Constitutional Law—Commerce Clause—California Takes a Hit: The Supreme Court Upholds Congressional Authority over The State-Approved Use Of Medicinal Marijuana. Gonzales v. Raich, 545 U.S. 1 (2005).

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—CALIFORNIA TAKES A 
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I. INTRODUCTION

"[A] single courageous State may, if its citizens choose, serve as a 
laboratory; and try novel[,] social[,] and economic experiments without risk 
to the rest of the country."

The framers of the Constitution created a unique form of government 
that distributed the power to govern between a central government and indi-
vidual state governments. In particular, the Constitution enumerates limited 
powers to the federal government and provides that "[t]he powers not dele-
gated to the United States by the Constitution, nor prohibited by it to the 
States, are reserved to the States respectively. . . ." This distribution of 
power became known as "federalism." Traditionally, our federalist system 
has recognized the states' police power to define criminal law and "protect 
the health, safety, and welfare of [its] citizens."

Among the enumerated powers, the Constitution grants Congress the 
authority to "regulate Commerce . . . among the several states." Over the 
past seventy years, this power has emerged as one of Congress's most im-
portant and apparent enumerated powers. In fact, from 1937 to 1995, the 
Court did not strike down a single piece of congressional legislation as be-
yond Congress's authority under the Commerce Clause. Then, in 1995, at a 
point when Congress seemed to exercise unlimited authority pursuant to the

1. Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (Raich IV) 
   (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
3. UNITED STATES CONST. amend. X.
4. See WALTER B. MEAD, THE UNITED STATES CONSTITUTION: PERSONALITIES, 
   PRINCIPLES, AND ISSUES 92 (1987). John Calhoun first coined the term "federalism" in 1851 
to describe the distribution of power in the United States. Id.
5. Raich IV, 545 U.S. at 42 (O'Connor, J., dissenting).
6. UNITED STATES CONST. art. 1, § 8, cl. 3.
   Constitution 1 (1981). Beginning in 1937, the Court began to abandon decisions requiring a 
direct link to interstate commerce, focusing instead on whether the regulated activity had "a 
close and substantial relation to interstate commerce." Lamar F. Jost, Note, The Commerce 
Clause in the New Millennium: Enumeration Still Presupposes Something Not Enumerated, 1 
8. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 811-17 (3d ed. 
  2000).
Commerce Clause, the Rehnquist Court relied on principles of federalism to reestablish some limits on the scope of the commerce power. Characterized as the "federalism revolution," many thought this would be the lasting legacy of Chief Justice William H. Rehnquist. In the Court's latest decision, however, a 6–3 majority upheld the Controlled Substance Act (CSA) against the intrastate cultivation of medicinal marijuana as within Congress's authority under the Commerce Clause. By its decision in Gonzales v. Raich, the Court has cast doubt on whether it will continue this so-called "federalism revolution," or whether the decision in United States v. Lopez will prove to be nothing more than a hiccup in the growing expansion of the Commerce Clause.

This note explores the significance of Raich to Commerce Clause jurisprudence. The note begins with an overview of the conflicting statutes, facts, and procedural history that led the Court to its decision in Raich. Next, the note examines the historical background of the Commerce Clause, moving from the Court's initial interpretation and formalistic approaches, through the Court's "New Deal" expansion, and finally the Court's recent attempt to reestablish some limitation based on federalism principles. Following the historical background, the note explores the Court's analysis in the Raich decision. The note concludes with a discussion of the significance of Raich, focusing on the impact of the Court's decision to the "federalism revolution" and the future of the state-authorized use of medicinal marijuana.

II. FACTS

The following section summarizes the facts that led to the Court's decision in Raich. First, this section will briefly outline the conflicting federal and state statutes. Next, this section will focus on the facts that led Angel

11. Raich IV, 545 U.S. at 8–9.
14. See infra Part II.
15. See infra Part III.A.–B.
16. See infra Part III.C.
17. See infra Part III.D.
18. See infra Part IV.
19. See infra Part V.
20. See infra Part II.A.
Raich and Diane Monson into court. 21 Finally, this section tracks the procedural history and ultimate grant of certiorari by the Supreme Court. 22

A. Conflicting Statutory Schemes

1. Compassionate Use Act of 1996

In 1996, California voters approved Proposition 215, codified as the Compassionate Use Act of 1996 ("Act"), 23 thereby becoming the first state to authorize the use of marijuana for medicinal purposes. 24 The Act ensured that California residents suffering from a serious illness could obtain and use marijuana for medicinal purposes. 25 The Compassionate Use Act created an exemption from criminal prosecution for patients and primary caregivers who received the approval or recommendation of a physician, and the Act specifically excluded from prosecution or persecution physicians who recommended marijuana to a patient. 26 In 2003, as a result of uncertainties in the enforcement and distribution of marijuana for medicinal purposes, the California legislature amended the Compassionate Use Act for the purpose of defining the scope of the Act and establishing a voluntary identification system for users of medicinal marijuana. 27

2. Controlled Substance Act

On October 27, 1970, President Nixon signed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA) into law. 28 Federal

21. See infra Part II.B.
22. See infra Part II.C.
25. CAL. HEALTH & SAFETY CODE ANN. § 11362.5(b)(1)(A). Serious illnesses included the following: “cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.” Id. The proposition also encouraged the “federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana. Id. § 11362.5(b)(1)(C).
26. Id. § 11362.5(b)(1)(B)–(C).
27. See id. § 11362.7. For a general discussion on the amendments to the Compassionate Use Act, see Tammy L. McCabe, Note, Health & Safety: It's High Time: California Attempts to Clear the Smoke Surrounding the Compassionate Use Act, 35 McGEORGE L. REV. 545 (2004).
legislators designed the CDAPCA to address the rapid growth of drug abuse by providing (1) federal facilities to increase their efforts in drug abuse prevention and rehabilitation, (2) a more effective means of law enforcement, and (3) an "overall balanced scheme" of criminal penalties.29

Title II of the CSA makes it illegal to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," unless specifically authorized by the statute.30 In addition, under section 844(a), mere possession of a controlled substance is illegal unless authorized by the CSA.31 A "controlled substance" is any drug or substance classified in one of the five schedules listed in section 812 of the CSA.32 Marijuana is designated as a Schedule I controlled substance.33 To designate a controlled substance as Schedule I, it must be found that the substance has a "high potential of abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use of the drug or other substance under medical supervision."34

Additionally, the CSA sets out specific Congressional findings and declarations, which bear directly on Congress’s authority under the Commerce Clause.35 The most relevant include the following:

(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.

29. Committee on Interstate and Foreign Commerce, Comprehensive Drug Abuse Prevention and Control Act, H.R. Rep. No. 91-1444, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4567. In fact, prior to the reorganization of 1968, which merged the Bureau of Narcotics of the Treasury Department and the Bureau of Drug Abuse Control of the Department of Health, Wealth, Education, and Welfare into a single agency under the Department of Justice, two separate bodies of statutory law governed drug classification and penalty structures—one based on the taxing power and the other on the commerce power. BOGOMOLNY, supra note 28, at 16–17. Thus, one of the principal purposes of the CDAPCA was to consolidate these inconsistent regulatory schemes. Id.

30. 21 U.S.C. § 841(a)(1) (2000). The CDAPCA consisted of three titles. Gonzales v. Raich, 545 U.S. 1, 12 n.19 (2005) (Raich IV). Title I governs the rehabilitation of drug addicts by the Department of Health, Education, and Welfare; Title II governs the control and enforcement of drugs by the Department of Justice; Title III governs the import and export of controlled substances. Id.

32. Id. § 802(6).
33. Id. § 812(c)(10).
34. Id. § 812(b)(1).
35. Id. § 801.
(3) 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.

(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.\(^\text{36}\)

B. The Incident

In 1996, California became the first of several states to enact a law authorizing the limited use of marijuana for medicinal purposes.\(^\text{37}\) Angel Raich and Diane Monson both resided in California and obtained marijuana as recommended by their board-certified physicians, pursuant to the Act,\(^\text{38}\) to alleviate several serious medical conditions.\(^\text{39}\) Angel Raich suffered from an extensive list of medical conditions that included life-threatening weight loss, severe chronic pain, and an inoperable brain tumor.\(^\text{40}\) As a result of her condition, Raich was confined to a wheelchair and was unable to play an active role in the parenting of her two children.\(^\text{41}\) Raich tried numerous medications in an attempt to control the pain, but none alleviated her symptoms.\(^\text{42}\) Her physician stated that she “had tried essentially all other legal alternatives to cannabis[,] and the alternatives [had] been ineffective or result[ed] in intolerable side effects.”\(^\text{43}\) The pain became so unbearable that in August of 1997, after her physician concluded that the pain could not be

\(^{36}\) Id. § 801.

\(^{37}\) Gonzales v. Raich, 545 U.S. 1, 5 n.1 (2005) (Raich IV). Other states include Alaska, Arizona, Colorado, Hawaii, Maine, Montana, Nevada, Oregon, Vermont, and Washington. Id.

\(^{38}\) See CAL. HEALTH & SAFETY CODE ANN. § 11362.5, later amended by §§ 11362.7–11362.9. For a discussion of the Act, see Part II.A.1 of this note.

\(^{39}\) Raich IV, 545 U.S. at 6–7.

\(^{40}\) Brief for Respondents at 4, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454).

\(^{41}\) Id.

\(^{42}\) Id. In fact, Raich tried thirty-five different medications in an attempt to alleviate her medical conditions. Id.

\(^{43}\) Id.
relieved by any legally prescribed medications, Raich attempted to end her own life.\textsuperscript{44} Upon her physician's recommendation, Raich began using marijuana, and her condition dramatically improved.\textsuperscript{45}

Diane Monson suffered from a degenerative disease of the spine that caused chronic back pain and muscle spasms.\textsuperscript{46} Under the guidance of her physician, also a board-certified practitioner, Monson tried several conventional medications in an attempt to alleviate these symptoms.\textsuperscript{47} Because of the severity of her condition and the lack of conventional alternatives, Monson's physician determined "that medical [marijuana] use [was] deemed appropriate for Diane Monson, and that medical [marijuana] provide[d] necessary relief for Diane's pain and suffering."\textsuperscript{48} Monson began using marijuana, which substantially relieved her back pain and muscle spasms.\textsuperscript{49}

Angel Raich and Diane Monson used marijuana cultivated entirely within California.\textsuperscript{50} Furthermore, they contended that none of the products necessary for the cultivation of marijuana originated out-of-state.\textsuperscript{51} Diane Monson grew her own marijuana, which she ingested by smoking or using a vaporizer.\textsuperscript{52} Angel Raich, however, was unable to cultivate her own marijuana; instead, she relied on two caregivers to produce and provide the marijuana at no charge.\textsuperscript{53}

On August 15, 2002, agents from the DEA and deputies from the Butte County Sheriff's Department investigated the home of Diane Monson.\textsuperscript{54} The county deputies determined that Monson's use of marijuana was legal under the Compassionate Use Act.\textsuperscript{55} The United States Attorney for the Eastern District of California, however, pursuant to the CSA,\textsuperscript{56} ordered DEA agents

\textsuperscript{44} Id. at 5.

\textsuperscript{45} Id. After the introduction of marijuana for pain treatment, it was no longer necessary for Raich to use a wheelchair. Id.

\textsuperscript{46} Brief for Respondents, supra note 40, at 5.

\textsuperscript{47} Id. at 5–6.

\textsuperscript{48} Id. at 6.

\textsuperscript{49} Id.

\textsuperscript{50} Gonzales v. Raich, 545 U.S. 1, 7 (2005) (Raich IV).

\textsuperscript{51} Brief for Respondents, supra note 40, at 6.

\textsuperscript{52} Raich IV, 545 U.S. at 7.

\textsuperscript{53} Id. Raich processed the marijuana into a variety of items including oils, balms, and food. Id.


\textsuperscript{55} Raich IV, 545 U.S. at 7.

to confiscate and destroy six of her marijuana plants.\textsuperscript{57} To avoid future confiscation and to protect their future use of marijuana for medicinal purposes, on October 9, 2002, Angel Raich, Diane Monson, and two unnamed parties (collectively Respondents), filed suit against the United States Attorney General, John Ashcroft, and the Administrator of the DEA, Asa Hutchinson.\textsuperscript{58} Respondents sought a preliminary and permanent injunction against the enforcement of the CSA as it applies to the manufacture, distribution, or possession of marijuana for their personal medical use.\textsuperscript{59} Respondents claimed that the enforcement of the CSA was an unconstitutional exercise of congressional power, violating the Commerce Clause, the Fifth Amendment, the Ninth Amendment, and the Tenth Amendment to the Constitution.\textsuperscript{60} They also claimed that the medicinal use of marijuana was legal under the doctrine of medical necessity.\textsuperscript{61}

C. The Procedural History

On March 5, 2003, the District Court for the Northern District of California denied Respondents' motion for a preliminary injunction.\textsuperscript{62} The district court concluded that, under the law of the Ninth Circuit, Respondents were unable to establish a likelihood of success on the merits on their motion for injunctive relief.\textsuperscript{63} The court was unwilling to distinguish the medicinal use of marijuana from prior Ninth Circuit decisions that upheld the CSA as a valid constitutional use of the commerce power.\textsuperscript{64} In addition, the district court determined that the CSA does not violate the Ninth or Tenth  

\textsuperscript{57} Raich II, 352 F.3d at 1226. Prior to the confiscation of Monson's marijuana plants, local officials attempted to exclude federal intervention, resulting in a three-hour standoff between the Butte County District Attorney and the United States District Attorney. \textit{Id.}

\textsuperscript{58} \textit{Id.} The two unnamed litigants, known as "John Does," were the caregivers that provided Angel Raich with locally grown marijuana. \textit{Raich IV}, 545 U.S. at 7.

\textsuperscript{59} \textit{Raich IV}, 545 U.S. at 7.

\textsuperscript{60} \textit{Id.} at 8.

\textsuperscript{61} \textit{Id.} The defense of necessity "traditionally covered the situation [in which] physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." United States v. Oakland Cannabis Buyer's Coop., 532 U.S. 483, 490 (2001) (\textit{citing} United States v. Bailey, 444 U.S. 394 (1980)). Prior to the passage of the Compassionate Use Act, the Supreme Court considered whether the doctrine of medical necessity could be applied to a patient using marijuana for medicinal purposes pursuant to a California initiative. \textit{Id.} at 491. The Court held that the doctrine of necessity is not applicable when the legislature has made a "determination on the values." \textit{Id.} Therefore, because Congress declared that marijuana did not have any medicinal use, the doctrine of medical necessity could not be applied. \textit{Id.} at 492.


\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.} at 925 (\textit{citing} United States v. Tisor, 96 F.3d 370 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390 (9th Cir. 1990); United States v. Rodriguez-Camacho, 468 F.2d 1220 (9th Cir. 1972)).
Amendments and that Respondents could not invoke the doctrine of medical necessity.\textsuperscript{65}

On appeal, a split Ninth Circuit reversed and remanded the case to the district court for entry of a preliminary injunction.\textsuperscript{66} Specifically, the court held that Respondents had demonstrated a likelihood of success on the merits of their claim that, as related to their narrow class of activity, the CSA was an unconstitutional exercise of Congress's commerce power.\textsuperscript{67} Unlike the district court, the Ninth Circuit distinguished its prior case law on the ground that the medicinal use of marijuana constituted a "separate and distinct class of activities."\textsuperscript{68} The court relied on \textit{United States v. Lopez}\textsuperscript{69} and \textit{United States v. Morrison}\textsuperscript{70} to determine whether this narrow class of activity substantially affected interstate commerce.\textsuperscript{71} Applying the four-factor test from \textit{Morrison},\textsuperscript{72} the court held that the Respondents' use of marijuana was neither commercial nor economic.\textsuperscript{73} In addition, the court held that the CSA contained no jurisdictional element to limit the reach of the statute and that the link between the use of medicinal marijuana and its effect on commerce was attenuated.\textsuperscript{74} The court agreed with the district court that the public interest and hardship factors weighed in Respondents' favor, and, thus, coupled with the likelihood of success on the merits, the facts warranted the entry of a preliminary injunction.\textsuperscript{75} On June 28, 2004, the United States Supreme Court granted certiorari.\textsuperscript{76}

\begin{itemize}
\item \textsuperscript{65} \textit{Id.} at 926–30.
\item \textsuperscript{66} \textit{Raich v. Ashcroft}, 352 F.3d 1222, 1235 (9th Cir. 2003) (\textit{Raich II}). For an in-depth discussion of the \textit{Raich II} decision, see Samantha Everett, Note, \textit{Raich v. Ashcroft: Medical Marijuana and the Revival of Federalism}, 41 \textit{SAN DIEGO L. REV.} 1873 (2004).
\item \textsuperscript{67} \textit{Raich II}, 352 F.3d at 1227.
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} 514 U.S. 549 (1995).
\item \textsuperscript{70} 529 U.S. 598 (2000).
\item \textsuperscript{71} \textit{Raich II}, 352 F.3d at 1229–34.
\item \textsuperscript{72} \textit{Id.} at 1229. The four-factor test for determining whether an activity substantially affects interstate commerce, as clarified in \textit{Morrison}, includes the following: "(1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains [an] express jurisdictional element . . . ; (3) whether the statute . . . contains 'express congressional findings' regarding the effects of the regulated activity . . . ; and (4) whether the link between the regulated activity and a substantial effect . . . is 'attenuated.'" \textit{Id.} (citing \textit{Morrison}, 529 U.S. at 610–12).
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{Id.} at 1229–34. The court did determine that the third element weighed in favor of the CSA's constitutionality; however, when weighing the factors, the court considered the first and fourth factors to be the most important. \textit{Id.} at 1232.
\item \textsuperscript{75} \textit{Id.} at 1234.
\item \textsuperscript{76} \textit{Ashcroft v. Raich}, 542 U.S. 936 (2004) (\textit{Raich III}).
\end{itemize}
By 1787, in the midst of competing economic interests, the Articles of Confederation—our nation’s first constitution—proved lacking in the centralized authority necessary to control commerce among the states. Fearful that these competing economic interests would lead to the ultimate dissolution of the union, state delegates assembled in Philadelphia to revise the powers of the national government. On September 17, 1787, after months of debate, the convention created a new framework of government—the Constitution of the United States. The Constitution grants enumerated powers to the central government and reserves the remaining power to the states. James Madison stated as follows: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.” In 1791, the First Continental Congress amended the Constitution to expressly adopt this implicit assumption that powers not specifically granted to the central government would be “reserved to the [s]tates.”

Among those enumerated powers, the Constitution grants Congress the authority to “regulate Commerce ... among the several states.” In drafting this seemingly broad clause, the convention neither defined the purpose nor

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77. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.3, at 413 (3d ed. 1999). As a result of the struggling market, individual states imposed economic sanctions against out-of-state products and taxed imported goods destined for other states. Id.

78. Id. at 412. The framers of the Articles of Confederation feared centralized authority over commerce and, therefore, granted the national government no power to regulate commerce among the states and only a limited power to regulate international affairs. Id.

79. Id. at 413. This assembly would later be known as the “Constitutional Convention.” Id.

80. See MEAD, supra note 4, at 90. At the time of the convention, the vast majority of political systems consisted of one governing body with concentrated powers, commonly called “unitary” or “centralized” government. Id. at 89–91. While a few European countries maintained a “confederacy,” that is, a loose association of states that delegate limited powers to a central governing body, none of the European countries balanced the powers between the two governing bodies. Id.

81. Id. at 111–49. Although the convention adopted the Constitution in September of 1787, the state ratification process did not end until March of 1789 and was amended thereafter by the Bill of Rights. Id.

82. Id. at 93.


84. UNITED STATES CONST. amend. X. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Id.

85. UNITED STATES CONST. art. 1, § 8, cl. 3. The United States Constitution also grants Congress the power to “regulate Commerce with Foreign Nations, ... and with the Indian Tribes.” Id.
the scope of this power as it related to the states. Therefore, the Constitution left the task of determining the purpose, meaning, and the scope of congressional authority, pursuant to the Commerce Clause, to the United States Supreme Court. The following sections will survey significant Commerce Clause jurisprudence in the United States. The first section will examine the initial interpretation of the Commerce Clause and the subsequent jurisprudence prior to 1886. The second section will examine the Court’s formalistic and restrictive approach to the commerce power from 1887 to 1936. The next section examines the Supreme Court’s decisions from 1937 to 1995, which abandoned the formalistic restriction of the commerce power in favor of the broad approach suggested in Gibbons v. Ogden. Finally, the last section will explore the Commerce Clause jurisprudence from 1995 to 2005 and the Court’s recent attempts to limit federal authority under the commerce power.

A. The Early Interpretation of the Commerce Power

The Court first interpreted the Commerce Clause in Gibbons v. Ogden. In Gibbons, New York enacted legislation granting a steamboat monopoly to Robert R. Livingston and Robert Fulton, who in turn, granted the monopoly to Aaron Ogden. Thomas Gibbons, a coastal trader, ran two steamboats between New York and New Jersey, which violated this exclusive privilege. Ogden sought and obtained an injunction against Gibbons. On appeal, the United States Supreme Court, through Chief Justice John Marshall, held that the state statute conflicted with a legitimate federal statute and was, therefore, invalid. Despite this narrow holding, Chief Justice

86. Rotunda, supra note 77, at 414.
87. Id.
88. See infra Part III.A.--D.
89. See infra Part III.A.
90. See infra Part III.B.
91. 22 U.S. (9 Wheat.) 1 (1824); see also infra Part III.C.
92. See infra Part III.D.
94. Id. at 7--8. The legislation granted “exclusive navigation of all the waters within the jurisdiction of [New York], with boats moved by fire or steam, for a term of years which has not yet expired; and authoriz[ed] the Chancellor to award an injunction, restraining any [other] person . . . from . . . those waters with boats of that description.” Id. at 2.
95. Id. at 2.
96. Id. at 7. The federal statute enacted guidelines for the enrollment, licensing, and regulation of coastal trading and fishing. Id. at 1.
97. Id. at 210; see also United States Const. art. 6, cl. 2. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Id.
Marshall, in dicta, discussed the scope of federal authority over commerce. 98 The commerce power, he stated, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than [those that] are prescribed in the constitution." 99 The power extended to commercial "intercourse" affecting "more States than one" and "cannot stop at the external boundary line of each State, but may be introduced into the interior." 100 Congress shall exercise plenary power over commerce, subject only to political restraints. 101 According to Chief Justice Marshall, the only commercial activities not subject to this federal power were those activities "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere." 102

Despite Chief Justice Marshall's exposition on the breadth of federal power over commerce, prior to 1887, few legislative acts relied on Congress's power to regulate commerce, and, as a result, there were even fewer judicial decisions interpreting the commerce power as an affirmative congressional power. 103 On the contrary, the majority of the Court's decisions concerned the Commerce Clause as a limitation on state legislation that affected interstate commerce. 104 Following Gibbons, until 1887, the Court's sparse Commerce Clause jurisprudence has been characterized as "inconsistent doctrinal themes." 105 Some of the decisions, like Gibbons, suggested that the primary limitation on federal authority over commerce should be political rather than judicial. 106 On the other hand, the Court began to make formal distinctions that would later limit congressional authority pursuant to the Commerce Clause. 107

99. Id. at 196.
100. Id. at 189, 194.
101. Id. at 197. "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, . . . the sole restraints on which they have relied, to secure them from its abuse." Id.
102. Id. at 195.
103. Tribe, supra note 8, at 808–09.
104. Id. at 809–10.
105. Id. at 808 n.6.
106. Id.; see also, e.g., The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871) (holding, over an objection that the Commerce Clause granted Congress a limitless power, that Congress could regulate the licensing of ships operating exclusively within the state if the transported goods were ultimately destined for other states); United States v. Marigold, 50 U.S. (9 How.) 560 (1850) (holding that the commerce clause, which, once conceded, "may operate on any and every subject of commerce to which the legislative discretion may apply it," granted Congress the authority to prohibit the importation of counterfeit coins).
107. Tribe, supra note 8, at 809 n.6; see also, e.g., United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870). For the first time, in United States v. Dewitt, the Court held that Congress had exceeded its authority granted by the Commerce Clause. Id. at 44–45. The Court invalidated a legislative act that prohibited the sale of naphtha or other illuminating oils flammable
B. 1887–1937: A Formalistic Approach to Restricting the Commerce Clause

In 1887, Congress began enacting legislation, pursuant to the commerce power, designed to resolve economic and social problems that developed as a result of the Industrial Revolution. Consequently, the Supreme Court began deciding cases involving the Commerce Clause as an affirmative grant of congressional power, as opposed to the previous period in which it was considered a limit on state legislative power. Unlike Chief Justice Marshall’s broad definition of “commerce,” the Court confined the term “commerce” to trade or exchange, as distinguished from economic activities such as “manufacturing,” “mining,” and “production.” For example, in United States v. E.C. Knight Co., the Supreme Court held that the Sherman Antitrust Act could not restrict the American Sugar Refining Company from acquiring almost complete control of the manufacture of refined sugar within the United States. The Court distinguished “commerce” from “manufacture,” stating that “[c]ommerce succeeds to manufacture, and is not a part of it.”

In 1936, the Supreme Court held the Bituminous Coal Conservation Act of 1935, which Congress enacted to govern various aspects of the coal-mining industry, was beyond Congress’s authority pursuant to the Commerce Clause. The Court distinguished commerce from manufacturing,

at a temperature less than 110 degrees Fahrenheit. Id. The Court concluded that “[w]ithin State limits, [Congress] can have no constitutional operation.” Id. at 45.

108. See ROTUNDA, supra note 77, § 4.5 at 422. By the late nineteenth century, advances in industrial technology had sparked the growth of modern-day, industrial cities. CHARLES A. BEARD & MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES 393-01 (H. Wolff Book Mfg. Co. 1944). These cities, however, became breeding grounds for poverty, disease, and industrial accidents. Id. at 394. As a result, a social movement occurred, which sought to improve conditions, such as factory sanitation and safety, compensation for workers, and the control of contagious diseases. Id. at 396.

109. TRIBE, supra note 8, at 810. For a comprehensive list of cases involving the Commerce Clause prior to 1937, see Tribe, supra note 8, at 810 n.8.

110. Id. at 810. “[T]his half century is usually remembered as one in which the Court repeatedly struck down congressional action as unauthorized under the Commerce Clause.” Id. at 810 n.8.

111. 156 U.S. 1 (1895).

112. Id. at 17; see also Kidd v. Pearson, 128 U.S. 1, 21 (1888) (holding that if the Court defined “commerce” to include those manufactured goods that might, in the future, be subject to commercial transactions, then “[C]ongress would be invested . . . with the power to regulate, not only manufacture, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—in short, every branch of human industry”).

113. E.C. Knight Co., 156 U.S. at 12.

114. Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936). The Court reasoned as follows: “[T]he incidents leading up to and culminating in the mining of coal do not constitute . . . intercourse. The employment of men, the fixing of their wages, hours of labor, and working
holding that Congress could regulate only the former.\textsuperscript{115} The Court reasoned that "[t]he regulation of commerce applies to the subjects of commerce, and not to matters of internal police."\textsuperscript{116}

The Court continued its restrictive interpretation of the Commerce Clause throughout the first several years of President Franklin D. Roosevelt's "New Deal."\textsuperscript{117} For example, in \textit{A.L.A. Schechter Poultry Corp. v. United States},\textsuperscript{118} the Court held that the Live Poultry Code, a provision of the National Industrial Recovery Act of 1933, was an unconstitutional exercise of congressional authority under the commerce power.\textsuperscript{119} The Court determined that the activities regulated were intrastate\textsuperscript{120} and had only an "indirect" effect on interstate commerce.\textsuperscript{121} By making this distinction, the Court established the "direct effects" test for determining the scope of the commerce power as it related to intrastate activity.\textsuperscript{122} Activities that "directly" affected interstate commerce fell within the federal government's authority; whereas, activities that had an "indirect" effect on interstate commerce "remain[ed] within the domain of state power."\textsuperscript{123}

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conditions . . . each and all constitute intercourse for the purposes of production, not of trade." \textit{Id.} at 303.
\textsuperscript{115} \textit{Id.} at 299–301. The Court defined commerce as "intercourse for the purposes of trade" and defined manufacturing as the transformation of raw materials into finished products. \textit{Id.} at 299, 303. The Court also rejected the notion that the manufactured coal could be introduced to the interstate market at a later time. \textit{Id.} at 299.
\textsuperscript{116} \textit{Id.} at 301.
\textsuperscript{117} See \textit{Rotunda}, supra note 77, § 4.7 at 433–37; see also, \textit{e.g.}, \textit{R.R. Retirement v. Alton R. Co.}, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934 because the Act was designed to help "the social welfare of the worker" and was not related to an aspect of interstate commerce). President Roosevelt designed this "New Deal" legislation in an attempt to stabilize an economy shattered by the Great Depression. \textit{See Beard}, supra note 108, at 452–57. An estimated twelve million Americans became unemployed as a result of the Depression. \textit{Id.} at 452.
\textsuperscript{118} 295 U.S. 495 (1935).
\textsuperscript{119} \textit{Id.} at 550. The purpose of the legislation was to regulate the wages, hours, administration, trade practice, and general labor provisions of the poultry industry. \textit{Id.} at 523–24.
\textsuperscript{120} \textit{Id.} at 542–43. Although the government contended that the regulated products came from other states, the Court held that once the products were delivered to the state, the "flow in interstate commerce had ceased" and "had come to a permanent rest within the state." \textit{Id.} at 543.
\textsuperscript{121} \textit{Id.} at 550.
\textsuperscript{122} \textit{See id.} at 546.
\textsuperscript{123} \textit{Id.} The Court reasoned that if "indirect" activities were within the federal authority it "would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government." \textit{Id.}
C. 1937–1995: Out with the Old, in with the New—The “New Deal” Expansion of the Commerce Clause

Despite the Supreme Court’s unwillingness to broaden federal authority, President Roosevelt, after his reelection in 1936, continued to pursue his legislative reforms. In February of 1937, in an attempt to reconfigure the Court, President Roosevelt introduced legislation that would authorize him to appoint an additional judge for every current judge who was over seventy years of age and had served on the court for at least ten years. If enacted, the United States Supreme Court would have grown from nine justices to fifteen. Although his opponents defeated the Court Packing Plan, President Roosevelt won the war. The Court abandoned the formalistic interpretation of the Commerce Clause and began to expand its scope. Within the text of the Commerce Clause, the Court recognized three categories of activity within Congress’s authority. Under its commerce power, Congress could regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and those activities that affect interstate commerce. The following sections explore the Court’s adoption and interpretation of the third category.

1. The “Substantial Effects” Test

The 1937 decision, NLRB v. Jones & Laughlin Steel Corp., prompted a new line of Commerce Clause jurisprudence. Despite a Commerce Clause challenge, the Court upheld the National Labor Relations Act. In
doing so, the Court departed from the "direct" and "indirect" effects test and held, instead, 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 control." The Jones & Laughlin holding would become the foundation of the "substantial effects" test.

The Supreme Court's expansion of federal authority under the Commerce Clause continued in Wickard v. Filburn. To avoid regularities in pricing that could obstruct commerce, the federal government enacted the Agricultural Adjustment Act of 1938, which regulated the volume of wheat produced annually in order to control the market. After being penalized for the overproduction of wheat, Mr. Filburn, the owner and operator of a small farm, contested the Act as an unconstitutional exercise of the commerce power. Even though Mr. Filburn's wheat cultivation was a purely intrastate activity, the Court upheld the legislation based on the principle of aggregation. The Court stated "[t]hat [Mr. Filburn'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." Thus, the Court further expanded the scope of the commerce power to include those trivial activities that, when considered alone, have little impact on commerce, but, when "aggregated," can "exert[] a substantial economic effect on interstate commerce." In addition, the Wickard Court expressly

Labor Relations Board found that the Jones & Laughlin Steel Corporation had violated the Act by discriminating against members of the union and coercing its employees to disrupt and discontinue their self-organization. Id. at 22.

Id.; see also United States v. Darby, 312 U.S. 100 (1941) (holding that Congress's authority "extends to those activities intrastate [that] so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end").

Rotunda, supra note 77, § 4.8 at 446.

317 U.S. 111 (1942); see also Tribe, supra note 8, at 813.

Wickard, 317 U.S. at 116.

Id. at 118. The federal statute allotted farmers roughly 223 bushels of wheat on a maximum of 11.1 acres of land; however, Mr. Filburn harvested approximately 462 bushels of wheat. Id. at 113.

Id. at 127–28.

Id. The Court reasoned that a farmer, influenced by the rising market price of wheat, could sell his excess wheat and ultimately frustrate the balance of the market. Id. In sum, the excess wheat competes with wheat produced for interstate commerce. Id.

Id. at 125; see also Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
rejected the previous distinction between “direct” and “indirect” effects on interstate commerce.\textsuperscript{143}

The Court’s expansive interpretation of the Commerce Clause continued in 1971 when the Court upheld federal regulation of intrastate criminal activity.\textsuperscript{144} The Court sustained Title II of the Consumer Credit Protection Act,\textsuperscript{145} which made it unlawful to collect on an extension of credit by extortion, violence, or other criminal means.\textsuperscript{146} After the introduction of extensive evidence, a district court found Perez, a local “loan shark,” guilty under this federal statute.\textsuperscript{147} The Court recognized that Perez’s activity occurred purely intrastate; however, the Court held that “[when] the class of activities is regulated and that class is within the reach of federal power, the courts have no power to ‘excise, as trivial, individual instances’ of the class.”\textsuperscript{148} Congress provided ample evidence to support its claim that loan sharking, which occurred purely intrastate, could be associated with interstate crime.\textsuperscript{149}

2. The Rational Basis Standard

In addition to the “substantial effect” and “aggregation” principles, the Court began to defer to congressional findings regarding whether an activity has an effect on interstate commerce.\textsuperscript{150} For example, in Heart of Atlanta Motel v. United States,\textsuperscript{151} the Court upheld the Civil Rights Act of 1964 as a valid exercise of the commerce power.\textsuperscript{152} In doing so, the Court relied on

\begin{itemize}
\item \textsuperscript{143} Wickard, 317 U.S. at 125. “But even if appellee’s activity be local and though it may not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . irrespective of whether such effect . . . [has] been defined as ‘direct’ or ‘indirect.’” Id.
\item \textsuperscript{144} Perez v. United States, 402 U.S. 146 (1971).
\item \textsuperscript{145} See 18 U.S.C. § 891 (2000).
\item \textsuperscript{146} Perez, 402 U.S. at 147. The statute included extortionate transactions that occurred interstate and intrastate. Id. at 148 n.1.
\item \textsuperscript{147} Id. at 148. The prosecution introduced testimony from two witnesses claiming that Perez loaned money and then used violence to encourage repayment. Id.
\item \textsuperscript{148} Id. at 154 (citing Maryland v. Wirtz, 392 U.S. 183 (1968)).
\item \textsuperscript{149} Id. at 155. Congress conducted several studies that showed that loan sharking took large amounts of money from America's poor and was commonly controlled by interstate crime syndicates. Id. at 155-56.
\item \textsuperscript{150} See Tribe, supra note 8, at 814; see also, e.g., Perez, 402 U.S. 146; Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941).
\item \textsuperscript{151} 379 U.S. 241. In Heart of Atlanta Motel, the owner and operator of a motel in Georgia—who refused to rent rooms to African Americans—challenged the constitutionality of Title II of the Civil Rights Act of 1964, which was enacted for the purpose of “eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations.” Id. at 245.
\item \textsuperscript{152} Id. at 258.
\end{itemize}
Congressional findings in determining whether the local operation of a motel would affect interstate commerce. The Court concluded that "[t]he commerce power invoked here . . . is a specific and plenary one [and] . . . [t]he only questions [for the Court] are: (1) whether Congress had a rational basis . . . and (2) if it had such a basis, whether the means . . . are reasonable and appropriate." Similar to *Heart of America Motel*, in *Katzenbach v. McClung*, the Court upheld the Civil Rights Act of 1964 under the Commerce Clause. The Court reasoned, "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."

By combining the "substantial effect" and "aggregation" principles and by relying on the Court’s deference to congressional findings, Congress enacted a wide range of legislation designed to deal with the social and economic problems of the twentieth century. The Court upheld legislation regulating civil rights and criminal law. However, as Professor Tribe pointed out, these principles "placed [the Court] in the increasingly untenable position of claiming the power to strike down invocations of the Commerce Clause, while at the same time applying a set of doctrines that made it virtually impossible actually to exercise this power."


By 1995, Congress’s power to regulate activities under the Commerce Clause appeared limitless. From 1937 to 1955 the Court did not strike

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153. *Id.* at 257. Specifically, the Court relied on congressional findings supporting the theory that racial discrimination would have a disruptive influence on interstate commerce. *Id.*

154. *Id.* at 259. The Court, quoting Chief Justice Marshall in *Gibbons*, stated that "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence [that] their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from its abuse." *Id.* at 255 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824)).

155. 379 U.S. 294.

156. *Id.* at 304. In *Katzenbach*, the owner and operator of a restaurant, Ollie McClung, Sr., sought to enjoin the enforcement of the Civil Rights Act, thereby allowing him to refuse service on the basis of race. *Id.* at 296.

157. *Id.* at 303–04. The Court concluded that Congress appropriately found that racial discrimination would have an adverse effect on interstate commerce. *Id.* at 304.

158. See *Tribe*, *supra* note 8, at 815.


162. *Id.* at 811–17.
down a single piece of legislation as an unconstitutional exercise of the commerce power.\textsuperscript{163} Chief Justice William H. Rehnquist was among a growing number of people who were unsettled by the federal government's broad authority over all activities.\textsuperscript{164} In previous decisions, Chief Justice Rehnquist expressed his discomfort with the New Deal expansion of the Commerce Clause.\textsuperscript{165} Chief Justice Rehnquist finally mobilized the Court in 1995 to rein in on Congress's commerce power.\textsuperscript{166}

In 1995, the Court, through Chief Justice Rehnquist, held that the Gun-Free School Zones Act of 1990 (GFSZA), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress's authority under the Commerce Clause.\textsuperscript{167} The Court recognized that Congress, pursuant to the Commerce Clause, had the authority to regulate "those activities that substantially affect interstate commerce."\textsuperscript{168} The Court, however, reaffirmed the idea that the commerce power must be subject to some "outer limits."\textsuperscript{169} Thus, the Court reformulated the rule for determining the scope of the commerce power according to the "substantial effects" test.\textsuperscript{170} "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."\textsuperscript{171} If the legislation "has nothing to do with 'commerce' or any sort of economic enterprise" and "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," then that activity is beyond congressional authority under the Commerce Clause.\textsuperscript{172} The GFSZA regulated an activity that was purely intrastate; there-

\textsuperscript{163} Id.
\textsuperscript{164} Id. at 817.
\textsuperscript{165} See Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring in judgment) (warning that "it would be a mistake to conclude that Congress's power to regulate pursuant to the Commerce Clause is unlimited"); see also United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).
\textsuperscript{166} See TRIBE, supra note 8, at 817.
\textsuperscript{167} United States v. Lopez, 514 U.S. 549, 551 (1995). The statute made it a crime to "possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (1990), amended by 18 U.S.C. § 922(q)(2)(A) (1996). The term "school zone" is defined as "in, or on the grounds of a . . . school" or "within a distance of 1,000 feet from the grounds of a . . . school." Id. § 921(a)(25).
\textsuperscript{168} Lopez, 514 U.S. at 558.
\textsuperscript{169} Id. at 557. The commerce power "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that . . . [it] would effectually obliterate the distinction between what is national and what is local . . . ." Id. (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).
\textsuperscript{170} See TRIBE, supra note 8, at 817-23.
\textsuperscript{171} Lopez, 514 U.S. at 560 (emphasis added). The Court reconciled this reformulation of the rule by showing that the Court's New Deal decisions relied on this economic distinction, at least through implication, when determining a federal statute's constitutionality. Id. at 559.
\textsuperscript{172} Id. at 560.
fore, to invoke the "substantial effects" and "aggregation" principles, the activity itself would have to be economic in nature. Because the possession of a firearm in a school zone was not an economic activity, the Court held that it was beyond Congress's constitutional authority under the Commerce Clause.

In addition, the GFSZA did not contain a jurisdictional element, which would limit its scope by requiring an explicit connection with interstate commerce. Nor were there any legislative or congressional committee findings to support Congress's determination that this activity, knowingly possessing a firearm in a school zone, would affect interstate commerce. In defense of the GFSZA, the government argued that this local activity could affect interstate commerce. The government argued that violent crime related to the possession of a gun near a classroom would affect the economy by (1) raising the costs of insurance, which would be spread throughout the population, and (2) discouraging tourism. The Court, however, refused to adopt the Government's contention. The majority concluded by stating the following:

173. Id.
174. Id. at 567. The Court reasoned that if the possession of a firearm in a school zone was "economic," then it would be difficult to exclude federal authority over any area of activity. Id. The Court admitted that the ultimate determination of whether an intrastate activity was economic or non-economic would create uncertainty in the law. Id. at 566. In his dissent, Justice Breyer articulated three instances in which gun-related violent crimes near a school could create an economic threat. Id. at 623 (Breyer, J., dissenting). These threats could bring about a decline in the quality of education, which would produce "inadequately educated workers" and a work force unprepared for the challenges of expanding technologies. Id.
175. Id. at 562. "[A] 'jurisdictional element,' the term used to refer to a statutory clause (such as 'in or affecting interstate commerce') . . . limits [a] statute to those instances [in which] the . . . possession is shown to be related to interstate commerce." United States v. Rybar, 103 F.3d 273, 285 (3d Cir. 1996). Subsequent to the Court's decision in Lopez, the statute was amended to include a jurisdictional element. See 18 U.S.C. § 922(q)(2)(A) (2000). The federal statute now reads as follows: "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." Id.
176. Lopez, 514 U.S. at 562. "While 'Congress normally is not required to make formal findings . . .,' the existence of such findings may 'enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.' United States v. Morrison, 529 U.S. 598, 612 (2000) (citing Lopez, 514 U.S. at 563) (citations omitted).
177. Lopez, 514 U.S. at 563–64.
178. Id.
179. Id. at 567. "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." Id.
Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these [prior] opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. 180

The Court further limited congressional power in 2000 when it held that the Violence Against Women Act of 1994 (VAWA), 181 which was designed to provide a civil remedy for victims of gender-based violence, exceeded Congress’s authority under the Commerce Clause. 182 The Court, following Lopez, held that “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” 183 Therefore, the Court “reject[ed] the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” 184

In addition, VAWA, like the GFSZA in Lopez, lacked a jurisdictional element; however, unlike Lopez, Congress provided extensive findings regarding the activities’ effect on interstate commerce. 185 The Court, based on the same concerns as expressed in Lopez, reasoned that these findings, if accepted, “would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.” 186 Thus, the Court rejected the “but-for” causal chain that Congress used to reach its conclusions as expressed in the congressional findings. 187

180. Id. (citations omitted).
181. 42 U.S.C. § 13981 (2000), held unconstitutional by Morrison v. State, 529 U.S. 598 (2000). The statute provided a civil remedy against “[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).” Id. § 13981(c). Under subsection (b), “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.” Id. § 13981(b).
182. Morrison, 529 U.S. at 598; see also JOST, supra note 7.
183. Morrison, 529 U.S. at 610 (citing Lopez, 514 U.S. at 560).
184. Id. at 617.
185. Id. at 613–14. Congress found that gender-based violence impacted interstate commerce by (1) discouraging potential victims from traveling, (2) increasing medical and insurance costs, (3) discouraging interstate employment, and (4) decreasing the supply and demand of interstate products. Id. at 615.
186. Id. at 615.
187. Id. If the Court accepted these findings, “Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority.” Id.
IV. REASONING

On June 6, 2005, Justice Stevens delivered the opinion of the Court, which upheld the constitutionality of Congress’s authority to prohibit the local cultivation and use of marijuana as permitted by California law.\textsuperscript{188} Justices Kennedy, Souter, Ginsburg, and Breyer joined in the opinion.\textsuperscript{189} Justice Scalia filed a separate opinion in which he concurred in the majority’s judgment.\textsuperscript{190} On the other hand, Justice O’Connor filed a dissenting opinion, in which Chief Justice Rehnquist joined, and Justice Thomas joined as to all but Part III.\textsuperscript{191} In addition, Justice Thomas filed a separate dissenting opinion.\textsuperscript{192}

The following section explores the reasoning of the Court.\textsuperscript{193} The first subsection focuses on the majority opinion, including both Justice Steven’s majority opinion and Justice Scalia’s concurring opinion.\textsuperscript{194} The second subsection focuses on the dissenting opinions of Justices O’Connor and Thomas.\textsuperscript{195}

A. Majority

1. Justice Stevens’s Majority Opinion

The majority framed the underlying issue in \textit{Gonzales v. Raich} as whether Congress exceeded its authority under the Commerce Clause when it prohibited the local use and cultivation of marijuana in compliance with state law.\textsuperscript{196} Initially, the majority traced the history of drug enforcement and, in particular, the regulation of marijuana in the United States.\textsuperscript{197} The majority then discussed the passage of the CSA and the subsequent classification of marijuana as a Schedule I controlled substance.\textsuperscript{198} The Court noted the unsuccessful legal and legislative campaign to reclassify marijuana as a Schedule II substance.\textsuperscript{199}

\begin{itemize}
\item \textsuperscript{188} Gonzales v. Raich, 545 U.S. 1, 5 (\textit{Raich IV}).
\item \textsuperscript{189} \textit{Id.} at 4.
\item \textsuperscript{190} \textit{Id.} at 33–42 (Scalia, J., concurring).
\item \textsuperscript{191} \textit{Id.} at 42–57 (O’Connor, J., dissenting).
\item \textsuperscript{192} \textit{Id.} at 57–74 (Thomas, J., dissenting).
\item \textsuperscript{193} See infra Part IV.A.–B.
\item \textsuperscript{194} See infra Part IV.A.
\item \textsuperscript{195} See infra Part IV.B.
\item \textsuperscript{196} \textit{Raich IV}, 545 U.S. at 5, 9. The majority recognized the seriousness of the Respondents’ conditions but stated that “[w]ell-settled law controls [the Court’s] answer.” \textit{Id.} at 9.
\item \textsuperscript{197} \textit{Id.} at 10–12. Marijuana was first regulated by taxation, and the possession of marijuana was not completely prohibited until the enactment of the CSA. \textit{Id.} at 11–14.
\item \textsuperscript{198} \textit{Id.} at 12–15.
\item \textsuperscript{199} \textit{Id.} at 15 n.23.
\end{itemize}
After summarizing the history of the CSA, the majority discussed the Respondents' challenge, which was characterized as "quite limited."\(^{200}\) The Respondents did not dispute the passage of the entire CSA or any section thereof as an unconstitutional exercise of Congress's commerce power, but rather, they argued that the prohibition of marijuana as applied to the purely local cultivation and possession, pursuant to California law, exceeded Congressional authority under the Commerce Clause.\(^{201}\) After articulating the Respondents' argument, the majority traced the history of Commerce Clause jurisprudence, focusing on those cases that implicated Congress's authority to regulate activities that substantially affect interstate commerce.\(^{202}\)

a. *Wickard v. Filburn*

The majority's analysis focused on an earlier decision, *Wickard v. Filburn,*\(^{203}\) referring to it as being of "particular relevance."\(^{204}\) After briefly summarizing the facts, the majority stated that *Wickard* "establishes that Congress can regulate purely intrastate activity that is not itself 'commercial' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."\(^{205}\) The Court also recognized its adoption of the "aggregation principle" in *Wickard.*\(^{206}\) Next, the majority compared the *Raich* facts with *Wickard,* concluding that the cases' similarities were almost indistinguishable.\(^{207}\) For example, like the farmer in *Wickard,* respondents cultivated a fungible commodity that had an established interstate market, and, in addition, Congress designed both of the federal statutes to regulate the supply and demand of that commodity.\(^{208}\) Also, in both situations, Congress had a rational basis to believe that intrastate cultivation, when viewed in the aggregate, could have a substantial influence on interstate market conditions and prices.\(^{209}\) Like *Wickard,* the high demand and rising prices of the commodity, be it wheat or marijuana, could draw the commodity into the interstate market, and, in the

\(^{200}\) Id. at 15.

\(^{201}\) Id.

\(^{202}\) *Raich IV,* 545 U.S. at 13–18. For a survey of Commerce Clause jurisprudence, see *supra* Part IV.

\(^{203}\) *317 U.S. 111* (1942).

\(^{204}\) *Raich IV,* 545 U.S. at 17.

\(^{205}\) Id. at 18. The Court in *Wickard* upheld the regulation of wheat production, despite the argument that this production was not intended for commerce, but instead, was completely local in nature. *Id.* For a more detailed description of the facts, see *supra* Part III.

\(^{206}\) See *id.* at 18.

\(^{207}\) *Id.* at 18–19.

\(^{208}\) *Id.*

\(^{209}\) *Id.* at 19.
alternative, the use of marijuana for medicinal purposes could frustrate the goal of eliminating the interstate market of marijuana in its entirety.\textsuperscript{210}

Next, the majority addressed the Respondents' argument that \textit{Wickard} could be distinguished because (1) the federal statute in \textit{Wickard} provided an exclusion, (2) the production of wheat, unlike the Respondents' use of marijuana, was commercial in nature, and (3) Congress made specific findings in \textit{Wickard}, concluding that the aggregation of wheat would have a significant impact on the market.\textsuperscript{211} The Court dispensed with each of the respondents' claims.\textsuperscript{212} First, it pointed out that the exemption for smaller farmers did not play a role in the Court's decision in \textit{Wickard}.\textsuperscript{213} Second, although \textit{Wickard} involved a commercial farmer, the Court was asked to address the home consumption of wheat; thus, the Court did not treat the home production as a commercial operation.\textsuperscript{214} Finally, the congressional findings as expressed in the CSA were "fully comparable" to those congressional findings expressed in \textit{Wickard}.\textsuperscript{215} The Court's role is not to determine whether an activity substantially affects interstate commerce but, instead, to determine whether there was a "rational basis" for so concluding.\textsuperscript{216} Because of the enforcement difficulties and the possibility that the marijuana could be diverted into illicit channels, the majority held that Congress had a "rational basis" for believing that the regulation of the intrastate cultivation would be necessary to effectuate the goals of prohibiting the interstate distribution and possession of marijuana.\textsuperscript{217} It concluded that, like in \textit{Wickard}, Congress acted within its authority to "make laws which shall be necessary and proper" to "regulate Commerce . . . among the several states" when it enacted a comprehensive regulatory scheme that also encompasses some purely intrastate activities.\textsuperscript{218}

\begin{itemize}
  \item[b.] The \textit{Lopez} and \textit{Morrison} decisions
\end{itemize}

Next, Justice Stevens analyzed the Respondents' reliance upon the Court's recent decisions establishing limits on Congress's authority under

\begin{footnotes}
\footnotetext{210}{Raich \textit{iv}, 545 U.S. at 19. For a comparison of the \textit{Wickard} findings, see supra note 141.}
\footnotetext{211}{\textit{Id.} at 20.}
\footnotetext{212}{\textit{Id.} at 20–21.}
\footnotetext{213}{\textit{Id.} at 20.}
\footnotetext{214}{\textit{Id.}}
\footnotetext{215}{\textit{Id.} at 20–21.}
\footnotetext{217}{\textit{Id.}}
\footnotetext{218}{\textit{Id.}}
\end{footnotes}
the Commerce Clause. Justice Stevens pointed out two flaws in their argument: (1) Respondents failed to recognize that the recent Commerce Clause jurisprudence preserved earlier decisions, and (2) even if recent Court decisions overruled prior case law, the Respondents read those decisions too broadly.

First, the majority distinguished both *Lopez* and *Morrison* because in those cases the parties asserted that the entire statute or provision fell outside Congress's commerce power, as opposed to Respondents in *Raich* who argued that their specific class of activity should be excluded as beyond Congress's commerce power. Next, the majority pointed out several factors that distinguished the *Lopez* holding. The Gun-Free School Zones Act of 1990 was a brief, single-subject statute that did not regulate an economic activity and was not based on any congressional findings. On the opposite end of the legislative spectrum was the CSA, which was part of a larger regulatory scheme that regulated an economic activity that was supported by numerous congressional findings.

For similar reasons, the Court distinguished *Morrison* from the present case. In particular, unlike *Morrison* and *Lopez*, the majority characterized the CSA as "quintessentially economic." It referred to the dictionary and defined "economic" as "the production, distribution, and consumption of commodities." Because the CSA regulates the production, distribution, and consumption of substances that have an established interstate market, the majority held that prohibiting the intrastate cultivation or possession was a rational means of regulating the commerce of that product. "Because the CSA is a statute that directly regulates economic, commercial activity, [the Court's] opinion in *Morrison* casts no doubt on its constitutionality."


220. *Id.*

221. *Id.* The majority found this distinction of particular importance because the Court has often held that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* (citing *Perez*, 402 U.S. at 154).

222. *Raich IV*, 545 U.S. at 23–25.

223. *Id.* at 23.

224. *Id.* at 24.

225. *Id.* at 25. Unlike the CSA, the Violence Against Women Act of 1994 depended on state law and did not relate to an economic activity. *Id.*

226. *Id.*


229. *Id.*
c. The "separate and distinct" argument

Next, the majority critiqued the Ninth Circuit's conclusion that, as a "separate and distinct" class of activities, the private cultivation and use of marijuana for medicinal purposes was beyond the reach of federal power under the Commerce Clause. The Court disagreed and concluded that Congress acted rationally in determining that the use of medicinal marijuana was part of a larger regulatory scheme. This determination was rational for a number of reasons: (1) the advice of a physician was irrelevant because Congress had expressly found that marijuana had no medicinal uses; (2) the exemption for medicinal marijuana would only increase the supply; (3) there existed a danger of an excess in supply, which at some point could be used to satisfy recreational demands; (4) the Compassionate Use Act is too broad and provided physicians with an economic incentive to recommend marijuana use; and (5) a criminal could take advantage of the system. Furthermore, it would be impossible for this local activity to remain sealed off from the larger interstate marijuana market.

Next, the majority discussed Justice O'Connor's argument that medicinal marijuana should be distinguished from non-medicinal marijuana and treated as a separate class of activity. The Court concluded, however, that if it labeled the personal cultivation and use of marijuana as beyond the "outer limits" of congressional authority, then this rationale could extend to all locally produced and consumed controlled substances. This rationale would undermine the entire regulatory scheme. Additionally, the majority concluded that Respondents' use of marijuana "in accordance with state law" could not act, consistent with the Supremacy Clause, as a limitation on congressional reach.

In conclusion, the majority presented the Respondents with two alternative avenues of relief. First, the Respondents could seek to reclassify marijuana as a Schedule II drug, pursuant to the CSA, thereby authorizing

230. Id. at 26–27. The Ninth Circuit Court of Appeals defined the Respondents' activities as "the intrastate, noncommercial cultivation, possession[,] and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." Id. at 26 (citing Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003)).
231. Id. at 26–27.
232. Id.
233. Id. at 27–29, 31.
234. Raich IV, 545 U.S. at 30.
235. Id. at 28.
236. Id.
237. Id.
238. Id. at 29. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." Id.
239. Id. at 33.
the medicinal use of marijuana.\textsuperscript{240} Second, instead of seeking judicial remedies, Respondents could rely on the democratic process to effectuate their desired use of medicinal marijuana.\textsuperscript{241}

2. Justice Scalia's Concurring Opinion

Justice Scalia, in his concurring opinion, agreed with the majority opinion but wrote separately to better articulate the doctrinal foundation of the Commerce Clause.\textsuperscript{242} Justice Scalia recognized the three broad categories that permit congressional regulation under the Commerce Clause.\textsuperscript{243} Focusing on the "substantial effects" category, Justice Scalia noted that the power to regulate an intrastate activity does not come from the Commerce Clause alone but, instead, must also be derived from the Necessary and Proper Clause.\textsuperscript{244} Prior case law had permitted federal regulation of intrastate activities that are necessary and proper for the regulation of interstate activities in two circumstances: Congress can devise rules (1) that govern commerce between states and (2) that aid interstate commerce by dispensing with potential obstructions.\textsuperscript{245} The Court limited the "substantial effects" test by recent decisions that rejected Congress's power to regulate intrastate activity that was non-economic in nature and that required multiple inferences to show the activity's effect on interstate commerce.\textsuperscript{246} Under Lopez, if the activity is non-economic, it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."\textsuperscript{247} Justice Scalia concluded that in the event an activity falls within a more general regulatory scheme, the question for the Court is "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."\textsuperscript{248}

\textsuperscript{240} Raich \textit{IV}, 545 U.S. at 33. Section 811 of the CSA gives the Attorney General, after consultation with the Secretary of Health and Human Services, the authority to add, remove, or reclassify substances within the schedules. 21 U.S.C. § 811 (2000).

\textsuperscript{241} Id.

\textsuperscript{242} Id. (Scalia, J., concurring).

\textsuperscript{243} Id. at 33–34. The three categories include the following: (1) the channels of commerce, (2) the instrumentalities of commerce, and (3) those "activities that substantially affect" interstate commerce. Id. (citing Perez v. United States, 402 U.S. 146 (1971)).

\textsuperscript{244} Id. at 34. For Justice Scalia's application of the Necessary and Proper Clause, see \textit{infra} Part IV.A.2.b.

\textsuperscript{245} Raich \textit{IV}, 545 U.S. at 35.

\textsuperscript{246} Id. at 35–36. Justice Scalia was referring to the recent decisions of Lopez and Morrison. Id.

\textsuperscript{247} Id. at 36 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

\textsuperscript{248} Id. at 37 (citations omitted).
a. Distinguishing *Lopez* and *Morrison*

Justice Scalia disagreed with the dissents' contention that the Court has limited *Lopez* and *Morrison* to "little more than a drafting guide."²⁴⁹ *Lopez* and *Morrison* affirmed the distinction that Congress may not regulate purely intrastate activities based on attenuated effects on interstate markets.²⁵⁰ Neither decision, however, involved Congress's power to regulate intrastate activity pursuant to a broad, comprehensive regulatory scheme.²⁵¹

b. Application of the Necessary and Proper Clause

Under Justice Scalia's doctrinal approach, intrastate activities that were not themselves part of interstate commerce could be regulated by Congress pursuant to the Necessary and Proper Clause.²⁵² The Necessary and Proper Clause requires the Court to apply a two-part test.²⁵³ First, the means chosen by Congress must be "appropriate" and "plainly adapted" to the legitimate end.²⁵⁴ Second, the means employed by Congress cannot violate any other right guaranteed by the Constitution.²⁵⁵ Justice Scalia characterized the application of the Necessary and Proper Clause to the Respondents' activities as "straightforward."²⁵⁶ Justice Scalia concluded that the prohibition on the intrastate use of medicinal marijuana was an appropriate and plainly adapted means of attaining the legitimate goal of the general eradication of marijuana in the interstate market because it would be virtually impossible to distinguish between controlled substances produced intrastate and controlled substances produced interstate.²⁵⁷ In addition, Justice Scalia pointed out that the regulation of the intrastate use of medicinal marijuana would not violate any other right guaranteed by the Constitution.²⁵⁸

²⁴⁹. *Id.* at 38.
²⁵⁰. *Id.*
²⁵². *Id.* at 34–35. Unlike the majority, Justice Scalia argued that under the authority of the Necessary and Proper Clause, Congress could regulate an intrastate activity that did not substantially affect interstate commerce. *Id.*
²⁵³. *Id.* at 39; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
²⁵⁵. *Id.*
²⁵⁶. *Id.*
²⁵⁷. *Id.* at 39–41.
²⁵⁸. *Id.* at 41.
B. Dissent

1. Justice O'Connor's Dissenting Opinion

Justice O'Connor was concerned about the "outer limits" of the Commerce Clause, not for its own sake, but for the sake of protecting state sovereignty from expanding federal control.\textsuperscript{259} Justice O'Connor believed that this case signified the role of states as laboratories.\textsuperscript{260} Quoting Justice Louis D. Brandeis, Justice O'Connor wrote, "a single courageous State may, if its citizens choose, serve as a laboratory[,] and try novel and social and economic experiments without risk to the rest of the country."\textsuperscript{261} After discussing her initial concerns about federalism, Justice O'Connor examined the Court's holding in \textit{Lopez}.\textsuperscript{262} To Justice O'Connor, the \textit{Lopez} decision rested on four factors.\textsuperscript{263} First, the Court recognized that federal regulation of economic activity had generally been upheld under the "substantial effects" test, but in the case of non-economic activities, the "substantial effects" test did not apply.\textsuperscript{264} Second, the legislation in \textit{Lopez} did not have a jurisdictional element to limit its impact to interstate commerce.\textsuperscript{265} Third, the Court in \textit{Lopez} recognized the importance of congressional findings.\textsuperscript{266} Finally, the Court rejected congressional findings that were too attenuated.\textsuperscript{267} Justice O'Connor concluded that these factors were indistinguishable from \textit{Raich}.\textsuperscript{268}

a. Comprehensive regulatory scheme

Initially, Justice O'Connor pointed out that the majority relied on two facts when it upheld the CSA.\textsuperscript{269} First, Congress chose to create a single, comprehensive act regulating all controlled substances, and, second, Congress chose not to distinguish between the interstate and intrastate cultivation, possession, and use of marijuana.\textsuperscript{270} Justice O'Connor expressed con-

\begin{itemize}
  \item \textsuperscript{259} \textit{Id.} at 42 (O'Connor, J., dissenting).
  \item \textsuperscript{260} \textit{Raich IV}, 545 U.S. at 42.
  \item \textsuperscript{261} \textit{Id.} (quoting New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting)).
  \item \textsuperscript{262} \textit{Id.} at 43–44.
  \item \textsuperscript{263} \textit{Id.} at 44.
  \item \textsuperscript{264} \textit{Id.}
  \item \textsuperscript{265} \textit{Id.}
  \item \textsuperscript{266} \textit{Raich IV}, 545 U.S. at 44.
  \item \textsuperscript{267} \textit{Id.} at 44–45.
  \item \textsuperscript{268} \textit{Id.} at 45.
  \item \textsuperscript{269} \textit{Id.}
  \item \textsuperscript{270} \textit{Id.}
\end{itemize}
cern with the majority's approval of an all-encompassing statute, which effectively removed any meaningful limits on the Commerce Clause. For example, the majority distinguished Lopez on the ground that one statute was brief and the other was comprehensive. By making this distinction, Justice O'Connor described the Lopez decision as "nothing more than a drafting guide." Justice O'Connor concluded that the Court must establish "objective markers" to confine Congress's reach under the commerce power and protect the notion of enumerated powers. One such "objective marker" could be to distinguish the medical and non-medical uses of drugs as distinct and separate activities. Thus, Justice O'Connor focused on the local cultivation, possession, and use of marijuana for medical purposes as a distinguishable activity under the CSA.

b. Substantial effects test

Once Justice O'Connor defined the relevant activity, she focused on whether the activity was "economic" and, in the aggregate, whether it substantially affected interstate commerce. Justice O'Connor argued that the local use of medicinal marijuana was not an economic activity, and, even if it were, the activity does not substantially affect interstate commerce. Justice O'Connor opposed the majority's broad definition of "economic activity." The majority's definition "draw[s] no line at all," and would include everything as economic. Justice O'Connor relied on Lopez and Morrison, which suggested that economic activity should be limited to commercial activity. This is of particular importance because both the Government and Respondents agreed that the marijuana and the supplies to grow it were

271. Id.
272. Raich IV, 545 U.S. at 45-46.
273. Id. at 46. Justice O'Connor even suggested that, in Lopez, if Congress would have described the crime as "transfer or possession of a firearm anywhere in the nation," according to the majority's decision, the statute would have been upheld. Id.
274. 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.
275. Id. at 48.
276. Id.
277. Id. at 49.
278. Raich IV, 545 U.S. at 49.
279. Id. Justice O'Connor stated that the "Court uses a dictionary definition . . . to skirt the real problem of drawing a meaningful line between 'what is national and what is local.'" Id. (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).
280. Id. at 50.
281. Id.
never in the stream of commerce. Justice O'Connor concluded by pointing out that *Lopez* made it clear that possession, by itself, is not commerce.

Even if the majority correctly determined that the private cultivation of marijuana for medicinal purposes was economic, Justice O'Connor pointed to the absence of congressional findings regarding whether such activity substantially affected interstate commerce. Justice O'Connor claimed that any attempt by Congress to invade traditional states' rights should be specifically justified. In response to the majority's argument about the impact of the Compassionate Use Act on interstate commerce, Justice O'Connor admitted that these arguments were plausible but, without evidence, were merely conclusory statements.

c. Distinguishing *Wickard*

Next, Justice O'Connor distinguished the Court's holding in *Wickard*. First, Justice O'Connor contrasted the CSA's "limitless assertion of power" with the statute in *Wickard*, which exempted some small-scale, non-commercial wheat farming. Justice O'Connor concluded that, contrary to the majority's opinion, the Court in *Wickard* did not assert that all production of wheat, no matter how small in scale, would be considered economic and, therefore, within Congress's reach. Additionally, contrary to the majority, the Court in *Wickard* examined the actual effect of locally cultivated commodities on the interstate market. In *Wickard*, as opposed to the present case, there was specific evidence of the activities' substantial effect on interstate commerce. Finally, despite the majority's claim that the congressional findings were similar in both cases, Justice O'Connor disagreed and characterized the congressional findings in the CSA as "bare declarations" that were "too vague and unspecific."

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282. *Id.*
283. *Id.*
284. *Raich IV*, 545 U.S. at 51.
285. *Id.* at 52.
286. *Id.* at 53-54. The majority argued that the California statute could (1) be exploited by criminals, (2) promote overproduction, or (3) lead to difficulties in law enforcement. *Id.* at 56-57.
287. *Id.* at 53-57. Justice O'Connor noted that the decision in *Wickard* has been characterized as "perhaps the most far reaching example of Commerce Clause authority over intra-state activity." *Id.* at 51 (citing United States v. *Lopez*, 514 U.S. 549, 560 (1995)).
288. *Id.*
289. *Raich IV*, 545 U.S. at 51.
290. *Id.* at 53.
291. *Id.*
292. *Id.*
293. *Id.* at 54, 55. "They amount to nothing more than legislative insistence that the regulation of controlled substances must be absolute." *Id.* at 54.
2. Justice Thomas's Dissenting Opinion

Like Justice O'Connor, Justice Thomas stated that if the commerce power could regulate the Respondents' marijuana, "then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers." Justice Thomas defined the local cultivation and consumption of medicinal marijuana as neither "commercial" nor "necessary and proper" for carrying out Congress's restriction on the interstate drug trade.

a. Traditional notions of commerce

Initially, Justice Thomas distinguished the Respondents' activities from the Court's traditional notions of commerce. Justice Thomas noted that the text, structure, and history of the Constitution suggest that the term "commerce" meant selling, buying, bartering, or transporting commodities. Respondents had not bought or sold marijuana, nor had they ever crossed state lines. Thus, according to Justice Thomas, the Respondents' specific activities could not be defined as "commerce." Furthermore, because the CSA completely bans the possession or manufacture of controlled substances, including those activities that are purely intrastate in nature, Justice Thomas concluded that the CSA exceeded congressional authority under the Commerce Clause as applied to the Respondents' conduct.

b. The Necessary and Proper Clause

Justice Thomas then considered whether Congress had the power to enact laws that were "necessary and proper" for carrying into execution Congress's authority to regulate the drug trade. To invoke the Necessary and Proper Clause, Congress must meet a two-part test that requires (1) that the means be "appropriate" and "plainly adapted" to a legitimate, enumerated power and (2) that the means cannot be "prohibited" by the Constitution.

294. Id. at 57–58 (Thomas, J., dissenting).
295. Id. at 58.
296. Raich IV, 545 U.S. at 58–59.
297. Id. at 58.
298. Id. at 59.
299. Id.
300. Id.
301. Id. at 59–60.
302. Raich IV, 545 U.S. at 60.
First, Justice Thomas addressed whether the means were "plainly adapted" to the regulation of drug trafficking. Justice Thomas concluded that the means had to be more than reasonable, to wit, "there must be an, obvious, simple, and direct relation' between the intrastate ban and the regulation of interstate commerce." Justice Thomas admitted that, on its face, the ban of intrastate cultivation and possession was plainly adapted to stopping the flow of marijuana across state lines. Justice Thomas, however, argued that the Respondents, as medical marijuana users, were part of a separate and distinct class that was readily distinguishable under the CSA. Justice Thomas relied on the specific provisions of the Compassionate Use Act to distinguish Respondents' conduct from that of the ordinary intrastate cultivators and users. Furthermore, Congress did not present any evidence supporting its claim that the regulation of purely intrastate possession by medicinal users could impact the interstate drug trade. In sum, Congress did not show that the regulation of Respondents' activities was a necessary means of effectuating its legitimate end of eradicating the interstate drug trade.

Second, Justice Thomas examined whether the application of the CSA to Respondents' activities would violate another right implicit within the Constitution. Justice Thomas determined that the use of the Necessary and Proper Clause to regulate purely intrastate, non-commercial activities would confer on Congress a "police power" over the states. Additionally, Congress should not be able to use the Necessary and Proper Clause to "subvert basic principles of federalism and dual sovereignty." Thus, Justice Thomas concluded that the regulation of locally cultivated marijuana for medical purposes would encroach on the traditional state "police power."

303. Id. at 61.
304. Id. (citing Sabri v. United States, 541 U.S. 600 (2004) (Thomas, J., concurring)).  
305. Id.  
306. Id. at 61–62. Justice Thomas reframed the question as "[W]hether the intrastate ban is 'necessary and proper' as applied to medical marijuana users like respondents." Id. at 61.  
307. Id. at 62. Contrary to the majority, Justice Thomas argued that there was no reason to believe that the Compassionate Use Act would not provide adequate limitations and safeguards for the medicinal use of marijuana. Id. at 63.  
308. Raich IV, 545 U.S. at 64.  
309. Id.  
310. Id. at 64–65.  
311. Id. at 65.  
312. Id.  
313. Id. at 66.
c. Addressing the majority’s opinion

Justice Thomas then addressed what he considered "fundamental flaws" in the majority’s reasoning. First, Justice Thomas described the majority’s use of the “substantial effects” test as “rootless.” By expanding the relevant activities, the majority established a malleable rule that defined a class of activities in a general way, thereby avoiding whether a particular activity substantially affects interstate commerce. Second, by defining economic activity in its broadest sense, Justice Thomas contended that the majority evaded “even that modest restriction on federal power” that held that Congress could not regulate non-economic activity that substantially affects interstate commerce. Justice Thomas asserted that the majority’s attempt to circumvent even the narrowest of limitations made a mockery of Madison’s assurance that the federal authority is “few and defined,” “while those of the States are ‘numerous and indefinite.” Justice Thomas concluded that the only way to establish some stability in the area of Commerce Clause jurisprudence would be to reformulate a new definition of “Commerce . . . among the several States.”

V. SIGNIFICANCE

The impact of the Supreme Court’s decision in Gonzales v. Raich can be characterized as two-fold. First and foremost, the decision casts doubt on the notion that Lopez initiated a broad shift in Commerce Clause jurisprudence. Second, the decision ratified the continued federal prosecution of people who, through the democratic process, voted to enact state legislation authorizing the limited use of marijuana.

314. Raich IV, 545 U.S. at 67.
315. Id.
316. Id. at 67–68. According to Justice Thomas, the appropriate question “is whether Congress’s legislation is essential to the regulation of interstate commerce itself” and “not whether the legislation extends only to economic activities that substantially affect interstate commerce.” Id.
317. Id. at 68–69.
318. Id. at 69 (citing The Federalist No. 45, at 313 (J. Madison)).
319. Id. at 71. Justice Thomas suggested the following definition: “Congress may regulate interstate commerce—not things that affect it, even when summed together, unless truly ‘necessary and proper’ to regulating interstate commerce.” Id.
320. Readers questioning the importance of this issue need look no further than the odd blend of progressive and conservative states filing amicus briefs on behalf of the Respondents. See Brief of the States of Alabama, Louisiana, and Mississippi as Amici Curiae in Support of Respondents, Ashcroft v. Raich, 545 U.S. 1 (2005) (No. 03-1454); Brief of the States of California, Maryland, and Washington as Amici Curiae in Support of Angel McClary Raich, et al., Ashcroft v. Raich, 545 U.S. 1 (2005) (No. 03-1454).
This section first examines the impact of Raich on Lopez and the Court's recent attempt to rely on principles of federalism to reestablish some limitation on the scope of the Commerce Clause.\(^2\) Next, this section examines the impact of Raich on Angel Raich, Diane Monson, and the future of the state-authorized use of medicinal marijuana.\(^2\)

A. Lopez, Morrison, and the Federal Regulation of Intrastate Activities

"Was United States v. Lopez a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?"\(^3\) The Lopez decision has been characterized as "[a] hallmark of the Rehnquist Court... , resulting in decisions that demand[] a new respect for the sovereignty of the states and place[] corresponding restrictions on the powers of Congress."\(^4\) In Lopez, a five-justice majority applied federalism principles and established a new bright-line rule: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."\(^5\) But if the regulated activity is not commercial (or economic in nature)—and is not part of a larger regulatory scheme that is commercial itself—the legislation will be struck down as an unconstitutional exercise of the commerce power.\(^6\) For the first time since pre-New Deal jurisprudence, the Court interpreted the Commerce Clause in a way so as to preserve the delicate balance between "what is national and what is local."\(^7\) In 2000, the Court reaffirmed this rule, signifying the Court's intention to limit Congress's authority over those activities considered intrastate or local.\(^8\) Prior to Raich, however, the Court left two questions unanswered. What does "economic by nature" mean?\(^9\) And, how will the "substantial effects" test be applied to those activities that are not economic themselves but are part of a larger regulatory scheme?\(^10\) In answering

\(^{321}\) See infra Part V.A.
\(^{322}\) See infra Part V.B.
\(^{324}\) Greenhouse, supra note 10.
\(^{326}\) Id.
\(^{327}\) TRIBE, supra note 8, at 811–17.
\(^{328}\) Morrison, 521 U.S. at 610.
\(^{329}\) See Jennifer L. Wethington, Note, Violence Against Women Act’s Civil Rights Remedy Exceeds Congress’s Powers to Regulate Interstate Commerce, 23 U. ARK. LITTLE ROCK L. REV. 485, 508 (2001). The majority relied on the broadest interpretation of the word “economic,” which encompasses any activities that have an effect on commercial goods. Gonzales v. Raich, 545 U.S. 1, 49–50 (O’Connor, J., dissenting) (Raich IV).
\(^{330}\) Lopez, 514 U.S. at 560. The majority concluded that the classification of marijuana under the CSA was one of many “essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regul-
these two questions, the Raich decision has effectively undermined the so-called "federalism revolution," and as Justice O'Connor warned, the majority's interpretation of Lopez and Morrison will surely invite increased federal regulation.\footnote{Raich IV, 545 U.S. at 24. Thus, as long as Congress included the non-economic activity within its larger regulatory legislation, it can regulate an activity that is neither economic itself nor part of interstate commerce. See id.}

So the question becomes, what is left of Lopez and the so-called "federalism revolution?" The Court in Raich did not overrule Lopez, Morrison, or any of the prior Commerce Clause jurisprudence. Instead, the Court attempted to harmonize prior precedents with its holding in Raich. Despite the Court's continued adoption of the federalism-based limitation to the commerce power, the Court's interpretation significantly narrowed its application. First, the majority in Raich reaffirmed the rational basis standard.\footnote{Raich IV, 545 U.S. at 46–47 (O'Connor, J., dissenting).} Second, the Court interpreted Lopez in a way that effectively eviscerated its limitations.\footnote{Id. at 25–27.} For example, in response to the majority's interpretation of "economic," Justice O'Connor correctly stated that "[t]o draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic."\footnote{Id. at 50 (O'Connor, J., dissenting).} In the end, Lopez will likely become nothing more than a drafting guide for federal legislation, an example of how not to write a law.

\section*{B. Angel Raich, Diane Monson, and the Future of the Compassionate Use Acts}

The real victims of the Court's decision were Angel Raich, Diane Monson, and the citizens of the ten states that ratified the limited use of mari-
juana for medicinal purposes. For those suffering debilitating and life-threatening illnesses, this decision was more than a case about state sovereignty; it was about survival. Shortly after the decision came down, Angel Raich emphasized what was at stake by stating that "[i]f I did not use cannabis, I would die."  

Fortunately for these patients and many others like them, the Raich decision was relatively narrow. It addressed only the issue of whether Congress exceeded its authority under the Commerce Clause by prohibiting the intrastate cultivation and possession of marijuana. Thus, the Court’s holding in Raich did not address the preemption of the state statute, preserving the validity of the CSA. The Raich decision makes it clear that federal authorities can prosecute patients possessing and consuming marijuana for medicinal purposes, irrespective of a state statute authorizing the patients use. The CSA and similar statutes, however, will continue to protect patients against prosecution by state authorities. Robert Raich, Angel Raich’s husband and attorney, stated that patients using medical marijuana should “rest assured that it remains safe” because “[ninetynine] percent of marijuana arrests take place at the local level.”

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335. Tony Mauro, United States Supreme Court Roundup: Ruling in Medical Marijuana Case Marks Shift for States’ Rights, 180 N.J. L.J. 989 (2005). Although disappointed by the outcome, Angel Raich told reporters that the war was not over, and she planned to continue using marijuana. Id.

336. Raich IV, 545 U.S. at 5.

337. Marijuana Policy Project, In All 10 Medical Marijuana States, Officials Say “Nothing’s Changed” Since Gonzales v. Raich, available at http://www.mpp.org/raich/officials.html (last visited Nov. 14, 2005). Attorney Generals from all ten states authorizing the use of medicinal marijuana issued statements endorsing the opinion that Raich would not overrule state-initiated, medical-marijuana laws. Id.

338. Mauro, supra note 335. Similarly, Boston University law professor Randy Barnett stated that “[t]he ruling has absolutely nothing to do with the continued existence of the [CSA].” Id.

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