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## The Economic/Noneconomic Activity Distinction Under the Commerce Clause

David M. Driesen

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# THE ECONOMIC/NONECONOMIC ACTIVITY DISTINCTION UNDER THE COMMERCE CLAUSE

*David M. Driesen*<sup>†</sup>

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## INTRODUCTION

In the wake of the Supreme Court's decisions in *United States v. Lopez*<sup>1</sup> and *United States v. Morrison*,<sup>2</sup> the lower courts have struggled to figure out whether federal statutes challenged under the Commerce Clause regulate "economic" activity or "noneconomic" activity. For the *Lopez* Court created a distinction between these categories of activities, and the Court applied this distinction in both of these cases to strike down federal statutes regulating noneconomic activity as beyond Congressional authority under the Commerce Clause.<sup>3</sup> *Lopez* and

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<sup>†</sup> University Professor, Syracuse University. J.D. Yale Law School 1989.

1. 514 U.S. 549 (1995).

2. 529 U.S. 598 (2000).

3. See *Lopez*, 514 U.S. at 628 (Breyer, J., dissenting) (noting that the courts that decided the cases relied upon by the majority "did not focus on the economic nature of the activity regulated").

*Morrison* strongly suggest that the Court will not give statutes regulating noneconomic activities the full measure of deferential review afforded federal statutes challenged under the Commerce Clause since the late New Deal, and may well strike them down.<sup>4</sup>

Scholars agree that *Lopez* and *Morrison* offer no guidance about how to apply the economic/noneconomic distinction, leaving lower courts adrift when trying to figure out whether challenged federal statutes regulate economic activities or not.<sup>5</sup> This view about the absence of guidance stems from the Supreme Court's failure to explain why it categorized the activities regulated under the statutes it has invalidated as noneconomic activities.<sup>6</sup> In *Lopez*, the Court stated that the Gun-Free School Zones Act (GFSZA) regulated the activity of gun possession in school zones. It justified its characterization of gun possession as noneconomic by declaring that gun possession near schools has "nothing to do with . . . any sort of economic enterprise."<sup>7</sup> The *Morrison* Court concluded that the Violence Against Women Act regulated "gender-related crimes" such as rape. In similar conclusory fashion, the Court declared that "gender-motivated crimes" do not constitute economic activity "in any sense of the phrase."<sup>8</sup> So, the scholarly consensus about the lack of guidance is understandable, having roots in the leading cases' use of conclusory statements to justify characterization of the activities before them.<sup>9</sup>

Nevertheless, this Article argues that *Lopez* and *Morrison* offer substantial guidance about the economic/noneconomic distinction's meaning. This guidance stems not from explanation of the characterization of the activity that motivated these decisions (which is missing),

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4. See Mollie Lee, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 YALE L.J. 456, 458–59 (2006) (characterizing "recent Supreme Court cases" as suggesting that Congress may only regulate economic activity); cf. *United States v. Patton*, 451 F.3d 615, 623 (10th Cir. 2006) (stating that a finding that a statute regulates an economic activity triggers a perhaps irrebuttable presumption of constitutionality).
  5. Lee, *supra* note 4, at 482 (noting that *Morrison* and *Lopez* provide "little guidance about how to determine whether a statute regulates economic activity").
  6. Cf. *id.* at 465 (noting that "the *Lopez* Court did not explain what would make an activity economic") (internal quotation omitted).
  7. *Lopez*, 514 U.S. at 561.
  8. *United States v. Morrison*, 529 U.S. 598, 613 (2000).
  9. See Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 CONST. COMMENT. 563, 567 (2002) (noting that the Court's conclusions about the noneconomic character of the activities at issue in *Lopez* and *Morrison* "rest on the judicial sense that there is really nothing to argue about").

but primarily from the *Lopez* Court's effort to distinguish prior precedent, an effort that was essential to obtaining a majority for its result. Prior to *Lopez*, the Court did not distinguish economic from noneconomic activity. The *Lopez* Court invented this dichotomy in order to distinguish an unrelieved decades-old line of precedent upholding all sorts of statutes as regulating activities having a substantial effect on interstate commerce.<sup>10</sup> The *Lopez* Court distinguished *all* of those precedents by characterizing them as regulating economic activity.<sup>11</sup> Thus, we know that all regulated activities that the Court has characterized as affecting interstate commerce constitute economic activities. Moreover, the *Lopez* Court examined some of this precedent and explained what (economic) activities those cases addressed, thereby giving the lower courts valuable additional guidance about how one characterizes activities regulated under federal statutes. This Article elucidates the guidance offered in *Lopez* about how to distinguish economic from noneconomic activity.

This Article, therefore, engages primarily in an analytical task. It does, however, take the analysis in a normative direction by asking what this guidance shows about the value and prospects of this new formalist distinction, which the dissenting Justices and many scholars have sharply criticized.

Part I lays the groundwork, explaining the role of the economic/noneconomic distinction in Commerce Clause jurisprudence. It then reviews scholarly concerns about the lack of guidance and the distinction's theoretical unsoundness.

Part II, the heart of the Article, parses the *Lopez* decision and the precedent it relies upon in creating the economic/noneconomic distinction, elucidating the guidance offered. It shows that the *Lopez* majority intended a rather capacious understanding of economic activity, and that this breadth played a key role in securing the concurrences of Justices Kennedy and O'Connor, which were essential to obtaining a majority in *Lopez*.<sup>12</sup> At the same time, the Court imposed an important

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10. See *Lopez*, 514 U.S. at 627 (Breyer, J., dissenting) (noting the Court's belief that the distinction between commercial and noncommercial transactions reconciles its holding with "earlier cases").

11. See *id.* at 559–60 (majority opinion) (stating that the cases evince a clear pattern of accepting regulation of *economic* activity affecting interstate commerce); *id.* at 580 (Kennedy, J., concurring) (clearly implying that all "earlier cases" involved commercial activities or actors).

12. Cf. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 695 (1995) (finding the commercial/noncommercial distinction essential to Kennedy and O'Connor's votes). I agree with Professor Jones on this point but go further to show that Kennedy and O'Connor accepted the majority opinion not only because the majority distinguished economic from noneconomic activities, but also because they read the majority's concept of economic activity as a

limit on the concept of economic activity by rejecting the relevance of the regulated activity's effects to the determination of whether the activity is economic.

Part III addresses this analysis's implications in both practical and theoretical terms. It critically examines the question of whether this guidance should substantially ameliorate concerns about arbitrariness and inconsistency. It also addresses the question of whether this guidance should allay critics' concerns about the distinction's theoretical soundness.

## I. THE ROLE OF THE ECONOMIC/NONECONOMIC DISTINCTION IN COMMERCE CLAUSE JURISPRUDENCE

This Part will provide the background needed to understand the economic/noneconomic distinction's role in Commerce Clause jurisprudence. It begins with some Commerce Clause history in order to introduce the problematic nature of formalist distinctions, which informs reactions to the economic/noneconomic distinction.<sup>13</sup> It then moves to a discussion of the role of the economic/noneconomic distinction in *Lopez* and its progeny. This Part concludes with a review of scholarly opinion and the dissents that they have echoed. This review demonstrates that scholars have agreed that the Court has provided no guidance to applying the economic/noneconomic distinction and that many of them have expressed more general concerns about the distinction's theoretical soundness, as have the dissenting Justices in *Lopez* and *Morrison*.

### A. Experience with Formalist Distinctions under the Commerce Clause

Scholars and judges view the economic/noneconomic distinction through the lens of prior experience with formalist distinctions.<sup>14</sup> For

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broad one preserving prior case law that a narrower concept of economic activity would call into question.

13. See generally Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000) (examining the roles of formalism and realism in the Commerce Clause jurisprudence from the Civil War to World War II).
14. See, e.g., *Lopez*, 514 U.S. at 627–28 (Breyer, J., dissenting) (criticizing the majority's adoption of an economic/noneconomic distinction as a return to the formalist distinctions it rejected in the 1940s); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 118 (2010) (describing the economic/noneconomic distinction as the latest in a series of "dubious formal distinctions"); Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2175–76 (2001) (endorsing Justice Souter's view that the economic/noneconomic distinction is like the old direct/indirect effects test); Merritt, *supra* note 12, at 679–81 (linking

that reason, some understanding of the history of Commerce Clause jurisprudence provides important background.

Article I section 8 of the Constitution enumerates the limited powers of Congress.<sup>15</sup> Clause 3 of that section empowers Congress to regulate commerce among the states and with foreign nations.<sup>16</sup> Because this Commerce Clause power is much broader than the other listed powers, a conclusion that a particular matter lies outside the Commerce Clause authority often implies that it lies beyond the federal government's power altogether.<sup>17</sup> Hence, the Commerce Clause's interpretation plays an important role in establishing American federalism's basic contours.

The early Commerce Clause jurisprudence gave the Commerce Clause a liberal construction. In *Gibbons v. Ogden*, the Supreme Court construed the authority to regulate interstate commerce as reaching all "commercial intercourse" touching more than one state.<sup>18</sup> The *Gibbons* Court suggested that Congress could regulate activities that affect other states, but not the "completely internal" commerce within a state.<sup>19</sup>

The rise of federal regulatory power associated with nineteenth century progressivism and later, the early New Deal, gave rise to jurisprudence employing formalist distinctions to cabin the Commerce Clause's reach. The Court during this period held that the Commerce Clause did not authorize federal regulation of "manufacturing" or "mining," even when these activities produced goods to be shipped between states.<sup>20</sup> It distinguished commerce in the narrow sense of trade or exchange from manufacturing and mining. Belying the formalism of

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the *Lopez* Court's reading of the substantial effects test to proximate cause in tort law and therefore a resurrection of the indirect effects test).

15. See U.S. CONST. art. I.
16. See *id.* art. I, § 8.
17. See Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 605 (2001) (noting that "the clear majority of federal legislation is enacted" under the Commerce Clause); cf. *United States v. Morrison*, 529 U.S. 598, 619–26 (2000) (examining the question of whether the 14th Amendment authorizes the Violence Against Women Act).
18. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824).
19. See *id.* at 194–95 (distinguishing between "completely internal" commerce within a state and "concerns" affecting the states generally).
20. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–13 (1895) (prohibiting use of the Sherman Antitrust Act to thwart a sugar-refining monopoly because the Commerce Clause did not authorize regulation of manufacturing); *Carter v. Carter Coal Co.*, 298 U.S. 238, 303–04 (1936) (invalidating regulation of coal miners' wages and hours because the Commerce Clause may not reach production).

the cases forbidding federal regulation of production, the Court sometimes upheld regulation of intrastate activities on the ground that they directly affected interstate commerce.<sup>21</sup> On the other hand, it rejected regulation of other intrastate activities that affected interstate commerce on the ground that they only did so indirectly.<sup>22</sup> Thus, the Court's decisions hinged on arbitrary formal distinctions between production and commerce and between direct and indirect effects. These formalist distinctions made the jurisprudence unpredictable and seemed out of keeping with a functional understanding of the national economy, which new technologies and forms of business organization had transformed in ways that made activities in one state closely related to activities in other states.

The Court also struggled during this period with the issue of whether the Commerce Clause only authorizes regulation for commercial purposes. It struck down early progressive legislation prohibiting child labor, which had a moral purpose of discouraging employment of young children.<sup>23</sup> On the other hand, it upheld regulation combatting the moral evils of gambling,<sup>24</sup> prostitution,<sup>25</sup> and kidnapping.<sup>26</sup>

After creating quite a bit of political controversy by striking down early New Deal legislation seeking to address the Great Depression,<sup>27</sup>

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21. *See, e.g.*, *Houston, East & West Texas R.R. Co. v. United States (The Shreveport Rate Cases)*, 234 U.S. 342 (1914) (upholding regulation of railroad rates for intrastate shipments).
  22. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 523–25, 542–51 (1932) (invalidating regulation of diseased chicken sales because regulated work conditions only affected commerce indirectly); *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 368–69 (1935) (striking down requirements for pensions for railroad workers for lack of a “direct and intimate” relationship with commerce).
  23. *See Hammer v. Dagenhart*, 247 U.S. 251, 271–72 (1918) (striking down a statute prohibiting interstate shipment of goods made by children), *overruled by United States v. Darby*, 312 U.S. 100, 116–17 (1941).
  24. *Champion v. Ames (Lottery Case)*, 188 U.S. 321 (1903).
  25. *Hoke v. United States*, 227 U.S. 308 (1913) (upholding the White Slave Traffic Act's prohibition on taking a woman across state lines for immoral purposes).
  26. *See, e.g.*, *Gooch v. United States*, 297 U.S. 124 (1936) (upholding a federal kidnapping statute).
  27. *See Robert L. Stern, The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 677 (1946) (discussing President Roosevelt's view of his reelection in 1936 as an endorsement of the regulatory program struck down by the Court and his proposal of a court packing plan to address the Court's obstruction); *see, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 309 (1936) (invalidating regulation of coal's price and miners' wages and hours as having only an “indirect” effect on commerce); *Schechter*

the Court began to retreat from the formalist approach of the late nineteenth and early twentieth centuries.<sup>28</sup> The Court accepted Congressional regulation of any activity substantially affecting interstate commerce whilst overruling the cases establishing the old formalist distinctions and prohibiting Commerce Clause regulation for moral purposes.<sup>29</sup> And in deciding whether regulated activity affected interstate commerce, it deferred to Congress.<sup>30</sup> The Court saw its role as deciding whether Congress could have had a rational basis for finding an effect on interstate commerce, even in cases where Congress had made no express findings about the relationship between regulated activities and commerce.<sup>31</sup> This deferential approach dovetailed with a contemporaneous retreat from *Lochner*-era substantive due process jurisprudence.<sup>32</sup> During the same period, the Court adopted a rational basis standard for judicial review of substantive due process claims.<sup>33</sup> The Court also judged this question of effects on interstate commerce

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*Poultry*, 295 U.S. at 548–49 (overruling a wage and hours law as having an indirect effect on commerce).

28. See Stern, *supra* note 27, at 679–81 (describing the *Jones & Laughlin* case as repudiating the direct/indirect effects test and the prohibition on federal regulation of manufacturing in favor of a practical “actual experience” test).
29. See, e.g., Wickard v. Filburn, 317 U.S. 111, 120, 123–25 (1942) (rejecting the indirect effects test and declaring the question of whether a statute regulates “production” immaterial); United States v. Darby, 312 U.S. 100, 116–17 (1941) (overruling *Hammer v. Dagenhart*); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38–40 (1937) (upholding the National Labor Relations Act even though it clearly regulates manufacturing).
30. See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264, 276 (1981) (describing the Court’s role as “narrow” because of this deference to Congress).
31. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (finding that Congress had a rational basis for finding that racial discrimination affects interstate commerce in spite of a lack of formal findings).
32. See United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) (explaining that a move to greater deference occurred simultaneously under the Commerce and Due Process clauses in 1937); cf. R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330, 344–74 (1935) (striking down obligations to pay railroad workers pensions on due process and Commerce Clause grounds).
33. *Lopez*, 514 U.S. at 606–07 (Souter, J., dissenting) (describing the articulation of a rational basis test as occurring quite quickly in the due process realm and a few years later in the Commerce Clause cases); Stern, *supra* note 27, at 678–80 (noting that the Court decided the *Jones & Laughlin* case just a few weeks after the Court’s “amazing” decision in *West Coast Hotel Co. v. Parrish* to overrule prior substantive due process jurisprudence).

by asking whether the activities regulated under a statute affect interstate commerce *in the aggregate*.<sup>34</sup> The Court repeatedly declared the triviality of a particular plaintiff's activity's effects on commerce irrelevant.<sup>35</sup> The Court, in effect, prohibited as-applied challenges to legislation under the Commerce Clause.<sup>36</sup>

The demise of formalist distinctions and the rise of rational basis review led to a consistent pattern of rejecting challenges to federal legislation on Commerce Clause grounds.<sup>37</sup> Although federalism concerns frequently led Congress to limit its own exercises of Commerce Clause power during this period, the era of judicial enforcement of limits on the scope of the most central enumerated power appeared to be over.<sup>38</sup>

*B. Lopez, Morrison, Raich, and the Economic/Noneconomic Distinction*

Against this backdrop, *United States v. Lopez* came as a surprise. In that case, the Supreme Court, for the first time in almost sixty years, struck down an act of Congress as beyond the Commerce Clause power. It subsequently struck down another act of Congress in *United States*

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34. See, e.g., *Perez v. United States*, 402 U.S. 146, 151–53 (1971) (describing the substantial effects test as the “class of activities” test); *Wickard*, 317 U.S. at 127–28 (declaring the triviality of the plaintiff's effect on commerce as irrelevant, when the effect of all regulated parties is “far from trivial”).

35. See, e.g., *Perez*, 402 U.S. at 153–55 (noting the Court's lack of power to excise trivial activities when a statute regulates a class of activities affecting interstate commerce and giving examples of cases based on that principle).

36. David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 884 (2004) (pointing out that the Court “disallows as-applied challenges” under the Commerce Clause).

37. Cooter & Siegel, *supra* note 14, at 130 (noting that the Court upheld every statute challenged under the Commerce Clause between 1937 and 1995).

38. See David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 1–2 (describing the lack of judicially enforceable limits on the Commerce Clause power as “the operating premise” of the Court's jurisprudence between 1937 and 1995); see, e.g., *California v. United States*, 438 U.S. 645, 663–70 (1978) (discussing Congressional policy of making sure that federal reclamation projects did not interfere with traditional state control over private water rights); *Manchester Envtl. Coal v. EPA*, 612 F.2d 56, 58 (2d Cir. 1979) (explaining that Congressional concerns about “federal intrusion into the traditionally local domain of land use control” led to Clean Air Act amendments restricting EPA's authority to demand land use restrictions protecting air quality); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

*v. Morrison*. Both cases relied on a new formalist distinction, this one between economic and noneconomic activities.

*Lopez* addresses a challenge to the GFSZA, which prohibited gun possession in or around schools, albeit with exceptions for school security guards and law enforcement officials.<sup>39</sup> The Court begins its opinion by affirming the doctrine of enumerated powers, that Congressional authority does have limits.<sup>40</sup> Even during the modern era of rational basis review, the Court had acknowledged, albeit in dicta, that the Commerce Clause authority has judicially enforceable limits.<sup>41</sup> The *Lopez* Court drew attention to this dicta, proclaiming that the Constitution requires a distinction between the truly national and truly local.<sup>42</sup>

The opinion carries forward the work of giving the Court some role in limiting congressional Commerce Clause authority by cabining the post-New Deal jurisprudence into three formal, albeit broad, categories.<sup>43</sup> The *Lopez* Court reaffirms much of the modern jurisprudence by recognizing that Congress may regulate “the channels of interstate commerce[,] . . . the instrumentalities of interstate commerce,” and “activities that substantially affect interstate commerce.”<sup>44</sup> By identifying three categories of activity that Congress may regulate, however, the Court implied that Congress cannot regulate activities outside these formal categories. Although all of these categories figure in the prior jurisprudence, and the typology comes from prior cases, the prior jurisprudence was considerably messier than this typology

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39. See 18 U.S.C. § 922(q)(2)(B)(ii), (v) (2012) (exempting paid security guards’ economic activity from the GFSZA through school contract and qualified licensee exemptions).

40. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (describing the enumerated powers doctrine as a first principle making the federal government’s powers few and defined).

41. See *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *rev’d on other grounds*, *Nat’l League of Cities v. Usery*, 426 U.S. 833, 842 (1976), *rev’d on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985) (acknowledging that the Commerce power has limits); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (acknowledging that the power cannot extend to effects so “remote” that the extension “create[s] a completely centralized government”).

42. See *Lopez*, 514 U.S. at 556–58.

43. See *id.* at 558 (identifying “three broad categories of activity that Congress may regulate under its commerce power”).

44. See *id.* at 558–59 (stating that the instrumentality part of the *Lopez* three-part framework also authorizes regulation to “protect . . . persons or things in interstate commerce”).

implies.<sup>45</sup> Accordingly, the cases anticipating the *Lopez* typology characterize these categories of activities as “problems” that the Commerce Clause reaches or as examples of the “plenary” nature of the power.<sup>46</sup> And these earlier opinions carefully avoid the implication that these categories describe the totality of the power.<sup>47</sup> Thus, the *Lopez* Court tried at once to accept the post-New Deal tradition and to limit it through the use of broad formal categories.<sup>48</sup>

The *Lopez* opinion quickly concludes that the GFSZA does not regulate Commerce’s “channels” or “instrumentalities.”<sup>49</sup> *Lopez* then confirms the impression that the Court has reconstructed the main examples of problems arising under the Commerce Clause into firm limits on the scope of the power by stating that if that the GFSZA is to be upheld, it must be as a regulation of activities substantially

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45. See Robert A. Shapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1203 (2003) (claiming that the late New Deal case law accepts not just activities, but also the commercial effects of legislation, and the commercial nature of regulatory targets as a basis for finding substantial effects on interstate commerce).
46. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981) (mentioning these categories to illustrate why the plenary nature of the authority makes the judicial role in reviewing legislation under the Commerce Clause limited); *Perez v. United States*, 402 U.S. 146, 150 (1971) (stating that the “Commerce Clause reaches . . . three categories of problems”).
47. See *Hodel*, 452 U.S. at 276 (using these categories to illustrate the principle that the Commerce Clause power has “no limitations other than are prescribed in the Constitution”) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)); *Perez*, 402 U.S. at 150 (stating that the Commerce Clause power reaches these three categories of problem “in the main”).
48. See *Lee*, *supra* note 4, at 465 (characterizing *Lopez*’s holding that Congress may only regulate three categories of activities as narrowing the Court’s interpretation of the Commerce Clause); Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 840 (2005) (identifying this approach’s purpose as grandfathering in old innovations, while creating authority to strike down new innovations).
49. See *Lopez*, 514 U.S. at 559.

affecting interstate commerce.<sup>50</sup> Thus, if a statute does not fit in the three formal categories listed, it lies beyond the power of Congress.<sup>51</sup>

This cabining, however, does not by itself threaten the GFSZA. For, as Justice Breyer's dissent explains, Congress might have had a rational basis for thinking that the activity regulated by the GFSZA—gun possession in school zones—substantially affects interstate commerce.<sup>52</sup> After all, gun possession in school zones may lead to violence interfering with educating students, thereby limiting their future productivity and negatively influencing interstate commerce.<sup>53</sup>

The Court, however, avoids this conclusion, partly through creation of a distinction between economic and noneconomic activity.<sup>54</sup> First, it characterizes its cases upholding regulation of activities affecting interstate commerce as exhibiting a pattern of recognizing the validity of legislation regulating “economic” activity substantially affecting interstate commerce.<sup>55</sup> Second, it declares that the GFSZA “has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms.”<sup>56</sup> Third, it points out that the provision outlawing gun possession is not “an essential part of a larger

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50. *See id.* A majority of the Justices recently reconfirmed this understanding of the categories' exclusivity by declaring that the Affordable Care Act's requirement that the uninsured purchase insurance could not be justified under the Commerce Clause because it does not regulate an existing activity (instead commanding a new activity). *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587–91, 2644 (2012) (finding the individual mandate beyond the Commerce Clause authority on that ground). This dictum did not determine the outcome of the case only because the Court ultimately upheld this “individual mandate” under the taxation authority. *See id.* at 2598, 2629.
51. *See Merrill, supra* note 48, at 839 (noting that “Justice Rehnquist cleverly transformed this description of prior precedent into a fixed menu of the permissible options available to Congress”).
52. *See Louis H. Pollak, Foreword*, 94 MICH. L. REV. 533, 547 (1995) (finding that the dissent “shows, beyond question” that Congress could rationally have found that gun possession near schools substantially affects interstate commerce).
53. *See Dorf, supra* note 14, at 2172 (characterizing this point as “obvious” and not disputed by the majority); *Merritt, supra* note 12, at 698–99 (characterizing this argument as the government's strongest argument).
54. *See Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 564 (1995) (noting that the “leading cases . . . do not rely on . . . [the] commercial-noncommercial distinction”).
55. *See Lopez*, 514 U.S. at 559 (1995) (emphasis added).
56. *Id.* at 561.

regulation of economic activity.”<sup>57</sup> The *Lopez* Court uses this third point to distinguish cases, such as *Wickard v. Filburn*, which authorize regulation of “activities that arise out of or are connected with a commercial transaction,” which in the aggregate substantially affect interstate commerce.<sup>58</sup> Thus, it suggests that it might not be willing to uphold regulation of noneconomic activities, even if those activities substantially affect interstate commerce.

The Court, however, says almost nothing about why precisely gun possession does not constitute an economic activity, apparently considering its conclusion self-evident. The only hint is the language quoted above linking “economic activity” to activities having something to do with commerce or “economic enterprise.” But the Court concedes that “depending on the level of generality, any activity can be looked upon as commercial.”<sup>59</sup>

*Lopez* also does not give a great deal of guidance about what precise function a finding that a law regulates noneconomic activity should play, beyond vaguely suggesting that regulation of noneconomic activity makes the law suspect. The Court does not expressly repudiate the substantial effects test, either generally or as applied to noneconomic activity. Instead, it rejects the chain of causation argument linking gun possession to a substantial effect on interstate commerce.<sup>60</sup> It does not claim that the argument that gun possession substantially affects interstate commerce is factually wrong, nor does it expressly repudiate the rational basis test, which would seem to require upholding the GFSZA.<sup>61</sup> Instead, the Court claims that accepting the chain of causation that the dissent articulates would lead to the demise of limits on the Commerce Clause power and authorize Congressional legislation in traditional areas of state sovereignty, such as crime, education, and family law.<sup>62</sup> As Judith Resnik has pointed out, the

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57. *Id.*

58. *Id.*

59. *Id.* at 565.

60. *See id.* at 564–67 (describing the dissent’s argument as “piling inference upon inference” and citing *Schechter* to support the idea that the Court’s “view of causation” must be limited).

61. *See* Dral & Phillips, *supra* note 17, at 616–17 (explaining that *Lopez* and *Morrison* do not disavow the rational basis test, but apply “standards that clearly are stricter than rational basis”); Ides, *supra* note 9, at 578–79 (suggesting that the actual impact of gun possession or gender-based crime on commerce may have been “irrelevant” to the Court’s decision); Merritt, *supra* note 12, at 682–83 (claiming that the “dissenters amply illustrated” that the “Gun-Free School Zones Act . . . easily pass[es] the weak rational basis test”).

62. *See Lopez*, 514 U.S. at 565–66 (stating that the government’s rationale implies that the Court could regulate family law or crime, and finding the dissent’s

Court seems animated by a view of categorical federalism—a view that separate judicially identifiable and enforceable state and federal categories of powers exist.<sup>63</sup> Thus, *Lopez* creates an impression that the Court will scrutinize the links between noneconomic activity and interstate commerce with a more jaundiced eye than the rational basis test would suggest, at least where the law regulates in an area of traditional state dominance.<sup>64</sup>

*Lopez* left judges and commentators in some doubt not only about the economic/noneconomic distinction's meaning, but also about the distinction's importance.<sup>65</sup> The Court also noted the lack of any findings

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suggestion that this rationale would limit federal power over family law or education “devoid of substance”).

63. See *id.* at 557 (warning against obliterating the distinction between what is national and what is local); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 619–20 (2001) (defining categorical federalism); see also Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 625–26 (1995) (describing the state sovereignty claims as the heart of *Lopez* and its antecedents).
64. See *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1251–52 (11th Cir. 2008) (suggesting that review of statutes regulating noneconomic activity “is significantly less deferential” under *Lopez* and *Morrison*); *United States v. Gregg*, 226 F.3d 253, 272 (3d Cir. 2000) (Weiss, J., dissenting) (reading *Morrison* as abandoning substantial deference under the rational basis test); Merritt, *supra* note 12, at 677 (claiming that *Lopez* reduces deference to Congress by creating a “toughened” rational basis standard); see also *United States v. Comstock*, 560 U.S. 126, 151–52 (2000) (Kennedy, J., concurring) (suggesting that rational basis review under the Commerce Clause is less deferential than rational basis review under the Due Process Clause); cf. Jack M. Balkin, 109 MICH. L. REV. 1, 42 (2010) (criticizing the *Lopez* Court's reliance on “traditional” areas of state regulation on the grounds that the federal government has long played a role in family law, education, and criminal law); Regan, *supra* note 54, at 566 (pointing out that every area of law is a traditional area of state concern “until the federal government takes an interest in it”).
65. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 203 (characterizing the scope and nature of the limitation on regulation of noneconomic activity as “unclear”); see, e.g., Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 829 (1995) (stating that “we know” that Rehnquist's opinion “does not make a distinction” based on economic activity); Pollak, *supra* note 52, at 551 (suggesting that the economic/noneconomic distinction would not “survive analysis” in future opinions and that Justices Kennedy and O'Connor probably see no merit in the distinction); H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 651–52 (1995) (predicting that *Lopez*'s “main effect” would likely be “nothing more than a renewed congressional interest” in making findings).

linking gun possession to interstate commerce.<sup>66</sup> Even though the Court acknowledged that its precedent does not require Congressional findings, some lower courts and commentators assumed that adequate findings would protect legislation from invalidation under *Lopez*.<sup>67</sup>

*Morrison* largely dispelled any doubts about the economic/noneconomic distinction's importance, even though its treatment of the statute before it did nothing to clarify the distinction's meaning and only marginally helped with gauging the distinction's effect. *Morrison* expressly declares the noneconomic nature of gun possession "central" to the *Lopez* Court's conclusion.<sup>68</sup> The *Morrison* Court struck down the Violence Against Women Act, which created a private cause of action for victims of gender-based crimes, while declaring, in conclusory language very similar to that of *Lopez*, that gender-based crime is not an economic activity "in any sense of the phrase."<sup>69</sup>

As in *Lopez*, the *Morrison* Court did not squarely claim that its finding of noneconomic activity doomed the statute before it. Indeed, the Court clarified the law somewhat by stating that it was not creating a categorical rule against aggregating noneconomic activities to find an effect on interstate commerce.<sup>70</sup> But the Court repeated its performance in *Lopez* by tacitly departing from robust rational basis review based on the inconsistency of rational basis review with categorical federalism, since the Violence Against Women Act regulated crime. Moreover, *Morrison* invalidated the Violence Against Women Act in spite of congressional findings linking gender-based crime to interstate commerce, reading *Lopez* as prohibiting following "attenuated" chains of causation.<sup>71</sup> Thus, *Morrison* casts doubt on the significance of

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66. See *Lopez*, 514 U.S. at 562–63.

67. See *id.* (noting that Congress is normally not required to make findings, but suggesting that they might be helpful); see, e.g., *Doe v. Hartz*, 970 F. Supp. 1375, 1418 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998) (doubting the significance of noneconomic activities and reading *Lopez* as hinging on the lack of findings); Judi L. Lemos, Comment, *The Violence Against Women Act of 1994: Connecting Gender-Motivated Violence to Interstate Commerce*, 21 SEATTLE U. L. REV. 1251, 1261 (1998) (reading *Lopez* as requiring Congressional findings).

68. *United States v. Morrison*, 529 U.S. 598, 610 (2000) ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.").

69. *Id.* at 613.

70. See *id.* (stating that "we need not adopt a categorical rule against aggregating the effects of any noneconomic activity," but noting that such aggregation would be without precedent).

71. See *id.* at 614 (acknowledging "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families" but

findings as a defense, suggesting that statutes regulating noneconomic activities traditionally regulated by states would receive stricter scrutiny than the rational basis test traditionally called for even when Congress documented apparently substantial effects on interstate commerce.<sup>72</sup>

In *Gonzalez v. Raich*<sup>73</sup>—which upheld federal regulation of the cultivation, possession, and use of marijuana for medical purposes—the Court suggested a definition of economic activity. It supported its conclusion that the Controlled Substances Act regulated “quintessentially economic” activities by pointing out that the dictionary defined economics as the “production, distribution, and consumption of commodities.”<sup>74</sup> This definition strongly suggests that cultivation and production of medical marijuana constitute economic activities, but seems to leave open the possibility that possession of marijuana, like possession of a gun, is not an economic activity. The *Raich* majority, however, seems to treat possession as an economic activity as well.<sup>75</sup>

Justice Scalia, however, in a concurring opinion, distinguished simple possession from manufacture, distribution, and possession with intent to distribute, characterizing simple possession as noneconomic.<sup>76</sup> He found simple possession’s noneconomic status “immaterial,” since Congress may regulate noneconomic activity as part of a larger scheme.<sup>77</sup> Scalia’s approach suggests that the actor’s intent may prove relevant to whether an activity qualifies as economic: possession with an intent to distribute constitutes an economic activity, whilst the same act without this intention does not.

A few commentators have suggested that *Raich* makes the economic activity concept irrelevant, because it defines economic activity

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finding the chain of causation linking gender-related crimes and interstate commerce “attenuated”).

72. See *Ides*, *supra* note 9, at 566 (finding that the “non-economic characterization” of the activity in *Morrison* “played a significant role in the Court’s determination that a substantial relationship with interstate commerce was lacking”); cf. Shapiro & Buzbee, *supra* note 45, at 1223 (describing *Lopez* and *Morrison* as establishing a “high, likely insuperable hurdle” for arguments that Congress may regulate noneconomic activity).

73. 545 U.S. 1 (2005).

74. *Id.* at 25.

75. See *id.* (characterizing CSA-regulated activities as economic without qualification).

76. See *id.* at 40.

77. See *id.* (Scalia, J., concurring).

expansively.<sup>78</sup> Even after *Raich* though, the lower courts have grappled with substantial questions about how to characterize regulated activities both in single subject statutes and broad schemes. And *Raich* itself divided the Court in part because the Justices differed about how to identify and characterize the regulated activities.<sup>79</sup>

Although this Article has used the term “economic activity” consistently for ease of exposition, the *Morrison* and *Lopez* decisions frequently use the term “commercial activity” as a synonym.<sup>80</sup> *Raich*, however, does not use those terms interchangeably. Indeed, it characterizes the activity at issue in *Wickard*—growing wheat for home consumption—as noncommercial even though the *Lopez* Court had characterized this same activity as “economic.”<sup>81</sup> Thus, *Raich* suggests that commercial activity constitutes a subset of economic activity, with the latter encompassing production, consumption, and distribution of commodities. Not much hinges on this distinction between economic and commercial activity at the moment, however, as *Lopez* and *Morrison* both suggest that regulation of economic activity (the broader of the two categories) still remains subject to deferential rational basis review.<sup>82</sup> Accordingly, this Article will continue to refer to the

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78. See, e.g., Merrill, *supra* note 48, at 844 (characterizing *Raich* as defining economic activity in such “sweepingly broad” terms as to confine *Morrison* and *Lopez* to their facts).

79. See *Raich*, 545 U.S. at 48–49 (O’Connor, J., dissenting) (focusing analysis only on the cultivation and possession of marijuana for medicinal use and questioning the characterization of these activities as economic).

80. See *United States v. McFarland*, 311 F.3d 376, 396 (5th Cir. 2002) (en banc) (noting that *Lopez* and *Morrison* “appear to use the terms” commercial and economic activity “synonymously”).

81. See *Raich*, 545 U.S. at 17–18 (discussing *Wickard*’s upholding of regulation of wheat grown for home consumption and concluding that *Wickard* establishes the validity of regulating noncommercial activity as part of a regulation of an interstate market); *United States v. Lopez*, 514 U.S. 549, 560 (1995) (stating that “*Wickard* . . . involved economic activity”).

82. This conclusion about the irrelevance of the distinction between commercial and economic activity is not as clearly true for the Supreme Court as it is for lower courts. Justice Rehnquist’s opinion for the Court in *Lopez* characterizes *Wickard* as an outlier, even though the Court purported to follow it. See *Lopez*, 514 U.S. at 560 (describing *Wickard* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity”). Having now declared *Wickard* a case about noncommercial (albeit economic) activity, the Court might further limit the Commerce Clause by overruling *Wickard* in a future case. It could conceivably distinguish *Wickard* from the other cases by recategorizing the remaining cases as about commercial activity. The lower courts, however, cannot overrule and must follow *Wickard*.

economic/noneconomic distinction, even though large subsets of economic activities are also commercial activities.

*C. Scholars' and Dissenting Justices' Reaction to the Economic/Noneconomic Distinction*

Scholars agree that the Court has not provided any useful guidance on how to administer its economic/noneconomic distinction. Robert Shapiro and William Buzbee accuse the Court of “keep[ing] the cards face down” by giving “no indication” of how courts should identify the activity to be evaluated for commercial characteristics under the Commerce Clause.<sup>83</sup> Lawrence Lessig characterizes *Lopez* as offering “nothing” to help distinguish commercial from noncommercial activity.<sup>84</sup> Similarly, Christy Dral and Jerry J. Phillips accuse the Court of creating “unworkable standards” partly because it has not “sufficiently defined” the “economic requirement.”<sup>85</sup>

*Lopez* and *Morrison* have defenders, but these defenders do not dispute the lack-of-guidance claim.<sup>86</sup> Instead, they defend these cases simply on the ground that the doctrine of enumerated powers requires *some* limits on the Commerce Clause authority, and the notion that regulation of economic activity fits the Commerce Clause seems sensible.<sup>87</sup>

One might think that *Raich* has provided a sufficient resolution of the guidance problem, as it does seem to define economic activity as the production, distribution, and consumption of commodities. But scholars have recognized a closely related problem in figuring out what

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83. See Shapiro & Buzbee, *supra* note 45, at 1227–28.

84. See Lessig, *supra* note 65, at 205.

85. See Dral & Phillips, *supra* note 17, at 616–18.

86. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 604–05 (2010); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

87. See, e.g., Grant S. Nelson & Robert J. Pushaw Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 5–6 (1999) (approving the *Lopez* Court’s enforcement of Article I constraints but faulting the Court for providing no guide to identifying economic activity); see also Merrill, *supra* note 48, at 842 (characterizing the “economic activity limitation” as having “some connection to the language of the Constitution” but still rejecting *Lopez*); cf. Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1253–54 (2003) (characterizing the economic/noneconomic distinction as “reviv[ing] a discredited approach” but explaining that some limits are necessary).

activity a statute regulates, which *Raich* does little to clarify.<sup>88</sup> For example, one might characterize the Endangered Species Act (ESA) as regulating a species or as regulating construction (or any other type of activity) that harm critters.<sup>89</sup> Viewed as a regulation of species, it is very hard to see the activities as economic. Under the Court's definition, construction would seem to be an economic activity, as it is a form of production. But what if a person shoots an endangered critter, is that an economic activity?<sup>90</sup> Furthermore, many statutes, such as the Controlled Substances Act analyzed in *Raich* and the ESA, regulate multiple activities, making identification of a single focus for analysis impossible without an arbitrary characterization decision.<sup>91</sup> But the larger point is that a definition of economic activities does not solve the problem of how to characterize activities under a statute to identify a focal point (or foci) for analysis of activities' economic nature.

The dissenting Justices in *Lopez* analogized the economic/noneconomic distinction to the older, formalist distinctions that the Court rejected in the 1930s.<sup>92</sup> They criticized the distinction for creating legal uncertainty and demanding arbitrary line drawing.<sup>93</sup>

Scholarly opinion, echoing the dissents, also generally finds the distinction normatively unsound.<sup>94</sup> Since the *Lopez* Court affirms that

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88. See Dral & Phillips, *supra* note 17, at 618 (explaining that the Court has not explained “how courts define ‘economic’ or characterize the activity at issue”); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 209 (1998) (discussing the “choice of activities problem”); Shapiro & Buzbee, *supra* note 45, at 1250 (finding identification of a constitutionally relevant single activity an unclear exercise).
89. See Nagle, *supra* note 88, at 178 (stating that some D.C. Circuit judges in a leading case focused on the relationship between the protected species and commerce while others looked at the relationship between activities harming species and commerce).
90. See *Gibbs v. Babbitt*, 214 F.3d 483, 492–94 (4th Cir. 2000) (holding that killing wolves to protect livestock constitutes an economic activity).
91. See Lessig, *supra* note 65, at 204 (illustrating this problem with examples).
92. See *United States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting) (likening the economic distinction to the distinction between direct and indirect effects); *id.* at 627–28 (Breyer, J., dissenting) (chiding the Court for making its decision hinge on a formalist distinction like those that outlawed statutes that have only indirect effects on commerce or regulate manufacturing).
93. See *id.* at 628–30 (Breyer, J., dissenting) (claiming that the majority's approach creates uncertainty and questioning the assumption that regulation of education must be regarded as regulating noneconomic activity).
94. See, e.g., Peter M. Shane, *Federalism's “Old Deal”: What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 220

it will uphold regulation of activities substantially affecting interstate commerce, it would seem that it must uphold regulation of *any* activities having such an effect, regardless of their nature.<sup>95</sup> Furthermore, regulation of economic as well as noneconomic activity can displace traditional state regulation.<sup>96</sup> So, it is not clear that the distinction tracks the Court's categorical federalism concerns.<sup>97</sup>

Shapiro and Buzbee articulate a broader thesis that illustrates the tenor, if not the exact specifics, of other critiques of the Court's new formalist distinction. This Article also draws on their work in Part III to answer the question of how the *Lopez* guidance might inform our understanding of the Commerce Clause.

Shapiro and Buzbee argue that the Rehnquist Court's focus on regulated activities unduly constricts the substantial-effects test. They suggest that instead of focusing solely on whether regulated activities substantially affect commerce, the Court should also consider whether a challenged law might benefit interstate commerce or otherwise affect commerce.<sup>98</sup> In general, they criticize *Lopez* and *Morrison* for a uni-dimensional approach to the assessment of a challenged law's relationship to commerce, focusing only on the law's targets.<sup>99</sup> Furthermore, they argue that even in identifying the regulatory target, the Court has

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(2000) (seeing no "plausible normative basis" for a distinction between commercial and noncommercial activity).

95. See *United States v. Morrison*, 529 U.S. 598, 657 (2000) (Breyer, J., dissenting) (questioning the idea that a noneconomic activity having the same effect as an economic activity on commerce should be treated differently); Dral & Phillips, *supra* note 17, at 618 (echoing Justice Breyer in contending that the Constitution authorizes regulation of all activities substantially affecting interstate commerce, whether economic or not); Pollak, *supra* note 52, at 547 (noting the irrelevance of the characterization of the activity as economic to the question of whether regulated activity has a substantial effect on interstate commerce); Shane, *supra* note 94, at 220.
96. See *Lopez*, 514 U.S. at 628–29 (Breyer, J., dissenting) (pointing out that education, a traditional area of state regulation, might be thought of as a commercial activity); *Morrison*, 529 U.S. at 658 (Breyer, J., dissenting) (discussing the lack of congruence between noneconomic activity and areas of traditional state regulation); Shane, *supra* note 94, at 221 (observing that federal regulation of commercial activity "interfer[es] every bit as much in local police power as would federal regulation of . . . non-commercial activity").
97. See Cooter & Siegel, *supra* note 14, at 116 (finding the "distinction between economic and noneconomic activity . . . mostly irrelevant to the problems of federalism"); Ides, *supra* note 9, 580–81 (finding that the Court's true concern is with protecting "truly local" matters from federal regulation, not with preventing federal regulation of "noneconomic" activity).
98. See Shapiro & Buzbee, *supra* note 45, at 1202.
99. See *id.* at 1201–02.

permitted itself to strike down laws based on a single characterization of the target, even when multiple characterizations are plausible and appropriate.<sup>100</sup>

Law and economics scholars find the economic/noneconomic distinction senseless. Reflecting economists' understanding of economics as the science of rational choice, they consider practically all activity economic.<sup>101</sup> Indeed, Alan Ides argues specifically that rape, the activity at the heart of *Morrison*, constitutes an economic activity.<sup>102</sup>

On the other hand, a number of scholars recognize that the Court faces a dilemma in this area. On the one hand, a return to formalism through an economic/noneconomic distinction seems unattractive. On the other hand, the Commerce Clause must have some limits, and it did not have any judicially enforceable limits in the decades immediately preceding *Lopez*.<sup>103</sup>

Donald Regan has therefore suggested a functional approach to finding limits—arguing that the Court should ask if there is some reason that the federal government must do what it does under a challenged statute rather than just leave the matter to the states.<sup>104</sup> Following up on this suggestion, several scholars have proposed functional economic theories accepting either state collective action problems or market failures as justifications for regulation under the Commerce Clause.<sup>105</sup> These approaches would limit federal authority by authorizing the Court to strike down laws enacted in areas where no need for federal regulation existed.

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100. *See id.* at 1228 (claiming that the power to choose one characterization of an activity unleashes the Court's discretion, while from 1937 to 1995 any plausible characterization would suffice).

101. *See, e.g.,* Ides, *supra* note 9, at 567 (referencing the rational-choice definition of economics, and stating that individuals maximize their self-interest and that "their activity in this regard is quintessentially economic").

102. *See id.* at 568 (characterizing rape as an economic activity because the rapist "maximizes his self-interest" and perceives rape's benefits as outweighing its likely cost to him).

103. *See* Dorf, *supra* note 14, at 2175 (characterizing the Court's concern about granting Congress "a general police power" as "an understandable worry"); *see also* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 43–44 (2010) (arguing that the Commerce Clause reaches only those problems that the states cannot handle on their own).

104. *See* Regan, *supra* note 54, at 555 (suggesting that courts adjudicating Commerce Clause cases should ask if there is "some reason" that the federal government must act instead of leaving the matter to the states).

105. *See* Neil S. Siegel, *Collective Action Federalism and its Discontents*, 91 TEX. L. REV. 1937, 1938 (2013) (finding increasing support among scholars for the idea that the Commerce Clause is best read as solving collective-action problems); Cooter & Siegel, *supra* note 14; Lee, *supra* note 4.

Thus, many scholars find the distinction senseless. And all agree that *Lopez* and *Morrison* provide no guidance about its meaning.

## II. *LOPEZ* AND *MORRISON*'S GUIDANCE ON ECONOMIC ACTIVITY

*Lopez* and *Morrison*, however, offer quite a few clues about how to apply the economic activity concept to statutes challenged under the Commerce Clause. These clues, however, appear in the midst of the *Lopez* Court's effort to distinguish prior precedent, in the *Lopez* majority's response to the dissent, and in *Morrison*'s structure, not in the Court's application of the economic activity concept to the facts of the cases before it.

### A. *Lopez*'s Broad Conception of Economic Activity

The *Lopez* Court employed the concept of "economic activity" as a device to distinguish prior precedent.<sup>106</sup> The Court characterized all prior substantial effects cases upholding statutes as economic activity cases. Hence, every case in which the Court upheld a statute under the substantial effects test constitutes a source of guidance for how to define economic activity. Furthermore, the *Lopez* Court addressed the principal cases that seemed to pose a challenge to its effort to characterize all prior precedent upholding statutes under the substantial effects test as regulating economic activity, thereby providing some guidance about activity characterization.

This guidance, however, does not establish what many scholars may have in mind when they lament the lack of guidance—a clear guide to choosing a single characterization of a single activity. Rather, the plethora of examples shows a liberal approach to characterization of activities for purposes of economic activity analysis.<sup>107</sup> In other words, it suggests that the Court will accept a plausible characterization of activities as economic within certain limits, even when another characterization casting them as noneconomic is equally plausible.

The Court made clear, for example, that it accepts regulation of arguably noncommercial conduct as a regulation of economic activity,

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106. See Merrill, *supra* note 48, at 840 (characterizing the employment of the economic activity concept as a "sleight of hand" transforming a synthesis of prior case law into a "normative limitation").

107. See Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzalez v. Raich*, 2005 SUP. CT. REV. 1, 25 (describing the Court's conception of commercial activity as "extremely capacious").

when the regulated actors are commercial.<sup>108</sup> Two of the most revealing cases in this regard, *Heart of Atlanta Motel v. United States*<sup>109</sup> and *Katzenbach v. McClung*,<sup>110</sup> involve challenges to the Civil Rights Act of 1964 (Civil Rights Act). As the dissent pointed out, these statutes might fairly be characterized as regulating an apparently noneconomic activity, racial discrimination.<sup>111</sup> We might think of racial discrimination as a social practice, rather than an economic activity. The *Lopez* Court, however, characterized the Civil Rights Act as regulating hotels and restaurants.<sup>112</sup> In other words, instead of characterizing the activities in terms of the proscribed conduct, the *Lopez* Court focused on the nature of the actors regulated. The Civil Rights Act, in this view, regulates the activities of running hotels and restaurants by insisting that people operating these public accommodations serve all customers regardless of race. And the Court adopted this actor-centered approach even though the civil rights cases recognize that the Civil Rights Act's purpose is to protect human dignity, which might be characterized as a noncommercial purpose.<sup>113</sup> This approach is consistent with earlier cases upholding regulation for moral purposes under the Commerce Clause. Thus, *Lopez* characterizes the civil rights cases as regulating economic activities based on the character of the actors regulated.

The *Lopez* Court employed a similar actor-centered approach to distinguish *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*,<sup>114</sup> which upheld the Surface Mining Control and Reclamation Act of 1977 (Mining Act).<sup>115</sup> One might characterize the Mining Act as

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108. See *United States v. Morrison*, 529 U.S. 598, 656–57 (2000) (Breyer, J., dissenting) (recognizing that the Court accepts regulation of activities by economic actors).

109. 379 U.S. 241 (1964).

110. 379 U.S. 294 (1964).

111. See *United States v. Lopez*, 514 U.S. 549, 628 (1995) (Breyer, J., dissenting) (suggesting that the Civil Rights Act regulates noncommercial activity because it forbids “race-based exclusion”); *Heart of Atlanta Motel*, 379 U.S. at 241–42 (describing the Civil Rights Act as forbidding racial discrimination in public accommodations); Regan, *supra* note 54, at 575 (noting that *Heart of Atlanta* shows that Congress “may guarantee access and equal treatment of patrons”).

112. See *Lopez*, 514 U.S. at 559 (characterizing *McClung* as about regulation of “restaurants using substantial interstate supplies” and *Heart of Atlanta Motel* as about regulation of hotels “catering to interstate guests”).

113. See, e.g., *Heart of Atlanta Motel*, 379 U.S. at 250 (describing the Civil Rights Act’s “fundamental object” as vindicating “personal dignity”).

114. 452 U.S. 264 (1981).

115. 30 U.S.C. § 1201 *et seq.* (1976 ed., Supp. III).

regulating the activity of pollution, defining the activity regulated in terms of the evil the statute seeks to address, something the *Lopez* dissent suggested.<sup>116</sup> Or one might characterize the regulated activity as the major activity demanded by the statute, land restoration. These characterizations in terms of evils or remedies might make the activities appear non-economic.<sup>117</sup> The *Lopez* Court, however, chose to characterize the Mining Act as regulating “intrastate coal mining,” which it characterized as an economic activity.<sup>118</sup> The Court chose an actor-centered approach over focusing on the regulated evil or required remedies.

The *Lopez* Court made it equally clear, however, that it accepts a statute not regulating legitimate economic actors as a regulation of economic activity, if it regulates transactions having an economic component. It did this by distinguishing *Perez v. United States*,<sup>119</sup> which upheld a federal prohibition on loan sharking. The *Lopez* Court might have characterized the actors extorting money through loan sharking as economic actors, or alternatively as thugs. The Court might have characterized the activity in terms of the violence or threats that the statute aimed to prevent, rendering it perhaps noneconomic, as the Breyer dissent suggested.<sup>120</sup> Instead, the Court focused on the regulated transactions rather than the regulated actors and viewed the transactions holistically by characterizing *Perez* as upholding the economic activity of “extortionate credit transactions.”<sup>121</sup> Thus, *Lopez* accepts economic transactions as economic activity and defines economic transactions broadly.

The Court also seems to accept production and consumption as economic activities, even when production and consumption do not lead to commercial transactions. The *Lopez* Court devoted most of its discussion of prior economic activity cases to distinguishing *Wickard v. Filburn*,<sup>122</sup> characterizing “production and consumption of home grown wheat” as an economic activity.<sup>123</sup> *Lopez’s* discussion of *Wickard* recites

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116. See *Lopez*, 514 U.S. at 629 (Breyer, J., dissenting) (associating *Hodel* with the regulation of pollution).

117. See generally Merrill, *supra* note 48, at 842 (suggesting that environmental statutes regulate pollution, a non-economic activity in his view).

118. *Lopez*, 514 U.S. at 559 (citing *Hodel*, 452 U.S. at 276–280).

119. 402 U.S. 146 (1971).

120. See *Lopez*, 514 U.S. at 628 (Breyer, J., dissenting) (noting that the use of force in *Perez* was not “commercial”).

121. See *Lopez*, 514 U.S. at 559 (citing *Perez*, 402 U.S. at 164).

122. 317 U.S. 111 (1942).

123. See *Lopez*, 514 U.S. at 559–61 (discussing *Wickard*).

*Wickard's* facts and quotes from the opinion without explaining why the material recited supports the characterization of “production and consumption of home grown wheat” as economic activity. The recited facts establish that some of this homegrown wheat was sold.<sup>124</sup> And the recited passage from the opinion shows that even the wheat consumed at home influenced the prices for wheat that the challenged statute sought to regulate.<sup>125</sup> The *Lopez* opinion seems to reflect some ambivalence about accepting home consumption as an economic activity (why else mention that some of it was sold) but in the end it accepted that consumption is an economic activity.<sup>126</sup>

At first glance, the Court's opinion does not seem to establish any guidance, in spite of the discussion of all of this precedent. After all, the Court does not discuss the basis for the choices it has made in characterizing the activities in prior cases.<sup>127</sup> Furthermore, the choices themselves are not consistent. In the civil rights and environmental cases, the Court employs an actor-centered approach, focusing on what sorts of entities the statutes regulate. In distinguishing *Perez* and *Wickard*, however, the Court does not focus on the actor so much as on the statutory prohibitions and the precise actions to which they apply.

By accepting all of the prior case law as a source of guidance, however, the Court accepted the idea that activities that might be considered economic under *any* of the conceptions implicit in prior cases constitutes economic activity. Statutes regulating economic transactions *or* economic actors, therefore, regulate economic activities.

The *Lopez* majority opinion signals the breadth of its conception of economic activities by characterizing the statute before it as having “*nothing to do with . . . any sort of economic enterprise, however broadly one might define [that] term*”.<sup>128</sup> It also states that gun possession in a school zone “is in *no sense* an economic activity.”<sup>129</sup> And the Court echoes these statements in *Morrison*, stating that gender-related crimes

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124. *See id.* at 560.

125. *See id.* (citing *Wickard*, 317 U.S. at 128).

126. *See Lopez*, 514 U.S. at 559–60 (describing *Wickard* as about consumption and production of homegrown wheat); *see also* U.S. v. Jeronimo–Bautista, 425 F.3d 1266, 1271–73 (10th Cir. 2005) (finding that production of child pornography constitutes an economic activity even when it is not intended for sale under *Wickard* and *Raich*).

127. *See Lopez*, 514 U.S. at 559–60 (setting out its characterization of prior cases' regulated activities in parentheses).

128. *Id.* at 561 (emphasis added).

129. *Id.* at 567 (emphasis added).

are not economic “*in any sense of the phrase.*”<sup>130</sup> These statements suggest that activity that is *in some sense* an economic activity should be treated as such, even if competing plausible characterizations suggest that it is not an economic activity.

Furthermore, this broad conception of economic activity, accepting, at a minimum, regulation of all economic actors *and* all economic transactions, was clearly essential to obtaining Justices Kennedy and O’Connor’s votes, which were needed to form a majority in *Lopez*. The two Justices concurred because the majority opinion’s broad approach to the characterization of activities as economic justified the result in *Lopez* without, in their view, violating *stare decisis*.<sup>131</sup>

Justices Kennedy and O’Connor expressed great concern for *stare decisis*.<sup>132</sup> And they identified that concern with the need to honor the “practical conception of the commerce power” found in cases beginning in the late New Deal.<sup>133</sup> They accepted the majority opinion because it employed a broad concept of economic activity, which the concurrence refers to as “the Court’s practical conception of commercial regulation.”<sup>134</sup> The majority opinion’s concept of economic activity, in their view, comports with *stare decisis*, because it is broad enough not to “call[] into question” *Heart of Atlanta Motel, Katzenbach, Perez*, and the rest of the modern precedent.<sup>135</sup> Thus, acceptance of all of the implicit conceptions of economic activity in prior cases was essential to their vote.

The concurrence finds the *Lopez* result acceptable only because under the GFSZA “*neither the actors nor their conduct has a commercial character.*”<sup>136</sup> Thus, a statute regulating *either* commercial actors or commercial conduct would regulate economic activity. This broad understanding of economic activity is essential to the concurrence’s finding *Lopez* consistent with prior precedent.

This reading of *Lopez* as embracing a liberal understanding of economic activity has the virtue of resolving gross contradictions within *Lopez*. *Lopez* tells us in one breath that gun possession in school zones “is in no sense an economic activity” no matter how “broadly one might

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130. *United States v. Morrison*, 529 U.S. 598, 613 (2000) (emphasis added).

131. *See Lopez*, 514 U.S. at 573–74 (Kennedy, J., concurring).

132. *See id.* at 574 (noting the legal system’s “immense stake in the stability of our Commerce Clause jurisprudence” and stating that “[s]tare decisis operates with great force” in this area).

133. *See id.* at 572.

134. *Id.* at 574.

135. *See id.* at 573–74.

136. *See id.* at 580 (emphasis added).

define” economic enterprise.<sup>137</sup> In the next, it acknowledges that “any activity can be looked upon as commercial.”<sup>138</sup> Well, if gun possession “can be looked upon as commercial,” then it is an economic activity in *some* sense. Thus, the statements in *Lopez* (and *Morrison*) characterizing the activities before the Court as not conceivably economic cannot be taken literally.<sup>139</sup> These statements must be read, instead, as signaling a very broad meaning of economic activity consistent with all prior precedent.<sup>140</sup> Otherwise, the statements that characterize the activities before the Court as “in no sense economic” flatly contradict the Court’s acknowledgment that all activities can, in some sense, be regarded as economic.

This reading also resolves a problem that Justice Breyer flagged—that the Court’s characterization of gun possession as a noneconomic activity cannot be reconciled with the civil rights cases.<sup>141</sup> Justice Breyer points out that the majority’s ruling, in effect, identifies the regulated activity as the prohibited conduct, gun possession.<sup>142</sup> If conduct prescription limits the available characterizations of regulated activities, the civil rights cases must be characterized as cases about the regulation of racial discrimination, which looks like a noneconomic activity, and *Lopez* becomes arguably inconsistent with the civil rights cases. Accepting a reading of *Lopez* that allows regulation of either economic actors *or* economic transactions, however, resolves this contradiction. Such a reading is consistent with the civil rights cases, since the activities regulated can fairly be described as the majority does (as regulation of hotels and restaurants) or in the terms suggested by the dissent (as regulation of racial discrimination). Since the GFSZA exempts gun possession by paid guards from its prohibition, the majority’s statements saying that the activities regulated under that Act were not economic in any sense can be read as signaling that the Act focused on noncommercial actors as well as noncommercial

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137. *See id.* at 561, 567 (stating that the Act “has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms” and that gun possession is “in no sense an economic activity”); *see also* *United States v. Morrison*, 529 U.S. 598, 613 (2000) (declaring that gender-motivated crimes are not economic activity “in any sense of the phrase”).

138. *See Lopez*, 514 U.S. at 565.

139. *See Ides*, *supra* note 9, at 567 (characterizing this claim as an “overstatement”).

140. *See Lopez*, 514 U.S. at 565 (rejecting Justice Breyer’s argument that schools can be looked upon as commercial because it “lacks . . . limits”).

141. *See id.* at 628 (stating that economic activity cannot be defined solely in terms of gun possession itself, because this conflicts with the civil rights cases).

142. *See id.*

transactions. In other words, the only way of reconciling *Lopez* with the civil rights cases (and for that matter the various statements in the majority opinion with each other) is to accept that a statute is valid if it regulates either economic activities *or* economic actors.

*B. Limits on the Economic Activity Concept*

The *Lopez* majority's response to Justice Breyer's dissent, however, does suggest some limits to the Court's conception of economic regulation. Specifically, this response suggests that an activity that has nothing to do with consumption, production, or sales cannot become economic simply because it has an effect, even a very substantial effect, on commerce.<sup>143</sup> Justice Breyer suggests that gun possession near schools can be thought of as a commercial activity, in part because the threat of gun violence can impede learning necessary to create a productive work force.<sup>144</sup> He also squarely argues that education can be thought of as an economic activity because it trains the nation's workforce.<sup>145</sup> The majority rejects looking at gun possession or education's effects on commerce in determining whether gun possession or education is commercial activity.<sup>146</sup> The majority's concession that "any activity can be looked upon as commercial" appears as part of its response to Justice Breyer's attempt to bring practical effects into the analysis of economic activity.<sup>147</sup> And its insistence that the concept of

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143. Compare *id.* at 559–61 (creating the economic/noneconomic distinction and declaring gun possession noneconomic) and *United States v. Morrison*, 529 U.S. 598, 613 (2000) (finding "[g]ender-motivated crime" noneconomic) with *Lopez*, 514 U.S. at 563–65 (analyzing the question of whether gun possession substantially affects interstate commerce); *Morrison*, 529 U.S. at 615–619 (rejecting the argument that the law should be upheld because the regulated activity substantially affects interstate commerce); see also *United States v. Gregg*, 226 F.3d 253, 270 (3rd Cir. 2000) (Weiss, J., dissenting) (reading *Morrison* and *Lopez* as requiring that the regulated "conduct itself" determine the nature of activities without reference to such "external factors as financial effects").
144. See *Lopez*, 514 U.S. at 620 (Breyer, J., dissenting) (explaining that "gun-related violence" in school zones is "a commercial . . . problem" because it disrupts education, which has a "direct economic link" to "industrial productivity").
145. See *id.* at 628–30 (Breyer, J., dissenting) (arguing that education can be viewed as a commercial activity because it trains a skilled workforce).
146. See *id.* at 565 (Rehnquist, J.) (rejecting using a chain of causation linking gun possession disrupting education to negative effects on commerce as a way of deciding whether education or child rearing constitute commercial activities).
147. See *id.* (complaining that Justice Breyer's chain of causation rationale "lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial").

commercial activity must have some limits is best read as an insistence that the concept of commercial or economic activity not include an assessment of economic effects.

The structure of the Court's *Morrison* opinion confirms economic effect's irrelevance to the characterization of activities as commercial or non-commercial. *Morrison* begins with a determination of whether regulated activity is economic.<sup>148</sup> It continues with a separate analysis of whether the activity substantially affects interstate commerce.<sup>149</sup> *Morrison's* summary of *Lopez* also separates the characterization of activity from the evaluation of effects on commerce.<sup>150</sup>

Furthermore, the role of a finding of noneconomic activity seems to involve biasing the analysis against finding a substantial effect. It would be circular to bring the question of whether a substantial effect exists into the determination of which activities are economic.<sup>151</sup> And the Supreme Court has, for the most part, avoided that approach.<sup>152</sup>

### III. IMPLICATIONS

This Part examines the implications of the existence of meaningful guidance in *Lopez*. Its first Section will look at the question of whether sources outside of the Supreme Court's *Lopez* opinion undermine this interpretation. If they do, then this guidance may not help much. The second Section looks at whether the existence of the guidance has any implications for criticisms of the distinction. The third Section offers some analysis of this guidance's capacity to resolve the uncertainties that the economic activities concept has spawned.

#### *A. Challenges to the Broad Interpretation*

The analysis presented above reconciles the Court's treatment of the GFSZA and its treatment of prior precedent by emphasizing that

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148. *Morrison*, 529 U.S. at 613 (finding “[g]ender-motivated crime” noneconomic).

149. *Id.* at 615–19 (rejecting the argument that the law should be upheld because the regulated activity substantially affects interstate commerce).

150. *Id.* at 610–12 (employing a four-part framework beginning with characterization and ending with effects to summarize *Lopez*); *cf. Lopez*, 514 U.S. at 559–61, 563–65 (following the structure described but returning to the activity characterization in the midst of analyzing effects to rebut Justice Breyer).

151. *Cf. Seinfeld*, *supra* note 87, at 1287 (portraying the substantial effects test as providing a functional view of federalism at war with a formalist distinction between economic and noneconomic activities).

152. *See Morrison*, 529 U.S. at 610–12 (treating *Lopez* as having a four-part structure beginning with its findings about economic activity and ending with an application of the substantial effects test).

the former regulated neither economic transactions nor economic actors whilst the latter regulated one or the other. Some have argued for a narrower conception of economic activities focused on economic transactions alone based on the premises that Lopez himself was an economic actor.<sup>153</sup> They read *Lopez* as demanding that conduct prescriptions delineate the definition of regulated activities.

The view that Lopez was an economic actor arises from the fact that somebody paid Lopez to deliver the gun to a gang member.<sup>154</sup> This fact, however, appears nowhere in the Supreme Court opinion, even though the opinion below does mention it.<sup>155</sup> So speculation about what this fact implies cannot supersede explicit statements approving of regulation of economic actors in the Supreme Court's *Lopez* opinion. There are several possible explanations for why neither the majority nor the dissent mentioned this fact.

Since the Court adjudicates the validity of any statute under the Commerce Clause with reference to the entire class of activities regulated, not with reference to the particular case before the Court, Lopez's particular situation might have seemed irrelevant. Absent some showing that a substantial portion of those carrying guns in school zones received payment for doing so, this fact would not matter.<sup>156</sup> Lopez's receipt of cash does raise an issue worthy of more attention: statutes regulating a richer mix of economic and noneconomic activities may pose great analytical challenges. But there seems to be no reason to assume that a substantial portion of those carrying guns illegally in school zones receive payment under a statute that legalizes gun

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153. See, e.g., Reply Brief for Petitioners at 6–7, *GDF Realty Investments, LTD. v. Norton*, 545 U.S. 1114 (2005) (No. 03-1619), *denying cert. to* 326 F.3d 622 (5th Cir. 2003), 2004 WL 2092631 (arguing that motive should be irrelevant to determining commercial activities since the violation in *Lopez* itself was carried out for economic reasons—the \$40 payment); Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 240 & n.162 (2001) (citing the payment to *Lopez* to narrow the conception of economic activity).

154. See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995) (stating that somebody paid Lopez \$40 to deliver a gun to a person who planned to use it in a gang war).

155. See *id.*

156. Cf. Jonathan H. Adler, *Is Morrison Dead?: Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 772 (2005) (arguing that Lopez was engaged in a commercial transaction so that an as-applied challenge to the GFSZA, if allowed, might have failed).

possession in school zones for the obvious recipients of payments (security guards and police).<sup>157</sup>

Another possibility is that the Court's conception of an economic transaction reaches only legitimate economic transactions, not criminal conduct. *Morrison* suggests as much by identifying the "noneconomic, criminal nature of the conduct at issue" in *Lopez* as central to its *Lopez* decision.<sup>158</sup> Yet, at the same time, the *Lopez* Court approved of *Perez*, which poses a challenge for the idea that only legitimate commercial activity counts, as it upheld federal regulation of extortion. Perhaps the best way of reconciling these apparently conflicting statements would be to assume that courts should treat regulation of organized crime as regulation of an economic activity, but not regulation of general crimes that sometimes have economic motives.

In any event, speculation about the significance of a fact omitted from a Supreme Court opinion cannot defeat its rationale. Nor, for that matter, can this fact undermine all of the previous precedent that *Lopez* left in place, which now rests on a broad concept of economic activity. Accordingly, the unacknowledged facts surrounding *Lopez*'s arrest do not pose a serious challenge to the broad definition of economic activity offered above. They do, however, reveal that this guidance certainly does not resolve all issues of how to apply the economic activity concept to federal criminal statutes.<sup>159</sup>

Subsequent Supreme Court cases likewise do not fundamentally challenge the guidance derived above from *Lopez*, but do raise questions about how well the guidance functions in narrowing the realm of uncertainty emanating from the economic activity concept. The Supreme Court's decision in *Solid Waste Agency of North Cook County v. Army Corps of Engineers (SWANCC)*<sup>160</sup> made statements in some tension with the broad concept outlined above, but did so in dicta that cannot displace *Lopez*'s rationale or prior precedent's implications. In *SWANCC*, the Court held that the terms establishing the Clean Water Act's jurisdictional limits do not authorize federal jurisdiction over sand

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157. See 18 U.S.C. § 922(q)(2)(B)(ii), (v)–(vi) (2012) (exempting people under contract with a school, law enforcement personnel, and qualified licensees generally).

158. *United States v. Morrison*, 529 U.S. 598, 610 (2000) (emphasis added).

159. See, e.g., *U.S. v. McCoy*, 323 F.3d 1114, 1122, 1138 (9th Cir. 2003) (the majority characterizing the regulation of child pornography as noneconomic because it focused on the defendant's conduct and the dissent characterizing it as economic because it focused on the class of activities regulated); *United States v. McFarland*, 311 F.3d 376, 395 (5th Cir. 2002) (en banc) (disagreeing with some "sister circuits" as to whether robbery is an economic activity).

160. 531 U.S. 159 (2001).

and gravel pits providing habitat for migratory birds.<sup>161</sup> The case resolved an ordinary statutory issue, but did not reach the appellant's Commerce Clause claim.<sup>162</sup> The Court, however, made statements that raise questions about its willingness to follow its precedent. The *SWANCC* Court acknowledged the characterization problem that *Lopez* created, stating that if it were to resolve the Commerce Clause claim it would have to figure out how to describe the relevant regulated activity.<sup>163</sup> Commenting on the government's argument that the municipal landfill that the EPA regulated in order to protect migratory bird habitat is "plainly of a commercial nature," the Court responded that this characterization "is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."<sup>164</sup> This response's focus on a single statutory provision suggests a formalism quite at odds with the *Lopez* Court's treatment of precedent, which the *Lopez* concurrence relied upon in finding the majority opinion consistent with a broad functional approach to the Commerce Clause. And the suggestion that an appropriate analysis under the substantial effects test might focus on the waters to be protected, rather than on the activities to be regulated, seems completely at odds with the *Lopez* Court's approach to cabining the Commerce Clause by formally restricting it to three defined categories of cases.<sup>165</sup> The *Lopez* decision, for all of its myriad inconsistencies, clearly treats the human activities that a statute modifies or restricts as the regulated activity, not the resources that it might protect.

Because this statement is dictum it cannot supersede *Lopez's* call to focus on regulated activity or its endorsement of a broad approach to characterizing that activity. But it raises troubling questions, to be addressed below, about whether *Lopez's* guidance will channel future decisions.<sup>166</sup>

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161. *See id.* at 162, 174 (explaining the statutory issue as about jurisdiction over a sand and gravel pit and concluding that the Migratory Bird Rule as applied to that site exceeds the Army Corps of Engineer's statutory authority under the Clean Water Act).

162. *See id.* at 162 (stating that the Court "do[es] not reach" the Commerce Clause claim).

163. *See id.* at 173.

164. *Id.*

165. *Cf. Merrill, supra* note 48, at 841–42 (explaining that *Lopez's* summary of *Wickard* seems to conflate economic effect with economic activity, but that the Court ultimately focused on economic activity, not economic effect).

166. *Cf. id.* at 842–43 (assuming that the Clean Water Act regulates migratory birds). The Clean Water Act, of course, does not issue instructions to migratory birds. Instead, it regulates human activities that harm migratory bird habitat. The fact that a very thoughtful scholar and the Supreme Court, albeit in ill-considered dicta, suggested a characterization of economic activity

*B. The Guidance's Theoretical Significance*

The guidance found in *Lopez* suggests some qualification of the unidimensional federalism critique that Shapiro and Buzbee offer. In particular, *Lopez* takes a multidimensional approach to the characterization of activities as economic or noneconomic. The best reading of *Lopez* does not give courts license to reject a regulation of an economic actor based on the fact that the statutory prescription may regulate a noncommercial aspect of the actor's conduct. Conversely, *Lopez* does not permit courts to reject regulation restricting commercial transactions engaged in by noncommercial actors. *Lopez* is, at least to that extent, multidimensional.

Some other pieces of Shapiro and Buzbee's critique remain valid, however, but these problems may prove less important than Shapiro and Buzbee think. For example, they criticize the Court's sole focus on regulatory targets, which neglects effects on regulatory beneficiaries as a basis for Commerce Clause validity. But one can convert effects on regulatory targets into Commerce Clause arguments based on regulatory benefits fairly easily.<sup>167</sup> It remains important to recognize this, because courts and lawyers have tripped themselves up over this matter.

Take the ESA. Some courts and lawyers have attempted to defend the ESA's constitutionality by examining the benefits that the ESA generates.<sup>168</sup> Framed in terms of statutory benefits, this argument about meeting the substantial effects test seems like an impermissible argument under *Lopez*. It may well be that saving endangered plants and animals (and their habitats) benefits interstate commerce by conserving genetic material that might prove useful in making products, promoting tourism, or providing ecosystem services to the economy. But why should that matter under *Lopez*'s substantial effects test? The ESA does not regulate the conduct of plants and animals; it protects them. So this argument about a statute's benefits seems like an argument that seeks to undo the cabining that *Lopez* put in place in order to put some limits on the power of the federal government under the Commerce Clause. This simply is not an argument about *regulated*

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demonstrably at odds with *Lopez* suggests that lower courts will likewise find it difficult to distinguish regulated activities from a regulation's beneficiaries.

167. *See, e.g.*, *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1250 (11th Cir. 2008) (finding the question of whether a law eliminating tort liability for rental car companies regulates commercial leasing or state torts insignificant, as in either case it relieves car rental companies of burdens).

168. *See, e.g.*, *People for the Ethical Treatment of Property Owners (PETPO) v. U.S. Fish and Wildlife Serv.*, 57 F. Supp. 3d 1337, 1344 (2014) (addressing a government argument that a rule affects interstate commerce, not framed in terms of regulated activities affecting interstate commerce).

*activities'* effects on commerce; it is an argument about a *statute's* effects on commerce. Accordingly, several judges have rejected such arguments.<sup>169</sup>

Yet, lawyers can make functionally identical arguments by framing them in terms of the activities regulated. The ESA regulates economic actors (like mining companies, timber companies, and farming) when their activities kill endangered species (usually by harming their habitat). These activities can cause species to perish, thereby harming commerce by destroying the useful genetic material, tourism, and ecosystem services that stem from the existence of the protected creatures and their habitats. Hence, the argument would continue, the ESA constitutes a permissible regulation of economic activity, which has a substantial effect on commerce. This argument that the Act regulates *activities* affecting interstate commerce, while functionally identical to the argument that the *Act* affects interstate commerce by protecting species, formally lies comfortably within the substantial effects test as defined by *Lopez*.<sup>170</sup>

This type of reframing does not evade *Lopez*. The *Lopez* Court itself identified its articulation of a substantial effects test focused on regulated activities as a way of implementing prior decisions permitting regulation “where ‘a general regulatory statute bears a substantial relation to commerce.’”<sup>171</sup>

The unidimensional federalism critique flags the possibility that *Lopez* unleashes judicial discretion to invalidate Acts of Congress based on manipulation of formal categories. The comments made above show that *Lopez* requires a great deal of multidimensionality, thereby formally at least preventing many of the unfortunate outcomes that concern Shapiro and Buzbee. The question of whether judges will follow this guidance and judges and other lawyers will skillfully navigate the formal requirements receives more attention below. The unidimensional federalism thesis may well identify traps for the unwary, even if it does not identify strong doctrinal impediments to reaching appropriate results.

Although this analysis shows that the *Lopez* guidance does have implications for Commerce Clause theory, I do not want to claim too much on the normative front. The guidance does not address some more

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169. See, e.g., *id.* at 1344 (rejecting an argument that a rule under the ESA has a substantial effect on commerce, because the argument does not focus on regulated activities).

170. Cf. *id.* at 1345 (converting an argument framed in terms of the protected prairie dog's effect on interstate commerce into an argument about regulated activities' effects on interstate commerce, but rejecting the argument as too “tenuous”).

171. See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (emphasis added by the *Lopez* Court) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).

fundamental arguments raised by the dissenters and their supporting commentators. Even if one could show that this guidance eliminates all substantial ambiguity about application of the economic/noneconomic distinction (which is a stretch to say the least), this would not significantly improve its formal fit with the substantial effects test. That is, if the test accepts Congressional regulation of activities substantially affecting interstate commerce, why should it matter that a set of regulated activities having that effect are noneconomic? Even an airtight economic/noneconomic distinction does not answer that question.

Nor does the guidance answer the question of whether or not the economic/noneconomic distinction makes more or less sense than some of the functionalist theories put forward as a way of cabining the Commerce Clause authority, although it may color some aspects of that question. The functional theories call for a judicial judgment about whether a federal role in a particular matter is needed based on collective action or market failure. This judgment entails a rather ambitious judicial role in making more or less political judgments. The debate about functionalism has focused on the constitutional justification for the inquiry and its soundness in principle. So far, scholars have paid little attention to the question of whether a new functional approach will reduce the amount of uncertainty that the economic/noneconomic distinction has spawned. The existence of some guidance on the concept of economic activity should play a role in assessing that question.

Similarly, the existence of this guidance might influence the ongoing debate about whether the federal courts should define the limits of the Commerce Clause's reach or instead leave that task to the political process.<sup>172</sup> If uncertainty persists in spite of the guidance, that would strengthen the case for judicial modesty. Conversely, if the guidance makes uncertainty negligible that would strengthen the case for allowing some continuation of the new judicial activism in this realm.

### *C. Resolving Uncertainty*

This Section addresses the question of whether *Lopez's* guidance substantially limits the uncertainty that the distinction has spawned. To start on a note of optimism, *Lopez* has not sparked a wave of lower court rulings striking down statutes because of a failure to appreciate the breadth of *Lopez's* conception of economic activity.<sup>173</sup> This might

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172. See Strauss, *supra* note 38, at 3–4 (pointing out that the Court has leapt from the premise that the Constitution imposes limits to the conclusion that the courts must enforce them in spite of the failure of previous efforts to do so in the Commerce Clause context).

173. See Brannon P. Denning, *United States v. Lopez (1995) and its Progeny: About-Face, Detour, or Misstep?*, in BITTKER ON REGULATION INTERSTATE AND FOREIGN COMMERCE § 5.04(I) (2nd ed., Aspen Publishers 2016) (stating that

suggest that in practice the lower courts and the lawyers who argue cases before them have assimilated *Lopez's* guidance and employed a sufficiently broad conception of commercial activity to justify upholding a lot of statutes. If so, this Article may strengthen the trend by making the guidance's existence and content explicit.

According to the Fifth Circuit, a number of federal courts have recognized the breadth of the economic activity concept articulated in *Lopez*.<sup>174</sup> The case mentioning this pattern went on to uphold a federal statute requiring reasonable accommodation of the disabled in the sale or lease of housing based on both the economic character of the regulated transactions and the economic character of the actors before the Court, in keeping with the *Lopez* guidance.<sup>175</sup>

The lower court rulings suggest some learning about *Lopez's* guidance over time. For example, shortly after the Supreme Court decided *Lopez*, the D.C. Circuit upheld the ESA's application to the Delhi Sands Flower-Loving Fly in a divided opinion reflecting confusion about the application of the economic activity concept.<sup>176</sup> Judge Wald suggested that the ESA regulates the activity of taking species, a non-economic activity.<sup>177</sup> She nevertheless concluded that the statute passes muster because it has a substantial effect on interstate commerce.<sup>178</sup> In a concurring opinion, Judge Henderson characterized the activity regulated as the commercial development that the statute restricts, a commercial activity.<sup>179</sup> Judge Sentelle, in dissent, characterized the activity regulated more narrowly, as the "killing of flies," which he viewed as noncommercial.<sup>180</sup> This confusion suggests that *Lopez's* treatment of

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"lower courts have not invalidated [federal] statutes *en masse*" in the wake of *Lopez* and *Morrison*).

174. *See* *Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 208–09 (5th Cir. 2000) (referring to other courts' "broad reading" of the economic activity concept and giving numerous examples).

175. *See id.* at 206 (describing the Act as regulating the purchase, sale, or rental of housing and identifying these transactions as "commercial" and the plaintiff as a "commercial actor").

176. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

177. *See id.* at 1049 (characterizing the activity regulated as the taking of species and suggesting that this activity is not commercial).

178. *See id.* at 1052 (finding that the ESA affects interstate commerce by protecting biodiversity and related commerce by regulating a byproduct of interstate competition).

179. *See id.* at 1058.

180. *See id.* at 1061, 1064 (characterizing the question before the Court as whether Congress may regulate the "killing of flies" and finding that activity noncommercial).

economic activity initially confounded the judges sitting on the second most powerful court in the country.

But when the D.C. Circuit revisited the question of the ESA's constitutionality in a post-*Morrison* case challenging protection of the arroyo toad, it showed considerably less confusion about identifying regulated activities. The court unanimously adopted the views of Judge Henderson, characterized the case before it as about regulation of a "commercial housing development," the activity threatening the arroyo toad.<sup>181</sup> It specifically rejected the idea that the ESA regulates the arroyo toad, commenting that the "ESA does not purport to tell toads what they may or may not do."<sup>182</sup>

More importantly than the particular result reached, the court embraced this economic activity characterization based on at least some appreciation of the guidance *Lopez* offered. In particular, it characterized *Lopez* and *Morrison* as about "purely" noneconomic activity.<sup>183</sup> And it quoted language from *Morrison* emphasizing that regulation of commercial actors or commercial transactions count as economic activities.<sup>184</sup> By adopting a concept of "pure" noneconomic activity, the D.C. Circuit recognized that *Lopez* does not permit the manipulation of the economic activity category based on the existence of some noneconomic regulatory targets or some ways of characterizing activities sensibly viewed as economic as noneconomic. Indeed, the court notes that the ESA seeks "*in part*" to regulate "economic growth and development," thereby suggesting that the existence of noneconomic regulatory targets would not justify striking down a statute when it also regulates a substantial amount of economic activity.<sup>185</sup>

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181. *See Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1069, 1080 (D.C. Cir. 2003) (majority and concurring opinions) (identifying the "regulated activity" as "a 202 acre commercial housing development").

182. *Id.* at 1072.

183. *See id.*

184. *See id.* (noting that "*Morrison* describes *Lopez* as a case in which 'neither the actors nor their conduct ha[d] a commercial character'" (quoting *United States v. Morrison*, 529 U.S. 598, 611 (1999)) (brackets in original)).

185. *See id.* at 1072–73 (quoting 16 U.S.C. § 1531(a)(1)); *cf.* *U.S. v. Gilbert*, 677 F.3d 613, 624–25 (4th Cir. 2012) (finding that a federal prohibition on animal fighting regulates an economic activity in light of evidence showing that such fights often are staged to encourage betting, admission fees, and payments from those providing animals); *San Luis Water Auth. v. Salazar*, 638 F.3d 1163, 1176 (9th Cir. 2011) (recognizing that the ESA "implicates economic concerns" because it prevents "overutilization" of species for commercial purposes and prohibits commerce in protected species); *Alabama-Tombigbee Rivers Coal v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007) (mentioning the ESA's prohibition on commerce in endangered species); *see also U.S. v. Rodia*, 194 F.3d 465, 480 (3d Cir. 1999) (upholding prohibition of

Similarly, the Fourth Circuit has recognized that the economic activity concept “must be understood in broad terms.”<sup>186</sup> Accordingly, ranchers’ wolf-killing primarily to protect “commercially valuable livestock and crops” constitutes an economic activity for the purpose of analyzing the ESA’s constitutionality under the Commerce Clause as applied to restrictions protecting red wolves.<sup>187</sup>

Some courts have explicitly recognized the *limits* found in *Lopez*’s guidance as well. In analyzing the difficult question of whether robbery constitutes an economic activity under *Lopez*, the Fifth Circuit recognized that the fact that robbery has an economic effect cannot be dispositive.<sup>188</sup> In doing so, it explicitly recognized that *Lopez* (and *Morrison*) do not allow consideration of effects to enter into activity characterization.<sup>189</sup>

Some courts, however, show little understanding of the *Lopez* guidance. Thus, the Fifth Circuit, in a disjointed opinion, declined to consider the commercial nature of the activities taking species in seeking to implement the economic/noneconomic distinction.<sup>190</sup> Its opinion reveals quite a bit of confusion regarding how to apply the *Lopez* guidance.<sup>191</sup>

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possession of child pornography, even though some possessors engage in non-commercial activity rather than purchase or sell child pornography).

186. *See Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000).
187. *See id.* at 492 (characterizing taking red wolves as economic activity because a desire to protect commercially valuable assets motivates the killings).
188. *United States v. McFarland*, 311 F.3d 376, 396–97 (5th Cir. 2002) (en banc) (concluding that robbery is not a commercial activity even though it has an “economic effect”).
189. *See id.* at 397 (recognizing that considering economic effects in deciding whether robbery is an economic activity would support “making a federal offense of any crime,” which is inconsistent with *Lopez* and *Morrison*); *cf. United States v. Gray*, 260 F.3d 1267, 1274 (11th Cir. 2001) (holding that robbery constitutes an economic activity because it involuntarily transfers assets).
190. *See GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 633–36 (5th Cir. 2003) (stating that application of the ESA to a commercial development should not be considered an economic activity).
191. The Fifth Circuit seemed to recognize that either commercial actors or commercial transactions would justify a classification of an activity as economic. *See id.* at 634 (citing indirectly the statements in *Lopez* and *Morrison* that neither the actors nor the transactions in those cases were commercial). Yet, the *GDF Realty* Court took a senseless formalistic approach to applying that teaching to the facts before it, declaring that the ESA does not “directly” regulate “commercial development.” *See id.* It thus attempted to distinguish regulated takings from commercial activity. Such a division is untenable and completely inconsistent with *Lopez*’s treatment of prior precedent. The litigation in *GDF Realty* stemmed from a denial of a

Furthermore, in some cases, the *Lopez* guidance, even as supplemented by *Raich*, fails to resolve critical ambiguities in the concept of economic activities. For example, courts adjudicating the validity of the Child Support Recovery Act (CSRA) have tacitly followed the liberal *Lopez* guidance by viewing it as a regulation of a financial obligation, even though it could be viewed as a regulation of parenting—a non-economic activity under *Lopez* and *Morrison*.<sup>192</sup> One might think it obvious that payment of money constitutes a financial transaction and, therefore, an economic activity under *Lopez*.<sup>193</sup> But child support constitutes a transfer of wealth, not squarely fitting the conception that *Raich* suggested.<sup>194</sup> This ambiguity may help explain why many courts have upheld the CSRA as a regulation of an instrumentality of commerce with little reliance on the substantial effects test.<sup>195</sup>

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permit for commercial development. *See id.* at 626–627 (discussing the history of permit denials). The Fish and Wildlife Service refused to issue permits because the commercial development would take a protected species. *Id.* Hence, the take and the commercial development were one and the same. Furthermore, it is impossible to reconcile this formalism with *Lopez*'s treatment of the civil rights cases and *Perez*. The *GDF Realty* Court also struggled with the difference between activity characterization and the evaluation of effects on commerce. Its opinion meanders between the two issues. *Id.* at 630–36 (noting several times the centrality of deciding whether activity is commercial, but discussing effects on commerce repeatedly before finally deciding that the activity before it is not commercial). And it treats the ESA as not regulating commercial activity, because it only has the “effect” of prohibiting commercial development in some circumstances. *See id.* at 634. But when a statute prohibits an activity, it regulates it.

192. *See, e.g.,* United States v. Faasse, 265 F.3d 475, 489–91 (6th Cir. 2001) (en banc) (stating that the court could find that the CSRA validly regulates “financial obligations” having a substantial effect on commerce).

193. *Cf.* Kathleen A. Burdette, Comment, *Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez*, 144 U. PA. L. REV. 1469, 1506 (1996) (suggesting that child support should be viewed as a commercial transaction because it involves “an exchange of value in the form of money”).

194. *Cf. Faasse*, 265 F.3d at 496 (Batchelder, J., dissenting) (characterizing a child support order as mandating a “transfer of wealth” and therefore suggesting that a child support debt is not “commercial in nature”); *but see* United States v. Gray, 260 F.3d 1267, 1274 (11th Cir. 2001) (holding that robbery constitutes an economic activity because it involuntarily transfers assets).

195. *See, e.g.,* U.S. v. King, 276 F.3d 109, 113 (2d Cir. 2002) (holding that the CSRA regulates a thing in commerce within *Lopez*'s category two); *Faasse*, 265 F.3d at 489 (majority opinion) (same).

A circuit split has developed on the question of whether robbery, regulated under the Hobbs Act, constitutes an economic activity, a legitimate question unresolved by the *Lopez* guidance.<sup>196</sup> A federal statute shielding rental car companies from state tort liability has not generated a circuit split, but perhaps it should have. The appellate courts have usually treated this law as regulating the commercial activity of renting out cars.<sup>197</sup> But it is not obvious that this view is correct. This law imposes no obligations on rental car companies, so it may be error to suggest that it regulates their activities. The law *deregulates* the activity of renting cars by shielding car rental companies from tort liability.<sup>198</sup> Accordingly, some judges have viewed this statute as regulating the activity of suing in tort.<sup>199</sup> The judges viewing it that way have found that the statute regulates noneconomic activity.<sup>200</sup> A tort suit itself does not constitute consumption, production, or distribution of commodities under *Raich*. So, *Lopez's* guidance, while helpful, hardly resolves all important ambiguities.<sup>201</sup>

Even in cases where the *Lopez* guidance cannot resolve all ambiguities it can contribute something to their resolution. *Raich* may not rule out an argument that a tort suit, in which somebody pays a lawyer to seek a monetary award, constitutes an economic activity, when interpreted in light of *Lopez's* breadth.<sup>202</sup> The *Lopez* concurrence's endorsement of a broad functional approach to interpreting the economic activity concept and its preservation of prior precedent shows that the

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196. See *United States v. McFarland*, 311 F.3d 376, 395 (5th Cir. 2002) (en banc) (suggesting that it agrees with the 7th Circuit, but disagrees with the 10th and 11th Circuits on this question).

197. See, e.g., *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1252 (11th Cir. 2008) (upholding the shielding of rental car companies from tort liability because the shield regulates the commercial activity of vehicle leasing); *Graham v. Dunkley*, 852 N.Y.S.2d 169, 174 (A.D. 2 Dept. 2008) (same).

198. Cf. *Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587–91, 2644 (2012) (dicta of five Justices) (stating that the Commerce Clause does not authorize Congress to compel citizens to engage in required activities).

199. *Graham v. Dunkley*, 827 N.Y.S.2d 513, 524 (N.Y. Sup. Ct. 2006), *rev'd*, 852 N.Y.S.2d 169 (N.Y. App. Div. 2008) (characterizing the statute as regulating “the pursuit of justice”).

200. See, e.g., *id.* (finding that the “pursuit of justice” does not constitute an economic activity and “has nothing to do with commerce”).

201. See *Stampolis v. Provident Auto Leasing Co.*, 586 F. Supp. 88, 101–02 (E.D.N.Y. 2008) (characterizing the liability shield as regulating the lease transaction itself).

202. See *Gonzalez v. Raich*, 545 U.S. 1, 25 (2005) (defining economics as the production, consumption, and distribution of commodities, but not explicitly limiting the economic activity concept to those three items).

*Raich* definition of economics, which narrowly focuses on commodities, cannot constitute an inflexible limit on the concept's reach.<sup>203</sup> *Lopez* shows that regulation of hotels and restaurants, which offer services rather than produce commodities, constitute regulation of economic activity. Thus, courts must consider *Raich's* definition of economics in the context of the broad functional approach to economic activity articulated in *Lopez*.

Although some ambiguities persist in spite of *Lopez's* guidance, the inherent ambiguity of the economic activity concept may not constitute the greatest impediment to the guidance's efficacy in yielding consistent applications of the economic activity concept. The economic activity concept has its vagaries, but on the whole it does not seem as ambiguous as the old indirect/direct effects dichotomy.<sup>204</sup> On the other hand, the economic/noneconomic distinction seems much more ambiguous than the highly criticized distinction between commerce, on the one hand, and mining and manufacturing on the other. But formalism's uncertainty does not come only from the ambiguity of the verbal formulas judges announce. Rather, it also stems from the verbal tests' lack of correspondence with the concerns that tend to control opinions.<sup>205</sup> The exemption of mining and manufacturing from Commerce Clause regulation hardly lacked verbal clarity; but it lacked a sensible rationale and, therefore, the distinction between those activities and sales appeared as an arbitrary distinction. The same has been said of the economic/noneconomic activity distinction.<sup>206</sup>

Judges often fail to heed *Lopez's* guidance, because they want to minimize impediments to reaching ultimate conclusions that make sense. So, for example, the appellate courts have agreed that the Freedom of Access to Clinic Entrances Act (FACE) regulates an activity having a substantial effect on commerce because the protected health clinics engage in interstate transactions.<sup>207</sup> But some of the courts up-

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203. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 224–25 (3d Cir. 2013) (holding that wagering and national sports, neither of which involve commodities, constitute economic activity).

204. *Accord Ernest A. Young, The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 137 (2004).

205. See *Ides, supra* note 9, at 575–76 (arguing that the formalist approach fails because judges adjust the cases to address “the felt necessities of society”).

206. See, e.g., *Young, supra* note 204, at 137 (describing the claim that the distinction between commercial and noncommercial activity is arbitrary as the “primary objection” to the distinction).

207. See, e.g., *Norton v. Ashcroft*, 298 F.3d 547, 559 (6th Cir. 2002) (finding that obstructing health clinic operations has “disrupted the national market for abortion-related services”); *United States v. Gregg*, 226 F.3d 253, 263 (3d Cir. 2000) (holding that FACE “has a substantial effect on the interstate

holding this statute have ignored *Lopez's* guidance about how to characterize activities as economic, characterizing blocking access to a health clinic as an economic activity, because it has an economic effect.<sup>208</sup> That conclusion flatly contradicts the reasoning employed in *Lopez* and *Morrison*, but it removes a potential impediment to reaching a decision upholding the statute. In the case of the liability shield for rental car companies, a state court judge who characterized tort suits as a noneconomic activity made it quite clear that he considered the federal shield an inappropriate interference with state tort law.<sup>209</sup> Thus, he may well have found that a tort suit constitutes a noneconomic activity, notwithstanding the need to pay lawyers and the prayer for damages, because that finding helped justify invalidating the statute. Furthermore, judges, in a number of cases, have recited the economic/noneconomic activity distinction, but then failed to apply it at all, instead reaching the results that they prefer without the inconvenience of stating whether it regulates economic activity or not.<sup>210</sup>

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commerce of reproductive health services"); *Hoffman v. Hunt*, 126 F.3d 575, 587 (4th Cir. 1997) (holding that FACE regulates activities having a direct effect on the interstate market for reproductive health care services); *U.S. v. Bird*, 124 F.3d 667, 678 (5th Cir. 1997) (holding that FACE-regulated activities have a substantial effect on interstate markets in abortion services).

208. *See, e.g., Norton*, 298 F.3d at 556 (squarely holding that obstructing health clinic operations is an economic activity because it has a direct economic effect); *Gregg*, 226 F.3d at 262 (same); *but see Gregg*, 226 F.3d at 269–70 (Weiss, J., dissenting) (finding the activity regulated by FACE criminal and noneconomic); *Bird*, 124 F.3d at 688 (DeMoss, J., dissenting) (finding that the use of force to interfere with health clinic access is not part of a commercial activity); *U.S. v. Bird*, 279 F. Supp. 827, 837 (S.D. Tex. 2005), *order vacated*, 401 F.3d 633 (5th Cir. 2005) (characterizing regulated “anti-abortion activities” as noneconomic).
209. *See Graham v. Dunkley*, 827 N.Y.S.2d 513, 522–24 (N.Y. Sup. Ct. 2006), *rev'd*, 852 N.Y.S.2d 513 (N.Y. App. Div. 2008) (discussing the traditional role of the state in defining the common law of tort and concluding that the federal statute “subverts” the New York State Legislature’s authority).
210. *See, e.g., City of New York v. Beretta U.S.A. Corp.* 524 F.3d 384, 393–94 (2d Cir. 2008) (not squarely addressing the question of whether a statute protecting gun manufacturers from tort liability should be viewed as a regulation of civil litigation because the unidentified regulated activity has a “far more direct” effect on commerce than the activities at issue in *Lopez* and *Morrison*); *Green v. Toyota Motor Credit Corp.*, 605 F. Supp. 2d 430, 435–36 (E.D.N.Y. 2009) (upholding the statute shielding rental companies from tort liability without mentioning or applying the economic activity concept); *Vanguard Car Rental USA, Inc., v. Druin*, 521 F. Supp. 2d 1343, 1349–51 (S.D. Fla. 2007), *rev'd*, 2009 WL 995141 (11th Cir. 2009) (noting *Morrison's* economic activity requirement, but invalidating the statute limiting the tort liability of car rental companies without determining whether it regulates economic activity); *U.S. v. Corp.*, 236 F.3d 325, 332–333 (6th Cir. 2001) (overturning a child pornography conviction not involving a pedophile when

Thus, the desire to reach results that appear sensible to judges, whether based on allegiance to categorical federalism or economic reality, may control, and sometimes distort, the application of the economic activity concept to actual cases.<sup>211</sup> The tendency to apply the economic activity concept to support results reached on other grounds has sometimes generated inconsistent applications of the economic activity concept and therefore limits the guidance's utility.

### CONCLUSION

*Lopez* offers guidance that should help courts apply the economic activity concept to Commerce Clause cases. This guidance makes that concept more multidimensional than some had thought. Furthermore, arguments about statutory benefits apparently ruled out by *Lopez's* exclusive focus on regulatory targets can be reformulated in terms of regulated activities' effects. The *Lopez* guidance has informed lower court characterizations of activities, leading to fewer arbitrary restrictions on federal authority than some have feared. At the same time, this guidance does not resolve all ambiguities and does not resolve fundamental theoretical problems that limit verbal formulas' capacity to control decisions in this area. Nor does the existence of guidance show that the distinction makes good normative sense.

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the girl photographed was months away from turning eighteen without reaching a conclusion about the economic nature of the activity).

211. *But see Hoffman*, 126 F.3d at 587 (finding that FACE regulates non-commercial conduct and upholding it anyway); *Bird*, 124 F.3d at 675 (5th Cir. 1997) (same).