

## WHY NOT HEIGHTEN THE SCRUTINY OF CONGRESSIONAL POWER WHEN THE STATES UNDERTAKE POLICY EXPERIMENTS?

by  
Ann Althouse\*

*This Article assesses Justice O'Connor's attempt, in her dissent from Gonzales v. Raich, to define a new standard of review for congressional Commerce Clause authority when a state has undertaken a policy experiment in an area that has traditionally been left to states. The majority in Raich found that the Controlled Substances Act was not a "single-subject statute," as in United States v. Lopez and United States v. Morrison, and regulated more than non-commercial intrastate matters. The majority viewed Raich as an easy case—not significantly different from Wickard v. Filburn. This Article finds that the decision was conventional and predictable and not a surprising betrayal of the principles of limiting the commerce power articulated in Lopez and Morrison.*

*O'Connor's dissent, although never clearly articulated, suggests a higher level of scrutiny for federal statutes that infringe on the states' ability to carry out specific policy experiments. This Article restates O'Connor's suggestion as a straightforward doctrine and discusses the difficulties it would present. It may be disappointing and unsatisfying to those of us who care about federalism values, but O'Connor's suggested doctrine would be unworkable and unstable.*

I.	INTRODUCTION.....	780
II.	THE MAJORITY'S CONVENTIONAL TREATMENT OF CONGRESSIONAL POWER.....	781
III.	JUSTICE O'CONNOR'S ATTEMPT TO WORK OUT A NEW POSITION.....	783
IV.	SHOULD THE EXISTENCE OF A STATE POLICY EXPERIMENT INCREASE JUDICIAL SCRUTINY?.....	786
V.	CONCLUSION .....	789

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\* Robert W. & Irma M. Arthur-Bascom Professor of Law, University of Wisconsin-Madison. I would like to thank my son John Althouse Cohen for his editorial help on this Article.

## I. INTRODUCTION

Long ago, Justice Louis Brandeis praised federalism because “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.”<sup>1</sup> Beginning her dissenting opinion in *Gonzales v. Raich*<sup>2</sup> with that classic quote, Justice Sandra Day O’Connor invited us to see the state of California as a model “laboratory of democracy” and its Compassionate Use Act<sup>3</sup>—providing for the medicinal use of marijuana—as a promising project that we ought to want to accommodate through constitutional interpretation. In this Article, I examine Justice O’Connor’s attempt to provide this seemingly desirable interpretation and find it muddled. In search of clarity, I restate her interpretation as a straightforward doctrine that heightens the judicial scrutiny of congressional powers when a state has embarked on a policy experiment like California’s. Looking unsentimentally at this doctrine, unfortunately, I find it impracticable.

I say “unfortunately” because I am genuinely sorry to have to controvert what may be Justice O’Connor’s final attempt at articulating an approach to the judicial enforcement of federalism. I have followed Justice O’Connor’s writings about federalism throughout her tenure on the Court.<sup>4</sup> I have shared what I think are her reasons for caring about the search for a judicially enforceable federalism.<sup>5</sup> In this view, federalism is not merely an artifact of the founding era but a valuable structural safeguard, worthy of enforcement because it yields tangible benefits in the present day. When we approach *Raich* with this attitude, we may feel disposed to find a way to protect California’s autonomy as it performs a valuable policy experiment.

Set against California’s law is the Controlled Substances Act,<sup>6</sup> which contains Congress’s uncompromisingly harsh judgment banning all uses of marijuana, regardless how small or sympathetic. It expresses a clear and pervasive federal policy of remorseless prohibition. One might fantasize about asking Congress: *Are you sure you mean to cover even a fragile cancer patient who sincerely believes marijuana is keeping her alive?* If the members of Congress had to wield their power like that, they would not dare to vote to deny Angel Raich the right to use marijuana.<sup>7</sup> But sweepingly broad statutes are

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<sup>1</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>2</sup> 125 S. Ct. 2195 (2005).

<sup>3</sup> Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2005).

<sup>4</sup> Justice O’Connor dominated the Court’s writing about federalism in the early 1990s. Of particular note are *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *New York v. United States*, 505 U.S. 144 (1992).

<sup>5</sup> See, e.g., Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993).

<sup>6</sup> Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801–971 (2000)).

<sup>7</sup> We have seen Congress’s willingness to give exceptional treatment to a suffering woman once the public spotlight shines on her. See David D. Kirkpatrick and Sheryl Gay Stolberg, *How Family’s Cause Reached the Halls of Congress*, N.Y. TIMES, Mar. 22, 2005,

common, and nothing forces Congress to address arguments about the need for exceptions that arise in the real-world application of statutes it saw fit to enact years ago. Congress certainly has the power to amend the Controlled Substances Act to provide for the medicinal use of marijuana, but it has not revisited its original choice to ban all marijuana use, and the fact that it never made a nuanced judgment about the small-scale medicinal use of marijuana is irrelevant under existing doctrine. If the federal law is broad enough to preempt, and no constitutional rights stand in the way, the only question is the breadth of Congress's enumerated powers.<sup>8</sup> A federal law, however crude, trumps conflicting state law, no matter how carefully conceived and magnificently beneficial the state's policy experiment may be.

The decision in *Raich* was thus conventional and predictable. In the next Part of this Article, I look at why we should not be surprised at the outcome or view it as a betrayal of the principle of limiting the commerce power articulated in *United States v. Lopez*<sup>9</sup> and *United States v. Morrison*.<sup>10</sup> The interesting question is whether some new doctrine could have been created, changing the rules of preemption, imposing some higher level of scrutiny on crudely broad federal statutes that infringe on the ability of the states to carry out specific policy experiments. I then examine Justice O'Connor's dissent and find that it suggests this path without taking responsibility for articulating the necessary doctrine, admitting what a departure it would be from established practice, and perceiving the complications it would cause in future cases. Restating the doctrine that O'Connor's opinion only suggested, I outline some of the difficulties it would present. In conclusion, I invite anyone who thinks the Court went wrong in *Raich* to think through the question in the framework I have set out here. To my regret, I cannot support the doctrinal innovation suggested by the O'Connor dissent.

## II. THE MAJORITY'S CONVENTIONAL TREATMENT OF CONGRESSIONAL POWER

The *Raich* plaintiffs hoped to convince the Court that the commerce power, though notoriously broad, did not reach home-grown marijuana used for medicinal purposes under the California Compassionate Use Act. The recent cases of *Lopez v. United States* and *United States v. Morrison* seemed to provide support for this argument. Yet when the Court struck down the Gun-Free School Zones Act (GFSZA) in *Lopez* and put some localized, noneconomic activities outside of the commerce power, it did not disaffirm any of its precedents. Of these precedents, *Wickard v. Filburn*<sup>11</sup> presented the most

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at A1 (describing "Congress's marathon weekend session, resulting in the recall of more than 260 members of the House from their spring vacations to try to preserve the life of one brain-damaged woman who has spent 15 years unable to speak, feed herself or move much more than her eyes").

<sup>8</sup> *Raich*, 125 S. Ct. at 2212.

<sup>9</sup> 514 U.S. 549 (1995).

<sup>10</sup> 529 U.S. 598 (2000).

<sup>11</sup> 317 U.S. 111 (1942).

serious obstacle to the *Raich* plaintiffs. In *Wickard*, the Court upheld Congress's power to limit the production of wheat grown only for home use. It was enough that home-produced wheat, taken in the aggregate, had a substantial effect on the interstate market in wheat. Even if it were never sold, this wheat met the needs of someone who would otherwise make purchases in the market, and "overh[ung] the market," threatening to flow into the market. In the deferential view of the Court, Congress could rationally conceive of it as part of the set of activities that constituted the market it sought to regulate.

The Supreme Court saw *Raich* as an easy case, not significantly different from *Wickard*. Congress had the aim of controlling a large interstate market and opted to achieve this end by reaching down to the smallest components of that market, including growing the product without ever intending to sell it. The *Raich* plaintiffs had perceived room in the developing doctrine, after *Lopez*, to distinguish *Wickard* on the ground that, in that case, the wheat was grown on a commercial farm. The *Lopez* opinion had, after all, stressed the noncommercial nature of gun possession. Moreover, in *United States v. Morrison*, the Court, following *Lopez*, made the same commercial/noncommercial distinction as it struck down the portion of the Violence Against Women Act that gave individuals a federal cause of action against their private-citizen attackers. Because the regulated activity—gender-motivated violence—is not commercial, it was not enough, the Court wrote, that the activity, taken in the aggregate has a substantial effect on interstate commerce. Relying on *Lopez* and *Morrison*, the *Raich* plaintiffs called attention to the fact that their cultivation and use of marijuana was not commercial. They grew it at home, not as part of any farming operation, and had no intention of selling it or using it to produce anything that they would sell.

Justice Stevens, writing for the majority in *Raich*, brushed aside this argument, noting that the *Wickard* Court had recognized that "Wickard's activity 'may not be regarded as commerce.'"<sup>12</sup> The farmer in the case was *Filburn*, not *Wickard*, and Stevens's sloppy mistake seems to betray a breezy confidence in the existence of pervasive federal power. Indeed, Stevens, like three other members of the *Raich* majority, dissented in *Lopez* and *Morrison*, and presumably has little interest in nurturing the commercial/noncommercial distinction.<sup>13</sup> I would expect these four Justices some time soon to cite *Raich* for the proposition that the commercial/noncommercial distinction has been abandoned.

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<sup>12</sup> *Raich*, 125 S. Ct. at 2207 n.30.

<sup>13</sup> Justice Breyer's dissenting opinion in *Lopez* chided the majority for trying to frame *Wickard* as a case involving economic activity:

*Wickard* . . . did not focus upon the economic nature of the activity regulated. Rather, [it] focused upon whether that activity affected interstate or foreign commerce. In fact, the *Wickard* Court expressly held that *Filburn's* consumption of homegrown wheat, "though it may not be regarded as commerce," could nevertheless be regulated—"whatever its nature"—so long as "it exerts a substantial economic effect on interstate commerce."

*Lopez*, 514 U.S. at 628 (Breyer, J., dissenting).

2005] HEIGHTEN THE SCRUTINY OF CONGRESSIONAL POWER 783

But what if the majority had taken the distinction seriously? The Justices would have had to address the central *practical* problem at the heart of the *Raich* case: If Congress lacks the power to regulate home-grown marijuana used pursuant to California's Compassionate Use Act, how could it still have the power to regulate other home-grown, home-consumed marijuana, when there was no state-run program and, more significantly, when the use is not medicinal? The plaintiffs themselves recognized that it would never work to rely on the simple, *Lopez*-based argument that the substantial, aggregate effect on interstate commerce is not enough to bring a noncommercial activity within the commerce power. If that proposition were accepted, all home-grown, home-consumed marijuana would fall outside of the federal regulatory power, and the federal effort to suppress marijuana use would collapse.<sup>14</sup>

The plaintiffs had therefore tried to construct an argument that would place the *state-regulated* medicinal use outside of Congress's power while somehow leaving intact the power to regulate homegrown, home-consumed marijuana that the state had not tried to authorize. The Court of Appeals had accepted this difficult argument, and Justice O'Connor's dissenting opinion would also try to engage with it. But the majority's view of the Commerce Clause easily skirted this difficulty. In its view, when Congress writes an ambitiously comprehensive statute, it does not need to make specific findings about why it is applying the law to various intrastate activities:

That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.<sup>15</sup>

To the majority, *Lopez* and *Morrison* were completely different. They dealt with "single-subject statutes." There was no large statutory scheme regulating what was clearly a matter of interstate commerce that happened to sweep in tiny, intrastate matters. Congress had regulated *only* the tiny, noncommercial, intrastate matter. *Raich* would be similar to *Lopez* and *Morrison* if one segmented off the portion of the Controlled Substances Act to which California had taken an interest in giving special treatment. But the majority refused to see the question from the state's perspective. In the familiar style associated with judges who do not care about the judicial enforcement of federalism, the majority looked only at what Congress chose to do and applied the conventional, very deferential standard of review. The plaintiffs' argument never had a chance.

### III. JUSTICE O'CONNOR'S ATTEMPT TO WORK OUT A NEW POSITION

Justice O'Connor began her opinion from the state's perspective. The states are laboratories of democracy. California has addressed a "difficult and sensitive question" about a matter lying within the sphere of "core police

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<sup>14</sup> Regulation of marijuana would devolve to the states, some of which might choose to permit the noncommercial use of home-grown marijuana.

<sup>15</sup> *Raich*, 125 S. Ct. at 2209.

powers” traditionally left to the states.<sup>16</sup> In contrast to California’s delicate approach to legislating, Congress has made a broad power grab, crudely defining vast territory for itself, without taking any care for the necessity of reaching as far as it did, even as the least needed parts of its scheme blocked beneficial, circumscribed policy experiments by state and local governments.

Justice O’Connor had taken a similar approach in *Lopez*, where she joined the concurring opinion penned by Justice Kennedy.<sup>17</sup> (One imagines that Kennedy’s defection to the *Raich* majority must have dismayed O’Connor.) The *Lopez* concurrence—representing the fourth and fifth votes—contrasted with the crisper textualism and originalism of Chief Justice Rehnquist’s majority opinion. The *Lopez* concurrence focused on the way Congress’s blunt decision to deal with school violence through a harsh criminal penalty intruded on the more creative policy experiments undertaken by state and local government. Invoking the classic Brandeis citation, Kennedy wrote of the normative value of allowing the states to “perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”<sup>18</sup> Some states might want to impose the kind of “harsh criminal sanctions” that Congress had favored, but other states, responding to local conditions and local democratic preferences, might come up with workable alternatives, such as gun exchange programs or parental responsibility laws:

The [GFSZA] forecloses 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.<sup>19</sup>

From the perspective of the state experimenting with a new policy, the Controlled Substances Act is much more of an intrusion than the GFSZA. State and local governments would almost surely agree with the federal government that guns ought to be kept out of schools. They might, however, want to pursue solutions more sensitive to child psychology and adolescent development than the stark criminal penalties that Congress decided to impose. Creative solutions devised by state and local government are interfered with if federal prosecutors intervene and pluck schoolchildren out of their communities and have them imprisoned for a term of years. By contrast, under the Controlled Substances Act, the federal government interferes not only with the state’s choice of means, it also puts the federal government at odds with the state’s end: it bans the drug the state wants to authorize. The state cannot even begin its experiment with medicinal marijuana, because it directly conflicts with federal law.

As we have seen, the *Raich* majority found the CSA to be much easier to justify than the GFSZA because of its comprehensiveness. With the GFSZA, Congress selected a single topic close to the core of state responsibility, but

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<sup>16</sup> *Id.* at 2221 (O’Connor, J., dissenting).

<sup>17</sup> *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

<sup>18</sup> *Id.* at 581.

<sup>19</sup> *Id.* at 583.

most of what Congress sought to do with the CSA belongs solidly within the commerce power. The argument about constitutionality lies around the edges, with respect to the last few components of what Congress saw as the market it wanted to control. It is one thing to look at a minor, single-issue statute and say that it lies outside of Congress's power, quite another to take one of Congress's major legislative schemes and permit individual litigants to petition the courts to isolate their activity and judge Congress's work as it applies to them alone. And, indeed, Justice O'Connor conceded that the courts could not allow each person who wants to avoid federal regulation to draw a line around himself and to ask to have his activity judged in isolation.

Justice O'Connor accused the majority of sending "a signal" to Congress that it can aggrandize its power by writing "more extensive and more intrusive" statutes. She fretted that, under the majority's approach, the concept of enumerated powers will become "nothing more than a drafting guide."<sup>20</sup> But what alternative did she offer? After critiquing the majority's opinion, Justice O'Connor expatiated on the need for courts to do the "hard work" of searching for "objective markers" to limit congressional power without taking over the legislative role.<sup>21</sup> But how is this to be done? O'Connor does not inspire confidence as she begins her idea by saying, "[t]he analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated."<sup>22</sup> In other words, she would have the courts engage in ad hoc balancing of federal interests and state interests? Despite the repetition of the word "objective" and the replacement of the usual word "factors" with the more scientific-sounding "markers," the discussion is hopelessly mushy. I puzzled for an hour over this paragraph in a futile search for doctrine or even some factors phrased with some generality:

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation recognize that medical and nonmedical (*i.e.*, recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. Respondents challenge only the application of the CSA to medicinal use of marijuana. Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where "States lay claim by right of history and expertise." California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress's encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.<sup>23</sup>

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<sup>20</sup> *Raich*, 125 S. Ct. at 2223 (O'Connor, J., dissenting).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2224 (citations and parenthetical quotations omitted).

Let me translate that into plain English:

It makes sense to distinguish the medicinal and nonmedicinal uses of marijuana. The state has passed a law that draws a line there, and traditionally, states have regulated in areas of health and crime. I would therefore like to ask only whether Congress can regulate the [state-regulated] medicinal use of home-grown, home-consumed marijuana.<sup>24</sup>

Justice O'Connor goes on to treat Congress's ban on the state-regulated medicinal use of home-grown, home-consumed marijuana as if it were a single-subject statute like the GFSZA and finds that it is not economic, and moreover, does not have a substantial effect on interstate commerce.<sup>25</sup>

But what happens in other cases where someone affected by a comprehensive federal statute asks a court to view his or her activity in isolation? Let me try to translate that O'Connor paragraph once again, this time making it into a general proposition:

When the state regulates in a way that draws a rational line around a type of activity that states have traditionally regulated, the scope of congressional power will be judged only with respect to that activity and without regard to the existence of a larger statute.

Did O'Connor think beyond the specific, sympathetic plight of the plaintiffs in this case and consider what it would mean for courts to handle questions about the scope of Congress's power in this manner? She never articulated a new doctrine at a higher level of generality, and, unsurprisingly, she had nothing to say about how such a new approach would work in practice across a broad range of cases.<sup>26</sup> But let us consider what she did not.

#### IV. SHOULD THE EXISTENCE OF A STATE POLICY EXPERIMENT INCREASE JUDICIAL SCRUTINY?

Let us consider whether to embrace a new doctrine that would change the degree of deference to Congress where a state has undertaken a policy experiment in an area that had been traditionally left to the states. We would

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<sup>24</sup> The bracketed material represents an additional limitation that I believe, from reading the rest of O'Connor's opinion, she meant to include. This omission magnifies my already intense exasperation with this paragraph. Later, in determining that the segmented-off activity does not have a substantial effect on interstate commerce, O'Connor writes: "Because here California, like other States, has carved out a limited class of activity for distinct regulation, the inadequacy of the CSA's findings is especially glaring." *Id.* at 2228.

<sup>25</sup> Unlike the exasperating paragraph quoted above, the crucial link in the chain of reasoning, this part of O'Connor's opinion goes on at great length. *Id.* at 2224–29. Responding, the majority thought that the even the segmented off activity standing alone satisfied the substantial effects test. *Id.* at 2213–15.

<sup>26</sup> Justice Stevens, writing for the majority, did briefly address the idea as a generality, and neatly folded the problem back into the conventional deference to Congress:

The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.

*Raich*, 125 S. Ct. at 2213.



## 2005] HEIGHTEN THE SCRUTINY OF CONGRESSIONAL POWER 787

not allow Congress to define the outer reaches of its own power and intrude aggressively into intrastate matters involving health, safety, welfare, education, and street level crime, if the state has acted by drawing a statutory line, identifying an activity and claiming its interest in regulating it. Instead, courts would accept the state's line and judge the scope of congressional power only with respect to the activity within the circumscribed area of the state's policy experiment, without regard to the existence of a larger statute.

Although putting the question this way may seem like a throwback to an era when courts saw the Tenth Amendment as an affirmative limitation on Congress's power,<sup>27</sup> one could argue that it is simply a recognition that courts, applying the rational basis standard of review, have been very deferential to Congress's vision of its own power. That deference stems largely from ideas about the imperfection of *judges*. But when the *state* has acted, drawing a line around the activity it sees fit to regulate, it is no longer a matter of the difficulty courts have drawing the line that marks the end of Congressional power. The court can use the line that the state has drawn as its starting point and, motivated by respect for the democratic processes that took place within the state, shake off the erstwhile pull of judicial restraint. By acting, the state has functioned as a laboratory of democracy and come up with a policy experiment. Now the question is not whether the countermajoritarian courts will oppose a democratically based decision of Congress, but whether the courts will umpire the competing democracies at the national and state levels. With less justification for judicial restraint, the courts could look at the area within the state's policy experiment and ask whether Congress has the power to regulate those activities. In this analysis, Congress loses the ability to draw the line that defines its own power. The state's line is taken seriously, and Congress's larger statutory scheme no longer boosts Congress's power. The courts treat Congress's regulation of the activity that the state has segmented off as if it were a single-issue statute like the GFSZA.

This doctrinal move would be somewhat similar to the presumption against preemption, articulated in *Gregory v. Ashcroft*,<sup>28</sup> where Congress regulates in an area traditionally left to the states. A key difference is that Congress can overcome the presumption against preemption with a clear statement. The proposed doctrine discussed in this Article would enforce federalism values by removing the presumption in favor of congressional power that is currently reflected in the deferential approach to defining the commerce power. Under this new approach, once the court decides that a particular matter is outside of Congress's power, there is nothing Congress can do to acquire that power short of initiating the constitutional amendment process.

Good idea? It is great news for Angel Raich. Does it solve the problem of the run-of-the-mill recreational user of marijuana who would like to be left

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<sup>27</sup> See *United States v. Darby*, 312 U.S. 100 (1941) (viewing the Tenth Amendment as nothing but "a truism that all is retained which has not been surrendered").

<sup>28</sup> 501 U.S. 452 (1991).

alone with his potted plant and his at-home pleasures? It does, but only until the state decides to undertake a policy experiment on behalf of persons like him.

Here, we encounter the classic dilemma about federalism: we might like to empower vanguard states to experiment with bold, creative new policies, but we also fear the bad things states will do if they have autonomy. In an individual case, like *Raich*, we may feel strongly compelled to find a way to insulate the state's project from federal laws we think are misguided or harsh, but we hesitate to create a new doctrine that will also insulate states that make choices we disapprove of—choices that will hobble the federal government when it has a better policy.<sup>29</sup> One solution is to fuzz up the opinion, in the manner of Justice O'Connor's *Raich* dissent, so that the state with an experiment that the Court favors can prevail in the present case, but the Court has not committed itself to what will happen in the next case and has not revealed to the states what they must do to build a separate sphere for themselves. This solution maximizes judicial power and generates uncertainty and litigation. It also misses the point of supporting the states as laboratories of democracy. If one really believes in the laboratories concept, one should want to free the states to conduct their policy experiments, not to empower judges to decide which experiments are the good ones and which are the bad.<sup>30</sup>

The other obvious solution is to do what the *Raich* majority did and let Congress decide how far into the areas of traditional state regulation it wants to intrude and how much it wants to leave matters to the states. Judges cannot openly admit to having a federalism doctrine that chooses between good and bad state policy experiments. If one wants a centralized decisionmaker to be in a position to make policy judgments, it will have to be Congress. The majority's position is at least stable and clear, though it is disappointing and unsatisfying to those of us who care about the judicial enforcement of federalism values and the role of the states as laboratories of democracy. But Justice O'Connor's approach, remade into a stable and clear rule, introduces a new set of problems. States could hastily write their own exceptions to federal law. Indeed, if we look closely at California's medical marijuana program, we may conclude that it was not a well-run experiment.<sup>31</sup>

In the end, there is good reason to treat far-reaching federal statutes like the Controlled Substances Act differently from single-subject statutes like the GFSZA. The GFSZA was an unnecessary gesture of a statute, revealing Congress catering to constituents who like to see politicians attend to issues like gun violence, children, and education—the very issues seen as traditionally belonging to the states. Concern about the states as laboratories of democracy justified drawing the line on congressional power in *Lopez*: Congress had

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<sup>29</sup> This is a theme I develop at some length in Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 174 (2004).

<sup>30</sup> Even if the federalism doctrine strongly protected state autonomy, federal constitutional rights would still protect people from some misguided state policy experiments. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 143–49 (1991).

<sup>31</sup> *Raich*, 125 S. Ct. at 2213–15 nn.41–43.

2005] HEIGHTEN THE SCRUTINY OF CONGRESSIONAL POWER 789

sought political favor by taking advantage of hot-button political issues and, in doing so, had strayed far from its proper role of attending to the kinds of things that require uniform, national legislation. Congress's choice to target only the possession of guns in schools zones revealed its lack of interest in any national web of activities. By contrast, the marijuana ban is part of a comprehensive effort to achieve an end far beyond the capacity of the states to act individually, on a decentralized level. If Congress had undertaken some sort of sweeping approach to gun regulation in the GFSZA, it would have *deserved* more deference. But, in fact, there was insufficient political support for broad-based gun regulation.<sup>32</sup> Congress could not pass the kind of law the Commerce Clause envisioned. It resorted to a brief single-subject statute because that was all it had the political support to do, and in doing so, passed the kind of law typical of local government, but inferior to those that local government would produce in this area, displacing innovative efforts with a clunky law-and-order approach to the problem. The differences distinguishing a comprehensive statute like the CSA from the single-issue statute justify greater judicial restraint.

## V. CONCLUSION

Justice O'Connor seems to have responded sympathetically to the predicament in which the *Raich* plaintiffs found themselves. This sympathy resonated with ideas about the states as laboratories of democracy. But Justice O'Connor's dissenting opinion never faces up to what it means as a general proposition. Many commentators will nevertheless look at her opinion and, through the lens of their own sympathy for the plaintiffs and perhaps also their own enthusiasm for the judicial enforcement of federalism, see a better formulation of Commerce Clause doctrine than what the majority had to offer. I would ask commentators who think the Court erred in *Raich* to look beyond the context of the case and consider the general issue of whether to endorse a new doctrine that would change the degree of deference to Congress where a state has undertaken a policy experiment in an area that traditionally has been left to the states. I think such a doctrine is unworkable. It would invite fifty states and innumerable cities to carve out exceptions of all sorts from important federal statutes that are unquestionably supported by the Commerce Clause. Much as I would prefer to believe that it would prove beneficial to free local government to conduct idiosyncratic policy experiments that take random bites out of major federal statutes, I predict disarray and detriment. But I would love to be convinced that I am wrong.

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<sup>32</sup> See J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE ROLE OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004).



