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***261 GONZALES V. RAICH: HOW THE MEDICAL MARIJUANA DEBATE INVOKED COMMERCE CLAUSE CONFUSION**

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I. Introduction

The United States Supreme Court's Commerce Clause jurisprudence has undergone significant shifts since the Constitution was ratified more than two hundred years ago. [\[FN1\]](#) For nearly sixty years, between 1937 and 1995, there was consistency as the Court permitted Congress to undertake a wide range of regulations targeted at a host of social problems that had little relation to interstate commerce. [\[FN2\]](#) At first, it appeared that the Court was ushering in a new era for the Commerce Clause when it decided *United States v. Lopez* [\[FN3\]](#) in 1995, and *United States v. Morrison* [\[FN4\]](#) in 2000. [\[FN5\]](#) Both decisions severely limited Congress' power to legislate, and it appeared the Court was signaling that power over traditional state matters, such as crime, family, and education, was going to be kept out of Congress' reach. [\[FN6\]](#)

But in 2005, the Court swerved from its path when it announced its decision in *Gonzales v. Raich*, [\[FN7\]](#) upholding Congressional regulation of a purely intrastate activity—the cultivation of marijuana [\[FN8\]](#) for medical purposes pursuant to state law. [\[FN9\]](#) This decision left two groups in limbo. It was a crushing blow to patients who depended on marijuana to alleviate serious suffering and left them with the difficult decision of whether to violate federal law or endure excruciating pain. The legal community, on the other hand, was left wondering what this decision meant for the Commerce Clause.

[\[FN10\]](#) Suddenly, instead of following its decisions in *Lopez* and *Morrison* and limiting Congressional power, the Raich Court reverted to its pre-*Lopez* jurisprudence.

The Supreme Court's decision in *Raich* is inconsistent with the Court's decisions in *Lopez* and *Morrison*. Under the principle of *stare decisis*, the *262 *Raich* court should have followed *Lopez* and *Morrison* and held that Congress had overstepped its bounds in regulating medical marijuana use. Justices Kennedy and Scalia, however, did an about-face in *Raich*, joining their opponents in *Lopez* and *Morrison*; and thus, perhaps inadvertently, invoking inconsistency and confusion regarding the Commerce Clause.

Part II of this casenote examines the history of Commerce Clause jurisprudence in the United States. Part III scans the current federal and state drug laws relating to medical marijuana use. Part IV details the legal proceedings that culminated with the Supreme Court *Raich* decision. Part V examines the Supreme Court's opinion in *Raich*, including the concurring and dissenting opinions. Finally, Part VI analyzes the opinion and argues that it was inconsistent with the Court's most recent pronouncements about the Commerce Clause in *Lopez* and *Morrison*. This casenote concludes that in the short term, the decision will probably lead to confusion and broad legislating, but in the long term, the precedential value of *Raich* will likely be minimal. [45]II. Historical Background of the Commerce Clause

A. The Birth and Adolescence of the Commerce Clause

Although the founding fathers envisioned a limited role for the federal government, the power to regulate interstate commerce was considered a critical component of federal authority. [\[FN11\]](#) After the American Revolution, serious trade infighting between states and a depressed economy plagued the young nation under the Articles of Confederation. [\[FN12\]](#) The central government under the Articles was weak and did not have the authority to prevent

the states from enacting trade barriers and taxes or to establish commercial regulations. [FN13] Thus, during the Constitutional Convention, the role of the federal government in regulating commerce received tremendous attention. [FN14] As a result, the founders included in [Article I, Section 8 of the Constitution](#) a clause granting Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” [FN15]

Despite its prominence and importance during these early years, the Commerce Clause was not examined by the Supreme Court for several *263 decades. [FN16] In 1824, in *Gibbons v. Ogden*, [FN17] Chief Justice Marshall provided guidance about the scope of Congress' power to regulate commerce that was relied upon for decades, and continues to be relied upon today. [FN18] His opinion granted Congress expansive powers under the Commerce Clause by broadly defining “commerce.” [FN19] Chief Justice Marshall explained that “[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, the parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” [FN20] However, there were also limits to these powers, including that the “completely internal commerce of a State . . . may be considered as reserved for the State itself.” [FN21]

At issue in *Gibbons* was a decision by the New York legislature to grant two men exclusive navigational rights in the state. [FN22] Aaron Ogden obtained an injunction to stop Thomas Gibbons from violating the exclusive privilege by running his boats in New York waters. [FN23] Gibbons challenged the injunction, arguing that the actions of the New York legislature were unconstitutional since they were repugnant to federal acts created by Congress in regulating interstate commerce. [FN24]

The Court agreed, holding that “commerce” as contemplated by the Constitution was much broader than mere “buying and selling,” and included navigation. [FN25] But the Court also recognized limits on Congress' Commerce Clause power: The *Gibbons* Court determined that a regulation of commerce that was “completely internal” would exceed Congress'

authority. [FN26]

Despite the broad interpretation of commerce in *Gibbons*, the Supreme Court subsequently found several occasions where Congress exceeded those limits. [FN27] Between the late 1800s and the mid-1930s, the Court employed a *264 direct/indirect effects test to determine what matters affected commerce in a manner that permitted federal regulation. [FN28] While the Court never seemed to be able to precisely define a “direct” or “indirect” effect, it indicated that an intent to affect interstate commerce might be required before Congress could regulate. [FN29] Therefore, the extent of the activity's impact on interstate commerce was ostensibly irrelevant. [FN30] Instead, the Court instructed that the Commerce Clause analysis should focus on “the manner in which the effect has been brought about.” [FN31] The test was designed to reflect the constitutional limitations on the activities Congress could regulate. [FN32] Indirect effects were beyond the limits because otherwise “the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.” [FN33]

During this period, the Supreme Court used the direct/indirect effects test to find a number of federal statutes unconstitutional. For example, in the *Employers' Liability Cases*, [FN34] the Court invalidated a federal act providing that *265 common carriers engaged in interstate commerce were liable to employees who were injured or killed due to the negligence of the companies' officers or employees. [FN35] In *Hammer v. Dagenhart*, [FN36] the Court rejected a statute prohibiting the shipment and delivery in interstate commerce of goods produced by young children. [FN37] The Railroad Retirement Act, which created a pension system for employees of common carriers involved in interstate commerce, was struck down in *Railroad Retirement Board v. Alton Railroad Co.* [FN38] Similarly, the Live Poultry Code, which required slaughterhouse operators to abide by certain labor provisions, was found unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*. [FN39] Finally, in *Carter v. Carter Coal Co.*, [FN40] the Court struck down the Bituminous Coal Conservation Act of 1935, which, among other things, fixed

the minimum price for coal and established labor provisions for coal mines. [\[FN41\]](#)

However, the Court also upheld some federal statutes facing Commerce Clause challenges. The Court held that a regulation on carrying lottery tickets across state lines was constitutional in the Lottery Case. [\[FN42\]](#) In *Hipolite Egg Co. v. United States*, [\[FN43\]](#) the Court upheld a prohibition on shipping adulterated food interstate. [\[FN44\]](#) The Court also upheld the Mann Act, [\[FN45\]](#) which created criminal penalties for transporting women and girls across state lines for “immoral purposes.” [\[FN46\]](#)

B. Expansion-The “Anything Goes” Era of the Commerce Clause

A major shift in Commerce Clause jurisprudence began in 1937, with the Court's decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* [\[FN47\]](#) Although it was decided less than a year after *Carter* by an identical *266 Court, [\[FN48\]](#) *Jones & Laughlin* departed from the direct/indirect effects test and set in motion a significant expansion of Congress' Commerce Clause power. [\[FN49\]](#) The *Jones & Laughlin* Court upheld the constitutionality of the National Labor Relations Act because the labor practices it regulated had a “close and substantial relation to interstate commerce.” [\[FN50\]](#) The Court counseled that the analysis must focus on “the effect upon commerce, not the source of the injury.” [\[FN51\]](#)

Over the next couple of years, the composition of the Court changed significantly and the more expansive nature of the Commerce Clause became firmly implanted in the Court's jurisprudence. [\[FN52\]](#) By 1942, when the Court decided *Wickard v. Filburn*, [\[FN53\]](#) only two of the nine justices who decided *Carter* remained on the bench. [\[FN54\]](#) The 1940s ushered in an “anything goes” attitude toward Congress' power under the Commerce Clause that lasted until 1995. [\[FN55\]](#) The Court openly recognized and accepted that Congress was using the Commerce Clause to advance social policies by finding creative ways to connect their regulations to commerce. [\[FN56\]](#)

*267 In *Wickard*, the Court analyzed the effect of the Agricultural Adjustment Act of 1938 (“AAA”), which permitted the establishment of an annual wheat acreage allotment. [\[FN57\]](#) Farmers who harvested more than allowed were subject to penalties for each bushel in excess of the allotment. [\[FN58\]](#) In 1941, the allotment was set at 11.1 acres; however, Filburn, who owned a small farm in Ohio, sowed twenty-three acres. [\[FN59\]](#) Filburn refused to pay the fine, choosing instead to file suit against the Secretary of Agriculture to enjoin the enforcement of the penalty. [\[FN60\]](#)

Much of the wheat that Filburn harvested was not going to be sold in interstate commerce or otherwise. [\[FN61\]](#) While he did sell some of his crop, the rest was for his own consumption—for his family to eat, for feeding livestock and poultry, and for seeding the following year's crop. [\[FN62\]](#) Filburn argued that Congress had no authority to regulate his production and consumption of wheat “since [these activities] are local in character, and their effects upon interstate commerce are at most ‘indirect.’” [\[FN63\]](#)

The Court, however, looked at the effect of the regulation on the wheat market as a whole. [\[FN64\]](#) The Court noted that the United States' wheat industry had faced serious challenges and that the AAA was managing fluctuating market prices for the benefit of farmers. [\[FN65\]](#) Additionally, the record provided evidence of the significant impact of home-grown wheat on the overall national market, leaving the Court with “no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.” [\[FN66\]](#) Therefore, the Court determined that even though Filburn's crop may not have, by itself, had a significant impact on interstate commerce, that “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.” [\[FN67\]](#)

Wickard is often recognized as the real metamorphosis of Commerce Clause jurisprudence [\[FN68\]](#) because it clearly pronounced that a broad in-

terpretation of *268 Congress' power under the Commerce Clause was required such that even activities that were “local” and not “regarded as commerce” could be regulated. [FN69] Chief Justice Rehnquist has described Wickard as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.” [FN70] Nevertheless, the Court followed Wickard's broad interpretation of commerce to uphold statutes pertaining to criminal activity, [FN71] civil rights, [FN72] labor relations/employment, [FN73] and environmental regulation. [FN74] Since the statute at issue in Raich was criminal, the cases from this era that contemplated the constitutionality of criminal statutes are particularly instructive.

In *Cleveland v. United States*, [FN75] members of a Mormon sect were charged with violating the Mann Act, [FN76] which instituted criminal penalties for transporting women across state lines for any “immoral purpose.” [FN77] The petitioners, who each had multiple wives, sought to invalidate the Mann Act *269 after they were arrested for bringing their wives across state lines to live. [FN78] The Court noted that the Mann Act had primarily been used to quell the interstate market for prostitution, but determined that the regulation could go further to include prosecuting polygamy. [FN79] The Court also recognized that the statute's expansive scope evidenced Congress' intent to regulate non-commercial acts. [FN80] The Court concluded that such regulation was constitutionally permissible. [FN81] The Court explained that:

The fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the States. The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have “the quality of police regulations” is not consequential. [FN82] In *Perez v. United States*, [FN83] the Court held that a federal statute targeting organized crime was constitutional as applied to the petitioner, who was a “loan shark.” [FN84] The petitioner was

arrested following a lengthy extortion scheme in which he loaned money to a business owner and then rapidly increased the required payments and threatened bodily harm if payments were not made. [FN85] Since these loan sharking operations were purely intrastate, the petitioner argued that the federal government had no power to prosecute. [FN86] The Court acknowledged that loan sharking was “a traditionally local activity,” but concluded that Congress properly found it was integral to the financing of organized crime and thus, permissibly regulated under the Commerce Clause. [FN87]

C. Contraction of Congress' Commerce Clause Power

The “Anything Goes” Era of Commerce Clause jurisprudence ended abruptly with the Court's decision in 1995 in *Lopez*. The *Lopez* Court declared that the Gun-Free School Zones Act of 1990 (“GFSZA”) [FN88] was *270 unconstitutional because it exceeded Congress' authority under the Commerce Clause. [FN89] The GFSZA was a criminal statute providing federal penalties for possession of a firearm in a school zone. [FN90] Alfonso Lopez, Jr., a high school senior, was charged with violating the GFSZA after he brought a .38 caliber handgun to his Texas high school. [FN91] He argued that Congress had no authority to enact the GFSZA. [FN92]

Writing for the five-to-four majority, Chief Justice Rehnquist noted that the Commerce Clause granted Congress the authority to regulate three broad categories of activities: (1) “the use of the channels of interstate commerce”; [FN93] (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; [FN94] and (3) “activities having a substantial relation to interstate commerce.” [FN95] The Court determined that the activity must “substantially affect” interstate commerce in order for Congress to have the authority to regulate it under the third category. [FN96] Because the GFSZA did not fall within either of the first two categories, the issue was whether the federal statute “substantially affected” interstate commerce such that it fell within the third category of permissible regula-

tions. [\[FN97\]](#)

Justice Rehnquist, who was joined by Justices O'Connor, Thomas, Kennedy, and Scalia, distinguished Lopez from Wickard and determined that the GFSZA did not substantially affect interstate commerce for three reasons. [\[FN98\]](#) First, the GFSZA was “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.” [\[FN99\]](#) Second, the statute did not have a “jurisdictional element”—something ensuring that the regulated activity in question (here, possession of a gun by a student at a school) affected interstate commerce. [\[FN100\]](#) Third, the GFSZA did not contain legislative findings regarding *271 the regulation's effect on interstate commerce. [\[FN101\]](#) The Court acknowledged that legislative findings were not required, but noted that if those findings existed, they could help to unearth a link to interstate commerce that was not “visible to the naked eye.” [\[FN102\]](#)

The Lopez Court sought to establish clear limits to Congress' power under the Commerce Clause partly because of an underlying fear that expansion over the past several decades was creating a federal police power. [\[FN103\]](#) The majority admitted three possible connections between gun regulation and interstate commerce. [\[FN104\]](#) First, gun violence drives up insurance costs, which are distributed among all Americans. [\[FN105\]](#) Second, people who fear gun violence could limit their interstate travel. [\[FN106\]](#) Third, student learning is disrupted by gun violence, and this impacts the country's productivity and ability to compete globally. [\[FN107\]](#) But Justice Rehnquist was concerned that these connections to interstate commerce were too tenuous, especially because those reasons could be used to justify federal regulation in all three core areas generally reserved for state control: family law, criminal law, and education. [\[FN108\]](#)

In a concurring opinion, Justice Kennedy described the importance of limitations on federal power to protect the balance between federal and state authority that is at the heart of our political system. [\[FN109\]](#) Justice Kennedy did not doubt that keeping guns out of our schools was important, but

since there was disagreement regarding how to attain that goal, “the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.” [\[FN110\]](#) Additionally, he noted that more than forty states had already enacted criminal penalties for carrying firearms near schools. [\[FN111\]](#) Justice Kennedy was concerned that the GFSZA “foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and [the GFSZA did] so by *272 regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.” [\[FN112\]](#)

Justices Stevens, Souter, Breyer, and Ginsburg dissented. Justice Breyer maintained that the majority's decision was inconsistent with nearly six decades of Commerce Clause precedent. [\[FN113\]](#) He also reminded that the Court was required to engage in judicial restraint, striking down federal acts only where Congress did not have a “rational basis” for concluding that its regulation sufficiently affected interstate commerce. [\[FN114\]](#) Justice Breyer was satisfied that the rational basis for Congress' determination existed because legislative findings showed that “guns in schools significantly undermine the quality of education in our Nation's classrooms” [\[FN115\]](#) and “[e]ducation, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy.” [\[FN116\]](#) Finally, he warned that the majority's decision “threaten[ed] legal uncertainty in an area of law that, until this case, seemed reasonably well settled.” [\[FN117\]](#)

Although some may have believed or hoped that Lopez was merely an anomaly, [\[FN118\]](#) the Court's shift in Commerce Clause jurisprudence was confirmed five years later when it decided Morrison. The vote in Morrison was exactly the same as in Lopez—a five-to-four decision to strike down a section of the Violence Against Women Act of 1994 (“VAWA”). [\[FN119\]](#) That section provided a civil remedy for victims of gender-motivated violence. [\[FN120\]](#)

*273 Again writing for the majority, Chief Justice Rehnquist more clearly established that the test for

whether a federal regulation substantially affected interstate commerce involved four prongs: (1) whether the statute regulated commerce or any sort of economic enterprise; [\[FN121\]](#) (2) whether the statute contained an “express jurisdictional element which might limit its reach to a discrete set” of situations; [\[FN122\]](#) (3) whether the statute or legislative history contained “express congressional findings regarding the effects upon interstate commerce” of the regulated activity; [\[FN123\]](#) and (4) whether the link between the regulated activity and a substantial effect on interstate commerce was “attenuated.” [\[FN124\]](#)

The majority determined that Morrison was analogous to Lopez on the first two prongs because gender-motivated violence was not “in any sense of the phrase, economic activity,” [\[FN125\]](#) and that the VAWA did not contain any jurisdictional element. [\[FN126\]](#) However, regarding the third prong, Chief Justice Rehnquist acknowledged that Morrison was distinguishable from Lopez in that the VAWA was “supported by numerous [congressional] findings regarding the serious impact that gender-motivated violence has on victims and their families.” [\[FN127\]](#) He then downplayed the importance of this third prong, declaring that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.” [\[FN128\]](#) As a result, the Chief Justice rejected “the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” [\[FN129\]](#)

Justices Souter, Stevens, Ginsburg, and Breyer again allied in dissent. Justice Souter outlined many of the same criticisms levied by Justice Breyer in Lopez, particularly that the decision ignored Commerce Clause precedent since the 1940s. [\[FN130\]](#) Justice Souter’s dissent also focused on the significant distinguishing feature of Morrison—“the mountain of data assembled by *274 Congress . . . showing the effects of violence against women on interstate commerce.” [\[FN131\]](#)

III. Federal and State Drug Laws

President Richard Nixon declared a “war on

drugs” soon after he took office in 1969. [\[FN132\]](#) Congress then enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970. [\[FN133\]](#) Title II of that Act is the Controlled Substances Act (“CSA”), [\[FN134\]](#) which constructed a comprehensive regime for fighting international and interstate drug trafficking and use. [\[FN135\]](#) Congress determined that federal regulation was needed since “[a] major portion of the traffic in controlled substances flows through interstate and foreign commerce.” [\[FN136\]](#) The CSA made it unlawful “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” [\[FN137\]](#) It also established five schedules of controlled substances. [\[FN138\]](#) Marijuana was classified as a schedule I drug, [\[FN139\]](#) meaning that it has “a high potential for abuse” and “no currently accepted medical use.” [\[FN140\]](#)

In 1996, California legalized the use of marijuana for medical purposes. [\[FN141\]](#) The Compassionate Use Act of 1996 (“CUA”) allowed “seriously ill Californians,” who have a doctor’s recommendation, to obtain and use marijuana to alleviate their pain. [\[FN142\]](#) The CUA additionally provided specific *275 protection for doctors who recommend marijuana to their patients. [\[FN143\]](#) Since that time, at least eight other states, including Hawai’i, [\[FN144\]](#) have enacted similar medical marijuana statutes. [\[FN145\]](#)

*276 States have also taken other steps towards legitimizing medical marijuana use. [\[FN146\]](#) Alaska, Iowa, Montana, Tennessee, and the District of Columbia have rescheduled marijuana [\[FN147\]](#) to recognize that it has therapeutic use. [\[FN148\]](#) Legislators in California, Michigan, Missouri, New Hampshire, New Mexico, and Washington have passed non-binding resolutions asking the federal government to permit doctors to prescribe marijuana. [\[FN149\]](#) Maryland recognizes a medical necessity defense for medical marijuana, which means that patients can only be fined and not jailed. [\[FN150\]](#) Several states allow marijuana to be used for research purposes, although in many of these states, the programs have never been operational. [\[FN151\]](#) Additionally, a number of states have considered legalizing or removing criminal penalties for medical

marijuana. [\[FN152\]](#)

In the states where medical use has been legalized, the available data indicates that few people are taking advantage of the programs. [\[FN153\]](#) In a November 2002 report to Congress, the General Accounting Office explained that “[r]elatively few people had registered to use marijuana for medical purposes in Oregon, Hawai[']i and Alaska.” [\[FN154\]](#) In all three states, less than one *277 percent of the state population had registered. [\[FN155\]](#) The report also noted that few physicians were recommending marijuana to their patients. [\[FN156\]](#)

IV. Gonzales v. Raich Facts and Procedural History

Angel Raich and Diane Monson, the petitioners in Raich, are both California residents whose doctors recommended marijuana to treat their medical conditions. [\[FN157\]](#) Raich suffers from several ailments, [\[FN158\]](#) and marijuana appears to be the only effective treatment. [\[FN159\]](#) The Supreme Court acknowledged that discontinuing the prescribed use of marijuana “would certainly cause Raich excruciating pain and could very well prove fatal.” [\[FN160\]](#) Monson suffers from a degenerative disease of the spine, which causes “severe chronic back pain and constant, painful muscle spasms.” [\[FN161\]](#) Her doctor explained that marijuana appeared to be the only available treatment of Monson's condition. [\[FN162\]](#) While Monson cultivated her own marijuana, Raich relied on two caregivers to supply her with the drug, [\[FN163\]](#) in accordance with California law. [\[FN164\]](#) Neither the marijuana used by Raich and Monson, nor the supplies *278 needed for growing it ever entered the stream of commerce or crossed state lines. [\[FN165\]](#)

In August 2002, county and federal law enforcement agents went to Monson's home and investigated her for marijuana possession. [\[FN166\]](#) After a three-hour stand-off, law enforcement officials determined that Monson was not in violation of any state law, but federal Drug Enforcement Agency (“DEA”) agents nevertheless confiscated her marijuana plants [\[FN167\]](#) because her possession of them violated the federal CSA. [\[FN168\]](#) Monson, Raich, and Raich's two caregivers subsequently filed suit in federal court

seeking injunctive and declaratory relief to stop the Attorney General and the administrator of the DEA from enforcing the CSA against them. [\[FN169\]](#)

In March 2003, a federal district court judge denied their motion for a preliminary injunction. [\[FN170\]](#) Even though the court recognized that Raich and Monson would “suffer severe harm and hardship if denied use of” marijuana and that the voter-approved CUA clearly articulated the interest of Californians in allowing patients to use marijuana, the court concluded that a preliminary injunction could not be granted since it was not likely that Raich and Monson would succeed on the merits of their case. [\[FN171\]](#) The district court examined the constitutionality of the CSA as applied to Raich and Monson in light of Lopez and Morrison, but it determined that neither decision provided clear guidance for judging the constitutionality of the CSA, and did not undermine existing Ninth Circuit precedent upholding the validity of the CSA in the face of Commerce Clause challenges. [\[FN172\]](#) However, none of the three Ninth Circuit cases cited and discussed by the district court dealt specifically with the constitutionality of the CSA as applied to medical marijuana users who possessed the drug legally under state law. [\[FN173\]](#) Instead, the court relied on *279 United States v. Oakland Cannabis Buyers' Cooperative, [\[FN174\]](#) and held that the medical necessity defense did not exist for violations of the CSA, even for patients using marijuana to treat life-threatening medical conditions. [\[FN175\]](#)

The Ninth Circuit, however, disagreed and ordered the district court to issue the preliminary injunction. [\[FN176\]](#) The court recognized its prior decisions upholding the constitutionality of the CSA under Commerce Clause challenges, [\[FN177\]](#) but distinguished them since none of those cases examined the application of the CSA to medical marijuana users. [\[FN178\]](#) The court first determined that Raich and Monson's marijuana use fell within 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.” [\[FN179\]](#) The court then used the four factors established in Morrison to examine whether this class

of activities had a substantial effect on interstate commerce. [FN180] First, the court determined that since medical marijuana was not sold or exchanged, it did not constitute commerce or “any sort of economic enterprise.” [FN181] Second, the court found that the CSA contained no “jurisdictional hook” limiting it to activities that did substantially affect commerce. [FN182] Third, the court noted that while Congress had provided findings about how local distribution and possession of controlled substances affected interstate commerce, these findings did not address how cultivation of marijuana for medical use affected interstate commerce. [FN183] Finally, the court concluded that the link between medical marijuana use and interstate commerce was too “attenuated.” [FN184] The Ninth Circuit additionally determined that not granting the injunction would result in “significant hardship” to Raich and Monson and would be contrary *280 to the public interest. [FN185] As a result, the court reversed the district court, holding that Raich and Monson were likely to succeed on the merits of their claim that the CSA was unconstitutional as applied to them. [FN186] Because of this finding, the court did not examine the district court's rejection of the medical necessity defense. [FN187]

V. The Supreme Court's Opinion In Raich-Stare Decisis Ignored

Given the holdings in Lopez and Morrison, one might have expected the Supreme Court to invalidate the CSA, at least as applied to medical marijuana users like Raich and Monson. In fact, after Lopez and Morrison, some legal scholars hinted that a challenge to federal medical marijuana prohibitions would be successful. [FN188] However, in a six-to-three vote, [FN189] the Raich Court held that the federal prohibition of state-permitted marijuana cultivation was a constitutional exercise of Congress' power under the Commerce Clause. [FN190]

Raich and Monson conceded that the CSA was valid on its face, but maintained that it was unconstitutional as applied to them. [FN191] They argued that because their cultivation and use of marijuana was entirely intrastate and legal *281 under state law, the CSA unconstitutionally conferred criminal penalties

on them. [FN192]

Writing for the majority, Justice Stevens analogized Raich with Wickard, another as-applied challenge to Congress' Commerce Clause power. [FN193] In both situations, the federal regulation impacted individuals who were producing a marketable commodity that was being consumed solely at home, never entering the stream of commerce. [FN194] Wickard had established 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.” [FN195] In Wickard, the Court determined that the record showed Congress was regulating this intrastate use because in the aggregate, home consumption substantially impacted the national wheat market. [FN196] Likewise, Justice Stevens found that “Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.” [FN197]

Justice Stevens found it more difficult to distinguish Raich from Lopez and Morrison, both in which he had dissented. First, he posited that the Lopez and Morrison holdings were very narrow and thus provided little assistance in deciding Raich. [FN198] Second, he pointed out that Lopez and Morrison were facial challenges, whereas Raich and Monson were arguing that the CSA was unconstitutional as applied, a distinction he described as “pivotal.” [FN199] Third, Justice Stevens explained that the activities being regulated in Lopez and Morrison (gun possession and violence, respectively) were not economic, whereas “the activities regulated by the CSA are quintessentially economic.” [FN200]

The majority then examined the arguments that the Ninth Circuit had found persuasive—that Raich and Monson's activities were part of a “separate and *282 distinct class” that was beyond the reach of Congress. [FN201] The Court disagreed with the Ninth Circuit decision, instead finding that Congress had a rational basis for concluding that medical marijuana users should not be exempted from the CSA. [FN202] The majority's rationale was that

neither a doctor's recommendation for medical use, nor state legalization could create a "separate and distinct class" of medical marijuana users because neither distinction could prevent marijuana from affecting the interstate market. [FN203] The majority first explained that doctor-prescribed marijuana could not be considered separately because the CSA forbade marijuana use "for any purpose." [FN204] Not regulating medical use would impact supply and, in turn, the interstate market, which is within federal purview. [FN205] Next, Justice Stevens reasoned that because federal law trumps state law under the Supremacy Clause, a state law permitting marijuana use could not create a separate class of legal marijuana users. [FN206] State efforts to legalize medical marijuana use could not prevent the drug from entering or affecting the interstate market. [FN207] In fact, the majority opined, "[t]he exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market." [FN208] According to the Court, while Raich and Monson's activities were intrastate and noncommercial, they sufficiently paralleled the farmer's wheat-growing activities in Wickard, and thus, were subject to federal regulation. [FN209] Finally, the Court refused to address Raich and Monson's due process and medical necessity defense claims. [FN210] Even though those issues were raised in their complaint, ruled on by the district court, and briefed by the parties for the Supreme Court, the majority decided not to examine those issues since they were not reached by the Ninth Circuit. [FN211]

*283 Justice Scalia, who voted with the majority in Lopez and Morrison, wrote a separate concurrence in Raich. Attempting to draw a distinction between Raich and Lopez/Morrison, he explained that his "understanding of the doctrinal foundation on which [the Court's] holding rests is, if not inconsistent with that of the Court, at least more nuanced." [FN212]

Justice Scalia thought it important that the regulation in question was of the third type permitted [FN213]-a regulation of an activity that substantially affected interstate commerce. [FN214] As a result, he posited that Congress' power had to come not only from the Commerce Clause, but also from the Necessary and Proper Clause. [FN215] Congress' ability to

regulate an activity that was not in itself interstate commerce could only be constitutional if that regulation was necessary in carrying out its efforts in regulating interstate commerce. [FN216]

Justice Scalia indicated that it was the Necessary and Proper Clause that gave the federal government such broad regulatory powers. [FN217] He explained that the lesson from Lopez and Morrison was that Congress' power still had limits and that a "remote chain of inferences" could not be used to sustain regulation of local activities. [FN218] Thus, Justice Scalia downplayed Justice Stevens' inquiry into whether the regulation was economic or non-economic, explaining instead that "[t]he relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." [FN219]

Therefore, in applying his analysis to the Raich facts, Justice Scalia found it significant that home-grown marijuana is "never more than an instant from the interstate market-and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State." [FN220] It made sense then, to Justice Scalia, to permit Congress to regulate medical use because otherwise, its efforts to regulate interstate traffic of the drug would *284 be crippled. [FN221] But beyond explaining that the regulations in Lopez and Morrison were connected to interstate commerce only through a "remote chain of inferences," [FN222] Justice Scalia failed to distinguish Raich, which arguably presented an equally remote connection to interstate commerce.

Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justice Thomas. Justice O'Connor leveled a number of criticisms at the majority's opinion, including that Raich was indistinguishable from Lopez and Morrison, [FN223] the decision encouraged Congress to write broad, all-encompassing legislation, [FN224] medical marijuana users did create a distinct class, [FN225] medical marijuana use was non-economic and there was no showing of how it affected interstate commerce, [FN226] and Raich was distinguishable from Wickard. [FN227] Echoing Justice Kennedy's concurrence in Lopez, [FN228] Justice O'Connor em-

phasized that one of “federalism's chief virtues” was “that it *285 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.’” [FN229] She criticized the majority for “extinguish[ing] that experiment.” [FN230]

Although he joined Justice O'Connor's dissent, Justice Thomas also wrote a separate dissenting opinion. Justice Thomas' criticism of the majority opinion concentrated on the fact that Raich and Monson's marijuana use was neither economic nor interstate in scope. [FN231] He pointed out that “Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California-it never crosses state lines, much less as part of a commercial transaction.” [FN232]

Justice Thomas also argued that Raich and Monson's activities were set apart from other producers and users of marijuana because the California government had instituted controls. [FN233] These controls, he maintained, prevented medical marijuana from substantially affecting the interstate market or impeding federal efforts to stop drug trafficking. [FN234] Therefore, Raich and Monson constituted a distinguishable class with a valid challenge that the CSA was unconstitutional as applied to their group. [FN235]

Justice Thomas warned that the majority's opinion essentially gives the federal government general police power by approving of Congress' invasion “on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.” [FN236] The problem, in part, he maintained, is that the “substantial effects” test is too “malleable,” and thus, should be abandoned. [FN237] The majority's manipulation of this test, Justice Thomas warned, will create inconsistency in Commerce Clause jurisprudence. [FN238]

Finally, Justice Thomas criticized the majority opinion for distinguishing Lopez and Morrison based on the fact that those cases involved facial *286 challenges as opposed to applied challenges. [FN239] In addition to the fact that medical marijuana users as a

class could easily be “excis[ed]” from the CSA's coverage, Justice Thomas pointed to several cases in which the Court entertained as-applied challenges. [FN240]

VI. Analysis of the Decision

A. Inconsistency With Lopez and Morrison Will Likely Lead to Confusion and Broad Legislating

The Raich decision was inconsistent with the Court's shift toward contracted Commerce Clause powers articulated in Lopez and Morrison. The Raich majority's attempt to distinguish Lopez and Morrison will likely have two troublesome consequences. First, courts will be confused about proper Commerce Clause analysis, particularly regarding as-applied challenges, which may lead to courts refusing to hear as-applied challenges entirely. Second, Congress will write broad, all-encompassing legislation to protect it from judicial Commerce Clause review.

The similarities between Raich and Lopez are striking, especially when utilizing Morrison's four-factor Commerce Clause analysis. [FN241] Since Raich was an as-applied challenge, this analysis will focus on whether the CSA's regulation of medical marijuana use was constitutional. The first prong of the Morrison analysis requires looking at whether the statute regulates an economic enterprise. Both Raich and Lopez involved criminal statutes that regulated possession-an activity that, by itself, is not economic. While it is true that marijuana is a commodity that is often trafficked between states, the same is true of guns. In each case, however, the issue was whether simple possession of that commodity could be federally regulated. The answer in Lopez was that it could not. Arguably, marijuana is even less of a commodity than a gun since the CSA has prevented any legal market for marijuana from ever forming.

Neither the CSA nor the statute in question in Lopez (the GFSZA) contained a jurisdictional element to ensure that the cases to which the regulation applied actually affected interstate commerce. Thus, Raich fails under the second part of the Morrison analysis, as Lopez did. Raich and Lopez are also similar in that neither of the statutes involved contained

express legislative findings regarding how the regulated activity affected interstate *287 commerce. While it is true that the CSA did contain findings about general interstate traffic of controlled substances, the statute contained nothing indicating how medical marijuana use affected interstate commerce. [FN242] Again, since Raich was an as-applied challenge, the Court was required to look at whether the CSA was constitutional as applied to Raich and Monson as medical marijuana users. Without specific findings about medical marijuana, the Raich outcome should have mirrored Lopez since there was nothing to enable the Court “to evaluate the legislative judgment that the activity in question substantially affected interstate commerce.” [FN243]

The final step in the Morrison test requires examining the link between the regulated activity and its effect on interstate commerce. There are arguments that can be made regarding how medical marijuana use could affect the national supply of the drug. Justice Stevens expected that “the high demand in the interstate market will draw [marijuana cultivated for medical purposes] into [the national] market.” [FN244] However, proponents of the GFSZA made similar arguments in Lopez to connect gun possession with interstate commerce. [FN245] In that case, Chief Justice Rehnquist instructed that connections that are too tenuous will fail because otherwise “it [would be] difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.” [FN246] The connection between the medical marijuana supply and the vast interstate market is tenuous in part because there were no findings regarding how it impacts interstate commerce. Perhaps even more significant is that the available evidence suggests that the number of medical marijuana users is so small [FN247] that any spillover of their supply into the national market could hardly be substantial. And, since the states that do permit medical marijuana require a doctor's recommendation and in some cases, registration, there are controls in place to prevent medical marijuana from entering the illicit drug market. As a result, law enforcement officials have reported that “the introduction of medical marijuana laws has had little im-

pact on their operations.” [FN248]

Because Raich and Lopez seem indistinguishable using Morrison's four-factor test, confusion is inevitable. Raich guides us to the conclusion that the distinguishing factor was its status as an as-applied, rather than a facial *288 challenge. [FN249] It follows that some courts might erroneously decide that as-applied challenges to the Commerce Clause are without merit. In fact, the Ninth Circuit has already leaned in this direction. [FN250] In an unpublished opinion filed two months after Raich, the Ninth Circuit noted “[t]here is also a serious question as to whether as applied challenges to the constitutionality of statutes brought under the Commerce Clause are still valid after the Supreme Court's recent decision in *Gonzales v. Raich*.” [FN251]

Justice Stevens likely did not intend such a result. The confusion was created through Justice Stevens' struggle to distinguish precedent that he disagreed with. The Court has never held that as-applied challenges to the Commerce Clause cannot be heard. As Justice Thomas pointed out, the Court has considered as-applied challenges to Congress' Commerce Clause power on a number of occasions without questioning their propriety. [FN252]

The second concern about Raich is that it will encourage Congress to write broad legislation. [FN253] Justice Stevens pointed out that the statute in Lopez “was a brief, single-subject statute” whereas the CSA “was a lengthy and detailed statute creating a comprehensive framework.” [FN254] Thus, Justice Stevens opined that medical marijuana use could be regulated since it was an essential part of a comprehensive regulatory scheme. [FN255] This distinction may signal to Congress that it can regulate intrastate commerce by folding regulated activities into broad statutes that have valid interstate commerce components.

B. Raich's Precedential Value Will Likely Be Short-Lived

The impact of Raich should not be overstated since its value as precedent will likely be short-lived. The curious outcome (and resulting confusion) can be

attributed to Justices Kennedy and Scalia's dramatic shift in Commerce Clause application. Justice Kennedy's concurring opinion in *Lopez* made *289 clear that a state's experimentation with social issues was important, and that states should be allowed to use their own judgment and expertise in regulating criminal behavior. [FN256] But this same argument failed when applied to medical marijuana use. It seems probable that Justices Kennedy and Scalia will revert back to their *Lopez* and *Morrison* mindsets given a different set of facts. Therefore, Raich could represent an anomaly based on strongly-held biases against marijuana, and Raich's precedential value could soon expire.

However, there are already signs that Raich was successful in damaging the *Lopez/Morrison* shift toward contracted Commerce Clause power. [FN257] In *United States v. Maxwell*, [FN258] the defendant was charged with violating federal law for possessing child pornography after police recovered pornographic images on computer disks owned by the defendant. [FN259] In a pre-Raich decision, the Eleventh Circuit used *Morrison*'s four-factor analysis to vacate the defendant's conviction since the only connection with interstate commerce was that the disks were manufactured out-of-state. [FN260] However, the post-Raich Supreme Court vacated the Eleventh Circuit decision and remanded "for further consideration in light of *Gonzales v. Raich*." [FN261]

Similarly, in *United States v. Jeronimo-Bautista*, [FN262] a Utah district court dismissed federal charges for possession of child pornography. [FN263] In its pre-Raich decision, the district court found it "difficult to conceive of an activity any less commercial that [sic] the 'simple local possession of a good produced for personal use only.'" [FN264] After Raich, however, the Tenth Circuit reversed, citing Raich's expansive definition of "economics" as including "production, distribution, and consumption of commodities." [FN265]

The *Maxwell* and *Jeronimo-Bautista* decisions are not surprising. Child pornography falls within that same category as marijuana-illicit behavior that judges do not want to be tagged with condoning. Raich will not truly be tested until the Court is

presented with a statute that does not elicit such strong reactions based on deeply held beliefs.

*290 C. Why Justice Stevens Ignored the Medical Necessity and Due Process Claims

Justice Stevens was not pleased with the ramifications for medical marijuana users, like Raich and Monson, who depend on the pain-relieving qualities of cannabis to get through the day. [FN266] In a speech at a bar association meeting in August 2005, Justice Stevens described the outcome of Raich as "unwise." [FN267] Justice Stevens made it clear that his personal feelings about the federal government's crackdown on medical marijuana users had to be trumped by his "duty to uphold the application of the federal statute." [FN268] Those comments fail to explain why he chose to ignore Raich and Monson's due process and medical necessity defense claims.

Justice Stevens had previously indicated that he would recognize a medical necessity defense for medical marijuana users prosecuted for violating the CSA. [FN269] He concurred in *Oakland Cannabis Buyers' Cooperative*, in which the Court held that the medical necessity defense was not available to medical marijuana manufacturers and distributors. [FN270] Justice Stevens wrote separately to clarify that the Court's holding was limited to a denial of the medical necessity defense for manufacturers and distributors of medical marijuana. [FN271] Thus, the question of whether the defense was available to medical marijuana users remained unanswered. [FN272] In fact, Justice Stevens counseled that "precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words." [FN273]

So why did Justice Stevens not jump at the chance to answer that question in Raich? The simple answer is that he would have lost his opportunity to limit the holdings of *Lopez* and *Morrison*. While *Oakland Cannabis Buyers' Cooperative* provides hints about Justice Stevens' opinion on the medical necessity defense for medical marijuana users, the opinion is even more revealing of his colleagues' thoughts. Justice Thomas delivered the opinion of the

Court, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, *291 and Kennedy. While the holding was narrow, “that medical necessity is not a defense to manufacturing and distributing marijuana,” [FN274] the dictum was clear that those five justices intended to extend the holding to medical marijuana users. [FN275] In a footnote, Justice Thomas

clarif[ied] that nothing in our analysis, or the [CSA], suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act. Furthermore, the very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is “seriously ill” and lacks alternative avenues for relief. . . . We reject the argument that these factors warrant a medical necessity exception. [FN276] If Justice Stevens had affirmed the Ninth Circuit’s decision in Raich on medical necessity grounds, he would no longer have been in the majority and would have lost his opportunity to do damage to the Lopez and Morrison holdings.

The same problem would have arisen if Justice Stevens sought to affirm based on Raich and Monson’s substantive due process claims, even though precedent exists to support them. [FN277] The Fifth Amendment proclaims that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” [FN278] Raich argued that, at least in her case, where forgoing marijuana use could result in death, the CSA deprived her of the right to life. [FN279] And for patients who are not necessarily facing death, the CSA also arguably denies a liberty interest—freedom from severe pain. [FN280]

The notion that freedom from pain implicates a constitutionally-protected liberty interest is not that far-fetched. In *Cruzan v. Director, Missouri Department of Health*, [FN281] the Court recognized a liberty interest in refusing medical treatment. [FN282] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, [FN283] the Court proclaimed that “[a]t the heart of liberty is the right to

define one’s own concept of existence,” including a woman’s decision of whether or not to undergo the pain, anxiety, and physical constraints of continuing*292 a pregnancy. [FN284] And in *Washington v. Glucksberg*, [FN285] the concurring opinions indicated that individuals suffering from severe pain may have a liberty interest in alleviating their suffering. [FN286] These cases recognized that the Due Process Clause protects fundamental individual rights, which include a person’s right to make decisions that would prevent suffering. It follows that a statute prohibiting an individual from accessing medication that relieves profound pain infringes on that constitutionally-protected liberty interest.

V. Conclusion

Without a doubt, the Raich decision will have a serious impact on critically ill patients in this country—people whose quality of life is tied directly and substantially to the use of marijuana as prescribed by their doctors. For these people, the Supreme Court’s decision in Raich presents them with two unenviable choices—break the law or suffer excruciating pain. After the Supreme Court’s ruling, Angel Raich reported that she would continue to use marijuana, saying, “[i]f I stopped using cannabis I would die. I am not going to stop.” [FN287] Her lawyers indicated that they would continue fighting the legal battle by urging the lower courts to grant the injunction based on Raich and Monson’s substantive due process claims. [FN288]

However, Raich’s impact on Commerce Clause jurisprudence likely will not be as significant. Although Raich may appear to limit the Court’s restrictions on Congress’ power imposed in Lopez and Morrison, its value as precedent is small since Justices Scalia and Kennedy are likely to jump back to the other side of the fence given a different set of facts. [FN289] Lopez and Morrison represent a significant shift in Commerce Clause jurisprudence, which was tempered only slightly by Raich. [FN290]

*293 Justice Stevens ignored meritorious legal arguments that could have changed the outcome for Raich and Monson—an outcome he admits was unwise. [FN291] Because he would not have succeeded

in establishing new precedent regarding the medical necessity defense, he instead advantageously used Justices Scalia and Kennedy's fence-jumping to try to limit the scopes of Lopez and Morrison. [\[FN292\]](#)

[\[FN1\]](#) . See discussion *infra* Part II.

[\[FN2\]](#) . See discussion *infra* Part II.B.

[\[FN3\]](#) . [514 U.S. 549 \(1995\)](#).

[\[FN4\]](#) . [529 U.S. 598 \(2000\)](#).

[\[FN5\]](#) . See discussion *infra* Part II.C.

[\[FN6\]](#) . See [Lopez, 514 U.S. at 564](#).

[\[FN7\]](#) . [Gonzales v. Raich, 545 U.S. _____, 125 S. Ct. 2195 \(2005\)](#).

[\[FN8\]](#) . This casenote will use the most common spelling of “marijuana.” An alternative spelling is “marihuana.” See [21 U.S.C. § 812 \(2000\)](#).

[\[FN9\]](#) . [Raich, 545 U.S. _____, 125 S. Ct. 2195](#).

[\[FN10\]](#) . See discussion *infra* Part VI.A.

[\[FN11\]](#) . Robert H. Bork & Daniel E. Troy, [Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce](#), 25 *Harv. J.L. & Pub. Pol'y* 849, 858-59 (2002).

[\[FN12\]](#) . [Id. at 855](#).

[\[FN13\]](#) . [Id. at 855-57](#).

[\[FN14\]](#) . [Id. at 858](#).

[\[FN15\]](#) . [U.S. Const. art. I, § 8, cl. 3](#).

[\[FN16\]](#) . Bork & Troy, *supra* note 11, at 860.

[\[FN17\]](#) . [22 U.S. 1 \(1824\)](#).

[\[FN18\]](#) . See, e.g., [United States v. Morrison, 529 U.S. 598, 648-49 \(2000\)](#) (Souter, J., dissenting); [United States v. Lopez, 514 U.S. 549, 553 \(1995\)](#); [Perez v. United States, 402 U.S. 146, 150-51 \(1971\)](#); [Wickard v. Filburn, 317 U.S. 111, 120-21 \(1942\)](#); [Carter v. Carter Coal Co., 298 U.S. 238, 298 \(1936\)](#); [Hammer v. Dagenhart, 247 U.S. 251, 269 \(1918\)](#);

[Employers' Liab. Cases, 207 U.S. 463, 492 \(1908\)](#); [The Lottery Cases, 188 U.S. 321, 346-48 \(1903\)](#).

[\[FN19\]](#) . [Gibbons, 22 U.S. at 189-90](#).

[\[FN20\]](#) . *Id.*

[\[FN21\]](#) . *Id.* at 195.

[\[FN22\]](#) . *Id.* at 1.

[\[FN23\]](#) . *Id.* at 1-2.

[\[FN24\]](#) . *Id.* at 2-3.

[\[FN25\]](#) . *Id.* at 189-90.

[\[FN26\]](#) . *Id.* at 194.

[\[FN27\]](#) . See, e.g., [Carter v. Carter Coal Co., 298 U.S. 238 \(1936\)](#) (declaring unconstitutional a federal act creating employment regulations and taxes on the bituminous coal industry); [A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 \(1935\)](#) (striking down employment regulations for the poultry industry); [R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 \(1935\)](#) (finding an act creating a retirement and pension system for railroad workers unconstitutional); [Hammer v. Dagenhart, 247 U.S. 251 \(1918\)](#) (invalidating child labor laws); [Employers' Liab. Cases, 207 U.S. 463 \(1908\)](#) (striking down a federal act holding employers liable for injuries to employees hurt on the job); [Trade-Mark Cases, 100 U.S. 82 \(1879\)](#) (declaring unconstitutional a federal criminal statute punishing trademark counterfeiting); [United States v. Dewitt, 76 U.S. \(9 Wall.\) 41 \(1869\)](#) (invalidating a federal statute that prohibited the sale of a certain mixture of oils); but see [Stafford v. Wallace, 258 U.S. 495 \(1922\)](#) (upholding a federal act that prohibited unfair, discriminatory and deceptive trade practices by packers involved in interstate commerce).

[\[FN28\]](#) . See, e.g., [Carter, 298 U.S. at 308](#) (“The distinction between a direct and indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.”); [Schechter, 295 U.S. at 546](#) (“[W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transac-

tions remain within the domain of state power.”); [Hopkins v. United States](#), 171 U.S. 578, 592 (1898) (“There must be some direct and immediate effect upon interstate commerce in order to come within the act.”); [United States v. E. C. Knight Co.](#), 156 U.S. 1, 12 (1895) (“Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly.”).

[FN29] . [Schechter](#), 295 U.S. at 546-47 (“[W]here . . . intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to [federal regulation].”).

[FN30] . [Carter](#), 298 U.S. at 307-08.

[FN31] . [Id.](#) at 308.

[FN32] . See [Schechter](#), 295 U.S. at 546.

[FN33] . [Id.](#)

[FN34] . [207 U.S. 463 \(1908\)](#).

[FN35] . [Id.](#)

[FN36] . [247 U.S. 251 \(1918\)](#).

[FN37] . [Id.](#)

[FN38] . [295 U.S. 330 \(1935\)](#).

[FN39] . [295 U.S. 495 \(1935\)](#).

[FN40] . [298 U.S. 238 \(1936\)](#).

[FN41] . [Id.](#)

[FN42] . [188 U.S. 321 \(1903\)](#).

[FN43] . [220 U.S. 45 \(1911\)](#).

[FN44] . [Id.](#)

[FN45] . White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at [18](#)

[U.S.C. § 2421 \(2000\)](#)).

[FN46] . [Id.](#); see also [Caminetti v. United States](#), 242 U.S. 470 (1917); [Hoke v. United States](#), 227 U.S. 308 (1913).

[FN47] . [301 U.S. 1 \(1937\)](#); see also [United States v. Lopez](#), 514 U.S. 549, 556 (1995) (“Jones & Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.”).

[FN48] . The Carter court held that the Bituminous Coal Conservation Act of 1935, which among other things, imposed a tax on the sale of all bituminous coal and established requirements for working conditions and wages of coal manufacturers, exceeded Congress' power under the Commerce Clause because the effect the manufacture of coal has upon commerce “however extensive it may be, is secondary and indirect.” [Carter v. Carter Coal Co.](#), 298 U.S. 238, 309 (1936).

[FN49] . [Jones & Laughlin Steel Corp.](#), 301 U.S. at 37 (adopting the “close and substantial relation” test).

[FN50] . [Id.](#)

[FN51] . [Id.](#) at 32 (citing [Second Employers' Liab. Cases](#), 223 U.S. 1, 51 (1912)).

[FN52] . See *infra* notes 54-87 and accompanying text.

[FN53] . [317 U.S. 111 \(1942\)](#).

[FN54] . The Justices deciding Carter were: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, [Roberts](#), and [Cardozo](#). See [Carter v. Carter Coal Co.](#), 298 U.S. 238 (1936). The Justices deciding Wickard were: Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, and Jackson. See [Wickard](#), 317 U.S. 111.

[FN55] . In [United States v. Lopez](#), 514 U.S. 549 (1995), the Court significantly shifted Commerce Clause jurisprudence when it struck down a federal gun law as beyond Congress' power under the Com-

merce Clause. See discussion *infra* Part II.C.

[FN56] . See, e.g., [Heart of Atlanta Motel, Inc. v. United States](#), 379 U.S. 241, 257 (1964) (upholding the Civil Rights Act of 1964 and its prohibition on discrimination in hotels even though “Congress was legislating against moral wrongs” because “that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse”); [Cleveland v. United States](#), 329 U.S. 14, 19 (1946) (“The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have ‘the quality of police regulations’ is not consequential.” (citations omitted)); [United States v. Darby](#), 312 U.S. 100, 113-14 (1941) (upholding a labor statute even though the Court recognized that it was enacted “under the guise of a regulation of interstate commerce” simply so that the federal government could regulate in an area reserved for the states).

[FN57] . [317 U.S. at 113-14.](#)

[FN58] . [Id. at 114-15.](#)

[FN59] . [Id. at 114.](#)

[FN60] . [Id. at 113-15.](#)

[FN61] . [Id. at 114.](#)

[FN62] . [Id.](#)

[FN63] . [Id. at 119.](#)

[FN64] . [Id. at 125.](#)

[FN65] . [Id. at 125-26.](#)

[FN66] . [Id. at 128-29.](#)

[FN67] . [Id. at 127-28 \(citations omitted\).](#)

[FN68] . [Bork & Troy, supra note 11, at 881.](#)

[FN69] . [Wickard, 317 U.S. at 125](#) (“But even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substan-

tial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’”). The Court has subsequently upheld several federal acts without discussion based solely upon *Wickard*. See, e.g., [United States v. Ohio](#), 385 U.S. 9 (1966); [United States v. Haley](#), 358 U.S. 644 (1959); [Bender v. Wickard](#), 319 U.S. 731 (1943); [Beckman v. Mall](#), 317 U.S. 597 (1942).

[FN70] . [United States v. Lopez](#), 514 U.S. 549, 560 (1995).

[FN71] . See, e.g., [Perez v. United States](#), 402 U.S. 146 (1971) (holding that Congress can prescribe criminal penalties for “loan sharking”); [Cleveland v. United States](#), 329 U.S. 14 (1946) (upholding convictions for transporting women across state lines for “immoral purposes”).

[FN72] . See, e.g., [Heart of Atlanta Motel, Inc. v. United States](#), 379 U.S. 241 (1964) (holding that the Civil Rights Act of 1964’s prohibitions on discrimination in hotels were constitutional); [Katzenbach v. McClung](#), 379 U.S. 294 (1964) (finding that discrimination in restaurants could also be prohibited by Congress).

[FN73] . See, e.g., [Maryland v. Wirtz](#), 392 U.S. 183 (1968) (finding it within Congress’ power under the Commerce Clause to require states to comply with minimum wage requirements); [United States v. Darby](#), 312 U.S. 100 (1941) (upholding a federal statute regulating wages and work hours for lumber manufacturers); [Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.](#), 301 U.S. 1 (1937) (holding that the National Labor Relations Act, which prevented employers from denying employees the right to organize, was valid).

[FN74] . See, e.g., [Hodel v. Virginia Surface Mining & Reclamation Ass’n](#), 452 U.S. 264 (1981) (holding that the Surface Mining Act, which was enacted to protect the environment from surface coal mining operations, was constitutional).

[FN75] . [329 U.S. 14 \(1946\).](#)

[FN76] . In earlier cases, the Mann Act is referred

to under its original name, the White-Slave Traffic Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at [18 U.S.C. § 2421 \(2000\)](#)). See [Caminetti v. United States](#), 242 U.S. 470 (1917); [Hoke v. United States](#), 227 U.S. 308 (1913). Later, the Supreme Court began calling it the Mann Act, a reference to the bill's author, Representative Mann. See [Mortensen v. United States](#), 322 U.S. 369, 370 (1944); [Caminetti](#), 242 U.S. at 497 (McKenna, J., dissenting).

[FN77] . [Cleveland](#), 329 U.S. at 16.

[FN78] . Id.

[FN79] . Id. at 18.

[FN80] . Id. at 19.

[FN81] . Id.

[FN82] . Id. (quoting [Hoke v. United States](#), 227 U.S. 308, 323 (1913)) (other citations omitted).

[FN83] . [402 U.S. 146 \(1971\)](#).

[FN84] . [Id. at 146-47](#).

[FN85] . Id.

[FN86] . Id. at 149.

[FN87] . Id. at 155-57.

[FN88] . [18 U.S.C. § 922\(q\)](#) (Supp. V. 1988), invalidated by [United States v. Lopez](#), 514 U.S. 549 (1995).

[FN89] . [Lopez](#), 514 U.S. 549.

[FN90] . [Id. at 551](#) (citing [18 U.S.C. § 922\(q\)\(1\)\(A\)](#) (Supp. V. 1988)).

[FN91] . Id.

[FN92] . Id.

[FN93] . Id. at 558 (citing [United States v. Darby](#), 312 U.S. 100, 114 (1941); [Heart of Atlanta Motel, Inc. v. United States](#), 379 U.S. 241, 256 (1964)).

[FN94] . Id. (citing [Shreveport Rate Cases](#), 234

[U.S. 342 \(1914\)](#); [Southern Ry. Co. v. United States](#), 222 U.S. 20 (1911); [Perez v. United States](#), 402 U.S. 146, 150 (1971)).

[FN95] . Id. at 558-59 (citing [Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.](#), 301 U.S. 1, 37 (1937); [Maryland v. Wirtz](#), 392 U.S. 183, 196 n.27 (1968)).

[FN96] . Id. at 559.

[FN97] . Id.

[FN98] . Id. at 559-68.

[FN99] . Id. at 561.

[FN100] . Id.

[FN101] . Id. at 562.

[FN102] . Id. at 562-63.

[FN103] . Id. at 564-65.

[FN104] . Id. at 563-64.

[FN105] . Id. (citing [United States v. Evans](#), 928 F.2d 858, 862 (9th Cir. 1991)).

[FN106] . Id. at 564 (citing [Heart of Atlanta Motel, Inc. v. United States](#), 379 U.S. 241, 253 (1964)).

[FN107] . Id.

[FN108] . Id.

[FN109] . Id. at 575-80 (Kennedy, J., concurring).

[FN110] . Id. at 581 (citing [San Antonio Indep. Sch. Dist. v. Rodriguez](#), 411 U.S. 1, 49-50 (1973); [New State Ice Co. v. Liebmann](#), 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[FN111] . Id. (citations omitted).

[FN112] . Id. at 583.

[FN113] . Id. at 625 (Breyer, J., dissenting) (positing that one of the serious legal problems created by the Lopez decision was that "the majority's

holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence”).

[FN114] . Id. at 616-17 (“Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.”).

[FN115] . Id. at 620.

[FN116] . Id.

[FN117] . Id. at 630.

[FN118] . See id. at 614-15 (Souter, J., dissenting) (“[T]oday’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.”); see also Kathleen F. Brickey, [Crime Control and the Commerce Clause: Life After Lopez](#), 46 *Case W. Res. L. Rev.* 801, 839 (1996) (predicting that the significance of Lopez was merely symbolic); Alex Kreit, [Why Is Congress Still Regulating Noncommercial Activity?](#), 28 *Harv. J.L. & Pub. Pol’y* 169, 179 (2004) (maintaining that even Morrison did not confirm Lopez to be more than an anomaly); Deborah Jones Merritt, [Reflections on United States v. Lopez: COMMERCE!](#), 94 *Mich. L. Rev.* 674, 729 (1995) (arguing that Lopez was “unlikely to herald a new era of Commerce Clause jurisprudence”).

[FN119] . [529 U.S. 598 \(2000\)](#).

[FN120] . [Id. at 605](#) (citing [42 U.S.C. § 13981\(c\)](#)).

[FN121] . [Id. at 610](#).

[FN122] . [Id. at 611](#).

[FN123] . [Id. at 612](#).

[FN124] . Id.

[FN125] . Id. at 613.

[FN126] . Id.

[FN127] . Id. at 614.

[FN128] . Id.

[FN129] . Id. at 617. “The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.” Id. at 618.

[FN130] . Id. at 628.

[FN131] . Id. at 628-29; see also id. at 635 (“[T]he legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases [[Heart of Atlanta Motel Inc. v. United States](#), 379 U.S. 241 (1964), and [Katzenbach v. McClung](#), 379 U.S. 294 (1964)] upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges.”).

[FN132] . [Gonzales v. Raich](#), 545 U.S. _____, 125 S. Ct. 2195, 2201 (2005).

[FN133] . Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at [21 U.S.C.A. §§ 801-890, 901-904, 951-971](#) (West 2005)).

[FN134] . The Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at [21 U.S.C.A. §§ 801-890](#) (West 2005)).

[FN135] . [Raich](#), 545 U.S. at _____, 125 S. Ct. at 2203.

[FN136] . [21 U.S.C. § 801\(3\) \(2000\)](#).

[FN137] . Id. § 841(a).

[FN138] . Id. § 812(a).

[FN139] . Id. § 812 Schedule I(c)(10).

[FN140] . Id. § 812(b)(1).

[FN141] . California voters adopted Proposition

215, later codified as the Compassionate Use Act of 1996, which became effective November 6, 1996. See [Cal. Health & Safety Code § 11362.5 \(2005\)](#).

[FN142] . Id. Specifically, the Compassionate Use Act of 1996 provides that:

(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: (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. (2) 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. (c) 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. (d) 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. (e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person. Id.

[FN143] . [Id. § 11362.5\(c\)](#).

[FN144] . Hawaii's medical marijuana law, which was passed in 2000, provides that:

(a) Notwithstanding any law to the contrary, the medical use of marijuana by a qualifying patient shall be permitted only if: (1) The qualifying patient has been diagnosed by a physician as having a debilitating medical condition; (2) The qualifying patient's physician has certified in writing that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient; and (3) The amount of marijuana does not exceed an adequate supply. [Haw. Rev. Stat. § 329-122\(a\) \(2004\)](#); see also [id. § 329-121](#) (defining terms); [id. § 329-123](#) (requiring registration); [id. § 329-124](#) (explaining that insurers are not required to provide coverage for medical marijuana); [id. § 329-125](#) (providing protections from prosecution for qualifying patients and primary caregivers); [id. § 329-126](#) (providing protection from prosecution for doctors who recommend marijuana); [id. § 329-127](#) (requiring that marijuana plants seized from medical marijuana users be returned); [id. § 329-128](#) (providing penalties for fraudulent misrepresentation).

[FN145] . [Gonzales v. Raich, 545 U.S. _____, 125 S. Ct. 2195, 2199 n.1](#) (listing the statutes of nine states that allow marijuana use for medical purposes).

[FN146] . See Marijuana Policy Project, State-By-State Medical Marijuana Laws: How to Remove the Threat of Arrest 1 (2004) [hereinafter Marijuana Policy Project], available at http://www.mpp.org/pdf/sbs_report_2004.pdf.

[FN147] . Id. at 11. Most states follow the federal government's lead in scheduling drugs. See [id.](#) At the federal level, marijuana is classified as a schedule I drug, which means that (1) it has "a high potential for abuse"; (2) it "has no currently accepted medical use in treatment in the United States"; and (3) "there is a lack of accepted safety for use of the drug or other substance under medical supervision." [21 U.S.C. § 812\(b\)\(1\) \(2000\)](#). Despite an intense effort to reschedule marijuana, the Attorney General, who has authority under the CSA to reclassify drugs, has refused. [Raich, 545 U.S. at _____, 125 S. Ct. at 2204](#). An Administrative Law Judge concluded in 1988 that marijuana should be reclassified as a schedule III drug, but that was not persuasive. [Id. at _____, 125 S.](#)

[Ct. at 2204 n.23](#). A schedule III drug is one that (1) “has a potential for abuse less than the drugs or other substances in schedules I and II”; (2) “has a currently accepted medical use in treatment in the United States”; and (3) “may lead to moderate or low physical dependence or high psychological dependence” when abused. [21 U.S.C. § 812\(b\)\(3\) \(2000\)](#).

[\[FN148\]](#) . Marijuana Policy Project, *supra* note 146, at 11.

[\[FN149\]](#) . *Id.*

[\[FN150\]](#) . *Id.* at 10.

[\[FN151\]](#) . *Id.* at A-7 to-10.

[\[FN152\]](#) . *Id.* at 15.

[\[FN153\]](#) . U.S. Gen. Accounting Office, GAO-03-189, *Marijuana: Early Experiences with Four States' Laws That Allow Use for Medical Purposes* 21 (2002) [hereinafter GAO Report], available at <http://www.gao.gov/new.items/d03189.pdf>.

[\[FN154\]](#) . *Id.* at 3. Oregon, Hawai'i, and Alaska were the only states examined in which statewide data was available. *Id.* at 8.

[\[FN155\]](#) . *Id.* at 22. In Oregon, .05 percent or 1,691 people had registered to use medical marijuana as of February 2002; in Hawai'i, .04 percent or 573 people had registered as of April 2002; and in Alaska, .03 percent or 190 people had registered as of April 2002. *Id.*

[\[FN156\]](#) . *Id.* at 26. Less than one percent of Hawai'i physicians and three percent of Oregon physicians had reported recommending marijuana to their patients. *Id.*

[\[FN157\]](#) . [Gonzales v. Raich, 545 U.S. _____, 125 S. Ct. 2195, 2199-2200 \(2005\)](#).

[\[FN158\]](#) . Raich's medical conditions include: life-threatening weight loss, nausea, severe chronic pain (from scoliosis, temporomandibular joint dysfunction and bruxism, endometriosis, headache, rotator cuff syndrome, uterine fibroid tumor causing severe dysmenorrheal, chronic pain com-

bined with an episode of paralysis that confined her to a wheelchair), post-traumatic stress disorder, non-epileptic seizures, fibromyalgia, inoperable brain tumor (probable meningioma or Schwannoma), paralysis on at least one occasion (the diagnosis of multiple sclerosis has been considered), multiple chemical sensitivities, allergies, and asthma. Brief for Respondents at *4, [Raich, 545 U.S. _____, 125 S. Ct. 2195 \(No. 03-1454\)](#) (quoting Decl. of Frank Henry Lucido, M.D.).

[\[FN159\]](#) . [Raich, 545 U.S. at _____, 125 S. Ct. at 2200](#).

[\[FN160\]](#) . *Id.*

[\[FN161\]](#) . [Raich v. Ashcroft, 352 F.3d 1222, 1225 \(9th Cir. 2003\)](#), *rev'd sub nom. Raich, 545 U.S. _____, 125 S. Ct. 2195*.

[\[FN162\]](#) . *Id.*

[\[FN163\]](#) . [Raich, 545 U.S. at _____, 125 S. Ct. at 2200](#).

[\[FN164\]](#) . The Compassionate Use Act of 1996 also protects primary caregivers from criminal prosecution for obtaining marijuana for patients who have a doctor's recommendation. See [Cal. Health & Safety Code § 11362.5\(d\) \(West Supp. 2005\)](#).

[\[FN165\]](#) . [Raich, 545 U.S. at _____, 125 S. Ct. at 2225](#) (O'Connor, J., dissenting).

[\[FN166\]](#) . [Id. at _____, 125 S. Ct. at 2200](#).

[\[FN167\]](#) . *Id.*

[\[FN168\]](#) . [21 U.S.C. § 801 \(2000\)](#).

[\[FN169\]](#) . [Raich, 545 U.S. at _____, 125 S. Ct. at 2200](#).

[\[FN170\]](#) . [Raich v. Ashcroft, 248 F. Supp. 2d 918, 931 \(N.D. Cal. 2003\)](#), *rev'd, 352 F.3d 1222 (9th Cir. 2003)*, *rev'd sub nom. Raich, 545 U.S. _____, 125 S. Ct. 2195*.

[\[FN171\]](#) . *Id.* at 930-31.

[\[FN172\]](#) . *Id.* at 922-26 (citing and discussing

[United States v. Kim](#), 94 F.3d 1247 (9th Cir. 1996); [United States v. Visman](#), 919 F.2d 1390 (9th Cir. 1990); [United States v. Tisor](#), 96 F.3d 370 (9th Cir. 1996)).

[FN173] . See *id.* at 924 (citing and discussing [Kim](#), 94 F.3d 1247; [Visman](#), 919 F.2d 1390; [Tisor](#), 96 F.3d 370). In *Kim*, the defendant argued that possession of methamphetamine was not a commercial activity, and thus, not within [Congress' Commerce Clause power](#), 94 F.3d at 1249. In *Visman*, the defendant argued that Congress did not have the power to regulate cultivation because “plants rooted in the soil [did not] affect interstate commerce.” 919 F.2d at 1392. The defendant in *Tisor* argued that intrastate drug trafficking did not substantially affect interstate commerce. 96 F.3d at 373. None of these defendants' activities was lawful under state law nor did any defendant claim medical uses for the drugs.

[FN174] . [532 U.S. 483 \(2001\)](#). The Court held that the medical necessity defense was not available for manufacturers and distributors of medical marijuana who were charged with violating the CSA. *Id.*

[FN175] . [Raich](#), 248 F. Supp. 2d at 928-31 (expanding the holding of [Oakland Cannabis Buyers' Coop.](#), 532 U.S. 483).

[FN176] . [Raich v. Ashcroft](#), 352 F.3d 1222, 1235 (9th Cir. 2003), rev'd sub nom. [Gonzales v. Raich](#), 545 U.S. ., 125 S. Ct. 2195 (2005).

[FN177] . *Id.* at 1227 (citing [United States v. Bramble](#), 103 F.3d 1475, 1479-80 (9th Cir. 1996); [Tisor](#), 96 F.3d at 375; [Kim](#), 94 F.3d at 1249-50; [Visman](#), 919 F.2d at 1393; [United States v. Montes-Zarate](#), 552 F.2d 1330, 1331 (9th Cir. 1977); [United States v. Rodriguez-Camacho](#), 468 F.2d 1220, 1222 (9th Cir. 1972)).

[FN178] . *Id.*

[FN179] . *Id.* at 1228.

[FN180] . *Id.* at 1229 (citing [United States v. Morrison](#), 529 U.S. 598, 610-12 (2000)).

[FN181] . *Id.* at 1229-31.

[FN182] . *Id.* at 1231.

[FN183] . *Id.* at 1231-32.

[FN184] . *Id.* at 1233.

[FN185] . *Id.* at 1234-35.

[FN186] . *Id.* One of the judges on the three-judge panel hearing the case dissented, arguing that the instant case was indistinguishable from *Wickard*, and thus the CSA was a constitutional exercise of Congress' Commerce Clause power. *Id.* at 1237-38 (Beam, J., dissenting).

[FN187] . *Id.* at 1227 (majority opinion).

[FN188] . See Jesse H. Choper, [Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?](#), 55 Ark. L. Rev. 731, 738 (2003) (“[A]fter *Lopez* and *Morrison*, . . . Congress may not be able to prohibit possession or use of a certain product (e.g., drugs), but it could outlaw any transaction or exchange that involved that product.”); Grant S. Nelson, [A Commerce Clause Standard for the New Millennium: “Yes” to Broad Congressional Control over Commercial Transactions; “No” to Federal Legislation on Social and Cultural Issues](#), 55 Ark. L. Rev. 1213, 1227 (2003) (“[L]eaving to the states prosecution of simple drug possession while requiring federal law enforcement to focus on drug trafficking seems to be an appropriate balance between local and national interests.”); Alistair E. Newbern, [Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After *United States v. Lopez*](#), 88 Cal. L. Rev. 1575, 1633 (2000) (arguing that based on *Lopez* and *Morrison*, Congress may not have the authority to regulate medical marijuana use); Marcia Tiersky, [Medical Marijuana: Putting the Power Where It Belongs](#), 93 Nw. U. L. Rev. 547, 593-94 (1999) (arguing that the CSA “suffers from the same defect” as the GFSZA struck down in *Lopez* and that “[t]he idea that the Court might be willing to strike down federal involvement in medical marijuana seems even more plausible when one considers Justice Thomas' position on the Commerce Clause”).

[FN189] . Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and Scalia formed the majority. [Gonzales v. Raich, 545 U.S. _____, 125 S. Ct. 2195 \(2005\)](#). Justices O'Connor, Thomas and Chief Justice Rehnquist dissented. Id.

[FN190] . Id.

[FN191] . [Id. at _____, 125 S. Ct. at 2204-05](#).

[FN192] . Id.

[FN193] . [Id. at _____, 125 S. Ct. at 2205-09](#).

[FN194] . [Id. at _____, 125 S. Ct. at 2206](#).

[FN195] . Id.

[FN196] . [Id. at _____, 125 S. Ct. at 2207](#); see also discussion *supra* Part II.B.

[FN197] . [Raich, 545 U.S. at _____, 125 S. Ct. at 2207](#).

[FN198] . [Id. at _____, 125 S. Ct. at 2209](#). Countering Raich and Monson's argument that Lopez and Morrison were analogous, Justice Stevens commented that “[i]n their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly.” Id.

[FN199] . Id.

[FN200] . [Id. at _____, 125 S. Ct. at 2209-11](#) (noting that marijuana is a commodity “for which there is an established, and lucrative, interstate market”).

[FN201] . [Id. at _____, 125 S. Ct. at 2211](#).

[FN202] . Id.

[FN203] . [Id. at _____, 125 S. Ct. at 2211-15](#).

[FN204] . [Id. at _____, 125 S. Ct. at 2211](#).

[FN205] . [Id. at _____, 125 S. Ct. at 2212](#). The Court explained that:

[o]ne need not have a degree in economics to understand why a nationwide exemption for the

vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. Id.

[FN206] . [Id. at _____, 125 S. Ct. at 2212](#) (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”).

[FN207] . [Id. at _____, 125 S. Ct. at 2213](#).

[FN208] . [Id. at _____, 125 S. Ct. at 2214](#).

[FN209] . [Id. at _____, 125 S. Ct. at 2215](#).

[FN210] . Id.

[FN211] . Id.; see also Brief for Respondents, *supra* note 158, at 45-50; Reply Brief for the Petitioners at 19, [Raich, 545 U.S. _____, 125 S. Ct. 2195 \(No. 03-1454\)](#).

[FN212] . [Raich, 545 U.S. at _____, 125 S. Ct. at 2215](#) (Scalia, J., concurring).

[FN213] . For a discussion of the three types of regulations permissible under the Commerce Clause, see *supra* Part II.C.

[FN214] . [Raich, 545 U.S. at _____, 125 S. Ct. at 2215-16](#) (Scalia, J., concurring).

[FN215] . Id. The Necessary and Proper Clause empowers Congress “[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.” [U.S. Const. art. I, § 8, cl. 18](#).

[FN216] . [Raich, 545 U.S. at _____, 125 S. Ct. at 2216](#) (Scalia, J., concurring) (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”).

[FN217] . Id.

[FN218] . [Id. at _____, 125 S. Ct. at 2216-17.](#)

[FN219] . [Id. at _____, 125 S. Ct. at 2217](#) (quoting [United States v. Darby, 312 U.S. 100, 121 \(1941\)](#)).

[FN220] . [Id. at _____, 125 S. Ct. at 2219.](#)

[FN221] . [Id. at _____, 125 S. Ct. at 2219-20.](#)

[FN222] . [Id. at _____, 125 S. Ct. at 2217.](#)

[FN223] . [Id. at _____, 125 S. Ct. at 2220-29](#) (O'Connor, J., dissenting). Justice O'Connor argued that the majority opinion was inconsistent with Lopez and Morrison in its definition of commerce because "Lopez ma[de] clear that possession is not itself commercial activity." [Id. at _____, 125 S. Ct. at 2225](#). She also argued there were inconsistencies regarding the scope of the Court's power to review Congress' determination that an activity substantially affects interstate commerce and the extent to which the Court will permit tenuous connections between a regulation and its effects on interstate commerce. [Id. at _____, 125 S. Ct. at 2220-29.](#)

[FN224] . [Id. at _____, 125 S. Ct. at 2222-23.](#) Justice O'Connor argued that the majority's emphasis on the necessity of regulating medical marijuana use in order to facilitate drug trafficking eradication goals will enable Congress to hereafter regulate local activities simply by folding them into broad statutes. *Id.* Thus, the trilogy of decisions (Lopez, Morrison and Raich) created "nothing more than a drafting guide." [Id. at _____, 125 S. Ct. at 2223.](#)

[FN225] . [Id. at _____, 125 S. Ct. at 2224.](#)

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation-including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation-recognize that medical and nonmedical (i.e., recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. *Id.*

[FN226] . [Id. at _____, 125 S. Ct. at 2224-29.](#) Justice O'Connor argued that the majority's definition of "economic activity" is so broad that it "threatens to sweep all of productive human activity into federal regulatory reach." [Id. at _____, 125 S. Ct. at 2224.](#)

[FN227] . [Id. at _____, 125 S. Ct. at 2225-27.](#) Justice O'Connor explained that in Wickard, there were findings to indicate how home-consumption of wheat affected the national market; whereas "the CSA's introductory declarations are too vague and unspecific to demonstrate that the federal statutory scheme will be undermined if Congress cannot exert power over individuals like [\[Raich and Monson\]](#)." [Id. at _____, 125 S. Ct. at 2227-28.](#) In addition, Justice O'Connor noted that because "California, like other States, has carved out a limited class of activity for distinct regulation, the inadequacy of the CSA's findings is especially glaring." [Id. at _____, 125 S. Ct. at 2228.](#)

[FN228] . See discussion *supra* Part II.C.

[FN229] . [Raich, 545 U.S. at _____, 125 S. Ct. at 2220](#) (O'Connor, J., dissenting) (quoting [New State Ice Co. v. Liebmann, 285 U.S. 262, 311 \(1932\)](#) (Brandeis, J., dissenting)).

[FN230] . [Id. at _____, 125 S. Ct. at 2221.](#)

[FN231] . [Id. at _____, 125 S. Ct. at 2229-30](#) (Thomas, J., dissenting).

[FN232] . [Id. at _____, 125 S. Ct. at 2230.](#)

[FN233] . [Id. at _____, 125 S. Ct. at 2232.](#)

[FN234] . *Id.*

[FN235] . [Id. at _____, 125 S. Ct. at 2231-33.](#)

[FN236] . [Id. at _____, 125 S. Ct. at 2233-34.](#)

[FN237] . [Id. at _____, 125 S. Ct. at 2235](#) (citing [United States v. Morrison, 529 U.S. 598, 627 \(2000\)](#) (Thomas, J., concurring)). Justice Thomas also made this argument in his concurring opinions in Lopez and Morrison. See [United States v. Lopez, 514 U.S. 549, 584-602 \(1995\)](#) (Thomas, J., concurring); [Morrison, 529 U.S. at 627](#) (Thomas, J., concurring).

[FN238] . [Raich, 545 U.S. at _____, 125 S. Ct. at 2235-37](#) (Thomas, J., dissenting).

[FN239] . [Id. at _____, 125 S. Ct. at 2237-38.](#)

[FN240] . *Id.* (citing [United States v. Raines, 362](#)

[U.S. 17, 20-21 \(1960\)](#); [Katzenbach v. McClung](#), 379 U.S. 294, 295 (1964); [Heart of Atlanta Motel, Inc. v. United States](#), 379 U.S. 241, 249 (1964); [Wickard v. Filburn](#), 317 U.S. 111, 113-14 (1942)).

[FN241] . See discussion *supra* of the four-factor test articulated in *Morrison* in Part II.C.

[FN242] . See [Raich](#), 545 U.S. at _____, 125 S. Ct. at 2208.

[FN243] . See [United States v. Lopez](#), 514 U.S. 549, 563 (1995) (emphasis added).

[FN244] . [Raich](#), 545 U.S. at _____, 125 S. Ct. at 2207.

[FN245] . [Lopez](#), 514 U.S. at 563-64.

[FN246] . *Id.* at 564.

[FN247] . See *supra* note 155.

[FN248] . GAO Report, *supra* note 153, at 32.

[FN249] . [Raich](#), 545 U.S. at _____, 125 S. Ct. at 2209. Justice Stevens explained that:

[T]he statutory challenges at issue in [*Lopez* and *Morrison*] were markedly different from the challenge [*Raich* and *Monson*] pursue in the case at hand. 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' commerce power in its entirety. This distinction is pivotal *Id.*

[FN250] . See [United States v. Tashbook](#), 144 F. App'x. 610, 614 n.2 (9th Cir. 2005).

[FN251] . *Id.*

[FN252] . [Raich](#), 545 U.S. at _____, 125 S. Ct. at 2238 (Thomas, J., dissenting) (citing [Katzenbach v. McClung](#), 379 U.S. 294, 295 (1964); [Heart of Atlanta Motel, Inc. v. United States](#), 379 U.S. 241, 249 (1964); [Wickard v. Filburn](#), 317 U.S. 111, 113-14 (1942)).

[FN253] . See *id.* at _____, 125 S. Ct. at 2222-23 (O'Connor, J., dissenting).

[FN254] . *Id.* at _____, 125 S. Ct. at 2209-10 (majority opinion).

[FN255] . *Id.* at _____, 125 S. Ct. at 2210.

[FN256] . [United States v. Lopez](#), 514 U.S. 549, 581-83 (1995) (Kennedy, J., concurring).

[FN257] . See *United States v. Maxwell*, _____ U.S. _____, 126 S. Ct. 321 (2005); [United States v. Jeronimo-Bautista](#), 425 F.3d 1266 (10th Cir. 2005).

[FN258] . [386 F.3d 1042](#) (11th Cir. 2004), vacated, _____ U.S. _____, 126 S. Ct. 321.

[FN259] . *Id.* at 1045.

[FN260] . *Id.* at 1055.

[FN261] . [Maxwell](#), _____ U.S. _____, 126 S. Ct. 321.

[FN262] . [319 F. Supp. 2d 1272](#) (C.D. Utah 2004), rev'd, [425 F.3d 1266](#) (10th Cir. 2005).

[FN263] . *Id.*

[FN264] . *Id.* at 1279 (quoting [United States v. Kallestad](#), 236 F.3d 225, 231 (5th Cir. 2000) (Jolly, J., dissenting)).

[FN265] . [United States v. Jeronimo-Bautista](#), 425 F.3d 1266, 1271, 1273 (10th Cir. 2005) (quoting [Gonzales v. Raich](#), 545 U.S. _____, _____, 125 S. Ct. 2195, 2211 (2005)) (internal quotation marks omitted).

[FN266] . Linda Greenhouse, *Justice Weighs Desire v. Duty* (*Duty Prevails*), *N.Y. Times*, Aug. 25, 2005, at A1.

[FN267] . *Id.*

[FN268] . *Id.*

[FN269] . See [United States v. Oakland Cannabis Buyers' Coop.](#), 532 U.S. 483, 499-503 (2001) (Stevens, J., concurring).

[FN270] . *Id.* at 494 (majority opinion).

[FN271] . *Id.* at 499-501 (Stevens, J., concurring).

[FN272] . [Id. at 501.](#)

[FN273] . [Id.](#) (citing [United States v. Bailey, 444 U.S. 394, 415 \(1980\)](#)).

[FN274] . [Id.](#) at 494 (majority opinion).

[FN275] . [Id.](#) at 495 n.7.

[FN276] . [Id.](#)

[FN277] . See, e.g., [Washington v. Glucksberg, 521 U.S. 702 \(1997\)](#); [Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 \(1992\)](#); [Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 \(1990\)](#).

[FN278] . [U.S. Const. amend. V.](#)

[FN279] . Brief for Respondents, *supra* note 158, at 48.

[FN280] . [Id.](#)

[FN281] . [497 U.S. 261.](#)

[FN282] . [Id. at 278-79.](#)

[FN283] . [505 U.S. 833 \(1992\).](#)

[FN284] . [Id. at 852.](#)

[FN285] . [521 U.S. 702 \(1997\).](#)

[FN286] . [Id.](#) at 745 (Stevens, J., concurring) (quoting [Casey, 505 U.S. at 851](#)) (“Avoiding intolerable pain . . . and . . . agony is certainly ‘at the heart of [the] liberty . . . to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’”); *id.* at 790-92 (Breyer, J., concurring) (suggesting that a law preventing a patient from receiving medication to alleviate pain would violate the patient’s fundamental rights); *id.* at 777 (Souter, J., concurring) (quoting [Schloendorff v. Soc’y of New York Hosp., 105 N.E. 92, 93 \(N.Y. 1914\)](#)) (“This liberty interest in bodily integrity [includes that] ‘every human being of adult years and sound mind has a right to determine what shall be done with his own body’ in relation to his medical needs.”).

[FN287] . CBS5: Bay City News Wire, Update:

Raich Vows to Continue Medical Marijuana Battle, http://cbs5.com/localwire/localnews/bcn/2005/06/06/n/HeadlineNews/MEDICAL-MARIJUANA/resources_bcn_html (last visited Nov. 13, 2005).

[FN288] . [Id.](#)

[FN289] . See *supra* Part VI.B.

[FN290] . See *supra* Part VI.A.

[FN291] . See *supra* Part VI.C.

[FN292] . See *supra* Part VI.C.

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