commerce, and further criticized the dissent for what the majority perceived as

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51. *Id.* at 503-04.
52. *Id.* at 503.
53. *Id.* at 506-10.
54. *Id.* at 506.
55. *Id.* at 507-08.
56. *Id.* at 507.
57. *Id.* at 508 ("the expansive view of the Commerce power expressed by the majority today is closely akin to that separately expressed by Justice Breyer in his dissent in *Lopez* and Justice Souter in his dissent in *Morrison* . . . .").
58. *Id.* at 509.
59. *Id.* at 509-10.
60. *Id.* at 504-06.
Judge Luttig's willingness to allow personal distaste for the regulation to muddle his analysis of the regulation's constitutionality. The majority believed that by mixing inquiries into Congress' jurisdiction and the quality of Congress' judgment, the dissent would compromise federalism. The dissent's excessive assertions of judicial activism could, in an effort to tinker with the federal-state balance, completely overturn the balance of power between the legislature and judiciary.

II
ANALYSIS

Gibbs v. Babbitt suggests that the precedents set by the Supreme Court in Lopez and Morrison are compatible with continued federal protection of endangered species on private land. The reading of Lopez and Morrison that allows this interpretation is quite controversial, however, and represents the most noteworthy aspect of the Gibbs opinion. The Fourth Circuit dealt with uncertainty about the current state of Commerce Clause jurisprudence by opting for a less revolutionary and less restrictive reading of Lopez and Morrison. Part II.A. of this Note assesses the validity of this choice and concludes that Gibbs employs an acceptable framework for assessing Commerce Clause challenges to the ESA.

Part II.B. addresses the court's discussion of connections between endangered species and commerce. While particularly strong connections between wolves and commerce may have made this an easy case, they will likely diminish Gibbs' precedential value. Nevertheless, Gibbs, in combination with a series of other cases reaching similar results, upholds the general principle that most endangered species protection is tied to commerce, and suggests that the ESA's protections will not be limited to red wolves.

A. The Fourth Circuit's Application of Lopez to the ESA

Lopez and Morrison were undisputedly controlling precedent in Gibbs, but the Fourth Circuit was faced with the difficult

61. Id. ("It cannot be that the mere expression of judicial derision for the efforts of the democratic branches is enough to discard them.").

62. Id. at 505.

63. Id. at 490 ("We consider this case under the framework articulated by the Supreme Court in United States v. Lopez ... and United States v. Morrison"); id. at
task of determining exactly how to apply such precedent. While the dissent viewed *Lopez* and *Morrison* as revolutionary cases signaling a fundamental change in judicial review of the scope of Congressional power, the majority treated them as consistent with the historic development of Commerce Clause jurisprudence. This dispute over the true meaning of *Lopez* and *Morrison* is likely to continue, but the *Gibbs* majority's reading of these cases appears faithful to the precedents set by the Supreme Court.

*Lopez* and *Morrison* provided mixed signals for the Fourth Circuit to decipher. On one hand, the *Lopez* majority took pains to appear restrained, wording its opinion as though it was only defining the outer limits of the Commerce Clause's broad grant of power, limiting its response to an isolated Congressional effort to overextend federal jurisdiction. The *Lopez* decision itself did not overturn any Supreme Court decisions. In fact, the Court cited with approval the line of Commerce Clause cases preceding *Lopez*. Nevertheless, the Court struck down a statute—an action deeply inconsistent with the pre-*Lopez* conventional wisdom that the Commerce Clause allowed Congress to do anything—and the dissenting opinions vehemently asserted that the majority's holding was far more revolutionary than its unobtrusive language suggested.

Cases and commentaries following *Lopez* reflected this tension between cautious language and broad possibilities. On one hand, several scholars immediately suggested that the

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506 (Luttig, J., dissenting) (noting that *Lopez* and *Morrison* provide the framework for analysis).

64. See United States v. *Lopez*, 514 U.S. 549, 556 (1995) (acknowledging that the Commerce Clause power remained broad); id. at 556-57 (noting continuity between *Lopez* and previous Commerce Clause cases, and suggesting that the limits imposed in *Lopez* had their roots in the language of those cases); Deborah Jones Merritt, *Commercial*, 94 Mich. L. Rev. 674, 729 (1995) ("Chief Justice Rehnquist's opinion . . . indicates little inclination to expand *Lopez*.").


66. See Merritt, supra note 64, at 674 ("When I graduated from law school in 1980, my classmates and I believed that Congress could regulate any act—no matter how local—under the Commerce Clause.").

67. See *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) (stating that the majority's opinion abandoned the practice of deferring to Congressional determinations of what constituted commerce, and in so doing took a major step toward reworking the balance of power between the legislature and the judiciary); Merritt, supra note 64, at 729 (noting that Justice Breyer "read portions of his dissent from the bench, evidencing a deep commitment to the ideals expressed there").
holding in *Lopez* would be applied narrowly. Likewise, several circuit court opinions following *Lopez* came to conclusions consistent with pre-*Lopez* Commerce Clause doctrine, and the Supreme Court's denials of certiorari in several of these cases suggested acceptance of such results. On the other hand, some scholars suggested that *Lopez* might be the first case in a wave of general retrenchment of Congress' Commerce Clause power, and argued that *Lopez* left the ESA in particular in a sudden position of vulnerability.

Judge Wilkinson's majority opinion in *Gibbs* placed the Fourth Circuit firmly behind a narrow reading of the majority opinions in *Morrison* and *Lopez*. The *Gibbs* majority carefully respected the rules laid down by *Lopez* and *Morrison*; the Fourth Circuit's analysis of connections between the regulated acts and commerce tracked that of the Supreme Court, carefully weighing each of the federalism concerns raised by the Court. The *Gibbs* majority also followed *Lopez* and *Morrison* in referring to the previous line of Commerce Clause cases as though they stand as binding precedent, suggesting that the majority

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68. See, e.g., Merritt, supra note 64, at 729 ("the decision is unlikely to herald a new era of Commerce Clause jurisprudence"); Suzanna Sherry, *The Barking Dog*, 46 CASE W. RES. L. REV. 877 (1996) ("I believe that *Lopez* will join a growing list of cases . . . that appear to be startling changes in direction . . . but that are subsequently ignored by the Court.").

69. See Sherry, supra note 68, at 881-82.

70. See, e.g., White, supra note 3; Linehan, supra note 3; Villareal, supra note 3; J. Blanding Holman, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVT. L.J. 139 (1995) (arguing that the ESA's take provision may be constitutionally vulnerable).

71. Judge Wilkinson's concurring opinion in *Brzonkola v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1998), aff'd sub nom. *United States v. Morrison*, 529 U.S. 598 (2000) provides a detailed discussion of his view of federalism's resurgence, and provides the philosophical grounding for his support of a limited reading of *Lopez*. Wilkinson stressed that, while revived judicial emphasis upon limiting legislative assertions of power was consistent with the textual mandates of the Constitution, the resurgence of federalism represented a new form of judicial activism that should be exercised only with deference and restraint. *Id.* at 889-98.


73. *Id.* at 499-504 (finding that the regulation is consistent with the vision of federalism espoused in *Lopez* and *Morrison*).

74. *Id.* at 490-505 (citing NLRB v. Jones & Laughlin Steel Corp, 301 U.S. 1 (1937); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264 (1981); Perez v. United States, 402 U.S. 146 (1971); Hodel v. Indiana, 452 U.S. 314 (1981); and United States v. Darby, 312 U.S. 100 (1941)); see infra text accompanying note 80 (discussing how the holdings in *Lopez* and *Morrison* raise doubt about the precedential value of the previous cases).
viewed these cases as consistent with the historic development of Commerce Clause jurisprudence.

The Gibbs majority may have deviated from the Lopez standard by granting excessive deference to Congress. Lopez and Morrison clearly suggest that, while Congress may present evidence that a regulated activity implicates interstate commerce, defining the limits of Congress’ Commerce Clause power is ultimately a judicial question.\textsuperscript{75} Nevertheless, Lopez noted that courts historically consider whether Congress had a “rational basis” for concluding that an activity substantially affects commerce.\textsuperscript{76} The Morrison Court agreed, stating that “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.”\textsuperscript{77} Despite this language, the dissents in both Lopez and Morrison took the majority to task for abandoning traditional deference.\textsuperscript{78} In addition, the fact that both statutes at issue were invalidated suggests the use of a test more rigorous than traditional rational basis review.\textsuperscript{79} This may indicate that the majority’s language in Lopez and Morrison was little more than lip service and that deference to Congressional assessment of the Commerce Clause power stands on shaky ground.\textsuperscript{80}

Notwithstanding this uncertainty, the Gibbs court relied on judicial deference as a partial basis for its opinion. The court described its standard as “rational basis review with teeth,” and declared that Congressional assessments of which activities affect commerce could not be lightly swept aside.\textsuperscript{81} Moreover, Judge Wilkinson stated that once an activity’s substantial effect upon commerce was demonstrated, courts should not question Congressional judgments about how this effect should be

\textsuperscript{76} Lopez, 514 U.S. at 557.
\textsuperscript{77} Morrison, 529 U.S. at 607.
\textsuperscript{78} Lopez, 514 U.S. at 603-04 (Souter, J., dissenting); Morrison, 529 U.S. at 628-55 (Souter, J., dissenting).
\textsuperscript{79} Lopez, 514 U.S. at 603-04 (Souter, J., dissenting); Morrison, 529 U.S. at 628-55 (Souter, J., dissenting).
\textsuperscript{80} See Morrison, 529 U.S. at 637 (“Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them.”).
regulated. On its face, the Fourth's Circuit's standard appears consistent with the levels of deference required by *Lopez* and *Morrison*. However, while the Supreme Court majority could be accused of paying only lip service to deference doctrine, Judge Wilkinson's repeated emphasis upon respect for Congressional judgment suggests a deeper commitment. Thus, in one respect, the *Gibbs* majority may have been out of step with the direction of the current Supreme Court.

Judge Luttig's dissent, however, suggested that the *Gibbs* majority had erred far more broadly. While his terse language leaves some uncertainty about exactly what standard of Commerce Clause analysis Judge Luttig believed *Lopez* and *Morrison* established, the general tone of the opinion suggests, at the very least, that he believed these opinions had substantially restricted the definition of commerce. Ironically, in advancing his claim, Judge Luttig agreed with the very *Lopez* and *Morrison* dissents that he had accused the *Gibbs* majority of aping. Neither *Lopez* nor *Morrison* claimed that the Court's definition of commerce itself had changed, or that older laws passed under the pre-*Lopez* understanding of the commerce

82. Id. at 496. Judge Wilkinson also appears to suggest that the sole appropriate question is whether the ESA in aggregate is sufficiently connected to commerce, and that individual regulations promulgated within this broader scheme are the product of policy judgments and are not subject to review. Id. at 498. This reasoning, if accepted, would seem to render the ESA immune to as-applied challenges, and Judge Luttig's dissent opens by vigorously asserting that Section 17.84(c), and not the entire ESA, should be the focus of the court's inquiry. Id. at 506. Since the remainder of the majority opinion does approach the case as an as-applied challenge, however, my analysis does not focus upon this rationale for the majority's holding.

83. Unlike the *Lopez* majority's opinion, which does not actually contain the word "deference," Wilkinson mentions deference throughout his opinion. See id.

84. Luttig's opinions on the scope of the commerce power after *Lopez* are far more fully developed in his majority opinion in *Brzonkola v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999), aff'd sub nom. *United States v. Morrison*, 529 U.S. 598 (2000). Judge Luttig placed heavy emphasis upon the distinction between commercial and non-commercial activities, arguing that a conclusion that the regulated activity was not commercial settled the issue and made further discussion of impacts upon commerce and federalism superfluous. Id. at 836. This argument suggests that the question of whether an activity is commerce is distinct from the question of whether it affects commerce, a distinction that could force courts to rigidly define commerce by tradition and intuition rather than by assessment of actual economic effects. While the Supreme Court upheld *Brzonkola*, *Morrison* does not appear to mandate such a narrow conception of commercial activities. Judge Wilkinson, author of the majority opinion in *Gibbs*, joined Judge Luttig's majority opinion in *Brzonkola*, but also wrote a concurring opinion indicating his preference for a restrained application of the principles contained in *Lopez*. Id. at 890.

85. See *Gibbs*, 214 F.3d at 506-10 (Luttig, J., dissenting).
power would now be vulnerable. The suggestion that Commerce Clause doctrine was actually being reworked came instead from dissenting opinions that decried this possibility.

While the real meaning of Lopez and Morrison remains elusive, the limited interpretation employed by the Gibbs court should stand. Most importantly, the Gibbs interpretation is consistent with the Lopez and Morrison opinions. In addition, there are prudential reasons to expect that further retrenchment of the federal Commerce Clause power is unlikely. While both Lopez and Morrison involved the striking down of new statutes, the Court has yet to use the doctrine to strike a well-established law. The ESA, nearing its thirtieth birthday and having survived challenges before the Court, does not seem nearly so likely a candidate for modification as relatively new legislation like the Gun-Free School Zones and Violence Against Women Acts. In addition, both the explicit language of the Lopez and Morrison opinions and the Court's efforts to portray the cases as consistent with historic Commerce Clause jurisprudence suggest an intent to limit the holdings. If these concerns persist, the version of the Lopez doctrine Judge Wilkinson applied to the ESA should survive.

B. Gibbs v. Babbitt's Value as Precedent

While the Gibbs court interpreted Lopez in a way the red wolf could live with, it did not establish that the Commerce Clause permits protection of all federal endangered species on private lands. While Gibbs found numerous connections between wolves and commerce, factual circumstances made establishing those connections relatively easy. Connections between other species and commerce may not be so direct. Nevertheless, Gibbs does stand for the more limited proposition that some species affect commerce. In combination with several other cases upholding the ESA against Commerce Clause challenges, Gibbs may add to a critical mass of opinions suggesting that the ESA will be immune to Commerce Clause challenges in all its applications.

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86. See Morrison, 529 U.S. at 627 (Thomas, J., concurring) (criticizing the majority's failure to return to what Thomas describes as "the original understanding of Congress' powers").
87. See id. at 637-38 (Souter, J., dissenting).
1. **Endangered Species as Commercial Items**

Despite Judge Luttig's skepticism, the connections between red wolves and commerce seem almost irrefutable. The tie between tourism and the wolves alone might have sustained the regulation. According to one newspaper, an average of 75 people per night attend "howling" events hosted by FWS, and crowds of up to 300 are not uncommon. As another local editorial noted, the district court ruling "was a reminder that 'eco-tourism' has potential Down East, where the traditional industries of fishing, farming, and forestry have declined. Wild places bring tourism. And tourists bring dollars." Likewise, the possibility of a renewed trade in pelts, while admittedly speculative, is speculation with a reasonable basis. The current tiny wolf population is the possible seed for this future trade, and the presence of alligator-skin fashion accessories and buffalo burgers in our modern economy demonstrates that an endangered population can become an economically exploitable resource.

While these connections may be direct, they do not stand by themselves for a general principle that endangered species directly impact commerce. There are other species that almost no one will be interested in hunting, trading, or traveling to see. Few species are as charismatic as a howling wolf, federal protection of the Snail Darters and Delhi Sands Flower-Loving Flies of the animal kingdom will require a rationale more general than direct connections to tourist dollars. While Gibbs offers several generally applicable rationales, they may not carry quite the same weight as the wolves' direct connections to the local economy.

2. **Connections Between the Regulated Activity and Commerce**

One somewhat more general rationale is the economic nature of the regulated activity. In discussing the economic motivations for taking wolves (as opposed to the economic

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90. Diane Tennant, *Call of the Wild: The Chilling Howl of the Red Wolf Draws Visitors to Dare County Refuge*, THE VIRGINIAN-PILOT AND THE LEDGER-STAR, June 11, 2000, at E10. While this particular story was not before the court, Judge Wilkinson noted that the plaintiffs had not challenged the defendants' assertion that such howling events drew out-of-state tourists. See Gibbs, 214 F.3d at 494.


92. See Gibbs, 214 F.3d at 495 (discussing the development of trade in alligator products).

impacts of the wolves taken), the majority focused upon a type of connection between endangered species and commerce less likely to be unique to red wolves and more likely to apply to other species. The legislative history of the ESA amply documents concern about the effects of habitat destruction upon endangered species, and many challenges to endangered species protection have involved activities likely to be considered commercial under the Commerce Clause. Perhaps the two most famous modern endangered species controversies—the conflict between the Tellico Dam and the Snail Darter and the Pacific Northwest’s battles pitting Spotted Owl protection against timber harvesting—have involved activities that would clearly qualify as commercial. Nevertheless, even if this rationale applies more generally, it is still possible to imagine numerous scenarios in which takings of endangered species might be decidedly less commercial. One commentator, for example, speculated about whether the Commerce Clause could allow regulations to prevent wandering children from trampling insect habitat. Similarly, a predator like the wolf might be killed out of fear or hatred, motives that, while perhaps misguided, have little connection to interstate commerce. While many threats to endangered species are directly connected with commercial activity, this nexus is insufficient to connect interstate commerce to all takings.


While also more generally applicable, the connection between endangered species and scientific study still seems insufficient to independently sustain regulation. The Gibbs majority noted that out-of-state scientists studied red wolves and

94. See TVA v. Hill, 437 U.S. 153, 173-85 (1978) (describing the legislative history of the ESA. While the history cited does not mention commercial activity, connections between commercial activity and habitat destruction, which the history suggests was of fundamental concern, are likely to be rather common).


96. See Hill, 437 U.S. at 153.


that such study was economic in nature.99 Moreover, the court noted that the connection was quite direct; without wolves, there would be no such study.100 The Gibbs court was not the first to cite this rationale; in a pre-Lopez case, the District Court of Hawaii upheld the ESA’s protection of the Palila, an endangered Hawaiian bird, in part because “interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species... would otherwise be lost by state inaction.”101 Nevertheless, the Supreme Court, concerned about limiting Congressional power, might reject the contention that an activity affects interstate commerce merely because it affects something studied. Scientists can, after all, study just about anything. The fact of study alone, without reference to possible economic benefits arising from such studies, may not be enough to connect an activity to interstate commerce. Thus, this justification’s potentially over-broad application may be its undoing.

The Gibbs court did, however, note that the study of wolves might provide such economic benefits.102 In so doing, the court offered a rationale that could be extended to all endangered species. First, the court noted that the study of wolves could provide economically valuable information about ecosystems.103 This claim could be made about any endangered species. Second, the court noted that the study of wolves could reveal currently unforeseeable uses for the wolves, and noted that many discoveries in modern medicine originate with the study of plants and animals.104 This latter rationale is also extremely broad in its application, since predicting which species will become valuable is difficult, if not impossible. Thus, the only way to ensure the possibility of future discoveries may be to protect all species.105

100. Id. at 492.
102. Gibbs, 214 F.3d at 494.
103. Id.
104. Id.
105. See Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997) (noting that it is certain that biodiversity overall has great value even if the contribution of individual species to that value is unknown). But see Nagle, supra note 98, at 207 (suggesting that we can discern that some species will have more potential for impacts upon commerce than others).
The potential reach of this rationale has already been illustrated by the role it played in protecting the Delhi Sands Flower-Loving Fly. In *National Ass'n of Home Builders v. Babbitt*, Judge Wald, of the D.C. Circuit, adopted exactly this position. Faced with a Commerce Clause challenge to the listing of an obscure fly endemic to a tiny area of southern California, Judge Wald cited the value of biodiversity as a cognizable connection between the ESA and interstate commerce. In addition, she emphasized that the potential economic value of biodiversity is immense. Medical discoveries involving endangered species have the potential to generate lucrative payoffs, and pharmaceutical companies have demonstrated their willingness to invest major sums of money in "bioprospecting."

Nevertheless, the protection of every endangered species based upon speculative connections to commerce has proved too tenuous for some judges. In *National Ass'n of Home Builders*, for example, both Judge Henderson, who concurred in Judge Wald's judgment for other reasons, and Judge Sentelle, in his dissent, found this rationale overbroad. Other judges may also find such connections to commerce overly speculative or attenuated, especially given that "[e]fforts to identify plants and animals with medicinal uses have identified far more useless species than helpful ones." If the connections between commerce and gun possession in schools (*Lopez*) or gender-motivated violence (*Morrison*) were insufficient, and if the Court is fundamentally concerned with ensuring that laws are justified by limited rationales, an unlikely connection between commerce and an individual species may be insufficient to sustain a protective regulation.

4. *Ecosystem Benefits and Commerce*

In noting the ecosystem benefits the wolf might provide, Judge Wilkinson offered perhaps the strongest of the *Gibbs* majority's broader justifications for a connection between the Commerce Clause and endangered species. This rationale's

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106. 130 F.3d 1041 (D.C. Cir. 1997).
107. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1052-54.
108. White, *supra* note 3, at 244-45; see also Nagle, *supra* note 98, at 185 (noting the value of endangered species to medical and agricultural research).
109. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring) ("I do not see how we can say that the protection of an endangered species has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value.").
applicability could extend far beyond red wolves. Almost any species functions within interdependent ecosystems. Each may perform, either as predator or prey, functions affecting the availability of natural resources, and thus may impact commerce. Moreover, the holdings in both Gibbs and National Ass'n of Home Builders suggest that the scientific principle that ecologically diverse ecosystems are more stable and healthy and, therefore, potentially more economically useful, has achieved some acceptance among judges.111

Nevertheless, this rationale has its skeptics. Just as most species lack potential medicinal value, many species will not affect the economic utility of the ecosystems they inhabit.112 Moreover, some entire ecosystems arguably may have little commercial value.113 Finally, the ecosystem argument employs a rather broad rationale. Endangered species are not the only things that affect ecosystems; a court adopting this argument might be required to allow federal regulation of anything affecting ecosystems. The Gibbs court seemed prepared to do just this. It flatly stated, "natural resource conservation is economic and commercial,"114 suggesting that permitting federal regulation of all natural resources under the Commerce Clause might be entirely appropriate. Given the current Supreme Court's concerns with enumerated, limited power, however, such a broad construction of commerce, while entirely intuitive to many environmentalists, might not survive judicial scrutiny.

5. The Aggregate Effect

This analysis has focused on the independent viability of the arguments used by the Gibbs court. This court did not, however, consider these arguments in isolation, and their cumulative weight should carry more precedential power. Connections among commerce and potential future resource use, current academic study, tourism or other current economic uses, potential medical, agricultural, or other yet-to-be-discovered uses, and ecosystem impacts all might be independently insufficient to sustain a regulation. Nevertheless, the cumulative weight of all of these actual or potential uses could reasonably

113. Id.
114. Gibbs, 214 F.3d at 506.
establish a sufficient connection to commerce. Likewise, a court might note that while some of the activities prohibited by the ESA are not commercially motivated, most are. While none of these rationales alone may be sufficient to sustain the ESA’s takings clause in all instances, their aggregate effect is to demonstrate that, in one or more ways, endangered species protection will almost always be a commercial activity.

This conclusion is borne out by the recent history of ESA cases. As the Gibbs majority noted, courts have consistently allowed endangered species protection under the Commerce Clause. Individually, none of these cases appears to stand for the general principle that the Commerce Clause will always permit the regulation of takings under the ESA. Gibbs, for example, involved an unusually charismatic animal with an active fan following. Likewise, National Ass’n of Home Builders involved a regulated activity that was clearly commercial and, moreover, resulted in three separate opinions, with only the ecosystem impacts rationale garnering a majority. Building Industry Ass’n of Superior California most clearly states that all endangered species protection is permitted under the Commerce Clause, but does so largely on the basis of general citations to precedent and does not otherwise make clear why this is the case. Nevertheless, if these cases individually do not provide principles to squelch all Commerce Clause challenges to the ESA, their collective weight, combined with the ESA’s thirty-year history, may create enough critical mass of precedent to ensure that the ESA will survive intact.

CONCLUSION

By asserting limits upon Congress’ Commerce Clause powers, the Supreme Court’s decisions in Lopez and Morrison cast doubt upon broad areas of federal legislation, including the Endangered Species Act’s take provision. The Fourth Circuit’s holding in Gibbs v. Babbitt provides strong rationales for upholding the take provision in the face of such doubts. While the reach of Lopez and Morrison remain in dispute, the majority opinion in Gibbs appears faithful to the reasoning of those cases.

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115. Id. at 496 (citing United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996); Nat’l Ass’n of Home Builders, 130 F.3d 1041; Building Indus. Ass’n of Superior California v. Babbitt, 979 F. Supp. 893 (D.D.C. 1997); and Palila v. Hawaii Dep’t of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), aff’d, 639 F.2d 495 (9th Cir. 1981)).

demonstrating how the holdings of *Lopez* and *Morrison* are compatible with continued federal protection of endangered species. Thus, the decision should stand.

The actual holding of *Gibbs* may be limited; connections between red wolves and interstate commerce were quite direct, and a finding that the Commerce Clause allows protection of wolves does not indicate that the Commerce Clause allows protection of all endangered species. Nevertheless, the rationales employed to allow protection have broad applicability, especially when considered in aggregate, and may carry enough weight to sustain the ESA against all Commerce Clause challenges. Moreover, *Gibbs* stands with other post-*Lopez* decisions in upholding regulations promulgated under the ESA take clause against constitutional challenge. In combination with these other cases, *Gibbs* suggests that the Commerce Clause power may still allow Congress to regulate the taking of all endangered species.