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ECONOMIC ACTIVITY AS A PROXY FOR FEDERALISM: INTUITION AND REASON IN *UNITED STATES V. MORRISON*

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The Violence Against Women Act of 1994 (VAWA) created a private right of action pursuant to the Commerce Clause and § 5 of the Fourteenth Amendment for victims of gender-based violence. Christy Brzonkala, a young woman who credibly charged that two members of her university's football team had raped her, brought suit against her assailants under VAWA after the university failed to provide her with redress. In *United States v. Morrison*,[1] the Supreme Court held that Congress lacked the power to create the civil remedy on which Ms. Brzonkala relied. The Court's Commerce Clause discussion emphasized the "non-economic" character of gender-based violence. In so doing, the Court ostensibly affirmed the constitutional significance of this factor in the context of the "substantially affects" test.

This essay examines the so-called "economic activity" element with an eye toward discovering its content and justification. In fact, as I will attempt to demonstrate below, this new doctrinal twist appears to have no independent content. It operates less as an explanation for the result than as a sleight of hand that distracts us from the core principle of the decision. The policy behind the emerging doctrine, therefore, is starkly instrumental, and premised more on ideology than it is on any explication of doctrine or reason.

When Captain Renault shut down Rick's Café Americain in the film "Casablanca," he announced, "I am shocked, shocked to

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1. *U.S. v. Morrison*, 529 U.S. 598 (2000).

find that gambling is going on in here"—and then quickly pocketed his winnings.[2] Our shock in learning that something other than pure doctrine may have driven the decision in *Morrison* is similarly ironic. Ideology is, was, and always has been a part of the judicial process, and particularly so in the context of constitutional law. But even if we accept this reality, it does not follow that the judicial creation of constitutional law should be bounded by nothing other than the personal predilections of a majority of five. The fact that ideology is something doesn't mean it should be everything.

Ideally, a Supreme Court decision ought to reflect a careful accommodation of intuitive judgment and reasoned explanation. By "intuitive judgment" I mean the felt sense derived from personal and professional experience that the principle and its application are correct. If we must put a harder spin on the concept, we could call it passion, bias, or ideology. It certainly comes in all those flavors. What I am describing is a Justice's philosophic sense of right and wrong. I accept this not only as a harsh reality, but as a positive good. So, yes, ideology is a critical ingredient in the mix. But there must be a mix, and part of that mix is the check provided by some form of reasoned explanation. This connotes a relatively dispassionate examination of the intuition, an examination that transcends the intuition and tests it against a larger legal and societal framework. It requires the frank imposition of self-doubt on the initial judgment, a type of reality-check. Interwoven with these two elements is the application of doctrine, which at its best is a product of collective experience and applied reason. In a colloquial sense, we would like to say that the judgment in any particular case "feels right," as being within a reasonable range of options, and that the opinion in support of it has a well-reasoned, independent validity. We would also like to see some consistency between that opinion and the prior doctrine, unless a convincing reason is given for the departure from previously established norms.[3]

Admittedly, the line between intuition and reason is indistinct. Both ways of thinking form and inform one another, and either can easily operate as a mask for the other. It is also probably true that the power of intuition and ideology can overwhelm the check of reason, especially in the most highly charged

2. *Casablanca* (Warner Bros., 1942).

3. Of course, doctrine can be used to obfuscate and to bludgeon. It can calcify. I am using the term, however, in an ideal sense as the collective experience of a forward-looking reasoned judgment.

and politically heated cases.[4] So, yes, the real world is not the ideal world, and our own judgment of these matters is always to some extent clouded. What should be clear, however, is that neither intuition nor reason, in isolation, will do. An insistence on pure logic both underestimates the critical role that nonlinear thinking plays in all human decision making and denies the real world implications of a decision.[5] This may be one of the reasons why strict originalism has never gained much of a foothold in the Court. It lacks the basic flesh of human experience. On the other hand, exclusive reliance on intuition simply transforms personal predilection into the law, and this is hardly a recipe for either justice or coherence. What we seek is not perfection, but a balance between the subjective and objective elements of decision.

Perhaps this middle ground between law as pure reason and law as personal preference does not exist. One's intuition, emotion, or ideology may inevitably control the ultimate conclusion reached. However, even if this observation is correct, the application of reason can provide "non-believers" a sufficient basis for accepting the legitimacy of a judgment with which they disagree. In essence, the reasoning process creates a shared lexicon that is capable of embracing and validating discordant views, and as such it creates a realm within which passionate minds can differ and in which a range of passionate but reasonable alternatives may peacefully coexist.

To return to the subject at hand, the immediate question is whether the decision in *Morrison*, and in particular the "economic activity" portion of that opinion, satisfies the above criteria. As I have suggested, I believe that it does not.

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The *Morrison* Court's discussion of the Commerce Clause opens with a standard and relatively non-controversial description of the scope of the commerce power. Congress may regulate the channels or instrumentalities of interstate commerce, i.e., anything that either *is* interstate commerce or anything that is *in* interstate commerce, as well as certain matters that substantially affect interstate commerce. Since VAWA provided a remedy for conduct that was concededly not itself interstate com-

4. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944). I'm sure there's a more recent example, but the name escapes me at the moment.

5. Antonio R. Damasio, *Descartes' Error* (Putnam, 1994); John Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17 (1924).

merce nor necessarily in interstate commerce, the statute had to rest on the "substantially affects" principle. More specifically, the question was whether gender-based violence substantially affected interstate commerce. Congress said it did. The Court said it did not.

In so ruling, the Court relied in part on the non-economic nature of gender-based violence. This should not have surprised anyone who had read *United States v. Lopez*.[6] In striking down the Gun Free School Zones Act, the *Lopez* Court emphasized what it perceived as the non-economic nature of the regulated activity, namely, the possession of a gun in a school zone.[7] Whether this non-economic status completely insulated the activity from congressional oversight under the commerce power was left ambiguous. Clearly, however, the non-economic characterization played a significant role in the Court's determination that a substantial relationship with interstate commerce was lacking.

In *Morrison*, the Court reiterated the significance of this new threshold consideration, noting that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."[8] Applying this principle, the Court then concluded without elaboration (just as it had done with gun possession) that "[g]ender-motivated crimes of violence are not, *in any sense of the phrase*, economic activity."[9] Again, as in *Lopez*, the Court was coy with respect to the dispositive nature of this factor. "While we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[10] In other words, this factor is "central" but not necessarily dispositive, leaving the Court some doctrinal wiggle room while creating a relatively effective barrier to congressional regulation.

From a purely doctrinal perspective, the Court's reliance on "economic activity" as a factor limiting the scope of congres-

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6. *U.S. v. Lopez*, 514 U.S. 549 (1995).
7. Id. at 561, 567.
8. *Morrison*, 529 U.S. at 610.
9. Id. at 613 (emphasis added); cf. *Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.")
10. *Morrison*, 529 U.S. at 613.

sional power raises two legitimate questions. First, what does the Court mean by the phrase, "economic activity?" Next, why does the economic character of an activity matter if the question is one of substantial effects on interstate commerce? We will consider each question in turn. The answers may illuminate the intuitive judgment at the heart of *Morrison* and the Court's effort to rationalize the result.

ON DEFINING ECONOMIC ACTIVITY

As to the first question, the Court did not define economic activity in either *Lopez* or *Morrison*. Rather, the Court's conclusions regarding gun possession and gender-based violence rest on the judicial sense that there is really nothing to argue about regarding what the Court characterized as a pivotal issue. In the Court's view, no matter how broadly one defines "economic activity," neither gun possession in a school zone nor gender-based violence could possibly qualify.[11] This assumption, while clearly convenient and perhaps even appealing as a rhetorical device, is a bit of an overstatement. In what follows, I consider a variety definitions of "economic activity," to see which, if any, make doctrinal sense in the context of the *Morrison* Court's holding.

In his leading treatise on law and economics, Judge Richard A. Posner proposes the following definition of economics: "[E]conomics is the science of rational choice in a world—our world—in which resources are limited in relation to human wants."[12] Within this real world, individuals operate as rational maximizers of their own self-interest. Their activity in this regard is quintessentially economic. And while economic theory often favors voluntary transfers and market transactions, forced transfers are nonetheless economic in nature as well. In both contexts, voluntary and involuntary, the exchange of wealth or utility is an economic event. Moreover, the economic market is not limited to the realm of pecuniary exchange. Economics is "about resource use, money being merely a claim on resources. . . . [Thus] housework is an economic activity, even if the houseworker is a spouse who does not receive pecuniary compensation; it involves cost—primarily the opportunity cost of the houseworker's time."[13]

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11. Id. at 613; *Lopez*, 514 U.S. at 567.
12. Richard A. Posner, *Economic Analysis of Law* 3 (Little, Brown, 4th ed. 1992).
13. Id. at 7.

With this definition in mind, let's consider the economic nature of gender-based violence, and of rape in particular. Simply and starkly put, the perpetrator of the violence maximizes his self-interest at the expense of the victim. In the specific context of rape, the rapist, acting within a market in which sex is not a free commodity,[14] perceives the benefits of forced sexual intercourse as outweighing the risk of prosecution and punishment. He forcibly takes that to which he has no right. The consequence of this choice, generated in part by the perceived low cost of the crime, is a forced transfer of wealth and utility from the victim to the rapist, with attendant costs to both the victim and society. The victim is stripped of her free choice, her bodily integrity, and her confidence that she alone controls her sexual freedom. A society that recognizes the egregious nature of this crime might feel morally obligated to reallocate its economic resources toward prevention and recompense.

Characterizing gender-based violence as economic does not belittle or diminish the problem of gender-based violence or sanitize the horrific nature of rape. Clearly, the personal tragedy of rape can outrun the economic consequences of this particularly loathsome crime. But an examination of those economic consequences exposes rape for what it is—a brutal theft and invasion of the most basic economic interest one can have, namely, dominion over one's own body. In a sense, the rapist claims an ownership interest in the victim in much the same way as a master claims an ownership interest in a slave. Not too surprisingly, rape was a brutal by-product of the master/slave relationship in antebellum South. The analogy goes further. The critical difference between slavery and freedom is the free person's right to contract, which includes the right to determine the circumstances under which others may exploit one's body. Rape involves a forced relinquishment of that fundamental, personal, and economic right.

Nor is this characterization of gender-based violence particularly novel. The right of a person to be free from violence of whatever kind has been long recognized as basic component of Anglo-American tort law. The traditional remedy for such harm is the award of compensatory damages, i.e., an economic meas-

14. As to the economic market and sex, Posner observes, "Sex is an economic activity too. The search for a sexual partner (as well as the sex act itself) takes time and thus imposes a cost measured by the value of that time in its next-best use. The risk of disease or of unwanted pregnancy is also a cost of sex—a real, though not primarily a pecuniary, cost." Id. at 7.

ure of the harm done to the victim.[15] If the harm itself is not at least in part economic, it's difficult to see how the award of damages can be seen as redressing the injury. In any event, it would seem that Congress was acting on precisely this principle when it created the private right of action under VAWA. Provision of that private right recognizes that the economic loss generated by gender-based violence, i.e., the forced wealth transfer, entitles the victim to an economic compensatory remedy. Moreover, the availability of damages also imposes a higher price on acts of gender-based violence, creating a greater (or at least additional) disincentive for their commission. The creation of this disincentive is itself an economic act on the part of society. So what may seem intuitively odd is a commonplace of our economic and legal system. Rape, regardless of how else one might characterize it, is also an economic crime. And a civil remedy for rape is part of that economic equation.[16]

Judge Posner would seem to be in accord. He defines crime, including violent crime, as representing an economic transaction in which there is a "coercive transfer either of wealth or utility from victim to wrongdoer."[17] He then specifically describes rape as a crime that "bypasses the market in sexual relations (marital and otherwise) in the same way that theft bypasses markets in ordinary goods and services, and therefore should be forbidden."[18] In short, rape is an economic crime, and the act of rape constitutes economic activity.

The activity regulated in *Lopez* would also seem to have been economic in nature. It should not require a string of citations or an arcane philosophical discourse to defend the position that the exercise of dominion over personal property constitutes an economic act.[19] For example, by constructing a wall around that which I claim to be my property, I engage in an economic act by attempting to maximize my utility in that property vis à vis the general public. Lopez was exercising and asserting precisely such a property interest in the gun he brought to school. He possessed and asserted dominion over it. Indeed, he brought it to school to sell it, a fact the *Lopez* Court conveniently ignored.

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15. Id. at 191 ("The Function of Tort Damages").

16. Of course, not failing to provide an effective remedy for rape is also an economic act since the need to prevent the activity then remains with the potential victims who can either purchase protection or engage in self-help.

17. Posner, *Economic Analysis of Law* at 217 (cited in note 12).

18. Id. at 218.

19. Cf. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (recognizing as a property right the possessory interest in a chattel purchased on credit).

So not only was Lopez an economic actor asserting a property right in a piece of personal property, he was an economic actor on a commercial mission. Seen in this light, the statute in *Lopez*, at least as applied, should have cleared the "economic activity" hurdle under the Court's seemingly open-ended definition of this element.

In short, the Court's confident assertion that a criminal statute regulating gun possession has nothing to do with an "economic enterprise" would seem to be somewhat off target.

Of course, just as the Constitution does not embrace Mr. Herbert Spencer's Social Statics, it need not embrace Judge Posner's view of economics. But if the concept of economic activity is "central" to the scope of congressional power, as the Court tells us it is, the Constitution must embrace some view of its meaning. Given the Court's lack of guidance, we can only speculate. Perhaps the Court meant to limit its definition of economic activity to commercial activity. In *Lopez*, for example, the Court at times used the words economic and commercial interchangeably.[20] Yet in key passages in both cases the majority opinions relied almost exclusively on the broader phrase, "economic activity," inviting the reader to apply the most liberal definition to it. Having taken that invitation, we can see that the "obvious conclusion" is not necessarily the one the Court proposed.

ECONOMIC ACTIVITY AS COMMERCIAL ACTIVITY

Suppose, however, that the Court did mean to limit the more inclusive phrase to one of its specific iterations, namely, commercial activity. The Court has again left us to discover our own definition of this "central" consideration. Presumably such a definition would include the exchange of goods or services for profit—the definition of "commerce" used by Chief Justice Marshall in *Gibbons v. Ogden*.[21] It might also include the creation of goods or services for the marketplace, e.g., production, manufacturing, farming, etc., and all other activities designed to facilitate transactions within that marketplace, e.g., systems of credit, insurance, advertising, etc. After all, such activities are commonly understood to be commercial in nature. The definition could

20. *Lopez*, 514 U.S. at 565-66; see also id. at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").

21. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

also embrace the post-exchange use of a product on the fair assumption that utility is part of the bargained—for exchange, covering such matters as consumer and environmental safety and the like. In other words, commercial activity could be defined to embrace a broadly construed range of activities designed to promote pecuniary gain. The possession of a gun in a school zone would seem to fit this definition. As Justice Stevens in his *Lopez* dissent observed, "Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity."[22]

Of course, we could continue to narrow the definition of commercial activity until the facts of *Lopez* are plainly excluded from its terms. Given the Court's treatment of gun possession in *Lopez* as "non-commercial," one must assume that that is what the Court did or would have done if it had actually thought about the definitional problem. But we are left to wonder what that narrower definition might be and why is it to be preferred over other more inclusive and generally accepted alternatives. Again we can speculate. For example, commercial activity could be limited to the mere exchange of goods and services, essentially cutting off the head and tail of the overall commercial process. This would make the crime in *Lopez* "non-commercial" (and therefore non-economic) in the sense that simple possession of a weapon is not an exchange. It may be the product of an exchange or the precursor to an exchange, but it is not itself an exchange. Yet the Court, at least since *United States v. Darby*,[23] has not taken such a restrictive view. And both the *Lopez* and *Morrison* Courts went out of their way to reaffirm the post-New Deal precedents applying the substantial effects test to elements of the commercial process not directly involved in the actual exchange of goods, e.g., production, farming, mining, etc. So this very narrow definition would seem to be an unsatisfactory candidate.

Another alternative for the Court would have been to define commercial activity as including the entire commercial process up through the exchange of the good or service. Post-exchange possession, therefore, would be excluded, the idea being that the stream of commerce has come to an end. Gun possession is again outside the scope of the definition. Yet this "end

22. *Lopez*, 514 U.S. at 602-03.
23. *U.S. v. Darby*, 312 U.S. 100 (1941).

of commerce" definition is somewhat artificial and is reminiscent of the Court's long discarded and overly formalistic "original package" and "come to rest" doctrines.[24] It presumably includes the exchanged service since commerce cannot end until the service is complete, but not the use or performance of an exchanged product. It also assumes that the "stream of commerce" actually ends with the commercial exchange. In the context of guns, for example, post-exchange possession is usually but a temporary detour from a continuing process of use and exchange. This view also runs counter to the Court's consistently held position that garbage—a post-exchange good if ever there was one—is a legitimate article of commerce, the regulation of which is subject to the restrictions of the Commerce Clause.[25] With that in mind, it would appear that Mr. Lopez could be prohibited from buying the gun, from selling it, and from throwing it away. He couldn't, however, be prohibited from possessing it in the interim between purchase and sale or discard. Here doctrine can be said to reach terminal sterility.

The "end of commerce" definition also leads to some interesting anomalies. If possession is not considered "commercial" for purposes of the commerce power, then we will have to jump through some interesting hoops to explain how the federal government can regulate the mere possession of a controlled substance. Presumably the Court would assert that the ban on possession although not itself economic was part of the regulation of economic activity, namely, the sale of controlled substances.[26] One would at least hope for some significant findings by Congress in this regard, findings that demonstrate, for example, that marijuana grown for personal use actually has a discernable impact on the illegal drug trade.[27] Yet one must admit that even in the absence of such findings the necessary doctrinal stretch would not be beyond the capacity of a Court on a mission.

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24. See, e.g., *In Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

25. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

26. See *Lopez*, 514 U.S. at 561: "[The Gun Free School Zones Act] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."

27. Cf. *Wickard v. Filburn*, 317 U.S. 111, 127 (1942) (consumption of wheat grown on farm constitutes 20% of the yearly production of wheat thus establishing a substantial effect on the interstate wheat market).

That brings us back to *Morrison*. Let's suppose that we adopt either the "exchange of goods or services" or the "end of commerce" definitions of commercial activity. How would gender-based violence fare within these definitions? To answer this we need to consider the commercial nature of crimes. The *Lopez* Court specifically recognized that extortionate credit transactions, i.e., credit transactions enforced by the use or threat violence or other criminal means, fell within the realm of economic (or commercial) activity.[28] Importantly, the crime in *Perez* was not the making of the loan or its terms, but the potentially violent nature of the collection technique, which included paybacks that far exceeded the obligations made under the loan. Quite clearly the victims of loan sharking had not consented to either of these practices. In other words, what was being regulated was a forced exchange of money. Thus our definition of commercial activity as an exchange of goods, with *Perez* as a guide, might well include such property crimes as larceny, robbery, and burglary, all of which involve the forced exchange of goods. Having gone this far it is but a small step (if it is a step at all) to conclude that the forced exchange of services is also commercial in nature.

Clearly *Morrison* does not involve a commercial exchange of goods, criminal or otherwise. The transaction in *Morrison* does, however, involve a forced exchange of sexual services and in this sense is as commercial as the threat to use violence to collect a debt in *Perez*. Again, the definition of commercial activity could be narrowed in a manner that excludes the facts of *Morrison* while at the same time affirming the *Lopez* Court's characterization of the crime in *Perez* as economic. For example, we could say that it was the antecedent credit transaction in *Perez* that "commercialized" the criminal acts of extortion. The Court in *Perez*, however, imposed no such limitation, suggesting instead that the nature of the extortionate criminal transaction, commercial or otherwise, was completely irrelevant to the scope of the commerce power.[29] But pruning doctrine is part of the judicial process and the current Court could certainly reinterpret *Perez* to cover a very specific type of "commercial" crime.

Where does this leave us? The Court in *Lopez* and *Morrison* insisted that the economic nature of an activity was central in determining whether Congress could regulate that activity. In

28. *Lopez*, 514 U.S. at 559, citing *Perez v. United States*, 402 U.S. 146, 147 (1971).

29. *Morrison*, 402 U.S. at 151-52 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

neither case, however, did the Court provide even a working definition of economic (or commercial) activity. Rather, the standard, if there is one at all, appears to be something along the lines of "I know it when I see it." We can say with some confidence that this standard is significantly narrower than the Posnerian view of economics. It is also less inclusive than a variety of plausible definitions of commercial activity, including definitions that seem to be implicit in some of the Court's own decisions. So why did the Court pick a seemingly restrictive ad hoc standard over the other available alternatives? Does that standard reflect more accurately the everyday reality of economic and commercial practices? Does it measure more precisely the economic consequences of the regulated activity? Does it assess more effectively the impact that activity may have on interstate commerce?

It is difficult, if not impossible, to answer these questions given the Court's cryptic treatment of this issue. Perhaps the answers can be found in an examination of the second question posed above: why does the economic character of an activity matter in determining if it has a substantial effect on interstate commerce? For if we know why the economic character matters, we might glean some insight into what is or should be meant by the phrase "economic activity."

ON THE RELEVANCE OF ECONOMIC ACTIVITY

One reason that the economic character of an activity might matter would stem from a legitimate desire to understand the real world consequences of that activity. In other words, application of some form of economic theory might be useful in exposing the actual costs, in terms of human capital, of either regulating or not regulating the activity. For example, an economic analysis of rape exposes the damage, both personal and social, caused by the crime. With this awareness we can more fully appreciate the relationship between rape and arguably pertinent national interests such as interstate commerce. Or if the economic consequences of a particular activity are exposed as trivial, we might be more reluctant to find the necessary connection with interstate commerce. Simple possession of marijuana might be a case in point.

Such a realistic approach does not, however, seem to have been at the heart of what the Court was doing in either *Lopez* or *Morrison*. In neither opinion did the Court explore the potential

economic nature or economic consequences of the regulated transaction. Rather the economic activity element, which was applied in a conclusory fashion, seems to have been premised on an a priori view of the inherent limits of congressional power.

Realism aside, we might find the seeds of the economic activity element in the Constitution itself. The authority granted to Congress by Article I, § 8, cl. 3, is the power to "regulate Commerce . . . among the several States." If "commerce" is the matter to be regulated then it would seem that the scope of the power should be limited to interstate commercial matters. That is, after all, what the Constitution says.[30] Yet even from a textualist perspective, the Constitution says much more than this. The Necessary and Proper Clause provides a sweep to the exercise of congressional power that is not bound by the precise text of the enumerated powers.[31] More to the point, nothing in the language of the Necessary and Proper Clause limits its scope in the context of the commerce power to the regulation of distinctly commercial matters. The clause certainly doesn't say that, and judicial constructions of it, beginning with *McCulloch v. Maryland*,[32] seem to grant Congress at least some latitude in determining which means are appropriate to the exercise of an enumerated power. The war powers, for example, may be exercised over matters that are not technically during a war or not even within a broadly conceived theater of war, in fact, to matters that would not normally be considered "military."[33]

If, despite the foregoing observations, we adopt a formal definition of the commerce power that limits the scope of the power to commercial matters, we are confronted with another problem. Highly formalistic approaches to constitutional law are bound to fail in all but the most obvious circumstances. They are premised on the notion that the scope of a granted power or the range of an individual right can be permanently cabined by a technical doctrinal device. This presumes a form of constitutional practice over time that simply does not exist. Even if we could momentarily agree on the structure of such formalism, the force of current conditions as reflected in actual cases subverts

30. Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 Iowa L. Rev. 1 (1999).

31. U.S. Const., Art. I, § 8, cl. 17.

32. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

33. *Woods v. Cloyd W. Miller, Co.*, 333 U.S. 138 (1948) (post-war rent controls); *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919) (upholding War-Time Prohibition Act).

such principles and eventually adjusts them to the felt necessities of society.[34] Even within relatively limited periods of time, formal principles tend to obscure or morph when applied through the vehicle of doctrine to real situations. For example, Justice Black's insistence on the sanctity of the text in the context of the First Amendment—no law means no law—dissolved when he was confronted with intuitively uncomfortable forms of communication.[35]

Thus, we need to consider the extent to which the economic activity element rests on sound and enduring principles of constitutional law. Since the economic activity element operates within the judicially-created substantially affects test—a test that both *Lopez* and *Morrison* reaffirmed, the first step is to determine the constitutional foundations for that doctrine. In *United States v. Darby,*[36] the Court used this test to validate an exercise of congressional power directed at intrastate activities, i.e., to matters not within the technical or literal scope of the Commerce Clause. "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[37] Whether this conclusion is based specifically on the Necessary and Proper Clause or on inferences drawn from constitutional structure, its import for our purposes remains the same. The powers of the national government embrace activities falling outside of the sphere of granted authority so long as these "outside activities" affect matters falling within the sphere. Plainly, it is not the nature of the outside activities that counts. It's their effect on the constitutionally regulable activities that matters. After all, the structural extension of power is meant to allow Congress to control the effects, not the outside activities. The regulation of those outside activities is simply an incident to the authority to control the effects.

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34. Oliver Wendell Holmes, *The Common Law* 1 (Little, Brown, 1881).

35. See, e.g., *Adderley v. Florida*, 385 U.S. 39 (1966) (declining to see the free speech implications of a public protest); *Cohen v. California*, 403 U.S. 15, 27 (1971) (joining Justice Blackmun's dissent treating jacket emblazoned with "Fuck the Draft" as largely conduct and not speech).

36. *United States v. Darby*, 312 U.S. 100 (1941).

37. Id. at 119 (citing *McCulloch, 17 U.S. (4 Wheat) 316 (1819)*.

That brings us back to the *Lopez/Morrison* Court's treatment of "economic activity" as a "central" element of the substantially affects test. Since the constitutional foundation for this test is the impact on interstate commerce caused by the outside activity, one can fairly ask, what is it about the economic or commercial character of an activity that inherently alters the degree or substantiality of the impact? The answer is nothing whatsoever. While perhaps economic or commercial activity may more often have a substantial effect on interstate commerce than non-economic activity, that plausibility does not increase or decrease the actual effect in particular cases. As the Court has whimsically observed, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[38] And, one might add, a squeeze is a squeeze whether it be economic, commercial, or otherwise. Justice Breyer makes a similar point in his *Morrison* dissent:

> More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause*? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to 'regulate Commerce . . . among the several States,' and to make laws 'necessary and proper' to implement that power. Art. I, § 8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.[39]

Given the foregoing, it appears that the *Lopez/Morrison* Court altered the substantially affects doctrine with little regard for the rationale behind it. Of course, the Court is always free to change or jettison doctrine, but one hopes that any such action will have some comprehensible rationale. The *Morrison* Court's primary explanation for inclusion of the economic activity element is that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[40] To the Court, therefore, these new statutes seemed unconstitutional because they were unfamiliar. This, of course, confuses the familiar with the constitutional, and to rest a judgment on the lack of familiar-

38. *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949).
39. *Morrison*, 529 U.S. at 657 (Breyer, J., dissenting).
40. Id. at 613.

ity alone is to base that judgment solely on a reactionary intuition, i.e., one premised solely on the past, without the necessary check of reasoned judgment applied in the context of the present. In any event, this alteration of doctrine provides no clue as to how we might define economic activity.

AN INSTRUMENTAL DEFINITION OF ECONOMIC ACTIVITY

The statutes at issue in *Lopez* and *Morrison* did take federal regulation into at least somewhat novel territory. By regulating gun possession in a school zone and gender-based violence in general, Congress entered realms of lawmaking that previously had been largely left to the states. In the Court's view these exercises of congressional power threatened the basic structure of our federal system by allowing Congress to supplant traditional state prerogatives. As the *Morrison* Court observed, "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part."[41] Similarly, in *Lopez* the Court strongly suggested that the field of primary and secondary education was a matter largely beyond the reach of the commerce power.[42] In general, permitting Congress such legislative latitude would invite congressional intervention into other "areas of traditional state regulation" such as marriage, divorce, and childrearing.[43] "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based *solely on that conduct's aggregate effect on interstate commerce.* The Constitution requires a distinction between what is truly national and what is truly local."[44] Stated somewhat differently, the enumeration of powers presupposes something not enumerated, and that something is the authority to regulate matters deemed truly local.[45]

The problem the Court perceived in *Lopez* and *Morrison*, therefore, was not that Congress was attempting to regulate noneconomic matters, or that the activity's aggregate effects on in-

41. Id. at 615.
42. *Lopez*, 514 U.S. at 565.
43. *Morrison*, 529 U.S. at 615.
44. Id. at 617-18. (emphasis added) (citing *Lopez*, 514 U.S. at 568 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937))).
45. *Lopez*, 514 U.S. at 567-68.

terstate commerce were too tenuous in any quantitative sense. In fact, the preceding quote suggests that the degree of impact on interstate commerce was irrelevant. Rather the problem was that Congress was attempting to regulate matters that in the Court's view were traditionally and perhaps exclusively left to the states. All this talk about economic or commercial activity (or any of the other doctrinal elements mentioned in these two opinions) was simply a proxy for this much more significant theme. Thus any effort to define "economic activity" solely by reference to economic theory or to factors measuring the commercial nature of the activity is a fool's errand. The definition must also account for the critical distinction between what is "truly national and what is truly local." Gender-based violence and gun possession are non-economic because they involve matters that are "truly local." Similarly, they do not substantially affect interstate commerce for the simple reason that Congress has no authority to regulate them. These may sound like nonsequiters, but in the world of free-floating doctrine they represent the essence of pure reason.

That the Court's economic activity element has little to do with economics or commercial behavior is evident from the other areas the Court identified as beyond the regulatory reach of Congress. In *Lopez*, the Court expressed concern that validation of the Gun Free School Zones Act would lead to the federal regulation of the details of elementary and secondary education, including such matters as curriculum.[46] Yet the provision of education, both public and private, is plainly economic, even commercial. It involves the exchange of a service for valuable consideration.[47] Teachers, after all, are paid for what they do. The Republican Party seems to understand this simple fact. The avowed idea behind that party's support for vouchers is that private schools can provide a better service than is now provided by some public schools. Just follow the money. If, from a constitutional perspective, the provision of education is not economic, it is only because it involves a matter that in the Court's estimation is "truly local."

Similarly, the *Morrison* Court expressed concern that the constitutional theory behind VAWA would permit Congress to regulate marriage, divorce, and childrearing.[48] Yet marriage in-

46. *Lopez*, 514 U.S. at 565.

47. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (citing state funding of educational institutions as an example of the market participant doctrine).

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

volves a classic contractual relationship with obvious economic dimensions, and divorce is the means through which that contract is dissolved. Indeed, the terms of a divorce are typically measured by the pecuniary obligations of one spouse to the other. The advent of "pre-nuptials" makes the economic character of the relationship crystal clear. Such agreements are designed to control the economic consequences of the marriage contract. And what about childrearing? Only a person who has never raised a child would consider this activity to be purely non-economic. Among other things, the law imposes clear financial obligations on the parents. Why, therefore, would we describe marriage, divorce, or childrearing as non-economic? Again, like education, they involve matters that the Court deems truly local.

In short, the definition of economic activity would seem to include any activity pertaining to the exchange of goods or services which does not involve a matter of local concern.

INTUITION, REASON, AND DOCTRINE

The basic intuition behind *Morrison* is that the civil remedy created by VAWA transgressed the undefined distinction between what is truly local and what is truly national. That intuition can be seen as deriving from a sense of the reserved powers of the states—reflecting the Court's solicitude for states rights—or as based on the platitude that the enumeration of powers presupposes something not enumerated—reflecting a judicial antipathy for congressional excess. Or a little of both. My point here is not to criticize these intuitions, but to note that neither have anything to do with the economic character of the regulated activity. Or to put itn differently, the economic activity element does not in any manner justify these intuitions about the scope of national power.

The economic activity factor has only the most tangential relationship to the Court's intuitions, and then only if we define the phrase in terms of the distinction between what is truly national and what is truly local, essentially milking it of independent meaning. In this sense, the application of doctrine does not operate as a reasoned measure of the Court's judgment, but as a rather thin and intrinsically unpersuasive cover for it. The irrelevancy of this economic activity factor is further indicated by the Court's failure to define this "central" term or to provide any rationale explaining its constitutional relevance. Rather, from

the Court's perspective, it is simply enough to observe that the congressional regulation of non-economic activity, whatever that phrase may entail, has not been judicially validated in the past. This represents a gross evasion of the underlying issues, a type of shell game that adds little to constitutional discourse other than cynicism.

My dispute with the Court is not simply stylistic. Nor is it premised on a disagreement with the result. Congress does on occasion (and perhaps too often) jump on the "feel good" bandwagon without fully considering constitutional policy and consequences. An occasional knuckle rapping may be in order. But given our constitutional system, if that rebuke is to be judicially delivered, it ought to represent something more than the iron fist of policy disagreement in the velvet glove of doctrinal formalism. Once we accept, as I think we must, that constitutional law is not a product of pure logic or formalism, but also reflects the intuitive judgment of the judicial lawmakers, a frank application of doctrine or a clear explication of reasoning becomes critical to the legitimacy of the judicial product.

Virtually all human decisions begin with an intuition or a feeling. Those intuitions are largely premised on experience (with the exception of the most basic flight-or-fight type of reactions). Our intuitions, however, can be flawed and misleading. They can reflect bias and gross prejudice. As a consequence, although we rely on our intuitions, as civilized people we also depend on a process of reasoning to examine those intuitions and, when appropriate, to revise them. The "reasons" for acting on any particular intuition flow from this consequentialist examination. Assuming the Justices share these universal human characteristics, it is both wise and fair to expect them to test their constitutional intuitions through reasoned judgment. In the absence of such a practice, a judicial decision is simply a product of power disguised as law and entitled only to the respect that comes with inevitability.

Returning to *Morrison*, a reasoned justification that spoke in terms of the Court's examined intuitive judgment would look quite different from the one we saw in the Court's opinion. Among other things, it might consider the scope of the reserved powers doctrine, its content, and its present utility. It might also explore whether the often stated premise for this new federalism—the protection of liberty—was served or disserved by the application of the principle in the context of the *Morrison* facts. It could examine the Court's concern that a broader reading of

congressional power would eviscerate the concept of enumerated powers. Baldly stating the platitude does no more than reformulate the intuition. It also overlooks the Courts ability to enforce the platitude through a standard, rational basis application of the substantially affects test. If, in the Court's view, that test is itself constitutionally suspect, then the Court should say so and explain why.[49]

Several other questions come to mind. How, for example, does the parallel federal regulation of violent crime impinge on the power of the states? Do such parallel measures undermine state authority or prevent the states from protecting the health, safety, or welfare of their constituents? Do they undermine liberty? What defines the scope of a constitutionally protected state prerogative? Does a tradition of state regulation automatically equate with an exclusive constitutional prerogative? What qualifies as a tradition? Under what circumstances might a tradition of state regulation evolve into a tradition of federal regulation? Why is a rational basis application of the substantially affects test inadequate to serve the intuitions underlying the Court's judgment? This may be dangerous or uncharted territory, but we are entitled to at least a rough map of the terrain if these are the true trail markers of the Court's judgment.

Essentially what we end up with in *Morrison* is a highly formalistic opinion based on vaguely conceived, nonintersecting realms of power between the national and state governments. This is the same type of formalism that collapsed under the pressure of the Great Depression and will likely be subject to a similar fate in the future. It represents at best a temporary political fix for a problem that is better resolved by reference to the actual experience of governing. The damage done by the opinion, however, arises not out of its formalism, but out of its use of doctrine as a cover for an unexamined intuition. Here lie the seeds of a cynicism that this Court has unfortunately fostered with decisions like *Lopez* and *Morrison*, among others. Each might fairly be said to have involved a result in search of a rationale. It does not follow that there is no rationale for these decisions. My point is simply that any such rationale can not be discerned within from the four corners of the opinions.

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49. See id. at 627 (Thomas, J., concurring).