Supplemental Materials for Brest, Levinson, Balkin, Amar and Siegel
Processes of Constitutional Decisionmaking
Gonzales v. Raich– Commerce Clause

GONZALES v. RAICH

545 U.S. 1 (2005)

[California's Compassionate Use Act allows seriously ill persons to use marijuana for medicinal persons when authorized by a doctor. Marjiuana is a Schedule I controlled subtance under the federal Controlled Substances Act (CSA), which regulates drugs; it is illegal to manufacture, distribute, or posess a Schedule I drug. Respondents Raich and Monson argued that Congress lacked the power under the Commerce Clause to apply the federal Controlled Substances Act (CSA) to the intrastate, noncommercial cultivation and possession of the marijuana plant, cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law. The Ninth Circuit Court of appeals, relying on *Lopez* and *Morrison*, agreed. The Supreme Court reversed in a 6-3 decision.]

Justice STEVENS delivered the opinion of the Court.

[O]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, *e.g.*, *Perez*; *Wickard v. Filburn*. As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have never required Congress to legislate with scientific exactitude. When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. [W]hen " 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.' "

Our decision in *Wickard*. . . upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess by consuming it on his own farm. Filburn argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize "federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm." Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote: "The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may

forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

Wickard thus establishes 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.

. . . Like the farmer in *Wickard,* respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses ..." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard,* we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a "quintessential economic activity"--a commercial farm--whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning.

The fact that Wickard's own impact on the market was "trivial by itself" was not a sufficient reason for removing him from the scope of federal regulation. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis. Moreover, even though Wickard was indeed a commercial farmer, the activity he was engaged in--the cultivation of wheat for home consumption--was not treated by the Court as part of his commercial farming operation. And while it is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect. . . . Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech. While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does call into question Congress' authority to legislate.[a]

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana

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[a][T]he dissenters . . . would impose a new and heightened burden on Congress (unless the litigants can garner evidence sufficient to cure Congress' perceived "inadequa[cies]")--that legislation must contain detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme. Such an exacting requirement is not only unprecedented, it is also impractical. Indeed, the principal dissent's critique of Congress for "not even" including "declarations" specific to marijuana is particularly unpersuasive given that the CSA initially identified 80 other substances subject to regulation as Schedule I drugs, not to mention those categorized in Schedules II-V. Surely, Congress cannot be expected (and certainly should not be required) to include specific findings on each and every substance contained therein in order to satisfy the dissenters' unfounded skepticism.

grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard,* when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce ... among the several States." U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

[T]he statutory challenges [in *Lopez* and *Morrison*] were markedly different from the challenge respondents 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 for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez.*

[T]he Gun-Free School Zones Act of 1990 [invalidated in *Lopez*] was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. . . . We explained: "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."

[T]he CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances--those listed in Schedules II through V--"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project. [The classification of marijuana as a Schedule I

controlled substance], unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*.[b]

[I]n *Morrison*, [we held] The Violence Against Women Act of 1994. . . unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*. . . .

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." The court characterized this class as "different in kind from drug trafficking." The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none

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[b]The principal dissent asserts that by "[s]eizing upon our language in *Lopez*, *i.e.*, giving effect to our well-established case law, Congress will now have an incentive to legislate broadly. Even putting aside the political checks that would generally curb Congress' power to enact a broad and comprehensive scheme for the purpose of targeting purely local activity, there is no suggestion that the CSA constitutes the type of "evasive" legislation the dissent fears, nor could such an argument plausibly be made.

of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme.

First, the fact that marijuana is used "for personal medical purposes on the advice of a physician" cannot itself serve as a distinguishing factor. The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses. Moreover, the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. Indeed, most of the substances classified in the CSA "have a useful and legitimate medical purpose."

. . . More fundamentally, if, as the principal dissent contends, the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the " 'outer limits' of Congress' Commerce Clause authority, it must also be true that such personal use of marijuana (or any other homegrown drug) for recreational purposes is also beyond those " 'outer limits,' " whether or not a State elects to authorize or even regulate such use. [T]he dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the " 'outer limits' " of Congress' Commerce Clause authority. One 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. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the naked eye," *Lopez*, under any commonsense appraisal of the probable consequences of such an open-ended exemption.

Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. . . . Just as state

acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state action cannot circumscribe Congress' plenary commerce power.[c]

Respondents acknowledge this proposition, but nonetheless contend that their activities were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market." . . . The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.

Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just "plausible" as the principal dissent concedes, it is readily apparent. The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. . . . The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact Justice O'CONNOR's

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[c][C]alifornia's decision (made 34 years after the CSA was enacted) to impose "stric[t] controls" on the "cultivation and possession of marijuana for medical purposes," cannot retroactively divest Congress of its authority under the Commerce Clause. Indeed, Justice THOMAS' urgings to the contrary would turn the Supremacy Clause on its head, and would resurrect limits on congressional power that have long since been rejected. . . . Justice THOMAS' suggestion that States possess the power to dictate the extent of Congress' commerce power would have far-reaching implications beyond the facts of this case. For example, under his reasoning, Congress would be equally powerless to regulate, let alone prohibit, the intrastate possession, cultivation, and use of marijuana for *recreational* purposes, an activity which all States "strictly contro[l]." Indeed, his rationale seemingly would require Congress to cede its constitutional power to regulate commerce whenever a State opts to exercise its "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens."

dissent conveniently disregards in arguing that the demonstrated effect on commerce while admittedly "plausible" is ultimately "unsubstantiated," Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

So, from the "separate and distinct" class of activities identified by the Court of Appeals (and adopted by the dissenters), we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana." Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim. . . .

Justice SCALIA, concurring in the judgment.

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Since *Perez v. United States*, our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather . . . Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of "activities that substantially affect interstate commerce," is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the

governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. . . .

This principle is not without limitation. In *Lopez* and *Morrison*, the Court--conscious of the potential of the "substantially affects" test to " 'obliterate the distinction between what is national and what is local,' "-- rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. . . . Thus, although Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to "pile inference upon inference," *Lopez*, in order to establish that noneconomic activity has a substantial effect on interstate commerce.

As we implicitly acknowledged in *Lopez*, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." [*United States v.*] *Wrightwood Dairy Co.*, [315 U.S., 110, 119 (1942)]. As the Court put it in *Wrightwood Dairy*, where Congress has the authority to enact a regulation of interstate commerce, "it possesses every power needed to make that regulation effective."

Although this power "to make ... regulation effective" commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power.

In *Darby*, for instance, the Court explained that "Congress, having ... adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards," could not only require employers engaged in the production of goods for interstate commerce to conform to wage and hour

standards, but could also require those employers to keep employment records in order to demonstrate compliance with the regulatory scheme. While the Court sustained the former regulation on the alternative ground that the activity it regulated could have a "great effect" on interstate commerce, it affirmed the latter on the sole ground that "[t]he requirement for records even of the intrastate transaction is an appropriate means to a legitimate end."

As the Court said in the *Shreveport R. Co.*, the Necessary and Proper Clause does not give "Congress ... the authority to regulate the internal commerce of a State, as such," but it does allow Congress "to take all measures necessary or appropriate to" the effective regulation of the interstate market, "although intrastate transactions ... may thereby be controlled."

. . . Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could ... undercut" its regulation of interstate commerce. This is not a power that threatens to obliterate the line between "what is truly national and what is truly local."

Lopez and *Morrison* . . . do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation . . . [T]he Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. See *McCulloch v. Maryland*.

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch v. Maryland*, even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. Moreover, they may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." These phrases are not merely hortatory. For example, cases such as *Printz v. United States,* and *New York v. United States,* affirm that a law is not " '*proper* for carrying into Execution the Commerce Clause' " "[w]hen [it] violates [a constitutional] principle of state sovereignty."

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which

prohibit it." *Darby*; *Lottery Case.* To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances-- both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

[N]ot only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use 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. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market. "To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution." *McCulloch*.

Finally, neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation "inappropriate," except to argue that the CSA regulates an area typically left to state regulation. That is not enough to render federal regulation an inappropriate means. . . . I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market "could be undercut" if those activities were excepted from its general scheme of regulation. That is sufficient to authorize the application of the CSA to respondents.

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice THOMAS join. . . . , dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may,

if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann* (Brandeis, J., dissenting). This case exemplifies the role of States as laboratories. . . . California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause--nestling questionable assertions of its authority into comprehensive regulatory schemes--rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez, supra,* and *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). Accordingly I dissent.

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Today's decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing Congress to set the terms of the constitutional debate in this way, *i.e.*, by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.

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Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation"--thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones. Furthermore, today's decision suggests we would

readily sustain a congressional decision to attach the regulation of intrastate activity to a pre-existing comprehensive (or even not-so-comprehensive) scheme. If so, the Court invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a *new* interstate scheme exclusively for the sake of reaching intrastate activity.

I cannot agree that our decision in *Lopez* contemplated such evasive or overbroad legislative strategies with approval. Until today, such arguments have been made only in dissent. *Lopez* and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires, as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.

The hard work for courts, then, is to identify objective markers for confining the analysis in Commerce Clause cases. Here, respondents challenge the constitutionality of the CSA as applied to them and those similarly situated. I agree with the Court that we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious--that their personal activities do not have a substantial effect on interstate commerce. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis). The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated.

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. Respondents challenge only the application of the CSA to medicinal use of marijuana. Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where "States lay claim by right of history and expertise." California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in the aggregate, substantially affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.

The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court's opinion--the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates– the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between "what is national and what is local." It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow--a federal police power.

In *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity. The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. (Marijuana is highly unusual among the substances subject to the CSA in that it can be cultivated without any materials that have traveled in interstate commerce.) *Lopez* makes clear that possession is not itself commercial activity. And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value.

[I]n contrast to the CSA's limitless assertion of power, [in *Wickard*] Congress provided an exemption within the AAA for small producers. *Wickard,* then, did not extend Commerce Clause authority to something as modest as the home cook's herb garden. . . . *Wickard* did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (*i.e.*, whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. . . .[T]hat authority must be used in a manner consistent with the notion of enumerated powers--a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. Indeed, if it were enough in "substantial effects" cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are "never more than an instant from the interstate market" in guns already subject to extensive federal regulation,, recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act of 1990. (According to the Court's and the concurrence's logic, for example, the *Lopez* court should have reasoned that the prohibition on gun possession in school zones could be an appropriate means of effectuating a related prohibition on "sell[ing]" or "deliver[ing]" firearms or ammunition to "any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age." 18 U.S.C. § 922(b)(1) (1988 ed., Supp. II).)

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market--or otherwise to threaten the CSA regime. Explicit evidence is helpful when substantial effect is not "visible to the naked

eye." And here, in part because common sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana from the illicit market, the effect of those activities on interstate drug traffic is not self-evidently substantial. . . .

The Court recognizes that "the record in the *Wickard* case itself established the causal connection between the production for local use and the national market" and argues that "we have before us findings by Congress *to the same effect.*" . . . These bare declarations cannot be compared to the record before the Court in *Wickard.* . . . They are asserted without any supporting evidence--descriptive, statistical, or otherwise. . . . Indeed, if declarations like these suffice to justify federal regulation, and if the Court today is right about what passes rationality review before us, then our decision in *Morrison* should have come out the other way. In that case, Congress had supplied numerous findings regarding the impact gender-motivated violence had on the national economy. . . . If, as the Court claims, today's decision does not break with precedent, how can it be that voluminous findings, documenting extensive hearings about the specific topic of violence against women, did not pass constitutional muster in *Morrison*, while the CSA's abstract, unsubstantiated, generalized findings about controlled substances do?

In particular, 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 respondents. The declarations are not even specific to marijuana. . . . The California Compassionate Use Act . . . specifies that it should not be construed to supersede legislation prohibiting persons from engaging in acts dangerous to others, or to condone the diversion of marijuana for nonmedical purposes. To promote the Act's operation and to facilitate law enforcement, California recently enacted an identification card system for qualified patients. We generally assume States enforce their laws, and have no reason to think otherwise here.

The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug's seeping into the market in a significant way. [The Court] says that the California statute might be vulnerable to exploitation by unscrupulous physicians, that Compassionate Use Act patients may overproduce, and that the history of the narcotics trade shows the difficulty of cordoning off any drug use from the rest of the market. These arguments are plausible; if borne out in fact they could justify prosecuting Compassionate Use Act patients under the federal CSA. But, without

substantiation, they add little to the CSA's conclusory statements about diversion, essentiality, and market effect. Piling assertion upon assertion does not, in my view, satisfy the substantiality test of *Lopez* and *Morrison.* . . .

Justice THOMAS, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything--and the Federal Government is no longer one of limited and enumerated powers.

[T]he Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines The Clause's text, structure, and history all indicate that, at the time of the founding, the term " 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." Commerce, or trade, stood in contrast to productive activities like manufacturing and agriculture. Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term "commerce" is consistently used to mean trade or exchange--not all economic or gainful activity that has some attenuated connection to trade or exchange. Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L.Rev. 101, 112-125 (2001). The term "commerce" commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 Ark. L.Rev. 847, 857-862 (2003).

[C]ertainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

On this traditional understanding of "commerce," the Controlled Substances Act (CSA) regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA does not, however, criminalize only the interstate buying and selling of marijuana. Instead, it bans the entire market--intrastate or interstate, noncommercial or commercial--for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial.

[T]he Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. . . . To

act under the Necessary and Proper Clause, . . . Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power; the means cannot be otherwise "prohibited" by the Constitution; and the means cannot be inconsistent with "the letter and spirit of the [C]onstitution." The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause. . . . [I]n order to be "necessary," the intrastate ban must be more than "a reasonable means [of] effectuat[ing] the regulation of interstate commerce." It must be "plainly adapted" to regulating interstate marijuana trafficking--in other words, there must be an "obvious, simple, and direct relation" between the intrastate ban and the regulation of interstate commerce.

[R]espondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the intrastate ban is "necessary and proper" as applied to medical marijuana users like respondents.

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA's interstate ban. The Court of Appeals found that respondents' "limited use is distinct from the broader illicit drug market," because "th[eir] medicinal marijuana ... is not intended for, nor does it enter, the stream of commerce." If that is generally true of individuals who grow and use marijuana for medical purposes under state law, then even assuming Congress has "obvious" and "plain" reasons why regulating intrastate cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

. . . California strictly controls the cultivation and possession of marijuana for medical purposes. To be eligible for its program, California requires that a patient have an illness that cannabis can relieve, such as cancer, AIDS, or arthritis, and that he obtain a physician's recommendation or approval. Qualified patients must provide personal and medical information to obtain medical identification cards, and there is a statewide registry of cardholders. Moreover, the Medical Board of California has issued guidelines for physicians' cannabis recommendations, and it sanctions physicians who do not comply with the guidelines. . . . We normally presume that States enforce their own laws, and there is no reason to depart from that presumption here: Nothing suggests that California's controls are ineffective. . . . Enforcement of the CSA can continue as it did prior to the Compassionate Use Act. Only now, a qualified patient could avoid arrest or prosecution by presenting his identification card to law enforcement officers. In the event that a qualified patient is arrested for possession or his cannabis is seized, he could

seek to prove as an affirmative defense that, in conformity with state law, he possessed or cultivated small quantities of marijuana intrastate solely for personal medical use. Moreover, under the CSA, certain drugs that present a high risk of abuse and addiction but that nevertheless have an accepted medical use--drugs like morphine and amphetamines--are available by prescription. No one argues that permitting use of these drugs under medical supervision has undermined the CSA's restrictions.

But even assuming that States' controls allow some seepage of medical marijuana into the illicit drug market, there is a multibillion-dollar interstate market for marijuana. It is difficult to see how this vast market could be affected by diverted medical cannabis, let alone in a way that makes regulating intrastate medical marijuana obviously essential to controlling the interstate drug market. . . .

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is also "proper." The means selected by Congress to regulate interstate commerce cannot be "prohibited" by, or inconsistent with the "letter and spirit" of, the Constitution. . . . . When agents from the Drug Enforcement Administration raided Monson's home, they seized six cannabis plants. If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers--as expanded by the Necessary and Proper Clause--have no meaningful limits. . . . Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, . . . Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty. Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. Further, the Government's rationale--that it may regulate the production or possession of any commodity for which there is an interstate market--threatens to remove the remaining vestiges of States' traditional police powers. This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext ... for the accomplishment of objects not intrusted to the government." *McCulloch*.

. . .

The majority's treatment of the substantial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause. Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce--any more than Congress may regulate activities that do not fall within, but that affect, the subjects of its other Article I powers. [T]he question is whether Congress' legislation is essential to the regulation of interstate commerce itself--not whether the legislation extends only to economic activities that substantially affect interstate commerce.

[T]he majority defines economic activity in the broadest possible terms as the " 'the production, distribution, and consumption of commodities.' " This carves out a vast swath of activities that are subject to federal regulation. If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. . . . [But] Congress is authorized to regulate "Commerce," and respondents' conduct does not qualify under any definition of that term. The majority's opinion only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from " 'commerce,' " to "commercial" and "economic" activity, and finally to all "production, distribution, and consumption" of goods or services for which there is an "established ... interstate market," Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it. . . .

Discussion

1. *Symbolic federalism or anti-grandstanding principle? Raich* seems to suggest that a majority of the Justices are not yet prepared to engage in a wholesale rethinking of Commerce Clause jurisprudence. Instead, in *Lopez* they merely sought to demonstrate that there were some limits to the scope of the commerce power. The vast majority of federal regulation, however, will be continue to upheld under the relaxed test of *Darby* and *Wickard*: when there is a "rational basis" for concluding that the regulated activities, taken in the aggregate, substantially affect interstate commerce. If this is what *Raich* means, then perhaps the Rehnquist Court's federalism revolution has proven mostly symbolic. It limits Congress only in modest ways, and even in those instances it allows Congress to do most of what it wants through other means.

Another interpretation of *Raich* is that it embodies a sort of "anti-grandstanding principle." Raich's distinction of *Lopez* and *Morrison* suggests that Congress may not "grandstand" by picking out particular instances of local non-economic conduct and regulating them to score political points. Instead, Congress must aim at and produce comprehensive schemes of regulation of economic activity. If Congress does pass a comprehensive scheme, however, the Court will uphold it, even if it reaches intrastate activities and (even some non-economic activities), and clever plaintiffs like those in Raich may not come up with carveouts and assert that these are beyond the Commerce Power. This "anti-grandstanding" rule might have some modest effects on the kinds of collations necessary to get legislation passed. The broader the scheme, the more likely there will be resistance from some important stakeholder so the anti-grandstanding principle might put some very modest constraints on regulation. Note, however, that Congress can still past "grandstanding" legislation like the Gun-Free School Zones Act of 1990 if it adds a

jurisdictional predicate, as it did following *Lopez*. Was the Violence Against Women Act also "grandstanding" legislation or was it a valuable civil rights measure? Is the problem in *Morrison* that the Court construed Congress's Section Five powers too narrowly?

2. *Death by a thousand carve-outs*. Was the plaintiffs' attempted carve out from federal regulatory power– "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." -- ad hoc? If the Court had allowed it, what incentives would this have created to try other carveouts, either by plaintiffs or by state governments unhappy with federal policy? Assume that a series of plaintiffs would have tried to bring as applied challenges to a variety of federal laws, including drug laws, health and safety laws, and environmental laws. Would all of them have succeeded? Even if they did succeed, would this necessarily have been a bad thing? What assumptions about the underlying federal regulatory policy at issue does one have to make to answer that question?