

GONZALES v. RAICH AND THE DEVELOPMENT OF
COMMERCE CLAUSE JURISPRUDENCE:
IS THE NECESSARY AND PROPER CLAUSE THE
PERFECT DRUG?

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I. INTRODUCTION

The uncontradicted evidence in the record indicated that marijuana provided important therapeutic benefits to the two petitioners, that no other medicine was effective, and that without access to that drug one of the petitioners may not survive. Moreover, the petitioners' cultivation and use of marijuana for health reasons was perfectly lawful as a matter of California law. I have no hesitation in telling you that I agree with the policy choice made by the millions of California voters, as well as the voters in at least nine other states (including Nevada), that such use of the drug should be permitted, and that I disagree with executive decisions to invoke criminal sanctions to punish such use. . . . Nevertheless, those policy preferences obviously could not play any part in the analysis of the constitutional issue that the case raised. . . . [And] in my judgment our duty to uphold the application of the federal statute was pellucidly clear.¹

Associate Justice John Paul Stevens made these comments in his address to the Clark County (Nevada) Bar Association Luncheon Meeting in August 2005. The words are an explicit acknowledgement of two temptations

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1. John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 4 (2005) (footnotes omitted).

swaying the appellate judges charged with interpreting our law. As human beings with a moral conception of the world, a particular fact pattern may first trigger an emotional, extrajudicial response. At the same time, however, the judge's duty to faithfully and impartially apply the Constitution takes precedence. If or when it pervades a judicial opinion, it is the first temptation that incites the now commonplace cries of "judicial activism."² The recent intensification of these cries,³ however, cannot obscure that the two tendencies will often coincide, with the outcome being both palatable and legally "correct." Nonetheless, Justice Stevens used his address to highlight five particular cases decided in the 2004 Term in which "the law compelled a result that I would have opposed if I were a legislator."⁴

This Note will only analyze the constitutional issues raised by one of these five cases, *Gonzales v. Raich*.⁵ The "medical marijuana case" involved

2. Although there is voluminous literature on the concept of "judicial activism," it is a term that evades simple classification. *See generally* Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441 (2004) (arguing that any definition of "judicial activism" necessarily raises subsidiary questions about issues ranging from interpretative methods to institutional competency). Although often invoked to attack judges who elevate personal opinion above the decisions of an elected majority, many commentators conclude that the term "activism" is ultimately empty or unhelpful. *See, e.g.,* Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases,* 73 U. COLO. L. REV. 1275, 1275-76 (2002) (expressing the belief that the "term, while clearly pejorative, is generally empty"); Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?,* 73 U. COLO. L. REV. 1403, 1403 (2002) ("Everyone scorns judicial 'activism,' that notoriously slippery term. . . . 'Activism' remains . . . a term of opprobrium. Everyone wants to appropriate and apply the word so that his favored approach is sound and its opposite 'activist.' Then 'activism' just means Judges Behaving Badly—and each person fills in a different definition of 'badly.'").

3. *See, e.g.,* Donald Lambro, *DeLay Slams Court Activism as 'Autocracy,'* WASH. TIMES, Aug. 15, 2005, at A4 (discussing former House Majority Leader Tom DeLay's rebuke of some recent courts for their acts of "judicial supremacy" and "judicial autocracy," especially with respect to same-sex marriage and religious displays on public property). "Mr. DeLay blamed 'a movement of judicial activism—principally, but not exclusively, of the political left—that has found the public will increasingly inconvenient to its designs. Policies this movement supports simply cannot hope to be passed into law by the democratic process.'" *Id.*

4. Stevens, *supra* note 1, at 1.

5. 545 U.S. 1 (2005). Besides *Raich*, Justice Stevens briefly discussed cases raising questions of federal jurisdiction and criminal procedure. *See* Stevens, *supra* note 1, at 1-2 (discussing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (federal supplemental jurisdiction over class action suits)); *id.* at 2-3 (discussing *United States v. Booker*, 545 U.S. 220 (2005) (Federal Sentencing Guidelines)). Justice Stevens also discussed the interpretation of "public use" in Takings Clause jurisprudence, *id.* at 3-4 (discussing *Kelo v. City of New London*, 545 U.S. 469 (2005)), and the interplay between the Commerce

a seemingly benign California law that allowed severely ill citizens either to receive a prescription for cannabis, or to grow their own, for personal curative purposes. As already shown, Justice Stevens personally approved of this state law, but nevertheless felt that its innovative, sound policy could not withstand the application of a contradictory federal statute—the Controlled Substances Act. The dictates of the law trumped his “desire for popularity.”⁶ Although judicial restraint may require the sacrifice of purely personal feeling, a proper legal result at least limits exposure to cries of “judicial activism.”⁷ But was this the proper legal result? Should the federal government have the authority to regulate the private possession and use of marijuana for medical purposes when a state sets up a comprehensive plan to regulate carefully that possession and use?

This Note attempts to answer this question in light of *Raich*'s interpretation of the two Supreme Court decisions warning Congress to proceed with caution when legislating under the commerce power, *United States v. Lopez*⁸ and *United States v. Morrison*.⁹ Part II offers an overview of the case law interpreting the Commerce Clause power, from Chief Justice Marshall's early interpretation, to the twentieth century emphasis on categorical limitations, to the deferential position adopted by the Court in the wake of the New Deal. Part III then analyzes the two monumental opinions preceding *Raich* that attempted to place meaningful limits on Congress's ability to legislate under the Commerce Clause. Part IV discusses the facts in *Raich* and analyzes the four separate opinions penned by members of the Court. Part V discusses the various rationales identified by Justice Stevens for upholding the application of the Controlled Substances Act to intrastate possession of medical marijuana. Close scrutiny of his interpretation of *Lopez* and *Morrison*, however, highlights the unworkability of some of the late Chief Justice Rehnquist's conclusions in those two cases. This Note concludes with the disentangling of this jurisprudence and attempts to construct a meaningful approach to deciding cases under the modern Commerce Clause. Disregarding the requirement that regulated intrastate

Clause and the Twenty-First Amendment, *id.* at 4-5 (discussing *Granholt v. Heald*, 544 U.S. 460 (2005)).

6. Stevens, *supra* note 1, at 6.

7. See Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 926 (2005) (suggesting that judicial deference to congressional actions “likely stems, at least in part, from the Court's unwillingness to be charged with ‘judicial activism’”).

8. 514 U.S. 549 (1995).

9. 529 U.S. 598 (2000).

activities be “economic” in character, the Note instead focuses on both (1) the “general-regulatory-scheme” principle, and its connection to the Necessary and Proper Clause, and (2) Justice Scalia’s exposition of judicial minimalism under the Necessary and Proper Clause, to conclude that the Court reached the proper legal result in *Raich*, albeit one better supported by Justice Scalia’s formulation of judicial deference.

II. FROM MARSHALL TO LOPEZ

The Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁰ This enumerated power responded directly to the inability of the Confederation government to manage the economic affairs of the nation without conflicting, self-interested state legislation.¹¹ Like much of the language in the Constitution, however, these words were not given substantial attention until John Marshall’s tenure as Chief Justice.¹² In *Gibbons v. Ogden*, Marshall’s opinion for the Court addressed a conflict between the federal government’s right to regulate interstate navigation and New York’s decision to grant one party an exclusive right to navigate state waters.¹³ The beneficiary of the exclusive right sought to enjoin Gibbons from operating his steamship between New York and New Jersey.¹⁴ Gibbons,

10. U.S. CONST. art. 1, § 8, cl. 3.

11. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring). Justice Johnson wrote that the states, free from the economic controls thought necessary to avoid defeat in the Revolution,

finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad.

This was the immediate cause, that led to the forming of a convention. *Id.*; see also *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949) (describing the commercial anarchy that preceded ratification and the subsequent need for a federal commerce power); *United States v. Sullivan*, 451 F.3d 884, 889 (D.C. Cir. 2006).

12. See Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 614 (2006) (“[T]he Court under Marshall had a unique opportunity to put meat on the largely bare bones of the Constitution.” (quoting DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 62-63 (1985))).

13. See *Gibbons*, 22 U.S. (9 Wheat.) at 1.

14. *Id.* at 1-2.

in turn, invoked the protection of the Commerce Clause and a license issued under an Act of Congress regulating the coasting trade.¹⁵ Although Marshall concluded that navigation is commerce,¹⁶ modern doctrine more importantly turns on his interpretation of the phrase “among the several States.” Marshall wrote:

The word “among” means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

. . . .

. . . [However, t]he genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.¹⁷

Gibbons does not speak with complete clarity. Marshall conceded that commerce among the states “cannot stop at the external boundary line of each State, but may be introduced into the interior.” Lawful federal action could be applied “to those internal concerns which affect the States generally.” Even Marshall’s explicit prohibition of federal interference with concerns “completely within a particular State” yielded an implied caveat. To Marshall, federal regulation could not extend to those state concerns “with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.”

Part of this ambiguity derives from Marshall’s unwillingness to validate the “strict construction” view of constitutional interpretation.¹⁸ The stronger

15. *Id.* at 2-3; see FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 15 (Peter Smith ed., Univ. of N.C. Press 1978) (1937).

16. *Gibbons*, 22 U.S. (9 Wheat.) at 189-90, 193. Marshall wrote: “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches” *Id.* at 189-90.

17. *Id.* at 194-95.

18. See *id.* at 187 (“This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be

basis for this ambiguity, however, derives from the Necessary and Proper Clause and its interplay with the enumerated powers. Rather than read the commerce power in isolation, courts were required to account for the ancillary congressional privilege “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”¹⁹ Accordingly, the completely internal commerce of a state was free from federal interference unless it was necessary and proper to interfere for the execution of the government’s general power.²⁰

Marshall had previously defined when a law was “necessary and proper” in *McCulloch v. Maryland*.²¹ To Marshall, “necessary” did not mean “an absolute physical necessity,” but rather something “convenient, or useful, or essential to another.”²² Marshall, however, warned that legislation used as a means to exercise a constitutional end would be “proper” only if “appropriate,” “plainly adapted to that end,” “not prohibited,” and “consist[ent] with the letter and spirit of the [C]onstitution.”²³

Marshall’s opinion in *Gibbons*, however, did not address whether or how a state could act to regulate commerce in the absence of specific federal legislation, i.e., whether Congress had exclusive power to regulate commerce among the states.²⁴ Because of this uncertainty, and because “Congress did not begin to invoke the Commerce Clause to enact large-scale legislation

construed strictly. But why ought they to be so construed? Is there one sentence in the [C]onstitution which gives countenance to this rule?”. Not only did the constitutional text not require a “strict construction,” but Marshall felt such an interpretation would also defeat the spirit of the document. He could not “perceive the propriety of this strict construction” if it “would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent.” *Id.* at 188.

19. U.S. CONST. art. I, § 8, cl. 18; *Gibbons*, 22 U.S. (9 Wheat.) at 187.

20. See EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS: BACK TO THE CONSTITUTION* 12 (2d prtg. 1962) (“[E]ven such completely internal concerns of a [s]tate may be interfered with by national power when such interference is necessary for the purpose of executing some of the general powers of the government.” (internal quotation marks omitted)).

21. 17 U.S. (4 Wheat.) 316 (1819).

22. *Id.* at 413; see also *id.* at 413-14 (“To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end . . .”).

23. *Id.* at 421.

24. See *Gibbons*, 22 U.S. (9 Wheat.) at 209-10; see also PAUL R. BENSON, JR., *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970*, at 21 (1970) (“[A] careful reading of Marshall’s opinion reveals that he skirted the issue and made no clear resolution of it.”).

until the late nineteenth century,²⁵ the Court instead spent close to a century laboring over the permissible scope of *state* economic regulation.²⁶ The Court used formal, content-based categories to determine the lawfulness of particular local attempts to regulate economic activity.²⁷ Typically this categorization tended to distinguish “commerce” from those matters pertaining to “production.”

In one example, the Court considered the constitutionality of an Iowa law prohibiting the manufacture and intrastate sale of liquor without permission.²⁸ Against a claim that the statute conflicted with the national commerce power, the Court focused on the difference between manufacturing and commerce. The Court noted that “[n]o distinction is more popular to the common mind . . . than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different.”²⁹ If the commerce power authorized Congress to regulate local manufacture, “it would follow as an inevitable result that the duty would devolve on Congress to regulate . . . interests which in their nature are, and must be, local in all the details of their successful management.”³⁰

The Court followed similar logic in permitting state regulation of mining, a prototypical “interest” better left to local control. The Court concluded that the “character” of mining “is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce.”³¹

As courts and commentators recognize, this approach did not threaten federal attempts to exercise its commerce power; it merely permitted states to regulate economic activity within their geographic borders.³² Greater

25. Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 888 (2005); see also *United States v. Lopez*, 514 U.S. 549, 568-69 (1995) (Kennedy, J., concurring).

26. See *Lopez*, 514 U.S. at 569 (Kennedy, J., concurring) (“The Court’s initial task, therefore, was to elaborate the theories that would permit the States to act where Congress had not done so.”).

27. See *id.*

28. *Kidd v. Pearson*, 128 U.S. 1 (1888).

29. *Id.* at 20.

30. *Id.* at 21.

31. *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 178-79 (1923).

32. See *Lopez*, 514 U.S. at 570 (Kennedy, J., concurring) (noting that the approach was “confined to the question of a State’s authority to enact legislation”); CORWIN, *supra* note 20, at 192 (“All of these cases, however, involved simply questions of *State* power [T]he

industrialization and integration of national markets, however, soon prompted federal efforts to regulate interstate commerce³³—which in turn forced the Court to confront the constitutionality of this legislation. At first, the Court used the previous production/commerce dichotomy to invalidate legislation that unnecessarily encroached on economic endeavors better left to state regulation. With respect to the Sherman Act's application to a *national* sugar monopoly, the Court held that “relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with.”³⁴ The Court held that the interstate effects of intrastate monopolistic activities were indirect; therefore, Congress could not reach into the state and regulate those activities.³⁵

The Court followed similar logic to invalidate social and economic legislation addressing both the use of union labor and the distribution of products created with this labor. In these instances, the Court foreclosed Congress's authority to regulate either local activities affecting interstate commerce or the treatment of persons engaged in interstate commerce.³⁶

Although the use of a production/commerce dichotomy suggests interpretive stability and predictability, this strict categorization of economic endeavors belied actual commercial practice.³⁷ In addition, this signaled the ideological triumph of *laissez faire* capitalism—what Justice Holmes once

Court held that local regulation of production is not *ipso facto* a regulation of commerce among the States such as the States are forbidden to impose even in the absence of regulation by Congress.”).

33. See *Lopez*, 514 U.S. at 604 (Souter, J., dissenting); Pushaw, *supra* note 25, at 888 n.65 (citing An Act to Regulate Commerce (Interstate Commerce Act), ch. 104, 24 Stat. 379 (1887), repealed by Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), 92 Stat. 1337, 1466-67; Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2000)).

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

35. *Id.* at 16 (“Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms . . . might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result . . .”). *But see* CORWIN, *supra* note 20, at 155 (criticizing the conclusion that “the effects of a combination of producers upon commerce among the States in the product must be labelled ‘indirect’ *however inevitable they may be and however extensive*”).

36. See *Lopez*, 514 U.S. at 570 (Kennedy, J., concurring) (discussing *Adair v. United States*, 208 U.S. 161, 178 (1908); *The Employers' Liability Cases*, 207 U.S. 463, 497 (1908)).

37. See CORWIN, *supra* note 20, at 193-94 (recognizing that production and commerce constitute a continuous process and arguing that “the power which controls commerce must be able to reach production also”); *id.* at 197 (discussing “stream of commerce” concept as a judicial recognition that production of goods occurs with an eye toward eventual sale in the interstate market).

classified as “an economic theory which a large part of the country does not entertain.”³⁸

True, the judicial “endorsement” of an economic school of thought did not result in uniform application. The Court realized the interrelated nature of intrastate and interstate activities in its treatment of railway rate regulation. In the *Minnesota Rate Cases*,³⁹ the Court upheld a state’s right to fix intrastate rail rates for interstate carriers, but discussed the federal power to regulate those same rates in dicta. The Court reasoned that the “commingling of interstate and intrastate operations” could not preclude Congress’s authority to regulate.⁴⁰

The Court’s discussion was dictum because of its primary focus instead on the congressional commerce power to regulate every “instrumentality or agency” of interstate commerce⁴¹—an uncontroversial conclusion similarly applied to federal railway rates set by the Interstate Commerce Commission in the *Shreveport Rate Cases*.⁴² Nevertheless, the Court applied the concept

38. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); see CORWIN, *supra* note 20, at 151-53 (noting the popularity of laissez faire theory, and the inevitable effect of this practice: a “no-man’s land in which business interests organized on a national scale at times escape all regulation” (emphasis omitted)); see also *Lopez*, 514 U.S. at 605-07 (Souter, J., dissenting) (discussing the parallels between the Court’s ill-fated laissez faire approach to both substantive due process and the commerce power).

39. 230 U.S. 352 (1913).

40. *Id.* at 399. The Court added that:

[T]he execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.

Id.; see also *Lopez*, 514 U.S. at 571-72 (Kennedy, J., concurring) (“Congress might be empowered to regulate [intrastate rates] if ‘by reason of the interblending of the interstate and intrastate operations of interstate carriers’ the regulation of interstate rates could not be maintained without restrictions on ‘intrastate rates which substantially affect the former.’” (quoting *Minnesota Rate Cases*, 230 U.S. at 432-33)).

41. *Minnesota Rate Cases*, 230 U.S. at 399; see also Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1130 (2000). It is well recognized that Congress can regulate the instrumentalities or vehicles used to carry out interstate commerce. See *infra* note 104 and accompanying text.

42. *Houston, E. & W. Tex. Ry. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 351 (1914) (noting that congressional authority “necessarily embraces the right to control . . . all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic”). The Court also used this case to reinforce the supremacy of federal rail rates when in conflict with state regulations, concluding that “it is Congress, and not the state, that is entitled to prescribe the final and

of “blended” intrastate and interstate affairs to federal regulations of agricultural commodities as well⁴³—even if this application was an exception rather than the constitutional rule.⁴⁴

The decisions upholding Congress’s power to regulate the instrumentalities (rail cars) or agencies (stockyards) of interstate commerce also relied on the public nature of the businesses regulated.⁴⁵ The Court thus drew a public/private distinction between those intrastate businesses subject, and those not subject, to federal scrutiny. This was one of a handful of distinctions that the Court used to invalidate New Deal legislation designed to regulate the affairs of private businesses not dedicated to the public use. The Court relied on the direct/indirect distinction (as well as other distinctions) first solidified in *E.C. Knight*⁴⁶ in two important cases: *A.L.A. Schechter Poultry Corp. v. United States*⁴⁷ and *Carter v. Carter Coal Co.*⁴⁸ In *Schechter*, the Court invalidated provisions of the National Industrial Recovery Act fixing the number of hours in a workday and the minimum wage for employees.⁴⁹ The Court based its decision on its observation that

dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority.” *Id.* at 351-52.

43. See, e.g., *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930) (upholding Packers and Stockyards Act of 1921 as valid regulation under the Commerce Clause); *Stafford v. Wallace*, 258 U.S. 495 (1922) (same); *Swift & Co. v. United States*, 196 U.S. 375 (1905) (upholding injunction issued against combination of meat dealers for their restraint of trade in cattle destined for interstate markets). The opinion in *Swift & Co.* provides typical language. Justice Holmes stated that “commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.” 196 U.S. at 398. Looking at this course of business, Holmes concluded that the constant movement of cattle with the expectation that this movement would cross state lines constituted “a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.” *Id.* at 399.

44. See Cushman, *supra* note 41, at 1128-29. Professor Cushman notes that “[b]efore 1937, the Court upheld national regulation of ‘local’ activities on the ground that they occurred in a stream of interstate commerce on only four occasions. Three of those cases involved transactions in a public stockyards; the fourth involved transactions on the Chicago Board of Trade.” *Id.* (citing *Tagg Bros.*, 280 U.S. at 436-39; *Bd. of Trade of Chi. v. Olsen*, 262 U.S. 1, 33 (1923); *Stafford*, 258 U.S. at 519; *Swift & Co.*, 196 U.S. at 396-98).

45. See Cushman, *supra* note 41, at 1131 (“So long as the power of Congress to regulate interstate rates remained confined to businesses affected with a public interest, its derivative power to regulate intrastate rates would remain similarly confined. The due process context of *Shreveport* thus severely constrained the range of its application to intrastate matters.”).

46. 156 U.S. 1 (1895). See *supra* notes 32-35 and accompanying text for a discussion of the early use of the production/commerce dichotomy.

47. 295 U.S. 495 (1935).

48. 298 U.S. 238 (1936).

49. 295 U.S. at 550.

“hours and wages have no direct relation to interstate commerce”⁵⁰ and therefore were beyond the reach of the commerce power. *Carter* likewise held that the Bituminous Coal Conservation Act of 1935 was an unconstitutional exercise of the commerce power.⁵¹

The famous “switch in time” in 1937, however, precipitated a “new approach to the economic powers of government.”⁵² Gone was the restrictive view of the commerce power embodied in *Schechter* and *Carter*; in its place appeared a case-by-case inquiry into whether a regulated intrastate activity “affect[ed] commerce in such a close and intimate fashion as to be subject to federal control.”⁵³ The Court’s decision in *NLRB v. Jones & Laughlin Steel Corp.* not only upheld the National Labor Relations Act, but also initiated

50. *Id.* at 548. The Court defended the distinction between intrastate activities having a direct effect on interstate commerce and those having an indirect effect as a “fundamental one, essential to the maintenance of our constitutional system.” *Id.* Without the distinction, “there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government.” *Id.*

51. 298 U.S. at 310. The Court first gave a complete recitation of the previous Commerce Clause jurisprudence and its usage of fixed categories to define the outer limits of Congress’s authority to regulate interstate commerce. *See id.* at 297-301. The Court reiterated “[t]hat 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 [C]ommerce [C]ause.” *Id.* at 301. Because mining was production, and thus not commerce, the Court concluded that the events leading up to the mining of coal were not commerce. *Id.* at 303. Among these events were the “employment of men, the fixing of their wages, hours of labor, and working conditions . . . [all] intercourse for the purposes of production, not of trade.” *Id.* As for the effect of one man’s wages on interstate commerce, the Court explicitly stated that “[s]uch effect as they may have upon commerce, however extensive it may be, is secondary and indirect,” and that the substantial aggregated effect of a wage shift did not “alter its character.” *Id.* at 309.

The *Carter* Court relied on many of the judicially created dichotomies, including the distinctions between production and commerce, local and national activities, and direct and indirect effects on interstate commerce. *See generally id.* Perhaps for this reason, Justice Owen Roberts “characterized this opinion in later years as ‘the high water mark of the doctrine that Congress cannot regulate local activities.’” CHARLES A. LEONARD, A SEARCH FOR A JUDICIAL PHILOSOPHY: MR. JUSTICE ROBERTS AND THE CONSTITUTIONAL REVOLUTION OF 1937, at 72 (1971) (quoting OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION: THE OLIVER WENDELL HOLMES LECTURES 1951, at 49 (1951)).

52. LEONARD, *supra* note 51, at 105.

53. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32 (1937). In another part of the opinion, Chief Justice Hughes restated that intrastate activities could be regulated by Congress that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.” *Id.* at 37. “The question is necessarily one of degree.” *Id.* The opinion rejected the prior use of strict categorization and refused “to shut [its] eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum.” *Id.* at 41.

“an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.”⁵⁴ Cases that followed upheld most of the New Deal’s economic and social legislation.⁵⁵

Five years after *Jones & Laughlin Steel*, the Court adopted its farthest-reaching interpretation of the Commerce Clause to permit federal regulation of one farmer’s wheat harvest. In *Wickard v. Filburn*,⁵⁶ the Court disapproved of the arbitrary distinction between “direct” and “indirect” effects and instead reiterated *Jones & Laughlin Steel*’s focus on the “degree” of the relation between the regulated activity and interstate commerce.⁵⁷ The Court also doubted the relevance of defining the regulated intrastate activity in a particular way. The Court focused on the economic *effects* of particular activities and therefore disposed of the “mechanical application of legal formulas.”⁵⁸ The Court concluded that “[w]hether the subject of the regulation in question [is] ‘production,’ ‘consumption,’ or ‘marketing’ is . . . not material for purposes of deciding [questions] of federal power.”⁵⁹ Ultimately, the relevant question was whether a local activity “exert[ed] a substantial economic effect on interstate commerce.”⁶⁰ If the intrastate activity did exert such an effect, Congress could reach it.⁶¹

54. *United States v. Lopez*, 514 U.S. 549, 556 (1995). This new approach also “reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.” *Id.*; see also *id.* at 606 (Souter, J., dissenting) (“The Court’s finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects.”).

55. See, e.g., *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (upholding Agricultural Marketing Agreement Act of 1937 and extending commerce power “to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power”); *United States v. Darby*, 312 U.S. 100, 118 (1941) (upholding the Fair Labor Standards Act of 1938 and extending commerce power to “those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce”); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937) (applying the logic and standards of *Jones & Laughlin Steel* to smaller firms).

56. 317 U.S. 111 (1942) (discussing the constitutionality of the Agricultural Adjustment Act of 1938).

57. *Id.* at 123 n.24 (“Whatever terminology is used, the criterion is necessarily one of degree and must be so defined.” (quoting *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 467 (1938))).

58. *Id.* at 124.

59. *Id.*

60. *Id.* at 125.

61. *Id.*

The *Wickard* Court did not stop with this observation. The Court adopted a sweeping “cumulative effects” test, finding that a farmer’s trivial contribution to the demand for wheat still placed him within the regulatory scheme. “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”⁶²

With the abandonment of formal dichotomies, and the adoption of both the “substantially affects” and “cumulative effects” doctrines, Congress enjoyed expansive authority to enact legislation thought necessary to regulate interstate commerce.⁶³ Accordingly, the Court did not engage in post hoc review of the propriety or wisdom of congressional conclusions that the regulation of certain intrastate activities was necessary to regulate interstate commerce, or even articulate the standard of review that would control congressional exercises of the commerce power.⁶⁴ This changed in the tumult of the Civil Rights Movement and Congress’s subsequent reliance on the commerce power to pass the Civil Rights Act of 1964, an attack on discrimination imposed by businesses of public accommodation.⁶⁵ The Court made explicit the test in a challenge brought by a family-owned barbecue restaurant that received numerous out-of-state supplies but refused to serve African Americans.⁶⁶ The test stated that “where we find that the legislators, in light of the facts and the testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”⁶⁷

62. *Id.* at 127-28.

63. See Earl M. Maltz, *The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause—A Case Study in the Decline of State Autonomy*, 19 HARV. J.L. & PUB. POL’Y 121, 129 (1995) (“In the wake of *Jones & Laughlin* and *Wickard*, it has become clear that . . . Congress has authority to regulate virtually all private economic activity.”). See BENSON, *supra* note 24, at 116-89, for a discussion of the Court’s Commerce Clause jurisprudence in the years between the New Deal and the Civil Rights Act of 1964.

64. See *United States v. Lopez*, 514 U.S. 549, 607 (1995) (Souter, J., dissenting) (declaring that the *Jones & Laughlin Steel/Wickard* line of cases “so far settled the pressing issues . . . as to leave the Court for years without any need to phrase a test”).

65. See Jennifer Lynn Crawford, Note, *America’s Dark Little Secret: Challenging the Constitutionality of the Civil Rights Provision of the 1994 Violence Against Women Act*, 47 CATH. U. L. REV. 189, 210 n.126 (1997) (citing LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 469 (1992)).

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

67. *Id.* at 303-04; see also *Perez v. United States*, 402 U.S. 146, 156 (1971) (“We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to

This deferential definition of the standard marched in step with the Court's refusal to apply formalistic dichotomies and other bright-line rules to congressional exercises of its commerce power.⁶⁸ Although this judicial deference to Congress's interpretation and use of its own authority yielded relative constitutional calm,⁶⁹ the Court fought an eighteen-year battle over the application of the federal commerce power to employees of state and local governments. Although at first the Court held that amendments to the Fair Labor Standards Act of 1938, requiring enterprises engaged in commerce or production for commerce to pay a minimum wage, could be applied constitutionally to some state governmental units,⁷⁰ this view provoked criticism.⁷¹

When Congress amended the Fair Labor Standards Act in 1974 to apply federal employment regulations to all employees of state and local governments,⁷² then-Justice Rehnquist wielded his strong conception of federalism to invalidate the legislation and overrule *Maryland v. Wirtz*.

legislate."); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964) (articulating the rational basis standard). Prior to its statement, the *McClung* Court did state that "the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court." 379 U.S. at 303; *accord* *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."). For an argument that *McClung*'s expression of the rational basis standard is incorrect and lacks historical support, see generally James M. McGoldrick, *Katzenbach v. McClung: The Abandonment of Federalism in the Name of Rational Basis*, 14 *BYU J. PUB. L.* 1 (1999).

68. See Jim Chen, *Filburn's Legacy*, 52 *EMORY L.J.* 1719, 1745-46 (2003) ("The decisions upholding the Civil Rights Act of 1964 as proper exercises of Congress's commerce power . . . did little more than reaffirm the New Deal's Commerce Clause sequence." (footnotes omitted)).

69. See *id.* at 1745 ("Despite its reputation for judicial activism, the Warren Court cut relatively little if any new ground on federalism. The Warren Court's Commerce Clause jurisprudence rates among that era's least innovative—and consequently, its most secure—doctrinal developments.").

70. See *Maryland v. Wirtz*, 392 U.S. 183, 198-99 (1968), *overruled by* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The Court brushed aside as untenable the argument that the exercise of federal regulation "must yield to state sovereignty in the performance of governmental functions." *Id.* at 195. Rather, Congress could, within its delegated power, "override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." *Id.*

71. See, e.g., *id.* at 201 (Douglas, J., dissenting) ("[W]hat is done here is . . . such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism.").

72. *Nat'l League of Cities*, 426 U.S. at 836.

Rehnquist wrote that there was an essential difference between regulating the intrastate activities of businesses that could also be regulated by the states, and regulating the state itself.⁷³ By telling the state to pay its employees the federally determined minimum wage, Congress had crossed this line.⁷⁴

Justice Rehnquist's opinion too, however, provoked considerable criticism.⁷⁵ This criticism came to a head in 1985, when Justice Blackmun—part of the *National League of Cities* majority—did an about face and concluded that Rehnquist's limits on the federal commerce power were unworkable.⁷⁶ Blackmun concluded that the political process, not judicial reconsideration of an equal branch's policy decisions, better protected the ideals of federalism.⁷⁷

III. MEANINGFUL LIMITS ON CONGRESS?

Commerce Clause jurisprudence, therefore, relied on a few basic principles for over half a century. First, reliance on strict categorization (like whether a regulated activity had a “direct” or “indirect” impact on interstate commerce) to determine the proper scope of the commerce power overly restrained Congress in a period of rapid industrial growth and national

73. *Id.* at 845. The Court insisted “that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.” *Id.*

74. *Id.* at 855-56 (“Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.”).

75. Of particular interest is Justice Brennan's harsh dissent, which accused the majority of “repudiat[ing] principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall.” *Id.* at 857 (Brennan, J., dissenting). Brennan's opinion also questioned the Court's departure from the rational basis standard and its implicit recognition of the legislature's institutional competence. *See id.* at 858 (calling the majority opinion a “patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States”). More bluntly, Justice Brennan criticized the majority's reading of precedent, calling it “a transparent cover for invalidating a congressional judgment with which they disagree.” *Id.* at 867.

76. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985) (“What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations.”).

77. *Id.* at 550-52 (relying on the Framers' original conception of the federal structure to conclude that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power”).

development.⁷⁸ Second, Congress could reach into the States and regulate intrastate activity that “substantially affected” interstate commerce.⁷⁹ The Court best explained this principle in *Wickard v. Filburn*, with Justice Jackson writing that:

[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’⁸⁰

Third, the Court warned that judicial interpretation should defer to congressional policy judgments so long as a “rational basis” existed for Congress to choose a particular regulatory scheme as the means to regulate interstate commerce.⁸¹ Finally, courts could not read the Commerce Clause in isolation. Rather, congressional use of the commerce power relied heavily on the Clause’s doctrinal interplay with the Necessary and Proper Clause.⁸²

Applying the preceding legal principles, the Supreme Court held constitutional every congressional attempt to legislate pursuant to the Commerce Clause from 1937 to 1994.⁸³ This deferential trend ended when a

78. See *Wickard v. Filburn*, 317 U.S. 111, 123 n.24 (1942) (stating that abandonment of bright-line distinctions “does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution”); *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905) (refusing to treat interstate commerce as “a technical legal conception”). However, cautionary language in some of the major opinions suggested that particular distinctions could be relevant. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (warning that commerce power “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between *what is national and what is local*” (emphasis added)).

79. See *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *United States v. Darby*, 312 U.S. 100, 118 (1941).

80. 317 U.S. at 125.

81. See *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 17 (1990); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964).

82. See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807-08 (1996) (“[T]he [New Deal] Court did not simply and directly enlarge the scope of the Commerce Clause itself Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce.”).

83. Pushaw, *supra* note 25, at 880. For representative cases, see generally *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981); *Perez v. United States*, 402 U.S. 146 (1971). *But see Nat’l League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (holding that

high school student challenged the Gun-Free School Zones Act of 1990 (“GFSZA”) in *United States v. Lopez*.⁸⁴

A. Lopez

The GFSZA made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”⁸⁵ On March 10, 1992, defendant Alfonso Lopez, Jr. arrived at his San Antonio high school with a concealed .38-caliber handgun and five bullets.⁸⁶ He later stated that he was offered forty dollars by one student to take the weapon and deliver it to another student, presumably so the other student could use the weapon in a gang war.⁸⁷ Lopez was arrested and charged under state law with firearm possession on school premises.⁸⁸ However, the state charges were dropped the following day; instead, federal agents charged Lopez with violating the GFSZA.⁸⁹ Lopez was indicted by a federal grand jury on one count of knowing possession of a firearm in a school zone, despite his objection to the GFSZA as an unconstitutional exercise of congressional power.⁹⁰ Addressing Lopez’s objection, the District Court for the Western District of Texas held that §

amendments to Fair Labor Standards Act of 1938 exceeded Congress’s authority under the Commerce Clause), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). In fact, other than the later-overruled *National League of Cities*, the Court invalidated only one act of Congress in that period based on the lack of an enumerated power. *See Oregon v. Mitchell*, 400 U.S. 112, 129-30 (1970) (opinion of Black, J.) (invalidating Voting Rights Act Amendments of 1970 provision requiring states to change the voting age to eighteen as beyond Congress’s power to enforce the Fifteenth Amendment).

84. 514 U.S. 549, 551 (1995)

85. 18 U.S.C. § 922(q)(1)(A) (Supp. III 1991); *see also* Crime Control Act of 1990, Pub. L. No. 101-647, § 1702, 1990 U.S.C.C.A.N. (104 Stat.) 4789, 4844-45 (amended 1994). The GFSZA defined “school zone” as “in, or on the grounds of, a public, parochial or private school” or “within a distance of 1,000 feet from the grounds of a public, parochial or private school.” 18 U.S.C. § 921(a)(25) (2000).

86. *Lopez*, 514 U.S. at 551.

87. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff’d*, 514 U.S. 549.

88. *Lopez*, 514 U.S. at 551 (citing TEX. PENAL CODE ANN. § 46.03(a)(1) (Vernon Supp. 1994)).

89. *Id.* At first, the United States Attorney refused to prosecute Lopez; however, the following day, “apparently feeling some pressure from headquarters in Washington, [the U.S. Attorney] changed his mind.” MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 258 (2005). After charging Lopez with violating the GFSZA, the attorney “held a press conference with Senator Phil Gramm to announce a get tough policy on guns in schools.” *Id.*

90. *Lopez*, 514 U.S. at 551.

922(q) “is a constitutional exercise of Congress’[s] well-defined power to regulate activities in and affecting commerce, and the ‘business’ of elementary, middle and high schools . . . affects interstate commerce.”⁹¹ After a bench trial, the district court judge found Lopez guilty and “sentenced him to six months’ imprisonment and two years’ supervised release.”⁹²

Lopez then appealed to the United States Court of Appeals for the Fifth Circuit, renewing his claim that the GFSZA was an unconstitutional exercise of the congressional power to regulate commerce “among the several States.”⁹³ The Fifth Circuit reversed Lopez’s conviction, concluding that Congress had failed to provide sufficient evidence in the legislative history “to locate section 922(q) within the Commerce Clause.”⁹⁴ Because Congress failed to demonstrate a proper link between firearm possession in a school zone and interstate commerce as to necessitate federal punishment,⁹⁵ the

91. *Id.* at 551-52 (citation omitted).

92. *Id.* at 552.

93. *Id.*

94. *United States v. Lopez*, 2 F.3d 1342, 1368 (5th Cir. 1993), *aff’d*, 514 U.S. 549. The circuit court expressly refused to discuss whether § 922(q) could ever be constitutionally applied. *Id.* (“Conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce.” (footnote omitted)). Although the parties stipulated that a government witness would “testify that Lopez’s gun had been manufactured outside of the State of Texas,” the court still reversed the conviction. *Id.* The court noted that criminal procedure required the government to allege a connection to interstate commerce in the indictment where the nexus was itself an element of the offense. *Id.* (citing *Stirone v. United States*, 361 U.S. 212, 216-18 (1960) (Hobbs Act); *United States v. Hooker*, 841 F.2d 1225, 1227-32 (4th Cir. 1988) (en banc) (RICO); *United States v. Moore*, 185 F.2d 92, 94 (5th Cir. 1950) (Fair Labor Standards Act)).

95. Despite a heavy emphasis on the absence of legislative findings, the opinion was conciliatory and conceded that “[w]hether with adequate Congressional findings or legislative history, national legislation of similar scope could be sustained, we leave for another day.” *Id.* The court noted that “the Supreme Court has consistently deferred to Congressional findings in this respect, both formal findings in the legislation itself and findings that can be inferred from committee reports, testimony before Congress, or statutory terms expressly providing for some nexus to interstate commerce.” *Id.* at 1362. The opinion cited or discussed no fewer than six Supreme Court cases to support this principle. *See id.* at 1362-63 & nn.41-42. However, helpful legislative findings were wholly absent in the original enactment of § 922(q). Circuit Judge Garwood wrote that:

Courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding. And, in such a situation there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states.

Fifth Circuit concluded that the GFSZA stretched the commerce power so far as to warrant invalidation.⁹⁶ Accordingly, the court reversed the conviction and ordered the dismissal of the indictment.⁹⁷

The government petitioned for certiorari review, which the Court granted.⁹⁸ Faced with a lower court's invalidation of congressional legislation—a serious judicial act—Chief Justice Rehnquist's majority opinion⁹⁹ began with “first principles,” specifically the basic proposition that “[t]he Constitution creates a Federal Government of enumerated powers.”¹⁰⁰ After an overview of Commerce Clause jurisprudence since the beginning of the Republic,¹⁰¹ the Chief Justice noted the Court's identification of “three

Indeed, as in this case, there is no substantial indication that the commerce power was even invoked.

Id. at 1363-64 (footnotes omitted).

96. After discussing relevant case law and the history of gun legislation, the court relied on pragmatic arguments in the final pages of the opinion. The court foresaw absurd results if the judicial branch were to defer to a congressional judgment—without the use of legislative findings—that intrastate possession of a weapon substantially affected interstate commerce.

Id. at 1367. The court stated:

If Congress can thus bar firearms possession because of such a nexus to the grounds of any public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, “sneakers,” Game Boys, or slide rules.

Id. The court also feared the effect of an overly broad definition of “school zone” on criminal penalties:

The Gun Free School Zones Act extends to criminalize any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session.

Id. at 1366.

97. *Id.* at 1368.

98. *Lopez*, 514 U.S. at 552.

99. There were six opinions in *Lopez*. Chief Justice Rehnquist penned the majority opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.* at 551 (majority opinion). Justice Kennedy wrote a concurring opinion, joined by Justice O'Connor, *id.* at 568 (Kennedy, J., concurring), with Justice Thomas also writing a concurring opinion. *Id.* at 584 (Thomas, J., concurring). Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, wrote the principal dissenting opinion, *id.* at 615 (Breyer, J., dissenting), with Justice Stevens adding a brief dissenting opinion, *id.* at 602 (Stevens, J., dissenting), and Justice Souter also penning a dissent. *Id.* at 603 (Souter, J., dissenting).

100. *Id.* at 552 (citing U.S. CONST. art. I, § 8).

101. *Id.* at 552-58. Justice Kennedy gave a more detailed analysis of the case law interpreting the Commerce Clause. *See id.* at 568-74 (Kennedy, J., concurring); *see also supra* Part II.

broad categories of activity that Congress may regulate under its commerce power.”¹⁰² First, Congress could “regulate the use of the channels of interstate commerce.”¹⁰³ Second, Congress could “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”¹⁰⁴ Examples of proper legislation under this category included laws prohibiting the destruction of an aircraft or thefts from interstate commerce.¹⁰⁵ Third, Congress could “regulate those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.”¹⁰⁶ Chief Justice Rehnquist quickly dismissed the applicability of the first two categories.¹⁰⁷ Instead he concluded that “if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.”¹⁰⁸

With respect to the third category, Chief Justice Rehnquist noted that all previous examples of permissible congressional regulation of intrastate activities shared a common element. To Rehnquist, “the pattern [was] clear. Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”¹⁰⁹ The Chief Justice’s opinion even reconciled *Wickard v. Filburn*, the 1942 case that legitimized federal regulation of one man’s wheat harvest.¹¹⁰ Although the man only

102. *Lopez*, 514 U.S. at 558 (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276-77 (1981); *Perez v. United States*, 402 U.S. 146, 150 (1971)).

103. *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964); *United States v. Darby*, 312 U.S. 100, 114 (1941)).

104. *Id.* (citing *Perez*, 402 U.S. at 150; *Shreveport Rate Cases*, 234 U.S. 342 (1914)).

105. *Perez*, 402 U.S. at 150 (citing 18 U.S.C. § 32 (Supp. IV 1956); 18 U.S.C. § 659 (1966)).

106. *Lopez*, 514 U.S. at 558-59 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

107. *Id.* at 559. He explained:

§ 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.

Id.

108. *Id.*

109. *Id.* at 560 (emphasis added).

110. *Id.* (discussing *Wickard v. Filburn*, 317 U.S. 111 (1942)). Although the opinion conceded that *Wickard* was “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” Rehnquist used this case to limit Congress’s authority to

harvested twelve acres of wheat above his allotment, Rehnquist wrote that a penalty assessed under the Agricultural Adjustment Act of 1938 was a proper exercise of authority because Congress intended “to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained.”¹¹¹ The Chief Justice used this commerce-centered legislative intent to derive a rule permitting Congress to regulate intrastate activities when the regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”¹¹²

In addition to emphasizing the “economic” character of the regulated conduct, Rehnquist added two drafting considerations. Although the majority opinion suggested that a lack of a jurisdictional “hook”¹¹³ and the lack of

pass the GFSZA by concluding that “[e]ven *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not.” *Id.*

111. *Id.* Rehnquist also quoted the *Wickard* Court’s description of one of the legislative purposes of the Act:

“[T]o increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It could hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. . . . Home-grown wheat in this sense competes with wheat in commerce.”

Id. at 560-61 (quoting *Wickard*, 317 U.S. at 128).

112. *Id.* at 561. The opinion provided an alternate formulation of this rule. Congressional legislation could be upheld if it involved “regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” *Id.* Some scholars have argued that this rule represents an additional “category” of permissible regulation—an argument that only weakens the persuasive power of the majority opinion. *See, e.g.,* Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 840 (2005) (arguing that the “regulatory scheme” rule derives from the *Shreveport Rate Cases* and suggesting that the *Shreveport* doctrine should be included “as another category of permissible regulation under the Commerce Clause”); Pushaw, *supra* note 25, at 881-82 (arguing that the “larger . . . regulatory scheme” concept “[a]dd[ed] to the confusion” in *Lopez* and that the opinion’s vague standards could be manipulated “to promote a particular ideological agenda”). For a description of Rehnquist’s three categories of permissible regulation, see *supra* notes 102-06 and accompanying text.

113. *See Lopez*, 514 U.S. at 561 (noting that “§ 922(q) contains no jurisdictional element”). A proper jurisdictional hook would operate to ensure that the firearm at issue had a proper nexus to interstate commerce. After the Court upheld the Fifth Circuit’s invalidation of the GFSZA, Congress amended the statute to include a jurisdictional hook. *See* Pub. L. No. 104-208, div. A, tit. I, § 101(f), 110 Stat. 3009-369, 3009-372 (1996) (“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

explicit legislative findings¹¹⁴ were not dispositive to the determination of § 922(q)'s constitutionality, these omissions did not help the Government's case. Ultimately, the Court instead focused on the Government's primary argument—one the Court referred to as “‘costs of crime’ reasoning”¹¹⁵—and answered that Congress's perception of its own power would result in “a general federal police power.”¹¹⁶ The Government argued that gun possession in a school zone could lead to school violence.¹¹⁷ This violence would result in “[a] handicapped educational process . . . [and] a less productive citizenry.”¹¹⁸ Following this causal chain to its ugly conclusion, Congress could rationally conclude that the conduct to be remedied by § 922(q) could substantially affect interstate commerce.¹¹⁹

The Court dismissed the tenuous causal link between possession of a firearm and interstate commerce and reasoned that, under its theory, Congress could regulate any activities leading to violent crime.¹²⁰ Even worse, Rehnquist postured, Congress could regulate any activity affecting

believe, is a school zone.” (emphasis added)). Courts interpreting the amended § 922(q) have upheld the legislation. *See, e.g.*, *United States v. Dorsey*, 418 F.3d 1038, 1045-46 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037, 1039 (8th Cir. 1999) (“[S]ection 922(q) contains language that ensures, on a case-by-case basis, that the firearm in question affects interstate commerce. We hold that the amended Act is a constitutional exercise of Congress's Commerce Clause power.”).

114. The Court noted that Congress amended § 922(q) to include explicit congressional findings “regarding the effects of firearm possession in and around schools upon interstate and foreign commerce.” *Lopez*, 514 U.S. at 563 n.4. The findings note, in part, that “firearms and ammunition . . . have been found in increasing numbers in and around schools,” 18 U.S.C. § 922(q)(1)(C) (Supp. III 1991), *amended by* Pub. L. No. 104-208, div. A, tit. I, § 101(f), 110 Stat. 3009-369, 3009-370 (1996); “the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country,” *id.* § 922(q)(1)(F); and “this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States,” *id.* § 922(q)(1)(G). However, the government chose not to rely on these findings in its argument. *See Lopez*, 514 U.S. at 563 n.4.

115. *Lopez*, 514 U.S. at 564.

116. *Id.* Not surprisingly, Chief Justice Rehnquist warned of a dangerous slippery slope if courts sanctioned federal punishment for the intrastate possession of a firearm, within a school zone, without any connection to interstate commerce. The Court feared that if Congress had the power to pass legislation like § 922(q), the Court would be “hard pressed to posit any activity by an individual that Congress [would be] without power to regulate.” *Id.*

117. *See id.* at 563.

118. *Id.* at 564.

119. *Id.*

120. *Id.*

national productivity (and in turn affecting interstate commerce).¹²¹ Because the Chief Justice concluded that a “costs of crime” analysis would permit Congress “to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power,”¹²² the Court affirmed the Fifth Circuit’s judgment and invalidated the GFSZA.¹²³

As expected, the Court’s opinion in *Lopez* elicited both praise and disapproval.¹²⁴ Some commentators suggested that the opinion did not go far enough in its resurrection of federalist virtues,¹²⁵ whereas at least one scholar viewed *Lopez* as evidence that the Court should explicitly withdraw from

121. *Id.* Rehnquist listed matters typically covered by state family law—marriage, divorce and child custody law—as the prime examples of activity affecting “the economic productivity of individual citizens.” *Id.* His opinion also reasoned that the power to regulate any activities having an adverse effect on the learning environment would permit Congress to “*a fortiori* . . . regulate the educational process directly.” *Id.* at 565. This power could manifest itself in Congress’s decision to “mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant ‘effect on classroom learning’ and that, in turn, has a substantial effect on interstate commerce.” *Id.* (internal citation omitted).

122. *Id.* at 567.

123. *Id.* at 568.

124. Compare Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 167 (1996) (“At long last, the federal government has *lost* a case that challenged its power to regulate under the Commerce Clause.”), with Herbert Hovenkamp, *Judicial Restraint and Constitutionalism Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2213 (1996) (characterizing the Court’s decision in *Lopez* as one instance of “activist Justices” operating “as a kind of super-legislature”), and Tom Stacy, *What’s Wrong with Lopez*, 44 U. KAN. L. REV. 243, 243-44 (1996) (criticizing both the majority and dissenting views, but noting that the majority replaced “legal doctrine in place since the demise of the *Lochner* Court” with “profoundly unsatisfying” reasoning).

125. See, e.g., Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 695-96 (1996) (arguing that failure to adhere to the original narrow conception of Congress’s commerce power “undermine[s] the rule of law and foster[s] suspicion that the Constitution is merely what the fluctuating majority of the Justices says it is”); Russell F. Pannier, *Lopez and Federalism*, 22 WM. MITCHELL L. REV. 71, 72 (1996) (“[T]he law of the Interstate Commerce Clause as it existed before *Lopez* cannot be justified . . . however *Lopez* itself is best interpreted, it does not take us far enough in the right direction—that of becoming a federalist republic once again.”). This view squares with Justice Thomas’s originalist interpretation of the Commerce Clause. See *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (“In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.”).

Commerce Clause review.¹²⁶ What the opinion did substantively was clear enough. “Doctrinally, *Lopez* limited *Wickard*’s broad and deferential ‘rational basis’ test.”¹²⁷ Ultimately, *Lopez* was an attempt to utilize the judicial branch as a counterweight to Congress’s “do what we feel” attitude, which, in the eyes of the majority, completely disregarded the plain language of the Constitution.¹²⁸ Although opinion about the decision was clear, less certain was *Lopez*’s significance for future cases.¹²⁹ As Professor John T.

126. See Lino A. Graglia, *United States v. Lopez: Judicial Review under the Commerce Clause*, 74 TEX. L. REV. 719, 769-771 (1996) (arguing that “[p]retend judicial review” makes the rational basis standard an “embarrassing and demeaning charade” and that judicial disapproval of this technique would lead to greater congressional self-discipline, and honesty and openness in government).

127. Eric R. Claeys, Raich and *Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 801 (2005); see also David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1090 (1996) (“[T]he Court appeared to be applying a higher level of scrutiny and reasserting its constitutional role of judicial review . . .”).

128. See Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 756 (2005) (“If the only question is whether a particular class of activities impacts interstate economic activity in some identifiable way, there is hardly anything that falls outside of Congress’s authority. And that is the whole point of the *Lopez* test . . .”); Merrill, *supra* note 112, at 825 (“A central theme of the Rehnquist Court . . . was that the federal courts do have a vital role to play in determining the allocation of powers in the federal system.”).

129. Professor William E. Hellerstein addressed some of the questions raised by the decision:

Is *Lopez* the first step in a broad assault by the Court on congressional power? . . . Or does *Lopez*’s main significance lie in that it is a “process” decision, one in which the Court . . . has now directed Congress to abide by specific legislative processes, such as adequate hearings and sufficient findings of fact, when a statute’s legitimacy is not immediately apparent?

Leon Lazer & William E. Hellerstein, *Tiptoeing Through the Tulips: The Supreme Court’s Major, but Modest by Comparison, Criminal Law Rulings During the 1994-95 Term*, 12 TOURO L. REV. 267, 269 (1996); see also John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 176 (1998) (“Whether *Lopez* marks a dramatic shift in Commerce Clause jurisprudence or is instead destined to be a ‘but see’ citation remains to be seen.”). Of course, some scholars gave their opinions on *Lopez*’s importance. See, e.g., Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995) (“I do not think *Lopez* is likely to inaugurate a major change in the Court’s inclination to uphold federal legislation.”). Five years after *Lopez*—but before the Court ruled in *United States v. Morrison*, 529 U.S. 598 (2000)—Professors Reynolds and Denning suggested that the actual impact of *Lopez* was minimal in the lower courts. See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 401 (suggesting that “the lower courts’ reactions to

Parry noted in hindsight in 2005, how far the doctrinal shift in *Lopez* would be carried would not become apparent “until the next case explained it to us.”¹³⁰

B. Morrison

This “next case” came to the Supreme Court five years later, and the Court’s opinion in *United States v. Morrison*¹³¹ “indicated that the doctrinal shift would be significant.”¹³² *Morrison* addressed the constitutionality of a provision of the Violence Against Women Act (“VAWA”)¹³³ creating a federal civil rights remedy for victims of gender-motivated violence.¹³⁴ Congress relied on both its commerce power and its power to enforce the Fourteenth Amendment as the constitutional bases for VAWA.¹³⁵ Although

Lopez might represent a sort of institutional conservatism in the face of an ambiguous opinion with an uncertain future”).

130. John T. Parry, “*Society Must Be [Regulated]*”: *Biopolitics and the Commerce Clause* in *Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 853, 855 (2005).

131. 529 U.S. 598 (2000).

132. Parry, *supra* note 130, at 856; *see* Adler, *supra* note 128, at 759 (“*Morrison* was the real breakthrough for enumerated powers jurisprudence.”). *But see infra* Part IV.

133. *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, § 40302, 108 Stat. 1902, 1941-42 (codified as amended at 42 U.S.C. § 13981 (2000)), *invalidated by* *United States v. Morrison*, 529 U.S. 598, 602 (2000). Section 13981 states that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.” 42 U.S.C. § 13981(b). The statute defines a “crime of violence motivated by gender” as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” *Id.* § 13981(d)(1).

134. Section 13981 provides that:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

42 U.S.C. § 13981(c). For a fuller discussion of VAWA’s civil rights remedy, its motivations and statutory models, *see* Sally F. Goldfarb, “*No Civilized System of Justice*”: *The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 505-09 (2000). At its core, “VAWA’s civil rights provision was a pioneering attempt to provide legal redress at the national level for one of the most common and fundamental manifestations of gender inequality.” *Id.* at 509.

135. *Morrison*, 529 U.S. at 607. In Part III of the majority opinion, the Court relied on *The Civil Rights Cases*, 109 U.S. 3 (1883), and *United States v. Harris*, 106 U.S. 629 (1883), to rule that the enactment of VAWA exceeded Congress’s power under Section 5 of the Fourteenth Amendment. *Morrison*, 529 U.S. at 619-27. This Note will not discuss this aspect of the Court’s decision. For an expansive critique of the Court’s interpretation of the

Congress explicitly invoked the Commerce Clause for authority—and despite extended legislative hearings and a “mountain of data . . . showing the effects of violence against women on interstate commerce”¹³⁶—the Court, again in an opinion by Chief Justice Rehnquist,¹³⁷ invalidated the civil rights remedy as an unconstitutional exercise of the power to regulate interstate commerce.¹³⁸

Morrison arose “from the gang rape of a freshman at the Virginia Polytechnic Institute by two members of the college football team, and the school’s decision to impose only a nominal punishment on the rapists.”¹³⁹ The freshman, Christy Brzonkala, enrolled at Virginia Tech in the fall of 1994.¹⁴⁰ In September, she and another freshman girl met two men, later identified as football players Antonio Morrison and James Crawford, in a student dormitory room.¹⁴¹ About thirty minutes after meeting, Morrison asked Brzonkala to have sex, which she refused twice.¹⁴² Morrison, however, grabbed her, threw her on a bed, pushed her down by the shoulders, and removed her clothes.¹⁴³ He then “used his arms to pin down her elbows,” “pressed his knees against her legs,” and forcibly raped her.¹⁴⁴ Soon,

Fourteenth Amendment and its subsequent invalidation of the civil rights remedy provided by VAWA, see Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 116-24 (2002).

136. *Morrison*, 529 U.S. at 628-29 (Souter, J., dissenting). In his dissenting opinion, Justice Souter cited numerous hearings and committee and subcommittee reports as evidence that Congress could rationally find a nexus between intrastate gender-motivated violence and interstate commerce. *Id.* at 629-34 & nn.3-8 (citations omitted).

137. Like *Lopez*, *Morrison* was a 5-4 decision, with the same Justices lining up on opposite sides. See *supra* note 99. Justices O’Connor, Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist’s opinion for the Court. *Id.* at 601 (majority opinion). Justice Thomas filed the only separate concurring opinion, using one paragraph to reiterate his argument in *Lopez*. *Id.* at 627 (Thomas, J., concurring). Justice Souter authored the principal dissent, which Justices Stevens, Ginsburg, and Breyer joined. *Id.* at 628 (Souter, J., dissenting). Whereas Justice Souter upheld § 13981 as a valid exercise of the commerce power, and therefore did not discuss Congress’s invocation of the Fourteenth Amendment, *id.* at 628 n.1, Justice Breyer’s dissenting opinion discussed both sources of congressional authority. *Id.* at 655-66 (Breyer, J., dissenting). Justice Stevens joined Justice Breyer’s opinion in full, with Justices Souter and Ginsburg joining only Part I-A. *Id.* at 655.

138. *Id.* at 619 (majority opinion).

139. *Brzonkala v. Va. Polytechnic Inst. & State Univ. (Brzonkala II)*, 132 F.3d 949, 952 (4th Cir. 1997), *aff’d in part, rev’d in part en banc*, 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom. Morrison*, 529 U.S. 598.

140. *Id.*

141. *Id.* at 953.

142. *Id.*

143. *Id.*

144. *Id.*

Crawford entered the room, switched places with Morrison, and also raped Brzonkala.¹⁴⁵ After Crawford finished, Morrison raped her a second time and warned her that she “better not have any fucking diseases.”¹⁴⁶ After the rape, Morrison publicly boasted that he “like[d] to get girls drunk and fuck the shit out of them.”¹⁴⁷

After the assault, Brzonkala became depressed, avoided social contact, changed her appearance, stopped going to class, and attempted suicide.¹⁴⁸ She also visited a University psychiatrist, who prescribed antidepressant medication.¹⁴⁹ In April 1995, she filed a complaint against Morrison and Crawford under Virginia Tech’s Sexual Assault Policy.¹⁵⁰ The school held a three-hour hearing in May on her complaint, at which Brzonkala, Morrison, and Crawford all testified.¹⁵¹ Morrison admitted that he had sex with Brzonkala despite her repeated refusal.¹⁵² Accordingly, Virginia Tech’s judicial committee found Morrison guilty of sexual assault and suspended him for two semesters.¹⁵³ Although the Dean of Students upheld the suspension—a decision which was supposed to be final—the Dean and another University official later visited Brzonkala at her home and informed her that Morrison was threatening to sue the school.¹⁵⁴ Because Virginia Tech was unwilling to defend a legal action, the officials asked Brzonkala to appear at a second hearing.¹⁵⁵ Although Brzonkala faced a number of procedural hurdles at this seven-hour hearing,¹⁵⁶ the committee imposed the

145. *Id.*

146. *Id.* (internal quotation marks omitted).

147. *Id.* (internal quotation marks omitted).

148. *Id.*

149. *Id.*

150. *Id.* Neither Brzonkala nor Virginia Tech reported the rape to the local police. *Id.* at 954. “Rape of a female student by a male student [was] the only violent felony that Virginia Tech authorities [did] not automatically report to the university or town police.” *Id.*

151. *Id.*

152. *Id.*

153. *Id.* The judicial committee found insufficient evidence to act against Crawford. *Id.* This was due to Crawford’s testimony, and his friend’s corroborating testimony, that he did not have sexual contact with Brzonkala. *Id.*

154. *Id.* (“Morrison claimed that the college denied him his due process rights and imposed an unduly harsh and arbitrary sanction.”).

155. *Id.* In addition to an unwillingness to defend a suit, the university “thought there might be merit to Morrison’s ‘ex post facto’ challenge that he was charged under a Sexual Assault Policy that was not yet spelled out in the Student Handbook.” *Id.* To induce her participation at the hearing, the school officials assured Brzonkala that they believed her story and that the hearing would be a “mere technicality.” *Id.*

156. *Id.* at 954-55. Not only did Brzonkala have to retain individual counsel at her expense, but she received insufficient notice that testimony at the first hearing would be

same two-term suspension.¹⁵⁷ Surprisingly, however, the committee found Morrison guilty not of sexual assault, but rather of “using abusive language.”¹⁵⁸ After Morrison again appealed his suspension, Virginia Tech’s provost set aside the punishment and instead allowed him to return to the school for the following semester.¹⁵⁹ Virginia Tech did not notify Brzonkala of the change in Morrison’s punishment; she learned of Morrison’s early return to the school in an August 22 *Washington Post* article.¹⁶⁰

On December 27, 1995, Brzonkala filed suit against Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia.¹⁶¹ In an amended complaint, she alleged, *inter alia*, that Morrison and Crawford had raped her because of gender animus in violation of § 13981.¹⁶² Morrison and Crawford moved to dismiss her complaint because it failed to state a claim upon which relief could be granted.¹⁶³ Alternately, the

inadmissible in the second hearing. *Id.* In addition, Brzonkala was refused access to the tape recordings of the earlier hearing and could not mention Crawford’s name at the second hearing because charges against him had been dismissed. *Id.* at 955.

157. *Id.*

158. *Id.* at 955-56.

159. *Id.* at 955. The provost found the punishment to be “excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy.” *Id.* (internal quotation marks omitted). She did not elaborate on the “other cases.” *Id.* Instead of an immediate two-term suspension, the provost deferred suspension until after Morrison’s graduation and required him to attend a one-hour educational session with a university compliance officer. *Id.*

160. *Id.*

161. *Id.* at 956.

162. *Id.* Brzonkala also raised a number of claims against Virginia Tech. In addition to a state breach of contract claim, she alleged violations of Title IX of the Education Amendment Act of 1970. *Brzonkala v. Va. Polytechnic Inst. & State Univ. (Brzonkala I)*, 935 F. Supp. 772, 773 (W.D. Va. 1996) (citing 20 U.S.C. §§ 1681-88 (1994)), *rev’d*, 132 F.3d 949, *aff’d in part, rev’d in part en banc*, 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom. Morrison*, 529 U.S. 598. She claimed that Virginia Tech’s handling of her sexual abuse case against Morrison and Crawford demonstrated an intent to discriminate based on gender. *Id.* at 776 n.1. The university moved to dismiss for failure to state a claim upon which relief could be granted. *Id.* at 773. The district court considered Brzonkala’s allegations and granted the motion to dismiss, concluding she did “not allege facts which will support a conclusion that [Virginia Tech] acted with an anti-female animus. They simply do not rise to a plausible inference of [sexually] discriminatory intent.” *Id.* at 778 (citation and internal quotation marks omitted). Because the granted motion to dismiss extinguished all federal law claims, the district court dismissed the state breach of contract claim for lack of jurisdiction. *Id.* at 779.

163. *Brzonkala I*, 935 F. Supp. at 783.

defendants argued that the civil rights remedy was unconstitutional.¹⁶⁴ Although Brzonkala successfully stated a claim against Morrison,¹⁶⁵ the court accepted the second argument and concluded that the civil rights remedy exceeded Congress's power under both the Commerce Clause and the Fourteenth Amendment.¹⁶⁶

Brzonkala appealed the dismissal of her claims to the United States Court of Appeals for the Fourth Circuit. The circuit court, in an opinion by Judge Motz,¹⁶⁷ reversed the district court's holding that the civil rights

164. *Id.* When the defendants argued that § 13981 was unconstitutional, the federal government intervened to defend the statute. *United States v. Morrison*, 529 U.S. 598, 604 (2000).

165. *Brzonkala I*, 935 F. Supp. at 784-85. The court identified the "sticking point" as whether Brzonkala "alleged that the rape was 'motivated by gender.'" *Id.* at 784. Although the court first noted that Brzonkala made conclusory statements "likely insufficient to state a claim," the court found that she alleged other facts to support these statements. *Id.* The court ultimately concluded that "[t]he characteristics of the rape combined with Morrison's statements are sufficient at least to meet the minimal federal pleading requirements." *Id.* at 785. The court did not reach Brzonkala's claim against Crawford. *Id.* ("Deciding whether a claim is stated against Crawford is unnecessary considering my decision on the constitutionality of VAWA.").

166. In concluding that § 13981 could not be sustained under Congress's commerce power, the district court deconstructed *Lopez* and discussed what it identified as the four important parts of *Lopez*'s "effects-analysis": (1) the nature of the regulated activity; (2) the presence of a jurisdictional element; (3) the importance of legislative history; and (4) the practical implications of accepting an argument that the regulated activity "substantially affect[ed] interstate commerce." *Id.* at 786-87. The court used these four parts to compare VAWA with the gun legislation invalidated in *Lopez*. *Id.* at 787-89. The court dismissed any differences between the two pieces of legislation as insufficient to salvage the civil rights remedy. "The bottom line is that both *Lopez* and the case at hand involve regulated activity that is too remote from interstate commerce. Any substantial distinction between the lengths of the chains of causation in *Lopez* and the lengths of the chains . . . [here] is inconsequential." *Id.* at 791. Therefore, the court found § 13981 to be an improper use of the commerce power. *Id.* at 793 ("The combination of the insignificance of the differences between the case at hand and *Lopez* and the significance of the similarities leads to the conclusion that Congress acted beyond its commerce power in enacting VAWA.").

For the district court's decision that VAWA's civil rights remedy exceeded Congress's Fourteenth Amendment power, see *id.* at 793-801.

167. *Brzonkala II*, 132 F.3d at 952. Circuit Judge Luttig wrote a stinging dissent. See *id.* at 974-79 (Luttig, J., dissenting). Judge Luttig accused the majority opinion of "bold intransigence" in the face of the Supreme Court's decision in *Lopez*. *Id.* at 977. He characterized the majority opinion as "a manifest misreading of the Supreme Court's historically significant *Lopez* decision and . . . [a] fundamental misunderstanding of the import of that decision and its implications for the Violence Against Women Act," *id.* at 974—in stark contrast to the district court's "exhaustive analysis[,] . . . scrupulously faithful not only to Supreme Court precedent, but to our Circuit precedent as well," *id.* at 977 (emphasis deleted).

remedy exceeded Congress's authority under the Commerce Clause.¹⁶⁸ Noting that "Congress took great care to detail its findings and support its conclusion that VAWA was within its commerce authority,"¹⁶⁹ the opinion applied the "rational basis" test and found that the civil rights remedy could pass constitutional muster.¹⁷⁰ The court reasoned that *Lopez*'s holding was limited to the facts of that case and dismissed the contention that VAWA invaded areas of traditional state concern.¹⁷¹

However, the full Court of Appeals vacated the opinion and reheard the case en banc. In a divided vote, the court affirmed the district court's opinion that Congress lacked authority to enact the civil rights remedy.¹⁷² With rhetorical flourish (or bombast), the circuit refused to extinguish "the principles of limited federal government upon which this Nation is founded,"¹⁷³ and set the stage for Chief Justice Rehnquist's next major exposition on the permissible bounds of the Commerce Clause.

The Chief Justice did not unveil revolutionary principles in *Morrison*. Rather, he took the basic framework set by *Lopez* and gave it greater bite. Rehnquist made it clear that litigants could not pigeonhole or ignore *Lopez* in the future. Nowhere was this pronouncement more evident than in Rehnquist's scornful reminder that the principal dissent "d[id] not reconcile its analysis with our holding in *Lopez* because it apparently would cast that decision aside."¹⁷⁴ Despite the dissent's attack, Rehnquist insisted that *Lopez*

168. *Id.* at 962 (majority opinion). The Fourth Circuit also found that Brzonkala stated a Title IX hostile environment claim against Virginia Tech. *Id.* at 961. The circuit court did, however, affirm the district court's dismissal of Brzonkala's Title IX gender discrimination claim against the university. *Id.* at 962; *see supra* note 162.

169. *Brzonkala II*, 132 F.3d at 973.

170. *Id.* at 973 ("The core teaching of *Lopez* is simply that Congress must ensure that legislation enacted pursuant to its Commerce Clause authority reaches only activities that 'substantially affect interstate commerce.'").

171. *Id.* at 970-71.

172. *United States v. Morrison*, 529 U.S. 598, 605 (2000). Judge Luttig wrote an exhaustive opinion for the full circuit. *See Brzonkala v. Va. Polytechnic Inst. & State Univ. (Brzonkala III)*, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom. Morrison*, 529 U.S. 598. Chief Judge Wilkinson and Judge Niemeyer both authored concurring opinions. Judge Motz, this time in the minority, wrote a dissenting opinion, joined by Judges Murnaghan, Ervin, and Michael.

173. *Brzonkala III*, 169 F.3d at 826; *see also id.* at 825-26 ("We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves.").

174. *Morrison*, 529 U.S. at 611 n.4.

clarified Commerce Clause jurisprudence and provided “the proper framework for conducting the required analysis of § 13981.”¹⁷⁵

This “proper framework” began with the doctrinal understanding that even the most expansive interpretations of the commerce power identified limits on congressional authority.¹⁷⁶ Within the outer bounds of this power, Congress could regulate three categories of activity.¹⁷⁷ When Congress used its power to regulate intrastate activities that “substantially affected” interstate commerce, however, additional considerations counseled judicial scrutiny. Chief Justice Rehnquist noted that *Lopez* confronted “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”¹⁷⁸ From the observation that the GFSZA regulated conduct in no way economic or commercial, the *Morrison* Court concluded that the economic nature of the regulated activity is an extremely important consideration.¹⁷⁹ Analogizing the GFSZA to VAWA’s civil rights remedy, it was easy enough for the Court to conclude that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”¹⁸⁰

The Court also addressed the lack of a jurisdictional “hook” in both the GFSZA and § 13981.¹⁸¹ Because Congress chose not to include a jurisdictional element limiting the application of the civil rights remedy to conduct with a clearer nexus to interstate commerce, the Court doubted Congress’s intent to exercise its power in a constitutional manner.¹⁸²

175. *Id.* at 609.

176. *Id.* at 608 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

177. *Id.* at 608-09 (internal citations and quotations omitted); *see also supra* notes 102-06.

178. *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 561).

179. *Id.* at 610-11 (“[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. . . . [W]here we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.” (citations omitted)). It is interesting to note that the Court in essence adopted a categorical rule without adopting a categorical rule. *Id.* at 613 (“While we need not adopt a categorical rule[.] . . . thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”); *see also* Goldfarb, *supra* note 134, at 523.

180. *Morrison*, 529 U.S. at 613. It was “easy enough” for the Court to conclude that gender-motivated violence was not economic because it never defined “economic.”

181. *Id.* at 611-13; *see also supra* note 113.

182. *Morrison*, 529 U.S. at 613 (“Congress elected to cast § 13981’s remedy over a wider, and more purely intrastate, body of violent crime.” (footnote omitted)).

More importantly, however, *Morrison* altered the deference courts should give to legislative findings. An abundance of legislative findings distinguished the enactment of § 13981 from that of the GFSZA.¹⁸³ Despite this legislative diligence, and although the *Morrison* Court quoted language in *Lopez* respecting the deferential “rational basis” standard,¹⁸⁴ the Chief Justice fell back on raw judicial strength. He cited one of his previous opinions for the proposition that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”¹⁸⁵ Because the Court was the ultimate arbiter of an act’s constitutionality, Chief Justice Rehnquist disregarded Congress’s findings because they relied “so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.”¹⁸⁶ The Court likened the congressional “method” to the “costs of crime” analysis discredited in *Lopez*.¹⁸⁷ Accordingly, the Court refused to use this reasoning as a pretext for federal regulation of state crime typically handled by the state police power.¹⁸⁸ When the Court added that the legislation would permit future federal incursions into family law,¹⁸⁹ the civil rights remedy did not stand a chance.

Morrison solidified many of the principles raised in *Lopez*. Of prime importance, the Court stressed that the nature of a regulated activity is an essential aspect of the constitutional inquiry. Without adopting a clear rule against the aggregation of individual instances of noneconomic or noncommercial conduct, the Court noted the historical unwillingness to

183. *Id.* at 612, 614; see also Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 627 (2001) (distinguishing the “bare record” in *Lopez* and noting that VAWA’s proponents did not rely on a “generic, aggregate-effects-on-the-economy claim akin to that rejected in *Lopez*”).

184. *Morrison*, 529 U.S. at 612 (“Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.” (quoting *United States v. Lopez*, 514 U.S. 549, 562 (1995)); see also *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

185. *Morrison*, 529 U.S. at 614; see *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 254, 311 (1981) (Rehnquist, J., concurring).

186. *Morrison*, 529 U.S. at 615.

187. *Id.* (referring to “but-for causal chain” reasoning as a ploy to regulate intrastate violence with an attenuated effect on interstate commerce); see also *supra* notes 115-22 and accompanying text.

188. *Morrison*, 529 U.S. at 615.

189. See *id.* at 615-16. For a critique of the Court’s reasoning, see generally Resnik, *supra* note 183 (arguing that “categorical federalism” improperly gives states exclusive control over particular areas of law). For more detail on the Court’s slippery slope argument, see *supra* notes 116, 121 and accompanying text.

permit this broad use of the commerce power.¹⁹⁰ In addition, the Court refused to indulge in deferential “rational basis” review if it found Congress’s method of reasoning to be a screen for regulating conduct with a tenuous link to interstate commerce.

Like any bold new venture, skepticism greeted *Morrison*’s revival of a meaningful brand of federalism. Commentators argued that application of its central principles would prove unworkable in practice.¹⁹¹ Others feared *Morrison*’s potential impact on popular regulatory schemes that did not purport to regulate intrastate “economic” activity.¹⁹² Despite this skepticism, lower courts applied the central principles of *Lopez* and *Morrison* with greater frequency.¹⁹³ The Ninth Circuit even upheld an as-applied challenge to the federal criminalization of marijuana possession, based on a California law permitting medicinal use of the drug.¹⁹⁴ However, much like the difficulties faced when applying the federalist principles to popular environmental legislation,¹⁹⁵ the Court flinched “when considering whether to rein in an ambitious national program like the War against Drugs.”¹⁹⁶

190. See Adler, *supra* note 128, at 761 (“[T]he fact that a given intrastate activity, when aggregated with all other instances of like conduct, may have a measurable impact on the nation’s GDP is insufficient.”).

191. See, e.g., Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 605 (2001); Elizabeth S. Saylor, *Federalism and the Family after Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 HARV. WOMEN’S L.J. 57, 58 (2002).

192. See, e.g., Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 724 (2002) (noting that “the Endangered Species Act of 1973 . . . is likely to raise concerns under the Court’s recent interpretation of the Commerce Clause” (footnote omitted)); Merrill, *supra* note 112, at 842 (noting that the new doctrine “did not successfully grandfather all federal regulatory programs that were well-entrenched and enjoyed widespread popular and political support”); 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, 949-50 (2001) (arguing that emphasis on the “economic” nature of a regulated activity “may forecast doom for a wide array of future federal legislation”).

193. See Reynolds & Denning, *supra* note 7, at 916-18 (discussing *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003); *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), *vacated*, 545 U.S. 1112 (2005)—two Ninth Circuit opinions that sustained as-applied challenges to federal criminal statutes by “follow[ing] *Lopez* and *Morrison* to the letter”).

194. *Raich v. Ashcroft*, 352 F.3d 1222, 1229-30 (9th Cir. 2003), *vacated sub nom. Gonzales v. Raich*, 545 U.S. 1 (2005).

195. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 162 (2001) (refusing to decide whether the Clean Water Act could be extended to

IV. RAICH AND THE IMPORTANCE OF THE REGULATORY SCHEME

To say that drug regulation is within the authority of both the state and federal government is to state the obvious. The United States Supreme Court once concluded that state authority to regulate all aspects of drug use was “so manifest” that it could not be “successfully called in question.”¹⁹⁷ This authority attaches to the sovereign right to promote the public health, safety, and welfare of the citizenry.¹⁹⁸ Coterminous with the state police power, however, is federal authority to regulate drug trafficking. *Lopez* reaffirmed the federal government’s authority under the Commerce Clause to regulate persons or things moving in interstate commerce.¹⁹⁹ Because drugs often move through the channels of interstate commerce, their regulation fits within a constitutional legislative end.²⁰⁰

In a modern regulatory world, either the state or federal government, or both, will regulate individual conduct.²⁰¹ Often, complementary state and federal enforcement schemes coexist and accordingly engender little conflict. However, the fact that *some* government will regulate individual conduct, or that both governments may regulate in a comparable fashion, fails to account for instances of statutory conflict, i.e., when one government deviates from

regulate an abandoned intrastate gravel pit inhabited by migratory birds). *See generally* Matthew B. Baumgartner, Note, *SWANCC’s Clear Statement: A Delimitation of Congress’s Commerce Clause Authority to Regulate Water Pollution*, 103 MICH. L. REV. 2137 (2005) (arguing that federal regulation of wetlands does not offend *Lopez*’s federalism concerns because such wetlands are connected to navigable waterways).

196. Claey’s, *supra* note 127, at 792; *see also* Ann Althouse, *Why Not Heighten the Scrutiny of Congressional Power When the States Undertake Policy Experiments?*, 9 LEWIS & CLARK L. REV. 779, 785 (2005); Merrill, *supra* note 112, at 843 (“[A]pplication of the Court’s new prohibitory doctrine threatened another federal program . . . [that] enjoys widespread political support. . . . *Lopez* was not intended to cast the Court in the role of revolutionary, undermining popular shibboleths like the War on Drugs.”).

197. *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41, 45 (1921).

198. *See* Kenneth E. Johnson, Note, *The Constitutionality of Drug Paraphernalia Laws*, 81 COLUM. L. REV. 581, 586-87 (1981) (discussing the state police power).

199. *United States v. Lopez*, 514 U.S. 549, 558 (1995) (citing *Perez v. United States*, 402 U.S. 146, 150 (1971); *Shreveport Rate Cases*, 234 U.S. 342 (1914)).

200. Even in *Gonzales v. Raich*, there was no dispute over Congress’s broad authority to regulate the trafficking of drugs. 545 U.S. 1, 15 (2005).

201. *See* Parry, *supra* note 130, at 865 (“Accepting federal power to regulate increases the size of the relevant population to be regulated, but I suspect it has little impact on whether regulation takes place.”). Professor Parry also minimizes the significance of conflicting approaches to medical marijuana regulation, setting forth the common sense argument that even medical marijuana will “be regulated by government entities at some level. The only issue [is] which government [is] allowed to do the necessary regulating.” *Id.* at 863.

the other government's established regulatory scheme. *Raich* presented this situation. Its analysis should therefore begin with a look at the competing regulatory schemes.

A. Statutory Conflict—Blanket Coverage Versus Compassionate Exemption

1. California Compassionate Use Act

Over the course of the twentieth century, the State of California was a pioneer in its regulation of marijuana use.²⁰² In 1996, “California became the first State to authorize limited use of the drug for medicinal purposes.”²⁰³ The codified Compassionate Use Act of 1996²⁰⁴ permitted “seriously ill Californians . . . to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician.”²⁰⁵ The statute shielded physicians,²⁰⁶ as well as patients and primary caregivers,²⁰⁷ from criminal liability so long as the marijuana possession was within the ambit of the Act.²⁰⁸

202. See *Raich*, 545 U.S. at 5 (noting that California was one of the first states to prohibit the sale and possession of the drug, but also the first to allow its use with restrictions).

203. *Id.* By late 2004, ten states had followed California's lead. See *id.* at 5 n.1 (citing COLO. CONST. art. XVIII, § 14; NEV. CONST. art. 4, § 38; ALASKA STAT. §§ 11.71.090, 17.37.010-17.37.080 (2004); ARIZ. REV. STAT. ANN. § 13-3412.01 (Supp. 2004); COLO. REV. STAT. § 18-18-406.3 (2004); HAW. REV. STAT. § 329-121 to -128 (Replacement 2004); ME. REV. STAT. ANN., tit. 22, § 2383-B(5) (2004); NEV. REV. STAT. §§ 453A.010-453A.810 (2003); ORE. REV. STAT. §§ 475.300-475.346 (2003); VT. STAT. ANN., tit. 18, §§ 4471-4474d (Supp. 2004); WASH. REV. CODE §§ 69.51.010-69.51.080 (2004)). In November 2004, Montana voters approved an initiative permitting medical marijuana use. *Id.* The Montana Medical Marijuana Act is codified at scattered sections of the Montana Code. See MONT. CODE ANN. §§ 37-1-136, 45-9-101 to -103, 50-46-101 to -210 (2005).

204. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006).

205. *Id.* § 11362.5(b)(1)(A). The Act deemed medicinal marijuana use “appropriate” for the treatment of “cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.” *Id.*

206. “Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.” *Id.* § 11362.5(c).

207. The Compassionate Use Act intended to ensure “that patients and their primary caregivers who obtain and use marijuana for medical purposes . . . are not subject to criminal prosecution or sanction.” *Id.* § 11362.5(b)(1)(B). The Act defined a “primary caregiver” as “the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.” *Id.* § 11362.5(e).

208. Criminal sanctions for possession and cultivation of marijuana still applied to conduct outside the Act. *Id.* § 11362.5(d) (“Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a

2. Federal Controlled Substances Act

Despite the Compassionate Use Act's hope that the federal government would "implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need,"²⁰⁹ national regulation of marijuana has consistently avoided categorical exemptions since the late 1960s. Although Congress enacted its first drug laws in the early twentieth century, most pre-1970 federal drug regulation was packaged as revenue and tax legislation, not outright prohibitory schemes.²¹⁰ The Harrison Narcotics Act of 1914 was an example, with its assessment of taxes against registered producers, distributors, and purchasers of certain narcotics.²¹¹

Not surprisingly, the regulation of marijuana mirrored the regulation of other narcotics. The Marihuana Tax Act of 1937²¹² required persons "importing, producing, selling, or dealing in marijuana" to register with the federal government and pay annual taxes and transfer taxes.²¹³ Because state laws prohibiting the possession of marijuana existed across the United States, federal regulation worked as a vise or funnel, either punishing individuals for noncompliance with the tax law or publicizing their dealings in the drug and exposing them to state sanctions.²¹⁴

This regime existed until the late 1960s, when public discontent with the Vietnam War and rising crime levels, coupled with the national visibility of

patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient . . .").

209. *Id.* § 11362.5(b)(1)(C).

210. *Gonzales v. Raich*, 545 U.S. 1, 10-11 (2005). It is interesting to note that "[p]rior to 1906, there was essentially no drug regulation in the United States." Abigail Alliance for Better Access to Developmental Drugs & Wash. Legal Found. v. von Eschenbach, 445 F.3d 470, 481 (D.C. Cir. 2006). *See generally* Charles J. Walsh & Alissa Pyrich, *Rationalizing the Regulation of Prescription Drugs and Medical Devices: Perspectives on Private Certification and Tort Reform*, 48 RUTGERS L. REV. 883, 890-92 & n.9 (1996) (detailing the early history of narcotics regulation).

211. *Raich*, 545 U.S. at 10-11 (citing Harrison Narcotics Act of 1914, ch. 1, 38 Stat. 785 (repealed 1970)).

212. Ch. 553, 50 Stat. 551, *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1292.

213. *Raich*, 545 U.S. at 10, 11 n.12 (citing *Leary v. United States*, 395 U.S. 6, 14-16 (1969)).

214. *Id.* at 11 ("Thus, while the Marihuana Tax Act did not declare the drug illegal per se, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade."). The *Raich* Court noted that all states had some law regulating marijuana prior to the enactment of the federal tax statute, *id.* at 11 n.14, but stated that "dissatisfaction with enforcement efforts at state and local levels" provided a partial impetus for federal regulation. *Id.* at 11.

the counterculture movement, provoked public concern over drug use and prompted greater federal intervention.²¹⁵ President Johnson created the Bureau of Narcotics and Dangerous Drugs in 1968 as an amalgamation of different parts of various administrative agencies.²¹⁶ However, the formulation of additional drug policy was left to Richard Nixon, who stressed punishment and criminal accountability instead of rehabilitation.²¹⁷ In a July 1969 address to Congress, Nixon urged a national “war on drugs.”²¹⁸ Spurred by Nixon’s address, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (“CDAPCA”).²¹⁹ Title II of the CDAPCA, shorttitled the Controlled Substances Act (“CSA”), created a comprehensive regulatory scheme to combat interstate drug traffic.²²⁰ However, Congress contemplated not only regulation of the interstate traffic of drugs, but also the intrastate manufacture and possession of drugs.²²¹

215. DAVID R. MARES, *DRUG WARS AND COFFEE HOUSES: THE POLITICAL ECONOMY OF THE INTERNATIONAL DRUG TRADE* 121 (2006).

216. *Id.* The federal reorganization plan merged the Bureau of Narcotics, then under the purview of the Department of Treasury, with the Bureau of Drug Abuse Control (then under the Department of Health, Education, and Welfare). The new Bureau of Narcotics and Dangerous Drugs operated within the Department of Justice. *See* DAVID F. MUSTO & PAMELA KORSMEYER, *THE QUEST FOR DRUG CONTROL* 32-35 (2002) (citing corruption in the previous groups and disapproval of the Bureau of Narcotics’ “hard-line” approach as factors in the decision to create the new Bureau of Narcotics and Dangerous Drugs).

217. MARES, *supra* note 215, at 124. Despite the stricter attitude, treatment actually increased during Nixon’s presidency as a means to reduce crime. *See id.* at 126-27.

218. MUSTO & KORSMEYER, *supra* note 216, at 60.

219. Pub. L. No. 91-513, § 1101, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C. (2000)).

220. Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242-84 (1970) (codified as amended at 21 U.S.C. §§ 801-904 (2000)).

221. In its formal factual findings, Congress noted that:

(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

Because the CSA encompassed the registration and regulation of all controlled substances, the scheme classified substances into one of five “schedules,” with varying rules and regulations based on the accepted medical uses, potential for abuse, and psychological and physical effects on the body of each substance.²²² Congress classified marijuana as a Schedule I drug because it lacked accepted medical use and had a high potential for abuse.²²³ The possession of Schedule I drugs is a criminal offense.²²⁴

The years after Nixon’s resignation witnessed a greater push for marijuana decriminalization.²²⁵ However, despite the liberalization of public discourse regarding marijuana use, Ronald Reagan’s election marked a return to increased punishment for all individuals involved in the drug trade.²²⁶ States followed the national example with harsher penalties, the “Supreme Court began to ease restrictions on law enforcement,” and federal and state prison populations skyrocketed.²²⁷ Thus, despite judicial

(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 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.

21 U.S.C. § 801(1)-(6).

222. 21 U.S.C. §§ 811, 812.

223. *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (citing 21 U.S.C. § 812(b)(1), (c)).

224. 21 U.S.C. §§ 841(a)(1), 844(a). Section 841(b)(1)(A)-(D) assigns increasing criminal penalties for possession or manufacture of particular quantities of Schedule I substances. There is one research exception to the blanket prohibition of marijuana possession, manufacture or use. *See* 21 U.S.C. § 823(f) (permitting possession of Schedule I drugs for qualified “practitioners wishing to conduct research”).

225. *See, e.g.,* MARES, *supra* note 215, at 128 (discussing a 1976 Federal Drug Strategy report and other calls for decriminalization during the Ford administration); *id.* at 128-29 (describing President Carter’s campaign endorsement of decriminalization and subsequent emphasis on treatment and civil penalties instead of criminal penalties); *see also* MUSTO & KORSMEYER, *supra* note 216, at 192-96 (chronicling divided opinion within Carter administration on issue of decriminalization).

226. MARES, *supra* note 215, at 133. Reagan attacked the drug problem with great vigor, promising to “tak[e] down the surrender flag that has flown over so many drug efforts. We’re running up a battle flag.” *Id.* at 132 (citing DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 166 (1996)).

227. *Id.* at 133.

recognition of the benefits of medicinal marijuana use,²²⁸ and substantial efforts to reschedule the drug,²²⁹ California's Compassionate Use Act conflicted with relevant federal law at the turn of the century. In a 2001 case, the Court refused to discuss whether Congress could regulate private, intrastate cultivation and possession of marijuana for medical purposes.²³⁰ Instead, the Court waited until two California women raised the issue, triggering another debate over congressional authority to regulate aspects of everyday life.

B. Factual and Procedural History

The two women were Angel Raich and Diane Monson, both California residents suffering from a variety of medical ailments. Licensed family practitioners prescribed, with limited success, "conventional" medicines to alleviate their pain.²³¹ The doctors eventually concluded, however, that "marijuana [was] the only drug available that provide[d] effective treatment" and accordingly recommended its use.²³² Both women used marijuana for

228. See *Conant v. Walters*, 309 F.3d 629, 640-43 (9th Cir. 2002) (Kozinski, J., concurring) (collecting numerous sources and studies recognizing valid medical uses for marijuana). While Judge Kozinski admitted that "evidence supporting the medical use of marijuana does not prove that it is, in fact, beneficial," he believed that suffering individuals and their families at least deserved to learn about possible avenues of relief, especially when evidence supported both sides of the debate. *Id.* at 643.

229. See *Gonzalez v. Raich*, 545 U.S. 1, 15 n.23 (2005). The Food and Drug Administration defended federal marijuana policy, and refuted claims that smoked marijuana provided medicinal value, in an April 20, 2006 announcement. See Press Release, U.S. Food & Drug Admin., Inter-Agency Advisory Regarding Claims that Smoked Marijuana Is a Medicine (Apr. 20, 2006), available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01362.html> (citing several federal health agencies for the conclusion "that no sound scientific studies supported medical use of marijuana for treatment in the United States, and no animal or human data supported the safety or efficacy of marijuana for general medical use"). The announcement also addressed the "growing number of states" with medical marijuana provisions, stating that "[t]hese measures are inconsistent with efforts to ensure that medications undergo the rigorous scientific scrutiny of the FDA approval process and are proven safe and effective under the standards of the [Federal Food, Drug, and Cosmetic] Act." *Id.* Some members of the scientific community viewed the announcement as a blind refusal to accept the findings of certain studies, and even suggested that "the agency's statement about marijuana demonstrated that politics trumped science." Gardiner Harris, *F.D.A. Dismisses Medical Benefit from Marijuana*, N.Y. TIMES, Apr. 21, 2006, at A1.

230. See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494-95 n.7 (2001).

231. *Raich*, 545 U.S. at 7.

232. *Id.*

relief for several years prior to litigation.²³³ Monson grew her own marijuana plants, whereas Raich received the drug from two caregivers at no charge.²³⁴

On August 15, 2002, Drug Enforcement Administration (“DEA”) agents and local authorities went to Monson’s home, where a search and three-hour standoff uncovered six marijuana plants.²³⁵ Despite determining that her possession was lawful under California law, the federal agents seized and destroyed the plants.²³⁶ Hoping to prevent future federal intervention into their personal medical marijuana use, the two women, along with the two caregivers, brought suit against the Attorney General and the head of the DEA in the Northern District of California, seeking injunctive and declaratory relief.²³⁷ The plaintiffs moved for a preliminary injunction; the district court denied the motion in March 2003.²³⁸ The court cited three prior Ninth Circuit decisions validating Congress’s factual findings and upholding the application of the Controlled Substances Act to intrastate possession of marijuana.²³⁹ Because of this strong precedent, the court concluded that the plaintiffs “demonstrated no likelihood of success on the merits” and accordingly denied the motion.²⁴⁰

On appeal to the Ninth Circuit, a divided panel reversed the district court’s decision and ordered the entry of a preliminary injunction.²⁴¹ The Ninth Circuit concluded that the two women demonstrated a strong likelihood of success on the merits, and that the “real medical emergency” facing the plaintiffs outweighed any impact on national drug regulation from the intrastate possession of marijuana for limited medical purposes.²⁴² On the merits, the Ninth Circuit agreed with the plaintiffs’ argument that the “intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law” constituted a “separate and distinct class of

233. *Id.* In fact, “Raich’s physician believe[d] that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.” *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *See* Raich v. Ashcroft, 248 F. Supp. 2d 918 (N.D. Cal. 2003), *rev’d*, 352 F.3d 1222 (9th Cir. 2003), *vacated sub nom.* Gonzalez v. Raich, 545 U.S. 1 (2005).

239. *Id.* at 925 (citing United States v. Tisor, 96 F.3d 370, 374 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390, 1392 (9th Cir. 1990); United States v. Rodriguez-Camacho, 468 F.2d 1220, 1221 (9th Cir. 1972)).

240. *Id.* at 930.

241. Raich, 352 F.3d at 1235.

242. *Id.* at 1234-35.

activities.”²⁴³ The court reasoned that this distinct class did not implicate the same policy concerns as other illegal marijuana possession and that the separate and distinct class was cordoned off from the interstate market by California law.²⁴⁴ The court also applied the factors enunciated in *Lopez* and *Morrison* to find that the regulation of noncommercial, noneconomic conduct never discussed or anticipated by Congress in 1970—in fact, conduct with an attenuated link to interstate commerce—likely fell outside Congress’s commerce power.²⁴⁵

Circuit Judge Beam, in dissent, pointed out that the Supreme Court’s decisions in *Lopez* and *Morrison* had expressly affirmed the validity of *Wickard v. Filburn*,²⁴⁶ the most expansive reading of congressional commerce power.²⁴⁷ Because of *Wickard*’s continued validity, and because Judge Beam found it “impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce” in *Wickard*, he concluded that the Controlled Substances Act could be applied to the plaintiffs’ individual intrastate conduct.²⁴⁸

C. The Supreme Court Takes a Turn

The Supreme Court offered its take on the permissible scope of the Controlled Substances Act on June 6, 2005. The Court split 5-1-3 on the question, with the majority largely consisting of the *Lopez* and *Morrison* dissenters.²⁴⁹ Justice Scalia wrote a separate opinion concurring in the

243. *Id.* at 1228.

244. *Id.*

245. *Id.* at 1229-34.

246. 317 U.S. 111 (1942).

247. *Raich*, 352 F.3d at 1239 (Beam, J., dissenting).

248. *Id.* at 1235.

249. Not surprisingly, Justices Souter, Ginsburg, and Breyer—all dissenting in *Lopez* and *Morrison*—joined Justice Stevens’s opinion. However, Justice Kennedy, who had authored a concurring opinion in *Lopez* and joined *Morrison* without comment, joined the *Raich* opinion. No explanation accompanied this shift in thought. True, Justice Kennedy’s *Lopez* concurrence had proceeded with caution, detailing the history of the Commerce Clause and noting “that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.” *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring). However, Kennedy there relied on the Madisonian principle of governmental accountability—that both governments will compete for the adoration of the populace—to distinguish national priorities from those of “traditional state concern.” *Id.* at 576-77 (citations omitted). It was because

judgment.²⁵⁰ Justice O'Connor, joined in part by Chief Justice Rehnquist and Justice Thomas, wrote the principal dissent.²⁵¹ Justice Thomas added his own dissenting opinion.²⁵²

1. The Majority

Justice Stevens began his opinion with the now-mechanical restatement of the “three general categories” of permissible congressional regulation under the Commerce Clause.²⁵³ Reflecting an expansive, deferential approach to legislative authority, Stevens wrote that Congress may “regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”²⁵⁴ For drafting purposes, it was irrelevant if particular individual instances of that class of activities did not pose a threat to interstate commerce.²⁵⁵

Congress had entered an area of “traditional state concern” that Justice Kennedy supported the invalidation of a federal prohibition on guns in school zones. *See id.* at 580-83.

Despite his cautious approach in *Lopez*, Justice Kennedy joined the *Morrison* opinion without pause. Because of his seeming acceptance of meaningful limits on federal power, his silent shift in *Raich* provoked criticism. *See, e.g.,* Adler, *supra* note 128, at 769 (wondering why Kennedy did not echo his earlier concern for “allowing states to act as laboratories of democracy”); *id.* at 770 (“Other commentators have been less charitable in their initial assessments, suggesting that Justice Kennedy may have views about drug use that eclipse his concerns about the traditional federal state balance.”); Pushaw, *supra* note 25, at 908 (“The most popular theory is that [Scalia’s and Kennedy’s] personal and political hostility to illegal drug use is so intense that they refused to countenance any exceptions to it”); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 7 (“Justice Kennedy’s vote, on the other hand, does seem plausibly explicable by the political hypothesis. He is well known for his hostility to drug use . . .”).

250. *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring).

251. *Id.* at 42 (O’Connor, J., dissenting). Chief Justice Rehnquist and Justice Thomas did not join Part III of Justice O’Connor’s opinion.

252. *Id.* at 57 (Thomas, J., dissenting).

253. *Id.* at 16 (majority opinion); *see also supra* notes 102-06 and accompanying text.

254. *Raich*, 545 U.S. at 17 (citing *Perez v. United States*, 402 U.S. 146, 151 (1971); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)).

255. *Id.* (“[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.” (alteration in original) (quoting *Perez*, 402 U.S. at 154-55)). Justice Stevens also emphasized that when “‘a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.’” *Id.* (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968), *overruled by Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

Like Judge Beam, the Court drew a close parallel to *Wickard v. Filburn*.²⁵⁶ In the legislation at issue there, Congress intended to regulate the amount of wheat available for sale in the market, with price stability being the ultimate goal. Despite Filburn's argument that Congress could not use a quota to regulate his individual production of wheat for home consumption, the Court refused to permit one man's retreat from the market to undercut interstate regulation of the market for that commodity.²⁵⁷

In addition, the Court noted similarities between wheat and marijuana privately grown and isolated from the interstate market. Both are fungible commodities for which there is an established market.²⁵⁸ Federal regulation of the private cultivation and use of both products reflects a need to control market supply and demand.²⁵⁹ Finally, the Court noted that fluctuating market prices in either commodity could induce an individual to sell his or her quantity on the market, defeating the purpose of federal regulation.²⁶⁰

Justice Stevens also discussed relevant legislative findings in an effort to analogize the regulation of local marijuana to the regulation of wheat in *Wickard*. Raich and Monson had argued that *Wickard* was inapposite because there the parties specifically used statistics to stipulate "the causal connection between the production for local use and the national market."²⁶¹ Brushing this argument aside, Justice Stevens noted that Congress did highlight such a connection in its legislative findings.²⁶² It was also foolish, according to the Court, to require the 1970 Congress to "make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially

256. *Id.* at 18 ("The similarities between this case and *Wickard* are striking.").

257. *Id.* (recognizing that Congress can regulate purely intrastate noncommercial activity, even when the fruits of that activity will not reach the interstate market).

258. *Id.* It is not relevant that the established market for marijuana is an unlawful one. *See id.* at 19 n.29 ("Congress'[s] power to regulate [interstate] commerce includes the power to prohibit commerce in a particular commodity." (citing *United States v. Lopez*, 514 U.S. 549, 571 (1995) (Kennedy, J., concurring)); *Wickard*, 317 U.S. at 128 ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.")).

259. *Raich*, 545 U.S. at 19. With respect to marijuana, Congress found, inter alia, that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." 21 U.S.C. § 801(4) (2000); *see also supra* note 221.

260. *Raich*, 545 U.S. at 19 ("[T]he diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety.").

261. *Id.* at 20.

262. *See supra* note 221.

affect the larger interstate marijuana market.”²⁶³ Because the Court did not require particularized findings, the application of the deferential rational basis standard foreclosed greater scrutiny.²⁶⁴ Echoing previous doctrine concerning individual instances of conduct, the Court concluded, “That the regulation ensnares some purely intrastate activity is of no moment.”²⁶⁵

Justice Stevens also addressed claims that the aggregation of noncommercial or noneconomic intrastate activities could never substantially affect interstate commerce and that these activities were therefore beyond congressional authority to regulate. He responded with two alternate justifications. First, per *Lopez*, the regulation of all incidences of marijuana possession was an “essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁶⁶

Second, Justice Stevens followed *Morrison*’s admonition that Congress could only regulate “economic” activity that substantially affected interstate commerce. Using one dictionary definition of “economics”—the “production, distribution, and consumption of commodities”—Justice Stevens stated that the intrastate possession of marijuana was “quintessentially economic.”²⁶⁷ Because this activity was economic, the Court could therefore aggregate individual instances to find a substantial effect on interstate commerce.²⁶⁸

Stevens also refused to sanction the Ninth Circuit’s narrow formulation of the class of activities eventually found to be beyond federal control.²⁶⁹ If the class of activities was defined as the state-approved, intrastate, noncommercial possession and use of marijuana for medical purposes, Stevens wrote, the courts would ignore Congress’s determination that, as a Schedule I drug, there was no medical value to marijuana.²⁷⁰ In addition,

263. *Raich*, 545 U.S. at 21. This burdensome requirement “is not only unprecedented, it is also impractical. . . . [T]he CSA initially identified 80 other substances subject to regulation as Schedule I drugs Surely, Congress cannot be expected (and certainly should not be required) to include specific findings on each and every substance” *Id.* at 21 n.32.

264. *Id.* at 22.

265. *Id.*

266. *Id.* at 24 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

267. *Id.* at 25 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 720 (1966)).

268. *Id.* at 32.

269. *See supra* notes 243-44.

270. *See Raich*, 545 U.S. at 27 (“[E]ven if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug, the

such a class definition would ignore the Supremacy Clause and its requirement that, when federal and state law conflict, and Congress has exercised its powers in a constitutional manner, federal law trumps state law.²⁷¹

Finally, Justice Stevens doubted California's ability to isolate private users of marijuana for medical purposes from the interstate market in marijuana. The opinion concluded that unscrupulous physicians could prescribe marijuana either beyond necessary levels or to individuals with no demonstrated need for marijuana whatsoever.²⁷² The Court also cited the manipulation of the regulatory scheme by a California Cannabis Buyers' Club to divert "lawful" marijuana into the "unlawful" market.²⁷³ Because of these concerns, the Court held that the regulable class of activities was *any* type of intrastate possession, cultivation, and use of marijuana, whose regulation Congress could rationally believe was necessary to regulate interstate commerce in the drug.²⁷⁴

2. Justice Scalia's Concurrence

Although Justice Stevens referenced Congress's authority to "make all laws which shall be necessary and proper" to carry out its power to regulate interstate commerce²⁷⁵ in order to support Congress's rational belief that certain intrastate activities "substantially affected" interstate commerce, the Necessary and Proper Clause was not the primary justification for his decision. Justice Scalia, however, read the Necessary and Proper Clause as the primary doctrinal source of Congress's ability to reach purely intrastate activities.²⁷⁶ Justice Scalia took this structural distinction further, arguing that

CSA would still impose controls beyond what is required by California law." (footnote omitted)).

271. *Id.* at 29.

272. *Id.* at 32 & n.41 (discussing the economic incentive for physicians to prescribe marijuana, the unlikelihood that patients will use only a "necessary" amount, and the enormous quantity of marijuana that some cities allow patients to possess).

273. *Id.* at 32 n.43 (citing *People ex rel. Lungren v. Peron*, 70 Cal. Rptr. 2d 20, 23 (Cal. Ct. App. 1997)).

274. *Id.* at 32.

275. *Id.* at 22 (quoting U.S. CONST. art. I, § 8, cl. 18).

276. *See id.* at 34 (Scalia, J., concurring) ("[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. . . . [but rather] derives from the Necessary and Proper Clause." (citation omitted)); *see also* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting) (explaining the intersection of the Necessary and Proper Clause and the Commerce Clause). Scalia noted that

intrastate activities did not even need to “substantially” affect interstate commerce to be within the purview of Congress’s authority.²⁷⁷ Justice Scalia added that *noneconomic* local activity could be regulated if necessary to a more general regulatory scheme.²⁷⁸ Scalia adopted Chief Justice Marshall’s earlier definition of a “necessary” law as one where the means are “‘appropriate’ and ‘plainly adapted’” to attain a legitimate end.²⁷⁹

Based on this reading of the Necessary and Proper Clause, Justice Scalia had no difficulty upholding the application of the Controlled Substances Act to the intrastate possession and use of marijuana for medical purposes.²⁸⁰ His opinion also discounted the notion that Congress would write expansive regulatory statutes in order to sweep in as much intrastate conduct as possible. Congress could only reach intrastate activity—whether it substantially affected interstate commerce or not—in conjunction with a valid regulation of an interstate market.²⁸¹

the Court acknowledged this doctrinal nuance as early as 1838. *See Raich*, 545 U.S. at 34 (Scalia, J., concurring) (citing *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838)).

277. *Raich*, 545 U.S. at 35 (Scalia, J., concurring) (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”).

278. *See id.* at 35-36 (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

279. *Id.* at 39 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). Justice Scalia also discussed one of the significant New Deal cases, *United States v. Darby*, 312 U.S. 100 (1941). In *Darby*, the Court upheld a federal requirement that employers keep employment records in order to demonstrate statutory compliance. *Id.* Congress could regulate this noneconomic intrastate activity because the requirement was an “appropriate means to [a] legitimate end.” *Id.*

280. *Raich*, 545 U.S. at 39-40 (Scalia, J., concurring). Because of its fungibility, Justice Scalia noted the close proximity between “intrastate” marijuana and “interstate” marijuana. *Id.* at 40-41. Put simply, marijuana could go from the controlled state regulatory system to the uncontrolled illicit market in an instant. To force the federal government to depend on the regulatory system set up by another sovereign power “‘might disappoint its most important designs, and is incompatible with the language of the constitution.’” *Id.* at 41 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 424).

281. *Id.* at 38. This was a response to the principal dissent. There, Justice O’Connor argued that the majority opinion “[s]eiz[ed] upon [the] language in *Lopez*” permitting regulation of essential parts of a larger regulation of economic activity, and illogically deduced from this cherry-picked language “that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme.” *Id.* at 46 (O’Connor, J., dissenting). Justice O’Connor felt that the Court’s conclusion reduced *Lopez* to a drafting guide, counseling Congress “to enact legislation that is more extensive and more intrusive into the domain of state power.” *Id.* at 47. Because Justice O’Connor could not contemplate the use of federalism principles to encourage “evasive and overbroad” legislation, she exempted the possession, cultivation, and use of marijuana for medical purposes from the statutory prohibition. *See infra* Part IV.C.3.

3. Justice O'Connor's Dissent

Justice O'Connor began her dissent by invoking an oft-quoted virtue of federalism: that the maintenance of separate spheres of authority allowed “a single courageous State . . . [to] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁸² Looking at California's policy choice, and the factors highlighted by *Lopez* and *Morrison*, Justice O'Connor concluded that Congress had made no factual showing that the CSA's regulation of intrastate activity—noneconomic activity not having a substantial effect on interstate commerce at that—was necessary to carry out its power to regulate interstate commerce.²⁸³

Ultimately, Justice O'Connor returned to the stronger conception of judicial review wielded by Chief Justice Rehnquist in *Morrison*.²⁸⁴ In this institutional showdown, it was necessary for the courts to create “objective markers for confining the analysis in Commerce Clause cases.”²⁸⁵ Justice O'Connor's formulation of the relevant “objective marker” relied on a common recognition that medical drug use is different from nonmedical drug use.²⁸⁶ She concluded that the relevant objective conduct was the personal

Justice O'Connor's dissent echoed the 2001 observations of Professor Adrian Vermeule. He wrote that the *Lopez* opinion's introduction of meaningful restraints on Congress's congressional authority, with the implied hope that regulation would become decentralized and concentrated at the state level, would actually lead to “centralization of public policy at the national level by providing congressional coalitions with ex ante incentives to legislate more broadly, and to create national programs that are more comprehensive, than they would otherwise choose.” Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1325 (2001).

282. *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

283. *Id.* at 43, 49. Based on these observations, Justice O'Connor concluded that “the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same [factors] are taken into account.” *Id.* at 45.

284. *Id.* Justice O'Connor read the majority opinion as “suggest[ing] that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal.” *Id.* She rejected this judicial restraint. “In my view, allowing Congress to set the terms of the constitutional debate in this way, i.e., by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.” *Id.*

285. *Id.* at 47. “The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis).” *Id.* at 47-48.

286. *See id.* at 48. Justice O'Connor also claimed that the regulations touched on “areas of criminal law and social policy, where ‘States lay claim by right of history and

cultivation, possession, and use of marijuana for medical purpose. Under scrutiny, she concluded that this conduct could hardly be classified as “economic.”²⁸⁷

Even if the intrastate activity was “economic,” however, Justice O’Connor found no evidence either that the intrastate activity substantially affected interstate commerce or that the regulation was “necessary,” in the absence of a substantial effect, to carry out a constitutional regulation of interstate commerce.²⁸⁸ The Necessary and Proper Clause could not apply because the regulation was an improper contravention of the affirmative Tenth Amendment guarantee of state sovereignty.²⁸⁹ The Commerce Clause also failed to expand the statute’s reach. In response to the majority, Justice O’Connor noted that Congress’s factual findings paled in comparison to *Wickard*’s statistical stipulation documenting the effect of homegrown wheat on the interstate market.²⁹⁰ Her dissent dismissed the Controlled Substances Act’s “vague and unspecific” introductory declarations,²⁹¹ but essentially turned on a fundamental difference of opinion between herself and Justice Stevens. Whereas Justice Stevens doubted California’s quarantine of medical

expertise.” *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring)). This Note, however, postulates that drug regulation is not an area claimed by the states through history. Federal regulation of medicine and drugs did not begin with a 1970 desire to eradicate illicit drug use. *See supra* notes 210-14 and accompanying text; *see also Raich*, 545 U.S. at 10 (“This was not, however, Congress’[s] first attempt to regulate the national market in drugs.”). Although not regulations of marijuana, Congress had attempted to regulate the labeling of drugs and had prohibited the movement in interstate commerce of adulterated medicines as early as 1906. *See Raich*, 545 U.S. at 10-11.

287. *See Raich*, 545 U.S. at 49 (O’Connor, J., dissenting) (“The Court’s definition of economic activity is breathtaking.”). The broad definition of “economic,” O’Connor argued, “skirt[ed] the real problem of drawing a meaningful line between ‘what is national and what is local.’” *Id.* at 49 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Justice O’Connor also dismissed any economic similarity between the wheat production in *Wickard* and the marijuana cultivation and possession in question. *See id.* at 51 (arguing that the statute in *Wickard* did not extend federal regulation to “something as modest as the home cook’s herb garden”).

288. *Id.*

289. *See id.* at 52 (“Likewise, that authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment’s explicit textual command.”).

290. *Id.* at 53-54.

291. *Id.* at 55. Justice O’Connor noted that “[t]he declarations are not even specific to marijuana” and that “the inadequacy of the CSA’s findings is especially glaring.” *Id.* The declarations “amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute. They are asserted without any supporting evidence—descriptive, statistical, or otherwise.” *Id.* at 54.

marijuana and emphasized the ease with which homegrown marijuana could escape into the illicit interstate market,²⁹² Justice O'Connor said "common sense" suggested California could isolate a relatively small number of persons using medical marijuana and that the amount of marijuana consumed by this limited group could not have a substantial effect on interstate commerce.²⁹³ Because of this "common sense" approach, she considered the Controlled Substances Act unconstitutional as applied to the two California women.

4. Justice Thomas's Dissent

In *Lopez*, Justice Thomas stood out from the rest for his originalist reading of the Commerce Clause and his disapproval of the modern "substantial effects" test.²⁹⁴ Therefore, it was not a surprise that he would disapprove of a statute purporting to regulate "marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana."²⁹⁵ Because the activity was neither interstate nor commercial, Justice Thomas did not believe the regulation could pass muster under either the Commerce Clause or the Necessary and Proper Clause. Turning first to the Necessary and Proper Clause, Thomas explained that a necessary law needed to be "plainly adapted" to the interstate regulation—in his words, an "obvious, simple,

292. See *supra* notes 272-73 and accompanying text.

293. *Raich*, 545 U.S. at 53 (O'Connor, J., dissenting). The majority opinion, to Justice O'Connor, overlooked a clear lack of evidentiary evidence, namely the:

empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug's seeping into the market in a significant way.

Id. at 56.

294. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (arguing that the substantial effects test could give Congress a plenary police power and noting that the Court "ha[s] never come to grips with this implication"); *id.* at 585-88 (describing the earlier, narrower conception of the term "commerce"); *id.* at 589 (arguing that many of the Article I enumerated powers would be superfluous if the substantial effects test were carried to its logical conclusion); *id.* at 596 (criticizing the substantial effects doctrine as "but an innovation of the 20th century"); *id.* at 601 ("[O]ur substantial effects test is far removed from both the Constitution and from our early case law . . ."); see also *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (criticizing the substantial effects test as a "rootless and malleable standard").

295. *Raich*, 545 U.S. at 57 (Thomas, J., dissenting).

and direct relation' between the intrastate ban and the regulation of interstate commerce" was required.²⁹⁶ Applying this standard, there was no obvious and direct relationship between the local cultivation and personal use of marijuana for medical purposes, and the interstate marijuana market, as to require federal intervention.²⁹⁷

Alternatively, Justice Thomas argued that Congress's regulation of noncommercial, intrastate medical marijuana was not a "proper" exercise of its commerce power. The law was not a proper legislative exercise because it threatened to subvert the concept of state sovereignty by appropriating the states' traditional police powers.²⁹⁸

Justice Thomas also deferred to the policy choice and regulatory competence of California. Like Justice O'Connor, he noted that the State requires medical identification cards for qualifying patients and otherwise strictly controls physicians who prescribe marijuana.²⁹⁹ With these controls, there was no reason to presume that California would not enforce its own law.³⁰⁰ Justice Thomas also agreed that, even if medical marijuana found its way into the illicit interstate market, the effect would not be "substantial"; therefore the local activity at issue was beyond congressional control.³⁰¹

Finally, Justice Thomas took the majority's alternative arguments and pitted them against each other to show that the intrastate regulation could not be upheld under either the Commerce Clause or the Necessary and Proper Clause. As discussed above, he argued that the prohibition against medical

296. *Id.* at 61 (quoting *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring)).

297. *See id.* at 62.

298. *See id.* at 65. Thomas echoed Chief Justice Marshall's warning that the Necessary and Proper Clause could not be used as a "pretext . . . for the accomplishment of objects not intrusted to the government." *Id.* at 66 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819)).

299. *Id.* at 62-63. Because of these requirements, Justice Thomas concluded that "California's Compassionate Use Act sets respondents' conduct apart from other intrastate producers and users of marijuana." *Id.* at 62.

300. *Id.* at 63 (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). This presumption, according to Thomas, also minimized the federal government's fear that the regulatory scheme could be undercut if the intrastate activities were not also controlled. "Enforcement of the CSA can continue as it did prior to the Compassionate Use Act. . . . [A] qualified patient could avoid arrest or prosecution by presenting his identification card to law enforcement officers." *Id.*

301. *Id.* at 64. Thomas used an Office of National Drug Control Policy estimate that the interstate marijuana market is a "multibillion-dollar" affair to conclude that the control of a small amount of intrastate medical marijuana was not necessary or essential to the broader regulatory scheme. *Id.* (citation omitted). In addition, legislative findings were unavailing because they resembled conclusory "assertions of power." *Id.*

marijuana was not an “essential” part of a larger regulatory scheme because the low number of medical marijuana users and the diligence of the California regime combined to render the effect of the intrastate activity nugatory.³⁰² Logically, if regulation of intrastate activity was not “essential,” the government could fall back on its alternative argument—that the regulation of local activities was merely incidental to a larger interstate regulatory scheme. Justice Thomas, however, dismissed both arguments at once because of their patent inconsistency³⁰³—but not without a quick denunciation of any argument that would permit Congress to “ensnare” local activity as an incidental effect of its larger scheme.³⁰⁴

V. IS ONE FORM OF DIFFERENCE BETTER THAN ANOTHER?

The federal “War on Drugs” loomed over the Supreme Court’s consideration of *Gonzales v. Raich*. The Controlled Substances Act’s blanket prohibition of any and all cultivation, possession, and use of marijuana remains viable public policy for reasons beyond the maintenance of public health. The prohibition of marijuana is a symbolic measure.³⁰⁵ To exempt a special category—the state-authorized private use of marijuana for medical purposes—from federal regulation may make sense, and it may ease the suffering of terminally ill individuals, but it would subject the federal judiciary to extensive scrutiny. Thus, the outcome seemed preordained. Instead, uncertainty arose over how the Court would apply *Lopez* and *Morrison*, its two opinions that limited congressional authority over the

302. *Id.*

303. *Id.* at 71.

304. *Id.* (“[I]f the regulation of the intrastate activity is purely incidental, then it may not be regulated under the Necessary and Proper Clause.”).

305. Societal norms and public expectations usually drive the creation of restrictive drug laws. See Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279, 282-87 (2006) (discussing various concerns that inspire drug legislation, including the parental desire to protect a child). “The most potent grass-roots political force in the formulation of drug policy is parents who are concerned that their children will be seduced by the lure of drug use.” *Id.* at 285. This concern may not be properly focused, as an “obsessive focus on illegal drugs” ignores widespread teenage use of tobacco and alcohol, which may prove far more harmful than the occasional marijuana joint. *Id.* at 291.

regulation of intrastate activities.³⁰⁶ When the opinion did come down, perception varied of its effect on those prior cases.³⁰⁷

On its face, Justice Stevens's opinion did not seem revolutionary. First, the opinion latched onto *Lopez*'s enunciation of one type of permissible federal regulation. Unlike the GFSZA at issue in *Lopez*, Justice Stevens noted that regulation of intrastate cultivation, possession, and use of marijuana was an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."³⁰⁸ In addition, the Court applied *Morrison*'s noneconomic/economic standard, finding that the production of a commodity constituted "economic" activity.³⁰⁹ Armed with this conclusion, the Court could permissibly aggregate all instances of this economic conduct to demonstrate its substantial effect on interstate commerce.

Despite its affirmation of some modern Commerce Clause considerations and principles, there are problems with the *Raich* opinion. This Note, however, argues that the problems do not reflect any defect in the majority's reasoning. If anything, Justice Stevens read the *Lopez* and *Morrison* opinions *too* well, using Chief Justice Rehnquist's groundbreaking opinions in a manner unforeseen to the late chief justice. The manipulation of *Lopez*'s key doctrinal holdings highlights the serious flaws in *that* opinion's analysis and treatment of the post-New Deal Commerce Clause. The *Lopez* and *Morrison* Courts created a de facto requirement that the regulated intrastate activity be "economic" in nature. Not only was this conclusion questionable, but the Court never defined "economic" in order to offer guidance to future courts. In addition, the *Lopez* Court questioned whether the total incidence of a class of activities "substantially affected" interstate commerce. Although this phrase finds support in the case law, never had a post-1937 Court questioned how "substantial" an effect needed to be in order to permit the intrastate

306. See Adler, *supra* note 128, at 752 ("The Chief Justice could pen a narrow opinion for the Court, rejecting Raich's claim by distinguishing the regulation of commodities from other expansive exercises of federal power . . . Or Justice Stevens . . . could collect five votes to free federal power from judicial restraints.").

307. Compare Adler, *supra* note 128, at 753 (concluding that a pillar of "New Federalism" suffered a mortal blow when the "Supreme Court hollowed out the core of contemporary Commerce Clause jurisprudence"), with Althouse, *supra* note 196, at 781 ("The decision in *Raich* was thus conventional and predictable. . . . [W]e should not be surprised at the outcome or view it as a betrayal of the principle of limiting the commerce power articulated in [*Lopez*] and [*Morrison*]." (footnotes omitted)).

308. *Raich*, 545 U.S. at 24 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

309. See *supra* note 267 and accompanying text.

regulation of the cause. New emphasis on the degree of the effect, however, was not accompanied by a definition of “substantial.”

Lopez’s failure to set guideposts for the future interpretation of the Commerce Clause led to the *Raich* majority’s conclusion that an economic activity did substantially affect interstate commerce, and the dissent’s view that the noneconomic intrastate possession of marijuana did not substantially affect interstate commerce. In the introduction, this Note questioned whether Justice Stevens reached the proper legal result. Despite this Note’s conclusion that he did reach the proper *result*, it concludes that Justice Scalia’s concurrence was the proper exercise of deference to reach this result. Strict reliance on the *Lopez* opinion led to two equally plausible viewpoints.³¹⁰ Because of this, Professor Pushaw’s conclusion seems on point. It is “fruitless to try to ascertain whether the majority or dissent properly applied *Lopez* and *Morrison*, because these cases set forth standards so flexible as to justify either outcome.”³¹¹ Therefore, it is necessary to postulate an alternate justification for the judgement. Luckily, Justice Scalia provided this justification in his interpretation of the Necessary and Proper Clause and its inherent reliance on judicial minimalism.

A. *The Economic/Noneconomic Distinction*

The first problem with *Lopez*’s system is reflected in *Raich*’s classification of private marijuana possession as an “economic” activity. Justice Stevens reached this conclusion by defining “economics” as “the production, distribution, and consumption of commodities.”³¹² From there, it was easy to conclude that the cultivation and possession of marijuana was “quintessentially economic.”³¹³ However, this “capacious definition”³¹⁴ was

310. See Pushaw, *supra* note 25, at 884 (“My take on *Raich* is different. I think it is impossible to determine whether the majority or the dissent correctly applied the *Lopez* and *Morrison* standards, because they are so malleable as to justify either result.”).

311. *Id.* at 908.

312. *Raich*, 545 U.S. at 25 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 720 (1966)).

313. *Id.* It is arguable that intrastate possession fits within the broad definition of “economics” given by the Court. See Adler, *supra* note 128, at 763 (“Yet the activity to be regulated . . . includes the ‘intrastate possession’ of commodities, and ‘possession’ is not included in the Court’s 1966 dictionary.” (footnote omitted)). In this light, the Court’s bold assertion that the conduct regulated is “quintessentially” economic is far more questionable, not to mention doctrinally unsatisfying.

314. Pushaw, *supra* note 25, at 898.

all the more interesting as it was the only definition cited by the Court.³¹⁵ Although critics of the opinion can point to a stunted definition of the term, Justice Stevens was merely following Chief Justice Rehnquist's example. In *Lopez*, Rehnquist had invalidated the GFSZA partially because the statute "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."³¹⁶ Faced with Rehnquist's statement in *Morrison* that "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature,"³¹⁷ Justice Stevens chose to read "economic" in terms broad enough to encompass the intrastate cultivation, possession, and consumption of marijuana. It is clear that Justice Stevens merely applied the law according to precedent, even as the outcome offended the ideological spirit underlying that precedent.

The *Raich* Court, however, should never have been thrust into such a silly position.³¹⁸ Chief Justice Rehnquist's *Lopez* opinion weaved back and forth in its use of language and created a prohibitory rule that was not "securely grounded in constitutional traditions"—an analysis one commentator has classified as a "doctrinal sleight of hand."³¹⁹ Within the

315. See Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 749 (2005) ("[T]he Court found the activity to be economic relying solely on a single forty-year old dictionary definition."); cf. *Muscarello v. United States*, 524 U.S. 125, 127-32 (1998) (relying on no less than thirteen dictionaries and other sources to define the term "carries" in federal drug trafficking statute); *Bailey v. United States*, 516 U.S. 137, 143 (1995) (looking at a number of dictionary definitions to define "uses" for purposes of federal drug trafficking statute). This Note concedes that those cases required the construction of ambiguous language enacted by a majoritarian body, whereas Justice Stevens was merely defining a word, "economics," put into a judicial opinion. However, as Professor Randy Barnett, who argued the case for the two women, points out, the word "economic" does not have one easy definition. See Barnett, *supra*, at 749 ("Broad as it is, however, the definition used by the Court is considerably narrower than the theory urged upon it by the government, and the Court's definition of 'economic' is far from unlimited.").

316. *United States v. Lopez*, 514 U.S. 549, 561 (1995) (emphasis added). Later in the opinion, the Chief Justice bluntly stated that "[t]he possession of a gun in a local school zone is in no sense an economic activity." *Id.* at 567. This conclusion was not accompanied by a definition of "economic."

317. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

318. True, the idea that Congress cannot reach intrastate noncommercial or noneconomic activities may operate as a useful presumption in Necessary and Proper Clause cases. See Barnett, *supra* note 315, at 748 ("[A] requirement that intrastate activity reached under the 'substantial effects' doctrine be economic in nature could be viewed as a judicially administrable criterion by which the necessity of reaching such activity pursuant to the Necessary and Proper Clause can be assessed.").

319. Merrill, *supra* note 112, at 839.

Lopez opinion, the language was inconsistent. Rehnquist began by citing *Jones & Laughlin Steel*'s recognition of Congress's power to regulate "those activities having a substantial relation to interstate commerce."³²⁰ There is no adjective qualifying the root cause, only a requirement that the cause affect commerce. In fact, the Court cited *Wickard*'s recognition that Congress could regulate activity that "exerts a substantial *economic effect* on interstate commerce."³²¹ Shortly after, however, the Court grafted an "economic" requirement onto the regulated intrastate activity.³²²

This doctrinal shift is problematic in two ways. First, there is little foundation for Rehnquist's requirement that the regulated intrastate activity be "economic" instead of "commercial."³²³ As mentioned above, Rehnquist concluded that the conduct regulated by the GFSZA was neither "commercial" nor "economic" enterprise. Requiring the regulated conduct to be "economic" seems inconsistent with the power to regulate *commerce*. There is common sense in Justice Thomas's argument that courts "ought to resolve cases based on the meaning of words that are actually in the document."³²⁴ "Commerce" is merely one subset of "economics": to require activities to be "economic" in order to regulate interstate "commerce" seems relatively arbitrary.

The greater problem, however, is that this "arbitrary" qualifier finds no support in modern Commerce Clause jurisprudence. Chief Justice Rehnquist ignored statements made in critical New Deal cases suggesting that the

320. *Lopez*, 514 U.S. at 558-59 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Later, the Chief Justice similarly framed the question as "whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559.

321. *Id.* at 557 (emphasis added) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

322. *See id.* at 560. The Court suggested that properly regulated intrastate activity has always been economic in character, before stating the explicit rule: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* Although the statement's grammatical structure does not foreclose the regulation of noneconomic activity, *Morrison*'s reaffirmation of *Lopez* did foreclose this possibility. *See Morrison*, 529 U.S. at 610 & 611 n.4.

323. The opinion does not help explain this decision, especially when it uses the two terms interchangeably. *Compare Lopez*, 514 U.S. at 560 ("economic activity"), *with id.* at 566 ("Admittedly, a determination whether an intrastate activity is *commercial* or *noncommercial* may in some cases result in legal uncertainty." (emphasis added)).

324. *Gonzales v. Raich*, 545 U.S. 1, 69 (2005) (Thomas, J., dissenting). Although Justice Thomas was discussing the *Raich* definition of "economic," his critique can be applied to Chief Justice Rehnquist's bright-line rule, another manifestation of "the steady drift away from the text of the Commerce Clause." *Id.* at 70.

character of the regulated intrastate activity was irrelevant.³²⁵ Indeed, to permit Congress to regulate only “economic” intrastate activities suggested a “backward glance” toward previously discredited constitutional analysis.³²⁶ Three cases illustrate the inconsistency of imposing an “economic” requirement. Although *United States v. Wrightwood Dairy Co.* made the broad assertion that the commerce power “extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end,”³²⁷ it was *Wickard* that explicitly disclaimed a bright-line rule requiring regulated activity to fit within a particular category.³²⁸ *United States v. Darby*³²⁹ took this abstract concept and applied it to the requirements imposed by the Fair Labor Standards Act, explicitly disregarding the noneconomic nature of local reporting requirements.³³⁰ Because of this realization, judicial interpretation prior to 1995 did not fall back on strict categorization. Thus, *Lopez* and *Morrison* were revolutionaries rallied around a shaky premise.

From the preceding discussion, it is clear that Chief Justice Rehnquist’s requirement that Congress regulate only *economic* intrastate activity was not only prone to judicial creativity, but could find no legitimate place within modern Commerce Clause jurisprudence. Professors Marianne Moody Jennings and Nim Razook attributed this result to a combination of judicial boldness and timidity, noting that Rehnquist, in his revival of federalism,

325. See Gardbaum, *supra* note 82, at 808-11. Professor Gardbaum observed,

Surprisingly few observers have noted that the New Deal Court’s own constitutional justification for its radical expansion of the scope of federal power over commerce was that the congressional measures in question were valid exercises of the power granted by the Necessary and Proper Clause and were not direct exercises of the power to regulate commerce among the several states.

Id. at 807. Not surprisingly, this radical expansion of federal authority did not coincide with a reversion to pre-1937 dichotomies. *Id.* at 811 (“Nothing in the necessary and proper rationale, as previously employed, requires that the means involve an economic activity, only that the activity in question affect interstate commerce.” (emphasis omitted)).

326. *Lopez*, 514 U.S. at 608 (Souter, J., dissenting). See generally *supra* Part II.

327. 315 U.S. 110, 119 (1942).

328. *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (“Whether the subject of the regulation in question was ‘production,’ ‘consumption,’ or ‘marketing’ is, therefore, *not material* for purposes of deciding the question of federal power before us.” (emphasis added)); see also *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (“[I]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate commerce that requires preventive regulation.” (citation omitted)).

329. 312 U.S. 100 (1941).

330. See *supra* note 279 and accompanying text.

“artificially retain[ed New Deal] precedents but . . . ignore[d] their essential principles: Congress’[s] plenary power and the resulting politicization of federalism.”³³¹ It seems that Justice Stevens worked in a similar fashion in *Raich*, incorporating elements of *Lopez* and *Morrison* while minimizing their effect on fifty years of New Deal-derived precedent.³³² Although Justice Stevens came out on the right side, his reasoning nonetheless drew some support from questionable doctrinal authority.

B. Does Medical Marijuana Use Really Have a Substantial Effect on Interstate Commerce?

The *Raich* opinion also demonstrates the difficulty in applying the substantial effects test without a definition of “substantial.” Because Justice Stevens revived the use of the rational basis standard here, this criticism lacks the bite of the previous argument. The rational basis standard does away with the sort of technical inquiry into whether intrastate activities substantially affect interstate commerce in fact,³³³ and its adoption led to fifty years of judicial inaction.

In *Raich*, the Court concluded that a rational basis existed for finding that private intrastate marijuana use was part of “an economic ‘class of activities’ that have a substantial effect on interstate commerce.”³³⁴ Notwithstanding the rational basis standard’s strong deference to congressional decisions, its articulation in *Raich* has flaws. Justice Stevens’s slick treatment of Congress’s factual findings did not help his argument.³³⁵

331. Marianne Moody Jennings & Nim Razook, *United States v. Morrison: Where the Commerce Clause Meets Civil Rights and Reasonable Minds Part Ways: A Point and Counterpoint from a Constitutional and Social Perspective*, 35 *NEW ENG. L. REV.* 23, 57 n.186 (2000).

332. John Parry illustrates the effect of this form of jurisprudence:

I would read the majority as stating that *Wickard* is the heart of Commerce Clause doctrine, while *Lopez* and *Morrison* are, if not outliers, at least cases that merely police the outer boundaries of the doctrine to ensure that Congress is regulating economic activity in the broad sense defined by *Raich*

Parry, *supra* note 130, at 859.

333. The substantial effects test utilizes the rational basis standard and counsels judicial deference “because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.” *United States v. Lopez*, 514 U.S. 549, 616-17 (1995) (Breyer, J., dissenting).

334. *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005) (citing *Perez v. United States*, 402 U.S. 146, 151 (1971); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942)); *see supra* notes 254-55 and accompanying text.

335. *See infra* note 338 and accompanying text.

The standard's greatest flaw is its lack of guidance on how to define the relevant "class of activities" to be regulated.³³⁶ Justice Stevens argued strongly that the class of activities could not be defined as the private, state-authorized cultivation, possession, and use of marijuana for medical purposes. Such a classification ignored the fact that marijuana had no medical value and could not be "authorized" by state law in contravention of a blanket federal prohibition.³³⁷ The argument has great logical force, but in light of Justice O'Connor's fashioning of a far narrower class of activities, judicial line drawing seems inadequate or arbitrary. Reasonable minds can differ as to what the class of activities will be, just as reasonable minds can differ over whether an activity is economic or noneconomic, or whether an intrastate activity substantially affects interstate commerce.

Justice Stevens's treatment of the Controlled Substances Act's formal findings emphasizes the vulnerability of his brand of deferential review. In response to *Wickard*'s use of a statistical stipulation to prove a direct relation between the use of homegrown wheat and the interstate market in wheat, Justice Stevens claimed that "we have before us findings by Congress to the same effect."³³⁸ Although these findings may suffice to satisfy the rational basis standard, Stevens' characterization of them comes off as weak and defensive. In addition, their relevance is highly dependent on how general or narrow the Court draws the relevant "class of activities." Although the findings make sense if the relevant class consists of *all* intrastate possession and use of marijuana, some findings make little sense if the class is defined as marijuana possessed and used for medical purposes.³³⁹ Because the definition of the relevant class of activities is an arbitrary process, judicial interpretation of congressional findings becomes arbitrary, especially considering the continued viability of *Morrison*'s stricter approach to legislative findings.³⁴⁰

336. Pushaw, *supra* note 25, at 904 ("[A]pplication of the 'substantial effects' test depends on two utterly subjective judgments. The first concerns the level of generality at which the regulated activity is characterized.").

337. See *supra* notes 269-71 and accompanying text.

338. *Raich*, 545 U.S. at 20; see also *supra* note 221 (listing Congress's formal findings).

339. For example, it is unlikely that "[l]ocal distribution and possession" of medical marijuana "contribute[s] to swelling the [marijuana] interstate traffic," 21 U.S.C. § 801(4) (2000), notwithstanding Justice Stevens's suspicion of state regulatory schemes. Similarly, it is doubtful that private cultivation of marijuana for medical purposes involves prior or subsequent transport in interstate commerce. See *id.* § 801(3)(A)-(C).

340. See *supra* notes 183-88 and accompanying text.

C. *Why the Necessary and Proper Clause is the Perfect Drug*

As Professor Pushaw notes, *Lopez* and *Morrison* “invite discretionary application of imprecise standards on a case-by-case basis.”³⁴¹ Uncertainty may pique the interest of a risk seeker, but it is unsettling for American citizens daily affected by federal regulatory statutes. Thus, while Justice Stevens’s opinion in *Raich* may be “correct,” it is vulnerable because it is subject to *Lopez*’s analytical jungle. Despite some strong arguments, it is vulnerable in its reliance on many different theories to justify its result. Under one justification, the *Raich* Court concluded that the possession of marijuana for medical purposes was an economic activity and thus could be aggregated to demonstrate a substantial effect on interstate commerce. This argument manipulated Chief Justice Rehnquist’s dubious requirement, leaving its persuasive force even weaker.

Raich also argued that the intrastate possession of marijuana was part of a class of activities that could substantially affect interstate commerce. This argument, however, is prone to attack for permitting an arbitrary determination of what constitutes the relevant “class of activities” and what “substantially affects” commerce, notwithstanding the deferential role of the rational basis standard.

Thus, a significant chunk of *Raich* relied on imprecise standards constructed in *Lopez* and *Morrison*. There was scant reference to the Necessary and Proper Clause; only one passage explicitly approved Congress’s regulation of intrastate marijuana use as a necessary means to achieving a constitutional end—the regulation of interstate commerce.³⁴² This lack of attention, however, does not minimize the importance of the Clause. Rather, as Justice Scalia pointed out, the Necessary and Proper Clause provides the correct formula for analyzing *Raich*’s constitutional dilemma.³⁴³ It supplies a doctrinal anchor to Justice Stevens’s claims that the federal government can reach intrastate medical marijuana use, without the need to fit that use into a particular “class of activities.” Based on Chief Justice Marshall’s original reading of its language, it is apparent that the Clause poses a threat when it is used as a pretext to enact legislation far beyond the permissible scope of the commerce power. Because the

341. Pushaw, *supra* note 25, at 908.

342. See *Raich*, 545 U.S. at 22.

343. *Id.* at 34 (Scalia, J., concurring) (“[U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them . . . derives from the Necessary and Proper Clause.” (citation omitted)).

Controlled Substances Act did not operate as a pretext to accomplish legislation of dubious constitutionality, Justice Stevens got the outcome right, even if his analysis failed to acknowledge the importance of the Necessary and Proper Clause.

Compared to the argument that intrastate possession of medical marijuana fits into a class of activities that substantially affects interstate commerce, Justice Scalia's view is more satisfying because it engages in a similar form of deference, but does not require creative or imaginative spins on certain words. Rather, "[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."³⁴⁴ Justice Scalia's additional claim that federal regulation is "not limited to laws directed against economic activities that have a substantial effect on interstate commerce,"³⁴⁵ further steers the interpretation of the Controlled Substances Act away from the questionable conclusion that the regulated intrastate activity must be economic in nature. Instead of a rule prohibiting the regulation of certain "types" of activity, Scalia recognized the congressional right to exercise "every power needed to make . . . effective" the regulation of interstate commerce.³⁴⁶ The Necessary and Proper Clause imposed only the requirements noted by Chief Justice Marshall in *McCulloch*, namely that the means chosen to exercise an enumerated power be "reasonably adapted" to the attainment of a legitimate end.³⁴⁷

Chief Justice Marshall's opinion deserves a further look, through the prism of both Professor Barnett's exhaustive analysis of the original meaning of the Necessary and Proper Clause and other scholarship. Professor Barnett notes that the original debate over the scope of the term "necessary" vacillated between two extremes.³⁴⁸ On the one hand, the term "necessary" could be strictly construed to allow Congress to enact only legislation deemed "indispensable" to the exercise of its enumerated powers.³⁴⁹ Professor Barnett read James Madison's argument against the

344. *Id.* at 35. This conclusion frees judges from creative interpretations of what type of effect is a substantial effect.

345. *Id.* at 36.

346. *Id.* at 37 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)). The federal commerce power extended to those "intrastate activities 'which in a substantial way interfere with or obstruct the exercise of the granted power.'" *Id.* (quoting *Wrightwood Dairy*, 315 U.S. at 119).

347. *Id.* (quoting *United States v. Darby*, 312 U.S. 100, 121 (1941)).

348. See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 184 (2003).

349. *Id.*

constitutionality of a proposed national bank as evidence that “necessary” must be read narrowly lest the concept of enumerated powers evaporate.³⁵⁰

On the other hand, the term could be construed in a more liberal fashion, permitting laws merely thought “convenient” or “useful” to make effective the exercise of the enumerated power.³⁵¹ Secretary of the Treasury Alexander Hamilton pressed this interpretation, believing that the use of Madison and Jefferson’s stricter definition of “necessary” “would be to depart from its obvious and popular sense, and to give it a restrictive operation; an idea never before entertained.”³⁵²

Of course, the relevant parties did not adhere stubbornly to extreme viewpoints. As Professor Barnett documents, Madison understood the impracticality of permitting Congress to enact only those laws “essentially necessary” to the exercise of an enumerated power, and Hamilton still required some fit between the means used and the constitutional end.³⁵³ Because of this lack of a collective original meaning, Barnett concluded that “a showing of necessity should neither be so ‘strict’ that no statute can pass muster nor so lenient that any statute can pass.”³⁵⁴ It may seem academic to debate where the “correct” definition of “necessary” falls on this continuum. That attitude fails to recognize that the word’s interpretation affects the degree of judicial scrutiny to be directed against congressional exercises of authority.³⁵⁵ This level of scrutiny controls whether an unelected body unsettles the work of the people’s agents.

As it turned out, Chief Justice Marshall set the definition of necessity (and with it the proper degree of judicial deference) with his conclusive

350. *Id.* at 194 (“Thus, for Madison, whether or not a proposed action of government that restricted the liberty of the people was necessary, and therefore within the powers of Congress to enact, required some assessment of whether the means chosen were *essential* to the pursuit of an enumerated end. Without this assessment, the scheme of limited enumerated powers would unravel.” (emphasis added)). Barnett also discussed the viewpoints of Maryland’s Michael Stone, Georgia’s James Jackson, Virginia’s William Giles, Attorney General Edmond Randolph, and Secretary of State Thomas Jefferson—all of whom supported Madison’s interpretation. *Id.* at 194-96.

351. *Id.* at 184.

352. *Id.* at 197 (quoting Alexander Hamilton, *Opinion of Alexander Hamilton, on the Constitutionality of a National Bank* (Feb. 23, 1791), reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 98 (M. St. Clair Clarke & D.A. Hall eds., 1967) (1832)).

353. *Id.* at 206.

354. *Id.* at 206-07.

355. *Id.* at 220 (“The meaning we attach to that Clause not only determines the scope of congressional power—it determines the degree of deference that courts owe a congressional judgment that it is acting within its powers.”).

interpretation of the Necessary and Proper Clause in two early cases.³⁵⁶ Professor Barnett opines that “Marshall interpreted the Clause to give almost complete discretion to Congress” in the first, less famous, case.³⁵⁷ There, Marshall concluded, “Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the [C]onstitution.”³⁵⁸ Marshall later clarified the congressional scope of authority, adopting Hamilton’s view that “necessary” did not mean “an absolute physical necessity,” but rather something “convenient, or useful, or essential to another.”³⁵⁹

Marshall also discussed briefly the definition of “proper.” Of course, the Necessary and Proper Clause presents a conjunctive test, and legislation must satisfy both prongs to be constitutional.³⁶⁰ However, because of Marshall’s extensive analysis of the term “necessary” and passing discussion of the term “proper,” the second requirement has received little attention.³⁶¹ In their detailed work, Gary Lawson and Patricia B. Granger seek to rectify this obscurity and refute claims that (1) the terms “necessary” and “proper” are synonymous; and (2) the Constitution does not require legislation to comport with more ethereal constitutional principles.³⁶² They searched eighteenth

356. See Gardbaum, *supra* note 82, at 814 (“*McCulloch* is, of course, one of the handful of foundational decisions of the Supreme Court that are automatically cited as original sources for the propositions of constitutional law that they contain. But *McCulloch* has the further (and even rarer) distinction of being treated as providing a full and complete interpretation of a particular clause of the Constitution.”).

357. Barnett, *supra* note 348, at 198 (discussing *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805)).

358. *Fisher*, 6 U.S. (2 Cranch) at 396.

359. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819); see also *id.* at 413-14 (“To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end . . .”).

360. See, e.g., Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 275-76 (1993).

361. *Id.* at 285 (“Historically, discussion of the Sweeping Clause has been dominated by discussion of the meaning of the word ‘necessary,’ no doubt because of Chief Justice Marshall’s focus on that word in *McCulloch v. Maryland*. The word ‘proper’ has generally been treated as a constitutional nullity or, at best, as a redundancy.” (footnotes omitted)). But see Gardbaum, *supra* note 82, at 815 & n.74 (explaining minor disagreement with Lawson and Granger’s interpretation of Marshall’s *McCulloch* opinion).

362. See Lawson & Granger, *supra* note 360, at 275-76, 289-91, 297. They argued that “the words ‘necessary’ and ‘proper’ were commonly used as distinct terms with different meanings, often with ‘proper’ being the more restrictive term.” *Id.* at 289. With respect to the terms’ ability to limit Congress’s jurisdiction, they believed that “executory laws must be

century dictionaries to note the distinction between the two terms and to define a “proper” law as “one that is *within the peculiar jurisdiction or responsibility of the relevant governmental actor.*”³⁶³ Marshall himself may not have gone this far, but he did place additional requirements on necessary and proper legislation, warning that legislation would be “proper” only if “appropriate,” “plainly adapted to that end,” “not prohibited,” and “consist[ent] with the letter and spirit of the [C]onstitution.”³⁶⁴

Of greater importance, however, is Marshall’s discussion of the judicial role in interpreting congressional exercises of enumerated power in conjunction with the Necessary and Proper Clause. Marshall wrote:

Should [C]ongress, in the execution of its powers, adopt measures which are prohibited by the [C]onstitution; or should [C]ongress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.³⁶⁵

This Note takes the position that Marshall intended the judicial branch to step in and nullify congressional enactments only when clearly warranted, as when Congress used an enumerated power as a pretext to accomplish some object not granted it by the Constitution. As Marshall noted, this would be a painful duty, not to be exercised with reckless abandon. Instead, restraint would characterize the judicial interpretation of statutory enactments. Marshall insisted,

consistent with principles of separation of powers, principles of federalism, and individual rights.” *Id.* at 297.

363. *Id.* at 291 (emphasis added).

364. *McCulloch*, 17 U.S. (4 Wheat.) at 421. Unfortunately, this Note cannot discuss all of the nuances and modern repercussions of particular characterizations of “necessary” and “proper.” See Lawson & Granger, *supra* note 360, and Gardbaum, *supra* note 82, for more than adequate discussions of this complicated issue. Professor Gardbaum also provides intriguing thoughts on the “spirit” of the Constitution, *see* Gardbaum, *supra* note 82, at 816 & n.80, and an alternative model of federalism in which the judiciary “polic[es] Congress’s deliberative process and its reasons for regulating,” *id.* at 799.

This Note avoids further discussion because it argues below that Justice Scalia (and Chief Justice Marshall before him) preferred to avoid searching inquiries into the meaning of these terms. *See infra* notes 372, 385. Judicial deference counseled against the invalidation of legislation except in clear examples of coercion or pretextual legislation.

365. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

[W]here the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.³⁶⁶

Marshall's interpretation of the Necessary and Proper Clause therefore relied heavily on a perceived need for judicial deference, refusing to inquire into the necessity of a congressional enactment unless the law seemed to operate as a pretext to accomplish some unconstitutional goal. Recent cases make clear that the rule against pretextual legislation has continued viability. As Justice Scalia notes in *Raich*, the regulation of intrastate activity considered an "essential part of a larger regulation of economic activity" deserves respect because it fits within a larger scheme of interstate commercial regulation.³⁶⁷ *Lopez* implicitly recognized the prohibition on pretextual legislation when it cited with approval an important distinction made in *Maryland v. Wirtz*.³⁶⁸ The *Wirtz* Court answered the fears of a dissenting justice by noting the difference between (1) "a general regulatory statute bear[ing] a substantial relation to commerce,"³⁶⁹ in which a proper exercise of the congressional commerce power would permit the regulation of de minimis individual activities; and (2) legislation used as a pretext to extend congressional authority beyond its permissible reach. Such a pretextual statute would let Congress use a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."³⁷⁰

Like Marshall, Justice Scalia believes that the Necessary and Proper Clause does not endow Congress with the unrestricted privilege to expand its enumerated powers and enact pretextual legislation.³⁷¹ It is also clear that

366. *Id.*

367. *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

368. 392 U.S. 183 (1968), *overruled by* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

369. *Id.* at 196 n.27.

370. *Id.*

371. *See Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary . . .").

Justice Scalia's form of judicial minimalism accords with Marshall's refusal to scrutinize the necessity or propriety of congressional legislation, absent an obvious overstepping of authority.³⁷² Scalia has used the Necessary and Proper Clause to invalidate legislative action on at least one occasion.³⁷³ In *Printz v. United States*, Scalia wrestled with the constitutionality of federal handgun legislation that "purport[ed] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."³⁷⁴ Scalia conceded that the constitutionality of the law required a searching inquiry because "there [wa]s no constitutional text speaking to this precise question."³⁷⁵ Despite acknowledging that the judicial branch was ill situated to analyze the propriety of a legislative exercise of authority,³⁷⁶ Scalia eventually relied on the Necessary and Proper Clause to invalidate the statute because the statute was an extreme example of federal encroachment into state sovereignty.³⁷⁷ To Scalia, the Court should only use the Necessary and Proper Clause to invalidate congressional action in such narrow, obvious cases. Because the federal government specifically coerced local agents, the Court could declare,

372. See Claeys, *supra* note 127, at 812 (noting that "[t]he Court's reading of *McCulloch* has been conventional legal wisdom for a long time," and that Justice Scalia follows the conventional meaning in order to avoid making "controversial and unmanageable value judgments about what 'necessary' and 'proper' mean").

373. See *id.* at 806-09 (discussing Justice Scalia's opinion in *Printz v. United States*, 521 U.S. 898 (1997)).

374. 521 U.S. at 904. Congress imposed the requirements as part of the 1993 Brady Act, which amended the Gun Control Act of 1968. *Id.* at 902. The Brady Act amendments established an extensive national background-check system and imposed a five-day waiting period before a firearms purchaser could legally receive his weapon. *Id.* at 902-03. Two chief law enforcement officers challenged the legislation, objecting "to being pressed into federal service "and arguing that "congressional action compelling state officers to execute federal laws is unconstitutional." *Id.* at 905.

375. *Id.* To determine the legislation's permissibility, Scalia searched "historical understanding and practice . . . the structure of the Constitution, and . . . the jurisprudence of this Court." *Id.*

376. Scalia noted that the Court had not succeeded in defining "the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes." *Id.* at 927.

377. See Claeys, *supra* note 127, at 808 ("Justice Scalia specified that the rule applies only in narrow cases when the 'whole object of the law [is] to direct the functioning of the state executive' and when the federal government tries to 'compel the States to enact or administer a federal regulatory program.'" (alteration in original) (quoting *Printz*, 521 U.S. at 932-33)).

When a “La[w] . . . for carrying into Execution” the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a “La[w] . . . *proper* for carrying into Execution the Commerce Clause,” and is thus, in the words of The Federalist, “merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.”³⁷⁸

Scalia’s reluctance to wield the Necessary and Proper Clause as a weapon to invalidate Congress’s policy choices permeated his *Tennessee v. Lane*³⁷⁹ dissent. The *Lane* majority found that Title II of the Americans with Disabilities Act of 1990³⁸⁰ did not exceed Congress’s remedial power under Section 5 of the Fourteenth Amendment because it satisfied the “congruence and proportionality” test set by earlier case law.³⁸¹ The Court developed this “congruence and proportionality” test “[t]o avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of § 5.”³⁸² Justice Scalia’s interpretation of the Necessary and Proper Clause is relevant to this inquiry, however, because the Court had previously stated that “appropriate legislation” under Section 5 should be measured according to the *McCulloch* standard.³⁸³

Justice Scalia supported the creation of a “congruence and proportionality” test and applied the test in subsequent cases.³⁸⁴ Scalia admitted, however, that he supported the test “with some misgiving,” noting that he “generally rejected tests based on such malleable standards as ‘proportionality,’ because they have a way of turning into vehicles for the

378. *Printz*, 521 U.S. at 923-24 (alterations in original) (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

379. 541 U.S. 509 (2004).

380. The Americans with Disabilities Act provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (2000).

381. *Lane*, 541 U.S. at 531. Section 5 provides that “Congress shall have power to enforce, by appropriate legislation, the provisions” of the Amendment—including the Equal Protection and Due Process Clauses. U.S. CONST. amend. XIV, § 5. “Congress’[s] § 5 power is not, however, unlimited. . . . Section 5 legislation is valid if it exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” *Lane*, 541 U.S. at 520 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

382. *Lane*, 541 U.S. at 556 (Scalia, J., dissenting).

383. *See id.*; *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (“Thus the *McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under § 5 of the Fourteenth Amendment.”).

384. *See Lane*, 541 U.S. at 556-57 (Scalia, J., dissenting) (collecting cases).

implementation of individual judges' policy preferences."³⁸⁵ Scalia's misgivings gave way to complete disillusion in *Lane*. He conceded,

I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.³⁸⁶

When Congress used its enforcement powers to prohibit racial discrimination by states or state actors, Scalia decided to "leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5."³⁸⁷

Despite *Morgan*'s interpretative linkage of the phrases "necessary and proper" and "congruent and proportional," Justice Scalia's language cannot be read to liken explicit constitutional text to the Court's self-constructed "flabby tests." Nonetheless, the passage evinces Scalia's thinking on the judiciary's limited institutional competence to analyze Congress's work product and to challenge the propriety of its policy considerations and conclusions. He did not wish to quarrel with the elected branches of government over the interpretation and satisfaction of particular words because the Court was "ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch," especially when those rules or tests "cannot objectively be shown to have been met or failed."

385. *Id.* at 556; see also Claeys, *supra* note 127, at 808 (discussing the Necessary and Proper Clause and noting that "[n]ormally, 'proper' is the sort of term that Justice Scalia would prefer to leave for Congress to construe"). Scalia cited examples of his general reluctance to accept tests that risk being manipulated by subjective opinion or sentiment. Of significance was his citation to the "undue burden" standard created in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

386. *Lane*, 541 U.S. at 557-58 (Scalia, J., dissenting).

387. *Id.* at 564.

This stance squares with the thrust of judicial minimalist thinking³⁸⁸ and echoes Marshall's wariness to battle with Congress over the degree of necessity or propriety.³⁸⁹ Thus, Scalia's (and Marshall's) conception of both the Necessary and Proper Clause and judicial restraint works to limit judicial intrusion into congressional decisionmaking. It also, however, probably furnishes the best mechanism to discourage pretextual legislation or blatant attempts to impose the federal will on state functions,³⁹⁰ and minimizes some of the implicit problems with the "substantial effects" category.³⁹¹

388. See Claeys, *supra* note 127, at 795 (discussing the conservative legal reaction to the Warren Court and noting that "[j]udicial minimalists . . . concluded mainly that the federal courts should never again construe the Constitution in a manner that requires them to launch a frontal assault against the political branches of the federal government"). Professor Claeys adds that Justice Scalia's willingness to "leave it to Congress . . . to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States" would have construed the terms "necessary" and "proper" (the requirements for "appropriate legislation") less restrictively than the term "enforce" under Section 5. *Id.* at 811 (quoting *Lane*, 541 U.S. at 564 (Scalia, J., dissenting)). Contrasted with Scalia's construction of "enforce,"

[I]n the Necessary and Proper Clause, he suggested, he preferred to err on the side of construing that jurisdiction more broadly. Scalia inclined toward these opposite errors because he placed a higher priority on avoiding judicial abuse and congressional blowback than he did on following the original meaning of the relevant text, or on avoiding the substantive consequences that would have come from departing from original meaning.

Id.

389. See *supra* note 372 and accompanying text.

390. Scalia's conception argues that judicial officers should defer to legislative judgments under the Necessary and Proper Clause unless "the law has no connection to a scheme for regulating interstate markets, or when the law violates a specific and clearly-defined state immunity." Claeys, *supra* note 127, at 814-15 (footnote omitted) (discussing Justice Scalia's interpretation of the Necessary and Proper Clause precedents).

391. See, e.g., *United States v. Patton*, 451 F.3d 615, 622-23 (10th Cir. 2006). Circuit Judge McConnell summarized the problem:

Consideration of effects necessarily involves matters of degree. The third category thus poses not two hazards, like Scylla and Charybdis, but three. If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless. If we entertain too narrow an understanding, Congress is stripped of its enumerated power, reinforced by the Necessary and Proper Clause, to protect and control commerce among the several states. If we employ too nebulous a standard, we exacerbate the risk that judges will substitute their own subjective or political calculus for that of the elected representatives of the people, or will appear to be doing so.

Id.

VI. CONCLUSION

Even when confronted by a federal drug statute he did not like, Justice John Paul Stevens placed legal doctrine above personal sentiment. Stifling the urge to be popular—to strike down the application of the Controlled Substances Act to two women suffering through severe pain and in need of medical marijuana to let them live in peace—he cited with approval, rather than shunned, two recent opinions restricting federal authority to create broad regulatory schemes—*United States v. Lopez* and *United States v. Morrison*. However, the standards erected in *Lopez* and *Morrison* proved nebulous and easy to evade. When Stevens adeptly applied the law of those cases, the result did not square with the federalism principles behind them. Furthermore, the opinion followed post-New Deal practice and largely overlooked the important role of the Necessary and Proper Clause in modern Commerce Clause jurisprudence.

Greater attention to the Necessary and Proper Clause would have clarified the legal analysis. Justice Scalia’s concurring opinion reached the same result as Justice Stevens’ opinion, but did so in a far more satisfying fashion, without resorting to questionable categorical limitations—whose implementation was questionable in the first place. Rather, by relying on the interplay between the Commerce Clause and the Necessary and Proper Clause, Scalia was able to exercise a different type of deference, anchored in the wisdom of Chief Justice Marshall, and dispose of the question in a less strained manner.

Justice Scalia’s interpretation of the Commerce Clause in *Raich* reflects a recognized need to defer to congressional policy determinations unless the regulation uses an enumerated power as a pretext to enact unconstitutional legislation.³⁹² Through the exercise of this sort of limited judicial scrutiny, Justice Scalia’s focus on the Necessary and Proper Clause leads to the same result as Justice Stevens, without the slippery attempts to reconcile the Controlled Substances Act’s ban on all marijuana with the doctrine forged in

392. See *Gonzales v. Raich*, 545 U.S. 1, 38 (2005) (Scalia, J., concurring) (“Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary . . .”). Some commentators claim that judicial disapproval of pretextual legislation prompted the invalidation of the GFSZA and VAWA’s civil rights remedy. See, e.g., Althouse, *supra* note 196, at 788-89 (“Congress had sought political favor by taking advantage of hot-button political issues and, in doing so, had strayed far from its proper role of attending to the kinds of things that require uniform, national legislation.”).

Lopez and *Morrison*. Despite reaching the same outcome as Justice Stevens, Justice Scalia's approach is far more satisfying and far less dependent on creative ways to evade *Lopez*'s nebulous standards. Not surprisingly, Justice Scalia's judicial deference (albeit under the Necessary and Proper Clause) echoes Justice Stevens' closing notes, in which he described the medical marijuana patients' avenues of relief:

As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.³⁹³

Both justices prefer to show deference to the informed policy choices of an elected legislature. But if we truly wish to follow this principle, it seems far more helpful to adhere to the constitutional text and the strong line of New Deal precedent linking the Commerce Clause and the Necessary and Proper Clause, and to let the nebulous standards and selective definitions of *Lopez* and *Morrison* go up in smoke.

393. *Raich*, 545 U.S. at 33.