CASENOTE

Gonzales v. Raich: Has New Federalism Gone up in Smoke?

In *Gonzales v. Raich*,[1] the United States Supreme Court broke with recent federalist trends[2] by holding that Congress did not exceed its Commerce Clause[3] power in prohibiting the local growth and use of marijuana, which was legal under California state law.[4] While the Court asserted that this case did not break with recent precedent restricting Congress's Commerce Clause power,[5] this decision reaffirms

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1. 125 S. Ct. 2195 (2005).

2. The Court, in recent years, has struck two laws on federalist principles. United States v. Lopez, 514 U.S. 549 (1995); Morrison v. United States, 529 U.S. 598 (2000).

3. The Commerce Clause of the United States Constitution provides that Congress has the power "[t]o regulate Commerce . . . among the several States. . . ." U.S. CONST. art 1, § 8, cl. 3.

4. California's Compassionate Use Act of 1996 provides that its purpose is:

> To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

CAL. HEALTH & SAFE. CODE ANN. § 11362.5(b)(1)(A) (West Supp. 2005).

5. *Gonzales*, 125 S. Ct. at 2209–11.

expansive congressional power and creates uncertainty about whether federalist principles limit congressional power.

I. FACTUAL BANKGROUND

Diane Monson and Angel Raich are residents of California who used marijuana to alleviate the symptoms associated with their medical conditions. Both women were treated by doctors who believed marijuana was the only effective treatment available. Monson grew her own marijuana while Raich relied on caregivers to provide the drug for free. On August 15, 2002, local sheriffs and federal Drug Enforcement Agency agents came to Monson's home. The local sheriffs determined that her possession and use of marijuana were in compliance with California's Compassionate Use Act.[6] Despite the sheriffs' conclusion, the federal agents seized and destroyed all of Monson's marijuana plants.[7]

Raich and Monson (the "Respondents"), brought suit against the United States Attorney General seeking injunctive and declaratory relief.[8] The Respondents sought to prohibit the enforcement of the Controlled Substance Act[9] ("CSA").[10] They argued that, as applied, the CSA violated, *inter alia*, the Commerce Clause.[11] The Northern District Court of California denied their motion for a preliminary injunction, concluding that the Respondents "[did] not demonstrate a likelihood of success on the merits of their legal claims."[12] A split Ninth Circuit Court of Appeals reversed, holding that the Respondents "'demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' *Commerce Clause*

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6. Cal Health & Safe. Code Ann. § 11362.5(b)(1)(A).

7. *Gonzales*, 125 S. Ct. at 2219–20.

8. *Id.* at 2201.

9. 21 U.S.C. §§ 801-904 (2000 & Supp. 2002). Shortly after President Nixon declared a "war on drugs," Congress enacted the Comprehensive Drug Abuse and Prevention Act. *Gonzales*, 125 S. Ct. at 2201. This statute consolidated all drug laws into one law and repealed all previous laws. Title II of the Act, the Controlled Substance Act, created five schedules, or classifications, of drugs based on their accepted medical use, potential for abuse, and psychological and physical effects on the body. 21 U.S.C. § 811(c). Marijuana is classified as a Schedule 1 drug. *Id.* § 812(c)(c)(10). Schedule 1 drugs are determined to have no known medical use. *Id.* § 812(b)(1)(B). With the exception of using marijuana in a study approved by the Attorney General, all manufacture, possession, or distribution of marijuana is a criminal offense. *Id.* §§ 841(a)(1), 844.

10. *Gonzales*, 125 S. Ct. at 2201.

11. *Id.* at 2200. In addition to the Commerce Clause, respondents claimed the CSA violated the Due Process Clause of the Fifth Amendment, the Ninth Amendment, the Tenth Amendment and the medical necessity doctrine. *Id.*

12. *Id.* (citing Raich v. Ashcroft, 248 F. Supp. 2d 918, 931 (N.D. Cal. 2003)).

authority.'"[13] The majority relied upon the recent trend in the Supreme Court restricting Commerce Clause power.[14] The Supreme Court granted certiorari to decide the Commerce Clause issue.[15]

II. LEGAL BACKGROUND

The Commerce Clause was included in the Constitution by the framers as a response to the failure of the Articles of Confederation, which did not give any federal commerce power.[16] Over the years, the Court's deference to Congress under the Commerce Clause has waxed and waned, as discussed below. Commerce Clause jurisprudence is crucial because it is one of Congress's most-used enumerated powers.[17] The Court first addressed the issue of Congress's power under the Commerce Clause in *Gibbons v. Ogden*.[18] The Court in *Gibbons* defined commerce as "the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[19] Despite this broad definition, prior to 1937, the Court used the Commerce Clause to strike down federal economic regulations.[20]

A. *1890–1937 Limiting Congressional Commerce Clause Power*

From 1890 to 1937 the Court struggled to define congressional Commerce Clause power. While the Court upheld some congressional actions as proper regulations over the "stream of commerce,"[21] other congressional acts were struck as being federal invasions into state power.[22] The Court's actions reinforced a laissez-faire economy by preventing federal regulations.

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13. *Id.* at 2200-01 (quoting Raich v. Ashcroft, 352 F.3d 1222, 1227 (2003)).

14. *Id.* at 2201.

15. *Id.*

16. *Id.* at 2205.

17. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 238-39 (Aspen Publishers 2d ed. 2002) (1997).

18. 22 U.S. 1 (1824).

19. *Id.* at 189-90.

20. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding congressional attempts to destroy a sugar monopoly unconstitutional); R.R. Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (holding federal pension system for railroad employees unconstitutional); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding federal laws regulating the coal industry unconstitutional).

21. *See, e.g.*, McDermott v. Wisconsin, 228 U.S. 115 (1913) (upholding labeling requirements for items shipped interstate); United States v. Nice, 241 U.S. 591 (1916) (upholding the federal government's power to regulate commerce with Indians).

22. *See, e.g., E.C. Knight*, 156 U.S. 1; *R. R. Retirement*, 295 U.S. 330; *Carter*, 298 U.S. 238.

One exemplar case from this era is *A.L.A. Schechter Poultry Corp. v. United States*,[23] in which the Court struck the "Live Poultry Code" as exceeding Congress's commerce clause power.[24] The federal regulations sought to create fair trade in the poultry industry. The law also regulated employment by prohibiting child labor, establishing a forty hour work week, and creating a minimum wage.[25]

In striking the regulations, the Court was concerned with the potentially limitless power of the federal government to regulate if it had the power to regulate intrastate business practices, not withstanding the practical effects the Court's decision would have on the nation's economic crisis.[26] At the time, New York was the biggest live-poultry market in the United States.[27] Most of the chicken arrived in New York via freight shipments from other states.[28] The issue was whether the regulation of wage and salary was a Constitutional exercise of Congress's power.[29] The Court reasoned that the fact the poultry market included many states did not justify Congress's regulations because "the code provisions, . . . [did] not concern the transportation of the poultry from other States to New York . . . ."[30] The government argued that the prices of poultry were directly related to the cost of labor.[31] The Court, however, reasoned "[i]f the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and price and their indirect affect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost. . . ."[32] The fact that no state would enact labor protection laws because it would harm its economy was not persuasive to the Court.[33] The Court reasoned that "extraordinary conditions may call for extraordinary remedies . . . [but] [e]xtraordinary conditions do not create or enlarge constitutional power."[34] Practical considerations were not sufficient.

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23. 295 U.S. 495 (1935).
24. *Id.* at 550.
25. *Id.* at 523-27.
26. *See id.* at 519-26.
27. *Id.* at 520.
28. *Id.*
29. *Id.* at 542.
30. *Id.*
31. *Id.* at 548-49.
32. *Id.* at 549.
33. *Id.*
34. *Id.* at 528.

B. 1937–1995 Broad Congressional Commerce Clause Power

The shift in the Court's approach to the Commerce Clause is famously known as "the switch in time that saved nine."[35] After winning re-election, President Roosevelt encouraged Congress to enact a law that would have added six new justices to the Supreme Court in order to garner enough support on the bench to uphold New Deal legislation as constitutional.[36] Even President Roosevelt's supporters hesitated at the idea of court-packing for fear it would permanently injure judicial independence.[37] While it is unclear if Justice Owen Roberts was influenced by President Roosevelt's plan, he changed his vote in *West Coast Hotel v. Parrish*,[38] and ushered in a new era of congressional power.[39] In fact, during this era, not a single law was struck by the Court on the ground that it exceeded Commerce Clause power.[40]

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[41] the Court laid out its new Commerce Clause jurisprudence, holding the National Labor Relations Act (the "Act") to be constitutional.[42] The Act regulated the relations between companies and their employees. The respondent *Jones & Laughlin* was a large iron manufacturing company charged with violating the Act by discriminating against its employees who were union members. The company terminated the employees. The employees brought a complaint against the company to the National Labor Relations Board, which found for the employees. When the company refused to comply with the Board's order to reinstate the employees, the agency sued the company in federal court. The district court found for the company, holding that the Act was outside the federal government's constitutional powers. The issue on appeal was whether the Act was a valid exercise of Congress's Commerce Clause power.[43]

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35. My research did not reveal the origin of this phrase. For a discussion of the switch, *see, e.g.*, G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 198-99 (Harvard Univ. Press 2000).

36. For an in-depth discussion of President Roosevelt's plan and its eventual failure, *see, e.g.*, MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR (Fordham Univ. Press 2002).

37. For in depth discussion *see* MCKENNA, *supra* note 36, at 280-377.

38. 300 U.S. 379 (1937).

39. *See, e.g.*, WHITE, *supra* note 35, at 198-99.

40. CHEMERINSKY, *supra* note 17, at 239.

41. 301 U.S. 1 (1937).

42. *Id.* at 49.

43. *Id.* at 22-30.

The Court shifted its focus from whether the activity being regulated was commerce to whether the activity had a substantial affect on interstate commerce. The Court recognized that Congress has the power to regulate and protect interstate commerce.[44] The court held that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[45] The Court admitted that under its ruling, the distinction between local and national was not clear and was a question of degree.[46] Unlike previous rulings, the practical effects of the Act were important to the Court.[47] The reasoning focused on how past labor problems had catastrophic effects on the nation's economy and that Congress was within its constitutional power to protect interstate commerce from the crippling effect of a shut down in the iron industry.[48]

While *National Labor Relations Board* was a major shift in the Court's deference to congressional authority, the most expansive Commerce Clause case of the era was *Wickard v. Filburn*.[49] In *Wickard* the Court upheld a law that allowed for the regulation of wheat grown for home consumption and never entered into the interstate market.[50] The appellee in *Wickard* challenged the constitutionality of the Agricultural Adjustment Act of 1938[51] ("Adjustment Act") as it applied to him as violating the Commerce Clause. The Adjustment Act regulated wheat production by setting limits on how much could be grown. The appellee grew wheat in excess of the Adjustment Act's limit. He used most of the wheat to feed livestock and for home consumption. There was no evidence that any of the wheat was sold outside of the state. However, the Court upheld the regulations even though they applied regardless of whether or not the wheat was sold or intended for sale in the interstate market.[52]

In holding that Congress had not exceeded its Commerce Clause power, the Court made clear its intention to defer to Congress in the

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44. *Id.* at 36-38.
45. *Id.* at 37.
46. *Id.*
47. *See id.* at 41-42.
48. *Id.* at 41-43.
49. 317 U.S. 111 (1942). *Wickard* is called "the most far reaching example of *Commerce Clause* authority over intrastate activity" in *Lopez*. 514 U.S. at 560.
50. *Wickard*, 317 U.S. at 132-33.
51. 7 U.S.C § 1281-1407 (2000).
52. *Wickard*, 317 U.S. at 113-19.

area of economic regulation, and thus employed a rational basis test. Because Congress's goal of controlling the price was a legitimate legislative exercise, it may properly include wheat that was never part of the interstate market.[53] Thus, even if the activity regulated is purely local, if in the aggregate it has the potential to affect interstate commerce, it may properly be regulated under Congress's Commerce Clause power.[54] The Court also made clear its desire to avoid making economic policy decisions. The Court noted that it could not address "the wisdom, workability, or fairness" of legislation.[55] Rather the "conflicts between the regulated and those who advantage by it are wisely left . . . to resolution by the Congress under its more flexible and responsible legislative process."[56] *Wickard* shut the door on all possible Commerce Clause challenges to federal power, until 1995.

C. 1995-2005 Revival of Federalism and Limiting Congressional Commerce Power

The case of *United States v. Lopez*[57] was a landmark decision because it revived the Court's power to limit the federal government's power based on federalist principles. *Lopez* was a challenge to the constitutionality of the Gun-Free School Zones Act of 1990 (the "Act").[58] The Act made it a crime to knowingly possess a fire-arm in a school zone. Lopez was a twelfth grade student who was found carrying a gun at school. Lopez argued that the federal government lacked the constitutional authority to enact the law; however, he was later convicted. The Fifth Circuit Court of Appeals reversed the conviction on the ground that Congress had exceeded its Commerce Clause power.[59]

In affirming the Fifth Circuit, the Court established the framework under which it would analyze future Commerce Clause cases. The Court divided Congress's Commerce Clause regulatory power into three categories: 1) "the use of the channels of interstate commerce," 2) "the instrumentalities of interstate commerce," and 3) "those activities that substantially affect interstate commerce."[60] The first category encompasses the regulation of roads, highways, and hotels. The second

53. *Id.* at 128-29.
54. *Id.* at 127-28.
55. *Id.* at 129.
56. *Id.*
57. 514 U.S. 549.
58. 18 U.S.C. § 922(q)(1)(A) (1990).
59. *Lopez*, 514 U.S. at 551-52.
60. *Id.* at 558-59 (internal citations omitted).

category refers to goods that are bought and sold in interstate commerce.[61] The third category, at issue in *Lopez*, can include activities that are completely intrastate and local in nature but have a substantial affect on interstate commerce. The Court put *Jones* and *Wickard* in this third category.[62] The Court determined that the Act did not fall into the third category based on several factors. The first factor the Court considered was whether the activity is of a commercial nature.[63] The Court reasoned that the Act "is a criminal statute that by its term has nothing to do with 'commerce' or any sort of economic enterprise."[64] The second factor was whether there was a case-by-case jurisdictional element that would require an examination of whether the case concerned interstate commerce.[65] The Court held there was no requirement in the Act to determine whether each individual violator had affected interstate commerce.[66] The third factor was whether there were congressional findings demonstrating how the regulated activity affected interstate commerce.[67] The court was careful to note that "Congress normally is not required to make formal findings as to the substantial burdens on interstate commerce."[68] But there were no congressional findings to show the affect that guns in school zones had on interstate commerce.[69] The final factor was whether the regulation dealt with issues that are traditionally left to the states.[70] The Court was concerned with the government's assertion that it could essentially regulate anything so long as it was logically connected to the national economy.[71] The Court made clear that it rejected the government's reasoning and noted that areas such as family law and education should be left to the states to regulate.[72]

Because *Lopez* was extremely important in reestablishing the Court's involvement in establishing the boundaries of federal power, the Court responded to potential criticisms of the decision.[73] The criticism of the Court's holding was that it did not clarify when it will give deference to

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61. *Id.* at 558.
62. *Id.* at 559-60.
63. *See id.* at 561.
64. *Id.*
65. *Id.*
66. *Id.* at 562.
67. *Id.* at 562-63.
68. *Id.* at 562.
69. *Id.* at 562-63.
70. *Id.* at 564-66.
71. *Id.* at 564.
72. *Id.* at 564-66.
73. *Id.* at 566-68.

Congress and when it will assume a more activist role.[74] The Court responded by noting that "Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty 'to say what the law is.'"[75] The majority affirmed that the judiciary will remain active in limiting the federal government in order to maintain the "distinction between what is truly national and what is truly local."[76]

The Court continued its resurgence of federalist activism in *United States v. Morrison*.[77] In that case, a woman was allegedly attacked and raped by two Virginia Polytechnic Institute ("Virginia Tech") students. After several attempts to punish the students through Virginia Tech's procedures, the woman filed suit in federal court under section 13981 of the Violence Against Women Act ("VAWA") of 1994.[78] The district court dismissed the suit on the ground that Congress had exceeded its authority in enacting the section. The court of appeals affirmed the lower court's decision, and the Supreme Court granted certiorari.[79]

In affirming the court of appeals decision, the Court reaffirmed its reasoning from *Lopez*. VAWA fell within the third category of Commerce Clause jurisprudence: "a regulation of activity that substantially affects interstate commerce."[80] Following the reasoning in *Lopez*, the Court first held that VAWA did not regulate a commercial activity.[81] Next, the Court noted that the VAWA did not contain a case-by-case jurisdictional analysis.[82] Third, the Court examined the extensive congressional findings in passing VAWA.[83] The findings were not satisfactory to the Court.[84] Congress's reasoning had "already [been] rejected as unworkable . . . to maintain the Constitution's enumeration of powers" because the connection between violence against women and interstate commerce was too attenuated.[85] The final factor the Court analyzed was whether the activity regulated was a traditional area of state

74. *Id.*; *Id.* at 630 (Souter, J., dissenting) (arguing the Court's holding "threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled").
75. 514 U.S. at 566 (quoting Marbury v. Madison, 5 U.S. 137, 178 (1803)).
76. *Id.* at 567-68.
77. 529 U.S. 598 (2000).
78. 42 U.S.C. § 13981 (1994).
79. *Morrison*, 529 U.S. at 602-05.
80. *Id.* at 609.
81. *Id.* at 609-11.
82. *Id.* at 613.
83. *Id.* at 614-15.
84. *Id.*
85. *Id.* at 615.

concern.[86] Presumably in response to *Lopez*, Congress indicated that VAWA could not be used in the family law setting, ceding that setting to state power.[87] This rationale did not persuade the Court because "the limitation of congressional authority is not solely a matter of legislative grace."[88] The Court reasoned that the regulation of violent crimes was an area traditionally within the state's control.[89] After analyzing these factors, the Court held that "Congress may [not] regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[90]

In summary, before *Gonzales* the Court defined three areas of Commerce Clause power: channels of commerce, instrumentalities of commerce, and activities that substantially affect interstate commerce. The Court gave deferential treatment to regulations in the first two categories. For regulations that fell within the third category, the Court considered four factors: whether the activity is commercial, whether there is a jurisdictional element, congressional findings, and whether it is an area of traditional state concern. If the Court was not satisfied that the regulated activity had a substantial affect on interstate commerce, it would strike the law as exceeding Commerce Clause authority.

III. COURT'S RATIONALE

In *Gonzales v. Raich*,[91] the Supreme Court considered whether the federal government had exceeded its Commerce Clause power by prohibiting the local cultivation and sale of marijuana in compliance with California law.[92] The majority departed from recent judicial limitations on Commerce Clause jurisprudence and returned to a rational-basis test from the height of the Commerce Clause.[93]

The majority first noted that the CSA fell into the third category of Commerce Clause jurisprudence, namely, activities that substantially affect interstate commerce.[94] The Court reasoned that Congress may regulate purely local activities when Congress "decides that the 'total incidence' of a practice poses a threat to the national market, it may

86. *Id.* at 615-19.
87. *Id.* at 616.
88. *Id.*
89. *Id.* at 617.
90. *Id.*
91. 125 S. Ct. 2195 (2005).
92. *Id.* at 2198-99.
93. *Id.* at 2214-15.
94. *Id.* at 2205.

regulate the entire class."[95] Instead of using the four factors established under *Lopez* and *Morrison*, the Court used a rational basis test.[96] The test was "not whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."[97] The Court concluded that Congress had a rational basis for deciding that home-grown and consumed marijuana may have a substantial affect on interstate commerce.[98]

In holding that Congress had not exceeded its Commerce Clause power, the Court relied heavily on *Wickard*.[99] The Court reasoned that, like *Wickard*, Congress was regulating local production of a fungible product.[100] The high demand for marijuana made it likely that home-grown marijuana may find its way into the interstate market, affecting price and the market.[101] Congress in *Wickard* proffered findings showing the causal connection between the local production and the price in the national market.[102] The majority reasoned that Congress's findings that local production affects the interstate market in illegal drugs satisfied the requirement of a causal connection.[103] The majority was particularly persuaded by the argument that the high price of marijuana in the illegal interstate market may draw it into the market, defeating Congress's goal of eliminating the market for the substance.[104]

The majority rejected the Respondents' attempts to distinguish *Wickard*.[105] The Respondents argued that *Wickard* was distinguishable for three reasons: 1) the statute at issue in *Wickard* exempted small farmers, 2) Respondents' activity was not commercial in nature, and 3) the legislative record lacked extensive findings on the impact of home-grown marijuana.[106] The majority responded to the first argument by noting that even though the wheat contribution in *Wickard* was trivial, it was still regulated.[107] Second, Congress in *Wickard* did not

95. *Id.* at 2206.
96. *Id.* at 2208.
97. *Id.* (citing *Lopez*, 514 U.S. at 557).
98. *Id.* at 2209.
99. *Id.* at 2206-08.
100. *Id.* at 2206.
101. *Id.* at 2207.
102. *Id.*
103. *Id.* at 2208.
104. *Id.* at 2207-08.
105. *Id.*
106. *Id.*
107. *Id.*

exclude the wheat that was grown for home consumption from its regulation, and this reasoning was upheld.[108] Finally, as discussed above, the Court was satisfied with Congress's findings of fact.[109]

Because the Respondents relied heavily on *Lopez* and *Morrison*, the majority distinguished those cases.[110] The Court reasoned that in *Lopez* and *Morrison*, entire statutes were held to be outside of Congress's Commerce Clause power.[111] Here, the power of Congress to create the CSA was not being challenged, just the local application of the law.[112] The CSA, unlike the gun control statute at issue in *Lopez*, is an extensive and comprehensive regulation of medications.[113] The Court reasoned that the CSA regulated an activity that was "quintessentially economic."[114] The Court concluded that because the CSA regulated an economic activity, unlike the activities regulated in *Lopez* and *Morrison*, the cases were easily distinguishable.[115]

Finally, the majority rejected the dissenters' arguments, stating that their reasoning created a slippery slope.[116] The Court reasoned that the dissenters' position would extend to any federal regulation (quality regulations, for example) of any locally cultivated and possessed controlled substance.[117] The majority concluded that the judiciary should not be active in limiting Congress, but rather "the entire regulatory scheme is entitled to a strong presumption of validity."[118]

A. Scalia Concurrence

Justice Scalia, concurring, wrote that his understanding of the "doctrinal foundation" was more nuanced than that of the majority.[119] Scalia reasoned that Congress's authority to regulate the third area of Commerce Clause jurisprudence—activities that substantially affect interstate commerce—does not derive from the Commerce Clause alone, but also from the Necessary and Proper Clause.[120] Justice Scalia reasoned that "[w]here necessary to make regulation of interstate

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108. *Id.*
109. *Id.* at 2208.
110. *Id.* at 2209-15.
111. *Id.* at 2209.
112. *Id.*
113. *Id.* at 2209-11.
114. *Id.* at 2211.
115. *Id.*
116. *Id.* at 2212.
117. *Id.*
118. *Id.*
119. *Id.* at 2215 (Scalia, J., concurring).
120. *Id.* at 2216 (Scalia, J., concurring); *see* U.S. CONST. art. 1, § 8, cl. 18.

commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect commerce."[121] Justice Scalia noted two general circumstances in which this occurs: 1) in eliminating potential obstructions and 2) restricting stimulants to interstate commerce.[122] Scalia found support in *Lopez* as a limit to this area of Commerce Clause jurisprudence because the Court would not "'pile inference upon inference'" to find the link between local activity and interstate commerce.[123]

Justice Scalia noted that when Congress has the authority to enact a regulation, it has the power to make all regulations necessary to make that regulation effective.[124] The distinction between the authority to make the regulation effective and the authority to regulate economic activities that substantially affect interstate commerce may have been confused.[125] Because Justice Scalia agreed with the majority that Congress had the authority to enact the regulation over controlled substances, the regulation of purely local activities was justified because it was necessary and proper to make its regulation effective.[126] Justice Scalia concluded that Congress had a rational basis for deciding that the purely local cultivation of marijuana may interfere with its regulation of drugs under the CSA.[127]

B. O'Connor's dissent joined in part by the Chief Justice and Thomas

The main dissent expressed dissatisfaction with the majority's shift away from the federalist principles of *Lopez* and *Morrison*.[128] The dissent argued that the purpose of enforcing the outer limits of the Commerce Clause is to maintain the federalist system and the ability of states to serve as laboratories for social and economic experiments.[129] The dissent argued that this case is a perfect example of a state fulfilling that role.[130] The majority ended a social experiment "without any proof that the personal cultivation, possession, and use of marijuana . . . has a substantial effect on interstate commerce . . . ."[131]

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121. *Gonzales*, 125 S. Ct. at 2216 (Scalia, J., concurring).
122. *Id.* (Scalia, J., concurring).
123. *Id.* at 2217 (Scalia, J., concurring) (citing *Lopez*, 514 U.S. at 567).
124. *Id.* at 2218 (Scalia, J., concurring).
125. *Id.* at 2217 (Scalia, J., concurring).
126. *Id.* (Scalia, J., concurring).
127. *Id.* at 2219 (Scalia, J., concurring).
128. *Id.* at 2220-29 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
129. *Id.* at 2220 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
130. *Id.* at 2221 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
131. *Id.* (O'Connor, Rehnquist & Thomas, JJ., dissenting).

The dissent criticized the majority for allowing Congress to regulate purely local activities simply because the regulation was part of larger interstate regulatory scheme.[132] By allowing this, the majority encouraged Congress to enact broad, sweeping regulations that encompass local activities as a way of getting around the restraints of *Lopez* and *Morrison*.[133]

The dissent reasoned that the Court's job is to find objective markers to divide between what may and may not be regulated.[134] In this case, there is a line between medical use of marijuana and recreational use, recognized by both state and federal laws.[135] Furthermore, criminal and social policies are the traditional domains of the state.[136] Therefore, the relevant conduct that the Court should analyze is the personal use of marijuana for medicinal purposes.[137] The Court should analyze whether the CSA can constitutionally regulate that conduct.[138] The dissent questioned whether this activity is even economic in nature, and further argued that the activity has not been shown to affect interstate commerce.[139] The dissent argued that the majority's definition of economic activity "threatens to sweep all of productive human activity into federal regulatory reach."[140] Moreover, not drawing a clear line between what is commerce and what is not, the majority gave Congress federal police power.[141]

The dissent also disagreed with the majority's use of *Wickard*.[142] It argued *Wickard* did not hold that small-scale production is always economic, and therefore within Congress's reach.[143] The dissent analyzed the congressional findings, a factor from *Lopez* and *Morrison*, to point out that the Court in *Wickard* had data that showed the effect of home-grown wheat on the interstate market.[144] The Court's analysis in *Wickard* showed that homegrown wheat could affect the market by as much as twenty percent.[145] The dissent argued there were no

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132. *Id.* at 2222 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
133. *Id.* at 2222-23 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
134. *Id.* at 2223 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
135. *Id.* at 2224 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
136. *Id.* (O'Connor, Rehnquist & Thomas, JJ., dissenting).
137. *Id.* (O'Connor, Rehnquist & Thomas, JJ., dissenting).
138. *Id.* (O'Connor, Rehnquist & Thomas, JJ., dissenting).
139. *Id.* (O'Connor, Rehnquist & Thomas, JJ., dissenting).
140. *Id.* (O'Connor, Rehnquist & Thomas, JJ., dissenting).
141. *Id.* at 2225 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
142. *Id.* at 2225-26 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
143. *Id.* (O'Connor, Rehnquist & Thomas, JJ., dissenting).
144. *Id.* at 2227 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
145. *Id.* (O'Connor, Rehnquist & Thomas, JJ., dissenting).

such findings for the Court to use in this case.[146] The dissent argued that Congress must do more than merely assert that the local activity it is regulating has a substantial affect on interstate commerce for it to not violate the principles of federalism.[147]

C. *Thomas's Dissent*

Justice Thomas scathingly criticized the majority by arguing that if the majority is taken seriously, then Congress may regulate "quilting bees, clothes drives, and potluck suppers . . . ."[148] Justice Thomas wished to return to the pre-1937 era of Commerce Clause jurisprudence because he disagreed with the majority's understanding of the word commerce as it is used in the Constitution.[149] Justice Thomas explained that commerce, as it was understood at the ratifying of the Constitution, involves trade or barter, not manufacture or cultivation.[150] Therefore, Justice Thomas concluded that this law is beyond Congress's Commerce Clause power because it is a regulation of a purely intrastate and noncommercial activity.[151] Justice Thomas addressed the practical concerns that the marijuana may enter the interstate market by noting there was nothing in the record to suggest that California's laws are not being enforced or were ineffective in preventing the flow of marijuana to those not seriously ill.[152] Justice Thomas disagreed with the entire third area of Commerce Clause jurisprudence, substantial affects on interstate commerce, because it is a "'rootless and malleable standard,'" and therefore should be rejected.[153]

IV. IMPLICATIONS

The consequence of *Raich* is that individuals who use medical marijuana in accordance with state law are at risk of federal prosecution. This result will likely end the social experiments of other states that have allowed the use of marijuana for medical purposes, although it did not stop Rhode Island from passing its own laws legalizing the use of medical marijuana.[154] Also, it could pressure Congress to change its

146. *Id.* at 2227-28 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
147. *Id.* at 2227 (O'Connor, Rehnquist & Thomas, JJ., dissenting).
148. *Id.* at 2236 (Thomas, J., dissenting).
149. *Id.* at 2229-30 (Thomas, J., dissenting).
150. *Id.* (Thomas, J., dissenting).
151. *Id.* (Thomas, J., dissenting).
152. *Id.* at 2232 (Thomas, J., dissenting).
153. *Id.* at 2235 (Thomas, J., dissenting) (quoting *Morrison*, 529 U.S. at 627).
154. Katie Zezima, *Rhode Island: New Marijuana Law*, N.Y. TIMES, Jan. 4, 2006, at A11.

classification of marijuana, although previous efforts to change its classification have failed.

Of the four factors established by the Court under *Lopez* and *Morrison* to evaluate cases arising under the third area of Commerce Clause jurisprudence, the only factor that has been reaffirmed by *Raich* is the question of whether the activity is commercial. Once there is a finding that the regulated activity is commercial, this case suggests the Court will employ a rational-basis test to determine whether the activity affects interstate commerce. If the Court continues with its deference to Congress and rational-basis review, then as the dissents point out, it is difficult to conceive of real limitation to federal power. Traditional police powers that have been exercised only by the states will be increasingly exercised by the federal government. *Raich* seems to relegate *Lopez* and *Morrison* to a brief footnote in history when the Court returned to its prior activism of limiting Congressional power.

Despite the apparent lack of concern over Congress usurping state power, the Supreme Court recently limited the reach of the federal government under the CSA and used states' rights as a justification. In *Gonzales v. Oregon*,[155] the Court addressed the issue of whether the Attorney General could prohibit doctors from prescribing legal doses of drugs, even though the doctors acted in accordance with Oregon's Death with Dignity Act.[156] In holding the Attorney General could not, the Court reasoned that the Attorney General had gone beyond the power given to him in the plain language of the CSA.[157] Another reason the Court gave for limiting the Attorney General's power was federalism; the Court reasoned that the regulation of the practice of medicine is a matter of state concern.[158] It is this declaration that Justice Thomas found inconsistent with *Raich*. Justice Thomas noted "the majority's newfound understanding of the CSA as a statute of limited reach is . . . puzzling because it rests upon constitutional principles that the majority of the Court rejected in *Raich*."[159] Justice Thomas argued that he had supported limiting the power of the federal government under the CSA "in a manner consistent with the principles of federalism and our constitutional structure."[160] However, Justice Thomas argued that

155. Gonzales v. Oregon, No. 04-623, 2006 U.S. LEXIS 767 (Jan. 17, 2006).
156. *Id.* at *12.
157. *Id.* at *38-39.
158. *Id.* at *48-51.
159. *Id.* at *102 (Thomas, J., dissenting).
160. *Id.* at *104 (Thomas, J., dissenting).

because the concerns of federalism were rejected in *Raich*, it was inconsistent and unnecessary to revive them in this case.[161]

The Court's decision in *Raich* shows that despite forty years of stability in this area of law, interrupted by *Lopez* and *Morrison*, the true question under Commerce Clause jurisprudence remains whether the regulated activity is commercial. The Court continues to struggle to define commerce in a way that gives deference to Congress while preserving the federalist system. This area of law is not settled and the Court's activism will likely fluctuate, as indicated by its recent decision in *Oregon*. Only future Commerce Clause cases will satisfactorily determine whether the Court will use the newly-affirmed rational basis test from the height of congressional power in all circumstances, or whether Congress will have to meet a higher burden in certain instances.

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161. *Id.* at *104–05 (Thomas, J., dissenting).

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