MORRISON OVERCOME: PROTECTING RED WOLVES AND THE ADMINISTRATIVE STATE

I. INTRODUCTION

The Endangered Species Act (ESA) was intended not only to further the recovery of dwindling species, but also to enable the Fish and Wildlife Service (FWS) to reintroduce species which have been completely eliminated from the wild.[1] The ESA's goal of reintroduction has proven to be essential to the red wolf. Removed entirely from the wild by 1980, a small population of red wolves has been successfully reintroduced into eastern North Carolina.[2] The red wolf's current resurrection, however, could be undermined by a recent trend in constitutional law.

The Constitution sets forth enumerated powers to which the federal government is limited.[3] Nevertheless, since the late 1930s Congress has enjoyed an almost plenary power based on an expansive interpretation of the Commerce Clause.[4] The power to regulate interstate commerce has been cited by Congress as justification for federal legislation in fields as seemingly remote from commercial activities as civil rights, unfair labor practices, and loan sharking.[5]

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[1] *See* H.R. Rep. No. 95-1625 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453.

[2] *See* Revision of the Special Rule for Nonessential Experimental Populations of Red Wolves in North Carolina and Tennessee, 60 Fed. Reg. 18,940 (1995) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revision of the Special Rule]. " By almost every measure, the reintroduction experiment was successful and generated benefits that extended beyond the immediate preservation of red wolves to positively affect local citizens and communities, larger conservation efforts, and other imperiled species." *Id.* at 18,941.

[3] *See* U.S. CONST. art. I, § 7. " The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[4] "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8. *See generally* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). Professor Epstein argues that "[t]he New Deal cases systematically removed each of the previous limitations on the scope of the commerce clause." *Id.* at 1443.

[5] *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (upholding federal regulation of threat of violence used to collect debts); *see also* Heart of Atlanta Motel v. United

The ESA is one such example of federal legislation that relies on an expansive reading of the Commerce Clause for legitimacy.[6]

The Supreme Court recently signaled a possible return to the more confined reading of the Commerce Clause enforced prior to the 1930s. *United States v. Lopez*, struck down the Gun-Free School Zones Act of 1990 for regulating a non-economic activity.[7] *Lopez*' reliance on a categorization of the regulated activity more closely resembles the dichotomy-based decisions of the nineteenth century than the decisions of the last sixty years.[8] This signal seems to have become a trend with the decision in *Morrison v. United States*.[9] *Morrison* invalidated the Violence Against Women Act of 1994 for regulating a non-economic activity and emphasized that the Commerce Clause does not grant plenary power.[10] Whether this trend eradicates twentieth century expansion of federal powers under the Commerce Clause and threatens longstanding federal regulation, or simply curtails further expansion of these powers into violent crime, remains to be seen.

Among the early judicial examinations of Commerce Clause powers in the wake of *Morrison* is *Gibbs v. Babbit*.[11] The Fourth Circuit, in fact, purposely delayed issuing a decision in *Gibbs* until the *Morrison* decision was handed down in order to apply the Supreme Court's most recent Commerce Clause analysis.[12] *Gibbs* centers on a challenge to the federal government' s reintroduction of the red wolf under the ESA as not being authorized by the Commerce Clause.[13] The challenge in *Gibbs*, in light of *Morrison*, presents a real threat to the continued recovery of the red wolf. Nevertheless, the Fourth Circuit upheld the red wolf reintroduction. In doing so, the Fourth Circuit chose to view *Morrison* as rejecting further expansion of Commerce Clause powers rather than as cutting into the currently accepted reach of those powers. This note argues that although the *Gibbs* decision does not follow the black letter law of the Supreme Court's recent precedent, the Fourth Circuit's decision is well-founded on the spirit of *Morrison* and *Lopez*.

States, 379 U.S. 241 (1964) (upholding Civil Rights Act of 1964); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding federal regulation of labor practices).

[6] Although Congress does not explicitly cite the Commerce Clause, it is the sole power delegated to Congress by the Constitution that could support the Endangered Species Act.

[7] 514 U.S. 549 (1995).

[8] *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895); Kidd v. Pearson, 128 U.S. 1 (1888).

[9] 529 U.S. 598 (2000).

[10] *See* Morrison v. United States, 529 U.S. 598 (2000).

[11] 214 F.3d 483 (4th Cir. 2000).

[12] *See* Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (order of April 21, 2000 postponing opinion).

[13] *See id.* at 486-87.

II. THE ENDANGERED SPECIES ACT[14]

Congress enacted the Endangered Species Act of 1973 (ESA) to conserve endangered and threatened species and the ecosystems upon which they depend.[15] As justification for the ESA, Congress found that many animal and plant species had become extinct or were on the verge of extinction due to inadequate conservation.[16] Furthermore, these species were of "esth etic, ecological, educational, historical, recreational and scientific value."[17] In addition to these concerns, Congress stressed the United States' responsibility to conserve wildlife pursuant to various international treaties.[18] Congress, as a result, established a system of cooperation between the federal government, the states and other parties that would protect "th e Nation's heritage in fish, wildlife, and plants."[19]

The ESA establishes a listing system that includes any animal that is threatened because of "manmad e factors affecting its continued existence."[20] Animals listed as endangered must receive whatever protective measures the Secretary of the Interior deems necessary or advisable for their preservation.[21] Vital to the effectiveness of this statutory scheme, the ESA forbids the taking of any listed species.[22] To "tak e" an animal is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."[23] In addition, an attempt to engage in any of these behaviors constitutes a taking.[24] An endangered animal may also be taken through alteration of its habitat that impairs its "essen tial behavioral patterns, including breeding, feeding or sheltering."[25] Finally, the ESA enables the FWS to enact recovery plans intended not only to preserve a species' cu rrent numbers, but also to propagate the species until endangered status is no longer warranted.[26]

Taking through habitat alteration has lead to reluctance on the part of local residents to recognize endangered species in the area, as doing so may lead to burdensome federal regulation of land use.[27] Particularly prone to public

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[14] *See generally* Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1994 & Supp. III 1997)).

[15] 16 U.S.C. § 1531(b) (1994).

[16] *Id.* § 1531(a)(1-2).

[17] *Id.* § 1531(a)(3).

[18] *Id.* § 1531(a)(4).

[19] *Id.* § 1531(a)(5).

[20] 16 U.S.C. § 1533(a)(1)(E) (1994).

[21] *Id.* § 1533(d).

[22] *Id.* § 1538(a)(1)(B).

[23] *Id.* § 1532(19).

[24] *Id.*

[25] 50 C.F.R. 17.3 (1999).

[26] 16 U.S.C. § 1533(f) (1994).

[27] *See Gibbs*, 214 F.3d at 487.

criticism was any proposal by the FWS to reintroduce an endangered species.[28] As a result, Congress amended the ESA in 1982 to ease the burden on local residents near species reintroduction and enable the FWS to continue carrying out such projects.[29] The new regulations allowed the Secretary to designate a population inessential to the survival of the species as "ex perimental."[30] These experimental populations can then be categorized under the lesser standard of "th reatened" instead of endangered.[31] Threatened populations could receive specialized rules in place of the more uniform, stringent requirements for endangered species.[32] The potential leniency of specialized rules is illustrated by Congress' approval of "in stances where the regulations allow for the incidental tak[ing] of experimental populations."[33]

III. THE RED WOLF REINTRODUCTION

The red wolf, or *Canis rufus*, is a distinct species from the gray wolf.[34] In size and coloration, the red wolf resembles the coyote, though its coat often exhibits a distinct tawniness.[35] Available evidence suggests that the red wolf resulted from a hybridization of the gray wolf and the coyote.[36] Although packs often consist of five to eight individuals, only the dominant pair in a pack will reproduce in any given year.[37] This low reproductive rate is further compounded by a high rate of pup mortality.[38] The red wolf's diet consists almost entirely of deer, raccoons, and smaller mammals.[39] Consequently, the red wolf's preferred

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[28] *See id.; see generally* Nicole R. Matthews, *Who is the Predator and Who is the Prey? The Endangered Species Act and the Reintroduction of Predator Species into the Wild*, 6 ENVTL. L. 183 (1999).

[29] *See* Matthews, *supra* note 28.

[30] *See* 16 U.S.C. § 1539(j)(2)(B) (1994).

[31] *See id.* § 1539(j)(2)(C).

[32] *See id.* § 1539(j)(2)(C)(i). "[Th e Fish and Wildlife Service may promulgate] special regulations for each experimental population that will address the particular needs of that population." H.R. Rep. No. 97-567 at 34 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2834.

[33] H.R. Rep. No. 97-567 at 34 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2834.

[34] *See U.S. Fish and Wildlife Service: Endangered Red Wolves*, (visited Mar. 28, 2002) <http://southeast.fws.gov/pubs/publications/alwolf.pdf>.

[35] *See id.* While the gray wolf weighs between 80-120 pounds, the red wolf weighs 45-80 pounds and the coyote weighs 20-45 pounds. *Id.*

[36] *See id.*

[37] *See Species Accounts: Red Wolf* (visited Mar. 28, 2002) <http://endangered.fws.gov/i/a/saa04.html>. The average red wolf litter size is 4.6 pups. *Id.*

[38] *See id.*

[39] *See U.S. Fish and Wildlife Service: Endangered Red Wolves*, (visited Mar. 28, 2002) <http://southeast.fws.gov/pubs/publications/alwolf.pdf>. "Non mammalian prey, domestic pets, and livestock were uncommon as prey items." *Id.*

habitat appears to be "botto mland riverine habitats," which harbor large populations of its prey.[40] A red wolf will occupy a territory of between 25 and 50 square miles to meet its dietary needs.[41]

Prior to human intervention, the red wolf ranged throughout southeastern North America.[42] Today, however, "[t]he red wolf is one of the most endangered animals in the world."[43] This is largely the result of massive habitat alteration by man and, more directly, misguided predator control measures.[44] Concerned with its rapid decline, the FWS in 1967 listed the red wolf as an endangered species under the ESA's predecessor, the Endangered Species Preservation Act of 1968.[45] By 1970, man's pressures had eliminated the red wolf from the wild except for a population of less than 100 individuals in the coastal wetlands of southeastern Texas and southwestern Louisiana.[46] Finally, in 1976, the red wolf was listed as an endangered species under the ESA.[47]

The FWS in 1975 concluded that the red wolf population had been so degraded that it could no longer survive in the wild.[48] As a result, the FWS had the

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[40] *See* Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,791 (Nov. 19, 1986) (to be codified at 50 C.F.R. pt. 17) [hereinafter Determination of Experimental Population Status].

[41] *See Species Accounts: Red Wolf* (visited Mar. 28, 2002) <http://endangered.fws.gov/i/a/saa04.html>.

[42] *See U.S. Fish and Wildlife Service: Endangered Red Wolves*, (visited Oct. 26, 2000) <http://southeast.fws.gov/pubs/publications/alwolf.pdf>. "[T]he original red wolf range extended . . . from the Atlantic and Gulf Coasts, north to the Ohio River valley and central Pennsylvania, and west to central Texas and southeastern Missouri." *Id.*

[43] *Id.*

[44] *See* Determination of Experimental Population Status, *supra* note 40, at 41,790.

> The demise of the red wolf was directly related to man's activities, especially land changes, such as the drainage of vast wetland areas for agricultural purposes; the construction of dam projects that inundated prime habitat; and predator control efforts at the private, State, and Federal levels. At that time the natural history of the red wolf was poorly understood, and like most other large predators, it was considered a nuisance species. Today, the red wolf's role as a potentially important part of a natural ecosystem, if it can be successfully reintroduced, is better appreciated. Furthermore, it is now clear that traditional controls would not be needed in any case; the red wolf would pose no threat to livestock in situations where its natural prey . . . are abundant.

Id.

[45] *See U.S. Fish and Wildlife Service: Endangered Red Wolves*, (visited Mar. 28, 2002) <http://southeast.fws.gov/pubs/publications/alwolf.pdf>.

[46] *See* Determination of Experimental Population Status, *supra* note 40.

[47] *See* 32 Fed. Reg. 4001 (March 11, 1976).

[48] *See Species Accounts: Red Wolf* (visited Mar. 28, 2002) <http://endangered.fws.gov/i/a/saa04.html>. "This decision was based on the obviously low number of animals left in the wild, poor physical condition of those animals due to internal and external parasites and disease, and the t[h]reat posed by an expanding

remaining red wolves removed from the wild by 1980 in order to create a captive-breeding program.[49] By late 1997, there were approximately 175 red wolves spread among thirty-five captive breeding facilities around the country.[50] "Th roughout this time, however, the goal of the [FWS]'s red wolf recovery program has continued to be the eventual release of at least some of the captive animals into the wild to establish new, self-sustaining populations."[51] To assess the feasibility of such reintroductions, the FWS conducted experimental releases of captive-reared pairs onto a small island off the coast of South Carolina.[52] The releases were deemed successful, and after the wolves were recaptured in good health, the stage for a large-scale reintroduction had been set.[53]

The first site chosen for permanent reintroduction was the Alligator River National Wildlife Refuge (ARNWR) in northeastern North Carolina.[54] The FWS described this area of roughly 120,000 acres of wetland habitat as "id eal."[55] Although the ARNWR is bordered by an additional 47,000 acres of wetland used by the U.S. Air Force as a bombing range, the FWS was not concerned by the possibility of losing wolves to military exercises.[56] Between 1987 and 1992, the FWS released 42 wolves into the ARNWR.[57] The FWS now estimates that between 70 and 80 red wolves roam ARNWR and the surrounding area.[58]

This is not to say that the reintroduction of the red wolf has not met with

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coyote population and consequent inbreeding problems." Determination of Experimental Population Status, *supra* note 40, at 41,791.

[49] *See* Determination of Experimental Population Status, *supra* note 40, at 41,791. The results of the removal revealed how timely the FWS's actions were as "[o]nl y 14 captured animals met the criteria established to define the species and stood between its existence and extinction." *U.S. Fish and Wildlife Service: Endangered Red Wolves*, (visited Oct. 26, 2000) <http://southeast.fws.gov/pubs/publications/alwolf.pdf>.

[50] *See U.S. Fish and Wildlife Service: Endangered Red Wolves*, (visited Oct. 26, 2000) <http://southeast.fws.gov/pubs/publications/alwolf.pdf>.

[51] Determination of Experimental Population Status, *supra* note 40, at 41,790.

[52] *See id.*

[53] *See id.* "Observatio ns and conclusions derived from these experiments, plus knowledge gained with wild-caught but captive-reared pups in Texas, also indicate the potential success of establishing captive reared populations in the wild." *Id.*

[54] *See id.*

[55] *See id.*

[56] *See* Determination of Experimental Population Status, *supra* note 40, at 41,791. "The very limited live ordnance expended by the Air Force and Navy on this range is restricted to two extremely small, well defined, and cleared target areas (approximately ten acres each)." *Id.* *See generally* Major Sharon E. Riley, *The Wolf at the Door: Competing Land Use Values on Military Installations*, 153 MIL. L. REV. 95 (1996) (providing an in depth discussion of conflicts arising when species are reintroduced onto military holdings).

[57] *See* Revision of the Special Rule, *supra* note 2.

[58] *See Gibbs*, 214 F.3d at 488 n.1. "T he Service notes that the red wolf population lies between 53 and 101 wolves." *Id.*

difficulties. An attempted reintroduction into Tennessee's Great Smoky Mountains National Park ended unsuccessfully in late 1998.[59] After eight years of releases and monitoring, it was determined that the proposed habitat did not offer sufficient food for a viable wolf population.[60] Although thirty-seven animals were released into the park beginning in 1991, only four remained by November 1998.[61] These four remaining wolves included only two of the thirty-three pups born in the park during that period, with the remaining having been lost to a combination of "d isease, parasites and starvation."[62] However, the failure in Tennessee illustrates the importance of reintroduction siting, not a weakness in the overall scheme. The FWS seems to have been inattentive to the degree to which the "fo rested mountaintops" of the Great Smoky Mountains are unsuitable for red wolves.[63] As one FWS biologist noted, "Peo ple have gotten the idea that [the red wolf] is a woodland species, but that's just where we'v e forced them."[64] In addition to starvation and flight from the area, a birth rate only one-third of the ARNWR's wolf population demonstrates that the Great Smoky Mountains was a poor siting choice.[65] The FWS seems to have learned this lesson, as it relocated the surviving Tennessee wolves to ARNWR and its more appropriate bottomland riverine habitats.[66]

IV. THE COMMERCE CLAUSE[67]

A. Historical Expansion and Contraction

The Commerce Clause of the Constitution has long been interpreted to

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[59] *See* Timothy B. Wheeler, *A Mournful Howl for Red Wolves*, BALTIMORE SUN, Oct. 25, 1998, at A2; *see also* Randy Lee Loftis, *Nature Preys on Wolf Experiment*, DALLAS MORNING NEWS, Nov. 9, 1998, at 1A.

[60] *See* Loftis, *supra* note 59.

[61] *See* Wheeler, *supra* note 59.

[62] *Id.*

[63] *Id.* The FWS perhaps made a mistake when it chose Cades Cove, an atypical tract of the Park, for a trial release. "Cades Cove is unique within the Park; it possesses a great diversity and abundance of prey species, making it highly attractive to a large predator. As a result, the average home range for the [trial release] was 16 km^2, scarcely larger than Cades Cove itself." Revision of the Special Rule, *supra* note 2, at 18,942. This result now seems indicative of the unattractiveness of the Park as a whole, not the particular attractiveness of Cades Cove. A range of 16 km^2 in stark contrast to the red wolf's preferred range of between 25 and 50 square miles. *See Species Accounts: Red Wolf* (visited Nov. 14, 2000) <http://endangered.fws.gov/i/a/saa04.html>.

[64] *See* Loftis, *supra* note 59.

[65] *Id.*

[66] *See id.*

[67] "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8.

authorize Congress to legislate subjects that seemingly have no connection to the modern conception of commerce.[68] In fact, the Supreme Court had all but removed the element of commerce from its analysis by the close of the nation's second century: "It is established beyond peradventure that the Commerce Clause . . . is a grant of plenary authority to Congress."[69] Nevertheless, the Court has apparently begun to question its earlier acceptance of plenary congressional power. This would not be the first time that Commerce Clause doctrine has undergone a fundamental transformation.

The earliest judicial interpretation of the Commerce Clause was provided by Justice Marshall in *Gibbons v. Ogden*.[70] A dispute arose between two steamboat operators over the use of water routes.[71] Ogden had secured a license to operate between New York City and New Jersey pursuant to a New York monopoly grant.[72] Gibbons, however, operated his boats in the same area pursuant to a federal license.[73] Instead of deciding the seemingly simple case on Supremacy Clause grounds, Marshall launched into a discussion of the full extent of the Commerce Clause. Marshall recognized that it would be in "v ain to look for a precise and exact definition of the powers of Congress, [because] [t]he [C]onstitution did not undertake the task of making such exact definitions."[74] Instead, he interpreted "commerc e" to include navigation out of necessity, interpreted "regu late" to include the power to decide an activity should be unregulated, and defined "in terstate" by what it was not.[75] In Marshall's view, the Commerce Clause granted authority over all activities except those "wh ich are completely within a particular State [and] do not affect other States."[76] This "effects test," though controversial at the time, remains an important component of Commerce Clause analysis today.[77]

In the second half of the nineteenth century, Commerce Clause analysis appeared more confining than *Gibbons*. This contraction in interpretation was typically facilitated by distinctions between binary opposites. *Kidd v. Pearson*, outlined one such dichotomy between manufacture and commerce.[78] The Court upheld a state law outlawing intrastate liquor production for interstate sale.[79] Because the statute regulated only the manufacture of goods, Congress'

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[68] *See generally* Epstein, *supra* note 4.

[69] National League of Cities v. Usery, 426 U.S. 833, 840 (1976).

[70] 22 U.S. 1 (1824).

[71] *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

[72] *See id.* at 8.

[73] *See id.* at 9.

[74] *Id.* at 10.

[75] *Id.* at 195-6.

[76] Gibbons v. Ogden, 22 U.S. 1, 195 (1824)..

[77] *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 48-49 (1993); *see also* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 611 (1926).

[78] 128 U.S. 1 (1888).

[79] *See id.*

authority over interstate commerce was not impaired by state regulation.[80] Commerce was held not to exist "u ntil [items] have been shipped or started for transportation from the one State to the other."[81]

Two additional facilitating dichotomies were outlined in *United States v. E.C. Knight Co.*[82] *Knight* invalidated the Sherman Antitrust Act's application to acquisition of competitors resulting in monopolistic holdings.[83] Returning to Marshall's effects test, the Court distinguished between direct and indirect effects on commerce.[84] Though the majority conceded that regulation of manufacturing does indeed affect commerce,[85] it held that such effects are so remote as to be outside the authority of Congress.[86] The Court also emphasized the difference between local and national activities.[87] In the absence of such a distinction, Congress' authority would extend to all industries and abridge the traditional role of state government.[88] As a result, the federal system envisioned by the Founders would be compromised.[89]

At the same time the Court' s reliance on dichotomies was restraining federal authority under the Commerce Clause, a new approach was laying the groundwork for an expansion of congressional power. This analysis was first exhibited in *Swift & Co. v. United States*, 196 U.S. 375 (1905).[90] The defendant-appellants, who controlled 60% of the national meat trade, were charged with violating the Sherman Antitrust Act by fixing meat prices through an elaborate compact, each component of which took place within the boundaries of a single state.[91] The Court nonetheless found that such acts could be reached under the Commerce Clause because their effects on interstate commerce were not secondary or indirect pursuant to *E.C. Knight*.[92] Writing for the majority, Justice Holmes reasoned:

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the

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[80] *See id.* at 21.
[81] *Id.* at 26 (citing Coe v. Errol, 116 U.S. 517 (1886)).
[82] 156 U.S. 1 (1895).
[83] *See id.* at 17.
[84] *See id.* at 12.
[85] *See id.*
[86] *See id.*
[87] *See id.* at 13.
[88] *See E.C. Knight Co.*, 156 U.S. at 17.
[89] *See id.* at 13.
[90] 196 U.S. 375 (1905).
[91] *See* Swift & Co. v. United States, 196 U.S. 375, 390-93 (1905).
[92] *See id.* at 397.

purchase of the cattle is a part and incident of such commerce.[93]

This "cu rrent" or stream of commerce model had the potential to reach acts previously thought to be outside federal authority.

The watershed case of twentieth century Commerce Clause doctrine was *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[94] Although Court precedent had found manufacture to be outside Congress' power over commerce, the National Labor Relations Act guaranteed the right to all employees of collective organization and bargaining in order to "elimi nate . . . obstruction to the free flow of commerce."[95] The Court, however, refused to apply its established distinctions of commerce versus production and indirect versus direct effects.[96] Instead, the Court relied on an analysis of whether the effects on interstate commerce were "clo se and substantial."[97] This analysis would require the Court to proceed on a case-by-case basis, whereas the distinction-based analyses had proved inflexible to the peculiarities of individual cases.

This more lenient analytical method, in turn, gave way to virtual blind approval of federal statutes within the next five years. In *United States v. Darby*, the Court upheld federal regulations focusing specifically on intrastate activities.[98] The Court justified the regulations as being necessary to maintain the intrastate market, lest deleterious effects spill over into the interstate market.[99] Finally, in *Wickard v. Filburn*, the Supreme Court revealed the extent to which it would allow Congress to legislate for the remainder of the century.[100] The legislation at issue regulated farm production, including food produced only for the farmer's personal needs.[101] Upholding this act, the Court ruled that Congress' power extended to activities the effects of which, although insignificant individually, substantially affect interstate commerce when aggregated together.[102] The Court also made clear that a new age of lenient analysis was now in full swing:

> We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "p roduction" and "ind irect" and foreclose consideration

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[93] *Id.* at 398-99.

[94] *See Lopez*, 514 U.S. at 555.

[95] *See* National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 23 (1937).

[96] *See id.* at 36-41

[97] *See id.*

[98] 312 U.S. 100 (1941).

[99] *See* United States v. Darby, 312 U.S. 100, 119-20 (1941).

[100] 317 U.S. 111 (1942).

[101] *See* Wickard v. Filburn, 317 U.S. 111, 118-19 (1942).

[102] *See id.* at 127.

of the actual effects of the activity in question upon interstate commerce.[103]

It was during this period of expansive Commerce Clause interpretation that the ESA was enacted.[104]

B. *Outer Limits or New Era?:* United States v. Lopez

The first restraint on modern expansive interpretation came in *United States v. Lopez*, in which for the first time in half a century the Supreme Court invalidated a federal statute as outside Congress' authority under the Commerce Clause.[105] The statute in question, the Gun-Free School Zones Act of 1990, created a federal offense for knowing possession of a gun in a school zone.[106] Through an examination of Commerce Clause precedent, the Court identified three categories of activities that Congress may regulate.[107] Congress may regulate "th e use of the channels of interstate commerce . . ., the instrumentalities of interstate commerce . . ., [and] those activities that substantially affect interstate commerce."[108]

The Court summarily ruled out the first two regulatory alternatives as being unsuited to the Gun-Free School Zone Act, and required that the effects on interstate commerce contemplated by the third alternative be substantial.[109] This substantiality requirement is met if a statute regulates an economic activity or an activity necessary to control of economic activities, if a statute contains a jurisdictional nexus tying the activity in specific cases to commerce, and if the statute does not lead to a slippery slope of federal enlargement.[110] The regulation of gun possession within a school zone, however, failed to have substantial effects in the Court's eyes despite the government's position that the costs of violent crime and educational disturbances rendered this regulation economic, or at least a necessary part of an overarching regulatory scheme.[111] The Court noted that the statute did not contain a "ju risdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[112] Finally, the Court recognized that judicial acceptance of such federal regulations would "co nvert congressional authority under the

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[103] *See id.* at 120.

[104] *See* Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1994 & Supp. III 1997)).

[105] 514 U.S. 549 (1995).

[106] *See id.* at 551.

[107] *See id.* at 552-58.

[108] *Id.* at 558-59.

[109] *See id.*

[110] *See Lopez*, 514 U.S. at 559-65.

[111] *See id.* at 563-64.

[112] *Id.* at 561.

Commerce Clause to a general police power of the sort retained by the States."[113]

Throughout the *Lopez* opinion, the Court took pains to distinguish rather than overrule a half-century of precedent. The paradigm case for minimum substantial effects, *Wickard*, was distinguished from *Lopez* because the Court read the former to require that the regulated activity be economic.[114] *Lopez*, on the other hand, dealt with a "crimin al statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[115] Although the Court resurrected the dichotomy-based analysis of the pre-New Deal era, its reluctance to explicitly reject precedent left *Lopez* as a somewhat ambiguous marker of things to come.[116]

C. *Ambiguity Resolved?:* United States v. Morrison

United States v. Morrison struck down the Violence Against Women Act of 1994, which created a federal civil right of action for victims of gender motivated crimes against their attackers.[117] Like the Gun-Free School Zones Act before it, the Violence Against Women Act was found to be unconstitutional because it regulated only non-economic activities.[118] The Court rejected the government's two-pronged argument that violent crime was an economic activity. First, the government argued that violent crime had monetary costs that were spread throughout the population by both government intervention and insurance.[119] Second, the government argued that violent crime discouraged persons from traveling to areas affected thereby, which in turn caused economic damage to communities.[120] The Court rejected both bases as unconvincing. Citing the same federalism concerns raised by *Lopez*, the Court noted that if such arguments were accepted, it would be difficult to "p erceive any limitation on federal power, even in areas . . . where States historically have been sovereign."[121] Furthermore, the Court held that for any activity to be aggregated with others of its kind to reach the required substantial effects, the individual activity must itself be economic.[122]

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[113] *Id.* at 567.

[114] *See id.* at 560.

[115] *Lopez*, 514 U.S. at 561.

[116] *See generally* Jeanine A. Scalero, *The ESA's Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 CHAPMAN L. REV. 317 (2000).

[117] *See* United States v. Morrison, 529 U.S. 598 (2000).

[118] *See Lopez*, 514 U.S. at 563-66.

[119] *See id.* at 612.

[120] *See id.*

[121] *Id.* at 613.

[122] *See Morrison*, 529 U.S. at 611 n.4. *See also* Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 123 (2000). ("Althoug h it declined to adopt a categorical rule against aggregating the effects of noneconomic activity, by interpreting prior case law as a limit on Congress's power to aggregate the effects of intrastate activity, the Court effectively created the categorical rule

Unlike the Gun-Free School Zones Act, the Violence Against Women Act contained a set of jurisdictional findings outlining how Congress saw the activities regulated as affecting interstate commerce.[123] In addition to the government's above argument, Congress explained the connection as "diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products."[124] Though the Court held that such findings were due a certain amount of deference, it rejected Congress' explanation as again affronting notions of federalism. The Court stated that such "but-for causation" must have limits in order to avoid the risk of federal enlargement into the traditionally state sphere.[125]

The Court's earlier reluctance to overrule precedent was made seemingly unimportant by *Morrison* and its almost exclusive reliance on *Lopez*. The Court may have avoided overruling the modern era of Commerce Clause doctrine, but *Morrison* effectively replaced longstanding practice with the resurrection of dichotomies-based analysis.[126] How the lower courts would apply this analysis to longstanding statutes like the ESA, however, remained to be seen.

V. HONORING OR IGNORING *MORRISON*?: *GIBBS V. BABBITT*

The first challenge to an ESA authorized regulation in the wake of *Morrison* came in *Gibbs v. Babbitt*.[127] The plaintiff in *Gibbs* pled guilty to shooting and killing a red wolf that had wandered from the ARNWR onto his land.[128] Although the red wolf recovery plan allows for the incidental takings contemplated by the ESA's 1982 amendments, such takings must either be "in defense of that person's own life or the lives of others,"[129] or "when the wolves are in the act of killing livestock or pets."[130] A landowner may also "harass red wolves found on his or her property . . . [p]rovided that all such harassment is by methods that are not lethal or injurious to the red wolf."[131] On appeal, the plaintiff argued that the anti-taking regulation as applied to private land exceeded the federal government's Commerce Clause powers.[132] The Fourth Circuit upheld the regulations as having a substantial effect on interstate commerce, and alternatively as being a necessary component of a proper federal regulatory

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it expressly disclaimed.").

[123] *See Morrison*, 529 U.S. at 613.

[124] H.R. Conf. Rep. No. 103-711, at 385, 1994 U.S.C.C.A.N. 1803.

[125] *See Morrison*, 529 U.S. at 613-15.

[126] *See id.* at 643 (Souter, J., concurring) ("Why is the majority tempted to reject the lesson so painfully learned in 1937?").

[127] 214 F.3d 483 (4th Cir. 2000).

[128] *See Gibbs*, 214 F.3d at 489.

[129] 50 C.F.R. § 17.84(c)(4)(i)(1998).

[130] *Id.* at § 17.84(c)(4)(iii).

[131] *Id.* at § 17.84(c)(4)(iv).

[132] *See Gibbs*, 214 F.3d at 489.

scheme.[133]

A. *Ignoring the Black Letter of* Morrison*'s Law*

The Fourth Circuit's decision to delay the ruling in *Gibbs* in anticipation of the *Morrison* opinion is telling.[134] Had the Fourth Circuit trusted *Lopez* as reliable precedent, it presumably would have decided *Gibbs* without delay. Instead, it apparently believed that *Lopez* was somehow an anomalous departure from accepted doctrine, and that the Supreme Court would correct this aberration at the next opportunity. This judicial distrust of *Lopez* need not have been total; as discussed in section B below, the court was able to abide by the spirit if not the letter of *Lopez* and *Morrison*. As for the more explicit mandates of *Morrison*, however, the theory of selective distrust outlined in Judge Luttig's dissent is supported by evidence in the majority opinion.[135]

Chief Judge Wilkinson begins the majority's an alysis with an exposition of the principles it sees as underlying *Morrison*.[136] The ambiguous quotes included, however, leave an impression of judicial resignation to congressional acts that was absent from *Morrison*.[137] In particular, the majority describes the Supreme Court's view of commerce as "relativ ely generous."[138] Chief Judge Wilkinson notes that commerce is not to be confined by eighteenth century conceptions.[139] This discussion hides the fact that *Lopez* and *Morrison*, in an attempt to avoid the well-known implications of the accepted breadth of commerce, had placed more emphasis on the sphere of economic activity than on commercial activity.[140] In so

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[133] *See id.* at 497.

[134] *See id. at* 483 (order of April 21, 2000 postponing opinion). Judge Luttig's dissent in *Gibbs* criticizes the majority for unnecessarily holding the decision in abeyance while waiting for the *Morrison* decision. *Id.* at 508. In Judge Luttig' s view, the majority read *Morrison* and then proceeded to ignore it. *Id.*

[135] *See id.* at 506-10.

[136] *See id.* at 490-92.

[137] The Fourth Circuit cites the Supreme Court as "dema nd[ing] that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Gibbs*, 217 F.3d at 490 (citing *Morrison*, 529 U.S. at 607). Furthermore, "[t]he substantial element of political judgment in Commerce Clause matters leaves [the courts'] institutional capacity more in doubt than when [they] decide cases, for instance, under the Bill of Rights." *Id.* (citing *Lopez*, 514 U.S. at 579). The Fourth Circuit, however, neglects to mention the Court's pronouncement that "[e] very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607. Similarly, the Fourth Circuit de-emphasizes the Court's view that "m odern-era precedents which have expanded congressional power under the Commerce Clause confirm that th[ese] power[s are] subject to outer limits." *Lopez*, 514 U.S. at 556-57.

[138] *Gibbs*, 214 F.3d at 491 (citing *Brzonkala*, 169 F.3d at 835).

[139] *See id.* (citing *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring)).

[140] *See Morrison*, 529 U.S. at 610-11 (citing *Lopez*, 514 U.S. at 559). Although there

doing, the Fourth Circuit sets the mood for an appeal to the more far-reaching conception of commerce in the pre-*Lopez* era. Simultaneously, it de-emphasizes the narrowness of the economic sphere the Supreme Court had outlined; namely, that unless an activity is economic or necessary to control of such economic activities, Congress will not be able to regulate it under the Commerce Clause.[141] In effect, *Gibbs* reads *Morrison* as removing barriers to federal regulation, while in reality *Morrison* recognized such barriers.

This appeal to the pre-*Lopez* era allows the Fourth Circuit's determination of the economic nature of takings to be directed towards desired results through an expansive view of economics. The basis upon which the majority relies for concluding that such activities are economic, that takings are primarily aimed at protecting economic assets like livestock and crops,[142] is not descriptive of the variety of takings outlawed. Such economically motivated protective takings are, in fact, exempted from coverage under the red wolf regulations.[143] It is non-economically motivated takings, including takings for sport, and takings for profit that are prohibited.[144] This situation mirrors that found in *Lopez*, as gun possession in a school zone implicates both economically and non-economically motivated crimes. The Supreme Court struck the GFSZA for regulating non-economic activity,[145] while the Fourth Circuit upholds the takings regulation despite the apparent presence of the same defect.

Such a lenient approach to the borders of the economic sphere is vital to an appearance of following *Morrison*, as that decision made clear for the first time that uneconomic activities could not be aggregated in order to satisfy the substantial effects threshold.[146] As a result of its lenient approach, the Fourth Circuit is able to aggregate the impacts of individual wolf takings. Having overcome this substantial obstacle, the court is still unable to fashion a convincing explanation of the substantial effects such aggregation would inflict upon interstate commerce. The difficulty is in part due to the stubbornly non-economic nature of takings, and in part due to the similarity of the Fourth Circuit's in ferential reasoning to the government's u ltimately rejected reasoning in both *Morrison* and *Lopez*.

The Fourth Circuit first holds that the red wolves are part of an interstate tourist revenue stream.[147] It bases this assertion, as the dissent points out, largely on one scholarly article that claims interested tourists could bring anywhere from

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is reference to both commerce and economic activity, the Court clearly sees economic activity as the primary consideration. *See id.* at 611 n.4.

[141] *See id.*

[142] *See Gibbs*, 214 F.3d at 492.

[143] *See* 50 C.F.R. § 17.84(c)(4)(i-iii)(1998).

[144] *See id.* By negative implication, these are the only prohibitions remaining after the statutory exemptions.

[145] *See Lopez*, 514 U.S. at 567.

[146] *See* Goldscheid, *supra* note 122.

[147] *See Gibbs*, 214 F.3d at 493.

$39.61 million to $183.65 million per year to northeastern North Carolina in order to witness the red wolf.[148] Such a speculative effect on a localized economy was found by the Supreme Court to have insufficient effects in *Lopez*.[149] Second, the majority holds that the possibility that observation of the red wolves will lead to new scientific knowledge is a substantial effect.[150] In doing so, the court makes two speculative inferential steps. First, the court assumes a novel scientific development will result from red wolf observation. Second, the court assumes this development will substantially affect interstate commerce. This reasoning requires cognitive leaps similar to those required by the "d iminishing national productivity" argument rejected by the Supreme Court as blurring the line between federal and state powers.[151] Indeed, if potential scientific observation is all that is required for substantial effects, little if anything would remain outside the reach of Congress. Third, the Fourth Circuit relies upon the possibility of a trade in the pelts of red wolves.[152] If any proposed basis for a statute has ever tested the rational basis standard of review, surely this is it.[153] Finally, the majority rules that the red wolf regulations have a substantial effect on agricultural markets.[154] Each of these alternatives, however, require a "n umber of inferences (not even to mention the amount of speculation) . . . exponentially greater than the number necessary in *Lopez* . . . or in *Morrison*."[155] Because the Court in those decisions was wary of such attenuated effects,[156] *Gibbs*' reliance on them seems contrary to precedent.

The majority again contradicts the letter of the *Morrison* and *Lopez* decisions by arguing that the judiciary should not play an active role in policing the boundaries of federalism.[157] The majority writes that "[t]he political, not the judicial, process is the appropriate arena for the resolution of this particular dispute."[158] As Judge Luttig' s dissent correctly points out, this position more accurately reflects the dissents in *Lopez* and *Morrison*.[159] The *Gibbs* court's

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[148] *See id.* at 493-94.

[149] *See Lopez*, 514 U.S. at 564. The government argued that violent crime substantially affected interstate commerce because it discouraged persons from traveling to high crime areas, which suffered financially from a lack of visitors. *Id.*

[150] *See Gibbs*, 214 F.3d at 494.

[151] *See Lopez*, 514 U.S. at 564.

[152] *See Gibbs*, 214 F.3d at 495.

[153] *See id.* at 507-09 (Luttig, J., dissenting).

[154] *See id.* at 495.

[155] *See id.* at 507-08 (Luttig, J., dissenting).

[156] *See Morrison*, 529 U.S. at 615. Justice Thomas' concurrence describes the substantial effects test as "ro otless and malleable." *See id.* at 627 (Thomas, J., concurring).

[157] *Compare Gibbs*, 214 F.3d at 504-06, *with Morrison*, 529 U.S. at 616 n.7 *and Lopez*, 514 U.S. at 557 n.2.

[158] *Gibbs*, 214 F.3d at 506.

[159] *See id.* at 508 (Luttig, J., dissenting). The Court rejected such a theory as "remarkable." *Morrison*, 529 U.S. at 608.

federalism discussion differed fundamentally from the first principles analysis engaged in by the Supreme Court. The federalism concerns in both *Lopez* and *Morrison* were raised throughout both opinions, intertwined with the determination of whether the regulations at issue were within the larger Commerce Clause powers.[160] In *Gibbs*, however, the court had already designated the takings regulation as falling under such powers.[161] The discussion in the Fourth Circuit thus becomes an afterthought, with the court maintaining a stance of deference to Congress so long as a rational basis for the legislation is apparent. As a result, precedent becomes the dispositive factor. The last fifty years of conservation decisions present a picture of, if not exclusive federal jurisdiction, shared jurisdiction between the two levels of government.[162] Because the federal government already exercises such jurisdiction, the federal structure was not deemed threatened.[163]

B. Honoring the Spirit of Morrison

That the *Gibbs* outcome would not have been reached through the identical analytical devices used in *Morrison*, however, is not to say that the Supreme Court would reverse *Gibbs*. Despite abandoning the Supreme Court's explicit determinations, the Fourth Circuit did honor the underlying spirit of *Morrison* by following an implicit mandate attributable to the Supreme Court. Although the *Gibbs* court does not expressly promulgate this spirit, it consists of two premises. First, the twentieth century era of expansion of Commerce Clause powers under the substantial effects test will not be continued through enablement of greater federalization of violent crime. Second, although such further expansion will be prevented, currently accepted precedent will not be overturned. This implied directive finds considerable support in the texts of *Lopez* and *Morrison*.

The Supreme Court's careful monitoring of the expansion of the Commerce Clause into new areas for federal regulation is manifest throughout its two recent decisions. The Court emphasizes that Congress has been operating with "co nsiderably greater latitude" since 1937 than the "p revious case law permitted."[164] Nevertheless, the Court makes it repeatedly clear that despite this latitude, "Con gress' regulatory authority is not without effective bounds."[165] It is obvious in both *Lopez* and *Morrison* that the Court was particularly concerned with the federalization of violent crime.[166] The Court notes that the "Fo unders denied the National Government"[167] the power to suppress violent crime.

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[160] *See Morrison*, 529 U.S. at 613-20; *Lopez*, 514 U.S. at 559-68.

[161] *See Gibbs*, 214 F.3d at 499-504.

[162] *See id.*

[163] *See id.* at 504-06.

[164] *Morrison*, 529 U.S. at 608.

[165] *Lopez*, 514 U.S. at 557.

[166] *See Morrison*, 529 U.S. at 615-16; *Lopez*, 514 U.S. at 564.

[167] *Morrison*, 529 U.S. at 618.

Furthermore, the suppression of violent crime "h as always been the prime object of the States' police power."[168] "Were the Federal Government to take over the regulation of entire areas of traditional state concern, . . . the boundaries between the spheres of federal and state authority would blur."[169] When confronted with this unwanted advance, the Court was forced to distinguish it from the considerable precedent allowing Congress to regulate almost without regard to federalism concerns. Restraining federal regulation to the economic sphere removes most areas of crime from federal control; domestic violence and firearms violations are easily characterized as non-economic. Thus, the emergence of an economic sphere as the primary consideration in Commerce Clause analysis is most likely the result of the federal government's recent attempts to enlarge its role in crime prevention and control.[170] If the Court recognizes a new variety of undesirable federal encroachment in the future, it may feel a need to revise its lexicon again to plausibly distinguish both violent crime and this new encroachment from precedential acceptance.

Similarly, the Supreme Court's desire to leave precedent, and the modern administrative state, intact is not difficult to discern.[171] The Court in both *Lopez* and *Morrison* took pains to distinguish precedent rather than overrule it.[172] This approach is understandable, as blind adherence to a new reading of federal powers would render a large portion of the federal government's currently accepted action unconstitutional. Characterizing the entire body of precedent as economic is dubious, however, and further illustrates that the Court was more concerned with guarding against crime federalization than explaining its past decisions. Nevertheless, the Fourth Circuit took advantage of this atmosphere of statutory preservation in order to uphold the wolf takings regulations as regulating an economic activity.

The dispensability of the majority's fo ray into the substantial effects test sheds light on its possible motives. The court could legitimately have upheld the regulations solely on the basis of their being a necessary part of an overarching

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[168] *Id.* at 615.

[169] *Lopez*, 514 U.S. at 577.

[170] *See generally* Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?,"* 50 SYRACUSE L. REV. 1317 (2000). The past two decades have seen a rapid increase in the federalization of violent crimes. *See id.* at 1328.

[171] *See Lopez*, 514 U.S. at 574.

> [T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.

Id.

[172] *See Morrison*, 529 U.S. at 611 n.4; *Lopez*, 514 U.S. at 559-61.

regulatory scheme.[173] As the majority observed, Congress's inability to regulate takings of animals on private land undermines the entire species preservation scheme.[174] Because endangered species are by definition small in number, any taking by an individual threatens the species' survival and the goals outlined in the ESA.[175] The ESA, in turn, definitely falls within the scope of Congress' authority.[176] As a result, individual takings offer a sound basis for upholding the regulations, and the problems of aggregation and inferential reasoning that plague the Fourth Circuit's eco nomic activity and substantial effects analysis could have been avoided. Such problems would be unavoidable, however, if the Fourth Circuit wanted to provide an example for other circuits and lower courts that would prefer not to bring about the disruptive consequences of the more rigid analysis. The *Gibbs* court offered the following model for non-disruptive *Morrison* analysis: activities long-accepted as fit for federal regulation should be designated economic regardless of their nature, and such activities should be found to substantially affect interstate commerce regardless of their similarity to reasoning rejected by the Court as "u nworkable."[177]

VI. CONCLUSION

Despite the longstanding plenary power exercised by Congress under the Commerce Clause, a revolutionary shift in Commerce Clause jurisprudence is not without precedent. This history renders the language in *Morrison* and *Lopez* all the more dangerous to the administrative state and the red wolves harbored by it. Recognizing this danger, the Fourth Circuit was reluctant to follow the Supreme Court's explicit description of the scope of the Commerce Clause and chose to outline a more appropriate method of reading *Morrison*. Whenever congressional statutes affect activities that have long been federally regulated, or activities of a non-criminal nature, lower courts should be skeptical of the seemingly rigid language of *Morrison*. This is evident from the Supreme Court's own aversion to overturning Commerce Clause precedent. Instead, courts should interpret the economic sphere of activity to refer to all areas of regulation excepting violent crime. By doing so, the courts will ensure that government interventions will not be undermined by the Supreme Court's unwillingness to clearly state its holding in *Morrison* and *Lopez*; namely, that violent crime should remain within the province of the states.

Walter Partain

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[173] *See Gibbs*, 214 F.3d at 497.

[174] *See id.* at 497-98.

[175] *See id.* at 498.

[176] *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

[177] *Morrison*, 529 U.S. at 615.