

GONZALES V. RAICH: HOW TO FIX A MESS OF “ECONOMIC” PROPORTIONS

I. INTRODUCTION

From 1937 to 1994, the Supreme Court upheld every single application of Congress’s power that was challenged under the Commerce Clause.¹ Then in 1995, for the first time in over fifty years the Court invalidated an act under the Commerce Clause, the Gun-Free School Zones Act,² in *United States v. Lopez*.³ The Court followed up *Lopez* in 2000 by striking down part of the Violence Against Women Act⁴ in *United States v. Morrison*.⁵ Suddenly, the Commerce Clause was alive and well, or was it?⁶

In 2005, the Supreme Court heard arguments in *Gonzales v. Raich*.⁷ Would the Supreme Court hold true to their recent trend of placing meaningful limits on the commerce power, or would the Court revert to their “toothless” judicial review and continue to reject as-applied challenges under the Commerce Clause?⁸

A thorough analysis of *Raich* demonstrates that the *Lopez* and

1. U.S.CONST. art. I, § 8, cl. 3. *See generally*, Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL’Y 1, 5 (1996) (referring to post-New Deal Commerce Clause as the “Hey, you-can-do-whatever-you-feel-like Clause”).

2. 18 U.S.C. § 922(q)(1)(A) (1990).

3. 514 U.S. 549 (1995). *See infra* notes 52-65 and accompanying text (discussing this case).

4. 42 U.S.C. § 13981 (1994).

5. 529 U.S. 598 (2000). *See infra* notes 66-82 and accompanying text (discussing this case).

6. *See* Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 736 (2003) (stating without more guidance from the Court, the real effect of *Lopez* and *Morrison* will be minor and have few practical effects). *See also*, Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369.

7. 125 S.Ct. 2195 (2005).

8. *See* Jonathon H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (Winter 2005) (arguing *Raich* continued the Supreme Court’s practice of rejecting as-applied challenges under the Commerce Clause); Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 880 (2005) [hereinafter Pushaw, *Counter-Revolution*] (calling judicial review under the Commerce Clause “toothless”).

Morrison standard is an “economic” mess with no basis in the Constitution.⁹ The Constitution does place meaningful restrictions on congressional legislation of “commerce.”¹⁰ First, the legislation must concern “commerce.”¹¹ Second, that “commerce” must be “among the several States.”¹² This Note argues that the text of the Commerce Clause can be adequately defined to place meaningful limits on Congress and provide easy rules for judicial review,¹³ and proposes that the Court adopt a Neo-*Gibbons* approach because the existing approach is inadequate.¹⁴

The Note examines the history, evolution, elements, and application of the Commerce Clause doctrine.¹⁵ Part II, Sections A through C, concentrate on the history of the Supreme Court’s interpretation of the Commerce Clause, focusing extensively on *Wickard v. Filburn*,¹⁶ which the majority in *Raich* held controlling, and *United States v. Lopez*¹⁷ and *United States v. Morrison*,¹⁸ which the dissent would have held as controlling.¹⁹ Part II, Sections D and E, provide an overview of the Controlled Substances Act,²⁰ whose constitutionality was challenged as applied in *Gonzales v. Raich*,²¹ and the Compassionate Use Act²² of California, which led to the conflict in *Raich*.²³ Part III provides a statement of the facts, the procedural history, and the United States Supreme Court decision in *Gonzales v. Raich*.²⁴ Part IV, Sections A and B, analyze the *Raich* decision, arguing that based on fundamental legal arguments the *Lopez/Morrison* standard applied in *Raich* is inadequate.²⁵ In Part IV, Sections C through E, the meanings of the words

9. See *infra* notes 121-39 and accompanying text (discussing this point). See also Christy H. Dral & Jerry J. Phillips, *Commerce By Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 605 (Spring 2001) (arguing the standards in *Lopez* and *Morrison* “will prove to be unworkable”).

10. See U.S.CONST. art. I, § 8, cl. 3.

11. See *infra* notes 141-65 and accompanying text (analyzing the term “commerce”).

12. See *infra* notes 166-78 and accompanying text (analyzing the phrase “among the several States”).

13. See *infra* notes 191-223 and accompanying text (discussing the Neo-*Gibbons* approach).

14. *Id.*

15. See *infra* Parts II-V.

16. 317 U.S. 111 (1942).

17. 514 U.S. 549 (1995).

18. 529 U.S. 598 (2000).

19. See *infra* notes 29-82 and accompanying text.

20. 21 U.S.C. § 801 et seq.

21. 125 S.Ct. 2195 (2005).

22. CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (2005).

23. See *infra* notes 83-89 and accompanying text.

24. See *infra* notes 90-112 and accompanying text.

25. See *infra* notes 113-40 and accompanying text.

“commerce,” “among the several States,” and “to regulate” are analyzed based on the text and history of the Constitution.²⁶ Part IV, Section F, proposes a Neo-*Gibbons* standard,²⁷ and Section G applies this standard to Commerce Clause jurisprudence.²⁸

II. BACKGROUND

A. Overview of the Commerce Clause

Among the enumerated powers delegated to Congress in the Constitution is the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .”²⁹ Despite initially defining the commerce power broadly in *Gibbons v. Ogden*,³⁰ the Supreme Court’s early cases interpreted the Commerce Clause too strictly.³¹ Later, however, expansive interpretations practically granted Congress plenary power under the Commerce Clause to pass extensive federal regulation.³² Federal regulations have extended to areas traditionally considered the province of state governments, such as criminal statutes.³³ For over fifty years, the Supreme Court found no federal regulation unconstitutional on the grounds that Congress had exceeded its power under the Commerce Clause.³⁴ Then, in 1995, the Supreme Court declined to expand further the commerce power and thereby placed a limit on Congress’s authority to make laws under the Commerce Clause.³⁵

26. See *infra* notes 141-91 and accompanying text.

27. See *infra* notes 191-223 and accompanying text.

28. See *infra* notes 224-44 and accompanying text.

29. U.S.CONST. art. I, § 8, cl. 3.

30. *Gibbons v. Ogden*, 22 U.S. 1 (1824). See *infra* notes 37, 147-48, 169 and accompanying text (setting out the *Gibbons* Court’s analysis).

31. See *infra* notes 38-39 and accompanying text.

32. See *infra* notes 40-42 and accompanying text.

33. See *Raich v. Gonzales*, 545 U.S. 1 (2005) (concerning the Controlled Substances Act, making it a federal crime to possess marijuana and other controlled substances); *United States v. Lopez*, 514 U.S. 549 (1995) (involving the Gun-Free School Zones Act of 1990, making possession of a gun near a school zone a federal crime); *Perez v. United States*, 402 U.S. 146 (1971) (upholding loan sharking as a federal crime).

34. See *infra* notes 40-41 and accompanying text.

35. See *United States v. Morrison*, 529 U.S. 598 (2000) (holding as unconstitutional a federal civil remedy for victims of gender motivated violence under the Violence Against Women Act); *Lopez*, 514 U.S. 549 (striking down an attempt by Congress to criminalize possession of a gun in a school zone under the Gun-Free School Zones Act).

B. *The Commerce Clause Pre-1995*

In *Gibbons v. Ogden*, Chief Justice Marshall examined whether commercial navigation was “commerce,” and whether that commerce had taken place “among the several states.”³⁶ After finding both conditions met, Chief Justice Marshall articulated the commerce power in *Gibbons* as an expansive power to regulate commerce “among the several states” that “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”³⁷ Despite Chief Justice Marshall’s broader interpretation of “commerce” in *Gibbons*, prior to 1937 the Supreme Court routinely struck down legislation enacted under the Commerce Clause that it considered local in nature, and stressed that the activities (e.g., manufacturing, labor) were not “commerce.”³⁸ The Court allowed regulations only where the goods involved passed interstate.³⁹

36. *Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that New York could not grant an exclusive right to operate steamboats in New York waters where the federal government also granted licenses under federal law). See *infra* notes 148, 169 (setting forth Chief Justice Marshall’s articulation of “commerce” and “among the several states”).

37. *Gibbons*, 22 U.S. at 196 (1824) (holding that New York could not grant an exclusive right to operate steamboats in New York waters where the federal government also granted licenses under federal law). Professor Pushaw states that Chief Justice Marshall was “not saying that Congress has plenary power under the Commerce Clause,” but rather “if a subject is ‘commercial’ and concerns more than one state, then Congress can regulate the subject however it pleases.” E-Mail from Robert Pushaw, James Wilson Professor of Law, Pepperdine University School of Law, to author (Dec. 3, 2006) (on file with author). The Commerce Clause and the Constitution do prescribe some limitations. See *infra* notes 141-90 and accompanying text (discussing these limitations).

38. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (pronouncing that Congress had no power to regulate the maximum hours and minimum wages in coal mines because the labor provisions fall upon production, not commerce, and production is a local activity); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (finding the Congress had no power to regulate the hours and wages of a local poultry slaughterhouse); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (invalidating a law establishing a compulsory retirement and pension plan for all carriers subject to the Interstate Commerce Act because it was a regulation related solely to the social welfare of the worker and not a regulation of commerce within the meaning of the Constitution); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down a congressional act of 1916 that excluded the products of child labor from interstate commerce because manufacturing was considered local activity), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that manufacture of goods was not interstate commerce and that the regulation of a monopoly in sugar refining was outside the scope of the commerce power using a direct/indirect approach).

39. See, e.g., *Houston E. & W. Ry. Co. v. United States* (The Shreveport Rate Case), 234 U.S. 342 (1914) (upholding congressional authority to reach intrastate railroad rates that discriminated against interstate railroad traffic under a “substantial economic effects” approach); *Hoke & Economides v. United States*, 227 U.S. 308 (1913) (upholding the Mann Act which prohibited the transportation of women across state lines for prostitution); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (pronouncing that articles which are “outlaws of commerce” may be seized); *Swift*

The Court took a dramatic turn after President Franklin Roosevelt embarked on his New Deal with America.⁴⁰ The commerce power went virtually unchecked from 1937 until 1995.⁴¹ The most expansive interpretation of the Commerce Clause came in *Wickard v. Filburn*.⁴²

& Co. v. United States, 196 U.S. 375 (1905) (validating a Sherman Act injunction against price fixing by meat dealers under the "stream of commerce" theory); *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903) (upholding the Federal Lottery Act of 1895 which prohibited importing, mailing, or interstate transporting of lottery tickets on the grounds that articles of traffic, such as lottery tickets, were articles of commerce).

40. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 216 (1995). While President Roosevelt threatened a court-packing plan to save the New Deal legislation from judicial invalidation by loading the Court with justices willing to find his policies constitutional, the then-existing Court abandoned the restrictive interpretations in the Commerce Clause in favor of an almost plenary power interpretation. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 187 (1997). Compare JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 135, 140 (1937) (suggesting that Justice Roberts's "switch in time" from the narrow interpretation to the broader liberal view occurred before the President's court-packing plan was announced), with MERLO J. PUSEY, *THE SUPREME COURT CRISIS* (1937) (arguing that the court-packing plan intimidated Justice Roberts into switching his voting trend from conservative to liberal). See generally Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 630-31 (1994).

41. See Nat'l Labor Relations Bd. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act, which regulated hours, wages, and working conditions in businesses over a certain size, effectively overruling *Schechter Poultry*). The Court stated that, "It is the effect upon commerce, not the source of the injury, which is the criterion" for determining Commerce Clause constitutionality. *Id.* at 32. The Supreme Court reinforced the "effect upon commerce" approach in *United States v. Darby*, 312 U.S. 100 (1941) (upholding regulation of wages and hours in the manufacture of goods intended for shipment in interstate commerce, overruling *Hammer v. Dagenhart*). In "perhaps the most far reaching example of Commerce Clause authority over interstate activity," *United States v. Lopez*, 514 U.S. 549, 560 (1995), the *Wickard v. Filburn* Court upheld as constitutional the Agricultural Adjustment Act of 1938, which limited the amount of wheat that a farmer could produce. 317 U.S. 111, 115 (1942). *Filburn* was found liable under the Act even though the excess wheat was for home consumption because the interstate price was a function of the total wheat production and "homegrown wheat . . . competes with wheat in commerce." *Wickard*, 317 U.S. at 125, 127-29. See also, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding federal pollution laws because surface coal mining affects interstate commerce); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding amendments to the Fair Labor Standards Act that extended coverage to every employee employed in an enterprise engaged in commerce or the production of goods for commerce) overruled by *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (validating the Civil Rights Act of 1964 as applied to local restaurants on the grounds that discrimination in restaurants affected interstate travel and that much of the food had traveled in interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the Civil Rights Act of 1964 as applied to a local hotel because segregation would discourage travel, affecting interstate commerce).

42. 317 U.S. 111 (1942) (holding that Congress could regulate wheat cultivated for home consumption because, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions).

1. *Wickard v. Filburn*⁴³

In 1941, Filburn sought a declaratory judgment stating that the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938⁴⁴ as applicable to him were not sustainable under the Commerce Clause.⁴⁵ Filburn had exceeded his allotment for the 1941 wheat crop.⁴⁶ He harvested additional bushels of wheat for home consumption, which under the Act were marketing excess and subject to penalty.⁴⁷ Filburn argued that although Congress had the ability to regulate production of goods for commerce, its power did not authorize regulation of production not intended for commerce but wholly for consumption on the farm.⁴⁸

43. *Id.*

44. 7 U.S.C. § 1281 et seq. The general scheme of the Act as related to wheat was to “control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.” *Wickard*, 317 U.S. at 115. Under the Act, the Secretary of Agriculture annually announced a national acreage allotment for the next crop of wheat, which was apportioned to the states and their counties, and eventually into allotments for individual farmers. *Id.* Small producers were exempt from the quotas. *Id.* at 130.

45. *Wickard*, 317 U.S. at 113-14. Filburn had for many years owned and operated a small farm in Montgomery County, Ohio. *Id.* at 114. It was his practice to raise a small acreage of wheat; “to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some for making flour for home consumption; and to keep the rest for the following seeding.” *Id.* The Agricultural Adjustment Act of 1938 “extend[ed] federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.” *Id.* at 118. The marketing quotas included that which may be sold without penalty and what may be consumed on the premises. *Id.* at 119.

Wheat produced on excess acreage is designated as ‘available for marketing’ as so defined and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat either within or without the quota is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Id. (internal footnote omitted). Filburn sowed 23 acres, however, and harvested from his additional 11.9 acres 239 excess bushels of wheat, which under the Act were marketing excess and subject to penalty. *Id.* at 114-15.

46. *Id.* at 114. Filburn’s allotment for the 1941 wheat crop was 11.1 acres with a normal yield of 20.1 bushels of wheat an acre. *Id.*

47. *Id.* at 115. Filburn could have avoided the penalty by turning over the excess wheat to the Secretary of Agriculture or storing it under regulation of the Secretary. *Id.* However, Filburn argued he intended to use the excess wheat by consuming it on his farm. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

48. *Wickard*, 317 U.S. at 118. *See* *United States v. Darby*, 312 U.S. 100 (1941) (sustaining the federal power to regulate production of goods for commerce). In *Darby*, the court stated:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make

A unanimous Court rejected Filburn's argument.⁴⁹ The Court found "[t]he effect of consumption of homegrown wheat on interstate commerce [was] due to the fact it constitute[d] the most variable factor in the disappearance of the wheat crop."⁵⁰ Congress may properly consider "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" and, therefore, the Commerce Clause applied.⁵¹

C. Major Precedent Since 1995

1. *United States v. Lopez*⁵²

The Gun-Free School Zone Act of 1990 (GFSZA) made it a federal offense "for any individual knowingly to possess a firearm . . . at a place

regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Id. at 118. See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress's power to regulate under the Commerce Clause).

49. *Wickard*, 317 U.S. at 125. "[E]ven if [Filburn]'s activity be local and though it may not be regarded as commerce, it still may, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ." *Id.*

50. *Id.* at 127. Consumption appears to have accounted for greater than twenty percent of the average production. *Id.* The Court stated:

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.

Id. at 127-28.

51. *Id.* at 129. "The wheat industry [had] been a problem industry for some years." *Id.* at 125. The *Wickard* court stated the following:

One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Homegrown wheat in this sense competes with wheat in commerce.

Id. at 128.

52. 514 U.S. 549 (1995) (holding that the Gun-Free School Zone Act of 1990, which made it a crime for an individual to possess a gun in a school zone, was invalid).

that the individual knows, or has reasonable cause to believe, is a school zone.”⁵³ Respondent, a twelfth-grade student, carried a concealed handgun into his high school and was charged with violating the GFSZA.⁵⁴ The district court found the student guilty of violating the Act.⁵⁵ The Court of Appeals for the Fifth Circuit reversed the conviction, finding the statute invalid because it was beyond Congress’s power under the Commerce Clause.⁵⁶ The United States Supreme Court granted certiorari.⁵⁷

The United States Supreme Court found that the GFSZA exceeded the authority of Congress “[t]o regulate Commerce . . . among the several States. . . .”⁵⁸ The Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the “use of the channels of interstate commerce[;]” (2) the “instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities[;]” and (3) “those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”⁵⁹

The Court analyzed the GFSZA under the third category, regulation of an activity that substantially affects interstate commerce.⁶⁰ The Court found that Section 922(q) was a criminal statute that had nothing to do with commerce or economic enterprise, that it contained no jurisdictional element to ensure the firearm possession in question affected interstate commerce, and that neither the statute nor its legislative history contained express congressional findings on the affect

53. 18 U.S.C. § 922(q)(2)(A) (1990).

54. *Lopez*, 514 U.S. at 551. Acting on an anonymous tip, school authorities confronted the student, who admitted he was carrying a .38-caliber handgun and five bullets. *Id.* He was arrested under state charges that were subsequently dropped the very next day when federal agents charged him with violating the law Gun-Free School Zones Act of 1990. *Id.* The student moved to dismiss his federal indictment on the ground § 922(q) was unconstitutional as beyond the power of Congress under the commerce clause. *Id.* The district court denied the motion. *Id.*

55. *Id.* at 552. The student had waived his right to a jury trial and was sentenced to six months of imprisonment and two years’ supervised release. *Id.*

56. *Id.*

57. *United States v. Lopez*, 511 U.S. 1029 (1994) (granting a petition for a writ of certiorari).

58. *Lopez*, 514 U.S. at 551 (quoting U.S. CONST. art. I, § 8, cl. 3).

59. *Id.* at 558-59 (internal citations omitted).

60. *Id.* at 559. The Court quickly disposed of the first two categories noting § 922(q) “is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce” and that § 922(q) cannot “be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.” *Id.* Under the third category, the proper test is whether the regulated activity “substantially affects” interstate commerce. *Id.* “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” *Id.*

of gun possession in a school zone on interstate commerce.⁶¹ Therefore, “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”⁶²

Justices Breyer, Stevens, Souter, and Ginsburg dissented.⁶³ The dissent first stated that the specific question before the Court was “not whether the ‘regulated activity sufficiently affected commerce,’” but “whether Congress could have had ‘a rational basis’ for so concluding.”⁶⁴ In the dissent’s view, Congress could have rationally concluded that gun-related violence near schools had an adverse impact on interstate commerce when violence, education, and economic facts

61. *Id.* at 561-62. In addition, the *Lopez* Court stated:

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.

Id. at 561. Unlike the statute in *United States v. Bass*, 404 U.S. 336 (1971) (making it a crime for a felon to receive, possess, or transport in commerce or affecting commerce any firearm), Section 922(q) had “no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.” *Lopez*, 514 U.S. at 561-62. The Court noted that while Congress is not required to make particularized findings, such findings “would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye. . . .” *Id.* at 563.

62. *Lopez*, 514 U.S. at 567. The Court rejected the Government’s argument that “possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways.” *Id.* at 563. First, the costs of violent crime are substantial and through insurance are dispersed throughout the population. *Id.* at 564. Second, violent crime reduces travel to areas perceived to be unsafe. *Id.* The Government also argued that there is a substantial threat to the educational process through threats to the learning environment which would result in an impaired educational process producing less productive citizens adversely affecting the Nation’s economic well-being. *Id.* Under the Government’s “cost of crime” reasoning, Congress could regulate all violent crime and activities that could lead to such. *Id.* Similarly, under the “national productivity” reasoning, Congress could regulate any activity it found to be related to productivity including family law. *Id.* It is difficult to find any limitation on federal power under the Government’s theories. *Id.* “[I]f Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly.” *Id.* at 565. “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* at 567. To do so would eliminate the distinction between what is truly national and what is truly local. *Id.* at 567-68.

63. *Id.* at 615 (Breyer, J., dissenting).

64. *Id.* at 617. Courts should give a degree of deference to Congress in determining whether a significant factual connection exists between the regulated activity and interstate commerce because the Constitution delegates the power directly to Congress and the empirical judgment is more likely to be made with accuracy by the legislative body. *Id.* at 616-17.

are taken together.⁶⁵

2. *United States v. Morrison*⁶⁶

Morrison involved a female student who had accused two football players of rape.⁶⁷ She filed a complaint under the Violence Against Women Act (VAWA), which created a private right of action in federal court for female victims of violence against their assailant.⁶⁸ The district

65. *Id.* at 623-24. Numerous reports and studies were available to show that the problem of guns in and around schools was widespread, serious, and interfered with the quality of education. *Id.* at 619-20. Education has long been linked with the Nation's economy. *Id.* at 620. Technological changes have "altered the nature of the workplace so that more jobs now demand greater educational skills." *Id.* "Increasing global competition also has made primary and secondary education economically more important." *Id.* at 621. Today, many firms base their location decisions on the presence of a work force with a basic education. *Id.* at 622. The Court continued:

The evidence of (1) the *extent* of the gun-related violence problem, (2) the *extent* of the resulting negative effect on classroom learning, and (3) the *extent* of the consequent negative commercial effects, when taken together, indicate a threat to trade and commerce that is 'substantial.' At the very least, Congress could rationally have concluded that the links are 'substantial.'

Id. at 623 (internal citations omitted).

[This holding] would permit Congress 'to act in terms of [economic] realities,' would interpret the commerce power as 'an affirmative power commensurate with the national needs,' and would acknowledge that the 'commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy.'

Id. at 625 (quoting *N. American Co. v. SEC*, 327 U.S. 686, 705 (1946) (citing *Swift v. Co. v. United States*, 196 U.S. 375, 398 (1905) (Holmes, J.)). The majority's holding creates three legal problems: modern Supreme Court cases have upheld congressional actions with a less significant effect than that of school violence; the Court ignores earlier warnings and places a critical distinction between "commercial" and noncommercial "transactions" instead of looking to the actual effects of the activity on interstate commerce; and it creates legal uncertainty. *Id.* at 625-31. Further, Congress could conclude that schools were commercial. *Id.* at 629. "In 1990, the year Congress enacted the statute before us, primary and secondary schools spent \$230 billion . . . which accounts for a significant portion of our \$5.5 trillion gross domestic product for that year." *Id.*

66. 529 U.S. 598 (2000) (holding that the Commerce Clause did not provide Congress with the authority to enact the civil remedy provision of the Violence Against Women Act (VAWA)).

67. *Id.* at 602. Christy Brzonkala was a student at Virginia Polytechnic Institute (Virginia Tech) in 1994, when she alleged that Antonio Morrison and James Crawford assaulted and repeatedly raped her. *Id.* Brzonkala filed a complaint under Virginia Tech's Sexual Assault Policy and Morrison was found guilty of sexual assault and suspended for two semesters. *Id.* at 603. Due to an error in processing her complaint a second hearing was necessary at which Morrison was again found guilty, but this time his offense was changed from "sexual assault" to "using abusive language." *Id.* Later, Morrison's punishment was set aside as excessive and Brzonkala withdrew from the university. *Id.* at 603-04.

68. *Id.* at 604. See Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 573 (2004) (stating *Morrison* "arose from a civil suit under the [VAWA] . . ."). The VAWA act states that "[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem

court dismissed the complaint, holding that Congress lacked the authority to enact that section of the statute under the Commerce Clause.⁶⁹ An en banc panel of the Court of Appeals for the Fourth Circuit affirmed the district court's conclusion.⁷⁰ The Supreme Court granted certiorari.⁷¹

The Supreme Court first categorized the VAWA under the "substantially affects interstate commerce" category of *Lopez*.⁷² In this category, the Court articulated four factors for review relevant to a Commerce Clause analysis.⁷³ First, a court must consider whether the regulation involves "economic activity;"⁷⁴ second, whether the regulation in question contained an express jurisdictional element to connect it with interstate commerce;⁷⁵ third, whether the legislative history contains express congressional findings regarding the effect on

appropriate." Violence Against Women Act of 1994, 42 U.S.C. § 13981 (2003). Brzonkala filed suit in the United States District Court for the Western District of Virginia and the United States intervened to defend § 13981's constitutionality. *Morrison*, 529 U.S. at 604.

69. *Morrison*, 529 U.S. at 604. Another issue in the case was whether Congress lacked authority under § 5 of the Fourteenth Amendment, but that question is beyond the scope of this Note and will not be addressed. *See generally id.*

70. *Brzonkala v. Virginia Polytechnic and State Univ.*, 169 F.3d 820 (4th Cir. 1999).

71. *United States v. Morrison*, 527 U.S. 1068 (1999).

72. *Morrison*, 529 U.S. at 608-09. The Court emphasized that even under the expansive modern interpretation of the Commerce Clause, Congress's regulatory authority is not unlimited. *Id.* at 608. The Court stated:

Even our modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."

Id. (quoting *United States v. Lopez*, 514 U.S. 549, 556-57 (1995) (quoting *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))).

73. *Id.* at 609-13 (summarizing the framework developed in *Lopez*).

74. *Id.* at 610. The Court reasoned that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision. . . ." *Id.* The Court stated, "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. *See also* Bradley, *supra* note 68 (stating very few cases have been reversed based on *Morrison* and *Lopez*); Choper, *supra* note 6, at 732 (noting that a number of legal scholars questioned whether *Lopez* was an aberration rather than a major shift in Commerce Clause jurisprudence); Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 5 (November, 2003) (arguing that the Court's recent federalism revival may ultimately be "much ado about nothing"); Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685, 693 (1996) (stating "*Lopez* has deprived Congress of very little power").

75. *Morrison*, 529 U.S. at 611-12. "Such a jurisdictional element may establish that the enactment is in pursuance of Congress'[s] regulation of interstate commerce." *Id.* at 612. The Court noted § 13981 contained no jurisdictional element. *Id.* at 613.

interstate commerce;⁷⁶ and fourth, whether the link between the regulated activity and the effect on commerce was “attenuated.”⁷⁷ After considering the four factors, the Court held that the VAWA was unconstitutional under the Commerce Clause.⁷⁸

Justices Souter, Stevens, Ginsburg, and Breyer dissented.⁷⁹ The dissent stated that the business of the Court was merely to review whether Congress had a rational basis for concluding that the activity, in the aggregate, had a substantial effect on interstate commerce.⁸⁰ Under this approach, the large amount of data Congress assembled provided a rational basis for the legislation that could not “seriously be questioned.”⁸¹ Moreover, the dissent questioned the validity of an economic/noneconomic distinction.⁸²

76. *Id.* at 612. The Court stated that the legislative history was relevant to aid the Court in evaluating the effect on interstate commerce, when that effect was not apparent. *Id.* Congress, however, is not required to make formal findings and such findings alone are insufficient to sustain the constitutionality of Commerce Clause legislation. *Id.* at 612, 614. The Court noted that § 13981 was supported by numerous congressional findings considering the serious impact of gender-motivated violence. *Id.* at 614.

77. *Id.* at 612. The United States argued that:

[T]he possession of guns may lead to violent crime, and that violent crime ‘can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe.’ The Government also argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus interstate commerce.

Id. at 612 (internal citations omitted). The Court rejected these “costs of crime” and “national productivity” arguments because they would allow Congress to regulate any activity that it found caused crime or related to the productivity of individuals, including family law. *Id.* at 612-13.

78. *Id.* at 627. The Supreme Court has “always rejected readings of the Commerce Clause . . . that would permit Congress to exercise a police power.” *Id.* at 618-19 (citing *United States v. Lopez*, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring)).

79. *Id.* at 628 (Souter, J., dissenting). See also *id.* at 656 (Breyer, J., dissenting).

80. *Id.* at 628 (Souter, J., dissenting).

81. *Morrison*, 529 U.S. at 634 (Souter, J., dissenting). Justice Souter summarized the evidence before Congress. *Id.* at 628-34.

82. *Id.* at 644-47; *id.* at 656-57 (Breyer, J., dissenting). “[I]f substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial?” *Id.* at 644 n.13 (Souter, J., dissenting). Justice Souter questioned why the formalistic economic/noneconomic distinction should matter today, noting that the majority believed it was useful in serving a conception of federalism, but “history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once.” *Id.* at 644-45. “[P]olitics, not judicial review, should mediate between state and national interests[.]” *Id.* at 647. “The ‘economic/noneconomic’ distinction is not easy to apply.” *Id.* at 656 (Breyer, J., dissenting). The line becomes even harder to draw because the Court permits Congress to aggregate ‘noneconomic’

*D. The Controlled Substances Act (CSA)*⁸³

Congress enacted the CSA as part of the Comprehensive Drug

activity taking place at economic establishments (*see* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)), and where the regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the interstate activity were regulated.” *Id.* at 656-57 (quoting *Lopez*, 514 U.S. at 561). Regarding the integrated national economy, Justice Breyer stated:

We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the state—at least when considered in the aggregate. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause “aggregation” rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Id. at 660 (internal citations omitted).

83. 21 U.S.C. § 801 et seq. The CSA “repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.” *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). Under § 801 of the CSA, Congress made the following findings related to interstate commerce:

- (1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
- (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
- (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because –
 - (A) after manufacture, many controlled substances are transported in interstate commerce,
 - (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
 - (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
- (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
- (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
- (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

21 U.S.C. § 801(1)-(6).

Abuse Prevention and Control Act of 1970.⁸⁴ Except as provided in the statute, the CSA makes it unlawful to knowingly or intentionally “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .”⁸⁵ Simple possession of a controlled substance is also unlawful, except as permitted under the CSA.⁸⁶

E. California’s Compassionate Use Act of 1996

In 1996, California voters passed Proposition 215, codified as the Compassionate Use Act of 1996.⁸⁷ The Proposition was intended to ensure seriously-ill residents of the State access to marijuana for medical purposes.⁸⁸ The Act exempted physicians, patients, and primary

84. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970). The act consists of three titles. *Raich*, 545 U.S. at 12 n.19. Title I addresses the treatment and prevention of narcotic addicts. 84 Stat. 1238. Title II concerns drug control and enforcement. 84 Stat. 1242. Title III relates to the import and export of controlled substances. 84 Stat. 1285. Under Title II, the CSA established five “schedules” of drugs and other substances and designates these items “controlled substances.” 21 U.S.C. § 802(6). Marijuana is classified as a Schedule I controlled substance. *Id.* § 812(c). For an item to be designated a Schedule I controlled substance, it must be found (1) that the substance “has a high potential for abuse[;]” (2) that the substance “has no currently accepted medical use in treatment in the United States[;]” and (3) that there is “a lack of accepted safety for use of the drug or other substance under medical supervision.” *Id.* § 812(b)(1). The CSA contains procedures by which the schedule of a controlled substance may be modified. *Id.* § 811(a).

85. 21 U.S.C. § 841(a)(1).

86. *Id.* § 844(a).

87. CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (2005). California was just one of eleven States that authorized the use of marijuana for medical purposes. *See* ALASKA STAT. §§ 11.71.090, 17.37.010-17.37.080 (2005); ARIZ. REV. STAT. ANN. § 13-3412.01 (2005); COLO. CONST. art. XVIII, § 14, COLO. REV. STAT. ANN. § 18-18-406.3 (West 2005); HAW. REV. STAT. ANN. §§ 329-121 to 329-128 (LexisNexis 2004); ME. REV. STAT. ANN. tit. 22, § 2383B(5) (2004); MONT. CODE ANN. §§ 50-46-101 to 50-46-210 (2005); NEV. CONST. art. 4, § 38, NEV. REV. STAT. ANN. §§ 453A.010-453A.810 (LexisNexis 2004); OR. REV. STAT. §§ 475.300-475.346 (2003); VT. STAT. ANN. tit. 18 §§ 4472-4474d (2005); WASH. REV. CODE ANN. §§ 69.51A.005-69.51A.080 (2005).

88. CAL. HEALTH & SAFETY CODE ANN. § 11362.5(b)(1) (2005). The statute listed as its purpose:

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

caregivers who possessed or cultivated marijuana for medical purposes with the recommendation or approval of a physician from criminal prosecution.⁸⁹

III. STATEMENT OF THE CASE

A. *Statement of the Facts*

California citizens Angel McClary Raich and Diane Monson used marijuana as a medical treatment for a multiplicity of serious physical conditions.⁹⁰ Both claimed that their marijuana was cultivated locally

the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

Id.

89. CAL. HEALTH & SAFETY CODE ANN. § 11362.5(c)-(d). "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." § 11362.5(c).

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.

§ 11362.5(d). A "primary caregiver" is an individual designated by the patient who has "consistently assumed responsibility for the housing, health, or safety" of the patient. § 11362.5(e). California has enacted additional legislation supplementing the Compassionate Use Act. *See* §§ 11362.7-11362.9 (2005).

90. *See* Joint Appendix at 65-86, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454) (Declaration of Angel McClary Raich). Raich had been diagnosed with serious medical conditions including "an inoperable Brain Tumor, life-threatening wasting syndrome with severe weight loss borderline cachexia, a Seizure Disorder, Nausea, several Severe Chronic Pain Disorders, including Scoliosis, Temporomandibular Joint Dysfunction Syndrome, Bruxism, Endometriosis, a Tumor in [her] Uterus, and other documented medical conditions." *Id.* at 61-62. Raich began using medical marijuana in early 1998. *Id.* at 87. She used "over two and one-half ounces of processed medical cannabis per week, or over eight pounds of cannabis per year." *Id.* at 90. Raich maintained that she would "starve to death without cannabis." *Id.* at 61. *See also* Joint Appendix at 47-51, *Raich* (No. 03-1454) (Declaration of Frank Henry Lucido, M.D.). Dr. Lucido is Raich's primary care physician and is of the opinion that "Angel cannot be without cannabis as medicine because of the precipitous medical deterioration that would quickly develop." *Id.* at 47-48. Cannabis has worked well for Raich. *Id.* at 49. She has "no reasonable legal alternative" to medical marijuana because alternative treatments have proven ineffective or result in intolerable side effects. *Id.* Raich previously tried the following medications: Marinol, Demulen Tablets, Codine, Tylenol #3, Erythromycin, Acetaminophen with Codeine, Serzone, Amitriptyline, Clonidine, Meclizine, Promethazine, Depakote, Prazosin, Carbamazepine, Imipramine, Trazodone, Methadone, Hydrocodone, Dicloxacillin, Chlorpheniramine/Phenylpropanolamine, Beclonmethasone, Vicodin, Dilantin, Tagretol, Desipramine, Valproic Acid, Seldane, Lorazepam, Paxil, Lamotrigine (Lamical), Elavil, Soma, Albuterol Solution, Fentanyl, and Versed. *Id.* at 49-50. *See also* Joint Appendix at 55-59, *Raich* (No. 03-1454) (Declaration of Diane Monson). Monson has used medical marijuana since March of 1999, "on the recommendation of [her] physicians for the treatment of [her] Severe Chronic Back Pain and Spasms[.]" *Id.* at 55. *See also* J.A. at 53, *Raich* (No. 03-1454) (Declaration

within California's borders.⁹¹ Drug Enforcement Agents seized and destroyed Monson's six marijuana plants on August 15, 2002.⁹²

B. Procedural History

1. The District Court

Raich, Monson, John Doe Number One, and John Doe Number Two⁹³ sued the Attorney General of the United States and the Administrator of the Drug Enforcement Agency seeking injunctive and declaratory relief prohibiting the federal government's enforcement of the Controlled Substances Act against them to the extent that it prevented them from possessing, obtaining, or manufacturing marijuana for their personal medical use.⁹⁴ California's Compassionate Use Act of 1996 permitted the use and cultivation of marijuana for personal medical

of Dr. John Rose) (stating that medical marijuana is appropriate and provides necessary relief for Monson's conditions).

91. Raich v. Ashcroft, 248 F.Supp.2d 918 (N.D.Cal. 2003), *rev'd*, Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003). Monson grew her own cannabis, while Raich had two caregivers that cultivated her marijuana for her without charge, because she was unable to grow it herself. *Id.* at 920. Plaintiffs claimed Raich's marijuana was "cultivated using only water and nutrients originating from within California, and that it [was] grown exclusively with equipment, supplies, and materials manufactured within the borders of the state." *Id.* at 921. Monson's marijuana was "similarly local in nature." *Id.*

92. *Id.* at 921. Sheriff's deputies from the Butte County Sheriff's Department and Drug Enforcement Agents came to Monson's home on August 15, 2002. *Id.* The deputies concluded that Monson's use of marijuana "was legally permissible under California's Compassionate Use Act." *Id.* A three-hour standoff ensued during which the local District Attorney with the United States Attorney for the Eastern District of California attempted unsuccessfully to intervene. *Id.* DEA agents subsequently seized and destroyed the plants. *Id.*

93. *Id.* at 920. The two John Doe plaintiffs are Raich's caregivers who "cultivate several varieties [of marijuana] and provide them to her without charge." *Id.*

94. *Id.* On October 9, 2002, plaintiffs (hereinafter Raich) filed suit in the United States District Court for the Northern District of California seeking declaratory relief and a permanent injunction. *Id.* at 921. A motion for preliminary injunction was filed on October 30, 2002, and a hearing on that motion was held on December 17, 2002. *Id.* United States district courts may issue preliminary injunctions. FED. R. CIV. P. 65. *See* BLACK'S LAW DICTIONARY 1218 (8th ed. 2004) (defining 'preliminary injunction' as "[a] temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case."). Raich also sought a declaration that the CSA was "unconstitutional to the extent it purports to prevent them from possessing, obtaining, manufacturing, or providing cannabis for medical use." Raich v. Ashcroft, 352 F.3d 1222, 1226 (2003). Raich's constitutional argument was that the CSA, when applied to purely intrastate, non-commercial use of medical marijuana, was an impermissible extension of Congress's power to regulate interstate commerce; infringed the rights reserved to the States through the Tenth Amendment; and violated fundamental rights of citizens protected by the Ninth Amendment. Raich, 248 F.Supp.2d at 922. Raich also presented a medical necessity defense. *Id.*

purposes upon the recommendation of a doctor.⁹⁵ The court denied the motion for preliminary injunction.⁹⁶

2. Ninth Circuit Court of Appeals Decision

The Ninth Circuit granted Raich's interlocutory appeal.⁹⁷ The court first found that "none of the cases in which the Ninth Circuit has upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes."⁹⁸ The court then found

95. *Raich*, 248 F.Supp.2d at 920.

96. *Id.* at 918. There are two tests the court can apply to determine whether a preliminary injunction should issue. *Id.* at 921. "To meet the 'traditional' test, the movant must establish: (1) a strong likelihood of success on the merits; (2) that the balance of irreparable harm favors its case; and (3) that the public interest favors granting the injunction." *Id.* at 921. "To prevail under the 'alternate' test, the movant must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and that the balance of hardships tips sharply in its favor." *Id.* Under either test, the moving party "must show a fair chance of success on the merits." *Id.* at 922. The court found that despite the gravity of the Raich's needs and the concrete interest of California, the existing Ninth Circuit precedent held that the CSA passed constitutional muster and precluded a finding of likelihood of success on the merits. *Id.* at 926. The court relied on *United States v. Visman*, 919 F.2d 1390 (9th Cir. 1990) (rejecting a challenge to the CSA by a defendant whose marijuana plants were rooted in the soil); *United States v. Rodriguez-Camacho*, 468 F.2d 1220 (9th Cir. 1972) (refusing to excise individual drug activity under the CSA from an entire class of permissibly regulated activity); and *United States v. Tisor*, 96 F.3d 370 (9th Cir. 1996) (distinguishing the CSA from the Gun-Free School Zones Act found unconstitutional in *United States v. Lopez*, 514 U.S. 549 (1995), because of the presence of congressional findings to support the CSA). *Id.* at 924. The court further held that the CSA is not a violation of the Tenth Amendment or the Ninth Amendment, and that there is no medical necessity defense for violations of the CSA. *Id.* at 931.

97. *Raich*, 352 F.3d at 1226. An interlocutory appeal is "[a]n appeal that occurs before the trial court's final ruling on the entire case." BLACK'S LAW DICTIONARY 832 (8th ed. 2004). Under 28 U.S.C.A. § 1292(a)(1), the federal courts of appeals have jurisdiction over appeals from interlocutory orders of the district courts of the United States refusing injunctions. 28 U.S.C.A. § 1292(a)(1) (West, Westlaw through P.L. 109-467 (excluding P.L. 109-415, 109-417, 109-432, 109-435, 109-461, 109-462) approved Dec. 22, 2006). Raich filed a timely appeal on March 12, 2003. *Raich*, 352 F.3d at 1226. "A district court's order regarding preliminary injunctive relief is subject to limited review." *Id.* The decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion, while the legal issues underlying the district court's decision are reviewed de novo. *Id.* at 1226-27.

98. *Raich*, 352 F.3d at 1227. The court found the appellant's class—the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician—was a "separate and distinct class of activities" different in kind from earlier cases which concerned drug trafficking. *Id.* at 1228. This class is distinct because the concern regarding health and safety and policy concerns about the spread of drug abuse are significantly different when recommended by a physician. *Id.* Further, "this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medical marijuana—insofar as the medical marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Id.*

that recent Supreme Court cases, *Lopez*⁹⁹ and *Morrison*,¹⁰⁰ have aided in refining the Commerce Clause analysis.¹⁰¹ Based on the four factors from *Morrison*, the court concluded that the CSA, as applied to *Raich*, is likely unconstitutional.¹⁰² Thus, in a split decision the court reversed the

99. 514 U.S. 549 (1995) (finding the Gun-Free School Zones Act an unconstitutional exercise of power under the Commerce Clause and setting forth three categories of activity that Congress may regulate under the Commerce Clause). See *supra* note 59 and accompanying text (setting out these categories).

100. 529 U.S. 598 (2000) (finding the Violence Against Women Act was an invalid exercise of Congress's power under the Commerce Clause and establishing a four-factor test for determining whether a regulated activity "substantially affects" interstate commerce). See *supra* note 73-77 and accompanying text for a discussion of the four factors.

101. *Raich*, 352 F.3d at 1229.

102. *Id.* at 1229-34. The court applied the *Morrison* factors. *Id.* at 1229. First, the court found that "[a]s applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise." *Id.* "The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity." *Id.* Non-economic activity is not subject to the "aggregation principle" of *Wickard v. Filburn*, which held that the cumulative effect of the activities has a commercial effect. *Id.* at 1230. However, these sorts of drug activities were reasonably determined by Congress to be part of the overall class of activities covered by the CSA that involve economic activity and substantially affect commerce. Petitioner's Brief at 36, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454). The growing, processing, and resulting possession of marijuana for personal use involves economic activity, the production of a fungible commodity for which there is an established market, in the same way that growing wheat for consumption did in *Wickard*. *Id.* at 21-22. *Wickard* established that Congress may regulate local activity if it is an essential part of a larger regulation of economic activity and the regulatory scheme would be undercut unless it were regulated. *Id.* at 10. *But see* Respondent's Brief at 14-18, *Raich* (No. 03-1454) (discussing how *Wickard* differs in at least three respects: (1) unlike the CSA, the AAA exempted small farming operations and therefore, "did not apply to every person who produced a fungible commodity for which there is an established market," (2) *Wickard* involved a commercial farming operation; (3) the Court in *Wickard* required proof of the actual effect of the regulated activity on interstate commerce). If Petitioner's definition of "economic activity" were accepted, no area of human activity would fall outside this realm. *Id.* at 26. Second, the court found that "[n]o such jurisdictional hook exists in relevant portions of the CSA. *Raich*, 352 F.3d at 1231. *But see* Petitioner's Brief at 17, *Raich* (No. 03-1454) (stating the CSA "comprehensively bans all manufacture, distribution, and possession of any scheduled drug unless explicitly authorized by the Act" in order to establish a closed system and making all transactions outside the system illegal). Third, the court found the congressional finding regarding the effects of the regulated activity upon interstate commerce insufficient. *Raich*, 352 F.3d at 1232-33. The findings are concerned with trafficking or distribution of controlled substances, are not specific to marijuana, and the marijuana in this case "never entered into and was never intended for interstate or foreign commerce." *Id.* at 1233. *But see* Petitioner's Brief at 39-40, *Raich* (No. 03-1454) (discussing that Congress clearly had marijuana in mind when it made the findings due to marijuana's placement in schedule I and Congress's awareness that marijuana was one of the most widely abused drugs in the country). Fourth, the court found that any connection between the regulated activity and a substantial effect on interstate commerce was "attenuated." *Raich*, 352 F.3d at 1233. *But see* Petitioner's Brief at 14-15, *Raich* (No. 03-1454) (stating that "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence"). The court found a strong showing of the likelihood of success on the merits. *Raich*, 352 F.3d at 1234. The court also found that the hardship and public interest factors tipped largely in *Raich*'s favor. *Id.*

judgment of the district court.¹⁰³

C. United States Supreme Court Decision

1. The Majority Opinion

In 2004, the Supreme Court granted United States Attorney General John Ashcroft's petition for a writ of certiorari.¹⁰⁴ The Court undertook the issue of whether Congress's power to regulate interstate markets for medical substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.¹⁰⁵ The Court held that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of medical marijuana pursuant to California state law did not exceed Congress's authority under the Commerce Clause.¹⁰⁶ The Court found

The court declined to reach Raich's other arguments based on the principles of federalism embodied in the Tenth Amendment, the alleged fundamental rights under the Fifth and Ninth Amendments, and the doctrine of medical necessity. *Id.* at 1227.

103. *Raich*, 352 F.3d at 1235. The case was remanded to the district court for entry of the preliminary injunction. *Id.* On May 14, 2004, the district court entered a preliminary injunction enjoining petitioners. Petitioner's Brief at 9, *Raich* (No. 03-1454). Judge Beam dissented stating it was "impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in *Wickard v. Filburn*." *Raich*, 352 F.3d at 1235 (Beam, J., dissenting).

104. *Ashcroft v. Raich*, 124 S.Ct. 2909 (2004) (granting a petition for writ of certiorari).

105. *Gonzales v. Raich*, 545 U.S. 1, 8 (2005). The Court decided whether the CSA as applied to the intrastate, noncommercial cultivation and possession of marijuana for personal medical purposes as recommended by a patient's physician pursuant to California state law was an unconstitutional exercise of Congress's power. *Id.*

106. *Raich*, 545 U.S. 1. The Court stated that it "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." *Id.* at 26 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)). The Court noted that the similarities between this case and *Wickard* were "striking." *Id.* at 17. In *Wickard*, the Court concluded 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." *Id.* at 19. The activities regulated by the CSA are quintessentially economic, unlike those at issue in *Lopez* and *Morrison*. *Id.* at 25. The "[f]indings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA." *Id.* at 20. Congress had a rational basis for concluding that failure to regulate home-consumed marijuana would affect interstate price and market conditions and "leave a gaping hole in the CSA." *Id.* at 22. When "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." *Id.* at 17 (citing *Lopez*, 514 U.S. at 558; quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, n.27 (1968)).

Justice Scalia concurred in the judgment. *Id.* at 32-41 (Scalia, J., concurring). Justice Scalia opined that activities that merely substantially affect interstate commerce are not part of interstate commerce, and thus cannot be regulated by the commerce clause in isolation. *Id.* at 32-35.

that the CSA regulated economic activity and therefore *Wickard*, and not *Lopez* or *Morrison*, was controlling.¹⁰⁷ The United States Supreme Court vacated the judgment of the Ninth Circuit and remanded the case to the Court of Appeals.¹⁰⁸

2. The Dissent

Justice O'Connor's dissent, joined by the late Chief Justice Rehnquist, opined that the Court announced a rule that gives Congress an incentive to legislate broadly under the Commerce Clause.¹⁰⁹ The dissent opined that medical and nonmedical uses of drugs are distinct and can be segregated and regulated differently.¹¹⁰ She found the activity at question to be noneconomic, and therefore, that the rule and the result in the present case were irreconcilable with the prior Supreme Court decisions in *Lopez* and *Morrison*.¹¹¹ Justice Thomas's dissent argued that

The power derives from the Necessary and Proper Clause. *Id.* at 34. Under Justice Scalia's view, Congress can regulate even intrastate activities that do not substantially affect interstate commerce if it is necessary to make a regulation of interstate commerce effective. *Id.* at 39.

107. *See Raich*, 545 U.S. 1 (majority opinion). The Court defined economics as "the production, distribution, and consumption of commodities." *Id.* at 25 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). Because the Court held that the CSA regulates "the production, distribution, and consumption of commodities[.]" it was found to be "quintessentially economic." *Id.* at 25. Justice Scalia stated that economic activity that substantially affects intrastate commerce will be upheld, but that noneconomic activity may only be regulated if its connection to interstate commerce is not too attenuated. *Id.* at 34-37 (Scalia, J., concurring). Justice Scalia opined that Congress had prohibited intrastate activities related to Schedule I substances under the CSA that were both economic (manufacture, distribution, possession with the intent to distribute) and noneconomic (simple possession). *Id.* at 39. Justice Scalia held, "[t]hat simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation." *Id.*

108. *Id.* at 32 (majority opinion). Raich also raised a substantive due process claim and a medical necessity defense. *Id.* These theories of relief were set forth in the complaint but were not reached by the Ninth Circuit Court of Appeals. Therefore, the Supreme Court did not reach these issues. *Id.* The Court did, however, note procedures for reclassification of Schedule I drugs as another avenue of relief. *Id.*

109. *Id.* at 44-47 (O'Connor, J., dissenting). The majority's decision "suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambiguous, all-encompassing statute, rather than piecemeal." *Id.* at 42.

110. *Id.* at 48.

111. *Id.* at 42. *Lopez* and *Morrison* are materially indistinguishable from the present case when the same factors are taken into account. *Id.* at 44. Those factors in *Lopez* are: (1) substantial effects cases "generally have upheld federal regulation of economic activity that affected interstate commerce[.]" (2) the statute contains "no express jurisdictional requirement establishing its connection to interstate commerce[.]" (3) "the absence of legislative findings about the regulated conduct's impact on interstate commerce[.]" and (4) whether the argument that the conduct could affect the national economy was to "attenuated." *Id.* at 42-45. The same four factors were used in *Morrison*. *Id.* at 44. Justice O'Connor questioned whether "intrastate cultivation and possession of marijuana for one's own medicinal use can properly be characterized as economic . . ." *Id.* at 48.

the local cultivation and consumption of marijuana in this case was not commerce among the several states and was not necessary and proper for executing Congress's restriction of interstate drug trafficking.¹¹²

IV. ANALYSIS

A. *The Supreme Court's Current Commerce Power Test After Raich*

As it now stands, the current test employed by the Supreme Court in Commerce Clause jurisprudence consists of deciding which of the three *Lopez* categories is at issue: (1) instrumentalities; (2) channels; or (3) substantially affects.¹¹³ If the regulation falls into either of the first

She stated that the Court's definition of economic activity is "breathtaking" and "threatens to sweep all of productive human activity into federal regulatory reach." *Id.* Economic activity is usually directly related to commercial activity and the homegrown cultivation, possession, and use of medical marijuana has "no apparent commercial character." *Id.* at 49. *Lopez* held that possession was not itself economic activity. *Id.*

112. *Id.* at 56 (Thomas, J., dissenting). The "local cultivation and consumption of marijuana is not 'Commerce . . . among the several States.'" *Id.* Justice Thomas observed that "the term 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Id.* at 58 (citing *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring)). Justice Thomas stated that, at the time of the ratification debates, the term "commerce" was "consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange." *Id.* The majority defines economic activity in the broadest of terms. *Id.* at 69. Justice Thomas then cited a dictionary, which defined the term "economic" more narrowly. *Id.* at n.7 (citing *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 583 (3d ed. 1992)). However, Justice Thomas pointed out that Congress is authorized to regulate "commerce," not "economic" activity, and the local cultivation and consumption of marijuana does not qualify under any definition of the term "commerce." *Id.* at 69. "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." *Id.* at 56. Under the traditional definition of "commerce," the CSA exceeds Congress's commerce power as applied to Respondent's conduct, which is "purely intrastate and noncommercial." *Id.* at 58. "Congress[s] goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich." *Id.* at 63 (Thomas, J., dissenting). Justice Thomas noted that no one argues that other drugs presenting a high risk for abuse but that do have an accepted medical purpose and are available under medical prescriptions undermines the CSA's restrictions. *Id.* Justice Thomas argued that even if necessary, the ban on locally cultivated marijuana was not proper because Congress had "encroached on States' traditional police powers to define criminal law and to protect the health, safety, and welfare of their citizens." *Id.* at 65.

113. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). *But see* Pushaw, *Counter Revolution*, *supra* note 8, at 906 (stating that "[o]nly seven Justices have endorsed [the 'substantial effects' test] fully, and they cannot agree on its meaning"). *See also Lopez*, 514 U.S. at 589 (Thomas, J., concurring) (noting "if a 'substantial effects' test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that 'substantially affect' the Army and Navy, bankruptcies, tax collection, expenditures, and so on"). *But cf. Substantial Effects Test – Controlled Substances Act*, 119 HARV. L. REV. 169

two categories, instrumentalities or channels, it is upheld.¹¹⁴ However, if the regulation falls into the third category, the court looks to see whether the statute regulates economic or noneconomic activity.¹¹⁵ If the regulation is of economic activity, the Court applies a rational basis standard and defers to the judgment of Congress.¹¹⁶ If the activity is noneconomic then the Court will look to legislative findings;¹¹⁷ jurisdictional elements;¹¹⁸ whether the connection to interstate commerce is too attenuated;¹¹⁹ or whether the regulation is part of a larger economic regulation that would be undercut if the activity at issue were exempt.¹²⁰

B. An “Economic” Mess

There are three major problems with the economic/noneconomic

(November, 2005) (suggesting the Court missed the opportunity to reorient the “substantial effects” test around the Necessary and Proper Clause).

114. *Lopez*, 514 U.S. at 558. It is no longer open to question that Congress can regulate the channels of interstate commerce. *Id.*

115. *See Raich*, 545 U.S. at 25 (stating the activities regulated by the CSA are “quintessentially economic”); *id.* at 34 (Scalia, J., concurring) (opining that the manufacture, distribution, and possession with intent to distribute are economic, but that simple possession is not); *id.* at 48 (O’Connor, J., dissenting) (questioning whether the intrastate cultivation and possession of marijuana for one’s own medical use can be characterized as economic); *United States v. Morrison*, 529 U.S. 598, 610 (2000) (stating “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained” and “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity”); *Lopez*, 514 U.S. at 561 (stating the criminal statute had nothing to do with “commerce” or “any sort of economic enterprise”). *But see Raich*, 545 U.S. at 69 (Thomas, J., dissenting) (rejecting the economic distinction in favor of the text of the Constitution which specifies “commerce”).

116. *Raich*, 545 U.S. at 20. “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.” *Id.*

117. *See Morrison*, 529 U.S. at 614 (stating that the VAWA was supported by numerous findings regarding the impact of gender-motivated crime); *Lopez*, 514 U.S. at 563 (finding neither the GFSZA nor its legislative history contained findings regarding the effect of gun possession in a school zone on interstate commerce).

118. *See Morrison*, 529 U.S. at 613 (finding the VAWA contained no jurisdictional element limiting its reach); *Lopez*, 514 U.S. at 562 (stating the GFSZA contained no jurisdictional element to ensure the effect on interstate commerce).

119. *See Morrison*, 529 U.S. at 615 (stating that the findings are rejected as unworkable because they would completely obliterate the distinction between what is national and what is local); *Lopez*, 514 U.S. at 567 (opining that to uphold the government’s cost of crimes and national productivity reasoning we would have to “pile inference upon inference” turning the Commerce Clause into a “general police power” of the kind “retained by the States”).

120. *Raich*, 545 U.S. at 17 (noting that *Wickard* establishes that “Congress can regulate . . . activity that is not ‘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”); *Lopez*, 514 U.S. at 560.

distinction.¹²¹ The first problem is how one defines "economic" for purposes of the Commerce Clause.¹²² Second, depending on whether the Court aggregates or disaggregates the relevant class of activities for purposes of defining whether the activity is economic, will affect that outcome.¹²³ Third, the Constitution grants power over commerce, not economic activity.¹²⁴

Not even the justices agree what "economic" means or how the standard should be applied.¹²⁵ The *Raich* majority¹²⁶ defined "economic"

121. See *infra* notes 122-40 and accompanying text.

122. See *infra* notes 125-34 and accompanying text.

123. See *infra* notes 128, 132 and accompanying text.

124. See *Raich*, 545 U.S. at 69 (Thomas, J., dissenting). Professors Nelson and Pushaw state: [W]e do not equate "commerce" with modern "economics," which covers virtually all human endeavors and interactions, including areas such as crime and religion. Although all conduct has economic consequences, it does not thereby become "commercial" in nature. Similarly, we recognize that economists would find artificial our effort to distinguish production and services for the marketplace from similar activities undertaken for personal or home use. Rather, they would treat all such actions as an integrated whole because of the effect of home-oriented economic activities on market supply, demand, and price. Again, defining "commerce" to include all economic impacts would enable Congress to regulate everything, and thereby drain the Commerce Clause of any meaningful content.

Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 109-10 (1999) [hereinafter Nelson & Pushaw, *Rethinking the Commerce Clause*]. See also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) [hereinafter Barnett, *Original Meaning*] (agreeing with Justice Thomas's original meaning of commerce); Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 842 (2005) (asking why talk about economic activity when the Constitution says commerce, and surmising that the talk was to allow the Court to validate past cases while permitting it to strike down newer innovations); Pushaw, *Counter-Revolution*, *supra* note 8, at 895 (stating that the justices mistakenly used the terms "commerce" and "economics" interchangeably despite the fact the former is a subset of the latter, and that Court did not define "economic" or "commercial" activity in *Lopez* or *Morrison*); Alex Kreit, *Article: Why is Congress Still Regulating Noncommercial Activity?*, 28 HARVARD J.L. & PUB. POL'Y 169 (2004) (proposing an approach to the broader scheme doctrine based on the enterprise concept).

125. Compare *infra* notes 126-29 and accompanying text (defining the activity as economic), with *infra* notes 130-36 and accompanying text (finding the activity noneconomic in whole or in part).

126. The *Raich* majority included Justices Stevens, Breyer, Ginsburg, and Souter, all of whom coincidentally, were *Lopez* and *Morrison* dissenters who argued against the economic/noneconomic distinction. *United States v. Morrison*, 529 U.S. 598, 628-66 (2000) (dissenting opinions of Justices Souter and Breyer); *Lopez*, 519 U.S. at 602-64 (dissenting opinions of Justices Stevens, Souter, and Breyer). Interestingly, Justice Kennedy who concurred in *Lopez* and joined the majority opinion in *Morrison* joined with the four dissenters to provide the fifth vote for the majority opinion in *Raich* without opinion. See Adler, *supra* note 8, at 768-70 (noting that Justice Kennedy's silence in *Raich* was "quite conspicuous"). Some authors have gone so far as to suggest that Justice Kennedy may have views about drugs that trump his concern about the federal state balance. Posting of Lyle Denniston to SCOTUSblog, *Commentary: Justice Kennedy and the "War on Drugs,"*

broadly as “production, distribution, and consumption[,]” sweeping a great deal of activity under the deferential rational basis standard.¹²⁷ Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer analyzed the CSA broadly as applied to “production, distribution, and possession,” and found it to be “quintessentially economic.”¹²⁸ This being so, the Justices held that Congress could have rationally found that locally cultivated and consumed marijuana had a substantial effect on the interstate market.¹²⁹

Justice O’Connor, however, joined by the late Chief Justice Rehnquist, found that the local cultivation and consumption of medical marijuana was noneconomic in nature.¹³⁰ These Justices applied the CSA narrowly to the specific conduct at issue, “the intrastate, noncommercial cultivation and possession of [marijuana] for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law,”¹³¹ and would find the CSA unconstitutional as applied to the Respondent’s conduct.¹³²

Justice Scalia concurred with the Court’s judgment, finding that some of the activity was economic,¹³³ and that some was noneconomic.¹³⁴ Justice Scalia found the distinction between economic

http://scotusblog.com/movabletype/archives/2005/06/commentary_just.html (June 6, 2005).

127. *Raich*, 545 U.S. at 25 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). *But see id.* at 69 n.7 (Thomas, J., dissenting) (noting that the majority did not explain why it selected a “remarkably expansive 40-year-old definition”). *See also supra* note 126 (suggesting the possible reason that the majority in *Raich* chose such an expansive definition was because it would severely limit the holdings in *Morrison* and *Lopez*, and advance the rational basis test as the major means of analyzing Commerce Clause challenges); Adler, *supra* note 8, at 753 (opining that while *Raich* purports to be following *Lopez* and *Morrison*, it actually represents a repudiation of those cases).

128. *Raich*, 545 U.S. at 25. The substantial effects test depends on subjective judgments concerning the “level of generality at which the regulated activity is characterized[,]” and whether the effects must be shown affirmatively or hypothetically. Pushaw, *Counter-Revolution*, *supra* note 8, at 904-05.

129. *Raich*, 545 U.S. at 20.

130. *Id.* at 48-49 (O’Connor, J., dissenting) (noting that “homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character” and that “*Lopez* makes clear that possession is not itself commercial activity”).

131. *Id.* at 8 (majority opinion).

132. *Id.* at 48 (O’Connor, J., dissenting). Justice O’Connor noted the problem of the majority’s shift in focus from the activity at issue in *Raich* to the entirety of what the CSA regulates. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 565 (1995)). *But see* Ann Althouse, *Why Not Heighten the Scrutiny of Congressional Power When the States Undertake Policy Experiments?*, 9 LEWIS & CLARK L. REV. 779 (2005) (finding Justice O’Connor’s suggested doctrine would be unworkable and unstable).

133. *Raich*, 545 U.S. at 39 (Scalia, J., concurring). Justice Scalia listed as economic activities manufacture, distribution, and possession with the intent to distribute. *Id.*

134. *Id.* Justice Scalia listed simple possession as noneconomic activity. *Id.*

and noneconomic activity to be immaterial to whether Congress could regulate the activity as a necessary part of a larger regulation.¹³⁵ Justice Thomas's dissent, also found the reliance on the economic/noneconomic distinction to be misplaced.¹³⁶

In total, five Justices have rejected the economic/noneconomic distinction outright.¹³⁷ These Justices and numerous scholars are correct in that the economic/noneconomic distinction has no place in Commerce Clause analysis.¹³⁸ It is unreliable and is not based on the Constitution.¹³⁹ The correct analysis under the Commerce Clause, as Justice Thomas points out, is whether the regulation involves "commerce."¹⁴⁰

C. What is "Commerce?"

There is great scholarly debate on the original meaning of "commerce" in the Commerce Clause.¹⁴¹ Professor Barnett's¹⁴² research

135. *Id.* Justice Scalia opined that whether any activity is economic is not relevant to whether the activity can be prohibited as a necessary part of a larger regulation. *Id.*

136. *Id.* at 69 (Thomas, J., dissenting). Justice Thomas advanced the idea of returning to the original meaning of the Commerce Clause, which requires interpreting the word "commerce" and not the term "economic." *Id.* However, Justice Thomas differs from Justice Scalia in that he does not find the CSA necessary or proper as applied to Respondent's conduct. *Id.* at 70.

137. See *infra* notes 63-65, 79-82, 112 and accompanying text (concerning the four dissenting Justices from *Lopez* and *Morrison*, and Justice Thomas's view that the proper focus ought to be on the meaning of words actually in the Constitution).

138. See *infra* notes 140-65 (supporting this position).

139. See *Raich*, 545 U.S. 1 (noting the general disagreement between the opinions over how to determine whether the activity is economic or noneconomic). See also *supra* notes 121-36. *But cf.* Paul Tzur, *Comment: I Know Economic Activity When I See Economic Activity: An Operational Overhaul of the Measure by Which Federal Criminal Conduct is Deemed "Economic,"* 94 CRIM. L. & CRIMINOLOGY 1105 (2004) (suggesting a "limited economic activity" interpretation).

140. *Raich*, 545 U.S. at 69. "[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress'[s] powers and with this Court's early Commerce Clause cases." *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring). "I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence." *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). *Cf.* Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743 (2005) (suggesting that *Raich* could be limited to its facts due to the unique circumstances of the war on drugs and the fungible nature of the commodity, and that because the Court primarily relied on the larger regulatory scheme, the definition of economic might be dicta or declined as dispositive by future Courts).

141. Barnett, *Original Meaning*, *supra* note 124 (arguing for a narrow definition of "commerce" which was limited to the trade and exchange of goods and transportation for this purpose); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003) [hereinafter Barnett, *New Evidence*] (same); Douglas W. Kmiec, *Gonzales v. Raich: Wickard v. Filburn Displaced*, 2005 CATO SUP. CT. REV. 71 (arguing for the original meaning of the Commerce Clause); Grant S. Nelson, *A Commerce Clause Standard for the New Millennium: "Yes" to Broad Congressional Control over Commercial Transactions; "No" to*

on the original meaning of the Commerce Clause suggests that “commerce,” around the time the Constitution was drafted, referred to buying, selling, bartering, and transportation for these purposes.¹⁴³ However, Professors Nelson’s and Pushaw’s research supports the theory that commerce had a broader meaning which included all activities intended for the market.¹⁴⁴ Professors Barnett, Nelson, and Pushaw are all in agreement, however, that both meanings did exist; they just disagree on which meaning attached to the word “commerce” for purposes of the Commerce Clause.¹⁴⁵ On the meaning of commerce, Chief Justice Marshall¹⁴⁶ stated in *Gibbons v. Ogden*.¹⁴⁷

Federal Legislation on Social and Cultural Issues, 55 ARK L. REV. 1213 (2003) [hereinafter Nelson, *New Millennium*] (arguing for a broader definition of commerce that includes the sale of good or services and all accompanying activities geared toward the market but does not include noncommercial regulation); Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124 (same); Pushaw, *Counter-Revolution*, *supra* note 8 (same); Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U.L. REV. 695 (2002) [hereinafter Pushaw & Nelson, *Critique*] (same).

142. Professor Barnett argued for the Respondents before the Supreme Court in *Gonzalez v. Raich*, 545 U.S. 1 (2005). Notably, Professor Barnett was cited in the dissent. *Raich*, 545 U.S. at 58 (Thomas, J., dissenting) (citing Barnett, *Original Meaning*, *supra* note 124, at 112-25).

143. Barnett, *Original Meaning*, *supra* note 124, at 101. In *United States v. Lopez*, Justice Thomas cited: Samuel Johnson, 1 A DICTIONARY OF THE ENGLISH LANGUAGE 361 (W. Strahan 4th ed. 1773) (defining commerce as “intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick”); Nathan Bailey, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Neill 26th ed. 1789) (“trade or traffic”); T. Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 585-86 (W. Young, Mills and Son 6th ed. 1796) (“Exchange of one thing for another; trade; traffick”). *Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring). Justice Thomas also found support in the etymology of the word “commerce” which means “with merchandise.” *Id.* at 586 (citing 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989) (com—“with;” merci—“merchandise”). Professor Barnett analyzed the text of the Constitution, contemporary dictionaries, notes from the Constitutional Convention, the Federalist Papers, and ratification conventions in deducing his narrow definition of “commerce.” Barnett, *Original Meaning*, *supra* note 124, at 112-25.

144. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124. Placing the phrase “to regulate” before “commerce” signified the word should be given its broader meaning—“to enact rules to govern all gainful activities, including subjects as diverse as trade, navigation, agriculture, manufacturing, industry, mining, fisheries, building, employment, wages, prices, banking, insurance, accounting, bankruptcy, business associations, securities, and bills of exchange.” *Id.* at 17. “[I]n the context of governmental regulations, however, ‘commerce’ included only those human activities geared toward the marketplace.” *Id.* at 19. Nelson & Pushaw relied heavily on historical evidence collected in the works of WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953) and WALTER HAMILTON & DOUGLAS ADAIR, *THE POWER TO GOVERN* (1937).

145. Barnett, *Original Meaning*, *supra* note 124, at 131 (stating “I am not disputing here that ‘commerce’ had a broad as well as a narrow meaning”). Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 17 (stating “[t]o be sure, ‘commerce’ sometimes conveyed a narrower sense, referring solely to the buying and selling of goods”).

146. John Marshall served as Chief Justice of the Supreme Court of the United States from 1801 to 1835. For more information on Chief Justice John Marshall and the Commerce Clause see FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* (1937).

The subject to be regulated is commerce; and our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. [Ogden] would limit it to traffic, to buying and selling, or the interchange of commodities, and do[es] not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.¹⁴⁸

The fact that using either meaning of "commerce" was a valid interpretation when the Commerce Clause was written is important to this analysis.¹⁴⁹ Even if the narrow interpretation was originally intended by the framers, it would prove unworkable today.¹⁵⁰ The fact remains that both interpretations were plausible and would be valid according to the text and history of the Constitution.¹⁵¹ When the Constitution contains words that have a specific meaning (like "commerce"), which have always had both narrow and broad definitions, the broader definition should be used.¹⁵² Today, more than ever, we live in a global economy with a national market that necessitates Congress legislate "commerce" in the broader sense of the term.¹⁵³

Even more important is the fact that both interpretations expressly

147. 22 U.S. (9 Wheat.) 1 (1824).

148. *Id.* at 189-90.

149. See *infra* notes 150-65 and accompanying text. While Professor Barnett's position is persuasive as to one original meaning, Professor Nelson and Pushaw's position is more logical and supported by early Supreme Court jurisprudence on the matter. See *supra* notes 143-48 and accompanying text; notes *infra* 150-65 and accompanying text.

150. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 6. "[E]ven if the original understanding were restricted to interstate sales, the Court could not adopt it without invalidating almost every law enacted under the Commerce Clause, which would wreak havoc on America's nationally integrated economy." *Id.*

151. See *supra* notes 143-45 and accompanying text.

152. E-Mail from Robert Pushaw, James Wilson Professor of Law, Pepperdine University School of Law, to author (Dec. 3, 2006) (on file with author). See also Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 8 (noting that the original meaning of "commerce" must be applied "in light of the evolution of the federal system to meet modern challenges"). Nelson and Pushaw contend that the Commerce Clause has the same legal meaning today as in 1787, but that what has changed is society around it: "As America has moved from an overwhelmingly agrarian economy rooted in self-sufficient households and local communities to an integrated national market economy based on manufacturing and service, the scope of the Clause has commensurately increased." *Id.* at 8 n.34 (citing WALTER HAMILTON & DOUGLAS ADAIR, *THE POWER TO GOVERN* 179, 191-92 (1937)).

153. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 49. "[O]ur economy has become so interdependent that almost all in-state commercial activities now affect other states." *Id.*

exclude noncommercial activities.¹⁵⁴ Article I provides that “[a]ll legislative Powers herein granted shall be vested in . . . Congress”¹⁵⁵ and therefore, this denied Congress authority not explicitly given to it in the Constitution. Article I also authorizes Congress “to make all Laws which shall be necessary and proper for carrying into Execution [the government’s constitutional powers].”¹⁵⁶ Chief Justice Marshall explained:

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its power, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land.¹⁵⁷

The Necessary and Proper Clause cannot be invoked to expand substantive commerce power.¹⁵⁸ Therefore, under the Commerce Power, Congress has no ability to regulate anything which does not come within the scope of the term “commerce.”¹⁵⁹ The original meaning of commerce did include a broader interpretation and that interpretation, if not the dominant meaning at the time our Constitution was written, has been the dominant meaning since *Gibbons*; the meaning should remain in today’s society out of sheer necessity to regulate our national market and out of respect to Supreme Court jurisprudence.¹⁶⁰ However, both the broad and narrow interpretations of “commerce” exclude noncommercial activities such as possession.¹⁶¹

Thus, the term “commerce” means the voluntary buying, selling, or bartering of property or services and all the “accompanying market-oriented activities.”¹⁶² Commerce would therefore include the

154. See Barnett, *Original Meaning*, *supra* note 124, at 104 n.26 (stating “I agree with Nelson and Pushaw that even the broadest original meaning of the Commerce Clause that can be justified historically is still far narrower than the power the Supreme Court currently allows Congress to exercise). “Congress has no power to legislate conduct that does not constitute ‘commerce’ . . .” Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 110. “[I]n the noncommercial sphere, we object to federal standards because they wipe out all differences of opinion on social, cultural, or moral issues—regional, state, and local.” *Id.* at 118.

155. U.S. CONST. art. I, § 1.

156. U.S. CONST. art. I, § 8, cl. 18.

157. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

158. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

159. See *supra* notes 156-58 and accompanying text.

160. See *supra* notes 150, 152-53 and accompanying text.

161. See *supra* note 154 and accompanying text.

162. Pushaw, *Counter-Revolution*, *supra* note 8, at 909. The first requirement in the Neo-Federalist approach to the Commerce Clause is analyzing whether Congress is regulating “commerce.” *Id.* The first step in the proposed Neo-*Gibbons* analysis is the same as the Neo-

production, manufacture, agriculture, transportation, and labor associated with commodities or services intended for the market.¹⁶³ Commerce would also include the byproducts of these market-oriented activities such as pollution.¹⁶⁴ However, commerce would not include activities such as production, manufacture, and agriculture of commodities that were not intended for the market but rather for personal or household needs.¹⁶⁵

D. "Among the Several States"

"Among the several States" could mean "between" the states or concerning more than one state.¹⁶⁶ Nelson and Pushaw argue that "among the several States" has always been construed as "concerning more than one state."¹⁶⁷ They note that the primary definition of "among" both in 1787 and the present is "the mingling of" or "associated with;" and that read naturally, "among the several States" applies to "commercial activity that links one state to another."¹⁶⁸ Chief Justice Marshall held that:

The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot

Federalist approach for regulations but not for prohibitions, on this point the two analyses differ. See *infra* notes 212-16 and accompanying text.

163. Pushaw, *Counter-Revolution*, *supra* note 8, at 884-85. Pushaw notes that commerce cannot reasonably extend to personal or household needs such as a backyard garden or to issues of purely a moral, social, or cultural concern such as violent crime.

164. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 122-23. Because the definition of "commerce" includes production and manufacturing of commodities intended for the market place, Congress may regulate their byproducts as well, such as air, water, and ground pollution. *Id.*

165. Pushaw, *Counter-Revolution*, *supra* note 8, at 885. See also *supra* notes 141-42, and 161.

166. Compare Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 42 (stating "among the several States has always meant "concerning more than one state"), with Barnett, *Original Meaning*, *supra* note 124, at 132 (stating that the text of the Constitution supports the conclusion that "among the several States" means "between people of different states").

167. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 42 (citing *United States v. Lopez*, 514 U.S. 549, 595 (1995) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824))). See also HAMILTON & ADAIR, *THE POWER TO GOVERN*, *supra* note 144, at 141-42 (supporting this view). But see *Lopez*, 514 U.S. at 587-96 (Thomas, J., concurring) (arguing that Congress can only regulate commerce only between the states); Barnett, *Original Meaning*, *supra* note 124, at 132 (same); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 703-06 (1996) (same). However, because every act of commerce physically takes place in one state, the relevant factor is not the location but the connection of the transaction to out-of-state commerce. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1403 (1987).

168. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 43 (citing 1 OXFORD ENGLISH DICTIONARY 286 (1961)).

stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word “among” is, it may very properly be restricted to *that commerce which concerns more States than one*. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. *The completely internal commerce of a State, then, may be considered as reserved for the State itself.*¹⁶⁹

Nelson and Pushaw agree with Chief Justice Marshall’s analysis and assert that “among the several States” did not extend to commerce that occurred entirely within one state and that had no impact outside its borders.¹⁷⁰ If the drafters of the Constitution had intended to cover all commerce they would have said, “Congress shall have the power to regulate all commerce.”¹⁷¹

However, Barnett argues that the phrase “among the several States” refers to “between people of different states.”¹⁷² He rejected “concerning

169. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (emphasis added).

170. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 43.

171. *Id.* See also Ernest J. Brown, *Book Review*, 67 HARV. L. REV. 1439, 1448 n.21, 1450-51 (1954) (making this point about the term “among” in the Commerce Clause).

172. Barnett, *Original Meaning*, *supra* note 124, at 132. Hamilton himself used the words “between the States” when referring to the regulation of commerce. *Id.* (citing Federalist 23 (Hamilton), in Clinton Rossiter, ed., THE FEDERALIST PAPERS 153 (Penguin 1961)).

more than one state" as too broad a construction of the original phrase "among the several States" and blamed "Marshall's vague formulation" for improperly permitting "the expansion of the power to regulate commerce beyond that which actually crosses state lines."¹⁷³ Barnett's argument for the meaning of "among the several States" must be rejected for the same reasons his original meaning of "commerce" was rejected above.¹⁷⁴ Barnett's meaning of "among the several States" will not work in our modern national market and would require overturning vast amounts of Supreme Court precedent.¹⁷⁵ Barnett's own words, "if Congress can only regulate gainful activity that takes place between people of different states, even the broader definition of commerce will not encompass much more than trade or exchange," express the unworkability of his view to modern Commerce Clause analysis.¹⁷⁶

Nelson and Pushaw's research and conclusion of the meaning of the phrase "among the several States" is consistent with Chief Justice Marshall's opinion in *Gibbons*.¹⁷⁷ The meaning of "among the several States" is "concerning more states than one."¹⁷⁸

E. The Meaning of "To Regulate"

"To regulate" unmistakably refers to the enactment of rules for the purpose of controlling an activity, but does it include the power to prohibit?¹⁷⁹ Nelson and Pushaw maintain that "to regulate" does encompass prohibitions, which are "inherent in the very notion of a regulation."¹⁸⁰ Barnett suggests however, that the power to regulate

173. Barnett, *Original Meaning*, *supra* note 124, at 137.

174. *See supra* notes 150-53 and accompanying text.

175. *See* Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 6 n.21 (stating "Congress has passed hundreds of statutes, many of which do not even purport to regulate the exchange or transportation of goods"). *See also* Pushaw & Nelson, *Critique*, *supra* note 141, at 714-16 (noting that Professor Barnett's theory would reverse *Gibbons v. Ogden*, invalidate the National Labor Relations Act and the Fair Labor Standards Act, reinstate E.C. Knight, and repudiate the decisions upholding the Civil Rights Act).

176. Barnett, *Original Meaning*, *supra* note 124, at 136.

177. *See supra* notes 167-70 and accompanying text.

178. *See infra* notes 209-16 and accompanying text (setting forth this prong in the proposed Neo-*Gibbons* test for Commerce Clause analysis).

179. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 14 (citing 8 OXFORD ENGLISH DICTIONARY 379 (1961)). Nelson and Pushaw, who find the meaning "clear," quickly dispose of this element of the Commerce Clause. *Id.* They maintain that "to regulate" encompasses both rules that affirmatively direct conduct and rules that prohibit. Pushaw & Nelson, *Critique*, *supra* note 141, at 697. The Neo-*Gibbons* analysis differs significantly from the Neo-Federalist analysis on this point, as prohibitions are analyzed more rigorously under the proposed standard than regulations. *See infra* notes 212-16 and accompanying text.

180. Pushaw & Nelson, *Critique*, *supra* note 141, at 714.

generally does not include the power to prohibit.¹⁸¹ While not accepting Professor Barnett's theory that Congress had the power to prohibit foreign commerce but not domestic commerce, he does bring to light an important distinction.¹⁸² "To regulate" is not the same as "to prohibit," and depending on which type of statute is at issue (a regulation or a prohibition), the choice used will affect the analysis and occasionally be outcome-determinative under the Commerce Clause.¹⁸³

The difference between a regulation and prohibition is apparent under the "concerning more states than one" prong of the test.¹⁸⁴ First, without question Congress can prohibit certain commodities from the interstate market.¹⁸⁵ However, how far can such prohibitions can go?¹⁸⁶ Can Congress ban a commodity not only from the interstate market, but from the intrastate market as well?¹⁸⁷ The intrastate market does not have the requisite character of "concerning more states than one" because by definition (and per the prohibition) there is no interstate market.¹⁸⁸ Therefore, the answer lies in whether the intrastate activity in State X, in a commodity banned from the interstate market, competes with other sufficiently similar commodities that are in the interstate market, thereby giving State X an unfair advantage within its own borders.¹⁸⁹ If this is true, than the requisite "concerning more states than one" part of the analysis is met.¹⁹⁰

181. Barnett, *Original Meaning*, *supra* note 124, at 139.

182. Barnett, *Original Meaning*, *supra* note, 124 at 139-46. Professor Barnett notes that in other places in the Constitution, the term "to regulate" is used where it could not include the power to prohibit, such as the power to regulate the value of money, not to prohibit the use of money. *Id.* at 140. He also notes that Article III, Section 2 gives the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as Congress shall make." *Id.* (noting the Constitution distinguished exceptions from regulations).

183. "To regulate" is defined as "[t]o adjust by rule or method" and "[t]o direct." Barnett, *Original Meaning*, *supra* note 124, at 139 (citing Samuel Johnson, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (J.F. Rivington, et al 6th ed. 1785)). "To prohibit" is defined as "[t]o forbid; to interdict by authority" and "[t]o debar; to hinder." Barnett, *Original Meaning*, *supra* note 124, at 139 (citing Samuel Johnson, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (J.F. Rivington, et al 6th ed. 1785)). See *infra* notes 212-16 and accompanying text (distinguishing the analysis for a regulation and a prohibition).

184. See *infra* notes 188-91, 212-16 and accompanying text.

185. Pushaw & Nelson, *Critique*, *supra* note 141, at 714.

186. See *infra* notes 188-91 and accompanying text (emphasizing this point).

187. *Id.*

188. See *infra* notes 229-32 and accompanying text (analyzing *Raich* on this point).

189. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (setting forth the "concerning more states than one" requirement).

190. *But see* Barnett, *Original Meaning*, *supra* note 124, at 139-46 (distinguishing the power to regulate from the power to prohibit and concluding that the Commerce Clause did not include the power to prohibit in domestic commerce). See also Pushaw & Nelson, *Critique*, *supra* note 141, at 714 (making no distinction on the power to regulate and prohibit under the commerce clause).

F. A New (Old) Commerce Clause Standard

1. Importing the *Gibbons* Two-Part Test from 1824 to 2006

The Supreme Court should adopt a Neo-*Gibbons*¹⁹¹ framework to analyze future Commerce Clause cases.¹⁹² The Neo-*Gibbons* analysis is based largely on the framework Chief Justice Marshall put forth in *Gibbons v. Ogden*,¹⁹³ and Nelson and Pushaw’s “Neo-Federalist” analysis.¹⁹⁴ As Justice Thomas stated in *Lopez*, the Court needs “a standard that reflects the text and history of the Commerce Clause without totally rejecting [the] more recent Commerce Clause jurisprudence.”¹⁹⁵ The text and history of the Constitution’s Commerce Clause will support the results of the majority of the modern Court’s cases.¹⁹⁶ However, application of the Neo-*Gibbons* test will result in the invalidation of some Supreme Court case law.¹⁹⁷ But, some invalidation is absolutely necessary to implement a “standard that reflects the text and history of the Commerce Clause.”¹⁹⁸ One would have to question

191. See *infra* notes 200-16 and accompanying text (setting forth the factors in the Neo-*Gibbons* test).

192. See *infra* notes 224-44 and accompanying text (analyzing application of the proposed standard).

193. 22 U.S. (9 Wheat.) 1 (1824). See *supra* notes 36-37, 147-48, 169 and accompanying text (regarding the pertinent parts of this case for the proposed analysis).

194. See Nelson, *New Millennium*, *supra* note 141; Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124; Pushaw, *Counter-Revolution*, *supra* note 8; Pushaw & Nelson, *Critique*, *supra* note 141.

195. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). Justice Thomas stated “one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce.” *Id.* at 600. However, Justice Thomas’s Commerce Clause theory suffers from the opposite problem; he has drawn the circle too narrowly. See *supra* notes 144, 150 and accompanying text.

196. See *infra* notes 224-44 and accompanying text (applying the Neo-*Gibbons* analysis). It should be noted, while supporting a great deal of outcomes, the Neo-*Gibbons* analysis does not support the reasoning implemented by the Court in reaching these outcomes. In fact, the Neo-*Gibbons* analysis flatly rejects the three categories of Commerce Clause regulations set forth in *Lopez*.

197. See *infra* notes 224-44 and accompanying text (applying the Neo-*Gibbons* analysis).

198. See *Lopez*, 514 U.S. at 585 (Thomas, J., concurring) (noting how far the Court had departed from the original understanding of the Commerce Clause). See also Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 83 (arguing that the New Deal Court “twisted *McCulloch* and *Gibbons* to justify its far broader holdings that (1) Congress can regulate activities that are not ‘commerce’ as long as they ‘substantially affect’ the interstate economy, and (2) the latter determination constitutes a political question”). Nowhere in *Gibbons* did the Court imply that Congress could regulate noncommercial activities that substantially affected interstate commerce. *Id.* at 83 n.384. Likewise, in *McCulloch*, Chief Justice Marshall “reaffirmed the Court’s power to strike down federal statutes when Congress invoked the Necessary and Proper Clause as a ‘pretext’ to achieve a goal not enumerated in Article I or when it violated the Constitution’s ‘spirit.’” *Id.*

any standard that left the present Commerce Clause jurisprudence at its status quo.¹⁹⁹

The Neo-*Gibbons* analysis applies Chief Justice Marshall's two distinct requirements for statutes under the Commerce Clause.²⁰⁰ First, Congress must regulate "commerce."²⁰¹ Second, that regulation of "commerce" must implicate commerce in more than one state.²⁰²

a. First Prong: Commerce

The first prong of the Neo-*Gibbons* analysis asks whether the legislated conduct constitutes "commerce." This Note rejects the view that "commerce" cannot be defined into a workable standard to produce practicable and reliable results.²⁰³ Research has shown that the term "commerce" as used in the Commerce Clause means the voluntary buying, selling, or bartering of property or services and all their accompanying market-oriented activities, (which includes production, manufacture, agriculture, transportation, and labor), that are associated with commodities or services intended for the market, as well as the byproducts of these market-oriented activities such as pollution.²⁰⁴

This definition of "commerce" is broad, but not as broad as "economic" which can be extended to cover virtually all human activity.²⁰⁵ One criticism of this approach is that it does not allow

(citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819)). See also *supra* note 157 and accompanying text (setting forth Chief Justice Marshall's language in *McCulloch* to this effect).

199. See *supra* notes 141-90 and accompanying text (discussing the meaning of "commerce," "among the several States," and "to regulate").

200. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-97 (1824). *Gibbons* held Commerce Clause regulations enacted by Congress had to meet two threshold requirements: it had to regulate "commerce;" and it had to affect "commerce" in more than one state. See *id.*

201. *Id.* at 189-90.

202. *Id.* at 194-95. See also *supra* note 36-37, 146-47, 168 and accompanying text (setting forth in greater detail the relevant text of *Gibbons*).

203. The majority in *Lopez* stated, "Depending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565. See *id.* at 569-70 (Kennedy, J., concurring) (arguing that efforts to define categories of activities that were and were not commerce was futile). Some scholars have rejected the commercial/noncommercial distinction use in this analysis. See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 816-17 (1996); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 768-69 (1996); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 742-50 (1995). But see Barnett, *Original Meaning*, *supra* note 124, at 111-32 (defining the term "commerce"); Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 14-42 (same).

204. See *supra* notes 141-65 and accompanying text (arguing that this is the meaning of "commerce").

205. See *Gonzales v. Raich*, 545 U.S. 1, 48 (2005) (O'Connor, J., dissenting) (stating "the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to

Congress to regulate noncommercial activities that have a substantial impact on interstate commerce.²⁰⁶ However, the Constitution only grants Congress the power to regulate "commerce."²⁰⁷

If the first prong of the Neo-*Gibbons* analysis is not met, then the statute in question is not a valid exercise of Congress's power under the Commerce Clause and should be struck down without reaching the second prong of the analysis.²⁰⁸

b. Second Prong: "Among the Several States"

If the statute meets the first prong of the Neo-*Gibbons* analysis, then the Court must determine whether the "commerce" at issue affects more states than one. Almost all commercial activity will have commercial effects concerning more states than one due to the country's integrated national economy.²⁰⁹ Whether the commercial affect concerns more states than one a sufficient amount to warrant federal legislation is a question of policy, not constitutional authority.²¹⁰ Courts should review regulations of "commerce" under a "rational basis" test that asks whether Congress had, or could have had, a rational basis to conclude such a commercial impact existed.²¹¹

If the legislation is a prohibition on interstate "commerce," however, it will necessarily be valid in that it involves (1) "commerce" and (2) at least two states.²¹² This does not necessarily mean that the

sweep all of productive human activity into federal regulatory reach"); *id.* at 69 (Thomas, J., dissenting) (stating that the majority in *Raich* "defines economic activity in the broadest possible terms"). See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 217-18 (4th ed. 1992) (arguing crime is economic activity); Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 109-10 (differentiating between "economic" and "commerce").

206. See *United States v. Morrison*, 529 U.S. 598, 628-55 (2000) (Souter, J., dissenting) (arguing for upholding the VAWA); *id.* at 655-64 (Breyer, J., dissenting) (same); *Lopez*, 514 U.S. at 602-03 (Stevens, J., dissenting) (arguing for upholding the GFSZ); *id.* at 603-15 (Souter, J., dissenting) (same); *id.* at 615-31 (Breyer, J., dissenting) (same).

207. U.S.CONST. art. I, § 8, cl. 3.

208. If the statute does not concern "commerce," then it is immaterial whether it concerns more states than one for purposes of the Commerce Clause.

209. WALTER HAMILTON & DOUGLAS ADAIR, *THE POWER TO GOVERN* 179, 191-92 (1937). See also *supra* notes 152-53 and accompanying text (examining this point).

210. Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 111.

211. *Gonzales v. Raich*, 545 U.S. 1, 20 (2005). The Court does not have to determine whether the activities "substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* (citing *Lopez*, 514 U.S. at 557). The Neo-*Gibbons* approach agrees with the Supreme Court on the applicability of a rational basis analysis, it just disagrees about the starting point (an actual regulation of "commerce").

212. See *supra* notes 200-11 and accompanying text (stating the two requirements for the Neo-*Gibbons* analysis).

Congress can also prohibit that same “commerce” intrastate.²¹³ The Court should review prohibitions that aim to eliminate intrastate “commerce” in an article of “commerce” independently of the interstate aspect of the prohibition to see whether there is a rational basis for Congress to conclude that the intrastate activity concerns more states than one.²¹⁴ Obviously, the intrastate “commerce” of an article of “commerce” banned from the interstate market cannot have an effect on commerce outside the borders of the state in which it is contained by operation of the interstate ban.²¹⁵ However, it could have an effect on other interstate “commerce” within the state in which the intrastate “commerce” is contained within, if the intrastate “commerce” unfairly

213. *See id.* Whereas a prohibition on interstate commerce by definition requires more states than one and therefore satisfies the second prong of the *Neo-Gibbons* analysis, an intrastate prohibition by definition requires only one state and therefore more analysis must be done if the second prong is to be satisfied. *Id.*

It should be noted, however, that there is nothing to prevent a prohibition simply from being re-written as a regulation to avoid this extra scrutiny. While not all prohibitions can be written as regulations, many can. For instance, in *The Child Labor Case* (*Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941)), the congressional act of 1916 that prohibited transportation in interstate commerce of goods produced in factories employing children could have been written as a ban on child manufactured “commerce” or as a regulation requiring certain labor standards for articles intended for the market.

In this example, as a regulation it would pass the *Neo-Gibbons* test because it concerns commerce in more than one state. Written as a prohibition, the interstate prohibition aspect would be valid per se. The intrastate prohibition aspect would require further analysis. Ultimately, the intrastate prohibition in this example would also be valid under the *Neo-Gibbons* approach because intrastate child produced items of widgets would unfairly compete intrastate with similar imported out-of-state produced widgets that are held to higher labor standards as a prerequisite to being shipped in interstate commerce.

214. *See Raich*, 545 U.S. at 44 (O’Connor, J., dissenting) (arguing that allowing Congress to set the terms of the constitutional debate by “packaging regulation of local activity in broad schemes, is tantamount to removing meaningful limits on the Commerce Clause”); *id.* at 72 (Thomas, J., dissenting) (“The intrastate conduct swept within a general regulatory scheme may or may not have a substantial effect on the relevant interstate market.”). It should be noted that this is a significant difference from Professor Nelson and Pushaw’s *Neo-Federalist* approach which only considers the prohibition in its entirety. *See Nelson & Pushaw, Rethinking the Commerce Clause*, *supra* note 124, at 126 (concluding that under their test, “Congress could also directly prohibit lotteries or, for that matter, all gambling in the United States. After all, not only is gambling commerce, but Congress could easily conclude that it has a pervasive impact on commerce across state lines.”). The *Neo-Gibbons* approach would not reach the same conclusion. *See infra* notes 229-232 and accompanying text (analyzing a prohibition in the context of *Raich* under the *Neo-Gibbons* approach).

215. *See Raich*, 545 U.S. at 55 (O’Connor, J., dissenting) (stating that the Court generally assumes that states enforce their laws). The same logic would apply to the federal government. Therefore, the Court generally should assume that the federal government enforces its laws, and if the government does not enforce its laws, it should not be rewarded with greater legislative authority.

competes with the interstate "commerce."²¹⁶

The Neo-*Gibbons* approach to analyzing the Commerce Clause will provide clear rules that are easy to follow and remain true to the text of the Constitution.²¹⁷ The current three-category classification the Supreme Court has used since *Lopez* is malleable and not based on the Constitution.²¹⁸ In fact, the statute at issue in *Lopez* was subsequently amended to include a jurisdictional element requiring the gun to have moved in interstate commerce, which moved the statute from the "substantially affects" category to the "channels" category.²¹⁹ Whether an article has previously moved in interstate commerce cannot magically turn mere possession of that article into "commerce."²²⁰ To hold otherwise, on the same theory Congress could regulate possession of every object that has ever traveled interstate, and completely eradicate any real limits on the Commerce Clause.²²¹

The commerce power must have meaningful limits because Congress has no authority to legislate conduct that is not "commerce."²²² The Neo-*Gibbons* rule provides these constitutionally demanded limits on the commerce power.²²³

216. See *infra* notes 224-32 and accompanying text (analyzing the CSA in *Raich*).

217. See *supra* notes 141-216 (analyzing the meaning of the Commerce Clause and setting forth the Neo-*Gibbons* analysis).

218. See Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 112. See also Merrill, *supra* note 124, at 840 (stating that the Court has made no attempt to connect its three category classification of acceptable Commerce Clause regulations set forth in *Lopez* to the constitution or intent of the framers, because the scheme was just "a description of Supreme Court decisional law"); *supra* notes 124, 140 and accompanying text (arguing that the substantial effect test has no basis in the Constitution).

219. See *United States v. Tucker*, 90 F.3d 1135 (6th Cir. Mich. 1996) (noting that *Lopez* had been superseded by statute).

220. See *supra* notes 162-65 and accompanying text (providing the definition of "commerce," which does not include simple possession). See also *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (stating that simple possession was noneconomic activity); *id.* at 49 (O'Connor, J., dissenting) (arguing "*Lopez* makes clear that possession is not itself commercial activity").

221. See Pushaw, *Counter-Revolution*, *supra* note 8, at 910 (stating "simple possession of any commodity is not 'commerce' and therefore always beyond Congress's reach").

222. See U.S.CONST. art. I, § 8, cl. 3. See also *supra* notes 141-90 and accompanying text (analyzing the meanings of the terms "commerce," "among the several States," and "to regulate"). But see Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court?"*, 46 CASE W. RES. L. REV. 663 (1996) (arguing for complete deference to the legislature); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996) (same).

223. See *supra* notes 200-16 and accompanying text (providing the framework and requirements for Commerce Clause analysis under the Neo-*Gibbons* test). The Neo-*Gibbons* approach also avoids the unnecessary hassle of determining whether an activity has been traditionally a matter of local or federal concern. Either Congress has the power and can regulate it,

G. Application of the Neo-Gibbons Standard to Commerce Clause Jurisprudence

1. “Medical” Marijuana and *Gonzales v. Raich*

Under the proposed Neo-*Gibbons* standard, Congress has the power to ban marijuana from the interstate market under the CSA.²²⁴ However, the CSA bans all manufacture, distribution, and possession of marijuana both interstate and intrastate.²²⁵ The first problem the CSA raises is that the Neo-*Gibbons* definition of “commerce” does not include simple possession or donative distribution.²²⁶ Therefore, the Court initially would have to strike down the portion of the CSA addressing simple possession, would have to exclude donative transfers from the meaning of the term distribution, and would have to limit manufacturing to manufacturing intended for market, and not for personal or household needs.²²⁷ Applying this analysis to the facts of *Gonzales v. Raich* would result in the CSA being held unconstitutional as applied to the donative transfer to Raich from her donors, the growing of marijuana for personal needs by Monson, and the simple possession of both Raich and Monson, because none of these activities qualifies as “commerce.”²²⁸

Whether Congress can regulate the intrastate manufacture of marijuana intended for market; the intrastate buying and selling of marijuana; and the possession of marijuana with intent to sell intrastate depends on whether this wholly intrastate “commerce” in marijuana affects more states than just one.²²⁹ In the case of medical marijuana, there appears to be no similar commodity available in interstate

or they do not. *See Raich*, 545 U.S. at 48-49 (O’Connor, J., dissenting) (noting the problem of drawing a meaningful line between “what is national and what is local”). *But cf.* Martin H. Redish, *Doing it With Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 596-603 (1994) (arguing that the Court should determine whether an enumerated power exists to authorize congressional legislation instead of trying to identify areas of protected state sovereignty).

224. The power to prohibit an item of “commerce” from the interstate market is *per se* valid. *See supra* note 212 and accompanying text (emphasizing this point).

225. *See supra* notes 83-86 and accompanying text (discussing the CSA).

226. *See supra* note 204 and accompanying text (discussing the scope of “commerce”).

227. *Id.*

228. *See supra* notes 200-16 and accompanying text (laying out the analysis of the Neo-*Gibbons* test). *See also* Pushaw, *Counter-Revolution*, *supra* note 8, at 910 (stating that the CSA flunks the “commerce” test as applied to Raich and Monson who grew and possessed marijuana solely for personal medical use, without the intent to sell it).

229. *See supra* notes 209-16 and accompanying text (stating the proposed second prong of the Neo-*Gibbons* test). This part of the analysis is beyond the facts of the *Raich* case, but worth analyzing as it could apply to future cases.

"commerce" with which medical marijuana would unfairly compete within the borders of a single state.²³⁰ Therefore, the regulation and prosecution of solely intrastate "commerce" in medical marijuana would be left to the state and local governments.²³¹ However, if a sufficiently similar product was found to exist in the interstate market, then Congress could regulate the intrastate production of marijuana intended for the intrastate market; the intrastate buying and selling of marijuana; and the possession of marijuana with intent to sell intrastate, because otherwise these activities would unfairly compete with the sufficiently similar product in interstate commerce.²³²

2. Other Consequences of the Application of a Neo-*Gibbons* Test

Previously the Court has granted Congress near plenary authority over all transportation under their "channels" and "instrumentalities" theories.²³³ The Neo-*Gibbons* approach rejects this notion, and would uphold only federal legislation governing transportation associated with commodities or services intended for the market.²³⁴ Only this kind of transportation would meet the definition of "commerce," and Congress could rationally conclude that even intrastate transportation associated with commodities or services intended for the market would have an effect among the states.²³⁵ The Neo-*Gibbons* test leaves federal regulation of commercial transportation whole, but requires statutes that

230. However, Congress could regulate the intrastate manufacture, buying, selling, and possession with intent to sell of marijuana if an interstate commodity is found with which medical marijuana would unfairly compete within the borders of a single state. It is of significance that this argument would apply equally to marijuana not intended for medicinal purposes. It is conceded that, under the proposed Neo-*Gibbons* approach, Congress could protect the persons and things in interstate commerce against crime, but this still would not save the CSA, as it does not protect persons or things in interstate commerce from crime, but instead makes it a crime to have marijuana.

231. See Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 138-39 (noting that this leaves the decision to the states whether to prosecute simple drug possession and allows the federal government to focus on trafficking).

232. Even if this were the case, it would not change the analysis in *Raich* under the Neo-*Gibbons* approach because the case involved noncommercial activity. What would constitute a "sufficiently similar product" is beyond the scope of this Note. Nelson and Pushaw would not analyze this step under their analysis and would allow Congress to prohibit this type of activity without the extra burden of showing an effect concerning more states than just one. See Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 136-39.

233. See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (discussing Congress's power in these categories and citing cases).

234. See *supra* note 204 and accompanying text (listing this as part of "commerce").

235. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). See also *supra* notes 36-37, 147-48, 169 and accompanying text (analyzing *Gibbons*).

reach personal travel be invalidated.²³⁶

Regulation of commercial production and labor are valid under the Neo-*Gibbons* definition of “commerce” which includes all production, manufacture, agriculture, transportation, and labor associated with commodities or services intended for the market. Regulations of commercial production and labor will inevitably be upheld under the rational basis standard employed in the second prong of this analysis.²³⁷ However, production not intended for the market but for personal or household use is exempt.²³⁸ For these reasons, a Neo-*Gibbons* Court would distinguish *Wickard v. Filburn*.²³⁹ Under the Commerce Clause, Congress has no power to regulate agriculture not intended for the market but for home consumption.²⁴⁰ A Neo-*Gibbons* Court would, however, uphold the Agricultural Adjustment Act of 1938 as to agriculture intended for the market.²⁴¹

The Neo-*Gibbons* test would uphold federal criminal legislation to protect “commerce” from interference, or if the underlying conduct was commercial.²⁴² If a federal criminal statute does not meet one of these requirements, the Court should strike it down under the Neo-*Gibbons* test.²⁴³ The Neo-*Gibbons* approach would also sustain federal environmental, health, and safety regulations concerning market-oriented activities, so long as Congress rationally concluded they affect more states than one.²⁴⁴

V. CONCLUSION

This Note advocates that the Court in *Gonzales v. Raich* decided the case incorrectly by subjecting it to the *Lopez/Morrison* standard, a

236. See Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 120 (reaching the same conclusion).

237. The Neo-*Gibbons* analysis would uphold the result (but not the reasoning).

238. See *supra* note 165 and accompanying text (setting forth this standard).

239. See *supra* notes 43-51 and accompanying text (analyzing *Wickard*).

240. See *supra* note 165 and accompanying text (setting forth this standard).

241. See *supra* note 44 and accompanying text (setting forth 7 U.S.C. § 1281 et seq.). The penalties assessed *Filburn* in the case could most likely be upheld as a condition of receiving the subsidy on the alternative ground of Congress’s power under the Spending Clause.

242. See Nelson & Pushaw, *Rethinking the Commerce Clause*, *supra* note 124, at 126.

243. *Id.* Under this analysis, the Neo-*Gibbons* test would uphold the decisions reached in *Lopez* and *Morrison*, as neither case involved commercial activity nor the protection of commerce. See *supra* notes 52-65 (analyzing *United States v. Lopez*) and notes 66-82 (analyzing *United States v. Morrison*).

244. See *supra* note 204 and accompanying text (“commerce” includes production, manufacture, agriculture, transportation, and labor associated with commodities or services intended for the market, as well as the byproducts of these market-oriented activities, such as pollution).

standard not based on the Constitution.²⁴⁵ The Court has available to it a justifiable alternative: the Neo-*Gibbons* standard, based on the text and history of the Constitution, which will provide easy rules for judicial review of legislation challenged under the Commerce Clause.²⁴⁶ Moreover, the Neo-*Gibbons* standard aligns with most pre-*Lopez/Morrison* Supreme Court Commerce Clause precedent.²⁴⁷

The Commerce Clause is not a "Hey, you-can-do-whatever-you-feel-like Clause."²⁴⁸ Judicial review of the Commerce Clause will only be meaningful if and when the Court goes back to where it started in *Gibbons*, interpreting the Constitution.

Gregory W. Watts

245. See *supra* notes 121-40 and accompanying text.

246. See *supra* notes 200-16, 218, 223 and accompanying text.

247. See *supra* notes 233-44 and accompanying text.

248. Kozinski, *supra* note 1, at 5 (referring to post-New Deal Commerce Clause as the "Hey, you-can-do-whatever-you-feel-like Clause").