


The Commerce Clause, The Preposition, and the Rational Basis Test

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The Commerce Clause, The Preposition, and the Rational Basis Test

James M. McGoldrick, Jr.

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ABSTRACT

In *Gonzales v. Raich*, the United States Supreme Court upheld the application of the federal Controlled Substances Act to bar the use of state-grown marijuana for in-state personal medical use. In so doing, the Court ratified the expansion of Congress' commerce power beyond any known limits. It abandoned the "substantial effects" test that it had used since 1937 and applied the "rational basis" test. This Article traces the historical development of Congress' enumerated powers from the earliest cases, emphasizing the expansive view of commerce power found in *Gibbons v. Ogden*. From that strong beginning for the commerce power, the Article follows the various detours of the United States Supreme Court cases, some cases imposing now rejected limits on the commerce power, some setting the foundation for the modern test. The main thrust of the Article is to argue that both in terms of history and in terms of our federalist form of government that Congress' commerce power in instances not involving the actual crossing of state lines should be limited to local activities that in a practical fact-based way have a substantial impact on interstate commerce. The Article asserts that the rational basis test should have no role to play in determining Congress' power to regulate interstate commerce, that the rational basis test is not only historically unsupportable, but that it also represents a failure of the Court to play its appropriate role in protecting "Our Federalism."

AUTHOR'S NOTE

Professor of Law, Pepperdine University School of Law. I am especially grateful for the support and encouragement given to my scholarship by my close colleagues at Pepperdine, Professors Harry Caldwell, Tony Miller, Steven Schultz, and Colleen Graffy.

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I. INTRODUCTION

*In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding.*¹

In *Gonzales v. Raich*,² the United States Supreme Court upheld the application of the federal Controlled Substances Act to bar the use of state-grown marijuana for in-state personal medical use. In so doing, the Court ratified the expansion of Congress' commerce power beyond any known limits. It abandoned the "substantial effects" test that it had used since 1937³ and applied the "rational basis" test.⁴ Make no mistake about it, the substantial effects test is the correct test based upon both Supreme Court precedents and the constitutional division of power in our federalist system between the federal government and the

¹ *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

² *Id.*

³ See, for example, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), where the Court used the "substantial effects test." In *Jones & Laughlin Steel*, the Court stated that, "Although 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." *Id.* (emphasis added).

⁴ The rational basis test is primarily a minimum level of scrutiny used in substantive due process and equal protection cases not involving fundamental rights or suspect classifications. See e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory 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." (emphasis added)). But the rational basis test did morph into some Commerce Clause cases. See e.g., *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964) ("But 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." (emphasis added)). In *McClung*, the Court upheld Congress' commerce power under the 1964 Civil Rights Act to regulate private racism impacting the interstate shipment of food supplies to an in-state restaurant. *Id.*

states. The rational basis test is fundamentally inconsistent with our federalist system of government.

The opening quote from Justice Steven’s opinion in *Raich* has at least three substantive errors. First, the task for the Court in reviewing federal enumerated power is far from a “modest one.”⁵ Determining the limits on federal power is one of the Court’s most important jobs. Our federalist system of government dividing power between the central government and our fifty states requires that the Court enforce the limits on federal power.

Second, in terms of Congress’ power to regulate interstate commerce, the Court’s job is specifically to look at the aggregate impact of local activity to determine if activity strictly within one state has a “substantial effect” on interstate commerce.⁶ The substantial effects test imposes judicially enforceable limits on federal power over local activity strictly in one state. The substantial effects test requires a substantial connection between a federal law and some impact on interstate commerce and thus imposes limited but specific restrictions on Congress’ enumerated power.⁷ It is a practical fact-based inquiry and has the support of history, precedent, and common sense on its side.

Third, the rational basis test is a venerable test for due process and equal protection issues, but despite some precedential support, its use in determining the scope of federal enumerated commerce power is inconsistent with constitutional limits on federal power. The rational

⁵ As Chief Justice Marshall famously said about the scope of federal power, “But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.” *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

⁶ See the Court’s approach in *Wickard v. Filburn*, “But even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce” *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Later the Court continued, “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” *Id.* at 127–28.

⁷ As the Court said in *N.L.R.B. v. Jones & Laughlin Steel*, “We 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.” *Jones & Laughlin Steel Corp.*, 301 U.S. at 41–42.

basis test for determining enumerated powers essentially allows Congress to define its own powers and is virtually without identifiable limits; it is little more than a judicial rubber stamp on congressional legislation.⁸ The logic of the rational basis due process and equal protection cases is that the political processes will prevent abuse, thus precluding the necessity of court review.⁹ Our federalist system of government dividing power between the central government and our fifty states requires that the Court enforce the limits on federal power. Congress, if left to its own devices, will pass laws on anything that seems politically expedient.¹⁰ The idea that the constitutional limits on federal power will be politically self-correcting is fanciful if not ludicrous.

In short, the Court's job in determining the scope of federal power is crucial. The substantial effects test is the correct test for determining Congress' commerce power to regulate intrastate commerce, and the

⁸ It is possible that the rational basis test in the commerce power cases may be a less permissive level of review than in the due process cases. In the due process cases, there are two moving targets. The law limiting substantive interests must rationally relate to some legitimate interest, but as applied that means some conceivable relationship to some conceivably legitimate purpose. In commerce power cases, there is only one moving target; the federal law limiting local activities must at least conceivably relate to a fixed object, Congress' enumerated power to regulate commerce among the several states. The Court has not indicated that the rational basis test might be more vigorous in the commerce power cases.

⁹ See, e.g., *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." (footnote omitted)).

¹⁰ See, for example, *Holloway v. United States*, 526 U.S. 1 (1999), a case clarifying the intent requirement in the Federal Anti-Car Theft Act of 1992, which made it a federal crime to use a firearm to steal a motor vehicle that had been shipped in interstate commerce. So-called carjacking was likely a crime in every state. Other than responding to the spate of publicity in the early 1990s from a number of local carjackings, there was no reason whatsoever for Congress to pass such a law, yet Congress used the barest connection to interstate commerce to pass a law no rational person would think was needed. It all culminated in the waste of judicial review, with *Holloway* resolving a conflict in the circuits as to the Act's definition of specific intent. See *id.* at 12.

rational basis test is the wrong test.¹¹ This Article will first trace the historical development of substantial effects test as a limit on federal power. It will argue that the test is an important limit on federal power, balancing the need to protect our federalist system and its division of power between the central government and the states with the flexibility that Congress needs to address national issues. Second, the Article will develop how the rational basis test became part of the test for federal commerce power and why it is inconsistent with constitutional limits. The Article will describe the use of the rational basis test as a means of achieving federal power to protect violations of basic civil rights by private entities totally within one state, a power denied to the federal government by a narrow view of Congress' power under Section 5 of the Fourteenth Amendment and by the normal application of the substantial effects test in terms of commerce power. The Article will trace the movement of the rational basis test from a test in a few commerce power cases to the all-purpose test it appears to be in the *Raich* case.

II. *MCCULLOCH V. MARYLAND*—OUR FEDERALISM

Our Federalism¹² refers to our form of government, a sharing of power between the now fifty states and the central government as

¹¹ See James M. McGoldrick, *Katzenbach v. McClung: The Abandonment of Federalism in the Name of Rational Basis*, 14 *BYU J. PUB. L.* 1, 1 (1999) for my first discussion on this issue, which I addressed some twenty-years ago. Other than as specifically cited, no part of this article comes from my earlier effort.

¹² Justice Black stated the concept well, “[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism,’ and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of ‘Our Federalism,’ . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.” *Younger v. Harris*, 401 U.S. 37, 44–45 (1971). Under the first government, after gaining our freedom from the British, the Articles of Confederation created more of a confederation, a loose association of the first thirteen colonies, as the states were then called, in a shared form of government. There was a central government only if the most

represented by the Congress. The best description of this federalist form of government is not in the original Constitution¹³ but in the Tenth Amendment, which was part of the later added Bill of Rights: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁴

Like all discussions of our federalist form of government, the Supreme Court’s part of that story begins in 1819 with *McCulloch v. Maryland*.¹⁵ Chief Justice John Marshall could hardly have been more extravagant in his claim of importance for the case involving Maryland’s tax of between one and two percent¹⁶ on the face value of

minimal sense; the central government that existed was fully subject to state control. Under the Articles of Confederation, each of the colonies had equal power, and it took a consensus of all thirteen colonies for it to be amended. The central government, to the degree that there was one, only had the power as granted to it by the vote of all of the colonies.

¹³ The United States Constitution was ratified by the requisite number of states in 1787 and replaced the Articles of Confederation as the embodiment of our national and state form of government. It is of passing interest that the new Constitution was itself of questionable legality in that it provided that only nine of the states had to approve it for it to replace the Articles of Confederation. Eventually, all of the original thirteen colonies ratified the new Constitution seeming to effectively moot any claim of illegality. Unlike the Articles of Confederation, the Constitution specifically gave the central government a number of enumerated powers, the overwhelming majority found in Article I, Section 8, Clauses 1 through 18, with Clause 18 being the Necessary and Proper Clause.

¹⁴ U.S. CONST. amend. X. In furtherance of a promise made during the ratification debate for the United States Constitution to add civil rights protections to the United States Constitution, the first Congress in 1789 proposed twelve amendments to the Constitution, ten of which were ratified by the requisite number of states in 1791, becoming part of the constitution. The Twenty-Seventh Amendment was one of twelve proposed amendments by Congress in 1789, but it was not ratified until 1992. The Twenty-Seventh Amendment limits when a congressional pay raise becomes effective. *See Schaffer v. Clinton*, 240 F.3d 878, 880 (10th Cir. 2001). *Schaffer* held that the plaintiffs did not have standing to challenge a cost of living increase as being contrary to the Twenty-Seventh Amendment. *Id.* at 886.

¹⁵ *McCulloch v. Maryland*, 17 U.S. 316 (1819). *McCulloch* and the shortened form *M’Culloch* are used interchangeably by various sources, but *McCulloch* seems the more modern choice.

¹⁶ The taxing scheme was hardly a model of logical clarity. The tax started out at 2% on a \$5 Bank of the United States note, and then reduced to 1.5% on a \$20 note, 1% on a \$50 note, only to revert to 2% on a \$500 note. In lieu of the tax on

banknotes issued by the federally chartered Bank of the United States.¹⁷

*The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision.*¹⁸

Marshall got quickly to the issue, “The first question made in the cause is—has congress power to incorporate a bank?”¹⁹ If Congress had the power to incorporate the Bank of the United States, then the state tax on it was unconstitutional.²⁰ Under the Supremacy Clause,²¹ federal

the individual bank notes, the Bank could also pay a yearly tax of \$15,000. *McCulloch*, 17 U.S. at 321.

¹⁷ The Bank of the United States was a quasi-public entity which helped the federal government manage its basic financial obligations, but it was politically controversial for many reasons, including its connection to the Federalist Party long since eclipsed by Thomas Jefferson and the Democratic Republicans, its lending policies which led to failure of some state banks, and a high level of corruption, including at the Baltimore branch at issue in the *McCulloch* case. As summarized by Professors Plous and Baker, “In the minds of much of the public the Bank of the United States was a ruthless and irresponsible institution, controlled by a small group of private bankers for personal profit. The federal government held a minor share of stock and held no actual control over the Bank’s policies. While much of the antagonism was emotional, and while the Bank perhaps received more blame for economic conditions than it deserved, a good deal of the disrepute was justified (as indicated above) by poor management and selfish profit-seeking.” Harold J. Plous & Gordon E. Baker, *McCulloch v. Maryland: Right Principle, Wrong Case*, 9 STAN. L. REV. 710, 719 (1957).

¹⁸ *McCulloch*, 17 U.S. at 400. There are some who agree with Marshall’s assessment of the importance of the case. See Plous & Gordon, *supra* note 17, at 710–20 (“Few cases in the history of American constitutional law can match the significance and long-range implications of *McCulloch v. Maryland*. Often considered the greatest of Chief Justice John Marshall’s decisions, it is familiar to later generations of students not only as the landmark case in the development of American federalism, but also as a classic example of solemn Marshallian rhetoric.”).

¹⁹ *McCulloch*, 17 U.S. at 401.

²⁰ See U.S. CONST. art. VI, cl. 2.

law is supreme over inconsistent state law and Marshall said that a state tax would necessarily be the “power to destroy”²² the federally chartered bank, thus inconsistent with federal law, and under the Supremacy Clause would be invalid.²³

The supremacy of federal law over inconsistent state law seems incontrovertible, and Marshall had little doubt as to Congress’ power to incorporate the bank.²⁴ In upholding federal power, Marshall framed the basic black letter law for every federal law: “This government is acknowledged by all, to be one of enumerated powers.”²⁵ But despite the fact that the Constitution did not anywhere mention the enumerated power to incorporate a bank,²⁶ this black letter rule was no obstacle. The Constitution empowered the central government “to lay and

²¹ Article VI, Clause 2 of the United States Constitution reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” See generally, Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559 (2013), which nicely summarizes the various historical and scholarly issues related to the Supremacy Clause, and leads to Professor Ramsey’s straight-forward conclusion, “The Constitution’s text gives Congress power to displace state laws to the extent state laws interfere with federal interests.” *Id.* at 593.

²² *McCulloch*, 17 U.S. at 427.

²³ *Id.* at 405 (“If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.”). As for the application of the Supremacy Clause to the state tax, Marshall stated, “That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.” *Id.* at 431.

²⁴ See *id.* at 401–02. It was of some importance to Marshall that the law incorporating the bank had the imprimatur of the very first Congress and that it was passed after open political debate: “The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability.” *Id.* at 401–02.

²⁵ *Id.* at 405.

²⁶ *Id.* at 406 (“Among the enumerated powers, we do not find that of establishing a bank or creating a corporation.”).

collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies,”²⁷ and this power over the “sword and the purse”²⁸ included the implied power²⁹ to select means to accomplish the enumerated powers or ends.³⁰

Nonetheless, this implied power to choose means to accomplish enumerated ends was not without limits.³¹ The Constitution required that means must bear a “necessary and proper” relationship to the enumerated ends.³² Necessary, Marshall said, did not mean “an absolute physical necessity” but rather “no more than that one thing is convenient, or useful, or essential to another.”³³ Marshall later

²⁷ *Id.* at 407. The power to tax and the power to borrow are found in Clause 1 of Article I, Section 8; the power to regulate commerce in Clause 3; the power to declare war in Clause 11; the power to support armies in Clause 12; and the power to maintain a navy in Clause 13.

²⁸ *Id.*

²⁹ *Id.* at 406 (“But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.”).

³⁰ *Id.* at 409–10 (“The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means . . .”).

³¹ *Id.* at 411–12 (“But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making ‘all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.’”).

³² U.S. CONST. art. I, § 8, cl. 18 (“[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”) (the bracketed addition comes from Article I, Section 8, Clause 1)).

³³ *McCulloch*, 17 U.S. at 413 (“Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.”). The Supreme Court in *United States v. Comstock* used a version of this phrase in finding that Congress had power under the Commerce Clause to impose civil sentences to sexually dangerous persons who had been convicted of an underlying federal crime, “Accordingly, the Necessary and Proper Clause makes clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are

concluded, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate”³⁴ Of the choices “convenient,” “useful,” “essential” or “appropriate,” history shows that the one word that best sums up the necessary and proper requirement in the Constitution for the relationship between means and enumerated ends is “appropriate.” If the word appropriate is hardly conclusive in *McCulloch* itself for the required means to the ends relationship, there is little doubt that it has carried the day in history. Of the seventeen amendments added to the United States Constitution since *McCulloch*, eight of them included enabling or enforcement clauses, little necessary and proper clauses, each of the eight including the word “appropriate” in enabling Congress to enforce the substantive provisions of the amendment.³⁵

In *McCulloch*, Marshall does not actually attempt to determine if the Bank was appropriate to any particular enumerated power. He readily acknowledged that there was no enumerated power to incorporate a bank or anything else, but among the enumerated powers was the power “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”³⁶ While the power to collect taxes, to borrow money, perhaps even to regulate commerce seemed to have the most

‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’” *United States v. Comstock*, 560 U.S. 126, 133–34 (2010).

³⁴ *McCulloch*, 17 U.S. at 421.

³⁵ The first amendment to use the term appropriate and typical of the other seven is the Thirteenth Amendment, which reads, “Section 2. Congress shall have power to enforce this article by appropriate legislation.” The eight amendments using the term “appropriate” as part of its enabling clause are the Thirteenth (the prohibition of slavery), the Fourteenth (the protection of privileges and immunities, due process, and equal protection rights), the Fifteenth (the bar on use of race in voting), the Eighteenth (the prohibition of manufacture and sale of alcohol), the Nineteenth (the grant of the right to vote without regard to gender), the Twenty-Fourth (the ban on poll tax for voting in federal elections), and the Twenty-Sixth (the grant of eighteen-year-olds the right to vote). The Eighteenth Amendment is unique in that both the federal government and the states are granted the “concurrent power” to pass appropriate legislation. States are not limited by the enumerated power concept, and thus in the Eighteenth Amendment the point likely was to allow the states to regulate alcohol sales without the normal restrictions of the Dormant Commerce Clause.

³⁶ *McCulloch*, 17 U.S. at 407.

logical connection to the Bank of the United States, Marshall took the national security route:³⁷

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported.³⁸ The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive?³⁹

Other than the general reference to a number of different possible enumerated powers and specifically the need to pay the salary of federal troops, Marshall made no effort to determine with which power the Bank of the United States was appropriate. He just made it so by concluding, “After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.”⁴⁰

³⁷ The Court’s resort to national security to justify federal power is not without controversy. But its use in *McCulloch* is hardly the worst offender. See *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (“In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”).

³⁸ This phrasing reminds one of the Marine Hymn, “From the Halls of Montezuma [t]o the shores of Tripoli,” see USA FLAG SITE, *The Marine’s Hymn Lyrics*, <http://www.usa-flag-site.org/song-lyrics/the-marines-hymn/> [https://perma.cc/5DH3-3S6N] (last visited Jan. 29, 2019), but unlike the Marine Hymn the reference here appears to be just to areas geographically remote from each other, and not related to military battles. St Croix seems to refer to a river in Minnesota, which would be the North to the Gulf of Mexico’s South. See NAT’L PARK SERV., *Saint Croix*, <https://www.nps.gov/sacn/planyourvisit/maps.htm> [https://perma.cc/S7L6-LKZJ] (last updated Feb. 15, 2019). St. Croix is also one of the U.S. Virgin Islands and was purchased from Denmark in 1917 for \$25,000,000. See VINOW, *Virgin Islands History*, http://www.vinow.com/general_usvi/history/ [https://perma.cc/3EGL-4LXJ] (last visited Feb. 17, 2019).

³⁹ *McCulloch*, 17 U.S. at 408.

⁴⁰ *Id.* at 424.

Despite *McCulloch's* importance as a case in defining federal enumerated power broadly, it was singularly unhelpful in demonstrating how to determine if any particular means was appropriate.⁴¹ Thomas Jefferson had, several years before, expressed concern about unbounded federal power. As described by Justice Kennedy in a concurring opinion in *United States v. Comstock*, “[A]s Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of ‘this is the house that Jack built.’”⁴² Nothing in *McCulloch*

⁴¹ In one of the first cases to refer to the holding of *McCulloch*, the Pennsylvania Supreme Court said only, “The term *necessary*, is not however to be confined to cases of *absolute necessity*, but extends to cases of *convenience* also.” *Bank of the N. Liberties v. Cresson*, 1825 WL 1907, at *4 (Pa. Apr. 8, 1825). *McCulloch* was cited in a few earlier cases, but generally only as to the holding related to the Bank. A Connecticut state court concluded its discussion of the legitimacy of the Bank with these obsequious words, “I am, therefore, clearly of opinion, that the act of Congress incorporating the bank of the *United States*, is a law made in pursuance of the constitution; and advise, that judgment be rendered for the defendants. In coming to this conclusion, I have been relieved from an anxious responsibility, by the luminous and cogent reasons of Chief Justice *Marshall*, in *McCulloch v. Maryland*, upon the general question of the constitutionality of the charter . . .” *Magill v. Parsons*, 4 Conn. 317, 322 (Conn. 1822).

⁴² *United States v. Comstock*, 560 U.S. 126, 150 (2010) (Kennedy, J., concurring). In *Comstock*, the Supreme Court found within federal commerce power a federal law providing for civil commitment of sexually dangerous predators, “Taken together, these considerations lead us to conclude that the statute is a ‘necessary and proper’ means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.” *Id.* at 149. Kennedy referenced the original sources: “Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 *The Papers of Thomas Jefferson* 547 (B. Oberg ed.2004).” *Id.* at 150. Kennedy also referred to a modern expression of a similar concern by the Tenth Circuit in *United States v. Patton*, 451 F.3d 615, 628 (10th Cir. 2006). *Patton* quoted the following language from Judge Posner in *United States v. Marrero*, “[W]e are in a new era and must be wary of such arguments as that the theft of a bottle of aspirin from a person’s home ‘affects’ commerce, provided only that the bottle was shipped from another state, because the homeowner would be likely to buy another bottle from his local druggist to replace the one that was stolen and the druggist would replace that sale by purchasing another bottle interstate.” *Patton*, 451 F.3d at 628 (quoting *United States v. Marrero*, 299 F.3d 653, 656 (7th Cir. 2002)). *Marrero* upheld the application of the federal Hobbs Act, which makes a federal crime of robberies that obstruct interstate or foreign commerce, to the robbery of two drug dealers who had been enticed by federal agents to travel from Detroit, Michigan to Chicago, Illinois. *See generally Marrero*, 299 F.3d

necessarily supports “the house that Jack built” logic for federal enumerated power, but neither does it alleviate that concern. Pretty much, all Marshall said was that the Bank could be helpful—and thus appropriate—in paying federal troops in remote areas of North America.

III. *GIBBONS V. OGDEN*—COMMERCE, TO REGULATE, AND THE PREPOSITION

The first enumerated power to be defined with any detail⁴³ was the commerce power⁴⁴ in *Gibbons v. Ogden*,⁴⁵ and the breadth of power recognized in *Gibbons* was “embracing and penetrating” in its scope.⁴⁶

653. That interstate trip was enough to bring the case within federal commerce power. *Id.* at 655. “The Hobbs Act criminalizes robberies that obstruct or otherwise affect interstate or foreign commerce, and the main issue raised by this appeal [was] whether the robbery of the drug dealers had the requisite effect on commerce.” *Id.* at 654. *Patton* found within Congress’ commerce power a federal law barring convicted felons from owning body armor because the law applied only to an item that had “moved across state lines at some point in its existence.” *Patton*, 451 F.3d at 635.

⁴³ Even at the lower court level, there were few attempts to define federal power as to any enumerated power. Most of the early lower court cases involved little more than a cite to *McCulloch*. One of the early lower federal court cases involved the power of Congress to give jurisdiction “in any circuit court of the United States” as to any case involving the Bank of the United States. *Bank of the U.S. v. Roberts*, 2 F. Cas. 728, 729 (Cir. Ct. Ky. 1822). One South Carolina court found that *McCulloch* did not apply to a Charleston city tax on Bank stock held by an individual residing in Charleston, “I think it has been before shown, that the interest of the *United States* and the *individual stockholders* are distinct and independent.” *Bulow v. City Council of Charleston*, 10 S.C.L. (1 Nott & McC.) 527, 530 (S.C. Const. Ct. App. 1819).

⁴⁴ See *Katzenbach v. McClung*, 379 U.S. 294, 301–02 (1964). The Court in *Katzenbach* summarized Congress’ interstate commerce power in Article 1, Section 8, Clause 3 and Clause 18 as conferring “upon Congress the power ‘(t)o regulate Commerce . . . among the several States’ and Clause 18 of the same Article grants it the power ‘(t)o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers’” *Id.* The Commerce Clause has been the subject of much litigation. As one lower court put it, “In spite of its simplicity and clarity and because of the constantly increasing ‘interpenetrations of modern society,’ it has spawned thousands of cases.” *McClung v. Katzenbach*, 233 F. Supp. 815, 821 (N.D. Ala.), *rev’d*, 379 U.S. 294 (1964).

⁴⁵ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁴⁶ *Wickard v. Filburn*, 317 U.S. 111, 120 (1942). The Court in *Wickard* stated, “At the beginning Chief Justice Marshall described the Federal commerce power

Gibbons paralleled *McCulloch* in that both cases involved a conflict between federal law and state law with federal law being supreme over state law if the federal law was passed pursuant to some federally enumerated power. In *Gibbons*, New York and New Jersey had given a monopoly on steamboat traffic between New York and New Jersey to Fulton and Livingston, who were credited with the invention of the steamboat, and who had, in turn, granted a license to Ogden.⁴⁷ Marshall read federal law as giving *Gibbons* a license to operate interstate, including between New York and New Jersey.⁴⁸ If Congress had the federal power to give *Gibbons* a license, then the New York and New Jersey monopoly to Fulton and Livingston—and their

with a breadth never yet exceeded.” *Id.* Chief Justice Rehnquist would seem to disagree that *Gibbons* was the pinnacle of commerce power, “*Jones & Laughlin Steel, Darby, and Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.” *United States v. Lopez*, 514 U.S. 549, 556 (1995). *Lopez* found that Congress did not have the commerce power to criminalize the possession of a gun on public school grounds. *Id.* at 551.

⁴⁷ *Gibbons*, 22 U.S. at 1–2.

⁴⁸ Marshall latched on to the Federal Coastal Act of 1793 as being the source of *Gibbons*’s license. It is unlikely that the federal law had any such intention. As argued in the case, the law gave “no right to trade; and that its sole purpose is to confer the American character,” that is, it was intended only to register a vessel as being from the United States. *Id.* at 21. Marshall concluded that the law’s use of the term “license” meant otherwise and was “founded too clearly in the words of the law, to require the support of any additional observations.” *Id.* Marshall relied on the federal law and the Supremacy Clause to avoid having to decide whether the Commerce Clause’s grant of power to the federal government all by itself prevented New York and New Jersey from regulating items in interstate commerce. This use of the Commerce Clause to limit state power is popularly referred to as the Dormant or Negative Commerce Clause and is beyond the scope of this article except as to its impact on federal enumerated power. Daniel Webster arguing for *Gibbons* relied primarily on the Dormant Commerce Clause argument that the grant of power to Congress to regulate commerce meant that the states could not. *Id.* at 209. Marshall was sympathetic to the Dormant Commerce Clause argument and conceded, “There is great force in this argument, and the Court is not satisfied that it has been refuted.” *Id.* But Marshall said that he did not need to resolve whether Congress’ power in the constitution by itself precluded state regulations of interstate commerce. In *Gibbons*, a much easier argument was available to Marshall. There was a federal law, the state law was inconsistent with it, and under the Supremacy Clause, the state law was invalid. Marshall summarized the importance of the Supremacy Clause, “In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.” *Id.* at 211.

franchise to Ogden—was inconsistent with that federal license and, under the Supremacy Clause, was invalid.

Marshall's opinion first defines federal commerce power broadly, it then expresses agreement with the Dormant Commerce Clause argument, and finally concludes that a federal license preempted the state monopoly.

As Marshall read it, the Federal Coastal Act of 1793 gave Gibbons a federal license to operate his steamboat *Bellona* anywhere in the coastal areas of the United States: "The license must be understood to be what it purports to be, a legislative authority to the steamboat *Bellona*, 'to be employed in carrying on the coasting trade, for one year from this date.'"⁴⁹ Since this included in the case steamboat traffic between New York and New Jersey, it would seem to easily fall within Congress' power to regulate commerce among the several states, but Marshall's definition of commerce power, which gave each element the broadest definition possible, went far beyond the facts of the case.⁵⁰

Marshall begins his discussion of the federal commerce power with the text of Article I, Section 8, Clause 3: "The words are, 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.'"⁵¹ He then defines it in this order (1) the noun "commerce," (2) the preposition "among," and finally (3) the verb "to regulate." Surprisingly, it is his definition of the preposition "among" that bedevils us to this day. As to the easy parts of the definitions, Marshall said that commerce included all forms of commercial intercourse,⁵²

⁴⁹ *Id.* at 214.

⁵⁰ *See id.* at 189–90. Indeed, before turning to the commerce power itself, Marshall rejected the notion that federal enumerated power should be strictly constructed, and though not citing *McCulloch* at all, restated his approach in *McCulloch* that federal powers were to be interpreted generously: "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose." *Id.* at 187.

⁵¹ *Id.* at 189.

⁵² *Id.* at 189–90 ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts

including navigation.⁵³ The power “to regulate” was “complete,”⁵⁴ “plenary,”⁵⁵ and only limited by the power of the people to vote.⁵⁶ It is hard to imagine a more comprehensive definition of either “commerce” or “to regulate,” but the definitions, though expansive, hardly seem revolutionary. Commerce not only included the horse and buggy, but also steamboat traffic, intercontinental jets, and, perhaps in the future, the Starship Enterprise. The verb to regulate included not only the power to impose conditions but also the power to eliminate interstate commerce altogether.

But despite the broadness of the definitions of commerce and to regulate, it is the definition of the preposition⁵⁷ “among”⁵⁸ that was so

of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”).

⁵³ *Id.* at 190 (“All America understands, and has uniformly understood, the word ‘commerce,’ to comprehend navigation.”).

⁵⁴ *Id.* at 196 (“[The commerce] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”).

⁵⁵ *Id.* at 197 (“[Congress’ power over commerce] is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government . . .”). More specifically, the existence of the states did not limit federal power.

⁵⁶ *Id.* (“[T]he influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.”).

⁵⁷ Dictionary.com defines a preposition as “any member of a class of words found in many languages that are used before nouns, pronouns, or other substantives to form phrases functioning as modifiers of verbs, nouns, or adjectives, and that typically express a spatial, temporal, or other relationship, as *in, on, by, to, since.*” *Preposition*, DICTIONARY.COM, <http://www.dictionary.com/browse/preposition?s=t> [https://perma.cc/9PQR-TRLH] (last visited Feb. 17, 2019). While prepositions are typically insignificant connectors, I label “among” The Preposition because to this day its ambiguity and potential breadth continue to confound the relationship of commerce to states and activities within the states. *Cf.* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) (where Professor Balkin elevates the famous footnote number 4 in *United States v. Carolene Products Co.*, to legendary status with The Ohio State and The City (San Francisco)). *Carolene Products* is commonly cited as the origin of the rational basis test for due process issues, but in Footnote 4 it recognized that laws impacting rights such as free speech or impacting minority rights might get a higher level of review. Prepositions are stinky little words, and one should never end a sentence with one for it is considered only slightly less gauche than blowing your nose on your

sweeping that it is at the core of even modern cases such as *Raich*. Congress had the power to regulate commerce “with” foreign nations and the Indian tribes but comparatively it had the power to regulate “commerce among the several states.” It is of interest that the framers used the preposition “with” for foreign commerce and “among” with regard to interstate commerce, but it is hard to draw any conclusions from that different choice. “Commerce among the States must, of necessity, be commerce with the States,” is how Marshall summed up the different prepositions.⁵⁹ In practice, however, there is no real difference between Congress’ commerce power with foreign nations and its power among the several states.⁶⁰

napkin. And what devils they are, suddenly converting pronouns from the first or second person to the third person; if a she does not become a her after a preposition, it is a mark of bad grammar that trips up even the most literate among us. See *The I’s Have It*, N.Y. TIMES (Feb. 23, 2009), https://www.nytimes.com/2009/02/24/opinion/24oconner.html?_r=1 [<https://perma.cc/7JF5-C4ST>] (“Since his election [] president [Obama] has been roundly criticized by bloggers for using “I” instead of “me” in phrases like “a very personal decision for Michelle and I” or “the main disagreement with John and I” or “graciously invited Michelle and I.”).

⁵⁸ The number one definition of among in Dictionary.com is “in, into, or through the midst of; in association or connection with; surrounded by: He was among friends.” *Among*, DICTIONARY.COM, <http://www.dictionary.com/browse/among?s=t> [<https://perma.cc/ZR6H-PUFV>] (last visited Feb. 17, 2019). While the definition works with the constitutional power, the example does not. Synonyms include “between, in the midst of, in the middle of, with, in the thick of, surrounded by, betwixt, encompassed by, in dispersion through, amid, and amidst.” *Among*, THESAURUS.COM, <https://www.thesaurus.com/browse/among> [<https://perma.cc/QF9U-3VF4>] (last visited Feb. 17, 2019). And antonyms include “away from, outside, separate.” *Id.*

⁵⁹ *Gibbons*, 22 U.S. at 196.

⁶⁰ *Id.* at 193–94 (“It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.”). And Congress’ power over foreign commerce certainly includes commerce that begins within the internal boundaries of each of the states. See *id.* at 195 (“If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.”). In some ways, Congress’ power over foreign commerce is more comprehensive since there are no federalist concerns to limit its power over foreign commerce. In other ways, Congress’ power is less comprehensive in that, unlike interstate commerce power, there could be no claim that Congress’ power over foreign commerce gives Congress the right to regulate internal matters of foreign countries.

Marshall gives an all-encompassing definition of among. Marshall defined among to mean “intermingled with” which to him meant that commerce among the several states did not stop at the borders of each state but included the interior of the state as well.⁶¹ Certainly, among could mean intermingled with in that a person might be found among those or intermingled with those protesting the separation of children at the border, but it is hardly the most logical meaning of among. The most logical definition would seem to be the common synonym for among, that is, “between” the several states. By picking a broader definition, Marshall gives support for congressional regulation of matters totally within one state. As he puts it, “Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”⁶² Logically, this has to be true. The border is but a line in the sand where nothing happens; commerce has to cross that line. Or as Marshall reasoned, “Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third?”⁶³ One cannot argue with that logic, but Marshall took it a step further.

He acknowledged that among did not include “that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.”⁶⁴ Going back to the preposition, “Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.”⁶⁵ That is, it did not include “the completely interior traffic of a State”⁶⁶ or “the exclusively internal commerce of a State.”⁶⁷

Congress’ power to regulate commerce with foreign nations includes that portion within any state, but its power does not reach into the internal commerce of any foreign country.

⁶¹ *Id.* at 194 (“The subject to which the power is next applied, is to commerce ‘among the several States.’ The word ‘among’ means intermingled with. A thing which is among others, is intermingled with them.”).

⁶² *Id.*

⁶³ *Id.* at 196.

⁶⁴ *Id.* at 194.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 195.

Though among did not include commerce exclusively within one state, there was an important qualifying phrase that has carried the day: “which does not extend to or *affect* other States.”⁶⁸ Out of this would come what is called the Affectation Doctrine—“among the several states” included local activity that affected other states. To emphasize that this qualifying phrase was no accident, Marshall includes the Affectation Doctrine in his summary of his definition of among:

*The genius and character of the whole government seem 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.*⁶⁹

In short, Congress’ commerce power included (1) “all the external concerns of the nation,” (2) “those internal concerns which affect the States generally,” but (3) “not to those which are completely within a particular state and which do not affect other states,” that is, not to “[t]he completely internal commerce of a State.” And this definition of among finds itself in the most common framing of Congress’ power to regulate interstate commerce: “First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.”⁷⁰

⁶⁸ *Id.* at 194 (emphasis added).

⁶⁹ *Id.* at 195. Almost fifty years later, the Court held that Congress had the power to regulate steamboat traffic exclusively between points within one state because of the impact on interstate commerce. *See Daniel Ball*, 77 U.S. 557, 565 (1870) (“So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress.”). The case was based in part on Congress’ power to regulate navigable waters, a derivative power flowing from Article III. *See generally id.*

⁷⁰ *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (citations omitted).

Despite the internal lack of logic of this summary of the commerce power,⁷¹ this common statement of Congress' commerce power as restated here by the *Raich* opinion is the most common modern framing and includes both "the external concerns," which is broken into two parts channels and instrumentalities of interstate commerce, and "those internal concerns," which is defined as "activities that substantially affect interstate commerce." *Gibbons* and its modern framing mean that Congress has two types of commerce power. First, Congress has the ability to regulate anything "in commerce," that is, anything crossing from one state into another state. This is the clearest form of federal power, regulating things in commerce. Second, Congress has the ability to regulate local activities affecting interstate commerce, which are activities totally within one state but affecting other states or the national interest.

IV. AFTER *GIBBONS*, THE COURT DETOURS ON ITS WAY TO 1937, BUT NOT ALWAYS.

Marshall's broad view of Congress' commerce carried the day in 1937 *N.L.R.B. v. Jones & Laughlin Steel*.⁷² As discussed later, the Court expanded *Jones & Laughlin Steel's* view of the commerce power with the addition of the rational basis test in *Katzenbach v. McClung*.⁷³ *McClung's* rational basis approach was enshrined as the law in *Raich*, but this expansionist view of commerce power was not without its detours. The detours were a product of a number of factors, but one of the most important was that Congress had done little to

⁷¹ This issue is discussed later, but Professor Engdahl captures the illogic perfectly: "Chief Justice Rehnquist's taxonomy of the commerce power—now intoned as a ceremonial incantation by every inferior court—is positively dysfunctional. The cases involving 'persons or things in interstate commerce' certainly are Commerce Clause cases, but the 'instrumentalities' cases, which Chief Justice Rehnquist put in the same category, are really Necessary and Proper Clause cases. The same is true for some of the 'channel' cases, which Chief Justice Rehnquist separated out as category one, and all of the 'affecting' cases, which he segregated as category three. Chief Justice Rehnquist's attempt at categorization is akin to a zoologist describing vertebrates as comprised of three groups—herbivores, mammals, and primates. Such confused classification obscures the very distinctions that are essential to understanding and utility." David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 115 (1998) (citations omitted).

⁷² *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁷³ *Katzenbach v. McClung*, 379 U.S. 294 (1964).

regulate interstate commerce after *Gibbons*, and the states passed most of the regulations.⁷⁴ The Court opinions upholding state power were then corrupted to justify limiting federal power.

One major detour was in 1895 in *United States v. E.C. Knight* when the Court said that commerce did not include manufacturing⁷⁵ and a second detour in 1918 in *Hammer v. Dagenhart* when the Court gave a limited definition of interstate commerce.⁷⁶ Later, the stream of commerce cases detoured around the *E.C. Knight* detour. Two other detours around *Gibbons* were the direct/indirect test and the doctrine of dual federalism. In an incomprehensible way, the direct/indirect test limited Congress' ability to regulate activity affecting interstate commerce, and the doctrine of dual federalism twisted the Supremacy Clause on its head. All four of these detours are historical oddities and later rejected or distinguished in *Jones & Laughlin Steel* and later cases. They, however, controlled the narrative from roughly 1890 to 1937.

In *E.C. Knight*, the Court held that Congress did not have the commerce power to regulate a business trust⁷⁷ with a monopoly⁷⁸ on

⁷⁴ See *Wickard v. Filburn*, 317 U.S. 111, 121 (1942) (“For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce.”). *Gibbons* itself, it might be noted, was not really an attempt to expand Congress' powers, but just a regulation of vessels as originating in the United States, which Marshall then used to expand federal commerce power and to limit state regulation of interstate commerce.

⁷⁵ *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). There are differences of opinion as to where the Court went the wrong way. Justice Thomas argues that the Court abandoned the constitutional scheme when it departed from *E.C. Knight*. See *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., concurring) (“If anything, the ‘wrong turn’ was the Court’s dramatic departure in the 1930’s from a century and a half of precedent.”), *superseded by statute*, 18 U.S.C. § 922, *as recognized in* *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005).

⁷⁶ *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941).

⁷⁷ See *Trust, SMALL BUS. DEV. CORP.*, <https://www.smallbusiness.wa.gov.au/business-advice/business-structure/trust> [<https://perma.cc/K2LB-KSAB>] (last visited Jan. 27, 2019) (“A trust is a structure where a trustee carries out the business on behalf of the trust’s members (or beneficiaries). A trust is not a separate legal entity.”).

⁷⁸ See *E. C. Knight Co.*, 156 U.S. at 9 (“By the purchase of the stock of the four Philadelphia refineries with shares of its own stock the American Sugar

refined sugar. The Sherman Antitrust Act,⁷⁹ passed in 1890 specifically referred to the commerce power and stated, “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.” The Court said that manufacturing was not commerce; therefore, it was not subject to the federal commerce power.⁸⁰ The flaw in the Court’s reasoning was that even if manufacturing itself was not commerce, Congress under *Gibbons* could regulate anything within one state affecting interstate commerce.⁸¹ The incorrect holding in *E.C. Knight* was followed in a number of cases.⁸²

Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States.”).

⁷⁹ The *E.C. Knight* case does not actually refer to the act by this name, but it was the commonly used name. *Id.*

⁸⁰ *Id.* at 13 (“The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.”).

⁸¹ The *E.C. Knight* decision was buttressed by the 1888 case, *Kidd v. Pearson*, which had held that Iowa could bar the manufacturing of liquors in Iowa, all of it sold outside of the state of Iowa. *Kidd v. Pearson*, 128 U.S. 1 (1888). The Court said the fact that “an article was manufactured for export to another state does not of itself make it an article of interstate commerce.” *Id.* at 24. The *Kidd* Court cited *Coe v. Errol*, 116 U. S. 517 (1886) in support. *Kidd*, 128 U.S. at 24. *Coe* had held that the town of Errol, New Hampshire had the right to tax logs being held in its rivers for transport interstate to Maine. *Coe*, 116 U.S. 517, 528–29 (1886). Under the Dormant Commerce Clause, the city could not tax interstate commerce, but the Court said, the logs were not interstate commerce until the interstate journey actually began. *Id.* The point of both *Kidd* and *Coe* was to uphold state power, but *E.C. Knight* used them to impose a limit on federal power. The *E.C. Knight* court was in error. However accurate either *Kidd* or *Coe* was with regard to the Dormant Commerce Clause’s limits on state power, Congress could still regulate in-state commerce and activities that were not interstate commerce if the local activity affected interstate commerce. As the Court said a half-century later, “The source of the restraint may be intrastate, as the making of a contract or combination usually is” but “[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.” *United States v. Women’s Sportswear Mfg. Ass’n*, 336 U.S. 460, 464 (1949). The case involved an antitrust action against a trade organization of jobbers buying and selling fabrics for women’s sportswear. *Id.* at 461–62.

⁸² Justice Thomas believes that the Court went astray when it ceased to follow *E.C. Knight*. See *United States v. Lopez*, 514 U.S. 549, 598 (1995) (Thomas, J.,

In *Hammer v. Dagenhart*, the Court limited Congress' ability to regulate things moving in interstate commerce. The Court held that Congress did not have the power to bar the interstate shipment of goods manufactured by child labor. Because of *E.C. Knight*, Congress thought that it could not regulate manufacturing using child labor, so it sought to regulate the interstate shipment of goods made by child labor, what under *Gibbons* would be the clearest form of commerce among the several states, and commerce from one state to another state. *Hammer* stopped this leapfrog over *E.C. Knight* in its tracks: "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof."⁸³ The Court distinguished a number of cases that had seemed to allow the regulation of anything traveling in interstate commerce.⁸⁴

concurring) ("If federal power extended to these types of production 'comparatively little of business operations and affairs would be left for state control.' *Id.* [*E.C. Knight*]... Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant."), *superseded by statute*, 18 U.S.C. § 922, *as recognized in* *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005). In a later case, Justice Thomas summarized his limiting view of commerce power. *See United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("I write separately only to express my view that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.").

⁸³ *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941).

⁸⁴ *See, e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903) (holding that Congress could pass a law to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (sustaining the power of Congress to pass the Pure Food and Drug Act which prohibited the introduction into the states by means of interstate commerce of impure foods and drugs); *Hoke v. United States*, 227 U.S. 308 (1913) (upholding the constitutionality of the so-called 'White Slave Traffic Act' that forbade the transportation of a woman in interstate commerce for the purpose of prostitution); *Caminetti v. United States*, 242 U.S. 470 (1917) (holding that Congress could prohibit the transportation of women in interstate commerce for immoral purposes); *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311 (1917) (upholding the power of Congress over the interstate

In attempting to avoid the *E.C. Knight* limitation on Congress' ability to regulate things affecting interstate commerce, the Court used what it called the stream of commerce⁸⁵ to create a loophole to *E.C. Knight*. If local activity in one state was connected to local activity in other states, the Court found that the local activity was in the stream of commerce and thus Congress had the power to regulate interstate commerce between two states.⁸⁶ The most famous examples of the stream of commerce cases are *Swift & Company v. United States*⁸⁷ and

transportation of intoxicating liquors. The *Hammer* court distinguished these other cases as involving the need to use a ban on interstate commerce to prevent the spread of evil results). In *Hammer*, there were no evil products being transported. The Court also said that the Child Labor Act violated the Tenth Amendment in that "[I]t must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved." *Hammer*, 247 U.S. at 275. Here *Hammer* repeats the error of the doctrine of dual federalism.

⁸⁵ The enumerated power stream of commerce cases morphed into a due process personal jurisdictional issue, but personal jurisdiction, whether a state has sufficient contact with a party, is a completely different issue. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.").

⁸⁶ Perhaps the best example is found in Congress' attempt to regulate the deceptive practices in stockyards in the Packers and Stockyards Act of 1921. The Court tied stockyards to the full distribution of meat from pasture to table, it found that "The stockyards are not a place of rest or final destination. Thousands of head of livestock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out, to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another." *Stafford v. Wallace*, 258 U.S. 495, 515–16 (1922).

⁸⁷ *Swift & Co. v. United States*, 196 U.S. 375 (1905). *Swift & Co.* does not actually use the stream of commerce phrase, calling it "a current of commerce." *Id.* at 399. The Court later extravagantly claimed that *Swift & Co.* "was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such." *Bd. of Trade of City of Chicago v. Olsen*, 262 U.S. 1, 35 (1923). If *Swift & Co.* was a milestone, its impact was limited. Professor Cushman found only four cases before 1937 where the Court upheld a federal

Stafford v. Wallace.⁸⁸ As in *E.C. Knight*, Swift & Co. was charged with violation of the Sherman Antitrust Act. The claim was that Swift & Co. had rigged bids with competitors in buying livestock in Chicago, Omaha, Kansas City, and other cities. Swift & Co.'s defense was that the activity in each of the states was not commerce, because like manufacturing the activity was totally within one state and did not involve the crossing of state lines. Because Swift & Co. eventually converted the livestock to fresh meat for human consumption and sent it to plants in various states, the Court said that the various interstate aspects of the business fell within "the current of commerce" and was within Congress' commerce power.⁸⁹

Stafford was an attempt to regulate the stockyards more generally. The Packers and Stockyards Act of 1921 gave the Secretary of

law under the stream of commerce doctrine. See Barry Cushman, *The Structure of Classical Public Law*, 75 U. CHI. L. REV. 1917, 1936 (2008). In addition to *Swift & Co.* and *Stafford*, Cushman identifies another stockyard case, *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930), where the Court upheld under the Packers and Stockyards Act the right of the Secretary of Agriculture to fix the commission of agents selling livestock at the Omaha, Nebraska stockyards. The fourth case in this small group was *Board of Trade of City of Chicago v. Olsen*, which upheld the federal Grain Futures Act's restrictions on the Chicago Board of trade, what the Court called "the greatest grain market in the world." *Bd. of Trade of City of Chicago*, 262 U.S. at 33. Referencing *Stafford*, the Court held, "The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East." *Id.* at 36. The Court also used the stream-of-commerce phrase in upholding the right of the Interstate Commerce Commission ("ICC") to compel the New York Central Railroad Company to install a connecting line to the Erie Barge Canal in Buffalo, New York. The Court said that the ICC "intended to confer upon the Commission power to regulate *the entire stream of commerce*. Whereas here interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute." *United States v. N.Y. Cent. R.R. Co.*, 272 U.S. 457, 464 (1926) (emphasis added).

⁸⁸ *Stafford*, 258 U.S. 495. *Stafford* does use the phrase "stream of commerce." *Id.* at 519.

⁸⁹ *Swift & Co.*, 196 U.S. at 398–99 ("When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.").

Agriculture, Secretary Wallace, authority to regulate a whole series of “unfair, discriminatory, or deceptive practices.”⁹⁰ Again, the defense was that stockyards involved activity like manufacturing that was entirely within one state and not interstate commerce. The Court following what it called *Swift & Company’s* “natural development of interstate commerce under modern conditions” and concluded that the inherently interstate aspects of the livestock business meant:

*[T]hat such streams of commerce from one part of the country to another, which are ever flowing, are in their very essence the commerce among the states and with foreign nations, which historically it was one of the chief purposes of the Constitution to bring under national protection and control.*⁹¹

Under the streams of commerce logic, Congress could regulate local activity within one state not based upon its effect on interstate commerce but because it fell within Congress’ power to regulate things in commerce.⁹² The Court avoided its limiting precedent in *E.C. Knight* as to things affecting interstate commerce by creating the fiction that a series of local activities in different states was in “the stream of commerce” and thus within Congress power to regulate things in interstate commerce.⁹³

⁹⁰ *Stafford*, 258 U.S. at 513.

⁹¹ *Id.* at 518–19.

⁹² The *Hammer* limitation on regulating things interstate that were not evil in and of themselves was not yet part of the equation. “In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.” *Hammer v. Dagenhart*, 247 U.S. 251, 271 (1918).

⁹³ Part of the explanation for Congress’ more expansive view of commerce likely begins with Upton’s Sinclair’s *The Jungle* exposing the health hazards in the meat and packing industry leading to the passage of the federal Food and Drug Act and to the Court’s more sympathetic view of the need for federal regulation of health-related matters. The Pure Food and Drug Act passed in 1906 for the first time regulated food and drugs that moved in interstate commerce and forbade the manufacture, sale or transportation of poisonous patent medicines. “It arose, with strong White House support, in the wake of exposés by such muckrakers as Upton Sinclair and Samuel Hopkins Adams.” Andrew Glass, *Pure Food and Drug Act Passes, June 23, 1906*, POLITICO (June 23, 2014, 12:02 AM), <https://www.politico.com/story/2014/06/fda-theodore-roosevelt-108164> [https://perma.cc/8Q57-PGT3].

Whatever the reason for the “streams of commerce” clause doctrine, it soon died a lingering death, a victim of the same laissez-faire doctrine that led to the weakening of the commerce power in *E.C. Knight* and *Hammer*. In 1935, the Court in *Schechter Poultry v. United States*⁹⁴ held that the doctrine did not apply to commerce that had already ended, and in 1936 in *Carter v. Carter Coal*,⁹⁵ the Court held that it did not apply to commerce that had not yet started. The *Carter* court said it this way:

*The restricted field covered by the Swift and kindred cases is illustrated by the Schechter Case. There the commodity in question, although shipped from another state, had come to rest in the state of its destination, and, as the court pointed out, was no longer in a current or flow of interstate commerce. The Swift doctrine was rejected as inapposite. In the Schechter Case the flow had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the same.*⁹⁶

With the *Jones & Laughlin Steel* case later eviscerating the *E.C. Knight* and the *Hammer* cases, there was no need for the “stream of commerce” fiction as a workaround. The Court will still occasionally, including in *Raich*, mention the “stream of commerce,” but it is no longer a meaningful test.⁹⁷

⁹⁴ A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *Schechter* found the National Industrial Recovery Act (“NIRA”), the cornerstone of President Franklin Roosevelt’s economic recovery program, unconstitutional as beyond the scope of federal commerce power. *Id.* at 542. The NIRA permitted the establishment of codes for fair competition in various industries—in the case the “Live Poultry Code”—which regulated everything from conditions of employment to the health of chickens sold. *Id.* at 521–23.

⁹⁵ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

⁹⁶ *Id.* at 306 (citations omitted).

⁹⁷ One of the post-1937 cases to rely on the stream of Commerce Clause logic was *United States v. South-Eastern Underwriters Ass’n*. *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944). Prior to 1944, insurance had been held in a number of cases to be within the state’s power to regulate, and thus it was argued was beyond Congress’ power. The Court held that the regulation of insurance was within Congress’ commerce power “continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts.” *Id.* at 541. The stream of commerce language was unnecessary since

One of the more incomprehensible detours in the application of *Gibbons*' broad view of commerce power was the direct/indirect limitation on Congress' ability to regulate local activity affecting interstate commerce. *Schechter Poultry* was one of the most famous cases to attempt to limit commerce power to those cases where local activities directly affected interstate commerce as opposed to only being indirect. In *Schechter Poultry*, the National Industrial Recovery Act, one of President Roosevelt's most important anti-depression measures, attempted to mandate wages and limit hours in the live poultry business in New York City, described as the largest such market in the United States, with 96% of live poultry coming from other states before being consigned to so called commission men. In addition to finding that the chickens were not part of the stream of commerce because interstate commerce had stopped, the Court also held that any impact of the chickens on interstate commerce was indirect. The Court said there was "a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle."⁹⁸ It believed that if the Commerce Clause reached "all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace

the insurance policies affected interstate commerce or, as the Court said, "They concern people living far beyond the boundaries of that state." *Id.* at 542. Even in *Raich*, as noted by Justice Stevens' opinion for the Court, the Ninth Circuit had found that the federal law was outside of federal power in part because "[T]his limited use is clearly distinct from the broader illicit drug market-as well as any broader commercial market for medicinal marijuana-insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (quoting *Raich v. Ashcroft*, 352 F.3d 1222, 1228 (2003)). Justice Thomas' dissenting opinion summarized the lower court's holding "The Court of Appeals found that respondents' 'limited use is clearly distinct from the broader illicit drug market,' because 'th[eir] medicinal marijuana ... is not intended for, nor does it enter, the stream of commerce.'" *Id.* at 62 (Thomas, J., dissenting) (citations omitted). Justice O'Connor among her other reasons for believing that Congress did not have the power to regulate home-grown home consumed medical marijuana observed, "Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it." *Id.* at 50 (O'Connor, J., dissenting). It was, she said, one of the few narcotics whose preparations did not involve at least some of its ingredients moving in interstate commerce.

⁹⁸ *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 546.

practically all the activities of the people”⁹⁹ It concluded that the hours and wages of persons in the live poultry business did not directly affect interstate commerce.¹⁰⁰

*Carter v. Carter Coal*¹⁰¹ attempted to define the difference between direct and indirect effects on interstate commerce. Under the Bituminous Coal Conservation Act of 1935, Congress gave a commission broad authority to regulate, including wage and hour provisions. The Court like in *Schechter* considered the wages and hours of coal miners to be indirect.¹⁰² *Carter* conceded that whether any particular activity was direct or indirect was “not always easy to determine,”¹⁰³ but it sought to define the difference:

*The word ‘direct’ implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.*¹⁰⁴

⁹⁹ *Id.* The Court later emphasized the point; “[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government.” *Id.* at 548.

¹⁰⁰ *Id.* (“The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce.”).

¹⁰¹ *Carter*, 298 U.S. 238.

¹⁰² *Id.* at 308-09 (“The employees are not engaged in or about commerce, but exclusively in producing a commodity Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect.”).

¹⁰³ *Id.* at 307.

¹⁰⁴ *Id.* at 307-08. The continuation of this quote does not make it any more comprehensible, “If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. . . . But the matter of degree has no bearing upon the question here, since that question is not—

This language has the air of mystery to it, perhaps even mysticism, similar to Justice Andrews' definition of proximate cause in his dissenting opinion in *Palsgraf v. Long Island Railroad Company*.¹⁰⁵ If there is anything that might send shivers through the spine of law students and lawyers, it would be comparing anything to the test for proximate cause. Like the proximate cause test in torts, the direct/indirect test has no easily discernable meaning. Say direct/indirect fast, underline it, put it in italics, capitalize it, and tweet it to the world some early morning, and it is still devoid of meaning. *Jones & Laughlin Steel*, and *Wickard* gave it the quiet death that it deserved.¹⁰⁶

What is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce? but—What is the relation between the activity or condition and the effect?” *Id.* at 308.

¹⁰⁵ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting) (“Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space.”).

¹⁰⁶ *See Wickard v. Filburn*, 317 U.S. 111, 122–23 (1942) (“In some cases sustaining the exercise of federal power over intrastate matters the term ‘direct’ was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with ‘substantial’ or ‘material;’ and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.”). Though dead in the commerce power cases, the direct/indirect test continues to have some life in the Dormant Commerce Clause cases. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of ‘direct’ and ‘indirect’ effects and burdens.”) (citations omitted). In *Pike*, the Court found that Arizona improperly burdened interstate commerce by requiring that its cantaloupes be packed in Arizona, as opposed to in California as the grower preferred. *Id.* at 144–45. Arizona said that it was trying to address the fact that consumers falsely believed that Arizona’s delicious cantaloupes packed in California were grown in California. *Id.* at 142–43. (California only wishes its cantaloupes had such delicacies of flavor.). In that the direct/indirect test refuses to fully die, it is like Justice Scalia’s complaint about the *Lemon* test in the free exercise of religion cases—it is “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

Perhaps the most bizarre of the detours in the application of the *Gibbon's* test was the concept called Dual Federalism.¹⁰⁷ Under the concept, there are some powers exclusively in control of the federal government, and under the Tenth Amendment, others are exclusively under the control of state governments. The doctrine is erroneous because Congress can regulate anything, even if it falls within a state's police power when it also falls within one of Congress' enumerated powers.¹⁰⁸

The doctrine can be found in both *E.C. Knight* and *Hammer*.¹⁰⁹ The Court's view in *E.C. Knight* of the limited scope of commerce was in part a product of its view of state police power versus Congress' power. The Court said that the state police power "to protect the lives, health, and property of its citizens, and to preserve good order and the public morals" was not "surrendered by them to the general government" and was "essentially exclusive."¹¹⁰ But the Court cautioned, "On the other hand, the power of congress to regulate

¹⁰⁷ The Court's most revealing discussion of the dual federalism doctrine is found in a spending power case, *United States v. Butler*, where the Court found that it did not have to decide if the Agricultural Adjustment Act of 1933 was within Congress spending power, but nonetheless found it unconstitutional because it usurped state power. *United States v. Butler*, 297 U.S. 1, 68 (1936) ("We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."). Justice O'Connor called *Butler* a mistake not because of its holding as to the spending power, but "rather its crabbed view of the extent of Congress' regulatory power under the Commerce Clause. The Agricultural Adjustment Act . . . was regulation that today would likely be considered within Congress' commerce power." *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting) (citations omitted). *Dole* found that Congress' conditioning receipt of highway funds on a state's adopting a 21-year-old drinking limit was within its spending power. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 61 (1994).

¹⁰⁸ *United States v. Darby*. 312 U.S. 100, 114 (1941). *Jones & Laughlin Steel* does not address the concept of dual federalism, but it is rejected in *Darby*. *Id.* at 114.

¹⁰⁹ See *Hammer v. Dagenhart*, 247 U.S. 251, 274 (1918), *overruled in part by United States v. Darby*, 312 U.S. 100 (1941) ("The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.").

¹¹⁰ *United States v. E. C. Knight Co.*, 156 U.S. 1, 11 (1895).

commerce among the several states is also exclusive.”¹¹¹ As it summarized, “That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.”¹¹² Of course, *E.C. Knight* was wrong about state power being exclusive over federal power. Under the Supremacy Clause, federal law is supreme over state law, but there is no similar rule with regard to state law.¹¹³

Despite all of the limiting decisions as to Congress’ commerce power during this period, the Court did not consistently rule against Congress’ commerce power. During this period, many cases had the shadings of the later more modern approach. During the same time period that the Court limited Congress’ commerce power in *E.C. Knight* and *Hammer*, the Court decided other cases that allowed for a more expansive view of commerce power. The substantial effects test has its origins in *Southern Railway Company v. United States*.¹¹⁴ A

¹¹¹ *Id.*

¹¹² *Id.* at 12.

¹¹³ *Darby*, 312 U.S. at 114 (rejecting the doctrine). It is rejected again later in even more forceful language. *Id.* at 123–24 (“Our conclusion is unaffected by the Tenth Amendment which provides: ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’. The amendment states but a truism that all is retained which has not been surrendered.”). See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950), for the most famous discussion of the doctrine of dual federalism. Professor Corwin is given credit for having coined the phrase “dual federalism.” Paul D. Moreno, “*So Long As Our System Shall Exist*”: Myth, History, and the New Federalism, 14 WM. & MARY BILL RTS. J. 711, 711 n.2 (2005). And he is said to have “famously announced” its passing. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1921 (2014). Professor Bulman-Pozen summarized Corwin’s argument, “[H]e argued that the federal system had ‘shifted base in the direction of a consolidated national power’ and wondered whether ‘the constituent States of the System [could] be saved for any useful purpose.’” *Id.* (citations omitted). *But see* Printz v. United States, 521 U.S. 898, 918–19 (1997) (“It is incontestible [sic] that the Constitution established a system of ‘dual sovereignty.’ Although the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’”) (citations omitted). *Printz* was referring only to the Court’s holding in *New York v. United States*, 505 U.S. 144 (1992), that under the Tenth Amendment Congress could not commandeer state or local agencies to enforce federal laws.

¹¹⁴ *S. Ry. Co. v. United States*, 222 U.S. 20 (1911). In another case earlier in the same year also cited by *Jones & Laughlin Steel*, the Court upheld a safety

federal railway safety act as amended applied to all railroad cars, even intrastate ones using an interstate rail line.¹¹⁵ In addressing whether the act was constitutional, the Court said the issue was whether there was “a real or substantial relation or connection” or a “close or direct relation or connection” between intrastate traffic, and “the safety of interstate commerce and of those who are employed in its movement.”¹¹⁶ For the Court, the answer to this required no more than “common knowledge”: “Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals” that they are “interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains” and the lack of safety equipment “is a menace not only to that train, but to others.”¹¹⁷

One of the most famous cases allowing for a more expansive view of commerce power was the decision in *The Shreveport Rate Cases*¹¹⁸ where the Court indirectly upheld the authority of the Interstate Commerce Commission (“ICC”)¹¹⁹ to regulate intrastate commerce

measure related to hours of employment. *Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm’n*, 221 U.S. 612, 622-23 (1911). The act included in its coverage employees whose work was strictly for intrastate commerce. *Id.* at 616. The railroad was undone by its own argument, that “the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employees” between interstate and intrastate work. *Id.* at 618. Without giving any rationale, the Court held that the interwoven operations confirmed that both were subject to Congress’ commerce power: “Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting.” *Id.*

¹¹⁵ *S. Ry. Co.*, 222 U.S. at 26 (“[I]t must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.”).

¹¹⁶ *Id.* It is worth noting that the Court uses the modifier direct as synonymous with a close relationship, not the direct/indirect metaphysical connection of other cases.

¹¹⁷ *Id.* at 27.

¹¹⁸ *The Shreveport Rate Cases*, 234 U.S. 342 (1914).

¹¹⁹ The ICC was the first administrative agency to regulate interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111, 121 (1942) (“It was not until 1887 with the enactment of the Interstate Commerce Act that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman

between cities within the same state.¹²⁰ Borrowing from *Gibbons*, the Court said that “Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce”¹²¹ and parroting *McCulloch* “to enact ‘all appropriate legislation’ for its ‘protection and advancement.’”¹²² The Court previewing the substantial effects test of *Jones & Laughlin Steel*, held that the ICC’s authority “necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic.”¹²³

The Court implicitly recognized that the ICC had the power to order that the lower in-state rates be raised to be equal to the higher ICC approved interstate rates.¹²⁴

Anti-Trust Act and, thereafter, mainly after 1903, by many others.” (footnotes omitted)); *see also* *R.R. Comm’n of Wis. v. Chi., B. & Q. R.R. Co.*, 257 U.S. 563, 582 (1922) (“The Interstate Commerce Act of 1887, 24 Stat. 379, . . . was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities.”).

¹²⁰ The Texas railroads in the case were subject to regulation by the Texas Railroad Commission for in-state rates and by the ICC for interstate rates. *The Shreveport Rate Cases*, 234 U.S. at 346. The in-state rates were much cheaper. Illustrative, the rate from Dallas, Texas for the 147.7 miles to Marshall, Texas near the Louisiana border was 37 cents while the in-state rate from Shreveport, Louisiana for the 42 miles to Marshall, Texas was 56 cents, over 50% higher for less than 1/3 the distance. *Id.* To prevent discriminatory pricing, the ICC ordered that the interstate rate be lowered to be the same as the Texas in-state rate. *Id.* at 347.

¹²¹ *Id.* at 351.

¹²² *Id.* *See also* *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

¹²³ *Id.* It was argued that under its commerce power the ICC had no authority to consider the in-state rate at all. The Court said, “It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government.” *Id.* at 350.

¹²⁴ *See* JONATHAN D. VARAT & VIKRAM D. AMAR, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 140 (15th ed. 2017). The Court in *R.R. Comm’n of Wis. v. Chi., B. & Q. R. Co.* found that Congress had the commerce power to expand ICC authority to regulate travel strictly within one state if it impacted interstate rates. *R.R. Comm’n of Wis. v. Chi., B. & Q. R.R. Co.*, 257 U.S. 563, 590–91 (1922). In the case, the Wisconsin rate for the intrastate portion of an interstate journey was 2 cents per mile versus 3.6 cents for interstate travelers, cutting the interstate railroad net income by \$6,000,000. *Id.* at 578–80. Interstate travelers going from Chicago to Madison, Wisconsin could buy an interstate ticket to Madison or save money by buying an interstate ticket to Milwaukee, Wisconsin and a cheaper intrastate ticket from Milwaukee to Madison. The basic holding was that interstate travelers between Chicago and interior cities of Wisconsin were paying an unfair portion of the cost of passenger travel and that the ICC

**V. JONES & LAUGHLIN STEEL CORPORATION—1937 AND THE
COMMERCE POWER EMERGES FROM ITS TWISTY DETOURS**

In 1937, *N.L.R.B. v. Jones & Laughlin Steel*¹²⁵ along with *West Coast Hotel v. Parrish*¹²⁶ started a constitutional revolution. Both cases rejected the Court's earlier imposed limits on governmental power, *Jones & Laughlin Steel* on congressional commerce power, and *West Coast Hotel* on due process limits on state and federal power. Cases like *E.C. Knight* and *Hammer* limited Congress' commerce power to regulate social and economic issues. A similar line of cases imposed substantive due process limits on states and the federal government to address social and economic issues.¹²⁷ Both the Commerce Clause cases and substantive due process cases limiting governmental powers were more about imposing a laissez-faire view of government, federal or state, as to regulations of private business than about commerce power or due process. The Court was open in the post-1937 due process cases about how it had misused the Due Process Clause in the past and the reason why it was adopting a different approach going forward.¹²⁸ *Jones & Laughlin Steel* jettisoned the heavy restrictions of the post-*Gibbons* cases without noting that they too were likely manifestations of a similar laissez-faire philosophy.¹²⁹

could increase the intrastate rate. The Court in *Chi., B. & Q. R.R. Co.* referred to its holding as to strictly intrastate commerce rates as “power already indirectly exercised as to persons and localities, with approval of this court in the Shreveport and other cases.” *Id.* at 584.

¹²⁵ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹²⁶ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹²⁷ *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905).

¹²⁸ *See e.g., Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois*, ‘For protection against abuses by legislatures the people must resort to the polls, not to the courts.’” (citations omitted)). In *Williamson*, the Court found that the state might have had a conceivable justification for passing what was likely a needless wasteful regulation of the sale of eyeglasses. *Id.* at 487–88.

¹²⁹ Justice Souter's dissent in *Lopez* recognized the joint history behind both a restrictive view of commerce power and an expansive view of due process limits, “These restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope of state economic regulation. It is most familiar history that during this same period the

Even putting aside the due process cases, there is little doubt that 1937 is a turning point in American history, unlike few others. Congress went from being unable to regulate the economic consequences of child labor to being able to regulate the minutest aspects of our national economy.¹³⁰ The limiting pre-1937 cases became as dead as prehistoric dinosaurs snuffed out by some meteor. True, the fossils of cases like *E.C. Knight* and *Hammer* can still be perceived,¹³¹ but they have as little real life in them as the etchings in dry riverbeds. But it is equally intriguing that the revolution has had little advancement, except for the rational basis test moving from

Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them. It was not merely coincidental, then, that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together, in 1937, with *West Coast Hotel Co. v. Parrish*, and *NLRB v. Jones & Laughlin Steel Corp.*" *United States v. Lopez*, 514 U.S. 549, 605–06 (Souter, J., dissenting) (citations omitted).

¹³⁰ The Court in *Hammer v. Dagenhart* framed the issue as to child labor, "The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods . . . in which . . . children under the age of fourteen have been employed or permitted to work." *Hammer v. Dagenhart*, 247 U.S. 251, 269 (1918). The Court's answer was unequivocal, "To sustain this statute . . . would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states." *Id.* at 276. Then just two years after *Jones & Laughlin Steel* in 1937, the Court said, "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 606 (1939). "The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest." *Maryland v. Wirtz*, 392 U.S. 183, 192–93 (1968), *overruled by Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976). Twenty-five years later in *Katzenbach v. McClung*, federal commerce power was held to include barring racial discrimination by a demonstrably local barbeque joint that had purchased \$69,683 its meat from a local supplier who had purchased it from outside the State. *See Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

¹³¹ Justice Thomas alone regularly reminds us of the fossilized remains of *E.C. Knight*.

substantive due process cases to commerce power cases. In the due process cases, the rational basis test is little changed from shortly after *West Coast Hotel*.¹³²

The constitutional revolution of 1937 was indeed a reemergence of a broad view of federal commerce power. Giving detail to the Affectation Doctrine of *Gibbons*, the Court in *Jones & Laughlin Steel* emphasized a “substantial effects” test to show how close intrastate activities had to be before Congress had the power to regulate it under their commerce power. The Court upheld the National Labor Relations Act (“NLRA”) of 1935 as being within Congress’ enumerated power to regulate local activities affecting interstate commerce.¹³³ The NLRA required collective bargaining between the company and the employee’s labor union as to activities affecting interstate commerce.¹³⁴ *Jones & Laughlin* was a Pittsburg, Pennsylvania company and the dispute primarily involved the company’s firing of union representatives in its nearby Aliquippa, Pennsylvania plant.¹³⁵ *Jones & Laughlin* argued that no interstate commerce was involved, only a dispute as to relations and activities in its manufacturing department.¹³⁶ The Court noted that *Jones & Laughlin* was “a self-

¹³² Since the first application of the rational basis test in *Carolene Products*, a year after *West Coast Hotel*, the rational basis test has remained virtually unchanged. But since that case, the Court has adopted a number of other tests for cases that previously may have fallen within the rational basis test. Strict scrutiny for free speech and race classifications likely had their origin before *Carolene Products*, but the higher level of review for classifications based upon gender, alienage, and illegitimacy all would have been subject to the rational basis test in 1937. The fundamental rights other than free speech are also post-1937 in origin.

¹³³ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) (noting that the NLRA involved the Affectation Doctrine: “The critical words of this provision, prescribing the limits of the Board’s authority in dealing with the labor practices, are ‘affecting commerce.’”). The NLRA prevented any person from engaging in unfair labor practices “affecting commerce.” *Id.* at 30. Commerce was defined as any “trade, traffic, commerce, transportation, or communication” between any states or foreign countries. *Id.* at 31. “[A]ffecting commerce,” the Act said, meant “burdening or obstructing commerce or the free flow of commerce.” *Id.*

¹³⁴ *See id.* at 24 (“The Board is empowered to prevent the described unfair labor practices affecting commerce and the act prescribes the procedure to that end.”).

¹³⁵ *See id.* at 28 (“Practically all the factual evidence in the case, except that which dealt with the nature of respondent’s business, concerned its relations with the employees in the Aliquippa plant whose discharge was the subject of the complaint.”).

¹³⁶ *Jones & Laughlin Steel’s* emphasis was that its Aliquippa plant was a self-contained operation for making iron and steel products from raw materials. *Id.* at

contained, highly integrated body” that drew “raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by [Jones & Laughlin].”¹³⁷ In simple terms, a labor dispute in Aliquippa would substantially affect commerce all the way from Minnesota to the coal mines of West Virginia and the states in between, and that in the final analysis was all the Court required.

Before discussing the substantial effects test, it is important to see the approaches discarded by the Court. First, the Court dismissed the need to apply the stream of commerce test,¹³⁸ saying that it was enough that there was a “close and substantial relation to interstate commerce.”¹³⁹ Relying on *E.C. Knight*,¹⁴⁰ the company claimed that no interstate commerce was involved. Citing *Stafford* and its progeny, the government sought to distinguish the *E.C. Knight* line of cases by urging “that these activities constitute a ‘stream’ or ‘flow’ of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement.”¹⁴¹ The Court refused to take the bait, saying that being in the stream of commerce was only one type of commerce power case, the better approach being whether the federal law bore a substantial relationship to interstate commerce.¹⁴² The Court seemed not to be

27. It argued that “the industrial relations and activities in the manufacturing department of respondent’s enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce.” *Id.* at 34 (citations omitted).

¹³⁷ *Id.* at 27.

¹³⁸ *Id.* at 36).

¹³⁹ *Id.* at 37.

¹⁴⁰ *Id.* at 39. A whole line of cases supporting this claim have been omitted. Later, *E.C. Knight* was separately considered by the Court.

¹⁴¹ *Id.* at 35.

¹⁴² *Id.* at 36–37 (“We do not find it necessary to determine whether these features of defendant’s business dispose of the asserted analogy to the ‘stream of commerce’ cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the government invokes in support of the present act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a ‘flow’ of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact ‘all appropriate legislation’ for its ‘protection or advancement.’” (citations omitted)).

tempted in the least by the government's reliance on the stream of commerce cases, preferring a straight-forward substantial effects approach:

*Although 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.*¹⁴³

Second, the Court acknowledged the direct/indirect test¹⁴⁴ but said that whether something was direct or indirect was a matter of degree, decided by a practical factual evaluation. The Court recognized the series of cases where local activities had obviously impacted interstate commerce, but the cases had found that the impact was “indirect” as opposed to “direct.” The Court paid homage to those cases, saying that there had to be some limit on our federalist form of government, that federal power to regulate the effects of local activities on interstate commerce should not be “so indirect and remote” that it obliterated the difference between local and federal government.¹⁴⁵ Then in one short sentence, the Court changed the direct/indirect test from some mystical mumble jumble to an exercise of practical reality: “The question is necessarily one of degree.”¹⁴⁶ Later picking up that theme, it said that to call a disruption of the steel business by a strike “indirect or remote” disregarded that such a stoppage “would have a most serious effect upon interstate commerce,” that it was obvious that “it would be immediate and might be catastrophic.”¹⁴⁷ In calling these effects indirect, the Court said, “We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and

¹⁴³ *Id.* at 37.

¹⁴⁴ *Id.* at 31–32 (“It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. . . . Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control . . . is left by the statute to be determined as individual cases arise.”).

¹⁴⁵ *Id.* at 37. Three times the Court equates a direct impact with “a close and intimate” impact, a seemingly closer relationship than the prevailing substantial effect test but if it meant the phrase to be more protective, it did not carry the day. *Id.* at 32, 37, 38.

¹⁴⁶ *Id.* at 37.

¹⁴⁷ *Id.* at 41.

indirect effects in an intellectual vacuum.”¹⁴⁸ In then the deathblow to the old direct/indirect test, it concluded, “We 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.”¹⁴⁹ In applying the Court’s substantial effects test, any impact on interstate commerce was to be based upon a practical real-life factual evaluation, not based upon some metaphysical concept of direct versus indirect.¹⁵⁰

Third, the Court minimized *E.C. Knight’s* holding that manufacturing was not commerce. Citing other federal antitrust cases, the Court said that the defense’s reliance upon *E.C. Knight* “have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice.”¹⁵¹ It is not that the Court reversed *E.C. Knight’s* holding that manufacturing was not commerce, but rather that it did not matter if it was commerce or not. If the manufacturing substantially affected interstate commerce, it was subject to the federal commerce power.¹⁵²

¹⁴⁸ *Id.* More specifically, the Court did not turn blind eye of the impact on interstate commerce of nationally integrated companies, “When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?” *Id.*

¹⁴⁹ *Id.* at 41–42.

¹⁵⁰ *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (“If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined.”).

¹⁵¹ *Jones & Laughlin Steel Corp.*, 301 U.S. at 39.

¹⁵² In Justice Thomas’ defense of the *E.C. Knight* case and its progeny, he disagrees, “If federal power extended to these types of production ‘comparatively little of business operations and affairs would be left for state control.’” *United States v. Lopez*, 514 U.S. 549, 598 (1995) (citations omitted) (Thomas, J., concurring); *see also Newberry v. United States*, 256 U.S. 232, (1921) (“It is settled . . . that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress”). “Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.” *Lopez*, 514 U.S. at 598 (citations omitted) (Thomas, J., concurring).

It cannot be overemphasized what a game changer *Jones & Laughlin Steel* was.¹⁵³ *McCulloch* had only required that means to accomplish enumerated powers be “appropriate.” *Gibbons* had said that intrastate commerce must “affect” interstate commerce. The intervening tests varied from the hostile in *E.C. Knight* and *Hammer* to the practical in *Southern Railway* and *The Shreveport Rate Cases* to the metaphysical in *Carter* and *Butler*. In *Jones & Laughlin Steel*, the Court ignored *Hammer*, minimized the stream of commerce cases, distinguished *E.C. Knight*, and reframed the direct/indirect test into the substantial effects test, the first meaningful test for Congress’ power to regulate intrastate commerce or any other local activity affecting interstate commerce.

The Court was respectful of the concern for our federalist system¹⁵⁴ but did not mention the dual federalism doctrine per se. As to the line between too much power for the central government and too little, the Court was subtle if not coy: “The question is necessarily one of degree.”¹⁵⁵ It thought that *Southern Railway* and, with the exception of *E.C. Knight*, many of the antitrust cases supported the view that intrastate activities with a “close and intimate relation to interstate commerce”¹⁵⁶ was subject to federal control. Its position could not have been clearer: “[I]f Congress deems certain recurring practices though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint.”¹⁵⁷

The key to the substantial effects test is that it is a practical one,¹⁵⁸ one not dependent upon the manipulations of the stream of commerce

¹⁵³ Justice Kennedy says it simply, “The case that seems to mark the Court’s definitive commitment to the practical conception of the commerce power is *NLRB v. Jones & Laughlin Steel Corp.*” *Id.* at 573 (citations omitted) (Kennedy, J., concurring).

¹⁵⁴ *Jones & Laughlin Steel Corp.*, 301 U.S. at 37 (1937) (“Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 37.

¹⁵⁷ *Id.* at 40 (quoting *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 408 (1922)).

¹⁵⁸ In summing up the fact-based nature of its inquiry, the Court concluded, “[I]nterstate commerce itself is a practical conception. It is equally true that

cases, the vagaries of the direct/indirect test, or the fallacies of dual federalism. As the Court said, “In view of respondent’s far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic.”¹⁵⁹ The impact on interstate commerce was not to be decided “in an intellectual vacuum.”¹⁶⁰ The Court minced no words in rejecting a laissez-faire view of government power, “When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?”¹⁶¹

interferences with that commerce must be appraised by a judgment that does not ignore actual experience.” *Id.* at 41–42. The following year in another N.L.R.B. case, the Court summarized its holding in *Jones & Laughlin Steel*, “The question that must be faced under the act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes.” *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 467 (1938).

¹⁵⁹ *Jones & Laughlin Steel Corp.*, 301 U.S. at 41.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* Just two years later, the Court said that national scale was not determinative. See *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 606 (1939) (“Nor do we think it important, as respondents seem to argue, that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.”). *Fainblatt*, a New Jersey operation, made women’s sports garment out of fabrics sent from New York and returned to New York dealers or directly to customers in other states. *Id.* at 602–03. The *Fainblatt* case introduced the concept of class or aggregate impact. Though businesses like *Fainblatt* had an average of only thirty-two employees, the women’s clothing industry consisted of over 3,414 businesses and ranked ninth in number of workers employed nationally. *Id.* at 608 n.2.

VI. APPLYING THE SUBSTANTIAL EFFECTS TEST

The first key case following *Jones & Laughlin Steel* was *United States v. Darby*.¹⁶² *Darby* did not advance the substantial effects test to any significant degree, but it did some important clean-up work. *Darby* involved the Fair Labor Standards Act (“FLSA”). The FLSA based its regulation of minimum wages and maximum hours on two different aspects of the federal commerce power. In 1938 when the FLSA was passed, Congress was still uncertain as to the scope of its power to regulate interstate commerce, so it sought to use both its power over things in interstate commerce and its power to regulate local activities affecting interstate commerce. Section 1¹⁶³ made “unlawful the shipment in interstate commerce of any goods” made in violation of the acts wage and hour provisions.¹⁶⁴ Section 2 made unlawful the violation of the act as to “employees engaged in production of goods for commerce.”¹⁶⁵

Fred W. Darby operated a lumber company in Georgia using raw material from Georgia but shipping much of the finished lumber to other states. He paid his employees less than the then twenty-five cents minimum wage in violation of the Act. The lower court had found the FLSA unconstitutional on the basis of the *Hammer* case. The Court

¹⁶² *United States v. Darby*, 312 U.S. 100 (1941). Falling between *Jones & Laughlin Steel* and *Darby* was *Currin v. Wallace*, where the Court upheld against an enumerated powers challenge the Tobacco Inspection Act of August 23, 1935. *See Currin v. Wallace*, 306 U.S. 1 (1939). The Act allowed federal inspection of tobacco at tobacco auctions one hour prior to the sell, some of the tobacco intended for interstate and foreign commerce, some not. *See id.* at 11 (“Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale.”).

¹⁶³ Fair Labor Standards Act of 1938, 45 U.S.C. § 15(a)(1) (repealed 1994).

¹⁶⁴ *Darby*, 312 U.S. at 110. After *Darby*, there are no discernable limits on Congress ability to regulate goods moving in interstate commerce.

¹⁶⁵ Fair Labor Standards Act of 1938, 45 U.S.C. § 15(a)(2) (repealed 1994). Unlike much federal legislation, which required that the Court or some administrative agency, such as the N.L.R.B. in *Jones & Laughlin Steel*, find that some local activity affected interstate commerce, the FLSA specifically found that violations of the wage and hour by businesses producing goods for shipment in interstate commerce did affect interstate commerce. As the *Darby* court points out, earlier acts, such as the Safety Appliance Act and the Railway Labor Act had also made similar findings. *Darby*, 312 U.S. at 120. This aspect of *Darby* became important in the first round of the rational basis cases as represented by *Katzenbach v. McClung*.

reversed *Hammer*.¹⁶⁶ Section 1 was premised entirely on Congress' power to regulate goods in commerce, "While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."¹⁶⁷ Regulation of goods in commerce knew of no limits: "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution.'"¹⁶⁸ If it was interstate commerce, Congress could regulate it. There is no clearer form of federal commerce power.¹⁶⁹ Any motive of Congress to use interstate commerce as a cover for regulating some local activity was irrelevant.¹⁷⁰ The fact that the federal law might interfere with local police power was meaningless: "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended

¹⁶⁶ *Darby*, 312 U.S. at 116 ("The distinction on which the [*Hammer*] decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned.").

¹⁶⁷ *Id.* at 113.

¹⁶⁸ *Id.* at 114 (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824)).

¹⁶⁹ Whether merely crossing state lines should always bring into play federal commerce power is an issue worthy of discussion, but it is beyond the scope of this article which involves Congress' ability to regulate activity that does not cross state lines. The issue was raised in *N.L.R.B. v. White Swan Co.*, but the case was resolved on procedural grounds. *N.L.R.B. v. White Swan Co.*, 313 U.S. 23, 26 (1941) ("Where a local business, such as a laundry, is located in a city on a state line, and is not engaged in interstate commerce, except in so far as it may collect articles to be serviced and may make deliveries to customers living across the state line, is such business, by reason of such collections and deliveries, deemed engaged in 'commerce' within the meaning of [the NLRA] so that an unfair labor practice on its part would be an unfair labor practice 'affecting commerce' . . ."). For an argument that Congress power to regulate things crossing state lines goes too far, see Barry Friedman & Genevieve Lakier, "To Regulate," Not "To Prohibit": *Limiting the Commerce Power*, 2012 SUP. CT. REV. 255, 290 (2012) ("In short, the reasoning of these cases became strained and completely formalistic. The mere fact that a good or a person crossed a state line was deemed sufficient to give Congress the power to ban it.").

¹⁷⁰ *Darby*, 312 U.S. at 114 ("Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions.").

by the same incidents which attend the exercise of the police power of the states.”¹⁷¹

As for Section 2, “with respect to all employees engaged in the production of goods for interstate commerce,” since the employees were not actually engaged in interstate commerce, the issue was whether the production was “so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.”¹⁷² The Court said, starting with *McCulloch* and *Gibbons* that Congress’ power extended “to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”¹⁷³ The Court rejected the fallacy of *E.C. Knight*, that since local activity was within the scope of state power, it could not be regulated by Congress: “In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce.”¹⁷⁴ Other than shortening the *Jones & Laughlin Steel* phrase from “close and substantial” to just “a substantial effect,” the *Darby* case does not expand the test. *Darby* did go beyond *Jones & Laughlin Steel* in defending the test’s constitutional validity. The *Darby* court said, “But long before the adoption of the National Labor Relations Act, this

¹⁷¹ *Id.* This language, despite its sparseness, is in effect a rejection of the doctrine of dual federalism. But if there was any doubt about the Court’s meaning, *Darby* explicitly rejected the dual federalism doctrine. *Id.* at 124 (“The [tenth] amendment states but a truism that all is retained which has not been surrendered.”); see *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 219–20 (1938) (“It does not follow, however, because these operations of the utilities are of vast concern to the people of the City and State of New York, that they do not also involve the interests of interstate and foreign commerce in such a degree that the Federal Government was entitled to intervene for their protection.”); see also *Curran v. Wallace*, 306 U.S. 1, 11–12 (1939) (“Congress is not to be denied the exercise of its constitutional authority in prescribing regulations merely because these may have the quality of police regulations.”).

¹⁷² *Darby*, 312 U.S. at 117.

¹⁷³ *Id.* at 118.

¹⁷⁴ *Id.* at 119 (citations omitted). This holding is a further rejection of dual federalism. Just because something fell within state power did not preclude federal power.

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.”¹⁷⁵ *Darby* also mentioned the importance of the class or aggregate impact of smaller business on interstate commerce, which becomes a key to modern commerce power.¹⁷⁶

Perhaps the most maligned substantial effects case was *Wickard v. Filburn*.¹⁷⁷ *Wickard* upheld the Agricultural Adjustment Act (“AAA”)

¹⁷⁵ *Id.* at 119–20. *Darby*’s original contribution to this debate was with respect to other enumerated powers: “Congress . . . may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.” *Id.* at 121. Examples included the Lever Act passed during World I that allowed the President to limit the use of food additives in the manufacture of beer, which was found within the War Powers. *See Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264 (1920). A federal ban on the prescribing of “intoxicating malt liquors for medicinal purposes” was found within the enumerated power under Section 2 of the Eighteenth Amendment to pass “appropriate legislation” as to the prohibition of alcoholic beverages in Section 1 of the Eighteenth Amendment. *See James Everard’s Breweries v. Day*, 265 U.S. 545, 554 (1924). A more obtuse citation was *Westfall v. United States*, which found that a crime involving a state bank fell within the Federal Reserve Act of 1913. *Westfall v. United States*, 274 U.S. 256 (1927). The case itself does not deal with whether the Federal Reserve Board itself fell within any enumerated power. *See generally McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹⁷⁶ *See Darby*, 312 U.S. at 123 (“Congress [in the FLSA] has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. The legislation aimed at a whole embraces all its parts.” (citations omitted)).

¹⁷⁷ The case of *Wickard v. Filburn* has become the shibboleth for overreaching federal power. *Wickard v. Filburn*, 317 U.S. 111 (1942). Mr. Filburn was subject to a financial penalty of 49 cents a bushel, or \$117.11 in all. *Id.* at 114–15. The penalty was actually far more severe because the crop could not be sold without a compliance certificate. *See id.* At 60 pounds per bushel, this would be 14,340 pounds too much wheat, almost 3 1/2 truckloads in a Ford F250. *See Deborah Jones Merritt, Commerce!*, 94 MICH. L. REV. 674, 674 (1995) (Professor Merritt frames it humorously by quoting from her law school student musical spoof sung to the tune of “Convoy.” “His name was farmer Filburn, we looked in on his wheat sales. We caught him exceeding his quota. A criminal

of 1938 that fixed a quota on the acreage and the amount of various commodities that a farmer could grow.¹⁷⁸ As for Farmer Filburn, he planted twenty-three acres producing 462 bushels of wheat, considerably over his allotted eleven acres and an excess of 239 bushels of wheat. The AAA went beyond the FLSA in *Darby* in that *Darby* involved lumber either in commerce or intended for interstate transportation, while *Wickard* involved wheat grown on Farmer Filburn's farm primarily intended for consumption on his farm by his animals and his family.¹⁷⁹ There was no evidence that any part of

hard as nails. He said, 'I don't sell none interstate.' I said, 'That don't mean cow flop. We think you're affecting commerce.' And I set fire to his crop, HOT DAMN! Cause we got interstate commerce Ain't no where to run! We gone regulate you That's how we have fun. You made a call last Thursday long distance to Bayonne. We gone put you out of business, an' disconnect your phone. COMMERCE!"; *Perez v. United States*, 402 U.S. 146, 151 (1971) ("Decisions which followed [*Gibbons*] departed from that view; but by the time of *United States v. Darby*, and *Wickard v. Filburn*, the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored." (citations omitted)); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012) (citing *United States v. Lopez*, 514 U.S. 549 (1995)) ("*Wickard* has long been regarded as 'perhaps the most far reaching example of Commerce Clause authority over intrastate activity,' . . ."). *But see Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968), *overruled by Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) ("Neither here nor in *Wickard* had the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.").

¹⁷⁸ See *United States v. Stangland*, 242 F.2d 843, 845 (7th Cir. 1957) ("As announced in *Wickard v. Filburn*, the general purpose of the Agricultural Adjustment Act, insofar as it relates to wheat, is to control production in order to avoid the problems resulting from deficits or surpluses. In furtherance of this objective, the Secretary of Agriculture is required to establish a national acreage allotment for each successive wheat crop, which, in turn, is apportioned among the farms of the nation." (citations omitted)).

¹⁷⁹ See *Wickard*, 317 U.S. at 114. Farmer Filburn's practice was "to sell a portion of the crop," but the rest was used "to feed part to poultry and livestock on the farm," "in making flour for home consumption," and "the rest for the following seeding." *Id.* In an earlier challenge to the Agricultural Adjustment Act, the Court, using the stream of commerce fiction, found the case within Congress' ability to regulate things in commerce. See *Mulford v. Smith*, 307 U.S. 38, 47 (1939) ("The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at

Farmer Filburn's excess wheat had moved or was ever intended to move in interstate commerce.¹⁸⁰ The Court readily acknowledged that Congress was pushing the envelope, "Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof."¹⁸¹

Despite *Wickard's* criticism, reading Justice Jackson opinion in *Wickard* is a textbook example of lucidity of reasoning and writing after the long historical slug through cases like *E.C. Knight* and *Hammer*. It is like waking up from a horrible dream. In one recurring dream I have, I am helping to herd sheep into a corral, but they keep escaping from a back gate, and no one will listen to me. In *Wickard*, all the back gates are closed.¹⁸² Every law professor has his own hypothetical, often involving vegetables from someone's backyard garden,¹⁸³ to emphasize *Wickard's* overreach. *Wickard* is criticized

the throat where tobacco enters the stream of commerce,—the marketing warehouse.”).

¹⁸⁰ *Wickard*, 317 U.S. at 114. There was actually no evidence as what was to be done with the crop from his excess acreage. *Id.* (“The intended disposition of the crop here involved has not been expressly stated.”). It is worth noting that *Wickard* does not cite to *Jones & Laughlin Steel*, that *Darby* is its benchmark case. *Id.* at 118. The Court does, however, quote the “close and substantial” relationship language as found in the *Shreveport Rate Cases*. *Id.* at 123.

¹⁸¹ *Id.* at 120. It was enough under the act that it was “available for marketing.” *Id.* at 119. There was no requirement that “any part of the wheat either within or without the quota is sold or intended to be sold.” *Id.*

¹⁸² *See id.* at 124–25. The Court rejected the *E.C. Knight* open gate around the Commerce Clause, “Whether the subject of the regulation in question was ‘production,’ ‘consumption,’ or ‘marketing’ is, therefore, not material for purposes of deciding the question of federal power before us.” *Id.* at 124. The direct/indirect back gate was also closed, “But even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’” *Id.* at 125.

¹⁸³ Justice O’Connor seemed to reject this legal trope. *Gonzales v. Raich*, 545 U.S. 1, 51 (2005) (O’Connor, J., dissenting) (“*Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook’s herb garden.”). Perhaps because of my long career in Malibu, California, my go to hypothetical involves the federal government’s regulating avocado seeds germinating in a glass jar secured by three strategically placed toothpicks, not one of these seeds having ever verifiably survived to actually grow into a producing tree. *See generally* Will Brokaw, *Growing an Avocado Tree From a*

because no goods ever actually move in interstate commerce, and because the most de minimis of grain was said to impact the interstate and foreign price of wheat. Although not the first case to use the concept, *Wickard* is usually associated with the use of the class or aggregate impact doctrine to satisfy the substantial effects test.¹⁸⁴ In *Wickard*, the facts are persuasive that the class impact of homegrown and home-consumed wheat on the price of interstate and foreign commerce was substantial, if not dramatic.

The demonization of *Wickard* as judicial overreach is unjustified. There were ample facts supporting the Court's decision. Unlike in other Commerce Clause cases where the Court has taken judicial notice of facts supporting the substantial impact on interstate commerce,¹⁸⁵ in *Wickard* the opposing parties had "stipulated a summary of the economics of the wheat industry."¹⁸⁶ Three key facts emerged. First, the interstate commerce in wheat was "large and important."¹⁸⁷ Second, there was a large international market in wheat that much impacted interstate commerce.¹⁸⁸ Third, homegrown and home-consumed wheat was far from a trivial factor in the market. The Court said that the consumption of homegrown wheat "constitutes the

Seed, <http://www.willsavocados.com/index.php/grow-avocado-tree> [https://perma.cc/PJ8N-Y29D] (last visited Mar. 16, 2019) ("Ungrafted" trees (like those grown inside from seeds) rarely produce fruit.").

¹⁸⁴ See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012) ("Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others." (citing *Wickard*, 317 U.S. at 127–128)).

¹⁸⁵ See e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252 (1964) ("While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce."); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) ("Here, of course, Congress had included no formal findings. But their absence is not fatal to the validity of the statute, for the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate." (citations omitted)).

¹⁸⁶ *Wickard*, 317 U.S. at 125.

¹⁸⁷ *Id.* Its problems were national in scope. *Id.* ("Although wheat is raised in every state but one, production in most states is not equal to consumption.").

¹⁸⁸ *Id.* ("Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent.").

most variable factor in the disappearance of the wheat crop,”¹⁸⁹ that it had a variability factor of 20%.¹⁹⁰ The bottom line is that when the price of wheat was high, farmers sold it in the interstate and foreign markets. When it was cheap, they fed it to their livestock and made flour for home consumption.¹⁹¹

The class or aggregate impact of homegrown and home-consumed wheat could hardly be more obvious. On the other hand, the impact of Farmer Filburn’s 239 extra bushels would be like a grain of sand compared with the total production of wheat in the United States.¹⁹² It is hard to argue with the fact that in determining whether any particular activity substantially affects interstate commerce, that the aggregate impact of the class of like activities has to be considered. That is surely the basis of all legislation. There might be little harm in ignoring a stop sign in some distant point in the wheat fields of Kansas with visibility in all directions, but if widely ignored, there would be traffic chaos. *Wickard* was not the first case to use the aggregate or class impact test, but it still remains its most famous example. The Court’s finding that the class or aggregate impact of all homegrown home-consumed wheat had enough of an impact on interstate commerce seems supported by the facts.

Interestingly, the Court nowhere mentions *Jones & Laughlin Steel* but rather emphasized the holding of *The Shreveport Rate Cases* in 1914, that intrastate rates could be revised “because of the economic effects which they had upon interstate commerce,”¹⁹³ that local matters having “a close and substantial relation to interstate traffic”¹⁹⁴ were subject to federal power. Justice Jackson also quoted then current

¹⁸⁹ *Id.* at 127.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 128 (“But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.”).

¹⁹² See *Wheat Facts*, NAT’L ASS’N OF WHEAT GROWERS, <https://www.wheatworld.org/wheat-101/wheat-facts/> [https://perma.cc/FN9L-5GZY] (last visited Mar. 21, 2019) (“In 2008/2009, U.S. farmers grew nearly 2.4 billion bushels of wheat on 63 million acres of land”); see also *Top Wheat Producing Countries*, WORLD ATLAS, <https://www.worldatlas.com/articles/top-wheat-producing-countries.html> [https://perma.cc/9JLQ-RS7L] (last visited Mar. 21, 2019) (stating that the United States is currently fourth in wheat production trailing (3) Russia, (2) India and (1) China).

¹⁹³ *Wickard*, 317 U.S. at 123.

¹⁹⁴ *Id.* (quoting the *Shreveport Rate Cases*, 234 U.S. 342, 351 (1914)).

Chief Justice Stone's description of federal power in the 1942 case of *United States v. Wrightwood Dairy Company*:

*The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.*¹⁹⁵

The quoted test is an interesting one in that Chief Justice Stone referred to regulating local activities as an “appropriate means to the attainment of a legitimate end,”¹⁹⁶ which as discussed later, is close to a rational basis test. Of course, Stone also refers to the substantial effects test. Finally, *Wickard* itself concludes in the language of the substantial effects test,

*The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.*¹⁹⁷

The case most representing the overreach of commerce power is not *Wickard* but the 1971 case *Perez v. United States*.¹⁹⁸ In *Perez*, Congress made loan sharking a federal crime subject to as much as

¹⁹⁵ *Id.* at 124 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)). The Court in *Wrightwood* held that Congress could regulate the local sale of milk because it competed with milk shipped interstate. *Wrightwood Dairy Co.*, 315 U.S. at 125.

¹⁹⁶ *United States v. Darby*, 312 U.S. 100, 118 (1941) (where Chief Justice Stone first used this framing of the test).

¹⁹⁷ *Wickard*, 317 U.S. at 128–29.

¹⁹⁸ *Perez v. United States*, 402 U.S. 146 (1971).

twenty years in prison.¹⁹⁹ Unlike what is common with regard to federal criminal statutes, there was no “jurisdictional peg”²⁰⁰ to tie loan sharking to the channels of interstate commerce or to any effect on interstate commerce.²⁰¹ Congress did include a declaration of

¹⁹⁹ See *United States v. Perez*, 426 F.2d 1073, 1074 (2d Cir. 1970) (“The statute was enacted as Title II of the Consumer Credit Protection Act of 1968 and amended Title 18 of the United States Code by adding Chapter 42, sections 891–96, which deal with ‘Extortionate Credit Transactions.’”).

²⁰⁰ See *id.* at 1075. Jurisdictional peg is a common concept, not actually dealing with jurisdiction but with Congress’ specifically tying a law to its commerce power. Jurisdictional peg is the phrase used by the Second Circuit in the opinion in *Perez*. *Id.* (“We will concede at the outset that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense.”). As examples of jurisdictional pegs, the lower court in *Perez* mentioned the Hobbs Act (“obstructing or affecting interstate commerce or movements of commodities in commerce by robbery or extortion”), the Interstate Communications Act (“... transmitting kidnapping or extortion threats by means of interstate commerce”), and an interstate prostitution act (“transporting women in interstate commerce for prostitution, etc.”). *Id.* at 1075, 1075 n.1. See also *Raich v. Ashcroft*, 352 F.3d 1222, 1231 (9th Cir. 2003) (“a ‘jurisdictional hook’ (i.e., limitation) that would limit the reach of the statute to a discrete set of cases that substantially affect interstate commerce.”). The Supreme Court in *Perez* mentions as an example of protecting against the misuse of the channels of interstate commerce one of the more interesting examples of the use of jurisdictional pegs, the Lindberg Act passed after the kidnapping of the Lindberg baby. The Lindberg Act had a three-part jurisdictional peg, (1) either that the kidnapped victim “is willfully transported in interstate or foreign commerce,” (2) the kidnapper “travels in interstate or foreign commerce” or (3) that the kidnapper “uses the mail or any means, facility, or instrumentality of interstate or foreign commerce.” 18 U.S.C. § 1201(a)(1) (2006). The Supreme Court mentions two other jurisdictional pegs as examples of protecting instrumentalities of interstate commerce, the destruction of an aircraft “used, operated, or employed in interstate, overseas, or foreign air commerce,” and theft from interstate shipments “in interstate or foreign commerce.” *Perez*, 402 U.S. at 150 (citing 18 U.S.C. § 32 (2006); 18 U.S.C. § 659 (2012)).

²⁰¹ *Perez* categorized the commerce power cases: “The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnaped. Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce. It is with this last category that we are here concerned.” *Perez*, 402 U.S. at 150 (citations omitted). This three-part category is widely used by the Supreme Court but in the more common form found in *Lopez*. See *United States v. Lopez*,

“Findings and purpose” to the Act, which stated that, “Organized crime is interstate and international in character” involving “billions of dollars each year,” and that much of that illicit income “is generated by extortionate credit transactions,” that is, loan sharking.²⁰² Further, the findings continued, loan sharking was both carried out using interstate and foreign commerce “to a substantial extent” and even when strictly intrastate, “they nevertheless directly affect interstate and foreign commerce.”²⁰³

But the law did not require the trial court to find any interstate activities to make it a federal crime.²⁰⁴ To compound the problem, the actual crime in *Perez* could hardly have been more local in nature. *Perez*, apparently a New Yorker, had loaned \$3,000 to a New York City butcher to build a local butcher shop. The butcher had attempted but failed to get more conventional financing. The only even remote reference to the broader world of loan sharking was that *Perez* “threatened [the butcher] with hospitalization, harm to his family, the attention of persons higher in the moneylending chain, as well as an ominous ‘or else,’ if repayments should not be promptly forthcoming.”²⁰⁵ It was enough for the federal crime that *Perez* was a loan shark, which he undoubtedly was. Other than *Perez*’ assertion that he might bring the unpaid loan to “the attention of persons higher in the moneylending chain,” there was no evidence that *Perez* had any

514 U.S. 549, 588–89 (1995). Only the third category is emphasized in this article.

²⁰² Consumer Credit Protection Act of 1968, Pub.L. No. 90-321, § 201, 82 Stat. 146, 159 (1968).

²⁰³ The findings also mentioned that loan sharking had an adverse impact on the Bankruptcy Act, bankruptcy power being an alternative federal enumerated power. *Id.*

²⁰⁴ 18 U.S.C. § 891(6) (“An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.”). Indeed, no part of the actual law referenced any aspect of interstate commerce. *But see Perez*, 426 F.2d at 1082 (“The statute here questioned is unprecedented in making a federal crime of conduct related to interstate commerce only by an assumed effect on such commerce. In all previous federal criminal statutes proof of some specific connection with interstate commerce such as movement across state lines or the use of some instrumentality of interstate commerce, such as the mails, has been required.” (Hays, J., dissenting)).

²⁰⁵ *Perez*, 426 F.2d at 1074.

association with organized crime or any other interstate connections, but that hardly mattered. No part of the law required any connection to interstate commerce, and no part of the transaction involved interstate commerce.²⁰⁶

The Court's emphasis in *Perez* was the class or aggregate impact, "Petitioner is clearly a member of the class which engages in 'extortionate credit transactions' as defined by Congress and the description of that class has the required definiteness."²⁰⁷ After discussing *Heart of Atlanta Motel* and *McClung*, but without mentioning the rational basis test for which those cases are noteworthy, it picked up the class impact theme again, "In emphasis of our position that it was the class of activities regulated that was the measure, we acknowledged that Congress appropriately considered the 'total incidence' of the practice on commerce."²⁰⁸ And then concluded, "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."²⁰⁹

The Court then followed this up with a series of conclusions: "Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce."²¹⁰ It continued, "The findings by Congress are quite adequate on that ground."²¹¹ Congressional hearings showed that "The loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses."²¹² And finally, far from being just a local crime, "Loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the

²⁰⁶ See *United States v. Bass*, 404 U.S. 336, 337 (1971) (interpreting the possession portion of the federal law making it a crime for a felon "who receives, possesses, or transports in commerce or affecting commerce," to require the government to show some connection to interstate commerce). The Court in *Bass* reserved the question as to whether the commerce power required such a connection. See generally *id.*

²⁰⁷ *Perez v. United States*, 402 U.S. 146, 153 (1971).

²⁰⁸ *Id.* at 154 (footnote omitted).

²⁰⁹ *Id.*

²¹⁰ *Id.* This is the closest *Perez* comes to mentioning or applying the rational basis test.

²¹¹ *Id.* at 155.

²¹² *Id.* at 156.

poor and the rich alike and syphons funds from numerous localities to finance its national operations.”²¹³ Although the *Perez* majority did not mention the rational basis test, this use of congressional hearings to justify the claimed impact on interstate commerce is reminiscent of the use of committee hearings in rational basis due process cases.²¹⁴

There are two difficulties with the *Perez* opinion. First, the class or aggregate impact reasoning does not work. There was no showing that *Perez* was part of any out of state or organized crime syndicate.²¹⁵ An impact of zero can be multiplied by infinity, and it is still zero. Justice Stewart, the lone dissenter, framed it well; “But under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce.”²¹⁶ Second, there is nothing about the crime of loan sharking that distinguishes it from all other crimes. Why was there a need to define prostitution in terms of interstate travel if supporting organized crime was enough to fall within Congress’ commerce power?²¹⁷ Here again, Justice Stewart hit it on the head, “But it is not enough to say that loan sharking is a national problem, for all crime is a national problem . . . 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.”²¹⁸

Because *Wickard* involved a measly extra 239 bushels of homegrown and home-consumed wheat, it seems to exemplify

²¹³ *Id.* at 157.

²¹⁴ *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 148 (1938) (relying largely on congressional hearings). In *Carolene Products*, the seminal due process case, the Court stated that “The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified.” *Id.*

²¹⁵ *See Perez*, 402 U.S. at 147–48. The Supreme Court facts say that Miranda, a butcher, obtained an extortionist loan of \$3,000 from Perez, both borrower and lender presumably from New York but neither residency is actually stated. *See id.* The Court mentions a threat of Perez to turn the collection over “to people who would not be nice but who would put him in the hospital if he did not pay” but that threat also contained no reference to out-of-state residency. *See id.*

²¹⁶ *Id.* at 157 (Stewart, J., dissenting).

²¹⁷ *See Hoke v. United States*, 227 U.S. 308, 317–18 (1913) (considering the constitutionality of a law that forbade the transportation of a woman in interstate commerce for the purpose of prostitution).

²¹⁸ *Perez*, 402 U.S. at 157–58 (Stewart, J., dissenting).

commerce power overreach. But the class impact in *Wickard* was undeniable, a 20% variable in what was a volatile international market. *Perez* involved organized crime's second most leading source of income, so the impact on interstate commerce seems obvious beyond comment. But *Perez* loaned \$3,000 to a local butcher, all aspects occurring in New York City, and however brutal *Perez*' threats were, it is hard to see the federal interest.²¹⁹ No matter the pot of money going to organized crime across the country, there was no evidence tying *Perez* to any part of that national class or aggregate impact.²²⁰

Furthermore, in *Wickard*, only the federal government had the power to control the supply of wheat in the international and national market.²²¹ Any individual state could have regulated only the wheat in that state. In *Perez* on the other hand, New York State would have had the ability to prosecute *Perez* for his threat of physical violence against the New York City butcher. There was absolutely no need for the federal government to step into the case, further congesting federal courts with what were essentially local crimes.²²² Unlike something like the Lindberg Act, which criminalized the transportation of a kidnap victim across interstate lines,²²³ where any one state authority

²¹⁹ See *United States v. Perez*, 426 F.2d 1073, 1083 (2d Cir. 1970) (Hays, J., dissenting). The opinion in the Second Circuit was no more helpful as to any out-of-state connection, but the dissenting Justice Hays summarized the case, "Here Congress has sought to use the Commerce Clause as a basis for criminal sanctions on purely local activity." *Id.*

²²⁰ See generally *Gonzales v. Raich*, 545 U.S. 1 (2005) (suggesting an alternative explanation for *Perez* is that it would have been too difficult to prove the federal crime if some actual connection to organized crime was required).

²²¹ *Wickard v. Filburn*, 317 U.S. 111, 125–26 (1942). The marketing of wheat was international in scope, with Argentina, Australia, Canada, and the United States being the four largest exporters. *Id.* In stipulations by the parties, it was revealed that wheat was raised in all but one. *Id.* at 125. Sixteen states had a surplus of wheat, and thirty-two states and the District of Columbia produced less than they consumed. *Id.*

²²² The lower court in *Perez* stated that Congress in its findings refuted that organized crime was a subject more appropriate for the states. *Perez*, 426 F.2d at 1080 ("The legislative history also shows recognition by Congress that the states alone cannot control organized crime, including loan-sharking, while federal efforts are better able to do so." (footnote omitted)).

²²³ See *United States v. Wills*, 234 F.3d 174, 176 (4th Cir. 2000) ("The Federal Kidnapping Act was enacted by Congress to stem an increasing tide of interstate kidnappings and to curb an epidemic of criminals who purposely took advantage of the lack of coordination among state law enforcement agencies."). The Federal Kidnapping Act currently provides: "(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away

might have trouble following, federal power did not enhance in any way the prosecution of Perez. Even assuming that loan sharking was the national problem that the government claimed, that could have been addressed by funding state programs addressing the issue. There was no need for the federal government to involve itself in what was every way a local issue. *Perez*, not *Wickard*, is the poster child of federal overreach.

VII. THE RATIONAL BASIS TEST BECOMES PART OF THE COMMERCE POWER

Nothing seems to be more local than racism, but *Heart of Atlanta Motel v. United States*²²⁴ found that racial discrimination by places of accommodation against persons traveling interstate rationally related to interstate commerce and was subject to federal regulation. *Katzenbach v. McClung*²²⁵ took the reasoning a step further and found that racial discrimination by restaurants serving only local customers but who bought some portion of their supplies in interstate commerce impacted interstate commerce and was subject to federal control. One can quickly see the logic of *Heart of Atlanta Motel*, that a black businesswoman would have great difficulty traveling interstate in her business dealings because of racial discrimination by hotels and motels. It is harder to see the interstate impact of racial discrimination against local black families by racist restaurants who did not serve interstate travelers. This is not intended to deemphasize the odium of such discrimination, but just to raise doubt about the impact on interstate commerce.

Both *Heart of Atlanta Motel* and *McClung* as companion cases, involved the Civil Rights Act of 1964. The Civil Rights Act of 1964 was a workaround to avoid the 1883 Civil Rights Cases,²²⁶ which had held that Congress did not have the power to remedy private violations of the Fourteenth Amendment.²²⁷ The Civil Rights Cases held

and holds for ransom or reward or otherwise any person . . . when— (1) the person is willfully transported in interstate or foreign commerce . . .”). *Id.* at 176 – 77 (citing 18 U.S.C. § 1201(a)(1)).

²²⁴ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

²²⁵ *Katzenbach v. McClung*, 379 U.S. 294 (1964).

²²⁶ *The Civil Rights Cases*, 109 U.S. 3 (1883).

²²⁷ *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 284 (“The Senate Committee laid emphasis on the Commerce Clause. The use of the Commerce Clause to surmount what was thought to be the obstacle of the Civil Rights Cases is

unconstitutional the Civil Rights Act of 1875, which criminalized racial discrimination by private places of public accommodation and other public uses.²²⁸ The Court in the Civil Rights Cases gave a limiting construction to Section 5 of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment says that “No State . . . shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.”²²⁹ Section 5 of the Fourteenth Amendment gives Congress the power “to enforce, by appropriate legislation, the provisions of this article.”²³⁰ The Civil Rights Cases said that Section 5 meant that Congress could pass legislation only as to “state action” in violation of the substantive provisions, not as in the Civil Rights Act “private acts.”²³¹ Racial discrimination by the private Grand Opera House in New York was certainly odious, but it did not come within federal power under Section 5 because no state action was involved.²³² Since

mentioned.” (Douglas, J., concurring) (citations omitted)); *see also* U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); *see also* U.S. CONST. amend. XIV, § 5 (giving Congress the right to pass “appropriate legislation” to enforce “the provisions of this article.”).

²²⁸ *See The Civil Rights Cases*, 109 U.S. 3. The law applied to “the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement” and provided for civil damages of \$500 per offense and criminal penalties of a fine of up to \$1,000 and imprisonment of “not less than 30 days nor more than one year.” *Id.* at 20.

²²⁹ U.S. CONST. amend. XIV, § 1.

²³⁰ U.S. CONST. amend. XIV, § 5.

²³¹ *See The Civil Rights Cases*, 109 U.S. at 22 (“And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against State laws and acts done under State authority.”).

²³² *Id.* at 11 (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment.”); *see also* James M. McGoldrick, *The Civil Rights Cases: The Relevancy of Reversing a Hundred Plus Year Old Error*, 42 ST. LOUIS U. L.J. 451 (1998) (arguing that the *Civil Rights Cases* were wrongly decided and should be reversed).

the Civil Rights Cases precluded the use of the Fourteenth Amendment to bar private racial discrimination, Congress sought to justify the reach of the Civil Rights Act of 1964 to include private racial discrimination as based upon its commerce power.²³³

The Civil Rights Act of 1964 barred discrimination in places of public accommodation “on the ground of race, color, religion, or national origin.”²³⁴ Public accommodations included places of lodging, restaurants, and cinemas,²³⁵ which affected interstate commerce. As to lodgings, the Act declared that “any inn, hotel, motel, or other establishment which provides lodging to transient guests” affected commerce per se.²³⁶ In other words, if the trial court found that a covered hotel discriminated as to race against an interstate traveler, the Act was violated. There was no requirement that the court find any impact on interstate commerce. Congress had found that the impact on commerce from such actions per se affected interstate commerce. While many prior federal laws required the courts to find some effect on interstate commerce, in some others, Congress had made a per se finding. *Heart of Atlanta Motel* was the first to make this aspect of the law a determinative feature.²³⁷

²³³ The Civil Rights Act of 1964 was based on both commerce power and its power under the Fourteenth Amendment. The Act applied “if [the covered business establishments’] operations affect commerce, or if discrimination or segregation by it is supported by State action.” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964). There was no allegation of state action as to the privately owned Heart of Atlanta Motel except by Justice Douglas who in a concurring opinion argued that there was sufficient state action to bring the law within Section 5 of the Fourteenth Amendment. *Id.* at 282 (Douglas, J., concurring) (“That definition [of state action] is within our decision of *Shelley v. Kraemer* for the ‘discrimination’ in the present cases is ‘enforced by officials of the State,’ i.e., by the state judiciary under the trespass laws.”).

²³⁴ *Id.* at 247.

²³⁵ *Id.* at 247–48. In the Act, a cinema was charmingly called a “motion picture house.” *Id.* at 247. The jurisdictional peg for motion picture houses was for the films “which move in commerce.” *Id.* at 248.

²³⁶ *Id.* at 247. The Court does not use the term per se, but that it is clearly what it has in mind; see also *The Civil Rights Cases*, 109 U.S. at 23 (“It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed.”).

²³⁷ An early such law with a per se finding was the FLSA upheld in *Darby*.

After an extended discussion of its commerce power cases, the Court concluded, with echoes of the substantial effects test, “Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”²³⁸ Applying the substantial effects test, including the aggregate impact, there is little doubt that racial discrimination against interstate travelers would have a substantial and harmful impact on interstate commerce.²³⁹

But the Court did not leave it there. It added that the question was “whether Congress had a rational basis”²⁴⁰ for its per se holding that racial discrimination by hotels serving interstate travelers always affected interstate commerce. The Court said that there was no need to see any evidence of this as congressional hearings on the evils of racial discrimination against interstate travelers had amply demonstrated that there was such a rational basis.²⁴¹ The Court offered no explanations or

²³⁸ *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258.

²³⁹ Justice Black’s concurring opinion had a note of caution but ultimately yielded to the class impact test, “I recognize too that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, just as such an establishment is not covered by the present Act. But in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow.” *Id.* at 275 (Black, J., concurring). For Justice Black, the Court finally went too far in *Daniel v. Paul*, involving racial exclusion as to the Lake Nixon Club, a 232 acre swimming and boating amusement area 12 miles west of Little Rock, Arkansas. *See Daniel v. Paul*, 395 U.S. 298 (1969). He thought there was little chance that interstate travelers would find their way there, “While it is the duty of courts to enforce this important Act, we are not called on to hold nor should we hold subject to that Act this country people’s recreation center, lying in what may be, so far as we know, a little ‘sleepy hollow’ between Arkansas hills miles away from any interstate highway. This would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States. This goes too far for me.” *Id.* at 315 (Black, J., dissenting).

²⁴⁰ *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258.

²⁴¹ *Id.* The Court referred to “evidence” in support of the harm to interstate commerce, “One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by

precedents for the need to only find a rational basis. The Court brought the rational basis test into the commerce power cases without preamble or explanation. Since it is likely that it could easily be shown that such racial discrimination against interstate travelers did substantially impact interstate commerce, the rational basis test added little or nothing to the holding in *Heart of Atlanta Motel*. Its companion case, *Katzenbach v. McClung* is a different matter.

In *McClung*, the Court dealt with another provision of the Civil Rights Act of 1964, this time that portion of the Act that said discrimination by restaurants that purchased a “substantial”²⁴² amount of its supplies in interstate commerce had a per se impact on interstate commerce.²⁴³ In the case, Ollie’s Barbeque, a local Birmingham, Alabama barbeque joint, was not alleged to have served any interstate travelers; rather, it was alleged that it had purchased some 46% (\$69,683) of its food from a local supplier who in turn procured it from out of state.²⁴⁴ Ollie’s racism was open and notorious, serving only whites in the interior portions of the restaurant but offering blacks service in a backdoor takeout window. To the government’s argument that the class or aggregate impact of racial discrimination by such restaurants affected interstate commerce, Ollie’s argument was that it was not part of such a class, that its overt racism led it to sell far more barbeque than if it fully integrated its restaurant, a result that would

motels serving travelers, however ‘local’ their operations may appear.” *Id.* But the Court’s reference to “evidence” was not to any congressional findings, of which there were none, but to testimony of various parties to House and Senate congressional committees. *Id.* at 252–53.

²⁴² The government’s indictment was challenged because it used the word “some,” “This use of the word ‘some’, say defendants, is insufficient because the act uses the term ‘substantial’” *McClung v. Katzenbach*, 233 F. Supp. 815, 818 (N.D. Ala.), *rev’d* 379 U.S. 294 (1964). The lower court found that a substantial amount had moved in interstate commerce. But the lower court had found no substantial effect on interstate commerce, “If Congress has the naked power to do what it has attempted in title II of this act, there is no facet of human behavior which it may not control by mere legislative ipse dixit that conduct ‘affect(s) commerce’ when in fact it does not do so at all, and rights of the individual to liberty and property are in dire peril.” *Id.* at 825.

²⁴³ *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964). The act stated that any “restaurant . . . principally engaged in selling food for consumption on the premises” did per se affect commerce 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.” *Id.*

²⁴⁴ *Id.* at 296.

have led to a loss of white patrons.²⁴⁵ It is the simplicity of this evil claim that made the rational basis test far more important in *McClung* than in *Heart of Atlanta Motel*.

As in *Heart of Atlanta Motel*, the law did not require that the Court find any substantial effect on interstate commerce. Rather, Congress had specifically said that restaurants buying a substantial amount of their supplies in interstate commerce did per se affect interstate commerce. The Supreme Court conceded “The volume of food purchased by Ollie’s Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce.”²⁴⁶ Nonetheless, the Court relied on the aggregate impact doctrine of *Wickard*, “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”²⁴⁷ It said that racial discrimination was nationwide in scope and that “Congress appropriately considered the importance of that connection with the knowledge that the discrimination was but ‘representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.’”²⁴⁸ The Court did not address Ollie’s claim that he was not part of a class adversely impacting interstate commerce since, if he did not engage in such racial discrimination, he would lose his white customers.

The Court noted that it was not uncommon for Congress to declare that certain activity per se impacted interstate commerce as it had done in the *Darby* case.²⁴⁹ But the Court in *McClung* made a leap of logic that the *Darby* case did not make. *Darby* had said, “In passing on the validity of legislation of the class last mentioned [where Congress had made a per se finding] the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.”²⁵⁰ But *Darby* did not say what test was to

²⁴⁵ *Id.* at 297 (“The court below concluded that if it were required to serve Negroes it would lose a substantial amount of business.”).

²⁴⁶ *Id.* at 300–01.

²⁴⁷ *Id.* at 301 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)).

²⁴⁸ *Id.* (quoting *Polish Nat’l All. of U.S. v. N.L.R.B.*, 322 U.S. 643, 648 (1944)).

²⁴⁹ *Darby* itself was not the first. *Darby*, in addition to “the present act,” mentioned “the Safety Appliance Act . . . and the Railway Labor Act.” *United States v. Darby*, 312 U.S. 100, 120 (1941).

²⁵⁰ *Id.* at 120–21.

be used to determine if such a per se finding fell “within the reach of the federal power.” There is no reason to believe that it would not have been the substantial effects test that *Darby* was applying.²⁵¹ *McClung* said that the mere fact that Congress had made a per se finding of effect on interstate commerce “does not preclude further examination by this Court,”²⁵² but essentially in applying the rational basis test it did preclude just that. Following *Heart of Atlanta Motel*, the further examination was only to see if Congress “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.”²⁵³ No formal findings were required to show this rational basis.²⁵⁴ Given the results of congressional hearings, the Court concluded that Congress “had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce.”²⁵⁵ It concluded, “The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.”²⁵⁶ Most of the congressional hearings dealt with the impact of racial discrimination on interstate travelers. The Court then claimed that its interpretation of the commerce power

²⁵¹ In describing Congress’ commerce power, *Darby* does use language similar to the rational basis test, “[Congress’ power] extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.” *Id.* at 118 (citing *McCulloch’s* use of “appropriate” as a synonym for “necessary and proper” (*McCulloch v. Maryland*, 17 U.S. 316, 421 (1819))). *Darby* then states a paragraph later what the appropriate test was, “But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce.” *Id.* at 119.

²⁵² *McClung*, 379 U.S. at 303.

²⁵³ *Id.* at 303–04.

²⁵⁴ *Id.* at 304. The Court cited to *United States v. Carolene Products Company*, the quintessential rational basis due process case. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). *Carolene* had found that a ban on the sale of skim milk to which coconut oil had been added rationally related to legitimate governmental ends. *Id.* 151–52. Congressional hearings, the Court said, amply supported the government’s health and fraud concerns. *Id.*

²⁵⁵ *Id.* at 304.

²⁵⁶ *Id.* at 304–05.

was consistent with history, “The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere.”²⁵⁷

The first Supreme Court case to apply the rational basis to a Commerce Clause case after *Heart of Atlanta Motel* and *McClung* was *Maryland v. Wirtz*²⁵⁸ in 1976. The dearth of any attempt to find some actual substantial impact on commerce in *Wirtz* indicates the impact of the rational basis test on the commerce power and its impact on fundamental concepts of federalism. *Wirtz* was of primary importance because it upheld against a Tenth Amendment challenge to Congress’ right to impose the federal maximum hour and minimum wage of the FLSA on state and local employees.²⁵⁹ In a 1961 amendment to the FLSA, Congress had eliminated an exemption in the original act for state and local government employees “of hospitals, institutions, and schools.”²⁶⁰ Essentially, *Wirtz* held that if Congress had commerce power, it could impose the same laws it imposed on private entities on states and political subdivisions of states. It was only limitations on the enumerated power that protected concepts of federalism. The 1961 amendment had expanded the reach of Congress’ commerce power to regulate not just employees connected to interstate commerce, but to all employees of any “enterprise” engaged in interstate commerce.²⁶¹

²⁵⁷ *Id.* at 305.

²⁵⁸ *Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled by* *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976).

²⁵⁹ *Id.* at 201. Justice Douglas’ dissent summarized this issue, “The Court’s opinion skillfully brings employees of state-owned enterprises within the reach of the Commerce Clause; and as an exercise in semantics it is unexceptionable if congressional federalism is the standard. But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism.” *Id.* (Douglas, J., dissenting). *Wirtz* was overruled by *National League of Cities v. Usery*, on Tenth Amendment grounds, which in turn was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*. *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). *Garcia* held, as *Wirtz* had, that if Congress had the enumerated power, in both cases commerce power, the Tenth Amendment did not preclude it from applying generally applicable laws not just to private entities but also to state and local entities.

²⁶⁰ *Wirtz*, 392 U.S. at 187.

The result was to include no additional companies, but some additional employees.

In *Wirtz*, the Court described *Darby* both in terms of the substantial effects test and the rational basis test. The first step in *Darby*, the *Wirtz* court said, was its finding that Congress can “by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce.”²⁶² The second step was to determine if there was such a substantial effect.²⁶³ Here, Congress had specifically found a per se substantial effect.²⁶⁴ Third, since Congress had made that specific finding, the Court had only a final task: “But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”²⁶⁵ *Wirtz* then concluded summarily, “There was obviously a ‘rational basis’ for the logical inference that the pay and hours of production employees affect a company’s competitive position.”²⁶⁶ As for the expansion of the FLSA to include employees who did no work in interstate commerce but who worked for enterprises that did, the Court said, “The class of employers subject to the Act was not enlarged by the addition of the enterprise concept. The definition of that class is as rational now as it was when *Darby* was decided.”²⁶⁷ Other than the conclusion that there was a rational basis

²⁶¹ *Id.* The Court said that the change from employees engaged in interstate commerce to enterprises engaged in interstate commerce did not make a constitutional difference, “Thus the effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of employers subject to the Act.” *Id.* at 188. It said that the enterprise concept was “settled by the reasoning of *Darby* itself and is independently established by principles stated in other cases.” *Id.*

²⁶² *Id.* at 189 (quoting *United States v. Darby*, 312 U.S. 100, 119 (1941)).

²⁶³ *Id.*

²⁶⁴ *Id.* at 190 (citing *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964))

²⁶⁵ *Id.* at 190 (quoting *McClung*, 379 U.S. at 303–04).

²⁶⁶ *Id.* at 190. The quotations around rational basis are in the original. *Wirtz* also referenced that “other cases have found a ‘rational basis’ for statutes regulating labor conditions in order to protect interstate commerce from labor strife.” *Id.* at 191. The only citation was to *Jones & Laughlin Steel*, which did not apply that test.

²⁶⁷ *Id.* at 193.

for the enterprise concept, there was no attempt to apply the rational basis test.²⁶⁸

Wirtz does not expand the *Darby* substantial effects test or the rational basis test, but it does reinforce the basic approach of the Court. First, the general rule is that Congress has the commerce power to regulate intrastate commerce or any other local activity if it substantially affects interstate commerce. Second, if commerce power is challenged, it is the trial court's job to determine if the local activity substantially affects interstate commerce. As has been seen in *Jones & Laughlin Steel*, that is a practical factual evaluation.²⁶⁹ Third, if Congress makes a per se finding that certain local activity will always substantially affect interstate commerce, then the trial courts job is only to determine if those per se local activities occurred and then to decide if Congress had a rational basis for believing that the local activities did substantially impact interstate commerce. It is not the trial court's job to determine if there was in fact some substantial impact, only to determine if Congress could rationally or conceivably believe that there was. Finally, if Congress does not make a per se finding, then only the practical factual evaluation of the substantial effects test comes into play, not the rational basis test.

Hodel v. Indiana,²⁷⁰ in 1981, applied the rational basis test in commerce cases to a federal law requiring corrective measures to restore surface land subject to strip mining and was alleged to be in violation of the commerce power in addition to numerous other constitutional provisions.²⁷¹ As to the commerce claim, the Court said, "It is established beyond peradventure [sic] that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . .'"²⁷² For this proposition,

²⁶⁸ *Id.* at 195 ("It is therefore clear that a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises.").

²⁶⁹ See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937) ("We 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.").

²⁷⁰ *Hodel v. Indiana*, 452 U.S. 314 (1981).

²⁷¹ *Id.* at 320 ("The complaints alleged that the Act contravenes the Commerce Clause, the equal protection and due process guarantees of the Due Process Clause of the Fifth Amendment, the Tenth Amendment, and the Just Compensation Clause of the Fifth Amendment.").

²⁷² *Id.* at 323.

the Court cited *Usery v. Turner Elkhorn Mining Company*,²⁷³ which was strictly a statement about the rational basis Due Process Clause, not commerce power. Bringing the presumption of the constitutionality of economic legislation from due process cases to commerce power cases was an important turn in commerce cases. Citing *McClung* and *Heart of Atlanta Motel, Hodel* said that a court could “invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce.”²⁷⁴ It then misapplied the class or aggregate impact test, saying that the volume of commerce actually affected was not a relevant inquiry, “The pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce.”²⁷⁵ The Court misused language in *N.L.R.B. v. Fainblatt* concerning the class impact test to support this proposition, “The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.”²⁷⁶ Of

²⁷³ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In *Usery*, coal mine operators claimed that it violated their due process rights to impose liability for miners who were disabled by black lung’s disease prior to the act being passed and prior to the awareness of the cause of the disease. *Id.* at 1.

²⁷⁴ *Hodel*, 452 U.S. at 323–24. For a similar conclusion as to the Congress’ commerce power, see the related case, *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981), where it was found that, “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.” See also *Preseault v. I.C.C.*, where the Court found that a “tracks to trails” program whereby unused railroad lines were converted to walking trails was within federal commerce power without much support at all: “We evaluate this claim under the traditional rationality standard of review: we must defer to a congressional finding that a regulated activity affects interstate commerce ‘if there is any rational basis for such a finding,’ *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, and we must ensure only that the means selected by Congress are ‘reasonably adapted to the end permitted by the Constitution.’” *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990) (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)). *Preseault*, although it made no attempt to truly address the commerce power issue, is worth noting since the federal law, unlike *Katzenbach* and the other rational basis cases, made no findings that certain local activities would per se affect interstate commerce.

²⁷⁵ *Hodel*, 452 U.S. at 324. This holding misused language in *N.L.R.B. v. Fainblatt* concerning the class impact test to support this proposition. Of course, the volume of commerce is important, but not just the volume of one person, the volume of the class impact.

²⁷⁶ *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 606 (1939).

course the volume of commerce is important, but not just the volume of one person, the volume of the class impact. Going further, the Court said that it was not necessary that each provision in an act had an impact on interstate commerce, but that in a “complex regulatory program” it was “enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.”²⁷⁷ While there is a certain logic to the Court’s point about complex regulatory businesses—it would make no sense to require that each part of a complex law impact interstate commerce—there was virtually no precedent for the point.²⁷⁸

VIII. A RETURN TO THE SUBSTANTIAL EFFECTS TEST

Two of the most famous recent commerce power cases are *United States v. Lopez*²⁷⁹ and *United States v. Morrison*.²⁸⁰ Both were the first cases by the Supreme Court since *Jones & Laughlin Steel* was decided in 1937 finding that federal laws were outside the scope of Congress’ commerce power. *Lopez* found that Congress did not have the commerce power to criminalize the possession of a gun on or near a public or private school. *Morrison* held that Congress did not have the commerce power to provide a civil remedy for gender-motivated violence. In neither case did Congress require some jurisdictional tag connecting the acts to interstate commerce, and in both the Supreme Court applied the substantial effects test,²⁸¹ not the rational basis test.²⁸² On a more practical note, both cases involved unnecessary

²⁷⁷ *Hodel*, 425 U.S. at 329 n.17.

²⁷⁸ *Id.* The Court cited to many of the key commerce cases as support for this proposition—*Heart of Atlanta Motel*, *McClung*, *Perez*, *Wickard*, and *Darby*—but none of the language cited to actually supports the proposition. Most relate at most to the class or aggregate impact doctrine. *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 123 (1941).

²⁷⁹ *United States v. Lopez*, 514 U.S. 549 (1995).

²⁸⁰ *United States v. Morrison*, 529 U.S. 598 (2000).

²⁸¹ *See Lopez*, (“We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”); *see also Morrison*, 529 U.S. at 610 (“Reviewing our case law, we noted that ‘we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.’”).

²⁸² *Lopez* acknowledged the rational basis test, but did not apply it. *Lopez* quoting *Jones & Laughlin Steel* warned that commerce power should not be so extended as to “obliterate the distinction between what is national and what is local and

federal laws, which paralleled state laws. Whether constitutional or not, there was no need whatsoever to make a federal crime out of what were already state crimes.

The Court in *Lopez* identified the three categories of federal commerce power first used by the Court in *Perez*:

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.*²⁸³

Because this language is so widely quoted or paraphrased by the courts, including the *Raich* case,²⁸⁴ it is important to distinguish it

create a completely centralized government.” *Lopez*, 514 U.S. at 557 (quoting *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). After summarizing *Darby* and *Wickard*, *Lopez* then inserted the rational basis test, “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.” *Id.* The Court also referred to the rational basis test in responding to Justice Breyer’s dissenting opinion, “Justice Breyer rejects our reading of precedent and argues that ‘Congress . . . could rationally conclude that schools fall on the commercial side of the line.’” *Id.* at 565. The only other mention of the rational basis test in the case is in Justice Souter’s dissenting opinion. *Id.* at 603 (Souter, J., dissenting). The first mention of the rational basis test in *Morrison* was in Justice Souter’s dissenting opinion in that case, “But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned.” *Morrison*, 529 U.S. at 634 (Souter, J., dissenting).

²⁸³ *Lopez*, 514 U.S. at 558–59 (citations omitted). It is easy to agree with what seems to be Justice Scalia’s claim that the reference to these three categories seems more rote than instructive, “[O]ur cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories.” *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring).

²⁸⁴ Given that *Raich* did not remotely involve items crossing state lines, it is understandable that *Raich* has the most barebones statement of these categories, “First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate

from the substantial effects test. In both of the first two categories, the Court is referring to Congress' power to regulate commerce between two states, not local activities affecting interstate commerce. The regulation of commerce between two states is the clearest instantiation of the federal power.²⁸⁵ Unfortunately, there is no obvious distinction between the channels category and the instrumentality category. Further, the Court illustrates the instrumentalities categories using cases involving the effect on interstate commerce, further confusing the distinctions.

As to the channels of interstate commerce, *Lopez* used *Darby*,²⁸⁶ the transportation of goods made by a person paid less than required by the FLSA, and *Heart of Atlanta Motel*,²⁸⁷ the movement of persons

commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." *Id.* at 16–17 (citations omitted). Supporting Justice Scalia's point about mechanical references, the *Raich* case indicates what often happens to Supreme Court precedents. *Perez* and *Lopez* cited historical examples that supported the categories, while *Raich* just cited the categories without any historical context. The problem is that the first two categories make little enough sense even with the historical references, and make virtually none without them. But since the reversal of *Hammer*, few have questioned federal power to regulate anything crossing state lines. *But see* Friedman & Lakier, *supra* note 169, at 258–59 ("This article calls for a reexamination of the long-standing, yet inadequately examined, assumption that Congress's power to regulate interstate commerce necessarily includes the power not only to (as the *Raich* Court put it) 'protect' interstate markets but also to 'eradicate' them.").

²⁸⁵ See *Raich*, 545 U.S. at 34 (Scalia, J., concurring) ("The first two categories are self-evident, since they are the ingredients of interstate commerce itself. . . . [U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.").

²⁸⁶ *Lopez* appears to cite to the following language in *Darby*, "Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use." *United States v. Darby*, 312 U.S. 100, 114 (1941) (citations omitted). Among other cases, *Darby* cited *The Lottery Case (Champion v. Ames)*, 188 U.S. 321 (1903) (lottery tickets crossing state lines), *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (adulterated foods crossing state lines) and *Hoke v. United States*, 227 U.S. 308 (1913) (women transported across interstate lines for immoral purposes).

²⁸⁷ The reference seems to be to this language, "Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes

across state lines, as examples. *Perez* had been a bit more detailed and framed the issue in terms of the misuse of interstate commerce, which seems a bit more helpful: “First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnaped.”²⁸⁸ *Perez* used as an example of protecting the channels of interstate commerce, the Lindbergh Act, which made it a crime for either the victim to be transported or the kidnapper to travel across state lines.²⁸⁹

As for the second category, the instrumentalities of interstate commerce, *Lopez* gave as examples *The Shreveport Rate Cases* and *Southern Railway*, both problematic examples of power over instrumentalities in interstate commerce since both involved the regulation of local activities affecting interstate commerce, not the regulation of things crossing state lines. *The Shreveport Rate Cases* had held that the ICC could consider intrastate rates in Texas because of their impact on interstate commerce from Louisiana into Texas.²⁹⁰ *Southern Railway* had held that Congress could, under the federal Railway Safety Act, regulate safety on intrastate railroad cars because the railroad company had so intermingled its intrastate and interstate business that it was impossible to tell them apart.²⁹¹ Nonetheless, the Court’s point seems to be that Congress has great power in protecting instrumentalities crossing state lines. The Court makes this clear with

the transportation of persons and porperty [sic].’ . . . Nor does it make any difference whether the transportation is commercial in character.” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (citations omitted).

²⁸⁸ *Perez v. United States*, 402 U.S. 146, 150 (1971) (citations omitted).

²⁸⁹ *Id.*

²⁹⁰ *See The Shreveport Rate Cases*, 234 U.S. 342, 358–59 (1914) (“This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal . . .”).

²⁹¹ *See S. Ry. Co. v. United States*, 222 U.S. 20, 26 (1911), in which the Court asked, “Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate?” The Court gave an affirmative answer. *Id.*

two examples mentioned in *Perez*, the destruction of an aircraft “used, operated, or employed in interstate, overseas, or foreign air commerce,” and theft from interstate shipments “in interstate or foreign commerce.”²⁹²

The Court’s distinction between channels and instrumentalities of interstate commerce seems unhelpful to a strong degree, but luckily it is of no great importance to distinguish between the two, since both fall within federal power. What is important is that they are both examples of Congress protecting the actual crossing of state lines and not local activities affecting interstate commerce.

Lopez then turned to the issue at hand, “activities that substantially affect interstate commerce.” The majority opinion although referencing both *McClung* and *Heart of Atlanta Motel* emphasized the substantial effects test.²⁹³

*First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.*²⁹⁴

The law in *Lopez*, banning the possession of a gun on or near schools, made no attempt to tie the crime to any aspect of interstate commerce;

²⁹² *Perez*, 402 U.S. at 150 (citing 18 U.S.C. §§ 32, 659).

²⁹³ After discussing *Jones & Laughlin Steel*, *Darby*, and *Wickard*, the Court briefly mentioned the rational basis line of cases. *United States v. Lopez*, 514 U.S. 549, 557 (1995). But there was no attempt to apply or distinguish the rational basis test.

²⁹⁴ *Id.* at 559–60 (citations omitted). Justice Kennedy called *Perez*, *Heart of Atlanta Motel*, and *McClung* “[l]ater examples of the exercise of federal power where commercial transactions were the subject of regulation . . .” *Id.* at 573. He seemed to dismiss them as being significant advancements, “These and like authorities are within the fair ambit of the Court’s practical conception of commercial regulation and are not called in question by our decision today.” *Id.* at 573–74. (Kennedy, J., concurring).

failing to make use of what are commonly called jurisdictional pegs.²⁹⁵ It was also totally devoid of any connection to “any sort of economic enterprise, however broadly one might define those terms,” what the Court called “commerce.”²⁹⁶ Since no economic enterprise or commerce was involved, the Court said that the class or aggregate impact doctrine did not apply: “It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”²⁹⁷ This emphasis on commercial activity as opposed to other activity may be defensible, but it is not necessarily supported by precedent.²⁹⁸ Certainly, in the pure commerce cases involving the crossing of state lines, the commerce power was not limited to economic activity. But even in the

²⁹⁵ The federal crime, the Court said, “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” *Id.* at 561. Nor did the facts raise any issues as to interstate commerce: “Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.” *Id.* at 567.

²⁹⁶ *Id.* at 561.

²⁹⁷ *Id.*

²⁹⁸ Justice Souter in dissent did not think the distinction workable. *Id.* at 608 (Souter, J., dissenting) (“The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly.”); see Friedman & Lakier, *supra* note 169, at 256 (“Commencing with *United States v Lopez*, the Supreme Court drew a line resting on the distinction between ‘economic’ and ‘non-economic’ activity. That line quickly withered.”). The difficulty in applying the distinction between economic or commercial and the opposite is suggested by Melissa Irr in her instructive article on the role of congressional findings. See Melissa Irr, *United States v. Morrison; An Analysis of the Diminished Effect of Congressional Findings in Commerce Clause Jurisprudence and a Criticism of the Abandonment of the Rational Basis Test*, 62 U. PITT. L. REV. 815, 834 (2001) (“If a statute similar to the one in *Wickard* were before the current Court, it would likely find the statute unconstitutional under the current Commerce Clause [sic] framework. The production of wheat is not an inherently economic activity.”). Irr may or may not be correct as to the Morrison’s court view of *Wickard*, but surely she is incorrect as to *Wickard* being “not an inherently economic activity.” *Id.* at 834. Home grown and consumed wheat was 20% of a multibillion dollar business in the United States. But Irr may be correct on the bigger issue. *Id.* (“The Court’s focus on the economic or noneconomic nature of the regulation is unworkable in the Commerce Clause context and may result in the striking down of statutes that have a substantial effect on interstate commerce.”).

Heart of Atlanta Motel and *McClung's* rational basis cases involving racial discrimination, the emphasis was on the economic harm²⁹⁹ of racial discrimination on interstate travelers and on goods purchased in interstate commerce.³⁰⁰ In his dissent to *Lopez*, Justice Breyer makes a strong argument against the commercial and noncommercial distinctions, equating them to *E.C. Knight's* comparison of manufacturing versus commerce, or the direct/indirect test. The issue was not nomenclature, he said, but the actual practical effect on interstate commerce.³⁰¹ He also argued that given the real impact education has on the economy, *Lopez* was the wrong case to make that distinction. Nonetheless, one can accept the Court's conclusion in *Lopez* without accepting its commercial and noncommercial distinctions.

The government's assertion that guns on school grounds did impact interstate commerce was met with something close to derision. The government argued that guns on or near schools might result in violent crime and that violent crime impacts interstate commerce; first, in that its costs are substantial; second, that violent crime might make persons unwilling to travel to parts of the country that might be perceived as unsafe; and third, that guns in schools are a substantial

²⁹⁹ *But see Lopez*, 514 U.S. at 628 (Breyer, J., dissenting) (“The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases (*McClung* and *Daniel*) or *Perez*—in each of those cases the specific transaction (the race-based exclusion, the use of force) was not itself ‘commercial.’”).

³⁰⁰ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 279 (1964) (Douglas, J., concurring) (arguing against a commerce power approach and stating that his “reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the ‘right of persons to move freely from State to State’ ‘occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.’” (citations omitted)). Justice Douglas favored federal power under Section 5 of the Fourteenth Amendment, “A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.” *Id.* at 280.

³⁰¹ *Lopez*, 514 U.S. at 627–28 (Breyer, J., dissenting).

threat to the learning environment which results in less productive citizens. The Court said that under the government's "costs of crime" logic, "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."³⁰² And under its "national productivity" logic, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."³⁰³ Finally, with the Court's slippery slope concerns running rampant, it said that it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."³⁰⁴

The majority's concluding paragraph is an anthem to fading principles of federalism and is worth quoting in full:

*To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See [Hodel, Perez, McClung, Heart of Atlanta Motel]. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. Gibbons v. Ogden, and that there never will be a distinction between what is truly national and what is truly local, cf. Jones & Laughlin Steel. This we are unwilling to do.*³⁰⁵

³⁰² *Id.* at 564.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 567–68 (citations omitted).

Many of the historic issues related to federal power are here, the House that Jack built concerns of President Jefferson, the intrusion on state powers of the *E.C. Knight* and *Hammer* era, the recognition of the overreaching scope of the rational basis cases, and the respect for the foundational cases of *Gibbons* and *Jones & Laughlin Steel*.³⁰⁶

Justice Breyer's dissenting opinion, in which Souter, Stevens, and Ginsburg joined, relied on the rational basis test. He described nicely how the rational basis test changed the role of the courts in commerce power cases:

*[T]he Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words “rational basis” capture this leeway. Thus, 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.*³⁰⁷

³⁰⁶ *Id.* at 578 (Kennedy, J., concurring) (putting the issue in grander terms of the importance of federalism, “Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.” (citations omitted)).

³⁰⁷ *Id.* at 616–17 (Breyer, J., dissenting) (citations omitted). In order to reconcile the rational basis Commerce Clause cases to history, Justice Breyer undertakes a somewhat quixotic attempt to change the vocabulary: “[T]he power to regulate Commerce . . . among the several States, encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. . . . I use the word significant because the word substantial implies a somewhat narrower power than recent precedent suggests. But to speak of substantial effect rather than significant effect would make no difference in this case.” *Id.* at 615–16 (internal citations and quotation marks omitted).

Breyer made clear the difference between the substantial effects test of *Jones & Laughlin Steel* and how it is applied in the rational basis line of cases. In the former, the Court made the practical factual determination that commerce had been substantially impacted. In the latter, the question was only whether Congress might rationally have found such a substantial impact, not whether there was in fact one, or indeed even if Congress itself had found one.³⁰⁸ And given the ease of passing the rational basis test, the conclusion for the dissent was forgone, “Upholding this legislation would do no more than simply recognize that Congress had a ‘rational basis’ for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten.”³⁰⁹

Perhaps no case better illustrates the human dimensions of the limits on commerce power than *United States v. Morrison*. In the case, the victim said that she had been raped by two football players at Virginia Tech. In response to the school’s failure to punish her attackers and to protect her, she filed a civil action in federal court alleging damages under the federal Violence Against Women’s Act of 1994 (“VAWA”), which provided for compensatory and punitive damages for violence motivated by gender bias.³¹⁰ The Supreme Court affirmed the lower courts’ dismissal of her action as being beyond the scope of Congress’ power, either under the Commerce Clause or Section 5 of the Fourteenth Amendment. Congress’ power under Section 5 of the Fourteenth Amendment to protect against equal protection violations was limited to state actions, not to the private actions in the case, however horrific.³¹¹ The Court could find no state action in the case. That holding is beyond the scope of this Article.

³⁰⁸ *Id.* at 618 (explaining that “[T]here is no special need here for a clear indication of Congress’ rationale.”). The Court’s job, Breyer said, was only to ask “whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce.” *Id.*

³⁰⁹ *Id.* at 631.

³¹⁰ *United States v. Morrison*, 529 U.S. 598, 605–06 (2000). The Act stated that “All persons within the United States shall have the right to be free from crimes of violence motivated by gender” and declared that any person who committed such a crime was “liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.” *Id.* at 605.

³¹¹ *Id.* at 621 (summarizing the precedents, “Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment’s provisions, *United States v. Harris*, and the *Civil Rights Cases*. In *Harris*, the

As to the commerce power, the law itself had no jurisdictional pegs³¹² but did include “gender motivated violence . . . affecting interstate commerce”³¹³ The Court cited *Lopez* for the applicable law, “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”³¹⁴ Following the logic of its *Lopez* case, the Court doubled down on the importance of commercial versus noncommercial activity:

*Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.*³¹⁵

Court considered a challenge to § 2 of the Civil Rights Act of 1871. That section sought to punish ‘private persons’ for ‘conspiring to deprive any one of the equal protection of the laws enacted by the State.’ We concluded that this law exceeded Congress’ § 5 power because the law was ‘directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.’ . . . We reached a similar conclusion in the *Civil Rights Cases*. In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the § 5 enforcement power.” (citations omitted).

³¹² *Id.* at 612. The Court said, just as it did in the School Gun Act in *Lopez*, that the VAWA contained no jurisdictional element that might indicate some connection to commerce. “Such a jurisdictional element may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce.” *Id.* The Court compared the civil remedy in VAWA with the criminal provision of the VAWA, which states: “A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person’s spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).” 18 U.S.C. § 2261(a)(1) (1994) (amended 2013). The criminal provision is cited by *Morrison* apparently to contrast its use of the crossing state lines jurisdictional peg as compared with no jurisdictional peg in the civil provision. *Morrison*, 529 U.S. at 613 n.5.

³¹³ 34 U.S.C. § 12361 (1994).

³¹⁴ *Morrison*, 529 U.S. at 610 (citing *Lopez*, 514 U.S. at 560).

³¹⁵ *Id.* at 613.

The presence of substantial congressional findings of impact on interstate commerce, unlike the *Lopez* case that had none, did not sway the Court: “But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, ‘[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.’”³¹⁶ Rather, the Court continued, “Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”³¹⁷

In terms of the impact on interstate commerce, the Court was not impressed with the congressional findings:

*The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce. If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.*³¹⁸

The Court said more broadly that Congress could not “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”³¹⁹ The Constitution required, it said, “a distinction between what is truly national and what is truly local.”³²⁰ The Court concluded, “The regulation and punishment of intrastate violence that is not directed at the

³¹⁶ *Id.* at 614 (citations omitted).

³¹⁷ *Id.* (citations omitted).

³¹⁸ *Id.* at 615.

³¹⁹ *Id.* at 617.

³²⁰ *Id.* at 617–18.

instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”³²¹ Unlike *Lopez*, where the majority at least mentioned the rational basis approach, *Morrison* left it to the dissent to raise the issue.

The dissenting opinion by Justice Souter, in which Stevens, Ginsburg, and Breyer joined, framed the role of the courts versus Congress in its most complete form:

*Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact.*³²²

Souter’s dissent extensively reviewed Congress’ finding of the economic consequence of gender based violence concluding, “[T]he sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned.”³²³ The dissent’s main complaint was not that the Court had found no substantial effect on interstate commerce, but that the Court was replacing the rational basis test with categorical preferences for economic effects on interstate commerce over noneconomic effects. Souter also objected to the Court’s concern for the fact that the VAWA “addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities.”³²⁴ As the dissent pointed out, the Court had long since rejected the dual federalism notion that somehow areas

³²¹ *Id.* at 618. The Court conveniently overlooked *Perez* in its summary of crimes affecting interstate commerce.

³²² *Id.* at 628 (Souter, J., dissenting) (citations omitted).

³²³ *Id.* at 634 (Souter, J., dissenting).

³²⁴ *Id.* at 645 (Souter, J., dissenting).

traditionally within state power limited congressional commerce power: “Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once.”³²⁵

Although many themes run throughout *Lopez* and *Morrison*, at the most simple level, the majority found that neither law involved local activities with a substantial effect on interstate commerce. Meanwhile, the dissent found that Congress could have rationally believed that there was a substantial effect.³²⁶

IX. RAICH AND THE ASCENDENCY OF THE RATIONAL BASIS TEST

In *Gonzalez v. Raich*, the Court held that the federal government had the commerce power to regulate in-state grown marijuana for in-state medicinal use, and that Congress could rationally believe that even such local activity might substantially affect interstate commerce.³²⁷ California’s Compassionate Use Act of 1996, allowed the use of marijuana for medicinal purposes. The federal Controlled Substance Act (“CSA”) passed in 1970 treated marijuana as a Schedule 1 drug, the most dangerous category, disallowing its use for any purpose. Whatever the wisdom of the CSA, if the CSA was within federal commerce power, it preempted the inconsistent state law.³²⁸

³²⁵ *Id.*

³²⁶ *Id.* at 660 (Breyer, J., dissenting) (taking a very holistic approach to reaching this conclusion, Breyer stated, “We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause ‘aggregation’ rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce. Since judges cannot change the world, the ‘defect’ means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance.” (citations omitted).

³²⁷ *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

³²⁸ *Id.* at 29. See generally Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 15 (2013) (“In sum, courts have applied a broad conflict preemption rule under the CSA. This rule finds state law preempted if it requires violation of federal law or otherwise undermines Congress’s objective of curbing marijuana consumption.”).

Federal agents from the Drug Enforcement Administration (“DEA”) came to the home of one marijuana user and destroyed all six of her cannabis plants.³²⁹ Ms. Raich used marijuana for cancer pain provided to her free by two caregivers.³³⁰ Ms. Raich and others filed a preliminary injunction to prevent the United States Attorney General³³¹ from enforcing the CSA as to marijuana that is “cultivated using only water and nutrients originating from within California, and that it is grown exclusively with equipment, supplies, and materials manufactured within the borders of the state.”³³² Despite the local nature of the marijuana use, the federal government argued that “(1) controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate; and (2) federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.”³³³ The district court found the CSA as applied was within Congress’ commerce power. The Ninth Circuit reversed.³³⁴

Professor Mikos argues for a more limited view of preemption in CSA cases, requiring a direct conflict. *Id.*

³²⁹ *Raich*, 545 U.S. at 7. Both county and federal agents raided one Ms. Monson’s home. *Id.* The county agents concluded that her use marijuana was entirely legal, but after a three-hour standoff, the federal agents seized and destroyed all six of her plants. *Id.*

³³⁰ *Id.* Raich had to rely on two caregivers, listed as “John Does” in the case, who provided her marijuana free of charge. *Id.*

³³¹ *Id.* The United States Attorney General at the time the case was filed was John Ashcroft, later superseded by Alberto Gonzales.

³³² *Raich v. Ashcroft*, 248 F. Supp. 2d 918, 921 (N.D. Cal.), *rev’d*, 352 F.3d 1222 (9th Cir. 2003), *vacated and remanded sub nom. Gonzales v. Raich*, 545 U.S. 1 (2005). This was the claim of Ms. Raich. *Id.* The petitioner whose plants were seized was even more local, coming from plants in her own backyard. *Id.*

³³³ *Id.* at 926.

³³⁴ *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *vacated and remanded sub nom. Gonzales v. Raich*, 545 U.S. 1 (2005). The Ninth Circuit relied heavily on its own precedent. *United States v. McCoy*, 323 F.3d 1114, 1115–16 (9th Cir. 2003) (In *McCoy*, while painting Easter eggs and consuming large quantities of alcohol, a sexually explicit picture of Mrs. McCoy and her ten-year-old daughter was taken. Turned in for processing at the U.S. Navy Exchange in San Diego, the McCoy’s were investigated by the NCIS, the FBI, and the San Diego police and eventually charged with violating federal law making it a crime to possess child pornography made with products from out of the state, in the case a Canon Sureshot 60 camera and Kodac film. A jury acquitted Mr. McCoy. Mrs. McCoy pleaded guilty subject to her appeal of the constitutional issues.). The Ninth

Emphasizing the economic versus noneconomic logic of the *Lopez* case, the Ninth Circuit said, “The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity. Lacking sale, exchange or distribution, the activity does not possess the essential elements of commerce.”³³⁵ The Ninth Circuit made no effort to determine if there was any substantial effect on commerce, instead relying on a finding in another Ninth Circuit case, “Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce. Federal efforts to regulate it considerably blur the distinction between what is national and what is local.”³³⁶

In *Raich*, the Supreme Court’s analysis of the law begins with a concise statement of the substantial effects test, “Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”³³⁷ *Wickard*, the Court noted, had a “striking”³³⁸ similarity to *Raich*. Both involved “a fungible commodity for which there is an established, albeit illegal, interstate market”³³⁹ and “the likelihood that the high demand in the interstate market will draw such marijuana into that market.”³⁴⁰ The Court may have overstated this claim of a striking similarity since any similarity seems more forced than real. Based upon the agreed findings of the parties in

Circuit found that the “possession of home-grown child pornography not intended for distribution or exchange” was “not, in any sense of the phrase, economic activity” and that there was no “relationship, attenuated or otherwise, between the regulated activity and interstate commerce—and certainly not the type of direct or substantial relationship necessary to justify the invocation by Congress of its Commerce power . . .” *Id.* at 1123–24. Making the connection to the marijuana in *Raich*, the Ninth Circuit said, “As the photograph in *McCoy* stood in contrast to the commercial nature of the larger child pornography industry, so does the medicinal marijuana use at issue in this case stand in contrast to the larger illicit drug trafficking industry.” *Raich*, 352 F.3d at 1230.

³³⁵ See *Raich*, 352 F.3d at 1235.

³³⁶ *Id.* at 1233 (quoting *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring)).

³³⁷ *Raich*, 545 U.S. at 17.

³³⁸ *Id.* at 18.

³³⁹ *Id.*

³⁴⁰ *Id.* at 19.

Wickard,³⁴¹ it involved a variability factor of 20% in a highly volatile market.³⁴² *Raich* involved only congressional findings and the common sense³⁴³ likelihood that some homegrown marijuana for homegrown use would find its way interstate.³⁴⁴ *Perez* is the better comparison.³⁴⁵ For purposes of enforcement, distinguishing between marijuana grown in California for use in California from marijuana shipped in interstate commerce would be at least as difficult as distinguishing loan sharking unaffiliated with organized crime from that going into the pockets of organized crime.

More unforgivable is the Court's misstatement of the rule of law used in *Wickard*, the case that fairly or unfairly stands for an extreme application of the substantial effects test, especially as to the class impact.³⁴⁶ Instead, in the Court's framing, "In *Wickard*, we had no

³⁴¹ *Id.* at 53 (O'Connor, J., dissenting) (emphasizing this difference with *Wickard*, "Critically, the Court was able to consider 'actual effects' because the parties had 'stipulated a summary of the economics of the wheat industry.' . . . With real numbers at hand, the *Wickard* Court could easily conclude that 'a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions' nationwide." (citations omitted)).

³⁴² *Id.* at 20. Responding to *Raich's* arguments, the Court seemed to concede that the differences with *Wickard*, though not controlling, were substantial if not striking. In *Wickard* (1) small farmers by law were excluded; (2) *Wickard* involved commercial activity to the highest degree; and (3) the class impact on the interstate and international price of wheat was significant. *Id.*

³⁴³ *Id.* at 28–29 ("The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but 'visible to the naked eye,' under any commonsense appraisal of the probable consequences of such an open-ended exemption." (citations omitted)).

³⁴⁴ *Id.* at 20. The Court seemed to acknowledge the disconnect, "And while it is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect." *Id.*

³⁴⁵ *Perez v. United States*, 402 U.S. 146 (1971). The federal law criminalized all loansharking without requiring any interstate Commerce Clause connection. *Id.* at 146–47. Though the Court in *Perez* does not mention it, a possible rational would be that to require an interstate connection to organized crime would make it impossible to prosecute much loan sharking, since any connection would be vague and spidery at best.

³⁴⁶ *Wickard v. Filburn*, 317 U.S. 111, 127 (1942). The class impact in *Wickard* was far from some conceivable fact. The parties had stipulated that it varied by "an amount greater than 20 per cent of average production," the single biggest variance by far. *Id.*

difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions.”³⁴⁷ This then leads to its final comparison, “Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”³⁴⁸ *Wickard*, of course, was decided in 1942, some twenty-two years before the rational basis test became part of the Court’s approach to Congress’ commerce power.³⁴⁹

Then, as this Article begins, *Raich* wraps it up: (1) the Court’s role in determining the scope of Congress’ commerce power was “a modest one,” (2) the test was not whether Ms. Raich’s and the use by others of homegrown, home-consumed marijuana “taken in the aggregate, substantially affect interstate commerce in fact,” but (3) “only whether a “rational basis” exists for so concluding.”³⁵⁰ And from there it was a short journey to find that Congress might rationally have believed that there were “enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere”³⁵¹ and that there were “concerns about diversion into illicit channels,”³⁵² that the law “ensnares some purely intrastate activity is of no moment.”³⁵³ And unlike *Lopez* and *Morrison*, which involved noneconomic criminal matters, the Court said, *Raich* involved “quintessentially

³⁴⁷ *Raich*, 545 U.S. at 19.

³⁴⁸ *Id.*

³⁴⁹ *United States v. Darby*, 312 U.S. 100 (1941) (the rational basis test is sometimes dated to this case). *Darby* was one of the early cases where Congress made a per se finding that certain things would affect interstate commerce. *Darby* said only that such a per se finding would have to fall within federal power, not that the test was the rational basis test: “In passing on the validity of legislation of the class last mentioned [where Congress makes a per se finding] the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.” *Id.* at 120–21.

³⁵⁰ *Raich*, 545 U.S. at 22.

³⁵¹ *Id.* at 40 (Scalia, J., concurring) (summarizing the majority’s point well, “[M]arijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State.”).

³⁵² *Id.* at 22.

³⁵³ *Id.*

economic”³⁵⁴ regulations of “the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.”³⁵⁵ The Court’s penultimate sentence before remanding the case is almost plaintive in its acknowledgment of the weaknesses of the rational basis approach, “But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.”³⁵⁶ It is no great insight to say that to hope that Congress might, in this polarized age, do any such thing is akin to hoping that global warming will reverse itself and year-long wildfires in the west and tornadoes in the east will become a distant memory.

The dissent of Justice O’Connor, in which Chief Justice Roberts and Justice Thomas joined, applied a four-factor test from *Lopez* and *Morrison*.³⁵⁷ First, economic activity substantially affecting interstate commerce fell within federal power. A criminal statute “having nothing to do with commerce or any sort of economic enterprise”³⁵⁸ and was “not an essential part” of a larger regulatory scheme did not.³⁵⁹ Second, the law contained no jurisdictional peg, which might establish some connection to interstate commerce.³⁶⁰ Third, although legislative findings are not required for purposes of the commerce power, their absence is “telling” especially when any impact on interstate commerce is not “visible to the naked eye.”³⁶¹ And fourth, any claim of impact on interstate commerce was too attenuated, which

³⁵⁴ *Id.* at 25.

³⁵⁵ *Id.* at 26.

³⁵⁶ *Id.* at 33.

³⁵⁷ *Id.* at 44–45 (O’Connor, J., dissenting) (describing the four factors: “First, we observed that our ‘substantial effects’ cases generally have upheld federal regulation of economic activity that affected interstate commerce Second, we noted that the statute contained no express jurisdictional requirement establishing its connection to interstate commerce. . . . Third, we found telling the absence of legislative findings about the regulated conduct’s impact on interstate commerce. . . . [Fourth], we rejected as too attenuated the Government’s argument that firearm possession in school zones could result in violent crime which in turn could adversely affect the national economy.”).

³⁵⁸ *Id.* at 44 (O’Connor, J., dissenting) (internal citations and quotation marks omitted).

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

if accepted would convert the commerce power into a general police power.³⁶² Justice O'Connor concluded, "In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account."³⁶³ Justice O'Connor barely acknowledged the Court's use of the rational basis test, saying almost in passing that if it was enough that regulating medical marijuana was "a rational part of regulating" the relevant market that "the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach."³⁶⁴ Perhaps an indication of how entrenched the rational basis test was in the commerce cases, she did not specifically reject it as the correct test.³⁶⁵

Justice Scalia's concurring opinion was the sixth vote in favor of the federal law, and it is hard to decide whether his separate approach was puzzling or brilliant.³⁶⁶ He said that the substantial effects test was not actually part of the Commerce Clause but derived from the

³⁶² *Id.* at 44–45 (O'Connor, J., dissenting).

³⁶³ *Id.* at 45 (O'Connor, J., dissenting). Justice O'Connor validly points out that the CSA could easily have excluded marijuana for medical or even recreational use, but it is hard to see how that point has anything to do with commerce power. She also claimed that "dual sovereignty animate[s] our Commerce Clause cases," especially "in areas of criminal law and social policy" where States had long had power. *Id.* at 48 (O'Connor, J., dissenting). Dual Sovereignty has been a long rejected view of federal power and it is even harder to accept her assertion that "state autonomy" was a relevant factor. *Id.*

³⁶⁴ *Id.* at 49 (O'Connor, J., dissenting).

³⁶⁵ *Id.* Justice Scalia's concurring opinion did not mention the rational basis test at all. Justice Thomas in his separate and somewhat strident dissent mentions one case in which the Court applied the rational basis test but does not specifically object to its use. He does object to the manipulation of the substantial effects test to include noneconomic factors, "If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States." *Id.* at 69 (Thomas, J., dissenting). Justice Thomas is exaggerating, but given his visceral disagreement with the substantial effects test, it would seem that he might have objected to the rational basis expansion of that test.

³⁶⁶ See Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 379 (2007). Professor Mank seemed to have the same ambivalence, "Not joining the majority opinion in *Raich*, Justice Scalia wrote an interesting and potentially influential concurring opinion that relied on the Constitution's Necessary and Proper Clause to justify regulation of medical marijuana under the Commerce Clause." *Id.* Interesting seems exactly the opposite of influential.

Necessary and Proper Clause.³⁶⁷ And he thought that his insight expanded commerce power:

*And the category of “activities that substantially affect interstate commerce,” is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.*³⁶⁸

It is hard to see how viewing the necessary and proper as a separate test would expand Congress’ commerce power beyond the substantial effects test. The substantial effects test is the necessary and proper test in the context of the commerce power. The substantial effects test in *Jones & Laughlin Steel* was that Court’s test for local activities affecting interstate commerce. It was that Court’s finding that a refusal to engage in collective bargaining, a local activity, would have a necessary and proper or appropriate relationship to interstate commerce.³⁶⁹

³⁶⁷ *Raich*, 545 U.S. at 34 (Scalia, J., concurring). Justice Scalia went back to *United States v. Coombs* for support for this, “Any offence which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority, to make all laws necessary and proper to execute their delegated constitutional powers.” *United States v. Coombs*, 37 U.S. 72, 74 (1838). In *Coombs*, the issue was whether Congress could make theft from a beach-stranded vessel not in navigable waters a crime under the Commerce Clause. It could. *Id.* at 78–79.

³⁶⁸ *Raich*, 545 U.S. at 34–35. (Scalia, J., concurring) (citations omitted).

³⁶⁹ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937). In the sentences just before stating its “close and substantial” test, the Court in *Jones & Laughlin Steel* did not directly cite but it did use terms from Chief Justice Marshall opinions in *McCulloch v. Maryland* and *Gibbons v. Ogden* in describing federal enumerated power and the Necessary and Proper Clause: “The fundamental principle is that the power to regulate commerce is the power to enact ‘all appropriate legislation’ for its ‘protection or advancement’ . . . That power is plenary and may be exerted to protect interstate commerce ‘no matter what the source of the dangers which threaten it.’” *Id.* (emphasis added). Compare with Marshall in *McCulloch* rejecting a narrow view of the Necessary and Proper Clause, “This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end.” *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (emphasis added). And his definition of

But then Justice Scalia may have been just typically brilliant. It may be that Justice Scalia's point is that the Necessary and Proper Clause in addition to expanding Congress' power to regulate local activity substantially affecting interstate commerce also increases the ability of Congress to expand its power to regulate its power over things moving in interstate commerce. The majority opinion in *United States v. Comstock*³⁷⁰ seemed to support that view.³⁷¹ The Court in *Comstock* emphasized that Congress had the power under the Necessary and Proper Clause to incarcerate civilly "a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released."³⁷² In *Comstock*, the named plaintiff³⁷³ had been convicted of receipt of child pornography in interstate commerce. The majority ultimately held that the civil extension of Comstock's sentence was necessary and proper to whatever federal power—as to Comstock himself, Congress' power to protect the misuse of the channels of interstate commerce—supported the initial criminal conviction. In sum, the Necessary and Proper Clause expands Congress' power to regulate things actually in interstate commerce.

commerce power in *Gibbons* could not be more sweeping, "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is *plenary* as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824) (emphasis added).

³⁷⁰ *United States v. Comstock*, 560 U.S. 126 (2010).

³⁷¹ *Id.* at 129. The government in its brief said that the government did not rely on the Commerce Clause, but contended that "[T]he court need not reach the Commerce Clause issue to decide the case, arguing that Congress had the authority to enact [the commitment law] pursuant to the Necessary and Proper Clause," that the civil commitment power "flow[ed] from Congress's power to criminalize that conduct in the first place." *United States v. Comstock*, 507 F. Supp. 2d 522, 530 (E.D.N.C. 2007), *aff'd*, 551 F.3d 274 (4th Cir. 2009), *rev'd*, 560 U.S. 126, *rev'd*, 627 F.3d 513 (4th Cir. 2010).

³⁷² *United States v. Comstock*, 560 U.S. at 129.

³⁷³ *Id.* at 131–32. The *Comstock* case was a consolidation for five different persons convicted of federal crimes contesting additional civil commitment beyond their criminal sentence. Comstock's conviction was for receipt of child pornography via a computer, that is using "any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed," a very typical federal jurisdictional peg based upon the power to regulate things actually in interstate commerce. 18 U.S.C. § 2252 (2008).

After discussing the Necessary and Proper Clause, the ultimate holding by the Court in *Comstock* was that whatever federal power supported Comstock's initial conviction would also support his civil commitment. The federal power was the purest form of the commerce power, involving the transportation across interstate lines of child pornography. Justice Scalia's and the *Comstock* court's fascination with the Necessary and Proper Clause in a Commerce Clause case is misplaced in cases involving the effect of local activity on interstate commerce. The substantial effects test is the specific necessary and proper test in a commerce power case negating the need to apply a test as vague and uncertain as the Necessary and Proper Clause.

X. *SEBELIUS*, THE RATIONAL BASIS TEST: THE ONLY CLEAR WINNER

*National Federation of Independent Business v. Sebelius*³⁷⁴ is not narrowly speaking a rational basis commerce power case, but the test is the only clear winner in the case. The majority found that the Affordable Care Act's ("ACA")³⁷⁵ individual mandate, a provision requiring that most persons have some form of health insurance, was not within Congress' commerce power because it regulated inactivity, not activity. The Court claimed that in the history of the Commerce Clause it had never allowed the regulation of inactivity, thus there was no need to apply either the substantial effects test or the rational basis test. With Chief Justice Roberts making a quick change of hand, worthy of the most talented close-up magician, his opinion for the majority concluded that the individual mandate fell within Congress' taxing power. Given that the Court claimed in the history of the commerce power cases it had never encountered the regulation of inactivity, including the inability of Farmer Filburn to grow wheat above a certain allotment, the case seems singularly unimportant both in terms of the ACA and the Commerce Clause. The ACA, with the exception of the abuse of spending power,³⁷⁶ was upheld, and since the

³⁷⁴ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

³⁷⁵ The ACA is commonly called "Obamacare" by both its supporters and its detractors.

³⁷⁶ *Sebelius*, 567 U.S. at 675–76. Using its spending power to impose conditions, the law required that states dramatically increase the number of indigent persons eligible for Medicaid coverage subject to a state's loss of all federal contributions for covered state expenses, not just for the new coverage. The Court said that "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs."

Court in its history had never had to deal with the impact of inactivity on commerce, whether the Court was wrong or right on that distinction as to Congress' commerce power seems of little notice.³⁷⁷

Despite the Court not applying either the substantial effects test or the rational basis test, the case is instructive as to the rational basis test. Only Chief Justice Roberts in announcing the opinion for the Court, in which Justices Breyer and Kagan joined in part, did not mention the rational basis test. The Chief Justice recognized that Congress' power to regulate interstate commerce "extends to activities that 'have a substantial effect on interstate commerce'"³⁷⁸ and also "extends to activities that do so only when aggregated with similar

Id. at 581. The Court felt that the threat of loss as to high percentage of 20% of a state's overall budget was too coercive to be passed under Congress' spending power, "In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head." *Id.* The Court may for the first time since *South Dakota v. Dole* also have breathed new life into limits on Congress' spending power, which may ultimately be viewed as another winner. *South Dakota v. Dole*, 483 U.S. 203 (1987) (The Court found unexceptional Congress' use of its power to spend money for interstate highways to require that all states adopt a twenty-one-year-old drinking limit).

³⁷⁷ Friedman & Lakier, *supra* note 169, at 256 ("Whatever one thinks of the decision on its merits, this is not a line Congress has needed to cross for over two hundred years, which is reason enough to doubt it will have much significance."). *But see* Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331 (2013). Professor Barnett, listed as one of the attorneys in both *Raich* and *Sebelius* on the side challenging federal power, "Had we not contested this power grab, Congress's regulatory powers would have been rendered limitless. They are not." *Id.* at 1333. In answer to his own question, Professor Barnett posits, "Why did so many law professors miss the mark in predicting this reasoning? Part of the explanation is, of course, that law professors largely exist in an ideological bubble in which folks like me are either nonexistent or can be dismissed as marginal because we are so few in number." *Id.* at 1346. Despite Professor Barnett's celebratory dance in the end zone, the line between inactivity and activity is surely as specious as the historical line between direct and indirect impact on commerce. What should be important is that the individual mandate impacted billions of dollars of economic costs in the health field, not some indefensible line between activity and inactivity. As Chief Justice Roberts seemed to concede, it is a line no economist would respect: "To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers." *Sebelius*, 567 U.S. at 555 (citations omitted).

³⁷⁸ *Sebelius*, 567 U.S. at 549.

activities of others.”³⁷⁹ While the Chief Justice did not apply the rational basis test, the concurring opinion of Justice Ginsburg, joined by Justices Sotomayor, Breyer, and Kagan, on the judgment but dissenting as to the commerce power holding, was as complete an adoption of the rational basis test as is possible:

[W]e owe a large measure of respect to Congress when it frames and enacts economic and social legislation. (“[S]trong deference [is] accorded legislation in the field of national economic policy.”) (“This [C]ourt will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.”) When appraising such legislation, we ask only (1) whether Congress had a “rational basis” for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a “reasonable connection between the regulatory means selected and the asserted ends.” In answering these questions, we presume the statute under review is constitutional and may strike it down only on a “plain showing” that Congress acted irrationally.³⁸⁰

Perhaps even more telling as to the ascendancy of the rational basis test, the dissent of Justice Scalia, joined by Justices Kennedy, Thomas, and Alito, conceded, though almost begrudgingly, that the rational basis test was the correct test, except that it was inapplicable to inactivity, “It is true enough that Congress needs only a ‘rational basis’ for concluding that the *regulated activity* substantially affects interstate commerce. But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce.”³⁸¹

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 602–03 (citations omitted). The Court cited to the usual commerce power suspects, *Raich*, *McClung*, and *Heart of Atlanta Motel* among others, but also to *Carolene Products*, the seminal rational basis case Due Process Clause case.

³⁸¹ *Id.* at 657–58 (Scalia, J., dissenting) (internal citations and quotation marks omitted).

XI. SWIMMING AGAINST THE TIDE—FIVE REASONS WHY THE RATIONAL BASIS TEST IS THE WRONG TEST FOR THE COMMERCE POWER

There are few arguments made against the rational basis test in commerce power cases, even at the scholarly level.³⁸² That failure is somewhat ironic in view of the fact that the rational basis test sometimes encounters criticism, even in the due process and equal protection cases where it began.³⁸³ Still, one can see why the rational basis test has perhaps fewer critics in the commerce power cases than even in due process cases. The logic behind the low level of review in the due process and equal protection cases is that economic matters do not need judicial protection but should depend upon the political

³⁸² See, e.g., Friedman & Lakier, *supra* note 169, at 290. This article argues for limits as to Congress' most obvious power, the power to cross state lines, on the grounds that the power to regulate does not necessarily include the power to ban altogether, but the article barely mentions the rational basis test. Professor Friedman and Ms. Lakier use the term rational basis only once. *Id.* at 297; see also Mank, *supra* note 366, at 384 (Professor Mank, who exaggerates the Court's use of the test stated, "From 1937 until 1995, the Supreme Court applied a very lenient rational basis standard for reviewing congressional legislation under the Commerce Clause, and upheld in every case congressional regulation of intrastate activities even if the activities had only indirect impacts on interstate commerce."). But see Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1801 (2012) (They believe that even the rational basis test is too restrictive of legislative actions, "To reject rational basis review is not to hold that the government may pass irrational laws. Rather, it is to hold that laws passed by the people's representatives, according to the constitutional prescriptions for enacting laws, are per se reasonable. Our protection against irrationality is institutional and democratic, not theoretical and judicial. The Constitution does not authorize courts to interfere with validly enacted laws that do not violate a stated limit on the government.").

³⁸³ See Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 898, 899 (2005) ("The purpose of this essay is to help expose the rational basis test for the sham that it is and to show how application of the test in actual litigation perverts our system of justice."); see also Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 493 (2011) ("The rational basis test as it currently stands is too weak. By allowing any plausible reason for the legislation to suffice, whether or not it was a true reason for the legislation, and by asking only whether lawmakers could have thought that it was reasonably related to the subject it purported to advance, the Court has essentially made the rational basis test the equivalent to no test at all.").

processes to seek any needed legislative adjustments. Perhaps the most widely quoted statement of this comes from *Williamson v. Lee Optical*:

*The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois*, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'*³⁸⁴

With a few significant exceptions,³⁸⁵ the commerce power cases involve only economic issues while due process and equal protection rational basis cases often involve some of the most important practical and personal concerns in one's daily life.³⁸⁶

There are at least five reasons why the rational basis test is the wrong test for determining Congress' commerce power. First, the overwhelming weight of precedents supports the substantial effects test as the correct test. The substantial effects test has carried the day in history.³⁸⁷ Even in the cases that also apply the rational basis test,

³⁸⁴ *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955) (citations omitted).

³⁸⁵ The racism in *Heart of Atlanta Motel* and *Katzenbach* and the gender violence in *Morrison* are exceptions from the normal economic issues, although the economic aspects of both cannot be discounted.

³⁸⁶ These include housing, *Nordlinger v. Hahn*, 505 U.S. 1 (1992); support for needy children, *Dandridge v. Williams*, 397 U.S. 471 (1970); protection from disproportionate racial impact, *Jefferson v. Hackney*, 406 U.S. 535 (1972); medical coverage for indigent women for everything from pregnancies, *Geduldig v. Aiello*, 417 U.S. 484 (1974), abortions, *Harris v. McRae*, 448 U.S. 297 (1980); decisions as to life and death, *Vacco v. Quill*, 521 U.S. 793 (1997); job security, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976); and equality of education, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

³⁸⁷ Based upon a Westlaw search, there are almost 150 Supreme Court cases, including every Commerce Clause case mentioned in this Article decided after 1937, and over 1,500 federal cases that cite to *Jones & Laughlin Steel*. See, e.g., *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 576 (1942) ("The commerce power is plenary, [Footnote 5—*Jones & Laughlin Steel*] may deal with activities in connection with production for commerce and as said in the *Darby* case, may extend to those activities intrastate which so affect interstate

the substantial effects test is included as part of the test. The substantial effects test had its full reveal in 1937 in *Jones & Laughlin Steel* (“a close and substantial relation”³⁸⁸), but even during the several decades prior to 1937 when the Court had pretty much lost its way in terms of the Congress’ commerce power, a few cases used similar language in finding the commerce power. The substantial effects test was first used by the Court as early as 1911 in *Southern Railway* (“a real or substantial relation or connection”³⁸⁹) and again in 1914 in *The Shreveport Rate Cases* (“a close and substantial relation”³⁹⁰) to describe the connection required between intrastate railroads and interstate railroads to justify regulation by the ICC.

The test in *Jones & Laughlin Steel* is even respectful of the origins of the Affection Doctrine in *McCulloch* in 1819. *Jones & Laughlin Steel* said that intrastate activities could be regulated if they so substantially affect interstate commerce “that their control is essential or appropriate to protect that commerce.” Both “essential”³⁹¹ and “appropriate”³⁹² are used as synonymous terms in *McCulloch* to

commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.” (internal quotations omitted). *See, e.g.*, *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 280 (1975) (“Similarly, the Court’s opinion in *NLRB v. Jones & Laughlin Steel Corp.*, two years later, had emphasized that congressional authority to regulate commerce was not limited to activities actually ‘in commerce,’ but extended as well to conduct that substantially affected interstate commerce.”). *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003) (“Nor is application of the FAA defeated because the individual debt-restructuring transactions, taken alone, did not have a substantial effect on interstate commerce. Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control. Only that general practice need bear on interstate commerce in a substantial way.” (internal citations and quotation marks omitted)).

³⁸⁸ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

³⁸⁹ *S. Ry. Co. v. United States*, 222 U.S. 20, 26 (1911).

³⁹⁰ *The Shreveport Rate Cases*, 234 U.S. 342, 351 (1914).

³⁹¹ *See McCulloch v. Maryland*, 17 U.S. 316, 413 (1819) (“If reference be had to its [the word necessary] use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or *essential* to another.” (emphasis added)).

³⁹² *See id.* at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate*, which are plainly adapted to

explain what “necessary and proper” meant in terms of expanding Congress’ enumerated powers.

Second, the rational basis test has been used in only a handful of Supreme Court commerce power cases starting with *Heart of Atlanta Motel* and *McClung* in 1964, and, of the two, likely only in *McClung* did it make a difference.³⁹³ It can hardly be doubted that the Court on its own would have found that the racist denial of food and lodging to interstate travelers substantially affected interstate commerce.³⁹⁴ There was no need to add to the substantial effects test that the Court’s job was only to find if Congress might rationally believe that such odious treatment of racial minorities traveling in interstate commerce substantially affected interstate commerce. The rational basis test puts the Court a step removed from the operative test. Under the rational basis test, the Court need only find that it is conceivable³⁹⁵ that Congress might have believed that commerce was substantially affected, not that it actually was. Instead of the Court actually deciding in a practical kind of way if local activity affected interstate commerce, under the rational basis test the Court only looks to see if Congress might have conceivably believed there was such an effect. In

that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” (emphasis added)).

³⁹³ It is also unlikely that the rational basis test was needed in *Hodel* to find that strip mining substantially affected interstate commerce.

³⁹⁴ It seems a little churlish to point out that Ollie’s did not actually purchase any goods in interstate commerce but that it only purchased goods from a supplier that had purchased goods in interstate commerce.

³⁹⁵ See *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307 (1993). This case raised an equal protection rational basis issue as to the exclusions of some commonly owned buildings from FCC regulations. “The question before us is whether there is any *conceivable* rational basis justifying this distinction for purposes of the Due Process Clause of the Fifth Amendment.” *Id.* at 309 (emphasis added). “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably *conceivable* state of facts that could provide a rational basis for the classification.” *Id.* at 313 (emphasis added). “[T]hose attacking the rationality of the legislative classification have the burden ‘to negative every *conceivable* basis which might support it,’ ‘[I]t is entirely irrelevant for constitutional purposes whether the *conceived* reason for the challenged distinction actually motivated the legislature.’” *Id.* at 315 (citations omitted) (emphasis added).

Heart of Atlanta Motel, there was no need to take the task of finding a substantial effect away from the Court to uphold the law.³⁹⁶

McClung is another story. It is far from obvious that the overt racism by Ollie's Barbeque, even as multiplied by the class impact doctrine, actually impacted the amount of food shipped in interstate commerce. Almost certainly, no interstate travelers were involved.³⁹⁷ Moving the Court one step away in the case of Ollie's may have saved that part of the law. And if it took the rational basis test to give Congress the power to address the evils of racism in local restaurants, then its use in modifying the substantial effects test is perhaps justified.³⁹⁸ *McClung* in this way was unlike *Lopez* and *Morrison* where there was no need for federal remedies to address issues already addressed for the most part at the state and local level. In *McClung*, if there was no federal power, then there was no remedy at the state level given the endemic regional racism of the time. One can applaud the

³⁹⁶ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964). The Court first stated the issue in terms similar to *Jones & Laughlin Steel* before later inserting the rational basis test, "In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest." And after discussion of the various barriers that blacks faced in traveling interstate, it concluded, "Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Id.* at 258. Only then did the Court mention the rational basis test. *Id.*

³⁹⁷ In the days before Yelp made all of us both more careful and more adventurous—we are willing to go outside of the normal interstate choices if enough stars are aligned—but that was not the case in the 1960's. Then we looked for proven mediocrity—thank you, McDonalds—and convenience. No one was risking food poisoning on a long road trip.

³⁹⁸ *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964). As urged by Justice Douglas, the Court could have taken a more direct route and upheld the civil rights law as being within Congress' power to protect due process and equal protection rights under Section 5 of the Fourteenth Amendment. The Court might even have held that interstate travelers were protected under the Privileges and Immunities Clause of the Fourteenth Amendment. See *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) ("Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference."). The Court's logic in *Griffin* was that Congress had the inherent power to protect attributes of federal citizenship, including the right to travel interstate, without any reference to Section 5 of the Fourteenth Amendment or the state action limitations of Section 1.

Court's twisting the commerce power precedents to address the serious evil of local racism, but the Court should have limited the rational basis test to *McClung* alone. There was no reason to drag it out in any other case, and certainly not in the *Raich* case.

The Court's explanation for using the rational basis test in *Heart of Atlanta Motel* and *McClung* is not even remotely persuasive. The Court said that since Congress had made the per se finding that racism by businesses serving interstate travelers and by businesses buying goods in interstate commerce hurt interstate commerce, the Court's job was not to apply the substantial effects test, but only to see if Congress had a rational basis for the per se finding of such an effect.³⁹⁹ Congress had made such per se findings many times in the past dating back at least as far back as 1941 in the *Darby* case, upholding the FLSA.⁴⁰⁰ And *Darby* itself pointed out that the FLSA was not the first such law to do that. Still, *Darby* applied the substantial effects test of *Jones & Laughlin Steel*.⁴⁰¹ It nowhere suggested that some lesser test might be appropriate just because Congress may have tried to preempt the Court's role with its per se finding. If anything, Congress' universal finding that all such cases impacted interstate commerce should have required a higher level of review.⁴⁰²

³⁹⁹ *McClung*, 379 U.S. at 303–04. Only in *McClung* does the Court actually attempt to defend—and that more a conclusion than a defense—the rationale for applying the rational basis test, “But 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.” *Id.*

⁴⁰⁰ *See* *United States v. Darby*, 312 U.S. 100, 125 (1941). The Court acknowledges that when sometimes Congress decides for itself that a particular activity will affect interstate commerce that the Court will have to decide if it “is within the reach of federal power.” *Id.* at 120–21.

⁴⁰¹ *Id.* at 119. The Court in *Darby* not only cited to the *Jones & Laughlin Steel*'s test, but it said the substantial effects test had even an older history, “But long before the adoption of the National Labor Relations Act, this 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.” *Id.* at 119–20.

⁴⁰² *Compare Darby*, 312 U.S. 100, with *Gitlow v. New York*, 268 U.S. 652 (1925). In *Gitlow*, the Court said that if the law made certain types of speech a crime, the Court was not to apply the clear and present danger test to see if the law was consistent with the First Amendment. The clear and present danger test, it said, had “no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.” *Id.* at 671. *Compare Darby*, 312 U.S. 100, with *Dennis*

Third, the rational basis test and the substantial effects test are incompatible. The key to the substantial effects test is that it requires a practical evaluation⁴⁰³ of the actual impact on interstate commerce, including the class or aggregate impact of any similarly situated entities. It is a well-balanced test with all the cards on the table. Applied correctly, it gives Congress the power to address all issues involving more than one state, and certainly all of those issues with which the individual states are incompetent to handle.⁴⁰⁴ But it does impose some limits. Congress cannot simply indulge its tendency to pass any law that might enhance the visibility or stature of members of Congress whether needed or not.⁴⁰⁵ The rational basis test, on the other hand, imposes no limits. That is its appeal. In the due process and equal protection cases, the test allows the Court to wipe its hands of

v. United States, 341 U.S. 494 (1951). The Court in *Dennis* said that of course the Court in such a case had to apply the clear and present danger test: “[W]here an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a ‘clear and present danger’ of attempting or accomplishing the prohibited crime” *Id.* at 505.

⁴⁰³ See United States v. Lopez, 514 U.S. 549, 573 (1995) (Kennedy, J., concurring) (“The case that seems to mark the Court’s definitive commitment to the practical conception of the commerce power is *NLRB v. Jones & Laughlin Steel Corp.*” (citations omitted)).

⁴⁰⁴ One of the virtues of the substantial effects test is its simplicity. The test was not advanced historically by the attempt to artificially distinguish between direct and indirect effects on interstate commerce any more than it is helped modernly by distinctions between economic or noneconomic effects and certainly not by the specious attempt to distinguish between activities and inactivities. If no economist would accept the distinction, then why should we believe that the “practical statesmen” that made up the framers of our constitution would have countenanced such a distinction?

⁴⁰⁵ See Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1026–27 (1977). The legendary Judge Friendly said, “Considerably more troubling to me, from the standpoint of policy and even from that of constitutionality, has been what seems a knee-jerk tendency of Congress to seek to remedy any serious abuse by invoking the commerce power as a basis for the expansion of the federal criminal law into areas of scant federal concern.” *E.g.*, United States v. Bishop, 66 F.3d 569 (3d Cir. 1995), *as amended* (Sept. 29, 1995). The statement of Representative Jim Ramstad, then a Republican representative from Minnesota, in support of a federal carjacking law, “People are outraged and terrified by the heinous carjacking epidemic currently upon us. How can any civilized nation tolerate the brutal killing of a mother dragged 2 miles to her death, while desperately trying to reach for her infant child inside her commandeered car? How can any civilized people tolerate such despicable, outrageous criminal acts? They cannot and they will not.” *Id.* at 579 n.12.

any responsibilities. Absent fundamental rights or suspect classifications, the Court upholds another law as rational and does not look back at the havoc it might have left in its wake.⁴⁰⁶ Under the Court's combined rational basis and substantial effects test, the Court accepts as conceivable that Congress may have applied a practical evaluation whether it did or not.⁴⁰⁷

⁴⁰⁶ See *Dandridge v. Williams*, 397 U.S. 471 (1970). How did the Court sleep at night when it turned its back on hungry children in allowing the state with little or no justification to cap aid to families with dependent children based upon the number of kids, denying larger families a basic sustenance? See *Saenz v. Roe*, 526 U.S. 489 (1999). Compare this Court's approach where it struck down on Fourteenth Amendment privileges and immunities grounds a California law that gave new residents the much lower welfare aid for the first year of California residency that they had received in their former state. To California's assertion that it did so out of fiscal motives to save 10.9 million dollars per year, the Court answered, "An evenhanded, across-the-board reduction of about 72 cents per month for every beneficiary would produce the same result." *Id.* at 506. The higher level of review of the Privileges and Immunities Clause of the Fourteenth Amendment, instead of the rational basis test, turned the Court from Scrooge to King Solomon. See *1 Kings* 3:16-28 (where Israeli King Solomon exposed the false mother in a disputed child custody case by ordering that the baby be cut in half).

⁴⁰⁷ In most cases the conflict between the substantial effects case and the rational basis test would not have to come into play. The Court does not, but in most cases, it could first determine if there was, in fact, a substantial effect on interstate commerce. If there were, it could then conclude that Congress might rationally believe that. Only in cases where there was in fact no substantial effect would the Court have to turn to the rational basis test. See *United States v. Virginia*, 518 U.S. 515 (1996). This Court created a similar but less dramatic conflict in its rule statement. There, Justice Ginsburg for the Court stated the test for gender discrimination in alternative terms, either that such laws had to substantially relate to some important governmental interest or have some exceedingly persuasive jurisdiction. It is possible that both statements mean the same thing, but it looks like Justice Ginsburg might have been nudging the test for gender discrimination to something closer to the compelling state interest test for racial discrimination. Still, other than adding a note of confusion, both tests give a high level of protection against state-based gender discrimination. See Justice Rehnquist's mild complaint in his concurring opinion as to the exceedingly persuasive justification test, "It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test." *Id.* at 559 (Rehnquist, J., concurring). The conflict can largely be avoided by the Court first determining if any gender classification did substantially advance some important governmental interest. If it did not, as is likely in most cases, the Court will never have to reach whether there is also some exceedingly persuasive justification.

Fourth, our federal courts should be reserved for preeminent federal interests, not bogged down with the minutia of daily governance that should be reserved for the state courts. Of course, it is not just the federal courts, but also the whole of the federal justice system from the FBI to the United States Marshal's Office to the federal penitentiaries that are preempted from their primary responsibility of protecting the nation as a whole.⁴⁰⁸ There are many examples.⁴⁰⁹ Although not technically speaking a commerce power case, *Bond v. United States*,⁴¹⁰ a 2011 case, involved such an issue. The dispute could not have been more local. Ms. Bond was happy for her close friend's pregnancy until she learned that the father was Ms. Bond's husband.⁴¹¹ Ms. Bond used her access to dangerous chemicals at her local place of employment⁴¹² to try to harm her now not-so-close

⁴⁰⁸ As for one of the five respondents in *Comstock*, Marvin Vigil, the government's petition to certify him as a sexually dangerous person mentioned in no particular order the following federal resources: (1) the United States District Court, (2) appointment of a psychiatrist or psychologist, (3) the Special Assistant U.S. Attorney, (4) the Federal Bureau of Prisons, Certificate Review Panel, (5) the U.S. Marshal, (6) the Federal Public Defender, (7) the Senior U.S. District Judge, and (8) the Federal Courthouse in the (9) Terry Sanford Federal Building, Raleigh, North Carolina. Certification of a Sexually Dangerous Person, *United States v. Vigil*, No. 06157-051 (E.D.N.C. Nov. 22, 2006), <https://assets.documentcloud.org/documents/324328/vigil-marvin-certification.pdf> [<https://perma.cc/6JK4-U5UG>]. As for the need for the federal law in *Comstock*, the government in its Petition for Certiorari acknowledged, "many of the criminal acts that sexually dangerous persons might be expected to commit would violate state law" but claimed that federal law criminalized many others. Petition for Writ of Certiorari, *United States v. Comstock*, 2009 WL 907847, at *25 n.12 (2009).

⁴⁰⁹ *E.g.*, *Bishop*, 66 F.3d at 571. The Third Circuit upheld on both rational basis and instrumentalities of interstate commerce grounds a federal law-making carjacking a federal crime. The Third Circuit said that the "issue is the power of Congress to criminalize 'carjacking'—the armed theft of an automobile from the presence of another by force and violence or by intimidation." *Id.* A better question has been suggested, "[W]as 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?" See McGoldrick, *supra* note 11, at 32.

⁴¹⁰ *Bond v. United States*, 572 U.S. 844 (2014).

⁴¹¹ See *United States v. Bond*, 581 F.3d 128, 131 (3d Cir. 2009), *rev'd*, 564 U.S. 211 (2011).

⁴¹² Other caustic chemicals were purchased on the Internet, so some interstate commerce was involved.

friend, by rubbing caustic chemicals on various objects that the pregnant woman might touch. After several dozen attempts, Ms. Bond finally inflicted on her victim a minor burn on her hand from chemicals Ms. Bond had smeared on the victim's front door.⁴¹³ The victim called the federal authorities. Ms. Bond was indicted by a Philadelphia federal grand jury for possessing and using a chemical weapon in violation of a federal law that had been passed to fulfill a treaty obligation,⁴¹⁴ bringing Congress' treaty power into play and only indirectly its commerce power.⁴¹⁵ Whatever the source of federal power, it is hard to believe that this crime raised any issues not adequately dealt with at the state level. If trying to harm someone with a dangerous chemical is not a crime in the Keystone State, it is not the happy place it claims to be.⁴¹⁶ Likely, nothing is going to curb the desire of Congress to appear to be doing something, whether based in reality or not, but at the very least, the substantial effects test's more limited view of the federal commerce power as compared with the

⁴¹³ See *Bond*, 572 U.S. at 844.

⁴¹⁴ See *Bond*, 581 F.3d at 132. Under the 1993 Chemical Weapons Convention, Congress was obligated to pass implementing legislation. The Supreme Court reversed the Third Circuit's decision that Ms. Bond did not have standing to raise the Tenth Amendment enumerated powers issue. The Court said that principles of federalism were intended to protect both state sovereignty and individual rights, the latter through the diffusion of power between the federal government and the states.

⁴¹⁵ *Id.* The Court does not acknowledge that this use of the treaty power without support of the commerce power raised again an issue the Court first discussed in *Missouri v. Holland*. *Missouri v. Holland*, 252 U.S. 416 (1920). *Holland* upheld the federal Migratory Bird Act of 1918 based upon Congress' treaty power, even though the law might at the time have been outside the then scope of its commerce power. A limiting view of *Holland's* language as to treaty power can be found in *Reid v. Covert*. *Reid v. Covert*, 354 U.S. 1 (1957). A plurality opinion by Justice Black in *Reid* said that laws passed pursuant to treaty powers were, of course, limited by the other provisions in the Constitution. See generally Thomas Healy, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998).

⁴¹⁶ See 'Pennsylvania. Pursue Your Happiness:' Officials Unveil New State Slogan, NBC PHILADELPHIA (Mar. 9, 2016, 6:57 AM) <https://www.nbcphiladelphia.com/news/business/Pennsylvania-Pursue-Your-Happiness-Officials-Unveil-New-State-Slogan-371406511.html> [http://perma.cc/66FY-MJRP]. Pennsylvania has reportedly changed her state slogan to "Pennsylvania. Pursue Your Happiness," a reference to its role as the site for the signing of the U.S. Constitution, which is a bit less assertive than "America Starts Here," but not as maudlin as "You've Got a Friend in Pennsylvania," both earlier slogans of Pennsylvania. *Id.*

rational basis test imposes a somewhat more significant institutional barrier.

Fifth, the substantial effects test is more consistent with notions of federalism than is the rational basis test. In the sentence immediately following its statement of the “substantial effects” test, the Court in *Jones & Laughlin Steel* raised the federalism issue:

*Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.*⁴¹⁷

What level of federal commerce power is more consistent with protecting the vibrancy of state power is a matter of degree. The rational basis test as a source of federal commerce power is several degrees off.

Much has been written about our system of federalism, and at the Supreme Court level, perhaps none more so than by Justice Kennedy.⁴¹⁸ His first significant effort was in his concurring opinion with Justice O’Connor in *Lopez* where he described four distinctive aspects of our constitution:

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

⁴¹⁷ N.L.R.B. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (citations omitted).

⁴¹⁸ This Article does not attempt to define the merits of our federalist system, but Justice Kennedy does it well. See *United States v. Lopez*, 514 U.S. 549, 568–83 (1995). See also *Alden v. Maine*, 527 U.S. 706, 713–15 (1999) (Justice Kennedy delivered the opinion of the Court that under the Eleventh Amendment Congress could not abrogate the sovereign immunity of the States as to monetary damages using its commerce powers.); *Bond v. United States*, 564 U.S. 211, 220–24 (2011) (Justice Kennedy wrote for the Court holding that a person charged with a federal crime can raise the Tenth Amendment federalism issue.).

*Judiciary to play a significant role in maintaining the design contemplated by the Framers.*⁴¹⁹

Only “our role,” he said of the Court, “in preserving the federal balance” seemed “tenuous.”⁴²⁰ And that is exactly the problem with the rational basis test in the Commerce Clause cases. It removes to a significant degree the Court from the job of deciding a crucial element as to federal power *vis-à-vis* the states. It is my opinion that under the substantial effects test, the Court is to decide this element of federalism. Under the rational basis test, it seems to me, the Court’s job is to rubber stamp it if Congress’ own determination of its role in our federalist system is at all conceivable. I would say that not only is Congress incapable of limiting itself to matters needing national attention, it is unfair to ask it to monitor itself. Congress gets no credit for what it does not do. Yet, the country is so polarized that it is hard to address real issues like the looming bankruptcy of our public pension system. Thus, Congress almost for survival has to appear to be doing something, even if that something is already being adequately handled at the state and local level.

There is something very telling about the Line Item Veto Act that Congress passed in 1994.⁴²¹ Under that Act, Congress gave the President the power to veto line items related to certain spending and tax deductions.⁴²² No one was forcing Congress to spend money or to give tax deductions, but it seemed to recognize that it could not control itself. Like the first of some kind of economic twelve-step program, Congress acknowledged that it had a spending problem, and it needed the President’s help.⁴²³ Congress can be no more trusted with defining its own power in our federalist system than it can be trusted to be fiscally responsible. It needs the help of the Court to keep its powers in

⁴¹⁹ *Lopez*, 514 U.S. at 575.

⁴²⁰ *Id.*

⁴²¹ *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998). The Court found the Line Item Veto unconstitutional, “Thus, because we conclude that the Act’s cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court’s alternative holding that the Act ‘impermissibly disrupts the balance of powers among the three branches of government.’” *Id.*

⁴²² *Id.* at 436.

⁴²³ *Id.* at 447. The Court in *Clinton* recognized the potential merits, “Many members of both major political parties who have served in the Legislative and the Executive Branches have long advocated the enactment of such procedures for the purpose of ‘ensur[ing] greater fiscal accountability in Washington.’” *Id.*

check. Admittedly, the substantial effects test may be more like the illusion of a check, but the rational basis test is not even that.

XII. CONCLUSION—LIMITS ON COMMERCE POWER MATTERS

This Article has the audacity to claim that a somewhat stricter limit on Congress' commerce power would be more compatible with constitutional norms of federalism. Even if that claim is supportable as this Article tries to do, does it make a difference when all is said and done? What Congress cannot do using its other enumerated powers, including its commerce power, it can accomplish using its spending power. As others have said, Congress' spending power makes it the 900-pound gorilla.⁴²⁴ Congress is virtually unlimited in its ability to encourage state and local bodies to undertake federal objectives. Nonetheless, Congress cannot use its spending power as a source of direct legislative power, and oftentimes Congress needs to do that.⁴²⁵ Limits on commerce power matter. They go to weightier matters of the waste of federal resources and respect for states to find their own way. In terms of *California v. Raich*, would the substantial effects test have made a difference? The estimate—and the rational basis test required no more than that—was that there were 100,000 users of state-grown marijuana. Surely some of that unregulated marijuana would have made its way into the interstate market, but would the class impact of that illegally diverted marijuana have been a substantial impact? Or framed in another way, was there a sufficient impact on interstate commerce for Congress to preempt California's different calculus as to the permissible use of that ubiquitous substance? I think not. Whatever

⁴²⁴ It was my pleasure many years ago to co-teach a course in constitutional history at Pepperdine University School of Law with Justice Scalia, and he was forever reminding the class that Congress' control over the purse was "the 900-pound gorilla." Every class he made us laugh, and he challenged us to move beyond our preconceptions. He will be missed.

⁴²⁵ Spending power alone does not always work. *E.g.*, Robert Pear, *Medicaid Expansion Finds Grass-Roots Support in Conservative Utah*, N.Y. TIMES (Sept. 9, 2018), <https://www.nytimes.com/2018/09/09/us/politics/utah-medicaid-expansion.html?action=click&module=Top%20Stories&pgtype=Homepage> [<http://perma.cc/TFW5-P5E4>]. Only thirty or so states have taken advantage of the additional federal spending available for the expansion of Medicaid under the ACA despite the fact that the federal purse pays for at least 90% of the cost of newly eligible beneficiaries. *Id.*

the test the Court applies, it must always be applied with respect for what is truly national versus what is local.