

THE MEDICAL MARIJUANA CASE: A COMMERCE CLAUSE COUNTER-REVOLUTION?

by
Robert J. Pushaw, Jr.*

Many observers have suggested that Gonzales v. Raich signals the Supreme Court's abandonment of its radical ten-year effort to enforce meaningful limits on Congress's power "to regulate Commerce . . . among the several States." Professor Pushaw argues that such reports of the death of recent Commerce Clause jurisprudence are greatly exaggerated. Indeed, he demonstrates that the so-called Commerce Clause "revolution" was quite modest, consisting of the development and application of vague standards to invalidate two minor federal statutes. Those standards are so elastic that they could plausibly have been invoked either to uphold or strike down the federal law involved in Raich, which prohibited the cultivation or possession of marijuana for any purpose.

Professor Pushaw contends that, if the Court actually wants to reform its doctrine, it must identify and apply particularized rules of law drawn from the Commerce Clause's text, history, and early precedent. This law is straightforward: Congress can regulate only "commerce" (i.e., the sale of goods or services and all accompanying activities geared toward the market) that has an impact "among the states." Application of this approach in Raich would have resulted in thwarting Congress's attempt to reach conduct—the mere possession of home-grown marijuana for personal medical use—that did not constitute "commerce" and had no effect in any other state.

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* James Wilson Endowed Professor, Pepperdine University School of Law. J.D., Yale, 1988. I thank A.J. Bellia, Jesse Choper, Grant Nelson, and Jim Pfander for their comments.

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I. INTRODUCTION

From 1937 until 1994, the Supreme Court upheld every exercise of Congress's power "to regulate Commerce . . . among the several States."¹ This toothless judicial review under the Commerce Clause emboldened Congress to assert ever-expanding authority over a host of activities that did not appear to be either commercial or interstate in scope.²

One such federal statute, which criminalized gun possession in school zones, finally prompted the Court to end its rubber-stamp deference in *United States v. Lopez*.³ Chief Justice Rehnquist joined Justices O'Connor, Kennedy, Scalia, and Thomas in striking down this law on the ground that Congress had tried to regulate conduct that was not inherently "commercial," did not "substantially affect" interstate commerce, and interfered with areas of "traditional state concern" (crime and education).⁴ The Court followed *Lopez* in *United States v. Morrison*⁵ by invalidating federal legislation that had attempted to prohibit violence against women—noncommercial activity historically left to state criminal and tort law.⁶

Lopez and *Morrison* properly stressed two ideas. First, because the Constitution limits the federal government to its enumerated powers and reserves to the states all other authority, the Commerce Clause cannot sensibly be construed as giving Congress unrestrained power.⁷ Second, the language of that Clause contemplates only the regulation of "commerce" that flows "among the states."⁸

Unfortunately, the Court did not translate those two insights into a workable doctrine. The main problem was that the majority sought to avoid formally overruling any prior cases,⁹ yet to diverge from their rationale and

¹ See U.S. CONST. art. I, § 8, cl. 3.

² See Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 695, 715–17 (2002) (citing cases sustaining federal laws that regulate matters such as local crime and public health and safety).

³ 514 U.S. 549 (1995).

⁴ *Id.* at 556–68.

⁵ 529 U.S. 598 (2000).

⁶ *Id.* at 617–18.

⁷ See *Lopez*, 514 U.S. at 556–57, 563–68; *Morrison*, 529 U.S. at 607–08, 613–19.

⁸ See *Lopez*, 514 U.S. at 556–68; *Morrison*, 529 U.S. at 610–18.

⁹ See *Lopez*, 514 U.S. at 553–58 (discussing the major Commerce Clause decisions without reversing any of them).

results. To accomplish this sleight-of-hand, the Court gleaned from its precedent three nebulous “standards,” then applied them in a subjective manner.

First, the Court announced that Congress can regulate only “commercial” or “economic” activity.¹⁰ Remarkably, the majority refused to define these words.¹¹ Instead, they simply asserted that gun possession and gender-based violence were not “commercial.” If that is true, however, why did the Court leave undisturbed its decisions that had sustained Congress’s power to regulate gun possession by felons and sex discrimination?¹²

Second, *Lopez* and *Morrison* reaffirmed a judicial test that had been created during the New Deal era: The regulated activity, considered in the aggregate, had to exert a “substantial effect” on interstate commerce.¹³ Again, however, the Court did not clarify key terms. For example, the “regulated activity” might be characterized narrowly (a specific statutory provision applied to a discrete type of conduct) or broadly (the overall legislative scheme). Similarly, Chief Justice Rehnquist did not articulate any objective basis (e.g., monetary thresholds) for distinguishing “substantial” from “insubstantial” effects. Nor did the majority persuasively answer the four dissenters’ argument that activities like gender-motivated violence, when added up nationwide, generate a multibillion dollar impact on the national economy.¹⁴ That failure led many judges and scholars to surmise that *Lopez* and *Morrison* would preclude noncommercial conduct from ever being aggregated to meet the “substantial effects” test.¹⁵

Third, the Court stressed the imperative of protecting from federal encroachment areas of “traditional state concern,” such as violent crime, education, and family law.¹⁶ But the majority nowhere explained why this vision of federalism did not dictate overturning many cases that had allowed Congress to regulate these subjects.¹⁷ Adding to the confusion, the Court indicated that Congress could reach local matters if they were “an essential part

¹⁰ See *Lopez*, 514 U.S. at 558–61, 565–66; *Morrison*, 529 U.S. at 610–11.

¹¹ See *Lopez*, 514 U.S. at 566; *id.* at 574 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 610–11.

¹² See *infra* notes 81, 85, 87, 125 and accompanying text (describing these cases).

¹³ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34–43 (1937); *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942).

¹⁴ See *Morrison*, 529 U.S. at 628–55 (Souter, J., dissenting); *id.* at 655–64 (Breyer, J., dissenting).

¹⁵ See, e.g., Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 796–97, 816–18 (1996); *United States v. Maxwell*, 386 F.3d 1042, 1059 (11th Cir. 2004) (concluding that the “aggregate approach cannot be applied to intrastate criminal activity of a noneconomic nature,” including the simple possession of child pornography).

¹⁶ *Lopez*, 514 U.S. at 564–68; *id.* at 568–83 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 611–19.

¹⁷ Since the New Deal, the Court has done nothing to stop Congress from passing thousands of laws addressing crime, education, and families. See Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 331–32 (2005) [hereinafter Pushaw, *Partial-Birth Abortion*] (citing statutes).

of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”¹⁸

The three vague standards of *Lopez* and *Morrison* can be applied, whether intentionally or not, to promote a particular ideological agenda. For instance, liberal critics charged that these two cases reflected the conservative Republican Justices’ hostility to gun control and women’s rights and would lead to the gutting of civil rights and environmental legislation.¹⁹ Indeed, in a post-*Morrison* case, the Court suggested that a provision of the Clean Water Act might exceed Congress’s authority under the Commerce Clause, but avoided this question through statutory interpretation.²⁰

Was a revolution afoot, which would shake the foundations of New Deal and Great Society legislation that had long ago received judicial blessing? Or would the Court confine its doctrinal innovations to the invalidation of a few recent laws on “hot button” issues that largely duplicated existing legislation, such as bans on guns near schools and sexual assault?

In *Gonzales v. Raich*,²¹ the Court appeared to choose the latter path. Justices Kennedy and Scalia allied with the *Lopez/Morrison* dissenters to sustain a federal statute criminalizing the in-state cultivation, possession, and use of marijuana, which had been applied to citizens who had taken this drug solely to relieve excruciating pain (as prescribed by California law).²² In dissent, Chief Justice Rehnquist and Justices O’Connor and Thomas argued that Congress could not regulate such local, noncommercial, state-authorized marijuana usage.²³

Raich illustrates the shortcomings of the *Lopez/Morrison* standards. First, the Court held that any commodity with an interstate market (including marijuana) was “commercial” or “economic.”²⁴ By contrast, the dissenters asserted, with equal plausibility, that the mere possession and medical use of marijuana were not “commerce.”²⁵ Second, the majority ruled that Congress had a rational basis for concluding that the regulated activity (characterized

¹⁸ *Lopez*, 514 U.S. at 561.

¹⁹ See, e.g., Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 376, 382 (2002); Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 LAW & CONTEMP. PROBS. 53 (2004); Susan N. Herman, *Introduction to David G. Trager Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1205 (2004). Environmental law seemed especially vulnerable to reexamination, although lower courts showed extreme solicitude to Congress in this area. See, e.g., Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005).

²⁰ See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 166–74 (2001).

²¹ 125 S.Ct. 2195 (2005).

²² *Id.* at 2199–2215; *id.* at 2215–20 (Scalia, J., concurring).

²³ *Id.* at 2220–29 (O’Connor, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.); *id.* at 2229–39 (Thomas, J., dissenting).

²⁴ *Id.* at 2211.

²⁵ *Id.* at 2224–25 (O’Connor, J., dissenting); *id.* at 2229–30 (Thomas, J., dissenting).

broadly as all production, possession, and consumption of marijuana) “substantially affected” interstate commerce.²⁶ The dissenters, on the other hand, cogently argued that Congress had presented no evidence that the specific conduct being regulated—using home-grown marijuana *for medical purposes as permitted by state law*—exerted a “substantial effect” on the interstate economy.²⁷ Third, the majority emphasized the federal government’s long regulation of marijuana and other controlled substances,²⁸ whereas the dissenters found that California’s “compassionate use” exception to its general ban on marijuana fell within the state’s traditional police power over public health, welfare, and morals.²⁹

Commentators have defended either the majority³⁰ or the dissenters.³¹ Nonetheless, both camps agree that *Raich* signals the abandonment by Justices Kennedy and Scalia of the quest to impose meaningful limits on Congress’s Commerce power.³² Indeed, some have speculated that these two Justices switched sides for political reasons—most obviously, a refusal to budge on the War on Drugs, especially in favor of pot-smoking San Franciscans.³³

²⁶ *Id.* at 2205–09.

²⁷ *Id.* at 2221–29 (O’Connor, J., dissenting).

²⁸ *Id.* at 2201–03.

²⁹ *Id.* at 2220–21, 2226–29 (O’Connor, J., dissenting); *id.* at 2233–34, 2238–39 (Thomas, J., dissenting).

³⁰ See, e.g., Bruce Fein, *Difficult Case, Right Decision*, WASH. TIMES, June 14, 2005, at A15 (agreeing with the majority that Congress needed “a blanket marijuana prohibition . . . to prevent local seepages into a booming (albeit illegal) interstate drug market”); Editorial, *Joint Venture*, THE NEW REPUBLIC ONLINE, June 20, 2005, <http://www.tnr.com/arch/issues/20050620/7-7.mhtml> (celebrating the Court’s opinion as discouraging a “radical assault” on congressional regulation); Wesley J. Smith, *False Federalism*, NAT’L REV. ONLINE, June 8, 2005, <http://www.nationalreview.com/smithw/smith200506080755.asp>.

³¹ See, e.g., Randy Barnett, *The Ninth Circuit’s Revenge*, NAT’L REV. ONLINE, June 9, 2005, <http://www.nationalreview.com/comment/barnett200506090741.asp> [hereinafter Barnett, *Revenge*]. Professor Barnett’s position is unsurprising, as he represented Angel Raich in the Supreme Court and has championed a narrow interpretation of the Commerce Clause. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) [hereinafter Barnett, *Original Meaning*].

³² See, e.g., Smith, *supra* note 30; Barnett, *Revenge*, *supra* note 31; Marcia Coyle, *A Changing Landscape: Supreme Court Review*, NAT’L L.J., Aug. 3, 2005, at 1. In this Symposium, Professor Adler makes an especially forceful argument that Justices Scalia and Kennedy joined the majority in destroying the *Lopez/Morrison* restrictions on Congress’s authority under the Commerce Clause. Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Court Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005).

³³ See, e.g., Barnett, *Revenge*, *supra* note 31 (arguing that Justice Kennedy’s vote likely reflects his “zero-tolerance approach to drugs,” and assailing Justice Scalia as “a fair-weather federalist . . . when the chips were down”); Ryan Grim, *A Guide to Gonzales v. Raich*, SALON.COM, June 7, 2005, http://www.salon.com/news/feature/2005/06/07/supreme_court_and_pot/ (quoting Professors David Bernstein and Orin Kerr, who criticized Justice Scalia for betraying his federalism principles for political reasons). Others have charged that Justices Scalia and Kennedy wished to appear more moderate on congressional power to enhance their chances of Senate confirmation should they be nominated as Chief Justice. See Grim, *supra*. My concern is not whether such claims are true, but rather that they can be made so easily because of the vagueness and inconsistent application of the Court’s doctrine.

My take on *Raich* is different. I think it is impossible to determine whether the majority or the dissent correctly applied the *Lopez* and *Morrison* standards, because they are so malleable as to justify either result. Moreover, as the Justices implement these standards prudentially on a case-by-case basis, it is unwise to extrapolate far-reaching implications from any single decision. Just as many scholars prematurely heralded *Lopez* as the beginning of a Commerce Clause revolution,³⁴ others now may be too quick to characterize *Raich* as the end.³⁵ Finally, the Court's discretionary application of protean standards guarantees both accusations of political manipulation and continuous uncertainty for Congress, lower court judges, and lawyers.

Raich highlights the intractable difficulties that led Grant Nelson and me six years ago to urge the Court to abandon its current approach.³⁶ Instead, we recommended that the Justices adopt a "Neo-Federalist" methodology, which identifies clear rules of law that are rooted in the Commerce Clause's text and history, yet can be applied without dismantling the modern federal regulatory framework.³⁷

The core legal principle is that Congress can regulate only "commerce," which has always meant "the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and

³⁴ See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1055 (2001); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 168 (1996).

³⁵ For example, Cass Sunstein asserted that "[t]he hopes of those who wanted a fundamental rethinking of congressional power under the [C]ommerce [C]lause are dashed—more even than they might have feared." See Jan Crawford Greenburg, *Top Court Rejects Marijuana For Sick; U.S. Laws Trump States' Statutes*, CHI. TRIB., June 7, 2005, at C1 (quoting Professor Sunstein). Other observers, however, have warned against reading too much into *Raich*. See, e.g., *Assessing the Term that Was*, LEGAL TIMES, Aug. 1, 2005, at 24 (citing Solicitor General Paul Clement's opinion that both the original *Lopez* revolution and its supposed demise after *Raich* have been "overstated," and that the outcome in *Raich* should not have been surprising in light of the limiting language in *Lopez*); Herman Schwartz, *A Deeply Rooted Revolution: U.S. Supreme Court Year in Review 2004–2005 Term*, N.J. L.J., July 25, 2005, at 329 (rejecting the claim by several legal commentators that *Raich* spells doom for the Court's Commerce Clause/federalism revolution, and instead suggesting that Justices Kennedy and Scalia defected in this particular case only because it involved federal drug law enforcement); see also Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 927–34 (2005) (concluding that *Raich* illustrates that the *Lopez/Morrison* restraints on the Commerce Clause power were far weaker than generally supposed and that the Court has retreated from robust judicial enforcement of federalism).

³⁶ See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1 (1999).

³⁷ For a fuller description and defense of this method of analyzing constitutional law, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 397–99, 454, 467–72, 511–12 (1996) [hereinafter Pushaw, *Justiciability*]; Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448–49 (1994). For a detailed Neo-Federalist interpretation of the Commerce Clause, see Nelson & Pushaw, *supra* note 36, at 9–12, 107–19.

interests.”³⁸ “Commerce” includes buying and selling goods; their prior production through agriculture, manufacturing, and mining; and rendering services for money. By contrast, “commerce” cannot reasonably be interpreted as encompassing actions taken to satisfy personal or household needs (such as a backyard garden) or as extending to issues of purely moral, social, or cultural concern (e.g., violent crime).³⁹ The Court should thwart congressional attempts to regulate anything that falls outside this definition of “commerce,” which is generous but still bounded.

If a federal law does address “commercial” activity, the Court must then determine if this commerce flows “among the several States”—i.e., either between different states or within one state but affecting others.⁴⁰ Such an interstate nexus is typically present in our integrated national economy.

Application of the proposed legal test in *Raich* would have streamlined the analysis and muted ideological considerations. Growing and possessing marijuana for personal medical use—as opposed to sale in the market—is not “commerce,” but rather is exclusively a matter of social and moral interest. Congress cannot evade this legal limit by placing this noncommercial activity within a larger regulation of interstate commerce. Because the federal statute fails to meet the threshold “commerce” requirement, it is unnecessary to determine whether such local medical marijuana use has impacts in other states (although none are apparent).

The foregoing themes will be explored in three parts. Part I sets forth a brief history of the Commerce Clause and the precedent it has spawned. Part II discusses *Raich*. Part III explains the advantages of applying a Neo-Federalist analysis to *Raich* and other cases.

II. A SHORT HISTORY OF THE COMMERCE CLAUSE

A Neo-Federalist methodology is especially helpful in deriving workable rules from constitutional provisions.⁴¹ This approach initially seeks to recover, against the background of Federalist political theory, a constitutional provision’s original “meaning” (the ordinary definition of its words), “intent” (the purpose of its drafters), and “understanding” (the sense of its ratifiers and its early implementers in all three branches).⁴² Next, those original Federalist principles are refined in light of intervening legislative practice and judicial precedent.⁴³ Neo-Federalism reveals that the Commerce Clause had a well-

³⁸ See Nelson & Pushaw, *supra* note 36, at 9.

³⁹ See *infra* notes 45–48, 51–53, 57–59 and accompanying text.

⁴⁰ See Nelson & Pushaw, *supra* note 36, at 10–11, 110–13.

⁴¹ See, e.g., Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473 (1998) [hereinafter Pushaw, *Advisory Opinions*]; Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1276–89 (2002).

⁴² See Pushaw, *Justiciability*, *supra* note 37, at 397–99, 454, 467–72, 511–12.

⁴³ See *id.*

known and relatively broad eighteenth-century meaning that can be applied to sustain most, but not all, modern federal statutes.⁴⁴

A. The Commerce Clause as Originally Conceived

The Clause's language naturally lends itself to a two-part inquiry: Congress can regulate "[1] commerce . . . [2] among the several States." The definitions of these two terms circa 1787 do not differ markedly from our current understandings, even though the volume of commercial and interstate activity has mushroomed.

First, "commerce" had a primary meaning in 1787 that persists to this day: buying, selling, and transporting merchandise.⁴⁵ But it also had a firmly established secondary definition: all gainful activities intended for the marketplace, such as the production of goods for sale and the compensated provision of services.⁴⁶ Adam Smith and other leading thinkers distinguished such market-oriented "commercial" activities from those undertaken strictly for individual or home use.⁴⁷ Indeed, the same activity might be "commercial" or "noncommercial," depending on why it was being performed. For example, growing fruit for sale would be "commerce," whereas growing fruit to feed your family would not be.⁴⁸

Second, "among the several States" obviously included commerce that moved between two or more states. More subtly, it encompassed commerce that occurred within one state but affected other states.⁴⁹

The Framing and Ratification debates and other sources support this two-pronged interpretation of the Commerce Clause's text.⁵⁰ Most importantly, an overarching Federalist theme was that the new Constitution would meet the crying need for uniform national regulation of interstate commerce,⁵¹ but would

⁴⁴ See Nelson & Pushaw, *supra* note 36, at 13–63 (detailing the Founders' conception of the Commerce Clause); *id.* at 107–72 (applying this original meaning to modern statutes). For the sake of brevity, I will not reproduce all of the authority that supports each of my points.

⁴⁵ See *id.* at 15 n.53 and accompanying text (citing sources).

⁴⁶ See, e.g., DANIEL DEFOE, A PLAN OF THE ENGLISH COMMERCE 1–5, 72–74, 154, 172–74, 228, 245–46, 348–53 (2d ed. 1730) (1967); Nelson & Pushaw, *supra* note 36, at 9–42, 107–10 (describing this broad view of commerce held by Defoe and many other influential eighteenth-century British and American writers).

⁴⁷ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 22, 354–55 (Edwin Cannan ed., 1937).

⁴⁸ *Id.*

⁴⁹ See Nelson & Pushaw, *supra* note 36, at 9–12, 42–49, 110–13 (citing contemporaneous evidence of this understanding).

⁵⁰ See, e.g., THE FEDERALIST NO. 11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 449 (Max Farrand ed., Yale University Press 1966) [hereinafter RECORDS] (citing Pinckney). For extensive primary source support, see Nelson & Pushaw, *supra* note 36, at 19–50.

⁵¹ During the 1780s, the Articles of Confederation government could not stop the states from implementing protectionist commercial laws that wreaked havoc on the national economy. Nor did the federal government have power to affirmatively promote interstate commerce. For an exhaustive catalogue of these problems, see GORDON S. WOOD, THE

leave to the states their existing “police powers” over internal, noncommercial matters of public health, safety, morality, and social welfare.⁵² The Commerce Clause would thereby help America develop a common market without interfering with each state’s ability to respond to its unique culture, customs, and social mores.⁵³

The Marshall Court faithfully implemented the original understanding of the Commerce Clause in *Gibbons v. Ogden*.⁵⁴ New York granted Ogden a monopoly to run a ferry between that state and New Jersey, but Gibbons began operating a competing ferry pursuant to a license issued under a federal statute regulating coastal trade vessels.⁵⁵ The Court upheld Congress’s power to enact this law, for two reasons.

First, “commerce” was a broad word that included navigation.⁵⁶ Chief Justice Marshall rejected the argument that “commerce” should be restricted “to traffic, to buying and selling, or the interchange of commodities.”⁵⁷ On the contrary, “commerce” was “a general term, applicable to many objects . . . Commerce, undoubtedly, is traffic, but it is something more . . . It describes the commercial intercourse between nations, and parts of nations, in all its branches.”⁵⁸ In contemporaneous parlance, the “branches” of “commercial intercourse” referred to activities integrally related to trade, such as transportation, production, labor, banking, and insurance.⁵⁹ Second, the Court held that “among the several States” meant “that commerce which concerns more States than one,” not “the completely interior traffic of a State.”⁶⁰ The Court correctly acknowledged, however, that Congress could reach internal state commerce (such as transportation within one state) when it was connected to commerce in at least one other state.⁶¹

Another Marshall Court decision, which did not involve the Commerce Clause directly but would later be invoked to augment Congress’s power under that Clause, was *McCulloch v. Maryland*.⁶² The Court there held that Congress could create a national bank as a means “Necessary” (i.e., useful or helpful) and

CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 132–61, 354–63, 393–429, 463–67 (1969).

⁵² See, e.g., THE FEDERALIST NO. 17, at 105 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961); 1 RECORDS, *supra* note 50, at 157 (James Wilson); see also Nelson & Pushaw, *supra* note 36, at 11–12, 25–30, 109–19 (setting forth relevant historical materials).

⁵³ See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In *Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

⁵⁴ 22 U.S. (9 Wheat.) 1 (1824).

⁵⁵ *Id.* at 1–3.

⁵⁶ *Id.* at 189–93.

⁵⁷ *Id.* at 189.

⁵⁸ *Id.* at 189–90.

⁵⁹ See Pushaw & Nelson, *supra* note 2, at 706–09 (listing examples of such usage by Adam Smith, Daniel Defoe, and Alexander Hamilton).

⁶⁰ *Gibbons*, 22 U.S. (9 Wheat.) at 194–95.

⁶¹ *Id.* at 195–97, 204.

⁶² 17 U.S. (4 Wheat.) 316 (1819).

“Proper” to executing its other enumerated Article I powers (e.g., borrowing money and taxation).⁶³ Chief Justice Marshall cautioned that such implementing federal laws would be “proper” only if they were (1) “plainly adapted” to achieving objectives entrusted to the federal government, rather than a “pretext” to grab unauthorized power; (2) not “prohibited by the [C]onstitution;” and (3) “consist[ent] with the letter and spirit of the Constitution.”⁶⁴ These limits indicate that the Court did not consider the Necessary and Proper Clause to be a bottomless well of supplemental authority.

In short, the Marshall Court incorporated the Federalist vision of the Commerce Clause as authorizing Congress to regulate “commerce” (i.e., market-based activities) that had interstate impacts, and the Necessary and Proper Clause as allowing Congress to effectuate its legislation through means that respected basic constitutional principles. This original meaning and understanding became obscured over time.

B. The Court’s Evolving Interpretation of the Commerce Clause

1. The Leading Cases

Congress did not begin to invoke the Commerce Clause to enact large-scale legislation until the late nineteenth century.⁶⁵ The Court, seeking to protect state regulatory power over “local” matters, adopted an unduly restrictive definition of “commerce”—buying, selling, and shipping goods—and hence struck down many federal laws dealing with activities such as manufacturing and labor.⁶⁶

The Court initially applied this jurisprudence to invalidate New Deal legislation, which systematically addressed matters formerly left to the states,

⁶³ *Id.* at 405–15.

⁶⁴ *Id.* at 421, 423.

⁶⁵ The earliest major regulatory statutes were the Interstate Commerce Act of 1887, 49 U.S.C. § 101 et. seq. (2000), and the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (2000).

⁶⁶ *See, e.g.,* *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–16 (1895) (holding that the federal antitrust laws could not constitutionally be applied to national sugar refining companies because they engaged in “manufacturing” rather than “commerce” and because such production took place “locally” and affected interstate commerce only “indirectly”); *Hammer v. Dagenhart*, 247 U.S. 251, 269–72, 275–77 (1918) (using similar logic to strike down the Child Labor Act).

Moreover, the Court permitted Congress to exercise plenary control over the “channels” of interstate commerce (e.g., highways) and their “instrumentalities” (e.g., cars and trains) on the theory that all transportation constituted “commerce,” even that undertaken without any market motive. Thus, for example, the Court upheld the imposition of criminal penalties under the Mann Act against those who had brought women across state lines either for “prostitution” (a commercial service) or for “immoral purposes”—such as men who had taken their mistresses from California to Nevada as part of consensual, noncommercial relationships. *See Caminetti v. United States*, 242 U.S. 470, 489, 491, 502 (1917). *Caminetti* represented the first, but not the last, time the Court extended the Commerce Clause beyond the realm of commerce and into exclusively moral matters.

such as agriculture, employment, manufacturing, and banking.⁶⁷ This judicial resistance ended in 1937, when the Court upheld the National Labor Relations Act (“NLRA”) in *NLRB v. Jones & Laughlin Steel Corp.*⁶⁸ A bare majority of Justices acknowledged that the workers in the case were engaged in “manufacturing” rather than “commerce” and performed their labor within one state, but concluded that Congress nonetheless could regulate their activities as “essential” and “appropriate” to control the interstate commerce that had been substantially affected in a direct way by labor disputes.⁶⁹

The “essential” and “appropriate” phrase evokes the Necessary and Proper Clause, although the Court did not cite that provision or any cases interpreting it. Such express reliance came a few years later in *United States v. Darby*,⁷⁰ which sustained application of the Fair Labor Standards Act (“FLSA”) to a small Georgia lumber company whose employees engaged in local manufacturing.⁷¹ The Court reasoned that Congress could regulate such noncommercial intrastate activities as “necessary and proper” to control interstate commerce in the lumber being produced.⁷²

In *Wickard v. Filburn*,⁷³ the Court announced that the “substantial effect” on interstate commerce would be determined not by reference to the facts of any particular case, but rather by considering the aggregate of the regulated activity throughout the nation.⁷⁴ *Wickard* involved the federal Agricultural Adjustment Act (“AAA”), which imposed quotas on wheat production to reduce supply and hence keep prices from falling.⁷⁵ The Court upheld penalties against Filburn, an Ohio farmer who had exceeded his wheat allotment by a few acres and had used this surplus in his household rather than selling it.⁷⁶ The Court conceded that Filburn had grown only a “trivial” quantity of extra wheat for noncommercial purposes, but ruled that the government had persuasively demonstrated that the total of all such home-grown wheat amounted to about twenty percent of the national market, which exerted a “substantial effect” on interstate commerce in that commodity.⁷⁷

⁶⁷ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 299–310 (1936) (invalidating an Act of Congress regulating coal mining, which was deemed to be a local issue concerning the noncommercial activities of manufacturing and labor); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550–51 (1935) (striking down a key provision of the National Industrial Recovery Act).

⁶⁸ 301 U.S. 1 (1937).

⁶⁹ *Id.* at 37–43. Although *Jones & Laughlin* involved a huge multinational steel company, the Court swiftly extended its holding to much smaller outfits. See, e.g., *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

⁷⁰ 312 U.S. 100 (1941).

⁷¹ *Id.* at 117–19.

⁷² *Id.* at 118–19, 124.

⁷³ 317 U.S. 111 (1942).

⁷⁴ *Id.* at 120–28.

⁷⁵ *Id.* at 115–19, 128.

⁷⁶ *Id.* at 113–19.

⁷⁷ *Id.* at 120–28.

The Justices who decided *Wickard* knew that almost any activity, when viewed in the aggregate, substantially affected interstate commerce.⁷⁸ Thus, judicial review under this test became an empty formality.⁷⁹ Not surprisingly, Congress aggressively invoked the Commerce Clause to pass any laws it deemed to be in the national interest. A prime example is the Civil Rights Act of 1964, which banned racial discrimination in public accommodations.⁸⁰ In upholding this law, the Court declared that Congress did not have to demonstrate a “substantial effect” on interstate commerce; rather, it would suffice if there might exist some “rational basis” for concluding that the regulated activity had such an effect.⁸¹ This new doctrinal wrinkle relieved Congress of the responsibility for making factual findings to justify legislation under the Commerce Clause, which now extended into new areas like environmental law.⁸²

Perhaps most significantly for present purposes, the Court approved Congress’s sweeping expansion of its criminal code. In *Perez v. United States*,⁸³ the Court sustained a federal criminal ban on all loan sharking because of its cumulative effect on interstate commerce, even as applied to a loan shark who operated within New York and had no out-of-state contacts.⁸⁴ *Perez* eliminated the former requirement that the federal government had to prove that the defendant’s actions bore some relation to interstate commerce.⁸⁵ Moreover, even though loan sharking involves a commercial exchange,

⁷⁸ See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 217–21 (Oxford University Press 1998) (supporting this conclusion with a detailed analysis of internal Court documents and the Justices’ private correspondence).

⁷⁹ Indeed, for over a half-century after *Wickard*, the Court sustained every challenged federal statute as “substantially affecting” interstate commerce. On a parallel track, the Court allowed Congress to regulate the local sale of any product (or its components) that had ever gone through interstate channels, no matter how long ago. See *United States v. Sullivan*, 332 U.S. 689, 690–98 (1948) (sustaining the conviction of a pharmacist who purchased from a local wholesaler a large bottle of pills containing an FDA-required warning label, then transferred a few pills to an unlabeled box and sold them). The Court began to invoke the “channels” and “instrumentalities” theories to enable Congress to regulate anyone or anything that ever had moved, or would move, across state lines. See, e.g., *Nelson & Pushaw*, *supra* note 36, at 84–86 (citing cases). In this way, the Commerce Clause became a license for all-purpose federal power.

⁸⁰ 42 U.S.C. § 2000(a) (2000).

⁸¹ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255–58 (1964); *Katzbach v. McClung*, 379 U.S. 294, 298–305 (1964).

⁸² See, e.g., *Hodel v. Indiana*, 452 U.S. 314, 321–29 (1981) (allowing federal regulation of strip mining techniques that might damage “prime farmland,” even though that category included only 21,800 acres nationwide and states had always exclusively regulated land use).

⁸³ 402 U.S. 146 (1971).

⁸⁴ *Id.* at 147–58.

⁸⁵ *Id.* The standard for such proof, however, was extremely low. See *Scarborough v. United States*, 431 U.S. 563, 569–77 (1977) (ruling that the Gun Control Act of 1968, 18 U.S.C. § 922(g), which prohibits felons from “possess[ing], in or affecting commerce, any firearm,” merely required some evidence that the firearm had passed at some point through interstate commerce, as virtually all guns do).

Congress successfully prohibited many other activities that did not, most notably the simple possession of certain drugs⁸⁶ and guns.⁸⁷

2. *A Critique of the Modern Court's Jurisprudence*

In response to the emergency of the Depression, the Court created a nebulous “substantial effects” test that had no basis in the Commerce Clause’s text, history, or precedent. The Justices apparently believed this radical step was necessary because they accepted the Court’s decades-old teaching that this Clause, as originally understood, did not authorize Congress to regulate commercial production or services.

In reality, however, the Commerce Clause has always allowed legislation addressing these matters and all other market-oriented activities that concern more than one state. Thus, for example, the NLRA, FLSA, Civil Rights Act, and the anti-loan sharking law could have been upheld simply because they regulated “commerce”—the provision of services for money—with interstate ramifications.⁸⁸ Similarly, Congress can govern the production of commodities for the interstate market, such as growing crops intended for sale.⁸⁹

The original meaning of “commerce” cannot, however, be stretched to cover production or services for personal or household use.⁹⁰ Therefore, the Court erred in *Wickard* by ruling that the AAA could constitutionally be applied to growing wheat exclusively for home use.⁹¹ Moreover, the mere possession of goods, without intent to sell them, has never been considered “commerce.”⁹² Hence, the federal government should not be able to ban the

⁸⁶ See Nelson & Pushaw, *supra* note 36, at 136–39 (analyzing the relevant statutes and cases).

⁸⁷ See *id.* at 139–41. The *Raich* Court deemed *Perez* to be directly on point. *Raich*, 125 S. Ct. at 2205–08. Unlike the mere possession of drugs and guns, however, loan sharking itself is a commercial transaction. Thus, a more analogous Act of Congress would be one that prohibited household members from giving each other noncommercial loans—for example, a mother lending her adult child \$25,000 interest-free to buy a car. Under the Court’s standards, this hypothetical statute would be upheld because such loans would decrease resort to market lenders, which in the aggregate could exert a “substantial effect” on interstate commerce. By contrast, under my proposed approach, Congress would not be permitted to interfere with such noncommercial services provided within families.

⁸⁸ See Nelson & Pushaw, *supra* note 36, at 10, 120, 124–25, 150, 159–60; Pushaw & Nelson, *supra* note 2, at 697–98, 716–19. Antidiscrimination laws obviously reflect moral principles, but they also ensure a free market in services and property such as public accommodations, employment, housing, and banking.

⁸⁹ See Nelson & Pushaw, *supra* note 36, at 120–23, 159. Congress can also regulate the impacts of commercial production, such as health, safety, and environmental problems. See Pushaw & Nelson, *supra* note 2, at 697–98, 715.

⁹⁰ I recognize that producing goods or rendering services for individual or family purposes has an *economic* impact by eliminating the need to go into the market. The Constitution, however, authorizes Congress to regulate only “commerce” (i.e., selling goods or services in the market, and activities preparatory to such sales). By contrast, “economics” is a global term that encompasses any activity, commercial or not, that affects the production or distribution of goods or services. See *infra* notes 117–20 and accompanying text.

⁹¹ See *Wickard v. Filburn*, 317 U.S. 111, 113–28 (1942).

⁹² See *supra* notes 45–48 and accompanying text.

possession of products deemed morally or socially harmful; only individual states have this power.⁹³

To be clear, I am not claiming that the Constitution's drafters and ratifiers specifically contemplated federal laws like the NLRA or AAA. Rather, I am contending that the Framers knew they could not see the future, but wanted to ensure that Congress could always regulate interstate commerce, however it happened to develop.⁹⁴ Although Congress's legal authority has never changed, the occasions for its exercise have increased dramatically as the scope of both "commercial" and "interstate" activities has exploded, owing to radical changes in technology, transportation, and communications.⁹⁵ For instance, over the past two centuries, agriculture evolved from predominantly self-sufficient and local farms to a national and international business.⁹⁶ Congress can respond to such changes, as long as it adheres to the requirement that it regulate only the "commercial" aspects of agriculture.

Overall, during the New Deal the Court missed a golden opportunity to apply the historical meaning of the Commerce Clause to meet modern exigencies. Instead, the Court adopted a novel "substantial effects" test that gave Congress unbridled regulatory power.

C. *The Rehnquist Court's Revision of Commerce Clause Doctrine*

By the 1980s, Congress assumed that all its laws would be upheld, and thus often enacted statutes without bothering to explain how they regulated interstate commerce. An example was the Gun-Free School Zones Act ("GFSZA"), which contained no findings in making it a crime to possess a firearm within a thousand feet of a school.⁹⁷ The GFSZA induced the Court, quite unexpectedly, to enforce limits on the Commerce Clause for the first time in almost six decades.

1. *Lopez and Morrison*

In *United States v. Lopez*,⁹⁸ Chief Justice Rehnquist wrote the opinion for the Court invalidating the GFSZA, primarily on the ground that gun possession near schools "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."⁹⁹ Nor, he added, was this criminal law

⁹³ See *supra* notes 39, 52–53 and accompanying text.

⁹⁴ See, e.g., Nelson & Pushaw, *supra* note 36, at 8–9, 108–13; Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1344–45 (1934).

⁹⁵ See Nelson & Pushaw, *supra* note 36, at 8–9 n.34.

⁹⁶ Even at the time of the Founding, however, some farmers engaged in national and worldwide commerce. For example, many southern plantations produced staple crops primarily for export, such as cotton and tobacco. During the Convention and Ratification debates, delegates noted that such agricultural activities were part of commerce. See, e.g., 2 RECORDS, *supra* note 50, at 449.

⁹⁷ 18 U.S.C. § 922(q) (1990).

⁹⁸ 514 U.S. 549 (1995).

⁹⁹ *Id.* at 561.

an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.¹⁰⁰

Moreover, the Court stressed that the GFSZA contained no jurisdictional requirement confining prosecutions to situations where the gun could be linked to interstate commerce.¹⁰¹ Finally, Chief Justice Rehnquist faulted Congress for interfering with two subjects of traditional state concern, crime and education.¹⁰²

Lopez featured several separate opinions. Justice Kennedy (joined by Justice O'Connor) emphasized that the Court's holding was limited to unique situations where Congress had ignored federalism principles by attempting to supplant state legislation in areas with no relation to commerce, but he reaffirmed that Congress retained vast power to regulate the national economy.¹⁰³ In a more radical concurring opinion, Justice Thomas rejected the "substantial effects" test as contrary to the original meaning of the Commerce Clause, which in his view restricted Congress to regulating the sale of goods that crossed state lines.¹⁰⁴ Finally, four dissenting Justices—Stevens, Souter, Ginsburg, and Breyer—argued that application of longstanding precedent counseled deference to Congress, which had a rational basis for concluding that gun possession in school zones, considered in the aggregate, substantially affected interstate commerce.¹⁰⁵

The same five-to-four split occurred in *United States v. Morrison*.¹⁰⁶ The majority invalidated the Violence Against Women Act ("VAWA") on the ground that such violence was not "commerce" (either of itself or as part of a larger regulation of economic activity), did not "substantially affect" interstate commerce, and had always been addressed by the states in their criminal and tort laws.¹⁰⁷ The dissent countered that Congress reasonably had determined that gender-based violence costs women billions of dollars in health care fees and in lost educational and economic opportunities.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 564–66.

¹⁰³ *Id.* at 568, 577, 580, 583 (Kennedy, J., concurring).

¹⁰⁴ *See id.* at 584–602 (Thomas, J., concurring).

¹⁰⁵ *See id.* at 602–03 (Stevens, J., dissenting); *id.* at 603–15 (Souter, J., dissenting); *id.* at 615–44 (Breyer, J., dissenting).

¹⁰⁶ 529 U.S. 598, 600 (2000).

¹⁰⁷ *Id.* at 600–19. Once again, Justice Thomas rejected the "substantially affects" test, and instead would have prohibited Congress from regulating gender-motivated violence on the simpler ground that it did not involve trade and took place wholly within one state. *Id.* at 627 (Thomas, J., concurring).

¹⁰⁸ *See id.* at 628–55 (Souter, J., dissenting); *id.* at 655–64 (Breyer, J., dissenting).

In short, the Court in *Lopez* and *Morrison* finally discovered two laws that exceeded Congress's Commerce power. But would the reasoning of those opinions stand the test of time?

2. Problems with the Lopez/Morrison Framework

The *Lopez* and *Morrison* opinions built upon the logically unassailable premise that, in our constitutional system of limited and enumerated powers, the Commerce Clause cannot be interpreted in a way that effectively leaves Congress with absolute discretion.¹⁰⁹ Furthermore, the Court usefully redirected its attention to the pertinent constitutional language, which speaks of "commerce" that occurs "among the several States."

The majority did not, however, define those terms in a legally precise way. This failure resulted from the Court's conflicting desire to keep all its cases intact,¹¹⁰ but to avoid their plain implication: that Congress has plenary power under the Commerce Clause.¹¹¹ To achieve this delicate balance, the Court creatively reinterpreted its precedent as revealing three general limits on Congress.

First, Congress could regulate only "commercial" or "economic" conduct.¹¹² As the dissenters pointed out, however, the Court had long rejected such a focus on the nature of the activity regulated and instead looked at the effect of the activity on interstate commerce.¹¹³ Moreover, the majority deemed it pointless to try to define "commerce."¹¹⁴ Justice Thomas rightly criticized

¹⁰⁹ See, e.g., *Lopez*, 514 U.S. at 552–53, 564–68.

¹¹⁰ The Court did not overturn any of its cases. See *id.* at 553–64; *id.* at 573–74 (Kennedy, J., concurring).

¹¹¹ In its landmark New Deal decisions, the Court rhetorically acknowledged that the Commerce Clause had limits, but interpreted the Clause so broadly as to render such limits meaningless as a practical matter. Most importantly, the Court unequivocally held that Congress could reach even noncommercial activities that formerly had been subject to exclusive state regulation, as long as they "substantially affected" interstate commerce. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); and *Wickard v. Filburn*, 317 U.S. 111 (1942), discussed *supra* notes 68–78 and accompanying text. The Justices adopted this incredibly lenient standard of review to leave decisions under the Commerce Clause to Congress's discretion. See *supra* notes 78–79 and accompanying text. In *Lopez*, the Court quoted the language of limitation in these cases, but whitewashed their actual holdings (not to mention their intent) by denying that Congress could reach matters that were "noncommercial" and of "traditional state concern." See *Lopez*, 514 U.S. at 554–61, 566.

¹¹² *Id.* at 561, 565.

¹¹³ See *id.* at 608 (Souter, J., dissenting); *id.* at 627–28 (Breyer, J., dissenting).

¹¹⁴ *Id.* at 565 (noting that "depending on the level of generality, any activity can be looked upon as commercial"); *id.* at 569, 574 (Kennedy, J., concurring) (arguing that it was futile to try to "defin[e] by semantic or formalistic categories those activities that were commerce"). Most scholars have agreed that the Court cannot devise a workable definition of "commerce." See Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 768–69 (1996); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 133–35; Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 742–50 (1995); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555, 564–65 (1995).

this dodge and contended that the Framers had chosen the word “commerce” to convey a specific meaning.¹¹⁵ He went astray, however, in concluding that the primary definition of “commerce” in 1787 (buying and selling goods) was the exclusive one.¹¹⁶

Furthermore, all of the Justices mistakenly used “commerce” and “economics” interchangeably, instead of recognizing that the former is a subset of the latter.¹¹⁷ “Commerce” means selling property or services in the marketplace, as well as preparatory activities for that purpose.¹¹⁸ By contrast, “economics” is an umbrella term that covers anything—commercial or not—that relates to the production, distribution, or use of goods or services.¹¹⁹ For instance, rape and gun possession near schools have “economic” impacts, but they are not “commerce.”¹²⁰ Any attempt to impose serious limits under the Commerce Clause, therefore, will be doomed if “commerce” is equated with “economics,” which sweeps in virtually all human activity.

Second, all of the Justices except Thomas retained the “substantially affects interstate commerce” test.¹²¹ Unfortunately, they neglected to provide any concrete guidelines for determining what counts as “substantial” or how this effect should be calculated. The majority simply asserted that gun possession in school zones and gender-based violence did not “substantially affect” interstate commerce, whereas the dissent claimed that they did. There is no objective benchmark to determine which side is right.

Third, the Court emphasized the need to prevent Congress from interfering with “local” areas of “traditional state concern,” such as crime, education, and family law.¹²² For decades, however, the Court has allowed massive federal regulation in those areas.¹²³ Did none of those thousands of federal laws trench upon traditional state prerogatives? How can one tell when Congress can take over former state regulatory bastions, and when it cannot? Instead of answering

¹¹⁵ *Lopez*, 514 U.S. at 585–87 (Thomas, J., concurring).

¹¹⁶ Other scholars have made the same error. *See, e.g.,* Barnett, *Original Meaning*, *supra* note 31; Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1389 (1987); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 702–03 (1996).

¹¹⁷ *See Lopez*, 514 U.S. at 556–57, 559–61, 564–65, 567; *Morrison*, 529 U.S. at 610–13, 615.

¹¹⁸ *See supra* notes 45–46, 51, 57–59 and accompanying text.

¹¹⁹ *See Nelson & Pushaw*, *supra* note 36, at 109–10.

¹²⁰ A Nobel laureate long ago demonstrated the economic consequences of crime. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

¹²¹ *See supra* notes 100–08 and accompanying text.

¹²² *Lopez*, 514 U.S. at 564–68; *id.* at 568–83 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 611–19.

¹²³ *See* AMERICAN BAR ASS’N, TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 2, 5–14 (1998) (expressing concern that there are over three thousand federal criminal laws); 20 U.S.C. §§ 1–9413 (2000) (setting forth thousands of provisions governing education); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (noting widespread and longstanding federal regulation of families).

such questions, the Court offered platitudes about certain subjects being inherently either “local” or “national.”¹²⁴ But if local gun possession is a criminal matter historically committed to the states, why did the Court in *Lopez* reaffirm a case from the 1970s holding that Congress could ban intrastate gun possession by felons?¹²⁵

At bottom, then, *Lopez* and *Morrison* rest upon the subjective conclusion of five Justices that certain activities were not “commercial,” did not “substantially” affect interstate commerce, and were historically of “state” rather than “national” concern. Grant Nelson and I have long argued that, although the Court reached correct results in *Lopez* and *Morrison*, its decision to apply three vague standards on a case-by-case basis would have two negative consequences.¹²⁶

First, this methodology would lead to inconsistent results that could easily be characterized as driven by politics or ideology.¹²⁷ Indeed, several scholars suggested that *Lopez* and *Morrison* were arbitrary decisions motivated by five Republican Justices’ antipathy toward liberal laws that limited gun possession and that expanded women’s rights.¹²⁸ That accusation gained credence when the same five Justices, who are perceived as skeptical of environmental laws, cast doubt on Congress’s power to regulate certain aspects of water pollution.¹²⁹ Conversely, conservative Justices might be more inclined to uphold federal statutes which implement policies they support, such as tough criminal laws and bans on partial-birth abortion.¹³⁰

Second, and relatedly, Professor Nelson and I predicted that such common law development of malleable standards would prove inadequate in the long run to sustain genuine doctrinal reform.¹³¹ On the one hand, if the Court so desired, it could easily cabin *Lopez* and *Morrison* to the trendy and largely symbolic laws at issue in those cases (perhaps adding some similar recent “feel

¹²⁴ See *Morrison*, 529 U.S. at 617–18 (citing *Lopez*, 514 U.S. at 568). Scholars have criticized this rhetoric as empty and unhelpful. See, e.g., Graglia, *supra* note 114, at 768; Regan, *supra* note 114, at 566.

¹²⁵ See *Scarborough v. United States*, 431 U.S. 563 (1977), discussed *supra* note 85. The Court asserted that the law in *Scarborough* required that the gun had been “in or affecting commerce,” whereas the GFSZA did not. See *Lopez*, 514 U.S. at 561–62. But virtually every firearm has gone through interstate commerce, presumably including the one involved in *Lopez*. In fact, Congress amended the GFSZA to substitute for the word “firearm” the phrase “firearm that has moved in or that otherwise affects interstate or foreign commerce.” See GFSZA, 18 U.S.C. §§ 922 (q)(1), (q)(2)(A), (q)(3)(A) (2000), *as amended* by Pub. L. 104-208 (1996). If that verbiage satisfies *Lopez*, then the Court’s stated goal of limiting federal power and preserving state authority will be completely frustrated.

¹²⁶ See Nelson & Pushaw, *supra* note 36, at 5–8, 93–107.

¹²⁷ See, e.g., Pushaw, *Partial-Birth Abortion*, *supra* note 17, at 321–22, 337.

¹²⁸ See *supra* note 19 and accompanying text.

¹²⁹ See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001); see also Adler, *supra* note 19, at 379–81 (noting the conservative Justices’ reputation for being hostile to environmental legislation).

¹³⁰ See Pushaw, *Partial-Birth Abortion*, *supra* note 17, at 321, 337.

¹³¹ See Nelson & Pushaw, *supra* note 36, at 93–173.

good” federal statutes, like the prohibition on carjacking).¹³² On the other hand, the conservative Justices could invoke the standards of *Lopez* and *Morrison* to tear down major legislation that previously had been upheld, such as that concerning civil rights and the environment.¹³³ Finally, the Court could steer a middle path, proceeding on a case-by-case basis with no clear pattern.

The foregoing problems with discretionary application of vague Commerce Clause standards became apparent in *Gonzales v. Raich*.¹³⁴ The majority, concurring, and dissenting opinions all contained reasonable applications of the *Lopez/Morrison* standards, but several Justices left themselves open to accusations of raw political decision-making.

III. THE *RAICH* CASE

California’s Compassionate Use Act created a narrow exception to its criminal laws prohibiting the manufacture, possession, and consumption of marijuana in situations where doctors approved marijuana use for patients with serious illnesses.¹³⁵ Pursuant to this law, Angel Raich and Diane Monson, who suffered excruciating pain because of various medical problems, obtained their physicians’ authorization to use marijuana cultivated entirely within California.¹³⁶

The federal government sought to enforce against these two women a provision of the Controlled Substances Act of 1970 (“CSA”), which criminalized the manufacture, distribution, possession, or use of marijuana.¹³⁷ The CSA was part of comprehensive legislation designed to (1) ban “Schedule 1” drugs (including marijuana) that had, in Congress’s judgment, a high potential for abuse and no accepted medical use, and (2) regulate trade in legitimate drugs to prevent their diversion into illicit channels.¹³⁸ Raich and Monson claimed that the CSA exceeded Congress’s power under the Commerce Clause as applied to their noncommercial, local possession of home-grown marijuana for personal medical use as authorized by state law.¹³⁹

This argument generated four separate opinions in the Supreme Court. First, Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, relied heavily upon *Wickard* and *Perez* (as affirmed in *Lopez* and *Morrison*) to hold that Congress had rationally concluded that the intrastate cultivation, possession, and use of marijuana was part of a class of economic activities (drug manufacturing and trafficking) that substantially affected

¹³² See *id.* at 84–88, 125–41 (describing the panoply of federal criminal statutes and noting that they are usually redundant, as the states already prohibit conduct such as sexual assault, gun possession near schools, and carjacking).

¹³³ *Id.* at 86–87, 101–02, 122–25 (discussing the civil rights and environmental law cases).

¹³⁴ 125 S. Ct. 2195 (2005).

¹³⁵ *Id.* at 2199 (citing statute).

¹³⁶ *Id.* at 2199–2200.

¹³⁷ *Id.* at 2201–04 (summarizing the CSA).

¹³⁸ *Id.* at 2203 (citing statute).

¹³⁹ *Id.* at 2204–05.

interstate commerce.¹⁴⁰ Second, Justice Scalia concurred on the ground that Congress could enact *any* statute it deemed “necessary and proper” to effectuate a valid regulation of interstate commerce.¹⁴¹ Third, Justice O’Connor dissented and contended that, under *Lopez* and *Morrison*, the Court should have vindicated California’s traditional police power to define its criminal law instead of accepting Congress’s undocumented assertion that in-state medical marijuana use substantially affected interstate commerce.¹⁴² Fourth, Justice Thomas agreed with Justice O’Connor’s application of *Lopez* and *Morrison*, but reiterated his theory that the “substantial effects” test should be discarded and replaced by an analysis focusing on whether the regulated activity constituted “commerce” (i.e., trade) between states.¹⁴³

In short, all of the Justices recognized that *Lopez* and *Morrison* provided the controlling authority, yet they could form no consensus about the meaning or applicability of the standards set forth in those cases: whether the regulated activity was “commercial,” whether it “substantially affected” interstate commerce, and whether it was a matter of “national” or “local” concern. These standards will be examined in turn.

A. “Commercial” or “Economic” Activity

Lopez and *Morrison* restricted Congress to addressing only “commercial” or “economic” conduct.¹⁴⁴ In *Raich*, Justice Stevens adopted a capacious definition of “economics” found in a forty-year old dictionary: “the production, distribution, and consumption of commodities.”¹⁴⁵ This conception of economics extended the Commerce Clause to any commodities (even those located entirely within one state) that had an “established . . . interstate market.”¹⁴⁶ Accordingly, Justice Stevens concluded that Congress could regulate the “economic” activity of producing and using marijuana, a commodity with a large interstate market.¹⁴⁷ Justice O’Connor objected that

the Court’s definition of economic activity . . . threatens to sweep all of productive human activity into federal regulatory reach . . .

¹⁴⁰ *Id.* at 2205–15.

¹⁴¹ *Id.* at 2215–20 (Scalia, J., concurring).

¹⁴² *Id.* at 2220–29 (O’Connor, J., dissenting).

¹⁴³ *Id.* at 2229–39 (Thomas, J., dissenting).

¹⁴⁴ *See* *United States v. Lopez*, 514 U.S. 549, 561 (1995).

¹⁴⁵ *Raich*, 125 S. Ct. at 2211 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). Justice Stevens did not explain why he chose this definition of “economics,” which ignores the transformation of the study of economics over the past four decades.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2205–09, 2211–15. Justice Stevens declared that *Wickard* and its progeny required rejecting the argument that Congress cannot regulate a “locally cultivated product that is used domestically rather than sold on the open market.” *Id.* at 2215. That precedent, however, stands on its head the original meaning of “commerce,” which concerned only activities oriented toward the marketplace and thus excluded goods produced and used at home. *See supra* notes 45–59 and accompanying text.

....

... It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all and to declare everything economic. We have already rejected the result that would follow—a federal police power.¹⁴⁸

Instead, Justice O'Connor argued that the precise conduct at issue—the at-home cultivation, possession, and use of marijuana *for personal medical purposes as prescribed by state law*—had no commercial character: Mere possession was not “commerce” (as *Lopez* held), and Raich and Monson had never engaged in any commercial transactions to obtain the marijuana.¹⁴⁹

Justice Thomas echoed Justice O'Connor's concerns,¹⁵⁰ but went further and repeated his call for the Court to adopt his version of the original meaning of “commerce”: buying, selling, and transporting goods.¹⁵¹ He concluded that Raich and Monson had not engaged in “commerce” because they had never bought or sold marijuana.¹⁵²

This judicial debate fulfills my prediction that the Court's refusal in *Lopez* and *Morrison* to define “commerce,” and its careless equation of that word with “economics,” would eventually sabotage its attempt to reform Commerce Clause doctrine.¹⁵³ Justice Stevens exploited that loose language by embracing the broadest possible meaning of “economics.” Justice O'Connor (joined by the Chief Justice) would have continued the *Lopez/Morrison* practice of simply asserting that the marijuana-related activity was not “commercial” or “economic”—as if this point were intuitively obvious, even though their colleagues failed to grasp it. Only Justice Thomas was willing to define “commerce” precisely and to apply that meaning faithfully. He should be commended for doing so, even though his proposed definition is too narrow.¹⁵⁴

¹⁴⁸ *Id.* at 2224–25 (O'Connor, J., dissenting) (citing *Lopez*, 514 U.S. at 564).

¹⁴⁹ *Id.* at 2225.

¹⁵⁰ *Id.* at 2229–39 (Thomas, J., dissenting) (contending that the majority's sweeping definition of economics “carves out a vast swath of activities that are subject to federal regulation,” including “quilting bees, clothes drives, and potluck suppers”).

¹⁵¹ *Id.* at 2229–30.

¹⁵² *Id.* at 2230.

¹⁵³ See Nelson & Pushaw, *supra* note 36, at 94–95, 109–10; Pushaw, *Partial-Birth Abortion*, *supra* note 17, at 320–22, 331, 333–38.

¹⁵⁴ Justice Thomas declared that “the term ‘commerce’ [was] consistently used [in the 1700s] to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange.” *Raich*, 125 S. Ct. at 2230 (Thomas, J., dissenting) (citing Barnett, *Original Meaning*, *supra* note 31, at 112–25). Professor Barnett's article attempted to refute the argument made by Grant Nelson and me that, although the

In sum, the Court in *Lopez* and *Morrison* did not illuminate the meaning of “commerce” or “economics.” Thus, it is impossible to ascertain whether the majority in *Raich* correctly characterized the growth, possession, and use of marijuana as “commercial” or “economic” activity, or if the dissenters properly reached the opposite conclusion.

B. “Substantial” Effects on Interstate Commerce

Similar vagueness problems plague the “substantial effects” test. Justice Stevens maintained that Congress could regulate noncommercial and local activities (such as the personal cultivation, possession, and use of marijuana) if it had a rational basis for determining that, in the aggregate, they were part of an economic class of activities that “substantially affected” interstate commerce.¹⁵⁵ As in *Wickard*, Congress could reach the production of a fungible commodity (e.g., wheat or marijuana) for home consumption to control overall supply and demand for that product in the national market.¹⁵⁶ The Court emphasized that, under the lenient “rational basis” test, Congress had no duty to demonstrate (e.g., through specific findings) the economic effect of every

main definition of “commerce” during the eighteenth century was indeed trade in goods, this word had a well-established secondary meaning: all activities geared toward the marketplace, including the production of goods for sale and the compensated provision of services. See Nelson & Pushaw, *supra* note 36, at 13–50.

Contrary to Justice Thomas’s suggestion, we never claimed that “commerce” included “all economic or gainful activity that has some attenuated connection to trade or exchange.” On the contrary, Professor Nelson and I rejected the notion that “commerce” encompassed “economic” activities, and instead limited our definition of “commerce” to market-oriented conduct that directly related to the sale of goods or services. *Id.* at 109–10.

Our thesis may have influenced Justice Thomas to alter his originalist conception of “commerce” to include services. In *Lopez*, he said that in 1787 “‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.” *United States v. Lopez*, 514 U.S. 584, 585 (1995) (Thomas, J., concurring); see also *id.* at 586–87 (repeatedly equating “commerce” with “trade in goods”). Justice Thomas nowhere mentioned compensated services like banking or insurance. In *Raich*, however, he asserted that “the Commerce Clause empowered Congress to regulate the buying and selling of goods and services trafficked across state lines.” *Raich*, 125 S. Ct. at 2229 (Thomas, J., dissenting) (emphasis added).

¹⁵⁵ *Raich*, 125 S. Ct. at 2205–09. Justice Stevens erroneously cited *Wickard v. Filburn*, 317 U.S. 111 (1942), as applying a “rational basis” test. See *Raich*, 125 S.Ct. at 2207. In fact, the Court in *Wickard* concluded that the government had presented ample evidence that home-grown wheat “substantially affected” interstate commerce in that commodity. *Wickard*, 317 U.S. at 128–29. The notion that the Court would uphold an exercise of the Commerce power merely if it could posit some “rational basis” for the law (even if Congress had not set forth any justification) emerged only in the 1960s. See *supra* notes 81–82 and accompanying text.

¹⁵⁶ *Raich*, 125 S. Ct. at 2206–09. In other words, the federal government could reasonably conclude that the high demand in the interstate market for a particular commodity would draw some of the home-grown supply of that item into the market. *Id.* at 2207. Justice Stevens rejected the pertinence of the fact that Filburn (whom he mistakenly called “Wickard”) was a commercial farmer, whereas Raich and Monson did not sell marijuana, because the Court in *Wickard* did not treat Filburn’s home consumption of wheat as part of his commercial farming operation. *Id.*

subcategory within the class of activities regulated, such as growing and using marijuana for medical purposes.¹⁵⁷ Rather, Congress could regulate all marijuana-related activities, especially given the difficulty of distinguishing marijuana cultivated at home from that grown elsewhere and the constant possibility of its diversion into illicit channels.¹⁵⁸

Moreover, the Court declared that it would not excise individual applications of a comprehensive economic regulatory scheme because they had a *de minimis* character.¹⁵⁹ Justice Stevens contrasted the CSA with the Gun-Free School Zones Act and the Violence Against Women Act, which fell entirely outside the scope of the Commerce Clause because they did not feature any larger regulation of economic activity.¹⁶⁰

Finally, the Court concluded that Congress, in exercising its Commerce power, did not have to accept the claim that California would effectively segregate marijuana grown for medical use from the interstate market.¹⁶¹ Rather, Congress could rationally surmise that “medical” marijuana from California and eight other states would significantly increase the supply of that commodity, and that some of this marijuana would be channeled into interstate commerce.¹⁶²

Justice Scalia argued that the majority’s treatment of the “substantially effects” test failed to capture the breadth of the Necessary and Proper Clause, which authorized Congress to make effective any law it had duly enacted under another Article I power (including the Commerce Clause).¹⁶³ For instance, Congress could regulate noneconomic, local activities—regardless of whether they substantially affected interstate commerce—either to facilitate interstate commerce by removing potential obstructions or to restrict such commerce by eliminating possible stimulants.¹⁶⁴ Justice Scalia read *Lopez* and *Morrison* as

¹⁵⁷ *Id.* at 2208–09, 2211. Indeed, the marijuana’s use for “personal medical purposes” was irrelevant, because Congress had found that marijuana could not be consumed “for any purpose” and “ha[d] no acceptable medical uses.” *Id.* at 2211.

¹⁵⁸ *Id.* at 2209.

¹⁵⁹ *Id.* at 2206, 2209.

¹⁶⁰ *Id.* at 2209–11. Justice Thomas replied that, because the Court could strike down entire statutes as exceeding Congress’s constitutional power, it surely could invalidate a provision of a statute as applied. *Id.* at 2238 (Thomas, J., dissenting). Indeed, Congress contemplated such a possibility when it included in the CSA an express severability provision. *Id.* at 2237–38 (Thomas, J., dissenting).

¹⁶¹ *Id.* at 2212–13; *see also id.* at 2220 (Scalia, J., concurring) (to similar effect).

¹⁶² *Id.* at 2213–14.

¹⁶³ *Id.* at 2215–20 (Scalia, J., concurring) (citing cases such as *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

¹⁶⁴ *Id.* at 2216 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)). Justice Scalia traced such reliance on the Necessary and Proper Clause back to *United States v. Coombs*, 37 U.S. (12 Pet.) 72 (1838), a case he cited but failed to discuss.

In *Coombs*, the Court upheld a federal statute prohibiting the theft of goods from shipwrecked vessels on the ground that Congress’s power to regulate interstate commercial navigation included the ability to protect that commerce from criminal interference (there, stealing items from a commercial ship that had foundered on a beach in New York). *Id.* at 78–79. The Court nowhere suggested that this federal law could constitutionally have been

confirming that Congress can reach noneconomic conduct within a state as an essential part of a larger regulatory scheme involving an interstate market—but not as the starting point in a remote chain of inferences that would eventually lead to an effect on interstate commerce.¹⁶⁵ He further maintained that, in cases dating back to *McCulloch*, judicial review had been limited to ensuring that the statutory means were “plainly adapted” to a legitimate end and were “consistent with the letter and spirit of the [C]onstitution” (for example, the concept of state sovereignty).¹⁶⁶

Applying these principles to the CSA, Justice Scalia initially found that, under the Commerce Clause, Congress undoubtedly had power “to extinguish the interstate market in Schedule 1 substances” such as marijuana.¹⁶⁷ Accordingly, he concluded that, under the Necessary and Proper Clause, Congress could effectively achieve that legitimate end by prohibiting all intrastate activities related to such drugs—both economic (manufacturing, distribution, and possession with intent to distribute) and noneconomic (simple possession).¹⁶⁸

In dissent, Justice O’Connor contended that *Lopez* and *Morrison* required Congress to justify any encroachment on historical state police powers by affirmatively demonstrating that the regulated activity “substantially affect[ed] interstate commerce.”¹⁶⁹ That requirement traced back to *Wickard*, where the Court relied upon a detailed record showing that the consumption of home-grown wheat affected the national wheat supply by twenty percent.¹⁷⁰ Justice

applied to sailing vessels that had not been engaged in commerce. *See* Nelson & Pushaw, *supra* note 36, at 66–67 n.286 and accompanying text (examining *Coombs*). Nor did Congress purport to criminalize theft from shipwrecks as part of a broader scheme prohibiting the theft of goods generally.

Thus, the statute in *Coombs* is unlike the CSA, which does not protect interstate commerce in marijuana from criminal interference. Rather, the CSA is an entirely negative regulation that prohibits all drug-related activity, even as applied to those not participating in interstate commerce.

¹⁶⁵ *Raich*, 125 S. Ct. at 2216–18 (Scalia, J., concurring) (noting that *Lopez* and *Morrison* followed the analysis that had begun in cases like *United States v. Darby*, 312 U.S. 100 (1941)); *see also id.* at 2218 (distinguishing *Lopez* and *Morrison* as involving laws that regulated intrastate activities for their own sake, not as a means to effectuate a comprehensive system of commercial legislation).

¹⁶⁶ *Id.* at 2218–19 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421–22 (1819)).

¹⁶⁷ *Id.* at 2219.

¹⁶⁸ *Id.*; *see also id.* at 2219–20 (arguing that, because drugs are a fungible commodity, it is impossible to distinguish “intrastate” from “interstate” drug manufacture and distribution, and emphasizing that marijuana grown at home and possessed for personal use is always an instant from the interstate market).

¹⁶⁹ *Id.* at 2220–29 (O’Connor, J., dissenting).

¹⁷⁰ *Id.* at 2227. Justice O’Connor dismissed Justice Stevens’s claim that *Wickard* approved federal power over any home-grown commodity for which a national market exists. *Id.* at 2225; *see also id.* at 2237 (Thomas, J., dissenting) (rejecting the majority’s contention that, if Congress broadly regulates an interstate market, it can sweep in any incidental local activity). Rather, the AAA exempted individuals who were not commercial farmers and who raised very small amounts of wheat, so the Court could not have held that any production of a commodity falls within the scope of the Commerce power. *Id.* at

O'Connor contrasted such documentation with the CSA's "bare declaration[]" that all intrastate production, distribution, possession, and use of drugs had a significant impact on the interstate market and therefore had to be regulated.¹⁷¹ Most pertinently, Congress had never considered—much less established—that homegrown marijuana used for medical purposes exerted a "substantial effect" on interstate commerce.¹⁷²

Justice O'Connor argued that this complete absence of evidence also undercut Justice Scalia's theory that regulating such local activity was necessary to effectuate a legislative scheme dealing with interstate commerce in marijuana.¹⁷³ She stressed that Congress's enabling laws under the Necessary and Proper Clause had to be consistent with basic constitutional principles, such as enumerated federal powers and reserved state authority; otherwise, the Clause "will always be a backdoor for unconstitutional federal regulation."¹⁷⁴

Justice O'Connor further charged the Court with eviscerating *Lopez* and *Morrison* by giving Congress a perverse incentive to legislate in the broadest possible way, thereby sweeping in dubious assertions of power over local matters.¹⁷⁵ Contrary to the majority, Justice O'Connor characterized recreational and medicinal use of drugs (including marijuana) as distinct

2225–26 (O'Connor, J., dissenting). *But see id.* at 2207 (responding that this statutory exemption was irrelevant to the federal government's power to control local marijuana growers and users, whose aggregate production was deemed significant enough by Congress to warrant regulation).

¹⁷¹ *Id.* at 2222, 2227 (O'Connor, J., dissenting).

¹⁷² *Id.* at 2226–28; *see also id.* at 2227–28 (faulting the majority for accepting the government's speculation that a substantial amount of medical marijuana probably would be diverted into the national market). Indeed, even when Congress did make voluminous findings that a particular activity substantially affected interstate commerce (as in the Violence Against Women Act), the Court could reject that conclusion. *Id.* at 2227–28 (citing *United States v. Morrison*, 529 U.S. 598, 614 (2000)).

¹⁷³ *Id.* at 2228; *see also id.* at 2233 (Thomas, J., dissenting) (to similar effect).

¹⁷⁴ *Id.* at 2226 (O'Connor, J., dissenting). Justice O'Connor pointedly cited Justice Scalia's majority opinion in *Printz v. United States*, 521 U.S. 898, 923 (1997), deeming the Necessary and Proper Clause "the last, best hope of those who defend ultra vires congressional action" (there, an attempt to "commandeer" state executives into enforcing laws as dictated by Congress). Justice Thomas likewise asserted that the CSA's intrastate ban on the personal use of medical marijuana was neither "necessary" to regulating interstate commerce in marijuana nor "proper" (because it subverted federalism by taking over the states' traditional police powers). *See Raich*, 125 S. Ct. at 2230–34 (Thomas, J., dissenting).

¹⁷⁵ *Id.* at 2221–22 (O'Connor, J., dissenting). For example, under the majority's reasoning, Congress could have regulated gun possession in school zones by placing this local, noncommercial activity into a comprehensive statute that criminalized "transfer or possession of a firearm anywhere in the nation." *Id.* at 2223. Similarly, the Court in *Lopez* could have concluded that guns near schools might always be diverted into the interstate commercial network of firearms already subject to federal regulation (e.g., the federal law banning the sale of guns to minors). *Id.* at 2226; *see also id.* at 2238 (Thomas, J., dissenting) (contending that if Congress lacks independent authority to enact a statutory provision, it cannot pass the same provision by inserting it into broader legislation). Professor Vermeule accurately predicted that the *Lopez* and *Morrison* standards would encourage Congress to enact, and the Court to uphold, the most comprehensive possible regulatory schemes. *See* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2001).

activities that could be regulated separately.¹⁷⁶ Because states isolated the tiny number of medical marijuana users from the market (and would presumably enforce their criminal laws banning the sale of marijuana), the effect of their activity on interstate marijuana trade was not self-evident.¹⁷⁷

Finally, Justice Thomas assailed the “substantial effects” test on three grounds. First, it had no roots in either the Commerce Clause or the Necessary and Proper Clause.¹⁷⁸ Second, this standard was too malleable, as illustrated by the majority’s expansion of the relevant conduct by describing the class at the highest level of generality (interstate manufacturing, possession, and use of marijuana), instead of focusing on the particular activity of state-controlled possession of home-grown marijuana for medical use, which has no discernible impact on interstate commerce.¹⁷⁹ Third, the test was “easily manipulated.”¹⁸⁰ Most pertinently, to evade the *Lopez/Morrison* prohibition on federal regulation of “noneconomic” activity that substantially affects interstate commerce, the majority defined “economics” so broadly as to encompass virtually all conduct.¹⁸¹ In Justice Thomas’s view, the “substantial effects” test guaranteed doctrinal instability and therefore should be replaced by an approach that defined and enforced Article I limits on Congress’s powers.¹⁸²

These conflicting opinions illustrate that application of the “substantial effects” test depends on two utterly subjective judgments. The first concerns the level of generality at which the regulated activity is characterized.¹⁸³ Justice Stevens described the CSA broadly as governing the production, possession, and use of drugs—conduct which exerts a substantial effect on interstate commerce.¹⁸⁴ By contrast, Justice O’Connor characterized the relevant activity narrowly as the state-authorized “personal cultivation, possession, and use of

¹⁷⁶ *Id.* at 2222–24 (O’Connor, J., dissenting).

¹⁷⁷ *Id.* at 2226–28; *see also id.* at 2232, 2235 (Thomas, J., dissenting) (to similar effect).

¹⁷⁸ *Id.* at 2235 (Thomas, J., dissenting).

¹⁷⁹ *Id.* Justice Thomas rejected the Court’s claim that the effectiveness of the states’ regulation of medical marijuana was immaterial because states cannot diminish Congress’s powers. Rather, the very issue was whether Congress had power in the first place, which depended upon factors such as whether the states were properly enforcing their medical marijuana laws. *Id.* at 2235 n.6; *see also id.* at 2237 (noting that, if one assumed that the federal government did have authority over local medical marijuana, then Raich and Monson could not escape prosecution merely because their individual conduct had a trivial impact on the interstate drug trade).

¹⁸⁰ *Id.* at 2235.

¹⁸¹ *Id.* at 2236.

¹⁸² *Id.* at 2237; *see also id.* (observing that if the Court did not wish to vindicate these constitutional limitations, it should forthrightly declare the Tenth Amendment and federalism to be dead).

¹⁸³ *See id.* at 2235 (emphasizing this point); *see also* Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199 (2003) (arguing that the multifaceted possible perspectives about whether an activity substantially affects interstate commerce suggest that the Court invariably should defer to Congress’s judgments).

¹⁸⁴ *Raich*, 125 S. Ct. at 2205–15.

marijuana for medical purposes,”¹⁸⁵ which did not have any measurable impact on the interstate economy. A second ambiguity is whether the “substantial effect” must be demonstrated affirmatively (the dissent’s position) or can be hypothesized through a “rational basis” test (the majority’s approach). Because the “substantial effects” standard is based primarily on discretion rather than law, it is again pointless to try to ascertain whether Justice Stevens or Justice O’Connor applied it correctly.

To complicate matters further, two Justices questioned the “substantial effects” test itself, although their proposed substitutes are troubling. Justice Thomas argued that this standard was far too expansive and that Congress could regulate only “interstate commerce” itself, not anything that substantially affected it.¹⁸⁶ Justice Thomas has helpfully returned our focus to the Commerce Clause’s language and history, but has ignored eighteenth-century evidence indicating that “commerce” included all market-oriented activities.¹⁸⁷ Moreover, he did not grapple with the implications of his argument that Congress can regulate only trade that crosses state lines, which would require overturning many decades of precedent and invalidating huge swaths of legislation. At the other extreme, Justice Scalia criticized the “substantial effects” test as too restrictive and asserted that Congress can control *any* activity as necessary to effectuate its regulation of interstate commerce.¹⁸⁸ Justice Scalia has presented a reasonable interpretation of modern precedent, but not of history (as a professed originalist would be expected to do).¹⁸⁹

¹⁸⁵ *Id.* at 2224 (O’Connor, J., dissenting).

¹⁸⁶ *Id.* at 2235-37 (Thomas, J., dissenting).

¹⁸⁷ See *supra* notes 45-46, 51, 57-59 and accompanying text.

¹⁸⁸ *Raich*, 125 S. Ct. at 2215-20 (Scalia, J., concurring).

¹⁸⁹ Justice Scalia fails to cite any evidence from the Framing or Ratification debates to support his robust conception of the Necessary and Proper Clause. Furthermore, he ignores exhaustively documented historical analyses which refute his arguments. See, e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). Likewise, he does not mention any of the historical studies that conflict with his perception of the Commerce Clause. See, e.g., Berger, *supra* note 116; Epstein, *supra* note 116; Nelson & Pushaw, *supra* note 36.

Admittedly, Justice Scalia’s brand of originalism considers not only the Framing and Ratification debates, but also the early official actions of the federal government. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-38 (Amy Gutmann et al. eds., 1997). Moreover, he recognizes that the Constitution’s original meaning, however determined, must be reconciled with existing precedent. See *id.* at 138-39; see also Eric R. Claey, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 791-815, 817-819 (2005) (maintaining that *Raich* reveals Justice Scalia’s tendency to defer to legislative judgments and to follow entrenched precedent, even when they are inconsistent with original meaning). Nonetheless, I dispute Justice Scalia’s contention that early federal statutes and decisions (like *McCulloch* and *Coombs*) support the constitutionality of the CSA provision in *Raich*. See *supra* notes 62-64, 66 and accompanying text. Rather, his opinion rests entirely upon twentieth-century cases. Justice Scalia should frankly acknowledge this fact and not grasp at historical straws.

The “substantial effects” test, then, has little concrete content. Only seven Justices have endorsed it fully, and they cannot agree on its meaning.

C. *Federalism/“Traditional State Regulation”*

Because Justices Stevens and Scalia concluded that Congress had power to enact the CSA, they had no difficulty finding that this federal statute preempted all conflicting state legislation, regardless of whether states traditionally had regulated in this area.¹⁹⁰ Moreover, Justice Stevens noted that, although the CSA was relatively recent, federal drug laws dated back a century.¹⁹¹

By contrast, Justice O'Connor stressed that *Lopez* and *Morrison* had enforced Commerce Clause limits “to protect historic spheres of state sovereignty from excessive federal encroachment,” thereby allowing states to experiment with different approaches to complex social policy issues.¹⁹² She charged the majority with disregarding this federalism rationale by assuming, without any evidence, that California and other states would not enforce their criminal drug laws that carefully carved out a limited exception for medical use of marijuana.¹⁹³ Indeed, the Court's holding would encourage Congress to enact legislation intruding most deeply into state affairs by packaging regulation of purely local activities into comprehensive statutes.¹⁹⁴ Similarly, Justice Thomas argued that the CSA, as applied, had improperly invaded the states' traditional police powers to define criminal law and protect their citizens' health, safety, and welfare.¹⁹⁵

As should be apparent, interpreting the Commerce Clause in light of “federalism” further confuses analysis. If the majority is correct that Congress has Article I power to enact the CSA, then it can supersede state laws. Conversely, if the dissenters have properly concluded that Congress lacks authority to regulate intrastate medical marijuana possession and use, then this subject is reserved to the states. Either way, the only relevant question is one of federal legislative power. This inquiry should not be obscured by conceptions of federalism that attempt to categorize topics as historically matters of either state or federal concern.¹⁹⁶

¹⁹⁰ *Raich*, 125 S. Ct. at 2212–13; *see also id.* at 2219 (Scalia, J., concurring) (reiterating this point, but reaffirming an exception when Congress attempts to commandeer state governments to implement federal dictates, which violates state sovereignty).

¹⁹¹ *Id.* at 2201–03.

¹⁹² *Id.* at 2220–21 (O'Connor, J., dissenting).

¹⁹³ *Id.* at 2228.

¹⁹⁴ *Id.* at 2222–23.

¹⁹⁵ *See id.* at 2233–34, 2239 (Thomas, J., dissenting).

¹⁹⁶ I do not mean to imply that federalism is irrelevant. On the contrary, the Framers limited Congress to regulating only “commerce” that flows “among the states” because they thought that noncommercial and intrastate activities (e.g., matters of public morality and social welfare) would be addressed much more effectively by states and their subdivisions responding to local concerns. *See Nelson & Pushaw, supra* note 36, at 25–31, 113–18. Nonetheless, if a subject fell within the scope of interstate commerce, Congress could regulate it even if states had traditionally done so. Thus, the dispositive legal issue is whether

D. A Variety of Unsatisfactory Approaches

None of the Justices has set forth an analysis of the Commerce Clause that is both workable and faithful to its language and history. The four *Lopez/Morrison* dissenters, who became the *Raich* majority, engaged in a form of judicial review so anemic that every federal law passes muster. Their approach, in practical terms, is equivalent to treating Congress's exercise of its Commerce Clause power as raising political rather than legal questions.¹⁹⁷ Although a candid declaration of nonjusticiability would be preferable to their current "pretend" judicial review,¹⁹⁸ either option abdicates the Court's duty to ensure that Congress does not exceed its constitutional powers.¹⁹⁹ Justice Scalia added little rigor by making Congress play his version of "Simon Says": proclaiming that a particular regulation is "necessary and proper" to carry into effect a broader economic program. Justice O'Connor and Chief Justice Rehnquist put some brakes on Congress, but through an improvisational application of standards that maximized their discretion and minimized the rule of law.²⁰⁰ Only Justice Thomas proposed meaningful judicial review based upon the text and history of the Commerce Clause. If Thomas's historical interpretation were correct, however, its application would destroy the modern federal regulatory structure.

The Justices have thereby put themselves into a box. They can either engage in arbitrary judicial review or adopt Justice Thomas's historical approach and unleash political and economic chaos. Their understandable reluctance to do the latter explains their embrace of the former.

E. The Reaction to Raich

Raich has engendered a mixed response. Most legal scholars, who deemed *Lopez* and *Morrison* to be misguided attempts to resurrect pre-New Deal restrictions on the Commerce Clause,²⁰¹ either have or will welcome this decision.²⁰² Other commentators, however, have praised the dissenters, either

an activity is "commerce" that concerns at least two states, not whether states or the federal government historically have regulated it.

¹⁹⁷ See, e.g., Althouse, *supra* note 15, at 799–800.

¹⁹⁸ See Graglia, *supra* note 114, at 719–23, 767–71.

¹⁹⁹ See Nelson & Pushaw, *supra* note 36, at 104–05.

²⁰⁰ Shortly after *Raich* came down, Chief Justice Rehnquist died and Justice O'Connor retired. It will be interesting to see if their replacements continue their Commerce Clause analysis.

²⁰¹ Such criticism spanned the ideological spectrum. For instance, liberals viewed these cases as ultimately designed to roll back progressive legislation in areas like civil rights and the environment. See *supra* note 19 and accompanying text. Taking a different tack, conservatives like Lino Graglia and moderate liberals like Jesse Choper argued that the Court should defer to all of Congress's judgments under the Commerce Clause, regardless of the political positions they embodied. See Graglia, *supra* note 114; Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court?"*, 46 CASE W. RES. L. REV. 663 (1996).

²⁰² Because *Raich* is so recent, scholarly works examining it have not yet appeared. (Indeed, this Symposium contains the first published articles). Nonetheless, law professors'

because they approve of limiting congressional power²⁰³ or because they favor medical marijuana as a policy matter.²⁰⁴

Nevertheless, analysts on both sides of the fence apparently agree that Justices Kennedy and Scalia have given up on the Court's ten-year experiment of fashioning genuine limitations on the Commerce power.²⁰⁵ The only debate concerns why they jumped ship. The most popular theory is that these two Justices' personal and political hostility to illegal drug use is so intense that they refused to countenance any exceptions to it—even for noncommercial, intrastate activities that, in any other context, would have led them to the opposite result.²⁰⁶

I view *Raich* in a different light. For reasons already discussed, I find it fruitless to try to ascertain whether the majority or the dissent properly applied *Lopez* and *Morrison*, because these cases set forth standards so flexible as to justify either outcome. Furthermore, it is premature to pronounce *Raich* the death knell of the Rehnquist Court's Commerce Clause revolution because of the supposed defections of Justices Scalia and Kennedy. After all, the majority and concurring opinions reaffirmed rather than overruled *Lopez* and *Morrison*, and those cases invite discretionary application of imprecise standards on a case-by-case basis.

Given that latitude, it may be unfair to impute sinister motives to Justices Kennedy and Scalia. Kennedy may have joined the majority opinion simply because he found its legal analysis persuasive. In this regard, it is worth recalling that he wrote a separate opinion in *Lopez* arguing that the GFSZA was an aberrational congressional attempt to regulate wholly noncommercial activity entrusted to the states, but that the Court should continue to show deference to Congress's exercise of its broad Article I power to govern the national economy.²⁰⁷ Similarly, Justice Scalia may sincerely believe that Congress has wide discretion to regulate noncommercial, intrastate conduct as necessary and proper to effectuate its Commerce Clause power.²⁰⁸

In short, it is idle to speculate that Justices Kennedy and Scalia betrayed their conservative colleagues for personal or political reasons, or that they and

overwhelmingly negative reaction to *Lopez* and *Morrison* suggests that they will approve of *Raich*, as several media commentators already have done. *See supra* note 30.

²⁰³ *See, e.g.,* Barnett, *Revenge*, *supra* note 31.

²⁰⁴ *See, e.g.,* Cathy Young, *The Medical Pot Hysteria*, BOSTON GLOBE, June 13, 2005, at 15, available at 2005 WLNR 9385159; Sally Satel, *Good to Grow*, N.Y. TIMES, June 8, 2005, at A1.

²⁰⁵ *See supra* note 32 and accompanying text.

²⁰⁶ *See supra* note 33 and accompanying text.

²⁰⁷ *United States v. Lopez*, 514 U.S. 549, 568–83 (1995) (Kennedy, J., concurring). Interestingly, Justice O'Connor joined this concurring opinion, but obviously felt that its logic warranted invalidation of the CSA in *Raich*.

²⁰⁸ *See, e.g.,* Mark Moller, *What Was Scalia Thinking?*, CATO INST. ONLINE, June 15, 2005, http://www.cato.org/pub_display.php?pub_id=3813 (maintaining that Justice Scalia's opinion was consistent with his past deference to comprehensive federal regulatory programs, even though his position enhances federal power at the expense of individual liberty).

their fellow Justices distorted the plain meaning of *Lopez* and *Morrison* to re-establish federal hegemony. Instead, it is more productive to attack the root of the problem, which is that the Court's prudential, common law application of malleable standards invites such unseemly charges of manipulation. To remove this cloud of doubt and uncertainty, the Court should articulate clear rules of law based upon the Commerce Clause itself and apply them impartially and consistently.

IV. A NEO-FEDERALIST APPROACH TO *RAICH* AND OTHER CASES

Recommending the adoption of neutral principles of constitutional law may seem anachronistic and impractical in our post-Realist world. I submit, on the contrary, that the straightforward application of the rules actually contained in the Constitution usually works far better than the modern Court's complex doctrine.²⁰⁹ The Commerce Clause is Exhibit A.

As described earlier, this Clause prescribes two requirements.²¹⁰ First, Congress can regulate only "commerce"—the voluntary sale of property or services and all accompanying market-oriented activities.²¹¹ Second, such commerce must occur "among the several States" (i.e., either cross state lines or take place in one state but affect others).²¹² Unlike Justice Thomas's crabbed historical vision of the Commerce Clause, the Neo-Federalist interpretation can be applied to uphold most modern federal legislation.

For instance, federal labor, employment, banking, and commercial transportation laws would be sustained simply because they involve the compensated provision of services that have multistate impacts. Likewise, Congress can regulate the buying and selling (and antecedent production) of any goods intended for the market, such as agricultural commodities and manufactured items. Moreover, Congress can establish reasonable presumptions that the production or possession of a certain significant quantity of goods indicates an intent to sell them.²¹³

Nonetheless, Neo-Federalism draws certain bright lines. Most pertinently, Congress never should be allowed to regulate activities that are not "commerce"—for example, the mere possession of items without the intent to

²⁰⁹ I have defended at length the argument that constitutional provisions—particularly those delineating the federal government's powers, such as the Commerce Clause—should be interpreted, wherever possible, as setting forth legal rules that can and should be applied objectively and consistently. See Pushaw, *Partial-Birth Abortion*, *supra* note 17, at 338–45; Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1185–87, 1206–11 (2003); see also Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) (contending that the language of the Constitution, properly understood, is usually superior to the Court's doctrinal embellishments).

²¹⁰ See *supra* Part II. A.

²¹¹ See *supra* notes 37–38, 45–48 and accompanying text.

²¹² See *supra* notes 40, 49 and accompanying text.

²¹³ See Nelson & Pushaw, *supra* note 36, at 137.

sell them, or the production of commodities for individual or home use.²¹⁴ Nor should the federal government ever address issues of exclusively moral, social, or cultural concern.²¹⁵

Application of the Neo-Federalist approach over the past decade would have led to coherent results supported by logical legal reasoning. For instance, the Gun-Free School Zones Act would have been struck down because it did not regulate the sale of products or services or any related market activities. Rather, the GFSZA was nakedly moral/social legislation. Likewise, the Violence Against Women Act was invalid because it did not regulate “commerce”: Gender-motivated violence cannot possibly be characterized as conduct geared toward the marketplace.

The Controlled Substances Act, unlike the GFSZA and VAWA, is not unconstitutional on its face. Rather, Congress can regulate the manufacture and sale of all goods earmarked for the market, including drugs like marijuana. Nonetheless, the CSA should not have been upheld as applied to Raich, Monson, and others similarly situated. They grew and possessed a small amount of marijuana solely for their own personal medical use, and they had neither sold this drug in the past nor planned to sell it in the future. Under a Neo-Federalist approach, Congress cannot regulate such wholly noncommercial activities, either directly or through the subterfuge of inserting such regulations into a broader statute that does address commerce. Instead, each state is free to deal with the issue of medical marijuana according to its citizens’ prevailing social and cultural norms.

Because the CSA flunks the initial “commerce” test, there is no need to proceed to the second part of the inquiry and determine whether or not the regulated conduct concerns more than one state. It is worth noting, however, that the facts of this case present a rare situation where the activity at issue—medical marijuana use by Raich, Monson, and others—did not have any demonstrable connection to marijuana trafficking in any other state.

As the foregoing analysis illustrates, Neo-Federalism can be applied without regard to politics or ideology. Most importantly for present purposes, the simple possession of any commodity is not “commerce” and therefore always lies beyond Congress’s reach. This principle will lead to results across the ideological spectrum. For instance, striking down the GFSZA would be considered a victory for conservatives, who tend to favor the right to possess guns.²¹⁶ By contrast, invalidating the CSA as applied to the possession of medical marijuana would appeal more to liberals, who generally support such legislation.²¹⁷ Finally, holding that Congress cannot regulate gender-based

²¹⁴ See *supra* notes 45–48, 92 and accompanying text.

²¹⁵ See *supra* notes 39, 52–53, 93 and accompanying text.

²¹⁶ I recognize, of course, that many conservatives would make an exception for the possession of firearms in and around schools. Conversely, some prominent liberals have stressed the wide scope of the constitutional right to bear arms. See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

²¹⁷ Again, I realize that a considerable number of conservatives favor medical marijuana use and, more generally, have criticized the War on Drugs.

violence does not appear to please any interest group as a matter of policy, because no sane individual or organization favors such violence (which explains why both Democrats and Republicans overwhelmingly supported this law).²¹⁸

This objective application of Commerce Clause rules is particularly helpful when addressing controversial social issues on which reasonable people passionately disagree, such as medical marijuana. Another good example is abortion. A Neo-Federalist would maintain that Congress can regulate abortion because it is “commerce” (the sale of a service) that has an interstate market.²¹⁹ Hence, the Commerce Clause authorizes both the “conservative” Partial-Birth Abortion Ban Act and the “liberal” federal law protecting abortion clinics from criminal disruption.²²⁰

Although the use of a Neo-Federalist methodology would result in sustaining most modern enactments under the Commerce Clause, it would prevent Congress from continuing its recent pattern of adopting crowd-pleasing laws that do not regulate interstate commerce in any meaningful way. Most crucially, it would halt the federalization of noncommercial and local crimes already prohibited by the states, such as gun possession near schools, sexual assault, arson, and carjacking.²²¹ I hasten to add, however, that Congress can deal with crimes that involve the voluntary sale of goods (like illegal drugs and guns) and services (e.g., loan sharking and prostitution).²²² Thus, the proposed approach would confine Congress to its proper constitutional role of regulating true “commerce” that flows interstate, not any social issue that appears to be politically compelling.

In this Article and elsewhere, I have defended the Neo-Federalist interpretation of the Commerce Clause from general criticism that it is simplistic, naive, and impractical.²²³ Nonetheless, I anticipate several more specific objections to my suggested application of this approach to *Raich*.

The most powerful counterargument would be that the in-state cultivation, possession, and use of marijuana—for medical treatment or any other purpose—are strands of an interconnected web of activities that ultimately implicate marijuana sales, and that therefore it is artificial to distinguish between “commercial” and “noncommercial” aspects of marijuana. I cheerfully concede that noncommercial activities (such as the manufacture and possession of drugs for personal use) often can be linked to interstate commerce; that line-

²¹⁸ Concededly, liberal institutions like the National Organization for Women initially spearheaded the campaign to adopt VAWA, and therefore *Morrison* can be portrayed as a conservative blow to feminists. See *supra* note 19 and accompanying text. Nonetheless, by the time the VAWA was enacted, it enjoyed strong bipartisan support.

²¹⁹ See Pushaw, *Partial-Birth Abortion*, *supra* note 17, at 322–23, 340–53. Of course, such legislation cannot infringe on the individual constitutional right to abortion.

²²⁰ See *id.* at 352–53 (citing statutes). As the Court has recognized in cases dating back to 1838, Congress can protect specific commercial transactions and establishments (e.g., commercial shipping; business outlets) from criminal interference. See *supra* note 164.

²²¹ See *supra* note 123 and accompanying text.

²²² See Pushaw & Nelson, *supra* note 2, at 698.

²²³ See, e.g., Pushaw, *Partial-Birth Abortion*, *supra* note 17, at 338–48.

drawing sometimes can be difficult; and that comprehensive federal regulation (of drugs or anything else) is more efficient than having fifty-one separate legal regimes. Nonetheless, the Constitution grants the federal government enumerated powers because the Framers feared totally centralized authority, and the Supreme Court accordingly has an obligation to enforce the limitations set forth in Article I.²²⁴ One of the clearest and most critical restrictions is that Congress can regulate only “commerce” occurring “among the several States,” which correspondingly leaves to each state control over internal noncommercial activities.²²⁵

The Court should not ignore the language of the Commerce Clause, as well as its underlying federalist design, to achieve the policy goal of federal regulatory efficiency. Doing so not only disregards the Constitution, but often inflicts serious real-world harms. For instance, after *Raich* no state may help its citizens who are enduring constant pain that can be relieved only through the controlled use of marijuana. It is precisely to allow such a state response to noncommercial social problems that the Commerce Clause contains the language it does.²²⁶

²²⁴ See *supra* notes 7, 64, 109 and accompanying text.

²²⁵ See, e.g., Pushaw, *Partial-Birth Abortion*, *supra* note 17, at 338–48. Professor Merrill properly criticizes Chief Justice Rehnquist for imposing “prohibitory limitations” on Congress derived not from the Commerce Clause itself, but rather from misleading citations to generalized assertions contained in post-1937 cases. Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 835–42, 844–45 (2005). He concludes that the Court’s approach is fatally flawed and should be replaced by an inquiry focusing on whether Congress has made a “clear statement” explaining the constitutional basis of its authority to enact statutes that lie close to the boundary of Article I power. *Id.* at 826–27, 831–35, 845–51. Professor Merrill’s proposal presents two key difficulties.

First, the Court has power to invalidate federal statutes only if they violate the Constitution—not a mere judicially created requirement like the “clear statement” rule. Chief Justice Rehnquist’s failure to articulate coherent and workable restrictions on Congress grounded in the Commerce Clause does not mean that any attempt to do so is futile. On the contrary, I have set forth a legally principled basis for the Court to strike down federal laws that do not regulate “commerce” (i.e., market-oriented activities) or that do not have effects in more than one state.

Second, a “clear statement” rule would at most delay, rather than prevent, Congress from exercising power in any way it chooses. See *id.* at 832–34 (acknowledging this criticism). For example, Professor Merrill contends that application of his suggested rule would have led to the invalidation of the GFSZA in *Lopez*, but that Congress’s amended version of this law would have sufficiently explained the connection between regulating guns near schools and interstate commerce. *Id.* at 827, 837–38, 847. The difference between these two versions of the GFSZA, however, is one of form rather than substance. See *supra* note 125. Professor Merrill also defends the result in *Raich* on the ground that Congress clearly stated why it must prohibit intrastate marijuana growth and possession in order to regulate interstate commerce in drugs. *Id.* at 826–27, 849–51. By contrast, I submit that Congress lacks power under the Commerce Clause to regulate activities that do not constitute “commerce,” such as the simple possession of drugs, guns, or any other item. Congress cannot evade that plain textual limit by declaring that noncommercial conduct is actually commercial activity.

²²⁶ See *supra* notes 45–53 and accompanying text.

A second, and related, objection is that Congress must have power to prohibit the possession of marijuana and other drugs to decrease demand for such substances, which will reduce their sale. Economists would readily accept this argument, and so would I—if the Commerce Clause authorized Congress to regulate “economics” rather than “commerce.” But the Clause does not say that.²²⁷ If it did, Congress would be able to control the possession of virtually any goods, as well as their usage. Although possession might be deemed part of a commercial transaction at the point of sale, thereafter it cannot be considered “commerce” if the commodity is used solely for personal or home purposes.²²⁸ For example, once I purchase furniture, appliances, and other things for my household, the long arm of the federal government should not be permitted to reach in and regulate my use of those items on the ground that they are part of the interstate commercial chain.

At bottom, opposition to the Neo-Federalist approach reflects a policy view favoring comprehensive federal solutions to all perceived social problems. The Commerce Clause, however, empowers Congress to enforce such national uniformity only in the realm of commerce.

V. CONCLUSION

Raich illustrates the pitfalls of the Court’s discretionary application of flexible standards to resolve questions of congressional power under the Commerce Clause. This provision has become an empty vessel into which any meaning can be poured to decide any given case. It is thus futile to try to determine which opinion in *Raich* correctly applied the law. Moreover, although case-by-case adjudication based on standards has been lauded as a form of sophisticated pragmatism,²²⁹ I cannot see much practical value in a prudential regime that provides so little guidance to Congress and that spawns so much needlessly complicated litigation.

Instead of continuing down this winding path, the Court should impartially apply precise legal rules drawn from the Commerce Clause’s text, structure, and history. The governing principles are straightforward: Congress can regulate only “commerce” (i.e., market-driven activity) that transpires “among the several States.” This law is not a relic of a bygone age, but rather retains modern vitality in determining the validity of statutes. The in-state cultivation and possession of marijuana for personal medical use is not “commerce” in any

²²⁷ See *supra* notes 117–20 and accompanying text.

²²⁸ See *supra* notes 39, 47–48 and accompanying text.

²²⁹ See, e.g., CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

meaningful sense of the word and does not affect commerce in any other state, and so is beyond the purview of federal regulation.

Therefore, *Raich* should have been an easy decision. Only the Court's commitment to its own doctrine made the case an analytical quagmire. Returning to the Commerce Clause as written would restore legal clarity and coherence.