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"[*W*]*here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.*"[1]

"*Congress had a rational basis for believing that carjacking substantially affects interstate commerce.*"[2]

I. INTRODUCTION

The point of this Article is a simple one: The prevailing rational basis test is the wrong test for determining the constitutional scope of federal commerce power and is inconsistent with the bedrock principle of our federalist form of government that the central government is limited to enumerated powers.[3] The 1964 case of *Katzenbach v. McClung*,[4] is the germinal beginning of this misuse of the rational basis test in resolving fundamental issues of federalism.[5] The Court in *McClung* found

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1. Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964).

2. United States v. Bishop, 66 F.3d 569, 576 (3d Cir. 1995).

3. The value of this constitutional principle is accepted for now but will be more fully explored. *See infra* Part VI.

4. 379 U.S. 294 (1964).

5. Congress passed the Civil Rights Act of 1964 using both its power under Section 5 of the Fourteenth Amendment and its power to regulate interstate commerce. Pursuant to Section 5 of the Fourteenth Amendment, it banned racial discrimination supported by state action, and using its commerce power it banned racial discrimination as to private action impacting interstate commerce. In an early turn of the century case, *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court held that Congress' Section 5 power was limited to preventing state actions in violation of the substantive provisions of the Fourteenth Amendment. While this may have been an incorrect limitation on Section 5 power, the *Civil Rights Cases* have never been reversed. In a concurring opinion to both *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *McClung*, Justice Douglas argued that the Court should have upheld the whole of the Civil Rights Act of 1964 as within Section 5 power, both as to state acts and private acts. He felt that commerce power was an illogical and irrelevant power for addressing the harm of private racial discrimination. *See* Heart of Atlanta Motel, 379 U.S. at 293. I believe that Justice Douglas was correct in his argument, that the Civil Rights Act of 1964 was within Congress' Section 5 power, and that the Court should

that Congress had the commerce power to regulate racial discrimination at the consummately local Ollie's Barbecue. The 1995 case of *United States v. Lopez*,[6] holding that a congressional ban on guns on public school property was outside the scope of Congress' commerce power, unfortunately is not a significant retreat from the improper use of the rational basis test.[7] After summarizing the historical cases, including *McClung*, Chief Justice Rehnquist for the majority in *Lopez* concludes, "[s]ince that time, the Court has . . . undertaken to decide *whether a rational basis existed* for concluding that a regulated activity sufficiently affected interstate commerce."[8] It then obfuscated the matter by seeming to apply the fundamentally different "substantially affects" test.[9] The four-person dissent in *Lopez* relies even more heavily on the

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have reversed the *Civil Rights Cases*. The Civil Rights Act of 1964 was important legislation addressing the national problem of private racism which was not being handled adequately at the state and local level, exactly the kind of legislation which Congress should be passing. Nonetheless, the Court did not uphold the law on Section 5 grounds and instead upheld the Civil Rights Act on the basis of the commerce power, an unnecessary, incorrect, and, in terms of the virtues of a federalist system, a dangerous holding. Upholding even such a beneficial federal law with a corrupt interpretation of the commerce clause works harm into the distant future.

6. 514 U.S. 549 (1995).

7. Indeed the lower courts constantly cite *Lopez* for the proposition that the rational basis test is the correct test. With few exceptions, the rational basis test in the circuit courts even post-*Lopez* is endemic without regard to subject matter, statutory reference to interstate commerce, or reality of impact on interstate commerce. Typical is *United States v. Parker*, 108 F.3d 28, 30 (3d Cir. 1997), finding the Child Support Recovery Act (CSRA), a law with an interstate component, within federal power: "Our job . . . is not to second-guess the legislative judgment of Congress that [the regulated activity] substantially affects interstate commerce, but rather to ensure that Congress had a rational basis for that conclusion." (citation omitted). Other cases upholding the CSRA using the rational basis test are *United States v. Black*, 125 F.3d 454, 459 (7th Cir. 1997) and *United States v. Bailey*, 115 F.3d 1222, 1225 (5th Cir. 1997). Or see *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996), upholding constitutionality of the Freedom of Access to Clinic Entrances Act, a law with no interstate component: "Congress can regulate activities if it has a rational basis for concluding that they 'substantially affect interstate commerce.'" (citation omitted). As to that same law, there was the same result in *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996). For examples of courts applying the rational basis test in its simplest form in upholding a ban on the sale of a machine gun, whether intra or interstate, see *United States v. Beuckelaere*, 91 F.3d 781, 783-84 (6th Cir. 1996), *United States v. Kenney*, 91 F.3d 884, 886 (7th Cir. 1996) and *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997). Or see *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996), upholding Fair Housing Act prohibition on handicap discrimination with no interstate commerce component. For an even more recent example, see *Liu v. Striuli*, 36 F.Supp.2d 452, 477 (D.R.I 1999): "First, the Court must determine whether Congress had a rational basis for concluding that the regulated activity affects interstate commerce. *See Lopez*, 514 U.S. at 557."

8. *Lopez*, 514 U.S. at 557 (emphasis added). Significantly, this is the only direct use of the word "rational" in the majority opinion. The dissenting opinions use the word like catsup at a children's party at McDonald's.

9. This test is also commonly called the "affectation test." It flows from a combination of the commerce clause and the necessary and proper clause of Article I, Section 8, Clause 18. In addition to its enumerated powers, including the power to regulate commerce among the several states, the necessary and proper clause allows Congress to choose means to carry out its enumerated powers provided only that the means bear a necessary and proper relationship to the enumer-

rational basis test. As Justice Breyer for the dissent concludes, "[t]hus, the specific question before us, *as the Court recognizes,* is not whether the 'regulated activity sufficiently affected interstate commerce,' but, rather, whether *Congress could have had 'a rational basis' for so concluding.*"[10] Not until the March 1999[11] Fourth Circuit en banc decision, *Brzonkala v. Virginia Polytechnic Institute and State University,*[12] did the *Lopez* case have any significant impact at the Circuit Court level.[13]

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ated powers. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 355 (1819), Chief Justice John Marshall held that a synonymous term for necessary and proper was "appropriate." This is the word chosen for the enumerated power provisions in the Thirteenth, Fourteenth and Fifteenth Amendments. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court used the phrase "close and substantial affect" to define when Congress could regulate local or intrastate activity as an appropriate or necessary and proper means of protecting interstate commerce.

Although the test predated *Jones & Laughlin Steel Corp.*, it is the modern case most commonly cited for this test. The Court, in rejecting the then-fashionable narrow view of federal power, said, "[a]lthough activities may be intrastate in character when separately considered, if they have such a *close and substantial relation to interstate commerce* that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." 301 U.S. at 37 (emphasis added). *Jones & Laughlin Steel Corp.* is a seminal case in that it abandoned a narrow view of federal power which had been common since the 1895 case *United States v. E.C. Knight*, 156 U.S. 1 (1895), and went back instead to the expansive view of federal power found in Chief Justice Marshall's opinion in *McCulloch v. Maryland* as to federal enumerated power generally and to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), as to the commerce power specifically. The year 1937, in which *Jones & Laughlin Steel Corp.* was decided, is also highly significant. In that same year, the Court disavowed the use of the due process clause to closely scrutinize state regulation of economic and social issues in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Both *Jones & Laughlin Steel Corp.* and *West Coast Hotel* taken together are viewed as evidence that the Court had abandoned its attempt to impose a laissez faire view of government vis-a-vis business as national policy. Rather, it was up to the political branches to decide what our economic policies would be. Not coincidentally, *United States v. Carolene Products*, 304 U.S. 144 (1938), was decided the following year. *See infra* note 21 for a discussion of this connection.

10. *Lopez*, 514 U.S. at 617 (Breyer, J., dissenting) (emphasis added).

11. At the time this article is being written, it is not yet known if review by the U.S. Supreme Court of this significant case will be sought or, if so, whether the Court will grant certiorari. Thus far the Court has turned down numerous opportunities to clarify *Lopez*.

12. 169 F.3d 820 (4th Cir. 1999). The district court in *Brzonkala*, 935 F.Supp. 779 (W.D. Va. 1996), found the civil aspect of Violence Against Women Act (VAWA) outside of congressional commerce power. *Brzonkala* was reversed by a divided panel of the Fourth Circuit, 132 F.3d 949 (4th Cir. 1997), but the decision was vacated and the district court holding of unconstitutionality reinstated after an en banc hearing, 169 F.3d 820 (4th Cir. 1999).

13. Whatever impact there was is not very evident at the circuit court level with *Brzonkala* being the only successful challenge. Some recent circuit court decisions have, however, limited the application of federal laws possibly to avoid potential constitutional conflicts with *Lopez*. *See, e.g.*, United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995); United States v. Denalli, 73 F.3d 328 (11th Cir. 1996) (refusing to apply the federal arson statute, 18 U.S.C. § 444(i) to primarily intrastate activities). See *infra* note 110 for a recent case granting cert on this issue. *See also* United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (expressing doubt about the Clean Water Act's consistency with *Lopez*, but construing the statute to avoid the issue). A few district courts have struck federal laws down as contrary to *Lopez*. In addition to the district court in *Brzonkala*, the district court in *Hoffman v. Hunt*, 923 F.Supp. 791 (W.D.N.C. 1996) found the Freedom of Access to Clinic Entrances Act, protecting access to abortion clinics, outside the scope of com-

Brzonkala held that the civil portion[14] of the Violence Against Women Act (VAWA), giving a civil rights action to women who were abused because of their gender, was outside of federal power.[15] *Brzonkala* was clearly a minority approach among the federal courts.[16] *Lopez* and the plethora of lower court federal cases generated by it,[17] especially *Brzonkala*, have made *McClung* and the misapplication of the rational basis test relevant again.

II. SUMMARY OF ARGUMENTS

This Article develops the errors of the *McClung* rational basis approach, examines the modest *Lopez* retreat, and briefly notes *Brzonkala*'s recent elevation of the "substantially affects" test. In summary, this Article will argue that, prior to *McClung*, there were only two kinds of federal power: the power to regulate anything involving the crossing of state lines and the power to regulate local activity substantially affecting interstate commerce. *McClung* added a third: the

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merce power but was reversed by the Court of Appeals, 126 F.3d 575 (4th Cir. 1997). (Both *Hunt* and *Brzonkala* also raised issues involving Congress' power under Section 5 of the Fourteenth Amendment.) *See also* United States v. Olin Corp, 107 F.3d 1506 (11th Cir. 1997) (reversing a decision of the district court that the Super Fund Act was unconstitutional as applied to a wholly intrastate hazardous waste site); United States v. Mussari, 95 F3d 787 (9th Cir. 1996) (reversing the district court's holding that the Child Support Recovery Act was outside of federal commerce power).

14. Interestingly, the criminal and the civil portions of VAWA are premised upon different aspects of federal power. The criminal portion requires that the crossing of interstate lines be a part of the crime while the civil portion is said to be based upon the substantial affect on interstate commerce. The criminal portion was found to be within federal power in *United States v. Bailey*, 112 F.3d 758 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 240 (1997):

> The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Id. at 766. *Accord* United States v. Page, 167 F.3d 325 (6th Cir. 1999). See *infra* note 27 for a discussion of Congress' power to regulate things crossing state lines.

15. The *Brzonkala* court found that the act was not within the scope of either Congress' commerce power or its power under Section 5 of the Fourteenth Amendment to protect equal protection and due process rights. *See supra* note 5 and *infra* Part IV.

16. Two circuits have found the criminal portion of VAWA within congressional power, but that portion has an interstate component requiring the crossing of state lines. *See supra* note 14. Every district court other than the one in *Brzonkala*'s has found the civil portion to be constitutional as well. *See, e.g.*, Liu v. Striuli, 36 F.Supp.2d 452 (D.R.I. 1999); Ziegler v. Ziegler, 28 F.Supp.2d 601 (E.D. Wash. 1998); Doe v. Hartz, 970 F.Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); Anisimov v. Lake, 982 F.Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F.Supp. 1188 (E.D. Tenn. 1997); Crisonino v. New York City Hous. Auth., 985 F.Supp. 385 (S.D.N.Y. 1997); Doe v. Doe, 929 F.Supp. 608 (D. Conn. 1996).

17. Over 90 lower federal court cases have specifically addressed *Lopez* based challenges to the applicability of federal laws. *Lopez* has been cited peripherally over 2000 times. See *supra* note 7 and *infra* note 60 for a sampling of this outpouring of litigation.

power of Congress to say that something substantially affected interstate commerce, in which case the Court needed to use only a rational basis test to determine whether the regulated matter did affect interstate commerce. This third test was very different from the second in that no actual finding of impact on interstate commerce by the Court had to be made. It was enough that Congress could conceivably believe that there was such an impact. Even in those instances where Congress had made no actual finding of impact on interstate commerce, the Court simply began to ask the question whether there was a rational basis for Congress to believe that the regulated activity substantially affected interstate commerce. No longer was the Court significantly involved in the federalist issue.

Lopez on its face did little or nothing to change the *McClung* approach. In fact, only where any connection to commerce was patently absurd did the Court play any limiting role. Essentially, almost any impact on commercial interest was enough to satisfy the Court. Despite the hopeful glimmer of federalism found in some of the district court opinions, the circuit courts, with the *Brzonkala* exception, have limited *Lopez* to its facts.

III. THE RATIONAL BASIS TEST

In *Katzenbach v. McClung*, the United States Supreme Court held that Congress had the authority to regulate, under its commerce power, racial discrimination by Ollie's Barbecue, a family owned restaurant in Birmingham, Alabama. Congress had made a conclusive presumption in the Civil Rights Act of 1964 that racial discrimination by certain businesses which either served interstate travelers or purchased substantial goods in interstate commerce had a *per se* impact on interstate commerce.[18] However, unlike its companion case, *Heart of Atlanta Motel v. United States*,[19] there was no claim that interstate travelers frequented Ollie's restaurant. Instead, the commerce power over Ollie's came from the fact that forty-six percent of the $150,000 worth of food which Ollie's purchased annually was meat purchased from a local supplier who had purchased it out of state. As for Ollie's claim that there was no real proof that racial discrimination actually impacted the flow of such food, the Court said that "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for

18. Sections 201(b)(2) and (c) of Title II of the Civil Rights Act of 1964, 78 Stat. 243, places any "restaurant . . . principally engaged in selling food for consumption on the premises" under the Act "if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce."

19. 379 U.S. 241 (1964).

finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."[20] Therefore, the only job for the Court was to determine whether Ollie's had purchased "a substantial portion" of its food in interstate commerce. Ollie's admitted that it had.

Beginning[21] in 1938 with *United States v. Carolene Products Co.*,[22] the United States Supreme Court has applied the rational basis test to a variety of situations.[23] From *Carolene* comes a common phrasing[24] of that test:

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20. *McClung*, 379 U.S. at 303–4.

21. Claiming that the rational basis test begins with *Carolene Products* is true only in the sense that *Carolene* is a sign post case in which the rational basis test eclipsed the historically parallel reasonable basis test. The rational basis phrase and variations of the test were used by the Supreme Court well before *Carolene*. One of the earliest uses of the rational basis phrase at the Supreme Court level in a due process or equal protection case is *Singer Sewing Machine Co. v. Brickell*, 233 U.S. 304, 316 (1914): "The state has a wide range of discretion with respect to establishing classes for the purpose of imposing revenue taxes, and its laws upon the subject are not to be set aside as discriminatory unless it clearly appears that there is no rational basis for the classification." An early use of a version of the rational basis test similar to *Carolene* is *Ohio v. Deckebach*, 274 U.S. 392, 397 (1927):

> It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong.

West Coast Hotel v. Parrish, 300 U.S. 379 (1937), also predated *Carolene* and although it did not specifically use the rational basis test, it is the seminal case in limiting judicial review as to due process and economic legislation:

> [I]f such laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"; that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal"; that "times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

300 U.S. at 398 (citations omitted).

22. 304 U.S. 144 (1938).

23. Absent fundamental rights and suspect classifications, it is the principal test in determining whether most substantive due process and equal protection rights have been violated. See the cases mentioned in *infra* note 26.

24. The version of the rational basis test in *Carolene* has its origin in *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 584 (1935):

> It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. [Footnote with 14 string cites omitted.] A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.

(citations omitted).

Interestingly, *Carolene* cites *Metropolitan Casualty* "and cases cited" but only one of the

> "[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[25]

Other cases have emphasized that the rational basis test is met if the legislature had any conceivable justification for it.[26]

There is a three-part logic to the rational basis test. First, courts have no knowledge superior to that of the legislative branch in making societal choices as to most non-fundamental issues. Second, if the legislator makes mistakes of judgment in passing laws, the legislative process can be trusted to correct any past legislative mistakes. Third, since no fundamental rights are involved, no harm great enough to justify court interference with the legislative process is done in waiting for the self-correcting legislative process to fix its own mistakes. Of course, each of these assumptions about the rational basis test is doubtful,[27] but

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fourteen cases cited in the omitted *Metropolitan Casualty* footnote actually used the rational basis test. Most used the then more common "reasonable basis" framing of the test. But the one case cited by *Metropolitan Casualty* that actually used the rational basis test, *Hardware Dealers' Mutual Fire Ins. Co. of Wisconsin v. Glidden*, 284 U.S. 151, 158–59 (1931), has language similar to *Carolene*:

> The record and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

(citations omitted).

Despite the language in *Metropolitan Casualty*, before *Carolene* there was often at least some effort made at establishing some actual rational basis. For example, in *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934), the Court applied the rational basis test to a minimum milk price scheme that allowed less well known brands to charge one cent more per gallon than heavily promoted brands. It said that the economic assertions for the different pricing schemes, which were the claimed rational basis for the law, were properly "the subject of evidence and of findings" and remanded the case. *Id.* at 210.

25. *Carolene*, 304 U.S. at 152 (citing *Metropolitan Casuality Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935)).

26. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (upholding as rational Oklahoma's regulation of the optometry business even if such laws were found to be "needless, wasteful requirement[s]"); Vance v. Bradley, 440 U.S. 93 (1979) (upholding mandatory retirement law for overseas federal State Department employees but not for essentially similar Civil Service employees); Michael H. and Victoria D. v. Gerald D., 491 U.S. 110 (1989) (upholding California's denial of the parental rights of a natural father based upon the irrebuttable presumption that the husband was the father of the child despite overwhelming evidence to the contrary).

27. *Carolene* itself is an example of why these assumptions are speculative at best. There, Congress banned the interstate transportation of milk-filled products, including a low-priced milk substitute called Milnut made from skim milk—then a largely valueless byproduct of butter and

whether the test is justified in other settings or not, the Court has misused it in defining the scope of federal power.

The logic that legislative mistakes can easily be corrected through the use of the political processes and thus there is no need for activist judicial intervention, whether justified in other areas of the law or not, certainly does not work with regard to the division of power between the federal government and the states. It is Congress' natural tendency to undertake more and more legislative power. It wants to appear to be doing something, and the notion that there are areas outside the scope of Congress' enumerated powers is not something easily communicated to the public. If the public is concerned about carjacking, Congress makes it a federal crime. What is the point of telling the public that state laws are adequate for the problem and that most car-jacking is unrelated to federal enumerated power? There is no political virtue in restraint in the face of perceived danger when any action, even unnecessary action, carries the impression that Congress is doing something to address the danger. While Congress may have little stomach to address real issues in America—bloated and unnecessary defense facilities, an illogical and unfair tax structure, an insolvent Social Security system—it is always on the ready to address the fashionable concern of the moment, particularly when state laws may already adequately handle that concern—e.g., guns on school property, violence against women, and juvenile crime.[28] For the Court to apply a rational basis test to determine if Congress is correct when Congress says that it has enumerated power is judicial abdication of one of the Court's most important responsibilities: reconciling the separation of powers between the state and federal governments. There are no political processes which restrain Congress. It has all the motivation in the world to define its powers broadly, and none to impose limits on its self. It is the Court that must take responsibility for the balance of power between the federal

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cheese production—and coconut oil. It had the advantage over regular milk in that it was low priced and did not need to be refrigerated, a matter of some importance in the days of "ice boxes." The facts indicated that the product was every bit as healthy—or given its fat content as unhealthy—as regular milk, but the Court upheld the congressional ban as being rationally related to concern for health and perhaps the danger of passing it off as real milk. It would have been very easy for the Court to have determined that the ban on such products was the result of the dairy industry's jealousy and that there was no legitimate justification for it. The likelihood that poor people of this country were going to be sufficiently organized to overturn this law generated by the dairy industry lobby is, of course, patently ridiculous, confirmed by the fact that many such pro-dairy laws exist to this day.

28. This is not to say that these are not subjects which are in need of legislation. The point is that state laws likely regulate each of these and to the degree that they are inadequate, the state legislature should be held responsible. There is little need for Congress to pass largely parallel legislation.

government and the states, and the rational basis test is the ultimate failure to meet that responsibility.

IV. *McCLUNG* AND THE ENUMERATED POWER TO REGULATE INTERSTATE COMMERCE

McClung was questionable the day that it was decided and has surprisingly little historical support. Joining *McClung* is its younger sibling, *Katzenbach v. Morgan*,[29] which also misapplied the rational basis test. In *Morgan*,[30] the Court held that Congress, under the enumerated power given it by Section 5 of the Fourteenth Amendment to the U.S. Constitution, had the authority to ban literacy tests for persons who had "successfully completed the sixth primary grade [in a school in Puerto Rico and elsewhere] in which the predominant classroom language was other than English."[31] Section 5 provides that Congress can pass "appropriate legislation" to carry into effect the provisions of Section 1 of the Fourteenth Amendment. The Court, citing *McCulloch v. Maryland*,[32] said that "appropriate" meant "plainly adapted." One of the provisions of Section 1 is that no state may deny equal protection rights. (*The Civil Rights Cases*[33] mentioned above involved private, not state, equal protection violations.) The state of New York argued that under then controlling Supreme Court precedents[34] literacy tests did not

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29. 384 U.S. 641 (1966)

30. *See id.*

31. The full text of section 4(e) is as follows:

(1) Congress hereby declares that to secure the rights under the Fourteenth Amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

79 Stat. 439, 42 U.S.C. § 1973b(e) (Supp. I 1964).

32. 17 U.S. (4 Wheat.) 316 (1819).

33. *See supra* note 5.

34. Among other cases cited in support of this approach was *Heart of Atlanta Motel v. United States*, the companion case to *McClung* with *McClung* being the first case to use the rational basis test for determining the scope of federal power. *Morgan*, 384 U.S. at 653 n.11. *Heart of Atlanta* itself does not actually use the rational basis phrase but the test is implied: "How obstructions in commerce may be removed–what means are to be employed–is within the sound and

violate the Fourteenth Amendment and thus Congress had no authority under Section 5 to ban them. The Court held that the congressional finding that literacy tests did at least indirectly impact the equal protection rights of Puerto Rican citizens was conclusive: "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[35] While the Court did not actually use the phrase "rational basis," this was quite clearly the test that it was using in determining when congressional findings were sufficient to satisfy the "appropriate/plainly adapted" requirement of Section 5.[36]

At the time that *McClung* was decided, there were two basic approaches[37] to determining the scope of the federal commerce power.

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exclusive discretion of the Congress. It is subject only to one caveat–that the means chosen by it must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel*, 379 U.S. at 262.

35. *Morgan*, 384 U.S. at 653.

36. *See id.* In *City of Boerne v. Flores*, 521 U.S. 507 (1997), finding the Religious Freedom Reformation Act outside the scope of federal Section 5 power, the Court limited the expansive view of Section 5 power found in *Morgan*. *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999), following *Boerne*, found the Violence Against Women Act, outside the scope of Section 5 power. *Boerne* and *Lopez* join two Tenth Amendment intergovernmental cases, *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 98 (1997), in elevating the profile of federalism issues in recent years.

37. The Court in *Lopez* lists "three broad categories." They are as follows:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558–59 (citations omitted). *Perez v. United States*, 402 U.S. 146, 150 (1971), is the first case to use these three categories without any citation. Interestingly, it misstates the third as "affecting interstate commerce," not substantially affecting. To the lower courts, one of the most important aspects of *Lopez* is its reprise of the *Perez* division of federal power into three parts, channels of commerce, instrumentalities including things in commerce, and regulating things that substantially affect interstate commerce. While the two-power view of federal power is conceptually neater than the three-power view, nothing of real importance is impacted either way. The first category seems primarily the regulation of things crossing state lines. The third category is the "substantial affects" power. The second category, to the degree that it includes persons or things in interstate commerce, is the power to regulate things crossing state lines. To the degree that it includes intrastate activities that affect interstate commerce, it falls within the power to regulate things affecting interstate commerce.

Although this Article stubbornly eschews the three categories of *Lopez* in favor of two categories, the lower courts widely quote these three categories as defining the scope of the federal commerce power. *See, e.g.*, Hoffman v. Hunt, 126 F.3d 575, 583 (4th Cir. 1997) (upholding the constitutionality of the Freedom of Access to Clinic Entrances Act (FACE) despite the fact that it criminalizes the blocking of access to abortion clinics and has no apparent contact with interstate commerce); United States v. Wright, 117 F.3d 1265, 1270 (11th Cir. 1997) (holding that Congress had the authority to make criminal the possession of all machine guns, whether there was any proven movement in interstate commerce or not); United States v. Bailey, 115 F.3d 1222, 1226 (5th Cir. 1997) (upholding the Child Support Recovery Act (CSRA) which makes it a crime for an

First, Congress had the power to regulate anything crossing state lines[38] and second, Congress had the power to regulate anything that substantially affected interstate commerce. *McClung* and *Heart of Atlanta Mo-*

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out-of-state parent not to pay child support). The unhelpfulness of the three categories is revealed in *Wright* which says that it agrees with the Third Circuit, *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) and Seventh Circuit, *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996), that the regulation of in-state machine guns falls within the third category, and not the Sixth Circuit, *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996) and the Ninth Circuit, *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996) which found it within the first category, and not the Tenth Circuit, *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) which found it within the second category and not the Fifth Circuit, *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) which found it within both the first and second. Only an experienced short-order cook or an air-traffic controller at Kennedy airport could keep track of the various permutations. Which category it falls within hardly matters since the rational basis test is then used whichever of the three categories the court concludes is involved. *See*, however, *Bailey*, *supra*, where the majority found the CSRA rationally related to both the first and second categories, but the dissent, agreeing with the district court, is premised upon it not being rationally related to the third category. Note that the Tenth Circuit, United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996), found it within the third category and constitutional.

38. Though potentially far-reaching in scope, this regulatory poser is generally the most limited form of federal power since it involves the actual crossing of state lines in at least some form, but as the power has evolved the crossing can be coincidental, and thus the power has burgeoned. Many of the uses of this power are odd to the extreme. For example, under the criminal portion of VAWA, the federal law requires that a person must have crossed state lines to abuse a spouse, whereas under the civil provision the abuse only had to affect interstate commerce. Crossing state lines is such an irrelevancy in terms of federal concern that one wonders why Congress was so brazen in its claim of power for the civil provision and so technical as to the criminal portion. Also, see the discussion of carjacking and the crossing of state lines in the text at *infra* note 70-73 where it is argued that the crossing of state lines is such a de minimis part of the crime as to be almost pointless. It is the form of federal power used in much of the federal criminal legislation, making illegal the transportation in interstate commerce every thing from lottery tickets, *The Lottery Case (Champion v. Ames)* 188 U.S. 321 (1903), to yellow oleo margarine, *McCray v. United States*, 195 U.S. 27 (1904), to adulterated foods and drugs, *Hipolite Egg Company v. United States*, 220 U.S. 45 (1911), to women for immoral purposes, *Caminetti v. United States*, 242 U.S. 470 (1917). When Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824), said that commerce included "commercial intercourse . . . in all its branches," he probably did not have the latter in mind where the defendant traveled with his girlfriend from Sacramento, California to Reno, Nevada. See the criminal portion of the VAWA premised on this power. *See supra* note 14. For an interesting VAWA case, see *United States v. Page*, 167 F.3d 325 (6th Cir. 1999), an en banc decision involving an equally divided court, which found the criminal portion constitutional. The oddest part of the case is the division of the court over whether violence has to occur after the interstate commerce took place or if it could occur before the interstate commerce actually took place.

Congress also attempted to use this power when there was uncertainty about its other commerce powers, unsuccessfully in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), but successfully in *United States v. Darby*, 312 U.S. 100 (1941). The limiting aspects of this power are revealed in *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974), where an intrastate asphaltic concrete processor sued two interstate asphalt companies for price discrimination in favor of a local in-state competitor. The Federal Robinson-Patman Act requires that the discrimination be "in commerce." The Court said this meant that an effect on interstate commerce was not enough, that one of the discriminatory sales transactions had to actually cross state lines. Since the asphalt was used for interstate highways, it is not that Congress could not have passed a law within its commerce power, rather, Congress, either through accident or design, limited the application of the law to the actual crossing of state lines.

tel added a third approach: Congress could say that certain things had a substantial impact on interstate commerce and the Court would uphold the congressional conclusion, if there was any rational basis in support of its conclusion. In *Heart of Atlanta Motel*, Congress said that in the interstate travel provision of the Civil Rights Act of 1964 racial discrimination by hotels and inns serving interstate travelers impacted interstate commerce. In *McClung*, Congress said that racial discrimination by businesses buying a substantial amount of food in interstate commerce impacted interstate commerce. As to both of these conclusions, the Court itself did not undertake any factual evaluation of these congressional claims, finding ample support in testimony before congressional committees. Under the rational basis test, it was enough that it was conceivable that racial discrimination impacted interstate commerce; it was not any thing that had to actually be proven.

The approach in these two cases should be contrasted with *Wickard v. Filburn,*[39] which is widely thought to be one of the most extreme examples of Congress' use of its commerce power. In *Wickard*, Congress allocated how much wheat each farmer could grow and sought sanctions against Farmer Filburn for growing 239 bushels too much wheat, wheat which Farmer Filburn grew and consumed on his own farm. In *Wickard*, the Court stated the applicable commerce test requires that Farmer Filburn's actions have a substantial impact on interstate commerce. It found that impact by looking at the aggregate, or class impact of homegrown and home-consumed wheat on the interstate and international market of wheat. *Wickard* is not a case in which the Court assumed that even the most de minimis impact on interstate commerce was enough to bring something within federal power. Rather, the trial court heard volumes of evidence as to the impact of such wheat on the total market for wheat. The evidence revealed that wheat was a very volatile market and even small changes in the supply of wheat could have a dramatic impact. Furthermore, the aggregate impact of the class of homegrown, home-consumed wheat was anything but small. Depending on the market price of wheat, such wheat had a variability factor of more than 20%. The Court in *Wickard* did not simply assume that commerce was hurt because Congress might conceivably believe that it would. Extensive evidence introduced in open court proved that impact.

The prominent test, prior to *Heart of Atlanta Motel* and *McClung*, not involving the actual crossing of state lines, was that there had to be

39. 317 U.S. 111 (1942).

some substantial impact on interstate commerce.[40] That test could easily have been passed in *Heart of Atlanta Motel*. The use of the rational basis test is far more significant in *McClung* than in *Heart of Atlanta Motel*.[41] Given the overwhelming testimony before Congress, it is easy to believe it could have been proven that racial discrimination by businesses serving interstate travelers did have a substantial impact on interstate commerce. Black business persons and even black tourists will find it very difficult to travel interstate if they cannot find lodging and food. Given the accepted fact that Ollie's did not serve interstate travelers, it is not as easy to see the impact on interstate commerce from racial discrimination by such businesses. Ollie's family-owned barbecue

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40. *See, e.g.*, Mandeville Island Farms v. American Crystal Sugar, 334 U.S. 219, 234 (1948):

> For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence.

See also United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941); Currin v. Wallace, 306 U.S. 1 (1939); Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197 (1938).

41. The Court's use of the rational basis test in *Heart of Atlanta Motel* is at best half-hearted. Throughout the opinion, the Court refers to the close and substantial affects or just substantial affects test of *Jones & Laughlin Steel Corp*. Finally, towards the end of the opinion, it states that the act does not violate liberty or property rights protected "under the Fifth Amendment," apparently referring to due process rights. It then states that the power is within Congress' commerce power and that the questions are, first, "whether Congress had a rational basis for finding that racial discrimination by motels affected commerce" and, second, if so, "whether the means it selected to eliminate that evil are reasonable and appropriate." It then concludes with extensive cites that the Court had held consistently that such laws do not violate the Fourteenth Amendment due process clause. *Heart of Atlanta Motel*, 379 U.S. at 258–59. This two-part approach and its combination of enumerated commerce powers issues with the due process clause is at best confusing. In the first, the Court must find that Congress could have rationally concluded that the local activity, racial discrimination, affected interstate commerce. Regulating racial discrimination is the means chosen to protect interstate commerce. It's not clear what the point of the second test is, but it appears to be a reference to substantive due process. The Court repeats it at the end of its opinion when it summarizes its holding, first concluding that the law was within Congress' commerce power and then stating that the means chosen by Congress to remove obstructions in commerce is solely within congressional discretion "subject only to one caveat–that the means chosen by it must be reasonably adopted to the end permitted by the Constitution." *Id.* at 262. Although this language is widely quoted, it is not clear whether it is an alternative commerce clause test or a reference to its due process discussion. In any event, it has not been given any gloss separate from the rational basis test. If intended as a reference to the due process clause, the more common phrasing is that the means must only rationally relate to legitimate governmental ends. The requirement of a "reasonable connection" while sometimes used synonymously with rational is actually a stricter level of review which predates the emphasis on rational basis. Compare *Weaver v. Palmer Bothers*, 270 U.S. 402 (1926), applying the reasonable basis test and finding invalid a state ban on shoddy stuffing made from used fabrics, with *United States v. Carolene Products* applying the rational basis test and upholding a ban on milk filled products. See also the reasonable basis language used in *Reed v. Reed*, 404 U.S. 71 (1971), as a precursor to the stricter middle level test of *Craig v. Boren*, 429 U.S. 190 (1976).

was not the kind of place that interstate travelers tend to choose. The proven mediocrity of McDonald's or Denny's is more the preferred fare to the uncertain results of venturing off the interstate highway and sampling local delicacies. Although Ollie's is now of some renown, having been featured on CNN International News as a recommended spot for businesspersons seeking something a little different, this was not the case at the time.

Despite the obvious hatefulness of the racial discrimination by Ollie's, a situation that had existed since its opening in 1927, the power of Congress to regulate it is far from clear. Because private action was involved, Congress, under controlling precedents, did not have regulatory power under Section 5 of the Fourteenth Amendment.[42] And as for the commerce clause, what was the impact on interstate commerce? Ollie's sold all of the barbecue that it could possibly sell. Its 200 plus sit-down service sold to whites only, but its take-out service did a thriving business to blacks. There was no direct evidence of any kind that, but for Ollie's racial discrimination, it would have sold more pork sandwiches and homemade pies and thus, have purchased more food in interstate commerce. The Court referred to the testimony before Congress of an Under Secretary of Commerce that attributed lower restaurant spending in the South to racial discrimination. The equal possibility, that any differences were the result of the Southern inclination to eat more meals at home, did not deter the Court from concluding, "[t]his diminutive spending springing from refusal to serve Negroes and their *total* loss as customers has, *regardless of the absence of direct evidence*, a close connection to interstate commerce."[43] The Court also referred to "many references [in Congressional testimony] to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities."[44] Despite these possible connections to interstate commerce, the Court relied primarily on studies indicating that racial discrimination made it harder for blacks to travel interstate, an irrelevancy as far as the assumed facts in Ollie's. Ollie's did not serve interstate travelers. It was subject to regulation

42. See the discussion of Section 5 of the Fourteenth Amendment power in *supra* note 5 where I express my agreement with Justice Douglas' concurring opinion in *Heart of Atlanta Motel* and *McClung* that Congress had the power to pass this provision using Section 5. It is not the law that I object to or even to federal interference within this area of state influence. In fact, I believe that the Fourteenth Amendment intended for Congress to take the lead in eliminating both state and private racism. My objections are much simpler. I do not believe that there is commerce power, and I think there is something to be said for complying with the constitutional scheme of enumerated powers although the precise reason for doing so has eluded me.

43. *McClung*, 379 U.S. at 299 (emphasis added).

44. *Id.* at 300.

only if on other grounds its racial discrimination substantially affected interstate commerce.

The only real possibility in Ollie's for proving substantial impact on interstate commerce was by use of the aggregate or class impact gloss on that requirement. *Wickard v. Filburn* is the classic illustration of the use of the aggregate impact application. Farmer Filburn by himself grew 239 too many bushels of wheat. Even given the probable uncertainty as to our understanding of what a bushel is, it's difficult to believe that Farmer Filburn by himself had much of an impact on the international or interstate market in wheat. Nonetheless, looking at the aggregate impact of the class of homegrown and home-consumed wheat—with a variability factor of 20%—indicated a clear and substantial impact in what was described as a volatile market. In Ollie's case, although racial discrimination by Ollie's itself certainly did not have a substantial impact on interstate purchases of food, the inquiry focused on the aggregate impact on interstate purchases by Ollie's class: restaurants that purchased goods interstate and discriminated based upon race. Surely racial discrimination by restaurants will lead to fewer blacks frequenting such restaurants generally, and thus the aggregate impact of such discrimination on the amount of food purchased could be substantial. There are factual problems with this scenario in that it is hard to see the overall impact on interstate commerce. Such discrimination might lead to more sales by restaurants that did not discriminate or more sales by grocery stores to blacks choosing to eat at home as opposed to being faced with racial discrimination. However, it is hard to see an impact on interstate commerce since the amount of food consumed is likely to be unchanged; what would be affected is the locale where the food is eaten.

Also, factually there was no attempt to prove that Ollie's was part of the class of restaurants where discrimination would have affected interstate commerce. Because its discrimination impacted only its sit-down service, Ollie's had the best of both worlds. Any white customers could freely frequent its sit-down service and any racially excluded person could purchase from its take-out service. There was no evidence at all that resentment of their exclusion from the sit-down service led to potential black customers eschewing the tasty pork sandwiches from the take-out window. While some restaurants may sell less food because of racial discrimination and the aggregate impact of that group may have a substantial impact on interstate commerce, Ollie's was not necessarily a part of that class. In fact, Ollie's argued that because of its location in a black neighborhood, it would lose its white customers if it did not exclude blacks from its sit-down service. By mentioning this argument,

there is no intent here to defend its legitimacy or to detract from its odiousness. Rather, as a commerce clause class action issue, there is little likelihood that Ollie's discrimination actually impacted commerce at all. As a class, a million times zero is still zero.

Finally, although the Court referred to language from the *Wickard* case about the aggregate impact, there is no indication from the case that the aggregate impact doctrine was the basis for the holding of federal power in the case. The rational basis test, requiring only that it be conceivable that Congress could have believed that there be such an impact, made it unnecessary to undertake even the factual inquiry which the aggregate impact test requires.

McClung is similar to the liberal finding of congressional power in the later case of *Perez v. United States*.[45] In *Perez*, federal law made loan sharking a federal crime. Congress, using its commerce clause power, concluded that the aggregate impact of loan-sharking as a class contributed to organized crime and that organized crime had a substantial impact on interstate commerce. Perez's defense was that he was an independent entrepreneur and as such he was not a part of the class contributing to organized crime. (Indeed, the federal law did not require any actual proof of a connection to such a class.) The Court's response to this argument admits its validity: "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. Extortionate credit transactions, *though purely intrastate*, may in the judgment of Congress affect interstate commerce."[46] Justice Stewart in dissent argued that *Perez* did not pass the rational basis test:

> In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.[47]

I actually see more of a connection in *Perez* to interstate commerce than in *McClung*. Perhaps Congress may have thought that proving any

45. 402 U.S. 146 (1971).

46. *Id.* at 154 (citations omitted) (emphasis added).

47. *Id.* at 157–58 (Stewart, J., dissenting).

actual connection to organized crime, given its shadowy nature, may have made it hard to prosecute loan sharks that did contribute to the profits of organized crime. In order to make it easier to prosecute affiliated loan sharks, Congress could punish all loan sharks. There was not even this type of connection in *McClung*.

The Court in *McClung* for the first time[48] relied exclusively on the rational basis test in finding a law within the enumerated power of Congress. Although stating that the mere fact that Congress said that something affected interstate commerce did not "preclude further examination by this Court,"[49] it then stated such a deferential level of review as to cause doubt on that qualification. It stated, "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."[50] The Court also said there was no requirement that Congress make any specific or formal findings as to any actual impact on commerce. In perhaps the most telling citation in the opinion, it wrote ominously, "see *United States v. Carolene Products Co.*"[51] The apparent reference was to this language:

> Even in the absence of such aids [specific legislative findings] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[52]

Although the *Carolene Products* case has a commerce clause issue in it, this quote is not in reference to the commerce clause, but rather to the claim that the federal law in that case violated substantive due process rights.

McClung cites *United States v. Darby*[53] for the proposition that it is enough that there is some rational basis in support of Congress' finding that something substantially affects interstate commerce. However, *Darby* does not support this proposition. The Court in *McClung* cites the following language from *Darby*:

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48. The Court in *Heart of Atlanta Motel*, the companion case, mentioned the rational basis test but in an ambiguous, confusing context. *See supra* note 34.

49. *McClung*, 379 U.S. at 303.

50. *Id.* at 379.

51. *Id.* at 304.

52. *Carolene*, 304 U.S. at 152.

53. 312 U.S. 100 (1941).

> [S]ometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of the legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.[54]

From this language, the *McClung* Court concluded that *Darby* stands for the proposition that a rational basis connection between local activity and interstate commerce is enough. But of course, *Darby* said no such thing. Although Congress made certain legislative findings in *Darby* as to the impact on interstate commerce, the Court in the cited passage clearly states that it had the responsibility for determining if the "particular activity regulated or prohibited is within the reach of the federal power."[55] The applicable test at the time of *Darby* was the "close and substantial test."[56] The *Darby* Court states an abbreviated version of this test, "[T]his Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it."[57]

Historically, *Darby* has been a commerce power case of immense importance. *Darby* involved principally the constitutionality of two provisions in the Fair Labor Standards Act. The first provision said that any goods made by persons in violation of the minimum-wage/maximum-hours limitations of the Act could not be shipped through interstate commerce. The second applied the provisions of the act to all persons who worked in producing goods for interstate commerce. Though the provisions on the surface seem repetitive, that is not entirely the case.[58] The first provision is an exercise of Congress' power over activities crossing state lines; the second provision is an exercise of its power to regulate local activity having a substantial impact on interstate commerce. The first provision was the clearest form of federal enumerated power over interstate commerce. For most of the

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54. *McClung*, 379 U.S. at 303 (citing *Darby*, 312 U.S. at 120–21) (legislative code sections deleted by the *McClung* Court).

55. *Darby*, 312 U.S. at 121-22.

56. *See supra* note 9.

57. *Darby*, 312 U.S. at 119–20. At this point the Court cited a number of older cases in support of this test which it said predated even *Jones & Laughlin*. *See supra* note 9.

58. It is partly the case since at the time the act was passed in 1938, despite the *Jones & Laughlin* case in 1937, the scope of congressional power was far from clear. Congress used both of its principal commerce powers in the hope that at least one of them would withstand the Court's scrutiny. The lower court in *Darby*, applying the older cases, quashed Darby's indictment. *See* United States v. Darby, 3 F.Supp. 734 (S.D. Ga. 1940).

history of the commerce clause,[59] the Court has given Congress the plenary power to control the crossing of state borders. This power was used to regulate everything from interstate shipment of lottery tickets, to interstate shipment of milk substitutes, to interstate drugs, to interstate victims of kidnapping.[60] Under the second provision, if any part of the production were to be used in interstate commerce, workers were protected by the act as to both producing goods for the local market as well as the interstate market.

The second provision, and the one relevant to the *McClung* case, is an example of Congress' ability to regulate local or intrastate activity if such activity substantially affects interstate commerce. This provision is sometimes called the "affectation doctrine."[61] As early as *Gibbons v. Ogden*[62] in 1824, the Court had given an expansive definition of Congress' ability to regulate activities or factors affecting interstate commerce. Since 1895 in *United States. v. E.C. Knight*,[63] the Court had

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59. At the time of the passage of the Fair Labor Standards Act in 1938, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the major exception to this clear historical trend, had not yet been reversed. *Darby* specifically did so. *Hammer* had found that Congress did not have the commerce power to ban the interstate shipment of goods produced by child labor. Although the line of precedents supporting Congress' plenary power over the crossing of state lines seemed insurmountable, the *Hammer* Court strained to distinguish them on a number of grounds, the principle one being that even though Congress seemed to be regulating the crossing of state lines, its secret motive was to regulate local manufacturing and under the *E.C. Knight* case, 156 U.S. 1 (1895), this it could not do. *Darby* rejected considerations of motive as relevant in determining Congress' power to regulate things crossing state lines:

> The thesis of the [*Hammer*] opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force.

Darby, 312 U.S. at 116.

60. *See, e.g.*, 18 U.S.C. § 844(d) (1994) (explosives); 18 U.S.C. § 924(b) (1994 (firearms); 18 U.S.C. § 1201(a)(1) (1994) (kidnapping); 18 U.S.C. § 1231 (1994) (strikebreaking); 18 U.S.C. § 1301 (1994) (lotteries); 18 U.S.C. § 1465 (1994 & Supp. III 1997) (obscenity); 18 U.S.C. §§ 2251, 2252 (1994 & Supp. III 1997) (sexual exploitation of children); 18 U.S.C. § 2312 (1994) (stolen motor vehicles and aircraft); 18 U.S.C. § 2314 (1994) (other stolen property); 18 U.S.C. § 2318 (1994 & Supp. III 1997) (counterfeit phonograph records), 18 U.S.C. § 2421 (1994) (prostitution); 18 U.S.C. §§ 2511(1)(b)(iii), 2512(1) (1994 & Supp. III 1997) (electronic eavesdropping). *See also supra* note 37 (discussion of this type of federal power).

61. *See supra* note 9.

62. 22 U.S. (9 Wheat.) 1 (1824). Chief Justice Marshall, after giving every part of the commerce clause an expansive definition, concluded:

> The genius and character of the whole government seem[s] to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

Id. at 195.

63. 156 U.S. 1 (1895).

undertaken in some cases[64] a very limited view of the affectation doctrine. *Knight* held that the then recently passed Sherman Antitrust Act had no application to a manufacturer's combination controlling 96% of domestic sugar because manufacturing was not interstate commerce.[65] But in 1937, the Court began the return to the expansive definition of commerce in *Gibbons*, holding that, whether something was commerce or not, if it had a close and substantial effect on interstate commerce it was within federal power.[66] *Darby* reaffirmed the legitimacy of the *Gibbons* approach though shortening the test, if not softening it, to require a substantial effect. It also pointed out that this test predated *Jones & Laughlin* and it rejected the artificiality of the *Knight* approach. The actual substantial effect–or even close and substantial effect–on interstate commerce could hardly be less clear in *Darby*. If goods made for intrastate commerce were cheaper because produced by cheap labor, they would have a significant competitive advantage over goods moving in interstate commerce subject to the first provision of the Fair Labor

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64. The circuit court in *Brzonkala* described the early holdings in this way:

> The courts of the first era gave an exceedingly narrow definition to the term "commerce," unduly restricting congressional power. By distinguishing commerce from manufacturing, production, and mining, see, e.g., *Carter*, (mining is not commerce); *United States v. E.C. Knight Co.*, (manufacturing is not commerce), and by separating economic activities that directly affect interstate commerce from those that have only indirect effects, see, e.g., *Schechter Poultry*, (wage and hour regulations lack direct relation to interstate commerce), the Supreme Court removed even the plainly economic activities of mines, manufacturing plants, railroads, and merchants from the sphere of regulable "commerce."

169 F.3d at 894 (citations omitted).

This limited view of the affectation or close and substantial affects test was found primarily in cases involving Congress' regulation of economic and labor matters which was inconsistent with the Court's then laissez faire view. In other instances the Court applied the affectation doctrine as liberally as suggested by Marshall in *Gibbons v. Ogden*. For example, in the *Shreveport Rate Cases*, 234 U.S. 342 (1914), the Court found that the Interstate Commerce Commission had the authority to regulate intrastate railroad rates in Texas because of the possibility that they might impact interstate rates from Louisiana to Texas and perhaps beyond.

65. This view was premised upon the misapplication of *Kidd v. Pearson*, 128 U.S. 1 (1888), a case involving state power. In *Kidd*, the state of Iowa banned the manufacture of alcoholic beverages within the state, even though for interstate deliveries. At the time there was a prevailing view that states could not regulate interstate commerce at all, so to avoid those precedents the Court simply held that manufacturing was not commerce. Although a possibly defensible conclusion in terms of state power, the application of the precedent to federal power was totally debilitating to federal power and fundamentally flawed. Even if manufacturing itself was not commerce, it could certainly be regulated because of its affect on interstate commerce. The *Knight* Court, however, distinguished between direct and indirect effects, an impossible line divorced from the reality of any actual effect on interstate commerce. *Jones & Laughlin* largely discredited the *Knight* direct/indirect distinction and in *Wickard v. Filburn* it was specifically disapproved. Interestingly, the majority in *Brzonkala*, 169 F.3d at 901, although disapproving of the *Knight* era of cases, attempted to resurrect the direct/indirect test to help determine the kind of effect on interstate commerce that might satisfy the substantially affects test.

66. *See supra* note 9.

Standards Act.[67] Also, the act applied only if goods were "produced for interstate commerce."[68] While not the same as many earlier federal laws which limited their application to businesses "affecting commerce,"[69] the act certainly required proof that interstate commerce was involved. *Darby*, unlike *McClung*, is not an instance where Congress, by saying it's so, made it so. And the standard used is most certainly not the rational basis test.

Darby represents both types of Congress' pre-*McClung* commerce power. As discussed previously, *Darby* regulated local activities that substantially impacted interstate commerce; in this instance it was manufacturing for in-state use. The *Darby* court also used the other principal type of commerce power: Congress can regulate anything crossing state lines (*i.e.* goods made by persons paid less than the minimum wage). As to this type of interstate commerce, there was no requirement that there be a substantial effect on, or even that the law rationally relate to, interstate commerce. Crossing state lines keyed the enumerated power itself; nothing else was required. Chief Justice Marshall referred to this as any commerce touching more states than one. Although he referred to commercial intercourse between states, the later cases were in no way limited to economic or commercial transactions. Anything crossing state lines was subject to federal power. The line of precedent is overwhelming.[70] Only the reversed *Hammer v. Dagenhart* [71] case, denying Congress the power to regulate the crossing of state lines of things manufactured by children, imposed any limitation on this power. The Court in *Lopez* also emphasized the commercial nature of interstate commerce, but in the context of a law not involving the crossing of state lines.

Few of the lower courts have appreciated the difference between these two types of power.[72] One of the exceptions is a problematic Sixth

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67. 29 U.S.C §§ 201-219 (1994 & Supp. III 1997). Also, the failure to regulate both in-state and out-of-state production would provide a loophole for employers such as Fred Darby. By paying his employees far less than the minimum wage for their intrastate work, he could effectively avoid the economic impact of the law on the work they did for interstate shipment.

68. 29 U.S.C § 202 (1994).

69. *See, e.g.*, National Labor Relations Board Act (NLRB), 29 U.S.C. §§ 151-169 (1994); Sherman Antitrust Act, 15 U.S.C. §§ 1-35 (1994).

70. *See supra* note 38.

71. 247 U.S. 251 (1918).

72. The Child Support Recovery Act (CSRA) cases are illustrative. The CSRA made it crime as to anyone who "willfully fails to pay a past due support obligation with respect to a child who resides in another state." 18 U.S.C. § 228 (1994). This seems to me a clear use of Congressional power to regulate things involving more states than one, things clearly within the commerce power. Interstate collection of child support is made difficult because of the jurisdictional hurdles. Such hurdles are not insurmountable, but the relevance of the state borders are clear. Whether Congress was justified in making the federal courts part of the child support enforcement proce-

Circuit case, *United States v. McHenry*,[73] which upheld the law making carjacking a federal crime. That law[74] made it a crime to take by force or violence "a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce." Since most cars will have been shipped interstate at some point in their life, the law is all encompassing. Perhaps some car will be manufactured in Michigan, driven by a little old librarian from Ann Arbor, Michigan who never leaves the comfortable confines of the city, and this fact will be known to the defense attorney, but that is not the likely scenario. It is not clear from the law whether it is limited to cars shipped after manufacture to another state, or whether having driven it to a neighboring state for a tractor race might be sufficient, but even the most restrictive view will include most cars. The court in *McHenry* found that this law involved the regulation of instrumentalities[75] in interstate commerce and as such, that was the end of any inquiry into commerce power. Although it also concluded that Congress could have rationally concluded that carjacking substantially affected interstate commerce, it specifically noted that such a finding was unnecessary to a holding that the law was within commerce power. Even though the *McHenry* court focused on the instrumentalities of commerce as opposed to statutory requirement of the crossing of state lines, it at least recognized that no impact on commerce needed to be shown.

Even though this case is used as an example of a modern court recognizing the regulating of the crossing of state lines as different than the regulating of things affecting interstate commerce, it is nonetheless

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dures is a useful political question (discussed in *infra* Part VI.) but one that does not go to federal commerce power. *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997), *United States v. Black*, 125 F.3d 454 (7th Cir. 1997), *United States v. Johnson*, 114 F.3d 476 (4th Cir. 1997) and *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996) all treated the problem as involving things moving in interstate commerce. (Of this group, only *Bongiorno* and *Sage* did not also use the rational basis test.) *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996) emphasized that instrumentalities of interstate commerce were likely used for such payments. Reversing the district court, *United States v. Parker*, 108 F.3d 28 (3d Cir. 1997), concluded that Congress could rationally find some substantial effect on interstate commerce. *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996) and *United States v. Crawford*, 115 F.3d 1397 (8th Cir. 1997), held that the law fell within both the power to regulate things moving in interstate commerce and the "substantially affects" test. Of this group of cases, the *Bongiorno* case is particularly interesting for its use of the word "fribbling." *See Bongiorno*, 106 F.3d at 1032.

73. 97 F.3d 125 (6th Cir. 1996).

74. 18 U.S.C. § 2119 (1992).

75. In this it stated its agreement with the Third and Ninth Circuits' view of automobiles. The Third Circuit in *United States v. Bishop*, 66 F.3d 569, 588–90 (3rd Cir. 1995), called cars "the quintessential instrumentalities of modern interstate commerce" and the Ninth Circuit in *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995) agreed: "[C]ars are themselves instrumentalities of commerce which Congress may protect."

discomforting. Unlike more traditional crossing state-line cases, the state boundaries appear to be almost irrelevant except as an excuse to justify federal power. When the federal government makes it a federal crime to ship lottery tickets into a state where it is illegal, it is using its power to address a problem that would be difficult to regulate by any individual state. When it makes it a crime to transport a kidnap victim over interstate lines, it is supplementing the jurisdictional weaknesses of the states involved. When it bans the interstate shipment of illegal drugs, it helps prevent problems in enforcement in one state from tainting the enforcement efforts of another state. It also attacks the problem of illegal drugs at a more vulnerable stage than the private use behind closed doors. Carjacking a car that at some imprecise time has moved in interstate commerce has none of those elements. It complements state enforcement not a lick. Making it a crime to carjack a car and then transport it across state lines would be compatible with traditional uses of commerce power, but that is not what was done here.

Unless the instrumentalities of interstate commerce are actually crossing state lines, or about to be directly involved in crossing state lines, it seems that the "substantially affects" test would be entirely appropriate. If an object, say a car, has both interstate and intrastate uses, any regulation of its intrastate uses should be under federal power only if there is some substantial connection to interstate commerce. Otherwise, a member of Congress unhappy with his or her free car wash may convince Congress to make it a federal crime to leave watermarks on freshly washed cars. After all, "who would be in favor of water marks?" As a United States Senator, in adding as a rider a ban on the ownership of all machine guns whether connected to interstate commerce or not, asked "[w]ho is in favor of owning a machine gun?"[76] The fact that the question is irrelevant to the concept of limits on enumerated power seems to have been missed.

The fact that the rational basis test has carried the day can hardly be doubted. As the Court summarized in the 1981 case of *Hodel v. Virginia Surface Mining*,[77] a case concerning congressional commerce power to regulate the effects of surface coal mining,

> The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether "the means chosen by [Congress is] reasonably adapted to the end permitted by the Constitution." The judicial task is

76. United States v. Wright, 117 F.3d 1265, 1269 n.5 (11th Cir. 1997).

77. 452 U.S. 264 (1981).

> at an end once the Court determines that Congress acted rationally in adopting a particular regulatory scheme.[78]

Of course, given the obvious interstate impact of surface coal mining,[79] the same result would have been reached applying the substantially affects test.

Now the rational basis test is not even limited to its initial application in *McClung*.[80] It has replaced the substantially affects test to a large extent. This change occurred shortly after *McClung*. In *Maryland v. Wirtz*,[81] Congress extended coverage of the Fair Labor Standards Act from employees engaged in commerce to employees working for enterprises engaged in interstate commerce. This change potentially made it easier to require that all business affecting interstate commerce be covered by the act. It was argued that some employees of interstate enterprises were not necessarily individually engaged in commerce. The Court said that it was enough that Congress had rationally found them to be so. However, Congress had done no such thing. The law still required that the Court itself apply the substantially affects test, and given the aggregate impact of employees of all such interstate enterprises, it seemed a pretty easy test to satisfy. However, the Court incorrectly applied the rational basis test.

In some of the modern cases paralleling the older substantially affects cases, such as the reach of the National Labor Relations Act in *Jones & Laughlin* or the scope of the Sherman Antitrust Act, the Court continues to apply the substantially affects test. This may be due to the

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78. *Hodel*, 452 U.S. at 276 (Citations omitted). Although the reasonable basis test is not the same as a rational basis test (compare *Carolene Products* with *Weaver v. Palmer Brothers*, *see supra* note 39), the Court does not accord any significance to the use of this language in *Heart of Atlanta Motel*. It is common to quote this language, but uncommon to apply any test other than the rational basis requirement. *See, e.g.*, United States v. Wright, 117 F.3d 1265 (11th Cir. 1997) (holding that Congress had the authority to make criminal the possession of all machine guns, whether there was any proven movement in interstate commerce or not). The court cites both the rational basis and reasonably adapted language from *Hodel* via *Lopez* but thereafter applied simply the rational basis test. *Id.* at 1270. *United States v. Black*, 125 F.3d 454 (7th Cir. 1997) (upholding the Child Support Recovery Act which makes it a federal crime for an out-of-state parent not to pay child support) does exactly the same thing. *Id.* at 459.

79. On the simplest level, interstate coal companies subject to strict environmental regulations could not compete with intrastate companies exempted from such regulations.

80. This statement is as clear as anything from Justice Rehnquist's separate concurring opinion in *Hodel*. Although calling the concept of Congress' being of limited powers a fiction, he concludes, "Thus it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce." He emphasized the "substantially affects" test as being the major test, but then admitted somewhat begrudgingly that even when Congress is the one applying that test, "Congress' findings must be supported by a 'rational basis' and are reviewable by the courts." *Hodel*, 452 U.S. at 311.

81. 392 U.S. 183 (1968).

language in some of the older acts limiting their application to things "affecting interstate commerce" but it may also be out of respect for the older precedents.[82] The older statutes used the "affecting" language in an attempt to avoid the wholesale finding of unconstitutionality. Congress was uncertain of the scope of its power to regulate interstate commerce, so it allowed the Court to decide on a case by case basis the constitutional issues related to whether commerce was impacted. The statutory requirement mimicked what was thought to be the constitutional requirement.

V. A CLOSER LOOK AT *LOPEZ*

Not until 1995, in *United States v. Lopez*,[83] did the Court marginally retreat from the rational basis test that seemed to have carried the day. In *Lopez*, the issue was possession of a gun on public school grounds, a strictly local activity. The Court was asked, without any evidence, to accept that this law implicated some interstate commerce concern. The Court rejected the argument and noted that no commercial interest of any type seemed to be involved. The Court's apparent point was not that the commerce clause had to involve commercial endeavors, but only that it was less likely to make a leap of faith to find a substantial effect on commerce when no commercial concerns were implicated.[84]

However, even in *Lopez*, the Court does not actually reject the rational basis test. The *Lopez* opinion is schizophrenic, mostly because it is a "substantial affect" case, but reflects a rational basis analysis. After surveying the key historical decisions, the Court summarizes *Jones & Laughlin*, *Darby*, and *Wickard* as requiring that the regulated activities substantially affect interstate commerce. *Lopez* then concludes, "Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."[85] The *Lopez* Court then cited a number of "e.g." cases, including *Perez*, *McClung*, and *Heart of At-*

82. See *supra* note 9.

83. 514 U.S. 549 (1995).

84. *See, e.g.*, United States v. Kirk, 105 F.3d 997 (5th Cir. 1997): "*Lopez* sends a clear cautionary signal that federal criminalization of intrastate noneconomic activity, when such regulation is not essential to a broader regulation of commercial activity, will have difficulty satisfying the substantial effects basis for Commerce Clause regulation." *Id.* at 1009. Of course, it is not often difficult for the reviewing court to find some commercial activity. *See, e.g.*, United States v. Wilson, 73 F.3d 675 (7th Cir. 1995) (finding within the commerce power the Freedom of Access to Clinic Entrances Act, which has no interstate component, because performing abortions is a commercial activity).

85. *Lopez*, 514 U.S. at 557.

lanta Motel.[86] *Perez* is the most interesting citation of the group, since the majority opinion in *Perez* does not refer to the rational basis test at all. Other than referring to the aggregate impact approach, the *Perez* Court does not indicate what test it is applying. In fact, Justice Stewart dissents, claiming that even a modest level of review was not employed by the majority.[87] Later in the *Lopez* case, both *Perez* and *McClung* are listed as examples of where the Court has "concluded that the activity substantially affected interstate commerce."[88] Of course, neither *Perez* nor *McClung* did any such thing. Is it any wonder that the *Lopez* court must lament that "our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce"?[89] Finally, however, the Court concludes strongly that the weight of authority requires that "the regulated activity 'substantially affects' interstate commerce" in order to be within Congress' power to regulate it under the Commerce Clause.[90]

Justice Breyer's dissent in *Lopez*, joined by Justices Stevens, Souter, and Ginsburg, also makes it clear that the majority was not applying the rational basis test.[91] He considers the "substantial affect" requirement as inconsistent and views the precedents as requiring a "sig-

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86. A fourth case was cited, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276-80 (1981).

87. Compare this objection with the due process case of *Ferguson v. Skrupa*, 372 U.S. 726 (1963) where the majority opinion does not once mention the rational basis test in upholding state economic legislation involving debt collection against a due process challenge. It is left to Justice Harlan's two line concurring opinion to mention the supposedly operative test. *Id.* at 733.

88. *Lopez*, 514 U.S. at 559.

89. *Id.*

90. *Id.*

91. Separate concurring opinions by Justice Thomas and Justice Kennedy, in which Justice O'Connor joined, go their divergent ways. Justice Kennedy, in a thoughtful essay on the importance of the concept of a Congress with limited powers in our federalist system, argues for meaningful Court involvement in protecting the key attributes of our federalist system:

> Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers.

Id. at 575. But Justice Kennedy does not commit to any particular approach in resolving the delicate balance between state and federal power. Justice Thomas is of the opinion that the "substantially affects" test needs to be re-evaluated. Unlike this Article, which decries the abandonment of that test in favor of the standardless, valueless rational basis test, Justice Thomas argues that the substantially affects test was an unwarranted expansion of pre-New Deal commerce clause jurisprudence. Somewhat amazingly, he even defends the *E.C. Knight* rejection of manufacturing as being within federal commerce power and concludes: "I am aware of no cases prior to the New Deal that characterized the power flowing from the commerce clause as sweepingly as does our substantial affects test. My review of the case law indicates that the substantial affects test is but an innovation of the 20th century." *Id.* at 596.

nificant affect," which to him is less than "substantial."[92] However, the key to his approach is not the difference between significant and substantial, but rather that "the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one removed."[93] The Breyer dissent insists that the Court must defer to Congress in determining that there is a significant factual connection "because the determination requires an empirical judgement of a kind that a legislature is more likely than a court to make with accuracy. The traditional words 'rational basis' capture this leeway."[94] Breyer then concludes, "[t]hus, the specific question before us, as the Court recognizes, is not whether the 'regulated activity sufficiently affected interstate commerce,' but, rather whether Congress could have had 'a rational basis' for so concluding."[95]

This is exactly the question that Breyer asks about the *Lopez* case: "Could Congress rationally have found that 'violent crime in school zones,' through its effect on the 'quality of education,' significantly (or substantially)[96] affects 'interstate' or 'foreign commerce'?"[97] He concludes "yes" with an interesting qualification: "As long as one views the commerce connection, not as a 'technical legal conception,' but as 'a practical one,'"[98] citing the opinion of Justice Holmes in *Swift & Co. v. United States*.[99] The quote from Holmes is interesting because the Swift case is the ultimate in technical distinctions. Earlier cases such as *E.C. Knight* had found that the kind of manufacturing and processing found in the Swift stockyards were not commerce within federal power. Instead of directly reversing these undoubtedly erroneous decisions, Holmes said that a stockyard business was such a continuous operation that it was all part of the current of commerce. In other words, Holmes tried to fit the regulation within the crossing of state lines form of commerce power as opposed to what it was, local activities affecting interstate commerce. This current of commerce approach was largely abandoned in *Jones & Laughlin*, where the Court said it was unneces-

92. *Lopez*, 514 U.S. at 616 (Breyer. J., dissenting).

93. *Id.*

94. *Id.* at 616-17.

95. *Id.* at 617.

96. Since any difference between significant and substantial seems shading at best, it's hard to understand Justice Breyer's insistence on trying to substitute significant as a synonymous term for the historically accepted substantial. What's key is that under the rational basis test Congress, not the Court, makes the applicable finding, with the Court only nodding in consent, "Sounds rational to us." Nonetheless, Breyer in *Lopez* consistently refers to the significant impact with substantial in parentheses as though a definition were needed.

97. *Lopez*, 514 U.S. at 618 (Breyer. J., dissenting).

98. *Id.*

99. 196 U.S. 375, 398 (1905).

sary to consider the current or stream of commerce cases since the test was whether the local activity had a practical impact on interstate commerce.[100]

The quote of Justice Breyer is interesting in another way as well. His approach in *Lopez* makes it quite clear that he is not interested in the practical impact emphasized in *Jones & Laughlin,* but rather is willing to accept Congress' technical conclusion as to the impact on commerce as conclusive. In *Jones & Laughlin*, the Court stated "[w]e have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience."[101] Further, the Court in *Jones & Laughlin* made a careful finding of the actual impact on interstate commerce of labor unrest in a highly integrated interstate steel operation, something which Justice Breyer found unnecessary.

The significance of Breyer's conclusion that the rational basis test meant that the courts were one step removed cannot be emphasized enough. The rational basis due process, and equal protection cases where this difference is key are legion. One of the most famous is *Williamson v. Lee Optical,*[102] where the Court concluded that the laws regulating optometry passed by the Oklahoma legislature might be "needless, [and] wasteful," but that they were nonetheless rational.[103] In *Board of Railroad Retirement v. Fritz,*[104] the Court is at pains to figure out why persons with more years of service in the railroad lose their pensions but persons with fewer years and holding a current union membership keep theirs. Though knowing full well that the probable explanation was that the union wrote the law for Congress to favor their current members, the Court concluded that it was conceivable that Congress saw some rational connection to some conceivable state end. Even in a case as recent as *Nordlinger v. Hahn,*[105] where the Court upheld California Proposition 13, (which discriminated as to property taxes based upon time of purchase), the Court had trouble seeing any justification for a lack of equality as to something as basic as real property taxes. Nonetheless, the Court found that surely California could conclude that this law was rationally connected to some overly broad attempt at protecting persons on fixed income from being taxed out of

100. *Jones & Laughlin*, 301 U.S. at 36–37.
101. *Id.* at 41–42.
102. 348 U.S. 483 (1955).
103. *Id.* at 487.
104. 449 U.S. 166 (1980).
105. 505 U.S. 1 (1992).

their property. And Breyer's dissent in *Lopez* is a perfect example of the significance of this approach in interpreting commerce power: Congress, by saying it, makes it so.[106]

Brzonkala, both at the district court level and the en banc decision of the Fourth Circuit, is a careful and thoughtful analysis of the *Lopez* opinion. The circuit court's majority opinion applies principally the "substantially affects" test and only at the end of its commerce clause analysis does it mention the rational basis test at all. It calls the claims for the rational basis test, "a deference so absolute as to preclude any independent judicial evaluation of constitutionality whatsoever, a deference indistinguishable from judicial abdication."[107] Although rejecting the deferential level of review claimed for the rational basis test, the Fourth Circuit acknowledges that the rational basis level of review may be the correct one. It nonetheless claims that in applying the "substantially affects" test, that it is faithfully applying the rational basis test. The approach of the majority is far removed from the classic formulations of the rational basis test found in *Carolene* and *McClung*, but it is a faithful application of the "substantially affects" test.

One of the interesting differences between *Lopez* and *Brzonkala* is the congressional finding of impact on interstate commerce in the VAWA. The act specifically states that Congress' concern is for acts of violence which substantially affect interstate commerce. It does not require that the court find any effect on interstate commerce in a particular case, but, unlike *Lopez*, it at least acknowledges the relevancy of the commerce power. When Congress says that certain things will affect interstate commerce, the courts typically call that a finding of jurisdictional facts. The VAWA does not go so far as to say that violence against women will presumptively affect interstate commerce, as Congress said of racial discrimination in *McClung*. That failure may or may not be significant. It is possible that all *Lopez* means is that Congress must first make such an assertion before the court, under the guise of rational basis, will uncritically accept the congressional assertion. Since the VAWA also did not make any such presumptive findings, the *Brzonkala* majority did not view itself bound to accept any presumption of harm to interstate commerce. In *Lopez*, there was no claim in the legislation itself that guns on school property had anything to do with commerce at all, so at least the VAWA goes further in attempting to

106. The dissent in *Brzonkala* essentially follows this approach. The *Brzonkala* majority claims, "[T]he dissent, after announcing the 'rational basis' standard of review, offers not a single sentence–not one–of independent analysis of whether gender-motivated violence substantially affects interstate commerce." 169 F.3d at 857.

107. *Id.*

draw some commerce clause connections. *Lopez* does not address whether the Court would uncritically accept Congress' claim that guns on school property will affect commerce. And Congress was not willing to take the risk that the Court would not critically accept such a claim. Although initially Congress passed a new version of the Guns on Schools law which said that guns did impact interstate commerce, it eventually changed the law to require that the gun or the carrier had to cross interstate lines.[108]

VI. CONCLUDING COMMENTS

Is it likely that the Supreme Court will reject the rational basis test, roll back its Commerce Clause theories to pre-1964 and reinstate the "substantially affects" test of 1937?[109] Probably not, but *Brzonkala* would give the Court the perfect opportunity to do so.[110] The "substantially affects" test gives Congress ample ability to regulate any local activity actually impacting interstate commerce to any significant degree. Congress, apparently, is not the least bit concerned with interstate commerce. It wishes to pass legislation and views the concept of enumerated powers as a minor speed bump in its rush to federalize everything. Before *Lopez*–and in all likelihood after it as well–the rational basis test gave Congress the means by which it could do just that. All Congress had to do was say that commerce was impacted and the rational basis test took care of the rest. Eventually, Congress became so sure of its legislative powers that it even stopped taking the preliminary step of making certain holdings and just assumed that the Court would fill in the details. The Court filled in the details until *Lopez*.

This Article accepts as an element of faith that protecting federalism by limiting Congress to enumerated powers is a constitutional prin-

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108. See the reference to this change in the following quote from the majority opinion in the *Brzonkala* case:

> [Congress], at the Administration's urging, amended 18 U.S.C. § 922(q) by adding a jurisdictional element. Compare 18 U.S.C. § 922(q)(2)(A) (limiting statute's reach to prohibition of possession, in a school zone, of a firearm "that has moved in or that otherwise affects interstate or foreign commerce"), with 31 Weekly Comp. Pres. Doc. 809 (May 15, 1995) (presenting Attorney General Reno's "analysis of *Lopez*" and recommended "legislative solution" of limiting the statute's reach by adding a jurisdictional element, "thereby bring[ing] it within the Congress' Commerce Clause authority").

169 F.3d at 849.

109. The idea seems not as far-fetched to me as Justice Thomas' expressed desire in *Lopez* to reject even the substantial affects test in favor of something pre-20th Century. *See supra* note 91.

110. And if certiorari is either not sought or not granted in *Brzonkala*, the *Lopez* issue is so heavily litigated that the Court has a plethora of opportunities to expand on *Lopez*. The Court recently granted certiorari in *Jones v. United States*, 1999 WL 699893, 1999 U.S. Lexis 7495 (U.S.), to determine if the federal arson law applied to the burning of private residences and, if so, whether that would be consistent with Lopez.

ciple worth arguing about, but there is a legitimate question as to whether this bedrock principle is worth the trouble. The Court in *Lopez* struck down the first federal law in sixty years on such grounds, despite the century being replete with examples of federal laws having little connection to enumerated powers.[111] And the flurry of litigation after *Lopez* indicates that most such challenges are fruitless and only serve to clog up the judicial system. The Child Support Recovery Act (CSRA), passed just four years ago, has already generated nine circuit court opinions and even more district court opinions.[112] The strain on judicial resources on just one CRSA case can be tremendous. As the First Circuit in *United States v. Bongiorno*[113] observed before upholding the act: "In many respects the history of this litigation resembles a Greek Tragedy, excerpts of which from time to time have occupied the attention of no fewer than ten federal and state judges across the nation."

It is often claimed that this constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."[114] The *Lopez* court agrees that a balance of power between the federal government and the states "will reduce the risk of tyranny and abuse from either front."[115] While I personally believe that our federalist system is a healthy one, this particular reason seems weak at best. First, fundamental individual rights are amply protected from federal laws by a combination of the checks and balances within the federal government, especially independent judicial review, and the Bill of Rights. Second, if only Congress could pass laws, it would be easier to spot attempted invasions of our civil rights. However, we are so distracted by the various pieces of legislation and regulations being enacted every day at many different legislative and administrative levels, it is only when the law impacts us directly that we are likely to notice.

Finally, even if notions of federalism were in some way protective of our civil rights, that would not mean that a restrictive view of commerce would necessarily advance that goal. A decision striking down a federal law based upon a narrow view of the commerce power might be overcome by the exercise of some other enumerated power, such as the spending power or the taxing power.[116] On the other hand, spending

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111. To be fair, there are other cases where the Court has limited the application of federal law to avoid the constitutional issue. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), for example, limited the potential reach of the federal Age Discrimination Act to avoid conflict with fundamental principles of federalism.

112. *See supra* note 72.

113. 106 F.3d 1027, 1029 (1st Cir. 1997).

114. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotations marks omitted).

115. *Lopez*, 514 U.S. at 552 (citing *Gregory*, 501 U.S. at 458).

116. The only case to disapprove of such an end run, *Bailey v. Drexel Furniture Co. (The*

and taxing are not perfect parallels to legislation under the Commerce Clause. For example, Congress could use its spending power to encourage states to more effectively address domestic violence by doing away with the spousal privilege in rape, but it could not use the spending power to make domestic violence a federal crime. However, if the appropriate impact on interstate commerce were found, Congress could use its commerce power to make spousal rape a crime.[117] As for the spending power, it is always possible that a particular state would rather forego federal funds than to accede to federal demands.

Another approach might be to let Congress pass any law it wanted and switch the argument to the political arena: Do the states or the people want Congress federalizing everything? Despite my doubt that the political processes will place much in the way of significant limits on congressional power, there is a certain appeal to that approach at the legislative level. As an example, what exactly does the federal carjacking law accomplish? Several federal courts have wrestled with whether it is within the realm of federal commerce power and concluded that it was.[118] I think the better question would be whether this issue was being adequately handled at the state and local level. Or better still, was there some pocket of local government in this country that had fallen under some perverted Amish anti-car influence and thus local car owners needed the federal government to step in and protect their unhindered access to drive unmolested to Orlando, Florida? It's bad enough that the federal courts have to spend their time resolving the legal issue of enumerated power. It's even worse that the federal trial courts are put to the burden of trying what are in essence local cases of malicious robbery.[119] Is this the best use of the best and the brightest of our life-appointed federal judges, or are there local and state judges out there, not aspiring to the leisure of the federal court calendar, who are quite competent to handle such matters?

Child Labor Tax Case), 259 U.S. 20 (1922), striking down a punitive federal tax on goods produced by child labor as being an improper regulation of intrastate manufacturing, has long since been rejected. *See, e.g.*, Sonzinsky v. United States, 300 U.S. 506 (1937) (upholding a confiscatory tax on the interstate shipment of sawed off shotguns).

117. If nothing else, Congress could use its power over the crossing of state lines to fashion a federal criminal law. *See supra* note 14 (discussing the criminal provisions of the VAWA). Even if the Court were to accept the claim in this Article, that the rational basis test should be abandoned, the result might only be the increased arbitrary use of pointless references to interstate travel as triggering the federal law.

118. *See, e.g.*, United States v. Bishop, 66 F.3d 569 (3d Cir. 1995), with one judge dissenting.

119. Most of the federal carjacking cases are straightforward, small-time criminal law cases. *See, e.g.*, United States v. Cruz, 106 F.3d 1134 (3d Cir. 1997) (circuit court decision where the major issue was whether a 12-year old passenger was a vulnerable victim for purposes of the federal carjacking law).

Rather than debating the intricacies of the commerce clause, a straightforward policy judgment as to whether any subject is worth federalizing might be the better approach. But judges do not have the choice of debating the true issue. They are limited to defining the vagaries of the commerce clause and in so doing hopefully advance the overall principles of federalism, but any overlap between the real issues and the legal niceties may be more limited than we care to admit. A fair question would be whether the rational basis test or the substantially affects test is more likely to overlap with fundamental federalist concerns. The dissenting opinion in *Brzonkala* argues that the rational basis test correctly gives Congress the principle role.[120] I believe that the Constitution and, until the *McClung* case, Supreme Court precedents gave the Court that primary function. I am not in favor of the rational basis test in any of its forms. If the due process and equal protection clauses were intended to protect individual liberties then they should protect interests that people care about–work, health, housing–as well as more high profile concerns like speech and privacy. I do not believe that the rational basis test allows the Court to play any significant role in protecting such bread and butter rights. Nonetheless, the historical approach of extreme judicial deference is well established in the due process and equal protection field.[121] With the recent *Lopez* case, there is still time to reconsider the appropriate judicial rule in determining the breadth and scope of Congress' power to regulate everything under the patently fictional claim of concern for interstate commerce. The rational basis test is no test at all, and its level of judicial deference is so extreme as to alter dramatically the precarious balance of power between the states and the federal government. The "substantially affects" test comes closer to confining Congress properly to those subjects needing the inflexibility of the monolith of a federal approach.

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120. 169 F.3d at 918 (Motz, J., dissenting).

121. There are some recent notable exceptions to this extreme level of deference in the due process and equal protection cases, but it is hard to see whether these cases represent a trend or an aberration. *See, e.g.*,); Romer v. Evans, 517 U.S. 620 (1996) (holding unconstitutional Colorado's exclusion of gays from groups given protection against arbitrary discrimination); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (finding invalid a city law that placed additional burdens on group homes for the mentally retarded not imposed on other types of group homes); Metropolitan Life Ins. v. Ward, 470 U.S. 869 (1985) (striking down an Alabama law which with Congressional approval taxed out of state insurance companies more than in state companies); Plyler v. Doe, 457 U.S. 202 (1982) (striking down a Texas law denying public education to children of illegal aliens). Adding these cases to *Lopez* and *Boerne*, the inconceivable is possible–that the rational basis test itself may become a significant level of review. Somehow I doubt it. I also doubt that Hohfeldian principles much influenced the writing of the U.S. Constitution. *See contra* H. Newcomb Morse, *Applying the Hohfield System to Constitutional Analysis*, 9 WHITTIER L. REV. 639 (1988).

Perhaps the courts might, as a minimum, require that Congress say that something will impact interstate commerce. One would think that *McClung* required some such jurisdictional statement and the Court was to apply the rational basis test only to those situations where Congress made a presumptive finding that certain things impacted interstate commerce. Such a statement would be an improvement, in that such specific language would require that Congress acknowledge openly that it is choosing to maximize its power vis-a-vis the states and was willing to bear whatever political cost such an open admission would bring. Congress is required to do something similar when it abrogates the Eleventh Amendment sovereign immunity of the states.[122] But *McClung* has never been strictly limited to just such situations.

Finally, I suggest a modest proposal, that every federal law passed, whatever the source of enumerated power, should be required to have a "Federalism Impact Statement," where Congress specifically addresses the impact the law will have on the independent sovereignty of the states. Congress would also identify the increased burden on our central government in accepting the primary responsibility for the resolution of every problem. Such a statement might also address the trivialization of our vaunted federal judiciary.[123] It's not that these issues are not important, but they do not necessarily need the collective wisdom of life appointed judges to resolve.[124] No right thinking person can believe that guns should be allowed on public school properties, but is there a need to federalize such a concern? This is not a matter of good laws or bad laws. There are subtle and not so subtle costs to our system when Congress tries to do too much and has too little confidence in the diversity of our federalist system. I believe that there would be some difficult-to-

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122. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court found that Congress could abrogate sovereign immunity of the states using its power under Section 5 of the Fourteenth Amendment, but only if there was a plain statement that it intended to do so. Before it was overruled on other grounds, the Court in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), had the same requirement as to abrogation of immunity using commerce power.

123. Compare with the following sentiment of a wise old teacher of Jurisprudence:

> The more you depart from simplicity the more you dilute the truth. Passing from the purgatorial process to the desired destiny of simplicity, Thoreau wrote: 'Our life is frittered away by detail. An honest man has hardly need to count more than his ten fingers, or in extreme cases he may add his ten toes, and lump the rest. Simplicity, simplicity, simplicity! I say, let your affairs be as two or three, and not a hundred or a thousand; instead of a million count half a dozen, and keep your accounts on your thumb-nail.'

H. Newcomb Morse, *The Johnsonian Definitional Delimitation of Constitutional Speech*, 17 WHITTIER L. REV. 403, 404 (1996), quoting HENRY DAVID THOREAU, WALDEN OR LIFE IN THE WOODS 66 (New American Library 1960) (1854).

124. *See supra* note 119 and its description of the efforts of the Third Circuit in working through the intricacies of the federal carjacking law.

quantify harm to our form of government were Congress, for example, to mandate school uniforms in all our public schools. It's not that such a law would be bad, but surely federal energy focused on such inherently local matters diverts our federal government from addressing those problems that the individual states are incompetent to handle. That, I believe, was what the Framers intended for the central government.[125] Whatever temptations Congress may face to federalize every problem imaginable, the Constitution and history cautions otherwise.

125. And not so coincidentally, that is exactly what the Framers of the United States Constitution initially approved before sending their proposal for limiting the scope of federal power to the Committee of Details. For reasons unknown, the Committee of Details came back with specific enumerations of various powers, and that is the language ultimately approved by the Framers. WILLIAM COHEN & JONATHAN D.VARAT, CONSTITUTIONAL LAW, CASES AND MATERIALS at 152-54 (10th ed. 1998) (quoting from the historical record).