Congress' Regulation of Intrastate, Noncommercial Cultivation and Possession of Medicinal Marijuana under the Controlled Substances Act Is a Constitutional Exercise of Its Commerce Clause Authority: Gonzales v. Raich

Emily K. Nicholson
Congress’ Regulation of Intrastate, Noncommercial Cultivation and Possession of Medicinal Marijuana under the Controlled Substances Act is a Constitutional Exercise of its Commerce Clause Authority: Gonzales v. Raich

CONSTITUTIONAL LAW – COMMERCE CLAUSE – CONTROLLED SUBSTANCES ACT – REGULATION OF MEDICINAL MARIJUANA – The Supreme Court held that Congress can regulate the intrastate, noncommercial cultivation and possession of medicinal marijuana through the Controlled Substances Act pursuant to its authority under the Commerce Clause of the United States Constitution.

Gonzales v. Raich, 125 S. Ct. 2195 (2005).

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 19701 to consolidate existing federal drug legislation and to reinforce the national government’s regulation of illicit drugs.2 Title II of this Act, the Controlled Substances Act (hereinafter “CSA”), renders the manufacture, distribution, or possession of marijuana a federal offense subject to criminal prosecution.3 In 1996, California passed the Compassionate Use Act, which legalized the use of marijuana within the state to treat serious medical conditions.4 Respondents, California residents

2. Gonzales v. Raich, 125 S. Ct. 2195, 2201, 2203 (2005).
3. Raich, 125 S. Ct. at 2203. The CSA classifies all controlled substances into five categories, known as schedules, based on each drug’s medicinal value, potential for abuse and addiction, and effects on the body. 21 U.S.C. § 812(a)-(b). Drugs are subjected to various manufacturing, distribution, and use restrictions depending on which schedule they fall into. See id. §§ 821-830. Marijuana is classified as a Schedule 1 substance due to its “high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.” Raich, 125 S. Ct. at 2204. See also 21 U.S.C. §§ 812(b)(1), 812(c).
4. Raich, 125 S. Ct. at 2199. Section 11362.5(b) of the CALIFORNIA HEALTH & SAFETY CODE (West Supp. 2005) states in relevant part:
   Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.
Angel Raich and Diane Monson, use medicinal marijuana in accordance with the Compassionate Use Act to treat a host of severe medical problems that have been unresponsive to traditional medications.  

In August 2002, federal drug enforcement agents confiscated and destroyed a small supply of medicinal marijuana plants grown in Monson's home. Monson and Raich subsequently filed suit in federal court against then-Attorney General of the United States, John Ashcroft, and former Administrator of the Federal Drug Enforcement Administration, Asa Hutchinson. Monson and Raich sought to enjoin the government from enforcing the CSA against them insofar as it prevented them from growing and consuming marijuana for private, medical purposes. They argued that applying the CSA in this situation would violate various constitutional provisions; specifically, they contended that Congress had no authority under the Commerce Clause of the United States Constitution to regulate the purely intrastate, noncommercial cultivation and possession of medicinal marijuana.

The district court refused their request for injunctive relief on the ground that Monson and Raich had failed to establish the probability of success on their claims. The Court of Appeals for the Ninth Circuit reversed, finding the case sufficiently distinguishable from its prior decisions upholding the CSA as a consti-

---

5. Raich, 125 S. Ct. at 2199-2200. Specifically, Raich suffers from "an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders. Appellant Monson suffers from severe chronic back pain and constant, painful muscle spasms . . . caused by a degenerative disease of the spine." Raich v. Ashcroft, 352 F.3d 1222, 1225 (9th Cir. 2003).

6. Raich, 125 S. Ct. at 2200.

7. Id. Only Monson's home was raided; Raich joined the suit based on the possibility of future government seizures and of consequently "being deprived of medicinal marijuana." Raich, 352 F.3d at 1226.

8. Raich, 125 S. Ct. at 2200.

9. Id. "Respondents claimed that enforcing the CSA against them would violate the . . . Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity." Id.

10. The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

11. Raich, 125 S. Ct. at 2204-05.

12. Raich v. Ashcroft, 248 F. Supp. 2d 918, 920 (N.D. Cal. 2003). The court concluded that "in the absence of an intervening Supreme Court decision," it was constrained to adhere to existing Ninth Circuit authority "that Congress' findings [that the intrastate, noneconomic possession of controlled substances has a substantial effect on interstate commerce] are sufficient to overcome a Commerce Clause challenge . . . ." Raich, 248 F. Supp. 2d at 925-26.
tutional exercise of federal commerce authority. The court acknowledged that when the class of activities sought to be regulated is an appropriate object of federal governance, the judiciary may not "excise, as trivial, individual instances of the class." The Ninth Circuit overcame this well-settled rule by determining that Monson and Raich's activities were not the type of conduct intended to be regulated by the CSA (i.e., drug trafficking), but rather constituted "a separate and distinct class of activities: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a . . . physician pursuant to valid California state law." The court went on to conclude that this narrow class of activities had no substantial impact on interstate commerce, using the four-factor test set forth by the United States Supreme Court in United States v. Lopez and United States v. Morrison.

The Supreme Court granted certiorari, and the majority held that the CSA's general ban on the manufacture and possession of marijuana can be constitutionally applied to the use of intrastate medicinal marijuana under the power granted to Congress by the Commerce Clause. Justice Stevens, delivering the majority opinion of the Court, began by identifying the three types of regulatory commerce power that Congress is constitutionally entitled to assume and noted that only the third category, the regulation of activities that substantially affect interstate commerce, is relevant to the case.

13. Raich, 352 F.3d at 1227.
14. Id. at 1228 (quoting Perez v. United States, 402 U.S. 146, 154 (1971)).
15. Raich, 352 F.3d at 1228.
17. 529 U.S. 598 (2000). The four factors are 1) whether the statute regulates commerce or any sort of economic enterprise; 2) whether the statute contains any express jurisdictional element that might limit its reach to a discrete set of cases; 3) whether the statute or its legislative history contains express congressional findings regarding the effects of the regulated activity upon interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated. Morrison, 529 U.S. at 610-12.
18. The majority included Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Raich, 125 S. Ct. at 2198.
19. Raich, 125 S. Ct. at 2201.
20. Id. at 2205. The first and second categories include the power to "regulate the channels of interstate commerce" and the "authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce." Id. (citing Perez, 402 U.S. at 150).
In Part III of the opinion,\textsuperscript{21} the beginning of the substantive analysis, the majority relied heavily on the Court’s decision in \textit{Wickard v. Filburn}.\textsuperscript{22} In \textit{Wickard}, a commercial farmer was fined for harvesting an excess of wheat – to be consumed by his family rather than sold – in violation of the Agricultural Adjustment Act of 1938 (hereinafter “AAA”),\textsuperscript{23} which attempted to stabilize wheat prices by controlling the volume produced and released into the commercial market.\textsuperscript{24} The \textit{Wickard} Court found that while the impact of Filburn’s \textit{individual} cache of wheat on the market was minimal, his supply substantially affected interstate commerce when aggregated with that of other farmers producing superfluous wheat for personal use.\textsuperscript{25}

Justice Stevens drew a close parallel between the \textit{Raich} case and \textit{Wickard}.\textsuperscript{26} The Court observed that both the CSA and the AAA were passed to control the supply and demand of fungible commodities.\textsuperscript{27} Justice Stevens inferred that Congress, in failing to exempt personal stores of wheat from regulation, reasonably believed the existence of such quantities to have considerable effects on the grain’s exchange in the open market.\textsuperscript{28} Specifically, Congress feared the diversion of excess wheat into the stream of commerce, thus culminating in market saturation and price drops that would hinder the stabilization efforts of the AAA.\textsuperscript{29} Justice Stevens predicted that the high demand for marijuana may similarly lure homegrown medicinal supplies of cannabis into illicit channels, thereby frustrating the CSA’s object of eliminating the drug’s commercial trade altogether.\textsuperscript{30}

The Court next considered the three factors argued by Monson and Raich to distinguish their case from \textit{Wickard}.\textsuperscript{31} First, Monson and Raich noted that the AAA explicitly exempted small farms

\begin{footnotesize}
\begin{enumerate}
\item 317 U.S. 111 (1942).
\item Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (codified at 7 U.S.C. §§ 1281-1521 (2000)).
\item Wickard, 317 U.S. 111.
\item Id. at 127-28.
\item Raich, 125 S. Ct. at 2206.
\item Id. at 2206-07.
\item Id. at 2207.
\item Id.
\item Id.
\item Raich, 125 S. Ct. at 2207.
\end{enumerate}
\end{footnotesize}
producing less than two hundred bushels of wheat from regulation, while the CSA contains no similar exception. Justice Stevens, however, failed to discern a connection between the government's decision to remove small farming operations from the AAA's jurisdiction and its authority to control all aggregated activity having a substantial impact on interstate commerce.

Monson and Raich's second argument—that the commercial farm in Wickard constituted a "quintessential economic activity," while their use of medicinal marijuana involved no selling, buying, or trading—was likewise found to be unpersuasive on the ground that Filburn's private consumption of wheat was deemed by the Wickard Court as noncommercial in nature, yet still subject to regulation.

Third, Monson and Raich contended that the evidence in Wickard clearly indicated that homegrown supplies of wheat had a substantial effect on interstate commerce, while there is no such concrete support for the similar assertion regarding locally cultivated medicinal marijuana. Justice Stevens responded to this argument by referencing congressional findings that intrastate drug activity does indeed affect interstate commerce. While the Court conceded that these findings are not specific to the intrastate, noncommercial cultivation and possession of medicinal marijuana, it concluded that "the absence of particularized findings does not call into question Congress' authority to legislate."

32. Id. Filburn produced 460 bushels. Respondents' Brief in Opposition at 14, Raich, 125 S. Ct. 2195 (No. 03-1454).
33. Raich, 125 S. Ct. at 2207.
34. Id.
35. Id. The Wickard record established that "on-site consumption of homegrown wheat could have the effect of varying the amount of wheat sent to market by as much as 20%." Id. at 2227 (O'Connor, J., dissenting).
36. Id. at 2207-08 (majority opinion). Particularly, Congress found that:
   (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
   (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
   (6) 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.
37. Raich, 125 S. Ct. at 2208 (citing Lopez, 514 U.S. at 562; Perez, 402 U.S. at 156).
In Part IV of the opinion, the majority examined the relevance of two of the Court’s most recent Commerce Clause decisions. In *United States v. Lopez*, the Court determined that the Gun-Free School Zones Act, which prohibited gun possession in school zones, exceeded the government’s Commerce Clause power. Likewise, in *United States v. Morrison*, the Court found no Commerce Clause basis for Congress’ enactment of the Violence Against Women Act of 1994, which established a private right of action for victims of violent crimes committed on the basis of gender.

Justice Stevens distinguished *Lopez* and *Morrison* on the ground that neither case involved a comprehensive regulatory scheme that would be seriously undermined by a failure to control the regulated activity at the local level. Moreover, neither statute purported to regulate economic activity. The CSA, on the other hand, does regulate economic activity because it controls the “production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.”

Next, Justice Stevens invalidated the court of appeals’ conclusion that “the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law” constitutes a separate class of activities beyond the reach of federal commerce power and outside the realm of the CSA.

First, the Court explained that the drug’s medical use in this case does not distinguish it from the rest of the activities controlled by the CSA because many of the substances included in the Act have medicinal value. One of the primary purposes of the CSA is to “regulate which controlled substances can be utilized for

---

42. 529 U.S. 598.
44. *Morrison*, 529 U.S. 598.
46. Id. at 2211.
47. Id. “Economics’ refers to ‘the production, distribution, and consumption of commodities’.” Id. (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (3d ed. 1966)).
48. *Raich*, 352 F.3d at 1229.
50. Id. at 2211-12.
medicinal purposes, and in what manner.\footnote{Id. at 2211.} Congress answered these questions with regard to marijuana by classifying it as a Schedule 1 drug with no legitimate medical uses.\footnote{Id.} Thus, Monson and Raich's contention that marijuana is a medically beneficial substance serves only to advance the argument that it should be relegated to a less-restrictive schedule, as opposed to being left completely unregulated by federal law.\footnote{Id. at 2211-12 n.37.}

Second, the fact that Monson and Raich's use was "in accordance with state law" is of no consequence, due to the Supremacy Clause's\footnote{The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any . . . Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.} command that federal laws trump conflicting state laws.\footnote{Raich, 125 S. Ct. at 2212.} Monson and Raich argued that their activities were effectively isolated from the interstate market, thus warranting an interpretation of the CSA that does not conflict with the Compassionate Use Act; however, Justice Stevens considered a number of potential scenarios that demonstrate the opposite.\footnote{Id. at 2213-14.} For example, unethical physicians may be financially induced to "over-recommend" marijuana treatment, given their exemption from criminal prosecution and the lack of dosage and length of use restrictions that generally accompany traditional prescription drugs.\footnote{Id. at 2214.} Additionally, the Court reasoned, it would be naïve to expect the production of marijuana purportedly cultivated for medical purposes to "precisely match . . . medical needs" and "promptly terminate when patients recover."\footnote{Id.} Far more likely is the possibility that a significant percentage of the drug will seep into the illicit market for recreational use.\footnote{Id.}

Thus, after eliminating as irrelevant the phrases "for personal medical purposes on the advice of a physician" and "in accordance with state law" from the class of activities as defined by the Ninth Circuit, the Court concluded that what remains — "the intrastate, noncommercial cultivation, possession and use of marijuana" — is hardly "separate and distinct" from the illicit activities controlled

\footnote{Id. at 2211.} \footnote{Id.} \footnote{Id. at 2211-12 n.37.} \footnote{The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any . . . Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.} \footnote{Raich, 125 S. Ct. at 2212.} \footnote{Id. at 2213-14.} \footnote{Id.} \footnote{Id. at 2214.} \footnote{Id.}
by the CSA.\textsuperscript{60} Further, this category of activities, which encompasses recreational use of the drug, undoubtedly has a substantial impact on the interstate market for marijuana.\textsuperscript{61} Accordingly, Justice Stevens held the CSA to be constitutionally valid under the Commerce Clause and vacated the order of the court of appeals.\textsuperscript{62}

Justice Scalia filed a concurring opinion to discuss his "more nuanced" understanding of Congress' commerce power.\textsuperscript{63} He first explained that the government's authority to regulate activities that have a substantial effect on interstate commerce is derived not only from the Commerce Clause but also from the Necessary and Proper Clause of the United States Constitution.\textsuperscript{64} Thus, while Congress may clearly enact laws to regulate intrastate activities that substantially affect interstate commerce, it may also regulate intrastate activities that "do not themselves substantially affect interstate commerce" when doing so is necessary and proper to the effective regulation of interstate commerce.\textsuperscript{65}

This second category of regulation is identical to the power of Congress, referred to in the majority opinion and enunciated in \textit{Lopez}, to regulate intrastate activity when a larger regulatory design would collapse without such local regulation in place.\textsuperscript{66} This authority extends over even noneconomic activity if its governance is critical to the success of a comprehensive regulatory scheme involving interstate commerce.\textsuperscript{67} Thus, although the activities in \textit{Lopez} and \textit{Morrison} could have been lawfully regulated despite being noneconomic and local in character, those cases were correctly decided because neither of the involved statutes was associated with a broader legislative system of commercial regulation.\textsuperscript{68}

Justice Scalia then applied these principles to the case at hand.\textsuperscript{69} He determined that Congress has purported to regulate

\textsuperscript{60} Raich, 125 S. Ct. at 2215. \textit{See Raich}, 352 F.3d at 1229.

\textsuperscript{61} Raich, 125 S. Ct. at 2212, 2215.

\textsuperscript{62} Id. at 2215.

\textsuperscript{63} Id. (Scalia, J., concurring).

\textsuperscript{64} Id. at 2215-16 (citing United States v. Coombs, 37 U.S. 72 (1838)). The Necessary and Proper Clause states that Congress shall have the power to "make all laws 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." U.S. CONST. art. I, § 8, cl. 18.

\textsuperscript{65} Raich, 125 S. Ct. at 2216 (Scalia, J., concurring).

\textsuperscript{66} Id. at 2210 (majority opinion), 2217 (Scalia, J., concurring). \textit{See Lopez}, 514 U.S. at 561.

\textsuperscript{67} Raich, 125 S. Ct. at 2217 (Scalia, J., concurring).

\textsuperscript{68} Id. at 2218.

\textsuperscript{69} Id. at 2219.
under the CSA intrastate activities that are both economic (manufacture and distribution) and noneconomic (possession) in nature. Both types of activity may be regulated here because Congress has "reasonably conclude[d] that its objective of prohibiting marijuana from the interstate market could be undercut if those activities were excepted from its general scheme of regulation." Justice Scalia believed such a conclusion to be reasonable based on the highly marketable nature of marijuana and the ease with which it can slip into illicit channels.

Justices O'Connor and Thomas and Chief Justice Rehnquist dissented. Justice O'Connor wrote the first dissenting opinion, which opened with the observation that one of the most unique features of federalism is the freedom it grants to the states to "serve as ... laborator[ies] and try novel social and economic experiments without risk to the rest of the country."

The dissent immediately expressed concern that the majority's ruling will encourage Congress to legislate broadly to insure that any activity it desires to control is enmeshed in a larger regulatory scheme of economic activity. Such an emphasis of form over substance threatens to render the "outer limits" of the Commerce Clause meaningless and intrudes upon well-settled notions of state sovereignty.

Justice O'Connor defined the class of activities involved in this case to be "the personal cultivation, possession, and use of marijuana for medicinal purposes." This designation was believed to be appropriate because it provides a balanced framework from which to analyze Congress' regulatory action. The dissent then

70. Id.
71. Id. at 2220 (citing Lopez, 514 U.S. at 561).
72. Raich, 125 S. Ct. at 2219 (Scalia, J., concurring).
73. Id. at 2220.
74. Chief Justice Rehnquist and Justice Thomas joined as to all but Part III of O'Connor's dissent. Raich, 125 S. Ct. at 2220 (O'Connor, J., dissenting). Justice Thomas then wrote a separate dissenting opinion. Id. at 2229 (Thomas, J., dissenting).
75. Id. (O'Connor, J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
76. Raich, 125 S. Ct. at 2221 (O'Connor, J., dissenting).
77. Id. at 2223.
78. Id. at 2224.
79. Id. at 2223-24. With regard to defining the class of activities in Commerce Clause challenges, Justice O'Connor stated:

The hard work for courts, then, is to identify objective markers for confining the analysis in Commerce Clause cases. ... [W]e must look beyond respondents' own activities. Otherwise individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvi-
turned to the questions of whether such activity can be characterized as economic, whether it substantially affects interstate commerce, and whether it is integral to a more comprehensive regulatory scheme.\textsuperscript{80}

Justice O'Connor first argued that the majority's definition of economic activity — the production, distribution, and consumption of commodities — is far too broad and theoretically encompasses all "productive human activity."\textsuperscript{81} That a private, noncommercial activity may have a commercial counterpart\textsuperscript{82} does not make it economic for Commerce Clause purposes.\textsuperscript{83} Further, none of the marijuana in this case, nor any of the materials used to cultivate it, ever moved between states; rather, all supplies were acquired and plants produced within the State of California.\textsuperscript{84} Finally, Justice O'Connor rejected the notion that \textit{Wickard} "impl[ies] that small-scale production is always economic, and automatically within Congress' reach."\textsuperscript{85}

The dissent then noted that federalism requires Congress to be warranted in its belief that certain activity substantially affects interstate commerce or is inextricably linked to a broader system of interstate regulation before it can intrude upon areas typically governed by state law.\textsuperscript{86} This is because the principles of state

\textsuperscript{80} Raich, 125 S. Ct. at 2224 (O'Connor, J., dissenting).
\textsuperscript{81} Id.
\textsuperscript{82} For example, "[h]ome care substitutes for daycare. Charades games substitute for movie tickets. Backyard or window sill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic." \textit{Id.} at 2225.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} \textit{Id.} at 2225-26.
\textsuperscript{86} Raich, 125 S. Ct. at 2226 (O'Connor, J., dissenting). "[S]omething more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident." \textit{Id.} Traditionally, states have retained the power to "define the criminal law and to protect the health, safety and welfare of their citizens." \textit{Id.} at 2221 (citing Brecht v. Abrahamson, 507 U.S. 619, 635 (1993); Whalen v. Roe, 429 U.S. 589, 603 n.30 (1977)).
sovereignty embodied in the Tenth Amendment work to limit the potentially sweeping effects of the Necessary and Proper Clause.

According to Justice O'Connor, sufficient justification for Congress' action was not present in this case.

Unlike the aggregated private wheat stores in Wickard, Justice O'Connor found no concrete evidence that users of homegrown medicinal marijuana are so numerous as to permit their activity to have a noticeable impact on the interstate drug trade. The dissent believed the congressional findings referenced by the majority to be nebulous and vague; moreover, the existence of even detailed findings that a particular activity influences interstate commerce is not always dispositive of the issue.

Finally, the dissent found that because California has passed legislation establishing an identification card system for medicinal marijuana users, and because it is traditionally assumed that states enforce their own laws, there are no substantiated reasons to believe that the CSA will be ineffective in regulating interstate drug traffic without specific control of intrastate, medicinal marijuana.

Justice Thomas began his separate dissent with the assertion that Monson and Raich's activity could not be characterized as either "interstate" or "commerce" and thus could not fall within the reach of Congress' Commerce Clause authority. Moreover, the regulation of their activity was neither necessary nor proper to the execution of such commerce power and thus could not be justified under the Necessary and Proper Clause.

The dissent noted that the word "commerce" has been traditionally understood to denote the exchange of goods and services for value and any transportation thereby involved. There was no such exchange or transportation in Raich, due to the fact that

---

87. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
88. Raich, 125 S. Ct. at 2226 (O'Connor, J., dissenting).
89. Id.
90. Id.
94. Raich, 125 S. Ct. at 2228 (O'Connor, J., dissenting).
95. Id. at 2229 (Thomas, J., dissenting).
96. Id.
97. Id. at 2229-30 (citing Lopez, 514 U.S. at 585 (Thomas, J., concurring)).
Monson grew her marijuana in her home and Raich was provided with a gratuitous supply from her caregivers. Further, their activities were not “interstate” because their marijuana was cultivated and consumed entirely within the State of California. Thus, Justice Thomas concluded, Monson and Raich’s personal use of medicinal marijuana could not constitute interstate commerce.

Justice Thomas next expounded on the role of the Necessary and Proper Clause in this case. He argued that necessity within the meaning of the clause requires an “obvious, simple, and direct” relationship between the intrastate prohibition of medicinal marijuana and the regulation of the drug’s interstate market. Such a relationship clearly exists when generally considering the local cultivation, possession, and use of the drug; however, this case involves the added distinction of marijuana used for medical purposes. Thus, none of the “obvious” and “plain” rationales for regulating non-medicinal intrastate marijuana were applicable to the matter at hand, due to California’s effective legislative controls and the extremely small number of medical users of the drug.

Justice Thomas next considered whether Congress’ enforcement of the CSA against users of intrastate, medicinal marijuana would be “proper” under the Necessary and Proper Clause. To be proper, the measures taken by Congress to exercise its commerce authority must not be forbidden by or “inconsistent with the ‘letter and spirit’ of the Constitution.” The dissent opined that regulating the conduct at issue in this case because of its connection with a broader scheme of commercial regulation could lay the groundwork for Congress’ intervention in a variety of “state police powers

98. *Raich*, 125 S. Ct. at 2200 (majority opinion), 2230 (Thomas, J., dissenting).
99. *Id.* at 2230 (Thomas, J., dissenting).
100. *Id.* at 2229-30.
101. *Id.* at 2230.
102. *Id.* at 2231 (citing Sabri v. United States, 541 U.S. 600, 613 (2004) (Thomas, J., concurring); United States v. Dewitt, 76 U.S. 41, 44 (1870)).
103. *Raich*, 125 S. Ct. at 2231 (Thomas, J., dissenting).
104. *Id.* For example, “[u]nregulated local growers and users could swell both the supply and demand sides of the interstate marijuana market, making the market more difficult to regulate.” *Id.*
105. *Id.* at 2232.
106. *Id.* at 2233.
107. *Id.* (citing McCulloch v. Maryland, 17 U.S. 316, 421 (1819)).
under the guise of regulating commerce.” Such action would be a contortion of the Necessary and Proper Clause to contravene the ideologies of federalism and state sovereignty embodied in the Constitution.

In Part Two of his dissent, Justice Thomas attacked each of the three arguments propounded by the majority for enforcing the CSA in the present case: 1) the activity, when viewed in the aggregate, substantially affects interstate commerce; 2) the regulation of the activity is crucial to the regulation of the overall drug market; and 3) the regulation of the activity is incidental to the regulation of the overall drug market.

First, Justice Thomas rejected the majority’s use of the “substantial effects” analysis, describing the test as both “rootless” and “malleable.” The label “rootless” was used because the “substantial effects” test is not based on the literal language of the Commerce Clause, which limits Congress’ regulation to actual interstate commerce, rather than activities that substantially affect interstate commerce. Nor is the test rooted in the Necessary and Proper Clause, which considers whether the regulation of the activity is necessary to the regulation of interstate commerce, not whether the activity has substantial effects on interstate commerce. Justice Thomas accused the test of being “malleable” because the majority was able to broadly define the class of activities in order to inflate its interstate effects. By utilizing such an easily manipulable standard, the majority essentially “rewrote” the Commerce Clause.

Because Justice Thomas had already mentioned various reasons why regulating medicinal marijuana is not essential to the overall regulation of illicit drugs, he moved on to the majority’s some-
what contradictory claim that such regulation is constitutional because it is incidental to the broader legislative design of the CSA. The majority rested this contention on the rule that individual and de minimis instances of conduct may not be overlooked by courts in deciding whether to uphold attempted federal regulation where the conduct itself is part of a constitutionally regulable class of activities. Yet if the conduct is not within a regulable class of activities, as Justice Thomas believed had been demonstrated here, Congress has no commerce power to regulate it. Finally, the fact that regulation of the conduct may be incidental to the regulation of an appropriate class of activities is not enough to bring it within the purview of the Necessary and Proper Clause, for that provision requires a more direct and interdependent relationship between the regulation of the two activities. For all of these reasons, Justice Thomas concluded, the majority erred in reversing the decision of the court of appeals.

As evidenced by the four very different opinions described above, the Supreme Court has wrestled with the nebulous language of the Commerce Clause for the past 180 years. Indeed, judicial interpretation of this potentially limitless source of federal legislative authority has played a large role in shaping modern notions of federalism. Charged with the demanding task of drawing distinct lines between national and state regulatory power in the face of ever-changing times and contexts, the Su-

117. Raich, 125 S. Ct. at 2237 (Thomas, J., dissenting).
118. Id. at 2209 (majority opinion) (quoting Perez, 402 U.S. at 154).
119. Raich, 125 S. Ct. at 2237 (Thomas, J., dissenting).
120. Id. at 2231, 2237.
121. Id. at 2239.
122. The Court's first major Commerce Clause case was Gibbons v. Ogden, 22 U.S. 1 (1824), in which the New York legislature granted a monopoly on steamship operation in state waters to a private company, who then transferred that exclusive right to Ogden. Gibbons, 22 U.S. at 1-2. Ogden sued Gibbons to enjoin him from running competing steamships between New York and New Jersey. Id. at 2. Gibbons, who had been acting pursuant to a license granted under federal law, claimed New York's actions violated the Commerce Clause. Id. at 2-3. The Court held that regulating navigation fell within the scope of the government's commerce authority; thus, the federal law pre-empted the New York statute. Id. at 189-90, 239-40 (Johnson, J., concurring). More important than the specific question of navigation, however, was Chief Justice Marshall's expansive characterization of the Commerce Clause power, noting that it "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Id. at 196 (majority opinion).
The Supreme Court has understandably fluctuated a great deal in defining the scope of the Commerce Clause.\(^\text{124}\)

For six decades following the 1824 landmark decision of *Gibbons v. Ogden*,\(^\text{125}\) in which Chief Justice Marshall broadly defined "commerce" to encompass steamboat navigation between two states, judicial treatment of the Commerce Clause was relatively stable.\(^\text{126}\) The Court routinely adhered to Marshall's demonstrated deference to the legislative branch and placed few restrictions on the government's commerce power.\(^\text{127}\) The turn of the century era, however, brought with it an onslaught of federal commercial regulation, which gave the Court ample opportunity to tighten its reins on Congress by striking down measures it deemed excessive and intrusive upon state matters.\(^\text{128}\) Yet the Court also rendered several decisions during this time period that would lay the groundwork for *Gonzales v. Raich*.\(^\text{129}\) Most notably, it determined that Congress may not only regulate, but may also prohibit activities under its Commerce Clause authority,\(^\text{130}\) and in the *Shreveport Rate Case*, it held that purely intrastate transactions may be regulated where such control is inextricably linked to the regulation of interstate commerce.\(^\text{131}\)

---


125. 22 U.S. 1 (1824).

126. *Rotunda & Nowak, supra* note 123, § 4.4, at 415. "Relatively little emerges up to the death of [Chief Justice] Waite in 1888, regarding the Court's attitude towards the commerce clause as an affirmative instrument for promoting 'commerce among the states.' . . . And so it was, because Congress passed little commercial legislation during this period and the Supreme Court reviewed even less." *Id.* (quoting FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 7 (Quadrangle Books 1964) (1937)).


128. *Id.* § 4.6, at 424-32. For example, the Court held in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), that regulation of intrastate manufacturing was beyond the reach of the government's commerce power and that a monopoly having only "indirect" effects on interstate commerce could not be controlled by the Sherman Antitrust Act. 156 U.S. at 12-13, 16-17. In *Hammer v. Dagenhart*, the Court concluded that regulating conditions of production was a matter for state law and that the government could not circumvent this rule by purporting to regulate the transportation of goods manufactured by factories engaging in child labor. 247 U.S. 251, 276 (1918), overruled by United States v. Darby, 312 U.S. 100 (1941).

129. *Raich*, 125 S. Ct. at 2207 n.29, 2218 (Scalia, J., concurring).

130. Champion v. Ames (The Lottery Case), 188 U.S. 321, 357-58 (1903) (upholding a federal ban on lottery ticket traffic in interstate commerce).

131. Houston, East & West Texas Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342, 351-52 (1914) (holding that Congress, via the Interstate Commerce Commission, could constitutionally regulate intrastate railroad rates in order to prevent railroad companies from discriminating against interstate transport, and thereby, interstate commerce). This intrastate regulation was limited, however, to railroad regulation cases. *Rotunda & Nowak, supra* note 123, § 4.6, at 432-33.
The Court began to significantly curb Congress' commerce power after the election of Franklin D. Roosevelt in 1932. For the next five years, the Court quashed a large percentage of Roosevelt's New Deal legislation on the ground that it exceeded the scope of the Commerce Clause, thus provoking the former president to retaliate with his now infamous Court Packing Plan. While the plan did not go through, the Court appeared to take the threat seriously by returning to its former pattern of broad interpretation of the Commerce Clause to uphold extensive federal commercial legislation.

The first Commerce Clause case decided by the "reformed" Court was NLRB v. Jones & Laughlin Steel Corp., which involved the government's enactment of the National Labor Relations Act of 1935 (hereinafter "the Act") to eliminate obstructions to interstate commerce caused by unfair labor practices. In the majority opinion, Chief Justice Hughes departed from traditional theories used by the Court to analyze Commerce Clause challenges and instead concocted early versions of the "substan-

132. ROTUNDA & NOWAK, supra note 123, § 4.7, at 433.
134. ROTUNDA & NOWAK, supra note 123, § 4.7, at 437-38. Roosevelt proposed the appointment of an additional judge for every federal judge over the age of 70 who had served on a court for at least ten years. Id. at 438. According to this plan, six additions would be made to the United States Supreme Court, raising the total number of justices to fifteen. Id. In response to this proposal, the justices began voting more uniformly to uphold federal legislation, thus forming a new majority more favorable towards a far-reaching federal commerce power. Id. The Court's change of heart is commonly referred to as "the switch in time that saved nine." RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 192 (7th ed. 2003).
135. ROTUNDA & NOWAK, supra note 123, § 4.7, at 438. Rotunda points out, however, that the switch may not have been purely the result of presidential pressure; rather, the Court may have been responding to the severe social and economic crises occurring at the time. Id.
136. 301 U.S. 1 (1937).
138. Jones & Laughlin Steel, 301 U.S. at 22-23. The National Labor Relations Board, created by the Act to enforce its provisions, found the Jones & Laughlin Steel Corp. guilty of dismissing employees because of their participation in union activity and sought assistance from the Circuit Court of Appeals when the company failed to comply with remedial orders. Id. at 22. The court refused to enforce the orders on the ground that they exceeded federal authority. Id.
139. Such theories included the "stream of commerce" analysis utilized by Justice Holmes in Swift & Co. v. United States, which permitted the regulation of intrastate activity that is "but a temporary stop . . . 'in a current of commerce among the States.'"
tial effects" and "necessary and proper" tests by drawing from the language of the statute itself and expanding the holding in the Shreveport Rate Case. In response to arguments that the Act's goal was to bring all industrial labor relations within federal control, Chief Justice Hughes pointed to the Act's definition of "affecting commerce." By limiting the Act's provisions to those labor practices "burdening or obstructing commerce... or having led or tending to lead to a labor dispute burdening or obstructing commerce," Congress legislated within its "constitutional bounds." Citing the Shreveport Rate Case and other railroad cases as examples, the Court acknowledged that "although activities may be intrastate in character... 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." Here, the Court concluded, any interruption in the steel company's operations due to labor disagreements could have "catastrophic" effects on commerce in several states. Thus, the Act was necessary in order to prevent potentially severe repercussions in the interstate marketplace.

Four years later, the "substantial effects" test was emphatically affirmed in United States v. Darby, which abandoned the previ-

ROTUNDA & NOWAK, supra note 123, § 4.6, at 427 (quoting Swift, 196 U.S. 375, 398-99 (1905)). The Court had also previously distinguished between federal legislation that regulated the commercial trade of goods, as opposed to their production or manufacture, as well as between activities that had a direct versus indirect effect on commerce. See supra note 128 and accompanying text; Carter, 298 U.S. 238, 301 ("That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause."); Schechter, 295 U.S. 495, 546 ("Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power.").

140. Jones & Laughlin Steel, 301 U.S. 1. See supra note 131 and accompanying text.
141. Jones & Laughlin Steel, 301 U.S. at 31.
143. Jones & Laughlin Steel, 301 U.S. at 31.
144. Id. at 37 (citing Schechter Poultry, 295 U.S. 495).
145. Jones & Laughlin Steel, 301 U.S. at 41.
146. Id.
147. 312 U.S. 100, 118 (1941). The Darby Court upheld a prohibition against shipment in interstate commerce of goods produced by manufacturers who failed to comply with federal wage and hour requirements. Darby, 312 U.S. at 109. With regard to the "substantial effects" test, the Court stated: The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce... as to make regulation of them appro-
ously relied upon "direct-indirect effects" and "production-commerce" distinctions, reduced the Tenth Amendment to a mere "truism,"¹⁴⁸ and overruled *Hammer v. Dagenhart.*¹⁴⁹ The Court's rejection of its claim in *Hammer* that the congressional motive behind a particular provision "can operate to deprive the regulation of its constitutional authority" would pave the way for future cases upholding legislation that had been promulgated for the primary purpose of eliminating racial discrimination, rather than regulating commerce.¹⁵⁰

In *United States v. Wrightwood Dairy Co.*,¹⁵¹ the Court refined the "necessary and proper" test alluded to in the *Shreveport Rate Case* and *Jones & Laughlin Steel.*¹⁵² In approving the application of federal milk regulations to milk produced and sold purely intrastate, the Court relied on the fact that failure to control such milk would impede the government's statutory regulation of milk moving through the channels of interstate commerce.¹⁵³ Chief Justice Stone noted that "Congress plainly has the power to regulate the price of milk distributed through . . . interstate commerce and it possesses every power needed to make that regulation effective."¹⁵⁴ Because competition between intrastate and interstate milk led to interference with Congress' price regulation of the latter, the

---

¹⁴８. *Id.* at 118. The Court then deferred to legislative findings that "competition in the distribution of goods produced under substandard labor conditions . . . is injurious to the commerce and to the states from and to which the commerce flows." *Id.* at 115.


¹⁵¹. 315 U.S. 110 (1942).


¹⁵⁴. *Id.* at 118-19 (citing United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939)).
Court concluded that control of the former was necessary to effectuate the federal law.\textsuperscript{155}

Several months after \textit{Wrightwood Dairy}, the Court decided \textit{Wickard v. Filburn}.\textsuperscript{156} \textit{Wickard} involved a scenario much like the one presented in \textit{Gonzales v. Raich} – the attempted governmental regulation of wheat grown for personal consumption.\textsuperscript{157} Filburn contended that his activities could not be regulated pursuant to any "substantial effects" theory of Commerce Clause jurisprudence because his private cache of wheat was too small to have any measurable impact on the flow of wheat in the open market.\textsuperscript{158} The Court used this as an opportunity to expand the "substantial effects" test to include small-scale activities which, when combined with the operations of others on a similar scale, substantially affected interstate commerce.\textsuperscript{159} Thus, Congress could constitutionally regulate personal supplies of wheat because, when viewed in the aggregate, such supplies competed with commercial wheat and threatened to drive down prices by seeping into the interstate market.\textsuperscript{160}

The Court in \textit{Wickard} demonstrated great deference to congressional findings that the activity sought to be regulated substantially affected interstate commerce, but the Supreme Court would soon decide that official findings are not a necessary component of the "substantial effects" test.\textsuperscript{161} In \textit{Heart of Atlanta Motel, Inc. v. United States},\textsuperscript{162} the Court dealt with the constitutionality of Title II of the Civil Rights Act of 1964,\textsuperscript{163} which prohibited racial discrimination in public establishments such as restaurants and hotels.\textsuperscript{164} While Congress' motive in passing the bill was the obliteration of racial discrimination, the legislation was promulgated as an exercise of the federal commerce power.\textsuperscript{165} Because this case involved a purely intrastate activity – the operation of one motel within a single state – the Court was required to determine

\begin{itemize}
\item \textsuperscript{155} \textit{Wrightwood Dairy}, 315 U.S. at 120-21.
\item \textsuperscript{156} 317 U.S. 111 (1942).
\item \textsuperscript{157} \textit{Wickard}, 317 U.S. 111.
\item \textsuperscript{158} \textit{Id.} at 119.
\item \textsuperscript{159} \textit{Id.} at 127-28.
\item \textsuperscript{160} \textit{Id.} at 128.
\item \textsuperscript{161} \textit{Rotunda & Nowak, supra} note 123, § 4.10(b), at 460.
\item \textsuperscript{162} 379 U.S. 241.
\item \textsuperscript{164} \textit{Heart of Atlanta Motel}, 379 U.S. at 247.
\item \textsuperscript{165} \textit{Id.} at 250.
\end{itemize}
whether the motel's discriminatory practices substantially affected interstate commerce.\textsuperscript{166}

Writing for the majority, Justice Clark noted that Title II was not accompanied by any formal congressional findings to the effect that racial discrimination in public establishments adversely impacted interstate commerce.\textsuperscript{167} However, the Court's job was not to search out proof of such a relationship, but rather to determine whether Congress had a "rational basis" for concluding that the activity affected commerce to such a degree as to justify Commerce Clause action.\textsuperscript{168} After establishing that such a basis existed, said the Court, the only question left to be determined was whether the "means . . . selected [by Congress] to eliminate that evil are reasonable and appropriate," or rather, whether they are "reasonably adapted to the end permitted by the Constitution."\textsuperscript{169}

In adopting such a deferential standard, the Court set the stage for nearly thirty years of consistent judicial enforcement of federal commercial legislation.\textsuperscript{170} During this time, the Court permitted Congress to regulate anyone or anything moving across state lines, including the power to prohibit outright such interstate travel or shipment, as long as the legislation was otherwise constitutional.\textsuperscript{171} Congress was also authorized to regulate any intrastate activity having a substantial effect on interstate commerce.\textsuperscript{172} This second category included activities regulated pursuant to the \textit{Wickard} "cumulative effects" standard, as well as those encompassed by \textit{Wrightwood Dairy's} "necessary and proper" analysis.\textsuperscript{173} Further, \textit{Heart of Atlanta}'s "rational basis" test remained the measure by which intrastate activities were deemed to have a relation to interstate commerce sufficient to render them within congressional reach.\textsuperscript{174}

\textsuperscript{166} \textit{Id.} at 258.
\textsuperscript{167} \textit{Id.} at 252.
\textsuperscript{168} \textit{Id.} at 258. The Court found such a rational basis in this case. \textit{Id.} at 252-53. Relying on testimony presented during the passage of the statute, the Court concluded that discrimination in public accommodations had the effect of discouraging African-Americans from traveling out of state, which could reasonably be viewed as an obstruction to interstate commerce. \textit{Id.} \textit{See also} Katzenbach, 379 U.S. at 303-04 ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").
\textsuperscript{169} \textit{Heart of Atlanta Motel}, 379 U.S. at 258.
\textsuperscript{171} ROTUNDA \& NOWAK, \textit{supra} note 123, § 4.8, at 439-41.
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.} at 441.
\textsuperscript{174} \textit{Raich}, 125 S. Ct. at 2208-09.
In 1995, the Court struck down a piece of Commerce Clause legislation for the first time in decades, and, in so doing, subtly refined and narrowed both the scope of Congress' power and the judiciary's interpretive tests. 175 United States v. Lopez involved the regulation of the intrastate, noncommercial possession of a firearm in a school zone. 176 The petitioner was charged with such possession and prosecuted under the federal Gun-Free School Zones Act of 1990, 177 which he subsequently challenged as an unconstitutional exercise of the government's Commerce Clause authority. 178

Chief Justice Rehnquist first articulated the three categories of activities that Congress had been empowered to govern under the Commerce Clause since Jones & Laughlin Steel: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, including persons or things moving through interstate commerce; and 3) activities that substantially affect interstate commerce. 179 With respect to the third category, which encompassed the gun possession at issue in Lopez, the Court broke the "substantial effects" test into four components, focusing first on whether the activity sought to be regulated could be characterized as economic or commercial in nature. 180

The Court distinguished precedents such as Wickard and Heart of Atlanta on the ground that such cases involved "economic activity in a way that possession of a gun in a school zone does not." 181 Rather, the statute in Lopez purported to regulate a criminal activity that had no connection to any economic endeavor or operation. 182 Moreover, the regulation could not be saved under a "necessary and proper" analysis, as it was not a crucial component of a larger regulatory scheme of commercial activities. 183

175. COENEN, supra note 170, at 63, 101-05.
178. Lopez, 514 U.S. at 552.
179. Id. at 558-59. Regulating the use of channels of interstate commerce involves keeping them "free from immoral and injurious uses." Id. at 558 (quoting Heart of Atlanta, 379 U.S. at 256). Examples of "instrumentalities" of interstate commerce include railroads, telecommunications facilities, airport operations, and natural gas pipelines. COENEN, supra note 170, at 64 n.2.
180. Lopez, 514 U.S. at 559-60.
181. Id. at 560.
182. Id. at 561.
183. Id.
The Court next noted the absence of a "jurisdictional element" which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce," as well as the lack of any congressional findings that could demonstrate a link between firearm possession in schools and interstate commerce. While Chief Justice Rehnquist acknowledged that official findings had not been required since Heart of Atlanta Motel, he alluded that their presence would be beneficial in analyzing situations involving intrastate, noneconomic activities that have no readily apparent relation to interstate commerce.

Finally, the Court rejected the government's argument that gun possession in school zones substantially interferes with the educational process, thus producing a less capable workforce, which in turn adversely affects interstate commerce. Chief Justice Rehnquist deemed this connection to be too attenuated and reasoned that the government's logic would have the effect of extending federal commerce power over any activity found to reduce the "economic productivity of individual citizens." By this rationale, Congress could regulate traditionally state-governed matters such as divorce and child custody, as well as education as a whole. While it may be argued that such activities do indeed substantially affect interstate commerce when viewed in the aggregate, thus seemingly bringing them within the holding of Wickard, the critical difference lies in their noneconomic nature. In this manner, then, the Court appeared to narrow the "substantial effects" category to encompass only those intrastate activities with a commercial or economic root.

184. A jurisdictional element is a "provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute." United States v. Rodia, 194 F.3d 465, 471 (3d Cir. 1999).
186. Id. at 562-63.
187. Id. at 563-64.
188. Id. at 564.
189. Id. at 564-65.
190. Lopez, 514 U.S. at 564-66. See also Morrison, 529 U.S. at 615-16.
191. ROTUNDA & NOWAK, supra note 123, § 4.9, at 457-58. Chief Justice Rehnquist acknowledged, however, that characterizing an activity as either economic or noneconomic will at times be difficult, stating:

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially
Justice Breyer filed a dissenting opinion, which included an exhaustive summary of the evidence tending to prove a link between gun possession in schools and interstate commerce. Specifically, however, Justice Breyer disagreed with the majority's focus on the economic or noneconomic character of the activity at issue, expressing his belief that the Constitution would not "distinguish between two local activities, each . . . ha[ving] an identical effect upon interstate commerce, if one, but not the other, is 'commercial' in nature." Such a distinction, Justice Breyer believed, could not be reconciled with the earlier holdings of Wickard, Heart of Atlanta, Katzenbach v. McClung, and Perez v. United States, which were not concerned with the commercial or noncommercial nature of the activities involved, but rather with the extent of their effects on interstate commerce. Moreover, the dissent noted, none of the activities at issue in these prior cases (i.e., consumption of wheat, racial discrimination, the use of force in debt collection) were by themselves any more "economic" or "commercial" than a single instance of gun possession in a school zone. Justice Breyer concluded that in order to faithfully apply Wickard, the Court must look beyond the activity as it stands alone to the broader picture of how it affects interstate commerce.

Five years after Lopez, the Court affirmed its four-part "substantial effects" test in United States v. Morrison, which involved a federal law creating a private cause of action for victims
of violent, gender-motivated crime. Here again, the Court found no economic aspect to the criminal activity covered by the statute, nor any jurisdictional element that might limit its application to specific instances clearly involving interstate commerce. Unlike Lopez, however, the statute included express congressional findings regarding the effects of gender-based crime on the national economic landscape.

 Rather than merely accepting Congress’ determinations as having had a “rational basis,” the Court concluded that such findings were entitled to little deference for two primary reasons: 1) the statute involved the regulation of a single-state, noneconomic activity, and 2) the congressional findings relied on the same type of chain-reaction reasoning previously rejected by the Court in Lopez. The findings alleged, and the government argued, that gender-based violence discouraged women from traveling and conducting business interstate, increased medical costs, and weakened national productivity, all of which led to substantial interference with interstate commerce. Again, the Court rejected such reasoning as having no defined boundaries, as it would allow Congress to regulate “family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.

 Thus, after Lopez and Morrison, the Court was willing to apply the “substantial effects” test – including the aggregation principle set forth in Wickard and the Heart of Atlanta “rational basis” standard – only when 1) the federal law regulated intrastate activity that was sufficiently economic in nature or 2) control of the intrastate conduct was necessary for the regulation of a larger class of interstate economic activities. But when the activity bore no relation to any economic endeavor, the Court appeared reluctant to extend federal jurisdiction unless Congress could

200. Morrison, 529 U.S. at 613.
201. Id. at 614.
203. Morrison, 529 U.S. at 615.
204. Id.
205. Id. at 615-16. The dissenters in Lopez also disagreed with the Morrison decision and continued to question “why . . . critical constitutional importance [should be given] to the economic, or noneconomic nature of an interstate-commerce-affecting cause.” Id. at 657 (Breyer, J., dissenting).
206. ROTUNDA & NOWAK, supra note 123, § 4.9, at 457-58.
demonstrate a strong factual, rather than merely "rational," basis for the need.\textsuperscript{209}

The interplay of these theories thus set the stage for the controversial decision in \textit{Gonzales v. Raich}. Yet \textit{Raich} was made even more difficult by the direct human consequences that would accompany a ruling in favor of the government.\textsuperscript{210} By extending congressional authority over the intrastate, noncommercial use of medicinal marijuana, the Supreme Court was well aware that it was subjecting many seriously ill Californians and citizens of other states to potential federal prosecution for engaging in the only form of therapy capable of relieving their pain.\textsuperscript{211} The majority understood, however, that despite the name of the California statute, this case was not about compassion, but about the Commerce Clause.\textsuperscript{212} Thus, the Court remained true to its duty to render a decision in accordance with precedent and established constitutional principles.\textsuperscript{213}

The Court faithfully adhered to the "substantial effects" test as it currently stood after sixty years of molding and refinement. The liberal doctrines embodied in early "modern" cases like \textit{Wickard}, \textit{Wrightwood Dairy}, and \textit{Heart of Atlanta} were applied in perfect harmony against the more conservative backdrop of \textit{Lopez} and \textit{Morrison}. \textit{Raich} indeed involved the attempted regulation of a purely intrastate and noncommercial activity, but the majority understood that nothing in the Court's recent jurisprudence required the analysis to stop there.\textsuperscript{214} Rather, the Court properly took into account the fact that the activity, when viewed in the aggregate, substantially affected interstate commerce, that the regulation of such marijuana was crucial to the government's enforcement of the CSA, and that Congress had a rational basis for coming to both of these conclusions.\textsuperscript{215}

The Court's decisions in \textit{Lopez} and \textit{Morrison} did not preclude the result reached in \textit{Raich}. While those cases certainly took a more limiting view of the Commerce Clause with respect to the pure "substantial effects" test, insofar as intrastate activities that affect interstate commerce were required to be commercial or eco-

\textsuperscript{207} Id. at 459.
\textsuperscript{208} \textit{Raich}, 125 S. Ct. at 2201.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 2209.
\textsuperscript{213} \textit{Raich}, 125 S. Ct. at 2207, 2211.
nomic in nature before they could be federally regulated, *Lopez* and *Morrison* left intact the "necessary and proper" extension of that test.\(^1\)\(^6\) The *Raich* majority correctly noted that the presence of a broader statutory scheme of regulation, which could be weakened by a lack of enforcement against certain subclasses of activities, was an important distinguishing factor between the circumstances of *Raich* and those of *Lopez* and *Morrison.*\(^2\)\(^1\)\(^7\)

Justice Scalia's concurring opinion also relied on the fact that the Court "implicitly acknowledged in *Lopez* . . . [that] Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce."\(^2\)\(^1\)\(^8\) Indeed, "though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'"\(^2\)\(^1\)\(^9\)

In a perhaps more accurate reflection of the issues presented in *Raich* and the current state of Commerce Clause theory, Justice Scalia's opinion was not bogged down by the "economic-noneconomic" distinction. Such an inquiry is undoubtedly important where, as in *Lopez*, the federal statute under scrutiny concerns only a single activity, such as gun possession in a school zone, and is constitutionally challenged as a whole — i.e., the entire statute is claimed to exceed the scope of the Commerce Clause.\(^2\)\(^2\)\(^0\) In such cases, the question of whether the statute purports to regulate economic activity is identical to the question of whether the activity sought to be regulated is economic in nature. According to *Lopez* and *Morrison*, the same rule applies no matter how the question is phrased: the activity must be economic in order to be subject to federal regulation under the "substantial effects" test of the Commerce Clause.\(^2\)\(^2\)\(^1\)

However, where, as in *Raich*, the federal law is alleged to be unconstitutional as applied only to a specific *subgroup* of the class of activities covered by the statute, the "economic-noneconomic" distinction falls to the wayside. In these cases, the government's de-

\(^{214}\) Id. at 2218 (Scalia, J., concurring).
\(^{215}\) Id. at 2209-10 (majority opinion).
\(^{216}\) Id. at 2217 (Scalia, J., concurring).
\(^{217}\) Id. (quoting *Lopez*, 514 U.S. at 561).
\(^{218}\) *Raich*, 125 S. Ct. at 2209 (majority opinion).
\(^{219}\) *Lopez*, 514 U.S. at 560-61; *Morrison*, 529 U.S. at 610.
fense of the legislation will virtually always involve a "necessary and proper" type of argument, or rather, a contention that regulation of the subclass of activities is necessary to give meaningful regulatory effect to the entire statute. When such an argument is made, the pivotal question is not whether the activity sought to be regulated is economic in nature, but whether its control is truly essential to the regulation of the broader class of activities (or, more specifically, whether Congress had a "rational basis" for so concluding). The question of whether the overall statutory scheme regulates economic activity becomes an entirely different query from the issue of whether the specific conduct underlying the controversy can be characterized as economic. Moreover, the former question is not likely to arise, as the statute's general constitutionality under the Commerce Clause has not been attacked.

Thus, the majority's discussion of the CSA's regulation of economic activity was unnecessary, as neither Monson nor Raich had contended that the CSA, as generally applied, was an unconstitutional attempt to regulate noneconomic conduct. Justice O'Connor's dissent correctly pointed out that the majority had shifted its focus from the economic nature of "the activity at issue... to the entirety of what the CSA regulates," but again, neither inquiry is relevant when conducting a necessary and proper analysis. Because of this, the most persuasive element of the majority's opinion was its discernment of a "rational basis" upon which Congress had concluded that regulation of intrastate, medicinal marijuana is necessary to effectively enforce the CSA. Conversely, the most compelling part of Justice O'Connor's dissent was her rejection of the arguments in support of such a basis.

Raich will almost certainly stand for the Court's reaffirmance and refinement of the "necessary and proper" theory of Commerce Clause jurisprudence. The four-factor test utilized in Lopez and Morrison is still a valid standard for dealing with activity that either by itself or in the aggregate substantially affects interstate commerce, but where regulation of the conduct is not essential to a comprehensive regulatory scheme. The test will not be used, however, in cases involving regulation that is claimed to be necessary

220. "Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power." Raich, 125 S. Ct. at 2204.
221. Id. at 2224 (O'Connor, J., dissenting) (citing Lopez, 514 U.S. at 565).
222. Raich, 125 S. Ct. at 2207, 2213-14.
223. Id. at 2226, 2228 (O'Connor, J., dissenting).
and proper to broader commercial legislation. In such situations, significant attention will not be given to the economic or noneconomic nature of the specific activity at issue because "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." Nor will the Court be concerned with a lack of particularized congressional findings on the matter as long as it is determined that there was a rational basis for Congress' exercise of authority. As Justice Scalia pointed out, the natural safeguards built in to this mode of analysis will prevent the Necessary and Proper Clause from becoming "a back door for unconstitutional legislation."

Returning now to the human costs of the case, it is likely that many of the nation's citizens, both conservatives and liberals, will continue to lament the Raich decision as an unconscionable federal intrusion into the private affairs of the seriously ill. Yet the solution to this problem does not lie in artificially restraining the government's established Commerce Clause power. Rather, Congress should take note of the potentially dire medical and social impacts of allowing federal agents to arrest and prosecute medicinal marijuana users and reconsider the drug's classification as a Schedule 1 substance. Relegating marijuana to a less restrictive category would enable those who need to use and obtain it for medical purposes to do so without fear of criminal charges, while still allowing the federal government to maintain strict control of its manufacture, possession, and distribution.

The congressional findings deferred to by the Raich Court are certainly not the be-all or end-all of the matter. Even Congress is free to change its mind in light of new research and information, and it may do so with regard to medicinal marijuana without altering the scope of its Commerce Clause power.

Emily K. Nicholson

224. Id. at 2217 (Scalia, J., concurring) (citing Lopez, 514 U.S. at 561).
225. Raich, 125 S. Ct. at 2226 (O'Connor, J., dissenting). Justice Scalia noted that "the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective." Id. at 2218 (Scalia, J., concurring). Further, "even when the end is constitutional and legitimate, the means must be 'appropriate' and 'plainly adapted' to that end . . . [and] 'must be consistent with the letter and spirit of the constitution.'" Id. at 2219 (Scalia, J., concurring) (quoting McCulloch, 17 U.S. at 421).
226. Raich, 125 S. Ct. at 2215 (majority opinion).