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## The Future of the Federalism Revolution: *Gonzales v. Raich* and the Legacy of the Rehnquist Court

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# Note

## The Future of the Federalism Revolution:

### *Gonzales v. Raich* and the Legacy of the Rehnquist Court

By Christina E. Coleman\*

#### I. INTRODUCTION

With the passing of Chief Justice William Rehnquist,<sup>1</sup> some observers have wondered what will become of the former Chief Justice's "Federalism Revolution."<sup>2</sup> Chief Justice Rehnquist's Court restrained Congress's authority to enact federal legislation under the Commerce Clause for the first time since the New Deal era.<sup>3</sup> When the

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1. Liz Halloran & Angie Cannon, *Rehnquist's Death Leaves Second Vacancy*, U.S. NEWS & WORLD REP., Sept. 4, 2005, available at <http://www.usnews.com/usnews/news/articles/050904/4chiefjustice.htm>. The nation's sixteenth chief justice died of thyroid cancer on September 3, 2005. *Id.* William Rehnquist was Assistant U.S. Attorney General when President Nixon appointed him to the Court in 1971; he joined the Court as an Associate Justice in 1972. Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at A16. In 1986, President Reagan appointed him Chief Justice. *Id.*

2. See, e.g., Randy Barnett, *Will the 'New Federalism' Survive the New Court?*, WALL ST. J., Op-ed., Sept. 5, 2005, at A28, available at <http://www.volokh.com/posts/1126102484.shtml> ("[I]t was William Rehnquist who was most personally responsible for what is now called 'the New Federalism'—the revival of the ideas that judiciary should protect the role of the states within the federal system and enforce the textual limits on the powers of Congress."); David Bernstein, *Balkin on Originalism*, [http://www.volokh.com/archives/archive\\_2005\\_11\\_06-2005\\_11\\_12.shtml#1131389614](http://www.volokh.com/archives/archive_2005_11_06-2005_11_12.shtml#1131389614) (last visited Apr. 17, 2006) ("[A]m I optimistic that the 'federalism revolution' will be revived? No, at least not until the Republican Party signifies that it would provide some political support/cover for such a move."); see *infra* Part II.B (discussing Chief Justice Rehnquist's Federalism Revolution).

3. *United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (finding the Violence Against Women Act exceeded Congress's authority under the Commerce Clause); *United States v. Lopez*,

Court struck down federal legislation enacted under the Commerce Clause, critics heralded a new era of federalism.<sup>4</sup>

It appeared to certain commentators that the Court would continue in this direction in deciding *Gonzales v. Raich*, in which the Respondents challenged the constitutionality of the Controlled Substances Act (CSA) in the context of medical marijuana—these observers predicted the Court would not uphold such an attenuated exercise of the federal commerce power.<sup>5</sup> However, in *Raich*, the Court held that Congress had the power to regulate the purely local, noncommercial cultivation and possession of marijuana for personal medical use.<sup>6</sup> Chief Justice

514 U.S. 549, 560 (1995) (holding the Gun-Free School Zones Act beyond the scope of federal congressional power because it regulated a noneconomic activity).

4. See L. Darnel Weeden, *United States v. Morrison: The Supreme Court's Old School Federalism Places Federal Civil Rights for Women and Minorities at Risk*, 26 T. MARSHALL L. REV. 1, 1 (2000–2001) (“Prior to *Morrison* it was generally believed that Congress could use its power to regulate commerce to protect the civil rights of American citizens so long as there was a reasonably demonstrated nexus between the regulated activity and a burden on interstate commerce.”); Gordon G. Young, *The Significance of Border Crossings: Lopez, Morrison and the Fate of Congressional Power to Regulate Goods, and Transactions Connected with Them, Based on Prior Passage Through Interstate Commerce*, 61 MD. L. REV. 177, 183 (2002) (“In its apparently categorical exclusion of certain activities from Commerce Clause regulation, the *Lopez* Court takes a position resembling one taken by the pre-New Deal Court and strongly repudiated by subsequent Supreme Courts.”); Louis J. Virelli III & David S. Leibowitz, *Federalism Whether They Want It or Not: The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation after United States v. Morrison*, 3 U. PA. J. CONST. L. 926, 949 (2001) (“Despite a clearly established trend of evaluating statutes in terms of whether Congress acted rationally in finding that the regulated activity substantially affects interstate commerce, the *Lopez* Court instead focused on whether the regulated activity was economic in nature or belonged to an area of law that was traditionally reserved to the states.”).

5. Marcia Tiersky, Comment, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U. L. REV. 547, 593 (1999) (quoting Roger Pilon, *Medical Marijuana Hearing of the Crime Subcommittee of the House Judiciary Committee*, FED. NEWS SERV., Oct. 1, 1997) (“Not even the notorious case of *Wickard v. Filburn* will justify federal intervention in this kind of a case.”). See, e.g., *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003) (Kozinski, J., concurring) (“Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce.”); Jonathan H. Adler, *High Court High Anxiety: The Supreme Court's Medical-Marijuana Case Could Send Federalism Up in Smoke*, NAT'L REVIEW ONLINE, Dec. 1, 2004, <http://nationalreview.com> (arguing that under the government's reasoning at oral argument “there is no activity beyond Congress's grasp”); Catherine Laughlin, *U.S. Supreme Court Hears Oral Arguments in Ashcroft v. Raich*, 33 J.L. MED. & ETHICS 396, 399 (2005) (“[S]ome legal scholars have framed *Raich* as test of the Supreme Court's commitment to limiting federal power.”). But see Warren Richely, *It's Rehnquist's Court, but the Liberals Are Gaining*, USA TODAY, June 30, 2005, [http://www.usatoday.com/news/washington/2005-06-30-csm-liberal-court\\_x.htm?csp=34](http://www.usatoday.com/news/washington/2005-06-30-csm-liberal-court_x.htm?csp=34) (arguing that the supposed states' rights coalition—Justices Rehnquist, Thomas, Scalia, Kennedy and O'Connor—was on shaky ground, largely because of the swing votes of Kennedy and O'Connor (written prior to the departures of Justices Rehnquist and O'Connor)).

6. *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005). See *infra* Part III.A (outlining the facts of *Raich*). The Court denied an as-applied challenge to the constitutionality of the Controlled Substances Act of 1970, despite California law allowing seriously ill patients the use of marijuana

Rehnquist, Justice O'Connor and Justice Thomas vigorously dissented, insisting that such an extension of the federal commerce power was unprecedented.<sup>7</sup> The majority, including Justices Scalia and Kennedy, who voted with the *Raich* dissenters in earlier decisions limiting the commerce power, maintained that *Raich* was not analogous to those prior cases, and found a rational basis for congressional regulation.<sup>8</sup> With this apparent departure from earlier limitations on federal power set by the Rehnquist Court and the addition of two new Justices,<sup>9</sup> it is unclear whether *Raich* marks a shift away from federalism or simply a trumping of current drug policy over federalist concerns.<sup>10</sup>

Part II of this Note will provide an overview of Commerce Clause jurisprudence, with special focus on the three central cases discussed in the *Raich* opinion: *United States v. Lopez*, *United States v. Morrison*, and *Wickard v. Filburn*.<sup>11</sup> In addition, Part II will briefly outline Justice Rehnquist's efforts to turn the Court toward federalism.<sup>12</sup> Part II will also outline the history of drug regulation in the United States and describe the main provisions of the CSA and state legislation governing

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for therapeutic purposes on the recommendation of a physician. *Raich*, 125 S. Ct. at 2201. After federal agents destroyed the marijuana plants of one such medical marijuana user, an injunction action was brought in federal court, eventually reaching the Supreme Court. *Id.* at 2200.

7. *Raich*, 125 S. Ct. at 2220–39.

8. *Id.* at 2200.

9. William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST, July 1, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html>. Justice O'Connor announced her retirement from the Court effective July 1, 2005. *Id.* Prior to the death of Chief Justice Rehnquist, Judge John Roberts was nominated to replace Justice O'Connor; following Chief Justice Rehnquist's death, he was tapped by President Bush to lead the Court. Richard W. Stevenson, *President Names Roberts as Choice for Chief Justice*, N.Y. TIMES, Sept. 6, 2005, at A1. He was confirmed as Chief Justice on Sept. 29, 2005. Sheryl Gay Stolberg & Elizabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice: Democrats Split – Focus Now on Second Pick*, N.Y. TIMES, Sept. 30, 2005, at A1. On January 31, 2006, Justice Samuel Alito was sworn in to replace Justice O'Connor after a Senate vote that sharply divided Democrats and Republicans. David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006 at A21.

10. Hendrick Hertzberg, *Watched Pot*, NEW YORKER, June 27, 2005, available at [http://www.newyorker.com/talk/content/articles/050627ta\\_talk\\_hertzberg](http://www.newyorker.com/talk/content/articles/050627ta_talk_hertzberg). Hertzberg argues that in *Gonzales v. Raich* “the true agenda of the majority (especially its moderate members) was to slow the Court’s ‘federalist’ . . . drift toward chipping away at the regulatory powers of the national government, while the minority’s purpose was to accelerate that drift.” *Id.*

11. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that intrastate activities of an individual may not escape regulation under the Commerce Clause if those activities, when taken in consideration with those of other similarly situated actors, have an effect on interstate commerce); *supra* note 3 (briefly describing *Lopez* and *Morrison*). See *infra* Part II.A (reviewing the history of federal commerce power interpretations).

12. See *infra* Part II.B (detailing Justice Rehnquist’s Federalism Revolution and the landmark cases *United States v. Lopez* and *United States v. Morrison*).

medical marijuana use.<sup>13</sup> Part III then will discuss the majority, concurring and dissenting opinions from the United States Supreme Court's decision in *Gonzales v. Raich*.<sup>14</sup> Part IV will argue that the dissenting judges were correct in asserting that the purely local, noncommercial cultivation of marijuana for personal use as defined by state law is a class of activities beyond the scope of the Commerce Clause.<sup>15</sup> Part V will evaluate the impact of *Raich* on future Commerce Clause challenges, as well as on CSA enforcement, and will consider the future of federalism.<sup>16</sup> This Note will conclude by asserting that with the majority decision in *Raich*, and the replacement of two confirmed federalists on the Court, the future of the new federalism is uncertain.<sup>17</sup>

## II. BACKGROUND

This Part will provide an overview of Commerce Clause jurisprudence, with a primary focus on the expansion of the federal commerce power in the New Deal Era, which reached its apogee with *Wickard v. Filburn*.<sup>18</sup> It will examine the subsequent shift towards a federalist approach to Commerce Clause cases with the arrival of (then) Justice Rehnquist.<sup>19</sup> In addition, this Part will furnish a brief history of drug regulation and outline the pertinent provisions of the Controlled Substances Act (CSA) and California's Compassionate Use Act.<sup>20</sup>

### A. *The Development of the Commerce Clause*

Under the Tenth Amendment to the U.S. Constitution, any powers not expressly granted to the federal government are reserved to the states.<sup>21</sup> While the Tenth Amendment appears to limit federal power,

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13. See *infra* Part II.C (providing a short history of drug legislation, and detailing pertinent federal and state legislation).

14. See *infra* Part III.D.1 (discussing the majority opinion in *Raich*); *infra* Part III.D.2 (discussing the concurring opinion in *Raich*); *infra* Part III.D.3 (discussing the dissenting opinions in *Raich*).

15. See *infra* Part IV (analyzing the majority's economic and separate class arguments).

16. See *infra* Part V.A (examining the impact of *Raich* on medical marijuana users).

17. See *infra* Part V.B (considering the impact of *Raich* on the future of federalism).

18. See *infra* Part II.A (providing a brief outline of Commerce Clause challenges from the first Supreme Court decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

19. See *infra* Part II.B (describing modern Commerce Clause challenges since the arrival of Justice Rehnquist on the bench).

20. See *infra* Part II.C (providing a short history of drug regulation in America, including Prohibition).

21. U.S. CONST. amend. X. ("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 Commerce Clause of the Constitution expands it and has been used to authorize the bulk of federal legislation.<sup>22</sup> In the seminal case of *Gibbons v. Ogden*, Chief Justice John Marshall rejected a limited definition of “commerce” as traffic and, instead, defined it broadly as “commercial intercourse,” sweeping any such activity with an interstate element into its purview.<sup>23</sup> For most of the nineteenth century, however, Congress utilized its power under the Commerce Clause in a predominantly negative fashion, as a means of restricting state activity.<sup>24</sup>

### 1. The Rise of the Commerce Power—The Early Years

The transition of the commerce power from a “dormant” or “negative” power into an affirmative legislative power was not direct, despite Justice Marshall’s generous interpretation in *Gibbons*.<sup>25</sup> The affirmative legislative power of Congress under the Commerce Clause came into question in the late nineteenth century after passage of the Interstate Commerce Act<sup>26</sup> and the Sherman Anti-Trust Act,<sup>27</sup> both of

22. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 807–08 (3d ed. 1999) (“The Commerce Clause is both the chief source of congressional regulatory power and, implicitly and more controversially, a limitation on state legislative power.”). U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the Several states, and with the Indian Tribes.”).

23. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 3 (1824) (“The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State.”). TRIBE, *supra* note 22, at 808. Justice Marshall stated that 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.” *Gibbons*, 22 U.S. at 196. Justice John Marshall, the fourth Chief Justice of the Supreme Court (1801–1835), was a prominent Richmond attorney and a member of the Virginia convention that ratified the federal Constitution in 1788. *THE SUPREME COURT JUSTICES, ILLUSTRATED BIOGRAPHIES*, 1789–1993, at 62–63 (Clare Cushman ed., 1993). President Adams appointed Marshall Secretary of State in 1800; he was made Chief Justice in 1801. *Id.* at 62.

24. TRIBE, *supra* note 22, at 808–10 (“Most cases in the early period concerned the validity of state action arguably conflicting with ‘dormant’ congressional power over commerce, otherwise known as the negative or dormant Commerce Clause.”).

25. *Id.*

26. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). Enacted in 1887, the Interstate Commerce Act created the Interstate Commerce Commission (ICC), the first of the powerful regulatory commissions established by Congress. *THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES 17–19* (Bernard Schwartz ed., 1973). The ICC was established at a time when the railroads were engaging in “highly speculative railroad building, irresponsible financial manipulation, destructive competitive warfare resulting in monopolies, [and] fluctuating and discriminatory rates . . .” *Id.* at 17. Although the ICC’s name referred to interstate commerce, Schwartz states that “the commission was, accurately speaking, only an Interstate Railroad Commission, rather than a commission to regulate interstate commerce in general.” *Id.* at 20. See generally RICHARD D. STONE, *THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY*

which conferred broad regulatory powers on Congress. The view taken by the Court at that time did not always reflect Chief Justice Marshall's broad approach.<sup>28</sup> For example, in *United States v. E.C. Knight & Co.*, the Court found that Congress lacked authority to regulate manufacturing, because it was distinct from commerce, despite the fact that the products of such manufacturing would later enter the stream of interstate commerce.<sup>29</sup> However, the Court's subsequent holding in the *Shreveport Rate Cases* directly contrasted with the *Knight* decision; in *Shreveport Rate* the Court held that congressional power to regulate interstate commerce extended to any matter with a "close or substantial relation to interstate traffic" adequate to require federal control.<sup>30</sup> The Court distinguished between direct and indirect effects on interstate traffic, and this distinction was later often the basis for limitations on the reach of the Commerce Clause.<sup>31</sup> The tension between *Shreveport* and *Knight* was not easily resolved; *Shreveport*'s expansive notion of the federal commerce power was a far cry from the restrictive holding of *Knight*.<sup>32</sup>

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OF REGULATORY POLICY 1-30 (1991) (describing the "[e]ra of negative regulation," the years prior to the passage of Interstate Commerce Act and subsequent developments through 1920).

27. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 2-4 (2000)). See also Sherman Anti-Trust Act, <http://www.encyclopedia.com/html/S/ShermanA1.asp> (last visited Apr. 17, 2006):

[O]pposition to the concentration of economic power in large corporations and in combinations of business concerns led Congress to pass the Sherman Act [in 1890]. The act, based on the constitutional power of Congress to regulate interstate commerce, declared illegal every contract, combination (in the form of trust or otherwise), or conspiracy in restraint of interstate and foreign trade.

*Id.*

28. *TRIBE*, *supra* note 22, at 810 ("The view of the Commerce Clause developed by the Court during this period contrasted sharply with the approach of Chief Justice Marshall in *Gibbons v. Ogden*.").

29. *United States v. E.C. Knight & Co.*, 156 U.S. 1, 17 (1895). The Court held that the federal commerce power did not extend to the purchase of sugar refinery stock. *Id.* *Knight* is "[p]erhaps the case most often cited as an illustration of the interpretive technique of categorical exclusion . . . ." Virelli & Leibowitz, *supra* note 4, at 935.

30. *Houston, E. & W. Tex. Ry. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 351 (1914) (upholding federal legislation setting rates for intrastate routes because they had direct effect on interstate commerce).

31. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548-549 (1935). The Court held invalid federal regulations governing working conditions of employees in a strictly intrastate business, holding that any effect on interstate commerce in that case was indirect, and indirect effects were insufficient to warrant federal interference. *Id.* Otherwise, the Court noted, "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.

32. See generally PAUL R. BENSON, *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970*, at 48-52 (1970) ("The revolutionary effect of the *Shreveport* doctrine was to provide constitutional sanction for the future expansion of national sovereignty over the American

In the first decades of the twentieth century, the Court often upheld Congress's Commerce Clause authority to enact social welfare legislation, particularly in instances prohibiting pernicious items, such as lottery tickets and bad eggs, suggesting a shift towards a more comprehensive interpretation of the Commerce Clause.<sup>33</sup> In *Hammer v. Dagenhart*, however, the Court held that Congress could not prohibit interstate commerce in products created by child labor, arguing that unlike the cases involving harmful commodities, the items being shipped were themselves harmless.<sup>34</sup> The Court insisted that local regulation properly governed the manufacture of commercial goods, even those destined for interstate commerce.<sup>35</sup> The Court's reasoning in *Hammer* was extended to cases involving manufacturing; in *Carter v. Carter Coal Co.*, the Court held that Congress could not regulate coal production, as it was a purely local activity centered on manufacturing and production, not commerce.<sup>36</sup> Continuing in this vein of restricting federal power, the Court struck down federal legislation in *Carter* and *A.L.A. Schechter Poultry Corp.*, relying on the direct-indirect distinction made in the *Shreveport Rate Cases*.<sup>37</sup>

## 2. The New Deal Era

However, in 1937 with *NLRB v. Jones & Laughlin Steel Corp.*, the

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economy at the expense of state power.”).

33. See, e.g., *Hoke v. United States*, 227 U.S. 308, 322–23 (1913) (holding that Congress could prohibit white slave traffic); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 68–69 (1911) (finding that Congress could regulate to prevent impure food and drugs); *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 363 (1903) (upholding Congress's power to prohibit the transport of lottery tickets from one State to another). But see *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (invalidating a federal regulation limiting the interstate sale of goods produced using child labor). The Court held that the commerce power did not “incidentally include[] the authority to prohibit the movement of ordinary commodities . . .” *Id.* at 270. The *Hammer* decision appeared to contradict the holdings of *The Lottery Case*, *Hoke*, and *Hipolite Egg*, and was overruled in *United States v. Darby*, 312 U.S. 100, 113 (1941) (“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.”).

34. *Hammer*, 247 U.S. at 272.

35. *Id.* However, in his dissent, Justice Holmes argued: “The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights.” *Id.* at 281 (Holmes, J., dissenting).

36. *Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936) (“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.”).

37. See *supra* note 31 and accompanying text (discussing the distinction between direct and indirect effects).



Court effected a significant shift in direction.<sup>38</sup> In *Jones & Laughlin*, the Court dispensed with the direct and indirect analysis of the *Shreveport Rate Cases* and framed the issue rather as one of degree.<sup>39</sup> The Court reiterated that congressional commerce power exists even in the case of intrastate activities if there is "a close and substantial relation to interstate commerce" that makes federal control imperative.<sup>40</sup> Shortly after *Jones & Laughlin*, the Court also overruled *Hammer*.<sup>41</sup> Thus the New Deal era ushered in a series of decisions greatly expanding the federal commerce power,<sup>42</sup> and it was during this period that the rational basis test and presumption of constitutionality for economic and social legislation developed.<sup>43</sup> For the next sixty years,

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38. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). At this time, the nation was in grip of the Great Depression, and President Roosevelt's attempts to repair the economy under the New Deal program had been largely thwarted by the Court. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 231-232 (1993). Roosevelt responded to the Court's adhesion to a laissez-faire model of government regulatory power by introducing his "Court-packing" plan in 1937, which would have allowed him to appoint six new justices. *Id.* at 233. See generally BRUCE ACKERMAN, WE THE PEOPLE 47-50 (1991) (arguing that President Roosevelt's "Court-packing plan" was the impetus for the Court's shift in direction). However, there is evidence that the Court voted on *Jones & Laughlin* before the plan was disclosed. JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLE AND POLICY, CASES AND MATERIALS 91 (6th ed. 2002). Schwartz also points out that the Court had also decided to uphold a state-minimum wage law before the President's announcement, indicating that the shift in attitude was not provoked by the President's plan. SCHWARTZ, *supra* note 38, at 235.

39. *Jones & Laughlin*, 301 U.S. at 37 ("The question is necessarily one of degree.").

40. *Id.* (referencing *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 544 (1935)).

41. *United States v. Darby*, 312 U.S. 100, 118 (1941) (invoking the Necessary and Proper Clause and stating that Congress's commerce power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end . . ."). See U.S. CONST., Art. I, § 8, cl. 18. ("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."). In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), Chief Justice Marshall gave the Necessary and Proper Clause a broad interpretation: "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 that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* concerned the ability of Congress to charter a bank, which is not an enumerated power under the Constitution. See SCHWARTZ, *supra* note 38, at 45-47. "The Necessary and Proper Clause attaches not only to the enumerated congressional powers of Article I, § 8, but also to 'all other Powers vested by this Constitution in the Government of the United States . . .'" TRIBE, *supra* note 22, at 805.

42. See generally KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 79-86 (2004) (arguing that Roosevelt appointed liberal Justices deferential to federal power to secure his civil rights agendas).

43. See, e.g., *United States v. Carolene Products*, 304 U.S. 144, 152 (1938), stating that: [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

the Court found almost no outer limits on the commerce power, and federal legislation was essentially unchecked by the restrictions of federalism.<sup>44</sup>

### 3. The Height of New Deal Power—*Wickard v. Filburn*

The Court reached the zenith of Commerce Clause power in *Wickard v. Filburn*, when it held that cultivation of wheat for consumption on the farm upon which it was grown could be regulated under the Commerce Clause as an activity or part of a class of activities affecting interstate commerce.<sup>45</sup> In 1942, a farmer named Filburn brought an as-applied challenge<sup>46</sup> to wheat quota regulations promulgated under the Agricultural Adjustment Act of 1938 (AAA).<sup>47</sup> The purpose of the AAA was to control wheat prices by preventing surpluses and shortages; to achieve this goal an annual national allotment of wheat was set by the Secretary of Agriculture and apportioned to the states,

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rational basis within the knowledge and experience of the legislators.

44. Barnett, *supra* note 2 (“[T]he New Deal Court replaced the Constitution’s textual scheme of limited federal power with a policy of judicial deference to any claim by Congress to regulate anything and everything with even a remote connection with the national economy.”).

45. *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942). See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (describing *Wickard* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity . . .”). The Court did not use the “class of activities” terminology specifically in the case; discussion of activities in a class appeared in *Perez v. United States*, 402 U.S. 146, 152 (1971). In *Perez*, the Court held that extortionate credit transactions could be categorized as a class of activities having an adequately substantial impact on interstate commerce to be within the reach of the Commerce Clause. *Id.* at 155–56.

46. Black’s Law Dictionary defines an as-applied challenge as “[a] claim that a law or governmental policy, though constitutional on its face, is unconstitutional as applied, usu. because of a discriminatory effect; a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party.” BLACK’S characterizes a facial challenge as “[a] claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally.” BLACK’S LAW DICTIONARY 244 (8th ed. 2004). See also *Sanjour v. EPA*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995):

The usual distinction between ‘as-applied’ and ‘facial’ challenges is that the former ask only that the reviewing court declare the challenged statute or regulation unconstitutional on the facts of the particular case; the latter, in contrast, request that the court go beyond the facts before it to consider whether, given all of the challenged provision’s potential applications, the legislation creates such a risk of curtailing protected conduct as to be constitutionally unacceptable ‘on its face.’

*Id.* *Sanjour* involved a “First Amendment challenge to regulations prohibiting EPA employees from receiving travel expense reimbursement from private sources for unofficial speaking or writing engagements concerning the subject matter of the employees’ work, while permitting such compensation for officially authorized speech on the same issues.” *Id.* at 87.

47. *Wickard*, 317 U.S. at 113. See generally Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation and Congressional Power over Commerce*, in CONSTITUTIONAL LAW STORIES 69 (Michael C. Dorf ed., 2004) (providing details of the AAA and the background of *Wickard*).

which in turn authorized acreages for each individual farm.<sup>48</sup> The AAA included within its purview wheat “available for marketing” and wheat that was fed to livestock that might be sold.<sup>49</sup> Under the AAA, Filburn was entitled to sow 11.1 acres of wheat in 1941.<sup>50</sup> However, Filburn planted twenty-three acres, and maintained that the excess was to be used solely on his farm.<sup>51</sup> Therefore, according to Filburn, Congress could not regulate the surplus wheat under the Commerce Clause.<sup>52</sup>

In its holding, the Court observed that, as far back as the *Shreveport Rate Cases*, federal regulation of intrastate activities with a “close and substantial relation to interstate traffic” had been upheld.<sup>53</sup> The Court affirmed *Jones & Laughlin’s* eradication of the distinction between direct and indirect effects on the market, stating that whatever the nature of the activity, even if it is local and not considered commerce, it may be regulated by Congress “if it exerts a substantial economic effect on interstate commerce.”<sup>54</sup> Turning then to the current state of the wheat market, the Court explained that consumption of homegrown wheat was the most variable factor in the national market.<sup>55</sup> Justice Jackson, writing for the Court, contended that while Filburn’s activities might be construed as trivial standing on their own, they could not be deemed as such when viewed together with comparable actions of others across the country.<sup>56</sup> The aggregate effect of farmers nationwide producing crops

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48. *Wickard*, 317 U.S. at 115 (“Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms.”); *Chen*, *supra* note 47, at 83 (“Acreage limitations were the Act’s primary tool for controlling the supply of federally subsidized crops. Supply control has always played a crucial role in rationalizing agricultural regulation.”).

49. *Wickard*, 317 U.S. at 113–14.

50. *Id.* at 114.

51. *Chen*, *supra* note 47, at 83. “Filburn sold part of his wheat crop, fed part to his cattle and poultry, ground part into flour for household consumption, and kept the rest as seed for the following season.” *Id.*

52. *Wickard*, 317 U.S. at 113–14. The Court observed that, although the Commerce power had “great latitude,” activities could not be regulated under it unless “part of the product is intended for interstate commerce or intermingled with the subjects thereof.” *Id.* at 120.

53. *Id.* at 123 (citing *Houston, E. & W. Tex. Ry. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 351 (1914)). See *supra* note 30 and accompanying text (explaining the substantial relation test).

54. *Wickard*, 317 U.S. at 125. See *supra* Part II.A.1 (discussing the development of the indirect and direct analysis for a Commerce Clause challenge).

55. *Wickard*, 317 U.S. at 127.

56. *Id.* at 127–28. Justice Robert H. Jackson was appointed to the Supreme Court by President Roosevelt in 1941, having previously served as U.S. Attorney General. Robert H. Jackson as Associate Justice of the Supreme Court, <http://www.roberthjackson.org/Man/theman2-2-2-4> (last visited Apr. 17, 2006). Justice Jackson served on the Court until his death in 1954. *Id.*

for local use had a substantial impact on interstate commerce, because homegrown wheat removed the grower from both the supply and demand sides of the market.<sup>57</sup> In this way, intrastate production competed with wheat in interstate commerce, and thus the class of activity had a substantial impact on the national market and could be regulated by Congress.<sup>58</sup>

For the next fifty years, the Court interpreted the federal commerce power broadly, upholding congressional legislation against Commerce Clause challenges in a variety of contexts, perhaps most importantly in sustaining the Civil Rights Act of 1964.<sup>59</sup> Increased deference to congressional findings was an essential component of these holdings.<sup>60</sup> Critics characterize the period as one of largely unfettered federal power.<sup>61</sup>

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During the October 1945 term, Justice Jackson served as American Chief of Counsel, prosecuting Nazi leaders before the International Military Tribunal at Nuremberg. *Id.*

57. *Wickard*, 317 U.S. at 128. The complex concepts of supply and demand involve multiple economic theories, including demand schedule and curve. MARTIN BRONFENBRENNER ET AL., *MICROECONOMICS* 52 (1984). Individual, market and aggregate levels of supply and demand function differently. *Id.* While individual demand is an important theoretical concept, "it is market, or aggregate, demand that determines the revenue as a whole that sellers receive for various prices." WILLIAM SHER & RUDY PINOLA, *MODERN MICROECONOMIC THEORY* 161 (1986).

Market demand is the sum of all the individual consumers' demands for a particular good or service in a certain location. Market supply is the sum of all the individual firms' supplies of that good or service in the same location. The interaction of market demand and market supply determines the market price used in buying and selling. Aggregate demand and aggregate supply, in turn, result from adding up all the money values of different market demands and market supplies that exist in a nation or economy.

BRONFENBRENNER, *supra* note 57, at 53.

58. *Wickard*, 317 U.S. at 128–29. *Wickard* "completely swept away the old distinction between production and commerce; manufacturing, mining and agriculture were now considered to be part of commerce and inseparable from it." BENSON, *supra* note 32, at 101.

59. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (holding disruptive effect on interstate commerce of racial discrimination in intrastate accommodation sufficient to permit legislation under the Commerce Clause); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding intrastate refusals to serve African Americans food that had moved in interstate commerce imposed sufficient burden on interstate commerce to support exercise of federal commerce power). In *Katzenbach*, the Court stated that where Congress had a rational basis for finding that regulation of intrastate activity was necessary for the furtherance of interstate commerce, its commerce power was valid. *Katzenbach*, 379 U.S. at 304.

60. *TRIBE*, *supra* note 22, at 814–15. In civil rights legislation cases, and others decided in this period, "congressional fact-finding stressed that the regulation of local incident of an activity was necessary to abate a cumulative evil affecting national commerce. The Supreme Court has without fail given effect to such congressional findings." *Id.*

61. Judge Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995) (describing the Commerce Clause in the 1970's as the "'Hey, you-can-do-whatever-you-feel-like Clause'"). Judge Kozinski was appointed by President Reagan to the Ninth Circuit in

### B. Justice Rehnquist's New Federalism

In a departure from cases authorizing the enhancement of the commerce power, in 1976, (then) Justice Rehnquist authored the Court's opinion in *National League of Cities v. Usery*, which restricted the right of federal interference in "traditional government functions."<sup>62</sup> In *National League of Cities*, Justice Rehnquist, writing for a 5-4 Court, found that certain amendments to the federal Fair Labor and Standards Act (FLSA) significantly disrupted the states' ability to self-govern.<sup>63</sup> He identified several key areas that were typically administered by state and local government as traditional government functions, including health, police, fire prevention, parks, and sanitation.<sup>64</sup> Under a theory of intergovernmental immunity, Justice Rehnquist argued that the federal wage requirements at issue in the case stood in direct opposition to the states' power to effect policy decisions and were not authorized by the commerce power.<sup>65</sup> Justice Rehnquist's "traditional governmental function" standard was noted in several other cases,<sup>66</sup> but the standard was later deemed "unworkable" in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>67</sup> In *Garcia*, the Court explicitly overruled *National League of Cities*, and returned to a broader view of the federal commerce power by holding that there could be no rule of state immunity simply because the function to be regulated was

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1985. Cato Unbound, Alex Kozinski, <http://www.cato-unbound.org/contributors/alex-kozinski/> (last visited Apr. 17, 2006). One commentator described him as "[c]ulturally libertarian while politically conservative . . ." Robert S. Boynton, *Wise Guy*, GEORGE, Dec. 95/Jan. 96 at 254.

62. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (striking down provisions of the federal Fair Labor and Standards Act as applied to state and municipal employees). "The *National League of Cities* decision marked a dramatic resurgence of a Tenth Amendment barrier to federal power." Virelli & Leibowitz, *supra* note 4, at 943.

63. *Nat'l League of Cities*, 426 U.S. at 852.

64. *Id.* at 851.

65. *Id.* at 852. In so holding, *National League of Cities* overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding Fair Labor and Standards Act requirements for state and municipal employees). "Wirtz exemplified the largely unquestioned prevailing view . . . that the rights of the states provided no judicially-enforceable limits on congressional power." Virelli & Leibowitz, *supra* note 4, at 944 n.106. The doctrine of intergovernmental immunity holds that "[w]ithin certain spheres neither the federal government nor the states may intrude on the other." JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 236 (1999).

66. See, e.g., *Hodel v. Va. Surface Min. Reclamation Ass'n*, 452 U.S. 264, 286-89 (1981) (finding valid federal strip mining regulation and detailing the requirements under *National League of Cities* to prevail on Tenth Amendment cases); *EEOC v. Wyoming*, 460 U.S. 226, 240-44 (1983) (upholding application of the ADEA and finding that federal interference was not adequate to allow challenge under the *National League of Cities* standard).

67. 469 U.S. 528, 546-47 (1985). "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" *Id.*

traditional.<sup>68</sup> Chief Justice Rehnquist's dissent was brief but expressed his confidence that the pendulum would swing back to a narrow approach to the federal commerce power.<sup>69</sup> Ten years later, his prediction came true when *Lopez*, in which (now) Chief Justice Rehnquist wrote for the majority, put limits on the seemingly unbounded federal commerce power, shocking the legal academy and sending a warning to Congress.<sup>70</sup>

### 1. *United States v. Lopez*

In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990 as beyond the scope of Congress's commerce power.<sup>71</sup> In his opinion, the Chief Justice urged a return to first principles of Constitutional interpretation.<sup>72</sup> Justice Rehnquist explained that the Gun-Free School Zones Act did not regulate a commercial activity, as it purported to prevent possession of a firearm within a certain locality; furthermore, it did not contain any express jurisdictional element requiring the possession of the gun to be related to interstate commerce.<sup>73</sup> In its analysis, the Court delineated three classes of activity that Congress may permissibly regulate under the Commerce Clause: 1) channels of interstate commerce; 2) instrumentalities of interstate commerce, and commodities and people in interstate commerce; and 3) activities substantially affecting interstate commerce.<sup>74</sup> The Chief Justice stated that activities falling into the last

68. *Id.*

69. *Id.* at 579–80 (Rehnquist, J., dissenting).

70. *United States v. Lopez*, 514 U.S. 549, 565 (1995); Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 CAL. L. REV. 1575, 1607 (2000) ("*Lopez* provided an immediate warning shot, indicating that, however distended the Commerce Clause had become over the years, it still drew a firm line between the roles of nation and state."); Barnett, *supra* note 2 ("For the first time in 60 years, the Court found a federal statute to have exceeded the commerce power of Congress.").

71. *Lopez*, 514 U.S. at 565. The Gun-Free School Zones Act of 1990 (Pub. L. No. 101-647, 104 Stat. 4844) (1990) stated that "it is illegal to possess a firearm at a place that is within 1,000 feet of a school zone . . . ." After *Lopez*, the pertinent section was amended to read: "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(2)(A) (2000).

72. *Lopez*, 514 U.S. at 552 (emphasizing that "[t]he Constitution creates a Federal Government of enumerated powers.").

73. *Id.* at 561. An example of an express jurisdictional element might be a requirement that guns having moved in interstate commerce could be not possessed in a school zone. *TRIBE, supra* note 22, at 818 n.45.

74. *Lopez*, 514 U.S. at 558–59. In his analysis Justice Rehnquist cited *Perez, Shreveport Rate Cases*, and *Jones & Laughlin*, among others. *Id.* See *supra* Part II.A (discussing *Perez, Shreveport Rate Cases*, and *Jones & Laughlin*).

category should be analyzed according to whether they were economic or noneconomic.<sup>75</sup> While economic activities clearly could be regulated under the Commerce Clause, noneconomic activities must be more closely scrutinized to determine whether they are subject to federal power.<sup>76</sup> Observing that the Gun-Free School Zones Act was a criminal statute unconnected with commerce, the Chief Justice noted that it was not part of a larger scheme governing economic activity.<sup>77</sup> Moreover, Congress did not include any specific findings illustrating the effect of gun possession in a school zone on interstate commerce.<sup>78</sup> Although the Government outlined the impact of violent gun crime on the national economy, the Court found the link between such crimes and interstate commerce was too attenuated.<sup>79</sup>

The Chief Justice rejected Justice Breyer's dissenting contention that the influence of violence on education and learning sufficiently threatened the national economy to support congressional regulation.<sup>80</sup> Chief Justice Rehnquist explained that such an interpretation would permit general federal intervention in education, which has historically been under the governance of the states.<sup>81</sup> Contending that any activity can be deemed commercial when considered in its generalities, Chief

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75. See *TRIBE*, *supra* note 22, at 822. Tribe warns against overstating the apparent similarity between this approach and those of the pre-1937 cases distinguishing production and manufacturing from commerce. *Id.* In *Lopez* the majority was simply differentiating between the regulation of activity that is economic and that which was not. *Id.*

76. *Lopez*, 514 U.S. at 561–62. Young, *supra* note 4, at 182 (“If some activity seems noneconomic on the surface . . . then the burden is on the federal government to establish a substantial effect on interstate commerce by very persuasive evidence . . .”).

77. *Lopez*, 514 U.S. at 561. Moreover, the Court noted that the statute in question displaced existing state law; the defendant was initially charged under state law, but state charges were dropped after federal authorities charged him with violating the Gun-Free School Zones Act. *Id.* at 551.

78. *Id.* at 562–63 (explaining that although congressional findings are not required, they serve to assist the Court in interpreting legislative intent, particularly in cases where the relation between the activity and interstate commerce appears so remote that it is not “visible to the naked eye”). One observer noted, “the main effect of *Lopez* is very likely to be nothing more than a renewed congressional interest in loading federal criminal statutes with findings and jurisdictional ‘elements’ . . .” H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 651–52 (1995). However, as *Morrison* illustrated, the addition of congressional findings would not guarantee the jurisdictional nexus required by the Court. *United States v. Morrison*, 529 U.S. 598, 614 (2000). See *infra* Part II.B.2 (explaining that the Court rejected the link between interstate commerce and violence against women as too tenuous).

79. *Lopez*, 514 U.S. at 564 (“[W]e are hard pressed to posit any activity by an individual that Congress is without power to regulate” under the Government’s scheme).

80. *Id.* at 565 (quoting Breyer, J., dissenting, at 623). In his dissent, Justice Breyer maintained that Congress could have found a rational connection between violent gun crime in school zones and the national economy. *Id.* at 623 (Breyer, J. dissenting).

81. *Id.* at 564–65.

Justice Rehnquist admitted that no precise formulation governs whether an intrastate activity is commercial.<sup>82</sup> However, for Chief Justice Rehnquist, when one must “pile inference upon inference” to find a substantial impact on the national economy, the distinction between interstate and intrastate activity is lost.<sup>83</sup> As such, the *Lopez* Court held that the Gun-Free School Zones Act was beyond Congress’s Commerce power.<sup>84</sup> The Court’s return to a limited view of congressional power under the Commerce Clause would continue with *United States v. Morrison*.<sup>85</sup>

## 2. *United States v. Morrison*

After *Lopez*, the Rehnquist Court continued to restrict the federal commerce power in *United States v. Morrison*.<sup>86</sup> In *Morrison*, the respondents challenged the provision of a federal civil remedy for victims of gender-based violence in the Violence Against Women Act (VAWA) as beyond the scope of the commerce power.<sup>87</sup> The government argued that the statute was valid under the Commerce Clause because violence against women has substantial impact on interstate commerce.<sup>88</sup>

In *Morrison*, Chief Justice Rehnquist developed a four-factor test to determine whether an activity substantially affects interstate commerce: 1) whether the statute in question is a criminal law having any relation to commerce or economic enterprise; 2) whether the law contains a “jurisdictional element” that limits its reach; 3) whether there are specific congressional findings detailing the effect of the regulated

82. *Id.* at 566–67.

83. *Id.* at 567.

84. *Id.* at 567–68.

85. *United States v. Morrison*, 529 U.S. 598 (2000). See generally Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605 (2000–2001) (positing that the Court has created unworkable standards in *Lopez* and *Morrison*).

86. *Morrison*, 529 U.S. at 598.

87. *Id.* at 601–02. The statute at issue was 42 U.S.C. § 13981(e)(3), part of the Violence Against Women Act (VAWA) of 1994. *Id.* VAWA represented a federal response to gender-based violence, criminalizing domestic violence against women and providing victims with federal remedies. DAVID FORD ET AL., U.S. JUST. DEP’T, CONTROLLING VIOLENCE AGAINST WOMEN: A RESEARCH PERSPECTIVE ON THE 1994 VAWA’S CRIMINAL JUSTICE IMPACTS 3 (2002).

88. *Morrison*, 529 U.S. at 607 (“Congress found that gender-motivated violence affects interstate commerce ‘by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.’”) (citing H.R. CONF. REP. NO. 103-711 at 385 (1994) and U.S. CODE CONG. & ADMIN. NEWS at 1803, 1853 (1994)).



activity on interstate commerce; and 4) whether the link between the activity and its effect on interstate commerce is remote.<sup>89</sup> The Court observed that the statute in question, as in *Lopez*, concerned criminal conduct and contained no express jurisdictional element; however, in contrast to *Lopez*, the statute in *Morrison* was supported by specific congressional findings.<sup>90</sup> While congressional findings often serve as a mechanism to find a rational basis for congressional conclusions concerning the impact of an activity on interstate commerce, the Court rejected the findings in this instance because the connection was too tenuous.<sup>91</sup> Affirming *Lopez*, the Court held that Congress could not regulate noneconomic activity based on its aggregate effect on interstate commerce.<sup>92</sup> Together with *Lopez*, *Morrison* was essential in establishing the Chief Justice's New Federalism.<sup>93</sup>

Beginning with *National League of Cities* in 1976, the Chief Justice aimed to return traditional arenas of state governance to state control and pursued that aim persistently throughout his career, culminating with *Lopez* and *Morrison*.<sup>94</sup> Some scholars found Chief Justice Rehnquist's approach to states' rights to be extreme and even misguided; by contrast others argued that the so-called revolutionary decisions in *Lopez* and *Morrison* were so limited that very little had changed.<sup>95</sup> Generally, however, the "new federalism" or "Federalism

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89. *Id.* at 610–12.

90. *Id.* at 614. Young, *supra* note 4, at 183 ("[W]hile the absence of [congressional] findings was fatal in *Lopez*, their presence is not constitutionally sufficient to validate regulation of noneconomic activities.").

91. *Morrison*, 529 U.S. at 614. The Chief Justice referred to his statement in *Hodel v. Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264 (1981): "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* See *supra* note 66 (describing the Court's holding in *Hodel*).

92. *Morrison*, 529 U.S. at 617. In his dissent, Justice Souter "doubt[ed] that the majority's view will prove to be enduring law . . . this Court, in any event, lacks the institutional capacity to maintain such a regime for very long." *Id.* at 645 (Souter, J., dissenting).

93. See Barnett, *supra* note 2 ("Rehnquist's opinions in *Lopez* and *Morrison* were the keystones of the New Federalism.").

94. See generally MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 249–78 (2005) ("The Rehnquist Court did revolutionize federalism doctrine. What it didn't do was revolutionize the actual scope of national power.").

95. JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE 4 (2003) ("[I]n fits of judicial activism evocative of the infamous *Lochner* era, the Court's majority reaches out to strike down progressive rights-expanding legislation at both the federal and state levels. Its justifications vary but the Court often invokes the vacillating and inscrutable requirements of 'federalism,' a word that appears nowhere in the Constitution but that has often proved handy for negating federal protection of the rights of the people."); TUSHNET, *supra* note 94, at 252 ("From 1937 to the Rehnquist Court, federalism meant nothing as a restriction on Congress's power. The Rehnquist Court's federalism revolution consisted of replacing that zero with something more than zero. But not much more."). See also Ramesh

Revolution” of the Rehnquist Court was understood to be the Chief Justice’s legacy to constitutional jurisprudence.<sup>96</sup> Restriction on federal power was a theme initiated in his *National League of Cities* decision and extended through *Lopez* and *Morrison*.<sup>97</sup> In *Raich*, the Court continued to consider this theme in its review of the federal regulation and criminalization of drug use.<sup>98</sup>

### C. Drug Regulation

The power of the federal government to control the intrastate manufacture and possession of drugs is at the heart of the *Raich* decision.<sup>99</sup> This section of the Note will discuss early regulation of drugs in America, including Prohibition, and review laws governing the use of marijuana prior to the passage of the Controlled Substances Act.<sup>100</sup> It will then outline the major provisions of the CSA.<sup>101</sup> Finally, this section will describe California’s Compassionate Use Act of 1996 and the responses it prompted on the part of the federal government.<sup>102</sup>

#### 1. Early Regulation

The use, manufacture, and distribution of psychotropic substances have been the subject of great debate in Western societies.<sup>103</sup> Attempts

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Ponnuru, *The End of the Federalism Revolution . . . If Such a Revolution Had Ever Occurred*, NAT’L REV. ONLINE, July 4, 2005, <http://www.nationalreview.com/ponnuru/ponnuru200506230756.asp> (“So is the federalism revolution over? No: For the revolution to be over it would have had to begin. The truth is that there never was a federalism revolution . . .”).

96. Richard Brust, *Reviewing Rehnquist*, A.B.A. J. (May 2003), available at <http://www.abanet.org/journal/redesign/rehnquist.html> (“most observers identify federalism . . . as [the] hallmark [of the Rehnquist Court].”).

97. See *supra* Part II.B (discussing Chief Justice Rehnquist’s “New Federalism”).

98. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). See generally JUDGE JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 231–34 (2001) (observing that the federalization of drug policy has done little to resolve the problem of drug use in America).

99. See *Raich*, 125 S. Ct. at 2204–05.

100. See *infra* Part II.C.1 (outlining the early regulation of drugs in American society).

101. See *infra* Part II.C.2 (discussing the major provisions of the CSA).

102. See *infra* Part II.C.3 (outlining California’s Compassionate Use Act).

103. DAVID T. COURTWRIGHT, FORCES OF HABIT: DRUGS AND THE MAKING OF THE MODERN WORLD 166 (2001). While many psychotropic drugs (including rum, tobacco, opium and sugar) facilitated the imperial agendas of Old World nations, in the late nineteenth and early twentieth centuries, the elite that had previously benefited enormously from the commerce of such drugs did an about-face and began to develop an “international control regime.” *Id.* Interestingly, Courtwright distinguishes between drugs that were produced and traded by imperial powers chiefly for their use as drugs, and cannabis, which was utilized primarily as an agricultural product (hemp). *Id.* “Cannabis as a drug was an affair of common folk, slaves and peasants . . .” *Id.* at 167.

to control or prohibit the use of various drugs likewise pervade American social policy, although efforts to regulate marijuana did not begin until the twentieth century.<sup>104</sup> In the 1800's and early 1900's, marijuana was recognized in Europe and the U.S. for its therapeutic properties—indeed, until 1942 the United States Pharmacopeia listed marijuana as a medical treatment.<sup>105</sup> A different drug was the focus of prohibition movements in the nineteenth century: alcohol.<sup>106</sup> By the end of the nineteenth century, the temperance movement in America was gathering widespread momentum.<sup>107</sup> In 1893, the Anti-Saloon League was formed with the objective of nation-wide prohibition.<sup>108</sup> After intense lobbying, the Eighteenth Amendment was passed by Congress in 1917, and ratified by the states in 1919.<sup>109</sup> Less than

104. John C. McWilliams, *The History of Drug Control Policies in the United States*, HANDBOOK OF DRUG CONTROL IN THE UNITED STATES 29 (James A. Inciardi ed., 1990). In 1765, George Washington grew marijuana at Mount Vernon to combat toothache pain. *Id.*

105. Hélène Peters & Gabriel G. Nahas, *A Brief History of Four Millennia (B.C. 2000–A.D. 1974)*, in *MARIHUANA AND MEDICINE* 4–6 (Gabriel G. Nahas et al. eds., 1999) (documenting the use of marijuana in nineteenth-century Britain for “rabies, rheumatism, epilepsy and tetanus”). The United States Pharmacopeia was founded in 1820 and is the public authority for reviewing all prescription and over-the counter drugs; only 217 drugs were listed on the first U.S. Pharmacopeia, <http://www.usp.org/aboutUSP/history.html> (last visited Apr. 17, 2006).

106. See generally JACK S. BLOCKER, JR., *AMERICAN TEMPERANCE MOVEMENTS: CYCLES OF REFORM* 1–29 (1989) (explaining the prohibition movement in the United States); Harvey A. Siegal & James A. Inciardi, *A Brief History of Alcohol*, in *THE AMERICAN DRUG SCENE* 40, 44 (James A. Inciardi & Karen McElrath eds., 2d ed. 1988).

107. BLOCKER, *supra* note 106, at 61 (“In contrast to the 1850's, when only a few hundred women scattered in several dozen communities attacked liquor outlets, tens of thousands of women in nearly a thousand towns and cities now enlisted in the new crusade.”). See also Richard F. Hamm, *Short Euphorias Followed by Long Hangovers: Unintended Consequences of the Eighteenth and Twenty-first Amendments*, in *UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENTS* 164 (2000). Although many states were dry, the Supreme Court interpreted the Commerce Clause as allowing out-of-state liquor to enter dry jurisdictions. *Id.* at 167–68. However, by the time of the First World War, “the Country was largely dry.” GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* 197 (1995).

108. BLOCKER, *supra* note 106, at 96. Other groups with comparable goals to the Anti-Saloon League included the Prohibition Party and the Woman's Christian Temperance Union (WCTU). Hamm, *supra* note 107, at 164. The WCTU still exists today. Woman's Christian Temperance Union Homepage, <http://www.wctu.org/> (last visited Apr. 17, 2006). The prohibitionists, in an attempt to avoid the charge that a ban on alcohol was an infringement on personal liberty, aimed their efforts at the sale of liquor rather than its consumption. ANASTAPLO, *supra* note 107, at 196.

109. U.S. CONST., amend. XVIII, cl. 1 (“After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”); ANASTAPLO, *supra* note 107, at 196 (stating that the Eighteenth Amendment was unnecessary because the Commerce Clause provided Congress adequate power to regulate the sale of alcohol). Ironically, one consequence of the Eighteenth Amendment was an increase in the use of marijuana. Laura M. Rojas, Comment, *California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to their Patients without Subjecting Themselves to*

fifteen years later, it was repealed by the Twenty-First Amendment, the first and only time an amendment has ever been repealed.<sup>110</sup> After the repeal of Prohibition, regulation of alcohol was once again left to local government, and various control mechanisms were employed by the individual states.<sup>111</sup>

Federal drug regulation began with the passage of the Pure Food and Drug Act in 1906, which mandated product labeling.<sup>112</sup> However the first comprehensive federal statute regulating drugs was the Harrison Act, a taxation measure enacted in 1914 that aimed to control cocaine, opiates and narcotics, while still allowing for the medical use of such drugs.<sup>113</sup> Failed federal attempts to ban alcohol did not deter Congress from continuing to develop regulatory schemes to control the use of drugs.<sup>114</sup> In 1930, Congress created a separate federal Bureau of Narcotics (Bureau) to curb illegal drug trafficking.<sup>115</sup> Although the Bureau was initially established to combat cocaine and opium, with the spread of recreational marijuana use into the Midwest and Northeastern

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*Sanctions?*, 30 MCGEORGE L. REV. 1373, 1377 (1999).

110. U.S. CONST., amend. XXI, cl. 1 & 2 ("1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."); ANASTAPLO, *supra* note 107, at 203 (explaining that the Twenty-First Amendment was the only Amendment ratified by state conventions as opposed to state legislatures; repeal was thus considered to be "mandated by the people directly."). See Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 98 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) ("The Eighteenth Amendment, it should be said, is nearly everybody's prime example of a constitutionally dumb idea.").

111. GRAY, *supra* note 98, at 232; Tribe, *supra* note 110, at 99 (explaining that the "evident objective" of the Twenty-First Amendment was to empower the states to regulate the transportation and importation of liquor into their respective jurisdictions, an objective that completely contradicted the principles of federalism); Hamm, *supra* note 107, at 164 ("The Eighteenth Amendment accelerated the already present trend toward the development of a federal police presence..."). Hamm also notes that during Prohibition the federal policing system expanded greatly, including the creation of a new group of federal enforcement officers called Prohibition Agents. *Id.* at 176-77.

112. Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768 (1906), *repealed by* Federal Food, Drug and Cosmetic Act, ch. 675, § 902(a), 52 Stat. 1040, 1059 (1938) (establishing the Food and Drug Administration and imposing a prescription requirement for certain drugs). See also THEODORE VALLANCE, PROHIBITION'S SECOND FAILURE: THE QUEST FOR A MORE HUMANE DRUG POLICY 4 (1993).

113. Harrison Act, 38 Stat. 785 (1914) (repealed 1970). VALLANCE, *supra* note 112, at 4-5 ("Although written as a taxation measure, the Harrison Act was clearly intended by the enforcement agencies to prohibit the use of cocaine and narcotic drugs...").

114. McWilliams, *supra* note 104, at 31.

115. *Id.* at 32; VALLANCE, *supra* note 112, at 5 ("a crusading anti-drug activist, Harry J. Anslinger, was named director [of the Bureau].").

cities, the “evil weed” became one of the Bureau’s prime targets, despite the fact that marijuana was not controlled by any legislation at this time.<sup>116</sup> In 1937, the federal Treasury Department passed the Marihuana Tax Act, which imposed burdensome registration requirements for manufacturers, importers, and dealers of marijuana, as well as for practitioners prescribing the drug for medical purposes.<sup>117</sup> As under the Harrison Act, medicinal purposes were recognized as legitimate, although the law imposed a myriad of compliance requirements; penalties for uses not permitted under the law were very harsh.<sup>118</sup> In 1956, Congress passed the Narcotic Control Act, which made marijuana possession a felony, included mandatory minimum sentences for first time offenders, and imposed draconian sentences for others.<sup>119</sup>

## 2. The Controlled Substances Act

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, or Controlled Substances Act (CSA or the Act).<sup>120</sup> The CSA repealed several earlier acts, including the Harrison Act, the Marihuana Tax Act, and the Narcotic Control Act, in an attempt to codify existing drug legislation into one cohesive act.<sup>121</sup>

116. McWilliams, *supra* note 104, at 35. The drug was “considered particularly dangerous because of its *alien* (spelled ‘Mexican’) and un-American origins.” James Inciardi, *Introduction: The Evolution of Drug Abuse in America*, in HANDBOOK OF DRUG CONTROL IN THE UNITED STATES 8 (James Inciardi ed., 1990) (emphasis in original).

117. Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1970); McWilliams, *supra* note 104, at 36–37. The Marihuana Tax Act required tax stamps to be affixed to all marijuana. *Id.* Many states continue to have marijuana tax stamp legislation on the books. Marijuana Tax Stamp Laws and Penalties, [http://www.norml.org/index.cfm?Group\\_ID=6670](http://www.norml.org/index.cfm?Group_ID=6670) (last visited Apr. 17, 2006). Failure to affix state-issued tax stamps to marijuana may result in civil fines, criminal liability or both. *Id.* Of course, most marijuana purchasers do not comply with the stamp requirement as it identifies them to government agents. *Id.* Minnesota’s law imposes the harshest penalties for violation of the stamp statute: up to seven years prison time, \$14,000 in fines or both. *Id.* States with tax stamps requirements include Alabama, Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas and Utah. *Id.*

118. Rojas, *supra* note 109, at 1279–80. During committee hearings, marijuana was described as “an addictive drug which produces in its users insanity, criminality, and death,” and physicians arguing for the medical use of marijuana were met with hostility. *Id.* See also McWilliams, *supra* note 104, at 38, for a description of the provisions of the 1937 law.

119. The Narcotics Control Act of 1956, 70 Stat. 567 (repealed 1970) (“[A]mending the Internal Revenue Code of 1954 and Narcotic Drugs Import and Export Act to provide for a more effective control of narcotic drugs and marihuana, and for other related purposes.”). See also McWilliams, *supra* note 104, at 43 (detailing the passage and provisions of the NCA).

120. McWilliams, *supra* note 104, at 43. The CSA is currently codified at 21 U.S.C. §§ 801–02, 811–14 (2000).

121. D. MUSTO & P. KORSMEYER, *THE QUEST FOR DRUG CONTROL* 32–35 (2002)

Under the Act, controlled substances are organized into five groups, or Schedules.<sup>122</sup> Schedule I drugs possess no demonstrated medical value and a high potential for abuse; in addition, there is a “lack of accepted safety for use of the drug under medical supervision.”<sup>123</sup> Drugs on Schedules II–V have demonstrated medical use and are ranked in order according to their addictive properties.<sup>124</sup> Certain narcotics are classified as Schedule I drugs, including all opium derivatives, such as heroin.<sup>125</sup> Hallucinogens such as lysergic acid diethylamide (LSD) and peyote are categorized under Schedule I.<sup>126</sup> Marijuana is also listed in Schedule I, and thus has no currently recognized medical use according to the CSA.<sup>127</sup> The only permitted use of Schedule I drugs under the

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[hereinafter MUSTO & KORSMEYER]. Similarly, the federal drug control agencies were merged into one—the Bureau of Narcotics and Dangerous Drugs, which became the Drug Enforcement Agency (DEA) in 1973. *Id.*

122. 21 U.S.C. § 812 (2000). Controlled substances acts at the state level generally echo the CSA’s division of drugs. *A Guide to State Controlled Substances Acts (1988)*, in HANDBOOK OF DRUG CONTROL IN THE UNITED STATES, Appendix E, 349 (James Inciardi ed., 1990).

123. 21 U.S.C. § 812(b)(1) (2000); Jerome Beck and Marsha Rosenbaum, *The Scheduling of MDMA (“Ecstasy”)*, in HANDBOOK OF DRUG CONTROL IN THE UNITED STATES 307–08 (James Inciardi ed., 1990) [hereinafter Beck & Rosenbaum]. The United States Court of Appeals for the District of Columbia set forth five elements that must be satisfied for a drug to have an accepted medical use in *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (D.C. Cir. 1994):

- a. The drug’s chemistry is known and reproducible;
- b. There are adequate safety studies;
- c. There are adequate and well-controlled studies proving efficacy;
- d. The drug is accepted by qualified experts; and
- e. The scientific evidence is widely available.

124. Beck & Rosenbaum, *supra* note 123, at 308.

125. 21 U.S.C. § 812(c) (2000).

126. *Id.* at § 812(c)(12). The California Supreme Court, in a very limited holding, permitted a constitutional freedom of religious practice defense asserted by members of the Native American Church charged with criminal possession of peyote. *People v. Woody*, 394 P.2d 813, 821–22 (Cal. 1964). 42 U.S.C. § 1996a(b)(1) (2000) allows use of peyote in tradition Native American religious functions:

Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.

42 U.S.C. § 1996a(b)(1) (2000). *See also* 21 U.S.C. § 812(c) (2005) (listing all of the Schedule I substances under the CSA, including peyote); Garrett Epps, *The Story of Al Smith: The First Amendment Meets Grandfather Peyote*, in CONSTITUTIONAL LAW STORIES 477, 477 (Michael C. Dorf ed., 2004) for a description of a landmark freedom of religion case involving the use of peyote in religious services; RASKIN, *supra* note 95, at 224 (detailing the passage, and subsequent striking down by the Supreme Court, of the Religious Freedom Restoration Act, which granted waivers for religious practices, including peyote use by Native Americans).

127. 21 U.S.C. § 812 (c)(10) (2000). Marijuana is defined as:

[A]ll parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof;

CSA is in connection with Investigational New Drug applications pre-approved by the Food and Drug Administration.<sup>128</sup>

In its introductory provisions, the Act details the nature of interstate commerce in controlled substances and the impact of that traffic on the American people.<sup>129</sup> In particular, the Act states that controlled

the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16) (2000). In 1985, the FDA approved a synthetic form of marijuana called dronabinol, sold in capsules containing tetrahydrocannabinoids (THC) under the brand name Marinol, for treatment of symptoms stemming from chemotherapy. DRUG POLICY INFO. CLEARINGHOUSE, OFFICE OF NAT'L DRUG CONTROL POLICY, MARIJUANA FACT SHEET 1, 6 (Feb. 2004), <http://www.whitehousedrugpolicy.gov/publications/pdf/ncj198099.pdf> [hereinafter MARIJUANA FACT SHEET]. In 1992, the FDA approved the use of dronabinol for anorexia arising from AIDS. *Id.* at 6. The FDA has also approved nabilone, a substance with chemical properties similar to marijuana. *Id.* Both Marinol and nabilone are available by prescription. *Id.*

128. 21 U.S.C. §§ 812, 823(f), 829 (2000). The Department of Health and Human Services has established procedures for obtaining botanical or "research-grade" marijuana through the National Institute on Drug Abuse. Notice of Denial of Petition, 66 Fed. Reg. 20,038, 20,047 (Apr. 18, 2001). However, after an upsurge in applications, the program was discontinued in 1992; in 1997 only nine patients continued to receive marijuana under the program. LESTER GRINSPOON & JAMES B. BAKALAR, MARIJUANA, THE FORBIDDEN MEDICINE 22-23 (1997). Research, however, does continue in other countries: "a Saskatchewan study reported that a cannabis-like substance injected into rats caused new nerve-cell growth in the hippocampus, suggesting the possibility that marijuana might actually improve certain brain functions . . . ." Marni Jackson, *Pass the Weed, Dad*, MACLEAN'S, Nov. 7, 2005, at 26, 28.

129. 21 U.S.C. § 801(1)-(6) (2000). The Act provides a general description of its aims as follows:

- (1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
- (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
- (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
  - (A) after manufacture, many controlled substances are transported in interstate commerce,
  - (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
  - (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
- (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

substances possessed and distributed within a state increase interstate traffic.<sup>130</sup> Moreover, according to the Act, no distinction can be made between controlled substances produced and distributed intrastate from those moving in interstate commerce; therefore federal control over intrastate trafficking in controlled substances is essential to controlling interstate movement of such substances.<sup>131</sup> No specific congressional findings are included, however, and the Act's assertions are unaccompanied by any statistics or other supporting documentation.<sup>132</sup>

The Act also provides a mechanism for rescheduling substances.<sup>133</sup> There have been ongoing efforts to reschedule marijuana that date back almost as far as the CSA itself; indeed the National Organization for the Reform of Marijuana Laws (NORML) has campaigned for the rescheduling of marijuana since 1972.<sup>134</sup> In 1972, NORML filed a

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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.

*Id.*

130. *Id.* at § 801(3).

131. *Id.* at § 801(5).

132. *Id.* at § 801.

133. 21 U.S.C. § 811 (2000 & West Supp. 2005). *See, e.g.*, *Grinspoon v. DEA*, 828 F.2d 881, 898 (1st Cir. 1987) (upholding DEA's scheduling of MDMA ecstasy as a Schedule I drug, despite researcher's claim that such a Schedule placement would discourage medical research). The Act specifies eight factors that the Attorney General will consider in determining whether a substance should be added, transferred or removed from a schedule:

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration, and significance of abuse.
- (6) What, if any, risk there is to the public health.
- (7) Its psychic or physiological dependence liability.
- (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

21 U.S.C. § 811(c).

134. About NORML, [www.norml.org/index.cfm?Group\\_ID=3418#question1](http://www.norml.org/index.cfm?Group_ID=3418#question1) (last visited Apr. 17, 2006) (describing NORML's mission). *See also* Brief for National Organization for the Reform of Marijuana Laws (NORML) et al. as Amici Curiae Supporting Respondents, at 1–2 *Ashcroft v. Raich*, 125 S. Ct. 2195 (2004) (No. 03-1454), 2004 WL 2336547 [hereinafter NORML brief] (describing NORML's background and efforts at rescheduling marijuana). Additionally in 1972, the National Commission on Marihuana and Drug Abuse “unanimously recommended that consumption-related offenses involving marijuana be ‘decriminalized.’” RICHARD J. BONNIE, *MARIJUANA USE AND CRIMINAL SANCTIONS: ESSAYS ON THE THEORY AND PRACTICE OF DECRIMINALIZATION* iii (1980).



petition requesting that marijuana be removed from the CSA, or transferred to Schedule V; however, the Drug Enforcement Agency (DEA) refused even to accept NORML's petition for rescheduling until it was ordered to do so by the United States District Court of Appeals for the District of Columbia Circuit.<sup>135</sup> It was not until 1986, after the petition's third consideration, that the DEA finally held public hearings.<sup>136</sup> In 1988, after two years of administrative hearings, a DEA Administrative Law Judge (ALJ) determined that marijuana had therapeutic uses and recommended that the drug be rescheduled.<sup>137</sup> However, the DEA refused to implement the ALJ's recommendation, and its refusal was affirmed by the United States Court of Appeals for the District of Columbia Circuit.<sup>138</sup>

While NORML's broad aims include new legislation permitting the use of marijuana for recreational and other purposes, many cannabis advocates are particularly interested in the therapeutic uses of marijuana.<sup>139</sup> Despite the current classification of marijuana as a Schedule I drug with no recognized medical uses, recent medical studies, including a 1999 report from the National Academy of Sciences, Institute of Medicine, have recognized potential therapeutic uses for marijuana.<sup>140</sup> In recent years, marijuana has been reported to alleviate pain, stimulate appetite in HIV and AIDS patients, and treat

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135. Rojas, *supra* note 109, at 1383–84 (describing the saga of court battles to reclassify marijuana).

136. *Id.* See MARIJUANA, MEDICINE & THE LAW (R.C. Randall ed., 1988) (providing direct testimony of witnesses in the DEA hearings).

137. *In re Marijuana Rescheduling Petition*, No. 86–22 (Sept. 6, 1988) (“[I]t would be unreasonable, arbitrary and capricious” to deny the substance to those using it for medical purposes).

138. *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1137 (D.C. Cir. 1994) (“Our review of the record convinces us that the Administrator's findings are supported by substantial evidence”).

139. See, e.g., Lester Grinspoon & James Balakar, *Marijuana as Medicine—A Plea for Reconsideration* 273 JAMA June 21 (1995).

140. JANET E. JOY ET AL., INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 177 (1999) (“For patients such as those with AIDS or who are undergoing chemotherapy, and who suffer simultaneously from severe pain, nausea, and appetite loss, cannabinoid drugs might offer broad-spectrum relief not found in any other single medication”). See *Conant v. Walters*, 309 F.3d 629, 640–43 (9th Cir. 2002) (Kozinski, J., concurring) (stating “legitimate and growing division of informed opinion” exists regarding therapeutic uses of marijuana). Judge Kozinski also detailed findings from Canadian and British sources. *Id.* at 641–42. He noted that the British House of Lords, “a body not known for its wild and crazy views,” had determined after conducting public hearings that physicians should be permitted to prescribe medical marijuana. *Id.* In its brief, NORML includes a lengthy list of health organizations supporting immediate legal access to medical marijuana. NORML brief, *supra* note 134, at 1a–4a.

nausea and vomiting resulting from chemotherapy.<sup>141</sup> Although the FDA has approved two synthetic forms of marijuana, leading opponents of medical marijuana to argue that the availability of synthetic marijuana precludes the need for organic marijuana, proponents of therapeutic marijuana claim that the organic form of the drug is superior.<sup>142</sup> Due to the therapeutic benefits of marijuana, several states have implemented programs that allow for the use of medical marijuana in certain circumstances, creating a class of state-authorized medical marijuana users (SAMMUs).<sup>143</sup> Some federal legislators have also proposed the reclassification of marijuana as a Schedule II drug.<sup>144</sup> However, notwithstanding the efforts of marijuana advocates and legislators, the drug remains on Schedule I of the CSA.<sup>145</sup>

### 3. California's Compassionate Use Act of 1996

In addition to the CSA, every state has its own laws governing drug use and allocates resources for enforcement; indeed, in 1990 state and local governments prosecuted over 85% of all drug offenses nationwide.<sup>146</sup> In fact, states have consistently regulated drugs

141. Rojas, *supra* note 109, at 1387 (outlining medical studies describing the effectiveness of marijuana as a medicine). See *infra* note 150 (listing the illnesses for which marijuana provides relief according to California's Compassionate Use Act).

142. See *supra* note 127 (describing the synthetic varieties of the drug approved by the FDA). Tiersky explains that organic marijuana has several advantages over synthetic: 1) organic marijuana is superior where chronically nauseous patients cannot ingest Marinol capsules; 2) organic marijuana is a more effective appetite stimulant; 3) organic marijuana is cheaper; and 4) organic marijuana has immediate effects and thus the patient can more easily adjust her intake. Tiersky, *supra* note 5, at 575–77. Another drawback of Marinol is that it contains only one synthetic delta-9-tetrahydrocannabinol, whereas organic marijuana contains numerous different cannabinoids. Medical Marijuana ProCon.org, Individual Bio, Gregory T. Carter, M.D., <http://www.medicalmarijuanaprocon.org/BiosInd/Carter.htm> (last visited Apr. 17, 2006). Different groups of cannabinoids have different therapeutic benefits; the presence of multiple groups in a treatment is often advantageous. *Id.*

143. See *infra* note 151 (listing the legislation of states with SAMMU programs).

144. H.R. 1782, 105th Cong. § 2 (1997); H.R. 2592, 107th Cong. § 2 (2001) (proposing the reclassification of marijuana as a Schedule II drug, and giving states the right to determine medical marijuana policy). A letter from Representative Newt Gingrich to the Journal of the American Medical Association stated: “federal agencies continue to prohibit physician-patient access to marijuana. This outdated federal prohibition is corrupting the intent of state laws . . .” Newt Gingrich, *Legal Status of Marijuana*, 247 JAMA 1563 (1982), reprinted in Tiersky, *supra* note 5, at 589.

145. See, e.g., Notice of Denial of Petition, 66 Fed. Reg. 20,047 (2001) (denying petition to reclassify marijuana because it has no currently accepted medical use in the United States).

146. William J. Bennett, *Introduction*, OFFICE OF NAT'L DRUG CONTROL POLICY, STATE DRUG CONTROL STATUS REPORT I (1990) (noting in the introduction that federal drug policy is aimed at large-scale and international trafficking, rather than the lower level “street dealers” and users). Bennett, Director of the Office of Drug Control Policy under President George H. Bush, also acknowledged that “federal laws cannot displace State drug legislation . . . [s]tate

alongside the federal government.<sup>147</sup> In an attempt to regulate drugs in their state, California voters passed Proposition 215 (Prop 215) in 1996.<sup>148</sup> Codified as the Compassionate Use Act of 1996, the law permits both patients and their primary caregivers to possess or cultivate marijuana for personal medical reasons, and exempts them from sanction under other provisions of the California criminal code.<sup>149</sup> The Compassionate Use Act specifies several diseases that may be treated by medical marijuana.<sup>150</sup> Currently at least eleven other states have enacted legislation similar to the Compassionate Use Act.<sup>151</sup>

legislatures have the authority to . . . define criminal [drug] offenses . . .” *Id.* at 1–2. Commentators have noted the “effort to control drugs appears [in these reports] essentially as a battle between good and evil.” VALLANCE, *supra* note 112, at 18.

147. Tiersky, *supra* note 5, at 586–87. State control of drug policy has several advantages over federal legislation: 1) such policy is inherently a state right; 2) states have greater flexibility to experiment with policy options; 3) citizens can undertake referenda to ascertain support for different policies; 4) citizens can move to another state if they vehemently disagree with medical marijuana policy. *Id.* at 586–87.

148. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2005) (providing that “seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician . . .”). Proposition 215 was a ballot initiative that passed “overwhelmingly” on November 5, 1996 and became effective at 12:01 a.m. on November 6, 1996. Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California’s Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 166 (1997). Note that marijuana cannot be prescribed, only recommended, because it is a Schedule I drug. Tiersky, *supra* note 5, at 578.

149. CAL. HEALTH & SAFETY CODE § 11362.5(c–d) (West 2005).

150. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A). The list is not exclusive but includes: “cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.” CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A).

151. ALASKA STAT. §§ 11.71.090, 17.37.010–080 (2004); ARIZ. REV. STAT. ANN. § 13–3412.01 (1996); COLO. CONST. art. XVIII, § 14; HAW. REV. STAT. §§ 329–121 to –128 (2004); ME. REV. STAT. ANN., tit. 22, § 2383–B(5) (2004); MONT. CODE ANN., tit. 50, Ch. 46, §§ 101–103; 201–207 (2005); NEV. CONST. art. 4, § 38, NEV. REV. STAT. §§ 453A.010–810 (2003); OR. REV. STAT. §§ 475.300–346 (2003); VT. STAT. ANN. tit. 18, §§ 4472–4474(d) (2004); WASH. REV. CODE ANN. §§ 69.51.010–.070 (West 2006). In addition, the Rhode Island state legislature overrode the governor’s veto on January 3, 2006 and enacted the Thomas Slater-Edward Hawkins Medical Marijuana Act. Katie Zezima, *National Briefing, Rhode Island: New Marijuana Law*, N.Y. TIMES, Jan. 4, 2006 at A11; see R.I. Gen. Laws. § 21–28.6. Regulations will not be promulgated until after a public hearing held on February 28, 2006. Rhode Island Dep’t of Health, Notice of Public Hearing (Jan. 20, 2006), <http://www.health.ri.gov/hsr/regulations/proposed/marij-prop.pdf>. Rhode Island is the first state to enact a medical marijuana law since the Supreme Court’s holding in *Raich*. Zezima, *supra* note 151. In 1997, legislators amended Arizona’s medical marijuana law, which passed by referendum in 1996; nevertheless, the full text of the law was restored by Proposition 300 (November 1998). ARIZ. REV. STAT. ANN. § 13–3412.01 (1996). See Dominica Minore Bassett, *Comment, Medical Use and Prescription of Schedule I Drugs in Arizona: Is the Battle Moot?*, 30 ARIZ. ST. L.J. 441, 442 (1998) (providing background to the 1996 referendum and subsequent legislative action). However, because the text of Arizona’s law allows *prescription* of marijuana, it is arguably not effective until such time as a physician can legally prescribe marijuana, i.e.,

The federal government responded to the Compassionate Use Act by threatening to revoke the controlled substances license of any physician who recommended the use of marijuana.<sup>152</sup> A group of physicians, patients and non-profit organizations filed for and won a preliminary injunction against the government in federal court on the theory that this policy infringed on patients' First Amendment rights.<sup>153</sup> The government appealed, but in *Conant v. Walters* the Ninth Circuit affirmed the injunction, preventing federal officers from arresting physicians for merely discussing medical marijuana with seriously ill patients.<sup>154</sup>

In another response to California's passage of Proposition 215, the United States filed for an injunction to prevent the Oakland Cannabis Buyers Cooperative from manufacturing and distributing marijuana, and the case reached the Supreme Court.<sup>155</sup> The Cooperative proceeded under a medical necessity defense and also claimed that the CSA, as applied to medical marijuana, exceeded the power of Congress under the Commerce Clause.<sup>156</sup> The Supreme Court, in an opinion authored

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until the federal government reclassifies the drug. MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST, July 2004, [http://www.mpp.org/pdf/sbs\\_report\\_2004.pdf](http://www.mpp.org/pdf/sbs_report_2004.pdf). Other state laws require that marijuana be "recommended" by a doctor, and thus do not run afoul of the CSA. *Id.*

152. Tiersky, *supra* note 5, at 579; Bergstrom, *supra* note 148, at 167. Federal law requires health professionals entitled to dispense, administer or prescribe controlled substances to register with the DEA. U.S. Dep't of Justice, Drug Enforcement Administration, Office of Diversion Control, [http://www.deadiversion.usdoj.gov/prog\\_dscrp/index.html](http://www.deadiversion.usdoj.gov/prog_dscrp/index.html) (last visited Apr. 17, 2006). See also 21 C.F.R. § 1301.11 (a) (2005) ("Every person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any controlled substance shall obtain a registration unless exempted by law or pursuant to Secs. 1301.22–1301.26").

153. *Conant v. McCaffrey*, 172 F.R.D. 681, 701 (N.D. Cal. 1997) ("The government's statutory authority to regulate [distribution and possession of drugs by physicians] does not allow the government to quash protected speech about it."). See George J. Annas, *Reefer Madness—The Federal Response to California's Medical-Marijuana Law*, in DRUGS: SHOULD WE LEGALIZE, DECRIMINALIZE OR DEREGULATE? 120, 123–26 (Jeffrey A. Schaler ed., 1998) (discussing the prior history of *Conant*, the rationale of the court, and the Clinton administration's response to the injunction).

154. *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002) (finding the federal policy violated "core First Amendment interests of doctors and patients").

155. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (holding that no medical necessity defense exists to prohibitions on manufacture and distribution of marijuana established by CSA). The mission of the Oakland Cannabis Buyers' Cooperative, a not-for-profit organization operating in downtown Oakland, "is to provide seriously ill patients with a safe and reliable source of medical cannabis information and patient support." Oakland Cannabis Buyers' Cooperative, <http://www.rxcbc.org/mission.html> (last visited Apr. 17, 2006). The federal government attempted to close down the club in August 1996, prior to the passage of Prop 215. *Oakland Cannabis*, 532 U.S. at 487.

156. *Oakland Cannabis*, 532 U.S. at 494. One commentator suggested that medical marijuana advocates had been slow to pursue the Commerce Clause argument in challenging the CSA

by Justice Thomas, held that a medical necessity defense could not be inferred from the CSA.<sup>157</sup> Justice Thomas explicitly declined to reach the constitutional questions raised by the Cooperative, as the appellate court did not address them.<sup>158</sup> The perceived conflict between state and federal legislation concerning the use of medical marijuana would not be resolved until *Gonzales v. Raich*, and the issue would be framed by the Court as implicating the reach of federal power under the Commerce Clause.<sup>159</sup>

### III. DISCUSSION

In granting *certiorari* in *Gonzales v. Raich*, the Supreme Court undertook the specific question it had left unanswered in *Oakland Cannabis Buyers Cooperative*—whether the Commerce Clause gives Congress the power to regulate medical marijuana under the CSA—but also necessarily addressed the issue of recent restrictions on the federal commerce power.<sup>160</sup> The first section of this Part will outline the pertinent facts of the case;<sup>161</sup> the second and third sections will review the decisions of the district and appellate courts, respectively;<sup>162</sup> and the fourth section will discuss the opinions of the Court.<sup>163</sup>

#### A. Facts

On August 15, 2002, federal Drug Enforcement Agency (DEA)

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because in other debates, many advocates “would object most strenuously to the limitation of the federal government’s power, especially in cases involving individual rights.” Newbern, *supra* note 70, at 1581.

157. *Oakland Cannabis*, 532 U.S. at 491. See also Tim Warriner, *Some Thoughts About Raich*, [http://www.warrinerlaw.com/archives/2005/06/some\\_thoughts\\_a.html](http://www.warrinerlaw.com/archives/2005/06/some_thoughts_a.html) (last visited Apr. 17, 2006) (“While medicinal use is not a defense in federal court, language from *Raich* may potentially be used as a basis for sentencing departure.”).

158. *Oakland Cannabis*, 532 U.S. at 494 n.7 (“Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress’s power under the Commerce Clause.”). The Ninth Circuit had previously found the CSA constitutional on the basis of Congress’s Commerce Clause power in a case involving non-medical marijuana possession. *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972) (holding that Congress did not exceed its authority in enacting the CSA). In *Rodriguez*, the defendant pled guilty before the district court to possession of ninety-nine pounds of marijuana, but on appeal argued that the CSA was “unconstitutionally vague” because the words “intent to distribute” were not adequately specified. *Id.* at 1221. The court found that “possession with intent to deliver or transfer a controlled substance, either interstate or intrastate, constitutes a federal offense, and therefore is not unconstitutionally vague.” *Id.*

159. *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005).

160. *Id.*

161. See *infra* Part III.A (discussing the facts of *Raich*).

162. See *infra* Part III.B–C (discussing the lower court decisions).

163. See *infra* Part III.D (discussing the Supreme Court opinions).

officers arrived at the home of Diane Monson, a seriously ill California citizen, and after a three-hour standoff, destroyed her six marijuana plants.<sup>164</sup> Monson, who suffered from a wasting spinal disease that caused chronic back pain, cultivated and used marijuana to treat her symptoms under a doctor's recommendation as allowed by California's Compassionate Use Act of 1996.<sup>165</sup> Monson had been using marijuana for medical purposes for three years after other medicines had failed to provide relief or had caused insupportable side effects.<sup>166</sup> Angel Raich, another California citizen, also relied on marijuana to treat her severe medical conditions, including an inoperable brain tumor, seizure disorder, and chronic pain.<sup>167</sup> Raich's physician testified that not only were commercially available medicines ineffective, but also that denying Raich further marijuana treatments could be fatal.<sup>168</sup> The district court agreed that conventional treatments showed no promise of alleviating the symptoms suffered by either woman.<sup>169</sup>

Together with Raich and two John Doe plaintiffs who grew the drug for Raich and provided it to her free of charge, Monson filed suit in the Federal District Court for the Northern District of California on October 9, 2002, requesting declaratory relief and a permanent injunction.<sup>170</sup> Three weeks later, on October 30, the plaintiffs filed a motion for a preliminary injunction.<sup>171</sup> The goal of the plaintiffs' action was to prevent similar seizures by DEA agents and to secure their continuing use of marijuana as a medical treatment.<sup>172</sup> In their complaint, the plaintiffs mounted an as-applied challenge to the CSA as an "impermissible extension of Congress's power to regulate interstate commerce."<sup>173</sup> They also claimed that enforcement of the CSA against them violated their Due Process rights under the Fifth Amendment, the Ninth and Tenth Amendments, and the medical necessity doctrine.<sup>174</sup>

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164. *Raich v. Ashcroft*, 248 F. Supp. 2d 918, 921 (N.D. Cal. 2003).

165. *Id.* at 921. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 1996) (listing a sample of illnesses, including chronic pain, for which California citizens have a right to obtain and use marijuana); *supra* Part II.C.3 (discussing California's Compassionate Use Act).

166. *Raich v. Ashcroft*, 352 F.3d 1222, 1224–25 (9th Cir. 2003).

167. *Id.*

168. *Id.*

169. *Raich*, 248 F. Supp. 2d. at 921 ("Traditional medicine has utterly failed these two women.").

170. *Id.* at 920–21.

171. *Id.* at 921.

172. *Id.*

173. *Id.* See *supra* note 46 (distinguishing between facial and as-applied challenges).

174. *Raich*, 248 F. Supp. 2d at 922. These claims were not considered in the later Supreme Court decision; only the Commerce Clause issue was granted *certiorari*. *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005). The doctrine of medical necessity stems from the common law concept

### B. The District Court Decision

The Federal District Court for the Northern District of California denied the plaintiffs' motion for a preliminary injunction.<sup>175</sup> The court reviewed the history of attacks on the CSA in the Ninth Circuit Court of Appeals, finding that the appellate court had rejected challenges in which the defendants claimed that Congress lacked authority to regulate possession of marijuana under the Commerce Clause, because mere possession was not a commercial or interstate activity.<sup>176</sup> Furthermore, the court noted that the appellate court had held that the CSA remained valid after the *Lopez* and *Morrison* decisions, as it was backed by adequate and valid congressional findings.<sup>177</sup> In light of Ninth Circuit jurisprudence regarding the CSA, the district court stated that it was bound by precedent to hold that Congress can regulate wholly intrastate possession of a controlled substance, even for medicinal purposes.<sup>178</sup> In addition, the court ruled that: 1) the plaintiffs' Tenth Amendment claim was invalid because Congress has not compelled the states to take any action;<sup>179</sup> 2) no fundamental constitutional right to obtain and use

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of a necessity defense, in which an actor commits a proscribed act to avoid harm from the forces of nature or the "press of circumstances." Robin Isenberg, *Medical Necessity As a Defense to Criminal Liability*: *United States v. Randall*, 46 GEO. WASH. L. REV. 273, 274 (1978). The medical necessity defense, "fashioned . . . from basic concepts of criminal justice and new concepts of a right to health," is a relatively new development. *Id.* In *United States v. Oakland Cannabis Buyers Cooperative*, 532 U.S. 483, 491 (2001), Justice Thomas stated that the provisions of the CSA "leave no doubt that the [medical necessity] defense is unavailable."

175. *Raich*, 248 F. Supp. 2d at 931. To prevail on a temporary injunction, the plaintiff must demonstrate: 1) "a strong likelihood of success on the merits;" 2) "the balance of irreparable harm favors [plaintiffs'] case;" and 3) "the public interest favors granting the injunction." *Id.* at 921 (citing *Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983)). The plaintiff may also win a temporary injunction if he can show a combination of 1) probable success on the merits and potential irreparable injury, or 2) serious questions going to the merits and a balance of hardships that strongly favors the plaintiff. *Id.* (citing *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990)).

176. *Raich*, 248 F. Supp. 2d at 924-26. See also, e.g., *United States v. Kim*, 94 F.3d 1247, 1249-50 (9th Cir. 1996) (denying defendant's contention that regulating possession of a controlled substance was beyond Congress's power under the Commerce Clause because it was not a commercial activity); *United States v. Visman*, 919 F.2d 1390, 1392-93 (9th Cir. 1990) (rejecting defendant's argument that marijuana plants rooted in the ground do not affect interstate commerce).

177. *United States v. Tisor*, 96 F.3d 370, 374-75 (9th Cir. 1996) (holding that the CSA remained valid post-*Lopez* because it is backed by congressional findings). See *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972) (relying on congressional findings to uphold the CSA against a challenge claiming that the CSA exceeded Congress's authority).

178. *Raich*, 248 F. Supp. 2d at 926.

179. *Id.* at 927. The Supreme Court has made a number of decisions that implicate the Tenth Amendment's limit on the federal government's power to control the actions of the states. E.g., *Reno v. Condon*, 528 U.S. 141, 149-51 (2000) (holding federal act limiting state's ability to disclose individuals' personal information to be within congressional power, stating that Congress

marijuana for medical purposes exists, and thus there was no Ninth Amendment violation;<sup>180</sup> and 3) medical necessity is not a defense for prohibitions contained within the CSA.<sup>181</sup> However, while the court conceded that it was constrained by precedent and, thus, unable to rule for the plaintiffs, it concluded that “the equitable factors tip in plaintiff’s favor.”<sup>182</sup>

### C. The Ninth Circuit Decision

The appellants filed their appeal in the United States Court of Appeals for the Ninth Circuit in March 2003.<sup>183</sup> In its analysis, the Ninth Circuit differentiated the class of activities in the appellants’ case from the class of activities in previous cases in which it had upheld the CSA as constitutional.<sup>184</sup> The court noted that where an entire class of activities is within the scope of federal power, minor individual instances cannot be excised from that class as beyond federal regulatory authority.<sup>185</sup> However, the appellate court found that the cultivation and use of medical marijuana constituted a different class of activities than marijuana trafficking.<sup>186</sup> As such, the court reasoned that the intrastate and strictly noncommercial cultivation, distribution and possession of medical marijuana in accordance with state law could be considered a separate class of activities.<sup>187</sup>

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may not “commandeer[] the state legislative process”); *New York v. United States*, 505 U.S. 144, 187–88 (1992) (holding that federal legislation’s take-title provision requiring states to regulate in accordance with Congress was beyond scope of federal power). *See also* *Printz v. United States*, 521 U.S. 898, 932–33 (1997) (holding that state officers could not be forced to conduct background searches in connection with federal legislation regulating handguns).

180. *Raich*, 248 F. Supp. 2d at 928 (quoting *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980) (“the decision by the patient *whether to have a treatment or not* is a protected right, but his selection of a *particular treatment*, or at least a medication, is within the area of government interest in protecting public health.”) (emphasis in original)).

181. *Id.* at 929–30. The court relied on the language of the majority in *Oakland Cannabis*: “there is no medical necessity exception to the prohibitions at issue, even when the patient is ‘seriously ill’ and lacks alternative avenues for relief.” *Id.* at 929 (quoting *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 n.7 (2001)). It extrapolated the finding of no medical defense for manufacturing and distributing to all of the prohibitions in the Act. *Raich*, 248 F. Supp. 2d at 929.

182. *Raich*, 248 F. Supp. 2d. at 931.

183. *Raich*, 352 F.3d 1222, 1226 (9th Cir. 2003).

184. *Id.* at 1227. *See supra* notes 176–77 (listing cases in which the Ninth Circuit had previously found the CSA constitutional).

185. *Raich*, 352 F.3d at 1226–27 (internal citations omitted).

186. *Id.* The court distinguished marijuana used for medical purposes from other marijuana, noting that medical marijuana does not raise the same health issues, does not have the same implications for the increase of drug abuse, and does not enter the stream of commerce. *Id.*

187. *Id.* at 1229. The court also relied heavily on its decision in *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), in which it held that the possession of a photograph that had “not been



The appellate court framed the issue facing the court as whether cultivation and use of medical marijuana as a class of activities has a substantial effect on interstate commerce such that it comes within the federal government's Commerce Clause power.<sup>188</sup> To determine this issue, the court examined all four of the *Morrison* factors.<sup>189</sup> In determining whether the statute regulates commerce or any sort of economic enterprise, the court first observed that there was simply no economic or commercial activity because there was no sale, barter, exchange or distribution.<sup>190</sup> The court then found that the *Wickard* aggregation principle did not apply because the regulated activity was not commercial; it involved none of the essential elements of commerce, such as sale, exchange or distribution.<sup>191</sup> As such, the court held that, as applied to the facts, the first element of the *Morrison* test was not satisfied.<sup>192</sup> The court also found that there was no express jurisdictional element in the CSA, and thus the second factor weighed in

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mailed, shipped, or transported interstate and is not intended for interstate distribution, or for any economic or commercial use" could not be regulated under the Commerce Clause. *Id.* at 1115. In *McCoy*, the majority found that the activity was not *de minimis* but comprised a "substantial portion" of the regulated conduct, and was also sufficiently distinct to constitute a separate class. *Id.* at 1132.

188. *Raich*, 352 F.3d at 1229.

189. *Id.* See *supra* Part II.B.2 (discussing the four-part *Morrison* test for determining whether legislation is permissible under the federal commerce power: 1) whether the law at issue is a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise;" 2) whether the statute contains any "express jurisdictional element which might limit its reach to a discrete set of" cases; 3) whether there are "express congressional findings regarding the effects upon interstate commerce" of the activity in question; and 4) whether the link between the activity and a substantial effect on interstate commerce is "attenuated").

190. *Raich*, 352 F.3d at 1229–30. The court relies on Black's Law Dictionary to define "commerce," as "the exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations." *Id.* (quoting BLACK'S LAW DICTIONARY (7th ed. 1999)).

191. *Id.* at 1230 (quoting *United States v. Morrison*, 529 U.S. 595, 611 n.4 (2000)) ("[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . . the regulated activity was of an apparent commercial character.") (alteration in original).

192. *Id.* at 1231. The court observed that in another case concerning medical marijuana, while medical marijuana use and cultivation had been properly distinguished as a class, the congressional findings of the CSA were then erroneously applied to that class. *Id.* at 1231 n.5 (citing *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1208 (N.D. Cal. 2003)). In *Santa Cruz*, the plaintiff, a medical marijuana alliance, sought an injunction against the DEA to prevent the seizure of marijuana from the alliance and its member patients. *Santa Cruz*, 279 F. Supp. 2d at 1195. The *Santa Cruz* court denied the injunction because it did not find that the plaintiff was likely to succeed on the merits, including its claim that the CSA was an unlawful exercise of power under the Commerce Clause. *Id.* at 1209. The appellate court in *Raich* explained that the congressional findings dealt with trafficking and distribution; moreover, the district court failed to consider whether the statute, as applied to the medical marijuana class, actually regulated any commercial or economic undertaking. *Raich*, 352 F.3d at 1231 n.5.

favor of finding the CSA unconstitutional as applied to the appellants.<sup>193</sup>

The court then turned to the third prong of the test—the presence of congressional findings.<sup>194</sup> The congressional findings included in the CSA, according to the court, dealt chiefly with trafficking and, as such, did not apply directly to the cultivation and use of medical marijuana as a class of activity.<sup>195</sup> While the inclusion of the findings in the Act indicated that Congress considered the impact of intrastate controlled substance possession on interstate commerce, the court stated that the findings “are not specific to marijuana, much less intrastate medicinal use of marijuana.”<sup>196</sup> However, the court conceded that the third *Morrison* factor was likely satisfied in light of the findings listed in the Act.<sup>197</sup> The final factor required the court to assess whether the link between the regulation and the substantial effect on commerce was attenuated.<sup>198</sup> The court found that it was, satisfying the fourth factor.<sup>199</sup> In consideration of all four factors, the court held that the appellants established a strong showing of the likelihood of success on the merits of their case because, under the *Morrison* test, cultivation and use of medical marijuana as a class of activity did not substantially affect interstate commerce.<sup>200</sup> The appellate court also noted approvingly the public interest factors discussed in the lower court’s decision and added that the public interest of California voters in the “viability” of such state legislation supported ruling in favor of the appellants.<sup>201</sup> The appellate court thus reversed the lower court’s

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193. *Raich*, 352 F.3d at 1231.

194. *Id.*

195. *Id.* at 1232. See also 21 U.S.C. § 801 (2000) (describing congressional “findings and declarations” regarding controlled substances). See *supra* note 129 (listing the congressional findings in CSA).

196. *Raich*, 352 F.3d at 1232.

197. *Id.* However, the court reiterated that “common sense” would dictate that if findings were included specific to the class at issue, they would vary widely from those relating to drug trafficking. *Id.* Moreover, the court recalled the *Morrison* Court’s admonishment that congressional findings are not dispositive, and that the first and fourth *Morrison* factors are more significant than the second and third in conducting the analysis. *Id.* at 1232–33.

198. *Id.*

199. *Id.* at 1233. Another Ninth Circuit judge previously observed: “Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce.” *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) (internal citation omitted) (holding that mere discussion of therapeutic uses of cannabis between doctor and patient were insufficient to constitute conspiracy). He continued, “[f]ederal efforts to regulate it considerably blur the distinction between what is national and what is local.” *Id.*

200. *Raich*, 352 F.3d at 1234.

201. *Id.* at 1234–35. In discussing the public interest component, the court quoted Justice Brandeis’s famous dissent from *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)

decision, and remanded to the lower court for entry of a preliminary injunction.<sup>202</sup>

#### D. The Supreme Court Decision

In a 6-3 decision, the Supreme Court vacated the appellate court's decision.<sup>203</sup> Writing for the Court, Justice Stevens found the controlling jurisprudence clearly established that the CSA was within the scope of federal power.<sup>204</sup> While Justice Stevens conceded the insufficiency of the congressional findings denying the therapeutic uses of marijuana, he held that the Commerce Clause granted Congress the authority to regulate the intrastate medicinal marijuana market under the *Wickard* doctrine of aggregate activities.<sup>205</sup> In his concurrence, Justice Scalia agreed that Congress had the power to regulate the class of activities but maintained that the authority derived chiefly from the Necessary and Proper Clause.<sup>206</sup> Chief Justice Rehnquist, Justice O'Connor and Justice Thomas disagreed with the majority in two dissenting opinions, arguing that *Lopez* and *Morrison* were analogous and that the regulation of the class was impermissible under the federal commerce power.<sup>207</sup>

#### 1. The Majority Opinion

The majority asserted that Congress has the authority to regulate the

(Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

202. *Raich*, 352 F.3d at 1235. The dissenting judge argued that *Wickard* was controlling because the conduct of the farmer in *Wickard* and the conduct of the plaintiff here are essentially "indistinguishable." *Id.* at 1238 (Beam, J., dissenting). He also found that the plaintiffs did not have standing to bring an as-applied challenge to the CSA where it had not, with one minor exception (the destruction of the six plants), been applied to any of their activities. *Id.* at 1235-37 (Beam, J., dissenting).

203. *Gonzales v. Raich*, 125 S. Ct. 2195, 2198, 2215 (2005).

204. *Id.* at 2201. Justice Stevens later stated that the outcome of *Raich* was "unwise," but "I was convinced that the law compelled a result that I would have opposed if I were a legislator." Linda Greenhouse, *Justice Stevens Weighs v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1. Justice Stevens added, "I have no hesitation in telling you that I agree with the policy choice made by the millions of California voters . . . [but] our duty to uphold the application of the federal statute was pellucidly clear." *Id.*

205. *Raich*, 125 S. Ct. at 2201, 2216-18. See *infra* Part III.D.1 (discussing the majority opinion in *Raich*). See also *supra* Part II.A.3 (discussing *Wickard* doctrine of aggregate activities).

206. *Raich*, 125 S. Ct. at 2218 (Scalia, J., concurring). See *infra* Part III.D.2 (discussing Justice Scalia's concurring opinion in *Raich*). See also *supra* note 41 (discussing the Necessary and Proper Clause).

207. *Raich*, 125 S. Ct. at 2220, 2229. See *infra* Part III.D.3 (discussing the dissenting opinions); *supra* Parts II.B.1-2 (discussing *Lopez* and *Morrison*).

intrastate cultivation and use of medical marijuana.<sup>208</sup> After reviewing California's Compassionate Use Act, as well as the pertinent facts and procedural history of the case, the Court outlined a brief history of marijuana regulation.<sup>209</sup> Tracing the arc of legislation from the Pure Food and Drug Act of 1906<sup>210</sup> to the Marihuana Tax Act of 1937<sup>211</sup> to the CSA,<sup>212</sup> the Court noted the congressional findings included in the CSA concerning the impact of the intrastate drug market on the national market<sup>213</sup> and described the mechanics of the CSA, including its scheduling and provisions for reclassification.<sup>214</sup> Having established the framework for the case, the Court then turned to the Commerce Clause.<sup>215</sup>

#### a. Applying *Wickard*

The Court began with an overview of the evolving nature of the Commerce Clause, and its transition from a remedy for discriminatory state legislation to an instrument of federal legislative power.<sup>216</sup> Over the course of the last century, jurisprudence established three areas in which Congress can regulate under its commerce power, which the Court listed: channels of interstate commerce, instrumentalities of interstate commerce, and activities that substantially affect interstate commerce.<sup>217</sup> The Court next outlined the power of Congress, set forth in *Wickard*, to regulate local activities that form part of an economic class of activities having a significant impact on interstate markets.<sup>218</sup> The majority noted the similarities between the facts of *Wickard* and the instant case: both cases involved the cultivation of a marketable, fungible commodity for personal use.<sup>219</sup> Furthermore, the Court

208. *Raich*, 125 S. Ct. at 2215.

209. *Id.* at 2199–2204.

210. Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768 (1906), *repealed by* Federal Food, Drug and Cosmetic Act, ch. 675, § 902(a), 52 Stat. 1040, 1059 (1938) (establishing the Food and Drug Administration and imposing a prescription requirement for certain drugs).

211. *See supra* note 117 and accompanying text (referencing the Marihuana Tax Act of 1937).

212. *Raich*, 125 S. Ct. at 2199–2201. *See supra* Part II.C.2 (discussing the CSA).

213. *Raich*, 125 S. Ct. at 2203 n. 20. *See supra* note 129 (listing the congressional findings of the CSA).

214. *Raich*, 125 S. Ct. at 2203–04. *See supra* notes 133–38 and accompanying text (detailing the CSA's reclassification process).

215. *Raich*, 125 S. Ct. at 2204.

216. *Id.* at 2205. *See supra* Part II.A (providing a brief history of Commerce Clause jurisprudence).

217. *Raich*, 125 S. Ct. at 2205; *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (listing the three areas of regulation).

218. *Raich*, 125 S. Ct. at 2205.

219. *Id.* at 2206.

observed that the purposes behind the governing statutes in each instance were comparable, as both the Agricultural Adjustment Act (AAA) and the CSA were designed to control the movement, supply, and demand of commodities within markets.<sup>220</sup> Although the CSA regulates both legal and illegal markets,<sup>221</sup> the Court posited that the correspondence between the acts was adequate to extend the rationale of *Wickard* to the facts of the instant case, and concluded that Congress had a rational basis for including locally cultivated marijuana within the purview of the CSA.<sup>222</sup> In addition, the Court drew a parallel between homegrown wheat and homegrown marijuana in that both commodities, while perhaps initially intended for home use, could potentially be drawn into the interstate market as prices and demand increase.<sup>223</sup> Such diversion frustrates federal interests, whether that interest is in controlling the market in wheat or eradicating the one in marijuana.<sup>224</sup> As such, and because the existence of the homegrown commodity has an impact on supply and demand in the interstate marketplace, Congress has authority to regulate it under the Commerce Clause.<sup>225</sup>

The Court quickly dispatched the Respondents' arguments that *Wickard* was not controlling, while allowing that they were "factually accurate."<sup>226</sup> The Court explained that simply because the AAA did not regulate all farms, this did not *per se* diminish Congress's power to regulate Filburn's farm.<sup>227</sup> The Court continued that the production of

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220. *Id.* at 2207.

221. *Id.* The Court conceded that in contrast to the CSA, which attempts to eliminate demand for marijuana, the aim of Congress under the Agricultural Adjustment Act is to stabilize and control the legitimate wheat market. *Id.* at 2207 n.29. However, prohibition of commerce lies within Congress's power to regulate, argued the Court, as set forth by Justice Kennedy's concurrence in *Lopez*. *Id.* See *infra* note 231 (discussing concepts of legal and illegal markets).

222. *Raich*, 125 S. Ct. at 2207.

223. *Id.* In contrast, one study suggests that the demand for illegal drugs is not elastic, and impacts on supply merely impact price. Gary Becker et al., *The Economics Theory of Illegal Goods: The Case of Drugs* (Nat'l Bureau of Econ. Research, Working Paper No. 10976, 2004), available at [http://home.uchicago.edu/~gbecker/illegalgoods\\_Becker\\_Grossman\\_Murphy.pdf](http://home.uchicago.edu/~gbecker/illegalgoods_Becker_Grossman_Murphy.pdf).

224. *Raich*, 125 S. Ct. at 2207.

225. *Id.* See *supra* note 57 (discussing supply and demand concepts).

226. *Raich*, 125 S. Ct. at 2207. Respondents argued that *Wickard* should not control for three main reasons. *Id.* First, the Agricultural Adjustment Act (AAA) allowed exemptions for small farmers, and the CSA makes no such provision. *Id.* Second, commercial farming is a "quintessential economic activity," unlike the activities of Respondents, which involved no commercial transaction. *Id.* Third, in *Wickard*, the impact of the class of activities (aggregate production of locally cultivated wheat for farm use) was shown to be substantial. *Id.*

227. *Id.* Congress was presumably entitled to use its discretion in deciding which farms contributed to the aggregate class ("That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis."). *Id.* By an extension of the above argument, the Court implied that the absence of an exemption provision in

homegrown wheat was not considered a commercial activity for the Court's purposes in *Wickard*, although the wheat was grown on a commercial farm.<sup>228</sup> Finally, the Court stated that the congressional findings included in the CSA were sufficient to demonstrate a nexus between the national marketplace and local production, similar to the findings from the *Wickard* record.<sup>229</sup> As the majority explained, Congress is not required to make specific findings, and while its findings must certainly be considered if made, the lack of such findings has no impact on Congress's power to enact legislation.<sup>230</sup> In a footnote, the Court observed that not only did Congress include findings regarding the impact of intrastate drugs on interstate drug markets but also that it would be impractical to require Congress to make detailed findings concerning each activity to be regulated.<sup>231</sup> In closing its *Wickard* analysis, the Court also pointed out that its duty under the standard of review did not include deciding whether or not the cumulative actions of persons, such as the Respondents, actually had a significant impact on the interstate market; the Court needed only to determine whether there was a "rational basis" for such a belief.<sup>232</sup> The

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the CSA had no bearing on its applicability to the Respondents. *Id.*

228. *Id.*

229. *Id.* at 2207–08.

230. *Id.* The Respondents posited that the CSA was unconstitutional as applied to them where Congress made no specific findings concerning the cultivation of medical marijuana and its impact on the interstate market. *Id.* In support of its statement that findings were unnecessary, the Court cited *United States v. Lopez*, 514 U.S. 549, 562 (1995) ("We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."), and *Perez v. United States*, 402 U.S. 146, 154 (1971) ("We do so not to infer that Congress need make particularized findings in order to legislate.").

231. *Raich*, 125 S. Ct. at 2208 n.32 ("Such an exacting requirement is not only unprecedented, it is also impractical."). For an analysis of the drug trade in economic market terms, see *Disrupting the Market: Attacking the Economic Basis of the Drug Trade*, in THE PRESIDENT'S NATIONAL DRUG CONTROL POLICY 27 (2005), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs05/disruptmkt.html> [hereinafter *Disrupting the Market*]. Although the Court referred briefly to the fact that the marijuana market is an illegal one, it never considered whether the impact of a locally grown commodity on illegal markets could differ significantly from such an impact on legal ones. *Infra* Part IV.A.1. The nature of supply and demand in illegal markets is treated in Becker, *supra* note 223. See Timothy Lynch, *Tabula Rasa for Drug Supply*, in AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY 6 (2000) ("[I]s the Office of National Drug Control Policy achieving its twin objectives of 'reducing demand' and 'disrupting supply'?"); Peter Reuter, *Setting Priorities: Budget and Program Choices for Drug Control*, in THE UNIVERSITY OF CHICAGO LEGAL FORUM, TOWARD A RATIONAL DRUG POLICY 145 (1994) ("For the last decade, the federal drug control budget has been heavily weighted towards programs that are classified as 'supply side.'").

232. *Raich*, 125 S. Ct. at 2208. The Court once again cited *Lopez*, 514 U.S. at 557, for the proposition that the Court is not required to determine if the class of activities actually has a

Court then concluded that there was indeed such a foundation for Congress's belief.<sup>233</sup>

b. Not Analogous: *Lopez* and *Morrison*

The Court proceeded to discuss two key recent Commerce clause cases: *Lopez* and *Morrison*.<sup>234</sup> The Court first distinguished these cases from the current challenge because in both *Lopez* and *Morrison* the statute or provision in question was found to be entirely beyond the federal commerce power.<sup>235</sup> The Court explained that it could not excise individual instances of a class of activity as trivial if the class as a whole is properly regulated under the Commerce Clause.<sup>236</sup> Turning to *Lopez*, the Court contrasted the Gun-Free School Zones Act with the CSA, explaining that the former is a brief, single-purpose criminal statute regulating no commercial or economic activity, whereas the latter is a comprehensive commercially-based piece of legislation that governs an enormous spectrum of controlled substances, the bulk of which serve a beneficial purpose to the American public.<sup>237</sup> The Court described the classification of marijuana as a Schedule I drug by Congress as simply one of the many essential features of the CSA, and stated that the regulation of intrastate activity ensures that the larger aim of the Act will not be undermined.<sup>238</sup> The holding in *Lopez*, according to the Court, had no impact on Congress's power to regulate purely local marijuana as part of a larger scheme.<sup>239</sup>

Similarly, the Court argued that in *Morrison*, the creation of a federal civil remedy in the Violence Against Women Act (VAWA) transcended the bounds of the federal commerce power because it did not regulate economic or commercial activity.<sup>240</sup> The Court also noted that in *Morrison*, as in *Lopez*, criminal conduct was at issue in the statute under

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substantial impact on interstate commerce, but only whether there is a possible "rational basis" for such a determination. *See supra* Part II.B.1 (discussing *Lopez*).

233. *Raich*, 125 S. Ct. at 2209.

234. *Id.* *See supra* Part II.B.1–2 (discussing *Lopez* and *Morrison*).

235. *Raich*, 125 S. Ct. at 2209. Conversely, in *Raich*, the Respondents recognized the validity of the CSA in general but requested the Court to find unconstitutional a particular application of the statute. *Id.*

236. *Id.* (citing *Perez v. United States*, 402 U.S. 146, 154 (1971)). *See supra* note 45 (outlining *Perez*' "class of activities" holding).

237. *Raich*, 125 S. Ct. at 2210.

238. *Id.*

239. *Id.*

240. *Id.* Significantly, in *Morrison*, Congress included findings that gender-based violent crimes had a substantial impact on interstate commerce. *United States v. Morrison*, 529 U.S. 598, 614 (2000). *See supra* Part II.B.2 (discussing *Morrison*).

attack.<sup>241</sup> In opposition to *Lopez* and *Morrison*, the Court reiterated that in the instant case, the activities governed by the legislation in question were “quintessentially economic.”<sup>242</sup> Thus, the Court concluded, its holdings in these earlier cases did nothing to undermine the constitutionality of the CSA.<sup>243</sup>

c. Conclusion: No Separate Class

Lastly, the Court denied that intrastate medical marijuana cultivation and production constituted a separate class of activities.<sup>244</sup> The Court conceded that while the distinctions between individuals participating in such a class and traffickers could allow for a separate, exempt class, such a characterization of the issue missed the mark.<sup>245</sup> The Court explained that the sole question for resolution was whether Congress’s decision not to allow for such an exemption violated the Constitution.<sup>246</sup> According to the Court, Congress determined that a separate class was not justified in light of the CSA’s regulatory aims.<sup>247</sup> First, the Court underscored that in classifying marijuana as a Schedule I drug, Congress conclusively ascertained that it has no accepted medical use.<sup>248</sup> While the Court acknowledged the existence of studies documenting the medicinal value of marijuana, it maintained that the possibility of rescheduling the drug was irrelevant to the case at hand.<sup>249</sup> Moreover, the Court posited, by logical extension, if Congress had no power to regulate local marijuana production and use for therapeutic purposes, then it would necessarily have no authority to regulate any locally cultivated and possessed controlled substance for any use, whether medical or recreational.<sup>250</sup> Clearly, the Court opined, the quantity of drugs falling into this category would be tremendous and

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241. *Raich*, 125 S. Ct. at 2210.

242. *Id.* at 2211. The Court defined “economic” according to WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966) (“the production, distribution, and consumption of commodities.”).

243. *Raich*, 125 S. Ct. at 2211.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* Ongoing efforts for over thirty years to reclassify the drug have been unsuccessful. See *supra* Part II.C.2 (describing ongoing efforts to reschedule marijuana).

249. *Raich*, 125 S. Ct. at 2211–12. The Court addressed the potential therapeutic benefits of marijuana in a footnote. *Id.* at 2212 n.37 (citing JANET E. JOY ET AL., INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 179 (1999); and *Conant v. Walters*, 309 F.3d 629, 640–43 (9th Cir. 2002) (Kozinski, J., concurring)).

250. *Id.* at 2212.



would have a substantial impact on interstate markets.<sup>251</sup> Congress was well within the bounds of its authority in electing not to create an exemption for intrastate marijuana because it would undermine the operation of the regulatory scheme as a whole.<sup>252</sup> In addition, the Court observed that under the Supremacy Clause, federal law necessarily preempts the California statute.<sup>253</sup>

The Court then remarked that the exemptions permitted under the Compassionate Use Act would clearly have a substantial effect on the marijuana market.<sup>254</sup> Several potential misuses of medical marijuana were suggested by the Court: corrupt doctors making a profit from prescriptions, other physicians determining that recreational use has therapeutic benefits, patients failing to terminate their use upon recovery, and non-patients using the exemptions to serve their own commercial ends.<sup>255</sup> In all of these scenarios, the Court maintained that marijuana intended for therapeutic purposes is diverted into the market as a whole, and where not just California but nine other states have such legislative exceptions, the aggregate effect of medical marijuana on interstate markets would certainly be substantial.<sup>256</sup>

In conclusion, the Court recommended that the Respondents pursue alternative avenues for relief, such as reclassification of marijuana under the mechanism included in the CSA or new legislation.<sup>257</sup> The Court

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251. *Id.* The Court observed that marijuana is an “extraordinarily popular substance.” *Id.* Indeed, cannabis remains the number one illicit drug in North America. Jackson, *supra* note 128, at 28.

252. *Raich*, 125 S. Ct. at 2212–13.

253. *Id.* The Supremacy Clause “ensure[s] the uniform interpretation of federal law.” *TRIBE*, *supra* note 22, at 254–55.

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.

U.S. CONST. art. VI, cl. 2. Federal laws “enjoy legal superiority over any conflicting provision of a state constitution or law.” BLACK’S, *supra* note 46, at 682. The Court cited *Wickard*, among others, in support of its Supremacy Clause argument: “[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.” *Raich*, 125 S. Ct. at 2212 (quoting *Wickard v. Filburn*, 317 U.S. 111, 124 (1942)).

254. *Raich*, 125 S. Ct. at 2212. Under the Compassionate Use Act, citizens can cultivate, possess, and use marijuana for medicinal purposes. *Supra* note 148.

255. *Raich*, 125 S. Ct. at 2214–15.

256. *Id.* at 2214. *See supra* note 151 (listing the eleven other states that currently have medical marijuana legislation or initiatives: Alaska, Arizona, Colorado, Hawaii, Maine, Montana, Nevada, Oregon, Rhode Island, Vermont, and Washington).

257. *Raich*, 125 S. Ct. at 2215. In its brief, *NORML* observed that efforts to reclassify marijuana have been ongoing for over thirty years, and have been rejected by the DEA. *NORML* brief, *supra* note 134, at 1–2. Reclassification is apparently not an available alternative under

held that the regulation of intrastate, noncommercial cultivation, use, and possession of marijuana was not beyond the scope of federal power under the Commerce Clause, and therefore vacated the judgment of the Court of Appeals.<sup>258</sup> The case was remanded for further proceedings consistent with the Court's holding.<sup>259</sup>

## 2. Justice Scalia's Concurrence

Justice Scalia concurred in the majority judgment, but wrote separately to outline his more "nuanced" approach to the Commerce Clause interpretation.<sup>260</sup> Justice Scalia began by listing the three categories of interstate commerce within the scope of the federal power.<sup>261</sup> He then distinguished the first two classes from the last, asserting that while the former are "self-evident," the latter differs as it is not an actual component of commerce, and therefore the power to regulate it must stem from another source.<sup>262</sup> Justice Scalia determined that the source of this complementary authority was the Necessary and Proper Clause.<sup>263</sup> Indeed, Justice Scalia maintained that the third category, consisting of activities that substantially affect interstate commerce, is actually incomplete.<sup>264</sup> Congress, under the Necessary and Proper Clause, has the power to regulate any intrastate activity necessary to effect its regulation of interstate commerce.<sup>265</sup>

Justice Scalia established the general framework for the regulation of intrastate activities critical to effective regulation of interstate

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current DEA standards. *Id.* See *supra* notes 133–38 and accompanying text (discussing the attempts to reclassify marijuana).

258. *Raich*, 125 S. Ct. at 2215. The Court noted that it would not address the medical necessity defense or substantive due process claim argued by Respondents because the appellate court did not reach these theories of relief. *Id.* In *Oakland Cannabis*, the Court unanimously held that there was no implied medical necessity exception to the ban on marijuana under the CSA. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001).

259. *Raich*, 125 S. Ct. at 2215.

260. *Id.* (Scalia, J., concurring).

261. *Id.* See *supra* note 74 and accompanying text (describing the categories as set forth in *Lopez* and derived from *Perez*: the channels of interstate commerce, the instrumentalities and persons or things in interstate commerce, and activities that substantially affect interstate commerce).

262. *Raich*, 125 S. Ct. at 2215–16 (Scalia, J., concurring).

263. *Id.* at 2216 (Scalia, J., concurring). Justice Scalia cited several cases in support of his proposition, the most recent of which was *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584–85 (1985) (O'Connor, J., dissenting) ("[A]n intrastate activity 'affecting' interstate commerce can be reached through the commerce power" by means of the Necessary and Proper Clause). *Raich*, 125 S. Ct. at 2216 n.1 (Scalia, J., concurring). See *supra* note 41 (describing the Necessary and Proper Clause).

264. *Raich*, 125 S. Ct. at 2216 (Scalia, J., concurring).

265. *Id.*

commerce, listing the intrastate activities at issue in several cases where the commerce power was upheld.<sup>266</sup> He then proceeded to outline the limitation on the regulation of intrastate activity by Congress, looking to *Lopez* and *Morrison*.<sup>267</sup> The relationship between the regulated activity and the regulation itself may not be so attenuated that essentially no area of activity remains beyond the scope of federal power.<sup>268</sup> However, the power to regulate is broad, and Justice Scalia contended that regulation of noneconomic activity could indeed come under federal commerce power if it were critical to the regulation of a larger economic activity.<sup>269</sup> Justice Scalia explained that this power derived from the Necessary and Proper Clause.<sup>270</sup>

Justice Scalia then turned his attention to the dissent and asserted that allowing Congress the power to regulate certain intrastate activities did not reduce the effectiveness of *Lopez* and *Morrison*.<sup>271</sup> He discussed the restraints upon Congress's authority to regulate intrastate commerce under the Necessary and Proper Clause.<sup>272</sup> Positing that such authority only existed within the framework of a larger interstate regulation, and could only be exercised if vital to the success of that regulation, Justice Scalia declared that the power was thus a limited one.<sup>273</sup> He explained that neither *Lopez* nor *Morrison* stood for the proposition that Congress lacked the ability to regulate intrastate activities, but rather that the relation between the activity and the regulation must be rational.<sup>274</sup> The

266. *Id.* ("That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce."). Justice Scalia then listed several cases where such intrastate activities had been federally legislated including: *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 281 (1981) (extending Commerce Clause power to regulate surface coal mining); *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (extending Commerce Clause power to prohibit discrimination by restaurants); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (extending Commerce Clause power to prohibit discrimination by hotels).

267. *Raich*, 125 S. Ct. at 2216–17 (Scalia, J., concurring).

268. *Id.* at 2217 (Scalia, J., concurring).

269. *Id.* Justice Scalia interpreted the Court's holding in *Lopez* as allowing that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* See *supra* Part II.B.1 (discussing *Lopez*).

270. *Raich*, 125 S. Ct. at 2217 (Scalia, J., concurring). Justice Scalia explained that the distinction between the Congress's power to regulate based on the Necessary and Proper Clause and its authority under the Commerce Clause to regulate activities substantially affecting interstate commerce is often misunderstood. *Id.*

271. *Id.* at 2218 (Scalia, J., concurring). Justice Scalia quoted Justice O'Connor's dissent, which argued that the *Raich* holding reduced *Lopez* and *Morrison* to "nothing more than a drafting guide." *Id.* at 2223 (O'Connor, J., dissenting).

272. *Id.* at 2218–19 (Scalia, J., concurring). See *supra* note 41 (discussing the Necessary and Proper Clause).

273. *Raich*, 125 S. Ct. at 2218–19 (Scalia, J., concurring).

274. *Id.*

statute at issue in this case was part of comprehensive legislation governing commercial transactions, unlike the laws challenged in *Lopez* and *Morrison*.<sup>275</sup> Finally, federal power in this arena is also limited by the requirement that it must not violate constitutional principles, such as state sovereignty.<sup>276</sup>

Applying this interpretation to the facts of the case, Justice Scalia explained that one of the goals of Congress under the CSA was to eradicate the national market for Schedule I drugs.<sup>277</sup> In order to effectuate this aim, Congress has banned the bulk of activities concerned with these substances, including manufacture, distribution and possession.<sup>278</sup> Justice Scalia stated that the issue before the Court was not the commercial nature of Respondents' activities, because Congress has authority to regulate any activity in connection with comprehensive interstate commerce legislation.<sup>279</sup> Rather, the question is whether the CSA prohibition on intrastate activity is a rational means of achieving the purpose of the statute.<sup>280</sup> Justice Scalia concluded that Congress's inclusion of intrastate activities was reasonable where fungible commodities like marijuana, despite state law controls, easily enter the interstate market, undercutting the federal government's efforts to eliminate the Schedule I drug marketplace.<sup>281</sup> He rejected the Respondents' state sovereignty claim that Congress's action in regulating intrastate activities allowed under state law was not "necessary and proper."<sup>282</sup> Justice Scalia therefore concluded that the CSA was constitutionally applied to the Respondents' activities.<sup>283</sup>

### 3. The Dissenting Opinions

Chief Justice Rehnquist, Justice O'Connor and Justice Thomas dissented to the majority opinion; Justices O'Connor and Thomas authored separate dissents.<sup>284</sup> In Justice O'Connor's dissent, she argued that the majority's holding could not be reconciled with *Lopez* and

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275. *Id.* See *supra* notes 234–43 and accompanying text (describing similar arguments made in the majority opinion distinguishing *Raich* from *Lopez* and *Morrison*). The majority also distinguished the challenge in *Raich* from that of *Lopez* and *Morrison* in that the latter cases were facial rather than applied challenges. See also *supra* note 46 (discussing as-applied challenges).

276. *Raich*, 125 S. Ct. at 2218–19 (Scalia, J., concurring) (internal citations omitted).

277. *Id.* at 2219.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 2220 (Scalia, J., concurring).

283. *Id.*

284. *Id.* at 2220–30 (O'Connor, J., dissenting) and 2230–39 (Thomas, J., dissenting).

*Morrison* and that it improperly expanded the reach of the federal commerce power.<sup>285</sup> Justice Thomas contended that the concept of enumerated powers was eviscerated if noncommercial activities producing goods that had no significant impact on the interstate marketplace could be regulated under the federal commerce power.<sup>286</sup>

a. Justice O'Connor's Dissent

The Chief Justice and Justice Thomas both joined in Justice O'Connor's dissent, except for the last section.<sup>287</sup> Justice O'Connor began by explaining that restraints on the Commerce Clause are necessary to prevent "excessive federal encroachment" and maintain state sovereignty—essential elements in preserving a federalist system of government.<sup>288</sup> The police power, she argued, has always granted authority to the states to regulate matters involving the health and welfare of their citizens.<sup>289</sup> Justice O'Connor then stated that the Court had failed to protect the authority of the states in holding the CSA constitutional as applied to a class of activities which may not even be economic, and for which there was furnished no proof of a significant effect on interstate commerce.<sup>290</sup> Justice O'Connor stated that the Court's holding would encourage broad-sweeping statutes; by enacting comprehensive rather than precise legislation, Congress could ensure its authority for previously impermissible exercises of federal power, as under this rule congressional power is much more likely to be found within a framework of a larger regulatory scheme.<sup>291</sup> In addition, Justice O'Connor contended, the Court's holding could not be reconciled with *Lopez* and *Morrison*.<sup>292</sup>

Justice O'Connor reviewed the Court's reasons for striking down legislation enacted under the Commerce Clause in *Lopez* and argued that the instant case could not be distinguished from *Lopez* and

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285. See *infra* Part III.C.3.a (detailing Justice O'Connor's dissent).

286. See *infra* Part III.C.3.b (detailing Justice Thomas's dissent).

287. *Id.* at 2220 (O'Connor, J., dissenting). In her final section, which the Chief Justice and Justice Thomas did not join, Justice O'Connor explained that if she lived in California, she would not have voted for Proposition 215, and if she were a California legislator she would not have supported the Compassionate Use Act. *Id.* at 2229 (O'Connor, J., dissenting).

288. *Id.* at 2220 (O'Connor, J., dissenting). Justice O'Connor also referred to the famous Brandeis quote which posited one of the main values of the federalist system to be that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

289. *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting).

290. *Id.*

291. *Id.*

292. *Id.*

*Morrison* using the same analysis.<sup>293</sup> Justice O'Connor argued that, in holding intrastate medical marijuana cultivation and possession to be within the reach of the federal commerce power because they cannot easily be separated from the other activities governed by the CSA, the majority permitted Congress to extend its Commerce Clause power essentially without restriction, simply by enacting comprehensive statutes.<sup>294</sup> For the dissenters, the Court's rationale reduced *Lopez* to "nothing more than a drafting guide," for almost any regulation could be sanctioned so long as it falls within the framework of a larger economic regulatory scheme.<sup>295</sup> Justice O'Connor observed that *Lopez* and *Morrison* were intended to put limits on the encroachments of federal power, not to encourage it by means of more extensive legislation.<sup>296</sup>

Justice O'Connor acknowledged the inherent difficulty in restricting analysis for cases involving the commerce power, and explained that courts must find "objective markers" for limiting such analysis.<sup>297</sup> In the instant case, such markers include the recognition by both state and federal law that therapeutic uses of drugs differ from other uses and can be separately regulated, as well as state sovereignty concerns.<sup>298</sup> Taking these markers into consideration, Justice O'Connor stated that the class of activities engaged in by the Respondents should be limited to the "personal cultivation, possession, and use of marijuana for medicinal purposes."<sup>299</sup> Justice O'Connor questioned whether such a class could be characterized as economic, and argued that insufficient evidence was presented to sustain an argument that the class, taken in the aggregate, either substantially affects interstate commerce or undercuts the larger regulatory aims of the CSA.<sup>300</sup>

Justice O'Connor disagreed with the Court's definition of economic activity, claiming that the majority's definition included "all of

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293. *Id.* at 2221–22 (O'Connor, J., dissenting). Justice O'Connor identified the four dispositive factors in *Lopez* as: 1) the statute involved was a criminal statute and not part of larger economic legislation; 2) the statute did not provide an "express jurisdictional requirement establishing its connection to interstate commerce;" 3) no congressional findings were made; and 4) the connection between the activity and the purported impact was too remote. *Id.* See *supra* Part II.B.1 (discussing *Lopez*).

294. *Raich*, 125 S. Ct. at 2222 (O'Connor, J., dissenting).

295. *Id.* at 2223 (O'Connor, J., dissenting).

296. *Id.* See *supra* Part II.B.1–2 (discussing *Lopez* and *Morrison*).

297. *Raich*, 125 S. Ct. at 2223 (O'Connor, J., dissenting).

298. *Id.* at 2224 (O'Connor, J., dissenting).

299. *Id.*

300. *Id.*

productive human activity.”<sup>301</sup> By negating any distinction between a purely local activity and an interstate activity, the Court conflated two distinct categories and opened the door to a federal police power.<sup>302</sup> Justice O'Connor continued that in *Lopez* and *Morrison*, the Court required a direct relation between the regulated activity and commercial activity.<sup>303</sup> Moreover, in *Lopez*, possession was clearly identified as a noncommercial activity.<sup>304</sup> Justice O'Connor also rejected the Court's holding that *Wickard* was dispositive, distinguishing it on the existence of exemptions in the AAA.<sup>305</sup> The AAA exemption illustrated that Congress was not attempting to extend its authority to every corner of local wheat production, and the holding of *Wickard* did not stand for the proposition that every production of a commodity is economic and therefore subject to congressional regulation.<sup>306</sup>

Moreover, Justice O'Connor insisted, even if the intrastate cultivation of marijuana for personal therapeutic uses is indeed economic, no evidence was furnished that such conduct had a substantial impact on interstate commerce.<sup>307</sup> Distinguishing this case from *Wickard*, where the “actual effects” of the activity were considered in light of hard evidence submitted, Justice O'Connor posited that Congress's mere statement that the activity in question had a significant impact on national markets was inadequate.<sup>308</sup> If congressional statement were all that was required to prove such an impact, the challenged statute (VAWA) in *Morrison* would have been upheld.<sup>309</sup> Furthermore, specific, extensive congressional findings were included in VAWA detailing the impact of the activity on the national economy, unlike the CSA's declarations, which were unsupported by any such evidence.<sup>310</sup> Justice O'Connor also noted that the unsubstantiated CSA findings did not specifically address marijuana.<sup>311</sup> She concluded that the lack of

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301. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 565 (1995)) (“depending on the level of generality, any activity can be looked upon as commercial”) (internal quotations omitted).

302. *Raich*, 125 S. Ct. at 2224–25 (O'Connor, J., dissenting).

303. *Id.* According to Justice O'Connor, the language of *Lopez* indicated that such activity must “arise out of or [be] connected with a commercial transaction.” *Id.* (quoting *Lopez*, 514 U.S. at 561).

304. *Raich*, 125 S. Ct. at 2225 (O'Connor, J., dissenting).

305. *Id.* The AAA included exemptions for small farmers. *Id.* at 2207 (O'Connor, J., dissenting). See *supra* Part II.A.3 (outlining *Wickard*).

306. *Raich*, 125 S. Ct. at 2225–26.

307. *Id.* at 2226 (O'Connor, J., dissenting).

308. *Id.* at 2227 (O'Connor, J., dissenting).

309. *Id.* See *supra* Part II.B.2 (discussing *Morrison* and the Violence Against Women Act).

310. *Raich*, 125 S. Ct. at 2227 (O'Connor, J., dissenting).

311. *Id.* at 2228 (O'Connor, J., dissenting).

evidence demonstrating that medical marijuana use poses a serious threat to federal efforts to control the marijuana trade was fatal to the government's argument.<sup>312</sup> Justice O'Connor therefore maintained that the states' power to regulate for the welfare of its citizens forbids the intrusion of the federal commerce power on the intrastate cultivation of medical marijuana for personal use.<sup>313</sup>

#### b. Justice Thomas's Dissent

Justice Thomas reasoned that if the Commerce Clause power extended to marijuana that had never entered the stream of commerce and had no significant impact on the interstate marketplace, then the concept of limited and enumerated powers was dead.<sup>314</sup> According to Justice Thomas, the activity being regulated was neither interstate nor commercial, nor was its regulation necessary to preserve Congress's control of the interstate drug trade under the CSA.<sup>315</sup> In maintaining that the activity in question was not commercial, Justice Thomas referred to the founding-era usages of the term "commerce," which were consistently limited to trade or exchange and not simply any productive activity.<sup>316</sup> The CSA, under Justice Thomas's analysis, thus represented an impermissible overextension of the federal commerce power as applied to purely intrastate noncommercial activity.<sup>317</sup>

Justice Thomas addressed the issue of whether the Necessary and Proper Clause provided Congress with authority for its regulation of such a class of activities.<sup>318</sup> Justice Thomas viewed the Necessary and Proper Clause as not conferring sweeping authority, but necessarily limiting Congress's actions under it to appropriate, plainly adapted means to achieve legitimate, constitutional ends.<sup>319</sup> Therefore, contended Justice Thomas, an "obvious, simple and direct relation"

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312. *Id.*

313. *Id.*

314. *Id.* at 2229 (Thomas, J., dissenting).

315. *Id.*

316. *Id.* at 2230 (Thomas, J., dissenting). In *Lopez*, Justice Thomas argued from an originalist viewpoint, stating that commerce should be defined as it was at the time of the Founding: "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring). "In its purest form, originalism postulates that a constitution, amendment, or law is to be understood through what its authors intended and in the context of the time when it was created." Hamm, *supra* note 107, at 165.

317. *Raich*, 125 S. Ct. at 2230 (Thomas, J., dissenting).

318. *Id.* See *supra* note 41 (detailing the Necessary and Proper Clause).

319. *Raich*, 125 S. Ct. at 2230–31 (Thomas, J., dissenting). Justice Thomas referred to Justice Marshall's interpretation of how Congress's power under the clause is to be used. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).



must exist between the prohibited intrastate activity and the larger regulation of interstate commerce.<sup>320</sup>

Justice Thomas then pointed out that the Respondents had brought an as-applied rather than a facial challenge to the CSA.<sup>321</sup> In an as-applied challenge, Justice Thomas noted, only the scope of the Respondents' and other similarly situated individuals' activities was considered, and the issue was whether a ban on their activities was necessary to the aims of the CSA.<sup>322</sup> Justice Thomas concluded that intrastate growers of medicinal marijuana formed a distinct class, apart from other intrastate growers, because the marijuana was not intended for commerce, and because the class was regulated by the Compassionate Use Act.<sup>323</sup> Furthermore, added Justice Thomas, there was no proof that the state controls imposed by California had been ineffective in preventing medical marijuana from entering the national market.<sup>324</sup> Nor was it evident that allowing medical marijuana use would impede enforcement of the CSA; the identity card registration system already in place would provide a simple and effective way to establish who had authority to cultivate and possess medical marijuana.<sup>325</sup> Finally, the government provided no empirical evidence that medical marijuana would have a substantial impact on the huge national marijuana market.<sup>326</sup>

Justice Thomas then expanded his analysis of the substantial effects requirement, arguing that the *Morrison* factors are insufficient.<sup>327</sup> Justice Thomas argued that by over-generalizing the class of activities

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320. *Raich*, 125 S. Ct. at 2231 (Thomas, J., dissenting). Justice Thomas cited his concurrence in *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring) (discussing "jurisdictional hook" requirements for a federal act in the context of Necessary and Proper Clause). Justice Thomas expressed doubts regarding the Court's Commerce Clause jurisprudence. *Id.*

321. *Raich*, 125 S. Ct. at 2231 (Thomas, J., dissenting).

322. *Id.* Justice Thomas added in a footnote that as *Lopez* and *Morrison* involved facial challenges, the analysis in those cases was necessarily different. *Id.* at n.3. See also *supra* note 46 (discussing facial and as-applied challenges).

323. *Raich*, 125 S. Ct. at 2232 (Thomas, J., dissenting).

324. *Id.*

325. *Id.*

326. *Id.* at 2233 (Thomas, J., dissenting).

327. *Id.* at 2235 (Thomas, J., dissenting) (urging that the standard established in *Morrison* be abandoned). Justice Thomas cited his concurrence from *Morrison* in which he stated that:

[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress[sic] 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.

*Id.* at 2237 (Thomas, J., dissenting) (quoting *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring)).

at issue, defining the class as involving merely intrastate marijuana and not limiting the class to intrastate medical marijuana, the *Morrison* factors are too easily manipulated to expand congressional power.<sup>328</sup> Moreover, by relying on an overbroad definition of “economic,” the Court empowered Congress to “regulate quilting bees, clothes drives and potluck suppers throughout the 50 states.”<sup>329</sup> Justice Thomas reminded the Court that the commerce power is just that—authority to regulate commerce and must not include every conceivable human endeavor.<sup>330</sup> In closing, Justice Thomas attacked the Court’s assertion that as the CSA governed interstate commerce, it was immaterial if local activity was implicated.<sup>331</sup> He stated that purely local activity may not be regulated under the Commerce Clause, nor is merely incidental regulation permitted under the Necessary and Proper Clause.<sup>332</sup> Justice Thomas also observed that the Court’s refusal to consider whether a particularized class of activities significantly affected interstate commerce belied its support for the substantial impact test.<sup>333</sup> Justice Thomas reaffirmed that the federalist system permits state regulation for the health and welfare of its citizens, and asserted that the Court’s holding in this case disregarded the sovereign power of the States.<sup>334</sup>

#### IV. ANALYSIS

The majority of Justices in *Raich* improperly held that the intrastate cultivation of marijuana for personal, noncommercial purposes was within the reach of the Commerce Clause.<sup>335</sup> This Part will analyze how the majority incorrectly applied the *Wickard* aggregate effects doctrine, and failed to recognize intrastate, noncommercial personal marijuana cultivation, possession, and use for purposes closely defined and tightly controlled under state law as a separate class of activities.<sup>336</sup>

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328. *Raich*, 125 S. Ct. at 2235 (Thomas, J., dissenting). See *supra* Part II.B.2 (discussing the *Morrison* factors).

329. *Raich*, 125 S. Ct. at 2236 (Thomas, J., dissenting).

330. *Id.* See *supra* note 316 (noting Justice Thomas’s concurrence in *Lopez*, which relied on an originalist interpretation of commerce).

331. *Raich*, 125 S. Ct. at 2237 (Thomas, J., dissenting). See *supra* note 41 (discussing the Necessary and Proper Clause).

332. *Raich*, 125 S. Ct. at 2237.

333. *Id.* at 2238 (Thomas, J., dissenting).

334. *Id.*

335. See *supra* Part III.D.1 (discussing the majority opinion in *Raich*).

336. See *infra* Part IV.A.1–2 (outlining majority’s application of *Wickard* doctrine and arguing that its economic arguments do not apply because the AAA and CSA have disparate goals).

It will argue that the dissenters were correct in maintaining that the majority's position resulted in an overly expansive interpretation of federal congressional power and blurred the gains of the Federalism Revolution.<sup>337</sup>

### A. *Misapplication and Overexpansion*

The *Raich* Court established that federal regulation of noneconomic intrastate activities can withstand a Commerce Clause challenge if: 1) the regulation controlling the intrastate activity is nested within comprehensive economic regulation governing interstate commerce; and 2) the intrastate activity undercuts the goals of such regulation.<sup>338</sup> In *Lopez*, the Court described the rationale relied on in *Wickard* as the "most far reaching" application of the Commerce Clause.<sup>339</sup> The holding in *Raich* will certainly now assume that title.<sup>340</sup>

Under the Court's holding in *Raich*, Congress can now regulate any local, noncommercial production of a commodity for which there is an interstate market.<sup>341</sup> Moreover, under the rational basis test, the very existence of the interstate market supports the conclusion that such a commodity could enter the interstate market.<sup>342</sup> However, such a conclusion is necessarily based on the assumption that current state legislation governing local production will fail.<sup>343</sup> The Court's reasoning fell short on two primary counts: it incorrectly identified *Wickard* as controlling, and it improperly refused to recognize intrastate noncommercial production of marijuana for certain personal uses

337. See *infra* Part IV.A.3-4 (concluding that the majority improperly refused to recognize a separate class and the dissenters correctly found that the CSA as applied exceeded congressional authority).

338. See *supra* notes 238 and 252 and accompanying text (describing the Court's rationale in asserting that if regulation of intrastate activity is required to effect the larger aims of the regulation, it is permissible).

339. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

340. *Raich*, 125 S. Ct. at 2224 (O'Connor, J., dissenting) (observing that *Raich* "threaten[ed] to sweep all of productive human activity into federal regulatory reach.>").

341. *Id.* at 2236 (Thomas, J., dissenting) (claiming that under *Raich*, Congress could now regulate "quilting bees, clothes drives, and potluck suppers throughout the 50 States.>").

342. *Raich*, 125 S. Ct. at 2206 (discussing whether Congress's "rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions.>"). See *supra* notes 232-33 (discussing the rational basis test employed in *Raich*).

343. See *supra* note 146 (describing how the bulk of local drug enforcement is effected by the states). The federal government realized early on that it did not have the resources to police drug activities in all fifty states, and the first "drug czar," Harry Anslinger, petitioned states to sign the Uniform State Narcotics Act. See generally GRASS (Sphinx Productions 2000) (detailing the adoption of the Uniform Narcotics Act at the urging of Anslinger); GRAY, *supra* note 98, at 24 (detailing the efforts of Anslinger to encourage the passage of the Uniform Narcotics Act by the states).

defined by the state as a separate class of activities.<sup>344</sup>

### 1. *Wickard* Was Not Analogous

The Court improperly expanded *Wickard* to reach the facts of *Raich*.<sup>345</sup> *Wickard* was not analogous for several reasons, the most important of which centered on Filburn's occupation as a commercial farmer who grew wheat for commercial distribution, whereas the Respondents in *Raich* were completely unconnected to commerce.<sup>346</sup> The *Wickard* Court distinguished Filburn's cultivation of wheat for personal use from his commercial wheat farming.<sup>347</sup> However, in finding a rational basis for the conclusion that Filburn's homegrown wheat could enter interstate markets, his position as a commercial actor was very relevant.<sup>348</sup> In *Wickard*, the homegrown wheat was indistinguishable from the wheat intended for interstate sale—Filburn was cultivating both types of wheat on the same farm.<sup>349</sup> Moreover, no state regulations controlled the homegrown wheat.<sup>350</sup> The Court in *Raich* similarly contended that it was impossible to differentiate between the two categories of marijuana.<sup>351</sup> However, unlike Farmer Filburn, the Respondents were not commercial actors and state

344. See *supra* note 222, 244 and accompanying text (describing the majority's finding that *Wickard* was controlling and conclusion that intrastate noncommercial production of marijuana for medical use was not a separate class); *supra* Part IV.A.1 (arguing the majority's application of *Wickard* doctrine was improper because the control of wheat under the AAA is not analogous to the growth of medical marijuana under the Compassionate Act); Part IV.A.3 (arguing the use of marijuana for medicinal purposes is a separate class of activities from those controlled under the CSA). See also *Raich*, 125 S. Ct. at 2201 (discussing *Wickard* and refusing to find a separate class).

345. *Raich*, 125 S. Ct. at 2206 ("The similarities between this case and *Wickard* are striking.").

346. See Chen, *supra* note 47, at 83.

347. *Raich*, 125 S. Ct. at 2207.

It has been [Filburn's] practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding.

*Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

348. *Raich*, 125 S. Ct. at 2207. ("In *Wickard*, we had no 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.").

349. *Wickard*, 317 U.S. at 114.

350. *Id.*

351. *Raich*, 125 S. Ct. at 2206. See *supra* text accompanying note 219 (referring to marijuana and wheat as "fungible," or interchangeable, commodities). Congress has previously enacted regulation that supplied a mechanism for distinguishing legal marijuana from contraband: the Marihuana Tax Act's tax stamp requirement. See *supra* note 117 (observing that the Marihuana Tax Act required tax stamps to be affixed to all marijuana).

regulations were in place governing their local production of medical marijuana.<sup>352</sup>

## 2. AAA and CSA: Different Goals

Furthermore, the economic arguments relied on in *Wickard* do not apply in the context of personal, noncommercial intrastate marijuana production, despite the contentions of the Court.<sup>353</sup> A substantial impact of locally produced commodities on the national market can only derive from significant effects on demand, supply or cost.<sup>354</sup> In *Wickard*, the Court found that the cumulative effect of farmers nationwide growing their own wheat had the potential to substantially affect the national wheat market.<sup>355</sup> By growing their own wheat, farmers removed themselves from the demand side of the market.<sup>356</sup> This reduced demand, coupled with Congress's intent under the AAA to stabilize and control that market, could thwart Congress's efforts to regulate the market.<sup>357</sup> Similarly, state-authorized medical marijuana users (SAMMUs) cultivating their own marijuana remove themselves from the demand side of the equation because they are no longer forced to resort to their local illegal marijuana market, which, to the extent that it is supplied via interstate commerce, affects the national illegal marijuana market.<sup>358</sup>

However, the effect of homegrown wheat on national wheat markets in *Wickard* and the effect of SAMMUs' homegrown marijuana on national marijuana markets are markedly different.<sup>359</sup> The distinction stems from the divergent purposes of the AAA and the CSA.<sup>360</sup> The

352. See *supra* Part II.C.3 (discussing the pertinent state regulations).

353. See *supra* note 222 and accompanying text (detailing the *Raich* majority's conclusion that Congress had a rational basis for including intrastate medical marijuana within the scope of the CSA).

354. See *supra* note 57 (discussing the concept of supply and demand).

355. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

356. *Id.*

357. *Id.*

358. *Gonzales v. Raich*, 125 S. Ct. 2195, 2207 n.28 (2005) ("Even respondents acknowledge the existence of an illicit market in marijuana; indeed Raich has personally participated in that market, and Monson expresses a willingness to do so in the future.").

359. See *supra* Part II.A.3 (detailing *Wickard* and the effect of homegrown wheat on national wheat markets).

360. *Raich*, 125 S. Ct. at 2207 n.29. The Court acknowledged that the CSA aimed to eliminate the demand for marijuana, but argued that prohibition is within Congress's power to regulate, citing Justice Kennedy's concurrence in *Lopez* that looked to the *Lottery Case*, *Hoke* and *Hipolite Egg*. *Id.* See *supra* note 33 (describing the *Lottery Case*, *Hoke* and *Hipolite Egg*, all of which regulated the movement of goods/people in interstate commerce). This misses the point, because the issue here is how the local activity affects congressional intent.

goal of the CSA is, in part, to eradicate the illegal interstate market for marijuana.<sup>361</sup> In a National Office of Drug Control position paper, market disruption is identified as one of the federal government's chief strategies in the drug war.<sup>362</sup> Because the CSA aims to extinguish the interstate market for illegal marijuana, a reduction in demand arising from the movement of SAMMUs out of the market would further the CSA's goals, as a decrease in demand would shrink the market.<sup>363</sup> By contrast, the AAA sought to maintain a steady supply of wheat by controlling both demand and supply.<sup>364</sup> Fluctuations resulting in both shortages and surpluses came within the purview of the AAA.<sup>365</sup> Filburn's activities, when considered in the aggregate, undercut the aims of the AAA by decreasing demand.<sup>366</sup> The differences between the goals of the CSA and the AAA are significant because the *Raich* Court framed the issue as one of congressional intent, relying consistently on the argument that if local noncommercial activities undercut the goals of a larger economic regulatory scheme, then regulation of the local activities is permissible under the Commerce Clause.<sup>367</sup>

No rational basis exists for concluding that state-authorized local production of marijuana for medical purposes would significantly affect the supply moving in national markets.<sup>368</sup> In accordance with California's Compassionate Use Act, SAMMUs locally consume the entire supply of medical marijuana, and the commodity never enters interstate commerce.<sup>369</sup> The argument that state-authorized medical

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361. See MUSTO & KORSMEYER, *supra* note 121, at 60. The CSA was an integral component of President Nixon's "law and order" platform, and represented the cornerstone of his "War on Drugs." *Id.*

362. See *Disrupting the Market*, *supra* note 231.

363. See *supra* note 57 (discussing supply and demand principles).

364. See Chen, *supra* note 47, at 83–84. "Because excessive production can stretch the gap between the market price for a commodity and the target price set in a government-sponsored support program, virtually every price support mechanism is paired with some sort of supply control." *Id.*

365. Wickard v. Filburn, 317 U.S. 111, 115 (1942). The AAA "control[ed] the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce." *Id.*

366. *Id.* at 128.

367. Gonzales v. Raich, 125 S. Ct. 2195, 2209–10 (2000). The Court cited *Lopez* in explaining that the CSA, unlike the Gun-Free School Zones Act of 1990, was "one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activities were regulated.'" *Id.* (internal citations omitted).

368. But see *Raich*, 125 S. Ct. at 2208–09 ("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.").

369. See Joan Biskupic et al., *Patients Who Use Marijuana Fear Worst if Forced to Stop*, USA TODAY, June 6, 2005, available at <http://www.usatoday.com/news/health/2005-06-06-marijuana->

marijuana cultivation affects the supply side of the national marijuana market necessarily assumes that marijuana grown for personal noncommercial use enters that market.<sup>370</sup> It also assumes that such marijuana enters the interstate market in sufficient quantities to have a substantial effect upon interstate availability and hence prices, and infers that California state law is ineffective in regulating local use and production.<sup>371</sup> The Court refers to no studies or data in setting forth this argument, in spite of the fact that a number of states have had medical marijuana initiatives for several years.<sup>372</sup>

### 3. A Separate Class

The Court also refused to recognize local, noncommercial production of marijuana for personal medical use as a separate class of activities.<sup>373</sup> Congress included in the CSA a statement that drugs moving in interstate commerce were indistinguishable from locally produced drugs, and therefore, the regulation of intrastate production was critical to the larger regulatory scheme.<sup>374</sup> In accepting this rationale, the Court stated that Congress had no obligation to create an exception under the law for the purported class, largely because marijuana is absolutely prohibited under the CSA, and under the Supremacy Clause, in any conflict between state and federal law, federal law prevails.<sup>375</sup> However, for intrastate purposes, medical marijuana is recognized under California law.<sup>376</sup> The Court observed that under the dissenters' argument, any locally cultivated controlled substances would be beyond

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cover\_x.htm (discussing the number of SAMMUs in the state of California—approximately 100,000). In 1994, it was estimated that nine million Americans used marijuana regularly. Marcia Angell & Jerome P. Kassirer, *Alcohol and Other Drugs—Towards a More Rational and Consistent Policy*, 331 NEW ENG. J. MED. 537 (1994).

370. *Raich*, 125 S. Ct. at 2207 (“The . . . concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market.”).

371. *But see supra* note 146 (acknowledging that federal law could not supplant local drug enforcement).

372. *See supra* note 151 (listing the states in addition to California with medical marijuana laws or initiatives in place).

373. *See supra* Part III D.1.c (outlining the Court’s rationale in declining to recognize the cultivation and possession of medical marijuana as a separate class of activities).

374. *See supra* note 129 (listing CSA statements concerning the effects of intrastate production of on interstate traffic in controlled substances).

375. *Raich*, 125 S. Ct. at 2211 (“The CSA designates marijuana as contraband for any purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.”). *See supra* note 253 (discussing the Supremacy Clause).

376. *See supra* Part II.C.3 (detailing California’s Compassionate Use Act).

the reach of the federal commerce power.<sup>377</sup> In making this argument, the Court overlooked one key element of the proposed class: the activity must be noncommercial.<sup>378</sup> While a class of activity including all intrastate noncommercial cultivation would certainly be larger than a strictly SAMMU class, eliminating commercial growers would keep major intrastate production out of the class of activity.<sup>379</sup>

Moreover, while the Court maintained that Congress did not exceed its authority under the Commerce Clause in declining to include an exception for SAMMUs' activities in the CSA, it also insisted that authorizing SAMMUs' activities as a class would have a substantial impact on the national market because of the diversion of medical marijuana into the general interstate market.<sup>380</sup> The majority explained that a trivial specific instance cannot be excised if the class in general is reachable under the Commerce Clause.<sup>381</sup> And yet, if the cumulative impact of intrastate medical marijuana production on interstate commerce is indeed substantial, as posited by the majority, such activities cannot be characterized as trivial, and merit review under an as-applied challenge.<sup>382</sup> As the Ninth Circuit correctly observed, SAMMUs' activities have no substantial impact on interstate commerce under the *Morrison* factors.<sup>383</sup> If SAMMUs' activities are considered as a separate class, the CSA is invalid as applied.<sup>384</sup>

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377. *Raich*, 125 S.Ct. at 2212.

378. DONALD N. MCCLOSKEY, *THE APPLIED THEORY OF PRICE* 84 (2d ed. 1982). An individual who creates demand also creates supply, because he supplies money, which then enters the market place—economists describe this phenomenon as the “veil of money” that has been thrown over the transaction. *Id.* See also BLACK’S, *supra* note 46, at 285 (defining “commerce” as “[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations”).

379. See Biskupic et al., *supra* note 369 (estimating that roughly 100,000 SAMMUs exist in the state of California).

380. *Raich*, 125 S.Ct. at 2213–2215. “Indeed, that the California [medical] exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just ‘plausible’ . . . it is readily apparent.” *Id.* at 2213 (referring to Justice O’Connor’s dissent at 2229).

381. *Id.* at 2209 (“That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.”).

382. See *supra* note 46 (explaining that under an as-applied challenge, although a law may be constitutional on its face, it can also be found unconstitutional in its application to a particular set of facts). In contrast to the facial challenges brought in *Lopez* and *Morrison*, in *Raich* the Respondents asked the Court to find the CSA unconstitutional as applied to intrastate medical marijuana. *Raich*, 125 S.Ct. at 2209.

383. See *supra* text accompanying note 200 (explaining that the Ninth Circuit, applying the four-part *Morrison* test, found that medical marijuana did not substantially affect interstate commerce).

384. See *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring)



#### 4. Inherent States' Rights

In addition, as acknowledged by the DEA, state officials conduct the vast majority of enforcement at the local level.<sup>385</sup> Also, under California's law, medical marijuana may not be commercially distributed.<sup>386</sup> By eliminating any potential profit motive and maintaining criminal penalties for selling marijuana, the movement of authorized medical marijuana into the interstate stream of commerce is effectively limited.<sup>387</sup> The Court's supply-side argument is flawed because it implies that state mechanisms are inefficient and federal laws should thus supplant those of the state.<sup>388</sup> The Constitution grants limited powers to the federal government; replacement of state laws perceived to be lacking is not a legitimate goal under the Commerce Clause.<sup>389</sup>

In her dissent, Justice O'Connor rightly observed that the broad two-part test created by the *Raich* Court will encourage Congress to enact comprehensive rather than precise legislation, and, under this new standard, Congress can reach almost any purely local, noncommercial production of a commodity for personal use.<sup>390</sup> While conceding that identifying classes for consideration in Commerce Clause challenges would require close analysis, she also insisted that the purely local, noncommercial production of marijuana for medical purposes should be

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(determining that medical marijuana did not satisfy the requirements of the *Morrison* test for substantial impact on interstate commerce).

385. Bennett, *supra* note 146 (recognizing that federal drug legislation cannot supplant state legislation).

386. See CAL HEALTH & SAF. CODE § 11362.5 (West Supp. 2005).

Section 11362.5(d) exempts 'a patient' and 'a patient's primary caregiver' from prosecution for two specific offenses only: possession of marijuana (§ 11357) and cultivation of marijuana (§ 11358). It does not preclude prosecution under sections 11359 (possession of marijuana for sale) or 11360(a), which makes it a crime for anyone to 'sell[], furnish [], administer [], or give [] away' marijuana.

People *ex rel.* Lungren v. Peron, 70 Cal Rptr. 2d 20, 26 (Cal. Ct. App. 1997) (emphasis in original).

387. See *Raich*, 125 S. Ct. at 2214. The majority argued that allowing intrastate noncommercial marijuana cultivation would permit unscrupulous individuals to improperly profit from marijuana, which could have a substantial impact on the national market for marijuana. *Id.* However, by this reasoning, every drug for which there is an illegal market or potential for abuse, such as Valium and Viagra, should be placed on Schedule I. See, e.g., News Release, Pfizer, Pfizer Launches Campaign Against Sellers of Illegal Generic and Counterfeit Viagra and Senders of Viagra-Related Spam (Aug. 3, 2004), available at [http://www.pfizer.com/pfizer/are/news\\_releases/2004pr/mn\\_2004\\_0803.jsp](http://www.pfizer.com/pfizer/are/news_releases/2004pr/mn_2004_0803.jsp) (detailing some of the illegal activities surrounding Viagra distribution).

388. But see *Raich*, 125 S. Ct. at 2213 n.38 (noting that Prop 215 was passed some thirty-four years after the CSA).

389. See *supra* note 76 and accompanying text (citing *Lopez*).

390. *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting).

deemed a separate class of activity, particularly in light of legislative acknowledgment that medical and recreational drug use can be separately regulated.<sup>391</sup> The act of cultivating marijuana that is for therapeutic purposes and that is not sold, bartered or exchanged cannot be construed as commercial activity.<sup>392</sup> Otherwise, regulation under the Commerce Clause threatens to “sweep all of productive human activity into federal regulatory reach,” including “quilting bees, clothes drives, and potluck suppers.”<sup>393</sup> The dissent’s approach would provide a result more consistent with earlier decisions restricting federal intrusion into areas historically governed by the states.<sup>394</sup>

## V. IMPACT

This Part will consider the impact of the *Raich* decision in two areas: the future for SAMMUs, and the future of the Federalism Revolution in the context of the Roberts Court.<sup>395</sup>

### A. *The Future for SAMMUs*

For SAMMUs, *Raich* may ultimately have limited practical

391. *Id.* at 2223–24 (O’Connor, J., dissenting).

392. *Raich v. Ashcroft*, 352 F.3d 1222, 1228–29 (9th Cir. 2003), *vacated by* *Gonzalez v. Raich*, 125 S. Ct. 2195 (2005). See also BLACK’S, *supra* note 46, at 285 (defining commerce as “[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations.”).

393. *Raich*, 125 S. Ct. at 2224 (O’Connor, J., dissenting); *id.* at 2236 (Thomas, J., dissenting). Justice Thomas’s opinion in this case appears to be a shift away from his rationale in *Oakland Cannabis*, in which the Oakland Cannabis Buyers Club proceeded under the theory of medical necessity to defend its manufacture and distribution of marijuana. See *supra* Part II.C.3 (discussing the federal response to California’s Compassionate Use Act). In *Oakland Cannabis*, Justice Thomas stated that marijuana had no medical use under the CSA, and could not be dispensed without violating the law, and moreover because the federal legislature had determined that marijuana had absolutely no medical benefits, a medical necessity defense could not be inferred from the statute. *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001). In *Raich*, Justice Thomas was willing to move beyond the categorical congressional findings to determine that this limited class of activities stands beyond the reach of federal power. *Raich*, 125 S. Ct. at 2238.

394. See TUSHNET, *supra* note 94, at 255. Tushnet describes the “enclave theory,” which “identif[ies] areas where regulation by the states, rather than by national government, is so important that the national government has to stay out. . . . The usual candidates are family law, land use regulation, ordinary criminal law, and elementary and secondary education.” *Id.* See D.G. Savage, *Flip Sides: California Marijuana Law Tests High Court Conservatives’ Commitment to Federalism*, 90 A.B.A. J. 14 (Dec. 2004) (questioning whether federalism is “a principle that decides cases, whether or not you agree with the underlying issue,” or merely a doctrine of convenience). Compare with E.A. Young, *Let Homegrowers Be*, 62 NAT’L L.J. 23 (2004) (framing *Raich* as a test to determine whether commitment to federalism will prevail over conservative policies).

395. See *infra* Part V.A (discussing the limited practical impact of *Raich* for SAMMUs); Part V.B (considering the direction of federalism in the newly-composed Roberts Court).

impact.<sup>396</sup> The Supreme Court has held that state sovereignty precludes Congress from mandating state participation in federal regulatory schemes, also known as the “commandeering” doctrine.<sup>397</sup> Specific to California, the Ninth Circuit posited that under this doctrine the federal government could not force California to repeal its medical marijuana law; rather it could only step up its own enforcement.<sup>398</sup> As federal marijuana prosecutions are rare, the likelihood of such prosecution for medical marijuana users in states with exemptions for such use is low.<sup>399</sup> One commentator documented state refusal to cooperate with federal officials after gun-wielding DEA agents arrested a polio patient confined to a wheelchair during a raid on a medical marijuana hospice.<sup>400</sup> State officials, including the Attorney General of California, emphasized the ruling would have very little practical impact.<sup>401</sup> Indeed, despite the *Raich* holding, other states and communities continue to consider enacting their own medical marijuana legislation.<sup>402</sup> Commentators observe that *Raich*’s holding does not invalidate state laws, nor does it require that federal or state authorities prosecute SAMMUs.<sup>403</sup>

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396. See Tim Warriner, *Bad Spin on Jackson and Raich*, June 18, 2005, [http://www.warrinerlaw.com/archives/2005/06/bad\\_spin\\_on\\_jac.html](http://www.warrinerlaw.com/archives/2005/06/bad_spin_on_jac.html) (“*Raich* perpetuates a conflict in the law. Medical users who possess smaller quantities, who are not prosecuted in federal court, may continue to use marijuana. The media treated the *Raich* decision as the final battle over medical pot, which it was not.”).

397. See, e.g., *New York v. United States*, 505 U.S. 144 (1992) (finding that states could not be required to accept ownership of waste or regulate according to instructions of Congress). See also *Printz v. United States*, 521 U.S. 898, 925 (1997) (“the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs”). See *supra* note 179 (discussing the Tenth Amendment commandeering doctrine).

398. See *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002). The concurring opinion, authored by Judge Kozinski, was handed down prior to the *Raich* decision. *Id.* at 629–30. In an interesting parallel to states’ refusals to assist federal enforcement of the ban on medical marijuana, after the Eighteenth Amendment passed, many states “abdicate[d] their law enforcement responsibilities” in relation to alcohol laws. *Hamm, supra* note 107, at 175.

399. Linda Greenhouse, *Justices Say U.S. May Prohibit the Use of Medical Marijuana*, N.Y. TIMES, June 7, 2005, at A1.

400. Alex Kreit, Comment, *The Future of Medical Marijuana: Should the States Grow their Own?*, 151 U. PA. L. REV. 1787, 1787–88 (2003).

401. Biskupic et al, *supra* note 369.

402. Meghan Meyer, *Movement for Legalization of Medical Marijuana Pushes On*, DAILY SENTINEL, Oct. 20, 2005, available at [http://www.dailysentinel.com/news/content/shared/news/nation/stories/10/1020\\_COXMARIJUA\\_NA.html](http://www.dailysentinel.com/news/content/shared/news/nation/stories/10/1020_COXMARIJUA_NA.html) (stating that two Michigan cities are also contemplating medical marijuana initiatives). In addition, on November 7, 2005, Denver, Colorado residents approved I-100, an initiative legalizing possession of small amounts of marijuana (less than one ounce). Patrick O’Driscoll, *Denver Votes to Legalize Marijuana Possession*, USA TODAY, Nov. 3, 2005, available at [http://www.usatoday.com/news/nation/2005-11-03-pot\\_x.htm](http://www.usatoday.com/news/nation/2005-11-03-pot_x.htm).

403. Medical Marijuana Policy Project of Montana, <http://montanacares.org/home> (last visited

The majority opinion in *Raich* suggested that reclassification of marijuana affords one potential resolution to the medical marijuana issue.<sup>404</sup> Attempts to reclassify marijuana have been a cornerstone of marijuana reformers' efforts for over three decades.<sup>405</sup> If therapeutic marijuana were moved to a less restrictive schedule, *Raich* would become largely irrelevant, because the thrust of the majority's logic in denying that the cultivation and use of medical marijuana could constitute its own separate class of activity centered on the fact that, as marijuana is a Schedule I drug, there could be no legal activity involving it.<sup>406</sup> Although the CSA contains provisions allowing for the rescheduling of controlled substances, thus far, federal regulators have been unwilling to accept findings concerning the potential medical uses for marijuana.<sup>407</sup>

### *B. The Future of the Federalism Revolution*

The *Raich* decision established that federal regulation of purely local, noneconomic activity can be sustained under the Commerce Clause if such regulation is included within comprehensive legislation governing interstate economic activity, and as long as there is a rational basis for concluding that the local activity undercuts the interstate activity.<sup>408</sup> The test set forth by the *Raich* Court is a departure from more recent cases as it grants much greater authority to Congress in the regulation of intrastate activities.<sup>409</sup> Moreover, as noted by Justice O'Connor in her

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Apr. 17, 2006). "Because the DEA and other federal agents make only 1% of annual marijuana arrests, patients in Montana and other medical marijuana states retain a high level of protection." *Id.*

404. *Gonzales v. Raich*, 125 S. Ct. 2195, 2215 (2005). See *supra* note 133 (explaining the reclassification process under the CSA).

405. NORML brief, *supra* note 134. The prospect of reclassification seems "quite unlikely, given the response of John P. Walters, the Bush administration's 'drug czar,' the director of national drug control policy." Greenhouse, *supra* note 399. See also *supra* note 134–38 and accompanying text (discussing NORML's attempt to reclassify marijuana under the CSA).

406. *Raich*, 125 S. Ct. at 2211 ("The CSA designates marijuana as contraband for any purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.") (emphasis in original).

407. See *supra* note 134–38, 144 and accompanying text (outlining failed attempts at reclassification by lobby groups and legislators). In 1989, an ALJ recommended that marijuana be removed from Schedule I after conducting extensive hearings; the DEA Administrator declined to follow that recommendation. *Id.* DEA Administrators have insisted that further research be done before any petition for reclassification can be approved; however, in a Catch-22, it is almost impossible to legally obtain marijuana for research purposes. Tiersky, *supra* note 5, at 590–91. See also *Grinspoon v. DEA*, 828 F.2d 881, 896–97 (1st Cir. 1987) (upholding DEA Administrator's decision not to follow ALJ recommendation that MDMA be placed on Schedule III).

408. See *supra* Part III.D.1 (reviewing the majority opinion of *Raich*).

409. See *supra* Part II.B.1–2 (discussing *Lopez* and *Morrison*, which limited congressional

dissent, the *Raich* holding will certainly promote comprehensive legislation packages as federal legislators attempt to capitalize on the broader powers extended under *Raich*.<sup>410</sup>

Renewed deference to congressional findings seems likely after the *Raich* decision.<sup>411</sup> The *Lopez* Court refused to observe an automatic nexus between violent gun crimes and interstate commerce simply because the government argued such a connection could be found.<sup>412</sup> In *Morrison*, the Court rejected the voluminous congressional findings detailing the impact of gender-motivated violence on interstate commerce included in the Act.<sup>413</sup> However, in *Raich*, the Court accepted at face value Congress's bare assertion that intrastate drug production affected interstate drug markets.<sup>414</sup> It is unclear whether the Court's failure to question congressional findings in *Raich* marks a shift away from Rehnquist's federalist agenda or rather represents current drug policy.<sup>415</sup>

The appointment of both a new Chief Justice and a new associate Justice compounds the difficulty of forecasting whether *Raich* indicates that the pendulum is swinging away from the Federalism Revolution initiated by Chief Justice Rehnquist.<sup>416</sup> It appears that the new Justices may follow Chief Justice Rehnquist's vision.<sup>417</sup> In contrast, however,

power under the Commerce Clause). With *Lopez* and *Morrison*, the Court adopted a more restrictive interpretation of the federal commerce power. See generally Kreit, *supra* note 400, at 1802–06 (discussing the trend in Supreme Court decisions over the last decade of limiting federal congressional power under the Commerce Clause).

410. *Raich*, 125 S. Ct. at 2221–22 (O'Connor, J., dissenting).

411. Compare with Powell, *supra* note 78 (suggesting that the effect of *Lopez* will be to encourage the inclusion of congressional findings in proposed legislation).

412. See Newbern, *supra* note 70, at 1607 (arguing that *Lopez* “drew a firm line between the roles of nation and state . . . [and] showed that this line could not be automatically crossed by the magical incantation, ‘in interstate commerce.’”).

413. *United States v. Morrison*, 529 U.S. 598, 599–600 (2000). See *supra* Part II.B.2 (discussing the *Morrison* decision).

414. *Raich*, 125 S. Ct. at 2210–13.

415. See Hertzberg, *supra* note 10 (arguing that the majority aimed to “slow the Court’s ‘federalist’ . . . drift”).

416. Stolberg & Bumiller, *supra* note 9 (reporting that Chief Justice John Roberts was confirmed on September 29, 2005). Associate Justice Samuel Alito was confirmed January 31, 2006. Kirkpatrick, *supra* note 9.

417. Bernstein, *supra* note 2 (noting that “very conservative judges who satisfy core Republican constituencies . . . are also more likely to vote for a more originalist view of federal power . . .”). The new Chief Justice served as the former Chief Justice’s clerk; although his slim judicial record provides little clear indication of whether he shares the former Chief Justice’s federalist agenda, some commentators posit that the new Chief Justice will continue in his predecessor’s footsteps. Jonathan Turley, *Roberts the Elder*, VILLAGE VOICE, Sept. 13, 2005, available at [http://www.villagevoice.com/news/0537\\_turley.67758.6.html](http://www.villagevoice.com/news/0537_turley.67758.6.html). Moreover, Chief Justice Roberts’ dissent in *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003)

one commentator discussing the majority decision in *Raich* characterized it as evidence that Chief Justice Rehnquist's federalist agenda may not survive.<sup>418</sup> Others concur, arguing that as the Republican Party's majority is now firmly entrenched, its interest in a limited federal government has declined.<sup>419</sup> Two of the five majority justices in *Lopez* and *Morrison*, and two-thirds of the dissenters in *Raich* are no longer on the Court.<sup>420</sup> However, Justices Scalia and Kennedy, who voted with the majority to curb congressional power in *Lopez* and *Morrison*, may well return to the federalist fold.<sup>421</sup> For now, however, the *Raich* test will remain in effect, with the result that more federal legislation will withstand Commerce Clause challenges, diluting the gains of the Federalism Revolution.<sup>422</sup>

## VI. CONCLUSION

Chief Justice Rehnquist and Justice O'Connor firmly supported limiting congressional power under the Commerce Clause in line with federalist principles. However, in *Gonzales v. Raich*, a majority of the Court held that Congress can regulate any purely local, non-commercial, state-controlled activity that comes within the purview of larger, federal economic legislation, even if the local activity does not undercut congressional goals. The *Raich* holding's expansive interpretation of the Commerce Clause undermined the Rehnquist

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suggests that his views on the Commerce Clause may be in line with the *Raich* dissenters. In *Rancho Viejo*, the petitioners challenged under the Commerce Clause the application of the Endangered Species Act (ESA) in protecting a species of toad that lives only in California. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2002). Then-Judge Roberts urged for a rehearing after a three-judge panel decided that the government could enforce the ESA to protect the toad without violating the Commerce Clause. *Rancho Viejo*, 334 F.3d at 1160. Judge Roberts disagreed with the majority's interpretation of the Commerce Clause power: "The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'" *Id.*

418. Barnett, *supra* note 2 ("Establishing the New Federalism took enormous effort and leadership by Rehnquist over many years. Now that legacy is in jeopardy.").

419. Bernstein, *supra* note 2. It was "no coincidence that *Raich* was decided when the Republican Party was no longer paying lip service to a limited federal government . . ." *Id.*

420. See *supra* note 9 (providing the recent membership changes to the U.S. Supreme Court).

421. See David Bernstein, *Originalism in Crisis*, [http://volokh.com/archives/archive\\_2005\\_10\\_30-2005\\_11\\_05.shtml#1130967291](http://volokh.com/archives/archive_2005_10_30-2005_11_05.shtml#1130967291) (last visited Apr. 17, 2006) (blasting Justice Scalia for "faint-hearted originalism" and commenting that Justice Kennedy's disapproval of drugs seems to have gotten the better of him in *Raich*.) The term "faint-hearted originalist" was actually used by Scalia in a lecture. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1989) ("most originalists are faint-hearted and most nonoriginalists are moderate . . .").

422. See *supra* Part V.B. (analyzing the impact of the *Raich* decision for future Commerce Clause challenges).

Court's shift toward federalism and the restriction of congressional power with the landmark decisions of *Lopez* and *Morrison*. The result of the *Raich* holding on federal legislation will be twofold: congressional legislators will introduce more comprehensive legislation, and that legislation will more easily withstand Commerce Clause challenges. Whether the Federalism Revolution of former Chief Justice Rehnquist can survive after *Raich* will be determined in the coming terms by the newly composed Roberts Court.