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Guns, Drugs, and. . . Federalism? - *Gonzales V. Raich* Enfeebles the Rehnquist Court's *Lopez-Morrison* Framework

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Guns, Drugs, and . . . Federalism? – *Gonzales v. Raich* Enfeebles the Rehnquist Court’s *Lopez-Morrison* Framework

DAVID L. LUCK*

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*The political process has not protected against these encroachments on state activities, even though they directly impinge on a State's ability to make and enforce its laws. With the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.**

I. INTRODUCTION

A. A Brief History of Commerce Clause Jurisprudence

In the late 1990s the United States Supreme Court handed down two significant decisions intended to restore the balance between congressional Commerce Clause legislation and state police power regulations – *United States v. Lopez*¹ and *United States v. Morrison*.² In *Morrison*, Chief Justice Rehnquist stated that the *Lopez-Morrison* framework provided the required analytical structure to address “substantial effects” Commerce Clause challenges.³ In spite of this precedent, Justice Stevens, writing for the majority in *Gonzales v. Raich* – a “substantial effects” case – declined to apply the *Lopez-Morrison* framework.⁴ Instead, Justice Stevens distinguished those cases on their facts.⁵ *Raich*, as part of a seemingly endless historic cycle, has again raised the question, “what does ‘federalism’ mean?” Some may dismiss that question as purely academic, but the answer is of considerable importance to advocates of a less centralized government.

Within the Commerce Clause context, many constitutional scholars divide Supreme Court decisions into distinct chronological-thematic eras. A general consensus recognizes three such eras, while some scholars recognize a fourth: (1) *Broad Commerce Power, but Largely Undefined* – Inception-1888; (2) *Narrowly Defined to Promote Laissez-Faire Capitalism* – 1888-1936; (3) *Broadly Defined to Further the New Deal* – 1937-1995; and (4) *Broadly Defined, but Somewhat Circumscribed to Foster Dual Federalism* – 1995-present.⁶ During the Third Era the

♦ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 587-88 (1985) (O'Connor, J., dissenting).

1. 514 U.S. 549 (1995).

2. 529 U.S. 598 (2000).

3. *Morrison*, 529 U.S. at 609 (“Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation [i.e. activities that substantially affect interstate commerce], it provides the proper framework for conducting the required analysis . . .”).

4. *Gonzales v. Raich*, 125 S. Ct. 2195, 2207-11 (2005).

5. *Id.*

6. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 163-225 (7th ed. 2004) (describing the three commerce eras and concluding that post-1995 the Rehnquist Court adopted a posture favoring both expanded state police power and a more narrowly tailored federal

Supreme Court largely declined to overturn congressional Commerce Clause legislation, even within the context of as-applied challenges.⁷ In the latter portion of this era, some Justices wondered whether any aspect of American life was beyond the commerce power's grasp.⁸ This near limitless Commerce Clause doctrine starkly contrasted with Alexander Hamilton and James Madison's prior assurances that, in ratifying the Constitution, the states were to retain a sphere of sovereignty.⁹

Those assurances, which appeared in the Federalist papers, were primarily intended to assuage the Anti-Federalists' concerns that the Constitution represented the destruction of individual liberty and state sovereignty.¹⁰ Madison and Hamilton undoubtedly contemplated a greater role for the states than that posited by Professor Wechsler in his famous thesis, wherein he argued that the judiciary should not intervene to define federalism's contours because the states' traditional functions are protected structurally by their participation in the national govern-

commerce power); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT 195-200* (Sanford Levinson ed., 4th ed. 2005) (recognizing the "potential for a sea change" posed by two Rehnquist Commerce Clause opinions – *United States v. Lopez* and *Unites States v. Morrison* – which could represent "the ultimate lesson that the willingness of President Franklin Roosevelt's justices to give Congress enhanced power was later matched by an equal determination of appointees of far more conservative Presidents to reign in the national government").

7. With the notable exception of *National League of Cities v. Usery*, 426 U.S. 833 (1976).

8. See, e.g., *Lopez*, 514 U.S. at 564-65 ("Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. Justice Breyer posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance. . . . For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a 'significant' effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant 'effect on classroom learning,' and that, in turn, has a substantial effect on interstate commerce." (internal citations omitted)).

9. THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) ("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. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."); THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.").

10. See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

ment.¹¹ In keeping with Wechsler's thesis, however, the Third Era Court did not recognize a sphere of state sovereignty that lay outside the bounds of the federal commerce power. Justice Stone made this abundantly clear in *United States v. Darby* when he stated,

[o]ur conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states *but a truism* that all is retained which has not been surrendered.¹²

The Burger Court attempted to reinstitute a balance between federal and state power in 1976 with *National League of Cities v. Usery*.¹³ The case involved the 1974 amendments to the Fair Labor Standards Act, which applied the Act's minimum wage and maximum hour provisions to public agencies, including the states.¹⁴ The opinion, authored by then Associate Justice William Rehnquist, reestablished the Tenth Amendment as an affirmative limit on Congress's commerce power.¹⁵ Justice Rehnquist conceived a system where the Tenth Amendment circumscribed congressional authority to regulate the "States Qua States."¹⁶ The practical effect of this limitation was to insulate state police power regulations from Commerce Clause interference.¹⁷ Justice Rehnquist

11. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (arguing that the Senate's representation structure – two senators per state, regardless of size – enables significant state participation in the national government, with the states "regarded as constituent and essential parts of the federal government" (quoting THE FEDERALIST No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961))).

12. *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (emphasis supplied).

13. 426 U.S. 833, 842-43 (1976).

14. *Id.* at 836-37.

15. *Id.* at 842-43 ("While the Tenth Amendment has been characterized as a truism, stating merely that all is retained which has not been surrendered, it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." (internal quotations and citations omitted)).

16. *Id.* at 854-55 (stating "we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States v. California*, simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty,' and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled." (internal citations omitted)).

17. *Id.* at 851-52 ("[F]ire prevention, police protection, sanitation, public health, and parks

established a dichotomy between traditional government functions and non-traditional government functions, demarcating the permissible extent of congressional Commerce Clause regulation regarding the states.¹⁸ When Congress attempted to regulate traditional state government functions, the Tenth Amendment acted as a bar, thereby safeguarding state sovereignty.¹⁹ *National League of Cities'* traditional government functions versus non-traditional government functions dichotomy, however, did not endure.

In 1985, the Burger Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.²⁰ *Garcia* involved yet another application of the Fair Labor Standards Act. A municipal mass transit authority asserted that the Act, as-applied, represented an interference with a traditional government function – municipal public transit.²¹ Justice Blackmun abandoned Justice Rehnquist's dichotomy as unworkable.²² Blackmun cited Professor Wechsler, with approval, for the proposition that the states' protection in our federal system is ensured primarily by their participation in the national government, rather than by any affirmative limits imposed by the Tenth Amendment.²³ The Court – despite vehement dissents by Justices Powell, Rehnquist, and O'Connor – rejected the proposition that the Tenth Amendment placed substantive limits on Congress's ability to apply the

and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. . . . We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.”).

18. *Id.*

19. *Id.* at 842-43 (“While the Tenth Amendment has been characterized as a ‘truism,’ stating merely that ‘all is retained which has not been surrendered,’ it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” (internal citations omitted)).

20. 469 U.S. 528 (1985).

21. *Id.* at 530-31.

22. *Id.* at 531 (“[T]he attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.”).

23. *Id.* at 550-51 (citing Professor Wechsler in support of the proposition that “[a]part from the limitation on federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”).

commerce power to the states.²⁴ Epitomizing the *Garcia* dissenters' concerns, Justice O'Connor stated:

[F]ederalism cannot be reduced to the weak essence distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in the realm of authority left open to them by the Constitution.²⁵

Justice Rehnquist posited the *Garcia* dissenters' other primary contention by stating in a thinly veiled jab at the majority that it was only a matter of time before the Court revived the *National League of Cities* dichotomy.²⁶

National League of Cities' revival of the Tenth Amendment as an affirmative limit on the commerce power, while brief, foreshadowed the eventual doctrinal developments in *Lopez*²⁷ and *Morrison*.²⁸ In those cases, the Rehnquist Court labored to articulate limits on Congress's commerce power that would ensure a "distinction between what is national and what is local," and avoid the creation of "a completely centralized government."²⁹ To accomplish that goal, the Court imposed a new doctrinal framework within a single Commerce Clause sub-context. Justice Rehnquist recognized that Congress may regulate interstate commerce within three areas: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.³⁰ Justice Rehnquist, however, created the new framework solely to address the third sphere of congressional commerce regulation – activities that substantially affect

24. *Id.* at 554 ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983))).

25. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (O'Connor, J., dissenting) (internal quotations omitted).

26. *Id.* (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.").

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

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

29. *Lopez*, 514 U.S. at 557; see *Morrison*, 529 U.S. at 608 ("Even [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the 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 to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" (quoting *Lopez*, 514 U.S. at 556-57)).

30. *Morrison*, 529 U.S. at 610-13.

interstate commerce.³¹ On one hand, the Third Era Court gave Congress the power to characterize nearly any regulatory matter as “substantially affecting” interstate commerce.³² On the other hand, the Rehnquist Court hoped the *Lopez-Morrison* framework, via a five-part analysis,³³ would restrict that virtually limitless power: (1) does the case involve “substantial effects” legislation; (2) if so, is the regulatory subject matter commercial or noncommercial; (3) is there a jurisdictional element ensuring a connection to interstate commerce; (4) are there congressional findings demonstrating a connection to interstate commerce; and (5) is the purported effect on interstate commerce attenuated – is it predicated upon an inference upon an inference?³⁴

National League of Cities, *Lopez*, and *Morrison* share the same intrinsic goal: to preserve a sphere of local activity as a domain for state action. That common thread led to a conflict in one of the Rehnquist Court’s final Commerce Clause cases, *Gonzales v. Raich*.³⁵ *Raich* exposed the *Lopez-Morrison* framework’s weaknesses and signaled the need for a more viable means to preserve even a modicum of local state sovereignty in the face of a broad commerce power.³⁶

B. *Organization & Objectives*

This Note will explore *Gonzales v. Raich*’s majority, concurring, and dissenting opinions, with an eye towards the inherent futility created by the majority’s conception of the *Lopez-Morrison* framework. This narrow conception permits Congress to unilaterally sculpt the bounds of state sovereignty and once again questions the Tenth Amendment’s significance. The framework that emerges is devoid of the protections necessary to ensure its primary goal – retaining a sphere of local state sovereignty to prevent “a completely centralized government.”³⁷

1. DOES RAICH MAKE SENSE?

In the remaining sections, I present the difficulties that arise when

31. *Id.*

32. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that a single farmer’s wheat, grown for personal consumption, substantially affected interstate commerce).

33. Courts applying the *Lopez-Morrison* Framework have explicitly identified four prongs – prongs (2)-(5) above. However, the threshold question these courts have inevitably asked before applying the framework is something along the lines of “is this a ‘substantial effects’ case?” Consequently, this Note addresses the *Lopez-Morrison* Framework as a five part analysis beginning with that threshold inquiry.

34. *Morrison*, 529 U.S. at 610-13.

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

36. This, of course, assumes that the Roberts Court will continue the Rehnquist Court’s tradition of extolling the virtues of state sovereignty and dual federalism.

37. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

one endeavors to harmonize *Raich* with the *Lopez-Morrison* framework. This exercise's ultimate objective is to suggest how the Court might craft a more effective standard to resolve disputes between federal and state regulation. Section II addresses the legal issues implicated by the Court's Commerce Clause analysis – with the definitive issue being whether the states may create a medical exception to the federal Controlled Substances Act, which would decriminalize the production and consumption of medical marijuana by state citizens who possess a valid recommendation from a state-licensed physician.³⁸ To provide an appropriate context for that issue, Subsection A includes a brief history of American marijuana regulation, along with a description of the federal Controlled Substances Act (“CSA”). Subsection B describes California's Compassionate Use Act (“CUA”) and its underlying impetus. Subsection C addresses the federal preemption issue created by the supposed CSA-CUA collision. Finally, Subsection D considers the Court's Third Era Commerce Clause jurisprudence, and the Rehnquist Court's subsequent attempt to limit its breadth.

Section III deconstructs *Raich* itself, including: Justice Stevens' majority opinion, Justice Scalia's concurrence, Justice O'Connor's dissent, and Justice Thomas' dissent. They are respectively addressed in subsections B, C, D, and E. Section IV, Subsection A, scrutinizes the disconnect between Justice Stevens' majority opinion and Chief Justice Rehnquist's *Lopez-Morrison* framework, while addressing the question of whether *Lopez* and *Morrison* are reconcilable with two influential Third Era decisions – *Wickard v. Filburn*³⁹ and *Maryland v. Wirtz*.⁴⁰ Subsection B discusses whether the states have any legal alternative to provide their seriously ill citizens with medical marijuana free of federal control.

Finally, subsection C contemplates a return to the *National League of Cities* dichotomy, thereby preventing congressional interference – via the Commerce Clause – with the states' traditional police powers. Section V acknowledges the Roberts Court's currently undefined federalism stance, but notes that if history is any guide, the Tenth Amendment will return as a limit on Congress's commerce power.

II. RAICH'S LEGAL ISSUES

A. *The Controlled Substances Act & Medical Marijuana*

Despite the modern stigma attached to marijuana use, marijuana

38. *Raich*, 125 S. Ct. at 2198.

39. 317 U.S. 111 (1942).

40. 392 U.S. 183 (1968).

has had a relatively brief history of outright criminalization in the United States.⁴¹ In fact, beginning in the 19th century Americans began using marijuana for medicinal purposes to treat such maladies as asthma, chronic bronchitis, convulsions, dysmenorrhea, gonorrhea, post partum psychosis, headaches, insomnia, lack of appetite, and rheumatic pain.⁴² Furthermore, marijuana remained in the United States pharmacopoeia until 1941.⁴³ During the late 1930s, increased social awareness of marijuana abuse encouraged many states to pass laws restricting its use and possession.⁴⁴

The Federal government joined the marijuana regulation menagerie with the Pure Foods and Drugs Act of 1906, therein specifying labeling and packaging requirements for over-the-counter cannabis medications.⁴⁵ However, the first major federal marijuana legislation was the 1937 Marijuana Tax Act (“1937 Act”), which outlawed marijuana’s use, save for medical purposes. In regulating marijuana’s medical usage, the 1937 Act erected a prohibitively expensive tax and penalty system, which discouraged doctors from writing marijuana prescriptions.⁴⁶

In 1969, President Nixon declared the “War on Drugs.”⁴⁷ At its heart was the Comprehensive Drug Abuse Prevention and Control Act

41. Deborah Garner, *Up In Smoke: The Medicinal Marijuana Debate*, 75 N. DAK. L. REV. 555, 556-58 (1999) (describing how marijuana was a legal, pharmacologically recognized drug in the United States until 1941).

42. *Id.* at n.26 (citing Gregg A. Bilz, Note, *The Medical Use of Marijuana: The Politics of Medicine*, 13 HAMLIN J. PUB. L. & POL’Y 117, 118 (1992); LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA: THE FORBIDDEN MEDICINE 5 (1993)).

43. K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 277-78 (2005) (“Marijuana had been listed in the United States Pharmacopoeia since 1850, and American doctors continued to prescribe it until 1937 when the paperwork and expense of complying with the Marijuana Tax Act made it prohibitive. By 1941, the National Formulary and Pharmacopoeia dropped marijuana from their listings.”).

44. Garner, *supra* note 41, at 558 (“On January 1, 1932, the Federal Bureau of Narcotics warned that marijuana had come into widespread and increasing abuse and encouraged the passage of rigid marijuana laws. By 1937, nearly every state had laws restricting marijuana. Under most of these laws, use of marijuana was subjected to the same penalties applicable to morphine, heroin, and cocaine, even though designating marijuana as a narcotic was technically incorrect.”).

45. Lauryn P. Gouldin, *Controlled Substance Law, Cannabis, Compassionate Use and the Commerce Clause: Why Developments in California May Limit the Constitutional Reach of the Federal Drug Laws*, 1999 ANN. SURV. AM. L. 471, 475 (1999) (“The first federal regulation of marijuana appeared in the Pure Food and Drug Act of 1906, which required, on all foods and over-the-counter medicines containing cannabis, clear labels specifying the quantity of cannabis contained.”).

46. *Id.* at 476.

47. Gonzales v. Raich, 125 S. Ct. 2195, 2201; D. MUSTO & P. KORSMEYER, *THE QUEST FOR DRUG CONTROL* 60 (2002).

of 1970,⁴⁸ better known as the Controlled Substances Act (“CSA”).⁴⁹ The CSA’s goals are: (1) preventing drug abuse and rehabilitating addicts; (2) providing more effective means of law enforcement; and (3) providing a balanced scheme of criminal penalties for drug offenses.⁵⁰ The Act groups controlled substances into five Schedules, with Schedule I being the most restrictive and Schedule V being the least restrictive. The federal government schedules a drug based on three main factors: (1) potential for abuse; (2) currently accepted medical uses; and (3) level of psychological and physical dependence.⁵¹ Marijuana is classified as a Schedule I substance; accordingly it is deemed to have “a high potential for abuse,” “no currently accepted medical use,” and “a lack of accepted safety for use . . . under medical supervision.”⁵² Due to this classification, marijuana use – even for medicinal purposes – is illegal under federal law, with the possible exception of participation in an exceedingly small federal research program.⁵³

The Department of Justice (“DOJ”) claims that the CSA represents a “closed regulatory system.”⁵⁴ The Act criminalizes the manufacture, distribution, dispensation, or possession of any controlled substance except as authorized under its terms.⁵⁵ Those terms only permit prescriptions for drugs listed in Schedules II – V, hence marijuana and other Schedule I drugs may not be prescribed per federal law.⁵⁶ Under the CSA’s framework, the Attorney General may reclassify or remove controlled substances, but he or she must consult with the Secretary of Health and Human Services (“HHS Secretary”) in making such determinations.⁵⁷ The HHS Secretary’s recommendations are binding concerning “scientific and medical matters.”⁵⁸

The relevant factors bearing on any removal or reclassification are the drug’s: (1) actual or relative potential for abuse; (2) scientific evidence of its pharmacological effect; (3) the scientific knowledge regard-

48. Comprehensive Drug Abuse and Prevention Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

49. 21 U.S.C. §§ 801-904 (2005).

50. H.R. REP. NO. 91-1444 513 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4417, at 4567.

51. 21 U.S.C. § 812 (2005).

52. 21 U.S.C. § 812(b)(1) (2005).

53. *See* 21 U.S.C. § 823(f) (2005).

54. Petition for a Writ of Certiorari at 2, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454), *available at* 2004 WL 871328 (“The CSA thus establishes a closed system of drug distribution for all controlled substances. To effectuate that closed system, the CSA authorizes transactions within the legitimate distribution chain and makes all others illegal.”) (internal citations and quotations omitted).

55. 21 U.S.C. § 844(a) (2005).

56. *See* 21 U.S.C. § 829 (2005).

57. 21 U.S.C. § 811 (2005).

58. *Id.*

ing the drug; (4) its history and current pattern of abuse; (5) the scope, duration, and significance of abuse; (6) the risk to the public health; (7) its psychological and physical dependency; and (8) whether the drug is a precursor of a drug already controlled under the CSA.⁵⁹ To date, all marijuana rescheduling efforts have failed,⁶⁰ in spite of studies suggesting it possesses legitimate medical uses.⁶¹

To complicate matters, the CSA is ambivalent concerning congressional intent to preempt the field of controlled substance regulation.⁶² In response to this ambivalence and the federal government's steadfast refusal to reclassify marijuana, during the late 1990s many states passed

59. *Id.*

60. Gouldin, *supra* note 45, at 478-79 (citing *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 938 (D.C. Cir. 1991)) ("Driven specifically by the Controlled Substance Act's prohibition of the medical use of marijuana, through its inclusion of marijuana in Schedule I, the National Organization for the Reform of Marijuana Laws ("NORML") endeavored to get marijuana rescheduled. The Drug Enforcement Administration ("DEA") eventually agreed to commence public hearings in 1986 on the possible rescheduling of marijuana. After two years of hearings, an administrative law judge ruled that 'a respectable minority' of American physicians' accepted medical uses of marijuana for the treatment of cancer, glaucoma, and other diseases. Because of marijuana's 'currently accepted medical use,' the judge recommended the removal of marijuana from Schedule I and placement in Schedule II. Instead of adopting the judge's ruling, the Administrator of the DEA applied an eight-factor test to reject NORML's petition rescheduling marijuana.").

61. See INSTITUTE OF MEDICINE, *Marijuana and Medicine: Assessing the Science Base* 177 (Janet E. Joy et. al. eds., 1999), available at <http://www.nap.edu/books/0309071550/html/>; WORLD HEALTH ORGANIZATION, 1997, *Cannabis: A Health Perspective and Research Agenda*. Geneva: WHO, available at http://www.nap.edu/html/marimed/app_E.html ("Therapeutic uses of cannabinoids warrant further basic pharmacological and experimental investigation and clinical research into their effectiveness. More research is needed on the basic neuropharmacology of THC and other cannabinoids so that better therapeutic agents can be found.").

62. *Compare* 21 U.S.C. § 801(3)-(6) (2005) ("A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because – (A) after manufacture, many controlled substances are transported in interstate commerce, (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession. (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances. (5) Controlled substances manufactured and distributed intrastate cannot be 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."), *with* 21 U.S.C. § 903 (2005) ("No provision of this title subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title subchapter and that State law so that the two cannot consistently stand together.").

legislation legalizing medical marijuana.⁶³ California was one such state.

B. *California's Compassionate Use Act*

In 1996, California voters passed Proposition 215, which resulted in the California CUA.⁶⁴ The CUA's stated purposes are:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction. (C) To encourage 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.⁶⁵

Of particular interest are the protections the CUA left in place concerning the criminalization of marijuana manufacture, use, and possession for non-medical purposes. The CUA, for example, upholds all California marijuana criminalization as applied to anyone other than a patient or primary caregiver who possesses a valid doctor recommendation.⁶⁶ The CUA's protection range is actually quite narrow. California physicians who recommend medical marijuana are protected from prosecution.⁶⁷ In addition, the patient and their primary caregiver⁶⁸ are immune from state prosecution for marijuana possession and cultivation

63. See Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2004); ALASKA STAT. §§ 11.71.090, 17.37.010 *et seq.* (Michie 2003); COLO. CONST. ART. 18, § 4; HAW. REV. STAT. ANN. §§ 329-121 to 128 *et seq.* (Michie Supp. 2003); ME. REV. STAT. ANN. tit. 22, § 2383-B(5)(a) (West 2004); NEV. REV. STAT. ANN. § 453A.200 (Michie Supp. 2003); OR. REV. STAT. §§ 475.300-.346 (West 2003); VT. STAT. ANN. tit. 18 §§ 4272-4474(d) *et seq.* (2004); WASH. REV. CODE ANN. §§ 69.51.010-.080 (West 2004).

64. Gouldin, *supra* note 45, at 481.

65. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2004).

66. *Id.* ("Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.")

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

68. *Id.* ("Primary caregiver," is defined as, "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.")

that is intended for the patient's medical use, as recommended by a licensed physician.⁶⁹

The CUA's statutory scheme is sparse, albeit possibly intentionally so.⁷⁰ Consequently, there were wide implementation variances throughout California, with different localities promulgating disparate regulations.⁷¹ These localities were principally left to their own devices in implementing the CUA, with a prime example being the amount of marijuana the individual patient or caregiver was allowed to possess and cultivate.⁷² These problems, however, were the predictable result of California experimenting with the implementation of a novel legislative program.⁷³

At first blush, the conflict between the CSA and CUA seems readily apparent: how can one square a federal act that declares marijuana "has no accepted medical use"⁷⁴ with a state act whose express purpose is "[t]o ensure that seriously ill [state citizens] have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician?"⁷⁵ Quite simply, there is a disconnect between the federal and state governments in approaching the medical marijuana issue. The federal government, in classifying marijuana as a Schedule I drug, sees the issue as a national crime control problem, whereas states, like California, view

69. *Id.* ("Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.").

70. Gouldin, *supra* note 45, at 493 ("It is not clear that this local experimentation was unforeseen; the drafters of Proposition 215 seemed to anticipate that the Act was a work in progress and explicitly stated that one of the Act's purposes is to 'encourage 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.'").

71. There were different law enforcement approaches to distinguishing medical marijuana patients from non-patients. Northern California localities promulgated identification regulations and issued ID cards, to ensure that medical marijuana patients were not inadvertently arrested and prosecuted. In contrast, Southern California localities typically arrested patients, regardless of ID, and forced the patient to bear the burden, during prosecution, of establishing that they were a medical marijuana patient. *Id.* at 492.

72. *Id.* at 493 ("The Oakland City Council established a policy which allows medicinal marijuana users to stock a three-month supply of the drug; the policy is much more liberal than the one set by the state Attorney General which allows about one marijuana cigarette per day. While the state would limit home growers to the cultivation of two plants, the Oakland ordinance allows qualifying users to grow up to 144 plants and to keep over a pound of processed marijuana.").

73. *Id.* ("[T]he drafters of Proposition 215 seemed to anticipate that the Act was a work in progress and explicitly stated that one of the Act's purposes is to 'encourage 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.'").

74. 21 U.S.C. § 812(b)(1)(B) (2005).

75. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2004).

medical marijuana legalization as a state police power solution for seriously ill state residents.

C. Preemption

The disconnect between federal and state marijuana regulation, in turn, implicates the preemption doctrine.⁷⁶ The Supreme Court has held that “[t]he question whether a certain state action is pre-empted by federal law is one of congressional intent. ‘The purpose of Congress is the ultimate touchstone.’”⁷⁷ In addition, there is a presumption against federal preemption of state police power regulations.⁷⁸ The CSA was ambivalent regarding field preemption; moreover, there was no clear statement of expressed preemption. In 21 U.S.C. § 801(5)-(6), Congress stated that:

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. 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.⁷⁹

These CSA provisions give the impression that Congress intended to co-opt and control local controlled substances regulation, in addition to regulating the interstate traffic in such substances. But 21 U.S.C. § 903 appears to leave the states some flexibility:

No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the

76. “It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. In the absence of express pre-emptive language, Congress’ intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation.” *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985) (internal citations and quotations omitted).

77. *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 96 (1992) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)).

78. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260 (2004) (“First, [i]n all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))).

79. 21 U.S.C. § 801(5)-(6) (2005) (internal divisions omitted).

authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.⁸⁰

The phrase “including criminal penalties” logically implies that criminal penalties are included in addition to, not to the exclusion of, other permissible state controlled substance regulation. Apparently, these other permissible regulatory areas were not federally co-opted. But, what are these other areas – provision of medical services to state citizens, perhaps? It is doubtful Congress would have incorporated the term “including,” if “criminal penalties” was intended to be an exhaustive delineation of the regulatory subject matter left to the states.⁸¹ In sum, it is unclear whether Congress intended to preempt all state forays into controlled substance regulation; likewise, it is apparent that the CSA does not erect the DOJ’s wholly “closed regulatory system.”⁸² Such a contention does not comport with the CSA’s patent statutory language.⁸³ In fact, 21 U.S.C. § 903 is a direct preemption disclaimer, to the extent that the state and federal laws are not irreconcilable.⁸⁴ The resolution of the preemption issue seems imprecise at best, and the scope of Congress’s commerce power, post-*Raich*, is similarly ill defined.

D. *The Supreme Court’s Third Era Commerce Clause Jurisprudence & Lopez and Morrison’s Collective Impact*

1. MAPPING THE COURT’S THIRD ERA JURISPRUDENCE

1937 marked the Third Era’s inception.⁸⁵ Justice Roberts’ famous

80. 21 U.S.C. § 903 (2005).

81. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 404-06 (1950) (“Every word and clause must be given effect. . . . Words are to be interpreted according to the proper grammatical effect of their arrangement within the statute. . . . It must be assumed that language has been chosen with due regard to grammatical propriety and is not interchangeable on mere conjecture.”).

82. See Petition for Writ of Certiorari, *supra* note 54, at 2.

83. 21 U.S.C. § 903 (2005) (“No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.”).

84. *Id.*

85. See, e.g., McCloskey, *supra* note 6, at 117-26.

“switched” vote⁸⁶ in *West Coast Hotel v. Parish*⁸⁷ allowed President Roosevelt’s appointees to uphold, in subsequent cases, broad New Deal legislation premised on the federal commerce power, including the National Labor Relations Act and the Agricultural Adjustment Act.⁸⁸

The Commerce Clause’s language is facially clear-cut, permitting Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁸⁹ And this power, as with all of Congress’s enumerated powers, may be combined with the Necessary and Proper Clause, which states that Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁹⁰ However, whether the Tenth Amendment imposes any affirmative limits on the federal government’s enumerated powers is a question that continues to lurk just beneath the surface.⁹¹

86. “Franklin Roosevelt was re-elected in November, 1936, by a stunning majority, and after the dust of the campaign had settled a little, he turned his attention to the hostile Supreme Court. . . . [He] presented Congress with a judiciary plan that purported to cope with the supposed problem of overcrowded federal court dockets. It would have enabled him to appoint a new judge to supplement any judge over seventy who failed to retire. . . . The significant fact was that the plan would permit the President to appoint six new Supreme Court justices.” McCloskey, *supra* note 6, at 113. “The Court’s authority to interpret the Constitution was . . . linked to the Court’s separation from politics. For post-World War II constitutional scholars, the most widely known event suggesting that the Court was engulfed in politics was the ‘switch’ by Justice Owen Roberts during the spring of 1937, a switch that many believed was the result of President Franklin Delano Roosevelt’s ‘court-packing’ plan.” Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 622 (1994).

87. 300 U.S. 379 (1937).

88. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding Fair Labor Standards Act legislation); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding Agricultural Adjustment Act legislation).

89. U.S. CONST. art. I, § 8, cl. 3.

90. U.S. CONST. art. I, § 8, cl. 18. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 411-21 (1819) (“To [Congress’s] enumeration of powers is added that of making ‘all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof. . . .’ [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

91. See, e.g., *Nat’l League of Cities v. Usery*, 426 U.S. 833, 842 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (“‘While the Tenth Amendment has been characterized as a ‘truism,’ stating merely that ‘all is retained which has not been surrendered,’ it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.’” (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975))); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580-81 (1985) (O’Connor, J., dissenting) (“In my view, federalism cannot be reduced to the weak essence

Tellingly, even Chief Justice Marshall's broad opinion in *Gibbons v. Ogden* acknowledged that there is a sphere of activities exclusively within a single state, which is inaccessible to the federal government's commerce power.⁹² The Third Era, which lasted until 1995, however, obscured, or perhaps destroyed, this limitation.⁹³

During the early 20th century the Court imposed awkward Commerce Clause limitations in defense of unfettered laissez-faire capitalism. Distinctions were drawn between direct and indirect effects on interstate commerce, as well as between local and national activities.⁹⁴ Manufacture, production, and labor relations were deemed wholly local and, hence, off-limits to federal Commerce Clause regulation.⁹⁵ These limitations often led to incongruous and absurd results. For example, a sugar conglomerate, which controlled over ninety-percent of the national sugar market, was not subject to federal anti-trust regulation because sugar refining was considered production, and, thus, outside the commerce power's scope;⁹⁶ while cattle stockyards, not directly involved in

distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in the realm of authority left open to them by the Constitution. The central issue of federalism, of course, is whether any realm is left open to the States by the Constitution – whether any area remains in which a State may act free of federal interference. . . . The true essence of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme. If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." (internal citations and quotations omitted)).

92. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. . . . Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.").

93. See, e.g., McCloskey, *supra* note 6, at 195-200.

94. *Id.* at 109-13.

95. *Id.* The Court rejected this distinction in *United States v. Darby*, 312 U.S. 100, 113 (1941) ("While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power to prescribe the rule by which commerce is governed. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." (internal citations and quotations omitted)).

96. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-17 (1895) (interpreting the Commerce Clause narrowly, thereby excluding manufacturing activities from federal control).

interstate commerce, but through which cattle intended for interstate commerce flowed, were deemed regulable under the federal commerce power.⁹⁷

The Third Era Court took a major step away from the production-manufacture limitation in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, where Chief Justice Hughes stated, “[i]t is the effect upon commerce, not the source of the injury, which is the criterion [for reviewing Commerce Clause legislation].”⁹⁸ That case involved a multi-national steel corporation’s challenge to the National Labor Relations Act’s prohibition of unfair labor practices. Even within that context, Chief Justice Hughes was careful to maintain limits on the commerce power’s reach, stating:

The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce “among the several States” and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.⁹⁹

Such limitations, however, would recede to the background as the Court became more comfortable with a nearly limitless commerce power.¹⁰⁰

Another important Third Era decision which bears on *Raich* is *United States v. Darby*.¹⁰¹ There, the Court not only rejected the distinction between direct and indirect effects, but also presaged Professor Wechsler’s view that the Tenth Amendment was “but a truism” – that protection of state sovereignty is guaranteed, not through affirmative limits on Congress’s enumerated powers, but through the states’ participation in the federal government.¹⁰² Despite this language, whether the Tenth Amendment imposes affirmative limitations on the federal exercise of enumerated powers remains a question, as exemplified by the *Raich* dissenters.¹⁰³

97. *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905) (“[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.”).

98. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32 (1937).

99. *Id.* at 30.

100. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that a single farmer’s wheat, grown for personal consumption, substantially affected interstate commerce).

101. 312 U.S. 100 (1941).

102. *Id.* at 123-24.

103. *See, e.g., Gonzales v. Raich*, 125 S. Ct. 2195, 2220 (2005) (O’Connor, J., dissenting)

In the wake of *Jones* and *Darby*, it was clear that broad commerce power proponents had prevailed, but their doctrinal expansion did not end there. *Wickard v. Filburn*,¹⁰⁴ recognized as perhaps the broadest Commerce Clause case to date, introduced the Aggregation Principle.¹⁰⁵ *Wickard* involved the Agricultural Adjustment Act of 1938 (“AAA”), which, among other things, imposed wheat quotas and assessed fines for exceeding those quotas.¹⁰⁶ The quota-system was intended to stabilize supply and price levels in the national wheat market.¹⁰⁷ To accomplish that goal, Congress declared that even local production intended for use on an individual’s farm deprived the wheat market of necessary demand.¹⁰⁸ *Wickard* was the result of a single farmer’s challenge to the AAA. Filburn, the farmer, had grown above his federally imposed wheat quota and was fined, but reasoned that his home-grown wheat – intended to feed his own livestock and family – was beyond the commerce power’s grip.¹⁰⁹

The Court held to the contrary, and in doing so established the Aggregation Principle: “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”¹¹⁰ And, “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”¹¹¹ The Court, however, was explicit in stating the AAA’s purpose – “to stimulate trade therein [referring to the national market] at increased prices.”¹¹² That raises the question of whether Filburn’s homegrown wheat would have been federally regulable had the congres-

(“We enforce the ‘outer limits’ of Congress’s Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government.”).

104. 317 U.S. 111 (1942).

105. *Id.* at 127-28 (“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”).

106. *Id.* at 114-16.

107. *Id.* at 128-29.

108. *Id.* at 127-28.

109. *Wickard v. Filburn*, 317 U.S. 111, 119 (1942) (“Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most ‘indirect.’”).

110. *Id.* at 127-28.

111. *Id.* at 125.

112. *Id.* at 129.

sional goal been to eradicate the intrastate wheat market, rather than stimulate national wheat prices.

To further complicate this question, the Third Era court fashioned yet another broad doctrinal tool in *Maryland v. Wirtz*.¹¹³ There, the Court upheld the application of the Fair Labor Standards Act's minimum wage and maximum hours provisions to state hospital and education employees who did not participate in interstate commerce.¹¹⁴ In doing so, the Court established the so-called Broader Doctrine or Enterprise Theory: "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."¹¹⁵ As we will see, both *Wickard's* Aggregation Principle and *Wirtz's* Enterprise Theory played an important role in Justice Stevens' *Raich* opinion.¹¹⁶

Nevertheless, it is uncertain whether the Court intended that Enterprise Theory apply to parties other than enterprises who are, at some level, engaged in interstate commerce.¹¹⁷ The theory was initially used merely to regulate the non-interstate aspects of enterprises that participated in interstate commerce.¹¹⁸ Clearly, individual medical marijuana patients are not wholly intrastate employees of an enterprise that is otherwise engaged in interstate commerce.¹¹⁹ *Wirtz* is important in another

113. 392 U.S. 183 (1968).

114. *Id.* at 193-94 ("The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals. . . . It is clear that labor conditions in schools and hospitals can affect commerce. The facts stipulated in this case indicate that such institutions are major users of goods imported from other States.").

115. *Id.* at 196.

116. *See infra* notes 175-76.

117. Alex Kreit, *Why is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J.L. & PUB. POL'Y 169, 191 (2004) ("This concept allows Congress to regulate *discrete parts of a business enterprise* that may not themselves be economic in isolation but can be seen as economics within the context of a broader regulatory scheme.") (emphasis supplied); *Id.* at 183 ("[A broader] reading of the doctrine allows Congress to potentially regulate any noncommercial activity simply by placing it in a broader scheme under the theory that Congress has determined that regulating the noncommercial activity is helpful to achieving the goals of the broader act. This is problematic for a number of reasons. First, by focusing on Congress's purpose in enacting a statute, it gives Congress near limitless power and discretion. Second, to the extent that this view of the doctrine does place limits on Congress, these limits can be overcome simply by regulating more broadly, thus creating a perverse incentive for Congress.").

118. *Id.* at 190-92.

119. Contrary to what some might argue, *Perez v. United States*, 402 U.S. 146 (1971), does not change this conclusion. That case involved loan shark schemes, which encompassed the entire nation and were conducted solely for pecuniary gain. *Id.* at 148-49. Whereas, *Raich* and *Monson*

respect; it further embraced Wechsler's limited conception of federalism:

But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.¹²⁰

The *Wirtz* majority's limited conception of federalism sharply contrasted with Justice Douglas' passionate dissent, in which he stated:

[W]hat is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism. . . . The exercise of the commerce power may . . . destroy state sovereignty. All activities affecting commerce, even in the minutest degree, may be regulated and controlled by Congress. Commercial activity of every stripe may in some way interfere with the [interstate] flow of merchandise or interstate travel. The immense scope of this constitutional power is demonstrated by the Court's approval in this case of regulation on the basis of the "enterprise concept" – which is entirely proper when the regulated "businesses" are not essential functions being carried on by the States.¹²¹

Justice Douglas' *Wirtz* dissent is yet another example of the Court's struggle with the Tenth Amendment and its appropriate effect on Congress's commerce power. Should it pose an affirmative limit, as Justice Douglas posits; should Professor Wechsler's thesis prevail; or are there gray areas of compromise that lay between these two extremes? The Court overruled *Wirtz* in its *National League of Cities* opinion, but *National League of Cities* itself was subsequently overruled in *Garcia*, thus restoring *Wirtz*'s precedential value.¹²²

are two extremely sick women who grew their own medical marijuana, with a doctor's recommendation, consistent with state law, for wholly non-economic reasons.

120. *Maryland v. Wirtz*, 392 U.S. 183, 196-97 (1968).

121. *Id.* at 201-04 (Douglas, J., dissenting) (internal quotations omitted).

122. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 855 (1976) ("We agree that such assertions of power, if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty,' and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. *We are therefore persuaded that Wirtz must be overruled.*" (emphasis supplied; internal citations omitted)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) ("Our examination of this 'function' standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with

2. LOPEZ, MORRISON, & THE RISE OF THE FOURTH ERA

When *Garcia* destroyed the *National League of Cities* dichotomy, it appeared that the Tenth Amendment had again receded into the shadows, but 1995 witnessed its reemergence. Local police arrested twelfth-grader Alfonso Lopez for possessing a hand gun in a school zone.¹²³ Initially, the police charged Lopez with violating Texas state law; however, the state charges were later dropped and he was prosecuted under the harsher federal provision – 18 U.S.C. § 922(q) – which made it a federal crime “for any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone.”¹²⁴ The Court faced the question of whether this statute exceeded the scope of Congress’s commerce power. The majority led by Chief Justice Rehnquist responded in the affirmative.¹²⁵

Chief Justice Rehnquist first withheld application of the Aggregation Principle and noted the absence of a jurisdictional element linking the firearm in issue to interstate commerce.¹²⁶ Second, Chief Justice Rehnquist noted that Section 922(q) was 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,” thereby refusing to apply Enterprise Theory.¹²⁷

Third, Chief Justice Rehnquist reemphasized the lack of a jurisdictional element:

§ 922(q) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearms possession in question affects interstate commerce. . . . Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.¹²⁸

Fourth and finally, Chief Justice Rehnquist noted: (1) the lack of congressional findings concerning the economic impact of school-zone

established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. *That case, accordingly, is overruled.*” (emphasis supplied)).

123. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

124. *Id.*

125. *Id.* (“We hold that the Act exceeds the authority of Congress ‘to regulate Commerce . . . among the several States. . . .’” (citing U.S. CONST., art. I, § 8, cl. 3)).

126. *Id.* at 567 (“The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.”).

127. *Id.* at 561.

128. *United States v. Lopez*, 514 U.S. 549, 561, 567 (1995).

gun possession on interstate commerce; and (2) the Court's disapproval of reasoning, which connects the regulated activity to interstate commerce via an inference upon an inference.¹²⁹

In assessing *Lopez*'s impact, it is important to note that the Court did not overrule any Third Era cases, including *Wickard* and *Wirtz*. Nevertheless, the *Lopez* dissenters, foremost among them Justice Souter, were shocked by what they perceived as a return to the Second Era distinction between direct and indirect effects and the Court's abandonment of its prior commitment to reviewing Commerce Clause legislation from a "rational basis"¹³⁰ perspective.¹³¹ In fact, the dissenters openly speculated that the majority's opinion was a sheer "misstep" that would not last.¹³²

Their speculation proved unwarranted, as Chief Justice Rehnquist reaffirmed the Court's commitment to *Lopez* in *Morrison*.¹³³ *Morrison* involved a challenge to the Violence Against Women Act ("VAWA").¹³⁴ The Court held that the VAWA exceeded the Commerce Clause's scope, and in doing so clarified the *Lopez* framework.¹³⁵ To briefly reiterate, the *Lopez-Morrison* framework is as follows: (1) does the case involve

129. *Id.* at 567-68 ("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. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these 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. This we are unwilling to do." (internal citations omitted)).

130. *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) (holding that "where 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" (emphasis supplied)).

131. *United States v. Lopez*, 514 U.S. 549, 608-09 (1995) (Souter, J., dissenting) ("The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. . . . Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.").

132. *Id.* at 614-15 (Souter, J., dissenting) ("Because Justice Breyer's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case.").

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

134. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (2000).

135. *Morrison*, 529 U.S. at 617-618 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."); *Id.* at 609 ("Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981.").

“substantial effects” legislation; (2) if so, is the regulatory subject matter commercial or non-commercial; (3) is there a jurisdictional element ensuring a connection to interstate commerce; (4) are there congressional findings demonstrating a connection to interstate commerce; and (5) is the purported effect on interstate commerce attenuated – is it predicated upon an inference upon an inference?¹³⁶ Given this framework, it remains unsettled how the Court’s Third Era doctrinal tools, such as *Wickard’s* Aggregation Principle and *Wirtz’s* Enterprise Theory, complete the commerce analysis puzzle.

In *Lopez*, Chief Justice Rehnquist found each tool inapplicable.¹³⁷ Recall, the Aggregation Principle did not apply because gun possession was non-economic, which implies that Filburn’s wheat production in *Wickard* was somehow economic, despite Justice Jackson’s suggestion that Filburn’s activity “may not be regarded as commerce.”¹³⁸ Enterprise Theory’s inapplicability, on the other hand, could be interpreted in at least two ways: (1) § 922(q)’s circle of regulation was drawn narrowly, regulating at the individual, rather than enterprise, level; or (2) in an as-applied challenge to commerce regulation, the Court looks at the individual involved – and *Lopez* was assuredly not a part of a business enterprise operating in interstate commerce. The former interpretation would give Congress the incentive to legislate on a broad scale, while the latter interpretation would return to the states some exclusive control over local activities. The issue remains whether the Aggregation Principle or Enterprise Theory may save “substantial effects” Commerce Clause legislation that fails the *Lopez-Morrison* framework. With that issue at the forefront, we move to *Gonzales v. Raich*.

III. GONZALES V. RAICH

A. Facts & Procedure

The respondents, Angel Raich (“Raich”) and Diane Monson (“Monson”), are California citizens, each of which has serious medical problems. Raich was diagnosed with “more than ten serious medical conditions, including an inoperable brain tumor, life-threatening weight

136. *Id.* at 610-13.

137. *Lopez*, 514 U.S. at 561 (“Section 922(q) is a criminal statute that by its terms has *nothing to do with ‘commerce’ or any sort of economic enterprise*, however broadly one might define those terms. Section 922(q) 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. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” (emphasis supplied)).

138. *Gonzales v. Raich*, 125 S. Ct. 2195, 2205-06 (2005) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

loss, a seizure disorder, nausea, and several chronic pain disorders.”¹³⁹ Whereas, Monson was diagnosed with a degenerative spinal condition that causes “severe chronic back pain and constant, painful muscle spasms.”¹⁴⁰ Per their doctors’ recommendations, they obtained medical marijuana in compliance with the California CUA.¹⁴¹ Monson cultivated her own supply of marijuana, while Raich, due to her condition, enlisted the help of caregivers to grow her medical marijuana.¹⁴² Each of their physicians attempted treatment with conventional drugs before resorting to medical marijuana.¹⁴³ Additionally, both physicians came to the conclusion that “marijuana [was] the only drug available that provide[d] effective treatment.”¹⁴⁴

County sheriffs and DEA agents raided Monson’s home on August 15, 2002.¹⁴⁵ The California officers determined that Monson’s marijuana cultivation and possession was authorized under California law. The DEA agents, however, seized and destroyed all six of Monson’s marijuana plants.¹⁴⁶ Due to the looming threat of federal prosecution, the respondents brought an action in United States District Court, seeking “injunctive and declaratory relief prohibiting the enforcement of the [CSA], to the extent it prevent[ed] them from possessing, obtaining, or manufacturing cannabis for their personal medical use.”¹⁴⁷ The District Court denied the respondents’ motion for a preliminary injunction, but the Ninth Circuit reversed, finding that the respondents “demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress’ Commerce Clause authority.”¹⁴⁸

The Ninth Circuit applied the *Lopez-Morrison* framework in a manner consistent with a prior Ninth Circuit case, *United States v. McCoy*.¹⁴⁹ At the outset, Judge Pregerson, writing for the majority, addressed the question of which of the three permissible Commerce Clause categories applied: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; or (3) activities that substantially affect

139. Raich v. Ashcroft, 352 F.3d 1222, 1225 (9th Cir. 2003), *rev’d sub nom.* Gonzales v. Raich, 125 S. Ct. 2195 (2005).

140. *Id.*

141. *See id.*

142. *Id.*

143. *Id.*

144. Gonzales v. Raich, 125 S. Ct. 2195, 2200 (2005).

145. *Id.*

146. *Id.*

147. *Id.* at 2200.

148. Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003).

149. 323 F.3d 1114 (9th Cir. 2003).

interstate commerce.¹⁵⁰ The Court found that the third category applied.¹⁵¹ Next, Judge Pregerson assessed each of the four remaining *Lopez-Morrison* prongs.

Because the case involved an as-applied challenge, the Ninth Circuit's review was narrow – interpreting the CSA's application only to those California citizens, like Raich and Monson, who cultivated and used marijuana for medical purposes pursuant to a valid doctor recommendation.¹⁵² Under the second *Lopez-Morrison* prong – whether the regulated activity is commercial or non-commercial – the Ninth Circuit held:

As applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise. The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity. Lacking sale, exchange or distribution, the activity does not possess the essential elements of commerce.¹⁵³

Hence, the second prong militated in favor of the respondents. The Court then moved to the third prong – whether there is a jurisdictional element establishing a connection to interstate commerce. Judge Pregerson determined that there was no “jurisdictional hook” ensuring that the marijuana involved had ever, or would ever move in interstate commerce; therefore, he concluded, “[the third prong] favors a finding that Congress has exceeded its powers under the Commerce Clause.”¹⁵⁴

In assessing the fourth prong – Congress's legislative findings – the Court held that while the CSA's findings did not explicitly address marijuana,¹⁵⁵ they did “provide some evidence that intrastate possession of controlled substances may impact interstate commerce. Therefore, the [fourth] factor weighs in favor of finding the CSA constitutional under the Commerce Clause.”¹⁵⁶ Finally, the Court held that the fifth prong – whether the connection between the regulated activity and the effect on

150. *Raich v. Ashcroft*, 352 F.3d at 1229.

151. *Id.*

152. *Id.* at 1228 (“But here the appellants are not only claiming that their activities do not have the same effect on interstate commerce as activities in other cases where the CSA has been upheld. Rather, they contend that, whereas the earlier cases concerned drug trafficking, the appellants’ conduct constitutes a separate and distinct class of activities: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law.”).

153. *Id.* at 1229-30.

154. *Id.* at 1231.

155. See 21 U.S.C. § 801 (2005).

156. *Raich v. Ashcroft*, 352 F.3d 1222, 1232 (9th Cir. 2003).

interstate commerce was too attenuated – militated in favor of the respondents:

The connections in this case are, indeed, attenuated. Presumably, the intrastate cultivation, possession and use of medical marijuana on the recommendation of a physician could, at the margins, have an effect on interstate commerce by reducing the demand for marijuana that is trafficked interstate. It is far from clear that such an effect would be substantial. The congressional findings provide no guidance in this respect, as they do not address the activities at issue in the present case. . . . Therefore, we conclude that this factor favors a finding that the CSA cannot constitutionally be applied to the class of activities at issue in this case.¹⁵⁷

In sum, the Ninth Circuit held that three out of the four remaining *Lopez-Morrison* prongs militated in favor of the respondents, Raich and Monson. The Ninth Circuit’s holding was specific and did not deem the CSA unconstitutional; rather, Judge Pregerson stated:

On the basis of our consideration of the [five *Lopez-Morrison*] factors, we find that the CSA, as applied to the appellants, is *likely* unconstitutional. . . . Therefore, we find that the appellants have made a strong showing of the likelihood of success on the merits of their case.¹⁵⁸

The Ninth Circuit majority also found that *Wickard*’s Aggregation Principle did not apply to the respondents’ activities, which were non-commercial in character.¹⁵⁹ The majority relied on Chief Justice Rehnquist’s *Lopez* language indicating that Filburn’s wheat growing activities were commercial in character: “In every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . . the regulated activity was of *an apparent commercial character*.”¹⁶⁰ *Wirtz*’s Enterprise Theory was likewise inapplicable. Judge Pregerson skillfully distinguished the respondents from the “enterprise” Congress sought to regulate via the CSA:

Clearly, the way in which the activity or class of activities is defined is critical. We find that the [respondents’] class of activities – the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician – is, in fact, different in kind from drug trafficking.¹⁶¹

Thus, neither of the doctrinal tools that could have sustained the

157. *Id.* at 1233.

158. *Id.* at 1234 (emphasis supplied; internal citations and quotations omitted).

159. *Id.* at 1230 (“As the regulated activity in this case is not commercial, *Wickard*’s aggregation analysis is not applicable.”).

160. *United States v. Morrison*, 529 U.S. 598, 611 n.4 (2000) (emphasis supplied).

161. *Raich v. Ashcroft*, 352 F.3d at 1228.

CSA, as-applied to the respondents, was applicable. The respondents' behavior was non-commercial, hence, no Aggregation Principle; additionally, the respondents were not part of the drug-trafficking enterprise that Congress sought to regulate, hence, no Enterprise Theory.

On April 20, 2004, the Attorney General sought Supreme Court *certiorari*, arguing that the CSA erected a "comprehensive federal scheme to regulate the market in controlled substances" and "a closed system of drug distribution," which was incompatible with state legalization of medical marijuana.¹⁶² The respondents submitted their Brief in Opposition on June 7, 2004, arguing that:

[F]urther proceedings in the district court [would] produce a more complete record and findings of fact. A complete factual record is likely to shed light on a range of issues . . . including whether the activities of similarly-situated individuals substantially affect interstate commerce.¹⁶³

The respondents distinguished *Wickard* and *Wirtz* and applied the *Lopez-Morrison* framework in a similar fashion as the Ninth Circuit had below.¹⁶⁴ Also of note was the respondents' claim that medical care is a traditional area of state regulation, where Tenth Amendment and state sovereignty concerns command attention.¹⁶⁵

The Supreme Court granted *certiorari* and determined that the pertinent issue was:

[W]hether the power vested in Congress by Article I, § 8, of the Constitution '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.¹⁶⁶

In a 6-3 decision the Court held that, in combination, the Commerce Clause and the Necessary and Proper Clause did indeed permit Congress to constitutionally "prohibit the local cultivation and use of marijuana in compliance with California law."¹⁶⁷

B. *Justice Stevens' Majority Opinion – The Lopez-Morrison Framework Unjustifiably Abandoned*

Justice Stevens' majority opinion began in much the same fashion

162. Petition for a Writ of Certiorari, *supra* note 54, at 2.

163. Respondents' Brief in Opposition at 11, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (No. 03-1454), available at 2004 WL 1329967 (internal citations omitted).

164. *Id.* at 12-22.

165. *Id.* at 22.

166. *Gonzales v. Raich*, 125 S. Ct. 2195, 2199 (2005).

167. *Id.*

as Judge Pregerson's – by acknowledging the limited nature of the respondents' challenge:

[R]espondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.¹⁶⁸

That, however, is where the similarities ended. In stark contrast to Judge Pregerson's Ninth Circuit opinion, Justice Stevens made no discernible effort to apply the *Lopez-Morrison* framework; instead, his opinion is premised upon a combination of *Wickard's* Aggregation Principle and *Wirtz's* Enterprise Theory.¹⁶⁹

Justice Stevens outlined the now familiar trio of permissible Commerce Clause regulation categories and stated that “[o]nly the third category is implicated in the case at hand” (i.e. activities that substantially affect interstate commerce).¹⁷⁰ The first pages of analysis expose a subtle doctrinal shift – “[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”¹⁷¹ This language hinted that the respondents' as-applied challenge was for naught; the Court would simply group their local non-economic activity into a broader economic class of activities.

This linguistic choice gives Congress a tremendous incentive to legislate broadly, thereby capturing activities which at the individual level are wholly non-economic, but which at the macroeconomic level can be grouped into a larger economic class of activities.¹⁷² For example, non-economic possession of a homegrown commodity can almost always be cast into a broader economic class of activities because a market competitor exists.¹⁷³ In other words, one's choice to grow at home

168. *Id.* at 2204-05.

169. *Id.* at 2206.

170. *Id.* at 2205.

171. *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005).

172. *Id.* at 2238 (Thomas, J., dissenting) (“The intrastate conduct swept within a general regulatory scheme may or may not have a substantial effect on the relevant interstate market. [O]ne always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. The breadth of legislation that Congress enacts says nothing about whether the intrastate activity substantially affects interstate commerce, let alone whether it is necessary to the scheme.” (internal citations and quotations omitted)).

173. *Id.* at 2225 (O'Connor, J., dissenting) (“It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private

affects the market competitor's supply and demand. This entails a doctrinal shift because the *Lopez* and *Morrison* majorities sought to provide incentives for Congress to legislate narrowly, to preserve an area of state sovereignty.¹⁷⁴

Early on, Justice Stevens quoted both *Wickard* and *Wirtz*, which foreshadowed their all-encompassing importance throughout the *Raich* majority opinion:

[E]ven if [Filburn's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . .¹⁷⁵ [W]hen 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'¹⁷⁶

The opinion thereafter segued into a comprehensive *Wickard* analogy. Justice Stevens stated *Wickard* stands for the proposition "that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."¹⁷⁷

Justice Stevens observed that Raich and Monson, like Filburn, "are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."¹⁷⁸ The congressional legislation at issue in *Wickard* and *Raich* is also analogized:

Just as the Agricultural Adjustment Act was designed to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . . and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.¹⁷⁹

He found that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."¹⁸⁰ In doing so, he assumed – without supporting data – that seriously ill patients cultivating and using medical marijuana, like Monson and Raich, would inevitably cause a substantial

activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow – a federal police power.").

174. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

175. *Gonzales v. Raich*, 125 S. Ct. 2195, 2205-06 (2005) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

176. *Id.* at 2206 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)).

177. *Id.*

178. *Id.*

179. *Id.* at 2206-07 (internal citations and quotations omitted).

180. *Gonzales v. Raich*, 125 S. Ct. 2195, 2207 (2005).

diversion of medical marijuana into the illicit drug market, thus “frustrat[ing] the federal interest in eliminating commercial transactions in the interstate market in their entirety.”¹⁸¹

The Court, through Justice Stevens, rejected the respondents’ attempts to distinguish *Wickard*. First, he found it irrelevant that the AAA, at issue in *Wickard*, exempted small farming operations as this merely reflected the Secretary of Agriculture’s policy choice, not the extent of Congress’s power to reach smaller farms.¹⁸² Second, he was not convinced that Filburn’s status as a commercial farmer played a role in the Court’s *Wickard* decision – “even though [Filburn] was indeed a commercial farmer, the activity he was engaged in – the cultivation of wheat for home consumption – was not treated by the Court as part of his commercial farming operation.”¹⁸³ Finally, Justice Stevens found that Congress included CSA findings that the local incidents of controlled substance production and possession affect interstate commerce.¹⁸⁴

The majority engaged in a bare rational basis review, without applying the *Lopez-Morrison* framework.¹⁸⁵ Justice Stevens was content to distinguish *Lopez* and *Morrison* by noting that *Lopez* and *Morrison* involved facial challenges, whereas “respondents ask[ed] [the Court] to excise individual applications of a concededly valid statutory scheme.”¹⁸⁶ Again, this provides Congress with the incentive to legislate broadly.¹⁸⁷ *Lopez* and *Morrison* involved congressional legislation that was comparatively narrow in scope (gun possession in school zones and gender-motivated violence respectively) and thus subject to facial challenge,¹⁸⁸ whereas *Raich* involved a broad “statutory scheme,” (regulating the national controlled substances market) from which the Court

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 2208.

185. *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005) (“[W]e stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”).

186. *Id.* at 2209.

187. *Id.* at 2221 (O’Connor, J., dissenting) (“Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause – nestling questionable assertions of its authority into comprehensive regulatory schemes – rather than with precision.”).

188. *Id.* at 2209 (“At issue in *Lopez*, was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. The Act did not regulate any economic activity and did not contain any

would not “excise individual applications.”¹⁸⁹ Such a distinction merely endorses Congress’s decision to enact a more ambitious legislative scheme, thereby encouraging the federal government to co-opt even more state police power.

The Court cut off the respondents’ as-applied challenge by stating that marijuana’s classification as a Schedule I drug “was merely 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 regulated.’”¹⁹⁰ This was contrasted with “the discrete prohibition established by the Gun-Free School Zones Act of 1990,”¹⁹¹ at issue in *Lopez*.

Morrison was similarly distinguished. There and in *Lopez*, “the noneconomic, criminal nature of the conduct at issue was central to [the Court’s] decision.”¹⁹² Justice Stevens concluded that marijuana regulation is “quintessentially economic,”¹⁹³ compared to the relevant activity in *Morrison* – violence against women – which was “not, in any sense of the phrase, economic activity.”¹⁹⁴ The majority further emphasized both the CSA’s economic nature and the rational-basis nature of the Court’s review:

The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a *rational* (and commonly utilized) means of regulating commerce in that product.¹⁹⁵

A key factor in the Court’s rational basis review was Congress’s assertion that “[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate.”¹⁹⁶ Justice Stevens found that Congress’s decision to regulate the local incidents of controlled substance production and possession was rationally based on Congress’s declaration that these

requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity.” (internal citations and quotations omitted).

189. *Id.* at 2210 (“The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of controlled substances.” (internal citations omitted)).

190. *Gonzales v. Raich*, 125 S. Ct. 2195, 2210 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

191. *Id.*

192. *United States v. Morrison*, 529 U.S. 598, 610 (2000).

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

194. *Morrison*, 529 U.S. at 613.

195. *Raich*, 125 S. Ct. at 2211 (emphasis supplied).

196. 21 U.S.C. § 801(5) (2005).

local incidents are indistinguishable from national incidents.¹⁹⁷ This deference to Congress's blanket statement, however, ignores the highly distinguishable situation of someone like Monson, who state authorities expressly found personally grew and consumed her medical marijuana, locally in a non-commercial manner, and in compliance with state law.¹⁹⁸

Ultimately, Justice Stevens refused to analyze Congress's decision to regulate the local incidents of marijuana possession, production, and use because "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial."¹⁹⁹ Furthermore, he declined to thoroughly explore the congressional findings regarding marijuana because the Court:

[Has] never required Congress to make particularized findings in order to legislate. . . . While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.²⁰⁰

This statement rejects, without explanation, the role that congressional findings play in the fourth *Lopez-Morrison* prong.²⁰¹

Justice Stevens closed by exploring the Supremacy Clause's²⁰² impact on the CSA-CUA collision. Within his Supremacy Clause analysis, he quoted questionable language from *Wirtz* and *Sanitary District of Chicago v. United States*: "It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be."²⁰³ This language is questionable because Justice

197. *Gonzales v. Raich*, 125 S. Ct. 2195, 2213 (2005) ("The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.").

198. *Id.* at 2200.

199. *Id.* at 2215.

200. *Id.* at 2208 n.32.

201. *Id.* at 2222 (O'Connor, J., dissenting) ("Third, we found telling the absence of legislative findings about the regulated conduct's impact on interstate commerce. We explained that while express legislative findings are neither required nor, when provided, dispositive, findings '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.'" (quoting *United States v. Lopez*, 514 U.S. 549, 563 (1995))).

202. U.S. CONST. art. VI, cl. 2.

203. *Gonzales v. Raich*, 125 S. Ct. 2195, 2212 (2005) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)).

Douglas' dissent in *Wirtz*,²⁰⁴ Justice Rehnquist's majority opinion in *National League of Cities*,²⁰⁵ and Justice O'Connor's dissent in *Garcia*²⁰⁶ all indicate that this sort of reasoning conflicts with the Tenth Amendment. The Tenth Amendment's significance, undoubtedly, remains a tough point of contention.

Relatedly, Justice Stevens alluded to Professor Wechsler's thesis – protection of state sovereignty lies in the political process, not in judicial enforcement of supposed limits imposed by the Tenth Amendment.²⁰⁷ His allusion, perhaps unintentionally, reintroduced the question of whether the Tenth Amendment imposes any limits on the commerce power. Furthermore, he punched the Court's return ticket to a bygone age – next stop: the Third Era and a nearly limitless commerce power.

The Court issued a *Wickard*-centered holding that ignored the *Lopez-Morrison* framework without sufficient explanation. Specifically, the Court found congressional prohibition of locally cultivated, possessed, and utilized medical marijuana by seriously ill individuals in compliance with state law, rational per the CSA's findings.²⁰⁸ For that reason, California's CUA cannot legalize such activity because "the CSA would still impose controls beyond what is required by California law."²⁰⁹

C. Justice Scalia's Concurrence – Drugs Trump State Sovereignty

Justice Scalia's concurrence primarily rehashed the majority's reasoning.²¹⁰ The concurrence's noteworthy aspect is its emphasis on the interplay between the Commerce Clause and the Necessary and Proper Clause. To be sure, Justice Stevens mentioned the interplay, even expressly incorporating it into his statement of the issue.²¹¹ Justice Scalia, though, specifically focused on this interplay to justify the con-

204. *Wirtz*, 392 U.S. at 201-05 (Douglas, J., dissenting).

205. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (O'Connor, J., dissenting).

206. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580-89 (1985).

207. Justice Stevens stated that "perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress." *Raich*, 125 S. Ct. at 2214-15.

208. *Gonzales v. Raich*, 125 S. Ct. 2195, 2206 (2005).

209. *Id.* at 2212.

210. *Id.* at 2215 (Scalia, J., concurring) ("I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.").

211. *Id.* at 2198 ("[W]hether the power vested in Congress by Article I, § 8, of the Constitution '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.").

tinuing validity of *Lopez* and *Morrison*'s holdings, *Wickard*'s Aggregation Principle, and *Wirtz*'s Enterprise Theory.²¹² That of course introduces the question of whether such reconciliation is meaningful, especially if it renders the *Lopez-Morrison* framework a mere formalism.²¹³

Justice Scalia identified the Necessary and Proper Clause as the origin of the substantial effects category of Commerce Clause regulation: "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."²¹⁴ He framed the inquiry as "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."²¹⁵ He was careful to point out, however, that:

[T]he Necessary and Proper Clause does not give "Congress . . . the authority to regulate the internal commerce of a State, as such," but it does allow Congress "to take all measures necessary or appropriate to" the effective regulation of the interstate market, "although intrastate transactions . . . may thereby be controlled."²¹⁶

He then attempted to reconcile the *Lopez-Morrison* framework with the majority's holding. First, Justice Scalia noted that both "*Lopez* and *Morrison* recognized the expansive scope of Congress's authority in this regard: '[T]he pattern is clear. Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be

212. *Id.* at 2216 (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of activities that substantially affect interstate commerce, is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce. . . . *Lopez* and *Morrison* recognized the expansive scope of Congress's authority in this regard: '[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'" (quoting *United States v. Lopez*, 514 U.S. 549, 560; (1995); *United States v. Morrison*, 529 U.S. 598, 610 (2000) (internal citations omitted))).

213. *Gonzales v. Raich*, 125 S. Ct. 2195, 2223 (2005) (O'Connor, J., dissenting) ("*Lopez* and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires, as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers." (internal citations omitted)).

214. *Id.* at 2216 (Scalia, J., concurring).

215. *Id.* at 2217 (Scalia, J., concurring) (internal citations omitted).

216. *Id.* at 2218 (Scalia, J., concurring) (quoting *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914)).

sustained.’”²¹⁷ Second, he quoted *Lopez* for the proposition that even though “the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’”²¹⁸ Third, he claimed this language reconciled *Lopez* and *Morrison* with congressional regulation of purely local intrastate activities “in connection with a more comprehensive scheme of regulation.”²¹⁹ Justice Scalia’s reading of *Lopez* and *Morrison* would limit their collective holding to this:

Congress may not regulate certain “purely local” activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government.²²⁰

In short, if legislated in isolation, Justice Scalia would prohibit congressional regulation of the entirely local possession of commodities, like guns or marijuana. If, however, congressional regulation of local possession is included in a “comprehensive scheme of regulation,” Justice Scalia would find such regulation within Congress’s grasp.²²¹ This line of reasoning would foreclose as-applied challenges, which in Justice Scalia’s view “undercut” the regulatory scheme. In fact, he explicitly stated in his concurrence “[t]hat simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation.”²²² Surprisingly, Justice Scalia openly castigated Justice O’Connor for labeling his distinction formalistic, but his only criticism was that Justice O’Connor “misunderstand[s] the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation.”²²³

If, however, the Tenth Amendment is more than a truism, Justice O’Connor’s characterization of Justice Scalia’s distinction as mere formalism makes sense. For instance, if the Tenth Amendment imposes limitations on congressional power, those limitations would reach the Necessary and Proper Clause, where Congress attempted to use it in combination with the Commerce Clause to impermissibly interfere with

217. *Id.* at 2216 (Scalia, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 560; (1995); *United States v. Morrison*, 529 U.S. 598, 610 (2000)) (emphasis supplied).

218. *Gonzales v. Raich*, 125 S. Ct. 2195, 2216 (2005) (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561).

219. *Id.* at 2218 (Scalia, J., concurring).

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

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

222. *Id.* at 2219 (Scalia, J., concurring).

223. *Gonzales v. Raich*, 125 S. Ct. 2195, 2218 (2005) (Scalia, J., concurring).

the states' police powers.²²⁴ Such a formalistic distinction would impede the *Lopez-Morrison* framework's goal – preserving a local sphere for state police power regulation.²²⁵ Justice Scalia's distinction produces a *Lopez-Morrison* framework devoid of significance. Congress may reach wholly local activities that would otherwise be regulated by the states, by including them in a “comprehensive scheme of regulation.”²²⁶

It is imperceptible, to this reader, how Justice Scalia's take on the *Lopez-Morrison* framework contributes to avoiding the creation of a completely centralized government. Quite the contrary, Justice Scalia's concurrence, along with Justice Stevens' majority opinion, encourages Congress to legislate broadly by regulating activities that, individually, are non-commercial and local.²²⁷ Justice Scalia's concurrence perfectly illustrates the *Lopez-Morrison* framework's newfound futility – it is procedural formalism, rather than an affirmative limit on Congress's commerce power.²²⁸

D. *Justice O'Connor's Dissent – Wholly Intrastate Medical Marijuana Legalization Implicates State Sovereignty & Demands a Lopez-Morrison Analysis*

Justice O'Connor had four interrelated qualms with the majority and concurring opinions: (1) our system of Dual Federalism and Tenth Amendment concerns should have been factors in the Court's decision;²²⁹ (2) Congress's asserted need to regulate the local incidents of

224. *Id.* at 2226 (O'Connor, J., dissenting) (“Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. As Justice Scalia recognizes, Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers – a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident.” (internal citations and quotations omitted)).

225. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

226. *Id.* at 600 (Thomas, J., concurring) (“[O]ne always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce.”).

227. *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting) (“[T]he Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause – nestling questionable assertions of its authority into comprehensive regulatory schemes – rather than with precision.”).

228. *Id.* at 2223 (O'Connor, J., dissenting) (observing that the majority and concurrence's reading of *Lopez* and *Morrison* reduce them to “nothing more than a drafting guide.”).

229. *Id.* at 2224 (O'Connor, J., dissenting) (“[B]ecause fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where States lay claim by right of history and expertise.” (internal citations and quotations omitted)).

medical marijuana use and production to avoid undercutting the CSA, is just that – a mere assertion;²³⁰ (3) the Court ignored *stare decisis* by straying from the *Lopez-Morrison* framework;²³¹ and (4) the majority’s holding creates a “perverse incentive for Congress to legislate broadly,” thereby co-opting traditional areas of state regulation.²³²

Instead of distinguishing *Lopez* and *Morrison*, as Justices Stevens and Scalia were content to do, Justice O’Connor sought to apply the *Lopez-Morrison* framework’s underlying rationale: to preserve a local sphere for state police power regulation and thereby avoid creating a completely centralized government.²³³ Justice O’Connor opined that she did not personally agree with medical marijuana legalization and would have voted against Proposition 215,²³⁴ but she also declared that a prime virtue of federalism is that it enables individual states to experiment with legislation that is currently unpopular in other states and in Washington, D.C.²³⁵

An important consideration, which played little or no part in the majority and concurring opinions, was the fact that, unlike *Wickard*, *Raich* involved a state’s attempt to exercise its retained police powers.²³⁶ Justice O’Connor realized this and she focused on the limits that should apply where the federal government legislates in derogation of the states’ ability to exercise their police powers:

We enforce the “outer limits” of Congress’ Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist sys-

230. *Id.* at 2227 (O’Connor, J., dissenting) (“[Congress’s CSA findings] amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute. They are asserted without any supporting evidence – descriptive, statistical, or otherwise. [S]imply because Congress may conclude a particular activity substantially affects interstate commerce does not necessarily make it so.” (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment))).

231. *Gonzales v. Raich*, 125 S. Ct. 2195, 2221 (2005) (O’Connor, J., dissenting).

232. *Id.* (O’Connor, J., dissenting).

233. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

234. *Raich*, 125 S. Ct. at 2229 (O’Connor, J., dissenting).

235. *Id.* at 2220 (O’Connor, J., dissenting) (“One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’” (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

236. *Id.* at 2221 (O’Connor, J., dissenting) (“[*Raich*] exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering.” (internal citations omitted)).

tem of government. . . . The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.²³⁷

From her perspective, the majority ended California's medical marijuana experiment "without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation."²³⁸ Justice O'Connor determined that the majority should have applied the *Lopez-Morrison* framework to avoid converting congressional Commerce Clause authority into a general police power, which the framers denied the federal government, but left to the states.²³⁹

By failing to utilize the *Lopez-Morrison* framework, the majority encouraged Congress to legislate broadly in derogation of state police power and denied the respondents a true as-applied challenge.²⁴⁰ Justice O'Connor would have narrowed the relevant inquiry to the distinct set of circumstances presented by individuals like Raich and Monson – seriously ill state citizens who personally grow and consume medical marijuana pursuant to state law.²⁴¹ In other words, Justice O'Connor would have approached this case along the same lines as the Ninth Circuit.

Within the context of this narrowed inquiry, Justice O'Connor would have run through the now familiar litany of remaining *Lopez-Morrison* factors,²⁴² determining that: (1) the activity at issue is non-commercial;²⁴³ (2) there is no jurisdictional element ensuring a connection to interstate commerce;²⁴⁴ (3) the congressional findings posited in the CSA are merely a series of declarations that "amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute;"²⁴⁵ and (4) Congress's determination that all marijuana will somehow seep into the interstate market is based on an inference upon an inference.²⁴⁶

Justice O'Connor would not allow Congress, without proof of a substantial effect on interstate commerce, to frustrate a state's attempt to provide its seriously ill citizens with doctor-recommended medical marijuana: "[S]imply because Congress may conclude a particular activity

237. *Id.* at 2220-21 (O'Connor, J., dissenting).

238. *Id.* at 2221 (O'Connor, J., dissenting).

239. *Gonzales v. Raich*, 125 S. Ct. 2195, 2221 (2005) (O'Connor, J., dissenting).

240. *Id.* (O'Connor, J., dissenting).

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

242. *Id.* at 2221-22 (O'Connor, J., dissenting).

243. *Id.* at 2225 (O'Connor, J., dissenting).

244. *Gonzales v. Raich*, 125 S. Ct. 2195, 2225 (2005) (O'Connor, J., dissenting).

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

246. *Id.* at 2226-27 (O'Connor, J., dissenting).

substantially affects interstate commerce does not necessarily make it so.”²⁴⁷ Presumably, Justice O’Connor would limit the following language from *Lopez* to activities that are at least tangentially related to commerce: “[A]n essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁴⁸ Such a characterization would avoid the majority’s conclusion that medical marijuana use by seriously ill California citizens undercuts the CSA, as these activities are admittedly non-commercial.

In rebuttal of Justice Stevens’ comprehensive *Wickard* analogy, Justice O’Connor pointed out three important distinctions. First, she acknowledged that Congress expressly limited the AAA’s application to wheat growing operations above a certain size. In contrast to Justice Stevens, Justice O’Connor claimed Congress, in doing so, implicitly recognized the commerce power’s limits and declined to overreach, thereby avoiding impermissible congressional regulation at the level of the “modest . . . home cook’s herb garden.”²⁴⁹ Second, she recognized that in *Wickard*, the Court possessed voluminous congressional findings demonstrating that supply gradations were the primary variable affecting wheat-market stability; whereas in *Raich*, the Court lacked such comprehensive congressional findings regarding medical marijuana legislation’s effect on the illicit interstate marijuana market’s supply and demand levels.²⁵⁰

Third, and perhaps most important, Filburn was a commercial farmer. Thus, all wheat growing activities occurring on his farm were at least tangentially commercial in nature. In contrast, *Raich* and *Monson* were not commercial marijuana producers at any level, tangential or otherwise.²⁵¹ In other words, *Raich* and *Monson* were not part of the enter-

247. *Id.* at 2227 (O’Connor, J., dissenting) (quoting Virginia Surface Mining & Reclamation Ass’n, 452 U.S. at 311 (Rehnquist, J., concurring in judgment)).

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

249. *Gonzales v. Raich*, 125 S. Ct. 2195, 2225 (2005) (O’Connor, J., dissenting).

250. *Id.* at 2227 (O’Connor, J., dissenting) (“The Court recognizes that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market and argues that we have before us findings by Congress to the same effect. The Court refers to a series of declarations in the introduction to the CSA saying that (1) local distribution and possession of controlled substances causes ‘swelling’ in interstate traffic; (2) local production and distribution cannot be distinguished from interstate production and distribution; (3) federal control over intrastate incidents ‘is essential to effective control’ over interstate drug trafficking. These bare declarations cannot be compared to the record before the Court in *Wickard*.” (internal citations and quotations omitted)).

251. *Id.* at 2225 (O’Connor, J., dissenting) (“*Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. The AAA itself confirmed that Congress made an explicit choice not to reach – and thus the Court could not possibly have approved of federal control over – small-scale, noncommercial wheat farming. In contrast to the

prise Congress sought to regulate via the CSA (i.e. illegal commercial producers and distributors of marijuana). Rather, they were part of the subclass of seriously ill state citizens for whom California sought to provide healthcare in the form of access to medical marijuana.²⁵²

Finally, Justice O'Connor took issue with Justice Scalia's use of the Necessary and Proper Clause as a means to justify congressional interference with California's police powers: "Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment."²⁵³ If it were otherwise, Congress could have recast the Gun-Free School Zones Act of 1990, at issue in *Lopez*, as a necessary and proper means of regulating the national firearms market.²⁵⁴

Justice O'Connor concluded that the Court faced a valid exercise of state police power – provision of medical care – which the federal CSA did not defeat because "[t]here is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market – or otherwise to threaten the CSA regime."²⁵⁵ Moreover, she understood that California had not legalized marijuana *in toto*, but instead had created a separate class of legitimate medical marijuana users, pursuant to its healthcare police power. "[The Court] generally assume[s] States enforce their laws and [the Court] ha[s] no reason to think otherwise here."²⁵⁶

E. *Justice Thomas' Dissent – The States are Co-equal Sovereigns, Right?*

For the most part, Justice Thomas echoed Justice O'Connor's concern for preserving a certain level of inviolable state sovereignty:

The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of

CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers." (internal citations omitted).

252. *Raich v. Ashcroft*, 352 F.3d 1222, 1228 (9th Cir. 2003) ("We find that the [respondents'] class of activities – the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician – is, in fact, different in kind from drug trafficking.").

253. *Raich*, 125 S. Ct. at 2226 (O'Connor, J., dissenting).

254. *Id.* (O'Connor, J., dissenting).

255. *Id.* (O'Connor, J., dissenting).

256. *Id.* at 2228 (O'Connor, J., dissenting) (citing *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

their citizens.²⁵⁷

But his dissent is noteworthy for two issues that Justice O'Connor did not address.

First, Justice Thomas reiterated his now familiar plea to abandon the substantial effects test as a constitutional perversion. He instead favors a return to an earlier conception of the commerce power, which allowed Congress to reach activities of "trade or exchange – not all economic or gainful activity that has some attenuated connection to trade or exchange,"²⁵⁸ thus preventing congressional interference with the "States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens."²⁵⁹

The second distinct argument Justice Thomas offered was an adaptation of the proverbial drop-in-the-bucket metaphor. He applied this metaphor to the government's claim that California's legalization of medical marijuana will "substantially affect" interstate commerce. Adeptly, Justice Thomas turned the government's assertions in his favor. He accomplished this by first accepting the government's claim that "there is a multibillion-dollar interstate market for marijuana"²⁶⁰ and then asking the logical corollary of how California's legalization of medical marijuana can have a "substantial effect" on an already burgeoning marijuana market.²⁶¹ Hence, the inquiry becomes – recognizing that the illicit marijuana market was booming pre-medical marijuana legalization – what meaningful effect could such legalization have? In a sense, the government's contention is comparable to one claiming Bill Gates winning the lottery would "substantially affect" his net worth.

Justice Thomas, however, recognized that this entire argument should have been superfluous because the Court usually assumes that the states will effectively enforce their own laws.²⁶² In his mind, there was

257. *Id.* at 2238-39 (Thomas, J., dissenting) (quoting *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in judgment)).

258. *Id.* at 2230 (Thomas, J., dissenting).

259. *Id.* at 2234 (Thomas, J., dissenting).

260. Executive Office of the President, Office of Nat. Drug Control Policy, *Marijuana Fact Sheet* 5 (Feb. 2004).

261. *Raich*, 125 S. Ct. at 2233 (Thomas, J., dissenting) ("It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market.").

262. *Id.* at 2232 (Thomas, J., dissenting) ("We normally presume that States enforce their own laws, and there is no reason to depart from that presumption here: Nothing suggests that California's controls are ineffective. The scant evidence that exists suggests that few people – the vast majority of whom are aged 40 or older – register to use medical marijuana. In part because of the low incidence of medical marijuana use, many law enforcement officials report that the introduction of medical marijuana laws has not affected their law enforcement efforts." (internal quotations and citations omitted)).

no reason to assume that California's distinction between illegal marijuana use and legal medical marijuana use was any different.²⁶³ In short, Justice Thomas reemphasized Justice O'Connor's concern with preserving a sphere of state sovereignty, while adding two important arguments of his own: (1) the Court should reexamine the constitutional validity of the substantial effects test;²⁶⁴ and (2) assuming the government is correct about the size of the interstate marijuana market, there is no principled argument that medical marijuana legalization will have any appreciable effects.²⁶⁵

F. Raich's Consequences for Commerce Clause Jurisprudence

Justice Stevens' majority opinion encircles the *Lopez-Morrison* framework in a cloud of uncertainty. Instead of steadfastly defending the framework's underlying aspiration – to preserve a local sphere of state sovereignty²⁶⁶ – Justice Stevens took the wind out of its sails by distinguishing *Lopez* and *Morrison* on the facts.²⁶⁷ Chief Justice Rehnquist explicitly envisioned a larger role for the framework than simply applying where Congress chose to legislate in the absence of a comprehensive regulatory scheme – the framework was to be the obligatory approach in reviewing “substantial effects” Commerce Clause legislation.²⁶⁸

The majority's reasoning validates Justices O'Connor and Thomas' concern with giving Congress the perverse incentive to legislate broadly. Congress may simply include the regulation of intrastate non-commercial activity within a broad regulatory scheme that is generally commercial in character, and the Court will honor such a decision by proclaiming that the intrastate non-commercial aspects of the regulatory scheme are “an essential part of a larger regulation of economic activity.”²⁶⁹

The most disconcerting aspect of the majority and concurring opinions is their disregard for the fact that *Raich* involved a state exercising its police powers. Even conceding *Wickard*'s continuing validity, that case involved the isolated activity of a commercial farmer, not a state

263. *Id.* (Thomas, J., dissenting).

264. *Id.* at 2235 (Thomas, J., dissenting).

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

266. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

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

268. *United States v. Morrison*, 529 U.S. 598, 609 (2000) (“Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation [i.e. activities that substantially affect interstate commerce], it provides the proper framework for conducting the required analysis . . .”).

269. *Raich*, 125 S. Ct. at 2217 (Scalia, J., concurring).

exercising its retained police powers.²⁷⁰ *Raich*, in contrast, involved a state's decision to provide medical care to its seriously ill citizens by allowing home-grown medical marijuana upon a state-licensed physician's recommendation.²⁷¹ If the Court wishes to recognize a sphere of state sovereignty, where a state acts pursuant to a traditional police power, the Court must enunciate a more sustainable doctrine to protect that sovereignty from federal encroachment. Otherwise, Justice Brandeis' oft reiterated notion that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country,"²⁷² will be remembered as a mere utopian pipe dream.

IV. CRITIQUE

A. *Justice Stevens' Disconnect from the Lopez-Morrison Framework – Should Wickard & Wirtz Apply in Raich?*

As intimated in the preceding sections, Justice Stevens was content to distinguish, rather than apply the *Lopez-Morrison* framework. However, the precedential value of those two cases would seem to dictate their application rather than distinction. As Chief Justice Rehnquist stated in *Morrison*, "[s]ince *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation [i.e. activities that substantially affect interstate commerce], it provides the proper framework for conducting the required analysis."²⁷³ *Lopez* and *Morrison* were not intended as cases readily distinguishable via slight factual deviations.²⁷⁴ Admittedly, *Lopez* and *Morrison* were not easy to apply because Justice Rehnquist declined to overrule seemingly conflicting Third Era precedent.²⁷⁵ They were, nevertheless, intended to provide an ongoing analytical framework regarding "substantial effects" legislation, regardless of whether the pertinent challenge was facial or as-applied.²⁷⁶

Consequently, Justice Stevens' decision to distinguish *Lopez* and *Morrison* based on the fact that *Raich* and *Monson* brought as-applied, as opposed to facial challenges, is questionable.²⁷⁷ Justice Stevens'

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

271. *Raich v. Ashcroft*, 352 F.3d 1222, 1228 (9th Cir. 2003).

272. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

273. *United States v. Morrison*, 529 U.S. 598, 609 (2000).

274. *Id.*

275. See, e.g., McCloskey, *supra* note 6, at 195-96.

276. *Morrison*, 529 U.S. at 609.

277. *Gonzales v. Raich*, 125 S. Ct. 2195, 2209 (2005) ("Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress'

proffered defense was that the Court lacked the authority to “excise individual applications of a concededly valid statutory scheme.”²⁷⁸ Justice Thomas, however, rebutted that very argument quite effectively in his dissent:

But [Justice Stevens’ argument] begs the question at issue: whether respondents’ “class of activities” is “within the reach of federal power,” which depends in turn on whether the class is defined at a low or a high level of generality. If medical marijuana patients like Monson and Raich largely stand outside the interstate drug market, then courts must excise them from the CSA’s coverage.²⁷⁹

The source of Justice Stevens’ argument that the Court lacks the authority to “excise individual applications of a concededly valid statutory scheme,” casts further doubt on its applicability to *Raich*. That language emerged from *Wirtz*, which we know involved Enterprise Theory.²⁸⁰ Therefore, such an argument is inapposite where the individuals sought to be regulated are not involved in an enterprise that at some level is engaged in interstate commerce.²⁸¹ Raich and Monson did not grow their medical marijuana as part of any commercial enterprise; thus, Stevens’ reliance on *Wirtz*’s enterprise theory is inappropriate. What the Court actually faced in *Raich* was not a commercial enterprise of any sort, but rather two very sick women whose doctors recommended medical marijuana, pursuant to state law, after conventional medicine failed them.

Justice Stevens’ heavy reliance on *Wickard* is equally questionable. Chief Justice Rehnquist stated in *Lopez* that “[i]n every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . . the regulated activity was of an *apparent commercial character*.”²⁸² Despite Justice Stevens’ protestations to the contrary, the fact that Filburn was a commercial farmer undoubtedly played a role in the *Wickard* decision. Were that not the case, Congress could reach “something as modest as the home cook’s herb garden.”²⁸³ What is more, Justice Rehnquist would never have made the claim that every Commerce Clause case involving an application of the Aggregation Principle

commerce power in its entirety. This distinction is pivotal for we have often reiterated 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.” (internal citations and quotations omitted)).

278. *Id.*

279. *Id.* at 2237 (Thomas, J., dissenting).

280. *Maryland v. Wirtz*, 392 U.S. 183, 188 (1968).

281. *See* Kreit, *supra* note 117.

282. *United States v. Morrison*, 529 U.S. 598, 611 n.4 (2000) (emphasis supplied).

283. *Raich*, 125 S. Ct. at 2225 (O’Connor, J., dissenting).

“was of an apparent commercial character,”²⁸⁴ if Filburn’s status as a commercial wheat farmer was irrelevant. Thus, the Ninth Circuit’s reasoning below is more appropriate: “As the regulated activity in this case is not commercial, *Wickard*’s aggregation analysis is not applicable.”²⁸⁵

Simply because Congress stated in the CSA that “[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate” does not make it so: “Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question.”²⁸⁶ Furthermore, such a claim does not magically render *Wickard*’s Aggregation Principle applicable to non-commercial activities, in light of Justice Rehnquist’s aforementioned language from *Lopez*.²⁸⁷ A critical observation which should have played a larger role in Justice Stevens’ majority opinion was the fact that the California CUA did not legalize marijuana use; rather, it legalized *medical* marijuana use:

[W]here that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.²⁸⁸

And despite Justice Scalia’s assertion that the federal government is not forced to rely on the states’ effective enforcement of their laws, the Court “normally presume[s] that States enforce their own laws.”²⁸⁹ Correspondingly, federal encroachment is highly suspect where “Congress has encroached on States’ traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.”²⁹⁰

All told, the *Raich* dissenters and the Ninth Circuit majority adhered to Court precedent by distinguishing *Wickard* and *Wirtz* and applying the *Lopez-Morrison* framework. It is doubtful the Court originally intended for *Wirtz*’s Enterprise Theory to apply in contexts other than cases involving the regulation of the non-interstate activities of commercial enterprises that at some level participate in interstate commerce.²⁹¹ Since *Raich* and *Monson* did not participate in any commer-

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

285. *Raich v. Ashcroft*, 352 F.3d 1222, 1230 (9th Cir. 2003).

286. *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995); *Morrison*, 529 U.S. at 614.

287. *Lopez*, 514 U.S. at 611 n.4.

288. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2004).

289. *Gonzales v. Raich*, 125 S. Ct. 2195, 2232 (2005) (Thomas, J., dissenting) (citing *Riley v. Nat’l Fed’n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

290. *Raich*, 125 S. Ct. at 2234 (Thomas, J., dissenting) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 719 (1985)).

291. See *Kreit*, *supra* note 117.

cial enterprise, Justice Stevens' Enterprise Theory analysis was inappropriate.

Also, as Chief Justice Rehnquist stated in *Lopez*, Aggregation Principle cases involve "regulated activity . . . of an apparent commercial character."²⁹² Raich and Monson, regardless of the existence of a commercial market for marijuana, did not partake in such a market. Rather, they cultivated medical marijuana – pursuant to California law – for wholly personal consumption as recommended by a state-licensed physician. Their cultivation and consumption was as non-commercial "as the home cook's herb garden."²⁹³ Given these observations, one is left with Justice O'Connor's *Lopez-Morrison* analysis: (1) the activity at issue is non-commercial;²⁹⁴ (2) there is no jurisdictional element ensuring a connection to interstate commerce;²⁹⁵ (3) the congressional findings posited in the CSA are merely a series of declarations that "amount to nothing more than a legislative insistence that the regulation of controlled substances must be absolute;"²⁹⁶ and (4) Congress's determination that all marijuana will somehow seep into the interstate market is based on an inference upon an inference.²⁹⁷

Given the reality, however, that Justice Stevens' majority opinion is now the law, the resulting conception of the *Lopez-Morrison* framework is just as Justice O'Connor feared – it is "little more than a drafting guide."²⁹⁸ The reality is that Congress may, in the words of Justice Thomas, "draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce."²⁹⁹ Henceforth, the Court will apparently defer to congressional inclusion of wholly local, non-commercial activities in a broad regulatory scheme that generally targets commercial activity, so long as Congress asserts that the intrastate non-commercial aspects of the regulatory scheme are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."³⁰⁰

Such a characterization does absolutely nothing to preserve a sphere of local state sovereignty.³⁰¹ In reality, as Justice O'Connor

292. *United States v. Morrison*, 529 U.S. 598, 611 n.4 (2000).

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

294. *Id.* (O'Connor, J., dissenting).

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

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

297. *Id.* at 2226-27 (O'Connor, J., dissenting).

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

299. *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas, J., concurring); *Raich*, 125 S. Ct. at 2238 (Thomas, J., dissenting).

300. *Raich*, 125 S. Ct. at 2209-10 (quoting *Lopez*, 514 U.S. at 561).

301. *Lopez*, 514 U.S. at 557.

noted, such a characterization has just the opposite effect by giving Congress the incentive to legislate broadly in derogation of state police power.³⁰² This allows Congress to co-opt, rather than recognize, traditional areas of state sovereignty, and contributes to the creation of a completely centralized government.³⁰³ Additionally, when coupled with Justice Scalia's assertion that when exercising such a broad commerce power the federal government is not forced to rely on the states to enforce their own laws, the Court is practically begging Congress to use the Commerce Clause as the "hey, you-can-do-whatever-you-feel-like Clause."³⁰⁴

The *Raich* majority made it abundantly clear that supporters of the notion that the Tenth Amendment imposes limits on Congress's ability to regulate the states via the Commerce Clause will have to utilize a doctrinal tool other than the *Lopez-Morrison* Framework to preserve a "distinction between what is national and what is local."³⁰⁵

B. *Post-Raich, What Recourse Do the States Have?*

The Court, through *Raich*, has foreclosed the possibility that state medical marijuana legalization statutes provide protection from federal prosecution.³⁰⁶ Are there any routes left for states like California that see a legitimate need for medical marijuana? Certainly, there is the route offered by Justice Stevens³⁰⁷ and Professor Wechsler³⁰⁸ – lobby Congress and push citizens to vote for candidates who support rescheduling marijuana. But, given the current national political climate, the efficacy of such efforts remains doubtful.

Another prospective route is to create a completely state owned and operated program controlling medical marijuana dispensation from farm to patient. It would be virtually impossible for the federal government to argue that such a program had a substantial, non-inferential impact on interstate commerce. For example, California could conceivably – funding issues aside – create a state governmental body to grow medical

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

303. *Id.* (O'Connor, J., dissenting).

304. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995).

305. *Raich*, 125 S. Ct. at 2216 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 566-67).

306. *Id.* at 2215.

307. *Id.* ("We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated.")

308. See Wechsler, *supra* note 11.

marijuana, harvest the medical marijuana, and distribute the medical marijuana at state run dispensaries to California citizens with valid doctor recommendations.

To further allay federal concerns about diversion into the illicit marijuana market, states could require such patients to consume their medical marijuana on-site, in the presence of medical personnel. If the federal government sought to regulate that type of tightly controlled state program, what actually lies at the bottom of this entire dilemma would emerge – the federal government abhors marijuana use in any context, even by extremely sick individuals. What remains clear is “[t]he States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.”³⁰⁹ If Justices Brandeis and O’Connor are correct that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country,”³¹⁰ states like California, if they can allot the requisite funding, should be able to create such programs.

Simply put, a state run, non-profit, tightly controlled medical marijuana dispensation program could not be readily characterized as commercial or economic. Furthermore, restricting patients to on-site consumption in the presence of medical staff would allay concerns about diversion into the illicit marijuana market. Of course, other enumerated powers would remain to frustrate the states, for example Congress’s taxing and spending power.³¹¹ However, congressional frustration of an imaginative state’s efforts to create such a program, after the state carefully avoided commerce implications, would be extraordinarily draconian.

The ultimate question becomes whether it is wise to allow Congress, in spite of the states’ traditional power to “protect the health, safety, and welfare of their citizens,”³¹² to monopolize the authority to decide whether marijuana has a legitimate medical purpose. If one believes the states are residual sovereigns retaining historic spheres of state sovereignty protected from excessive federal encroachment, free to act as legislative laboratories, it seems states should have some recourse to provide their seriously ill citizenry with medical marijuana.³¹³ State discontent with federal marijuana policies is currently making headlines,

309. See *Raich*, 125 S. Ct. at 2234 (Thomas, J., dissenting).

310. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

311. See generally *South Dakota v. Dole*, 483 U.S. 203 (1987).

312. *Raich*, 125 S. Ct. at 2234 (Thomas, J., dissenting) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 719 (1985)).

313. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

but none offers the hope of immunity from federal prosecution.³¹⁴ How states answer the problems *Raich* poses will be interesting to say the least.

C. *Following Raich, What Direction Should the Court Take to Preserve State Sovereignty?*

The post-Rehnquist Supreme Court faces a broader issue – should the Court embrace a limited or broad conception of federalism? If the Court chooses the latter, new doctrinal tools are necessary to preserve a local sphere for state police power regulation.³¹⁵ If history offers any guidance in this situation, it is that the Tenth Amendment is a resilient bit of constitutional language.³¹⁶ What remain uncertain are the characteristics we should expect from a resurgent Tenth Amendment.

Raich's overarching message appears to be that the Supreme Court is willing to distinguish *Lopez* and *Morrison* on the facts, rather than adhering to Chief Justice Rehnquist's intent that the *Lopez-Morrison* framework provide the required analysis for addressing substantial effects issues.³¹⁷ Justice Souter's premonition that *Lopez* represented a mere doctrinal misstep may have finally come to pass.³¹⁸ This realization is especially disconcerting for proponents of a less centralized government.

The *Raich* majority severely constrained the *Lopez-Morrison* framework, subverting the framework's stated purpose of ensuring a "distinction between what is national and what is local," to avoid the creation of "a completely centralized government."³¹⁹ As Justices O'Connor and Thomas pointed out, the majority and concurrence's stance creates a perverse incentive for the federal government to legis-

314. See Katie Zezima, *Rhode Island: New Marijuana Law*, NEW YORK TIMES, Jan. 4, 2006, at A11, available at 2006 WLNR 127512; <http://www.nytimes.com/2006/01/04/national/04brfs.html> ("Rhode Island has become the first state to enact a law sanctioning the use of medical marijuana since the Supreme Court ruled in [*Gonzales v. Raich*] that the authorities could prosecute users, even in states with laws that allow its use. The State House of Representatives overrode the veto of Gov. Donald L. Carcieri, a Republican who rejected the measure last year, 59 to 13. Rhode Island is the 11th state to allow the use of marijuana for medical purposes.").

315. See *United States v. Lopez*, 514 U.S. 549, 557 (1995).

316. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."), with *Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

317. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2209 (2005).

318. *Lopez*, 514 U.S. at 614-15 (Souter, J., dissenting).

319. *Id.* at 557.

late broadly, in derogation of the states' retained police powers.³²⁰ Thus, the Court has invited Congress to employ the Commerce Clause to regulate intrastate non-commercial activities by characterizing these activities 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."³²¹ By accepting such a limited view of federalism, the Court has gone a long way towards redefining the Commerce Clause as the "hey, you-can-do-whatever-you-feel-like Clause."³²²

It remains to be seen whether the Court will stray from the *Morrison-Lopez* framework in non-drug contexts, but to do otherwise would be highly inconsistent and would yield credibility to the notion that the Court makes *ad hoc* decisions when drug regulation is involved. If the future members of the Court adopt a broader vision of federalism, some enterprising Justice must articulate a doctrine that cannot be conveniently distinguished based on the facts.

Perhaps the necessary step is to reinstate and revitalize an abandoned Rehnquist doctrine – the *National League of Cities* dichotomy. In Seventh Amendment right-to-jury-trial situations, the Court is willing to analogize present-day causes of action to 18th century causes of action to determine if they are legal or equitable.³²³ If such an analogy is possible, creating a distinction between traditional and non-traditional government functions is hardly "unworkable."³²⁴ We can identify the broad regulatory areas where the states' traditional police powers applied: they "have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens."³²⁵ Therefore, the Court could categorize state regulations based on whether they fit the definition of a traditional state police power. In short, the Court could define the states' traditional government functions based on the states' historic police powers.

Where Congress claims to legislate within the "substantial effects" context, in derogation of one of these traditional state police powers, the

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

321. *Id.* at 2209-10 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

322. Kozinski, *supra* note 304.

323. *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 569-70 (1990) (holding that the right to a jury trial turns on whether the relevant cause of action and remedy are analogous to those from the 18th century common law which permitted jury trials).

324. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) ("[T]he attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only *unworkable* but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled." (emphasis supplied)).

325. *Raich*, 125 S. Ct. at 2221 (2005) (O'Connor, J., dissenting) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Whalen v. Roe*, 429 U.S. 589, 603 n. 30 (1977)).

Court ought to require a higher level of scrutiny. The Court should, as Justice Thomas suggested, begin with the presumption that a state effectively enforces its own laws.³²⁶ To accord federalism concerns due weight, the Court should require concrete congressional findings, demonstrating that a commerce regulation's subject matter does in fact have a "substantial effect" on interstate commerce. Reviewing federal commerce legislation in this manner would account for a key distinction between *Wickard* and *Raich* – *Raich* involved a state regulating pursuant to a traditional police power (i.e. healthcare), whereas *Wickard* did not.³²⁷

If states are truly residual sovereigns, congressional self-restraint should not shape the contours of state sovereignty on an impromptu basis. Instead, per its constitutional duty, the Court should impose some affirmative restraints on congressional power as it relates to retained state sovereignty. This proposed form of "substantial effects" review would impose those restraints by borrowing a portion of the *Lopez–Morrison* framework – congressional findings demonstrating a "substantial effect" on interstate commerce.³²⁸ But, rather than serving an informative role, as they did in the *Lopez–Morrison* Framework, these findings would be required where a traditional state police power is at stake.

V. CONCLUSION

Raich leaves us at a commerce crossroads; which path the Roberts Court will choose is uncertain. What remains probable, though, is that the Tenth Amendment will eventually reemerge as a limit on Congress's commerce power. The precise nature of such a reemergence remains indiscernible, but heightened judicial scrutiny would go a long way towards restoring balance to our system of federalism.

326. *Id.* at 2232 (Thomas, J., dissenting).

327. *See id.* at 2221 (O'Connor, J., dissenting).

328. *United States v. Lopez*, 514 U.S. 549, 563 (1995); *United States v. Morrison*, 529 U.S. 598, 612 (2000).