

IS MORRISON DEAD?
ASSESSING A SUPREME DRUG (LAW) OVERDOSE

by
Jonathan H. Adler*

Drugs would destroy the bravest and craziest of the rock stars.
- Stephen Davis¹

Drug prohibition does violence to the Constitution.
- David Boaz²

There was little doubt that the federal government would prevail in Gonzales v. Raich. What was, perhaps, so unexpected was so expansive a repudiation of enforceable judicial limitations on federal power. In upholding the constitutionality of the Controlled Substances Act as-applied to the non-commercial intrastate possession and consumption of marijuana for medical purposes as authorized under California law, the Supreme Court hollowed out the core of contemporary Commerce Clause jurisprudence. Insofar as United States v. Morrison had stood for the propositions that only intrastate economic activities could be aggregated for purposes of the “substantial affects” test, that attenuated connections between a regulatory scheme and interstate commerce exceeded Congress’s limited and enumerated powers, and, perhaps most importantly, that judicial review should serve as the ultimate check on overly broad assertions of federal power, it may now be a dead letter. The rationale adopted by Justice Stevens’s majority opinion undercuts the primary judicial safeguards of federalism. While the Raich majority purports to be following the doctrinal contours of Lopez and Morrison, it actually represents a repudiation of these prior cases. Further, Raich continued the Supreme Court’s uninterrupted practice of rejecting as-applied challenges to federal statutes, and is likely to preclude any such suits in the future. The inability to mount as-applied challenges to broad regulatory statutes like the CSA is significant because it creates additional barriers to future Commerce Clause litigation. The lack of a viable way to challenge discrete applications of broader federal laws means few Commerce Clause challenges can ever hope to succeed. The

* Visiting Associate Professor of Law, George Mason University School of Law; Associate Professor and Associate Director, Center for Business Law & Regulation, Case Western Reserve University School of Law. The author would like to thank Nelson Lund, Andrew Morriss, Christina Rorick, and Nathaniel Stewart for the comments on earlier drafts of this Article. Any errors, omissions, irrelevancies, or inanities are solely the fault of the author.

¹ STEPHEN DAVIS, JIM MORRISON: LIFE, DEATH, LEGEND xii (Gotham Books 2004).

² David Boaz, *Drug Prohibition Has Failed*, Cato Institute, Mar. 3, 1997, available at <http://www.cato.org/dailys/3-03-97.html>.

central holding of Morrison, like the legendary Jim Morrison, now lives on only in the hearts of true believers.

I.	THE SOFT PARADE.....	754
II.	BREAK ON THROUGH (TO THE OTHER SIDE).....	759
III.	LIGHT MY FIRE	762
	A. <i>Five to One</i>	766
	B. <i>The Changeling</i>	768
IV.	I CAN'T SEE YOUR FACE	770
V.	WHEN THE MUSIC'S OVER	776

All eyes were on Jim Morrison when The Doors took the stage. Audiences never knew quite what to expect, but there was never much doubt that it would be a night to remember. He could leave an entire concert hall in spellbound awe, or storm off in a substance-induced rage. One night he could be the world's most impressive and influential rock musician—sought out by Mick Jagger for advice on how to perform on stage.³ Another he could be a virtual sociopath, assaulting audiences with invective, spurring riots, and getting himself arrested for allegedly obscene conduct.⁴ Audiences could not know in advance whether they would see the rock legend who inspired millions, or the twenty-something has-been who would later die of a drug overdose. Yet at every Doors show, one thing was for certain: It would not be forgotten.⁵

During the Supreme Court's October 2004 term, all eyes were on *Gonzales v. Raich*.⁶ While there was never much doubt about the outcome—few expected Angel Raich and the other respondents to prevail—legal commentators did not know quite what to expect. The Chief Justice could pen a narrow opinion for the Court, rejecting Raich's claim by distinguishing the regulation of commodities from other expansive exercises of federal power, thereby preserving the essential holdings of *United States v. Lopez*⁷ and (more importantly) *United States v. Morrison*.⁸ The Chief had safeguarded federalism before, he could do it again.⁹ Or Justice Stevens, the ranking dissenter from the

³ See DAVIS, *supra* note 1, at 263–64.

⁴ Most infamously, Miami police filed a warrant for Morrison's arrest after a March 1969 show at which he allegedly exposed his genitals to the audience. Eyewitnesses deny the police account, but it generated notations in Morrison's FBI file nonetheless. See DAVIS, *supra* note 1, at 319–21, 322–23. One Morrison biographer would describe the subsequent trial as a politically motivated “kangaroo court.” *Id.* at 383. This was not Morrison's only brush with the law. At another show in New Haven, Morrison was arrested for obscenity after launching into a tirade about how he had been maced by a police officer before the show while he was “getting acquainted” with a local college student. *Id.* at 214–16.

⁵ Indeed, it is a testament to the memorability of Morrison's performances that a recent biography was able to detail well over one-hundred performances by The Doors in the band's very short musical career. See generally DAVIS, *supra* note 1.

⁶ 125 S. Ct. 2195 (2005).

⁷ 514 U.S. 549 (1995).

⁸ 529 U.S. 598 (2000).

⁹ See *Reno v. Condon*, 528 U.S. 118 (2000) (upholding the Driver's Privacy Protection

Rehnquist Court's "New Federalism" could collect five votes to free federal power from judicial restraints. In recent terms, the "federalist five" had shown itself to be a less stable court majority than some had hoped or feared.¹⁰ One thing was certain, *Raich* would be an important federalism case.

That the federal government would prevail did not necessarily mean that a pillar of the "New Federalism" would suffer a mortal blow in the process. Yet that appears to be the outcome in *Raich*. In upholding the constitutionality of the Controlled Substances Act as-applied to the non-commercial intrastate possession and consumption of marijuana for medical purposes as authorized under California law, the Supreme Court hollowed out the core of contemporary Commerce Clause jurisprudence. Insofar as *Morrison* stood for the propositions that only intrastate economic activities could be aggregated for purposes of the "substantial affects" test, that attenuated connections between a regulatory scheme and interstate commerce exceeded Congress's limited and enumerated powers, and, perhaps most importantly, that judicial review should serve as the ultimate check on overly broad assertions of federal power, it is no more. For this—killing *Morrison*—it is unlikely *Raich* will be forgotten.

Part I of this Article opens with the soft parade of *United States v. Lopez*, a tentative and meager start to the reinvigoration of enumerated powers. While *Lopez* is seen as the foundational modern Commerce Clause case, Part II suggests it was *United States v. Morrison* that represented the real breakthrough for the "New Federalism." Far more than *Lopez*, *Morrison* suggested that the judicial safeguards of federalism¹¹ were real and would be enforced, even in the context of enumerated powers.¹² It highlighted the distinction of economic and non-economic activity for Commerce Clause analysis and stressed the need for some judicially enforceable limit on federal power.

Part III turns to the *Raich* decision, delineating how the rationale adopted by Justice Stevens's majority opinion undercuts the primary judicial safeguards of federalism solidified by *Morrison*. While the *Raich* majority purports to be following the doctrinal contours of *Lopez* and *Morrison*, it actually represents a repudiation of these prior cases. Part III also considers some of the other opinions that were (and were not) written to justify the Court's result. Justice Scalia's opinion concurring in the judgment is no less expansive than Justice Stevens's majority, and is equally lethal to *Morrison*'s central holding. Justice Kennedy, on the other hand, concurred with the majority opinion without

Act as a proper exercise of Congress's Commerce Clause power).

¹⁰ Recent federalism cases in which the five most conservative justices failed to vote together include: *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act); *Alaska Dep't of Envtl. Cons. v. Envtl. Prot. Agency*, 540 U.S. 461 (2004) (upholding federal preemption of state permitting decision); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding abrogation of sovereign immunity under the Family and Medical Leave Act).

¹¹ See generally John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) (arguing that "judicial safeguards" of federalism replaced "political safeguards" in the Rehnquist Court).

¹² Cf. ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 17 (2001) ("the idea of limited national power is not judicially enforceable").

explanation. Given his outspoken defenses of federalism in the past, this silence is quite conspicuous, as it appears he has changed his views on the judicial safeguards of federalism.

Part IV discusses the particular difficulties posed by as-applied Commerce Clause challenges. Both *Lopez* and *Morrison* had been facial challenges to federal statutes. No as-applied Commerce Clause challenge has prevailed in the Supreme Court since the New Deal. *Raich* continued the Supreme Court's uninterrupted practice of rejecting such challenges to federal statutes, and is likely to preclude any such suits in the future. The inability to mount as-applied challenges to broad regulatory statutes like the Controlled Substances Act is significant because it creates additional barriers to future Commerce Clause litigation. All but the most aggressive believers in a "New Federalist" jurisprudence would hesitate before nullifying wide swaths of the federal code. The lack of a viable way to challenge discrete applications of broader federal laws means few Commerce Clause challenges can ever hope to succeed. The Article concludes by considering whether *Morrison*'s central holding, like Jim Morrison himself, lives on only in the hearts of true believers. For those who believe in *Morrison*'s message, the outlook is grim.

I. THE SOFT PARADE¹³

The Supreme Court's decision invalidating the Gun-Free School Zone Act (GFSZA) in *United States v. Lopez*¹⁴ was quite unexpected. The Court had not struck down a federal statute for exceeding the scope of the Commerce Clause in over one-half century. After the New Deal revolution, the idea that there were justiciable limits on the scope of Congress's Commerce Clause power was a dead letter.¹⁵ As then-Justice William Rehnquist observed in 1981, "one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress."¹⁶ Indeed, the reigning legal doctrine relied upon "political safeguards," rather than judicial review, to protect state autonomy and enforce constitutional limitations on federal power.¹⁷

¹³ THE DOORS, *The Soft Parade*, on THE SOFT PARADE (Elektra/Asylum Records 1969).

¹⁴ 514 U.S. 549 (1995).

¹⁵ See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE—VOL. 1: FOUNDATIONS* 105 (1991) (noting that after the New Deal "[a] commitment to federalism . . . was no longer thought to require a constitutional strategy that restrained the national government to a limited number of enumerated powers over economic and social life").

¹⁶ *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring). For the same reason, Ninth Circuit Judge Alex Kozinski characterized the Commerce Clause as the "Hey, you-can-do-whatever-you-feel-like Clause." Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995).

¹⁷ See, e.g., *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). The political safeguards theory upon which *Garcia* relied is outlined in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). See also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86

The revival of judicially enforceable limits on federal power prompted strong reaction as commentators greeted, or condemned, the Court for a potentially radical shift in federalism jurisprudence. Professor Laurence Tribe commented that *Lopez*, in conjunction with other federalism decisions, brought the Court “close” to “something radically different from the modern understanding of the Constitution.”¹⁸ *The New York Times*’ Linda Greenhouse warned *Lopez* “put in play . . . fundamental questions about the essential nature of the Federal Government”¹⁹

Despite the strong reaction, *Lopez* was a particularly modest opinion.²⁰ While starting at “first principles” with an assertion of limited and enumerated powers, Chief Justice Rehnquist’s majority opinion was quite tentative and embraced a narrow holding.²¹ The Court eschewed any “precise formulation” that would create a bright-line limitation on federal power.²² The Court instead stressed that there had to be *some* limit on federal power, but never made clear what that limit entailed.²³ It rejected the federal government’s arguments for sustaining the GFSZA because such arguments would create a commerce power without limit—in effect a federal police power—but it did not identify how limited the commerce power should be.

Under *Lopez*, the Constitution grants Congress the power to regulate in three areas: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) those activities that “substantially affect” interstate commerce.²⁴ The first two categories are rather unambiguous. If an item is used or sold in interstate commerce, it may be regulated, as may the channels through which such items flow. The contours of the “substantial effects” test, on the other hand, are less obvious—and subject to the greatest dispute.

As described in *Lopez*—and subsequently elaborated upon in *Morrison*—the “substantial effects” test is more qualitative than quantitative. It is more

YALE L.J. 1552 (1977). While *Garcia* was not a Commerce Clause case, the political safeguards theory it articulated has been advanced in the Commerce Clause context.

¹⁸ Quoted in Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1.

¹⁹ Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1.

²⁰ In particular, *Lopez* stopped far short of an originalist conception of the Commerce Clause. See *United States v. Lopez*, 514 U.S. at 584 (Thomas, J., concurring). See also Randy E. Barnett, *New Evidence of the Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

²¹ *Lopez*, 514 U.S. at 552, “After its ringing opening, the majority opinion quickly retreats from a robust, principled theory of enumerated powers.” MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 27 (1999).

²² *Lopez*, 514 U.S. at 567 (“These are not precise formulations . . .”).

²³ GREVE, *supra* note 21, at 28 (“The observation that there has to be some limit to congressional power and some distinction between commercial and noncommercial activities leads back to the questions of where that limit and distinction might be found, and *Lopez* provides no clear answer.”).

²⁴ *Lopez*, 514 U.S. at 558–59.

concerned with the nature of the regulated activity or the regulatory scheme in question than with the aggregate economic impact of the regulated activity alone, or in combination with other similarly regulated activities. Summarizing prior precedent, the Court detected a “clear” pattern: “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”²⁵ The activity regulated by the GFSZA—possessing a gun in a school zone—“by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”²⁶ Therefore, it did not “substantially affect” commerce, even if aggregated with all other instances of like conduct. As the majority observed, under such reasoning “Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.”²⁷ If the only question is whether a particular class of activities impacts interstate economic activity in some identifiable way, there is hardly anything that falls outside of Congress’s authority. And that is the whole point of the *Lopez* test—to reassert the existence of *some* limit on federal power, even if the limit itself remained undefined.

The initial doctrinal import of *Lopez* was further softened by Justice Kennedy’s concurring opinion, joined by Justice O’Connor, that “counsel[ed] great restraint” before enforcing Commerce Clause limits.²⁸ The concurrence strongly indicated that the two swing justices were not entirely on board with the majority’s reinvigoration of the judicial safeguards of federalism, even in a modest formulation. The *Lopez* holding was “necessary though limited”²⁹ and the interest of preserving a federal-state balance would have to be weighed against the nation’s “immense stake in the stability of [the Court’s] Commerce Clause jurisprudence as it has evolved to this point.”³⁰ While the Court would intervene where Congress clearly overstepped its bounds, Justice Kennedy emphasized that the ultimate check on federal power had to come from the political branches themselves.³¹

The majority placed greatest emphasis on the Commerce Clause itself, and whether a regulated activity could be said to “substantially affect” interstate commerce. Justice Kennedy, on the other hand, stressed the need to safeguard “areas of traditional state concern.” In this formulation, judicial review is more appropriate to prevent federal intrusion into territory historically the province of the states than it is to enforce any textual limit on the federal government’s

²⁵ *Id.* at 560.

²⁶ *Id.*

²⁷ *Id.* at 564.

²⁸ *Id.* at 568 (Kennedy, J., concurring).

²⁹ *Id.*

³⁰ *Id.* at 574.

³¹ *Id.* at 577. Thus, while Kennedy rejected a “*complete* renunciation of the judicial role” (emphasis added) he also stressed: “[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance.” *Id.* at 578, 577.

enumerated powers. As Justice Kennedy warned, “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”³² As he presented it, this distinction between “state” and “federal” was not particularly coherent. Without reference to the textual division of governmental power, or some exogenous theory of subsidiarity within a federal republic, there is no clear basis for assuming a given matter is more a state or federal concern, and Justice Kennedy never provided such a theory.

One reason in particular to safeguard state policy prerogatives is to ensure that states may operate as laboratories of democracy trying “novel social and economic experiments without risk to the rest of the country.”³³ It also enables states to develop policies that match local needs, preferences, and advantages.³⁴ Justice Kennedy noted it was “well established that education is a traditional concern of the States,” and over forty states already outlawed gun possession in school to some degree.³⁵ Insofar as gun possession in school zones was a problem, states were on the case, and undue federal intervention could only serve to impede the process by cutting states off from the costs and benefits of their own policy decisions. The GFSZA “foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.”³⁶ While Kennedy’s opinion stressed the need for state experimentation, there does not seem to be much risk of state experimentation in the *Lopez* context because states are unlikely to compete by doing *less* to control crime—in other words, in the criminal law context, allowing for state experimentation is unlikely to produce much actual interjurisdictional competition of the sort that might justify intervention.³⁷ For this rationale to have teeth, it would have to apply where state policy diversity would be less certain to yield uniformly “positive” results.³⁸ Laboratories are not free to experiment if they are not free to fail.

If *Lopez* marked the start of an enumerated powers parade, it was a soft parade. Without challenging the vitality of prior precedent, the Court merely

³² *Id.* at 577 (Kennedy, J., concurring).

³³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

³⁴ See generally Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987).

³⁵ *Lopez*, 514 U.S. at 580–81 (Kennedy, J., concurring).

³⁶ *Id.* at 583.

³⁷ See Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 180 (1996).

³⁸ GREVE, *supra* note 21, at 82.

“decline[d] here to proceed any further.”³⁹ That a given activity sufficiently affected commerce to be subject to federal regulation would no longer be accepted solely on Congress’s say so. The Court would make its own independent, if still deferential, assessment. Rehnquist’s majority opinion sought to integrate *Lopez* into the Court’s prior precedents, noting that prior opinions repeatedly acknowledged that the commerce power was limited in scope and stressing that even the most expansive of the prior precedents remained good law. It failed to challenge any of the existing post-New Deal precedents, preferring instead to reconcile them by distinguishing, and perhaps somewhat redefining them. As Michael Greve observed, *Lopez* did not “revive[] the enumerated powers doctrine of the pre-New Deal era in full regalia.”⁴⁰ Like the other initial federalism decisions, it merely sought to “make room for federalism concerns, without at the same time triggering a second constitutional war over enumerated powers.”⁴¹ In Chief Justice Rehnquist’s hands, even the most expansive post-New Deal cases acknowledged some “outer limit” to federal regulatory power, even if it left unclear what that “outer limit” was. The strength of this opinion was further weakened by a concurring opinion focused on the need to preserve stability within federalism jurisprudence and acknowledge the realities of twentieth-century commerce.

Lower courts clearly got the message. While academics and legal commentators saw a potential revolution in the Court’s renewed willingness to police the scope of the federal government’s enumerated powers, federal courts proved themselves completely uninterested in striking down additional federal laws.⁴² Concerns about the scope of Commerce Clause authority prompted some courts to narrow the scope of federal statutes containing jurisdictional elements, but that was it.⁴³ Other than the U.S. Court of Appeals for the Fourth Circuit,⁴⁴ no appellate court struck down a federal statute on Commerce Clause grounds between 1995 and 2000.⁴⁵ Moreover, at the same time the Court was re-establishing modest limits on federal power, other decisions, such as *U.S. Term Limits v. Thornton*,⁴⁶ were “profoundly nationalistic.”⁴⁷ If the Commerce

³⁹ *Lopez*, 514 U.S. at 567.

⁴⁰ GREVE, *supra* note 21, at 25.

⁴¹ *Id.*

⁴² See Glenn Reynolds & Brannon Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WISC. L. REV. 369 (2000); see also Brannon Denning & Glenn Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003).

⁴³ See, e.g., *United States v. Perrotta*, 313 F.3d 33 (2d Cir. 2002); *United States v. Carr*, 271 F.3d 172 (4th Cir. 2001); *United States v. Johnson*, 246 F.3d 749 (5th Cir. 2001); *United States v. Rea*, 300 F.3d 952 (8th Cir. 2002); *United States v. Lamont*, 330 F.3d 1249 (9th Cir. 2003); *United States v. Ballinger*, 312 F.3d 1264 (11th Cir. 2002).

⁴⁴ See *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 839 (4th Cir. 1999) (en banc) *aff’d sub nom* *United States v. Morrison*, 529 U.S. 598 (2000).

⁴⁵ See Reynolds & Denning, *supra* note 42, at 369.

⁴⁶ 514 U.S. 779 (1995).

⁴⁷ NAGEL, *supra* note 12, at 28 (2001).

Clause parade was to continue, the Court would have to take another significant step forward.

II. BREAK ON THROUGH (TO THE OTHER SIDE)⁴⁸

While modest in scope, *Lopez* at least raised the possibility that federal courts would actively police the boundaries of federal power and stem the centralization of governmental authority.⁴⁹ To do so, however, would require more than a single, tentative decision. The Supreme Court would need to extend the doctrine in order to entrench it.⁵⁰ The “warning shot” would have to be followed by a “full-out broadside.”⁵¹ Five years after *Lopez*, the same five Justice majority appeared to take this step by striking down provisions of the Violence Against Women Act (VAWA) in *United States v. Morrison*.⁵²

While most associate the reinvigoration of Commerce Clause scrutiny with *Lopez*, *Morrison* was the real breakthrough for enumerated powers jurisprudence. This opinion expressed Commerce Clause doctrine in more resolute—if not completely unqualified—terms, suggesting the Court’s majority was serious about the Commerce Clause. *Morrison* invalidated provisions of federal law Congress sought to enact explicitly pursuant to the Commerce Clause power. Unlike in *Lopez*, there was little sign any justice in the majority had any hesitation about striking down VAWA’s provision providing a civil remedy in federal court for a “crime of violence motivated by gender.”⁵³ There was no concurrence threatening to narrow the decision’s reach.⁵⁴

Doctrinally, *Morrison* began where *Lopez* left off. Building on the prior decision’s framework, the *Morrison* majority identified four factors for courts to consider in determining whether a given activity “substantially affects” interstate commerce. First and foremost, is the economic or commercial nature of the activity in question. Without adopting an ironclad rule, the Court noted that it had “upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”⁵⁵ Second is whether Congress included a jurisdictional element in the challenged statute that can serve to

⁴⁸ THE DOORS, *Break on Through (to the Other Side)*, on THE DOORS (Elektra/Asylum Records 1967).

⁴⁹ See, e.g., Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801 (1996).

⁵⁰ GREVE, *supra* note 21, at 45 (“Every application of *Lopez* . . . will almost surely extend it.”).

⁵¹ Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?* 46 VILL. L. REV. 1325, 1327 (2001) (“the warning shot across Congress’ bow in *Lopez* has been followed by the full-out broadside of *United States v. Morrison*”).

⁵² 529 U.S. 598 (2000).

⁵³ 42 U.S.C. § 13981(d)(1) (2000).

⁵⁴ Justice Thomas authored a concurring opinion in *Morrison*, but as in *Lopez*, his opinion suggested the Court was too timid insofar as it relied upon the “substantial effects” test at all. See *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

⁵⁵ *Id.* at 613.

“limit its reach to a discrete set” of activities that substantially affect commerce.⁵⁶ Such a jurisdictional element does not ensure a statute’s constitutionality,⁵⁷ but it can provide courts with a basis upon which to construe a statute so as to keep it within constitutional limits.⁵⁸ Third is whether Congress adopted legislative findings regarding the regulated activity’s alleged substantial effect on interstate commerce.⁵⁹ As with a jurisdictional element, the adoption of legislative findings does not ensure a statute’s constitutionality,⁶⁰ but the adoption of such findings can assist a court in identifying a given activity’s effect on interstate commerce, particularly if the effect is not obvious.⁶¹ The fourth and final factor is the nexus between the regulated activity and the alleged substantial effect on interstate commerce. Of particular concern to the Court here is that to accept highly attenuated connections of this type between intrastate activities and interstate commerce as the basis for Commerce Clause jurisdiction would make the courts “hard pressed to posit any activity by an individual that Congress is without power to regulate.”⁶² If establishing an effect on commerce required piling inference upon inference—establishing a causal chain that could connect nearly any conceivable activity to commerce—the statute would not pass muster.⁶³

While the Court addressed all four factors, it did not stress them equally. Most of the work in *Morrison* was performed by the first and fourth factors—whether the regulated activity was itself economic and whether the hypothesized link between the regulated activity and commerce was so attenuated as to provide a rationale for regulating anything at all. These two factors provided the opinion’s core, and would ensure that federal power remained limited. The Court again avoided adopting a categorical rule against regulating noncommercial intrastate activity. Yet it reiterated that such a regulation had never been upheld.⁶⁴ It further stressed that “the noneconomic,

⁵⁶ *Id.* at 612; *United States v. Lopez*, 514 U.S. 549, 562 (1995).

⁵⁷ *See Morrison*, 529 U.S. at 612 (noting jurisdictional element “may” establish the constitutionality of a given statute under the Commerce Clause).

⁵⁸ *Jones v. United States*, 529 U.S. 848, 857 (2000) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided” a court’s “duty is to adopt the latter.”).

⁵⁹ *Morrison*, 529 U.S. at 612.

⁶⁰ *Lopez*, 514 U.S. at 557 n.2 (“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”).

⁶¹ *See id.* at 563.

⁶² *Id.* at 564; *Morrison*, 529 U.S. at 613. *See also* Michell N. Berman, Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine, 89 IOWA L. REV. 1487, 1528 (2004) (“If the Rehnquist Court’s developing Commerce Clause doctrine is driven by a single impulse, it is the insistence that the doctrine not amount to a blank check.”).

⁶³ *See Lopez*, 514 U.S. at 567.

⁶⁴ *Morrison*, 529 U.S. at 611 (“in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor”); *id.* at 613 (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity . . . thus far in our Nation’s history our cases have upheld Commerce

criminal nature of the conduct at issue” in *Lopez* was “central” to the decision.⁶⁵

As reified in *Morrison*, the “substantial effects” test is more qualitative than quantitative. It is more concerned with the nature of the regulated activity or the regulatory scheme in question than with the aggregate economic impact of the regulated activity alone, or in combination with other similarly regulated activities. The key question is whether the activity subject to federal regulation is itself related to “‘commerce’ or any sort of economic enterprise” or whether the regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”⁶⁶ Congress clearly has the authority to regulate activities that are “economic in nature,”⁶⁷ such as industrial mining⁶⁸ or loan-sharking.⁶⁹ It also may reach relatively minor intrastate activities that are themselves economic, or related to commercial conduct, through broad economic regulatory schemes, such as a price maintenance regime for agricultural products.⁷⁰ But the fact that a given intrastate activity, when aggregated with all other instances of like conduct, may have a measurable impact on the nation’s GDP is insufficient. The Court explicitly rejected “the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁷¹ To hold otherwise would eviscerate judicial review of congressional exercises of the commerce power and make “the limitation of congressional authority . . . solely a matter of legislative grace.”⁷²

If nothing else, *Morrison* stood for the proposition that the federal commerce power would be constrained by judicial review. *Morrison* demonstrated—or so it appeared—that the Court’s new Commerce Clause jurisprudence was more than a one-hit wonder. The Court, or at least a slim majority of the justices, had shown its seriousness at policing federal intrusions into local concerns. Assuming the lower courts were listening,⁷³ the nation

Clause regulation of intrastate activity only where that activity is economic in nature.”).

⁶⁵ *Id.* at 610.

⁶⁶ *Lopez*, 514 U.S. at 561.

⁶⁷ *See Morrison*, 529 U.S. at 608.

⁶⁸ *See Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981).

⁶⁹ *See Perez v. United States*, 402 U.S. 146 (1971).

⁷⁰ *See Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding application of agricultural production quotas to production for a farmer’s own use because allowing such production would undermine the national price control scheme created by the Agricultural Adjustment Act of 1938); *Lopez*, 514 U.S. at 556 (“Even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’” (citing *Wickard*, 317 U.S. at 125)).

⁷¹ *Morrison*, 529 U.S. at 617.

⁷² *Id.* at 616.

⁷³ This assumption was not entirely warranted. *See* Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003).

would rely upon the judicial safeguards of federalism, rather than the political safeguards of prior decisions. While federal courts, as a whole, were still reluctant to invalidate federal statutes on Commerce Clause grounds, some began to look favorably on as-applied Commerce Clause challenges. The U.S. Court of Appeals for the Ninth Circuit, for instance, upheld Commerce Clause challenges to federal statutes where it found the litigants' conduct was not itself substantially related to interstate commerce.⁷⁴ The laws in question were not invalidated, as occurred in *Lopez* and *Morrison*. Rather, in each case the court held the relevant laws unconstitutional as-applied to particular individuals. Among the successful litigants were Angel McClary Raich and Diane Monson, whose successful challenge to the Controlled Substances Act (CSA) would force the Supreme Court to confront the limits of the Commerce Clause once again.⁷⁵

III. LIGHT MY FIRE⁷⁶

Angel Raich and her fellow respondents did not challenge the constitutionality of the Controlled Substances Act on its face—and with good reason. There is little basis for challenging the constitutionality of federal regulation of interstate markets in regulated drugs. Rather, they pressed an as-applied challenge to the application of the CSA to the “intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’ authority under the Commerce Clause.”⁷⁷ While this sort of challenge did not frontally challenge the constitutionality of the Controlled Substances Act, it presented doctrinal problems of its own.

Raich, like even the most expansive Commerce Clause opinions of the New Deal era, purported to recognize the continued limits on federal power. Yet, as with the New Deal opinions, this qualification is overwhelmed by the force of the doctrinal arguments deployed to uphold the challenged statute. While recognizing that the most expansive uses of the commerce power should be confined to economic activities, the majority so expanded the definition of “economic” so as to leave this a meaningless qualification. While reiterating the existence of Commerce Clause limits, the majority outlined a commerce power that is only limited by Congress’s appetite for expansive legislation. In this way the Court, once again, displaced judicial review in favor of the political safeguards of federalism. Justice Scalia’s concurrence, while providing a more nuanced—and perhaps a more doctrinally satisfying—rationale, was no

⁷⁴ See *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (upholding as-applied Commerce Clause challenge to application of federal Controlled Substances Act to medical marijuana); *Stewart v. United States*, 348 F.3d 1132 (9th Cir. 2003) (upholding Commerce Clause challenge to federal prohibition of possession of fully-automatic weapons as-applied to home-made firearm); *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003) (upholding Commerce Clause challenge to federal prohibition on possession of child pornography as-applied to family photo).

⁷⁵ *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

⁷⁶ THE DOORS, *Light My Fire*, on THE DOORS (Elektra/Asylum Records 1967).

⁷⁷ *Gonzales v. Raich*, 125 S. Ct. 2195, 2204–2205 (2005).

less expansive in its impact. Both the majority and concurring opinions hollowed out *Morrison*'s core—leaving it without any substance, if any life at all.

On the surface, Justice Stevens's majority opinion may seem consonant with the principles outlined in *Morrison*. As an initial matter, the opinion reiterates that Congress may regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."⁷⁸ If the regulated class is "economic," and "it exerts a substantial effect on interstate commerce," local or seemingly noncommercial activities within the class remain within federal reach.⁷⁹ Yet the Court never really explains how the activity in question here is "economic" in any meaningful sense of the word. To the contrary, the Court searches out a relatively elastic definition of economic, and then stretches it beyond its own discovered definition.

According to the one dictionary cited by the court, the 1966 *Webster's Third New International Dictionary*, "Economics" refers to "the production, distribution, and consumption of commodities."⁸⁰ Upon this basis, the Court declares that the activities at issue in *Raich*, "[u]nlike those at issue in *Lopez* and *Morrison*," are "quintessentially economic"⁸¹ because those activities regulated by the CSA are the "production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market."⁸² Yet the activity to be regulated here—the activity that is declared by the court to be "quintessentially economic"—includes the "intrastate possession" of commodities, and "possession" is not included in the Court's 1966 dictionary.⁸³

By refusing to exclude noncommercial intrastate possession from the definition of what constitutes "economic" activity, the majority does more than refuse to excise *de minimis* instances from the regulated class. Rather, it refuses to excise non-commercial activities from a Congressionally defined class—possession of a commodity—that is not, on its own terms, inherently economic. For the *Raich* majority, given that the "larger scheme" is economic, it is

⁷⁸ *Id.* at 2205 (citing *Perez*, 402 U.S. at 151).

⁷⁹ *Id.* at 2206 (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

⁸⁰ *Id.* at 2211 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). As Justice Thomas notes, the majority provides no explanation for its reliance on this particular dictionary, and other dictionaries do not provide quite so expansive a definition of "economic." *Raich*, 125 S. Ct. at 2236 n.7 (Thomas, J., dissenting) ("Other dictionaries do not define the term 'economic' as broadly as the majority does. . . . The majority does not explain why it selects a remarkably expansive 40-year-old definition." (citation omitted)). At one level, of course, the question answers itself. The majority cited this dictionary because it provided the definition that the majority wanted.

⁸¹ *Id.* at 2211.

⁸² *Id.*

⁸³ This expansive approach to what constitutes "economic" activity is also in conflict with *Lopez*. *Id.* at 2225 (O'Connor, J., dissenting) ("*Lopez* makes clear that possession is not itself a commercial activity.").

irrelevant that “purely intrastate,” non-economic activities are covered.⁸⁴ Not even the infamous case of *Wickard v. Filburn*,⁸⁵ upon which Justice Stevens heavily relies, reached this far. Farmer Filburn was engaged in economic activity—planting wheat as part of a larger commercial enterprise—even if he was not engaged in “commerce” with the wheat in question. As deployed by Justice Stevens, however, the import of *Wickard* is that Congress may regulate all possession of an object potentially bought and sold in interstate commerce.

Filburn was engaged in the manufacture of goods for interstate commerce. The statutory scheme at issue controlled wheat production, in part, as a factor in the production of other goods (e.g. milk, beef) in order to control wheat prices. In this light, the Court’s decision in *Wickard* could be seen as analogous to prior decisions in which the Court rejected a distinction between commerce and manufacture. The Court does not frame the case in this way, however, stressing instead that *Wickard* involved the regulation of a “purely intrastate activity” that was “not itself ‘commercial,’ in that it is not produced for sale,” but could nonetheless be regulated if Congress believed a “failure to regulate . . . would undercut the regulation of the interstate market in that commodity.”⁸⁶

Morrison, as reinterpreted by Justice Stevens, is fully consonant with this result, because the statute in question in *Raich*—the CSA—“is a statute that directly regulates economic, commercial activity.”⁸⁷ The invalidated VAWA provision (like the GFSZA) “fell outside Congress’ commerce power in its entirety.”⁸⁸ Thus, so long as a statute largely regulates economic or commercial activity—or defines a given activity at a level of generality sufficiently broad to cover a substantial amount of economic activity—there is no limit to the amount of non-commercial, intrastate activity that may also succumb to federal power so long as Congress enacts a sufficiently expansive regulatory regime.⁸⁹

The Commerce Clause analysis adopted by Justice Stevens provides no meaningful judicial check on Congressional power. A broad regulatory scheme that regulates economic matters in some regard will be constitutional in its entirety.⁹⁰ If any privately produced item that can substitute for a commercially produced good is subject to federal control, then Congressional power knows few limits. A comprehensive federal regulatory scheme governing commercial day care services could justify regulating child care in the home.⁹¹ A comprehensive regulatory scheme governing pre-packaged frozen dinners could justify regulating domestic food preparation. A comprehensive regulatory scheme governing land sales could justify the complete displacement of local

⁸⁴ *Id.* at 2209.

⁸⁵ 317 U.S. 111 (1942) (upholding the constitutionality of the Agricultural Adjustment Act of 1938).

⁸⁶ *Raich*, 125 S. Ct. at 2206.

⁸⁷ *Id.* at 2211.

⁸⁸ *Id.* at 2209 (emphasis added).

⁸⁹ Of note, the majority opinion offers no response to this charge.

⁹⁰ Vermeule, *supra* note 51, at 1332–33.

⁹¹ *Raich*, 125 S. Ct., at 2225 (O’Connor, J., dissenting).

zoning. And so on. Only the “political checks that . . . generally curb Congress’ power to enact a broad and comprehensive scheme” of regulation would stand in the way.⁹²

These expansive implications of the majority are made clear by the majority’s near-absolute deference to what Congress found—or, indeed, *might* have found had it looked. For the majority, the relevant question is not whether medical marijuana use in California actually does have a significant impact on commerce, but whether Congress *could* have believed so—even if it made no specific findings to that effect.⁹³ So long as an activity is “an essential part of a larger . . . regulatory scheme”⁹⁴ then Congress can pretty much define the class of activities as broadly as it would like.⁹⁵ Indeed, the broader the better, as this will all but ensure the statute’s constitutionality. Under *Raich* the only question for the Court is whether Congress could have rationally concluded this, not whether it is actually the case.⁹⁶ If Congress adopts legislation controlling non-commercial intrastate activity, so long as there could be a rational basis for believing that the activity is substantially related to regulated commercial activity, it should be upheld—even if the Court disagrees.⁹⁷

While the majority opinion pays lip service to the idea of judicially enforceable limits on federal power, there is no evidence that the majority would ever second-guess Congress’s conclusion that controlling non-commercial conduct was necessary to regulate economic activity with which Congress was concerned. It may still be the case that narrow, largely symbolic statutes with no relationship to economic activity may exceed the Commerce Clause, but this is not a meaningful limit on federal power. Such a limit is dependent upon Congress’s own restraint. So long as Congress thinks big—“we want the world and we want it, now”⁹⁸—the judiciary will not limit the assertion of federal power. Like the Lizard King, Congress can do anything.⁹⁹ In this fashion, the judicial safeguards of federalism are once again replaced with the political safeguards of federalism.

⁹² *Id.* at 2210 n.34.

⁹³ While substantial legislative findings accompanied passage of the CSA, none addressed the medical use of otherwise prohibited substances authorized and regulated under state law. This should be no surprise, as California and other states did not consider the regulated legalization of medical marijuana use until decades after adoption of the CSA. *Id.* at 2213 n.38 (noting California’s law was enacted “34 years after the CSA was enacted”).

⁹⁴ *United States v. Lopez*, 514 U.S. 549, 561 (1995).

⁹⁵ See *Raich*, 125 S. Ct. at 2212 (“The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity.”).

⁹⁶ See *id.* at 2213 (noting Congress “could have rationally rejected” California’s claim to have separated marijuana used for medical purposes from the broader marijuana market).

⁹⁷ Indeed, there is no indication in the majority opinion that the rational basis for this assumption needs to be articulated in the statute itself or legislative history.

⁹⁸ THE DOORS, *When the Music’s Over*, on STRANGE DAYS (Elektra/Asylum Records 1967).

⁹⁹ THE DOORS, *Not to Touch the Earth*, on WAITING FOR THE SUN (Elektra/Asylum Records 1968) (“I am the Lizard King. I can do anything.”). See also DAVIS, *supra* note 1, at 242.

*A. Five to One*¹⁰⁰

Concurring in the result Justice Scalia offered a “more nuanced,” if no less expansive, opinion.¹⁰¹ In Scalia’s view, the regulation of intrastate activities, such as Angel Raich’s possession and consumption of marijuana for medical purposes, could not properly be justified as the regulation of “commerce.” Intrastate possession, even of a commodity, is not “commerce.” Therefore, Congress could not reach such activity under the Commerce Clause alone. Rather, Congress’s power to reach such non-economic intrastate activities “derives from the Necessary and Proper Clause.”¹⁰² Rather than adopt an expansive definition of what constitutes an “economic” activity, Scalia instead relied upon the Necessary and Proper Clause to reach even those “intrastate activities that do not themselves substantially affect interstate commerce,” where such regulation is “necessary to make a regulation of interstate commerce effective.”¹⁰³ Scalia wrote separately because “this power ‘to make . . . regulation effective’ commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce,” yet the two powers are “distinct.”¹⁰⁴

The commerce power, by necessity, encompasses the power to “facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants.”¹⁰⁵ While such actions may not constitute direct regulation of commerce itself, actions to lubricate or stultify the flow of goods and services in interstate commerce may be “necessary and proper” to effectuate Congress’s regulation of commerce.¹⁰⁶ Because marijuana is a “fungible commodity,” congressional power to control interstate drug trafficking provides sufficient basis to criminalize smoking home-grown marijuana pursuant to a doctor’s prescription. The result in *Wickard* was grounded just as much on the “potential disruption” of Congress’s efforts to control wheat prices as it was on any effect personal wheat consumption had on interstate commerce itself.¹⁰⁷ Indeed, Scalia concurred with the majority’s troubling conclusion that any non-economic intrastate activity is fair game, so long as such activities are regulated “in connection with a more comprehensive scheme of regulation.”¹⁰⁸

¹⁰⁰ THE DOORS, *Five to One*, on WAITING FOR THE SUN (Elektra/Asylum Records 1968).

¹⁰¹ *Raich*, 125 S. Ct. at 2215 (Scalia, J., concurring). *Cf. id.* at 2230 (Thomas, J., dissenting) (noting that the application of the Necessary and Proper Clause poses a “more difficult” question than application of the Commerce Clause itself).

¹⁰² *Id.* at 2216 (Scalia, J., concurring).

¹⁰³ *Id.* at 2218 (Necessary and Proper Clause “empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation”).

¹⁰⁴ *Id.* at 2217.

¹⁰⁵ *Id.* at 2216.

¹⁰⁶ *Id.* at 2217 (“where Congress has the authority to enact a regulation of interstate commerce, ‘it possesses every power needed to make that regulation effective.’” (quoting *United States v. Wrightwood Dairy*, 315 U.S. 110, 118–19 (1942))).

¹⁰⁷ *Id.* at 2217 n.2.

¹⁰⁸ *Id.* at 2218.

The problem with Scalia's formulation, however, is that the judgment as to whether the regulation of non-economic activity is necessary to further a regulation of commerce is left up to Congress, just as it is in Stevens's majority. In reviewing a federal statute "the relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."¹⁰⁹ Scalia makes clear that "'all measures necessary or appropriate to' the effective regulation of the interstate market,"¹¹⁰ as determined by Congress, are allowed. Review of this question is to be quite deferential as well.

Insofar as limits remain, limits that in Justice Scalia's view would justify the holdings of *Lopez* and *Morrison*, they are to be found in the rejection of federal authority based solely upon a "remote chain of inferences" connecting a given non-economic intrastate activity to some effect on interstate commerce.¹¹¹ Yet Scalia's opinion does not really insulate such activities from federal regulation. As suggested by the majority, the problem in *Lopez* was not that Congress sought to regulate intrastate gun possession, but that Congress failed to enact a more expansive regulatory statute. Indeed, Scalia as much as acknowledges that *Lopez* and *Morrison* "do not declare noneconomic activities to be categorically beyond the reach of the federal government."¹¹² The problem in each of those cases was that neither statute regulated non-economic intrastate activity "in connection with a more comprehensive scheme of regulation."¹¹³ Yet guns, no less than marijuana, are items in interstate commerce, so had Congress wanted to regulate gun possession in school zones, a more comprehensive regulatory scheme would have done the trick.¹¹⁴

Scalia argues that his approach does retain limits on the Commerce Clause, but it is ultimately unconvincing. Scalia argues that "the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make interstate regulation effective."¹¹⁵ Yet as he acknowledges, so long as Congress could reasonably conclude that the regulation of a given non-economic intrastate activity is necessary to maintain a broader regulatory scheme, it passes muster. Thus, as with the majority opinion, the real limit on Congress's ability to reach non-economic intrastate conduct does not come from judicial review, but from potential political opposition to the enactment of the broad regulatory measures

¹⁰⁹ *Id.* at 2217 (quoting *United States v. Darby*, 312 U.S. 100, 121 (1941)).

¹¹⁰ *Id.* at 2218 (quoting *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914)) (emphasis added).

¹¹¹ *Id.* at 2217.

¹¹² *Id.* at 2218.

¹¹³ *Id.*

¹¹⁴ See *id.* at 2219–20 n.3 (suggesting the Gun Free School Zones Act could have been upheld had it been part of a broader federal regulatory scheme). As Justice O'Connor observes, prior to *Raich* "such arguments have been made only in dissent." *Id.* at 2223 (O'Connor, J., dissenting) (citing *United States v. Morrison*, 529 U.S. 598, 657 (2000) (Breyer, J., dissenting)).

¹¹⁵ *Id.* at 2218 (Scalia, J., concurring).

that would be necessary to reach otherwise non-regulatable activity. If this is “not a power that threatens to obliterate the line between ‘what is truly national and what is truly local,’”¹¹⁶ this is solely because Congress is unlikely to regulate so aggressively as to preempt local control of most local activities. This is a revival of the “political safeguards of federalism” in all but name.

At one level, Scalia’s opinion is more doctrinally satisfying as it does not require the Court to morph the power to regulate “commerce among the states” into the power to regulate anything that might plausibly relate to such commerce. Nor does it rely upon an elastic interpretation of what constitutes economic activity. Yet as elaborated upon by Justice Scalia, this approach to the Commerce Clause results in an equally expansive interpretation of federal power, and poses just as mortal a threat to the viability of *Morrison*. By Scalia’s admission, this is an expansive interpretation of Congress’s regulatory authority. In some cases it may even be *more* expansive than the rationale adopted by the majority.¹¹⁷

B. *The Changeling*¹¹⁸

There was little doubt that the four most liberal justices would uphold an expansive interpretation of the Commerce Clause power. Justices Stevens, Souter, Ginsburg and Breyer made no secret of their distaste for the heightening of Commerce Clause scrutiny in *Lopez* and *Morrison*. Justice Kennedy, on the other hand, joined the majority in each of those cases, and stressed the importance of federalism and state autonomy in many other cases as well.¹¹⁹ For this reason, Justice Kennedy’s silence in *Raich* was quite conspicuous, as he appears to have changed his views on the judiciary’s obligation to enforce meaningful limits on federal power.

In *Lopez*, and elsewhere, Justice Kennedy stressed the importance of state autonomy. States, he suggested time and again, needed the freedom and flexibility to develop and implement different approaches to various policy concerns. While Congress may believe that banning guns in and around schools is the most efficient and effective way to reduce gun violence in schools, individual states could well decide that other policies would be equally effective or better balance competing policy concerns.¹²⁰ While the U.S. Environmental Protection Agency might believe that local air quality is best

¹¹⁶ *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

¹¹⁷ *Id.* at 2216 (Scalia, J., concurring) (noting that “the category of ‘activities that substantially affect interstate commerce,’ is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce”) (citation omitted).

¹¹⁸ THE DOORS, *The Changeling*, on L.A. WOMAN (Elektra/Asylum Records 1971).

¹¹⁹ See, e.g., *Alaska Dep’t of Env’tl. Cons. v. Env’tl. Prot. Agy.*, 540 U.S. 461, 502 (2004) (Kennedy, J., dissenting); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 744 (2003) (Kennedy, J., dissenting); *Alden v. Maine*, 527 U.S. 706 (1999). But see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

¹²⁰ *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

protected through the adoption of particular technologies when facilities are built or modified, individual states might prefer alternative approaches that place a greater priority on local economic conditions.¹²¹ Yet if a state believes that the controlled medical use of marijuana is in the best interest of its citizens, it is not allowed the flexibility to experiment with such a policy if the federal government believes that any and all possession and consumption of marijuana is unacceptable.

Justice Kennedy may have been convinced by the federal government's argument that allowing medical marijuana in one or more states would threaten the federal government's control of interstate drug markets and compromise the general prohibition on the manufacture and distribution of illegal drugs. Yet states opposed to the legalization of medical marijuana did not share this view. Three states filed an amicus brief to in support of the respondents despite their opposition to California's policy.¹²² Not a single state filed a brief defending the federal government's position.¹²³ The federal government argued that excluding any marijuana possession from the CSA, for any purpose, threatened the viability of national prohibition. Yet Alabama, where drug possession is prosecuted quite vigorously,¹²⁴ sought to "support their neighbor's prerogative in our federalist system to serve as 'laboratories for experimentation.'"¹²⁵ California's policy may have been "profoundly misguided," yet it posed a lesser threat to Alabama's sovereignty than a federal commerce power without effective judicial restraints. Despite Justice Kennedy's prior solicitude for allowing states to act as laboratories of democracy, he did not respond to such concerns.¹²⁶

One possible explanation for Justice Kennedy's position is that states should be permitted to engage in policy experiments only in those contexts where there is little risk of significant interjurisdictional competition. In *Lopez*, Justice Kennedy noted that leaving states free to set their own policies unleashes a competitive dynamic through which states experiment and compete to provide the mix of services and amenities desired by present and prospective residents.¹²⁷ This dynamic may not operate in an equivalent fashion across all policy areas, however. States that adopt unduly burdensome taxes or regulations risk discouraging business investment or expansion, and even

¹²¹ See *Alaska*, 540 U.S. at 502 (Kennedy, J., dissenting).

¹²² Brief of the States of Alabama, Louisiana, and Mississippi as Amici Curiae Supporting Respondents, *Gonzales v. Raich*, 2004 WL 2336486 (hereinafter Alabama Brief). Louisiana, while a party to the brief, does allow the medicinal use of marijuana in very limited circumstances. See *id.* at n.5.

¹²³ This is potentially significant because, in other federalism cases, many states filed briefs supporting the constitutionality of a broad Commerce Clause power.

¹²⁴ See Ethan Nadelmann, *An End to Marijuana Prohibition*, NATL. REV. (July 12, 2004), at 28 ("Alabama currently locks up people convicted three times of marijuana possession for 15 years to life.").

¹²⁵ Alabama Brief, *supra* note 122, at 2–3.

¹²⁶ See *Gonzales v. Raich*, 125 S. Ct. 2195, 2221 (2005) (Connor, J., dissenting) ("This case exemplifies the role of States as laboratories.").

¹²⁷ *United States v. Lopez*, 514 U.S. 549, 581–583 (1995) (Kennedy, J., concurring).

driving taxpayers to more hospitable jurisdictions. Criminal laws, like those aimed at suppressing school violence or gender-motivated crimes, “cut[] the opposite way.”¹²⁸ Whereas states may benefit from reducing taxes or easing regulations, they benefit from increasing, not decreasing, the stringency of criminal laws.¹²⁹ Allowing states to experiment with different approaches to controlling drug abuse, it seems, risks some states adopting policies that are insufficiently stringent, as California and several other states elected to decriminalize medical marijuana possession. This sort of interjurisdictional competition—the sort that results in true policy diversity—is foreclosed by *Raich*. Yet to only allow states to experiment where the policy outcome is certain is to forego the benefits of state experimentation in the first place.¹³⁰

It is also possible that Justice Kennedy is convinced that any federal effort to control the national market in a commodity or service is constitutional, insofar as the emergence of a “single national market” is what led to the expansion of the federal commerce power in the first place.¹³¹ Other commentators have been less charitable in their initial assessments, suggesting that Justice Kennedy may have views about drug use that eclipse his concerns about the traditional federal state balance.¹³² Whatever the reason for his vote, Justice Kennedy offered no explanation as to how the *Raich* holding comported with federalism principles he endorsed in prior opinions. In *Raich*, we saw a once-reliable vote for a judicially enforced federalism change into a defender of federal power.

IV. I CAN’T SEE YOUR FACE¹³³

One additional wrinkle in *Raich* was the respondent’s effort to mount an *as-applied* Commerce Clause challenge. *Raich* did not maintain that the CSA as a whole, or even any of its provisions, was unconstitutional and should be struck down.¹³⁴ Rather, she maintained that the CSA was only unconstitutional as-applied to the specific conduct at issue. This was potentially significant because, up until this point, the only successful Commerce Clause challenges

¹²⁸ Epstein, *supra* note 37, at 180.

¹²⁹ GREVE, *supra* note 21, at 32.

¹³⁰ *Id.* at 82 (“a Court that celebrates state government *only* when and where the states will surely regulate . . . will soon forget that federalism’s point is to *discipline* state governments, not to empower them.”).

¹³¹ *Lopez*, 514 U.S. at 568, 574 (Kennedy, J., concurring) (“Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.”).

¹³² See Lyle Denniston, *Commentary: Justice Kennedy and the “War on Drugs”*, SCOTUSBLOG, June 6, 2005 (“Kennedy, it has been clear for some time, has little tolerance, judicial or otherwise, for those who are users of drugs, or who resist drug control measures.”) available at http://www.scotusblog.com/movabletype/archives/2005/06/commentary_just.html.

¹³³ THE DOORS, *I Can’t See Your Face*, on STRANGE DAYS (Elektra/Asylum Records 1967).

¹³⁴ *Gonzales v. Raich*, 125 S. Ct. 2195, 2230 (2005) (Connor, J., dissenting).

were *facial* challenges. While some litigants in prior cases had sought to make as-applied challenges to federal statutes, such claims were rejected by the Supreme Court every time they were brought.¹³⁵ If there was such a thing as an as-applied Commerce Clause challenge, there was little indication in the U.S. Reports what it might look like, and how it should be framed.

Facial challenges are rather straightforward. When a litigant challenges the constitutionality of a statute “on its face,” she argues that the statute is invalid irrespective of its application. For such a challenge to be successful, the litigant must demonstrate that “no set of circumstances exists under which the Act would be valid.”¹³⁶ As the Supreme Court explained in *United States v. Salerno*, this makes a facial challenge “the most difficult challenge to mount successfully” against a federal statute.¹³⁷

As a general rule, courts disfavor facial constitutional challenges to federal statutes.¹³⁸ Rather, the typical constitutional challenge alleges that a given statute is unconstitutional *as-applied* to a particular litigant or particular situation.¹³⁹ A successful as-applied challenge does not strike down the statute in question. It merely bars the government from applying that statute to the situation at hand. After a successful as-applied challenge, the government remains free to apply the statute in other contexts. The fact that the statute might be unconstitutional as-applied to certain circumstances has no impact on the law’s overall validity.¹⁴⁰ Outside of the First Amendment context, a law will not be struck down on “overbreadth” grounds because it “might operate unconstitutionally under some conceivable set of circumstances.”¹⁴¹

While the Court did not pause to declare the type of challenge at issue in either *Lopez* or *Morrison*, it is fairly clear that the Court upheld *facial*

¹³⁵ Nathaniel S. Stewart, Note, *Turning the Commerce Clause “On Its Face”: Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE WES. L. REV. 161 (2004). As Stewart details:

[T]he Supreme Court has invariably abstained from invalidating Commerce Clause statutes on an as-applied basis. That is, the Court has engaged in the facial analysis of determining whether the class of activity at issue is a constitutionally regulable class, and then whether the petitioner was a member of that class.

Id. at 196.

¹³⁶ *United States v. Salerno*, 481 U.S. 739, 745 (1987).

¹³⁷ *Id.*

¹³⁸ A court “should not extend its invalidation of a statute further than necessary to dispose of the case before it.” *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 502 (1985). See also *United States v. Raines*, 362 U.S. 17, 20–22 (1960) (as-applied challenges are preferred to facial challenges).

¹³⁹ See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000) (“the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge”). Indeed, Professor Fallon goes further, positing that “[a]ll challenges to statutes arise when a litigant claims that a statute cannot be enforced against her.” *Id.*

¹⁴⁰ See *Salerno*, 481 U.S. at 745 (“The fact that the Bail Reform Act might operate unconstitutionally under conceivable set of circumstances is insufficient to render it wholly invalid . . .”).

¹⁴¹ *Id.*

challenges to the respective statutes in each case.¹⁴² In neither case did the Court consider whether the specific conduct at issue—Alfonso Lopez’s possession of a gun in school or two Virginia Tech football players’ alleged brutal rape of another student—was substantially related to interstate commerce. Rather, the Court considered the laws themselves, striking them down because the relevant provisions lacked the necessary attachment to interstate commerce. In doing so, the Court necessarily held that in each case “no set of circumstances exists under which the Act would be valid.”¹⁴³

Had the Court only considered an as-applied challenge in either case, the result might have been different, particularly in *Lopez*. Alfonso Lopez had brought the gun to school as a courier in order to complete a commercial transaction.¹⁴⁴ His possession in this particular case was commercial.¹⁴⁵ On this basis, the Court could have readily aggregated Lopez’s gun possession in a school zone with all other instances of *commercial* gun possession in school zones—that is, all the other instances in which someone brought a gun into a school zone for the purpose of furthering a commercial transaction—and upheld the law as-applied to Lopez. After all, the *de minimis* nature of the activity is irrelevant if it may be aggregated with other like instances. As an as-applied challenge, *Lopez* would be virtually indistinguishable from cases like *Perez v. United States*, in which the Court upheld the federal regulation of a small-time local loan shark.¹⁴⁶

The Court did not uphold the GFSZA as-applied to Lopez, however. Rather, it struck down the statute because the regulated activity—gun possession in a school zone—was not economic. As the Court noted, the GFSZA “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”;¹⁴⁷ this was true regardless of whether Lopez possessed the gun for commercial purposes. It had no more than an attenuated connection to interstate commerce and could not be aggregated to sustain the law. Indeed, the fact that Lopez was engaged in a commercial transaction was not even mentioned in any of the justices’ opinions.¹⁴⁸ As emphasized in *Morrison*, the regulated conduct—gun

¹⁴² See *Sabri v. United States*, 541 U.S. 600, 610 (2004) (Kennedy, J., concurring in part) (noting that in *Lopez* and *Morrison*, the Court resolved “the basic question whether Congress, in enacting the statutes challenged there, had exceeded its legislative power under the Constitution”) (emphasis added); *Rancho Viejo, L.L.C. v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (“The Court in those cases upheld facial Commerce Clause challenges to legislation prohibiting the possession of firearms in school zones and violence against women.”).

¹⁴³ *United States v. Salerno*, 481 U.S. 739, 745 (1987).

¹⁴⁴ *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

¹⁴⁵ For instance, had the federal government banned gun possession for the purpose of engaging in black market firearms transactions, gun sales to minors, or some other commercially related activity.

¹⁴⁶ 402 U.S. 146, 146–47 (1971).

¹⁴⁷ *United States v. Lopez*, 514 U.S. at 561 (emphasis added).

¹⁴⁸ *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003), *reh’g en banc denied*, 334 F.3d 1158 (2003) (noting “the Supreme Court attached no significance to”

possession in a school zone—was not commercial in character.¹⁴⁹ This was true regardless of the commercial nature of Alfonso Lopez’s specific conduct.

The problem in each case was that the *class of activities* that Congress sought to regulate was beyond the scope of Congress’s Commerce Clause authority, even though it was conceivable that either statute could be applied to specific conduct that was commercial in character. Had the statutes been written differently—perhaps including jurisdictional elements that would have confined each statute’s reach to those activities sufficiently connected to commerce to lay within the scope of federal power¹⁵⁰—the results would almost certainly have been different. Rather than confront the constitutionality of each statute as a whole, the Court would have considered whether, given the facts of each specific case, a sufficient commercial connection was demonstrated to satisfy the requirements of the law. In *Jones v. United States*, for example, a unanimous court interpreted a federal statute prohibiting arson of any “property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce”¹⁵¹ to cover “only property currently used in commerce or in an activity affecting commerce.”¹⁵² By its terms, the statute only reached those activities within Congress’s Commerce Clause authority, so there would be no means to challenge the law as-applied. So long as Congress can prohibit arsons that are sufficiently connected to commerce, there is no constitutional problem with applying the statute to any given conduct that is itself sufficiently connected to commerce.

As noted above, the Supreme Court never ruled favorably on an as-applied Commerce Clause challenge. More important for understanding the obstacles confronting the respondents in *Raich*, the analysis consistently adopted by the Court in Commerce Clause cases would seem to preclude the possibility of an as-applied challenge. As the Court noted in *Maryland v. Wirtz*, “[t]he only question for the courts is then whether *the class* is ‘within the reach of the federal power.’”¹⁵³ And in every Commerce Clause case in the last six decades, the class has been defined by the terms of the statute adopted by Congress.¹⁵⁴ Thus, if a given litigant’s conduct is within the statutorily defined class—and regulation of the class as a whole is constitutional (or part of a broader, constitutional regulatory scheme)—the challenge will necessarily fail.

This is as true in the “New Federalism” cases as it was in the New Deal. For the Court to do what it did in *Lopez* and *Morrison*, it had to define the class

Lopez’s participation in a commercial transaction).

¹⁴⁹ United States v. Morrison, 529 U.S. 598, 611 (2000).

¹⁵⁰ For instance, the law could have been rewritten to require that the possession be with the intent to engage in a commercial transaction.

¹⁵¹ 18 U.S.C. § 844(i) (2000).

¹⁵² 529 U.S. 848, 859 (2000).

¹⁵³ Maryland v. Wirtz, 392 U.S. 183, 192 (1968) (quoting United States v. Darby, 312 U.S. 100, 120–21 (1941) (emphasis added)).

¹⁵⁴ From this perspective, one can argue that the proper Commerce Clause challenge to a federal statute is, in fact, a facial challenge. This case is made at length in Stewart, *supra* note 135.

based upon the conduct identified by Congress as the subject of the regulation. If a statute prohibits “possession of a firearm in a school zone” or “filling a jurisdictional wetland without a permit,” then that is how the class of activities is defined for the purposes of a Commerce Clause challenge.¹⁵⁵ If the statute also lacks a jurisdictional element, the question is not whether the specific conduct engaged in by a litigant affects commerce, either in isolation or in combination with all other like conduct. Rather, it is whether the conduct identified by Congress substantially affects commerce. If so, the statute is constitutional, and the only question is whether the litigant’s conduct falls within the statute.¹⁵⁶

Under existing precedents, for an as-applied challenge to be viable there needs to be an alternative means of defining the relevant class. Prior to *Raich*, none of the Court’s opinions suggested how this could be done. The Court has noted that “depending on the level of generality, any activity can be looked upon as commercial.”¹⁵⁷ Because *de minimis* instances of a regulable class are not excluded from Congress’s reach, the Court was required to adopt a qualitative approach to determining what activities substantially affect commerce.¹⁵⁸ Yet it has still focused on the class as defined by Congress so as to avoid a potentially standardless and indeterminate inquiry into how a given regulated activity should be classified and characterized.

The reason why as-applied challenges are nonetheless appealing is because requiring facial challenges has the potential to be very strong medicine.¹⁵⁹ Where federal statutes lack jurisdictional elements, or other provisions that would enable courts to excise a given litigant’s conduct from the statute’s reach, the only way a court can rule favorably on a Commerce Clause challenge is to strike the statute down. In the case of a broad regulatory statute, such as the Controlled Substances Act, the lack of as-applied challenges presents courts with a dilemma: Invalidate the statute or allow Congress to regulate classes of activities that lack a substantial relation to interstate commerce.¹⁶⁰

¹⁵⁵ See, e.g., *GDF Realty Invs. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003) (noting “the scope of the inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce”).

¹⁵⁶ As a practical matter, these issues are likely to be addressed in the opposite order so as to avoid the premature consideration of constitutional questions. That is, the Court will first determine whether the conduct in question falls within the scope of the statute. Only after answering this question affirmatively will a court then proceed to considering the statute’s constitutionality.

¹⁵⁷ *United States v. Lopez*, 514 U.S. 549, 565 (1995).

¹⁵⁸ *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968) (Courts lack the power “to excise, as trivial, individual instances falling within a rationally defined class of activities.”).

¹⁵⁹ See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (“Facial invalidation ‘is, manifestly, strong medicine’ that ‘has been employed by the Court sparingly and only as a last resort.’” (citation omitted)).

¹⁶⁰ Under the general assumption that statutory provisions will be severable, the court would not have to strike down the statute in its entirety, but it would have to invalidate a given statutory provision.

A good example is the Endangered Species Act (ESA).¹⁶¹ Under section 9 of the ESA, it is unlawful to “take” a species listed as “endangered” under the act.¹⁶² The ESA defines “take” to include just about any activity that could kill, injure, or harm a listed species, including the modification of habitat on private land.¹⁶³ While the law clearly covers many commercial activities, such as paving over habitat to build a parking lot or strip mall, as well as economically motivated behavior, such as hunting endangered animals to sell their feathers or fur, by its terms the ESA is not confined to conduct that is substantially related to commerce. While it may be the case that the vast majority of activity regulated under the ESA would still be regulated were the statute to contain a jurisdictional element limiting its application to commercially related activities, such a provision is lacking. For this reason, it is not immediately clear why the taking of a species on private land is all that different from carrying a gun to school. Each activity may be related to commerce in any given instance, but a statute prohibiting either does not define a commercially related class. That is to say, whether a given individual’s conduct is covered by the statute has nothing to do with whether her conduct substantially affects commerce. All that matters is the “take” of a listed species. Shooting an endangered owl out of spite is just as illegal as bulldozing Delhi Sands Flower-loving fly habitat for commercial development. A teenager’s spiteful use of a slingshot can be just as criminal as a developer’s profit-seeking use of land movers. Without an as-applied challenge, the federal government’s authority to regulate both activities will rise or fall together.

Faced with this dilemma, appellate courts have struggled to come up with coherent rationales for sustaining the ESA against Commerce Clause challenges.¹⁶⁴ In the cases to date, three divided appellate courts have upheld the ESA as against Commerce Clause challenge.¹⁶⁵ Appellate judges are understandably reluctant to invalidate a far-reaching environmental statute intended to protect thousands of different species from extinction.¹⁶⁶ After *Morrison* they are also not to uphold federal statutes on a basis that effectively

¹⁶¹ 16 U.S.C. §§ 1531–44 (2000).

¹⁶² 16 U.S.C. § 1538(a)(1) (2000).

¹⁶³ 16 U.S.C. § 1532(19) (2000) (defining to “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct”). See also *Babbitt v. Sweet Home Chapter of Cmty.*, 515 U.S. 687, 690 (1995) (upholding definition of “take” to include “significant habitat modification or degradation” that “actually kills or injures wildlife”).

¹⁶⁴ This issue is addressed in greater depth in Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 406–17 (2005).

¹⁶⁵ See *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2003), *reh’g en banc denied*, 334 F.3d 1158 (2003); *GDF Realty Invs. v. Norton*, 326 F.3d 622, 624 (5th Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043 (D.C. Cir. 1997).

¹⁶⁶ Appellate judges are reluctant to strike down such a well-intentioned statute even if it does not clearly protect endangered species. See Adler, *supra* note 164, at 459–60 (summarizing arguments that the Endangered Species Act is not effective at conserving species).

creates an unlimited federal regulatory power. Yet lacking the means to rule on an as-applied challenge, they must choose one or the other.

Like prior courts, the *Raich* majority dealt with this issue by treating the as-applied challenge as if it were a facial challenge.¹⁶⁷ The Court acknowledged that the challenge was as-applied, but the Court did not conduct an as-applied analysis. Although the Court uses the phrase “as applied” several times throughout the decision, there is really no as-applied analysis. Insofar as the Court holds that minor, intrastate, non-economic activities may be regulated as part of a broader regulatory scheme, there is no set of facts to which an otherwise valid law would be unconstitutional “as-applied.”

Given that the CSA itself is a constitutional regulation of economic activity, the Court saw no basis upon which it could carve out the conduct at issue from the overall regulatory scheme. Indeed, the Court fully deferred to Congress’s judgment that the class of activities regulated by the CSA was a single, undifferentiated class for the purposes of Commerce Clause challenges.¹⁶⁸ Given Congress’s apparent, albeit now wholly articulated, judgment, the Court dismissed efforts by the respondents and the dissenters to differentiate the noncommercial intrastate possession of marijuana for medical purposes pursuant to state law from commercially related possession.

This treatment of an as-applied challenge was not an innovation in *Raich*. To the contrary, the Court’s refusal “to excise individual components of that larger scheme” has been the norm—a norm to which there have been no exceptions.¹⁶⁹ After *Raich*, this pattern will continue. Because an “as-applied” challenge is only a challenge to a federal statute as-applied to a given class—and because the Court holds that Congress may regulate *any* class of activities that are plausibly connected to commerce so long as the regulation is part of a broader regulatory scheme—there is no potential for a successful as-applied challenge under *Raich*. When *Morrison* died, the prospect for as-applied Commerce Clause challenges expired as well.

V. WHEN THE MUSIC’S OVER¹⁷⁰

When Jim Morrison’s body was discovered lying in a bathtub in a Paris flat, some doubted he was really dead.¹⁷¹ There were rumors he had died

¹⁶⁷ There are cases in which the Court appeared to consider as-applied challenges to federal statutes. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). A careful reading of the Court’s analyses in these cases, however, reveals that the Court actually engaged in facial review of the statutes at issue. See Stewart, *supra* note 135, at 191–92.

¹⁶⁸ *Raich*, 125 S. Ct. at 2206 (“We have never required Congress to legislate with scientific exactitude. When Congress decides that the “total incidence” of a practice poses a threat to a national market, it may regulate the entire class.”).

¹⁶⁹ *Id.* at 2209 (“As we have done many times before, we refuse to excise individual components of a larger regulatory scheme.”).

¹⁷⁰ THE DOORS, *When the Music’s Over*, on STRANGE DAYS (Elektra/Asylum Records 1967).

¹⁷¹ DAVIS, *supra* note 1, at 466.

before,¹⁷² and to this day some maintain his death was staged.¹⁷³ But there is little doubt his life ended that sad day in France, ending a brief yet brilliant musical career.¹⁷⁴

The death of *United States v. Morrison* is equally hard to deny. Insofar as *Morrison* validated and fortified the holding of *United States v. Lopez*, its work has been undone. While it is possible to distinguish *Raich*, and argue the CSA is materially different from many other federal regulatory statutes, courts are unlikely to take this step any time soon.¹⁷⁵ Without the possibility of as-applied Commerce Clause challenges, such opportunities are unlikely to arise. Federal appellate courts were already reluctant to curtail federal power on Commerce Clause grounds. They will be even more timid after the Court's rejection of early experiments at isolating distinct non-commercial activity from broader regulatory schemes.

In another sense, *Morrison* will live on. Like *Lopez*, it will be cited in subsequent cases for the generic proposition that federal power is limited. *Morrison*'s formulation of the relevant considerations in evaluating Commerce Clause challenges will be repeated, but they will not retain any meaningful doctrinal force. Congress may not be able to enact stand-alone, symbolic legislation, but it will face no meaningful judicial obstacles to the assertion of far-reaching regulatory authority. Insofar as the judicial safeguards of limited and enumerated powers survive, they are a pale echo of what they might have been.

Jim Morrison's music lives on without him. Vigorous sales of posthumously released records and demos, videos of live performances, and other memorabilia continue to this day.¹⁷⁶ There was even a VH-1 special and a Doors reunion tour performing music Morrison himself never sang before a live audience.¹⁷⁷ Yet even the most talented replacement does not have the vitality of the real thing. It is a pale echo and, for some, a painful memory of what might have been.

¹⁷² *Id.* at 245 (United Press International erroneously reported Morrison's death in March 1968).

¹⁷³ *Id.* at 467 (noting one Morrison biography suggests Morrison "might have faked his own death").

¹⁷⁴ Jim Morrison died only five years after The Doors signed their recording deal with Elektra Records. By comparison, *Raich* was handed down only five years after *Morrison*.

¹⁷⁵ Ray Manzarek and Robby Krieger did not tour as The Doors of the 21st Century until over thirty years after Morrison's death.

¹⁷⁶ See, e.g., THE DOORS, IN CONCERT (Elektra/Asylum Records 1991); THE DOORS, THE BEST OF THE DOORS (Elektra/Asylum Records 1985); JIM MORRISON, AN AMERICAN PRAYER (Elektra/Asylum Records 1978). See also <http://www.thedoors.com>.

¹⁷⁷ Jim Morrison died before The Doors toured in support of the *L.A. Woman* album. See also "Riders on the Storm," at <http://www.thedoors.com/band/?fa=21stc>.

778

LEWIS & CLARK LAW REVIEW

[Vol. 9:4]

This is the end, beautiful friend
This is the end, my only friend
The end of our elaborate plans
The end of everything that stands
*The end.*¹⁷⁸

¹⁷⁸ THE DOORS, *The End*, on THE DOORS (Elektra/Asylum 1967).