

GONZALES V. RAICH: FEDERALISM AS A CASUALTY OF THE WAR ON DRUGS

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INTRODUCTION

The Supreme Court’s recent decision in *Gonzales v. Raich*¹ marks a watershed moment in the development of judicial federalism. If it has not quite put an end to the Rehnquist Court’s “federalism revolution,” it certainly represents an important step in that direction. In this Article, I contend that *Raich* represents a major – possibly even terminal – setback for efforts to impose meaningful judicial constraints on Congress’ Commerce Clause powers. I also argue that the *Raich* decision is misguided on both textual and structural grounds. The text of the Constitution does not support the nearly unlimited congressional power endorsed in *Raich*. Such unlimited power undercuts some of the major structural advantages of federalism, including diversity, the ability to “vote with your feet,” and interstate competition for residents. At the same time, the future prospects of judicial federalism may depend not just on the precise doctrinal reasoning of *Raich*, but on the possibility that liberal jurists and political activists may come to recognize that they have an interest in limiting congressional power. A cross-ideological coalition for judicial enforcement of federalism would be far more formidable than today’s narrow alliance between some conservatives and libertarians. Ironically, the *Raich* decision, in combination with other recent developments, may help bring about such a result.

Raich upheld the application of the Controlled Substances Act (“CSA”) forbidding the nonprofit use of homegrown marijuana for medical purposes specifically allowed by state law. It represents the broadest assertion of congressional power to “regulate commerce . . . among the several States” yet upheld by the Court.²

Part I explains how *Raich* largely eviscerates the modest steps towards limiting congressional Commerce Clause authority that the Court took in *United States v. Lopez*³ and *Morrison v. United States*.⁴ First, *Raich* adopts a definition of “economic” that is almost limitless, thereby

¹ 125 S.Ct. 2195 (2005).

² U.S. Const., art. I, § 8, cl. 3.

³ 514 U.S. 549 (1995).

⁴ 529 U.S. 598 (2000).

ensuring that virtually any activity, can be “aggregated” to produce the “substantial affect [on] interstate commerce” required to legitimate congressional regulation under *Lopez* and *Morrison*.⁵ Second, *Raich* makes it easier for Congress to impose controls on even “noneconomic” activity by claiming that it is part of a broader “regulatory scheme;”⁶ here, the Court builds on *Lopez*’s statement that Congress can regulate noneconomic activity if it is an “essential part of a larger regulation of economic activity.”⁷ But the *Raich* Court basically ignores the *Lopez* requirement that the regulation of the noneconomic activity must be an “essential” part of a “regulatory scheme” intended to control interstate “economic activity.”⁸

Finally, *Raich* reasserts the so-called “rational basis” test, holding that “[w]e need not determine whether [defendants’] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”⁹ This holding suggests that even in the rare case where an activity is considered “noneconomic” under *Raich*’s expansive definition of economic activity, the regulation is not part of a broader regulatory scheme, and there is no real substantial effect on interstate commerce, congressional regulation will likely *still* be upheld if Congress could “rationally” conclude that such an effect exists. Taken in combination, these three elements of *Raich* place nearly insurmountable obstacles in the path of efforts to ensure meaningful judicial review of congressional exercise of the Commerce Clause power. Future attempts to limit that power are unlikely to succeed unless the Court can be persuaded to overrule *Raich* or at least limit its reach. Unfortunately, this conclusion is not altered by the Court’s recent decision in *Gonzales v. Oregon*,¹⁰ which interpreted the CSA in a way that precludes a federal ban on the use of certain drugs to facilitate physician assisted suicide. The even more recent case of *Rapanos v. Army Corps of Engineers*¹¹ also leaves *Raich* very much intact.

Part II explains why *Raich* was wrongly decided on the basis of text, structure, and precedent. The word “commerce” should not be interpreted to mean “anything that might potentially affect commerce.” Moreover, it is a mistake to read the text of the Commerce Clause to create virtually unlimited congressional power, as such a reading would render

⁵ See *Lopez*, 514 U.S. at 558-559; see *Morrison*, 529 U.S. at 609.

⁶ *Raich*, 125 S.Ct. at 2208-10.

⁷ *Lopez*, 514 U.S. at 561. This language is quoted in *Raich*, 125 S.Ct. at 2210. However, the Court does not engage in any discussion of the implications of the word “essential” and seems to assume that it is of no significance.

⁸ *Lopez*, 514 U.S. at 561 (emphasis added).

⁹ *Raich*, 125 S.Ct. at 2208.

¹⁰ 126 S.Ct. 904 (2006).

¹¹ 126 S.Ct. 2208 (2006).

most of the rest of Congress' Article I powers completely superfluous. Indeed, reading the Interstate Commerce Clause as broadly as the *Raich* Court may even render superfluous the Indian Commerce Clause and the Foreign Commerce Clause, both of which are found in the very same sentence as Congress' power to regulate "commerce . . . among the several States."¹² Similar weaknesses bedevil Justice Scalia's effort, in his concurring opinion, to justify *Raich* on the basis of the Necessary and Proper Clause.¹³

Precedent also does not justify *Raich* or at the very least does not compel it. The 1824 case of *Gibbons v. Ogden*,¹⁴ often used to justify an expansive commerce power, in fact relies on a very narrow definition of interstate commerce. Even *Wickard v. Filburn*, the famous 1942 case that upheld federal regulation of home-grown wheat,¹⁵ is distinguishable from *Raich*.

Part III briefly explains why *Raich* undermines some of the major political and economic benefits of decentralized federalism. A federalist policy of allowing states to go their own way on the issue of medical marijuana would capture the advantages of diversity, "voting with one's feet," and interstate competition for residents that justify having a federalist system in the first place. Although it would be impractical and undesirable for the Court to try to maximize these benefits by fully eliminating all departures from the text of the Commerce Clause, that fact does not provide a justification for judicial abdication. Indeed, the political underpinnings for a revival of judicial federalism may already be emerging in the form of newfound interest in limitations on federal power on the part of many liberals. If such liberal jurists join with conservatives and libertarians in an effort to restore judicial review of Congressional Commerce Clause authority, *Raich* may not turn out to be the death knell of judicial federalism after all.

Finally, Part IV explores some interesting parallels between *Raich* and the undercutting of federalism by Prohibition in the 1920s. In both periods, the establishment of a nationwide prohibition regime greatly eroded decentralized federalism, in part because the Supreme Court accepted the government's claims that the power to regulate a market in prohibited substances necessarily required comprehensive regulation of virtually all sale or possession of the commodities in question. The political appeal of this argument and its ability to prevail in two widely divergent historical periods suggests that it may be difficult to combine meaningful judicial review of federalism with a large-scale prohibition

¹² U.S. Const. Art. I, § 8, Cl. 3.

¹³ *Raich*, 125 S.Ct. at 2215-20 (Scalia, J., concurring).

¹⁴ 22 U.S. (9 Wheat.) 1 (1824).

¹⁵ 317 U.S. 111 (1942).

regime. Conservatives committed to both judicial federalism and an aggressive federal government war on drugs may find it impossible have their cake and eat it too. The Prohibition experience also lends additional support to some of the other claims defended in this Article.

I. AN OVERDOSE OF FEDERAL POWER: *RAICH*'S IMPACT ON JUDICIAL REVIEW OF CONGRESSIONAL COMMERCE CLAUSE AUTHORITY

As several commentators have argued, *Raich* greatly restricts and perhaps almost completely eliminates the possibility of meaningful judicial limitation of Congress' Commerce Clause powers.¹⁶ It does so in three separate ways: by expanding the definition of "economic activity;" by making it easier to regulate even "noneconomic" activity as part of a broader regulatory scheme; and by reviving the highly deferential "rational basis" test for evaluating claims of congressional authority under the Commerce Clause. While some scholars still hold out hope that meaningful Commerce Clause review can continue even after *Raich*,¹⁷ the combination of these three moves probably renders such hopes illusory unless and until the Court sees fit to either overrule or significantly constrain *Raich*.

A. THE *LOPEZ-MORRISON* FRAMEWORK

In *Lopez* and *Morrison*, the Supreme Court majority faced the difficult task of attempting to impose some meaningful limits on Commerce Clause power without launching a frontal attack on post-New Deal precedents that underpin the modern administrative state. The Court outlined three areas of congressional power under the Commerce Clause:

1. Regulation of "the use of the channels of interstate commerce."
2. "Regulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."

¹⁶ See, e.g., Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 753-54 (2005) (contending that *Raich* effectively repudiates *Lopez* and *Morrison*); see generally Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915 (2005) (same).

¹⁷ See, e.g., Randy E. Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743 (2005) [hereinafter *Limiting Raich*] (The article's author represented Respondents Raich and Monson in *Raich*.); see also George D. Brown, *Counterrevolution? National Criminal Law after Raich*, 66 OHIO ST. U. L.J. 947, 974-82 (2005) (arguing that *Raich* merely refuses to extend *Lopez* and *Morrison* rather than cutting back on them).

3. “[R]egulat[ion] [of] . . . those activities that substantially affect interstate commerce.”¹⁸

The most expansive category – and the only one at issue in *Lopez*, *Morrison*, and *Raich* – is the third: congressional power over activities that “substantially affect interstate commerce.” In order to somehow constrain this category, the majority limited the government’s ability to use “aggregation” analysis in claiming that virtually any activity that affects interstate commerce is fair game if its impact is analyzed in conjunction with that of other similar actions. *Lopez* attempted to cabin the aggregation principle by focusing on the noncommercial aspects of the activity regulated by the Gun Free School Zones Act (GSFZA): possession of a gun in a school zone. Such gun possession had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”¹⁹ Therefore, the Court held, aggregation analysis could not be applied to it because any such application would inevitably lead to such a broad interpretation of federal power that the Court would be “hard pressed to posit any activity by an individual that Congress is without power to regulate.”²⁰

The *Morrison* decision went farther than *Lopez* in suggesting that “noneconomic” activity cannot be subjected to aggregation analysis. *Morrison* struck down a provision of the Violence Against Women Act that created a federal criminal cause of action for victims of gender-motivated violent crimes. Despite considerable evidence mustered by Congress and the dissenting justices indicating that violence against women had a substantial aggregate effect on interstate commerce,²¹ the majority refused to accept this as an adequate ground for federal regulation under the aggregation principle.

Chief Justice Rehnquist’s opinion for the Court emphasized its “reject[ion]” of “the argument that Congress may regulate, noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”²² While the Court indicated that it “need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases,”²³ it emphasized that previous Supreme Court cases had only used aggregation to uphold “regulation of intrastate activity only where that activity is economic in

¹⁸ *Lopez*, 514 U.S. at 558-59; *see also*, *Morrison*, 559 U.S. at 609.

¹⁹ *Lopez*, 514 U.S. at 560.

²⁰ *Id.* at 564.

²¹ *See Morrison*, 529 U.S. at 628-29 (Souter, J. dissenting) (describing the “mountain of data assembled by Congress . . . showing the effects of violence against women on interstate commerce”).

²² *Id.* at 617.

²³ *Id.* at 613.

nature.”²⁴ At the very least, *Morrison* and *Lopez* stand for the proposition that the use of aggregation to justify regulation of “noneconomic” activity is strongly disfavored, even if it is not categorically forbidden.

Unfortunately, however, the Court failed to provide any formal definition of “economic activity,” relying instead on an intuitive understanding of the concept. This ambiguity left the door open for future decisions to define the term more broadly than the *Lopez-Morrison* majority had intended. A second key ambiguity arose from the *Lopez* Court’s recognition that regulation of intrastate noneconomic activity might be permissible if doing so were an “essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁵ The use of the word “essential” strongly suggests that the connection between regulation of noneconomic activity and the “larger regulation of economic activity” must be at least somewhat substantial; otherwise, Congress could regulate almost any noneconomic activity simply by claiming a connection, however remote, to a broader regulatory scheme. However, since the *Lopez* and *Morrison* decisions both addressed facial challenges to “stand alone” statutes, neither majority opinion attempted to delineate how strong a connection to a broader regulatory scheme was necessary to uphold a regulation of intrastate economic activity that otherwise would fall outside the scope of congressional power.

Finally, *Lopez* and *Morrison* failed to clarify the fate of the highly deferential “rational basis” test, which had been used in some previous Commerce Clause cases as the standard for evaluating government claims that a given activity substantially affects interstate commerce.²⁶ Thus, *Lopez* and *Morrison* left at least two major ambiguities that could be exploited by opponents of the New Federalism. The *Raich* majority would take full advantage of both.

B. ECONOMIC IMPERIALISM: RAICH’S SWEEPING DEFINITION OF “ECONOMIC” ACTIVITY

The *Raich* Court’s most obvious innovation was its adoption of an extraordinarily broad definition of “economics,” taken from a 1966 Web-

²⁴ *Id.*

²⁵ *Lopez*, 514 U.S. at 561 (quoted in *Raich*, 125 S.Ct. at 2210). However, the Court does not engage in any discussion of the implications of the word “essential” and seems to assume that it is unimportant.

²⁶ See, e.g., *Hodel v. Virginia Surface Mining and Reclamation Association, Inc., et al.*, 452 U.S. 264, 276 (1981) (“The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such finding.”); *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (“[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”).

ster's dictionary: "refers to 'the production, distribution, and consumption of commodities.'"²⁷ As Justice Thomas points out in his dissent, the majority ignores the fact that "[o]ther dictionaries do not define the term 'economic' as broadly as the majority does," and questions the "select[ion of] a remarkably expansive 40-year-old definition."²⁸ The majority does not even attempt to explain why the 1966 *Webster's* definition should be preferred over other alternatives.

Regardless of the merits of this definition, it is indeed, as Justice Thomas writes, "remarkably expansive." Almost any human activity involves the "distribution" or "consumption" of a commodity, if not its production. Having dinner at home surely involves the "consumption" of a commodity – food. Similarly, giving a birthday present to a friend surely involves the "distribution" of a commodity. Any such activity involving production, consumption or distribution can now be regulated by Congress so long as its aggregate effect has a "substantial" impact on interstate commerce; and it is hard to deny that the aggregate impact of eating and gift-giving on interstate commerce is indeed substantial.

Some scholars contend that there is still a significant range of activities excluded from the Court's definition of "economic." For example, Randy Barnett, the prominent law professor who represented Angel Raich and co-respondent Diane Munson, writes that "reading a book" and "having sex" are activities that fall outside the definition's scope.²⁹ However, reading a book surely involves the consumption of a commodity in so far as books are commercially produced and sold and reading is their intended consumer use.³⁰ As for "having sex," it definitely involves the "consumption" of a commodity in any instance where one or both participants use birth control devices (commercially produced products that are "consumed" in the act of having protected sex). Even if the participants in the sexual act dispense with protection, a court applying *Raich* could easily conclude that sex itself is a "commodity" in the economic sense of the term. After all, prostitution and pornography are major industries and noncommercial, consensual sex is (in part) a substitute for the products of these industries. In the same way, the *Raich* Court relies heavily on the fact that noncommercial home production of marijuana is a substitute for marijuana produced for sale on the illegal drug market.³¹

²⁷ *Raich*, 125 S.Ct. at 2211 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

²⁸ *Id.* at 2236 n.7 (Thomas, J., dissenting).

²⁹ Barnett, *Limiting Raich*, *supra* note 17, at 749.

³⁰ Moreover, repeated reading may literally "consume" a book by weakening its binding and other wear and tear.

³¹ *Raich*, 125 S.Ct. at 2206-08.

Professor Barnett is, perhaps, on firmer ground in suggesting that “most violent crimes, such as the one at issue in *Morrison*,” might not count as production, distribution, or consumption of commodities.³² Even here, however, it is difficult to be sure. Murder, for example, might be considered a substitute for hiring a professional hitman; even rape (the crime at issue in *Morrison*) might be viewed as a means by which criminals “steal” the “commodity” of sex.³³ Analyzing rape as a “theft” of the “commodity” of sex should not be allowed to obscure or mitigate the horror of the crime. In any event, the point here is not to condone the analogy, but to show how it could enable a court to bring rape within the scope of *Raich*’s definition of “economic activity.”

Even more obviously, theft and other crimes involving efforts to illegally acquire property will surely be considered “economic activity” under the Court’s definition. For example, *Raich* will likely put an end to constitutional challenges to applications of the Hobbs Act, a federal statute that has been used to prosecute small-scale shoplifters on the ground that their crimes have a substantial aggregate impact on interstate commerce.³⁴ Even small-scale theft surely involves the “distribution” of commodities and sometimes their “consumption” as well. While Barnett may well be right to suppose that at least some activities fall outside the of the Court’s broad definition of “economic,” such examples are likely to be few and far between.

Raich’s breathtakingly broad definition of “economic activity” undercuts any argument to the effect that the decision is consistent with *Lopez* and *Morrison* because it retains the tripartite framework of analysis and the economic-noneconomic distinction.³⁵ Under such a broad definition, it is arguable that even the actions at issue in *Lopez* and *Morrison* would themselves qualify as “economic.” For example, carrying a gun in a school zone might well be considered “distribution” of a commodity, and possibly “consumption” as well. Indeed, Alfonso Lopez was paid \$40 to carry his gun in a school zone for the purpose of transferring it to a member of a drug gang who probably intended to use it to defend the

³² Barnett, *Limiting Raich*, *supra* note 17, at 749.

³³ See RICHARD A. POSNER, *SEX AND REASON* 182-83 (1992) (using tools of economic theory to analyze rape as “sex theft”).

³⁴ See, e.g., *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc) (upholding, on an equally divided en banc vote, the conviction of a local shoplifter who had been sentenced to 97 years in federal prison under the Hobbs Act, for robberies at four local liquor stores in which he stole a total of about \$2300); *But cf.* *United States v. Jimenez-Torres*, 435 F.3d 3, 14-15 (1st Cir. 2006) (Torruella, J., concurring) (suggesting that some Hobbs Act prosecutions are unconstitutional even after *Raich*). For an analysis of the *McFarland* case, see Kelly D. Miller, *The Hobbs Act, The Interstate Commerce Clause, and United States v. McFarland: The Irrational Aggregation of Independent Local Robberies to Sustain Federal Convictions*, 76 TUL. L. REV. 1761 (2002).

³⁵ See Brown, *supra* note 17, at 979-86.

group's commercial interests in a "gang war."³⁶ Not all gun possession near school zones has such obviously economic motives. But under *Raich's* broader regulatory scheme analysis, the government could easily argue that a ban on all possession in school zones is a rational way to reach those cases where such possession does have a commercial component or motive.

C. THE "BROADER REGULATORY SCHEME" EXCEPTION

As we have seen, the *Lopez* Court permitted congressional regulation of even "noneconomic" intrastate activity in cases where it is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity [is] regulated."³⁷ *Raich* pushes this exception as far as possible, holding that the CSA can be used to ban intrastate consumption of homegrown medical marijuana permitted by state law because such a ban is necessary to facilitate the CSA's attempt to suppress the interstate trade in marijuana grown for sale on the market.³⁸ As the Court puts it, "[t]he concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market."³⁹ Moreover, the Court emphasized that neither Congress nor the prosecution in the *Raich* case was required to provide "specific" evidence proving that the CSA's broad regulatory scheme really would be significantly undermined by permitting the use of homegrown marijuana for medical purposes.⁴⁰ It thereby completely ignored *Lopez's* statement that the broad regulatory scheme exception applies only in cases where inclusion of the noneconomic economic activity is "essential" to the enforcement of the regulatory framework.⁴¹ Indeed, all the government has to show under *Raich* is that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."⁴²

By effectively eliminating the requirement to provide any evidence that there really is a need to include intrastate noneconomic activity in the broader scheme, it becomes possible for Congress to shoehorn virtually any regulation of local noneconomic activity by designating it a

³⁶ *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

³⁷ *Lopez*, 514 U.S. at 561 (quoted in *Raich*, 125 S.Ct. at 2210). *The Raich Court* quotes this language from *Lopez* but does not engage in any discussion of the implications of the word "essential" and seems to implicitly assume that it is of no significance.

³⁸ *Raich*, 125 S.Ct. at 2208-11.

³⁹ *Id.* at 2207.

⁴⁰ *Id.* at 2208-09.

⁴¹ *Lopez*, 514 U.S. at 561.

⁴² *Raich*, 125 S.Ct. at 2209.

component of a broad regulatory framework. For example, Congress could potentially reenact the Gun Free School Zones Act (GFSZA) struck down in *Lopez* by labeling it as an amendment to the broader regulatory scheme of the No Child Left Behind Act (NCLBA). While defendants could certainly argue that the GFSZA is not really necessary to make the NCLBA effective, the kind of evidence cited in Justice Breyer's *Lopez* dissent⁴³ would surely be enough to prove that "Congress had a rational basis for believing that failure to regulate [gun possession in school zones] would leave a gaping hole in the [NCLBA]."⁴⁴ And even though *Lopez* did indicate that the broader regulatory scheme that justifies the regulation of noneconomic activity must itself be aimed at activity that is "economic" in nature,⁴⁵ education would surely fall within *Raich's* ultra-expansive definition of the latter.⁴⁶

Professor Anne Althouse contends that *Raich's* broader scheme exception is nonetheless constrained by the fact that often there may be "insufficient support for broad-based regulation."⁴⁷ For example, at the time the GFSZA was enacted, there may not have been enough political support to enact a broad-based federal regulation of gun possession. Thus, Congress would be forced to forgo some types of regulation because it could not enact them without making politically unpalatable decisions. However, this argument is undercut by the possibility that, under *Raich*, Congress would not be required to enact the GFSZA as part of a *new* broad regulatory scheme. As pointed out in Justice O'Connor's dissent, the majority opinion "suggests [that] we would readily sustain a congressional decision to attach the regulation of intrastate activity to a pre-existing comprehensive (or even not-so-comprehensive) scheme."⁴⁸ As the NCLBA example shows, it could enact it as an amendment to a preexisting scheme that addresses a vaguely related policy issue. Since *Raich* has eliminated the *Lopez* requirement that the regulation of noneconomic activity must be "essential" to the broader regulatory scheme, even an extremely vague connection between the original scheme and the "amendment" is likely to suffice. And there is no reason to expect the political costs of enacting GFSZA as an amendment to

⁴³ See *Lopez*, 514 U.S. at 618-30 (Breyer, J., dissenting) (citing extensive evidence showing that school violence undermines educational performance and that educational performance in turn has extensive effects on interstate commerce).

⁴⁴ *Raich*, 125 S.Ct. at 2209.

⁴⁵ *Lopez*, 514 U.S. at 561.

⁴⁶ See *supra* § I.B Education quite obviously involves the production, consumption, and distribution of commodities in many different ways.

⁴⁷ Anne Althouse, *Why Not Heighten the Scrutiny of Congressional Power When States Undertake Policy Experiments?* 9 LEWIS & CLARK L. REV. 779, 789 (2005).

⁴⁸ *Raich*, 125 S.Ct. at 2223 (O'Connor, J., dissenting).

NCLBA to be any greater than that of enacting it as a “single-issue statute.”⁴⁹

As several scholars have emphasized, *Raich’s* expansion of the broader regulatory scheme exception makes it almost impossible for “as applied” Commerce Clause challenges to federal power to succeed.⁵⁰ Virtually any new “stand alone” statute could easily be connected with a broader regulatory framework that would immunize it against challenge.

D. THE RETURN OF THE “RATIONAL BASIS” TEST

Prior to *Lopez* and *Morrison*, a number of Commerce Clause decisions had held that the government need not actually prove that a regulated activity had a “substantial effect” on interstate commerce, but merely had to show that there was a “rational basis” for such a conclusion.⁵¹ The *Lopez* and *Morrison* cases did not explicitly repudiate the rational basis test, but also conspicuously did not apply it to the statutes at issue in those decisions. Indeed, in *Morrison*, the Court struck down the challenged section of the Violence Against Women Act (VAWA) despite the fact that the claim of a substantial impact on interstate commerce was “supported by numerous [congressional] findings” that would almost certainly have been more than enough to pass muster under the rational basis approach.⁵² Although *Morrison* did not explicitly reject the rational basis test, the majority’s failure to apply the test and their explicit imposition of a considerably higher standard of scrutiny strongly suggested that, at the very least, rational basis analysis does not apply to regulations of intrastate, “noneconomic” activity.

However, *Morrison* and *Lopez’s* failure to explicitly repudiate the rational basis standard allowed the *Raich* majority to make use of it without even considering the possibility that it might no longer be applicable after the former two decisions. Instead, the *Raich* majority emphasized that “[w]e need not determine whether [defendants’] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”⁵³ This approach would enable the government to successfully defend almost any regulation. It is difficult to imagine any noteworthy class of activities for which

⁴⁹ Althouse, *supra* note 47, at 789.

⁵⁰ See, e.g., Adler, *supra* note 16, at 771-76; Reynolds & Denning, *supra* note 16, at 916-18.

⁵¹ See, e.g., *Hodel*, 452 U.S. at 276 (“The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.”); *McClung*, 379 U.S. at 303-304 (“Where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”).

⁵² *Morrison*, 529 U.S. at 614.

⁵³ *Raich*, 125 S.Ct. at 2208.

a reasonably intelligent lawyer cannot come up with *some* “rational” reason to believe that they might substantially affect interstate commerce if “taken in the aggregate.”⁵⁴ The return of the rational basis test casts further doubt on claims that meaningful judicial review of Commerce Clause cases can survive *Raich*.

Although there are some fields of law where the Court uses the rational basis test in a way that still preserves meaningful judicial scrutiny of a statute’s rationale,⁵⁵ in most areas “rational basis” is a euphemism for a highly permissive test that almost any rationale can satisfy. The *Raich* majority’s failure to require the government to present any evidence that homegrown, home-consumed medical marijuana has a significant impact on the interstate drug market indicates that it was applying the traditional highly permissive version of the test.

E. POST-*RAICH* DEVELOPMENTS

1. *Gonzales v. Oregon*⁵⁶

In January 2006, the Supreme Court handed down its decision in *Gonzales v. Oregon*,⁵⁷ a case that some perceive as a partial repudiation of *Raich*, or at least as a reassertion of state autonomy.⁵⁸ *Oregon* rejected the Bush Administration’s attempt to interpret the CSA in a way that would have permitted it to punish Oregon doctors who use prescription drugs to facilitate assisted suicide, as they are permitted to do under the state’s Death with Dignity Act.

In reality, however, *Oregon* does not in any way undercut *Raich*’s constitutional holding. Both the majority and dissenting justices took pains to point out that the decision was a purely statutory one and did not conclude that Congress lacked constitutional authority to forbid assisted suicide using its powers under the Commerce Clause. The majority opinion emphasized that “there is no question that the Federal Government can set uniform national standards” for the “regulation of health and

⁵⁴ *Id.*

⁵⁵ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (using the rational basis test to strike down a statute that discriminates against gays, despite the fact that the state put forward a number of rationales for the law that would normally have been enough to pass minimalistic rational basis scrutiny).

⁵⁶ For a more detailed analysis of *Oregon*, on which this Section is based, see Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules After Gonzales v. Raich*, 2005-2006 CATO SUP. CT. REV. 113, 123-26 (2006).

⁵⁷ 126 S.Ct. 904 (2006).

⁵⁸ See, e.g., Linda Greenhouse, *Justices Reject U.S. Bid to Block Assisted Suicide*, N.Y. TIMES, Jan. 18, 2006, at A1 (“While the court’s decision was based on standard principles of administrative law, and not on the Constitution, it was clearly influenced by the majority’s view that the regulation of medical practice belonged, as a general matter, to the states.”); Tony Mauro, *Court Sides with Oregon Over Assisted Suicide Law*, LEGAL TIMES, Jan. 23, 2006, at 10 (suggesting that the Court had “sid[ed] with states’ rights”).

safety” despite the fact that “these areas” have traditionally been “a matter of local concern.”⁵⁹ Justice Scalia’s dissent, joined by Justice Thomas and Chief Justice Roberts, similarly noted that “using the federal commerce power to prevent assisted suicide is unquestionably permissible” under the Court’s precedents, and that the only question addressed by *Oregon* is “not whether Congress *can* do this, or even whether Congress *should* do this; but simply whether Congress *has* done so in the CSA.”⁶⁰

The majority did make a small bow to federalism in stating that part of the basis of its decision was the fact that there was insufficient proof that in enacting the CSA Congress had “the farreaching intent to alter the federal-state balance” by overriding the states’ traditional power to regulate medicine.⁶¹ This holding might lend some support to scholars who would like to replace substantive judicial review of Commerce Clause cases with “clear statement” rules that require Congress to plainly indicate its intent in cases where a statute is intended to infringe on a particularly sensitive area of state authority.⁶² However, the *Oregon* Court specifically disclaimed reliance on any such principle, claiming that “[i]t is unnecessary even to consider the application of clear statement requirements” because the correct interpretation of the CSA could so easily be determined through the use of ordinary statutory analysis and “commonsense.”⁶³

Only Justice Thomas, in a solitary dissent, suggested that there was a possible tension between the Court’s reasoning in *Oregon* and its recent holding in *Raich*.⁶⁴ Whether or not Thomas’ argument has merit, it seems clear that the other eight justices, especially those in the majority, have done all they could to foreclose the possibility that *Oregon* could undercut *Raich* in any meaningful way.

⁵⁹ *Oregon*, 126 S.Ct. at 923 (quotation omitted).

⁶⁰ *Id.* at 939 (Scalia, J., dissenting).

⁶¹ *Id.* at 925.

⁶² *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (noting that there already is a clear statement requirement for cases where Congress enacts a statute that seeks to “alter the usual constitutional balance between the States and the Federal Government”); *SWANCC v. Army Corps of Engineers*, 531 U.S. 159 (2001) (using this canon to avoid the constitutional issue in a noteworthy Commerce Clause case); Thomas M. Merrill, *Rescuing Federalism after Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005) (*Cf.* arguing that the federalism clear statement rule is superior to judicial enforcement of substantive limits on federal power). Significantly, the *Oregon* majority did not even mention *SWANCC*.

⁶³ *Oregon*, 126 S.Ct. at 925.

⁶⁴ *Id.* at 939-42 (Thomas, J., dissenting).

2. *Rapanos v. Army Corps of Engineers*⁶⁵

In June 2006, the Court handed down another federalism-related decision, *Rapanos v. Army Corps of Engineers*.⁶⁶ The case involved the scope of federal authority to regulate “wetlands” under the Clean Water Act of 1972 (“CWA”), which gives the Army Corps of Engineers the power to regulate discharges into “navigable waters,”⁶⁷ a term defined as encompassing “the waters of the United States.”⁶⁸ Two property owners claimed that the Corps lacked both statutory and constitutional authority to regulate land they owned which was 11 to 20 miles away from the nearest navigable water and connected to it only by man-made drains.⁶⁹ In a split 4-1-4 decision, the Court refused to endorse the government’s claim that the CWA gives the Corps the power to regulate virtually any wet area, regardless of the degree of connection to “navigable” waterways, and instead remanded the case for further factfinding.⁷⁰

Some observers hoped and others feared that the *Rapanos* case might rein in the impact of *Raich* on judicial review of federalism.⁷¹ Such hopes and fears have turned out to be groundless. The *Rapanos* majority does not enforce any constitutional limits on federal power. Nor does it increase the protection for federalism provided by rules of statutory interpretation.

Neither Justice Scalia in his plurality opinion nor Justice Kennedy address the constitutional issues raised by the property owners. Both rely exclusively on statutory interpretation arguments about the meaning of the Clean Water Act.⁷² They hold that Congress in the CWA *didn’t* give the Army Corps of Engineers the power to regulate any and all bodies of water, no matter how small or non-navigable. But that does not mean that it *couldn’t* do so if it wanted to. Indeed, it is striking that Scalia’s opinion

⁶⁵ Some of the material in this section is a revised version of a post produced for the Volokh Conspiracy Blog. See Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/posts/1150751435.shtml> (June 19, 2006, 5:10 p.m.). For a more detailed discussion of *Rapanos*, see Somin, *A False Dawn for Federalism supra* note 56, at 126-30.

⁶⁶ 126 S.Ct. 2208 (2006).

⁶⁷ 33 U.S.C. §§ 1311(a), 1344(a) (2000).

⁶⁸ 33 U.S.C. § 1362(7) (2002).

⁶⁹ 126 S.Ct. at 2214, 2219.

⁷⁰ *Id.*

⁷¹ See, e.g., Sara Beardsley, *The End of the Everglades? Supreme Court Case Jeopardizes 90 percent of U.S. Wetlands*, 294 Sci. Am. 14, 14-15 (2006) (claiming that *Rapanos* might radically reduce federal regulatory authority over wetlands and noting that “federalist watchdogs cling to *Rapanos* . . . as an opportunity to curb Washington’s power”).

⁷² *Rapanos*, 126 S.Ct. at 2220-25 interpreting CWA reference to “waters of the United States” to cover only “relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams[,] . . . oceans, rivers, [and] lakes.” (citations and quotation marks omitted); *id.* at 2248 (Kennedy, J., concurring) (interpreting it to require “the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense”).

does not even mention *Raich*, while Kennedy's does so only briefly, using it to justify interpreting the CWA to give the Corps greater regulatory authority than the plurality would allow.⁷³

Rapanos also does little or nothing to limit congressional power through rules of statutory interpretation. There are two rules of construction that the *Rapanos* majority could have used to constrain congressional power. The "constitutional avoidance" canon requires courts to reject interpretations of a statute that "raise serious constitutional problems" unless there is a clear statement in the law that Congress intended it to be interpreted in that way.⁷⁴ The "federalism canon" requires a similar "unmistakably clear" statement of congressional intent in statutes that "alter the usual constitutional balance between the States and the Federal Government"⁷⁵ In the 2001 *SWANCC* case, the Court relied on both canons in rejecting the Army Corps of Engineers' "migratory bird rule," which interpreted the CWA to give the Corps authority to regulate any isolated non-navigable waters that might be used by migratory birds.⁷⁶

Justice Scalia's plurality opinion briefly cites the two canons to buttress its interpretation of the CWA.⁷⁷ However, Scalia mostly relies on a detailed textual analysis of the statute.⁷⁸ His opinion does not hold that either canon would require rejection of the government's interpretation of the CWA even if the latter were otherwise persuasive. This is a significant omission because previous avoidance canon cases specifically note that clear statement rules require courts to reject even "an otherwise acceptable construction of a statute" if endorsing it "would raise serious constitutional problems."⁷⁹

In any event, Scalia's treatment of the canons probably lacks precedential significance and does not bind lower courts because Justice Kennedy specifically rejected it in his concurring opinion. Because *Rapanos* is a 5-4 decision, Kennedy's vote was decisive to the result. As Chief Justice Roberts (who signed on to Scalia's interpretation of the CWA) points out in his concurring opinion, cases where there is no one opinion

⁷³ *Id.* at 2250 (Kennedy, J., concurring) (citing *Gonzales v. Raich*, 125 S.Ct. 2195, 2206 (2005)).

⁷⁴ *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) (requiring a clear expression of an affirmative intention of Congress' before a statutory interpretation that raises serious constitutional questions can be accepted).

⁷⁵ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

⁷⁶ *SWANCC v. Army Corps of Engineers*, 531 U.S. 159 (2001).

⁷⁷ *Rapanos*, 126 S.Ct. at 2224.

⁷⁸ *Id.* at 2220-23, 2225-34.

⁷⁹ *DeBartolo*, 485 U.S. at 575.

endorsed by a majority of the Court are governed by *Marks v. United States*.⁸⁰ According to *Marks*:

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.⁸¹

In this case, Kennedy is almost certainly the justice who concurred on the “narrowest grounds,” since his opinion places fewer restrictions on the Corps than Scalia’s, and also provides a considerably less sweeping and more ambiguous interpretation of the CWA. Thus, *Rapanos* is unlikely to expand the application of the two avoidance canons to statutes that rely on Congress’ Commerce Clause authority. Indeed, it is possible that *Raich* might result in a reduction of their applicability, since the scope of congressional power is now so broad that assertions of federal power will almost never raise serious constitutional problems.⁸²

F. POST-*RAICH* DEVELOPMENTS IN THE LOWER COURTS

Post-*Raich* Court of Appeals decisions confirm the view that congressional power is now virtually limitless. Five circuit courts have now held that *Raich* requires them to uphold a ban on the intrastate possession of internet images of child pornography,⁸³ reversing a previous trend under which the Eleventh and Ninth Circuits had held that at least some such prosecutions fall outside the scope of congressional Commerce Clause authority.⁸⁴ In *United States v. Sullivan*, the recent D.C. circuit case upholding the statute, Judge David Sentelle—a staunch conservative advocate of constitutional limits on federal power⁸⁵—wrote a concurring opinion where he noted the ways in which the case highlighted tensions

⁸⁰ See *Rapanos*, 126 S.Ct. at 2236 (Roberts, C.J., concurring) (citing *Marks v. United States*, 430 U.S. 188 (1977)).

⁸¹ *Marks v. United States*, 430 U.S. at 193.

⁸² *DeBartolo*, 468 U.S. at 575.

⁸³ See *United States v. Sullivan*, 451 F. 3d 884 (D.C. Cir. June 27, 2006); *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006) (“*Maxwell II*”); *United States v. Chambers*, 441 F.3d 438 (6th Cir. 2006); *United States v. Grimmette*, 439 F.3d 1263 (10th Cir. 2006); *United States v. Jeronimo-Batista*, 425 F.3d 1266 (10th Cir. 2005); *United States v. Forrest*, 429 F.3d 73 (4th Cir. 2005).

⁸⁴ *United States v. Maxwell*, 385 F.3d 1042 (11th Cir. 2004), *vacated* 126 S.Ct. 321 (2005), *overruled by Maxwell II*, 446 F.3d at 1216; *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).

⁸⁵ Sentelle is noted for his strong pro-federalism dissent in *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), where he argued that Congress lacked the power to forbid the destruction of the habitat of the Delhi Sands Flower-Loving Fly, an insect with no known commercial value that is found only in one state. *Id.* at 1061-67 (Sentelle, J., dissenting).

between *Raich* and *Lopez*, and explained that he “would have vote[d] to reverse appellant’s conviction were it not for . . . *Raich*.⁸⁶ Nonetheless, Sentelle concedes that “[he] cannot fault the majority’s application of the later decision in *Raich*.⁸⁷ If even so strong a defender of limits on federal power is persuaded that *Raich* permits regulation of activities that probably fall outside the three *Lopez* categories,⁸⁸ it is a safe bet that other lower court judges will reach the same conclusion.

A recent Tenth Circuit decision is the only lower court case so far that seems to set some limits on federal power under *Raich*. In *United States v. Patton*, the Tenth Circuit upheld a federal law criminalizing possession of body armor by convicted felons.⁸⁹ In an opinion by Judge Michael McConnell, the court concluded that possession of body armor does not fall within *Raich*’s definition of economic activity, which includes the “production, consumption, and distribution” of commodities.⁹⁰ Judge McConnell argued that possession of body armor does not constitute “consumption” of a commodity because “[c]onsumption is the ‘act of destroying a thing by using it; the use of a thing in a way that thereby exhausts it,’ *Black’s Law Dictionary* 336 (8th ed.2004), and possessing or wearing body armor neither destroys nor exhausts it.”⁹¹ Possession of body armor is therefore different from the possession of medical marijuana in *Raich*, since the latter eventually “exhausts” the drug by using it for medicinal purposes.⁹² Thus, the Tenth Circuit held that the body armor statute does not get the benefit of “aggregation” because it does not regulate economic activity.⁹³ And it cannot be upheld as regulation of noneconomic activity because it is not part of a comprehensive regulatory scheme.⁹⁴ In the end, the Tenth Circuit upheld the statute under *Scarborough v. United States*, a 1977 statutory interpretation case that seems to permit federal regulation of a commodity that has previously passed through interstate commerce.⁹⁵

⁸⁶ *Sullivan*, 2006 WL 1735889 at *12-13 (Sentelle, J., concurring).

⁸⁷ *Id.* at *13.

⁸⁸ *See id.* at *11-13 (explaining why possession of internet images of child pornography falls outside the three *Lopez* categories of federal Commerce Clause authority).

⁸⁹ *United States v. Patton*, 2006 WL 1681336 (10th Cir. June 20, 2006).

⁹⁰ *Id.* at *7 (citing *Raich*, 125 S.Ct. at 2211).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at *7-8.

⁹⁵ *Id.* at *16 (relying on *Scarborough v. United States*, 431 U.S. 563, 575 (1977)). The Tenth Circuit’s reliance on *Scarborough* is dubious, since the case merely assumes that Congress has the constitutional authority to regulate commodities that pass through interstate commerce in order to settle a question of statutory interpretation. It does not actually decide the constitutional issue itself. *See id.* at 575-77 (considering only the question of congressional “intent” in enacting the statute in question, and failing to examine the constitutional issue).

Patton, however, does not really impose meaningful limits on the scope of post-*Raich* federal power. Given the ease with which virtually any regulation can be fitted into a “comprehensive regulatory scheme,”⁹⁶ Congress could have easily reenacted the body armor ban had the Tenth Circuit invalidated it; for example, it could have passed it as an amendment to the Controlled Substances Act. The possibility that felons belonging to drug gangs might acquire body armor and make it more difficult for the authorities to go after them would almost certainly satisfy the lenient *Raich* standard.⁹⁷ Furthermore, Judge McConnell’s distinction between possession and consumption may not be a correct interpretation of *Raich*. After all, possession of medical marijuana in and of itself does not “destroy” or “exhaust” the commodity in question any more than possession of body armor. To be sure, the purpose of possessing marijuana is to eventually use it, and that does indeed lead to its destruction or exhaustion. However, the purpose of possessing body armor is also use. And such use can certainly result in the armor being destroyed or damaged, especially if it fulfills its intended function of stopping bullets.⁹⁸

Ultimately, the goal of possessing any commodity is to use it, or at least to retain the option of doing so. And such use nearly always has at least some chance of damaging, “exhausting,” or destroying it. In some cases, of course, we possess objects in order to later sell or give them to others rather than to use them ourselves. However, even this kind of possession ultimately entails future use, even if by other people. Moreover, possession for the purpose of transfer surely involves the “distribution” of a commodity, which also counts as economic activity under *Raich*.⁹⁹

G. SUMMING UP *RAICH*’S IMPACT

Overall, *Raich*’s evisceration of *Lopez* and *Morrison* was in large part a consequence of ambiguities in those earlier decisions themselves. The *Lopez* and *Morrison* Courts failed to provide a definition of “economic activity,” did not precisely delineate the scope of the “broader regulatory scheme” exception, and refrained from explicitly repudiating the rational basis test or stating unequivocally that it does not apply to regulations of “noneconomic” activity. In each of these three areas, there was some indication that the Court favored constructions that would limit federal power; otherwise *Lopez* and especially *Morrison* could not have

⁹⁶ See *supra* § I.C.

⁹⁷ See discussion in *id.*

⁹⁸ For example, the website of one body armor manufacturer notes that “Any attack against SAP or HAP armour will reduce the 100% effectiveness of the armour, [and] the damaged panel should be replaced at the earliest opportunity.” LBA Int’l Ltd., Body Armour FAQ, <http://www.lbainternational.com/faq.htm#8> (visited June 29, 2006).

⁹⁹ *Raich*, 125 S.Ct. at 2211.

come out the way they did. But the Court's failure to address these issues explicitly left gaps in its analysis that Justice Stevens' majority opinion in *Raich* exploited to the hilt. As a result, future substantive judicial review of congressional Commerce Clause authority is largely dead in the water until *Raich* is either limited or overruled.

II. TEXT, STRUCTURE, AND PRECEDENT IN *RAICH*

This Part criticizes the *Raich* decision primarily on textual and structural grounds. I also contend that *Raich* cannot be justified on the basis of precedent. The textualist arguments presented here should be distinguished from originalist ones. Even jurists who reject originalism need not and should not also reject the relevance of text and structure.¹⁰⁰ It is perfectly possible, at least in many situations, to analyze a text without reference to the intentions of its drafters or the understanding of the ratifiers. Rejection of textualism, as distinguished from originalism, would seem to raise the question of why we should have a written Constitution at all. If courts are to decide constitutional cases without being constrained by the text, it would seem to be more efficient and more honest to rely directly on whatever philosophical, prudential, or policy grounds that drive their decisions.

However, I do not attempt here to defend textualism against theories that argue that judicial decision-making should largely ignore the text in favor of reliance on prudential political considerations or "common law" reasoning focusing on policy consequences.¹⁰¹ For present purposes, I assume, in common with most scholars and jurists, that the constitutional text should play a major role in judicial review, even if it is not always the only factor that deserves consideration. I incorporate a number of prudential and political factors into the analysis in Part III.

A. THE TEXTUAL CASE AGAINST *RAICH'S* READING OF THE COMMERCE CLAUSE

The textual argument against *Raich's* interpretation of the Commerce Clause is sufficiently simple and unoriginal that I hesitate to dwell on it for too long. Nonetheless, some discussion is necessary in light of the *Raich* majority's almost complete neglect of textual considerations. It should be noted that the textualist argument presented differs from the *Raich* dissenters' contention that Congress cannot regulate homegrown medical marijuana because this class of activities is part of a special class

¹⁰⁰ See PHILIP BOBBIT, *CONSTITUTIONAL FAITH* 25-26 (1982) (explaining why "textualist" constitutional arguments are distinct from "historical" claims and rest on different premises).

¹⁰¹ See, e.g., TERRI JENNINGS PERRETI, *IN DEFENSE OF A POLITICAL COURT* (2000); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003) [hereinafter *LAW, PRAGMATISM*]; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

defined by the state's Compassionate Use Act.¹⁰² Under my analysis, Congress lacks the power to regulate homegrown medical marijuana even in cases where state law is silent on the subject. The critical issue is the scope of congressional power, not that of the state.

The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁰³ Focusing first on the word "commerce," I have long noted that nonlawyers and first year law students are almost always surprised at the notion that the Supreme Court has interpreted that word to give Congress the power to regulate anything that has even a remote potential effect on commerce; or as the *Raich* Court puts it, any activity that, "taken in the aggregate" Congress might have a "rational basis" for believing "substantially affect[s] interstate commerce."¹⁰⁴ In common usage, the word "commerce" generally refers to the exchange of goods or services, not to any and all activity that might have an effect on such exchange.¹⁰⁵

To be sure, some words function as "terms of art" that have specialized meanings in legal parlance that differ from ordinary usage. However, there is no evidence indicating that "commerce" is such a term. Indeed, in other situations, lawyers seem to use the term in much the same way as laypeople do. For example, first year law students quickly learn that the Uniform *Commercial Code* regulates the exchange of goods and services through contracts, but does not purport to govern activities such as manufacturing, education, torts, property ownership, and violent crime, despite the fact that all of these surely have an effect on commercial exchange. The leading American legal dictionary defines the term "commerce" as "[t]he exchange of goods, productions or property of any kind; the buying, selling, or exchanging of articles."¹⁰⁶ This legal definition is very similar to that found in ordinary usage and in general purpose dictionaries.¹⁰⁷ And, for those willing to give credence to originalism, it is worth noting that the modern lay and legal definition of the term is also very similar to that which prevailed at the time of the Founding.¹⁰⁸

¹⁰² *Raich*, 125 S.Ct. at 2224 (O'Connor, J., dissenting).

¹⁰³ U.S. CONST., art. I, § 8, cl. 3.

¹⁰⁴ *Raich*, 125 S.Ct. at 2208.

¹⁰⁵ See, e.g., THE RANDOM HOUSE DICTIONARY 176 (pbk. ed. 1984) (defining "commerce" as "an interchange of goods").

¹⁰⁶ BLACK'S LAW DICTIONARY 285 (8th ed. 2004).

¹⁰⁷ See THE RANDOM HOUSE DICTIONARY, *supra* note 105, at 176.

¹⁰⁸ See *Lopez*, 514 U.S. at 588-89 (Thomas, J., concurring); see also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112-25 (2001) (describing eighteenth century definitions of "commerce") [hereinafter *Original Meaning*].

As Justice Thomas effectively argued in his concurrence in *Lopez*, expanding our gaze beyond the word “commerce” to consider the Clause as a whole strengthens the textual case against deriving unlimited congressional power from the Commerce Clause.¹⁰⁹ In addition to giving Congress the power to regulate interstate commerce, the Clause also gives it the authority to regulate commerce “with foreign Nations” and “Indian Tribes.”¹¹⁰ As Thomas points out, “if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians.”¹¹¹ There is no doubt that “these other branches of trade substantially affect interstate commerce.”¹¹²

Thomas also emphasizes that a reading of the Commerce Clause that gives Congress the power to regulate all activities that might “substantially affect” interstate commerce would render most of Congress’ other enumerated Article I powers “wholly superfluous.”¹¹³

[I]f Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws,[U.S. Const. Art. I, § 8] cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post-offices and post-roads, cl. 7, or to grant patents and copyrights, cl. 8, or to “punish Piracies and Felonies committed on the high Seas,” cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease.¹¹⁴

As Thomas recognized, all of these other powers surely involve activities that, especially in the aggregate, have a “substantial affect” on interstate commerce.¹¹⁵ In addition, the same could be said for the power to “borrow Money on the credit of the United States,”¹¹⁶ the power to call state militia into federal service to enforce the law and suppress insurrections,¹¹⁷ and the power of “organizing, arming and disciplining”

¹⁰⁹ See *Lopez*, 514 U.S. at 585-89.

¹¹⁰ U.S. CONST., art. I, § 8, cl. 3.

¹¹¹ *Lopez*, 514 U.S. at 588-89 (Thomas, J., concurring).

¹¹² *Id.* at 589.

¹¹³ *Id.* at 588.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ U.S. CONST., art. I, § 8, cl. 2.

¹¹⁷ *Id.* at cl. 15.

the militia when called into federal service.¹¹⁸ After all, borrowing money surely has a major impact on interstate commerce and commerce is likely to be seriously disrupted if the federal government lacks the troops necessary to enforce the law or suppress an insurrection. If the troops are not organized, armed, and disciplined, that too is likely to have a major negative effect on commerce. While some overlap is probably inevitable in any enumeration of legislative authority, a reading of Article I that would render most, if not all,¹¹⁹ of Congress' eighteen enumerated powers "wholly superfluous"¹²⁰ is implausible to say the least.

My one quarrel with Thomas' analysis is that he frames it as a demonstration that the substantial effects test is a "depart[ure] from the original understanding."¹²¹ While this emphasis is understandable coming from an originalist, it is important to note that even a nonoriginalist should recognize the force of the argument so long as he or she remains committed to the importance of constitutional text. As demonstrated here, a textualist analysis casts serious doubt on *Raich's* interpretation of the Commerce Clause even without any reference to original meaning whatsoever.

B. JUSTICE SCALIA AND THE NECESSARY AND PROPER CLAUSE

More complex textual issues are raised by Justice Scalia's effort, in his concurrence in *Raich*, to justify congressional power over home-grown medical marijuana by means of the Necessary and Proper Clause rather than the Commerce Clause standing alone.¹²² However, Scalia's formulation is not wholly free of the same sorts of textual weaknesses that bedevil the majority opinion.

1. Justice Scalia's *Raich* concurrence

Scalia concedes that the power to regulate "activities that substantially affect interstate commerce [but] are not themselves part of interstate commerce . . . cannot come from the Commerce Clause alone."¹²³ He argues that such regulations can be sustained on the basis of the Necessary and Proper Clause, which grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution

¹¹⁸ *Id.* at cl. 16.

¹¹⁹ In addition to the Commerce Clause itself, probably only the power to establish lower federal courts (*Id.* at cl. 9) and the power to exercise "exclusive jurisdiction" over the national capital (*Id.* at art. 17), would not be redundant. And even the former might well be superfluous, since the establishment of federal courts could easily have a substantial effect on interstate commerce by enabling commercial disputes to be resolved through federal litigation.

¹²⁰ *Lopez*, 514 U.S. at 588 (Thomas, J., concurring).

¹²¹ *Id.* at 585.

¹²² *Raich*, 125 S.Ct. at 2215-20 (Scalia, J., concurring).

¹²³ *Id.* at 2215-16.

the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹²⁴

According to Scalia, the Necessary and Proper Clause permits regulation of intrastate activity in two situations that are not covered by the Commerce Clause power alone. First, he contends that it allows regulation of intrastate economic activity that “substantially affects” interstate commerce.¹²⁵ However, Scalia argues that this analysis does not apply to noneconomic activities, including mere possession of guns in a school zone or mere possession of homegrown medical marijuana.¹²⁶ Scalia contends that the Necessary and Proper Clause does permit regulation of “even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”¹²⁷ On this basis, he argues that the government’s position in *Raich* must be sustained because the CSA is a comprehensive attempt to “extinguish the interstate market in Schedule I controlled substances, including marijuana.”¹²⁸ Furthermore, he asserts it is “impossible to distinguish” homegrown medical marijuana from other types, thereby making it impossible to suppress the market in recreational marijuana without also banning medical marijuana.¹²⁹ As Scalia puts it, “marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market.”¹³⁰

Scalia contends that his approach does not give Congress unlimited power because “the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective.”¹³¹ Furthermore, quoting Chief Justice Marshall’s famous statement in *McCulloch v. Maryland*, Scalia emphasizes that the means used by Congress “must be ‘appropriate’ and ‘plainly adapted’” to a legitimate constitutional end, “and must be ‘consistent with the letter and spirit of the constitution’.”¹³²

Unfortunately, these strictures are largely undermined by Justice Scalia’s extremely lax standards for determining whether or not a given regulation of intrastate noneconomic activity really is “necessary to make

¹²⁴ U.S. CONST. art. I, § 8, cl. 18.

¹²⁵ *Raich*, 125 S.Ct. at 2216.

¹²⁶ *Id.* at 2216-17.

¹²⁷ *Id.* at 2217.

¹²⁸ *Id.* at 2219.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 2218.

¹³² *Id.* at 2219 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

the interstate regulation effective.”¹³³ In his view, Congress need only prove that the regulation is “reasonably adapted to the attainment of a legitimate end under the commerce power.”¹³⁴ This Necessary and Proper Clause test seems very similar to the “rational basis” standard applied by the majority under the Commerce Clause itself. This suspicion is strengthened by the fact that nowhere does Scalia state that the government is required to present evidence indicating that a ban on homegrown medical marijuana is actually needed to make the ban on the interstate market in marijuana effective.

This omission is unlikely to be accidental, since as Justice O’Connor’s dissent shows, “[t]here is simply no evidence that homegrown medical marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market.”¹³⁵ The scanty evidence presented by the government seems unlikely to pass muster under any standard of review more stringent than the “rational basis” approach adopted by the majority.¹³⁶ Failure to require at least some substantial evidence that regulation of intrastate noneconomic activity really is “necessary” to effectuate the government’s attempt to regulate interstate commerce ensures that Scalia’s approach has the same tendency to legitimate unlimited federal power as the majority’s use of the broader regulatory scheme exception.¹³⁷ Justice Scalia’s failure to cite any evidence at all or to indicate a standard of evidence that the government must meet, suggests that his interpretation of the Necessary and Proper Clause is ultimately just as deferential to the government as the majority opinion’s theory of the Commerce Clause.¹³⁸

2. *The textualist case against Justice Scalia’s position*

Is Justice Scalia’s argument less vulnerable to textualist objection than the majority’s? In one sense, it probably is. Because of its use of the broad and vague terms “necessary” and “proper,” the scope of the clause relied upon by Scalia is far more difficult to determine through textual analysis than that of the Commerce Clause, which uses more precise terms such as “commerce” and “among the several States.”¹³⁹ Indeed, the wording of the Necessary and Proper Clause is sufficiently imprecise that it is difficult to avoid the conclusion that the text alone does not

¹³³ *Id.* at 2218.

¹³⁴ *Id.* at 2217 (quotation omitted).

¹³⁵ *Id.* at 2226 (O’Connor, J., dissenting).

¹³⁶ *See id.* at 2228-29 (discussing evidence presented in the case).

¹³⁷ *See supra*, § I.C.

¹³⁸ *See* Adler, *supra* note 16, at 767-68 for another scholarly analysis that concludes that Justice Scalia’s approach ultimately leads to the same results as the majority’s opinion.

¹³⁹ U.S. Const. Art. I, § 8, cl. 3.

provide adequate indication of its meaning. Some analysis of external sources, whether originalist or otherwise, is necessary to define its scope with precision.¹⁴⁰

One textualist argument against Justice Scalia's interpretation can still be advanced, however. Like the majority's interpretation of the Commerce Clause, Scalia's theory of the Necessary and Proper Clause would render nearly all of Congress' other enumerated Article I powers superfluous. Under Scalia's theory, the combination of the Commerce Clause and the Necessary and Proper Clause give Congress sufficient power to regulate any activity that legislators believe may believe they must reach in to effectuate a scheme of regulation intended to control interstate commerce. And, as we have seen, the government is not required to provide any evidence demonstrating that Congress' judgment of necessity is correct.

At the very least, this theory renders Congress' power to regulate international trade and trade with the Indian tribes superfluous, since it is easy to claim that a regulation of interstate trade in a given commodity cannot be fully effective without similar regulation of international and Indian trade in the same article. Likewise, the power to borrow money, the power to raise armies, the power to set weights and measures, and others, could easily be incorporated within the scope of Justice Scalia's analysis because all of them can be used to control or influence either interstate commerce itself or activities that affect it.¹⁴¹ In effect, Justice Scalia's view leads to the conclusion that the combination of the Interstate Commerce Clause and the Necessary and Proper Clause renders nearly all of Congress' other enumerated powers superfluous. This result is a strong textualist reason to reject Scalia's position.

The textualist argument presented here does not provide a comprehensive theory of the Necessary and Proper Clause and is not intended to do so. Personally, I am persuaded by the arguments in the articles written by Randy Barnett¹⁴² and Gary Lawson and Patricia Granger,¹⁴³ which use Founding Era sources to show that the original understanding of the Clause incorporated somewhat restrictive definitions of "necessary" and of "proper," intending to prevent Congress from adopting measures that impinged on federalism and state power. I fully recognize that other scholars, especially those who reject originalism, might reasonably adopt a more expansive view of the Necessary and Proper Clause than

¹⁴⁰ Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003).

¹⁴¹ See discussion *supra* §II.A.

¹⁴² See Barnett, *supra* note 140, at 183.

¹⁴³ Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

the one I endorse. The analysis presented here certainly falls well short of a complete theory of the Clause. I have tried to show only that an interpretation expansive enough to sanction the *Raich* decision is vulnerable to the textualist criticism that it renders most of Congress' Article I powers completely superfluous.

3. *The relevance of McCulloch v. Maryland*

Finally, it is worth demonstrating that my conclusions are not inconsistent with Chief Justice Marshall's canonical interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland*.¹⁴⁴ Although Marshall famously concluded that the word "necessary" can be interpreted to mean "convenient . . . or useful,"¹⁴⁵ he also emphasized that legislation adopted by Congress must be for a "legitimate" end, using means that are "appropriate and plainly adapted to that end" and are "consistent with the letter and spirit of the constitution."¹⁴⁶ Furthermore, Marshall notes that,

should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.¹⁴⁷

Such judicial scrutiny, according to Marshall, need not be nearly as deferential to Congress as Justice Scalia's theory seems to be:

Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government; since, if the argument be, that the implied powers of the constitution may be assumed and exercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relation between them, the answer is, that this is nothing more than arguing from the abuse of constitutional powers, which would equally apply against the use of those that are confessedly granted to the national government; that *the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide, whether the connection is real, or*

¹⁴⁴ See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁴⁵ *Id.* at 413-14.

¹⁴⁶ *Id.* at 421.

¹⁴⁷ *Id.* at 423.

*assumed as the pretext for the usurpation of powers not belonging to the government.*¹⁴⁸

Thus, Chief Justice Marshall's interpretation of the Necessary and Proper Clause would require courts to scrutinize legislation to ensure that its connection with Congress' enumerated powers is "real" and not a mere "imaginary . . . pretext for . . . usurpation."¹⁴⁹ To be sure, Marshall's opinion does not provide much guidance as to how close and searching judicial scrutiny of the means-ends connection should be. Yet it is clear that his statements do not preclude vigorous judicial scrutiny of congressional claims of authority under the Necessary and Proper Clause, even if they do not necessarily compel it. Both in *McCulloch* itself and in his later writings, Marshall took pains to demonstrate that his interpretation of the Necessary and Proper Clause did not grant Congress anything approaching unlimited power.¹⁵⁰

C. RAICH AND PRECEDENT

The majority opinion in *Raich* relied heavily on precedent,¹⁵¹ especially the Court's 1942 decision in *Wickard v. Filburn*.¹⁵² In this Section, I attempt to demonstrate that the outcome of *Raich* was not compelled by precedent, as Justice Stevens' opinion for the Court claimed. However, it should be noted that precedent also does not require the opposite conclusion. *Raich* was a sufficiently novel case that the Court had enough discretion to decide either way without blatantly going against precedent.

1. *Raich* and the myth of *Gibbons v. Ogden*

Although the *Raich* majority did not engage in any extensive discussion of *Gibbons v. Ogden*,¹⁵³ this famous 1824 case is so often cited as a precedent supporting an extremely broad interpretation of the Commerce Clause that it deserves some brief consideration here.

In *Gibbons*, Chief Justice John Marshall wrote an opinion for the Court upholding the constitutionality of a federal law granting navigation licenses to ships engaged in the "the coasting trade," and forbade the State of New York to grant a monopoly on navigation of its waters to

¹⁴⁸ *Id.* at 358-59 (emphasis added).

¹⁴⁹ *Id.*

¹⁵⁰ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, 163-64 (1986) (noting that Marshall's formulation ensures that "tenuous connections to granted powers will not pass muster" and discussing other limitations on power stemming from his opinion); Barnett, *supra* note 142, at 214-15 (discussing Marshall's post-*McCulloch* attempt to rebut claims that he had sanctioned unlimited federal power).

¹⁵¹ See *Raich*, 125 S.Ct. at 2206-2209 (emphasizing the importance of *Wickard v. Filburn*, 317 U.S. 111 (1942)).

¹⁵² 317 U.S. 111 (1942).

¹⁵³ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); see *Raich*, 125 S.Ct. at 2205.

the entrepreneurs Robert Livingston and Robert Fulton and their licensees.¹⁵⁴

The case is often cited as a decision justifying an extremely broad interpretation of the commerce power. According to the Court's 1942 opinion in *Wickard*, "Chief Justice Marshall[*'s* opinion in *Gibbons*] described the Federal commerce power with a breadth never yet exceeded."¹⁵⁵ The *Wickard* Court even claimed that, according to *Gibbons*, "effective restraints on its exercise must proceed from political rather than from judicial processes."¹⁵⁶ Similarly, Justice Souter's dissent in *Lopez* refers to "the Court's recognition of a broad commerce power in *Gibbons v. Ogden*,"¹⁵⁷ and Justice Breyer's dissent in that case claims that *Gibbons* endorsed congressional power to "regulate local activities insofar as they significantly affect interstate commerce."¹⁵⁸ Justice Souter's dissenting opinion on behalf of four justices in *Morrison* cites *Gibbons* in similar terms.¹⁵⁹

One reason why *Gibbons* is so often cited by advocates of a broad interpretation of the commerce power may be their desire to dispel the impression that their view is a modern creation of the New Deal era of the 1930s and 40s. Citing *Gibbons* enables them to argue that Chief Justice Marshall, the leading early judicial interpreter of the Constitution, adopted a broad view of the Commerce Clause "from the start"¹⁶⁰ of our constitutional history.

It is certainly true that *Gibbons* famously defined commerce as "intercourse,"¹⁶¹ and emphasized that the commerce power extends to all "commerce which concerns more states than one."¹⁶² Chief Justice Marshall's opinion for the Court also notes that the Commerce power is "plenary as to those objects" to which it extends.¹⁶³ At the same time however, Marshall's *Gibbons* opinion interpreted the commerce power much more narrowly than the post-New Deal cases do. For example, Marshall recognized that "inspection laws," despite their obvious effect on trade, do not fall within the scope of congressional commerce clause authority:

¹⁵⁴ *Gibbons*, 22 U.S. (9 Wheat.) at 1-2.

¹⁵⁵ *Wickard*, 317 U.S. at 120.

¹⁵⁶ *Id.*

¹⁵⁷ *Lopez*, 514 U.S. at 603 (1995) (Souter, J., dissenting).

¹⁵⁸ *Id.* at 615 (Breyer, J., dissenting).

¹⁵⁹ See *Morrison*, 529 U.S. at 641 (2000) (Souter, J. dissenting) (quoting *Wickard*, 317 U.S. at 120, in describing *Gibbons* as a "seminal opinion" that "construed the commerce power from the start with 'a breadth never yet exceeded'").

¹⁶⁰ *Id.*

¹⁶¹ *Gibbons*, 22 U.S. (9 Wheat.) at 189.

¹⁶² *Id.* at 194.

¹⁶³ *Id.* at 197.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.¹⁶⁴

Thus, despite the fact that state inspection laws, quarantine laws, and health laws have a “considerable influence on commerce,” the federal government lacks the power to regulate them under the Commerce Clause.¹⁶⁵ This statement of Marshall’s is clearly at odds with the modern view that Congress can regulate even noncommercial activity so long as it has a “substantial effect” on interstate commerce. To be sure, Marshall does suggest that Congress may in some instances be able to regulate state inspection laws when doing so is “clearly incidental to some [congressional] power that is expressly given.”¹⁶⁶ But the requirement that it be “clearly incidental” certainly does not suggest broad congressional authority to regulate any activity that has an impact on interstate commerce.

2. *Wickard v. Filburn*

Wickard v. Filburn is the precedent on which the *Raich* majority relied most heavily. Justice Stevens’ majority opinion states that *Wickard* “is of particular relevance” and notes that “[t]he similarities between this case and *Wickard* are striking.”¹⁶⁷ Although *Wickard* is just one of sev-

¹⁶⁴ *Id.* at 203. I am not aware of any modern scholarly discussion of this passage in *Gibbons*. However, it is briefly cited and discussed in Justice Thomas’ concurrence in *Lopez*. *Lopez*, 514 U.S. at 594 (Thomas, J., concurring). Thomas correctly points out that this passage shows that the *Gibbons* Court “rejected the notion that Congress can regulate everything that affects interstate commerce.”

¹⁶⁵ *Gibbons*, 22 U.S. (9 Wheat.) at 203.

¹⁶⁶ *Id.* at 204.

¹⁶⁷ *Raich*, 125 S.Ct. at 2206.

eral post-New Deal Commerce Clause cases that interpret congressional power broadly, it is widely recognized as “perhaps the most far-reaching example of Commerce Clause authority over intrastate activity.”¹⁶⁸ If *Wickard* does not compel the outcome in *Raich*, it is likely that no other precedent does either.

Wickard upheld the application of the 1938 Agricultural Adjustment Act’s restrictions on wheat production as applied to Roscoe Filburn, an Ohio farmer who produced wheat for consumption on his own farm.¹⁶⁹ The Court noted that restriction of home-grown, home-consumed wheat was a necessary component of Congress’ scheme to “raise the market price of wheat” because in the absence of regulation, home-grown wheat could serve as a substitute for wheat sold in the market and depress demand for the latter.¹⁷⁰

There is no question that there *are* “striking” similarities between *Wickard* and *Raich*. As Justice Stevens’ *Raich* opinion points out:

Like the farmer in *Wickard*, respondents are cultivating, for home consumption a fungible commodity for which there is an established interstate market. Just as the Agricultural Adjustment Act was designed to control the volume of wheat moving in interstate and foreign commerce . . . a primary purpose of the CSA is to control the supply and demand of controlled substances in . . . drug markets.”¹⁷¹

Furthermore, in both cases there is a possibility that the “homegrown” commodity could be “drawn into” the interstate market.¹⁷²

However, there are also key differences between the two cases. First and foremost, *Wickard*, involved the regulation of commercial activity to a far greater extent than *Raich*. Roscoe Filburn actually sold “a portion of [his wheat] crop” on the market and “fe[d] part to poultry and livestock on the farm, some of which is sold.”¹⁷³ Filburn’s wheat production was quite clearly part of a commercial enterprise.¹⁷⁴ By contrast, Angel Raich and Diane Monson grew marijuana solely for personal consumption for medical purposes.¹⁷⁵ Under the *Lopez-Morrison* framework, the *Wickard*

¹⁶⁸ *Lopez*, 514 U.S. at 560.

¹⁶⁹ *Wickard*, 317 U.S. at 115, 121-27.

¹⁷⁰ *Id.* at 127-29.

¹⁷¹ *Raich*, 125 S.Ct. at 2206-07.

¹⁷² *Id.* at 2207.

¹⁷³ *Wickard*, 317 U.S. at 84.

¹⁷⁴ For more details on Filburn and his farm, see Jim Chen, *Filburn’s Legacy*, 52 EMORY L.J. 1719 (2003); See also Jim Chen, *Filburn’s Forgotten Footnote - Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249 (1997).

¹⁷⁵ *Raich*, 125 S. Ct. at 2200. Some of the cultivation of Raich’s marijuana was provided by “two caregivers,” but these individuals provided their services “at no charge.” *Id.*

case involved regulation of activity that would be considered “economic.”¹⁷⁶

The *Raich* majority tries to counter this point by citing language in *Wickard* indicating that Filburn’s wheat growing would legitimately be subject to regulation even though it “may not be regarded as commerce.”¹⁷⁷ However, this passage in *Wickard* is very likely just dictum, since the Court fully realized that Filburn was using his wheat for commercial purposes, including selling some of it on the market and feeding much of the rest to “poultry and livestock” that he was raising for commercial purposes.¹⁷⁸

Perhaps more importantly, however, *Raich*’s analysis of *Wickard* completely ignores the Court’s earlier interpretation of *Wickard* in *Lopez*. In that case, Chief Justice Rehnquist’s majority opinion distinguished *Wickard* on the ground that it “involved economic activity in a way that possession of a gun in a school zone does not.”¹⁷⁹ Rehnquist emphasized the importance of Filburn’s commercial utilization of his wheat crop.¹⁸⁰ Unlike the *Wickard* language relied on by the *Raich* majority, *Lopez*’s gloss on *Wickard* is arguably a part of the holding. Without it, Rehnquist could not have distinguished *Wickard* from *Lopez* itself and therefore could not have reached the result he did without overruling *Wickard*.

A second relevant difference between *Wickard* and *Raich* is the much greater evidence of a substantial effect on interstate commerce available in the former. The government in *Raich* presented very little proof that homegrown medical marijuana had a substantial effect on interstate markets.¹⁸¹ By contrast, the *Wickard* Court noted that “consumption of homegrown wheat . . . is the most variable factor” impacting commercial wheat markets.¹⁸² Indeed, “[c]onsumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production.”¹⁸³ It thus had a major impact on the price of wheat in interstate markets. This is much stronger evidence of “substantial effect” on commerce than that presented in *Raich*.

Obviously, the *Raich* Court was free to overrule *Lopez*’s interpretation of *Wickard*. But it should not have relied on *Wickard* as a controlling precedent that extends even to noneconomic activity, while ignoring

¹⁷⁶ See discussion *supra* §I.B.

¹⁷⁷ *Raich*, 125 S.Ct. at 2207 n.30 (quoting *Wickard*, 317 U.S. at 125).

¹⁷⁸ *Wickard*, 317 U.S. at 84.

¹⁷⁹ *Lopez*, 514 U.S. at 560.

¹⁸⁰ *Id.* (noting that Filburn sold “a portion of his crop” and fed “part of it to poultry and livestock”).

¹⁸¹ See *Raich*, 125 S.Ct. at 2226 (O’Connor, J., dissenting) (noting that “the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes . . . has a substantial effect on interstate commerce”).

¹⁸² *Wickard*, 317 U.S. at 127.

¹⁸³ *Id.*

Lopez's clear holding that *Wickard* should be read to apply only to “economic activity” such as that which Roscoe Filburn was himself engaged in. Similarly, it should not have ignored the considerably greater evidence of substantial effect on interstate commerce available in *Wickard* as compared to *Raich*. Although the Supreme Court could, if it chose to do so, expand the applicability of *Wickard* to cover cases such as *Raich*, it was not required to do so by any precedential considerations.

III. MEDICAL MARIJUANA AND THE POLITICS OF FEDERALISM

This section explains how the controversy over medical marijuana exemplifies some of the major benefits of decentralized federalism, benefits that are undercut when the Court endorses untrammelled federal power. Currently, there are eleven states that have legalized medical marijuana.¹⁸⁴

As I have explained elsewhere,¹⁸⁵ decentralized federalism has several major advantages, including responsiveness to diverse regional preferences and competition between state governments for citizens who can “vote with their feet.” Both of these are undermined in various ways by the Court’s decision in *Raich*. Obviously, decentralized federalism has costs as well as benefits. But there is little reason to believe that such costs are likely to be significant in the case of state laws permitting medical marijuana.

Although judicial enforcement of federalism in cases like *Raich* has considerable appeal, it is likely that a full-blown judicial assault on all exercises of the Commerce power that violate the constitutional text would be both undesirable and doomed to failure. However, this observation need not and lead us to the opposite extreme of endorsing total judicial abdication of the sort endorsed by *Raich*. Rather, courts should proceed with a cautious regard for political realities, much as they do in many other areas of constitutional law characterized by a middle ground between maximalist judicial enforcement of the text and total abnegation. Furthermore, a reasonably consistent approach to judicial enforcement of federalism might enable the Court to build a cross-ideological constituency supporting this form of judicial review, much as has arisen in the case of judicial review in a number of other fields.

¹⁸⁴ For a complete listing and detailed description of state medical marijuana laws, see <http://www.medicalmarijuanaprocon.org/pop/StatePrograms.htm> (last visited Jan. 16, 2006) [hereinafter *Medical Marijuana ProCon*].

¹⁸⁵ See John McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U. L. REV. 89, 106-12 (2004); Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 464-65 (2002) [hereinafter *Judicial Restriction*].

A. *RAICH* AND THE BENEFITS OF FEDERALISM

The Court's decision in *Raich* undercuts at least two major benefits of federalism: responsiveness to diverse regional preferences and interstate competition for citizens "voting with their feet."

1. *Responsiveness to diverse regional preferences*

Public preferences on many issues diverge widely across state lines. On many social and economic controversies, majority views in conservative "red states" understandably differ from those in liberal "blue states." Where such regional differences in opinion exist, a system of decentralized federalism can satisfy a higher proportion of citizens than can a unitary policy adopted by the federal government. Red staters can live under conservative policies while their blue state neighbors can simultaneously enjoy liberal ones.¹⁸⁶

Ironically, the issue of medical marijuana does not fully conform to the diversity model of federalism because support for medical marijuana is so strong across the nation. Depending on question wording, a variety of nationwide polls since 1995 have found support for legalized medical marijuana ranging from 60 to 85 percent of respondents.¹⁸⁷ State-level polls in twenty-six different states also find majority support for medical marijuana, often by large margins.¹⁸⁸ In fact, I have not been able to find a single state-level poll registering majority opposition to medical marijuana. Perhaps *Raich* should be criticized not for undermining federalism and diversity but because, on the basis of deference to democracy, it upholds a federal policy widely at variance with majority popular opinion.¹⁸⁹

However, there is considerable variation in the size of the pro-medical marijuana majorities, ranging from 51.4% in a 2002 Nebraska poll,¹⁹⁰ to 81% in a 1999 Massachusetts survey.¹⁹¹ Moreover, some of the surveys measured support for medical marijuana use in a wider range of circumstances than others. For example, some polls asked whether medical marijuana use should be allowed for "seriously" or "terminally" ill

¹⁸⁶ For a more detailed discussion, see McGinnis & Somin, *supra* note 185, at 106-07; *Judicial Restriction*, *supra* note 185, at 464-66.

¹⁸⁷ See Medical Marijuana ProCon, *supra* note 184.

¹⁸⁸ *Id.*

¹⁸⁹ See generally Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory*, 89 Iowa L. Rev. 1287 (2004) (arguing that judicial invalidation of legislation often does not have the counter-majoritarian effects ascribed to it because much legislation does not actually express majoritarian preferences or even runs counter to them) [hereinafter *Political Ignorance*].

¹⁹⁰ See Medical Marijuana ProCon, *supra* note 184.

¹⁹¹ *Id.*

patients, while others, such as a 2001 Minnesota poll, asked about legalization of its use for all “medical purposes.”¹⁹²

For these reasons, there is likely to be considerable interstate variation not only in the degree of general public support for medical marijuana, but also in the range of circumstances in which majorities are willing to permit its use. Decentralized federalism can satisfy these diverse preferences to a greater extent than the current federal policy under which all medical marijuana use is banned throughout the nation. Moreover, as Justice O’Connor’s dissent notes, allowing a diverse set of state policies to flourish might create “room for experiment[ation]”¹⁹³ that could provide useful information about the impact of differing policies.

2. *Interstate competition, mobility, and “voting with your feet”*

A second major advantage of decentralized federalism is the ability of citizens dissatisfied with conditions in their jurisdiction to “vote with their feet” by moving to a different area with more congenial public policies.¹⁹⁴ “Foot voting” can stimulate competition for people and residents by state governments anxious to attract new taxpayers or keep old ones from fleeing.¹⁹⁵ Even poor and disadvantaged groups, such as Jim Crow-era African-Americans, have often used “foot voting” to better their lot.¹⁹⁶ Indeed, foot voting has important advantages over traditional “ballot box voting,” including the ability to improve one’s situation without waiting for a favorable political majority to emerge in your state and the presence of much stronger incentives for individuals to acquire accurate information.¹⁹⁷

As yet, there is little evidence indicating that very many people are likely to express their preferences for or against medical marijuana by voting with their feet. After the passage of California’s medical marijuana law in 1996, San Francisco pro-marijuana activists claimed that “We’ve had people call and say they are moving to California because this law has passed.”¹⁹⁸ Perhaps more significant is the fact that some doctors believe that medical marijuana is often necessary to prevent severe pain. For example, “[Angel] Raich’s physician believe[d] that forgoing cannabis treatment would certainly cause Raich excruciating pain

¹⁹² *Id.*

¹⁹³ *Raich*, 125 S.Ct. at 2229.

¹⁹⁴ For a more detailed analysis, see Somin, *Political Ignorance*, *supra* note 189, at 1340-51.

¹⁹⁵ For analysis and citations to the literature, see Somin, *Judicial Restriction*, *supra* note 185, at 468-70.

¹⁹⁶ Somin, *Political Ignorance*, *supra* note 189, at 1346-47, 1350-51.

¹⁹⁷ *Id.* at 1341-46.

¹⁹⁸ Quoted in Mary Curtius, *S.F. Eager to Implement New Pot Law*, L.A. TIMES, Dec. 26, 1996.

and could very well prove fatal.”¹⁹⁹ The prospect of avoiding great pain or even death is certainly a powerful incentive to move to a state with legalized medical marijuana. People have often voted with their feet to achieve much smaller benefits. Over time, at least some significant number of people might have moved to California and the ten other states that permit medical marijuana in order to avail themselves of its benefits. That opportunity has now been largely foreclosed by *Raich’s* endorsement of a nationwide ban on medical marijuana.

3. *The possibility of spillover effects*

Despite its important benefits, decentralized federalism also has costs. The one most relevant to the issues in *Raich* is the danger of “spillover effects,” the possibility that states might enact policies that cause harm in neighboring jurisdictions.²⁰⁰ In the present case, the danger is that medical marijuana produced in one state might find its way into illegal drug markets in neighboring states. It is this possibility that played a key role in the *Raich* majority’s reasoning, as well as in Justice Scalia’s concurring opinion.²⁰¹ However, as discussed above, the government was unable to provide much evidence to support this contention.

A potentially important piece of evidence cutting the other way is the absence of any amicus briefs by state governments supporting the federal government’s position in the case. Indeed, three states that ban medical marijuana actually filed a brief supporting *Raich* on federalism grounds.²⁰² These three state governments evidently concluded that an increase in state autonomy more than outweighed any possible dangerous spillovers. While we would not necessarily expect every state government that might support the CSA’s ban on medical marijuana to file an amicus brief, it is still striking that not even one chose to do so. In other federalism cases, state officials have not hesitated to file briefs supporting federal power when they believed it was in their interest to do so. For example, thirty-six states filed an amicus brief supporting the United States position in *Morrison*.²⁰³ The failure of the United States to attract even one supportive state amicus brief suggests that even those state officials who favor a ban on medical marijuana do not expect major spillover effects to occur if some states pursue a policy of legalization.

¹⁹⁹ *Raich*, 125 S.Ct. at 2200.

²⁰⁰ For a brief recent discussion of the literature on spillover effects, see Larry E. Ribstein & Bruce Kobayashi, *The Economics of Federalism 6 in, THE ECONOMICS OF FEDERALISM 6* (eds. Larry E. Ribstein & Bruce Kobayashi, forthcoming 2006).

²⁰¹ See *Raich*, 125 S.Ct. at 2207 (emphasizing danger of diversion of medical marijuana into interstate markets); *id.* at 2214-16 (Scalia, J., concurring) (same).

²⁰² Brief of the States of Alabama, et al. as Amici Curiae Supporting Respondents, *Ashcroft v. Raich*, 124 S.Ct. 2909 (2004) (No. 03-14540, 2004 WL 2336486).

²⁰³ McGinnis & Somin, *supra* note 185, at 114.

Even if some spillovers do arise, it is reasonable to expect that they would be concentrated in states bordering on the legalizing jurisdictions or otherwise in close proximity to them. In such cases, federal intervention may not be necessary to control spillovers because a small number of neighboring states can address the issue through Coasean bargaining. For example, if medical marijuana from state A inflicts a negative impact on State B that inflicts more harm on B than A derives benefits, the government of the latter can cut a deal with A to get it to change its policies.²⁰⁴ This standard application of the Coase Theorem²⁰⁵ might well be a superior solution to spillover effects than a categorical federal ban forbidding medical marijuana across the board, even in states where spillover effects are nonexistent or outweighed by the benefits of legalization.

C. FEDERALISM AND POLITICAL REALISM

Even those persuaded by the legal and political arguments against *Raich* and in favor of judicial constraints on federal Commerce Clause authority might hesitate to support aggressive judicial intervention in this field because of the political obstacles.

After all, a comprehensive judicial attempt to enforce the text and original meaning of the Commerce Clause might well lead to attempts to invalidate large chunks of the modern administrative state, including some popular civil rights and environmental laws.²⁰⁶ Although such fears may be exaggerated,²⁰⁷ they are nonetheless real. Even Justice Thomas, the Supreme Court's strongest supporter of judicial review of federalism, concedes that "[a]lthough I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental examination of the past 60 years [of Commerce

²⁰⁴ See Thomas M. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 981 (1997) (explaining how disputes over pollution spillover effects between small numbers of neighboring states can often be resolved through negotiation).

²⁰⁵ Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

²⁰⁶ See, e.g., Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 379, 379-80 (2005) (compiling numerous examples of statements by jurists and scholars expressing concern that judicial enforcement of federalism could undermine environmental protection) [hereinafter *Judicial Federalism*]; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053-57 (2001) (arguing that judicial enforcement of federalism could lead to a sweeping rollback of civil rights laws).

²⁰⁷ See, e.g., Adler, *Judicial Federalism*, *supra* note 206, at 452-73 (arguing that even rigorous judicial enforcement of federalism would leave intact considerable judicial power over environmental issues, and that much of the remaining slack could be effectively dealt with by state and local government); DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON* (2005) (arguing that decentralization of environmental policy would have numerous benefits).

Clause precedent]. Considerations of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.”²⁰⁸

However, the dichotomy between a complete “return to the original understanding”²⁰⁹ (or to the text) and *Raich*-like judicial abdication is a false choice. There are numerous intermediate options. The Court can take many modest steps to limit congressional Commerce Clause power without even approaching a complete return to the pre-New Deal era. It may seem wrong or unprincipled for the Court to act on a constitutional vision of limited federal power that it cannot – and probably would not want to – fully realize. However, throughout its history, the Court has often taken account of political constraints in determining how far to push judicial doctrines. In the 1950s, for example, the Court refused to order immediate desegregation of southern schools and avoided striking down state bans on interracial marriage in large part because the justices believed that embracing either step would spark a political backlash that the Court could not overcome.²¹⁰ Yet such considerations did not mean that the Court had to give up judicial review of segregation issues completely and judicial intervention in fact had a greater impact in this field than some modern scholars are prepared to concede.²¹¹

We should not expect judicial power to be able to overcome any and all obstacles to achieving the “right” constitutional vision. If the judiciary did have such absolute power, the Supreme Court justices really would become the “judicial despots” of conservative campaign rhetoric, and there is little reason to expect judicial despotism to be much better than any other kind.

What the Supreme Court can reasonably be expected to do is strengthen enforcement of constitutional principles at the margin, especially in areas where judges have a “comparative advantage” over the perverse incentives of other political actors in Congress and the executive branch. Federalism may well be such a field because Congress and the president have strong incentives to overextend their powers and the electorate often lacks the vigilance and knowledge necessary to punish such efforts at federal self-aggrandizement.²¹² While the incentives faced by judges on federalism issues are by no means perfect, they are compar-

²⁰⁸ *Lopez*, 514 U.S. at 602 n.8.

²⁰⁹ *Id.*

²¹⁰ See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 312-22 (2004).

²¹¹ See generally David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004) (presenting evidence that early twentieth century judicial review sometimes helped promote civil rights for African-Americans even in cases where powerful political forces cut against such efforts).

²¹² For a detailed argument along these lines, see McGinnis & Somin, *supra* note 185, at 93-112.

atively better or at least less perverse than those of the other branches of government.²¹³

These considerations do not, of course, provide a detailed plan for exactly how far the Supreme Court should go in enforcing limits on the Commerce Clause. Any such outline would require far more extensive analysis than I have presented here. The present Article is limited to defending the more modest conclusion that the Court should not have endorsed the almost complete abdication represented by *Raich*.

D. *RAICH*, FEDERALISM, AND THE POLITICAL LEFT

One possible political opening for future judicial review of federalism is the reawakening of interest in constraining federal power on the political left. *Raich* is one of a series of recent cases in which the Bush Administration and its conservative Republican allies have made aggressive use of federal power in pursuing conservative policy goals. Other recent examples include the 2003 federal partial birth abortion ban,²¹⁴ the No Child Left Behind Act education bill,²¹⁵ the campaign for a federal ban on gay marriage,²¹⁶ and congressional intervention in the Terri Schiavo case.²¹⁷ The battle over assisted suicide that culminated in *Gonzales v. Oregon* is yet another example of the administration attempting to use federal power to curb liberal policies at the state level. In each of these cases, political liberals have found themselves in the unaccustomed position of defending state autonomy against interference by a conservative federal government.

As a result, some liberal scholars and political commentators have begun to believe that at least some judicial review of federalism may be justified. Writing in the left-wing journal *Dissent*, Harvard Law Professor David Barron recently urged that “[a] progressive federalism might . . . embrace the Rehnquist Court’s limited view of Congress’ Commerce Clause power. Congress would retain its ability to regulate economic activity. It would not, however, possess a general power to regulate any

²¹³ *Id.* at 127-30.

²¹⁴ See Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 408-12 (2002) (noting conservative support for a federal ban on partial birth abortions, despite its incongruity with conservative views on limited federal power).

²¹⁵ See Sam Dillon, *President’s Initiative to Shake up Education is Facing Protests in Many State Capitols*, N.Y. TIMES, Mar. 8, 2004, at 12 (noting liberal Democratic criticisms of the Act for excessive intrusion on state autonomy in education policy).

²¹⁶ See Steve Chapman, *Losing their Faith in Federalism: As the Gay Marriage Debate Shows, Conservatives Are No Longer Champions of Federalism*, NEWARK STAR-LEDGER, July 26, 2004, at 15 (noting that both liberals and conservatives have reversed their usual positions on federalism in the context of the battle over gay marriage).

²¹⁷ Marcia Coyle, *Life after ‘Schiavo’*, NAT’L L.J., Mar. 28, 2005, at 10.

matter chosen by a majority of its members.”²¹⁸ Barron argues that liberal “faith in unlimited national authority was the contingent product of liberal control of national institutions.”²¹⁹ Now that “circumstances have changed,” liberals must “look at the Constitution’s federalism with fresh eyes.”²²⁰ A similar argument has been advanced by liberal political commentator Franklin Foer.²²¹

Other left-leaning scholars and activists have advocated the use of federalism doctrine to protect gay rights (which have achieved greater political success at the state and local level, but are opposed by conservatives in Washington),²²² and to block federal legislation restricting abortion and assisted suicide.²²³ It is also significant that two recent lower court decisions, including the Ninth Circuit ruling in *Raich*, striking down federal legislation on Commerce Clause grounds have been authored by liberal court of appeals judges.²²⁴ Ironically, the Bush Administration’s aggressive use of federal power, coupled with the political decline of the Democratic Party from its post-New Deal peak, have accomplished a change in liberal attitudes towards federal power that conservative and libertarian academics were never able to achieve through intellectual argument.

At least for the foreseeable future, it is unlikely that the federal government will again be consistently dominated by liberal Democrats. Even if the Democratic Party does retake the Congress or the presidency, their victory is unlikely to be overwhelming or permanent. Moreover, there will still be numerous liberal causes, such as gay marriage, that have a greater chance of success at the state level than in Washington.

These circumstances create the potential for an alliance between conservative and libertarian supporters of judicial federalism on the one hand and liberal ones on the other. Although the three groups will continue to disagree on the exact contours of judicial review of federalism issues, they may be able to find common ground on the conclusion that Commerce Clause authority *is* subject to judicial review and that Congress does “not possess a general power to regulate any matter chosen by a majority of its members.”²²⁵ If Commerce Clause review is applied

²¹⁸ David J. Barron, *Reclaiming Federalism*, DISSENT 64, 68 (2005).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Franklin Foer, *The Joys of Federalism*, N.Y. TIMES, Mar. 6, 2005.

²²² See, e.g., Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719 (2003) (arguing that judicial enforcement of federalism can promote gay rights).

²²³ See Law, *supra* note 214, at 409-17.

²²⁴ See, e.g., *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *overruled* *Gonzales v. Raich*, 125 S. Ct. 2195 (2005); *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003) (partially invalidating federal statute forbidding possession of pornography).

²²⁵ Barron, *supra* note 218, at 68.

consistently enough to strike down both conservative and liberal statutes that go beyond the limits set by the courts, both right and left-wing jurists will have some reason to support judicial review in this area.

Obviously, it is unlikely that the four current liberal justices will change their minds about the Commerce Clause. They have committed themselves too openly and strongly in cases such as *Lopez*, *Morrison*, and *Raich*. However, given their ages (85 in the case of Justice Stevens), it is unlikely that these particular justices will continue to dominate the liberal wing of the Court for very long. Looking to the future, it is possible that a new generation of liberal and conservative/libertarian jurists can find at least some degree of common ground in this field. Just as judicial conservatives eventually accepted the liberal innovations of strong judicial review in the fields of free speech and criminal procedure, even as they continue to disagree with liberals as to the exact contours of doctrine in these areas, so too liberals may come to accept the “conservative” position that the judiciary has a legitimate role to play in constraining federal power – even as they continue to disagree with the conservative view of how that role should be exercised.

One of the lessons of *Raich* is that judicial review of federalism is unlikely to survive and prosper without at least some acceptance from liberals. Without such support on the left, it is likely to collapse in any case where the conservative bloc on the Court is internally divided, as it was in *Raich* itself.²²⁶ In the long run, however, *Raich* could help revive judicial review of federalism if it strengthens the growing sense among some liberals that unlimited federal power is no longer in their interest.

IV. THE PROHIBITION PARALLEL

Almost completely ignored in the debate over *Raich* is the fact that the decision was closely paralleled by judicial developments during the Prohibition era of the 1920s. The Prohibition precedent reinforces several of the conclusions advanced in this Article, including the claim that the Commerce Clause does not give Congress unlimited authority over all activities that “substantially affect” interstate commerce, the tendency of limited federal power to undermine the benefits of federalism, and the possibility that liberal causes can benefit from judicial constraints on congressional power as much as conservative ones.

Ratified in 1920, the Eighteenth Amendment forbade “the manufacture, sale, or transportation of intoxicating liquors . . . for beverage purposes.”²²⁷ Section 2 of the Amendment gave Congress the power to

²²⁶ See Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791 (2005) (analyzing divisions over federalism among different types of judicial conservatives).

²²⁷ U.S. CONST. amend. XVIII, § 1.

“enforce this article by appropriate legislation.”²²⁸ The fact that a constitutional amendment was considered necessary to give Congress the power to ban the “manufacture” and “sale” of alcoholic beverages provides additional proof that the Commerce Clause and Necessary and Proper Clause did not give Congress the power to regulate all activities that substantially affect interstate commerce.²²⁹ After all, early twentieth century jurists surely recognized that the manufacture and sale of alcohol products had a substantial impact on interstate trade. Nonetheless, the Eighteenth Amendment was enacted in large part precisely because mainstream legal opinion at the time recognized that Congress lacked the authority to ban the manufacture and sale of alcoholic beverages under its Article I powers.²³⁰

Like the enactment of the CSA in 1968, the enactment of the Eighteenth Amendment and associated enforcement legislation led to an enormous expansion in federal criminal law. From 1970 to 1994, the proportion of federal prisoners incarcerated for drug offenses increased from 16.3% to a high of 61.3%, before dropping to 54.1% in 2004.²³¹ Similarly, the advent of Prohibition more than doubled the federal prison population from 5000 in 1920 to some 12,000 in 1930.²³²

As with *Raich*, Prohibition significantly undermined state responsiveness to regionally diverse policy preferences. “Wet” states with populations supportive of alcohol consumption were forced to conform to the national regime imposed by prohibitionist “drys.”²³³ Obviously, this result also reduced the ability of “wets” to vote with their feet and move away from dry jurisdictions to more congenial areas.

In perhaps the most striking parallel of all, Congress used Section Two of the Amendment to enact broad enforcement legislation that eventually led to two Supreme Court decisions that became close Prohibition analogues to *Raich*. Although the Eighteenth Amendment only banned the manufacture and sale of alcohol used for “beverage purposes,”²³⁴ Congress soon enacted the National Prohibition Act of 1921, which forbade anyone to “manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor” except as authorized by a narrow range of exceptions included in the Act.²³⁵

²²⁸ *Id.* at § 2.

²²⁹ *See supra* Part II.

²³⁰ *See* RICHARD F. HAMM, SHAPING THE 18TH AMENDMENT: TEMPERANCE, LEGAL CULTURE, AND THE POLITY, 1880-1920 chs. 6-7 (1995) (tracing the constitutional debate over prohibition in the Progressive Era).

²³¹ U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003 519 tbl. 6.57 (2004).

²³² HAMM, *supra* note 230, at 267.

²³³ *Id.* at 261-66.

²³⁴ U.S. CONST. amend. XVIII, § 1.

²³⁵ *Quoted in* James Everard’s *Breweries v. Day*, 265 U.S. 545, 554 (1924).

In the 1924 case of *James Everard's Breweries v. Day*, the Supreme Court upheld the Prohibition Act's ban on manufacturing and possession as applied to two breweries that sought to sell alcoholic drinks for "medicinal purposes."²³⁶ In reasoning strikingly similar to that of *Raich*, the Court upheld the ban on the ground that it was "appropriate legislation" under Section Two of the Amendment because "[t]he opportunity to manufacture, sell, and prescribe intoxicating malt liquors for 'medicinal purposes' opens many doors to clandestine traffic in them as beverages under the guise of medicines . . . and thereby . . . hampers and obstructs enforcement of the Eighteenth Amendment."²³⁷ Like the *Raich* Court, the Prohibition-era Court justified a ban on possession of a proscribed substance for medical purposes on the theory that otherwise the stock might find its way into the market for recreational use.²³⁸ And it did so in a way that gave broad deference to Congress.²³⁹

In another close analogue to *Raich*, a 1926 Supreme Court opinion authored by Justice Louis Brandeis upheld a provision of the National Prohibition Act that forbade physicians to prescribe more than one pint of alcohol per patient for "any period of ten days" and also required that "no prescription [for alcohol] shall be filled more than once."²⁴⁰ In a 5-4 decision, the Court upheld the statute against challenge, relying primarily on the *Everard's* precedent.²⁴¹ In a forceful dissent that echoes Justice O'Connor's dissent in *Raich*, Justice Sutherland criticized the majority decision on the grounds that the Prohibition Act's "limitation on quantity" was "unsupported by any legislative finding that it is reasonable."²⁴² Sutherland also claimed that the majority opinion undermines federalism.²⁴³

Obviously, there is an important difference between the Prohibition Era cases and *Raich* in so far as the former only applied to congressional efforts to regulate alcohol, while the latter applies to the much broader range of legislation enacted under the Commerce Clause. Nonetheless, there are also important similarities that demonstrate how a broad federal prohibition regime cannot easily be sustained without stretching federal power to the limit and undercutting judicial constraints on congressional authority. Conservatives who support both judicial review of Commerce Clause power and an untrammelled federal War on Drugs may have to choose between these two goals, as it may not be possible to pursue both

²³⁶ *Id.* at 556.

²³⁷ *Id.* at 561.

²³⁸ Compare *Everard's*, 265 U.S. at 561, with *Raich*, 125 S.Ct. at 2207.

²³⁹ See *Everard's*, 265 U.S. at 560.

²⁴⁰ *Lambert v. Yellowley*, 272 U.S. 581, 587 (1926).

²⁴¹ *Id.* at 593-96.

²⁴² *Id.* at 603-06 (Sutherland, J., dissenting).

²⁴³ *Id.* at 604-06.

simultaneously. And, as with *Raich*, the Prohibition era cases drive home the point that unconstrained federal power can be used to undercut liberal policies no less than conservative ones.

CONCLUSION

From a doctrinal point of view, *Gonzales v. Raich* seems to all but eliminate the prospect of meaningful judicial restriction of congressional Commerce Clause authority. This result also has the effect of undercutting some of the major political benefits of decentralized federalism. Yet *Raich* also helps underscore the extent to which unlimited federal power no longer serves the interests of political liberals who for so long were the strongest supporters of unfettered congressional authority.

The Court may not find it difficult to get around *Raich* should a new cross-ideological judicial coalition emerge to rescue judicial review of federalism. Just as *Raich* exploited the ambiguities of *Lopez* and *Morrison* to gut these precedents while purporting to work within the framework they established,²⁴⁴ a future Supreme Court can exploit *Raich's* lip service to the *Lopez-Morrison* approach in order to undermine *Raich* itself. Such a Court could defuse *Raich's* impact by adopting a narrower definition of "economic activity,"²⁴⁵ restoring the word "essential" to the broader regulatory scheme exception,²⁴⁶ and returning to *Lopez* and *Morrison's* benign neglect of the "rational basis" test.²⁴⁷ While such steps would surely be inconsistent with the doctrinal letter of *Raich*, they could probably restore judicial review of Commerce Clause cases without overruling *Raich* in its entirety.

In the long run, the future of judicial federalism depends less on the precise reasoning of any one decision than on the answer to the question of whether it will continue to be a parochial concern of conservatives and libertarians. For the moment, judicial review of the Commerce Clause has become a casualty of the War on Drugs. It remains to be seen whether the wound is fatal or the precursor to a miraculous recovery fueled by support from unexpected liberal quarters. If judicial federalism is ever to escape the oblivion of *Raich*, it may be through a recognition that constraints on federal power have benefits that are not limited to one side of the political spectrum.

²⁴⁴ See *supra* §§ I.B-D.

²⁴⁵ See *supra* § I.B.

²⁴⁶ See *supra* § I.C.

²⁴⁷ See *supra* § I.D.